

**NO. 49244-0-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**CHARLES S. LONGSHORE, III,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## *ASSIGNMENT OF ERROR*

### *Assignment of Error*

1. The trial court erred when it failed to enter findings of fact and conclusions of law after denying the defendant's motion for dismissal under CrR 8.3(b).

2. The trial court erred when it failed to grant defendant's motion to dismiss under CrR 8.3(b) because the defendant demonstrated that (1) the police and prosecution intentionally violated his attorney-client privilege, and (2) that violation caused prejudice.

3. Should the state prevail on appeal this court should exercise its discretion and refuse to impose costs because the defendant does not have the present or future ability to pay.

*Issues Pertaining to Assignment of Error*

1. Does a trial court err if it fails to enter written findings of fact and conclusions of law after denying that defendant's motion for dismissal under CrR 8.3(b), when that failure precludes effective appellate review?

2. Does a trial court err if it denies a motion to dismiss under CrR 8.3(b) when a defendant demonstrates that (1) the police and prosecution intentionally violated the defendant's right under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment to confidential attorney-client communication, and (2) that the violation caused prejudice?

3. If the state prevails on appeal should costs be imposed when a defendant has neither the present nor future ability to pay?

## STATEMENT OF THE CASE

By information filed May 30, 2012, the Mason County Prosecutor charged the defendant with two counts of aggravated first degree murder. CP 271-272. Following a trial on the matter a jury found the defendant guilty on both counts. CP 256. The court later sentenced the defendant to two terms of life in prison without the possibility of release. CP 256-266. The defendant thereafter filed a direct appeal arguing in part that the trial court erred when it gave an accomplice instruction over the defendant's objection. *See State v. Longshore*, 197 Wn.App. 1019 (2016), *as amended on denial of reconsideration* (Mar. 14, 2017). By unpublished opinion this court agreed, vacated the defendant's convictions and ordered a new trial. *Id.* Both parties subsequently filed timely Petitions for Review which are pending before the Washington Supreme Court. *Id.*

During the pendency of the direct appeal in the underlying case the defendant filed a *pro se* Motion for Review from Judgment under CrR 8.3, along with his own supporting affirmation with various documents attached and with the supporting affirmation of his trial attorney. CP 234, 228-233, 224-227, 222-223, 93-110<sup>1</sup>. The essence of the defendant's factual and legal

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<sup>1</sup>The Mason County Clerk numbers and transmits clerk's papers in reverse chronological order. Thus, while the first document noted here has the highest page number (CP 234), it refers to the oldest document in the list.

claims were as follows: (1) that prior to trial he was transferred from the Mason County Jail to the custody of the Department of Corrections, (2) that as part of his transfer he was forced to leave a large bag of documents at the Mason County Jail, (3) that as part of the investigation in this case a Mason County Deputy searched that bag, read and copied all of the documents, and then provided copies to the Mason County Prosecutor, who then read all of the documents, (4) that one of the documents the Deputy and the Prosecutor read was entitled “Questions to Ask Attorney,” and was immediately recognizable as an attorney-client communication, (5) that the documents entitled “Questions to Ask Attorney” included details of trial strategy, (6) that the prosecutor knew that he was violating attorney-client privilege when he read the document, and (7) that the state’s review and use of this document caused prejudice and denied the defendant a fair trial. *Id.*; RP 26-75, 112-124<sup>2</sup>.

In its response to the defendant’s motion the state did not argue that it had not seen or read the document. CP 111-220; RP 75-112 In fact, as part of the normal discovery process in this case the state had provided the defendant with copies of all the documents the Deputy had taken from the

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<sup>2</sup>The record on appeal includes one continuously number volume of verbatim reports of the hearing held on 11/17/15, 3/29/16, 4/19/16, 7/1/16 and 9/27/16. They are referred to herein as “RP [page #].”

defendant's bag at the jail, including the document entitled "Questions to Ask Attorney." *Id.* Rather, the state argued that (1) the document included "Questions to Ask Attorney" was not privileged because it was included as part of a letter to a co-defendant with whom the defendant under jail rule and court order was prohibited from contacting, and (2) that even if the document fell within the attorney-client privilege, the defendant had failed to prove that the state's review of the documents caused him any prejudice, as he was required to prove under CrR 8.3. RP 75-112.

Following a hearing in this case during which the court heard argument from both parties, the trial court orally denied the motion. RP 131-137. The court later entered the following written order on its ruling denying the motion:

IT IS HEREBY ORDERED: That the defendant's Motion to Dismiss, filed on March 14, 2016, is hereby denied. Findings to be presented later.

CP 21.

As far as counsel can determine, the state has never prepared or presented any findings from this motion. Following entry of the written order the defendant filed timely notice of appeal. CP 19.

## ARGUMENT

### **I. THE TRIAL COURT ERRED WHEN IT FAILED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER DENYING THE DEFENDANT'S MOTION FOR DISMISSAL UNDER CrR 8.3(b).**

In the case at bar the defendant brought a motion under CrR 8.3(b) to vacate his convictions and dismiss the charges against him. Subsection (b) of the rule states:

**(b) On Motion of Court.** The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b).

Following argument the court orally denied the motion and later signed the following written order:

IT IS HEREBY ORDERED: That the defendant's Motion to Dismiss, filed on March 14, 2016, is hereby denied. Findings to be presented later.

CP 21.

Although the court specifically called for the preparation and filing of written findings of fact and conclusions of law, the state apparently did not comply with the court's order. As the following explains, this failure was error and requires remand of this case for entry of those findings.

The purpose for written findings following a motion or bench trial is

to allow an appellate court to determine the basis upon which the case was decided and to review the factual and legal issues raised on appeal. *State v. Pena*, 65 Wn.App. 711, 829 P .2d 256 (1992), *overruled on other grounds*, *State v. Alvarez*, 128 Wn.2d 1, 18-19, 904 P .2d 754 (1995). In these cases, the findings of fact and conclusions of law explain the trial court's resolution of the material issues of fact as well as the trial court's view on how the law applies to those facts in either granting or denying the motion at issue, including the trial court's conclusion on the legal standards applicable to the determination of the facts and the law. *State v. Jones*, 34 Wn.App. 848, 851, 664 P .2d 12 (1983).

While many types of motions and trials do require the trial court to enter written findings and conclusions, CrR 8.3(b) does not expressly mandate the entry of findings and conclusions. However, it does require the trial court to state the reasoning behind its decision in a written order. *State v. Wilson*, 108 Wn.App. 774, 31 P .3d 43 (2001). The reasoning behind the requirement of a written order lies in the rule that a trial court's oral statements are "no more than a verbal expression of informal opinion at that time" which are later "subject to further study and consideration, and may be altered, modified, or completely abandoned." *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P .2d 587 (1997).

For example, in *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587

(1997), our state Supreme Court considered the propriety of a trial court's order dismissing several charges pursuant to CrR 8.3(b). In addressing the lower court's order, the Supreme Court noted that its "review of the trial court's order in this case is hampered by the trial court's failure to set forth in its written order detailed reasons for dismissing the amended charges." The court then noted that "some of the reasons cited by the trial court in its oral opinion may not have been sufficient grounds for dismissal under CrR 8.3(b)[.]" *State v. Michielli*, 132 Wn.2d at 242. In spite of these deficiencies, the majority did affirm the dismissal upon its conclusion that a "review of the pleadings and the record before the court shows Defendant successfully supported his CrR 8.3(b) claim." *Michielli*, 132 Wn.2d at 243.

By contrast, the dissent would not have upheld the trial court's dismissal order based on an independent review of the record, in the absence of written findings entered by the trial court. On this point the dissent concluded that "While I would not be offended by a remand to the trial court for findings on the CrR 8.3(b) motion, I strongly oppose affirming a dismissal under that rule on the record we have before us." *Michielli*, 132 Wn.2d at 247 (Alexander, J., dissenting).

In analogous circumstances to those in *Michielli* as well as the circumstances in the case at bar, our State Supreme Court has held the appropriate remedy is to remand for entry of findings and conclusions

consistent with the rule requiring them. *See e.g. State v. Head*, 136 Wn.2d 619, 621, 964 P.2d 1187 (1998) (remanding for entry of findings of fact and conclusions of law under CrR 6.1(d)); *State v. Smith*, 68 Wn. App. 201, 211, 842 P.2d 494 (1992) (noting that failure to comply with CrR 3.6's finding requirement results in "an enormous waste of time and energy by defense counsel and this court"). In the same matter this court should remand this case to the trial court for entry of findings of fact and conclusions of law.

**II. THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S MOTION TO DISMISS UNDER CrR 8.3(b) BECAUSE THE DEFENDANT DEMONSTRATED THAT (1) THE POLICE AND PROSECUTION INTENTIONALLY VIOLATED HIS ATTORNEY-CLIENT PRIVILEGE, AND (2) THAT VIOLATION CAUSED PREJUDICE.**

Under CrR 8.3(b), the trial court has authority to dismiss a criminal prosecution upon a showing of arbitrary action or governmental misconduct. *State v. Brooks*, 149 Wn.App. 373, 203 P.3d 397 (2009). In order to qualify for relief under this measure, the governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is enough. *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). However, the defendant must show that such action prejudiced his right to a fair trial. *State v. Michielli*, *supra*. As the court notes in *Michielli*, "[s]uch prejudice includes the right to a speedy trial and the 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.'"

*Michielli*, 132 Wn.2d at 240 (quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). Dismissal under CrR 8.3 is an extraordinary remedy which the trial court should use only as a last resort. *State v. Wilson*, *supra*.

For example, in *State v. Michielli*, *supra*, the defendant was charged with two counts of second degree theft under a probable cause statement that alleged that he had stolen a rifle, a fish-finder, and a scanner out of a house in which he was staying. According to the probable cause statement, the defendant later pawned all three items, two at one pawn shop and the third at another. Three days before trial and without prior notice to the defense, the court allowed the state to amend the information to charge a third count of theft (for the third item), and three counts of trafficking in stolen property (for pawning the three items).

The defense later moved to dismiss the added charges, arguing in part that it was unprepared to respond to them, thus putting the defendant in the unfair position of either having to give up his right to speedy trial or give up his right to effective assistance of counsel. The trial court granted the motion, and the state appealed the dismissal of the amended charges. Following argument, the Court of Appeals reinstated the third theft charge, but affirmed the dismissal of the three trafficking charges on a separate legal theory. The state then obtained review before the Supreme Court.

Ultimately, the Supreme Court affirmed the decision of the Court of

Appeals that the trial court properly dismissed the three trafficking charges. However, it did so on the basis that the dismissal was proper under CrR 8.3(b), which allows the trial court to dismiss a charge “on its own motion in the furtherance of justice.” In its analysis, the court noted that for a dismissal to be proper under CrR 8.3(b), the defense must prove (1) government misconduct that (2) causes prejudice to the defendant’s case. As to the second criteria, the court held:

The state, by adding four new charges just before the scheduled trial date, without any justification for the delay in amending the information, forced Mr. Michielli either to go to trial unprepared, or give up his speedy trial right. *See also State v. Sulgrove*, 19 Wn.App. 860, 578 P.2d 74 (1978) (charge dismissed under CrR 8.3(b) after the State charged the wrong crime, amended to correct it the day before trial after defense motioned for dismissal, and then failed to produce necessary evidence to support the correct charge on the day of trial).

*State v. Michielli*, 132 Wn.2d at 245.

Loss of the right to speedy trial or effective assistance of counsel are not the only bases for dismissal of a case under CrR 8.3. *Id.* In the case at bar, the defendant argues that the trial court should have dismissed under CrR 8.3 because the police seizure of and the police and prosecutor’s review of a document that obviously constituted a privileged communication between the defendant and his attorney not only violated the attorney-client privilege under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, but it also caused prejudice. At a minimum

the document revealed the defendant's decision to go to trial under all circumstances and thus spurred a decision by the state to enter deals with the co-defendants to testify against the defendant as the privileged document made it clear that the defendant would not enter any type of deal with the prosecution. Given this prejudice, the trial court in this case erred when it refused to grant the defendant's motion, vacate his convictions and dismiss the charges under CrR 8.3(b).

**III. THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO IMPOSE COSTS SHOULD THE STATE PREVAIL ON APPEAL BECAUSE THE DEFENDANT DOES NOT HAVE THE PRESENT OR FUTURE ABILITY TO PAY LEGAL-FINANCIAL OBLIGATIONS.**

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra*. In the case at bar the trial court found the defendant indigent and entitled to the appointment of counsel at the original trial and for the purposes of this appeal. CP 236-238, 7-8. In the same matter this Court should exercise its discretion and disallow appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a “commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2. In *State v. Nolan, supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word “will” in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

*State v. Nolan*, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: “[t]he court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added). In *State v. Sinclair, supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v.*

*Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing “cannot displace the court’s obligation to exercise discretion when properly requested to do so.” *Supra*.

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant’s ability to pay, as remand to the trial court not only “delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties.” *State v. Sinclair*, 192 Wn. App. at 388. Thus, “it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” *State v. Sinclair*, 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra*. The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v.*

*Blazina, supra*). As the court notes in *Sinclair*, “[i]t is entirely appropriate for an appellate court to be mindful of these concerns.” *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis*, to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was “unable by reason of poverty to pay for any of the expenses of appellate review” and that the defendant “cannot contribute anything toward the costs of appellate review.” *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant’s indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. In fact, the defendant’s affirmation given in support of his Motion for Order of Indigency reveals that he has no money or assets and that he is currently serving two sentences of life without the possibility of release. CP 256-266. Although this court has ordered a new trial in the underlying appeal, that decision is not yet final as both parties filed competing Petitions for Review. *See* Petitions for Review. Given these facts it is unrealistic to think that the defendant will be able to pay appellate costs. Thus, this court

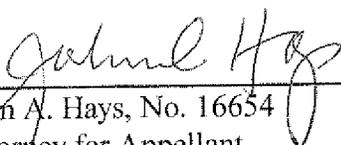
should exercise its discretion and order no costs on appeal should the state substantially prevail.

## CONCLUSION

The trial court erred when it failed to enter written findings of fact following its ruling denying the defendant's motion to dismiss under CrR 8.3(b) because the defendant demonstrated that the prosecution's improper conduct denied him a fair trial. As a result this court should vacate the defendant's conviction and remand with instructions to grant the defendant's motion to dismiss. In the alternative, this court should remand the motion back to the trial for entry of findings of fact and conclusions of law on the defendant's motion. Finally, should the state substantially prevail, this court should exercise its discretion and decline any invitation by the state to impose costs on appeal.

DATED this 4<sup>th</sup> day of May, 2017.

Respectfully submitted,

  
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John A. Hays, No. 16654  
Attorney for Appellant

## **APPENDIX**

### **CrR 8.3 DISMISSAL**

(a) On Motion of Prosecution. The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information or complaint.

(b) On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

(c) On Motion of Defendant for Pretrial Dismissal. The defendant may, prior to trial, move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged.

(1) The defendant's motion shall be in writing and supported by an affidavit or declaration alleging that there are no material disputed facts and setting out the agreed facts, or by a stipulation to facts by both parties. The stipulation, affidavit or declaration may attach and incorporate police reports, witness statements or other material to be considered by the court when deciding the motion to dismiss. Any attached reports shall be redacted if required under the relevant court rules and statutes.

(2) The prosecuting attorney may submit affidavits or declarations in opposition to defendant's supporting affidavits or declarations. The affidavits or declarations may attach and incorporate police reports, witness statements or other material to be considered by the court when deciding defendant's motion to dismiss. Any attached reports shall be redacted if required under the relevant court rules and statutes.

(3) The court shall grant the motion if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. In determining defendant's motion, the court shall view all evidence in the light most favorable to the prosecuting attorney and the court shall make all reasonable inferences in the light most favorable to the prosecuting attorney. The court may not weigh conflicting statements and base its decision on the statement it finds the most credible. The court shall not dismiss a sentence

enhancement or aggravating circumstance unless the underlying charge is subject to dismissal under this section. A decision denying a motion to dismiss under this rule is not subject to appeal under RAP 2.2. A defendant may renew the motion to dismiss if the trial court subsequently rules that some or all of the prosecuting attorney's evidence is inadmissible.

(4) If the defendant's motion to dismiss is granted, the court shall enter a written order setting forth the evidence relied upon and conclusions of law. The granting of defendant's motion to dismiss shall be without prejudice.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**COURT OF APPEALS OF WASHINGTON, DIVISION II**

**STATE OF WASHINGTON,  
Respondent,**

**NO. 49244-0-II**

**vs.**

**AFFIRMATION  
OF SERVICE**

**CHARLES S. LONGSHORE, III,  
Appellant.**

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The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 4<sup>th</sup> day of May, 2017, at Longview, WA.

  
\_\_\_\_\_  
Donna Baker

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