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SUPREME COURT OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

W.R., PETITIONER

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Appeal from the Superior Court of King County  
The Honorable Gregory P. Canova

**Filed**  
FEB 27 2014  
Clerk of Supreme Court  
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b/h

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BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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A. IDENTITY AND INTEREST OF THE AMICUS.

Amicus, Washington Association of Prosecuting Attorneys (WAPA), is an association of Washington county prosecutors, and hence has an interest in the elements required to prove forcible rape under RCW 9A.44.050, an issue with which the present case is likely to be concerned.

B. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether, where both the plain language and legislative history of RCW 9A.44.050 indicate that non-consent is not an element of forcible second degree rape, this Court should decline to require the State to prove non-consent as an element of that crime.

C. STATEMENT OF THE CASE.

W.R., a juvenile, was charged with and convicted of forcible second degree rape under RCW 9A.44.050(1)(a). CP 1-3, 43-51; RP (6/21/2011) 110-24. Among the juvenile court's written conclusions of law was that "[t]he respondent did not prove, by a preponderance of evidence, that the sexual intercourse was consensual." CP 50.

A detailed statement of the factual and procedural history of the case may be found in the Brief of Respondent, p. 1-6, filed in the Court of Appeals. That statement is incorporated herein.

D. ARGUMENT.

1. BECAUSE BOTH THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF RCW 9A.44.050 INDICATE THAT NON-CONSENT IS NOT AN ELEMENT OF FORCIBLE RAPE UNDER THAT STATUTE, THIS COURT SHOULD NOT REQUIRE THE STATE TO PROVE NON-CONSENT.

a. The plain language of RCW 9A.44.050(1)(a) demonstrates that although “forcible compulsion” is an element of forcible second degree rape, non-consent is not.

“When interpreting a statute, [this Court’s] fundamental objective is to determine and give effect to the intent of the legislature.” *State v. Sweany*, 174 Wn.2d 909, 914, 291 P.3d 305 (2012). Hence, when the “[p]lain language” of a statute “is not ambiguous,” it “does not require construction,” *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724, 727 (2013), and this Court “look[s] only to that language to determine the legislative intent without considering outside sources.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.2d 792, 795 (2003); *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). Specifically, it considers only “the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.” *Evans*, 177 Wn.2d at 192; *State v. Jones*, 168 Wn.2d 713, 722, 230 P.3d 576 (2010). Moreover, when it “interpret[s] a criminal statute, [it] give[s] it a literal and strict interpretation,” it “assume[s] the legislature ‘means exactly what it says,’” and does not “add words or clauses to an

unambiguous statute when the legislature has chosen not to include that language.” *Delgado*, 148 Wn.2d at 727.

RCW 9A.44.050(1)(a), the second degree forcible rape statute under which W.R. was charged and convicted, CP 1-3, 43-51, RP (06/21/2011) 110-24, is not ambiguous. *See State v. Lynch*, 178 Wn.2d 487, 504, 309 P.3d 482 (2013) (J. Gordon McCloud concurring, writing that “the second degree rape [by forcible compulsion] statute... is not ambiguous”).

That statute provides that

(1) [a] person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion.

RCW 9A.44.050(1)(a).

The statute mentions neither “consent” nor “non-consent,” *see* RCW 9A.44.050(1)(a), and since it was enacted, this Court has never held that non-consent is one of its elements or that the State bears the burden of proving non-consent.

Rather, this Court and the Court of Appeals have consistently held that to prove second degree rape by forcible compulsion, the State must show only “[1] sexual intercourse [2] by forcible compulsion.” *State v. Bright*, 129 Wn.2d 257, 265-70, 916 P.2d 922, 926-29 (1996); *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989); *State v. Tuitasi*, 46 Wn.

App. 206, 208, 729 P.2d 75, 76 (1986) (*holding* that “[t]he essential elements of rape in the second degree” by forcible compulsion “are (1) engaging in sexual intercourse (2) with another person (3) by forcible compulsion.”); *State v. Weisberg*, 65 Wn. App. 721, 725, 829 P.2d 252 (1992). *See* WPIC 41.02.

Hence, the plain language of RCW 9A.44.050(1)(a) does not make non-consent an element of forcible second degree rape. Because, when appellate courts “interpret a criminal statute, [they] give it a literal and strict interpretation,” and “assume the legislature ‘means exactly what it says,’” *Delgado*, 148 Wn.2d at 727, this Court should continue to hold, as it has since the current statute was enacted, that non-consent is not an element the State must prove.

Nor can it be said that “forcible compulsion” and “non-consent” are synonymous, and hence, that no additional burden would fall on the State by adding an element of non-consent to the proof of forcible second degree rape.

“[W]hile there is a conceptual overlap between the consent defense to rape and the rape crime’s element of forcible compulsion,” *State v. Gregory*, 158 Wn.2d 759, 803, 147 P.3d 1201 (2006) (*quoting State v. Camara*, 113 Wn.2d 631, 640, 781 P.2d 483 (1989)), the two are not logically equivalent or conceptually co-extensive. *Cf. State v. Martin*, 480 U.S. 228, 230, 107 S. Ct. 1098, 94 L. Ed. 267 (1987). Indeed, they are given different statutory definitions, RCW 9A.44.010(6), 9A.44.010(7),

and have been expounded upon by differing lines of decisional authority. Compare, e.g., *State v. Weisberg*, 65 Wn. App. 721, 725, 829 P.2d 252 (1992) (holding that a “finding of forcible compulsion cannot be based solely on the victim’s subjective reaction to particular conduct”) with *State v. Marable*, 4 Wn.2d 367, 374, 103 P.2d 1082 (1940) (stating that “consent may sometimes be inferred if there has been no outcry and no serious resistance” from the victim).

The State can clearly show non-consent even in the absence of forcible compulsion. A defendant could fail to use any force or threat in engaging in sexual intercourse with a victim, who nevertheless fails to consent to such intercourse. Indeed, this is the basis of one of the alternative means of committing third degree rape. See RCW 9A.44.060(1)(a) (non-consent alternative).

Moreover, the State may be able to show forcible compulsion in cases where it cannot establish a lack of consent. When proving forcible compulsion, the State must show the use of force or threat. RCW 9A.44.010(6). To prove non-consent, the State would have to show evidence of the victim’s lack of consent, see RCW 9A.44.010(7), which under pre-reform case law, largely means evidence of the victim’s resistance to force. See, e.g., *State v. Pilegge*, 61 Wn. 264, 112 P. 263 (1910); Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 Wash. L. Rev. 543, 552, n. 43 (1980) (hereinafter, “Loh Article,” noting that, “if force (or

resistance) is not an objective indicator of nonconsent, it is unclear how else the subjective state would be determined.”). Because force can exist in the absence of resistance, and in fact inspire a lack of resistance, the State can often show force in cases where it could not show resistance. Hence, in the absence of evidence of any other threat excusing a lack of resistance, it could prove forcible compulsion, but not non-consent. *Cf. State v. Weisberg*, 65 Wn. App. at 725 (noting that “a finding of forcible compulsion cannot be based solely on the victim’s subjective reaction to particular conduct.”)

Further, there are obviously situations, as noted by commentators, where “two people might... agree to have sexual intercourse in which one person resists and the other one physically overcomes that resistance.” Seth A. Fine & Douglas J. Ende, *Washington Practice: Criminal Law*, Vol 13B, § 2408, fn. 9 (2013-2014 ed.), hereinafter “Washington Practice.” In such situations, of which there could be real-world examples, *cf. State v. Landsiedel*, 165 Wn. App. 886, 888, 269 P.3d 347 (2012), “consent and forcible compulsion would co-exist,” Washington Practice, § 2408, fn. 9, at least as long as the force used did not exceed the scope of the consent given.<sup>1</sup>

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<sup>1</sup> Such situations, while perhaps rare, would obviously present an argument for allowing “consent” as an affirmative defense.

Hence, requiring the State to show non-consent in addition to forcible compulsion, would improperly add an element to the State's case not set forth by the unambiguous plain language of RCW 9A.44.050(1)(a).

- b. Even were this Court to consider the legislative history of the RCW 9A.44.050, it would find that the legislature intended to eliminate the need to show resistance in cases of forcible rape by eliminating the need to prove non-consent.

As the Supreme Court of New Jersey has noted, “[w]ith respect to a law, like the sexual assault statute, that ‘alters or amends the previous law or creates or abolishes types of actions, it is important, in discovering the legislative intent, to ascertain the old law, the mischief and the proposed remedy.’” *Grobart v. Grobart*, 5 N.J. 161, 166, 74 A.2d 294 (1950).

English Common law defined rape as the carnal knowledge of a woman forcibly and against her will. 4 William Blackstone, *Commentaries on the Laws of England: In Four Books* 210 (1765); Edward Coke, *The Third Part of the Institutes of the Laws of England* 60 (4<sup>th</sup> Ed. 1669) (*noting* that the law defined rape, in relevant part, as the “unlawful and carnal knowledge and abuse of any woman above the age of ten years *against her will.*”) (Emphasis added).

“A derivation of the English common law offense was used in most states in this country prior to 1975.” Cynthia Wickstrom, Note, *Focusing on the Offender's Forceful Conduct: A proposal for the*

*Redefinition of Rape Laws*, 6 Geo.Wash.L.Rev. 399, 399 (1988)  
(hereinafter, “Wickstrom Note”).

Hence, in 1854, Washington’s legislature enacted a statute based on the common law that defined rape, in relevant part, as “sexual intercourse with a person not the wife or husband of the perpetrator committed ***against the person’s will and without the person’s consent...*** (2) When the person’s resistance is forcibly overcome; or (3) When the person’s resistance is prevented by fear of immediate and great bodily harm which the person has reasonable cause to believe will be inflicted upon her or him.” RCW 9.79.010 (1974) (emphasis added; derived from Laws of 1854, p. 80, § 33).

Under this statute, “the State bore the burden of proving an alleged rape victim’s lack of consent.” *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989); *State v. Chambers*, 50 Wn.2d 139, 140, 309 P.2d 1055 (1957) (*holding* that, to prove the crime of rape, it is “incumbent upon the state to show the carnal knowledge was without the consent of the prosecutrix.”); *State v. Thomas*, 9 Wn. App. 160, 510 P.2d 1137, *review denied*, 82 Wn.2d 1012 (1973).

The terms “against the person’s will” and “without the person’s consent” were “synonymous in common law,” and defined in terms of the victim’s “***resistance...*** forcibly overcome” or “***resistance...*** prevented by fear of immediate and great bodily harm.” Loh Article, p. 549; 1973 Wash. Laws (1<sup>st</sup> Ex. Sess.) ch. 154, § 122, at 1198.

“To establish lack of consent, courts required proof of resistance,” Donna J. Case, *Condom or Not, Rape is Rape: Rape Law in the Era of AIDS –Does Condom Use Constitute Consent?*, 19 UDTNLR 227, 228 (1993), Wickstrom Note, p. 403-04.

In fact, in Washington, “*the pre-reform statute equated nonconsent with physical ‘resistance,’*” and “[i]ts literal terms permitted forced sexual penetration where the victim’s resistance had been too easily overcome to constitute nonconsent.” *State v. Lynch*, 178 Wn.2d 487, 510, 309 P.3d 482 (2013) (J. Gordon McCloud concurring) (emphasis added).

Hence, this Court held in 1910 that “carnal knowledge by force by one of the parties” and “nonconsent thereof by the other” were

*essential elements, and [that] the jury must be fully satisfied of their existence in every case by the resistance of the complainant, if she had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force. So far resistance by the complainant is important and necessary; but to make the crime hinge on the uttermost exertion the woman was physically capable of making would be a reproach to the law as well as to common sense.*

*State v. Pilegge*, 61 Wn. 264, 112 P. 263 (1910).

While the case law did not require, the “utmost” or a “terrific” exertion on the part of the victim” expected by other jurisdictions, Washington did require “reasonable” resistance. Loh Article, p. 549 (citing *Pilegge*, 61 Wn. 264; *Starr v. State*, 205 Wis. 310, 311, 237 N.W. 96, 97 (1931); and *Mills v. United States*, 164 U.S. 644, 648-49, 17 S. Ct. 210 (1897)).

Later decisions were careful to point out that resistance was “not one of the elements of the crime of rape” but “evidence of want of consent which is an element,” *State v. Meyerkamp*, 82 Wash. 607, 144 P. 942 (1914); *State v. Bridges*, 61 Wn.2d 625, 379 P.2d 715 (1963); *State v. Pitmon*, 61 Wn.2d 675, 678, 379 P.2d 922 (1963).

Nevertheless, these decisions continued to hold that “the extent of resistance or lack of resistance by the woman” was “an item of evidence to be considered by the jury along with all other evidence which bears upon willingness and consent.” *State v. Thomas*, 9 Wn. App. 160, 510 P.2d 1137 (1973). Thus,

[w]hether the resistance of the prosecuting witness was prevented by fear of immediate and great bodily harm which she had reasonable cause to believe would be inflicted upon her, was a question of fact to be determined by the jury.

*Pitmon*, 61 Wn.2d at 678 (citing *State v. Baker*, 30 Wn.2d 601, 192 P.2d 839 (1948)).

Moreover, and perhaps more important, courts held that, “[u]pon a charge of rape, if consent appears, however reluctant it may be, there can be no conviction, and *consent may sometimes be inferred if there has been no outcry and no serious resistance.*” *State v. Marable*, 4 Wn.2d 367, 374, 103 P.2d 1082 (1940) (emphasis added). Thus, where the victim “made no outcry, and her resistance was only passive,” it “was necessary to convince the jury that the lack of resistance on her part was due to weakness and fear.” *Marable*, 4 Wn.2d at 374-75. In order to do so, the

State had to “show the mental and physical condition of the [victim], as bearing upon the extent of the resistance the law required her to make.”

*Marable*, 4 Wn.2d at 375.

Thus, it was held to be

proper to consider the age and strength of the woman, and [that] her mental condition is also to be considered as bearing upon the question of whether the act was against her will and consent, and the extent of the resistance which the law required her to make. If the girl is very young, and of a mind not enlightened on the question, this consideration will lead the court to demand less clear opposition than in the case of an older and more intelligent female, or even lead to a conviction where there was no apparent opposition.

*State v. Mertz*, 129 Wash. 420, 422, 225 P. 62 (1924); *State v. Severns*, 13 Wn.2d 542, 125 P.2d 659 (1942).

Hence, the defendant’s “force was gauged and deemed criminal according to the victim’s conduct,” Loh Article, p. 549, and the victim’s conduct was judged by her individual characteristics and background.

*Mertz*, 129 Wash. at 422. As a result, the focus of a rape trial necessarily settled squarely on the victim. *See* Loh Article, p. 549. Washington’s rape law before 1975, like rape laws across the country,

required victims of rape, unlike victims of any other crime, to demonstrate their ‘wishes’ through physical resistance. And the law of rape [wa]s striking in the extent to which nonconsent defined as resistance ha[d] become the rubric under which all of the issues in a close case [were] addressed and resolved.

Susan Estrich, *Real Rape*, p. 29 (1987).

As Professor Loh noted,

***[u]nder the common law legislation, nonconsent was determined by examining the victim's conduct. This standard was prejudicial to and weakened prosecution. Women generally have not been socialized to be aggressive and many are afraid to and do not resist an assailant. Indeed, resistance to rape or other violent crimes often results in great injury to the victim. Under the common law statutes, a jury could acquit when it determined that the victim did not resist sufficiently; that is, the victim was deemed to have consented. A court could dismiss prosecution or reverse a conviction upon finding that resistance did not rise to the required level. For this reason, the consent standard has been criticized as "inflammatory and mistaken."***

Loh Article, p. 556 (footnotes omitted) (emphasis added).

A related problem was the use of "past sexual behavior" to "impeach [a victim's] testimony concerning the question of consent." Deborah Fleck, *Preliminary Review of the Subject of Rape, Memorandum to Gerald Mooney, House Judiciary Committee*, hereinafter, "Fleck Memorandum," Attachment 1A (1974) (on file with Wash. State Archives). Such evidence was used to attack a victim's credibility, "on the presumption that consent to any sexual behavior is indicative of possible consent to all other." *Id.*

Such evidentiary hurdles seem to have resulted in a "very small number of rape prosecutions, and [an] extremely low conviction rate," both of which were noticed by activists in the early to mid 1970s. Written testimony of Jackie Griswold Vice-President, Seattle Women's Commission (1974) (regarding S.B. 3173) (on file with the Wash. State

Archives and hereinafter referred to as “Griswold Testimony”); Fleck Memorandum, p. 2 (*noting* that “[t]he crime of rape not only has a low reporting level, but a uniquely low prosecution and conviction rate as well.”); Fact Sheet on Bill to Revise Present Rape Law at 1, S.B. 3173, 43d Leg., 3d Ex.Sess. (Wash. 1974) (on file with Washington State Archives).

This low conviction rate may have, in turn, resulted in both a decreased number of victims reporting to and cooperating with law enforcement and a “significant increase of rape.” Fleck Memorandum, p. 1-2. Hence, by the early 1970s in Washington, as elsewhere, it became “apparent that rape laws [were] in need of revision.” *Id.* at 5.

Thus, beginning in the early 1970s,

feminists launched the rape law reform movement and began lobbying state legislators in an effort to achieve statutory changes in the rape laws. Specifically, feminists advocated for changes in the legal definition of rape that would create gender-neutral rape/sexual assault statutes, eliminate the spousal rape exemption, and redefine rape as sexual assault. ***They also pushed for the elimination of the special evidentiary rules and requirements, which included eliminating the resistance requirement and establishing “rape shield” laws that would prohibit the use of the victim's past sexual history in court.***

Jennifer McMahon-Howard, *Does the Controversy Matter? Comparing the Causal Determinants of the Adoption of Controversial and Noncontroversial Rape Law Reforms*, 45 Law and Society Review, 401 (2011) (emphasis added).

“The Seattle Women’s Commission (SWC), appointed by the [Seattle] mayor to advise on women’s issues, was the most instrumental group in law reform in Washington.” Loh Article, p. 570. In association with a King County deputy prosecutor and an assistant attorney general, SWC Vice-President Jackie Griswold drafted a proposed reform bill. *Id.*; S.B. 3173, 43d Leg., 3d Ex.Sess. (Wash. 1974).

Three other bills were also considered, S.H.B. 208, 44<sup>th</sup> Leg. Reg. Sess. (Wash. 1975), S.B. 2196, 44<sup>th</sup> Leg., Reg. Sess. (Wash. 1975), and S.B. 2198, 44<sup>th</sup> Leg., Reg. Sess. (Wash. 1975), as was a proposal to “delete sexual offenses per se entirely from the law,” and “prosecut[e] sexual offenders under an assault statute.” Fleck Memorandum, p. 5-8.

Deborah Fleck, an intern for the House Judiciary Committee at the time, wrote that, of the proposals considered by the Washington State legislature, “[o]nly one proposal, that drafted by the King County Prosecutor’s Office and the Seattle Women’s Commission, deals with the question of admissibility of evidence which is considered to be a major factor in the low reporting level of rapes as well as the low level of prosecution and conviction for rape.” Fleck Memorandum, p. 5-6. Fleck concluded that of the five proposals discussed, “the revision drafted by the Seattle Women’s Commission and the King County Prosecutor’s Office, appears to deal most effectively with the rape problem.” Fleck Memorandum, p. 9.

In her written testimony before the legislature regarding her proposed bill, Ms. Griswold stated that her organization believed “that provisions in this bill will greatly help to remedy the imbalance of justice which we find in rape cases –in which the destruction of the complaining witness is permitted in order to safeguard the accused.” Griswold Testimony, p. 2. Specifically, Griswold testified that

At present, the very small number of rape prosecutions, and the extremely low conviction rate serve as a statement to society that rape is not an offense that is regarded as serious, and that the likelihood that one will be called to account for it is negligible. Potential rapists are thus encouraged to commit their attacks with impunity.

A major reason for this state of affairs is that the great majority of rape victims are unwilling to bring charges. They are strongly advised by family, by friends, by their physicians, not to go to court. They are told that the trial experience will be a humiliating and dehumanizing one for them, worse perhaps than the rape itself –that their lives and habits will be dissected and their reputations ruined, and that, once in the courtroom, it is they who will be on trial. This prediction is frequently correct. In courtroom practice, much of the victim’s past life may be scrutinized in the attempt to show that she consented to a single, specific act. Such practice so extends the meaning of the word consent as to make it meaningless.

....

The present law requires that the great bulk of rape cases be considered under a narrow set of criteria, ignoring the many factors and degrees of seriousness which may be involved. The inadequacy of these criteria has led to a situation where relatively few cases are prosecuted as rape, most cases being plea bargained down to offenses which do not at all indicate the nature of the crime committed, and in which many cases are not prosecuted at all. *Aside from such relatively unusually situations as where the victim was of unsound mind, or in a stupor, or unconscious of the nature of the act,*

*in the great majority of cases it must be shown that a woman's resistance was forcibly overcome or that her resistance was prevented by fear of immediate and great bodily harm.* We thought that fear of a lesser degree of bodily harm might very reasonably present resistance. So might threats of future harm, or threats to harm another person, or threats to harm the financial situation or personal relationships of the victim. It was our belief that rape should be divided into degrees according to the seriousness of the crime.

Griswold Testimony, p. 1-2 (emphasis added).

Thus, Ms. Griswold expressed concern about the necessity of evidence of resistance to prove non-consent. So did other reformers. In her thorough concurrence to *Lynch*, Justice Gordon McCloud wrote that “the legislative history of Washington’s rape law reform includes extensive testimony on the need to remove ‘resistance’ as an element of the rape crime.” *Lynch*, 178 Wn.2d at 511. In her written testimony to the legislature, Jean Marie Brough of the Seattle National Organization for Women, asked “[w]hy should rape victims be required to resist to the extent that they receive additional injuries when robbery victims are considered clever when they don’t dispute with the robber?” Written Testimony of Jean Marie Brough at 1, Legislative Coordinator for Seattle NOW to the S. Judiciary Comm. (Aug. 3, 1974) (on proposed S.B. 3173) (on file with Wash. State Archives).

Of course, the reason rape victims were required to resist is not because resistance was an element of the old rape statute itself, but because it was “evidence of want of consent which [wa]s an element,”

*State v. Meyerkamp*, 82 Wash. 607 (1914). Because “the pre-reform statute equated nonconsent with physical ‘resistance,’” *Lynch*, 178 Wn.2d at 510 (J. Gordon-McCloud concurring), to eliminate the need to prove resistance in cases of forcible rape, reformers had to eliminate the need to prove non-consent in such cases.<sup>2</sup>

Griswold’s bill, which ultimately became law, Loh Article, p. 570, did just this. *See* S.B. 3173; Laws of 1975 1<sup>st</sup> ex.s. ch. 14. As the original incarnation of the present RCW 9A.44.040 and .050(1)(a), it eliminated any reference to consent or non-consent in the language defining forcible rape, and instead described the crime in terms of the “forcible compulsion” exercised by the defendant. Laws of 1975 1<sup>st</sup> ex.s. ch. 14; RCW 9A.44.040; RCW 9A.44.050(1)(a).

As Professor Loh stated “[t]he first two degrees of rape,” those which proscribe forcible rape, “make no mention of consent in order to deflect attention away from the victim.” Loh Article, p. 551. He went on to state that “the new law channels the jury’s focus, via instructions, on the culpability of the actor rather than the response of the victim,” and that “[a]s a legal matter... a prosecutor under the new legislation no longer has the burden of proving victim resistance or nonconsent. He is relieved of the risk of nonpersuasion as to that element.” Loh, p. 557.

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<sup>2</sup> There, of course, was no need to eliminate resistance in a case of non-forcible rape, and hence, the element of “consent” remains in the statute defining non-forcible, third degree rape. RCW 9A.44.060(1)(a); S.B. 3173 § 6 (1)(a).

[W]ith [the] victim's conduct no longer a separate formal element of the crime, there is less legal justification for evidentiary rules unique to rape law based on the victim's past sexual actions. *The symbolic value of the shift should not be minimized. The reform statutes announce society's interest in accurately identifying perpetrators of rape, not in reinforcing traditional assumptions regarding appropriate behavior of virtuous women.*

*Id.* (emphasis added). See Donna J. Case, *Condom or Not, Rape is Rape: Rape Law in the Era of AIDS—Does Condom Use Constitute Consent?*, 19 Univ. Dayton L. Rev. 227, 232 (1993) (noting that “[t]he law regarding consent... has transformed over time, shifting the focus of the inquiry from the victim to the attacker.”).

Thus, although it has been stated that “the champions of reform did not view the removal of the ‘resistance’ element as tantamount to removing the element of nonconsent,” *Lynch*, 178 Wn.2d at 511 (J. Gordon McCloud concurring), these champions could not have removed the need for resistance evidence without removing the element of non-consent from the forcible rape statutes.

For the same reason, were non-consent resurrected as an element of forcible rape, so too would be the means by which the case law demands such non-consent be proven: by evidence of the victim's resistance. This could mean that, “consent may [again] be inferred if there has been no outcry and no serious resistance” by the victim. *Marable*, 4 Wn.2d at 374. It might mean that the State would again have to “show the

mental and physical condition of the [victim], as bearing upon the extent of the resistance the law required her to make.” *Marable*, 4 Wn.2d at 375.

It would definitely reverse nearly 40 years of progress and revert the focus of judicial proceedings from the actions of the accused back to the response of the victim. This could again, as it did in the late 1960s and early 70s, decrease the willingness of rape victims to report their ordeals or to cooperate with law enforcement for fear that, in the words of the drafter of the current statute, “it is they who will be on trial.” Griswold Testimony, p. 1 (underling in the original).

Ms. Griswold, who was the primary drafter of original version of RCW 9A.44.050(1)(a), testified that she wrote that statute with the intent “to remedy the imbalance of justice... in which the destruction of the complaining witness is permitted in order to safeguard the accused.” Griswold Testimony, p. 2. If this Court were to again require the State to prove the victim’s non-consent, it would again invite the judicial destruction of the complaining witness, by resurrecting the need to prove his or her resistance.

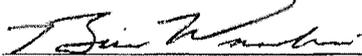
Given that “the legislative history of [RCW 9A.44.050(1)(a)] and the circumstances surrounding its enactment,” *Sweany*, 174 Wn.2d at 915, firmly indicate a legislative intent to eliminate the need to show resistance in cases of forcible rape by eliminating the need to prove non-consent, this Court should not now add an additional element of non-consent.

E. CONCLUSION.

Because both the plain language and legislative history of 9A.44.050 indicate that non-consent is not an element of forcible second degree rape under that statute this Court should not require the State to prove such non-consent as an element of that crime.

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