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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL PIATNITSKY,

Petitioner.

**SPECIAL SUPPLEMENTAL BRIEF OF RESPONDENT
STATE OF WASHINGTON**

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 ORIGINAL

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A. ISSUE PRESENTED

For the last sixty-five years, this Court has consistently held that the protections of Article I, Section 9 of the Washington Constitution and of the Fifth Amendment are co-extensive. The two provisions are nearly identical, and there is no evidence in our state's history that evinces an intent to provide greater protections than the federal constitution. Should this Court conclude that there is no principled basis for interpreting Article I, Section 9 independently of its federal counterpart?

B. STATEMENT OF THE CASE

Please see the Statement of the Case included in the Supplemental Brief of Respondent and incorporated herein by reference.

C. ARGUMENT

Twenty-seven years ago, this Court squarely addressed an increased reliance by state supreme courts on their own constitutions rather than the federal constitution, and the criticism and perils such jurisprudence engendered. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). This Court carefully considered when it should resort to independent state constitutional grounds to decide a case, rather than relying on decisions of the Supreme Court construing comparable provisions of the federal constitution. Id. at 61-62. This Court implicitly recognized that unprincipled reliance on the state constitution when

repudiating federal precedent threatens to undermine the credibility of the Court. Id. at 60 (noting criticisms of such decisions generally as “result oriented,” “constitution shopping,” courts as “superlegislatures,” and “all sail no anchor” (citations omitted)). This Court also wanted lawyers to be able to predict the direction of the law. Id. It wanted to guide briefing on independent state constitutional grounds. Id. at 62. And, it sought to insure that its decisions were made “for well founded legal reasons and not by merely substituting [its] notion of justice for that of duly elected legislative bodies or the United States Supreme Court.” Id. at 62-63.

In light of these goals, this Court in Gunwall established six factors to ensure principled determinations of whether the state constitution affords broader protections than its federal counterpart. These factors are: 1) the textual language of the state constitution; 2) significant differences in the texts of the parallel provisions of the two constitutions; 3) state constitutional and common-law history; 4) preexisting state law; 5) differences in structure between the federal and state constitutions; and 6) whether the subject matter of the particular provision presents a matter of particular state interest or concern. Id. at 61-62.

As to the particular issue raised here – whether Article I, Section 9 is co-extensive with the Fifth Amendment – this Court has so consistently answered “yes” that no formal Gunwall analysis is required. Still,

application of the six factors only confirms the correctness of this Court's many earlier holdings.

1. THIS COURT HAS UNIFORMLY HELD THAT ARTICLE I, SECTION 9 PROVIDES THE SAME PROTECTIONS AS THE FIFTH AMENDMENT.

This Court has examined on at least thirteen occasions whether the protections provided by Article I, Section 9 are broader than those provided by the Fifth Amendment. Each time, this Court has concluded that the protections are the same. Seven cases were decided before Gunwall. In State v. Miles, this Court held that the rights guaranteed by the parallel provisions are identical. 29 Wn.2d 921, 926, 190 P.2d 740 (1948). Over the next forty years, this Court adhered to this position every time it was asked to reconsider the issue.¹

After this Court provided the Gunwall framework for analyzing whether a state constitutional provision provides greater protection than its federal counterpart, this Court continued to conclude that the rights protected by Article I, Section 9 and the Fifth Amendment are the same.²

¹ See State v. James, 36 Wn.2d 882, 897, 221 P.2d 482 (1950); State v. Moore, 79 Wn.2d 51, 57, 483 P.2d 630 (1971) ("The Washington constitutional provision against self-incrimination envisions the same guarantee as that provided in the federal constitution. There is no compelling justification for its expansion."); State v. Mecca Twin Theater & Film Exch., Inc., 82 Wn.2d 87, 91, 507 P.2d 1165 (1973); State v. Foster, 91 Wn.2d 466, 473, 589 P.2d 789 (1979); Dutil v. State, 93 Wn.2d 84, 87-89, 606 P.2d 269 (1980); State v. Franco, 96 Wn.2d 816, 829, 639 P.2d 1320 (1982).

² See State v. Earls, 116 Wn.2d 364, 374-78, 805 P.2d 211 (1991) (engaging in at least a partial Gunwall analysis despite concluding that "resort to the Gunwall analysis is unnecessary because this court has already held that the protection of article 1, section 9

In short, every Washington court to consider the question – whether applying the Gunwall factors, pre-Gunwall analysis, or simply principles of stare decisis – has concluded that Article I, Section 9 and the Fifth Amendment provide identical protections. An examination of the six Gunwall factors demonstrates that these conclusions were correct.

2. A GUNWALL ANALYSIS DOES NOT PROVIDE A PRINCIPLED BASIS FOR AN INDEPENDENT INTERPRETATION OF THE WASHINGTON CONSTITUTION.

- a. The Text Of The Washington And United States Constitutions.

The first two Gunwall factors require an examination and comparison of the parallel provisions of the state and federal constitutions. Article I, Section 9 of the Washington Constitution provides that an accused shall not “be compelled in any criminal case to give evidence against himself.” The Fifth Amendment of the U.S. Constitution provides that an accused shall not “be compelled in any criminal case to be a witness against himself.” The only difference is that the Fifth Amendment uses the language “be a witness” where the Washington Constitution uses

is co-extensive with, not broader than, the protection of the Fifth Amendment”); State v. Russell, 125 Wn.2d 24, 57-62, 882 P.2d 747 (1994) (concluding after a full Gunwall analysis that Article I, Section 9 provides no greater protection than its federal counterpart); In re Ecklund, 139 Wn.2d 166, 172 n.6, 985 P.2d 342 (1999) (citing pre-Gunwall cases); State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996) (citing Earls); State v. Templeton, 148 Wn.2d 193, 207-08, 59 P.3d 632 (2002) (citing pre-Gunwall cases); State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008) (citing Earls).

the language “give evidence.” This textual difference is insignificant. A “witness” is one “whose declaration under oath (or affirmation) is received as evidence for any purpose.” BLACK’S LAW DICTIONARY 1603 (6th ed. 1990). Moreover, the Supreme Court has never limited the meaning of “be a witness” for these purposes to one who testifies. Rather, the Fifth Amendment prohibits the use of a defendant’s involuntary statements against him. United States v. Washington, 431 U.S. 181, 186-87, 97 S. Ct. 1814, 52 L. Ed. 2d 238 (1977). Where only testimonial evidence is at issue, there is no justification for reading Article I, Section 9 more broadly than its federal counterpart. Earls, 116 Wn.2d at 378.

Further, “[t]his court has already held that this difference in language is without meaning.” Russell, 125 Wn.2d at 59 (citing Moore, 79 Wn.2d at 55-57, and Earls, 116 Wn.2d at 376). Indeed, this Court has concluded that the two constitutional provisions have an identical purpose: “to prohibit the compelling of self-incriminating testimony from a party or witness.” Russell, 125 Wn.2d at 59. Accordingly, there is no significant difference between the language of the parallel provisions of the Washington and U.S. Constitutions.³ Taken together, the first two Gunwall factors do not support an independent state interpretation.

³ Even if this Court were to determine that the state provision was materially different from the language of the federal constitution, that alone is insufficient for this Court to

b. State Constitutional And Common-Law History.

The third Gunwall factor examines whether state constitutional history reflects an intent for the Washington Constitution to confer greater protection than that afforded by the federal constitution. The language of Article I, Section 9 was adopted with no change from the originally proposed language.⁴ There was no reported debate regarding its provisions. It appears to have been modeled on the constitutions of both the United States and Oregon.⁵ Arthur S. Beardsley, SOURCES OF THE WASHINGTON CONSTITUTION (1939), reprinted in STATE OF WASHINGTON 2011-2012 LEGISLATIVE MANUAL 390. The lack of support in the

interpret the Washington Constitution differently from the federal constitution. State v. Foster, 135 Wn.2d 441, 459, 957 P.2d 712 (1998).

⁴ THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 at 498 (Beverly P. Rosenow ed. 1962, reprint 1999). A proposal to change the language to “No person shall . . . be compelled in any criminal prosecution to testify against himself” was rejected. Id. This proposed change would have made this clause identical to Oregon’s parallel provision. See ORE. CONST. art. I, § 12.

⁵ To the extent that Article I, Section 9 was based on the Oregon Constitution – and it appears impossible to tell from which constitution the relevant clause was specifically drawn – there does not appear to be any evidence that the framers of either state constitution intended any different result than that reached under the federal constitution. Russell, 125 Wn.2d at 60. Moreover, this Court has previously expressed its opinion as to the origin of Article I, Section 9:

Candidly speaking, it is most unlikely that those who drafted our constitution, and the people who adopted it, greatly concerned themselves with the constitutional provision under discussion, or had any clear or fixed idea of its technical meaning. It is more likely that the provision was inserted in Article 1, entitled “Bill of Rights,” [sic] because it was in the Federal bill of rights and had been included in the constitutions of practically all of the states that had theretofore entered the Union.

State v. Gocken, 127 Wn.2d 95, 103, 896 P.2d 1267 (1995) (quoting State v. Brunn, 22 Wn.2d 120, 139, 154 P.2d 826 (1945) (discussing double jeopardy)) (alteration in Gocken).

constitutional history for reading the Washington Constitution as providing greater protection than its federal counterpart was explicitly recognized in Russell. 125 Wn.2d at 59-60. Thus, the constitutional history does not reflect an intention on the part of the framers to provide greater protection than the federal constitution.

c. Pre-Existing State Law.

The fourth Gunwall factor examines pre-existing state law, particularly the law that existed at the time of the adoption of the constitution. State v. Smith, 150 Wn.2d 135, 152-54, 75 P.3d 934 (2003) (noting that laws not enacted until after the constitution was adopted could not have influenced the framers' intent). Reference to the law in existence at the time of the adoption of the state constitution in 1889 and shortly thereafter does not demonstrate an intent that our constitution provide greater protection than the federal constitution with respect to a criminal defendant's privilege against self-incrimination.

Prior to 1889, Washington law made no special provision for the right to remain silent. The Act of Congress that established the territorial government of Washington made no reference to individual rights. Organic Act 1853. When Washington's territorial government established by that Act adopted its first legislation with respect to the rights of persons accused of criminal offenses, no provision was made for the privilege

against self-incrimination. Wash. Terr. Laws of 1854, §§ 1-10, at 75-77. Rights to confront witnesses face to face, to a speedy and public trial, against double jeopardy, and many others were explicitly adopted in the first legislative session; the right not to incriminate oneself was not among them. Id. The first session of the new Washington legislature, meeting after the admission of Washington to statehood in 1889, also did not codify a privilege against self-incrimination independent of the constitutional provisions. Laws of 1889-90.

In the statutes relating to evidence and witnesses, the legislature provided that confessions of defendants were admissible:

The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony.

Wash. Terr. Laws of 1854, § 96, at 117. In 1871, the legislature adopted a law permitting a defendant to offer himself as a witness in his own behalf.

Wash. Terr. Laws of 1871, §§ 1-2, at 105. That law provided that if a defendant testified, he was subject to all the rules of cross-examination applicable to other witnesses. Id. It also clarified that a criminal defendant was not required to testify, and that the jury should be instructed that it could not infer guilt from the defendant's refusal to testify. Id.

These laws continue in force today with little change from their original language. See RCW 10.58.030, 10.52.040. Nothing in them suggests that the right to remain silent was intended to be broader than the parallel federal guarantee, and this Court has never held otherwise.

Washington case law on the subject also does not support a broader reading of the state constitution. To the contrary, our courts have been more parsimonious than the Supreme Court in defining the scope of the privilege against self-incrimination. For example, three years before Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), mandated that police advise arrestees of their constitutional rights prior to questioning, this Court affirmed the admission of a defendant's confession obtained during a custodial interrogation even though the defendant had not been advised that "she was under arrest; that she did not have to make a statement; that anything she said might be used against her; and that she had a right to consult a lawyer." State v. Moore, 61 Wn.2d 165, 169, 377 P.2d 456 (1963); see also State v. Brownlow, 89 Wash. 582, 582-83, 154 P. 1099 (1916) (same). Indeed, this Court has never even held that the Miranda warnings are required by our constitution.⁶ Russell, 125 Wn.2d at 61-62.

⁶ As late as 1951, this Court held that the Washington Constitution had nothing to offer on the topic of the admissibility of confessions at all. State v. Winters, 39 Wn.2d 545, 549-50, 236 P.2d 1038 (1951).

Similarly, this Court examined the question of whether an individual can waive the right to counsel during an interrogation after the right had already been asserted. State v. Pierce, 94 Wn.2d 345, 352, 618 P.2d 62 (1980). This Court concluded that

the police may question a suspect who has once cut off questioning by requesting an attorney as long as (1) the right to cut off questioning was scrupulously honored, (2) the police engaged in no further words or actions amounting to interrogation before obtaining a valid waiver or assuring the presence of an attorney, (3) the police engaged in no tactics which tended to coerce the suspect to change his mind, and (4) the subsequent waiver was knowing and voluntary.

Id. The very next year, however, the Supreme Court held otherwise, providing broader protection under the Fifth Amendment by concluding that, once "having expressed his desire to deal with the police only through counsel, [a suspect] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

Piatnitsky may argue that State v. Robtoy, 98 Wn.2d 30, 40, 653 P.2d 284 (1982), is an example of this Court granting broader protection than the federal courts. This is incorrect. In Robtoy, this Court addressed the question of how, under the Fifth Amendment, police must respond

when faced with an equivocal invocation of the right to counsel. Id. at 38. After examining Miranda, Edwards, Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), and other federal cases, this Court followed the Fifth Circuit and concluded that police must end questioning about the offense and confine any further questioning to clarifying the suspect's wishes regarding his rights. Id. at 38-40. Twelve years later, the Supreme Court addressed the same question and reached a different conclusion. It held that only an unequivocal waiver of the right to silence or counsel required the police to cease their interrogation. Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

The more protective result reached by this Court was not compelled by the Washington Constitution; indeed, the Robtoy Court was not construing the Washington Constitution at all, but rather the Fifth Amendment. Robtoy, supra; State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008). Because Robtoy interpreted only the federal constitution, it does not support an independent interpretation of our state constitution. State v. Ortiz, 119 Wn.2d 294, 304, 831 P.2d 1060 (1992).

Finally, as discussed in section C.1, supra, this Court has consistently held since at least 1948 that the rights protected by Article I, Section 9 and the Fifth Amendment are identical. This longstanding rejection of any difference in the interpretation of the two provisions is a

component of pre-existing state law that forecloses a different interpretation of the Washington Constitution in the present context.

In short, neither the law existing prior to adoption of the Washington Constitution nor any law since reveals any basis to read Article I, Section 9 of the state constitution more broadly than its federal counterpart. They do not provide a principled basis upon which to independently interpret our state constitution.

d. Differences In Structure Between The Federal And State Constitutions.

The fifth Gunwall criterion directs a reviewing court to examine the differences in structure between the Washington and federal constitutions. The U.S. Constitution is a grant of limited power to the federal government, while the state constitution limits the otherwise plenary power of the state. Ortiz, 119 Wn.2d at 320. This difference in structure generally supports an independent state constitutional analysis in every case. Id. Analysis of this factor does not shed any light on whether the state constitution is more protective than the federal constitution except in the most general sense.

e. Particular State Interest Or Local Concern.

The final Gunwall factor examines whether the constitutional provision at issue addresses an area of particular state interest or local

concern. Washington's interest in protecting an accused's privilege against self-incrimination is not substantially different than the national interest in protecting that privilege. Although criminal law generally involves local rather than national concerns, Earls, 116 Wn.2d at 396-97 (Utter, J., dissenting), there is nothing uniquely Washingtonian about the right to remain silent.

On balance, although the language of the state and federal constitutions is marginally different, the Gunwall factors do not provide a principled basis for interpreting the Washington Constitution as more protective of the right to remain silent than its federal counterpart. Accordingly, this Court should hold that the rights protected are the same.

Moreover, the Supreme Court's decision on how law enforcement must respond when faced with an ambiguous comment about a suspect's rights strikes a reasonable balance between an accused's rights and society's interest in protecting the community from crime. Davis, 512 U.S. 452. First, the protections provided by Miranda are not constitutionally compelled, but are a prophylactic rule adopted by the Supreme Court to protect the right against self-incrimination. Id. at 457. The requirement that the police immediately cease questioning when a suspect unequivocally invokes his rights is similarly not constitutionally compelled; it is a second layer of protection against police badgering a

suspect into waiving his rights. Id. at 458. A third layer of protection is neither constitutionally compelled nor needed.

Second, permitting police to continue questioning absent an unequivocal invocation avoids “difficulties of proof and . . . provide[s] guidance to officers conducting interrogations.” Id. at 458-59. After all, it is generally clear to everyone when an unequivocal invocation of rights has been made, but when a comment is ambiguous, the suspect’s intent is – by definition – unclear. A detective will never really know when he may question or when he must stop. An additional layer of ambiguity also exists, as an officer will not know what level of “clarification” is required to resume questioning. Compare Davis, 512 U.S. at 461.

Third, allowing police to continue questioning when faced with an ambiguous statement respects our community’s need for effective law enforcement. Suppressing a voluntary confession because a police officer did not clarify a suspect’s equivocal statement unduly burdens society’s interest in holding criminals accountable for their conduct. Id. at 461; Berghuis v. Thompkins, ___ U.S. ___, 130 S. Ct. 2250, 2260, 176 L. Ed. 2d 1098 (2010).

In sum, the Gunwall analysis on this constitutional question shows that there is no difference between Article I, Section 9 and the Fifth Amendment. The protections afforded by the Fifth Amendment are

consistent with – and sometimes more protective than – state statutes and this Court’s decisions. Any additional protections may, of course, be provided by the legislature, and the needs of law enforcement and the protection of citizens can be balanced in that forum.

D. CONCLUSION

For all of the foregoing reasons, this Court should adhere to its prior decisions and conclude that Article I, Section 9 of the Washington Constitution provides the same protections as the Fifth Amendment of the United States Constitution.

DATED this 22nd day of April, 2013.

Respectfully submitted,

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila J. Silverstein, the attorney for the petitioner, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Special Supplemental Brief of Respondent State of Washington, in STATE V. SAMUEL PIATNITSKY, Cause No. 87904-4, in the Supreme Court, for the State of Washington.

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Please accept for filing the attached documents (Supplemental Brief of Respondent and Special Supplemental Brief of Respondent) in State of Washington v. Samuel Piatnitsky, No. 87904-4.

Thank you.

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