

82226-3
NO. 36186-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DANIEL MARSHALL AGUIRRE,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPOY

APPELLANT'S OPENING BRIEF

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ORIGINAL

TABLE OF CONTENTS

ASSIGNMENTS OF ERROR 1

ISSUES RELATING TO ASSIGNMENTS OF ERROR 2

STATEMENT OF THE CASE..... 4

I. THE CHARGES 4

II. OVERVIEW OF THE EVIDENCE 4

III. TESTIMONY AT TRIAL 6

IV. SENTENCING 12

ARGUMENT 13

I. EXCLUSION OF TESTIMONY FROM DANIEL AGUIRRE, JIMMY AGUIRRE, OFFICER WILKINSON, AND MS. LAUGHMAN ABOUT WHO DUMPED WHOM AND WHETHER MS. LAUGHMAN LIED – I.E., TESTIMONY BEARING ON THE CREDIBILITY AND BIAS OF THE STATE’S KEY WITNESS – VIOLATED THE CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE..... 14

A. The Excluded Testimony..... 14

B. This Favorable Defense Evidence Was Excluded Over Defense Counsel’s Repeated Objections 16

C. The Excluded Testimony Bore Directly on the Single Alleged Victim’s Credibility, Bias and Motive To Lie; Hence, Exclusion Violated the Constitutional Right to Present a Defense..... 17

1.	Exclusion of Evidence that Mr. Aguirre Wanted to Break off the Relationship, Not the Other Way Around, Violated the Right to Present a Defense Because It Bore Directly on Ms. Laughman’s Bias and Motive to Lie.....	18
2.	Exclusion of Jimmy Aguirre’s Testimony Was Especially Problematic, Because It Would Have Rebutted Laughman’s Testimony to the Contrary.	20
3.	Exclusion of Daniel Aguirre’s Detailed Proffer About Who Broke Up With Whom Was Especially Prejudicial For the Same Reason; It Would Have Rebutted Laughman’s Testimony to the Contrary, and the Prosecutor Took Advantage of this in Closing Argument by Arguing Laughman’s Version When Aguirre Was Barred From Presenting His.	21
4.	Exclusion of the Officer’s Testimony that Laughman Recanted Violated the Right to Present a Defense Because It Bore Directly on Her Credibility.	21
D.	<u>The “Rape Shield” Statute Rationale Upon Which the Trial Court Relied Does Not Apply – Because None of This Testimony Was About Sex</u>	22
E.	<u>The “Rape Shield” Statute Rationale Upon Which the Trial Court Relied Does Not Apply – Because The Right to Present a Defense Trumps that Statute Statutory Rule</u>	23

II.	ADMISSION OF TESTIMONY FROM THE “DOMESTIC VIOLENCE” EXPERT ABOUT HOW MS. LAUGHMAN SUFFERED FROM A CYCLE OF VIOLENCE WITH MR. AGUIRRE CONSTITUTED IMPERMISSIBLE VOUCHING.	26
	A. <u>The Domestic Violence Expert’s Testimony, Which Was Admitted Over Defense Counsel’s Continuing Objection.....</u>	26
	B. <u>This Testimony Was Impermissible Vouching, Bolstering the Credibility of the Woman on Whom the State’s Entire Case Hinged.....</u>	27
III.	THE COURT’S ANSWER TO THE JURY’S QUESTION ABOUT THE DEFINITION OF “UNLAWFUL FORCE” WAS FLAT WRONG – THE COURT INCORRECTLY TOLD THE JURY THAT IT REFERRED TO ANY UNCONSENTED TOUCHING, WHEN IN FACT THE FOCUS IS ON THE DEFENDANT’S SUBJECTIVE VIEWPOINT.	30
	A. <u>The Jury’s Question and the Court’s Answer.</u>	30
	B. <u>The Court’s Answer Was Totally Wrong. It Defined Unlawful Force as an Unconsented Touching, When in Fact Unlawful Force Must be Judged From the Defendant’s Subjective Viewpoint, Not an Objective Viewpoint and Not the Alleged Victim’s Feeling About Consent.</u>	30
	C. <u>The Remedy is Reversal – Prejudice is Presumed:.....</u>	33

D.	<u>It Was Also Error to Provide This Definition in a Supplemental Instruction, After the Parties Had Argued and the Jury Had Retired.....</u>	33
IV.	INSTRUCTION NO. 21 STATED THAT FOR PURPOSES OF THE SENTENCE ENHANCEMENT, A “DEADLY WEAPON” WAS ANY KNIFE WITH A BLADE OF 3” OR MORE. IT IMPERMISSIBLY OMITTED THE ELEMENTS OF BEING “ARMED” WITH THE WEAPON AND THE WEAPON HAVING A “NEXUS” TO THE CRIME.	35
A.	<u>Instruction No. 21 Defined “Deadly Weapon” As Any Knife With a Blade 3” Or Longer, For Purposes of the Deadly Weapon Sentence Enhancement.</u>	35
B.	<u>Omission of the “Armed” and “Nexus” Elements Impermissibly Reduced the State’s Burden of Proof on That Enhancement.</u>	35
V.	FOLLOWING <i>BLAKELY</i> AND <i>RECUENCO</i> , THE STATE CANNOT CHARGE SECOND-DEGREE ASSAULT BASED ON USE OF A DEADLY WEAPON AS WELL AS A DEADLY WEAPON ENHANCEMENT FOR THAT SAME WEAPON.	37
VI.	THE TRIAL COURT’S DENIAL OF THE MOTION TO CONTINUE TO ALLOW SUBSTITUTION OF COUNSEL DEPRIVED MR. AGUIRRE OF HIS RIGHT TO COUNSEL OF CHOICE.....	41
A.	<u>The Motion for a Continuance and to Substitute Counsel for Sentencing, and the Court’s Ruling.....</u>	41

B.	<u>The Trial Court’s Denial of the Motion to Permit Substitution and for a Continuance to Enable Substitution Violated the Constitutional Right to Counsel of Choice, Which Applies to Sentencing</u>	43
1.	The Right to Counsel of Choice.....	43
2.	The Right to Counsel of Choice Cannot Be Denied Absent a Conflict, Undue Delay, or a Desire for Counsel Beyond One’s Means.....	44
3.	The Record Shows No <i>Undue</i> Delay, Conflict, or Other Similar Problem Posed By Mr. Aguirre’s Request For Retained Counsel of Choice.....	45
C.	<u>The Remedy for this Deprivation of Counsel of Choice is to Reverse the Sentence and Remand for Resentencing.</u>	47
VII.	CONCLUSION.....	50

TABLE OF AUTHORITIES

STATE CASES

Commonwealth v. Black, 487 A.2d 396 (Penn. 1985)26

In re Personal Restraint of Sietz, 124 Wn.2d 645, 880 P.2d 34.....23

People v. Cobb, 962 P.2d 944 (Colo. 1998)25

People v. Golden, 140 P.3d 1 (Colo. App. 2005), review denied,
2006 Colo. LEXIS 568 (2006).....25

People v. Hackett, 421 Mich. 338, 365 N.W.2d 120 (1984)25

Stanley v. Allen, 27 Wn.2d 770, 180 P.2d 90 (1947).....34

State v. Bandura, 85 Wn. App. 87, 931 P.2d 174, review denied,
132 Wn.2d 1004 (1997).....44

State v. Barnes, 153 Wn.2d 378, 103 P.3d 1219 (2005).....36

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987).....28

State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005)29

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied,
516 U.S. 1121 (1996).....27

State v. Caldwell, 47 Wn. App. 317, 734 P.2d 542, review denied,
108 Wn.2d 1018 (1987) (robbery).....38

State v. Claborn, 95 Wn.2d 629, 628 P.2d 467 (1981).....38

State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991).....46

State v. Foster, 91 Wn.2d 466, 589 P.2d 789 (1979).....38

State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967).....28

<u>State v. Goodman</u> , 150 Wn.2d 774, 83 P.3d 410 (2004).....	39
<u>State v. Haga</u> , 8 Wn. App. 481, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973).....	28
<u>State v. Hobbs</u> , 71 Wn. App. 419, 859 P.2d 73 (1993).....	34
<u>State v. Howard</u> , 121 N.H. 53, 426 A.2d 457 (N.H. 1981).....	26
<u>State v. Husted</u> , 118 Wn. App. 92, 74 P.3d 672 (2003), <u>review</u> <u>denied</u> , 151 Wn.2d 1014 (2004) (same).....	38
<u>State v. Johnson</u> , 94 Wn. App. 882, 974 P.2d 855 (1999), <u>review</u> <u>denied</u> , 139 Wn.2d 1028 (2000)	36
<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996).....	32, 33
<u>State v. Lively</u> , 130 Wn.2d 1, 921 P.2d 1035 (1996)	23
<u>State v. McDaniel</u> , 83 Wn. App. 179, 920 P.2d 1218 (1996), <u>review denied</u> , 131 Wn.2d. 1011 (1997).....	18
<u>State v. McDonald</u> , 143 Wn.2d 506, 22 P.3d 791 (2001).....	49
<u>State v. Nguyen</u> , 134 Wn. App. 863, 142 P.3d 1117 (2006), 2007 Wash. LEXIS 102 (Jan. 30, 2007)	40
<u>State v. Papadopoulos</u> , 34 Wn. App. 397, 662 P.2d 59, <u>review</u> <u>denied</u> , 100 Wn.2d 1003 (1983)	27
<u>State v. Pentland</u> , 43 Wn. App. 808, 719 P.2d 605, <u>review denied</u> , 106 Wn.2d 1016 (1986) (rape).....	38
<u>State v. Pulizzano</u> , 155 Wis. 2d 633, 456 N.W.2d 325 (Wis. 1990).....	26
<u>State v. Ransom</u> , 56 Wn. App. 712, 785 P.2d 469 (1990).....	34
<u>State v. Recuenco</u> , 154 Wn.2d 156, 110 P.3d 188 (2005), <u>rev'd on other grounds</u> , 126 S.Ct. 2456 (2006)	3, 37, 39, 40, 41
<u>State v. Roberts</u> , 25 Wn. App. 830, 611 P.2d 1297 (1980).....	19

<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 713 (2000), as amended, 14 P.3d 713 (2001)	44
<u>State v. Roth</u> , 75 Wn. App. 808, 881 P.2d 268 (1994), <u>review denied</u> , 126 Wn.2d 1016 (1995)	45, 46, 47
<u>State v. Samaniego</u> , 76 Wn. App. 76, 882 P.2d 195 (1994)	36
<u>State v. Spencer</u> , 111 Wn. App. 401, 45 P.3d 209 (2002), <u>review denied</u> , 148 Wn.2d 1009 (2003)	19
<u>State v. Van Woerden</u> , 93 Wn. App. 110, 967 P.2d 14 (1998).....	23
<u>State v. Walden</u> , 131 Wn.2d 469, 932 P.2d 1237 (1997)	32
<u>State v. Warriner</u> , 30 Wn. App. 482, 635 P.2d 755 (1981), <u>rev'd on other grounds</u> , 100 Wn.2d 459 (1983).....	38
<u>State v. White</u> , 80 Wn. App. 406, 907 P.2d 310 (1995), <u>review denied</u> , 129 Wn.2d 1012 (1996)	44
<u>State v. Wilder</u> , 4 Wn. App. 850, 486 P.2d 319, <u>review denied</u> , 79 Wn.2d 1008 (1971).....	19
<u>State v. Willis</u> , 153 Wn.2d 366, 103 P.3d 1213 (2005).....	36
<u>State v. Woods</u> , 34 Wn. App. 750, 665 P.2d 895, <u>review denied</u> , 100 Wn.2d 1010 (1983).....	38
<u>Summit v. State</u> , 101 Nev. 159, 697 P.2d 1374 (Nev. 1985).....	26

FEDERAL CASES

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	39, 40
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)	3, 37, 39, 40

<u>Bland v. California Department of Corrections</u> , 20 F.3d 1469 (9th Cir.), <u>cert. denied</u> , 513 U.S. 947 (1994).....	48
<u>Boggs v. Collins</u> , 226 F.3d 728 (6th Cir. 2000), <u>cert. denied</u> , 532 U.S. 913 (2001).....	23, 24
<u>Bradley v. Duncan</u> , 315 F.3d 1091 (9th Cir. 2002)	20
<u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).....	17
<u>Crandell v. Bunnell</u> , 144 F.3d 1213 (9th Cir. 1998), <u>overruled in part on other grounds</u> , <u>Schell v. Witek</u> , 218 F.3d 1017 (9th Cir. 2000)	48
<u>Davis v. Alaska</u> , 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).....	19, 22
<u>Holmes v. South Carolina</u> , 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).....	17, 18, 23
<u>In re Grand Jury Empaneled Jan. 21, 1975</u> , 536 F.2d 1009 (3d Cir. 1976)	45
<u>In re Special Feb. 1977 Grand Jury</u> , 581 F.2d 1262 (7th Cir. 1978)	45
<u>Olden v. Kentucky</u> , 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988).....	24
<u>Pennsylvania v. Ritchie</u> , 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).....	17
<u>Perry v. Rushen</u> , 713 F.2d 1447 (9th Cir. 1983), <u>cert. denied</u> , 469 U.S. 838 (1984).....	17
<u>Ratzlaf v. United States</u> , 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994).....	23
<u>Taylor v. Illinois</u> , 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).....	17

<u>United States v. Abel</u> , 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984).....	20
<u>United States v. Armstrong</u> , 621 F.2d 951 (9th Cir. 1980).....	20
<u>United States v. Booker</u> , 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).....	39, 40
<u>United States v. Childress</u> , 58 F.3d 693 (D.C. Cir. 1995), <u>cert.</u> <u>denied</u> , 516 U.S. 1098 (1996).....	48
<u>United States v. Collins</u> , 920 F.2d 619 (10th Cir. Okla. 1990), <u>cert.</u> <u>denied</u> , 500 U.S. 920 (1991).....	48
<u>United States v. Combs</u> , 379 F.3d 564 (9th Cir. 2004).....	29
<u>United States v. Cronin</u> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	44
<u>United States v. Figueroa</u> , 165 F.3d 111 (2d Cir. 1998).....	23
<u>United States v. Harvey</u> , 814 F.2d 905 (4th Cir. Va. 1987).....	49
<u>United States v. James</u> , 609 F.2d 36 (2d Cir. 1979), <u>cert. denied</u> , 445 U.S. 905 (1980).....	20
<u>United States v. Miguel</u> , 338 F.3d 995 (9th Cir. 2003)	20
<u>United States v. Necochea</u> , 986 F.2d 1273 (9th Cir. 1993)	27
<u>United States v. Panzardi-Alvarez</u> , 816 F.2d 813 (1st Cir. 1987)	48
<u>United States v. Rankin</u> , 779 F.2d 956 (3d Cir. 1986).....	49
<u>United States v. Walters</u> , 309 F.3d 589 (9th Cir. 2002), <u>cert.</u> <u>denied</u> , 540 U.S. 846 (2003).....	44
<u>United States v. Washington</u> , 797 F.2d 1461, 1465 (9th Cir. 1986).....	44
<u>United States v. Weatherspoon</u> , 410 F.3d 1142 (9th Cir. 2005).....	27, 29

<u>United States v. Whitman</u> , 771 F.2d 1348 (9th Cir. 1985)	20
<u>United States v. Young</u> , 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).....	29
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).....	17
<u>Wheat v. United States</u> , 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).....	44
<u>Wilson v. Mintzes</u> , 761 F.2d 275 (6th Cir. 1985)	49

STATE STATUTES AND COURT RULES

CrR 3.1(e)	46
RCW 9.94A.602	3, 36, 40
RCW 9.95.040	38
RCW 9A.36.021(1).....	4
RCW 9A.44.020	23
RCW 9A.44.050(1).....	4
RCW 10.99.020	4

MISCELLANEOUS

5A Karl B. Tegland, <u>Washington Practice</u> § 607.7 at 320 (5th ed.)	19
Restatement (Second) of Torts, § 19.....	32, 33
WPIC 2.07.01.....	36, 37
WPIC 17.02.....	30, 31

WPIC 17.04.....	31, 32
WPIC 35.50.....	32, 33

ASSIGNMENTS OF ERROR

1. The trial court erred in excluding evidence proffered by the defense from:

- (a) Defendant Daniel Aguirre;
- (b) his brother Jimmy Aguirre;
- (c) Officer Wilkinson, concerning Ms. Laughman's prior

recantation; and

- (d) Ms. Laughman herself on cross-examination.

2. The trial court erred in admitting evidence from the "domestic violence" expert bolstering Ms. Laughman's testimony.

3. The trial court erred in giving Instruction No. 21, defining "deadly weapon."

4. The trial court erred in entering judgment on Count II, assault with a deadly weapon, and on the deadly weapon enhancement associated with that count.

5. The state erred in charging assault with a deadly weapon, plus a deadly weapon enhancement, for the same acts; the trial court erred in imposing sentence on both.

6. The trial court erred in its answer to the jury question about the definition of "unlawful force."

7. The trial court erred in denying the motion for continuance

to substitute counsel at sentencing.

8. The trial court erred in essentially denying the motion to substitute counsel at sentencing.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. The state's theory was that Mr. Aguirre raped his girlfriend, Ms. Laughman, because he was angry, jealous, barring her from contact with peers, and afraid she would leave him. The defense theory was that they had consensual sex and then Ms. Laughman must have felt used because he essentially left her, and hence she harbored bias, resentment and a motive to lie.

(a) Did the trial court's exclusion of evidence proffered by the defense from Daniel Aguirre, his brother Jimmy, Officer Wilkinson, and Ms. Laughman on cross-examination, challenging the state's theory, challenging Ms. Laughman's credibility, and revealing her bias, violate the constitutional right to present a complete defense, especially given the admission of state evidence on precisely these subjects?

(b) Did the trial court's admission of the "domestic violence" expert's opinion about how Ms. Laughman's actions, failure to report, and recantation, fit those of a rape victim trapped in a cycle of violence, constitute vouching?

2. When the jury asked for a definition of "unlawful force" in

the instruction defining assault, the court answered that it was “any force” used without “consent.” Was this unconsented-touching definition of unlawful force incorrect, since unlawful force depends on the defendant’s subjective viewpoint not the victim’s; and does giving a flatly incorrect supplemental instruction on a crucial issue – consent to use of force – after the jury retires, warrant reversal?

3. In Instruction No. 21, the court defined “deadly weapon” for the RCW 9.94A.602 sentence enhancement as: “A knife having a blade longer than three inches” Did this impermissibly relieve the state of the burden of proving that defendant was “armed” with the weapon and that it had a “nexus” with the crime?

4. Following Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), rev’d on other grounds, 126 S.Ct. 2456 (2006) – which held that any fact increasing the statutory maximum penalty is akin to an element of the crime – does the state violate double jeopardy protections by charging second-degree assault based on a deadly weapon, plus a deadly weapon enhancement for that same weapon?

5. Did denial of the motion for a continuance to substitute retained counsel of choice at sentencing deprive Mr. Aguirre of his constitutional right to counsel of choice?

STATEMENT OF THE CASE

I. THE CHARGES

On September 19, 2006, the state charged Daniel Aguirre with two counts of assault (for allegedly separate harms occurring during the same evening) and one count of rape (occurring that same evening). Count I (of which he was acquitted) charged assault in the second degree, in violation of RCW 9A.36.021(1)(a) (and RCW 10.99.020, the domestic violence statute) as follows:

In that the defendant DANIEL MARSHALL AGUIRRE, in the State of Washington, on or between August 26, 2006 and August 27, 2006, did intentionally assault his girlfriend, Emily F. Laughman, and thereby recklessly inflicted substantial bodily harm.

CP:8.

Count II charged second-degree assault under a different portion of that statute (RCW 9A.36.021(1)(c)) as assault with a deadly weapon, on the same dates. It alleged Aguirre “did intentionally assault ... Laughman with a deadly weapon, to wit: a combat knife.” Count II included a deadly weapon enhancement, for the same knife.

Count III charged second-degree rape in violation of RCW 9A.44.050(1)(a), on the same dates, with the same victim, alleging “sexual intercourse by forcible compulsion.” CP:9.

II. OVERVIEW OF THE EVIDENCE

The key issue at trial was credibility. 2/15/07 VRP:890-902 (state closing, arguing key issue of credibility throughout, and attempting to credit alleged victim Ms. Laughman as the more credible witness); id., VRP:926-30 (defense closing, attacking victim's credibility, and explaining defense theory that after the sex, Aguirre essentially broke up with Laughman – leaving her feeling used and upset, and prompted to report that Aguirre acted illegally rather than just acting like a jerk).

Both Emily Laughman and Daniel Aguirre were in the Army. They were both trained in combat, and they both held difficult jobs requiring knowledge of the use of force: she was in the military police and had been a guard at both Fort Leavenworth and Guantanamo Bay (2/13/07 VRP:325-26); he had served in Iraq and currently taught hand to hand combat to soldiers (including Laughman) at the NCO Academy. Id., VRP:327-28.

It was undisputed that the two of them had sex, and that they had it during a boyfriend-girlfriend relationship. She claimed that it was rape, and that the rape occurred because he was domineering, filled with anger, jealous of her, barring her from contacts with peers, and so he acted violently towards her because of this. He claimed that the sex was consensual, and that she was reacting negatively towards him because – as a result of some her actions, including lack of truthfulness about dating

another man – he was breaking off the relationship. So the state’s theory was that she was dumping him, that the violent crimes alleged occurred because of his reaction to that, and that bruises on her body were the result of his assaultive behavior;¹ the defense theory was that he was dumping her, but they had had consensual sex and they had engaged in combatives practice and consensual play-fighting – so any bruises resulted from that.²

III. TESTIMONY AT TRIAL

Given this context, it is surprising to note that the trial judge allowed the victim to present far-ranging testimony concerning her feelings for the defendant, details about his past actions towards her, and a history of how their relationship got to what she considered the breaking point – specifically, that he was supposedly jealous of her, tried to limit her contact with peers, 2/13/07 VRP:332-33, *id.*, 393-401, and made threats about what he would do to her if she left him. *Id.*, VRP:347-48 (describing Aguirre’s supposed threats to her, with the combat knife, to

¹ *E.g.*, 2/13/07 VRP:459-62 (nurse from sexual assault clinic testifies that she reviewed photos and medical report on Laughman and bruising like that cannot come from consensual sex).

² This was supported, for example, by testimony of Officer Carter, Thurston County Sheriff’s Department, who stopped Laughman on August 27 after a 911 call from her cell phone was dropped. She smelled intoxicants and Laughman seemed disoriented. But Laughman did say that she and her boyfriend had argued but “no other altercation.” She even said they were practicing combat moves, and the practice escalated and she was injured. Laughman did not claim rape, and said nothing to cause the officer to believe a crime had occurred. VRP:572-78.

never leave him or break the “circle of trust”). The judge allowed her to testify about his anger problem, the fact that he took medication to control his anger, and how his anger, agitation and jealousy supposedly exploded on the evening of August 26-27 into a series of physical attacks on her, and then forced sex in his bedroom. Id. VRP:337-51. The judge allowed her to explain the fact that she failed to report any assault or rape to Mr. Aguirre’s roommate, whom she saw thereafter while smoking in the living room; and to explain the fact that she told the officer who inquired about her welfare a day later (following a hang up 911 call) that she was practicing combat moves with him, not really fighting (id., VRP:425-28); by having a domestic violence expert testify that such denials were consistent with a rape victim profile. 2/13/07 VRP:350-61 (Laughman’s testimony); 2/14/07 VRP:493-537 (testimony of officer who was presented as domestic violence victim on how victims will fail to report, lie to protect, and recant).

It is surprising that the state was able to present such far-ranging testimony explaining failures to report, conflicting reports to law enforcement, and supposedly scientific justifications for such actions designed to make the eventual reporting more believable, because the trial judge prevented the defendant from presenting his side of the story on precisely these topics.

The trial judge certainly permitted the defendant, Mr. Daniel Aguirre, to testify about the events of the evening in question (August 26-27, 2006). He explained that Laughman decided to stay the night, and that in the course of the evening they engaged in play-fighting, practiced “combatives,” and then had consensual sex, before he fell asleep exhausted and she went out to the living room for a cigarette. 2/15/07 VRP:713-15, 768-92. And the judge did permit his roommate and a friend who were there that evening to testify that they saw Laughman there late that night and even saw her smoking in the living room after sex, but did not see or hear any evidence of a fight or hear her mention anything like that. E.g., 2/14/07 VRP:595-609 (roommate’s testimony); 2/14/07 VRP:661-73 (testimony of other friend who came to house that night). And the trial judge permitted Mr. Daniel Aguirre to testify that he was the one who decided to end the relationship before this incident occurred, not the other way around. 2/15/07 VRP:761-62.

But the trial judge barred the defense from presenting the type of evidence that she had allowed the alleged victim to bring into the case. Ms. Laughman had been allowed to testify in detail, with emotion, about how controlling Mr. Aguirre was and about how she was trying to leave him (not the other way around). She described how angry Mr. Aguirre was, and how he acted out because of this. Her narrative was detailed and

emotional, and included references to specific events: when Mr. Aguirre tried to stop her from moving out and when he was angered because she attended a party without him. 2/13/07 VRP:332-37. She included a specific denial of the assertion that she had been chasing Mr. Aguirre after the alleged rape occurred to try to get back together with him. 2/13/07 VRP:429-30.

But the trial court barred the defense from delving into these same topics. The judge barred defense counsel from cross-examining Ms. Laughman about seeing another man and about how that caused Aguirre to pull back from their relationship, thus refuting the notion that she was the one who wanted to leave him. 2/13/07 VRP:368-71, 372.

The trial court barred Mr. Aguirre from giving his own detailed testimony about this. It did eventually allow him to testify with almost antiseptic scripting and without detail, background, context, or corroboration, about the fact that she went out with someone else; the judge, however, rejected a detailed offer of proof (2/15/07 VRP:722-27) that he be allowed to testify about all the things that made such testimony believable – how he found out about her other boyfriend, where and when, the context, and how that influenced his desire to break things off with her.

The judge reasoned that allowing Mr. Aguirre to give any more

than one line about the fact that Ms. Laughman went out with someone else would violate the rape shield statute (2/15/07 VRP:736), even though defense counsel clearly stated he was not going to ask anything about sex – just about the fact that she dated, or saw, someone else. 2/15/07 VRP:739. The judge also reasoned that defendant’s testimony on this topic – of Laughman dating another man during the time period when Laughman claimed that she was dominated by Aguirre and barred from seeing her peers – had no probative value (2/15/07 VRP:741), even though Ms. Laughman’s credibility, bias, motive to lie, and attitudes towards Mr. Aguirre formed the absolute central element in dispute in this credibility case.

The trial judge further barred defense counsel from calling Mr. Aguirre’s brother Jimmy Aguirre to testify about how Ms. Laughman was trying to chase Mr. Aguirre down, through Jimmy, on her MySpace account, by asking Jimmy how to locate the defendant and why he was not returning her calls. This was particularly inappropriate, given the fact that Ms. Laughman was allowed to testify that she was not chasing Mr. Aguirre down; that she dumped him and not the other way around; and, specifically, that she did not try to use Jimmy Aguirre to chase the defendant, Daniel Aguirre, down and find out why he was not calling her any more after this alleged rape. 2/14/07 VRP 588-89 (offer of proof

regarding Jimmy Aguirre's testimony on this topic); *id.*, VRP:592 (excluded as impeachment on a collateral issue); 2/13/07 VRP: 429-30 (Ms. Laughman admits putting Jimmy Aguirre on her "friends" list for MySpace but denies trying to contact him repeatedly to find Danny and find out why he was no longer taking her calls).

Finally, the judge barred defense counsel from eliciting from a neutral law enforcement officer – Officer Wilkinson – the fact that when Ms. Laughman described the alleged rape and assault to him, she (Laughman) said that she was recanting her prior statement about what had happened. 2/14/07 VRP:479-80 (defense seeks to elicit from officer that on August 28, 2006, Laughman sought to recant her earlier version of what occurred during the supposed assault and rape; state's objection sustained and motion to strike granted). The judge thus excluded direct testimony that the victim recanted about the very supposed rape and assault that she was now claiming she was being truthful about – and it is harder to find something that bears on credibility and bias more than that.

Even with the lopsided nature of the evidence that the trial court admitted and excluded, the jury did not completely believe Ms. Laughman. They acquitted Mr. Aguirre of Count I, the first assault that the state said happened that evening, when Mr. Aguirre allegedly beat her and tried to strangle her with her hair.

But they convicted of Counts II (the other assault allegedly occurring that evening, supposedly with a knife) and III (rape). The jury also returned a deadly weapon enhancement on Count II, assault with a deadly weapon. CP:66-71.

IV. SENTENCING

Mr. Aguirre retained new counsel (undersigned counsel) to represent him at sentencing. The state opposed the joint motion of Mr. Aguirre, his trial counsel, and newly retained counsel to continue sentencing to enable newly retained counsel to represent Mr. Aguirre effectively. Sub No. 79,³ CP:113-15; 116-19. The state argued that since the victim was already present for sentencing, she should not be forced to return from out-of-town on another date. Balancing the constitutional right to counsel of choice of Mr. Aguirre against convenience to the victim, the trial court denied the motion to continue and thereby prevented Mr. Aguirre from proceeding with retained counsel of choice. Sub No. 82.⁴

³ Although included in the Designation of Clerk's Papers (CP:2), this document was omitted from the original Index to Clerk's Papers. The Thurston County Superior Court Clerk was unavailable at the time of the preparation of this brief to correct this omission.

⁴ This Order was inadvertently omitted from the Designation of Clerk's Papers; we will submit a supplemental designation to correct this error.

At the sentencing itself, the trial court rejected defense counsel's claims that conviction and sentencing on both the assault with the deadly weapon and the deadly weapon enhancement (for the same weapon, used at the same moment) violated double jeopardy clause protections. 4/12/07 VRP:12. It counted the rape and the assault separately, not as "same criminal conduct." Id., VRP:24. It ruled that the offender score on Count 2 was 2, and with an offense level IV, the range was 12 to 14 months plus 12 months for the deadly weapon enhancement; it imposed a standard range sentence of 26 months. It further ruled that the offender score on Count 3 was 2, and with an offense level of XI, the range was 95-125 months for the minimum term with a maximum term of life (for this crime with an indeterminate sentence). On this Count, the court imposed a maximum sentence of life, and a minimum term of 125 months. It ruled that the deadly weapon enhancement on Count II had to run consecutively with this Count III, also, and hence that the total minimum term was 137 months. CP:128. It imposed 18-36 months of community custody on Count II, and community custody of life on Count III. CP:129.

ARGUMENT

I. EXCLUSION OF TESTIMONY FROM DANIEL AGUIRRE, JIMMY AGUIRRE, OFFICER WILKINSON, AND MS. LAUGHMAN ABOUT WHO DUMPED WHOM AND WHETHER MS. LAUGHMAN LIED – I.E., TESTIMONY BEARING ON THE CREDIBILITY AND BIAS OF THE STATE’S KEY WITNESS – VIOLATED THE CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.

A. The Excluded Testimony

The judge allowed the victim to testify in detail, with emotion, about how controlling Mr. Aguirre was and about how she was trying to leave him (not the other way around). She implied that Mr. Aguirre was likely angry and acted out because of this. Her narrative was detailed and emotional, and included references to specific events when Mr. Aguirre tried to stop her from moving out and when he became angry because she went to a party without him. 2/13/07 VRP:332-37. She denied chasing Mr. Aguirre after the alleged rape occurred in an effort to get back together with him.

In contrast, the judge barred Mr. Aguirre from giving the same type of information about his view of their relationship.

As discussed above, the judge barred him from cross-examining Ms. Laughman about seeing another man and about how the impact of that caused him to pull back from their relationship, thus refuting the notion that she was the one who wanted to leave him. 2/13/07 VRP:368-71, 372.

The judge barred Mr. Aguirre himself from testifying about this same information, as discussed in Statement of the Case Section III.

The judge further barred defense counsel from calling Mr. Aguirre's brother Jimmy Aguirre to testify about how Ms. Laughman was trying to chase Mr. Aguirre down, through Jimmy, on her MySpace account, by asking Jimmy how to locate the defendant and why he was not returning her calls – despite the fact that Ms. Laughman testified to the contrary about this point. Specifically, Laughman was allowed to testify that she was not chasing Mr. Aguirre down; that she dumped him and not the other way around; and that she did not use Jimmy Aguirre to try to get back together with Daniel after this alleged rape.⁵

As discussed above, in Statement of the Case Section III, the judge even precluded the defense from eliciting from Officer Wilkinson the fact that when Ms. Laughman described the alleged rape and assault to him, she (Laughman) said that she was recanting her prior statement about what had happened. 2/14/07 VRP:479-80. This constituted exclusion of direct, unbiased, law enforcement testimony that the victim lied about the very events on which she was now claiming to tell the truth – and it is harder to

⁵ 2/14/07 VRP 588-89 (offer of proof regarding Jimmy Aguirre's testimony on this topic); *id.*, VRP:592 (excluded as impeachment on a collateral issue); 2/13/07 VRP: 429-30 (Ms. Laughman admits putting Jimmy Aguirre on her "friends" list for MySpace but denies trying to contact him repeatedly to find Danny and find out why he was no longer taking her calls).

find something that bears on credibility and bias more than that.

In sum, the judge barred defense counsel from eliciting evidence that the alleged victim had previously recanted; barred defense counsel from eliciting evidence that Ms. Laughman, who claimed that defendant was overly jealous and acting out because he could not stand to lose her, actually felt used and dumped by Mr. Aguirre; excluded proffered evidence that Ms. Laughman was actually trying to chase Mr. Aguirre down and get back in touch with him; and prevented the defendant himself from giving the most effective testimony – that is, the details – about how he felt towards Ms. Laughman after learning that she had another boyfriend, and why it was he who wanted to break things off with her rather than the other way around.

B. This Favorable Defense Evidence Was Excluded Over Defense Counsel's Repeated Objections

This favorable defense evidence was excluded over defense counsel's repeated objections. Defense counsel actively sought to cross-examine Ms. Laughman on these topics. 2/13/07 VRP:368-72. That motion was denied. Id., VRP:372. Defense counsel made a compelling and detailed proffer of the testimony that Jimmy Aguirre – who flew in from out of town and was waiting in the courtroom – would have offered. Id., VRP:429-30. Defense counsel sought to elicit evidence from the

officer about Laughman's recantations but was barred by the state's objection and the judge's ruling. 2/14/07 VRP:479-80. And the defense made a five page offer of proof about what the defendant himself would have said, if the judge had allowed him to testify, concerning his relationship with Laughman and about who dumped whom and why. 2/15/07 VRP:722-27 (offer of proof).

C. **The Excluded Testimony Bore Directly on the Single Alleged Victim's Credibility, Bias and Motive To Lie; Hence, Exclusion Violated the Constitutional Right to Present a Defense**

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006) (citations omitted). It is rooted in the due process right to present a defense, the Sixth Amendment right to "compulsory process,"⁶ and the Sixth Amendment right to confrontation.⁷

Washington courts have ruled that the right to present a defense is subject to the following limitations: "(1) the evidence sought to be

⁶ Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984).

⁷ See Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Accord Taylor v. Illinois, 484 U.S. 400, 408-09, 108 S.Ct. 646, 98 L.Ed.2d 798, rehearing denied, 485 U.S. 983 (1988) (fundamental Sixth Amendment right to present witnesses and a defense); Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process." State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996), review denied, 131 Wn.2d. 1011 (1997). The U.S. Supreme Court recently clarified, however, that a simple balancing won't do – "the Constitution permits judges to exclude evidence that is *repetitive* ..., only *marginally relevant* or poses an *undue risk* of harassment, prejudice, or confusion of the issues." Holmes, 547 U.S. at 326-27 (citations and quotes omitted) (emphasis added).

- 1. Exclusion of Evidence that Mr. Aguirre Wanted to Break off the Relationship, Not the Other Way Around, Violated the Right to Present a Defense Because It Bore Directly on Ms. Laughman's Bias and Motive to Lie.**

The trial court excluded evidence – proffered via cross-examination of Ms. Laughman, direct examination of Daniel Aguirre, and direct examination of Jimmy Aguirre – that Mr. Aguirre was the one who wanted to break off the relationship, not the other way around. Such evidence would have shown that Mr. Aguirre was not the jealous control-freak that Laughman described, and that Laughman herself felt jilted and left with bias and motive to hurt Mr. Aguirre.

True evidence of bias is always admissible. “Bias” includes various factors that can cause a witness to fabricate or slant testimony, such as prejudice, self-interest, or ulterior motives. See Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L. Ed.2d 347 (1974). The right of a criminal defendant to cross-examine witnesses against him as to their bias in favor of the state is guaranteed by the Sixth Amendment to the United States Constitution. Davis, 415 U.S. at 315-316. “[T]he exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.”⁸

Importantly, evidence that is inadmissible on other grounds may still be admissible for the purpose of showing bias.⁹ Thus, even if the rape shield law (discussed in Argument Section I.D below) or an evidentiary

⁸ Id. at 316-17. See also, State v. Spencer, 111 Wn. App. 401, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009 (2003); State v. Roberts, 25 Wn. App. 830, 611 P.2d 1297 (1980); State v. Wilder, 4 Wn. App. 850, 854, 486 P.2d 319, review denied, 79 Wn.2d 1008 (1971) (“It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility.”); 5A Karl B. Tegland, Washington Practice § 607.7 at 320 (5th ed.) (“the defendant enjoys nearly an absolute right to demonstrate bias on the part of the prosecution witnesses”).

⁹ United States v. Abel, 469 U.S. 45, 55, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (although specific instances of conduct inadmissible under ER 608(b) for purpose of showing “character for untruthfulness,” still admissible to show bias); United States v. James, 609 F.2d 36, 46-47 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980); 5A Tegland § 607.10 at 331 (“When acts of misconduct or criminal convictions are offered to show bias (as opposed to a general tendency towards untruthfulness), the restrictions in Rules 608 and 609 are inapplicable.”).

rule concerning collateral evidence might have made some of this evidence inadmissible, that has no bearing on whether it was admissible, in context, to prove motive to lie.

2. Exclusion of Jimmy Aguirre's Testimony Was Especially Problematic, Because It Would Have Rebutted Laughman's Testimony to the Contrary.

The trial court completely barred Jimmy Aguirre from testifying. His testimony would have contradicted Laughman's contention that she did not try to use Jimmy to get Daniel to return her calls.

The right to present witnesses is especially strong where they would *rebut* evidence introduced by the government from which the jury might infer an element of the crime.¹⁰ Since the proffered evidence would have rebutted Ms. Laughman's testimony on the critical issue of who broke off the relationship with whom, the right to present this proffered evidence must be considered especially strong.¹¹

¹⁰ See, e.g., United States v. Whitman, 771 F.2d 1348, 1351 (9th Cir. 1985); United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980).

¹¹ See also United States v. Miguel, 338 F.3d 995, (9th Cir. 2003) (district court erred in restricting defense counsel's argument that another specific individual was the gunman in this homicide case, supposedly because no evidence supported this theory and there could be no good faith basis for such an argument; structural error); Bradley v. Duncan, 315 F.3d 1091 (9th Cir. 2002) (habeas petition granted because trial court refused to give entrapment instruction where entrapment was defendant's only defense; due process right violated).

3. Exclusion of Daniel Aguirre's Detailed Proffer About Who Broke Up With Whom Was Especially Prejudicial For the Same Reason; It Would Have Rebutted Laughman's Testimony to the Contrary, and the Prosecutor Took Advantage of this in Closing Argument by Arguing Laughman's Version When Aguirre Was Barred From Presenting His.

Although the trial court barred Daniel Aguirre from testifying about the details causing him to want to break up with Ms. Laughman; and although that court barred Jimmy Aguirre from testifying about who was chasing whom; it allowed Laughman to testify in rich detail about Daniel Aguirre's supposed rage, supposed anger problem, and supposed all-encompassing jealousy of her. Then, in closing argument, the prosecution took advantage of this imbalance. The state argued that Ms. Laughman did love Mr. Aguirre, but he was overly jealous of her – thus indicating that he acted out against her because of this. 2/15/07 VRP:892. This is especially problematic, as detailed in footnotes 10 & 11 and accompanying text, immediately above.

4. Exclusion of the Officer's Testimony that Laughman Recanted Violated the Right to Present a Defense Because It Bore Directly on Her Credibility.

Finally, exclusion of the officer's testimony that Laughman recanted violated the right to present a defense because evidence of

recantation bears directly on credibility. As discussed above, evidence bearing on bias and credibility is always admissible. See Davis v. Alaska, 415 U.S. 308, 316-17.

D. The “Rape Shield” Statute Rationale Upon Which the Trial Court Relied Does Not Apply – Because None of This Testimony Was About Sex

The trial court excluded the testimony that Ms. Laughman went out with someone else – the details of that relationship and how it impacted Mr. Aguirre – in part because of the state’s “rape shield” law. That statute, RCW 9A.44.020, limits admission of certain “past sexual behavior” of the complaining witness – “marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards.”

But the defense did not offer “past sexual behavior.” It offered evidence that she went out with someone else, and how that affected the dynamic with Mr. Aguirre. The rape shield statute is totally inapplicable.

The trial judge stated that she was construing that statute broadly, because she thought the legislature was trying to reach this more general testimony, also. Broad interpretation of a statute governing criminal procedure runs contrary to controlling authority, though. Instead, the rape

shield statute must be interpreted narrowly, under the rule of lenity.¹² The trial court's opposite interpretation flatly contradicts controlling law.

E. The "Rape Shield" Statute Rationale Upon Which the Trial Court Relied Does Not Apply – Because The Right to Present a Defense Trumps that Statute Statutory Rule

Even if the rape shield statute did, by its terms apply, so does the constitutional right to present a defense. And the latter trumps the former. A state evidentiary rule, even a longstanding and well-respected one, cannot abridge the right to present a defense. Holmes, 547 U.S. 319 (exclusion of defense evidence of third-party guilt, pursuant to a state evidentiary rule, unconstitutional).

Thus, evidence of motive and bias is admissible under constitutional standards, regardless of rape shield law statutes to the contrary. The Sixth Circuit explained this in Boggs v. Collins, 226 F.3d 728, 737 (6th Cir. 2000), cert. denied, 532 U.S. 913 (2001), a rape case in which the appellate court had to decide whether the excluded cross-examination was permissible bias/credibility inquiry, or prohibited inquiry on prior victim sex acts touching only generally on credibility. That court

¹² Ratzlaf v. United States, 510 U.S. 135, 148, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); United States v. Figueroa, 165 F.3d 111, 119 (2d Cir. 1998); State v. Lively, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996); In re Personal Restraint of Sietz, 124 Wn.2d 645, 652, 880 P.2d 34; State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998) ("If there is no contrary legislative intent, we apply the rule of lenity, which resolves statutory ambiguities in favor of the criminal defendant.").

explained the constitutional distinction between the two categories – exposure of a witness’ motive or bias in testifying is constitutionally protected; general fishing for less related credibility information is not. Boggs v. Collins, 226 F.3d 728, 737.

The Supreme Court uses the same distinction. It has ruled that it is impermissible to bar defense counsel from cross-examining an alleged rape victim concerning her extramarital relationship – when the relationship would have shown the victim’s bias or motivation to lie to protect that relationship. Olden v. Kentucky, 488 U.S. 227, 232, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (exclusion of black defendant’s evidence through cross-examination of white complainant in kidnap, rape and sodomy trial about her living with black boyfriend violated confrontation clause right; it was relevant to his claim that their sex was consensual and that complainant had to lie about it because she was afraid of her boyfriend). That is precisely the situation in Mr. Aguirre’s case; the only difference is that the extramarital relationship in Olden v. Kentucky was a sexual one, whereas defense counsel in this case did not even seek to bring in any sex evidence. Thus, following Olden v. Kentucky, the evidence of the other boyfriend has to be admissible.

State courts use the same distinction – permitting introduction of evidence of a rape complainant’s prior sexual conduct directly showing

bias or motive, and barring only prior sexual conduct which is less focused. In People v. Hackett, 421 Mich. 338, 365 N.W.2d 120 (1984), for example, the Court explained:

... We recognize that in certain limited situations, such evidence (prior sexual conduct) may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. *For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted.* ... Moreover, in certain circumstances, evidence of a complainant's sexual conduct *may also be probative of a complainant's ulterior motive for making a false charge.* ... Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past.

Hackett, 421 Mich. at 348 (citations omitted) (emphasis added).¹³

Under this line of cases, evidence that the complainant had been seeing another boyfriend, and the effect this had on her relationship with Mr. Aguirre – that is, to drive him away from her – should have been

¹³ See also People v. Cobb, 962 P.2d 944, 951 (Colo. 1998) (evidence of sexual assault victim's prior conduct, relevant to defense theory, not inadmissible under rape shield statute: "While the jury conceivably might have inferred that [the victim] was engaged in an act of prostitution, evidence does not become inadmissible under either Rule 404(b) or the rape shield statute simply because it might indirectly cause the finder of fact to make an inference concerning the victim's prior sexual conduct."); People v. Golden, 140 P.3d 1, 4, 5 (Colo. App. 2005), review denied, 2006 Colo. LEXIS 568 (2006) (evidence that victim was in "committed romantic relationship" at time of alleged crime admissible despite rape shield statute, because it bore on question of her credibility and possible motive for telling her roommates that she had been sexually assaulted).

admitted. It was not generalized evidence about her reputation or sexual habits, but a “particularized” inquiry about one boyfriend, and not even about sex. Accord Commonwealth v. Black, 487 A.2d 396 (Penn. 1985) (insofar as rape shield law barred demonstration of witness bias, interest or prejudice, it unconstitutionally infringed upon the defendant’s confrontation clause rights); Summit v. State, 101 Nev. 159, 697 P.2d 1374 (Nev. 1985) (defendant was denied right to confrontation where the prior sexual history of complainant was offered to challenge credibility); State v. Howard, 121 N.H. 53, 426 A.2d 457 (N.H. 1981); State v. Pulizzano, 155 Wis. 2d 633, 456 N.W.2d 325 (Wis. 1990) (probative value of prior sexual abuse of child victim by other adults material to the case and therefore constitutionally protected).

II. ADMISSION OF TESTIMONY FROM THE “DOMESTIC VIOLENCE” EXPERT ABOUT HOW MS. LAUGHMAN SUFFERED FROM A CYCLE OF VIOLENCE WITH MR. AGUIRRE CONSTITUTED IMPERMISSIBLE VOUCHING.

A. The Domestic Violence Expert’s Testimony, Which Was Admitted Over Defense Counsel’s Continuing Objection

Over the defendant’s continuing objection (2/14/07 VRP:538-41), state’s witness Cheryl Stines, Thurston County Sheriff’s Department, testified as an expert in domestic violence. She essentially reiterated Ms. Laughman’s testimony, and explained how each bit of it (though all of it

was disputed) – Mr. Aguirre’s supposed jealousy, control, and wanting to keep her all to himself; her supposed embarrassment or guilt about reporting; and her demeanor in reporting – was all consistent with Laughman being a victim of domestic violence, and with Aguirre being a perpetrator of a cycle of violence towards her. 2/14/07 VRP:493-537.

The defense objected to “questions concerning how domestic violence works, the cycle of violence and what have you ...” 2/14/07 VRP:539 (“it could have the impact of essentially indirectly offering an opinion as to whether the victim was believable ...”).

B. This Testimony Was Impermissible Vouching, Bolstering the Credibility of the Woman on Whom the State’s Entire Case Hinged

“Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness’s veracity, or suggesting that information not presented to the jury supports the witness’s testimony.”¹⁴ Both types of vouching are implicated by the domestic violence expert’s testimony; her description of traits that matched a cycle of violence fit Mr. Aguirre and her description of traits

¹⁴ United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993). See United States v. Weatherspoon, 410 F.3d 1142 (9th Cir. 2005); State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996); State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983) (“A statement by counsel clearly expressing his personal belief as to the credibility of the witness or the guilt or innocence of the accused is forbidden.”) (citation omitted).

that matched a rape victim fit Ms. Laughman to a “T.” She reiterated their testimony, gave it a scientific (or pseudo-scientific) basis, placed her expertise as an expert (and government agent) on the line to back it up, and hence bolstered it with not just her own assurances, but with the assurance that there was a body of scientific study out there that prompted the same conclusion.

The testimony also constituted an impermissible opinion on the question of guilt or innocence. See State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967) (citation omitted).

The Washington Supreme Court has recognized that such testimony that the demeanor of the complainant fits a pattern consistent with that of a victim – a rape victim in particular – is impermissible opinion testimony, where it implies that the alleged victim is telling the truth. State v. Black, 109 Wn.2d 336, 341, 348-50, 745 P.2d 12 (1987) (social worker’s testimony that alleged victim fit profile of rape victim was impermissible opinion testimony).

The appellate courts have also recognized that testimony concerning whether the demeanor of a witness is consistent with innocence or guilt is also impermissible opinion testimony. State v. Haga, 8 Wn. App. 481, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973) (opinion testimony of ambulance driver that defendant had not shown

signs of grief following the murders of his wife and daughter was wrongfully admitted because the jury could infer from this that driver believed defendant was guilty).

The prosecutor's elicitation of the expert's opinion concerning the implications of Mr. Aguirre's and Ms. Laughman's demeanor – based upon Laughman's testimony about what their demeanors were and rejecting Aguirre's testimony and proffered testimony on that topic – thus constitutes impermissible vouching, that is, expressing a personal opinion concerning witness veracity.¹⁵ It is most prejudicial in a case like this: “the existence of a dispute in the evidence as to the credibility of a witness – a matter that by definition is for the jury to resolve – makes the prosecutor's placement of his thumb on the scales all the more impermissible.”¹⁶

¹⁵ United States v. Young, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); United States v. Weatherspoon, 410 F.3d 1142 (arguing that the officers risk losing their jobs if they lie, so they must have “came in here and told you the truth” impermissible vouching); United States v. Combs, 379 F.3d 564, 574-76 (9th Cir. 2004) (same).

¹⁶ Weatherspoon, 410 F.3d 1142, 1148. See State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005) (impermissible prosecutorial bolstering of witness testimony prejudicial, because “jury's verdict turned almost entirely upon the credibility of the complaining witness and the defendant.”).

III. THE COURT'S ANSWER TO THE JURY'S QUESTION ABOUT THE DEFINITION OF "UNLAWFUL FORCE" WAS FLAT WRONG – THE COURT INCORRECTLY TOLD THE JURY THAT IT REFERRED TO ANY UNCONSENTED TOUCHING, WHEN IN FACT THE FOCUS IS ON THE DEFENDANT'S SUBJECTIVE VIEWPOINT.

A. The Jury's Question and the Court's Answer.

On Friday, Feb. 16, 2007, during deliberations, the jury asked: "Define 'unlawful force' as used in Instruction #12." CP:61.¹⁷ "Unlawful force" had not been previously defined in the instructions. The court answered: "Unlawful force as used in Instruction #12 refers to any force alleged to have occurred that was not consented to and that otherwise meets the definition of assault as contained in Instruction #12." CP:61.

B. The Court's Answer Was Totally Wrong. It Defined Unlawful Force as an Unconsented Touching, When in Fact Unlawful Force Must be Judged From the Defendant's Subjective Viewpoint, Not an Objective Viewpoint and Not the Alleged Victim's Feeling About Consent.

The answer was flat wrong. "Unlawful force" is *not* any force "not consented to." It is a much narrower category.

First, the definition of "unlawful touching" provided by the court was wrong under the WPIC's. WPIC 17.02 defines lawful force and

¹⁷ Three Jury Questions were included on the Designation of Clerk's Papers (CP:2), however, the Index to Clerk's Papers does not differentiate between the three. Undersigned counsel is assuming that the Jury Notes are in sequential order.

unlawful force. It states:

It is a defense to a charge of assault in the second degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who *reasonably believes* that he is about to be injured and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 17.02 (emphasis added). It thus focuses on the defendant's reasonable belief, and the state's burden in proving that the defendant's belief was not reasonable. WPIC 17.04 continues this definition by focusing on the fact that it is the defendant's subjective intent that matters, and not whether the alleged victim subjectively consented, or whether another, different, observer would objectively think that she had consented:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great

bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

WPIC 17.04.

The trial court's supplemental instruction on the definition of "unlawful force" contained none of this material. It did not contain the subjective element required by these instructions; it did not mention the fact that the key inquiry in deciding whether the force was lawful or unlawful was the defendant's subjective mental state, rather than the alleged victim's consent. It was thus a totally incorrect definition of "lawful force" under the WPIC's.

It was also a totally incorrect definition of "lawful force" under State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (citing State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)) – since those decisions explain the importance of this focus on the defendant's subjective intent in deciding whether his force was lawful.

The judge's answer was even totally incorrect under the rationale for the WPIC on lawful and unlawful force. As the Comment to WPIC 35.50, defining "assault," explains, the definition of assault-battery (the one at issue here) focuses on the fact that "a bodily contact is offensive if it offends a reasonable sense of personal dignity." Restatement (Second) of Torts, § 19 (as quoted in WPIC 35.50 Comment). The contact "must be

one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.” Id., § 19 Comment (a) (as quoted in WPIC 35.50 Comment).

The “social usage[.]” in this case – according to Mr. Aguirre – was the fact that they were both trained soldiers who were engaging in rough practice of combatives as taught for fighting in the Army, as well as play-fighting based on combatives. That is a pretty rough “social usage.” It involves actual, physical, fighting – and there are always bound to be accidents when that happens. This is far different from, and involves a much higher standard of proof than, the simple unconsented-touching standard that the judge gave in the supplemental instruction.

C. The Remedy is Reversal – Prejudice is Presumed.

An instruction that misstates the law concerning the lawfulness of the defendant’s use of force, in an assault case, is an error of constitutional magnitude and this court presumes prejudice. LeFaber, 128 Wn.2d at 900.

D. It Was Also Error to Provide This Definition in a Supplemental Instruction, After the Parties Had Argued and the Jury Had Retired.

It was also error to provide a supplemental instruction on this

important topic of the lawfulness of the defendant's use of force – an instruction missing from the original packet – after the case had already been argued and the jury had retired. The general rule, in the criminal context, is that supplemental instructions “should not go beyond matters that either had been, or could have been, argued to the jury.” State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990).

In a civil case – where as here a jury instruction was changed by insertion of just a few words after the jury had already been instructed “and had retired to consider the matter,” and where as here the change was an incorrect statement of the law – the Washington Supreme Court ruled that such a charge is reversible error. Stanley v. Allen, 27 Wn.2d 770, 781-82, 180 P.2d 90 (1947) (reversing judgment for defendant in auto accident case where belated, changed, instruction added the word “negligently,” and thereby improperly elevated the plaintiff-pedestrian's burden).

The same rule applies in a criminal case. It is reversible error in a criminal case for the trial court to modify an instruction after the jury begins deliberations by eliminating an element from the “to convict” instruction. State v. Hobbs, 71 Wn.App. 419, 859 P.2d 73 (1993). The change in this case was equally important: the trial court defined a previously undefined phrase, “unlawful force,” which is part of the state's burden of proof and a very complicated concept, in a way that was flat wrong.

Since the incorrect definition of unlawful force as any unconsented-touching in this case went beyond the matters that were or could have been argued, and since it was flat wrong, the giving of this supplemental, incorrect, instruction was reversible error under these authorities.

IV. INSTRUCTION NO. 21 STATED THAT FOR PURPOSES OF THE SENTENCE ENHANCEMENT, A “DEADLY WEAPON” WAS ANY KNIFE WITH A BLADE OF 3” OR MORE. IT IMPERMISSIBLY OMITTED THE ELEMENTS OF BEING “ARMED” WITH THE WEAPON AND THE WEAPON HAVING A “NEXUS” TO THE CRIME.

A. Instruction No. 21 Defined “Deadly Weapon” As Any Knife With a Blade 3” Or Longer, For Purposes of the Deadly Weapon Sentence Enhancement.

Instruction No. 21 stated, in full: “For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Count II. *A knife having a blade longer than three inches is a deadly weapon.*” CP:95 (emphasis added).

It said nothing about the state having to prove that the defendant was “armed” with the deadly weapon and that the weapon had a “nexus” with the crime. Neither did any other instruction.

B. Omission of the “Armed” and “Nexus” Elements Impermissibly Reduced the State’s Burden of Proof on That Enhancement.

The omission of these elements impermissibly reduced the state's burden of proof on that enhancement .

In order to prove the deadly weapon sentencing enhancement applies, the state must prove beyond a reasonable doubt that the defendant was armed with the weapon. WPIC 2.07.01; State v. Samaniego, 76 Wn. App. 76, 882 P.2d 195 (1994) (state must also prove not just presence of knife with blade longer than 3", but also that defendant was armed with it). And in order to prove that that enhancement applies, the state must prove the weapon's "nexus" to the crime.¹⁸

Mere proof that the blade was longer than 3" is thus insufficient.

That is why the pattern WPIC instruction on the deadly weapon sentence enhancement, RCW 9.94A.602, provides:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime [in Count ____].

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily

¹⁸ In State v. Johnson, 94 Wn. App. 882, 886-87, 974 P.2d 855 (1999), review denied, 139 Wn.2d 1028 (2000), the Court of Appeals held that there must be a nexus between the defendant, the weapon, and the crime for a valid firearm enhancement verdict. The Court explained that without such a nexus, courts run the risk of punishing a defendant with a weapons enhancement for having a weapon unrelated to the crime. Johnson, 94 Wn. App. at 895. The remedy for failure to give such an instruction was reversal of the enhancements. Id., 94 Wn. App. at 897. Two recent controlling cases, State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005) and State v. Barnes, 153 Wn.2d 378, 103 P.3d 1219 (2005), reaffirm this holding.

accessible and readily available for offensive and defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant [or an accomplice]. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of weapon, and the circumstances under which the weapon was found.

...

[A knife having a blade longer than three inches is a deadly weapon.] [A deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.]

WPIC 2.07.01.

Instruction 21 omitted all of this material, including those two elements – “armed” and “nexus” – and nothing cured the error.

V. FOLLOWING *BLAKELY* AND *RECUENCO*, THE STATE CANNOT CHARGE SECOND-DEGREE ASSAULT BASED ON USE OF A DEADLY WEAPON AS WELL AS A DEADLY WEAPON ENHANCEMENT FOR THAT SAME WEAPON.

Mr. Aguirre was convicted of both assault in the second degree, under the use of a deadly weapon prong of that statute, as well as a deadly weapon enhancement for use of that same weapon.

In the past, the Washington courts have rejected double jeopardy challenges to the charging of both a substantive crime having use of a

deadly weapon as an element, as well as a deadly weapon enhancement.¹⁹

Those challenges, however, have always been rejected on the ground that the underlying, substantive, statute was considered a crime containing the element of unlawful use of a weapon, *but the deadly weapon enhancement statute was considered only a matter in enhancement of penalty – not a crime and not an element.*²⁰

¹⁹ E.g., State v. Caldwell, 47 Wn. App. 317, 320, 734 P.2d 542, review denied, 108 Wn.2d 1018 (1987) (robbery); State v. Pentland, 43 Wn. App. 808, 811, 719 P.2d 605, review denied, 106 Wn.2d 1016 (1986) (rape); State v. Woods, 34 Wn. App. 750, 665 P.2d 895, review denied, 100 Wn.2d 1010 (1983) (analyzing RCW 9.95.040, predecessor deadly weapon enhancement statute). See also State v. Warriner, 30 Wn. App. 482, 484, 635 P.2d 755 (1981), rev'd on other grounds, 100 Wn.2d 459 (1983) (“Warriner first contends that because possession of a weapon was a necessary element of second degree assault, enhancement of the penalty under the firearm and deadly weapon statutes was improper ..., and violated the double jeopardy clause of the United States and Washington State Constitutions. This argument was considered and rejected in State v. Foster, 91 Wn.2d 466, 589 P.2d 789 (1979), which Warriner urges us to disregard. We have no authority to ignore controlling precedent, and decline to do so. We are bound by the Supreme Court’s holding in Foster and affirm the findings and sentence enhancement under both the firearm and deadly weapon statutes.”).

²⁰ See, e.g., State v. Claborn, 95 Wn.2d 629, 628 P.2d 467 (1981) (first-degree assault); State v. Husted, 118 Wn. App. 92, 95, 74 P.3d 672 (2003), review denied, 151 Wn.2d 1014 (2004) (same); State v. Woods, 34 Wn. App. 750, 755 (“RCW 9.95.040 does not offend the constitutional protection against double jeopardy by imposing multiple punishments based on a single deadly weapon finding even when applied to a defendant convicted of an offense where the use of a firearm or deadly weapon is an element of the underlying offense. ... RCW 9.95.040 does not create a separate criminal offense, and thus a separate punishment, but merely limits the discretion of the trial court and the Board of Prison Terms and Paroles in the setting of minimum sentences.”).

That logic does not survive Apprendi,²¹ Blakely, and Recuenco, which adopted the logic and holdings of Apprendi and Blakely. In those three controlling cases, the courts made clear that any fact that increases the maximum penalty that may be imposed upon a criminal defendant is akin to an element of the crime, in that it must be proven to the jury beyond a reasonable doubt. In other words, the aggravating factor now acts as the *functional equivalent of an element* that must be charged in the Information.²²

Even the recent Booker²³ decision proves this. Its discussion about why engrafting a jury trial component onto the federal Sentencing Guidelines would directly contradict the intent of Congress shows that the majority assumed that such sentence-enhancing conduct would have to have been charged – *as an element* – for it to have been considered by a jury. Booker, 543 U.S. at 255-57 (Breyer, J.).

And while the dissent disagreed on certain points, it did not disagree on this point – in fact, it made exactly the same assumption, that is, that the enhancing factor must now be considered akin to an element of the crime that must be charged and proven. E.g., Booker, 543 U.S. at 277

²¹ Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

²² See State v. Goodman, 150 Wn.2d 774, 785-786, 83 P.3d 410 (2004).

²³ United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

(Stevens, J., dissenting) (“In many cases, prosecutors could avoid an Apprendi ... problem simply by alleging in the indictment the facts necessary to reach the chosen Guidelines sentence.”); id., 543 U.S. at 277-78 (Stevens, J., dissenting) (“The Government has already directed its prosecutors to allege facts such as the possession of a dangerous weapon or ‘that the defendant was an organizer or leader of criminal activity ...’”).

The deadly weapon enhancement statute, RCW 9.94A.602, certainly increases the maximum sentence that might be imposed over and above the Blakely statutory maximum – i.e., the standard Guidelines range – for the crime. Hence, following Blakely, Apprendi, and Recuenco, the enhancement statute is the functional equivalent of an element of the crime.

Since it is essentially an “element,” rather than a matter simply in aggravation of penalty, the prior decisions holding that there is no double jeopardy problem because there is no duplication of elements between the underlying statute and the weapon enhancement statute must now be reconsidered.

We acknowledge that this argument has been rejected in recent appellate court cases, notably, State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), review pending, 2007 Wash. LEXIS 102 (Jan. 30, 2007). The Supreme Court, however, has been presented with a Petition

for Review in that case, and has stayed decision on it pending the outcome of the remand in State v. Recuenco. We therefore suggest that this issue remains worthy of consideration.

VI. THE TRIAL COURT'S DENIAL OF THE MOTION TO CONTINUE TO ALLOW SUBSTITUTION OF COUNSEL DEPRIVED MR. AGUIRRE OF HIS RIGHT TO COUNSEL OF CHOICE.

A. The Motion for a Continuance and to Substitute Counsel for Sentencing, and the Court's Ruling.

Mr. Aguirre retained new counsel (undersigned counsel) to represent him at sentencing. The state opposed the joint motion of Mr. Aguirre, his trial counsel, and newly retained counsel to continue sentencing to enable the newly retained lawyer to represent Mr. Aguirre effectively. CP:113-15; 116-19. The state argued that since the victim was already present for sentencing, she should not be forced to return from out-of-town on another date.

At the April 10, 2007, date set for the sentencing hearing, newly retained counsel reiterated the previously filed written motion and moved to substitute in as counsel and to continue sentencing for eight weeks, given the amount of time that the court reporter said she needed to produce transcripts of the trial and that counsel needed to review them and prepare for sentencing. 4/10/07 VRP:4-5. (Trial counsel joined the motion, id. VRP:7, as did Mr. Aguirre himself, id., VRP:10.) The state

objected on the ground that the victim was present, in town, and in court, already. Id., VRP:6.

New counsel suggested hearing from victim immediately, since she was present, but continuing sentencing so that counsel could be prepared. Id., VRP:6. The state argued, “that would not statutorily be acceptable. The victim has a right to be present at the sentencing.” Id. The state did not, however, argue that the victim could not be available for sentencing at a later date. The implication was that it would be inconvenient, but possible, since she now lived back east. Id., VRP:12.

The court offered a one-week continuance, but newly retained counsel explained that the transcripts would not be done for 4-6 weeks based on the court reporter’s estimate. Id., VRP:14. “So I chose a date that gave her a little bit of wiggle room and gave me time to read the transcripts and prepare.” Id.

The court inquired, “What does that [transcripts] have to do with sentencing?” Id. Counsel explained that mitigation can be based on either the character of defendant or the role in crime, so the defendant’s role in crime is critical to understand. Id., VRP:15.

The trial court ruled, “I don’t think that balancing everybody’s interest that really falls – to me that balance is not even with respect to the interest of justice and the interest of the victim and having some finality

with respect to the sentencing.” Id., VRP:16. The court thus weighed the constitutional right to counsel of choice against not the victim’s right to be present at sentencing – since there was no assertion that the victim could not be present if a single continuance of eight weeks were granted (while Mr. Aguirre remained incarcerated) – but against the victim’s right against being inconvenienced by having to travel to Washington again. The state implied, but did not specify, that the alleged victim would have had to travel from Pennsylvania (where her family lived). The court denied the request for a 6 to 8 week continuance to enable counsel to take over for sentencing. Id., VRP:16.²⁴

B. The Trial Court’s Denial of the Motion to Permit Substitution and for a Continuance to Enable Substitution Violated the Constitutional Right to Counsel of Choice, Which Applies to Sentencing.

1. The Right to Counsel of Choice

Balancing the constitutional right to counsel of choice of Mr. Aguirre against convenience to the victim, the trial court denied the motion to continue and thereby prevented Mr. Aguirre from proceeding with retained counsel of choice.

²⁴ The court did offer undersigned counsel a one week continuance of sentencing to substitute in, but counsel made clear that she could not do an effective job unless she first learned about the trial through review of the transcripts and then had an opportunity to research and present a social history in favor of a mitigated sentence. Id., VRP:16-18.

A criminal defendant has a constitutional right to *retain* counsel of choice.²⁵ State v. Roberts, 142 Wn.2d 471, 516 (citing United States v. Washington, 797 F.2d 1461, 1465 (9th Cir. 1986)). This right applies to the sentencing proceeding. See State v. Bandura, 85 Wn. App. 87, 98, 931 P.2d 174, review denied, 132 Wn.2d 1004 (1997).

2. The Right to Counsel of Choice Cannot Be Denied Absent a Conflict, Undue Delay, or a Desire for Counsel Beyond One's Means.

There are only a few limitations on the qualified right to counsel of choice. “A defendant may not insist on representation by an attorney he cannot afford or who, for other reasons, declines to represent the defendant.” State v. Roberts, 142 Wn.2d 471, 516. The motion to substitute counsel cannot be done for improper or dilatory purposes. United States v. Walters, 309 F.3d 589, 592 (9th Cir. 2002), cert. denied, 540 U.S. 846 (2003). In addition, a court may deny counsel of choice if it poses the hazard of a conflict of interest. See Wheat v. United States, 486 U.S. 153, 164.²⁶

²⁵ Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); State v. Roberts, 142 Wn.2d 471, 516-17, 14 P.3d 713 (2000), as amended, 14 P.3d 713 (2001).

²⁶ United States v. Cronin, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); State v. White, 80 Wn. App. 406, 907 P.2d 310 (1995), review denied, 129 Wn.2d 1012 (1996) (right to retain counsel of choice cannot be denied or abridged absent a showing that representation by counsel of choice would pose

Finally, the motion can be denied if it would cause undue delay. State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), review denied, 126 Wn.2d 1016 (1995).

3. The Record Shows No *Undue Delay, Conflict, or Other Similar Problem Posed By Mr. Aguirre's Request For Retained Counsel of Choice.*

There was no conflict posed by the request to retain counsel, and Mr. Aguirre could obviously afford the lawyer whom he hired, and who appeared and was ready to substitute in.

Counsel did request a continuance. But it was the *first* request for a continuance of sentencing; the defendant was incarcerated; and the continuance request was not made for dilatory improper purposes. Instead, the record clearly shows that it was made to give the court reporter time to prepare a transcript of the trial for new counsel to review.

Under the authority cited in Sections B(1)-(2) above, denial of the request to retain a lawyer, where retaining that lawyer posed no conflict, was not done for the *purpose* of delay, and did not cause any *undue* delay, was constitutional error.

an "actual conflict"). Accord In re Special Feb. 1977 Grand Jury, 581 F.2d 1262, 1265 (7th Cir. 1978) (disqualification requires "clear showing of either an actual conflict of interest or a grave danger of such a conflict"); In re Grand Jury Empaneled Jan. 21, 1975, 536 F.2d 1009, 1012-13 (3d Cir. 1976) (disqualification order reversed because government failed to present evidence of potential conflict besides witness' assertion of privilege).

Under state law, the appellate courts have developed the following test for determining whether a defendant's rights are violated by denial of a continuance to obtain counsel of choice for trial: "(1) whether the court had granted previous continuances at the defendant's request; (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; (3) whether available counsel is prepared to go to trial; and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature." Roth, 75 Wn. App. at 825. The trial court's decision is reviewed for an abuse of discretion.²⁷

Most of the decisions on this subject, however, have arisen in the trial context. In that context, there is also the rule that once a case has been set for trial, a lawyer may not withdraw without "good and sufficient reason shown." CrR 3.1(e). The focus on delay is therefore likely more stringent in the trial setting, than it need be at sentencing.

Even under this trial-stage test, however, the continuance requested here was reasonable: it was a first continuance request; there were no previous continuances or even requests to continue sentencing; the

²⁷ See State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991) (decision to grant or deny request to substitute counsel within discretion of trial court). The same standard applies to continuances for the purpose of obtaining counsel. State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), review denied, 126 Wn.2d 1016 (1995).

defendant had lost confidence in trial counsel and wanted his appellate counsel to substitute in as soon as possible, partly in order to help preserve issues for appeal; and newly retained counsel was competent and able to proceed with sentencing following review of the transcript and sought only enough time to have the reporter prepare the transcript, to read it, and to prepare a social history and mitigation packet for sentencing.

Of particular importance is that the factors focusing on delay do not make delay itself impermissible; they ask whether the right to retain counsel of choice would “delay the proceedings unduly,” not whether there would be justifiable and limited delay. Roth, 75 Wn. App. at 824. The only real question for this Court is whether the trial court’s decision that an eight-week delay in sentencing was “undue” was an abuse of discretion. Given the fact that this was a first request for continuance, where the defendant was incarcerated, there was no evidence or tactical advantage that the state would have lost, and no evidence that the victim could not have attended at the later date, there is nothing about this delay that could be considered “undue.” It was simply an inconvenience that should have counted less, in the balance, than the defendant’s constitutional right.

C. **The Remedy for this Deprivation of Counsel of Choice is to Reverse the Sentence and Remand for Resentencing.**

One of the Roth factors listed above is whether denial of the motion to substitute prejudiced the defendant. In this case, the answer was yes; not one of the things that retained sentencing counsel sought time to accomplish was done by the original trial lawyer. There was no social history prepared or presented; no mitigating factors were identified for the court; no defense sentencing memorandum was even drafted for the court.

But the state court decisions are wrong to focus on the question of prejudice to the defendant. The remedy for improper deprivation of the constitutional right to retain defense counsel of choice should be automatic reversal, without proof of prejudice – given the impossibility of proving prejudice in a denial-of-counsel situation.

This is true in the sister jurisdictions – improper denial of counsel of choice results in automatic reversal.²⁸

²⁸ Crandell v. Bunnell, 144 F.3d 1213, 1216 (9th Cir. 1998), overruled in part on other grounds, Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000); United States v. Childress, 58 F.3d 693, 736 (D.C. Cir. 1995) (“the deprivation of his counsel of choice would entitle [defendant] to a reversal of his conviction as a matter of constitutional right.”), cert. denied, 516 U.S. 1098 (1996); Bland v. California Dept. of Corrections, 20 F.3d 1469, 1478-79 (9th Cir.), cert. denied, 513 U.S. 947 (1994); United States v. Collins, 920 F.2d 619, 625 (10th Cir. Okla. 1990), cert. denied, 500 U.S. 920 (1991) (“When a court unreasonably or arbitrarily interferes with an accused’s right to retain counsel of his choice, a conviction attained under such circumstances cannot stand, irrespective of whether the defendant has been prejudiced.”); United States v. Panzardi-Alvarez, 816 F.2d 813, 818 (1st Cir. 1987) (“A defendant’s choice of counsel cannot be reduced to a mere procedural formality whose deprivation may be allowed absent a showing of prejudice. The right to choose one’s counsel is an end in itself; its deprivation

We have not found a state Supreme Court decision dealing with the remedy for improper denial of counsel of choice. In comparable situations, however, the state Supreme Court has imposed the remedy of automatic reversal. In a Three-Strikes criminal case, for example, that Court held that it was reversible error for the trial court to fail to inquire into stand-by counsel's request to withdraw because of a conflict of interest, an error that saddled the defendant with a conflicted stand-by counsel during the course of his trial. State v. McDonald, 143 Wn.2d 506, 22 P.3d 791 (2001). The Supreme Court came to this conclusion despite the fact that there was no showing of prejudice.

The only proceeding affected by this error in Mr. Aguirre's case as sentencing – so only sentencing need be vacated here.

cannot be harmless.”); United States v. Harvey, 814 F.2d 905, 926 & n.10 (4th Cir. Va. 1987) (“prejudice is presumed from the denial of counsel of choice”); United States v. Rankin, 779 F.2d 956, 960-61 (3d Cir. 1986) (“A defendant who is arbitrarily deprived of the right to select his own counsel need not demonstrate prejudice.”); Wilson v. Mintzes, 761 F.2d 275, 284-86 (6th Cir. 1985) (agreeing with the majority of jurisdictions holding that “prejudice need not be shown when an accused is denied the right to counsel of his choice” because “right to counsel of choice, like the right to self-representation, is premised on respect for the individual and similarly is either respected or denied irrespective of the harmlessness or prejudicial nature of the error”).

VII. CONCLUSION

For all of the foregoing reasons, the convictions should be reversed. Alternatively, the case should be remanded for resentencing.

DATED this 10th day of September, 2007.

Respectfully submitted,



Sheryl Gordon McCloud, WSBA No. 16709
Attorney for Appellant, Daniel Aguirre

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of September, 2007, a copy of the APPELLANT'S OPENING BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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Sheryl Gordon McCloud