NO. 88341-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

W.R., Jr.,

Petitioner.

BRIEF OF AMICUS CURIAE
WASHINGTON COALITION OF SEXUAL ASSAULT PROGRAMS, KING COUNTY SEXUAL ASSAULT RESOURCE CENTER, LEGAL VOICE AND SEXUAL VIOLENCE LAW CENTER

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I. INTRODUCTION AND INTEREST OF AMICI CURIAE

The issue presented in this case is whether to turn the clock back to the early 1970s when a rape victim's actions were more rigidly scrutinized than her assailant's conduct. Amici Curiae Washington Coalition of Sexual Assault Programs ("WCSAP"), Legal Voice, King County Sexual Assault Resource Center ("KCSARC") and the Sexual Violence Law Center ("SLVC") are organizations with extensive experience advocating for the rights of sexual assault victims. Amici encourage the court to reject the invitation of the defendant herein to erect more hurdles to sexual assault victims receiving justice in the legal system by requiring the State to focus on the victim's conduct instead of the defendant's conduct.

II. IDENTITY AND INTEREST OF AMICI

The identity and interest of amici are set forth in the Motion for Leave to File Amici Curiae Brief, filed herewith.

III. STATEMENT OF THE CASE

Amici adopt the State of Washington's statement of the case.

IV. ARGUMENT

Appellant urges this Court to add an additional element, "lack of consent," to the crimes of Rape in the First and Second Degree by forcible compulsion, based on the premise that consent and forcible compulsion are "two sides of the same coin." Supplemental Defense Brief at 18.

When consent does negate forcible compulsion, proof of a lack of consent is redundant, as evidence of consent undermines the State's proof beyond a reasonable doubt the element of forcible compulsion. However, in many other cases, evidence of consent does not negate proof of forcible compulsion because, as this Court suggested in *Gregory*, a *conceptual* overlap is not the same as a *practical* overlap in the evidence that would be used to prove each of those elements. *State v. Gregory*, 158 Wn.2d 759, 803-804, 147 P.3d 1201 (2006). *Amici* urge this Court to consider the issues in this case in terms of their practical effect on trials, not merely in the abstract. Regressing to the pre-1975 focus on the victims consent as opposed to the defendant's forcible compulsion will open the door for defendants to emphasize rape myths and victim-blaming.

A. This Court Should Avoid Interpreting Statutes in Ways that Focus on the Victim and Promote Reliance on Rape-Myths and Victim-Blaming.

1. The Trend In Washington is to Focus Rape Cases on the Defendant, Not the Victim.

Washington's laws and court rules related to rape and other sex crimes have evolved in many ways, the trend being to shift the court's focus to the rapist's conduct, away from the victim's. For example, to stop defendants from subpoenaing victims' sexual assault advocates, which would shift focus improperly to the victim's post-rape conduct, the

Legislature created a near-absolute sexual assault advocate privilege. RCW 5.60.060(7). To prevent defendants from circumventing privilege, the Legislature enacted a statute to protect rape crisis centers records. RCW 70.125.65. To avoid an improper focus on the victim's sexual history, Washington enacted rape shield laws for both criminal and civil cases, as well as specifically in Washington's Sexual Assault Protection Order Act. RCW 9A.44.020, 7.90.080; ER 412. Likewise, in Sexual Assault Protection Order cases, courts are prohibited from focusing on the victim and denying relief "based, in whole or in part, on evidence that ... (b) the Petitioner was voluntarily intoxicated; or (c) The petitioner engaged in limited consensual sexual touching." RCW 7.90.090(4).

As the State describes effectively, in 1975 Washington's laws defining Rape in the First and Second Degree were amended to remove the element of non-consent and replace it with forcible compulsion. State's Supplemental Brief at 3-11. Contemporaneous publications were clear: "Under the new statute, the emphasis is on proof of forcible compulsion. This focuses attention on the defendant's acts rather than the victim's" (Helen Glenn Tutt, Washington's Attempt to View Sexual Assault as More than a "Violation" of the Moral Woman–The Revision of the Rape Laws, 11 Gonz. L. Rev. 145, 156-57 (1975)), and is consistent with the trend of re-focusing rape cases on the defendant's conduct.

This trend is national. For example, the concurrence in *State v. Lynch*, in advocating for an interpretation of rape by forcible compulsion that encompasses an element of lack of consent (despite its removal from the statute), compared the legislative history of Washington's and Michigan's rape statutes. *State v. Lynch*, 178 Wn.2d 487, 309 P.3d 482 (2013) (McCloud, J., concurrence). However, like Tutt's analysis, publications from that time suggest that the Michigan amendments were intended to lessen the focus on the victim's consent. Vivian Berger, Man's Trial, Woman's Tribulations: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 11, (1977) (listing Michigan and Ohio as jurisdictions that "passed statutes completely relieving the prosecution of the need to show resistance as proof of non-consent; others will likely follow suit.").

2. Focusing on Consent, in Cases of Rape by Forcible Compulsion, Shifts Focus Improperly to the Victim.

In amending its rape statutes in 1975, Washington (like many states) changed the court's focus from the victim's state-of-mind and conduct (Did the victim clearly express consent?) to the defendant's conduct (Did the defendant forcibly compel the sexual contact?). 77 Colum. L. Rev. at 12, (1977) ("The overall purpose of these reforms is to treat rape more like other offenses. A major motif is that rape prosecutions should concentrate on the *defendant's* conduct, inquiring into the actions

of the complaining witness only when fairness so requires.") (emphasis in original).

Those amendments, as well as rape shield rules and other reforms aimed at shifting the focus from the victim to the offender, "derive directly from heightened respect and concern for females, both in the courtroom and in the world." 77 Colum. L. Rev. at 11. For example, prior to these reforms, a victim's reputation for a lack of chastity was deemed compelling evidence of consent and corroboration of "the presumption that unchaste women lie." Michelle J. Anderson, From Chastity Requirement to Sexual License: Sexual Consent and a New Rape Shield Law, 70 Geo. Wash. L. Rev. 51, 75 (2002). Therefore, this supposed 'evidence' of consent was used to overcome actual evidence of force. *Id.* at 76-77 ("Independent of the character for truth issue, courts also presumed that, if a complainant had prior sexual experience, she was more likely to have consented to sexual intercourse with the defendant himself on the instance in question. The complainant's consent would negate the criminal element of nonconsent and, according to some courts, would even negate the element of force.")

In this case, the Appellant argues that lack of consent and forcible compulsion are precise inverses, so the State cannot prove its case without proving non-consent beyond a reasonable doubt. However, even assuming

in arguendo that the terms were two sides of the same coin, focusing on the victim's side of that coin instead of the defendant's can lead the trier of fact to rely improperly on evidence related the victim's reality before and after the sexual assault, not merely what happened during the assault. *See* Patricia D. Powers, *Overcoming the Consent Defense: Direct and Cross Examination*, SEXUAL ASSAULT TRAINING GUIDE FOR PROSECUTING ATTORNEYS IN WASHINGTON STATE (March 2003). When consent is the focus, the trier-of-fact is more likely to focus on the victim's conduct, judge the victim for it, and potentially acquit guilty defendants as a result.

3. Focusing Unnecessarily on Consent Deters Rape Complaints and Retraumatizes Victims.

Erecting additional barriers, even if minimal or symbolic, to the successful investigation and prosecution of rape risks further stymieing a system that already fails to hold the vast majority of rapists accountable. Very few sexual assaults result in criminal convictions. Rape remains the least reported, least indicted and least convicted felony in America. Only 16-36% of rape victims report the crime to law enforcement authorities and less than five percent of college victims report.[1]

Focusing unnecessarily on the victim's behavior will "chill future victim reporting," because: "[B]y allowing the focus to remain on the

[1] REPORT TO THE NATION, NATIONAL CENTER FOR VICTIMS OF CRIME (April 1992); B. Fisher et al, *Reporting Sexual Victimization to the Police and Others: Results from a National-Level Study of College Women,* CRIMINAL JUSTICE AND BEHAVIOR Vol. 30 No. 1, February 2003, at 24-25.

victim, we permit recurring violations of the victim's constitutional rights to privacy, [and] we risk negative trial outcomes...." M. Claire Harwell & David Lisak, Why Rapists Run Free, 14 Sexual Assault Report 2, 27 (November/December 2010).

This potential deterrent effect is particularly alarming given the recent data indicating that indicates that the conviction rate may have fallen to as low as three percent of *reported* rapes. Kimberly A. Lonsway et al., The "Justice Gap" for Sexual Assault cases: Future Directions for Research and Reform, 18(2) VIOLENCE AGAINST WOMEN 135, 139 (March 2012). Despite the prevailing rape myth of widespread false reporting, it does not explain this attrition. The rate of *intentionally false* (as opposed to unsubstantiated) allegations is only 2-3 percent of all rape allegations, similar to the levels of false reporting of other crimes. JOANNA BOURKE, RAPE: SEX, VIOLENCE, HISTORY 393 (Virago Press 2007). Creating additional deterrents to reporting rape, such as allowing the defendant to put the victim on trial, cannot serve justice.

4. Focusing Unnecessarily on Consent Undermines Effective Investigation of Rape.

Traumatizing victims in the legal process understandably deters them from vindicating their rights by cooperating in the investigation and prosecution of their rapists. *State v. Gonzalez,* 110 Wn.2d 738, 748, 757 P.2d 925 (1988). Of course, testifying about an intimate personal trauma is

intrinsically traumatic, and it comes as no surprise to victims that they can't "entirely avoid the negative attention and harsh judgment they will inevitably face in the adversarial process of our criminal justice system." M. Claire Harwell & David Lisak, Why Rapists Run Free, 14 Sexual Assault Report 2, 27 (2010). However, the harm can be minimized:

> How victims are treated by criminal justice practitioners may affect how they psychologically process the event. Investigations can and should be conducted without implying that the victim brought on the crime (should be blamed for the incident, did not resist sufficiently, etc.).

Patricia A. Resick & Pallavi Nishith, Sexual Assault, Ch. 3, Victims of Crime 27 (Robert Davis ed, 1997).

The fear that investigators will scrutinize the victim's behavior more than the rapist's can create a vicious cycle of self-destructive coping strategies that makes convicting guilty defendants even more difficult:

> Trauma, by its nature, often inspires attempts to avoid symptoms. Yet these avoidance strategies may produce victim behaviors that will be viewed unfavorably by jurors. For example, many victims drink alcohol to block out nightmares.... While this may be understandable from a human perspective, it is likely to undermine their credibility in court. In this way, behavior that is caused by the crime is often used against victims, to thwart jurors' empathy for the experience of being victimized.

Harwell & Lisak at 17-18. Consequently, focusing on the victim may have the perverse consequence of making the few people who falsely allege rape appear *more* credible than victims of real trauma. Focusing on the

defendant's use of force—instead of on the myriad social, emotional, physical factors related to communication about consent—reduces the risk that the trier of fact will be influenced by this sort of rape-related trauma, and mitigates the additional trauma the victim will experience.

Even setting aside concern for the victim, it is counterproductive for law enforcement to center an investigation on the victim:

> To focus on the suspect in a sexual assault case instead of the victim is to treat the suspect in the same way as a purported drug dealer, by evaluating his (or her) contacts, social circle, former romantic partners, etc., all with an eye toward developing information that pertains not just to a single crime, but potentially to a larger pattern of offenses. This is how such cases can be successfully prosecuted. To illustrate: In a case prosecuted by the first author, a broad investigation of a single flawed sexual assault report revealed numerous additional victims.... Where a narrowly focused investigation would have resulted in no prosecution, a more comprehensive approach resulted in the identification of nine sexual assault victims and additional victims of other types of offenses. Ultimately, the offender was convicted on charges stemming not from the original reported case, but from one of the cases that emerged later in the investigation.

Harwell & Lisak at 17-18. Thus, in adding a lack of consent element to rape by forcible compulsion, the law would encourage law enforcement to regress to the poor strategy of investigating the victim instead of the crime.

Moreover, an investigative focus on consent in a case of forcible acquaintance rape is particularly problematic because of the way gender and social status affect how people speak about sex in the real world:

> A person in a stressful situation (which unwanted sexual advances/contacts create) will often respond in a manner that reflects prior training and experience. Whereas some individuals will be very direct and communicate with very clear "no" or "stop" language others, who have been taught to issue soft rejections, may be less direct. Because of this, asking victims if they said "no" or "stop" can actually be harmful to an investigation. If a victim ... takes the question literally, she may answer in the negative to avoid lying, even though she may have clearly communicated lack of consent by other words or actions. Or she may lie and answer in the affirmative fearing her case will not be taken seriously if she acknowledges she did not use the words "no" or "stop." Additionally... the victim may perceive it as [victim-blaming, which] may make it harder to elicit more information from her. Lastly, a victim who communicated lack of consent with other words or actions, but did not use the words "no" or "stop" may determine she was not actually victimized... she may even withdraw from the investigation.

Catherine Johnson, Establishing Lack of Consent, 17 Sexual Assault Report 3, 45 (2014). Even if the concepts of forcible compulsion and consent overlap entirely or almost entirely, treating the absence of consent as an additional element the State must prove, and thereby re-focusing the investigation on the victim, raises all of these concerns.

5. Focusing Unnecessarily On The Victim's Conduct Opens The Door To Rape Myths, Undermining Prosecution Of Rape.

Even after the investigation stage—both pretrial and at trial—focusing on the victim will undermine the likelihood of convicting actual sexual predators. Focusing on the victim allows defendants to distract the trier of fact from evidence of force or threats by characterizing the case as a credibility contest. Harwell & Lisak at 26. Centering a rape trial on the victim's credibility leads to unjustified acquittals, because the defendant can easily manipulate the trier of fact into relying improperly on rape myths, because particularly in rape cases, "Jurors often apply unreliable or even erroneous methods to evaluate the credibility of witnesses." *Id.*

Rape myths are assumptions about victims' behavior that lead people (including jurors, judges, and law enforcement) to disbelieve victims based on factors that have little to no actual bearing on the victim's veracity. *Id.* Often these involve double-binds that make any potential response to a rape seem implausible. For example, myths about the "normal" emotional response to rape leads jurors to falsely assume that a victim who presents with a "flattened affect... in the courtroom" could not actually have experienced trauma, but a victim who is too emotional appears to be putting on a "performance." *Id.;* Louise Ellison & Vanessa E. Munro, Educational Guidance and (Mock) Jurors' Assessments of

Complainant Credibility in Rape Trials, 13 Sexual Assault Report 5, 65, 70, 72 (2010). A victim may be disbelieved because her or his answers are either too vague to be reliable or too precise to be truthful. *Id.* Some jurors disbelieve any victim who doesn't report a rape immediately, while others view a speedy report with skepticism if a victim claims that during the rape s/he was "frozen" in fear. *Id.* Even when force is not an element, jurors find the absence of physical injury a credibility problem (particularly female jurors, who want to believe that *they* would have resisted), yet even when educated about tonic immobility (being "frozen"), jurors tend to believe it only happens in 'stranger rape' cases. *Id.* Even when injuries did exist, "Jurors went to considerable lengths to provide alternative explanations" based entirely on conjecture. *Id.* In sum, focusing on the victim makes accurate fact-finding nearly impossible, because even with evidence of force, "the presence or absence of expected behavior can irretrievably alter the decisionmaker's perception of the validity of the complaint, the veracity of the victim's testimony and, ultimately, the adequacy of the proof of the charges." Harwell & Lisak. at 26.

Serial acquaintance rapists, the vast majority of rapists,[2] are particularly adept at impugning victims' credibility using rape myths.

[2] A survey of of peer-reviewed research on perpetrators of sexual assault demonstrates that most rapists are serial rapists (63-71%, each of whom admitted, on average, to raping six victims), and these serial rapists are responsible for an overwhelming percentage of

First, they carefully select vulnerable victims who are less likely to fight back, less likely report, and least likely to be believed if they do report. David Lisak, Rape Fact Sheet/The Undetected Rapist (March 2002), available at http://www.ncdsv.org/publications_sa.html. Second, these rapists use premeditated strategies (like isolation or alcohol) to make it more difficult for the victim to fight back, to recall the assault clearly, and to report it, as well as less likely to be believed. *Id.* Thus, if predators *are* charged, their effort to focus the court's attention on the victim is not merely opportunistic, but is the culmination of a comprehensive strategy to impugn the victim's credibility by alleging consent.

6. Unnecessary Focus on Consent Results in the Erroneous Reliance on Rape Myths and Unjust Outcomes.

A recent case in Montana illustrates that focusing on the victim's consent, particularly when consent is not actually relevant, triggers rape myths and causes miscarriages of justice.[3] In *Montana v. Rambold,* a 49-

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total number of rapes (91-95%, with only 5-9% of the rapes committed by perpetrators who admitted to only one rape). Harwell & Lisak at 17-18; David Lisak, Understanding the Predatory Nature of Sexual Violence, 14 Sexual Assault Report 4 (2011).

[3] Matt Pearce, *Hundreds Rally Against Montana Judge in Rape-Suicide Case*, L.A. Times, Aug. 29, 2013, available at http://articles.latimes.com/2013/aug/29/nation/la-na-nn-montana-rally-20130829; Steve Almasy, Board Urges Discipline for Montana Judge who Gave Short Rape Sentence, CNN, 2/4/2014, *available at* http://www.cnn.com/2014/02/04/justice/montana-rape-judge/; John Bacon, Judge Apologizes for Teen Rape Remarks, Not Sentence, USA Today, 9/6/2013, *available at* http://usatoday.com/story/news/nation/2013/08/28/teacher-rape-montana/2722817 /; Matthew Brown, Judge G. Todd Baugh Can't Change Sentence for Stacey Rambold, Montana Rapist, AP, 9/7/2013, *available at* http://www.huffingtonpost.com/2013/09/07/judge-g-todd-baugh-sentence- stacey-rambold_n_3885563.html.

year-old teacher pled guilty to sexual intercourse without consent. The victim was his 14-year-old-student, who committed suicide prior to trial. *Id.* After Rambold violated the terms of his deferred prosecution he returned to court for sentencing. *Id.* at the sentencing hearing, Judge G. Todd Baugh, an experienced jurist, sentenced Rambold to 15 years with all but a month suspended. *Id.*

The minor-victim's 'consent' should not have been an issue in the sentencing stage, but in entering this extremely light sentence the Judge made numerous statements demonstrating that he was fixated on the victim's purported consent, influenced by victim-blaming rape myths. Specifically, the Judge stated that the victim was a "troubled youth, but a youth that was probably as much in control of the situation as was the Defendant...." The Judge stated that the 14-year-old seemed "older than her chronological age." *Id.*

Although the sentence's appeal is still pending, and the Judge is on the verge of retirement, the Montana Judicial Review Board is pursuing sanctions against him in the Montana Supreme Court. *Id.* In responding to the complaint, the Judge acknowledged that he gave the erroneous sentence because he was improperly focused on whether the victim consented: "I am sorry I made those remarks.... They focused on the victim when that aspect of the case should have been focused on the

defendant." *Id.* If focusing on purported consent led such an experienced jurist, charged only with resentencing, to rely so egregiously on victim-blaming, focusing on consent in forcible compulsion cases clearly has the potential to skew outcomes against the victim.

B. Consent Does Not Negate Forcible Compulsion in Practice, Even if it May in the Abstract.

There are two situations in which a defense can be treated as an element of the offense, shifting the evidentiary burden from the defendant to the State: (1) when legislative history demonstrates it was intended to be considered an element, or (2) when the defense negates an element of the offense. *State v. McCullum,* 98 Wn.2d 484, 490, 656 P.2d 1064 (1983). *Amici* support the interpretation of the legislative history described by the State. State's Supplemental Brief at 3-11. However, *Amici* take a slightly different position regarding the 'negates analysis.'

1. *Gregory* Properly Focuses on Both the Technical and Practical Application of the 'Negates Analysis.'

Appellant's briefing asserts repeatedly that it is "indisputable" that consent negates forcible compulsion. *E.g.*, Supplemental Brief of Petitioner at 7. The State's briefing provides a counter-example (consensual simulations of rape). However, even the State overly limits the analysis by focusing on an abstract, technical interpretation of how those terms overlap, without regard to how they would apply in reality.

In contrast, in *Gregory* and to some extent in *Camara,* this court suggested that the "negates" analysis is neither so straightforward nor so abstract. *Gregory,* 158 Wn.2d 759; *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989). *Gregory* suggests a distinction between defenses that negate an element entirely and those that merely overlap to some degree:

> 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*.... 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.

158 Wn.2d at 803-804. Both *Gregory* and *Camara* use the term "conceptual overlap," as well as the term "conceptual opposites." *Id.; Camara* 113 Wn.2d at 637, 640. Furthermore, both rely on *Martin v. Ohio*, which held that the burden need not be shifted to the State when the defense merely "tend[s] to negate," but does not necessarily negate, an element. *Martin v. Ohio,* 480 U.S. 228, 235-36, 107 S.Ct. 1098 (1987).

2. When Evidence of Consent Does Negate Forcible Compulsion, Requiring Proof of Both is Redundant.

Consent means: "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). Thus, to prove 'nonconsent,' the State must prove either that the victim resisted or that the victim remained passive and silent. Forcible compulsion means "physical force which overcomes resistance, or a threat, express or implied, 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). Case law defines resistance (like consent) to include both physical resistance and oral objections. *State v. McKnight*, 54 Wn. App. 521, 774 P.2d 532 (1989).

When evidence of consent raises a reasonable doubt as to whether or not the victim resisted, requiring proof of "physical force overcoming resistance" *and* of the absence of consent is redundant. As *Gregory* put it, "so long as the jury instructions allow the jury to consider all of the evidence, including evidence ...[of] consent," the burden remains on the State to provide proof beyond a reasonable doubt that the victim resisted but the defendant overcame it with force. *Gregory,* 158 Wn.2d at 803-804. Even the concurrence to this Court's recent decision in *Lynch* noted:

> To the extent that Michigan's reform statute appears to remove "nonconsent" as an element of criminal sexual conduct, courts have recognized that this is only because it is "redundant" to require the prosecution to prove

> nonconsent where it is clearly implied by the use of force....

Lynch, 178 Wn.2d at 517 (McCloud, J., concurring).

Despite this redundancy, adding a consent element will tend to focus attention on the victim rather than the defendant, because even when they overlap conceptually, they may be based on different evidence:

> Consent involves words or conduct indicating agreement. That agreement, or lack thereof, must be assessed from the actions of the victim. It is then the jury's responsibility to determine if those actions sufficiently conveyed "yes" or "no." In contrast, a finding of forcible compulsion cannot be based solely on the victim's subjective reaction to the defendant's particular conduct....

State v. Higgins, 168 Wn. App. 845, 278 P.3d 693 (2012). Thus, adding a lack of consent element makes jurors more likely to be swayed by rape myths and victim-blaming. By focusing on consent, jurors may unnecessarily fixate on the victim's character and behavior before or after assault, instead of on focusing on physical evidence of resistance.

3. Evidence of Consent Usually Does Not Tend to Negate Forcible Compulsion by Threat.

In the absence of physical force, the element of forcible compulsion can be proved by evidence "a threat, express or implied, 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). Because W.R.'s rape of J.F. was based on "physical force which overcomes resistance," both the Appellant and the State focus their 'negates analysis' on that. However, the 'negates analysis' is more complicated in cases involving the other option (hereinafter "a qualifying threat"). *Id.*

In the abstract, consent negates forcible compulsion by qualifying threat, because if a defendant makes a qualifying threat, the victim's compliance is presumably not "freely given." RCW 9A.44.010(7). However, that very fact means that evidence of consent (*i.e.*, testimony about what the victim did and said) is not actually relevant to whether the victim was in fear or gave consent freely. Thus, in practice, as opposed to on paper, evidence of consent often won't negate forcible compulsion.

Proof of forcible compulsion by threat focuses almost entirely on the defendant's conduct and threats. In contrast, "Consent involves words or conduct indicating agreement. That agreement, or lack thereof, must be

assessed from the actions of the victim." *Higgins*, 168 Wn. App. at 859. Thus, adding a consent element opens the door to rape myths and victim blaming by shift attention away from evidence of the defendant's qualifying threat, to improperly focus on the victim. *See State v. Weisberg*, 65 Wn. App. 721, 725-26, 829 P.2d 252 (1992) ("[A] finding of forcible compulsion cannot be based solely on the victim's subjective reaction to particular conduct. There also must be a 'threat'....")

V. CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court find that the State does not, in a case of rape by forcible compulsion, have the redundant burden of proving a lack of consent beyond a reasonable doubt.

Respectfully submitted this 18th day of February, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2014, I served by First Class United States Mail, postage prepaid, one copy of the foregoing on the following individuals:

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