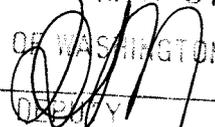


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 37529-0-II

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**VIRGINIA LYNN DENNEY,**

**Appellant.**

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**BRIEF OF APPELLANT**

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 **ORIGINAL**

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## ***ASSIGNMENT OF ERROR***

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

1. The trial court erred when it ruled that the state could elicit the defendant's responses to custodial interrogation given after the defendant invoked her right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. RP 9-41.

2. The trial court denied the defendant her right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it allowed the state to elicit evidence that was more prejudicial than probative. RP 33, 41.

3. Trial counsel's proposal of an unwitting possession instruction denied the defendant h right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. CP 16-17, 31.

*Issues Pertaining to Assignment of Error*

1. Does a trial court violate a defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, if it allows the state in its case in chief to elicit the defendant's responses to custodial interrogation given after the defendant invoked her right to silence?

2. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it allows the state to elicit evidence that was more prejudicial than probative when, in the absence of that evidence, the jury would more likely than not have acquitted the defendant?

3. Does a trial counsel's proposal of an unwitting possession instruction deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the defendant did not claim unwitting possession and the jury would more likely than not have returned a verdict of acquittal absent the instruction?

## STATEMENT OF THE CASE

### *Factual History*

Penny Ann McNeil is a resident of Cowlitz County and has lived next door to the defendant Virginia Lynn Denney for about eight years. RP 89-90.<sup>1</sup> Within the last two years, her husband died of pancreatic cancer. *Id.* During his illness, his doctors prescribed 60 milligram morphine tablets for his pain. *Id.* When he would take one he would be passed out for a number of hours. RP 92. Unfortunately, Ms McNeil was unable to keep these morphine tablets at home because her adult daughter was drug addicted and would steal them. RP 89-90. As a result, she had the defendant keep them for her. RP 80, 89-90. According to Ms McNeil, she never came up short on this medication all during the time that the defendant held it for her. *Id.*

There was one occasion, however, in which Ms McNeil did spill a bottle of morphine tablets and lose a few. RP 91. This happened one time when the defendant's mother drove Ms McNeil to the grocery store. RP 91, 94-96. At the time Ms McNeil had a bottle of her husband's morphine tablets in her purse, and when she placed the purse on the floor of the defendant's

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<sup>1</sup>The record in this case includes one volume of continuously numbered verbatim reports for the pretrial hearing held on June 19, 2007, the CrR 3.5 hearing and trial held on March 10, 2008, and the sentencing hearing held on March 13, 2008. It is referred to herein as "RP" with the designated page number.

mother's car, the bottle fell out and all the tablets spilled on the floorboards. *Id.* Although Ms McNeil thought she had found all of the tablets, the defendant was later in the same car with her mother and found a few of the tablets under a grocery sack. RP 81-83, 91, 94-96. She showed her mother, and then the defendant put the tablets into her purse, intending to given them back to Ms McNeil. RP 81-83, 94-96.

In fact, the defendant works by providing in home care for invalids. RP 74-77. As part of her job, she goes to local pharmacies to get her patients' prescription medication. *Id.* On June 18, 2007, the defendant went to the Olympic Drug Store in Longview on just such an errand. *Id.* After giving the pharmacist the prescription, he went and retrieved some nasal spray she intended to purchase. *Id.* She then waited. *Id.* Although the pharmacist initially told her that it would be about 20 minutes, it took well over an hour. *Id.* After getting the medication and paying for it, she walked out of the store. *Id.* According to the defendant, she forgot about the nasal spray, which she had put in a bag she was carrying. *Id.* However, when she left the store, a security strip in the box of nasal spray set off an alarm. *Id.*

When the alarm sounded, the defendant stopped and waited for the manager, who walked up and asked her to come back to an office. RP 46-49, 74-77. The defendant complied. *Id.* As she did, she realized she had left the store with the nasal spray. RP 74-77. Upon remembering this, the defendant

booking, even though he had not observed anything about the defendant to indicate that the defendant was under the influence of alcohol or any drug. RP 13, 65-66. According to the jail intake officer, the defendant also answered a "bail study question" about drug addiction and stated that she was addicted to morphine. RP 67-69.

### ***Procedural History***

By information filed June 20, 2007, the Cowlitz County Prosecutor charged the defendant with illegal possession of morphine. CP 1-2. The court later allowed the state to amend the information to add a count of third degree theft. CP 10-11. The case was later called a CrR 3.5 hearing and jury trial on the same day. RP 9-41, 45-123. During the CrR 3.5 hearing, the state called Officer Davis and Ms Jenny O'Neil, the jail intake officer. RP 9-19, 20-25. During this hearing Officer Davis and Ms O'Neil testified to the facts of the defendant's arrest and her booking as is set out in the preceding factual history. *See Factual History*. Ms O'Neil also testified that they routinely ask inmates during the booking process whether or not they have used drugs within the past 72 hours and whether or not they are drug dependent. RP 20-23.

During argument on the CrR 3.5 issues, the defendant argued that (1) the defendant's statements concerning drug usage and addiction should not be admitted because they were the product of custodial interrogation

following an invocation of the right to silence, and (2) the defendant's responses to these questions were more prejudicial than probative. However, the court ruled that both Officer Davis and Ms O'Neil would be allowed to testify in the state's case in chief to their claims as to how the defendant answered the questions concerning drug usage and addiction.

Following this ruling, the trial began with the state calling the Olympic Drug Store Manager, Officer Davis, and Jenny O'Neil as its witnesses. RP 45, 58, 66. They testified to the facts contained in the preceding factual history. *See* Factual History. The defense then called three witnesses: the defendant, Ms Penny McNeil, and Yonda Ellis, the defendant's mother. RP 73, 89, 94. The defendant testified to her version of how the morphine tablets came to be in her purse and what happened in the store on the day in question. RP 73-89. She also denied that she had ever used a morphine tablet in the past or stated that she had. RP 82-84. Ms McNeil and Ms Ellis testified concerning Mr. McNeil's prescription for the morphine tablets and how they ended up in the defendant's possession. RP 89-94, 94-96.

After the defense closed its case, the court instructed the jury without objection or exception by the defense. RP 99. In fact, the court also gave the following instruction on unwitting possession as proposed by the defense:

A person is not guilty of possession of a controlled substance if

the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in her possession or did not know the nature of the substance.

The burden is of the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP 16-17, 31.

Following argument by counsel, the jury retired for deliberation, eventually returning a verdict of guilty to both counts. RP 108-123, 41-42. The court later sentenced the defendant within the standard range and the defendant filed timely notice of appeal. CP 44-56, 57.

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT RULED THAT THE STATE COULD ELICIT THE DEFENDANT'S RESPONSES TO CUSTODIAL INTERROGATION GIVEN AFTER THE DEFENDANT INVOKED HER RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT.

Under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before a defendant's custodial statements may be admitted as substantive evidence, the state bears the burden of proving that prior to questions the police informed the defendant that: " (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him." *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly informed the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

In the case at bar the state informed the court and the defense that it intended to introduce the defendant's answers made during custodial interrogation. As a result prior to trial the court held a hearing as required under CrR 3.5, during which the state called Officer Davis, who claimed that he twice informed the defendant of her *Miranda* rights off of a "department issue card." However, the state did not introduce this card into evidence. Thus, there is no evidence in the record that Officer Martin informed the defendant that she had the absolute right to remain silent, that anything that she said could be used against her, that she had the right to have counsel present before and during questioning, and that if she could not afford counsel, one would be appointed to her prior to questioning. Consequently, the trial court erred when it ruled that the defendant's statements made during custodial interrogation were admissible in the state's case in chief.

In addition, the state itself admitted that the defendant had unequivocally invoked her right to silence in this case. However, the state argued, and the court ruled, that under the decision in *State v. Walton*, 64 Wn.App. 410, 824 P.2d 533 (1992), the defendant's answers to questions by jail personnel were not the product of custodial interrogation. The following examines this case.

In *Walton, supra*, the defendant was charged with possession of heroin the police found in a house during the execution of a house. The

defendant and his wife were in the house at the time the police served the warrant and they found items such as a power bill in the defendant's name in the house. Over the defendant's objection, the state introduced the defendant's jail records in which he gave this address to the booking officer as his place of residence. Following conviction, the defendant appealed, arguing in part that the admission of the booking records violated his right to silence because the booking officer's questions constituted custodial interrogation without proof of *Miranda* warnings.

In addressing this issue, the court noted the following concerning the admission of booking information a defendant gives when initially taken into a jail.

Interrogation, for purposes of *Miranda*, includes not only express questioning, but also any words or actions on the part of police which they should know are reasonably likely to elicit an incriminating response from the suspect. The nature of the question--not the procedure during which the question is asked--is decisive. It is well established that routine booking procedures do not require *Miranda* warnings. A request for routine information necessary for basic identification purposes is not interrogation even if the information revealed is incriminating. Only if the agent should have reasonably known the information sought was directly relevant to the offense will the request be subject to scrutiny. The intent of the police is relevant, but not conclusive. The issue of interrogation is factual, subject to a clearly erroneous standard.

*State v. Walton*, 64 Wn.App. at 414 (citations omitted).

The court then went on to hold that information concerning a defendant's residence is not "directly relevant to the offense" in question and

thus is not subject to *Miranda*. The court held:

The record suggests the booking officer and the pretrial investigator did nothing more than try to determine Mr. Walton's address. The questions asked were routine background questions necessary for identification and to assist a judge in setting reasonable bail. These are precisely the routine statements which are admissible, even though they ultimately prove to be incriminating.

*State v. Walton*, 64 Wn.App. at 414 (citations omitted).

By contrast, in the case at bar the jail officer was not asking "routine background questions necessary for identification." Rather, the officer was asking questions that any reasonable person would know could prove incriminating to a person being booked on a charge of possession of illegal drugs. The arresting officer was well aware of that and stood by the defendant during the booking process so he could hear the answers to these questions. Thus, the questions concerning drug use and addiction in the case at bar did qualify as custodial interrogation. As a result, the trial court abused its discretion when it refused to suppress these statements in the light of the state's admission that the defendant had unequivocally invoked his right to silence prior to the questioning.

In this case, the admission of this evidence was not only an abuse of the court's discretion, but it was a direct violation of the defendant's right to silence under Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment. Unlike *Walton*, in which the defendant

sought the suppression of his statements based upon the failure to give *Miranda* warnings, in the case at bar the defendant had invoked her right to silence, and the continued custodial interrogation violated these constitutional rights. As an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). “An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

In the case at bar, there is a reasonable probability that without the admission of the defendant’s alleged statements she would have been acquitted of the drug possession charges. This is particularly so given the testimony of Ms McNeil and Ms Ellis concerning the origin of the drugs and the circumstances in which the defendant came into possession of them. Thus, the state cannot meet its burden of proving that the error in the admission of the defendant’s custodial statements was harmless beyond a reasonable doubt. As a result, the defendant is entitled to a new trial.

**II. THE TRIAL COURT DENIED THE DEFENDANT HER RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ALLOWED THE STATE TO ELICIT EVIDENCE THAT WAS MORE PREJUDICIAL THAN PROBATIVE.**

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is

intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision of whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle without permission, and possession of

methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, the defendant appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

*State v. Acosta*, 123 Wn.App. at 426 (footnote omitted).

Turning to the case at bar, the trial court allowed the state to elicit the claim by Officer Davis and Ms O'Neil that the defendant admitted that she

was addicted to morphine. There was little relevance to this evidence. Conversely, it created a large amount of unfair prejudice. Specifically, it invited the jury to convict the defendant based upon the inference that since she was addicted to morphine she must be guilty of illegal possession of the same drug. In other words, the effect of this evidence was to prove bad character and then argue that the defendant was guilty of the crime charged because she was acting in conformity with her bad character. In admitting this evidence the trial court abused its discretion in the same manner that the court did in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001). The following examines this case.

In *Pogue*, the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal,

he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

*State v. Pogue*, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In the case at bar, as in *Pogue*, the defendant did not claim that she did not know what the pills were. Rather, she admitted that she knew that

they were morphine. Thus, there was little relevance in the state's evidence that the defendant had admitted a morphine addiction. In addition, as in *Pogue*, the admission of this evidence in the case at bar materially affected the outcome of the trial since the effect of this evidence was to destroy the credibility of the defendant's claims. Thus, under the facts of this case it is more likely that but for the admission of this improper evidence the jury would have acquitted. As a result, the defendant is entitled to a new trial.

**III. TRIAL COUNSEL'S PROPOSAL OF AN UNWITTING POSSESSION INSTRUCTION DENIED THE DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense

attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's actions proposing an instruction on unwitting possession.

This instruction stated:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in her possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP 16-17, 31.

The problem with the proposal of this instruction in the case at bar is twofold. First, the defendant did not really claim unwitting possession. Rather, she claimed that she knowingly possessed the morphine pills but did not do so illegally since her neighbor had a prescription for the pills and she was going to return them to him. Second, the effect of this instruction was to effectively shift the burden of proof from the state to prove that the defendant illegally possessed the drugs to the defendant to prove that she did legally possess the drugs. Given the first fact, there was no tactical reason for the defendant's attorney to propose the instruction. Thus, this action fell below the standard of a reasonably prudent attorney and meets the first requirement for a claim of ineffective assistance of counsel.

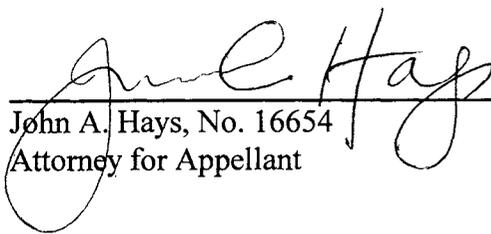
In addition, since the court did give the instruction, and since it did unnecessarily shift the burden of proof, it is more likely than not that had counsel not proposed this instruction, the jury would have returned a verdict of acquittal. Thus, the defendant was prejudiced by counsel's actions. As a result, the defendant is entitled to a new trial because trial counsel's actions in proposing an unnecessary, prejudicial instruction denied the defendant effective assistance of counsel in this case.

## CONCLUSION

This court should reverse the defendant's convictions and remand for a new trial because (1) the admission of defendant's answers to custodial interrogation after the defendant invoked her rights violated Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment. (2) the admission of evidence that the defendant was addicted to drugs denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, and (3) trial counsel's proposal of an unwitting possession charge denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

DATED this 11<sup>th</sup> day of July, 2008.

Respectfully submitted,

  
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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.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

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

**UNITED STATES CONSTITUTION,  
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

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

**ER 403**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**INSTRUCTION NO. 11**

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in her possession or did not know the nature of the substance.

The burden is of the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

