NO. 98919-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AUSTIN JOHN PARKS,

Petitioner.

ANSWER TO PETITION FOR REVIEW

ADAM CORNELL
Prosecuting Attorney

SETH A FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied.

II. STATEMENT OF THE CASE

The facts are accurately set out in the Court of Appeals opinion. Slip op. at 2-5.

III. ARGUMENT

A. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S HOLDINGS IN DETERMINING THAT THERE WAS NO COMMENT ON THE DEFENDANT'S PRE-ARREST SILENCE.

The first issue raised in the Petition for Review deals with whether the prosecutor commented on his pre-arrest silence. The Court of Appeals applied this court's holdings in State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996), and State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996). Under that analysis, the court concluded that there had been no improper comment. Slip op. at 9-11.

Contrary to the petitioner's claims, the State's evidence in this case did not show that he "failed to respond to police despite their multiple attempts to contact him." PRV at 7. Rather, the State's evidence indicated that the petitioner was unaware of those attempts. He called police shortly after the altercation. 2 RP 203-04.

They later tried to call him back, but they could not reach him, and he had no voice mail. 2 RP 217. Police also went to his address as listed with DOL, but he was not there. His mother lived there, but she had no information about how to contact him. 2 RP 219, 245. This evidence does not show that the petitioner exercised his right to remain silent. Rather, it shows that he attempted to contact police, and police attempted to contact him, but they were not able to establish communication.

The relevance of this evidence is clear. Suppose that the State had not introduced any evidence about police efforts to contact the petitioner. The jurors would naturally assume that no such efforts had been made. They would then probably infer that the investigating officers were biased, since the petitioner had tried to contact them, but the officers had made no attempt to get any information from him. To show the progress of the investigation, it was proper to show that the police *did* attempt to contact the defendant but were unable to do so.

Although the State did not introduce any evidence that the petitioner was aware of police attempts to contact him, the defense did. The petitioner's then-girlfriend (later his wife) testified that while she was in California with him, she became aware that police had

contacted the defendant's mother. 2 RP 274-75. The petitioner fails to explain, however, how a defendant's decision to introduce evidence can transform otherwise-proper State's evidence into constitutional error. In closing argument, the prosecutor did not argue that this evidence affected the defendant's credibility. Rather, he argued that it affected the *girlfriend's* credibility. 3 RP 395-96.

In short, the Court of Appeals applied this court's decisions in Easter and Lewis to the facts of this case. That application does not warrant review by this court.

B. THIS CASE PROVIDES NO BASIS FOR DISTURBING THIS COURT'S PRIOR DECISIONS THAT ARTICLE 1, SECTION 9 IS CO-EXTENSIVE WITH THE FIFTH AMENDMENT.

The petitioner asks this court to decide whether article 1, section 9 of the Washington Constitution should be interpreted as precluding comments on pre-arrest silence. Because the Court of Appeals found no comment on pre-arrest silence, it did not reach this issue. Slip op. at 8-9. For the same reason, it is doubtful whether this court would reach the state constitutional issue.

Even if it did, there is no reason to believe that there is any significant difference between the state and federal constitutions with regard to this issue. As the petitioner acknowledges, this court has consistently held that article 1, section 9 is co-extensive with

the Fifth Amendment. See, e.g., State v. Templeton, 148 Wn.2d 193, 207, 59 P.3d 632 (2002); State v. Earls, 116 Wn.2d 364, 374-76, 805 P.2d 211 (1991); Easter, 130 Wn.2d at 235; .

The petitioner suggests that a Gunwall analysis might provide a different answer. See State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). A detailed analysis is set out in the Brief of Respondent at 16-20. For purposes of this Answer, a brief summary should suffice.

1. **Language of the State constitution**: Article 1, section 9 contains no express language addressing the admissibility of pre-arrest silence.

2. **Parallel federal provisions**: As the petitioner points out, the language of article 1, section 9 is slightly different than that of the Fifth Amendment: Article 1, section 9, refers to "giving evidence," while the Fifth Amendment refers to "being a witness." This court has held, however, that the difference is insubstantial. Earls, 116 Wn.2d at 378. This is consistent with the usage of those words at the time the Washington Constitution was adopted. See, e.g., Ex parte Wall, 107 U.S. 265, 295, 2 S.Ct. 569, 27 L.Ed. 552 (1883); Bradshaw v. Territory, 3 Wash. Terr. 265, 269, 14 P. 594 (1887).

3. **Constitutional and common law history**: Under common law, evidence of pre-arrest silence was admissible. See State v. McKenzie, 184 Wn.2d 32, 38, 49 P.2d 1115 (1935).

4. **Pre-existing state law**: The petitioner's analysis of this factor begins with this court's 1986 decision in Easter. Prior to that time, this court had consistently held that pre-arrest silence was admissible. McKenzie, 184 Wash. at 39; State v. Redwine, 23 Wn.2d 467, 470-71, 161 P.2d 205 (1945).

5. **Structure of state and federal constitutions**: This factor rarely sheds light on the interpretation of any particular constitutional provision. See State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

6. **Matters of particular state interest**: The petitioner has not identified any distinctive circumstances in Washington that warrant a different rule than the one used in other jurisdictions. The parties' efforts in this case to comply with this court's case law does not establish such a circumstance.

In short, three of the Gunwall factors support following the rule under the U.S. Constitution: the similarity between the federal and Washington constitutions, common law history, and pre-existing state law. The other three factors shed no meaningful light

on this issue. Since article 1, section 9 has never been held to be more expansive than the Fifth Amendment, there is no reason to reach a different result in this context.

C. THE COURT OF APPEALS PROPERLY REJECTED THE PETITIONER'S CLAIM OF "PROSECUTORIAL MISCONDUCT."

The petition seeks review of the rejection of his "prosecutorial misconduct" claim.[1] The Court of Appeals applied the rule that when no objection is raised at trial, "misconduct" warrants a new trial only if "no curative instruction would have obviated any prejudicial effect on the jury. Slip op. at 12, citing State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012).[2] The court's application of this established rule does not warrant review.

---

[1] This court has recognized that the term "prosecutorial misconduct" is "a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). The court has nevertheless continued to use the term because it is purportedly necessary for research purposes. In re Phelps, 190 Wn.2d 155, 165 n. 3, 410 P.3d 1142 (2018). It is becoming increasingly clear, however, that use of this term is damaging to both prosecutors and the legal system. For example, a prominent national organization has commented on how seldom findings of "prosecutorial misconduct" lead to professional discipline. https://www.innocenceproject.org/6-reasons-we-need-prosecutorial-accountability.

[2] The Petition for Review mistakenly cites this case as 175 Wn.2d 742. PRV at 18.

The petitioner claims, however, that "prosecutorial misconduct" is subject to constitutional error analysis when it shifts or weakens the burden of proof. PRV at 18, citing Emery, 174 Wn.2d at 758, and State v. Fuller, 169 Wn. App. 797, 813, 282 P.3d 126 (2012). Emery holds exactly the opposite: that an argument that shifts the burden of proof is *not* subject to constitutional harmless error analysis. Emery, 174 Wn.2d at 757 ¶ 31. As for Fuller, it involved a comment on a suspect's silence — not any shifting of the burden of proof. Fuller, 169 Wn. App. at 813 ¶ 33.

The petitioner also claims that a prosecutor's misstatement of the law on reasonable alternatives violates the defendant's due process rights. PRV at 18-19, citing State v. Lile, 188 Wn.2d 766, 802, 398 P.3d 1052 (2017). The cited portion of Lile is a concurring opinion signed by one justice. Moreover, it has nothing to do with prosecutorial error. Rather, it discusses constitutional error stemming from erroneous exclusion of evidence. Id. at 801 ¶ 79 (Gordon McCloud, J., concurring). This discussion has nothing to do with the issues in the present case. Those issues do not warrant review.

D. THE PETITIONER'S INEFFECTIVENESS CLAIM DOES NOT WARRANT REVIEW.

Finally, the petitioner asks this court to review the Court of Appeals decision with regard to ineffective assistance of counsel. He provides no reason why this application of established law warrants review.

IV. CONCLUSION

The petition for review should be denied.

Respectfully submitted on September 22, 2020.

ADAM CORNELL
Snohomish County Prosecuting Attorney

By: _____
SETH A FINE, WSBA #10937
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, AUSTIN JOHN PARKS Petitioner.	No. 98919-2 DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:
The undersigned certifies that on the 22nd day of September, 2020, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to the attorney(s) for the Petitioner; Nielsen, Koch; Sloanej@nwattorney.net; bromane@nwattorney.net; MarchK@nwattorney.net

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of September, 2020, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

September 22, 2020 - 2:49 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98919-2
Appellate Court Case Title:	State of Washington v. Austin John Parks
Superior Court Case Number:	16-1-00690-1

The following documents have been uploaded:

- 989192_Answer_Reply_20200922144820SC010316_0764.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was parks answer to prv.pdf

A copy of the uploaded files will be sent to:

- MarchK@nwattorney.net
- Sloanej@nwattorney.net
- bromane@nwattorney.net

Comments:

Sender Name: Diane Kremenich - Email: diane.kremenich@co.snohomish.wa.us
Filing on Behalf of: Seth Aaron Fine - Email: sfine@snoco.org (Alternate Email: diane.kremenich@snoco.org)

Address:
3000 Rockefeller Avenue, M/S 504
Everett, WA, 98201
Phone: (425) 388-3333 EXT 3501

Note: The Filing Id is 20200922144820SC010316