No. 87904-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

SAMUEL PIATNITSKY,

Petitioner.

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PETITIONER'S COMBINED SUPPLEMENTAL BRIEF ADDRESSING FIFTH AMENDMENT AND ARTICLE I, SECTION 9

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ORIGINAL

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A. INTRODUCTION

Reports of *Miranda's* death are greatly exaggerated. As recently as 2010 in *Berghuis v. Thompkins*, the Supreme Court reaffirmed that the Fifth Amendment protects individuals from the inherently coercive pressures of custodial interrogations. The rule remains that once a suspect invokes his constitutional right to silence, police must "scrupulously honor" the invocation by immediately ceasing the interrogation. Any statements obtained in violation of this rule must be suppressed.

The Court in *Thompkins* held that although remaining silent in the face of initial questions is not sufficient to invoke the right to cease the interrogation, if an arrestee says that he "does not want to talk," this "simple, unambiguous statement" invokes the right to cut off questioning. During a custodial interrogation, Sam Piatnitsky said, "I don't want to talk right now, man." In violation of *Miranda*, the detectives continued to interrogate him anyway, and the statements they elicited were admitted at trial. This flagrant Fifth Amendment violation was not harmless, and a new trial should be granted.

B. ISSUES PRESENTED

1. If, during a custodial interrogation, a suspect indicates unequivocally that he wishes to remain silent, the Fifth Amendment requires police to cease questioning. Trial courts must grant a motion to exclude statements elicited in violation of this rule. Did the trial court violate Mr. Piatnitsky's Fifth Amendment rights by admitting statements he made in response to police questioning that continued after he said "I don't want to talk right now, man?"

2. The structure of our state constitution emphasizes individual rights, and, in crafting article I, section 9, the framers rejected the language of the Fifth Amendment in favor of language which more broadly protects a person from being compelled to "give evidence" against himself. Before the U.S. Supreme Court required unequivocal assertions of Fifth Amendment rights, this Court held that when a suspect invokes his rights in an equivocal manner, detectives are limited to asking clarifying questions. Other state courts have held that their parallel constitutional provisions are more protective than the Fifth Amendment in this context. Is article I, section 9 more protective than the Fifth Amendment, providing an independent basis for reversal in this case?

C. STATEMENT OF THE CASE

A fight broke out at a party, leaving one man dead and another injured. 9/28/10 RP 42-43, 47, 78. Samuel Piatnitsky was arrested as a suspect in the crimes. CP 310-11. Police read him *Miranda* warnings and two detectives questioned him for an hour before turning on a tape recorder. 9/16/10 RP 14; Pretrial Ex. 3 at 1 (attached as Appendix A). At this point, the police implied that Mr. Piatnitsky had confessed to wrongdoing during the first hour, but Mr. Piatnitsky said, "What are you guys talking about, man?" Pretrial Ex. 3 at 2.

One detective started reading Mr. Piatnitsky his *Miranda* rights again, but Mr. Piatnitsky said, "I'm not ready to do this, man." *Id.* He said, "I just write it down, man. I can't do this. I, I, I just write, man. I don't, I don't want ...." The detective said, "okay." Mr. Piatnitsky then said, "I don't want to talk right now, man." Pretrial Ex. 3 at 2.

But the detective did not cease the interrogation. He continued asking questions, and, when Mr. Piatnitsky tried to remain silent, the detective said, "You gotta answer out loud." Pretrial ex. 3 at 2. The detective kept interrogating Mr. Piatnitsky, and eventually obtained incriminating answers. Pretrial ex. 3 at 2-4; ex. 58; CP 313; 10/7/10 RP 8-45; 10/18/10 RP 12-44. The other detective wrote Mr. Piatnitsky's answers down and had him sign the statement. Ex. 58.

The State charged Mr. Piatnitsky with one count of first-degree murder, one count of first-degree attempted murder, possession of a stolen firearm, and unlawful possession of a firearm. CP 9-12. Mr. Piatnitsky moved to suppress his statements for the *Miranda* violation, but the trial court denied the motion. 9/16/10 RP 7-57; 9/20/10 RP 4-61. The detectives testified about what Mr. Piatnitsky told them in response to the questions they asked after he said "I don't want to talk." The statement they wrote for him was also admitted at trial. 10/7/10 RP 8-45; 10/18/10 RP 12-44; ex. 58. Mr. Piatnitsky was convicted as charged. CP 231-38.

Two judges of the Court of Appeals affirmed over Judge Becker's dissent. Judge Becker would have held the trial court violated Mr. Piatnitsky's Fifth Amendment rights, and that the error was not harmless in light of the highly damaging nature of the statements and the fact that the jury was instructed on both self-defense and lesser-included offenses. *State v. Piatnitsky*, 170 Wn. App. 195, 229-33, 282 P.3d 1184 (2012) (Becker, J., dissenting), *review granted* ___ Wn.2d ___ (2013).

This Court granted review and ordered supplemental briefing on article I, section 9 in addition to the usual briefing under RAP 13.7(d). Mr. Piatnitsky addresses both the Fifth Amendment and the state constitution in this combined supplemental brief.

D. ARGUMENT.

1. By saying "I don't want to talk right now," Mr. Piatnitsky unequivocally invoked his Fifth Amendment right to silence, but the detectives improperly continued to interrogate him.

The Fifth Amendment guarantees the right to silence, but the inherently coercive pressures of law-enforcement interrogations frustrate this right. The Supreme Court, recognizing this reality, has made clear that if a suspect subject to a custodial interrogation says that he does not want to talk, all questioning must cease. Sam Piatnitsky said he did not want to talk, but detectives did not cease questioning him. Instead, they continued to interrogate him, and the answers they elicited were admitted at trial. The admission of Mr. Piatnitsky's statements violated his Fifth Amendment rights, requiring reversal and remand for a new trial.

a. The standard of review is *de novo*.

The standard of review has been a source of confusion which this Court should take the opportunity to clarify. The Court of Appeals cited the correct standard in one part of the opinion, but then applied the wrong standard. It held that "substantial evidence supports" the "finding" that Mr. Piatnitsky never asserted his right to remain silent. *Piatnitsky*, 170 Wn. App. at 222. But the question of whether a suspect unequivocally invoked his right to silence is a question of law reviewed *de novo*. *United States v. Santistevan*, 701 F.3d 1289, 1293 (10th Cir. 2012).

The "substantial evidence" standard, in contrast, applies to *factual findings*. In other words, the question of what Mr. Piatnitsky in fact said is reviewed for substantial evidence. *See State v. Radcliffe,* 164 Wn.2d 900, 907, 194 P.3d 250 (2008) (substantial evidence supported finding that defendant said, "maybe I should contact an attorney"). But the State does not dispute that Mr. Piatnitsky said, "I don't want to talk right now, man." Pretrial ex. 3 at 2. The trial court found that Mr. Piatnitsky said, "I don't want to talk right now, man." CP 312. The Court of Appeals also acknowledged that Mr. Piatnitsky said, "I don't want to talk right now, man." *Piatnitsky,* 170 Wn. App. at 202. Thus, there is no factual issue subject to the substantial evidence standard of review.

The question is, does the phrase "I don't want to talk right now" constitute an unequivocal invocation of the right to silence? This is a legal issue subject to *de novo* review.[1] *Santistevan*, 701 F.3d at 1293; *see also State v. Pierce*, 169 Wn. App. 533, 544, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025 (2012) (factual findings were unchallenged and were

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[1] Mr. Piatnitsky continues to submit that the transcript does not accurately reflect what he said later, just before the detective turned off the recorder. Where the transcript states Mr. Piatnitsky said, "Yes. I don't know (unintelligible)," he actually said something like, "I don't really feel like talkin', man." *Compare* Pretrial ex. 3 at 4 *to* Ex. 56 at 4:48-4:50. The dispute over what was said here would be reviewed for substantial evidence, but the Court need not reach this question. Because it is undisputed that Mr. Piatnitsky earlier said "I don't want to talk right now," but detectives continued to interrogate him anyway, reversal is required.

verities on appeal, but trial court erred as a matter of law in concluding defendant failed to unequivocally request an attorney).

In *Solomon,* the Court of Appeals explained the difference between factual findings subject to the substantial evidence standard and legal conclusions subject to *de novo* review. *See State v. Solomon*, 114 Wn. App. 781, 787-89, 60 P.3d 1215 (2002). At issue there was whether the defendant was in custody for purposes of *Miranda.* The court explained that "[t]he factual inquiry determines 'the circumstances surrounding the interrogation.'" *Id.* at 787 (quoting *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)). Unchallenged factual findings are verities on appeal, and challenged findings are reviewed for substantial evidence. *Id.* at 789. But "[o]nce the scene is set and the players' lines and actions are reconstructed," the ultimate question of whether the defendant was in custody is a legal determination subject to *de novo* review. *Id.* at 788-89.

Similarly, in this context, once the court resolves the factual determination of what the suspect and detectives said, the legal determination of whether the suspect unequivocally invoked his Fifth Amendment right to silence is subject to *de novo* review. *see id*; *Pierce*, 169 Wn. App. at 544; *Santistevan*, 701 F.3d at 1293. Furthermore, any conclusion of law mislabeled a finding of fact is reviewed *de novo* as a

conclusion of law. *State v. Gaines*, 122 Wn.2d 502, 508, 859 P.2d 36 (1993).

In sum, the question of whether Mr. Piatnitsky invoked his Fifth Amendment right to silence when he undisputedly stated "I don't want to talk right now" is a question of law this Court reviews *de novo.*

b. Mr. Piatnitsky invoked his constitutional right to silence by saying "I don't want to talk right now."

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *see Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). The amendment reflects our society's "preference for an accusatorial rather than an inquisitorial system of criminal justice," and a recognition that a system "which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation." *Withrow v. Williams*, 507 U.S. 680, 692, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993). The Fifth Amendment, "while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent." *Id.*

Because of the inherently coercive nature of law enforcement interviews, police officers must advise suspects of their Fifth Amendment

rights prior to engaging in custodial interrogations. *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). Even if an accused person initially waives his right to silence, he may invoke his "right to cut off questioning" at any time. *Id.* at 474. This is a "critical safeguard" of the privilege against self-incrimination. *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) (citing *Miranda*, 384 U.S. at 474).

Once a suspect asserts his right to silence, "the interrogation must cease." *Mosley*, 423 U.S. at 101 (citing *Miranda*, 384 U.S. at 473-74). If an individual's right to cut off questioning is not "scrupulously honored," statements obtained after the suspect invoked his right to silence must be suppressed at trial. *Mosley*, 423 U.S. at 104.

An accused person must invoke his Fifth Amendment right to remain silent unambiguously. *Berghuis v. Thompkins*, ___ U.S. ___, 130 S.Ct. 2250, 2260, 176 L.Ed.2d 1098 (2010). Importantly, however, a suspect "need not speak with the discrimination of an Oxford don." *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). So long as the accused has made "some statement that can reasonably be construed to be an expression of a desire for [silence]," questioning must end. *Id.* And although remaining silent is not itself sufficient to invoke the right to silence, a suspect's statement "that he did

not want to talk," would "invoke[] his right to cut off questioning." *Thompkins*, 130 S.Ct. at 2260.

Here, Mr. Piatnitsky said that he did not want to talk. Pretrial ex. 3 at 2. Thus, under *Thompkins,* the trial court erred in concluding he did not invoke his right to cut off questioning. *See id.* The trial court wrongly concluded, "The context of the recorded statement clearly indicates that the defendant was willing to speak with the detectives, just not on tape." CP 315. Not only did Mr. Piatnitsky *not* say he was "willing to speak with" the detectives, he *explicitly stated the opposite.* He said, "I don't want to talk right now, man." He never said, "I don't want to talk *on tape.*" And after he invoked his right to silence by stating, "I don't want to talk," he began exercising that right *by not talking.* Pretrial Ex. 3 at 2. Only after the detective improperly told him he was *required* to talk did he answer the detectives' questions. Pretrial ex. 3 at 2 (detective says, "You gotta answer out loud though"). As a matter of law, Mr. Piatnitsky invoked his Fifth Amendment right to silence, and the trial court erred in concluding to the contrary.

In contrast, a suspect fails to invoke his Fifth Amendment right to silence or to counsel by using equivocal words like "maybe" or "might" or "I don't know." In *Davis,* for example, the defendant said, "Maybe I should talk to a lawyer." *Davis*, 512 U.S. at 455. The Court held this was

not an unequivocal request for counsel. *Id.* at 462; *see also Radcliffe*, 164 Wn.2d at 907 ("Maybe I should contact an attorney" is equivocal); *State v. Amaya-Ruiz*, 166 Ariz. 152, 166-67, 800 P.2d 1260 (Ariz. 1990) (defendant did not invoke right to silence by saying "I don't know if I will answer them," in response to inquiry about whether he would answer detectives' questions).

But even where individuals use moderating phrases like "I think" or insert relative adverbs like "rather," courts have held their assertions of Fifth Amendment rights were unequivocal. For example, a suspect who said, "I think I would rather have an attorney here to speak for me" unambiguously invoked his Fifth Amendment right to counsel. *McDaniel v. Commonwealth*, 28 Va. App. 432, 433, 437, 506 S.E.2d 21 (Va. Ct. App. 1998). A suspect similarly asserted his rights by saying, "I'd rather wait until my mom get me a lawyer." *State v. Bell,* 958 So.2d 1173, 1174-75 (La. 2007). If these statements constituted unequivocal invocations of Fifth Amendment rights, Mr. Piatnitsky's statement, which did not include such tempering language, certainly constituted an unequivocal invocation of the right to silence.

The two-judge majority below stated that although Mr. Piatnitsky said "I don't want to talk right now," he "at no time during that interview stated that he did not want to convey information to the detectives." *State*

v. Piatnitsky, 170 Wn. App. at 223. But the U.S. Supreme Court has emphasized that suspects are not required to "speak with the discrimination of an Oxford don." *Davis*, 512 U.S. at 459. While an Oxford don might say, "I do not wish to convey information right now," a normal person would say, "I don't want to talk right now." This is what Mr. Piatnitsky said, and, in so stating, he invoked his Fifth Amendment right to silence. *Thompkins*, 130 S.Ct. at 2260; *accord Robinson v. State*, 373 Ark. 305, 310, 283 S.W.3d 558, 561 (Ark. 2008) (statement "I don't want to say anything right now" was unequivocal invocation of right to silence); *Anderson v. Terhune*, 516 F.3d 781, 787 (9th Cir. 2008) (en banc) (suspect unequivocally invoked his right to silence by saying "I plead the Fifth," and state court erred in concluding the phrase was "ambiguous in context").

The Court of Appeals' opinion turns what was intended to be a constitutional shield into an interrogator's sword. The court maintained that there are no "magic words" which constitute an unequivocal invocation of the right to silence. *Piatnitsky,* 170 Wn. App. at 215-17. This holding is a perversion of the rule that a suspect *need not* use "magic words" to invoke his Fifth Amendment rights, so long as the invocation is unequivocal. *See Davis*, 512 U.S. at 459 (accused need only make "some statement that can reasonably be construed to be" an assertion of the

right); *Thompkins*, 130 S.Ct. at 2276 (Sotomayor, J., dissenting) (lamenting majority's implication that suspect must use "magic words" like "I don't want to talk" to invoke right to silence). Contrary to the Court of Appeals' holding, while "magic words" like "I don't want to talk" or "I plead the Fifth" should not be *necessary* to invoke the right, they are certainly *sufficient*. *Thompkins*, 130 S.Ct. at 2260; *Terhune*, 516 F.3d at 787. And when courts hold that unambiguous phrases like "I don't want to talk" require cessation of questioning, they not only ensure the Fifth Amendment remains in force, they also provide straightforward rules for law enforcement officers to follow. *See Thompkins*, 130 S.Ct. at 2260 (discussing goals of "dispelling the coercion inherent in a custodial interrogation" while "providing guidance to officers" in the field).

At bottom, this is a simple case. A statement is either an assertion of the right to silence or it is not. *See Smith v. Illinois*, 469 U.S. 91, 97, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) (emphasizing same point for right to counsel). "Interpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous." *Connecticut v. Barrett,* 479 U.S. 523, 529, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987). The statement "I don't want to talk" is an unambiguous assertion of the right to silence, requiring no interpretation. *Thompkins*, 130 S.Ct. at 2260. Sam Piatnitsky asserted his right to silence by saying "I don't want

to talk." As Judge Becker recognized, "[t]o tolerate the trial court's reinterpretation of the defendant's remark in this case waters down the protection of *Miranda* to the point where it is illusory." *Piatnitsky,* 170 Wn. App. at 232 (Becker, J., dissenting). This Court should reverse.

c. The detectives violated *Miranda* by continuing to interrogate Mr. Piatnitsky after he said "I don't want to talk right now," and the trial court erred in admitting the resulting statements.

Because Mr. Piatnitsky invoked his right to silence, detectives were required to "scrupulously honor" the invocation by immediately ceasing questioning. *Mosley*, 423 U.S. at 100, 104. "Any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Miranda*, 384 U.S. at 474. Thus, where detectives violate this rule, the statements they obtain are inadmissible at trial. *Mosley*, 423 U.S. at 104.

The trial court erred in admitting the statements Mr. Piatnitsky gave detectives because the detectives violated Mr. Piatnitsky's Fifth Amendment rights by continuing to ask him questions after he said "I don't want to talk." *Id.* Mr. Piatnitsky said he would be willing to write a statement, but detectives did not give him a piece of paper and pen. Instead they continued interrogating him and even forced him to answer

their questions out loud when he tried to remain silent after saying he did not want to talk. Pretrial ex. 3 at 2 ("You gotta answer out loud, though").

The violation is no less a violation simply because detectives initially couched the continued interrogation in terms of readvisement of rights. The detectives were not allowed to continue questioning at all – even to ask him to waive the rights he had invoked. *See Edwards v. Arizona*, 451 U.S. 477, 480, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (after suspect invoked Fifth Amendment right to counsel, detectives readvised him of his rights and obtained a confession; Supreme Court reversed because detectives were not allowed to continue to question suspect after he asserted his rights); *United States v. McCarthy,* 382 Fed.Appx. 789, 791 (10th Cir. 2010)[2] (after suspect said "I don't want nothing to say to anyone," agent said, "okay, ... did they read you your *Miranda* warnings?" and then obtained incriminating statement after readvisement; appellate court reversed for Fifth Amendment violation).

Indeed, although the contours of *Miranda* have evolved, the Supreme Court "has never wavered" from the bright-line rule that all questioning must cease when a suspect asserts his rights. *Terhune*, 516 F.3d at 788 (citing *Mosley*, 384 U.S. at 479; *Arizona v. Roberson*, 486

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[2] Citation to this "unpublished" opinion is proper under RAP 10.4(h), GR 14.1(b), and FRAP 32.1. The opinion is available on Westlaw.

U.S. 675, 683, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988)). It is especially egregious that after Mr. Piatnitsky invoked his rights by saying "I don't want to talk," the detective told him he *had to* "answer out loud" to continued questioning. Pretrial Ex. 3 at 2; *see Edwards*, 451 U.S. at 479 (guard told defendant he "had to" talk to detectives, who then readvised him of *Miranda* rights and elicited a confession; Supreme Court reversed for Fifth Amendment violation).

In sum, the trial court violated Mr. Piatnitsky's Fifth Amendment rights by admitting statements he made to detectives who continued to interrogate him after he asserted his right to silence.

d. The remedy is reversal of the convictions and remand for a new trial at which Mr. Piatnitsky's statements will be excluded.

The State bears the burden of proving that the admission of statements obtained in violation of *Miranda* was harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 292-97, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In other words, the State must show that the admission of the confession did not contribute to the conviction. *Fulminante*, 499 U.S. at 296 (citing *Chapman*, 386 U.S. at 26).

The State cannot meet this heavy burden here. "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Fulminante*, 499 U.S. at 296 (internal quotation omitted).

The State cannot prove beyond a reasonable doubt that the result in this case would have been the same without Mr. Piatnitsky's illegally obtained statements. This is especially so given that the jury was instructed on both self-defense and the lesser-included offenses of second-degree murder and attempted murder.[3] State's witness Jeffrey Manchester testified that Shawn Jones had a hold of the gun when he and Mr. Piatnitsky were struggling. 9/28/10 RP 37. Indeed, he was "pretty sure" Mr. Jones got the gun completely away from Mr. Piatnitsky. 9/28/10 RP 80. The only other witness to the shootings, Amy Davison, also testified that Mr. Jones was holding onto the gun. 9/28/10 RP 122. Mr. Manchester said Mr. Piatnitsky was on his back on the ground and Mr. Jones was on top of him, with at least partial control of the gun, when Mr. Piatnitsky reached up and pulled the trigger. 9/28/10 RP 82; 10/19/10 RP 72. This testimony supports a finding of self-defense; in other words, it

[3] The erroneous admission also prejudiced Mr. Piatnitsky as to the possession of a stolen firearm count, because it was only through Mr. Piatnitsky's own statement that the State proved knowledge.

creates a reasonable doubt as to intent. At a minimum, it creates a reasonable doubt as to premeditation.

But Mr. Piatnitsky's illegally obtained statement was admitted for the jury. In it, he stated that he fired two shots at Mr. Jones while Mr. Jones was "trying to scurry away." Ex. 58 at 2. Detective Keller similarly testified that Mr. Piatnitsky said he shot Mr. Jones two times as Mr. Jones was "crawling away." 10/7/10 RP 21. Detective Allen also testified that Mr. Piatnitsky said he was standing up and Mr. Jones was crawling or scurrying away when Mr. Piatnitsky shot Mr. Jones. 10/18/10 RP 34. Not only did the written statement go back to the jury room, but Detective Keller read the entire statement for the jury at trial. 10/7/10 RP 41. Furthermore, the prosecutor emphasized Mr. Piatnitsky's statements to the detectives during closing argument, particularly the statements about how Mr. Jones was crawling or scurrying away when Mr. Piatnitsky shot him. 10/25/10 RP 23-24, 30.

In sum, the State cannot prove that the outcome of the trial would have been the same absent the written statement, the detectives' testimony about the statement, and the prosecutor's argument about the statement. *See Piatnitsky*, 170 Wn. App. at 233 (Becker, J., dissenting) ("the error was not harmless"). This court should reverse and remand for a new trial.

2. **Under article I, section 9, if an individual asserts his right to silence but the assertion is equivocal, police may not ask further questions except to clarify the assertion.**

   a. Although the Court need not reach this issue because reversal is required under the Fifth Amendment, the state constitutional question is properly before the Court.

As explained above, reversal is required under the Fifth Amendment to the United States Constitution. However, adequate and independent grounds for reversal exist under article I, section 9 of the Washington Constitution. *See Michigan v. Long*, 463 U.S. 1032, 1040, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (Out of respect for independence of state courts, U.S. Supreme Court will not review cases where there is an adequate and independent state ground for decision).

The state constitutional issue is properly before this Court. Although it was not addressed below, both parties have presented thorough supplemental briefing on the state constitutional question. Thus, it is appropriate for this Court to reach the issue. *See United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013) (en banc) (although government abandoned an issue on appeal, court properly reached it where it had "called for and received supplemental briefs by both parties"); *cf. State v. Hendrickson*, 129 Wn.2d 61, 70 n.1, 917 P.2d 563 (1996) (deciding case under article I, section 7 even though petitioner argued for

application of state constitution for the first time in his supplemental brief).

There are good reasons for addressing a state constitutional issue even where reversal is also required under the federal constitution:

> First, state courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts. Second, the histories of the United States and Washington Constitutions clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty. ... Third, by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied. Fourth, we will be able to assist other states that have similar constitutional provisions develop a principled, responsible body of law that will not appear to have been constructed to meet the whim of the moment.

State v. Coe, 101 Wn. 2d 364, 373-74, 679 P.2d 353 (1984) (reversing and holding prior restraint on press invalid under both article I, section 5 and First Amendment).

Thus, this Court should address the state constitutional question. As explained below, it should hold that article I, section 9 is more protective than the Fifth Amendment, and that the use of Mr. Piatnitsky's statements at trial violated his state constitutional rights.

b. A *Gunwall* analysis demonstrates that article I, section 9 is more protective than the Fifth Amendment in this context, and that only clarifying questions may be asked following an equivocal invocation of the right to silence.

To determine whether a state constitutional provision supplies different or broader protections than its federal counterpart, this Court evaluates six nonexclusive criteria. These are: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.3d 808 (1986)

i. *The text of article I, section 9 and differences in language between article I, section 9 and the Fifth Amendment.*

It is "well established that state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution." *State v. Simpson*, 95 Wn. 2d 170, 177, 622 P.2d 1199 (1980). Doing so "is particularly appropriate when the language of the state provision differs from the federal, and the legislative history of the state constitution reveals that this difference was intended by the framers." *Id.* This is the case with article I, section 9.

Article I, section 9 of the Washington Constitution provides, "No person shall be compelled in any criminal case to give evidence against himself...." Const. art. I, § 9. The language is significantly different from that of the Fifth Amendment, which provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

In using the word "witness," the federal constitution's focus is on guaranteeing the right not to testify against oneself at trial. *See Michigan v. Tucker*, 417 U.S. 433, 440, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974) (although caselaw has extended its meaning, the language of the Fifth Amendment "might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify"); *Cf. Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (a "witness" is a person who "bears testimony"). But our framers explicitly rejected a proposed version of article I, section 9 which would have merely protected the right of a person not to "testify against himself." *Journal of the Washington State Constitutional Convention, 1889*, at 498 (B. Rosenow ed. 1962).[4] Instead, they favored the broader "give

[4] The *Journal* is now available online through the Washington State Constitutional Law Project. *See* https://lib.law.washington.edu/content/guides/waconst#section-6.

evidence" language. *Id.* In so doing, our founders expressly provided strong protection against self-incrimination at the investigatory stage.[5]

The Massachusetts Constitution uses language similar to Washington's, providing, "No subject shall ... be compelled to accuse, or furnish evidence against himself." Mass. Const. art. 12. Applying factors similar to our *Gunwall* factors, that state's supreme court has held that article 12 is more protective than the Fifth Amendment in the context of equivocal invocations of the right to silence. *Commonwealth v. Clarke*, 461 Mass. 336, 345-46, 350, 960 N.E.2d 306 (Mass. 2012). In light of the differences in text between the Fifth Amendment and article I, section 9, this Court should similarly hold that our state constitution provides broader protection in this context.

In sum, the text of article I, section 9 and the differences in language between that provision and the Fifth Amendment demonstrate that the framers of our constitution intended to confer stronger protection against self-incrimination upon Washingtonians than that provided by the federal constitution. *See Gunwall*, 106 Wn.2d at 65 (difference in

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[5] The framers also changed the order of the clauses, placing the protection against self-incrimination first and double jeopardy second. It is reasonable to conclude this rearrangement is another sign of the importance our founders attached to the right not to be compelled to give evidence against oneself. *See* Rosenow at 498.

language between Fourth Amendment and article I, section 7 is "material," and suggests state constitution provides broader protection).

ii. *Constitutional history and pre-existing state law.*

The third and fourth *Gunwall* factors, constitutional and common-law history and pre-existing state law, also demonstrate that article I, section 9 provides stronger protection than the Fifth Amendment. As discussed above, the delegates to the Constitutional Convention who served on the Declaration of Rights Committee rejected language that was similar to that of the federal constitution in favor of language which more broadly protects persons against compelled self-incrimination.

Furthermore, this Court's decisions pre-dating *Davis* and *Thompkins* provided greater protection in this context than the U.S. Supreme Court later endorsed under the federal constitution. *See State v. Robtoy*, 98 Wn.2d 30, 39, 653 P.2d 284 (1982). *Robtoy*, which was the law in this state for decades, held that:

> Whenever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. *Further questioning thereafter must be limited to clarifying that request* until it *is* clarified.

Robtoy, 98 Wn.2d at 39 (emphases in original). At the same time this Court endorsed the rule protecting equivocating suspects from compelled

self-incrimination, some other courts were denying such protection, instead requiring unequivocal assertions of the rights to silence or to counsel. *See Smith v. Illinois*, 469 U.S. at 96 n.3 (describing three different approaches state and federal courts had taken with respect to equivocal invocations; *Robtoy* fell in the middle, while the U.S. Supreme Court later adopted the least-protective rule).

Although this Court in *Robtoy* was addressing an invocation of the right to counsel as opposed to the right to silence, it makes sense to apply the same rule to both contexts. *Thompkins*, 130 S.Ct. at 2260. And limiting detectives to asking clarifying questions after suspects invoke their rights in an equivocal manner "gives a suspect the proper amount of protection to his rights without unduly burdening the police from taking voluntary statements." *Robtoy*, 98 Wn.2d at 39.

In *Radcliffe*, this Court noted that *Robtoy* was no longer good law *as to the Fifth Amendment* in light of *Davis*, but it declined to reach the state constitutional issue. *Radcliffe*, 164 Wn.2d at 907. Other state courts have reached the issue and applied the *Robtoy* rule under their state constitutions. *See, e.g., State v. Diaz-Bridges*, 208 N.J. 544, 34 A.3d 748 (N.J. 2012); *State v. Hoey*, 77 Hawai'i 17, 36, 881 P.2d 504, 523 (Haw. 1994). It is appropriate to review those cases to help determine the scope of protection under our state constitution. *See Gunwall*, 106 Wn.2d at 67-

68 (reviewing state constitutional cases from Colorado and New Jersey in determining scope of protection under article I, section 7).

Even though the language of Hawaii's self-incrimination clause is the same as that of the Fifth Amendment, the Hawaii Supreme Court held it was appropriate "to afford our citizens broader protection under article I, section 10 of the Hawai'i Constitution than that recognized by the *Davis* majority under the United States Constitution." *Hoey*, 881 P.2d at 523. In so holding, the Court was persuaded by the reasoning of the concurring opinion in *Davis*:

> A rule barring government agents from further interrogation until they determine whether a suspect's ambiguous statement was meant as a request for counsel ... assures that a suspect's choice ... will be scrupulously honored, and it faces both the real-world reasons why misunderstandings arise between suspect and interrogator and the real-world limitations on the capacity of police and trial courts to apply fine distinctions and intricate rules.

Id. (quoting *Davis*, 512 U.S. at 469 (Souter, J., concurring in the judgment)). The Hawaii Court accordingly held:

> (1) When a suspect makes an ambiguous or equivocal request for counsel during custodial interrogation, the police must either cease all questioning or seek non-substantive clarification of the suspect's request, and
> (2) If, upon clarification, the defendant unambiguously and unequivocally invokes the right to counsel, all substantive questioning must cease until counsel is present.

Hoey, 881 P.2d at 523.

Other supreme courts have adopted the same rule under their respective state constitutions. For example, the Minnesota Supreme Court held, "in order to protect an accused's right to counsel under the state constitution, police must stop questioning and must clarify an accused's intentions if the accused makes a statement during custodial interrogation that could reasonably be construed as an expression of a desire to deal with the police only through counsel." *State v. Risk*, 598 N.W.2d 642, 644 (Minn. 1999); *accord Steckel v. State*, 711 A.2d 5, 10-11 (Del. 1998) (announcing same rule under article I, section 7 of Delaware Constitution); *see also State v. Effler*, 769 N.W.2d 880, 895-96 (Iowa 2009) (Appel, J., specially concurring) (suggesting that upon proper briefing, Iowa Supreme Court would decline to follow *Davis* under state constitution).

Oregon, Delaware and New Jersey have adopted the same rule with respect to the right to silence. The New Jersey Supreme Court did so after *Thompkins* was decided, expressly declining to follow that opinion under the New Jersey Constitution. *Diaz-Bridges*, 208 N.J. at 564. The Delaware Supreme Court, which had already rejected *Davis* in the right-to-counsel-context, preemptively rejected *Thompkins* in *State v. Draper*, 49 A.3d 807, 810 (Del. 2002). There, the court held that a defendant's request to speak to his mother was an ambiguous invocation of his right to

remain silent, and that the police should have clarified his intent before continuing the interrogation. *Id.* at 808. Because the detectives instead forged ahead with questioning, the resulting statements should have been suppressed. *Id.* at 811. The Oregon Constitution similarly protects equivocal invocations of both the right to silence and the right to counsel. *State v. Holcomb*, 213 Or. App. 168, 159 P.3d 1271 (Or. Ct. App. 2007). Following such invocations, the police are only permitted to "ask follow-up questions to clarify whether the suspect, through the equivocal request, intended to invoke either right." *Id.* at 174.

The above state constitutional decisions are consistent with this Court's decision in *Robtoy.* The fact that *Robtoy* was the law in this State for decades, and that it provided stronger protection than that ultimately afforded by the U.S. Supreme Court under the federal Fifth Amendment, weighs in favor of a broader interpretation of the related rights under article I, section 9.

iii. *Structural differences and matters of particular state concern.*

The fifth *Gunwall* factor, differences in structure between the state and federal constitutions, always supports an independent constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's

power. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). While individual rights were tacked on as amendments to the federal constitution, our state constitution begins with the Declaration of Rights.

Finally, state law enforcement measures are a matter of state or local concern. *Id.* Indeed, the U.S. Supreme Court has recognized as much in the specific context of custodial interrogations. *Miranda*, 384 U.S. at 467 ("We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws"). As explained above, several state supreme courts have recognized that this issue is a matter of state concern, and have held that their state constitutions are more protective in this context. *Diaz-Bridges*, 208 N.J. 544; *Hoey*, 881 P.2d at 523; *Draper*, 49 A.3d at 810; *Risk*, 598 N.W.2d at 644; *Holcomb*, 213 Or. App. at 174.

Furthermore, the fundamental fairness of trials held in Washington is a matter of particular state concern. *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984). Here, fundamental fairness dictates that the federal rule does not apply in Washington. Rather, when a suspect invokes his rights during a custodial interrogation, but the invocation is ambiguous, police must limit further questioning to clarifying the request. *See Robtoy*, 98 Wn.2d at 39; *Davis,* 512 U.S. at 467 (Souter, J., concurring

in the judgment) ("The concerns of fairness and practicality that have long anchored our *Miranda* case law" point to a rule requiring law enforcement officials who reasonably do not know whether or not the suspect has invoked his rights to "stop their interrogation and ask him to make his choice clear").

In sum, an evaluation of the *Gunwall* factors shows article I, section 9 provides broader protection against compelled self-incrimination than the Fifth Amendment. The framers of the Washington Constitution purposely chose language that is different from that of the Fifth Amendment, the structure of our state constitution emphasizes individual rights, and prior caselaw in this state protected individuals who asserted their rights ambiguously from continued interrogation absent clarification. This Court should hold that under article I, section 9, if a suspect asserts his rights during a custodial interrogation but the assertion is equivocal, further questioning thereafter must be limited to clarifying that request until it is clarified. *Robtoy*, 98 Wn.2d at 39.

c. The detectives violated article I, section 9 by continuing to interrogate Mr. Piatnitsky after he said "I don't want to talk right now," and the trial court erred in admitting the resulting statements.

i. *Because Mr. Piatnitsky unequivocally invoked his right to silence, the detectives violated his rights by continuing to ask him questions.*

As explained above, Sam Piatnitsky unequivocally invoked his right to silence by saying "I don't want to talk right now, man." But the detectives continued interrogating him and even forced him to answer their questions out loud when he tried to remain silent after saying he did not want to talk. Pretrial ex. 3 at 2. The admission of the resulting statements violated Mr. Piatnitsky's state constitutional rights, just as it violated his federal constitutional rights.

Importantly, the fact that detectives are allowed to ask clarifying questions following an *equivocal* assertion of the right to silence or to counsel does *not* mean they are allowed to ask follow-up questions after an unambiguous invocation. This Court has appropriately admonished, "we will not permit interrogating officers to use the guise of clarification as a subterfuge for eliciting a waiver of the previously asserted right to counsel." *Robtoy*, 98 Wn.2d at 39-40. The same is of course true of a previously asserted right to silence.

Contrary to this Court's rule, the California courts had allowed the use of "clarifying questions" as a subterfuge for eliciting a waiver of the previously asserted right to silence in *Anderson*, 516 F.3d at 790. The circuit court noted the impropriety of this practice:

> Under the state court's application of *Miranda* and its progeny, every time a suspect unequivocally invokes the right to remain silent, the police can ask follow-up questions to clarify whether he really, *really* wants to invoke the right ... Such a practice is tantamount to endless re-interrogation.

Id (emphasis in original).

Because Mr. Piatnitsky unequivocally invoked his right to silence but detectives continued questioning him anyway, the trial court violated his constitutional rights by admitting the statements thereby obtained.

ii. *Even if Mr. Piatnitsky's assertion was equivocal, the detectives violated his rights by continuing to interrogate him instead of clarifying the assertion.*

Even if the phrase "I don't want to talk right now" were somehow an equivocal invocation of the right to silence, reversal would be required under article I, section 9. The detectives did not limit their subsequent questions to clarifying the assertion; instead, they proceeded with the interrogation, even ordering Mr. Piatnitsky to "answer out loud" when he tried to stay silent as they readvised him of his rights. Pretrial ex. 3 at 2. Instead of clarifying Mr. Piatnitsky's assertion, the detective put words in

his mouth, saying "I understand that you don't want to, you don't want to talk about this on tape" even though Mr. Piatnitsky had never qualified his assertion by saying he would be willing to talk off tape. Pretrial ex. 3 at 4.

The detective then *told* Mr. Piatnitsky that Mr. Piatnitsky was going to sign a waiver of his rights. *Id.* ("I want to go ahead and read the waiver of the rights that *you're gonna sign here in a second*"). He told him, "You've decided not to exercise these rights at this time." *Id.* These are not clarifying questions. Rather, the detective badgered Mr. Piatnitsky into waiving the right he had just invoked, in violation of article I, section 9. *See Draper*, 49 A.23d at 811 (reversing under Delaware Constitution where defendant ambiguously invoked his right to remain silent but detective did not limit ensuing questions to clarifying the assertion).

As explained above, the State cannot prove beyond a reasonable doubt that this constitutional violation was harmless. The remedy is reversal of the convictions on counts 1, 2, and 4, and remand for a new trial at which the illegally obtained statements will be suppressed.

E. CONCLUSION

Enforcing the constitutional protection against compelled self-incrimination is essential to ensuring fair trials with reliable results. Because his rights under the Fifth Amendment and article I section 9 were violated, Samuel Piatnitsky respectfully requests that this Court reverse his convictions and remand for a new trial at which his post-invocation statements will be suppressed.

DATED this 22nd day of April, 2013.

Respectfully submitted,

/s/ Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Petitioner Samuel Piatnitsky

APPENDIX A
(Pretrial Exhibit 3)

SHERIFF
KING COUNTY

KCSO Case # 08-257401
Suspect Statement
SAMUEL PIATNITSKY

DET: Okay. This is gonna a statement. Today's date is October 19, 2008. The time now is 08:10. Interviewing detectives are DAVE KELLER and JIM ALLEN (DET2). Interview is being conducted at the Precinct Three interview room. Interview person is ah, SAMUEL PIATNITSKY. Ah, SAMUEL, can you state your name and well, first of all, SAMUEL, are you aware this is being recorded? Do I have your permission to record it, SAMUEL?

DET2: You gotta answer out loud, SAM, so we can year you. Is it okay for us to record this, SAM?

SUS: Yeah, man.

DET2: Okay.

DET: Okay. Can, SAM, can you ah, state your full name and help me with the pronunciation on your last name and the spelling.

SUS: SAMUEL PIATNITSKY.

DET: And how do you spell PIATNITSKY?

SUS: P-I-A-T-N-I-T-S-K-Y.

DET: And what's your date of birth?

SUS: May 24th, '88.

DET: And what's your home address where you get mail?

SUS: 16702 133rd Place Southeast, Renton, Washington 98058.

DET: Good phone number for you?

SUS: 206-694-9373.

DET: Okay, and earlier you were advised of your Miranda rights. Do you remember that, your Constitutional rights by the officer, do you remember that?

SUS: Yeah; I have a right. . .

DET: Did you understand those?

SUS: I have a right to remain silent.

DET: Right. I'm gonna go ahead and. . . .

SUS: That's the, that's the only one I remember.

DET: Okay. I'm gonna read 'em for you again.

SUS: That's the one I, I should be doing right now.

DET: Well, you know, like we told you, you don't have to talk to us. Okay. You've already admitted to this thing. We want to go on tape, and because it's an important part of this, and we talked about that, and that's the part when you go back to get the shotgun. Before we do any of that, I want to read you. . .

SUS: What are you guys talking about, man?

DET: I want to read you your rights, okay. Do you understand that you have the right to remain silent?

DET2: You gotta answer out loud, SAM.

SUS: I'm not ready to do this, man.

DET2: You just told us that you wanted to get it in your own words on tape. You asked us to turn the tape on; remember?

SUS: I just write it down, man. I can't do this. I, I, I just write, man. I don't, I don't want. . .

DET: Okay.

SUS: I don't want to talk right now, man.

DET: Okay, but let's go over the rights on tape, and then you can write it down, okay.

SUS: All right, man.

DET: Okay. Do you understand that you have the right to remain silent?

DET2: You gotta answer out loud though.

SUS: Yes.

DET2: Okay.

DET: Do you understand that you have the right at this time to an attorney of your own choosing?

SUS: Yeah.

DET: Do you understand that anything you say or sign can be used against you in a court of law?

SUS: Yes.

DET: Do you understand that you have the right to talk to an attorney before answering any questions?

SUS: Yes.

DET: You understand that you have the right to have an attorney present during the questioning?

SUS: Yeah.

DET: You understand if you cannot afford an attorney, you can have one appointed for you without cost if you so desire?

SUS: Yes.

DET: You further understand that you could exercise these rights at any time?

SUS: Yeah.

DET: Okay. I'm gonna give you the form. I just read you these rights. You read 'em earlier. Why don't you sign that you understand these rights right here. And I understand that you don't want to, you don't want to talk about this on tape, and that's your right too, so we'll take a written statement from you; but I want, I want to go ahead and read the waiver of the rights that you're gonna sign here in a second. You understand that you, you've either had read or you have read to you the above explanation of rights and that you understand them. You've decided not to exercise these rights at this time. The following statement is made freely and voluntary and without threats or promises of any kind. Do you understand that? If you understand, you're willing to talk to us, sign that, and then we'll take a, I'll turn the tape off, and um, I'll, we'll write down a statement. Okay, SAM, I'm gonna go ahead and ah. . .

DET2: Are you sure you don't want to do it on tape like you said you did; you want to get in your own words?

SUS: Yes, sir.

DET2: Okay.

DET: So you'd rather take a written statement, do a written one.

SUS: Yes. I don't know (unintelligible)

DET: Okay, it's too hard to talk about; you'd rather write it.

DET2: Okay.

DET: The time now is ah, 08:15, and I'm gonna end this tape.

End of Statement

rh

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 87904-4
v.	)	
	)	
SAMUEL PIATNITSKY,	)	
	)	
Petitioner.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF APRIL, 2013, I CAUSED THE ORIGINAL **PETITIONER'S COMBINED SUPPLEMENTAL BRIEF** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ERIN BECKER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF APRIL, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
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Phone (206) 587-2711
Fax (206) 587-2710

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State v. Samuel Piatnitsky

No. 87904-4

Please accept the attached document(s) for filing in the above-subject case:

Petitioner's Combined Supplemental Brief

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