

ARTICLE I, SECTION 9: Rights of accused

persons. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

It was “a universal maxim of the common law of England, that no man is to be brought in jeopardy more than once for the same offence.” Thus Sir William Blackstone, the preeminent legal scholar at the time of America’s founding, described the long tradition behind part two of Section 9, known as the “double-jeopardy” clause. The first part is no less noteworthy, having its roots in abuses by the English courts long before the Revolutionary War.

In fact, that historical tradition probably led to the inclusion of Section 9 in the Washington Constitution. The state supreme court speculated in a 1945 case that “candidly speaking...it is more likely that the provision [Section 9] was inserted in Article I, entitled ‘Bill of Rights,’ 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. Brunn*). The writers of Section 9 likely patterned it after the Oregon Constitution and the Fifth Amendment of the U.S. Constitution.

Self-Incrimination Clause

The primary difference between the Fifth Amendment (“nor shall be compelled in any criminal case to be a witness against himself”) and Section 9 is the substitution of the word “evidence” for

“witness.” In at least one case, a defendant argued this difference was meaningful, but the supreme court determined that Section 9’s wording “envisions the same guarantee as that provided in the federal constitution” (*State v. Moore*). Washington state courts have consistently interpreted both the federal and state guarantees against self-incrimination as equal.

To invoke the right against self-incrimination, one must show two things: (1) the testimony is compulsory, and (2) the testimony involves “evidence.”

A person voluntarily testifying against himself cannot claim the right; it must be involuntary testimony. And by involuntary, the section doesn’t refer only to being stretched on a rack or other types of torture (although that has been a problem at times in English history). In our day, it usually takes the form of a person being faced with a “no-win” situation, in that if they testify truthfully, they incriminate themselves, and if they testify falsely, they commit perjury, and if they refuse to testify, they are held in contempt of court, or their denial is used to show guilt. Such a “cruel trilemma” is prohibited under Section 9 (*City of Seattle v. Stalsbrotten*).

There are two primary stages when a person can claim the privilege: upon arrest and at trial. Washington courts follow the famous federal case of *Miranda v. Arizona*, requiring that upon arrest a person must be informed of his or her right “to remain silent.” At trial, a defendant cannot be forced to testify, and a prosecutor cannot directly or indirectly infer guilt because of this refusal.

Many Washington cases have reviewed what “evidence” means, often in cases involving arrests for drunk driving under the state’s

“Implied Consent” law. According to this law, people who drive on Washington roads are deemed to have given consent for a breath or blood test to determine alcohol content. In 1971, the state supreme court reviewed the constitutionality of this law under Section 9 and upheld it in part because breath and blood samples are not “testimonial or communicative evidence.” The decision was consistent with other cases holding that actions such as providing fingerprints and participating in a police line-up aren’t covered under Section 9.

Double-Jeopardy Clause

The second part of Section 9 protects individuals from being punished (put “in jeopardy”) twice for the same action. For example, if a person shoots at someone and misses, they can’t be charged with both assault and attempted murder.

As in the first part of Section 9, Washington courts have not found any substantive difference between this state constitutional right and the nearly identical federal protection in the Fifth Amendment. The biggest question in applying this right is what “same offense” means, although there has also been controversy in recent cases over whether a civil judgment (like repossession of property) counts as a punishment under Section 9.

An 1896 case established the test for “same offense,” which Washington courts have followed in various forms ever since. That case dealt with the theft by fraud of a beaver shoulder cape, for which the thief was charged with two different crimes. The court didn’t find double jeopardy, however, because the facts needed to prove one crime were not necessary for the other, and the elements of the two crimes were different. To find double jeopardy “the offenses must be identical both in fact and in law” (*State v. Reiff*). This came to be known as the “same elements”

test, and is identical to the federal test (the *Blockburger* test). Because Washington courts track so closely on this issue with federal courts, there was a brief hiccup in 1990 when the U.S. Supreme Court added a new requirement to the same elements test. Washington courts did not embrace the change, however, and the U.S. Supreme Court reversed itself three years later.

Another shift occurred in 1994 when the U.S. Supreme Court indicated that a civil forfeiture of property, like repossession of a car, could be considered a “punishment.” If someone were punished in a civil case, it would violate the double jeopardy prohibition to punish them also with a criminal sentence. Washington courts started to follow this interpretation, but reversed course in a 5-4 decision three years later when the U.S. Supreme Court changed its mind. The dissent complained that this about-face made it appear that the court was “allowing federal precedent to rewrite our state constitution” (*State v. Catlett*).

Cases

- State v. Reiff*, 14 Wash. 664 (1896)
- State v. Brunn*, 22 Wash.2d 120 (1945)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- State v. West*, 70 Wash.2d 751 (1967)
- State v. Moore*, 79 Wash.2d 51 (1971)
- State v. Clark*, 124 Wash.2d 90 (1994)
- State v. Gocken*, 127 Wash.2d 95 (1995)
- State v. Easter*, 130 Wash.2d 228 (1996)
- State v. Catlett*, 133 Wash.2d 355 (1997)
- City of Seattle v. Stalsbrotten*, 138 Wash.2d 227 (1999)
- State v. Templeton*, 148 Wash.2d 193 (2002)
- In re Orange*, 152 Wash.2d 795 (2004)

Other Sources

Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide*, at 23 (2002)