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SUPREME COURT
STATE OF WASHINGTON

NO. 2008 JUN 13 A 10-56
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BY RONALD R. CARPENTER

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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES DANIEL RADCLIFFE,

Petitioner.

COURT OF APPEALS No. 34447-5-II

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 04-1-02111-5

HONORABLE RICHARD D. HICKS and
HONORABLE JUDGE WM. THOMAS MCPHEE, Judges

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF

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A. STATEMENT OF THE CASE

In the present case on review to this court, an *Amicus Curiae* Brief has been filed on behalf of the American Civil Liberties Union. This brief of the Respondent, State of Washington, is in answer to that *Amicus Curiae* brief. A Supplemental Brief addressing issues raised by the Petitioner has previously been filed by the Respondent in this court. The Statement of the Case detailed in that Supplemental Brief is incorporated herein by reference.

B. ARGUMENT

1. Article I, Section 9 of the Washington State Constitution should not be applied differently from the Fifth Amendment to the United State Constitution in the context of a criminal suspect's equivocal reference to his right to an attorney.

In the Supplemental Brief of Petitioner, filed with this court by the defendant after review was granted and after the State had filed its Supplemental Brief, the defendant argued for

the first time that the requirements of Article I, Section 9 of the Washington State Constitution should be interpreted differently from those of the Fifth Amendment to the United States Constitution in the context of a criminal suspect's equivocal reference to the right to an attorney during police interrogation. The United States Supreme Court has held that questioning may continue in the face of a suspect's equivocal reference to the right to counsel until a clear request for the assistance of counsel has been made, once the suspect has been fully advised of the Miranda warnings and the suspect has then waived his Miranda rights. Davis v. United States, 512 U.S. 452, 461-462, 114 S. Ct. 2350, 129 L.Ed.2d 362 (1994). However, the defendant argues that Article I, Section 9 should be interpreted to require instead that a police officer cease questioning in the face of a suspect's equivocal reference to counsel until there is clarification of whether the suspect wishes the assistance of counsel. That latter

rule was the holding of this court in State v. Robtoy, 98 Wn.2d 30, 38-39, 653 P.2d 284 (1982), but this court based that holding solely on the court's interpretation of what was required by the Fifth Amendment to the United States Constitution, rather than Article I, Section 9 of the Washington State Constitution.

In its *Amicus Curiae* Brief, the American Civil Liberties Union (ACLU) has endorsed the defendant's argument in reference to Article I, Section 9 of this state's constitution, and has urged this court to adopt the defendant's interpretation of the intent of Article I, Section 9 in the context of an equivocal reference to the right to counsel. However, the State contends that the defendant's comparison of the Fifth Amendment to Article I, Section 9 on the basis of the factors set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) has failed to demonstrate any basis for interpreting the state constitutional provision differently from its federal counterpart in the context of an equivocal

reference to the right to counsel. The Washington Supreme Court has consistently interpreted Article I, Section 9, to have the same meaning and intent as the Fifth Amendment. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); State v. Earls, 116 Wn.2d 364, 375-376, 805 P.2d 211 (1991); State v. Foster, 91 Wn.2d 466, 473, 589 P.2d 789 (1979); State v. Mecca Twin Theater & Film Exch., Inc., 82 Wn.2d 87, 507 P.2d 1165 (1973).

This court has set out six factors to consider in comparing a state constitutional provision to a similar provision in the United States Constitution: (1) the textual language of the state constitutional provision; (2) any significant differences between the state constitutional provision and its federal counterpart; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. Gunwall, 106

Wn.2d at 61-62.

The purpose of these factors is two-fold: first, to lend assistance to counsel where briefing might be appropriately directed in cases in which independent state grounds are urged; and second, to help insure that if the court does use independent state grounds in reaching its conclusion it will consider the six factors to the end that the decision shall be based on well founded legal reasons and not by merely substituting its own notion of justice for that of duly elected bodies or the United States Supreme Court. State v. Boland, 115 Wn.2d 571, 575, 800 P.2d 1112 (1990); Gunwall, 106 Wn.2d at 62-63.

When this court has previously made a comparison of a state constitutional provision with the relevant section of the United States Constitution, applying the six Gunwall criteria, the results of that previous analysis should be controlling in a subsequent case comparing the same provisions in a somewhat different context as regards the first, second, third and fifth Gunwall

factors. However, the court should then consider the fourth and sixth factors in the new context presented. State v. Russell, 125 Wn.2d 24, 58, 882 P.2d 747 (1994); Boland, 115 Wn.2d at 576.

In Russell, supra, the Washington Supreme Court addressed the issue of whether physical evidence derived from an un-Mirandized, but voluntary, confession should be suppressed. Russell argued for an independent interpretation of Article I, Section 9 in that context. Russell, 125 Wn.2d at 55-57.

In Russell, this court considered the first two Gunwall factors together. It was noted that Article I, Section 9 provides that "[n]o person shall be compelled in any criminal case to give evidence against himself . . .", while the Fifth Amendment states "nor shall [any person] be compelled in a criminal case to be a witness against himself". The court found that there was no meaningful difference between the phrase "giving evidence" in the state constitution and "being a witness" in the federal constitution, the

purpose of both being to prohibit compelling self-incriminating evidence from a party or witness. Russell, 125 Wn.2d at 59. Thus, these first two Gunwall factors provide no support for Article I, Section 9 having a different interpretation from the Fifth Amendment.

The court in Russell then considered the third factor, state constitutional and common law history. The court noted that Article 1 of the Washington State Constitution was based primarily on language from other state constitutions rather than that used in the federal constitution. However, the court further found there was no evidence suggesting that the framers of these other state constitutions had intended to enact a state provision differing in intent from the U.S. Constitution's Fifth Amendment, and therefore this factor also gives no support for a differing interpretation of Article I, Section 9. Russell, 125 Wn.2d at 59-60.

The court's analysis of the fifth Gunwall factor, structural differences of the state and

federal constitutions, noted that the state constitution limits the power of state governments while the federal constitution grants power to the federal government, and that this difference will favor an independent state interpretation in every Gunwall analysis, regardless of language and context. Russell, 125 Wn.2d at 61. It is clear that the Washington Supreme Court has generally found that Article I, Section 9 should not be given a different interpretation from the Fifth Amendment, and so this fifth factor provides no meaningful basis to differentiate this context from those others the court has considered.

The fourth Gunwall factor concerns preexisting state law. Longstanding state laws which reflect a strong concern for protecting certain rights of citizens beyond the protections of the federal constitution can constitute evidence of a different intent behind the relevant state constitutional provision. Gunwall, 106 Wn.2d at 61-62.

It may be argued that State v. Robtoy, supra,

and the later decisions of the Washington Appellate Court which have relied upon the holding in Robtoy constitute such preexisting state law. However, Robtoy and those cases following Robtoy have been based upon federal constitutional law. As noted above, the court's decision in Robtoy was an interpretation of the Fifth Amendment, relying upon a decision of the United States Court of Appeals, Fifth Circuit, at a time when the United States Supreme Court had not yet addressed the Fifth Amendment's requirements in the context of a criminal suspect's equivocal reference to the right to counsel. In Robtoy, the Washington Supreme Court was essentially attempting to further refine the rules applicable to the waiver of counsel which had been authorized in Miranda v. Arizona, 384 U.S. 436, 475, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). Therefore, this line of cases cannot constitute evidence of distinctive state concerns with regard to an equivocal reference to counsel.

In State v. Russell, supra, this court found

that state cases interpreting requirements derived from Miranda v. Arizona were decisions based on federal law and could not constitute support for interpreting Article I, Section 9 in a manner different from the Fifth Amendment. Russell, 125 Wn.2d at 60-61. The same conclusion should logically apply to Robtoy and other Washington cases following Robtoy.

A more significant consideration is that this court has time and again been called upon to find that Article I, Section 9 of the state constitution differs in intent or scope from the Fifth Amendment, and this court has consistently rejected such arguments. As early as 1971, in State v. Moore, 79 Wn.2d 51, 57, 483 P.2d 630 (1971), the following was stated concerning Article I, Section 9:

. . . 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.

Moore, 79 Wn.2d at 57. This longstanding rejection of any difference in the interpretation

of Article I, Section 9 from that of the Fifth Amendment is an aspect of preexisting state law that speaks against any different interpretation of Article I, Section 9 in the present context.

The sixth Gunwall factor refers to matters of particular state interest or local concern. The defendant claims that this factor strongly supports an independent interpretation of the intent of Article I, Section 9 because this court adopted the exclusionary rule in Washington long before it was required under the federal constitution. However, this is an apples and oranges argument that begs the real question.

No one in this case is suggesting that the exclusionary rule should not be applied when law enforcement has acted in violation of a protected right. The issue here concerns the nature of law enforcement's responsibility under the state constitution when a criminal suspect makes an equivocal reference to the right to counsel. When a law enforcement officer acts in conformity with constitutional requirements, the exclusionary rule

has no application. Therefore, it hardly sheds light on the real issue here to say that Washington has long favored the use of the exclusionary rule.

As noted by this court in State v. Russell, supra, the particular exclusionary rule the defendant seeks to extend under an expanded interpretation of Article I, Section 9, is actually an exclusionary rule derived from a federal case, Miranda v. Arizona, interpreting the federal constitution. Russell, 125 Wn.2d at 61-62. The facts of the present case involve a suspect who was informed of his Miranda warnings, who confirmed his understanding of those warnings, who chose to waive his Miranda rights, and who then made an equivocal reference to his right to counsel. How Miranda should be applied to that context cannot reasonably be viewed as a matter of particular Washington state interest, as opposed to being a national issue. Russell, 125 Wn.2d at 62.

Considering the analysis set forth above, a

disciplined Gunwall analysis that looks to well founded legal reasons as the basis for interpreting the state constitution can only lead to the conclusion that Article I, Section 9 of the Washington State Constitution should be given the same interpretation as the Fifth Amendment in the context of an equivocal reference to counsel. Consequently, Davis v. United States, supra, is controlling in the present case.

2. The appellate courts of other states have overwhelmingly followed the rule adopted by the United States Supreme Court in *Davis v. United States* allowing a police officer to question a suspect until an unequivocal request for counsel is made, after a full advisement of *Miranda* rights and a waiver of those rights by the suspect.

In the Brief of *Amicus Curiae*, this court is urged to look to decisions of appellate courts in other states in determining whether to follow the rule set forth in Davis v. United States, 512 U.S. 452, 461, 114 S. Ct. 2350, 129 L.Ed.2d 362 (1994), allowing a police officer to continue questioning a suspect until that suspect has made an unequivocal request for counsel, provided the

suspect was previously fully informed of his Miranda rights and chose to freely and voluntarily waive them. However, the Brief of *Amicus Curiae* discusses only one case in which the highest appellate court of another state has chosen to interpret that state's constitution as requiring a different rule than the one adopted in Davis, supra. State v. Hoey, 77 Hawai'I 17, 36, 881 P.2d 504 (1994).

The Brief of *Amicus Curiae* also refers to one decision of the Florida Court of Appeals in which that court refused to follow the lead of the United States Supreme Court in Davis. Deck v. State, 653 So.2d 435 (Fla. App. 5th Dist. 1995). However, *Amicus* ACLU fails to note that the decision cited was specifically overruled by the Florida Supreme Court in 1998. State v. Deck, 705 So.2d 566 (Florida Sup. Ct. 1998). Subsequent to the Florida Court of Appeals decision in Deck v. State, supra, the Florida Supreme Court had decided State v. Owen, 696 So.2d 715 (Florida Sup. Ct. 1997). In Owen, the Florida court relied upon

Davis v. United States, supra, in ruling that a police interviewer need not stop to clarify the suspect's intent when an equivocal reference is made to a Miranda right. Owen, 696 So.2d at 718-719. Thus, a year later, the Florida Supreme Court relied upon Owen in overruling the Court of Appeals decision in Deck v. State.

The fact is that the appellate courts of other states have overwhelmingly followed the rule enunciated by the United States Supreme Court in Davis v. United States with regard to an equivocal reference to the right to counsel or other Miranda right. Ex parte Cothren, 705 So.2d 861, 866-867 (Alabama Sup. Ct. 1997); State v. Ellison, 213 Ariz. 116, 127, 140 P.3d 899 (Arizona Sup. Ct. 2006); Holsombach v. State, 368 Ark. 415, 421-422, 246 S.W.3d 871 (Arkansas Sup. Ct. 2007); People v. Stitely, 35 Cal.4th 514, 534-536, 108 P.3d 182 (California Sup. Ct. 2005); People v. Adkins, 113 P.3d 788, 791-792 (Colorado Sup. Ct. 2005); State v. Anonymous, 240 Conn. 708, 721-722, 694 A.2d 766 (Conneticut Sup. Ct. 1997); Perez v. State, 283

Ga. 196, 198-200, 657 S.E.2d 846 (Georgia Sup. Ct. 2008); State v. Doe, 137 Idaho 519, 50 P.3d 1014 (Idaho Sup. Ct. 2002); People v. Christopher K, 217 Ill.2d 348, 378-380, 841 N.E.2d 945 (Illinois Sup. Ct. 2005); Bailey v. State, 763 N.E.2d 998, 1003 (Indiana Sup. Ct. 2002); State v. Harris, 741 N.W.2d 1, 6 (Iowa Sup. Ct. 2007); State v. Hullum, 273 Kan. 282, 287-289, 43 P.3d 806 (Kansas Sup. Ct. 2002); Ragland v. Commonwealth, 191 S.W.3d 569, 586 (Kentucky Sup. Ct. 2006); State v. Payne, 833 So.2d 927, 937 (Louisiana Sup. Ct. 2002); State v. Nielsen, 946 A.2d 382, 386-387, (Sup. Judicial Ct. of Maine 2008); Commonwealth v. Jones, 439 Mass. 249, 258, 786 N.E.2d 1197 (Sup. Judicial Ct. of Massachusetts 2003); State v. Farrah, 735 N.W.2d 336, 342 (Minnesota Sup. Ct. 2007); State v. Maestas, 332 Mont. 140, 145-146, 136 P.3d 514 (Montana Sup. Ct. 2006); State v. Mata, 266 Neb. 668, 683-684, 668 N.W.2d 448 (Nebraska Sup. Ct. 2003); Harte v. State, 116 Nev. 1054, 1065-1067, 13 P.3d 420 (Nevada Sup. Ct. 2000); State v. Barrera, 130 N.M. 227, 235-236, 22

P.3d 1177 (New Mexico Sup. Ct. 2001); People v. Lopez, 3 A.D.3d 455, 456, 770 N.Y.S.2d 854 (New York Sup. Ct., App. Div., 1st Dept. 2004); State v. Boggess, 358 N.C. 676, 687, 600 S.E.2d 453 (North Carolina Sup. Ct. 2004); State v. Greybull, 579 N.W.2d 161, 162-164 (North Dakota Sup. Ct. 1998); State v. Jackson, 107 Ohio St.3d 300, 309-310, 839 N.E.2d 362 (Ohio Sup. Ct. 2006); McHarn v. State, 126 P.3d 662, 671-672 (Oklahoma Ct. of Crim. App. 2005); State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284 (South Carolina Sup. Ct. 2001); State v. Saylor, 117 S.W.2d 239, 244-246 (Tennessee Sup. Ct. 2003); State v. Leyva, 951 P.2d 738, 743-744 (Utah Sup. Ct. 1998); Commonwealth v. Hilliard, 270 Va. 42, 49, 613 S.E.2d 579 (Virginia Sup. Ct. 2005); State v. Jennings, 252 Wis.2d 228, 232-234, 647 N.W.2d 142 (Wisconsin Sup. Ct. 2002); Hadden v. State, 42 P.3d 495, 503-504 (Wyoming Sup. Ct. 2002). Thus, appellate decisions in other states provide strong support for the approach taken by the United States Supreme Court in Davis v. United States.

3. Even under the rule of *State v. Robtoy*, the response of Detective Miller to the defendant's equivocal reference to counsel was appropriate as a clarification of the defendant's wishes before proceeding with the interview.

In the Brief of *Amicus Curiae*, the response of Detective Miller to the defendant's equivocal reference to counsel is characterized as demonstrating the need for the clarification rule enunciated in *State v. Robtoy*, supra. In *Robtoy*, this court held that in response to a suspect's equivocal reference to his right to counsel, the interviewing officer must thereupon limit his questions to clarifying that request until it is clarified. *Robtoy*, 98 Wn.2d at 39.

However, the fact is that Detective Miller did not simply continue the interrogation in response to the defendant's equivocal statement regarding counsel. Instead, Miller stopped his interview and cautioned the defendant that he could not give the defendant legal advice. Miller asked the defendant if he wanted Miller to read the Miranda rights to him again. 10-3-05 Hearing

RP 99-100; Finding of Fact No. 9 in CP 158-162. This offer by Miller was obviously intended to assist the defendant in making up his mind about counsel.

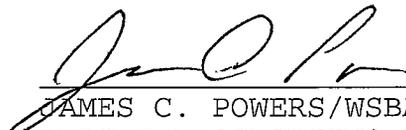
The defendant responded that he already understood his rights. That statement reasonably communicated to Miller that the defendant had the information he needed to make an informed decision on whether to seek the assistance of counsel. Therefore, Miller told the defendant that the ball was in his court. Amicus ACLU describes this statement as "forcing the issue". That characterization is absurd. Rather, the statement empowered the defendant by letting the defendant know that it was the defendant's decision to make, not that of anyone else.

At that point, Miller still did not attempt to resume the interview. Rather, he simply informed the defendant of his options to provide a taped statement, a written statement, or an oral statement. The defendant had already asserted his understanding of his rights, which included his

ability to exercise his right to counsel at any time. Thus, when the defendant responded that he would tell Miller about it, the detective could reasonably conclude that the defendant had made a knowing and voluntary choice to go forward with the interview. At that point, Miller had received the clarification Robtoy would require before proceeding. Therefore, Miller's actions, far from being an egregious attempt to coerce the defendant as *Amicus* would have this court believe, in fact should be found to have been lawful and appropriate whether the analysis applied is pursuant to Robtoy, supra, or according to Davis v. United States, supra.

DATED this 17th day of June, 2008:

Respectfully submitted,



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