

NO. 49633-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LUCIANO MOLINA RIOS,
Appellant.

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

The Honorable Robert Lewis, Judge

BRIEF OF APPELLANT

Skylar T. Brett
Attorney for Appellant

Law Offices of Lise Ellner
P.O. Box 2711
Vashon, WA 98070
(206) 494-0098
skylarbrettlawoffice@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Molina Rios's conviction for Count I was entered in violation of his Fourteenth Amendment right to due process
2. The state presented insufficient evidence to convict Mr. Molina Rios of Count I.
3. No rational jury could have found Mr. Molina Rios guilty of Count I beyond a reasonable doubt.

ISSUE 1: A conviction must be reversed for insufficient evidence if no rational jury could have found each element proved beyond a reasonable doubt. Did the state present insufficient evidence to convict Mr. Molina Rios of possession of the heroin found in someone else's purse in someone else's car when there was no evidence that he had ever been in that car, ever had control over the purse, or coordinated or aided the owner of the purse in any way?

4. The firearm enhancement for Counts II and III were entered in violation of Mr. Molina Rios's Fourteenth Amendment right to due process
5. The state presented insufficient evidence to impose the firearm enhancements for Count II.
6. The state presented insufficient evidence to impose the firearm enhancements for Count III.
7. No rational jury could have found beyond a reasonable doubt that Mr. Molina Rios was armed during his alleged possession of the drugs found in the apartment.

ISSUE 2: Constructive possession of a gun is insufficient to demonstrate that a person is "armed" for purposes of a firearm sentencing enhancement. Did the state fail to prove that Mr. Molina Rios was "armed" to justify the enhancement for Counts II and III when the evidence showed only that the guns and drugs were found in the same room, without any indication that Mr. Molina Rios had ever been in the same place as the guns and drugs at the same time?

8. RCW 9.41.171 violates the Fourteenth Amendment's guarantee of Equal Protection by providing for disparate treatment on the basis of national origin.
9. RCW 9.41.175 violates the Fourteenth Amendment's guarantee of Equal Protection by providing for disparate treatment on the basis of national origin.
10. Mr. Molina Rios's conviction under RCW 9.41.171 and RCW 9.41.175 must be vacated because the statutory scheme is unconstitutional in violation of Equal Protection.

ISSUE 3: The constitutional guarantee of equal protection prohibits disparate treatment on the basis of national origin. Must Mr. Molina Rios's conviction under RCW 9.41.171 and RCW 9.41.175 be vacated when those statutes (together criminalizing alien in possession of a firearm) give special privileges to Canadian citizens and make prosecution and conviction more difficult for Canadians than for citizens of other countries?

11. The Court of Appeals should decline to impose appellate costs if Respondent substantially prevails on appeal and requests such costs.

ISSUE 4: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Molina Rios is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The police claimed that Luciano Molina Rios had sold drugs to a confidential informant (CI) in Vancouver, WA. RP 76-77. To avoid revealing the identity of the CI or the details of his/her agreement with the police, however, the state never charged Mr. Molina Rios with those alleged deliveries. RP 42; CP 57-61.

Instead, based on the undisclosed CI's tip that Mr. Molina Rios was going to the Seattle area to replenish his drug supply, the police followed him as he drove north on I-5. RP 79-81. Once Mr. Molina Rios got to the Everett area, he stopped at a train station parking lot for a few minutes. RP 131, 187. Then he drove to a strip mall where he met two friends, Luciano Trujeque-Magana and Juana Santiago-Santos, for a meal at an IHOP restaurant. RP 132-33.

After they ate, Mr. Molina Rios and Trujeque-Magana hung out in the IHOP parking lot for a while. RP 134-36. They looked at their phones in Mr. Molina Rios's car. RP 136. At some point, they both looked at something in or on top of the center console of the car for a few minutes. RP 136.

Ms. Santiago-Santos napped in the car in which she and Trujeque-Magana had arrived— a white Honda – while the two men spent time together. RP 548, 590.

The trio next went to the mall in their separate cars.¹ RP 553. Inside, they window-shopped and ate at the food court. RP 143, 619. After a couple of hours, Mr. Molina Rios got back in his car and Trujeque-Magana and Ms. Santiago-Santos got back into their white Honda. RP 144.

The surveilling officers lost the two cars shortly after they left the mall parking lot. RP 144. They did not find them again until two to three hours later. RP 144.

The police found the cars again as they drove south toward Vancouver, WA on I-5. RP 144. The officers stopped both Mr. Molina-Rios's car and the white Honda that Trujeque-Magana was driving with Ms. Santiago-Santos as a passenger. RP 238. The officers asked if they could search the Honda and Trujeque-Magana said yes. RP 244.

When Ms. Santiago-Santos got out of the car for the search, she brought a purse with her and set it down on the ground. RP 246. The officers asked if they could search the purse and she said yes. RP 248.

¹ One of the surveilling officers said that the two cars stopped at a Safeway parking lot before going to the mall. RP 591-92. The other officer testified that they went straight to the mall. RP 553.

The police found a large bag of heroin in Santiago-Santos's purse. RP 248.

The officers arrested Mr. Molina Rios and Trujeque-Magana but not Ms. Santiago-Santos. RP 250, 253, 258.

The police got a warrant to search the apartment where the trio lived. RP 260-61. They found significant amounts of methamphetamine and cocaine in a bedroom that also contained some identification documents with Mr. Molina Rios's name on them. RP 641-42, 645-69; Ex. 114. They also found two operational firearms in that room.² RP 600-01, 642-44; Ex. 108, 120.

In a second bedroom, the police found some documents with Trujeque-Magana's name on them as well as large quantities of drugs and several more guns. RP 715-19, 723, 787-89, 999-1009.

The state charged Mr. Molina Rios with three counts of possession of a controlled substance with intent to deliver: one for the heroin found in Ms. Santiago-Santos's purse on the side of the road and two for the other drugs found in the first bedroom in the apartment.³ CP 57-61. The state

² The officers also found what they described as "drug notes," as well as two digital scales in the kitchen. RP 115, 643, 720. The police also found over \$180,000 in the apartment. RP 968.

³ The state also charged Mr. Molina Rios with possession of a stolen firearm but the court dismissed that charge because the state did not present any evidence that any of the guns had been stolen. RP 1036-37.

also charged Mr. Molina Rios with Alien in Possession of a Firearm. CP 57-61.

The state charged Trujeque-Magana with similar offenses. CP 57-61. Ms. Santiago-Santos was not charged with any crime. RP 985.

Mr. Molina Rios and Trujeque-Magana proceeded to a joint trial.

At trial, the state's police witnesses testified about the surveillance in Everett, the traffic stop, and the search of the apartment. *See* RP 543-1028.

The police officers who had surveilled the events in Everett testified that they believed Mr. Molina Rios and Trujeque-Magana had been counting money when they were in the car together outside the IHOP restaurant. RP 136. The officers admitted, however, that they could not see the men's hands and did not actually see any money. RP 171, 177. The officers conceded that the men could have been playing cards or doing any number of innocuous things while looking at the center console. RP 177.

No witness testified that Mr. Molina Rios was ever seen in the white Honda. *See* RP *generally*.

The state's theory in closing argument was that Ms. Santiago-Santos had been uninvolved in any coordination to buy or possess drugs

that had gone on between Mr. Molina Rios and Trujeque-Magana. RP 1168, 1170.

The jury convicted Mr. Molina Rios of all four charges. RP 1264. The jury also found that he was armed with two different firearms during the commission of the two possession offenses related to the apartment and that the apartment was within 1,000 feet of a school bus stop.⁴ RP 1264.

After doubling the statutory maximum for the possession offenses (based on the school bus stop enhancement) and running the four firearm enhancements consecutively, the court sentenced Mr. Molina Rios to a total of 332 months of confinement. RP 1280-81; CP 193.

This timely appeal follows. CP 205-06.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. MOLINA RIOS OF COUNT I.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Chouinard*, 169

⁴ The jury also found that the possession offenses related to the apartment constituted major trafficking violations, but the court declined to impose an exceptional sentence on that basis. RP 1264.

Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

Count I charged Mr. Molina Rios with possession of the heroin found in Ms. Santiago-Santos's purse with intent to deliver. CP 57-58.

But the state did not present any evidence that Mr. Molina Rios was ever in the white Honda with Ms. Santiago-Santos or her purse. The state also did not present any evidence that the heroin found in Ms. Santiago-Santos's purse had ever been anywhere outside of the white Honda. Finally, the state did not present any evidence that Mr. Molina Rios coordinated with or assisted Ms. Santiago-Santos in any way. *See RP generally.*

Even so, the jury convicted Mr. Molina Rios of possessing the heroin found in Ms. Santiago-Santos's purse with intent to deliver it. RP 1264. That conviction must be vacated for insufficient evidence.

1. No rational jury could have found beyond a reasonable doubt that Mr. Molina Rios had either actual or constructive possession of the heroin found in Ms. Santiago-Santos's purse.

Drug possession can be either actual or constructive. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Actual possession requires proof that the accused had the contraband in his/her "actual physical custody." *Id.* Constructive possession requires proof of "dominion and control" over a substance. *Id.*

A person does not exercise “dominion and control” over an object unless “the object may be reduced to actual possession immediately.” *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

The police did not find any heroin in Mr. Molina Rios’s physical custody. Nor was there any heroin in the bedroom attributed to Mr. Molina Rios. Accordingly, in order to convict him for Count I, the state was required to prove that Mr. Molina Rios had dominion and control over the drugs found in Ms. Santiago-Santos’s purse.

In *Cote*, the state failed to prove constructive possession when the evidence showed only that the accused was a passenger in a truck where drugs were found and that the jar containing the drugs had his fingerprints on it. *Cote*, 123 Wn. App. at 550 (citing *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969); *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990)). This is because the evidence that he was in close proximity to the contraband and had touched it at some point was not enough to prove dominion and control. *Id.*

The prosecution in Mr. Molina Rios’s case presented far less evidence than that found insufficient in *Cote*. There was no evidence that Mr. Molina Rios was ever in the white Honda or, indeed, anywhere near Ms. Santiago-Santos’s purse. Also unlike *Cote*, there was no evidence that Mr. Molina Rios had ever handled the drugs found in the purse.

The state failed to establish that Mr. Molina Rios had either actual or constructive possession of the heroin found in Ms. Santiago-Santos's purse. *Id.*

2. No rational jury could have found beyond a reasonable doubt that Mr. Molina Rios acted as Ms. Santiago-Santos's accomplice.

Because the state failed to prove that Mr. Molina Rios had actual or constructive possession of the heroin in Ms. Santiago-Santos's purse, the only basis for his conviction for Count I could have been if the state established that he had acted as Ms. Santiago-Santos's accomplice. CP 57-58.

In order to show that Mr. Molina Rios was Ms. Santiago-Santos's accomplice, the state was required to prove that he "solicit[ed], command[ed], encourage[ed], or request[ed]" Ms. Santiago-Santos to possess the heroin or that he aided or agreed to aid her in planning or committing the offense. RCW 9A.08.020(3). The state was also required to establish that Mr. Molina Rios had done these things knowing that they would "promote or facilitate the commission of the crime." RCW 9A.08.020(3).

First, the state presented no evidence that Mr. Molina Rios had any knowledge of the heroin in Ms. Santiago-Santos's purse. *See* RP

generally. This deficiency, alone, forecloses a conviction based on accomplice liability. RCW 9A.08.020(3).

There was also no evidence that Mr. Molina Rios coordinated with, encouraged, or assisted Ms. Santiago-Santos in any way. Indeed, the state's theory of the case was that Ms. Santiago-Santos was not involved in any coordination that took place between Mr. Molina Rios and Trujeque-Magana. RP 590, 1168, 1170.

The state did not prove that Mr. Molina Rios had actual or constructive possession of the heroin in Ms. Santiago-Santos's purse or that he acted as Ms. Santiago-Santos's accomplice. No rational jury could have found him guilty of Count I beyond a reasonable doubt. Mr. Molina Rios's conviction for heroin possession must be reversed. *Chouinard*, 169 Wn. App. at 899.

II. NO RATIONAL JURY COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT MR. MOLINA RIOS WAS "ARMED" WITH A FIREARM DURING THE COMMISSION OF THE DRUG POSSESSION OFFENSES WHEN THERE WAS NO EVIDENCE THAT HE, THE DRUGS, AND THE GUNS HAD EVER ACTUALLY BEEN IN THE SAME PLACE AT THE SAME TIME.

The state alleged that Mr. Molina Rios was armed with a firearm during the commission of the drug possession offenses related to the apartment. The allegation was based on the guns found in the room attributed to Mr. Molina Rios during the warrant search of the apartment.

But there was no evidence that Mr. Molina Rios had ever been in the same location as the gun and the drugs at the same time. The state did not prove that he was armed when he possessed the drugs.

RCW 9.94A.533(3)(a)⁵ imposes a severe mandatory sentence of imprisonment based on a defendant being “armed” with a firearm during the commission of a crime.

Constructive possession of a gun is insufficient to demonstrate that the accused was “armed” to justify a firearm enhancement. *State v. Brown*, 162 Wn. 2d 422, 431, 173 P.3d 245 (2007); *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). Mere proximity of the gun to the accused is, likewise, insufficient. *Brown*, 162 Wn.2d at 431.

Here, the state’s evidence demonstrated, at best, that Mr. Molina Rios had constructive possession of the guns in the room the state attributed to him. That evidence is categorically insufficient to prove that he was armed during the commission of the possession offenses under the state Supreme Court’s decisions in *Brown* and *Gurske*. *Brown*, 162 Wn.2d at 431; *Gurske*, 155 Wn.2d at 138.

⁵ Whether a person is armed is a mixed question of law and fact. *State v. Schelin*, 147 Wn.2d 562, 565, 55 P.3d 632 (2002). When the relevant facts are not in dispute, the issue of whether those facts are sufficient to demonstrate that a person is “armed” is a question of law reviewed *de novo*. *Id.* at 566.

Additionally, a person is only armed with a deadly weapon during the commission of a crime if it is “easily accessible and readily available for either offensive or defensive purposes.” *Brown*, 162 Wn.2d at 431.⁶ There must be a nexus between the accused and the gun and also between the gun and the crime. *Id.* The nexus requirement places particular parameters on the definition of “armed” in cases involving continuing offenses such as constructive possession of drugs. *Gurske*, 155 Wn.2d at 140-41.

There is no nexus between the accused and gun if the gun is not “easily accessible and readily available” at some time when “use for offensive or defensive purposes [is] important.” *Gurske*, 155 Wn.2d at 141-42.

The state’s evidence of constructive possession was insufficient to demonstrate a nexus between Mr. Molina Rios and the gun. No evidence showed that the gun was accessible and available at any time when Mr. Molina Rios would have had to use it for offensive or defensive purposes. *Id.* As the *Gurske* court noted, this limitation is particularly important in cases involving constructive drug possession. *Id.* Simply having a gun

⁶ Whether a person is armed is a mixed question of law and fact, reviewed *de novo*. *Schelin*, 147 Wn.2d at 565-66.

and drugs on the same premises is insufficient to prove that a person was armed during the commission of a specific offense. *Id.*

There must also be a nexus between the weapon and the crime. *Gurske*, 155 Wn.2d at 142. “Mere presence of a weapon at the crime scene may be insufficient.” *Id.*

In *Gurske*, the accused was caught with drugs in the driver’s seat of a car. He had a gun in a backpack on the floor behind him. *Id.* at 143. This evidence was insufficient to establish a nexus between the gun and the offense because he would have had to get out of the car or move to the passenger seat to access the gun. *Id.* There was no evidence that *Gurske* had easy access to the gun at any other relevant time, such as when he acquired the drugs. *Id.*

Here, there was far less evidence linking the gun and the alleged drug possession. Unlike in *Gurske*, the police did not find Mr. Molina Rios, the drugs, and the gun all in the same place. There was no evidence that Mr. Molina Rios was ever close to the gun while the drugs were in his constructive possession. The state failed to prove a nexus between the gun and the drugs. *Gurske*, 155 Wn.2d at 142.

The state presented insufficient evidence to prove that Mr. Molina Rios was armed during the commission of the drug possession offenses. *Brown*, 162 Wn. 2d at 431; *Gurske*, 155 Wn. 2d at 138. The firearm

enhancements must be vacated and the case remanded for resentencing.

Id.

III. THE STATUTE CRIMINALIZING ALIEN IN POSSESSION OF A FIREARM AT RCW 9.41.171 VIOLATES EQUAL PROTECTION BECAUSE IT DISCRIMINATES BASED ON NATIONAL ORIGIN BY OPENING CITIZENS OF OTHER COUNTRIES UP TO CRIMINAL PROSECUTION AND CONVICTION BASED ON CONDUCT THAT WOULD BE LEGAL IF COMMITTED BY A CANADIAN.

RCW 9.41.171 makes it a felony for a non-US-citizen to possess a firearm, *unless* the person:

- (1) Is a lawful permanent resident;
- (2) has obtained a valid alien firearm license pursuant to RCW 9.41.173; or
- (3) meets the requirements of RCW 9.41.175.

RCW 9.41.171.

RCW 9.41.175, in turn, permits citizens of countries other than the U.S. and Canada to possess a gun in certain hunting and other sporting contexts, *if* they also possess “a valid passport and visa showing that [they are] in the country legally.” RCW 9.41.175(1)(a).

But the statute also carves out an exception in which Canadians are immune from criminal liability whether they are “in the country legally” or not. RCW 9.41.175(2). Rather, a Canadian citizen may possess a gun for hunting or other sport if s/he merely possesses “valid documentation as required for entry into the United States.” RCW 9.41.175(2)(a).

Accordingly, citizens from every country *except* Canada must possess a visa and prove that they are “in the country legally” in order to lawfully possess a firearm without a license. RCW 9.41.175(1)(a). Canadians, on the other hand, must only possess “valid documentation as required for entry into the United States” to be protected from prosecution; they do not need to prove that they have a visa or are in the country legally. RCW 9.41.175(2)(a).

For Canadians (and citizens of the thirty-seven other countries that are part of the “visa waiver program”), a visa is not required to enter the United States for up to ninety days.⁷ Indeed, a Canadian need only prove that s/he has a valid passport in order to prove that s/he possesses “valid documentation as required for entry into the United States” as required by RCW 9.41.175(2)(a). This is true even though citizens of other countries that take part in the “visa waiver program” would still be required to obtain a visa in order to avoid criminal liability under RCW 9.41.175.

Indeed, because RCW 9.41.175(2)(a) does not include the requirement that Canadians prove that they are in “in the country legally,” a Canadian citizen who entered the U.S. without inspection or is subject to a deportation order could still be immune from prosecution under RCW 9.41.175(2)(a) so long as s/he has a valid Canadian passport.

⁷ See <https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html>

The statutory scheme gives preference to people based upon their national origin: Canadians have special privileges and are more difficult to convict than citizens of other countries. This national origin discrimination violates the constitutional guarantee of equal protection, and Washington’s special immunities’ provision. U.S. Const. Amend. XIV; Wash. Const. art. I, § 12.⁸

Classifications based on national origin are “suspect” for purposes of the equal protection analysis, subjecting them to strict scrutiny regardless of whether a fundamental right is implicated. *Graham v. Richardson*, 403 U.S. 365, 372, 376, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

“In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.” *Bernal v. Fainter*, 467 U.S. 216, 219, 104 S.Ct. 2312, 81 L.Ed.2d 175 (1984) (holding that a Texas statute requiring a notary public be a U.S. citizen did not withstand strict scrutiny).

⁸ Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). The Alien in Possession statute also implicates the constitutional right to bear arms. U.S. Const. Amend. II, XIV; Wash. Const. art. I, § 24; *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); *State v. Sieyes*, 168 Wn.2d 276, 291, 225 P.3d 995 (2010).

The purported state interest behind the alien in possession statute is “keeping ‘firearms out of dangerous hands.’” *State v. Hernandez-Mercado*, 124 Wn.2d 368, 377- 78, 879 P.2d 283 (1994).⁹ But the special protections afforded to Canadians under RCW 9.41.175 do nothing to promote that interest.

There is no reason to think that Canadians are any more careful with firearms than those from any other country or that prioritizing possession of guns by Canadians does anything to “keep[] firearms out of dangerous hands.” *Hernandez-Mercado*, 124 Wn.2d at 377- 78. The fact that Canada borders the continental United States may mean that people from that country are more likely to come to the U.S. to hunt and engage in other sports involving guns than those from other continents. But Mexico also borders the continental U.S. and receives no such favorable treatment. There is no basis for the extent to which the alien in

⁹ In *Hernandez-Mercado*, the Washington Supreme Court rejected an equal protection challenge to a previous version of the statute criminalizing alien in possession of a firearm. *Hernandez-Mercado*, 124 Wn.2d 368. But that challenge did not address the disparate treatment of people from different countries outside the US. Rather, it merely looked to whether the statute violated the constitution by treating non-U.S. citizens differently than citizens. *Id.*

Even in that context, however, the Supreme Court noted that the state’s argument that regulation of non-citizen possession of firearms was necessary to promote public safety was “weak” and that the disparate treatment by the statute “at least raises the question of equal protection of the laws.” *Id.* at 378-380. But the Court found that it could not declare the prior version of the statute unconstitutional beyond a reasonable doubt “on the limited record” available in that case. *Id.* at 380-81.

possession statute opens Mexicans up to criminal liability for conduct that would be legal if committed by a Canadian.

The disparate treatment and relative immunity from criminal liability that RCW 9.41.175(2) affords to Canadians is not narrowly tailored to achieve any state interest. The Alien in Possession statute at RCW 9.41.171 cannot survive strict scrutiny (indeed, it likely could not even survive rational basis review) and violates Equal Protection on its face. *Graham*, 403 U.S. at 372; *Bernal*, 467 U.S. at 219. Mr. Molina Rios's conviction under that statute must be reversed and vacated. *Id.*

IV. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE TO IMPOSE APPELLATE COSTS ON MR. MOLINA RIOS BECAUSE HE IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3 612 (2016).¹⁰

¹⁰ Division II's commissioner has indicated that Division II will follow *Sinclair*.

The trial court found Mr. Molina Rios indigent at the end of the proceedings in superior court. CP 207-09. That status is unlikely to change, especially with the imposition of a very lengthy prison term. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

Accordingly, the trial court waived all non-mandatory LFOs in Mr. Molina Rios’s case. RP 1289; CP 195-96.

Additionally, the newly amended RAP 14.2 specifies that the trial court’s finding of indigency stands unless the state presents evidence that the accused’s financial circumstances have changed:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

RAP 14.2 (*as amended by 2017 WASHINGTON COURT ORDER 0001*).

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

No rational jury could have found beyond a reasonable doubt that Mr. Molina Rios possessed the heroin found in Ms. Santiago-Santos’s

purchase or that he was “armed” during the commission of the other drug possession offenses. The statute criminalizing alien in possession of a firearm violates the constitutional guarantee of equal protection because it unreasonably favors citizens of Canada and renders them immune to conviction in contexts in which citizens of other countries would be criminally liable. Mr. Molina Rios’s convictions in Counts I and IX must be reversed.

Additionally, the firearm enhancements to his convictions in Counts II and III must be vacated and Mr. Molina Rios must be resentenced on those charges.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Molina Rios who is indigent.

Respectfully submitted on September 26, 2017,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Luciano Molina Rios/DOC#393118
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
cntypa.generaldelivery@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on September 26, 2017.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

LAW OFFICE OF SKYLAR BRETT

September 26, 2017 - 2:39 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49633-0
Appellate Court Case Title: State of Washington, Respondent v. Luciano Molina Rios, Appellant
Superior Court Case Number: 15-1-02179-6

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Sender Name: Valerie Greenup - Email: valerie.skylarbrett@gmail.com

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Address:
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