Supreme Court No. 89716-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

Kenneth Youngblood

Appellant/Respondent

Grays Harbor County Superior Court Cause No. 10-1-00185-1

The Honorable Judge David Edwards

ANSWER TO PETITION

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant/Respondent

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

I. THE PETITION SHOULD BE DENIED BECAUSE THE CASE DOES NOT MEET ANY OF THE CRITERIA SET FORTH IN RAP 13.4(B).

The Supreme Court should not accept review of a case unless the lower court's decision conflicts with another appellate decision, raises a significant constitutional question, or presents an issue of substantial public interest. RAP 13.4(b).

Petitioner raises no issues that warrant review of this case. The Supreme Court should deny review.

A. The Court of Appeals applied the correct standard in evaluating the sufficiency of the evidence.

Courts review the sufficiency of the evidence by viewing it in a light most favorable to the prosecution and asking if any rational trier of fact could find the essential elements beyond a reasonable doubt. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

The Court of Appeals applied this standard in Mr. Youngblood's case. Opinion, p. 4. Petitioner's contrary claim is entirely baseless. *See* Petition, p. 6. Petitioner quotes no language from the Opinion suggesting that the Court of Appeals applied a different standard.[1] *See* Petition, pp. 6-

[1] *Cf. Vasquez*, 178 Wn.2d at 6 ("The Court of Appeals applied the incorrect standard of review when it stated that 'the evidence of intent to defraud [was] substantial...'") (quoting lower court's opinion).

7. In fact, the Court of Appeals relied upon the same three Supreme Court cases cited in the Petition. *Compare* Opinion, p. 4 *with* Petition, pp. 5-6.

The Court of Appeals applied clearly-established, well-settled precedent. Opinion, p. 4. It appears that Petitioner is unhappy with the result. This does not provide a basis for review. RAP 13.4(b). The Supreme Court should deny the state's Petition.

B. The Supreme Court should not review the Clerk's Ruling entered December 18, 2013, because the prosecution failed to seek modification of that ruling.

1. RAP 13.3 requires a party to seek modification of a clerk's ruling before asking for Supreme Court review.

A party may seek Supreme Court review of "any decision of the Court of Appeals *which is not a ruling*..." RAP 13.3(a) (emphasis added). Furthermore, "[a] ruling by a commissioner or clerk of the Court of Appeals is not subject to review by the Supreme Court." RAP 13.3(e).[2]

The prosecution did not seek modification of the Clerk's Ruling rejecting its belated request to supplement the record. Accordingly, the ruling is not subject to review by the Supreme Court. RAP 13.3(e).

2. Even if the Clerk's Ruling were subject to review, the clerk correctly refused to allow late supplementation of the record

[2] Instead, "[t]he decision of the Court of Appeals on a motion to modify a ruling by the commissioner or clerk may be subject to review..." RAP 13.3(e).

after the Court of Appeals had issued its Opinion and denied the state's Motion to Reconsider.

Only after the Court of Appeals had issued its Opinion and denied the prosecution's Motion for Reconsideration did the state ask permission to supplement the record on review. The Rules of Appellate Procedure do not allow a party to supplement the record under such circumstances. *See* Title 9 RAP.

The Court of Appeals' clerk correctly rejected the prosecution's request. Accordingly, the Supreme Court should not consider the state's invitation to remand the case "with direction to allow supplementation of the record..." Petition, p. 7.

C. Petitioner's remand request is foreclosed by the Supreme Court's decision in *Heidari,* which resolved any prior conflict between the divisions.[3]

Following reversal of a conviction, an appellate court may not remand for resentencing on a lesser charge unless the trial court explicitly instructed jurors on the lesser charge. *In re Heidari*, 174 Wn.2d 288, 292-

[3] In addition, the Supreme Court will not consider an argument raised for the first time in a Motion for Reconsideration to the Court of Appeals. *1515--1519 Lakeview Boulevard Condo. Ass'n v. Apartment Sales Corp.*, 146 Wn.2d 194, 203 n. 4, 43 P.3d 1233 (2002). This rule follows from the more common observation that an appellate court will not review issues raised for the first time in a reply brief. *State v. Chen*, 178 Wn.2d 350, 358 n. 11, 309 P.3d 410 (2013).

296, 274 P.3d 366 (2012). *Heidari* controls Petitioner's request for remand in this case.

Petitioner fails to cite *Heidari,* even though the opinion dates from April of 2012. Instead, Petitioner cites the Court of Appeals' opinion in *Heidari,* and claims a conflict between the divisions. Petition, pp. 7-13.

The decision in this case comports with *Heidari.* Petitioner does not raise a valid argument for acceptance of review. Accordingly, the Supreme Court should reject review.

II. IF THE SUPREME COURT ACCEPTS REVIEW OF ANY ISSUES RAISED BY PETITIONER, IT MUST ALSO REVIEW ISSUES THAT THE COURT OF APPEALS DID NOT REACH.

A. Statement of Additional Issues

Although the Court of Appeals ruled in Mr. Youngblood's favor, it declined to reach three other issues. If this court accepts review, it should also review the following issues, which Mr. Youngblood raised in his Opening Brief:

> **ISSUE 1:** Due process requires that jury instructions properly outline the burden of proof in a criminal trial. Here, the trial court used a nonstandard instruction, omitting language that the accused person has no burden to establish that a reasonable doubt exists. Did the trial court's nonstandard instruction infringe Mr. Youngblood's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3?
>
> **ISSUE 2:** To obtain a conviction for first-degree manslaughter, the prosecution was required to prove that Mr. Youngblood had actual knowledge that ingesting Seroquel and alcohol created a

substantial risk of death. The prosecution produced no evidence showing that Mr. Youngblood had the capacity to understand the risk of mixing Seroquel and alcohol, due to his mental illness and intoxication. Did the conviction violate Mr. Youngblood's Fourteenth Amendment right to due process because the evidence was insufficient to prove recklessness?

ISSUE 3: To obtain a conviction for first-degree manslaughter, the prosecution was required to prove that Mr. Youngblood caused the death of Mark Davis. Here, Mr. Youngblood allegedly provided Seroquel pills to Mr. Davis, who voluntarily ingested them. Did the conviction violate Mr. Youngblood's Fourteenth Amendment right to due process because the evidence was insufficient to prove the essential element of causation?

B. Argument why the Supreme Court should accept review of additional issues.

1. The Supreme Court should accept review and hold that the trial court's nonstandard reasonable doubt instruction infringed Mr. Youngblood's right to due process. This case presents a significant issue of constitutional law that is of substantial public interest and should be decided by the Supreme Court. In addition, the Courts of Appeal have issued conflicting opinions relating to the issue. RAP 13.4(b)(2)-(4).

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The state constitution provides similar protection. Wash. Const. art. I, § 3. In a criminal prosecution, due process requires the government to prove each element of the charged crime beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d

368 (1970). The accused person "has no burden to present evidence." *State v. Montgomery,* 163 Wn.2d 577, 598, 183 P.3d 267 (2008).

The Washington Supreme Court has exercised its "inherent supervisory authority to instruct Washington trial courts to use *only* the approved pattern instruction WPIC 4.01 to instruct juries that the government has the burden of proving every element of the crime beyond a reasonable doubt." *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007) (emphasis added). The court noted that "every effort to improve or enhance the standard approved instruction necessarily... shifts, perhaps ever so slightly, the emphasis of the instruction." *Bennett,* 161 Wn.2d at 317.

In addition, a nonstandard instruction that fails to properly instruct on the burden of proof is "a grievous constitutional failure." *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977). Such an instruction violates due process, and requires reversal if the accused person was denied a fair trial "in light of the totality of the circumstances--including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors..." *Kentucky v. Whorton,* 441 U.S. 786, 789, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979) (citing *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56

L.Ed.2d 468 (1978)); *see also Matter of Lile*, 100 Wn.2d 224, 228, 668 P.2d 581 (1983) (adopting the *Whorton* standard under art. I, § 3).

The *Bennett* court disapproved an instruction known as the *Castle* instruction,[4] concluding that it passed constitutional muster but was not helpful. *Bennett,* 161 Wn.2d at 315-318. Instead, the Supreme Court exercised its supervisory authority and ordered trial courts to use the pattern instruction, which reads (in relevant part) as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. *The defendant has no burden of proving that a reasonable doubt exists.*

WPIC 4.01 (emphasis added) (certain bracketed materials omitted).

Division I has held that failure to use WPIC 4.01 requires reversal, unless the instruction used in its place is an improvement upon WPIC 4.01. *State v. Castillo*, 150 Wn. App. 466, 472-473, 208 P.3d 1201 (2009). By contrast, Division II has held that failure to use WPIC 4.01 is subject to harmless error analysis. *State v. Lundy*, 162 Wn. App. 865, 870-871, 256 P.3d 466 (2011).[5] In *Lundy,* the trial court used a modified instruction,

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[4] *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656 (1997).

[5] A recent decision noted *Bennett's* holding that the *Castle* instruction is not constitutionally deficient. *State v. Jimenez-Macias*, ___ Wn. App. ___, ___, 286 P.3d 1022 (2012). The *Jiminez-Macias* court erroneously suggested that *Lundy* addressed "a *Castle* instructional error." *Jiminez-Macias,* ___ Wn. App. at ____. This is not quite correct: the instruction at issue in *Lundy* was not a *Castle* instruction; instead, the *Lundy* court found harmless a version of WPIC 4.01 that "modified the WPIC by reversing the order of the first two

which differed only slightly from the pattern instruction. *Lundy*, 162 Wn. App. at 870-71. The *Lundy* court found that the instruction correctly communicated the standards set forth in WPIC 4.01:

> [The instruction] emphasized the presumption of innocence... Furthermore, [it] accurately described the State's burden of proof by clearly instructing the jury that the State must prove each element of the crimes charged beyond a reasonable doubt *and that the defendant has no burden of proving that a reasonable doubt exists.*

Id, at 873 (emphasis added).

In contrast to *Lundy,* the trial court's instruction outlining the burden of proof in this case failed to explicitly tell jurors that Mr. Youngblood had "no burden of proving that a reasonable doubt exists." *See* CP 20; *cf* WPIC 4.01. The deficiency was not remedied elsewhere in the court's instructions. *See* CP 17-23.

Unlike the instructions in *Bennett* and *Lundy,* Instruction No. 3 provided an incomplete statement regarding the burden of proof by neglecting to tell jurors that the accused person had no burden. In other words, Instruction No. 3 did not make the relevant standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). The effect of this was to leave open the possibility that

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paragraphs and modifying the first three sentences of the paragraph on the State's burden of proof." *Lundy,* 162 Wn. App.at 871. The instruction in *Lundy* did not contain the offending *Castle* language at issue in *Bennett;* nor did it omit the sentence missing from the instruction in this case. *Id.*

Mr. Youngblood had the burden of raising a reasonable doubt. The instruction that persuaded Division I to reverse in *Castillo* was characterized by this same omission.[6] *Castillo,* 150 Wn. App. at 473.

The nonstandard instruction used by the trial court in this case is not the "simple, accepted, and uniform instruction" adopted by the Supreme Court. *Bennett,* 161 Wn.2d at 318. Instead, by leaving out required language, Instruction No. 3 "shifts, perhaps ever so slightly, the emphasis of the instruction." *Bennett,* 161 Wn.2d at 318. The omission of an important component of the burden of proof created a manifest error affecting Mr. Youngblood's right to due process under the state and federal constitutions. Accordingly, the error may be raised for the first time on review. RAP 2.5(a)(3).[7]

Under *Castillo,* the error here would require automatic reversal. The *Castillo* court reasoned that the Supreme Court's clear and unambiguous directive did not allow for any exceptions. *Castillo,* 150 Wn. App. at 472-473. In Division I, the only nonstandard version of WPIC 4.01 that could survive analysis under *Bennett* would be one that improves upon the pattern instruction. *Id, at* 473. The court concluded

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[6] The instruction in that case suffered from other flaws as well.

[7] Furthermore, even if not "manifest," the error is significant, and the court should exercise discretion to review its merits. *State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

that the error here is sufficient to require reversal because it is not an improvement on the standard instruction:

> The omission of the last sentence of WPIC 4.01 from the given instruction alone warrants the conclusion that Instruction No. 3 is not better than the WPIC.

Id.

In Division II, however, an erroneous instruction on the burden of proof is subject to harmless error analysis under the stringent test for constitutional error. *Lundy,* 162 Wn. App. at 872. Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Irby,* 170 Wn.2d 874, 886, 246 P.3d 796 (2011); *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang,* 140 Wn.2d at 32. Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke,* 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The error here is not harmless beyond a reasonable doubt. First, the error was not "trivial, formal, or merely academic." *Lorang,* 140

Wn.2d at 32. The instruction omitted an essential component of the burden of proof: the rule that an accused person need not raise a reasonable doubt in order to be acquitted. CP 20. Because the burden of proof forms part of the bedrock upon which the entire criminal justice system rests, errors in communicating the standard will seldom, if ever, be considered harmless.

Second, there is at least some possibility that the deficient instruction prejudiced Mr. Youngblood and affected the final outcome of the case. *Lorang,* 140 Wn.2d at 32. Mr. Youngblood's primary defense involved diminished capacity and/or voluntary intoxication: his attorney argued to jurors that he did not know of and disregard a substantial risk that Davis would die after ingesting Seroquel and alcohol. RP 195-216, 228-242. As a result of the erroneous instruction, jurors likely believed that Mr. Youngblood bore the burden of raising a reasonable doubt (for example through the expert testimony of Dr. Trowbridge). *See* RP 195-216.

Third, a reasonable factfinder could have concluded that Mr. Youngblood did not appreciate the risk that Davis might die from an overdose of Seroquel. Dr. Trowbridge testified that Mr. Youngblood was unable to understand and appreciate the risk that Davis would die. RP 203-204, 206-207, 214-215. The prosecution expert did not provide an

opinion as to Mr. Youngblood's ability to understand and appreciate the risk that Davis would die.[8] RP 172-188. There was evidence that Mr. Youngblood had consumed similar amounts of Seroquel and alcohol in the past without harmful effects. RP 113, 127. His daughter testified that Mr. Youngblood poured the pills into Davis's palm so that Davis could count out the number of tablets he wanted to take, and that Mr. Youngblood had not anticipated that Davis would take all of the pills. RP 140-141, 150-151. Under these circumstances, it cannot be said that the evidence of recklessness was so overwhelming that it necessarily lead to a finding of guilt. *Burke*163 Wn.2d 204.

Fourth, a reasonable jury could have concluded that Mr. Youngblood did not cause Davis's death. Davis himself was the instrument of his own overdose; Mr. Youngblood did not force the pills down Davis's throat. RP 110, 125-126. Thus it cannot be said that the evidence was overwhelming on the element of causation. *Burke,* 163 Wn.2d 204.

For all these reasons, the state cannot prove beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not

[8] Instead, her testimony reflected a lack of understanding of the legal concepts involved: the focus of her testimony was on whether or not Mr. Youngblood had the capacity to be reckless in the abstract. When asked about issues pertaining to his understanding and appreciation of the risks in this case, she acknowledged, for example, that alcohol can impair a person's ability to assess risk. RP 181.

prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang,* 140 Wn.2d at 32.

If the Supreme Court accepts review of any issue raised in the Petition, it should also accept review of this issue. RAP 13.4(b)(2)-(4). Mr. Youngblood's conviction must be reversed and the case remanded for a new trial.

2. The Supreme Court should accept review and hold that Mr. Youngblood's conviction violated his Fourteenth Amendment right to due process because the evidence was insufficient to prove recklessness and causation. This case raises significant constitutional issues that are of substantial public interest. RAP 13.4(b)(3) and (4).

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *Winship,* 397 U.S. at 364. The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

a) The prosecution failed to prove recklessness.

To convict Mr. Youngblood of first-degree manslaughter, the prosecution was required to prove that he recklessly caused Davis's death. RCW 9A.32.060(1). In a manslaughter case, a person acts recklessly when s/he "knows of and disregards a substantial risk that a [death] may

occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010; *State v. Peters*, 163 Wn. App. 836, 838, 261 P.3d 199 (2011). Recklessness therefore requires proof of both subjective and objective components: "[w]hether an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts." *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999).

In this case, there is no proof that Mr. Youngblood had the capacity to understand the risks involved in mixing alcohol and Seroquel. As Dr. Trowbridge testified, Mr. Youngblood's ability to understand and appreciate the risk was diminished because of his mental health issues and his consumption of alcohol. RP 203, 207, 214. The state's expert did not actually undermine this testimony. Dr. Knopp testified that Mr. Youngblood had some capacity to act intentionally and/or knowingly, based on her review of his actions as reflected in the incident reports. RP 172-188. While it is true that intentional or knowing conduct can establish recklessness,[9] the abstract capacity for intentional or knowing conduct does not establish the capacity to understand a particular risk.

[9] *See* RCW 9A.08.010(2): When recklessness is an element of an offense, "such element also is established if a person acts intentionally or knowingly."

Mr. Youngblood's ability to understand simple facts and intentionally perform straightforward actions[10] does not prove that he had the capacity to understand something more complex and less concrete, such as the degree of risk posed by combining Seroquel and alcohol. Indeed, even Dr. Kopp testified that alcohol can impair the ability to assess risk. RP 181. Her observation that Mr. Youngblood was basically coherent shed no light on his ability to understand and appreciate the specific risk at issue here, and certainly did not rebut Dr. Trowbridge's testimony.

Absent proof that Mr. Youngblood could understand the risk posed by combining Seroquel and alcohol, the evidence was insufficient to prove recklessness. Accordingly, his conviction must be reversed and the case dismissed with prejudice. *Smalis,* 476 U.S. at 144.

b) The prosecution failed to prove causation.

Manslaughter requires proof of proximate cause. An accused person's conduct is a "proximate cause" of harm if "in direct sequence, unbroken by any new independent cause, it produces the harm, and without it the harm would not have happened." *State v. Meekins*, 125 Wn. App. 390, 396, 105 P.3d 420 (2005); *see also* CP 21.

[10] As Dr. Knopp indicated, Mr. Youngblood knew that the bar was closing, and intentionally invited others to his home. RP 176-177.

In this case, Davis's act of ingesting the pills was a "new independent cause" that broke the direct sequence of causation and thus relieved Mr. Youngblood of liability. Although Mr. Youngblood provided the Seroquel, he did not cause Davis to ingest the drugs (i.e. by placing them in his mouth, adding them to his drink, or somehow injecting them into his body.). Instead, Davis acted—taking the pills and swallowing them—and thereby caused his own death. RP 126.

The legislature has implicitly recognized that mere delivery of drugs is not by itself a proximate cause of any subsequent overdose. *See* RCW 69.50.415. To convict a person of controlled substances homicide, the prosecution need not prove a causal link between the delivery of drugs and the subsequent death:

> A person who unlawfully delivers a controlled substance...*which controlled substance is subsequently used by the person to whom it was delivered, resulting in the death of the user*, is guilty of controlled substances homicide.

RCW 69.50.415(1) (emphasis added). Thus in the context of controlled substances homicide—a crime that closely parallels the one here—the legislature has recognized that it is the decedent's *use* of the drug that results in death. RCW 69.50.415(1).

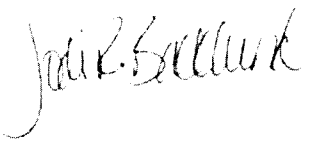
The evidence was insufficient to prove that Mr. Youngblood caused Davis's death. Accordingly, his conviction must be reversed and the case dismissed with prejudice. *Smalis,* 476 U.S. at 144.

III. CONCLUSION

For the foregoing reasons, this court should not accept review. If review is accepted, this court should review the additional issues listed in the preceding section.

Respectfully submitted on January 16, 2014.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant

Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of this Answer to the State's Petition postage pre-paid, to:

Kenneth Youngblood, DOC #352631
Airway Heights Corrections Center
PO Box 1899
Airway Heights, WA 99001

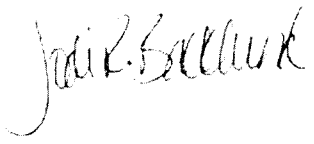
And:

Grays Harbor Prosecuting Attorney
102 W Broadway Ave Rm 102
Montesano, WA, 98563-3621

And I filed the brief electronically with the Supreme Court.

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

Signed at Olympia, Washington on January 16, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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Attached is Respondent's Answer to Petition.

Thank you.

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Backlund & Mistry
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870