

No. 44168-3-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

TRAVIS C. BAZE, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay

No. 12-1-00123-5

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. INTRODUCTION

On March 26, 2014, this Court issued an order that stayed this case pending the Washington Supreme Court's decision in the case of *State v. Piatnitsky*, No. 87904-4. This Court ordered that after the Supreme Court issued its decision in *Piatnitsky*, Baze was to move to lift the stay and was to "file a supplemental brief addressing the effect, if any, of the *Piatnitsky* decision on his appeal." This Court ordered the State to file a responsive brief.

The Supreme Court has now issued its decision in *Piatnitsky*. Baze has filed his supplemental brief. In his supplemental brief, Baze asserts that "[*Piatnitsky*] does not affect any of Baze's arguments regarding suppression of his statement." Supp. Br. of Appellant at 1. Baze provides a summary of four arguments, which are extracted from his opening and reply briefs, and he concludes that "*Piatnitsky* does not affect any of these arguments." Supp. Br. of Appellant at 2.

B. ARGUMENT

- 1) Baze's arguments in his supplemental brief are premised upon his contention that his question to officers ("Do I need an attorney?" PTr. Ex. 1 at 3) was an equivocal request for counsel. The State contends that on the facts of the instant case, Baze's question was neither a request for counsel nor an equivocal request for counsel but was

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instead a mere solicitation for advice.

The State respectfully refers the Court to the State's argument at pages 17-18 of the Brief of Respondent for its briefing in regard to this issue.

- 2) Baze's arguments in his supplemental brief mostly assume that no waiver of *Miranda* occurred until Baze expressly waived *Miranda* and that following the reading of *Miranda* no questioning or conversation should occur until there has been an express waiver of *Miranda*. The State maintains its contention that a waiver of *Miranda* can occur notwithstanding the absence of an express waiver, and irrespective of whether there has been a waiver, officers may converse with a suspect when the conversation is not interrogation and is not likely to elicit an incriminating response.

The State respectfully refers the Court to the State's arguments at pages 18-24 of the Brief of Respondent for its briefing in regard to these issues.

- 3) In his supplemental brief, Baze reiterates from his prior briefs his contention that detectives in this case contradicted *Miranda* and misled him about the availability and usefulness of a lawyer.

The State respectfully refers the Court to the State's arguments at pages 23-33 of the Brief of Respondent for its original briefing in regard to these issues.

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- 4) Baze contends that, under the federal constitution, when a suspect makes an equivocal request for counsel before, rather than after, waiving *Miranda*, further questioning must be limited to clarifying the equivocal request.

As argued in the State's previously filed Brief of Respondent (and elsewhere in this supplemental brief), the State contends that Baze's question to detectives ("Do I need an attorney?" PTr. Ex. 1 at 3) did not rise to the level of an equivocal request for counsel but was instead a mere request for advice.

Also, the State maintains its assertion that on the facts of this case there was an effective waiver of *Miranda* before there was an express waiver of *Miranda*. Still more, the conversation that occurred prior to the express waiver of *Miranda* was not interrogation.

The State respectfully refers the Court to the State's arguments at pages 18-24 of the Brief of Respondent for its original briefing in regard to these issues.

- 5) In his supplemental brief, Baze contends that even though *Piatnitsky* did not reach the issue, this Court should find that Wash. Const. art. 1, § 9, is more protective than the 5th Amendment, so that notwithstanding any federal or state precedent to the contrary, under Baze's proposed interpretation of the Washington Constitution any questioning of a suspect must stop if the suspect make's an equivocal request for counsel before waiving *Miranda*.

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As argued and pointed out elsewhere in this supplemental brief, Baze's contention assumes that his request for advice was an equivocal request for counsel. And, his contention also assumes that he did not effectively waive *Miranda* before he gave his express waiver. Finally, his contention assumes that detectives' responses to Baze's question was interrogation. The State continues to dispute all of these assumptions.

While anticipating that the Supreme Court's decision in *State v. Piatnitsky*, No. 87904-4, would address the question of whether Wash. Const. art. 1, § 9, is broader than the corresponding right under the 5th Amendment, this Court ordered supplemental briefing on the limited question of the effect of *State v. Piatnitsky*, No. 87904-4, on the instant case. But the *Piatnitsky* Court declined to decide this issue, finding instead that the issue was not properly raised or preserved in the lower courts. *Piatnitsky* at n.3.

But *Piatnitsky* does offer guidance that is useful to analysis of the instant case. In *Piatnitsky*, when asked to give a recorded statement, the defendant said "I don't want to talk right now, man." *Id.* at para. 13. This statement was ambiguous because if taken out of context it could be interpreted as a statement asserting the right to remain silent. But within

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the context of the facts a whole, it meant that the defendant wanted to write his statement rather than speak orally while the statement was audio recorded. Thus, the Court reasoned, Piatnitsky's "invocation of *Miranda* was equivocal at best." *Id.*

In the instant case, there is no context from which Baze's question to detectives should be interpreted as an equivocal request for counsel. It was not a request. It was a question. Just as it was reasonable for detectives in *Piatnitsky* "to interpret Piatnitsky's statements as an expression of preference for making a written confession rather than an audio recorded one[,]" *Id.* at para. 16, in the instant case it was reasonable for detectives to regard Baze's question as just that, a question soliciting advise, and not an ambiguous invocation of the right to counsel.

Thus, the holding of *Piatnitsky* should be equally applicable to the facts of the instant case, where the Court wrote as follows:

[W]e find that the "[s]uppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity."

Piatnitsky at para. 15 (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 382, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010)).

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- 6) Baze alleges a violation of CrR 3.1(c), but he failed to raise this issue in the trial court, and he concedes that *Piatnitsky* does not address this issue.

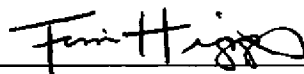
The State respectfully refers the Court to the State's arguments at pages 33-38 of the Brief of Respondent for its original briefing in regard to this issue.

C. CONCLUSION

Notwithstanding expectations to the contrary, the Supreme Court's decision in *Piatnitsky* did not alter current precedent in regard to the coextensive application of Wash. Const. art. 1, § 9, with the 5th Amendment.

DATED: July 27, 2014.

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