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

No. 96772-5

IN RE THE PERSONAL RESTRAINT PETITION OF:

KURTIS WILLIAM MONSCHKE,

Petitioner.

NO. 52286-1-II

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Should petitioner's time-barred claim of being entitled to an exceptional downward sentence for his aggravated murder conviction be dismissed when more than one year has passed since his judgment became final and he fails to show how his claim falls under any of the statutorily required exceptions to the one year time-bar?

2. Must the petition be dismissed as successive for failing to prove how the interests of justice would be served by review of an issue which could have been raised, but was not, in either of his two previous petitions?

3. Should this petition be dismissed where the petitioner has not shown (1) constitutional error resulting in actual and substantial prejudice, or (2) non-constitutional error amounting to a fundamental defect inherently resulting in a miscarriage of justice as (a) our

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legislature has made it clear that aggravated murder has a mandatory sentence of life without the possibility of parole and the SRA's exceptional sentence provision does not apply; (b) neither the Eighth Amendment of the federal constitution nor Article I, section 14 of our State Constitution are implicated in life without parole sentences for adults convicted of aggravated murder; and (c) petitioner's actions were not the result of youthful mistakes, but rather a deliberate and coordinated attack by a white supremacist?

B. STATUS OF PETITIONER:

Petitioner is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 03-1-01464-0. Appendix A. He was convicted of one count of aggravated murder in the first degree. *Id.* He committed a vicious murder against a homeless man due to petitioner's involvement and leadership in a white supremacist organization. Appendix B. Petitioner was sentenced to life in prison without the possibility of parole as required by statute. Appendix A; *see also* RCW 10.95.030.

Petitioner appealed his conviction. Appendix B. In the published portion of the opinion, he raised "numerous issues…including challenges to the constitutionality of RCW 10.95.020(6), the sufficiency of the evidence, the court's refusal to bifurcate the trial, and the court's order requiring him to wear a stun belt." *Id.* Other issues were raised in the unpublished portion of the opinion. *Id.* This Court affirmed his conviction, finding that he "received a fair and sound trial." *Id.* He subsequently filed a PRP raising additional issues. Appendix C. This Court denied his PRP in a published opinion. *Id.*[1] In 2015, petitioner filed a Motion to Vacate Judgment. Appendix D. The Pierce County Superior Court denied the

[1] While Appendix C indicates the opinion was unpublished, it was eventually published and is located at 160 Wn. App. 479, 251 P.3d 884 (2010).

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motion and transferred such to this Court as it appeared to be a time-barred PRP. Appendix E. This Court denied the PRP as being time-barred. Appendix F.

C. ARGUMENT:

Personal restraint procedure comes from the State's *habeas corpus* remedy, which is guaranteed by Article 4, section 4 of the Washington Constitution. ***In re Hagler***, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982); ***In re Meirhofer***, 182 Wn.2d 632, 648, 343 P.3d 731(2015). Fundamental to the nature of *habeas corpus* relief, and in turn a personal restraint petition, is the principle that the writ will not serve as a substitute for appeal. ***Hagler***, 97 Wn.2d at 823-24. "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." *Id.* (citing ***Engle v. Isaac***, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). These costs are significant and require collateral relief be limited in state as well as federal courts. *Id.*; ***Matter of Cook***, 114 Wn.2d 802, 809, 792 P.2d 506 (1990).

"After establishing the appropriateness of collateral review, a petitioner will be entitled to relief only if he can meet his ultimate burden of proof, which, on collateral review, requires that he establish error by a preponderance of the evidence." ***Cook***, 114 Wn.2d at 814 (citing ***In re Hews***, 99 Wn.2d 80, 89, 660 P.2d 263 (1983)); *see also* ***In re Borrero***, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007).

A personal restraint petitioner is required to provide "the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations. . .." RAP 16.7(a)(2)(i). This requirement means a "petitioner must state with particularity facts which, if proven, would entitle him to relief." ***In re Rice***, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). "Bald assertions and conclusory allegations will not support the

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holding of a [reference] hearing." *Id.*; *see also* ***Cook***, 114 Wn.2d at 813–814 ("We emphasize that the quoted principle from ***Williams***, is mandatory; compliance with that threshold burden is an absolute necessity to enable the appellate court to make an informed review. Lack of such compliance will necessarily result in a refusal to reach the merits.") (citing ***In re Williams***, 111 Wn.2d 353, 364–365, 759 P.2d 436 (1988)).

Reviewing courts have three options in evaluating personal restraint petitions:

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

Hews, 99 Wn.2d at 88. A petition must be dismissed when the petitioner fails to provide sufficient evidence to support the petition's claims. ***Williams***, 111 Wn.2d at 364.

1. PETITIONER'S TIME-BARRED CLAIM OF BEING ENTITLED TO AN EXCEPTIONAL DOWNWARD SENTENCE SHOULD BE DISMISSED AS THE PETITION FALLS UNDER NO EXCEPTION TO THE ONE YEAR TIME-BAR.

Rules of Appellate Procedure (RAP) 16.4(d) provides, in relevant part:

> The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090 or .100.

RCW 10.73.090 creates a time-bar preventing a personal restraint petition from being filed more than one year after the judgment becomes final so long as the judgment is facially valid and rendered by a court of competent jurisdiction. RCW 10.73.090(1); *see also* ***In re***

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Toledo-Sotelo, 176 Wn.2d 759, 764, 297 P.3d 51 (2013). For a judgment to be "invalid on its face" the judgment and sentence "...evidences the invalidity without further elaboration." ***In re Hemenway***, 147 Wn.2d 529, 55 P.3d 615 (2002). The one year time-bar is a mandatory rule. ***In re Greening***, 141 Wn.2d 687, 694-695, 9 P.3d 206 (2000) (internal citations omitted). There is no "good cause" or "ends of justice exception" to the time-bar. *Id.* If the judgment is facially valid and rendered by a court of competent jurisdiction, the only way a petitioner can avoid the one year time-bar is if an exception under RCW 10.73.100 is met.

Petitioner's judgment and sentence became final on March 15, 2007, when this Court issued the mandate following his direct appeal. Appendix G. He did not file this petition until August 10, 2018, over eleven years later. *See* PRP at 17. His PRP does not fall under any of RCW 10.73.100's exceptions to the one year time-bar. As such, his PRP should be dismissed as time-barred.

a. ***O'Dell*** is not a significant change in the law and hence does not exempt petitioner from the one year time-bar.

Petitioner claims ***State v. O'Dell***, 183 Wn.2d 680, 358 P.3d 359 (2015), is a significant change in the law meeting one of the exceptions to the one year time-bar. *See* PRP at 15-16. Petitioner is wrong. ***O'Dell*** did not represent a significant change in the law.

The history of allowing exceptional sentences below the standard range for adults was first articulated in our Supreme Court's opinion in ***State v. Ha'mim***, 132 Wn.2d 834, 940 P.2d 633 (1997). In ***Ha'mim***, the Court held that a defendant was not precluded from arguing youth as a mitigating factor, but rather a defendant must show how their youthfulness related to the commission of the crime. ***Ha'mim***, 132 Wn.2d at 846. The ***Ha'mim*** Court specifically held the SRA's exceptional sentence provision included a factor where age was relevant and could be considered. *Id.* The SRA included a mitigating factor

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where the defendant's capacity to appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of the law was significantly impaired as a basis for an exceptional sentence downward. *Id.* A defendant's youthfulness could be considered under this factor. *Id.*

In 2015, the Court reexamined its holding in ***Ha'mim*** in the seminal case of ***State v. O'Dell***, 183 Wn.2d at 358. In ***O'Dell***, the Court reaffirmed that ***Ha'mim*** allowed for age to be a mitigating factor entitling a defendant to an exceptional sentence below the standard range, but age alone was not a *per se* mitigating factor. ***O'Dell***, 183 Wn.2d at 695. The Court reiterated how ***Ha'mim*** allowed for youth to be a mitigating factor the court considers. *Id.* ***O'Dell*** though expanded ***Ha'mim*** by holding that a trial court must have the discretion to consider youth as a mitigating factor. ***O'Dell***, 183 Wn.2d at 695-696. Youth alone could "...amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range." *Id.* Interestingly, the Court in its holding specifically references the fact how O'Dell himself had only turned eighteen a few days before his charged offense. *Id.*[2] The Court stated youth must be considered for "...an offender like O'Dell, who committed his offense *just a few days* after he turned 18 [sic]." *Id.* (emphasis added).

The significance of ***O'Dell*** was unclear as to its retroactive effect and whether it constituted a significant change in the law until the Court issued its ruling in ***Matter of Light-Roth***, 191 Wn.2d 328, 422 P.3d 444 (2018) in August 2018. ***Light-Roth*** concerned a PRP where the judgment and sentence became final more than one year prior to the PRP's filing. ***Light-Roth***, 191 Wn.2d at 332. This was the first opportunity for our high court to determine if ***O'Dell*** constituted a significant change in the law, hence exempting a subsequent petition

[2] Ten days to be precise. ***O'Dell***, 183 Wn.2d at 683.

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from the one year time-bar. ***Light-Roth*** 191 Wn.2d at 330. The Court explicitly held that ***O'Dell*** was not a significant change in the law exempting a PRP from the time-bar. *Id.* The Court took ***Light-Roth*** as an opportunity to explain the interplay between ***O'Dell*** and ***Ha'mim***. The Court reiterated its analysis of ***Ha'mim*** from ***O'Dell*** stating how ***Ha'mim***

> *did not bar trial courts from considering a defendant's youth at sentencing*; it held only that the trial court may not impose an exceptional sentence automatically on the basis of youth, absent any evidence that youth in fact diminished a defendant's culpability.

Light-Roth, 191 Wn.2d at 336 (quoting ***O'Dell***, 183 Wn.2d at 689) (emphasis from ***Light-Roth***). ***O'Dell*** simply "...reiterated the general proposition relied on in...***Ha'mim***, that 'age is not a per se mitigating factor.'" *Id.* ***O'Dell*** merely clarified that an exceptional sentence based on youth was always available under the SRA. *Id.* Thus, ***O'Dell*** did not constitute a significant change in the law. ***Light-Roth***, 191 Wn.2d at 338. Youth as a mitigating factor was always an argument available to defendants since ***Ha'mim*** was decided in 1997 and youthful defendants could have raised such an argument since then. *Id.* Because ***O'Dell*** did not constitute a significant change in the law, that particular exception to the one year time-bar is inapplicable for petitioners convicted after ***Ha'mim*** was decided. *Id.*

Petitioner here claims ***O'Dell*** represented a significant change in the law for offenders serving life without parole who are over eighteen when they commit their crime. *See* PRP at 6. Nothing is further from the truth. As ***Light-Roth*** made clear, ***O'Dell*** was not a significant change in the law. ***Light-Roth***, 292 Wn.2d at 338. ***Light-Roth*** merely reiterated how ***Ha'mim*** was the case which allowed courts to consider a defendant's age in determining if they were entitled to an exceptional sentence downward from the standard range. *Id.* Hence, a sentencing court could have considered defendant's age since at least 1997.

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Petitioner here was sentenced on June 4, 2004. Appendix A. This was long after ***Ha'mim*** allowed for youthful defendants to have their age considered when asking for an exceptional downward sentence. 134 Wn.2d at 846. Just because petitioner did not ask for such, does not mean he could not have done so or the law stated otherwise. ***Light-Roth***, 191 Wn.2d at 338. He has not provided any evidence showing the sentencing court categorically refused to consider his age or that he even asked for such to be considered.

Petitioner here would arguably be a youthful offender as he committed his heinous murder when he was nineteen years old. Appendix A. This is the same age of petitioner in ***Light-Roth*** and older than the defendants in ***Ha'mim*** and ***O'Dell***. *See* ***Light-Roth***, 191 Wn.2d at 331 (petitioner nineteen years old at time of murder); ***Ha'mim***, 132 Wn.2d at 834 (defendant eighteen years old at time of robbery); ***O'Dell***, 183 Wn.2d at 680 (defendant ten days after his eighteenth birthday at the time of rape of a child). But he has failed to show why him being nineteen years old at the time of this crime entitles him to be treated differently than the petitioner in ***Light-Roth*** who raised the same claims related to ***O'Dell*** which petitioner now raises and our Supreme Court rejected.

O'Dell did not constitute a significant change in the law for petitioner. Thus, that exception to the one year time-bar does not apply to him. His petition should be dismissed as being time-barred.

b. ***Miller*** explicitly only applies to juveniles under the age of eighteen and is not a significant change in the law for petitioner.

Petitioner claims he is entitled to a ***Miller***[3] hearing and alludes that such is a significant change in the law. *See* PRP at 4-5. But ***Miller*** does not apply to petitioner's case.

[3] ***Miller v. Alabama***, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

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In ***Miller***, the Court stated, "We therefore hold that mandatory life without parole for those *under the age of 18* [sic] at the time of their crime violates the Eighth Amendment's prohibition on 'cruel and unusual punishment.'" ***Miller***, 567 U.S. at 465 (emphasis added). While ***Miller*** applies prospectively to a minor, it does not apply to one who commits their crime after turning eighteen. *See* ***Montgomery v. Louisiana***, – U.S. –, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). Petitioner being over eighteen here makes ***Miller*** inapplicable. Thus, while ***Miller*** constitutes a significant change in the law for a juvenile, it does not constitute one for an adult like petitioner. This Court should dismiss the petition as being time-barred.

2. THIS PETITION SHOULD BE DISMISSED AS SUCCESSIVE FOR FAILING TO PROVE HOW THE INTERESTS OF JUSTICE WOULD BE SERVED BY REVIEW OF A CLAIM PETITIONER PREVIOUSLY HAD AVAILABLE TO HIM AND HE FAILED TO RAISE IN HIS TWO PREVIOUS PETITIONS.

Collateral attacks, such as personal restraint petitions, should not be a reiteration of issues resolved at trial and direct review, but instead should raise new points of fact and law which were not, or could not, have been raised originally and must prejudice petitioner. ***In re Gentry***, 137 Wn.2d 378, 388-389, 972 P.2d 1250 (1999); ***In re Lord***, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

RCW 10.73.140 limits the filing of subsequent collateral attack petitions, particularly with the authority of the Court of Appeals to review them.

> If a person has previously filed a petition for personal restraint, the Court of Appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and/or shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the Court of Appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the Court of Appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition. Upon

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> receipt of a first or subsequent petition, the Court of Appeals shall, whenever possible, review the petition and determine if the petition is based on frivolous grounds. If frivolous, the Court of Appeals shall dismiss the petition on its own motion without first requiring the state to respond to the petition.

RCW 10.73.140. Where an issue is raised in a subsequent personal restraint petition, a petitioner must show good cause why the grounds were not raised in the previous petition. *See, e.g.*, ***In re Holmes***, 121 Wn.2d 327, 330, 849 P.2d 1221 (1993) (interpreting RAP 16.4(d)).

Petitioner has previously filed two personal restraint petitions. Appendix C-D. In those petitions he raised different claims than he raises here. He has provided no reasons, let alone good cause, on why he did not previously raise the grounds he argues here. There have been no significant changes in the law or any changes to his judgement and sentence since his judgment and sentence became final. The claims he now presents were available to him previously and he chose not to raise them in his two previous petitions. Petitioner now is abusing the writ doctrine through his successive petitions. As this petition is both untimely and successive, this Court must dismiss the petition. ***Matter of Bell***, 187 Wn.2d 558, 564, 387 P.3d 719 (2017).

3. THIS PETITION SHOULD BE DISMISSED WHERE THE PETITIONER HAS PRESENTED NO EVIDENCE TO SUPPORT HIS CLAIMS AND WHERE HE HAS NOT SHOWN (1) CONSTITUTIONAL ERROR RESULTING IN ACTUAL AND SUBSTANTIAL PREJUDICE, OR (2) NON-CONSTITUTIONAL ERROR AMOUNTING TO A FUNDAMENTAL DEFECT INHERENTLY RESULTING IN A MISCARRIAGE OF JUSTICE.

To obtain relief in a personal restraint petition, a petitioner must show either: (1) actual and substantial prejudice resulting from an alleged constitutional error, or (2) a fundamental defect inherently resulting in a miscarriage of justice in the case of a non-

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constitutional error. ***Matter of Cook***, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Petitioner here has failed to do so for any of his claims.

a. Aggravated murder carries a mandatory penalty of life without the possibility of parole and the SRA's exceptional sentencing provisions do not apply and petitioner has not met his burden proving otherwise.

Aggravated murder is Washington's most serious criminal offense and has its own sentencing chapter. RCW Ch. 10.95. "RCW 10.95.030(1) requires trial courts to sentence persons convicted of aggravated first degree murder to life imprisonment without possibility of release or parole..." ***State v. Meas***, 118 Wn. App. 297, 306, 75 P.3d 998, 1002 (2003) (citations omitted).

Washington's current aggravated murder sentencing statute was enacted in 1981, the same year as the SRA. *See* Laws of 1981, Ch.s 137 and 138. Enactment of the aggravated murder statute repealed prior statutory provisions related to punishment of Washington's most serious crime, aggravated first degree murder. *Id.* A new section was added to Title 10 governing the imposition of one of two possible sentences in aggravated murder cases. Laws of 1981, Ch. 138. *See* former RCW 10.95.030(1) and (2). Until 2014, that provision allowed for only two possible sentences for defendants convicted of aggravated murder, be they juveniles or adults: death or life in prison without parole. *Id.*

Aggravated murder sentencing was amended in 2014 in response to the United States Supreme Court's ***Miller*** decision. The 2014 so called ***Miller*** fix legislation amended Washington's statutory provisions to apply to juvenile aggravated murder offenders. *See* Laws of 2014, Ch. 130, section 1, Table 1 and section 9 (effective June 1, 2014). The purpose of the amendments was to address the "mitigating factors that account for the diminished culpability of youth as provided in ***Miller v. Alabama***. . . ." RCW 10.95.030(3)(b).

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Prior to 2014, there had never been any indication that the sentencing scheme which applies to non-aggravated murder cases, the SRA, applied to the aggravated murder statute. ***Meas***, 118 Wn. App. at 306.

> RCW 10.95.030(1) requires trial courts to sentence persons convicted of aggravated first degree murder to life imprisonment without possibility of release or parole. . . The only statutory exception occurs when the trier of fact finds no mitigating circumstances to merit leniency in a special sentencing proceeding, in which case, the sentence is death.[4]

Id. (citation omitted) (citing ***State v. Ortiz***, 104 Wn.2d 479, 485-486, 706 P.2d 1069 (1985)).

If the SRA applied to aggravated murder it is likely a robust jurisprudence would have developed over the past 35 years concerning mitigation and exceptional downward sentences. What better way to avoid life in prison than to seek an exceptional sentence? The reason no such jurisprudence has developed is that the two sentencing statutes are separate and apply to different offenses. ***Ortiz***, 104 Wn.2d at 485–486. In ***Ortiz***, the court stated:

> We take this time, however, to express our dissatisfaction with the mandatory sentencing provision in the aggravated first degree murder statute, RCW 10.95. Unlike the Sentencing Reform Act of 1981, RCW 9.94A, which allows the trial judge to depart from the prescribed sentencing range when the prescribed sentence would impose excessive punishment on a defendant, the aggravated first degree murder statute *allows for no such flexibility.*

Id. (emphasis added).

Both the Supreme Court and this Court have adhered to the reasoning in ***Ortiz***. The Supreme Court, has stated

> The SRA and RCW 10.95 serve two separate functions and are consistent. . . The SRA is a determinate sentencing system for felony offenders. It gives first degree aggravated murder a seriousness score of 15 and provides for two possible sentences, life without parole or death."

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[4] The State notes that while the original statute also allowed death as punishment, the Supreme Court's decision in ***State v. Gregory***, – Wn.2d –, 427 P.3d 621 (2018) found the statute to be unconstitutional as applied to the death penalty. The State only cites to death penalty cases to demonstrate the mandatory sentencing requirements for aggravated murder which are separate from the SRA.

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State v. Brett, 126 Wn.2d 136, 184, 892 P.2d 29 (1995) (citation omitted); ***State v. Kron***, 63 Wn. App. 688, 694, 821 P.2d 1248, 1252 (1992) ("The Legislature has specified in two separate statutes that death or life in prison without parole will be the only sentencing alternatives for someone who commits aggravated murder. The Legislature could not have intended any other penalty."); ***State v. Hacheney***, 160 Wn.2d 503, 511, 158 P.3d 1152 (2007) ("A verdict of aggravated first degree murder can subject the defendant to the death penalty, but where the prosecutor has chosen not to seek the death penalty, the sentence must be life without the possibility of release."). This Court citing ***Ortiz*** stated explicitly

> Unlike the Sentencing Reform Act of 1981, the aggravated first degree murder statute does not allow a trial judge flexibility to depart from the prescribed sentencing range…[The defendant] also claims, without citing to authority, that the trial court had an option to sentence him on either of his two convictions. But RCW 10.95.030 *does not give trial courts an option in sentencing defendants* convicted of aggravated first degree murder.

Meas, 118 Wn. App. at 306 (emphasis added). Recently, this Court again reaffirmed this principle by holding how the statute, "…does not give the trial court discretion to consider mitigating factors and depart from the prescribed life sentence." ***State v. Moen***, 4 Wn. App.2d 589, 603-604, 422 P.3d 930 (2018).

Miller adds further support to the view that the SRA does not apply to this case. ***Miller***'s holding was limited to cases where it was mandatory for a juvenile to be sentenced to life in prison without the possibility of parole. ***Miller*** 567 U.S. at 465. ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."). Thus, if all along Washington's aggravated murder sentencing statute had provided for a less than life sentence, if it had incorporated the SRA's mitigation exceptional sentence provisions, there would have been no need for the ***Miller*** fix. If life in prison was not mandatory, ***Miller*** would not apply.

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In light of the foregoing, petitioner's arguments about youth being a mitigating factor and exceptional sentences are not well taken as to aggravated murder. Since this case is about aggravated murder, RCW 10.95.030 applies to the exclusion of the mitigating circumstances provisions applicable to an exceptional sentence. RCW 9.94A.535(1)(c)(d) or (e). Petitioner is wrong insofar as the trial court's authority to impose an exceptional sentence. He has not shown how the trial court imposing the mandatory sentence results in either a constitutional error amounting to actual or substantial prejudice or a non-constitutional error which amounts to a fundamental defect which inherently results in a miscarriage of justice. This Court should dismiss his PRP as being without merit.

b. The 8th Amendment of the United States Constitution and Article I, section 14 of the Washington State Constitution are congruent and set a bright-line rule for life without parole at age eighteen and petitioner has not met his burden proving otherwise.

"Except as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years." RCW 26.28.010. Our State Constitution guarantees a voting age of eighteen to its citizens. Article VI, section 1. It also states that individuals whom are at least eighteen years old are liable for service in the militia. Article X, section 1. Similarly, state law explicitly states a juror must be at least eighteen years old (RCW 2.36.070(1)) and marriage licenses can be entered into without parental consent once a person is eighteen (RCW 26.04.210(1)). Certain rights also only take effect or can be lost upon turning eighteen. For instance the right to bear arms enshrined in Article I, section 24 of our state constitution does not necessarily apply unrestricted to those under the age of eighteen. *See* ***State v. Sieyes***, 168 Wn.2d 276, 225 P.3d 995 (2010) (the constitution is not violated by limiting the circumstances those under eighteen can possess a firearm). For our state's "paramount duty" of education "children" under Article IX, section

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1, are only those whom are under the age of eighteen. ***Tunstall ex rel Tunstall v. Bergeson***, 141 Wn.2d 201, 219, 5 P.3d 691 (2000). Finally, within our justice system, a "juvenile," "youth," and "child" is defined as "...any individual who is *under the chronological age of eighteen*" and who has not been transferred to an adult court. RCW 13.40.020(15) (emphasis added). Thus, our constitution and statutes make it abundantly clear that a juvenile and a youth is one who is under eighteen years old. An adult – and the full consequences of being an adult – apply to one who is over the age of eighteen.

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment while Article I, section 14 of the Washington State Constitution prohibits cruel punishment. Our Supreme Court has held that Article I, section 14 often provides greater protection than the federal constitution. ***State v. Rivers***, 129 Wn.2d 697, 712, 921 P.2d 425 (1996) (citing ***State v. Fain***, 94 Wn.2d 387, 392-393,617 P.2d 720 (1980)). Hence, if a sentence does not violate Article I, section 14, it does not violate the Eighth Amendment. *Id.*

Fain created four factors to be considered in determining whether punishment is cruel under Article I, section 14: (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) punishment which would have been received in other jurisdictions; and (4) the punishment which would have occurred for the same or other similar offense in the same jurisdiction. ***Fain***, 94 Wn.2d at 397. For life sentences without parole for juveniles, the Supreme Court has rejected the ***Fain*** analysis and rather has adopted the categorical bar analysis. ***State v. Bassett***, – Wn.2d –, 428 P.3d 343 (2018). The categorical bar analysis looks at (1) if there is an objective indicia of a national consensus against the sentencing practice at issue; and (2) the court's own independent judgment based on the standards of controlling precedent and the court's understanding and interpretation of the section's text, history, and

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purpose. ***Bassett***, 428 P.3d at 350 (quoting ***Graham v. Florida***, 560 U.S. 48, 61 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). ***Bassett*** though only applied to juveniles, not adults. ***Bassett***, 428 P.3d at 346. Petitioner cites to no case, text, legislative history, or purpose which states otherwise. Yet, under either analysis, what petitioner claims he is entitled to – an exceptional downward sentence and a ***Miller*** hearing – would not apply.

Beginning with ***Fain***, a bright-line rule of age eighteen satisfies both the Eighth Amendment and Article I, section 14. When considering the nature of the offense, our legislature has elected to treat aggravated murder as a unique category of murder separate from all other crimes and punishments. Our legislature made it clear that no court rule promulgated by the Supreme Court will supersede or alter any provision of RCW 10.95. RCW 10.95.010. Our legislature then took care to prescribe specific protected classes of people whom if killed, their murderer can be charged with aggravated murder. *See* RCW 10.95.020. Similarly, certain actions by a murderer, such as killing while in flight from a specific crime or killing multiple people, could also elevate to aggravated murder. *Id.* This demonstrates how aggravated murder is not a mere crime, but rather an offense of particular concern and one which is extremely serious.

Second, the legislative purpose behind the statute appears to be in order to protect certain classes of people and prohibit certain actions. This is likely meant as a deterrence factor. *See* ***State v. Witherspoon***, 180 Wn.2d 875, 888, 329 P.3d 888 (2014). It is also likely an attempt to segregate the most heinous murderers from the rest of society. *Id.*

Third, petitioner has cited to no law or authority to indicate life without parole would not be the same penalty in other jurisdictions for similar crimes. But even if he did, petitioner would be hard-pressed to find support for a contention that other similar jurisdictions would

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not impose life without parole. In fact, other than Alaska, every single state, the District of Columbia, the federal government, and the military authorize a sentence of life without parole for at least some type of murder. *See* https://deathpenaltyinfo.org/life-without-parole.[5]

Finally, the legislature made clear how the only penalty for aggravated murder is life without parole. RCW 10.95.030(1). This is proportional with other offenses, many of which are less severe in nature. Under our persistent offender laws, an offender convicted of their third "most serious offense" receives an automatic sentence of life without the possibility of parole. RCW 9.94A.570. Some of these most serious offenses include robbery in the second degree, manslaughter in the second degree, indecent liberties, assault in the second degree, assault of a child in the second degree, and willful alteration and forgery of medication. *See* RCW 9.94A.030(33), 70.245.200(1). Aggravated murder is a significantly more serious offense than any of the above crimes, not to mention the other most serious offenses not listed above. *See* RCW 9.94A.030(33). Our courts have upheld the constitutionality under ***Fain*** for these non-murder offenses, offenses less severe than aggravated murder. *See* ***Witherspoon***, 180 Wn.2d at 889. Thus, under the fourth ***Fain*** factor there is proportionality.

Even under a categorical bar analysis, petitioner's sentence is constitutional. First, the objective consensus at the national level is to create a bright-line rule at age eighteen. The United States Supreme Court in its jurisprudence on youth sentencing has made it clear that eighteen is a bright-line rule and does not violate the Eighth Amendment. In ***Roper v. Simmons***, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), the Court drew a bright-line at age eighteen when holding the death penalty was unconstitutional for juveniles. The Court held, "the age of 18 [sic] is the point where society draws the line for many purposes

[5] Alaska mandates a defendant convicted of first degree murder to serve a mandatory term of imprisonment of 99 years. AS 12.55.125.

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between childhood and adulthood. It is, we conclude, the age at which the line for the death penalty ought to rest." ***Roper***, 543 U.S. at 574. Using the same logic as ***Roper***, in ***Graham***, the Court held "those who are below [the age of eighteen] when the offense was committed may not be sentenced to life without parole for a nonhomicide crime." ***Graham***, 560 U.S. at 74-75. Finally, in ***Miller***, the Court held "mandatory life for those *under the age of 18* [sic] at the time of their crimes violates the Eighth Amendment..." ***Miller***, 567 U.S. at 465 (emphasis added). The national objective consensus is not to treat those over eighteen as children. On the contrary, as the cases make clear, the national consensus is to treat those over eighteen as adults for Eighth Amendment purposes.

Roper in particular examined how virtually every state makes the age of eighteen the time when one is considered an adult. The ***Roper*** Court included three appendices which conducted a state-by-state breakdown of the age of voting, serving on juries, or marrying without parental consent. ***Roper***, 543 U.S. at Appendices B-D. The Court stated how "almost every state prohibits those under [eighteen] years of age" from participating in the above activities. ***Roper***, 543 U.S. at 569. More specifically, all 50 states and the District of Columbia have set eighteen as the minimum age to vote[6] and 45 states including D.C. have set eighteen as the minimum age for jury service and to marry without parental consent. ***Roper***, 543 U.S. at Appendices B-D. Hence, the national consensus demonstrates the age of eighteen is a bright-line cutoff to be treated as an adult, including for Eighth Amendment purposes.

The second factor in the categorical bar analysis is the court's own independent judgment based on the standards of controlling precedent and the court's understanding and

[6] While the Twenty-Sixth Amendment of the United States Constitution provides those eighteen or older can vote, ***Roper***'s Appendix B indicates that no state has a lower minimum voting age.

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interpretation of the section's text, history, and purpose. ***Bassett***, 428 P.3d at 350 (quoting ***Graham v. Florida***, 560 U.S. at 61). Petitioner does not meet this factor. Our courts have historically held Article I, section 14 – and by implication the Eighth Amendment – to not be violated by imposing a mandatory life sentence without the possibility of parole for murder. ***State v. Moen***, 4 Wn. App.2d 589, 601, 422 P.3d 930 (2018) (citing ***In re Snook***, 67 Wn. App. 714, 720, 840 P.2d 207 (1992)). ***Snook*** noted how since at least 1978 our courts have rejected the claim that life without parole for murder is an unconstitutional sentence constituting cruel punishment. ***Snook***, 67 Wn. App. at 720 (citing ***State v. Forrester***, 21 Wn. App. 855, 870, 587 P.2d 179 (1978)). This is the case even for mandatory life without parole sentences. ***Forrester***, 21 Wn. App. at 870-871.

At no time in our State's history have our courts found there to be a categorical bar banning life without parole sentences for adults. A bright-line rule allowing those over the age of eighteen who commit aggravated murder to be sentenced to life without the possibility of parole is in line with the text, history, and purpose of the Eighth Amendment, Article I, section 14, and RCW 10.95. Petitioner has failed to meet his burden to show otherwise. He has not shown either constitutional error resulting in actual or substantial prejudice or a non-constitutional error amounting to a fundamental defect inherently resulting in a miscarriage of justice. This Court should dismiss the petition as being without merit.

c. <u>Petitioner's actions were premediated and deliberate, not the result of youthful indiscretion.</u>

Even if petitioner met his burden to show that an adult convicted of aggravated murder was entitled to an exceptional downward sentence, he has failed to show his crimes are the result of his age. Rather, the nature of his heinous crime shows he acted deliberately

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with the specific objective to brutally murder the victim and he considered what the long-term results would be of his actions.

Petitioner is a white supremacist. Appendix B at 4. He murdered a homeless man to assist a friend in getting their "red shoelaces," an indication they had assaulted a member of a minority group. Appendix B at 6. Petitioner had already "earned" his red shoelaces by the time of the murder. *Id.* He went with his fellow white supremacists to purchase baseball bats with the understanding they would be used to attack a minority. *Id.*

After his fellow white supremacists had already beaten the victim, likely knocking him unconscious, petitioner struck the victim ten-fifteen times in the head with one of the baseball bats he had bought for this exact purpose. Appendix B at 6-7. When he was leaving the attack, petitioner said, "I wonder if God gives us little brownie points for this." Appendix B at 7. Upon returning to his apartment, petitioner and one of the other assailants took the clothing worn during the attack and went to burn them. *Id.*

But petitioner was not just a mere assailant involved with white supremacists. He wanted to be a leader. Petitioner was a member of the Volksfront (a white supremacist organization), wanted to start a chapter in Tacoma, and move up in the group. Appendix B at 8. The Volksfront kept an online "prisoners-of-war" list of their members who committed hate crimes and are incarcerated for such. Appendix B at 11. He decorated his home with white supremacist and Nazi memorabilia, passed out National Alliance (a highly violent white supremacist group) fliers and pamphlets, and lived with the local leader for National Alliance. Appendix B at 8-9. He owned a National Alliance handbook and membership list, a photo album of white supremacist activities, and a flag with an SS shaped lightning bolt. Appendix B at 9.

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Petitioner's actions and leadership aspirations are not those of someone who was acting out of youthful indiscretion. He wanted to become a leader in the white supremacist movement and be a leader of a highly violent organization. Appendix B at 8, 11. What he did was a deliberate attempt to not only increase his own standing in the movement, but to "help" another earn a status symbol within the movement for assaulting a minority. Appendix B at 6. He chose to hit a defenseless homeless man in the head with a baseball bat over and over again for this exact purpose. *Id.* When he had finished, he thought about how God would react to his actions. Appendix B at 7. Petitioner was hoping God would look favorably upon him for what he did. This is an indication of thinking ahead of what he hoped the long-term consequences would be for his actions. He was also thinking ahead when he took the clothes used in the assault and went to go burn them. *Id.* Based on the vicious nature of the attack, the clothes were likely covered in the victim's blood. Burning the clothes was probably an attempt to cover up evidence of his involvement in the murder. Doing such was a deliberate action by an adult to protect himself, not the actions of a juvenile. Petitioner has failed to meet his burden of showing that his age was a factor in the vicious murder he undertook. Thus, he has not shown either constitutional error resulting in actual or substantial prejudice or a non-constitutional error amounting to a fundamental defect inherently resulting in a miscarriage of justice. This Court should dismiss his petition as being without merit.

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D. CONCLUSIONS:

For the foregoing reasons, the State urges the Court to dismiss the petition as being untimely, successive, and without merit.

DATED: December 11, 2018.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

NATHANIEL BLOCK
Deputy Prosecuting Attorney
WSB #53939

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for respondent and respondent c/o his or 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.

12.11.18
Date Signature

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APPENDIX "A"

2390 6/7/2004 00059

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KURTIS WILLIAM MONSCHKE, Defendant.	CAUSE NO: 03-1-01464-0 WARRANT OF COMMITMENT 1) ☐ County Jail 2) ☒ Dept. of Corrections 3) ☐ Other Custody

JUN - 4 2004

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

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[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 6.4.04

By direction of the Honorable Lisa Worswick
JUDGE

FILED
DEPT. 16
IN OPEN COURT
JUN 4 2004
Pierce County Clerk
By Deputy

KEVIN STOCK
CLERK

By: Melissa Engler
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF
Date JUN - 4 2004 By Melissa Engler Deputy

STATE OF WASHINGTON
ss:
County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____, _____.

KEVIN STOCK, Clerk
By:_____ Deputy

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY JUN - 4 2004

STATE OF WASHINGTON, Plaintiff, vs. KURTIS WILLIAM MONSCHKE Defendant. SID: 17955552 DOB: 06/30/1983	CAUSE NO. 03-1-01464-0 JUDGMENT AND SENTENCE (JS) [X] Prison [ ] Jail One Year or Less [ ] First-Time Offender [ ] SSOSA [ ] DOSA [ ] Breaking The Cycle (BTC)

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 **CURRENT OFFENSE(S)**: The defendant was found guilty on 06/01/04 by [ ] plea [X] jury-verdict [ ] bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	AGGRAVATED MURDER IN THE FIRST DEGREE (D14)	10.95.020(6) 9A.32.030(1)(A)	NONE	03/23/2003	03-082-0059 TPD

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

as charged in the Amended Information

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

04-9-00724-4

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2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	ARSON 2	05/21/1996	PIERCE, WA	03/17/1996	J	NV
2	MALICIOUS MISCHIEF 2	05/21/1996	PIERCE, WA	03/19/1996	J	NV
3	TMVWOP	03/30/1998	PIERCE, WA	02/01/1998	J	NV
4	RESIDENTIAL BURGLARY	08/19/1999	PIERCE, WA	04/21/1999	J	NV
5	THEFT 2	08/19/1999	PIERCE, WA	04/21/1999	J	NV
6	MALICIOUS HARASSMENT	12/02/1999	PIERCE, WA	08/15/1999	J	NV
7	CUSTODIAL ASSAULT	12/02/1999	PIERCE, WA	08/15/1999	J	NV
8	CUSTODIAL ASSAULT	12/02/1999	PIERCE, WA	08/15/1999	J	NV

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	N/A	XVI	LIFE WITHOUT RELEASE	NONE	LIFE WITHOUT RELEASE	LIFE/ $50,000

2.4 [ ] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence [ ] above [ ] below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 LEGAL FINANCIAL OBLIGATIONS. The judgment shall upon entry be collectable by civil means, subject to applicable exemptions set forth in Title 6, RCW. Chapter 379, Section 22, Laws of 2003.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____

[ ] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

_____

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows: NO AGREEMENTS.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [ ] The court DISMISSES Counts _____ [ ] The defendant is found NOT GUILTY of Counts

_____

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IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN $ ~~LOC~~ Restitution to: _____

$ 684.08 Restitution to: CVC Re: #VJ85080

(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV $ 500.00 Crime Victim assessment

DNA $ 100.00 DNA Database Fee

PUB $ _____ Court-Appointed Attorney Fees and Defense Costs

FRC $ 110 Criminal Filing Fee

FCM $ _____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

$ _____ Other Costs for: _____

$ _____ Other Costs for: _____

$ ~~710~~ 1,394.08 TOTAL

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than $_____ per month commencing . _____. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

4.2 RESTITUTION

~~[X]~~ The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[ ] shall be set by the prosecutor.

~~[X]~~ is scheduled for _____.

[ ] defendant waives any right to be present at any restitution hearing (defendant's initials): _____

[X] RESTITUTION. Order Attached

4.3 COSTS OF INCARCERATION

[ ] In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

4.4 COLLECTION COSTS

The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

4.5 INTEREST

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

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4.6 COSTS ON APPEAL

An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.

4.7 [ ] HIV TESTING

The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.8 [X] DNA TESTING

The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.9 NO CONTACT

The defendant shall not have contact with Sandra Harrell or any member of victim's family (Name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

[ ] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.10 OTHER:

4.11 BOND IS HEREBY EXONERATED

4.12 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

Actual number of months of total confinement ordered is: LIFE, WITHOUT RELEASE.

(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

_____.

The sentence herein shall run consecutively to all felony sentences in other cause numbers prior to the commission of the crime(s) being sentenced. _____

Confinement shall commence immediately unless otherwise set forth here: _____

_____.

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(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: _____.

4.13 [ ] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____months;

[ ] COMMUNITY CUSTODY is ordered as follows:

Count _____ for a range from: _____ to _____ Months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placemet offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.

[X] Defendant shall have no contact with:_____.

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit:

[ ] The defendant shall participate in the following crime-related treatment or counseling services: _____.

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: _____

_____

_____.

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: __

_____.

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4.14 [ ] WORK ETHIC CAMP. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.15 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

_____

_____

_____

_____

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7602.

5.4 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION. Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.5 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. N/A

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5.7 OTHER: _____

_____

_____

_____

DONE in Open Court and in the presence of the defendant this date: 6-4-04

FILED
DEPT. 16
IN OPEN COURT
JUN 4 2004
Pierce County Clerk
By _____ Deputy

JUDGE Lisa Worswick
Print name Lisa Worswick

Deputy Prosecuting Attorney
Print name: GREGORY L. GREER
WSB # 22936

Attorney for Defendant
Print name: ERIK BAUER
WSB # 14937

Kurtis Monschke
Defendant
Print name: KURTIS MONSCHKE

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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 03-1-01464-0

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by: _____, Deputy Clerk

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IDENTIFICATION OF DEFENDANT

SID No. 17955552 (If no SID take fingerprint card for State Patrol) Date of Birth 06/30/1983

FBI No. 457437AC3 Local ID No. NONE

PCN No. NONE Other

Alias name, SSN, DOB: _____

Race:						Ethnicity:		Sex:	
[ ]	Asian/Pacific Islander	[ ]	Black/African-American	[X]	Caucasian	[ ]	Hispanic	[X]	Male
[ ]	Native American	[ ]	Other: :			[X]	Non-Hispanic	[ ]	Female

FINGERPRINTS

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously

I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, _____ Dated: 6/4/04

DEFENDANT'S SIGNATURE: Kurtis Monachko

DEFENDANT'S ADDRESS: HELL (Pierce Co. Jail)

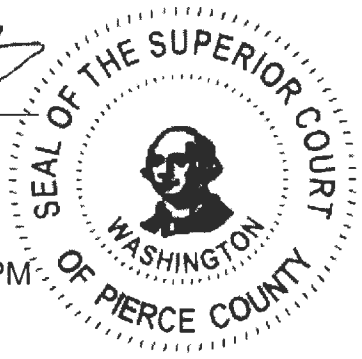
Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Case Number: 03-1-01464-0 Date: December 10, 2018
SerialID: A8BE261E-5D7A-4095-A1CF6309C4F6A02E
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 10 day of December, 2018

Kevin Stock, Pierce County Clerk

By /S/Jessica Hite, Deputy.
Dated: December 10, 2018 12:56 PM



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APPENDIX "B"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KURTIS WILLIAM MONSCHKE, Appellant.	No. 31847-4-II 03 1 01464 0 PART PUBLISHED OPINION

QUINN-BRINTNALL, C.J. — Kurtis Monschke appeals his conviction for aggravated first degree murder. The evidence presented at trial established that Monschke murdered a homeless man to advance his status as a white supremacist. Monschke raises numerous issues in this appeal, including challenges to the constitutionality of RCW 10.95.020(6), the sufficiency of the evidence, the court's refusal to bifurcate the trial, and the court's order requiring him to wear a stun belt at trial. We affirm.[1]

FACTS

Early on the morning of March 23, 2003, Terry Hawkins and Cindy Pitman observed a group of "[s]kinheads" kicking and using baseball bats to hit what appeared to be the Tacoma railroad track. 22 Report of Proceedings (RP) at 1078. The individuals were hollering and

[1] We address Monschke's additional assignments of error in the unpublished portion of this opinion. Our resolution of those issues does not alter the result.

appeared drunk. Hawkins and Pitman were homeless and lived in a camp under Interstate 705 near the train tracks and the Tacoma Dome. Hawkins told police that he saw three men and a woman kicking dirt and hitting at the ground; at trial, he testified that he saw two men swinging bats, a woman kicking, and a third man standing four feet away. Pitman told police and later testified that she saw three men with shaved heads swinging and kicking but did not see a woman.

Hawkins and Pitman watched for approximately 10 minutes before turning around and walking away. They headed up a trail but when the commotion stopped, they decided to go back toward the train tracks and their camp. On their way to the camp site, Hawkins and Pitman passed the people involved in the commotion: a man and woman snuggled together with two men following behind. The four headed up the trail and appeared "scared," like "[t]hey were trying to get away from there." 23 RP at 1218.

As Hawkins and Pitman approached the tracks where the commotion had been, they heard a strange gurgling sound. They discovered the badly beaten and bloody body of Randy Townsend, lying on his back with his head slumped over the train track. Hawkins and Pitman knew Townsend as a white acquaintance who camped nearby, but Townsend was so disfigured that neither Hawkins nor Pitman immediately recognized him. Hawkins and Pitman ran to get aid and call the police. As they returned to Townsend, Hawkins and Pitman saw the four individuals involved in Townsend's assault driving away in a "blue Datsan [sic] beater." 27 RP at 1769.

Townsend never regained consciousness and died after 20 days on life support. The medical examiner determined the cause of death as blunt force trauma to the head, with at least 19 points of impact. Townsend's facial bones were broken and his face had separated from his

skull. One of the blows caused a large subdural hematoma on the back side of his skull. This wound was consistent with his head having been forcefully stomped on while he was lying face down on the train track.

During the investigation that followed, officers found hate-based graffiti near the murder scene. The graffiti included swastikas, lightning bolts in the shape of "SS," "White Power Skinheads," "U Suck Wiggers," "El Spic," "Skinhead white to the bone," "Die SHARPS," "Die Junky Die," "El Nigger," "Tacoma Skinhead Movement," "die niggers," "Heil Hitler," and "Fuck All Drug Addicts."[2] 21 RP at 940; 26 RP at 112, 116, 118-19, 121-22. Homeless people in the area told police that the graffiti began appearing a couple weeks before Townsend's murder.

Officers also talked to Mertis Mathes and Amy Gingrich, a homeless couple living in a camp two blocks from the murder scene. Mathes is black and Gingrich is white. Mathes and Gingrich told officers they woke early on the night of the murder when three loud men approached their camp. Gingrich recognized one of the men from a casual encounter a couple weeks earlier. The men had shaved heads, appeared drunk, and were carrying baseball bats. Mathes asked what the men wanted. One responded, "we plan on doing a nigger like you." 21 RP at 956. When Mathes grabbed his machete, the three men walked away.

Officers linked the crime scene graffiti to a reported incident of graffiti at an apartment building two blocks from the murder scene. Scotty Butters, Tristain Frye, and David Pillatos had been evicted from the Rich Haven Apartments for yelling racial slurs at passersby, painting

[2] A pair of lightning bolts in the shape of "SS" is a neo-Nazi symbol. "Wigger" is a disparaging term used to describe white individuals who associate with minorities. "SHARPS" is an acronym for the white supremacist group Skinheads Against Racial Prejudice. "Spic" is a disparaging term used to describe a person of Latin American descent.

swastikas and "Fuck all niggers" on the building, and for Butters's sale of imitation cocaine to a drug addict. 26 RP at 147. Butters, Frye, and Pillatos matched Hawkins and Pitman's descriptions of Townsend's assailants.

Frye and Pillatos lived with Monschke. Frye and Pillatos were in a relationship and Frye was three months' pregnant. A car matching the one Hawkins and Pitman described was parked outside Monschke's apartment. Officers went to the apartment to discuss an unrelated incident with Pillatos, and he invited them inside. In Monschke's apartment, officers saw Nazi and white supremacist paraphernalia. They also noticed cigarette packages and empty beer bottles of the same brand found at the crime scene. Pillatos freely told the officers that he and Monschke were white supremacists.

The State charged Monschke, Butters, Frye, and Pillatos with premeditated first degree murder under RCW 9A.32.030 and alleged that the murder was aggravated under RCW 10.95.020(6) because Townsend was murdered so that the defendants could obtain or maintain their membership or advance their position in the hierarchy of an organization or identifiable group, namely, "white supremacists." 1 Clerk's Papers (CP) at 84. Under a plea bargain, Butters and Pillatos pleaded guilty to first degree murder, and Frye pleaded guilty to second degree murder. Each agreed to testify at Monschke's trial.

Prior to the plea agreements, the defendants appeared at a pretrial hearing where they were separated for security purposes. Each wore leg shackles and a belly chain with arm restraints. At some point, Butters and Pillatos began spitting and cursing at each other. As they were being subdued, Monschke stood up and started yelling at Pillatos and calling him a "fucking spic." 5 CP at 431; *see* note 1, *supra*. Monschke then grabbed a chair and attempted to throw it at Pillatos. Monschke was subdued and taken from the courtroom spitting and resisting.

After the altercation and after the plea agreements, the trial court held a hearing on a State motion to have Monschke wear a stun belt. At the hearing, the court heard testimony from Sergeant Sabrina Braswell of the Pierce County Department of Corrections. Sergeant Braswell testified that Monschke had been wearing a stun belt on his waist to every court proceeding since the altercation. She also testified that without the belt, Monschke was highly disruptive in the jail. Monschke had possessed makeshift weapons on several occasions and he routinely antagonized other inmates by, among other things, throwing feces at them. Sergeant Braswell testified that without restraints, she would have to instruct her officers to essentially "sit[ ]on top" of Monschke to ensure courtroom safety. 14 RP at 594.

Based on this testimony and its own observations of Monschke's courtroom conduct, the court ordered that Monschke be required to wear a stun belt during trial. The court concluded that the stun belt was necessary because the trial would become intense and Monschke had shown a pattern of misbehavior when not controlled. The court left it to the jail staff to determine whether to use a waist or ankle belt. Sergeant Braswell had testified that inmates often preferred the waist belt over the ankle belt. The court stated that it had not noticed Monschke wearing the waist belt but instructed defense counsel to raise any visibility issues if they arose.

Monschke moved to bifurcate his trial into a first degree murder phase and an aggravating circumstance phase, arguing that bifurcation was necessary to keep the jury from considering his white supremacist beliefs when deliberating on the first degree murder elements. The court denied the motion, concluding that evidence of Monschke's white supremacist affiliations was admissible in the trial on the merits of the first degree murder charge to prove motive and intent.

Frye testified at trial that on the evening of March 22, 2003, Pillatos brought up the subject of taking Frye out to earn her "red [shoe]laces." 30 RP at 2330. According to Frye, red shoelaces symbolized that the wearer had assaulted a member of a minority group; Butters, Monschke, and Pillatos each wore red shoelaces. Pillatos encouraged Butters and Monschke to take Frye out; the three men had discussed the idea two or three times before. After the discussion, the four drove to a grocery store to buy beer. The three men also purchased two baseball bats. They did not discuss the reason for the bats, but, according to Frye, it was understood that "they weren't going to be used for baseball." 31 RP at 2485.

The four then drove to the Tacoma Dome. Butters expressed a desire to go to a different part of the city to "beat up some niggers," but Frye and Pillatos wanted to show Monschke graffiti they had recently painted nearby. 30 RP at 2333. As they walked underneath Interstate 705, Frye separated from the group. She sat down and Townsend approached her. Townsend asked for a cigarette and a beer and the two talked for awhile.

Townsend finished his cigarette and had begun to walk away when Butters and Pillatos confronted him. Butters said something to Townsend and then struck him in the head with the bat. The blow shattered the bat and sent Townsend to the ground. Butters and Pillatos then began kicking Townsend in the head. Pillatos picked up a large rock, later determined to weigh 38 pounds, and threw it on Townsend's face. Butters and Pillatos carried Townsend to the train tracks and placed him on his stomach with his head lying face down on the track. Butters then stomped on the back of Townsend's head. Although Townsend was still breathing, Butters exclaimed, "I killed that guy." 30 RP at 2346. Butters and Pillatos went to find Monschke.

Monschke was carrying the second bat when the three men returned to where Townsend lay. Monschke walked up to Townsend and began hitting him in the head with the bat.

Monschke struck 10 to 15 blows while Butters continued to kick Townsend's head. Butters repeatedly called Townsend "a piece of shit." 30 RP at 2349. Pillatos told Frye to kick Townsend. According to Frye, she initially refused, but Pillatos covered her eyes and led her to Townsend. Frye then kicked Townsend's head four times. As the group left, Monschke stated, "I wonder if God gives us little brownie points for this." 31 RP at 2369.

When the four returned to Monschke's apartment, Monschke and Pillatos gathered up the clothing worn during the attack and left to burn it. Later, Butters told Frye, "Don't feel sorry for that piece of shit. He wasn't white." 31 RP at 2374. Butters excitedly told Frye that she had earned her red laces and he had earned his "bolts." 31 RP at 2375. At trial, the State presented evidence that between the time of his arrest and his testimony at trial, Butters had obtained an "SS" lightning bolt tattoo. *See* note 1, *supra*.

Butters, Pillatos, and Monschke also testified; their testimony differed from each other's and from Frye's in certain respects. Pillatos testified that Monschke hit Townsend in the head with the bat three or four times. Monschke and Butters testified that Monschke was somewhere else during the entire assault and that he used the bat afterwards simply to nudge Townsend to see if he was still alive. Butters also testified that he told officers that Monschke hit Townsend 10 or more times.

Although all three men denied that Townsend's death was premeditated or that it had anything to do with earning red shoelaces, Butters and Pillatos offered contradictory testimony. Like Frye, Butters testified that on the night of the murder, there was a discussion about Frye earning her red shoelaces. According to Butters, red shoelaces reflected that one was willing to shed blood, not necessarily that one had done so; Butters had earned his red shoelaces on more than one occasion by doing something physical. Butters testified that after the attack, Frye said,

"This means my baby gets to wear red laces, too." 30 RP at 2293. In addition, Pillatos testified that Townsend "got beat up" because he was a drug addict and a "parasite." 29 RP at 2106.

Jennifer Stiffler, who dated Monschke from September 2002 to March 2003, testified that Monschke was a very active white supremacist: He was a member of Volksfront and often talked about moving up in the group and starting a Tacoma chapter; he took Stiffler to a meeting for National Alliance; he decorated his home with white supremacist and Nazi memorabilia, including a flag for National Alliance; he listened to racist music; he frequently passed out fliers from several groups; and he obtained Nazi and white supremacist tattoos. According to Stiffler, Monschke and Pillatos repeatedly watched the movie AMERICAN HISTORY X (New Line Productions 1998), which includes a "curb stomp" scene that Monschke particularly enjoyed. In that scene, the main character, a white supremacist, shoots a black man and then stomps on the back of his head while the man is forced to bite a street curb.

Stiffler further testified that Monschke would wear white or red suspenders and red shoelaces whenever he went out with friends. Monschke told Stiffler that white suspenders symbolized "white pride" and that red shoelaces and suspenders "means you've beaten up somebody." 32 RP at 2602. Stiffler testified that she overheard Monschke several times talking to Frye about earning her red shoelaces. Stiffler also testified that Monschke had told her that he hated drug addicts.

The State presented evidence of white supremacist paraphernalia police found during their investigation. The items found in Monschke's apartment included: a National Alliance flier; pamphlets entitled "Martin Luther King Jr. was a fraud," "What is Holocaust Denial," and

"Inside the Auschwitz Gas Chambers";[3] and a business card listing a website and reading "Sick of wiggers? So are we. Check us out."[4] The items found in a storage unit Pillatos rented included: applications filled out by Pillatos and Frye to join the Aryan Nations; photos showing that Monschke had tattoos identical to the main character in AMERICAN HISTORY X; and a photo of Monschke giving a Nazi salute.

The State also presented evidence of white supremacist paraphernalia found in Brian Zauber's home. At the time of his arrest, Monschke was living with Zauber,[5] the local leader for National Alliance. Officers saw a hanging flag matching one that had been seen in Monschke's apartment. They also found the following items: THE TURNERS DIARIES,[6] a book commonly referred to as "the bible for the white supremacist movement";[7] a National Alliance membership card and an order form for National Alliance books and pamphlets; a "White Aryan Resistance" newspaper;[8] and an envelope with the names "Randall Townsend" and "Kurtis Monschke" written on it.[9] Officers found the following in a bag belonging to Monschke: a National Alliance handbook and membership list; a photo album of white supremacist activities; and a flag with "SS" shaped lightning bolts. *See* note 1, *supra*.

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[3] 27 RP at 1789.

[4] 27 RP at 1793-94; *see* note 1, *supra*.

[5] Monschke was evicted from his apartment in the period between the attack and his arrest.

[6] ANDREW MACDONALD, THE TURNERS DIARIES (2d ed. 1996).

[7] 28 RP at 1920.

[8] 28 RP at 1923.

[9] 28 RP at 1922.

The State and Monschke each presented expert testimony on the subject of white supremacy. The State called Mark Pitcavage, the director of fact-finding for the Anti-Defamation League (ADL). Pitcavage had studied white supremacy for several years and supervised the ADL's monitoring and research of extremist groups. Pitcavage testified that white supremacists could be identified by a shared ideology summed up in the following mission statement known as "The 14 Words": "We must secure the existence of our race and a future for white children." 25 RP at 1598. Pitcavage opined that this ideology fostered so many shared similarities, beliefs, and customs that white supremacists could be considered a "group" within the common meaning of the term.

Pitcavage considered white supremacists to be a "group" even though they were not well organized, did not have one overarching structure, had many subgroups, and were split over the advocacy and use of violence. Pitcavage explained that the subgroups were nonexclusive; routinely overlapping; and often loosely organized to prevent police infiltration, to limit legal liability, and to maintain a certain level of personal anonymity. Pitcavage testified to an organized "hierarchal structure" "in terms of status, where someone who's perceived to be really standing up for the white race, really being a white warrior, gets more results of status, gets more respect." 25 RP at 1635. In addition, Pitcavage testified that many subgroups internally advocated violence but publicly professed nonviolence so as to avoid lawsuits of the sort that had disbanded earlier white supremacy groups.

Monschke called Randy Blazak, a college professor whose research focused on hate crimes. Blazak opined that white supremacists were not an "identifiable group." Blazak agreed with Pitcavage that white supremacists shared an ideology captured by "The 14 Words," but he testified that in his opinion there was too much conflict within the movement to consider white

supremacists a cohesive group. These conflicts included disagreement over the need of an organized hierarchy, the use of violence, the role of religion, and defining who was "white."

Blazak also testified about Volksfront and National Alliance. According to Blazak, National Alliance was a highly violent subgroup of white supremacists. Blazak testified that a member could gain status in National Alliance for murdering someone deemed inferior. Blazak described Volksfront as a very secretive organization with a "public front" of nonviolence, but he noted that "there may be other things that go on behind closed doors." 34 RP at 2911. Blazak also testified that Volksfront had an organizational hierarchy. According to Blazak, Volksfront and National Alliance had over the last several years been partnering and connecting.

The State presented evidence that Volksfront maintained a prisoners-of-war (POW) list on its website. The list included the contact information for members of the white supremacy movement that had committed hate crimes and were currently incarcerated. Several individuals on the list had committed "very violent" crimes. 33 RP at 2696. The State also presented evidence that Monschke left messages on Volksfront's website and that he went by the screen name "SHARPshooter." 33 RP at 2686. *See* note 1, *supra*.

A jury found Monschke guilty as charged and the court sentenced him to serve a mandatory life sentence without possibility of early release under RCW 10.95.030(1). This appeal followed.

ANALYSIS

AGGRAVATING CIRCUMSTANCE AND RCW 10.95.020(6)

The jury found that Monschke's first degree murder conviction was aggravated because the murder was committed "to obtain or maintain his membership or to advance his position in the hierarchy of an organization, association, or identifiable group." 3 CP at 387. This

aggravating circumstance is set forth at RCW 10.95.020(6). Monschke challenges the aggravating circumstance and maintains that (1) white supremacy is not an "identifiable group" with a "hierarchy"; (2) RCW 10.95.020(6) is overbroad in that it punishes people merely for having "unpopular opinions about the superiority of the white race";[10] and (3) the term "group" is unconstitutionally vague as applied to him. We disagree with each of these contentions.

DOES WHITE SUPREMACY FALL WITHIN THE MEANING OF RCW 10.95.020(6)?

Interpretation of a statute is a question of law reviewed de novo. *State v. Thompson*, 151 Wn.2d 793, 801, 92 P.3d 228 (2004). The fundamental objective of statutory interpretation is to ascertain and give effect to the legislature's intent. *Thompson*, 151 Wn.2d at 801. We give effect to plain and unambiguous statutory language as a clear expression of legislative intent. *Thompson*, 151 Wn.2d at 801. If an unambiguous term is not statutorily defined, we define it by its dictionary meaning. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990).

The legislature did not define "group," "identifiable," or "hierarchy," but these terms are commonly understood and are not ambiguous. 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 or interests." WEBSTERS THIRD NEW INT'L DICTIONARY 1004 (3d ed. 1976); *see also id.* at 1123 (defining "ideology" as "a manner or the content of thinking characteristic of an individual, group, or culture"). A group is "identifiable" if it is "subject to identification" or "capable of being identified." WEBSTERS THIRD NEW INT'L DICTIONARY 1004 (3d ed. 1976). A "hierarchy"

[10] Br. of Appellant at 43.

is "the classification of a group of people with regard to ability or economic or social standing." WEBSTERS THIRD NEW INT'L DICTIONARY 1066 (3d ed. 1976).

When considered together, these definitions express the legislature's determination that a person's legal culpability for murder is greater if the murder is committed to advance the murderer's standing amongst a number of persons subject to identification and bound together, whether formally or informally, by a shared ideology or affinity of views. 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 not necessary.

Under the plain language of RCW 10.95.020(6), white supremacy is an "identifiable group" with a "hierarchy." As Pitcavage explained, white supremacists share a set of beliefs and customs and are bound together by a mission to "secure the existence of our race and a future for white children." 25 RP at 1598. Both Pitcavage and Blazak agreed that this mission embodies the white supremacist ideology. Also, according to Pitcavage, white supremacists have a "hierarchy." The hierarchy is not in the formal militaristic or corporate sense, but in a "social standing" sense: "[S]omeone who's perceived to be really standing up for the white race, really being a white warrior, gets more result of status, gets more respect." 25 RP at 1635.

Blazak's testimony also supports the conclusion that white supremacy falls within RCW 10.95.020(6). The thrust of Blazak's testimony was that white supremacy was not an "identifiable group" because, if it was, it would be "[a] very broad-based group," similar to "people who are liberal, people who are conservative, environmentalists, pro death penalty people." 34 RP at 2957-58. But the breadth of the group base is immaterial provided that the

group is identifiable, has a hierarchy, and shares an ideology. As Blazak testified, white supremacists are a "finite number of people" who can be "identified" by their common ideology that "white people are superior and the white race is somehow threatened." 34 RP at 2923-24. Thus, both Pitcavage and Blazak's testimony reflected that white supremacy falls within the plain language of RCW 10.95.020(6).

OVERBREADTH

A statute is overbroad if it chills or sweeps within its prohibition constitutionally protected free speech activities. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000). The First Amendment protects an individual's right to hold and express unpopular views and to associate with others who share that viewpoint. *Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

In *Wisconsin v. Mitchell*, 508 U.S. 476, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), the Court rejected an overbreadth challenge to a statute enhancing a defendant's sentence if the crime was motivated by a discriminatory point of view. The defendant argued that the statute had a "chilling effect" on free speech because evidence of the defendant's prior speech or associations could be used to prove that the defendant intentionally selected his victim on account of the victim's protected status. The Court found no merit in this contention:

> The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "over-breadth" cases. We must conjure up a vision of a . . . citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to . . . qualify[ ] him for penalty enhancement. This is simply too speculative a hypothesis to support [an] overbreadth claim.

Mitchell, 508 U.S. at 488-89.

RCW 10.95.020(6) is far less "intrusive" than the statute upheld in *Mitchell*. It is content neutral and does not intrude on constitutionally protected rights. RCW 10.95.020(6) merely requires an enhanced punishment for committing murder if the murder was committed to obtain, maintain, or advance one's position in the hierarchy of an organization, association, or identifiable group. That a political or other viewpoint was expressed through the particular murder or that the murder furthered the exercise of the murderer's association rights does not alter or shield the criminal act: "The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982). "[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts v. U.S Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Accordingly, we reject Monschke's claim that RCW 10.95.020(6) is unconstitutionally overbroad in that it limits his First Amendment rights.

VAGUENESS

Monschke contends that the term "group" is too vague to satisfy due process notice requirements.[11] A statute is vague if it does not give fair notice of the proscribed conduct or clear standards to prevent arbitrary enforcement. *State v. Halstien*, 122 Wn.2d 109, 117, 857 P.2d 270 (1993). But a statute is not unconstitutionally vague merely because a person cannot

[11] A vagueness challenge to an aggravating circumstance may be under either the due process clause of the Fourteenth Amendment or the Eighth Amendment's prohibition against cruel and unusual punishment. *See State v. E.A.J.*, 116 Wn. App. 777, 792, 67 P.3d 518 (2003), *review denied*, 150 Wn.2d 1028 (2004). An Eighth Amendment claim focuses on whether the challenged provision "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with . . . open-ended discretion." *E.A.J.*, 116 Wn. App. at 792 (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361-62, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988)). A due process challenge focuses on the sufficiency of notice to the accused. *E.A.J.*, 116 Wn. App. at 792.

predict with complete certainty the exact point at which his questionable actions are prohibited. *City of Seattle v. Eze*, 111 Wn.2d 22, 27, 759 P.2d 366 (1988). It is sufficiently definite if persons of ordinary intelligence can understand the statute's meaning, notwithstanding some possible areas of disagreement. *Eze*, 111 Wn.2d at 27. A statute "employ[ing] words with a well-settled common law meaning, generally will be sustained against a charge of vagueness." *Anderson v. City of Issaquah*, 70 Wn. App. 64, 75, 851 P.2d 744 (1993). We assess a vagueness challenge to a statute not implicating First Amendment rights in light of the statute's application to the case at hand. *Halstien*, 122 Wn.2d at 117.

As previously discussed, the term "group" is not ambiguous and its plain dictionary meaning includes white supremacy. A person of ordinary intelligence would understand that committing murder to advance one's position as a white supremacist is prohibited by RCW 9A.32.030 and RCW 10.95.020(6). Monschke's vagueness challenge fails accordingly.

SUFFICIENCY OF THE EVIDENCE

Monschke next maintains that the evidence was insufficient to find that he murdered Townsend to advance his hierarchal position as a white supremacist. We disagree.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Thomas*, 150 Wn.2d at 874. We defer to the trier of fact on decisions resolving conflicting testimony and the credibility of witnesses. *Thomas*, 150 Wn.2d at 874-75.

The record before us establishes the following: Monschke was a member of the white supremacist subgroup Volksfront; Volksfront associated with the violent subgroup National

Alliance; Monschke wanted to advance his position in Volksfront and open a local chapter; acts of violence elevated a member's status in many white supremacist subgroups; Volksfront maintained a POW list on its website that supported individuals who had committed violent hate crimes; Monschke posted messages on Volksfront's website and used a screen name, "SHARPshooter," that advocated violence against a nonviolent white supremacist group; Monschke sought to elevate Frye's status by helping her obtain red shoelaces, which Monschke believed were earned by violent acts against "inferior" people; Monschke previously advanced his own position in Volksfront through violent acts and wore red shoelaces and white suspenders as an indication of this advancement; Monschke, Butters, and Pillatos were underneath Interstate 705 looking to "do" someone "inferior"; Townsend was viewed as inferior by Monschke, Butters, and Pillatos; Townsend's murder elevated Butters's status; and Monschke wondered aloud whether Townsend's murder would elevate his status with God. Accepting this evidence as true, and taking all reasonable inferences in the light most favorable to the State, a rational trier of fact could find that Monschke murdered Townsend to advance his position as a white supremacist.

BIFURCATION MOTION

Monschke maintains that the trial court should have bifurcated his trial to separate the jury's consideration of the evidence of first degree murder from that supporting the aggravating circumstances. We disagree.

Monschke cites to no direct authority supporting bifurcation of an aggravated first degree murder trial under current law. A bifurcated procedure was required when the State alleged aggravating circumstances with a first degree murder charge under former RCW 9A.32.040-.045 and 10.94.020 (1977). But that statutory procedure has long since been repealed and replaced.

Currently, bifurcation is required in an aggravated first degree murder prosecution only if the State files a notice of intent to seek the death penalty and the jury finds the defendant guilty of aggravated first degree murder. RCW 10.95.040-.050. Bifurcation then occurs between the trial on the *entire* first degree murder charge, including the aggravating circumstance, and the penalty phase in which the jury addresses whether there are sufficient mitigating circumstances to merit leniency. RCW 10.95.040(1)-.080. The current statutes do not provide for bifurcated trials on first degree murder and the alleged aggravating circumstance.

We acknowledge, however, that the trial court has broad discretion to control the order and manner of trial proceedings. ER 611; *State v. Johnson*, 77 Wn.2d 423, 426, 462 P.2d 933 (1969). Although bifurcated trials "are not favored," they may sometimes be necessary. *State v. Kelley*, 64 Wn. App. 755, 762, 828 P.2d 1106 (1992). For example, bifurcation is appropriate where the defendant argues insanity and a second inconsistent defense. *See State v. Jeppesen*, 55 Wn. App. 231, 236-38, 776 P.2d 1372, *review denied*, 113 Wn.2d 1024 (1989). Bifurcation is inappropriate if a unitary trial would not significantly prejudice the defendant or if there is a substantial overlap between evidence relevant to the proposed separate proceedings. *Jeppesen*, 55 Wn. App. at 237; *State v. Jones*, 32 Wn. App. 359, 369, 647 P.2d 1039 (1982), *rev'd on other grounds*, 99 Wn.2d 735 (1983). We review a bifurcation decision for abuse of discretion. *Jeppesen*, 55 Wn. App. at 236. A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

Monschke argues that bifurcation of his trial was necessary to keep the jury from considering his white supremacist beliefs when it deliberated on the elements of premeditated first degree murder. But as discussed more thoroughly in the unpublished portion of this

opinion, evidence of Monschke's white supremacist beliefs was relevant to show that he had a motive for Townsend's murder and that he premeditated and intended to cause an "inferior" person's death. *See Stenson*, 132 Wn.2d at 702 ("Evidence of a defendant's motive is relevant in a homicide prosecution."); *State v. Campbell*, 78 Wn. App. 813, 821-22, 901 P.2d 1050 (group membership is relevant evidence of premeditation and motive when there is a sufficient nexus between the group affiliation and the motive for committing the crime), *review denied*, 128 Wn.2d 1004 (1995). Here, the trial court's denial of the motion rests on tenable ground and the court did not abuse its discretion in refusing to bifurcate Monschke's trial.

STUN BELT

Monschke asserts that the court erred in requiring that he wear a stun belt underneath his clothes at trial. We disagree.

Absent extraordinary circumstances, a defendant is entitled to appear at trial free from all restraints. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 693, 101 P.3d 1 (2004). But a trial court has inherent authority to determine what security measures are necessary to maintain decorum in the courtroom and to protect the safety of courtroom occupants. *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418, 33 P.3d 735 (2001). Restraints may be used if they are necessary to prevent escape, injury, or disorder in the courtroom. *Damon*, 144 Wn.2d at 691. In deciding whether to restrain a defendant during trial, a court should consider, among other things, (1) the seriousness of the present charge; (2) the defendant's temperament and character; (3) the defendant's history of disruptive behavior; and (4) the adequacy and availability of less restrictive alternatives to restraint. *Damon*, 144 Wn.2d at 691 (setting forth 12 specific factors).

To overturn a jury's verdict, a defendant challenging the use of restraints must make a threshold showing that the restraints had a "substantial or injurious effect or influence on the

jury's verdict." *Davis*, 152 Wn.2d at 694 (quoting *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998), *cert. denied*, 525 U.S. 1157 (1999)). This requires evidence that the jury saw the restraints or that the restraints substantially impaired the defendant's ability to assist in his trial defense. *See State v. Finch*, 137 Wn.2d 792, 845, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999); *Hutchinson*, 135 Wn.2d at 888; *State v. Jennings*, 111 Wn. App. 54, 61, 44 P.3d 1 (2002) (stun belt), *review denied*, 148 Wn.2d 1001 (2003).

Here, after ruling that Monschke be required to wear a stun belt under his clothes during trial, the court instructed defense counsel to bring any visibility concerns to the court's attention. No such complaints were made. Before its ruling, the court had not noticed that Monschke was being forced to wear the belt by jail personnel. Monschke offers only conclusory statements that the belt hampered his participation in his trial defense. But Monschke did not express any such concerns to the trial court. Monschke's failure to establish prejudice from the court's decision that he wear a stun belt defeats this assignment of error.

Nonetheless, we briefly address the propriety of the trial court's ruling. Here, the trial judge witnessed a violent and serious incident in her courtroom. Monschke was spitting and yelling at his then co-defendants, Butters and Pillatos. Monschke escalated the level of violence by throwing a chair, using racial slurs, and resisting the guard's attempts to defuse the situation and subdue him. Monschke represents to this court that the incident reflected "irrational behavior" raising serious competency concerns. Statement of Additional Grounds at 5. The incident was all the more alarming as it occurred before Monschke's co-defendants pleaded guilty and agreed to testify at his trial.

The trial court held a hearing and examined witnesses on the issue. It heard testimony that Monschke represented a continuing threat when not restrained. Monschke had been caught

in the county jail possessing makeshift weapons and repeatedly attempting to instigate fights with other prisoners. The evidence before the trial court established that a stun waist belt was the least restrictive alternative: it was not plainly visible or as inhibiting as chains or shackles; it did not carry with it the obvious prejudice of being closely surrounded by several armed officers; and prisoners often found it more comfortable than the stun ankle belt. In our view, the court's order requiring Monschke to wear a stun belt was well considered and proper.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

WHITE SUPREMACIST EVIDENCE

The trial court admitted evidence of Monschke's white supremacist views but gave the jury the following instruction limiting the jury's consideration of the evidence: "Evidence regarding white supremacist literature and materials . . . 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." 27 RP at 1787. The court gave this limiting instruction several times. Monschke now raises the following claims: admitting the evidence violated his First Amendment rights; the evidence was inadmissible under ER 404(b); the court's limiting instruction was an impermissible comment on the evidence; and the evidence was unduly cumulative. We disagree with each of these contentions.

ADMISSION AND EVIDENTIARY USE OF CONSTITUTIONALLY PROTECTED ACTIVITIES

Monschke asserts that "[i]t is error to permit the state to ask the jury to draw negative inferences from the exercise of any constitutional right." Br. of Appellant at 48. We note, as the Washington Supreme Court has, that "there is a distinction between making speech the crime

itself, or an element of the crime, and using speech to *prove* the crime." *Halstien*, 122 Wn.2d at 125 (quoting *State v. Plowman*, 314 Or. 157, 167, 838 P.2d 558 (Or. 1992), *cert. denied*, 508 U.S. 974 (1993)). "The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Halstien*, 122 Wn.2d at 125 (alteration in original) (quoting *Mitchell*, 508 U.S. at 489). Evidence of a defendant's exercise of a First Amendment right may be admissible when relevant to an issue in the case. *Campbell*, 78 Wn. App. at 822; *see, e.g.*, *United States v. Abel*, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984) (prosecution could establish a defense witness's bias by showing that both the defendant and the witness were members of the Aryan Brotherhood and that members were sworn to lie for each other); *Barclay v. Florida*, 463 U.S. 939, 949, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983) (plurality) (trier of fact could consider "the elements of racial hatred" in the crime as well as the defendant's "desire to start a race war" in assessing whether the crime was "especially heinous, atrocious, or cruel").

No authority supports Monschke's claim that admitting evidence of his affiliations and beliefs was reversible error and an automatic violation of his constitutional rights. *Contra Dawson v. Delaware*, 503 U.S. 159, 165, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) ("[T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."). The question of trial court error in allowing such evidence depends on whether this evidence was relevant and admissible to prove an element of the aggravated first degree murder charge. The relevancy threshold is "very low." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence. ER 401. We review the decision to admit evidence for abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Monschke argues that the trial court erred in concluding that white supremacist evidence was admissible under ER 404(b). That rule prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime. But evidence of a defendant's prior acts may be admitted for other limited purposes under ER 404(b), including to establish motive, intent, and to explain the circumstances surrounding the alleged crime. *State v. Brown*, 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998); *State v. Cook*, 131 Wn. App. 845, 849-50, 129 P.3d 834 (2006). Evidence of membership in a group may be relevant evidence of premeditation and a defendant's motive when there is a sufficient nexus between the group affiliation and the motive for committing the crime. *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964, *review denied*, 135 Wn.2d 1015 (1998); *Campbell*, 78 Wn. App. at 822. Such evidence is also admissible under RCW 10.95.020(6) to establish that the defendant committed murder to advance his position in the hierarchy of an organization, association, or identifiable group.

Monschke's entire ER 404(b) argument is as follows:

> [T]he only connection between the "white supremacist" evidence introduced at trial, [Monschke] and premeditation or motive was the inference that a person who believes in the supremacy of the white race is the kind of person who would commit a murder. . . . This is the precise inference forbidden by ER 404(b).

Br. of Appellant at 58-59. But Monschke incorrectly summarizes the evidence presented at trial. According to the record, the evidence admitted at trial not only established Monschke's belief in the superiority of the "white race," but also Monschke's hatred and hostility toward anyone he deemed inferior. This evidence included: literature, paraphernalia, and pictures associated with

the Nazi movement and the highly violent subgroup, National Alliance; literature denigrating minorities; and a movie Monschke particularly enjoyed because of a scene where a minority is shot and curb stomped. Monschke's hate-based beliefs and his affiliation with groups advocating violence did tend to explain Monschke's motive for attacking a white homeless stranger who was a possible drug user. The evidence established and explained the plan for Frye and Butters to earn red shoelaces and bolts, and for Monschke to advance his status as a white supremacist. The evidence made it more probable that Townsend's murder was premeditated. *See Stenson*, 132 Wn.2d at 702. In addition, the evidence explained the circumstances surrounding the crime, including the apparent "curb stomping" of Townsend's head as he lay on the railroad track. The court did not abuse its discretion in admitting evidence that Monschke was affiliated with white supremacist groups.

LIMITING INSTRUCTION

A judge comments on the evidence if statements or conduct convey the judge's attitude toward the merits of the case or the judge's evaluation relative to the disputed issue. *State v. Zimmerman*, 130 Wn. App. 170, 174, 180, 121 P.3d 1216 (2005). A jury instruction that does no more than accurately state the law pertaining to an issue is not an impermissible comment on the evidence. *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001); *Zimmerman*, 130 Wn. App. at 180-81.

Here, the court's limiting instruction told the jury that it could consider the white supremacist evidence only to establish motive, premeditation, and to explain the circumstances surrounding the alleged crime. As we discussed above, the evidence was relevant and properly admitted for the jury's consideration on these issues. The instruction accurately stated the law

and the legally permissible limits of the evidence. The trial court did not comment on the evidence by giving this limiting instruction.

UNDULY CUMULATIVE

Monschke also contends that even if the evidence was properly admitted under ER 404(b), the trial court "failed to make any kind of a reasonable limitation on the [amount of] highly prejudicial evidence." Br. of Appellant at 59. Under ER 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice," or by considerations such as "needless presentation of cumulative evidence." We review a court's ER 403 rulings for abuse of discretion. *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995).

At trial, Monschke denied any affiliation with hate-based or violent white supremacist subgroups; according to him, he was involved only with a group that "believe[s] in promoting race, but they d[o] not believe in hating races. They believe[ ] that all races are unique in their own way. They need to exist" 33 RP at 2763. Because Monschke's affiliations were relevant and in dispute, it was reasonable for the trial court to admit a substantial amount of probative evidence on the issue. *See Campbell*, 78 Wn. App. at 822 (trial court did not abuse its discretion in permitting several witnesses to testify that the defendant was part of a violent gang when the defendant denied any such membership). Further, the record reflects that the court carefully exercised its discretion in deciding to admit the evidence: it reviewed each piece of white supremacist evidence the State sought to admit, it excluded several, and it repeated the limiting instruction to the jury on multiple occasions. The trial court did not abuse its discretion in setting the scope of admissible white supremacist evidence.

Monschke also asserts that the court erred in admitting testimony about violent acts committed by other white supremacists. Monschke cites to three such incidents. But two of the incidents complained of occurred during questioning by Monschke's counsel and Monschke did not object to the third incident. He invited or waived any error in this testimony. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); *Storey v. Storey*, 21 Wn. App. 370, 376, 585 P.2d 183 (1978), *review denied*, 91 Wn.2d 1017 (1979).

TESTIMONIAL HEARSAY

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). The admission of testimonial hearsay violates a defendant's right of confrontation unless the declarant is unavailable and there was a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A statement is "testimonial" if the declarant would reasonably expect it to be used prosecutorially. *Crawford*, 541 U.S. at 52; *State v. Shafer*, 156 Wn.2d 381, 390 n.8, 128 P.3d 87 (2006). This definition includes statements elicited in response to structured questioning during a police investigation. *Crawford*, 541 U.S. at 52-53 & n.4; *State v. Walker*, 129 Wn. App. 258, 268, 118 P.3d 935 (2005). The erroneous admission of testimonial hearsay requires reversal unless the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844, *cert. granted*, 126 S. Ct. 547 (2005).

Monschke contends that testimonial hearsay was offered through investigative detective Jeffrey Shipp. In his testimony, Detective Shipp recounted what the managers of the Rich Haven Apartments told him, namely that Butters, Frye, and Pillatos were evicted for yelling racial slurs at passersby; for painting racist graffiti on the back of the apartment building; and for Butters selling imitation cocaine to a drug addict. The State agrees that the manager's statements were

testimonial, but it maintains that the statements were not offered to prove the truth of the matter asserted, and that, even if they were, Monschke's failure to object waived any error.

It is unnecessary for us to address whether a defendant may raise a testimonial hearsay objection for the first time on appeal[12] for, even assuming he can, there was no error here as the testimony was not hearsay. The State offered Detective Shipp's testimony to explain the context and background of the criminal investigation and how the investigation came to focus on Monschke, Butters, Frye, and Pillatos; it was not offered to prove that Monschke's cohorts were in fact yelling racial slurs, painting racist graffiti, or selling imitation drugs. Such background testimony is not hearsay. *See State v. Lillard*, 122 Wn. App. 422, 437, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002 (2005); *State v. Post*, 59 Wn. App. 389, 394-95, 797 P.2d 1160 (1990), *aff'd*, 118 Wn.2d 596 (1992).

Furthermore, even if we assume that the statements were testimonial hearsay, which we do not, any error in admitting the statements was harmless beyond a reasonable doubt. The events at the Rich Haven Apartments reflected a pattern of alarming behavior by Butters, Frye, and Pillatos, but it did not directly inculpate Monschke. Moreover, the events Detective Shipp recounted were cumulative of Butters, Frye, and Pillatos's testimony regarding their own racist

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[12] Certain state courts have answered no to this question. *See C.C. v. State*, 826 N.E.2d 106, 110 (Ind. Ct. App. 2005); *State v. Torres*, 2005-NMCA-70, ¶ 19, 137 N.M. 607, 113 P.3d 877 (N.M. Ct. App. 2005). *See generally* RAP 2.5(a)(3) (only a "manifest error affecting a constitutional right" may be raised for the first time on appeal); *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (manifest error exception "is a narrow one, affording review only of 'certain constitutional questions'") (quoting RAP 2.5 cmt. a); *State v. Lynn*, 67 Wn. App. 339, 343, 835 P.2d 251(1992) (discussing the reasons for a judicious understanding of manifest error). We note that Monschke failed to object on testimonial hearsay grounds even though *Crawford* was issued before his trial. *See State v. Borboa*, 124 Wn. App. 779, 792, 102 P.3d 183 (2004), *review granted*, 154 Wn.2d 1020 (2005).

conduct. We find no merit in Monschke's claim that Detective Shipp's testimony was prejudicial or that it violated his constitutional right to confront witnesses.

TESTIMONY REGARDING WHITE SUPREMACY GROUPS

Monschke challenges the trial court's admission of expert testimony on whether white supremacy is a "group" within the meaning of RCW 10.95.020(6). Monschke maintains that Pitcavage's testimony was improper because it was a matter for the jury to decide. He also maintains that such testimony was inadmissible under ER 702 and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

As a threshold matter, Monschke is precluded from assigning error to Pitcavage's testimony since he also offered expert opinion testimony on whether "white supremacy" is a group. "[T]he objector is in essence estopped to appeal admission of objectionable evidence when he has used it on his own behalf, or pursued the matter so extensively as to compound the prejudice." *Storey*, 21 Wn. App. at 376 (citations omitted). Monschke's decision to offer Blazak's testimony not only compounded the alleged error here, but served to neutralize it by providing the jury with two opposing expert opinions on this issue.

Nonetheless, we will address the issues that Monschke raises. Whether white supremacy is a "group" under RCW 10.95.020(6) was an issue for the jury to decide. But "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. Nor does the fact that an opinion encompassing ultimate factual issues support the conclusion that the defendant is guilty make the testimony improper: "[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material." *State v. Wilber*, 55 Wn. App. 294, 298

n.1, 777 P.2d 36 (1989). If such testimony satisfies ER 702, it is admissible. *State v. Baird*, 83 Wn. App. 477, 484-85, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997).

ER 702 requires that the witness be qualified as an expert and that the testimony be helpful to the trier of fact. *State v. Farr-Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999). Expert testimony is helpful if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. *Farr-Lenzini*, 93 Wn. App. at 461.

Monschke does not challenge Pitcavage's qualification as an expert; rather, he maintains that Pitcavage's testimony was not helpful to the jury. But at trial, Monschke did not object to Pitcavage's testimony on the basis that whether white supremacy was a "group" was within the jury's common knowledge. A defendant must state the exact grounds for excluding evidence at the time he objects "so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect." *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976) (quoting *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 675, 374 P.2d 939 (1962)). Said differently, an appellate court will not consider specific evidentiary objections raised for the first time on appeal. *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983).

At trial, Monschke did object that Pitcavage's testimony was inadmissible under the *Frye* test. *See State v. Copeland*, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996). Under *Frye*, if an expert's opinion is based on a scientific theory or method, the theory or method must be one generally accepted in the scientific community. But the *Frye* test applies to testimony regarding novel scientific evidence, not expert testimony recounting practical experience and acquired knowledge. *State v. Ortiz*, 119 Wn.2d 294, 311, 831 P.2d 1060 (1992) (expert testimony on tracking human beings not subject to *Frye*). Pitcavage's testimony and opinions on white

supremacy was acquired knowledge gained through experience, observation, and study. The testimony was therefore not subject to *Frye*.

TRIAL TESTIMONY LIMITATIONS

Monschke next maintains that the trial court improperly limited his questioning of Pillatos, Pitcavage, and Blazak. Although a defendant has a general constitutional right to control the mode and scope of his defense, this right is tempered by the trial court's broad discretion to control the admission and presentation of evidence. *See State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). The trial court's broad discretion extends to the mode of witness questioning,[13] cross-examination on matters that only remotely show bias or prejudice,[14] and the exclusion of irrelevant testimony or evidence.[15]

PILLATOS

Before testifying, Pillatos informed the court that he would not answer the State's questions. He said that he would answer questions from Monschke's attorneys if they called him as a defense witness. The State called Pillatos to the witness stand. After Pillatos refused to answer any questions, even under threat of contempt, the State "defer[red] to defense . . . if they agree." 29 RP at 2030. Defense counsel then began asking leading questions. The State objected and requested that all questions be asked in the form of a direct examination. The court

[13] ER 611(a); *Stevens v. Gordon*, 118 Wn. App. 43, 55-56, 74 P.3d 653 (2003).

[14] *State v. Kilgore*, 107 Wn. App. 160, 185, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288 (2002).

[15] ER 401; *In re Pers. Restraint of Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993).

sustained the objection and informed defense counsel: "If you wish to ask questions, it will be in the manner of direct testimony." 29 RP at 2031. Defense counsel objected but proceeded.

Monschke argues that the trial court abused its discretion by prohibiting him from asking Pillatos leading questions. We disagree.

Monschke did not ask to have Pillatos declared a hostile witness, *see* ER 611(c), nor does he explain how the court's ruling precluding his use of leading questions prejudiced his defense. In addition, because Pillatos refused to answer the State's questions, there was no testimony to cross-examine Pillatos about. *See* ER 611(b)-(c) (cross-examination should be limited to the subject matter of the direct examination; leading questions generally permissible for cross-examination but not direct examination). The court thus had a reasonable basis for requiring Monschke's questioning to be in the form of a direct examination just as it would have done if the defense had called Pillatos to the stand out of order in the middle of the State's case-in-chief. The trial court did not abuse its discretion here.

PITCAVAGE

Monschke argues that the trial court abused its discretion in prohibiting him from impeaching Pitcavage's testimony with questions about whether the ADL had been successfully sued for slander and libel in a case from Colorado in the 1980s. The court's refusal to permit questioning on this point was a proper exercise of its discretion: the court did allow Monschke to explore any bias or prejudice of the ADL, but the lawsuit Monschke sought to raise was remote, isolated, and had not involved Pitcavage. Thus, it was an attempt to impeach on a collateral matter and irrelevant. *State v. Descoteaux*, 94 Wn.2d 31, 37-38, 614 P.2d 179 (1980) (witness cannot be impeached on an issue collateral to the issue being tried; issue is collateral if

it is not admissible independently of the impeachment purpose), *overruled on other grounds by State v. Danforth*, 97 Wn.2d 255, 257 n.1, 643 P.2d 882 (1982).

BLAZAK

Monschke argues that the trial court abused its discretion in excluding Blazak's testimony about the prevalence of race-based gangs in juvenile detention facilities. Monschke had testified that he first became involved with white pride groups while incarcerated as a 12-year-old. Monschke argues that Blazak's testimony was necessary to explain "why he might join a white gang in custody and how that might have explained his participation in white pride or white power activities." Br. of Appellant at 89. How Monschke came to join a race-based group might have been relevant in a death penalty phase, but it was not relevant in determining guilt; what was relevant was his current beliefs, his current associations, and how those beliefs and associations played a role in his murder of a white homeless man. The trial court did not abuse its discretion in excluding this irrelevant evidence.

LETTER FROM FRYE TO THE PROSECUTOR

Monschke maintains that the trial court erred in refusing to provide discovery of a letter Frye wrote to one of the trial prosecutors. The letter was written after Frye's first day of testimony, but it was not received, opened, and read until Frye had completed her testimony. The prosecutor disclosed the letter to the court the day after it was received, but requested that the letter be sealed under CrR 4.7(h)(6) and not provided to Monschke. The court granted the request, concluding that the letter involved matters of a personal nature having nothing to do with Monschke.

The trial court has broad discretion in setting the scope of discovery. *Brown*, 132 Wn.2d at 626. While sealing documents is an extraordinary step that Washington courts should be

reluctant to take, it is appropriate where the record and individual circumstances of the case clearly establish a "good cause" basis. *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 540-41, 114 P.3d 1182 (2005). Good cause requires considerations of the public interest in the open administration of justice, whether sealing threatens the defendant's right to a fair trial, and whether sealing is necessary "to prevent a serious and imminent threat to an important interest." *Rufer*, 154 Wn.2d at 540; *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-38, 640 P.2d 716 (1982).

We have reviewed Frye's letter and conclude that there was a good cause basis to seal it. The letter has no evidentiary value. It includes nothing that could have been used to impeach a witness and nothing that would have exculpated Monschke. The court did not abuse its discretion in sealing the letter and in refusing to allow Monschke to read the letter, which had no evidentiary value.

PROSECUTOR'S QUESTIONING OF HAWKINS

Monschke maintains that the prosecutor committed misconduct by implying that defense counsel had tampered with Hawkins's testimony. We disagree.

Hawkins told law enforcement and the prosecutors that he found Townsend lying on his back. At trial, Hawkins gave equivocal and contradictory testimony as to whether he found Townsend lying on his back or on his stomach. The prosecutor then asked, "Is someone talking to you and trying to get you to say something to help out Mr. Monschke?" 23 RP at 1228. Hawkins answered no, but the prosecutor then asked, "Do you recall telling me that after meeting with [Monschke's defense team] you were concerned they were trying to get you to say things that were not true?" 23 RP at 1229. Hawkins responded, "Well, yes. I probably told you that. . . . I thought at the time that they was [sic] trying. Not trying to make me lie, but just tell

what I seen [sic]." 23 RP at 1229. The prosecutor then questioned Hawkins about the meeting with the defense team. Hawkins explained that he was asked many questions; that defense counsel opined that Monschke was innocent; and that defense counsel had speculated on the events surrounding Townsend's murder.

Monschke did not timely object to the prosecutor's questioning. Instead his counsel waited until the State had completed its direct examination of Hawkins and then moved for a mistrial after the lunch recess. *See State v. Gallo*, 20 Wn. App. 717, 728, 582 P.2d 558 ("An objection which comes after the witness has answered is not timely unless there was no opportunity to object or it was not apparent from the question that the answer would be inadmissible."), *review denied*, 91 Wn.2d 1008 (1978). In addition, although the record does not reflect that the defense team acted improperly during the interview with Hawkins, in light of Hawkins's inconsistent testimony and his prior statement that he felt pressured to change his story, it was arguably appropriate to clarify Hawkins's testimony and explore the basis for his prior inconsistent statements. *See* ER 607 (either party may test the credibility of a witness); *State v. Russell*, 125 Wn.2d 24, 92-93, 882 P.2d 747 (1994) (defense counsel's conduct may be questioned if there is specific evidence in the record to support such an allegation), *cert. denied*, 514 U.S. 1129 (1995); *accord United States v. Patterson*, 23 F.3d 1239, 1248 (7th Cir.) (where witness's story changes after meeting with defense counsel, "[t]he prosecutor need not ignore the circumstances and evidence surrounding the prior inconsistent statements"), *cert. denied*, 513 U.S. 1007 (1994).

TO-CONVICT INSTRUCTION

Monschke maintains that the to-convict instruction for first degree murder was erroneous because the jury was not instructed "to find that [Monschke] 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 [Monschke] participated in either the actus reas [sic] or the mens rea of the crime." Br. of Appellant at 91. We disagree.

The jury was instructed on accomplice liability in the language of RCW 9A.08.020, the accomplice liability statute. *See State v. McDonald*, 138 Wn.2d 680, 688, 981 P.2d 443 (1999) (a defendant is guilty whether he participates in a crime as an accomplice or as a principal). The court's instruction mirrors 11 WASHINGTON PATTERN INSTRUCTIONS: CRIMINAL 10.51, at 136 (Supp. 2005). The instruction correctly required that the jury find Monschke guilty only if it found that he, "with knowledge that [his actions] will promote or facilitate the commission of the crime of murder, [the defendant] 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." 3 CP at 384.

Likewise, the court's to-convict instruction accurately set forth the actus reus and mens rea of first degree murder as set forth in RCW 9A.32.030(1)(a):

> (1) That on or about the 23rd day of March, 2003, the defendant or a person to whom defendant was acting as an accomplice beat Randall Townsend;
> (2) That the defendant or a person to whom defendant was acting as an accomplice acted with intent to cause the death of Randall Townsend.
> (3) That the intent to cause the death was premeditated.

3 CP at 386. The court's instructions were consistent with the rule that "[a] defendant charged as an accomplice to first degree murder may be convicted on proof that he knew generally he was facilitating a homicide, but need not have known that the principal had the kind of culpability required for any particular degree of murder." *State v. Mullin-Coston*, 115 Wn. App. 679, 692 n.6, 64 P.3d 40 (2003) (discussing *State v. Roberts*, 142 Wn.2d 471, 512-13, 14 P.3d 713 (2000)), *aff'd*, 152 Wn.2d 107 (2004). The trial court properly instructed the jury on the

elements of first degree premeditated murder and accomplice liability. Monschke's challenge to the instructions is without merit.

PROSECUTORIAL MISCONDUCT AND ACCOMPLICE LIABILITY

In a similar vein, Monschke maintains that the prosecutor erroneously set forth the law of accomplice liability in closing argument. But Monschke did not object to the prosecutor's closing argument at any point. Failing to object during closing argument waives review of an allegedly improper remark unless the remark is so flagrant and ill-intentioned that a curative instruction could not have alleviated the resulting prejudice and any objection would have been futile. *See Brown*, 132 Wn.2d at 561. Here, the court instructed the jury that the arguments of counsel are not evidence and that it must decide the case based on the law as set forth in its instructions. Had defense counsel timely objected to the prosecution's closing argument that he belatedly claims to be improper, the court could have given a special additional jury instruction to ignore the prosecutor's argument and to focus on the accomplice liability instruction, which, as previously noted, accurately stated the law. No objection was made to the State's argument and Monschke has not preserved this issue for our review.

Moreover, the remark at issue was not improper. The prosecutor correctly argued that accomplice liability did not require a finding that Monschke had a premeditated intent to cause Townsend's death. *See Roberts*, 142 Wn.2d at 512-13; *Mullin-Coston*, 115 Wn. App. at 692 n.6. As the prosecutor correctly argued, Monschke was guilty of murdering Townsend, regardless of its degree or the alternative means at issue, if he affirmatively acted with the knowledge that his act would facilitate or promote Townsend's death and that Townsend's death was premeditated by Monschke or someone to whom he was an accomplice. The prosecutor was correct that in this narrow sense, Monschke was "in for a penny . . . in for a pound." 35 RP at 3061. *Cf.*

Roberts, 142 Wn.2d at 513 (accomplice's knowledge that the principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow).[16]

STATEMENT OF ADDITIONAL GROUNDS (SAG)

Monschke also raises several issues in his SAG. *See* RAP 10.10. We address only those issues that the record reflects and Monschke adequately discusses. *See State v. Spring*, 128 Wn. App. 398, 407, 115 P.3d 1052 (2005).

COMPETENCY EVALUATION

Monschke maintains that the trial court erred in proceeding to trial without obtaining a competency evaluation. *See* former RCW 10.77.060(1)(a) (2000). Defense counsel made a pretrial motion for a competency evaluation. The court signed an order to perform the evaluation, but Monschke refused to cooperate with the evaluation. Subsequently defense counsel informed the court that a voluntary medication regimen had alleviated his concerns regarding Monschke's mental health. The trial court then entered an order finding Monschke competent to stand trial.

At a subsequent pretrial hearing, defense counsel informed the court that Monschke's medications had recently been modified to address recurring panic attacks and periods where Monschke was unable to focus. Defense counsel indicated that the symptoms might reoccur and that he would inform the court if Monschke was unable to participate in his defense.

The trial court must obtain a medical report on the defendant's mental condition whenever there is "reason to doubt" his competency. Former RCW 10.77.060(1)(a). The

[16] Although the prosecutor did not improperly use the phrase, "in for a penny, in for a pound," here, we encourage the State to refrain from using this expression for concern that it might be confused with the usage disavowed in *Roberts*.

defense bears the threshold burden of establishing a reasonable question of competency. *Woods*, 143 Wn.2d at 604-05. A defendant is "incompetent" if he "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(14); *see also State v. Harris*, 114 Wn.2d 419, 427, 789 P.2d 60 (1990) (defendant is competent if capable of properly appreciating his peril and of rationally assisting in his own defense; important competency consideration is the defendant's ability to relate past events which would be useful in assisting his counsel in whatever defense counsel decides is appropriate).

Although defense counsel twice raised concerns about Monschke's mental health, he assured the court that Monschke was able to assist in his own defense. An attorney's opinion regarding his client's competency is given considerable weight. *Woods*, 143 Wn.2d at 605. Defense counsel also told the court that Monschke was voluntarily taking medication that had alleviated his emotional and mental health problems. He assured the court that any future concerns would be brought to the court's attention; the issue was not raised again. Monschke's trial testimony also reflects a competent individual who fully recalled the events at issue and understood the nature of the proceedings against him. Monschke has not shown that the trial court was presented with a reasonable basis to doubt his competency.

TRIAL CONTINUANCE

Monschke maintains that the court violated his speedy trial rights by granting a two-month trial continuance. Prior to their plea agreements, Butters and Pillatos requested the continuance citing scheduling conflicts and the need for further investigation. Monschke and Frye objected and requested that their trial be severed so they could proceed to trial on the previously set date.

We review a trial court's decision to grant a continuance for abuse of discretion. *Woods*, 143 Wn.2d at 579. Under CrR 3.3(f)(2), a defendant challenging a continuance must show that he suffered prejudice in the presentation of his defense. *State v. O'Neal*, 126 Wn. App. 395, 417, 109 P.3d 429, *review granted*, 155 Wn.2d 1024 (2005). Monschke does not point to any such prejudice here.

Further, Monschke's argument that the continuance entitled him to have his trial severed from his co-defendants is controlled by *State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994). There, the trial court denied one defendant's motion to sever. Instead, it granted a continuance of more than two months past the defendant's speedy trial period so that the co-defendant's new counsel could adequately prepare for trial. The *Dent* court held that the trial court did not abuse its discretion by continuing the trial because the defendant failed to allege any prejudice resulting from the delay and the "interests of judicial efficiency" favored a joint trial. 123 Wn.2d at 484.[17] The facts are similar here: the continuance was based on reasonable grounds; severances are not favored; and Monschke does not claim or demonstrate prejudice to his ability to present his defense. The trial court did not abuse its discretion in granting a continuance over Monschke's objection.

TRIAL COURT RULINGS

Monschke maintains that the trial court erred in permitting witnesses to discuss curb stomping when there was no evidence that it was relevant to Townsend's injuries. Monschke's view of the record is incorrect. Townsend was found with his head lying on the train tracks. Frye testified that Townsend's head was stomped on while it laid on the train track. The State's medical examiner also testified that Townsend's injuries were consistent with curb stomping.

[17] Subsequent amendments to CrR 3.3 have not limited *Dent*'s holding.

Evidence and references to curb stomping was relevant given that Townsend's wounds were consistent with such an attack.

Monschke also maintains that the court erred in admitting statements he made to police after an equivocal request for an attorney. The trial court initially ruled that the statements were inadmissible because officers did not clarify whether Monschke was invoking his right to an attorney. *But see Walker*, 129 Wn. App. at 274-75 & n.45 (2005) (noting that *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), overruled the Washington Supreme Court's conclusion that statements are inadmissible if made following an equivocal invocation of the right to attorney). But during Monschke's testimony, the trial court reviewed its earlier ruling and authorized certain statements to be used to impeach Monschke's inconsistent testimony. This was a correct ruling. *See Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), may be used for impeachment purposes).

Monschke maintains that the trial court erred in removing Blazak from the courtroom during Pitcavage's testimony. But this was within the court's discretion. ER 615.

PROSECUTORIAL MISCONDUCT

Monschke maintains that the prosecutors committed misconduct by portraying Frye as a "good person . . . who would never have anything to do with something like this." SAG at 10. Monschke's claim is undercut by the State's elicitation that Frye pleaded guilty to second degree murder. Further, credibility determinations are for the trier of fact. *Davis*, 150 Wn.2d at 874.

Monschke maintains that the prosecutors committed misconduct by seizing his mail and opening a letter written to his attorney. But the record reflects that the county jail mistakenly

opened the letter. Only *intentional* interference with attorney-client communications may warrant dismissal. *See State v. Granacki*, 90 Wn. App. 598, 959 P.2d 667 (1998).

Monschke maintains that the prosecutors tampered with witnesses. He cites no evidence and his allegations are based on matters outside the record on appeal. Thus, we cannot address them here. Monschke must file a timely personal restraint petition if he has evidence to support his claim. *See McFarland*, 127 Wn.2d at 335 (matters outside the record must be raised and properly supported in a personal restraint petition).

CUMULATIVE ERROR

Monschke lastly maintains that cumulative error denied him a fair trial. That doctrine requires reversal where several harmless errors had the cumulative effect of seriously impugning the integrity of the defendant's trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Having considered the entire record and all the issues raised, we conclude that Monschke received a fair and sound trial.

Affirmed.

QUINN-BRINTNALL, C.J.

We concur:

BRIDGEWATER, J.

PENOYAR, J.

Case Number: 03-1-01464-0 Date: December 10, 2018
SerialID: 7EA6A8E1-3F31-4103-BC26F28E838FF697
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 10 day of December, 2018

Kevin Stock, Pierce County Clerk

By /S/Jessica Hite, Deputy.
Dated: December 10, 2018 12:56 PM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
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This document contains 41 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "C"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint Petition of Kurtis William Monschke, Petitioner,	No. 38365-9-II UNPUBLISHED OPINION

VAN DEREN, J. — In this personal restraint petition (PRP), Kurtis William Monschke asks us to order a new trial or a reference hearing regarding his conviction for aggravated first degree murder. He argues that (1) his trial counsel were ineffective when they did not do a proper investigation or pretrial preparation of his defense expert witness who, in testifying, undermined key elements of Monschke's defense and (2) it was prosecutorial misconduct for the State to reach a plea agreement with Monschke's codefendant Tristain Frye based on a personal friendship between the elected prosecutor and Frye's defense attorney and to allow Frye to testify against him, knowing that she would commit perjury. We deny Monschke's personal restraint petition.

FACTS[1]

On March 23, 2003, Kurtis Monschke; Tristain Frye Scotty Butters; and David Pillatos assaulted Randall Townsend, a homeless man who lived under the interstate near the Tacoma Dome. *State v. Monschke*, 133 Wn. App. 313, 318-20, 135 P.3d 566 (2006). After 20 days on life support, Townsend died. *Monschke*, 133 Wn. App. at 320. The State charged Monschke, Frye, Butters, and Pillatos with aggravated first degree murder under RCW 9A.32.030 and RCW 10.95.020(6). *Monschke*, 133 Wn. App. at 321. The State alleged as an aggravating circumstance that "Townsend was murdered so that the defendants could obtain or maintain their membership or advance their position in the hierarchy of an organization or identifiable group, namely, 'white supremacists.'" *Monschke*, 133 Wn. App. at 321 (quoting 1 Clerk's Papers at 84).

Monschke and his codefendants were held at the Pierce County Jail, where it was jail procedure to open and screen inmate mail for contraband and other illegal activity. During this routine screening, jail staff discovered that Monschke had received a letter from a white supremacist group. The jail sent a copy of the letter to the Pierce County prosecutor's office. The State then requested that the jail photocopy all incoming and outgoing mail belonging to the four defendants, with the exception of legal mail. The State distributed copies of the defendants' mail to defense counsel so that all parties had copies of the inmate mail before trial. Through this process, the State discovered that Frye and Pillatos were violating a no-contact order by sending mail to each other through a third party. In these letters, Frye expressed a desire for

[1] The facts are limited to those necessary to evaluate Monschke's PRP. The opinion from Monschke's first appeal, *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 566 (2006), contains a more detailed fact summary.

guidance from Pillatos on how to proceed ("I need to know what [Pillatos] wants me to do." Br. of Resp't, App. S at 1721) and Pillatos attempted to persuade Frye to testify against him, but to make sure to emphasize that he did not seem like himself in order to help with his insanity defense.

Before trial, Monschke's three codefendants entered into plea agreements with the State. *Monschke*, 133 Wn. App. at 321. Frye agreed to plead guilty to second degree murder. *Monschke*, 133 Wn. App. at 321. Her plea agreement was conditioned on her being truthful and honest with prosecutors at all times and that she "testify truthfully and fully at the trial or trials" of her codefendant(s). Br. of Resp't, App. E at 2. The State filed a statement that explained its reasons for amending Frye's information to allege lesser charges, including:

> (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.

Br. of Resp't, App. G at 2.

Pillatos and Butters pleaded guilty to first degree murder. *Monschke*, 133 Wn. App. at 321. Monschke refused the offer Pillatos and Butters accepted and, thus, was the only one of the four defendants to go to trial. All four testified at Monschke's trial.

Frye testified that on March 22, 2003, Pillatos wanted to take her, his fiancée, out to earn her red shoelaces,[2] which she could do by assaulting a member of a minority group. *Monschke*, 133 Wn. App. at 323. Monschke, Pillatos, and Butters already wore red laces. *Monschke*, 133

[2] "According to Frye, red shoelaces symbolized that the wearer had assaulted a member of a minority group." *Monschke*, 133 Wn. App. at 323.

Wn. App. at 323. After discussing the idea with Butters and Monschke, the four drove to the store where they purchased beer and two baseball bats. *Monschke*, 133 Wn. App. at 323. The four did not discuss the reason for purchasing the bats but, according to Frye, it was understood that "'they weren't going to be used for baseball.'" *Monschke*, 133 Wn. App. at 323 (quoting 31 Report of Proceedings (RP) at 2485).

They parked near the Tacoma Dome and walked under Interstate 705 so Frye and Pillatos could show Monschke graffiti that they had painted under the overpass.[3] *Monschke*, 133 Wn. App. at 323. According to Frye, she separated from the group and began talking to Townsend. *Monschke*, 133 Wn. App. at 323. Butters and Pillatos came over to where Frye and Townsend were talking. Butters hit Townsend over the head with one of the baseball bats causing him to fall to the ground. *Monschke*, 133 Wn. App. at 323. Butters and Pillatos began kicking Townsend in the head and Pillatos threw a 38 pound rock on Townsend's face. *Monschke*, 133 Wn. App. at 323. Butters and Pillatos then carried Townsend to the railroad tracks and performed a "curb stomp" by stomping on the back of Townsend's head while he lay face down on the track. *Monschke*, 133 Wn. App. at 323.

Butters and Pillatos then left to find Monschke. When they returned with Monschke to where Townsend lay, Monschke began hitting him in the head with the other bat. *Monschke*,

[3] Officers investigating the murder "found hate-based graffiti near the murder scene [that] included swastikas, lightning bolts in the shape of 'SS,' 'White Power Skinheads,' 'U Suck Wiggers,' 'El Spic,' 'Skinhead white to the bone,' 'Die SHARPS,' 'Die Junky Die,' 'El Nigger,' 'Tacoma Skinhead Movement,' 'die niggers,' 'Heil Hitler,' and 'Fuck All Drug Addicts.'" *Monschke*, 133 Wn. App. at 320 (quoting 21 RP at 940; 26 RP at 112, 116, 118-19, 121-22).

133 Wn. App. at 324. According to Frye, Monschke hit Townsend 10 to 15 times.[4] *Monschke*, 133 Wn. App. at 324. "Pillatos told Frye to kick Townsend," which "she initially refused[,] but Pillatos covered her eyes and led her to Townsend" where she kicked his head 4 times. *Monschke*, 133 Wn. App. at 324. "As the group left, Monschke stated, 'I wonder if God gives us little brownie points for this.'" *Monschke*, 133 Wn. App. at 324 (quoting 31 RP at 2374). Butters told Frye "that she had earned her red laces and he had earned his 'bolts.'"[5] *Monschke*, 133 Wn. App. at 324 (quoting 31 RP at 2375). Pillatos testified that Townsend "got beat up" because he was a drug addict and a "parasite." *Monschke*, 133 Wn. App. at 325.

As discussed in the published portion of our opinion from Monschke's direct appeal, both parties presented expert testimony on white supremacists at trial:

> The State called Mark Pitcavage, the director of fact-finding for the Anti-Defamation League (ADL). Pitcavage had studied white supremacy for several years and supervised the ADL's monitoring and research of extremist groups. Pitcavage testified that white supremacists could be identified by a shared ideology summed up in the following mission statement known as "The 14 Words": "We must secure the existence of our race and a future for white children." Pitcavage opined that this ideology fostered so many shared similarities, beliefs, and customs that white supremacists could be considered a "group" within the common meaning of the term.
>
> Pitcavage considered white supremacists to be a "group" even though they were not well organized, did not have one overarching structure, had many subgroups, and were split over the advocacy and use of violence. Pitcavage explained that the subgroups were nonexclusive; routinely overlapping; and often loosely organized to prevent police infiltration, to limit legal liability, and to maintain a certain level of personal anonymity. Pitcavage testified to an organized "hierarchal structure" "in terms of status, where someone who's

[4] As noted in *Monschke*, the four defendants' testimony differed on this fact: "Pillatos testified that Monschke hit Townsend in the head with the bat three or four times. Monschke and Butters testified that Monschke was somewhere else during the entire assault and that he used the bat afterwards simply to nudge Townsend to see if he was still alive. Butters also testified that he told officers that Monschke hit Townsend 10 or more times." 133 Wn. App. at 324.

[5] "A pair of lightning bolts in the shape of 'SS' is a neo-Nazi symbol." *Monschke*, 133 Wn. App. at 320 n.2.

perceived to be really standing up for the white race, really being a white warrior, gets more result of status, gets more respect." In addition, Pitcavage testified that many subgroups internally advocated violence but publicly professed nonviolence so as to avoid lawsuits of the sort that had disbanded earlier white supremacy groups.

Monschke called Randy Blazak, a college professor whose research focused on hate crimes. Blazak opined that white supremacists were not an "identifiable group." Blazak agreed with Pitcavage that white supremacists shared an ideology captured by "The 14 Words," but he testified that, in his opinion there was too much conflict within the movement to consider white supremacists a cohesive group. These conflicts included disagreement over the need of an organized hierarchy, the use of violence, the role of religion, and defining who was "white."

Blazak also testified about Volksfront and National Alliance. According to Blazak, National Alliance was a highly violent subgroup of white supremacists. Blazak testified that a member could gain status in National Alliance for murdering someone deemed inferior. Blazak described Volksfront as a very secretive organization with a "public front" of nonviolence, but he noted that "there may be other things that go on behind closed doors." Blazak also testified that Volksfront had an organizational hierarchy. According to Blazak, Volksfront and National Alliance had, over the last several years, been partnering and connecting.

The State presented evidence that Volksfront maintained a prisoners of war (POW) list on its website. The list included the contact information for members of the white supremacy movement that had committed hate crimes and were currently incarcerated. Several individuals on the list had committed "very violent" crimes. The State also presented evidence that Monschke left messages on Volksfront's website and that he went by the screen name "SHARPshooter."

Monschke, 133 Wn. App. at 326-28 (citations omitted).

The jury convicted Monschke of aggravated first degree murder. *Monschke*, 133 Wn. App. at 318. He was sentenced to life without possibility of parole. Monschke appealed, challenging "the constitutionality of RCW 10.95.020(6), the sufficiency of the evidence, the trial court's refusal to bifurcate the trial, and the court's order requiring him to wear a stun belt at

trial." *Monschke*, 133 Wn. App. at 318-19. We affirmed his conviction.[6] *Monschke*, 133 Wn. App. at 319. The United States Supreme Court denied Monschke's petition for certiorari. *Monschke v. Washington*, 552 U.S. 841, 128 S. Ct. 83, 169 L.Ed. 2d 64 (2007). Monschke timely filed this PRP.

ANALYSIS

I. PERSONAL RESTRAINT PETITION STANDARD OF REVIEW

A petitioner may request relief through a PRP when he is under an unlawful restraint.[7] RAP 16.4(a)-(c). Our Supreme Court has limited collateral relief available through a PRP "'because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 670, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992)). A personal restraint petitioner must prove either a (1)

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[6] On Monschke's direct appeal, we noted the following evidence that supported his conviction:

> Monschke was a member of the white supremacist subgroup Volksfront; Volksfront associated with the violent subgroup National Alliance; Monschke wanted to advance his position in Volksfront and open a local chapter; acts of violence elevated a member's status in many white supremacist subgroups; Volksfront maintained a POW list on its website that supported individuals who had committed violent hate crimes; Monschke posted messages on Volksfront's website and used a screen name, "SHARPshooter," that advocated violence against a nonviolent white supremacist group; Monschke sought to elevate Frye's status by helping her obtain red shoelaces, which Monschke believed were earned by violent acts against "inferior" people; Monschke previously advanced his own position in Volksfront through violent acts and wore red shoelaces and white suspenders as an indication of this advancement; Monschke, Butters, and Pillatos were underneath Interstate 705 looking to "do" someone "inferior"; Townsend was viewed as inferior by Monschke, Butters, and Pillatos; Townsend's murder elevated Butters's status; and Monschke wondered aloud whether Townsend's murder would elevate his status with God.

Monschke, 133 Wn. App. at 333-34.

[7] Monschke is under a "restraint" as he is confined under a judgment and sentence resulting from a decision in a criminal proceeding. RAP 16.4(b).

constitutional error that results in actual and substantial prejudice or (2) nonconstitutional error that "constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *Davis*, 152 Wn.2d at 672 (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)). Additionally, the petitioner must prove the error by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

The petitioner must support the petition with facts or evidence and may not rely solely on conclusory allegations. RAP 16.7(a)(2)(i); *Cook*, 114 Wn.2d at 813-14; *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). For allegations "based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). "If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits . . . must contain matters to which the affiants may competently testify." *Rice*, 118 Wn.2d at 886. The petitioner must show that the "factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." *Rice*, 118 Wn.2d at 886.

"Once the petitioner makes this threshold showing, the court will then examine the State's response," which must "answer the allegations of the petition and identify all material disputed questions of fact." *Rice*, 118 Wn.2d at 886. "[T]o define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence" and only after "the parties' materials establish the existence of material disputed issues of fact" will we direct the trial court "to hold a reference hearing in order to resolve the factual questions." *Rice*, 118 Wn.2d at 886-87.

Thus, when reviewing a PRP, we have three options:

> 1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;[8]
> 2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12; [or]
> 3. If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the P[RP] without remanding the cause for further hearing.

In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Monschke first argues that his trial counsel was ineffective for failing to adequately interview and prepare his defense expert, Dr. Randy Blazak, before trial. The State responds that Monschke is merely second guessing his attorneys' decision to call an expert witness because there is no evidence of lack of trial preparation or investigation, especially in that Monschke's trial counsel consulted the expert witness more than once before trial.

A. Standard of Review

We review claims of ineffective assistance of counsel de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006). To prove ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced him, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). This standard is "highly deferential and courts will indulge in a strong presumption of reasonableness" until the

[8] RAP 16.11(b) states that the Chief Judge can dismiss a PRP or a panel of judges may deny a PRP.

defendant shows in the record the absence of legitimate or tactical reasons supporting trial counsel's conduct. *Thomas*, 109 Wn.2d at 226. But "[t]his presumption can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial." *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).

At oral argument and in its statement of additional authority, the State contended that, because this is a PRP, Monschke must show prejudice beyond "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" as *Strickland* requires. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Generally, in a PRP, the petitioner must demonstrate by a preponderance of the evidence that a constitutional error resulted in actual and substantial prejudice or a nonconstitutional error resulted in a complete miscarriage of justice. *Davis*, 152 Wn.2d at 672. But, as we held in *In re Pers. Restraint of Crace*, a personal restraint petitioner need not "satisfy a heightened prejudice requirement under actual and substantial prejudice that exceeds the showing of prejudice necessary to successfully establish the *Strickland* prejudice prong" when the PRP is based on ineffective assistance of counsel. 157 Wn. App. 81, 112-14, 236 P.3d 914 (2010), *petition for review filed*, No. 85131-0 (Wash. Oct. 1, 2010).

Moreover, "[i]n *Davis*, our Supreme Court . . . equated the *Strickland* prejudice standard with actual and substantial prejudice," holding that "'Davis cannot establish actual and substantial prejudice . . . . Because there was overwhelming evidence of his guilt, he cannot show there was a reasonable probability that, *but for* his counsel's deficient performance by not objecting, the outcome of his trial would have been different.'" *Crace*, 157 Wn. App. at 111

n.16 (second alteration in original) (quoting *Davis*, 152 Wn.2d at 700). Thus, a petitioner need not establish prejudice beyond that required by *Strickland* to satisfy "actual and substantial prejudice" in a PRP.[9]

Additionally, the State's statement of additional authority "on whether a petitioner in a collateral attack must make a higher showing of prejudice on an ineffective assistance of counsel claim than a defendant on direct appeal" cites *Rice*, 118 Wn.2d at 889, as "describing [the] *St[r]ickland* test as a prima facie showing that might entitle a petitioner in a collateral attack to

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[9] In *Crace*, we further explained our holding that the prejudice prong of the ineffective assistance of counsel analysis was not heightened in the PRP context:

> The reliability of a proceeding is undermined where the petitioner shows how "defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Our Supreme Court has referred to "'*reasonable probability*'" as "'a probability sufficient to undermine confidence in the outcome' of [the] trial." *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 208, 53 P.3d 17 (2002) [(alteration in original)] (quoting *Strickland*, 466 U.S. at 694). And this court, our Supreme Court, and the United States Supreme Court have referred to the showing of prejudice in the ineffective assistance of counsel context to be a showing of "actual prejudice." *Smith v. Robbins*, 528 U.S. 259, 286, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000); *State v. Crawford*, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006); *State v. Contreras*, 92 Wn. App. 307, 319, 966 P.2d 915 (1998); *see McFarland*, 127 Wn.2d at 338; *Thomas* 109 Wn.2d at 225-26; *see also In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 789 n.10, 100 P.3d 279 (2004); *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 590, 989 P.2d 512 (1999); *State v. Sosa*, 59 Wn. App. 678, 686-87, 800 P.2d 839 (1990); *Dorsey v. King County*, 51 Wn. App. 664, 674, 754 P.2d 1255 (1988).
>
> Washington courts granting petitions based on ineffective assistance of counsel have only stated that the petitioner established the "reasonable probability" standard from *Strickland*. [*In re Pers. Restraint of*] *Brett*, 142 Wn.2d [868,] 883[, 16 P.3d 601 (2001)]; *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 866-67, 16 P.3d 610 (2001); *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 930-32, 158 P.3d 1282 (2007); *In re Pers. Restraint of Sims*, 118 Wn. App. 471, 478, 480, 73 P.3d 398 (2003); *In re Pers. Restraint of Hoisington*, 99 Wn. App. 423, 434-35, 993 P.2d 296 (2000); *see In re Pers. Restraint of McCready*, 100 Wn. App. 259, 265, 996 P.2d 658 (2000).

157 Wn. App. at 110-12 (footnote omitted).

an evidentiary hearing." Resp't's Statement of Additional Authority at 1-2 (emphasis omitted). But our examination of our Supreme Court's response to Rice's ineffective assistance of counsel claim shows that the court applied the *Strickland* standard; thus, *Rice* does not support the State's argument that a heightened showing of prejudice is necessary in the PRP context. 118 Wn.2d at 888-89 ("No evidentiary hearing is required in a collateral proceeding if the defendant fails to allege facts establishing the kind of prejudice necessary to satisfy the *Strickland* test."). Accordingly, we again hold that a petitioner need not satisfy a "heightened prejudice requirement under actual and substantial prejudice that exceeds the showing of prejudice necessary to successfully establish the *Strickland* prejudice prong" in the ineffective assistance of counsel context. *Crace*, 157 Wn. App. at 112.

B. Expert Witness Testimony

Generally, an attorney's decision to call a witness to testify is "a matter of legitimate trial tactics," which "will not support a claim of ineffective assistance of counsel." *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). But a petitioner can overcome this presumption by demonstrating that counsel failed to adequately investigate or prepare for trial. *Byrd*, 30 Wn. App. at 799.

To support his claim of ineffective assistance of counsel, Monschke submitted declarations from Blazak and Erik Bauer, one of his two defense counsel. Blazak's declaration states that (1) before he testified, he spoke to Monschke's counsel by phone and in person; (2) nothing he testified to was inconsistent with what he told defense counsel in pretrial preparations; (3) he was not asked to prepare a report of his proposed testimony before trial; and (4) Monschke's counsel did not engage Blazak in a mock trial exercise to prepare for direct and cross-examination.

Monschke's trial attorneys made a strategic and tactical decision to call an expert witness to explain that white supremacists are not an identifiable group and that Volksfront was a nonviolent white supremacist group. Thus, Monschke's attorneys planned to "negate[] the prosecution's efforts to establish Mr. Monschke's membership and advancement as required by the [aggravating circumstance] statute." PRP Decl. of Eric L. Bauer (Dec. of Bauer) at 2-3. But, according to defense counsel, at trial, Blazak "presented opinions that he had not presented in pretrial interviews" and he "volunteered [the damaging information] without being prompted." Dec. of Bauer at 3. Even though this unexpected testimony allegedly "damaged the defense on every critical point," Monschke's counsel's performance does not rise to the level of ineffective assistance of counsel. Dec. of Bauer at 3.

In *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 488, 965 P.2d 593 (1998), our Supreme Court held that "there is no absolute requirement that defense counsel interview witnesses before trial" and ruled that trial counsel was not ineffective for failing to conduct pretrial interviews of the witnesses. The court noted that, although Pirtle's counsel did not conduct formal witness interviews, "counsel spent considerable time reviewing evidence and obtaining answers to various questions" with detectives and Pirtle failed to show how his counsel's approach was inadequate. *Pirtle*, 136 Wn.2d at 488. Our Supreme Court reiterated this proposition in *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 754-57, 16 P.3d 1 (2001).

In *Stenson*, the court declined to hold the petitioner's trial counsel ineffective for not personally interviewing Dr. Brady, the medical examiner, before trial but, instead, relied on his investigator's pretrial interview of the witness. 142 Wn.2d at 754. Similar to what Monschke points to here, at Stenson's trial, Dr. Brady offered unexpected, damaging testimony. In *Stenson*, the court stated that Stenson's attorney's "cross-examination of Brady did not go well because

Brady was a difficult witness, not because of deficient preparation." *Stenson*, 142 Wn.2d at 755. Bauer declares that Blazak volunteered information without prompting by questions during his testimony. In any attorney's experience, this behavior by a witness is problematic, making the person a difficult witness. But Monschke points to nothing that would have ensured that Blazak did not volunteer information on the stand, even if his counsel had done a mock trial or practiced Blazak's testimony, since Blazak volunteered his testimony without prompting, and Blazak declared he testified to nothing inconsistent with what he told Monschke's defense counsel before trial.

Monschke does not argue that defense counsel is held to a higher standard in preparing for an expert witness than the standard applicable to an alibi witness or any other indispensable witness. The record does not disclose the details of Monschke's trial counsel's pretrial interviews with Blazak, but we do know that they met with him more than once. From the record before us, Monschke's trial counsel's preparation of Blazak did not fall below the standard discussed in *Stenson* or *Pirtle*. Therefore, we hold that, because Monschke's counsel made a strategic tactical decision to call an expert to rebut the State's expert testimony, met with Blazak before trial, and then Blazak volunteered information from the witness stand, Monschke has not met his burden of establishing that trial counsel's performance was deficient based on inadequate expert witness preparation.

Additionally, Monschke has failed to meet his burden to show that Blazak's unexpected testimony prejudiced him. Monschke must show that there is a reasonable probability that, but for an error by his attorney, the result of the proceeding would have differed. *See Strickland,* 466 U.S. at 695. First, Blazak provided both expected testimony that helped the defense as well as, unexpected, damaging testimony. Throughout his testimony, Blazak remained consistent in

putting forth his views that supported Monschke's position that "white supremac[ists]" were not an "identifiable group" because there is too much disagreement among the people who share the white supremacist ideology. 34 RP at 2891. Blazak also testified that Volksfront has a hierarchy in which members "gain status . . . through hard work and dedication." 34 RP at 2920.

Additionally, he explained how a person might obtain notoriety among people who are white supremacists by murdering someone inferior, but he maintained that white supremac[ists] do not have a formal hierarchy or status structure. Blazak further testified that Volksfront may secretly promote violence, but he also stated that, "having monitored [Volksfront,] we couldn't come up with any incidents of anybody who has been promoted because of any act of violence." 34 RP at 2914. Blazak also testified that Volksfront e-mailed Blazak, saying that they "condemn acts of violence and [Monschke's] membership . . . had been terminated," that "the movement of Volksfront is to say these violent offenders are hurting [their] larger cause," that "newer members of the Volksfront are less violent," and that he believes Randall Craiger, the leader of Volksfront, "is sincere in his desire to take Volksfront into this new [nonviolent] territory of white supremacy." 34 RP at 2914, 2964, 2970, 2972.

It is unclear whether Monschke is arguing that his trial attorneys should have called another expert or no expert at all. But even without Blazak's testimony, there was sufficient evidence for a reasonable jury to have found the aggravating circumstance based on other trial testimony. For example, the State's expert witness testified that many white supremacist groups internally advocate violence but publicly profess nonviolence to avoid civil liability. *Monschke*, 133 Wn. App. at 327. Thus, the State had already offered testimony similar to Blazak's. Additionally, Monschke admitted his involvement in Volksfront. Frye's testimony about going

out with Monschke, Butters, and Pillatos to earn her red shoelaces, which would mean increased notoriety among white supremacists, also supports the aggravating circumstance.

Because we hold that Monschke's counsel was not deficient and did not prejudice Monshke's right to a fair trial, his ineffective assistance of counsel claim fails.

III. PROSECUTORIAL MISCONDUCT

Monschke also argues that the prosecutor committed misconduct by having Frye testify at Monschke's trial, "knowing [she and Pillatos] had concocted a false story." Br. of Pet'r at 34 (emphasis omitted). The State responds that the prosecutor did not "offer a plea agreement to Ms. Frye . . . for any improper purpose" and that Ms. Frye did not commit perjury, or, if she did, the prosecution did not know about it. Br. of Resp't at 18.

A. Standard of Review

To prevail on a prosecutorial misconduct claim, a petitioner "'must establish both improper conduct by the prosecutor and prejudicial effect.'" *Pirtle*, 136 Wn.2d at 481-82 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). To establish prejudice, the petitioner must show a substantial likelihood that the misconduct affected the jury's verdict. *Pirtle*, 136 Wn.2d at 481-82. Additionally, the petitioner must show actual and substantial prejudice arising from a violation of his constitutional rights or by a fundamental error of law. *Pirtle*, 136 Wn.2d at 482.

B. Prosecutor's Plea Agreement With Frye

Monschke claims that the prosecutors encouraged Frye to commit perjury by entering a favorable plea agreement that required her to testify against Monschke. Monschke further alleges that Frye's favorable plea agreement was obtained because Pierce County Prosecutor Gerald Horne was friends with Judith Mandel, Frye's defense attorney. Monschke also argues

that correspondence between Pillatos and Frye indicated that they were "'fabricating a story in an attempt to perpetrate a fraud on the Court and the prosecutor's office.'" Br. of Pet'r at 35 (quoting PRP, Decl. of Barbara Corey (Dec. of Corey) at 2).

In support of his claim of prosecutorial misconduct, Monschke submitted an affidavit from Barbara Corey, a former prosecutor who represented the State in this case before Frye, Butters, and Pillatos entered the plea agreements. Corey opines that (1) Pillatos and Frye "were indeed fabricating a story in attempt to perpetrate a fraud on the Court and the prosecutor's office"; (2) Prosecutors Horne, Costello, and Greer knew of Pillatos and Frye's plan to manipulate the trial; and (3) Frye's favorable plea agreement was based on a personal friendship between Mandel and Horne. Dec. of Corey at 2.

The State's affidavits from the two prosecutors, Gregory Greer and Gerald Costello, who executed the plea agreement with Frye, maintain that (1) Corey had personal animosity against Mandel; (2) Horne was not involved in the decision to offer Frye a plea; and (3) the plea offered to Frye was not based on any personal relationship with Frye's attorney but, because she "was least culpable of the four co-defendants." Br. of Resp't at 18, App. M at 5. These affidavits demonstrate the State's legitimate purpose in offering Frye a plea agreement. Br. of Resp't, App. O at 2 ("Mr. Greer and I decided to enter into an agreement with Ms. Frye because she was convincing, credible, and the least culpable."). Additionally, the State provided Frye's plea agreement to the defense, which they used to cross-examine Frye.

Moreover, even if Frye had not testified against Monschke, the State would have offered the testimony of Butters, Pillatos, and two other witnesses to the crime, Terry Hawkins and

Cindy Pitman.[10] Thus, Monschke has not established improper conduct by the prosecutor in entering a plea agreement with Frye, nor has he shown any prejudicial effect arising from the plea deal. His prosecutorial misconduct claim based on Frye's plea and testimony on behalf of the State fails.

Monschke also argues that the State committed misconduct by having Frye testify when it knew that Frye and Pillatos had communicated about their testimony. "It is fundamentally unfair for a prosecutor to knowingly present perjury to the jury" and "the use of known lies to get a conviction deprives a defendant of his constitutional right to due process of law." *U.S. v. LaPage*, C.A. 9 (Cal.), 231 F.3d 488, 491 (9th Cir. 2000). Conflicting witness testimony does not demonstrate that the witnesses committed perjury or that the prosecutor knew of any alleged perjury. Additionally, "[c]redibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, Monschke; Frye, Butters; and Pillatos all testified at Monschke's trial. And although their testimony differed about the sequence of events the night of the murder and Monschke's participation in the assault on Townsend, the defense had the opportunity to cross-examine and impeach all of Monschke's codefendants, particularly Frye and Pillatos, using the known content of their communications before they entered their pleas and before they testified. On cross-examination, Monschke's counsel confronted Frye about only one letter she had written from jail, and it was one she had written to Monschke, not Pillatos.

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[10] Hawkins told police that he saw three men and a woman kicking dirt and hitting at the ground; at trial, he testified that he saw two men swinging bats, a woman kicking, and a third man standing four feet away. Pitman told police and later testified that she saw three men with shaved heads swinging and kicking but did not see a woman.
Monschke, 133 Wn. App. at 319.

Our review of other jail correspondence Frye wrote shows that, although she wanted direction from Pillatos, she also demonstrated remorse and repeatedly discussed her intention to tell the truth and her desire for Pillatos to support her decision to testify truthfully.[11] It is likely that if the defense had attempted to impeach Frye with the letters she wrote Pillatos or others that the State would have responded by introducing the numerous letters wherein she wrote about telling the truth and wanting to take a polygraph examination. Therefore, defense counsel likely made the tactical decision not to attempt to impeach Frye based on her communication with Pillatos because they knew the attempt would be unsuccessful and might open the door to evidence that would bolster her credibility with the jury.

Furthermore, Monschke has not demonstrated that Frye committed perjury, as he failed to identify what portion of Frye's testimony constituted perjury. He points only to the prosecutors' knowledge that Pillatos and Frye communicated about assisting each other, which knowledge the

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[11] ("I'm going to have to [d]o things I really [d]on't want to for my freedom. Like testify to what I saw. All of it. Even the parts I want to leave out."); ("I'm gonna have to be real and tell the truth."); ("Anyhow, ask David what he wants me to [d]o. I am not ready to [d]ecide on my own, this baby is ½ his."); ("All I care about is David! I need to know what he wants me to do? To me it seems I have no way out. What about baby?"); ("I am soo irritated with not knowing what to do. I [d]on't want to end up having David hate me or you or anyone else you know!"); ("My attorney promises good things but I have to be 100% honest and go with whatever she says. The Lord told me to do the same."); ("[R]egardless I am going to tell the whole truth."); ("Don't worry about me, I'm gonna do what I have to do to get out of here and raise your child and be with you in your life again. I will testify, take a polygraph, whatever my lawyer says so long as I can raise this baby."); ("Tell [D]avid I am really sorry I've gotta do this but I want to be free for our child and him too, if he gets out any time or if he doesn't!"); ("I am doing everything in my power to tell the truth and be able to raise our son."); ("The full truth has to be known and I need to have faith that God will see that through. He wants justice and even in the Bible it says not to lie in court."); ("I have also been thinking deeply about this mess and how I ended up in it. I can't believe it even happen[e]d. It still messes with me every day."); ("It'll probably hurt all of the boys but I have to tell the truth and go home [a]nd be a mom."); ("I have to testify ag[ai]nst one of the boys first. The other two plead already. I'm looking at 165 months. I'm gonna miss out on a big piece of life but at least I know that by testifying the truth will be out and I can have a little piece [sic] of mind."). Br. of Resp't, App. S at 1650, 1651, 1695, 1721, 1725, 1785, 1826, 1845, 1990, 2528, 2599, 2662, 5412, 6522.

prosecutors shared with the court and defense when they discovered these communications, making all aware of their violation of the court's order. Monschke's prosecutorial misconduct claims fail.

Because Monschke fails to establish prejudice arising from constitutional error, a fundamental defect which inherently results in a complete miscarriage of justice or the existence of material disputed issues of fact, we deny his personal restraint petition.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.
VAN DEREN, J.

We concur:

ARMSTRONG, J.

HUNT, J.

Case Number: 03-1-01464-0 Date: December 10, 2018
SerialID: 709E4409-8FE9-4ACF-8815C1B33A54A16C
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 10 day of December, 2018

Kevin Stock, Pierce County Clerk

By /S/Jessica Hite, Deputy.
Dated: December 10, 2018 12:56 PM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

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This document contains 20 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX “D”

No.: 03-1-01464-0

SUPERIOR COURT OF WASHINGTON
FOR Pierce COUNTY

STATE OF WASHINGTON
Respondent,

v.

Kurtis William Monschke Defendant.

MOTION TO VACATE JUDGMENT
CrR 7.8

Kurtis Monschke #871510
Clallam Bay CorrectionCenter
1830 Eaglecrest Way,
Clallam Bay, WA. 98326

CrR 7.8 MOTION

I. ISSUE

The Judgment and Sentence issued by this Court is invalid on its face. The financial burden imposed was done, without a hearing and actual written finding, that Mr. Monschke had, or would have, the ability to pay. It constitutes cruel and unusual punishment to destitude and indebt a person to the point that it impoverus that person's family.

II. RESTRAINT

Mr. Monschke is held in unlawful restraint under this action's cause number at the Clallam Bay Correction Center at Clallam Bay, Washington, in Clallam County.

III. VENUE

This Pierce County Superior Court has venue as it was the sentencing Court.

IV. JURISDICTION

The Washington State Constitution gives the Superior Court authority and jurisdiction to hear collateral challenges under CrR 7.8. Trial Courts have concurrent jurisdiction with the appellate Court to grant post-conviction relief in Washington. Tolliver V. Olsen, 109 Wn.2d 607, 745 P.2d 809 (1987). Courts have a duty and power to correct an erroneous sentence upon its discovery. In re Pers. Restraint of Call, 144 Wn.2d 315, 334, 28 P.3d 709 (2001).

V. TIMELINESS

RCW 10.73.090's one year time bar does not apply to judgment and sentence that is invalid in itself. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002); McNutt V. Delmore, 47 Wn.2d 563, 565, 283 P.2d 848 (1955) ("When a sentence has been imposed for which there is no authority in law, the trial Court has the power and duty to correct the erroneous sentence, when the error is discovered") (emphasis omitted), cert. denied, 350 U.S. 1002 (1956), overruled in part by State V. Sampson, 82 Wn.2d 663, 513 P.2d 60 (1973). The timebar is not applicable to judgments and sentences that appear facially invalid. State V. Hibdon, 140 Wn.App. 534, 166 P.3d 825 (2007).

VI FACTS

This Court did make a required finding that Mr. was indigent and was not able to afford counsel or the cost of trial. This Court granted Mr. Monschke these services at public expense. At sentencing, this Court made no finding that Mr. Monschke 's financial status had changed or that he could pay costs, fines or restitution. This Court did not determine if Mr. Monschke would have the future ability to pay the financial part of the sentence this Court imposed. After sentencing, the Court did continue Mr. Monschke's indigency so that he could appeal at public expense. Mr. Monschke has been in jail and in prison since he was sentenced on this cause number. During his jail and prison time, Mr. Monschke has not

been afforded any opportunity to work a Class-One prison industry job that pays minimum wage to be able to pay against this cause number. The odds that Mr. Monschke can obtain one of these Class-One minimum wage jobs are likely a billion to one. The Washington State Department of corrections Purposely ignores the Legislative Mandate to bring back Class-One industry jobs so prisoners can be able to pay their legal financial obligations because it interferes with the privitized profits that Correctional Industries make the ex-prison execs share holders that were criminal-minded enough to introduce Legislation, and pay to get passed, that makes "Public disclosure" impossible to monitor their graft and corruption. The only money Mr. Monschke has been able to earn at a full time job is a "stipend" given to keep him from incurring a further debt for hygiene and postage that he would never be able to pay without. The money that has been paid against Mr. Monschke's Legal Financial Obligations has come from money sent in from his family and friends as a charity since he is in financial modern day slavery. Mr. Monschke has been well below the lowest state or federal poverty level each year imprisoned on this cause number.

VII. ARGUMENT

Stare Decis and the Supremacy Clause applies here. Slavery is constitutionally illegal. "The Supremacy Clause in the United States Constitution gives the Federal Government the power to

pre-empt state Law." Beatty V. Washington Fish and Wildlife Com'n., 341 P.2d 291, 306 (2015)(quoting Arizona V. United States, __U.S.__, 132 S.Ct. 3492, 2500-01, 183 L.Ed.2d 351 (2012). The Preemption Doctrine derives from the Supremacy Clause, which provides, "this Constitution, and the LAWS of the Land; and Judges in every State shall be bound thereby, anything in the Constitution or LAWS of any State to the contrary not withstanding. U.S. Const. art. VI, cl 2." Mellon V. Regional Trustee Services Corp., 182 Wn.App. 476, fn 4, 334 P.2d 1120 (2014). The Washington State Supreme Court exercised its own RAP 2.5 discretion to correct a manifest injustice. They held, "the State cannot collect money from defendants who cannot pay, which obviate one of the reasons for Courts to impose LFO's. See RAP 9.94A.030." State V. Blazina, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). The Blazina Court held that, "a trial Court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the Court imposes L.F.O.'s. Because the trial Judges failed to make this inquiry, we remand to the trial Courts for new sentencing hearings." Blazina, 344 P.3d at 681. Because Mr. Monschke's sentencing Court failed in their statutory obligation to hold an individualize inquiry as held in Blazina that they must make before imposing LFO's Mr. Monschke's sentence is invalid on its face. Stare Decis does apply that this Court must follow. "Decision by the Supreme Court takes precedence over a decision by the Court of Appeals." State V. Taylor, 91 Wn.App. 505, 958 P.2d 1032, 1034 (1998). The Blazina Court

agreed with RCW 10.01.160(3) "the Court shall not order a defendant to pay cost unless the defendant is or will be able to pay them." (emphasis added). Blazina, 182 Wn.2d at 838.

VIII RELIEF REQUESTED

Since it is axiomatic that Mr. Monschke does not have, nor will not have an ability to pay his LFO's through earning money on his own, vacation of the LFO portion of his sentence without his presence is requested. The return of his families and friends money taken by the Department of Corrections without legal authority is also requested as this is meant for a charity for Mr. Monschke's impoverished state. Or, bring Mr. Monschke back for a resentencing hearing in the alternative.

Respectfully submitted,

Kurtis Monschke, Pro Se

Dated: 12/3/15

Kurtis Monschke, pro se

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR Pierce COUNTY

State of Washington, No. 03-1-01464-0

Plaintiff / Petitioner,

v.

ORDER

Kurtis William Monschke

Defendant / Respondent. (Clerk's Action Required)

THIS MATTER having come before the Court, and the Court having considered the briefs filed relative to this motion,

IT IS HEREBY ORDERED that the motion of the moving party is hereby GRANTED, and the Clerk is directed to _____

_____

DONE IN OPEN COURT this _____ day of _____, 201__.

_____
Judge / Commissioner

Proposed Order presented by:

Case Number: 03-1-01464-0 Date: December 10, 2018
SerialID: 3DA90C1F-BDA9-4FCC-B213D867678886CB
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 10 day of December, 2018

Kevin Stock, Pierce County Clerk

By /S/Jessica Hite, Deputy.
Dated: December 10, 2018 12:56 PM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

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APPENDIX "E"

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff

vs.

MONSCHKE, KURTIS WILLIAM,
Defendant

Cause No: 03-1-01464-0

ORDER ON DEFENDANT'S MOTION TO MODIFY JUDGMENT AND SENTENCE

CLERK'S ACTION REQUIRED

THIS MATTER came before the undersigned judge of the above entitled court upon review of the defendant's motion CrR 7.8 filed on December 15, 2015. After reviewing the defendant's written pleadings, the court now enters the following order pursuant to CrR 7.8(c)(2):

A. [X] IT IS HEREBY ORDERED that this petition is transferred to the Court of Appeals, Division II, to be considered as a personal restraint petition. The petition is being transferred because:

[X] it appears to be time-barred under RCW 10.73.090;

[ ] is not time-barred under RCW 10.73.090, but is untimely under CrR 7.8(a) and therefore would be denied as an untimely motion in the trial court; or

[ ] is not time barred but does not meet the criteria under CrR 7.8 (c)(2) to allow the court to retain jurisdiction for a decision on the merits.

If box "A" above is checked, the Pierce County Superior Court Clerk shall forward a copy of this order as well as the defendant's pleadings identified above, to the Court of Appeals.

B. [ ] IT IS HEREBY ORDERED that this court will retain consideration of the motion because the following conditions have been met: 1) the petition is not barred by the one year time bar in RCW 10.73.090, and either:

[ ] the defendant has made a substantial showing that he or she is entitled to relief; or

[ ] the resolution of the motion will require a factual hearing.

IT IS FURTHERED ORDERED that the defendant's motion shall be heard on its merits. The State is directed to:

[ ] file a response by _____. After reviewing the response, the Court will determine whether this case will be transferred to the Court of Appeals, or if a hearing shall be scheduled.

[ ] appear and show cause why the defendant's motion should not be granted. That hearing shall be held on _____ at _____ a.m. / p.m.

[ ] As the defendant is in custody at the Department of Corrections, the State is further directed to arrange for defendant's transport for that hearing.

If box "B" above is checked, the clerk is directed to send a copy of this Order to the Appellate Division of the Pierce County Prosecutor's Office.

DATED this 13th of January, 2016.

FILED
DEPARTMENT 16
IN OPEN COURT
JAN 13 2016
PIERCE COUNTY, Clerk
By _____ DEPUTY

JUDGE Elizabeth P. Martin

Case Number: 03-1-01464-0 Date: December 10, 2018
SerialID: 1AF6AB2A-846E-448A-BB28B3E6D961443D
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 10 day of December, 2018

Kevin Stock, Pierce County Clerk

By /S/Jessica Hite, Deputy.
Dated: December 10, 2018 12:56 PM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

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This document contains 2 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "F"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of FRED C. MYERS, Petitioner.	Nos. 47954-1-II 48424-2-II 48460-9-II ORDER LIFTING STAYS AND DENYING PETITIONS
In re the Personal Restraint Petition of MAURICE TERRELL WALKER, Petitioner.	
In re the Personal Restraint Petition of KURTIS WILLIAM MONSCHKE, Petitioner.	

Fred C. Myers, Maurice Terrell Walker, and Kurtis William Monschke seek relief from personal restraint imposed following their 2005, 2010, and 2004 convictions under Pierce County cause numbers 04-1-05714-2, 10-1-03340-0, and 03-1-01464-0. They argue that the trial court failed to conduct individualized inquiries into their current or future ability to pay discretionary legal financial obligations (LFOs).

We stayed these petitions pending the resolution of *In re Personal Restraint of Dove*, 196 Wn. App. 178, 381 P.3d 1280 (2016), *review denied*, 188 Wn.2d 1008 (2017). *Dove* is now final. Accordingly, we lift the stay in these matters.

Recent opinions establish that the one-year time-bar, RCW 10.73.090, applies to personal restraint petitions challenging LFOs. *In re Pers. Restraint of Flippo*, 187 Wn.2d 106, 111, 113-14, 385 P.3d 128 (2016); *Dove*, 196 Wn. App. at 160-61. Petitioners filed these petitions more than one year after their judgment and sentences became final.[1] Thus, these petitions are untimely.[2]

Accordingly, it is hereby ORDERED that the stays are lifted in these matters, any motions for appointment of counsel are denied, and these petitions are denied.

Johanson, J.
JOHANSON, P.J.

We concur:

Melnick, J.
MELNICK, J.

Sutton, J.
SUTTON, J.

cc: Fred C. Myers
Maurice Terrell Walker
Kurtis William Monschke
Pierce County Clerk
County Cause No(s). 04-1-05714-2, 10-1-03340-0, 03-1-01464-0
Mark Lindquist, Pierce County Prosecuting Attorney

[1] Myers's judgment and sentence became final when his direct appeal mandated in 2007. RCW 9.94A.030(3)(b). He filed this petition in 2015.

Walker did not appeal, so his judgment and sentence became final when it was filed in 2010. RCW 9.94A.030(3)(a). He filed this petition in 2016.

Monschke's judgment and sentence became final when his direct appeal mandated in 2007. RCW 9.94A.030(3)(b). He filed this petition in 2015.

[2] We note that although these petitions are untimely, they are not frivolous for the purpose of RCW 4.24.430, which limits the number of times this court can waive a petitioner's filing fee, because whether this type of petition was subject to the time-bar was a debatable question at the time these petitions were filed.

Case Number: 03-1-01464-0 Date: December 10, 2018
SerialID: D9E65842-32A9-4B89-B6D94E0E48B4EC29
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 10 day of December, 2018

Kevin Stock, Pierce County Clerk

By /S/Jessica Hite, Deputy.
Dated: December 10, 2018 12:56 PM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

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APPENDIX "G"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KURTIS WILLIAM MONSCHKE, Appellant.	No. 31847-4-II MANDATE Pierce County Cause No. 03-1-01464-0

The State of Washington to: The Superior Court of the State of Washington in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on June 1, 2006 became the decision terminating review of this court of the above entitled case on March 6, 2007. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

Judgment Creditor Respondent State: $52.39
Judgment Creditor A.I.D.F.: $20,716.75
Judgment Debtor Appellant Monschke: $20,769.24

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 13th day of March, 2007.

Clerk of the Court of Appeals,
State of Washington, Div. II

Kathleen Proctor
Pierce County Prosecuting Atty Ofc
930 Tacoma Ave S Rm 946
Tacoma, WA, 98402-2171

Rita Joan Griffith
Attorney at Law
1305 NE 45th St Ste 205
Seattle, WA, 98105-4523

Hon. Lisa R. Worswick
Pierce Co Superior Court Judge
930 Tacoma Ave So.
Tacoma, Wa 98402

Indeterminate Sentence Review Board

Case Number: 03-1-01464-0 Date: December 10, 2018
SerialID: 3649F1F0-AE94-4183-9716C3C8076A6953
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 10 day of December, 2018

Kevin Stock, Pierce County Clerk

By /S/Jessica Hite, Deputy.
Dated: December 10, 2018 12:56 PM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

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PIERCE COUNTY PROSECUTING ATTORNEY

December 11, 2018 - 12:18 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52286-1
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:

- 522861_Personal_Restraint_Petition_20181211121818D2572515_3646.pdf
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  Personal Restraint Petition - Response to PRP/PSP
  The Original File Name was prp Monschke.pdf

A copy of the uploaded files will be sent to:

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Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us
Filing on Behalf of: Nathaniel Block - Email: nathaniel.block@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

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