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State Constitutional Law - Wyoming's Interpretation of Its Right to Silence - Tortolito v. State

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STATE CONSTITUTIONAL LAW—Wyoming's Interpretation of Its Right to Silence. *Tortolito v. State*, 901 P.2d 387 (Wyo. 1995) (replacing *Tortolito v. State*, 885 P.2d 864 (Wyo. 1994) (withdrawn)).

> *[A constitutional] decision without principled justification would be no judicial act at all.*
>
> — *Justices O'Connor, Kennedy, and Souter*[1]

In *Tortolito v. State*,[2] the Wyoming Supreme Court interpreted the right to silence in the Wyoming Constitution as more protective than its federal counterpart. However, the court's interpretation lacks principled justification.

Joseph Steven Tortolito was convicted of robbery following trial in Laramie County District Court.[3] He appealed that conviction to the Wyoming Supreme Court.[4] On appeal, Tortolito argued that the trial court committed reversible error when it allowed prosecutorial comments on his pre-arrest silence.[5] The focus of this casenote is the Wyoming Supreme Court's treatment of Tortolito's argument.

On January 20, 1992, a police officer (Officer P) responded to a call from the Cheyenne bus depot.[6] A minor at the bus depot had complained to a bus driver that Tortolito had robbed him.[7] Before Officer P arrived, the bus driver confronted Tortolito, who, "responded by admitting he had taken the money and stating he wasn't going to give it back."[8]

Officer P questioned Tortolito, but Tortolito remained silent.[9] Following this silence, Officer P and Officer H (another police officer on the scene) searched Tortolito and found $81.[10] The police arrested Tortolito after they discovered the money.[11]

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1. Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2814 (1992).
2. 901 P.2d 387 (Wyo. 1995).
3. *Id.* at 388.
4. *Id.*
5. *Id.* at 388-89.
6. *Id.* at 388; Tortolito v. State, 885 P.2d 864, 867 (Wyo. 1994).
7. *Tortolito*, 885 P.2d at 867.
8. *Id.*
9. *Id.* at 867.
10. *Id.*
11. *Id.*

According to the record, "[d]uring his opening statement, the prosecutor mentioned Tortolito's silence in the face of police accusations. . . ."[12] Defense counsel objected to the prosecutor's statement, but the objection was overruled.[13] During the prosecution's case and over defense counsel's objections, Officer P and Officer H testified that Tortolito was silent during pre-arrest questioning by the officers.[14] Officer H made four comments on Tortolito's silence and Officer P made five.[15] In his closing argument, the prosecutor made a final comment on Tortolito's silence.[16] He told the jury that Tortolito's silence was as good as a confession: "Admissions. All of those admissions. 'Yeah, I took it, and I'm not giving it back.'"[17]

In 1994, the Wyoming Supreme Court rejected Tortolito's appeal. The court ruled that Tortolito's admission to the bus driver created an exception[18] to the general rule that any prosecutorial comment on a defendant's silence is automatically reversible error.[19]

In 1995, Tortolito petitioned the Wyoming Supreme Court for rehearing.[20] The court took the unusual step of granting the rehearing request.[21] On rehearing, the court withdrew its first opinion, reversed Tortolito's conviction,[22] and ruled that a defendant has a self-executing constitutional right to silence that exists at all times.[23] The court also ruled that any prosecutorial comment on a defendant's silence entitles that defendant to an automatic reversal of his or her conviction.[24]

This casenote will examine the lack of principled justification for the state constitutional interpretation in *Tortolito*. It will also examine the implications of the case for practitioners of Wyoming constitutional law.

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12. *Tortolito*, 901 P.2d at 391.
13. *Tortolito*, 885 P.2d at 873.
14. *Id.* at 867-868; *Tortolito*, 901 P.2d at 391.
15. *Tortolito*, 885 P.2d at 874.
16. *Tortolito*, 901 P.2d at 391.
17. *Tortolito*, 885 P.2d at 874 n.2.
18. *Id.* at 870; *See infra* text accompanying note 60.
19. *Id.*; *See infra* text accompanying note 45.
20. *Tortolito*, 901 P.2d at 389; WYO. R. APP. P. 9.07(a).
21. *Id.*
22. *Tortolito*, 901 P.2d at 388.
23. *Id.* at 390.
24. *Id.*

BACKGROUND

A. Federal Law

The United States Supreme Court has not ruled on the issue of whether prosecutors may comment on a defendant's pre-arrest silence to imply an admission of guilt. Also, the Supreme Court has not decided whether witnesses may testify about a defendant's silence if that testimony suggests an admission of guilt by the defendant.[25]

The Federal Circuit Courts of Appeal are split on the issue.[26] The Eleventh Circuit allows prosecutorial comments on a defendant's pre-arrest silence to imply an admission of guilt.[27] Alternatively, the First,[28] Second,[29] Seventh,[30] and Tenth Circuits[31] have held that such prosecutorial comments are improper. The First Circuit found that the prosecutor's improper statement "may have been the clincher" and reversed the defendant's conviction.[32] However, the Second, Seventh, and Tenth Circuits found the improper prosecutorial comments harmless and affirmed the defendants' convictions.[33]

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25. JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 262 at 461 (4th ed. 1992) ("Despite the array of circumstances raising doubts regarding the reliability of this kind of evidence [silence in the face of accusations], the Supreme Court has not found any absolute federal constitutional barriers against its use other than those imposed in some circumstances by *Miranda*."). Tortolito was not in custody when he was questioned. Therefore, Miranda v. Arizona, 384 U.S. 436 (1966), did not apply.

26. United States v. Calise, 996 F.2d 1019, 1022 (9th Cir. 1993). A computer search at the time of this writing revealed no rulings on the issue from the Third, Fourth, Fifth, Sixth, Eighth, Ninth, and D.C. Circuits.

27. United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991).

28. Coppola v. Powell, 878 F.2d 1562 (1st Cir.), *cert. denied*, 493 U.S. 469 (1989). The defendant in *Coppola* "stated that he was not going to confess." *Id.* at 1568. The court held that the defendant's Fifth Amendment "constitutional rights were violated by the use of his statement in the prosecutor's case in chief." *Id.*

29. United States v. Caro, 637 F.2d 869 (2d Cir. 1981). The Second Circuit wrote that it "found no decision permitting the use of silence, even the silence of a suspect who has been given no Miranda warnings and is entitled to none, as part of the Government's direct case." *Id.* at 876.

30. United States *ex. rel.* Savory v. Lane, 832 F.2d 1011, 1018 (7th Cir. 1987) ("While the presence of Miranda warnings might provide an additional reason for disallowing use of the defendant's silence as evidence of guilt, they are not a necessary condition to such a prohibition."). Four years later, the Seventh Circuit distinguished *Lane* from cases where the defendant had "started down the self-exculpation road." United States v. Davenport, 929 F.2d 1169, 1174 (7th Cir. 1991).

31. United States v. Burson, 952 F.2d 1196 (10th Cir. 1991) ("Whether [the defendant] was advised of his privilege against self-incrimination is immaterial.") *cert. denied*, 503 U.S. 996, 1200-01 (1992).

32. *Coppola*, 878 F.2d at 1571.

33. All three courts held that the error was "harmless beyond a reasonable doubt." *Caro*, 637 F.2d at 876; *Lane*, 832 F.2d at 1019; *Burson*, 952 F.2d at 1202.

The Tenth Circuit, for example, ruled that testimony by two I.R.S. criminal investigators about the defendant's silence was improper.[34] The court based its ruling on the "general rule of law. . .that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised."[35] The court applied three "basic legal principles" to decide whether the defendant had invoked his right to silence before arrest and whether testimony by criminal investigators violated that right.[36] First, the Tenth Circuit wrote that the "privilege against self-incrimination must be given a liberal construction."[37] Second, the "invocation of the privilege against self-incrimination does not require any combination of words."[38] Third, the "privilege against self-incrimination can be asserted at any investigatory or adjudicatory proceeding."[39]

Although the United States Supreme Court has not ruled on the precise issue raised in *Tortolito*, the Court ruled in *Jenkins v. Anderson*[40] that a prosecutor can comment on a defendant's pre-arrest silence for impeachment purposes.[41] However, in *Doyle v. Ohio*,[42] the Supreme Court ruled "that use of the defendant's post-arrest silence violates due process."[43]

B. *Wyoming Law*

Before 1978, the right to silence in Wyoming was based on *Doyle*: a prosecutor could not comment on a defendant's post-arrest silence without

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34. *Burson*, 952 F.2d at 1201.

35. *Id.* (citing Griffin v. California, 380 U.S. 609, 615 (1965)).

36. *Burson*, 952 F.2d at 1200-01.

37. *Id.* at 1200 (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)). In *Hoffman*, the U.S. Supreme Court wrote that the right to silence, "like other provisions of the Bill of Rights, 'was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed.'" *Id.* (quoting Feldman v. United States, 322 U.S. 487, 489 (1944)).

38. *Burson*, 952 F.2d at 1200 (citing Quinn v. United States, 349 U.S. 155, 162 (1955)).

39. *Burson*, 952 F.2d at 1200 (citing Kastigar v. United States, 406 U.S. 441, 444 (1972)). In *Kastigar*, the Court explained that the right to silence "reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty." *Id.* (citations omitted).

40. 447 U.S. 231, 238-39 (1980).

41. Impeachment is to "call in question the veracity of a witness, by means of evidence adduced for such purpose, or the adducing of proof that a witness is unworthy of belief." BLACK'S LAW DICTIONARY 753 (6th ed. 1990) (citing McWethy v. Lee, 272 N.E.2d 663, 666 (Ill. App. 1971)).

42. 426 U.S. 610 (1976).

43. *Id.* at 611.

violating that defendant's constitutional right to due process.[44] In 1978, the Wyoming Supreme Court expanded Wyoming's right to silence beyond *Doyle*. The court held in *Clenin v. State*[45] that a defendant has a right to silence that "does not depend upon his being advised of that right, but exists by virtue of the constitutional language."[46] The *Clenin* rule established a self-executing constitutional right to silence that existed at all times. Any prosecutorial comment on a defendant's exercise of the right to silence was automatically reversible error.

In the 1982 case of *Richter v State*,[47] the Wyoming Supreme Court overruled the *Clenin* rule. The court ruled that prosecutorial comments on a defendant's pre-arrest silence might be harmless error.[48] The *Clenin* rule was reinstated in 1984, however, when the court overruled *Richter* in *Westmark v. State*.[49]

In the 1986 case of *Summers v. State*,[50] a two-justice plurality of the Wyoming Supreme Court attempted to limit the *Clenin* rule to post-arrest silence.[51] *Summers* did not limit the *Clenin* rule, however, because two-justice pluralities are not controlling law.[52]

Thus, the relevant law in Wyoming before *Tortolito* was the *Clenin* rule: there was a self-executing constitutional right to silence that existed at all times; any prosecutorial comment on a defendant's exercise of that right was automatically reversible error.[53]

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44. *Doyle* was adopted by the Wyoming Supreme Court in Irvin v. State, 560 P.2d 372, 373 (Wyo. 1977).

45. 573 P.2d 844 (Wyo. 1978).

46. *Id.* at 846.

47. 642 P.2d 1269 (Wyo. 1982). *See* Sylvia Lee Hackl, *Silence Is No Longer Golden: Destruction of the Right to Remain Silent*, 19 LAND & WATER L. REV. 629, 642-45 (1984).

48. *Richter*, 642 P.2d at 1272-76.

49. 693 P.2d 220, 225 (Wyo. 1984). *See* Gregory A. Phillips, Note, *Improper Comment Upon Post-Arrest Silence: Wyoming Returns to the Prejudicial Per Se Rule*, 21 LAND & WATER L. REV. 231 (1986). In *Westmark*, the Wyoming court wrote that the *Richter* harmless error rule resulted in prosecutors "playing 'Russian roulette'" with comments on a defendant's silence. 693 P.2d at 221.

50. 725 P.2d 1033 (Wyo. 1986).

51. *Id.* The *Summers* court wrote:

> [s]ilence prior to the arrest of an accused will not be presumed to be an exercise of the accused's rights pursuant either to the Fifth Amendment to the Constitution of the United States or Art. 1, § 11 of the Constitution of the State of Wyoming. In the absence of a showing that the silence constituted an exercise of the accused's constitutional privileges the use of the silence at trial does not impermissibly infringe on the constitutional rights of an accused.

Id. at 1049.

52. Chief Justice Golden, in his dissent to the 1994 *Tortolito* opinion, noted that "*Summers* was not a majority opinion but only a two-justice plurality and is not controlling law." *Tortolito*, 885 P.2d at 873 (Golden, C.J., dissenting).

53. *See supra* text accompanying note 45.

PRINCIPLE CASE

A. *The First Opinion*

In 1994, the majority affirmed Tortolito's conviction and sentence.[54] Chief Justice Golden filed a dissenting opinion in which Justice Taylor joined.[55]

The court held that prosecutorial comments on Tortolito's silence were permissible.[56] The court gave two reasons why those comments did not violate Tortolito's right to silence under the Wyoming Constitution.[57] First, the court concluded that the *Summers* limitation[58] was applicable because the silence at issue came before Tortolito's arrest.[59] Second, the court established—"without compunction"[60]—an exception to the *Clenin* rule, "once an accused has made a lawful affirmative admission [like Tortolito's confession to the bus driver] the [*Clenin*] rule is not applicable."[61] The majority also rejected Tortolito's claim that any prosecutorial comment on a defendant's silence is automatically reversible error.[62]

In dissent, Chief Justice Golden argued that the majority created an exception to the *Clenin* rule without authority or explanation.[63] The Chief Justice wrote that the majority's exception to the *Clenin* rule[64] "is not and should not be the rule of this court if fairness, justice, and due process of law are to mean anything to our citizens."[65]

B. *The Second Opinion*

In 1995, a four-to-one majority of the Wyoming Supreme Court withdrew the 1994 *Tortolito* opinion, reversed Tortolito's conviction, and remanded the case for a new trial.[66] Justice Macy, who voted with the

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54. *Tortolito*, 885 P.2d at 873. Justice Thomas wrote the court's opinion in which Justice Macy and Justice Cardine joined. Justice Cardine retired on July 6, 1994.
55. *Id.*
56. *Id.* at 870.
57. *Id.*
58. *See supra* note 50.
59. *See supra* text accompanying notes 10-12.
60. *Tortolito*, 885 P.2d at 870.
61. *Id.*
62. *Id.* at 868.
63. *Id.* at 875 (Golden, C.J., dissenting).
64. *See supra* text accompanying note 60.
65. *Tortolito*, 885 P.2d at 875 (Golden, C.J., dissenting).
66. *Tortolito*, 901 P.2d at 388. Chief Justice Golden wrote the court's opinion in which Justice Macy, Justice Taylor, and Justice Lehman joined.

majority in 1994 to affirm Tortolito's conviction, voted with the 1995 majority to reverse.[67] He offered no explanation for the switch.[68] Justice Thomas filed a dissenting opinion.[69]

The majority held that prosecutorial comments on Tortolito's pre-arrest silence were impermissible.[70] The court relied on the *Clenin* rule[71] to find that "the state constitutional language itself protect[s] an accused's right to silence and the existence of that protection [does] not depend upon *Miranda* advice."[72] The court also agreed with Tortolito's argument that any prosecutorial comment on a defendant's silence is automatically reversible error.[73] In sum, the 1995 *Tortolito* majority concluded that the Wyoming Constitution's right to silence is stronger than its federal counterpart.[74]

Justice Thomas' dissenting opinion consists of four parts.[75] First, he criticized the majority's interpretation and enlargement of the

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67. *Id.*

68. Justice Macy's silent change of opinion in a case about a defendant's silence is a striking coincidence. It is unusual for an appellate judge to change his or her mind on an issue without writing an opinion to explain the change. *Compare* Griswold v. Connecticut, 381 U.S. 479, 527-31 (1965) (Stewart, J., dissenting) *with* Roe v. Wade, 410 U.S. 113, 167-71 (1973) (Stewart, J., concurring and accepting the *Griswold* majority's opinion); *compare* National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring) *with* Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 528-57 (1985) (Blackmun, J., writing for the majority and explaining his change of opinion in the case that overruled *National League of Cities*); *but compare* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) *with* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (Roberts, J., voting—without explanation—with the majority on two cases that reach opposite results).

69. *Tortolito*, 901 P.2d at 391-95 (Thomas, J., dissenting).

70. *Id.* at 391.

71. *See* supra text accompanying note 45.

72. *Tortolito*, 901 P.2d at 390.

73. *Id.*

74. The U.S. Supreme Court's narrow interpretations of the federal Bill of Rights since the Warren Court has resulted in "many state courts . . . relying on state constitutions as an independent source of rights." CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 34.01 (3rd ed. 1993). Justice Brennan wrote an article that was the origin of modern state constitutionalism:

> [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed.

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); *but see* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992) (discussing the "poverty of state constitutional discourse" which Gardner defined as "the lack of a language in which participants in a legal system can debate the meaning of the state constitution"). For a comprehensive bibliography on state constitutionalism, *see, e.g.*, Dworkin v. LFP, Inc., 839 P.2d 903, 909, 920-22 (Wyo. 1992) *cited with approval in* Saldana v. State, 846 P.2d 604, 624 (Wyo. 1993).

75. *Tortolito*, 901 P.2d at 391-95 (Thomas, J., dissenting).

Clenin rule.[76] Second, he questioned whether Tortolito's silence was actually an exercise of his right to silence.[77] Third, he argued for imposition of a harmless error rule.[78] Finally, he expressed concern that the new majority opinion was unfair to the prosecutor and trial court in Tortolito's case.[79] Justice Thomas concluded that "[t]he shifting sands of Wyoming jurisprudence have been pummeled by another dust storm"[80] of "judicial vacillation."[81]

ANALYSIS

In *Tortolito*, the Wyoming Supreme Court disregarded the U.S. Supreme Court's warning that "a decision without principled justification would be no judicial act at all."[82] Principled justification is conspicuously absent from the *Tortolito* court's interpretation of Article 1, Section 11 of the Wyoming Constitution. This lack of principled justification leaves practitioners litigating state constitutional issues with "virtually no idea what will succeed or fail in state court."[83]

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76. *Id.* at 391-92.
77. *Id.* at 392-93.
78. *Id.* at 394.
79. *Id.* at 394-95.
80. *Id.* at 395.
81. *Id.* at 391.
82. Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2814 (1992). Justices O'Connor, Kennedy, and Souter explained the importance of principled justification:

> The underlying substance of [the legitimacy that gives the Court power] is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that *a decision without principled justification would be no judicial act at all.*

Id. (emphasis added). *See also* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) *quoted in* John Hart Ely, *Democracy and Distrust: a Theory of Judicial Review* 54 (1980). According to Ely, Wechsler "argued that the Supreme Court, rather than functioning as a 'naked power organ' simply announcing its conclusions ad hoc, should proceed on the basis of principles that transcend the case at bar and treat like cases alike." *Id.* at 54.

83. Gardner, *supra* note 73, at 765-66 (1992). Professor Gardner asks his reader to imagine that he or she is a lawyer researching a state constitutional issue:

> When you undertake this research, here is what you are likely to find. After reading dozens of state constitutional decisions, you have absolutely no sense of the history of the state constitution. You do not know the identity of the founders, their purposes in creating the constitution, or the specific events that may have shaped their thinking. You find nothing in the decisions indicating how the various provisions of the document fit together into a coherent whole, and if you do find anything at all it is a handful of quotations from federal cases discussing the federal Constitution. You are able to form no conception of the character or fundamental values of the people of the state, and no idea how to mount an argument that certain things are more important to people than others. If you have found state court decisions departing from the federal approach to the corresponding federal provision, you have no idea why the courts departed from federal reasoning . . . [N]othing in these

The right to silence in the Wyoming Constitution and its federal counterpart are not identical.[84] Textually, the federal provision appears to provide more protection to a criminal defendant than the Wyoming provision.[85] The Wyoming Supreme Court never gives principled justification for its conclusion that the state provision provides more protection than the federal provision.

The lack of principled justification in Chief Justice Golden's 1995 *Tortolito* majority opinion is surprising. In his 1994 dissent, the Chief Justice criticized the majority for not justifying its interpretation of Article 1, Section 11: "The majority by this sleight of hand has, without explanation, changed the landscape. . . ."[86] Three years earlier, in his dissent in the case of *Black v. State*,[87] Justice Golden wrote:

> I am troubled by the total absence of state constitutional analysis in a majority opinion expressly driven by the due process clause of the Wyoming Constitution . . . Declaring that our state's due process clause is more protective of [an individual's] rights against police questioning than the due process clause of the United States Constitution is one thing. Demonstrating it, quite another.[88]

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state opinions gives you any idea of what you, as an advocate, could say to convince state courts once again to reject the federal approach as a matter of state constitutional law.

As a result of this uncertainty, you are unable to draft an argument in which you have the slightest confidence, and you end up throwing anything you can think of at the court and praying that something hits the mark. If you are really dispirited, you may decide to abandon the state constitutional claim entirely, concluding that your client's money is better spent on trying to develop a novel federal constitutional argument; at least you will have some chance of evaluating the merits of such an argument, whereas you have *virtually no idea what will succeed or fail in state court.*

Id. (emphasis added).

84. There are "several noteworthy differences between the Wyoming Declaration of Rights and the federal Bill of Rights that merit attention." Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 527, 558 (1986) [hereinafter *Wyoming Constitutional Interpretation*]. Professor Keiter limited his analysis to particular sections of the Wyoming Constitution: "I will not examine the state constitutional criminal procedure protections (article 1, sections 4, 9, 10, 11, 12, and 13). It should be noted, however, that the court has generally not construed these provisions to provide protections greater than those available under the Bill of Rights." *Id.* at 558 n.169. The Wyoming Supreme Court's opinion in *Tortolito* calls for an extension of Keiter's analysis to state constitutional criminal protections.

85. The United States Constitution states that "[n]o person shall . . . be compelled in any criminal case to be *witness* against himself. . . ." U.S. CONST. amend. V (emphasis added). The Wyoming Constitution states that "[n]o person shall be compelled to *testify* against himself in any criminal case. . . ." WYO. CONST. art. 1, § 11 (emphasis added).

86. *Tortolito*, 885 P.2d at 875 (Golden, C.J., dissenting).

87. 820 P.2d 969, 975 (Wyo. 1991) (Golden, J., dissenting).

88. *Id.* at 977.

High courts in states including Oregon,[89] Texas,[90] and Washington[91] have developed methods of state constitutional interpretation that lead to decisions with principled justification. In 1993, Justice Golden wrote that he favored the Washington method.[92] The Supreme Court of Washington listed six factors for determining whether a provision of the state constitution is more protective than its federal counterpart: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."[93]

The *Tortolito* court should have used some identifiable method of constitutional interpretation—the Washington method, or one like it—as a model for its interpretation of Article 1, Section 11. The Wyoming court touched upon one of the Washington factors, "preexisting state law", when it applied the *Clenin* rule[94] to *Tortolito*.[95] However, the unanimous *Clenin* court's interpretation of Article 1, Section 11 itself lacked principled justification.[96]

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89. Sterling v. Cupp, 625 P.2d 123 (Or. 1981) *cited with approval in Wyoming Constitutional Interpretation, supra* note 83, at 541 n.78. The Supreme Court of Oregon requires that courts interpreting the Oregon Constitution consider three issues: whether the provision "has an unquestioned source in a provision expressly included in the political act of adopting the constitution"; whether the "provision is addressed specifically to the treatment" of the defendant; and whether the text of the state provision "itself makes necessary the test of the practices it controls." *Sterling*, 625 P.2d at 129.

90. Autran v. State, 887 S.W.2d 31 (Tex. Crim. App. 1994). The Texas Court of Criminal Appeals developed a five-factor analysis: "(A) a textual examination of the constitutional provision; (B) the Framer's [sic] intent; (C) history and application of the constitutional provision; (D) comparable jurisprudence from other states; and, (E) the practical policy considerations behind the constitutional provision." *Id.* at 37.

91. State v. Gunwall, 720 P.2d 808 (Wash. 1986) *cited with approval* in Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring).

92. *Saldana*, 846 P.2d at 622 (Golden, J., concurring) ("I recommend this analytical technique to our practicing bar.").

93. *Gunwall*, 720 P.2d at 811.

94. *See supra* note 45 and accompanying text.

95. The *Tortolito* court also relied on the cases that led to *Clenin*. In *Clenin*, the court noted that "[h]istorically, our Court has jealously guarded the right provided in Art. 1, § 11 of the Constitution of the State of Wyoming against any infringement." *Clenin*, 573 P.2d at 846 (citing *Irvin v. State*, 560 P.2d 372 (Wyo. 1977); *Jersky v. State*, 546 P.2d 173 (Wyo. 1976); *Dryden v. State*, 535 P.2d 483 (Wyo. 1975); *Moss v. State*, 492 P.2d 1329 (Wyo. 1972); *Priestley v. State*, 446 P.2d 405 (Wyo. 1968); *Dickey v. State*, 444 P.2d 373 (Wyo. 1968); *Miskimmins v. Shaver*, 8 Wyo. 392, 58 P. 411 (1899)) (Note: The petitioner's name is spelled "Miskimins" in the Pacific Reporter.)).

In a dissenting opinion in *Miskimmins*, Justice Knight argued that the majority's interpretation of the Wyoming right to silence was over-protective. *Miskimmins*, 8 Wyo. at 429-75, 58 P. at 422-39. Ten years earlier, Jesse Knight was a delegate to the 1889 Wyoming Constitutional Convention. JOURNALS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING 5 (1893) [hereinafter JOURNALS].

96. Justice Thomas, writing for the *Clenin* majority, cited no authority for the proposition that a defendant has a right to silence that "does not depend upon his being advised of that right, but exists by virtue of the constitutional language." *Clenin*, 573 P.2d at 846.

The *Tortolito* court did not consider the other five Washington factors: "the textual language"; "structural differences"; "the differences in the texts"; "constitutional history"; and "matters of particular state or local concern." Had the Wyoming court considered those factors, it would not have found authority for an expanded state right to silence. First, there are no textual or structural differences that suggest the state provision is more protective than its federal counterpart.[97] Second, nothing in the "constitutional history" of Article 1, Section 11 indicates greater protection than the federal version.[98] Finally, the right to silence is not a "matter of particular state or local concern" in Wyoming.[99]

The Wyoming Supreme Court should not rely on controlling precedent that lacks principled justification. State constitutional interpretations by the Wyoming Supreme Court are not reviewable by other courts and are not subject to legislative action (short of a constitutional amendment). The Hawaii Supreme Court recognized this responsibility:

> [A]s the ultimate judicial tribunal in this state, this court has final, unreviewable authority to interpret and enforce the Hawaii Constitution. We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights *when logic and sound regard for the purposes of those protections have so warranted.*

State v. Kaluna, 520 P.2d 51, 58 (Haw. 1974) (emphasis added).

97. *See supra* notes 83-84 and accompanying text.

98. There is no reference to Article 1, Section 11 in the record of the Wyoming Constitutional Convention. *See* Journals, *supra* note 94; *see also* ROBERT B. KEITER AND TIM NEWCOMB, THE WYOMING STATE CONSTITUTION: A REFERENCE GUIDE 11 (1993) (The convention delegates adopted the Wyoming Declaration of Rights [including Article 1, Section 11] without rancorous debate."). Keiter and Newcomb wrote that the delegates to the Wyoming Constitutional Convention consulted state constitutions from ten states. *Id.* at 4. Like Article 1, Section 11 of the Wyoming Constitution, the Colorado and Montana Constitutions protect a defendant from having to "testify" against himself or herself. COLO. CONST. art. 2, § 18; MONT. CONST art. 2, § 25. Three states follow the federal version and protect a defendant from being a "witness". NEV. CONST. art. 1, § 8; N.D. CONST. art. 1, § 12; IDAHO CONST. art. 1, § 13. Five states protect against self-incriminating "evidence". PA. CONST. art. 1, § 9; ILL. CONST. art. 1, § 10; NEB. CONST. art. 1, § 12; S.D. CONST. art. 6, § 9; WASH. CONST. art. 1, § 9.

The Supreme Court of Colorado wrote that a "study of the history of the development of such a constitutional provision as contained in our Colorado Constitution indicates that the original intent was to prevent a defendant from being forced to give testimonial evidence against himself, and did not contemplate the exclusion of evidence of physical facts relating to the defendant." Block v. People, 240 P.2d 512, 515 (Colo. 1951) (citing 8 WIGMORE ON EVIDENCE § 2250 (3d ed. 1940)). The Supreme Court of Montana compared the right to silence in the Montana and U.S. Constitutions and concluded:

> The language used in the two constitutions is substantially identical and affords no basis for interpreting Montana's prohibition against self-incrimination more broadly than its federal counterpart. Nor do we find any indication in the proceedings of Montana's Constitutional Convention that would indicate that the framers intended to grant any broader protection thereunder than that contained in the Fifth Amendment to the United States Constitution.

State v. Jackson, 672 P.2d 255, 260 (Mont. 1983).

99. Several states have confronted the *Tortolito* issue. None of those states, however, has found that the right to silence is a "matter of particular state or local concern." *See, e.g.*, State v.

Regardless of the outcome of *Tortolito*, the Wyoming Supreme Court should have applied some identifiable method of constitutional interpretation to give the decision principled justification. Without principled justification, *Tortolito* leaves Wyoming practitioners in the position of Professor Gardner's frustrated state constitutional litigator, "throwing anything [he or she] can think of at the court and praying that something hits the mark."[100]

CONCLUSION

A commentary in "Wyoming's Statewide Newspaper" applauded the 1995 *Tortolito* court for putting "our state constitutionally guaranteed liberty first, where it belongs . . . ahead of the U.S. Supreme Court, which in the last decade has encroached upon this right, finding human liberty less compelling than government strictures."[101] Whether or not an expanded right to silence is a good idea, however, the Wyoming Supreme Court's interpretation of the Wyoming Constitution in

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Franco, 639 P.2d 1320, 1327 (Wash. 1982) (holding that Article 1, Section 9 of the Washington Constitution should not be interpreted differently from the Fifth Amendment despite the fact that the Washington Constitution "protects a person from giving 'evidence' against one's own self whereas the federal provision merely prohibits compelling 'testimony'."); State v. White, 426 P.2d 796, 797 (Ariz. 1967) (holding that "variations of wording in the federal and state constitutions do not lead to different interpretations of the principle"). The Arizona Constitution protects a person from giving self-incriminating "evidence". ARIZ. CONST. art. 2, § 10.

100. *See* Gardner, *supra* note 73, at 766. The lack of principled justification in *Tortolito* presents two other problems. First, the court's opinion is less a judicial act and more a matter of proposing policies. *See* Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973) *quoted in* ELY, *supra* note 81, at 56. Professor Wellington wrote:

> If a society were to design an institution which had the job of finding the society's set of moral principles and determining how they bear in concrete situations, that institution would be sharply different from one charged with proposing policies . . . It would provide an environment conductive to rumination, reflection and analysis. "Reason, not power" would be the motto over its door.

Id. Justice Thurgood Marshall's frustration with the U.S. Supreme Court at the end of his career echoed Wellington's sentiment. "Power, not reason, is the new currency of this Court's decisionmaking." Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

Second, *Tortolito* undermines public confidence in the Wyoming Supreme Court's work. Justice O'Connor explained that a supreme court should "act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle . . . the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2814 (1992).

101. Charles Levendosky, *Court: Silence Admits to Nothing*, CASPER STAR-TRIBUNE August 20, 1995, at A4.

Tortolito lacks principled justification. Without principled justification, Wyoming practitioners are left without direction on how to litigate Wyoming constitutional issues.

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