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STATE OF WASHINGTON
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Supreme Court No. 85422-0

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

vs.

PHIENGCHAI SISOUVANH,

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION.

The State concedes, as logic, experience, and the rules of statutory construction require, that a psychologist, merely by virtue of being licensed, is not a “qualified expert or professional person” under RCW 10.77.060. *Response* at 13-16. Indeed, the State admits that, to be “qualified”, a licensed psychologist must have particularized education, training, and experience appropriate for the specific task at hand. *Id.* In making its concession, the State points out that Dr. Strandquist has training and experience in conducting forensic competency evaluations, but of course is unable to show that he had the cultural competency necessary to conduct one on Ms. Sisouvanh. *Response* at 13-15. Limited by these facts, the State is forced in turn to limit its construction of RCW 10.77.060 to conform to Strandquist’s lack of cultural competency. Thus, the State argues: “[t]he logical interpretation of RCW 10.77.060 is that it requires an expert or professional person who is qualified to do forensic exams.” *Response* at 15-16.

To borrow a term from the State’s brief, this interpretation of RCW 10.77.060 “adds” to the statutory language. *See Response* at 16. A better term is that the State’s construction “defines” the statutory term. Whether

its construction adds language or defines a term, the State acknowledges, as it must, that licensure alone does not turn a psychologist into a qualified expert or professional person under RCW 10.77.060.

Despite this acknowledgment, however, the State gives not even a passing glance to the extraordinary variety of cultures that shape and define human experience differently for people of different backgrounds. This is not surprising, since Dr. Strandquist, whose lack of cultural qualifications caused him to view Ms. Sisouvanh as just another all-American subject, ignored the extraordinary diversity of humanity. With an expert whose world view is monochromatic, two-dimensional, and extraordinarily limited, the State can hardly be expected to endorse a definition of “qualified” that requires an expert to understand that competency evaluations are conducted on real people whose perceptions and meanings and assumptions have been shaped and influenced by a full-color-spectrum, multi-dimensional world, and not just on subjects reduced to one-size-fits-all cardboard-cutouts whose lives as actually lived and experienced matter not a whit in the process.

II. STANDARD OF REVIEW: HARMLESS BEYOND A REASONABLE DOUBT.

The State attempts to change the standard of review by asking the Court to apply the abuse of discretion standard that would be appropriate if the only issue here related to the trial court's findings and conclusions regarding competency. *Response* at 17. However, the fundamental issue is whether the trial court violated due process, before it made any findings, by failing to require that Ms. Sisouvanh be evaluated not merely by a licensed psychologist (the State agrees that a license alone is insufficient), but by one who, by virtue of an understanding of the cultural influences that shaped Ms. Sisouvanh's life and thought processes (and thus her responses on standardized tests as well as her observed behavior and responses during clinical interviews and while on the ward at Eastern State Hospital), was qualified to conduct a forensic evaluation of Ms. Sisouvanh. The standard of review is therefore one of constitutional dimension, requiring this Court to presume prejudice and the State to prove the error was harmless beyond a reasonable doubt. *State v. Stephens*, 93 Wn. 2d 186, 190-91, 607 P. 2d 304 (1980).

III. THE COURT OF APPEALS OPINION IN STATE V. LEWIS.

The State argues that State v. Lewis, 141 Wn. App., 166 P. 3d 786 (2007) is a “helpful case.” Response at 18. Because the State’s analysis of Lewis is rather superficial, we take a look at this Court of Appeals opinion in greater detail than does the State.

The State argues that, in Lewis, the Court of Appeals

noted that the defendant did not explain how a finding of developmental disability, even if warranted, would have affected the trial court’s decision finding him competent to stand trial [and that, similarly, Ms. Sisouvanh] does not show how the requirement of a culturally competent expert would have affected the court’s decision, as the trial court had the benefit of Dr. Adler’s testimony who had consulted with Dr. Leng.

Response at 19 (citing Lewis at 383). The first problem with the State’s argument is that the discussion by the Court of Appeals in Lewis about whether a finding of developmental disability would have affected the trial court’s decision was not part of the holding in the case.

The holding in Lewis was specific and did not include a reference to harmlessness:

We hold, therefore, that (1) the plain language of RCW 10.77.090 does not require a developmental disability expert to evaluate a criminal defendant under a 90-day commitment order to restore competency; and (2) Dr. Hart's evaluation, that Lewis did not suffer from a developmental disability, satisfied the developmental-disability-evaluation requirement of RCW

10.77.090(1)(c).

Id. at 384. Furthermore, the *dictum* regarding harmlessness did not discuss the constitutional magnitude of the claimed error. Indeed, it does not appear that Lewis even raised the due process issue or argued that the standard of review was constitutional harmlessness.¹

The State notes that in *Lewis*, “the trial court ordered a competency evaluation and no one advised the trial court of any concerns that Lewis had any developmental disabilities.” *Response* at 18. Under RCW 10.77.060(1)(a), one of the competency-evaluating professionals must be a developmental disabilities professional only “if the court is advised by any party that the defendant may be developmentally disabled.” However, under that same statutory provision, the appointment or designation of a “qualified expert[] or professional person[]” is mandatory under the Due Process Clause; no one has to ask that the expert or professional person be qualified to perform his or her job.

Indeed, “[t]his state’s statutes express a clear public policy in favor

¹ The reviewing court did address constitutional harmlessness when discussing a different issue raised by Lewis. *See id.* at 390 (addressing the issue of the trial court’s failure to admit certain expert testimony). Thus, its failure to address it in the context of the competency issue renders its *dictum* regarding harmlessness somewhat less than useful here.

of putting an end to unethical and unprofessional behavior on the part of therapists.” *American Home Assur. Co. v. Cohen*, 124 Wn. 2d 865, 880, 881 P. 2d 1001 (1994). Psychologists must be licensed under RCW 18.83.020(1) in order to “safeguard the people of the state of Washington from the dangers of unqualified and improper practice of psychology.” *Id.* The legislature has directed the examining board of psychology to adopt a code of ethics for psychologists “designed to protect the public interest.” RCW 18.83.050(5). One should certainly expect that those who run our state mental hospitals would understand this clear public policy and therefore would designate experts and professional persons who have the requisite skills to be qualified to perform the particular job at hand.

In *Lewis*, there was not a shred of evidence that the defendant was in fact developmentally disabled:

[N]one of the three experts, not even Lewis’s, opined that Lewis was developmentally disabled. Although no one performed a formal IQ test, all three experts, including Lewis’s, placed his IQ above 70 and, thus, outside the IQ range for mental retardation.

Lewis at 383. In *Lewis*, the defense expert merely testified that “Lewis’s low IQ (70-75), in addition to other deficits, could result in his being developmentally disabled, for which a developmental disability expert would need to conduct an evaluation.” *Lewis* at 376. Of course, the trial

court evaluated the evidence and concluded that Lewis was not developmentally disabled.

Here, the trial court did not bother even to rule on the defense requests to have Ms. Sisouvanh evaluated by a culturally competent person at Eastern State Hospital. Moreover, that Ms. Sisouvanh is from a culture and an ethnicity far outside of the American mainstream was hardly hidden or obscured from anyone at Eastern State Hospital. Indeed, the first clue is her name, which presumably was well and readily known to Dr. Strandquist and everyone else at the hospital who dealt with her. The State suggests that there was a psychosocial intake by a social worker upon Ms. Sisouvanh's admission to the hospital, *Response* at 8, but what the evidence shows is that this "intake" was a farce, as the social worker did not talk to even a single collateral source. 3-12-10 RP 104-105. That Dr. Strandquist and the Eastern State staff working with him incompetently investigated Ms. Sisouvanh's background, history, religion, and culture, hardly means that she was not from a culture outside of the mainstream.²

² As noted in Ms. Sisouvanh's opening brief, Dr. Strandquist

knew she was not born in the United States, but beyond that he could not say what her legal status was, whether she was a U.S. or a Lao citizen, or whether she holds a passport. 3-12-10 RP 52-53. He knew nothing about her religion and how it played into her life. 3-12-10 RP 98-99. He had no real understanding of the refugee crisis that Ms. Sisouvanh had endured as a child. 3-

The fundamental problem in the State’s argument that Ms. Sisouvanh has not shown how “the requirement of the culturally competent expert would have affected the court’s decision” is its loose use of the already fuzzy verb “to affect”. The State’s usage fails to distinguish between, on the one hand, “to directly and preclusively affect” (that is, “to preclude”) and, on the other hand, “to impair the competence of the evaluating professional, thereby impairing his evaluation of the available data, thus negating the reliability of his opinion”. The State uses the verb in its “but-for, direct, preclusive” sense. Ms. Sisouvanh, however, argues that Dr. Strandquist, by virtue of his utter lack of cultural qualifications, fell far below the level necessary to allow him to collect and evaluate the available data. Reduced to its logical cause-and-effect essentials, the defense argument is not necessarily “garbage in, garbage out”, but, rather, “expert not qualified under RCW 10.77.060 to collect and interpret data, therefore data collected is garbage, therefore garbage out”.

The court in Lewis noted that a finding of developmental disability

12-10 RP 120-122.

Moreover, he administered no instruments to assess Ms. Sisouvanh’s level of acculturation, 3-12-10 RP 102-103, and admitted that he did not know enough to assess whether she was in touch with her native culture. 3-12-10 RP 108.

does not necessarily mean that a defendant will automatically meet the test for incompetency in Washington. *Id.* at 383. (citation omitted). The court noted *State v. Ortiz*, 104 Wn. 2d 479, 482, 706 P. 2d 1069 (1985) and *State v. Minnix*, 63 Wn. App. 494, 498-99, 820 P. 2d 956 (1991) as cases in which developmentally disabled defendants were found to be competent. In *Lewis*, however, there was no evidence whatsoever that an expert or professional person who was not a developmental disability expert could not adequately evaluate and interpret the relevant data in that particular case in coming to the opinion that the defendant understood the nature of the charges and was capable of rationally assisting his defense counsel.³

Here, we agree that simply being born into and raised in another culture does not directly preclude a finding of competency to stand trial. However, there was overwhelming evidence, coming from both Dr. Adler and Dr. Strandquist himself, that an expert or professional person without the requisite cultural qualifications could not competently evaluate and interpret the relevant data. Indeed, the evidence was overwhelming that

³ It pays to keep in mind how far out on a hypothetical limb this discussion was in *Lewis*, as the undisputed and un rebutted evidence in that case was that Lewis was ***not*** developmentally disabled.

such culturally unqualified persons could not begin even to obtain and create a reliable and relevant data set, let alone interpret it.

Although the importance of cultural competency in providing psychological services and conducting psychological evaluations was discussed in Ms. Sisouvanh's opening brief, it is worth noting again what the record shows on this issue, to emphasize the difference between this case and *Lewis*. As Dr. Adler testified, the DSM-IV "aptly recognizes that understanding the culture ... of the examinee is absolutely important." 3-24-10 RP 175:16-18. Dr. Strandquist agreed that the multiaxial scheme of the DSM is designed to make sure that no relevant part of the whole person is overlooked in a diagnosis. 3-12-10 RP 93. He also conceded that an understanding of a patient or subject's age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, and socioeconomic status may be essential for effective implementation of psychological services. 3-12-10 RP 92-94.

Dr. Adler noted that, without cultural competency, "the likelihood that one is going to make misdiagnoses ... and perhaps give inappropriate treatment or interventions is very high ... [and that] ... it's exceptionally important that one understands the context and background of the

examinee.” 3-24-10 RP 175:18-21, 175:23-25. “[T]here’s a marked difference in the rate of certain diagnoses if you really don’t understand the person that you are working with.” 3-24-10 RP 176:19-20. Dr. Strandquist conceded that the failure to understand a particular person’s culture or religious beliefs could result in a misdiagnosis. 3-12-10 RP 97-98.

Dr. Adler also stated that language issues can create barriers for the evaluator who does not understand the nuances or the idioms in the colloquial language that an examinee grew up using. 3-24-10 RP 176. “A lot of the subtleties... will kind of go over your head.” 3-24-10 RP 177:1-2. A requirement imposed by DSHS (which, of course, is Dr. Strandquist’s employer) mandates cultural consultations as part of the provision of mental health treatment. 3-24-10 RP 177-178.

Dr. Strandquist agreed that selection, administration, and interpretation of psychometric tests must take into consideration the particular individual being tested and that the clinician’s awareness regarding the subject’s culture was important. 3-12-10 RP 94-96. Giving the right test to the right patient population is absolutely critical and not a peripheral issue, he admitted. 3-12-10 RP 162. According to Dr. Adler,

the M-FAST and the PAI, two psychometric tests given by Dr. Strandquist to Ms. Sisouvanh, and relied upon by him in coming to his conclusions, 3-12-10 RP 19-20, were “clearly inappropriate” to give her and “absolutely not” interpreted in a culturally competent manner. 3-24-10 RP 269:4-9.

IV. CONCLUSION.

The State argues that the trial court would not have reached a different result even if Dr. Strandquist were culturally competent. After all, the State argues, the trial court heard the culturally competent testimony of Dr. Adler, who had consulted with the Lao-speaking Dr. Leng, so another culturally competent witness would have added nothing to the analysis. *Response* at 19. Of course, missing from the State’s argument is the fact that the trial court also heard and could not ignore the testimony of Dr. Strandquist, who relied upon tests that were culturally inappropriate to administer to Ms. Sisouvanh and upon results from those tests that were interpreted by him in a culturally incompetent manner.

Also missing from the State’s argument is the standard of review for constitutional errors. The State nowhere disputes that the failure to observe the statutory procedures in chapter 10.77 RCW is a violation of due process, and that, if the constitutional defect is not structural, a

harmlessness analysis requires this Court to presume prejudice and the State to prove the error was harmless beyond a reasonable doubt. See State v. Stephens, 93 Wn. 2d at 190-91. Since the only culturally competent evidence was that Ms. Sisouvanh was incompetent to stand trial, a presumption of prejudice is a presumption that a culturally qualified expert or professional person whose duty was to report directly to the trial court would have found Ms. Sisouvanh incompetent, just as Dr. Adler did in consultation with Dr. Leng. The issue is thus whether the State can prove beyond a reasonable doubt that the trial court would have reached the same conclusion at the end of a hearing at which all experts agreed that Ms. Sisouvanh was not competent. In trying to shift the burden of proving harm to Ms. Sisouvanh, the State makes an end run around the Due Process Clause and, in doing so, concedes that it cannot prove harmlessness.

Culture shapes and influences meanings, conventions, assumptions, actions, and perceptions. The meaning one person – for example, a psychologist or a staff person on the ward of a state mental hospital – attaches to the words and actions of another person – a patient, for example – comes within from the mind of the observer. Two people

can have a common understanding, but generally only within the boundaries of common – or commonly understood – culture and language, for within these boundaries the parties can draw upon matching assumptions and meanings and perceptions. Thus, a person who lives in Sikasso, Burkina Faso, and who grew up without knowing what a Husky or a Steeler or a Rose Bowl or a Fourteenth Amendment was, would be unlikely to have a cultural basis for understanding what constitutes an end run around anything, let alone the Due Process Clause.

On behalf of Ms. Sisouvanh and the thousands and thousands of people who, because of cultural influences, draw upon different assumptions and meanings and perceptions than do psychologists such as Randall Strandquist, Psy. D., this Court should hold that cultural competency is a prerequisite to being qualified under RCW 10.77.060, that Strandquist was not qualified, and that the State has not proved that the

constitutional error here was harmless beyond a reasonable doubt.

DATED: November 2, 2011.

Respectfully submitted,

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