

PETITIONER MAY FILE THE
PETITION WITHOUT PAYMENT OF
A FILING FEE

[Signature]
COURT CLERK 3/3/06

FILED
COURT OF APPEALS
DEPT. OF JUSTICE

06 JAN 11 AM 11:30

STATE OF WASHINGTON

BY [Signature]
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL J. GONZALES)

NO. 34488-2

PERSONAL RESTRAINT PETITION

Petitioner's Full Name

If there is not enough room on this form, use the back of these pages or use other paper. Fill out all of the form and other papers you are attaching before you sign this form in front of a notary.

A. STATUS OF PETITIONER

I, MICHAEL J. GONZALES, D.O.C. # 724909, P.O.
(Full name and current address)

Box 1809, UNIT LB60, AIRWAY HEIGHTS, WA 99001-1809

Apply for relief from confinement. I am X am not _____ now in custody serving a sentence upon conviction of a crime. (If not serving a sentence upon conviction of a crime) I am now in custody because of the following type of court order: Conviction of second degree

murder, Cause # 02-1-00415-6
(Identify type of court order)

1. The court in which I was sentenced is: Mason County Superior Court

2. I was convicted of the crime of: Second Degree Murder

3. I was sentenced after (check one) Trial X Plea of Guilty _____ on Jan 14, 2005
Date of Sentence

4. The Judge who imposed sentence was JUDGE JAMES B. SAWYER

5. My lawyer at trial court was MR. ADRIAN PIMENTEL
Name and Address if known

2201 N. 30th St., TACOMA, WA 98403

COPY

6. I did did not _____ appeal from the decision of the trial court. (If the answer is that I did), I appealed to: WA. COURT OF APPEALS - No. 30756-1-II
Name of court or courts to which appeal took place

PATRICIA A. PETHICK, P.O. BOX 7269
7. My lawyer for my appeal was: TACOMA, WA 98406-0269
Name and address if known or write "none"

The decision of the appellate court was _____ was not published. (If the answer is that it was published, and I have this information) the decision is published in _____

N/A

8. Since my conviction I have have not _____ asked a court for some relief from my sentence other than I have already written above. (If the answer is that I have asked, the court I asked was Motion To Reinstate Direct Appeal Relief was denied on _____
Name of court FROM RESENTENCING
MASON County Superior Court. Motion Pending
Date of Decision or, if more than one, all dates)

(If you have answered in question 7 that you did ask for relief), the name of your lawyer in the proceedings mentioned in my answer was MICHAEL GONZALES
Name and address if known
APPEARING PRO SE.

9. If the answers to the above questions do not really tell about the proceedings and the courts, judges and attorneys involved in your case, tell about it here: _____

I believe everything is explained & detailed on this page & throughout the PRP.

B. GROUNDS FOR RELIEF:

(If I claim more than one reason for relief from confinement, I will attach sheets for each reason separately, in the same way as the first one. The attached sheets should be numbered "First Ground", "Second Ground", "Third Ground", etc). I claim that I have 4 reason(s) for this court to grant me relief from the conviction and sentence described in Part A.

See attached sheets, pages 7 through 34.
Ground
(First, Second, etc)

1. I should be given a new trial or released from confinement because (State legal reasons why you think there was some error made in your case which gives you the right to a new trial or release from confinement): _____

See attached sheets, Pgs. 7-34

2. The following facts are important when considering my case. (After each fact statement put the name of the person or persona who know the fact and will support your statement of the fact. If the fact is already in the record of your case, indicate that also) _____

See attached sheets, Pgs. 7-34

3. The following reported court decisions (indicate citations if possible) in cases similar to mine show the error I believed happened in my case. (If none are known, state "None Known".) _____

See attached sheets, Pgs. 7-34

4. The following statutes and constitutional provisions should be considered by the court. (If none are now, state, "None Known") _____

See attached sheets, Pgs. 7-34

5. This petition is the best way I know to get the relief I want, and not other way will work as well because: As best as I can understand the Court rules, this PRP is the proper method.

C. STATEMENT OF FINANCES:

If you cannot afford to pay the \$250 filing fee or cannot afford to pay an attorney to help you, fill out this form. If you have enough money for these, do not fill this part of the form. If currently in confinement you will need to attach a copy of your prison finance statement.

The finance statement will be sent to Court within one week due to admin delay.

1. I do do not ask the court to file this without making me pay the \$250 filing fee because I am so poor and cannot pay the fee.

2. I have \$ 1.00 in my prison or institution account. (one dollar)

3. I do do not ask the court to appoint a lawyer for me because I am so poor and cannot afford to pay a lawyer.

4. I am am not employed. My salary or wages amount to \$ 47.00 a month. My employer is WA State Dept of Corrections (Porter Job).
Name and address of employer

5. During the past 12 months I did did not get any money from a business, profession or other form of self-employment. (If I did, it was N/A)
Type of self-employment
And the total income I received was \$ 0.

6. During the past 12 months I:

Did Did Not Receive any rent payments. If so, the total I received was \$ 0

Did Did Not Receive any interest. If so, the total I received was \$ 0

Did Did Not Receive any dividends. If so, the total I received was \$ 0

Did Did Not Receive any other money. If so the total I received was \$ 50.-

Do Do Not Have any cash except as said in question 2 of Statement of Finances. If so the total amount of cash I have is \$ N/A.

Do Do Not Have any savings or checking accounts. If so, the total amount in all accounts is \$ N/A

Do Do Not Own stocks, bonds or notes. If so, their total value is: \$ 0

7. List all real estate and other property or things of value which belong to you or in which you have an interest. Tell what item or property is worth and how much you owe on it. Do not list household furniture and furnishings and clothing which you or your family need.

Items	Value
<u>NONE</u>	<u>0 N/A</u>

8. I am am not married. If I am married, my wife or husband's name and address is:
TERI GONZALES, 6804 W. PRASCH AVE.
YAKIMA, WA 98908

9. All of the persons who need me to support them are listed below:

Name & Address	Relationship	Age
<i>None at this time due to incarceration.</i>		

10. All the bills I owe are listed here:

Name & Address of Creditor	Amount
<i>Mason County Court</i>	<i>20,000.—</i>
<i>Yakima County Court</i>	<i>10,000.—</i>

D. REQUEST FOR RELIEF:

I want this court to:

- Vacate my conviction and give me a new trial
- Vacate my conviction and dismiss the criminal charges against me without a new trial
- Other: *Allow me to withdraw my plea; Reinstate my appeal rights; Grant appointment of counsel; Order a new & complete resentencing hearing; Order that juvenile points not be included in offender score; Order that a corrected and accurate Judgment & Sentence document be provided to me & the Courts; Grant any other relief that this Court finds just.*

FILED
COURT OF APPEALS
DIVISION II
06 JAN 11 AM 11:30
STATE OF WASHINGTON
BY 24
DEPUTY

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
) No: 02-1-00415-6
) MASON Co. SUPERIOR CT No.
 v.) CERTIFICATE OF SERVICE
)
MICHAEL J. GONZALES)
)
 Petitioner.)

I, MICHAEL J. GONZALES, Petitioner in the above entitled cause, under the penalty of perjury, do hereby certify that on the date noted below, I sent copies of: Personal Restraint Petition 34 pages; Certificate of Service; Declaration; Affidavit to proceed in forma pauperis; Trust Acct. Statement; Motion for Court to proceed on Court's Transcripts and waiver of defendant to provide copies of transcripts referenced to; Motion and Order to proceed in forma pauperis; Cover letter to Court Clerk.

To: COURT OF APPEALS, Div. II, 950 Broadway, Suite 300,
Tacoma, WA 98402
By processing as Legal Mail, with first-class postage affixed thereto, at the Airway Heights Correction Center, P.O. Box 1809, Airway Heights, WA 99001-1809

Dated this 8th day of January, 2006.

Respectfully Submitted,

Michael Gonzales
Petitioner

R. MICHAEL F. GONZALES
724909, AHCC
P.O. Box 1809, UNIT LB60
AIRWAY HEIGHTS, WA 99001-1809

1-9-2006

Clerk Of The Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402



Re: Copies of Judgment & Sentences to
supplement PRP. Superior Court
No. 02-1-00415-6

Dear Clerk:

Please supplement my PRP documents
and file with the enclosed (4 sheets) copies
of pages 1 & 2 of both Judgment & Sentences
(of 6-13-03 and 1-14-05).

I was unable to obtain copies of the
documents before the PRP was mailed on
1-8-06. Thank you in advance for your assistance.

1-9-2006

Michael Gonzales

RECEIVED & FILED

JUN 13 2003

PAT SWARTOS, Clerk of the
Superior Court Mason Co. Wash.

SUPERIOR COURT OF WASHINGTON
COUNTY OF MASON

STATE OF WASHINGTON, Plaintiff,

v.
MICHAEL JESSE GONZALES,
Defendant.

SID:WA14896056
If no SID, use DOB: 122575

No. 02-1-00415-6

JUDGMENT AND SENTENCE (JS)

- Prison
- RCW 9.94A.712 Prison Confinement
- Jail One Year or Less
- RCW 9.94A.712 Prison Confinement
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Clerk's Action Required, para 4.1 and 5.8

724/909
06/13/03

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

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

2.1 CURRENT OFFENSE(S): The defendant was found guilty on MAY 27, 2003
by plea jury-verdict bench trial of: (Date)

COUNT	CRIME	RCW	DATE OF CRIME
II	MURDER IN THE SECOND DEGREE	9A.32.050	061402

as charged in the Second Amended Information, provided, the firearm enhancement in such Count II is stricken.

- The court finds that the defendant is subject to sentencing under RCW 9.94A.712
- A special verdict/finding for use of **firearm** was returned on Count(s) . RCW 9.94A.609, .510.
- A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) . RCW 9.94A.602 .510.
- A special verdict/finding of **sexual motivation** was returned on Count(s) . RCW 9.94A.835.
- A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) , RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic

center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

- A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine when a juvenile was present in or upon the premises of manufacture was returned on Count(s) . RCW 9.94A.605.
- The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.575.
- The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime charged in Count(s) involve(s) domestic violence.
- The offense(s) in Count(s) was/were committed in a county jail or state correctional facility. RCW 9.94A.510(5)
- A special verdict/finding determining aggravating circumstances was returned on Count(s) , as follows: . RCW 10.95.020.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589): []
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): []

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	DATE OF RELEASE	A or J Adult, Juv.	TYPE OF CRIME
1 RESIDENTIAL BURGLARY	022792	YAKIMA; WA	011392		J	
2 ASSAULT 2°	041993	YAKIMA; WA	041993		J	
3 VUCSA (2 Counts)	072994	YAKIMA; WA	031794		A	

V = Violent; SV = Serious Violent; Sex = Sex Offense; Vsex = Violent Sex; SVSex = Serious Violent Sex

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.
- The court finds that the following prior convictions are one offense for purposes of determining the offender score. (RCW 9.94A.525: _____)
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUS -NESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
II	4	XIV	165 - 265 MONTHS	N/A	165 - 265 MONTHS	LIFE

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

- Additional current offense sentencing data is attached in Appendix 2.3.

RECEIVED
FEB 11 2005
AHCC RECORDS OFFICE

RECEIVED & FILED

JAN 14 2005

PAT SWARTOS, Clerk of the
Superior Court Mason Co. Wash

SUPERIOR COURT OF WASHINGTON
COUNTY OF MASON

STATE OF WASHINGTON, Plaintiff,

vs.

MICHAEL JESSE GONZALES,
Defendant.

SID: WA148960056
If no SID, use DOB: 12-25-1975

No. 02-1-00415-6

JUDGMENT AND SENTENCE (JS)
(RESENTENCED PER COA II MANDATE)

Prison

Clerk's Action Required, para 4.15.2, 5.3, 5.6 and
5.8

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present. This is a resentencing with a corrected offender score pursuant to a mandate from COA II.

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 MAY 27, 2003 by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME
II	MURDER IN THE SECOND DEGREE	9A.32.050	06-14-2002

(If the crime is a drug offense, include the type of drug in the second column.)
as charged in the (_____ Amended) Information.

Additional current offenses are attached in Appendix 2.1.

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

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

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

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

JUDGMENT AND SENTENCE (JS) (Felony)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (6/2004))

Page 1 of 9

- A special verdict/finding for Violation of the Uniform Controlled Substances Act was returned on Count(s) _____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine when a juvenile was present in or upon the premises of manufacture was returned on Count(s) _____, RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- The defendant was convicted of vehicular homicide which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.
- This case involves kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.
- The crime charged in Count(s) _____ involve(s) domestic violence.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1 RESIDENTIAL BURGLARY ^{1/2 pt}	02-27-92	YAKIMA, WA	01-13-92	J	NV
2 ASSAULT SECOND DEGREE ^{2 pt}	02-10-93	YAKIMA, WA	04-19-93	J	V
3					
4					
5					

- Additional prior convictions which have washed and are no longer counted in offender score: 2 counts VUCSA (marijuana) 03-1994 Yakima WA.
- The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.
- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

DECLARATION

State of Washington

)

)

)

ss:

MICHAEL J. GONZALES

County of Spokane

I, *MICHAEL J. GONZALES*, declare under the penalty of perjury, under the laws of the State of Washington, that the following statement is true and correct.

That the Personal Restraint Petition and all supporting documents included, are true and to the best of my knowledge.

Executed on this *7th* day of *January*, 20 *06*, at Airway Heights Corrections Center.

Michael Gonzales
Signature

MICHAEL J. GONZALES
Typed Name

AFFIDAVIT TO PROCEED IN FORMA PAUPERIS

I, MICHAEL J. GONZALES, am the Petitioner in the above entitled action and believe I am entitled to redress. I request the court grant me the status of *In Forma Pauperis* because of the following responses:

1. Are you presently employed? Yes (X) No ()
a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer \$ 47.00 Forty-Seven Dollars per month. WA State Dept. of Corrections
b. If the answer was no, state the date of last employment and the amount of the salary and wages per month which you received N/A

2. Have you received within the last twelve months any money from the following sources?
a. Business, profession or form of self-employment? Yes () No (X)
b. Rent payments, interest or dividends? Yes () No (X)
c. Pensions, annuities or life insurance payments? Yes () No (X)
d. Gifts or inheritances? Yes (X) No ()
e. Any other sources of income? Yes () No (X)

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the last 12 months GIFTS 50.00 for the last 12 months

3. Do you own any cash, or do you have any funds in a checking, savings or inmate account? Yes () No (X)
If the answer is yes, state the total value in each account N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? Yes () No (X)
If the answer is yes, describe the property and state its approximate value N/A

5. List the persons who are dependent upon you for support, state your relationship to those persons and indicate how much you contribute toward their support N/A

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury. I declare under penalty of perjury that the foregoing is true and correct.

Dated this 7TH day of JAN, 2006.

Michael Gonzales
Signature
MICHAEL J. GONZALES
Typed Name

724909, AHCC
P.O. Box 1809, UNIT LB60
Address
Airway Heights, WA 99001-1809

In The Court Of Appeals Of The State Of
Washington, Division II

State of Washington
Plaintiff,
VS.

MICHAEL J. GONZALES
Defendant/Petitioner.

No. 02-1-00415-6
Motion For Court To
Proceed On Court's
Transcripts, And Waiver
Of Defendant To Provide
Copies Of Transcripts
Referenced To.

Petitioner requests Court to hear and rule on
Personal Restraint Petition without petitioner providing
copies of transcripts referenced to, being included,
due to unavailability of said and referenced to
Transcripts.

Respectfully submitted,
1-8-2006

Michael J. Gonzales

WASHINGTON STATE COURT
OF APPEALS DIVISION II
(Copy Receipt)

 [REDACTED] [REDACTED]
STATE OF WASHINGTON PLAINTIFF, VS. MICHAEL J. GONZALES DEFENDANT, PETITIONER.

(Clerk's Date Stamp)
NO. 02-1-00415-6
SUPERIOR COURT No.

CASE NO. _____
MOTION AND ORDER TO PROCEED IN
FORMA PAUPERIS
(ORPRFP)

MOTION

The petitioner moves the court for an order permitting the petitioner to proceed without paying the filing fee.

Type of action I wish to file:

- Civil Anti-Harassment
- Petition for Modification
- Initial Petition for Dissolution/Separation
- Other (specify): PRP

CERTIFICATE

The undersigned states:

I am the petitioner in this action. I believe that I have valid reasons for bringing this action and that I am entitled to relief. I am unable to pay the filing fee in this proceeding.

My financial statement is attached.

I certify under the penalty of perjury, under the laws of the State of Washington, that I have read the foregoing statements in the Certificate, and the attached financial statement, know the contents thereof, and believe them to be true and correct.

DATED at Spokane, Washington on this 7TH day of JAN. 2006.

Michael Gonzales
Petitioner's Signature

ORDER

It is hereby ordered that:

- The petitioner is permitted to proceed without payment of the filing fee.
- The filing fee shall be paid at the time of the final decree being entered.
- Payment of the filing fee may be reviewed at a subsequent hearing.
- The petitioner shall pay the \$10 surcharge fee.
- Forms shall be provided to petitioner at no cost.
- This is a joint petition; respondent shall pay the filing fee prior to entry of the final orders.
- The Clerk's office shall provide one complete set of copies of the pleadings to the petitioner without cost.
- The motion is denied.

Dated: This _____ day of _____, 20_____.

JUDGE / COURT COMMISSIONER

FINANCIAL STATEMENT

GENERAL INFORMATION

(a) Name: MICHAEL J. GONZALES
(b) Address: 724909 AHCC P.O. Box 1809, Unit LB60
Airway Heights, WA 99001-1809
(c) Telephone No.: N/A

(d) Social Security No.:	<u>534-76-2282</u>	(e) Date of Birth:	<u>12-25-1975</u>
--------------------------	--------------------	--------------------	-------------------

(f) Marital Status: Divorced Separated Married Single

(g) Persons whom you financially support: Spouse Children Other: N/A

List children's names, ages, and if different, address: N/A

(h) Are you presently employed? Yes No Occupation: PORTER

Length of employment: 2 mo. Name and address of employer or, if currently unemployed, prior employer:

WA Dept. of Corrections, P.O. Box 1899, Airway Heights, WA 99001-1899

(i) Is spouse employed? Yes No Occupation:

Name and address of employer: NOT KNOWN TO ME.

INCOME AND ASSETS

(a) Gross monthly income: 47.00
(you)
(b) Gross monthly income: UNKNOWN
(spouse)
(c) Other income: 0
(d) Cash:
Savings account: 0
Checking account: 0
On hand: 0
(e) Home - cash value
less amount owing: 0
(f) Auto - cash value
less amount owing:
(list make & year): 0
(g) Furniture
(approximate value): 0
(h) Notes, mortgages,
trusts, deeds: 0
(i) Stocks, bonds
(approximate value): 0
(j) Other assets and
property: 0
(k) Any indebtedness
owed to you: 0

(a) Monthly living expenses (itemize):

Rent or mortgage: 0
Food: 0
Utilities: 0
Transportation: 0
Installment payments: 0
Medical and dental: 0
Insurance: 0
Other: BASIC HYGIENE

+ POSTAGE
47.00 per. Month.

TOTAL: 47.00

(b) Debts:

Name / Creditor Amount Owed

MASON COUNTY CT 20,000

YAKIMA County CT 10,000

TOTAL 30,000.

EXPENSES AND DEBTS

" PREFACE "

Petitioner respectfully submits this petition pro se, and in forma pauperis, and requests this Court to rule on this petition at the Court's earliest convenience, and in Petitioner's absence.

Petitioner requests that the Court interpret pleadings liberally and with great latitude, and to raise the strongest arguments they suggest.

"Prisoners pro se civil rights complaint, however inartfully pleaded, is held to less stringent standards than formal papers drafted by lawyers...; such a complaint should not be dismissed for failure to state a claim..."; Miller v. Rowland, 999 F.2d 389, 391 (9th Cir, 1993), citing Hughes v. Rowe, 449 U.S.

5, 9, 1980; "Pro se habeas petitioners are to be afforded 'the benefit of any doubt' ".
Brown v. Roe, 279 F.3d 742, 746, (9TH Cir. 2002);
Morrison v. Hall, 261 F.3d 896, 899 (9TH Cir. 2001),
citing Haines v. Kerner, 404 U.S. 519, 520-21, 1972.

"FIRST GROUND"

Ineffective Assistance Of Counsel

1.1 Defendant was convicted on May 27, 2003; sentenced on June 13, 2003; resentenced on January 14, 2005.

1.2 Counsel, Ms. Linda Callahan was appointed 11-29-04 for resentencing.

1.3 After a postponement, counsel Callahan never contacted defendant/petitioner again, and when the resentencing actually took place, petitioner's original trial attorney showed up for my representation, without my approval, and despite the fact that petitioner had previously fired him (Mr. A. Pimentel) and filed a Ineffective Assistance Of Counsel (hereafter IAC)

claim regarding him and his representation, to the Court, after my original sentencing on 6-13-03.

1.4 Defendant specifically requested counsel, Mr. Pimentel to file a 'Direct Appeal' challenging the conviction, judgment and sentence, after my resentencing, and he did not file a notice of appeal or a direct appeal as I requested, and which I believe to be my State and Federal Constitutional right.

1.5 Petitioner believes there was an absolute conflict of interest, and IAC, by Mr. Pimentel representing me at the resentencing, without my approval, compounded with the fact he did not file a 'notice of appeal' and a 'direct appeal' as I requested and he agreed to do.

1.6 Under the Washington State Constitution, a person convicted of a crime has the right to appeal. Const. art., 1, Sec. 22; *State v. Kells*, 949 P.2d 818, 1998; *State v. Tomal*, 948 P.2d 833, 1997, *State v. Sweet*, 581 P.2d 579, 1978. The right to appeal "is to be accorded the highest respect". Sweet, *id.* at 286. Accompanying that right is the Federal and State right to due process and effective assistance of counsel on appeal. United States Constitution amends., 6, 14; Const. art., 1, Secs. 1, 3, 22; *Evitts v. Lucey* 469 U.S. 387, 396, 1985; *State v. Rolax* 702 P.2d 1185, 1985. Moreover, "... counsel has a constitutionally imposed duty to consult with

the defendant about an appeal where there is reason to think either 1) that the rational defendant would want to appeal (for example because there are non-frivolous grounds for appeal), or 2) that this particular defendant reasonably demonstrated that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 2000.

1.7 After requesting that Mr. Pimentel file a direct appeal on my behalf, after the resentencing hearing, Mr. Pimentel said clearly that he "would handle it".

1.8 Only recently has plaintiff learned that counsel did not file a notice of appeal or a direct appeal as agreed.

1.9 Under the two-pronged IAC analysis of *Strickland v. Washington*, 466 U.S. 668, 1984, a litigant must show that his counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced him. *State v. McFarland*, 899 P.2d 1251, 1995; *State v. Thomas*, 109 W.2d 222, 225-26, 1987.

In certain cases, however, prejudice is presumed.

State v. Wicker, 105 W.N.App. 428, 431, 2001.

The decision in Wicker is instructive. A person has a statutory right to seek revision of a commissioner's ruling in the supreme court.

Although Wicker expressed her desire that a motion for revision be filed, her attorney did not timely file the motion. Counsel eventually filed

the motion but it was untimely. The Superior Court dismissed the motion on the grounds that it was untimely filed. On appeal, the Wicker Court held that counsel's failure to timely file a motion for revision constituted IAC and was presumptively prejudicial. State v. Wicker, at 434. The Court remanded the case back to the Superior Court for a revision hearing.

1.10 The Wicker Court based its decision in part on the rationale in Flores-Ortega. In Flores-Ortega the Supreme Court held that counsel has a duty to consult with a client, and if a client wants to file an appeal, counsel has an obligation to do so. The Flores-Ortega Court reasoned that counsel's failure to file a requested appeal is

appeal challenging his conviction, judgment and sentence, in part due to petitioner's indigency, and need to proceed in forma pauperis.

1.13 Waive and or grant extension of time for petitioner and counsel to prepare and file a notice of appeal, and a direct appeal, pursuant to RAP 18.8 (a) & (b).

1.14 Additionally, Washington Courts have consistently ruled that waiver of a constitutional right will not be presumed. The State instead must establish that waiver of such rights is knowingly, intelligent, and voluntary. *State v. Smith*, 134 Wn. 2d 849, 852, 1998; *State v. Kells*, 134 Wn. 2d, at 315; *State v. Tomal* 133 W. 2d., at 989. In *Kells*, the Washington

Supreme Court held that an appeal may not be dismissed as untimely unless the state meets its burden. Kells, at 315. "[A]n involuntary forfeiture of the right to a criminal appeal is never valid." Id., at 314

1.15 The record does not support a finding that defendant knowingly, intelligently and voluntarily waived his constitutional right to an appeal. Petitioner again emphasizes that he never was notified of his appeal rights, at the resentencing, by Judge Sawyer or attorney Mr. Pimentel, but regardless, requested counsel Mr. Pimentel, who surprisingly showed up at the resentencing, to file a direct appeal challenging the conviction, judgment and sentence.

1.16 Petitioner is not an attorney. An attorney reviewing his case may identify any number of meritorious appellate issues. Petitioner has attempted to promptly notify the Court of the situation at the earliest date, and believes it would be a "gross miscarriage of justice" to deny Petitioner his constitutional right to appeal because counsel was ineffective for failing to file the notice of appeal and direct appeal.

1.17 Counsel failed to ensure that a 'complete' new resentencing hearing occurred, rather a repeat of the original sentencing hearing, by allowing only a single criminal history score calculation to be addressed.

1.18 Petitioner believes he has demonstrated the IAC in his case, resulting in deficient performance and prejudice held in *Strickland v. Washington* 466 U.S. at 687; *State v. Rawson*, 94 Wn.App. 293, 1984. To show prejudice, the movant need not prove that the outcome 'would' have been different. He must show only a "reasonable probability" — by less than a more likely than not standard — that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, id. at 694; *State v. Hendrickson*, 129 Wn. 2d 61. This standard is satisfied and counsel is ineffective, if he fails to notice, correct, or raise objections to critical errors of law made at the sentencing hearing. Citing —
1^{ST.} GR. Pg. 19

State v. Tinkham, 74 Wn. App. 102, 109; *In re Morris*, 34 Wn. App. 23, 1983; *U.S. v. Breckonridge*, 93 F.3d 132, 1996; *U.S. v. Headley*, 923 F.2d 1079, 1991; *U.S. v. Cocivera*, 104 F.3d 566, 571, 1996.

1.19 Counsel failed to object to the summary and pro forma nature of the resentencing hearing, and, Mr. Pimentel spoke on my behalf despite the fact he had been fired from my case.

1.20 There was an absolute conflict of interest because petitioner is entitled to a lawyer with undivided loyalty to his client. The conflict of interest burden is met by the facts, and petitioner is entitled to relief. *In re Pers. Res. of Benn*, 134 Wn.2d ~~686~~, 868, 890, 1998; *Strickland v. Washington* at 692.

1. 21 Defendant / Petitioner was not allowed to accept an 'Alford' plea which counsel agreed to coordinate, and specifically said he would be able to plea to.

"Second Ground"

2.1 Petitioner believes he should be granted relief to withdraw his plea, because the resentencing Judge failed to advise defendant/petitioner of his right to appeal whatever happened at resentencing. Please see Transcripts of resentencing hearing Pgs. 15-17.

2.2 The Judge failed to advise petitioner of the consequence of the plea, that is, the fact that I would be subject to a "no contact" order against the Abundiz family. The fact of a "no contact" order must be considered a direct consequence of the guilty plea, of which must be advised before one pleads guilty, or the plea can be withdrawn.

2.3 The general rule is that a Judge cannot accept a guilty plea without first determining that the defendant understands the nature of the charges. CrR 4.2 (d); *In re Pers. Restraint of Ness*, 70 Wn. App. 817, 821, 1993. Due Process clause protections also require that the defendant understands the direct consequences of the plea of guilty; "direct" consequences are those having a "definite, immediate and largely automatic effect on the range of the defendant's punishment." *Ness*, 70 Wn. App. at 822.

2.4 One of the direct consequences of a guilty plea is a "no-contact" order. See *State v. Wilson*, 117 Wn. App. 1, 11, review denied 150 Wn.2d 1016, 2003; see also *State v. O.P.*,

103 Wn. App. 889, 892, 2000.

2.5 Please see Transcripts - Judgment & Sentence Pg. 5, par. 4.3. The Judge never advised ~~the~~ petitioner of the direct consequence, nor is it in the 'Statement Of Defendant On Plea Of Guilty', nor in the transcripts of the hearing.

2.6 Because Petitioner was not advised of the "direct consequence" prior to pleading guilty, Petitioner could not make a knowingly, intelligent, and voluntary plea under those circumstances

2.7 Therefore, Petitioner believes he should be granted relief to withdraw his plea, under State and Federal Due Process protections.

"THIRD GROUND"

Petitioner should be granted relief because the Superior Court deprived defendant of the full remedy of a 'complete reversal and remand for a "full" resentencing hearing', ordered by the appellate Court, by only addressing the criminal history score calculation that formed the basis of the Appellate Court's reversal.

3.1 The Judge's failure to hold a entire new sentencing hearing is grounds for relief. The Prosecutor submitted, and the Judge considered, the transcript from the original sentencing hearing, yet the Judge changed only the single criminal history score calculation, that formed the basis of the Appellate Court's reversal.

3.2 Attorney Mr. Pimentel spoke at the resentencing hearing, rather than my newly appointed counsel, Ms. Callahan. This compounded the prejudicial effect, one, because the Judge allowed counsel to proceed on my behalf, despite petitioner previously firing him, and Mr. Pimentel moved to withdraw due to my IAC complaints about his performance, therefore amounting to a extraordinary conflict of interest.

3.3 The sentencing Court's failure to carry out the mandate of the Appellate Court to hold a resentencing hearing, by relying on the transcript of the last hearing, 'instead'.

3.4 At the very least, petitioner belief believes he should be granted relief of a complete resentencing hearing.

"FOURTH GROUND"

The Superior Court incorrectly used two (2) prior juvenile court convictions to calculate an offender score of two (2).

4.1 The juvenile convictions were incorrectly used for one reason, that there was not a 'right' to a jury trial in the juvenile cases.

The Ninth Circuit Court has ruled that prior juvenile adjudications cannot be counted against the offender in a criminal history score, because those juvenile adjudications lack the protection of a jury trial right that adult convictions have. The Washington Courts have been asked to adopt that Ninth Circuit ruling, and to also bar use of prior juvenile adjudications in criminal history scoring for

In *United States v. Tighe*, 266 F.3d 1187, 9th Cir. 2001, the Ninth Circuit explained that a prior juvenile adjudication could not be counted as part of the defendant's criminal history, because it was from a situation in which the defendant was not guaranteed a jury trial — and thus the defendant had never had the benefit of Apprendi-like protections to ensure its reliability, even when it first occurred.

4.4 Therefore, petitioner believes that his protected State and Federal Due Process protections to jury trials are sufficient grounds that neither juvenile convictions, and or points, should be used for his offender score, for which he deserves relief.

4TH GR. Pg. 29

4.5 In addition, 'neither' of the judgment and sentence documents which were used to help calculate the offender score were or are correct. Both judgment & sentence documents are incorrect and misrepresent the defendant's criminal history.

4.6 Please see 'first' J+S dated 6-13-03 Pg. 2 of 11, Sec. 2.2. The date of the crime and the sentence are the same - 4-19-03, which could not be possible, and which jeopardized the integrity of the process.

4.7 Please see 'second' J+S dated 1-14-05 (for resentencing) pg. 2 of 9, Sec. 2.2. The date of the crime and the sentence are again the same - 4-19-03, which could not be possible and again jeopardized the process.

regarding petitioner's right to a 'Direct Appeal' but rather only 'collateral attack' etc.

"CONCLUSION"

For all the aforementioned reasons, facts of the record, arguments, and in the interest of justice, Petitioner respectfully requests that this Court grant;

- 1.) Grant the Motion For Court To Proceed On Court's Transcripts, and Waiver of Defendant To Provide Copies of Transcripts.
- 2.) Reinstate Defendant's Direct Appeal Rights.
- 3.) Grant Appointment Of Counsel.
- 4.) Grant Petitioner's right to withdraw his plea.
- 5.) Order a new and complete resentencing hearing.
- 6.) Order that juvenile points not be included in offender score.

7.) Order that a corrected and accurate Judgment and Sentence be provided to the Courts and Defendant.

8.) Grant any other form of relief which this Court finds just.

I certify under penalty of perjury of the laws of the State of Washington, that the foregoing is true and correct.

Respectfully submitted,

Michael Gonzales

1-8-2006

" FIFTH GROUND "

5.1 Petitioner believes he should be granted relief because of new information obtained by petitioner, and freely offered and sworn to by the State's primary witness, Mr. Austin Jeffery, who admits that his trial testimony was perjured.

5.2 Mr. Jeffery's declaration/affidavit was recently received by petitioner (copy enclosed) and states that his "testimony in State of Washington v. Michael F. Gonzales was perjured".

5.3 Mr. Jeffery's perjured testimony enormously influenced the trial, and his recent declaration of perjury overwhelmingly provides information which would substantially benefit petitioner, would extremely minimize involvement in the

crime charged, and may overall exonerate petitioner of the crime charged, and would have very likely changed the outcome of the trial.

5.4 "Impeachment evidence is material" if there is a reasonable probability that, had the evidence been disclosed to the defense [and jury] the result of the proceeding would have been different."

Kyles v. Whitley, 514 U.S. 419, 433, 1995,
(quoting U.S. v. Bagley, 473 U.S. 667, 682, 1985)

5.5 The sworn affidavit of Mr. Jeffery is evidence that he is guilty of perjury under 18 U.S.C. Sec. 1621, A person is guilty of committing perjury if they voluntarily and intentionally give testimony they knew to be false, under oath about material matters.

5.6 Petitioner cites specific references to the trial transcripts, noting 'some' of the most obvious perjured statements already in the record, and which overwhelmingly support Mr. Jeffery's now declaration noting 'more' and 'extensive' perjury which occurred at trial, and which would have changed the outcome of the trial if the Judge and jury would have known the truth instead. In addition, Mr. Jeffery perjured himself in two (2) pre-trial taped statements / depositions.

5.7 Petitioner hereby submits references to trial transcripts, RP pages, pointing out some perjured statements and references to which occurred at trial.

- Direct 'Examination' of witness Dustin Jeffery begins at RP Pg. 481, and some specifics of his perjured testimony start at RP Pg. 538.
- RP 538 "... not true count of events ..."
 - RP 544 "1ST story to Det. Bergt ..."
 - RP 552 "... (none of it true) ..."
 - RP 558 "admits to wrapping Oscar in blanket and luring him to Shelton, Det. Steines hounds him for [not] telling truth;"
 - RP 562 "Dustin breaks down and tells 2ND statement (not taped);"
 - RP 564-5 "went with grandma, she [encourage] him to tell truth;"
 - RP 567 "1ST story [no] mention of Gonzales;"
 - RP 570 "[didn't] mention Gonzales [at all] in that statement;"
- 5TH GR. Pg. 38

- RP 571 "planning involved Oros, Packy and Austin, [not Gonzales]; this statement was "mostly accurate";
- RP 573 "transferred to Shelton, gave another taped statement to Det. Adams - 33 pages long - Ex. 104 - 6-18-02;"
- RP 574 "says Oros planned jacking;"
- RP 576-7 "description of final plan and that Uncle Jim was Moreno, [not Gonzales];"
- RP 579-80 "... today's testimony [not] true...";
- RP 585-88 "... he put 2 and 2 together that it was the same gun, [none] of that is in statement, didn't need Gonzales involved;"
- RP 594-96 "discussion re why Austin is now testifying about Gonzales' involvement,

whether it had anything to do with his plea or something else..."

-RP 609-610 "told Det. Adams Dros the only other one with pistol, [again never mentioned Gonzales, didn't mention Gonzales in any statement until 5/12 deposition];" (which was eleven (11) months after incident).

-RP 629-30 Ex. 104 taped statement with Adams, says he met Wies a couple of times in Yakima, [another lie, never met Wies before event];"

-RP 635 "heard shots right before he went out window, p. 20 of statement says he hooked up with Calprobe and they waited outside 1-2 hours, [also a lie to keep from tie in to disposal of body];" 5TH GR. Pg. 40

- RP 624 "admits he is a snitch, initially didn't want to implicate anyone;"
- RP 644 "first mentioned involvement of Gonzales at his 5/12 deposition, owed him \$300.-..."
- RP 653 "Gonzales had [no] knowledge of robbery;"

"SUPPLEMENTAL CONCLUSION"

Petitioner argues that his State and Federal Due Process rights have been violated, in regards to all issues raised, in all grounds for relief within his PRP, including but not limited to his 1ST, 5TH and 14TH United States Constitutional Amendment rights.

"The probative value of the relevant evidence and the unfair prejudice if not allowed for full discovery and a complete defense is enormous, and too great a risk to petitioner's liberty.

Washington v. Texas, 388 U.S. 14, 17-19, 1967.

Washington formally incorporated the compulsory due process clause into the due process clause of the 14th Amendment. "The right to present the defendant's version of the facts, as well as the prosecutions to the jury, so it may decide where the truth lies".

Ultimately, the entire trial has been jeopardized by the perjury of the State's witness, thus warranting relief. The perjury has collectively rendered the outcome of the trial invalid.

Supp. Conclusion. Pg. 42

Petitioner believes that in this case, there is overwhelming reasonable probability that more likely than not, the extremely high exculpatory potential of the relevant information is clearly material, and would have changed the trial outcome with reasonable doubt.

The new and cumulative evidence should be charged to a jury to be viewed objectively in light of the entire record. But whether in its absence a fair trial was achieved, understood as a trial resulting in a verdict worthy of confidence is the real question, thereby meeting the reasonable probability standard. *Matter of Jeffries*, 114 Wn. 2d 485, 493, 1990, citing

Supp. Conclusion. Pg. 43

State v. Williams, 96 Wn.2d 215, 223; Personal Restraint of Entry, 137 Wn.2d 378, 396-97 1999; citing *Kyles v. Whitley*, 514 U.S. at 434, (citing cases); *In re Winship* 397 U.S. 358, 364, 1970.

Finally, petitioner prays that his judgment and sentence be reversed for the aforementioned reasons, and the Court should grant all the relief requested, and or grant all relief that this Court finds just.

I certify under penalty of perjury of the laws of the State of Washington, that the foregoing is all true and correct.

Respectfully submitted, Michael Gonzales 2-6-06

Supp. Conclusion. Pg. 44

Superior Court of the State of Washington
for the County of Mason



JAMES B. SAWYER II, Judge
Department No. 1
TONI A. SHELDON, Judge
Department No. 2

Geri M. Burt, Court Administrator

P.O. Box "X"
Shelton, Washington 98584
(360) 427-9670 Ext. 348

Commissioners:
Richard C. Adamson
Amber L. Finlay
Patricia L. Morgan

Family Law Commissioner:
Anne L. Hirsch

January 20, 2006

Michael J. Gonzales #724909
Unit L-B, Cell 60-L
Airway Heights Correction Center
PO Box 1809
Airway Heights WA 99001-1809

Re: State of Washington vs. Michael J. Gonzales
Mason County Cause No. 02-1-00415-6

Dear Mr. Gonzales:

Your recent correspondence was referred to this office on
January 9, 2006.

Judge Sawyer has made a cursory review of your proposed
pleadings and the court file, and has indicated that this
matter should be referred to the Court of Appeals.

I am enclosing your original documents with this letter.
If you have any questions, please contact an attorney or
your law library.

Sincerely,

MASON COUNTY SUPERIOR COURT

Carolyn Putvin
Carolyn Putvin,
Judicial Assistant

CP
Enclosures
cc: Superior Court File

FILED
COURT OF APPEALS
DIVISION II

06 FEB 10 PM 2:37

STATE OF WASHINGTON

BY _____
DEPUTY

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

In re Personal Restraint Petition of)
)
MICHAEL J. GONZALES)
Petitioner.)

No:

CERTIFICATE OF SERVICE

I, MICHAEL J. GONZALES, Petitioner in the above entitled cause, under the penalty of perjury, do hereby certify that on the date noted below, I sent copies of: *Motion to reinstate def's direct appeal rights, and right to file a notice of appeal; Certificate of offenders trust account; PLRA Informa pauperis status report; Declaration/Affidavit of Dustin Jeffery; Mason Co. Superior CT. ltr to petitioner; Affidavit of petitioner; Fifth Ground for relief; copies of Account Struts for (b) months.*
TO: Court of Appeals, Div. II, 950 Broadway, Suite 300 Tacoma, WA 98402

By processing as Legal Mail, with first-class postage affixed thereto, at the Airway Heights Correction Center, P.O. Box 1809, Airway Heights, WA 99001-1809

Dated this 6TH day of February, 2006.

Respectfully Submitted,

Michael Gonzales
Petitioner

STATE OF WASHINGTON)
) ss:
COUNTY OF WALLA WALLA)

I, Dustin Jeffery, declare under penalty of perjury that the following statements within this affidavit are true and correct to the best of my knowledge and has been executed on this 6th day of March, 2004, at Washington State Penitentiary in the County of Walla Walla, Washington:

My testimony in STATE OF WASHINGTON v. MICHAEL JESSE GONZALES, No. 02-1-00415-6, was perjured. I falsified and misrepresented pertinent facts in statements and while testifying. This was done in an effort to exculpate myself and lessen the criminal liability I was facing. A truthful account of the events that took place would exonerate Mr. Gonzales; and I am now willing to provide that truthful testimony.

I know what I did was not only illegal, but was morally reprehensible; Yet throughout all of this case I was under unbearable pressures and just gave in to save myself. I now know that only my Lord and Savior Jesus Christ can truly save me.

This is one wrong I can make right and I pray for that opportunity to do so.


Dustin Jeffery

Affidavit pursuant to 28 U.S.C.1764, Dickerson v. Wainwright, 628 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.

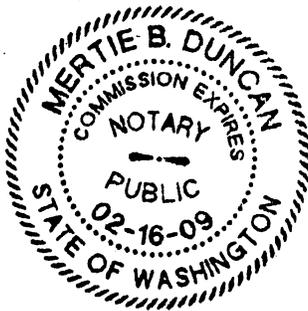
AFFIDAVIT

State of Washington)
)
County of Spokane)

ss: MICHAEL J. GONZALES

I, MICHAEL J. GONZALES, declare under the penalty of perjury, that the following statements within this affidavit are true and correct to the best of my knowledge and have been sworn to below on this 4TH day of January, 2006.

The motion to reinstate defendant's direct appeal and all supporting documents, are true and correct and to the best of my knowledge.



Michael Gonzales

(Signature) Affiant

MICHAEL J. GONZALES

(Typed Name) Affiant

Subscribed and sworn to me on this 4th day of Jan, 2006

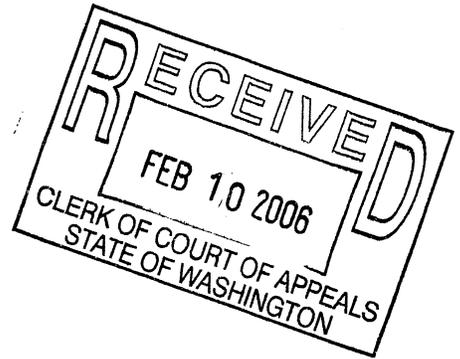
Mertie B. Duncan

Notary for the State of
Washington Commission
expires: 2-16-09

MR. MICHAEL J. GONZALEZ
724909, AHCC
P.O. Box 1809, UNIT LB60
AIRWAY HEIGHTS, WA 99001-1809

2-6-2006

Clerk Of The Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402



RE: Supplemental documentation and
Motion for petitioner's PRP.

Clerk of the Court:

Please file the enclosed supplemental motion and documents, and schedule all to be heard at the same time as my PRP.

On January 20, 2006, the Clerk from Mason County Superior Court wrote to me indicating that Judge Sawyer advised that the enclosed 'motion to reinstate defendant's direct appeal rights, and right to file a notice of appeal' should be referred to the Court of Appeals, (copy enclosed).

Cover ltr. to Clerk.

Pg. 1/3

Due to the advisement of Judge Sawyer, the motion has been revised to address the Appellate Court, Division II.

Please note, despite the printed average six (6) month balance of \$ 40.81 on the Certificate of inmates account, which I have no idea how they mistakingly obtained, my actual current six (6) month AVERAGE balance is \$ 12.31, and my actual present spendable balance is \$.50 ¢

Petitioner asks that the Court take notice that the Motion to reinstate defendant's direct appeal rights, and right to file a notice of appeal, were mailed / filed on 1-9-06, prison legal mail log # 8096.

Enclosed are the following documents:

- 1) Motion to reinstate defendant's direct appeal rights, and right to file a notice of appeal.
- 2) Certificate of offenders trust account.
- 3) PLRA In forma pauperis status report.

Cover ltr. to Clerk. Pg. 2/3

- 4) Declaration / Affidavit of Dustin Jeffery.
- 5) Letter from Mason County Superior Court.
- 6) Affidavit of petitioner Michael J. Gonzales.
- 7) Fifth Ground For Relief - for PRP.
* Numbered in chronological sequence to 'follow' the Fourth Ground For Relief. Fifth Ground numbered 35-44.
- 8) Copies of Account Statements from six (6) prior months.

Thank you in advance for your assistance.

Sincerely

Michael Gonzales

2-6-06

FILED
COURT OF APPEALS
DIVISION II

06 FEB 10 PM 2:37

STATE OF WASHINGTON

BY _____
DEPUTY

In The Court of Appeals of The State of
Washington, Division II

State of Washington
Plaintiff,
vs.

Michael J. Gonzales
Petitioner.

Appellate Court No.
Motion For Leave To Supplement
PRP With Newly Obtained
Documentation, and, Additional
Ground For Relief.

Petitioner hereby requests leave to
Supplement PRP with newly obtained
documentation, and, additional ground for
relief, 'Fifth Ground For Relief'.

Due in part to the recent advisement
of Judge Sawyer from Mason County Superior

Motion for leave. Pg. 1/2

Court, petitioner submits the following newly obtained documentation and motion, which petitioner believes is critical to his case, and necessary for the Court to consider before adjudication:

- 1) Motion to reinstate defendant's direct appeal rights, and, right to file a notice of appeal;
- 2) Certificate of offenders trust account;
- 3) PLRA In forma pauperis status report;
- 4) Declaration/Affidavit of Dustin Jeffery;
- 5) Letter from Mason County Superior Court;
- 6) Affidavit of petitioner Michael F. Gonzales;
- 7) 'Fifth Ground' For Relief;
- 8) Copies of Account Statements from six (6) prior months.

Petitioner has submitted the noted documents and motion at the earliest opportunity, and only after recently receiving the relevant information.

Michael Gonzales 2-6-06
Motion for leave Pg. 2/2

II Statement Of Relief Sought

Defendant requests this sentencing Court to:

2.1 Reinstate defendant's direct appeal rights, and right to file a notice of appeal.

2.2 Grant appointment of counsel to represent defendant, prepare and file a direct appeal challenging this conviction and sentence, in part due to defendant's indigency, and need to proceed in forma pauperis.

2.3 Waive and or grant extension of time for defendant and counsel to prepare and file a notice of appeal, and a direct appeal, pursuant to RAP 18.8 (a) + (b).

2.4 Defendant requests this Court to rule on this motion, in his absence, and to allow a teleconference if possible. The main phone number for AHCC, Counselor, Mrs. Hopkins is 509.244.6800.

2.5 Defendant requests this Court to provide all information which I may need to prepare and file a direct appeal, and a notice of appeal.

III Facts Relevant To Motion

3.1 Defendant was convicted on May 27, 2003; sentenced on June 13, 2003; resentenced on January 14, 2005.

3.2 Counsel, Ms. Linda Callahan was appointed 11-29-2004 for resentencing

3.3 After a postponement, counsel Callahan never contacted me again, and when the resentencing took place, my original trial attorney, Mr. Adrian Pimentel showed up to represent me, without my approval, and despite the fact that I had previously fired him and filed a Ineffective Assistance of Counsel claim regarding him and his representation, to the Court, after my original sentencing on 6-13-2003.

3.4 Defendant specifically requested counsel, Mr. A. Pimentel to file a direct appeal challenging my conviction, after my re-sentencing, and he did not file a notice of appeal, or a direct appeal as I requested, and which I believe is my State and Federal Constitutional right.

IV Grounds For Relief And Argument

4.1 At the resentencing hearing on 1-14-05 Judge Sawyer did not advise defendant of his right to appeal whatever happened at resentencing. Please see - Transcripts of hearing Pgs. 15-17.

4.2 Defendant believes that there was an absolute conflict of interest, and ineffective assistance of counsel by counsel, Mr. A. Pimentel representing defendant at the resentencing, compounded with the fact he did not file a Notice of Appeal and a Direct Appeal as I requested of Mr. Pimentel directly after the resentencing.

4.3 Defendant asks this Court to take into account the many many times that Mr.

Pimentel was absent from my hearings, late and overall ineffective throughout all the pre-trial proceedings, and some of which are noted in the Court records. Please see Omnibus Hearing transcripts from 1-16-03 where he did 'not' show up at all. Then the rescheduled hearing for 1-22-03 he was a 'no show' again, plus numerous other instances of ineffective assistance of counsel, hereafter referred to as 'IAC'.

4.4 Under the Washington Constitution, a person convicted of a crime has the right to appeal. Const. art. 1, Sec 22; State v. Kells 949 P.2d 818 1998; State v. Tomal 948 P.2d 833 1997; State v. Sweet 581 P.2d 579 1978.

The right to appeal "is to be accorded the highest respect". Sweet id. at 286.

Accompanying that right is the federal and State right to due process and effective

assistance of counsel on appeal. United States Constitution amends., 6, 14; Const. art., 1,

Secs., 1, 3, 22; *Evitts v. Lucey* 469 U.S.

387, 396 1985; *State v. Rolax* 702 P.2d

1185 1985. Moreover, "... counsel has a

constitutionally imposed duty to consult with the defendant about an appeal where there is

reason to think either 1) that a rational

defendant would want to appeal (for example because there are non frivolous grounds for

appeal), or 2) that this particular defendant

reasonably demonstrated that he was interested in appealing." *Roe v. Flores-Ortega* 528 U.S. 470, 480, 2000.

4.5 After requesting that Mr. Pimentel file a direct appeal on my behalf, after the resentencing hearing, Mr. Pimentel said clearly that he "would handle it". Only recently has defendant learned that counsel did not file a notice of appeal or a direct appeal as agreed.

4.6 Under the two-pronged IAC analysis of *Strickland v. Washington* 466 U.S. 668, 1984, a litigant must show that his counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient

performance prejudiced him. *State v. McFarland*, 899 P.2d 1251, 1995; *State v. Thomas* 109 W.2d 222, 225-26, 1987. In certain cases, however, prejudice is presumed. *State v. Wicker* 105 Wn. App. 428, 431, 2001.

The decision in Wicker is instructive. A person has a statutory right to seek revision of a commissioner's ruling in the Supreme Court.

Although Wicker expressed her desire ~~to~~ that a motion for revision be filed, her attorney did not timely file the motion. Counsel eventually filed the motion but it was untimely. The Superior Court dismissed the motion on the grounds that it was untimely filed. On appeal, the Wicker Court held that counsel's failure to timely

file a motion for revision constituted IAC and was presumptively prejudicial. State v. Wicker at 434. The Court remanded the case back to the Superior Court for a revision hearing.

4.7 The Wicker Court based its decision in part on the rationale in Flores-Ortega.

In Flores-Ortega the Supreme Court held that counsel has a duty to consult with a client, and if a client wants to file an appeal, counsel has an obligation to do so. The Flores-Ortega Court reasoned that counsel's failure to file a requested appeal is professionally unreasonable and presumed prejudicial because it denies a person not only the right to counsel at a critical stage

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of the proceeding, but also the right to an entire judicial proceeding. *Roe V. Flores-Ortega*, 528 U.S. at 471, 477. If counsel failed to file the requested notice of appeal, counsel was ineffective. *Roe V. Flores-Ortega* 528 U.S. at 477. And counsel's failure to file a notice of appeal is presumed prejudicial. *State V. Wicker* at 433. Therefore, this Court should grant Mr. Gonzales requested relief as requested.

4.8 Additionally, Washington Courts have consistently ruled that waiver of a const. right will not be presumed. The State instead must establish that waiver of such rights is knowingly, intelligent, and voluntary.

State v. Smith, 134 W.2d 849, 852, 1998;
State v. Kelts, 134 W.2d at 315; State v.
Tomal 133 W.2d at 989. In Kelts, the
Washington Supreme Court held that an appeal
may not be dismissed as untimely unless
the state meets its burden. Kelts at 315.
" [A]n involuntary forfeiture of the right to
a criminal appeal is never valid."
Id. at 314

4.9 The record does not support a finding
that defendant knowingly, intelligently and
voluntarily waived his constitutional right to
an appeal. Defendant again emphasizes that
he never was notified by the judge of his
appeal rights, and regardless, requested

the attorney representing him at the resentencing to file a direct appeal challenging the conviction and sentence.

4.10 Defendant is not an attorney. An attorney reviewing his case may identify any number of meritorious appellate issues.

Finally, Defendant clearly states that he is requesting an extension of time and or waiver of time to file the notice of appeal, because he wants to exercise his right to appeal.

4.11 Defendant has a constitutional right to appeal his judgment and sentence, which he requested counsel to do after resentencing, and defendant has promptly attempted to notify the Court.

4.12 It would be a "gross miscarriage of justice" to deny defendant his constitutional right to appeal because his attorney was ineffective for failing to timely file the notice of appeal and the direct appeal. Under Washington State Supreme Court precedent, without such a showing that defendant knowingly and intelligently and voluntarily waived his const. rights to appeal, his appeal rights cannot be dismissed.

V Conclusion

For the reasons stated herein, this Court should grant the relief sought.

Dated this 5TH day of January 2006

Respectfully submitted,

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