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No. 87882-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Respondent,

v.

JEFFREY LYNCH,  
Petitioner.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2013 APR 15 P 3:08  
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CORRECTED BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS

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 ORIGINAL

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**I.**  
**ISSUES PRESENTED**

1. In *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989), this Court held that the legislature implicitly created an affirmative defense of consent in cases of rape by forcible compulsion. Should *Camara* be overturned because its analysis of legislative intent was faulty?
2. Should *Camara* be overturned because an affirmative defense that negates an element of the crime violates due process?
3. Should the result in this case be overturned because a court cannot give an instruction on an affirmative defense, over the defendant's objection, when the evidence presented can properly be considered for the purpose of raising a reasonable doubt that the crime was committed?

**II.**  
**STATEMENT OF THE CASE**

WACDL accepts the statement of the case set out in Mr. Lynch's petition for review.

### III. ARGUMENT

#### A. SUMMARY OF ARGUMENT

Mr. Lynch's counsel has ably explained why the trial court should not have imposed an unwanted affirmative defense on his client, why the due process clause forbids an affirmative defense that completely negates an element of the crime, and why the jury instructions in this case were confusing. WACDL's brief will focus on the larger picture: that this Court's ruling in *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989), inevitably led to a state of confusion regarding sex crimes that include the element of "forcible compulsion." By finding that the legislature implicitly intended to make consent an affirmative defense, the Court created a system in which it became impossible to craft jury instructions that are both constitutional and comprehensible. Because *Camara* is wrong and harmful, this Court should overrule it.

#### B. THE *CAMARA* COURT INCORRECTLY FOUND THAT THE LEGISLATURE INTENDED TO MAKE CONSENT AN AFFIRMATIVE DEFENSE

In *Camara*, the Court addressed a 1975 revision in the rape statutes. The previous statute, enacted in 1909, described rape as

sexual intercourse ... 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 ...

*Camara*, 113 Wn.2d at 636, quoting RCW 9.79.010 (1974).<sup>1</sup> “The law was well settled under this statute that the State bore the burden of proving an alleged rape victim’s lack of consent.” *Id.* (citation omitted). The Court stated that the 1975 revision “replaced” lack of consent with “forcible compulsion.” *Id.* “Though the rape statutes no longer expressly mention nonconsent as an element of rape, we believe consent remains a valid defense to a rape charge.” The Court concluded that “the removal from the prior rape statute of language expressly referring to nonconsent

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<sup>1</sup> The full text is as follows:

Rape is an act of sexual intercourse with a female not the wife of the perpetrator committed against her will and without her consent. Every person who shall perpetrate such an act of sexual intercourse with a female of the age of ten years or upwards not his wife:

- (1) When, through idiocy, imbecility or any unsoundness of mind, either temporary or permanent, she is incapable of giving consent; or
- (2) When her resistance is forcibly overcome; or
- (3) When her resistance is prevented by fear of immediate and great bodily harm which she has reasonable cause to believe will be inflicted upon her; or
- (4) When her resistance is prevented by stupor or weakness of mind produced by an intoxicating narcotic or anaesthetic agent administered by or with the privity of the defendant; or
- (5) When she is at the time unconscious of the nature of the act, and this is known to the defendant;

Shall be punished by imprisonment in the state penitentiary for not less than five years.

RCW 9.79.010 (1974).

evidences legislative intent to shift the burden of proof on that issue to the defense.” *Id.* at 638.

The Court’s reasoning was faulty. The 1975 revision *does* include an express reference to lack of consent. That factor alone became the basis for a charge of rape in the third degree. *See* RCW 9A.44.060. This no doubt reflected a judgment that a woman can be raped even if she does not resist, and even if she is capable of resisting. *See Camara*, 113 Wn.2d at 639. Rape by forcible compulsion became one means of committing rape in the second degree. *See* RCW 9A.44.050. Its definition corresponds to alternatives (2) and (3) of the old law. It is true that the second-degree rape statute does not expressly state that lack of consent is an element, but such language would be superfluous. As the *Camara* Court acknowledged, forcible compulsion is the “conceptual opposite” of consent. *Id.* at 637. Listing both nonconsent and forcible compulsion as elements of second-degree rape could only generate confusion, since it would imply that it is possible to consent to forcibly compelled sex.<sup>2</sup> The old statute was redundant in that it technically required proof of both nonconsent and forcible compulsion. That was a result of the structure of the statute, which first sets out the elements that must apply in every rape

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<sup>2</sup> One could imagine a person consenting to some form of “rough sex,” but in that case there would be no true compulsion.

case, and then presents five additional, alternative elements. Because the various degrees of rape are now set out in separate statutes that redundancy has been avoided.

As the Washington Court of Appeals has recognized, the State still has the burden of proving lack of consent on a charge of rape in the third degree. *See State v. Higgins*, 168 Wn. App. 845, 854, 278 P.3d 693, 697 (2012), *reconsideration denied* (Aug. 9, 2012), *as corrected* (June 21, 2012), *review denied*, 176 Wn.2d 1012 (2013); *State v. Guzman*, 119 Wn. App. 176, 185, 79 P.3d 990, 994 (2003), *review denied*, 151 Wn.2d 1036, 95 P.3d 758 (2004). It makes little sense to hold that the defendant must prove lack of consent when charged with a higher degree of rape which subsumes lack of consent.

Certainly, this Court has not applied such reasoning to other statutes. For example, a person is guilty of manslaughter in the second degree if he causes a death through criminal negligence, RCW 9A.32.070, and he is guilty of manslaughter in the first degree if he causes a death through recklessness, RCW 9A.32.060. The first-degree statute does not expressly require the State to prove a lack of criminal negligence because that is necessarily proved by a finding of recklessness. It would be illogical to conclude that the legislature – by not mentioning criminal

negligence in the first-degree statute -- intended to create an affirmative defense that the defendant acted "without negligence" or "reasonably."

C. THE *CAMARA* COURT MISINTERPRETED U.S. SUPREME COURT PRECEDENT

The *Camara* Court recognized that the due process clause of the Fourteenth Amendment requires the State to prove every element of the crime beyond a reasonable doubt. *Camara*, 113 Wn.2d at 640. It concluded, however, that this principle was not violated by placing the burden of proving an affirmative defense on the defendant, even when the defense completely negated an element of the crime. It based that conclusion on a mistaken reading of *Martin v. Ohio*, 480 U.S. 228, 230, 107 S.Ct. 1098, 94 L.Ed.2d 267, *reh'g denied*, 481 U.S. 1024, 107 S.Ct. 1913, 95 L.Ed.2d 519 (1987).

In *Martin*, an aggravated murder case, the State was required to prove beyond a reasonable doubt that the defendant killed her husband, that she had the specific purpose and intent to kill, and had done so with "prior calculation and design." *Martin*, 480 U.S. at 233. The self-defense instruction provided for acquittal if the jury found, by a preponderance of the evidence, that Martin "had not precipitated the confrontation, that she had an honest belief that she was in imminent danger of death or great

bodily harm, and that she had satisfied any duty to retreat or avoid danger.” *Id.*

As defined under Ohio law, self-defense did not necessarily negate the elements of aggravated murder. *Id.* at 234. In fact, “[appellant] did not dispute the existence of [the elements of aggravated murder], but rather sought to justify her actions on grounds she acted in self-defense.” *Id.* quoting *Ohio v. Martin*, 21 Ohio St.3d 91, 94, 488 N.E.2d 166, *cert. granted in part*, 475 U.S. 1119, 106 S.Ct. 1634, 90 L.Ed.2d 180 (1986). Clearly, a person may kill with prior calculation and design while also acting in self-defense. That there might be some overlap between proof of the elements and proof of the affirmative defense did not violate due process. *Id.*

Here, there is no mere potential “overlap” between evidence of consent and forcible compulsion. The two are mutually exclusive in every case. The *Martin* decision is, thus, readily distinguishable from the issue presented in *Camara* and in Lynch’s case.

In any event, as Lynch’s counsel has explained, subsequent decisions from the U.S. Supreme Court and other courts leave no doubt that the due process clause prohibits any affirmative defense that negates the elements of a crime.

D. THE *CAMARA* DECISION HAS MADE IT IMPOSSIBLE TO DRAFT JURY INSTRUCTIONS THAT ARE BOTH CONSTITUTIONAL AND COMPREHENSIBLE

In *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the Court addressed how a jury might be instructed on consent in a prosecution for rape by forcible compulsion. The Court recognized that the State must prove forcible compulsion beyond a reasonable doubt, and that the jury must consider any evidence of consent in deciding whether the State has met that burden. *Id.*, 158 Wn.2d at 803. Nevertheless, the Court maintained that it was also proper to instruct the jury that consent was an affirmative defense, which the defense must prove by a preponderance of the evidence.

But how might a jury be instructed so that it understands these points? In Lynch's case, the jury was simply told that the State bore the burden of proving the elements of the crime, including forcible compulsion, but the defense must prove consent by a preponderance of the evidence. Understandably, the jury sent out an inquiry, noting that the two burdens of proof seemed "contradictory."

Perhaps the judge could have attempted a clarifying instruction that tracked the language of *Gregory*: "You may consider evidence that the alleged victim consented to the sexual act in determining whether the State has proved beyond a reasonable doubt the element of forcible

compulsion. You may also consider evidence of consent in determining whether the defense has proved the affirmative defense of consent by a preponderance of the evidence.” But that would surely leave the jurors scratching their heads. Why should they bother deciding whether the defense had proved consent if they must acquit when they had only a reasonable doubt about consent. After all, if there is a reasonable doubt that the alleged victim consented, it follows with greater force that there is a reasonable doubt that the act was forcibly compelled. Perhaps a lawyer on the jury could follow the convoluted logic of such instructions, but the average person would surely conclude that the defense had some special burden regarding evidence of consent.

E. IN THE ALTERNATIVE, THE COURT SHOULD AT LEAST  
RULE THAT THE AFFIRMATIVE DEFENSE CANNOT BE  
GIVEN OVER THE DEFENDANT’S OBJECTION

As a practical matter, the burden-of-proof issue will arise only if instructions on the affirmative defense can be given over a defense objection, as the trial court and Court of Appeals held in Lynch’s case. No defense lawyer in her right mind would ask for the affirmative defense instruction if she could present the same evidence for the purpose of creating a reasonable doubt. WACDL fully supports Lynch’s arguments that it is unconstitutional to instruct the jury on an affirmative defense the defendant does not wish to raise.

The Court of Appeals reasoned that, because the defense presented evidence of consent, it was proper to give the jury “a complete and accurate statement of the law.” *Lynch*, slip op. at 10. The Court believed that Lynch was trying to avoid the “legal implications” of the facts he presented. *Id.* That rationale might make sense if the defense evidence could be considered only under a special burden of proof. For example, if a defendant offered some evidence of duress, it would be proper to instruct the jury that such evidence *cannot* raise a reasonable doubt that the crime was committed, but rather can excuse the crime if proved by a preponderance. But, as this Court held in *Gregory*, a defendant may properly rely on evidence of consent to create a reasonable doubt regarding forcible compulsion. Therefore, Lynch was not distorting the legal implications of his defense.

It is not clear what the limits of the Court of Appeals’ reasoning might be. Must the affirmative defense instruction be given whenever a defendant admits that a sexual act occurred but denies forcible compulsion? Or is it required only if the defendant uses the magic word “consent.” Could the defendant avoid the instruction by describing how the alleged victim “invited” or “seemed pleased by” the defendant’s advances? Or would the defendant have to admit that the victim did not consent, while arguing that no force was involved?

As these questions show, the existence of an affirmative defense that also negates an element of the crime inevitably leads to a morass.

IV.  
CONCLUSION

As the above discussion shows, the *Camara* decision has proved to be both wrong and harmful. It should therefore be overruled. *See State v. Abdulle*, 174 Wn.2d 411, 415, 275 P.3d 1113, 1115 (2012). In the alternative, the Court should at least hold that the affirmative defense of consent cannot be given over a defense objection.

DATED this 9<sup>th</sup> day of April, 2013.

Respectfully submitted,



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David B. Zuckerman, WSBA #18221  
Attorney for Amicus Curiae

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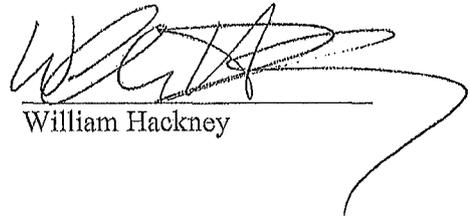
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Attached for filing in *State v. Lynch*, No. 87882-0, is the motion of WACDL to file a corrected amicus brief, along with the corrected amicus brief itself.

These are filed by David B. Zuckerman, WSBA # 18221, 206-623-1595, [david@davidzuckermanlaw.com](mailto:david@davidzuckermanlaw.com).

Thank you for your assistance.

William Hackney  
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