

COURT OF APPEALS  
DIVISION II  
CASE NO. 38365-9  
STATE OF WASHINGTON  
BY: *[Signature]*  
DEPUTY

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

IN RE THE PERSONAL RESTRAINT  
PETITION OF:

KURTIS MONSCHKE,  
  
Petitioner.

NO. 38365-9

STATE'S RESPONSE TO PERSONAL  
RESTRAINT PETITION

A. ISSUES PERTAINING TO DEFENDANT'S PERSONAL RESTRAINT  
PETITION:

1. Should this court dismiss this petition when petitioner has failed to show either prejudicial constitutional error or a fundamental defect resulting in a complete miscarriage of justice?
2. Has petitioner failed to demonstrate ineffective assistance of counsel as his evidence does not show either deficient performance or the resulting prejudice necessary to succeed on this claim?
3. Has petitioner failed to provide any evidence to support his claims of prosecutorial misconduct?

1 B. STATUS OF PETITIONER:

2 Petitioner, Kurtis Monschke, is restrained pursuant to a Judgment and Sentence  
3 entered in Pierce County Cause No. 03-1-01464-0. Appendix A. He was sentenced to  
4 life without parole on one count of aggravated murder in the first degree. *Id.* Petitioner  
5 appealed from entry of this judgment and sentence. His convictions were affirmed by  
6 Division II of the Court of Appeals in a partially published opinion filed on June 1, 2006.  
7 *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006), *pet review denied*, 159  
8 Wn.2d 1010, 154 P.3d 918 (2007). A copy of the opinion, including the unpublished  
9 portions, is attached. Appendix B. The mandate on direct appeal issued on March 13,  
10 2007. Appendix C. Petitioner sought certiorari, and the United State Supreme Court  
11 denied his petition on October 1, 2007. *Monschke v. Washington*, 128 S. Ct. 83, 169 L.  
12 Ed. 2d 64, 76 U.S.L.W. 3158 (2007).

14 On September 30, 2008, petitioner filed a timely first personal restraint petition  
15 alleging that his conviction should be vacated. Petitioner asserts that: 1) the trial  
16 prosecutors engaged in misconduct by either a) entering into a plea agreement with a co-  
17 defendant Tristain Frye, for an improper reason; and/or b) suborning perjury by calling  
18 her to testify at his trial; and 2) he received ineffective assistance of counsel.

19 The State has no information to dispute petitioner's claim of indigency.

20  
21 C. FACTS RELEVANT TO PETITION:

22 Petitioner was one of four codefendants charged in the murder of a homeless man,  
23 Randall Townsend, and the only one of the four that took his case to trial. *See* Appendix  
24 B. Petitioner's codefendants were Tristain Frye, David Pillatos, who was also Ms. Frye's  
25 fiancé, and Scotty Butters. *Id.* The first of the codefendants to enter a guilty plea was

1 Tristain Frye; she pleaded guilty to murder in the second degree and agreed to testify if  
2 called as a witness at the trial of any of her co-defendants. *See* Appendix D (Statement of  
3 Defendant on Plea of Guilty); Appendix E (Plea Agreement); Appendix F (Second  
4 Amended Information). The two prosecutors on the case presented a lengthy statement  
5 setting forth their reasons for the reduction of charges so that the court would accept the  
6 amended information. Appendix G

7 A few weeks after Ms. Frye entered her guilty plea, David Pillatos entered a guilty  
8 plea to murder in the first degree. *See* Appendix H (Statement of Defendant on Plea of  
9 Guilty); Appendix I (Prosecutor's Statement Regarding Amended Information). A week  
10 after that, Scotty Butters entered a guilty plea to murder in the first degree. *See* Appendix  
11 J (Statement of Defendant on Plea of Guilty); Appendix K (Prosecutor's Statement  
12 Regarding Amended Information). On both Pillatos and Butters cases, the State reserved  
13 the right to seek an exceptional sentence as part of the plea agreement. Appendices H and  
14 J. In June of 2004, prior to imposition of sentence in either case, the United States  
15 Supreme Court issued its decision in *Blakely v. Washington* which undermined the  
16 State's ability to seek an exceptional sentence against these co-defendants. *See State v.*  
17 *Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007). Ultimately, both men would receive  
18 standard ranges sentences.  
19

20 The State extended the same terms that were offered to Pillatos and Butters to  
21 petitioner, but he did not accept the offer. *See* Appendices L, M, and O. All of the four  
22 co-defendants testified at petitioner's trial. RP 2164-2303 (Butters), 2327-2496 (Frye),  
23 2029-2138 (Pillatos), 2753-2884(petitioner). A summary of the trial evidence - taken  
24 from the State's response brief on the direct appeal - is attached. Appendix N. After  
25

1 hearing the evidence the jury convicted petitioner of murder in the first degree with  
2 aggravating circumstances and he received a sentence of life without the possibility of  
3 parole. Appendix A.

4 Following petitioner's trial, the same judge that had presided over his trial  
5 sentenced Ms. Frye to a low end, standard range sentence. Appendix Q.

6  
7 C. ARGUMENT:

- 8 1. THE PETITION SHOULD BE DISMISSED BECAUSE  
9 PETITIONER HAS NOT SHOWN PREJUDICIAL  
10 CONSTITUTIONAL ERROR OR A FUNDAMENTAL DEFECT  
11 NECESSARY TO OBTAIN RELIEF BY PERSONAL  
12 RESTRAINT PETITION.

13 Personal restraint procedure has its origins in the State's habeas corpus remedy,  
14 guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of  
15 habeas corpus relief is the principle that the writ will not serve as a substitute for appeal.  
16 A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute  
17 for an appeal. *In re Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral  
18 relief undermines the principles of finality of litigation, degrades the prominence of the  
19 trial, and sometimes costs society the right to punish admitted offenders. These are  
20 significant costs, and they require that collateral relief be limited in state as well as federal  
21 courts. *Id.*

22 In this collateral action, the petitioner has the duty of showing constitutional error  
23 and that such error was actually prejudicial. The rule that constitutional errors must be  
24 shown to be harmless beyond a reasonable doubt has no application in the context of  
25 personal restraint petitions. *In re Mercer*, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987);

1 *Hagler*, 97 Wn.2d at 825. Mere assertions are insufficient in a collateral action to  
2 demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of  
3 the judgment and sentence and not against it. *In re Hagler*, 97 Wn.2d at 825-26. To  
4 obtain collateral relief from an alleged nonconstitutional error, a petitioner must show “a  
5 fundamental defect which inherently results in a complete miscarriage of justice.” *In re*  
6 *Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than the  
7 constitutional standard of actual prejudice. *Id.* at 810.

8  
9 Reviewing courts have three options in evaluating personal restraint petitions:

- 10 1. If a petitioner fails to meet the threshold burden of showing actual  
11 prejudice arising from constitutional error or a fundamental defect  
12 resulting in a miscarriage of justice, the petition must be  
13 dismissed;
- 14 2. If a petitioner makes at least a prima facie showing of actual  
15 prejudice, but the merits of the contentions cannot be determined  
16 solely on the record, the court should remand the petition for a full  
17 hearing on the merits or for a reference hearing pursuant to RAP  
16.11(a) and RAP 16.12;
- 18 3. If the court is convinced a petitioner has proven actual prejudicial  
19 error, the court should grant the personal restraint petition without  
20 remanding the cause for further hearing.

21 *In re Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

22 In a personal restraint petition, “naked castings into the constitutional sea are not  
23 sufficient to command judicial consideration and discussion.” *In re Williams*, 111 Wn.2d  
24 353, 365, 759 P.2d 436 (1988) (citing *In re Rozier*, 105 Wn.2d 606, 616, 717 P.2d 1353  
25 (1986), which quoted *United States v. Phillips*, 433 F.2d 1364, 1366 (8<sup>th</sup> Cir. 1970)).

That phrase means “more is required than that the petitioner merely claim in broad  
general terms that the prior convictions were unconstitutional.” *Williams*, 111 Wn.2d at

1 364. The petition must also include the facts and “the evidence reasonably available to  
2 support the factual allegations.” *Id.*

3 The evidence that is presented to an appellate court to support a claim in a  
4 personal restraint petition must also be in proper form. On this subject, the Washington  
5 Supreme Court has stated:

6 It is beyond question that all parties appearing before the courts of this  
7 State are required to follow the statutes and rules relating to authentication  
8 of documents. This court will, in future cases, accept no less.

9 *In re Connick*, 144 Wn.2d 442, 458, 28 P.3d 729 (2001). That rule applies to pro se  
10 defendants as well:

11 Although functioning pro se through most of these proceedings, Petitioner  
12 – not a member of the bar – is nevertheless held to the same responsibility  
13 as a lawyer and is required to follow applicable statutes and rules.

14 *Connick*, 144 Wn.2d at 455. The petition must include a statement of the facts upon  
15 which the claim of unlawful restraint is based and the evidence available to support the  
16 factual allegations. RAP 16.7(a)(2); *Petition of Williams*, 111 Wn.2d 353, 365, 759 P.2d  
17 436 (1988). Personal restraint petition claims must be supported by affidavits stating  
18 particular facts, certified documents, certified transcripts, and the like. *Williams*, 111  
19 Wn.2d at 364. If the petitioner fails to provide sufficient evidence to support his  
20 challenge, the petition must be dismissed. *Williams* at 364. The purpose of a reference  
21 hearing “is to resolve genuine factual disputes, not to determine whether the petitioner  
22 actually has evidence to support his allegations.” *In re Rice*, 118 Wn.2d 876, 886, 828  
23 P.2d 1086 (1992). It is not enough for a petitioner to give a statement about evidence that  
24 he believes will prove his factual allegations. *Id.* The court has been specific on how  
25 petition must support his claims:

If the petitioner’s allegations are based on matters outside the existing  
record, the petitioner must demonstrate that he has competent, admissible  
evidence to establish the facts that entitle him to relief. If the petitioner’s

1 evidence is based on knowledge in the possession of others, he may not  
2 simply state what he thinks those others would say, but must present their  
3 affidavits or other corroborative evidence. The affidavits, in turn, must  
4 contain matters to which the affiants may competently testify. In short, the  
petitioner must present evidence showing that his factual allegations are  
based on more than speculation, conjecture, or inadmissible hearsay.

5 *In re Rice*, 118 Wn.2d at 886. Generally, a motion or petition that is supported by  
6 unsworn statements or hearsay affidavits, rather than proper testimonial affidavits, should  
7 be dismissed. See *State v. Crumpton*, 90 Wn. App. 297, 952 P.2d 1100 (1998). In  
8 *Crumpton*, 90 Wn. App.297, 952 P.2d 1100 (1998), a motion for relief from judgment  
9 alleging newly discovered evidence, which was transferred to the Court of Appeals to be  
10 handled as a personal restraint petition, was dismissed because the affidavits from an  
11 attorney and an investigator that supported this claim were not testimonial, and therefore  
12 insufficient. Crumpton later filed another motion for relief of judgment alleging the same  
13 newly discovered evidence, but this time supported it with testimonial affidavits. The  
14 court dismissed it as an improper second or subsequent attack under RCW 10.73.140.  
15 The court noted that there was no showing of good cause for the delay in filing the  
16 testimonial affidavits, expressly rejecting a claim of incarceration as providing such  
17 cause. *Crumpton*, 90 Wn. App, at 302-303.

18 As will be more fully set forth below, petitioner has failed to meet his burden of  
19 showing that he is entitled to relief.

20 2. PETITIONER HAS FAILED TO PRESENT EVIDENCE TO  
21 SHOW BOTH DEFICIENT PERFORMANCE AND  
22 RESULTING PREJUDICE NECESSARY TO SUCCEED ON  
HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

23 The right to effective assistance of counsel is the right “to require the  
24 prosecution’s case to survive the crucible of meaningful adversarial testing.” *United*  
25 *States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When

1 such a true adversarial proceeding has been conducted, even if defense counsel made  
2 demonstrable errors in judgment or tactics, the testing envisioned by the Sixth  
3 Amendment of the United States Constitution has occurred. *Id.* “The essence of an  
4 ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial  
5 balance between defense and prosecution that the trial was rendered unfair and the verdict  
6 rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582,  
7 91 L. Ed. 2d 305 (1986).

8 To demonstrate ineffective assistance of counsel, a defendant must satisfy the  
9 two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052,  
10 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987).  
11 First, a defendant must demonstrate that his attorney’s representation fell below an  
12 objective standard of reasonableness. Second, a defendant must show that he or she was  
13 prejudiced by the deficient representation. Prejudice exists if “there is a reasonable  
14 probability that, except for counsel’s unprofessional errors, the result of the proceeding  
15 would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251  
16 (1995); *see also Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction,  
17 the question is whether there is a reasonable probability that, absent the errors, the fact  
18 finder would have had a reasonable doubt respecting guilt.”).

19 There is a strong presumption that a defendant received effective representation.  
20  
21 *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116  
22 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries  
23 the burden of demonstrating that there was no legitimate strategic or tactical rationale for  
24 the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.  
25

1 The standard of review for effective assistance of counsel is whether, after  
2 examining the whole record, the court can conclude that defendant received effective  
3 representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An  
4 appellate court is unlikely to find ineffective assistance on the basis of one alleged  
5 mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

6 Judicial scrutiny of a defense attorney's performance must be "highly deferential  
7 in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689.  
8 The reviewing court must judge the reasonableness of counsel's actions "on the facts of  
9 the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*,  
10 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

12 What decision [defense counsel] may have made if he had more  
13 information at the time is exactly the sort of Monday-morning  
14 quarterbacking the contemporary assessment rule forbids. It is  
15 meaningless...for [defense counsel] now to claim that he would have done  
16 things differently if only he had more information. With more  
17 information, Benjamin Franklin might have invented television.

18 *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995).

19 Post-conviction admissions of ineffectiveness by trial counsel have been viewed  
20 with skepticism by the appellate courts. Ineffectiveness is a question which the courts  
21 must decide and "so admissions of deficient performance by attorneys are not decisive."  
22 *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

23 In addition to proving his attorney's deficient performance, the defendant must  
24 affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the  
25 result would have been different." *Strickland*, 466 U.S. at 694.

The presumption of counsel's competence can be overcome by a showing, among  
other things, that counsel failed to conduct appropriate investigations. *State v. Thomas*,

1 109 Wn. 2d 222, 230, 743 P.2d 816 (1987). The adequacy of a pretrial investigation turns  
2 on the complexity of the case and trial strategy. *Washington v. Strickland*, 693 F.2d  
3 1243, 1251 (11th Cir.1982) (en banc), *rev'd on other grounds*, 466 U.S. 668, 104 S. Ct.  
4 2052, 80 L. Ed. 2d 674 (1984).

5 The reviewing court will defer to counsel's strategic decision to present, or to  
6 forego, a particular defense theory when the decision falls within the wide range of  
7 professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v.*  
8 *Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989);  
9 *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948  
10 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate  
11 a motion or objection, defendant must demonstrate not only that the legal grounds for  
12 such a motion or objection was meritorious, but also that the verdict would have been  
13 different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375;  
14 *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not  
15 required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir.  
16 1990).

17  
18 The decision to either call or not call a witness is generally a matter of legitimate  
19 trial tactics and will not support a claim of ineffective assistance. *Thomas*, 109 Wn.2d at  
20 230.

21  
22 Generally the decision whether to call a particular witness is a matter for  
23 differences of opinion and therefore presumed to be a matter of legitimate  
24 trial tactics. This presumption of counsel's competence can be overcome,  
25 however, by showing counsel failed to conduct appropriate investigations  
to determine what defenses were available, adequately prepare for trial, or  
subpoena necessary witnesses.

1 *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 742, 101 P.3d 1 (2004). The United  
2 States Supreme Court has also addressed under what circumstances a failure to  
3 investigate can sustain a claim of deficient performance. *Wiggins v. Smith*, 539 U.S. 510,  
4 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2002). In this case the Court held that attorneys  
5 representing a capital defendant who made strategic choice not to investigate and present  
6 mitigating evidence of client's dysfunctional background and instead concentrated their  
7 efforts at convincing the factfinder that their client was not directly responsible for the  
8 murder were constitutionally deficient. It noted that a decision not to present mitigation  
9 must be an informed choice after investigation has occurred. The Court made it clear that  
10 there was a distinction between and informed strategic decision and an uninformed one:  
11

12 *Strickland* does not require counsel to investigate every conceivable line  
13 of mitigating evidence no matter how unlikely the effort would be to assist  
14 the defendant at sentencing. Nor does *Strickland* require defense counsel  
15 to present mitigating evidence at sentencing in every case. Both  
16 conclusions would interfere with the "constitutionally protected  
17 independence of counsel" at the heart of *Strickland*. 466 U.S., at 689, 80  
18 L. Ed 2d 674, 104 S Ct 2052. We base our conclusion on the much more  
19 limited principle that "strategic choices made after less than complete  
20 investigation are reasonable" only to the extent that "reasonable  
21 professional judgments support the limitations on investigation." *Id.*, at  
22 690-691, 80 L Ed 2d 674, 104 S Ct 2052.

18 *Wiggins*, 539 U.S. at 533.

19 A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing  
20 court is not required to address both prongs of the test if the defendant makes an  
21 insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d  
22 816 (1987).

24 Petitioner claims that he received ineffective assistance of counsel asserting that  
25 his attorneys failed to conduct proper investigation. He asserts that as a result of

1 insufficient investigation that his case was harmed when a defense expert testified in an  
2 unexpected manner at his trial. Petitioner fails to meet his burden of providing evidence  
3 of insufficient investigation and, essentially, second guesses his attorneys' decision to call  
4 an expert witness.

5         The sole evidence petitioner presents to support his claim of ineffective assistance  
6 is the declaration from of one of his two trial attorneys, Erik Bauer. The declaration  
7 indicates that petitioner's attorneys made a strategic decision to counter expected expert  
8 evidence in the State's case with testimony of their own expert, Randy Blazak. *See*  
9 Declaration of Erik Bauer, attached to petition. The declaration further indicates that the  
10 defense attorneys interviewed this expert on more than one occasion prior to putting him  
11 on the stand; the declaration states that at trial this expert "presented opinions that he had  
12 not presented in pretrial *interviews*." (Emphasis added). This evidence does not establish  
13 a lack of either trial preparation or investigation. Rather, it indicates that defense counsel  
14 thought about obtaining evidence necessary to contradict the State's case and that they  
15 took action to secure an expert whom they anticipated would counteract the State's  
16 expert. These actions do not demonstrate deficient performance. The declaration also  
17 seems to imply that the physical state of the attorney conducting the direct examination of  
18 the defense expert somehow affected his performance; Mr. Bauer notes that his co-  
19 counsel was "noticeably tired" on the day that Blazak testified. It is not surprising that  
20 counsel might be tired after being in trial for several weeks. The important point is that  
21 the declaration not only fails to make a connection between co-counsel's physical state  
22 and his alleged deficient performance, it specifically refutes that it had anything to do  
23 with the unexpected testimony. The declaration states that "Mr. Blazak volunteered with  
24  
25

1 out being prompted that the public persona of the [Volksfront] organization might be  
2 different than the private part.” This evidence shows only that Mr. Bauer was surprised  
3 by the volunteered remarks of his expert, not that his co-counsel handling of the direct  
4 examination was deficient. It is entirely possible for a witness to volunteer information or  
5 to testify unexpectedly without it being due to deficient performance. Petitioner has  
6 provided evidence that one of his attorneys was surprised by the testimony of Mr. Blazak  
7 but not that it was due to any deficient performance.

8  
9 Mr. Bauer’s declaration also opines regarding the prejudicial effect this  
10 unexpected testimony had on the defense case. The record does not support his  
11 conclusions. The verbatim report of proceedings reveals that the defense called Randy  
12 Blazak, a professor of sociology at Portland State University, to testify as an expert on  
13 hate crimes, white supremacist groups, particularly Skinheads, and a group called  
14 Volksfront. RP 2885. Blazak opined that you could not consider “white supremacists”  
15 an “identifiable group” because there was too much disagreement among the various  
16 factions. RP 2891-2903. This was a critical issue in the trial because if the defense could  
17 convince the jury that “white supremacists” did not constitute “an identifiable group” or  
18 that it was not a group with a hierarchy, then it would succeed in undermining a key  
19 argument of the State as to why the jury should find the existence of the aggravating  
20 circumstance. If the jury did not find the aggravating circumstance, then petitioner would  
21 avoid a sentence of life without the possibility of parole. Mr. Blazak remained firm in his  
22 opinion that “white supremacists” did not constitute “an identifiable group” and stated  
23 that if your were to accept that it was a large “group,” it was not one that had a hierarchy.  
24 RP 2957-2961, 2979-2980. The value of this testimony, if accepted by the jury, would be  
25

1 significant and extremely beneficial. This aspect of his testimony was unaffected by his  
2 testimony regarding Volksfront being a secretive organization. Thus, Blazak's testimony  
3 supported a critical defense theory and nothing he said undermined this aspect of his  
4 testimony.

5         Moreover, it is clear from the record that defense counsel expected Blazak to  
6 testify regarding his knowledge of Volksfront, including its historical roots, and his  
7 interactions with its leader, Randall Craiger. RP 2904- 2906. Defense counsel  
8 specifically asked Mr. Blazak to testify about the change in Volksfront that he had noticed  
9 around 2001. RP 2907. Mr. Blazak testified that the organization began as Skinhead  
10 group with roots in a prison gang but that in 2001 it began describing itself as a non-  
11 violent civil rights group promoting the heritage of Northern Europeans. RP 2906-2909.  
12 On redirect, counsel asked many questions to establish the depth of Mr. Blazak's  
13 knowledge of Volksfront and his belief in the legitimacy of this new persona. RP 2961-  
14 2966, 2980-2983. While Mr. Blazak indicated that Volksfront was a secretive  
15 organization, he also opined that its public change of position on violence seemed to him,  
16 based upon years of study, to be sincere. This aspect of his testimony, if believed by the  
17 jury, was also beneficial to the defense case.

18  
19         This claim essentially comes down to whether defense counsel, in hindsight, made  
20 a good decision to put Mr. Blazak on the stand. Apparently, Mr. Bauer now regrets his  
21 decision. His declaration, however, does not provide evidence of either deficient  
22 performance or resulting prejudice. The *Strickland* standard is designed to eliminate the  
23 distorting effects of hindsight. The decision to call Mr. Blazak as a witness was clearly a  
24 matter of trial tactics and that will not support a claim of ineffective assistance of counsel.  
25

1 Finally, to focus on this single aspect of the performance of one of petitioner's two  
2 trial attorneys is to lead the court away from the proper standard of review under  
3 *Strickland* and its progeny. The standard of review for effective assistance of counsel is  
4 whether, after examining the whole record, the court can conclude that defendant received  
5 effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165  
6 (1988). The Sixth Amendment guarantees reasonable competence, not perfection, and  
7 counsel can make demonstrable mistakes without being constitutionally ineffective.  
8 *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

9  
10 Petitioner fails to demonstrate how the entirety of the record reveals that he was  
11 denied his Sixth Amendment right to counsel. He does not complain that his attorneys  
12 failed to present an opening statement, cross-examine witnesses, make objections, or  
13 present evidence on his behalf. He does not show, with cites to the record, that his  
14 attorneys demonstrated that they were unprepared for trial by how they conducted  
15 themselves. He does not present any evidence that his attorneys were told of possible  
16 witnesses, but that they failed to investigate them. He does not complain that his  
17 attorneys failed to make a reasonable closing argument. To meet the burden imposed by  
18 *Strickland*, petitioner must show that his attorneys failed to test the State's case in any  
19 significant manner so that he was left, essentially, unrepresented. Petitioner has failed to  
20 meet the heavy burden that *Strickland* places upon him. As petitioner has failed to show  
21 either deficient performance or resulting prejudice, his claim of ineffective assistance of  
22 counsel must be dismissed.  
23  
24  
25

3. PETITIONER HAS FAILED TO ESTABLISH THAT THE PROSECUTOR ENGAGED IN MISCONDUCT.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)).

The due process clause entitles defendants in criminal cases to fundamentally fair procedures and it is fundamentally unfair for a prosecutor to knowingly present perjury to the jury. *United States v. LaPage*, 231 F.3d 488, 491, 271 F.3d 909 (9th Cir. 2000). The Supreme Court made it clear that "a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). Not only is it reversible error for the prosecution to suborn perjury to seek a conviction, *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 98 A.L.R. 406, 79 L. Ed. 791 (1935); *Alcorta v. Texas*, 355 U.S. 28, 2 L. Ed. 2d 9, 78 S. Ct. 103 (1957), the prosecutor has an affirmative duty to correct state witnesses who testify falsely. *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). A prosecutor who violates these principles commits misconduct. *Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); *State v. Finnegan*, 6 Wn. App. 612, 616, 495 P.2d 674 (1972).

The exact nature of petitioner's claim of prosecutorial misconduct is somewhat confusing as to its factual and legal basis. He begins by citing cases that have to do with a trial court's authority to dismiss a case under CrR 8.3(b)<sup>1</sup> for governmental misconduct

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<sup>1</sup> CrR 8.3(b) states: "The court on its own motion in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution and shall set forth its reasons in a written order."

1 or mismanagement. See Petition at p. 18, citing *State v. Sherman*, 59 Wn. App. 763, 801  
2 P.2d 274 (1990); *State v. Sulgrove*, 19 Wn. App. 860, 863, 578 P.2d 74 (1978); *State v.*  
3 *Dailey*, 93 Wn.2d 454, 457-58, 610 P.2d 357 (1980); and, *State v. Burri*, 87 Wn.2d 175,  
4 183, 550 P.2d 507 (1976). He cites no authority for the proposition that CrR 8.3(b) has  
5 any relevance to this courts determination of his collateral attack. The State is unaware of  
6 the existence of any authority that CrR 8.3(b) may be used to dismiss a conviction on  
7 collateral review.

8 The general thrust of petitioner's claim is that the prosecutors suborned perjury by  
9 having Tristain Frye testify against him and that his due process rights were violated  
10 because the only reason that Ms. Frye was given a favorable plea agreement was "because  
11 Pierce County Prosecutor Horne liked Ms. Frye's attorney." See Petition at pp 10, 18-19.  
12 It is the specifics of petitioner's claim that remain unclear.

13 Petitioner seems to acknowledge that a prosecutor may enter in to a plea  
14 agreement with one co-defendant to obtain evidence against the others. In assessing  
15 whether petitioner has provided evidence of his claim of suborning perjury it is important  
16 to note that the mere fact that two of the State's witnesses testified inconsistently does not  
17 demonstrate that either committed perjury. *United States v. Haese*, 162 F.3d 359, 365  
18 (5th Cir. 1998). At most, such contradictions indicate a conflict in the testimony of the  
19 two witnesses. *United States v. Miranne*, 688 F.2d 980, 989 (5th Cir. 1982), *cert. denied*,  
20 459 U.S. 1109, 103 S. Ct. 73, 74 L. Ed. 2d 9596 (1983). Even if a petitioner can prove  
21 that one of the witnesses was lying, that still does not provide proof that the prosecution  
22 had knowledge of the perjury. *United States v. Haese*, 162 F.3d at 365. It must be  
23 remembered that the jury is the ultimate arbiter of the credibility of witnesses and of the  
24  
25

1 weight to be given to their testimony. *United States v. Millsaps*, 157 F.3d 989, 994 (5th  
2 Cir. 1998).

3 The established safeguards of the Anglo-American legal system leave the  
4 veracity of a witness to be tested by cross-examination, and the credibility  
of his testimony to be determined by a properly instructed jury.

5 *Hoffa v. United States*, 385 U.S. 293, 311, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966). In  
6 *Hoffa*, the court held the fact that a government informant was under federal indictment  
7 and may have had motives to lie did not render his testimony constitutionally  
8 inadmissible. The necessary safeguards were fulfilled in that the informant was subjected  
9 to rigorous cross-examination, and the trial court gave a general credibility instruction.

10 In petitioner's case, his evidence that the State committed misconduct is a  
11 declaration from a former prosecutor, Barbara Corey, who once had been assigned to  
12 handle petitioner's case and those of his co-defendants, but who was terminated from her  
13 employment on January 28, 2004, prior to any of the co-defendants entering a plea or  
14 going to trial. She asserts that the elected prosecutor, Gerald Horne, made the decision to  
15 offer Ms. Frye a favorable plea agreement and she opines that he did this because of his  
16 friendship with Ms. Frye's attorney, Ms. Mandel. In response to these assertions, the  
17 State submits the affidavits of the two prosecutors who extended the plea agreement to  
18 Ms Frye; setting forth how this decision came about and their reasons for doing so. *See*  
19 Affidavit of Gregory Greer, Appendix M and Affidavit of Gerald Costello, Appendix O.  
20 Both of these prosecutors indicate that Gerry Horne was not involved, in any manner, in  
21 the decision to offer a plea agreement to Ms. Frye and that neither of them took into  
22 consideration the existence, or non-existence, of any friendship between Gerry Horne and  
23 Ms. Mandel. Thus, there is no evidence to support petitioner's claim that the offer to Ms.  
24 Frye was extended for any improper purpose.  
25

1 Ms. Corey's declaration also asserts that she read intercepted jail correspondence  
2 between Pillatos and Frye that "appeared to be an attempt to fabricate evidence" and that  
3 she formed a professional opinion that "those two individuals were indeed fabricating a  
4 story in an attempt to perpetrate a fraud on the Court and the prosecutor's office." *See*  
5 Declaration of Barbara Corey at p. 2. She provides some specific examples of statements  
6 that Pillatos made in his letters to Frye, but none from Frye's letters to Pillatos. *See, id.* at  
7 pp 3-4. The declaration of Greg Greer indicates that from his review of the letters it also  
8 appeared to him that Pillatos was attempting to manipulate Frye as to what she might  
9 testify to, but that he recalled nothing in the correspondence to indicate that Frye was  
10 engaged in the same efforts or that she was inclined to do as Pillatos suggested. *See*  
11 Appendix M at para. 11. The State has attached copies of all of Ms. Frye's intercepted  
12 jail correspondence so the court can make its own assessment of what these letters reveal  
13 about Ms. Frye's character and whether they indicate that she was trying to manipulate  
14 Pillatos's testimony. Appendix S; *see also* Appendix P (Affidavit of Michelle Pritchard)  
15 and Appendix R (Affidavit of Kathleen Proctor) for information regarding Appendix S.

16 Most importantly, petitioner fails to identify what portion of Ms. Frye's testimony  
17 constituted perjury, supply any evidence to show that this testimony was perjured, or any  
18 evidence to show that the prosecution knew such testimony was perjured. All of this  
19 would be necessary for petitioner to meet his burden of proof on this claim. The only  
20 evidence he provides to support this claim is Ms Corey's declaration. Ms. Corey's  
21 declaration does not discuss any of Ms. Frye's trial testimony. Ms. Corey's declaration  
22 does not articulate what evidence exists that any of Ms. Frye's trial testimony was  
23 perjured. Ms. Corey's declaration does not provide any evidence that the State's knew  
24 that something to which Ms. Frye testified at trial was perjured testimony. At best, Ms.  
25 Corey's declaration provides evidence that Ms. Corey suspects Ms. Frye committed

1 perjury and evidence that she would not have entered into the same agreement with Ms.  
2 Frye. Her declaration is essentially asserting her opinion that any prosecutor should have  
3 come to the same conclusion as she did. That Ms. Frye's case was resolved in a manner  
4 with which she disagreed, however, is not proof of prosecutorial misconduct.

5       Ultimately, the jury in petitioner's trial heard from all four codefendants as to their  
6 respective versions of events. Petitioner's attorneys had been provided all of the jail  
7 correspondence in discovery, *see* Appendix P, Affidavit of Michelle Prichard, and could  
8 use these to cross-examine Ms. Frye, Mr. Butters, and Mr. Pillatos, if they so chose.  
9 Petitioner's counsel cross examined Ms. Frye about only one comment in one letter that  
10 she wrote to petitioner. RP 2480-2483. Apparently, petitioner's counsel did not see the  
11 letters as providing evidence that Ms. Frye's was fabricated a self-serving version of  
12 events in the same way as Ms. Corey. Due process was satisfied in petitioner's case as  
13 there was full disclosure of the agreement between the State and Ms. Frye, full discovery  
14 of all relevant sources of possible impeachment and the full opportunity to subject her to  
15 vigorous cross-examination; plus the jury was properly instructed that they were the  
16 judges of credibility. The same safeguards that were present in the *Hoffa* case were  
17 present here, so petitioner's claim of denial of due process must fail. From its verdict, the  
18 jury evidently found Ms. Frye to be more credible than it did petitioner. It is the jury's  
19 credibility determination that is critical, not the petitioner's or Ms. Corey's.

20       Petitioner's claim of prosecutorial misconduct should be dismissed for lack of  
21 supporting evidence.

22       In conclusion, the State disputes that: 1) the prosecutors who entered into the plea  
23 agreement with Ms. Frye did so for any improper reason; 2) Ms. Frye committed perjury  
24 when she testified; 3) the prosecutors knew Ms. Frye was committing perjury when she  
25

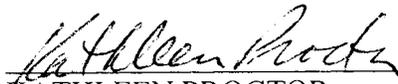
1 testified; 4) that there was any prosecutorial misconduct in petitioner's case; and, 5)  
2 petitioner received ineffective assistance of counsel.

3  
4 D. CONCLUSION:

5 The State respectfully requests that this court dismiss this personal restraint  
6 petition as meritless.

7 DATED: March 9, 2009.

8 GERALD A. HORNE  
9 Pierce County Prosecuting Attorney

10   
11 KATHLEEN PROCTOR  
12 Deputy Prosecuting Attorney  
13 WSB # 14811

14 Certificate of Service:

15 The undersigned certifies that on this day she delivered by U.S. mail  
16 to the petitioner a true and correct copy of the document to which this  
17 certificate is attached. This statement is certified to be true and correct  
18 under penalty of perjury of the laws of the State of Washington. Signed  
19 at Tacoma, Washington, on the date below.

20 3/9/09 Kathleen Proctor  
21 Date Signature

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