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STATE OF WASHINGTON

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NO. 87904-4

Court of Appeals No. 66442-5-1

BY RONALD R. GARRETT
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CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL PIATNITSKY,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Samuel Piatnitsky has filed a petition for review of the Court of Appeals opinion affirming his convictions for Murder in the First Degree, Attempted Murder in the First Degree, Possession of a Stolen Firearm and Unlawful Possession of a Firearm in the Second Degree: *State v. Piatnitsky*, __ Wn. App. __, 282 P.3d 1184 (2012) (Slip Op. No. 66442-5-I, filed August 20, 2012).

Respondent State of Washington asks this Court to deny review. The State files this answer to respond to the argument made by the petitioner in support of review, challenging the admission at trial of the defendant's confession.¹ The State also files this answer to preserve its harmless error argument, should this Court accept review and determine that the trial court erred in admitting at trial the defendant's confession.²

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a

¹ Piatnitsky also argues that the Court of Appeals decision regarding the "to-convict" instruction for the charge of attempted murder in the first degree conflicts with prior decisions from this Court. RAP 13.4(b)(1). The State will rely on its arguments made in the Brief of Respondent as to this argument.

² RAP 13.4(d). This issue was raised but not decided in the Court of Appeals. See Br. of Resp't at 28-30.

decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another 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.” RAP 13.4(b).

None of the issues raised in this petition meets these criteria.

C. STATEMENT OF THE CASE: THE CUSTODIAL INTERROGATION³

A canine unit and several police officers tracked Samuel Piatnitsky and Jason Young from where Piatnitsky had shot and killed one young man and seriously wounded another to Young’s parents’ house. Eyewitnesses were driven to Piatnitsky and Young’s location, where the witnesses positively identified Piatnitsky as the shooter. Police officers arrested Piatnitsky and Young and transported them to a police precinct.

Before two detectives (detectives Keller and Allen) took Piatnitsky’s recorded statement, they confirmed with Piatnitsky that he had been advised of his *Miranda*⁴ rights by the arresting officers.

³ The facts of this case are set out in detail in the opinion of the Court of Appeals and in the Brief of Respondent filed in that court.

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1996).

Pretrial Ex. 3, at 1. Piatnitsky said the only right that he remembered was the right to remain silent; he stated, "That's the one I, I should be doing right now." Pretrial Ex. 3, at 2; CP 311-12. Detective Keller immediately reminded Piatnitsky that, "[L]ike we told you, you don't have to talk to us." Pretrial Ex. 3, at 2; CP 312.

After Detective Keller started to re-advise Piatnitsky of his rights, Piatnitsky said, "I'm not ready to do this, man ...I just write it down, man. I can't do this, I, I, I just write, man. I don't, I don't want, I don't want to talk right now, man."⁵ CP 312; Pretrial Ex. 3, at 2. Detective Keller told Piatnitsky that after the taped advisement of rights, Piatnitsky could write his statement down. CP 312; Pretrial Ex. 3, at 2. Piatnitsky said, "All right, man." Pretrial Ex. 3, at 2. Piatnitsky confirmed that he understood each of his *Miranda* rights and that he could exercise his rights at any time. Pretrial Ex. 3, at 4; CP 312. Piatnitsky then signed the "Explanation

⁵ At trial, Piatnitsky's counsel conceded that Piatnitsky wanted to write a statement. The argument below was that the police coerced Piatnitsky into confessing because the detectives wrote down what Piatnitsky said rather than "fulfill his request that [Piatnitsky] was going to be writing in his own words." 9/20/10 (Report of Proceedings) 55; see also CP 314 ("The defense argued that this (Piatnitsky's remark that he would provide the detectives with a written statement) meant that the defendant was specifically requesting that he be allowed to write his own statement, by his own hand.").

of Constitutional Rights” form, exhibit 58, and again acknowledged that he understood each of his rights. Ex. 58, at 1; CP 312.

Detective Keller next read Piatnitsky the “Waiver of Constitutional Rights” section of exhibit 58 and asked Piatnitsky to sign the form if he was willing to talk to the detectives. Detective Keller said, “If you understand [the waiver and] 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.” Pretrial Ex. 3, at 3; CP 312.

Piatnitsky signed the waiver of rights, which stated

I have read the above explanation of my constitutional rights and I understand them. I have decided not to exercise these rights at this time. The following statement is made by me freely and voluntarily and without threats or promises of any kind.

Ex. 58, at 1; CP 312.

Before the detectives stopped the tape recorder, Detective Allen asked Piatnitsky, “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?” Pretrial Ex. 3, at 4; CP 313. Piatnitsky responded, “Yes, sir.” Pretrial Ex. 3, at 4; CP 313. Detective Keller confirmed, “So you’d rather take a written statement, do a written one.” Pretrial Ex. 3, at 4. Piatnitsky

said, "Yes, I don't know (unintelligible)⁶." Pretrial Ex. 3, at 4.

Detective Keller responded, "Okay, it's too hard to talk about; you'd rather write it." Pretrial Ex. 3, at 4.

During the suppression hearing, detectives Keller and Allen stated that Piatnitsky had agreed to provide a tape recorded statement, to tell his side of the story, and never invoked his right to remain silent. 9/16/10 Report of Proceedings ("RP") 19; 9/20/10 RP 16. Multiple times Piatnitsky told the detectives that he wanted to provide a written statement. 9/16/10 RP 41. Detective Keller said that the unintelligible portion of the recording was words to the effect of Piatnitsky did not want to talk on tape or that he did not want to talk out loud. 9/16/10 RP 23, 41. Detective Allen said that they turned the tape recorder off at Piatnitsky's request because Piatnitsky said that he would rather give a written statement. 9/20/10 RP 17-18. It was not until the end of the written statement that Piatnitsky said, "I'm done talking," at which point the interview terminated. 9/16/10 RP 23, 25-26; 9/20/10 RP 20; CP 313.

⁶ On direct appeal, Piatnitsky claimed that the unintelligible portion was actually an invocation of his right to remain silent. But, as the Court of Appeals opinion notes, Piatnitsky's basis for suppression has been a moving target. On appeal, Piatnitsky shifted his argument from the CrR 3.5 suppression hearing and at oral argument Piatnitsky again shifted the focus of his challenge. See Slip Op. at 13-16.

As Detective Allen wrote down Piatnitsky's version of the events, Piatnitsky asked several times to review the statement. 9/16/10 RP 27; 9/20/10 RP 21-22; CP 313. After Piatnitsky said that he was done talking, he reviewed the entire statement, requested a few changes (which Detective Allen made and Piatnitsky initialed), and he then signed the corrected statement. Ex. 58, at 1-2; 9/16/10 RP 27, 31, 48-49; 9/20/10 RP 21-23; CP 313, 315.

After hearing Piatnitsky's tape recorded statement and the detectives' testimony, the trial court found that at no time before the conclusion of the interview did Piatnitsky state that he wished to remain silent. CP 313⁷; 9/20/10 RP 59-61. Viewed in context, the trial court determined that Piatnitsky "clearly indicate[d] that [he] was willing to speak with the detectives, just not on tape." CP 315; 9/20/10 RP 60. The court said:

I have had the opportunity to hear the audio recording and the testimony of Detective Keller and Detective Allen, and I am satisfied that it is clear that Mr. Piatnitsky understood the rights as they were orally given to him on the audio recordings, and there was a written list of rights and a waiver which he signed.

⁷ On appeal, Piatnitsky assigned error to this finding. Br. of Appellant at 1 (Assignment of Error 1).

I am satisfied that based on the testimony of the officers and the statement itself, and the audio recording, that there is no objective evidence that he was not able to understand those rights, to make a knowing, voluntary, and intelligent decision to give up those rights and discuss the case with the detectives....

And when I look at all of the transcripts and the context, I am satisfied that the context of the statement clearly indicates that he was willing to talk to the officers....

I am satisfied that in the entire context for whatever reason he wished to have it in a written form rather than an audio form.

So, I am satisfied that there is no objective evidence that the statements were anything other than knowingly, voluntarily, and intelligently made.

9/20/10 RP 60; CP 315.

D. **THIS COURT SHOULD DENY THE PETITION FOR REVIEW**

1. ADMISSION OF PIATNITSKY'S CONFESSION.

Piatnitsky argues that the Court of Appeals decision upholding the admission at trial of his confession conflicts with two other Court of Appeals decisions⁸, and involves a significant

⁸ *State v. Gutierrez*, 50 Wn. App. 583, 749 P.2d 213, *review denied*, 110 Wn.2d 1032 (1988) and *State v. Nysta*, 168 Wn. App. 30, 275 P.3d 1162 (2012).

constitutional question.⁹ RAP 13.4(b)(2), (3). Neither of these bases supports acceptance of review.

Piatnitsky claims that he unequivocally invoked his right to silence when he said, "I don't want to talk right now."¹⁰ The trial court and the Court of Appeals rejected Piatnitsky's attempts to isolate and extract this statement from its surrounding context. A suspect's invocation must be unequivocal based on how a reasonable police officer in the circumstances would have understood the suspect's statement. Because the detectives properly assessed the entire circumstances of the conversation in determining Piatnitsky's intent – to turn off the tape recorder so that he could give a written statement – the trial court properly declined to suppress Piatnitsky's statement at trial.

a. A Suspect Must Unequivocally Invoke His Rights.

An accused must be clearly informed of his or her right to remain silent and right to counsel and that any statements made can and will be used against the individual in court." *Miranda v. Arizona*, 384 U.S. 436, 467-72, 86 S. Ct. 1602, 16 L.Ed.2d 694

⁹ Piatnitsky has not raised any claim under the Washington constitution. See Petition for Review at 2.

¹⁰ Again, Piatnitsky's claim regarding when he invoked his right to remain silent has shifted over time. See fn.6, supra.

(1966).¹¹ A custodial interrogation must cease once the suspect “invokes” his right to remain silent or his right to counsel by affirmatively asserting those rights. *Miranda*, at 473-74. However, an accused’s invocation of either the right to remain silent or the right to counsel must be unequivocal. *Berghuis v. Thompkins*, — U.S. —, 130 S. Ct. 2250, 2260, 176 L.Ed.2d 1098 (2010) (stating that “there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*”¹²).

An accused’s statement is an unequivocal invocation of his or her rights where that statement is sufficiently clear that “a reasonable police officer in the circumstances” would understand it to be such an assertion. *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L.Ed.2d 362 (1994) (holding that an accused must unambiguously invoke the right to counsel). An accused “need not rely on talismanic phrases or ‘any special combination of words’ ” in order to invoke his or her rights. *Bradley v. Meachum*, 918 F.2d 338, 342 (2d Cir.1990) (quoting *Quinn v. United States*,

¹¹ Piatnitsky does not dispute that he understood his *Miranda* rights or that he initially agreed to waive them and begin speaking with officers.

¹² *Davis v. United States*, 512 U.S. 452, 458-59, 114 S. Ct. 2350, 129 L.Ed.2d 362 (1994).

349 U.S. 155, 162, 75 S. Ct. 668, 99 L.Ed. 964 (1955)). Because no “special combination of words” are required for an invocation of one’s rights, and because whether an accused invoked his right must be analyzed from the perspective of a reasonable officer in the circumstances, a trial court “should examine ‘the entire context in which the claimant spoke’ to determine if the right to remain silent has been invoked.” *Bradley*, 918 F.2d at 342 (quoting *United States v. Goodwin*, 470 F.2d 893, 902 (5th Cir.1972)).

b. The Court Of Appeals Applied The Proper Standard Of Review.

Piatnitsky first contends that the Court of Appeals applied the wrong standard of review. Pet. for Review at 4-5, 7 (citing Slip Op. at 35-36). Piatnitsky has misread the Court of Appeals opinion. See Slip Op. at 28 (“After reviewing whether the trial court’s findings are supported by substantial evidence, we make a *de novo determination* of whether the trial court derived proper conclusions of law from those findings”) (internal quotation marks omitted) (italics added). Piatnitsky mistakenly focuses on the Court of Appeals summary of the standard of review on pages 35-36. Although the Court of Appeals summary may have used imprecise

language, it is clear from page 28 and the authorities cited therein that the court understood legal conclusions are reviewed *de novo*.

c. Piatnitsky Conflates Context With “Post-invocation” Conduct.

Piatnitsky next contends that the Court of Appeals improperly considered “post-invocation” conduct in determining that he had not asserted his right to remain silent. Pet. for Review at 5, 7-8. Piatnitsky is incorrect. The Court of Appeals recognized the distinction between considering the circumstances surrounding an accused’s statements (proper under *Davis*) and using an accused’s post-invocation responses to continued questioning to “cast doubt on the clarity” on the accused’s assertion of his rights (improper under *Smith v. Illinois*, 469 U.S. 91, 92-100, 105 S. Ct. 490, 83 L.Ed.2d 488 (1984)). See Slip Op. at 24-26.

In concluding that Piatnitsky’s statement was equivocal, the trial court credited the detectives’ un-refuted testimony that, prior to the audio-recorded interview, Piatnitsky never said that he did not want to talk to them.¹³ Instead, both detectives testified that Piatnitsky was willing to provide a statement. Both detectives also testified that during the audio-recorded statement, Piatnitsky

¹³ Credibility determinations are not subject to review on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

indicated that he no longer wished to give a taped statement but that he did want to give a written statement. Piatnitsky stated, "I'm not ready to do this, man.... I just write it down, man. I can't do this. I, I, I just write, man. I don't, I don't want ... I don't want to talk right now, man." Pretrial Ex. 3, at 2. Both detectives confirmed that Piatnitsky wished to provide a written statement in lieu of an audio-recorded statement. Pretrial Ex. 3, at 2-4.

Both detectives believed – as would “a reasonable police officer in the circumstances” – that Piatnitsky wished to give a written (not audio-taped) statement. Detective Keller testified that, “For some reason [Piatnitsky] didn't feel comfortable on tape, but he said multiple times that he did want to give a written statement; he did want to give a statement.” 9/16/10 RP 41. The trial court and the Court of Appeals properly “examine[d] the entire context” of Piatnitsky's statements in determining whether Piatnitsky had invoked his right to remain silent. *See Bradley*, 918 F.2d at 342.

Despite the Court of Appeals admonition that the circumstances surrounding an accused's statement is not tantamount to using post-invocation responses to “cast doubt on the clarity” of an accused's statements, Piatnitsky's claim rests on

the premise that the two analyses are identical. They are not. The Court should accordingly reject this claim.

2. THE COURT OF APPEALS OPINION IN THIS CASE DOES NOT CONFLICT WITH *GUTIERREZ* AND *NYSTA*.

Piatnitsky next asserts that the Court of Appeals opinion is in conflict with *Gutierrez* and *Nysta*. Piatnitsky is incorrect. It is only by isolating and extracting a statement from the circumstances surrounding the statement in each case that conflict arises.

In *Gutierrez*, the State elicited at trial testimony concerning the defendant's assertion of his right to remain silent following his arrest. *Gutierrez*, 50 Wn. App. at 588. After discovering narcotics in a storage unit, detectives had asked the defendant to comment; the defendant said, "I would rather not talk about it." *Id.* The State implied at trial that the defendant's invocation of his right to remain silent indicated that he was aware of the narcotics. *Id.* at 588-89. The Court of Appeals held that the defendant's statement was "an unequivocal assertion of his right to remain silent" and that testimony concerning that statement violated the defendant's right against self-incrimination. *Id.* at 589.

Piatnitsky fails to consider the circumstances surrounding the statements. See *Davis*, 512 U.S. at 59 (evaluating whether a

statement constitutes an invocation from the standpoint of a “reasonable police officer *in the circumstances.*”). In *Gutierrez*, the statement, taken in context, made clear that the defendant did not wish to talk to the police at all. *Gutierrez*, 50 Wn. App. at 588. Whereas here, as discussed above, Piatnitsky’s statements, given the context, made clear that he wished to give a written, but not an audio-recorded, statement. The different conclusions are not in conflict; the results differ based on the factual circumstances surrounding the statements made in each case.

Similarly, the result reached in *Nysta*, was based on the facts of that case, not on some “*talismanic phrases.*” The Court of Appeals found unambiguous Nysta’s statement, “I gotta talk to my lawyer.” *Nysta*, 168 Wn. App. at 42. But in so doing, the court assessed more than just Nysta’s words; the court said, “Where nothing about the request for counsel *or the circumstances leading up to the request* would render it ambiguous, all questioning must cease.” *Id.* (citing *Smith v. Illinois*, supra, 469 U.S. at 98) (italics added). As discussed fully above, the circumstances leading up to and surrounding Piatnitsky’s statement make clear that Piatnitsky was limiting the form of his statement, not invoking his right to remain silent.

The Court of Appeals opinion in the instant case is easily reconciled with the opinions in *Gutierrez* and *Nysta* provided the analysis includes – as it must – the circumstances surrounding the statements. The decisions of both the trial court and the Court of Appeals were driven by the circumstances surrounding Piatnitsky’s statement and the governing state and federal law. The Court of Appeals opinion does not conflict with other decisions of the Court of Appeals. Review on this basis should be denied.

3. THE COURT OF APPEALS DECISION COMPORTS WITH FEDERAL LAW.

Piatnitsky contends that the Court of Appeals decision in this case renders illusory the *Miranda* protections, and that review is also appropriate because the case presents a significant question of constitutional law. Pet. for Review at 11 (citing Slip Op. (Dissent) at 4); RAP 13.4(b)(3).¹⁴ To the contrary, the Court of Appeals decision reflects long-standing federal precedent: in order to invoke one’s rights, the invocation must be unequivocal and, in

¹⁴ Two times Piatnitsky asserts that, “Division One [of the Court of Appeals] rarely issues dissents.” Pet. for Review at 1, 5. Although Piatnitsky fails to cite to any authority for this assertion (or apparently consider the instances where different panels of the court reach different conclusions about the same legal issue), Piatnitsky’s claim does not illuminate the question of whether the confession was properly admitted at trial *in this case*.

determining whether such a request is unequivocal, the statement is evaluated in context.

As the Court of Appeals emphasized, there are no “magic words” needed to invoke one’s right to remain silent. Slip Op. at 20; *Bradley*, 918 F.2d at 342 (“an accused need not rely on talismanic phrases or any special combination of words in order to invoke his or her rights”). The scope of the defendant’s words is one surrounding circumstance. See, e.g., *Connecticut v. Barrett*, 479 U.S. 523, 525-29, 107 S. Ct. 828, 93 L.Ed.2d 920 (1987) (holding the defendant’s invocation of his right to counsel was limited by its terms to making a written statement because the defendant clearly expressed his willingness to speak to the police); *United States v. Thompson*, 866 F.2d 268, 272 (8th Cir.1989) (rejecting the defendant’s claim that it is improper to analyze the scope of an accused’s statements in determining whether he invoked his rights); *Michigan v. Mosley*, 423 U.S. 96, 105 n.11, 96 S. Ct. 321, 46 L.Ed.2d 313 (1975) (considering the scope of Mosley’s earlier refusal to answer questions in determining whether police fully respected Mosley’s right to cut off questioning); *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973) (finding defendant’s objection to the detective taking notes was not an

invocation of defendant's right to remain silent; the defendant willingly spoke to the police and the police honored the request to not take notes).

As in each of the cases cited above, Piatnitsky placed a limitation on the mode of communication; *i.e.*, he said he was willing to give a written – but not an audio-recorded – statement. The decisions in the trial court and the Court of Appeals in this case were informed by the scope of Piatnitsky's statement and the given context. This analytical framework is entirely consistent with federal (and state¹⁵) precedent. The Court of Appeals opinion does not raise a significant question of law under the Constitution. Review on this basis should be denied.

4. ERROR, IF ANY, WAS HARMLESS.

In the Brief of Respondent, the State argued that any error in admitting Piatnitsky's statement was harmless. Br. of Resp't at 28-30. The Court of Appeals did not decide the issue. Pursuant to RAP 13.4(d), the State seeks review of the issue only if the Court determines that the trial court erred in admitting at trial Piatnitsky's

¹⁵ See, e.g., *State v. Walker*, 129 Wn. App. 258, 273-75, 118 P.3d 935 (2005) (finding the defendant's repeated remarks that he did not want to say anything that would make him look guilty or incriminate him, equivocal at best, where defendant continued to speak with police officers for several hours and signed a highly incriminating statement).

statements.

In the petition for review, Piatnitsky claims for the first time that the police “implied that [he] had confessed to wrongdoing during the first hour,” before the audio-recording began. Pet. for Review at 3. Pre-trial, Detective Keller testified that he and Detective Allen spoke to Piatnitsky for about 50 minutes before they began the audio-recording. 9/16/10 RP 19. During that conversation, Piatnitsky asked the police to let Jason Young go. Piatnitsky “indicated that he would take the blame for it (the shooting).” 9/16/10 RP 17. Piatnitsky has not previously challenged Detective Keller’s testimony on this point.

E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

DATED this 15 day of October, 2012.

Respectfully submitted,

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Prosecuting Attorney

By: Randi J. Austell //
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the petitioner, Lila Silverstein, lila@washapp.org, containing a copy of the State's Answer to Petition for Review, in STATE V. PIATNITSKY, Cause No. 87904-4, in the Supreme Court, for the State of Washington.

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

Randi J. Austell //

Date 10/15/12

Name: Randi J. Austell
Done in Seattle, Washington

OFFICE RECEPTIONIST, CLERK

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To: 'Austell, Randi'; Lila Silverstein (Lila@washapp.org)
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To: OFFICE RECEPTIONIST, CLERK; Lila Silverstein (Lila@washapp.org)
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Subject: Piatnitsky Supreme Court No. 87904-4

Please accept for electronic filing the attached State's answer to Mr. Piatnitsky's petition for review.
If there are any difficulties with the transmission, please contact me.

Sincerely,

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