Petition to the

United States Supreme Court

for Writ of Certiorari

STATEMENT OF THE CASE

The Pierce County Prosecutor's Office charged Kurtis Monscke, along with David Pillatos, Scotty Butters and Tristain Frye, with aggravated first degree murder for the death of Randall Townsend, a homeless Caucasian man. CP 6-9. Because Randall was not a racial minority, there was no racial motivation for the crime.

The single charged aggravating factor, which made the defendants subject to the enhanced penalties of life without parole or death, was 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." RCW 10.95.020(6). This factor was added to the Washington aggravated murder statute as part of an initiative to the Legislature, I-159. The Bill Report described the initiative provision as permitting the death penalty to be "imposed upon conviction of aggravated first degree murder if the murder was gang-related. . ."

Prior to trial the prosecutor filed a "State's Statement of Clarification Regarding the Qualifying 'Organization' or 'Identifiable Group' under RCW 10.95.020(6)," which indicated that in Kurtis Monschke's case the "group" was not a street gang but "white supremacy," "because white supremacy is not simply a political movement, but also a subculture . . . the movement is far more coherent than one would 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. CP 6-9.

Pillatos, Butters and Frye were permitted to enter pleas to non-aggravated murder in exchange for their testimony against Kurtis Monschke at his trial. RP 2098, 2164, 2327, 2399.[1]

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[1] "CP" refers to the number of the Clerk's Papers filed in the appeal in state court and "RP" refers to the trial transcript which were transcribed in consecutively-numbered volumes. Other volumes are transcripts designated by date.

Pillatos, Butters and Frye all agreed in their testimony at trial that on the evening of March 23, 2003, they, along with Kurtis Monschke, were walking on the railroad tracks in a relatively inaccessible area in Tacoma, Washington, to look at some graffiti which Pillatos and Frye had spray painted several days earlier. RP 2038, 2063-2065, 2069-2071, 2074, 2269-2272, 2333. They had two bats with them for protection. RP 2060-2065, 2257.

Pillatos, Butters and Monschke walked ahead when Frye stopped to go to the bathroom. RP 2077, 2272-2273, 2334. Pillatos and Butters turned back to find Frye; Monschke stayed to talk with three teenage graffiti "taggers" they met as they walked along the tracks. RP 2076-2077, 2276. When Pillatos and Butters found Frye, she was talking to Randall Townsend, who was homeless because he suffered from paranoid schizophrenia. RP 868-870, 2078, 2279, 2336. After a brief exchange with Townsend, 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. Pillatos and Butters kicked him with their steel-toed boots back and forth; the back and forth action likely was the cause of death. RP 2081-2083, 2198, 2281-2285, 2336-2337, 2508, 2532, 2535, 2537. Pillatos also crushed Townsend's face with a large rock. RP 2083, 2339. Pillatos and Butters then carried Townsend to the railroad track; they admitted that they may have kicked him further there. RP 2339-2345.

After this assault on Townsend, Pillatos or Butters retrieved Monschke. RP 2086-2088,2288, 2345. Accounts differed as to whether Monschke then 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.

Monschke testified that he took a bat and prodded the man in his chest, shoulder and head to see if he would wake up. RP 2792-2793. Monschke had shown his tattoos to the taggers, whom he expected to return down the tracks and find the man. 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 with their boots. RP 2795. Out of concern that he would be implicated in the assault on Townsend, Monschke put some of the clothing and boots worn during the incident 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. In contast, the boots Monscke had worn had no blood on them. RP 1482.

Two homeless people, Cindy Pitman and Terry Hawkins, saw part of the assault. RP 1073-1075, 1078, 1187, 1190, 1207. Pitman saw three people who were "whooping and hollering" and kicking and beating at the tracks. RP 1078. A short time later, she and Hawkins passed four people coming up from the tracks. RP 1078. 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 Monschke was the person who stayed behind the other three who were actively kicking and hitting. RP 1233.

The state also presented evidence of an earlier encounter between Pillatos, Butters and Monschke and a homeless couple. RP 926-927. The person believed to be Monschke did not talk or act menacingly during the encounter. RP(5/13) 78, 98.

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

The police connected Pillatos to the crime because they found his distinctive graffiti at another location where he and Frye had lived for a short time and Butters visited. RP(5/13) 109, 111-112, 133-138, 140, 150, 156. Frye and Pillatos were staying temporarily with Monschke in his apartment in March 2003. Because the four matched the descriptions

given by Pitman, Hawkins and the homeless couple, they were arrested and ultimately charged with the crime. 1754-1755, 1779-1780, 1827, 1828.

Monschke belonged to a professed non-violent white pride organization called Volksfront and had literature, tattoos, clothing, flags and symbols associated with white supremacist ideology at his apartment. The state charged him with aggravated murder based on the his alleged white supremacist views and associations. CP84-89. CP 6-9.

The trial court denied defense motions to exclude categories of evidence of racist or neo-Nazi literature, white power music and symbols. CP 265-277, 335-339, 334-342. As a result, an overwhelming portion of the evidence at trial consisted of physical evidence and testimony about a wide variety of white supremacist groups which Monschke never belonged to and persons who were alleged to have committed unrelated hate crimes; literature, flags, symbols, music and clothing belonging to Kurtis; skinhead, racist, or neo-Nazi items tied to Frye, Pillatos or Butters; racist or white supremacist items belonging to acquaintances of Monschke; and opinion testimony that white supremacists were a group within the meaning of the aggravated murder statute.

Dr. Mark Pitcavage of the Anti-Defamation League described white supremacy as encompassing the Ku Klux Klan, organized racist prison gangs, white separatist groups, neo-Nazi groups, racist skinhead groups, religious sects believing that they were descendants of the tribes of Israel, as well as persons he described as "unaffiliated" white supremacists. 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.

Allen Kohlhepp of the Seattle Anti-Defamation Leaque testified that he had come across Monschke's name on white supremacist message boards on the Internet in the course

of his research on extremist groups. RP 2660-2664. Kohlhepp conceded that none of the posting by Kurtis advocated violence. RP 2687.

Additionally, the state was permitted to introduce evidence, some of it from the house in Kent where Monschke spent several days after being evicted from his own apartment and which was clearly not his, including 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 Osma 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. The state was permitted to elict 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.

When the trial court refused to give the limiting instruction proposed by the defense, defense counsel asked that no limiting instruction be given rather than have the instruction proposed by the state.[2] RP(5/13) 123-127. The court gave the instruction proposed by the state anyway: "Evidence regarding white supremacist literature and materials seized at the defendant's residence is being admitted for the purpose of proving motive, premeditation and for the circumstances surrounding the alleged crime. You must not consider the evidence for any other purpose." RP(5/13) 123-127, RP 1787. Similar instructions were given when other white supremacist evidence was introduced. RP 1787.

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[2] The defense proposed an instruction to tell the jury that the evidence was "admitted for the sole purpose of demonstrating that the materials contain white supremacist symbols or content." CP 351-352; RP(5/13) 123.

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 Monschke did not create any of this graffiti. RP 940.

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 listed names of persons in Monschke's 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 Monschke 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.

Monschke's ex-girlfriend, Jennifer Stiffler, testifed about going with Kurtis to the home of Randy Craiger, the head of Volksfront, in Oregon and making a demonstration

record. She told of Monschke's interest in white pride, and about his association with persons in groups related to white power. RP 2586-2587, 2600-2603.

On appeal, the Washington Court of Appeals held: (a) that a "group" is "a number of individuals bound together by a community of interest, purpose or function," or a "number of persons associated formally or informally for a common end or drawn together through an affinity of views of interests," (b) that "ideology" is "a manner or the content of thinking characteristic of an individual, group, or culture," (c) that "a group is 'identifiable' if it is "subject to identification" or "capable of being identified," and (d) that a "hierarchy" is "the classification of a group of people with regard to ability or economic or social standing." State v. Monschke, 133 Wn. App. at 329 (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 1004 (3d ed. 1976).

The Court of Appeals held that the "range of groups falling within RCW 10.95.020(6) is nearly infinite and can include such entities as a cheerleading squad, a law firm, the Republican or Democratic Party, or the Catholic Church. RCW 10.95.020(6) does not limit the structure or size of such a group or the nature of its ideology because such qualifiers are unnecessary." Monschke, at 329-330.

The Washington Supreme Court and the United States Supreme Court denied review.

Facts related to denial of confrontation and compulsory process

When David Pillatos was called by the state as a witness, he refused to answer questions by the prosecutor, but agreed to answer questions from defense counsel. RP 2029-2030. The trial court then ruled, over defense objection, that defense counsel had to conduct a direct examination of this state's witness by asking only non-leading questions; and permitted the prosecution to conduct cross-examination. RP 2029-2031, 2104-2134. The court denied the defense motion for mistrial after Mr. Pillatos gave bizarre answers

during the direct examination about Gay Aryan Nations, and accused a police detective and prosecutor of misconduct. RP 2151-2155.

Prosecution witness Mark Pitcavage of the Anti-Defamation League testified that non-violent groups such as the one Mr. Monschke belonged to only professed non-violence to avoid lawsuits by the Southern Poverty Center. The trial court, however, would not permit Mr. Monschke's attorneyus to impeach Mr. Pitcavage with civil lawsuits which had successfully prosecuted the Anti-Defamation League for libel or slander.

Another of the prosecution's witnesses, Detective Jeffrey Shipp was permitted to give testimony about what he learned from the manager of an apartment building where David Pillatos and Tristan Frye lived about their extremist views and activities, including assault and spray painting of racist slogans, and a police report that allegedly mentioned Mr. Monschke's name. RP(5/13) 139-142, 147. 156. Detective Shipp also reported information he allegedly learned from another detective about incidents involving skinheads taunting people to try to provoke assault. RP(5/13) 136.

Kurtis Monschke, who was 19 at the time of trial, explained that he met Pillatos and Butters and became involved in a white gang in a juvenile facility as a means of proection. The trial court, hwoever, refused to allow him to present testimony from defense expert Randy Blazak about his knowledge of this phenomenon in juvenile facilities. RP n27655-2761, 2915-2918.

Facts related to denigration of trial counsel

The prosecutor elicited from eyewitness Terry Hawkins whether he recalled saying that he was concerned that defense counsel and the defense investigator were trying to get him to say something that wasn't true. In response, Mr. Hawkins insisted that defense counsel told him to tell the true about he saw and not to lie. RP 1228-1229. The trial court denied the defense motion for mistrial after this accusation. RP 1257.

Facts related to jury instructions

The court's "to-convict" instruction told the jurors that they court convict Kurtis Monschke of murder in the first degree if they found he "or a person whom [he] was acting as an accomplice" beat the victim Randall Townsend and found that he "or a person whom [he] was acting as an accomplice" acted with intent to cause the death of the victim. CP 386. Thus, the jurors were not required to find the Mr. Monschke with actually beat or intended to kill the victim. The prosecutor argued to the jury that Mr. Monschke was guilty even if he did not personally premeditate or intend the death of Mr. Townsend, if Pillatos or Butters did; all Mr. Monschke needed to do was to prod him lightly with the bat. RP 30057. The prosecutor omitted the clear requirement under Washington law that Mr. Monschke had to have acted with knowledge that his actions would facilitate the commission of a murder.

Facts related to presentation of false testimony

Pierce County Prosecutor Barbara Corey was assigned to handle the charges against the four co-defendants in the case; she provided a declaration to support Mr. Monschke's Personal Restraint Petition. In her declaration, she describes letters between Mr. Pillatos and Ms. Frye which she believed established that they were "fabricating a story in an attempt to perpetrate a fraud on the Court and the prosecutor's office" by suggesting that she never assaulted Townsend of her own free will and that he had a diminished capacity defense. Declaration at 2-3. State's Response to Defendant's Motion Re: Mail, at 9. This was discussed at a pretrial hearing. At the hearing, Ms. Corey indicated that there were possible charges of "conspiracy to commit perjury" and "witness tampering." Further, according to Ms. Corey, Prosecutors Gerry Horne, Greg Greer and other deputy prosecutors and police detectives were away of these efforts to

manipulate the plea negotiations and trial. Decl. at 4. Her declaration is supported by the letters of both Mr. Pillatos and Ms. Frye.

Although, Ms. Frye sometimes wrote of telling the truth, these professions of truthfulness must be considered in light of her other statements. Several letters show that she was willing to do whatever was necessary to secure a deal for herself so she could be released to raise Pillatos' child ("I've gotta do what's best for me and the baby," PRP appendix, letter Bate stamped 1650; "I am doing what I must to get out as soon as possible so that I can raise our child," *Id.*, at 1825 "I am trying to go State witness . . . for my son," at 2316 "I have to do whatever I can to get out and raise our son.," at 4337. She also repeatedly expressed a need to talk to Mr. Pillatos so she would know what to do. *Id.*, at 16512, 1702, 1721, 1724, 1725. She admitted that "they know that David [Pillatos] would lie for me and that if he asked me I would lie for him." *Id*, at 1721.

Once Ms. Corey let the prosecutor's office, however, the office gave Ms. Frye a "most favorable plea agreement and sentence," which was inconsistent with the standard of the office during the 20 years Ms. Corey worked there. Decl. of Corey, at 2, 4-5. Ms. Corey attributed the favorable agreement to the friendship between Gerald Horne and Frye's attorney. Decl. at 5. In her testimony, Ms. Frye minimized her own involvement. As Pillatos suggested, she testified that she participated against her will. RP 2361-62.

Although Prosecutor Greer submitted an affidavit noting that Ms. Corey's employment was terminated while she was working on the case, he did not mention that Ms. 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. *Corey v. Pierce County*, 154 Wn. App. 752, 225 P.3d 367 (2010).

Based on the correspondence and Ms. Corey's declaration, Mr. Monschke demonstrated his unlawful restraint. The evidence shows that Mr. Pillatos and Ms. Frye schemed to perpetrate a fraud which would allow her to get out of prison well before the others to raise their child. Mr. Pillatos conceded the scheme at trial. RP 2134. The prosecutors had proof that he was attempting to shape Frye's testimony, and that she was looking to him for guidance and willing to lie if that is what he wanted her to do. Yet the prosecution used these two as primary witnesses against Mr. Monschke, Pillatos and Frye were the only two to testify at trial that Mr. Monschke assaulted Mr. Townsend. The state, in fact, has conceded the importance of Ms. Frye's testimony. Aff'd of Greet, at 8; Aff'd of Costello at 2, 4.

REASONS FOR GRANTING THE PETITION

The petition should be granted because Mr. Monschke's grounds for seeking habeas relief are all grounds which demonstrate "a substantial showing of the deniual of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 481 (2000); *Miller-El v. Cockrell*, 537 U.S,. 322, 327 (2003). He satisfied, with his issues, this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, at 327.

Kurtis Monshke asked for a Certificate of Appealability on the following issues:

1. Is the statutory aggravating factor under the Revised Code of Washington (RCW) 10.95.020(6) that the accused "committed the murder to obtain or maintain his or her membership in the hierarchy of an organization, association or identifiable group" vague and overbroad in violation of the First and Fourteenth Amendments if the "group" is simply a number of people across the country who share common beliefs (here white supremacy) and many of those people are against violence and do not condone murder?

2. Is the prosecution permitted to use the statutory aggravating factor, as interpreted by the Washington courts, to unconstitutionally punish for the exercise of protected First Amendment activity where the state presents no evidence that the accused personally urged violence or had any involvement in the selection of the victim (a white male) by his co-defendants, but was held to be motivated to violence because of his beliefs in white supremacy and his association with others who believed in white supremacy?

3. Is a trial court's limiting instruction -- "[e]vidence regarding white supremacist literature and materials seized at the defendant's residence is being admitted for the purpose of proving motive, premeditation and for the circumstances surrounding the alleged crime. You must not consider the evidence for any other purpose" – unconstitutional because it allows the jury to consider protected first amendment activity as evidence of guilt?

4. Is an accused denied his Sixth Amendment rights to confrontation and cross-examination where (a) he is forced to conduct direct examination of a state's witness after the witness refused to answer questions from the prosecutor, and (b) he is not permitted to impeach the state's expert witness speaking for the Anti-Defamation League with a prior successful lawsuit for libel and slander brought against the League; and where (c) the state's police officer witness is permitted to testify about testimonial statements others made to him detailing bad and inflammatory activities of the codefendants?

5. Is an accused person denied his Sixth Amendment right to compulsory process by the exclusion of testimony by his expert witness on how juveniles become members of white gangs in juvenile detention facilities as a means of protective themselves, when the meaning of affiliation with white supremacy beliefs or groups was a major issue at trial?

6. Is an accused person denied his Sixth Amendment right to counsel where the prosecutor falsely impugns the integrity of defense counsel by suggesting counsel tampered with an important state's witness?

7. Is the prosecution relieved of its burden of proving every element of the crime charged where the "to –convict" instruction given by the trial court informs the

jurors that they can find the accused guilty of murder in the first degree if they find that he "or a person to whom [he] was acting as an accomplice" beat victim and found that he "or a person to whom [he] was acting as an accomplice" acted with intent to cause the death of the victim, so that the jurors were not required to find that he actually beat the victim or intended to cause his death?[3]

8. Is trial counsel ineffective under the Sixth Amendment by failing to properly investigate and prepare its expert witness, who conceded on cross examination that the group's private activities might differ from its public image (that is violent instead of non-violent) and the expert later agreed that others who called him as a witness had interviewed him more thoroughly and anticipated the questions what would be asked by the prosecution?

9. Is an accused person denied his rights under the Fifth and Fourteenth Amendments to due process of law where the prosecutor presents false testimony by co-defendants, who the prosecution knew conspired to testify falsely through letters written between them while in custody, and where the prosecutor offers one of the co-defendant a very favorable plea bargain based on the personal friendship between the elected prosecutor and the co-defendant's attorney.

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[3] The jurors were instructed that a person could be found guilty if he, "with knowledge that it will promote or facilitate the commission of the crime of murder, . . . either: (1) solicits, commands, encourages or requests another person to commit the murder, or (2) aids or agrees to aid another person in planning or committing the murder." Thus, even with the accomplice instruction, the jurors were required to find the accused guilty of premeditated first degree murder. This is particularly true where, under the facts of the case, the only actions related to the murder the state was able to introduce at trial, was evidence that Mr. Monschke hit the victim well after his codefendant's assaulted him, moved him and found Mr. Monschke and brought him to the scene.

Certiorari should be granted and his case should be remanded to the Ninth Circuit Court of Appeals so that a certificate of appealability can be granted on these issues. They have merit and easily meet the requirements for granting a COA.

First Amendment claims

Mr. Monschke's case should be controlled by *Dawson v. Delaware*, 505 U.S. 159 (1992), not *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). As in *Dawson*, Mr. Monscke's white supremacist opinions were not relevant because these views were not tied to the murder of a Caucasian man. Unlike *Wisconsin v. Mitchell,* he was not convicted under a hate crime statute and was not motivated by hate in the charged crime; he was not even present when his co-defendants choose a victim who was not a racial minority.

The state's theory was that Mr. Monschke must have been motivated by his unpopular convictions and beliefs because there was no other explanation for the crime. RP 3047-3048, 3069. The inference was not that the beliefs explained something about the crime; it was simply that his beliefs meant there must have been an improper motive. Mr. Monschke was convicted of aggravated murder because of his constitutionally-protected beliefs and associations.

To fit under the statute, the state had to establish – not that he selected the victim because of race – but that committing a murder would enhance his status in an identifiable group, organization or association. RCW 10.95.020(6). Because the specific group Mr. Monschke belonged to, Volksfront, was against violence, the state proceeded under the assumption that people with white supremacist views (roughly 40,000 people) constituted a "group" and a group which – solely because of their racist opinions -- would accord enhanced status to any murderer.

The statute is also unconstitutionally vague under the due process clause of the Fourteenth Amendment because (1) it "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed," or (2) it "does not provide an ascertainable standard of guilt to protect against arbitrary enforcement." *Grayned v City of Rockford*, 408 U.S. 104, 108-109 (1972). The term "identifiable group" is not statutorily defined in the statute The Court of Appeals held that it could be any number of people with a commonality, such as a law firm, a political party or the Catholic Church. *Monshke*, 133 Wn. App. at 330. Thus, under the holding and reasoning of the Court of Appeals, if a person, who was Catholic, bombed an abortion clinic and someone was killed, then the jury would be entitled to convict him of aggravated murder because Catholics are against abortion – apparently whether or not Catholics as a whole accord higher status to someone who bombs an abortion clinic. And, to be analogous to Mr. Monshke's case, the bombing would not have been an abortion clinic. In fact, the Court of Appeals would include any "group" whether or not the group afforded increased status to a person who murdered another person, such as law firms and political parties.

The statute is unconstitutionally vague because it criminalizes speech and associations and an ordinary person could not determine what conduct was prohibited or punishable.

Further, the trial court erred in giving the jury a limiting instruction informing the jurors that "[e]vidence regarding white supremacist literature and materials seized at the defendant's residence is being admitted for the purpose of proving motive, premeditation and for the circumstances surrounding the alleged crime. You must not consider the evidence for any other purpose," and other similar instructions. RP(5/13) 123-127, RP

1787. By telling jurors that they could consider Mr. Monschke's protected opinions as evidence of guilt he was unconstitutionally punished for his unpopular views. *United States v. Jackson,* 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), and *Griffith v. California*, 380 U.S. 609, 614, 85 S. Ct. 1226, 14, L. Ed.2d 106 (1965).

Sixth Amendment confrontation

David Pillatos was called by the state as a witness, but refused to answer the state's questions at trial, even after the court ordered him to do so. RP 2022, 2029. He indicated, in front of the jury, however, that he would answer questions by defense counsel. RP 2023. As a result, the questioning was handed over to defense counsel. RP 2029-203. The trial court's forcing the defense to ask only non-leading questions and to treat Mr. Pillatos as if he were a defense witness denied the defense the right to decide what witnesses it wished to call at trial and denied the defense the right to cross examine a state's witness. As such it constituted constitutional error under the Sixth Amendment to the United States Constitution which guarantees to a criminal defendant the right to present testimony in his own defense and the right to confront and cross-examine the witnesses against him. Further, a criminal defendant has a constitutional right to control his own defense. *Faretta v. California,* 422 U.S. 806 (1975); *North Carolina v. Alford*, 400 U.S. 25 (1970). *Faretta* is based on "the conviction that a defendant has the right to decide within limits the type of defense he wishes to mount." *United States v. Laura,* 607 F.2d 52, 56 (3rd Cir. 1979). "[C]ourts should not 'force any defense on a defendant in a criminal case,' particularly when advancement of the defense might 'end in disorder.'" *North Carolina v. Alford*, 400 U.S. at 33 (quoting *Tremblay v. Overholser*, 199 F.Supp. 569, 570 (D.D.C. 1961)).

Further, prosecution expert Dr. Pitcavage testified that he worked for the Anti-Defamation League and that the Anti-Defamation League was a civil rights organization with a mission of combating hatred and bigotry and was committed to protecting the rights

of *all* people. RP 1583-1584. He was permitted to attack the credibility of organizations such as Volksfront, which proclaimed its non-violence, by testifying that some groups might profess to be non-violent only to avoid lawsuits by the Southern Law Provery Center. RP 1633-16334. When the trial court refused to allow defense counsel to impeach Pitcavage with evidence that the Anti-Defamation League had, in fact, been sued successfully for slander or libel, RP 1577-158. this unconstitutionally denied Mr. Monshcke his right to cross examination to establish motive, bias and credibility in violation of *Davis v. Alaska,* 415 U.S. 308, 317 (1974) (where a witness provides a "crucial link in the proof" of the defendant's act, the reviewing court should not speculate as to whether the determiner of credibility, the jury, would have accepted the defense argument on bias or not).

Finally, Detective Shipp gave extensive testimony reporting out-of-court statements by persons who were not called as witnesses at trial. He described conversations with managers of the Rich Haven Apartments in which the names of Pillatos, Frye and Butters were divulged, along with a number of alleged bad and inflammatory acts by the three, as well as their unpopular opinions and ideology. RP(5/13) 1342, 147. This was unconstitutional under *Crawford v. Washington*, 541 U.S. 36 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in the development of hearsay law -- as does [*Ohio v. Roberts*, 448 U.S. 56 (1980)], and as would an approach that exempted such statements from the Confrontation Clause altogether. Where *testimonial* evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailablity and a prior opportunity for cross-examination." _*Crawford*, 124 S. Ct. at 1374.

Crawford placed statements such as those of the managers of the Rich Haven apartments and other accusers to the police squarely in the testimonial category: "An accuser who makes a formal statement to government officers bears testimony in a sense

that a person who makes a casual remark to an acquaintance does not." *Crawford*, 124 S, Ct. at 1364.

The Washington court and the federal district court excused these constitutional violations by claiming that the evidence was not introduced for the truth of the matter asserted, but rather to explain the course of the investigation – "how Detective Shipp's initial investigation led him o focus on Butters, Frye and Pillatos, which subsequently led him to investigate Mr. Monschke." RR at 36. In fact, Detective Shipp's testimony was not admitted for any limited purpose, nor was the jury instructed that it could not consider his testimony as substantive evidence of guilt. Linking Mr. Monschke to these three and their racist opinions and actions was simply part of the substantive proof at trial that they committed the crime. These were the three people who decided to attack Mr. Townsend and their motives for doing so, and proof of their identity were part of the evidence of guilt at trial. Mr. Monschke was tied to these people through principles of accomplice liability. Mr. Monschke had the right to fully confront the witnesses and the testimonial hearsay introduced through Detective Shipp denied him this right.

Sixth Amendment compulsory process

The bulk of the state's evidence at trial was evidence of Mr. Monschke's beliefs and the beliefs of others (many of whom he did not even know) who were labeled white supremacists, yet he was not allowed to present expert evidence on how persons in juvenile detention facilities come to be in white gangs as a means of protecting themselves. RP 2915-2018. This denied Mr. Monschke his state and federal constitutional rights to present evidence in his own behalf. The court's denial of the right to present evidence contesting the state's evidence denied Mr. Monschke his fundamental right to appear and defend at trial, as guaranteed by the Sixth Amendment to the United States Constitution. *See Washington v. Texas,* 388 U.S. 14, 19 (1967); *United States v. Nixon,* 418 U.S. 683, 709 (1974). The state

cannot abrogate this right by evidentiary rule. *Holmes v. South Carolina*, 547 U.S. 319 (2006); *Chambers v. Mississippi*, 419 U.S. 284 (1973); *Rock v. Arkansas*, 483 U.S.44 (1987).

It simply cannot be constitutional that the state was entitled to introduce testimony about beliefs and actions committed by other people just because they believed in white supremacy and yet forbid Mr. Monschke from presenting evidence to the jury to support his theory that he did not believe in violence and came to his views for other reasons.

Sixth amendment violation for denigrating defense counsel

The prosecutor improperly asked Terry Hawkins if he recalled saying that defense counsel and the defense investigators were trying to get him to say something that wasn't true. RP 1228-1229. This was a serious charge, which Hawkins denied. RP 1228-1229. Hawkins insisted that even though Mr. Monschke's attorneys believed he was innocent, they told him to tell the truth about what he saw and not to lie. RP 1228-1229.

The prosecutor's question gave the jury the impression that defense counsel had acted improperly. This was misconduct and the trial court erred in denying a defense motion for mistrial based on the misconduct. RP 1257. A prosecutor may not "draw a cloak of righteousness" about the state and impugn the integrity of defense counsel. *State v. Gonzales*, 111 Wn. App. 272, 283, 45 P.3d 205 (2002); *United States v. Frascone*, 747 F.2d 953, 957-958 (5th Cir. 1984). A prosecutor may not launch unfounded attacks impugning the character of defense counsel and implying that the defense case is based on unethical activity. *United States v. Sanchez,* 176 F.3d 1214, 1224-1225 (9th Cir. 1999). To do so violates the defendant's Sixth and Fourteenth Amendment rights to the effective assistance of counsel. *See Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983).

Where the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process," a conviction should be reversed. *Darden v. Wainwright*, 477 U.S. 168, 1818 (1986).

Terry Hawkins was one of two witnesses who actually saw part of the assault on Mr. Townsend. The improper impugning of defense counsel to suggest that the defense had tried to get him to perjure himself on a critical point on which his testimony was favorable to the defense made the trial fundamentally unfair.

The unconstitutional jury instructions

The jurors were instructed, in court's instruction No. 10, that a person could be found guilty if he, "with knowledge that it will promote or facilitate the commission of the crime of murder, . . . either: (1) solicits, commands, encourages or requests another person to commit the murder, or (2) aids or agrees to aid another person in planning or committing the murder." CP 384.

In the court's "to convict" instruction, however, the jurors were told that they could find Mr. Monschke guilty of murder in the first degree if they found that he "or a person to whom [he] was acting as an accomplice" beat Randall Townsend and found that he "or a person to whom [he] was acting as an accomplice" acted with intent to cause the death of Randall Townsend. CP 386. Thus, the jurors were not required to find that Mr. Monshke actually beat Randall Townsend or that he actually intended to cause the death of Randall Townsend; under the court's instruction, the jury did not need to find that Mr. Monschke participated in either the actus reas or the mens rea of the crime. Even with the accomplice instruction, the "to convict" instruction did not adequately require the state to prove that Mr. Monschke was guilty of premeditated first degree murder. In Washington, jury instructions

are sufficient only if they correctly state the law and "are readily understood and not misleading to the ordinary mind," and allow the parties to argue their theory of the case. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968), *see also, State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). Here, the instructions were misleading to the ordinary mind and did not make the concept of accomplice liability readily understood.

The "to convict" instruction was particularly inadequate in light of the state's arguments to the jury. In closing, the state successfully convinced the court to preclude the defense from arguing that the state had to prove either that Mr. Monschke personally premeditated or intended to kill Mr. Townsend. RP 3025-3026. The state then argued that Mr. Monschke was guilty even if he did not personally premeditate or intend the death of Townsend, if Butters or Pillatos did; and that Mr. Monschke was guilty even if he only prodded Townsend lightly with the bat because this was encouragement and he was guilty as an accomplice. RP 3057, 3062, 3065-3066. The prosecutor's argument omitted the requirement that Mr. Monschke, to be guilty as an accomplice, must have acted with the knowledge *that the actions he took would facilitate the commission of a murder*. Given the prosecutor's argument, it is likely that the jurors did not understand that they had to find that the state had to prove that Mr. Monschke acted with knowledge that he was actually facilitating or promoting *the murder*, and that Mr. Monschke could not be found guilty simply for buying a bat (which he did not do) or for prodding Mr. Townsend to see if he was alive.

Further, it is conceptually and logically impossible to act with knowledge that you are facilitating the crime of murder and not to intend that a murder take place; there are no non-intentional degrees of murder. Because the court's "to convict" instruction implies that

one could be guilty of first degree premeditated murder as an accomplice without acting with intent to cause the death of the victim, it is an instruction that fails to require the jury to find every element of the crime beyond a reasonable doubt.

Clearly, "the State bears the entire burden of proving each element of its case beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)); Fifth and Fourteenth Amendments.

Ineffective assistance of defense counsel

Defense counsel failed to investigate what Dr. Blazak would say on the stand before choosing to call him as a defense expert. Without an investigation, counsel could not have made an informed decision. Trial counsel, Erick Bauer agreed, in his declaration, that Dr. Blazak hurt the defense by presenting opinions he had not presented in pretrial interviews. Dr. Blazak's declaration explains that this happened because counsel failed to determine what Dr. Balzak would say before deciding to call him

These activities, requiring a report and other preparations to reveal answers to important prosecution questions established the prevailing professional norm for investigation, and it is the failure to investigate which falls below professional norms and precludes the decision from being a strategic decision under *Strickland v. Washington*, 466 U.S. 668 (1984). The prejudice was in that Dr. Blazak's testimony contradicted the other substantial evidence at trial establishing Volksfront as non-violent. This contradicted the substantial evidence that Mr. Monschke was not violent during the crime. Even Ms. Frye , who testified contrary to the other co-defendants that Mr. Monschke hit Mr. Townsend with force, was impeached with her letter to him saying that maybe he would be punished for the crime, or maybe "the one who truly did this" would

be punished. RP 2481-82. And further, neither of the eyewitnesses could say Mr. Monschke was involved in the assault. RP 1078-80, 1158-1160; 1266-1269, 1316-1319. But once Dr. Blazak testified, the jurors' view of Mr. Monschke would have changed considerable.

The prosecutor's misconduct

A prosecutor's knowing use of perjured testimony is misconduct and violates a due process. *Miller v. Pate*, 386 U.S. 1 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959).

Based on the correspondence between Pillotos and Frye and Ms. Corey's declaration, Mr. Monschke demonstrated his unlawful restraint because of the prosecution's knowing use of false testimony. The evidence shows that Mr. Pillatos and Ms. Frye schemed to perpetrate a fraud which would allow her to get out of prison well before the others to raise their child. Mr. Pillatos conceded the scheme at trial. RP 2134. The prosecutors had proof that he was attempting to shape Frye's testimony, and that she was looking to him for guidance and willing to lie if that is what he wanted her to do. Yet the prosecution used these two as primary witnesses against Mr. Monschke. These were the only two to testify at trial that Mr. Monschke assaulted Mr. Townsend.

Although Mr. Monschke asserted in the personal restraint petition in state court that there was sufficient record to find both a due process violation and prejudice, given the contradictions in affidavits, he requested a reference hearing. Since that hearing was denied, at the least this Court should grant an evidentiary hearing.