COURT OF APPEALS, STATE OF COLORADO Appeal from the District Court of Douglas County, Honorable Nancy Hopf, Judge District Court Case Number 05CR177 Court Address: 2 East 14th Avenue Denver, CO 80203	**COURT USE ONLY** 2008 SEP 10 P 2:01 COURT OF APPEALS
Plaintiff(s): PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee **Defendant(s): TRI NGUYEN** Defendant-Appellant	
Attorney or Party Without Attorney Patrick J. Mulligan 1900 Grant Street, Suite 580 Denver, Colorado 80203 Phone Number: (303) 860-8100 FAX Number: (303) 860-8018 E-mail: patrickmulligan@qwest.net Atty. Reg. #: 16981	Case Number: 07CA929 Division/Courtroom
REPLY BRIEF	

Defendant-Appellant Tri Nguyen, by and through his attorney Patrick J. Mulligan, and in response to the arguments of the State in its Answer Brief, hereby submits the Reply Brief in this case.

The State argues that the trial court correctly excluded evidence of the second driver's horrible driving record. In support of this argument, the State asserts that such evidence was not relevant, and that such evidence was offered only to show that the second driver was a "bad driver." Answer

Brief, p.7. The State's argument misses the fundamental purpose of the evidence.

As noted in the Opening Brief, Mr. Nguyen was charged with both vehicular assault and vehicular homicide. The two charges arose from a single accident, but there were actually two collisions. The first collision was between Mr. Nguyen and Mr. Pott.

At the time of the first collision, Mr. Pott was driving with an illegal drug in his system. Pott tested positive for THC, the active ingredient in marijuana, some hours after the accident. By contrast, Mr. Nguyen tested negative for any and all drugs and alcohol.

By his own admission, Mr. Pott was driving in excess of 70 miles per hour. His car and the car being driven by Mr. Nguyen struck as Mr. Nguyen attempted to change lanes, and Mr. Pott's car then careened across the median, into the oncoming car of Mr. Combest, who was killed in the accident.

It was Mr. Nguyen's theory of defense that the first collision was caused by Mr. Pott. To that end, the defense sought and was permitted to introduce evidence that Pott tested positive for THC. In addition, however, the defense sought to introduce evidence of Pott's terrible driving record, in

support of its theory that Pott caused the accident. The exclusion of this evidence was reversible error.

Both the trial court and the State, on appeal, argue that Mr. Pott's history of driving under the influence, driving recklessly, and driving in excess of the speed limit is excludable as irrelevant "bad character" evidence. This argument is wrong, and completely misses the point.

If the charge against Mr. Nguyen were third degree assault, based upon a fight with Mr. Pott, evidence of Pott's terrible driving record would likely be irrelevant. Similarly, if Mr. Nguyen were accused of stealing something from Mr. Pott, Pott's driving record would probably be irrelevant. In this case, however, Pott's driving history was, and should have been, front and center. It was the specific theory of defense that Pott, and not Mr. Nguyen, caused the accident. Pott's history of drunken and aggressive driving was thus admissible for a "precise evidential hypothesis," as required by *People v. Spoto 795 P.2d 1314 (Colo. 1990).*

Further, the proffered evidence satisfies every other requirement for admission. Evidence of Pott's horrific driving record clearly made an issue in question, i.e. whether Pott caused the accident, more likely than not. In addition, the probative value of Pott's history of drunken and reckless driving far outweighed any prejudicial impact from its admission. Pott was

not charged with a crime, and as a witness faced no prejudice from the admission of the evidence. The State could have argued to the jury, as it did to the court, that the prior history of Pott's driving was of little significance to the accident. In other words, no party would have been prejudiced by the admission of the relevant and admissible evidence.

By contrast, the exclusion of the evidence worked a substantial and indeed irreparable prejudice to Mr. Nguyen. The Defendant's entire theory of defense was that Mr. Pott's bad driving caused the initial collision, and therefore caused the entire accident. The evidence at issue was critically important evidence in support of the defense theory. The exclusion of this evidence violated Mr. Nguyen's constitutional rights to present a defense, and his convictions must therefore be reversed. *U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 25. U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 25; Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct., 989, 94 L.Ed. 2d 40 (1987); Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 18 L.Ed.2d 330 (1972); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); People v. Bueno, 626 P.2d 1167 (Colo. App. 1981).*

The evidence at issue was admissible for another purpose. When Timothy Pott testified as to his recollection of the accident, Mr. Nguyen had

a fundamental constitutional right to confront and cross-examine him. As part of that right, Mr. Nguyen had a right to impeach the credibility of Pott. Especially when Pott denied, during defense counsel's cross-examination, that he had been involved in any traffic accidents, the door to confront Pott with his lengthy and significant driving history had been opened.

The State argues that Mr. Nguyen's right to confrontation was not violated because the evidence in question was not admissible under Rules 404 or 405. See, Answer Brief, p7. The State is wrong on two levels. First, the question of whether the evidence should have been permitted as part of the normal process of impeachment, during cross-examination, does not hinge upon whether the evidence is also admissible pursuant to a specific rule of evidence. By contrast, if the evidence is admissible for impeachment purposes, the Defendant need not show any specific rule of evidence to support admissibility. The exclusion of the evidence in this case violated Mr. Nguyen's right to confront and cross-examine the key witness against him, and requires that his conviction be reversed. *See, Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L.Ed.2d 523 (1988); People v. Merritt, 842 P.2d 162, 166 (Colo. 1992); People v. Bowman, 669 P.2d 1369 (Colo. 1983); People v. Owens, ___ P.3d ___ , 2007 WL 1438674 (Colo. App.);*

People v. Golden, 140 P.3d 1 (Colo. App. 2005); State v. Colton, 227 Conn. 231, 630 A.2d 577 (1993); Rankin v. State, 41 S.W.3d 335 (Tex.App.2001).

Second, as detailed in the Opening Brief, the evidence of Mr. Pott's driving history was admissible pursuant to the rules of evidence. The evidence was logically and legally relevant. CRE 401. The probative value of the evidence far outweighed any prejudice to any party. CRE 403. The evidence was admissible to show the plan, pattern and modus operandi of Mr. Pott to drive too quickly, recklessly, and under the influence. In addition, the Defendant articulated a precise evidentiary hypothesis for the admission of the evidence, as contemplated by Rule 404 (b). Finally, the evidence was admissible both to establish habit, and to show a relevant character trait of the witness, as required under Rules 405 and 406. CRE 405, 406. Under these circumstances, the exclusion of this critical defense evidence resulted in a violation of Mr. Nguyen's constitutional rights to due process, confrontation, and to present a defense, and requires that his conviction be reversed.

With respect to the trial court's refusal to instruct the jury on the intervening cause, the State again misapprehends the critical nature of the

instruction. Citing to the trial court's ruling, the State argues that the defense was required to introduce evidence of some sort of duty to repair the fence or median. Answer Brief, p9. In fact, there is no such requirement. By contrast, the evidence introduced through the prosecution's own witness, indicated that the purpose of the fence was to prevent exactly the type of accident that occurred in this case, and that the fence failed to perform as designed and as expected. Even the State Trooper agreed that the failure of the cable barrier contributed to the second and more serious accident in this case. Given the severity of the accident, the negligence at issue was clearly "gross," and thus not foreseeable. Phrased differently, how was Mr. Nguyen, or for that matter Mr. Pott, to know that the state would fail to maintain its highway equipment in such a severe and obvious way?

Even if it were established that Mr. Nguyen caused the first of the two collisions in this case, a point he does not concede, the second collision should never have happened. Mr. Nguyen did not participate in the failure of the median barrier, but for the failure the death in this case would not have occurred, and the failure of the barrier was not foreseeable. *People v. Lopez, 97 P.3d 277 (Colo. App. 2004).* Under these circumstances, the trial court's refusal to instruct the jury on the failure of the median as an intervening cause was reversible error.

CONCLUSION

For the reasons and authorities set forth in Arguments I and II in the Opening Brief, the convictions in this case should be reversed, and this case remanded to the district court for a new trial. For the reasons and authorities set forth in Argument III in the Opening Brief, and conceded by the State in its Answer Brief, the mittimus should be corrected to reflect the merger of the convictions. For the reasons and authorities set forth in Argument IV of the Opening Brief, the conviction for vehicular homicide should be reversed and vacated.

Patrick J. Mulligan No. 16981
1900 Grant Street, Suite 580
Denver, Colorado 80203
(303) 860-8100

CERTIFICATE OF MAILING

I hereby certify that on 9/9/08, I mailed a copy of the foregoing Reply Brief to the Office of the Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO, 80203.