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Supreme Court No. 79332-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KHA DANH MAGERS,

Appellant.

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

The Honorable Stephanie A. Arend, Judge

ANSWER TO PETITION FOR REVIEW

RITA J. GRIFFITH  
Attorney for Appellant

1305 N.E. 45th Street, #205  
Seattle, WA 98105-45232  
(206) 547-1742

TABLE OF CONTENTS

	Page
A. IDENTITY OF PETITIONER . . . . .	1
B. DECISION OF COURT OF APPEALS . . . . .	1
C. ISSUES PRESENTED FOR REVIEW . . . . .	1
D. STATEMENT OF THE CASE . . . . .	2
E. ARGUMENT WHY REVIEW SHOULD BE DENIED . . . . .	8
1. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS IN <u>STATE V. RAGIN AND STATE V. BARRAGAN</u> . . . . .	8
2. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION IN <u>STATE V. GRANT</u> . . . . .	10
F. ADDITIONAL ISSUES IF REVIEW IS GRANTED. . . . .	13
1. MS. RAY'S STATEMENTS WERE NOT EXCITED UTTERANCES . . . . .	13
2. THE DEFENSE WAS ENTITLED TO INTRODUCE EVIDENCE THAT THE COMPLAINING WITNESS KNEW MR. MAGERS FACED A THIRD STRIKE CONVICTION . . . . .	13
3. OFFICER LANG'S TESTIMONY WAS IMPROPER OPINION AS TO GUILT . . . . .	15
4. THE PROSECUTOR COMMITTED MISCONDUCT. . . . .	16

**TABLE OF CONTENTS** -- cont'd

	Page
<b>5. MR. MAGERS' SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE IS UNCONSTITUTIONAL. . . . .</b>	<b>19</b>
<b>G. CONCLUSION . . . . .</b>	<b>20</b>

---

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Ball</u> , 127 Wn. App. 956, 113 P.3d 520 (2005), review pending . . . . .	18
<u>State v. Barragan</u> , 102 Wn. App. 754, 9 P.3d 942 (2000) . . . . .	1, 8-10
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988) . . . . .	17
<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987) . . . . .	16
<u>State v. Brown</u> , 127 Wn.2d 749, 903 P.2d 459 (1995) . . . . .	13
<u>State v. Burri</u> , 87 Wn.2d 175, 550 P.2d 507 (1976) . . . . .	14
<u>State v. Dennison</u> , 115 Wn.2d 609, 801 P.2d 193 (1990) . . . . .	17
<u>State v. Fain</u> , 94 Wn.2d 387, 617 P.2d 720 (1980) . . . . .	19
<u>State v. Florczak</u> , 76 Wn. App. 55, 882 P.2d 199 (1994) . . . . .	16
<u>State v. Gefeller</u> , 76 Wn.2d 449, 458 P.2d 17 (1969) . . . . .	14, 15

**TABLE OF AUTHORITIES** -- cont'd

Page

State v. Grant,  
83 Wn. App. 98, 920 P.2d 609 (1996) . . . . . 1, 10-12

State v. Hardy,  
133 Wn.2d 701, 946 P.2d 1175 (1995) . . . . . 12

State v. Heaton,  
149 Wash. 452, 271 P. 89 (1928) . . . . . 17

State v. Lougin,  
50 Wn. App. 376, 749 P.2d 173 (1988) . . . . . 15

State v. Lynn,  
67 Wn. App. 339, 835 P.2d 251 (1992) . . . . . 16

State v. Maupin,  
128 Wn.2d 918, 913 P.2d 808 (1996) . . . . . 13

State v. Ragin,  
94 Wn. App. 407, 972 P.2d 519 (1994) . . . . . 1, 8-10

State v. Roberts,  
80 Wn. App. 342, 908 P.2d 892 (1996) . . . . . 14

State v. Smith,  
101 Wn.2d 36, 677 P.2d 100 (1984) . . . . . 14

**FEDERAL CASES**

Blakely v. Washington,  
542 U.S. 296, 124 S. Ct. 2531,  
159 L. Ed. 2d 403 (2004) . . . . . 18

TABLE OF AUTHORITIES -- cont'd

Page

<u>Harmelin v. Michigan</u> , 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 836 (1991) . . . . .	19
<u>Harris v. New York</u> , 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643, 645 (1971) . . . . .	13
<u>In re Winship</u> , 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) . . . . .	18
<u>Robinson v. California</u> , 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed 2d 758 (1962) . . . . .	19
<u>Sullivan v. Louisiana</u> , 508 U.S. 275, 118 S. Ct. 1390, 140 L. Ed. 2d 649 (1998) . . . . .	18
<u>United States v. Young</u> , 470 U.S. 1, 105 S.Ct. 1038, 54 L. Ed. 2d 1 (1985) . . . . .	15

STATUTES, RULES AND OTHER

Const. art. 1, § 16 . . . . .	18
Const. art. 1, § 22 . . . . .	13
Const., Art. 1, § 14 . . . . .	19
Eighth Amendment, U.S. Constitution . . . . .	2, 19, 20

**TABLE OF AUTHORITIES** -- cont'd

	Page
ER 404(b) . . . . .	8, 11
ER 609 . . . . .	12
Fifth Amendment, U.S. Constitution . . . . .	2
Fourteenth Amendment, U.S. Constitution . . . . .	2, 17, 19
RAP 13.4(b) . . . . .	13, 15, 18
RCW 9.94A.030(32)(a)(ii) . . . . .	19
Sixth Amendment, U.S. Constitution . . . . .	2, 18, 19

**A. IDENTITY OF PETITIONER**

Kha Magers, appellant below and respondent here, asks this Court to deny review of the decision designated in Part B of this motion.

If review is granted, however, Mr. Magers asks that review also be granted on the issues set out below which the Court of Appeals either decided adversely to him or did not decide,

**B. DECISION OF COURT OF APPEALS**

Respondent seeks denial of review of the unpublished decision of the Court of Appeals, Division II, filed in his case on September 12, 2006.

A copy of the decision is in Appendix A of the state's Petition for Review.

**C. ISSUES PRESENTED FOR REVIEW**

1. Where State v. Ragin and State v. Barragan upheld the admission of the defendant's prior bad acts to support testimony by a complaining witness that he was reasonably in fear of the defendant's threats to him, and the decision in this case involved admission of evidence of Mr. Magers's prior bad acts to establish that the alleged victim was *unreasonable* when she testified she *did not fear* Mr. Magers, are the decisions not in conflict?

2. Where the evidence of the defendant's prior bad acts in State v. Grant was admitted to support the trial testimony of the victim after her credibility was attacked by the defendant and the evidence of Mr. Magers's prior bad acts was admitted to prove that Mr. Magers was the type of person to have committed the charged crime and therefore the alleged victim was not credible in her testimony denying that she was in fear or assaulted, are the decisions not in conflict?

3. If review is granted on the issues raised by the state in its petition, should review also be granted on the issues of: (a) the erroneous

admission of Carissa Ray's statements to the police as excited utterances; (b) the improper exclusion of evidence that Mr. Magers faced a third strike sentence; (c) the improper opinion testimony as to guilt; (d) the prosecutor's misconduct in incorrectly instructing the jury in opening statement and in arguing facts not in evidence in closing argument; and (d) the unconstitutionality of Mr. Magers's sentence of life without parole? Issues (b) though (d) are issues arising under the federal constitution, under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as constitutional issues under the state constitution. Issues (b)-(d) were not decided by the Court of Appeals.

#### **D. STATEMENT OF THE CASE**

The state relies almost entirely on statements in the police report used to impeach Carissa Ray. The state carefully omits what Ms. Ray actually testified to at trial and her explanation of why her mother and stepfather called the police on the day of the incident. The following omitted facts are essential to a fair consideration of issues presented.

Ms. Ray testified that she grew up in a sad and non-functional home where her stepfather molested her and her mother would not believe her when Ms. Ray told her of his abuse. RP 258-261, 345-348. Ms. Ray ran away from home repeatedly when she was a teenager as a result of her stepfather's abuse. RP 345-348. She met Mr. Magers during the period in which she was a runaway; they started dating when Ms. Ray was 18 years old; he was the father of her two children. RP 262-265, 350-351.

Ms. Ray explained that even though her family life was miserable, she wanted to maintain a relationship with her mother and told many lies to maintain this relationship. RP 352.

Defense investigator Bob Crow confirmed at trial that he found two cases in Thurston County in which Ms. Ray's stepfather was listed as the suspect and Ms. Ray as the victim. RP 544-546.

Ms. Ray insisted in her testimony that Mr. Magers was a good person who loved their children; their arguments were normal family arguments and Mr. Magers was not physical with her during arguments. RP 266-269, 368. She denied that Mr. Magers hurt her, threatened her or kept her from leaving on January 16, 2004. RP 368, 370, 376.

Ms. Ray had written a letter on January 21, 2004, stating that on January 16, Mr. Magers came to her house to watch their children while she went to a job interview. RP 356. She knew that there was a no-contact order in place, but she had no one else to watch the children and the job was important to her. RP 356. When her mother and stepfather called and wanted Ms. Ray to come to their house, she lied to them about Mr. Magers, saying he would not let her leave her house, because she did not want to be near her stepfather. RP 358-359.

Ms. Ray wrote in the letter that she drove in her car to the store and phoned her mother from a pay phone. RP 359. During the call, she embellished her first lie by saying that Mr. Magers had a knife. RP 359-360, 385-386. Ms. Ray explained that she did not want them to be angry at her for not coming to their house and she did not want her stepfather to have a reason to keep her from seeing her mother. RP 385-386.

Ms. Ray reiterated at trial that she had told her parents that she and Mr. Magers were fighting because they wanted her to come and take her mother to the hospital. RP 286. When she called again from the store later, she said he had a knife to make up a further excuse. RP 287.

Ms. Ray testified that when the police came to her door on January 16 and asked her if Mr. Magers was there she said, "no," because she did not want to get him into trouble because of an outstanding no-contact order. RP 292. Her son said that Mr. Magers was there. RP 293. Ms. Ray insisted that after her son alerted the police, she asked them to tell him that she told them he was there so that he would come out. RP 294-295.

Ms. Ray testified that she had been surprised when the police arrived. RP 360. She had not thought that her parents would call the police because her stepfather physically abused her mother and sister. RP 385. Several days after the incident, Ms. Ray had given her letter to the

victim advocate explaining what had happened. RP 369-372. She had sent a second letter to court in February hoping to stop the chain of events she started with her untruths. RP 374.

When asked about the details of the January 16 incident, after the police arrived, Ms. Ray testified that she could not recall anything other than Mr. Magers' getting arrested and her having to sit in a police car with her children for a very long time. RP 284-285.

Over defense objection, the state was allowed to ask Ms. Ray if she recalled telling the police that Mr. Magers held a knife to her neck. RP 297. The prosecutor asked Ms. Ray if she had told the police that Mr. Magers had just been released from prison for domestic violence and had been coming and going from the house since that time. RP 299. In response, Ms. Ray insisted that before she went inside to give a written statement, her children were screaming and yelling and the police did not ask her questions. RP 296-298. She felt a lot of pressure when giving her written statement because the police were saying that they hoped they had not gone through everything for nothing and because of pressure from her parents. RP 329-330.

Ms. Ray testified that she could barely remember a time in December 2003 when the police said she and Mr. Magers were fighting.

RP 270-271. She had not called the police. RP 276. Over defense objection that there was nothing to impeach since Ms. Ray could not remember the occasion, the state was permitted to show Ms. Ray a copy of the police report from the December incident to refresh her memory and use it to question Ms. Ray about the contents of the report. RP 271-274.

Because of the trial court's pretrial rulings, the prosecutor was permitted to elicit from Ms. Ray that Mr. Magers was in prison for fighting when their first child was born. RP 263. When the prosecutor pressed Ms. Ray for details of his "legal troubles," she responded that she had seen some papers indicating that he had been fighting. RP 265.

Ms. Ray testified that she was feeling under pressure during her testimony because she had spent three days in jail for failing to appear in court, because she had been forced to post cash bond for her release and because she was required to call the prosecutor every Friday. RP 343-344. Ms. Ray testified that she had been afraid that she would be put in jail and her children taken from her. RP 374, 377.

Ms. Ray's testimony that she had no injuries from the December incident was unrebutted, and there was nothing to indicate that a knife had been held to her neck during the January incident. RP 375-376.

Seattle Police Officer Jim Lang testified that he responded to the 911 call on January 16, 2004, at 6:53 p.m. RP 401, 405-407. According to Lang, when Ms. Ray finally answered the door, she had her child at her side and said that Mr. Magers was not there. RP 408-409. He testified that from her demeanor he "knew something was terribly wrong." RP 409. He testified further, over defense hearsay objection, that as soon as he had Ms. Ray and the child step outside, he could see she was relieved and said that Mr. Magers was inside. RP 409-410.

Outside the presence of the jury, Lang testified that Ms. Ray was terrified; she was not hysterical, but she was crying and acting as if "her brain was overloaded." RP 413. He described her as like a dog cowering in the corner. RP 416. Based on this testimony, the court ruled that Ms. Ray's hearsay statements were admissible as excited utterances. RP 419.

After this ruling, the state elicited from Lang that Ms. Ray said that Mr. Magers was going to hurt her and that he was violent. RP 430. Lang testified that she rambled about how violent he was. RP 430, 435. He testified that she said Mr. Mager put a sword to the back of her head and threatened to cut it off. RP 435. Lang testified that Ms. Ray did not know her right from her left because she was "obviously traumatized." RP 436. Over further objection that the state was eliciting double hearsay, Lang was

permitted to testify that Ms. Ray said that Mr. Magers told her that if she listened to him and did what he said, they would be happy, but if she did not he was going to be mean and cut her head off. RP 442-443. Lang continued that Ms. Ray was afraid that Mr. Magers would get out of jail and hurt her and that she was crying and repeating that he was violent and had just gotten out of jail. RP 443, 447

In contrast to Officer Lang's testimony, veteran Tacoma Police Officers David Alred and Alan Morris described Ms. Ray as acting "peculiar" and "a little distraught." RP 493, 583.

**E. ARGUMENT WHY REVIEW SHOULD BE DENIED**

**1. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS IN STATE V. RAGIN AND STATE V. BARRAGAN.**

At trial, the court allowed the state to present, under ER 404(b), evidence of Mr. Magers' past criminal convictions for "violent" crimes, his prior time in custody and one alleged domestic violence *charge* and violation of a no-contact order. RP 13-18, 20-21, 22-23, 263, 270, 279.

In its petition for review the state argues that this evidence of Mr. Magers' prior bad acts was not inadmissible propensity evidence, but instead was evidence relevant to prove that Carrisa Ray's fear of Mr. Magers was reasonable. Petition 7-14. The state argues that the cases of

State v. Ragin, 94 Wn. App. 407, 972 P.2d 519 (1994), and State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000), support its position and conflict with the decision in Mr. Magers' case. Ragin and Barragan, however, are not in conflict with the decision of the Court of Appeals.

In both Ragin and Barragan, evidence of the defendants' prior bad acts was relevant to support the claim by the victim that he was reasonable in fearing a threat by the defendant. The victim's knowledge of the defendant's prior bad act in each case explained and supported the victim's claim of fear. In complete contrast, Ms. Ray denied that she was in fear of Mr. Magers. The evidence of his past acts could not show that she had reasonable fear and could not support a claim of reasonable fear. The purpose of the evidence was to show that Ms. Ray was *unreasonable*, and untruthful, if she did not fear Mr. Magers. And the inference was clearly the forbidden inference of ER 404(b) that Mr. Magers committed the crime, notwithstanding Ms. Ray's testimony, because it would be consistent with his character to have committed the crime.

Further, as the Court of Appeals properly held, citing State v. Powell, 126 Wn.2d 244, 262, 893 P.2d 615 (1995), if the jury believed that Mr. Magers held a knife to Ms. Ray's neck and threatened to kill her, then evidence of prior bad acts was not necessary or admissible to establish

reasonableness of fear; proof that he held the knife to her neck and threatened to cut off her head would establish his intent and the reasonableness of the fear. Slip op. at 5. And while the state claims, at length, that Mr. Magers did dispute that he caused Ms. Ray fear, the relevant point is that Mr. Magers never asked the jury to believe that he put a knife to her neck and threatened to decapitate her, but that this should not have caused her fear or that her fear was unreasonable. Petition at 11-13. Mr. Magers never claimed that it would be unreasonable to fear decapitation, only that he did not threaten to cut off her head at all. Indeed, as the state quotes, defense counsel argued that even a dull knife could cause harm and would likely have left a mark. RP 598. This concedes the point that the reasonableness of Ms. Ray's fear would not be an issue *if* Mr. Magers had actually threatened her with a knife at her neck.

The conflict the state claims is a misreading of Ragin and Barragan and does not constitute grounds for accepting review of the unpublished decision in Mr. Magers' case.

**2. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION IN STATE V. GRANT.**

Contrary to the claim of the state in its petition for review, State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996), simply does not hold that

evidence of prior acts of violence is categorically admissible to support the credibility of the complaining witness in a domestic violence case.

In Grant, the wife testified as a witness at trial and described the assault against her by her husband. Mr. Grant testified at trial that his wife did not tell him that she was afraid of being in a relationship with him. Grant, 83 Wn. App. at 104. Under these circumstances, where the defense attacked the credibility of the wife's testimony, the court held that the evidence of prior assaultive behavior was relevant "to explain [the wife's] statement and conduct which might otherwise appear inconsistent with her testimony of the assault at issue in the present charge." Grant, at 106.

This is a far cry from allowing testimony to *impeach* the credibility of the complaining witness. This is because ER 404(b) does not permit the introduction of evidence to establish that the defendant acted in conformity with his character, as could be inferred from his past conduct, in committing the charged crime. ER 404(b). The only way that Ms. Ray's credibility could be impeached by the prior acts is by the forbidden inference that Mr. Maggers committed violent acts in the past and therefore Ms. Ray is not telling the truth when she says he did not commit an act of violence against her on this occasion.

Moreover, unlike the defendant in Grant, Mr. Magers did not have a long history of prior domestic violence. There was one charge which was dismissed; the rest of the 404(b) evidence consisted of alleged assaultive behavior unrelated to Ms. Ray or any domestic relationship. Grant certainly does not hold that evidence of non-domestic violence is relevant in cases involving allegations of domestic abuse. The decision in this case is not in conflict with the decision in Grant.

The state's extended analogy to ER 609, and its claim that jurors have always considered prior evidence of crimes to assess credibility, overlooks the obvious. Petition 17-19. Assaultive crimes are not generally probative of credibility and prior convictions involving crimes similar to the charged crimes are unfairly prejudicial. State v. Hardy, 133 Wn.2d 701, 709-710, 946 P.2d 1175 (1995). Moreover, by the plain terms of the rule, evidence that the defendant has prior convictions is not ever admissible under ER 609 to impeach the credibility of a witness other than the testifying witness. The decision in this case is not inconsistent with the decision in Grant and review should be denied.

**F. ADDITIONAL ISSUES IF REVIEW IS GRANTED.**

**1. MS. RAY'S STATEMENTS WERE NOT EXCITED UTTERANCES.**

The trial court erred in admitting as excited utterances statements allegedly made by Ms. Ray to the police. Ms. Ray's statements were not excited utterances because, under the state's theory of the case, she had the capacity to consider her situation and decide to respond untruthfully that Mr. Magers was not at the house. Under the state's theory, Ms. Ray was not under the stress of the moment to the degree that she could not consider the consequences to her of her answer to the police. Therefore, the decision of the Court of Appeals is in conflict with this Court's decision in State v. Brown, 127 Wn.2d 749, 903 P.2d 459 (1995) where this Court held that the trial testimony of the victim that she decided not to tell the truth in a portion of her 911 call defeated a finding that her call was an excited utterance. Brown, 127 Wn.2d at 757-759. Review of this issue would be appropriate under RAP 13.4(b)(2).

**2. THE DEFENSE WAS ENTITLED TO INTRODUCE EVIDENCE THAT THE COMPLAINING WITNESS KNEW MR. MAGERS FACED A THIRD STRIKE CONVICTION.**

The exclusion of the evidence that Mr. Magers faced convictions for third strike offenses and a sentence of life without the possibility of

parole denied him his federal and state constitutional rights under the Sixth Amendment and Const. art. 1, § 22 to present evidence in his own behalf. See Harris v. New York, 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643, 645 (1971); Washington v. Texas, 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); Const. art. 1, § 22; State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Roberts, 80 Wn. App. 342, 351, 908 P.2d 892 (1996).

The state was permitted to introduce extremely and unfairly prejudicial evidence, prior bad acts of Mr. Magers, to establish its theory that Ms. Ray was afraid Mr. Magers would get out of jail and injure her if she testified against him at trial. RP 24-25,28, 40, 180. Given this theory and inferences from testimony elicited by the state, Mr. Magers was entitled to ask Ms. Ray if she knew that he was facing a third strike and a sentence of life without parole if convicted. If Ms. Ray were truly afraid of him, as the state argued, then she would be motivated to make sure that he was never out of prison again. Denying Mr. Magers the right to present this evidence denied him his fundamental right to present a defense at trial and elicit testimony from a witness at trial.

Mr. Magers had a right to present evidence to meet the state's case. Cross-examination on a topic introduced in direct examination may be essential to the jury's ability to find the truth. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); K. Teglund, Wash. Prac., Evidence, section 11 (3rd ed. 1989). Where the state opens the door by presenting evidence, as a matter of fundamental fairness, the defense must be given the opportunity to inquire further on the subject. State v. Lougin, 50 Wn. App. 376, 380, 749 P.2d 173 (1988) (citing State v. Gefeller, 76 Wn.2d at 455). The issue of the admission of evidence that Mr. Magers was facing a third strike is a constitutional issue and an issue of substantial public importance. The decision of the Court of Appeals is in conflict with other reported decisions. If review is granted, it should be granted on this issue as well which meets all of the criteria of RAP 13.4(b).

**3. OFFICER LANG'S TESTIMONY WAS IMPROPER OPINION AS TO GUILT.**

Officer Lang testified that when he asked Ms. Ray if Mr. Magers was at the house that he could tell that "something was terribly wrong." RP 409. He testified that Ms. Ray was "obviously traumatized." This testimony constituted impermissible testimony as to guilt because it represented his opinion that she was traumatized as a result of Mr. Magers' having committed the assault and unlawful imprisonment of her. It went

beyond a description of Ms. Ray's demeanor or an opinion that she was upset; it implied causation. As such it was constitutional error under the state and federal constitutions. See United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 54 L. Ed. 2d 1 (1985) (it is misconduct for a prosecutor to invade the province of the jury by expressing a personal opinion that the defendant is guilty).

The decision of the Court of Appeals is in conflict with the decisions in State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987), and State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994). Such a direct opinion as to guilt is manifest constitutional error that has "practical and identifiable consequences in the trial of the case." State v. Florczak, 76 Wn. App. at 73-74 (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). Review is appropriate in this case because the issue is constitutional and because the decision of the Court of Appeals is in conflict with other reported decisions.

#### **4. THE PROSECUTOR COMMITTED MISCONDUCT.**

The prosecutor committed misconduct in closing argument by inviting the jurors to rely on evidence that was not presented to them at trial: their own experiences or the experiences of friends and family involving domestic violence and the dynamics of domestic violence which

had been discussed during voir dire. RP 581. Not only was there no evidence about the dynamics of domestic violence relationship presented at trial, the trial court excluded expert testimony on the issue. RP 185-186. The trial court concluded that testimony on the "dynamics" of relationships involving domestic violence would constitute impermissible testimony as to credibility. RP 185-186. By inviting the jurors to rely on evidence outside the evidence at trial, the prosecutor effectively told the jury that they could convict Mr. Magers based on unreliable evidence which the defense had no opportunity to confront. This was misconduct and denied Mr. Magers his state and federal rights to confrontation of witnesses and to a fair trial.

The decision in this case is in conflict with the decision of this Court in State v. Belgarde, 110 Wn.2d 504, 507-509, 755 P.2d 174 (1988), State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990) and State v. Heaton, 149 Wash. 452, 460-461, 271 P. 89 (1928). When a prosecutor argues facts not in evidence, he essentially testifies in front of the jury and denies the defendant the Sixth and Fourteenth Amendment rights to confront and cross-examine "witnesses." Belgarde, 110 Wn.2d at 509.

The prosecutor also committed misconduct at the outset of the trial. Over defense objection, the prosecutor was permitted to instruct the jury

on the elements of the charged crimes and to provide an incomplete and erroneous definition of assault. This instruction by the prosecutor gave the jurors an incomplete view of the law, denied Mr. Magers the opportunity to take exception to instructions and usurped the authority of the judge to instruct on the law, as set out in Article 4, § 16. CrR 6.15

The prosecutor did not inform the jurors that they could consider lesser included offenses and did not inform the jury of the burden of proof and other essential matters which govern jury deliberations. The prosecutor erroneously instructed the jurors that Mr. Magers could be found guilty of an assault solely by intending to create fear and apprehension of bodily harm, an incomplete and inadequate definition of an assault. RP 250. This definition left out that the fear had to be reasonable and that the victim actually had to experience the fear. It was an incorrect and incomplete statement of the law.

The issue of the prosecutor's misconduct meets the criteria of RAP 13.4(b). It is a federal constitutional issue because the prosecutor's misconduct denied Mr. Magers both his Sixth Amendment right to a jury trial and his Fifth Amendment right to a fair trial with proper instructions by the court which set forth all of the elements of the crime and the proper burden of proof. In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S.

Ct. 1068 (1970); Sullivan v. Louisiana, 508 U.S. 275, 279-80, 118 S. Ct. 1390, 140 L. Ed. 2d 649 (1998).

**5. MR. MAGERS' SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE IS UNCONSTITUTIONAL.**

Mr. Magers's sentence of life without the possibility of parole is unconstitutional under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), because the jury's verdict alone did not authorize sentences greater than the top of the standard range. Under the Persistent Offender Accountability Act (POAA), before a sentence of life without parole can be imposed, the trial court has to make additional finding that (a) on two separate occasions, (b) the defendant has been convicted of felonies that meet the definition of most serious offenses, (c) the defendant's prior conviction counts as offender score, and (d) at least one conviction for a most serious offense occurred before any of the other most serious offenses was committed. RCW 9.94A.030(32)(a)(ii). The statute does not require that the facts be found beyond a reasonable doubt or by a jury. Therefore the POAA violates the Sixth Amendment.

Mr. Magers's sentence of life without the possibility of parole constitutes cruel and unusual punishment because it is grossly disproportional to the crimes he was convicted of committing. Harmelin v. Michigan, 501 U.S. 957, 997, 111 S. Ct. 2680, 115 L. Ed. 836 (1991).

The Eighth Amendment's prohibition against cruel and unusual punishment is applicable to state action through the Fourteenth Amendment and proscribes disproportionate punishment. Robinson v. California, 370 U.S. 660, 666, 82 S. Ct. 1417, 8 L. Ed 2d 758 (1962). Article 1, § 14, has been held to be even more protective than the Eighth Amendment. State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980).

Under both the Eighth Amendment and Article 1, § 14, the sentence of life without parole was cruel punishment. It is grossly disproportional to the crimes of conviction. In Washington those crimes of conviction are not ranked as serious as most other felonies. Therefore, the imposition of the longest possible sentence constitutes cruel punishment. Review should be granted on these issues,

**G. CONCLUSION**

Appellant respectfully submits that review should be denied. If review is not denied, it should be granted on his additional issues as well.

DATED this 23<sup>rd</sup> day of October 2006.

Respectfully submitted,

  
Rita J. Griffith  
WSBA No. 14360  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 23<sup>rd</sup> day of October 2006, I caused a true and correct copy of of Respondent's Answer to the State's Petition for Review to be served on the following via prepaid first class mail:

*Counsel for the Respondent:*

P. Grace Kingman  
Office of Prosecuting Attorney  
930 Tacoma Ave. S., Rm. 946  
Tacoma, Washington 98402-2102

Kha Danh Magers  
783959  
Washington State Penitentiary  
1313 N. 13th Avenue  
Walla Walla, WA 99362

 10/23/06  
Rita J. Griffith      DATE      at Seattle, WA