

1.4) Mr. Nichols' was convicted of the crimes of: Possession of Cocaine with intent to deliver, RCW 69.50.401(a)(1)(i), Count I, and Misdemeanor possession of marijuana, RCW 69.50.401(e), Count II. Count I is the only issue being presented in this Personal Restraint Petition (PRP).

1.5) Mr. Nichols was sentenced after being found guilty at a Bench Trial on the date of March 22, 2005. The Judge who imposed the sentence was Honorable Sharon Armstrong.

1.6) Mr. Nichols lawyer at the bench trial was: Byron Ward, of Associated Counsel of the Accused, 110 Prefontaine Place S., Suite 200, Seattle, Washington 98104, Telephone No. (206)-624-8105."

1.7) Mr. Nichols did appeal the decision of the trial court, and his appeal was to Division One in Seattle. Mr. Nichols, appellate attorney was: Jennifer M. Winkler, WSDA No. 35220, of Nielsen, Broman & Koch, PLLC, 1908 East Madison, Seattle, Washington 98122, Telephone No. (206)-623-2373.

1.8) The decision of the Court of Appeals Division One, was (not) published, (if published: ___ Wn.App. ___, ___ P.3d ___ (Div. 1, 200__)).

1.9) Since Mr. Nichols conviction he has not asked the court for some relief from his conviction and sentence other than what is written above.

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II. FACTS OF THE CASE

On February 26, 2004, Glen Nichols (Mr. Nichols) rented Room No. 56 at the "Travel Lodge Motel (Motel)." (2RP-pg. 30-31)¹ (CP-Ex. 1)². Mr. Nichols stated that he was not present during 13:50 hours through 16:15 hours (the hours in question) on said date above, (4RP-pg. 25), until his return to the motel room, at approximately 16:15 hours. (4RP-pg. 23-26) (4RP-pgs. 12-13) (4RP-pgs. 7,9-10).

On February 26, 2006, Seattle Police Department, Detective-Rudy Gonzales (Gonzales), Detective-Gregg Caylor (Caylor), (Team Leader) (2RP-pg. 28,29) (See Ex. 1), Patrol Officer-Richard Nelson (Nelson), Patrol Officer-Anderson, Patrol Officer-Tanya Kinney (Kinney), and Confidential Informant (CI)-Charles Ream (Ream) conducted a narcotic investigation concerning a female who went by "Toreka Ativalu" (Mrs. Ativalu). (2RP-pg. 8,11) (2RP-pg. 27) (2RP-pgs. 40-41) (3RP-pgs. 56-57).

At approximately 13:50 hours, CI-Ream and Det.-Gonzales went to the address location where Mrs. Ativalu was allegedly selling crack cocaine from her residence. (3RP-pgs. 42-44) (3RP-pgs. 60-61).

Det.-Gonzales performed a search of CI-Ream's person as to ensure that there was no drugs or other items that would taint the purchase of crack cocaine from the alleged

1) RP-represents Report of Recorded Proceedings

2) CP-represents Court Papers or Admitted Exhibts (Ex.)

controlled buy. (3RP-pgs. 43-44). Det.-Gonzales gave five "Ten dollar bills," serial numbers allegedly recorded before the buy, and instructed CI-Ream to purchase \$50.00 dollars worth of crack cocaine from Mrs. Ativalu. (3RP-pgs. 44-45) (3RP-pgs. 60-61).

At approximately 13:50 hours, CI-Ream entered Mrs. Ativalu's residence, and discovered Mrs. Ativalu was temporarily out of cocaine, but was going to resupply. (3RP-pg. 61). CI-Ream fronted the \$50.00 dollars controlled buy money to Mrs. Ativalu. (2RP-pg. 20). So did Robert, another male who was present at Mrs. Ativalu's residence. (2RP-pgs. 20-21) (3RP-pgs. 61-63). (See Ex. 4)

Mrs. Ativalu then took the \$80.00 dollars, including all the controlled buy money and gave it to her baby-sitter. (3RP-pg. 65) (4RP-pgs. 57-61). At approximately 14:00 hours, Mrs. Ativalu, CI-Ream, and Robert, all left her residence by way of a van that was parked behind her residence in the alleyway. (3RP-pg. 61). Then all three of them, proceeded to a location called "Travel Lodge Motel (motel)." (3RP-pg. 61). But on the way to the motel the three of them stopped at another location. CI-Ream did not personally witness the actual room number Mrs. Ativalu entered as he lost sight of her for 10-minutes. (3RP-pgs. 64-65). CI-Ream did not personally witness the person who sold Mrs. Ativalu the crack cocaine. (3RP-pg. 68). Mrs. Ativalu stated she had purchased the cocaine from "Jesus". (4RP-pgs. 65-66).

At approximately 14:40 (14:25) hours, the three of them

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returned to Mrs. Ativalu's residence, parking the van in front of her residence. CI-Ream went looking for Det.-Gonzales at a pre-determined location. (3RP-pg. 47).

At no time did, Det.-Gonzales, Det.-Caylor, or any other surveillance team member know that CI-Ream exited the area for approximately 40-minutes. (3RP-pg. 46) (3RP-pgs. 74-75). This time zone was calculated from (3RP-pg. 50) travel time line.

Det.-Gonzales performed a second search of CI-Ream after he surrendered \$50.00 dollars worth of crack cocaine. (2RP-pg. 22) (3RP-pg. 47). Det.-Gonzales then debriefed CI-Ream as to the events that transpired concerning the purchase of the crack cocaine and the controlled buy money. (3RP-pg. 47).

Search warrant Officers of Seattle Anticrime Unit executed the issued search warrant upon Mrs. Ativalu's residence. (2RP-pg. 11) (See Ex. 4) The Anticrime team did not recover any of the controlled buy money.

Det.-Caylor, Officer-Nelson and other members of the Anticrime Unit, went to the motel in search of someone who was allegedly selling narcotics from Room No. 56. (2RP-pgs. 45-46) (3RP-pgs. 74-77). Det.-Caylor and Officer Nelson, without a search or arrest warrant, made unsupported allegations about the occupant of Room No. 56 as to obtain private information about the occupant. The motel manager or front desk clerk, surrendered private information about Mr. Nichols from the motel's registration documents, to the

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officers. (2RP-pg. 30-31) (2RP-pgs. 41-43) (3RP-pg. 75)
(CP-Ex. 3).

Det.-Caylor and Officer Nelson, then with this private information about Mr. Nichols, conducted a criminal inquiry and Driving Record History as to perform a criminal interrogation of the suspect living in Room No. 56-Mr. Nichols. (2RP-pgs. 31-32) (3RP-pg. 77).

Mr. Nichols arrived and parked his vehicle in one of the parking stalls. (2RP-pg. 33) (2RP-pgs. 43-44) (3RP-pgs. 77-78).

The group of Officers in an unmarked car, pulled up behind Mr. Nichols vehicle. (2RP-pg. 33) (2RP-pgs. 43-44) (3RP-pgs. 77-78). Mr. Nichols had exited his vehicle and shut the door and proceeded to walk away heading towards the front of his vehicle. (2RP-pg. 33) (3RP-pg. 78). Det.-Caylor approached from behind, while Officer-Nelson and the other Officers went around to the front of the vehicle to cut him off from leaving the area of the vehicle. (2RP-pg. 33) (3RP-pg. 78).

Det.-Caylor and Officer Nelson stated that Mr. Nichols made a sudden movement towards the vehicle as if trying to reach for something within the vehicle. (3RP-pg. 78). Mr. Nichol's denied he even attempted to try to re-enter the vehicle as Officer-Nelso was blocking that area to the drivers door. (2RP-pgs. 44-45) (3RP-pg. 78).

Det.-Caylor and Officer-Nelson stated thats when Mr. Nichol's started to resist and hinder the police in their
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interrogation investigation, (3RP-pg. 79), at which point an alleged struggle occurred between Mr. Nichol's and the Officers. (2RP-pgs. 33-35) (3RP-pgs. 79-80).

Det.-Caylor and Officer-Nelson, stated that during this struggle they performed a search of Mr. Nichol's person as he was allegedly grabbing for his pockets, and this is when they put him under arrest. (2RP-pgs. 35-36) (3RP-pg. 101). Det.-Caylor and Officer-Nelson stated this is when they found \$460.00 dollars, crack cocaine, and marijuana on Mr. Nichol's person. (2RP-pgs. 35-36) (3RP-pgs. 81-82).

Mr. Nichol denied that he had any drugs on his person, and that he was never informed of the nature of the crime against him other than Driving While License Suspended/Revoked in the third degree.

Mrs. Ativalu stated that she did not buy any crack cocaine from Mr. Nichol's, (4RP-pgs. 59-61), but from "Jesue". (4RPpgs. 65-66). Mrs. Ativalu stated that \$80.00 dollars, \$50.00 dollars of the control buy money, was given to her baby sitter. (4RP-pgs. 58-59). Mrs. Ativalu, further stated that she did not see Mr. Nichol's until they were at the precinct together. (4RP-pg. 61).

Mr. Nichol's stated he was at his girlfriends residence from 10.00 a.m. until approximately 2:30 p.m. (4RP-pg. 23-26).

Demetria Johnson, stated that Mr. Nichol's was with her at her residence from 10:00 a.m. until approximately 2:00-2:30 p.m. when he left for his appointment. (4RP-pgs.

12-13).

Bill Heusler (Mr. Heusler) stated between the hours of 2:50 p.m. and 3:50 p.m., Mr. Nichol's was present for his counselor meeting with Ann Levalley-Wood, and to meet Mr. Heusler for the first time as he would be his replacement counselor. (4RP-pgs. 4,5,7).

Det.-Caylor stated he made a mistake in filling out his report concerning the amount of money recover from Mr. Nichol's. (3RP-pg. 89). The money now included a "Ten dollar bill" that was allegedly part of the buy money. (3RP-pg. 82).

The court excepted the photostat copy of the alleged five ten dollar bills used in the control buy. The photostat copy was not certified on the date of the alleged control buy. (See Photo Copy Ex. 4) (3RP-pg. 82)-83)

III. GROUNDS FOR RELIEF

Mr. Nichols presents 3 grounds for relief in this petition as follows:

GROUND No. 1

DOES THE STATE AND FEDERAL CONSTITUTIONS PROTECT MR. NICHOLS RIGHT TO BE SECURE IN HIS PERSON, HOUSES, PAPERS AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES:

- (A) Extend To His Right To Privacy In Motel Room Registration Information; and
- (B) If so, Did The Violation Negate The Subsequent Arrest, Search And Seizure Of Mr. Nichols Person And Alleged Crack Cocaine And Marijuana.

Mr. Nichols contends the State and Federal Constitutions protects his person, house (motel room), papers (motel

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registration), property and effects from unreasonable searches and seizures, unless a warrant was issued upon probable cause supported by a sworn affidavit by the Confidential Informant (CI) and Police Officer(s), which particularly describes the place to be searched and the person(s) and things to be seized.

Mr. Nichols asserts the Seattle Police Department (SPD) Anti-Crime Unit (ACU) made slanderous accusations about Mr. Nichols and his rented motel room number to the Motel Manager or Front Desk Clerk to obtain access to private information contained in the motel registration application.

The Manager/Clerk based upon these slanderous statements by SPD Officers, surrender the private information on the registration form over to SPD Officers so they could conduct a investigative search into Mr. Nichols' driving history, vehicle ownership, and criminal history.

Once SPD Officers obtained the necessary information from other state agencies. SPD Officers laid in waiting to conduct: (a) a traffic stop for Mr. Nichols driving while license suspended or revoked as to arrest, search and seize possible other criminal activities; (b) seizure of alleged crack cocaine, and (c) marijuana.

If SPD Officers had not violated Mr. Nichols rights to privacy in information contained in the motel room registration, the officers would not have known who and what Mr. Nichols was driving or his description.

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EXPECTATION OF PRIVACY

Mr. Nichols contends he has a legitimate right to expectation of privacy in Motel room registration records as they contain private information about him, and the police are not entitled to that information through unlawful search because the police did not first obtain legal process to obtain a search warrant nor was one supported by a sworn affidavit.

The Touchstone of the Fourth Amendment of the United States analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." Katz v. United States, 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (other citations omitted); State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 610 (2000).

Katz, posits a two-part inquiry: first, is the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979); State v. Bobic, supra, at 258.

The Court has stated that for an "illegal search" to occur, the conduct of the police must intrude or infringe on a legitimate expectation of privacy. Katz v. United States, supra; State v. Bobic, supra, at 258 (citing State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)).

"The Fourth Amendment guarantees the privacy, dignity and security of person against arbitrary and invasive acts
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by officers of the government or those acting at their direction." Id. Katz v. United States, supra, 389 U.S. at 351-52 ("(W)hat it seeks to preserve as private, even in areas accessible to the public, may be constitutionally protected."); Peters v. Vinatieri, 102 Wn.App. 641, 651, 9 P.3d 909 (Div. 2, 2000).

The Fourth Amendment, by its own language protects "persons, houses, papers and effects." These are the "core values" of the reach of the Fourth Amendment. Payton v. New York, 445 U.S. 573, 584-85, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); State v. Ross, 141 Wn.2d 304 (2000) . The protection of private papers is also a "core value." As with searches of the home, seizure of papers was one of the reasons the Fourth Amendment was adopted. Standford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)(reh. den.); State v. Williams, 142 Wn.2d 17, 35, 11 P.3d 714 (2000); Marcus v. Search warrant of Property, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed. 1127 (1961); Furfaro v. City of Seattle, 97 Wn.App. 537, 984 P.2d 1055 (1999).

At the minimum, this phase must be interpreted from the perspective of whether a "reasonable expectation of privacy" is involved. Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

Absent exigent circumstances, that threshold may not reasonably be crossed without legal process for a warrant. Id. Payton v. New York, supra, 455 U.S. at 589-90 (quotations and citation omitted).

"State constitutions provides greater protection for individual rights than does the United States Constitution. State v. Gunwall, 106 Wn.2d 54, 59, 720 P.2d 808 (1986) (citations omitted).

The expectation of privacy from a search for information from a room register, is both subjectively and objectively substantially similar to that of long distance telephone toll records and to that in toll billing records. Id State v. Gunwall, supra, 106 Wn.2d at 64 (citing State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982) (Handler J., concurring)). Legally, they are of the same mold.

Generally speaking "authority of law" required by are state constitution Article 1, Section 7 must seek an order to obtain records includes authority granted by a valid, (i.e. constitutional) statute, the common law or rule of this court.

"Authority of Law" includes legal process such as a search warrant or subpoena to obtain access to private information. Id. State v. Gunwall, supra, 106 Wn.2d at 69 (citing: State v. Fields, 85 Wn.2d 126, 530 P.2d 284 (1975); State v. Hunt, supra, 91 N.J. at 348)).

Exigent Circumstances

There were no exigent circumstances surrounding the search of motel room registration records justifying an exception to the warrant requirement of the Fourth Amendment and Article 1, Section 7 of the State constitution.

"Exigent circumstances are those circumstances that

would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspects or some other consequences improperly frustrating legitimate law enforcement efforts." United States v. Echevoyen, 799 F.2d 1271, 1278 (9th. Cir. 1986);

"Exigent circumstances alone are insufficient as the government must also show that a warrant could not have been obtained in time." United States v. Echevoyen, 799 F.2d at 1279; United States v. Good, 780 F.2d 773, 775 (9th. Cir. 1986). The burden is on the government to show that exigent circumstances existed and made the warrantless search imperative." United States v. Al-Azzawy, 784 F.2d 890, 894 (9th. Cir. 1985). "The government bears a heavy burden of demonstrating that exceptional circumstances justified departure from the warrant requirement....The burden cannot be satisfied by speculation about what may or might have happened...there must exist specific and articulable facts which, taken together with rationale inferences, support the warrantless intrusion." United States v. Licata, 761 F.2d 537, 543 (9th. Cir. 1985).

As to exigent circumstances, "its resolution requires that we strike a balance between sometimes conflicting societal values--the safety of law enforcement officers and Fourth Amendment privacy interests. The essential and difficult question raised by this balancing is how much

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risk police officers can reasonably be expected to assume before disregarding the rules society has adopted to otherwise circumscribe the exercise of their considerable discretionary authority in carrying out their vital law enforcement duties." United States v. McConney, 728 F.2d 1195, 1205 (9th. Cir. 1985). "An unjustified but sincere fear by an officer cannot excuse non-compliance or the protection of the occupants privacy interest would depend on no more than an officer's anxiety." United States v. McConney, supra, 728 F.2d at 1206. The exigency relied upon by the government must be reasonable.

"No exigency is created simply because there is probable cause to believe that a serious crime has been committed." Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 2099, 80 L.Ed 732 (1984). The critical time for determining whether exigency exists "is the moment of the warrantless (search) by the officers (into the private information of motel room registration) of the defendant." United States v. Morgan, 743 F.2d 1158, 1162 (6th. Cir. 1984) (Text added).

For the foregoing reasons, Mr. Nichols' has a right of expectation of privacy in motel room registration information from the unlawful search by police unless the motel manager is presented with a valid search warrant.

The Court should grant Mr. Nichols' personal restraint petition as to vacate the judgment and sentence and remand for a new suppression hearing on this issue.

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B. Did The Violation Negate The Subsequent Arrest, Search And Seizure Of Mr. Nichols Person And Alleged Crack Cocaine And Marijuana As They Are "Fruits Of The Poisonous Tree" Doctrine.

Mr. Nichols contends that the subsequent "stop, talk and frisk" investigation performed by the police was a direct result of the invasion of right to expectation of privacy in motel room registration information obtained from a unreasonable and unlawful search for information about the occupant within the assigned room number.

The police, without first obtaining a telephonic search warrant, made slanderous unsupported statements about the occupant within the motel as to gain access to the room registration that disclosed (i) full name of occupant, (ii) type of vehicle owned, (iii) copy of the occupants driver license, and (iv) assigned room number, all of which was used to conduct a criminal investigation through other state agencies.

This lead the police officers to lie in wait for Mr. Nichols to pull-into the motel parking lot. The police then approached Mr. Nichols, in an unmarked car, do to an alleged traffic stop, and used such opportunity to perform the "Stop, Talk and Frist" (Terry stop).

During this alleged legal stop the police claimed to had probable cause to conduct an arrest incident to the search, and allegedly recovered \$460 dollars, crack cocaine, and a small amount of marijuana.

All of the evidence and traffic violation are "Fruits of the poisonous tree" doctrine, do to the first unlawful
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search for information obtained from the motel room registration which lead the police to the next searches and seizures.

"Fruits Of The Poisonous Tree"

Under the "fruits of the poisonous tree" doctrine, any incriminating evidence found on the accused after law enforcement officers have unlawfully obtain private information from a motel room registration form (papers) about the accused would be inadmissible as "fruit" of the unlawful conduct. See e.g., Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("Verbal evidence derived from a unlawful entry); United States v. Rubalcava-Montoya, 597 F.2d 140 (9th. Cir. 1978); United States v. Beck, 602 F.2d 726 (5th. Cir. 1979) (where defendant threw narcotics out of automobile after police illegally stopped his vehicle, discarded narcotics were tainted by illegality of stop and therefore could not be used to validate search of truck which produced stolen items.); United States v. Sullivan, 138 F.3d 126 (4th. Cir. 1998) (since routine traffic stop amounts to seizure, albeit limited seizure analogous to Terry stop, if initial stop were illegal, seized contraband is excluded under fruits of poisonous tree doctrine); United States v. Elmore, 177 F.Supp.2d 773 (S.D. Ohio, 2000), judgment rev'd on other grounds, 304 F.3d 557, 2002 FED App. 03170 (6th. Cir. 2002) (as extension of exclusionary rule, "fruits of the poisonous tree" doctrine prohibits admissibility of any evidence

discovered not during search that violates Fourth Amendment, but as result of items or information obtained through such unconstitutional search); People v. Rodriguez 945 P.2d 1351 (Colo, 1997) (to determine whether evidence was obtained as direct result of police illegality so as to preclude its admission under fruits of the poisonous tree doctrine, relevant inquiry is whether evidence was obtained by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of primary taint); State v. Takesgun, 89 Wn.App. 608, 949 P.2d 845 (Div. 3, 1998) (if stop of vehicle were unreasonable, seized contraband is subjected to exclusion under fruits of the poisonous tree doctrine); State v. Swenson, 104 Wn.App. 744, 9 P.3d 933 (Div. 1, 2000), review denied, 148 Wn.2d 1009, 62 P.3d 890 (2003); Walls v. State, 514 P.2d 404 (Okla. Crim., 1973) (evidence gathered from third search of defendant's home was tainted from illegality of original two searches).

"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search. See 43 ALR.3d 385.

Moreover, if the tainted information search leads to the discovery of physical evidence, the latter evidence would also be "inadmissible". United States v. Finucan, 708 F.2d 838 (1st. Cir. 1983) (documentary evidence supporting conspiracy to commit mail fraud was suppressed, where material illegally seized from defendant's home were

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commingled with other evidence in files, and government relied upon those materials in guiding investigation to places it would not have otherwise reached).

In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968), the United States Supreme Court decided that a police officer has the power, consistent with the Fourth Amendment, to "stop, talk, and frisk" a suspicious person, i.e., without probable cause to make an arrest, a police officer may stop a suspicious person, question him and for his own protection if he reasonably believes him to be armed, pat his outer clothing for a weapon. A "frisk", depending upon the attendant circumstances, may not be lawful. People v. Gonzales, 17 Cal.App.3d 848, 95 Cal.Rptr. 291 (2nd Dist., 1971) (object felt by police officer during pat-down search was obviously not a weapon); State v. Rater, 253 Or. 109, 453 P.2d 680 (1969). The police officer had no reason to believe that the suspect was armed or danerous. United States v. Hostetter, 295 F.Supp. 1312 (DC Del., 1969).

Mr. Nichols had a right to pull-into the motel parking lot as he was renting a room there. He did not act suspiciously that would have drawn a normal police officer attention because he was not committing any criminal conduct. The police did not have a right to perform a "stop, talk, and frisk" of Mr. Nichols, and the only reason for the police conduct and actions was do to the unreasonable search that violated Mr. Nichols' right to expectation of privacy in motel room registration documents.

Therefore, the products from the subsequent searches and seizures are "fruits of the poisonous tree" and all should be suppressed.

GROUND No. 2

DID THE TRIAL COURT ERR IN ADMITTING A DUPLICATE PHOTOCOPY OF FIVE TEN-DOLLAR BILLS, ALLEGEDLY USED IN A CONTROL BUY OF CRACK-COCAINE, AS EVIDENCE TO SUPPORT A CONVICTION, BUT DID NOT CONFORM WITH OR COMPLY WITH THE RULES OF EVIDENCE, VIOLATING MR. NICHOLS' STATE AND FEDERAL CONSTITUTIONAL RIGHTS?

Mr. Nichols contends his state and federal constitutional rights were violated by the admission of evidence which did not conform with or comply with the "Rules of Evidence (ER)." The trial court erred in admitting a xerography copy of five ten-dollar bills that was allegedly used in a control buy operation by Seattle Police.

First, the xerographic copy was not authenticated by a notary public as being the actual money used on the date of the operation. Furthermore, the copy was not certified as being an original copy or witness certification statement setting forth the date, time, and purpose of the xerography money. There was no testimony given by the person(s) who had "custody" of the evidence and/or as to its validity, based on his/her knowledge and control over the evidence.

The validity of the xerographic copy is in question as to it being fraudulently fabricated from the \$460 dollars confiscated from Mr. Nichols during the police arrest and search of his person.

Investigating police must follow certain procedures to preserve the validity and admissibility of evidence. Once collected, detectives should book the evidence. They should document every time it is moved or touched, to preserve the "chain of custody" and to rebut any claims of tampering. And should write reports promptly, so the investigator is recording recent events, not distant recollections. In Nichols' investigation, Officer Gaylor violated all of these basic principles, according to the submitted evidence.

The reasons for following procedures is to avoid claims of fraudulent fabrication of evidence to support a criminal conviction and to protect citizens from wrongful police conduct.

If the xerographic copy is considered a business record, the copy must be authenticated by one who is familiar with the making of the copy or witnessed the making of the copy, such as a custodian or supervisor. See State v. Smith, 55 Wn.2d 482, 348 P.2d 417 (1960) (records identified, and mode of preparation established, by one not the custodian or keeper).

If a xerographic copy purports to be an official report or record and is proved to have come from the proper public office where such official papers are kept, it is generally agreed that this authenticates the offered copy (document) as genuine. See United States v. Ward, 173 F.2d 628 (2d. Cir. 1949) (records from files of Selective Service,

identified by custodian); Tameling v. Commissioner, 43 F.2d 814 (2d. Cir. 1930) (official assessment role shown to emanate from official custody admissible without further authentication); State v. Miller, 79 N.M. 117, 440 P.2d (1968) (fingerprint record from F.B.I. file; stating rule in terms of above text).

The result is founded on the probability that the officers in custody of such records of evidence, will carry out their public duty to receive or record only genuine official papers and reports. The principle again can be sustained if it appears that the official custodian had a public duty to verify the genuineness of the evidence papers (copy) offered for record or deposit and to accept only the genuine.

First, statutes which often provide that certain classes of evidence (writings/copies), usually in some manner purporting to be vouched for by an official, shall be received in evidence "without further proof." This helpful attribute is most commonly given by statutes for: (1) deeds, conveyances or other instruments, which have been acknowledged by the signers before a notary public, (2) certified copies of public records, and (3) books of statutes which purport to be printed by public authority.

But in the first two of these classes of evidence copies, which can qualify only when the acknowledgment is certified by a notary or the copy certified by the official who has custody of the record. How is the court to know without

proof that the signature or seal appearing on the copy is actually that of the official whose name and title are recited? This second step is supplied by the traditional doctrines which recognized the seal or signature of certain types of officers, including the keeper of the seal of state, judicial officers, and notary public, as being of themselves sufficient evidence of the genuineness of the certificate.

The original document rule (also called "Best evidence rule") is essentially directed to the prevention of fraud. It has long been observed that the opportunity to inspect original writings (copies) may be of substantial importance in the detection of fraud. At least a few modern courts and commentators appear to regard the prevent of fraud as an ancillary justification of the rule. See United States v. Manton, 107 F.2d 834 (2d. Cir. 1939).

Unless this view is accepted it is difficult to explain the rule's frequent application to copies produced by modern techniques which virtually eliminate the possibility of unintentional mistransmission.

Decisions illustrative of instance in which the terms of "copies" are the facts sought to be proved are numerous. See United States v. Rangel, 585 F.2d 344 (8th. Cir. 1978) (altered photocopies of charge card receipts submitted in support of fraudulent claim for reimbursement were best evidence rather than "original" altered charge slips); United States v. Gerhart, 538 F.2d 807 (8th. Cir. 1976)

(photocopies of original checks, submitted in support of loan application were "original" required by rule, but secondary evidence admissible under circumstances); State v. Calongne, 111 Kan. 332, 206 P. 1112 (1922) (prosecution for fraud defended on ground facts represented where believed by defendant to be true; telegrams received by defendant purporting to detail financial status of corporation held originals); In re Stringer's Estate, 80 Wyo. 389, 343 P.2d 508 (1959) (where testator actually executed only a "copy" of will, copy held the original dispositive instrument).

The primary purpose of the original document requirement is directed at securing accurate information from the contents of material writings, free of the infirmities of memory, mistakes and fraud.

However, if the original document requirement is conceded to be supported by the ancillary purpose of fraud prevention, it will be seen that even copies produced by photographic or xerographic processes are not totally as desirable as the original.

Under Federal Rules of Evidence (Fed.R.Evid.) 1001(4) copies produced by photography or chemical reproduction or equivalent techniques are classed as "duplicates," and under Rule 1003 are declared admissible as originals unless a genuine question is raised as to the authenticity of the original or it appears under the circumstances that it would be unfair to admit the duplicate in lieu of the

original.

The accepted view is that, in general, public and judicial records and public documents are required by law to be retained by the official custodian in the public office designated for their custody, and court will not require them to be removed. See State v. Black, 31 N.J.Super. 418, 422, 107 A.2d 33, 35 (1954) ("It is firmly established in this State that a public document may be proved by producing the original...and on grounds of public convenience a well-known rule of the common law allows proof of such document by duly authenticated copies whenever the original would be admissible, a public document being for this purpose, a document, either judicial or non-judicial, which is public in its nature and which the public had the right to inspect.").

Accordingly, statutes and rules have provided for the issuance of certified copies and for their admission in evidence in lieu of the original. Fed.R.Evid. 1005. In addition, examined copies, authenticated by a witness who has compared it with the original record, are usually receivable. See Doe v. Roberts, supra. Nor have certified copies traditionally been preferred to examined copies. See Smithers v. Lowrance, 100 Tex. 77, 93 S.W. 1064 (1906).

Some means of proof are clearly more reliable than others. In order of reliability the list might go something like this: (1) a mechanically produced copy, such as a photograph or xerograph, a carbon, a letter-press copy,

et., (2) a firsthand copy by one who was looking at the original while he copied (immediate copy, sworn copy), (3) a copy, however, made, which has been compared by a witness with the original and found correct (examined copy), (4) a secondhand or mediate copy, i.e., a copy of a firsthand copy, (5) oral testimony as to the terms of the writing, with memory aided by a previously made memorandum, and (6) oral testimony from unaided memory, there are many additional variations.

There is one rule of preference that is reasonable and is generally agreed on by the courts, namely, that for judicial and other public records, a certified, sworn or examined copy is preferred, See Jones v. Melindy, 62 Ark. 203, 36 S.W. 22 (1881) (proof of record of mortgage through testimony of custodian disallowed; use of examined or certified copy required); Whitteir v. Leigert, 72 N.D. 528, 9 N.W.2d 402 (1943) (rule stated; dictum), and other evidence of the terms of the record cannot be resorted to unless the proponent has no such copy available, and the original record has been lost or destroyed so that a copy cannot now be made. See People v. Cotton, 250 Ill. 338, 95 N.E. 283 (1911).

The second view is followed by a majority of the courts which have passed on the question. Here a distinction is recognized between types of secondary evidence, with a written copy being preferred to oral testimony, and, under the circumstances varying from state to state, and

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an immediate copy being preferred to a more remote one.

When the original is a public record and hence not producible, a certified or examined copy may be obtained at any time, and a copy of a copy would everywhere be excluded. See Lasater v. Van Hook, 77 Tex. 650, 655, 14 S.W. 270 (1890) (deed record; examined copy of a certified copy excluded). When the original is unavailable and there is no copy of record, then under the majority view the proponent would be required to produce an immediate copy, if available, before using a copy of a copy. See Schley v. Lyon, 6 Ga. 530, 538 (1949); State v. Cohen, 108 Iowa 208, 78 N.W. 857 (1899).

The police may not use inferior evidence, when it is within their power, to present and preserve more reliable evidence. See, e.g. Healy v. Gilman, 1 Bosw. (14 N.Y.Super.) 235 at 242 (1857) quoted in note, 38 Mich.L.Rev. 864, 874 (1940).

Therefore, the xerographic copy evidence which was not certified by a notary or supported by sworn statement as to what date, time, and purpose of the copied money was for, should not have been admitted into evidence to support the states/police claims.

GROUND No. 3

MR. NICHOLS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A. A criminal defendant has a constitutional right to effective assistance of counsel.

The state and federal constitutions guarantee criminal
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defendants reasonably effective representation by counsel at all critical stages of a case. U.S. Const., amend. 6, Wash. Const. art. 1, Section 22; Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Suppression Hearings and trial, are critical stages of a criminal case.

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must establish that: (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his case. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A legitimate tactical decision at trial will not be found deficient. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). It is not enough to simply conclude counsel's actions were tactical; tactical choices must still be reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 1037, 145 L.Ed.2d. 985 (2000).

B. Counsel's Representation of Mr. Nichols was deficient

Under the facts of this case, the counsels' failure to: (a) object unauthenticated photographic copy of evidence of alleged controlled buy money that did not comply with the Rules of Evidence; (b) object to evidence obtained from the unlawful search of "Motel Registration forms" and the private information pertaining to Mr. Nichols; (c) move to suppress all evidence obtain from the violation

of the right to privacy to the information within the Motel Room Registration forms that lead to an unlawful search of Mr. Nichols' and his arrest for allegedly violating other criminal traffic violations, and that yielded allegedly evidence of criminal activity; (d) raise and object to the use of the unlawful search of private information during trial; and (e) Appellate counsel's failure to raise the claim of ineffective assistance of counsel; and (f) raise constitutional violations on direct appeal that would have protected Mr. Nichols' from unlawful police conduct among other issues. The counsels acts, conducts, and omissions is so deficient and no tactical reason exists to justify counsels' failure to raise these legal issues. Despite a strong and well established legal argument favoring Mr. Nichols concerning one legal issue of unlawful search based on alleged violation of a non-traffic violation of Driving While License Suspended in the third degree, and Court Order for taking blood from Mr. Nichols for DNA testing.

Defense counsels' failure to raise viable legal issues constitutes deficient representation.

The court noted the "failure to cite controlling case law may be grounds for finding ineffective assistance." see e.g., State v. Ermert, 94 Wn.2d 839, 850, 621 P.2d 121 (1980); State v. Hernandez-Hernandez, 104 Wn.App. 263, 266, 15 P.3d 719 (2001) (case involved exceptional sentence below the standard range).

"Counsel has a duty to investigate potentially

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exculpatory evidence" such as unauthenticated photographic copy of alleged buy money used the day of the incident, and "failure to call witness(es), or investigate witness(es)", and evidence to be submitted, is deficient representation. see e.g., In re Personal Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004).

But, the failure to object to evidence does not support a claim of ineffective assistance of counsel unless not objecting to the submitted evidence fell below prevailing professional norms, and the outcome would have resulted in a different outcome at trial. See e.g., In re Personal Restraint of Davis, supra.

Also the counsel's failure to move to suppress evidence obtained by illegal or unlawful means is deficient. See e.g., State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995); Fields v. Bagley, 275 F.3d 478, 485 (6th. Cir. 2001) (per curiam).

Counsel's failure to interview and call witness(es) is deficient and prejudicial, depriving Mr. Nichols of effective assistance of counsel. See e.g., Riley v. Payne, 352 F.3d 1313, 1323-24 (9th. Cir. 2003); Jones v. Wood, 114 F.3d 1002, 1010-13 (9th. Cir. 1997).

Counsel's failure to advise of the consequences of trial and as to states evidence against Mr. Nichols is deficient and prejudice him to his right to effective assistance of counsel. See e.g., State v. Crawford, 128 Wn.App. 376, 383-84 (Div. 2, 2005).

Counsel's failure to introduce exculpatory evidence and argue against evidence that did not comply with the Rule of Evidence may constitute deficient performance, and had counsel argued against the evidence submitted by the state, the result would have been different outcome. See e.g., State v. McSorley, 128 Wn.App. 598, 609-10 (Div. 2, 2005); Banks v. Reynolds, 54 F.3d 1508, 1515-16 (10th. Cir. 1995).

Counsel's failure to raise any obvious and significant issues is ineffective assistance of counsel. See e.g., Mason v. Hanks, 97 F.3d 887, 894 (7th. Cir. 1996).

Appellate counsel's failure to raise any arguable issue in appellate brief is ineffective assistance of counsel. See e.g., Delgado v. Lewis, 223 F.3d 976, 980-82 (9th. Cir. 2000). Furthermore, appellate counsel failure to raise constitutional violations on appeal is both deficient and prejudicial, constituting ineffective assistance of appellate counsel. See e.g., In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004).

There is not tactical reasons for counsel's and appellate counsel's failure to raise these legal issues in a timely manner, as it deprived Mr. Nichols of the possibility of a Fair Trial and Appeal of the trial.

Consequently, Mr. Nichols was denied the right to effective assistance of counsel throughout his legal proceedings, including trial, and on direct appeal.

Counsel's and appellate counsel's representation was

deficient and prejudicial, thus reversal of Mr. Nichols trial is the appropriate remedy.

C. Counsel's Deficient Performance Resulted In Prejudice

Had counsel: (a) objected to unauthenticated photographic copy of alleged control buy money evidence which did not comply with the Rules of Evidence; (b) objected to evidence obtained by an unreasonable search of private information within Motel Room Registration forms; (c) move to suppress all evidence obtained from the violation of right to privacy to information within the Motel Room Registration forms which resulted in an unlawful stop, search, and arrest of Mr. Nichols' that yielded other evidence of a different criminal activity; (d) raised the unlawful search of private information within Motel Room Registration forms without a search warrant and supporting affidavit that alleged criminal activity was being performed by Mr. Nichols, among other information; and (e) to raise on appeal constitutional claims, and present an argument on each of the issues, under supporting case law, it is likely the court(s) would have favored Mr. Nichols' argument and case against the state.

Without question, counsels had appropriate factual and legal bases to: (a) object, (b) move to suppress all evidence, (c) to investigate exculpatory evidence, (d) raise constitutional violations, and (e) raise other legal issues with supporting arguments on behalf of Mr. Nichols and his case.

Furthermore, had counsel argued against the court's admission, and denials under firmly established caselaw, the court would have been able to make an informed decision which would have been in Mr. Nichols favor, either in part or in whole.

Under both Federal and State Constitutions, a criminal defendant has a right to assistance of counsel. U.S. Constitution, Amendments 5, 6, and 14, Washington's Constitution, Article I, Section 22, and other sections. In addition to a finding that counsel's performance was deficient, under a claim of ineffective assistance of counsel it also must be shown that the deficient performance prejudice the case. This can be done by showing that there is a reasonable probability that the outcome would have been different, but for the ineffective assistance of counsel. See e.g., State v. Bowerman, 115 Wn.2d 794 (1990).

The defendant request that the court reverses the conviction of Mr. Nichols and remand for a New Trial and other proceedings with instructions. See e.g., State v. Aho, 137 Wn.2d 736 (1999); State v. Sauders, 91 Wn.App. 575 (1998).

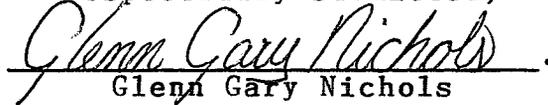
D. The Appropriate Remedy is a New Trial and Proceedings

When counsel for the defendant is ineffective, the appropriate remedy is ordinarily a New Trial. See e.g., State v. Thomas, 109 Wn.2d 222, 232, 743 P.2d 816 (1987); State v. Doogan, 82 Wn.App. 185, 187, 917 P.2d 155 (1996).

Here, defense counsel's deficient performance

substantially prejudiced Mr. Nichols with respect to him receiving a Fair Trial and Suppression Hearing. This court should therefore reverse the sentence imposed and remand the matter for a New Trial and Suppression Hearings with instructions.

Respectfully submitted;


Glenn Gary Nichols

See attached sheets of:

- 1) Statement of Finances
- 2) Request For Relief
- 3) Oath of Petitioner.

A. STATEMENT OF FINANCES

If you cannot afford to pay the filing fee or cannot afford to pay an attorney to help you, fill this out. If you have enough money for these things do not fill out this part of form.

1. I do do not () ask the court to file this without making me pay the filing fee because I am so poor I cannot pay the fee.
2. I have \$ 49.75 in my prison or institution account.
3. I do do not () ask the court to appoint a lawyer for me because I am so poor I cannot afford to pay a lawyer.
4. I am am not () employed; my salary or wages amount to \$ 55.00 a month. My employer is Department of Corrections, TWIN RIVERS UNIT.
5. During the past 12 months I did () did not get any money from a business, profession, or other form of self – employment.
6. Petitioner has not received any moneys from any other source except his institutional job.
7. Petitioner has no real-estate or other things of value.
8. I am () am not married. If I am married, my wife's or husband's name and address is:

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

NAME & ADDRESS	RELATIONSHIP	AGE
<u>GLENN JR. 9028 11TH AVE SW SEA, WA 98106</u>	<u>(SON)</u>	<u>25</u>
<u>ADRIEN N. 5915 DELRIDGE WY SW # B103 SEA, WA 98106</u>	<u>(SON)</u>	<u>23</u>
<u>KELVIN N. 5915 DELRIDGE WY SW # B 103 SEA, WA 98106</u>	<u>(SON)</u>	<u>21</u>
<u>JASMINE J. 130 SW 112TH ST # B 308 SEA, WA 98146</u>	<u>(stepdaughter)</u>	<u>11</u>
<u>DEONTE M. 130 SW 112TH ST # B 308 SEA, WA 98146</u>	<u>(stepson)</u>	<u>9</u>

10. All of the bills I owe are listed here:

NAME OF CREDITOR	ADDRESS	AMOUNT
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Note: Mandatory savings account is a non-accessible, non-spendable fund. Balance \$

87.36 RCW 72.09.111 (1) (d); RCW 72.09.480 and DOC 200.000.

B. 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:

E: OATH OF PETITIONER

STATE OF WASHINGTON)
) SS
COUNTY OF SNOHOMISH)

AFTER BEING FIRST DULY SWORN, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents and I believe the petition to be true.

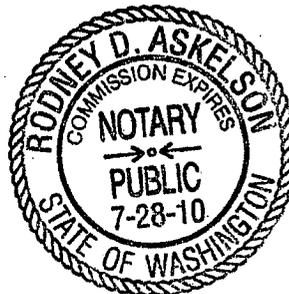
Gene Nichols

Monroe Correctional Complex @ TRU
P.O. Box 888
Monroe, WA 98272-0888

SUBSCRIBED AND SWORN TO, before me, this 15th of February, 2007.

Rodney D. Askelson

NOTARY PUBLIC in and for
The State of Washington, *Snohomish County*
My Commission Expires: *7/28/2010*



12/22/2006
LCCONNER2

DEPARTMENT OF CORRECTIONS
WASHINGTON STATE REFORMATORY

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OIRPLRAR
6.03.1.0.1.2

PLRA IN FORMA PAUPERIS STATUS REPORT
FOR DEFINED PERIOD : 06/01/2006 TO 11/30/2006

DOC : 0000931744
DOB : 10/30/1960

NAME : NICHOLS GLENN

ADMIT DATE : 09/10/1999
ADMIT TIME : 00:00

AVERAGE MONTHLY RECEIPTS	20% OF RECEIPTS	AVERAGE SPENDABLE BALANCE	20% OF SPENDABLE
49.75	9.95	38.22	7.64

Asmer 22 December 2006