IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 83709-1
Respondent,	)	
	)	
v.	)	En Banc
	)	
TIMOTHY SEAN MARTIN,	)	
	)	
Petitioner.	)	
	)	Filed May 19, 2011

ALEXANDER, J.—We granted review of a decision of the Court of Appeals affirming Timothy Martin's conviction on three counts of first degree kidnapping and one count of second degree robbery. Martin's principal claim is that protections afforded him by article I, section 22 of the state constitution were violated when a deputy prosecutor, on cross-examination, posed questions to Martin that inferred Martin had tailored his testimony to be consistent with police reports, witness statements, and testimony presented by prior witnesses. We conclude that there was no constitutional violation and affirm the Court of Appeals, albeit for reasons that differ from those given by the Court of Appeals.

I

Martin was charged in the Snohomish County Superior Court with three counts

of first degree kidnapping and one count of second degree robbery. At trial, the alleged victim, Jessica Sobania, testified that upon placing her two children in her van at a Rite Aid parking lot, a man grabbed her from behind. According to Sobania the man, whom she identified at trial as Martin, told her to get in the van and start driving. Sobania said that although she was eventually able to escape from the van to get help, the attacker drove off with her children. Several hours after the incident, the police found the van parked in an industrial complex in Marysville. Sobania's children were in the van.

Martin admitted at trial that he had entered the van as part of a vehicle prowl. He testified that when he entered the van, it was parked near the aforementioned industrial complex and that no driver was present. Martin claimed that after he entered the van, he noticed that there were children in the backseat. He said that he then grabbed a purse and other items from the front seat and ran off.

On direct examination, Martin's lawyer asked Martin if knew what time he was at the Marysville industrial complex location. Martin responded, "I would guess 11:30, 12:00, 12:30 at night. From prior testimony, I know it had to be before one, because I heard people working in there, I heard lots of, you know, loud working." Verbatim Report of Proceedings (VRP) (Dec. 11, 2007) at 28.

During cross-examination, the State also asked Martin what time he entered the van. Martin again estimated that it was somewhere between 11:30 p.m. and 12:30 a.m. but indicated that he did not know for certain because he did not have a watch. The colloquy between Martin and the State continued:

A. I'm saying this time, because of prior testimony, that I heard, said that the shop was closed at 1:00 a.m., so it was before 1:00 a.m.
Q. And you've had the advantage of hearing all the testimony before you testified today, correct?
A. Obviously I have been sitting in that seat the whole time, yes.
Q. And you've also had the advantage of knowing what people were going to say ahead of time, wouldn't you agree with me?
A. No, I didn't know what anybody was going to say ahead of time.
Q. You didn't get to read the police reports?
A. I got to read the police reports.
Q. And you didn't get to read witness statements?
A. I read witness statements, yes.
Q. And you weren't allowed to bring those reports and statements with you to court?
A. I read everything involved, yes.
Q. And you've had what, a little over a year to concentrate on what people were going to say, didn't you?

Id. at 74-75. Martin's lawyer objected to the last question, asserting that the State was impermissibly commenting on Martin's constitutional rights to confer with counsel and remain silent. The trial court overruled the objection, stating that it did not see how the question was a comment on Martin's rights. The State then resumed its questioning:

Q. So in the pendency of this trial, you've had access of [sic] what the evidence was?
A. I've read the police reports, I've read your discovery, yes.
Q. And you've heard all the testimony so far?
A. So far, yes.
Q. And so you knew all that before you testified?
A. Yes.
Q. And so you knew exactly where your DNA [deoxyribonucleic acid] had been found in the car?

Id. at 79. Martin objected to the question about DNA. After his objection was overruled, the State continued its questioning of Martin about his knowledge of the DNA evidence. At the conclusion of the trial, the jury found Martin guilty of all charges.

Following sentencing, Martin appealed his convictions to the Court of Appeals, Division One, arguing that the prosecutor's questions infringed on rights afforded him under article I, section 22 of the Washington Constitution. The Court of Appeals, after engaging in an analysis consistent with our decision in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), determined that "[t]he provisions of article I, section 22 implicated in this case . . . do not warrant an analysis independent from the Sixth Amendment." *State v. Martin*, 151 Wn. App. 98, 109, 210 P.3d 345 (2009), *review granted*, 168 Wn.2d 1006, 226 P.3d 781 (2010). It went on to affirm the trial court based on the United States Supreme Court's decision in *Portuondo v. Agard*, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), in which that Court determined that a defendant's rights under the Sixth Amendment to the United States Constitution were not violated when a prosecutor called attention, during argument, to the fact that the defendant has had an opportunity to hear all of the witnesses testify and tailor his testimony accordingly. *Martin*, 151 Wn. App. at 105 (citing *Portuondo*, 529 U.S. at 64).

II

Martin contends here, as he did at the Court of Appeals, that article I, section 22 affords defendants broader protection than does the Sixth Amendment. Accordingly, he asks us to hold that under the state constitution a prosecutor is prohibited from indicating in any way that a defendant tailored his or her testimony. Martin contends that 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." Am. Suppl. Br. of Pet'r at 24. He goes on to argue that while a defendant could "theoretically attempt to waive these rights—absenting himself from his own trial or testifying before the State's witnesses—the court would be under no obligation to grant such waivers." *Id.* The State responds that the protections set forth in article I, section 22 are coextensive with those afforded by the Sixth Amendment. Thus, it contends that the Court of Appeals correctly determined that the questioning by the prosecutor in the instant case was permissible under the United States Supreme Court's decision in *Portuondo*. Br. of Resp't at 36.[1]

As noted above, the United States Supreme Court was faced in *Portuondo* with the question of whether a defendant's rights under the Sixth Amendment were violated when a prosecutor, during closing argument, called attention to the fact that the defendant had the opportunity to hear all of the witnesses testify and tailor his testimony accordingly. *Portuondo*, 529 U.S. at 63. In *Portuondo*, there were two alleged victims, both of whom testified to the defendant's act of raping one of them and threatening both with a handgun. In his testimony, the defendant denied threatening either of the complainants and said that the sexual contact was consensual. During closing argument, the prosecutor made various statements that strongly suggested that the defendant's testimony was untruthful. One statement was as follows: "'[U]nlike all other witnesses . . . he gets to sit here and listen to the testimony of all the other witnesses before he testifies. . . . He used everything to his advantage.'" *Id.* at 64

[1]The State has not argued that the defendant waived his right to raise the issue by failing to raise it at trial.

(quoting App. at 49). In concluding that the prosecutor's accusation of tailoring did not violate the Sixth Amendment, the Supreme Court said that the prosecutor's comments concerned only the defendant's "*credibility as a witness*, and were therefore in accord with [the] longstanding rule that when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'" *Id.* at 69 (quoting *Brown v. United States*, 356 U.S. 148, 154, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958)).

The question before us, then, is whether in applying article I, section 22 of the Washington Constitution we should follow the reasoning of the United States Supreme Court in *Portuondo*. The answer to that question should be yes if we determine that a defendant's rights under article I, section 22 of our state constitution are coextensive with a defendant's rights under the Sixth Amendment to the United States Constitution. In seeking an answer to the question before us, we take note of the fact that this court has previously indicated that in other contexts, article I, section 22 is to be analyzed independently of the Sixth Amendment.[2] It is our view, however, that the prior cases in

[2]*See State v. Pugh*, 167 Wn.2d 825, 835, 225 P.3d 892 (2009) (holding that statements made by defendant's wife during 911 call qualified as res gestae and, therefore, did not implicate the state confrontation clause, but noting in dictum that "a *Gunwall* analysis is no longer necessary" because "an independent analysis applies" to article I, section 22); *State v. Shafer*, 156 Wn.2d 381, 391, 128 P.3d 87 (2006) (holding that RCW 9A.44.120, the child hearsay statute, complies with article I, section 22 and noting that a majority of our court held in *Foster* that article I, section 22 is subject to an independent analysis); *State v. Foster*, 135 Wn.2d 441, 473, 481, 957 P.2d 712 (1998) (a majority of our court concluded that the state constitution's confrontation clause must be given an interpretation independent of that given the Sixth Amendment's confrontation clause and indicated that in some other contexts the state provision is more protective than the Sixth Amendment right) (Alexander, J., concurring and

which we discussed the relationship between article I, section 22 and the Sixth Amendment are not determinative of the outcome here. That is so because we have never held that article I, section 22 is to be analyzed independently in the context presented by this case. It is incumbent on us, therefore, to make that determination based on the factors set forth in *Gunwall* and in the context of a case where it is alleged that the prosecutor's questioning of the defendant violated his constitutional rights to appear and defend, to testify, and to meet witnesses face to face.

In *Gunwall,* we determined that the following nonexclusive neutral factors are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."[3] *Gunwall*, 106 Wn.2d at 58. Martin highlights the first four *Gunwall* factors in support of his assertion that article I, section 22 of the Washington Constitution provides greater protection than the Sixth Amendment with regard to a defendant's rights to be present, mount a defense, testify, and confront witnesses.

With respect to factors one and two, it is obvious that the text of the Sixth Amendment is not identical to article I, section 22. The provision in our state

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dissenting) (C. Johnson, J., dissenting).

[3]In *Gunwall* we noted that these criteria are useful in ensuring that if we independently analyze a state constitutional provision, we "will consider these criteria to the end that our decision will be made for well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court." *Gunwall,* 106 Wn.2d at 62-63.

constitution reads, in pertinent part, that an accused shall have the right to

> appear and defend in person, . . . to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, . . . to have a speedy public trial . . . and the right to appeal in all cases.

Wash. Const. art. I, § 22. The Sixth Amendment, on the other hand, merely provides that an accused has the right "to a speedy and public trial, . . . to be confronted with the witnesses against him[, and] to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. Thus, it is readily observable that our state's confrontation clause provides several rights that are not specifically set forth in the Sixth Amendment, namely: the right to appear and defend in person, the right to have a copy of the charge, the right to testify in one's own behalf, and the right to appeal in all cases. The Court of Appeals took note of the obvious textual differences between the respective provisions, acknowledging that "the Sixth Amendment does not expressly guarantee the defendant the right to attend trial and to testify as does article I, section 22." *Martin*, 151 Wn. App. at 110. It went on, however, to discount this difference, stating that the "distinction is of no moment," basing that conclusion on the fact that the United States Supreme Court has subsequently determined that the Sixth Amendment "necessarily" guaranteed these rights. *Id*. (citing *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (recognizing defendant's right to testify)); *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (recognizing defendant's right to attend trial) (citing *Lewis v. United States*, 146 U.S. 370, 13 S. Ct.

136, 36 L. Ed 1011 (1892)). Although we agree with the Court of Appeals that the United States Supreme Court later found that these rights were guaranteed by the Sixth Amendment, the plain fact is that the rights were not explicitly set forth therein. As members of this court have noted, "the Sixth Amendment existed at the time the Washington Constitution was debated and we know the framers [of the Washington Constitution] chose different and specific words for use in article I, section 22." *State v. Foster*, 135 Wn.2d 441, 485, 957 P.2d 712 (1998) (C. Johnson, J., dissenting). We believe that when the framers of our state constitution drafted article I, section 22 and presented it to the people of the Territory of Washington for adoption they were aware of the linguistic differences between that section and the Sixth Amendment and assumed that the state provision provided rights that were not provided by the United States Constitution. *See* Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 515 (1984). For that reason, we believe that the Court of Appeals erred in minimizing the significant textual differences between article I, section 22 and the Sixth Amendment, and in concluding that the first and second *Gunwall* factors did not weigh in favor of an independent analysis of the confrontation clause of our state constitution.

As to factor three, constitutional and common law history, we agree with Martin that little is known about what the drafters of article I, section 22 intended in 1889. Am. Suppl. Br. of Pet'r at 12 (citing *Foster*, 135 Wn.2d at 474).[4] However, we do know, as

we have indicated above, that article I, section 22 of our state constitution explicitly recognized the right of defendants to appear, to present a defense, and to testify. It is reasonable to assume from that fact that the drafters of this provision believed that these rights are of great importance. We know, also, that shortly after statehood, this court acknowledged that article I, section 22 provided defendants the right to meet the witnesses against them face to face and to cross-examine those witnesses in open court. *See* Pet. for Review at 10 (citing *State v. Stentz*, 30 Wash. 134, 142, 70 P. 241 (1902), *abrogated on other grounds by State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001)). Significantly, the federal constitution did not provide such broad protection to defendants at the time Washington became a state. *See* Am. Suppl. Br. of Pet'r at 13-14; *Foster*, 135 Wn.2d at 474 (Alexander, J., concurring and dissenting). Indeed, we note that in *Portuondo*, the United States Supreme Court observed that historically under federal law what defendants "said at trial was not considered to be evidence, since they were disqualified from testifying under oath." *Portuondo*, 529 U.S. at 66 (citing 2 John Henry Wigmore, Evidence In Trials At Common Law § 579 (3d ed. 1940)). In light of this history, we believe that the third *Gunwall* factor weighs in favor of an independent analysis.

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[4]Unfortunately, minutes of Washington's constitutional convention and newspaper accounts of the proceedings there are the only contemporary records of the debates that took place at the convention. The service of shorthand was secured and those reporters took down the full text of speeches and arguments at the convention. The congressional appropriations did not, however, cover the costs of transcribing the shorthand notes and sadly they were destroyed. Charles M. Gates, *Foreword* to The Journal of the Washington State Constitutional Convention 1889, at vi-vii (Beverly Paulik Rosenow ed., 1962).

Insofar as the fourth *Gunwall* factor is concerned, preexisting state law, it is significant that some Washington courts have held that the State violates the Sixth Amendment by implying that a defendant tailored his or her testimony. *See, e.g., State v. Smith*, 82 Wn. App. 327, 334-35, 917 P.2d 1108 (1996), *abrogated by Portuondo*, 529 U.S. 61, *as recognized in State v. Miller*, 110 Wn. App. 283, 285, 40 P.3d 692 (2002); *State v. Johnson*, 80 Wn. App. 337, 341, 908 P.2d 900 (1996), *abrogated by Portuondo*, 529 U.S. 61, *as recognized in Miller*, 110 Wn. App. 283. Although this fact is not dispositive of the question before this court, it does signal that Washington courts have on occasion favorably viewed the argument that Martin now presents.[5]

The State contends that an examination of preexisting state law leads to a conclusion that article I, section 22 and the Sixth Amendment are coextensive in the context of protections afforded a defendant on cross-examination. Br. of Resp't at 22. It points out that "Washington has a long history of permitting cross examination into matters which bear on the defendant's credibility." *Id.* at 23. In support of this position, it quotes the *Washington Code of 1881*, § 1067, which provided that a defendant may

[5]Martin also points out that Washington has never required a defendant to testify prior to presenting his or her own witnesses, whereas other states have attempted to limit defendants in this way. Pet. for Review at 10 (quoting *Portuondo*, 529 U.S. at 66, noting that some states "'attempted to limit a defendant's opportunity to tailor his sworn testimony by requiring him to testify prior to his own witnesses'" (citing 3 John Henry Wigmore, Evidence §§ 1841, 1869 (1904); Ky. Stat., ch. 45, § 1646 (1899); Tenn. Code Ann., ch. 4, § 5601 (1896))). Martin's argument under this *Gunwall* factor, an argument based on the *lack* of a requirement in preexisting Washington law that a defendant testify first, does not bolster his position. Moreover, we note that in *Brooks v. Tennessee*, 406 U.S. 605, 612-13, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972), the United States Supreme Court held it was unconstitutional to require defendants to testify prior to hearing other evidence.

testify on his or her own behalf and that he or she "'shall be subject to all the rules of law relating to cross examination of other witnesses.'" *Id.* The State notes, additionally, that this court has held that a "'defendant in a cause has no special privileges when he offers himself as a witness on his own behalf. His credit as a witness may be tested and his testimony impeached in the same manner and to the same extent as that of any other witness.'" *Id.* at 24 (quoting *State v. Hollister*, 157 Wash. 4, 7, 288 P. 249 (1930)). Although these authorities support the view that Washington has long considered a defendant who chooses to testify at his own trial to be susceptible to the regular rules of cross-examination, we disagree with the State's contention that the fourth *Gunwall* factor supports its argument that our article I, section 22 should not be analyzed independently of its federal counterpart. We reach that conclusion because, as we stated in *Gunwall*, state law "may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims." *Gunwall*, 106 Wn.2d at 62. As indicated above, the Sixth Amendment was not deemed to afford a defendant the right to testify until 1961. *See Ferguson v. Georgia*, 365 U.S. 570, 596, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961). The fourth factor, like the first three, weighs in favor of an independent analysis. On balance, therefore, we are inclined to favor an independent analysis of the state constitution on the question before us.[6]

[6]Although Martin does not address the fifth *Gunwall* factor, we have held that it supports an independent state constitutional analysis in every case and have consistently stated that our "consideration of this factor is always the same; that is that the United States Constitution is a *grant* of limited power to the federal government,

III

Having determined in this case that article I, section 22 should be analyzed independently of the Sixth Amendment, we must now decide whether the protections afforded a defendant by article I, section 22 prohibit a prosecutor from indicating, via questioning, that a defendant has tailored his or her testimony to align with witness statements, police reports, and testimony from other witnesses at trial. As noted above, Martin contends that such conduct by a prosecutor violates the defendant's state constitutional rights to appear and defend at trial, to testify, and to meet witnesses face to face. He avers that if such conduct is permitted, defendants will be forced to choose between testifying, thereby facing potentially unfounded prosecutorial accusations of tailoring, or waiving the aforementioned rights to avoid such accusations. *See* Pet. for Review at 19. The State responds that the cross-examination here focused solely on Martin's credibility and did not implicate his confrontation rights as set forth in article I, section 22. Am. Suppl. Br. of Resp't at 11.

Although, for reasons stated above, we have concluded that the *Portuondo* decision does not control our analysis under article I, section 22, we believe it is appropriate to examine the entire opinion in order to determine if the reasoning of any of the justices can assist us in interpreting article I, section 22 of our state constitution. As noted above, a majority of the United States Supreme Court concluded in *Portuondo* that an indication of tailoring by the prosecutor during closing argument did not run

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while the state constitution imposes *limitations* on the otherwise plenary power of the state." *Foster*, 135 Wn.2d at 458-59 (citing *Gunwall*, 106 Wn.2d at 66).

afoul of the Sixth Amendment. *Portuondo*, 529 U.S. at 73. The majority stated:

> In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.

Id. In a dissent, Justice Ginsburg essentially indicates that the opinion went too far. She criticized the majority for "transform[ing] a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility."[7] *Id.* at 76 (Ginsburg, J., dissenting). She opined that a prosecutor should not be permitted to make such an accusation during closing argument because a jury is, at that point, unable to "measure a defendant's credibility by evaluating the defendant's response to the accusation, for the broadside is fired after the defense has submitted its case." *Id.* at 78 (Ginsburg, J., dissenting). She went on to say, however, that she did not favor a complete ban on prosecutorial accusations of tailoring. She expressed the notion that the defendant's Sixth Amendment rights are not violated if a prosecutor poses questions to the defendant during cross-examination that infer the defendant tailored his or her testimony to match that of other witnesses. In that regard, she said:

> The truth-seeking function of trials may be served by permitting

[7]In support of her conclusion, Justice Ginsburg cited a Washington case, discussed above, as an example of a state court that "found it improper for prosecutors to make accusations of tailoring based on the defendant's constant attendance at trial." *Portuondo*, 529 U.S. at 83 n.5 (Ginsburg, J., dissenting) (citing *Johnson*, 80 Wn. App. 337).

> prosecutors to make accusations of tailoring—even wholly generic accusations of tailoring—as part of cross-examination. Some defendants no doubt do give false testimony calculated to fit with the testimony they hear from other witnesses. If accused on cross-examination of having tailored their testimony, those defendants might display signals of untrustworthiness that it is the province of the jury to detect and interpret. But when a generic argument is offered on summation, it cannot in the slightest degree distinguish the guilty from the innocent. It undermines all defendants equally and therefore does not help answer the question that is the essence of a trial's search for truth: Is this particular defendant lying to cover his guilt or truthfully narrating his innocence?

Id. at 79 (Ginsburg, J., dissenting). In other words, Justice Ginsburg distinguished a comment in closing argument that is "tied only to the defendant's presence in the courtroom and not to his actual testimony" from accusations made during cross-examination of the defendant. *Id.* at 77 (Ginsburg, J., dissenting). The latter, she concluded, do not violate the Sixth Amendment.

We believe that Justice Ginsburg's view, that suggestions of tailoring are appropriate during cross-examination, is compatible with the protections provided by article I, section 22. It is during cross-examination, not closing argument, when the jury has the opportunity to determine whether the defendant is exhibiting untrustworthiness. Indeed, a "primary interest secured by the Confrontation Clause . . . is the right of cross-examination, '"the principal means by which the believability of a witness and the truth of his testimony are tested."'" *Foster*, 135 Wn.2d at 456 (quoting *Kentucky v. Stincer,* 482 U.S. 730, 736, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) (quoting *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)).[8]

[8]We note that the majority and dissent in *Portuondo* agreed that generic accusations of tailoring are permissible, although as we have discussed, there was

Here Martin testified on direct examination about what time he was in the parking lot where the van was found as follows: "I would guess 11:30, 12:00, 12:30 at night. From prior testimony, I know it had to be before one." VRP (Dec. 11, 2007) at 28. In our judgment, this testimony opened the door to questions on cross-examination about whether he tailored his testimony to evidence presented by other witnesses. Prohibiting the kind of questioning that occurred here, where the defendant states that he based his testimony, in part, on testimony of other witnesses, would inhibit the jury's ability to judge credibility and thereby seek the truth. In sum, we believe that in a case such as the instant, where the credibility of the defendant is key, it is fair to permit the prosecutor to ask questions that will assist the finder of fact in determining whether the defendant is honestly describing what happened.

We conclude, therefore, that the State did not violate article I, section 22 by posing questions during cross-examination that were designed to elicit answers indicating whether Martin tailored his testimony.

IV

Martin asserts that if we conclude there was no constitutional violation, as we do, we should exercise our inherent supervisory power to create a rule prohibiting this kind of questioning. The Court of Appeals declined to exercise its inherent supervisory power, stating that "[b]ecause we find no constitutional infirmity in the prosecutor's

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disagreement about whether such accusations are permitted during closing argument. Because the accusation of tailoring in this case was specific rather than generic, we do not decide whether generic accusations are prohibited under article I, section 22.

questions, there is no principled basis on which to fashion the rule that Martin seeks." *Martin*, 151 Wn. App. at 116 n.10. Martin correctly points out that Washington courts exercise inherent supervisory authority precisely when there is no constitutional infirmity, since there would be no need to exercise inherent supervisory power if there was a constitutional violation. *See* Pet. for Review at 13 (citing *State v. Bennett*, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007)). We have previously invoked our inherent supervisory power for the purpose of furthering "sound judicial practice." *Bennett*, 161 Wn.2d at 318. As noted above, cross-examination is the "'principal means by which the believability of a witness and the truth of his or her testimony are tested.'" *Foster*, 135 Wn.2d at 456 (internal quotation marks omitted) (quoting *Stincer,* 482 U.S. at 736). If we were to exercise our supervisory power in the manner requested by Martin, we would be inhibiting the truth seeking function by diminishing the jury's ability to obtain information relevant to the defendant's credibility. This would not be a "sound judicial practice." *Bennett*, 161 Wn.2d at 318.

V

In conclusion, we hold that in the context of prosecutorial suggestions of tailoring, article I, section 22 is more protective than the Sixth Amendment. For this reason, the United States Supreme Court's decision in *Portuondo* is not controlling in this case. We conclude, however, that our state constitution was not violated when a deputy prosecutor, in response to testimony Martin had given on direct examination, asked Martin if he had tailored his testimony to conform to testimony given by other

witnesses. We, therefore, affirm the Court of Appeals, albeit for reasons that differ from those relied on by that court.

AUTHOR:
Justice Gerry L. Alexander

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice Charles W. Johnson

Justice James M. Johnson

Justice Susan Owens