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NO. 96772-5

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

KURTIS WILLIAM MONSCHKE,

Petitioner.

Personal Restraint Petition
challenging the sentence of The Honorable Lisa Worswick
in Pierce County Superior Court No. 03-1-01464-0

BRIEF OF RESPONDENT

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I. INTRODUCTION

Kurtis Monschke beat a homeless man to death with a baseball bat in order to advance his own status as a white supremacist. Monschke was an adult. Seventeen years later, Monschke asks this Court to change the law to treat him like a juvenile offender under *Miller v. Alabama*. No exception under RCW 10.73.100 permits this untimely petition.

Precedent holds that a mandatory life-without-parole sentence imposed on an adult offender convicted of aggravated first degree murder and without particularized consideration of the defendant's character and record does not violate the state or federal constitutions' cruel punishment provisions. There has been no change in the law to say otherwise. The petition is time barred.

Monschke argues essentially for a new rule that "people are different." The tautological adult offender who acted irresponsibly or immaturely in breaking the law would be able to request a departure from mandatory literal or de facto life sentences for any reason, notwithstanding the legislature's and citizens' intent that the most serious crimes receive mandatory penalties. Such a rule would be a substantive change in law requiring retroactive application.

Because there is no scientific proof or objective measure of maturity or responsibility, legislatures have drawn a line between adults and children

at 18 years of age. This line reflects society's judgments about maturity and responsibility. The courts have respected and should continue to respect the legislatures' prerogative in drawing a line that is both necessary and constitutional.

II. ISSUES

A. Is the petition time barred where this Court has held that the state and federal constitutions do not require a particularized consideration of the defendant's character and record before imposing life without parole for an aggravated first degree murder under RCW 10.95.030? *State v. Hughes*, 106 Wn.2d 176, 203, 721 P.2d 902 (1986); *State v. Grisby,* 97 Wn.2d 493, 497, 647 P.2d 6 (1982), *cert. denied sub nom. Frazier v. Washington,* 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983).

B. Is the petition time barred where the significant change in law in *Miller* is only material to juvenile offenders? *Montgomery v. Louisiana*, 136 S. Ct. 718, 734, 193 L. Ed. 2d 599 (2016).

C. Has Monschke demonstrated actual and substantial prejudice where he has failed to provide any facts or evidence suggesting his acts resulted from transient immaturity?

D. In this time-barred petition, should this Court decline Monschke's invitation to expand *Miller* to adults who behave immaturely?

III. STATEMENT OF THE CASE

Kurtis Monschke has been involved with white supremacists since the age of 12. RP 2754. As an adult, he would research white supremacist groups online in the evenings after work. RP 2648-49, 2762-63. Volksfront maintained a POW list on its website in support of individuals who committed violent hate crimes and was associated with the violent subgroup

National Alliance. *State v. Monschke*, 133 Wn. App. 313, 333, 135 P.3d 966 (2006), *review denied* 159 Wn.2d 1010 (2007), *cert. denied* 522 U.S. 841 (2007). Monschke posted on Volksfront's website using the screen name "SHARPshooter" indicating that he was a shooter of SkinHeads Against Racial Prejudice or advocated violence against those who opposed violence. *Id.*; RP 2220-21.

Monschke was trying to start a Volksfront chapter in Tacoma, paying dues, and intending to advance in levels within the organization. RP (5/13) 16-17, 26, 33; RP 2583-85, 2598-99, 2648-49, 2753, 2764-65, 2847-48. He was proselytizing and recruiting. RP (5/13/04) 16, 25-26; RP 2215, 2765-66, 2850. His home was filled with white supremacist flags, music, films, literature, and stacks of fliers which he printed and distributed. RP 2217-20, 2377-79, 2584-85, 2588-90, 2608; RP (5/13/04) 14, 17-18. He wore a uniform: suspenders, black boots with red laces (indicating he had assaulted a minority), and a shaved head. RP 2230, 2246, 2602-03. He tattooed hate symbols on himself and others; some of the tattoos were inspired by the Edward Norton character in American History X. RP 2590-92, 2617, 2646, 2758-59, 2841. And he made racist graffiti. RP 2652.

When his best friend Scotty Butters returned to Washington, Monschke took him to a white supremacist rally in Roy and let him move in with him. RP 2215, 2582, 2601-02, 2766-68. And when David Pillatos

and his girlfriend Tristain Frye needed a place to stay, Monschke brought them home with him. RP 2580-81, 2768, 2771. Monschke showed Pillatos and Butters the American History X film, and they got "riled up" by the curb stomping scene. RP 2210-13, 2589-90, 2655-56, 2841. Soon, all three men had shaved heads and were wearing suspenders and black boots with red shoelaces, indicating that Monschke, Pillatos, and Butters had assaulted a member of a minority group. RP 2832-33, 2330; *Monschke*, 133 Wn. App. at 323. Pillatos called Monschke their fearless leader. RP 2105.

On the night of the murder, the men decided to take Frye out to earn her own red laces. RP 2330; *Monschke*, 133 Wn. App. at 323. They were looking to "do" someone "inferior." *Monschke*, 133 Wn. App. at 334. The four purchased two baseball bats before continuing to the Tacoma Dome to admire their hate graffiti and to find a victim. RP 923-27, 954-56, 959, 2781-83, 2332-34; *Monschke*, 133 Wn. App. at 323.

Randall Townsend had been discharged from the military with a diagnosis of schizophrenia. RP 868-69. Released from a residential program without notice to his family, Mr. Townsend had been living on the streets for about a year. RP 877-78. He had the mental capability of a fifteen-year old. RP 878. He was small, boyish, gentle, and perennially victimized. App. at 2-5; RP 1193, 2106.

Butters and Monschke set upon Townsend with bats, Pillatos used a 38-pound rock, and the group kicked him over and over. RP 1078-82, 1088, 1179, 1213-14, 1271, 2336-49, 2356-64, 2374; *Monschke*, 133 Wn. App. at 323-24. They stomped his head over the train track, separating his face from his skull and swelling his head like a basketball. RP 902-09, 1211-14, 1269-70, 2341-45, 2549-51, 2559; *Monschke*, 133 Wn. App. at 320, 323. Townsend's upper jaw and face bones were broken into many pieces; his lower jaw was separated from the skull. RP 2530-31, 2540-41, 2545-46. The group left him on the railroad tracks for a train to run over. RP 3059. Monschke then disposed of the evidence, burning the bloody clothes, boots, and car. RP 1965, 2000, 2007-08, 2094-96, 2124, 2207, 2294, 2371-73, 2798-99, 2870. Frye earned her laces, Butters earned his "bolts" (an neo-Nazi "SS" lightning bolt tattoo), and Monschke would wonder aloud whether he had elevated his status with God. RP 2301, 2369, 2375; *Monschke*, 133 Wn. App. at 324, 334.

After twenty days, Townsend's family removed him from life support; his comatose brain was irreparably damaged by diffuse axonal injury. RP 873-74, 2532-37; RP (6/4/04) at 10.

Monschke was 19 when he killed Randall Townsend. CP 6; RP 2754. In pretrial detention, he was highly disruptive, possessing makeshift weapons and routinely antagonizing other inmates by, among other things,

throwing feces at them. *Monschke*, 133 Wn. App. at 322. He brawled with his co-defendants in the courtroom despite leg shackles and arm restraints, so that a stun belt was added. *Id.* at 321-22.

A jury found that Monschke beat Townsend to death with a baseball bat in order to advance his own status as a white supremacist and convicted him of aggravated first degree murder. CP 6-7, 400, 406; *Monschke*, 133 Wn. App. at 318. The sufficiency of the evidence was affirmed on appeal. *Monschke*, 133 Wn. App. at 333-34.

Because the State did not seek the death penalty, Monschke was sentenced to life without parole. RCW 10.95.030(1). His conviction has long been final. RCW 10.73.090(3)(c) (final on Oct. 1, 2007 when certiorari was denied).

Monschke filed a previous timely personal restraint petition. *In re Monschke*, 160 Wn. App. 479, 251 P.3d 884 (2010). The matter before this Court is a subsequent personal restraint petition, filed with the court of appeals on August 8, 2018. After the direct appeal record was transferred and the briefs were filed, the petition was transferred to the Supreme Court. Mr. Monschke's attorney withdrew, and a new attorney filed the amended personal restraint petition on February 10, 2020.

Monschke notes that there were differing accounts as to his involvement. Amended PRP at 2. He raised this without success in the

earlier personal restraint petition. Monschke, Frye, Butters, and Pillatos all testified, and their testimony differed about the sequence of events the night of the murder and Monschke's participation. *Monschke*, 160 Wn. App. at 498 (it was for the jury to determine credibility).

Butters and Pillatos knew if they testified against Monschke, they were risking their lives. RP 2025, 2112, 2170-74, 2184, 2192-93, 2318-19, 2855. However, having pled guilty, they could not hide behind the Fifth Amendment. Therefore, they did their best to minimize Monschke's involvement. RP 2071, 2093, 2104-05, 2120, 2137, 2169, 2186, 2200-01. They were impeached with their earlier statements. RP 2105-08, 2168-70, 2186, 2201-02, 2310-12, 3053.

> Each accomplice in this case testified the defendant had the bat in his hand, that he struck the victim repeatedly.
>
> The defendant's best friend Scotty Butters, tried to minimize what occurred. Pillatos tried to minimize it as well. Neither man was willing to wear the snitch jacket in a prison world where real protection is needed from real enemies. Yet, even while trying not to snitch on the defendant, that's exactly what they did [ ] thereby emphasizing the truth of what they said about the defendant's role.

RP 3049-50. Butters admitted that he only swung his bat once, and both Butters and Pillatos testified that only Monschke swung the second bat. RP 2104, 2119, 2167.

Only Frye cooperated with the prosecution. App. at 8-12. Her account had indicia of reliability insofar as her surreptitiously intercepted jail correspondence to Pillatos expressed remorse, repeatedly discussed her intention to tell the truth, and requested Pillatos support her in this decision. *Monschke*, 160 Wn. App. at 499. Her account was also consistent with Cindy Pitman's and Terry Hawkins' testimony that all four defendants were present and working in tandem during the group attack. RP 1078-82, 1088, 1179, 1213-14, 1271, 2336-49, 2356-64, 2374; *Monschke*, 133 Wn. App. at 323-24.

> It was the testimony that Pillatos stood behind Frye and in fact pushed her forward, if you will, to participate.
>
> Who then was striking with the bat? Two are kicking Pillatos from behind and one was hitting with the bat. Everyone in the courtroom knows who struck Randall Townsend with the [second] bat. That was seen by Pitman and Hawkins.
>
> Pillatos and Butters did not want to say specifically what the others did. They were quite willing to accept the blame, if you will, on their own shoulders, not snitching. Yet neither of them claimed to have struck the victim with the bat.

RP 3051.

> ... is there any, any evidence in this case indicating that one of the other accomplices, besides the defendant, struck the victim with the bat, besides the initial blow by Scotty Butters, any evidence that anybody other than this defendant did so? There's not. It happened. He did it.
>
> ....

> So who struck the victim repeatedly with the bat? All evidence points to one person only. That would be the defendant.

RP 3053-54.

Monschke argues that he did not join in on the attack until "after" the others had completed their "lethal" attack. Amended PRP at 2. Not only is that inconsistent with Pitman's and Hawkins' testimony, but it also conflicts with the medical testimony. RP 3048. Butters broke his bat with his first strike to Townsend's head, but the skull itself "was not fractured; it was intact." RP 2440, 2531. Ultimately it was the diffuse axonal injury that Townsend could not survive, and that could have resulted from any of the 19+ blunt force impacts. RP 2535-37. The prosecutor argued that Monschke was "equally responsible for the injuries and the death of Mr. Randall Townsend." RP 3049.

Monschke argues that the prosecutors must have believed him less culpable, because they were quoted[1] in September 2004 as saying that Pillatos and Butters did more than Monschke did. Amended PRP at 3. This omits the context. The prosecutors had always intended to seek exceptional sentences for Pillatos and Butters. RP 2098-2101 (Pillatos had expected the prosecutors would ask for 200 years); App. at 13-16. However, between

[1] Monschke does not provide a copy of the article. The prosecutor has been unable to locate it, but assumes the existence of the quotation arguendo.

the time of plea and sentence, the United States Supreme Court determined that aggravating factors had to be found by a jury beyond reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). When the prosecutors attempted to empanel a sentencing jury, the superior court refused to allow the procedure. App. at 17-18. The prosecutors then requested the guilty pleas be vacated so Butters and Pillatos could be tried for aggravated murder. App. at 19-20. In September of 2004, when this request was refused as well, the prosecutors announced they would petition the Washington Supreme Court. App. at 21-22. Ultimately, the prosecutors' intent was frustrated, and Butters and Pillatos enjoyed the windfall of *Blakely*. *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007).

In the end, Frye, Butters, and Pillatos took responsibility for their crimes by pleading guilty. RP 2097-2101, 2164-66, 2327, 2395-99. Monschke did not and still does not acknowledge any responsibility for Mr. Townsend's killing. RP (6/4/04) at 18; Original PRP, Aff. of Monschke.[2]

[2] Although Monschke has amended his petition, he "incorporates by reference" the superseded petition with offender affidavit. Amended PRP at 1, n.1.

IV. ARGUMENT

A. The petition is time barred.

Prior to reviewing the merits of any claim, a state court is well advised to decide challenges on independent and adequate state grounds in order to pre-empt federal intervention. *Lambrix v. Singletary*, 520 U.S. 518, 117 S.Ct. 1517, 1524-25, 137 L.Ed.2d 771 (1997). State law prohibits the filing of untimely petitions. RCW 10.73.090. The federal courts will only respect state procedural bars when state courts regularly apply those bars and clearly announce when the procedural bar is a basis for a ruling. *Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850, 857-58, 112 L.Ed.2d 935 (1991); *Powell v. Lambert*, 357 F.3d 871 (9th Cir. 2004).

Access to the courts may be regulated by statutes of limitations and statutes of repose if the regulation serves a legitimate end. *See United States v. Kubrick*, 444 U.S. 111, 117, 62 L. Ed. 2d 626, 100 S. Ct. 352 (1979); *Marriage of Giordano*, 57 Wn. App. 74, 77, 787 P.2d 51 (1990). It has been 17 years since Mr. Townsend passed away. Strict application of the time bar promotes fairness to the victim and protects the state's legitimate interest in finality. These regulations are constitutional and exist, in part, because "[t]here is no absolute and unlimited constitutional right of access to courts. All that is required is a reasonable right of access--a reasonable

opportunity to be heard." *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 554 (3d Cir. 1985).

This petition was filed in 2018, many years after the 2007 date of finality. Monschke has asserted two exceptions to the time bar under RCW 10.73.100. Amended PRP at 24-25. The threshold inquiry is whether either exception applies. *Matter of Schorr*, 191 Wn.2d 315, 320, 422 P.3d 451 (2018).

First, Monschke argues RCW 10.95.030 is unconstitutional on its face or as applied to the defendant's conduct, i.e. aggravated first degree murder. *Id.* at 24 (citing RCW 10.73.100(2)). This Court has long held otherwise. *State v. Hughes*, 106 Wn.2d 176, 203, 721 P.2d 902 (1986); *State v. Grisby,* 97 Wn.2d 493, 497, 647 P.2d 6 (1982), *cert. denied sub nom. Frazier v. Washington,* 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983) (the state and federal constitutions do not require a particularized consideration of the defendant's character and record before imposing life without parole for an aggravated first degree murder).

Second, he asserts that there has been a significant change in the law material to his sentence which applies retroactively. Amended PRP at 24-25. In fact, no statute or case has prohibited mandatory life without parole for an adult offender convicted of aggravated first degree murder. Monschke is forced to "admit[ ] that there is no case directly on point," and

that reversal of his sentence would require an expansion of *Miller* from children to some vague category of immature adults. *Id.* at 21, 25. Indeed, the law review article which Monschke cites (Amended PRP at 8) notes that individualized sentencing in all felony cases would not only be an extension of current Eighth Amendment jurisprudence, but also would require the overruling of prior decisions. William W. Berry III, *Individualized Sentencing*, 76 Wash. & Lee L. Rev. 13, 22-23 (2019). In other words, there has been no material change in law, but Monschke would like to see one. This does not satisfy RCW 10.73.100(6).

Monschke argues that there is "no bright line dividing juvenile brains from adult brains at age eighteen with respect to determining culpability." Amended PRP at 26. This is misleading. "Currently, the only legitimate use of adolescent brain research in individual cases is to provide decision makers with general descriptions of brain maturation." Richard J. Bonnie & Elizabeth S. Scott, The Teenage Brain: Adolescent Brain Research and the Law, Current Directions in Psychol. Sci. 22(2) (Apr. 16, 2013) (there is no scientific basis for extrapolating group data to the measurement of an individual adolescent's neurobiological maturity for legal purposes, because there is too much variability within age groups and

across development).[3] *See also* Terry A. Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, 85 Notre Dame L. Rev. 89 (2009) (suggesting neuroscience does not shape legal decisionmakers' beliefs and values about youthful offenders, but is only read through the lens of existing beliefs and values); BJ Casey & Kristina Caudle, The Teenage Brain: Self Control, 22 Current Directions in Psychol. Sci. 82-87 (Apr. 1, 2013) (cautioning against myths and overgeneralizations about adolescence and noting "striking individual differences").[4]

What the law provides is a bright line rule dividing juvenile offenders from adult offenders at age eighteen with respect to sentencing. *Miller*, 567 U.S. at 489 (prohibiting mandatory sentencing schemes which require life without parole for juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 78, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) ("differences between juvenile and adult offenders are too marked and well understood") ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide"); *Roper v. Simmons*, 543 U.S. 551, 574, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (death penalty permitted for 18 year olds) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were

[3] https://journals.sagepub.com/doi/full/10.1177/0963721412471678
[4] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4182916/

under the age of 18 when their crimes were committed"); *State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993) (death penalty not authorized for crimes committed by juveniles); RCW 13.04.030(1)(e); RCW 13.40.020(15).

The significant change in law, which is *Miller*, is not material to adult offenders like Monschke. *See In re Richey*, No. 77822-6-I, 2019 WL 6492484 (Wash. Ct. App. Dec. 2, 2019) (unpublished) (non-binding authority cited under GR 14.1) (holding *Miller* was not material to a 65-year sentence imposed for an offense committed at the age of 18 and dismissing petition as time barred).

The petition must be dismissed as time barred.

B. Standards of review in a collateral attack.

The courts' review of personal restraint petitions is constrained, and relief gained through collateral relief is extraordinary. *In re Fero*, 190 Wn. 2d 1, 14, 409 P.3d 214, 222 (2018). In a personal restraint petition, the burden of proof shifts to the petitioner. *In re Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990); *Hews v. Evans*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983); RAP 16.7(a)(2) (petitioner must provide facts and the evidence which support the factual allegations). And the Defendant must make a heightened showing of prejudice. *Fero*, 190 Wn.2d at 15. Monschke must

demonstrate both constitutional error and actual and substantial prejudice or the petition will be dismissed. *Cook*, 114 Wn.2d at 810.

C. This Court has long held that the imposition of mandatory life without parole on adult offenders convicted of aggravated first degree is constitutional.

The Defendant asks the Court to find the aggravated murder statute unconstitutional as to adult offenders, because mandatory sentences fail to take into account that people are different. Amended PRP at 7 (asking for the imposition of an "individualization requirement"); Amended PRP at 12-13 (arguing that adults can also be immature). Such a holding would be a reversal of long-standing precedent. The question has been decided.

RCW 10.95.030 provides that, in the absence of the death penalty, an adult offender convicted of aggravated first degree murder "shall be sentenced to life without possibility of release or parole." Following the decision in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), a subsection was added such that juvenile offenders convicted of aggravated first degree murder receive an indeterminate sentence up to life. Laws of 2014, c. 130, § 9.

The capital punishment law was enacted in 1981. Laws of 1981, c. 138, § 3. Soon thereafter, Frazier and Grisby claimed that a mandatory life sentence without consideration of mitigating circumstances constituted cruel and unusual punishment under the federal and state constitutions.

State v. Grisby, 97 Wn.2d 493, 497, 647 P.2d 6 (1982), *cert. denied sub nom. Frazier v. Washington,* 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983) (U.S. CONST. amend. VIII; WASH. CONST. art. 1, § 14). Comparing life without parole to the death penalty, they argued the court must "allow the particularized consideration of relevant aspects of the character and record of each convicted Defendant" before imposing life without parole. *Id.* (citing *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976)). The court disagreed, stating there is "no analogy between the death penalty and life imprisonment without parole." *Grisby,* 97 Wn.2d at 498 (citing *Woodson*, 428 U.S. at 305). *Accord State v. Dictado,* 102 Wn.2d 277, 296, 687 P.2d 172 (1984). *See also Graham*, 560 U.S. at 69 (a life without parole sentence shares some characteristics with a death sentence, however, the death penalty is unique in its severity and irrevocability); *State v. Hughes*, 106 Wn.2d 176, 203, 721 P.2d 902 (1986) (reaffirming that the constitutions do not require that a capital sentence be mitigated to a parolable sentence).

> So long as the Legislature does not violate the state and federal constitutional directives against cruel and unusual punishment or excessive fines, it may restrict judicial discretion in imposing criminal sentences. We uphold the constitutionality of RCW 10.95.030(1) and .080(2).

Hughes, 106 Wn.2d at 203.

Monschke concludes "[t]his Court should 'straightforwardly' apply precedent." Amended PRP at 24. *Grisby* is the precedent.

Like Frazier and Grisby before him, Monschke relies upon the individualization requirement in death penalty jurisprudence. Amended PRP at 8 (citing *Woodson v. North Carolina* and *State v. Green*, 91 Wn.2d 431, 588 P.2d 1370 (1979)). This Court heard and rejected the argument in *Grisby*. Because Monschke was not sentenced to death, he had no constitutional right to require the sentencer to consider his particular qualities.

Monschke argues that the rule coming out of *Miller* is "that LWOP is different." Amended PRP at 10, 20. *But see* Corrected Brief of Amici Curiae at 1, *In re the Pers. Restraint of Domingo Cornelio*, No. 97205-2 (Wash. Jan. 13, 2020); Memorandum of Amici Curiae at 2-4, *In re the Pers. Restraint of Domingo Cornelio*, No. 97205-2 (Wash. May 21, 2019) (same author arguing that the Eighth Amendment jurisprudence regarded children only and not the length of the sentence). But that is not what *Miller* said. It said that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471; *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409, 413 (2017) (*Miller* said "children are different"). "*Miller* [...] rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'-- that is, juvenile offenders

whose crimes reflect the transient immaturity of youth." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734, 193 L. Ed. 2d 599 (2016).

Miller does not apply to adult offenders. *State v. Moretti*, 193 Wn.2d 809, 813, 446 P.3d 609 (2019); *State v. Witherspoon*, 180 Wn.2d 875, 890-91, 329 P.3d 888, 896 (2014) (holding *Miller* and *Graham* did not apply to persistent offender who was an adult at the time of each strike offense); *State v. Robertson*, 884 N.W.2d 864, 877 (Minn. 2016) (rejecting equal protection argument under *Miller* where offender was 22 at time of the offense). Monschke was not a child when he committed aggravated murder. Therefore, neither the federal nor the state cruel punishment clauses require the sentencer to consider Monschke's individual qualities.

D. Monschke fails to demonstrate, much less allege, prejudice.

In a personal restraint petition, a defendant must demonstrate both constitutional error and actual and substantial prejudice. *Matter of Meippen*, 193 Wn.2d 310, 315, 440 P.3d 978, 981 (2019). Assuming arguendo that (1) the petition was timely and (2) a life sentence was not mandatory for his adult offense, Monschke would still have to show that a court more likely than not would have imposed something less than life after considering his maturity, environment, and influences.

Monschke argues that the relevant aspect of his character that the sentencing court was not permitted to consider was his age. Amended PRP

at 4-5. But "age is not a per se mitigating factor." *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359, 366 (2015).

No other facts or evidence are attached to the Amended Petition. The original Petition only attached Monschke's affidavit. There, he does not express remorse or responsibility for Mr. Townsend's murder. He only states that he is a leader and an artist. He was already both of these things at the time of the offense.

Monschke makes no effort to show that he belonged in the class to which he would have the Court extend *Miller*, i.e. this vague category of immature adult. He does not show he was immature, dependent, pressured, or only transiently marked by the personality traits which led to the murder (e.g. his white supremacist ideology). *Simmons*, 543 U.S. at 569-70; *Houston-Sconiers*, 188 Wn.2d at 19, n.4 (describing general differences between children and adults). He was none of these things. Unlike his co-defendants, Monschke was fully employed and living independently. The people who were in his life (his girlfriend, friends, employers) were there by his own choices. He picked his own vocations and avocations. He researched and applied out for membership from an Oregon chapter. He gave his co-defendants shelter and proselytized them to his way of thinking.

Monschke cannot show that his crime was marked by impetuosity. The jury found premeditation. The evidence was that the co-defendants had

been talking about getting Frye her red laces for a while. RP 2190, 2362-63, 2418-19, 2484, 2603-04. The others already had their red laces, indicating that they had already committed similar violent acts. RP 2189-90. They purchased baseball bats before going to the railroad tracks to hunt for a victim. They chose a single, unarmed victim, passing over a couple armed with a machete. RP 924-26; *Monschke*, 133 Wn. App. at 320-21. Cold cognition, premeditation, and criminal enterprise are not consistent with immaturity.

At sentencing, the Honorable Judge Lisa Worswick said:

> This was just a tragic, senseless gang attack on one of the most defenseless members of our society who had feelings and family. He was attacked as if he was expendable, as if his life could be taken for your pleasure. It's very tragic all around.
>
> I thought a lot about what to say to you, but in the end all that needs to be said has already been said by 12 members of the community. According to their decision, I'm sentencing you to life in prison without the possibility of parole.

RP (6/4/04) at 19. The jury had been instructed on first degree manslaughter, second degree murder, first degree murder, and the aggravating factor. CP 373-96. It convicted of the most serious offense.

On this record, Monschke has not established actual and substantial prejudice.

E. The Court must decline Monschke's invitation to extend *Miller* or to legislate.

Monschke complains that the class should be based on something other than chronological age. Amended PRP at 15-17. This Court heard the same complaint in *In re Boot*, 130 Wn.2d 553, 573, 925 P.2d 964 (1996). Then Cornejo argued that it was improper to draw "a distinction between a young person who commits a crime one second before his sixteenth birthday, and one who commits a crime one second after his sixteenth birthday." *Boot*, 130 Wn.2d at 573. This Court disagreed. "This is precisely the distinction the Legislature has made, however, in declaring those under 18 to be juveniles, and it is precisely the kind of distinction the Legislature is empowered to make." *Id.*

"The Legislature often makes age-based distinctions in establishing legal consequences." *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 974, 977 P.2d 554, 561 (1999). "Our Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 85–86, 120 S. Ct. 631, 647, 145 L. Ed. 2d 522 (2000) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 473, 111 S. Ct. 2395 (1991) (regarding mandatory retirement of judges at 70 although it is far from true that their performance significantly deteriorates at this age)); *accord Massachusetts Bd. of Ret. v.*

Murgia, 427 U.S. 307, 96 S. Ct. 2562 (1976) (upholding law mandating retirement age of 50 for uniformed branch of state police regardless of actual physical fitness).

"Juveniles—those under the age of 18—are frequently treated differently under the criminal law." *Shawn P.*, 122 Wn.2d at 565. *See also Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 227, 5 P.3d 691 (2000) (rational basis test permits different treatment for individuals over age 18 who are in prison). The Legislature regularly draws the line between minority and majority of victims and offenders at 18. RCW 9.94A.030(32); RCW 9.94A.030(35); RCW 9.94A.030(38)(b)(ii); RCW 9.94A.535 (3)(h)(ii); RCW 9.94A.827; RCW 9.94A.833; RCW 13.04.011; RCW 13.40.020(15); RCW 69.52.030(2).

At 18, one gains the right to vote, hold office, independently decided to marry, make a will, and serve as a juror. *State v. Shawn P.*, 122 Wn.2d 533, 565, 859 P.2d 1220 (1993). At 18, one has the unrestricted right to possess a gun and enlist in the military. RCW 9.41.042; 10 U.S.C. §505(a). "These age distinctions are based on society's judgments about maturity and responsibility." *Davis*, 137 Wn.2d at 974.

> The bases for these judgments are not susceptible of scientific proof, as there is no objective measure of maturity or responsibility. Justice Holmes made the point over 70 years ago:

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the Legislature must be accepted unless we can say that it is very wide of any reasonable mark.
>
> *Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 41, 48 S.Ct. 423, 72 L.Ed. 770 (1928) (Holmes, J., dissenting).

Davis, 137 Wn.2d at 975. These lines are based on policy made after lengthy consultation with all shareholders. It is the proper province of the Legislature. *See e.g.* SSB 5819 (proposed bill to create a Post-Conviction Review Board to allow early release after 15 years confinement or, if inmate is over 60 years of age, after serving half the imposed sentence).

This Court "has consistently held" that the fixing of legal punishments for criminal offenses and the alteration of sentencing processes is a legislative, rather than a judicial, function. *Pillatos*, 159 Wn.2d at 469 (quoting *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719 (1986) (citing *State v. Le Pitre*, 54 Wash. 166, 169, 103 P. 27 (1909)). The power of the legislature in that respect is plenary. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). To create a sentencing procedure "out of whole cloth

would be to usurp the power of the legislature." *Pillatos*, 159 Wn.2d at 469 (quoting *State v. Hughes*, 154 Wn.2d 18, 151-52, 110 P.3d 192 (2005)). *See also Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975) (one branch's invasion of the prerogatives of another violates the separation of powers doctrine).

The United States Supreme Court recognized that there is no perfect way to distinguish between the mature and the immature. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Simmons*, 543 U.S. at 573. Eighth Amendment jurisprudence drew the line where the legislatures frequently had: at 18 years of age.

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. [...] The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Simmons, 543 U.S. at 574. *See also Rummel v. Estelle*, 445 U.S. 263, 275–76, 100 S. Ct. 1133, 1140, 63 L. Ed. 2d 382 (1980) (when the lines to be

drawn are indeed "subjective," they are therefore properly within the province of legislatures, not courts).

Our Washington Legislature has taken the note and enacted laws respecting this line for juvenile offender sentences. *See e.g.* RCW 9.94A.507(2); RCW 9.94A.730; Laws of 2014, ch. 130 (SSSB 5064).

If 18 is the line for death eligibility, the same line does not offend the constitution in a discussion of life sentences.

F. The sentencing scheme which applied to Monschke is different from the one which applied to Domingo Cornelio.

Monschke argues that extending *Miller* to adults is consistent with the Sentencing Reform Act (SRA) and its provision for exceptional sentences. Amended PRP at 22-23. Monschke's attorney will have heard the state make a similar argument in another case. Supplemental Brief of Respondent at 3, 6, 11, *In re Pers. Restraint of Domingo Cornelio*, No. 97205-2 (Wash. Dec. 6, 2019); State's Answer to Memorandum of Amici at 10, 16, 18, *In re Pers. Restraint of Domingo Cornelio*, No. 97205-2 (Wash. Jun. 7, 2019). There Domingo Cornelio was convicted of child rape and molestation and sentenced to a standard range sentence. The state noted that the sentencing court had the discretion to depart downward sua sponte based on facts in the trial record suggesting transient immaturity if the court found them to be persuasive. *Accord Matter of Meippen*, 193 Wn.2d 310, 316, 440 P.3d 978 (2019) (trial court had discretion to impose an

exceptional sentence downward but declined to do so). Quite separately from *Miller*, this discretion has always existed under the SRA. *Matter of Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2018) (RCW 9.94A.535(1)(e) has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward).

However, unlike Domingo Cornelio, Monschke was not sentenced under the SRA, but under RCW 10.95.030. RCW 9.94A.020 (explaining the Sentencing Reform Act is in Chapter 9.94A RCW). Monschke's "individualization requirement" would be *inconsistent* with the Washington law that actually applied to his sentence.

G. It is not cruel to treat criminals like adults.

Miller found that it was cruel and unusual to impose (1) mandatory (2) life sentences on any but the most incorrigible of (3) juvenile offenders. Currently criminal defendants are asking this Court to find that *Miller* applies to their cases, even in the absence of one of these necessary factors.

Sebastian Gregg argues the 8th Amendment jurisprudence applies even in the absence of any mandatory feature in his sentence. *State v. Gregg*, No. 97517-5. In other words, notwithstanding that the sentencing court has discretion to depart downward from the range under RCW 9.94A.535, Gregg asserts that the mere existence of standard ranges and the

court's choice to sentence within the standard range is cruel and unusual punishment.

Endy Domingo Cornelio and Said Omer Ali argue the 8th Amendment jurisprudence is not limited to life sentences. *In re Pers. Restraint of Domingo Cornelio*, No. 97205-2; *In re Pers. Restraint of Ali*, No. 95578-6. In other words, any sentence imposed on a juvenile offender, no matter how small, is cruel and unusual punishment if an adult could have received the same sentence.

And Monschke argues that *Miller* should not be restricted to juveniles. He asks this Court to "expand" the *Miller* hearing requirement from juvenile offenders to "defendants who share qualities recognized by caselaw as mitigating and meriting lesser punishment." Amended PRP at 11, 20-21.

Monschke has not defined a meaningful class. People of all ages may be impetuous, dependent, or weak in character. This does not render them deserving of special protections when they commit aggravated first degree murder or violate the Persistent Offender Accountability Act.

While juveniles are more likely than adults to be impulsive and reckless, juveniles who commit crimes are outliers.[5] On the other hand,

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[5] Washington State Statistical Analysis Center.
http://wa-state-ofm.us/CrimeStatsOnline/Index.cfm

adults who are impulsive and reckless are well on their way to a diagnosis[6] of antisocial personality disorder (ASPD) and a life of crime. Rafi Letzer, Scientists just got closer to understanding the genetic roots of crime – and it's making them nervous, Business Insider (Sep. 12, 2016) (ASPD is only observed in 1-3% of the general population but in 40-70% of prison populations).

Because it is irresponsible to break the law, such a class definition would include any offender. Therefore, according to Monschke, it is cruel and unusual punishment to treat adult criminals like adults.

His proposed rule is essentially that "people are different": everyone should receive individualized sentencing when facing mandatory life. Because no court has held adults must be treated the same as children, any interpretation of Monschke's proposed rule would be a new, substantive

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[6] Diagnostic criteria is met in an individual of at least 18 years of age with three or more of the following:

1. Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest.
2. Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure.
3. Impulsivity or failure to plan ahead.
4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults.
5. Reckless disregard for the safety of self or others.
6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.
7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

American Psychiatric Association, Diagnostic and statistical manual of mental disorders (5th ed.) (2013) at 659.

rule. New substantive rules apply retroactively. *Teague v. Lane*, 489 U.S. 288, 307, 312-13, 109 S.Ct 1060, 103 L.Ed.2d 334 (1989).

Monschke claims that his rule would be limited to mandatory life. However, it would necessarily apply equally to de facto life sentences resulting from mandatory provisions. *Houston-Sconiers*, 188 Wn.2d 1 (life sentence resulting from consecutive firearm enhancements); *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017) (life sentence resulting from consecutive murder sentences). And, depending on the outcomes in *Ali, Domingo Cornelio,* and *Gregg*, the scope of the rule could encompass any standard range adult sentence.

Monschke's proposal is not justified under the constitutions.

V. CONCLUSION

This Court should hold that Monschke's petition is time barred where there has been no change in law justifying the application of *Miller* to the sentences of adult offenders.

RESPECTFULLY SUBMITTED this 25th day of February, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Teresa Chen WSB# 31762
Deputy Prosecuting Attorney

Certificate of Service:
The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

2.26.20 Therese K
Date Signature

APPENDIX

APPENDIX: TABLE OF CONTENTS

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03-1-01464-0 21086293 VS 06-01-04

FILED
IN COUNTY CLERK'S OFFICE
A.M. MAY 28 2004 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

VICTIM IMPACT STATEMENT

State of Washington vs. DAVID PILLATOS, TRISTIAN FRYE, SCOTTY BUTTERS, KURTIS MONSCHKE
Superior Court Cause No. 03-1-01462-3, 03-1-01463-1, 03-1-01441-1, 03-1-01464-0

Please describe for the Court the impact of this crime on your life and/or the life of your family members. Special attention should be given to describing the emotional and/or financial impact resulting from this crime. This statement will be provided to the Judge, Prosecuting Attorney, Community Corrections Officer and the Defense Attorney. The original will be placed in the court file.

STATEMENT MUST BE WRITTEN IN INK ON FRONT SIDE ONLY. If needed, additional pages may be attached (please include Superior Court Cause Number on each page).

Signed: _____ Date: _____

Please return to: Donna Fung, Victim Advocate
Room 946, 930 Tacoma Avenue South, Tacoma, WA 98402

Dear Court & Members of the Jury:

My name is Mike, and I was a long-time friend of Randy Townsend. I think of him often to this day, though he was killed some time ago.

When I think of Randy, I picture his stature, which always blatantly stood out amongst other men. Randy was "boyish." If his ever-present stubble was absent, he could have been mistaken as a teenager. His arms were like pencils, and when he wore shorts in the summers, his pale legs looked feeble & knock-kneed. Overall, he looked underdeveloped, as if at some point in his life he suffered some sort of physical malady, or was born with a physical impairment of some kind. I always felt bad for him because of his physical condition, in light of the fact that he lived on the streets.

Thoughts of people harassing him, and taking advantage of him violently would bombard my mind when I'd see him. At times Randy would tell me of tales of trying to survive on the streets, of being punched in the face by crack dealers for quietly walking down the wrong side of the sidewalk. One time a drug dealer punched Randy, making to see "nothing but white light, like snow." I could only nod my head when he told me such stories,

because I knew there was nothing I could do for him. But I would pray for him - asking God to help him on the streets, to help him find safe and warm shelter. This was how it was for me everytime I saw Randy downtown, up until the final time I saw him two weeks before he was murdered.

He always looked helpless, and my heart and prayers cried out to him even the first time I met him in 1989 while working as a Community Service volunteer at Bellarmine Prep. High School. Then he lived at Jefferson House, a "home" for the forgotton and mentally handicapped. There we became pals. I gave him a set of dumbells because he said he wanted his arms to look bigger, and when I visited him through the years after graduation he would flex his arms, and with a broad smile tell me how the weights were really working for him. And I really wanted those arms to get bigger and his whole body as well, so people wouldn't mess with him and hurt his gentle soul. I knew he lived in a world of wolves downtown, among pimps, thieves and the like. I knew, as everyone else can attest to, Randy Townsend was none of these. In this knowledge I found both joy & fear. Joy that in my life I had met a truly wonderful person, that behind the mental

illness, tattered clothes and destitution existed one of the best people I knew, for he never spoke one ill word of anyone around me, but stated of "believing in Jesus" of being "a good friend" to people on the streets. He was one of the only people I knew who really listened when I spoke to him, and in his eyes you could see genuine concern.

In winter I remember walking out of Tulleys Coffee and seeing Randy. It was absolutely freezing and pitch-black outside. I saw Randy stiffly walking down 9th street. Although he only weighed about 140 lbs he looked like a football player in his ski-coat, or like a little boy getting ready to play in the snow. He walked up to me and looked into my eyes pleadingly, telling me how cold he was while twitching and coughing up phlegm. He was also soaked by the rain and looked frightened while telling me he couldn't find a warm place to sleep. I took him to Subways and we ate dinner and drank coffee. Randy must said "thank you" to the clerk fifty times. When we left he had the same pleading look. It was the hardest thing to drive away that night after hanging out for a couple of hours. I saw him sitting on a bench under a bright street light.

His head followed me as I drove down the hill. I honked, and he waved good-bye slowly. It was the last time I saw Randy alive. I will never forget that last scene though. He looked so defenseless and bundled up in the freezing air. I feared for him and wondered what would ever happen to my friend.

Two weeks later I read about Randy's murder. I remember his face in the newspaper. It seemed to me that the photo was taken before his lifelong battle with schizophrenia degraded his countenance, or dulled it if you will. His eyes were a little brighter and smile a little wider. I remember thinking what things must have been going on in his life for him to look so happy.

I rushed to Harborview Hospital immediately. Upon entering his room, I couldn't recognize Randy at all, except for his sticky arms and legs. I could barely look at his smashed face, so I held his limp hand, hoping for a response. I could barely stand to remain in his room when he would convulse from the fluid in his lungs. The nurses told me the blows from the bats and rock destroyed the dendrytes, or messenger to his brain. The nurse told me my friend's brain was "mush." I knew then that he was

I think about Randy Townsend every day. I cry a lot about him, about his life, about what it must have been like for a nice man like him to live on battle grounds. A man of peace in a culture of downtown violence. I cry when I think of how innocent he was, how impaired and needy. I think often of how much God loved him, how He loved his child-like manner. A God who is great and loving, loves a guy like Randy, for Randy was giving, kind & empathetic. Randy was giving, kind & would even forgive his attackers.

Most of my thoughts are of his actual murder. I have this picture in my head all the time, and it isn't fiction, because it really happened, and I know the area where he was killed. This picture is of my dear friend Randy, standing in the dim light near the East 26th street bridge. I always wonder what he was thinking with his killers in-front-of him. Randy was so innocent and trusting he probably didn't know what was going on before that baseball bat was broken in two pieces over his face. I always cry at this moment in my thoughts, because I am again reminded of the violent end to his life. I cry hard, clenching my fists and bending over. There is so much pain for Randy— everything about him and his murder.

I wish I could have been there to help him fight back. Sometimes I imagine myself fighting his murderers for him and saving him, so he'd be alive to contribute something special to a violent world.

I really haven't cried at all as much as I want to because I know it will be the worst cry I've had in my life. But it needs to happen. It's the best I can give him now.

I read in the papers that Randy's attackers were looking for a "parasite." They believed they found one (must have been the obvious mental illness and his tattered clothes. Who they did meet was the nicest guy in the world, who stayed giving, loving and concerned for others through his extreme hardships. To me, this was what made Randy Townsend so special in this world. He is an inspiration to me.

I could go on further and further, but there is not enough to say about Randy. I thank God that I knew him.

* In the cause of Randall Townsend, his life and all who loved him, let Justice Ring. Randy Townsend, friend to all - murder

Case Number: 03-1-01463-1 Date: March 9, 2009
SerialID: EBFF6B48-F20D-AA3E-59A5A0083B16C394
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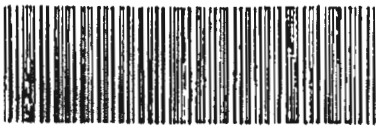

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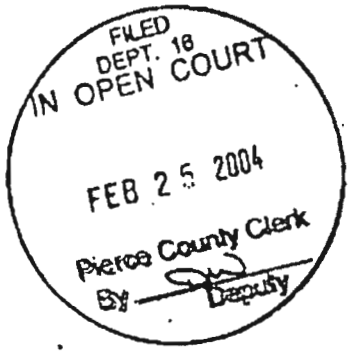

FEB 25 2004

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. TRISTAIN LYNN FRYE, Defendant.	CAUSE NO. 03-1-01463-1 PROSECUTOR'S STATEMENT REGARDING AMENDED INFORMATION

The State requests the Court to consider accepting a plea to the filing of an Amended Information pursuant to RCW 9.94A.431 for the following reasons:

The State is asking this court to accept an amended information that reduces the charge of aggravated murder - first degree, to murder in the second degree, on conditions as outlined in the separately filed "plea agreement."

This proposed disposition is not being offered because of any perceived major difficulties in proving any element of the crime. Rather, the State is offering this reduction in the interests of justice.

The State has charged Frye and her codefendants with committing a senseless and brutal murder. This crime was committed by individuals who believed in fact that by murdering a person they considered to be a "parasite" to our community, Frye would gain a heightened status in the white supremacy movement.

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After almost a year of continuing investigation and the compilation of almost 6,000 pages of discovery, the State now has a clear understanding of the details of the murder, including acts of each defendant leading to the death of Randall Townsend. This investigation also now includes a recent and lengthy, tape-recorded statement given by Frye concerning the details of the murder. It is after working with all of the evidence for such a lengthy period of time that the State has become even more convinced of the truth of its charge and the course it now must take in this case.

The reason Frye is being offered this reduction is because of (1) her reluctance to participate in the crime; (2) the substantially lower level of her culpability in committing the crime as compared to her codefendants; (3) the difference in the amount of physical harm she inflicted on Mr. Townsend as compared to her codefendants; (4) her remorse and horror expressed from shortly after the murder was committed to present; and, (5) her willingness to take responsibility for her actions and to cooperate in the prosecution of her codefendants.

In brief detail, Frye has told the State, and the investigation confirms, that Frye was the first of the four charged defendants to encounter Mr. Townsend (hereafter referred to as the "victim"). The victim came upon Frye as she was drinking beer in the general vicinity of the subsequent murder. Frye had become separated from the other codefendants. The victim approached Frye as she was drinking a beer and began speaking with her. He asked for a "swig" of her beer and she gave him the remainder. The two then began smoking cigarettes.

Shortly after this, the victim walked away, toward some railroad tracks, where he encountered defendants Butters and Pillatos. Butters spoke briefly with the victim who soon became afraid and tried to run away. The victim had run a very short distance when he looked back to see if he was being followed. As he did so, Butters, having pursued him, struck him in the side of the head with a baseball bat. The blow was so hard that the bat broke and the victim

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was rendered apparently unconscious. Frye's response to witnessing this act was to freeze, as if in shock.

As the victim lay unconscious on his back, Butters and Pillatos stood on each side of him and violently kicked his head back and forth between them with a force Frye has described as, "as hard as they could." Butters and Pillatos were wearing steel-toed boots. This went on for about a minute before Pillatos noticed a small boulder-sized rock. Pillatos picked up the heavy rock, raised it above his head, and then threw it forcefully straight down onto Mr. Townsend's face, hitting him in the mouth and nose region. Frye witnessed these acts from a distance of about 15 feet and remained frozen and in shock.

After this act, Butters grabbed the victim under his arms, Pillatos grabbed him by his legs, and they carried him to the nearby railroad tracks. Based on Frye's statement, together with independent evidence, it is believed that Butters and Pillatos positioned the victim's body by placing him face down across the railings of the track. The victim's face was positioned on one of the rails with his mouth wide open, as if he was biting the rail. It is firmly believed that Butters and Pillatos next performed what is known as a "curb stomp" on the victim; they stomped on the back of the victim's head several times with the heel of their boots, to ensure his death.

After this act, Butters, Pillatos and Frye walked further up the tracks in order to find defendant Monschke. As they walked, Butters kept repeating that he had "killed that guy." Pillatos ran ahead and located Monschke. The four defendants then returned quickly to where the victim had been left, with Butters and Monschke running slightly ahead. Pillatos and Frye soon arrived at the scene where they found the victim now on his back, gurgling blood and apparently still alive. Monschke then brutally beat the victim over and over in the face with a baseball bat and, according to Frye, "finished him off." Either Butters or Monschke, or both, had turned the victim over onto his back before Monschke began this final attack.

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It was at this time that Pillatos informed Frye that she must also kick the victim. Frye stated she couldn't do it; however, Pillatos grabbed her from behind her neck and forced her to walk up to the victim. He then covered her eyes with his hand and told her to kick – and she did. Frye kicked the victim in the head three or four times with such force that her knee hurt the next day.

The four defendants then left.

The King County medical examiner who performed the autopsy has been interviewed extensively and his opinion of the manner and method of the victim's death is wholly consistent with the State's accounting of the crime as described above.

Additionally, the forensic evidence, including DNA test results and blood spatter expert analysis and opinion, all are consistent with the State's above-stated accounting of the murder.

Frye and her codefendants were arrested within days of the murder of the victim. Frye initially invoked her right to remain silent and it was not until last week that she was formally interviewed and spoke in detail of the killing of the victim. Her statement ties up many of the State's remaining questions in this case and the State is convinced she told the entire truth.

This court is aware that, since their incarceration, the prosecutor's office has been provided with the defendants' incoming and outgoing, non-legal mail. Every one of these defendants' letters, consisting of several thousand pages, has been read. Upon being incarcerated, and long before she knew her mail was being read by authorities involved in prosecuting her, Frye wrote of her remorse and sorrow for the victim's death. She wrote that he did not deserve to die. She also frequently wrote of her nightmares and the horror she was experiencing in having to relive the murder in her mind.

It is the State's assessment that Frye is truly remorseful for her actions. The State also firmly believes that before Frye became romantically involved with Pillatos a few months before

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the murder, involvement in such a horrendous crime would not have been in her character or future.

A review of the evidence of Frye's involvement in the white supremacy movement reveals that it was Pillatos who held the views associated with the movement. Frye did not voice her objection to her boyfriend's views, lifestyle and culture. The minimal evidence of Frye's participation and level of involvement in the white supremacy movement is in stark contrast to the involvement of all the other charged defendants.

Significantly, Frye has entered into a plea agreement that requires her to fully cooperate with the prosecution in its preparation for the prosecution of the remaining codefendants, and a requirement that she testify fully and truthfully at their trials and/or sentencing hearings. Her testimony will bring direct evidence of the entire murder, including evidence regarding the various defendants' motivations for the murder.

On Friday, February 20, 2004, I spent three hours discussing this proposed disposition with the victim's sister and her husband. They are very educated and intelligent people and fully understand the reasons for the State's willingness to make the offer to Frye and they trust our judgment.

2/24/04
Date

GREGORY L. GREER
Deputy Prosecuting Attorney
WSB # 22936

GERALD COSTELLO
Chief Criminal Deputy Prosecuting Attorney
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Case Number: 03-1-01462-3 Date: March 9, 2009
SerialID: EBFF7256-F20F-6452-DA62E394AA82F1DE
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

03-1-01462-3 20853788 STPATTY 03-12-04

FILED
DEPT. 16
IN OPEN COURT
MAR 11 2004
Pierce County Clerk
By Deputy

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

MAR 11 2004

STATE OF WASHINGTON, Plaintiff, vs. DAVID NIKOS PILLATOS, Defendant.	CAUSE NO. 03-1-01462-3 PROSECUTOR'S STATEMENT REGARDING SECOND AMENDED INFORMATION

The State requests the Court to consider accepting a plea to the filing of its Second Amended Information pursuant to RCW 9.94A.431 for the following reasons:

The Plaintiff believes that justice will be served by Defendant pleading guilty to First Degree Murder, where the Plaintiff has the option to present evidence in support of an exceptional sentence, up to the statutory maximum. The Plaintiff has not decided exactly what sentence to recommend. However, we believe that it is to the public's benefit for the State to have wide-ranging opportunity to seek an appropriate sentence. Additionally, if the Plaintiff deems it necessary, Defendant will testify at the trial of any remaining co-defendants, describing their respective roles in the murder. The victim's sister, who has been the family spokesperson, has been notified of this resolution and has expressed confidence in the decision.

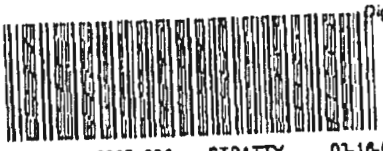
3/11/04
Date

Gerald T. Costello
GERALD T. COSTELLO
Deputy Prosecuting Attorney
WSB # 15738

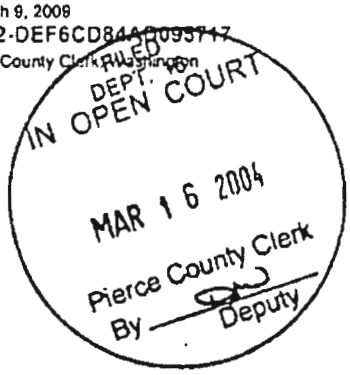
Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

12960 3-17-2004 60531

Case Number: 03-1-01441-1 Date: March 9, 2009
SerialID: EC0696C1-F20F-6452-DEF6CD844C095717
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington



03-1-01441-1 20671236 STPATTY 03-16-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. SCOTTY JAMES BUTTERS, Defendant.	CAUSE NO. 03-1-01441-1 PROSECUTOR'S STATEMENT REGARDING AMENDED INFORMATION

MAR 16 2004

The State requests the Court to consider accepting a plea to the filing of its Second Amended Information pursuant to RCW 9.94A.431 for the following reasons:

The Plaintiff believes that justice will be served by Defendant pleading guilty to First Degree Murder, where Plaintiff has the option to present evidence in support of an exceptional sentence, up to the statutory maximum. The Plaintiff has not decided exactly what sentence to recommend. However, we believe that it is to the public's benefit for the State to have wide-ranging opportunity to seek an appropriate sentence. Additionally, if the Plaintiff deems it necessary, Defendant will testify at the trial of any remaining co-defendants, describing their respective roles in the murder. The victim's sister, who has been the family spokesperson, has been notified of this resolution and has expressed confidence in the decision.

3/16/04
Date

GERALD T. COSTELLO
Deputy Prosecuting Attorney
WSB # 15738

ORIGINAL

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Defendant takes deal in homeless man's death

Mar 13, 2004

By The Associated Press

TACOMA — A second defendant in the beating and stomping death of a homeless man, apparently a rite of passage for a white supremacist group, has accepted a plea agreement.

David Nikos Pillatos, 20, of Tacoma, pleaded guilty Thursday to first-degree murder in the death of Randall Townsend, 42, in exchange for being able to ask that his prison term be no more than about 30 years.

Pierce County prosecutors said they would ask Superior Court Judge Lisa Worswick to sentence Pillatos to as much as life in prison. He initially was charged with aggravated first-degree murder, punishable by execution or a mandatory life prison term without parole.

"There's more than one way to get the sentencing that's warranted in this case," deputy prosecutor Greg Greer said. "Pillatos knows after sentencing, he could be looking at 200 years in prison."

Pillatos' girlfriend, Tristain Lynn Frye, the mother of his child, also had been charged with aggravated murder but pleaded guilty two weeks ago to second-degree murder.

Frye and Pillatos promised to testify against Scotty James Butters, 21, and Kurtis William Monschke, 20, both charged with aggravated murder.

According to documents filed in court, police think the attack on Townsend last March 22 was planned so Frye could earn red shoelaces in the white supremacist movement, indicating an attack causing a minority person to bleed. Townsend, however, was white.

Prosecutors wrote that Frye said Butters hit Townsend with a baseball bat, Pillatos and Butters kicked him in the head with steel-toed boots, and Monschke later hit him with a bat. Frye told investigators she reluctantly kicked Townsend when Pillatos pushed her.

Philip Thornton, Pillatos' lawyer, said Butters and Monschke have been offered the same deal as his client.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

DAVID NIKOS PILLATOS,

Defendant.

NO.: 03-1-01462-3

ORDER ON STATE'S MOTION FOR A JURY TRIAL ON AGGRAVATING FACTORS AND TO CONTINUE THE SENTENCING DATE

THIS MATTER having come on before the above-entitled Court upon motion of The State of Washington, by and through its attorney, Deputy Prosecuting Attorney Greg Greer, and the Defendant David N. Pillatos, by and through his attorney of record, Philip Thornton, on August 11, 2004,the court having reviewed the pleadings submitted by the parties, and the court having heard argument of counsel and entered an oral ruling, and the Court having been fully apprised of the circumstances, it is hereby

ORDERED that the State's Motion For jury Trial on Aggravating Factors is hereby denied. It Is Further

ORIGINAL

THE LAW OFFICE OF
PHILIP E. THORNTON
901 SOUTH "I" STREET, SUITE 201
TACOMA, WA 98405
TEL. (253) 383-3102

was stipulated to and (W)

ORDERED that the State's motion to continue the sentencing hearing is granted. The Sentencing Hearing in the above captioned matter is rescheduled to September 10, 2004 at 9:00 a.m..

DONE IN OPEN COURT this 11th day of August, 2004.

FILED
DEPT. 16
IN OPEN COURT
AUG 11 2004
Pierce County Clerk
By Deputy

Lisa Worswick
JUDGE LISA WORSWICK

Presented by:

BY: _____
PHILIP E. THORNTON
WSB# 20077
Attorney for Defendant

_____
GREG GREER
WSB# 22936
Deputy Prosecuting Attorney

THE LAW OFFICE OF
PHILIP E. THORNTON
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03-1-01462-3 21732173 CME 09-07-04

FILED
DEPT. 16
IN OPEN COURT
SEP 3 2004
Pierce County Clerk
By Deputy

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 03-1-01462-3

MEMORANDUM OF JOURNAL ENTRY

vs.

PILLATOS, DAVID NIKOS

Judge: LISA WORSWICK
Court Reporter: JEANNE COLE
Judicial Assistant: DEA WOLFE

GREGORY L GREER	Prosecutor
PHILIP THORNTON	Defense Attorney

Proceeding Set: MOTION (NOT CONTINUANCE)

Proceeding Date: 09/03/04 9:00

Proceeding Outcome: HELD

Resolution: Guilty Plea

Clerk's Code:

Proceeding Outcome code: **MTHRG**

Resolution Outcome code: **GP**

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

vs.

PILLATOS, DAVID NIKOS

Cause Number: 03-1-01462-3
MEMORANDUM OF JOURNAL ENTRY

Judge: LISA WORSWICK

MINUTES OF PROCEEDING

Judicial Assistant: DEA WOLFE Court Reporter:JEANNE COLE
Start Date/Time: 09/03/04 9:10 AM

September 03, 2004 09:10 AM This matter comes before the court on the State's motion for reconsideration and motion to vacate guilty plea. Deputy Prosecuting Attorneys Gregory Greer and Gerald Costello both present. Defendant Scotty Butters present with counsel Keith MacFie. Defendant David Pillatos present with counsel Philip Thornton. Atty Greer makes motion for reconsideration. 09:19 AM Atty Thornton responds. 09:26 AM Atty MacFie responds. 09:28 AM Atty Greer replies. 09:35 AM Court takes this under advisement. 09:35 AM Atty Greer makes motion to vacate the defendants's guilty pleas. 09:45 AM Court questions Atty Greer. 09:47 AM Atty Thornton responds. 10:10 AM Atty MacFie responds. 10:12 AM Atty Greer replies. 10:24 AM Atty Thornton replies. 10:26 AM Atty Greer replies. 10:28 AM Court will announce it's decision on Tuesday, September 7, 2004 at 9:00 a.m.

End Date/Time: 09/03/04 10:38 AM

03-1-01462-3 21747316 CME 09-09-04

FILED
DEPT. 16
IN OPEN COURT
SEP 7 2004
Pierce County Clerk
By _____ Deputy

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 03-1-01462-3

MEMORANDUM OF JOURNAL ENTRY

vs.

PILLATOS, DAVID NIKOS

Judge: LISA WORSWICK
Court Reporter: KIMBERLY ONEILL
Judicial Assistant: DEA WOLFE

GREGORY L GREER	Prosecutor
PHILIP THORNTON	Defense Attorney

Proceeding Set: MOTION (NOT CONTINUANCE)

Proceeding Date: 09/07/04 9:00

Proceeding Outcome: HELD
Resolution: Guilty Plea

Clerk's Code:
Proceeding Outcome code: **MTHRG**
Resolution Outcome code: **GP**

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

vs.

PILLATOS, DAVID NIKOS

Cause Number: 03-1-01462-3
MEMORANDUM OF JOURNAL ENTRY

Judge: LISA WORSWICK

MINUTES OF PROCEEDING

Judicial Assistant: DEA WOLFE Court Reporter:KIMBERLY ONEILL
Start Date/Time: 09/07/04 9:04 AM

September 07, 2004 09:04 AM This matter comes before the court for the court to announce its decision on the State's motions to reconsider and motion to vacate the Defendants' guilty pleas. Deputy Prosecuting Attorney Gerlad Costello present. Defendant Scoty Butters present with counsel Keith MacFie. Defendant David Pillatos present with counsel Philip Thornton. Court denies the State's motions. 09:10 AM Atty Costello makes motion to continue the sentencings to allow the state to petition the State Supreme Court for review of this court's rulings. 09:12 AM Atty Thornton objects to continuing the sentencing date. 09:13 AM Atty MacFie objects to continuing the sentencing date. 09:14 AM Court continues sentencing to Friday, October 1, 2004 at 9:00 a.m.

End Date/Time: 09/07/04 9:34 AM

PIERCE COUNTY PROSECUTING ATTORNEY

February 26, 2020 - 10:08 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96772-5
Appellate Court Case Title:	Personal Restraint Petition of Kurtis William Monschke
Superior Court Case Number:	03-1-01464-0

The following documents have been uploaded:

- 967725_Briefs_20200226100727SC140532_3505.pdf
  This File Contains:
  Briefs - Respondents
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A copy of the uploaded files will be sent to:

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- jeffreyerwinellis@gmail.com
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