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

STATE OF WASHINGTON, RESPONDENT

v.

SHANE CHRISTOPHER GILBERT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Karena Kirkendoll

No. 16-1-04632-2

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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similarly packaged items, and even if it was error,
was it harmless given the overwhelming evidence?
(Appellant's Assignment of Error #5)

4. Should this court find that the defendant's objection to the imposition of appellate costs moot when the State will not be filing a cost bill?

B. STATEMENT OF THE CASE.

1. Procedure

On November 28, 2016, Shane Christopher Gilbert, hereinafter "defendant," was charged with unlawful possession of a controlled substance with the intent to deliver. CP 4-5. On March 1, 2017 both parties appeared for trial. RP 1. The defendant was found guilty as charged and was sentenced to 45 months in custody. CP 82-96. This timely appeal follows. CP 103.

2. Facts

On November 20, 2016, Pierce County Sheriff's Deputy Dennis Miller was patrolling an area of Rhododendron Park in Bonney Lake. RP 245. At approximately 9:00 a.m., Deputy Miller saw a Toyota 4Runner parked at a known drug house and decided to run its license plate. RP 245, 249. Deputy Miller discovered that the 4Runner had listed a report of

sale but not transferred title within the required 45 days. RP 247. Deputy Miller was unable to determine the owner of the 4Runner. RP 325. As he continued eastbound on 119th street he observed the 4Runner back out of the driveway and drive at a high rate of speed. RP 248. Deputy Miller pursued the 4Runner and found it parked in front of another residence, seemingly unoccupied. *Id.* Deputy Miller observed a male standing knocking on the front door of the residence. RP 248-249.

Deputy Miller looked through the rear passenger window of the 4Runner and observed a body lying on the floor between the rear seat and the front seat. RP 250. Deputy Solbrack was also present to assist Deputy Miller. RP 353. Deputy Miller knocked on the 4Runner several times trying to get the person's attention but he saw no movement. RP 251. Clothing was plied up over the upper half of the body. RP 377, 394. Concerned for the person's welfare, Deputy Miller opened the driver's side rear door. RP 252-253. The person inside the car, later identified as the defendant¹, moved his right hand quickly to his waistband area. RP 253, 254, 378. Deputy Miller was aware that the defendant had an outstanding warrant for his arrest and took him into custody. *Id.*

¹ The defendant also goes by the street name "Star." RP 254.

Deputy Miller observed a glass drug pipe sticking out of the defendant's jacket at the time of his arrest. RP 255. Also recovered from the defendant's person was a lighter, a blue bandana, a cellular phone, headphones, two \$20 bills, and an orange pouch. RP 256-57, 264. The pipe had residue on it. RP 259. In his jeans was a small, clear plastic baggie with a white crystalline substance. RP 256. It was later discovered that inside the orange pouch were two baggies² containing a large amount of suspected methamphetamine. RP 263, 403. One of the baggies contained a large uncut rock of suspect methamphetamine, the other contained smaller pieces. RP 264. The suspected methamphetamine totaled 106.9 grams. RP 265. The items recovered were placed on the hood of Deputy Miller's patrol car. RP 302.

While Deputy Miller is searching the defendant's person, the defendant started shaking and convulsing like he was having a seizure. RP 271. Deputy Miller was unable to tell if the seizure was real or not. RP 272. One of the other individuals present at the residence, Krystal Nyland, told Deputy Miller that the defendant was hypoglycemic and received permission from police to give him some chocolate pudding. RP 272-273. As Nyland was kneeling next to the defendant, a conversation

² The two plastic baggies recovered from the orange pouch were admitted as exhibits #16 and #17.

occurred between Nyland and the defendant, but Deputy Miller could not hear what was said. RP 273, 355. Nyland then stood up, went across Deputy Miller and grabbed the orange pouch from the hood of the patrol car. RP 273-274. Nyland fled on foot. *Id.* Deputy Solbrack, who was present at the time, gave chase. RP 274.

Deputy Solbrack was unable to immediately apprehend Nyland and did not want to leave Deputy Miller at the scene by himself, so Deputy Solbrack returned to the scene for his police car. RP 274-275, 356. By that time, fire personnel had responded. RP 356. Deputy Solbrack was eventually able to apprehend Nyland, but she no longer had the orange pouch with her. RP 275-276. It was less than a minute after Deputy Solbrack got in his car that he was able to locate Nyland. RP 405. It was only during that 0-60 second period that Deputy Solbrack had lost visual contact with Nyland. *Id.* Nyland was located hiding in some blackberry bushes. RP 357. Deputy Solbrack noted that Nyland had green and red hair. RP 374. Nyland was handcuffed but kept digging at her back pocket. RP 357. Deputy Solbrack located a credit card in Nyland's name and a baggie of suspected methamphetamine. RP 357. A police K-9 unit was deployed at the scene and the orange pouch was located. RP 277, 421.

Thomas Lewis was a motorist in the area who had pulled over to allow the firetruck to pass him. RP 332. He observed a girl with green and red hair staggering down the roadway carrying what looked like a paper lunch bag. RP 332-333. Police had observed that Nyland had colored hair. RP 276. Lewis observed the girl try to throw the bag into the bushes but it did not go very far so she retrieved it and threw it again. RP 333. Lewis observed the police in the area and told them that the girl had run into a backyard. RP 334.

Vance Mettlen, a firefighter/paramedic was responding to render medical aid to the defendant when he also observed a female with brightly colored hair running down the street with a bag in her hand. RP 341, 344. Mettlen observed her try to throw the bag three times. RP 341-342.

A search warrant was executed on the 4Runner. RP 281. On the floor behind the passenger seat where the defendant had been lying was a metal box. RP 283. The defendant had been situated in the 4Runner so that his legs would have been placed over the box on the floor. *Id.* Inside the box was a small digital scale and three plastic baggies containing methamphetamine. *Id.* Also in the box was a small Tupperware container with a white residue inside. RP 283-284. Deputy Miller acknowledged that the residue was suspected methamphetamine but that it could have been anything. RP 316.

While in custody, the defendant made a telephone call in which he stated "they hit me with 101 grams." RP 463. He also stated that "I had five ounces on me, and I dropped off two to Michelle," and "All I was going to do was drop some off to you all, some to my bitch." *Id.*

Deborah Price, an analyst with the Washington State Patrol Crime Laboratory, tested some of the evidence collected by police. RP 478. Price tested five different items in this case. First, she analyzed exhibit #15, suspected methamphetamine. RP 480. Exhibit #15 was the suspected methamphetamine from the defendant's pants pocket. RP 270. Exhibit #15 contained 2.8 grams of crystalline material that was confirmed to be methamphetamine. RP 486, 493.

Second, Price analyzed exhibits #16 and #17, suspected methamphetamine from the orange pouch recovered. RP 266, 482-83. Exhibit #16 contained 52.5 grams of crystalline material. RP 488. Both exhibits #16 and #17 contained methamphetamine. RP 492. Finally, Price examined exhibit #21, suspected methamphetamine from inside the container recovered from the 4Runner. RP 443, 482-483. Exhibit #21 contained three baggies, of which Price tested one. RP 483. The substance she tested from one of the baggies contained methamphetamine. RP 492.

C. ARGUMENT.

1. ANY CLAIM THAT THE CHAIN OF CUSTODY PRESENTED WAS INADEQUATE IS WAIVED AS IT WAS NOT OBJECTED TO BELOW; EVEN IF IT HAD BEEN PRESERVED, A SUFFICIENT CHAIN OF CUSTODY WAS ESTABLISHED WHEN THE DEFENDANT'S ACCOMPLICE STOLE THE EVIDENCE FROM POLICE CUSTODY, WAS APPREHENDED IN MERE MINUTES, AND THE DEFENDANT CONFESSED TO DISTRIBUTING DRUGS.

A physical object connected with the commission of a crime may properly be admitted into evidence, once it has been satisfactorily identified and shown to be in substantially the same condition as when the crime was committed. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Evidence that is unique and readily identifiable may be identified by a witness who can state that the item is what it purports to be. *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002), citing 5 K. Tegland, Washington Practice § 402.31 (4th ed. 1999). A more particularized showing may be necessary for items susceptible to alteration or adulteration. *Id.* Factors to be considered include the nature of the item, the circumstances surrounding the preservation and custody, and the likelihood of tampering or alteration. *Campbell*, 103 Wn.2d at 21. It is not necessary to identify the evidence with absolute certainty or to eliminate every possibility of alteration or substitution. *Campbell*, 103

Wn.2d at 21. Minor discrepancies or uncertainty affect only the weight of the evidence, not its admissibility. *Id.*

When the evidence in question is an object, specimen, or part taken from a human body and made the basis for the testimony or report of an expert or officer, the proponent must show proof of this identity by showing that the thing was taken from the particular body from which it was supposed to be taken, and that thereafter it was properly kept and, if necessary, transported and delivered to the one who produced it at the trial or the expert who analyzed or examined it. *State v. Boehme*, 71 Wn.2d 621, 638, 430 P.2d 527 (1967), citing 29 Am. Jur. 2d Evidence § 775 (1967) at 845.

The trial court is vested with a wide latitude of discretion in determining admissibility, which will not be disturbed absent clear abuse. *Campbell*, 103 Wn.2d at 21. The State need not establish an unbroken chain of custody and an unbroken chain of custody does not render an exhibit inadmissible. *State v. Picard*, 90 Wn. App. 890, 898, 954 P.2d 336 (1998), citing *State v. DeCuir*, 19 Wn. App. 130, 135, 574 P.2d 397 (1978). Instead of requiring an unbroken chain, the State need only show that the item is properly identified as being the same object and in the same condition as when it was acquired. *Id.*

- a. Defense failed to object to chain of custody regarding exhibits #15, #16, and #17 below, thereby waiving any claim as to chain of custody on appeal.

Error may not be predicated on a ruling admitting evidence unless a timely objection is made which stated the specific ground of objection. *See* ER 103(a)(1), *see also State v. Davis*, 141 Wn.2d 798, 849, 10 P.3d 977 (2000). In this case, the defendant alleges for the first time on appeal that the State failed to establish a sufficient chain of custody regarding exhibits #15, #16 and #17. No objection was made as to any of those exhibits at the time they were admitted. RP 493-494. Because this objection was not raised below, it cannot be considered now for the first time.

- b. Even if properly preserved, the trial court properly exercised its discretion in admitting exhibits #15, #16, and #17 when the State presented a sufficient chain of custody.

Even if this court were to reach the merits of the defendant's claim, it is without merit as the exhibits were properly admitted. First, the defendant asserts that "In this case, [t]he State failed to make a sufficient showing that the methamphetamine introduced in exhibits 15, 16, and 17 were originally in the orange pouch found in the blackberry bushes on 120th St E." BOA, page 12. Exhibit #15 was not recovered from the orange pouch, but rather from the defendant's pants. RP 270, Exhibits

#16 and #17 were recovered from the orange pouch, which was recovered less than a minute after it was stolen from police custody by the defendant's accomplice.

Evidence was presented that exhibits #15, #16, and #17 were the same objects and in the same conditions they were in when recovered by police. Deputy Miller testified that exhibit #15—the baggie of methamphetamine from the defendant's pocket—had his label on it, which contained his initials. RP 270. Exhibit #15 also had a red seal that was placed on it by Deputy Miller that was still present. RP 270-271. The crime laboratory analyst indicated that exhibit #15 contained her initials and an intact seal from the lab. RP 480-481.

Similarly, Deputy Miller indicated that he sealed exhibits #16 and #17, and they contained his seal and a property label. RP 269. The crime laboratory analyst indicated that exhibit #16 and #17 were also sealed and were in the same condition it was in when she examined them. RP 482. Deputy Jank, who conducted the follow up investigation, indicated that he personally delivered exhibits #15-17 to the Washington State Patrol Crime Laboratory for testing. RP 446.

Testimony was presented that Nyland, under the rouse of providing medical aid to the defendant, conspired with him to steal the orange pouch from police custody. Both Deputy Miller and Deputy Solbrack stated that

they observed a brief conversation occur between the defendant and Nyland mere seconds before Nyland grabbed the orange pouch and fled the area. Testimony was presented from eyewitnesses who saw Nyland running down the street from the area and attempting to throw the pouch. RP 333, 341-342. Deputy Solbrack stated that once he was back to his police car, he had located Nyland in under a minute. RP 405. It was less than a minute that Deputy Solbrack lost visual contact with Nyland. *Id.* To the extent that the defendant was free to argue that the contents of the orange pouch were altered by Nyland, the defendant was free to argue that to the jury, and did so. RP 564. Any theory that Nyland stole an empty pouch from hood of the police car, concealed a portion of her own drugs inside it³, then tried repeatedly to throw it away is a theory that goes entirely to weight and not admissibility. Even if the defendant had objected as to chain of custody below, the trial court would have properly admitted the evidence based on the testimony presented.

³ Nyland was found with a credit card in her name and suspected methamphetamine on her person, separate from the orange pouch. RP 357.

2. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS PRESENTED TO ESTABLISH THAT THE DEFENDANT WAS IN POSSESSION OF THE METAL BOX THAT HE WAS PHYSICALLY COVERING AT THE TIME HE WAS APPREHENDED BY POLICE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also, Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review 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. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

The jury was instructed that to convict defendant of possession with intent to deliver a controlled substance, it had to find the following elements beyond a reasonable doubt:

- (1) That on or about the 20th day of November, 2016, the defendant possessed a controlled substance, to-wit methamphetamine;
- (2) That the defendant possessed the substance with the intent to deliver a controlled substance; and
- (3) That this act occurred in the State of Washington.

CP 44-66, Instruction 10. Defendant's sole challenge as to the elements is a claim that the prosecution produced insufficient evidence to show that he *constructively possessed* the methamphetamine found in the vehicle.

BOA, page 15. The jury was given the following instruction on possession:

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.

CP 44-66, Instruction #13.

The jury was also instructed on unwitting possession. CP 44-66, Instruction #17.

As the jury was instructed in this case, possession may be actual or constructive. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A defendant actually possesses an item if he has physical custody of it; he constructively possesses the item if he has dominion and control over it or the premises where the item is found. *Jones*, 146 Wn.2d at 333; *State v. Coahran*, 27 Wn. App. 664, 668, 620 P.2d 116 (1980) (citing *State v. Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969)). An automobile is considered to be “premises.” *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000); *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). Whether a passenger’s occupancy of a particular part of an automobile would constitute dominion and control of contraband found in that area depends upon the particular facts of the case. *Mathews*, 4 Wn. App. at 656. A person has dominion and control of an item if he has immediate access to it. *Jones*, 146 Wn.2d at 333. Mere proximity, however, is not enough to establish possession. *Jones*, 146 Wn.2d at 333. No single factor is dispositive in determining dominion and control. *State*

v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995). The totality of the circumstances must be considered. *Collins*, 76 Wn. App. at 501.

When there is sufficient evidence of the defendant's dominion and control over the premises, the defendant may be found guilty of constructive possession of contraband found in those premises even if he denies knowledge of the item. *Callahan*, 77 Wn.2d at 29-30 (citing *State v. Weiss*, 73 Wn.2d 372, 438 P.2d 610 (1968); *State v. Chakos*, 74 Wn.2d 154, 443 P.2d 815 (1968), *cert. denied*, 393 U.S. 1090, 89 S. Ct. 855, 21 L. Ed. 2d 783 (1969); *State v. Mantell*, 71 Wn.2d 768, 430 P.2d 980 (1967); *State v. Morris*, 70 Wn.2d 27, 422 P.2d 27 (1966)).

There was evidence presented that defendant had dominion and control over the vehicle where the metal box containing three baggies of methamphetamine, clean baggies, and a scale. RP 283, 441, 448 CP 68-70. Exhibit #12, #13. While the 4Runner was not registered to him, its ownership was uncertain as the title had never been properly transferred. RP 247, 325. It is clear, however, that the defendant was lying physically on top of the metal box containing the items—clearly exhibiting dominion and control over them.

In this case, the totality of the circumstances establish that the defendant was in constructive possession of the metal box in the 4Runner.

The defendant was discovered, partially concealed, hiding physically on top of it. Moreover, the drugs found in the defendant's pants were in a plastic bag, as were the drugs in the metal box. RP 264, CP 68-70, Exhibit 14. In fact, the drugs found in the defendant's pants were a baggie that appeared to be identical in appearance to two of the baggies recovered from the metal box. CP 68-70, Exhibit #13, #14. Also in the metal box was a scale with a white powdery residue on it. RP 448. Perhaps most critically, the defendant's own telephone call from the jail establishes that he was distributing drugs. He stated in his telephone call that "I had five ounces on me, and I dropped off two to Michelle," "All I was going to do was drop some off to you all, some to my bitch." RP 463; CP 68-70, Exhibit #27A. The evidence recovered from the defendant's person, his physical location on top of the box, and his statements after the fact about distributing narcotics cumulative establish that he was in constructive possession of the metal box containing drugs and the digital scale, all establishing an intent to deliver narcotics.

The defendant now relies on three cases—*State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969), *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990), and *State v. George*, 146 Wn. App. 906, 193 P.3d 693 (2008). All three cases are distinguishable from the case at bar. In *Callahan*, the defendant was charged with unlawful possession of

dangerous drugs. *Callahan*, 77 Wn.2d 27 at 28. At Callahan’s trial, however, another person testified that the drugs belonged to him— testimony that was substantiated by other witnesses. *Id.* at 31. The court found that there was “undisputed direct proof” that placed the drugs in the exclusive possession of another person. *Id.* In this case, no one else claimed ownership of the items in the metal box. On the contrary, as stated above, it was the defendant who was attempting to conceal the box with his own body and the defendant who admitted in later statements to being the person who was distributing drugs.

In *State v. Spruell*, the court held, relying on *Callahan*, *supra*, that mere proximity to the drugs, along with evidence of momentary handling, was insufficient to establish constructive possession. *Spruell*, 57 Wn. App. 383 at 388. In *Spruell*, the defendant was in a kitchen of a home where drugs were found and his fingerprint was on a dish that had cocaine on it. *Id.* at 388. The court held that there was nothing to refute the claim that the defendant was a mere visitor in the house and that proximity alone was not sufficient to establish dominion and control. *Id.* In this case, evidence was presented beyond “mere proximity.” The defendant not only was attempting to conceal the box with his body but later admitted to distributing drugs to “Michelle” and others.

Finally, in *State v. George*, 146 Wn. App. 906, 193 P.3d 693 (2008), the defendant was a backseat passenger in a vehicle where marijuana was located. *Id.* at 912. Near the defendant was a glass water pipe and empty beer cans. *Id.* The court found there was no evidence about the defendant's ownership of the marijuana, no drugs found on his person, and no evidence that he had recently used drugs. *Id.* at 922. The court concluded that the State's evidence consisted of mere proximity. *Id.* As argued above, in this there was more than mere proximity. The defendant had drugs in his pants pocket, as well as in the orange pouch from his jacket. The drugs from his pants pocket were in virtually identical packaging to that found in the metal box. CP 68-70, Exhibits #13, #14. Coupled with his admissions about distributing drugs and his physical location on top of the metal box, dominion and control was established.

3. THE DEFENDANT CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO FILE A MOTION TO SUPPRESS EXHIBIT #21 WHEN SUCH A MOTION WOULD NOT HAVE BEEN GRANTED⁴, AND EVEN IF ERROR COULD BE ESTABLISHED IT WOULD BE HARMLESS GIVEN THE OVERWHELMING EVIDENCE PRESENTED.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

⁴ In his opening brief, the defendant asserts that it error for his attorney to fail to object to the admission of exhibit #21 (baggie of methamphetamine) and to exhibit #24 (Tupperware container found in the metal box). BOA, page 24. In his assignments of error, however, the defendant only challenges the admission of exhibit #21. Because he has failed to assign error to the admission of exhibit #24, this court not consider any argument regarding that exhibit. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that

defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient

performance by attorneys are not decisive.” *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel’s failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, the defendant cannot establish prejudice and cannot show that a motion to suppress would have been granted. Evidence was presented that three bags were located in the metal box, and one was selected by the analyst at random. RP 483-484. The selected baggie that was tested was admitted as exhibit #21. CP 68-70. Photos were admitted that show that each of the three baggies were very similar in their contents and physical appearance. CP 68-70, Exhibit #13. The defendant asserts that no testimony was presented regarding the appearance of the tested sample in comparison to the two untested sample, but such argument ignores the photographic evidence that was admitted which shows that the baggies and their contents appear almost identical. *Id.*

In *State v. Caldera*, 66 Wn. App. 548, 832 P.2d 139 (1992), the court held that “scientific testing of a random portion of a substance that is consistent in appearance and packaging is reliable and supports a finding that the entire quantity is consistent with the test results of the randomly selected portion.” *Id.* at 550. In this case, the evidence supports such a finding—the analyst tested the contents of one of three nearly identical

baggies and found that it contained methamphetamine. A logical conclusion would be that all three baggies contained methamphetamine.

If however, this court disagrees that *Caldera* supports such an assumption, the defendant still cannot establish prejudice under an ineffective assistance of counsel claim. The defendant had methamphetamine in his pants pocket and in the orange pouch that was recovered. Also recovered was a digital scale and empty clean plastic baggies. RP 283, 440-442. The clean baggies were concealed in a cigarette carton inside the metal box, and are commonly used for packaging drugs. RP 440-441. Therefore, even if this court were to somehow discount the two baggies of suspected methamphetamine that were not tested, he cannot establish prejudice in light of the other evidence presented.

The defendant relies on *State v. Crowder*, 196 Wn. App. 861, 385 P.3d 275 (2016). BOA, page 21. In *Crowder*, at least four bottles were recovered from the defendant's residence. *Id.* at 871. All four bottles were potential sources for the drugs the defendant gave his victims. *Id.* Two of the bottles were amber-colored and two of the bottles were clear and had labels. *Id.* No one at trial testified as to what color bottle the defendant used when giving the victims pills. *Id.* No one testified as to whether the bottle used had a label. *Id.* All four bottles were potential

sources and therefore the court found that a “representative sample” testing was too speculative. *Id.* That is not the case in here. There were no variables present, unlike *Crowder*. Here, all three baggies of similar size, shape, and color, with only one baggie being slightly longer than the other two. CP 68-70, Exhibit #13. All contained what appeared to be identical crystalline material. *Id.* The photographic evidence supports that this court should follow the analysis of *Caldera* and distinguish this case from the facts of *Crowder*.

As argued above, the defendant cannot establish prejudice in this case. There was overwhelming evidence presented, including a scale with residue, methamphetamine from the defendant’s pants pocket, methamphetamine from the orange pouch, and clean plastic baggies. The orange pouch contained a large uncut rock of methamphetamine, in addition to methamphetamine that had been broken into smaller pieces. RP 264. Moreover, the defendant’s own admission that he was distributing drugs to other individuals renders any potential error in the failure to test each individual baggie recovered. The defendant’s claim of ineffective assistance of counsel fails.

4. THE STATE WILL NOT BE SEEKING APPELLATE COSTS IN THIS MATTER.

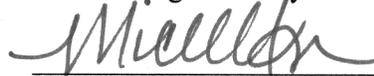
The defendant requests that no appellate costs be awarded in this matter. BOA, page 24. Such request is moot as the State will not be filing a cost bill, should it prevail in this appeal.

D. CONCLUSION.

For all of the above stated reasons, the State respectfully requests that this court affirm the defendant's conviction below.

DATED: January 25, 2018

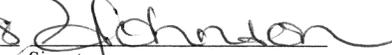
MARK LINDQUIST
Pierce County
Prosecuting Attorney



MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{efile} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/30/18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

January 30, 2018 - 11:09 AM

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