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No. 91669-1

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THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NAKIA L. OTTON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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A. SUMMARY OF ARGUMENT

This Court should reconsider its ruling in *State v. Smith*,¹ which held an out-of-court statement is admissible pursuant to ER 801(d)(1)(i) when the purpose of the statement is to determine probable cause and the judge finds the statement “reliable.” Because the use of a “reliability” test is contrary to the plain language of the rule and was rejected in *Crawford v. Washington*² as an amorphous and subjective concept, this Court should overrule *Smith* on the grounds the “reliability” test is incorrect and harmful, and reverse Mr. Otton’s conviction based on an out-of-court statement that was admitted as substantive evidence.

B. ISSUE PRESENTED

As a limited exception to the rule against hearsay, ER 801(d)(1)(i) provides an out-of-court witness statement given at a “trial, hearing, or other proceeding” may be admitted as substantive evidence when the declarant testifies at trial, is subject to cross-examination, the out-of-court statement is inconsistent with the declarant’s testimony, and the statement was given under oath and penalty of perjury. In *Smith*, this Court departed from the explicit requirements of ER 801(d)(1)(i), and ruled an out-of-court statement is admissible if the purpose of the statement is to determine probable cause, even when the statement was not given at a

¹ 97 Wn.2d 856, 861-63, 651 P.2d 207 (1982).

² 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

trial, hearing, or other proceeding, and noted “each case depends on its facts with reliability the key.” However, in *Crawford*, the United States Supreme Court rejected the use of a “reliability” test, recognizing that “[r]eliability is an amorphous, if not entirely subjective concept.” Should this Court overrule *Smith*, and find that substitution of a “reliability” test for the specific requirements of ER 801(d)(1)(i) is incorrect and harmful?

C. STATEMENT OF THE CASE

Nakia L. Otton and Debra Dugan began a romantic relationship in 2010. RP 126. Starting in October 2011, Ms. Dugan underwent six brain surgeries and by the time of trial on the instant charges, she was disabled, unable to work, and suffered memory problems. RP 123-24, 133.

In December 2012, Ms. Dugan was asleep in bed when Mr. Otton came home intoxicated and passed out on the bedroom floor. RP 129-30. Some time later, Ms. Dugan awoke, got out of bed, and apparently kicked Mr. Otton in his face, waking him. RP 130. An argument ensued. Mr. Otton was angry because he thought Ms. Dugan had kicked him purposely and Ms. Dugan was angry because Mr. Otton had been gone all day and came home intoxicated. RP 131-32. Mr. Otton left the residence and Ms. Dugan called 911. RP 131-32.

The responding officer took a statement from Ms. Dugan in her kitchen, in which she wrote:

approx time 2:00 Nakia Otton came home drunk & passed out on the bedroom floor. He woke up about an hour later, accused me of kicking him in the lip. He held me on the bed, holding me by neck against the wall & the bed – I couldn't breath. He told me he was gonna kill me. His mom showed up & took him out –

Ex. 14 (spelling and punctuation in original); RP 186-90, 197, 222-25.

Mr. Otton was charged with assault in the second degree and harassment. CP 1-2. At trial, Ms. Dugan's testimony was similar to her written statement except she did not remember being choked or that Mr. Otton threatened to kill her, as she wrote in her statement. RP 135, 137-38, 139, 140, 155. Ms. Dugan explained that she would not have lied to the officers, but she had taken several medications, she had "a couple of drinks," and she was angry when she made the statement. RP 130-32, 137. Over defense objection, the trial court admitted Ms. Dugan's written statements as substantive evidence and Mr. Otton was convicted as charged. RP 210-12; CP 38, 42.

On appeal, Mr. Otton argued, *inter alia*, Ms. Dugan's written statement was improperly admitted. Br. of App. at 5-10. The Court of Appeals disagreed and ruled the statement was admissible pursuant to ER 801(d)(1)(i) as interpreted in *Smith*, and the concerns about "reliability" expressed in *Crawford* were limited to the Confrontation Clause.

D. ARGUMENT

The “reliability” test articulated by this Court in *Smith* for admission of a prior written statement as substantive evidence is contrary to the plain language of ER 801(d)(1)(i), incorrect, harmful, and should be abandoned.

a. The legislative history of ER 801(d)(1)(i).

ER 801(d)(1)(i) provides for admission of a prior statement when:

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant’s testimony, and was given under oath subject to penalty of perjury at a trial, hearing, or other proceeding, or in a deposition ...

A statement admitted pursuant to this rule is not hearsay and is admissible as substantive evidence for the truth of the matter asserted. *Smith*, 97 Wn.2d at 862-63.

When considering the admissibility of a statement pursuant to ER 801(d)(1)(i), Washington courts have examined the legislative intent behind Federal Rule of Evidence (Fed.R.Evid.) 801(d)(1)(A), from which ER 801(d)(1)(i) was “taken verbatim.” *Smith*, 97 Wn.2d at 859; *State v. Sua*, 115 Wn. App. 29, 43, 60 P.3d 1234 (2003). The final wording of ER 801(d)(1)(A) is the result of a compromise negotiated by the joint House and Senate conference committee after the separate House and Senate judiciary committees could not reach agreement. *Sua*, 115 Wn. App. at 43-

46. To the advisory committee's original wording, the House added the language "and was given under oath subject to cross-examination, and subject to penalty of perjury at a trial or hearing or in a deposition...." *Id.* at 44. The Senate, however, was concerned that this language failed to include statements made before a grand jury. *Id.* at 45. In response to that concern, the conference committee eliminated the cross-examination requirement and added "other proceeding," so as to include testimony taken at grand jury proceedings. *Id.* at 45-46 (citing *Federal Rules of Evidence: House Comm. on the Judiciary*, H.R. Rep. No. 93-659, at 13 (1973), reprinted in 1975 U.S.C.C.A.N. 7075, 7086)). The resulting language of Fed.R.Evid. 801(d)(1)(A) is now embodied in Washington's ER 801(d)(1)(i).

b. *Ms. Dugan's written statement was not given at a "trial, hearing, or other proceeding."*³

The Rules of Evidence are interpreted according to the "traditional tools of rules of statutory construction." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (discussing federal evidentiary rules); accord *State v. Hawkins*, 181 Wn.2d 170, 183, 332 P.3d 408 (2014) ("This court interprets court rules

³ The term "deposition" follows the phrase "other proceeding," and, therefore, it is not subject to the referenced rules of statutory construction.

the same way it interprets statutes, using the tools of statutory construction.”). Settled rules of statutory construction direct courts first to the “plain meaning” of the language, as the clear expression of legislative intent. *State Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In the context of interpretation of a statute, this Court has stated, “The ‘plain meaning’ of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); *accord City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009).

When looking at a statutory scheme as a whole, “under the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Washington State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003) (internal citations omitted). Accordingly, the general term “other proceeding” must be construed to mean something similar to the preceding specific terms “trial” or “hearing.” The terms “trial” and “hearing” refer to judicial

proceedings, often adversarial, where the declarant is officially placed under oath and subject to questioning. *See* Black’s Law Dictionary (10th ed. 2014). By contrast, an affidavit is a “voluntary declaration of facts written down and sworn to by a declarant, usu[ally] before an officer authorized to administer oaths.” Black’s Law Dictionary (10th ed. 2014). Thus, an affidavit is not similar to either a trial or a hearing.

Here, Ms. Dugan’s statement was not given in a courtroom or governmental office, it was not in response to formal questioning, and she was not formally placed under oath. Rather, she simply wrote her statement on her kitchen counter on a form provided by the responding police officer, and filled in the pre-printed admonition, “I Deborah A. Dugan have read the above statement and I certify and declare it to be true and correct under the penalty of perjury under the laws of the state of Washington.” Ex. 14. Because the circumstances in which she made her statement were not similar in nature or substance to the specific circumstances enumerated in ER 801(d)(1)(i), her statement does not fall within the general phrase “other proceeding.”

c. Rather than adhering to the plain language of ER 801(d)(1)(i), Smith promulgated a separate test in which “reliability is the key.”

In *Smith*, the Court ruled a declarant’s out-of-court notarized statement was admissible as substantive evidence because it satisfied ER

801(d)(1)(i) “under the totality of [the] circumstances,” not because it was given at a “trial, hearing, or other proceeding.” 97 Wn.2d at 863. The declarant reported to the police that the defendant attacked her. *Id.* at 858-59. When the police advised her that nothing could be done unless she testified in court, she went to the police station, gave a written statement describing the assault, and again identified the defendant as her assailant. *Id.* at 858. The declarant signed each page of her statement and the detective signed as her witness. *Id.* The detective then took the declarant to a notary, where she read the affidavit portion of the statement and oath, and a notary executed the jurat and applied his seal. *Id.* At trial, the declarant testified to the same facts set forth in her statement, except she identified a different individual as her assailant. *Id.* She explained that she originally identified the defendant only because she was angry with him. *Id.* at 858-59.

The *Smith* Court recognized the declarant’s written statement did *not* meet the definition of “other proceeding.” Even so, the Court found the original *purpose* of a sworn statement – to determine the existence of probable cause – was the same as those circumstances that did meet the

definition of “other proceeding.”⁴ *Id.* at 862. Thus, the Court ruled the declarant’s prior statement was admissible under ER 801(d)(1)(i), on the grounds it satisfied the purpose of determining probable cause. *Id.* at 862-63. The Court cautioned, however, that “each case depends on its facts with reliability the key,” and it did not interpret the rule to “always exclude or always admit such affidavits.” *Id.* at 861.

Rather than adhering to the plain language of ER 801(d)(1)(i), the Court articulated four factors to determine whether an affidavit is reliable and therefore admissible as substantive evidence: (1) whether the witness voluntarily made the statement; (2) whether there were minimal guarantees of truthfulness; (3) whether the statement was taken as standard procedure in a permissible method for determining probable cause; and (4) whether the witness was subject to cross-examination when giving the subsequent inconsistent statement. *Id.* at 861-63. Subsequently, several Washington courts have applied the above four factors to admit a prior statement, dubbed a “*Smith* affidavit,” as substantive evidence. *See State v. Thach*, 126 Wn. App. 297, 308-09, 106 P.3d 782 (2005) (“domestic violence victim statement” written partly by declarant and partly by officer while declarant was in an ambulance receiving medical care); *State v.*

⁴ The Court identified four methods of determining probable cause: 1) filing an information in superior court, 2) grand jury indictment, 3) inquest proceedings, and 4) filing a criminal complaint before a magistrate. *Smith*, 97 Wn.2d at 862.

Nieto, 119 Wn. App. 157, 161-64, 79 P.3d 473 (2003) (declarant’s written statement given at police station following an investigative interview); *State v. Nelson*, 74 Wn. App. 380, 386-91, 874 P.2d 170 (1994) (officer’s written statement summarizing the “substance” of conversation with declarant that declarant signed before a notary). Each of these cases, however, considered only whether the statement satisfied the four *Smith* factors, and not whether the statement was given at a “trial, hearing, or other proceeding,” as required by ER 801(d)(1)(i).

d. *Smith* is incorrect and harmful and should be overruled.

A prior decision is properly overruled where it is incorrect and harmful. *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (collecting cases). “[C]ourts must have and exert the capacity to change a rule of law when reason so requires.” *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). A decision is incorrect where it is inconsistent with the state constitution or statutes. *Barber*, 170 Wn.2d at 864-65. A decision is harmful where it has a detrimental impact on the public interest. *Id.* at 865.

- i. The “reliability” test cannot substitute for the carefully drafted language of ER 801(d)(1)(i) and is incorrect.

As stated, ER 801(d)(1)(i) was taken verbatim from the Federal Rules of Evidence. *Smith*, 97 Wn.2d at 859. Where a Washington evidentiary rule is identical to a federal evidentiary rule, courts may look to federal interpretations of the rule for guidance. *State v. Copeland*, 130 Wn.2d 244, 258, 922 P.2d 1304 (1996); *Smith*, 97 Wn.2d at 859. The identical Fed.R.Evid. 801(d)(1)(A) has been interpreted to *exclude* statements to police during an investigation.

The term “other proceeding” is not unlimited. A typical police station interrogation, for example, is not an “other proceeding” within the meaning of the Rule. *See, e.g., United States v. Day*, 789 F.2d 1217, 1222 (6th Cir.1986) (collecting cases). “ ‘The Rule seems to contemplate situations in which an official verbatim record is routinely kept, whether stenographically or by electronic means, under legal authority.’ ” *United States v. Livingston*, 661 F.2d 239, 240 (D.C.Cir.1981) (quoting 4 D. Louisell & C. Mueller, *Federal Evidence* § 419 at 171 (1980)).

United States v. Dietrich, 854 F.2d 1056, 1061 (7th Cir. 1988).

Courts may not add terms to a legislative enactment. *State v. Roggencamp*, 153 Wn.2d 614, 632, 106 P.3d 196 (2005). ER 801(d)(1)(i) plainly does not include the term “affidavit,” and the *Smith* Court acknowledged that a statement made to a police officer did not fall within

the meaning of “other proceeding.” Thus, interpreting ER 801(d)(1)(i) to include such statements improperly adds terms to the rule, and is incorrect.

- ii. The “reliability” test is inherently subjective and harmful.

“Reliability is an amorphous, if not entirely subjective, concept.” *Crawford*, 541 U.S. at 63. In the context of a Confrontation Clause challenge to evidence admitted under ER 804(b)(3), the *Crawford* Court noted judges too frequently attach the same significance to opposite facts and facts can be turned either in favor or against the reliability of a statement, depending on the court. *Id.* (rejecting substitution of “reliability” for confrontation). For example, the Colorado Supreme Court found a statement was reliable because its inculcation of the defendant was “detailed,” whereas the Fourth Circuit found a statement was reliable because its inculcation of the defendant was “fleeting.” *Id.* (comparing *People v. Farrell*, 34 P.3d 401, 407 (Colo. 2001) with *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245 (4th Cir. 2001)). Similarly, the Virginia Court of Appeals found a statement reliable because the witness was a suspect and in custody, whereas the Wisconsin Court of Appeals found a statement reliable because the witness not a suspect and out of custody. *Id.* (comparing *Nowlin v. Commonwealth*, 40 Va. App. 327, 335-38, 579 S.E.2d 367 (2003) with *State v. Bintz*, 257

Wis. 2d 177, 187, 650 N.W.2d 913 (2002). Finally, the Colorado Supreme Court found a statement more reliable because it was given immediately after the events at issue, whereas the same court, in a case decided two months previously, found a statement more reliable because two years had elapsed. *Id.* (comparing *Farrell*, 34 P.3d at 407, with *Stevens v. People*, 29 P.3d 305, 316 (Colo. 2001)). Rejecting this strikingly subjective analysis, *Crawford* abrogated *Ohio v. Roberts*⁵ and its progeny that allowed for admission of an out-of-court statement by an unavailable witness when that statement bore “adequate indicia of reliability.” *Id.* at 60, 62-63.

The *Crawford* Court’s concern about the subjective nature of “reliability” echoed the concerns raised in *Delgado-Santos v. State*, in which the Florida Court of Appeals discussed the “basic flaw” of the *Smith* case-by-case approach to admission of a written statement under its identical rule of evidence:.

Smith ... purport[s] to make the question turn on the “reliability” of the contents of the particular statement and of the conditions under which it was given. In our view, the basic flaw in this conclusion is that it finds no basis in the statute. While the legislature and Congress may have been ultimately concerned with the “reliability” of a particular statement, they sought to vindicate that concern only by establishing given and objective criteria as to the circumstances, including the kind of forum, under which it was given. And it is for the legislature, not the courts, to determine not only the policy to be promoted, but the

⁵ 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

means by which that end is to be achieved. By suggesting, without statutory authority, that the determination that the existence of a proceeding can depend upon what is said before it, the *Robinson*⁶-*Smith* test of reliability violates this basic principle.

471 So.2d 74, 79 (Fla. Ct. App. 1985) (internal citation omitted).

Rather than addressing the Florida court's reasoning, the Court of Appeals here dismissed the concerns in a footnote, and based its decision on Washington jurisprudence rather than the statutory language. Opinion at 6 n.1. The court specifically relied on *Thach*, in which Division Two summarily denied an argument similar to that presented here, and stated, "*Crawford* has no bearing on this case as the Supreme Court stated that the confrontation clause is not implicated when the declarant is available for cross-examination." Opinion at 6. But, as demonstrated by the *Crawford* Court's examples of courts attaching the same significance to opposite facts, the subjective nature of a judicial determination of "reliability" is a generalized concern, not limited to the context of confrontation only, and is harmful.

E. CONCLUSION

The stated purpose of the Rules of Evidence is to afford a fair hearing to all parties. ER 102; *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984). As recognized by *Crawford*, a fair hearing cannot

⁶ *Robinson v. State*, 455 So.2d 481 (Fla. 5th DCA 1984).

rest on a subjective judicial determination of the “reliability” of circumstances under which an out-of-court statement is made. This Court should abandon the “reliability” test of *Smith* as incorrect and harmful, and adhere to the plain language of ER 801(d)(1)(i), which limits the hearsay exception to statements given at a “trial, hearing, or other proceeding.” Because Ms. Dugan’s statement written on her kitchen counter was not given at a “trial, hearing, or other proceeding,” it was improperly admitted as substantive evidence. For the foregoing reasons, as well as the reasons set forth in the briefing below and the Petition for Review, Mr. Otton requests this Court abandon the “reliability” test of *Smith*, and reverse his convictions for second degree assault and harassment based on the wrongful admission of the complaining witness’s out-of-court statement.

DATED this 7th day of December 2015.

Respectfully submitted,

s/ Sarah M. Hrobsky

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, |) | |
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| RESPONDENT, |) | |
| |) | NO. 91669-1 |
| v. |) | |
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| NAKIA OTTON, |) | |
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| PETITIONER. |) | |

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF DECEMBER, 2015.

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Supplemental Brief of Petitioner

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