Portion of brief from *State v. Gates*,
Challenging admission of prior robbery conviction to impeach
Under ER 609.

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ER 609 and article I, section 22.

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No. 83243-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER GATES,

Appellant.

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

BRIEF OF APPELLANT

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5. The admission of Mr. Gates's prior robbery conviction violated his rights under article I, section 22 and was improper under ER 609.

Over Mr. Gates's objection, the trial court admitted his prior conviction for robbery, permitting the State to describe it as "a crime of dishonesty" to attack his credibility during his testimony. CP 233. The court did so pursuant to ER 609(a), which provides, "For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted … if the crime … involved dishonesty or false statement."

Although the court correctly observed that ER 609's language is mandatory and that courts had ruled robbery is a "per se" crime of dishonesty, Mr. Gates properly noted that a prior conviction for robbery has nothing to do with credibility, that its admission would simply prejudice the jury against him, and that this prejudice would be exacerbated by the fact that he is a young, Black, male. CP 127-28, 233. He argued the

admission of this prior crime would violate his right to a fair trial. CP 127-28.

Mr. Gates was correct. The admission of a prior robbery conviction to attack his credibility violated Mr. Gates's right to a fair trial. Specifically, it violated his rights under article I, section 22 of the Washington Constitution, which guarantees the rights to appear and defend in person and to testify. The admission of the prior conviction also violated ER 609 under a proper reading of the rule, because robbery is not a crime of dishonesty.

Mr. Gates acknowledges that on both issues, Supreme Court precedent is to the contrary. *State v. Ruzicka*, 89 Wn.2d 217, 225-35, 570 P.2d 2108 (1977) (statute permitting use of prior convictions to impeach does not violate article I, section 22 or other constitutional provisions); *State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991) (overruling earlier cases and holding crimes of theft are per se admissible for impeachment purposes under ER 609(a)(2)); *State v. Rivers*, 129 Wn.2d 697,

705, 921 P.2d 495 (1996) (applying *Ray* to robbery). Nevertheless, just as Mr. Gates raised these issues in the trial court, he raises them here to preserve them for future review.

a. *Article I, section 22 guarantees the rights to appear and defend in person, to testify, and to a fair trial.*

Article I, section 22 of the Washington Constitution guarantees the right to a fair trial. *Glasmann*, 175 Wn.2d at 703. As part of that right, our constitution explicitly provides an accused person the rights "to appear and defend in person" and "to testify in his own behalf." Const. art. I, § 22. These rights are more robust than the implicit rights afforded under the federal constitution. *State v. Martin*, 171 Wn.2d 521, 529-33, 537, 252 P.3d 872 (2011).

In *Martin*, the defendant testified in his own behalf and the prosecutor on cross-examination accused him of tailoring his testimony to what he had heard from other witnesses and read in discovery. *Id.* at 523. The defendant argued these accusations of tailoring violated his article I, section 22 rights to

appear, defend, and testify. *Id.* at 526, 529. He noted, "permitting such conduct by prosecutors presents an agonizing choice for the defendant, forcing him to waive fundamental rights in order to protect himself from the prosecutor's accusations of dishonesty." *Id.* at 526 (internal quotations omitted).

The defendant acknowledged the federal constitution did not prohibit prosecutorial allegations of tailoring. *Id.* at 526 (citing *Portuondo v. Agard,* 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000)). But he argued the state constitution provided greater protection in this context. *Id.*

The Supreme Court agreed after performing an analysis under *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986). *Martin*, 171 Wn.2d at 528-33, 537. The Court noted that "article I, section 22 of our state constitution explicitly recognized the right of defendants to appear, to present a defense, and to testify" at a time when "the federal constitution did not provide such broad protection to defendants." *Id.* at 531.

In fact, "historically under federal law what defendants 'said at trial was not considered to be evidence, since they were disqualified from testifying under oath.'" *Id.* (quoting *Portuondo*, 529 U.S. at 66). It was not until 1961 that the U.S. Supreme Court interpreted the federal constitution to provide a right to testify. *Id.* at 533. Thus, "in the context of prosecutorial suggestions of tailoring, article I, section 22 is more protective than the Sixth Amendment." *Id.* at 537.[5]

b. *The admission of Mr. Gates's prior robbery conviction to impeach his testimony violated his rights under article I, section 22.*

The *Martin* analysis applies with equal force to prosecutorial suggestions of untruthfulness based on a prior robbery conviction. Indeed, the Court should hold that article I,

[5] The Supreme Court affirmed the defendant's conviction in *Martin* because the prosecutor's targeted cross-examination did not violate even Washington's more-protective constitution. *Martin*, 171 Wn.2d at 537-38. But the Court held that any allegation of tailoring in closing argument would violate article I, section 22, and that more generic allegations of tailoring in cross-examination might also violate article I, section 22. *Id.* at 537, 537 n. 8.

section 22 prohibits the use of any prior conviction to impeach a defendant, or at least any conviction other than one for a true crime of dishonesty like fraud or perjury.

The Hawai'i Supreme Court held that state's constitution prohibits the use of prior convictions to impeach a defendant's testimony. *State v. Santiago*, 53 Haw. 254, 492 P.2d 657, 661 (Haw. 1971). The Court acknowledged a statute permitted the use of prior convictions to impeach a witness. *Id.* at 661. It further recognized that most states had similar laws allowing the use of at least some types of prior convictions to attack a witness's credibility. *Id.* at 659-60. But it concluded that prior convictions have minimal relevance to a witness's credibility and that, in criminal cases, this minimally relevant evidence carries a substantial risk of prejudice due to the unavoidable propensity inference. *Id.* at 660-61.

> A number of authorities have come to believe that when the witness to be impeached is also the defendant in a criminal case, the introduction of prior convictions on the issue of whether the defendant's testimony is credible creates a

> substantial danger that the jury will conclude from the prior convictions that the defendant is likely to have committed the crime charged.

Id. at 660. The court observed the prejudice was "scarcely mitigated" by a limiting instruction. *Id.*

This minimally relevant, substantially prejudicial evidence runs headlong into a defendant's constitutional rights. *Santiago*, 492 P.2d at 660. "It has long been recognized that every criminal defendant has a right to testify in his own defense." *Id.* But allowing impeachment by prior conviction means "[a]ny defendant who has prior convictions will … feel constrained not to take the stand." *Id.* Thus, "to convict a criminal defendant where prior crimes have been introduced to impeach his credibility as a witness violates the accused's constitutional right to testify in his own defense." *Id.* at 661. The court held that insofar as it applied to criminal defendants,

the statute permitting impeachment by prior conviction violated article I, section 4 of the Hawai'i Constitution. *Id.*[6]

Although our Supreme Court in *Ruzicka* declined to follow *Santiago*, *Ruzicka* should be reconsidered for three reasons. *See Ruzicka,* 89 Wn.2d at 225-35. First, the 1977 *Ruzicka* decision predated the era of independent state constitutional analysis initiated in the early 1980's and formalized in *Gunwall*, 106 Wn.2d at 58. Thus, while the Court purported to resolve the issues under both the federal and state constitutions, it did not have the benefit of subsequent opinions like *Martin* holding our state constitution is more protective.

Second, the *Ruzicka* Court was reviewing a *statute* that permitted impeachment by prior conviction, and therefore the Court applied the rule of legislative deference. *Ruzicka,* 89 Wn.2d at 226 (citing former RCW 10.52.030). But that statute

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[6] The court also relied on the Fourteenth Amendment, but its holding was independently rooted in the state constitution. *Santiago*, 492 P.2d at 661.

was repealed and replaced by ER 609. Laws of 1984, ch. 76, § 31; *State v. Burton,* 101 Wn.2d 1, 3-4, 676 P.2d 975 (1984), *overruled on other grounds by Ray*, 116 Wn.2d at 543. Because the Supreme Court promulgates court rules, it can now evaluate the constitutional question without the constraint of legislative deference. *See Ray*, 116 Wn.2d at 545 (Court drafts rules).

Third, subsequent academic research has undermined the premises the Court relied on to reject the arguments. The Court believed it was "at least debatable" that "there is a nexus between a person having committed crimes and that person's propensity to lie." *Ruzicka,* 89 Wn.2d at 226. And it was "not convinced" that limiting instructions failed to prevent the forbidden propensity inference. *Id.* at 229.

Scholars have concluded otherwise. Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. Rev. 563, 577 (2014). "[I]mpeachment by proof of the fact of a prior conviction, especially a felony conviction not involving false statement, relies upon assumptions and inferences that lack

scientific validity.'" Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U.L. Rev. 741, 763–64 (2008) (internal citation omitted). Specifically, "prior convictions and other bad acts admissible under the impeachment rules are poor predictors of truthfulness in the courtroom because people are highly contextual in their decisions to lie." Julia Simon-Kerr, *Credibility by Proxy,* 85 Geo. Wash. L. Rev. 152, 156 (2017).

Moreover, "it is unrealistic to hope that [limiting] instructions could serve to prevent jurors from using this evidence in forbidden ways, such as viewing it as a sign of a defendant's propensity to commit crimes, or as a sign that a defendant is better off locked up." Roberts, *supra*, at 578. Empirical research demonstrates that "jurors seem to use the information as evidence of guilt rather than untruthfulness." Simon-Kerr, *supra*, at 188 (citing Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The*

Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes, 94 Cornell L. Rev. 1353, 1370 (2009)).

Systemic racism also renders ER 609 constitutionally questionable. As trial counsel noted, the prejudice discussed above is "further heightened when the defendant is a young African American male, as is Mr. Gates." CP 128. "When trial defendants are African American, as is disproportionately the case, they are vulnerable to implicit fact finder stereotypes that threaten the presumption of innocence: unconscious associations linking the defendants with violence, weaponry, hostility, aggression, immorality and guilt." Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping*, 83 U. Chi. L. Rev. 835 (2016). Admitting a Black defendant's prior conviction only reinforces this stereotype in jurors' minds, increasing the likelihood of conviction based on propensity rather than proof, and exacerbating the systemic racism that contributed to the prior conviction in the first place.

See Task Force 2.0: Race and the Criminal Justice Sys., *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court* (2021) ("Racial and ethnic bias distorts decision-making at various stages in the criminal justice system, thus contributing to disproportionalities in the criminal justice system.") (citation omitted). Washington's Constitution prohibits such practices. *See State v. Gregory*, 192 Wn.2d 1, 5, 427 P.3d 621 (2018) (death penalty violates article I, section 14 because it is imposed in an arbitrary and racially biased manner); *State v. Hicks*, 163 Wn.2d 477, 492, 181 P.3d 831 (2008) (article I, section 21 provides stronger protection against race discrimination in jury selection than Fourteenth Amendment).

The Court should hold that the admission of Mr. Gates's prior robbery conviction during his testimony violated article I, section 22 of the Washington Constitution.

c. *The admission of the prior conviction was also improper under ER 609.*

In the alternative, the Court should overrule *Ray* and *Rivers* and reaffirm prior cases holding theft and robbery are not per se crimes of dishonesty under ER 609(a)(2).

Ray and its progeny are incorrect and harmful. *See State v. W.R., Jr.*, 181 Wn.2d 757, 768, 336 P.3d 1134 (2014) (Court will overrule prior cases that are incorrect and harmful). The case *Ray* overruled correctly analyzed the issue. *Burton*, 101 Wn.2d at 3-10; *see Ray*, 116 Wn.2d at 543 (overruling *Burton*).

Burton noted that the language of Washington's rule was taken verbatim from Fed. R. Evid. 609, which limited per se crimes of dishonesty to those which "bear *directly* on a defendant's propensity for truthfulness." 101 Wn.2d at 7 (emphasis in original). Indeed, the Comment to the rule states, "This rule is substantially the same as Federal Rule 609 and is more restrictive than previous Washington law." Cmt. to ER 609, 91 Wn.2d 1150 (1979). The prior statute was constitutionally questionable given the right of a defendant to

testify, and therefore the new rule "narrow[ed] the scope of convictions which may be used to impeach the accused in a criminal case." *Id.*

"In choosing to adopt the federal version of rule 609 verbatim," the Court "indicated [its] acceptance of the interpretation given to that rule by federal courts." *Burton*, 101 Wn.2d at 9. That interpretation excludes theft, robbery, and related crimes from the rule of per se admissibility, and limits the rule to crimes that are directly relevant to veracity. *Burton*, 101 Wn.2d at 10.

Ray's rejection of *Burton* was not only incorrect, it was also harmful. Mandating admission of a broad range of prior convictions burdens constitutional rights and exacerbates systemic racism. As discussed above, "the admission of prior conviction evidence adversely affects a defendant's right to testify in his own defense." *Burton*, 101 Wn.2d at 9. Not only does it prejudice those who do testify, like Mr. Gates, but it compels defendants to waive their right to testify for fear of the

potential prejudice. Roberts, *Reclaiming Testimony, supra* at 836-37. In a 2008 study of DNA exonerees, 91 percent of those with prior convictions waived their right to testify despite factual innocence, and the most common reason given was fear of the prejudice that would result from the admission of prior convictions. *Id.* (citing John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J Empirical Legal Stud 477, 491 (2008)). Thus, the rule not only undermines the defendant's constitutional rights, it also robs the factfinder of crucial evidence. *Id.* at 837; *Burton*, 101 Wn.2d at 9.

In addition to infringing the right to testify, a rule broadly admitting prior convictions burdens the right to go to trial at all. Simon-Kerr, *supra*, at 188. Defendants cannot testify because of the problems discussed above, but they cannot stay silent because the jury will not hear their side of the story. *See Burton*, 101 Wn.2d at 9 (discussing "Hobson's choice"). The only way to avoid this problem is to plead guilty and waive the

constitutional right to a jury trial. *See* Simon-Kerr, ("it is likely that prior conviction impeachment at trial is a factor in many defendants' choice to accept plea bargains.").

Because racial disproportionality infects the criminal legal system, these burdens are even greater for defendants of color. The testimony of defendants of color "is important because it has the potential to combat the implicit stereotyping threatening the right to a fair trial." Roberts, *Reclaiming Testimony, supra*, at 873. But a disproportionate number of defendants of color have prior convictions, Task Force 2.0, *supra*, which would cause them to waive their right to testify or waive their right to trial.

In sum, *Ray*'s broadening of ER 609(a)(2) was incorrect and harmful. The Court should return to the rule of *Burton* and hold that only crimes bearing directly on truthfulness are per se admissible for impeachment.

d. *The error prejudiced Mr. Gates, requiring reversal and remand for a new trial.*

Constitutional error requires reversal unless the State proves beyond a reasonable doubt that the error did not contribute to the verdict obtained. *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (citing *Chapman v. California,* 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). An erroneous evidentiary ruling requires reversal if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

Under either standard, reversal is required here because the admission of the prior conviction prejudiced Mr. Gates. There was no dispute that Mr. Gates shot and killed the decedent. The only question was whether Mr. Gates acted in self-defense or committed murder. His testimony was thus critical. But during his testimony, the prosecutor stated that he had been convicted of a "crime of dishonesty," and the prosecutor twice reminded the jury about this supposed "crime

of dishonesty" in closing argument. The State bore the burden of disproving self-defense beyond a reasonable doubt, and, absent these multiple allegations of dishonesty, the jury may well have found Mr. Gates's testimony regarding the need for self-defense to be credible. The admission of the prior conviction was prejudicial, and the Court should reverse the murder conviction and remand for a new trial.

6. The judgment and sentence improperly includes a conviction on count two, violating the constitutional right to be free from double jeopardy.

The jury convicted Mr. Gates of both second-degree intentional murder, count 1, and second-degree felony murder, count 2, for the single death at issue. CP 259, 261. It also convicted him of a firearm enhancement for each count, even though it was a single death and single use of a firearm. CP 260, 262.

The court included all of these convictions on the judgment and sentence. CP 478-79. The judgment states, "The