

No. 94195-5

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**THE STATE OF WASHINGTON, Respondent**

**v.**

**LUIS A. AVILA, Appellant/Petitioner.**

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**RESPONSE TO PETITION FOR REVIEW**

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**BENJAMIN C. NICHOLS  
Asotin County  
Prosecuting Attorney  
WSBA# 23006**

P. O. Box 220  
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(509) 243-2061

1. IDENTITY OF RESPONDING PARTY

State of Washington, Respondent, through its attorney of record, Benjamin C. Nichols, Prosecuting Attorney for Asotin County.

2. STATEMENT OF RELIEF SOUGHT

An order denying Motion for Discretionary Review and affirming the decision of Division III of the Court of Appeals as set forth in the Unpublished Opinion No# 32113-4-III, filed July 14, 2016.

3. SUMMARY OF ISSUES PRESENTED

The Rules of Appellate Procedure limit the acceptance of petitions for discretionary review to the following situations:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Rules of Appellate Procedure 13.4(b). None of these situations exist in the present case. The Petitioner does not even attempt to identify any conflict between the Court of Appeals decision in this case and any other decision



is “non-English speaking.”” Petition for Review, page 1, page 3, page 8, page 14, and page 17 *respectively*.

In fact, both the trial court and the Court of Appeals found that based upon the record this particular claim is unfounded:

Mr. Avila makes a number of arguments as to why a person in his position would not believe he had a right to leave the interview with Detective Nichols. First, he argues he has limited English comprehension and nothing is known about his education. However, though Mr. Avila is Guatemalan, Detective Nichols testified he appeared to understand her questions and that his answers to the questions were appropriate. Moreover, Mr. Avila prepared a written statement that he read to the court at the CrR 3.5 hearing that ***demonstrated his high level of English proficiency. His ability to understand sophisticated legal concepts is also demonstrated by his first statement of additional grounds for review (SAG). There is strong evidence that Mr. Avila had a sufficient grasp of English to understand that his participation in the interview was not compulsory.***

Moreover, his experience with the legal system is some evidence that he was aware of what a custodial law enforcement environment looks like. He was arrested twice in 2006, twice in 2007, and once in both 2008 and 2010. The trial court could reasonably consider whether, after six arrests, Mr. Avila had enough experience to understand that the interview with Detective Nichols was not a custodial interrogation.

State v. Avila, 2016 Wash. App. LEXIS 1622, 13-14 (Wash. Ct. App., Div. III, July 14, 2016) (*emphasis added*). The assertion that the Petitioner does not speak or understand English is utterly contrary to the record and should not serve as justification for review herein.

A second fundamental factual flaw to the Petitioner’s position concerns the very nature of the statement he calls into question herein. The

Petitioner was interviewed during the investigatory phase of this case by Detective Jackie Nichols. *Id.* at page 2. During that interview the Petitioner completely denied all of the allegations and stated that he had never been in the bathroom with the victim. Report of Proceedings, pages 59 - 60 (*hereinafter* RP 59 - 60). When specifically asked about bodily fluids the detective testified that he again denied the possibility:

And so to be sure that he understood what I meant, I said, no I mean inside her body, inside her vagina, is there any reason that your DNA would be inside of her? And he said, no.

*Id.* at page 60. At trial the Petitioner testified inconsistently to this statement. In an effort to explain why his semen was identified on the vaginal swabs of the victim, he testified that on the night in question, after an amorous encounter with his girlfriend, he went into the victim's bathroom and masturbated to the point of ejaculation. RP 325 - 327. He stated that he ejaculated onto the toilet seat and then left. RP 327.

When he was asked by his trial attorney why he did not tell the detective about this chain of events during the interview he did not claim confusion or the result of a "language barrier." He did not assert that he was unable to understand her questions. He never even intimated that the statement made to the detective was involuntary, compelled, or the result of any perceived or real pressure. He did not attribute the discrepancy to "cultural differences" or ascribe it to his prior experience with law enforcement or authorities in any country.

The Petitioner testified that his in-court testimony differed from his statement because he was embarrassed to talk about masturbating:

No, because still true today I'm feeling embarrassing about that, so that why I didn't mention anything to her about that, in anyway.

RP page 330. At trial the jury found the Petitioner's explanation for the presence of his DNA inside the victim's vagina to be less plausible than the victim's account of a rape, and convicted him.

It appears, having failed to convince the finder of fact below that his denial was the result of embarrassment, the Petitioner has abandoned this explanation and now attributes it - without any evidence in the record and contrary to his own sworn testimony - to the coercive police conduct. This Court should not accept review in this case based upon inaccurate and duplicitous arguments.

Yet another factual misrepresentation by the Petitioner concerns the absence of a taped record of the interview. The Petitioner makes the following assertions concerning the lack of a tape of the interview:

Detective Nichols made the conscious decision not to record the interrogation.

And: Detective Nichols's [*sic*] decision to remove objective evidence to Avila's voluntariness is within the totality of circumstances.

And: Detective Nichols failed to use equipment that was at here [*sic*] disposal which would have accurately depicted the context and details necessary to assess Avila's perception and level of confusion.

Petition, page 15. The true fact, as found by both the trial court and the Court of Appeals, is that prior to the interview Detective Nichols asked the Petitioner if he would consent to a recording. Findings of Fact, Conclusions of Law, and Order on 3.5 Hearing, page 4 of 5, State v. Avila, supra at page 8. The Petitioner, after discussing this with a friend that he had brought with him to the interview, asked that the detective not record it. *Id.*

It must be noted that this particular fact was relied upon by both the trial court and the Court of Appeals in their consideration that the statement was not the product of custodial interrogation. For the Petitioner to now argue that the detective's compliance with the requirements of the law (Two Party Consent - RCW 9.73.030) and the Petitioner's own request, was actually "exploitive and/or coercive" verges on the outrageous. The law requires consent, the Petitioner declined to give consent. The detective complied and is now accused of misconduct. This Court should not accept review premised on this irresponsible, inaccurate, and offensive accusation.

Finally, the Petitioner's assertion that he is an "impaired person" pursuant to RCW 2.42.120 is contrary to the law. RCW 2.42 addresses the considerations for persons who have a "hearing or speech impairment. RCW 2.43 addresses the considerations for "non-English speaking persons." Pursuant to RCW 2.43.030 the law requires appointment of an interpreter only in the course of "legal proceedings." RCW 2.43.020(3) defines "legal proceeding" as follows:

“Legal proceeding” means a proceeding in any court in this state, grand jury hearing, or hearing before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof.

Police interviews do not fall within the express language of the statute. No case is cited by the Petitioner wherein any court has found that the requirement of an appointed interpreter attaches to a police investigatory interview. This Court should not judicially revise the plain language of the law.

In point of fact, the two cases cited by the Petitioner for “underlying rationale” for his efforts to judicially reinterpret the law do not support his position. In State v. Prok, (Petition, pages 18 - 19) the Supreme Court reversed the Court of Appeals and the trial court and found that failure to provide an explanation in “words easily understood” by the defendant did not apply until the defendant was “had not yet been formally charged, nor had he been taken before a committing magistrate.” State v. Prok, 107 Wn.2d 153, 156, 727 P.2d 652, 654 (1986). Rather than providing even subtle support for the Petitioner’s position herein, it is completely to the contrary.

The other case cited by the Petitioner State v. Morales (Petition, pages 18 - 19) is easily distinguished from the present case. In Morales, the Supreme Court expressly limited their holding to situations where an individual is arrested for impaired driving offenses. State v. Morales, 173 Wn.2d 560, 571, 269 P.3d 263, 269-270 (2012). Ultimately, the Morales Court held that failure to advise the defendant of a statutory right, “in a



meaningful manner,” would not meet the requirements of the implied consent law. In the present case it is clear that there were no “statutory rights” at issue, and based upon the findings of both the trial court and the Court of Appeals, the Petitioner’s Miranda rights were not at issue. Morales **MIGHT** provide at least a bit of support **IF** the situation had required that the detective advise the Petitioner of his Miranda rights, **AND IF** she had not done so “in a meaningful manner.” But this is not the case. This Court should not accept review of this case in order to create a requirement not found in the law.

## 5. CONCLUSION

This case should not be subject to discretionary review pursuant to RAP 13.4(b). There is no conflict between the Court of Appeals’ decision in this matter and any other decision of any other court. There are no constitutional issues identified that would call for review. The “significant public interest” asserted by the Petitioner is illusory at best, disingenuous at worst, and contrary by well-settled law.

Contrary to the Petitioner assertions, he received a fair trial and was convicted upon admissible evidence. He was afforded the due process required by the State and Federal Constitutions and the laws of this State and court rules. The Court of Appeals properly applied the applicable law to the actual facts of this case and rendered a proper decision thereupon. The

Petitioner's efforts to create an inaccurate version of events should not be allowed to cloud the issues herein. The relevant law is clear and does not require interpretation or judicial "re-writing."

Based upon the actual facts of this case, as found by the trial court and confirmed by the Court of Appeals, and based upon the clear dictates of the statutes and the prior applicable case law, this Court should not accept review of this case.

Dated this 2<sup>nd</sup> day of June, 2017.

Respectfully submitted,



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**DECLARATION OF MAILING**

DECLARATION

On June 2, 2017 I deposited in the mail of the United States a properly stamped, and addressed envelope directed to all counsel and parties as listed below a copy of the Response to Petition for Review in this matter to:

Luis A. Avila  
Airway Heights Correctional Center  
P.O. Box 2049  
Airway Heights, WA. 99001-2049

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on June 2, 2017.

  
SHARLENE J. TILLER  
Office Assistant

**ASOTIN COUNTY PROSECUTOR'S OFFICE**

**June 02, 2017 - 4:13 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 94195-5  
**Appellate Court Case Title:** State of Washington v. Luis A. Avila  
**Superior Court Case Number:** 12-1-00078-8

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