

**NO. 49918-5-II**

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**EDDIE MONK,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, substantial evidence does not support the conclusion that the defendant possessed methamphetamine with the intent to deliver because the evidence admitted at trial does not prove that the defendant possessed those drugs.

2. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, substantial evidence does not support the conclusion that the defendant possessed heroin with the intent to deliver because the evidence admitted at trial does not prove that the substance at issue was heroin.

3. This court should exercise its discretion and refrain from imposing costs on appeal should the state prevail because the defendant does not have the present or future ability to pay legal-financial obligations.

*Issues Pertaining to Assignment of Error*

1. Does substantial evidence support a conviction for possession of methamphetamine with intent to deliver when the methamphetamine at issue was found in a locked safe to which the defendant did not have access?

2. Does substantial evidence support a defendant's conviction for possession of heroin with intent to deliver when there was no expert testimony that the substance was heroin and the defendant did not agree that the substance was heroin?

3. Should an appellate court exercise its discretion and refrain from imposing costs on appeal when the state substantially prevails but when the defendant does not have the present or future ability to pay legal-financial obligations?

## STATEMENT OF THE CASE

### *Factual History*

At about 8:30 on the morning of May 26, 2016, four Longview Police Officers from that department's "Street Crimes Unit" executed a search warrant in a single-wide mobile home located at 1015 Allen Street, space 7, in Kelso. RP I 39-40, 81-82, 107-108; RP II 7-9.<sup>1</sup> The front door of this trailer opens into a small living room next to a kitchen, which leads down a hall to the master bedroom, a bathroom and a smaller bedroom in the rear. RP I 54-55, 92-93, 117-119; RP II 181-20. The warrant allowed the officers to search for drugs and to search the defendant's person. RP I 54-55. They had intended to execute the warrant the evening before but did not do so because there were no vehicles associated with the Defendant present at the trailer. RP III 15-17. By the next morning one of the vehicles associated with the defendant was present so they proceeded with their search. *Id.* In fact, an acquaintance of the defendant named Norman Schmidt and his girlfriend Deschelle Ross Martin, known as Daisy, are the trailer residents and Mr.

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<sup>1</sup>The record on appeal includes three volumes of verbatim reports. The transcriptionist did not number them consecutively. The first volume covers the testimony from the first day of trial on 11/29/16 and is referred to herein as "RP I [page #]." The second volume covers the testimony from the second day of trial on 11/30/16 and is referred to herein as "RP II [page #]." The third volume covers the testimony from the CrR 3.5 hearing held on 11/28/16 and the sentencing hearing held on 12/22/16 and is referred to herein as "RP III [page #]."

Schmidt's regularly receives his mail at that address. RP I 33-34, 69-77. RP II 32, 34, 36, 74-75.

Upon approaching the trailer one officer knocked and loudly announced "police, search warrant." RP II 18-20. That officer then tried the doorknob and determined that it was unlocked. *Id.* After knocking and announcing a second and third time the officers entered the residence and found Mr. Schmidt and Ms Martin in the front room laying down on the couch. *Id.* They also found a person by the name of Cody Jacobs in the trailer. *Id.* The officers immediately took them into custody. RP I 90-91. One of the vehicles in front of the trailer belonged to Mr. Jacobs and a search of it uncovered heroin. RP I 153. The officers also found a wooden box in the front room with heroin in it and arrested Mr. Schmidt for possessing those drugs. RP I 150-151; RP II 24. The box had Mr. Schmidt and Mr. Martin's name on it. RP I 150-151. As two officers were taking Mr. Schmidt and Ms Martin into custody, two other officers went down the hall and into the back bedroom where they found the defendant and a female sitting on the bed. RP I 54-55. In fact, as they had entered the trailer at least one officer had seen the defendant standing in the doorway to the back bedroom. RP I 117-119.

Upon entering the back bedroom the officers put the defendant and the female into handcuffs and took them out to the front room. RP I 55. The officers then proceeded to search the back bedroom. RP I 58-60. During that

search they found the following items in the locations noted: (1) a small glass table with three lines of suspected methamphetamine on it, (2) two safes, (3) a piece of mail addressed to the defendant Eddie Monk at 311 Rosewood Street, Kelso, (4) folding and fixed blade knives, one of which had the defendant's name engraved on it, (5) a pair of pants in the closet with a wallet and large set of keys in it, (6) the defendant's driver's license in the wallet, (7) a 12 gauge shotgun in the back corner of the closet behind a number of items, (8) a small tin box with 12 gauge shotgun shells also in the back corner of the closet, (9) glass smoking pipes, (10) small plastic baggies, and (11) a backpack with a Bowie knife in it. RP I 58-64; 93-101, 119-148.

One of the keys on the key ring the officers found in the pants opened one of the safes. RP I 63-64. Inside that safe the officers found a baggie with 17.62 grams of suspected heroin. RP I 63-64; RP II 132. Upon finding it one of the officers performed a field test, which gave a positive reaction for the presence of some type of opiate. RP II 26-27. While one of the keys on the ring opened the first safe, none of those keys opened the second safe and the officers found no key anywhere else to open it. RP I 66-67. As a result, they used some tools to force it open. *Id.* Inside they found 20.4 grams of what they suspected was methamphetamine and \$2,340.00 in cash in various denominations. *Id.* Just outside an open window within arms reach of the back bedroom door the officers found a set of digital scales sitting on a bush.

RP I 67-68. The scales had suspected heroin and methamphetamine residue on it. *Id.* The officers did not find anything else in the back bedroom or the trailer associated with the defendant. RP I 73-74, RP II 33-34.

Once the defendant was out in the living room one of the officers asked him where the “bulk of the dope” was. RP II 21-23. According to the officer, the defendant responded by nodding his head toward the back of the trailer and saying “You might want to check back there.” *Id.*

### ***Procedural History***

By information filed June 1, 2016, and amended four months later, the Cowlitz County Prosecutor charged the defendant Eddie Monk with one count of possession of methamphetamine with intent to deliver while armed with a firearm, one count of possession of heroin with intent to deliver while armed with a firearm, and one count of illegal possession of a firearm in the first degree. CP 1-4, 17-19. This case later come on for trial with the state calling the four Longview police officers who executed the search warrant at Mr. Schmidt’s trailer on the morning of May 26<sup>th</sup>. RP I 1-2; RP II 1-2. They testified to the facts contained in the preceding factual history. *See Factual History, supra.* In addition, during the trial the defendant stipulated that he had a prior conviction for a serious offense. RP I 7-8; RP II 68.

After calling the officers, the state also called a forensic scientist, who explained that she had tested the white power in the baggie the officers found

in the safe the officers had to bust open and that she had tested the residue the officers saw on the scales they found on the bush outside the window of the trailer. RP II 42-60. Her tests revealed that the white powder contained methamphetamine and that the residue on the scales contained both methamphetamine and heroin. RP II 53-58. Following her testimony the state closed its case. RP II 61.

After the state rested its case the defense called two witnesses, David Fierst and the defendant Eddie Monk. RP II 69-81, 82-109. Mr. Fierst testified that a number of months before the police executed the search warrant at Mr. Schmidt's trailer he had purchased the shotgun the police found and left it in the back closet for safe keeping. RP II 69-72. The defendant then testified that he did not reside at the a trailer although he did occasionally stay there as he had moved out of his house on Rosewood Street in Kelso. RP II 82-84. He went on to explain that none of the drugs in the back bedroom belonged to him, that he neither had access to the safes nor knew what was in them, and that he did not know the shotgun was in the closet. RP II 82-94.

Following the close of the defendant's case the court instructed the jury without objection from the defense or the prosecution. RP II 118. The parties then presented closing arguments, after which the jury retired for deliberation. RP II 119-136; CP 30-56. The jury eventually returned verdicts

of guilty on all three counts as well as findings that the defendant had committed the first two offenses while armed with a firearm. CP 57-61; RP 182-188. The court later sentenced the defendant within the standard range, after which he filed timely notice of appeal. CP 63-75; 76-77.

## ARGUMENT

### I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR POSSESSION OF METHAMPHETAMINE WITH THE INTENT TO DELIVER BECAUSE THE EVIDENCE ADMITTED AT TRIAL DID NOT PROVE THAT THE DEFENDANT POSSESSED THAT SUBSTANCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the state charged the defendant with possession of methamphetamine with intent to deliver for the methamphetamine the officers found in the safe they had to break open. As the following explains, under the facts as presented in this case, substantial evidence does not support the conclusion that the defendant possessed that methamphetamine.

Under the law of Washington, possession of a physical item such as drugs or firearms may be either actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). The court so instructed the jury in this case when it gave WPIC 50.03, which states as follows:

Possession means having a substance in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the

substance.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

*See* Instruction No. 9 at CP 41.

As this jury instruction explains, actual control means physical custody, while constructive control means dominion and control over an item.

*Id.* In examining dominion and control, the reviewing court must examine the “totality of the situation.” *State v. Morgan*, 78 Wn.App. 208, 212, 896 P.2d 731 (1995) (quoting *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977)). Constructive possession need not be exclusive. *Morgan*, 78 Wn.App. at 212, 896 P.2d 731.

For example, in *State v. Cote*, 123 Wn.App. 526, 96 P.3d 410 (2004), the defendant appealed his conviction for possession of pseudoephedrine with intent to manufacture methamphetamine arguing that the state had failed to present substantial evidence that he possessed the pseudoephedrine. At trial

the state had adduced the following evidence: (1) that the day before his arrest the defendant arrived at a residence as a passenger in a stolen truck, (2) that the defendant was arrested in that residence the next day, (3) that the stolen truck was still parked by the residence at the time of the defendant's arrest, and (4) in the back of the truck police officers found pseudoephedrine in a liquid in mason jars with the defendant's fingerprints on them.

In making his argument on appeal the defendant principally relied upon two cases: *State v. Callahan, supra*, and *State v. Spruell*, 57 Wn.App. 383, 788 P.2d 21 (1990). In *Callahan*, drugs were found in a houseboat near the defendant, who admitted handling the drugs earlier that day. The court held that the defendant's mere momentary handling of the drugs was insufficient to establish actual possession. In *Spruell* the defendant was arrested in close proximity to drugs found in a house, but the State failed to present evidence that the defendant had dominion and control over the premises. Under these facts the court held that the State had failed to prove the defendant actually or constructively possessed the drugs. After reviewing these two cases the court of appeals held as follows in *Cote*:

Mr. Cote was not in or near the truck at the time of his arrest. He was seen as a passenger in the truck, but this alone does not establish he had dominion and control over it. *See State v. Plank*, 46 Wn.App. 728, 733, 731 P.2d 1170 (1987) (mere fact that defendant is a passenger in a stolen vehicle is not sufficient to establish dominion and control). There is also no evidence indicating that the Mason jar containing Mr. Cote's fingerprint was found in the passenger area of

the truck. The officer indicated it was in the “back of the stolen pickup.” Report of Proceedings (Oct. 22, 2002) at 101. Moreover, the fingerprint on the jar proves only that Mr. Cote touched it. *See Spruell*, 57 Wn.App. at 386, 788 P.2d 21.

The evidence establishes that Mr. Cote was at one point in proximity to the contraband and touched it. But under Callahan and Spruell this is insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession. Because this issue is dispositive, we will not address the other issues raised in this appeal.

*State v. Cote*, 123 Wn.App. at 950.

In the case at bar the following facts are relevant to the defendant’s argument that substantial evidence does not support the conclusion that he possessed the methamphetamine the officers found in the locked safe. First, while the defendant had a large set of keys in his pants, the defendant did not have the key to the safe in his possession while he did have the key to the other safe in which the officers found the alleged heroin. Second, nothing in the safe created any association between the defendant and the methamphetamine. Third, the evidence did not support the conclusion that the defendant was a resident in the trailer. Rather, it supported the conclusion that the defendant was an occasional guest at that home. Fourth, there were four other persons present in the trailer, three of whom were found to be in possession of heroin and all three of whom were arrested for possession of heroin. Fifth, while there were items in the room belonging to the defendant, including a knife, the state failed to prove that any of the other items in the

back bedroom belonged to the defendant.

In *Cote* the state at least had the defendant's fingerprints on the contraband the defendant was alleged to have possessed. In the case at bar the only connection between the defendant and the methamphetamine found in the locked safe the officers had to break open was the fact that the defendant and another person were in the same room as the safe. This lone fact constitutes less of a connection between the defendant and the contraband than existed in *Cote*, *Spruell*, and *Callahan*. Thus, in the same manner that these courts found an absence of substantial evidence to support a claim of constructive possession in those cases, so the court in this case should find that the evidence presented at trial does not support a claim of constructive possession of the methamphetamine the officers found in the locked safe.

**II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR POSSESSION OF HEROIN WITH INTENT TO DELIVER BECAUSE THE EVIDENCE PRESENTED AT TRIAL DID NOT PROVE THAT THE SUBSTANCE AT ISSUE WAS HEROIN.**

Generally speaking, evidence of expert chemical analysis is not vital to uphold a conviction for possession of a controlled substance. *State v. Hernandez*, 85 Wn.App. 672, 935 P.2d 623 (1997). Rather, circumstantial evidence and lay testimony may be sufficient to establish the identity of a controlled substance in a criminal case. *State v. Colquitt*, 133 Wn.App. 789,

137 P.3d 892, 895 (2006). For example, in *State v. Hernandez, supra*, the court found sufficient evidence as to the identity of a controlled substance from detailed police testimony such as: (1) their expertise in identifying drugs and drug-sale behaviors; (2) standard drug prices; (3) their observations of behavior consistent with drug sales; (4) the drug-using behavior of the persons contacting defendants; (5) the known drug areas in which the defendants were observed; (6) discovery of materials on the defendants consistent with those they saw defendants deliver; and (7) discovery of money in amounts consistent with drug sales. *State v. Colquitt*, 133 Wn. App. at 797 (citing *State v. Hernandez*, 85 Wn.App. at 679–81).

In *United States v. Dominguez*, 992 F.2d 678, 681 (7th Cir.), *cert. denied*, 510 U.S. 891, 114 S.Ct. 250, 126 L.Ed.2d 203 (1993), the Seventh Circuit Court of Appeals noted that as long as the evidence presented at trial establishes the identity of the controlled beyond a reasonable doubt, it matters not that the evidence originated with the opinions of police officers based on familiarity through training and experience in the field. However, the court in *Dominguez* emphasized that when the trial record lacked sufficient indicia as to what factors the law enforcement officers considered in determining the identification of a substance, the record is then insufficient to prove the identity of the substance at issue. *Dominguez*, 992 F.2d at 681–82.

For example, in *State v. Colquitt, supra*, a defendant who had been

convicted of possession of cocaine after a stipulated facts trial following his termination from drug court appealed arguing that the stipulated facts were insufficient to prove beyond a reasonable doubt that the substance he possessed was cocaine. In that case there had been no lab analysis performed on the alleged cocaine although there had been a positive field test. In analyzing this argument the Court of Appeals first noted, as was stated above, that there was no evidentiary requirement for a lab test. The court then went on to note the following relevant factors:

Circumstantial evidence must prove the identity of the substance beyond a reasonable doubt. Whether the State has met its burden of establishing the identity of the items depends on a non-exhaustive list of factors, including: (1) testimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible; (2) corroborating testimony by officers or other experts as to the identification of the substance; (3) references made to the drug by the defendant and others, either by the drug's name or a slang term commonly used to connote the drug; (4) prior involvement by the defendant in drug trafficking; (5) behavior characteristic of use or possession of the particular controlled substance; and (6) sensory identification of the substance if the substance is sufficiently unique.

*State v. Colquitt*, 133 Wn.App. at 801 (citation omitted).

After reviewing these criteria, the court reversed the defendant's conviction, holding that the officer's opinion that the substance was cocaine was insufficient to prove that fact even with a positive field test. Similarly, in the case at bar, the evidence the state presented on the identity of the

alleged heroin found in the safe was also insufficient to prove beyond a reasonable doubt that the substance was heroin. In this case, as in *Colquitt*, the officer gave his opinion that the baggie looked like it contained heroin and that a presumptive field test indicated that it contained some type of opiate. However, as in *Colquitt*, in this case there is little other evidence on the identity of the substance. The defendant did not admit that the brown powder the officer found in the safe was heroin, the officers did not find paraphernalia for its use, and the officers did not find any person who appeared to be under the influence of heroin. Thus, in the case at bar, as in *Colquitt*, the evidence presented at trial was insufficient to prove the identity of the alleged heroin. As a result, this court should reverse the defendant's conviction for possession of heroin with intent to deliver and remand with instructions to dismiss this charge.

**III. THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFRAIN FROM IMPOSING COSTS ON APPEAL SHOULD THE STATE PREVAIL 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 1-4, 83-85. 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 Motion for Order of Indigency reveals

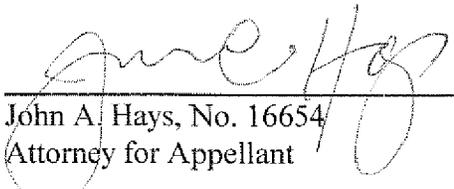
that he has no money or assets and that he is currently serving two concurrent sentences of 132 months (11 years) of which 72 months constitutes firearms enhancements with no good time or ability to serve that portion of the sentence outside of a prison. CP 63-75. Given these facts it is unrealistic 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 court should vacate the defendant's convictions in Counts I and II for possession of heroin with intent to deliver and possession of methamphetamine with intent to deliver because substantial evidence does not support the conclusion that the substance at issue was heroin or that the defendant possessed methamphetamine. In the alternative, this court should refrain from imposing costs on appeal because the defendant does not have the present or future ability to pay.

DATED this 5<sup>th</sup> day of June, 2017.

Respectfully submitted,



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John A. Hays, No. 16654  
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**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**WPIC 50.03**  
**Possession - Definition**

Possession means having a substance in one's custody or control. [It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.]

[Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.]

[In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include [whether the defendant had the [immediate] ability to take actual possession of the substance,] [whether the defendant had the capacity to exclude others from possession of the substance,] [and] [whether the defendant had dominion and control over the premises where the substance was located]. No single one of these factors necessarily controls your decision.]

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

**STATE OF WASHINGTON,**  
**Respondent,**  
  
**vs.**  
  
**EDDIE MONK,**  
**Appellant.**

**NO. 49918-5-II**

**AFFIRMATION  
OF SERVICE**

---

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:

1. Mr. Ryan Jurvakainen  
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Dated this 5<sup>th</sup> day of June, 2017, at Longview, WA.

  
\_\_\_\_\_  
Diane C. Hays

**JOHN A. HAYS, ATTORNEY AT LAW**

**June 05, 2017 - 1:34 PM**

**Transmittal Information**

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**Appellate Court Case Title:** State of Washington, Respondent v. Eddie Monk, Appellant  
**Superior Court Case Number:** 16-1-00683-1

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