

Kurtis Monschke
Register No. 98258-011
US Penitentiary Allenwood
P.O. Box 3000
White Deer, PA 17887

Appearing Pro Se

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DIVISION II

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STATE OF WASHINGTON
BY JK
DEPUTY

**IN THE COURT OF APPEALS OF WASHINGTON
DIVISION II**

In Re The Personal Restraint Petition Of, KURTIS MONSCHKE, Petitioner.	No. 38365-9 PERSONAL RESTRAINT PETITION
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I. INTRODUCTION:

Mr. KURTIS MONSCHKE, Petitioner above-named, appearing Pro Se, brings this collateral action under RAP 16.1 et seq., to challenge his conviction for aggravated First Degree Murder and sentence of Life Without the Possibility of Parole entered in Pierce County Cause No. 03-1-01464-0.

II. STATUS OF PETITIONER:

Mr. Monschke is currently confined pursuant to the Judgment of Conviction at issue here. Pursuant to a decision by Washington State Department of Corrections Officials,

PERSONAL RESTRAINT PETITION - 1.

PETITIONER MAY FILE THE
PETITION WITHOUT PAYMENT OF
A FILING FEE

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10/3/08

Mr. Monschke was transferred to the custody of the United States Attorney General to be confined in a Federal Bureau of Prisons facility. He currently is incarcerated at the United States Penitentiary Allenwood, P.O. Box 3000, White Deer, PA 17887.¹

III. PRIOR COURT PROCEEDINGS:

A. PROCEEDINGS IN THE SUPERIOR COURT:

Mr. Monschke exercised his right to a jury trial. On June 1, 2004 a verdict of guilty was returned by a Pierce County jury.

On June 4, 2004 a Judgment Sentence and Warrant of Commitment was entered by the Honorable Lisa Worswick, Judge, Pierce County Superior Court. Mr. Monschke was sentenced to Life Without the Possibility of Parole.

Mr. Monschke was represented at trial and at sentencing by Attorney Mr. Erik L. Bouer, 215 Tacoma Ave South, Tacoma, WA 98402, 253-383-2000; and by Attorney Mr. Jay Berneburg, 602 South Yakima, Tacoma, WA 98405, 253-572-1500.

B. PROCEEDINGS ON APPEAL:

Notice of appeal was filed on June 4, 2004 seeking appeal to Division II of the Washington Court of Appeals. The appeal was docketed under No. 31847-4-II. This Court affirmed Mr. Monschke's conviction and sentence in all respects on June 1, 2006.

A Petition for Review was timely filed in the State Supreme Court and was assigned docket No. 78871-5. Review was denied on March 6, 2007. See Exhibit 1 (State Supreme Court's decision denying review).

¹ Mr. Monschke's confinement in a prison far away from home has resulted in his being denied complete and adequate access to the courts of Washington State. Accordingly, he intends to file a motion with this Court asking for appointment of counsel for this proceeding.

A timely Petition For Writ of Certiorari was filed in the US Supreme Court and was assigned Supreme Court Cause No. 06-11279. Certiorari was denied by the US Supreme Court on October 1, 2007. See Exhibit 2 (US Supreme Court's decision denying certiorari).

Counsel on direct appeal, on petition for review in the State Supreme Court, and on Petition For Writ of Certiorari in the US Supreme Court, was Rita J. Griffith, 4616 25th Avenue NE, No. 453, Seattle, WA 98105, 206-547-1742.

No other proceedings have been filed.

IV. TIMELINESS OF THE INSTANT PETITION:

The instant Personal Restraint Petition is timely because it has been filed within one year of denial of certiorari by the United States Supreme Court. See RCW 10.73.090 (3) (c).

V. FACTS SUPPORTING GROUNDS FOR RELIEF:

1. Procedural and trial facts:²

Four people -- David Pillatos, Scotty Butters, Tristain Frye and Petitioner Kurtis Monschke -- were implicated in an incident which resulted in the death of Randall Townsend. CP 6-9. The Pierce County Prosecutor's Office originally charged all four codefendants with the crime of aggravated first degree murder. CP 6-9. Pillatos, Butters and Frye made agreements with the state to enter pleas to non-aggravated murder, in Frye's case to second degree murder, in exchange for their testimony against Kurtis Monschke at

² Most of the following statement of facts were borrowed from the Opening Brief Of Appellant prepared by Ms. Rita J. Griffith, Attorney for Defendant on direct appeal. See State v. Monschke, No. 31847-4-II. Additions and modifications have been made.

his trial. RP 2098, 2164, 2327, 2399.³ Kurtis was convicted of aggravated murder by jury verdict after trial before the Honorable Lisa Worswick. CP 397-399.

On June 4, 2003, Judge Worswick sentenced nineteen-year-old Kurtis Monschke to a term of life without the possibility of parole. CP 404-414.

While Defendants Pillatos and Butters attempted to appear to be reluctant to expressly incriminate others, the contours of the underlying offense emerged from their testimony. RP 2079, 2109, 2184. Defendant Frye, who was willing to blame everyone else, confirmed their accounts in many particulars. What they all agreed on was that on March 23, 2003, they, along with Kurtis Monschke, were walking on the railroad tracks in a relatively inaccessible area under the freeway overpasses and bridges near the Tacoma Dome in Tacoma, Washington. RP 2038-2044, 2071, 2074, 2191. This was an area where people conducted drug transactions, where homeless people camped and where graffiti artists decorated the columns and supports for the highways and streets overhead. RP 886-891, 2038-2044.

Defendants Pillatos, Butters and Frye agreed that after they had tried unsuccessfully to meet up with a friend who worked at the Tacoma Dome, they decided to go into the area to look at some graffiti which Pillatos and Frye had spray painted there several days earlier. RP 2038, 2063-2065, 2069-2071, 2074, 2269-2272, 2333. Pillatos had purchased two T-ball bats earlier in the evening at the Fred Meyers store; used this opportunity to make a purchase so that he could receive cash back from a check that he used to purchase beer. Pillatos testified that the bats were for protection. RP 2060-2065, 2257. The four carried the bats with them.⁴ RP 2079.

³ Most of the verbatim report of proceedings is in consecutively-numbered volumes which are designated RP. Other volumes are designated by date. Mr. Monschke has asked this Court to direct the Superior Court to transmit back to this Court for this personal restraint petition the original record on appeal. That record would include a copy of the transcripts.

⁴ Tacoma Police Officer Jennifer Muller confirmed that the area into which the defendants traveled was dangerous when she testified that she would not have gone into the area alone or unarmed. RP 1041-1042.

Out of deference to privacy needs of their female companion, Pillatos, Butters and Kurtis walked on while Frye stopped to go to the bathroom. RP 2077, 2272-2273, 2334. At some point Pillatos and Butters turned back to meet up with Frye; Kurtis stayed and engaged in conversation with three teenage "taggers" or graffiti artists they met up with as they walked along the tracks. RP 2076-2077, 2276. When Pillatos and Butters found Frye, she was talking to Randall Townsend, a homeless man who suffered from paranoid schizophrenia. RP 868-870, 2078, 2279, 2336. After a brief exchange with Townsend, and for no explained reason, Butters took the bat he was carrying and broke it over Townsend's head. RP 2079, 2167, 2280, 2336. Townsend fell to the ground and never regained consciousness. RP 2080, 2345.

After the initial assault with the bat by Butters, Pillatos and Butters stood on either side of Townsend and kicked him with their steel-toed boots back and forth; the back and forth action likely was the ultimate cause of death; it was an injury from which Townsend could not recover. RP 2081-2083, 2198, 2281-2285, 2336-2337, 2508, 2532, 2535, 2537. Pillatos also picked up a 38-pound rock and crushed Townsend's face with it. RP 2083, 2339. Pillatos and Butters then carried Townsend to the railroad track and may have kicked him further there. RP 2339-2345. Kurtis was not present during the initial assault and had no idea what was going on.

After this assault on Townsend, Pillatos or Butters went and found Kurtis. RP 2086-2088, 2288, 2345. When they returned, accounts differ as to whether Kurtis used a bat to prod Townsend to see if he was still alive or actually hit him with at least some force with the bat. RP 2089-2090, 2167-2168, 2185, 2187, 2289, 2311-2313, 2320, 2348. Townsend was breathing when they left. RP 2203. Frye testified that Pillatos forced her to kick Townsend a number of times by covering her eyes and thrusting her towards Townsend. RP 2361-2362. Pillatos and Butters testified that Frye willingly joined in. RP 2086-2087.

Kurtis testified in his own behalf and explained that on March 23, 2003, he had received a call from his friend Autumn who worked at the Tacoma Dome. RP 2773. The

group planned to meet Autumn and to drink beer with Butters who was leaving the next day to visit in Canada. RP 2773. Pillatos stopped at Fred Meyers to make a purchase so that he could cash a check for \$20 extra for beer. RP 2773-2774. Pillatos, Butters and Kurtis had been in an altercation on the Hilltop in Tacoma a week earlier and had to retreat because there were so many attackers. RP 2060-2062, 2774-2776. When Pillatos bought the T-ball bats he said that would help even things out in a future fight. RP 2778. It was not uncommon for people Kurtis knew to have bats in their houses or cars for protection. 2845.

When they got to the Tacoma Dome, no one would page Autumn for them. RP 2781. They decided to go look at Pillatos' graffiti and took the bats and beer with them; the area where the graffiti was painted was dark and isolated. RP 2781. On the way, they met up with some taggers. RP 2785. Kurtis went with the taggers when Pillatos and Butters turned back to look for Frye. RP 2784. Kurtis showed the taggers his tattoos. RP 2786. After about a half an hour, Pillatos returned and told Kurtis that someone had "grabbed Frye's butt," and they had beaten him up. RP 2788. Soon Kurtis saw Frye and Butters yelling back and forth and a man lying across the railroad tracks. RP 2791. Butters told Kurtis that he had broken a bat over the man's head. RP 2792. Kurtis took a bat and prodded the man in his chest, shoulder and head to see if he would wake up. RP 2792-2793.

Kurtis was concerned because he had shown his tattoos to the taggers, whom he expected to return down the tracks and find the man on the tracks. RP 2793, 2877. The man was breathing and no one told him that Pillatos had smashed a rock over his head or that Pillatos and Butters had kicked him. RP 2795. Out of this same concern that he would be implicated in the assault of Townsend, Kurtis put some of the clothing and boots people had been wearing into a bag and, with Pillatos, took them and burned them. RP 2798-2801.

Clothes taken from Pillatos, Frye, and Butters which were not burned had blood spatter and blood smears on them; DNA analysis confirmed that the blood was Townsend's.

RP 1459-1461, 1470-1481, 1485, 1493-1494. *The boots Kurtis had worn had no blood on them.* RP 1482.⁵

Two homeless people, Cindy Pitman and Terry Hawkins, who camped in the area under the overpass, saw part of the assault, although neither realized that they were witnessing an assault until they found Townsend and called for help.⁶ RP 1073-1075, 1078, 1187, 1190, 1207. Earlier in the evening, Pitman and Hawkins left their camp and went to the store to purchase cigarettes; on their return they saw people under the bridge. RP 1077-1078, 1207. Pitman saw three people who were "whooping and hollering" and kicking and beating at the tracks. RP 1078. She stopped and went to the portable restroom. RP 1078.

When the noise stopped, Pitman and Hawkins walked around so they could pretend they had just come into the area. RP 1078. They passed four people coming up from the tracks as they were going down. RP 1078. Pitman said she had seen three figures under the bridge, but four people appeared coming up from under the bridge. RP 1080, 1321. Pitman had also had nightmares in which she saw two men on each side of the body and the female in front bashing Townsend's head with a rock. RP 1081. She was confused about what she saw in her nightmare and what was reality. RP 1156. The night of the incident, Pitman told the police she saw three people beating with sticks and first saw the female as she passed on the path. RP 1088-1089. She testified at trial, however, that she could not distinguish between male and female under the conditions and that it had been hard for her to believe that a female would be involved. RP 1080, 1159-1160.

Pitman told defense counsel that she saw a female lift a large rock and throw it on the victim. RP 1157. In her taped statement during the defense interview, she said that she

⁵ Police discovered the boots because Kurtis had been wearing Butters' new boots, and Butters was unwilling to burn them. RP 2095, 2293-2294, 2458, 2797.

⁶ At trial, the state presented testimony of the police and fire fighters who responded to the scene, gave aid to Townsend and transported him to the hospital as well as the testimony of the police officers who secured the scene and collected evidence there. See, e.g., RP 892-907, 968-981, 982-998, 1007-1010, 1022-1055, 1056-1064, 1361-1362, 1363-1368, 1400-1525. The state also presented evidence of the four at Fred Meyers. RP 1861-1874.

saw two males and a female beating the tracks. RP 1158. She also said that one person, Kurtis Monschke, was not participating. RP 1170. Pretrial Pitman confirmed her initial statements to defense counsel when she told the court that she had been upset that Frye got a plea bargain because Frye was the person who had thrown the rock on the victim. RP 689. Pitman also expressed concern pretrial that Kurtis was the only one going to trial when she doubted that he had the same involvement as the others.⁷ RP 690.

Hawkins saw more than one male and a female, yelling and beating and kicking. RP 1210-1212. Hawkins saw one man on either side of a man lying on the track, a female by the man's head. RP 1214. The three were kicking and swinging. RP 1214. A fourth person was behind them. RP 1214. Hawkins believed that Kurtis was the last person to walk past him on the path and that Kurtis was the person who stayed behind the other three who were actively kicking and hitting. RP 1233.

Prosecutors knew all along that Mr. Monschke's participation in this horrendous attack was very limited. Indeed, since the dust has cleared from the trial and sentencing of Mr. Monschke, and after the appeals of three of the four defendants, Kurtis Monschke, David Pillatos, and Scotty Butters were finalized, prosecutors *then* candidly acknowledged that Mr. Monschke was less culpable than the other defendants yet he received a longer sentence:

“We [Prosecutors Jerry Costello and Greg Greer] think these guys [David Pillatos and Scotty Butters] did more than Monschke did.”

See Exhibit 3, attached hereto. (Tacoma News Tribune, Wednesday, September 8, 2004, Section B, pp. 1-2, 4).

⁷ Pitman and Hawkins had been picked up on material witness warrants and had spent a day or two in jail before being released and ordered to report twice a week to Detective Ringer. RP 687. Pitman expressed her opinion pretrial that she felt like a victim and that she was being badgered by the state. RP 687.

Despite the fact that Mr. Monschke's culpability was known to all but the jury to be far less than the other defendants, prosecutors pursued lines of questioning of witnesses directed at calling into question their honest testimony that Mr. Monschke did not participate in the initial assault as did Pillatos, Butters, and Frye. For example, prosecutor Greg Greer implied that defense counsel was engaged in witness tampering and soliciting perjury when he asked Hawkins if someone was trying to get him to help Kurtis and whether he recalled saying that he was concerned that defense counsel and the defense investigators were trying to get him to say something that wasn't true. Hawkins insisted that, although Kurtis's attorneys believed their client was innocent, defense counsel told him to tell the truth about what he saw and not to lie. RP 1228-1229.

On cross examination, Hawkins reiterated that he had seen *three* people swinging sticks and kicking and the female doing what the two men were doing. RP 1266, 1268, 1273. He reiterated that the fourth, Mr. Monschke, was behind the others and that he did not see Mr. Monschke move. RP 1269, 1271. ⁸

Prosecutors' actions were a concern to Mr. Hawkins who wanted to avoid being placed in jail again. At trial Mr. Hawkins revealed that he had previously been picked up on a material witness warrant and placed in jail. RP 1275-1276. After his release he was subsequently picked up by detective Ringer, brought to the prosecutor's office where he was given a copy of his statement to Defense counsel, and was directed to underline portions that were incorrect. RP 1272; 1233, 1280-1281.

Mr. Hawkins was tired the morning he was brought to the prosecutor's office because he had spent the night in the hospital with his friend Cindy Pitman, who was hospitalized for surgery. RP 1278-1279. ⁹ He went to the prosecutor's office reluctantly and out of fear of being arrested again. RP 1278-1280. Although Mr. Hawkins had

⁸ Mr. Townsend died in the hospital several weeks after the assault on him. RP 873-874.

⁹ Ms. Pitman was, of course, the other eye-witness to the murder of Mr. Townsend. RP 1073-1075, 1078, 1187, 1190, 1207.

underlined three things that morning at the prosecutor's office in response to a directive to do so for those things he was unsure about, at trial he explained that he did so only because he was unsure about distances and not because he was being coerced into fabricating favorable testimony for Mr. Monschke; he reaffirmed his prior statements to defense counsel. RP 1233-1239, 1271-1274.

All of these events regarding pre-trial and trial statements and their accuracy were colored by the concerns of both Mr. Hawkins and Ms. Pitman that they could be arrested when they had not done anything wrong. RP 11276-1277.

Defense counsel moved for a mistrial after the prosecutor's accusation that they had tampered with a witness, but the trial court denied the motion. RP 1257.

The prosecution team also knew that co-defendants Pillatos and Frye were in contact and were fabricating a story to exonerate Ms. Frye and create a defense for Pillatos. The two intended—and ultimately did—get plea bargains in exchange for their testimony against Kurtis Monschke. See Declaration of Barbara Corey (former Pierce County Prosecutor).¹⁰

Moreover, the plea agreement offered to Ms. Frye was over the objections of at least one prosecutor who believed Frye had participated in the murder to an extent far more horrendous than was being admitted by her. *Id.* The reason the plea agreement was offered was because Pierce County Prosecutor Horne liked Ms. Frye's attorney. *Id.*

Because Kurtis belonged to a professed non-violent white pride organization called Volksfront and had literature, tattoos, clothing, flags and symbols associated with white supremacist ideology, the state charged him with aggravated murder based on the aggravating factor that "the defendant committed the murder to obtain or maintain his membership or to advance his position in the hierarchy of an organization, association, or identifiable group."¹¹ CP 6-9.

¹⁰ Mr. Pillatos's sentence was 361 months. Ms. Frye's term was 165 months. Kurtis Monschke got Life Without the Possibility of Parole.

¹¹ Prior to trial, the prosecution filed "State's Statement of Clarification Regarding the Qualifying 'Organization' or 'Identifiable Group' under RCW 10.95.020(6)," indicating that "because white supremacy is not simply a political movement, but also a subculture . . . the movement is far more coherent than one would

In order to establish a violation of RCW 10.95.020(6) the prosecution put on expert testimony from several witnesses. One of these witnesses was Dr. Mark Pitcavage of the Anti-Defamation League. Dr. Pitcavage described the ADL as a civil rights organization founded to combat hatred and bigotry and to protect the rights of all people. RP 1583-1684. He testified that he was the director of fact-finding and that he had studied white supremacy and monitored the activities of extremist groups. RP 1584-1585.

Pitcavage testified to a reasonable certainty as an expert in extremism in the United States, that white supremacy is a group within the dictionary meaning of the word "group." RP 1620. RP 1620.¹²

Pitcavage was allowed to described white supremacy as encompassing the Ku Klux Klan, organized racist prison gangs, white separatist groups, neo-Nazi groups, racist skinhead groups, religious sects believing that they were descendants of the tribes of Israel, as well as persons he described as "unaffiliated" white supremacists.¹³ RP 1598-1599, 1603-1607, 1616, 1619, 1622-1627. He described white supremacy literature as including "The Turner Diaries," a blueprint for revolution and an influence on Timothy McVeigh. RP 1618. Pitcavage described Nazi and SS symbols, the swastika, and other emblems associated with Hitler and concentration camp guards. RP 1608-1609, 1613.¹⁴

To tie Kurtis to the images of hate and violence of the specific groups Dr. Pitcavage discussed,¹⁵ the state was permitted to introduce the following evidence, some of it from the

suspect it might be. . . . Though its adherents may belong to different groups, or to no group at all, they share to a very substantial degree both an ideology and a subculture." CP84-89.

¹² Even so, Pitcavage conceded that it was not a well-organized group with an overreaching sytructure. RP 1620.

¹³ The extent and considerable detail of Dr. Pitcavage's testimony is much greater than set out here. RP 1583-1698.

¹⁴ The state was permitted to elicit testimony about horrendous crimes perpetrated in the past by persons associated with the Klan or other extremist groups. RP 1634, 1689-1690, 2932, 2988, 2948.

¹⁵ The state was permitted to elicit testimony about horrendous crimes perpetrated in the past by persons associated with the Klan or other extremist groups. RP 1634, 1689-1690, 2932, 2988, 2948.

house in Kent where Kurtis spent several days after being evicted from his own apartment and which was clearly not his: pamphlets claiming that Martin Luther King was a fraud, an article entitled "Inside the Auschwitz Gas Chamber: What is Holocaust Denial," a pamphlet with Martin Luther King's picture with the word "not" written about the caption "King of Peace," a business card with the words "sick of wiggers?" on it, still photographs from the movie "American History X," books about the Third Reich, SS insignia, a pamphlet with a picture of Osama bin Laden on the front of it, a picture of Kurtis reportedly making a "heil Hitler" salute, "The Turner Diaries," a book on explosives, and items written in German. RP 1762-1792, 1893-1894, 1911-1924, 2608.

A majority of the witnesses testified in some manner about racist ideology. Detective Ringer described the items he had seen at Kurtis's apartment: a flag with an Iron Cross, books about the Third Reich, and a flag with "SS" insignia. RP 1762. Items seized from the apartment were introduced into evidence as well as pictures of the graffiti Pillatos spray-painted on his car and pictures of Butters' tattoos. RP 1793-1804, 1835. Ringer testified that the names of Pillatos, Butters and Frye were provided by a detective with knowledge of hate crimes. RP 1751. Mertis Mathes described graffiti in the area under the bridge as including swastikas, "die niggers," and "white power," even though it was undisputed that Kurtis did not create any of this graffiti. RP 940.

Another of the prosecution's expert witnesses was Allen Kohlhepp of the Seattle Anti-Defamation League. This witness testified that he had come across Kurtis' name on white supremacist message boards on the Internet in the course of his research on extremist groups. RP 2660-2664. Over defense hearsay and foundation objections, he was permitted to testify that he had found evidence on the Internet that the president of Volksfront had committed a hate crime against an African-American in the early 1990's. RP 2694-2696. Kohlhepp reluctantly conceded that none of the posting by Kurtis advocated violence. RP 2687.

The state was permitted to introduce extensive testimony about Pillatos and Frye spray-painting racist graffiti on Pillatos' broken down car and setting it on fire. RP 1397-1398, 1967-1982. The state was permitted to introduce extensive testimony about the graffiti Pillatos and Frye had allegedly spray-painted in the area where the assault took place and near their apartment before they were evicted. RP 940, 1517, 1706; RP(5/13) 106-121, 129-130, 133, 135.

Patricia Boulet, the property manager for the complex where Kurtis lived, was permitted to testify, over defense objection, about her out-of-court statements to Kurtis telling him to quit yelling racial slurs; she described too the "profanity and Nazi graffiti" Pillatos and Frye spray-painted on Pillatos' car. RP 1382, 1387. Boulet was impeached with her letter to Kurtis indicating that complaints had been made about loud music from his apartment, not about him making racial slurs. RP 1400.

Kurtis's ex-girlfriend, Jennifer Stiffler, testified about going with Kurtis to the home of Randy Craiger, the head of Volksfront, in Oregon and making a demonstration record. She told of Kurtis' interest in white pride, and about his association with persons in groups related to white power. RP 2586-2587, 2600-2603. Witnesses were repeatedly asked about the "curb stomp" and the movie "American History X." RP 1696-1698, 2122, 2292, 2341, 2838, 2842,

Detective Jeffrey Shipp testified that there was a substantial amount of "hate-based" graffiti at the scene of the assault on Townsend, and that the people involved appeared to be skinheads. RP 1707-1708. Shipp described the graffiti in detail -- swastikas, "White Power Skinhead," "Wiggers," "Tacoma Skinhead Movement," "White Pride World Wide," "Die SHARPS (non-racist skinheads)," "Heil Hitler," "Die Junkie Die," "El Nigger," "Fuck all Drug Addicts," "TWISST-- Peckerwood Property," and "White is Right." RP(5/13) 109-121, 130. Shipp testified that he had seen similar graffiti on Fawcett Street and learned from another detective that there were several incidents involving skinheads taunting people with racial vulgarities downtown trying to provoke an assault. RP(5/13) 136. As a result, Shipp

spoke with the manager of the Rich Haven apartments and allegedly learned the names of David Pillatos, Tristain Frye and Joshua (Scotty Butters). RP(5/13/) 138.

Shipp reported a conversation with the manager of the apartment and reported that the manager said that they were evicted after three days because of extremist views and for activities, including assault, which were provoked by yelling racial slurs out of the window. RP(5/13) 139-140. Shipp testified about an incident he said he learned of involving Butters' giving imitation crack cocaine to a woman in order to use her car and the woman's trying to run him over on the sidewalk. RP(5/13) 141-142. By tracing the 911 call, Shipp said he was able to locate Pillatos and Frye. RP(5/13) 142. Shipp reported that another manager of the Rich Haven apartments said Pillatos and Butters spray painted "Fuck All Niggers" and swastikas on the rear of the hotel. RP(5/13) 147. Shipp testified that Kurtis's name was added "from another police report." RP(5/13) 156. Shipp described in detail the tattoos of Pillatos, Butters, Frye and Kurtis. RP 1717-1738, He was also asked to describe the "curb stomp" scene in "American History X." RP 1738-1740.

Shipp listed names of persons in Kurtis' address book and their connection to hate-music bands or white power organizations. RP 178-184. Later Shipp was called to describe and introduce items of racist or white power materials found at the Kent residence where Kurtis stayed temporarily and which were not his. RP 2711-2728. Shipp admitted on cross examination that the names of Butters, Frye, Pillatos or any of their monikers were not found in any of the material seized or found at the Kent residence. RP 2723-2734.

Although Kurtis had explained that he met Pillatos and Butters and became involved in a white gang in a juvenile facility as a means of protection, defense expert Randy Blazek was not permitted to testify about his knowledge of this phenomenon in juvenile institutions. RP 2755-2761, 2915-2918.

To attempt to meet the second element of RCW 10.95.020(6), advancement in the group through murder, even more information about unrelated racial hatred and violence was allowed into the case. Dr. Pitcavage testified that in some circles it is believed that one

must murder a minority or attack an enemy of the white race to earn the right to wear certain emblems. Once again seeking to tie Kurtis to unrelated incidents, the prosecution presented and the court below allowed testimony about these unrelated incidents: Pitcavage was permitted to describe the "curb stomp" scene from "American History X," and report that criminals had committed a "curb stomp" recently in California, one in Germany and in Baltimore, which he had read about on the Internet. RP 1696-1698.¹⁶

In an attempt to counter this very prejudicial information, the defense team decided it was necessary to hire its own expert. See Declaration of Erik L. Bauer (defense trial attorney). Associate counsel Jay Berneburg was given the responsibility of the expert. *Id.* Unfortunately, the expert, Randy Blazak, seriously damaged the defense on critical points. *Id.*

Based on this evidence, Kurtis was convicted of aggravated murder. CP 397-399.

V. DISCUSSION:

A. KURTIS MONSCHKE WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN CONTRAVENTION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

In Strickland v. Washington, 466 U.S. 666 (1984) the Supreme Court held that "the proper standard for attorney performance is that of reasonably effective assistance." *Id.* 466 U.S. at 687. The Court further held that to sustain a claim of ineffective assistance of counsel, the defendant need only make two showings:

¹⁶ Although the trial court allowed the state to put on evidence that Kurtis owned this movie, which involved the lead character's reformation, and that he enjoyed the "curb stomp" scene, neither the testimony of the participants nor the medical testimony actually supported the state's assertion. RP 784, 786, 791, 2554-2555, 2563. The court denied the defense motion to exclude further evidence of the "curb stomp" scene of the movie, even after the medical testimony and the testimony of the codefendants. RP 2572-2574.

First, the defendant must show that counsel's performance was Deficient . . . Second, the defendant must show that the deficient Performance prejudiced the defense.

Id. 466 U.S. at 687.

The Strickland test requires a showing that counsel's representation fell below an objective standard of reasonableness judged by "prevailing professional norms."

Strickland, 466 U.S. at 687-688. In evaluating counsel's performance, court's must consider the law in effect at the time of the alleged ineffective assistance. Lockhart v. Fretwell, _____ U.S. _____, 113 S. Ct. 838, 834 (1993).

In determining the prejudice to defendant's case, the defendant need only show a "reasonable probability" that counsel's performance prejudiced the outcome; the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. further, in determining a claim of ineffective assistance, the reviewing court should consider the cumulative effect of all the alleged errors. Strickland, 466 U.S. at 695.

Of particular importance here was the Supreme Court's admonishment that counsel has a duty to make a reasonable investigation in every case or a reasonable decision that makes a particular investigation unnecessary. Strickland, 466 U.S. at 691. Only reasonably made strategic choices made after full investigation of fact and law can insulate counsel's performance from successful challenges as ineffective. Id. At 690.

These parameters were further defined by the Supreme Court in Wiggins v. Smith, 539 U.S. 510, 123 U.S. 2527, 156 L.Ed.2d 471 (2002), when the Court explained that,

Strategic choices made after thorough investigation of law and fact relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Wiggins v. Smith, *supra*, 539 U.S. at ____; 123 S. Ct. at 2535. When examining a claim of ineffective assistance involving the failure to investigate,

a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, apply a heavy measure of deference to counsel's judgments.

Id. 539 U.S. at ____; 123 S. Ct. at 2535.

Although Court's must give a great deal of deference to counsel's informed strategic choices, court's must "closely scrutinize an attorney's preparatory activities." See, Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993). This close scrutiny of preparatory activities is required because, obviously, counsel cannot make a reasonable strategic decision without first investigating and knowing the facts and law. Foster, *supra*, 9 F.3d at 726 (holding that defense counsel's decision not to pursue an impotence defense in a rape case was unreasonable because the attorney's only investigation was a cursory phone conversation with one urologist). See also, Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994), where the Ninth Circuit held that defense counsel was ineffective for failing to investigate another suspects purported confession.

In this case the defense expert Randy Blasak testified in a manner that seriously damaged the defense on critical issues and made a difference in the outcome of the case. Consequently there was no witness for the defense on matters that were

absolutely necessary to counter the state's presentations. The failure to properly determine what a witness will testify to where critical matters are at issue constitutes ineffective assistance.

B. THE PROSECUTION ENGAGED IN MISCONDUCT IN VIOLATION OF MR. MONSCHKE'S STATE AND FEDERAL DUE PROCESS GUARANTEES UNDER APPLICABLE STATE PROVISIONS AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE US CONSTITUTION:

It is well established that even simple mismanagement may establish sufficient evidence of state misconduct to justify dismissing a charge in the interest of justice. State v. Sherman, 59 Wn. App. 793, ___ P.2d ___ (1990); State v. Sulgrove, 19 Wn. App. 860, 863, 578 P.2d 74 (1978). In considering whether the misconduct justifies dismissal, the court should take into account the cumulative impact of multiple instances of mismanagement or misconduct. Sherman, *supra*; State v. Dailey, 93 Wn.2d 454, 610 P.2d 357 (1980); State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976). For example, in State v. Sherman, *supra*, the Court of Appeals upheld the trial court's dismissal of charges for the prosecutor's mismanagement in failing to provide discovery, failing to provide a witness list, amending the information and endorsing new witnesses after the trial was originally scheduled to begin. In State v. Dailey, *supra*, the appellate court upheld the dismissal in the interest of justice based on late compliance with discovery orders, failure to disclose the witness list until one day before trial, dilatory compliance with the bill of particulars, and late dismissal of charges against a co-defendant.

Putting on witnesses who the prosecution knew were concocting a false story in order to obtain a favorable plea agreement is tantamount to approving perjury. Allowing a

defendant a special plea agreement due to a favorable relationship with her counsel where that defendant is known to have conspired with another defendant to falsify testimony is a violation of due process guarantees. A new trial should be granted to Mr. Monschke.

VI. RELIEF REQUESTED:

Mr. Monschke requests that this Court grant the following relief:

1. Reverse his conviction and sentence and remand his case for retrial where the false testimony of Frye and Pillatos is excluded or the jury is informed of the actions by these two individuals.

2. In the alternative, Mr. Monschke requests a reference hearing on the issues presented here.

3 Finally, Mr. Monschke seeks appointment of counsel to perfect this action. Mr. Monschke will file a more comprehensive motion for appointment of counsel explaining the details of his incarceration in an East Coast state and the lack of access to Washington case law.

VII. CONCLUSION:

Based upon the records and files in this case, Mr. Monschke urges a reversal of his conviction.

VIII. VERIFICATION:

I, KURTIS W. MONSCHKE, do hereby declare under penalty of perjury pursuant to Washington State and federal law, that I have read the foregoing Personal Restraint Petition and all attachments thereto, know the contents thereof and believe the same to be true and accurate of my own knowledge, beliefs, and investigations.

DONE this 6 day of September, 2008, at White Deer, PA.



Kurtis W. Monschke

IX. FINANCIAL STATUS:

I, KURTIS W. MONSCHKE, hereby request that I be allowed to proceed in this action In Forma Pauperis because I do not have the money to pay the filing fee and other costs necessary to prosecute this action.

I own no stocks, bonds, or other securities.

I own no real-estate and I do not get money from rent, dividends, annuities, or other sources except for small amounts of money from friends and family every now and then not amounting to more than \$ 100 each year.

I am not employed. I am incarcerated.

I have no savings accounts or checking accounts. I have approximately \$ 3.00 in my prison account.

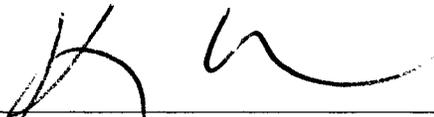
I have no other source of income and I have no things of value that I could sell to pay the filing fees and other costs of this litigation.

I request the appointment of an attorney.

Attached are records of my prison account for the last six months

I declare under penalty of perjury that this is true and correct.

DONE this 6 day of September, 2008, at White Deer, PA.



Kurtis W. Monschke

Date: 09/03/2008
Time: 2:10:22 pm

Federal Bureau of Prisons
TRUFACS
Inmate Statement
Sensitive But Unclassified

Facility: ALX

Start Date: 02/01/2008
End Date: 09/03/2008
Inmate Reg#: 98258011
Account Status: All
Institution: All

Date: 09/03/2008
 Time: 2:10:22 pm

Federal Bureau of Prisons
 TRUFACS
Inmate Statement
 Sensitive But Unclassified

Facility: ALX

General Information

Inmate Reg#:	98258011	Living Quarters:	Z04-221UDS
Inmate Name:	MONSCHKE, KURTIS WILLIAM	Arrived From:	OKL
Current Site Name:	Allenwood FCC	Transferred To:	
Housing Unit:	ALP-Z-A	Account Creation Date:	9/13/2005

Transaction Details

Alpha Code	Date Time	Reference#	Payment#	Receipt#	Transaction Type	Transaction Amount	Encumbrance Amount	Ending Balance
ALX	02/08/2008 01:00:38 PM	HIPP0108			Payroll - IPP	\$36.00		\$36.45
ALX	02/08/2008 07:12:23 PM	TFN0208			Phone Withdrawal	(\$3.00)		\$33.45
ALX	02/09/2008 04:49:04 PM	TFN0209			Phone Withdrawal	(\$3.00)		\$30.45
ALX	02/11/2008 11:42:23 AM	45			Sales	(\$29.65)		\$0.80
ALX	03/07/2008 12:12:26 PM	HIPP0208			Payroll - IPP	\$25.00		\$25.80
ALX	03/07/2008 12:23:25 PM	002040			FRP Quarterly Pymt	(\$25.00)		\$0.80
ALX	03/11/2008 06:11:56 AM	HFRP0308			FRP Excess With	\$25.00		\$25.80
ALX	03/11/2008 06:11:56 AM	HFRP0308	3657		FRP Treasury Pymt	(\$25.00)		\$0.80
ALX	03/12/2008 03:08:19 PM	33311808			Western Union	\$50.00		\$50.80
ALX	03/13/2008 11:17:01 AM	TFN0313			Phone Withdrawal	(\$3.00)		\$47.80
ALX	03/13/2008 07:08:37 PM	TFN0313			Phone Withdrawal	(\$3.00)		\$44.80
ALX	03/17/2008 09:49:20 AM	21			Sales	(\$18.30)		\$26.50
ALX	03/18/2008 07:30:23 AM		3861		Books	(\$9.00)		\$6.00
ALX	03/18/2008 07:30:23 AM		3859		Books	(\$11.50)		\$15.00
ALX	03/25/2008 12:51:59 PM	TFN0325			Phone Withdrawal	(\$3.00)		\$3.00
ALX	03/27/2008 08:31:19 PM	TFN0327			Phone Withdrawal	(\$3.00)		\$0.00
ALX	05/09/2008 12:10:37 PM	HIPP0408			Payroll - IPP	\$25.00		\$25.00
ALX	05/16/2008 10:27:01 AM	50			Sales	(\$1.85)		\$23.15
ALX	05/23/2008 10:11:49 AM	56			Sales	(\$8.40)		\$14.75
ALX	05/30/2008 09:51:04 AM	48			Sales	(\$6.95)		\$7.80
ALX	06/04/2008 02:38:56 PM	HICP0608			Inmate Co-pay	(\$2.00)		\$5.80
ALX	06/06/2008 09:58:59 AM	48			Sales	(\$1.85)		\$3.95
ALX	06/06/2008 01:16:07 PM	002062			FRP Quarterly Pymt	\$0.00		\$3.95
ALX	06/06/2008 07:48:15 PM	TFN0606			Phone Withdrawal	(\$3.00)		\$0.95
ALX	06/13/2008 09:46:34 AM	58			Sales	(\$0.95)		\$0.00
ALX	06/20/2008 09:32:56 AM	42			Sales	\$0.00		\$0.00
ALX	06/26/2008 05:09:37 AM	70111201			Lockbox - CD	\$10.00		\$10.00
ALX	06/27/2008 10:10:34 AM	58			Sales	(\$4.20)		\$5.80
ALX	07/01/2008 04:59:39 PM	TFN0701			Phone Withdrawal	(\$3.00)		\$2.80
ALX	07/02/2008 07:53:11 PM	TFN0702			Phone Withdrawal	(\$1.00)		\$1.80

Date: 09/03/2008
Time: 2:10:23 pm

Federal Bureau of Prisons
TRUFACS
Inmate Statement
Sensitive But Unclassified

Facility: ALX

General Information

Inmate Reg#:	98258011	Living Quarters:	Z04-221UDS
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Current Site Name:	Allenwood FCC	Transferred To:	
Housing Unit:	ALP-Z-A	Account Creation Date:	9/13/2005

Transaction Details

Alpha Code	Date Time	Reference#	Payment#	Receipt#	Transaction Type	Transaction Amount	Encumbrance Amount	Ending Balance
ALX	07/03/2008 04:12:32 PM	33319908			Western Union	\$25.00		\$26.80
ALX	07/03/2008 05:17:50 PM	TFN0703			Phone Withdrawal	(\$3.00)		\$23.80
ALX	07/07/2008 09:27:43 AM	14			Sales	(\$12.50)		\$11.30
ALX	07/16/2008 08:52:57 PM	TFN0716			Phone Withdrawal	(\$3.00)		\$8.30
ALX	07/17/2008 12:27:13 PM	67			Sales	(\$4.30)		\$4.00
ALX	07/17/2008 08:00:35 PM	TFN0717			Phone Withdrawal	(\$4.00)		\$0.00
ALX	08/08/2008 07:52:24 AM	HIPP0708			Payroll - IPP	\$5.25		\$5.25
ALX	08/15/2008 09:27:26 AM	49			Sales	(\$1.95)		\$3.30
Total Transactions:		38			Totals:	\$2.85	\$0.00	

Current Balances

Alpha Code	Available Balance	Pre-Release Balance	Debt Encumbrance	SPO Encumbrance	Other Encumbrance	Outstanding Instruments	Administrative Holds	Account Balance
ALX	\$3.30	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$3.30
Totals:	\$3.30	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$3.30

Other Balances

National 6 Months Deposits	National 6 Months Withdrawals	National 6 Months Avg Daily Balance	Local Max. Balance - Prev. 30 Days	Average Balance - Prev. 30 Days	Commissary Restriction Start Date	Commissary Restriction End Date
\$140.25	\$137.75	\$6.26	\$5.25	\$3.43	6/4/2008	10/31/2008

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Source: [Legal](#) > / ... / > **WA State Cases, Combined** ⓘ
 Terms: **name(state and monschke)** ([Edit Search](#) | [Suggest Terms for My Search](#))

Select for FOCUS™ or Delivery

154 P.3d 918; 2007 Wash. LEXIS 171, *

STATE OF WASHINGTON, Respondent v. KURTIS WILLIAM MONSCHKE, Petitioner.

NO. 78871-5

SUPREME COURT OF WASHINGTON

154 P.3d 918; 2007 Wash. LEXIS 171

March 6, 2007, Decided
 March 6, 2007, Filed

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: C/A No. 31847-4-II.
State v. Monschke, 133 Wn. App. 313, 135 P.3d 966, 2006 Wash. App. LEXIS 1104 (2006)

OPINION

ORDER

Department I of the Court, composed of Chief Justice Alexander and Justices C. Johnson, Sanders, Chambers and Fairhurst (Justice Madsen sat for Justice Sanders), at its March 6, 2007, Motion Calendar, considered whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 6th day of March, 2007.

For the Court

Gerry L. Alexander

CHIEF JUSTICE

Source: [Legal](#) > / ... / > **WA State Cases, Combined** ⓘ
 Terms: **name(state and monschke)** ([Edit Search](#) | [Suggest Terms for My Search](#))
 View: Full
 Date/Time: Tuesday, September 23, 2008 - 5:20 PM EDT

* Signal Legend:
 ● - Warning: Negative treatment is indicated

Exhibit 1

-  - Questioned: Validity questioned by citing refs
 -  - Caution: Possible negative treatment
 -  - Positive treatment is indicated
 -  - Citing Refs. With Analysis Available
 -  - Citation information available
- * Click on any *Shepard's* signal to *Shepardize*® that case.

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Ex 1, p. 2

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 1, 2007

Ms. Rita Joan Griffith
1305 N.E. 45th Street
No. 205
Seattle, WA 98105-4523

Re: Kurtis William Monschke
v. Washington
No. 06-11279

Dear Ms. Griffith:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

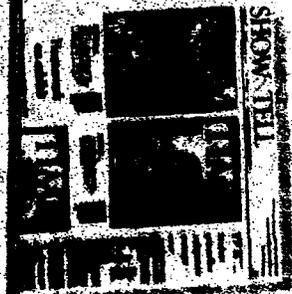


William K. Suter, Clerk

Exhibit 2

SOUTH SOUND

WEDNESDAY | SEPTEMBER 8, 2004 | WWW.TRIBNET.COM/NEWS/LOCAL



No extra prison for killers

Judge says U.S. Supreme Court decision doesn't grant her the authority to lengthen sentences in white supremacist case

**By Susan Wilson
The News Tribune**

When Prince George's County prosecutors made plans to charge a white supremacist with a hate crime, they intended to ask a judge to send the two to prison for nearly the rest of their lives for slaying a homeless man

to death.

But when the U.S. Supreme Court ruled in June that only juries, not judges, can impose the death penalty, it meant that the two men would be sentenced to 31 years for killing Randall "Dove" Howard last year.

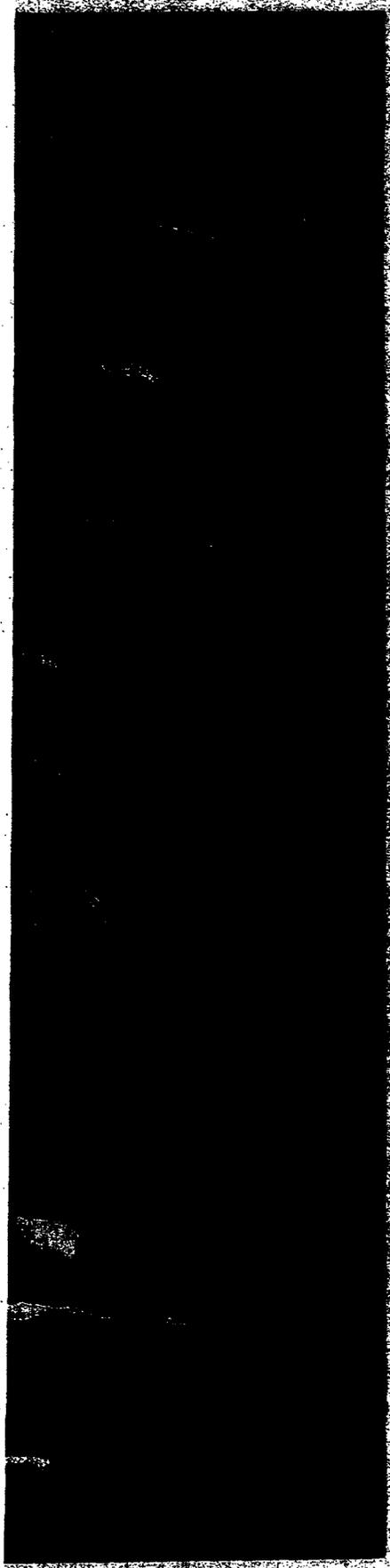
Prosecutors don't think that was long enough. So last week chief criminal deputy prosecutor Jerry Costello and deputy prosecutor Greg Greer asked Superior Court Judge Lisa Weinstock to let a jury decide whether Phillips and Butters should get longer sentences or to allow prosecutors to back out of the plea agreements and start over.

On Tuesday, Weinstock said no. "The state is requesting I create a sentencing procedure which is not in the

statute, and I don't believe the Legislature ever contemplated" it, the judge said. "I don't think I have the authority to do this."

Weinstock also refused to toss aside the plea, which gave prosecutors convictions without a trial and the defendants the possibility of a shorter prison term in exchange for their testimony against a co-defendant.

Please see stories, pg.



people prescribed health care fix

Killers

Continued from B1

people covered by health insurance. Many Washingtoners — and their children — lost jobs during the recession, but health benefits. Mean- while, budget cuts have pushed adults and children off subsidized health care. They have to have a new med- ical model," Sims said at a meeting sponsored by the Amer- ican Association of Wash- ington and other health care. Rossi also attended the debate. Gregoire did not say the real problem isn't the use of health care, but how to use it. He said King Coun- cil has approved millions of dollars by going to an evidence-based care system. Under such a system, for example, the most ef- fective drugs for a particular ail- ment would have smaller co-pays. Rossi also said his tax reform, including a state income tax, cutting the business tax and the sales tax — would free

up money for health care. "It is time to have people cov- ered with health insurance," Sims said. "It is a matter of backbone, a matter of will and a matter of leadership." Rossi said full employment is the first step toward improving health care in Washington. "If you don't have a job, odds are you don't have health insur- ance," Rossi said. "We need to create a business climate in Wash- ington state where people want to grow businesses." When the economy improves, Rossi said, employers will com- pete for workers by offering more and better health care benefits. He said the state should also roll- back regulations on health insur- ers to make it easier for compa- nies to offer stripped-down health benefits. Rossi supports a \$250,000 cap on "pain and suffering" damages in medical malpractice lawsuits. Sims said he has not decided whether he supports a cap on noneconomic damages in medical

malpractice cases. Gregoire said such a cap is unlikely to happen because it would require amend- ing the state constitution. She also said capping pain and suffering damages would not solve the problem of expensive malpractice insurance, and it would be unfair to people who are severely harmed by medical malpractice. Gregoire spoke about her propo- sals with The Associated Press on Tuesday. She said her first step as governor would be to pool state agencies' health care pur- chasing, and to pool Washington's purchasing with other states. The increased buying power would yield lower prices, Gregoire said. Then she would allow private businesses to join the state's pool and enjoy the same bargains — hopefully allowing them to offer health benefits to more workers. "It's high time we saw state government as a partner for do- ing good things for business," Gregoire said. "Small businesses need to get a piece of the state's megapurchasing pie."

The judge said the two men had testified in the trial of co-de- fendant Kurtis Monschke. Their testimony, she said, arguably helped prosecutors win Mon- schke's conviction and send him to prison for life for aggravated first-degree murder. So, Pillatos, 20, and Butters, 21, had lived up to their end of the bargain, Wor- swick said. Prosecutors are asking the Washington State Supreme Court to rule on Worswick's decision before the men's sentencing Oct. 1. Based on their criminal histo- ries, Pillatos faces 22 to 30 years in prison under the state's stan- dard sentencing range. Butler faces 23 to 31 years. It's one of several cases in question after the U.S. Supreme Court ruled June 24 in the case of Ralph Howard Blakely, a Grant County man who received more than seven years in prison for kid- napping his estranged wife in 1998.

The judge in that case said Blakely had been deliberately cruel to the woman, but the Supreme Court said the Constitu- tion keeps judges from tacking time onto people's sentences without a jury's input. Local lawyers lament that county judges are resolving "Blakely problems" in different ways. "You can't adequately advise your client because it's all depen- dent on which judge you get and that's not justice," said Phil Thornton, Pillatos' attorney. "The judge should be a nonfactor." Prosecutors want clarification, too. "If you have different judges in the same courthouse applying the law differently," Costello said, "we've got an equal-protection is- sue." He said he hopes the state Supreme Court will use Pillatos' and Butters' case to give Wash- ington courts direction on how to apply the Blakely ruling. The Legislature could weigh in, too, changing laws about sentencing ceilings or mandating jury pro- ceedings for exceptional sen- tences. Pillatos and Butters admitted to beating and stomping 42-year-

TACOMA NEWS TRIBUNE SEPT. 8, 2004 Page B2 (2 of 3)

sdot.wa.gov/projects/ 176th_234th. in Corvallis, The News Tribune. N ics announced in Aid 2004. Legend Jerry Lee Lewis, try hero Steve Earle and y Award winning singer- ter Lucinda Williams are acts that have been added soup for Farm Aid 2004. ay, organizers also as- l the additions of Mark rd Blue Merle, Kitty Jer- Voegtle, and Tegan and he lineup that will storm e White River Amphithe- le at 11. s organizers Willie Nelson, s, and camp. Neil Young e Matthews had been an- earlier. s for the show, which is to at 2 p.m., are \$30 to \$95. f any remain. the aren't able to score a ill have the option of e the concert online at

www.farmaid.org for a donation of \$10. Farm Aid has raised more than \$26 million since the first show in 1985, according to a press release. The group helps rural farmers with grants for food and emer- gency aid, hot lines, legal assis- tance, research and educational outreach programs. This year's theme is "10 Ways to Ensure Healthy Food for You and Your Family." Each day for 10 days before the show, a booth at Pike Place Market in Seattle will highlight one of those ways. Ethel A. Jaramin, The News Tribune. SOUTH SOUND Team loses long-lost B-17 to shores of lake in Canada. A team of local divers on a mis- sion to salvage a long-lost B-17 bomber from a lake bottom in Labrador, Canada, has miracu- lously towed the aircraft to the shore and began dismantling it for ground transportation. Late last month, the team, led by Puyallup diving expert Bob

Mester, used balloon bags to raise the World War II-era bomber from the bottom of Canada's Dyke Lake. The aircraft was lost in 1947 af- ter it ran out of fuel and the crew crash-landed it on the frozen lake. A search team found the B-17 on the lake bottom in 1998. Mark Allen, a member of the salvage team, said it took about 52 hours to tow the aircraft 65 miles. After docking it on shore last week, a team began disassem- bling it. Outer wing panels and engines already have been re- moved and transported to Labrador City, Allen said. A wealthy Georgian is financ- ing the recovery project. The plan is to transport the B- 17 to the personal hangar of Don Brooks in Douglas, Ga., where Brooks will evaluate whether the airplane can be fixed. He wants to restore it and fly it again. Eljira Kawada, The News Tribune

Ex 3 p 2

wsdot.wa.gov/projects/
176th_234th
on Corvin, The News Tribune

acts announced Farm Aid 2004

legend Jerry Lee Lewis, country hero Steve Earle, and Grammy Award-winning singer Lucinda Williams are acts that have been added to the lineup for Farm Aid 2004. Other day organizers also announced the additions of Mark Knopfler, Blue Merle, Kitty Jerins, Voegelé, and Tegan and Sara, the lineup that will storm the White River Amphitheater Sept. 18. Past regulars Willie Nelson, Dolly Parton, Neil Young, and Dave Matthews had been announced earlier. Tickets for the show, which is to start at 2 p.m., are \$30 to \$95, if any remain. Those who aren't able to score a ticket will have the option of watching the concert online at

www.farmaid.org for a donation of \$10.

Farm Aid has raised more than \$26 million since the first show in 1985, according to a press release. The group helps rural farmers with grants for food and emergency aid, hot lines, legal assistance, research and educational outreach programs.

This year's theme is "10 Ways to Ensure Healthy Food for You and Your Family." Each day for 10 days before the show, a booth at Pike Place Market in Seattle will highlight one of those ways.

Ernest A. Jassin, The News Tribune

SOUTH SOUND

Team tows long-lost B-17 to shore of lake in Canada

A team of local divers on a mission to salvage a long-lost B-17 bomber from a lake bottom in Labrador, Canada, has successfully towed the aircraft to the shore and begun disassembling it for ground transportation.

Late last month, the team, led by Puyallup diving expert Bob

Mester, used balloon bags to raise the World War II-era bomber from the bottom of Canada's Dyke Lake.

The aircraft was lost in 1947 after it ran out of fuel and the crew crash-landed it on the frozen lake. A search team found the B-17 on the lake bottom in 1998.

Mark Allen, a member of the salvage team, said it took about 57 hours to tow the aircraft 65 miles.

After docking it on shore last week, a team began disassembling it. Outer wing panels and engines already have been removed and transported to Labrador City, Allen said.

A wealthy Georgian is financing the recovery project.

The plan is to transport the B-17 to the personal hangar of Don Brooks in Douglas, Ga., where Brooks will evaluate whether the airplane can be fixed.

He wants to restore it and fly it again.

Eijiro Kawada, The News Tribune

napping his estranged wife in 1998.

The judge in that case said Blakely had been deliberately cruel to the woman, but the Supreme Court said the Constitution keeps judges from tacking time onto people's sentences without a jury's input.

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"If you have different judges in the same courthouse applying the law differently," Costello said, "we've got an equal-protection issue."

He said he hopes the state Supreme Court will use Pillatos' and Batters' case to give Washington courts direction on how to apply the Blakely ruling. The Legislature could weigh in, too, changing laws about sentencing ceilings or mandating jury proceedings for exceptional sentences.

Pillatos and Batters admitted to beating and stomping 42-year-old Townsend and throwing a boulder onto his face March 23, 2003, under the East 26th Street bridge in Tacoma.

They, along with Monschke and Pillatos' girlfriend, Tristain Frye, were charged with aggravated first-degree murder, which has a minimum sentence of life in prison with no possibility of release.

Frye pleaded guilty to second-degree murder. Prosecutors agreed to recommend she serve less than 14 years. Pillatos and Batters pleaded guilty in March to first-degree murder. The three testified in Monschke's trial in May, and jurors convicted Monschke.

"We think these guys did more than Monschke did," Costello said. "All along we expected to seek an exceptional sentence. The Blakely case for these defendants was like winning the Lotto."

Karen Hucks: 253-597-8660
karen.hucks@mail@tinet.com

TACOMA NEWS TRIBUNE SEPT. 8, 2004 PAGE B2 (3 of 3)

LOOKING BACK

100 years ago today: Sept. 2, 1904

The Ladies' Musical Club board met with the president of the board at her home. The season will open with a complimentary concert next month.

50 years ago today: Sept. 2, 1954

About 6,000 of the city's 2,800 AFL Lumber and sawmill workers went to work Tuesday morning for the first time in 77 days. All members of the union are expected back on the job by the end of the week.

25 years ago today: Sept. 2, 1979

Back in 1900 when the Western Washington Fair first started "doing the Puyallup," the crowds were drawn by buck-robin jams, prize Hosterias and record-sized squash. The fair has come a long way in 79 years, mushrooming into a 112-acre site worth \$10 million that figures to draw 1 million fairgoers during the 16-day run which opened this morning.



collection began... Sept. 7, 1943, might have been Mickey... n was the fourth show of the Grass... e from the USO at 13th Street and... car dealership at 1007 S. J St.

Ex 3 p3

FILED
COURT OF APPEALS
DIVISION II

08 SEP 30 PM 3: 21

STATE OF WASHINGTON
BY ADP
DEPUTY

**IN THE COURT OF APPEALS OF WASHINGTON
DIVISION II**

IN RE THE PERSONAL RESTRAINT PETITION OF, KURTIS MONSCHKE, Petitioner.	No. <u>34365-9</u> DECLARATION OF ERIK L. BAUER
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I, ERIK L. BAUER, under penalty of perjury pursuant to RCW 9A.72.085, do hereby declare as follows:

1. I am a United States citizen and a resident of the State of Washington. I am over the age of eighteen. I am competent to testify to the facts set out below. I make this declaration based upon my personal knowledge.

2. I am an attorney licensed to practice in the State of Washington. I currently have an office and practice in Tacoma. In 2003 I was asked by a local attorney, Jay Berneburg, to associate on an Aggravated First Degree Murder case. I agreed and became lead counsel in *State v. Kurtis Monschke*, Pierce County Cause No. 03-1-01464-0.

3. The case presented several difficult problems even though witnesses were willing to testify that the client's involvement was minimal compared to the culpability of the other codefendants. One of the problems was the prosecutor's use of RCW 10.95.020(6) to establish the aggravating factor. That law states that a sentence of Life

Without the Possibility of Parole can be imposed upon anyone who commits murder "to obtain or maintain his membership or to advance his position in the hierarchy of an organization, association, or identifiable group." In response to a bill of particulars the prosecutor's office informed us that it would use Mr. Monschke's well-documented adherences to White Supremacist ideology to establish a violation of RCW 10.95.020(6).

4. To make this application of RCW 10.95.020(6) work for the prosecution, several "experts" would be called to explain all about the activities of White Supremacist organizations. Additionally, Mr. Monschke's participation in a Portland, Oregon-based Skin Head organization would be presented to establish his membership and advancement in a white supremacist group. Finally, Mr. Monschke's day-to-day expressions of his white supremacist views—including displays of Nazi symbols and the like--were allowed into evidence to show, inter alia, that Mr. Monschke was a member of the white supremacist "group." In other words, the prosecutors were going to drag out fear-invoking incidents of racial hatred involving *other* persons and organizations to establish that Mr. Monschke's beliefs in "white supremacy" constituted his membership and possible advancement. The prosecution could then tell the jury that the victim in this case was murdered for the simple reason that the murder would allow Mr. Monschke to move up in the hierarchy of the white supremacy group.

5. In an effort to counter this highly prejudicial and inflammatory information that had, in my opinion, nothing to do with the crime, Jay Berneburg and I decided to call an expert of our own who could explain that white supremacy is an ideology and not a defined group with a hierarchy. Moreover, while Mr. Monschke did belong to a white supremacist Skin Head organization, called Volksfront, that

organization was a non-violent organization. Mr. Monschke not only did not gain advancement in Volksfront for his part in the murder, he was kicked out of the group for that behavior. This evidence was critical to the defense because it negated the prosecution's efforts to establish Mr. Monschke's membership and advancement as required by the statute.

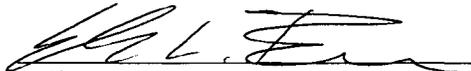
6. Jay Berneburg and I produced an expert, Randy Blazak, a professor and expert on white supremacy groups. Jay Berneburg and I decided that Jay would conduct the direct and redirect examination of this expert witness. Unfortunately, the expert hurt us very badly when he presented opinions that he had not presented in pretrial interviews.

7. Mr. Blazak's testimony damaged the defense on every critical point. For example, while he testified that the organization Mr. Monschke belong to, Volksfront, professed non-violence, Mr. Blazak volunteered without being prompted that the public persona of the organization might be different than the private part. Thus, he opined, Volksfront might be violent after all but to prevent lawsuits like those that destroyed other racist organizations, Volksfront might be claiming to be non-violent. The same was true about his testimony damaging the defense regarding the second major point, that being that white supremacy is not a "group" but is an ideology. Mr. Blazak's testimony basically confirmed that one could advance one's status with others who have white supremacist views by committing a murder like the one Mr. Monschke was alleged to have participated in. He hurt our defense very badly. I believe that he helped to convince the jury to convict Mr. Monschke under RCW 10.95.020(6).

8. Jay Berneburg was noticeably tired on the day Randy Blazak testified. He appeared to me to be exhausted to the extent I believe he was sick. It was not long after that that Jay had a heart attack.

I declare under penalty of perjury that the above is true and correct of my own knowledge and belief.

Done this 30th day of September, 2008 at Tacoma, Washington.


Erik L. Bauer

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION II

In Re The Personal Restraint Petition Of, KURTIS MONSCHKE, Petitioner.	No. <u>38365-9</u> DECLARATION OF BARBARA COREY
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I, BARBARA COREY, under penalty of perjury pursuant to RCW 9A.72.085, do hereby declare as follows:

1. I am a United States citizen and a resident of the State of Washington. I am over the age of eighteen. I am competent to testify to the facts set out below. I make this declaration based upon my personal knowledge.

2. I am an attorney licensed to practice in the State of Washington having received my license in 1981.. After graduating from Law School I worked a deputy prosecutor for the King County Prosecuting Attorney's Office and then for the Pierce

County Prosecutor's Office. I worked for the Pierce County Prosecutor's Office from May 1, 1984 until January 28, 2004. I now am a sole practitioner and maintain an office and practice in Tacoma

3. While with the Pierce County Prosecutor's Office in 2003 I was assigned to four connected cases involving charges of Aggravated First Degree Murder. Those charges were initially filed against David Pillatos, Scotty Butters, Tristain Frye and Petitioner Kurtis Monschke. I remember the case because it involved issues related to white supremacists and I had not previously worked on a case with that feature. I have not read the case file on any of these defendants since I left the prosecutor's office in January, 2004, but I have done a cursory review of some relevant materials in order to refresh my memory of events for this declaration. In addition to that, in my recent civil trial, Corey v. Pierce County, the litigants made reference to this case. My primary focus was on *State v. Monschke*.

4. While prosecuting those individuals I was informed that two of the defendants, David Nikos Pillatos and Tristain Lynn Frye, were exchanging correspondence in what appeared to be an attempt to fabricate evidence. I personally read the confiscated correspondence at the time and based upon my review of the subject letters and other considerations I formed a professional opinion that those two individuals were indeed fabricating a story in an attempt to perpetrate a fraud on the Court and the prosecutor's office. I informed the Court of the nature of the correspondence and I advised that,

“Defendant Pillatos and Frye appear to be corresponding about the content of her testimony; these defendants apparently intend to pursue a theory that will exonerate defendant Frye so that she will be free to raise their child.”

State's Brief, p. 2, Ls. 18-20.

5. Based upon my experience as a prosecutor with 22 years of experience (at that time) dealing with criminal defendants' behaviors, including numerous high profile cases, I reasoned that Pillatos' and Frye's versions of events were suspect in light of their correspondence and Pillatos' efforts to obtain a favorable plea agreement for Frye. For example, in one letter from Pillatos to Pillatos' father, the contents of which were obviously intended to be passed on to defendant Frye, Pillatos provides instructions to defendant Frye about her testimony as well as explanations about physical evidence from the crime scene. In that same correspondence Pillatos urges as "extremely important" that Frye quit representing that he, Pillatos, was not present at the scene of the crime. He tells his father that, "It is extremely important she quits denying I was there with her." (sic)

6. After considering the facts of the cases¹, including the herein noted correspondence between Pillatos and Frye and their post-arrest behavior, I concluded that Pillatos' and Frye's efforts were not those of remorseful individual seeking to cleanse their conscience through honesty and acceptance of responsibility. My experience and the facts told me that Pillatos was attempting to reduce Frye's exposure, something I know he personally desired, by having her admit he was present at he crime scene and then having her assert the exculpatory claim that he, Pillatos, forced her to assault Randall Townsend. Pillatos explained the plan to Frye in not-very-well-disguised language in one of the confiscated letters: "because you never assaulted the man of your own free will *if at all*." (Emphasis added by me). Additionally, Pillatos had an eye to his

¹ I reached these conclusions contemporaneous with the prosecution of the four individuals in 2003, right after discovering the exchange of letters between Pillatos and Ms. Frye.

own diminished capacity defense when he began reminding Frye that it would be helpful to him if Frye recalled that he wasn't himself the night they murdered Randall Townsend. Pillatos wrote to Frye reasoning that, "Besides if you think I wasn't myself that night it might help."

7. In addition to informing the court of Pillatos and Frye's correspondence activity the matter was also discussed internally by members of the Pierce County Prosecutor's Office. Pillatos and Frye's efforts to manipulate the plea and trial processes were known to Prosecutors Gerry Horne, Jerry Costello, Greg Greer, and other deputy prosecutors and police detectives.

8. Ms. Frye did indeed obtain what I believe is a most favorable plea agreement and sentence. She was allowed to plead guilty to second degree murder; she was sentenced to 165 months which term represents the bottom of the guideline range of 165 to 265 months. Ms. Frye's range was based upon her criminal history that included four prior convictions.

9. As a member of the prosecution team I was against giving Ms. Frye a reduced sentence. The mitigation package provided by her attorney was only one or two pages in length and did not contain, in my view, reasons sufficient to warrant a reduced sentence especially in light of her level of involvement in the murder of Randall Townsend. An unbiased eye witness, Ms. Cindy Pitman, stated that Ms. Frye hefted a huge rock and smashed it over Mr. Townsend's head.

10. When Ms. Frye's mitigation packet arrived at my office I asked my supervisor Jerry Horne for permission to seek a revised packet. Mr. Horne informed me that I could do so. I asked Ms. Frye's attorney to provide additional information and she

laughingly told me that Gerry Horne had already informed her that he would not seek the death penalty for Ms. Frye. She may have provided some meager additional materials, but she never provided a comprehensive and detailed mitigation packet such as defendants in her circumstances generally do.

I was also aware from Ms. Frye's correspondence that she informed a family member in the spring of 2003 that the prosecutor had decided not to seek the death penalty on her. This was several months prior to the death penalty staffing.

Gerry Horne later decided (and I respect his authority to make the decision, if not the actual decision) that Ms. Frye would be given a favorable plea agreement. I expressed my objections and pointed out that Ms. Frye's involvement in the murder of Mr. Townsend was far from minimal according to eyewitnesses. Mr. Horne informed me that Ms. Frye would be offered an opportunity to plead guilty to second degree murder and a specific amount of months would be the recommendation to the Court. Such plea was offered because mitigating facts existed that supporting leniency. I believe the plea offer likely was based on personal issues. I know that Ms. Mandel, Ms. Frye's attorney, has been a close friend of Gerry Horne's at least since 1984.

I know this because Gerry Horne often discussed his friendship with Ms. Mandel.

11. The process utilized by Mr. Horne to decide to offer Ms. Frye a plea agreement was unusual and its terms were inconsistent with the prosecutorial standards of the Pierce County Prosecutor's Office as I knew them to be for the entire time I worked there. The terms of the plea agreement offered to Frye and ultimate sentence she received constituted, in my professional prosecutorial judgment, an unfair

boon to Ms. Frye that she did not deserve. I note that the Pierce County Prosecuting Attorney's Office has never adopted written charging and disposition standards as have other Washington counties such as King, Kitsap, etc. Tristan Frye's participation in Mr. Townsend's murder was brutal and went far beyond the point where it could be said to be so limited as to justify a mitigated shorter term than ; it certainly was not the forced participation that Ms. Frye claimed. Consequently, the very favorable agreement for Ms. Frye resulted in an equally unfair result to Kurtis Monschke who was, according to the evidence, less culpable than Ms. Frye but who received sentence of Life Without the Possibility of Parole.²

12. It is noteworthy that the Tacoma Police Department lead detective John Ringer recommended that if the state wanted a testimonial codefendant, the state should deal with Scotty Butters. This issue came up in my recent civil case and I learned that the other individuals involved now assert that det. Ringer always wanted to deal with Ms. Frye. I stand by my statements that in 2003, det. Ringer recommended a deal with Butters. I believe that some historical revisionism occurred as a result of discussion of this issue in my civil case.

13. I was present to view the content of an offer of proof from defendant Frye. She therein averred that she had kicked the decedent so hard that she had injured her foot.

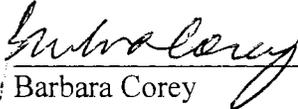
14. I was present for an offer of proof from defendant Scotty Butters.

² As it turned out Mr. Pillatos and Mr. Butters received terms (360 months each) that were significantly less than the one imposed upon Mr. Monschke despite the well known fact that both Messieurs Butters and Pillatos were far more responsible for the brutality inflicted upon, and ultimate death of, Mr. Townsend. At least it can be said in those two cases that the imposition of the shorter terms was due to the State Supreme Court's court-imposed limits placed on the prosecution's ability to seek exceptional sentences. Unlike the Frye case, the injustice of the shorter sentences for Butters and Pillatos was not the result of an unjust deal given by the Prosecutor because of a friendship with the defendant's attorney.

15. I believe that defendant David Pilatus also provided an offer of proof to the prosecutor as I was so informed by one of the deputy prosecutors who handled that case.

I declare under penalty of perjury that the above is true and correct of my own knowledge and belief.

Done this 30th day of Sept, 2008 at TU Koma, Wa -



Barbara Corey