

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

10 MAY 12 PM 4:06

BY RONALD R. CARPENTER

RC
CLERK

No. 83742-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF:

GLENN G. NICHOLS

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

LILA J. SILVERSTEIN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUES PRESENTED 2

C. STATEMENT OF THE CASE..... 3

D. ARGUMENT 5

 1. **Mr. Nichols is entitled to relief under *Jorden* because this Court decided *Jorden* before Mr. Nichols’s conviction was final.**..... 5

 a. A decision announcing a new rule applies retroactively to all cases not yet final at the time the decision was rendered. ... 5

 b. *Jorden* applies because it was decided before Mr. Nichols’s conviction was final. 7

 c. *Taylor* is inapposite; *VanDelft* and *St. Pierre* control. 8

 2. **Mr. Nichols is entitled to relief under *Jorden* because he raised the issue in a timely personal restraint petition.**..... 11

 a. The Court of Appeals’ ruling that Mr. Nichols may not seek relief for this constitutional violation is contrary to this Court’s settled caselaw addressing personal restraint petitions..... 11

 b. The Court of Appeals’ ruling that Mr. Nichols may not seek relief for this article I, section 7 violation is contrary to this Court’s settled caselaw addressing Washington’s constitutionally mandated exclusionary rule. 15

 c. The Court of Appeals’ ruling is contrary to this Court’s settled caselaw addressing RAP 2.5..... 17

 3. **Mr. Nichols is entitled to relief under *Jorden* because he has shown actual prejudice resulting from the officers’ unconstitutional search of his motel registry information.** 19

a. The warrantless motel registry search is unconstitutional under <i>Jorden</i>	19
b. Mr. Nichols was prejudiced by the unconstitutional search, because absent the fruits of the search, he would not have been convicted	23
E. CONCLUSION	24

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Personal Restraint of Brown, 154 Wn.2d 787, 117 P.3d 336 (2005) 14, 15

In re Personal Restraint of Cook, 114 Wn.2d 802, 792 P.2d 506 (1990) . 11

In re Personal Restraint of Gentry, 137 Wn.2d 378, 972 P.2d 1250 (1999) 14

In re Personal Restraint of Hews, 99 Wn.2d 80, 660 P.2d 263 (1983).... 11,
12, 14, 19

In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992)
..... 6, 14

In re Personal Restraint of Taylor, 105 Wn.2d 683, 717 P.2d 755 (1986) 6,
9, 14, 16

In re Personal Restraint of VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006)
..... passim

State v. Bonds, 98 Wn.2d 1, 653 P.2d 1024 (1982)..... 16

State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009)..... 21, 22

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 20, 22

State v. Irizarry, 111 Wn.2d 591, 763 P.2d 432 (1988)..... 10

State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003) 22

State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007) passim

State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009)..... 6

State v. Kirwin, 165 Wn.2d 818, 203 P.3d 1044 (2009)..... 17

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) 18

<u>State v. Miles</u> , 160 Wn.2d 236, 156 P.3d 864 (2007).....	22
<u>State v. O’Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	21
<u>State v. Patton</u> , 167 Wn.2d 379, 219 P.3d 651 (2009).....	21
<u>State v. White</u> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	16
<u>State v. Winterstein</u> , 167 Wn.2d 620, 220 P.3d 1226 (2009)	16, 17
<u>State v. Young</u> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	22

Washington Court of Appeals Decisions

<u>State v. Contreras</u> , 92 Wn. App. 307, 966 P.2d 915 (1998)	18
<u>State v. Walker</u> , 66 Wn. App. 622, 834 P.2d 41 (1992)	22

United States Supreme Court Decisions

<u>Batson v. Kentucky</u> , 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) .	8
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	9
<u>Griffith v. Kentucky</u> , 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)	6, 7, 8
<u>Stone v. Powell</u> , 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). 15, 16	
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	20, 22

Constitutional Provisions

Const. art. I, § 7.....	passim
U.S. Const. amend. IV	2

Rules

CrR 3.6..... 18
RAP 16.11..... 18
RAP 16.12..... 18
RAP 16.9..... 18
RAP 2.5..... 17

Other Authorities

Tracey Maclin, A Criminal Procedure Regime Based on Instrumental Values, 22 Constitutional Commentary 197 (2005) 17

A. INTRODUCTION

As the State conceded in its initial response to this personal restraint petition, Glenn Nichols suffered a violation of his constitutional right to privacy when officers discovered his name and other information pursuant to a warrantless motel registry search. As a result of the improper search, police officers found drugs and Mr. Nichols was convicted of one felony and one misdemeanor. At the time of his trial in 2005, this Court had not yet decided State v. Jorden, 160 Wn.2d 121, 130, 156 P.3d 893 (2007) (holding information in motel registry is a private affair protected by article I, section 7). Accordingly, although Mr. Nichols filed a suppression motion, he did not move to suppress the evidence on the basis of the unconstitutional registry search.

This Court decided Jorden before Mr. Nichols's convictions were affirmed on direct appeal. Mr. Nichols filed a personal restraint petition ("PRP") seeking a new trial based on the unconstitutional search of the motel registry. The Court of Appeals held Mr. Nichols waived the issue by failing to raise it in the trial court, even though Jorden had not been decided at that time, and even though this Court has stated a PRP "should not simply be reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action." This Court should

reverse because the Court of Appeals' decision is contrary to common sense, fundamental fairness, and settled precedent.

B. ISSUES PRESENTED

1. Is a petitioner entitled to relief where the record establishes a violation of article I, section 7 under this Court's decision in State v. Jorden, the petitioner's case was still pending on direct appeal when Jorden was decided, and the petitioner has shown he was actually prejudiced by the constitutional error?

2. In the alternative, was Mr. Nichols denied the effective assistance of counsel where (a) his attorney did not challenge the warrantless motel registry search without which the State would have no case against Mr. Nichols, (b) if counsel had exercised his duty to research the relevant law he would have discovered that the Ninth Circuit had held there is no Fourth Amendment protection in this context but that this Court had held on numerous occasions that article I, section 7 is more protective than the Fourth Amendment, and (c) the Court of Appeals recognized that "[h]ad Nichols' trial counsel filed a motion to suppress alleging that the search of the motel registry violated his right of privacy, hindsight shows

that such a motion likely would have been successful, if not at the trial level then ultimately on direct appeal or collateral attack?"¹

C. STATEMENT OF THE CASE

Based on evidence obtained as a result of a warrantless motel registry search, Glenn Nichols was convicted of possession of cocaine with intent to deliver and possession of less than 40 grams of marijuana. Before trial, Mr. Nichols's attorney moved to suppress the evidence against him, but not on the ground that the warrantless registry search was unconstitutional. App. D at 4-5;² 1/5/05 RP 7-9.

On direct appeal, Mr. Nichols's attorney did not challenge the search, and instead argued only that Mr. Nichols's rights were violated when the court ordered him to provide a biological sample for DNA identification. App. C at 2.

On March 29, 2007, while his direct appeal was still pending, Mr. Nichols filed the present personal restraint petition pro se, alleging, *inter alia*, that (1) his right to be free from unreasonable searches and seizures was violated when the police officers viewed his private motel room registration information without a warrant or exigent circumstances, and

¹ For this issue Mr. Nichols relies on his argument in the motion for discretionary review.

² The State attached appendices to its original response, and Mr. Nichols refers to those appendices here. Mr. Nichols has attached the State's original response, with appendices, to this brief.

(2) both trial counsel and appellate counsel were ineffective for failing to raise this issue. PRP at 8-19, 27-33.

On April 26, 2007, this Court held in Jorden that information contained in a motel guest registry is a “private affair” protected by article I, section 7 of our state constitution. Jorden, 160 Wn.2d at 130. As such, a police officer’s viewing of such information constitutes a search, which can only be performed pursuant to a warrant or a valid exception to the warrant requirement. Id.

On August 7, 2007, a commissioner of the Court of Appeals affirmed Mr. Nichols’s conviction, and on November 6, 2007, the court denied a motion to modify the commissioner’s ruling. On January 11, 2008, the court issued the mandate terminating review. App. C at 1.

On April 10, 2008, the State filed a response to Mr. Nichols’s PRP, in which it agreed that Mr. Nichols should be granted relief because he “has established that his constitutional right to privacy was violated when his name was obtained from a motel registry without a warrant.” Original Response at 3. The Court of Appeals appointed counsel for Mr. Nichols and ordered supplemental briefing, after which the State reversed course and urged the court to deny the petition. The State contended, inter alia, that Jorden was wrongly decided and that Washington should follow the

federal Fourth Amendment case of Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

On July 20, 2009, the Court of Appeals denied Mr. Nichols's PRP, relying on Stone v. Powell. The court held that Mr. Nichols waived the Jorden issue by not raising it in the trial court or on direct appeal, even though Jorden was not decided until after Mr. Nichols's trial and after the appellate briefs in his case had been filed. Slip Op. at 6. Although the court held that the failure to raise the issue waived the claim, the court also held that the failure to raise the issue did not constitute ineffective assistance of counsel. Slip Op. at 13.

The facts are further set forth in petitioner's supplemental brief in the Court of Appeals at pages 1-5.

D. ARGUMENT

1. Mr. Nichols is entitled to relief under Jorden because this Court decided Jorden before Mr. Nichols's conviction was final.

a. A decision announcing a new rule applies retroactively to all cases not yet final at the time the decision was rendered. In an order issued April 2, 2010, this Court "directed that the parties include in their supplemental briefs a discussion of whether State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007) is applicable to this personal restraint petition given retroactivity principles."

Jorden must be applied here because this Court decided Jorden while Mr. Nichols's case was still pending on direct review. In fact, Mr. Nichols filed his PRP before his direct appeal was final and before this Court decided Jorden. The exact timeline is as follows:

<u>Date</u>	<u>Event</u>
March 29, 2007	Mr. Nichols filed his PRP.
April 26, 2007	This Court decided <u>Jorden</u> .
August 7, 2007	The Court of Appeals affirmed Mr. Nichols's conviction on direct appeal.
January 11, 2008	The mandate was issued following direct appeal.

A decision announcing a new rule applies retroactively to all cases pending on direct review or not yet final at the time the decision was rendered. In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992); In re Personal Restraint of Taylor, 105 Wn.2d 683, 691, 717 P.2d 755 (1986); accord State v. Kilgore, 167 Wn.2d 28, 35, 216 P.3d 393 (2009) (the critical issue in applying retroactivity analysis is whether the case was final when the new rule was announced).

By "final," we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.

St. Pierre, 118 Wn.2d at 327 (quoting Griffith v. Kentucky, 479 U.S. 314, 321 n.6, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)). In Washington:

[A] judgment becomes final on the last of the following dates: when the judgment is filed with the clerk of the trial court, when the appellate court issues its mandate terminating direct review, or when the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal.

In re Personal Restraint of VanDelft, 158 Wn.2d 731, 737, 147 P.3d 573 (2006), overruled on other grounds by State v. Vance, ___ Wn.2d ___, ___ P.3d ___, No. 81393-1 (filed May 6, 2010).³

Griffith, which this Court followed in St. Pierre, explains the rationale for the rule: The “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.” Griffith, 479 U.S. at 322. “[T]he problem with not applying new rules to cases pending on direct review is the actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a new rule.” Id. at 323 (citation omitted) (emphasis in original).

b. Jorden applies because it was decided before Mr. Nichols’s conviction was final. Under VanDelft, Mr. Nichols’s conviction was not final until the Court of Appeals issued its mandate on January 11, 2008. This Court had decided Jorden almost nine months earlier, on April 26, 2007. Thus, Jorden must be applied to Mr. Nichols’s case.

³ The issue on which VanDelft was overruled was the Sixth Amendment issue. As to retroactivity and PRP procedural rules, VanDelft is still good law.

In Griffith, the Court applied Batson³ to cases that were still pending on direct review when Batson was decided, even though the rule announced in Batson was “a clear break from the past.” Griffith, 479 U.S. at 327. The Court explained that it would be unfair to refuse to apply Batson to Mr. Griffith’s case, because Mr. Griffith and Mr. Batson suffered the same constitutional violation approximately three months apart. Id. The Court emphasized that “selective application of new rules violates the principle of treating similarly situated defendants the same.” Id. at 323.

Here, Mr. Nichols and Mr. Jorden suffered the same constitutional violation – a warrantless motel registry search – within the same year. Jorden, 160 Wn.2d at 123 (warrantless motel registry search in March 2003); App. D at 1 (warrantless motel registry search in February 2004). Selective application of the privacy rule to Mr. Jorden but not to Mr. Nichols would violate the principle of treating similarly situated defendants the same. Griffith, 479 U.S. at 323. Thus, Jorden must be applied to Mr. Nichols’s case. Id.

c. Taylor is inapposite; VanDelft and St. Pierre control. In the Court of Appeals, the State did not argue that retroactivity principles barred Mr. Nichols’s claim, presumably because the State recognized that

³ Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

the timeline of this case does not present a retroactivity issue. The Court of Appeals sua sponte held that Mr. Nichols “would be required under Taylor to show that Jorden should be applied retroactively” and “it is unlikely that he could.” Slip Op. at 10. As explained above, the Court of Appeals was wrong.

In Taylor, the petitioner requested relief based on a new rule that was announced four years after his direct appeal was decided. Id. at 684-86. This Court held that under those circumstances the new rule did not apply. Id. at 689. The Court explained, though, that when a new rule is announced while a case is still pending on direct appeal, the new rule must be applied to the pending case. Id. at 691. Mr. Nichols’s case was still pending on direct appeal when Jorden was decided. Accordingly, Jorden must be applied to his case. Taylor is inapposite on the retroactivity issue.

Van Delft and St. Pierre are on point. In VanDelft, this Court reversed the Court of Appeals and applied Blakely⁴ retroactively to a personal restraint petitioner because his petition for writ of certiorari was still pending – and therefore his direct appeal was not final – when Blakely was decided. VanDelft, 158 Wn.2d at 737. Similarly here, Jorden must be applied retroactively to Mr. Nichols’s case because his direct appeal was not final when Jorden was decided.

⁴ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

In St. Pierre, the petitioner sought to apply Irizarry to his case. St. Pierre, 118 Wn.2d at 324 (citing State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988)). This Court had decided Irizarry eight days before denying Mr. St. Pierre's motion to reconsider the decision affirming his conviction on direct review. Id. The Court of Appeals held that retroactivity principles barred relief, but this Court disagreed. Id. at 324, 327. "Since this court announced the rule in Irizarry 8 days before denying petitioner's motion for reconsideration, petitioner's conviction was not yet final and he is entitled to retroactive application of the rule." Id. at 327. Similarly here, since this Court announced the rule in Jorden months before the Court of Appeals affirmed Mr. Nichols's conviction on direct appeal, Mr. Nichols's conviction was not yet final and he is entitled to retroactive application of Jorden.

In sum, there is no retroactively issue here because this Court decided Jorden while Mr. Nichols's case was still pending on direct review. Mr. Nichols is entitled to relief under Jorden.

2. Mr. Nichols is entitled to relief under Jorden because he raised the issue in a timely personal restraint petition.

a. The Court of Appeals' ruling that Mr. Nichols may not seek relief for this constitutional violation is contrary to this Court's settled caselaw addressing personal restraint petitions. The Court of Appeals held that Mr. Nichols's failure to raise the constitutional violation in the trial court and on direct appeal automatically barred him from filing a personal restraint petition based on the violation. The Court of Appeals' ruling is contrary to this Court's precedents.

This Court long ago held that "the failure to raise a constitutional issue for the first time on appeal is no longer a reason for automatic rejection of a Personal Restraint Petition." In re Personal Restraint of Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983).⁵ The Court of Appeals misread Hews, stating:

Nichols further argues that the case that controls his petition is In re Pers. Restraint of Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983). Hews holds that an issue can be raised in a personal restraint petition even if it was not raised on direct appeal, if the petitioner is able to demonstrate actual prejudice stemming from a constitutional error. Hews, 99 Wn.2d at 87. But Nichols' problem is not his failure to raise the suppression issue in his direct appeal. It is his failure to move to suppress at trial.

⁵ Even in the context of nonconstitutional error, there is no automatic bar to raising the issue in a PRP "merely because the argument was not advanced earlier." In re Personal Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990).

Slip Op. at 8.

The Court of Appeals failed to recognize that in Hews, the petitioner had not only failed to raise the issue in his direct appeal, but had also failed to raise the issue in the trial court. Hews, 99 Wn.2d at 85. Hews raised his constitutional issue for the first time in a personal restraint petition. Id. This Court held that the failure to raise the issue earlier was not a procedural bar, and remanded for a hearing on the merits of the petition. Id. at 87-88. Hews mandates consideration of Mr. Nichols's petition on the merits. Id.

The State now argues that Hews is inapposite because it was "a collateral attack on the validity of a guilty plea." Answer at 3. But nowhere did this Court say that only individuals who plead guilty may raise constitutional issues in a PRP. In Washington, the constitutional right to privacy is just as important as the constitutional right to due process for guilty pleas, the issue raised in Hews. The failure to raise a violation of the constitutional right to privacy in the trial court or on direct appeal is not a basis for automatic rejection of a personal restraint petition. Hews, 99 Wn.2d at 87.

Furthermore, VanDelft forecloses the State's argument that the rule of Hews applies only to those who plead guilty. In VanDelft, the petitioner was convicted following a jury trial, and an exceptional

sentence was imposed based on facts found by a judge. VanDelft, 158 Wn.2d at 735-36. VanDelft did not challenge his exceptional sentence in the trial court, in his direct appeal, or even in his first PRP. Id. For the first time in his second PRP, he argued the sentence violated Blakely. Id. at 736. The State urged this Court to hold that VanDelft's successive petition was procedurally barred. Id. at 737. This Court rejected the State's arguments:

When VanDelft filed his first personal restraint petition in February 2004, Blakely had not yet been decided. An intervening change in the law material to the petitioner's case can amount to good cause for a successive petition Thus, Van Delft's personal restraint petition cannot be dismissed as successive because it raised a new issue not previously heard and determined on the merits, and there was good cause for not raising the issue previously. We therefore proceed to consider the merits of VanDelft's petition.

Id. at 738.

Surely if a petitioner may raise an issue for the first time in a second PRP on the basis that the relevant case had not yet been decided, a petitioner may raise an issue for the first time in a first PRP on the basis that the relevant case had not yet been decided. Jorden had not yet been decided at the time of Mr. Nichols's trial or at the time the appellate briefs were filed. Accordingly, Mr. Nichols properly raised the issue for the first

time in his PRP, and, as in VanDelft, Mr. Nichols's argument should be considered on the merits and his petition granted.⁶

The following summary of this Court's cases shows that the Court of Appeals erred in concluding Mr. Nichols's petition was procedurally barred:

Case	When was issue raised?	Was petition procedurally barred?
<i>Taylor</i> , 105 Wn.2d at 688	Raised in trial court, direct appeal, and PRP.	No.
<i>St. Pierre</i> , 118 Wn.2d at 324	Raised in trial court; not raised on direct appeal; raised in PRP.	No.
<i>Brown</i> , 154 Wn.2d 787, 117 P.3d 336 (2005)	Raised in trial court and direct appeal but abandoned in petition for review; not raised in first PRP; raised in second PRP.	No.
<i>Hews</i> , 99 Wn.2d at 87.	First raised in PRP.	No.
<i>VanDelft</i> , 158 Wn.2d at 738	First raised in second PRP.	No.
Glenn Nichols	First raised in PRP.	?

In sum, Mr. Nichols's failure to raise the Jorden issue before Jorden was decided does not support automatic rejection of his PRP.

⁶ Indeed, although there would also be no per se bar to raising the issue if he had raised it on direct appeal, this Court appears to disfavor such redundant PRP's more than those like Mr. Nichols's, which raise new issues:

We take seriously the view that a collateral attack by PRP on a criminal conviction and sentence should not simply be reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant.

In re Personal Restraint of Gentry, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999).

Hews, 99 Wn.2d at 87. Rather, the petition must be addressed on the merits. Id.

b. The Court of Appeals' ruling that Mr. Nichols may not seek relief for this article I, section 7 violation is contrary to this Court's settled caselaw addressing Washington's constitutionally mandated exclusionary rule. Implicit in the Court of Appeals' opinion is the notion that although a petitioner may raise most constitutional violations for the first time in a PRP, he may not raise an article I, section 7 violation for the first time in a PRP.⁷ This holding is utterly at odds with the paramount importance of the privacy right in Washington.

The Court of Appeals relied for its ruling on federal Fourth Amendment jurisprudence – specifically, Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Slip Op. at 6. The rule in Stone v. Powell barring federal fourth amendment claims in habeas petitions arose out of the purpose of the federal exclusionary rule, which, unlike article I, section 7's exclusionary rule, is merely a prophylactic remedy designed to deter future violations. Stone, 428 U.S. at 481. “[T]he [federal] rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure.”

⁷ The court acknowledged that article I, section 7 claims were not procedurally barred in Taylor and Brown. Slip Op. at 7-9 (citing In re Personal Restraint of Brown, 154 Wn.2d 787, 117 P.3d 336 (2005); Taylor, 105 Wn.2d 683).

Stone, 428 U.S. at 486. Because the federal exclusionary rule is not a personal constitutional right, the Court held that costs of allowing Fourth Amendment claims in habeas petitions outweighed the benefit of deterrence. Id. at 495.

But as this Court has emphasized in numerous cases, Washington's exclusionary rule is constitutional, and its primary purpose is not to deter misconduct, but to protect privacy. State v. Bonds, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982).

We think the language of our state constitutional provision constitutes a mandate that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than on curbing governmental actions.

State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Thus, the balancing analysis performed in Stone is wholly inappropriate under the Washington Constitution. State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009) (rejecting the inevitable discovery exception to the exclusionary rule in Washington and stating, "the balancing of interests should not be carried out when evidence is obtained in violation of a defendant's constitutional rights"). Indeed, this Court already rejected the Stone v. Powell rationale for barring collateral attacks in Taylor. Taylor, 105 Wn.2d at 686 (citing and declining to follow Stone, 428 U.S. 465).

The exclusionary rule in Washington is “nearly categorical.” Winterstein, 167 Wn.2d at 636. In contrast, the federal exclusionary rule is “nearly toothless.” Tracey Maclin, A Criminal Procedure Regime Based on Instrumental Values, 22 Constitutional Commentary 197, 207 (2005). The Court of Appeals improperly rejected Mr. Nichols’s PRP based on the rationale of the federal exclusionary rule. Slip Op. at 6. This Court should reverse.

c. The Court of Appeals’ ruling is contrary to this Court’s settled caselaw addressing RAP 2.5. In automatically rejecting Mr. Nichols’s petition, the Court of Appeals further reasoned that (1) Mr. Nichols could not have raised the Jorden violation on direct appeal without having raised it in the trial court, and (2) an issue that may not be raised on direct appeal may not be raised in a PRP. Slip Op. at 6. The premise is false. And, even if the premise were true, the conclusion would be false.

An appellant may raise an issue that was not raised below if it is “a manifest error affecting a constitutional right.” RAP 2.5(a)(3). This is no less true for privacy violations than for other constitutional rights. State v. Kirwin, 165 Wn.2d 818, 823-24, 203 P.3d 1044 (2009) (addressing merits of article I, section 7 issue not raised in trial court). So long as the record is sufficient to review the issue, an appellant may raise a constitutional violation that was not raised at trial. State v. Contreras, 92 Wn. App. 307,

313-14, 966 P.2d 915 (1998). Here, the record from the CrR 3.6 hearing and trial provide a sufficient record for review, so Mr. Nichols would have been able to raise the issue on direct appeal had Jorden been decided earlier.

Perhaps more importantly, regardless of whether Mr. Nichols could have raised the violation in a direct appeal, he can certainly raise it in a PRP. That is because the rules governing PRP's provide for reference hearings and new documentary evidence as necessary. RAP 16.9, 16.11(b), 16.12; State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Accordingly, "[e]ven if the record did not permit direct review based on the existing trial record, a defendant/appellant could raise the issue through a personal restraint petition." Contreras, 92 Wn. App. at 314 n.2.

In sum, Mr. Nichols could have raised this issue on direct appeal had Jorden been available, and even if he could not have raised it on direct appeal, he may raise it in a personal restraint petition. Mr. Nichols's petition is properly before the Court, and the Court of Appeals erred in automatically dismissing it.

3. Mr. Nichols is entitled to relief under Jorden because he has shown actual prejudice resulting from the officers' unconstitutional search of his motel registry information.

A reviewing court should grant a personal restraint petition if the petitioner has suffered actual prejudice arising from constitutional error. Hews, 99 Wn.2d at 88. Mr. Nichols was convicted based on the fruits of an illegal motel registry search. Accordingly, this Court should grant his petition for relief.

a. The warrantless motel registry search is unconstitutional under Jorden. The police officers here searched a motel registry without a warrant, and no exception to the warrant requirement applied. The officer suspected that the people staying in room 56 of the motel were engaged in drug deals. Based on mere suspicion, the officers searched the registry for the personal information of those staying in the room.

In his briefing before the Court of Appeals, Mr. Nichols argued that his PRP should be granted because the evidence against him was obtained pursuant to a warrantless motel registry search, in violation of article I, section 7 and Jorden. The State initially agreed with Mr. Nichols, stating that relief should be granted because Mr. Nichols “has established that the warrantless search of the motel registry violated his right to privacy under the state constitution.” State’s Original Response at 1. As the Court of Appeals noted:

The State's initial response recommended that the petition be granted. The State cited the Supreme Court's recent decision in Jorden and agreed with Nichols that the inspection of his motel registration was a warrantless search of a private affair. Conceding that no exception to the warrant requirement applied, the State accepted that the evidence obtained from his detention and arrest should have been suppressed.

Slip Op. at 5.

The State later reversed course and contended that Jorden created a broad new exception to the warrant requirement. The State is wrong.

Jorden held that the viewing of a motel registry is a search, or "private affair," subject to protection under article I, section 7. Jorden, 160 Wn.2d at 130. As such, it may not be invaded absent "authority of law" – i.e., a warrant or one of the narrowly drawn exceptions to the warrant requirement. Const. art. I, § 7; State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996).

A warrantless search is per se unreasonable unless it falls under one of Washington's recognized exceptions. Hendrickson, 129 Wn.2d at 70-71. The exceptions are consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry⁸ investigative stops. Id. at 71. Exceptions to the warrant requirement must be "jealously and carefully drawn." State v. Garvin, 166 Wn.2d 242, 249,

⁸ Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

207 P.3d 1266 (2009). They “are not devices to undermine the warrant requirement.” State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). Exceptions to the warrant requirement are narrower under Washington’s “authority of law” clause than under the Fourth Amendment. State v. O’Neill, 148 Wn.2d 564, 584-85, 62 P.3d 489 (2003). “The State bears a heavy burden to show the search falls within one of the ‘narrowly drawn’ exceptions.” Garvin, 166 Wn.2d at 250 (citation omitted).

The State acknowledges that in this case there was no warrant and none of the above exceptions to the warrant requirement applied.⁹ But based on dicta in Jorden, the State argues that this Court created a new “reasonable suspicion” exception for evidentiary searches under article I, section 7. Br. of Resp’t at 13-15; Answer at 4. This Court should clarify that the dicta in Jorden did not create a sweeping new exception to the warrant requirement.

The issue in Jorden was whether the information in a motel registry constitutes a “private affair,” not whether there was a new exception to the warrant requirement under the “authority of law” clause. If reasonable suspicion constituted authority of law for evidentiary searches, as the State contends, then police officers could search a

⁹ For a discussion of the recognized exceptions to the warrant requirement as applied to this case, see Mr. Nichols’s supplemental brief in the Court of Appeals at 6-9. Mr. Nichols does not repeat that discussion here because the State concedes that none of these exceptions applies and instead urges this Court to create a new exception.

person's house based on mere individualized suspicion. They could search a person's car for evidence based on mere suspicion that a crime had been committed. They could search a person's bank records based on mere suspicion. They could attach a GPS device to a person's vehicle based on mere suspicion of criminal activity. The State would be wrong on all counts. See State v. Young, 123 Wn.2d 173, 186, 867 P.2d 593 (1994) (to search house government must have warrant or "show a compelling need to act outside of our warrant requirement"); Hendrickson, 129 Wn.2d at 70-71 (reversing conviction where search of car was based on mere individualized suspicion and not on warrant or recognized exception); State v. Miles, 160 Wn.2d 236, 252, 156 P.3d 864 (2007) (banking records are "private affairs" protected by article I, section 7, and may not be searched absent judicially issued warrant or subpoena); State v. Jackson, 150 Wn.2d 251, 264-65, 76 P.3d 217 (2003) (installation of GPS device requires a warrant; "mere suspicion" insufficient).

An evidentiary search is never allowed based on mere suspicion. See Hendrickson, 129 Wn.2d at 70-71. The only type of search for which individualized suspicion is sufficient is a weapons frisk. See Terry, 392 U.S. at 9; Garvin, 166 Wn.2d at 249. And even there, the initial stop of the person must be separately justified. Garvin, 166 Wn.2d at 150; State v. Walker, 66 Wn. App. 622, 629, 834 P.2d 41 (1992).

Like the State in its original response, the Court of Appeals did not believe Jorden created a new exception to the warrant requirement. Even though the court mistakenly thought the PRP was procedurally barred, it properly recognized that “[h]ad Nichols’ trial counsel filed a motion to suppress alleging that the search of the motel registry violated his right of privacy, hindsight shows that such a motion likely would have been successful, if not at the trial level then ultimately on direct appeal or collateral attack.” Slip Op. at 12.

The search of a motel registry is not a weapons frisk. Accordingly, more than mere “suspicion” is required to provide the authority of law necessary to allow the search. This Court should reaffirm Jorden and reject the State’s invitation to create a sweeping new exception to the warrant requirement.

b. Mr. Nichols was prejudiced by the unconstitutional search, because absent the fruits of the search, he would not have been convicted. Mr. Nichols has suffered actual prejudice arising from the above constitutional error. Mr. Nichols was stopped and searched because of the information discovered in the warrantless motel registry search. “Mr. Nichols’ detention flowed directly from the warrantless search of the motel registry.” State’s Original Response at 4. Accordingly, his personal restraint petition should be granted, his convictions reversed, and his case

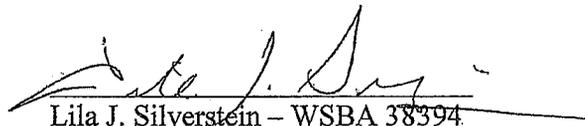
remanded with instructions to suppress the evidence and dismiss the charges.

E. CONCLUSION

For the reasons set forth above and in his Motion for Discretionary Review, Reply to State's Answer, and Court of Appeals briefs, petitioner Glenn Nichols asks this Court to reverse the Court of Appeals and grant his personal restraint petition.

DATED this 7th day of May, 2010.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

**ATTACHMENT:
STATE'S ORIGINAL RESPONSE TO PRP
(WITH APPENDICES)**

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 APR 11 PM 3:11

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

In re Personal Restraint)
Petition of)
)
) No. 59750-7-1
)
) STATE'S RESPONSE TO
) PERSONAL RESTRAINT
GLEN NICHOLS,) PETITION
Petitioner.)
_____)

A. AUTHORITY FOR RESTRAINT OF PETITIONER.

Glen Nichols is restrained pursuant to judgment and sentence in King County Superior Court No. 04-1-01099-0 SEA.

Appendix A.

B. ISSUES PRESENTED.

Whether this petition should be granted where petitioner has established that the warrantless search of the motel registry violated his right to privacy under the state constitution.

C. STATEMENT OF THE CASE.

Nichols was found guilty by bench trial of the crimes of possession with intent to deliver cocaine and possession of

marijuana. Appendix A and B. He received a sentence of 60 months of total confinement. Appendix A and B. He appealed. This Court affirmed his conviction and mandate issued on January 11, 2008. Appendix C.

The facts of the trial are recounted in this Court order's affirming his convictions:

On February 26, 2004, the Seattle Police Department was conducting buy narcotics operation using pre-recorded bills. During the course of the investigation, the officers acquired information suggesting that a drug supplier was staying at a local motel. The officers indentified Glenn Nichols as the registered occupant of the room suspected of being involved, determined that Nichols had a record of drug violations, and determined that his license was suspended. When Nichols drove into the motel parking lot, the officers arrested and searched him, recovering approximately 15 grams of crack cocaine, 2 grams of marijuana, and \$470 in cash, including one of the marked bills used earlier that day in a controlled buy.

Appendix C, at 2.

D. ARGUMENT.

PETITIONER HAS ESTABLISHED THAT HIS CONSTITUTIONAL RIGHT TO PRIVACY WAS VIOLATED WHEN HIS NAME WAS OBTAINED FROM A MOTEL REGISTRY WITHOUT A WARRANT.

Nichols contends that his constitutional right to privacy was violated when the police obtained his name from a motel registry without a warrant. Based on the state supreme court's recent decision in State v. Jorden, 160 Wn.2d 121, 130, 156 P.3d 893 (2007), the State believes he is correct.

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold showing of constitutional error from which he has suffered actual prejudice or nonconstitutional error which constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice.

In re Cook, 114 Wn. 2d 802, 813, 792 P.2d 506 (1990). In a personal restraint petition, petitioner bears the burden of showing prejudicial error. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986).

In State v. Jorden, 160 Wn.2d at 130, the Washington Supreme Court held that random searches of motel registries without particularized suspicion violated the right to privacy under

article I, section 7 of the state constitution. The Court summarized its holding as follows, "[a]bsent a valid exception to the prohibition against warrantless searches, random viewing of a motel registry violates article I, section 7 of the Washington State Constitution." Id. at 131.

Although the action taken by the police in Nichols' case was not a random search of a motel registry, it was a warrantless search of a private affair. As stated by the trial court in its factual findings pursuant to both CrR 3.6, the officers had reasonable, articulable suspicion to believe that the occupant of room 56 had engaged narcotics activity. Appendix D. However, the holding of Jorden requires that the police either obtain a warrant to search a motel registry, or identify an exception to the warrant requirement. No warrant was obtained in this case, and no exception to the warrant requirement applies. See State v. Ozuna, 80 Wn. App. 684, 911 P.2d 395 (1996) (warrant is required to search unoccupied car even if probable cause to believe car was involved in a crime existed, absent exigent circumstances). Because Nichols' detention flowed directly from the warrantless search of the motel registry, the evidence obtained from his detention and arrest should have been suppressed.

E. CONCLUSION.

This petition should be granted.

DATED this 10th day of April, 2008.

Respectfully Submitted,

DAN SATTERBERG
King County Prosecuting
Attorney

by 
ANN SUMMERS, #21509
Senior Deputy Prosecuting
Attorney
Attorneys for Respondent
Office ID #91002

W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
(206) 296-9650

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Cc: deborah.dwyer@kingcounty.gov
Subject: RE: Nichols 83742-2

The appendix exceeds the page limit that you may file via email. Here is a link regarding our email policy.

http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/?fa=atc_supreme_clerks.display&fileID=fax.

The brief is accepted for filing Received 5-12-10, please mail the appendix by mail with a cover letter explaining that you have emailed the brief .

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [mailto:maria@washapp.org]
Sent: Wednesday, May 12, 2010 3:27 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: deborah.dwyer@kingcounty.gov
Subject: Nichols 83742-2

In Re the PRP of Glenn Nichols
No. 83742-2

Please accept the attached documents for filing in the above-subject case:

SUPPLEMENTAL BRIEF OF PETITIONER

<<NICHOLS.SUPBRF.83742-2.pdf>>

Lila J. Silverstein - WSBA 38394
Attorney for Petitioner
Phone: (206) 587-2711
E-mail: lila@washapp.org

By

Maria Arranza Riley

Staff Paralegal

Washington Appellate Project

Phone: (206) 587-2711

Fax: (206) 587-2710

www.washapp.org

Please consider the environment before printing this e-mail.

WASHINGTON APPELLATE PROJECT

MELBOURNE TOWER • SUITE 701 • 1511 THIRD AVENUE • SEATTLE, WASHINGTON 98101

TOLL-FREE 1-877-587-2711 • PHONE (206) 587-2711 • FACSIMILE (206) 587-2710

WEBSITE: WWW.WASHAPP.ORG

May 12, 2010

Ronald Carpenter
Clerk of the Court
Supreme Court of the State of Washington
PO Box 40929
Olympia, WA 98504-0929

Re: In Re the Personal Restraint Petition of Glenn Nichols
Supreme Court No. 83742-2

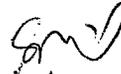
Dear sir:

Enclosed please find a copy of the ATTACHMENTS to the Supplemental Brief filed via e-mail on May 12, 2010 in the above-referenced cause. This is being sent via US Mail as it exceeds 25 pages and may not be filed via e-mail per Supreme Court Protocols for E-mail Filing.

The Supplemental Brief and attachments have been served by US Mail on all parties of record.

Thank you very much for your attention to the matter.

Respectfully,



Maria Arranza Riley
Legal Assistant

for:
Lila J. Silverstein
Attorney for Petitioner

cc: Deborah Dwyer, King County Prosecuting Attorney

Encl.

1. Copy of e-mail receipt from the Supreme Court; and
2. Attachments to Supplemental Brief.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2010 MAY 14 AM 8:10
RONALD R. CARPENTER
CLERK

Maria Riley

From: OFFICE RECEPTIONIST, CLERK [SUPREME@COURTS.WA.GOV]

Sent: Wednesday, May 12, 2010 4:05 PM

To: Maria Riley

Subject: RE: Nichols 83742-2

The appendix exceeds the page limit that you may file via email. Here is a link regarding our email policy.

http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/?fa=atc_supreme_clerks.display&fileID=fax.

The brief is accepted for filing Received 5-12-10, please mail the appendix by mail with a cover letter explaining that you have emailed the brief .

From: Maria Riley [mailto:maria@washapp.org]

Sent: Wednesday, May 12, 2010 3:27 PM

To: OFFICE RECEPTIONIST, CLERK

Cc: deborah.dwyer@kingcounty.gov

Subject: Nichols 83742-2

In Re the PRP of Glenn Nichols**No. 83742-2**

Please accept the attached documents for filing in the above-subject case:

SUPPLEMENTAL BRIEF OF PETITIONER

<<NICHOLS.SUPBRF.83742-2.pdf>>

Lila J. Silverstein - WSBA 38394

Attorney for Petitioner

Phone: (206) 587-2711

E-mail: lila@washapp.org

By

Maria Arranza Riley

Staff Paralegal**Washington Appellate Project****Phone: (206) 587-2711****Fax: (206) 587-2710****www.washapp.org**

Please consider the environment before printing this e-mail.

5/12/2010

**IN RE THE P.R.P. OF GLENN NICHOLS
SUPREME COURT NO. 83742-2**

**ATTACHMENT:
STATE'S ORIGINAL RESPONSE TO PRP
(WITH APPENDICES)**

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 APR 11 PM 3:11

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

In re Personal Restraint)	
Petition of)	
)	
	)	No. 59750-7-1
)	
	)	STATE'S RESPONSE TO
	)	PERSONAL RESTRAINT
GLEN NICHOLS,	)	PETITION
Petitioner.)	
_____)	

A. AUTHORITY FOR RESTRAINT OF PETITIONER.

Glen Nichols is restrained pursuant to judgment and sentence in King County Superior Court No. 04-1-01099-0 SEA.

Appendix A.

B. ISSUES PRESENTED.

Whether this petition should be granted where petitioner has established that the warrantless search of the motel registry violated his right to privacy under the state constitution.

C. STATEMENT OF THE CASE.

Nichols was found guilty by bench trial of the crimes of possession with intent to deliver cocaine and possession of

marijuana. Appendix A and B. He received a sentence of 60 months of total confinement. Appendix A and B. He appealed. This Court affirmed his conviction and mandate issued on January 11, 2008. Appendix C.

The facts of the trial are recounted in this Court order's affirming his convictions:

On February 26, 2004, the Seattle Police Department was conducting buy narcotics operation using pre-recorded bills. During the course of the investigation, the officers acquired information suggesting that a drug supplier was staying at a local motel. The officers identified Glenn Nichols as the registered occupant of the room suspected of being involved, determined that Nichols had a record of drug violations, and determined that his license was suspended. When Nichols drove into the motel parking lot, the officers arrested and searched him, recovering approximately 15 grams of crack cocaine, 2 grams of marijuana, and \$470 in cash, including one of the marked bills used earlier that day in a controlled buy.

Appendix C, at 2.

D. ARGUMENT.

PETITIONER HAS ESTABLISHED THAT HIS CONSTITUTIONAL RIGHT TO PRIVACY WAS VIOLATED WHEN HIS NAME WAS OBTAINED FROM A MOTEL REGISTRY WITHOUT A WARRANT.

Nichols contends that his constitutional right to privacy was violated when the police obtained his name from a motel registry without a warrant. Based on the state supreme court's recent decision in State v. Jordan, 160 Wn.2d 121, 130, 156 P.3d 893 (2007), the State believes he is correct.

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold showing of constitutional error from which he has suffered actual prejudice or nonconstitutional error which constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice. In re Cook, 114 Wn. 2d 802, 813, 792 P.2d 506 (1990). In a personal restraint petition, petitioner bears the burden of showing prejudicial error. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986).

In State v. Jordan, 160 Wn.2d at 130, the Washington Supreme Court held that random searches of motel registries without particularized suspicion violated the right to privacy under

article I, section 7 of the state constitution. The Court summarized its holding as follows, "[a]bsent a valid exception to the prohibition against warrantless searches, random viewing of a motel registry violates article I, section 7 of the Washington State Constitution." Id. at 131.

Although the action taken by the police in Nichols' case was not a random search of a motel registry, it was a warrantless search of a private affair. As stated by the trial court in its factual findings pursuant to both CrR 3.6, the officers had reasonable, articulable suspicion to believe that the occupant of room 56 had engaged narcotics activity. Appendix D. However, the holding of Jorden requires that the police either obtain a warrant to search a motel registry, or identify an exception to the warrant requirement.

No warrant was obtained in this case, and no exception to the warrant requirement applies. See State v. Ozuna, 80 Wn. App. 684, 911 P.2d 395 (1996) (warrant is required to search unoccupied car even if probable cause to believe car was involved in a crime existed, absent exigent circumstances). Because Nichols' detention flowed directly from the warrantless search of the motel registry, the evidence obtained from his detention and arrest should have been suppressed.

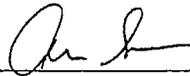
E. CONCLUSION.

This petition should be granted.

DATED this 10th day of April, 2008.

Respectfully Submitted,

DAN SATTERBERG
King County Prosecuting
Attorney

by 

ANN SUMMERS, #21509
Senior Deputy Prosecuting
Attorney
Attorneys for Respondent
Office ID #91002

W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
(206) 296-9650

APPENDIX A

FILED

2005 MAR 23 AM 10:18

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

VUCSA OVER 21

MAR 23 2005

PRESENTENCING STATMENT & INFORMATION ATTACHED CERTIFIED COPY TO COUNTY JAIL

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 04-1-01099-0 SEA

Vs.

JUDGMENT AND SENTENCE
FELONY

GLENN GARY NICHOLS

Defendant,

I. HEARING

I.1 The defendant, the defendant's lawyer, *Kevin Black* ~~BYRON WARD~~, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

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 1/6/2005 by bench trial of:

Count No.: I Crime: VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT/POSSESS WITH INTENT/COCAINE

RCW 69.50.401 (A)(1)(I)

Crime Code: 07319

Date of Crime: 2/26/2004

Incident No. 04-571162

Count No.: _____ Crime: _____

RCW _____

Crime Code: _____

Date of Crime: _____

Incident No. _____

Count No.: _____ Crime: _____

RCW _____

Crime Code: _____

Date of Crime: _____

Incident No. _____

Count No.: _____ Crime: _____

RCW _____

Crime Code: _____

Date of Crime: _____

Incident No. _____

[] Additional current offenses are attached in Appendix A

SPECIAL VERDICT or FINDING(S):

- (a) While armed with a firearm in count(s) _____ RCW 9.94A.510(3).
- (b) While armed with a deadly weapon other than a firearm in count(s) _____ RCW 9.94A.510(4).
- (c) With a sexual motivation in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A offense committed in a protected zone in count(s) _____ RCW 69.50.435.
- (e) Vehicular homicide Violent traffic offense DUI Reckless Disregard.
- (f) Vehicular homicide by DUI with _____ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
- (g) Non-parental kidnapping or unlawful imprisonment with a minor victim. RCW 9A.44.130.
- (h) Domestic violence offense as defined in RCW 10.99.020 for count(s) _____.
- (i) Current offenses encompassing the same criminal conduct in this cause are count(s) _____ RCW 9.94A.589(1)(a).

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

Criminal history is attached in Appendix B.

One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	7	II	60 to 120 MONTHS		60 TO 120 MONTHS	10 YRS AND/OR \$20,000
Count						
Count						
Count						

Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE (RCW 9.94A.535):

Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in Appendix D. The State did did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
- Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.
- Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
 - Date to be set.
 - Defendant waives presence at future restitution hearing(s).
- Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs; Court costs are waived; (RCW 9.94A.030, 10.01.160)
- (b) \$100 DNA collection fee; DNA fee waived (RCW 43.43.754)(crimes committed after 7/1/02);
- (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs;
 Recoupment is waived (RCW 9.94A.030);
- (d) \$ _____, Fine; \$1,000, Fine for VUCSA; \$2,000, Fine for subsequent VUCSA;
 VUCSA fine waived (RCW 69.50.430);
- (e) \$ _____, King County Interlocal Drug Fund; Drug Fund payment is waived;
(RCW 9.94A.030)
- (f) \$ _____, State Crime Laboratory Fee; Laboratory fee waived (RCW 43.43.690);
- (g) \$ _____, Incarceration costs; Incarceration costs waived (RCW 9.94A.760(2));
- (h) \$ _____, Other costs for: _____

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 500.00. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied. Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

- Court Clerk's trust fees are waived.
- Interest is waived except with respect to restitution.

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: [] immediately; (Date): 3/30/05 by 12 p.m.

(60) months/days on count I; _____ months/days on count _____; _____ months/day on count _____
_____ months/days on count _____; _____ months/days on count _____; _____ months/day on count _____

The above terms for counts I ^{is} consecutive (concurrent) w/ count II

The above terms shall run [] CONSECUTIVE [] CONCURRENT to cause No.(s) _____

The above terms shall run [] CONSECUTIVE [] CONCURRENT to any previously imposed sentence not referred to in this order.

[] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: _____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

[] The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The TOTAL of all terms imposed in this cause is 60 months.

Credit is given for [] _____ days served days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A.505(6).

4.5 NO CONTACT: For the maximum term of no ^{through community custody} years, defendant shall have no contact with Travel Lodge Motel 3512 SW Alaska St. Seattle, WA - & Toreka Ativalu

✓ 4.6 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, as ordered in APPENDIX G.

[] HIV TESTING: For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

4.7 (a) [] COMMUNITY PLACEMENT pursuant to RCW 9.94A.700, for qualifying crimes committed before 7-1-2000, is ordered for _____ months or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer. [24 months for any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 6-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against person defined in RCW 9.94A.411 not otherwise described above.] APPENDIX H for Community Placement conditions is attached and incorporated herein.

(b) [] COMMUNITY CUSTODY pursuant to RCW 9.94.710 for any SEX OFFENSE committed after 6-5-96 but before 7-1-2000, is ordered for a period of 36 months or for the period of earned early release awarded under RCW 9.94A.728, whichever is longer. APPENDIX H for Community Custody Conditions and APPENDIX J for sex offender registration is attached and incorporated herein.

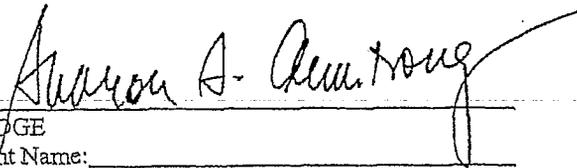
- (c) COMMUNITY CUSTODY - pursuant to RCW 9.94A.715 for qualifying crimes committed after 6-30-2000 is ordered for the following established range:
- Sex Offense, RCW 9.94A.030(38) - 36 to 48 months—when not sentenced under RCW 9.94A.712
 - Serious Violent Offense, RCW 9.94A.030(37) - 24 to 48 months
 - Violent Offense, RCW 9.94A.030(45) - 18 to 36 months
 - Crime Against Person, RCW 9.94A.411 - 9 to 18 months
 - Felony Violation of RCW 69.50/52 - 9 to 12 months
- or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer.
 Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.737.
- APPENDIX H for Community Custody conditions is attached and incorporated herein.
 APPENDIX J for sex offender registration is attached and incorporated herein.

4.8 WORK ETHIC CAMP: The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement. The defendant shall comply with all mandatory statutory requirements of community custody set forth in RCW 9.94A.700. Appendix H for Community Custody Conditions is attached and incorporated herein.

4.9 ARMED CRIME COMPLIANCE, RCW 9.94A.475, 480. The State's plea/sentencing agreement is attached as follows:

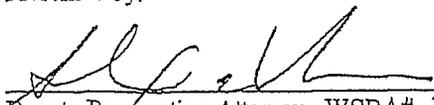
The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 3-22-05



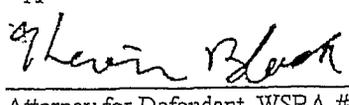
 JUDGE
 Print Name: _____

Presented by:



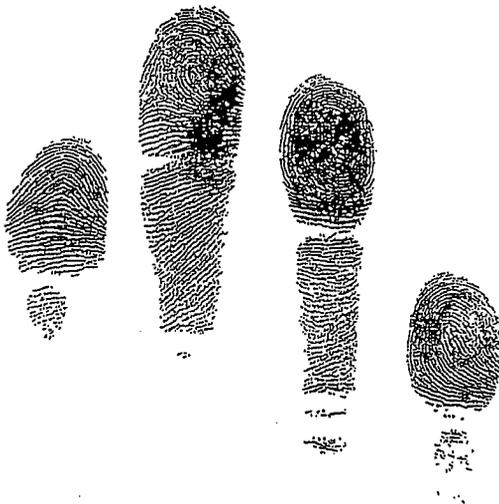
 Deputy Prosecuting Attorney, WSBA# 31915
 Print Name: Alexandra Voorhees

Approved as to form:



 Attorney for Defendant, WSBA # 72251
 Print Name: Kevin Black

FINGERPRINTS



BEST AVAILABLE IMAGE POSSIBLE

RIGHT HAND
FINGERPRINTS OF:

GLENN GARY NICHOLS

DATED: 3/22/05

Sumant A. Anantony
JUDGE, KING COUNTY SUPERIOR COURT

DEFENDANT'S SIGNATURE:

DEFENDANT'S ADDRESS:

10003 S.E. 192nd ST
RENTON WA 98055

ATTESTED BY: BARBARA MINER,
SUPERIOR COURT CLERK

BY: Glenn Nichols
DEPUTY CLERK

CERTIFICATE

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

CLERK

BY: _____
DEPUTY CLERK

OFFENDER IDENTIFICATION

S.I.D. NO. WA12637713

DOB: OCTOBER 30, 1960

SEX: M

RACE: B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

GLENN GARY NICHOLS

Defendant,

No. 04-1-01099-0 SEA

JUDGMENT AND SENTENCE,
(FELONY) - APPENDIX B,
CRIMINAL HISTORY

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
VUCSA-POSSESS COCAINE	11/13/1998	ADULT	981051023	KING CO
VUCSA-PWI TO DELIVER COCAINE	3/31/1995	ADULT	941035181	KING CO
UNLAWFUL POSSESSION OF FIREARM	3/31/1995	ADULT	941035181	KING CO
VUCSA-POSSESS COCAINE	11/25/1991	ADULT	911039549	KING CO
BURGLARY 2 ND DEGREE	2/4/1988	ADULT	871044838	KING CO
BURGLARY 2 ND DEGREE	8/14/1987	ADULT	871027119	KING CO
BURGLARY 2 ND DEGREE	8/14/1987	ADULT	871026864	KING CO

[] The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date:

9-22-05

Andrew A. Armstrong
JUDGE, KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

GLENN GARY NICHOLS

Defendant,

No. 04-1-01099-0 SEA

APPENDIX G
ORDER FOR BIOLOGICAL TESTING
AND COUNSELING

DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

HIV TESTING AND COUNSELING (RCW 70.24.340):

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date:

3-22-05

Arthur A. Armstrong
JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
	)	Plaintiff,
	)	No. 04-1-01099-0 SEA
)	
vs.	)	JUDGMENT AND SENTENCE
	)	APPENDIX H
GLENN GARY NICHOLS	)	COMMUNITY PLACEMENT OR
	)	COMMUNITY CUSTODY
)	
	)	Defendant,

The Defendant shall comply with the following conditions of community placement or community custody pursuant to RCW 9.94A.700(4), (5):

- 1) Report to and be available for contact with the assigned community corrections officer as directed;
- 2) Work at Department of Corrections-approved education, employment, and/or community service;
- 3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- 4) Pay supervision fees as determined by the Department of Corrections;
- 5) Receive prior approval for living arrangements and residence location;
- 6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.720(2));
- 7) Notify community corrections officer of any change in address or employment; and
- 8) Remain within geographic boundary, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

OTHER SPECIAL CONDITIONS:

- The defendant shall not consume any alcohol.
- Defendant shall have no contact with: all JES
- Defendant shall remain within outside of a specified geographical boundary, to wit:
- The defendant shall participate in the following crime-related treatment or counseling services: _____
- The defendant shall comply with the following crime-related prohibitions: _____
- _____

Other conditions may be imposed by the court or Department during community custody.

Community Placement or Community Custody shall begin upon completion of the term(s) of confinement imposed herein or when the defendant is transferred to Community Custody in lieu of earned early release. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions [RCW 9.94A.720] and may issue warrants and/or detain defendants who violate a condition [RCW 9.94A.740].

Date: 3-22-05

Sumant A. Chaturvedi
 JUDGE

APPENDIX B

Defendant shall pay to the clerk of this Court:

- (1) Restitution is not ordered; none Requested
- Order of Restitution is attached;
- Restitution to be determined at a restitution hearing on (Date) _____ at _____ m.;
 - Date to be set;
 - The defendant waives presence at future restitution hearing(s);

(2) \$ _____, Court costs;

(3) \$ on felony form, Victim assessment, \$500 for gross misdemeanors and \$100 for misdemeanors;

(4) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs;

(5) \$100 DNA collection fee;

(6) \$ _____, Fine;

(7) TOTAL financial obligation: on felony Ct. I JRS

The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; to be paid in full by (Date) _____.

The defendant shall have a biological sample collected for purposed of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in Appendix G (for stalking, harassment, or communicating with a minor for immoral purposes).

Date: 3-~~14~~-05²²

Anderson A. Armstrong
Judge, King County Superior Court
Print Name: _____

Presented by:

Alexandra E. Voorhees
Deputy Prosecuting Attorney, WSBA # 31915
Print Name: Alexandra E. Voorhees

Form Approved for Entry:

Kevin Black
Attorney for Defendant, WSBA # 21797
Print Name: Kevin Black

APPENDIX C

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

STATE OF WASHINGTON,
Respondent,
v.
GLENN GARY NICHOLS,
Appellant.

No. 55976-1-I

MANDATE
King
County

Superior Court No. 04-1-01099-0 SEA

FILED
KING COUNTY, WASHINGTON
JAN 24 2008
SUPERIOR COURT CLERK

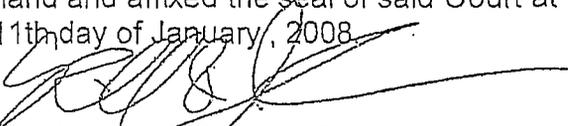
THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in
and for County.

This is to certify that the ruling entered on August 7, 2007 became the decision
terminating review of this court in the above on . An order denying a motion to modify
was entered on November 6, 2007. This case is mandated to the Superior Court from
which the appeal was taken for further proceedings in accordance with the attached true
copy of the ruling.

Pursuant to a Commissioner's ruling entered on August 27, 2007, costs of
\$3,397.34 are awarded in favor of judgment creditor WASHINGTON OFFICE OF PUBLIC
DEFENSE against judgment debtor GLENN GARY NICHOLS and costs in the amount of
\$78.55 are awarded against judgment debtor GLENN GARY NICHOLS in favor of
judgment creditor KING COUNTY PROSECUTOR'S OFFICE.

c: Carla B. Carlstrom (KCPA)
Jennifer Winkler (NBK)
Hon. Sharon Armstrong
Indeterminate Sentencing Review Board

IN TESTIMONY WHEREOF, I have hereunto set my
hand and affixed the seal of said Court at Seattle, this
11th day of January, 2008.


RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals, State
of Washington, Division I.



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

STATE OF WASHINGTON,)	
	)	No. 55976-1-I
Respondent,)	
)	
v.	)	COMMISSIONER'S RULING
	)	GRANTING MOTION ON
GLENN GARY NICHOLS,	)	THE MERITS TO AFFIRM
)	
Appellant.)	

Glenn Nichols appeals from his convictions for possession of cocaine with intent to deliver and possession of marijuana. He contends his state and federal rights to be free from unreasonable searches were violated when the court ordered him to provide a biological sample for DNA identification following his conviction. He alleges additional errors in a statement of additional grounds for review. This court set a motion on the merits to affirm pursuant to RAP 18.14. The motion is granted.

FACTS

On February 26, 2004, the Seattle Police Department was conducting a controlled buy narcotics operation using pre-recorded bills. During the course of the investigation, the officers acquired information suggesting that a drug supplier was staying at a local motel. The officers identified Glenn Nichols as the registered occupant of the room suspected of being involved, determined that Nichols had a record of drug violations, and determined that his license was suspended. When Nichols drove into the motel parking lot, the officers arrested

No. 55976-1-1/2

and searched him, recovering approximately 15 grams of crack cocaine, 2 grams of marijuana, and \$470 in cash, including one of the marked bills used earlier that day in a controlled drug buy.

The State charged Nichols with possession of cocaine with intent to distribute and possession of less than forty grams of marijuana. Nichols waived his right to a jury trial. The court found Nichols guilty of both counts, sentenced him to the low end of the standard range, and directed that a biological sample be taken for DNA identification. This appeal followed.

MOTION ON THE MERITS CRITERIA

RAP 18.14(e)(1) provides:

A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the . . . commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

These criteria are applied in light of State v. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985).

DECISION

Nichols first contends that RCW 43.43.754, which requires that convicted felons provide a biological sample for a DNA database, violates Article 1, section 7 of the Washington Constitution. Because the Washington Supreme Court has recently rejected the same argument in State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007), it need not be further addressed.¹

¹ This case was stayed pending a decision in Surge.

Nichols has also filed a Statement of Additional Grounds for Review. He first alleges that the evidence is not sufficient to support his conviction. Nichols testified that he did not have any drugs when he was arrested, suggesting that the officers planted the drugs. In reviewing a challenge to the sufficiency of the evidence, the appellate court determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). Credibility determinations cannot be reviewed on appeal. Brockob, 159 Wn.2d at 336.

Nichols takes issue with the fact that a photocopy of the buy money found in his possession was used at trial. But there was no objection to the use of a copy and no issue as to whether the copy was accurate. Nichols complains that the amount of the drugs listed by the officers and the amount tested by the crime lab were different. The officers estimated that the cocaine weighed 15.1 grams and that the marijuana weighed 2 grams, based on field testing. The laboratory reported that the suspected cocaine weighed 12 grams and that the marijuana weighed 1.2 grams. There was no objection at trial to this discrepancy and the laboratory report was admitted by stipulation. The differences between the weights obtained in field testing and those reported by the laboratory are immaterial in the context of this case. The only real issue at trial was whether Nichols had the drugs in his pocket when he was arrested. The officers testified that he did. The court specifically stated that it did not find Nichols' testimony credible. The officers' testimony alone is sufficient to sustain the conviction.

Nichols also seems to contend that there was some error in failing to disclose the criminal history of one of the State's witnesses. But the record does not show whether there was a request for this information or whether or not it was provided. And while one of the State's witnesses was an informant, whose credibility defense counsel attacked in cross examination, the testimony of this witness was collateral to the main issues at trial. Nichols has not shown error, but even assuming he could, he has not shown prejudice, and this claim is accordingly rejected.

Nichols alleges his attorney signed false documents and the prosecution presented a false statement in order to obtain a continuance. Nichols has included some documents from December 3, 2004 that he apparently believes support his argument. But none of these documents, even assuming there is some falsity, are critical. One is a pre-trial release order (in the name of a different defendant), one is an omnibus order, and one is an omnibus checklist. There is no record of any false statement by the prosecutor and no apparent prejudice from any of these alleged falsities. This claim is accordingly rejected.

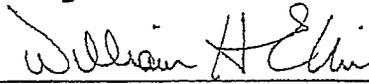
Nichols finally faults the prosecutor for making argumentative statements not supported by the record. It appears that the complained of statements, attacking the credibility of Nichols' witnesses and suggesting that Nichols was seen making a drug delivery, were made at sentencing, not at the trial. Moreover, as the court sentenced Nichols to the low end of the standard range, it appears the statements had no prejudicial effect, even if false. This claim is accordingly also rejected.

No. 55976-1-1/5

Now, therefore, it is hereby

ORDERED that the motion on the merits is granted and the judgment and sentence is affirmed.

Done this 14th day of August, 2007.



Court Commissioner

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2007 AUG -7 PM 4:15

APPENDIX D

FILED

2005 JAN 27 AM 11:24

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

ORIGINAL

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

GLENN GARY NICHOLS,

Defendant,

No. 04-1-01099-0 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL,
ORAL OR IDENTIFICATION
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on January 4, 2005 before the Honorable Judge Armstrong. After considering the evidence submitted by the parties and hearing argument, to wit: The testimony of Seattle Police Department Officers Sergeant Caylor, Detective Gonzalez and Officer Nelson, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE FINDINGS OF FACT:

- a. On February 26, 2004, Seattle Police Detective Rudy Gonzales used a cooperating witness to make a controlled buy of cocaine from Toreka "Tika" Ativalu. This controlled buy was the fourth made by the same cooperating witness from Ms. Ativalu since February 13, 2004. The first three were used to obtain a search warrant (attached as Appendix A) for Ms. Ativalu's house.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

- 1 b. At approximately 1:50 p.m. on February 26, Detective Gonzales dropped the cooperating
2 witness off at Ms. Ativalu's house, located at 4814 25th Ave. S.W. in Seattle, with
3 instructions to purchase \$50 worth of crack cocaine.
- 4 c. The cooperating witness, Charles Ream, had been searched by Detective Gonzales prior
5 to arriving at that location and was found to be free of contraband and money. After
6 searching him, Detective Gonzales issued Ream \$50 in pre-recorded Seattle Police
7 Department buy money. While Detective Gonzales remained in his vehicle, the Ream
8 went to the door of Ms. Ativalu's house and was permitted to enter.
- 9 d. Mr. Ream informed her that he wanted a "fifty" of crack cocaine. Ms. Ativalu told him
10 that she was out of drugs at that time and that she was going to meet her supplier in a few
11 minutes. Ream then handed Ms. Ativalu the \$50 in pre-recorded buy money and was
12 directed out the back door to Ms. Ativalu's van. Ms. Ativalu, Ream, and another male
13 Ream knew only as "Robert" then drove to the Travel Lodge Motel at 35th Ave. S.W. and
14 S.W. Alaska Street in Seattle Washington. The drive took five minutes or less.
- 15 e. When they arrived at the Travel Lodge, Ream and "Robert" remained in the van while
16 Ms. Ativalu exited. It appeared to Mr. Ream that she was unsure of which room she
17 needed to contact. Ms. Ativalu then called down to "Robert" and told him to call "OG"
18 to find out what room he was in. Robert used a cell phone and asked the person who
19 answered if "OG" was there. Robert then spoke with "OG" and asked what room he was
20 in. Robert then hung up and yelled to Ms. Ativalu that "OG" was in room number 56.
21 Mr. Ream then saw Ms. Ativalu go into room 56.
- 22 f. Approximately five minutes later, Ms. Ativalu exited room 56 and returned to the van.
23 Once inside, she handed Mr. Ream several small pieces of suspected crack cocaine. The

1 three then drove back to Ms. Ativalu's house. Mr. Ream returned to Detective
2 Gonzales's vehicle, gave him the cocaine Ms. Ativalu had handed to him, and told Det.
3 Gonzales what had happened. Detective Gonzales again searched Mr. Ream and found
4 him to be free of any drugs or money.

5 g. The Seattle Police Department served the search warrant that had been obtained on
6 February 25 at approximately 2:25 p.m. on the 26th. Detective Gonzales relayed the
7 information he received from Ream about Ms. Ativalu's apparent purchase of cocaine in
8 room 56 at the Travel Lodge to Sergeant G. Caylor and Officer R. Nelson.

9 h. At approximately 4:25 p.m., Sgt. Caylor and Officer Nelson went to the Travel Lodge
10 and contacted the desk clerk. They learned that the registered guest in room 56 was the
11 defendant, Glenn Nichols. Sgt. Caylor and Officer Nelson viewed a photocopy of the
12 defendant's identification, which was either a Washington Driver's License or
13 Identification Card. After obtaining the license information, Officer Nelson ran the
14 defendant's name through the computer in his unmarked patrol car and learned that his
15 license to drive was suspended in the third degree.

16 i. Shortly after learning the defendant's license was suspended, Sgt. Caylor and Officer
17 Nelson saw the defendant, who they recognized from having seen the photocopy of his
18 identification, drive into the Travel Lodge parking lot. Caylor and Nelson pulled in
19 behind the defendant, but did not activate any emergency equipment on their vehicle.

20 j. As the defendant exited his car, Sgt. Caylor asked him if he was Glenn Nichols. The
21 defendant said "yes." Officer Nelson then asked him to step away from his car. The
22 defendant asked why and Officer Nelson told him his license was suspended and he
23 wanted to speak with him.

- 1 k. The defendant immediately became uncooperative and started to try to re-enter his car.
2 Officer Nelson and Sgt. Caylor, fearing he might be trying to obtain a weapon or trying to
3 flee, grabbed him, told him to stop resisting, and informed him he was under arrest.
- 4 l. After gaining control of the defendant and placing him in handcuffs, Officer Nelson
5 searched him incident to arrest and found a plastic baggie containing approximately 15
6 small rocks of suspected crack cocaine and another baggie containing suspected
7 marijuana. Both items were found in the defendant's right front jacket pocket.
- 8 m. Sgt. Caylor also participated in the search of the defendant and found one small and one
9 large baggie of cocaine in the defendant's inside coat pocket, and also found \$460 in
10 cash, \$10 of which was later found to be pre-recorded buy money that had been given to
11 Charles Ream for the controlled buy from Ms. Ativalu earlier that day.
- 12 n. The court finds the testimony of Sergeant Caylor, Detective Gonzalez and Officer Nelson
13 to be credible.

14 2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE SOUGHT
15 TO BE SUPPRESSED:

- 16 a. Sergeant Caylor and Officer Nelson had a reasonable articulable suspicion to contact the
17 defendant for both investigation of narcotics activity and for Driving While License
18 Suspended in the Third Degree.
- 19 b. Sergeant Caylor and Officer Nelson had probable cause to arrest the defendant for
20 Driving While License Suspended in the Third Degree. At the time of his arrest the
21 Driving While License Suspended in the Third Degree statute R.C.W. 46.20.289 had not
22 yet been overturned by the Supreme Court decision in City of Redmond v. Moore, 151
23 Wn.2d 664, 91 P.3d 875 (1994). As such it was a presumptively valid law that was not

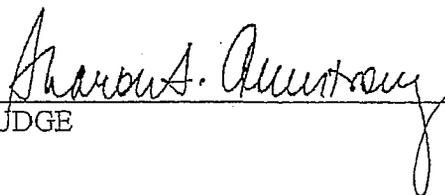
1 so obviously and flagrantly unconstitutional that it could not serve as a valid basis for
2 arrest. Based on the information the officers had at the time of the defendant's arrest they
3 had probable cause to believe that he was driving in violation of R.C.W. 46.20.289

4 c. The defendant's restive behavior and attempts to get back into his vehicle when contacted
5 by the officers as part of a legitimate criminal investigation also gave the officers
6 probable cause to arrest the defendant for Obstructing a Law Enforcement Office and
7 Resisting Arrest in addition to the Driving While License Suspended violation.

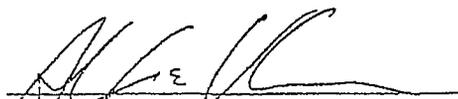
8 d. The defendant's motion to suppress evidence, to wit: the rock cocaine and money
9 recovered from his person is denied.

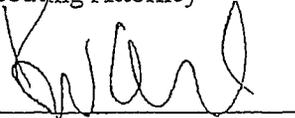
10
11 In addition to the above written findings and conclusions, the court incorporates by
12 reference its oral findings and conclusions.

13 Signed this 23rd day of January, 2005.

14
15 
16 JUDGE

17 Presented by:

18 
19 Alexandra E. Voorhees
20 WSBA # 31915
21 Deputy Prosecuting Attorney

22 
23 Byron Ward
24 WSBA # 2339
25 Attorney for Defendant

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 5

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

APPENDIX E

FILED

2005 JAN 27 AM 11:24

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

ORIGINAL

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

GLENN GARY NICHOLS,

Defendant,

No. 04-1-01099-0 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d)

THE ABOVE-ENTITLED CAUSE having come on for trial from January 4, 2005-
January 6, 2005 before the undersigned judge in the above-entitled court; the State of
Washington having been represented by Deputy Prosecuting Attorney Alexandra E. Voorhees;
the defendant appearing in person and having been represented by his attorney, Byron Ward; the
court having heard sworn testimony and arguments of counsel, and having received exhibits,
now makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

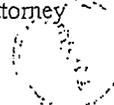
I.

The following events took place within King County, Washington:

- a. On February 26, 2004, Seattle Police Detective Rudy Gonzales used a cooperating witness to make a controlled buy of cocaine from Toreka "Tika" Ativalu. This controlled buy was the fourth made by the same cooperating witness from Ms. Ativalu since

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 1

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955



1 February 13, 2004. The first three were used to obtain a search warrant (attached as
2 Appendix A) for Ms. Ativalu's house.

3 b. At approximately 1:50 p.m. on February 26, Detective Gonzales dropped the cooperating
4 witness off at Ms. Ativalu's house, located at 4814 25th Ave. S.W. in Seattle, with
5 instructions to purchase \$50 worth of crack cocaine.

6 c. The cooperating witness, Charles Ream, had been searched by Detective Gonzales prior
7 to arriving at that location and was found to be free of contraband and money. After
8 searching him, Detective Gonzales issued Ream \$50 in pre-recorded Seattle Police
9 Department buy money. While Detective Gonzales remained in his vehicle, the Ream
10 went to the door of Ms. Ativalu's house and was permitted to enter.

11 d. Mr. Ream informed her that he wanted a "fifty" of crack cocaine. Ms. Ativalu told him
12 that she was out of drugs at that time and that she was going to meet her supplier in a few
13 minutes. Ream then handed Ms. Ativalu the \$50 in pre-recorded buy money and was
14 directed out the back door to Ms. Ativalu's van. Ms. Ativalu, Ream, and another male
15 Ream knew only as "Robert" then drove to the Travel Lodge Motel at 35th Ave. S.W. and
16 S.W. Alaska Street in Seattle Washington. The drive took five minutes or less.

17 e. When they arrived at the Travel Lodge, Ream and "Robert" remained in the van while
18 Ms. Ativalu exited. It appeared to Mr. Ream that she was unsure of which room she
19 needed to contact. Ms. Ativalu then called down to "Robert" and told him to call "OG"
20 to find out what room he was in. Robert used a cell phone and asked the person who
21 answered if "OG" was there. Robert then spoke with "OG" and asked what room he was
22 in. Robert then hung up and yelled to Ms. Ativalu that "OG" was in room number 56.
23 Mr. Ream then saw Ms. Ativalu go into room 56.

- 1 f. Approximately five minutes later, Ms. Ativalu exited room 56 and returned to the van.
2 Once inside, she handed Mr. Ream several small pieces of suspected crack cocaine. The
3 three then drove back to Ms. Ativalu's house. Mr. Ream returned to Detective
4 Gonzales's vehicle, gave him the cocaine Ms. Ativalu had handed to him, and told Det.
5 Gonzales what had happened. Detective Gonzales again searched Mr. Ream and found
6 him to be free of any drugs or money.
- 7 g. The Seattle Police Department served the search warrant that had been obtained on
8 February 25 at approximately 2:25 p.m. on the 26th. Detective Gonzales relayed the
9 information he received from Ream about Ms. Ativalu's apparent purchase of cocaine in
10 room 56 at the Travel Lodge to Sergeant G. Caylor and Officer R. Nelson.
- 11 h. At approximately 4:25 p.m., Sgt. Caylor and Officer Nelson went to the Travel Lodge
12 and contacted the desk clerk. They learned that the registered guest in room 56 was the
13 defendant, Glenn Nichols. Sgt. Caylor and Officer Nelson viewed a photocopy of the
14 defendant's identification, which was either a Washington Driver's License or
15 Identification Card. After obtaining the license information, Officer Nelson ran the
16 defendant's name through the computer in his unmarked patrol car and learned that his
17 license to drive was suspended in the third degree.
- 18 i. Shortly after learning the defendant's license was suspended, Sgt. Caylor and Officer
19 Nelson saw the defendant, who they recognized from having seen the photocopy of his
20 identification, drive into the Travel Lodge parking lot. Caylor and Nelson pulled in
21 behind the defendant, but did not activate any emergency equipment on their vehicle.
- 22 j. As the defendant exited his car, Sgt. Caylor asked him if he was Glenn Nichols. The
23 defendant said "yes." Officer Nelson then asked him to step away from his car. The

1 defendant asked why and Officer Nelson told him his license was suspended and he
2 wanted to speak with him.

3 k. The defendant immediately became uncooperative and started to try to re-enter his car.

4 Officer Nelson and Sgt. Caylor, fearing he might be trying to obtain a weapon or trying to
5 flee, grabbed him, told him to stop resisting, and informed him he was under arrest.

6 l. After gaining control of the defendant and placing him in handcuffs, Officer Nelson
7 searched him incident to arrest and found a plastic baggie containing approximately 15
8 small rocks of suspected crack cocaine and another baggie containing suspected
9 marijuana. Both items were found in the defendant's right front jacket pocket.

10 m. Sgt. Caylor also participated in the search of the defendant and found one small and one
11 large baggie of cocaine in the defendant's inside coat pocket, and also found \$460 in
12 cash, \$10 of which was later found to be pre-recorded buy money that had been given to
13 Charles Ream for the controlled buy from Ms. Ativalu earlier that day.

14 n. The court finds that Ms. Ativalu purchased narcotics from the defendant in room 56 of
15 the Travel Lodge Motel at approximately 2:00 p.m. The travel time between the motel
16 and the Mental Health Clinic that the defendant put forward as a partial alibi for the time
17 of the sale of the drugs does not preclude his involvement in the transaction.

18 o. The amount of narcotics and money found together on the defendant and absent any
19 paraphernalia is consistent with Possession With Intent to Deliver a Controlled
20 Substance.

21 p. The testimony of the defendant and his girlfriend that at the end of the month they had
22 \$460.00 of their combined \$875.00 in welfare money that was received on the first of the
23 month is not credible.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 4

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 q. The defendant's contention that Sergeant Caylor and Officer Nelson planted the drugs
2 and controlled buy money on him is likewise not credible.

3 r. The court finds the testimony of Sergeant Caylor, Detective Gonzalez and Officer Nelson
4 to be credible.

5 II.

6
7 And having made those Findings of Fact, the Court also now enters the following:

8 CONCLUSIONS OF LAW

9 I.

10 The above-entitled court has jurisdiction of the subject matter and of the defendant Glenn
11 Gary Nichols in the above-entitled cause.

12 II.

13 The following elements of the crime(s) charged have been proven by the State beyond a
14 reasonable doubt:

15 Count I. Violation of the Uniform Controlled Substances Act, Possession of Cocaine with Intent
16 to Deliver:

- 17 1. That on or about February 26, 2004 the defendant possessed cocaine, a controlled substance;
- 18 2. That the defendant possessed the cocaine with the intent to deliver a controlled substance;
19 and
- 20 3. That these acts occurred in Washington State.

21 Count II Violation of the Uniform Controlled Substances Act Possession of Less than 40 Grams
22 of Marijuana.

- 23 1. On or about February 26, 2004 the defendant possessed less than 40 grams of Marijuana; and
- 24 2. That those acts occurred in Washington State.

25 III.

26 The defendant is guilty of the crimes of Count I Violation of the Uniform Controlled
27 Substances Act Possession of Cocaine a Controlled Substance with the Intent to Deliver, and
28 Count II Violation of the Uniform Controlled Substances Act Possession of Less than 40 Grams
29 of Marijuana as charged in the Amended Information.

30 FINDINGS OF FACT AND CONCLUSIONS OF LAW
31 PURSUANT TO CrR 6.1(d) - 5

Norm Maleng, Prosecuting Attorney
WS54 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

IV.

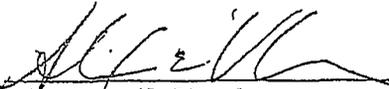
Judgment should be entered in accordance with Conclusion of Law III.

DONE IN OPEN COURT this 23rd day of January, 2005.



JUDGE

Presented by:



Alexandra E. Voorhees
WSBA # 31915
Deputy Prosecuting Attorney

Defendant



Byron Ward
WSBA # 2339
Attorney for Defendant

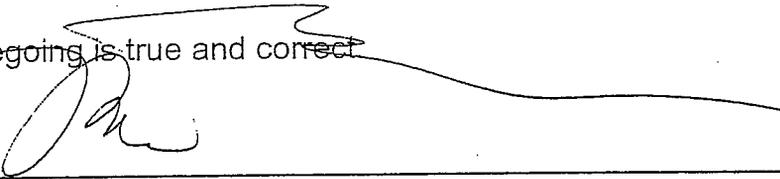
FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 6

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

CERTIFICATION OF SERVICE

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Glenn Nichols, at the following address: DOC# 931744, Monroe Corrections Center, P.O. Box 888, Monroe, WA 98272, the petitioner, containing a copy of the State's Response to Personal Restraint Petition in In re Nichols, No. 59750-7-1, in the Court of Appeals of the State of Washington.

I certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct



Name
Done in Seattle, Washington



Date

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 APR 11 PM 3:11