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ORIGINAL

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NO. 58623-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

HUYEN BICH NGUYEN,  
AKA GABRIELLE NGUYEN,

Appellant.

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APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

The Opening Brief raised three main issues. First, it explained that defense counsel told the trial court that Ms. Nguyen waived jury and filed the signed form, but there was no advice to, or inquiry of, Ms. Nguyen herself. The state's Response does not dispute these facts. Instead, the state argues that no personal inquiry of or colloquy with the defendant was necessary.

This is incorrect. The general rule, under Brand,<sup>1</sup> Pierce,<sup>2</sup> Downs<sup>3</sup> and Likakur,<sup>4</sup> is that no inquiry of the defendant is necessary – unless the record shows special circumstances, such as a prior finding of incompetency or mental illness. The Opening Brief explained that if the record did show special circumstances, then heightened inquiry is required. The state does not really

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<sup>1</sup> State v. Brand, 55 Wn. App. 780, 792-93, 780 P.2d 894 (1989), review denied, 114 Wn.2d 1002 (1990), grant of post-conviction relief denied on different grounds (due to procedurally improper collateral attack), 120 Wn.2d 365, 842 P.2d 470 (1992).

<sup>2</sup> State v. Pierce, 134 Wn. App. 763, 142 P.3d 610 (2006).

<sup>3</sup> State v. Downs, 36 Wn. App. 143, 145, 672 P.2d 416 (1983), review denied, 100 Wn.2d 1040 (1984).

<sup>4</sup> State v. Likakur, 26 Wn. App. 297, 300-01, 613 P.2d 156 (1980).

dispute the fact that some circumstances might trigger the need for heightened inquiry.

Following this limited acknowledgment in the state's Response, the only remaining question is whether such circumstances were present in this case. This question must be answered by reviewing the record before the trial court judge at the time of the jury waiver, which we do in Section II. That record showed that Ms. Nguyen had an undisputed history of lengthy prior incompetence and serious mental illnesses, as severe as visual and auditory hallucinations; prior beatings by her husband causing head trauma including concussion; prior involuntary hospitalizations; and diagnoses of psychosis. Since these mental problems were already memorialized in the trial court file as problems of long and continuing duration, at the time that the jury waiver was accepted, the red flags triggering heightened scrutiny were present here. Section II.

The state next argues that Ms. Nguyen cannot deny that physical control is a lesser included offense of driving while intoxicated for the first time on appeal, because it is not a claim of constitutional magnitude (under RAP 2.5(a)). But the cases it cites do not say that – they say that refusal to give a lesser included

offense instruction upon request is not a claim of statutory magnitude. The claim that a defendant was convicted of an uncharged offense is different – because controlling case law holds that due process protections bar conviction without sufficient notice. Section IV.

Ms. Nguyen’s final claim was that the drug possession statute of which she was convicted was unconstitutional for failure to include a mens rea element. The state’s entire response to this argument is that the claim is statutory and presents no constitutional due process issue – hence it should not be considered, and prior state court precedent construing the statute to eliminate scienter controls. But controlling Supreme Court authority holds that the power of the state to delete the mens rea element of a crime is only partly a matter of statutory construction. It also implicates due process protections. Hence, the state’s arguments against reaching this issue must fail. Section V.

**II. THE RECORD AT THE TIME OF THE JURY WAIVER SHOWED A LENGTHY PERIOD OF PRIOR INCOMPETENCE, A LONG HISTORY OF SEVERE MENTAL ILLNESS INCLUDING AUDITORY AND VISUAL HALLUCINATIONS, LONGSTANDING DIAGNOSES OF PSYCHOSIS, AND INVOLUNTARY HOSPITALIZATIONS. ALL THESE RED FLAGS COMPELLED DIRECT INQUIRY OF THE DEFENDANT.**

The Opening Brief explained that defense counsel told the trial court that Ms. Nguyen waived the right to jury trial and filed the signed form, but there was no advice to, or inquiry of, Ms. Nguyen anywhere on the record. The state does not dispute these facts in its Response Brief.

The Opening Brief continued that the general rule, under Brand, Pierce, Downs and Likakur is that no inquiry of the defendant is necessary *unless* the record shows special circumstances, such as a prior finding of incompetency or mental illness. It is unclear whether the state completely agrees that this is the rule. At one point, it argues that no direct inquiry of the defendant is required prior to acceptance of a jury trial waiver and implies that this rule has no exceptions.<sup>5</sup>

But at another point, the state seems to acknowledge that there are at least some exceptions requiring personal inquiry of the defendant. The Response acknowledges that “In cases where concerns arise regarding a defendant’s current mental health status

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<sup>5</sup> E.g., Response, p. 10 (citing Likakur for the rule that jury trial may be waived for tactical reasons, while excluding the fact that this case also endorses the rule that special circumstances may give rise to the need for such a colloquy); Response, p. 10 (citing State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994), for the rule that no colloquy is required, while omitting the fact that Stegall cites with approval authority holding that special circumstances create an exception to the rule and compel direct inquiry of the defendant).

or competency to stand trial, *a trial court should exercise greater caution ....*” Response, p. 11 (citation omitted) (emphasis added).

The Response must acknowledge this, because controlling Washington authority makes a special exception for defendants when there is a question about competency or a real mental health concern. As the Court of Appeals explained in Downs, there is a critical exception to the general rule that no colloquy is necessary prior to a jury trial waiver for such cases: “*absent circumstances that initially raise a question regarding the defendant’s capacity to waive a jury trial*, the trial court need not conduct an independent inquiry on that issue prior to accepting the waiver.” State v. Downs, 36 Wn. App. 143, 145 (emphasis added) (quoting Likakur, 26 Wn. App. 297, 300-01).

So there are at least some circumstances that trigger the need for direct inquiry of the defendant before accepting a jury trial waiver. The issue therefore boils down to a question about the state of the record in this case, at the time of the jury trial waiver: did it contain “circumstances that initially raise a question regarding defendant’s capacity to waive a jury trial,” Downs, 36 Wn. App. at 145, or not?

The state says the record presents no such concerns. It relies primarily on defense trial counsel's representation that Ms. Nguyen wanted to waive jury, and that she was now competent to do so. Response, pp. 12-13.

But the record contained much more. The transcript of this hearing shows that defense trial counsel also told the court that there had been a long period – perhaps a year and a half – during which Ms. Nguyen was indisputably incompetent. 3/29/06 VRP:6. This assertion was supported by the trial court file, to date, in the case. That court file contained prior orders mandating that Ms. Nguyen obtain and maintain mental health treatment, mandating evaluation by Western State, determining that she was incompetent, and not determining until months later that she had finally regained competency sufficient to stand trial. CP:212 (4/6/04 Conditions of Release for Defendant Pending Appeal, containing requirement that Ms. Nguyen “continue treatment @ Seattle Mental Health”); CP:14-17 (7/7/04 Order for Out of Custody Competency Evaluation at Western State Hospital); CP:18 (8/11/04 Western State still evaluating Ms. Nguyen); Sub No. 21 (8/11/04 competency evaluation pending); CP:215-16 (3/7/05 Clerk's Minutes stating counsel stipulate defendant not yet competent

based on WSH report, defendant must continue treatment); CP:217-18 (7/28/05, defendant finally found competent).

In fact, the record even contained the detailed reports of Ms. Nguyen's lengthy history of mental illness starting years and years before this arrest, including her history of psychiatric problems and physician contacts and treatment. CP:219-229 (12/29/05, Forensic Mental Health Report).

The December 29, 2005, Forensic Mental Health Report by WSH (dated March 2, 2005), even contains summaries and copies of a variety of previous reports and findings raising red flags of all sorts about Ms. Nguyen's competency. Its report about Ms. Nguyen's history showed that she was in counseling (CP:219-22); that her background of mental health problems was long and serious, including the fact that she would "speak[] in tongues"; that she had been hospitalized before for psychiatric problems, specifically having visions of "Moses and Elijah" and that this recurred in 2002 after she fasted for six days. It continues with Ms. Nguyen's reports of having seen visions of angels and demons since childhood. It states that she last saw demons two years ago and regarded these visions as gift from God. CP:222.

The Record Review portion of this same report from the court file shows (CP:222-25) that Ms. Nguyen was involuntarily hospitalized twice in King County, once on 12/12/98 and once on 2/22/99. It shows a further evaluation but not detention on 2/30/00. It continues by documenting her history of alcohol and cocaine abuse.

This report even contains descriptions of such severe domestic abuse that it should trigger concerns about organic brain injury. It summarizes an August 2, 1996, evaluation, following an assault by her husband, in which she was pushed to the pavement and suffered a concussion and contusions. It summarizes prior diagnoses of Substance Abuse Psychosis (12/16/98), characterizations as gravely disabled (2/22/99), psychotic and paranoid (12/30/00). CP:222-23.

It contains WSH records, specifically the Knopp Report of 12/19/03, containing a diagnosis of Psychotic Disorder Not Otherwise specified. This report summarizes her history of domestic abuse, her migraine headaches since that abuse, and her family history of mental illness including her sister's diagnosis of bipolar disorder. CP:223.

It contains an additional medical report (this one by Dr. Andrew Hwang, 2/6/04) in which she admitted to auditory hallucinations in which God spoke to her. This report contains an additional diagnosis of Major Depression, recurrent, with psychotic symptoms. CP:223-24.

And yet another report contained within this record entry contains another diagnosis of psychosis. Specifically, Cecelia MacClure, a therapist at Valley Counseling, states in her report of 9/16/04 that despite an initial diagnosis of Psychotic Disorder Not Otherwise specified, Ms. Nguyen did not want counseling because she viewed her hallucinations as gifts rather than problems. CP:225-26.

This report then summarizes (CP:225-26) that Ms. Nguyen suffers long-term memory colored by mental disorder; it characterizes her intellectual functioning as average, but her insight as poor given the fact that she does not believe that she is mentally ill.

These reports were in the file before and during the time the judge was offered the jury trial waiver and they show just how seriously mentally ill Ms. Nguyen is. They even characterize her inability to recognize her own mental illness as an indication of lack

of insight. It is therefore a small step to characterize the trial court's failure to note these red flags as indicating a similar lack of insight. Ms. Nguyen's case history raised all the red flags that it possibly could: consistent and longstanding history of severe mental illness and incompetency, including psychosis, visual and auditory hallucinations, indications of organic brain damage from beatings, plus denial and lack of insight into her own mental illness. The fact that her lawyer failed to flag her mental illness does not excuse the court's failure to note these red flags. This is especially true given this Report's final diagnostic formulation (CP:226), that Ms. Nguyen currently suffers from Psychotic Disorder Not Otherwise specified, as well as cocaine and alcohol abuse.

The fact that the record before the trial court at the time of the jury trial waiver contained so much information about Ms. Nguyen's prior incompetency and severe mental illnesses makes all the difference in the world. The reason is that the appellate courts hold that where the defendant has been found to be incompetent, or to be mentally ill, at least once during the course of the proceedings, then a written jury waiver alone with no further inquiry or assent on the record is insufficient – a fuller inquiry into voluntariness is required. See Downs, 36 Wn. App. 143-45

(reciting general rule that there is no need for a full inquiry prior to a jury trial waiver, and then the exception for special circumstances such as a finding of incompetency); Likakur, 26 Wn. App. at 300-01 (evidence in the record of prior psychosis and disagreement among doctors over prior competency findings triggered need for extended inquiry prior to acceptance of jury trial waiver).

The state therefore errs when it asserts that “Based on this record, the trial court was given no reason to question the validity of Nguyen’s written waiver of the right to a jury trial.” Response, p. 13.<sup>6</sup> Actually, the record in this case showed – prior to trial, and at the very time of the jury trial waiver – that Ms. Nguyen had suffered a lengthy period of incompetency and that it was based on a much longer period of serious mental illness. Given this state of the record, the general rule that a written waiver suffices is inapplicable. Instead, the special rule requiring personal inquiry of the defendant applies – and the trial court’s failure to inquire of Ms. Nguyen invalidates her waiver.

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<sup>6</sup> The state claims that no such circumstances existed here, primarily because defense trial counsel offered the waiver under the assumption that the client was competent. Response, p. 12. But it will always be defense trial counsel who is offering the waiver for the client, so that fact alone cannot eliminate the need to see if special circumstances are present.

**III. THE CLAIM THAT A DEFENDANT WAS CONVICTED OF AN UNCHARGED CRIME – PHYSICAL CONTROL – IMPLICATES DUE PROCESS PROTECTIONS OF U.S. CONST. AMEND. V AND WASH. CONST. ART. 1, § 22 AND, HENCE, CAN BE RAISED FOR THE FIRST TIME ON APPEAL UNDER RAP 2.5(a)(3).**

The state next argues that Ms. Nguyen cannot raise the claim that physical control is not a lesser included offense of driving while intoxicated for the first time on appeal, because it is a statutory issue rather than a claim of constitutional magnitude (under RAP 2.5(a)). Response, pp. 16-17.

But the claim that Ms. Nguyen was convicted of an uncharged offense certainly is an issue of constitutional magnitude – because due process protections bar conviction of an uncharged crime. State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960 (1996) (constitutional error for court to instruction on different uncharged means of committing crime when information charges only one alternative means of committing that crime); Wash. Const. art. 1 § 22 (barring conviction of uncharged crimes).

The decisions cited by the Response arise in a totally different context.

The portion of State v. Tamalini, 134 Wn.2d 725, 728, 953 P.2d 450 (1998), cited by the state (Response, p. 17) holds only:

“The right to have a lesser included offense instruction presented to the jury is, in appropriate cases, a statutory right.” That is certainly true. But the issue in this case is different; the issue here is whether conviction of an uncharged offense that is not a true “lesser included offense” is permissible. This latter issue presents the due process/notice problem. The portion of State v. Scott, 110 Wn.2d 682, 688, n.5, 757 P.2d 492 (1988), cited by the state (Response, p. 17) holds only, “Instructional errors that do not fall within the scope of RAP 2.5(a)(3) include failure to instruct on a lesser included offense....” We are not here raising *failure* to instruct on a lesser included offense. We are raising the claim of improper conviction of an uncharged offense. Neither Tamalini nor Scott deal with this issue; neither Tamalini nor Scott, nor any other controlling case, holds that conviction of an uncharged offense is a purely statutory (and always nonconstitutional) matter.

In fact, it is questionable whether the limited statements in Tamalini and Scott on this point are even correct, in light of U.S. Supreme Court authority. That Court has now held that even the failure to instruct on a lesser included offense can rise to the level of a constitutional due process violation. Beck v. Alabama, 447 U.S. 625, 627, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). Other

courts hold that failure to give a lesser included offense instruction can rise to the level of a constitutional violation even in noncapital cases. See Bagby v. Snowders, 894 F.2d 792, 797 (6<sup>th</sup> Cir.) (*en banc*), cert. denied, 496 U.S. 929 (1990); Vujosevic v. Rafferty, 844 F.2d 1023 (3d Cir. 1988); Trujillo v. Sullivan, 815 F.2d 597 603 (10<sup>th</sup> Cir.), cert. denied, 489 U.S. 929 (1987); Nicholas v. Gagnon, 710 F.2d 1267, 1272 (7<sup>th</sup> Cir. 1983), cert. denied, 466 U.S. 940 (1984); De Berry v. Wolff, 513 F.2d 1336, 1338 (8<sup>th</sup> Cir. 1975).

But whether or not the failure to instruct on a lesser included offense rises to the level of a constitutional violation is of no more than passing interest to this appeal. The key point is that the error asserted here – conviction of an uncharged offense – is a different sort of error entirely. It is an error that even the Washington courts consider to be of constitutional magnitude. That means it can be raised for the first time on appeal. RAP 2.5(a)(3).

The state also argues that defense counsel invited the error of conviction of the lesser included offense, citing cases concerning “erroneously submitted lesser included offenses.” Response, p. 17. But it was only the state that filed proposed jury instructions. See CP:55-76 (state’s proposed instructions). The defense did not file any at all. The state therefore errs in claiming that the defense

actually submitted or invited a lesser included offense instruction. The fact that defense counsel worked with the instructions that the state submitted and that the court decided to apply is not acquiescence, but dealing with the law that the court chose to apply.

On the merits, the state predictably cites to McGuire v. City of Seattle, 31 Wn. App. 438, 642 P.2d 765 (1982), review denied, 98 Wn.2d 1017 (1983), which we have already cited and distinguished in the Opening Brief. The state declines to address the numerous, persuasive, out of circuit decisions concerning the definition of a lesser included offenses; we call this Court's attention to those unrebutted, and still persuasive, decisions, now.

We also note that despite the state's argument in the Response, state statutes do not specifically state whether a lesser included offense must be lesser in elements, or in penalties, also. The Opening Brief explained that given this silence and the interpretive rule of lenity, physical control cannot be construed as a lesser of DUI when the penalties are identical. The state does not respond to the argument about the interpretive rule of lenity at all.

**IV. THE STATE DOES NOT HAVE UNFETTERED  
AUTHORITY TO DEFINE THE ELEMENTS OF  
CRIMES – DUE PROCESS CLAUSE**

**PROTECTIONS ARE ALSO IMPLICATED BY THE  
ELIMINATION OF A MENS REA ELEMENT.**

The Opening Brief has already acknowledged that *state law* allows the court to place the burden of proving unwitting possession of cocaine on the defense. It argued, instead, that due process clause protections announced in Dotterweich,<sup>7</sup> Staples<sup>8</sup> and Balint<sup>9</sup> prohibit the legislature from making this *malum in se* drug crime with the stigma and punishments of a felony into a strict liability offense. It further argued that this due process issue remained open following Cleppe<sup>10</sup> and Bradshaw<sup>11</sup> because those decisions were based solely on statutory interpretation.

The state responds that the entire mens rea issue is a statutory one, and that it has no due process or constitutional aspect to it at all – so there is nothing more to say on the matter

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<sup>7</sup> United States v. Dotterweich, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943).

<sup>8</sup> Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

<sup>9</sup> United States v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922).

<sup>10</sup> State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981). cert. denied, 456 U.S. 1006 (1982).

<sup>11</sup> State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2003), cert. denied, 544 U.S. 922 (2005).

following the statutory interpretation decisions of Cleppe and Bradshaw.

The state errs. While state legislatures do have the power to define crimes, they must do so within due process limitations.

The Supreme Court recognized this most recently in Clark v. Arizona, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2709, 165 L.Ed.2d 842 (2006), which presented the question of whether there was a constitutional bar to Arizona's decision to limit – but not totally eliminate – the element of mens rea from its murder statute. Certainly, the Court ruled that that there was no constitutional, due process, problem, presented by the reduction of the mens rea element in that case. Id. (holding that Arizona's narrowing of its insanity test did not violate due process, and that its exclusion of evidence of mental illness and incapacity due to mental illness on the issue of mens rea did not violate due process). But the Court also recognized that the due process clause placed limits on the power of the state to shift the burden of proof on mens rea – it simply found that the allocation of the burden of proof satisfied due process protections in that case. Thus, Clark v. Arizona, a 2006 Supreme Court case, stands for the rule that the due process clause and not just

statutory interpretation govern state legislative decisions to limit proof of intent in felony cases.

The decision in Clark followed a long line of Supreme Court cases concerning constitutional, due process, limits on a state's ability to define (or redefine) criminal offenses in a way that eliminates the mental element. See, e.g., Patterson v. New York, 432 U.S. 197, 202, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); Speiser v. Randall, 357 U.S. 513, 523, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958); Leland v. Oregon, 343 U.S. 790, 798, 72 S.Ct. 1002, 96 L.Ed.2d 1302 (1952); Montana v. Egelhoff, 518 U.S. 37, 43, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996).

In fact, the Supreme Court has explicitly stated that the elimination of a mens rea element from a felony presents a constitutional due process question. In Staples v. United States, 511 U.S. 600, the Court construed 18 U.S.C. § 5861(a)(6), prohibiting possession of an unregistered firearm but containing no mens rea. The Court reversed the conviction because the government had not been required to prove the defendant had "knowledge" that the item he possessed fit the statutory definition of "machinegun." One of the reasons the Court gave for this decision was "constitutional avoidance"; it explained that there would be a *serious constitutional*

*issue* presented by eliminating completely a mens rea element from this criminal statute, and it cited the prior Supreme Court cases holding that due process protections required imposition of a mens rea element for serious felonies:

A final canon of statutory construction supports the reading that the term “knowingly” applies to both elements. Cases such as Ferber, 458 U.S. at 765, 102 S.Ct. at 1359 (“As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant”); Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); and Osborne v. Ohio, 495 U.S. 103, 115, 110 S.Ct. 1691, 1699, 109 L.Ed.2d 98 (1990), *suggest that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts*. It is therefore incumbent upon us to *read the statute to eliminate those doubts* so long as such a reading is not plainly contrary to the intent of Congress. ...

(Emphasis added.) Thus, the Response errs in stating that state legislatures can completely eliminate mens rea elements from criminal statutes at will, with no constitutional limitations at all. In fact, the Supreme Court has held that there are due process limits on the ability of the states to eliminate mens rea from crimes.

The question here is whether those limits have been exceeded. Cleppe and Bradshaw did not answer that question, as

the state conceded when it characterized them as solely statutory interpretation decisions.

**V. CONCLUSION**

For all of the foregoing reasons, the convictions should be reversed.

DATED this 19<sup>th</sup> day of January, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19th day of January, 2007, a copy of the APPELLANT'S REPLY BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Andrea Vitalich, Sr. Deputy Prosecutor  
King County Prosecuting Attorney  
Appellate Division  
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