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No. 66556-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,  
Respondent,  
v.  
MARIO HUMPHRIES,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Regina Cahan

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SUPPLEMENTAL BRIEF FOLLOWING ORAL ARGUMENT

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## A. QUESTION PRESENTED

Did Humphries' signature on the stipulation constitute waiver? If so, what was waived?

## B. ARGUMENT

**THERE WAS NO WAIVER OF THE RIGHT TO APPEAL THE ERROR OF READING THE INVALID STIPULATION TO THE JURY, THERE WAS NO ABANDONMENT OF THE RIGHT TO COMPLAIN OF THE CONSTITUTIONAL ERROR ON APPEAL, AND THERE WAS NO "WAIVER" OF THE ERROR IN THE SENSE THAT IT WAS SOMEHOW "FIXED" OR "CURED" BELOW.**

Mr. Humphries did not want to stipulate, and had refused to place his signature on the document containing the language that was read to the jury.<sup>1</sup>

Humphries' counsel told him his disagreement with the decision to stipulate was immaterial, and that his signature on the document was therefore unnecessary. The trial court agreed with

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<sup>1</sup> The stipulation document read as follows:

The following statement is a stipulation by both parties. A stipulation means that the following facts are not in dispute and should be considered as fact for the purposes of this trial.

The parties in the above-referenced case agree that on February 7, 2010, the defendant, Mario Humphries, had previously been convicted of a serious offense.

The parties further agree that on February 7, 2010, the defendant, Mario Humphries, had previously received written notice that he was ineligible to possess a firearm.

The parties further agree that on February 7, 2010, the defendant, Mario Humphries, knew that he could not possess a firearm.

counsel, and told Humphries the same thing – his agreement, disagreement, signature, or non-signature, was immaterial one way or the other.

The invalid stipulation was then read to the jury. This was error.

After this error in the evidence phase occurred, some time later in the trial defense counsel noted to the court that he had convinced his client to sign the stipulation.

The State argued in its Brief of Respondent that if it is error to read an invalid stipulation to several elements of the crime to the jury over the defendant's voiced objection, this error was "waived" when Humphries later placed his signature on the document as to which he had been told his signature was meaningless.<sup>2</sup>

Of course, by that time, the error had been consummated- the invalid stipulation had already been read to the jury, over the objection of the accused who was told he had no right to object.

The document in question of course contained no language acknowledging that the defendant understood he had previously been misadvised by his counsel and the court who had told him his agreement to the stipulation was unnecessary, and there is no oral

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<sup>2</sup> Mr. Humphries' Reply Brief addressed the State's waiver contentions at length.

advisement in the record showing that Mr. Humphries was made to understand that critical truth, that he did have the right to object and block the stipulation.

Finally, the document memorializing the prior oral stipulation was of course not submitted to the jury in the jury instructions or as an exhibit.

Nevertheless, on appeal, relying on RAP 2.5(a), the Respondent in its Brief contended that Mr. Humphries “waived” the issue of the invalid oral reading of the stipulation by his after-the-fact signature on the document containing its language.

There was no waiver. First, RAP 2.5(a) does not discuss waiver and the word waiver does not appear within the Rule’s language. Rather, the Rule – titled “Errors Raised for the First Time on Review,” states: “The appellate court may refuse to review a claim of error which was not raised in the trial court.” RAP 2.5(a).

But of course, Mr. Humphries did raise the error in the trial court. And the trial court ruled on his protestations, dismissing them as being of no consequence. The *Rule*, RAP 2.5(a), does not apply.

Neither does the appellate court *doctrine* of waiver apply. This doctrine is employed by the court to effectuate various policies regarding whether the appellant should properly be permitted to

argue a matter in the appellate court. The doctrine precludes a defendant from making an argument on appeal after failing to present that argument to the *trial judge*, so as to give the trial court the opportunity to rule on the issue. Here, Mr. Humphries vocally and contemporaneously objected, manifestly giving the trial court the opportunity to rule – which opportunity the court then employed to rule incorrectly. There is no waiver of the right to argue the issue on appeal.

Another policy supporting waiver is the fact that it is fair and just for appellate courts apply the doctrine of waiver to the acts or omissions of a party's attorney – because attorneys are presumed to understand the substantive law, are presumed to understand the law of preservation of error, are presumed to be acting with understanding of their case, and are presumed to be making competent, tactical decisions to object, or not object, or not raise an argument, etc.

No such presumption of understanding of the law applies to acts or omissions by the lay defendant. Waiver and abandonment are the voluntary relinquishment of a known right. Indeed, that is why, when it is claimed that defendant waived a constitutional right, it must first be shown – somehow -- that he knew had had that right. A lay defendant cannot validly waive his Miranda right to

remain silent unless he is first told he has that right. He cannot validly waive his Sixth Amendment jury trial rights as to every element of the crime, unless it is established, by some means, that he knew he had the right to a jury and confrontation on each and every element.

And, certainly, a defendant cannot be said to have later “waived” the error of a stipulation entered after he was told he had no right to object to the stipulation, unless it is shown that he was finally at some juncture told the correct law on the matter.

Again, the stipulation document would be adequate in this case if there had not been the previous misadvisement of the incorrect, wrong law about his rights. That error having occurred, his later signature on the document required much more, before it could even conceivably be deemed a waiver of the error.

In reality, when the Respondent in this case argues “waiver,” what the State is really trying to convince this Court of is that the error of reading the invalid stipulation was somehow “cured” or fixed in some way below – that it was made to “go away.”

This is also incorrect. Perhaps, if the later-signed document had gone to the jury following a correction of the misunderstanding, or if the State had re-opened its case and read the document to the jury after it was signed, the earlier fatal error would have been

cured, fixed, or somehow rendered a nullity. No such "fix" occurred.

But even if this signed stipulation had been submitted to the jury or read to the jury, nothing in the record shows that the defendant, in placing his later signature on the document, understood he had previously been misadvised by his counsel and the court (who told him his agreement to the stipulation and his signature were utterly unnecessary), and that he now knew he did indeed have the right to object and block the stipulation, but that knowing this now, he was nonetheless agreeing to sign.

The courts disagree about whether an oral colloquy between the court and the defendant (determining if the defendant is voluntarily and knowingly giving up his right to a jury and confrontation on every element), is required before a stipulation to several elements of the crime may be presented to the jury. Some courts say this requires a colloquy. Other courts conclude that it is enough that the court can presume that counsel's agreement to a stipulation indicates that the defendant agrees, because the attorney is presumed to be acting with the authorization of the defendant after advising the client competently as to his rights.

This disagreement, of course, is about what degree and manner of assuredness there must be before the court concludes,

as it must in some fashion, that the stipulation to elements is a voluntary knowing relinquishment by the accused of his right to jury proof and confrontation on each and every element of the crime.

All of these courts do agree that a stipulation to elements certainly cannot be entered over the defendant's voiced objection.

Thus the Fourth Circuit recently stated:

We can find no reasoning or case law that would uphold a waiver of a Sixth Amendment right by defense counsel over a defendant's objection.

United States v. Williams, 632 F.3d 129, 132-34 (4<sup>th</sup> Cir. January 21, 2011) (admitting counsel's stipulation to element of "controlled substance," over the defendant's acknowledged objection, violated Sixth Amendment right to confrontation, and Sixth Amendment right to jury trial).

Now, if the stipulation document in this case had been signed originally by Humphries, and that document was read to the jury or placed in the instructions or exhibits, there would be no issue. This Court could presume as could the trial court that the defendant's signed agreement with the stipulation followed competent advice of rights by his lawyer, and that nothing more was required (unless a full colloquy is required, which is not a necessary issue for decision in this case).

But once the multi-aspect error had already occurred in this

case, that presumption disappeared. The defendant was told his agreement was not required, and the stipulation was then read to the jury. At that point, no longer could the court ever in this case “presume” that Mr. Humphries’ later signature on the document represented an act done with knowledge of his right to refuse to stipulate. The record affirmatively shows that the state of Mr. Humphries’ knowledge was that the judge told him he had no right to disagree with the stipulation, and that his signature was not required. Absent some on-the-record correction of that affirmative misunderstanding, 19-year-old Mario Humphries’ later signature on the document was meaningless in terms of creating a presumption that he stipulated with knowledge of the jury trial rights he was putatively foregoing.

That is why there is no “waiver,” abandonment of the issue, or “cure” of the error. The courts repeatedly state that they will not presume a knowing voluntary waiver of a constitutional right based on a silent record. This record is worse than silent. Humphries didn’t just lack an understanding that he had the right to object to the stipulation, the court and his lawyer specifically (in error) told him he did not. This was the opposite of correct.

This issue is therefore not about the absence of an adequate showing of knowledge before a stipulation can be entered. It is

about the presence of affirmative misunderstanding as to those rights – a document, later signed, cannot in any way be valid in the presence of such affirmative misunderstanding, and be deemed “waiver.”

The only reasonable inference from the fact of the later signature is that defense counsel finally succeeded with the very same argument to his client that he had been theretofore making – that his signature and agreement were not required, but that he should really sign the document anyway. See 10/12/10RP at 5-6. The record certainly allows no inference that, surely, Mr. Humphries was correctly disabused of the incorrect notion that his agreement or disagreement was immaterial, and then signed the document. And it would be a further, unreasonable, and indeed fanciful inference to infer that Mr. Humphries signed the document he did not want to sign, after being told that he did have the power to refuse to sign after all!

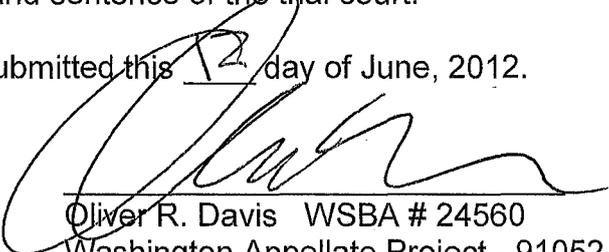
For all we know, the defendant would still be laboring under the misimpression that he had no right to object (had he not been later advised differently by appellate counsel), and for all we know the court and trial counsel are to this date continuing to labor under the same incorrect understanding. Nothing in the record shows otherwise.

argues that none of the purposes behind the appellate court doctrine of waiver would be furthered by declining to review an important constitutional issue that was so squarely placed before the trial court. This Court should find that the constitutional error was not waived for appeal, abandoned, or cured, and that the invalid stipulation requires reversal of the VUFA conviction.

### **C. CONCLUSION**

Based on the foregoing and on his Appellant's Opening Brief, and Reply Brief, and oral argument held May 22, 2012, the appellant Mario Humphries respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 12 day of June, 2012.



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DIVISION ONE**

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	)	
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	)	
MARIO HUMPHRIES,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 6<sup>TH</sup> DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT FOLLOWING ORAL ARGUMENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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STATE OF WASHINGTON  
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[X] ANN MARIE SUMMERS, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	( )	HAND DELIVERY
APPELLATE UNIT	( )	_____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 6<sup>TH</sup> DAY OF JUNE, 2012.

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