Supreme Court No. 101330-2
COA Div. 3 No. 38552-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

CARMELLA DESEAN,

Petitioner/Appellant,

v.

ISAIAH SANGER,

Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

Respondent, Isaiah Sanger, is the Respondent in the trial court and the Appellant in the Court of Appeals.

II. COURT OF APPEALS OPINION

The Court of Appeals, Division III, August 30, 2022, published opinion was attached by Petitioner as Appendix 1.

III. ISSUES PRESENTED FOR REVIEW

The Court of Appeals' application of the affirmative defense of reasonable belief regarding consent did not raise any issue of substantial public interest, where the appellate court ruled consistently with other jurisdictions and this court, and the statutory scheme, though subsequently re-codified, did not substantively change the provisions other than incorporating jurisprudence relied upon by the Court of Appeals.

IV. STATEMENT OF THE CASE

The instant case presents an issue of whether the Petitioner first meets the threshold criteria for discretionary

review under Petitioner's only stated basis for review, RAP 13.4(B)(4), an issue of substantial public interest. Respondent denies that the petition raises an issue not already decided consistently in the appellate courts below, and no substantial public interest exists in denying an entire class of litigants due process, implicating equal protection through disparate impact.

The underlying opinion concerns the Court of Appeals extension of the codified defense of reasonable belief that consent was present into the civil context constitutes an issue of substantial public interest or whether the court erred. Petitioner's claim that the Court of Appeals' opinion (hereinafter "Opinion") fundamentally diminishes the civil sexual assault protection order (hereinafter "SAPO") statute, codified at RCW Chapter 7.105, formerly RCW 7.90, by erroneously interpreting plain language ignores valid Washington case law finding the statute ambiguous and interpreting the same in harmony with the statutory scheme as a

whole. *See i.e. Nelson v. Duvall*, 197 Wash. App. 441, 387 P.3d 1158, 1165 (2017).

Petitioner's claim that the plain language of the statutes negates any legislative intent to consider the mental state of the respondent is directly contradicted by the holding in *Nelson*, which requires that the SAPO statute be read in harmony with the criminal sexual offense statutes, and by the plain language of the statute. *Nelson's* analysis, approved by the appellate court below herein, is consistent with the holding below and no reasonable justification exists for overturning this analysis.

In her original petition, Ms. DeSean alleged that she was sexually assaulted by Isaiah Sanger on August 7, 2020 in Henderson, Nevada. She could not remember all the details. She remembered having drinks by a pool, then sitting on a floor and telling him, "No" and having him wash her hair, then being brought to the bedroom of her friend, Bailey Duncan. She complained of several visible injuries as a result of the alleged incident of sexual assault. She claimed her head had a huge

lump on it and that there were bruises the next morning on her knees, arms and back. CP (Clerk's Papers) 4, 79 (Transcript of 9/10/20 hearing). Neither the police detective who interviewed her at the hospital nor the SANE nurse who did a physical examination were able to document any of these claimed injuries. RP (Report of Proceedings) 93 -98.

She attributed a number of statements to Mr. Sanger, which she maintained indicated they had engaged in sexual intercourse. Two days after the alleged incident, she went to a local hospital on August 9, and reported her complaint to the Henderson (Nevada) police. She spoke with a Detective Skinner of that department. CP 1-6.

Ms. DeSean subsequently filed a declaration on September 25, CP 42 et seq., where she claimed to have had three alcoholic drinks, two of which were made by her friend, Bailey Duncan and that she did not recall having sexual intercourse with Mr. Sanger. She had traveled to Nevada to visit Mr. Duncan. Ct. Op. (Court Opinion) 2.

Ms. DeSean later testified she did not remember getting into bed that night but did remember Mr. Sanger washing her hair in the bathroom, and laughing with him in the shower. RP 62, 64. She did not remember having any sexual contact with Mr. Sanger on the night of August 7, but claimed she said "no" to having sex with him and "no" to a threesome involving Mr. Duncan. RP 63. She claimed she did not consent to sexual intercourse with Mr. Sanger, even though she did not remember having sexual intercourse. RP 70.

On waking on August 8, she claimed she noticed bruising on her body, her vagina was bleeding and hurt, and the room where she awoke “smel[led] like condom[s] and sex.” CP 4. Ms. DeSean indicated Mr. Sanger had informed her they had sex. RP at 66.

Ms. DeSean did not report the alleged sexual assault until August 10, after a day she indicated she spent seeing the sights in Las Vegas and having sexual intercourse with Bailey Duncan. RP 67-68, RP 73.

Mr. Duncan later testified that by the end of the night, all three were pretty intoxicated and, as they went upstairs to the bathroom, they were all leaning on each other and that DeSean was crying and dry heaving. RP 36. He went to lie down, and passed out on the couch downstairs.

Duncan admitted that the next morning he left the apartment and drove to Arizona to see family and friends and to "clear his head," and that he did not know what if anything had happened. RP 38, 44. He told the court he had left that morning because he had felt he and Ms. DeSean were a couple, and he did not have a good feeling about Mr. Sanger's question, "are we good?'" RP 50. He returned to his apartment later the same day after receiving a text from DeSean and admitted she knew he was angry at her when he left for Arizona. RP 39, 52.

Duncan confirmed that DeSean was initially worried Duncan was angry with her when he left abruptly to visit his relatives but admitted that the two of them had sexual intercourse that day. RP 42-44, 52.

On Monday, Duncan took DeSean to the hospital to figure out definitively if anything had happened to her, and because she still did not feel well. RP 40. While there, Mr. Duncan was interviewed by Detective Skinner, from the Henderson Police. RP 40. Mr. Duncan indicated, contrary to his later testimony, that he did not know what happened between Mr. Sanger and Ms. DeSean on the night they had all been drinking, but told Mr. Sanger later that Sanger needed to find another place to live. RP 48.

Detective Kari Skinner was employed by the Henderson Police Department in the Special Victims Unit, which focuses primarily on sexual assaults and child abuse. RP 77. She was assigned to investigate DeSean's accusation against Mr. Sanger. RP 79. She recorded her interview with DeSean with the latter's permission. RP 82. They talked for about 80 minutes, and then she spoke with Mr. Duncan for about 15 minutes. RP 85. Mr. Duncan did not tell Detective Skinner any details to which he later testified, indicating he did not have a good recollection of

what had happened before he passed out. RP 88, 89. He told her that he did not know anything about what happened and only talked to DeSean and Mr. Sanger the next day about the night's events. RP 87.

DeSean initially claimed to Skinner that Mr. Sanger had admitted raping her, but upon Skinner's further questioning, DeSean said she had accused him of raping her, and he had answered with a question, "you think I raped you? Is that what you think I did?" Skinner interpreted DeSean's vocal inflection as reflecting Mr. Sanger's vocalization as a question and not as a statement of something he had actually done. RP 83-84.

DeSean vacillated between remembering bits of the evening and not remembering them. She concluded by telling the detective, "I don't have any recollection of what happened, but I feel like something happened, and I wouldn't have consented." RP 90.

The detective did not see any signs of physical injury, such as bruising or contusions on the parts of DeSean' s body

visible during her medical examination.[1] The SANE nurse who examined DeSean likewise did not document any sign of physical injury at all. The detective knew the SANE nurse, who had a reputation for being very thorough. RP 93-94, 98. There were simply no physical findings that suggested a sexual assault had taken place. RP 97.

DeSean originally told Detective Skinner that she had washed the clothes she said she had been wearing at the time of the alleged assault. Later, after returning to Washington, told the detective that she had not washed the clothes and had them in a plastic bag. RP 100.

Detective Skinner turned over her report on the incident to the local District Attorney, who made the determination that there was insufficient evidence to bring any criminal charge against Mr. Sanger. RP 102.

[1] At the time of the interview, Ms. DeSean was wearing shorts and a tank top, so a good portion of her body was likely to be visible to the detective. RP 91.

Mr. Sanger filed his own declaration concerning his encounter with Ms. DeSean. CP 87 (and following). His friend and co-worker Bailey Duncan had told him that Ms. DeSean was sexually aggressive. CP 88-89. She was the person who originally suggested a threesome involving Mr. Duncan and the two of them. CP 90. When he broached the subject with Mr. Duncan, the latter agreed if it would help Mr. Sanger "get laid." Duncan however, said he felt sick and lay down on the couch. CP 91.

Mr. Sanger and DeSean got into the shower with their swimsuits on. De Sean was the one who pursued a sexual encounter, and she insisted that they not have intercourse without a condom. At one point she said, "let's not do this because I feel bad for Bailey," but shortly thereafter began to initiate intercourse with him again. CP 92. She straddled him and was on top of him while they had intercourse. CP 92. She also was the one to suggest a change of position, on more than one occasion. CP 93, 94.

Mr. Sanger has had many briefings during his military service about the importance of consent in sexual encounters. He wanted to make sure any sexual partner was consenting to the activity. He believed that DeSean was fully capable of consenting to their encounter based on both her words and actions during their encounter. CP 92. 94, 95-96. In his live testimony before the court, Mr. Sanger re-asserted that he did not have intercourse with DeSean against her will, and believed that she knew what she was doing at the time. RP 114. She was the one who initiated their sexual contact. RP 115.

V. ARGUMENT

A. The Court of Appeals Decision Regarding the Applicability of the Defense of Reasonable Belief in Capacity to Consent in the Civil Context is Consistent with Washington Law

1. The Court of Appeals' Evaluation of the Applicability of the Affirmative Defense of Consent Presents No Issue of Substantial Public Interest Where the Statutory Scheme Was Subsequently Re-Written and Codified Differently, but The Substantive Provisions in Question Remain Nearly Identical.

The Court of Appeals decision requiring the SAPO statute be read in harmony with criminal statutes and importing the affirmative defense is based on valid case law interpreting substantively parallel statutory language. The pertinent language of the new statute, RCW Chapter 7.105, though reorganized, is largely duplicative of the prior statute and incorporates the holding of *Nelson v. Duvall*, 197 Wash. App. 441, 456, 387 P.3d 1158, 1166 (2017).

Petitioner complains that the court erroneously interpreted the plain language as ambiguous. However, the court's reliance on *Nelson*, which already found the statutory language sufficiently ambiguous to interpret, incorporates the conclusion regarding ambiguity which justifies the interpretation by the Court of Appeals in the instant case. Although the prior statute, Chapter RCW 7.90, lacked specific indications regarding the issue of incapacity by intoxication, the new statute mirrors the conclusion and language used in *Nelson*, which held:

> Once a claim of "incapacity" is raised, or evidence of "incapacity" is provided, *the court must determine on the record whether the victim had the capacity to consent*.

Nelson v. Duvall, 197 Wash. App. at 456 (2017).[2] Likewise, RCW 7.105.200(10) provides, in nearly identical language:

> "When a petitioner has alleged incapacity to consent to sexual conduct or sexual penetration due to intoxicants, alcohol, or other condition, *the court must determine on the record whether the petitioner had the capacity to consent*."

Although RCW 7.105 defines consent, it does not specifically define capacity. However, mental incapacity is defined in the chapter of Washington's criminal code defining sex offenses:

> "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

RCW 9A.44.010(7). The new statute does not incorporate any new definition or replace the definition found here and, as

[2] *See also State v. Gode*, 145 Conn. App. 1, 8-9, 74 A.3d 497, 502 (2013) (court required to allow reasonable belief of consent instruction in criminal trial).

Division III held, *Nelson* remains relevant, harmonizing the criminal and civil statutory schemes.

The Petitioner here claimed incapacity to consent. However, even if taken as genuine, a lack of memory, or being in a "blackout" state from drinking alcohol is not proof of incapacity and does not in and of itself correlate to incapacity. Julien, R. To Intend or Not to Intend: That is the Question, The Journal of Legal Nurse Consulting, Vol. 21, Number 4, Fall 2010 (last accessed on 1/10/2023 at http://drjulien.com/articles_by_dr_julien). The question of consent, and reasonable belief thereof is still relevant and incorporating the defense was properly decided by the appellate court below.

B. The Plain Language of RCW 7.105, in Defining Consent, Necessarily Requires Consideration of its Communication to Another Party

Communications are intrinsically subject to interpretation and prone to ambiguity. In defining the term "consent" in the

statute, the plain language negates any notion that the respondent's perception or mental state would be irrelevant. The statutory definition of the term "consent" naturally places at issue the perception of the respondent and thereby incorporates the same.

> RCW 7.105.010, Definitions, provides, in pertinent part:
>
> (5) "Consent" in the context of sexual acts means that at the time of sexual contact, *there are actual words or conduct* indicating *freely given agreement to that sexual contact*. Consent must be ongoing and may be revoked at any time. Conduct short of voluntary agreement does not constitute consent as a matter of law. Consent cannot be freely given when a person does not have capacity due to disability, intoxication, or age. …

(emphasis added). The lower court's extension of the affirmative defense of reasonable belief that the person had the capacity to consent, simply clarified an implicit notion in the statutory language defining consent: actual words or conduct *indicating* freely given agreement to that sexual contact. With the legislature's use of the verb "indicating," the perception of the respondent is necessarily implicated, and the affirmative

defense of "reasonable belief" clarifies the context for that perception.

The Merriam-Webster dictionary, in relevant part, defines "indicate" as a transitive verb[3], directed at another party, meaning: (1)(a) to point out or point to; and (2) to state or express briefly. *See* Merriam-Webster.com Dictionary, s.v. "indicate," accessed January 9, 2023, https://www.merriam-webster.com/dictionary/indicate. Thus, the perception of the recipient of the indication is necessarily implicated. The legislature's inclusion of this transitive verb to explain consent, which is fundamentally a communication between two persons, indicates the statute cannot be considered a strict liability statute, excluding the mental state or understanding of the object of the communication.

Communications between two persons are naturally fallible and subject to ambiguity. Thus, the understanding of

[3] A "transitive verb" is characterized by having or containing a direct object. *See* Merriam-Webster.com Dictionary, s.v. "transitive," accessed January 10, 2023, https://www.merriam-webster.com/dictionary/transitive.

the recipient of the communication, whether in words or conduct, should always be considered when evaluating consent. This has been confirmed by studies examining communications regarding sexual advances and the recipient's interpretation thereof. Sexual interactions are often characterized by physical gestures, acknowledged as forms of communicating consent in the statutory scheme. Such nonverbal communications may be intrinsically ambiguous:

> [R]ecipients of sexual advances typically do not offer consent in the form of a straightforward verbal utterance of willingness. The most common way individuals indicate willingness to engage in sexual activity is through nonverbal behavior (Beres, Herold, & Maitland, 2004; O'Sullivan & Byers, 1992); such as moving closer to the person, reciprocating sexual behavior, or helping their partner advance the level of intimacy. Overall, the typical ways that individuals negotiate sexual interaction can allow for a high degree of ambiguity and expectation and, consequently, may contribute to misperceptions of consent.

Lofgreen, A.M., Mattson, R.E., Wagner, S.A., Ortiz, E.G. and Johnson, M.D., 2021. Situational and dispositional determinants of college men's perception of women's sexual desire and

consent to sex: A factorial vignette analysis. *Journal of Interpersonal violence*, *36*(1-2), pp.NP1064-NP1090.

Lofgreen's conclusion emphasizes that judgments regarding consent hinge on communications:

> In any case, these findings add credence to the notion that men's judgments of desire and consent rest on the interplay between what is communicated by the woman, the circumstances under which the communication occurs, and the characteristics of the man to whom she is communicating (Lim & Roloff, 1999).

Id. at NP1087.

As communication is implicit in the definition of consent, the reasonable understanding or belief of the object of the communication is absolutely relevant to determining the existence of consent at the time of the acts in question. Particularly with alcohol intoxication and lack of memory, the perception at the time of the act should be more relevant to the question of consent than the emotional reaction in the aftermath of choices made.

C. Petitioner Erroneously Categorizes the SAPO Statute as one of Strict Liability

Petitioner here relies on a mischaracterization of the SAPO statute as providing for "strict liability" in the case of an alleged sexual assault. Petitioner's argument rests heavily on its assertion that the statute is one of strict liability whose plain language indicates a lack of intent to consider the respondent's "intent" or mental state. However, in making this assertion, the Petitioner fails to engage in a legal analysis of whether the statute is one of strict liability and the court should not endeavor to adopt this mischaracterization.

1. Petitioner Fails to Provide Jurisprudence in Support of Considering the SAPO Statute one of Strict Liability

To support its characterization of the SAPO as a statute of strict liability, Petitioner relies on *Siegler v. Kuhlman*, which found that, as a matter of law, a tort caused by a truck transporting gasoline was subject to strict liability as it fit within the common law definition of an abnormally dangerous activity. *Siegler v. Kuhlman,* 81 Wash. 2d 448, 458, 502 P.2d 1181, 1186 (1972).

Siegler is not instructive in this matter, however, because sexual contact or intercourse is not an abnormally dangerous activity and there is no reasonable argument that it would be so classified. *See Doe v. Johnson*, 817 F. Supp. 1382, 1399 (W.D. Mich. 1993).[4] Petitioner provides no jurisprudence in support of its insistence that the SAPO statute creates strict liability.

Nonetheless, in a case cited by *Siegler*, the Washington Supreme Court upheld the notion that strict liability is to be confined to things or activities which are extraordinary, exceptional, or abnormal. *Pac. Nw. Bell Tel. Co. v. Port of Seattle*, 80 Wash. 2d 59, 63, 491 P.2d 1037, 1039 (1971). Nowhere does the Petitioner explain how sexual contact would

[4] See i.e. *Stout v. Warren*, 176 Wash. 2d 263, 269-70, 290 P.3d 972, 976-77 (2012) (Whether an activity is abnormally dangerous is determined through consideration of six factors. Restatement (Second) of Torts § 520 (1977). The factors consider whether the "dangers and inappropriateness for the locality" of the activity are "so great that, despite any usefulness it may have for the community, [the principal] should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.")

qualify under this definition or provide any legal support for classifying the statute as one of strict liability.

The Washington Supreme Court has imported the notion of strict liability from criminal law into civil tort law where the basis of the claim is sexual misconduct. *Christensen v. Royal Sch. Dist.*, 156 Wash. 2d 62, 68, 124 P.3d 283, 286 (2005). However, this importation relies on clear statutory language establishing strict liability. Importantly, *Christensen* also establishes that prior to the decision below herein, and prior to the decision in *Nelson*, the Washington Supreme Court held that the criminal law regarding consent in criminal matters is also applicable in the civil context. *Id.* ("[T]he notion that minors are incapable of meaningful consent in a criminal law context should apply in the civil arena and command a consistent result.) In discussing whether a 13-year-old was capable of consenting to sexual conduct, the *Christensen* court imported the criminal statute, citing the obvious purpose of

protecting persons who, by virtue of their youth, are explicitly, by rule of law, too immature to rationally or legally consent. *Id.*

Subsequent to *Christensen*, however, even this extreme notion of strict liability in the criminal context was forcefully limited by the Washington Supreme Court, requiring consideration of the defendant's mental state, including the context of statutory rape, a strict liability crime defined by statute and inferring a lack of capacity to consent. *See i.e*. *State v. Deer*, 175 Wash. 2d 725, 740, 287 P.3d 539, 546 (2012) (involuntary conduct *negates* the commission of a strict liability crime); *State v. Blake*, 197 Wash. 2d 170, 174, 481 P.3d 521, 524 (2021) (strict liability statute criminalizing drug possession violates constitutional due process guarantees).[5]

Here, *Christensen* provides clear direction that Washington's criminal statutes and jurisprudence are

[5] In *Deer*, the court required that in a criminal prosecution, the defendant be allowed to assert a mental defense, and subsequently, in *Blake*, the court appears to modify *Deer* by removing the requirement that the defendant prove his or her mental state, shifting the proof requirement to the state. *Id.*

historically applicable in the parallel civil context. 156 Wash. 2d at 68 (2005).

D. The Statutory Definition Regarding Capacity to Consent is Instructive and Supports the Consideration of the State of Mind of Both Parties

Washington courts have long held, and statutes clearly reflect, that voluntary intoxication does not automatically negate responsibility for choices made by a person who is under the influence.

Further, RCW 9A.16.090, a criminal statute, makes it clear that persons may not absolve him or herself of responsibility for choices made leading to criminal acts, although the intoxication may be considered in relation to establishing the requisite mental state:

> Intoxication. No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090. While this statute is part of the general criminal statutory scheme, it evidences the legislature's concern for the effects of intoxication on a person's mental state. Nonetheless and in harmony with this statute, Washington courts have consistently held that a person's state of intoxication does not exonerate the individual from liability from choices made while under the influence. This has also been imported into the civil context where the licensing consequences may be imposed for refusal to provide a breath sample. *Hering v. State*, 13 Wash. App. 190, 191, 534 P.2d 143, 145 (1975) (voluntary intoxication does not excuse a refusal to take the chemical sobriety test).

Although the petitioner here claims lack of memory as to the issue of consent and the acts alleged, some of which respondent admitted, the claim of lack of memory has not served to absolve criminal defendants of choices made while under the influence. See i.e. *State v. Brown*, 78 Wash. App. 891, 893, 899 P.2d 34, 35 (1995) (where consent was not at

issue, the defendant's lack of intent as evidences by intoxication to the point of blackout was irrelevant because intent was not an element for consideration). While this may create a different landscape where consent is not at issue, where consent is at issue, the mental state of both parties should be considered.

Here, Petitioner avails herself of the statutory right to negate consent by the fact of her intoxication. However, the implication of the strict liability argument is that the respondent's mental state is entirely irrelevant where she determines *ex post facto* that her mental state should be the basis of penalizing the respondent for their mutual acts. Petitioner here seeks to prevent the respondent from even addressing the fundamental nature of consent as a communication between two parties.

The creation of a rule which automatically absolves a petitioner of responsibility for her choices and actions, or makes her communications to the respondent irrelevant, tends

to reinforce feudal notions of paternalistic control over a woman's chastity.

According to the National Sexual Violence Resource Center, the prevalence of false reporting in sexual assault cases is between 2% and 10%. *See* Statistics About Sexual Violence, National Sexual Violence Resource Center (accessed 1/9/2023) https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf. In its media sheet, providing information and statistics for journalists, the Center reports examples, including a study of eight U.S. communities, which included 2,059 cases of sexual assault, and found a 7.1% rate of false reports (approximately 146), as well as a study of 136 sexual assault cases in Boston found a 5.9% rate of false reports. *Id.*

The Center also reports that one in five women and one in 71 men will be raped at some point during their lives. *Id.* Applying this ratio to the incidence of false reporting, it becomes clear that the vast majority of falsely accused persons

are men. Although the statistical likelihood of false reporting may appear rather low, it is far from insignificant. Denying respondents the ability to defend against an allegation they insist is false, and invoking their own memory and knowledge that the act was done with consent, would be a deprivation of due process, and likely result in disparate impact of the statute based on gender, which may then violate Equal Protection.[6]

In modern society, marked by vestiges of patriarchal control, women face the dilemma of being labeled and judged for sexual promiscuity, which may be a driving force in blurring the line of consent, making the defense of reasonable belief in consent even more important.[7]

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[6] Although the petition in question is civil in nature, the statutory scheme also gives rise to criminal charges for violations of an order, once in place. Because of such criminal consequences, the statute may be quasi-criminal in nature. Alleged criminal violations may be charged based on nothing but the word of the petitioner and range from gross misdemeanors to felonies. *See* RCW 7.105.450; Wash. Const. art. I, § 3; U.S. Const. amends. XIV.

[7] "In a patriarchal context, the sexual double standard is an ideological hypocrisy that allows male promiscuity while requiring female chastity, based on the 'belief or attitude that a specific sexual behaviour, or all sexual behaviour, is more acceptable for persons of one sex, usually males[.]" Wallis, Alexandra. "Whores and the law: A case study of the sexual double standard and the contagious diseases acts in mid-nineteenth century England." (2014).

Jurisprudence has long recognized the danger of false reporting, even in the context of acknowledging the gravity of sexual assault:

> It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, though never so innocent." 1 M. HALE, PLEAS OF THE CROWN 633, 635 (1680). Hale's words should be read with the knowledge that, at common law, a rape victim's testimony alone was sufficient to support a conviction, raising an apprehension of false accusations. Cf. 7 J. WIGMORE, EVIDENCE § 2061 (3d ed. 1940).

Harris, L.R., 1975. Towards a consent standard in the law of rape. *U. Chi. L. Rev.*, *43*, p.613 (at footnote 19); *see also Walker v. United States*, 96 U.S. App. D.C. 148 n.4, 223 F.2d 613, 619 (1955).

If the law prohibited respondents in Washington from asserting the reasonable belief of capacity to consent defense, even where the petitioner does not deny the possibility of apparent consent, fabrication of claims of lack of memory may be further encouraged. Such an interpretation would effectively

protect false reporters from being subjected to any inquiry or doubt and encourage false reporting, leaving a large number of respondents, mostly male, without any possible defense.

Although as a matter of public policy, the legislature has chosen to provide strong protection to victims, nowhere is it apparent that the legislature would deprive those accused of any due process protection or ability to refute the presence of consent. If Petitioner were allowed to create a rule where consent may be revoked retroactively but no respondent is allowed to present his understanding of the consent, a class of civil offense would be created which, when merely alleged, would admit no defense, thus vitiating the concept of due process.

VI. CONCLUSION

As forth above, Respondent respectfully requests that this Court deny the Petition for Discretionary Review. The

potential reasons justifying discretionary review have not been properly argued, nor has the standard been met.

Respectfully Submitted this 10th day of January, 2023.

Nicole Dalton, WSBA#38230
Attorney for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the day noted, that:

1) I served, a true and correct copy of the foregoing document to the following places in the manner noted:

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Signed at Clark County, Washington, this 10th day of January, 2023.

Nicole Dalton, WSBA#38230
Attorney for Respondent

DALTON LAW OFFICE PLLC

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