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NO. 62318-4-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION ONE

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DIEM NGUYEN,

Appellant.

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

THE HONORABLE RICHARD EADIE

APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

Mr. Nguyen argued that the trial court abused its discretion in refusing to grant his motion for new trial based upon newly discovered evidence in the form of his childhood medical records from Vietnam, the discovery of which led directly to Mr. Nguyen's forensic psychological evaluation by Dr. Muscatel. As the childhood medical records and the results of the inextricable and interlocking forensic evaluation clearly establish that Mr. Nguyen suffered from a drug-induced psychosis at the time of the offense which rendered him incapable of formulating the requisite intent for first degree assault or malice for first degree malicious mischief, the newly discovered evidence is therefore both material and likely to change the result at trial. The trial court thus erred in refusing to grant a new trial based on this highly material newly discovered evidence.

As a threshold matter, the state cross-appeals the trial court's finding that Mr. Nguyen's childhood medical records from Vietnam were newly discovered evidence that could not have been discovered before trial through the exercise of due diligence. The trial court made this determination based upon the Declaration of Jeffrey H. Smith Re: Motion for New Trial, CP:226-29, in which Mr. Nguyen's former post-conviction counsel detailed the steps he took to obtain the childhood medical records and Dr. Muscatel's forensic psychological evaluation as a result. As trial

counsel neither inquired about the records nor knew of their existence, there way no way trial counsel could have discovered the childhood medical records from Vietnam through the exercise of due diligence. These records therefore constitute newly discovered evidence. Section II.

While Mr. Nguyen's childhood medical records from Vietnam *might not* be independently material, they are extremely material insofar as the discovery of such records directly and immediately resulted in the referral of Mr. Nguyen to Dr. Muscatel for a forensic psychological examination and evaluation. As Dr. Muscatel's opinion, which is thus necessarily also newly discovered evidence, provides a sufficient basis to request both voluntary intoxication and diminished capacity jury instructions, his opinion is material and likely to change the result at trial.

The state's principal response is that Dr. Muscatel's forensic evaluation- despite the fact that the evaluation was the immediate outgrowth of the newly discovered evidence of Mr. Nguyen's childhood medical records from Vietnam- does not qualify as newly discovered evidence. The state then cites to several cases in which post-conviction counsel hired a new expert with a new opinion, but the courts refused to find such evidence as a sufficient basis for new trial.

Here, by contrast, the issue of Mr. Nguyen's mental state- and his correlative inability to formulate the requisite intent for the crimes

committed- was not even raised at trial. As Mr. Nguyen presented neither an expert nor expert opinion, the state's assertion that Dr. Muscatel's forensic psychological evaluation is simply a reinterpretation of previously examined evidence is thus baseless.

The state argues, in the same vein, that because Dr. Muscatel's opinion was based on evidence that already existed at the time of trial, it does not constitute newly discovered evidence. The newly discovered evidence, contrariwise, actually consists of *both* the childhood medical records *and* Dr. Muscatel's forensic psychological evaluation. Trial counsel failed to request any information in relation to Mr. Nguyen's childhood infirmities and as a result, did not explore Mr. Nguyen's psychological state at the time of the offense. Given that in the absence of the childhood medical records, Mr. Nguyen's post-conviction counsel never would have pursued the forensic psychological evaluation, these items of evidence cannot be viewed independently in a vacuum and must, rather, be viewed as interlocking. Dr. Muscatel's evaluation is thus newly discovered evidence. Section III.

Given its lack of a response on the issue, the state apparently concedes that Dr. Muscatel's proposed testimony would be admissible in a new trial. The state argues, instead, that Dr. Muscatel's opinion is

immaterial for the purposes of Mr. Nguyen's motion for new trial and unlikely to change the result at trial.

Despite Dr. Muscatel's affirmative opinion that there "seems to be little doubt that Mr. Nguyen was in high[ly] impaired mental state at the time of the incident," that "there is little doubt that the possibility of a drug induced psychosis at the time is quite possible," and that as result, "the potential of an intoxication defense should have been considered by the jury in its deliberations on this matter," CP:254-55, the state nevertheless posits that Dr. Muscatel's testimony would not have likely changed the result at trial. Rather than address the substance of Dr. Muscatel's evaluation and his overall conclusion, the state fixates on the inconclusive results of the Minnesota Multiphasic Personality Inventory- Vietnamese language version- and then misconstrues Dr. Muscatel's statement that Mr. Nguyen's "lack of recollection *might* hobble" a diminished capacity defense "to some degree." The state also cites to a statement Mr. Nguyen allegedly made at the time of the incident, but which was heavily contested at trial- so much so that the state did not even mention the alleged statement in its closing argument.

Especially in light of the state's representations during closing argument that methamphetamine does not and cannot cause delusions,

RPV:545-46, 578, Dr. Muscatel's testimony is thus material and likely to change the result at trial. Section IV.

**II. THE TRIAL COURT PROPERLY DETERMINED THAT MR. NGUYEN'S CHILDHOOD MEDICAL RECORDS FROM VIETNAM WERE NEWLY DISCOVERED EVIDENCE THAT COULD NOT HAVE BEEN OBTAINED BEFORE TRIAL THROUGH THE EXERCISE OF DUE DILIGENCE.**

As delineated in Jeff Smith's Declaration, after trial and sentencing, Mr. Nguyen retained Mr. Smith as post-conviction counsel. Towards this end, Mr. Smith met with members of the Nguyen family and learned that Diem had suffered significant head injuries as a young child in Vietnam. CP:226-27. Mr. Smith then requested that, if possible, the family obtain the relevant medical records from Vietnam. The family, in turn, related that this information had never been requested by Mr. Nguyen's trial counsel. CP:227. Mr. Smith, moreover, averred that the "medical records were never discussed or requested by former counsel and, even if the records had been requested, they could not have been obtained prior to trial." CP:229 Mr. Smith also asserted that because trial occurred less than six months after Mr. Nguyen was charged, and it took the Nguyen family nearly one year to obtain the records (originally supplied in Vietnamese and thus requiring translation into English), there

was no way trial counsel could have obtained the records, even through the exercise of due diligence.

While the state contends that the failure by defense counsel to request a continuance to obtain needed discovery fails demonstrates a lack of due diligence, the two cases the state cites refer specifically to missing witnesses and the failure to request a continuance to locate the witness to bring that person to trial. See State v. Jackman, 113 Wn.2d 772, 783 P.2d 580 (1989); State v. Marks, 90 Wn.App. 980, 955 P.2d 406 (1998).

What the state omits to mention, however, is that a court *should not* grant a continuance “absent a showing that ‘the [evidence] can *probably* be found if the continuance is granted.” State v. Slanaker, 58 Wn.App. 161, 164, 791 P.2d 575 (1990) (adding emphasis) (quoting State v. Lane, 56 Wn.App. 286, 296, 786 P.2d 277 (1989)). Contrary to the state’s representations, therefore:

An inflexible requirement that a defendant must seek a trial continuance even when there is no likelihood the witness will be found, in order to preserve the opportunity for a new trial, would clog trial courts with meritless requests for continuance. We do not think this was the intent of the Jackman court.

Id. at 164-65.

Here, trial counsel never inquired about -and thus never requested- Mr. Nguyen’s childhood medical records from Vietnam. It took nearly

one year to receive the records after Mr. Smith and the Nguyen family's formal request for the records; and even then, Mr. Smith had to hire an interpreter to translate the records into English. There was, therefore, almost no possibility that all of this could have occurred in time for trial—even with a request for a continuance, a request for a continuance would have been for naught given the time parameters. Under such circumstances, there is no failure to exercise due diligence.

Most telling, however, is the fact that trial counsel had no knowledge of Mr. Nguyen's previously existing mental deficiencies and thus had no reason to look into obtaining such information. Only after the state's improper remarks during closing argument that methamphetamine cannot and does not cause delusions, RPIV:545-46, which drew a sustained objection that the state was presenting expert testimony, and the further misrepresentation that “[m]ethamphetamine induced madness ... is a stretch and completely unsupported by the law,” RPIV:578, did counsel have any need to investigate Mr. Nguyen's history of mental afflictions.

Because Mr. Nguyen's childhood medical records would have been immaterial at trial towards the defense that Mr. Nguyen's methamphetamine intoxication at the time of the offense rendered his inculpatory statements as meth-fueled ramblings that the jury could not trust, there was no lack of due diligence.

Rather, in response to the state's improper argument during closing that there was no evidence that methamphetamine could cause delusions, which is contrary to all medical evidence, see CP:151-53, National Institute on Drug Abuse InfoFacts: Methamphetamine, Mr. Smith investigated Mr. Nguyen's mental history and found that Mr. Nguyen suffered from mild brain dysfunction disorder, brain convulsions, and hemorrhagic fever. CP:239-45. As the direct and immediate result, Mr. Smith referred Mr. Nguyen to Dr. Muscatel for a forensic psychological evaluation to determine whether this had an effect on Mr. Nguyen's actions at the time of the offense.

Both the childhood medical records and Dr. Muscatel's evaluation are thus both newly discovered evidence which could not have been discovered before trial through the exercise of due diligence.

**III. DR. MUSCATEL'S FORENSIC PSYCHOLOGICAL EVALUATION IS ALSO NEWLY DISCOVERED EVIDENCE THAT COULD NOT HAVE BEEN OBTAINED BEFORE TRIAL THROUGH DUE DILIGENCE BECAUSE IT IS A DIRECT RESULT OF THE DISCOVERY OF MR. NGUYEN'S CHILDHOOD MEDICAL RECORDS.**

As mentioned above, because Dr. Muscatel's forensic psychological evaluation was the direct result of the discovery of Mr. Nguyen's childhood mental infirmities, the evaluation- like the childhood medical records- constitutes newly discovered evidence.

While the state attempts to frame the issue as one where post-conviction counsel seeks a different expert to produce a different opinion, see, e.g., State v. Evans, 45 Wn.App. 611, 726 P.2d 1009 (1986), there was no expert testimony introduced at Mr. Nguyen's trial on the subject of methamphetamine intoxication. The sole mention of expert testimony on this topic was defense counsel's objection that the prosecution was providing expert testimony by informing the jury, "There is no evidence that methamphetamine can cause delusions. You never would hear any evidence of something like that." RPIV:545." The court sustained the objection. Id. The state nonetheless continued: "There is no evidence, there is no instruction on the law that says it in any mitigates the responsibility for what you say or for what you do." Id. at 545-46. Later, in rebuttal closing, the state similarly argued: "There is no evidence and there is no instruction from the Court that methamphetamine use in any mitigates the responsibility to kick through that wall or for shooting those people. Methamphetamine induced madness? That is a stretch and completely unsupported by the law." Id. at 578.

This surprise argument- which was contrary to all existing evidence, properly sustained as objectionable, and, most importantly, thrust upon the Mr. Nguyen in the very final stages of trial- obviates any assertion that Mr. Nguyen lacked due diligence in not obtaining Dr.

Muscatel's evaluation prior to trial. See State v. Savaria, 82 Wn.App. 832, 838, 919 P.2d 1263 (1996) (material information introduced at trial as a surprise warrants new trial), overruled on other grounds by State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003).

In addition, even a previously known witness's testimony can be newly discovered evidence "when that witness could not be located before trial with the exercise of due diligence." Slanaker, 58 Wn.App. at 166.

Here, Dr. Muscatel was previously unknown to the parties. The state correctly argues that trial counsel made a tactical decision to not present expert testimony on the topic of methamphetamine intoxication. Trial counsel did not, however, anticipate that the state would improperly and incorrectly assert during closing argument that methamphetamine does not cause delusions and that there is no evidence of such a phenomenon.

While trial counsel *could have* retained Dr. Muscatel to examine Mr. Nguyen- as the state notes- testimony about voluntary intoxication mitigation was inconsistent with the defense of complete innocence so that expert testimony was immaterial to the defense. Trial counsel therefore did not lack due diligence.

When the state, however, presented argument contrary to all medical evidence- methamphetamine does not cause delusions- as well as

contrary to the laws of the State of Washington- methamphetamine intoxication cannot mitigate criminal culpability for crimes involving a mental element- Dr. Muscatel's evaluation became extremely material. Given the circumstances, Dr. Muscatel's evaluation is newly discovered evidence.

Especially given that the discovery of Mr. Nguyen's childhood medical records, which the trial court properly found to be newly discovered evidence, directly prompted Dr. Muscatel's forensic psychological evaluation, this must also necessarily constitute newly discovered evidence.

**IV. DR. MUSCATEL'S OPINION IS MATERIAL AND LIKELY TO CHANGE THE RESULT AT TRIAL BECAUSE IT PROVIDES A SUFFICIENT BASIS TO REQUEST BOTH VOLUNTARY INTOXICATION AND DIMINISHED CAPACITY JURY INSTRUCTIONS.**

Given the evidence of Mr. Nguyen's childhood infirmities, the overwhelming evidence of Mr. Nguyen's methamphetamine intoxication at the time of the offense, and the state's improper comments about methamphetamine during closing argument, as Dr. Muscatel's evaluation provides a sufficient basis to request an instruction on both voluntary intoxication and diminished capacity, it is thus both material and likely to change the result at trial.

Apparently conceding that Dr. Muscatel's testimony would be admissible in a new trial- towards voluntary intoxication under State v. Kruger, 116 Wn.App. 685, 67 P.3d 1147 (2003) and the other authorities cited and towards diminished capacity under State v. Mitchell, 102 Wn.App. 21, 997 P.2d 373 (2009) and State v. Thomas, 123 Wn.App. 771, 98 P.3d 1258 (2004)- the state instead asserts that his opinion probably would not have changed the result at trial. Despite Dr. Muscatel's affirmative assessment that there "seems to be little doubt that Mr. Nguyen was in high[ly] impaired mental state at the time of the incident," that "there is little doubt that the possibility of a drug induced psychosis at the time is quite possible," and that as result, "the potential of an intoxication defense should have been considered by the jury in its deliberations on this matter," CP:254-55, the state nevertheless posits that Dr. Muscatel's testimony would not have likely changed the result at trial.

Rather than address the substance of Dr. Muscatel's evaluation and his overall conclusion, the state first fixates on the inconclusive results of the Minnesota Multiphasic Personality Inventory- Vietnamese language version. While the results were unreliable because Mr. Nguyen had "a tendency on his part to over-endorse symptoms and present an exaggerated psychiatric profile," Dr. Muscatel found that "those results did not necessarily indicate a conscious attempt to malingering. Rather,

cultural factors and his poor psychological sophistication, couple[d] with the bizarre experiences and symptoms of his meth abuse, likely account for at least some of those results.” CP:248. Although Dr. Muscatel deemed the results “essentially invalid,” he found such results notable for Mr. Nguyen’s “intense endorsement of persecutory thoughts and feelings, feelings of alienation and discomfort with other people. Clearly, ego strength is highly impaired and he copes inadequately with the demands of daily living.” CP:252.

The state then proceeds to misconstrue Dr. Muscatel’s statement that Mr. Nguyen’s “lack of recollection *might* hobble” a diminished capacity defense “to some degree” to read that “Nguyen’s ‘lack of recollection’ would ‘hobble’ a mental defense to the crime.” Resp. at 18.

The relevant case law, however, establishes that such determination is for the jury.

In Mitchell, cited in the Opening Brief as directly analogous, in a prosecution for assault of a police officer, all the defendant could state was his recollection that he “did not believe that they were police.” 102 Wn.App. at 28. Without more information, his treating psychiatrist could not form an opinion as to whether the defendant was suffering from delusions at the time of the offense. Id. Because the “jury should be allowed to determine whether [the defendant] was experiencing delusions

at the time of his arrest even if [the expert] could only say that it was possible,” the Mitchell Court remanded for a new trial in which the defendant could present the expert testimony in reference to his intoxication at the time of the offense. Id.

Here, analogous to the expert in Mitchell, Dr. Muscatel knew that at the time of the offense, Mr. Nguyen suffered from a mental disease or disorder capable of causing delusions; due to a lack of information, he could not form an affirmative opinion as to whether Mr. Nguyen actually experienced delusions at the time of the offense; and there was a substantial basis to conclude that Mr. Nguyen was in fact suffering from delusions at the time of the offense so that “the potential of an intoxication defense should have been considered by the jury in its deliberations on this matter.” CP:255.

Finally, with respect the required mental states- intent and malice- the state cites to a statement Mr. Nguyen allegedly made at the time of the incident, Resp. at 18, but which was heavily contested at trial- so much so that the state did not even mention the alleged statement in its closing argument. The state actually had to attempt to sanitize Mr. Nam’s testimony by highlighting that memory, in general, is fallible. RPIV:550.

Surely, if this statement was so indicative of intent, the state would have mentioned it in closing.<sup>1</sup>

The sum of the state's evidence of intent is thus comprised of: the "essentially invalid," yet notable, MMPI results; Mr. Nguyen's ostensible "lack of recollection"; and a statement attributed to Mr. Nguyen which was never mentioned before trial. RPII:287. This surely cannot suffice for proof of intent, especially in light of Mr. Nguyen's acknowledged methamphetamine intoxication at the time of the offense.

Trial counsel elected to argue that Mr. Nguyen provided a false confession and that everyone else was mistaken; his choice to pursue exoneration- rather than mitigation- as a goal was indeed a tactical decision. The state's improper closing argument, however, effectively foreclosed this defense insofar as the prosecutor misinformed the jury that in spite of Mr. Nguyen's obvious and extreme intoxication at the time of the offense, his confession was trustworthy because methamphetamine does not cause delusions and that there is nothing in the law permitting mitigation on the basis of intoxication. This line of argument clearly

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<sup>1</sup> The state also cites to an alleged interaction between Mr. Nguyen and Mr. Nam that occurred during a break in trial. Resp. at 6 n.1. Officer Darren DeGraw, who was escorting Mr. Nguyen at the time, testified that nothing of the sort transpired. In any event, if this allegation was true and there was any factual basis, the state would have charged witness tampering- or at the very least mention this supposed interchange during closing, which it did not.

demonstrates the materiality of Dr. Muscatel's evaluation and the likelihood that it would change the result at trial.

With respect to voluntary intoxication, therefore, Dr. Muscatel's testimony is likely to change the result at trial because: (1) the crimes charged have particular mental states as elements; (2) there was substantial evidence of Mr. Nguyen's methamphetamine intoxication; and (3) Dr. Muscatel's testimony would establish that the methamphetamine intoxication affect Mr. Nguyen's ability to acquire the required mental state. See State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002). In other words, Dr. Muscatel's testimony would "reasonably and logically connect [Mr. Nguyen's] intoxication with the asserted inability to form the required level of culpability to commit the crime charged." Kruger, 116 Wn.App at 691-92.

Even more telling is the Kruger Court's determination that where there is sufficient evidence to support an instruction on voluntary intoxication, trial counsel's failure to request the instruction constitutes ineffective assistance of counsel. Id. at 693-95. This is because even if the issue of intoxication is presented to the jury, "without the instruction, the defense was impotent." Id. at 694-95.

By the same token, with respect to diminished capacity, Dr. Muscatel's testimony would "logically and reasonably connect [Mr.

Nguyen's] alleged mental condition with the asserted inability to form the required [mental states] to commit the crime[s] charged." Thomas, 123 Wn.App. at 778.

Because Dr. Muscatel concluded with reasonable certainty that Mr. Nguyen suffered from a mental disorder at the time of the offense, Dr. Muscatel does not have to provide an opinion that the mental disorder actually caused the impairment at the time of the offense- "only that it could have, and if so, how that disorder operates." Id. at 780.

Dr. Muscatel's testimony is thus both material and likely to change the result at trial.

#### **V. CONCLUSION**

For the reasons stated above, Mr. Nguyen respectfully requests that this Court vacate his judgment and sentence, reverse his convictions, and remand for a new trial during which Dr. Muscatel will testify about Mr. Nguyen's methamphetamine intoxication at the time of the offense and the deleterious effects of methamphetamine on the mental processes of a chronic addict such as Mr. Nguyen.

First, the trial court properly found that Mr. Nguyen's childhood medical records from Vietnam constitute newly discovered evidence.

Next, because Dr. Muscatel's evaluation was the direct and immediate result of the discovery of such records, his evaluation is also newly discovered evidence.

Finally, this evidence is likely to change the result at trial as Dr. Muscatel's expert testimony will provide a sufficient basis for Mr. Nguyen to request jury instructions on both voluntary intoxication and diminished capacity, which the trial court will likely grant given the substantial evidence of methamphetamine use and abuse.

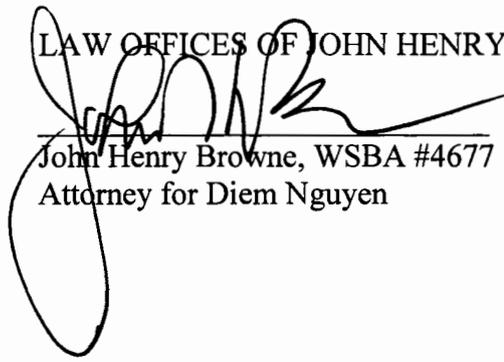
Given the substantial evidence of Mr. Nguyen's methamphetamine use and abuse at the time of the offense- coupled with the lack of any indication of intent- there is little chance that a jury would convict Mr. Nguyen of any offense which involves a particular mental state.

Dr. Muscatel's evaluation is thus newly discovered, material, likely to change the result at trial, and thus a proper ground on which to order new trial.

DATED this 15th day of June, 2009.

Respectfully submitted,

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DECLARATION OF SERVICE

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I certify under penalty of perjury under the laws of the State of Washington that I hand delivered a copy of the attached "Appellant's Reply Brief" upon the following counsel of record:

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