

No. 95510-7

NO. 74962-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

HUNG VAN NGUYEN,

Appellant.

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FILED  
Apr 24, 2017  
Court of Appeals  
Division I  
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Has Nguyen established that the trial court abused its discretion when it concluded that Nguyen was competent to stand trial after a forensic expert evaluated Nguyen and reached the conclusion that he was competent, where defense counsel stated he still had concerns?

2. Has Nguyen established that his 2012 conviction<sup>1</sup> for assault in the second degree is constitutionally invalid on its face because the factual statement in the guilty plea form was allegedly insufficient, where an insufficient factual statement in a guilty plea form does not render a conviction constitutionally invalid on its face and, in any event, as the trial court found, the factual statement in the guilty plea form was sufficient?

3. Has Nguyen failed to establish that his youth (20 years old) at the time of his first strike offense renders his mandatory life sentence upon conviction of this third strike (at 41 years old) cruel and unusual punishment?

4. Has Nguyen failed to establish that the persistent offender statute violates equal protection because it does not make

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<sup>1</sup> Nguyen refers to this conviction in his brief as a 2011 conviction. While the crime occurred in 2011, the guilty plea and sentence occurred in 2012. CP 119, 180. Thus, the conviction occurred in 2012. RCW 9.94A.030(9).

prior offenses an element of the current crime, where many appellate courts have rejected that specific claim?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant, Hung Van Nguyen, was charged with assault in the first degree of Thu Thi Nguyen and assault in the second degree of Ngoc Linh Truong, both occurring on December 12, 2014. RCW 9A.36.011, RCW 9A.36.021; CP 50-51. A deadly weapon enhancement was charged as to both counts. RCW 9.94A.533(4); CP 50-51.

The presiding court ordered mental health professionals at Western State Hospital to evaluate Nguyen's competency to stand trial. CP 11-16, 17-22. A psychologist evaluated Nguyen and concluded that he was competent to stand trial. CP 26-33. On April 29, 2015, the Honorable James Cayce considered the psychologist's report and found Nguyen competent. CP 23-25.

The Honorable Leroy McCullough presided over a jury trial that began on November 30, 2015. RP 48.<sup>2</sup> The jury found

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<sup>2</sup> The Report of Proceedings is in consecutively numbered volumes, and is referred to in this brief simply by page number.

Nguyen guilty as charged. CP 73-76. The court concluded that the State had proved Nguyen was a persistent offender and imposed a term of life in prison on each count pursuant to RCW 9.94A.570. CP 102-08; RP 696-97.

## 2. SUBSTANTIVE FACTS

In summary, these crimes occurred when defendant Hung Nguyen repeatedly stabbed victim Thu Nguyen<sup>3</sup> on December 12, 2014, and then stabbed her friend, Linh Truong, when Truong interrupted that ongoing assault. RP 329-40.

Thu Nguyen had known defendant Nguyen for 18 or 19 years. RP 316. She and her boyfriend were friends with Nguyen and she had previously allowed Nguyen to stay at their home when he had nowhere else to go. RP 316-17. Although they share the same last name, Thu Nguyen and defendant Hung Nguyen are unrelated. RP 318.

During the ten days preceding the stabbing, Thu Nguyen had repeatedly called police because she had asked Nguyen to leave her home and he had refused. RP 318-26. The police responded to the home but were little help. RP 318-20, 323-24.

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<sup>3</sup> Victim Thu Nguyen will be referred to by both first and last name throughout this brief, as part of an effort to avoid confusion with the defendant.

On the afternoon of December 10, police asked Nguyen to step outside to talk and Thu Nguyen took the opportunity to lock him out of the house. RP 326. Nguyen came back about three hours later; he continued banging on Thu Nguyen's door off and on through the night. RP 326-27.

The next morning, December 11, Thu Nguyen called police again and when the responding officer told Nguyen to leave, he did. RP 327-28. Nguyen came back later that night, however, again banging on Thu Nguyen's door and pleading to be let in. RP 328. Thu Nguyen was frightened and did not open the door. RP 328.

When Thu Nguyen got up on December 12, she did not see Nguyen outside. RP 329. She took her son to school, leaving her sleeping four-year-old grandson alone in the house. RP 314-15, 329-30. After she returned home, she laid down on her bed with her grandson to take a nap. RP 330-31.

Thu Nguyen woke up when she heard a noise and, when she opened her eyes, she saw Nguyen walking out of her bedroom closet, knife in hand. RP 331-32. When she asked what he was doing, he said, "I come here to kill you, what else?" RP 332. He stabbed her in the stomach and she began to plead for mercy. RP 333. He again said he was going to kill her. RP 333. When Thu

Nguyen reminded Nguyen that she had treated him well over the years, he said, "I hate you, it's cold outside and you left me outside in the cold." RP 334. Nguyen said that he would kill Thu Nguyen, then wait for her children and her boyfriend to come home and kill them too. RP 334.

Thu Nguyen threw a blanket at Nguyen's face and pushed him away, then ran out the bedroom door. RP 334-35. He caught her as she ran out of the bedroom and stabbed her again, this time in the back. RP 336. Thu Nguyen jumped over the stairway handrail to get downstairs to escape, but Nguyen caught up with her downstairs. RP 336-37. As Thu Nguyen struggled to get away, Nguyen stabbed her repeatedly, all over her body. RP 337. Nguyen continued stabbing Thu Nguyen after she fell to the living room floor. RP 338.

By chance, Thu Nguyen's friend Linh Truong arrived at the door at this moment, stopping by for a cup of coffee. RP 338, 362-64. Truong knocked on the door and Thu Nguyen screamed for help. RP 339, 364. Thu Nguyen's young grandson opened the door for Truong. RP 365.

Truong saw Nguyen on top of Thu Nguyen, holding her down with one hand and holding a knife in the other. RP 365. The

knife looked like a carving knife. RP 368. Truong testified that she believes that Thu Nguyen could not have gotten away from Nguyen without help, but as the two continued to struggle, Truong threw a chair at Nguyen. RP 339, 366-67.

When Truong threw the chair, she missed Nguyen, but Nguyen got off Thu Nguyen – he turned and stabbed Truong in the side. RP 339, 367-68. Thu Nguyen took that opportunity to escape out the front door, where she collapsed in the street a short distance away. RP 340, 354, 367-70. Truong followed Thu Nguyen out and called 911. RP 369-70.

Aid arrived and medics transported Thu Nguyen to Harborview, where she received treatment for about eleven lacerations. RP 342-46, 394-98. These included a stab wound to her head that penetrated her skull, causing a partial break in the skull bone, although it did not penetrate to her brain. RP 400-01. Thu Nguyen also had a significant penetrating knife wound to her back that required multiple layers of sutures. RP 403. She had multiple lacerations to her chest. RP 396-97. She had a knife wound to one hand that left it still impaired by the time of trial, almost a year after the stabbing. RP 397. None of the wounds penetrated vital organs, however, and Thu Nguyen was released

after receiving treatment. RP 398-400. Truong was treated for her stab wound at Valley Medical Center, receiving stitches for the wound, which was just above her waistline. RP 411.

Police entered Thu Nguyen's house and found Nguyen in an upstairs bedroom, with very bloody hands. RP 144-46, 180-82, 215-16. When they brought him outside, Truong identified him as the assailant. RP 146, 371, 436. At trial, both Thu Nguyen and Truong identified Nguyen as the man who stabbed both of them. RP 316, 333, 339, 360, 365, 367.

**C. ARGUMENT**

**1. THE COURT FOLLOWED THE STATUTORY PROCEDURE TO DETERMINE NGUYEN'S COMPETENCY TO STAND TRIAL, SATISFYING DUE PROCESS.**

Nguyen claims that he was deprived of due process because the trial judge did not give adequate deference to defense counsel's doubts when the court found Nguyen competent to stand trial. This argument should be rejected. During proceedings months before trial, presiding judges followed the procedure mandated by RCW 10.77.060, which satisfies constitutional due process. Defense trial

counsel did not raise any question about Nguyen's competency when the case was assigned for trial or at any time during trial.

a. Additional Relevant Facts.

When defense trial counsel raised concerns about Nguyen's competency on February 11, 2015, the State concurred in a request for a competency evaluation at Western State Hospital pursuant to RCW 10.77.060. RP 7. The Honorable Roger Rogoff heard and granted the request. CP 11-16; RP 1, 8-9.

The parties returned to court on March 4, 2015, appearing before the Honorable Patrick Oishi. RP 12. Nguyen had not yet been transported to Western State Hospital and the parties agreed that the evaluation should be ordered to be conducted in the King County Jail, to avoid further delay. RP 17-18. Defense trial counsel said he had no knowledge of any reason that one or the other site for the evaluation would be more appropriate. RP 18. The court ordered the evaluation to occur at the jail and told defense counsel, who was going to attend the evaluation, that if after that evaluation defense counsel thought there was a need for a different evaluation, he could request that. RP 19.

In a report dated March 26, 2015, Western State psychologist Dr. Deanna Frantz reviewed King County Jail mental health notes from September 2011, February and March 2012, May 2013, and September 2014; they showed that Nguyen was not on psychiatric medication and that he denied psychiatric problems. CP 28-29. Dr. Frantz noted that Nguyen was not currently prescribed any psychiatric medication. CP 28. Dr. Frantz reviewed Western State Hospital records, which showed one prior forensic competency evaluation of Nguyen that resulted in a report dated February 21, 2012. CP 29. That report concluded that Nguyen was competent to stand trial. CP 29-30.

In her report, Dr. Frantz described her own interactions with Nguyen during an interview at the King County Jail (Maleng Regional Justice Center) on March 19, 2015.<sup>4</sup> CP 26, 30-31. Defense trial counsel was present during the entire interview. CP 26. Dr. Frantz noted that Nguyen did not display or report symptoms of a mood or thought disorder. CP 32-33. Dr. Frantz stated that Nguyen's intellectual functioning appeared to be "in the below average to low average range." CP 31. Nguyen performed adequately on memory testing, including regarding prior charges

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<sup>4</sup> The interview was conducted with the assistance of a Vietnamese interpreter. CP 30.

and court proceedings. CP 31-32. He denied he could recall any factual or legal information related to his current charge, but Dr. Frantz observed that this contradicted Nguyen's performance during the rest of the evaluation and concluded it was volitional. CP 31-33. Dr. Frantz concluded that Nguyen was competent to stand trial. CP 32-33.

On April 29, 2015, a competency hearing was held before the Honorable James Cayce. RP 22. Defense counsel stated that he had concerns regarding Nguyen's capacity to assist counsel. RP 27. The court observed, "It does appear that when Mr. Nguyen wants to cooperate, that he clearly is competent. But sometimes he chooses not to." RP 28. Defense counsel noted that there was "some indication of a history of head injury," and that the doctor did not have access to medical records relating to those injuries. RP 28. Counsel said his concern was a head injury that occurred after the prior competency evaluation. RP 28-29. Dr. Frantz's report reflects that Nguyen reported he received no medical treatment for the possible head injury that occurred after 2012 (Nguyen described being "jumped" and "hit in the head"). RP 28. Judge Cayce found Nguyen competent to proceed. CP 24; RP 29.

No other question about Nguyen's competency was raised prior to trial or at any time during trial. Nguyen is incorrect in asserting, "During Hung Van Nguyen's trial, defense counsel repeatedly told the court he had doubts about Nguyen's competency...." App. Br. at 1. There are no citations to any such statements during the trial, just to statements made during these competency proceedings months earlier, and to a general statement made immediately before the sentence was imposed. See App. Br. at 13, citing RP 8 (hearing 2/11/15), RP 27-28 (hearing 4/29/15), and RP 696 (sentencing, 3/4/16). The trial occurred from November 30, 2015 to December 8, 2015. RP 43, 607. Thus, because the trial judge did not preside over any of the competency proceedings, he was not made aware of any competency concerns until the moment before he imposed the sentence. RP 696.

- b. The Competency Evaluation And Finding Of Competency In This Case Satisfied Due Process.

Constitutional due process dictates that an incompetent person may not be tried, convicted, or sentenced as long as that incapacity continues. U.S. CONST. AMEND. XIV; State v. Wicklund,

96 Wn.2d 798, 800, 638 P.2d 1241 (1982). Washington has a statutory guarantee that “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050. “Incompetency’ means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(15); State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). A defendant who refuses to cooperate with defense counsel is not for that reason incompetent to stand trial, although the ability to assist counsel is one component of competency. State v. Hicks, 41 Wn. App. 303, 309, 704 P.2d 1206 (1985).

RCW Chapter 10.77 sets out procedures for determination of competency, if competency is in question. As long as the defendant maintains a challenge to competency, the procedures in that chapter are mandatory to satisfy due process. State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009). Due process is satisfied if the court complies with the procedures in that chapter. State v. Coley, 180 Wn.2d 543, 559, 326 P.3d 702 (2014). The trial judge here followed the provisions of chapter 10.77 RCW, so due process was not violated. Id.

RCW 10.77.060 provides that if a court finds there is a reason to doubt a defendant's competency, the court shall have the defendant evaluated by a professional who will report on the defendant's mental condition. RCW 10.77.060(1)(a).<sup>5</sup> The trial court did order such an evaluation. After receiving a report from the evaluator as required by RCW 10.77.065, the court determined that Nguyen was competent.

The person challenging competency has the burden of disproving competency. Coley, 180 Wn.2d at 554-57. The Supreme Court recently concluded that this allocation of the burden of proof satisfies constitutional due process. Id. at 557-59. Nguyen does not claim that he sustained that burden.

Nguyen claims that the trial court violated the procedures set out in RCW Chapter 10.77 by failing to give adequate weight to the opinion of defense counsel, who expressed reservations about Nguyen's competency at the competency hearing. However, he cites no provision of RCW Chapter 10.77 that requires any

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<sup>5</sup> In pertinent part, RCW 10.77.060(1)(a) provides:

Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.

particular weight to be given to defense counsel's opinion. Thus, he has not established any violation of the statutorily mandated procedure, and due process was satisfied.

Nguyen does cite cases that require considerable weight be given to the opinion of defense counsel who expresses a reason to doubt a defendant's competency. App. Br. at 12-13 (citing State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991); City of Seattle v. Gordon, 39 Wn. App. 437, 441-42, 693 P.2d 741 (1985)). Courts have often noted the clear relevance of the observations of defense counsel regarding competency, but counsel's opinions are not controlling or insulated from careful examination. E.g., Hicks, 41 Wn. App. at 307. It is not a rule of law, and certainly not a requirement of due process, that a fact-finder must accept vague assertions or accept statements outweighed by other evidence.

The court in the case at bar did give weight to defense counsel's opinion when it ordered an evaluation of competency. RP 7-9. Once it received the evaluator's report, it listened to defense counsel's reservation, but found the report persuasive. CP 24; RP 29. That conclusion is unsurprising, since defense counsel cited no particular deficiency, stating only that he had concerns about Nguyen's ability to assist counsel and noting that the

psychologist did not have access to medical records relating to an alleged head injury, where Nguyen reported he received no medical care after that injury. RP 27-29. The current evaluator also cited and summarized a 2012 forensic evaluation, in which another psychologist had opined that Nguyen was competent. CP 29-30.

The trial court has wide discretion in judging the mental competency of a defendant to stand trial and its decision will not be reversed unless it has abused its discretion. Coley, 180 Wn.2d at 551; Ortiz, 104 Wn.2d at 482. An expert opinion that a defendant is competent forms a tenable basis for a trial court conclusion that the defendant is competent. State v. Lawrence, 166 Wn. App. 378, 389, 271 P.3d 280 (2012). Nguyen has not alleged or established that the finding was an abuse of discretion.

Once a competency determination is made, the court is not required to revisit competency unless “new information presented has altered the status quo ante.” State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992). There was no new information provided to the trial court – no one raised any question about competence during trial. The first time the issue was raised to the trial judge was at the end of the sentencing hearing, just before sentence was imposed. RP 696. At that point, defense counsel

said simply that he “had significant concerns regarding” Nguyen’s competence. RP 696. That statement provided no new information that would require the court to revisit the competency issue.

Nguyen has not claimed a violation of his substantive due process rights. There is no evidence before this Court that he was tried, convicted, or sentenced while not competent.

If this Court concludes that the trial court should have ordered a second competency evaluation based on defense counsel’s reservations, the remedy would be to remand for a determination of competency. If Nguyen was competent, the convictions should be affirmed. State v. P.E.T., 174 Wn. App. 590, 605, 300 P.3d 456, 463 (2013), *review granted, cause remanded on other grounds sub nom. State v. Tate*, 181 Wn.2d 1007 (2014). Such a retrospective determination may be conducted if a meaningful hearing on the issue of the competency of the defendant at the prior proceedings is possible. Id.; see also United States v. Johns, 728 F.2d 953, 957-58 (7th Cir. 1984) (listing cases). In this case, because Nguyen had been evaluated by an expert shortly before trial, and because the reservations of defense counsel do not relate to a mood disorder that would vary over time, a meaningful hearing on the issue is possible.

**2. THE 2012 ASSAULT CONVICTION WAS SUFFICIENTLY PROVEN; IT WAS NOT CONSTITUTIONALLY INVALID ON ITS FACE.**

Nguyen claims that his 2012 conviction<sup>6</sup> for assault in the second degree is constitutionally invalid on its face because the factual statement in the guilty plea form was insufficient. As a result, he claims, the trial court improperly relied on that conviction as a prior most serious offense, a predicate for his persistent offender sentence. This argument fails for two reasons: first, an insufficient factual statement in a guilty plea form does not render a conviction constitutionally invalid on its face;<sup>7</sup> second, as the trial court found, the factual statement in the guilty plea form was sufficient.

Under RCW 9.94A.570, a persistent offender shall be sentenced to life in prison without the possibility of release. A persistent offender is one who has been convicted of a most serious offense and has two prior felony convictions on separate occasions that are also most serious offenses, and at least one of

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<sup>6</sup> Nguyen refers to this conviction in his brief as a 2011 conviction. While the crime occurred in 2011, the guilty plea and sentence occurred in 2012. CP 119, 180. Thus, the conviction occurred in 2012. RCW 9.94A.030(9).

<sup>7</sup> The trial court did not address this point. However, this court may affirm the trial court on any basis supported by the record. State v. Michielli, 132 Wn. 2d 229, 242-43, 937 P.2d 587 (1997)

those previous convictions occurred before the commission of any of the other previous convictions for a most serious offense. RCW 9.94A.030(38)(a). Both of Nguyen's current convictions are most serious offenses: both because the specific crimes (first degree assault and second degree assault) are most serious offenses and because any felony with a deadly weapon verdict is a most serious offense. RCW 9.94A.030(33)(a), (b), (t); RCW 9A.36.011 (first degree assault is a Class A felony). Nguyen's two prior convictions for most serious offenses are a 1994 conviction for first degree burglary, and a 2012 conviction for second degree assault. CP 113, 119; RCW 9.94A.030(33)(a), (b); RCW 9A.52.020(2) (first degree burglary is a Class A felony).

The State is not required to prove the constitutional validity of prior convictions before they can be used at sentencing. State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719 (1986). This is because there are more appropriate methods for contesting the validity of prior convictions. Id. But a prior conviction that is unconstitutionally invalid on its face cannot be considered. Id. at 187–88. The term “on its face” includes the judgment and sentence and documents signed as part of a plea bargain. State v. Webb, 183 Wn. App. 242, 250, 333 P.3d 470 (2014). A conviction is

facially invalid if, based on those documents, it is clearly constitutionally invalid. Id. (citing Ammons, 105 Wn.2d at 188).

- a. There Is No Constitutional Requirement That A Factual Statement In A Guilty Plea Form Establish The Crime To Which The Defendant Pleads Guilty.

A guilty plea must be knowing, voluntary, and intelligent to be constitutionally valid. State v. Easterlin, 159 Wn.2d 203, 212–13, 149 P.3d 366 (2006).

Nguyen incorrectly states that it is a constitutional requirement that the conduct a defendant admits in a guilty plea form must constitute the offense to which the defendant has pled guilty. App. Br. at 16. The case upon which he relies for that proposition does not support it. That case was a direct attack on a conviction, in which the United States Supreme Court addressed the requirements set out in the federal rule relating to the procedure for taking a guilty plea, not a constitutional standard. McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). The Washington Supreme Court has explained that McCarthy held that the Constitution “does not require the establishment in all cases of a factual basis for a guilty plea.” In re Pers. Restraint of Hews, 108 Wn.2d 579, 592, 741 P.2d 983

(1987). The court in Hews did note that failure to establish a factual basis for a plea is likely to affect voluntariness because some information about the facts is necessary to determine whether the defendant understood the law in relation to the facts, and was able to appreciate the nature of the charge. Id.

Nguyen also suggests that the Washington Supreme Court has adopted a constitutional requirement that a defendant admit facts that constitute the offense, but the case on which he relies holds that the factual basis for a plea can be any reliable source in the record, not just the guilty plea form. In re Pers. Restraint of Keene, 95 Wn.2d 203, 210 n.2, 622 P.2d 350 (1981). The Court has approved reliance on a prosecutor's probable cause statement to provide the factual basis for a plea. State v. Osborne, 102 Wn.2d 87, 95-96, 684 P.2d 683 (1984).

The Supreme Court also has held that even the lack of the defendant's signature on a guilty plea form does not establish that the plea was involuntary. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Absent the defendant's signature on the plea form, the Court looked to the totality of the circumstances, including the transcript of the plea hearing, to determine that the guilty plea was voluntary. Id. at 642-44.

Nguyen asserts that the 2012 assault conviction was constitutionally invalid in its face because the plea documents do not demonstrate the guilty plea was knowing, intelligent, and voluntary. App. Br. at 18. The State is not required to prove the constitutional validity of the guilty plea, however, and the voluntariness of the plea cannot be determined based solely on the content of the guilty plea form. Because the face of the documents does not demonstrate constitutional invalidity, the trial court properly relied on this conviction as a prior most serious offense.

b. **The Factual Statement In The 2012 Plea Form Was Sufficient To Support The Guilty Plea To Second Degree Assault.**

Even if there were a constitutional mandate that the factual statement in a guilty plea form constitute the offense to which the defendant plead guilty, the trial court correctly concluded that the facts in the plea form here were sufficient.

Nguyen pled guilty to second degree assault by strangulation. CP 141. A person commits assault in the second degree when he or she "assaults another by strangulation or suffocation." RCW 9A.36.021(1)(g). "Strangulation' means to compress a person's neck, thereby obstructing the person's blood

flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." RCW 9A.04.110(26).

"Assault" is defined by the common law. State v. Smith, 159 Wn.2d 778, 781, 154 P.3d 873 (2007). The common law definitions appear in WPIC 35.50 and were recognized in Smith. Id.; Washington Pattern Jury Instructions, Criminal; 11 Wash. Prac. 35.50. Two of the three common law definitions of assault, commonly referred to as battery and attempted battery, are as follows:

An assault is an intentional touching, striking, cutting, or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting, or shooting is offensive, if the touching, striking, cutting, or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

Smith, 159 Wn.2d at 781-82; WPIC 35.50.

The statement in Nguyen's 2012 guilty plea established an assault by strangulation. Nguyen said, in relevant part, "I did intentionally assault my sister Huyen Dang when I put my hand on

her throat in attempt to strangle her. .... Strangle means to cut off ability to breathe by pressing on airway/ neck.” CP 189.

The trial court correctly concluded this statement was sufficient to establish assault by strangulation. CP 695. Nguyen said he tried to strangle his sister, which meets both the battery and attempted battery definitions of assault, and given the definition of strangulation as compression of the neck with intent to cut off the ability to breathe, these facts constitute assault in the second degree by strangulation.

**3. NGUYEN’S AGE (20 YEARS OLD) AT THE TIME OF HIS FIRST STRIKE DOES NOT RENDER THE LIFE SENTENCE IMPOSED FOR HIS THIRD STRIKE CRUEL AND UNUSUAL.**

Nguyen asserts that the life sentence imposed in this case amounts to cruel and unusual punishment because Nguyen was 20 years old when he committed his first strike offense and the sentencing court did not take his youth at the time of that crime into account in imposing sentence. This claim lacks merit because the constitutional rules adopted regarding sentencing defendants who were juveniles when they committed their crimes do not apply to

the sentencing of a recidivist who was 41 years old when he committed the crimes being sentenced.

The Washington Constitution prohibits cruel punishment, which is punishment disproportionate to the crime committed. WA Const. art. I, § 14; State v. Manussier, 129 Wn.2d 652, 676, 921 P.2d 473 (1996). Nguyen relies upon recent cases limiting sentences that may be imposed on defendants who were juveniles at the time they committed the current offense. E.g., Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (invalidating death penalty for crimes committed when under 18); Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407 (2012) (sentencing scheme that mandates life in prison without possibility of parole for a homicide offender who was under 18 at the time of the crime violates Eighth Amendment). These cases are not applicable to the case at bar, because Nguyen was sentenced for crimes that he committed when he was 41 years old.<sup>8</sup>

For purposes of the sentencing in this case, it is irrelevant what sentence would have been appropriate for the 1994 first degree burglary, or what sentence Nguyen received for that initial strike, as it is the fact of conviction, not the sentence imposed, that

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<sup>8</sup> Nguyen's birthdate is July 30, 1973. CP 107. These crimes occurred on December 12, 2014. CP 102.

is relevant to the current sentence. The Washington Supreme Court has recognized this distinction in upholding a constitutional challenge to a persistent offender sentence, quoting from a decision that upheld a life sentence under the former habitual criminal law: "The life sentence contained in RCW 9.92.090 is not cumulative punishment for prior crimes. The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime." State v. Thorne, 129 Wn.2d 736, 776, 921 P.2d 514 (1996) (quoting State v. Lee, 87 Wn.2d 932, 937, 558 P.2d 236 (1976)).

The constitutional rule adopted in Miller does not apply here, by its terms it applies only to defendants who were under 18 at the time of the crime being sentenced. Not only was Nguyen 41 years old at the time of these crimes, he committed the first degree burglary that is first strike offense on March 11, 1994, when he was 20 years old. CP 107, 113. Thus the constitutional limits on sentences imposed on juveniles are irrelevant.

Nguyen relies on the Washington Supreme Court's decision in State v. O'Dell, 183 Wn.2d 680, 359 P.3d 359 (2015), for the proposition that age is relevant to sentencing even for defendants who are over 18, but still relatively young. O'Dell recognized a

connection between youth and decreased moral culpability. 183 Wn.2d 680, 695, 358 P.3d 359 (2015). The court did not rely on constitutional analysis, however. It held that, in particular cases, youth can justify a sentence below the standard range if it diminished the defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. Id. at 696-97. Nevertheless, the court held that age is not a mitigating factor automatically entitling every youthful offender to an exceptional sentence – the sentencing court must exercise its discretion to decide when it is. Id. at 698-99. This analysis of the appropriate sentence for a youthful offender would be relevant to Nguyen's sentence for his 1994 crime (he was sentenced to 18 months for a first degree burglary)<sup>9</sup> but has no relevance to his culpability for the current crimes.

Nguyen's proposes a radical expansion of the State constitutional protection against cruel punishment: he asserts that the constitution includes a mandate that characteristics of the offender must be considered in making every sentencing decision. App. Br. at 25. This elimination of every mandatory sentencing provision is unwarranted and Nguyen has provided no support for

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<sup>9</sup> CP 113-15.

such a profound departure from the current state of the law. The Supreme Court has consistently rejected claims that the mandatory sentence imposed on persistent offenders violates the state or federal constitution. See State v. Witherspoon, 180 Wn.2d 875, 887-91, 329 P.3d 888 (2014); Manussier, 129 Wn.2d at 674-79; Thorne, 129 Wn.2d at 772-76; State v. Rivers, 129 Wn.2d 697, 712-15, 921 P.2d 495 (1996).

**4. THE PERSISTENT OFFENDER ACCOUNTABILITY ACT DOES NOT VIOLATE EQUAL PROTECTION.**

Nguyen challenges the validity of the Persistent Offender Accountability Act (POAA), RCW 9.94A.570, claiming that it violates the equal protection clause of the Fourteenth Amendment and article I, section 12 of the Washington Constitution. His argument as to the standard of review and his substantive claim both have repeatedly been rejected by appellate courts and should be rejected here.

The constitutional right to equal protection of the law requires that persons who are similarly situated with respect to the legitimate purpose of a law be similarly treated. U.S. Const. amend. XIV, § 1; Wa. Const. art. I, § 12; State v. Shawn P., 122

Wn.2d 553, 559-60, 859 P.2d 1220 (1993). A legislative classification is reviewed for a rational basis when the classification does not involve a suspect class or threaten a fundamental right. State v. Manussier, 129 Wn.2d 652, 673, 921 P.2d 473 (1996). The Supreme Court has held that when a physical liberty interest alone is involved, the deferential rational basis test applies. Id. It has applied the rational basis test in rejecting equal protection challenges to the POAA. Id.

Nguyen claims that a physical liberty interest alone is a fundamental right for purposes of equal protection analysis but cites no case that so holds. The two cases upon which he relies related to forced sterilization<sup>10</sup> and the scope of the liberty interest protected by due process.<sup>11</sup> This Court has been presented no reason to depart from the Supreme Court's holding that the rational basis test is appropriate here.

All three divisions of this court have specifically rejected Nguyen's core claim, that the POAA violates equal protection because the legislature failed to classify the persistent offender finding as an element, which would require that it be proved to a

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<sup>10</sup> Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942).

<sup>11</sup> Hamdi v. Rumsfeld, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004).

jury. State v. Salinas, 169 Wn. App. 210, 225–26, 279 P.3d 917 (2012); State v. Witherspoon, 171 Wn. App. 271, 286 P.3d 996 (2012), *aff'd on other grounds*, 180 Wn.2d 875 (2014); State v. Reyes-Brooks, 165 Wn. App. 193, 206–07, 267 P.3d 465 (2011), *review granted and remanded on other grounds*, 175 Wn.2d 1020 (2012); State v. McKague, 159 Wn. App. 489, 246 P.3d 558 (2011), *aff'd on other grounds*, 172 Wn.2d 802 (2011); State v. Langstead, 155 Wn. App. 448, 453–58, 228 P.3d 799 (2010); State v. Williams, 156 Wn. App. 482, 496–98, 234 P.3d 1174 (2010). In McKague, the Supreme Court took review of another issue and specifically noted that it would not review this issue, stating, “as we have repeatedly held, the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes.” 172 Wn.2d at 803 n. 1 (citing State v. Thieffault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 256–57, 111 P.3d 837 (2005); State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003)).

As have many other defendants in the cases cited above, Nguyen uses as a comparison crimes as to which proof of a prior conviction is an element that elevates a crime from a nonfelony to a felony offense. This Court has held repeatedly that “recidivists

whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense.” Salinas, 169 Wn. App. at 226 (quoting Langstead, 155 Wn. App. at 456-57).

Nguyen has not distinguished any of the many cases that reject the specific argument raised here. He has completely ignored them. App. Br. at 26-30. His equal protection argument should be rejected.

**D. CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm Nguyen's convictions and sentence.

DATED this 24<sup>th</sup> day of April, 2017.

Respectfully submitted,

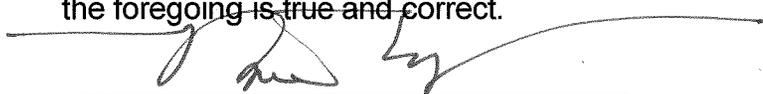
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

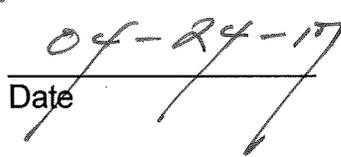
By:   
DONNA L. WISE, WSBA #13224  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Maureen M. Cyr, containing a copy of the Brief of Respondent in State v. Hung Van Nguyen, Cause No. 74962-5-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  
Done in Seattle, Washington

  
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Date