

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,) No. 94195-5
)
 Respondent,)
) MOTION TO MODIFY
 vs.)
)
 LUIS A. AVILA)
)
 Petitioner.)
 _____)

I. IDENTITY OF MOVING PARTY

The Petitioner, Luis A. Avila, requests the relief designated in Section II below.

II. STATEMENT OF RELIEF SOUGHT

The Petitioner, Luis A. Avila, moves the Supreme Court for an order modifying the Clerk's Ruling in the above-captioned matter dated July 10, 2017, which concerns Petitioner's Motion for Continuance filed on July 5, 2017. This Motion is brought pursuant to RAP 17.7, RAP 13.4 and RAP 13.7.

III. FACTS RELEVANT TO MOTION

On June 5, 2017, Avila received the Response to Petition

for Review ("Answer"). The Answer raises several new issues that were not raised in the Petition for Review ("Petition"). On July 10, 2017, the Clerk denied Petitioner's Motion for Continuance; finding a Reply was not warranted. RAP 13.4(d); RAP 13.7. The Clerk did not rule on the extraordinary circumstance discussed in the request for an extension of time. Petitioner received notice of the ruling on July 18, 2017. Avila now seeks modification.

IV. GROUNDS FOR RELIEF AND ARGUMENT

When reviewing a motion to modify a clerk's ruling brought under RAP 17.7, the Supreme Court performs a de novo review of the issues addressed in the challenged rulings. RAP 17.7; State v. Rolax, 104 Wn.2d 129, 133 (1985).

Avila requests modification of the Clerk's Ruling because the Answer raises several new issues. A Reply is critical and should be allowed.

1. THE NEWLY RAISED ISSUES ARE NON-RESPONSIVE.

The Petition plainly stated the "Issues Presented for Review" as Washington affording "no recognizable protections to non-English speaking persons outside of a formal legal proceeding." Petition at pg. 2. It was for that reason, Avila petitioned this Court seeking its "clarification and guidance...[on] what protections our State will afford" persons with language barriers. This is a question which

remains unsettled in Washington law. Avila believes his circumstances provides this Court a unique opportunity to resolve this significant public interest. The Petition was clearly presented on grounds of "substantive" due process.

Instead of answering this issue, Respondent attempts to recast Avila's substantive claim as an issue of "fundamental fairness." Answer at pg. 3. Avila, however, has not presented a procedural question for review. Rather, it is the Answer which implicates notions of fundamental fairness; without first determining what, if any, rights non-English speaking persons should be afforded when interrogated in English. The exclusion of the same from the Petition was intentional because the argument is premature. Washington courts have yet to recognize rights existing in the relevant circumstances. Therefore, it makes perfect sense why "fundamental fairness" is a commonly rejected theme in Washington's jurisprudence. This is the very reason why Avila deliberately avoided raising similar claims in his Petition.

Respondent's attempt to re-frame Avila's issues in this way, is an obvious effort to construct a straw man argument and to avoid answering the substantive question raised in this Petition. Avila should be allowed to clarify his issues in Reply.

The Answer also misrepresents Avila's position as

seeking review of the Court of Appeals decision affirming the trial court's application of Miranda v. Arizona, 348 U.S. 436 (1966) to custodial interrogations. Answer at 3, 5-7. Once again, this is an issue raised in the Answer and not in the Petition. Instead, Avila argues the Court of Appeals committed error when it failed to accomplish a complete review of the questions raised on direct appeal-Namely, whether or not the "outside of custodial statements" were involuntarily made. Petition at 2-5. Respondent acknowledges this within the Answer ("Petitioner's position concerns the very **nature** of the statements he call into question herein"). Answer at pg. 4. The questions concerning the custodial aspects of the interrogation is a newly raised issue.

Notably, the Answer clearly demonstrates that law enforcement's decision to "interview" Avila was to elicit incriminating statements. Specifically, Detective Nichols did not question Avila to ascertain what he knew, rather, her aim was to have Avila implicate himself in a crime she believed he had committed. Answer at pg. 5. Indeed, Respondent concedes the statements at issue are what convinced the jury beyond a reasonable doubt to believe "the victim's account" and is very likely what turned Avila's acquittal into a conviction. Answer at pg. 6.

A Reply is necessary to answer the insidious premise

underlying the cost benefit analysis advanced by the Respondent's position. In essence, Respondent is asserting the constitutionality of the statements should be assessed by its value as opposed to evaluating law enforcements motive and the manner in which the statements were obtained. Respondent urges this Court to carve out an exception to the mandates of Miranda based solely on characterizing an interrogation as an interview in so far as the value of the information outweighs violating a defendant's constitutional rights. Avila would like an opportunity to explain why this Court should reject Respondent's end-run-around constitutional principle and RCW 2.43 et. seq.

Also, the Answer contends certain predicates must be met in order to invoke the appropriate analysis. In particular, Respondent asserts Avila did not prove his "language barrier" and "cultural differences" contributed to his confusion which in turn resulted in the involuntary statements. Answer at pg. 5. Respondent's position fundamentally misconceives the proper standard of proof. As discussed in the Petition, it was the state's burden to prove Avila's statements were voluntarily made. Petition at 13-14. The Answer implies Avila invited the error because he failed to prove he had alerted his attorney to the specific manner in which he was exploited. Respondent's Answer is absurd because it seems to

suggest that a threshold showing of diligence is a predicate to constitutional protections and it impermissible shifts the burden of proof.

Continuing with this line of argument, Respondent asserts the Two Party Consent Statute (RCW 9.73.030) insulates the state from its burden when a defendant fails to meet certain predicates under Respondent's theory of consequentialism. The fundamental flaw with this argument is it ignores Detective Nichols turning her efforts towards substantiating her preconceived notions of the crime. In shifting her focus from interviewing Avila to incriminating him, Detective Nichols should have preserved evidence relevant to the issue of voluntariness. As explained in the Petition:

While the state was not required to record the interrogation, it 'bears the consequence in such cases as the present case where the' actual words and answers of the interrogation are pertinent to a determination of voluntariness."

Petition at pg. 15 (quoting U.S. v. Bundy, 966 F.Supp.2d 1180, 1188 (2013)).

The Answer further claims Avila was attempting to have this Court "re-write" legislation for the purpose to "abrogate prior case law." Answer at pg. 3. This is incorrect. Avila did not frame any of the issues in terms of statutory construction because there are no existing rights

within the context of Petitioner's claims. Therefore, there is nothing to construe. The "'underlying rationale'" referenced in the Answer concerned Washington's public policy which has long sought to protect the constitutional rights of non-English speaking persons. Answer at 8 (quoting Petition at 18-19). Avila argued the principles "underlying" that "rationale" should be "extended" to the circumstances discussed in the Petition. Petition at 18-19.

Importantly, mandatory blood draws are not included within the language of RCW 2.43 et. seq.. Instead, this Court extended those protections to impaired drivers because mandatory blood draws could potentially be used in a future legal proceeding. State v. Morales, 173 Wn.2d 560, 571 (2012). It stands to reason that rationale should also extend to interrogation missile locked on eliciting incriminating statements--from non-English speaking persons--to be used in a future legal proceeding; such persons should be advised their rights and options "in a meaningful manner." 173 Wn.2d at 571.

Finally, Respondent cherry picks facts he contends demonstrates Avila's contentions as "inaccurate and duplicitous." Answer at pg. 6. Centrally, Respondent asserts Avila's language barrier "is utterly contrary to the record herein." Answer at pg. 4.

As an officer of the court, Respondent is obligated to participate in these proceedings candidly, asserting positions consistent with RPC 3.3, and presenting all the relevant law and facts irrespective if its supportive of its position. Respondent is fully aware that Avila was appointed an interpreter to assist him at trial and the CrR 3.5 hearing. Unless the Asotin County Superior Court appoints interpreters to all brown complected migrant as a matter of practice, Respondent is officially misrepresenting the record. RPC 3.3(a)(1).

V. CONCLUSION

Based on the foregoing, Avila moves this Court for an Order Modifying the Clerk's Ruling dated August 10, 2017.

Respectfully submitted this 10 day of August, 2017.

X 

Luis A. Avila, #369547
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

I, Luis A. Avila, declare under the penalty of perjury under the laws of the state of Washington that on this 10 day of August, 2017, I deposited a true copy of the document to which this certificate is attached into the United States Mail, postage pre-paid, addressed to Benjamin C. Nichols, Asotin County Prosecutor's Office, P.O. Box 220, Asotin, WA 99042.

X 

Luis A. Avila