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STATE OF WASHINGTON
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No. 88341-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

W.R., Jr.,

Appellant.

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

BRIEF OF AMICUS,
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
ATTORNEYS AND WASHINGTON DEFENDER ASSOCIATION

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TABLE OF CONTENTS

I. ARGUMENT WHY REVIEW SHOULD BE GRANTED1
II. CONCLUSION4

TABLE OF AUTHORITIES

Cases

<i>Ohio v. Martin</i> , 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed. 267, <i>reh'g denied</i> , 481 U.S. 1024, 107 S.Ct. 1913, 95 L.Ed.2d 519 (1987)	1, 2
<i>State v. Camara</i> , 113 Wn.2d 631, 781 P.2d 483 (1989).....	2, 3
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006)	2, 3

Statutes

RCW 9A.44.010.....	2
RCW 9A.44.050.....	1

Rules

RAP 16.4.....	1
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I.
ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review because the trial court and Court of Appeals decisions conflict *Ohio v. Martin*, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed. 267, *reh'g denied*, 481 U.S. 1024, 107 S.Ct. 1913, 95 L.Ed.2d 519 (1987), RAP 16.4 (b)(3) and because this is an issue of substantial public importance that continues to create issues in the trial court and on appeal, RAP 16.4(b)(4).

In addition, this Court recently granted review in *State v. Lynch*, No. 87882-0, on the very issue raised in this case: Whether requiring the defendant in a rape prosecution to prove consent as an affirmative defense impermissibly shifts to the defendant the State's burden to prove forcible compulsion.¹

As the briefing in this case and in *Lynch* makes clear, second-degree rape requires the State to prove, beyond a reasonable doubt, that the defendant had sexual intercourse with another person by "forcible compulsion." RCW 9A.44.050(1)(a). "Forcible compulsion" is defined as:

. . . physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or

¹ *Lynch* is not yet set for oral argument.

physical injury to herself or himself or another person, or in fear that she or he or another will be kidnapped.

RCW 9A.44.010(6). Compare that with the definition of “consent”:

“Consent” means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

RCW 9A.44.010(7).

The Washington legislature and courts have defined forcible compulsion and consent to be mutually exclusive terms. *See State v. Camara*, 113 Wn.2d 631, 639, 781 P.2d 483 (1989). If a sexual act is forcibly compelled, it cannot be consensual, and vice versa. Lack of consent is therefore contained within the element of forcible compulsion.

This Court reconsidered *Camara* in *State v. Gregory*, 158 Wn.2d 759, 803-04, 147 P.3d 1201, 1225 (2006). In that case the Court said:

Gregory concedes that the instructions read to the jury in his rape case provide a correct statement of current law but claims that the *Camara* court incorrectly analyzed the *Martin* decision. We disagree; the *Martin* analysis clearly supports the *Camara* court’s conclusion. The jury in a first degree rape case must be convinced that none of the evidence presented raises a reasonable doubt that sexual intercourse occurred as the result of forcible compulsion. *See Martin*, 480 U.S. at 233, 107 S.Ct. 1098. Therefore, so long as the jury instructions allow the jury to consider all of the evidence, including evidence presented in the hopes of establishing consent, to determine whether a reasonable doubt exists as to the element of forcible compulsion, the conceptual overlap between the consent defense and the forcible compulsion element does not relieve the State of its burden to prove forcible compulsion beyond a reasonable doubt. We decline to overrule *Camara* and

conclude that the jury instructions here complied with due process.

Apparently, this Court was of the opinion that by directing the jury to consider all of the evidence, including any evidence related to consent determining whether a reasonable doubt existed as to any of the charged elements, they would necessarily place the burden of disproving consent on the State.

Without more, this was a dubious proposition. This case, however, unquestionably demonstrates that *Camara* and *Gregory* are simply not sufficiently clear statements of the law and this Court should speak again on this issue. This was a bench trial. Thus, it was an experienced trial judge (a former Assistant Attorney General and King County Prosecutor) who stated in written findings that the defendant had failed to prove the affirmative defense of consent by preponderance. He clearly did not understand that the Constitution forbid him from allocating the burden to the defense. Worse yet, the Court of Appeals affirmed the trial court in a one-paragraph decision. That Court appeared to believe that *Camara* and *Gregory* permit this allocation.

This case provides a proper companion case to *Lynch*. Undersigned counsel has reviewed the judge's oral ruling and the findings of fact and conclusions law. Those documents demonstrate that there was significant

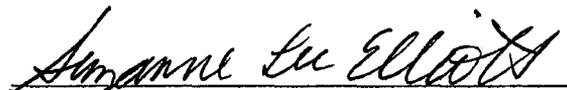
evidence that the State had little evidence of forcible compulsion. Nonetheless, instead of considering “all of the evidence, including evidence presented in the hopes of establishing consent to determine whether a reasonable doubt exists as to the element of forcible compulsion,” Judge Canova compartmentalized the two concepts. His oral and written findings demonstrate that he did not apply the evidence of consent and weight it in determining whether or not there was forcible compulsion. Instead, he found forcible compulsion first. Findings of Fact 18 and 19. Then he later considered the evidence of consent. Finding of Fact 48. He also considered the two concepts separately in his Conclusions of Law.

II. CONCLUSION

This Court should grant W.R.’s petition for review and consolidate it with *State v. Lynch*, No. 87882-0.

DATED this 7th day of March, 2013.

Respectfully submitted,


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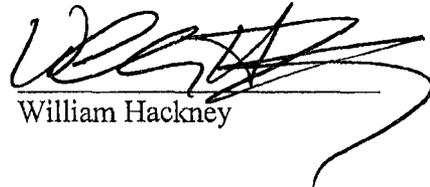
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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of the foregoing brief on the following individuals:

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12 Mar 2013
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Attached for filing in *State v. W.R., Jr.*, Supreme Court No. 88341-6 is the brief of amicus by the Washington Association of Criminal Defense Attorneys and Washington Defender association. It is filed by Suzanne Lee Elliott, WSBA #12634, 206-623-0291, Suzanne-elliott@msn.com, and by Travis Stearns, WSBA # 29335.

Thank you for your assistance.

~William Hackney
Legal Assistant to Suzanne Lee Elliott