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STATE OF WASHINGTON
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SUPREME COURT NO. 90495-2
C.O.A. No. 75993-6-II
Cowlitz Co. Cause NO. 12-1-00766-4

**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ROY EUGENE MILLER,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

SUSAN I. BAUR
Prosecuting Attorney
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Deputy Prosecuting Attorney
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 ORIGINAL

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I. IDENTIFY OF RESPONDENT

The respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney for Susan I. Baur, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS DECISION

The Court of Appeals correctly decided this matter, holding that the trial court did not exclude evidence, but rather ruled that evidence presented would be limited to what was relevant to the issues in the case. The respondent respectfully requests this Court deny review of the June 24, 2014, Court of Appeals' opinion in *State v. Roy Eugene Miller*, No. 44268-0-II, affirming Miller's conviction.

III. STATEMENT OF THE CASE

Roy Miller and Rachel Robinson were in a dating relationship and lived together at Miller's house for roughly seven years. RP at 49. They had a six-year-old son together named Matthew. RP at 49. Miller and Robinson's dating relationship ended about a year prior to November of 2012. RP at 49-50. Miller kicked Robinson out of the house at this time. RP at 50. Because there was no place for Robinson to go, Matthew stayed at Miller's house. RP at 50. There was no parenting plan between Miller and Robinson. RP at 50. Although Robinson no longer lived at the house, Miller would permit Robinson to come visit Matthew on a daily basis. RP

at 50-51. Robinson would go over to Miller's house and wake Matthew up to go to school. RP at 50. If Miller and Robinson did not argue after Matthew went to school, then Robinson would stay at the house and see Matthew after he got out of school. RP at 51. While Robinson had been living at Miller's house, she planted strawberry, raspberry, and blueberry bushes. RP at 51. After she moved out, she continued to take care of these plants. RP at 51. Whenever Robinson came to the house, she would use the back gate. RP at 51.

In the evening of July 13, 2012, Robinson was at Miller's house getting Matthew ready for bed. RP at 52. Robinson made plans with Miller to take Matthew to the Kalama Marina the next day. RP at 52. At the time, Miller agreed to let Robinson take Matthew. RP at 52. On the morning of July 14, 2012, Miller sent Robinson a text message telling her not to come over or she would leave in an ambulance. RP at 53. It was not uncommon for Miller to text Robinson telling her not to come over, but then, if she came over anyway, for Miller not to discuss the text with her. RP at 53-54.

In the late afternoon of July 14, 2012, Robinson went to Miller's house. RP at 53. Although she knew Miller was angry with her, Robinson was undeterred from going to the house because she wanted to follow through on her plans to take Matthew to the marina. RP at 54.

Robinson arrived at Miller's house and, because the gate was locked, entered the backyard by crawling under the fence. RP at 54-55. It was not unusual for this gate to be locked, or for Robinson to crawl underneath it to enter the backyard. RP at 55. In her hands, Robinson carried a knife and a cellular phone. RP at 55. Robinson brought the knife for her protection. RP at 56.

Once she was in the backyard, Robinson began picking blueberries off the blueberry bush. RP at 57. Robinson had her phone in one hand and her knife in the other. RP at 58. It was normal for Robinson to come over and pick blueberries while she waited for Matthew to come out of the house. RP at 58. Usually, Matthew would come out and the two of them would pick blueberries together. RP at 58. Robinson hoped Matthew would come out on his own so that she would not have to engage in a conversation with Miller. RP at 58-59.

Miller had security cameras on his property, which allowed him to see the back gate. RP at 58. Miller came out of the house holding a metal pipe. RP at 59, 185. Miller ran toward the strawberry and raspberry bushes nearby and asked Robinson, "[Are you] ready to die today, bitch?" RP at 59. Miller jumped down in front of Robinson holding the pipe as if he was about to hit Robinson. RP at 59.

Robinson told Miller she was just there to see Matthew and asked Miller why he was so angry with her. RP at 59. Miller told Robinson to leave. RP at 59. Robinson told Miller, “Well, I’m here to get Matthew, because we made arrangements for me to come pick him up.” RP at 59. Miller then acted as if he was about to swing the pipe. RP at 59. Robinson opened the knife and cut Miller’s arm. RP at 59. Miller hit Robinson in the hand with the pipe, shattering Robinson’s phone. RP at 60. Miller hit Robinson again with the pipe, this time in the left hip. RP at 60. Robinson dropped the knife. RP at 61. Robinson backed away from Miller. RP at 61. Miller then struck her for the third time with the pipe—this time, across the shoulder blade—knocking her to the ground. RP at 61.

Miller stood over Robinson, pulled out a handgun, pointed it at her, and told her, “I should just finish you off now.” RP at 62. Miller told Robinson, “No, I’m gonna make you deal with what you did.” RP at 62. After saying this, Miller then put the gun back into his pants. RP at 62. Miller then stomped on Robinson’s rib cage. RP at 62.

Andrew Elliot lived on the property bordering Miller’s. RP at 41. Elliot had lived on this property for a little over seven years. RP at 42. Elliot was aware that Miller and Robinson had lived at Miller’s house. RP

at 42. He would often see Robinson in the backyard playing with her son.

RP at 43.

On the afternoon of July 14, 2012, Elliot was replacing a pump to a pond in his front yard. RP at 43. While Elliot was checking on his pond, he heard yelling coming from Miller's yard. RP at 45. Although it was not uncommon to hear yelling coming from Miller's residence, this argument was more heated and intense than usual. RP at 45. Elliot could hear Miller and Robinson arguing.¹ RP at 46. Elliot heard Miller order Robinson to get off his lot, and Robinson respond by asking, "Why can't I see Matthew?" RP at 46. Elliot heard what sounded like a "hitting noise" three times. RP at 46. Then immediately after heard Miller say, "Die, bitch." RP at 46. At this point, Elliot called 911. RP at 46.

The Kalama police responded to this call. RP at 128-29. When Officer Jeff Skeie of the Kalama Police Department arrived at Miller's house, he was directed by an occupant of the house to the backyard. RP at 130-31. After Officer Skeie entered the backyard he observed Robinson laying on the ground with Miller standing "[r]ight on top of her" and "looking down at her." RP at 131. Officer Skeie observed Robinson crying with blood on her face. RP at 132. Officer Skeie asked Robinson

¹ Although Elliot identified the voices as being male and female, rather than Miller and Robinson, the timing of the argument and the fact that he heard the female asking about "Matthew" made it obvious at trial that this argument was between Miller and Robinson. RP at 45.

why she was laying on the ground. RP at 132. Miller told Officer Skeie, “Because I put her there.” RP at 133.

Officer Skeie observed that Miller was “very angry, very agitated, [and] just really worked up.” RP at 133. Miller told Officer Skeie that Robinson had been trespassing on his property. RP at 133. Officer Skeie asked Miller if he had any guns or knives on him. RP at 133. Miller then reached for a knife. RP at 133. Officer Skeie removed this knife, as well as two other knives found on Miller. RP at 134. The third knife Officer Skeie removed was a switchblade.² RP at 134, 135. While Officer Skeie was removing the knives, Miller turned his body. RP at 134. Officer Skeie observed that Miller had a gun in the waistband of his pants. RP at 134. Officer Skeie removed the gun from Miller. RP at 138. The gun was a .9 millimeter, semi-automatic pistol that was fully loaded. RP at 138.

Officer Skeie handcuffed Miller. RP at 142. Miller showed Officer Skeie a cut he had on his left arm. RP at 142. Officer Skeie observed Robinson on the ground in pain. RP at 145. He immediately noticed that Robinson had blood on her face and right knee. RP at 146. Robinson’s knee had scrape marks and rough areas consistent with falling on rocks. RP at 159. Officer Skeie observed that the ground in this area

² Officer Skeie referred to this knife both as a switchblade and a spring blade knife. RP at 135.

was “rocky dirt” or gravel. RP at 159-160. Robinson stood up, however due to pain she had difficulty walking and sat back down on the ground. RP at 148. In the area of the blueberry bush Officer Skeie recovered the metal pipe. RP at 149. Officer Skeie observed that Robinson had a long thin cut, elongated redness, and “puffiness” on her left thigh. RP at 157. Officer Skeie observed that Robinson’s cell phone was shattered. RP at 157-58. Officer Skeie observed that Robinson’s hand was swollen and cut. RP at 158. On Robinson’s shoulder Officer Skeie observed a “big long, red pattern” with a “deeper white injury” in the center that looked like it was beginning to “welt up.” RP at 160.

Sergeant (“Sgt”) Parker of the Kalama Police Department also responded to the 911 call. RP at 177-78. When Sgt Parker arrived, Officer Skeie had already placed Miller in handcuffs. RP at 180. Miller told Sgt Parker that normally Robinson had permission to come to the house to visit her child, however, today he had specifically told her not to come over. RP at 182. Miller told Parker that because Robinson had a knife, he used the metal pipe to defend himself. RP at 187. When asked about saying, “Die, Bitch,” Miller told Sgt Parker he might have said that. RP at 188.

Miller was charged with assaulting Robinson and with possessing a dangerous weapon. The case proceeded to trial. During motions in

limine, the State moved to exclude as irrelevant an email from Robinson to Miller that indicated Robinson was a drug user. RP at 15-16. Miller's attorney argued that the reason Miller had told Robinson not to come to his property was because Miller had heard Robinson was selling drugs for Scott Tuitt. RP at 16. Miller's attorney indicated that this evidence would come in both during his cross examination of Robinson and through Miller's testimony. RP at 22. After a lengthy discussion of the issue, the court ruled that testimony regarding Robinson's potential involvement with drugs was admissible so long as it was limited to the issue of Miller's belief. RP at 27. If the evidence was introduced for a reason beyond this purpose, then the court would rule on objections as they were raised. RP at 30.

During his cross examination of Robinson, Miller's attorney asked her if she had been with Scott Tuitt that morning. RP at 96. However, he did not ask her any questions related to the email, drug use, or a drug deal with Tuitt. RP at 77-105, 110-11. On direct examination, Miller testified that he had a gun on his person because Tuitt had come to his house. RP at 253-54. Miller's attorney chose not to ask Miller any questions regarding Robinson's involvement with drugs or a drug deal with Scott Tuitt. RP at 230-263, 274.

After hearing the evidence, the jury found Miller guilty as charged. RP at 358-59. Miller appealed, erroneously claiming, as he does in his petition for review, that the trial court granted the State's motion in limine to exclude evidence of Robinson's involvement with drugs. *See Brief of Appellant* at 13-14; *Petition for Review* at 11-12. The Court of Appeals corrected this error, explaining that the trial court did not exclude evidence, but simply ruled that evidence sought to be admitted must be shown to be relevant to the issues in the case. *Court of Appeals Opinion*, No. 44268-II at 4. Seemingly ignoring the fact that the evidence he sought to admit was never excluded, Miller again incorrectly claims that the trial court excluded evidence and seeks review of the Court of Appeals' opinion.

IV. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION

Because Miller's petition fails to demonstrate that any of the grounds listed under RAP 13.4(b) apply, his petition should be denied. Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The only grounds Miller asserts in his petition is that the decision of the Court of Appeals raises a significant question of constitutional law under RAP 13.4(b)(3). Miller claims the trial court denied him due process by excluding evidence of self-defense. However, because the trial court did not exclude the evidence that Miller now incorrectly claims he was prevented from admitting, no constitutional right with regard to raising a claim of self-defense was implicated.

At trial, the State moved to exclude an email conversation between Miller and Robinson where she admitted to using drugs. RP at 15-16. Miller's attorney argued the reason Miller told Robinson not to come over was because he had heard Robinson was using and selling drugs for Scott Tuitt, and that Miller wanted to protect his child. RP at 16-17. The trial court found that this evidence was relevant and admissible to showing Miller's belief. RP at 27. While the court explained that evidence would be limited by its relevance to the issues in the case, it did not exclude any

evidence and stated it would rule on objections as they were raised. RP at 27, 30. During trial Miller's attorney elected not to present any evidence of Robinson's involvement with drugs. RP at 77-105, 110-11, 230-236, 274. Thus, despite the fact the trial court had held the evidence was admissible to show Miller's belief, he chose not to introduce it at trial.

The Court of Appeals found Miller's argument was "frivolous," noting that the trial court did not exclude evidence but simply ruled evidence was limited by relevance, as all evidence necessarily is under ER 402.³ *Court of Appeals Opinion*, No. 44268-11 at 4; ER 402. The Court of Appeals explained that the trial court did not preclude Miller from cross examining Robinson on her drug use or exclude Miller from testifying about his Robinson's involvement in doing or selling drugs. *Id.* at 4-5. Because the trial court did not exclude evidence that prevented Miller from presenting his defense, his argument fails. Thus, Miller's petition fails to provide grounds for review under RAP 13.4(b) and should be denied.

³ With regard to irrelevant evidence ER 402 states: "Evidence which is not relevant is not admissible."

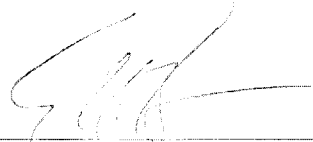
V. CONCLUSION

Because Miler's petition does not meet any of the **considerations governing** acceptance of review under RAP 13.4(b), it should **be denied**.

Respectfully submitted this 2nd day of August, 2014.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By:



Eric H. Bentson, WSBA #28471
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that the Response to Petition for Review was served electronically via e-mail to the following:

Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504
supreme@courts.wa.gov

and,

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 8th, 2014.



Michelle Sasser

OFFICE RECEPTIONIST, CLERK

To: Sasser, Michelle; jahayslaw@comcast.net; 'donnabaker@qwestoffice.net'
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Attached, please find the Response to Petition for Review letter filed by the e-mailing Petitioner.

If you have any questions, please contact this office. Thanks,

Michelle Sasser, Paralegal
Cowlitz County Prosecuting Attorney's Office
312 S.W. 1st Ave.
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From: pacopier_donotreply@co.cowlitz.wa.us [mailto:pacopier_donotreply@co.cowlitz.wa.us]
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