

No. 34611-7-II

Division II, COURT OF APPEALS  
OF WASHINGTON STATE

FILED  
COURT OF APPEALS  
SEP 11 10 41 AM '02  
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SW

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Albert L. Nickols,

Appellant,

vs.

STATE OF WASHINGTON,

Respondent.

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Lewis County Superior Court

Cause No. 05-1-00823-1

Judge Richard L. Brosey

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Appellant's Statement of Additional Grounds Brief

RAP 10.10

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Albert L. Nickols,  
Pro-Se litigant  
#883578, S.C.C.C., H5B136L  
191 Constantine Way  
Aberdeen, Wa 98520

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### ASSIGNMENT OF ERRORS

A. 1) The trial court had an affirmative duty to either hold an evidentiary hearing or not consider disputed facts.

2) The trial court exceeded its statutory authority in sentencing Mr. Nickols, and therefore Mr. Nickols' sentence is invalid on its face.

3) Defense trial counsel rendered ineffective assistance of counsel by failing to object to admission of evidence which should've been suppressed.

### ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

B. 1) Whether the trial court was obligated to either hold an evidentiary hearing or not consider the disputed facts pursuant to RCW 9.94A.530 (formerly 9.94A.370(2)), when Mr. Nickols affirmatively disputed material facts at sentencing. (Assignment of error No. 1)

2) Did the trial court exceed its statutory authority when it sentenced Mr. Nickols to a period of 9-12 months community custody on top of a 120 month, ten year, statutory maximum sentence? (Assignment of error No. 2)

3) Was Mr. Nickols denied the effective assistance of counsel when his trial attorney failed to

object to the admission of evidence which should've been suppressed? (Assignment of error No. 3)

STATEMENT OF THE CASE

C. 1) Procedural History.

Mr. Nickols accepts as presented the "Statement of facts and prior proceedings" as set forth in Appellate counsel's opening brief.

2) Substantive Facts.

a) The Sentencing Hearing. At the sentencing hearing, Mr. Nickols specifically refuted the alleged facts that the state offered in support of its recommendation for a high end, 120 month sentence. The following colloquy transpired:

**MR. EISINGER:**..., and Mr. Nickols was in the practice of distributing methamphetamine for money. He was engaged in that as a business of his own to make money.

**THE DEFENDANT:** Thats not true.

**MR. EISINGER:** And as a result, he should-- the sentence should reflect that, and again, 120 months is whats being asked.

VRP-03/20/2006, Pg. 5 @ 1-8.

THE COURT: ...Under the circumstances, I think that there needs to be a message sent here, and the message is that its against the law to deal in methamphetamine, and thats in essence what was going on here.

VRP-03/20/2006, Pg. 9 @ 9-14.

b) The Judgment and Sentence. Mr. Nickols' Judgment and sentence, on pg. 6, §(a), reads 120 months on counts I and II, to run concurrent. Under pg. 6, §4.6, it reads that Mr. Nickols is ordered to 9-12 months of community custody on counts I and II.

c) Ineffective Assistance of Counsel. The informant in this matter gave direct testimony that he was in violation of his Confidential Informant (C.I.) contract during the commission of at least One of the alleged buys in this case, and further established that he was and is an unreliable source of information for officers to have relied upon in executing this operation..

Defense counsel should've moved to suppress the evidence obtained from and as a result of the Informants information in this case, as it was obtained outside of the guaranteed and secured

Constitutional right against deprivation of liberty without due process of law. Washington Constitution Article 1 §3; U.S. Constitution Amendment V.

ARGUMENT

D. 1) THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RELYING ON EVIDENCE IN SUPPORT OF THE SENTENCE TO WHICH MR. NICKOLS DISPUTED WITHOUT HOLDING AN EVIDENTIARY HEARING.

Where a defendant disputes material facts, the court must either not consider the fact or order an evidentiary hearing. State v. Talley, 83 Wash. App 750, 923 P. 2d 721 (1996). In accord, State v. Strauss, 119 Wash. 2d 401, 832 P. 2d 78 (1992); State v. Young, 51 Wash. App. 517, 754 P. 2d 147 (1988). The scope of the record at sentencing is described in RCW 9.94A. 530 (formerly RCW 9.94A.370 (2)), which provides, in relevant part:

In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged or proved in a trial or at the time of sentencing. Acknowledging includes not objecting to information stated in the

presentence reports. Where a defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. (Emphasis added)

The above statute describes one aspect of the "real facts" doctrine of the Sentencing Reform Act (SRA). State v. Houf, 120 Wn. 2d 327, 333, 841 P. 2d 42 (1992). Under the doctrine, when the defendant disputes material facts at sentencing, the state must then prove those facts by a preponderance of the evidence at an evidentiary hearing before the sentencing court may rely on them. RCW 9.94A. 530; State v. Ammons, 105 Wn. 2d 175, 713 P. 2d 719 (1986); State v. Hemshaw, 62 Wn. App. 388, 405-06, 731 P. 2d 1101 (1986). The purpose of this process is to protect the defendant "from consideration of unreliable or inaccurate information" at sentencing by giving him or her the right to object to its use. State v. Handley, 115 Wn. 2d 275, 281-82, 796 P. 2d 1266 (1990).

In Talley, the court specifically noted that it was the trial courts obligation to hold a hearing, and not the responsibility of defense counsel to request one. 83 Wn. App. at 759-60. Therefore the trial court could not rely on disputed

facts without an evidentiary hearing that consisted of sworn testimony. Talley, at 758.

In Mr. Nickols' case, despite his general objections of specific dispute on an orally presented allegation from the state, intended for the purpose of justifying a high end sentence from the court, the sentencing court abdicated its responsibility to hold an evidentiary hearing. The record is entirely unclear as to what evidence the court relied upon in support of the high end sentence, but it is clear that the judge wanted to "send a message,- and that message is that its against the law to deal in methamphetamine...". VRP, supra.

Mr. Nickols was convicted of delivering a controlled substance, to the same individual, on two occasions. The elements are:

- 1) That on or about October 8, 2006, and October 13, 2006, the defendant delivered a controlled substance;
- 2) that the defendant knew that the substance delivered was a controlled substance; and
- 3) that the acts occurred in the State of Washington.

Nowhere in any elements or jury findings was it established or found that Mr. Nickols was "engaged in the distribution of methamphetamine for money" as so presented by the state, who also presented a

120 month sentence should reflect such. It was during this presentment that Mr. Nickols interjected and disputed the allegation as set forth.

However, in handing down the sentence, the judge found that "in essence", Mr. Nickols was dealing in methamphetamine, as so presented by the state in its recommendation, and proceeded to "send a message" by imposing the 120 month total high end sentence, as recommended by the state to "reflect" that Mr. Nickols was "engaged" in the business of "distributing" methamphetamine for money".

Again, Mr. Nickols was charged and convicted of violating RCW 69.50.401, to wit: Delivery of a Controlled substance. If the state wanted to establish that Mr. Nickols was engaged in the business of distributing methamphetamine for money, it certainly had the opportunity to initially, or amend, charges of violating RCW 69.50.410, to wit: Selling for profit any controlled substance. This the state declined to do. The elements do not establish that Mr. Nickols was DEALING in methamphetamine, only that delivery (transfer of possession) occurred.

Accordingly, Judge Brosey had an absolute duty to independently decide Mr. Nickols' sentence, including hearing testimonial evidence on disputed facts. Judge

Brosey was precluded from considering disputed material facts because he refused to grant an evidentiary hearing. Because the alleged facts found by the trial court should not have been considered and were not properly part of the record at sentencing, the findings on those facts cannot stand. State v. Young, supra at 523.

2) THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY BY IMPOSING A SENTENCE IN EXCESS OF THE STATUTORY MAXIMUM AUTHORIZED UNDER RCW 69.50.401. MR. NICKOLS' SENTENCE IS INVALID ON ITS FACE.

Mr. Nickols was sentenced to 96 months plus a 24 month school zone enhancement on counts I and II concurrent for a 120 month sentence. Pursuant to RCW 69.50.401, the most Mr. Nickols was to receive at sentencing was no more than ten years, 120 months. Mr. Nickols' community custody term (9-12 months) plus his standard range sentence (120 months) exceeds the statutory maximum term. RCW 69.50.401. Thus, the total sentence, 129-132 months, on its face exceeds the 120 month maximum term.

Under RCW 9.94A.505 (5), 'Except as [otherwise] provided...a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds

the statutory maximum for the crimes provided in chapter 9A. 20. RCW.' (Emphasis added) Since the sentencing court imposed a sentence exceeding Mr. Nickols' statutory maximum, 10 years, 120 months for a class B felony (RCW 9A.20.020(b) and RCW 69.50.401), his sentence must be vacated and remanded back to the trial court for resentencing to accomodate the community custody term. Resentencing structure should be as follows: 84 months, plus 24 months school zone enhancement= 108 months, plus 9-12 months community custody, for a 120 month, 10 year, sentence, concurrent on both counts I and II. State v. Zavala-Reynoso, No. 22675-1-III (04/21/2005).

3) DEFENSE TRIAL COUNSEL WAS DEFICIENT AND HIS REPRESENTATION WAS BELOW THE FUNCTIONING STANDARD GUARANTEED BY THE WASHINGTON STATE CONSTITUTION, ARTICLE 1 §22, AND THE U.S. CONSTITUTION, AMENDMENTS IV, V, AND VI.

An accused is guaranteed the right to effective assistance of counsel. U.S. Const., amendment VI; Washington Conct. Art. 1 §22. In reviewing a claim of ineffective assistance of counsel, the court inquires whether 2 prongs can be met.

To demonstrate ineffective assistance of counsel, the defendant must show: 1) that his counsels performance

was deficient, defined as falling below an objective standard of reasonableness, and 2) that counsel's deficient performance prejudiced the defendant, i.e. there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. CT. 2052, 80 L. Ed. 2d 674 (1984); State v. McKinnon, 110 Wn. App. 1, 5, 38 P. 3d 1015 (2001). Matters that go to trial strategy or tactics do not show deficient performance. State v. Hendrickson, 129 Wn. 2d 61, 77-78, 917 P. 2d 563 (1996). Courts engage in a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn. 2d 322, 335, 899 P. 2d 1251. When a defendant claims ineffective assistance of counsel based upon counsel's failure to challenge the admission of evidence, the defendant must show: 1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, McFarland, i.d.; 2) that an objection to the evidence would have likely been sustained, McFarland, i.d., and Hendrickson, supra; and 3) that the results of the trial would have been different had the evidence not been admitted, Hendrickson, supra; State v. Saunders, 91 Wn. App. 575, 578, 958 P. 2d 364 (1998).

In this particular matter, defense counsel was

absolutely deficient in his performance by not challenging the admission of any and all evidence, and/or testimony from the informant in this case. The Informant, hereinafter "C.I.", gave damaging direct testimony that established himself as an unreliable, dope fiend rogue agent whose actions severely tainted not only the entire investigation of Mr. Nickols, but also the subsequent case that arose therefrom.

The C.I. informed defense counsel, prosecution and both supervising detectives at least two weeks prior to trial that he used dope every other day. VRP-01/19/2006, pg. 15 at 4-25, pg. 16 at 1-25, pg. 17 at 1-25. Mr. Nickols was charged with 2 counts of delivery for allegedly delivering to the C.I. on October 8, 2005, and October 13, 2005. If the C.I. didn't use dope on October 8, 2005, then that means that he used on October 9, 2005, and again on October 11, 2005, and again on October 13, 2005, in accordance with his testimony of using every other day. This conclusively puts the C.I.'s actions as unreliable and untrustworthy as to operating as a C.I., and since this entire prosecution initiated solely from this C.I., the defense counsel should've moved the court for suppression of evidence and/or testimony of the C.I. prior to trial, on the premise of violating due

in initiating the charges.

There was no strategic or tactical reasons for failing to object to the continuation of prosecution of this case. That the detectives used tainted methods to obtain tainted evidence from a tainted informant is undeniable. The C.I. is a dope fiend, was high on at LEAST one of the alleged delivery's, and absent his information and/or testimony, this case would not have proceeded to trial. McFarland, supra.

Had defense counsel objected to the entry of the C.I.'s tainted operation on the grounds that he was violating his contract as a C.I. during operations as a C.I., and thus no longer reliable for the detectives to act on any information provided by him, prior to trial, it would have likely been sustained on grounds that it was a violation of due process. McFarland, supra; Hendrickson, supra.

Had the suppression hearing been granted for the defense, the outcome of the trial would have been different. 1) There would'nt have been a trial, or 2) If there was, the state would'nt have been allowed to use any information or evidence obtained as a result of the C.I.'s involvement in this case.

As previously stated, this entire case initiates from Robert Sibley, the confidential Informant (C.I.)

in this matter- his actions during the alleged delivery's, and his testimony at the trial. If you take Sibley out of this equation, Mr. Nickols would not have been convicted of any charges.

An "objective standard of reasonableness" application in this matter would have warranted defense counsel to challenge the entirety of this case prior to trial. This was not done, and the defense counsel fell below an objective standard of reasonableness in his lack of performance. Strickland prong 1, supra.

Had defense counsel not erred and actually challenged the entirety of this case, there is a very reasonable probability that the result of these proceedings would have had a different result- trial most likely wouldn't have commenced. Strickland, prong 2, supra.

Mr. Nickols shows 1) defense counsels performance fell below an objective standard of reasonableness, and 2) this deficiency prejudiced Mr. Nickols. As such, the 2 prong test of Strickland v. Washington, supra, has been met. See also State v. Thomas, 109 Wn. 2d 222, 743 P. 2d 819 (1987). Counsel was ineffective. Mr. Nickols' fundamental state and federal constitutional rights were violated, as each protects against these types of due process violations and injustices, and is a fundamental principle of the attorney-client

relationship. Wash. Const. Art. 1, §§ 3, 22; U.S. Const. Amendments IV, V.

### CONCLUSION

E. Because trial counsel rendered ineffective assistance of counsel, and his representation was far below the functioning standard, Mr. Nickols' conviction was obtained in violation of Constitutional provisions, as due process was not met. Mr. Nickols' convictions must be reversed, and this case must be remanded with instructions for new counsel to hold suppression hearings to determine if this case should be retried or dismissed with prejudice.

In the alternative, Mr. Nickols respectfully requests this court vacate his sentence and remand to the trial court with instructions to hold an evidentiary hearing in compliance with RCW 9.94A.530 on the disputed facts as enumerated in assignment of error No. 1 herein, and then independently determine Mr. Nickols' appropriate sentence in accordance therewith.

Mr. Nickols further requests this court to vacate his sentence and remand back to the trial court with instructions to resentence within the statutory maximum as enumerated in assignment of error No. 2 herein.

Respectfully submitted on this 05 day of December,  
2006.

*Albert L. Nickols*  
ALBERT NICKOLS, #883578  
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191 Constantine Way  
Aberdeen, Wa 98520

# **EXHIBIT 1**

Judgment and Sentence for Cause # 05-1-00823-1, entered on  
03-20-2006

Received & Filed  
LEWIS COUNTY, WASH  
Superior Court

MAR 20 2006

By Kathy A. Brack, Clerk  
Deputy

SUPERIOR COURT OF WASHINGTON  
COUNTY OF LEWIS

STATE OF WASHINGTON,  
Plaintiff,

vs.

ALBERT LEROY NICKOLS,  
Defendant.

SID: WA15262693  
DOB: 08-28-53

No. 05-1-00823-1

**FELONY JUDGMENT AND SENTENCE (FJS)**  
 Prison  RCW 9.94A.712 Prison Confinement  
 Jail One Year or Less  RCW 9.94A.712 Prison  
Confinement  
 First-Time Offender  
 Special Sexual Offender Sentencing Alternative  
 Special Drug Offender Sentencing Alternative  
 Clerk's Action Required, para 4.5 (SDOSA),  
4.15.2, 5.3, 5.6 and 5.8

**I. HEARING**

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer Daniel Havirco, and the deputy prosecuting attorney, Eric Eisinger, were present.

**II. FINDINGS**

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 01/20/2006

by  plea  jury-verdict  bench trial of:

(Date)

COUNT	CRIME	RCW	DATE OF CRIME
I	VUCSA - Delivery of a Controlled Substance: - Methamphetamine (Felony)	69.50.401(1)& (2)(b)	10/08/2005
II	VUCSA - Delivery of a Controlled Substance: Methamphetamine (Felony)	69.50.401(1)& (2)(b)	10/13/2005

as charged in the Second Amended Information.

Additional current offenses are attached in Appendix 2.1.

The court finds that the defendant is subject to sentencing under RCW 9.94A.712.

A special verdict/finding for use of **firearm** was returned on Count(s) \_\_\_\_\_, RCW 9.94A.602, 9.94A.533.

A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) \_\_\_\_\_, RCW 9.94A.602, 9.94A.533.

A special verdict/finding of **sexual motivation** was returned on Count(s) \_\_\_\_\_, RCW 9.94A.835.

- A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Counts I & II, RCW 69.50.401 and RCW 69.50.435. taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s) \_\_\_\_\_ RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime charged in Count(s) \_\_\_\_\_ involve(s) **domestic violence**.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589): NONE
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1 Possession of Stolen Property 2 <sup>nd</sup>	06/06/2005	Lewis, WA	04/29/2005	A	NV
2 Possession of Stolen Property 2 <sup>nd</sup>	06/06/2005	Lewis, WA	04/29/2005	A	NV
3 Possession of Stolen Property 2 <sup>nd</sup>	06/06/2005	Lewis, WA	04/29/2005	A	NV
4 Possession of Stolen Property 2 <sup>nd</sup>	06/06/2005	Lewis, WA	04/29/2005	A	NV
5 VUCSA - Possession of Methamphetamine	06/06/2005	Lewis, WA	04/29/2005	A	NV

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed both current offenses under the above-entitled cause number while on community placement (adds one point to score). RCW 9.94A.525.
- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525): NONE
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	7	II	60 to 120 mos.	24 mos. (V)	84 to 144 mos.	20 yrs.
II	7	II	60 to 120 mos.	24 mos. (V)	84 to 144 mos.	20 yrs.

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present.

Additional current offense sentencing data is attached in Appendix 2.3.

2.4  EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

within  below the standard range for Count(s) \_\_\_\_\_.

above the standard range for Count(s) \_\_\_\_\_.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were  stipulated by the defendant,  found by the court after the defendant waived jury trial,  found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4.  Jury's special interrogatory is attached. The Prosecuting Attorney  did  did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are  attached  as follows: \_\_\_\_\_.

### III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2  The court DISMISSES Counts \_\_\_\_\_.

3.3  The defendant is found NOT GUILTY of Counts \_\_\_\_\_.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

JASS CODE

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

RTN/RJN

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

PCV \$ 500.00 Victim assessment RCW 7.68.035

\$ \_\_\_\_\_ Domestic Violence assessment RCW 10.99.080

CRC \$ \_\_\_\_\_ Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee \$ 200.00 FRC

Witness costs \$ \_\_\_\_\_ WFR

Sheriff service fees \$ TBD SFR/SFS/SFW/WRF

Jury demand fee \$ \_\_\_\_\_ JFR

Extradition costs \$ \_\_\_\_\_ EXT

Other \$ \_\_\_\_\_

PUB \$ 1,600.00 Fees for court appointed attorney RCW 9.94A.760

WFR \$ \_\_\_\_\_ Court appointed defense expert and other defense costs RCW 9.94A.760

FCM/MTH \$ \_\_\_\_\_ Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ] VUCSA additional fine deferred due to indigency RCW 69.50.430

CDF/LDI/FCD \$ 500.00 Drug enforcement fund of Lewis County RCW 9.94A.760  
NTF/SAD/SDI

CLF \$ 100.00 Crime lab fee [ ] suspended due to indigency RCW 43.43.690

\$ 100.00 Felony DNA collection fee [ ] not imposed due to hardship RCW 43.43.7541

RTN/RJN \$ \_\_\_\_\_ Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum) RCW 38.52.430

\$ 1,000.00 Lewis County Jail Fee Reimbursement RCW 9.94A.760(2)

\$ 3,000.00 Other costs for: Lab cleanup fee RCW 69.50.401(2)(b)

\$ \_\_\_\_\_ TOTAL RCW 9.94A.760

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[ ] shall be set by the prosecutor.

[ ] is scheduled for \_\_\_\_\_

[ ] RESTITUTION. Schedule attached.

Restitution ordered above shall be paid jointly and severally with:

NAME of other defendant      CAUSE NUMBER      (Victim's name)      (Amount-\$)

RJN

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately unless the court specifically sets forth the rate here: Not less than \$38 per month commencing 60 days from this date  
RCW 9.94A.760. 3/20/06

The defendant shall report as directed by the clerk of the court and provide financial information as requested. RCW 9.94A.760(7)(b).

In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the rate of \$50.00 per day, unless another rate is specified here: \_\_\_\_\_ . (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.2 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

HIV TESTING. The defendant shall submit to HIV testing. RCW 70.24.340.

4.3 The defendant shall not have contact with \_\_\_\_\_ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for \_\_\_\_\_ years (not to exceed the maximum statutory sentence).

Domestic Violence No-Contact Order or Antiharassment No-Contact Order is filed with this Judgment and Sentence.

4.4 OTHER: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

- (a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

120 months on Count I months on Count
120 months on Count II months on Count
months on Count months on Count

Actual number of months of total confinement ordered is: 120 months DOC
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above.)

[ ] The confinement time on Count(s) contain(s) a mandatory minimum term of

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

The sentence herein shall run consecutively with the sentence in cause number(s)

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here:

- (b) CONFINEMENT. RCW 9.94A.712 (Sex Offenses only): The defendant is sentenced to the following term of confinement in the custody of the DOC:

Count minimum term maximum term
Count minimum term maximum term

- (c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: from 11/22/2005

4.6 [ ] COMMUNITY PLACEMENT is ordered as follows: Count for months;
Count for months; Count for months.

[X] COMMUNITY CUSTODY for count(s) I & II, sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

[X] COMMUNITY CUSTODY is ordered as follows:

Count I for a range from 9 to 12 months;
Count II for a range from 9 to 12 months;
Count for a range from to months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced

under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers,		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

Defendant shall have no contact with: \_\_\_\_\_

Defendant shall remain  within  outside of a specified geographical boundary, to wit: \_\_\_\_\_

Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8)).

The defendant shall participate in the following crime-related treatment or counseling services: \_\_\_\_\_

The defendant shall undergo an evaluation for treatment for  domestic violence  substance abuse  mental health  anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: \_\_\_\_\_

Other conditions: \_\_\_\_\_

For sentences imposed under RCW 9.94A.712, other conditions may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

4.7  **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: \_\_\_\_\_

**V. NOTICES AND SIGNATURES**

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 994A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.
- 5.4 **RESTITUTION HEARING.**  
[ ] Defendant waives any right to be present at any restitution hearing (sign initials): \_\_\_\_\_.
- 5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634.
- 5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047

**Cross off if not applicable:**

~~5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.~~

~~If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.~~

~~If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county~~

sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination.

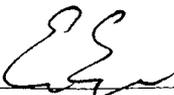
Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 48 hours excluding weekends and holidays after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff's office may require you to list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

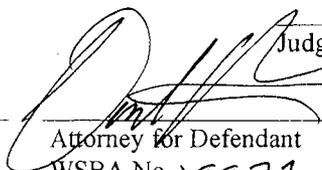
If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

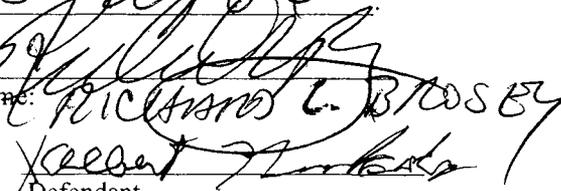
If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

- 5.8  The court finds that Count \_\_\_\_\_ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.
- 5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.
- 5.10 OTHER: \_\_\_\_\_

DONE in Open Court and in the presence of the defendant this date: 3/20/06

  
 Deputy Prosecuting Attorney  
 WSBA No. 34293  
 Print name: Eric Eisinger

  
 Attorney for Defendant  
 WSBA No. 19922  
 Print name: Daniel Havirco

Judge/Print name: RICHARD L. BROSBY  
  
 Defendant  
 Print name: Albert Leroy Nickols

**VOTING RIGHTS STATEMENT:** RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: X Albert Ninkala . 2005 Wash. Laws 246 § 1.

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the \_\_\_\_\_ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: \_\_\_\_\_

I, \_\_\_\_\_, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_.

Clerk of the Court of said county and state, by: \_\_\_\_\_, Deputy Clerk

**IDENTIFICATION OF DEFENDANT**

SID No. WA15262693 Date of Birth 08-28-53  
 FBI No. 976524HC1 Local ID No. 90612  
 PCN No. \_\_\_\_\_ Other \_\_\_\_\_

Alias name, DOB: \_\_\_\_\_

**Race:**  Asian/Pacific Islander  Black/African-American  Caucasian  
 Native American  Other: \_\_\_\_\_

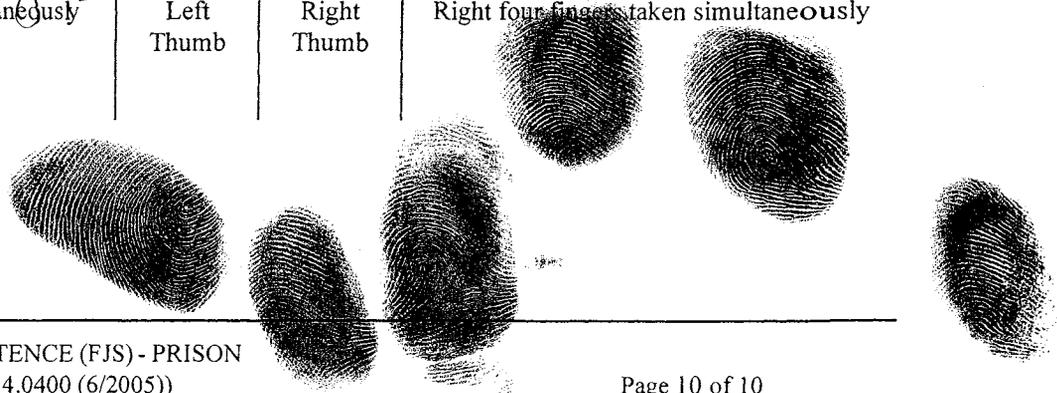
**Ethnicity:**  Hispanic  Non-Hispanic

**Sex:**  Male  Female

**FINGERPRINTS:** I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, S. Tyfu Dated: 3/20/06

DEFENDANT'S SIGNATURE: X Albert Ninkala

Left four fingers taken simultaneously | Left Thumb | Right Thumb | Right four fingers taken simultaneously



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**CERTIFICATE OF SERVICE BY MAIL**

This is to certify and state under the penalty of perjury under the laws of the State of Washington that I have mailed a true and correct copy of the following document(s):

10.10 (RAP) Brief  
Coverletter (clerk only)  
Certificate of Service by Mail

By depositing in the United States mail, marked *Legal Mail*, postage prepaid, on this 05 day of December, 2002 to the following:

<p>* David C. Pomphrey Appellate Ct. Clerk 950 Broadway, Suite 300 Tacoma, WA 98402</p>	<p>* Jeremy Randolph Lewis County Prosecutor 360 N.W. North Street MS: Ro-01 Chenahlis, WA 98532</p>
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Respectfully Submitted,

Albert L. Nickols  
Signature  
ALBERT L. NICKOLS  
Printed/Typed Name  
D.O.C.# 83578 Unit # H5 Cell # B136d  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

RECEIVED

DEC 08 2006  
CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

ALBERT L. NICKOLS  
# 83578, H5B136L  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

DECEMBER 5, 2006

DAVID C. PONZOHA,  
APPELLATE COURT CLERK  
950 BROADWAY, SUITE 300  
TACOMA, WA 98402

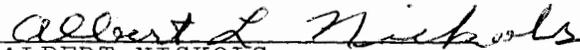
RE: STATE V. NICKOLS, COA # 34611-7-II

Mr. Ponzoha,

Per RAP 10.10 (e), I have received a COMPLETE copy of the VRP's in this matter as of 11/06/2006. Accordingly, please find my 10.10 brief enclosed for filing.

Thank you for your time in this matter.

Sincerely,

  
ALBERT NICKOLS

CC. PERSONAL FILE

ENCLOSURE: 10.10 brief