

NO. 38365-9-II

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

In re the Personal Restraint Petition Of:

KURTIS MONSCHKE

Petitioner

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STATE OF WASHINGTON
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FILED
COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Lisa Worswick, Judge

PETITIONER'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Petitioner was denied the effective assistance of counsel and a fair trial when, without proper investigation, his trial attorneys called an expert witness who undermined key elements of the defense case.

2. Prosecutors engaged in misconduct, in violation of petitioner's due process rights, when they called two witnesses at trial whom they knew had concocted a false story to obtain a favorable plea agreement.

Issues Pertaining to Assignments of Error

1. Kurtis Monschke was charged with aggravated murder in the first degree. The alleged aggravating circumstance was that Monschke committed the crime to increase his status among white supremacists. At trial, Monschke sought to demonstrate that he played no role in the crime and did not condone violence as a means to his political goals. Without proper investigation, defense counsel decided to call an expert witness on white supremacy and hate crimes. That witness undermined key aspects of the defense, aligning Monschke with those who condone violence and conceding the aggravating circumstance. Did counsels' failure to adequately investigate the expert before choosing to call him as a witness deny

Monschke his right to effective representation and a fair trial?

2. Prior to trial, prosecutors intercepted letters from two of Monschke's co-defendants, David Pillatos and Tristain Frye. The letters reveal that Pillatos was pressuring Frye to testify in a manner that minimized her role in the crime so that she could obtain a favorable plea deal, serve a relatively short sentence, and get out of prison to raise their child. The letters also reveal that Frye was looking to Pillatos for guidance and was willing to lie if Pillatos asked her. Nonetheless, prosecutors offered Frye a favorable deal in exchange for her testimony against Monschke, ultimately using both Pillatos and Frye to convince jurors of Monschke's guilt. Where prosecutors knew these witnesses had concocted a false story to benefit Frye, did their decision to use them at trial violate Monschke's due process rights?

3. Where a petitioner makes at least a prima facie showing of prejudice, but the merits of his claims cannot be determined solely on the record, a reference hearing is appropriate to supplement the record. At a minimum, is a reference hearing warranted in this case?

B. STATEMENT OF THE CASE

The facts of this case are discussed at length in this Court's opinion in Monschke's appeal, his Personal Restraint Petition, and the State's Response to the Petition.

In summary, David Pillatos, Tristain Frye, Scotty Butters, and Kurtis Monschke were charged with aggravated murder in the first degree in connection with the beating death of Randall Townsend. CP 6-9. Pillatos and Butters avoided a life sentence by pleading guilty to murder in the first degree. RP 2097-98, 2164. Frye cut a deal with prosecutors in which she was permitted to plead guilty to murder in the second degree in exchange for testimony implicating Monschke. RP 2395-2401, 2470-72.

Much of the evidence in this case was undisputed at trial. Townsend was homeless and suffered from paranoid schizophrenia. RP 869, 919. In the early morning of March 23, 2003, he was hit in the head with a baseball bat, repeatedly kicked in the head with steel-toed boots, and struck in the face with a large rock. RP 2081-88, 2167, 2336-2345. He died on April 12, 2003, when the decision was made to remove him from life support. RP 873-75.

Pillatos, Frye, and Butters all participated in the assault that led to Townsend's death. RP 2081-88, 2167, 2336-2345, 2361-62;

2460-2462. Moreover, it was undisputed that Monschke was not present for most of the assaultive conduct. RP 2284-85, 2302-03, 2076-2088, 2345, 2443, 2446. Monschke's role, if any, after he came upon the scene and found Townsend already unconscious was very much disputed at trial. See RP 2090, 2133, 2167-68, 2289-2290, 2348-49, 2356-2361, 2449-2451.

A jury found Monschke guilty of aggravated murder in the first degree and he was sentenced to life in prison without the possibility of parole. CP 397, 400, 404-414. This Court affirmed his conviction and sentence, and Monschke was unsuccessful in obtaining further review. State v. Monschke, 133 Wn. App. 313, 135 P.3d 966 (2006), review denied, 159 Wn.2d 1010 (2007), cert. denied, 552 U.S. 841 (2007).

Monschke filed a timely Personal Restraint Petition (PRP) raising two claims. First, Monschke argued that his trial attorneys were ineffective when, without proper investigation, they called an expert witness who undermined key elements of the defense case. PRP, at 15-18. Second, Monschke argued that prosecutors engaged in misconduct, in violation of his due process rights, when they called Pillatos and Frye as trial witnesses knowing they had concocted a false story concerning Monschke's involvement to

obtain a favorable plea agreement for Frye. PRP, at 18-19.

The Pierce County Prosecutor's Office contested Monschke's claims in a lengthy response, and this Court ordered the appointment of counsel. See generally Response to PRP; Court's Order of 8/20/09. The factual and legal bases for each claim are discussed below.

C. ARGUMENT

1. MONSCHKE WAS DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION AND A FAIR TRIAL.

RAP 16.4(c) defines the circumstances under which a petitioner can demonstrate unlawful restraint. One of those is where a conviction was obtained "in violation of the Constitution of the United States or the Constitution or laws of the State of Washington." RAP 16.4(c)(2). Where, as here, a claim involves a constitutional violation, the petitioner must merely demonstrate prejudice, rather than a complete miscarriage of justice – the requisite standard for most collateral claims. See In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990) ; In re Haverty, 101 Wn.2d 498, 504, 681 P.2d 835 (1984). The burden of proof is a preponderance of evidence. In re Brett, 142 Wn.2d 868, 874, 16 P.3d 601 (2001).

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. And a defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993).

Monschke was denied his right to effective representation when his attorneys called Dr. Randy Blazak as a defense witness without conducting sufficient factual investigation concerning his opinions and potential testimony.

a. The Defense Strategy

Attorneys Jay Berneburg and Erik Bauer represented Monschke at trial. 1RP 1. As discussed in detail below, they chose to employ three main strategies in Monschke's case.

First, based on Monschke's own testimony and the testimony of other witnesses, they would argue that he played no role in the assault that led to Townsend's death – that he was not present at the scene until after the others had assaulted Townsend

and merely used a bat to poke at Townsend and determine his condition.

Second, the defense would emphasize that the only white supremacist group to which Monschke belonged – Volksfront – was nonviolent.

Third, and related to the second strategy, the defense would challenge the factual basis for the aggravating circumstance. The prosecution alleged “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[.]” CP 7-8. The defense would attempt to prove that “white supremacists” were not a hierarchical group in which one could raise his position by committing a violent act. Nor could one raise his status in Volksfront given that group’s call for nonviolence.

i. Demonstrating Monschke’s limited role

Monschke testified there had been no plan to beat anyone the night of the assault. RP 2774-75, 2779. He, Pillatos, Frye, and Butters had been drinking prior to the attack. RP 2772-73. Butters was about to leave town and wanted a “night out” before he left. RP 2773. With Pillatos driving, the four stopped at Fred Meyer, where Pillatos said he planned to buy a pack of bubble gum, write

a check for \$20.00 over the purchase price, and use the extra cash to buy beer elsewhere. RP 2773-2775.

Once in the store, however, Pillatos and Frye headed for the sporting goods section, where Pillatos decided to buy two baseball bats to keep in the car "just in case." RP 2775-76. This was a reference to an event the previous weekend. While a passenger in a car, Pillatos had exchanged unpleasant remarks with a pedestrian in the hilltop section of Tacoma. When Pillatos exited the car to fight, more than a dozen people came to the aid of the other individual, forcing Pillatos to retreat. RP 2776-2779.

After leaving Fred Meyer and stopping to buy alcohol at a gas station, the four headed to the Tacoma Dome to meet a girl named Autumn, who was working at the facility and had expressed interest in joining the group for the evening. RP 2773, 2780. When the group was unable to make contact with Autumn, Pillatos suggested that they walk to where he and Frye had painted graffiti under nearby bridges. Pillatos and Butters grabbed the bats. Monschke assumed they did so because the group was headed for a dark area. RP 2781-82.

The three men separated from Frye and walked along railroad tracks looking at graffiti. RP 2783-2784. Eventually,

Pillatos indicated that he needed to return to where they left Frye, and he and Butters headed back in her direction with bats in hand. Monschke stayed behind to talk to some graffiti artists or "taggers." RP 2784-2785.

After about half an hour, Monschke began walking back in the direction of the car. RP 2786-87. Pillatos met him along the way and said that someone had touched Frye inappropriately and they had to beat him up. RP 2788. When Monschke arrived at the scene, Townsend was laying across the railroad tracks. RP 2791. Butters said he had hit Townsend in the head with one of the bats, and Monschke saw that Butters was now holding two pieces of a broken bat. RP 2792.

Monschke testified that he grabbed the other bat, leaned down, and "nudged the guy trying to wake him up," but Townsend did not respond. RP 2792-93. Monschke denied ever hitting Townsend with the bat or otherwise participating in the assault. RP 2793-2794, 2807-08. But he was afraid he would be associated with the assault because he had spoken at length with the taggers and even showed them his various tattoos. RP 2793. The other three were excited, yelling back and forth, and "hooping and hollering, like victory chants[.]" RP 2794. Monschke said the four

of them should leave and they did. RP 2794-95.

Butters was wearing a pair of Monschke's boots and Monschke wore a pair belonging to Butters. RP 2253-54, 2797-98. When the four arrived back at Monschke's apartment, he noticed that his boots were covered in blood, adding to his concern he would be implicated even though Butters had worn them. He decided to get rid of them and placed them in a plastic bag. Clothing items that Pillatos and Frye were wearing also had blood on them, and they tossed them into the bag. RP 2798. Monschke and Pillatos took the items, along with the bats, to a secluded location and burned them. RP 2799.

Later, when Monschke asked Butters why he struck Townsend in the first place, Butters said that Townsend was pretending to be crazy and said that voices in his head made him do drugs. This angered Butters, so he decided to hit Townsend in the head with one of the bats. RP 2800.

Butters' trial testimony was consistent with Monschke's version of events – that Butters struck Townsend in the head with a bat, and Monschke was not present when Townsend was hit, kicked, or when the large rock was dropped on him. Rather, he was “up the tracks” talking to the taggers and played no role in the

assault. Once Monschke arrived back at the scene, he merely “jabbed” Townsend with a bat to assess his condition. RP 2167-68, 2185, 2284-85, 2289-90, 2302-03. Prosecutors attempted to impeach Butters with the fact he had previously indicated that Monschke hit Townsend in the face with the bat, but on the stand Butters steadfastly maintained that Monschke merely checked to see if he was still alive and never used the bat in a violent fashion. RP 2168, 2185-88, 2201-2205, 2289-91, 2307-2323.

Pillatos also testified. He confirmed that Monschke was not present when Butters hit Townsend, when Townsend was repeatedly kicked in the head, or when the rock was dropped on Townsend’s face. RP 2076-2089. Contrary to Monschke’s and Butters’ trial testimony, however, Pillatos testified that he told Monschke he had to hit Townsend with a bat. Initially, Monschke declined but, according to Pillatos, after he told Monschke that “he better fucking do it,” Monschke struck Townsend three or four times in the chest and head, although not with as much force as he could have, never lifting the bat above his head. RP 2089-90, 2132-33.

Like Pillatos, Frye testified that Monschke hit Townsend in the face with one of the bats. Unlike Pillatos, however, Frye testified that Monschke struck 10 to 15 blows to Townsend’s face

and the hits were “forceful,” with Monschke raising the bat above his head before each strike. RP 2348-49, 2356-2361, 2449-2451.

*ii. Emphasizing Volksfront's nonviolence/
challenging the aggravating
circumstance*

Prosecutors contended that by assaulting Townsend, Monschke sought to advance his position in two groups: the white supremacy movement generally and the group Volksfront specifically. RP 747.

The defense conceded Monschke's involvement with Volksfront. RP 442. But counsel sought to prove that Volksfront was a nonviolent organization. Therefore, Monschke could not have been promoted within that organization by committing a violent act against Townsend. In fact, Volksfront had publicly distanced itself from Monschke since Townsend's death. RP 443-444, 749-750. The defense also contended that “white supremacists” did not satisfy the definition of an “identifiable group” in which one could climb a hierarchy through violence. RP 2743-44.

As to whether white supremacists could be considered a group, the State's primary expert on white supremacists – Dr. Mark Pitcavage of the Anti-Defamation League (ADL) – testified that they

could using the ordinary, dictionary definition of the word "group." RP 1583-85, 1620. They are loosely organized, but to be a white supremacist one must subscribe to a certain ideology, i.e., that the existence of the white race is currently threatened. RP 1596-1598, 1620. There is no one leader or one single formal hierarchy for the white supremacist movement. There are many groups with their own formal and informal hierarchies. RP 1695-96.

Pitcavage testified that some groups profess nonviolence to avoid civil liability. RP 1633-34. Depending on the group, various acts may allow one to advance in the hierarchy, including the distribution of literature, donating money, or even violent acts against the group's enemies. RP 1636-37. "Prisoners of War," meaning white supremacists that have been put in jail for a criminal act related to their ideology, tend to achieve the highest status. RP 1619, 1637. As to Volksfront, Dr. Pitcavage testified that the group was about 10 years old, headed by Randall Kreiger,¹ started in Oregon, and had chapters in some other states, including Washington. RP 1625, 1674.

The State also called another witness from the ADL, Allen

¹ The trial transcript mistakenly refers to Randall Kreiger as Randall Krueger.

Kohlhepp, a researcher for the ADL's Pacific Northwest region. RP 2660-62. Kohlhepp had come across Monschke's name on various internet message boards. RP 2664-68. He testified that in none of Monschke's messages did he ever advocate violence. RP 2687. As to Volksfront, he testified that it was not unusual for a group to distance itself from a member accused of a crime. RP 2691. He also testified that Volksfront's leader, Kreiger, attacked an African-American in the 1990s and the group's website listed prisoners of war, which he described as those perceived as martyrs or heroes in the supremacist movement. RP 2695-2700. Kohlhepp conceded, however, that he had never spoken to anyone associated with Volksfront. RP 2701.

To counter the State's theory that Monschke was a violent white supremacist and that white supremacists were an identifiable group, defense counsel decided to call an expert of their own:

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 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.

PRP, Declaration of Erik Bauer at 2-3.

Defense counsel chose Dr. Randy Blazak, a professor at Portland State University. RP 2885. Blazak has a Ph.D. in sociology, with a specialty in criminology. He has presented and published extensively on hate crimes and chairs the Coalition Against Hate Crimes, a group designed to gather information on hate crimes and reduce these crimes in the community. RP 2885-88. Blazak has studied Volksfront and has had direct e-mail communications and discussions with Volksfront's leader, Randall Kreiger. RP 2904-2907.

Dr. Blazak's testimony was a defense disaster. He largely agreed with Dr. Pitcavage that while white supremacists were not a cohesive group, they do share a loose, common ideology not unlike Christians, Muslims, and right or left wing political groups, each of which contains a wide variety of sometimes disparate subgroups. The shared ideology for white supremacists generally is supremacy of the white race and the notion that whites are currently threatened. RP 2891-2895, 2922.

Regarding the group to which Monschke belonged, Volksfront, Dr. Blazak made it clear the group's public image may hide a private agenda. He testified that since 2001, consistent with the general trend in supremacy groups, Volksfront had presented itself as nonviolent. RP 2906-07. When asked Volksfront's position toward groups that advocate violence, Dr. Blazak responded, "to be honest, this is this public front of Volksfront, and there may be other things that go on behind closed doors that those of us who monitor the groups don't know about. But very publically, they have tried to distance themselves from these groups." RP 2911. Along these same lines, Dr. Blazak testified that "[t]heir public claim is they're a nonviolent group and that they believe people who commit violent hate crimes should be put in jail" but also added, "Again, that doesn't mean that these things [advocating acts of violence] don't go on" RP 2913.

On cross-examination, using shared ideology to define "group," Dr. Blazak admitted that white supremacists are an identifiable group. RP 2922-2925. His one caveat concerned the notion of subjective self-identification as a group, a factual predicate for a sociologist's definition of "group." RP 2924, 2975. He conceded, however, that under a standard dictionary definition

of “group,” white supremacists qualify. RP 2975-76. Moreover, there was no debate that Volksfront was a group, having no more than 100 members. RP 2976-77.

In response to additional prosecution questions – and consistent with his testimony on direct – Blazak testified that Volksfront is “a very secretive organization,” they may have a public face and “then there may be this world that even I haven’t seen,” and they may have distanced themselves from Monschke solely to avoid civil liability. RP 2929-30.

Further examination by the prosecution elicited the following from Blazak:

- Volksfront sponsors large rallies where they welcome all supremacist groups [RP 2932];
- people involved in the highest levels of Volksfront “have very violent histories,” including their leader, who has a history of violence against people considered inferior, which reveals the “two faces” of Volksfront [RP 2934];
- Volksfront considers a person who murdered an Ethiopian man a “prisoner of war” and is raising money for him [RP 2933-35, 2939];
- Volksfront also would consider Monschke a “prisoner of war,” which is considered high status, because he is being victimized by “the system” [RP 2936];

- the Volksfront website contains a link to another site advocating the release of individuals involved in robbery, murder, and an attempted bombing despite their obvious guilt [RP 2937-38];
- another supremacist subgroup, National Alliance, advocates violence and partners with Volksfront locally [RP 2940-2941];
- Volksfront promotes bands that use violent lyrics [RP 2932-33, 2949];
- considering the total number of white supremacists, estimated at between 100,00 and 500,000, by committing murder one could advance his position within some portion of the group, even if it reduced his position with other parts of the overall supremacy movement [2977-78]; and
- based on Volksfront's continued ties to violence, a member like Monschke might reasonably believe that murdering an inferior would raise his status in the organization [RP 2979].

Dr. Blazak was the last witness before closing arguments. In the State's closing, the prosecutor noted that even Blazak agreed that white supremacists are an identifiable group under the applicable definition of that word. RP 3068. The prosecutor also pointed out that whether Monschke succeeded in improving his position with Volksfront was not the issue; the issue was whether he had been motivated by a belief that he could improve his

position. RP 3069.

In the State's rebuttal argument, the prosecutor focused on this same topic, again using Dr. Blazak's testimony against the defense to demonstrate that Monschke was motivated to attack Townsend in the hope he would increase his stature among supremacists. RP 3122-23.

b. Defense Counsel Performed Deficiently

Reasonable attorney conduct includes a duty to investigate both the facts and the relevant law. Strickland, 466 U.S. at 690-91; State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978); see also RPC 1.1 ("Competent representation requires . . . thoroughness and preparation reasonably necessary for the representation.").

"To provide constitutionally adequate assistance, 'counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client.'" In re Brett, 142 Wn.2d at 873 (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994)). As the United States Supreme Court said in Strickland:

strategic choices made after thorough investigation of

law and facts 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. . . .

Strickland, 466 U.S. at 690-691.

Whether an investigation is reasonable “includes a context-dependent consideration of the challenged conduct as seen ‘from counsel’s perspective at the time[.]’” Wiggins v. Smith, 539 U.S. 510, 523, 123 S. Ct. 2527 (2003) (quoting Strickland, 466 U.S. at 688-689). Whether counsel learned *some* information pertaining to a defense is not determinative; courts must also assess “whether the known evidence would lead a reasonable attorney to investigate further.” Wiggins, 539 U.S. at 527. And nowhere is proper investigation more important than when it concerns the defendant’s “most important defense[s].” In re Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (quoting Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001), amended by 253 F.3d 1150 (9th Cir. 2001)).

Typically, counsel’s decision to call an expert witness will not support a claim of ineffective assistance of counsel. “However,

the presumption of counsel's competence can be overcome by a showing, among other things, that counsel failed to conduct appropriate investigations" prior to the decision to call that witness. State v. Thomas, 109 Wn.2d 222, 230, 743 P.2d 816 (1987) (finding counsel deficient for failing to discover expert's lack of qualifications prior to trial); see also Davis, 152 Wn.2d at 742 (presumption of competence is overcome by showing that counsel did not adequately prepare for trial); Dillon v. Weber, 737 N.W.2d 420, 426 (N.D. 2007) (counsel ineffective for failing to prepare expert witnesses).

The deficiency in Monschke's case is counsel's failure to adequately determine what Dr. Blazak would say on the stand before choosing to call him as a defense expert. Counsel chose to call Dr. Blazak based on limited and insufficient information. This was a failure of investigation and preparation, making it impossible for counsel to make an informed decision.

In support of his PRP, Monschke previously submitted a declaration from Erik Bauer, one of his attorneys at trial.² See

² Undersigned counsel attempted to speak with Mr. Bauer, but he is in the Australian outback until sometime in March and attempts to reach him there proved unsuccessful. Undersigned counsel also attempted to discuss the relevant issues in this PRP with Monschke's second trial attorney, Jay Berneburg.

Declaration of Erik L. Bauer (attached to PRP as an exhibit). According to Bauer, Blazak “hurt us very badly when he presented opinions that he had not presented in pretrial interviews” and “damaged the defense on every critical point.” Bauer Decl., at 3. Bauer provided two examples: that Volksfront’s public proclamation of nonviolence may differ from the group’s private activities and his opinion that an individual might be able to advance his position among certain white supremacists by committing the murder Monschke was accused of committing. Bauer Decl., at 3.

While Bauer’s declaration does not explain why Blazak presented new information at trial, Blazak’s declaration does: defense counsel failed to determine what Blazak would say on the stand before deciding to call him as a defense witness.

For example, Blazak has no recollection of the attorneys ever asking him whether Volksfront’s public image differed from its private activities, whether the content of its website and other connections implied the continued promotion of violence, or whether Volksfront had partnered with National Alliance at the local level. Declaration of Randy Blazak, at 2 (attached to this brief as

Mr. Berneburg was not responsive to my request. See Declaration of David Koch (attached to this brief as appendix A).

appendix B).

During a break in Dr. Blazak's testimony, defense counsel were "somewhat panicked" and indicated that his testimony was aiding the prosecution. According to Blazak, "I recall thinking that we should have talked about my possible answers on these subjects prior to my taking the stand." Blazak Decl., at 2. Blazak acknowledges that he ended up testifying that one could increase his status within segments of the white supremacy movement with acts of violence and one might reasonably believe he could do the same in Volksfront. Blazak Decl., at 2. But, he explains, "[n]othing I said in my trial testimony was inconsistent with what I told defense counsel in pretrial discussions. Had defense counsel, prior to trial, asked the same questions the prosecutor asked me during trial, I would have provided the same answers." Blazak Decl., at 2.

Blazak notes that in other cases in which he has been used as an expert, he has been asked beforehand to provide a report revealing his testimony. Moreover, in other cases, the attorneys have prepared by conducting a mock exercise, exposing him to the questions he is likely to receive at trial from both sides. Neither was done in Monschke's case. Blazak Decl., at 2-3. In addition,

the trial transcript reveals that counsel did not even provide Blazak with a copy of the relevant Washington statutes under which Monschke was charged with aggravated murder before deciding to call him as a witness. RP 2926.

Returning to the standard for ineffective assistance of counsel, Monschke has demonstrated deficient performance.

Monschke's attorneys had a duty to adequately investigate Blazak's testimony before deciding whether to call him to the stand. Strickland, 466 U.S. at 690-91; Davis, 152 Wn.2d at 721; Brett, 142 Wn.2d at 873; Thomas, 109 Wn.2d at 230. While there were reasons arguably supporting a decision to call Blazak (discussing Volksfront's public image of nonviolence and the fact Monschke did not advance in Volksfront, but rather was kicked out for his alleged involvement in the murder), counsel could not make a reasoned decision whether to do so without also investigating the damaging aspects of his testimony. Defense counsel simply failed to ask the questions necessary to determine what Blazak would say.

Competent counsel would have anticipated the damaging information Blazak eventually provided. Indeed, prosecutors made no secret of their intentions. They indicated well before Blazak took the stand that they intended to demonstrate Volksfront's

peaceful message was merely a front. RP 408-09, 1100, 1114-15, 2670, 2672. Prosecutors also made it clear they would attempt to link Monschke, Volksfront, and National Alliance. RP 336-339, 409, 468-474, 633, 824-29, 1093-1141. And they made it clear they intended to prove that by assaulting Townsend, Monschke could advance his status in two groups: the larger white supremacy movement and Volksfront. RP 746-47.

There is no excuse for defense counsels' failure to determine Dr. Blazak's views on these and related subjects prior to the decision to call him as a defense witness.

c. Monschke Suffered Severe Prejudice

Monschke has demonstrated that he suffered prejudice because there is a reasonable probability that but for counsels' errors, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 693-94).

Monschke did not contest his involvement with Volksfront. And prior to Blazak's testimony, there was evidence that Volksfront was a nonviolent organization. Calvin Vanier, who worked at the apartment complex where Monschke lived, testified that Monschke

tried to recruit him into Volksfront and that the group's application said nothing about violence. RP (5/13/04) at 10, 50. Pillatos described Volksfront as a nonviolent group of "sissies." RP 2050. Butters testified that the group promoted its interests through politics rather than violence. RP 2243. None of Monschke's internet postings promoted violence. RP 2687. And Monschke also testified that Volksfront was nonviolent, cutting ties with him once he was charged with murder. RP 2765-66, 2809.

Nothing Dr. Pitcavage said on the stand directly contradicted this nonviolent image of Volksfront. And while the State's other expert from the ADL – Allen Kohlhepp, briefly discussed Randall Kreiger's violent past and the "prisoners of war" listed on the Volksfront website, it was Dr. Blazak who provided everything prosecutors could have hoped for.

Dr. Blazak had studied Volksfront, had direct communications with Kreiger, and held himself out to be more neutral than either witness from the ADL because they represented "an advocacy group that has a certain political agenda," whereas he was simply "an academic . . . mainly interested in the pursuit of knowledge and a kind of neutral look at the facts and trying to uncover what's really going on[.]" RP 2889.

Blazak confirmed that Volksfront may simply be seeking to avoid civil liability. He also testified that Volksfront invites all groups (necessarily including those professing violence) to their rallies, their high-ranking members have violent histories, they consider those properly convicted of murdering minorities “prisoners of war,” Monschke was considered such a prisoner, Volksfront has partnered with the violent group National Alliance, and one could reasonably believe that murdering an inferior would raise one’s status within some groups that make up the larger white supremacist movement and Volksfront specifically. RP 2929-2930, 2932-41, 2949, 2977-79.

Bauer’s assessment that “Blazak’s testimony damaged the defense on every critical point” is correct. Bauer Decl., at 3.

The defense had sought to convince jurors that, unlike his three co-defendants, Monschke was nonviolent and did not participate in assaulting Townsend once he came upon the scene. Without Blazak’s testimony, Monschke had a fair chance of success on this point. Monschke denied using the bat in any violent manner, testifying that he merely poked at Townsend to determine his condition. Butters also testified that Monschke did not use the bat to assault Townsend.

While Pillatos and Frye both testified that Monschke struck

Townsend in the face, their stories were inconsistent. Pillatos had Monschke hitting Townsend three or four times with little force and only after being pressured to do so. Frye had Monschke enthusiastically hitting Townsend 10 to 15 times, using extreme force. Moreover, Frye was impeached with a letter she wrote to Monschke from jail, in which she said, "someone's got to be punished for this crime. It might not be you, it might be the one who truly did this." RP 2481-82.

Two eyewitnesses, watching the attack from a distance, could not say Monschke was involved in the assault. Cindy Pittman testified that she saw three of the four "whooping and hollering" and it looked like they were kicking and "beating up the tracks." RP 1078-1079. Pittman could not identify which of the three she saw. Nor could she say for certain whether it was three men or two men and a woman. In a defense interview, she said it was the latter.³ RP 1079-1080, 1158-1160. Terry Hawkins, who was with Pittman, testified that he saw three people kicking and beating, one of whom was a female. RP 1266-1268. He also saw a fourth person standing

³ This Court's summary of Pittman's testimony in Monschke's direct appeal indicates that Pittman testified "she saw three men with shaved heads swinging and kicking but did not see a woman." Monschke, 133 Wn. App. at 319. This is incorrect.

back from the others. RP 1268-69. He did not see this individual hitting or swinging at anything. RP 1318-1319.

The physical evidence also was consistent (or at least not inconsistent) with Monschke's version of events. While Pillatos, Frye, and Butters had significant blood on their shoes and clothing, none was found on Monschke. RP 1470-1491, 1508-1513, 1936-37, 2798-99. Specifically, the boots Monschke was wearing, which actually belonged to Butters, showed no signs of blood whatsoever. RP 1482-83, 1490-91, 1938-39, 1963-64. Nor did they show signs they had been cleaned or polished. RP 1512-13. This total absence of blood is an astonishing fact if – using Frye's testimony – Monschke had actually struck Townsend with the bat "mid face," at close range, 10 to 15 times. RP 2359-2361. The State's own expert from the Washington State Patrol Crime lab testified that exposed boots would likely show blood if they were close in proximity to a body struck in this fashion. RP 1512-13.

Moreover, Dr. John Howard, a pathologist, testified that it was impossible to determine whether anyone struck Townsend in the face with a bat. Notably, without a bat striking Townsend's face, all of his facial injuries could be accounted for by the other acts

committed by his co-defendants. RP 2556, 2561-2563.

But once Blazak testified – the only expert on white supremacy and Volksfront without an agenda or political bias – the jurors' view of Monschke would have changed considerably. Blazak's testimony supported the notion that Volksfront was a fraud, a group that promoted nonviolence purely to ensure its continued existence without an earnest desire to change its violent ways. In a case where the jury's murder verdict turned on deciding which of two versions of events was correct – a violent version where Monschke actively assaulted Townsend or a peaceful version where Monschke did nothing criminal – placing him squarely in a group of violent racists who make themselves out to be something they are not clearly favored the first version. This made it more likely in jurors' eyes that Monschke actively participated in the assault.

Of course, not only did Blazak's testimony make conviction for murder more likely, it also increased significantly the likelihood jurors would find the aggravating circumstance, thereby mandating a life sentence. Blazak told jurors that killing someone could advance the killer's position within segments of the overall supremacy movement. RP 2972-78. Moreover, someone in Monschke's position – a new member of Volksfront – might reasonably believe that by killing

Townsend, he could increase his status within Volksfront specifically. RP 2979. This testimony alone extinguished any chance the defense could convince jurors the State had not proved the aggravating circumstance beyond a reasonable doubt.

As previously noted, the prosecution used Blazak's testimony against Monschke during closing argument. See RP 3068-69, 3122-23. Recognizing its value to the prosecution, the State also used his testimony to defend against Monschke's claims on direct appeal.

In its Brief of Respondent, the State argued there was sufficient evidence to sustain the jury's finding on the aggravating circumstance, in part, based on Blazak's testimony. See Brief of Respondent, at 134 (noting the experts agreed on the nature of white supremacist groups and their core belief); at 134-135 (noting Blazak agreed that those who commit hate crimes are considered martyrs or heroes and attain some of the highest status among those in the supremacist movement); at 136 (noting that Monschke had connections to National Alliance, and Blazak testified it was possible to gain status in that group through murder); at 136 (citing Blazak's testimony for the propositions that groups proclaim nonviolence to avoid lawsuits, it is unknown what Volksfront does behind closed doors, Volksfront reveres those who have committed violent crimes,

and many people in the organization have violent histories); at 137 (again noting that “Blazak testified that Volksfront was trying to partner itself with National Alliance.”); see also Brief of Respondent, at 42-45 (discussing Blazak’s testimony in its statement of the case and mentioning much of the same damaging testimony).

In affirming the jury’s verdict that Monschke was guilty of aggravated murder in the first degree, this Court also relied on Blazak’s testimony. It noted Blazak’s testimony that National Alliance was a violent subgroup of white supremacists and one could gain status in that organization for murdering someone deemed inferior. This Court also noted Blazak’s testimony that Volksfront was highly secretive, its private activities may differ from its public image, and Volksfront had partnered with National Alliance in the several years before the murder. Monschke, 133 Wn. App. at 327-28.

Moreover, this Court cited Blazak’s testimony in finding sufficient evidence that Monschke committed murder to increase his status in the hierarchy of an identifiable group:

Blazak’s testimony also supports the conclusion that white supremacy falls within RCW 10.95.020(6). The thrust of Blazak’s testimony was that white supremacy was not an “identifiable group” because, if it was, it would be “[a] very broad-based group,” similar

to “people who are liberal, people who are conservative, environmentalists, pro death penalty people.” 34 RP at 2957-58. But the breadth of the group base is immaterial provided that the group is identifiable, has a hierarchy, and shares an ideology. As Blazak testified, white supremacists are a “finite number of people” who can be “identified” by their common ideology that “white people are superior and the white race is somehow threatened.” 34 RP at 2923-24. Thus, both Pitcavage and Blazak’s testimony reflected that white supremacy falls within the plain language of RCW 10.95.020(6).

Monschke, 133 Wn. App. at 330.

Ultimately, Blazak had little to offer that could help Monschke at trial. The primary reason defense counsel called him was to discuss whether white supremacists qualify as a “group” with a “hierarchy” under RCW 10.95.020(6). RP 2926. As this Court recognized, under the commonly understood dictionary definitions of these words, white supremacists qualify. Monschke, 133 Wn. App. at 329-330. On the flipside, calling Blazak as a defense witness was fraught with great risk. And this certainly proved true once he took the stand.

The mistake here was not the decision to call Blazak as a defense witness. Rather, the mistake was weighing the pros and cons of doing so, and deciding to call him as a defense witness, without properly investigating what he would say when asked

obvious and important questions, the answers to which undermined the defense case.

Having demonstrated both deficient performance and resulting prejudice, Monschke is entitled to relief.

2. PROSECUTORS ENGAGED IN MISCONDUCT WHEN THEY CALLED CRITICAL PROSECUTION WITNESSES KNOWING THEY HAD CONCOCTED A FALSE STORY TO OBTAIN FRYE'S EARLY RELEASE.

A prosecutor's knowing presentation of perjured testimony is misconduct and violates a defendant's due process rights under the Fourteenth Amendment. See State's Response to PRP, at 16 (citing Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); Alcorta v. Texas, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957); Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 2d 791 (1935); United States v. LaPage, 231 F.3d 488, 271 F.3d 909 (9th Cir. 2000)).

Former Pierce County Prosecutor Barbara Corey was assigned to handle the charges against Pillatos, Frye, Butters, and Monschke. See Declaration of Barbara Corey (attached to PRP as an exhibit). Corey was privy to written correspondence to and from

the four defendants after their arrest and incarceration. Decl. of Corey, at 2. Frye was pregnant with Pillatos' child and Corey believed the two were "fabricating a story in an attempt to perpetrate a fraud on the Court and the prosecutor's office." Decl. of Corey, at 2.

Specifically, it appeared the two were scheming to pursue a theory that would result in a favorable plea agreement for Frye, allowing her to be released to raise their child. Decl. of Corey, at 2-3.

It was clear to Corey that Pillatos was attempting to shape Frye's version of events by suggesting that she never assaulted Townsend or never assaulted him of her own free will. Moreover, Pillatos was suggesting ways in which Frye could help him mount a diminished capacity defense. Decl. of Corey, at 2-3.

This very matter was discussed at a pretrial hearing on a defense motion to stop prosecutors from reading the defendants' mail. Corey summarized Pillatos' efforts to manipulate Frye's testimony in a written response to the defense motion:

defendant Pillatos has been using the mail to tamper with witnesses. In a letter to his father dated April 22, 2003, he provided instructions to be given to defendant Frye about her testimony; in the letter, defendant Pillatos provides an explanation for some physical evidence from the scene and states, "It is extremely important she quits denying I was there with her."

Defendant Pillatos also has written to defendant Frye about her role in the murder: "Because you never assaulted the man of your own free will if at all." Defendant Pillatos also has instructed defendant Frye "to testify against me" and also to help with his insanity defense: "Besides if you think I wasn't myself that night it might help." In a letter, defendant Pillatos wrote to defendant Frye: "Like I said plea against me if you'll get a deal. Just remember I didn't seem like myself." In a letter to Cynthia Marler (who spent time in DOC following her murder conviction reported at 32 Wn.App. 503 (1982)), defendant Pillatos explained, "I told Tristain to testify against me."

See State's Response to Defendant's Motion Re: Mail, at 9 (filed under Tristain Frye's cause number and attached to this brief as appendix C). Referring to correspondence between Pillatos and Frye, Corey indicated "there's a conspiracy to commit perjury charge that's possible. There's a witness tampering charge. . . ." RP 87-88.

Later, Corey was present when Frye – interested in cutting a deal that would ensure her earliest release – made an offer of proof regarding what she was willing to say on the stand. Decl. of Corey, at 6. After listening to Frye, and considering all available information (including the correspondence between Frye and Pillatos), Corey concluded that:

Pillatos' and Frye's efforts were not those of remorseful individual[s] 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 [t]he crime scene and then having her assert the exculpatory claim that he, Pillatos, forced her to assault Randall Townsend. . . .”

Decl. of Corey, at 3. According to Corey, “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.” Decl. of Corey, at 4.

Corey’s conclusion that Pillatos and Frye manipulated the process not only finds support in Pillatos’ letters, it finds support in Frye’s letters.

In some of her letters, Frye did speak of telling the truth about what she has seen. State’s Response to PRP, appendix S, at 1651⁴ (“I’m gonna have to be real and tell the truth.”); at 1826 (“I am going to tell the whole truth.”); at 2531 (“I am doing everything I can to tell the truth and somehow be free for my son.”); at 4916 (indicating she would do whatever was necessary short of lying); at 5412 (“I have to tell the truth and go home and be a mom.”). But these statements must be considered in light of other statements she made. Several letters show that Frye was willing to do whatever was necessary to

⁴ Appendix S contains copies of all letters Frye wrote while incarcerated at the Pierce County Jail. Numbers refer to the Bates stamps on these letters.

secure a deal for herself in the hope she could be released to raise Pillatos' child.

Frye made it clear in her letters that she was prepared to do whatever was best for her and her baby. *Id.* at 1650 (“I’ve gotta do what’s best for me and the baby.”); at 1825 (“I am doing what I must to get out as soon as possible so that I can raise our child”); at 2025 (“All I want is to be free to raise our child and be free for you.”); at 2316 (“I am trying to go State witness . . . for my son.”); at 4337 (“I have to do whatever I can to get out and raise our son.”).

Frye was undecided how to proceed, however, and she was looking to Pillatos for guidance. *Id.* at 1651 (indicating she has not decided what to do); at 1702 (“I can’t help but worry for him and wonder what he wants me to do as far as court goes.”); at 1721 (“I need to know what he wants me to do”); at 1724 (“I am so lost for what to do.”); at 1725 (“I wish I could just sit down and talk to David, or write him. I am soo [sic] irritated with not knowing what to do.”).

Pillatos supported Frye testifying against the others, including himself, so that she could get out and raise their child. *Id.* at 2026 (“I respect you so much for standing by me as far as testifying. . . . You wanting me to be free to raise our baby means the world to me.”); at 5930 (“David will be testifying on my behalf as well. He wanted me

to testify against them all, including him. If it would get me to raise our son he is all for it.”).

Meanwhile, Frye did not care what happened to Monschke. *Id.* at 1993 (calling him a punk); 2024-25 (stating she has no respect for Monschke, does not feel sorry for him, and does not care about him). And, notably, she admitted she was willing to lie if Pillatos asked. *Id.* at 1721 (“they know that David would lie for me and that if he asked me I will lie for him”).

Despite Corey’s conclusion that Pillatos and Frye were manipulating the process to Frye’s advantage, and the fact this was known to the other prosecutors involved with the case, once Corey left the office, prosecutors gave Frye “a most favorable plea agreement and sentence.” Decl. of Corey, at 4. In exchange for a guilty plea to murder in the second degree, she testified against Monschke. She also minimized her own involvement. Just as Pillatos had suggested, she testified that she participated against her own free will. She claimed that Pillatos covered her eyes, moved her toward Townsend, and forced her to kick him.⁵ RP 2361-62.

⁵ Terry Hawkins, who – along with Cindy Pittman – watched the assault, testified that Frye was hollering and screaming just like the two men with her while beating and kicking Townsend. No one was holding her, it did not look like anyone was covering her eyes, and it did not appear she was forced to

According to Corey, Frye's deal was inconsistent with the prosecutorial standards of the Pierce County Prosecutor's Office for the 20 years she worked there. Decl. of Corey, at 2, 5. Moreover, it was unfair to Mr. Monschke. Decl. of Corey, at 6. Corey believes that Frye received favorable treatment "based on personal issues," noting that Gerald Horne and Frye's attorney, Judith Mandel, have been friends for decades. Decl. of Corey, at 5.

In response, the prosecutor's office has submitted affidavits from Deputy Prosecutors Gregory Greer and Gerald Costello. See Affidavits of Greer and Costello (attached to State's Response to PRP as appendices M and O, respectively).

Prosecutor Greer notes that Corey's employment with the Pierce County Prosecutor's Office was terminated while she was handling this case. Aff. of Greer, at 1. Not mentioned is the fact Corey successfully sued her former employer for wrongful termination, defamation, false light, and outrage, and a jury awarded her more than \$3 million in damages. See Corey v. Pierce County, ___ Wn. App. ___, 2010 WL 255956 (filed January 25, 2010).

participate. RP 1266-1283. Indeed, by the time of trial, even Pillatos was no longer maintaining the façade that Frye had acted under duress. See RP 2086-87 (denying that anyone forced Frye to violently kick Townsend in the side of the head).

According to Greer, Gerald Horne was not involved in the decision to offer Frye a deal. Aff. of Greer, at 8. Greer concedes that Pillatos was trying to direct how Frye should testify. But his recollection (without a recent review of the letters) is that Frye's correspondence revealed she intended to tell the truth and was remorseful for what had happened. Aff. of Greer, at 6-7. He believes Frye testified truthfully and attributes Ms. Corey's contrary statements and opinions to personal animosity against Ms. Mandel. Aff. of Greer, at 3, 5-6, 9.

Costello, who also notes that Corey was terminated from the office, indicates that he often heard her speak harshly of Ms. Mandel. Aff. of Costello, at 2. Like Greer, Costello expresses his opinion that Frye was credible and indicates that neither Horne nor his relationship with Ms. Mandel played any role in the deal she received. Aff. of Costello, at 2-4.

Based on the correspondence between Frye and Pillatos, and Barbara Corey's declaration, Monschke is unlawfully restrained under RAP 16.4(c)(2) because he has demonstrated a violation of his constitutional right to due process. Corey recognized the two were scheming to perpetrate a fraud, allowing Frye to take a deal and get out of prison well before the others so that she could raise

her child.⁶ Prosecutors had proof that Pillatos was attempting to shape Frye's testimony. And, in her jail correspondence, Frye repeatedly indicated she was looking for his guidance and admitted she was willing to lie if that is what he wanted her to do. Yet, prosecutors made these two their primary witnesses against Monschke.⁷

There can be no doubt Monschke suffered prejudice. The two schemers – Pillatos and Frye – were the only witnesses to testify on the stand that Monschke assaulted Townsend. The State has conceded the importance of Frye's testimony in particular. See Aff. of Greer, at 8 (“This plea agreement [with Frye] secured us critical evidence that would be used to obtain convictions against the three other co-defendants”); Aff. of Costello, at 2 (“It appeared to us that to prove, in detail, the factual sequence of events on the night of the murder that Ms. Frye's testimony would be extremely valuable in the prosecution of her co-defendants.”); Aff. of Costello, at 4 (Frye

⁶ Pillatos even conceded the scheme during his testimony at trial. RP 2134.

⁷ Monschke pointed out this ironic turn of events during trial; *i.e.*, prosecutors gave Frye a favorable deal that ensured her early release and made her and Pillatos their star witnesses after previously recognizing they were conspiring to commit perjury to ensure her early release. RP 483-485, 508. Monschke sought permission to call Corey as a defense witness on this subject, but the request was denied. RP 486-491.

“was instrumental in convincing the jury.”).

Although Monschke maintains that the record is sufficient to find both a due process violation and prejudice, given the contradictory affidavits submitted by Corey, Greer, and Costello, at a minimum, this Court should order a reference hearing to determine precisely what prosecutors knew about Pillatos’ and Frye’s scheme to get her a deal and the effect of Gerald Horne’s relationship with Ms. Mandel on prosecutors’ decision-making. See In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983) (“If petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and 16.12”).

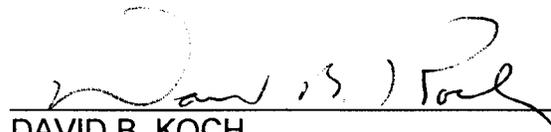
D. CONCLUSION

Monschke's conviction is the product of deficient representation and prosecutorial misconduct. He should receive a new trial. Alternatively, this Court should remand for a reference hearing on one or both of Monschke's claims.

DATED this 12th day of February, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789

Attorneys for Petitioner

APPENDIX A

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**IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON**

In Re the Personal Restraint of:
KURTIS MONSCHKE,
Petitioner.

COA No.: 38365-9-II

**DECLARATION OF
David B. Koch**

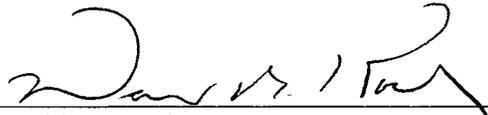
I, David Koch, under penalty of perjury pursuant to RCW 9A.72.085, do hereby declare as follows:

1. I am an attorney with Nielsen, Broman & Koch. Our office was appointed to represent Mr. Monschke in In Re the Personal Restraint of Kurtis Monschke, and the case was assigned to me.
2. In his PRP, Mr. Monschke alleges that his trial attorneys, Erik Bauer and Jay Berneburg, were ineffective for failing to properly investigate the potential testimony of Dr. Randy Blazak, a witness called by the defense at trial. In order to properly represent Mr. Monschke, I attempted to contact Mr. Bauer, Mr. Berneburg, and Dr. Blazak to investigate this claim.

- 1 3. In light of my conversations with Dr. Blazak, he has provided a declaration regarding Mr.
2 Monschke's claim. That declaration is appendix B to Mr. Monschke's brief. I was unable to
3 speak with Mr. Bauer. After attempting to contact him by phone, and e-mail, I was informed by
4 his office that he is in the Australian outback until sometime in March and unlikely to receive
5 my messages until his return. Moreover, even if he receives my messages before his return, he
6 may not be able to respond.
- 7 4. I also attempted to contact Jay Berneburg. I sent him an e-mail message identifying myself and
8 the purpose of my contact. I indicated I would like to speak with him on the phone, would call
9 him shortly, and was interested in having a meeting. He received this message because he
10 responded, albeit only to ask that I send him a copy of the declaration Mr. Bauer had provided
11 in this matter. I sent him an electronic copy of the declaration. The following day, I called him
12 at his office number. No one answered, and I left a voicemail message asking him to call me
13 and indicating when best to reach me. He has never returned my call or otherwise responded to
14 me.
- 15 5. In reviewing the trial record in Mr. Monschke's case, I discovered that an important document –
16 the State's response to a defense motion regarding the interception of inmate mail – had not
17 been filed under Mr. Monschke's Superior Court cause number. Rather, it had been filed under
18 the cause number of a co-defendant, Tristain Frye. Our office obtained a copy of that
19 document, which is now appendix C to Mr. Monschke's brief, from the Pierce County Legal
20 Information Network Exchange (LINX), which allows our office to obtain electronic copies of
21 documents from Pierce County Superior Court files. There is no reason to doubt this document
22 is an identical copy of the original paper document in the Superior Court file.

22 I declare under penalty of perjury under the laws of the State of Washington that the forgoing is true
23 and correct.

24 Signed this 11th day of February, 2010 at Seattle, Washington.

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28 David B. Koch
Attorney at Law

APPENDIX B

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**IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON**

In Re the Personal Restraint of:
KURTIS MONSCHKE,
Petitioner.

COA No.: 38365-9-II

**DECLARATION OF
Dr. Randy Blazak, Ph.D.**

I, Randy Blazak, under penalty of perjury pursuant to RCW 9A.72.085, do hereby declare as follows:

1. I am a tenured professor at Portland State University in Portland, Oregon. I have a Ph.D. in sociology, with a specialty in criminology, from Emory University in Atlanta, Georgia. My dissertation was "The Suburbanization of Hate: The Evolution of Racist Youth Subcultures," and I have presented and published extensively on hate crimes. Since 2003, I have chaired the Coalition Against Hate Crimes, a group designed to gather information on hate crimes and reduce these crimes in the community. I have been used as an expert in nine cases, testifying in seven of them. One of these cases is State v. Kurtis Monschke, an aggravated murder case tried

1 in Pierce County Superior Court in 2004. I have reviewed a transcript of my testimony and
2 some of my notes pertaining to that case.

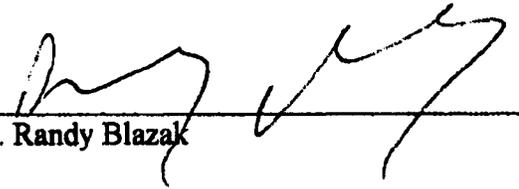
- 3 2. Prior to my testimony in Mr. Monschke's case, I spoke with his attorneys, Jay Berneburg and
4 Erik Bauer. We had discussions by phone and in person. I told them I was not an advocate for
5 the defense and that my testimony concerning the white supremacist movement would be the
6 same if the prosecution called me. Counsels' main focus was whether "white supremacists"
7 constitute an identifiable group, with a hierarchy, in which one could advance his position by
8 committing a violent act. It was my opinion, and I testified, that white supremacists are not a
9 cohesive group or organization, share only a loose ideology, and do not have a formal hierarchy.
- 10 3. Prior to trial, counsel and I also discussed Volksfront. We discussed that it was a small group
11 out of Portland, led by Randall Kreiger, and now publicly professing nonviolence. I ultimately
12 testified to this under direct examination by Mr. Berneburg. I do not recall the attorneys ever
13 asking me prior to trial whether Volksfront's public image differed from some of its private
14 activities, whether the content of its website and other connections implied the continued
15 promotion of violence, or whether Volksfront had partnered with National Alliance at the local
16 level.
- 17 4. Following cross-examination by the prosecuting attorney, the court recessed trial for lunch. The
18 defense attorneys were somewhat panicked and indicated that my answers were helping the
19 prosecution. I recall thinking that we should have talked about my possible answers on these
20 subjects prior to my taking the stand. Later, in response to additional questions posed by the
21 prosecution, I testified that a violent act could increase one's status among some segments of
22 the white supremacist movement, while reducing status among other segments. I also testified
23 that Volksfront was a relatively small group and, based on the group's website and what
24 appeared to be continued associations with those advocating violence, one might reasonably
25 conclude that a violent act could increase status within that organization.
- 26 5. Nothing I said in my trial testimony was inconsistent with what I told defense counsel in pretrial
27 discussions. Had defense counsel, prior to trial, asked the same questions the prosecutor asked
28 me during trial, I would have provided the same answers.
6. In some other cases in which I have been called as an expert, I have been asked to provide a
report revealing my proposed testimony beforehand. I was not asked to do so in this case. In
some other cases in which I have testified, the attorneys have prepared me by conducting a

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mock exercise, exposing me to questions I should expect from both sides. None was conducted in this case.

I declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

Signed this 9th day of February, 2010 at Portland, Oregon.


Dr. Randy Blazak

APPENDIX C



03-1-01463-1 18292946 SRSP 07-15-03



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-01463-1

vs.

TRISTAIN L. FRYE,

STATE'S RESPONSE TO
DEFENDANT'S MOTION RE:MAIL

Defendant.

A. ISSUES FOR TRIAL COURT DECISION:

1. Should this court decline to apply a defunct WAC to the mail handling policies of the Pierce County Corrections and Detention Center?
2. Should this court refuse to consider defendants claim that the PCCDC's mail practice violates any provisions of the United States Constitution and the Washington State Constitution where defendants have failed to present argument on this issue or cite any legal authority to support their contention?
3. Should this court hold that the PCCDC mail practices are permissible where the practices comport with the Washington Supreme Court case of State v. Hawkins?
4. Should this court decline to consider defendant's challenge to the PCCDC screening of in-coming mail where defendants lack standing to assert the privacy rights of third parties?

ORIGINAL

1 B. STATEMENT OF FACTS:

2 In late April, 2003, Pierce County Sheriff's Department Office, Christine Hammond, sent
3 to the prosecuting attorney's office copies of defendants' letters which she thought might be
4 important to this case. Appendix A. After reviewing the letters, Tacoma Police Department
5 Detective John Ringer contacted Hammond and asked her to forward any other letters from
6 defendants that might be relevant to the case. Appendix B. No legal mail was either reviewed or
7 copied.

8 In addition, to this correspondence, the State has received numerous infraction reports
9 documenting misconduct by all four defendants. (See appendix C). All four defendants have
10 created security issues when they are together to and from court. The State also has been
11 informed that defendant Pillatos is considered to be very dangerous because he has made
12 numerous statements suggesting that he wants to die by "suicide by cop". Defendant Pillatos
13 also has defaced his cell with racist graffiti, stated that he intends to keep acting out against
14 corrections officers, and shouted racial slurs ("monkey nigger") at other individuals. Defendant
15 Monschke has engaged in feces throwing while in the PCCDC, has assaulted other inmates, and
16 has written racist graffiti on cell walls. Defendant Monschke has tried to enlist support from
17 Volksfront, a white supremacist entity. Defendants Pillatos and Frye appear to be corresponding
18 about the content of her testimony; these defendants apparently intend to pursue a theory that
19 will exonerate defendant Frye so that she will be free to raise their child. (Note: the preceding
20 paragraph does not discuss all of the infraction reports against defendants.)

21
22 Subsequent to the demise of the State Jail Commission, the PCCDC promulgated the
23 Prisoner Information Handbook, which clearly states that the jail has the right to review any
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1 outgoing mail upon "good cause". Appendices D and E. The "good cause" requirement is not
 2 the same as probable cause and is a reasonable and necessary component of jail management.

3 The State is not aware of any authority which prohibits the review and copying of a
 4 criminal defendant's mail."

5 C. LAW AND ARGUMENT:

- 6
 7 1. THIS COURT SHOULD DECLINE TO APPLY A
 8 DEFUNCT WAC TO THE MAIL HANDLING POLICIES
 9 OF THE PIERCE COUNTY CORRECTIONS AND
 10 DETENTION FACILITY.

11 Defendant relies on WAC 289-24-110, which regulated the handling of mail in "holding
 12 facilities", as defined by WAC 289-02-020(9). The PCCDC is not a "holding facility" within
 13 that definition and the State surmises that defendant probably intended to refer to WAC 289-24-
 14 210(b)(ii), which applied to jails and detention centers. At any rate, defendant's error and
 15 probable intention are irrelevant for the simple reason that the WACs cited are no longer in
 16 effect.

17 The referenced WACs are found in Title 289, "Corrections Standards Board." WAC
 18 289-02-010 provides that "the rules set forth in this title are adopted by the state jail commission
 19 pursuant to and for the purposes of fulfilling the mandates of the City and County Jails Act,
 20 chapter 70.48 RCW." However, RCW 70.48.050, which vested powers and duties in the board
 21 of the State Jail Commission, was repealed by the Laws of 1987, chapter 462, section 23
 22 effective 1/1/88. Appendix F. Because the statutory authority for the WAC has not been in
 23 effect for more than fifteen years, the WAC promulgated by the defunct board likewise are not in
 24 effect. In sum, defendant argues to this court that she is entitled to relief based upon a WAC that
 25 has not been in effect for more than fifteen years. This novel argument lacks any basis in law.

1 Since defendant fails to cite any applicable authority, defendant's request for relief should be
2 denied.

- 3 2. THIS COURT SHOULD REFUSE TO CONSIDER
4 DEFENDANT'S CLAIM THAT THE PCCDC'S MAIL
5 PRACTICE VIOLATES ANY PROVISIONS OF THE
6 UNITED STATES CONSTITUTION AND THE
7 WASHINGTON STATE CONSTITUTION WHERE
8 DEFENDANTS HAVE FAILED TO ARGUE THIS
9 ISSUE OR CITE ANY LEGAL AUTHORITY TO
10 SUPPORT THEIR CONTENTION.

11 It is axiomatic that a court does not have to consider any that are unsupported by
12 argument or citation to authority. For example, in State v. Farmer, 116 Wn.2d 414, 433, 805
13 P.2d 200 (1991), the court held, "In the absence of an argument and citation to authority, an issue
14 raised on appeal will not be considered."

15 CrR 8.2 makes CR7 applicable to these types of motions in criminal cases. CR 7 requires
16 the moving party to "state with particularity the grounds" for the motion.

17 Although this case obviously is not an appeal, the law nevertheless requires the moving
18 party to make argument and provide authority for the relief requested. It is improper and unfair
19 for this court to permit defendants to base a motion upon a string-cite of constitutional provisions
20 with no other authority or argument. Neither the State nor this court should have to guess what
21 specific arguments defendants want to make, to perform the legal research that defendants
22 obviously have failed to do, and to make their record for them. Because defendants in no way
23 have properly briefed any constitutional objections to the PCCDC's practice of screening and
24 copying in-mate mail, this court should not permit defendants to seek any relief on these
25 grounds.

- 1 3. PCCDC MAIL POLICIES COMPORT WITH THE
2 WASHINGTON STATE SUPREME COURT CASE OF
3 STATE V HAWKINS AND THEREFORE ARE
4 PERMISSIBLE; MOREOVER, A CRIMINAL
5 DEFENDANT IN A COUNTY JAIL HAS NO
6 EXPECTATION OF PRIVACY IN MAIL SENT OR
7 RECEIVED.

8 The Washington Supreme Court has held that the evidentiary use of a letter written by an
9 unconvicted prisoner was proper and that there was no impermissible violation of the prisoner's
10 privacy because a loss of privacy is a necessary adjunct to detention. State v. Hawkins, 70
11 Wn.2d 697, 425 P.2d 390, cert. denied 390 U.S. (1967). In Hawkins, the defendant was awaiting
12 trial for murder; during the pretrial period, the defendant's letter to his mother was inspected and
13 copied. The trial court later admitted the evidence at trial. The court affirmed the admission of
14 the letter and noted that the prisoner was aware that his mail would be inspected, and that such
15 inspection for very obvious security reasons was a common practice of jail and penal institutions.
16 Hawkins remains good law. It is therefore resolves any issue regarding mail in this case because
17 once the Washington supreme court has decided an issue of state law, that interpretation is
18 binding on all lower courts until it is overruled by this court. State v. Gore, 101 Wn.2d 481, 487,
19 681 P.2d 1083 (1984).

20 Consistent with this principle, the majority of courts, including the United States
21 Supreme Court and the 9th Circuit, long have held that an in-mate has no expectation of privacy
22 in his correspondence. In the case of Stroud v. United States, 251 U.S. 15, 64 L.Ed.103, 40 S.Ct.
23 50 (1919), the court held that the censorship of prisoner mail is a proper measure to promote
24 security and discipline and ordinarily violates no constitutional rights. In that prosecution for the
25 murder of a prison guard, the prosecution had introduced a letter written by defendant while in
 custody. Affirming the conviction, the court rejected defendant's argument that the seizure and

1 use of letters denied the prisoner the immunity from unreasonable searches and seizures afforded
2 by the Fourth Amendment to the Federal Constitution. Nor, explained the court, apparently
3 alluding to the Fifth Amendment protection against self-incrimination, did not seizure and use of
4 the letters constitute testimony of the accused. Rather, the court reasoned, the letters were
5 voluntarily written and came into the possession of the officials of the penitentiary under an
6 established practice reasonably designed to promote the discipline of the institution.

7 In the landmark case of Ex parte Hull, 312 U.S. 546, 85 L.Ed. 317, 40 S.Ct. 176 (1919),
8 the court held that legal mail could not be reviewed or censored in the same manner as non-legal
9 mail. (Note: there was no review of defendants legal mail in this case).

10 Three decades after Stroud, the United State Supreme Court reiterated the rule that lawful
11 incarceration brings about the necessary withdrawal or limitation of many rights and privileges, a
12 retraction justified by the nature of custody. Price v. Johnson, 334 U.S. 266, 92 L.Ed. 1356, 68
13 S.Ct. 1049 (1948).

14 Finally, in Turner v. Safely, 482 U.S. (1986), the court again noted that regulation on
15 inmate correspondence will be upheld if "reasonably related" to legitimate interests. Further,
16 under the "hands off" doctrine, courts traditionally have been extremely reluctant to review
17 prison regulations and have refused to do so unless the circumstances were exceptionally
18 aggravated. See 60 Am Jur 2d, Penal and Correctional Institutions, sec. 45.

19 A prisoner who submits for posting a letter which he knew would be subject to routine
20 censorship will not be heard to later complain that the letter was obtained by means of an
21 unreasonable search and seizure. State v. Johnson, (1970), MO) 456 SW2d 1, adhered to on later
22 appeal 476 SW2d 516, cert denied, 409 U.S. 859. Court also has recognized that a deprivation of
23 privacy is a necessary adjunct to imprisonment. People v. Dinkins, 242 Cal App 2d 892 (1966).
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1 Other courts have rejected defendants' claim that censorship of unconvicted defendants' mail
2 abridged due process or denied other constitutional rights, such as freedom of religion. See
3 Green v. Maine, 113 F.Supp. 253 (1953, DC Me); King v. McGinnis, 289 F.Supp. 466 *DC NY,
4 1968).

5 In addition, courts have generally held that evidence derived in the course of such
6 censorship was admissible at trial. Thus, so long as the censorship did not concern legal mail (to
7 the attorney), the courts have permitted the censorship of the mail of unconvicted prisoners and,
8 indeed, have not distinguished between the unconvicted and the convicted.

9 For example, in State v. Loza, 641 NE2d 1082, reconsideration denied 643 NE 2d142
10 (1994), the court held that the murder defendant's rights were not violated when jail officials read
11 and copied letters written by the defendant while in pretrial custody, in which defendant admitted
12 the killings, where the defendant voluntarily wrote letters and handed them unsealed to the jailer
13 for mailing; the court held that examination of the mail was warranted where one piece of the
14 mail was addressed to a material witness who felt threatened by the defendant.
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16 Similarly, the use of a photocopy of a letter written to a prospective witness by a federal
17 prisoner incarcerated in a jail following his arrest for bank robbery was held not to violate his
18 Fourth Amendment rights where the court noted that the prisoner's meticulous avoidance of
19 detail in the letter indicated that he well knew it would be subjected to official scrutiny before
20 reaching the intended recipient. United States v. Wilson, 447 F.2d 1, cert denied 404 US 1053
21 (1971, CA9 Or, 1971).

22 Likewise, in Baker v. State, 202 So. 2d 563 (Fla, 1967), the court rejected defendant's
23 claim that an illegal search had been committed by a jailer who intercepted and copied a letter
24 which a prisoner awaiting trial had written to his uncle and given to the jailer for mailing; the
25

1 defendant had made damaging admissions in the letter, which the court held was properly
2 admitted into evidence inasmuch as the jailer read it in accordance with usual practice and the
3 letter had come into his possession in the orderly process of the operation of the jail.

4 In this case, defendants have no cognizable right to privacy in their non-legal mail.
5 These defendants had notice that their mail might be screened. For example, in a letter written
6 on April 23, 2003, defendant Scotty Butters wrote, "I can't write to (sic) much in a letter about it
7 because they might read it and I don't need them to make more evidence on me." Likewise,
8 defendant Frye wrote to a friend that she can't talk about her circumstances.

9 Review of the defendants' mail establishes that the PCCDC has "good cause" to review
10 and copy their non-legal mail and also that these actions promote legitimate State interests.
11 Defendants' mail has addressed such subjects as close affiliation with hate groups that actively
12 support the type of actions charged in this case, witness tampering, threats against other
13 individuals (including police, prosecutors, and codefendants). To illustrate, defendant Pillatos
14 has asked other in-mate in the Washington correctional system to harm defendant Scotty Butters;
15 Pillatos wrote: Can you put the word out on Scotty James Butters? He's a rat. Rolled on me,
16 Kurtis and my pregnant fiance and lied at that. Defendant Pillatos also wrote to defendant Frye
17 about codefendants Butters and Monschke: "I'm gonna knock Kurtis out and so worse to Scotty.
18 There (sic) no friends of mine. Both have called me out of my name and both will pay. Blood
19 and Honor." Defendant Pillatos has voiced thoughts of violence toward the State's attorneys:
20 "I'll slap the prosecutor off his bar stool . . . leave handprints all across him..." /Defendant
21 Pillatos wrote to a friend that "I'd kill 'em both [referring to Butters and Monschke) if they were
22 plotting against me."
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1 In addition, defendant Pillatos has been using the mail to tamper with witnesses. In a
2 letter to his father dated April 22, 2003, he provided instructions to be given to defendant Frye
3 about her testimony; in the letter, defendant Pillatos provides an explanation for some physical
4 evidence from the scene and states, "It is extremely important she quits denying I was there with
5 her." Defendant Pillatos also has written to defendant Frye about her role in the murder:

6 "Because you never assaulted the man of your own free will if at all." Defendant Pillatos also
7 has instructed defendant Frye "to testify against me" and also to help him with his insanity
8 defense: "Besides if you think I wasn't myself that night it might help." In a letter, defendant
9 Pillatos wrote to defendant Frye: "Like I said plea against me if you'll get a deal. Just remember
10 I didn't seem like myself." In a letter to Cynthia Marler (who spent time in DOC following her
11 murder conviction reported at 32 Wn.App. 503 (1982)), defendant Pillatos explained, "I told
12 Tristain to testify against me."
13

14 Further, the defendants' mail contains evidence regarding their involvement in the white
15 supremacy movement. Defendant Monschke received a letter from an Oregon white supremacist
16 who discussed their shared beliefs. In numerous letters, defendant Monschke avows his
17 continued support for the white supremacist movement. Defendant Frye acknowledges that her
18 application for Aryan Nations was taken by police during a search warrant. Defendant Frye also
19 acknowledges that the crime was committed to obtain her red laces: "...Even Jen, Kurtis's
20 girlfriend said I've been wanting to get my red laces for a while! The fact is I really didn't care.
21 They're shoelaces, the boys wanted me to get them more than anyone."
22

23 The State has not presented an exhaustive summary of the contents of defendants' letters.
24 Suffice it to say that the defendants discuss threats to other individuals, how to testify at trial, and
25 also make occasional admissions. Given the number of infractions these defendants have earned

1 and their affiliation with a hate group that is known to actively support its prisoners, the PCCDC
 2 has "good cause" to read their mail. Similarly, under the rule of Hawkins, supra, the PCCDC has
 3 authority to copy any and all non-legal letters and forward them to the prosecutor.

4 This court should deny defendant's motion. Defendants have failed to cite any relevant
 5 authority that prohibits the practices used in this case.

6 4. THIS COURT SHOULD REFUSE TO REVIEW
 7 DEFENDANTS' CHALLENGE TO SCREENING IN-
 8 COMING MAIL WHERE DEFENDANTS LACK
 9 STANDING TO OBJECT TO REVIEW OF IN-COMING
 10 MAIL.

11 Privacy rights are personal rights which may not be vicariously asserted. State v.
 12 Goucher, 124 Wn.2d 778, 787, 881 P.2d 210 (1994). Defendants thus lack standing to allege a
 13 violation of a third party's rights. Adult Entertainment Center, Inc. v. Pierce County, 57 Wn.
 14 App. 435, 442, 788 P.2d 1102 (1990). Further, the PCCDC has a legitimate interest in screening
 15 in-coming mail for contraband and prohibited contents. Because defendants lack standing to
 16 assert the rights of any individuals who may correspond with them, this court should not consider
 17 defendants' claim that third party rights have been violated.

18 DATED this 14th day of July, 2003.

19 GERALD A. HORNE
 20 Pierce County Prosecuting Attorney

21 
 22 Barbara Corey-Boulet
 23 Deputy Prosecuting Attorney
 24 WSB#11778
 25

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Fax

hand delivered

7/14/03
Date Signature

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