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No. 51098-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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State of Washington,

Respondent,

v.

Jeremiah Allen Teas,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

---

APPELLANT'S OPENING BRIEF

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## **A. INTRODUCTION**

The framers of the Washington Constitution believed an accused's right to testify was so critical that they explicitly included this right in our constitution. Jeremiah Allen Teas exercised this right during his trial. In turn, during closing arguments, the prosecutor insinuated this decision was simply an act of desperation. He suggested Mr. Teas exercised his right to testify in order to fabricate a story consistent with the other testimony produced at trial. He also implied that Mr. Teas' behavior mirrored that of the 9/11 terrorists. Because the prosecutor used Mr. Teas' exercise of his constitutional rights to create an inference of guilt, and due to other misconduct that pervaded throughout Mr. Teas' trial, this Court should reverse the conviction.

Alternatively, Mr. Teas asks this Court to find that his life without parole sentence is cruel under our constitution. The court had no choice but to sentence Mr. Teas to life without parole pursuant to the Persistent Offender Accountability Act (POAA) based in part on a predicate offense that occurred when Mr. Teas was a teenager. Because youthful offenders are less culpable than fully formed adults, this Court should hold that a sentence of life without parole based in part on a predicate offense that occurred when the defendant was a youth is cruel under our constitution.

## **B. ASSIGNMENTS OF ERROR**

1. In violation of article I, section 22 of the Washington Constitution, the prosecutor engaged in misconduct during closing argument when he suggested Mr. Teas tailored his testimony and denigrated Mr. Teas' decision to exercise his right to testify.

2. The prosecutor engaged in misconduct that deprived Mr. Teas of his right to a fair trial and this misconduct substantially prejudiced him when the prosecutor inflamed the passion of the jury by equating the weapon retrieved in Mr. Teas' accuser's room to the weapons used during the 9/11 terrorist attacks.

3. The prosecutor engaged in misconduct that deprived Mr. Teas of his right to a fair trial and this misconduct substantially prejudiced him when the prosecutor argued facts not in evidence and used some of these facts to bolster Mr. Teas' accuser's credibility during his closing argument.

4. The trial court erred in denying Mr. Teas' request for a consent instruction (CP 18).

5. Cumulative error deprived Mr. Teas of his right to a fair trial.

6. In violation of article I, section 14 of the Washington constitution, the court erred when it sentenced Mr. Teas to life without parole under the Persistent Offender Accountability Act (POAA) based in

part on a predicate offense that occurred when Mr. Teas was between the ages of 17 and 19.

7. Article I, section 14 bars the imposition of life without parole pursuant to the POAA when the predicate offense(s) occurred when the offender was a youth.

### **C. ISSUES**

1. A prosecutor commits misconduct when he insinuates that a defendant is guilty or not credible based on his exercise of his constitutional rights. Additionally, it is inconsistent with our constitution and therefore improper for a prosecutor to argue during summation that a defendant tailored his testimony.

Mr. Teas had a right to be present at his trial and to testify in his own defense. During closing argument, the prosecutor claimed Mr. Teas only exercised his right to testify because he “saw the overwhelming evidence against him.” The prosecutor then suggested Mr. Teas tailored his testimony based on the testimony of others. Did the prosecutor commit misconduct, warranting reversal?

2. Additionally, a prosecutor commits misconduct when he inflames the passion and prejudice of the jury. Here, the prosecutor equated the weapon recovered from Mr. Teas’ accuser’s room to the weapon the hijackers used during the 9/11 terrorist attacks. This was the

deadliest foreign attack on American soil. Did the prosecutor commit misconduct that prejudiced Mr. Teas, warranting reversal?

3. A prosecutor also commits misconduct when he argues facts never introduced into evidence. Moreover, it is misconduct for a prosecutor to use facts never introduced into evidence to vouch for the credibility of a witness. Here, the prosecutor claimed the police found Mr. Teas' blood at the alleged crime scene, which was false. He also claimed Mr. Teas' accuser's story remained "consistent" from the time she reported the alleged crime, but this too was false. Did the prosecutor commit misconduct that prejudiced Mr. Teas, warranting reversal?

4. The cumulative effect of repetitive prejudicial misconduct may be so flagrant that no instruction can erase its combined prejudicial effect. Based on the previously mentioned instances of misconduct, was the prosecutor's misconduct so flagrant that no instruction could have erased its prejudicial effect?

5. When requested, a defendant is entitled to a consent instruction if the evidence presented at trial supports this instruction. Although Mr. Teas' trial produced significant evidence of consent, the trial court refused to instruct the jury on consent. Did the court err when it refused to grant Mr. Teas' instruction on consent?

6. An accumulation of non-reversible errors can nevertheless deprive a defendant of his right to a fair trial. If any of the previously stated errors does not independently require reversal, should this Court reverse due to cumulative error?

7. Both the United States Supreme Court and our Supreme Court agree that sentencing laws that fail to take a defendant's youthfulness into account are fundamentally flawed. Under the Persistent Offender Accountability Act (POAA), a court must sentence someone to life without parole if he commits certain offenses. The POAA does not take a defendant's youthfulness at the time of his predicate offenses into account.

Article I, section 14 is more protective than the Eighth Amendment's bar against cruel punishment.

a. Under the categorical approach, is a sentence of life without parole under the POAA cruel under our constitution if the predicate offense(s) occurred when the defendant was a youth?

b. Under a *Fain* framework that accounts for an offender's youthful attributes, is a sentence of life without parole under the POAA cruel under our constitution if the predicate offense(s) occurred when the defendant was a youth?

#### **D. STATEMENT OF THE CASE**

Jeremiah Allen Teas was at work perusing Backpages.com under the "adult services" section when he clicked on the subcategory of "escort services." RP 646-48. After scrolling through this subcategory, he

stumbled upon an advertisement posted by a woman who claimed her name was “Miley.” RP 646-47. The advertisement was for a “massage.” Mr. Teas called the phone number listed in the advertisement and inquired with “Miley” about her services. RP 650. The two agreed to meet after Mr. Teas finished work. RP 650. Mr. Teas was hoping to receive a “happy ending.” RP 673.

After leaving work, Mr. Teas arrived at “Miley’s” apartment, where she directed Mr. Teas into her bedroom. RP 652, 654. The bedroom did not contain any massage tables. RP 654. Mr. Teas took off his shoes and “Miley” asked him to take off his pants, so he took off his belt and pulled his pants down to his mid-thigh. RP 657. He then took off “Miley’s” pants. RP 657. Mr. Teas asked “Miley” if they could kiss or if she could perform oral sex on him, but she refused. RP 657. Upon “Miley’s” request, Mr. Teas put on a condom; shortly afterwards, he attempted to have intercourse with her, but he could not become erect. RP 657-58.

“Miley” asked Mr. Teas several times if she could get him some lubrication or a penis pump to help him become erect. RP 659. Mr. Teas tried to get himself erect while he reached in his pocket to try and pull out some money. His pocketknife fell out. RP 659. “Miley” ran away,

screaming. RP 659-60. Confused, Mr. Teas grabbed his belongings and left the apartment. RP 663.

While walking down the street after leaving the apartment, he heard “Miley” yelling from a car, “I’m going to get you. I have your stuff.” RP 661. “Miley” also yelled other obscene language at Mr. Teas. RP 661.

A few days later, the police arrested Mr. Teas. When the police interviewed him, Mr. Teas denied any encounter with “Miley” and instead said he was in the area of her apartment but only to visit a friend. RP 172. Mr. Teas later admitted to initially denying the encounter with “Miley” because he was ashamed and did not want his family to learn he was seeking out escort services. RP 665-66.

The police arrested Mr. Teas because “Miley” (whose real name is not actually “Miley” and will be referred to in the rest of this brief by her true initials, “R.C.”) reported that Mr. Teas raped her, and the State later charged Mr. Teas with rape in the first degree. CP 2, 5. R.C. told the police that as soon as Mr. Teas entered her apartment, he shoved her onto a bed, held a knife to her throat, and informed her he was going to rape her. CP 2. However, at trial, she told the jury that Mr. Teas jumped on her back “like he was trying to get a piggyback ride” and wielded a knife to her throat. RP 296. R.C. said she told Mr. Teas she would do whatever he

wanted her to do if he put his knife away. RP 298. According to R.C., when Mr. Teas put the knife in his pocket, she told him she was not going to “do this” with a knife in his pocket, so she instructed him to put the knife in his backpack, and he obliged. RP 298.

Though she previously said she would do “whatever [Mr. Teas] wanted [her] to do” in order to get Mr. Teas to put down the knife, R.C. testified she denied Mr. Teas’ request to kiss or have her perform oral sex on him. RP 297-98. R.C. said Mr. Teas honored these requests. RP 298. She testified that she asked Mr. Teas put on a condom, and he also obliged this request. RP 298-99.

R.C claimed Mr. Teas had trouble getting an erection, but he nevertheless penetrated her for about two minutes. RP 299. Though she initially told the police Mr. Teas asked for some lubrication, she later testified that she was the one who actually proposed getting lubrication for Mr. Teas as a ruse to escape from the bedroom. RP 302. R.C. avowed that she and Mr. Teas struggled at the door before she ran out screaming for help from her roommate. RP 302. She claimed Mr. Teas had blood on his hand and left blood on her sheet and on her bra strap. RP 315. But everything that resembled blood from R.C.’s bedroom tested negative for Mr. Teas’ DNA. RP 627-28.

During her testimony, R.C. maintained that although she posted under the “adult services” of Backpages.com under the subcategory of “escorts,” she only delivered massage services. RP 325-25, 328. R.C. is not a licensed massage therapist. RP 326. R.C. has three prior theft convictions. RP 321-22.

R.C.’s roommate, Savannah Crawford, also testified at trial. RP 343. The two have been close friends for 13 years. RP 343. Ms. Crawford was not in the same bedroom as R.C. and Mr. Teas when the alleged rape occurred; she was instead in her own bedroom. RP 347. She testified that R.C. ran screaming into her bedroom, naked from the waist-down, claiming Mr. Teas had a knife. RP 348. Ms. Crawford locked the door and claimed to have heard Mr. Teas jiggle her bedroom door. In response, she grabbed a pair of scissors to defend herself and pushed her body against the door to prevent Mr. Teas from entering her bedroom. RP 349-50. When Mr. Teas left the apartment, Ms. Crawford and R.C. decided to follow Mr. Teas in Ms. Crawford’s car. RP 353. Ms. Crawford also said she wanted to get in the car because her gun was in the glove box. RP 353.

The two got in Ms. Crawford’s car and followed Mr. Teas. RP 357. R.C. yelled at Mr. Teas from the window, but Mr. Teas happened to be walking close to a bunch of schoolchildren exiting their bus. RP 357-59.

Ms. Crawford claimed that if the schoolchildren were not present when she followed Mr. Teas, she would have shot him. RP 373.

The nurse who conducted R.C.'s physical examination after this incident also testified. RP 409, 413. R.C. did not have any physical injuries. RP 419. A forensic DNA analyst found Mr. Teas' DNA on R.C.'s breasts, on a hat Mr. Teas left behind, on Mr. Teas' pocketknife, and on R.C.'s bedsheet. RP 627-30. The analyst did not identify Mr. Teas' DNA in R.C.'s vagina or in her perineal area. RP 626.

Mr. Teas also testified at his trial; he also requested a jury instruction on consent, which the court refused. RP 687.

During closing argument, the prosecutor insinuated Mr. Teas only testified out of desperation because the evidence was simply too overwhelming; he also claimed Mr. Teas crafted a story for the jury to "explain away what happened." RP 747-48. The prosecutor also claimed the pocketknife retrieved at the crime scene was similar to the weapon the terrorists used to take down the planes during 9/11. RP 735-36. Furthermore, the prosecutor claimed R.C.'s version of what happened was always consistent, which was false. RP 725. The jury convicted Mr. Teas of rape in the first degree. CP 42.

Mr. Teas has a prior conviction for child molestation in the first degree. RP 789. This crime occurred between 1994 and 1996, when Mr.

Teas was between the ages of 17 and 19 years old. Supp. CP., sub. no. \_\_\_, pgs. 1-2. Based on this crime and the current conviction, the court had no choice but to impose life without parole pursuant to the Persistent Offender Accountability Act (POAA). RP 796-77.

Mr. Teas appeals.

## **E. ARGUMENT**

**1. The prosecutor engaged in misconduct when he: (1) created an inference of guilt based on Mr. Teas' exercise of his right to testify; (2) equated the weapon allegedly used in the offense to the weapon the 9/11 hijackers used to take down the planes during 9/11; and (3) used facts not in evidence to vouch for the credibility of Mr. Teas' accuser.**

- a. Defendants possess the right to a fair trial, and a prosecutor may deprive a defendant of this right if he engages in misconduct.

The Sixth and the Fourteenth Amendments to the United States Constitution and article I, section 22 of our State Constitution secure a defendant's right to a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *In re Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). A prosecutor's misconduct may deprive a defendant of this right. *Glasmann*, 175 Wn.2d at 703.

A prosecutor engages in misconduct if he insinuates a defendant is guilty of a crime or not credible based on the defendant's exercise of his constitutional right(s). *See State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285

(1996) (reversing a defendant's conviction due to prosecutorial misconduct because the prosecutor elicited testimony from a police officer regarding the defendant's exercise of his Fifth Amendment right to remain silent and also because the prosecutor emphasized during closing argument that the defendant remained silent in response to questioning); accord *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979); *State v. Romero*, 113 Wn. App. 779, 54 P.3d 1255 (2002); see also *State v. Espey*, 184 Wn. App. 360, 336 P.3d 1178 (2014) (reversing a conviction due to prosecutorial misconduct because the prosecutor created an inference of the defendant's guilt due to the defendant's exercise of his right to confer with counsel before his arrest).

- b. The prosecutor committed reversible misconduct when he disparaged Mr. Teas' exercise of his right to testify by (1) suggesting he only exercised his right to testify in order to lie to the jury; and (2) asserting Mr. Teas tailored his testimony.

During closing arguments, the prosecutor committed reversible misconduct when he maligned Mr. Teas' exercise of his right to testify and suggested he tailored his testimony.

Both the federal and state constitutions guarantee a defendant's right to testify at his own trial. Within the federal constitution, this right is implicitly rooted in the Fifth, Sixth, and Fourteenth Amendments. U.S. Const. amends. V, VI, XIV; *Rock v. Arkansas*, 483 U.S. 44, 51-52, 107 S.

Ct. 2704, 97 L. Ed. 2d 37 (1987); *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). A criminal defendant’s right to testify is fundamental, and “the most important witness for the defense in many criminal cases is the defendant himself.” *Rock*, 483 U.S. at 51-52.

Additionally, both the federal and state constitution protect a defendant’s right to present a defense and confront all of the witnesses against him at trial. U.S. Const. amend. VI; *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L. Ed. 2d 353 (1970); Const. art. I, § 22.

- i. It is contrary to article I, section 22 for a prosecutor to impugn guilt upon a defendant during closing argument based on a defendant’s exercise of his right to testify and to suggest the defendant tailored his testimony.*

Here in Washington, the right to testify is explicitly protected under article I, section 22 of our constitution, and so is a defendant’s right to be present at trial and mount a defense. Const. art. I, § 22. Accordingly, after conducting a *Gunwall*<sup>1</sup> analysis, our Supreme Court concluded article I, section 22 of our state constitution is more protective of these rights than the federal constitution. *State v. Martin*, 171 Wn.2d 521, 533, 537-38, 252 P.3d 872 (2011).

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<sup>1</sup> 106 Wn.2d 54, 720 P.2d 808 (1986).

*Martin* explored the boundaries of these heightened rights with respect to prosecutorial suggestions of a defendant tailoring his testimony during cross-examination. In *Martin*, the defendant testified during his trial. *Id.* at 524. During cross-examination, the prosecutor highlighted that the defendant “had the advantage” of hearing all the testimony produced at trial and also had the benefit of examining the State’s evidence. *Id.* at 524-25. On appeal, the defendant contended the State improperly implied he tailored his testimony and that this infringed on his article I, section 22 right to testify, appear and defend at his trial, and meet witnesses face-to-face. *Id.* at 533.

To determine whether the prosecutor’s actions ran counter to article I, section 22, our Court turned to a somewhat factually similar United States Supreme Court case. *Id.* at 534. That case, *Portuondo v. Agard*, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), involved a defendant who challenged his conviction under the Fifth, Sixth, and Fourteenth Amendment because after he testified, the prosecutor suggested in closing argument that he tailored his testimony because he had the constitutional ability to hear all the witnesses. The majority of the court found no constitutional error. *Id.* at 73.

However, our court did not stop at the majority’s opinion and instead adopted Justice Ginsburg’s dissent. *Martin*, 171 Wn.2d at 534. In

her dissent, she concluded the majority's opinion went too far. *Id.* at 534. While she believed it was permissible for a prosecutor to pose questions to a defendant during *cross-examination* that suggest the defendant tailored his testimony, she believed it was impermissible for a prosecutor to make such a suggestion during *closing argument*. *Id.* at 535 (*referencing Portuondo*, 529 U.S. at 78-79) (Ginsburg, J., dissenting). This is because at the time of closing, the jury is unable to “measure a defendant’s credibility by evaluating the defendant’s response to the accusation, for the broadside is fired after the defense has submitted its case.” *Portuondo*, 529 U.S. at 78 (Ginsburg, J., dissenting). Moreover, “when a generic argument [of tailoring] is offered on summation, it cannot in the slightest degree distinguish the guilty from the innocent. It undermines all defendants equally...” *Id.* at 79 (Ginsburg, J., dissenting).

Our Supreme Court agreed with Justice Ginsburg’s dissent and held it was proper for a prosecutor to suggest a defendant tailored his testimony during cross-examination. *Martin*, 171 Wn.2d at 535-36. In so holding, the court noted this was because “it is *during cross-examination*, *not closing argument*, when the jury has the opportunity to determine whether the defendant is exhibiting untrustworthiness.” *Id.* at 535-36 (emphasis added).

Congruent with the court's decision to not rely on the majority's opinion in *Portuondo* and instead rely on Justice Ginsburg's dissent, *Martin* holds it is improper for a prosecutor to suggest a defendant tailored his testimony during closing argument.

But here, during closing argument, the prosecutor denigrated Mr. Teas' exercise of his right to testify by (1) creating an inference that Mr. Teas was lying due to his exercise of his right to be present and testify; and (2) suggesting Mr. Teas tailored his testimony. First, the prosecutor spent considerable time arguing Mr. Teas' testimony "defie[d] logic" and "made no sense." RP 733-35. Next, the prosecutor explained that because Mr. Teas initially denied being in the apartment with R.C., the State had to obtain and present physical evidence to prove he was there. RP 745-46. Afterwards, the State described all of the evidence it presented at trial and commented,

So that's another reason why, ladies and gentlemen, *the defendant decided to testify. He saw the overwhelming evidence against him. Couldn't deny the DNA. Could not deny the DNA.*

RP 747 (emphasis added).

This comment is improper because it asserts Mr. Teas exercised his right to testify only because he was confronted with the evidence against him and had to resort to concocting a story to explain his presence. This creates an impermissible inference that Mr. Teas' decision

to testify was not an exercise of his constitutional right to testify and present a defense, but is instead evidence of a mischievous plan to bamboozle the jury.

The prosecutor went on to describe the DNA found on the hat, the bedsheet, and R.C.'s left breast. RP 747-48. He then commented,

Again, the estimated probability of selecting an unrelated individual at random in the U.S. population with a matching [DNA] profile is 1 in 130 quintillion. These are things that the defendant cannot dispute, cannot rebut. *And so that's why he got on the stand yesterday and came -- came up with a story to try and explain away what happened. And he wrapped up some of the things that have been proved to be true.* For example, his presence there, because he can't deny that he wasn't there because he was. *But he had to explain why and how and then deny that he was able to engage in sexual intercourse.*

RP 747-48 (emphasis added).

This comment is just another example of the prosecutor improperly maintaining that Mr. Teas' exercise of his right to testify was just a deceitful ploy to con the jury into believing his innocence. This comment also alleges Mr. Teas tailored his testimony based on the testimony of others. It assumes Mr. Teas took advantage of his constitutional right to be present at trial to fabricate a story consistent with the State's testimony. The prosecutor's comments undermined Mr. Teas' right to be present, testify, and present a defense because they use Mr. Teas' assertion of these rights to create an inference of guilt. As these comments occurred during

closing argument, the State's comments are incongruent with our Supreme Court's holding in *Martin* and also incompatible with article I, section 22 of our constitution.

- ii. *Because these improper comments undoubtedly affected the verdict, the State cannot meet its heavy burden of proving beyond a reasonable doubt that these comments were harmless.*

When a prosecutor commits misconduct that directly violates a constitutional right, this Court applies the constitutional harmless error standard to determine if the misconduct warrants reversal. *Easter*, 130 Wn.2d at 242. A constitutional error is harmless only if this Court is convinced beyond a reasonable doubt the jury would have reached the same result absent the misconduct and “where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *Espey*, 184 Wn. App. at 370. The State bears the burden of demonstrating that any error was harmless. *Id.*

When the defendant does not object to an improper prosecutorial remark on his exercise of his constitutional rights,<sup>2</sup> he can still raise this issue for the first time on appeal if the error is manifest. *Id.* at 365; RAP 2.5(a)(3). To determine whether the error is manifest, this Court assesses

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<sup>2</sup> Mr. Teas' trial counsel did not object to these comments.

whether the error is “so obvious on the record that the error warrants appellate review.” *State v. Gordon*, 172 Wn.2d 671, n.2, 260 P.3d 884 (2011). When the defendant identifies the error, he does not bear the burden to establish it was harmful. *Id.* Instead, the State bears the burden of proving the error was harmless under the *Chapman*<sup>3</sup> standard. *Id.* at 367.

*Espey* is instructive, as it assesses how a court should assess the harm to a defendant when (1) a prosecutor implies the defendant is guilty or not credible based on his exercise of a constitutional right; and (2) the defendant’s credibility is central to the outcome of his case. In *Espey*, the defendant and some of his friends allegedly assaulted a man who they believed drugged and raped their friend. 184 Wn. App. at 363. During this alleged incident, some of the defendant’s friends stole money and drugs from the man’s home. *Id.* The man’s girlfriend claimed she hid in the house during this incident. *Id.* After the purported assault, the man called the police and identified the defendant as the “ringleader” of the incident. *Id.* The State obtained an arrest warrant for the defendant. *Id.*

The defendant knew the police were looking for him, so he contacted a friend’s attorney so the attorney could see if the defendant had

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<sup>3</sup> *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

outstanding warrants. *Id.* The defendant also sought the advice of another attorney. *Id.* at 364. Eventually, the police arrested the defendant. *Id.* He agreed to a recorded interview where he claimed (1) he went alone to the assault victim's house; (2) he was only there to discuss the reported rape; (3) the purported victim invited him in; (4) he did not steal anything from the house; and (5) he did not hit anyone. The State charged the defendant with several crimes, including burglary, robbery, and unlawful possession of a controlled substance. *Id.*

During trial, the State relied on a picture of the alleged victim's injuries and the alleged victim and his girlfriend's recounting of the events to prove its case. *Id.* at 368. The alleged victim's girlfriend's testimony corroborated her boyfriend's retelling of the events. *Id.* On the other hand, the defendant presented his recorded statement to the police denying the events and the testimony of the alleged victim's roommate, who corroborated the defendant's version of the events. *Id.*

During closing arguments, the prosecutor argued several times that the jury should consider the defendant's recorded statement to the police in the context of his decision to consult with attorneys. *Id.* at 364-65. On appeal, the defendant argued the prosecutor improperly commented on his right to confer with counsel and this error was not harmless. *Id.* at 365-66. While the defendant's attorney did not object, this Court reversed the

defendant's conviction because the State "strike[s] at the core of the right to counsel when it seeks to create an inference of guilt out of a defendant's decision to meet with counsel." *Id.* at 365-67.

This Court found the prosecutor's comments were not harmless because the defendant's credibility was central to his case. *Id.* at 368. Aside from the pictures of the alleged victim, the only evidence presented on both sides was testimonial, and so the entire trial turned on who was more credible: the alleged victim and his girlfriend or the defendant and the alleged victim's roommate. *Id.* at 368-69. Although the prosecutor's comments on the defendant's exercise of his right to confer with counsel were brief, "they were designed to weigh in [on the issue of credibility] by framing [the defendant's] story as false or at least incomplete...the prosecution created the inference that [the defendant was lying] because he consulted with attorneys, and this improper inference went to the central issue of the case." *Id.* at 369. Absent these comments, this Court concluded a reasonable doubt existed that the jury may have reached a different verdict. *Id.* at 370.

As in *Espey*, the prosecutor's comments were likely to have substantially affected the verdict, as Mr. Teas' credibility was central to his case. As the prosecutor recognized, "this case is not about who done it. This case, we know who the participants were." RP 720. Instead, this case

was not only about *whose version* of what happened was more believable, but also on *who* was actually more believable.

R.C. presented dubious testimony. She testified that while using the pseudonym “Miley,” she posted an ad on Backpages.com under “escorts” strictly to give massage services, though she is not a certified massage therapist. RP 285-87, 326, 330. R.C. does not own a massage table. RP 326. An “escort” is a euphemistic description for a sex worker. *Escort*, Oxford Dictionary.<sup>4</sup> And the government recently shut down Backpages.com because the Justice Department described it as “the Internet’s leading forum” for sex worker advertisements. Emily Witt, *After the Closure of Backpages Increasingly Vulnerable Sex Workers are Demanding their Rights*, The New Yorker (June 8, 2018).<sup>5</sup>

On the other hand, Mr. Teas presented two stories. When the police first arrested him, he denied any encounter with R.C. RP 172-77. However, he later testified that he initially denied meeting with R.C. because he was ashamed and did not want his family to learn that he was seeking out escort services. RP 665-66.

These facts tasked the jury with deciding who was more credible: someone who maintains she posted on Backpages.com under “escorts”

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<sup>4</sup> <https://en.oxforddictionaries.com/definition/escort>.

<sup>5</sup> <https://www.newyorker.com/news/dispatch/after-the-closure-of-backpage-increasingly-vulnerable-sex-workers-are-demanding-their-rights>.

under a fake name strictly to provide massages, or someone who initially denies to the police a sexual encounter with an “escort.”

And like *Espey*, the evidence presented at trial was in no way overwhelming. The only witness who corroborated R.C.’s story, Ms. Crawford, was not present in the bedroom where the alleged rape occurred. RP 347-48. The physical evidence of sexual assault was, at best, thin, as the police and medical professionals discovered no injuries on R.C. RP 209, 419, 627-28, 757. While R.C. claimed Mr. Teas had a bloody cut on his hand and left blood on both her person and her bedroom, the forensic evidence presented at trial tested negative for Mr. Teas’ blood. RP 315, 333-34, 417, 627-28, 757. Mr. Teas’ DNA was absent from R.C.’s vagina or perineal area. RP 626.

Like in *Espey*, the prosecutor resorted to attacking Mr. Teas’ exercise of his constitutional rights to tarnish Mr. Teas’ credibility. Because the jury’s belief in Mr. Teas’ credibility (or lack thereof) was critical to this case, the prosecutor’s comments undoubtedly prejudiced him. The State cannot prove that the prosecutor’s improper comments were harmless beyond a reasonable doubt. Accordingly, this Court should reverse.

- c. The prosecutor further compounded the prejudice with other flagrant misconduct.

The prosecutor further compounded the prejudice Mr. Teas experienced when he engaged in other flagrant misconduct. First, the prosecutor equated the pocketknife that was recovered from the incident to the weapon the 9/11 hijackers used to take down the planes during 9/11. Second, the prosecutor argued facts never admitted into evidence. And third, the prosecutor used some of these facts never admitted into evidence to bolster the credibility of the complainant.

A prosecutor engages in misconduct when he appeals to the passions and prejudice of the jury to secure a conviction. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Moreover, while a prosecutor has wide latitude to persuade the jury it may make inferences based on the evidence the State presented, it is misconduct for a prosecutor to urge the jury to decide a case based on evidence never presented at trial. *State v. Pierce*, 169 Wn. App. 533, 553, 283 P.3d 1158 (2012); *accord State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). This is because it is a fundamental principle in our criminal justice system that a jury convict a defendant *only* with the evidence presented at trial. *See State v. Miles*, 139 Wn. App. 879, 886, 162

P.3d 1169 (2007), referencing *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950).

Because the jury knows the prosecutor is an officer of the State, it is particularly grievous for a prosecutor to mislead the jury regarding a critical fact in a case. See *State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015) (noting it is particularly egregious for a prosecutor to misstate the law of the case). “Consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is reasonable ground to believe that the defendant has been prejudiced.” *State v. Pete*, 152 Wn.2d 546, 555, n.4, 98 P.3d 803 (2004).

Relatedly, a prosecutor commits misconduct when he improperly vouches for the credibility of a witness with evidence never presented at trial. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). A prosecutor may not express his personal belief as to the credibility of a witness, as it is for the jury, not the prosecutor, to decide whether a witness is credible. *Id.*

Improper argument requires reversal if the prosecutor’s conduct was both improper and prejudicial. *Glasmann*, 175 Wn.2d at 704. This Court assesses the prejudice to the defendant in the context of the entire record, the issues in the case, the instructions to the jury, and the

circumstances at trial. *Id.*; *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).

Misconduct requires reversal if a substantial likelihood exists it affected the jury verdict. *Id.* When a defendant does not object to the misconduct at trial, prejudice can still be established if the misconduct was so flagrant and ill-intentioned that a jury instruction would not have cured it. *Id.* The focus on this inquiry is not on the flagrant or ill-intentioned nature of the remarks but rather on whether the resulting prejudice could have been cured. *Pierce*, 169 Wn. App. at 552. The cumulative effect of repetitive prejudicial misconduct may be so flagrant that no instruction can erase its combined prejudicial effect. *Glasmann*, 175 Wn.2d at 677.

The prosecutor inflamed the passion of the jury when he equated the pocketknife retrieved at the scene of the crime to the weapon the 9/11 hijackers used during one of the deadliest attacks on American soil. As discussed, R.C. claimed Mr. Teas pressed a pocketknife against her throat and told her he was going to rape her. RP 296-97. As the State charged Mr. Teas with rape by means of forcible compulsion with a deadly weapon, the State bore the burden of proving that the pocketknife was a deadly weapon. CP 5; RCW 9A.44.040. The State relied on the alleged use of this knife to argue Mr. Teas used forcible compulsion to have sexual intercourse with K.C.

During closing argument, the prosecutor stated,

the way that [the pocketknife] was used, the manner in which it was used, the crime in which it was used in, constitutes a deadly weapon. Now, it is not a gun. It's not a firearm. It's not a pistol, a revolver, because those are, per se, deadly weapons. Okay? But the manner in which this instrument, this implement was used, with either blade, and the proximity to a person's neck, constitutes a deadly weapon. *And we know that something like this has been used in the past.* Okay? I'm not saying -- what I'm about to say, and I will preface this by saying this is not a terrorist act. This is not even close to 9/11. Okay? *But we all know what was reported about the people who meant to harm on -- on those planes that crashed into the twin towers. What did they have? Box cutters. This, ladies and gentlemen, with this blade exposed, the manner in which it was used, is a deadly weapon.*

RP 735-36 (emphasis added).

The prosecutor's inflammatory argument achieved two things.

First, the argument associated Mr. Teas' alleged behavior to that of the 9/11 hijackers. This painted Mr. Teas in a considerably unflattering light, and in cases like Mr. Teas' that involve credibility contests, improper arguments that villainize a defendant can readily become a deciding factor for the jury. *See State v. Walker*, 164 Wn. App. 724, 738, 265 P.3d 191 (2011).

Second, the prosecutor used the 9/11 terrorist attacks to convince the jury that the pocket knife was, in fact, a deadly weapon: if the 9/11 hijackers could inspire enough fear with similar weapons to have the ability to take down entire planes, then surely the weapon Mr. Teas used

could constitute a deadly weapon. The prosecutor improperly invoked the deadliest foreign attack on American soil to help it meet its burden in proving forcible compulsion. *See State v. Tarrer*, no. 413477, 2013 WL 1337943 (Wash. Ct. App. Apr. 2, 2013)<sup>6</sup> (reversing conviction due to prosecutorial misconduct in part because the prosecutor compared reasonable doubt to questions involving the 9/11 terrorist attacks).

The prosecutor again engaged in flagrant misconduct when he argued facts never introduced as evidence during opening statements and during closing argument. First, during opening statements, the prosecutor stated,

The DNA from the blood stain on [R.C.'s] bed matched the defendant's DNA.

RP 196.

As previously discussed, all of the apparent blood stains actually tested negative for blood and therefore did not match Mr. Teas' DNA. RP 627-28. But the prosecutor's false assertion that Mr. Teas' blood was found at the scene insinuated that some violent struggle occurred and therefore bolstered its claim Mr. Teas used forcible compulsion to have sex with R.C.

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<sup>6</sup> Because this case is unpublished, it is cited to as persuasive authority. GR 14.1.

Next, the prosecutor falsely stated that all of R.C.'s retellings of the alleged rape were "consistent." During closing arguments, the prosecutor recounted R.C.'s testimony and stated,

So that's what --what [R.C.'s] version of [the story] was. And that version has been consistent from the very beginning.

RP 724.

The prosecutor then claimed R.C. told (1) different police officers; (2) the nurse; (3) defense counsel; and (4) the jury the exact same story.

RP 724-25. The prosecutor went on to say,

And each of those [stories] have been consistent. They have not -- she has not changed her story. Everything that she said at trial has been consistent with the previous versions that she has told everybody. And it started within moments after it happened. So what -- what conclusion do you draw from that? That she didn't make it up. She had no time to fabricate the details of what happened because it was like that. She didn't have time to think about, sat down, and, you know -- about all the details and whatnot. So that's what you can conclude from [R.C.'s] testimony.

RP 725.

These assertions were patently false, as R.C.'s story changed with each retelling. It is important to first note that Detective Luque never testified regarding R.C.'s specific retelling of the events. But the probable cause statement Detective Luque drafted indicates R.C. told him that Mr. Teas shoved her onto the bed, held a knife to her throat, and told her he was going to rape her. CP 2. She claimed Mr. Teas first penetrated her and

then he asked for some lubrication. CP 3. With the nurse, R.C. also recounted that Mr. Teas asked for lubrication. RP 417.

At trial, R.C.'s version of what happened changed. She claimed Mr. Teas first jumped on her back like "he was trying to get a piggyback ride" and when she looked back, she saw him wielding a knife. RP 296. She did not mention being pushed onto a bed. She then claimed that it was her, not Mr. Teas, who suggested getting lubrication. RP 301. She claimed she suggested the lubrication so that she could use that as a ruse to flee from the bedroom. RP 302.

The prosecutor also claimed R.C. told "Deputy Osborne" the same story she told the jury, but this person never testified at Mr. Teas' trial. RP 724.

Aside from these arguments being improper because these representations of R.C.'s retelling of events were never admitted into evidence, the prosecutor also used these facts to improperly bolster and vouch for R.C.'s credibility. The prosecutor told the jury that R.C.'s "consistent" statements (which were actually inconsistent) were evidence "that she didn't make it up." RP 725. This was particularly prejudicial, as the credibility of both Mr. Teas and R.C. was crucial to the outcome of this case.

- d. Because credibility was the key issue in this case and the prosecutor's misconduct lambasted Mr. Teas' credibility and bolstered R.C.'s credibility, the prosecutor's misconduct substantially prejudiced Mr. Teas; therefore, this Court should reverse.

To assess whether prosecutorial misconduct prejudiced the defendant, this Court does not assess whether sufficient evidence exists to convict the defendant; instead, this Court assesses whether the misconduct encouraged the jury to base its verdict on the prosecutor's improper arguments rather than the properly admitted evidence. *Glasmann*, 175 Wn.2d 710-11.

The prosecutor's misconduct substantially prejudiced Mr. Teas because it resolved the centrally disputed issue in this case—credibility—in the State's favor. *See Glasmann*, 175 Wn.2d at 708 (reversing a conviction due to prosecutorial misconduct because the misconduct addressed a critical element of the defendant's charge); *accord Allen*, 182 Wn.2d at 375 (reversing a conviction due to prosecutorial misconduct because the misconduct misstated an element that was critically important to the defendant's case); *see also Miles*, 139 Wn. App. at 888 (reversing a conviction due to prosecutorial misconduct because the extraneous facts

the prosecutor inappropriately introduced during trial went to the heart of the defendant's defense).

While Mr. Teas did not object to the prosecutor's misconduct, the prosecutor's numerous instances of misconduct warrants reversal because this misconduct undoubtedly influenced the jury's verdict. The prosecutor continuously impugned Mr. Teas' credibility and maligned his character while he simultaneously bolstered R.C.'s credibility.

Mr. Teas' right to a fair trial must be granted in full. *Glasmann*, 175 Wn.2d at 712. Accordingly, this Court should reverse.

**2. The trial court erred when it denied Mr. Teas' request for a consent instruction.**

- a. A defendant is entitled to a consent instruction if the evidence presented at trial creates a reasonable doubt as to the alleged victim's consent.

The Due Process Clauses of the state and federal constitutions secure a defendant's right to a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3. If sufficient evidence is produced at trial to support a defendant's proposed instruction, then the Due Process Clause requires a court to provide an instruction that allows the defendant to argue his theory of the case. *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 612 (2009). This right correlates with a defendant's Sixth Amendment right to present a defense. U.S. Const. amend. VI; *See State v. Coristine*, 177

Wn.2d 370, 375, 300 P.3d 400 (2013). The Sixth Amendment also ensures that a defendant can make fundamental strategic decisions concerning his defense. *Id.*

If the instruction negates an essential element of the crime, then the evidence presented at trial need only create a reasonable doubt as to the victim's consent. *See State v. W.R.*, 181 Wn.2d 757, 768, 336 P.3d 1134 (2014); *see also State v. Riker*, 123 Wn.2d 351, 367, 869 P.2d 43 (1994). Creating a "reasonable doubt" in the minds of jurors is far easier than proving a defense by a preponderance of the evidence, so it follows that the quantum of evidence that must be produced at trial is even lower than the quantum of evidence that must be produced with affirmative defenses. *See id.* at 770; *see also State v. Fisher*, 185 Wn.2d 836, 850-51, 374 P.3d 1185 (2016) (describing the deferential standard our court applies to determine whether a defendant is entitled to an affirmative defense instruction). The defendant may point to either the State's or his own evidence to merit this instruction. *See Fisher*, 185 Wn.2d at 849.

An essential element of rape in the first degree is the element of forcible compulsion. RCW 9A.44.040(1). "Forcible compulsion" is "physical force which overcomes resistance, or a threat . . . that places a person in fear of death or physical injury to herself or himself or another

person, or in fear that she or he or another person will be kidnapped.”

RCW 9A.44.010(6).

But the act of rape cannot occur with consent, so consent negates the essential element of forcible compulsion. *W.R.*, 181 Wn.2d at 766. Consent means that “at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.” RCW 9A.44.010(7). When a defense negates an element of the crime, the State bears the burden of disproving it beyond a reasonable doubt; accordingly, the State bears the burden of proving a lack of consent beyond a reasonable doubt. *W.R.*, 181 Wn.2d at 770-71.

- b. Mr. Teas’ trial produced more than enough evidence to require the court to instruct the jury on consent.

Mr. Teas and the State produced more than enough evidence to require the court to instruct the jury on consent, yet the court failed to issue this requested instruction. This Court reviews whether sufficient evidence supports an instruction *de novo*. *Fisher*, 185 Wn.2d at 849.

R.C posted an advertisement for “massages” on Backpages.com under the category of “escorts.” RP 285-87, 326, 330. After texting with Mr. Teas and speaking with him on the phone, she let Mr. Teas into her

home and into her bedroom. RP 284, 294. When Mr. Teas entered the room, he did not see any massage tables. RP 654.

Mr. Teas testified that when he entered the bedroom, he sat on R.C.'s bed; she then asked him to take off his pants. RP 656-57. R.C. later got on the bed, and Mr. Teas unbuckled his belt and pulled down his pants, not knowing what to expect. RP 657. Mr. Teas asked R.C. if he could kiss her or if she could perform oral sex, and R.C. replied with "no." RP 657. Both Mr. Teas and R.C. agreed Mr. Teas honored this request. RP 298, 657. Moreover, both R.C. and Mr. Teas agreed that he honored R.C.'s request to put on a condom. RP 298, 658. Mr. Teas had trouble getting an erection, so R.C. proposed getting lubrication and a penis pump to help him with this issue. RP 658. While R.C. alleged that Mr. Teas penetrated her despite his erection issues for two minutes, Mr. Teas said he did not insert his penis into R.C.'s vagina. RP 299, 672.

Mr. Teas requested a jury instruction consistent with 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 18.25 (4th Ed. 2016);<sup>7</sup> CP 18; RP 685. The State objected, arguing

I don't believe that this instruction is warranted.  
It's not supported by the evidence. Mr. Teas testified  
that there was no sexual intercourse. It did happen that

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<sup>7</sup> This instruction reads:

Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have [sexual intercourse] [sexual contact].

he was unable to get an -- an erection and so therefore there was no penetration. If there's no penetration, there's no sexual intercourse. If there's no sexual intercourse, consent is not an issue. So it's strict denial from the Defense.

RP 686.

In response, Mr. Teas explained he testified this was a consensual sexual act that he could not complete, so it was not an outright denial. RP 687. While the court acknowledged the law defines sexual intercourse as “penetration of the vaginal cavity, *no matter how slight*,” the court concluded, “I don’t think, under the facts as they’ve come forward, 18.25 is [warranted].” RP 687 (emphasis added). The court then said it was also not granting the defense’s request for an instruction because the State still had to meet its burden in proving a lack of consent. RP 688.

The court’s reasoning in denying Mr. Teas’ request for a jury instruction was in error for two reasons. First, the court failed to give weight to the deferential standard a court must employ in providing a jury instruction for a defendant, particularly when proposing a jury instruction that need only create a “reasonable doubt” in the jury.

Second, the court neglected to defer to Mr. Teas’ right to make fundamental strategic decisions concerning his defense: even if the State bore the burden of proving consent beyond a reasonable doubt, Mr. Teas still had the right to *instruct* the jury on his defense. *See Coristine*, 177

Wn.2d at 376 (“to further the truth-seeking function of trial and to respect the defendant’s dignity and autonomy, the Sixth Amendment recognizes the defendant’s right to control important strategic decisions...the primary focus should be whether the defendant had a fair chance to present his case in his own way”) (referencing *McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)).

- c. The State cannot prove the court’s error in refusing to grant this instruction was harmless beyond a reasonable doubt; therefore, this Court should reverse.

Because the right to instruct a jury on one’s defense correlates with one’s Sixth Amendment right to present a defense, the court’s error is of constitutional magnitude, and the State bears the burden of proving this error was harmless beyond a reasonable doubt. *See Coristine*, 177 Wn.2d at 379-80.

The State cannot meet its heavy burden. Without the proposed instruction, no assurances exist that the jury knew whether it *could* weigh the evidence of consent. Similarly, the jury had no guidance on *how* to weigh the considerable evidence of consent. Accordingly, this Court should reverse.

### **3. Cumulative error deprived Mr. Teas of a fair trial.**

Mr. Teas maintains that every previously identified error, on its

own, warrants reversal. But if this Court disagrees, cumulative error deprived him of a fair trial.

“An accumulation of non-reversible errors may deny a defendant a fair trial.” *State v. Perrett*, 86 Wn. App. 312, 322-23, 936 P.2d 426 (1997). Reversal is warranted for cumulative error when the combination of errors denies the defendant a fair trial, even if each individual error is harmless by itself. *State v. Salas*, 1 Wn. App. 2d 931, 952, 408 P.3d 383 (2018), *review denied*, 190 Wn.2d 1016, 415 P.3d 1200 (2018).

A reasonable probability exists that the cumulative effect of any combination of the errors identified in this brief materially affected the outcome of Mr. Teas’ trial. The prosecutor repeatedly impugned Mr. Teas’ credibility, which was central to his case. He used Mr. Teas’ exercise of his constitutional rights to create an inference he was not credible. He argued facts never admitted into evidence the bolster the credibility of Mr. Teas’ accuser. He insinuated that Mr. Teas’ behavior mirrored that of the 9/11 terrorists and used the 9/11 terrorist attacks to help him meet his burden in proving that Mr. Teas exerted forcible compulsion upon his accuser. In a trial where the main allegation was that Mr. Teas used forcible compulsion to have sex with his accuser, the prosecutor claimed the police found Mr. Teas’ blood at the scene of the incident, which was false.

Additionally, the trial court refused to grant Mr. Teas' proposed consent instruction.

Mr. Teas' trial was fundamentally unfair. This Court should reverse the conviction and remand for a new trial. *See, e.g., Johnson*, 90 Wn. App. at 74 (reversing due to cumulative error).

**4. The court erred when it imposed a sentence of life without parole because article I, section 14 categorically bars the imposition of life without parole under the POAA when the predicate offense(s) occurred when the offender was a youth.**

- a. Under the POAA, courts must impose life without parole upon individuals if the individual's criminal history consists of certain crimes.

In 1993, the Legislature amended our criminal sentencing laws in accordance with an initiative passed by voters to divest judges of discretion and require courts to sentence "persistent offenders" to life imprisonment without the possibility of parole. *State v. Manussier*, 129 Wn.2d 652, 659, 921 P.2d 473 (1996); RCW 9.94A.570. The Persistent Offender Accountability Act ("POAA") is commonly referred to as the "three strikes" law, but under certain circumstances, two offenses can subject an individual to life without parole. *See id.* An individual becomes a "persistent offender" subject to life without parole if he is convicted of a "most serious offense" and if the individual was previously convicted of certain crimes, including child molestation in the first degree. RCW

9.94A.030(38)(a)(i), (b)(i). Rape in the first degree is a most serious offense. RCW 9.94A.030(33)(a); RCW 9A.44.040(2).

Because Mr. Teas (1) was previously convicted of the crime of child molestation in the first degree; and (2) is currently convicted of rape in the first degree, the POAA compelled the court to sentence Mr. Teas to life in prison without the possibility of parole.

- b. Mr. Teas committed the predicate offense that required the court to impose life without parole for the current offense when he was between the ages of 17 and 19 years old.

Mr. Teas committed the predicate offense that required the sentencing court to impose life without parole—child molestation in the first degree—when he was between the ages of 17 and 19 years old. Supp. CP. , sub. no. 92, Appendix B, pg. 2. It appears from the judgment and sentence for this offense that the victim did not report this crime until between two to four years after it occurred. Supp. CP. \_\_ , sub. no. 92, Appendix B, pgs. 2, 16. Consequently, Mr. Teas pleaded guilty to this crime when he was just a month shy of his 21st birthday. Supp. CP \_\_, sub. no. 92, Appendix B, pgs. 1, 16.

Life may have been considerably different for Mr. Teas if he was sentenced to this crime when he was 17. The juvenile court rather than the adult court would have possessed default jurisdiction over him unless the

juvenile court declined jurisdiction pursuant to RCW 13.40.110. RCW 13.04.030. Unlike adult courts, which are largely punitive, the legislature designed juvenile courts to rehabilitate children convicted of crimes. *State v. Saenz*, 175 Wn.2d 167, 175, 283 P.3d 1094 (2012). Consequently, children serving sentences through the juvenile court system rather than the adult system are less likely to reoffend. *See Donna M. Bishop et. al, The Transfer of Juveniles to the Criminal Court: Does it Make a Difference?*, 42 Crime & Delinquency 171, 171 (1996) (“by every measure of recidivism employed, reoffending was greater among [juvenile transfers to adult court]”).

Most importantly, if a juvenile court had sentenced Mr. Teas to this crime when he was 17, this crime would not have subjected him to life without parole for his current offense under the POAA. Only an “offender” is subject to the POAA. *State v. Knippling*, 166 Wn.2d 93, 99, 206 P.3d 332 (2009); RCW 9.94A.030(38). A juvenile only qualifies as an “offender” if (1) the case is under automatic superior court jurisdiction under RCW 13.04.030; or (2) the juvenile court declined jurisdiction pursuant to RCW 13.40.110. *Id.* at 99-100; RCW 9.94A.030(35). Because child molestation in the first degree does not automatically divest the juvenile court of jurisdiction, the juvenile court would have had to waive jurisdiction pursuant to RCW 13.40.110 to try Mr. Teas under the adult

court system and qualify him as an “offender” subject to the POAA. RCW 13.04.030(v); RCW 9.94A.030(46).

- c. A defendant’s age at the time of his crime is relevant to the constitutionality of his sentence under the Eighth Amendment.

The Eighth Amendment prohibits the government from imposing cruel and unusual punishments. U.S. Const. amend. VIII. A defendant’s diminished culpability renders some punishments excessive under the Eighth Amendment. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 224, 2153 L. Ed. 2d 335 (2002) (holding in part that because individuals with intellectual disabilities are less culpable than the “average criminal,” it is cruel and unusual to execute an individual with an intellectual disability).

A person’s age at the time of his crime is relevant to the constitutionality of his sentence under the Eighth Amendment because a person’s youth renders them less culpable for their crimes. As both the United States Supreme Court and our Supreme Court have repeatedly recognized, “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017) (referencing *Graham v. Florida*, 560 U.S. 48, 76, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); U.S. Const. amend. VIII.

Youthful offenders are less culpable than fully matured adults because they do not have the same mental maturity that fully formed adults possess. Due to fundamental cognitive differences and an underdeveloped brain, youth are less capable of controlling their behavior. *Miller v. Alabama*, 567 U.S. 460, 471-72, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). As such, youth behave rashly and without the full ability to assess the consequences of their actions when they commit crimes. *Id.* Because the cognitive maturity of a fully matured adult is absent with a youthful offender, their indiscretions are “not as morally reprehensible as that of an adult.” See *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 118, 3161 L. Ed. 2d 1 (2005) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1998) (plurality opinion)).

Applying this understanding of the juvenile brain, the United States Supreme Court struck down various sentencing practices pursuant to the Eighth Amendment. See *Roper*, 543 U.S. 551 (categorically barring the imposition of the death penalty upon juvenile offenders); *Graham*, 560 U.S. 48 (banning the imposition of life without parole on juvenile offenders who commit non-homicide crimes); *Miller*, 567 U.S. 460 (forbidding courts from automatically sentencing juveniles to life without parole for homicide offenses); see also *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (holding courts should

consider the age of the suspect to assess whether the defendant was in custody for *Miranda*<sup>8</sup> purposes because children perceive adult interactions differently than adults).

- d. Relying on Eighth Amendment cases assessing the constitutionality of punishing juveniles like adults, our Supreme Court liberalized a court's ability to assess a defendant's youthfulness at the time of the crime when imposing a sentence.

Relying on *Roper*, *Graham*, and *Miller*, our Supreme Court expanded these holdings here in Washington in a number of cases. First, in *State v. O'Dell*, the court examined whether a defendant's youthfulness at the time of the crime justified an exceptional sentence below the standard range under the Sentencing Reform Act (SRA). 183 Wn.2d 680, 688-89, 358 P.3d 359 (2015). At the time the defendant committed the crime, he was 18. *Id.* at 683. To determine whether the defendant's youth justified a departure from the standard range, the court applied a two-part test. *Id.* at 690. First, the court assessed whether the legislature necessarily considered youth as a mitigating factor when it established the standard range sentence for the crime. *Id.* The court observed the Legislature enacted the SRA in 1981, which was decades before the psychological and

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<sup>8</sup> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

neurological research underlying the decisions in *Roper*, *Graham*, and *Miller*. *Id.* at 691.

However, even though *Roper*, *Graham*, and *Miller*'s holdings expressly related only to juveniles under the age of 18, our court applied the research underlying these cases to the defendant, who was 18. *Id.* This was because "parts of the brain continue to develop well into a person's 20s," and "the brain isn't fully mature at 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car." *Id.* at n.5 (internal quotations omitted) (citing *MIT Young Adult Developmental Project: Brain Changes*, Mass. Inst. of Tech.).<sup>9</sup> Because the Legislature was unaware of these cognitive differences in 1981, the court concluded the legislature could not have contemplated a defendant's youth as a mitigating factor. *Id.* at 693.

Second, the court assessed whether a defendant's youth was "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." *Id.* at 690 (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)). Again relying on the research surrounding the Supreme Court's holdings in *Miller*, *Roper*, and *Graham*, the court concluded the answer to this question was "yes"

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<sup>9</sup> <http://hrweb.mit.edu/worklife/youngadult/brain.html> (last visited Aug. 13, 2018).

because a young adult's diminished mental faculties decreases his moral culpability for the crime. *Id.* at 695. The court concluded trial courts *must* possess the discretion to consider an individual's youth as a mitigating factor when imposing a sentence. *Id.* at 696.

Our Supreme Court again expanded upon the reasoning in *Roper*, *Graham*, and *Miller* in *Houston-Sconiers*. In *Houston-Sconiers*, a court sentenced two youths to sentences ranging from 31 years to 45 years due to mandatory gun sentencing enhancements. 188 Wn.2d at 13. Although the sentences imposed in *Houston-Sconiers* were not necessarily the functional equivalent to life without parole, the court interpreted *Miller* to unequivocally compel courts to "consider the mitigating qualities of youth" when sentencing juveniles pursuant to the SRA. *Id.* At 20-21.

Consistent with the reasoning in *Miller*, the court held that although the sentencing enhancements were otherwise mandatory under the SRA, these sentences were not mandatory if the defendant was a juvenile subject to adult court. *Id.* at 19-21. Instead, the court held "trial courts *must* consider the mitigating qualities of youth at sentencing and must otherwise have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." *Id.* at 21 (emphasis added).

- e. Article I, section 14 prohibits courts from imposing life without parole pursuant to the POAA if the predicate offense(s) occurred when the individual was a youth because youth are less morally blameworthy for their actions.

Consistent with (1) our Supreme Court’s expansive interpretation of Eighth Amendment jurisprudence with respect to the sentencing of youthful offenders; and (2) our constitution’s enhanced protections against cruel punishment, article I, section 14 prohibits courts from imposing life without parole pursuant to the POAA if the predicate offense(s) occurred when the individual was a youth.

While the Eighth Amendment proscribes both “cruel” and “unusual” punishment, our constitution prohibits the government from imposing “cruel” punishment. Const. art. I, § 14; *State v. Fain*, 94 Wn.2d 387, 393, 617 P.2d 720 (1980). This provision of article I, section 14 is more protective than the Eighth Amendment. *Fain*, 94 Wn.2d at 392-93.

Generally, Washington courts turn to the four *Fain* factors to assess whether a sentence is “cruel” under our constitution. *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014). These factors include “(1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would have received in other jurisdictions; and (4) the punishment meted out for other offenses in the same jurisdiction.” *Id.* at 887 (quoting *Fain*, 94 Wn.2d at 713).

But because *Fain*'s factors fail to take into account special constitutional concerns inherent in sentencing individuals for youthful offenses—the attributes of youth and a youth's diminished culpability—this Court applied a different framework to assess the constitutionality of a Washington statute that grants courts discretion to sentence juveniles to life without parole. *State v. Bassett*, 198 Wn. App. 714, 734-739, 394 P.3d 430 (2017), *review granted* 402 P.3d 827 (2017). This Court also rejected the *Fain* framework because in *Bassett*, the petitioner was challenging an entire sentencing scheme, not just the proportionality of his specific sentence. *Id.* at 738.

Similarly, Mr. Teas is challenging the POAA because it fails to evaluate specific constitutional concerns that arise when sentencing individuals for youthful offenses. Mr. Teas, in essence, is making an as-applied challenge to the constitutionality of the POAA: as applied to individuals like Mr. Teas whose POAA offenses include youthful offenses, the POAA is unconstitutional under article I, section 14. Mr. Teas is arguing that as a category, such individuals may not be sentenced to life without parole. As such, this Court should apply the framework announced in *Bassett*.

Applying this framework, this Court should hold it is cruel under our constitution to sentence someone to life without parole pursuant to the

POAA if the predicate offense(s) occurred when the defendant was a youth.

- i. Under the categorical approach, the POAA's mandatory imposition of life without parole based in part on youthful offenses is incompatible with article I, section 14.*

Under the categorical approach, the POAA's mandatory imposition of life without parole based, in part, on youthful offenses is incompatible with article I, section 14. Mr. Teas is challenging the application of the statute in the context of his sentence. *Id.* at 916. When a court finds that a statute is unconstitutional as-applied, the statute can no longer be applied in a similar context. *Id.* This Court assesses the constitutionality of a statute *de novo*. *State v. Hunley*, 175 Wn.2d 901, 908, 287 P.3d 584 (2012).

When conducting a categorical analysis of the constitutionality of a statute, this Court first considers the "objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue." *Bassett*, 198 Wn. App. At 730 (quoting *Graham*, 560 U.S. at 61). While legislation is the "clearest and most reliable objective evidence of contemporary values... it is not so much the number of states [that impose the sentence] that is important, but the consistency of the

change's direction" *Id.* (quoting *Atkins*, 536 U.S. at 312, 315). This first consideration, however, is not dispositive. *Id.*

The national consensus is trending towards excluding the use of youthful crimes to later drastically enhance sentences under recidivist statutory schemes. *See* Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel & Unusual Punishment*, 46 U.S.F. L. Rev. 581, 617-25. (2012). Ten states prohibit courts from using juvenile adjudications for purposes of three strikes sentences, and ten additional jurisdictions "most likely prohibit the use of juvenile adjudications as strikes." *Id.* at 619, n.421. Additionally, thirteen other states appear to prohibit the use of juvenile adjudications to count as strikes. *Id.* at 620, n.244.

Importantly, at least nine states "prohibit or limit the circumstances under which convictions of juvenile offenders in adult court may be used for future sentencing enhancements under three strikes laws." *Id.* at 628 n. 282; *see also* Wyo. Stat. Ann. 6-10-201(b)(ii)(2013). And notably, our own legislature recently "took the extraordinary step of extending juvenile court jurisdiction to age 25, recognizing that a juvenile does not instantly mature into an adult at age 18 or even 21." *State v. Watkins*, No. 949735 (Wash. Aug. 16, 2018) (J. Yu, dissenting); Laws of 2018, ch. 162 § 1.

Next, this Court exercises its independent judgment to determine whether the punishment in question violates our State’s cruel punishment proscription. *Bassett*, 198 Wn. App. at 742. In doing so, this Court considers “the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.” *Id.* at 729 (quoting *Graham*, 560 U.S. at 67.) Critically, Washington precedent informs this Court’s independent assessment of the constitutionality of a punishment. *Id.* at 741.

As previously explained, this Court and our Supreme Court have repeatedly extended the reasoning expressed in *Roper*, *Graham*, and *Miller* to Washington sentencing practices because youthful offenders are less culpable than fully formed adults. *See infra* at 44-46. In *O’Dell*, it permitted sentencing courts to consider the mitigating qualities of youth when sentencing a youthful offender despite the fact that the youth was 18. And in *Houston-Sconiers*, it granted sentencing courts unfettered discretion to impose whatever sentence a court deemed appropriate, regardless of the SRA’s legislative requirements. Following these precedents, this Court held that article I, section 14 categorically barred the imposition of life without parole on a juvenile offender. *Bassett*, 198 Wn. App. at 446.

Based on this precedent, a POAA sentence of life without parole due, in part, to a youthful offense is incompatible with our constitution. In *Fain*, our Supreme Court held that a court must consider each of the defendant's offenses when assessing the constitutionality of his sentence under a habitual offender statute like the POAA. 94 Wn.2d at 397-98. Yet the POAA strips courts of discretion to impose a sentence that reflects the defendant's youth at the time of his predicate offense and instead commands courts to impose a sentence of life without parole. Next to the death penalty, the imposition of life without parole is the most severe sentence a court can impose. If one of the defendant's crimes occurred at a time when he was not fully cognitively developed and therefore less morally culpable, a sentence of life without parole is unacceptable under our constitution.

This Court should hold that article I, section 14 bars the imposition of life without parole under the POAA if one of the predicate offenses occurred when the defendant was a youth.

- ii. *If the Supreme Court rejects this Court's use of the categorical approach, then this court should apply a "Fain+" analysis to hold it is inconsistent with article I, section 14 to sentence individuals to life without parole if the predicate offense(s) occurred in the defendant's youth.*

Alternatively, if the Supreme Court rejects this court's use of the categorical approach in *Bassett*, then this Court should apply a *Fain+* analysis to hold it is inconsistent with article I, section 14 to sentence individuals to life without parole under the POAA if the predicate offense(s) occurred in the defendant's youth. Under this analysis, this Court would apply the four *Fain* factors but also assess the defendant's youth at the time of the predicate offense and its mitigating circumstances when it assesses the constitutionality of the sentence.

To recap, the four traditional *Fain* factors include (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would have received in other jurisdictions; and (4) the punishment meted out for other offenses in the same jurisdiction. 94 Wn.2d at 713. Under Mr. Teas' proposed analysis, this Court would also add to this analysis Mr. Teas' youth and diminished culpability at the time of his predicate offense. This factor must weigh heavier than any of the other four factors in accordance with our Supreme Court's jurisprudence in *O'Dell* and *Houston-Sconiers*.

Moreover, *each* of the *Fain* factors should be informed by Mr. Teas' youthfulness at the time of his predicate offense. This proposed analysis is consistent with the Supreme Court's acknowledgment that sentencing schemes that fail to take the defendant's youthfulness into account at all are flawed. *Houston-Sconiers*, 188 Wn.2d at 8

Both of Mr. Teas' offenses are Class A felonies and are considered "most serious offenses." RCW 9A.44.083(2); RCW 9A.44.040(2); RCW 9.94A.030(33). These offenses carry a maximum term of life imprisonment. But as discussed, if a juvenile court sentenced Mr. Teas for the crime of child molestation conviction when he was 17, he would not have been automatically subject to adult court. If the juvenile court retained its jurisdiction over him, Mr. Teas would have received a sentence of 30-65 weeks at the JRA. RCW 13.40.0357. Importantly, if Mr. Teas was sentenced at 17 in juvenile court, his predicate offense would not count as a strike for purposes of the POAA.

The legislative purposes of the POAA includes deterrence, community protection, and the segregation of criminals from the rest of society. *Witherspoon*, 180 Wn.2d at 888; RCW 9.94A.555. The POAA does not contemplate a defendant's diminished culpability and instead commands that "punishments for criminal offenses should be

proportionate to both the seriousness of the crime and the prior criminal history.” RCW 9.94A.555(c).

The purposes of the POAA are incompatible with what we know today about youthful offenders. As our Supreme Court recognized in *O’Dell* regarding the SRA, the legislature enacted the POAA in 1994, long before it was aware of the research underlying the United States Supreme Court’s reasoning in *Roper*, *Graham*, and *Miller*. RCW 9.94A.555; *O’Dell*, 183 Wn.2d at 691. Because the POAA fails to assess a youthful offender’s diminished culpability, the POAA’s purposes are inapposite with both Eighth Amendment and our Supreme Court’s jurisprudence regarding youthful offenders. As such, the “legislative purpose” prong of the *Fain* analysis should not weigh as strongly as the other factors.

The next factor is the punishment the defendant would have received in other jurisdictions. While many states have “three strikes” laws, only nine have two strike laws that require courts to “strike” out a defendant if he previously committed two qualifying offenses. U.S. Dep’t of Just., *Three Strikes & You’re Out: A Review of State Legislation* 7-9 (Sept. 1997).<sup>10</sup> The definitions of “striking out”, however, varies, with some states using the second strike to not impose life without parole, but

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<sup>10</sup> <https://www.ncjrs.gov/pdffiles/165369.pdf>.

to instead impose a harsher sentence. (e.g., Kansas provides that upon the second strike, the court can double the term specified in the sentencing guidelines; North Dakota provides that an offender can be subject “up to life” for a second offense). *Id.* Mr. Teas would only receive the same sentence of life without parole for his two offenses in four states— Georgia, Montana, South Carolina, and Tennessee. *Id.* While this factor is not dispositive, this factor weighs in favor of this Court finding Mr. Teas’ sentence is unconstitutional. *Witherspoon*, 180 Wn.2d at 888.

The fourth factor is the punishment meted out for other offenses in the same jurisdiction. As explained in *Witherspoon*, under the POAA, anyone convicted of certain offenses is subject to life imprisonment without the possibility of parole. *Id.* And in *Witherspoon*, the court upheld a challenge to the court’s imposition of a third strike for a robbery conviction because “the repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime.” *Id.* But this reasoning fails to take into account what this Court has consistently held regarding the diminished culpability of youthful offenders. A youthful offense does not justify a heavier penalty for a current crime because the defendant’s youth at the time of the predicate offense rendered him less morally culpable than a fully developed adult.

The fifth proposed factor is a consideration of the defendant's youth at the time he committed the predicate offense. As fully discussed in this brief, the United States Supreme Court's reasoning in *Roper*, *Graham*, and *Miller*, and the Washington Supreme Court's reasoning in *O'Dell* and *Houston-Sconiers* weigh in favor of this Court finding that article I, section 14 forbids the imposition of life without parole under the POAA if the predicate offense occurred when the defendant was a youth.

f. This Court should remand for resentencing.

Mr. Teas' sentence of life without parole is based, in part, on a crime he committed when he was between the ages of 17 and 19 years old. This is unacceptable under article I, section 14 based on (1) the categorical approach applied in *Bassett*; and (2) a *Fain* analysis that assesses Mr. Teas' youth at the time of the predicate offense. Accordingly, this Court should remand so that the sentencing court may impose a sentence within the standard range.

**F. CONCLUSION**

Based on the foregoing, Mr. Teas asks this Court to reverse his conviction and remand for a new trial. Alternatively, Mr. Teas asks this Court to hold that his sentence is cruel under our constitution and remand so that the court can sentence him within his standard range.

DATED this 27th day of August, 2018.

Respectfully submitted,

/s Sara S. Taboada  
Sara S. Taboada – WSBA #51225  
Washington Appellate Project  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 51098-7-II
v.	)	
	)	
JEREMIAH TEAS,	)	
	)	
Appellant.	)	

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# WASHINGTON APPELLATE PROJECT

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