68408-6

68408-6

NO. 68408-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

QUY DINH NGUYEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Two years after being charged with Murder in the First Degree and numerous other counts, after trial had begun, and after his co-defendant had pled guilty and agreed to testify against him, Nguyen pled guilty to Murder in the Second Degree and Conspiracy to Commit Leading Organized Crime. Before sentence was imposed, he claimed that he did not understand that he was pleading guilty to murder. The trial court appointed new counsel to assist Nguyen in moving under CrR 4.2(f) to withdraw his guilty plea on that basis. That new attorney sought a four- to six-month delay in order to try to find another basis for the motion to withdraw the guilty plea. The court denied the motion to continue, on the grounds that extensive time was not needed in order to explore the narrow issue that the court would be addressing at the CrR 4.2(f) hearing. Did the trial court act within its discretion in denying a lengthy continuance for new counsel to try to ferret out a new and different "manifest" injustice, when any such claim could still be made after sentencing?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On October 7, 2009, the State of Washington charged the defendant, Quy Dinh Nguyen, and two co-defendants, Jerry Henry Thomas, III, and Le Nhu Le, with Conspiracy to Manufacture Marijuana,

Conspiracy to Commit Murder in the First Degree, Attempted Murder in the First Degree, and Murder in the First Degree. CP 1-3. Nguyen and Le had previously been indicted on related charges in federal court. Appendix A.[1] Additional state charges were added in August 2010, including Leading Organized Crime, Assault in the First Degree, and Conspiracy to Commit Professional Gambling in the First Degree, as well as firearm enhancements with respect to some of the original charges. CP 9-14.

Two years later, on October 13, 2011, pursuant to a negotiated plea agreement, Nguyen pled guilty to one count of Murder in the Second Degree with a firearm enhancement and one count of Conspiracy to Commit Leading Organized Crime. CP 36-53. Nguyen also agreed to plead guilty to Conspiracy to Manufacture Marijuana in federal court, and did so the next day.[2] CP 39; Ex. 4. The pleas came after Thomas and Le had already pled guilty, with Le agreeing to testify against Nguyen, and after a jury had been seated, opening statements were made, and one

[1] The documents relating to the federal case have not been filed with the King County Superior Court, but all parties involved and the court were well aware of the parallel federal case. E.g., 6/11/10RP 7-9. Two of the relevant federal documents are appended to this brief.

[2] Nguyen had a separate public defender representing him in federal court. 11/4/11RP 5.

witness had testified. 10/4/11RP 2-25, 30-38; 10/11/11RP 6, 14; 10/12/11RP 3-49.[3]

At the scheduled sentencing hearing on November 4, 2011, Nguyen told the court that he wanted to withdraw his plea of guilty because, he claimed, he did not understand that he had pled guilty to murder. 11/4/11RP 13-15; CP 76. The court set over the matter until December 16, 2011, for Nguyen to consult further with his attorneys. CP 76; 11/4/11RP 15-23. When counsel for Nguyen, Brian Todd and Jennifer Cruz, confirmed for the court that Nguyen did want to proceed with a motion to withdraw his guilty plea, the court permitted them to withdraw and ordered that new counsel be assigned. CP 76-78. In its order of November 17, 2011, the court specified that one new attorney should be assigned, that the motion to withdraw the plea would be heard on December 16, 2011, and that Nguyen must waive attorney-client privilege with respect to Todd and Cruz's understanding of Nguyen's knowledge and understanding of the plea agreement. CP 76-78. Al Kitching was assigned to represent Nguyen. CP 87.

On November 28, 2011, Kitching moved to continue the plea withdrawal hearing. CP 87-91. In making his motion, Kitching claimed that he needed four to six months in order to "thoroughly investigate the

[3] The twenty-nine volumes of the Verbatim Report of Proceedings are referred to by date.

allegations against [his] client[]." CP 87-88. He sought to re-investigate the case, hire experts, review all discovery, and evaluate whether prior counsel provided effective representation. CP 89-91.

The court denied the motion to continue on November 30, 2011. CP 84-86. In its order, the court clarified that the scope of the plea withdrawal hearing would be to address exactly the issue that Nguyen raised on November 4, 2011 – whether his plea on October 13, 2011, was made knowingly, intelligently, and voluntarily. CP 84. The court also stated that the areas that counsel wished to explore and for which the continuance was sought were outside the scope of the planned hearing. CP 85. The court further indicated that while a complete review of the case might identify additional issues, those issues could be addressed on appeal or collateral attack; they were not within the scope of the December 16, 2011, hearing. CP 86.

On December 15, 2011, Kitching renewed his motion to continue. CP 139-45. In his declaration in support of the motion, Kitching explained that he wanted to explore the underlying evidence in the case, potential defenses, prior counsel's representation, and potential sentences. CP 139-40. The court denied this motion as well. 12/16/11RP 9. Specifically, the court reiterated that the scope of the hearing would not include ineffective assistance of counsel or other issues, because there had

never been a threshold showing that the plea was not valid for any other reason than Nguyen's claim at the November 4, 2011, hearing. 12/16/11RP 6-9.

On December 16 and 20, 2011, the court held a hearing on Nguyen's motion to withdraw his plea. 12/16/11RP; 12/20/11RP. The State called prior counsel Todd and Cruz to testify; Nguyen testified on his own behalf and also presented the testimony of an interpreter, Nova Phoung, and a stipulation regarding the opinion of Dr. Brett Trowbridge. 12/16/11RP 11-108; 12/20/11RP 6-54; CP 178. Nguyen argued that he should be permitted to withdraw his plea because (1) at the time of the plea, he was so tired that his concentration and judgment were impaired; (2) his Vietnamese interpreters improperly induced him to plead guilty; and (3) he did not understand key concepts of the plea paperwork. 12/20/11RP 55-60; CP 278-81.

The trial court denied Nguyen's motion to withdraw his plea. 12/20/11RP 104. In reaching its conclusion, the trial court made a detailed review of the history of the proceedings, found that attorneys Cruz and Todd were credible, and rejected the testimony of Nguyen as not credible. 12/20/11RP 80-104.

On January 27, 2012, Nguyen was sentenced to 304 months in custody, to be served concurrently with his federal sentence. CP 250-57.

The federal court imposed the same sentence a few weeks later. Appendix B. This appeal timely followed. CP 269.

2. SUBSTANTIVE FACTS

Nguyen was the leader of a street gang known as the Young Seattle Boyz ("YSB"). The gang ran a marijuana growing and selling operation, importing large amounts of marijuana from British Columbia and selling it locally, as well as gambling activities. Le and a man named Hoang Nguyen also participated in these activities.

In 2005 or 2006, Nguyen stopped importing marijuana and began to grow his own, purchasing several houses in the Seattle area in which to grow the plants. Le and several other men were involved in the day-to-day activities of operating these grow houses, under the supervision of Nguyen. Hoang Nguyen participated in managing Nguyen's illegal gambling operations, which included both sports books and illegal gambling machines.

In 2006, Nguyen's younger brother, Diem Nguyen, repeatedly shot another member of the YSB gang and that man's girlfriend; the victims survived the attack. The shooting exacerbated a rift forming in the gang, with several members, including Hoang Nguyen, blaming Nguyen for his younger brother's actions. Each side began retaliating against the other. Hoang Nguyen's faction stole Nguyen's gambling machines and

intentionally caused the police to discover and dismantle marijuana growing operations at one of Nguyen's grow houses. Nguyen and Le hired Thomas to rob and pistol whip a member of Hoang Nguyen's group.

In December 2006, Hoang Nguyen approached the prosecutors handling the Diem Nguyen case and offered to testify against him at trial, although ultimately he was not called as a witness. In retaliation, Nguyen and Le hired Thomas to kill Hoang Nguyen. After Diem Nguyen was convicted, Thomas went to a café where Hoang Nguyen and others were celebrating the conviction. He drew a gun, pointed it at Hoang Nguyen, and pulled the trigger. However, the gun jammed and no shots were fired.

A few weeks later, on January 8, 2007, Thomas tried again. He went to a parking lot where he found Hoang Nguyen and his wife arriving in their car. He shot Hoang Nguyen in the back of the head, killing him. He did so at Nguyen and Le's behest, and with a gun provided by Le. Nguyen paid Thomas about $5,300 for carrying out the murder.

C. ARGUMENT

At his sentencing hearing, Nguyen moved to withdraw his plea of guilty. A motion to withdraw a plea of guilty prior to judgment is governed by CrR 4.2(f). That rule states, in pertinent part, that "[t]he court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest

injustice." A manifest injustice is one which is obvious, directly observable, overt, and not obscure. State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Four indicia of manifest injustice have been recognized by the Washington State Supreme Court: 1) the defendant was denied effective assistance of counsel; 2) the plea was not ratified by the defendant; 3) the plea was involuntary; 4) the plea agreement was not kept by the prosecution. Taylor, 83 Wn.2d at 597.

A defendant "has the burden of establishing a manifest injustice in light of all the surrounding facts of his case." State v. Dixon, 38 Wn. App. 74, 76, 683 P.2d 1144 (1984). Proving a manifest injustice is a demanding standard, made so because of the many safeguards taken when a defendant enters a guilty plea. State v. Hystad, 36 Wn. App. 42, 45, 671 P.2d 793 (1983). A trial court's denial of a defendant's motion to withdraw his plea will be overturned only in the case of an abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001), abrogated on other grounds by State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012).

Here, Nguyen does not claim that the trial court abused its discretion in denying his CrR 4.2(f) motion to withdraw his plea. He does not allege that the court applied the wrong standard in deciding his motion, or that the court erred in any of its factual findings or legal

conclusions. Indeed, Nguyen does not even assign error on appeal to the trial court's denial of his CrR 4.2(f) motion.

Instead, Nguyen attacks the trial court's denial of his motion to continue the hearing on his motion to withdraw his plea. Nguyen had sought a four- to six-month continuance in order to allow his attorney more time to prepare. CP 87-88. Like a motion to withdraw a guilty plea, "[a] motion for a continuance is addressed to the sound discretion of the trial court," and the trial court's decision is reviewed for abuse of that discretion. State v. Barker, 35 Wn. App. 388, 396-97, 667 P.2d 108 (1983) (citation and internal quotation marks omitted). A trial court abuses its discretion only if "no reasonable person would have taken the view adopted by the trial court." Barker, 35 Wn. App. at 397 (citation and internal quotation marks omitted). Further, the trial court's denial of a motion to continue will be "disturbed only upon a showing that the accused has been prejudiced and/or that the result of the [hearing] would likely have been different had the continuance not been denied." State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974).

Here, Nguyen fails to even allege how more preparation time might have affected the outcome of the hearing. Instead, he contends that the denial of his motion to continue resulted in a denial of counsel

altogether, a denial of due process, and a denial of the effective assistance of counsel. This brief will address each of these claims in turn.

1. THE TRIAL COURT'S DENIAL OF NGUYEN'S MOTION TO CONTINUE DID NOT VIOLATE HIS RIGHT TO COUNSEL.

Nguyen first complains that he was denied his constitutional right to assistance of counsel during his post-conviction motion to withdraw his plea of guilty. Although he acknowledges that counsel was assigned, he claims that his lawyer was given so little time to prepare for the hearing that he was effectively denied counsel. This claim is without merit.

A defendant has the constitutional right to the assistance of counsel at all critical stages of a criminal proceeding. State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). A pre-sentence motion to withdraw a guilty plea is a critical stage for which a defendant has the right to counsel. State v. Pugh, 153 Wn. App. 569, 579, 222 P.3d 821 (2009). Accordingly, Nguyen was entitled to counsel for his CrR 4.2(f) motion to withdraw his plea.

An actual or constructive denial of the right to counsel renders the adversarial process unreliable, and prejudice will therefore be presumed. Roe v. Flores-Ortega, 528 U.S. 470, 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). In other words, a denial of counsel is structural error,

mandating reversal.[4] Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); Chapman v. California, 386 U.S. 18, 43, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Even though a constitutional right is implicated, the trial court's decision to deny a continuance is still reviewed under the abuse of discretion standard. State v. Sutherland, 3 Wn. App. 20, 22, 472 P.2d 584 (1970).

Here, Nguyen was neither actually nor constructively denied the right to the assistance of counsel for his motion to withdraw his guilty plea. Nguyen does not allege that he was actually denied counsel, nor could he. Attorney Al Kitching was appointed to represent Nguyen on November 18, 2011, the day after the trial court ordered new counsel be appointed to represent him, and fourteen days after Nguyen first voiced his desire to withdraw his plea. CP 89; 11/4/11RP 13-15.

Rather, Nguyen states that his right to the assistance of counsel was abridged because Kitching was "denied the time necessary to investigate and prepare for the hearing and was denied the tools he needed as well"; in other words, he was constructively denied the right to the assistance of counsel. Brief of Appellant at 17. Although the constitutional right to counsel includes a reasonable time for consultation

[4] Nguyen alleges that he was denied the assistance of counsel during his motion to withdraw his guilty plea, not during the guilty plea itself. Accordingly, if this Court agrees and grants relief, the remedy would be to vacate the trial court's denial of the CrR 4.2(f) motion to withdraw the guilty plea, and remand for that hearing to be held anew.

and preparation, State v. Hartzog, 96 Wn.2d 383, 402, 635 P.2d 694 (1981), "[n]ot every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) (citing Chambers v. Maroney, 399 U.S. 42, 53-54, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970)).

Prior cases are instructive in determining whether the trial court's denial of a continuance so constrained counsel as to work a constructive denial of the assistance of counsel. The seminal case, as Nguyen points out, is Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 58, 77 L. Ed. 158 (1932). Powell and his co-defendants were indicted on capital charges. At arraignment, the court appointed as counsel "all the members of the bar." Id. at 49. When the case was called for trial six days later, no one "answered for the defendants or appeared to represent or defend them." Id. at 53. An attorney from Tennessee, sent to Alabama by "people who were interested in the case," then agreed to represent the defendants if a local attorney also assisted him. Id. The court accepted this arrangement, and the cases proceeded to trial that day; the defendants were convicted and sentenced to death. Id. at 50, 57. The Supreme Court, in examining whether "the defendants were in substance denied the right of counsel,"

held that the appointment of counsel was either "so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." Id. at 52, 53.

By contrast, in Avery v. Alabama, 308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940), the defendant was arraigned on a charge of murder for a crime that had occurred six years earlier. Two local attorneys were appointed to represent the accused at that time. The case was called for trial three days later. Both counsel moved for a continuance, on the grounds that they had been in court on other matters during the intervening days, and had not had the time or opportunity to investigate and prepare the defense. Id. at 447. The motion to continue was denied; the case proceeded to trial, and the defendant was convicted and sentenced to death the same day. Id. at 448-49.

The Supreme Court upheld the conviction. The Court acknowledged that "the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." Id. at 446 (footnote omitted). However, the Court held that the

representation provided was zealous and not a mere formality. Id. at 450. Accordingly, the constrained time in which counsel had to prepare for trial did not work a constructive denial of counsel, for which reversal would be required without any showing of prejudice. Id. at 445-46, 453.

Similarly, in United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), the Supreme Court considered a case where a defendant charged with mail fraud was assigned a real estate attorney who had never tried a case to represent him. That attorney was given 25 days to prepare for trial; the government had spent four-and-a-half years investigating the case, which involved reviewing thousands of documents. Id. at 649. The Court rejected the defendant's argument that he had been denied the assistance of counsel guaranteed by the Sixth Amendment. Id. at 666. Specifically, the Court held that, unless the surrounding circumstances were such that there was a breakdown in the adversarial process, prejudice would not be presumed; instead, the defendant would be required to show ineffective assistance of counsel. Id. at 662, 666.

The case at bar is entirely unlike Powell. Moreover, the circumstances of the representation are far better than those deemed adequate – for the limited purpose of determining whether a trial court's

actions had worked a constructive denial of counsel – in Avery and Cronic.

Here, Kitching was not tasked with preparing for trial, but with assisting a defendant in his motion to withdraw a plea, predicated on his specific and narrow claim that he had been unaware that he was pleading to the crime of murder. Kitching was a member of the local bar with thirty years of experience in criminal defense. CP 139. He provided significant and material assistance in support of Nguyen's motion.

For instance, Kitching interviewed Nguyen's prior counsel in advance of the hearing. 12/16/11RP 7. In fact, he subpoenaed one of Nguyen's attorneys, Brian Todd, to testify. 12/16/11RP 71. He subpoenaed records from the King County Jail in support of his client's new claim that he was overtired at the time of his plea. CP 143. He retained a mental health expert, Dr. Trowbridge, to evaluate Nguyen with respect to that new allegation. 12/16/11RP 8. Dr. Trowbridge did an initial assessment, Kitching subpoenaed him to testify, and the State ultimately stipulated to his proffered testimony. 12/16/11RP 8, 91-92; CP 178. Because Nguyen also made a new claim that his interpreter coerced him into pleading guilty, Kitching interviewed that interpreter, Nova Phung, and called him as a witness at the hearing. CP 145; 12/16/11RP 73-74. Kitching filed a written brief in support of Nguyen's

motion to withdraw his plea, and he made reasonable argument on his client's behalf as well. CP 278-88; 12/20/11RP 54-65, 76-79.

There is nothing in the record of the CrR 4.2(f) motion and hearing that would support a conclusion that Kitching was not functioning as the counsel envisioned by the Sixth Amendment. There was no "breakdown in the adversarial process." Cronic, 466 U.S. at 662. Instead, counsel vigorously served as a meaningful adversary to the State. See id. at 666. Based on the significant amount of work actually done by Kitching – especially in light of the limited nature of the claim initially made by Nguyen – it cannot be said that Nguyen was actually or constructively denied the right to be represented by counsel. Accordingly, no structural error mandating reversal occurred. Instead, to obtain relief, Nguyen must prove that he was denied due process or the effective assistance of counsel.

2. THE TRIAL COURT'S DENIAL OF NGUYEN'S MOTION TO CONTINUE DID NOT VIOLATE DUE PROCESS.

Nguyen also argues that the trial court's denial of his motion to continue served to deny him due process. He does not specify exactly how he was denied his right to a fair hearing, beyond the contention that his attorney had inadequate time to prepare. However, under the circumstances of this case, Kitching had adequate time to prepare for the

limited issues that the CrR 4.2(f) motion hearing would address. Moreover, Nguyen has failed to show how the denial of a continuance caused him actual prejudice. His due process claim should be rejected.

The right to due process of law before a deprivation of liberty is guaranteed by both the federal and Washington constitutions. U.S. CONST. amend. V, XIV, § 1; WASH. CONST. art. I, § 3. In a criminal case, due process encompasses many rights, but fundamentally it is the right to notice and an opportunity to defend. E.g., State v. Karas, 108 Wn. App. 692, 699, 32 P.3d 1016 (2001); see also Mathews v. Eldridge, 424 U.S. 319, 333-34, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In other words, due process guarantees a fair trial in a fair tribunal. In re Davis, 152 Wn.2d 647, 692, 101 P.3d 1 (2004); see also Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ("Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.").

Here, Nguyen has failed to specify what component of due process he was denied when the trial court refused to continue his CrR 4.2(f) motion. Of course, the right to counsel, and the right to effective assistance of counsel, are elements of due process protected by the Fifth and Fourteenth Amendments to the United States Constitution. Gideon v.

Wainwright, 372 U.S. 335, 338, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); Strickland, 466 U.S. at 684-85. To the extent that Nguyen uses the term "due process" to refer to these rights, this brief addresses them in sections C.1, supra, and C.3, infra. If Nguyen intends to invoke some additional aspect of due process, he has failed to identify it with any particularity.

Certainly, a denial of a continuance may work to deprive a defendant of due process. "In a criminal case constitutional issues are raised where it can be said denial of a continuance deprived the defendant of a fair trial. There is, however, no mechanical test for deciding when denial of a continuance is violative of due process, and the answer must be found in the circumstances present in the particular case." Sutherland, 3 Wn. App. at 22. Under the circumstances of this case, though, the trial court's denial of Nguyen's motion to continue was not an abuse of discretion.

First, although the trial court did limit the amount of time that Kitching had to prepare for the motion hearing, the scope of the hearing was narrow. As discussed above, in moving to withdraw his plea, the defendant bears the burden of proving that withdrawal is necessary to correct a manifest injustice. CrR 4.2(f); Dixon, 38 Wn. App. at 76. A manifest injustice is one that is "obvious, directly observable, overt, [and]

not obscure." Pugh, 153 Wn. App. at 577 (citation omitted) (alteration in original).

The trial court initially allowed Nguyen to make his motion based on his claim that he was unaware that he had pled guilty to the crime of murder. 11/4/11RP 14-17. Clearly, if a defendant did not understand to what crime he has entered a plea of guilty, there has been a manifest injustice warranting withdrawal of his plea.

Kitching, however, sought four to six months to read the discovery, evaluate the performance of prior defense counsel, conduct investigation, retain experts, "independently assess the strengths and weaknesses of the State's evidence," and take other steps to discover whether there were other bases to support withdrawal of Nguyen's plea. CP 87-91. A basis for withdrawal of a plea that could only be uncovered after such a thorough investigation is one that is obscure, not one that is obvious, directly observable, or overt.

In recognition of this fact, the trial court – in denying the motion to continue – properly limited the scope of the CrR 4.2(f) hearing to the "manifest injustice" that Nguyen himself had alleged. CP 84-86; 12/16/11RP 6, 9. The court declined to grant a continuance for Kitching to determine if there might be an additional, different basis for withdrawal of the guilty plea. 12/16/11RP 9. In other words, the court refused to

further delay a case that had been pending for over two years to allow Kitching to go on a fishing expedition without any threshold showing whatsoever that there were fish to be caught.

Indeed, Nguyen's claim that the denial of his continuance motion deprived him of due process appears to be a complaint that he was not given the right to explore, pre-judgment, all possible bases to permit him to withdraw his plea.[5] Of course, he points to no caselaw that such a right exists. To the contrary, the trial court need not "waste valuable court time on frivolous or unjustified CrR 4.2 motions." State v. Davis, 125 Wn. App. 59, 68, 104 P.3d 11 (2004). And, there can be no question that the court permitted the thorough exploration of the basis for withdrawal that Nguyen initially raised – that he didn't know he pled guilty to murder – as well as the additional grounds that counsel was able to identify in the time that he had. In light of the narrow issues that the court appropriately limited the CrR 4.2(f) hearing to, four weeks was an adequate amount of time for counsel to explore the merits of Nguyen's claim that he was

[5] By constraining the time in which Kitching could explore Nguyen's specific claim that he did not understand he was pleading guilty to murder, the trial court in no way foreclosed Nguyen's ability to attack his conviction after sentencing in a motion to vacate the judgment under CrR 7.8, a direct appeal, or a personal restraint petition. Indeed, in denying the motion to continue, the court specifically identified the availability of some of those avenues of relief if further investigation later turned up some irregularity justifying such relief. CP 86 ("Counsel may review the discovery to determine if there are collateral issues to be brought on appeal, but those issues are not the purpose of the hearing scheduled for December 16, 2011."); 12/16/11RP 6 ("You've talked about collateral appellate issues; you've talked about ineffective assistance of counsel. These are all for appeal.").

unaware of the nature of the charge to which he pled guilty. The trial court did not abrogate Nguyen's right to due process and a fair hearing by denying him a four- to six-month continuance.

Second, even if Nguyen should have been granted further time to investigate whether other grounds to withdraw his plea pursuant to CrR 4.2(f) could be found, he is entitled to relief only if he can show prejudice. Barker, 35 Wn. App. at 396-97 (holding that "[t]he decision to deny the defendant a continuance will be disturbed on appeal only upon a showing that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted" (internal quotation marks and citation omitted)); State v. Anderson, 23 Wn. App. 445, 449, 597 P.2d 417 (1979) (rejecting a due process claim because defendant failed to show how denial of a continuance prejudiced his case). He has not even attempted to do so. Rather, he relies on caselaw outlining the duties of a defense attorney, without any explanation of how, had Kitching had more time to fulfill those duties,[6] it would have made a difference here. This is inadequate. His due process claim must be rejected.

[6] The State does not concede that Kitching failed to perform any duty required of him by the Constitution or caselaw.

3. NGUYEN HAS FAILED TO PROVE THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

In addition to contending that he was denied the assistance of counsel, Nguyen also claims that he was denied the effective assistance of counsel. However, Nguyen does not even allege, let alone prove, either that his counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this contention must be rejected.

A defendant claiming ineffective assistance of counsel must demonstrate (1) that his counsel's performance was so deficient that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the defendant was prejudiced by reason of his attorney's actions, such that the defendant was deprived of a fair hearing. Strickland, 466 U.S. 668; see also State v. Jeffries, 105 Wn.2d 398, 417-18, 717 P.2d 722 (1986) (adopting the Strickland standard in Washington). Counsel is deficient if his "representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice results when it is reasonably probable that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991).

There is a strong presumption that counsel's representation was effective. Lord, 117 Wn.2d at 883. The presumption of effectiveness will only be overcome by a clear showing of ineffectiveness derived from the record as a whole. State v. Hernandez, 53 Wn. App. 702, 708, 770 P.2d 642 (1989). The defendant bears the heavy burden of proving both deficient performance and prejudice. State v. Grier, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011).

Here, Nguyen is unable to carry his burden under either prong of Strickland. First, Nguyen fails to demonstrate that counsel's performance was deficient. Although he claims that the trial court "left counsel without the time or the tools necessary to effectively represent him," he does not allege with any specificity how exactly Kitching's representation fell below professional norms, beyond not reviewing the discovery that prior counsel failed to provide to him. There is no reason to believe that a review of the discovery would have been helpful in addressing the issue Nguyen had raised – that he did not understand that he was pleading guilty to murder.

Second, and of even greater significance, Nguyen nowhere attempts to describe how he was prejudiced by Kitching's performance. In apparent acknowledgement that he has failed to even allege prejudice,

Nguyen claims that he need not prove prejudice because the trial court's actions left him without counsel. This is not the test. Strickland requires that the defendant alleging ineffective assistance of counsel prove both deficient performance and prejudice.

Instead of trying to meet the Strickland standard, Nguyen has chosen to circle back to his argument that he was constructively denied the right to counsel. This sleight-of-hand conflates the right to counsel with the right to effective assistance of counsel. Certainly, a defendant is entitled to both. If Nguyen proves that he was denied – even constructively – the assistance of counsel, prejudice is presumed and reversal is warranted. But as discussed at length in section C.1, supra, Nguyen has failed to show that a constructive denial of counsel occurred. If Nguyen had counsel, the burden is on him to show that counsel's performance was deficient and that that deficiency prejudiced him. Nguyen has not seriously attempted to do so. His claim of ineffective assistance of counsel must fail.

D. CONCLUSION

For all of the foregoing reasons, this Court should reject Nguyen's claims that the trial court's denial of his motion to continue deprived him

of the rights to counsel, due process, and effective assistance of counsel. His conviction and sentence should be affirmed.

DATED this 29th day of January, 2013.

Respectfully submitted,

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APPENDIX A

Presented to the Court by the foreman of the Grand Jury in open Court, in the presence of the Grand Jury and FILED in The U.S. DISTRICT COURT at Seattle, Washington.

JULY 21 20 09
BRUCE RIFKIN, Clerk
By: Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

QUY DINH NGUYEN,
a/k/a "The Godfather,"
a/k/a "The Boss,"
a/k/a "The Old Man,"
LE NHU LE, and
KIM-HIEU THI NGUYEN,
a/k/a "Kristine Nguyen,"

Defendants.

NO. CR09-062RSM

SECOND SUPERSEDING INDICTMENT

09-CR-00062-INDI

THE GRAND JURY CHARGES THAT:

COUNT 1
Conspiracy to Manufacture Marijuana

Beginning in or before 2006, and continuing through January 9, 2008, at King County, in the Western District of Washington, and elsewhere, QUY DINH NGUYEN, LE NHU LE, Hung Van Nguyen, Stephen Thai Nguyen, and other persons known and unknown, knowingly and intentionally conspired to manufacture marijuana, a substance controlled under Schedule I of Title 21, United States Code, Section 812.

The grand jury further alleges that this offense involved more than 1,000 marijuana plants.

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Manner and Means of the Conspiracy

1. As part of the conspiracy, QUY DINH NGUYEN, LE NHU LE, Hung Van Nguyen, Stephen Thai Nguyen, and other coconspirators operated several marijuana "grow houses" in the greater Seattle area, at which they cultivated and harvested marijuana plants.

2. It was further part of the conspiracy that after the marijuana was harvested at the "grow houses," QUY DINH NGUYEN, LE NHU LE, Hung Van Nguyen, Stephen Thai Nguyen, and other coconspirators processed the marijuana and packaged it for distribution.

3. It was further part of the conspiracy that QUY DINH NGUYEN, LE NHU LE, and other coconspirators distributed, and arranged for the distribution of, the marijuana to customers.

4. It was further part of the conspiracy that QUY DINH NGUYEN and KIM-HIEU THI NGUYEN laundered the cash proceeds generated by the conspiracy in the manner described more fully below in Count 6, including secretly funneling the cash proceeds to "straw buyers" for the purchase of several real properties that were used as marijuana "grow houses" and to otherwise facilitate the manufacture and distribution of marijuana.

Overt Acts in Furtherance of the Conspiracy

During and in furtherance of the conspiracy, one or more of the conspirators committed one or more of the following overt acts, among other overt acts:

1. During 2006, QUY DINH NGUYEN, LE NHU LE, and other coconspirators operated a marijuana "grow house" at 4827 S. Morgan Street, Seattle.

2. On or about October 25, 2006, QUY DINH NGUYEN, LE NHU LE, and other coconspirators were growing 310 marijuana plants at 4827 S. Morgan Street, Seattle.

3. Between 2006 and January 2008, QUY DINH NGUYEN, LE NHU LE, and other coconspirators operated a marijuana "grow house" at 7726 48th Avenue S., Seattle.

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4. On or about January 9, 2008, QUY DINH NGUYEN, LE NHU LE, and other coconspirators were growing 766 marijuana plants at 7726 48th Avenue S., Seattle.

5. Between 2006 and January 2008, QUY DINH NGUYEN, LE NHU LE, and other coconspirators operated a marijuana "grow house" at 10818 Roseberg Avenue S., Seattle.

6. On or about January 9, 2008, QUY DINH NGUYEN, LE NHU LE, and other coconspirators were growing 633 marijuana plants at 10818 Roseberg Avenue S., Seattle.

7. Between 2006 and January 2008, QUY DINH NGUYEN, LE NHU LE, and other coconspirators operated a marijuana "grow house" at 5005 ½ S. 114th Street, Tukwila, Washington.

8. On or about January 9, 2008, QUY DINH NGUYEN, LE NHU LE, and other coconspirators were growing 128 marijuana plants at 5005 ½ S. 114th Street, Tukwila. In addition, the defendants possessed 157 pots, each containing soil and the stem and root system of a marijuana plant that recently had been harvested at the same house.

All in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A), and 846.

COUNT 2
Manufacturing Marijuana
(4827 S. Morgan Street, Seattle)

On or about October 25, 2006, at Seattle, within the Western District of Washington, QUY DINH NGUYEN and LE NHU LE knowingly and intentionally manufactured, and aided and abetted the manufacturing of, marijuana, a substance controlled under Schedule I of Title 21, United States Code, Section 812.

The grand jury further alleges that this offense involved more than 100 marijuana plants.

The grand jury further alleges that this offense was committed during and in furtherance of the conspiracy charged in Count 1 above.

All in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B), and 846.

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COUNT 3
Manufacturing Marijuana
(7726 48th Avenue S., Seattle)

On or about January 9, 2008, at Seattle, within the Western District of Washington, QUY DINH NGUYEN and LE NHU LE knowingly and intentionally manufactured, and aided and abetted the manufacturing of, marijuana, a substance controlled under Schedule I of Title 21, United States Code, Section 812.

The grand jury further alleges that this offense involved more than 100 marijuana plants.

The grand jury further alleges that this offense was committed during and in furtherance of the conspiracy charged in Count 1 above.

All in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B), and 846.

COUNT 4
Manufacturing Marijuana
(10818 Roseberg Avenue S., Seattle)

On or about January 9, 2008, at Seattle, within the Western District of Washington, QUY DINH NGUYEN and LE NHU LE knowingly and intentionally manufactured, and aided and abetted the manufacturing of, marijuana, a substance controlled under Schedule I of Title 21, United States Code, Section 812.

The grand jury further alleges that this offense involved more than 100 marijuana plants.

The grand jury further alleges that this offense was committed during and in furtherance of the conspiracy charged in Count 1 above.

All in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B), and 846.

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COUNT 5
Manufacturing Marijuana
(5005 ½ S. 114th Street, Tukwila)

On or about January 9, 2008, at Seattle, within the Western District of Washington, QUY DINH NGUYEN and LE NHU LE knowingly and intentionally manufactured, and aided and abetted the manufacturing of, marijuana, a substance controlled under Schedule I of Title 21, United States Code, Section 812.

The grand jury further alleges that this offense involved more than 100 marijuana plants.

The grand jury further alleges that this offense was committed during and in furtherance of the conspiracy charged in Count 1 above.

All in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B), and 846.

COUNT 6
Conspiracy to Engage in Money Laundering

Beginning in or before 2006, and continuing through January 9, 2008, at King County, in the Western District of Washington, and elsewhere, QUY DINH NGUYEN, KIM-HIEU THI NGUYEN, and others known and unknown, knowingly and intentionally conspired to:

(A) Conduct financial transactions affecting interstate and foreign commerce, which in fact involved the proceeds of specified unlawful activity, that is, Conspiracy to Manufacture Marijuana and Manufacturing Marijuana, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1), and 846, knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, with the intent to promote the carrying on of the specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i);

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(B) Conduct financial transactions affecting interstate and foreign commerce, which in fact involved the proceeds of specified unlawful activity, that is, Conspiracy to Manufacture Marijuana and Manufacturing Marijuana, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1), and 846, knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, and knowing that the transactions were designed in whole or in part to (i) conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of the specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i); and (ii) to avoid a transaction reporting requirement under State or Federal law, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(ii); and

(C) Engage in monetary transactions in or affecting interstate and foreign commerce, that involved criminally derived property of a value greater than $10,000, and which was derived from specified unlawful activity, that is Conspiracy to Manufacture Marijuana and Manufacturing Marijuana, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1), and 846, in violation of Title 18, United States Code, Section 1957(a).

Manner and Means of the Conspiracy

1. The purpose of the conspiracy was to launder the cash proceeds generated by QUY DINH NGUYEN and other persons through the commission of the offenses alleged above in Counts 1 through 5 (hereinafter referred to as "the cash proceeds").

2. As part of the conspiracy, QUY DINH NGUYEN and KIM-HIEU THI NGUYEN arranged for "straw buyers" to purchase several houses for use as marijuana "grow houses" and to otherwise facilitate the manufacture and distribution of marijuana, including the real properties located at: 7726 48th Avenue S., Seattle; 10818 Roseberg Avenue S., Seattle; 5005 ½ S. 114th Street, Tukwila; 7017 44th Avenue S., Seattle; and 5003 S. 114th Street, Tukwila.

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3. It was further part of the conspiracy that QUY DINH NGUYEN and KIM-HIEU THI NGUYEN secretly funneled the cash proceeds to the straw buyers, for them to use in acquiring and maintaining the above-listed properties. Among other things, QUY DINH NGUYEN and KIM-HIEU THI NGUYEN instructed the straw buyers to use the funds as down payments at closing and to pay the monthly mortgage payments for the properties.

4. It was further part of the conspiracy that, as part of funneling the cash proceeds to the straw buyers as described above, QUY DINH NGUYEN and KIM-HIEU THI NGUYEN deposited, and arranged for the straw buyers and other members of the conspiracy to deposit, hundreds of thousands of dollars of cash proceeds into various bank accounts held in the names of KIM-HIEU THI NGUYEN, the straw buyers, and other persons.

5. It was further part of the conspiracy that QUY DINH NGUYEN and KIM-HIEU THI NGUYEN arranged for a straw buyer to purchase the house located at 4623 S. Fontanelle Street, Seattle, in the same manner described above. Thereafter, KIM-HIEU THI NGUYEN used additional cash proceeds to purchase the house under her own name. QUY DINH NGUYEN and KIM-HIEU THI NGUYEN used this house as a private residence and to facilitate the distribution of marijuana.

6. It was further part of the conspiracy that, on occasion, QUY DINH NGUYEN and KIM-HIEU THI NGUYEN arranged for the straw buyers to refinance and/or sell the above-referenced properties, and instructed the straw buyers to provide them with the proceeds of the transactions and/or to use the proceeds to purchase additional properties.

The grand jury further alleges that this offense was committed during and in furtherance of the conspiracy charged in Count 1 above.

All in violation of Title 18, United States Code, Section 1956(h).

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COUNT 7
Unlawful Possession of Firearms

On or about November 14, 2008, at Seattle, within the Western District of Washington, QUY DINH NGUYEN, after having been convicted of a crime punishable by imprisonment for a term exceeding one year, that is, Possession of a Controlled Substance – Cocaine (VUCSA), in King County Superior Court, case number 991008282, on May 21, 1999, did knowingly possess a firearm which had been shipped and transported in and affecting interstate and foreign commerce, namely, a Smith and Wesson .22 caliber pistol, with serial number UAC3491, and a FEG Model PA-63 9mm semi-automatic pistol, with serial number F8346.

All in violation of Title 18, United States Code, Sections 922(g)(1).

CRIMINAL FORFEITURE ALLEGATIONS

A. Controlled Substance Offenses.

Pursuant to Title 21, United States Code, Section 853, the Grand Jury alleges that as a result of the felony offenses charged in Count 1 through Count 5 above, which are punishable by imprisonment for more than one year, QUY DINH NGUYEN and LE NHU LE shall forfeit to the United States of America any and all interest in property, real or personal, constituting, or derived from, any proceeds obtained, directly or indirectly, as the result of said criminal offenses, and shall further forfeit any and all interest in property used or intended to be used in any manner or part to commit, and to facilitate the commission of, such felony offenses.

B. Conspiracy to Engage in Money Laundering.

Pursuant to Title 18, United States Code, Section 982(a)(1), the Grand Jury alleges that upon conviction of the offense set forth in Count 6 of this Indictment, QUY DINH NGUYEN and KIM-HIEU THI NGUYEN shall forfeit to the United States of America, pursuant to Title 18, United States Code, Section 982(a)(1), any property, real or personal, involved in such offense, and any property traceable to such property, including but not limited to, a money judgement of approximately $500,000.

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C. **Substitute Assets.**

If any forfeitable property, as a result of any act or omission of any defendant, cannot be located upon the exercise of due diligence, has been transferred or sold to, or deposited with, a third person, has been placed beyond the jurisdiction of the Court, has been substantially diminished in value, or has been commingled with other property which cannot be subdivided without difficulty, it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek the forfeiture of any property of any defendant up to the value of the forfeitable properties.

A TRUE BILL YES.

DATED: 7/21/09

Signature of Foreperson redacted pursuant to the policy of the Judicial Conference of the United States.

JEFFREY C. SULLIVAN
UNITED STATES ATTORNEY

TODD GREENBERG
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES ATTORNEY
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APPENDIX B

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Western District of Washington

UNITED STATES OF AMERICA
V.
QUY DINH NGUYEN

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:09CR00062RSM-001

USM Number: 39185-086

Walter George Palmer
Defendant's Attorney

FILED ENTERED
RECEIVED

FEB 17 2012

CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON DEPUTY

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Second Superseding Indictment.

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1), 841(a)(1)(A), and 846	Conspiracy to Manufacture Marijuana	03/25/2009	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 2,3,4,5,6,&7 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Todd [illegible]
Assistant United States Attorney

2/17/12
Date of Imposition of Judgment

Signature of Judge

The Honorable Ricardo S. Martinez
United States District Judge

2/17/2012
Date

09-CR-00062-CNST

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: QUY DINH NGUYEN
CASE NUMBER: 2:09CR00062RSM-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 304 months to run concurrent with the sentence imposed in State of Washington v. Quy Nguyen, 09-C-06802-6SEA.

☒ The court makes the following recommendations to the Bureau of Prisons:
Defendant shall serve sentence in federal BOP facility.

2/17/2012

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: QUY DINH NGUYEN
CASE NUMBER: 2:09CR00062RSM-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 5 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug and/or alcohol test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight valid tests per month, pursuant to 18 U.S.C. § 3563(a)(5) and 18 U.S.C. § 3583(d).

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3C — Supervised Release

DEFENDANT: QUY DINH NGUYEN
CASE NUMBER: 2:09CR00062RSM-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate as instructed by the U.S. Probation Officer in a program approved by the probation office for treatment of narcotic addiction, drug dependency, or substance abuse, which may include testing to determine if defendant has reverted to the use of drugs or alcohol. The defendant shall also abstain from the use of alcohol and/or other intoxicants during the term of supervision. Defendant must contribute towards the cost of any programs, to the extent defendant is financially able to do so, as determined by the U.S. Probation Officer.

The defendant shall submit his/her person, residence, office, safety deposit box, storage unit, property, or vehicle to a search, conducted by a U.S. Probation Officer or any other law enforcement officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation; the defendant shall notify any other residents that the premises may be subject to searches pursuant to this condition.

The defendant shall participate as directed in a mental health program approved by the United States Probation Office. The defendant must contribute towards the cost of any programs, to the extent the defendant is financially able to do so, as determined by the U.S. Probation Officer.

The defendant shall be prohibited from gambling and the defendant shall not enter, frequent or be otherwise involved with any legal or illegal gambling establishment or activity, except if approved by the defendant's probation officer.

The defendant shall provide his or her probation officer with access to any requested financial information including authorization to conduct credit checks and obtain copies of the defendant's Federal Income Tax Returns.

The defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or obtaining a loan without approval of the defendant's U.S. Probation Officer.

~~A fine in the amount of $17,500 is due immediately. Any unpaid amount is to be paid during the period of supervision in monthly installments of not less than 10% of the defendant's gross monthly household income. Interest on the fine shall be waived.~~

The defendant shall not be self-employed nor shall the defendant be employed by friends, relatives, associates or persons previously known to the defendant, unless approved by the U.S. Probation Officer. The defendant will not accept or begin employment without prior approval by the U.S. Probation Officer and employment shall be subject to continuous review and verification by the U.S. Probation Office. The defendant shall not work for cash and the defendant's employment shall provide regular pay stubs with the appropriate deductions for taxes.

The defendant shall not obtain or possess any driver's license, social security number, birth certificate, passport or any other form of identification in any other name other than the defendant's true legal name, without the prior written approval of the Probation Officer.

The defendant shall maintain a single checking account in his or her name. The defendant shall deposit into this account all income, monetary gains, or other pecuniary proceeds, and make use of this account for payment of all personal expenses. This account, and all other bank accounts, must be disclosed to the probation office.

If the defendant maintains interest in any business or enterprise, the defendant shall, upon request, surrender and/or make available, for review, any and all documents and records of said business or enterprise to the probation office.

The defendant shall disclose all assets and liabilities to the probation office. The defendant shall not transfer, sell, give away, or otherwise convey any asset, without first consulting with the probation office.

The defendant shall not associate with any known gang members.

If deported, the defendant shall not reenter the United States without permission of the Bureau of Immigration Customs Enforcement. If granted permission to reenter, the defendant shall contact the nearest U.S. Probation Office within 72 hours of reentry.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: QUY DINH NGUYEN
CASE NUMBER: 2:09CR00062RSM-001

CRIMINAL MONETARY PENALTIES

	Assessment	Fine	Restitution
TOTALS	$ 100	$ [redacted]	$ N/A

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
	N/A	N/A	
TOTALS	$ 0	$ 0	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

X The court finds that the defendant is financially unable and is unlikely to become able to pay a fine and, accordingly, the imposition of a fine is waived

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: QUY DINH NGUYEN
CASE NUMBER: 2:09CR00062RSM-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

☒ PAYMENT IS DUE IMMEDIATELY. Any unpaid amount shall be paid to Clerk's Office, United States District Court, 700 Stewart Street, Seattle, WA 98101.

☒ During the period of imprisonment, ~~no less than~~ 25% of their inmate gross monthly income or $25.00 per quarter, whichever is greater, to be collected and disbursed in accordance with the Inmate Financial Responsibility Program.

☒ During the period of supervised release, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after release from imprisonment.

☐ During the period of probation, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after the date of this judgment.

The payment schedule above is the minimum amount that the defendant is expected to pay towards the monetary penalties imposed by the Court. The defendant shall pay more than the amount established whenever possible. The defendant must notify the Court, the United States Probation Office, and the United States Attorney's Office of any material change in the defendant's financial circumstances that might affect the ability to pay restitution.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the United States District Court, Western District of Washington. For restitution payments, the Clerk of the Court is to forward money received to the party(ies) designated to receive restitution specified on the Criminal Monetaries (Sheet 5) page.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court

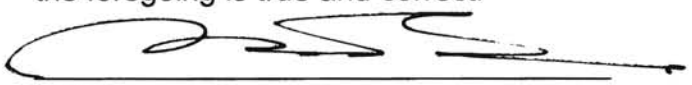
☐ The defendant shall forfeit the defendant's interest in the following property ~~to the United~~ States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. NGUYEN, Cause No. 68408-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

01-30-13

Date

Done in Seattle, Washington