

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

Appearing Pro Se

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STATE OF WASHINGTON

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

In Re The Personal Restraint Petition Of,  KURTIS MONSCHKE,  Petitioner.	No. _____  <b>PERSONAL RESTRAINT PETITION</b>
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**I. INTRODUCTION:**

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

**II. STATUS OF PETITIONER:**

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

Mr. Monschke was transferred to the custody of the United States Attorney General to be confined in a Federal Bureau of Prisons facility. He currently is incarcerated at the United States Penitentiary Allenwood, P.O. Box 3000, White Deer, PA 17887.<sup>1</sup>

### **III. PRIOR COURT PROCEEDINGS:**

#### **A. PROCEEDINGS IN THE SUPERIOR COURT:**

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

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

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

#### **B. PROCEEDINGS ON APPEAL:**

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

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

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

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

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

No other proceedings have been filed.

#### **IV. TIMELINESS OF THE INSTANT PETITION:**

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

#### **V. FACTS SUPPORTING GROUNDS FOR RELIEF:**

##### **1. Procedural and trial facts: <sup>2</sup>**

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

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

his trial. RP 2098, 2164, 2327, 2399.<sup>3</sup> Kurtis was convicted of aggravated murder by jury verdict after trial before the Honorable Lisa Worswick. CP 397-399.

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

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

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

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

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

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

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

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

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

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

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

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

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

RP 1459-1461, 1470-1481, 1485, 1493-1494. *The boots Kurtis had worn had no blood on them.* RP 1482.<sup>5</sup>

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Pitcavage testified to a reasonable certainty as an expert in extremism in the United States, that white supremacy is a group within the dictionary meaning of the word "group." RP 1620. RP 1620.<sup>12</sup>

Pitcavage was allowed to describe white supremacy as encompassing the Ku Klux Klan, organized racist prison gangs, white separatist groups, neo-Nazi groups, racist skinhead groups, religious sects believing that they were descendants of the tribes of Israel, as well as persons he described as "unaffiliated" white supremacists.<sup>13</sup> RP 1598-1599, 1603-1607, 1616, 1619, 1622-1627. He described white supremacy literature as including "The Turner Diaries," a blueprint for revolution and an influence on Timothy McVeigh. RP 1618. Pitcavage described Nazi and SS symbols, the swastika, and other emblems associated with Hitler and concentration camp guards. RP 1608-1609, 1613.<sup>14</sup>

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

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

<sup>12</sup> Even so, Pitcavage conceded that it was not a well-organized group with an overarching structure. RP 1620.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

must murder a minority or attack an enemy of the white race to earn the right to wear certain emblems. Once again seeking to tie Kurtis to unrelated incidents, the prosecution presented and the court below allowed testimony about these unrelated incidents: Pitcavage was permitted to describe the "curb stomp" scene from "American History X," and report that criminals had committed a "curb stomp" recently in California, one in Germany and in Baltimore, which he had read about on the Internet. RP 1696-1698.<sup>16</sup>

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

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

## V. DISCUSSION:

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

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

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

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

Id. 466 U.S. at 687.

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

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

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

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

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



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

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

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

*Id.* 539 U.S. at \_\_\_\_; 123 S. Ct. at 2535.

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

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

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

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

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

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

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

## **VI. RELIEF REQUESTED:**

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

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

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

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

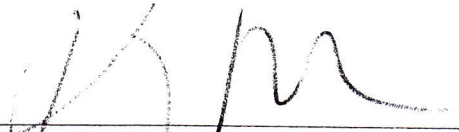
## **VII. CONCLUSION:**

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

### VIII. VERIFICATION:

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

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



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Kurtis W. Monschke

PERSONAL RESTRAINT PETITION -