

No. 94902-6

**No. 48481-1**

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

---

STATE OF WASHINGTON, Respondent

v.

ANTHONY G. HAND, Appellant

---

APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY

---

BRIEF OF APPELLANT

---

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Graham, WA  
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Marie J. Trombley  
WSBA 41410

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR ..... 1

II. STATEMENT OF FACTS ..... 2

III. ARGUMENT ..... 7

    A. Mr. Hand’s Constitutional Right To Due Process Was  
    Violated By The 76-Day Delay Between A Court Order  
    For Competency Restoration And Admission to  
    Western State Hospital..... 7

    B. The Trial Court Erred When It Denied Mr. Hand’s  
    Motion To Dismiss ..... 12

    C. This Court Should Exercise Its Discretion To Deny  
    Appellate Costs Should The State Substantially Prevail  
    On Appeal..... 18

IV. CONCLUSION..... 20

TABLE OF AUTHORITIES

*Washington Cases*

*In re Det. of D.W.*, 181 Wn.2d 201, 332 P.3d 423 (2014)..... 17

*In re Det. of Morgan*, 180 Wn.2d 312, 330 P.3d 774 (2014)..... 7

*State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010)..... 17

*State v. Beito*, 147 Wn.App. 504, 195 P.3d 1023 (2008)..... 14

*State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 19

*State v. Clinkenbeard*, 130 Wn. App. 552, 123 P.3d 872 (2005)..... 8

*State v. Flinn*, 119 Wn.App. 232, 80 P.3d 171 (2003), (*aff'd*, 154 Wn.2d 193, 110 P.3d 748 (2005) ..... 14

*State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997)..... 14

*State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000) ..... 19

*State v. Sinclair*, 192 Wn.App. 380, 367 P.3d 612 (2016) ..... 18

*State v. Wicklund*, 96 Wn.2d 798, 638 P.2d 1241 (1982) ..... 9

*U.S. Supreme Court*

*Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972)..... 10

*United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)..... 17

*Federal Cases*

*Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9<sup>th</sup> Cir. 2003).... 8

*Trueblood v. D.S.H.S.*, 822 F.3d 1037 (9<sup>th</sup> Cir. 2016)..... 10

*Constitutional Provisions*

Const. art. I, §3 ..... 8, 10  
U.S. Const. amend. 14..... 7, 10

*Statutes*

RCW 10.73.160(1)..... 19  
RCW 10.77.086(1)(a)(i) ..... 9  
RCW 10.77.050 ..... 9  
RCW 10.77.060(1)(a)..... 9  
RCW 10.77.086 (1)(a)(2013), amended by LAWS of 2015, 1<sup>st</sup>  
    Spec. Sess. ch. 7, §5 ..... 12  
RCW 10.77.086 (1)(a)(i)(ii)(b) ..... 9  
RCW 10.77.086(1)(a)(i) ..... 13  
RCW 10.77.086(1)(b)..... 13

*Rules*

CrR 8.3(b) ..... 13  
RAP 14.2..... 18

I. ASSIGNMENTS OF ERROR

A. The Trial Court Erred When it Found Mr. Hand's Constitutional Rights To Liberty And Due Process Were Not Violated By The Unreasonable 76-Day Delay Between The Court Order For Competency Restoration And Compliance With That Order By Western State Hospital.

B. The Trial Court Erred When It Denied Mr. Hand's Motion To Dismiss.

C. This Court Should Exercise Its Discretion To Deny Appellate Costs Should The State Substantially Prevail On Appeal.

Issues Related To Assignments of Error

A. The trial court found Mr. Hand incompetent to stand trial and ordered him to receive competency restoration treatment for a 45-day period, within 15 days of the order. Over 60 days later Mr. Hand remained confined at the Pierce County Jail. He was transported to Western State Hospital (WSH) 76 days after the court ordered restoration services. Was Mr. Hand's constitutional right to liberty and due process violated by the by the delay ?

B. Did the trial court err when it failed to dismiss the charges against Mr. Hand?

C. Should this Court exercise its discretion to deny a cost bill if the State substantially prevails on appeal?

## II. STATEMENT OF FACTS

On August 26, 2014, the Pierce County Superior Court sentenced Anthony Hand to nine months of confinement with a portion to be served at the Alternative to Confinement program. (ATC). (CP 2;266). On September 5, 2014, Mr. Hand allegedly violated the program requirements. (CP 2). Pierce County prosecutors charged him with escape in the first degree. (CP 1). He was arrested on a warrant on October 1, 2014. (CP 3; 274).

At his arrest, officers found methamphetamines and he was charged with unlawful possession of a controlled substance. (CP 274;275). He could not post the \$30,000 bail bond for the escape from custody charge or the \$20,000 bail bond for the unlawful possession charge. He remained confined at the jail. (CP 4-5; 276-277).

Seventy-one days later, defense counsel requested and received an order for a competency evaluation for Mr. Hand. (12/11/14 RP 3-4; CP11-17). The court ordered him to be held in

custody without bail. (CP 11). He was evaluated at the Pierce County Jail (PCJ). (CP 291-299). The evaluator concluded Mr. Hand had a long history of mental illness symptoms, substance abuse disorder, and lacked the capacity to reasonably assist in his own defense. (CP 26; 298). The court found Mr. Hand not competent to stand trial on December 24, 2014. (CP 18-27; 12/24/14 RP 4). It ordered a 45-day commitment to Western State Hospital (WSH) within 15 days, “pursuant to the *Trueblood* decision<sup>1</sup>.” (12/24/14 RP 6; CP 30-32; 302-304).<sup>2</sup>

Twenty six days later, on January 19, 2015, Mr. Hand sent a letter to the court, (CP 34-38). He was still in the jail, awaiting his restorative treatment as ordered by the court. (CP 34). Mr. Hand asked the court to consider whether the *Trueblood* decision did more than allow financial sanction of Department of Social and Health Services for noncompliance, specifically whether it was also to protect the due process rights of individuals with mental disabilities. (CP 35). He reminded the court he was being held on a no bail hold, without having been convicted of a crime, and

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<sup>1</sup> *Trueblood, et al., v. Washington State Dept. of Social and Health Services*, 73 F. Supp.3d 1311 (W.D. WA 2014).

<sup>2</sup> In a separate order for the unlawful possession charge, the court issued an amended order on December 29, 2014, for a 45 -day period rather than a 90-day time. (CP 305-307).

without the ability to obtain needed mental health services either at WSH or somewhere else. (CP 36-37). He asked the court to dismiss based on a violation of his right to due process or to transfer his case to the mental health court. (CP 38).

On February 11, 2015, defense counsel submitted a motion to dismiss, or to order WSH to show cause why it should not be held in contempt of the court's December 24, 2014. The motion sought dismissal because of the "extended and inexcusable incarceration in the county jail, in direct contradiction to the prior order of the court; the abrogation of Mr. Hand's right to a speedy trial by a State agency (DSHS, of which Western State Hospital is a part), and punishment by means of extended incarceration in violation of the clear directives set forth in Chapter 10.77 RCW, the court rules, due process, and the Eighth Amendment to the United States Constitution." (CP 39-40). The court denied the motion to dismiss without prejudice. (2/18/2015 RP 2).

The following week, the court held a Show Cause hearing and set the motion to dismiss or be released to the following week. (2/25/2015 RP 5). In its briefing, the attorney general's office (AGO) acknowledged that Mr. Hand was a class member in the federal court class action brought in *Trueblood v. DSHS*.

*Trueblood* held the DSHS delay in providing court ordered competency services violated the plaintiffs' Fourteenth Amendment due process rights. (CP 58). The AGO's briefing conceded that Mr. Hand had a due process right to avoid unreasonable delays in admission while detained and urged the court to order a temporary release of Mr. Hand to correct any constitutional deficiencies. (CP 50).

Arguing against imposition of a sanction, the AGO contended that the initial two orders for treatment issued on December 24, 2014 gave a 15-day time frame for admission; however, one of the orders was amended on December 29<sup>th</sup>, and did not have the handwritten 15-day time limit. It was however, received by the hospital on January 2, 2015. (CP 55-56).

At the hearing, the trial court did not hear oral argument from the attorney general. Rather, the court said it had heard argument previously on the same issue in numerous other cases and unless there was a new issue, it did not need argument. (2/25/16 RP 6). The court imposed sanctions of \$500 per day, beginning February 26, 2015. (CP 83).

On March 4, 2015, the court heard the defense motion to dismiss the charges or to release Mr. Hand. (CP 98). Mr. Hand

was still waiting for restoration services. The prosecutor argued *Trueblood* was a federal case, and had “no bearing” on the superior court. (3/4/15 RP 8). The state also argued Mr. Hand’s Fourteenth Amendment right to due process “ is a very distinct right versus having his case thrown out down here because of the violation of the --- ride up in the clouds. What he is looking at down here is, well, how has this Court or the State here violated some type of right?” (3/4/15 RP 8).

Despite the over two month delay in restoration services by WSH, the State argued there was no governmental mismanagement under CrR 8.3. (3/4/2015 RP 8-9). The court denied the motion to dismiss and specifically found there was no due process violation. (3/4/2015 RP 11). Mr. Hand continued in confinement.

Mr. Hand was admitted to WSH on March 10, 2015. (CP 111). In June 2015, the trial court signed an order holding DSHS in contempt for its failure to comply with the court order of December 24, 2014. The court ordered DSHS to pay a \$6,000 sanction for failure to obey a court order. (CP 195-196).

Mr. Hand was found competent to stand trial on April 29, 2015, 209 days after his arrest and 50 days after his admission to

the hospital. (4/29/15 RP 2). His bail was reset to 20,000 dollars. (4/29/15 RP 3). He could not post bail and remained confined.

Mr. Hand entered the felony mental health court program. (CP 197-199). Six months later he was terminated from the program for noncompliance. (CP 502-503). The matter proceeded to a stipulated facts trial and he was found guilty on both counts. (CP 265-268; 497-499). He was sentenced to 63 months of confinement. (CP 250-262; 12/4/15 RP 51). The court found that Mr. Hand did not have the current or likely future ability to pay discretionary legal fees and imposed only the mandatory minimum financial obligations. (12/4/15 RP 53). He makes this timely appeal. (CP 269;524).

### III. ARGUMENT

#### A. Mr. Hand's Guaranteed Constitutional Right to Substantive Due Process Was Violated By The 76-Day Delay Between A Court Order For Competency Restoration And Compliance With That Order By DSHS.

Constitutional questions are questions of law and are reviewed de novo. *In re Det. of Morgan*, 180 Wn.2d 312, 319, 330 P.3d 774 (2014). The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Article I, §3 of the

Washington State Constitution provide that no person shall be deprived of life, liberty, or property without due process of law. The substantive component of the due process clause bars the government from infringing on fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. *State v. Clinkenbeard*, 130 Wn. App. 552, 564, 123 P.3d 872 (2005).

Constitutional questions regarding confinement of incompetent pretrial criminal defendants are analyzed under the due process clause. *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1120 (9<sup>th</sup> Cir. 2003). Whether the substantive due process rights of an incompetent criminal defendant have been violated is determined by balancing their liberty interests in freedom from incarceration and in restoration treatment against the legitimate interests of the State. *Id.* at 1121.

“No incompetent<sup>3</sup> person may be tried, convicted, or sentenced for the commission of an offense so long as the individual remains incompetent.” *State v. Wicklund*, 96 Wn.2d 798,

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<sup>3</sup> Incompetency means a person lacks the capacity to understand the nature of the proceedings against him or to assist in his own defense as a result of mental disease or defect. RCW 10.77.010(15).

800, 638 P.2d 1241 (1982); RCW 10.77.050. Washington has statutory procedures for the identification and treatment of mentally incompetent criminal defendants. RCW 10.77 et. seq.

Whenever there is reason to doubt the competency of a defendant, the court is authorized to order an evaluation and a report on the mental condition of the defendant. RCW 10.77.060(1)(a). If the defendant determined to be incompetent has been charged with a Class C or nonviolent Class B felony, the court *must* commit the defendant to a facility for competency restoration for up to forty-five days. RCW 10.77.086 (1)(a)(i)(ii)(b).(Emphasis added). Washington State Department of Social and Health Services (DSHS), not city or county jails, is tasked with overseeing both the competency evaluations and the restoration services. RCW 10.77 et.seq.

Here, based on a pretrial competency evaluation the court followed the procedures outlined in RCW 10.77 and ordered restoration treatment services for Mr. Hand. The court committed him to the custody of DSHS. RCW 10.77. 086(1)(a)(i). Treatment was to begin within 15 days after the court issued its order on December 24, 2014. However, instead of being offered admission to WSH for treatment, Mr. Hand remained under DSHS custody but

confined and untreated at the county jail for 76 days, until March 10, 2015.

The Ninth Circuit has previously determined that pretrial detainees needing competency restoration treatment have a substantive due process right to restoration services. *Mink*, 322 F.3d at 1121. Mr. Hand asserts that as an incompetent criminal defendant, who had not been convicted of the alleged crimes, he had a liberty interest in being free from incarceration. As an individual found incompetent he had a liberty interest in receiving timely competency restoration treatment. *Trueblood v. D.S.H.S.*, 822 F.3d 1037 (9<sup>th</sup> Cir. 2016). Here, WSH did not offer admission to Mr. Hand in a timely manner. He waited in the county jail for 76 days. There was no reasonable relation between the nature and duration of his confinement and the purpose for which he was being held. The nature of the confinement, a jail, and the duration, 76 days, bore no reasonable relation to the purpose for which he was being held: that is, competency restoration. U.S. Const. amend. 14; Const. art. I, §3; *Jackson v. Indiana*, 406 U.S. 715, 733, 738, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972).

The State's identified interest in detaining Mr. Hand appears to have been based on an erroneous understanding of the

due process argument and Mr. Hand's criminal record. (CP 86).

The State argued:

“He is being incarcerated not only because of a pending competency restoration period, but also because he is dangerous and a flight risk. The court's initial bail set in this matter was \$30,000. Clearly the court was concerned that the defendant was a danger to the community. At this point, it is fair to assume that the defendant would be incarcerated pending trial whether there were competency issues or not.” (CP 86).

The State's stated interest in keeping Mr. Hand locked in the jail for over two months is unpersuasive. The issue was not whether Mr. Hand would be held in jail pending trial if he were competent, the only matters holding him were the current two charges. (3/4/15 RP 4). The issue was whether his liberty interest in restorative treatment had been violated by the State's dilatory offer of admission for treatment. Mr. Hand was not being held for nor did he have a history of committing violent crimes. (CP 509-510).

A reasonable state interest is to treat and restore the defendant's competency so the state may resume trial proceedings.

*Mink*, 322 F.3d at 1122. Delaying the court-ordered treatment and holding an incompetent defendant in the jail for months bears no reasonable relation to the restoration purpose for which the court committed Mr. Hand. *Id.* Like the plaintiffs in *Mink* and *Trueblood*, here there was no legitimate state interest in holding Mr. Hand untreated in the county jail.

Mr. Hand respectfully asks this Court to find that his due process rights were violated and the remedy must be dismissal.

B. The Trial Court Erred When It Denied Mr. Hand's Motion To Dismiss.

RCW 10.77 provides that once a defendant is found incompetent, until he either regains competency or it is determined he is unlikely to regain competency, but "in any event for a period of no longer than ninety days, the court ...shall commit the defendant to the custody of the secretary who shall place such defendant in an appropriate facility of the department for evaluation and treatment." Former RCW 10.77.086 (1)(a)(2013), amended by LAWS of 2015, 1<sup>st</sup> Spec. Sess. ch. 7, §5. However, for a defendant whose highest charge is a class C felony or a class B felony not classified as violent under RCW 9.94A.030, the maximum time

allowed for the initial period of commitment for restoration is forty-five days. RCW 10.77.086(1)(b).<sup>4</sup>

The statute requires the court to commit the defendant to the custody of DSHS, “who shall place such defendant in the appropriate facility of the department for evaluation and treatment;”. RCW 10.77.086(1)(a)(i). Here, between days 1 and 70, the court held 3 hearings to discuss why Mr. Hand was not receiving the ordered competency treatment. On February 25, 2015, approximately 18 days after the 45-day period, the trial court imposed sanctions on DSHS to coerce the State to comply with the court order. (2/25/15 RP 8)

CrR 8.3(b) provides in relevant part:

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

Dismissal under CrR 8.3 is an extraordinary remedy and appropriate in truly egregious cases. *State v. Flinn*, 119 Wn.App.

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<sup>4</sup> The legislature amended RCW 10.77 to take effect on July 1, 2015, after Mr. Hand had already entered mental health court. LAWS OF 2015, 1<sup>st</sup> Spec. Sess. ch. 7, § 19. Mr. Hand addresses the question of dismissal under the statutes in effect in March 2015.

232, 247, 80 P.3d 171 (2003), (*aff'd*, 154 Wn.2d 193, 110 P.3d 748 (2005)). The defendant must first demonstrate arbitrary action or governmental misconduct. The governmental misconduct need not be evil or dishonest, simple mismanagement is sufficient. *Id.* at 831. The second necessary element is prejudice affecting a defendant's right to a fair trial. *State v. Michielli*, 132 Wn.2d 229, 241, 937 P.2d 587 (1997).

A trial court's decision regarding a motion to dismiss under CrR 8.3(b) is reviewed for a manifest abuse of discretion. *State v. Beito*, 147 Wn.App. 504, 508, 195 P.3d 1023 (2008). Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *Michielli*, 132 Wn.2d at 240.

Failure by DSHS and WSH, to comply with the law and the court's order amount to government misconduct. Here, the initial 45 day period began on December 24, 2014; by the time he was transported for treatment on March 10, 2015, Mr. Hand had waited four times the maximum time allowed by the court order, and 21 days past the 45-day time for services.

In the AGO brief to deny sanctions, the State pointed out that felony defendants awaiting 45 and 90-day restoration treatment

services waited approximately 75 days after a court orders treatment. (CP 51). At that time, there were 99 criminal defendants awaiting transport to WSH. (CP 51). The bottom line explanation for the length of wait time was a lack of funding and staffing. (CP 51).

In *Mink*, the federal court noted the Oregon state statutory procedures, which recognized the constitutional rights of mentally incompetent persons charged with a crime, provided for identification and restoration treatment of such individuals so their guilt or innocence could be determined at trial. *Mink*, 322 F.3d at 1105. The question there, as here, was “what happens when the state mental hospital...which is charged with evaluating and treating mentally incapacitated defendants, refuses to accept such defendants on a timely basis.” *Id.*

The court definitively answered the question: Incompetent defendants may not be indefinitely or unreasonably detained in jails: a “lack of funds, staff, or facilities cannot justify the State’s failure to provide [such persons] with [the] treatment necessary for rehabilitation.” *Mink*, 322 F.3d at 1121. (alterations in original).

Similarly, in *Trueblood*, the federal court found that Washington State DSHS violated the liberty rights of individuals

who, like Mr. Hand, faced criminal charges, and found to be mentally incompetent to proceed to trial, were left to wait for weeks or months in jails, until offered admission to a state hospital. *Trueblood*, 73 F.Supp.3d 1313. The federal court prohibited the State from delaying competency restoration services for these jailed defendants. *Id.* In the later appeal of the *Trueblood* ruling, the State did not challenge the court's finding that a *seven day* deadline for providing restorative services was timely. *Trueblood* 822 F.3d at 1044. (emphasis added).

Mr. Hand was prejudiced by the failure of DSHS and WSH to comply with the statutory scheme, the trial court's order, and the federal court ruling of a seven day transport timeframe. Mr. Hand's right to due process, guaranteed under the Fourteenth Amendment was violated by the lengthy and unnecessary delay in admission to WSH. He spent 76 days of what was supposed to be a 45-day restoration period housed in the county jail.

In a concurrence opinion, Justice Sanders wrote:

The judiciary should accept no shortcuts when it comes to discharging its constitutional obligation to appoint effective attorneys to represent indigent criminal defendants. If no such attorney is to be found because adequate funding is not available, then no attorney should be appointed and

the case dismissed. It is not up to the judiciary to tax or appropriate funds; these are legislative decisions. However, it is up to the judiciary to facilitate a fair proceeding with effective appointed counsel if there is to be one.

*State v. A.N.J.*, 168 Wn.2d 91, 121, 225 P.3d 956 (2010).

The Washington Supreme Court and the Ninth Circuit have made clear that a legislative failure to provide adequate funding does not relieve the court of discharging its obligations to protect the constitutionally guaranteed substantive due process rights of criminal defendants. “*Anyone* detained by the State due to incompetence has a *constitutional* right to receive “such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition.” *Detention of D.W.*, 181 Wn.2d 201, 207, 332 P.3d 423 (2014)(internal citations omitted)(emphasis added).

Here, the State acted in a manner that interfered with the rights implicit in the concept of ordered liberty. *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Mr. Hand was prejudiced by the State’s mismanagement, its violation of his constitutional rights, and the delay of his exercise of a right to a speedy trial when it detained him for 76 days on a

'stay' without offering him admission to the hospital. The trial court was well aware of the problems and attempted numerous times to encourage and eventually coerce the State, through sanctions, into compliance in an effort to safeguard his rights. However, sanctions on DSHS did not undo the irreparable injury Mr. Hand suffered while he waited for services.

This case should have been dismissed under CrR 8.3. The trial court abused its discretion by denying Mr. Hand's motion to dismiss. Mr. Hand respectfully asks this Court to reverse his convictions and dismiss the charges with prejudice.

C. This Court Should Exercise Its Discretion And Decline To Impose Appellate Costs.

RAP 14.2 authorizes the State to request the Court to order an appellant to pay appellate costs if the State substantially prevails on appeal. The Court of Appeals has held that an indigent appellant must object, before the Court has issued a decision terminating review, to any such cost bill that might eventually be filed by the state. *State v. Sinclair*, 192 Wn.App. 380, 395-394, 367 P.3d 612 (2016). The appellate courts may deny awarding the

State the costs of appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000); *Sinclair*, 192 Wn.App. at 382.

In exercising its discretion, a defendant's inability to pay appellate costs is a significant factor to consider when deciding whether to impose such costs. *Sinclair*, 192 Wn.App. at 382.

The Washington Supreme Court recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants, which include an interest rate of 12 percent, court oversight until LFOs are paid, and long term court involvement which "inhibit re-entry" and increases the chances of recidivism. *State v. Blazina*, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). An appellate court should deny an award of costs to the State if the defendant is indigent and lacks the ability to pay. *Sinclair*, 192 Wn.App. at 382.

In *Sinclair*, the defendant was indigent, aged, and facing a lengthy prison sentence. The Court determined there was no realistic possibility he could pay appellate costs and denied award of those costs. *Sinclair*, 192 Wn.App. at 392.

Similarly, Mr. Hand is indigent and lacks an ability to pay appellate costs. Mr. Hand is over 50 years old, subsists on SSI, and there is no record of a work history. His mental health issues and

drug addiction are well documented. At his sentencing, the trial court chose not to impose any discretionary legal financial obligations because it was unrealistic to expect Mr. Hand's financial situation to improve.

Given these factors, Mr. Hand respectfully asks this Court to exercise its discretion and order no costs on appeal should the State substantially prevail.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hand respectfully asks this Court to reverse his convictions and dismiss all charges with prejudice.

Dated this 17<sup>th</sup> day of August 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Anthony Hand, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid on August 17, 2016 to:

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And by electronic service by prior agreement between the parties to:

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# TROMBLEY LAW OFFICE

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