

NO. 83742-2

SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of
GLENN G. NICHOLS,
Petitioner.

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STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether a defendant may raise a suppression issue for the first time in a personal restraint petition, where he never litigated the issue in the trial court.

2. Whether it is ineffective assistance of counsel to fail to raise a suppression issue under the state constitution, when federal law explicitly allows the search and there is no state authority holding that such a search is unlawful.

3. Whether police may search the guest registration information for a specific motel room based on particularized and individualized suspicion that the resident of that room is selling cocaine.

B. RELEVANT FACTS¹

In February of 2004, Seattle Police Detective Rudy Gonzales was engaged in an ongoing investigation arising from a complaint about a residence where drugs were being sold. RP (1-4-05) 11. Gonzales had already made three controlled purchases of narcotics from the residence using a cooperating witness, and had secured a search warrant for the residence on that basis. RP (1-4-05) 11-12. On February 26, 2004,

¹ Most of the facts recited here are taken from the trial court's Written Findings of Fact and Conclusions of Law on CrR 3.6 Motion to Suppress Physical, Oral or Identification Evidence. Appendix A. Any additional facts will refer to the specific volume of the verbatim report of proceedings in which they appear.

Gonzales was attempting to make a fourth controlled purchase, primarily to learn whether the target of the investigation was present, and to assess any officer safety concerns prior to executing the search warrant. Id.

Detective Gonzales dropped off the cooperating witness, Charles Ream, at the residence of Toreka "Tika" Ativalu, the target of the investigation, at about 1:50 p.m. Ream had \$50 in prerecorded money to use for the purchase of cocaine. When Ream went into the house and asked to buy a "fifty," Ativalu told him that she was out of drugs, but was going to meet her supplier in a few minutes. Ream gave Ativalu the money, and he was permitted to ride with Ativalu and a driver to a Travelodge Motel about five minutes away.

While Ream and the driver waited in the car, Ativalu went to contact her supplier. Unsure of the room, Ativalu directed the driver to contact "OG" and find out what room he was in. Using his cell phone, the driver called "OG" and learned that he was in room 56. Ream saw Ativalu go to room 56. She returned in a few minutes and gave Ream the cocaine he had requested. The three then returned to Ativalu's house. Detective Gonzales estimated that 20-30 minutes passed between the time he dropped Ream off at Ativalu's house and Ream's return to Gonzales with the cocaine he had purchased. RP (1-4-05) 24.

The police executed the search warrant at Ativalu's residence at approximately 2:25 p.m. on that same day. Sergeant Gregg Caylor supervised the search team. RP (1-4-05) 23, 28. Gonzales relayed the information about the purchase of cocaine from room 56 at the Travelodge to Sergeant Caylor and Officer Nelson. Caylor and Nelson went to the Travelodge at about 4:25 p.m. on that same day.

When Sergeant Caylor arrived at the Travelodge, he went to the desk clerk and requested information on the person registered in room 56. RP (1-4-05) 31. Caylor was given a photocopy of identification in the name of Glenn Nichols. When Caylor ran Nichols' name through the computer in his unmarked patrol car, he learned that Nichols' driver's license was suspended in the third degree.

While sitting near the motel office in their patrol car, Caylor and Nelson saw Nichols drive into the parking lot; they recognized him from the photocopy of his identification. When Nichols got out of his car, the police asked him if he was Glenn Nichols; when Nichols responded in the affirmative, they asked him to step away from his car. When Officer Nelson told Nichols that his license was suspended and the police wanted to talk to him, Nichols tried to get back into his car. Fearing that Nichols might be trying to reach a weapon, or that he might flee, the officers grabbed him and placed him under arrest for Driving While License

Suspended in the Third Degree. RP (1-4-05) 36. Searching his person incident to the arrest, police found several baggies with suspected crack cocaine, as well as a baggie of suspected marijuana; they also found \$460 in cash, including prerecorded "buy money" from the controlled purchase.

Nichols moved to suppress both the drugs and the cash obtained during the search. RP (1-5-05) 9. Counsel argued that the process by which Nichols' license had been suspended was unconstitutional, relying on City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004). RP (1-5-05) 7-9. The trial court denied the motion. RP (1-5-05) 13.

Nichols waived jury trial. RP (1-5-05) 25-27. The trial court found Nichols guilty of Possession of Cocaine with Intent to Deliver and Possession of Less than 40 Grams of Marijuana. Appendix B (Findings of Fact and Conclusions of Law Pursuant to CrR 6.1(d)).

On appeal, Nichols challenged the constitutionality of the requirement that convicted felons provide a biological sample for a DNA database. Relying on State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007), a commissioner of the Court of Appeals rejected this argument. The commissioner also rejected several arguments that Nichols raised in a Statement of Additional Grounds for Review, including a challenge to the sufficiency of the evidence, several evidentiary challenges, and claims of

attorney misconduct. The judgment and sentence was affirmed, and the mandate issued on January 11, 2008. Appendix C.

Nichols filed this personal restraint petition on March 29, 2007. Appendix D. He argued, for the very first time, that the police violated his right to privacy when they obtained information from the motel registry without first obtaining a search warrant. In re Personal Restraint of Nichols, 151 Wn. App. 262, 265, 211 P.3d 462 (2009). The State initially conceded, based on State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007). In re Nichols, 151 Wn. App. at 268. The Court of Appeals appointed counsel for Nichols, and directed the parties to file additional briefs addressing whether a suppression issue could be raised for the first time in a personal restraint petition in light of In re Personal Restraint of Rountree, 35 Wn. App. 557, 668 P.2d 1292 (1983). In re Nichols, 151 Wn. App. at 268.

The Court of Appeals ultimately held that, by failing to move in the trial court to suppress the fruits of the motel registry search, Nichols waived his claim that admission of that evidence was error. Id. at 272. The court further found that trial counsel was not ineffective in "failing to break new ground under article I, § 7," and that "trial counsel's use of *Moore* to argue that the police lacked probable cause to arrest Nichols

shows skill in developing a new argument suggested by a recent appellate decision." Id. at 274.

C. ARGUMENT

1. THE INTERESTS OF FINALITY REQUIRE THAT A DEFENDANT BE PROHIBITED FROM RAISING IN A COLLATERAL ATTACK A SUPPRESSION ISSUE THAT WAS NOT LITIGATED IN THE TRIAL COURT.

Nichols contends that his failure to argue on direct appeal for suppression of evidence obtained through a search of his motel registration information does not preclude him from raising the issue on collateral attack. Petitioner's Supplemental Brief (filed 10-10-08) at 10. As the Court of Appeals pointed out, however, Nichols' problem is not his failure to raise the suppression issue in his direct appeal, but his failure to move to suppress on that basis at trial. In re Nichols, 151 Wn. App. at 270.

There are obvious problems, even on direct appeal, with raising a suppression motion that was not litigated in the trial court; first and foremost, the record is rarely sufficient for review. For example, in this case, there was no testimony in the trial court directed to whether the Travelodge Motel had notified guests, either orally or by written posting, that information in the guest registry would be available to police, either in general or upon particularized, individualized suspicion. Nor was there testimony from Sergeant Caylor or Officer Nelson concerning any exigent

circumstances that may have existed, e.g., a concern that Nichols might flee or that evidence might be destroyed. This was, after all, a motel, and not likely a permanent residence. And while there is evidence that Caylor, as supervisor of the search team at Ativalu's residence, was busy for some period of time between Ativalu's purchase of drugs from room 56 and Caylor's trip to the Travelodge to investigate, Caylor was never asked to explain what he was doing, where, and for how long, and what reasons he had for not obtaining a search warrant before going to the Travelodge.

Some appellate courts have reviewed a suppression issue raised for the first time *on direct appeal* under RAP 2.5(a), which allows review of a "manifest error affecting a constitutional right" even where the error was not raised in the trial court. Nichols cites to State v. Kirwin, 165 Wn.2d 818, 203 P.3d 1044 (2009), and State v. Contreras, 92 Wn. App. 307, 966 P.2d 915 (1998). Motion for Discretionary Review ("MDR") at 6. In Kirwin, the factual record below was not relevant, because Kirwin's challenge to the basis for his arrest was purely a legal one ("the sole issue before this court is whether the littering ordinance unconstitutionally conflicts with the littering statute"). 165 Wn.2d at 824. In Contreras, the appellate court found that "the record is sufficiently developed for us to determine whether a motion to suppress clearly would have been granted or denied." 92 Wn. App. at 314. Thus, in both cases it was possible to

review the defendant's Fourth Amendment challenge in spite of his failure to raise it in the trial court.

By contrast, courts generally decline to review a suppression issue where the defendant failed to raise it at trial and the record is *not* sufficient for appellate review. "RAP 2.5(a) does not mandate appellate review of a newly raised argument where the facts necessary for its adjudication are not in the record and therefore where the error is not 'manifest.'" State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Thus, in Riley, the court declined to reach the defendant's Fourth Amendment claim because the record was unclear. Id.

This Court has more than once held unequivocally that a suppression issue may *not* be raised on appeal unless the defendant made a timely motion to suppress in the trial court. In State v. Baxter, 68 Wn.2d 416, 413 P.2d 638 (1966), the defendant moved to suppress already-admitted evidence after the State had rested its case. 68 Wn.2d at 419. This Court found that "the search and seizure were incident to a lawful arrest." Id. at 422. Nevertheless, the Court explicitly found that the defendant had waived his suppression claim:

Our decision is not limited to the determination that the arrest was made upon probable cause. . . . We adhere to the rule that, when a defendant wishes to suppress certain evidence, he must, within a reasonable time before the case is called for trial, move for such suppression, and thus give

the trial court an opportunity to rule on the disputed question of fact.

...
The exclusion of improperly obtained evidence is a privilege and can be waived. While it is true that both our state and federal constitutions protect us from unreasonable searches and seizures, it is also true that, in order to preserve these rights, persons claiming benefits thereunder must seasonably object.

Id. at 422-23 (internal citations omitted).

More recently, in State v. Mierz, 127 Wn.2d 460, 901 P.2d 286 (1995), this Court again took a firm stand on waiver. Mierz had not filed a motion to suppress evidence in the trial court. Id. at 466. For the first time on appeal, he claimed that evidence against him was illegally obtained as a result of a warrantless entry onto his property. Id. at 468. This Court rejected the attempt: "Mierz's failure to move to suppress evidence he contends was illegally gathered constitutes a waiver of any error associated with the admission of the evidence" Id.

Just last year, in State v. Millan, 151 Wn. App. 492, 212 P.3d 603 (2009), the Court of Appeals relied on Baxter and Mierz in refusing to consider a suppression claim raised for the first time on appeal:

This rule – that a defendant waives the right to challenge the trial court's admission of evidence gained by an illegal search or seizure by failing to move to suppress the evidence at trial – has roots in early Washington State Supreme Court cases. Even before RAP 2.5 was published

in 1976, case law barred defendants from raising a search and seizure claim for the first time on appeal.

Millan, 151 Wn. App. at 499 (internal footnote omitted).²

Regardless of how this Court resolves the issue of waiver where a suppression issue is raised for the first time *on direct appeal*, there are additional considerations when such an issue is raised *in a personal restraint petition* without ever having been litigated in the trial court. In addressing the limits of collateral attack, this Court has long emphasized the "significant costs" of collateral relief as well as the central importance of finality: "**Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.**" In re Personal Restraint of Hagler, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). While this statement is quoted so often that it risks losing impact, its very repetition in case after case highlights the importance that this Court continues to place on these principles. E.g., In re Personal Restraint of Hews, 99 Wn.2d 80, 86, 660 P.2d 263 (1983); In re Personal Restraint of Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990); In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 329, 823 P.2d 492 (1992); In re Personal Restraint of Davis, 152 Wn.2d 647, 670, 101 P.3d 1 (2004).

² This Court has accepted review in Millan (No. 83613-2).

It is hard to imagine a procedure that more effectively contradicts *all* of these principles than one that allows a criminal defendant to raise a suppression issue in a personal restraint petition where the trial court was never given an opportunity to rule on that issue. That such a procedure "undermines the principles of finality of litigation" is self-evident – it allows a petitioner to *begin* litigating, perhaps years after the events in question, an issue that should have been resolved prior to trial. And allowing a petitioner to raise a suppression issue on collateral attack when he never raised it at trial inarguably "degrades the prominence of the trial." Finally, allowing a personal restraint petitioner to challenge the admission of relevant evidence that he never challenged at trial risks costing society the right to punish an offender whose guilt can no longer be questioned.

This last concern goes directly to the truth-finding function of the trial. Almost 30 years ago, Justice Utter pointed out the importance of distinguishing, in a personal restraint petition, those errors that impact the truth of a conviction from those that do not:

Where a constitutional error goes to *the truth-finding function of the jury* we must provide collateral relief where the error might have affected the result in a criminal procedure. Our concerns for finality of judgments simply have no force where a person *who might be innocent* is the subject of such finality.

In re Hagler, 97 Wn.2d at 830 (Utter, J., concurring) (italics added).³ See also In re Rountree, 35 Wn. App. at 559 (emphasizing disproportionate cost to society where error raised on collateral attack does not go to truth-finding function of courts).

A successful motion to suppress the fruits of the search of registration information for room 56 would not change the fact that Nichols had illegal drugs and marked buy money in his pockets. The suppression issue has nothing to do with the "truth-finding" function, and relief is not justified on collateral attack where the issue was never raised in the trial court.

In holding that Nichols could not raise his suppression issue for the first time in this petition, the Court of Appeals relied in part on the reasoning in Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). In Powell, the United States Supreme Court found that, at the significant remove of collateral attack, the benefit a defendant gains by excluding relevant, trustworthy evidence could not outweigh the significant cost to the public of excluding that evidence. 428 U.S. at 490. While Nichols dismisses Powell as irrelevant because it is based on the Fourth Amendment (MDR at 4), the cost to the public of excluding

³ This quotation preceded the enactment of the one-year time bar for collateral attacks in RCW 10.73.090 (1989) The concerns expressed nevertheless remain relevant.

relevant, trustworthy evidence is significant even when the privacy concerns implicated by article I, section 7 are considered.

Nichols also contends that the Court of Appeals misread In re Hews, *supra*. MDR at 4-5. Rejecting Nichols' reliance on Hews, the Court of Appeals observed: "*Hews* holds that an issue can be raised in a personal restraint petition even if it was not raised on direct appeal . . . But Nichols' problem is not his failure to raise the suppression issue in his direct appeal. It is his failure to move to suppress at trial." In re Nichols, 151 Wn. App. at 270. Nichols argues that Hews also failed to raise the issue at trial and that, because the court there found no procedural bar to raising the issue on collateral attack, Hews "mandates" consideration of his suppression issue on the merits in this petition. MDR at 5.

It is not entirely clear from the opinion whether the petitioner in Hews challenged the voluntariness of his guilty plea at trial. The Court of Appeals noted that the personal restraint petition "*appears* to have been the first challenge of the guilty plea." Hews, 99 Wn.2d at 85 (italics added). The court was not so equivocal as to whether Hews raised the issue on appeal: "*Without question*, Hews failed to appeal the issues now raised in his Personal Restraint Petition." Id. (italics added).

The Hews court's singular focus on the failure to raise the issue *on appeal* is crystal clear. The court framed the question before it as "the

issue of whether we will consider a personal restraint petition in which the petitioner *can* show he was prejudiced by an error of constitutional dimensions *which was not raised on appeal.*" Hews, at 87 (second italics added). The court held that "the failure to raise a constitutional issue for the first time *on appeal* is no longer a reason for automatic rejection of a Personal Restraint Petition." Id. (italics added). Hews does not "mandate" consideration of Nichols' suppression claim on its merits in this petition.

Any reliance on In re Personal Restraint of Taylor, 105 Wn.2d 683, 717 P.2d 755 (1986),⁴ is similarly misplaced. Taylor moved in the trial court to suppress evidence found in his car, and challenged the search on direct appeal. 105 Wn.2d at 685-86. The initial question for the court on collateral attack was whether Taylor was prohibited from raising the suppression issue in his personal restraint petition where the *same challenge* had already been rejected on direct appeal. Id. at 686. The court held that, under certain circumstances, a challenge raised on appeal could be renewed on collateral attack. Id. at 688.

The weight of authority, logic and policy supports precluding a personal restraint petitioner from raising a suppression motion for the very first time in a collateral attack. This Court should reject Nichols' belated

⁴ See In re Nichols, 151 Wn. App. at 270-71.

attempt to suppress the evidence obtained from a search of his motel registration information.

2. NICHOLS' ATTORNEYS WERE NOT INEFFECTIVE IN FAILING TO CHALLENGE THE SEARCH OF THE REGISTRATION INFORMATION FOR ROOM 56.

Nichols argues that his attorneys, both at trial and on direct appeal, were constitutionally ineffective in failing to challenge the search of his motel registration information. MDR at 7-10. These claims should be rejected under the circumstances of this case.

In order to demonstrate ineffective assistance of counsel, the defendant bears the burden to show that: (1) counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant, in that there is a reasonable probability that but for counsel's errors, the outcome would have been different. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (citing Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). If either part of the test is not satisfied, the inquiry need go no further. Hendrickson, 129 Wn.2d at 78.

The reviewing court should begin with the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. In assessing performance, the court must make every effort to eliminate the distorting

effects of hindsight. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). "There are countless ways to provide effective assistance in any given case." Strickland, 466 U.S. at 689. Where a claimed error was part of a legitimate trial strategy or tactical decision, it does not constitute ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Nichols has failed to show that his trial attorney was deficient for not seeking suppression of the drugs based on Sergeant Caylor's viewing the motel registration information for room 56. There was no appellate decision at the time of trial or appeal holding that police could not conduct even random, suspicionless searches of motel registries.⁵ Nichols' counsel had no obligation to move to suppress evidence based on a search of a motel registry when no published decision in Washington supported this argument. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) (not ineffective for counsel to rely on pattern jury instruction where no published case had questioned it). Counsel cannot be found

⁵ The trial court's Findings of Fact and Conclusions of Law denying Nichols' motion to suppress were signed on January 23, 2005. Appendix A. On February 23, 2005, the Court of Appeals held that a random, suspicionless search does *not* violate a defendant's article I, section 7 rights. State v. Jorden, 126 Wn. App. 70, 74, 107 P.3d 130 (2005). Nichols filed his brief on direct appeal on October 10, 2005. It was not until April 26, 2007 that this Court held that random, suspicionless searches violate a defendant's article I, section 7 rights. State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007). Federal authority holds that random, suspicionless searches of a motel's guest registry do *not* violate a defendant's rights under the Fourth Amendment. United States v. Cormier, 220 F.3d 1103, 1108 (9th Cir. 2000).

constitutionally ineffective for failing to break new ground under article I, section 7.⁶

Furthermore, Nichols' trial counsel moved to suppress the evidence on different grounds based on a recent (at the time) case, suggesting that counsel was well-prepared and understood the current law. See Nichols, 161 Wn.2d at 14-15 (counsel was not ineffective for not bringing suppression motion, in part because counsel moved to suppress evidence on different grounds). Cf. State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) (finding trial counsel ineffective where counsel raised *no challenge* to the seizure of the drugs); State v. Meckelson, 133 Wn. App. 431, 135 P.3d 991 (2006) (defense counsel "misapprehended" the legal principles governing pretextual stops). The Court of Appeals correctly summed up trial counsel's performance:

Applying the demanding standard of *Strickland*, we cannot conclude that trial counsel for Nichols fell below reasonable professional norms by failing to break new ground under article I, § 7. There is no indication that counsel was unprepared or thoughtless. Indeed, trial counsel's use of *Moore* to argue that the police lacked

⁶ Nichols' reliance on State v. Kylo, 166 Wn.2d 856, 215 P.3d 177 (2009) (MDR at 9-10) is inapposite. In Kylo, there were several published cases questioning the language of the "act on appearances" self-defense instruction in other situations. 166 Wn.2d at 866-69.

probable cause to arrest Nichols shows skill in developing a new argument suggested by a recent appellate decision.

In re Nichols, 151 Wn. App. at 274.

Nor was appellate counsel constitutionally ineffective. This Court's decision in Jorden, on which counsel might have relied, was not issued until 18 months after counsel filed the brief on appeal. See fn 6, supra. And in any event, as pointed out above, the record at trial was not sufficient for review on this basis.

3. THIS COURT SHOULD HOLD THAT POLICE MAY SEARCH A MOTEL REGISTRY BASED ON PARTICULARIZED AND INDIVIDUALIZED SUSPICION.

In Jorden, this Court was faced with a random, suspicionless check of a motel registry – essentially a "fishing expedition" to check for warrants. Jorden should not control the outcome here, where the police asked to see the registration information for the specific room from which they knew that drugs had been sold only hours before.

This Court recognized this distinction in Jorden. Throughout its opinion, this Court repeatedly emphasized the random nature of the motel registry search in that case. Jorden, 160 Wn.2d at 123 (agreeing that "random check" of motel registry violated privacy rights under article I, section 7 of the Washington State Constitution); at 124 (guests not told of possibility for "random, suspicionless searches" of motel registry); at 125

(Jordan argued that "random registry check" violated state constitutional protections); at 127 (court has consistently expressed displeasure with "random and suspicionless searches"); at 129 (most important inquiry is whether "random and suspicionless search" of guest registry reveals intimate details; information gleaned from "random, suspicionless searches" of guest registry may provide intimate details about activities and associations); at 130 (a "random, suspicionless search" is a fishing expedition, which court has disapproved in the past; "random, suspicionless registry checks" are only a part of the Lakewood program).

At the same time, the Court indicated repeatedly that it would view searches conducted on the basis of "particularized and individualized suspicion" in a different light. Jorden, 160 Wn.2d at 124 (pointing out that program encourages random searches of motel registry "without individualized or particularized suspicion"); at 127-28 (in cases cited by State, police had a "particularized and individualized suspicion" about the suspect that preceded review of the registry); 130 (court hesitates to allow the search without at least an "individualized or particularized suspicion" about search subject).

In summing up its conclusions and its holding, this Court maintained the distinction: "Consequently, we hold that the practice of checking the names in a motel registry for outstanding warrants *without*

individualized or particularized suspicion violated the defendant's article I, section 7 rights." Jorden, at 130 (italics added). "Absent a valid exception to the prohibition against warrantless searches, *random* viewing of a motel registry violates article I, section 7 of the Washington State Constitution." Id. at 131 (italics added).

This Court did not simply mention these concerns in passing, but weighed them against a recognized need for law enforcement in this area:

We are not insensitive to the difficulties facing law enforcement in ensuring our motels and hotels remain relatively crime-free, but as a practical matter, our holding does not unduly restrict the investigative powers of the police. Random, suspicionless registry checks are but one part of the Lakewood Crime-Free Hotel Motel Program. Law enforcement may continue to randomly run checks of the license plates of cars parked at the motels, provide training to motel owners, and encourage motel owners to be watchful of *behavior evincing criminal activity*. *Reports of such observations may engender the requisite individualized suspicion that is notably missing from current program techniques.*

Jorden, 160 Wn.2d at 13-31 (italics added).

Nichols nevertheless insists that this Court's repeated statements distinguishing random, suspicionless searches of motel registries from those based on particularized and individualized suspicion are nothing more than dicta. Petitioner's Reply to State's Answer to Motion for Discretionary Review at 4. More than one court has recognized that statements such as those quoted above are authoritative. See, e.g., Jones v.

St. Paul Cos, 495 F.3d 888, 893 (8th Cir. 2007); People v. Higuera, 625 N.W.2d 444, 449 (Mich. Ct. App. 2001); Robinson v. Ariyoshi, 658 P.2d 287, 298 (Haw. 1982).

In any event, the words are this Court's own, and the Court may give them such weight as it sees fit. The State urges the Court to take this opportunity to clarify that, when police are allowed to view the motel registry information of a specific guest based on individualized and particularized suspicion that the guest is engaging in criminal activity, the Washington Constitution is not offended.

4. STATE V. JORDEN IS RETROACTIVE TO THIS CASE.

After finding that Nichols had waived his suppression issue by failing to litigate it in the trial court, the Court of Appeals questioned whether Jorden applied retroactively to this case. This Court directed the parties to address the retroactivity issue.

In raising the issue, the Court of Appeals observed that, even if Nichols had moved at trial to suppress the drugs based on Sergeant Caylor's viewing of the motel registry information for room 56, "he still would be required under *Taylor* to show that *Jorden* should be applied retroactively." In re Nichols, 151 Wn. App. at 272. The problem with this conclusion is that the retroactivity analysis employed in In re Personal

Restraint of Taylor, 105 Wn.2d 683, 717 P.2d 755 (1986), has been superseded by subsequent case law from the United States Supreme Court.

In Taylor, the court declined to apply the rule announced in State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983), to Taylor's collateral attack. In so doing, the court applied a three-part test that considered the purpose of the new rule, the reliance by law enforcement on the old standards, and the effect that retroactive application would have on the administration of justice. In re Taylor, 105 Wn.2d at 690-92. This test originated in the United States Supreme Court. See Linkletter v. Walker, 381 U.S. 618, 636, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965); Stovall v. Denno, 388 U.S. 293, 297, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967).

The Supreme Court subsequently "rethought" its retroactivity analysis. Griffith v. Kentucky, 479 U.S. 314, 321, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (citing United States v. Johnson, 457 U.S. 537, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982)). Noting its previous reliance on the aforementioned three-part test, the Court concluded that "the retroactivity analysis for convictions that have become final must be different from the analysis for convictions that *are not final at the time the new decision is issued.*" Griffith, 479 U.S. at 320-22 (italics added). The Court held that new rules for the conduct of criminal prosecutions would

apply retroactively to all cases that were, like Griffith's, not yet final. Id. at 328.

Two years later, in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), the Court took on the task of clarifying retroactivity for purposes of collateral review. Again the Court rejected the three-part test, noting that it had led to inconsistent results. Id. at 302-03. The Court set the standard that applies to this day, announcing that new constitutional rules of criminal procedure would not generally be applied to cases "which have become final *before the new rules are announced.*" Id. at 310 (italics added). Washington courts have consistently followed this federal retroactivity analysis. In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 324, 823 P.2d 492 (1992); State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005).

"Final" for retroactivity purposes means a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or such a petition finally denied. Griffith, 479 U.S. at 321 n.6; In re St. Pierre, 118 Wn.2d at 327. This Court's decision in Jorden was announced on

April 26, 2007. The mandate did not issue on Nichols' direct appeal until January 11, 2008. Appendix C. Thus, the rule announced in Jorden applies retroactively to Nichols' case.

This does not end the inquiry, however. The Supreme Court has made clear that, in determining whether a defendant can get relief under a retroactive rule, it "expect[s] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below" United States v. Booker, 543 U.S. 220, 268, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). Nichols did not raise his suppression issue in the trial court. Thus, he cannot get relief under the new rule announced in Jorden.

D. CONCLUSION

For all the foregoing reasons, this Court should affirm the Court of Appeals' holding that a suppression issue may not be raised for the first time in a personal restraint petition, without ever having been litigated in the trial court. This Court should also clarify that a search of motel registration information for a specific room, based on particularized and

individualized suspicion that the occupant of that room is engaged in criminal activity, does not offend the Washington Constitution.

DATED this 12th day of May, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

FILED

2005 JAN 27 AM 11:24

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

ORIGINAL

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

GLENN GARY NICHOLS,

Defendant,

No. 04-1-01099-0 SEA

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

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

1. THE FINDINGS OF FACT:

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

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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

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

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

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

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

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

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

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

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

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 4

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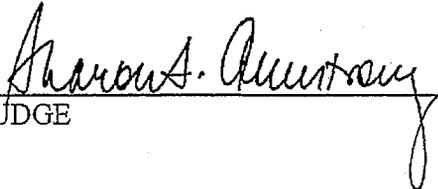
1 so obviously and flagrantly unconstitutional that it could not serve as a valid basis for
2 arrest. Based on the information the officers had at the time of the defendant's arrest they
3 had probable cause to believe that he was driving in violation of R.C.W. 46.20.289

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

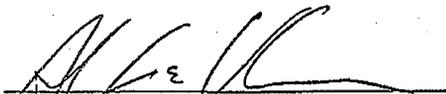
8 d. The defendant's motion to suppress evidence, to wit: the rock cocaine and money
9 recovered from his person is denied.

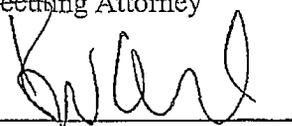
10
11 In addition to the above written findings and conclusions, the court incorporates by
12 reference its oral findings and conclusions.

13 Signed this 23rd day of January, 2005.

14
15 
16 JUDGE

17 Presented by:

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

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

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 5

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APPENDIX B

FILED

2005 JAN 27 AM 11:24

ORIGINAL KING COUNTY SUPERIOR COURT CLERK SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

GLENN GARY NICHOLS,

Defendant,

No. 04-1-01099-0 SEA

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

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

FINDINGS OF FACT

I.

The following events took place within King County, Washington:

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

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 2

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 3

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

- 3 k. The defendant immediately became uncooperative and started to try to re-enter his car.
4 Officer Nelson and Sgt. Caylor, fearing he might be trying to obtain a weapon or trying to
5 flee, grabbed him, told him to stop resisting, and informed him he was under arrest.
- 6 l. After gaining control of the defendant and placing him in handcuffs, Officer Nelson
7 searched him incident to arrest and found a plastic baggie containing approximately 15
8 small rocks of suspected crack cocaine and another baggie containing suspected
9 marijuana. Both items were found in the defendant's right front jacket pocket.
- 10 m. Sgt. Caylor also participated in the search of the defendant and found one small and one
11 large baggie of cocaine in the defendant's inside coat pocket, and also found \$460 in
12 cash, \$10 of which was later found to be pre-recorded buy money that had been given to
13 Charles Ream for the controlled buy from Ms. Aivalu earlier that day.
- 14 n. The court finds that Ms. Aivalu purchased narcotics from the defendant in room 56 of
15 the Travel Lodge Motel at approximately 2:00 p.m. The travel time between the motel
16 and the Mental Health Clinic that the defendant put forward as a partial alibi for the time
17 of the sale of the drugs does not preclude his involvement in the transaction.
- 18 o. The amount of narcotics and money found together on the defendant and absent any
19 paraphernalia is consistent with Possession With Intent to Deliver a Controlled
20 Substance.
- 21 p. The testimony of the defendant and his girlfriend that at the end of the month they had
22 \$460.00 of their combined \$875.00 in welfare money that was received on the first of the
23 month is not credible.

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

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- 1 q. The defendant's contention that Sergeant Caylor and Officer Nelson planted the drugs
2 and controlled buy money on him is likewise not credible.
- 3 r. The court finds the testimony of Sergeant Caylor, Detective Gonzalez and Officer Nelson
4 to be credible.

5
6 II.

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

8 CONCLUSIONS OF LAW

9 I.

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

12 II.

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

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

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

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

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

25 III.

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

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

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IV.

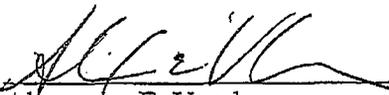
Judgment should be entered in accordance with Conclusion of Law III.

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



JUDGE

Presented by:



Alexandra E. Voorhees
WSBA # 31915
Deputy Prosecuting Attorney

Defendant


Byron Ward
WSBA # 2339
Attorney for Defendant

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

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APPENDIX C

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

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

No. 55976-1-1

MANDATE
King
County

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

FILED
KING COUNTY, WASHINGTON
JAN 24 2008
SUPERIOR COURT CLERK

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

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

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

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

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

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



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

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

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

FACTS

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

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

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

MOTION ON THE MERITS CRITERIA

RAP 18.14(e)(1) provides:

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

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

DECISION

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

¹ This case was stayed pending a decision in Surge.

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

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

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

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

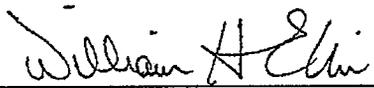
Nichols finally faults the prosecutor for making argumentative statements not supported by the record. It appears that the complained of statements, attacking the credibility of Nichols' witnesses and suggesting that Nichols was seen making a drug delivery, were made at sentencing, not at the trial.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

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Now, therefore, it is hereby

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

Done this 17th day of August, 2007.



Court Commissioner

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2007 AUG -7 PM 4:15

APPENDIX D

CASE EVENTS # 597507

Date	Item	Action	Participant
03/04/2010	Disposed	Status Changed	
03/04/2010	Discret Review to SC Granted <i>Comment: ent 3/3/10</i>	Received by Court	SUPREME COURT
02/17/2010	Other <i>Comment: order continuing hearing to 3/2/10 ent 2/9/10</i>	Received by Court	SUPREME COURT
10/19/2009	Letter <i>Comment: SC# 83742-2</i>	Received by Court	SUPREME COURT
10/19/2009	Letter <i>Comment: ack of files</i>	Received by Court	
10/12/2009	Court of Appeals case file (pouch) <i>Comment: to sc 2 coa</i>	Sent by Court	
10/09/2009	Notice of Discret Review to Supreme Crt	Filed	SILVERSTEIN, LILA JANE
09/11/2009	Order on Motions <i>Comment: ORDERED that the Motion for Reconsideration is denied.</i>	Filed	BECKER, MARY KAY
09/08/2009	Notice of Intent to Withdraw Service Date: 2009-09-08 <i>Comment: James M. Whisman withdraws as counsel for respondent</i>	Filed	WHISMAN, JAMES MORRISSEY
08/24/2009	Notice of Appearance Service Date: 2009-08-24 <i>Comment: J. Whisman subs for Daniel Kalish and appears for respondent</i>	Filed	WHISMAN, JAMES MORRISSEY
08/10/2009	Motion for Reconsideration Service Date: 2009-08-10 Hearing Location: None Motion Status: Decision filed <i>Comment: circulated to the panel August 12, 2009</i>	Filed	SILVERSTEIN, LILA JANE
07/20/2009	Decision Filed	Status Changed	
07/20/2009	Opinion Pages: 15 Publishing Status: Published Publishing Decision: Denied Opinion Type: Majority	Filed	BECKER, MARY KAY

	Opinion Number: 2009-05077 JUDGE: Becker Mary Kay ROLE: Authoring JUDGE: Cox Ronald ROLE: Concurring JUDGE: Ellington Anne ROLE: Concurring <i>Comment: Petition denied.</i>		
07/20/2009	Trial Court Action <i>Comment: Petition denied.</i>	Not Required	BECKER, MARY KAY
06/10/2009	Heard and awaiting decision	Status Changed	
06/10/2009	Oral Argument Hearing <i>Comment: 9:30 AM (Resheduled) Becker, Mary Kay. Cox, Ronald Ellington, Anne</i>	Rescheduled	
04/23/2009	Set on a calendar	Status Changed	
04/23/2009	Oral Argument Setting Letter	Sent by Court	
03/16/2009	Screened	Status Changed	
03/09/2009	Appellants Reply brief Service Date: 2009-03-09 <i>Comment: *2/17/09* mot to ext time filed 2/17/09 to printer 3/10/09</i>	Filed	SILVERSTEIN, LILA JANE
02/26/2009	Ruling on Motions <i>Comment: Granted. However, no further extensions.</i>	Filed	JOHNSON, RICHARD D
02/17/2009	Motion to Extend Time to File Service Date: 2009-02-17 Motion Status: Decision filed <i>Comment: to 3/10/09</i>	Filed	SILVERSTEIN, LILA JANE
02/06/2009	Report of Proceedings <i>Comment: transcripts transferred from 55976-1 to 59750-7 6 vols.</i>	Filed	
02/06/2009	Ruling on Motions <i>Comment: Granted.</i>	Filed	JOHNSON, RICHARD D
01/20/2009	Ruling on Motions <i>Comment: Granted.</i>	Filed	JOHNSON, RICHARD D
01/15/2009	Ready <i>Comment: to rj for screening 3/6/09</i>	Status Changed	
01/15/2009	Motion - Other	Filed	DWYER,

	Service Date: 2009-01-15 Motion Status: Decision filed <i>Comment: Motion to transfer vrps from 55976-1 to 59750-7</i>		DEBORAH A.
01/15/2009	Notice of Appearance Service Date: 2009-01-15	Filed	DWYER, DEBORAH A.
01/15/2009	Respondents brief Service Date: 2009-01-15 <i>Comment: due 60 days after app. brief filed mot to ext time filed 12/5/08, ext req to 1/8/09 to printer 1/15/09</i>	Filed	DWYER, DEBORAH A.
01/06/2009	Motion to Extend Time to File Service Date: 2009-01-06 Motion Status: Decision filed <i>Comment: to 1/15</i>	Filed	King County Prosecutor's Office - State of Washington
01/06/2009	Notice of Appearance Service Date: 2009-01-06	Filed	KALISH, DANIEL
12/16/2008	Motion - Other Service Date: 2009-12-16 Hearing Location: None Motion Status: No Action Necessary <i>Comment: "MOTION IN OBJECTION TO STATE'S MOTION FOR EXTENSION OF TIME" FILED BY PETITIONER</i>	Filed	Nichols, Glenn Gary
12/09/2008	Ruling on Motions <i>Comment: Granted. However, no further extensions.</i>	Filed	JOHNSON, RICHARD D
12/05/2008	Motion to Extend Time to File Service Date: 2008-12-05 Motion Status: Decision filed <i>Comment: ext to 1/8/09</i>	Filed	SUMMERS, ANN MARIE
10/10/2008	Appellants brief Service Date: 2008-10-10 <i>Comment: *6/12/08* NBK removed as counsel 8/6/08, WAP is appointed. to printer 10/10/08</i>	Filed	SILVERSTEIN, LILA JANE
09/23/2008	Ruling on Motions <i>Comment: Granted. However, no further extensions should be anticipated.</i>	Filed	JOHNSON, RICHARD D
09/19/2008	Motion to Extend Time to File Service Date: 2008-09-19 Motion Status: Decision filed <i>Comment: ext to 10/22/08</i>	Filed	SILVERSTEIN, LILA JANE
09/19/2008	Notice of Substitution of Counsel Service Date: 2008-09-19	Filed	SILVERSTEIN, LILA JANE
08/06/2008	Other Ruling	Filed	JOHNSON, RICHARD D

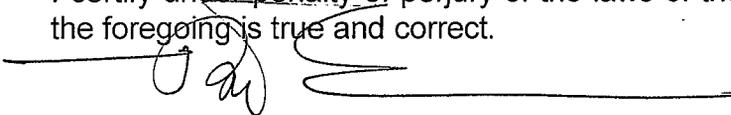
	<i>Comment: Nielsen Broman and Koch are removed as assigned appellate counsel and Washington Appellate Project is appointed.</i>		
07/21/2008	Other <i>Comment: requesting new counsel</i>	Filed	Nichols, Glenn Gary
07/15/2008	Letter <i>Comment: re: counsel</i>	Filed	Nichols, Glenn Gary
07/07/2008	Letter Service Date: 2008-07-07 <i>Comment: conflict letter</i>	Filed	BROMAN KOCH PLLC, NIELSEN
07/01/2008	Letter <i>Comment: regarding status of case and request for new counsel</i>	Filed	Nichols, Glenn Gary
06/11/2008	Letter <i>Comment: requesting new appt of counsel</i>	Filed	Nichols, Glenn Gary
05/06/2008	Letter <i>Comment: addressed to counsel</i>	Filed	Nichols, Glenn Gary
04/28/2008	Indigent Defense Counsel Assigned <i>Comment: copy of prp and resp/reply to nbk 4/28/08</i>	Filed	BROMAN KOCH PLLC, NIELSEN
04/28/2008	Passed to the Merits <i>Comment: ORDERED that Nielson Broman and Koch is appointed as counsel to petitioner with regard to the issues referenced herein; and it is further ORDERED that the clerk of this court shall set the briefing schedule, and upon completion of the briefing, shall determine whether the case shall receive oral argument and set the date for the hearing on the merits.</i>	Filed	DWYER, STEPHEN J
04/28/2008	Case Received and Pending	Status Changed	
04/18/2008	PRP Ready	Status Changed	
04/18/2008	Letter <i>Comment: submit for final</i>	Sent by Court	JOHNSON, RICHARD D
04/17/2008	Reply to Response to Prp Service Date: 2008-04-17 <i>Comment: To Printer 4/28/08</i>	Filed	Nichols, Glenn Gary
04/11/2008	Response to Personal Restraint Petition Service Date: 2008-04-11 <i>Comment: To Printer 4/28/08</i>	Filed	SUMMERS, ANN MARIE
02/14/2008	Notice of Appearance Service Date: 2008-02-14	Filed	SUMMERS, ANN MARIE

02/11/2008	Case Received and Pending	Status Changed	
02/11/2008	<p>Calling for Response</p> <p><i>Comment: NOTATION RULING PRP of Glenn Nichols No. 59750-7 February 11, 2008 This personal restraint petition filed by Glenn Nichols was stayed pending final resolution of his direct appeal in 55976-1-I, State v. Nichols. Because the mandate was issued in that case on January 18, 2008, the stay is lifted. The King County Prosecuting Attorney is directed to file by April 11, 2008 a response to the petition. The King County Prosecuting Attorney shall serve a copy on Mr. Nichols and file an affidavit of service in this court. Mr. Nichols shall file any reply by May 15, 2008. The petition will be submitted to the Acting Chief Judge for consideration under RAP 16.11(b) as soon as the reply is filed, or the time to file the reply expires. James Verellen Court Commissioner</i></p>	Filed	VERELLEN, JAMES
02/11/2008	Stay Lifted	Status Changed	
01/31/2008	<p>Check case Information</p> <p><i>Comment: mandate in No 55976-1</i></p>	Comment	
08/27/2007	<p>Ruling on Motions</p> <p><i>Comment: Once the mandate issues, currently scheduled for September 27, 2007, the stay shall be lifted.</i></p>	Filed	VERELLEN, JAMES
08/17/2007	<p>Motion - Other</p> <p>Motion Status: Decision filed <i>Comment: Motion to Lift Stay</i></p>	Filed	Nichols, Glenn Gary
04/16/2007	Stayed, Pending Case	Status Changed	
04/16/2007	<p>Order to stay</p> <p><i>Comment: ORDERED that consideration of Nichols' personal restraint petition is stayed pending issuance of the mandate in State v. Nichols, No. 55976-1.</i></p>	Filed	SCHINDLER, ANN
04/09/2007	Submitted	Status Changed	
04/09/2007	<p>Letter</p> <p><i>Comment: coa no and submit for prelim</i></p>	Sent by Court	JOHNSON, RICHARD D
03/29/2007	Case Received and Pending	Status Changed	
03/29/2007	<p>Personal Restraint Petition</p> <p><i>Comment: To Printer 4/28/08</i></p>	Filed	Nichols, Glenn Gary

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Lila J. Silverstein**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101-3647, containing a copy of the **Supplemental Brief of Respondent**, in **STATE V. GLENN G. NICHOLS**, Cause No. **83742-2-I**, in the Supreme Court of the State of Washington.

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



Name
Done in Seattle, Washington

05-12-10
Date