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Division III
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No. 35567-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JEREMY ALVAREZ,

Appellant.

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

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ARGUMENT

Article I, § 9 of the Washington Constitution provides a right to prearrest silence that does not need to be expressly invoked when confronted by the police.

1. Contrary to well-established Washington jurisprudence, a plurality of justices on the United States Supreme Court in *Salinas* held that there is no right to prearrest silence absent express invocation.

Both article I, § 9 of the Washington Constitution and the Fifth Amendment to the United States Constitution provide a right against self-incrimination. The Fifth Amendment protection against self-incrimination was held to be incorporated against the States under the Fourteenth Amendment in 1964. Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); McNear v. Rhay, 65 Wn.2d 530, 536, 398 P.2d 732 (1965). Until then, the Fifth Amendment did not apply to the States. State v. Seattle Taxicab & Transfer Co., 90 Wash. 416, 429, 156 P. 837 (1916). Well before incorporation, however, the right against self-incrimination under article I, § 9 was being applied in Washington courts. See, e.g., State v. Paschall, 182 Wash. 304, 306, 47 P.2d 15 (1935) (stating that Supreme Court had consistently held that article I, § 9 precluded the State from directly referring to the fact that defendant did not testify); City of Seattle v. Hawley, 13 Wn.2d 357, 358, 124 P.2d 961 (1942) (same). Of course, cases from the United States Supreme Court interpreting the Fifth

Amendment were not irrelevant. Such cases were deemed “a proper aid” in determining the meaning of the privilege against self-incrimination. State v. Gibbons, 118 Wash. 171, 184, 203 P. 390 (1922).

In 1996, the Washington Supreme Court held the right against self-incrimination under the state and federal constitutions encompassed a right to prearrest silence. State v. Easter, 130 Wn.2d 228, 235-36, 241, 922 P.2d 1285 (1996); State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). In Easter, the court held this right was violated because the prosecution elicited testimony that the defendant did not answer questioning when confronted by police before his arrest. Id. at 241. The court rejected the State’s contention that “the defendant must specifically invoke the privilege to enjoy it prior to arrest . . .” Id. at 238. This position was well-reasoned and supported by many other courts’ interpretation of the privilege. Id. at 238-41. In the following years, Washington courts adhered to the rule that prearrest silence was inadmissible as substantive evidence of guilt. State v. Burke, 163 Wn.2d 204, 218, 181 P.3d 1 (2008); State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002).

In 2013, three justices on the United States Supreme Court reasoned that, in general, the privilege against self-incrimination applies only if a person expressly invokes the privilege. Salinas v. Texas, 570 U.S.

178, 183, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013) (Alito, J., plurality).¹ In Salinas, the defendant had voluntarily submitted to a police interview, but was silent in response to some questions. Id. at 182. This silence was used as substantive evidence against him at trial. Id. at 182-83. The plurality reasoned that the defendant's failure to expressly invoke his right to silence was fatal to his claim that this violated his privilege against self-incrimination. Id. at 183. Two other justices reasoned that even if the defendant had invoked his right against self-incrimination, this did not matter because (under an original understanding theory) the constitution did not forbid a prosecutor from commenting on a defendant's silence. Id. at 191-93 (Thomas, J. concurring). Four justices dissented. Id. at 193 (Breyer, J., dissenting).

This Court reasoned that Salinas overruled Easter and its progeny as to the meaning of the Fifth Amendment. State v. Magana, 197 Wn. App. 189, 194-95, 389 P.3d 654 (2016). The Court did not analyze whether article I, § 9 required a different result. Id.²

¹ The plurality outlined two exceptions, which the plurality reasoned did not apply. Salinas, 570 U.S. at 184-85.

² Without analysis, the Court stated that the state constitution did not afford greater protection. Magana, 197 Wn. App. at 195.

2. Consistent with Washington precedent, this Court should hold that the right against self-incrimination enshrined in article I, § 9 continues to provide a right to prearrest silence and that this right need not be expressly invoked when confronted by the police.

As explained in more detail below, other States have rejected Salinas under their own state constitutions. Following suit, this Court should hold article I, § 9 continues to forbid the use of prearrest silence against a defendant and that no express invocation is required.³

It is “well established that state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution.” State v. Simpson, 95 Wn.2d 170, 177, 622 P.2d 1199 (1980). “When both the federal and Washington constitutions are alleged, it is appropriate to examine the state constitutional claim first.” State v. Young, 123 Wn.2d 173, 178, 867 P.2d 593 (1994).

Our Supreme Court articulated standards to decide when and how Washington’s constitution provides different protection of rights than the United States Constitution in State v. Gunwall, 106 Wn.2d 54, 720 P.2d

³ As argued in the Reply Brief, Salinas is limited to its facts and is materially distinguishable because there the defendant voluntarily submitted to an interview and had the opportunity to expressly invoke his right to silence. Reply Br. at 3-6. In this case, Mr. Alvarez did not voluntarily submit to an interview and he did not have an opportunity to expressly invoke his right to silence. If the Court agrees that Salinas does not apply, this issue need not be reached.

808 (1986). The court examines six “nonexclusive” criteria: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the two constitutions, and (6) matters of particular state interest and local concern. Gunwall, 106 Wn.2d at 61-62. “The purpose of these factors is not to presumptively adhere to federal constitutional analysis.” State v. Silva, 107 Wn. App. 605, 614, 27 P.3d 663 (2001). Rather, the purpose is to provide a “process that is at once articulable, reasonable and reasoned.” Gunwall, 106 Wn.2d at 63.⁴

In evaluating a state constitutional claim, the context of the specific claim is critical. Sometimes analogous state and federal constitutional provisions will demand the same rule. But this does not mean they always do. In the words of our Supreme Court, “when the court rejects an expansion of rights under a particular state constitutional provision in one context, it does not necessarily foreclose such an

⁴ Courts should use “the *Gunwall* criteria as interpretive tools rather than as a magic key to the walled kingdom of the state constitution.” Hugh D. Spitzer, New Life for the “Criteria Tests” in State Constitutional Jurisprudence: “Gunwall Is Dead-Long Live Gunwall!”, 37 Rutgers L.J. 1169, 1180 (2006); accord City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 641, 211 P.3d 406 (2009) (“*Gunwall* is better understood to prescribe appropriate arguments: if the parties provide argument on state constitutional provisions and citation, a court may consider the issue.”).

interpretation in another context.” State v. Russell, 125 Wn.2d 24, 58, 882 P.2d 747 (1994). Thus, in Russell, the court rejected the State’s argument that because a previous decision interpreting article I, § 9 had declined to give it a broader reading than the Fifth Amendment, it was precluded from analyzing whether article I, § 9 was more protective in a different context. Id. Because the context was different, a Gunwall analysis was appropriate and useful. Id. at 59-62.

Starting with the text, article I, § 9 of the Washington Constitution provides, “No person shall be compelled in any criminal case to give evidence against himself.” Const. art. I, § 9. This language is broader than the language of the Fifth Amendment, which provides that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. In using the word “witness,” the focus of the federal constitution is on guaranteeing the right not to testify against oneself at trial. See Michigan v. Tucker, 417 U.S. 433, 440, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974) (the language of the Fifth Amendment “might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify”).

In contrast, constitutional history shows that our framers explicitly rejected a proposed version of article I, § 9 which would have only protected the right of a person not to “testify against himself.” Journal of

the Washington State Constitutional Convention, 1889, at 498 (B. Rosenow ed. 1962).⁵ Instead, they adopted the broader “give evidence” language. Id. The framers thus expressly provided strong protection against self-incrimination at the investigatory stage.

That the text of a state constitutional provision is identical or similarly worded to a federal constitutional provision does not mean the two must be interpreted the same. See Justice Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 514-16 (1983-1984) (arguing provisions should always be interpreted independently); Gunwall, 106 Wn.2d at 61 (language or text is not decisive); see, e.g., State v. Bartholomew 101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984) (despite similar language, United States Supreme Court’s interpretation of the Fourteenth Amendment’s due process clause did not control interpretation of due process provision in the Washington Constitution). This approach makes sense because ours is a system of federalism, with power divided between the federal government and the States. The purpose of this division is to protect the individual. New York

⁵ The *Journal* is available online through the Washington State Constitutional Law Project. <https://lib.law.washington.edu/content/guides/waconst#section-6>.

v. United States, 505 U.S. 144, 181, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (“the Constitution divides authority between federal and state governments for the protection of individuals.”).

Given the structure of our government and its history, it does not make sense to assume that the meaning of state constitutional provisions depends on what a federal court says the federal constitution means. As two Washington constitutional law scholars have explained:

It would be illogical to assume that a state constitution written before the U.S. Constitution, or a declaration of rights copied from such a state constitution when the federal Bill of Rights did not apply to the states, was meant to be interpreted with reference to federal courts’ interpretations of the federal Constitution.

Justice Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide, 2-3 (2002) (hereinafter Utter & Spitzer).

Relatedly, as one federal appellate judge has argued, even when state and federal provision have similar or identical language, there is no reason to think that provisions from different sovereigns would mean the same thing, especially if the guarantee is highly generalized:

There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed the same. Still less is there reason to think that a highly generalized guarantee, such as prohibition on “unreasonable” searches, would have just one meaning for a range of differently situated sovereigns.

Jeffrey S. Sutton, What Does—and Does Not—Ail State Constitutional Law, 59 U. Kan. L. Rev. 687, 707 (2011).⁶ It is particularly important to remember this “whenever the United States Supreme Court’s decisions dilute or underenforce important individual rights and protections.” State v. Mole, 149 Ohio St. 3d 215, 221, 74 N.E.3d 368 (2016) (interpreting equal protection provision in Ohio Constitution independently of Fourteenth Amendment in light of Ohio’s conditions and traditions).

Independent interpretation of the Washington Constitution is consistent how Washington interprets its rules of evidence, which (unlike the Washington Constitution) are premised on federal law. As explained by our Supreme Court (in a post-Gunwall case):

[F]ederal case law interpreting the federal rule is not binding upon this court. Simply because our rule is identical to the federal rule does not require us to interpret our rule in the same fashion, nor could it require us to do so. This court is the final authority insofar as interpretation of this State’s rules is concerned, and we are free to interpret the rules differently than do the federal courts as long as we do not run afoul of federal constitutional prohibitions.

State v. Brown, 113 Wn.2d 520, 547-48, 782 P.2d 1013 (1989) (emphasis added).

⁶ See also Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018) (arguing that state constitutional law is underappreciated and state courts should independently interpret their state constitutions); <https://reason.com/volokh/2018/05/21/interview-with-judge-jeffrey-sutton-about> (interview with author about book).

Skipping briefly to the fifth and sixth Gunwall factors, these factors support independent interpretation. The fifth factor, differences in structure between the state and federal constitutions, always supports an independent analysis because the federal constitution is a grant of power from the people, while the state constitution represents a limitation on the State. Russell, 125 Wn.2d at 61. As for the sixth factor, state and local concern, this factor also favors independent interpretation because criminal law is matter of local concern generally delegated to the States. Bond v. United States, 572 U.S. 844, 848, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014) (“our constitutional structure leaves local criminal activity primarily to the States”).

Turning back to the fourth factor, preexisting state law, this factor strongly supports independent interpretation of article I, § 9 in the present context. As outlined earlier, well before the United States Supreme Court’s decision in Salinas, Washington courts interpreted article I, § 9 to protect against a person’s prearrest silence from being used against the person and did not require people to expressly invoke the privilege. Easter, 130 Wn.2d at 235-36; Lewis, 130 Wn.2d at 705; Burke, 163 Wn.2d at 218. That the United States Supreme Court may have reached a different conclusion as to the Fifth Amendment does not mean Washington should abandon its jurisprudence.

For example, our Supreme Court refused to “follow, blindly, the lead of the United States Supreme Court” on the test for evaluating the existence of probable cause. State v. Jackson, 102 Wn.2d 432, 438, 688 P.2d 136 (1984). In Jackson, our Supreme Court refused to abandon the Aguilar-Spinelli⁷ test, which requires that the affidavit in support of the warrant establish both the basis of the information and credibility of the informant. Id. at 137-38. Interpreting the Fourth Amendment, the United States Supreme Court had abandoned this test in favor of a totality of the circumstances test. Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Our Supreme Court declined to follow, reasoning that our citizens’ constitutional privacy rights under article I, § 7 would not be protected under such an approach. Jackson, 102 Wn.2d at 443.

Similarly, our citizens’ constitutional right against self-incrimination will not be protected under Salinas. At least three other states—Pennsylvania, Florida, and Hawaii, reached this conclusion and rejected Salinas under their own state constitutions. Com. v. Molina, 628 Pa. 465, 502-03, 104 A.3d 430 (2014); State v. Horwitz, 191 So. 3d 429, 441-42 (Fla. 2016); State v. Tsujimura, 140 Hawai’i 299, 312-14, 400 P.3d 500 (2017). Washington should follow suit.

⁷ Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

In Molina, the Pennsylvania Supreme Court held that the use of prearrest silence as substantive evidence of guilt violated its state constitutional protection against self-incrimination. Molina, 628 Pa. at 469. The court rejected the plurality's position in Salinas that there must be an express invocation of the right against self-incrimination, reasoning that Pennsylvania precedent was more aligned with the dissenting opinion in Salinas. Id. at 479. Consistent with Washington jurisprudence, the court concluded that a rule against drawing an adverse inference from a defendant's silence (regardless of the timing) is encompassed within the right against compelled self-incrimination. Id. at 498, 501 & n.20 (citing Easter).

The Florida Supreme Court similarly reached the same holding in interpreting its own constitution. Horwitz, 191 So. 3d at 431. As in Molina, the court rejected the reasoning of the plurality in Salinas and choose to follow Florida precedent. Id. at 441-42.

Most recently, the Hawaii Supreme Court held that the privilege against self-incrimination under the Hawaii Constitution provided a right to prearrest silence. Tsujimura, 140 Hawai'i at 319. The court rejected the plurality's opinion in Salinas. Id. at 313 n.21. The court held that people need not expressly invoke their right to silence. Id. The court further reasoned that (similar to the facts of Mr. Alvarez's case) "where there was

no verbal exchange between the police officer and the defendant, there is no requirement that the defendant invoke the right to remain silent because, at that particular juncture, there was no opportunity to do so.” Id. In reaching its decision, the court cited Easter twice. Id. at 315, 325 n.21.

Following the lead of Pennsylvania, Florida, and Hawaii, this Court should hold that article I, § 9 continues to provide a right to prearrest silence and that no express invocation is required.

This holding will correctly decouple the meaning of article I, § 9 from the “often surprising decision of the United States Supreme Court.” State v. Ingram, 914 N.W.2d 794, 797-98 (Iowa 2018). This Court should not allow the words of the Washington Constitution to be “balloons to be blown up or deflated every time, and precisely in accord with the interpretation of the U.S. Supreme Court, following some tortuous trail.” Penick v. State, 440 So.2d 547, 552 (Miss. 1983). Consistent with federalism, independent interpretation is the rule, not the exception.

3. Mr. Alvarez’s right to pre-arrest silence under article I, § 9 was violated when an officer was permitted to testify that Mr. Alvarez did not appear surprised when told of the criminal allegations for which he was on trial. The conviction must be reversed.

As argued in the opening brief, Mr. Alvarez’s right against self-incrimination was violated when the State purposefully elicited testimony from a law enforcement officer that Mr. Alvarez did not appear surprised

when told by the officer about the criminal allegation for which he was on trial. Br. of App. at 16; Easter, 130 Wn.2d 241.

In addition to Washington precedent, Hawaii's Tsujimura's case in particular supports Mr. Alvarez's argument. There, the defendant was charged with driving under the influence. Tsujimura, 140 Hawai'i at 302. The defendant participated in field sobriety tests ("FST"), but stated that he had an old knee injury. Id. at 303. Over the defendant's objection, the prosecutor was permitted to elicit testimony from a police officer that the defendant did not state he would have difficulty exiting the car because of a leg injury. Id. at 304-05. The Hawaii Supreme Court held this violated the defendant's right against self-incrimination:

By eliciting the fact that Tsujimura did not say anything about his injury while he exited his car, it was clear that the State's purpose was to imply that Tsujimura's injuries did not physically inhibit him from performing the FSTs and to inferentially establish that Tsujimura's diminished faculties during the FSTs were a product of intoxication and not influenced by his injuries.

...

Accordingly, the information regarding Tsujimura's prearrest silence was erroneously admitted because the State's purpose in adducing it was to imply Tsujimura's guilt and because the character of the information suggested to the district court judge that it may be considered as inferential evidence of Tsujimura's guilt.

Id. at 316.

Similarly, the purpose of the prosecutor in eliciting testimony about Mr. Alvarez's prearrest silence was to imply guilt. The implication was that an innocent person would express surprise if accused of a serious crime by a police officer. That Mr. Alvarez was silent and did not react in a surprised manner after being accuse of sexual misconduct against a child suggested guilt. The elicitation of this testimony violated Mr. Alvarez's right against self-incrimination.

Because the prosecution has not proved the error harmless beyond a reasonable doubt, the conviction must be reversed. Br. of App. at 17-18; Reply Br. at 7-8.

B. CONCLUSION

Article I, § 9 of the Washington Constitution should be interpreted independently of the Fifth Amendment and the jurisprudence of the United States Supreme Court. Consistent with Washington precedent, this Court should hold that the right against self-incrimination under article I, § 9 provides for a right to prearrest silence and that no express invocation is required. Because Mr. Alvarez's right to prearrest silence was violated, this Court should reverse the conviction and remand for a new trial.

DATED this 19th day of December, 2018.

Respectfully submitted,

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APPELLANT.)	

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