No. 80588-1

SUPREME COURT OF THE STATE OF WASHINGTON

City of Woodinville,

Plaintiff/Respondent,

v.

Northshore United Church of Christ and SHARE/WHEEL,

Defendants/Petitioners

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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IDENTITY AND INTEREST OF AMICUS

The ACLU of Washington is a state-wide, non-profit, non-partisan organization with over 20,000 members dedicated to the defense of civil liberties. The ACLU has frequently appeared before this Court to ensure that the state constitution, and particularly its Declaration of Rights, is interpreted in a way that best safeguards the freedom of Washingtonians.

The ACLU takes no position on the merits of the underlying dispute. Instead, this brief examines the propriety of rejecting a state constitutional argument solely for lack of a Gunwall analysis in an appellate brief. Amicus submits that a party's failure to adhere to a rigid template of Gunwall factors is not, by itself, a valid basis to deny a state constitutional claim or defense.

BACKGROUND

Significant confusion has arisen as to when state constitutional claims will be rejected for a party's failure to conform its briefing to the factors used by the Court in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). This case presents a clear example of the problem and highlights the need for a comprehensive solution.

In its land use dispute with the City of Woodinville, Petitioner Northshore United Church of Christ (NUCC) had a colorable defense under the free exercise guarantee of Art. I, § 11 of the state constitution,

which has been conclusively interpreted, in a line of cases involving church challenges to land use regulations. to require an analysis independent of the federal religion clauses.[1] NUCC pleaded Art. I, § 11 in its answer; received a decision on the merits from the trial court: asserted Art. I, § 11 again in its appellate brief; supported it by citation to the relevant state cases; and even included a footnote with a citation explaining why Gunwall analysis was unnecessary. Yet the Court of Appeals refused to reach the merits because NUCC did not structure its brief to separately identify and discuss the Gunwall factors. City of Woodinville v. Northshore United Church of Christ, 139 Wn.App. 639, 654, 162 P.3d 427 (2007).

DISCUSSION

This case calls for clear guidance from this Court as to whether Gunwall briefing is required to preserve a state constitutional argument on appeal. As explained below, a lingering line of cases continues to suggest that otherwise colorable state constitutional arguments should be disregarded if they do not follow a lockstep briefing format. Although this Court has, in practice, moved away from that approach, it has not clearly

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[1] Open Door Baptist Church v. Clark County, 140 Wn.2d 143, 995 P.2d 33 (2000); Munns v. Martin, 131 Wn.2d 192, 930 P.2d 318 (1997); First United Methodist Church v. Hearing Examiner, 129 Wn.2d 238, 916 P.2d 374 (1996); First Covenant Church of Seattle v. City of Seattle, 120 Wn.2d 203, 840 P.2d 174 (1992).

stated to the bar and to lower courts that the older cases are no longer controlling. For the reasons that follow, the ACLU proposes that this Court issue an opinion that makes explicit that the Gunwall factors are a useful interpretive tool, but not mandatory subjects for briefing. Standing alone, a party's failure to write a brief that overtly tracks the Gunwall factors can never be a basis to deny an otherwise adequately briefed state constitutional claim.

A. The History of the Gunwall Factors

Gunwall was premised on two important insights that remain valid: (a) provisions of the state constitution may be interpreted independently from analogous federal provisions, 106 Wn.2d at 59; and (b) the decision to afford an independent interpretation or to follow federal jurisprudence should be a principled one, id. at 63. Without question, the factors identified in Gunwall (text, history, precedent, constitutional structure, and federalism) are valuable guides toward principled interpretation. But Gunwall was never intended to be a hostile gatekeeper preventing Washingtonians from asserting their rights under the state constitution.

1. The Gunwall Factors Were Announced To Settle A Controversy That No Longer Exists

To a large extent, the Gunwall factors were announced in response to a criticism voiced for a brief time in the early 1980s, when some judges questioned whether it could ever be legitimate for a state to interpret its

constitution differently than the US Supreme Court interpreted analogous federal provisions. These critics argued that different outcomes would exist only if the state court was being result-oriented. See generally, Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims and Defenses § 1.03[4]; Robert F. Williams, "In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication," 72 Notre Dame L. Rev. 1015, 1055-63 (1997). That question has long since been answered. Today, no one questions the legitimacy of a state court independently interpreting a state constitution. Id. As lucidly explained by the Vermont Supreme Court:

> [W]e address whether warrantless garbage searches violate Article 11 of the Vermont Constitution because the issue was properly raised, briefed, and presented to us for argument. Our decision is not result-oriented simply because it reaches a result different from the Supreme Court, any more than it would be result-oriented had we reached the same result as the Supreme Court.

State v. Morris, 680 A.2d 90, 101-02 (Vt. 1996).

In Washington, independent interpretation has a lengthy pedigree predating Gunwall. In early statehood, Washington courts routinely decided cases under the Washington constitution without comparing their results against possible federal results. Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 809 n.12, 83 P.3d 419 (2004) ("Grant County II"). As the federal bill of rights was held

applicable to the states beginning in the 1940s, individual rights litigation tended to rely more heavily on federal theories. But consistent with a national trend, Washington courts began in the 1980s to rely increasingly on the state constitution to protect rights left unprotected under federal jurisprudence.[2] Years before Gunwall, this Court said: "it is by now 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) (citations omitted).

At this time, some began to suggest that the longstanding practice of independent state interpretation was somehow improper. In Washington, this was always a minority view expressed in dissenting opinions. E.g. Ringer, 100 Wn.2d at 706 (Dimmick, J., dissenting) (decrying "this sudden leap to the sanctuary of our own state constitution"); White, 97 Wn.2d at 117 (Brachtenbach, J., dissenting); Simpson, 95 Wn.2d at 202 (Horowitz, J., dissenting). The Gunwall criteria arose as a response to this minority view. Gunwall demonstrated

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[2] See e.g., State v. Myrick, 102 Wn.2d 506, 513, 688 P.2d 151 (1984) (open fields doctrine); State v. Coe, 101 Wn.2d 364, 374, 679 P.2d 353 (1984) (prior restraint); State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983) (vehicle search incident to arrest); City of Pasco v. Mace, 98 Wash.2d 87, 97, 653 P.2d 618 (1982) (jury trial for misdemeanors); State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) (stop-and-identify statute). A similar collection of cases is found in Gunwall. 106 Wn.2d at 59 n.3.

conclusively that independent interpretation could be readily justified through reference to neutral and principled criteria. As a result, there could be no accusation that recourse to the state constitution is something that "spring[s] ... from pure intuition." Gunwall, 106 Wn.2d at 63. This history teaches that rigid adherence to Gunwall briefing is no longer necessary, if it ever was, to establish the legitimacy of independent interpretation.

2. The Wrong Turn at Wethered

State v. Wethered, 110 Wn.2d 466, 472, 755 P.2d 797 (1988), introduced the idea that "failing to discuss at a minimum the six criteria mentioned in Gunwall" would result in refusal to consider a state constitutional claim. Wethered began from a familiar premise, namely that an appellate Court is not required to rule on issues where the briefing is cursory. After all, "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). The problem with Wethered was its implication that the lack of a Gunwall analysis means, per se, that a party's brief is cursory. NUCC's brief is a perfect counter-example: it clearly raised a state constitutional defense, cited all the relevant cases in support, and related those cases to its facts. Yet the failure to structure the

brief in a rigid format led the Court of Appeals to rule against NUCC on the issue, regardless of the merits.

The Wethered approach was rightly criticized as needless formalism that "has slowed the development of state constitutional jurisprudence rather than sped it along." Hugh D. Spitzer, "Which Constitution? Eleven Years of *Gunwall* in Washington State," 21 Seattle U. L. Rev. 1187, 1211 (1998). In the 11 years after Gunwall was decided, Wethered-type reasoning was used in this Court to avoid the merits in 57% of the state constitutional claims presented. Id. at 1197. See also, Williams, 72 Notre Dame L. Rev. at 1026-1029. Since these criticisms were published, this Court has greatly curtailed its use of Wethered. In recent practice, this Court almost never rejects state constitutional claims for lack of Gunwall briefing. Hugh D. Spitzer, "New Life for the 'Criteria Tests' in State Constitutional Jurisprudence: *Gunwall* is Dead — Long Live *Gunwall*!" 37 Rutgers L. J. 1169, 1183 (2006). But because this Court has not made a clear statement to that effect, the Wethered approach remains on the books.

3. The Court's Current Standard For Gunwall Briefing Is Unclear

Although this Court has retreated from the formalism of Wethered, it remains hard to predict whether Gunwall briefing will be needed in a given case. For example, State v. Reichenbach, 153 Wn.2d 126, 131 n. 1,

101 P.3d 80 (2004), said that Gunwall briefing was not required "where this court has already determined *in a particular context* the appropriate state constitutional analysis." (emphasis added). Similarly, State v. White, 135 Wn.2d 761, 958 P.2d 982 (1998), said that "a Gunwall analysis is no longer helpful or necessary" once prior case law establishes independent analysis "at least *in the context of the specific legal issue*," and with the proviso that "Gunwall analysis is nevertheless *required* in cases where the legal principles are not *firmly established*." Id. at 769 & n.7 (emphasis added).[3]

Unfortunately, there is no way to predict with confidence whether a reviewing court will agree that two cases involve the same "context" and whether the law in that context is "firmly" established. The Court of Appeals' actions in this case may be traceable to the difficulty of knowing what constitutes a "particular context." For example, with regard to time, place, or manner restrictions on speech, Art. I, § 5 is interpreted independently if the speech occurs in a traditional public forum, Collier v. City of Tacoma, 121 Wn.2d 737, 854 P.2d 1046 (1993), but it follows federal jurisprudence in nonpublic forums and in determining whether a

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[3] If accepted, the proviso would go beyond the Court's practice during the Wethered era. Even then, the Court often overlooked the absence of Gunwall briefing to perform for itself whatever Gunwall analysis it deemed necessary. Spitzer, "Which

forum is public to begin with, City of Seattle v. Mighty Movers, Inc., 152 Wn.2d 343, 96 P.3d 979 (2004). In State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007), a concurrence argued that the plurality should have done more Gunwall analysis because "we have never determined whether Art. I, § 7 is more protective than the Fourth Amendment in the particular context of DNA samples taken from convicted felons." Id. at 86 (Owens, J., concurring).

In recent years, some decisions of this Court have stated that Gunwall briefing is required only once for a given constitutional provision, rather than for each factual context implicated by that provision. E.g., State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003) ("a Gunwall analysis is no longer necessary" for Art. I, § 7). Other decisions have simply discussed state constitutional questions on the merits without any mention of Gunwall — and without any apology for its absence. E.g., State v. Recuenco, No. 74964-7 (April 17, 2008) (Art. I, § 21); York v. Wahkiakum School District, -- Wn.2d --, 178 P.3d 995 (2008) (Art. I, § 7); Ventenbergs v. City of Seattle, -- Wn.2d --, 178 P.3d 960 (2008) (Art. I, § 12). But decisions with this degree of clarity are decided contemporaneously with cases that perpetuate confusion. Only weeks

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Constitution?," 21 Seattle U. L. Rev. at 1207-09. A recent example is Open Door Baptist Church, 140 Wn.2d at 152.

after York and Ventenbergs, but a week before Recuenco, a plurality in McNabb v. Department of Corrections, -- P.3d --, 2008 WL 976782 (2008), said that Gunwall factors are unnecessary if independent interpretation is "settled law," but otherwise the Court will reach state constitutional questions "*only if* the parties brief the six nonexclusive factors set forth" in Gunwall. Id. at ¶ 12 (emphasis added).

Given the many variations expressed to date, the current situation is exemplified by this Delphic description from the plurality in Madison v. State, 161 Wn.2d 85, 93 n.5, 163 P.3d 757 (2007): "It is well settled that a party raising a claim under a state constitutional provision must brief the Gunwall factors to the extent required by this court's jurisprudence."

B. Formal Briefing of the Gunwall Factors Should Never Be Mandatory

As with any judge-made rule, this Court may revisit the requirement to brief the Gunwall factors. The rule should be expressly abandoned, not only because it is frustrating and unworkable, but because it conflicts with the law of this state and does not provide any meaningful benefit to the Court's decision-making.

1. Rejecting Claims For Lack of Gunwall Briefing Conflicts with State Law, the State Constitution, and Gunwall Itself

Gunwall never purported to announce a rigid rule where the style in which a brief is written determines the success or failure of a state

constitutional claim. Instead, the opinion simply said that certain criteria "should be considered." 106 Wn.2d at 58. The factors "are aimed at ... *suggesting* to counsel where briefing might appropriately be directed." Id. at 62 (emphasis added). And as this Court has repeated virtually every time it has discussed them, the factors are "nonexclusive." Id. at 58. There is no requirement that all of the factors, or even a majority of them, lean in a single direction before independent interpretation is afforded. The manner in which the factors interrelate is not fixed. There is inherent tension in the idea of a mandatory recitation of factors that are nonexclusive but will ultimately be balanced by the Court according to no fixed formula.

Nowhere else in the law will a claim fail based solely on how a party structures its briefing on a legal argument. Briefs do not serve the same function as jurisdictionally significant documents like indictments, tort claims, complaints, answers, or notices of appeal. Documents of this sort formally mark that a claim is being asserted. By contrast, Gunwall deals with interpretation of law on the merits after the claim is asserted. The structure of a legal argument in a brief is traditionally left to the good judgment of counsel. A court has a responsibility to make the best legal decision possible, even if the parties' briefs are less than perfect. Ellis v. City of Seattle, 142 Wn.2d 450, 459 n.3, 13 P.3d 1065 (2000) ("any court

is entitled to consult the law in its review of an issue, whether or not a party has cited that law"). Rejecting a potentially meritorious claim because the brief does not follow a rigid formula is an extreme sanction that does not exist anywhere else in our law.

To the contrary, Washington strongly prefers to decide cases on the merits and not on procedural technicalities. Vaughn v. Chung, 119 Wn.2d 273, 280, 830 P.2d 668 (1992). The civil rules were designed to eliminate "procedural traps" that lead to "technical miscarriages of justice." In re Detention of Turay, 139 Wn.2d 379, 390, 986 P.2d 790 (1999). On appeal, the rules "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a).

The preference for decisions on the merits is especially strong with regard to constitutional claims. Trial errors affecting constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3). Constitutional claims can be decided in moot cases, because they involve questions of continuing and substantial public interest. In re Swanson, 115 Wn.2d 21, 24, 793 P.2d 962, 804 P.2d 1 (1990). And of course, Art. I, § 32 reminds Washington courts that "a frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." Art. I, § 29 goes further to declare that "the provisions of this [Washington] constitution are mandatory." Adherence to the

constitution is "mandatory," but "nonexclusive factors" by definition are not. Rigidly requiring Gunwall briefing prevents the recurrence to fundamental principles that the state constitution requires, instead valuing "'magic words' exactitude." Friesen, State Constitutional Law § 1.08[1] at 1-61.

2. A Clear Statement That Gunwall Briefs Are Not Mandatory Will Not Injure Judicial Decision-Making

None of the foregoing implies the Gunwall factors are unwelcome in briefs. Counsel are free to discuss these factors in the manner most germane to the dispute and most helpful to the Court. Indeed, since the Gunwall factors are so elemental (speaking of the building blocks of text, history, and so on), they will typically be useful on the merits, and not solely on the threshold question of whether the state constitution receives independent interpretation. Spitzer, "New Life," 37 Rutgers L. J. at 1184.

When the Gunwall factors are briefed, the discussion is most likely to be useful to the Court if they are not presented in rigid Gunwall order. It is a continuing puzzle for counsel and judges to distinguish Gunwall's first factor (the text of the state constitution) from its second factor (differences between the state and federal texts), so they are routinely collapsed together. E.g., Grant County II, 150 Wn.2d at 806-07; State v. Foster, 135 Wn.2d 441, 459, 957 P.2d 712 (1998). The fifth factor (structural differences) "supports an independent state constitutional

analysis in every case" such that "our consideration of this factor is always the same." Id. at 458. Indeed, in many cases the Court skips the first, second, third, and fifth factors. E.g., State v. Johnson, 128 Wn.2d 431, 445, 909 P.2d 293 (1996).

These recurring statements discouraging counsel from unnecessary Gunwall briefing acknowledge the reality that briefs rigidly structured in a rigid Gunwall framework are often not useful to the Court. Good lawyers try to focus their arguments on those issues that are of greatest importance to the Court's decision, but Gunwall actually inhibits such focus by requiring attention to topics that the Court itself often does not find valuable. In short, the Court will benefit from briefs that read as an organic whole rather than as a laundry list.

Of course, if a party's only state constitutional argument takes the form of "a mere unexplained citation" tacked on as an afterthought, the court "may request counsel either to explain the claim under state law or to abandon it." State v. Kennedy, 666 P.2d 1316, 1321 (Or. 1983). The usual rules apply when determining whether a claim is properly preserved for appeal. But there should not be any rule under which state constitutional arguments are harder to preserve on appeal than other legal arguments.

3. The Experience of Other States Shows That Independent Interpretation Does Not Require A Mandatory Briefing Format

Among states like Washington that use announced criteria to guide independent interpretation, rigid briefing requirements are typically not imposed. Gunwall quoted with approval the New Jersey decision State v. Hunt, 450 A.2d 952 (N.J. 1982), see 106 Wn.2d at 60-61, but amicus could locate no subsequent New Jersey case refusing to consider a claim for failure to recite the Hunt factors. Indeed, no subsequent New Jersey opinion even uses the phrase "Hunt factors." Vermont's State v. Jewett, 500 A.2d 233 (Vt. 1985), was a lengthy opinion instructing counsel how to properly brief a state constitutional claim. Jewett nowhere stated that briefs must follow a format to the letter, and no subsequent Vermont cases have required this.

Given Washington's inconsistent precedent, clarity will best be served here by a statement similar to one made by the Supreme Court of Pennsylvania. That state's counterpart to Gunwall is Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991), but Pennsylvania does not require briefing on the Edmunds factors:

> [I]t is necessary to address the Commonwealth's claim that White has waived his claim that the search of his automobile was illegal under Art. I, § 8 of the Pennsylvania Constitution because he did not set forth his state constitutional claims in the manner required by Commonwealth v. Edmunds. This claim is meritless. White clearly raises a claim under the Pennsylvania Constitution, cites

> cases in support of his claim, and relates the cases to the claim. That is sufficient. In Edmunds, in dicta, this court clearly stressed the importance of briefing and analyzing certain factors in order to aid the courts in reviewing state constitutional issues. While not mandating the analysis, we reaffirm its importance and encourage its use. In other words, Edmunds expresses the idea that it may be helpful to address the concerns listed therein, not that these concerns must be addressed in order for a claim asserted under the Pennsylvania Constitution to be cognizable.

Commonwealth v. White, 669 A.2d 896, 899 (Pa. 1995) (citation omitted). Accord, Commonwealth v. Swinehart, 664 A.2d 957, 961 n.6 (Pa. 1995) ("The failure of a litigant to present his state constitutional arguments in the form set forth in Edmunds does not constitute a fatal defect, although we continue to strongly encourage use of that format").

C. Gunwall Created No Presumption That Federal Interpretations Control

One unwelcome side effect of a rigid view of Gunwall is its implication that the federal interpretation should be the baseline for state interpretation. Gunwall identified factors that "are relevant in determining whether" there would be independent interpretation. 106 Wn.2d at 58, but never created a presumption that the state constitution is identical to the federal constitution unless proven otherwise. Just as the decision to give independent interpretation should be principled and reasoned, so should a decision to give congruent interpretation. There is no burden of persuasion that must be proven in a party's brief, only criteria for the Court to consider.

1. The Federal Structure Encourages State-Level Variation

One major benefit of our Nation's federal structure is that states may act, as Justice Brandeis analogized, as laboratories of democracy. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). So long as a state does not violate the federal constitution, it has the sovereign right to interpret and apply its own constitution as it sees fit. The federal courts do not expect states to yoke their constitutions to federal precedents. To the contrary, a long line US Supreme Court opinions expressly reminds states of their independence. E.g., Danforth v. Minnesota, 128 S.Ct. 1029 (2008) (retroactivity of new rules on habeas); California v. Greenwood, 486 U.S. 35, 43 (1988). (searches of garbage). Federal decisions do not limit a state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (speech at shopping malls). The US Supreme Court does not expect state courts to defer to it regarding state constitutions.

If there is to be any presumption, it should be in favor of independent interpretation. Post-Gunwall decisions have noted that Factor #5 (differences in structure between state and federal constitutions) always leans in favor of independent interpretation. E.g., Foster, 135 Wn.2d at 458. In a case involving the individual rights of citizens, it is significant

that the Washington constitution begins with the declaration of individual rights in Article I, where the federal constitution added a bill of rights only through amendment. James W. Talbot, "Rethinking Civil Liberties Under the Washington State Constitution," 66 Wn. L. Rev. 1099, 1100-01 (1991). And Art. I. § 1 declares that the state government is "established to protect and maintain individual rights," a provision that applies to the state constitution as a whole but has no federal counterpart.

2. Independent Interpretation Does Not Require Explicit Comparison of State and Federal Results

Justice Hans Linde of the Oregon Supreme Court, a leading theorist on state constitutions, once wrote:

> The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand.

Hans A. Linde, "E Pluribus — Constitutional Theory And State Courts," 18 Ga. L. Rev. 165, 179 (1984). Unfortunately, one line of Washington decisions under Gunwall calls for an express comparison of state and federal constitutions, even after independent interpretation is decided.

> If we determine that an independent analysis is warranted, we then analyze "whether the provision in question extends greater protections for the citizens of this state." This second analysis focuses on whether our state constitution provision is more protective of the claimed right in the particular context than is the federal constitution provision, and the scope of that protection. ... The six Gunwall factors parallel interpretive inquiries made when

> determining "whether the state constitution ultimately provides greater protection than its corresponding federal provision."

Madison, 161 Wn.2d at 93 (citations omitted). The call for a "second analysis" is misplaced. If the state constitution is to be interpreted independently, then the second step is simply to decide the state question.

An express comparison between Washington and federal results is counterproductive for a number of reasons. Most importantly, it diverts the Court from the proper inquiry, which is to decide the case. "Simply to say that protection under a state constitution may be more extensive than under the Federal Constitution begs the question of what those protections should and will be." Williams, 72 Notre Dame L. Rev. at 1050. Abstract discussion of which constitution is more protective will often be dicta that does not resolve the dispute. And where the US Supreme Court has not yet decided an issue, comparison to federal results may amount to an advisory opinion. Whether an issue is presented first to this Court or a federal court is a matter of happenstance that should not affect the reasoning or the outcome. Talbot, 66 Wn. L. Rev. at 1109.

Unnecessary comparison between state to federal constitutions places the state constitution "in the shadow of the federal Constitution, [making it] difficult to view the state constitution with a fresh perspective." Talbot, 66 Wn. L. Rev. at 1111. The comparison may mean that Washington's independent meaning "is lost somewhere in the ever-

shifting shadow of the federal courts." State v. Gocken, 127 Wn.2d 95, 111, 896 P.2d 1267 (1995) (Madsen, J., concurring).

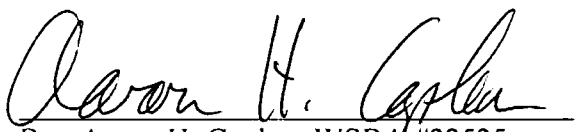
This does not mean US Supreme Court decisions should never be cited or considered. They frequently will be and should be. As with any non-Washington authority, they may be followed if they are persuasive. Kennedy, 666 P.2d at 1321. Results and methods do not have to be different to be independent. Surge, 160 Wn.2d at 71 n.4. The key is to determine whether a given method or result is consistent with this state's controlling texts, history, precedents, structure, and public policy.

CONCLUSION

For these reasons, the Court should clearly announce in its opinion that a state constitutional argument should never be rejected for the sole reason that it was not structured to track the Gunwall factors.

Respectfully submitted this 18th day of April, 2008.

AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON FOUNDATION



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