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NO 83024-0 W. R. CARPENTER

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SUPREME COURT OF THE STATE OF WASHINGTON

BELLEVUE SCHOOL DISTRICT,

Petitioner,

v.

E.S.,

Respondent.

**PETITIONER'S SUPPLEMENTAL BRIEF ON
STATE CONSTITUTIONAL CLAIM**

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A. ISSUE

1. Does the state constitutional right to due process differ from the federal constitutional right?

B. FACTS

No additional facts are pertinent to this state constitutional claim.

C. ARGUMENT

E.S. has argued for the first time in this case that article 1, § 3 of the state constitution confers *broader* due process rights than does the federal constitution. Her claim is incorrect, and should be rejected. As this Court has frequently held, the Gunwall factors do not support a more expansive interpretation of the state due process clause.¹ The same result is required with respect to the alleged due process right to counsel in truancy proceedings where liberty is not threatened.

This Court recently rejected an argument that appointed counsel is required by the due process clause of the state constitution in dissolution cases. King v. King, 162 Wn.2d 378, 174 P.3d 659 (2007). The

¹ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). The six factors are: (1) textual language, (2) significant differences between the texts, (3) state constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. Gunwall, 106 Wn.2d at 61-62.

petitioner's argument turned on application of the Gunwall factors. This Court rejected the argument, holding that the factors did not support independent state constitutional analysis. King, 162 Wn.2d 391-95. In particular, this Court rejected the argument that either In re Luscier, 84 Wn.2d 135, 524 P.2d 906 (1974), or In re Myricks, 85 Wn.2d 252, 533 P.2d 841 (1975), compels a finding that the due process clause of the state constitution is more protective than the federal constitution. King, at 391-92. The Court held that, "[o]utside of cases involving a risk to a fundamental liberty interest, there is a presumption of a right to counsel only where physical liberty is at stake." In re Dependency of Grove, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995).

The holding in King, rejecting independent analysis of the state's due process clause, is consistent with an unbroken line of this Court's decisions that have rejected independent state constitutional analysis of the due process clause under the Gunwall factors. Ongom v. State, Dept. of Health, Office of Professional Standards, 159 Wn.2d 132, 148 P.3d 1029 (2006) (in the context of professional disciplinary actions, "[t]he Washington Constitution provides no more procedural due process protections than does the United States Constitution"); Andersen v. King County, 158 Wn.2d 1, 43, 138 P.3d 963 (2006) (due process right to liberty interest in domestic partnerships); City of Bremerton v. Widell,

146 Wn.2d 561, 579, 51 P.3d 733 (2002) (rejecting due process right to intimate association for engaged couples); State v. Manussier, 129 Wn.2d 652, 679, 921 P.2d 473 (1996) (rejecting challenge to persistent offender statute and holding, “[t]he Gunwall factors do not favor an independent inquiry under article I, section 3 of the state constitution”); In re Matteson, 142 Wn.2d 298, 310, 12 P.3d 585 (2000) (rejecting claim that state due process clause provides greater protection than federal due process clause); State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994) (preservation of evidence for the defense); State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992) (negligent failure to preserve biological evidence); *see also* In re Dyer, 143 Wn.2d 384, 394, 20 P.3d 907 (2001) (“Washington's due process clause does not afford a broader due process protection than the Fourteenth Amendment” but failing to reach the claim because insufficient Gunwall analysis).²

In particular, this Court has repeatedly recognized that the first and second Gunwall factors, the language of the state constitution, and a comparison of the state and federal constitutional language, do not support a broader interpretation of the state due process clause. King v. King, at 392. Article 1, section 3 provides that “No person shall be deprived of

² The Court of Appeals has followed this Court and has consistently reached the same conclusion. *See e.g.* State v. Turner, 145 Wn. App. 899, 187 P.3d 835 (2008) (due process challenge to recording of custodial interrogations).

life, liberty, or property without due process of law." Wash. Const. art. 1, sec. 3. The Fourteenth Amendment to the United States Constitution provides that "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, sec. 1. "There are no material differences between the 'nearly identical' federal and state provisions." Matteson, 142 Wn.2d at 310; *see also* Wittenbarger, 124 Wn.2d at 480 ("This language is nearly identical to the federal provision, and no legislative history indicates that the state provision should be interpreted differently.").

With respect to the third Gunwall factor, state constitutional history, the court has repeatedly recognized that there is no state history that provides any justification for interpreting the identical provisions differently. Matteson, 142 Wn.2d at 310.

With respect to the fourth Gunwall factor, preexisting state law, E.S. cites to no authority for the notion that the right to counsel has ever been constitutionally or statutorily required when liberty interests were not at stake. Lucier and Myricks, relied upon by E.S., dealt with the fundamental right of parents to custody and care of their children, and are inapposite. *See* Supp. Br. of Pet. at 11 n.2. Likewise, Washington has no legal tradition or history recognizing a greater due process right for truants or juveniles than was provided under the federal constitution.

Significantly, before In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), there was no constitutional right to counsel for juveniles charged with felonies in the superior courts of Washington. See State v. Angevine, 62 Wn.2d 980, 385 P.2d 329 (1963) (citing Klapproth v. Squier, 50 Wn.2d 675, 314 P.2d 430 (1957) and State v. Baforo, 146 Wash. 312, 262 P. 964 (1928)).

The fifth Gunwall criterion, the differences in structure between state and federal constitutions, is neutral on the issue. This Court has held that, while this factor "may support the notion that our constitution is more protective in a general sense" with respect to article 1, section 3, "it does not shed any light on this *particular issue*." Matteson, 142 Wn.2d at 310-11 (citing State v. Ortiz, 119 Wn.2d at 303 (emphasis in original)).

The sixth Gunwall factor requires consideration of whether the matter is of particular state or local concern. This Court has found that this factor does not support a broader reading of the state due process clause. Wittenbarger, 124 Wn.2d at 480 ("we are not persuaded that the preservation of potentially exculpatory evidence is of particular local interest in Washington."). Although E.S. suggests that education is a matter of local concern, courts have observed that the simple fact that there exists some local control does mean that the issue is more local than national. See e.g. State v. Spurgeon, 63 Wn. App. 503, 507, 820 P.2d 960

(1991) (the fact that criminal law enforcement is primarily a function of state rather than national government is true for every criminal case, but does not establish that the quantum of constitutional protection should be different).

E.S. argues, apparently under the fifth Gunwall factor, that Article 9, § 1 "provides an independent right to education that invokes due process protections, and also heavily informs any balancing of interests in due process analysis." Supp. Br. of Resp. at 23. Article 9, § 1 provides that, "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."

This provision does not support E.S.'s argument. Art. 9, §1 is a constitutional mandate to fund education. It would stand the provision on its head to hold that a lawyer is constitutionally required to represent a juvenile who refuses to take advantage of the constitutional benefits that Art. 9, § 1 confers. And, Art. 9, § 1 does not answer the question whether providing counsel will *further* a juvenile's educational interests. *See* Supp. Br. of Pet. at 22-24. Thus, Art. 9, § 1 does not advance the argument for independent state constitutional analysis.

Accordingly, a review of the Gunwall factors and the relevant case law does not support a finding that the state due process clause provides

greater protection than the federal due process clause in the context of providing counsel to truants who do not face deprivation of liberty. There is no principled basis upon which to overturn or distinguish these numerous decisions.

E.S. relies on two cases to argue that due process in Washington is different than due process under the federal constitution. Supp. Br. of Resp. at 22-23 (citing State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984); State v. Davis, 38 Wn. App. 600, 686 P.2d 1143 (1984)). The issue in Bartholomew was the constitutionality of RCW 10.95.060(3), which permitted evidence of uncharged or unproved crimes in a death penalty special sentencing proceeding. In an opinion following reversal and remand from the U.S. Supreme Court, this Court held that the statute was "particularly offensive" because it permitted evidence in death proceedings that was deemed unreliable for general prosecutions. Bartholomew, at 640. Although this Court has refused to overrule the holding in Bartholomew, see State v. Clark, 143 Wn.2d 731, 778, 24 P.3d 1006 (2001), this Court has never found any other category of case where the state due process clause was interpreted differently than the federal clause.

In Davis, the Court of Appeals relied on the state constitution and declined to follow a recent United States Supreme Court case, Fletcher v.

Ware, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), which held that if Miranda warnings have not been given, the federal due process clause does not prohibit the use of the defendant's post-arrest silence for impeachment purposes.³

Reliance on these cases is flawed. First, both cases predate Gunwall, so no analysis was performed under the relevant criteria. The Gunwall criteria were developed to ensure principled decision-making on state constitutional claims. This Court recognized "[t]he difficulty with . . . decisions [that simply announce a state constitutional right without analysis] is that they establish no principled basis for repudiating federal precedent and thus furnish little or no rational basis for counsel to predict the future course of state decisional law." Gunwall, at 60. Constitutional decision-making of that sort is "all sail, no anchor" in that it encourages justices to decide constitutional claims based on preference rather than precedent. Id. at 60 n.7 (citing Deukmejian & Thompson, All Sail and No

³ In Davis, the court expressed concern that the rule in Fletcher would tend to discourage the reading of Miranda warnings and penalize defendants who are already knowledgeable of their Miranda rights. 38 Wn. App. at 605. Given the focus on Miranda, it is not clear that the Davis court's reasoning would survive a Gunwall analysis and the Washington Supreme Court's subsequent state due process decisions. See State v. Russell, 125 Wn.2d 24, 55-62, 882 P.2d 747 (1994) (rejecting argument that the state constitution required a broader exclusionary rule applying to the fruits of an un-Mirandized statement given that Miranda was a federal judicial decision and the state had never required Miranda warnings under the state constitution). See also State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) (stating the rule in Fletcher but also noting Davis, without comment).

Anchor-Judicial Review Under the California Constitution, 6 Hastings Const. L.Q. 975 (1979)). More than a decade ago, the Washington Supreme Court observed, "[t]his court traditionally has practiced great restraint in expanding state due process beyond federal perimeters." Rozner v. City of Bellevue, 116 Wn.2d 342, 351, 804 P.2d 24 (1991). Application of the Gunwall test ensures the appropriate level of restraint, and requires rejection of E.S.'s arguments.

Second, this Court noted the limited reach of Bartholomew and Davis in State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992), where the issue was the standard of appellate review of destruction of evidence claims.

Ortiz also argues that Const. art. 1, § 3 has already been interpreted more broadly than the federal due process clauses in State v. Bartholomew . . . and State v. Davis . . . However, neither of those cases concerned the right asserted here to discover potentially exculpatory evidence. . . . This case concerns a different application of due process.

Ortiz, 119 Wn.2d at 304-05.

Thus, Bartholomew is unique, and the Court of Appeals decision in Davis is likely incorrect. Neither case demands, or even suggests, that the due process clause of the state constitution should be more broadly interpreted in the truancy context.

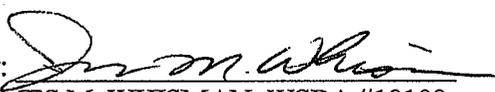
D. CONCLUSION

For the foregoing reasons, this Court should hold that the Washington State Constitution does not confer greater rights upon a juvenile in truancy proceedings than does the federal constitution.

DATED this 16th day of December, 2009.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I sent by electronic mail to counsel for E.S. and amici, a copy of the PETITIONER'S SUPPLEMENTAL BRIEF ON STATE CONSTITUTIONAL CLAIM, in Bellevue School District v. E.S., Cause No. 83024-0-I, in the Supreme Court of the State of Washington.

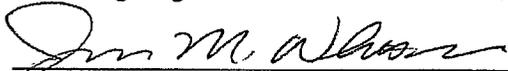
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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12/16/09

Date 12/16/09