Jesse Wing
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Seattle, Washington 98104-1745
206-622-1604

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON AT RICHLAND

HUMAN RIGHTS DEFENSE CENTER, Plaintiff, v. JEFFREY A. UTTECHT, SUPERINTENDENT OF COYOTE RIDGE CORRECTIONS CENTER OF the WASHINGTON DEPARTMENT OF CORRECTIONS, in his individual and official capacities; JOHN D. TURNER, MAILROOM SERGEANT of COYOTE RIDGE CORRECTIONS CENTER, in his individual and official capacities, Defendant.	No. COMPLAINT DEMAND FOR JURY TRIAL

I. NATURE OF THE CASE

1.1 Plaintiff Human Rights Defense Center brings this action to enjoin Defendants' censorship of its publication titled THE HABEAS CITEBOOK: INEFFECTIVE ASSISTANCE OF COUNSEL – 2nd edition (2016) that Plaintiff sends to prisoners who are held in custody at the Coyote Ridge Corrections Center of the

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Washington Department of Corrections, in violation of the First Amendment and the Fourteenth Amendment's Due Process Clause of the United States Constitution.

1.2 Defendants have adopted and implemented mail policies, practices, customs, or usages that unconstitutionally restrict correspondence to prisoners, that prohibit legal materials, and that do not afford adequate due process notice and an opportunity to challenge the censorship as required by the Constitution.

II. PARTIES

2.1 Plaintiff Human Rights Defense Center (HRDC) is a Washington Non-Profit Corporation that publishes and distributes THE HABEAS CITEBOOK: INEFFECTIVE ASSISTANCE OF COUNSEL – 2nd edition (2016).

2.2 Defendant Superintendent Jeffrey A. Uttecht. At all times relevant, Jeffrey A. Uttecht has been Superintendent of Coyote Ridge Corrections Center. Superintendent Uttecht is an employee of the State of Washington, Department of Corrections. Defendant Uttecht is responsible for making decisions about approving or rejecting documents containing case law, reviewing publications rejected from the Coyote Ridge Corrections Center, and responding to appeals about censored correspondence, or delegating those responsibilities to a designee to do so on his behalf. All of his acts and omissions alleged herein occurred within the scope of his employment, under color of state law.

2.3 Defendant Mailroom Sergeant John D. Turner. At all times relevant, John D. Turner has been the Mailroom Sergeant of Coyote Ridge Corrections Center. Sergeant Turner is an employee of the State of Washington, Department of Corrections. All of his acts and omissions alleged herein occurred within the scope of his employment, under color of state law.

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III. JURISDICTION AND VENUE

3.1 This action arises under the First and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

3.2 Venue is proper in the Eastern District of Washington under 28 U.S.C. § 1391(b)(2) because a substantial part of the events complained of occurred in this District, and because the Defendants reside in this District.

IV. FACTS

4.1 The core of Plaintiff HRDC's mission is public education, prisoner education, advocacy, and outreach in support of the rights of prisoners and in furtherance of basic human rights. The organization publishes and distributes a monthly journal named *Prison Legal News* of corrections news and analysis and certain books about the criminal justice system and legal issues affecting prisoners, to prisoners, lawyers, courts, libraries, and the public throughout the country. HRDC also maintains a website (www.prisonlegalnews.org) and operates an email list. Prisoners of all types, family and friends of prisoners, and prisoner advocates, are among the intended beneficiaries of HRDC's activities.

4.2 Among its educational activities, HRDC publishes and distributes THE HABEAS CITEBOOK: INEFFECTIVE ASSISTANCE OF COUNSEL – 2nd edition (2016), a citation book for federal habeas corpus cases in which the prayer for relief is based on ineffective assistance of counsel. The book is designed to assist pro se prisoners understand how to approach a habeas corpus case. The book contains sample pleadings that readers can refer to as an example for formatting their pleadings and presenting argument to the courts. The names of the parties are redacted from the pleadings. **Exhibit A** hereto is a true copy of the cover page, table of contents,

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publisher's introduction, and the example submissions contained in THE HABEAS CITEBOOK.

4.3 HRDC distributes THE HABEAS CITEBOOK to prisoners across the country.

4.4 HRDC sent at THE HABEAS CITEBOOK to at least eighteen (18) prisoners incarcerated at the Coyote Ridge Corrections Center in Connell, WA between June 2019 and June 2020.

4.5 On April 23, 2020, Defendants rejected THE HABEAS CITEBOOK sent to Johnson Ayodeji. Johnson Ayodeji was a prisoner at Coyote Ridge Corrections Center when Defendants received THE HABEAS CITEBOOK from HRDC. The Defendants rejected the THE HABEAS CITEBOOK stating:

> "Per DOC Policy 590.500. Section III. 2. Individuals will not possess case law documents, including discovery material, unless approved by the Superintendent/designee., 3. Individuals will not possess legal materials (e.g., case law, legal documents) containing information about another incarcerated Washington State incarcerated individual[.] The Habeas Citebook rejected contains case law."

4.6 On May 13, 2020, Paul Wright, the Executive Director of the HRDC, wrote an appeal request to the mailroom sergeant, Defendant John D. Turner, challenging the rejection of THE HABEAS CITEBOOK that had been sent to Johnson Ayodeji.

4.7 HRDC sent the appeal through United States Postal Service certified mail, which was delivered to the Coyote Ridge Corrections Center on May 18, 2020, which Defendants received on May 21, 2020.

4.8 On or about May 29, 2020, HRDC received a letter from the Mailroom Sergeant for the Coyote Ridge Corrections Center, Defendant John D. Turner, denying HRDC's appeal, explaining:

> As outlined in DOC Policy 450.100 you failed to request to appeal the rejected item in the allotted 20 day time frame, where as you generated your appeal on the 13th of May which would have been the

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due date to my desk for the appeal to be granted as such the time for delivery didn't allow the time allotted for prompt delivery to my desk.

As you failed to get the requested appeal to my desk as outlined in DOC policy 450.100 your appeal is denied.

4.9 The same Rejection Notice that HRDC had appealed but which appeal Defendant Turner had rejected as untimely, had notified HRDC: "An appeal request is not needed for…rejected publications, which are automatically reviewed by the Superintendent/designee or Publication Review Committee."

4.10 On June 10, 2020, HRDC mailed THE HABEAS CITEBOOK addressed to each of the following prisoners at the Coyote Ridge Corrections Center:

Prisoner Name

Carl Brooks

Frank Harmon

Gregg Hansen

Robert Nicholson

William Brooks

The individuals identified above were prisoners at the Coyote Ridge Corrections Center when the Defendants received THE HABEAS CITEBOOK.

4.11 On June 12, 2020, HRDC mailed THE HABEAS CITEBOOK addressed to each of the following prisoners at the Coyote Ridge Corrections Center:

Prisoner Name

John Buchmann

Richard King

Richard Manthie

Roland Pitre

Rory Star

The individuals identified above were prisoners at the Coyote Ridge Corrections Center when the Defendants received THE HABEAS CITEBOOK from HRDC.

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4.12 On June 15, 2020, HRDC mailed THE HABEAS CITEBOOK addressed to each of the following prisoners at the Coyote Ridge Corrections Center:

Prisoner Name
Charles McKee
Clinton Judd
Del Ferguson
Edward Payne
Shane Smith

The individuals identified above were prisoners at the Coyote Ridge Corrections Center when the Defendants received THE HABEAS CITEBOOK.

4.13 On June 18, 2020, Coyote Ridge Corrections Center rejected THE HABEAS CITEBOOK sent to the following prisoners:

Prisoner Name
Carl Brooks
Frank Harmon
Gregg Hansen
Robert Nicholson
William Brooks

The individuals identified above were prisoners at the Coyote Ridge Corrections Center when Defendants rejected THE HABEAS CITEBOOK from HRDC. In rejecting THE HABEAS CITEBOOK, Defendants stated that "page 213-235 contains example submissions of case law filed in US District Court in Washington State. Case law has not been properly redacted and contains information related to other WA state incarcerated offenders." The rejection notice was mailed to HRDC, which received it on June 22, 2020.

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4.14 On June 23, 2020, Paul Wright, the executive director of the HRDC, wrote an appeal to the mailroom sergeant of Defendants' rejection of THE HABEAS CITEBOOK that HRDC sent to the five individuals identified above.

4.15 HRDC sent the appeal through United States Postal Service certified mail on June 23, 2020. The appeal was picked up at the Postal Facility at 9:13 am on June 26, 2020 and was stamped as received on June 29, 2020.

4.16 On June 25, 2020, Coyote Ridge Corrections Center rejected THE HABEAS CITEBOOK sent to the following prisoners:

Prisoner Name

Charles McKee

Edward Payne

The individuals identified above were prisoners at the Coyote Ridge Corrections Center when Defendants rejected THE HABEAS CITEBOOK from HRDC. In rejecting THE HABEAS CITEBOOK, Defendants stated "the book Habeas Citebook uses examples of other offender's cases. Book is rejected;" and "the book, The Habeas Citebook: Ineffective Assistance of Counsel, contains case law material that is not approved for offender retention. Case law must be acquired through the law library." The rejection notice was mailed to HRDC, which received it on June 29, 2020.

4.17 On June 29, 2020, HRDC sent a letter to each of the following prisoners:

Prisoner Name

Carl Brooks

Charles McKee

Clinton Judd

Del Ferguson

Edward Payne

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Frank Harmon
Gregg Hansen
John Buchmann
Richard King
Richard Manthie
Robert Nicholson
Roland Pitre
Rory Star
Shane Smith
William Brooks

The letter notified each individual that HRDC had mailed to each prisoner THE HABEAS CITEBOOK, which the individual should have received by that point. HRDC's letter asked each prisoner to notify HRDC whether he had received the book along with any other material that accompanied it.

4.18 On June 30, 2020, on behalf of Defendants, Defendant Mailroom Sergeant John D. Turner rejected THE HABEAS CITEBOOK sent to Richard Manthie. Richard Manthie was a prisoner at the Coyote Ridge Corrections Center at the time the Corrections Center rejected the book. The Center rejected THE HABEAS CITEBOOK because "[i]ndividuals will not possess legal materials (e.g. case law, legal documents) containing information about another incarcerated Washington State individual." The rejection notice was mailed to HRDC, which received it on July 6, 2020.

4.19 Together with this mail rejection notice, Defendant Turner sent a letter to HRDC explaining: "In my view and review of DOC policy 590.500 I understand the policy to not allow the offender population to have the information in the book, as such I have rejected the book as a publication rejection for review by the Headquarters publication committee as this is the best way I could see to

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have the issue resolved." He added, "I believe this will resolve any issues of the book being allowed or not allowed. I am currently changing all rejections for the book to publication rejections and will be sending out new notices to update the rejections and inform the offender population."

4.20 However, Defendants did not send new notices to "update" the earlier rejection notices or otherwise communicate with HRDC about any "review" by the Headquarters publication committee or any decision made about the censorship of HRDC's publication.

4.21 On July 7, 2020, HRDC received a letter from Charles McKee alerting it that he had not received THE HABEAS CITEBOOK. Mr. McKee stated that he appealed Coyote Ridge Corrections Center's rejection of THE HABEAS CITEBOOK. In his letter Mr. McKee explained his need for THE HABEAS CITEBOOK as a pro se litigant, remarking that the book includes information related to his case that he cannot get in the prison law library. Mr. McKee wrote that he needed the book as soon as possible because he had planned to rely on it in meeting an upcoming filing deadline.

4.22 On July 11, 2020, Frank Harmon wrote HRDC alerting it that he had not received THE HABEAS CITEBOOK and had been notified that the book sent to him had been rejected. HRDC received his letter on July 16, 2020.

4.23 On July 12, 2020, Edward Payne wrote HRDC alerting it that he had not received THE HABEAS CITEBOOK and had been notified that the book sent to him had been rejected. HRDC received his letter on July 16, 2020.

4.24 On July 13, 2020, Richard Manthie wrote HRDC alerting it that he had not received THE HABEAS CITEBOOK and had been notified that the book sent to him had been rejected. Mr. Manthie wrote that he had appealed Coyote Ridge Corrections Center's rejection of the book. HRDC received his letter on July 17, 2020.

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4.25 On July 18, 2020, Carl Brooks wrote HRDC alerting them that he had not received THE HABEAS CITEBOOK and had been notified that the book sent to him had been rejected. Mr. Brooks stated he had appealed Coyote Ridge Corrections Center's rejection of the book on July 8, 2020 but had not heard back. HRDC received his letter on July 24, 2020.

4.26 Defendants failed to provide a written notice of rejection for each HRDC publication that it censored.

4.27 HRDC intends to continue sending THE HABEAS CITEBOOK to prisoners at Coyote Ridge Corrections Center in the future.

DOC Policy[1]

4.28 **Possession of Legal Materials:** DOC Policy on "Legal Access for Incarcerated Persons," 590.500, states in pertinent part:

> Possession of Legal Materials/Documents
>
> …
>
> "3. Individuals will not possess legal materials (e.g., case law, legal documents) containing information about another incarcerated Washington State incarcerated individual."

4.29 DOC Policy on "Mail for Individuals in Prison," 450.100, states in pertinent part:

> **Rejecting Mail**
>
> "C. Rejected incoming mail/eMessages can be appealed to the superintendent/ designee by submitting a written request to the mailroom within… 20 days of the rejection if appealed by the sender."
>
> **Publications**

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[1] Defendants' rejection notices identified above contain portions of the DOC's written policies. The policies relating to mail are lengthy and are only partially quoted in this Complaint.

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> "B.1. Individuals may receive new books, newspapers, certain catalogs and brochures, and other publications in any language sent directly from the publisher(s) and/or approved vendor(s)."
>
> "H. Publications with content that violates any Department policy or facility specific procedure will be referred to the Publication Review Committee for further review and a final decision."
>
> The receiving mailroom will:
>
> a. Scan the questionable page(s) from the publication and a completed DOC 05-525 Rejection Notice to the shared folder at Headquarters. 1) A new rejection notice will be completed and distributed for subsequent publications received with the same title, copyright date, and volume/issue number.
>
> b. Provide the individual and vendor/publisher with a copy of DOC 05-525 Rejection Notice.
>
> c. Notify Prison mailrooms and Washington State Library contract staff that the publication is being held for review by the committee.
>
> The committee will review the facility's decision and return the completed DOC 05-525 Rejection Notice to the facility.
>
> The individual and vendor/publisher will be notified of the committee's decision. Notification should be made within 10 business days.
>
> The committee's decision will apply to subsequent publications that were held by any facility. Each facility will notify the individual of the committee's decision, including the date, on the original DOC 05-525 Rejection Notice. Subsequent notices will not contain a signature from the chair of the committee.
>
> …
>
> "5. …The vendor/publisher may appeal the committee's decision to the Mailroom Sergeant within 20 business days… which will be forward to the Headquarters Correctional Manager, who will provide a final decision to the requester."
>
> "6. The final decision will be binding for at least 3 years and will be maintained in a database by the Assistant Secretary for Prisons/designee."

4.30 Defendants' policies, practices, customs, or usages violate the First Amendment.

4.31 Defendants' policies, practices, customs, or usages unconstitutionally burden the First Amendment rights of Plaintiff, other correspondents who send

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mail to prisoners confined at the Coyote Ridge Corrections Center, and prisoners at the Coyote Ridge Corrections Center.

4.32 Defendants' policies, practices, customs, or usages violate the Due Process Clause of the Fourteenth Amendment.

4.34 Defendants' policies, practices, customs, or usages described above have a chilling effect on future speech.

4.35 Defendants' policies, practices, customs, or usages described above frustrate HRDC's organizational mission and have caused it to divert its resources.

4.36 Defendants' policies, practices, customs, or usages have violated, continue to violate, and are reasonably expected to violate in the future Plaintiff's constitutional rights to distribute its publication, communicate its political message to prisoners, to recruit new supporters, readers and subscribers, and have caused Plaintiff additional financial harm in the form of lost subscriptions, and lost publication and book purchases.

4.37 Defendants are responsible for or personally participated in creating and implementing these unconstitutional policies, practices, customs, or usages, or for training and supervising the mail staff members whose conduct also have injured and continue to injure Plaintiff and others, or ratified, or adopted the policies or actions described herein.

V. CAUSES OF ACTION

COUNT 1

FIRST AMENDMENT

TO THE UNITED STATES CONSTITUTION

5.1 Plaintiff alleges and incorporates by reference the preceding paragraphs.

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5.2 The acts described above constitute violations of Plaintiff's rights and the rights of prisoners confined at the Coyote Ridge Corrections Center under the First Amendment to the United States Constitution through 42 U.S.C. § 1983.

5.3 The acts described above have caused damages to Plaintiff and will continue to cause damage.

5.4 Plaintiff seeks nominal, compensatory, and punitive damages against all Defendants in their individual capacities.

5.5 Plaintiff seeks declaratory and injunctive relief against all Defendants in their official capacities.

COUNT 2

DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

5.6 Plaintiff realleges and incorporates by reference the preceding paragraphs.

5.7 The acts described above constitute violations of Plaintiff's rights and the rights of prisoners confined at the Coyote Ridge Corrections Center under the Fourteenth Amendment to the United States Constitution through 42 U.S.C. § 1983.

5.8 The acts described above have caused damages to Plaintiff and will continue to cause damage.

5.9 Plaintiff seeks nominal, compensatory, and punitive damages against all Defendants in their individual capacities.

5.5 Plaintiff seeks declaratory and injunctive relief against all Defendants in their official capacities.

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VI. INJUNCTION ALLEGATIONS

6.1 Defendants' unconstitutional policy, practices, customs, or usages are ongoing and continue to violate Plaintiff's constitutional rights and the rights of other correspondents and prisoners, and as such there is no adequate remedy at law.

6.2 Plaintiff is entitled to injunctive relief prohibiting Defendants from: refusing to deliver or allow delivery of THE HABEAS CITEBOOK to prisoners at Coyote Ridge Corrections Center, refusing to deliver or allow delivery of any other documents sent to prisoners at the Coyote Ridge Corrections Center that contain third party legal material, and censoring or rejecting mail on the same grounds that Defendants rejected the THE HABEAS CITEBOOK; and prohibiting Defendants from censoring mail without adequate due process of law.

VII. REQUEST FOR RELIEF

WHEREFORE, the Plaintiff requests relief as follows:

7.1 A preliminary injunction and a permanent injunction preventing Defendants from continuing to violate the Constitution, and providing other equitable relief;

7.2 A declaration that Defendants' policies, practices, customs, or usages violate the Constitution;

7.2 An award of nominal, compensatory, and punitive damages for each violation of its First Amendment rights to free speech and expression in an amount to be proved at trial;

7.3 An award of nominal, compensatory, and punitive damages for each violation of its Fourteenth Amendment rights to due process in an amount to be proved at trial;

7.4 A trial by jury;

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7.5 Costs, including reasonable attorney's fees, under 42 U.S.C. § 1988, and under other applicable law;

7.6 Pre-judgment and post-judgment interest;

7.7 The right to conform the pleadings to the proof and evidence presented at trial; and

7.8 Such other relief as the Court deems just and equitable.

DATED this 9th day of December, 2020.

MacDONALD HOAGUE & BAYLESS

By: *s/ Jesse Wing*

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EXHIBIT A

"...an essential resource..."
— Peter Schmidt, Publisher, *Punch & Jurists*

The HABEAS CITEBOOK: Ineffective Assistance of Counsel

2nd EDITION

By BRANDON SAMPLE & ALISSA HULL

Edited by SUSAN SCHWARTZKOPF

Foreword by ELIZABETH ALEXANDER

"...handy and easy-to-use..." — Kent Russell

The Habeas Citebook:

Ineffective Assistance of Counsel

Second Edition

Brandon Sample and Alissa Hull
Edited by Susan Schwartzkopf

Table of Contents

Publisher's Introduction

By Paul Wright

Executive Director
Human Rights Defense Center
Prison Legal News Publishing

The Habeas Citebook: Ineffective Assistance of Counsel, 2nd Edition by Brandon Sample is the fifth book to be printed and published by Prison Legal News Publishing. The first edition of *The Habeas Citebook* was the second title to be printed and published by Prison Legal News Publishing in 2010. The sales of THC were very successful and the book really met a need. Every week we receive a dozen letters from prisoners saying how much THC has helped them as they try to navigate the habeas corpus maze. More importantly, jail prisoners awaiting trial write and tell us how much the book helped them assist in their own defense as they learned about the duties of their lawyers, who were often appointed. Given the massive need and the paucity of resources, we believe that giving prisoners information that helps them help themselves is a wise use of our limited resources.

Brandon Sample, Alissa Hull, Mason C. Wilson, Hon Mok, Susan Schwartzkopf, Panagioti Tsolkas and Alex Friedmann have put a tremendous amount of work into this book and the results show it. David Zuckerman, one of the top post–conviction lawyers in Washington State, was kind enough to share the winning pleadings from one of his cases that readers can refer to as an example for formatting their pleadings and presenting a winning argument to the courts. Elizabeth Alexander, former executive director of the ACLU National Prison Project, also deserves our thanks for writing the introduction to the book. No one knows more about the importance of court access to prisoners than Elizabeth.

We are very proud to have *The Habeas Citebook: Ineffective Assistance of Counsel, 2nd Edition* as the fifth book in the Prison Legal News Publishing line. We aim to continue publishing high–quality, non–fiction reference and research books of particular interest to prisoners. For authors seeking a publisher we have a very simple formula based on my own experiences with the book publishing industry: an easy–to–understand contract that ensures the author gets a very competitive royalty on every book sold.

Each day we receive letters from prisoners asking for information about habeas corpus and post–conviction relief. This book is a partial solution to those requests. We have focused on ineffective assistance of counsel because of all the legal claims that tend to be raised in federal habeas corpus petitions, that is the one that most often results in relief on the rare occasions when habeas petitions are granted. One reason is that there is indeed some bad lawyering out there. The other is political. Many judges find it much easier to find fault with the defendant's lawyer for not doing a good job than to fault the prosecutor for misconduct or the police for perjury and evidence tampering.

This book is not intended as a substitute for your own legal research; rather, it is an aid for the reader to jump–start their research and identify those claims and areas of law that bear investigation for potential relief. Note that the cases are current as this book goes into production at the end of July 2016, but the law is constantly evolving and you should always check for new case law. We will publish updated editions of our books periodically.

Appendix F: Example Submissions

Introduction

This appendix includes the following sample pleadings:

1. Habeas petition filed in U.S. District Court
2. Response to Answer
3. Objections to Report and Recommendation
4. Request for Certificate of Appealability
5. Appellate Brief

This sample habeas petition was filed by counsel and resulted in a successful ruling on appeal. The attorney, David Zuckerman, gave us permission to reprint the pleadings but asked that we redact the name of his client, which we have done.

Note: These are sample pleadings to give you an idea of the format and structure of a habeas petition. The claims in your petition will likely be different from the claims raised in this one, and of course the facts will be different. This is only an example of a successful habeas petition; do not assume that the arguments raised in these pleadings will apply equally to your claims.

These sample pleadings do not constitute legal advice; they are for informational purposes only.

FILED LODGED RECEIVED
MAR 06 2002 KN
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON DEPUTY

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court

District	Western District of Washington
Name	[redacted]
Prisoner No.	[redacted]
Case No.	C02-5108 RJB
Place of Confinement	McNeil Island Corrections Center, P.O. Box #88-1000, Steilacoom, WA 98388-1000
Name of Petitioner (include name under which convicted)	[redacted]
Name of Respondent (authorized person having custody of petitioner)	v. Alice Payne
The Attorney General of the State of:	Washington

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Pierce County Superior Court, Tacoma, Washington
2. Date of judgment of conviction: [redacted]
3. Length of sentence: [redacted]
4. Nature of offense involved (all counts)
   I.: Assault [redacted]
   II.: Robbery [redacted]
   III.: Robbery [redacted]
   IV.: [redacted]
5. What was your plea? (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒ As to Counts I - III
   (b) Judge only ☒ As to Count IV, which was severed for trial
7. Did you testify at the trial?
   Yes ☒ No ☐
8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

(2)

AO 241 (Rev. 5/85)

9. If you did appeal, answer the following:
   (a) Name of court: Washington Court of Appeals, Division II
   (b) Result: Affirmed
   (c) Date of result and citation, if known: [redacted] (May 21, 1997) (unpublished)
   (d) Grounds raised: see attached
   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
   (1) Name of court: Washington Supreme Court
   (2) Result: Affirmed
   (3) Date of result and citation, if known: State v. [redacted]
   (4) Grounds raised: see attached
   (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:
   (1) Name of court:
   (2) Result:
   (3) Date of result and citation, if known:
   (4) Grounds raised:
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes ☒ No ☐
11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court: Washington Court of Appeals, Division II
    (2) Nature of proceeding: Personal Restraint Petition
    (3) Grounds raised: see attached

(3)

AO 241 (Rev. 5/85)

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒
(5) Result: Petition dismissed by chief judge
(6) Date of result: August 3, 2001

(b) As to any second petition, application or motion give the same information:
(1) Name of court:
(2) Nature of proceeding:
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐
(5) Result:
(6) Date of result:

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☒ No ☐ petition pending until January 8, 2002
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.
CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

(4)

AO 241 (Rev. 5/85)

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: See Attached

Supporting FACTS (state *briefly* without citing cases or law)

B. Ground two:

Supporting FACTS (state *briefly* without citing cases or law):

(5)

C. Ground three:

Supporting FACTS (state *briefly* without citing cases or law):

D. Ground four

Supporting FACTS (state *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:
Not applicable

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing Not applicable

(b) At arraignment and plea [redacted]
Tacoma, WA 98402-4629

(c) At trial Same

(d) At sentencing Same

(e) On appeal [redacted] Tacoma, WA 98422-1129

(f) In any post-conviction proceeding David Zuckerman 1300 Hoge Building
705 Second Ave. Seattle, WA 98104

(g) On appeal from any adverse ruling in a post-conviction proceeding David Zuckerman

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒
(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)
David B. Zuckerman

I declare under penalty of perjury that the foregoing is true and correct. Executed on

(date)

Signature of Petitioner

VERIFICATION

David Zuckerman states as follows:

1. I am the attorney for [redacted]

2. To avoid unnecessary delay in filing the petition, I am verifying the petition on his behalf. See Local Rule W.D. Wash. CR 100(e).

3. Based on my review of the state court record, I know all of the facts described in the petition and verify them to be true.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

3/6/02 Seattle, WA
DATE & PLACE

DAVID B. ZUCKERMAN

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Seattle, Washington 98104
(206) 623-1595

[redacted] V. PAYNE

Attachments to Habeas Petition

9(d). Grounds Raised on Direct Appeal

1. On the facts of this case, including the prosecutor's closing argument, the "first aggressor" instruction denied Mr. [redacted] First Amendment right to free speech.

2. The prosecutor violated Mr. [redacted] rights to due process and freedom from self-incrimination by: a) questioning [redacted] about his illegal possession of a firearm, despite the trial court's ruling severing the firearm count because it was unfairly prejudicial as to the other counts; b) asking [redacted] to comment on whether other witnesses were lying; c) questioning [redacted] in violation of his Fifth Amendment right to be free from self-incrimination, about whether he was revealing his story to the State for the first time on the witness stand; d) in closing argument, telling the jury that defense counsel's argument was improper and misstating the standards for self-defense.

3. The trial court improperly imposed an exceptional sentence.

9(e)(4). Ground Raised in Petition for Review

1. On the facts of this case, including the prosecutor's closing argument, the "first aggressor" instruction denied Mr. [redacted] First Amendment right to free speech.

11(a)(3). Grounds Raised in Personal Restraint Petition

1. The prosecutor violated Mr. [redacted] right to free speech and due process when he urged the jury to conclude that [redacted] was the first aggressor based on [redacted] words alone.

2. The prosecutor violated Mr. [redacted] rights to due process and freedom from self-incrimination by: a) questioning [redacted] about his illegal possession of a firearm, despite the trial court's ruling severing the firearm count because it was unfairly prejudicial as to the other counts; b) asking [redacted] to comment on whether other witnesses were lying; c) questioning [redacted], in violation of his Fifth Amendment right to be free from self-incrimination, about whether he was revealing his story to the State for the first time on the witness stand; d) in closing argument, telling the jury that defense counsel's argument was improper and misstating the standards for self-defense.

3. Mr. [redacted] was denied effective assistance of counsel at trial because his attorney a) failed to interview and present testimony from witness Edward Pettis; b) failed to object when the prosecutor argued that the jury should find [redacted] to be the first aggressor based on his words alone; c) failed to object when the prosecutor told the jury it should use its own standard regarding necessary force.

4. If the court finds that appellate counsel failed to argue that the prosecutor's closing argument violated [redacted] First Amendment rights, then [redacted] was denied effective assistance of counsel on appeal.

5. The accumulation of errors in this case violated Mr. [redacted] right to due process.

13. Grounds for Relief

A. Ground one:

Mr. [redacted] was denied effective assistance of counsel at trial.

Supporting Facts:

Mr. [redacted] was charged with assault in the first degree for shooting Gustavo Jaramillo. Jaramillo was a 15-year-old gang member and drug dealer. On July 16, 1994, Jaramillo was driving a stolen car and carrying a stolen gun. He was accompanied by his fellow gang member Aaron Calloway. Because of his injuries, Jaramillo remembered little of the incident with [redacted] Calloway testified, after being granted immunity from prosecution, that [redacted] approached him and Jaramillo, drew his gun, and demanded Jaramillo's gun. [redacted] accomplice then held down Calloway and took his pager. [redacted] then shot Jaramillo and took his gun. No other prosecution witness claimed to have seen the shooting or the events immediately preceding it.

[redacted] admitted shooting Jaramillo but claimed self-defense. He testified that he approached Calloway and Jaramillo because he was interested in a car they were selling. Jaramillo was carrying a loaded 9mm pistol. During the initially friendly conversation, [redacted] made a joking remark about the others being "wanna-bes" rather than true gang members. They immediately became angry, and began making threats. Jaramillo ultimately told [redacted] that he would shoot him. [redacted] then pulled out his own gun, told Jaramillo not to move, and demanded his gun. [redacted] stated that he was afraid to walk away while Jaramillo was armed because he could be shot in the back. Jaramillo lied about the location of his gun, and tried to distract [redacted]. When Jaramillo turned as if to draw the gun from his pocket, [redacted] shot him.

Mr. [redacted] testified that Edward Pettis was with him during the incident with Jaramillo and Calloway, and that neither [redacted] nor Pettis attempted to rob anyone. He explained to his lawyer Gary Clower, long before trial, that Pettis would support his version of the events. Nevertheless, Clower never interviewed Pettis nor called him as a witness. Pettis was available and willing to cooperate with the defense. If called to the stand, Pettis would have corroborated [redacted] account, from the initial encounter until Jaramillo threatened to shoot. Pettis ran away before any shots were fired, although he heard a gun go off. [redacted] caught up to him within minutes and stated: "He tried to shoot me."

Trial counsel failed to object when the prosecutor argued that the jury should find [redacted] to be the first aggressor based on his words alone. See ground two, below. He also failed to object when the prosecutor told the jury it should use its own standard regarding necessary force. See ground three, below.

B. Ground two:

The "first aggressor" instruction was so vague that it permitted the jury to deny Mr. [redacted] his right to self-defense based solely on his constitutionally-protected speech. This violated [redacted] right to free speech under the First Amendment. In the alternative, if the instruction clearly applied only to unprotected conduct, then the prosecutor's closing argument flagrantly misstated the law, and deprived [redacted] of his rights to due process and free speech.

Supporting Facts:

As discussed above, Mr. [redacted] testified that his encounter with Jaramillo and Calloway was friendly until he jokingly called them "wanna-bes." Jaramillo then told [redacted] that he "was fucking with the wrong people." [redacted] replied, "Yeah, right." Jaramillo, who possessed a loaded 9mm pistol, then threatened to shoot [redacted]. Only then did [redacted] pull his own gun and demand Jaramillo's.

Over defense objection, the court gave the following jury instruction:

INSTRUCTION NO. 15

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

The prosecutor's closing argument included the following:

> *Instruction Number 15 tells you what perhaps may be the most important instruction for your purpose in this case.* The defendant cannot be the aggressor. He can't start the fight and decide now I'm going to finish it. He cannot create the necessity for self-defense.
>
> What I would suggest to you is that, *if you look at what the defendant said and how he said it in this case, that you will find there is no self-defense. Even if you ignore our evidence*, ignore Gus, ignore Aaron, ignore everybody else and everything else, even if you just sit and listen to what the defendant said and how he said it, you will determine he is the aggressor. . . .
>
> *The defendant admits he insulted Gus and Aaron.* And when they become insulted and Gus said, "you don't know who you're "F"ing with," I asked the defendant, "Why don't you leave?" And his answer – and I don't remember the exact wording – but it was something along the lines of "Nobody talks to me that way."
>
> I mean, that was the gist of it. That was the tone of it. And again, I don't remember the exact words. I wasn't taking notes,[1] but that was the tone of it. Nobody talks to [redacted] that way. [redacted] is a big man, and he carries a gun, and nobody talks to him that way. . . .
>
> *He pokes his finger in Gus's eye*[2]*, according to his testimony – not our evidence – his testimony, and he gets sarcastic with him and says, "Yeah, right."* And he knows Gus has a gun, and here he is poking at this guy, according to his testimony.

(emphasis added).

C Ground Three

In addition to the argument discussed above, the prosecutor violated Mr. [redacted] rights to due process and freedom from self-incrimination by: a) questioning [redacted] about his illegal possession of a firearm, despite the trial court's ruling severing the firearm count because it was unfairly prejudicial as to the other counts; b) asking [redacted] to comment on whether other witnesses were lying; c) questioning [redacted], in violation of his Fifth Amendment right to be free from self-incrimination, about whether he was revealing his story to the State for the first time on the witness stand; d) in closing argument, telling the jury that defense counsel's argument was improper and misstating the standards for self-defense.

Supporting Facts:

The trial court severed the charge of unlawful possession of a firearm because it would involve evidence unfairly prejudicial as to the other counts. Nevertheless, during cross-examination of the defendant, DPA Hill asked Mr. [redacted] if he knew it was illegal for him to carry a gun, to which [redacted] answered that he did. When Hill then asked [redacted] if he remembered previously being caught with a gun in his possession and being arrested for it, defense counsel objected and the jury was momentarily excused.

Defense counsel objected to this questioning and moved for a mistrial. The court sustained the defense objection, finding that the questions were irrelevant and in direct contravention of the severance ruling. The court denied the mistrial motion, however.

Also during cross-examination of the defendant, DPA Hill twice asked Mr. [redacted] to comment on the truthfulness of testimony given by other witnesses. Defense counsel twice objected and the trial court twice sustained the objection.

When Mr. [redacted] testified that Edward Pettis was with him at the scene of the shooting, DPA Hill asked, "You never told us that before, have you?" Defense counsel objected and the trial court sustained. Hill's question violated [redacted] specific Fifth Amendment right to be free from self-incrimination, as well as his general right to due process.

During closing argument, DPA Hill said, "When you go in there, you're going to have to separate out those I thinks [sic] of [defense counsel] Mr. Clower's from what you heard which was valid argument, because that's invalid argument, and it's against the rules." This suggested that there was something improper about Clower's argument, when in fact he was raising legitimate inferences from the evidence. The defense objected and the trial court sustained.

Also during closing argument, DPA Hill told the jury to use its standard of what force is necessary, not Mr. [redacted]. This suggested that the standard was a subjective one, based on the whims of individual jurors, rather than an objective "reasonableness" standard. There was no objection to this argument.

D. Ground Four

If the court finds that appellate counsel failed to argue that the prosecutor's closing argument violated [redacted] First Amendment rights, then [redacted] was denied effective assistance of counsel on appeal.

Supporting Facts

On direct appeal, counsel argued that the "first aggressor" instruction was unconstitutionally vague because it permitted the prosecutor to argue, and the jury to find, that Mr. [redacted] could not claim self-defense solely because of his protected speech. The Washington Supreme Court agreed that Mr. [redacted] speech was protected by the First Amendment, but found that the instruction made someone an aggressor based only on his conduct and not his words. The Supreme Court never acknowledged the prosecutor's argument to the contrary, even though appellate counsel relied on it extensively.

If this court finds that appellate counsel never properly raised the prosecutor's misconduct, it should also find that such failure amounted to ineffective assistance of counsel.

E. Ground Five

The accumulation of errors in this case violated Mr. [redacted] right to due process.

Supporting Facts

See above.

[1] *Had* DPA Hill been taking notes, they would have shown that no such words were ever spoken by Mr. [redacted]

[2] The prosecutor must have meant this as a figure of speech, because nobody testified that [redacted] actually poked a finger at Jaramillo.

CERTIFICATE OF SERVICE

I certify that I served today by U.S. mail copies of the accompanying habeas petition, attachments, and verification of counsel, on the following:

Washington Attorney General's Office
Corrections Division
P.O. Box 40116
Olympia, WA 98504-0116

3/06/02
Date

Signature: Serin Ngai

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Seattle, Washington 98104

Honorable John L. Weinberg

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

****** *** *****, Petitioner, vs. ALICE PAYNE, Respondent	No. C02-5108RJB PETITIONER'S RESPONSE TO RESPONDENT'S ANSWER NOTED: June 28, 2002

I. STATE COURT RECORD

The Court directed respondent to "File and serve an Answer in accordance with Rule 5 of the Rules Governing Section 2254 Cases in United States District Courts." Dkt. #3 (3/20/02). Rule 5 includes the following:

> The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished.

Here, respondent did not provide the Court with trial transcripts, although they are available. ***** maintains that the transcripts are essential to assess the constitutional errors at trial, the extent to which ***** was prejudiced by them, and the unreasonableness of the Washington courts' decisions. He therefore asks the Court to order the State to furnish complete trial transcripts. Petitioner cites to the transcript ("RP") in this brief.

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Petitioner also cites to the superior court clerk's papers ("CP"). It may not be necessary for respondent to provide these, however, since the propositions for which they are cited are probably not disputed.

II. STATEMENT OF THE CASE

A. EVIDENCE PRESENTED AT TRIAL

****** *** ***** was charged by amended information in Pierce County Superior Court with the following: Count I – Assault in the First Degree (Victim: Gustavo Jaramillo); Count II – Robbery in the First Degree (Victim: Gustavo Jaramillo); Count III – Robbery in the First Degree (Victim: Aaron Calloway); and Count IV – Unlawful Possession of a Short Firearm. CP 16-18. All counts were alleged to have occurred on July 16, 1994. It was the state's theory of the case that ***** shot and seriously injured Jaramillo as the result of an armed robbery gone bad. CP 4 (Affidavit for Determination of Probable Cause).

Trial began on November 7, 1994, before the Honorable Thomas Felnagle. RP I 1. The state was represented by Deputy Prosecuting Attorney Douglas Hill. Mr. ***** was represented by attorney **** ******.

Prior to jury selection, the court granted defendant's motion to sever the firearm count, finding that such evidence would unduly prejudice Mr. ***** on the other counts. RP 18.

In its opening statement to the jury, the defense admitted that Mr. ***** shot Gustavo Jaramillo, and emphasized that the only issue was whether the defendant had acted in self-defense. RP II 53-71.

The only witness to be called by the defense was Mr. ***** himself. He testified that he had met Jaramillo a few times before July 16th and knew his name. RP IV 20. Mr. ***** saw Jaramillo and Calloway approximately an hour prior to the shooting when they were pulling up in an alley in a Cutlass automobile. Mr. ***** was there visiting his girlfriend's sister's boyfriend at an apartment building nearby. RP IV 21. A man named Mike, who was talking out

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the window to Jaramillo and Calloway below, came inside and told ***** that the car was for sale for $1,000. Mr. *****, thinking his father might be interested in the car, left the apartment to talk to Jaramillo and Calloway. RP IV 22. When he arrived, Jaramillo was showing a 9mm gun to two young women. RP IV 22-23. ***** had a friendly conversation with Jaramillo and Calloway about the car. He then left to find his father, but was unsuccessful. He returned in 10 to 15 minutes and continued the conversation about the car. RP IV 24-26.

Mr. ***** noted Jaramillo's bandana, and asked if he was in a gang. Jaramillo said that he and Calloway were both in a gang. When ***** asked which gang, Jaramillo responded with a "funny name" that ***** did not understand. RP IV 26. ***** asked where the gang was from. Jaramillo said that it was from Los Angeles. ***** asked Jaramillo if he was from Los Angeles to which Jaramillo responded "no." RP IV 27.

Mr. ***** then called Jaramillo a "wanna-be." ***** said it jokingly – not as an insult. RP IV 28, 73. Jaramillo told ***** that he "didn't know who he was fucking with" and that he "was fucking with the wrong people." RP IV 28. ***** replied, "Yeah, right." RP IV 29. Jaramillo then told ***** that he was going to "bust a cap in [*****'s] ass." RP IV 28. ***** understood this to mean that Jaramillo would shoot him. RP IV 29-30.

Mr. ***** responded to this threat by drawing his own gun, and telling Jaramillo not to move and to hand over his gun. RP IV 30-31. ***** testified that he did not want to walk off and have Jaramillo shoot him in the back. RP IV 31. ***** explained that he had been shot a few years earlier after an argument with some men in a bar. As he was "trying to leave to avoid fighting them," he was shot in the back of the head. RP IV 36. Because of that memory, ***** did not want to leave himself vulnerable again. RP IV 37.

Jaramillo replied that he did not have a gun, even though ***** could clearly see it in Jaramillo's right front pants pocket. After ***** pointed this out, Jaramillo attempted to distract ***** by telling him that the gun was in the bushes across the street. He then said, "look, there

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[sic] comes the police." RP IV 32. ***** believed Jaramillo was attempting to distract his attention so Jaramillo could draw his gun and shoot him. RP IV 34. In fact, when Jaramillo made the remark about the police, ***** did briefly look to where Jaramillo motioned. RP IV 34. As ***** began to look away, he saw Jaramillo turn as if to reach for the gun in his pocket. RP IV 34-35. ***** shot first. RP IV 35. He did not aim at any particular part of the body. RP IV 35. "I didn't want him to shoot me, just trying to keep him from turning around and shooting me." RP IV 35.

After firing a shot, Mr. ***** ran, leaving his car behind. He did not take any items from Jaramillo. RP IV 37-38. Nor did the person ***** was with, Edward Pettis, take anything. RP IV 38. Although ***** testified that Pettis was present at the scene, the defense never called Pettis as a witness. A detective testified in rebuttal that he looked for Pettis over the weekend after *****'s testimony, but could not find him. RP V 62-65.

Despite the trial court's severance ruling, DPA Hill brought up on cross-examination that ***** was prohibited from possessing a gun, and that he had a prior conviction for doing so. RP IV 42.

In the state's case, fifteen year-old Gustavo Jaramillo testified that he arrived at 8th Avenue and "G" Street in a car that he had stolen along with his partner in crime, Aaron Calloway. RP III 3-5, 15. Jaramillo was carrying a 9mm pistol, also recently stolen. RP III 3-5. He carried a gun because he dealt drugs. RP III 3-4. His prior criminal history included auto theft, burglary, vehicular prowling, attempting to elude a police officer, and drugs. RP III 15. Jaramillo did not remember if he had seen Mr. ***** prior to the shooting (RP III 9), nor did he remember talking to ***** about purchasing the car. RP III 16. He remembered that he had the stolen gun in his pants pocket. RP III 11-12. He did not remember if he moved his arms, hands or other parts of his body when ***** stood nearby asking him for the gun. RP III 11-12. Jaramillo did admit that he told and gestured to ***** that the gun was "over there." RP III 16-17.

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Sixteen year-old Aaron Calloway admitted that he and Jaramillo stole cars and sold drugs together. RP III 73-75. He testified only after being granted immunity by the prosecution. RP III 93-94. A few minutes before the shooting, Jaramillo and Calloway had ingested cocaine (RP III 77), and Calloway had slept only five or six hours in the previous 48 hours. RP III 121.

Calloway is a member of a gang called "Sureno." At the time of trial, he had been a "fledged or courted-in" member for almost one year and had been associated with the gang for approximately three years. RP III 94-95. When asked if Jaramillo was a member, Calloway responded that "his family is." RP III 96. When asked again, Calloway said that "he'd claim it" but had never actually been "courted-in." RP III 96-97.

On cross-examination, Calloway testified that it is not unusual for gang members such as himself to carry and use guns. Calloway testified that "disrespecting" either a gang member or the gang as a whole is often sufficient cause for confrontation. Fights and shootings can occur over something as simple as the color of clothing someone wears. A physical confrontation is not necessary to provoke sudden violence. RP III 109-112. There is nothing in the record to indicate that Mr. ***** was aware that gang members react in this way.

Calloway testified that ***** and an associate confronted him and Jaramillo and immediately demanded their gun. RP III 83. While ***** attempted to rob the gun from Jaramillo, the other man held down Calloway, went through his pockets, and ultimately took Calloway's pager. RP III 84. After shooting Jaramillo, ***** took his gun. RP III 133. When the police arrived, Calloway said nothing about the gun or pager being taken. RP III at 136. Nor did he mention that he and Jaramillo had ingested drugs that day (RP III 91), or that he and Jaramillo had stolen the car they were driving (RP III 91). He did not give this version of events until he was granted immunity. Id.

On direct examination, Calloway claimed that he did not see the shooting because he was looking at the ground at the time. RP III 86. When cross-examined, however, he admitted that

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***** shot Jaramillo only after Jaramillo started to turn and throw his hip down to the ground towards his gun. RP III 131-132.

Two other state witnesses testified that they saw Mr. ***** together with Calloway and Jaramillo shortly before the shooting, but could shed no light on whether ***** acted in self-defense. RP II 71-77 (Jennifer Woster); RP III 49-56 (Cornella Young).

The jury acquitted Mr. ***** of both robbery counts, but convicted him of Assault in the First Degree. CP 91, 92, 93. The parties stipulated that the trial judge could decide the firearm charge based on the evidence submitted at trial without further testimony. CP 136. At the time of sentencing, the court entered Findings of Fact and Conclusions of Law in which it found Mr. ***** guilty of the firearm count. CP 163-165.

On January 11, 1995, the court imposed an exceptional sentence of 25 years in prison (300 months), exceeding the standard range of 120-160 months. CP 150-157. Findings of Fact and Conclusions of Law for the exceptional sentence were entered on January 18, 1995. CP 166-170.

B. STATE APPELLATE PROCEDURE

The Washington Supreme Court affirmed the conviction and sentence on direct appeal in State v. *****, 137 Wn.2d 904, 976 P.2d 624 (1999). ***** then filed a personal restraint petition ("PRP") in the Washington Court of Appeals. The Chief Judge dismissed the petition. ***** filed a motion for discretionary review, which was denied by the Supreme Court Commissioner. An en banc panel of the Washington Supreme Court denied *****'s motion to modify the commissioner's ruling.

Mr. ***** complied with all state and federal time limits.

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III. LEGAL ARGUMENT

A. MR. ***** DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

1. Failure to Interview and Subpoena Edward Pettis

The Sixth Amendment to the U.S. Constitution guarantees the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984). A defendant is entitled to a new trial if he can show (1) that trial counsel's performance was defective; and (2) a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. A petitioner can meet this standard by showing that counsel failed to conduct adequate pretrial investigation. Jones v. Wood, 114 F.3d 1002 (9th Cir. 1997). "Before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision." Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993). See also, Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994).

As discussed above, Mr. ***** testified that Edward Pettis was with him during the incident with Jaramillo and Calloway. He explained to his lawyer **** ******, long before trial, that Pettis would support his version of the events. Ex. 10(A) to State's Submission of Relevant State Court Record (Declaration of Johnny *****). Nevertheless, ****** never interviewed Pettis nor called him as a witness. Ex. 10(B) (Declaration of Edward Pettis at para. 8). ****** never explained this omission to *****. Ex. 10(A). Pettis was available and willing to cooperate with the defense. Ex. 10(B). If asked, Pettis would have testified to the following:

2. I was with Johnny ***** on the day that he shot a guy. I'm told that the date was July 16, 1994, and that the name of the man he shot was Gus Jaramillo.

3. I was a friend of Johnny's at the time. He was living with the mother of his daughter in the Washington Apartments on Tacoma Avenue. I sometimes stayed over there.

4. On July 16, 1994, I was on the street near the apartments when Johnny drove up in his car. He told me that some guys were selling a car and asked me if I'd like to take a look at it. I wasn't interested in buying a car, but I went along anyway because I

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wanted to talk with Johnny about meeting some female friends of mine. There was nobody else with us in the car.

5. Johnny pulled up to a spot near the McDonald's on Tacoma Avenue. There were two Hispanic teenage guys hanging out on the grass. Johnny went up to them to talk about the car. The guys looked and acted like gang members. I remember one of them saying the name of his gang at some point. I'd never heard of it. The conversation was friendly until Johnny said something about the guys being "wanna-bes." I remember those words clearly because everything changed as soon as he said that. Even though Johnny was just joking around, the guys got real mad. They started threatening Johnny. When one of them said he was going to shoot Johnny, I ran away. I wouldn't have been afraid of these guys if they didn't have a gun because they were younger and smaller than me and Johnny. But when one of them started talking about shooting, he sounded like he really meant it. I think he wanted to prove how tough he was because he thought Johnny had insulted him.

6. I didn't see what happened after that, but I heard a gun go off. Johnny met up with me a couple of minutes later and said "He tried to shoot me."

Ex. 10(B).

Mr. ****** did not make, and could not have made, a reasonable strategic choice to forego interviewing Edward Pettis. ***** informed ****** that Pettis would be a helpful witness, and there could be no risk in speaking with him. Had he conducted the interview, ****** would have learned that Pettis would support his case.

2. Failure to Object to Improper Argument

As discussed below, Mr. ****** failed to object when the prosecutor argued that the jury should find Mr. ***** to be the first aggressor based on his words alone. ****** also failed to object when the prosecutor told the jury it should use its own standard regarding necessary force. ***** contends that the prosecutor's misconduct was so flagrant that no objection was needed. The State has argued that a timely defense objection would have given the trial court an opportunity to cure any prejudice. If this Court agrees with the State, ***** argues in the alternative that counsel was ineffective in failing to make timely objections.

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3. ***** was Prejudiced by Counsel's Errors

The prejudicial effect of counsel's errors must be considered cumulatively rather than individually. Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1515, 146 L.Ed.2d 389 (2000); Harris v. Wood, 64 F.3d 1432, 1438- 39 (9th Cir. 1995) (basing that conclusion on Strickland).

Here, as the prosecutor argued in closing, this case turned on whether ***** or Jaramillo was the first aggressor. RP VI 34-36. Although Pettis did not see the actual shooting, he knew that ***** was not the first aggressor. Pettis also could have confirmed *****'s reasonable fear of Jaramillo. Pettis himself was so scared that he ran away.

The only defense witness in this case was Mr. *****. A corroborating witness would have strengthened the defense considerably. As discussed above, the credibility of the state's witnesses was questionable. Both Jaramillo and Calloway were affiliated with gangs, had lengthy criminal records including crimes of dishonesty, and took drugs on the day of the incident. Jaramillo's recollection was hazy because of his injuries. Calloway's recollection conveniently changed over time, depending on the favors provided to him by the prosecutor's office. Under these circumstances, it is reasonably likely that the testimony of Edward Pettis would have changed the result of the trial.

Counsel's failure to object to the prosecutor's improper argument compounded the error in failing to call Pettis to the stand. Counsel let the State argue, without correction, that *****'s mere words could make him the first aggressor. In fact, the prosecutor argued that the jury should convict based on *****'s testimony alone. See section B, below. Counsel also permitted the State to argue an incorrect standard for self-defense.

Thus, counsel unnecessarily based his entire case on his client's testimony, while letting the prosecutor argue that that testimony established guilt, even if believed. It is more than likely that the result would have been different in the absence of these errors.

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4. The State Courts' Analysis of this Claim was Unreasonable

The Chief Judge of the Court of Appeals denied this claim because he believed ***** had not established prejudice. Pettis "could only have corroborated *****'s assertion that he was threatened," and "was not present during the crucial moments immediately before ***** shot Jaramillo." Order at 7. The Chief Judge failed to recognize that Pettis's testimony went to the central issue at trial: whether ***** was justified in initially drawing his gun and pointing it at Jaramillo. As ****** pointed out in closing argument, the trial was essentially a credibility contest between ***** and Calloway. RP VI 52 and 64-68. The other witnesses either did not observe the critical events or, in the case of Jaramillo, did not remember them. Calloway claimed that ***** commenced an unprovoked, armed robbery, which would obviously make ***** the first aggressor. ***** claimed that he approached Jaramillo for a friendly talk about buying a car, and drew his gun only to protect himself from a credible threat of being shot. The events after that, which led to ***** shooting the gun, were essentially undisputed. There was no question that ***** pulled the trigger only after Jaramillo made a move towards his own gun. The jury could well find this to be reasonable force in self-defense if Jaramillo had just threatened to shoot *****; it could not even consider self-defense if ***** had begun the altercation.

The Supreme Court Commissioner's reasoning was somewhat different, but equally unreasonable. He believed that *****'s trial counsel might have chosen not to call witness Edward Pettis because of concerns about Pettis' credibility. Ruling at 3. Even if Mr. ****** had made such a decision, however, it would be unreasonable to do so without first interviewing Pettis and evaluating his credibility. See Lord v. Wood, 184 F.3d 1083 (9th Cir. 1999), cert. denied, 120 S. Ct. 1262, 146 L. Ed. 2d 118 (2000). Pettis' probation warrant did not preclude his use as a defense witness. In fact, it would not even have been admissible for the purpose of impeachment. See State v. Johnson, 90 Wash. App. 54, 72, 950 P.2d 981 (1998). The State's

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witnesses in this case had far more serious problems with the law. Mr. ****** did not hesitate to pit his client's credibility against these juvenile delinquents' even though Mr. ***** himself had prior convictions.

The State court's decisions were also unreasonable because they failed to consider the totality of the ineffective assistance of counsel. See Williams v. Taylor, 120 S. Ct. at 1515. The courts considered each error individually, rather than cumulatively. Cf. Kyles v. Whitely, 514 U.S. 419, 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995) (Brady violations must be considered cumulatively).

B. THE "FIRST AGGRESSOR" INSTRUCTION, AND THE PROSECUTOR'S ARGUMENT BASED ON IT, VIOLATED MR. *****'S RIGHTS TO FREE SPEECH AND DUE PROCESS.

Over defense objection (RP VI 16-19), the court gave the following jury instruction, taken from WPIC 16.04:

INSTRUCTION NO. 15

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 112.

The prosecutor relied on this instruction in closing argument:

> [By DPA Hill] *Instruction Number 15 tells you what perhaps may be the most important instruction for your purpose in this case.* The defendant cannot be the aggressor. He can't start the fight and decide now I'm going to finish it. He cannot create the necessity for self-defense.
>
> What I would suggest to you is that, *if you look at what the defendant said and how he said it in this case, that you will find there is no self-defense. Even if you ignore our evidence*, ignore Gus, ignore Aaron, ignore everybody else and everything else, even if you just sit and listen to what the defendant said and how he said it, you will determine he is the aggressor. . . .
>
> *The defendant admits he insulted Gus and Aaron.* And when they become insulted

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and Gus said, "you don't know who you're "F"ing with," I asked the defendant, "Why don't you leave?" And his answer – and I don't remember the exact wording – but it was something along the lines of "Nobody talks to me that way."

I mean, that was the gist of it. That was the tone of it. And again, I don't remember the exact words. I wasn't taking notes,[1] but that was the tone of it. Nobody talks to Johnny ***** that way. Johnny ***** is a big man, and he carries a gun, and nobody talks to him that way. . . .

He pokes his finger in Gus's eye[2], according to his testimony – not our evidence – his testimony, and he gets sarcastic with him and says, "Yeah, right." And he knows Gus has a gun, and here he is poking at this guy, according to his testimony.

RP VI 34-36 (emphasis added).

These statements were not isolated off-hand comments. They were the central thrust of the prosecutor's argument. As DPA Hill must have realized, he had serious problems with the credibility of his only eyewitnesses. See section A(3).

Rather than rely on Jaramillo and Calloway, Hill convinced the jury to convict based solely on *****'s testimony. He began by describing the first aggressor instruction as the most important one in the case. Then, in the space of three pages of transcript, he stressed four times that the jury should find ***** to be the first aggressor based only on his testimony – ignoring the testimony of Calloway and Jaramillo. Since ***** maintained that he was not the first to make a threatening statement or gesture, Hill focused on *****'s words. He stressed that ***** "insulted" Jaramillo (which could only have referred to the "wanna-be" comment) and then added insult to injury by saying "yeah, right" when Jaramillo began making threats.

It is likely that the jury convicted based on this argument. The jury obviously did not find Jaramillo and Calloway entirely credible because it *acquitted* ***** of the two robbery

[1] *Had* DPA Hill been taking notes, they would have shown that no such words were ever spoken by Mr. *****. See RP IV 74.

[2] The prosecutor must have meant this as a figure of speech, because nobody testified that ***** actually poked a finger at Jaramillo.

LAW OFFICE OF
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Seattle, Washington 98104

counts. The jury necessarily rejected Calloway's testimony that ***** and an accomplice set out to rob him and Jaramillo of their gun, and ended up shooting Jaramillo when he would not hand over the gun. But without the testimony of these young gang members, there was no evidence that ***** committed the first aggressive act. Thus, the prosecutor apparently succeeded in convincing the jury to convict based on *****'s words alone.

As the prosecutor's argument proves, the jury instruction was sufficiently broad to cover protected speech.

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. *Herndon v. Lowry, 301 U.S. 242, 258 (1937); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Grayned v. City of Rockford, 408 U.S., at 116-117.*

Broadrick v. Oklahoma, 413 U.S. 601, 611-12; 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. [footnote omitted] Cf. Marcus v. Search Warrant, 367 U.S. 717, 733, 81 S.Ct. 1708, 1717, 6 L.Ed.2d 1127. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. Smith v. California, supra, 361 U.S. at 151-- 154, 80 S.Ct. at 217-- 219; Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Cantwell v. Connecticut, 310 U.S. 296, 311, 60 S.Ct. 900, 906, 84 L.Ed. 1213.

NAACP v. Button, 371 U.S. 415, 432-33, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

Here, instruction 15 applied to "any intentional act reasonably likely to provoke a belligerent response." The jury was never told that the word "act" excluded speech. In any event, the First Amendment applies to expressive physical acts as well as to purely verbal expression. See R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (cross burning); United States v. Eichman, 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d

LAW OFFICE OF
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Seattle, Washington 98104

287 (1990) (flag burning); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (dancing). Certainly, the "act" of making a verbal insult will commonly "provoke a belligerent response."[3]

As the U.S. Supreme Court has repeatedly held, the government cannot deny or restrict access to some right, privilege or benefit based on a citizen's protected speech.

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible.

Perry v. Sinderman, 408 US 593, 596-97, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). See also, O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996); Thomas v. Review Bd. of Indiana Employment Sec. Division, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981);. Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). For example, even though a prisoner has no protected liberty interest in his placement within a prison system, prison officials cannot transfer him in retaliation for his protected speech. Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759(1998). Here, the government deprived ***** of his self-defense claim based on his protected speech, in violation of his First Amendment rights.

[3] This does not necessarily mean that the insult constitutes unprotected "fighting words," however. "Fighting words" are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke *violent reaction*." Cohen v. California, 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (emphasis added), citing Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L. Ed. 1031 (1942). A "belligerent response" is not necessarily a "violent" one. It may consist of nothing more than harsh, angry words.

LAW OFFICE OF
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Even if the instruction itself did not violate *****'s First Amendment rights, the prosecutor's argument certainly did. Arguments that direct infringe on a specific constitutional right are analyzed under a more stringent standard than those that are merely improper. Donnelly v. DeChristoforo, 416 U.S. 637, 642-43, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). In such cases, the conviction must be reversed unless the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) (comment on failure to testify). In this case, the prosecutor's argument directly prejudiced *****'s right to free speech under the First Amendment.

2. The Washington Supreme Court's Analysis was Unreasonable.

Respondent contends that *****'s claim is not based on clearly established Supreme Court law. "Although the First Amendment protects speech, the Supreme Court has never held that the First Amendment prohibits a state court from giving an aggressor instruction based upon protected speech." Respondent's Answer at 20. A prisoner is not required, however, to show that the Supreme Court has addressed the precise facts of his case, but only that it has clearly established the applicable legal principle.

As the State concedes, AEDPA's standard for "clearly established law" is essentially the same as that for an "old rule" under Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989). Answer at 13-14. "The one caveat . . . is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence." Answer at 14, quoting Ramdass v. Angelone, 530 U.S. 156, 165-66 (2000). The Supreme Court has described the Teague analysis as follows:

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

LAW OFFICE OF
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Wright v. West, 505 U.S. 277, 308-309, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992) (opinion concurring in judgment).

Here, ***** is relying on two well-established principles of first amendment jurisprudence: 1) that a citizen has the right to criticize another, so long as he does not use "fighting words;" and 2) that the State cannot deny a citizen a right, privilege or benefit based on his protected speech. Both of these are rules of "general application." *****'s use of the term "wanna-be" clearly falls within the range of protected speech. ***** need not show that the Supreme Court has specifically addressed that phrase. Similarly, the Supreme Court has repeatedly stated, in the broadest terms, that a State may not infringe *any* benefit based on a citizen's protected speech. Whether or not ***** had a constitutional right to self-defense is irrelevant. It is undisputed that Washington generally provides that right to its citizens. It therefore cannot deny it based on protected speech, any more than it could deny a job, welfare benefits, or placement within a particular prison.

The Washington Supreme Court unreasonably applied this clearly established law. While the Court agreed that the jury could not rely solely on *****'s words to find him the first aggressor, it concluded that the instruction given permitted the jury to rely only on *****'s "acts and conduct." See State v. *****, 137 Wn.2d 904, 911-13, 976 P.2d 624 (1999). "If applied in a case like this one, a rule that words alone preclude the speaker from claiming self-defense could lead to the conclusion that insults about gang affiliation justify a violent response." Id. at 912. It believed that the first aggressor instruction was based only on *****'s "aggressive conduct." Id. at 913.

> Apparently, the Court was referring to the following portion of its fact statement: Other witnesses, including Calloway, testified that ***** approached, pulled out his gun and stood over Jaramillo while demanding to know where the 9 mm pistol was. Jaramillo's hands were by his head, as he had propped himself up on his right elbow, and the gun was in his right pants pocket, beneath him as he lay on his side on the ground. ***** ordered Jaramillo and Calloway not to move, and when Jaramillo looked up ***** shot him in the back of the neck, took Jaramillo's gun, and left.

LAW OFFICE OF
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705 Second Avenue #1300
Seattle, Washington 98104

Id. at 907. The court's reference to "other witnesses," however, is incorrect. As discussed above in section A(4), Calloway was the *only* witness who claimed that ***** approached him and Jaramillo aggressively. Further, the jury necessarily rejected Calloway's testimony because it acquitted ***** of the robbery charges. The "facts" quoted above would obviously amount to robbery.

Perhaps more importantly, the Washington Supreme Court did not even mention the prosecutor's explicit argument that ***** was a first aggressor based on his words alone. ***** quoted that argument at length in his brief. See Brief of Appellant at 16-17 (Ex. 2). If the prosecutor, a trained attorney, could interpret instruction 15 to apply to protected speech, surely the jury could as well. Thus, the Washington Supreme Court avoided the central issue in this case by ignoring the critical facts.

In an effort to force the Washington courts to address the prosecutor's argument, ***** specifically focused on this misconduct in his PRP. Again, the courts' analysis was unreasonable. The Court of Appeals found that ***** was not prejudiced by the prosecutor's argument, because the jury instruction referred only to "acts and conduct." See Answer at 23 (quoting Ex. 12 at 4). But if the jury instruction was truly so clear on this point, that merely proves that the prosecutor flagrantly misstated the law, which would be a due process violation in itself. It is unreasonable to assume that the jury would disregard the prosecutor's interpretation of a jury instruction, especially when there is no objection from defense counsel nor admonition from the court.

> The Washington Supreme Court's reasoning was different, and even more unreasonable. It is evident from the argument that the prosecutor was not suggesting to the jury that it could find Mr. ***** the aggressor solely because of what he said to Jaramillo. The prosecutor focused on Mr. *****'s testimony and demeanor, emphasizing that when he asked Mr. ***** why he did not leave the scene when Jaramillo became belligerent, he responded that "Nobody talks to me that way." The prosecutor thus tried to persuade the jury that by his words and actions, Mr. ***** took an aggressive posture and needlessly escalated the confrontation.

LAW OFFICE OF
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1300 Hoge Building
705 Second Avenue #1300
Seattle, Washington 98104

See Answer at 23 (quoting Ex. 14 at 5-6). But, as discussed above, the prosecutor explicitly argued that the jury should find ***** to be the first aggressor based solely on *****'s own testimony. ***** testified only that he jokingly called Jaramillo a "wanna-be," and that he responded "yeah, right" when Jaramillo said he was not someone to trifle with. He denied *any* aggressive conduct until Jaramillo threatened to shoot him. It is true that the prosecutor claimed that ***** testified "Nobody talks to me that way." *But that was a misstatement of the evidence.* The prosecutor's erroneous legal interpretation of instruction 15 cannot be excused by the fact that he also distorted *****'s testimony. In fact, the prosecutor's questioning about why ***** did not earlier leave the scene was also improper. In Washington, a defendant has no duty to retreat from a confrontation before using force in self-defense. See State v. Studd, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999).

According to the Supreme Court, the prosecutor argued that "Mr. ***** took an aggressive posture and needlessly escalated the confrontation." True enough. But the Court overlooked that the prosecutor based this argument solely on *****'s protected speech and not on any physical actions (other than perhaps declining to run away). Thus, the Court's analysis was unreasonable.

3. No Part of this Claim is Procedurally Defaulted

Respondent alleges that the prosecutorial misconduct portion of this claim is defaulted because it was not raised on direct appeal, and the Washington courts found it to be procedurally barred in the PRP. Respondent relies on the principle that "[A] personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." Respondent's Answer at 12, citing In re Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994) and In re Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). ***** will refer to this as the "Taylor rule," because that is the case in which it was announced. Respondent notes that ***** raised other claims of prosecutorial misconduct on direct appeal,

LAW OFFICE OF
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Seattle, Washington 98104

but only as far as the Court of Appeals. Respondent contends that the prosecutor's argument concerning instruction 15 amounted to the same "ground" or "issue" as the other prosecutorial misconduct claims, and therefore that it was barred from review under Taylor. For several reasons, the Taylor rule does not require default in this case.

First, whether or not the claim was properly raised in the PRP is irrelevant because it was already exhausted in the direct appeal. It is true that the Supreme Court did not address the prosecutor's closing argument in its decision, but that is irrelevant. See Smith v. Digmon, 434 U.S. 332 (1978). ***** thoroughly explained to the Washington Supreme Court how the prosecutor's closing argument, as well as the language of instruction 15 itself, violated *****'s first amendment rights. See Petition for Review at 6-7, Ex. 7. At most, his legal argument was somewhat different than it is here. The Supreme Court has recognized, however, that the "ultimate question for disposition" before the state and federal court may be the same "despite variations in the legal theory or factual allegations urged in its support." Picard v. O'Connor, 404 U.S. 270, 277, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). "A ready example is a challenge to a confession predicated upon psychological as well as physical coercion." Id., citing Sanders v. United States, 373 U.S. 1, 16, 410 L. Ed. 2d 148, 83 S. Ct. 1068 (1963). Only the "substance" of the federal claim must be presented to state court. Picard at 278. See also, Vasquez v. Hillery, 474 U.S. 254, 258 (1986); Humphrey v. Cady, 405 U.S. 504, 516 n.18 (1972); Chacon v. Wood, 36 F.3d 1459, 1467 (9th Cir. 1994) (petitioner may "reformulate" claims made in state court). ***** could have filed a habeas petition on this claim without addressing it again in his PRP, but he chose instead to give the Supreme Court the courtesy of revisiting the issue.

To cover all bases, ***** argued in the alternative in his PRP that appellate counsel was ineffective in failing to raise the first amendment issue as a prosecutorial misconduct claim. The Chief Judge of the Court of Appeals responded as follows:

> Here, where *****'s appellate counsel did make the First Amendment argument as part of the challenge to the aggressor instruction, it is hard to conceive how

LAW OFFICE OF
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Seattle, Washington 98104

counsel's performance can be deficient. "[I]t does not show low reframing the argument as a prosecutorial misconduct claim would have made any difference to the resolution of the issue by this court or the Supreme Court.

Ex. 12 at 4-5. In other words, the state court found that – even if ***** had presented precisely the same briefing on direct appeal as he did in the PRP – it would have made absolutely no difference. This is equivalent to saying that it would have been futile to frame the issue differently in the PRP. Futility is an exception to the exhaustion requirement. See Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 893 n.4, 137 L. Ed.2d 63 (1997); Blackledge v. Perry, 417 U.S. 21, 24, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); Beam v. Paskett, 966 F.2d 1563, 1568 (9th Cir. 1992), vacated and remanded on other grounds, Arave v. Beam, 507 U.S. 1027, 123 L. Ed. 2d 464, 113 S. Ct. 1837 (1993); Sweet v. Cupp, 640 F.2d 233, 236 (9th Cir. 1981). "The purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court." Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 188 L.Ed.2d 318, 329 (1992). Here, the state courts have explained that this claim would not have been vindicated even if it had been raised in precisely the way it is here. Applying the exhaustion doctrine under such circumstances would create a procedural hurdle for its own sake.

In any event, even if the prosecutor's argument regarding instruction 15 was not properly raised in the direct appeal, it certainly was in the PRP. Respondent contends, however, that ***** was barred from raising the claim in the PRP because he raised other prosecutorial misconduct claims on appeal. But that argument fails because the other prosecutorial misconduct claims were presented on appeal only to the Court of Appeals and not to the Supreme Court. See Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990).

> Taylor only bars issues which have been "heard and determined" by the reviewing court. The record shows that Russel's present claims were not presented to the Washington Supreme Court as part of his direct appeal. Thus, the Washington

LAW OFFICE OF
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Seattle, Washington 98104

Supreme Court, unlike the state court of appeals, cannot have rejected Russell's claims on Taylor grounds.

Id. at 1035 n.3. As in Russell, the Supreme Court Commissioner was not holding that Taylor barred the Supreme Court from considering the claim, but only that the Court of Appeals properly applied Taylor, and that the Supreme Court was electing not to review the claim itself. See Ex. 12 at 4; Russell, 893 F.2d at 1035-36.

Further, a state procedural rule can bar relief in federal court only if it is "independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991). The Taylor rule is not independent because it turns on the merits of the federal claim. As noted above, it does not apply when the "interests of justice" (or "ends of justice") favor relitigation. The Washington courts have never precisely defined this standard but have noted that it "cannot be too finely particularized." See In re Taylor, 105 Wn.2d at 688-89, quoting Sanders v. United States, 373 U.S. 1, 17, 10 L. Ed. 2d 148, 83 S. Ct. 1068 (1963). The "ends of justice" standard is distinct from the more stringent "good cause" standard that applies when a prisoner attempts to file a successive PRP. In re Holmes, 121 Wn.2d 327, 330, 849 P.2d 1221 (1993). The ends of justice may be satisfied whenever a petitioner raises "new points of fact and law that *were not* or could not have been raised in the principal action, to the prejudice of the defendant." In re Gentry, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999) (emphasis added). Thus, there is no requirement that petitioner's failure to raise the new points earlier was due to some external impediment.

The Washington courts have found the "ends of justice" to be satisfied when a petitioner presents additional allegations in support of the same legal claim made on direct appeal, when he presents the same allegations but improves his constitutional analysis, and when the court was simply wrong the first time around. In In re Brett, 142 Wn.2d 868, 16 P.3d 601 (2001), the Supreme Court found trial counsel ineffective in failing to present expert testimony concerning the defendant's medical and mental conditions. Brett had previously argued on direct appeal that

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trial counsel were ineffective, and had specifically relied on counsel's failure to explore Brett's fetal alcohol syndrome. Id. (conc. op. of Talmadge, J.) citing State v. Brett, 126 Wn.2d 136, 202-04, 892 P.2d 29 (1995). See also, State v. Brett, 126 Wn.2d at 198-200. Nevertheless, the stronger evidence of ineffectiveness presented in the PRP justified revisiting the issue and granting relief. In In re v. Maxfield, 133 Wn.2d 332, 945 P.2d 196 (1997), petitioner challenged the same search and seizure as on direct appeal, and alleged no new facts. The court addressed the issue, and reversed itself, because of the stronger constitutional analysis presented. Recently, the Court of Appeals found the interests of justice satisfied simply because it had been wrong the first time around. In re Percer, -- Wn.2d --, -- P.2d --, 2002 Wash. App. LEXIS 1085 (May 21, 2002). In Percer, the Court specifically rejected petitioner's claim that there had been a significant intervening change in the law since the direct appeal.

> Nevertheless, as we conclude below, this court's earlier decision in Mr. Percer's case was incorrect. In light of the clear error involving a constitutional right, we reexamine the issue in the interests of justice.

Id. at *5.

There is no Washington case in which an appellate court found that the petitioner had established that he was otherwise entitled to relief, yet refused to entertain the claim on Taylor grounds. In fact, Taylor explains that the ends of justice will always be satisfied whenever a petitioner "is actually prejudiced by the error." Taylor, 105 Wn.2d at 688. Thus, the Taylor rule necessarily turns on the merits of the claim, and therefore is not "independent" of the federal constitutional analysis. See Ake v. Oklahoma, 470 U.S. 68, 74-75, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).[4]

[4] The court's broad discretion in applying the Taylor rule also shows that it is not "adequate." See Johnson v. Mississippi, 486 U.S. 578, 587 (1988); Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). In addition, it is questionable whether the Washington courts have consistently interpreted the concept of "same claim" as broadly as urged by Respondent. The prosecutorial misconduct claims raised on direct appeal that, according to Respondent, barred relief in the PRP, were quite different from the claim that the prosecutor's argument regarding instruction 15 violated *****'s first amendment rights. A state court procedural bar is adequate only if it is "firmly established and regularly followed." See Fields v. Calderon, 125 F.3d 757, 760 (9th Cir. 1997) (quoting Ford v. Georgia, 498 U.S. 411, 424 (1991)).

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Finally, even if Taylor provided an adequate and independent state procedural bar, ***** can pursue the claim in federal court if he can show "cause" for the default and "prejudice" resulting from it. Edwards v. Carpenter, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L.Ed. 2d 518 (2000). "[C]ounsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice" to establish cause. Id. The ineffective assistance claim must itself be properly presented to the state courts. Id. at 452. Here, as noted above, ***** alleged in his PRP that his appellate attorney was ineffective in failing to raise the prosecutor's improper argument regarding instruction 15 as a distinct claim. Respondent concedes that this claim of ineffective assistance on appeal is properly exhausted. Answer at 6. If the Court finds that appellate counsel failed to exhaust the issue of the prosecutor's closing argument regarding instruction 15, it must likewise find that he was ineffective in failing to do so. See section D, below. ***** was prejudiced by this failure because the claim was meritorious.

C. OTHER ACTS OF PROSECUTORIAL MISCONDUCT VIOLATED MR. *****'S CONSTITUTIONAL RIGHTS

1. Merits of Claims

During cross-examination, DPA Hill asked Mr. ***** if he knew it was illegal for him to carry a gun. ***** answered that he did. RP IV 42. When Hill then asked ***** if he remembered previously being caught with a gun in his possession and being arrested for it, defense counsel objected and, after the jury was excused, moved for a mistrial. RP IV 45. The court sustained the defense objection, finding that Hill's questions directly contravened its previous ruling severing the firearm charge because of its prejudicial effect. RP IV 47.[5] However, the court denied *****'s motion for a mistrial. RP IV 48.

[5] The court's reason for severing the firearm count is set forth at RP I 14-18.

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Hill's questions informed the jury that ***** had previously been convicted of possessing a firearm, and implicitly informed them that he had lost his right to possess firearms through another prior felony.[6] This unfairly prejudiced Mr. ***** and rendered the proceedings unfair. Cf. Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (government unfairly prejudiced defendant by introducing nature of prior conviction when defendant was willing to stipulate that he had a conviction that would make him ineligible to carry a firearm).

Also during cross-examination, DPA Hill twice asked Mr. ***** to comment on the truthfulness of the testimony by other witnesses. RP VI 82-83. Defense counsel twice objected and the trial court twice sustained the objection. RP IV 82-83. The Washington courts have consistently found such questions to be improper. See State v. Neidigh, 78 Wn. App. 71, 76-78, 895 P.2d 423 (1995) (reviewing cases). Other jurisdictions, including the federal courts, are in accord. United States v. Sullivan, 85 F.3d 743, 749-50 (1st Cir. 1996); United States v. Boyd, 54 F.3d 868, 871 (D.C. Cir. 1995); United States v. Richter, 826 F.2d 206, 208 (2nd Cir. 1987); Scott v. United States, 619 A.2d 917, 924 (D.C. 1993) ("We have repeatedly condemned questioning by counsel which prompts one witness to suggest that he or she is telling the truth and that contrary witnesses are lying."); State v. Flanagan, 111 N.M. 93, 801 P.2d 675 (N.M. Ct. App. 1990). "The rule reserves to the jury questions of credibility." Sullivan, 85 F.3d at 750. The courts have applied this rule whether the opposing witness is a lay person or government agent. Id.

When Mr. ***** testified that Edward Pettis was with him at the scene of the shooting, DPA Hill asked, "You never told us that before, have you?" RP IV 67. Defense counsel objected and the trial court sustained. RP IV 67. Hill's question violated *****'s Fifth Amendment right

[6] Except for DPA Hill's remarks, the jury was never told of Mr. *****'s previous criminal conviction.

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to be free from self-incrimination. See Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

During closing argument, DPA Hill said, "When you go in there, you're going to have to separate out those I thinks [sic] of Mr. ******'s from what you heard which was valid argument, because that's invalid argument, and it's against the rules." RP VI 86. This suggested that there was something improper about ******'s argument, when in fact he was raising legitimate inferences from the evidence. The defense objected and the trial court sustained. RP VI 86.

Also during closing argument, DPA Hill told the jury to use its standard of what force is necessary, not Mr. *****'s. RP VI 87. This suggested that the standard was a subjective one, based on the whims of individual jurors, rather than an objective "reasonableness" standard. There was no objection to this argument. By arguing that the jury should use its standard of what is necessary, not Mr. *****'s, DPA Hill urged them to follow his instructions and to disregard the court's Instruction Number 16. CP 113. A prosecutor's statements regarding the law must be confined to what is set forth in the instructions, and must not mislead the jury. United States v. Berry, 627 F.2d 193, 200 (9th Cir. 1980) (citing United States v. Artus, 591 F.2d 526, 528 (9th Cir. 1979); State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972).

Taken as a whole, the prosecutorial misconduct so infected the trial with unfairness as to deny Mr. ***** due process. See generally, Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). In addition, the comment on Mr. *****'s silence specifically violated his Fifth Amendment right to be free from self-incrimination, and is reversible error under the stricter Chapman standard of review. See Part B, above.

2. The Washington Supreme Court's Analysis of These Claims was Unreasonable

The Washington Supreme Court did not address these claims at all, although they were raised in the PRP. On direct appeal, the Court of Appeals made a conclusory finding that the

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misconduct was not sufficiently prejudicial to warrant relief. This ignored the fact that the case turned entirely on a credibility contest between ***** and Calloway. See section A(3), above. By repeatedly throwing mud at ***** and his attorney, the prosecutor may well have tipped the balance.

3. The Claims are Not Procedurally Barred

The State notes that these claims were presented only to the Court of Appeals on direct appeal. It contends that this precluded the Washington Supreme Court from considering them in the PRP. This argument fails, for all of the reasons discussed above in section B(3).

D. IF THE COURT FINDS THAT APPELLATE COUNSEL FAILED TO ARGUE THAT THE PROSECUTOR'S CLOSING ARUMENT VIOLATED *****'S FIRST AMENDMENT RIGHTS, THEN ***** WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

This claim is discussed above as "cause" for an alleged procedural default. See section B(3). Respondent seems to argue that appellate counsel would have weakened his case by throwing in "every arguable point." Answer at 19. But counsel already discussed at length the prosecutor's argument regarding instruction 15. If that did not exhaust the claim, then at most one additional sentence was needed: "By the way, just in case it's not already obvious, all that argument I've been quoting violated Mr. *****'s rights to free speech and due process under the first and fourteenth amendments." Such a sentence would hardly have weakened the appeal.

***** does not truly believe he was prejudiced by counsel's failure to include this sentence, since he maintains that the federal constitutional claims were fully presented even without it. If the Court disagrees, however, it must conclude that the failure to add the sentence prevented the Washington Supreme Court from understanding and considering the claim. In that event, the failure would be highly prejudicial.

E. CUMULATIVE ERROR

Respondent claims that this court cannot grant relief based on cumulative error. That would be a bizarre rule.

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Assume that the testimony of two witnesses, taken together, significantly rebuts the state's case, but that neither witness' testimony is meaningful on its own. Under Respondent's theory, ***** would of course be entitled to relief if defense counsel ineffectively failed to present the testimony of these witnesses. On the other hand, if defense counsel failed to present one witness, while the prosecutor improperly withheld the other, ***** would not be entitled to relief. In either case, the defendant has been denied a fair trial due to one or more constitutional violations. It makes no sense that the result should change.

In fact, both the U.S. Supreme Court and the Ninth Circuit have recognized that errors must be considered in their totality, rather than singly. See Kyles v. Whitley, 514 U.S. 419, 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995) (multiple Brady violations);. Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1515, 146 L.Ed.2d 389 (2000) (multiple instances of ineffectiveness); Mak v. Blodgett, 970 F.2d 614, 624-25 (9th Cir. 1991), cert. denied, 507 U.S. 951 (1993)(counsel's failure to present certain mitigating evidence; court's exclusion of other mitigating evidence; and improper jury instruction).

Even if the U.S. Supreme Court has yet to consider the effect of multiple violations of different types, ***** is not precluded from relying on the concept of cumulative error. ***** must show only that his underlying constitutional claims are based on clearly established U.S. Supreme Court law. Cumulative error it is not in itself a ground for relief, but merely a process used by the federal courts to evaluate the prejudice from several underlying constitutional violations.

As discussed above, this case pitted *****'s claim that he acted in self-defense against Calloway's claim that ***** started the altercation by engaging in armed robbery. Counsel's ineffectiveness deprived ***** of a corroborating witness. Instruction 15, and the argument based on it, deprived ***** of *any* defense based on his testimony alone. The prosecutor's other

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improper questions and arguments unfairly demeaned *****'s credibility. In combination, at least, these errors deprived ***** of a fair trial.

IV. CONCLUSION

The Court should grant the writ of habeas corpus.

DATED this _____ day of _____, 2002.

Respectfully submitted:

David Zuckerman, WSBA #18221
Attorney for Petitioner ****** *** *****

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

****** *** *****, Petitioner, vs. ALICE PAYNE, Respondent	No. C02-5108RJB PETITIONER'S OBJECTIONS TO REPORT AND RECOMMENDATION NOTED: November 22, 2002

I. INTRODUCTION

***** objects to all adverse rulings in the Report and Recommendation (R&R) issued on October 16, 2002. *****'s position is set out primarily in Petitioner's Response to Respondent's Answer (Dkt. 10), filed on June 24, 2002. ***** will address here some of the comments in the R&R.

II. ARGUMENT

A. MR. ***** DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL (CLAIM 1).

1. Failure to Interview and Subpoena Edward Pettis

***** testified that he approached Calloway and Jaramillo in a friendly manner, and drew his gun only after they threatened to shoot him. He then shot Jaramillo when the latter made a move for his gun. Calloway agreed that ***** did not shoot until Jaramillo made a movement towards his gun. He claimed, however, that ***** approached them initially with his own gun drawn in an effort to rob them. Under the trial court's instruction, the jury could not

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even consider self-defense if ***** was the "first aggressor." See Petitioner's Response at 2-6, 9-11. Edward Pettis could have testified that ***** was not the first aggressor. Petitioner's Response at 7-8. This would have provided critical corroboration of *****'s testimony.

According to the magistrate judge:

> Petitioner argues that the Court of Appeals failed to recognize that Pettis's testimony went to the central issue at trial – whether petitioner was justified in initially drawing his gun and pointing it at Jaramillo. (Dkt. 10 at 10). Petitioner's argument, however, is flawed in that it misstates the issue. Whether petitioner was justified in drawing his gun was not the issue; rather, the issue was whether petitioner could rely on a claim of self-defense for actually shooting Jaramillo. While Pettis certainly could have testified to the events that occurred before he ran away, which led up to the shooting, e.g., that Jaramillo threatened petitioner, he could not have testified as to whether Jaramillo attempted to reach for his gun, whether petitioner truly believed he was about to be shot, or whether petitioner could have simply walked or run away as Pettis did. (*See* Dkt. 8, Exh. 10, Declaration of Edward Pettis.)

R&R at 11.

This simply repeats the error made by the Washington Court of Appeals. It was *undisputed* that ***** shot Jaramillo after the latter made a move towards his gun. The critical issue was whether ***** was the first aggressor. In fact, the prosecutor stressed in closing argument that the circumstances under which ***** fired his gun were irrelevant since he was not entitled to self-defense as a first aggressor. See Petitioner's Response at 11-12. Edward Pettis could unequivocally testify that ***** was *not* the first aggressor. It is more than reasonably likely that this testimony would have changed the result of the trial.

2. Failure to Object to Improper Argument

The prosecutor argued that the jury could convict even if it accepted Mr. *****'s testimony, because his admitted words made him a first aggressor. See Petitioner's Response at 11-12. The prosecutor was wrong. State v. *****, 137 Wn.2d 904, 911-13, 976 P.2d 624 (1999). Yet defense counsel failed to object.

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The magistrate judge agreed with the state courts that ***** was not prejudiced because the jury would have understood that the first aggressor instruction applied only to conduct and not words, and because there was "sufficient evidence" of aggressive conduct to support the instruction. R&R at 12-13. It is reasonably likely, however, that the jurors would accept the interpretation of an instruction urged upon them by the prosecutor, who is presumably an expert in such matters. Few jurors would assume that the prosecutor is flagrantly misstating the law, especially when there is no objection.

Whether there was "sufficient" evidence to support the instruction misses the point. The test for sufficiency is whether any reasonable trier of fact could have found ***** to be the first aggressor, taking all inferences in favor of the State. See Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). The test for ineffective assistance, however, is whether there is a reasonable likelihood that the result would have been different if not for counsel's errors. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Here, it is at least reasonably likely that the jury convicted ***** for the reasons urged by the prosecutor. Counsel's failure to object to this improper argument likely affected the result. The prejudice was compounded by counsel's failure to call a witness who could confirm that ***** was *not* the first aggressor.

B. THE "FIRST AGGRESSOR" INSTRUCTION, AND THE PROSECUTOR'S ARGUMENT BASED ON IT, VIOLATED MR. *****'S RIGHTS TO FREE SPEECH AND DUE PROCESS (CLAIM 2).

The magistrate judge believed that the "instruction did not provide that petitioner's words alone would make him a 'first aggressor.'" R&R at 15. Once again, the judge failed to consider that the prosecutor expressly and forcefully argued that the instruction did in fact apply to *****'s words. If the prosecutor could reasonably interpret the instruction to apply to protected speech, then the instruction was overbroad in violation of the First Amendment. See

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Petitioner's Response at 11-18. ***** made precisely this argument on direct appeal, and the Washington Supreme Court ignored it. The R&R repeats the same error.

On the other hand, if the instruction could not reasonably be interpreted to apply to *****'s speech, then the prosecutor deliberately misstated the law, in violation of *****'s right to due process and free speech. See Petitioner's Response at 15; United States v. Sherlock, 962 F.2d 1349, 1362 (9th Cir. 1992) (prosecutor's improper argument showed either that instructions were too complex to be understood or that prosecutor intentionally misstated the law). The magistrate judge declined to consider this point, however, because he incorrectly believed it to be procedurally barred.

First, the "improper argument" portion of Claim 2 was exhausted on direct appeal. ***** contended that the prosecutor's argument, as well as the instruction itself, contributed to the violation of his constitutional rights. See Petitioner's Response at 19. The magistrate judge *agreed* that this was the case. R&R at 7-8. He stated, however, that "Petitioner did not specifically raise the issue of whether the prosecutor's argument 'flagrantly misstated the law.'" Id. at 8. The exhaustion doctrine, however, does not cut so fine a line. It is sufficient that the "ultimate question for disposition" before the state and federal court is the same "despite variations in the legal theory or factual allegations urged in its support." Picard v. O'Connor, 404 U.S. 270, 277, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). "The purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court." Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 188 L.Ed.2d 318, 329 (1992). Here, the state Court of Appeals explicitly stated that "reframing" the issue raised on direct appeal in the same way it is raised here would not "have made any difference to the resolution of the issue by this court or the Supreme Court." See Petitioner's Answer at 19-20. Therefore, considering the "reframed" issue here could not possibly violate

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the principles of comity that the exhaustion doctrine is supposed to serve. Rather, this Court would be creating a procedural hurdle for its own sake.

In any event, in his personal restraint petition (PRP), ***** phrased his claim concerning the prosecutor's closing argument *precisely* as he did in his habeas petition. The magistrate judge found this portion of the PRP to be procedurally defaulted, however. R&R at 8. In doing so, he did not directly respond to *****'s numerous arguments against procedural default.

It is true that the Court of Appeals believed the "improper argument" claim to be barred by In re Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986), which held that a petitioner may not renew a claim raised on direct appeal unless the "ends of justice" favor relitigation. In its view, Taylor applied because ***** had raised some claims of prosecutorial misconduct on direct appeal – even though they were completely unrelated to the misconduct described in the PRP. For many reasons, Taylor cannot give rise to a procedural default on this claim.

First, Taylor applies only when the same claim has been previously litigated in the same reviewing court. Russell v. Rolfs, 893 F.2d 1033, 1035 n.3 (9th Cir. 1990). It does not apply when a claim was previously raised in the Court of Appeals, and the petitioner later attempts to raise it in the Washington State Supreme Court. Id. Here, ***** raised his other claims of prosecutorial misconduct on direct appeal only in the Court of Appeals. Taylor could not bar him from raising it in the Supreme Court. ***** does not believe the Supreme Court Commissioner stated otherwise. But even if he did, he would have been announcing a new rule, and not one "firmly established and regularly followed." See Fields v. Calderon, 125 F.3d 757, 760 (9th Cir. 1997) (quoting Ford v. Georgia, 498 U.S. 411, 424 (1991)).

Second, a state procedural rule can bar relief in federal court only if it is "independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991). The Taylor rule is not independent because it turns on the merits of the federal claim. See Petitioner's Response at 21-22. The Washington

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Supreme Court has explained that "we limit collateral review, but not so rigidly as to prevent the consideration of serious and potentially valid claims." In re Bailey, 141 Wn.2d 20, 25, 1 P.3d 1120 (2000) (citations and internal quotations omitted). In his Response, ***** cited several examples of the Washington courts reconsidering in a PRP claims raised on direct appeal. Additional examples include the following: In re Vanderlugt, 120 Wn.2d 427, 842 P.2d 950 (1992) (reconsidering sentencing claim because of developments in case law); In re Jeffries, 114 Wn.2d 485, 489, 789 P.2d 731 (1990) (permitting petitioner to relitigate the proportionality of his death sentence because the Court had "refine[d]" its standards somewhat since the direct appeal); In re Sarausad, 109 Wn. App. 824, 39 P.3d 308 (2001) (reconsidering accomplice liability claim because of developments in case law); In re Ridley No. 4372-7-I, 2002 Wash. App. LEXIS 615 (April 15, 2002) (granting relief on double jeopardy claim even though it had denied the same claim on direct appeal). Since the Taylor decision issued in 1986, there is not a single Washington case – published or unpublished – in which the court agreed that a prisoner's constitutional rights were violated, yet refused to consider the claim because it had been litigated on direct appeal. Thus, any barrier that Taylor may create is not independent of the merits of the claim.

Finally, even if Taylor provided an adequate and independent state procedural bar, ***** can pursue the claim in federal court if he can show "cause" for the default and "prejudice" resulting from it. Edwards v. Carpenter, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L.Ed. 2d 518 (2000). Without explanation, the magistrate judge concluded that ***** had not met this standard. R&R at 9. In fact, "counsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice" to establish cause. Id. The ineffective assistance claim must itself be properly presented to the state courts. Id. at 452. Here, ***** alleged in his PRP that his appellate attorney was ineffective in failing to raise the prosecutor's improper argument regarding instruction 15 as a distinct claim. Respondent concedes that this claim of ineffective

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assistance on appeal is properly exhausted. Answer at 6. In federal court, ***** clearly raised ineffective assistance on appeal as a basis for cause and prejudice. See Petitioner's Response at 23, 26. Yet the magistrate judge never addressed that issue. He was admittedly confused about the function of this claim. See R&R at 15.

C. OTHER ACTS OF PROSECUTORIAL MISCONDUCT VIOLATED MR. *****'S CONSTITUTIONAL RIGHTS (CLAIM 3).

The merits of these claims are discussed in Petitioner's Response at 23-26. In addition, the Court should consider the following case: Thomas v. Hubbard, 273 F.3d 1164, 1174-76 (9th Cir. 2001) (petitioner was denied due process where prosecutor violated ruling in limine excluding prior robbery with firearm).

The claims were raised on direct appeal in the Court of Appeals, but not in the Washington Supreme Court. ***** therefore raised them again in the PRP in order to bring them before the Supreme Court. See O'Sullivan v. Boerckel, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) (claims are not exhausted unless they have been presented to the state's highest court).

The Washington Court of Appeals declined to consider these claims based on In re Taylor. As with claim 2, ***** argued that Taylor could not give rise to procedural default. Petitioner's Response at 26. The magistrate judge acknowledged some of *****'s arguments, but rejected them without explanation. R&R at 9-10. The Court cannot "adopt" a report that gives no basis for its conclusions.

D. IF THE COURT FINDS THAT APPELLATE COUNSEL FAILED TO ARGUE THAT THE PROSECUTOR'S CLOSING ARUMENT VIOLATED *****'S FIRST AMENDMENT RIGHTS, THEN ***** WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL (CLAIM 4).

The magistrate's reasoning on this issue is particularly confusing. R&R at 15. "Apparently, petitioner believes that respondent does not consider this claim to have been exhausted. . . . It is unclear whether petitioner argues anything else in regard to appellate

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counsel's performance." Id. In fact, ***** did not even discuss whether this claim was exhausted because respondent conceded that it was. As ***** explained, the purpose of this claim was to avoid a procedural default as to a portion of Claim 2. Petitioner's Response at 23, 26.

The magistrate judge concluded: "For the reasons stated above under Claims 2 and 4, the Court finds that the state courts reasonably denied this claim." R&R at 15. This is puzzling. Under Claim 2, the magistrate never addressed the merits of the "improper argument" claim; he merely concluded that it was procedurally barred. Yet nobody contends that a procedural bar applies to claim 4. Further, it makes no sense to refer to the "reasons stated above under Claim[] . . . 4" because this *is* Claim 4.

E. CUMULATIVE ERROR (CLAIM 5)

The magistrate judge appears to have concluded that this claim fails because it is not based on clearly established U.S. Supreme Court law. As ***** explained in Petitioner's Response at 26-27, a petitioner must show only that his underlying constitutional claims are based on clearly established U.S. Supreme Court law. Cumulative error is not in itself a ground for relief, but merely a process used by the federal courts to evaluate the prejudice from several underlying constitutional violations.

As discussed above, this case pitted *****'s claim that he acted in self-defense against Calloway's claim that ***** started the altercation by engaging in armed robbery. Counsel's ineffectiveness deprived ***** of a corroborating witness. Instruction 15, and the argument based on it, deprived ***** of *any* defense even if the jury accepted his testimony. The prosecutor's other improper questions and arguments unfairly demeaned *****'s credibility. In combination, at least, these errors deprived ***** of a fair trial.

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III. CONCLUSION

The Court should reject the Report and Recommendation and grant the writ of habeas corpus. In the alternative, it should grant an evidentiary hearing on Claim 1.

DATED this _____ day of _____, 2002.

Respectfully submitted:

_____
David Zuckerman, WSBA #18221
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Honorable Robert J. Bryan

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

****** *** *****, JR.
Petitioner,
vs.
ALICE PAYNE,
Respondent.

No. C02-5108RJB

PETITIONER'S REQUEST FOR CERTIFICATE OF APPEALABILITY

NOTED: January 17, 2003

I. INTRODUCTION

On December 6, 2002, this Court entered an order denying Mr. *****'s petition for a writ of habeas corpus. ***** filed a notice of appeal today. He requests a certificate of appealability on all claims.

This Court rejected many of *****'s claims on a procedural ground. As discussed below, the Court's decision directly conflicts with a subsequent Ninth Circuit opinion.

II. ARGUMENT

A. LEGAL STANDARDS FOR CERTIFICATE OF APPEALABILITY

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a habeas petitioner cannot appeal from a district court judgment unless he obtains a certificate of appealability. See 28 U.S.C. § 2253. This is similar to the former requirement of a certificate of probable cause. As before, the petitioner must make a "substantial showing of the denial of a

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constitutional right." 28 U.S.C. § 2253(c)(1)(A)(2). Unlike the certificate of probable cause, however, the certificate of appealability must specify which claim or claims meet the "substantial showing" standard. The request for a certificate should be addressed first by the district court. United States v. Asrar, 116 F.3d 1268 (9th Cir. 1997).

To make a substantial showing, "obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). Rather, the petitioner need only show that the petition contains an issue (1) that is "debatable among jurists of reason"; (2) "that a court could resolve in a different manner"; (3) that is "adequate to deserve encouragement to proceed further"; or (4) that is not "squarely foreclosed by statute, rule, or authoritative court decision, or . . . [that is not] lacking any factual basis in the record." Id. at 893 n.4 and 894 (internal quotations and citations omitted). See also, Gardner v. Pogue, 558 F.2d 548 (9th Cir. 1977). *****'s claims meet all of those standards.

Petitioner incorporates by reference the arguments in his Response to Respondent's Answer and his Objections to Report and Recommendation. He will not repeat all his arguments here, but simply note key points.

This Court adopted the Magistrate Judge's report and recommendation (R&R) in its entirety. ***** will therefore refer to the report and recommendation as the ruling of the Court.

B. ***** IS ENTITLED TO A CERTIFICATE OF APPEALABILITY ON EACH CLAIM.

1. Ineffective Assistance at Trial

***** first claims that trial counsel was ineffective in failing to present the testimony of Edward Pettis. The State's theory was that ***** approached Jaramillo and Calloway with his gun drawn, in an effort to rob them of their pager and gun. The defense maintained that ***** was having a friendly conversation with Jaramillo and Calloway until he made a joke that they took as an insult to their gang. When Jaramillo announced that he would shoot *****, *****

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drew his own gun and asked Jaramillo to hand over his gun. Both sides agreed that ***** shot Jaramillo only after Jaramillo made a move for his gun. Because Pettis' testimony would have corroborated ***** on the only disputed issue in the case, ***** maintains that the failure to present it was ineffective under Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984).

Pettis admittedly left the scene after Jaramillo and Calloway threatened to shoot, and before ***** fired his gun. Because of this, the Court found that his testimony would not have helped resolve whether ***** acted in self defense. A reasonable jurist could disagree. In Washington, a defendant may not rely on self defense at all if he is the "first aggressor." In closing argument, the prosecutor vigorously argued that ***** was the first aggressor because of his hostile initial confrontation with Jaramillo. RP VI 34-36. Therefore, according to the prosecutor, the jury did not have to consider whether ***** was acting in self defense when he fired his gun. A reasonable jurist could conclude that the nature of the initial confrontation between *****, Jaramillo and Calloway was material to the jury's verdict. Put another way, *****'s claim that Pettis' testimony is material is not "lacking any factual basis in the record."

***** also maintains that trial counsel was ineffective in failing to object to the prosecutor's closing argument. The prosecutor argued that the jury should convict even if it accepted *****'s testimony as true, because *****'s admitted statements to Jaramillo made him the first aggressor. See Petitioner's Response at 11-12. The prosecutor was wrong; a defendant's words alone can never make him the first aggressor. State v. *****, 137 Wn.2d 904, 911-13, 976 P.2d 624 (1999).

This Court found that ***** was not prejudiced because the jury would have understood that the first aggressor instruction applied only to conduct and not words, and because there was "sufficient evidence" of aggressive conduct to support the instruction. R&R at 12-13. A reasonable jurist, however, could find that jurors would likely accept the interpretation of an

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instruction urged upon them by the prosecutor, who is presumably an expert in such matters. Further, a reasonable jurist could find that the analysis under Strickland does not turn on whether there was "sufficient" evidence to support a first aggressor instruction, but on whether it is reasonably likely that the jury would have believed such evidence beyond a reasonable doubt. *****'s claim is not "squarely foreclosed by statute, rule, or authoritative court decision," nor "lacking any factual basis in the record."

2. The "First Aggressor" Instruction, and the Prosecutor's Argument Based on it, Violated Mr. *****'s Rights to Free Speech and Due Process.

First, the Court found that the "instruction did not provide that petitioner's words alone would make him a 'first aggressor.'" R&R at 15. As noted above, however, the prosecutor expressly and forcefully argued that the instruction did in fact apply to *****'s words. A "jurist of reason" could find that jurors – like the prosecutor – might interpret the instruction to apply to protected speech. See Petitioner's Response at 11-18. This claim is not "squarely foreclosed" by any court decision, nor is it "lacking any factual basis in the record."

Alternatively, if the instruction could not reasonably be interpreted to apply to *****'s speech, then the prosecutor deliberately misstated the law, in violation of *****'s right to due process and free speech. See Petitioner's Response at 15; United States v. Sherlock, 962 F.2d 1349, 1362 (9th Cir. 1992) (prosecutor's improper argument showed either that instructions were too complex to be understood or that prosecutor intentionally misstated the law). The Court found this portion of the claim, however, to be procedurally barred and declined to consider it. R&R at 7-10. The Court accepted the State's argument that ***** could not "relitigate" this claim in his personal restraint petition because he had raised other prosecutorial misconduct claims on direct appeal. Id. See also Respondent's Answer at 11-12.

Recently, the Ninth Circuit ruled that "Washington's relitigation rule does not serve as a bar to habeas review." Pirtle v. Morgan, Nos. 01-99012, 01-99013 (consolidated), slip op. at 17, 2002 U.S. App. LEXIS 26208 at *20-21 (9th Cir., Dec. 19, 2002). Thus, the procedural default

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question is not merely "debatable." It is now clear that ***** will prevail on this issue in the Ninth Circuit. Obviously, a certificate of appealability must issue under such circumstances.

3. Other Acts of Prosecutorial Misconduct Violated *****'s Constitutional Rights

The merits of these claims are discussed in Petitioner's Response at 23-26. This Court declined to consider them because it found them procedurally defaulted under the same relitigation rule discussed above. Again, the Pirtle decision requires the issuance of a certificate of appealability.

4. Ineffective Assistance of Counsel on Appeal

Petitioner raised this claim in the alternative to his arguments against procedural default. Even when a claim is defaulted, ineffective assistance of counsel on appeal can provide "cause" for the federal court to consider it. See Petitioner's Response to Answer at 23. This claim may now be superfluous in view of Pirtle. Nevertheless, ***** asks the Court to grant a certificate on it in an excess of caution. (Conceivably, Pirtle could be reversed or limited at some point.)

The Court was puzzled about the purpose of this claim, and never addressed it squarely. See R&R at 15; Objections to R&R at 7-8. A "reasonable jurist" could reach a different result. The State has conceded that the claim was properly exhausted in the Washington courts. Respondent's Answer at 6.

5. Cumulative Error

This Court concluded that the cumulative error claim fails because it is not based on clearly established U.S. Supreme Court law. See R&R at 16.[1] ***** has argued that a petitioner must show only that his underlying constitutional claims are based on clearly established U.S. Supreme Court law. Cumulative error is not in itself a ground for relief, but merely a process used by the federal courts to evaluate the prejudice from several underlying constitutional

[1] The Court also noted that there could be no cumulative error, since it found no error on any individual claim. Since ***** has raised debatable individual claims, it follows that the cumulative error claim is also debatable.

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violations. See Petitioner's Response at 26-27. This position is at least "debatable," and is certainly not foreclosed by any authoritative decision. The Court should therefore grant a certificate on this claim.

III.
CONCLUSION

For the reasons stated, the Court should grant a certificate of appealability as to all portions of each claim raised.

DATED this _____ day of _____, 2002.

Respectfully submitted:

_____
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Attorney for Petitioner ****** *** *****

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CERTIFICATE OF SERVICE

I certify that I sent today a copy of Petitioner's Request for a Certificate of Appealability, and Proposed Order, by first-class U.S. Mail to :

Mr. John Samson
Attorney General's Office
Criminal Justice Division
P.O. Box 40116
Olympia, WA 98504-0116

Date

Serin Ngai

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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

****** *** *****, JR.,
Petitioner/Appellant,
vs.
ALICE PAYNE,
Respondent/Appellee.

No. 03-35054
DC# C02-5108RJB

BRIEF OF PETITIONER/APPELLANT

Appeal from the United States District Court
Western District of Washington
Honorable Robert J. Bryan

By:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

I. JURISDICTION

The district court had jurisdiction over this habeas corpus petition because Mr. ***** alleged that he was in custody of the State of Washington in violation of the Constitution of the United States. See 28 U.S.C. § 2241(c)(3). This appeal is taken from the final judgment entered on December 6, 2002, denying the petition for a writ of habeas corpus with prejudice. CR 18; ER 83-84.[1] Mr. ***** filed a notice of appeal on December 30, 2002. CR 20; ER 86. The appeal was timely under Fed. R. App. P. 4(a)(1). The district court issued a certificate of appealability on January 23, 2003, as to all claims. CR 23; ER 87-89. This Court has jurisdiction under 28 U.S.C. § 2253.

II. ISSUES PRESENTED FOR REVIEW

1) Whether ***** was entitled to relief, or in the alternative an evidentiary hearing, on his claim of ineffective assistance of counsel, where counsel failed to present the testimony of a critical defense witness?
2) Whether *****'s right to free speech was violated when he lost the right to defend himself simply because he called a gang member a "wanna-be?"

[1] "CR" stands for the docket number in the clerk's record in federal court. "ER" stands for Petitioner/Appellant's Excerpts Of Record. "RP" stands for the report of proceedings in the state trial court, which is filed as exhibits 17-24 of the State's Supplemental Submission of State Court Record. See CR 14. "CP" stands for the numbered clerk's papers in state court.

III. STATEMENT OF THE CASE

A. EVIDENCE PRESENTED AT TRIAL

****** *** ***** was charged by amended information in Pierce County Superior Court with the following: Count I – Assault in the First Degree (Victim: Gustavo Jaramillo); Count II – Robbery in the First Degree (Victim: Gustavo Jaramillo); Count III – Robbery in the First Degree (Victim: Aaron Calloway); and Count IV – Unlawful Possession of a Short Firearm. CP 16-18. All counts were alleged to have occurred on July 16, 1994. It was the state's theory of the case that ***** shot and seriously injured Jaramillo as the result of an armed robbery gone bad. CP 4 (Affidavit for Determination of Probable Cause).

Trial began on November 7, 1994, before the Honorable Thomas Felnagle. RP I 1. The state was represented by Deputy Prosecuting Attorney Douglas Hill. Mr. ***** was represented by attorney Gary Clower.

Prior to jury selection, the court granted defendant's motion to sever the firearm count, finding that such evidence would unduly prejudice Mr. ***** on the other counts. RP 18.

In his opening statement to the jury, defense counsel admitted that Mr. ***** shot Gustavo Jaramillo, and emphasized that the only issue was whether the defendant had acted in self-defense. RP II 53-71.

The only witness called by the defense was Mr. ***** himself. He testified that he had met Jaramillo a few times before July 16th and knew his name. RP IV 20. ***** saw Jaramillo and Calloway approximately an hour prior to the shooting when they were pulling up in an alley in a Cutlass automobile. ***** was there visiting a friend at an apartment building nearby. RP IV 21. A man named Mike, who was talking out the window to Jaramillo and Calloway below, came inside and

told ***** that the car was for sale for $1,000. Mr. *****, thinking his father might be interested in the car, left the apartment to talk to Jaramillo and Calloway. RP IV 22. When he arrived, Jaramillo was showing a 9mm gun to two young women. RP IV 22-23. ***** had a friendly conversation with Jaramillo and Calloway about the car. He then left to find his father, but was unsuccessful. He returned in 10 to 15 minutes and continued the conversation about the car. RP IV 24-26.

Mr. ***** noted Jaramillo's bandana, and asked if he was in a gang. Jaramillo said that he and Calloway were both in a gang. When ***** asked which gang, Jaramillo responded with a "funny name" that ***** did not understand. RP IV 26. ***** asked where the gang was from. Jaramillo said that it was from Los Angeles. ***** asked Jaramillo if he was from Los Angeles to which Jaramillo responded "no." RP IV 27.

Mr. ***** then called Jaramillo a "wanna-be." ***** said it jokingly – not as an insult. RP IV 28, 73. Jaramillo told ***** that he "didn't know who he was fucking with" and that he "was fucking with the wrong people." RP IV 28. ***** replied, "Yeah, right." RP IV 29. Jaramillo then told ***** that he was going to "bust a cap in [*****'s] ass." RP IV 28. ***** understood this to mean that Jaramillo would shoot him. RP IV 29-30.

Mr. ***** responded to this threat by drawing his own gun, and telling Jaramillo not to move and to hand over his gun. RP IV 30-31. ***** testified that he did not want to walk off and have Jaramillo shoot him in the back. RP IV 31. ***** explained that he had been shot a few years earlier after an argument with some men in a bar. As he was "trying to leave to avoid fighting them," he was shot in the back of the head. RP IV 36. Because of that memory, ***** did not want to leave himself vulnerable again. RP IV 37.

Jaramillo replied that he did not have a gun, even though ***** could clearly see it in Jaramillo's right front pants pocket. After ***** pointed this out, Jaramillo attempted to distract ***** by telling him that the gun was in the bushes across the street. He then said, "look, there [sic] comes the police." RP IV 32. ***** believed Jaramillo was attempting to distract his attention so Jaramillo could draw his gun and shoot him. RP IV 34. In fact, when Jaramillo made the remark about the police, ***** did briefly look to where Jaramillo motioned. RP IV 34. As ***** began to look away, he saw Jaramillo turn as if to reach for the gun in his pocket. RP IV 34-35. ***** shot first. RP IV 35. He did not aim at any particular part of the body. RP IV 35. "I didn't want him to shoot me, just trying to keep him from turning around and shooting me." RP IV 35. After firing a shot, ***** ran, leaving his car behind. He did not take any items from Jaramillo. RP IV 37-38.

Although ***** testified that Edward Pettis was present at the scene, RP IV 37-38, the defense never called Pettis as a witness. A detective testified in rebuttal that he looked for Pettis over the weekend after *****'s testimony, but could not find him. RP V 62-65.

Despite the trial court's severance ruling, DPA Hill brought up on cross-examination that ***** was prohibited from possessing a gun, and that he had a prior conviction for doing so. RP IV 42.

In the state's case, fifteen year-old Gustavo Jaramillo testified that he arrived at 8th Avenue and "G" Street in a car that he had stolen along with his partner in crime, Aaron Calloway. RP III 3-5, 15. Jaramillo was carrying a 9mm pistol, also recently stolen. RP III 3-5. He carried a gun because he dealt drugs. RP III 3-4. His prior criminal history included auto theft, burglary, vehicular prowling, attempting to elude a police officer, and drugs. RP III 15. Jaramillo did not

remember if he had seen ***** prior to the shooting (RP III 9), nor did he remember talking to ***** about purchasing the car. RP III 16. He remembered that he had the stolen gun in his pants pocket. RP III 11-12. He did not remember if he moved his arms, hands or other parts of his body when ***** stood nearby asking him for the gun. RP III 11-12. Jaramillo did admit that he told and gestured to ***** that the gun was "over there." RP III 16-17.

Sixteen year-old Aaron Calloway admitted that he and Jaramillo stole cars and sold drugs together. RP III 73-75. He testified only after being granted immunity by the prosecutor. RP III 93-94. A few minutes before the shooting, Jaramillo and Calloway had taken cocaine (RP III 77), and Calloway had slept only five or six hours in the previous 48 hours. RP III 121.

Calloway is a member of a gang called "Sureno." At the time of trial, he had been a "fledged or courted-in" member for almost one year and had been associated with the gang for approximately three years. RP III 94-95. When asked if Jaramillo was a member, Calloway responded that "his family is." RP III 96. When asked again, Calloway said that Jaramillo would "claim it" but had never actually been "courted-in." RP III 96-97.

On cross-examination, Calloway testified that it is not unusual for gang members such as himself to carry and use guns. Calloway testified that "disrespecting" either a gang member or the gang as a whole is often sufficient cause for confrontation. Fights and shootings can occur over something as simple as the color of clothing someone wears. A physical confrontation is not necessary to provoke sudden violence. RP III 109-112.

Calloway testified that ***** and an associate confronted him and Jaramillo and immediately demanded their gun. RP III 83. While ***** attempted to rob the gun from Jaramillo, the other man held down Calloway, went through his

pockets, and ultimately took Calloway's pager. RP III 84. After shooting Jaramillo, ***** took his gun. RP III 133. When the police arrived, however, Calloway said nothing about the gun or pager being taken. RP III at 136. Nor did he mention that he and Jaramillo had taken drugs that day (RP III 91), or that he and Jaramillo had stolen the car they were driving (RP III 91). He did not give this version of events until he was granted immunity. Id.

On direct examination, Calloway claimed that he did not see the shooting because he was looking at the ground at the time. RP III 86. When cross-examined, however, he admitted that ***** shot Jaramillo only after Jaramillo started to turn and throw his hip down to the ground towards his gun. RP III 131-132.

Two other state witnesses testified that they saw ***** together with Calloway and Jaramillo shortly before the shooting, but could shed no light on whether ***** acted in self-defense. RP II 71-77 (Jennifer Woster); RP III 49-56 (Cornella Young).

The trial court instructed the jury that ***** could not rely on self-defense if he was the "first aggressor." CP 112; ER 9. The prosecutor argued that this instruction was the most important one, because ***** admitted that he insulted Jaramillo. Therefore, by his own testimony, he was the first aggressor and he had no defense to the assault charge. RP VI 34-36; ER 6-8.

The jury acquitted ***** of both robbery counts, but convicted him of Assault in the First Degree. CP 91, 92, 93. The parties stipulated that the trial judge could decide the firearm charge based on the evidence submitted at trial without further testimony. CP 136. At the time of sentencing, the court entered Findings of Fact and Conclusions of Law in which it found Mr. ***** guilty of the firearm count. CP 163-165.

On January 11, 1995, the court imposed an exceptional sentence of 25 years in prison (300 months), exceeding the standard range of 120-160 months. CP 150-157; ER 10-18.

B. STATE APPELLATE PROCEDURE

The Washington Supreme Court affirmed the conviction and sentence in State v. *****, 137 Wn.2d 904, 976 P.2d 624 (1999). ER 29-35. ***** then filed a personal restraint petition ("PRP") in the Washington Court of Appeals. CR 8 (Ex. 10). The petition included new facts, discussed below, in support of *****'s claim of ineffective assistance of counsel. The Chief Judge dismissed the petition. CR 8 (Ex. 12); ER 39-46. ***** filed a motion for discretionary review, which was denied by the Supreme Court Commissioner. CR 8 (Exs. 13-14); ER 47-52. An en banc panel of the Washington Supreme Court denied *****'s motion to modify the commissioner's ruling. CR 8 (Exs. 15-16); ER 53.

C. FEDERAL PROCEEDINGS

Mr. ***** filed a timely habeas petition in federal district court on March 6, 2002. CR 1; ER 54-66. Magistrate Judge John L. Weinberg issued a Report and Recommendation on October 15, 2002, recommending dismissal with prejudice. CR 15; ER 67-82. Petitioner objected. CR 16. The Honorable Robert J. Bryan adopted the Report and Recommendation on December 6, 2002. CR 18; ER 83-84.

Mr. ***** is incarcerated at Stafford Creek Corrections Center in Aberdeen, Washington. He has not sought bail pending appeal.

IV. SUMMARY OF ARGUMENT

***** was denied effective assistance of counsel. ***** informed his defense attorney that Edward Pettis was present at the scene of the alleged crimes,

and would corroborate his testimony. Although Pettis was available, counsel never interviewed him or called him as a witness. This reduced the trial to a credibility contest between ***** and the alleged victims.

***** was also denied his First Amendment right to free speech. Under Jury Instruction number 15, ***** could not rely on self-defense if he was the "first aggressor." The instruction was phrased so broadly that the jury could interpret it to apply to ***** calling Jaramillo a "wanna-be." In fact, the prosecutor expressly argued that interpretation to the jury. *****'s speech was constitutionally protected, and did not amount to "fighting words." ***** was therefore deprived of his right to self-defense based on his protected speech.

V. ARGUMENT

A. STANDARD OF REVIEW

This Court's review of the district court's ruling is de novo. Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995). A federal court's review of a state court judgment is constrained by 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim --
> 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

B. MR. ***** DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

1. Failure to Interview and Subpoena Edward Pettis

The Sixth Amendment to the U.S. Constitution guarantees the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984). A defendant is entitled to a new trial if he can show (1) that trial counsel's performance was deficient; and (2) a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. Id. at 687. A petitioner can meet this standard by showing that counsel failed to conduct adequate pretrial investigation. Jones v. Wood, 114 F.3d 1002 (9th Cir. 1997). "Before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision." Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993). See also, Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994).

As discussed above, Mr. ***** testified that Edward Pettis was with him during the incident with Jaramillo and Calloway. He explained to his lawyer Gary Clower, long before trial, that Pettis would support his version of the events. See, Ex. 10(A) to State's Submission of Relevant State Court Record (Declaration of Johnny *****). CR 8; ER 36. Nevertheless, Clower never interviewed Pettis nor called him as a witness. Ex. 10(B) (Declaration of Edward Pettis at para. 8); CR 8; ER 37-38. Clower never explained this omission to *****. Ex. 10(A). Pettis was available and willing to cooperate with the defense. Ex. 10(B). If asked, Pettis would have testified to the following:

2. I was with Johnny ***** on the day that he shot a guy. I'm told that the date was July 16, 1994, and that the name of the man he shot was Gus Jaramillo.

3. I was a friend of Johnny's at the time. He was living with the mother of his daughter in the Washington Apartments on Tacoma Avenue. I sometimes stayed over there.

4. On July 16, 1994, I was on the street near the apartments when Johnny drove up in his car. He told me that some guys were selling a car and asked me if I'd like to take a look at it. I wasn't interested in buying a car, but I went along anyway because I wanted to talk with Johnny about meeting some female friends of mine. There was nobody else with us in the car.

5. Johnny pulled up to a spot near the McDonald's on Tacoma Avenue. There were two Hispanic teenage guys hanging out on the grass. Johnny went up to them to talk about the car. The guys looked and acted like gang members. I remember one of them saying the name of his gang at some point. I'd never heard of it. The conversation was friendly until Johnny said something about the guys being "wanna-bes." I remember those words clearly because everything changed as soon as he said that. Even though Johnny was just joking around, the guys got real mad. They started threatening Johnny. When one of them said he was going to shoot Johnny, I ran away. I wouldn't have been afraid of these guys if they didn't have a gun because they were younger and smaller than me and Johnny. But when one of them started talking about shooting, he sounded like he really meant it. I think he wanted to prove how tough he was because he thought Johnny had insulted him.

6. I didn't see what happened after that, but I heard a gun go off. Johnny met up with me a couple of minutes later and said "He tried to shoot me."

Ex. 10(B).

Mr. Clower did not make, and could not have made, a reasonable strategic choice to forego interviewing Edward Pettis. ***** informed Clower that Pettis would be a helpful witness, and there could be no risk in speaking with him. Had he conducted the interview, Clower would have learned that Pettis would support his case.

2. Failure to Object to Improper Argument

As discussed below, Clower failed to object when the prosecutor argued that the jury should find ***** to be the first aggressor based on his words alone. ***** contends that this argument was authorized by jury instruction number 15, to which counsel did object. If this Court finds that the prosecutor's argument contravened the instruction, however, ***** argues in the alternative that defense counsel was ineffective in failing to object to the argument.

Clower also failed to object when the prosecutor told the jury it should use its own standard regarding necessary force. ***** contends that the prosecutor's misconduct was so flagrant and prejudicial that no objection was needed. The State has argued that a timely defense objection would have given the trial court an opportunity to cure any prejudice. If this Court agrees with the State, ***** argues in the alternative that counsel was ineffective in failing to make a timely objection.

3. ***** was Prejudiced by Counsel's Errors

The prejudicial effect of counsel's errors must be considered cumulatively rather than individually. Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1515, 146 L.Ed.2d 389 (2000); Harris v. Wood, 64 F.3d 1432, 1438-39 (9th Cir. 1995) (basing that conclusion on Strickland).

Here, as the prosecutor argued in closing, this case turned on whether ***** or Jaramillo was the first aggressor. RP VI 34-36. Although Pettis did not see the actual shooting, he knew that ***** was not the first aggressor. Pettis also could have confirmed *****'s reasonable fear of Jaramillo. Pettis himself was so scared that he ran away.

The only defense witness in this case was Mr. *****. A corroborating witness would have strengthened the defense considerably. As discussed above,

the credibility of the state's witnesses was questionable. Both Jaramillo and Calloway were affiliated with gangs, had lengthy criminal records including crimes of dishonesty, and took drugs on the day of the incident. Jaramillo's recollection was hazy because of his injuries. Calloway's recollection conveniently changed over time, depending on the favors provided to him by the prosecutor's office. Under these circumstances, it is reasonably likely that the testimony of Edward Pettis would have changed the result of the trial.

Counsel's failure to object to the prosecutor's improper argument compounded the error in failing to call Pettis to the stand. Counsel let the State argue, without correction, that *****'s mere words could make him the first aggressor. In fact, the prosecutor argued that the jury should convict based on *****'s testimony alone. See section C(1), below. Counsel also permitted the State to argue an incorrect standard for self-defense.

Thus, counsel unnecessarily based his entire case on his client's testimony, while letting the prosecutor argue that such testimony established guilt. It is more than likely that the result would have been different in the absence of these errors.

4. The State Courts' Analysis of this Claim was Unreasonable

The Chief Judge of the Court of Appeals denied this claim because he believed ***** had not established prejudice. Pettis "could only have corroborated *****'s assertion that he was threatened," and "was not present during the crucial moments immediately before ***** shot Jaramillo." ER 45. The Chief Judge failed to recognize that Pettis's testimony went to the central issue at trial: whether ***** was justified in initially drawing his gun and pointing it at Jaramillo. As Clower pointed out in closing argument, the trial was essentially a credibility contest between ***** and Calloway. RP VI 52 and 64-68. The other

witnesses either did not observe the critical events or, in the case of Jaramillo, did not remember them. Calloway claimed that ***** commenced an unprovoked, armed robbery, which would obviously make ***** the first aggressor. ***** claimed that he approached Jaramillo for a friendly talk about buying a car, and drew his gun only to protect himself from a credible threat of being shot. The events after that, which led to ***** shooting the gun, were essentially undisputed. There was no question that ***** pulled the trigger only after Jaramillo made a move towards his own gun. The jury could well find this to be reasonable force in self-defense if Jaramillo had just threatened to shoot *****; it could not even consider self-defense if ***** had begun the altercation.

The Supreme Court Commissioner's reasoning was somewhat different, but equally unreasonable. He believed that *****'s trial counsel might have chosen not to call witness Edward Pettis because of concerns about Pettis' credibility. ER 49. Even if Mr. Clower had made such a decision, however, it would be unreasonable to do so without first interviewing Pettis and evaluating his credibility. See Lord v. Wood, 184 F.3d 1083 (9th Cir. 1999), cert. denied, 528 U.S. 1198, 120 S. Ct. 1262, 146 L. Ed. 2d 118 (2000). Pettis' probation warrant did not preclude his use as a defense witness. In fact, it would not even have been admissible for the purpose of impeachment. See State v. Johnson, 90 Wash. App. 54, 72, 950 P.2d 981 (1998). The State's witnesses in this case had far more serious problems with the law. Clower did not hesitate to pit his client's credibility against these juvenile delinquents' even though ***** himself had prior convictions.

The State court's decisions were also unreasonable because they failed to consider the totality of the ineffective assistance of counsel. See Williams v. Taylor, supra, 120 S. Ct. at 1515. The courts considered each error individually,

rather than cumulatively. Cf. Kyles v. Whitely, 514 U.S. 419, 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995) (Brady violations must be considered cumulatively).

5. ***** was at Least Entitled to an Evidentiary Hearing.

> A habeas petitioner is entitled to an evidentiary hearing as a matter of right on a claim where the facts are disputed if two conditions are met: (1) the petitioner's allegations would, if proved, entitle him to relief; and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir. 1992).

Jones v. Wood, 114 F.3d 1002, 1010 (9th Cir. 1997). In this case, the State has never disputed the facts contained in the declarations of Edward Pettis and Johnny *****. Thus, the district court should have granted relief without an evidentiary hearing. In the alternative, the court should at least have granted a hearing. As in Jones, ***** presented his declarations to the state courts and requested a hearing there. 28 U.S.C. § 2254(e)(2) does not preclude an evidentiary hearing because ***** did not "fail[] to develop the factual basis" of his claims in state court. Jones, 114 F.3d at 1013.

C. THE "FIRST AGGRESSOR" INSTRUCTION, AND THE PROSECUTOR'S ARGUMENT BASED ON IT, VIOLATED MR. *****'S RIGHTS TO FREE SPEECH AND DUE PROCESS.

1. Merits of Claim

Over defense objection (RP VI 16-19), the court gave the following jury instruction:

INSTRUCTION NO. 15

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 112; ER 9.

The prosecutor relied heavily on this instruction in closing argument:

> [By DPA Hill] *Instruction Number 15 tells you what perhaps may be the most important instruction for your purpose in this case.* The defendant cannot be the aggressor. He can't start the fight and decide now I'm going to finish it. He cannot create the necessity for self-defense.
>
> What I would suggest to you is that, *if you look at what the defendant said and how he said it in this case, that you will find there is no self-defense. Even if you ignore our evidence*, ignore Gus, ignore Aaron, ignore everybody else and everything else, even if you just sit and listen to what the defendant said and how he said it, you will determine he is the aggressor. . . .
>
> *The defendant admits he insulted Gus and Aaron.* And when they become insulted and Gus said, "you don't know who you're "F"ing with," I asked the defendant, "Why don't you leave?" And his answer

> – and I don't remember the exact wording – but it was something along the lines of "Nobody talks to me that way."
>
> I mean, that was the gist of it. That was the tone of it. And again, I don't remember the exact words. I wasn't taking notes,[2] but that was the tone of it. Nobody talks to Johnny ***** that way. Johnny ***** is a big man, and he carries a gun, and nobody talks to him that way. . . .
>
> *He pokes his finger in Gus's eye[3], according to his testimony – not our evidence – his testimony, and he gets sarcastic with him and says, "Yeah, right."* And he knows Gus has a gun, and here he is poking at this guy, according to his testimony.

RP VI 34-36 (emphasis added).

These statements were not isolated off-hand comments. They were the central thrust of the prosecutor's argument. As DPA Hill must have realized, he had serious problems with the credibility of his only eyewitnesses. See section III(A).

Rather than rely on Jaramillo and Calloway, Hill convinced the jury to convict based solely on *****'s testimony. He began by describing the first aggressor instruction as the most important one in the case. Then, in the space of three pages of transcript, he stressed four times that the jury should find ***** to be the first aggressor based only on his testimony – ignoring the testimony of Calloway and Jaramillo. Since ***** maintained that he was not the first to make a threatening statement or gesture, Hill focused on *****'s "insult[s]." This

[2] *Had* DPA Hill been taking notes, they would have shown that no such words were ever spoken by Mr. *****. See RP IV 74.

[3] The prosecutor must have meant this as a figure of speech, because nobody testified that ***** actually poked a finger at Jaramillo.

obviously referred to *****'s "wanna-be" comment and his saying "yeah, right" when Jaramillo began making threats.

It is likely that the jury convicted based on this argument. The jury obviously did not find Jaramillo and Calloway entirely credible because it *acquitted* ***** of the two robbery counts. The jury necessarily rejected Calloway's testimony that ***** and an accomplice set out to rob him and Jaramillo of their gun. But without such testimony, there was no evidence that ***** committed the first aggressive act. Thus, the prosecutor apparently succeeded in convincing the jury to convict based on *****'s words alone.

As the prosecutor's argument proves, the jury instruction was sufficiently broad to cover protected speech.

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. Herndon v. Lowry, 301 U.S. 242, 258 (1937); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Grayned v. City of Rockford, 408 U.S. [104], at 116-117 [(1972)].

Broadrick v. Oklahoma, 413 U.S. 601, 611-12; 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. [footnote omitted] Cf. Marcus v. Search Warrant, 367 U.S. 717, 733, 81 S.Ct. 1708, 1717, 6 L.Ed.2d 1127 [(1961)]. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as

> the actual application of sanctions. Cf. Smith v. California, supra, 361 U.S. [147] at 151-154, 80 S.Ct. at 217-219 [(1959)]; Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 [(1958)]. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Cantwell v. Connecticut, 310 U.S. 296, 311, 60 S.Ct. 900, 906, 84 L.Ed. 1213 [(1940)].

NAACP v. Button, 371 U.S. 415, 432-33, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

Here, instruction 15 applied to "any intentional act reasonably likely to provoke a belligerent response." The jury was never told that the word "act" excluded speech. In any event, the First Amendment applies to expressive physical acts as well as to purely verbal expression. See R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (cross burning); United States v. Eichman, 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990) (flag burning); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (dancing). Certainly, the "act" of making a verbal insult may "provoke a belligerent response."[4]

As the U.S. Supreme Court has repeatedly held, the government cannot deny or restrict access to some right, privilege or benefit based on a citizen's protected speech.

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[4] This does not necessarily mean that the insult constitutes unprotected "fighting words," however. "Fighting words" are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke *violent reaction*." Cohen v. California, 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (emphasis added), citing Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L. Ed. 1031 (1942). A "belligerent response" is not necessarily a "violent" one. It may consist of nothing more than harsh, angry words. *****'s comments, while arguably insulting, do not nearly rise to the level of fighting words.

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible.

Perry v. Sinderman, 408 US 593, 596-97, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). See also, O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996); Thomas v. Review Bd. of Indiana Employment Sec. Division, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981);. Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). For example, even though a prisoner has no protected liberty interest in his placement within a prison system, prison officials cannot transfer him in retaliation for his protected speech. Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998). Here, the government deprived ***** of his self-defense claim based on his protected speech, in violation of his First Amendment rights.

Even if the instruction itself did not violate *****'s First Amendment rights, the prosecutor's argument certainly did. Arguments that direct infringe on a specific constitutional right are analyzed under a more stringent standard than those that are merely improper. Donnelly v. DeChristoforo, 416 U.S. 637, 642-43, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). In such cases, the conviction must be reversed unless the error was harmless beyond a reasonable doubt. Chapman v.

California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) (comment on failure to testify). In this case, the prosecutor's argument directly prejudiced *****'s right to free speech under the First Amendment.

2. The Washington Supreme Court's Analysis was Unreasonable.

The Washington Supreme Court unreasonably applied these standards. While the Court agreed that the jury could not rely solely on *****'s words to find him the first aggressor, it concluded that the instruction given permitted the jury to rely only on *****'s "acts and conduct." See State v. *****, 137 Wn.2d 904, 911-13, 976 P.2d 624 (1999). "If applied in a case like this one, a rule that words alone preclude the speaker from claiming self-defense could lead to the conclusion that insults about gang affiliation justify a violent response." Id. at 912. It believed that the first aggressor instruction was based only on *****'s "aggressive conduct." Id. at 913.

Apparently, the Court was referring to the following portion of its fact statement:

> Other witnesses, including Calloway, testified that ***** approached, pulled out his gun and stood over Jaramillo while demanding to know where the 9 mm pistol was. Jaramillo's hands were by his head, as he had propped himself up on his right elbow, and the gun was in his right pants pocket, beneath him as he lay on his side on the ground. ***** ordered Jaramillo and Calloway not to move, and when Jaramillo looked up ***** shot him in the back of the neck, took Jaramillo's gun, and left.

Id. at 907. The court's reference to "other witnesses," however, is incorrect. As discussed above in section III(A), Calloway was the *only* witness who claimed that ***** approached him and Jaramillo aggressively. Further, the jury necessarily

rejected Calloway's testimony because it acquitted ***** of the robbery charges. The "facts" quoted above would obviously amount to robbery.

Perhaps more importantly, the Washington Supreme Court did not even mention the prosecutor's explicit argument that ***** was a first aggressor based on his words alone. ***** quoted that argument at length in his brief. See Brief of Appellant at 16-17, CR 8 (Ex. 2 to State's Submission of Relevant State Court Record). If the prosecutor, a trained attorney, could interpret instruction 15 to apply to protected speech, surely the jury could as well. Thus, the Washington Supreme Court avoided the central issue in this case by ignoring the critical facts.

In an effort to force the Washington courts to address the prosecutor's argument, ***** specifically focused on this misconduct in his PRP. Again, the courts' analysis was unreasonable. The Court of Appeals found that ***** was not prejudiced by the prosecutor's argument, because the jury instruction referred only to "acts and conduct." See Ex. 12 to State's Submission of Relevant State Court Record at 4; CR 8; ER 42. It is unreasonable, however, to assume that the jury would disregard the prosecutor's interpretation of a jury instruction, especially when there is no objection from defense counsel nor admonition from the court.

The Washington Supreme Commissioner's reasoning was different, and even more unreasonable.

> It is evident from the argument that the prosecutor was not suggesting to the jury that it could find Mr. ***** the aggressor solely because of what he said to Jaramillo. The prosecutor focused on Mr. *****'s testimony and demeanor, emphasizing that when he asked Mr. ***** why he did not leave the scene when Jaramillo became belligerent, he responded that "Nobody talks to me that way." The prosecutor thus tried to persuade the jury that by his words and actions, Mr. ***** took an aggressive posture and needlessly escalated the confrontation.

See Ex. 14 to Submission of Relevant State Court Record at 5-6; CR 8; ER 51. But, as discussed above, the prosecutor explicitly argued that the jury should find ***** to be the first aggressor based solely on *****'s own testimony. ***** testified only that he jokingly called Jaramillo a "wanna-be," and that he responded "yeah, right" when Jaramillo said he was not someone to trifle with. He denied *any* aggressive conduct until Jaramillo threatened to shoot him. It is true that the prosecutor claimed ***** testified "Nobody talks to me that way." *But that was a misstatement of the evidence.* The prosecutor's perhaps erroneous legal interpretation of instruction 15 cannot be excused by the fact that he also distorted *****'s testimony. Cf. Paxton v. Ward, 199 F. 2d 1197, 1218 n.10 (10th Cir. 1999) (prosecutor violated due process by misstating the evidence in closing argument). In fact, the prosecutor's questioning about why ***** did not earlier leave the scene was also improper. In Washington, a defendant has no duty to retreat from a confrontation before using force in self-defense. See State v. Studd, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999).

As the Commissioner noted, the prosecutor did argue that "Mr. ***** took an aggressive posture and needlessly escalated the confrontation." But the Commissioner overlooked that the prosecutor based this argument solely on *****'s protected speech and not on any physical actions (other than perhaps declining to run away). Thus, the Commissioner's analysis was unreasonable.

3. No Part of this Claim is Procedurally Defaulted

The district court found that this claim was procedurally defaulted to the extent it relied on the prosecutor's closing argument rather than on the language of the jury instruction. Report and Recommendation at 7-10; ER 73-76. It believed the state courts declined to consider this issue based on Washington's relitigation

rule. "'[A] personal restraint petitioner may not renew an issue that was raised an rejected on direct appeal unless the interests of justice require relitigation of that issue.' In re Personal Restraint Petition of Lord, [123 Wn.2d 296,] 868 P.2d 835, 824 (Wash. 1994) (citing in re Taylor, [105 Wn.2d 683,] 717 P.2d 755, 758 (Wash. 1986)." Report and Recommendation at 9; ER 75. Although the court's reasoning is not entirely clear, it apparently accepted the State's position: because ***** raised different and unrelated claims of prosecutorial misconduct on direct appeal, he was barred from raising the prosecutor's argument concerning Instruction 15 in his PRP.

In the district court, ***** explained the many reasons why Washington's "relitigation" policy could not give rise to procedural default in this case. See Petitioner's Response to Answer at 18-23 (CR 10); Petitioner's Objections to Report and Recommendation at 4-7 (CR 16). ***** will not repeat these arguments here, because this Court has now unequivocally held that "Washington's relitigation rule does not serve as a bar to habeas review." Pirtle v. Morgan, 313 F.3d 1160, 1168 (9th Cir. 2002).

D. OTHER ACTS OF PROSECUTORIAL MISCONDUCT VIOLATED MR. *****'S CONSTITUTIONAL RIGHTS

1. Merits of Claims

During cross-examination, DPA Hill asked Mr. ***** if he knew it was illegal for him to carry a gun. ***** answered that he did. RP IV 42. When Hill then asked ***** if he remembered previously being caught with a gun in his possession and being arrested for it, defense counsel objected and, after the jury was excused, moved for a mistrial. RP IV 45. The court sustained the defense objection, finding that Hill's questions directly contravened its previous ruling

severing the firearm charge because of its prejudicial effect. RP IV 47.[5] However, the court denied *****'s motion for a mistrial. RP IV 48.

Hill's questions informed the jury that ***** had previously been convicted of possessing a firearm, and implicitly informed them that he had lost his right to possess firearms through another prior felony.[6] This unfairly prejudiced Mr. ***** and rendered the proceedings unfair. Cf. Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (government unfairly prejudiced defendant by introducing nature of prior conviction when defendant was willing to stipulate that he had a conviction that would make him ineligible to carry a firearm).

Also during cross-examination, DPA Hill twice asked Mr. ***** to comment on the truthfulness of the testimony by other witnesses. RP VI 82-83. Defense counsel twice objected and the trial court twice sustained the objection. RP IV 82-83. The Washington courts have consistently found such questions to be improper. See State v. Neidigh, 78 Wn. App. 71, 76-78, 895 P.2d 423 (1995) (reviewing cases). Other jurisdictions, including the federal courts, are in accord. United States v. Sullivan, 85 F.3d 743, 749-50 (1st Cir. 1996); United States v. Boyd, 54 F.3d 868, 871 (D.C. Cir. 1995); United States v. Richter, 826 F.2d 206, 208 (2nd Cir. 1987); Scott v. United States, 619 A.2d 917, 924 (D.C. 1993) ("We have repeatedly condemned questioning by counsel which prompts one witness to suggest that he or she is telling the truth and that contrary witnesses are lying."); State v. Flanagan, 111 N.M. 93, 801 P.2d 675 (N.M. Ct. App. 1990). "The rule

[5] The court's reason for severing the firearm count is set forth at RP I 14-18.

[6] Except for DPA Hill's remarks, the jury was never told of Mr. *****'s previous criminal conviction.

reserves to the jury questions of credibility." Sullivan, 85 F.3d at 750. The courts have applied this rule whether the opposing witness is a lay person or government agent. Id.

When Mr. ***** testified that Edward Pettis was with him at the scene of the shooting, DPA Hill asked, "You never told us that before, have you?" RP IV 67. Defense counsel objected and the trial court sustained. RP IV 67. Hill's question violated *****'s Fifth Amendment right to be free from self-incrimination. See Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

During closing argument, DPA Hill said, "When you go in there, you're going to have to separate out those I thinks [sic] of Mr. Clower's from what you heard which was valid argument, because that's invalid argument, and it's against the rules." RP VI 86. This suggested that there was something improper about Clower's argument, when in fact he was raising legitimate inferences from the evidence. The defense objected and the trial court sustained. RP VI 86. Such denigration of defense counsel violates due process. United States v. Rodrigues, 159 F.3d 439 (1998), amended on denial of rehearing, 170 F.3d 881 (9th Cir. 1999), citing Darden v. Wainwright, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986).

Also during closing argument, DPA Hill told the jury to use its standard of what force is necessary, not Mr. *****'s. RP VI 87. This suggested that the standard was a subjective one, based on the whims of individual jurors, rather than an objective "reasonableness" standard. There was no objection to this argument. In effect, DPA Hill urged the jury to follow his instructions and to disregard the court's Instruction Number 16. CP 113. A prosecutor's statements regarding the law must be confined to what is set forth in the instructions, and must not mislead

the jury. United States v. Berry, 627 F.2d 193, 200 (9th Cir. 1980) (citing United States v. Artus, 591 F.2d 526, 528 (9th Cir. 1979); State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972).

Taken as a whole, the prosecutorial misconduct (including the argument regarding Instruction 15) so infected the trial with unfairness as to deny Mr. ***** due process. See generally, Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). In addition, the comment on Mr. *****'s silence specifically violated his Fifth Amendment right to be free from self-incrimination, and is reversible error under the stricter Chapman standard of review. See section C(1), above.

2. The Washington Supreme Court's Analysis of These Claims was Unreasonable

The Washington Supreme Court did not address these claims at all, although they were raised in the PRP and motion for discretionary review. On direct appeal, the Court of Appeals made a conclusory finding that the misconduct was not sufficiently prejudicial to warrant relief. This ignored the fact that the case turned entirely on a credibility contest between ***** and Calloway. By repeatedly throwing mud at ***** and his attorney, the prosecutor may well have tipped the balance.

3. The Claims are Not Procedurally Barred

In the district court, the State noted that these claims were presented only to the Court of Appeals on direct appeal. It contended that this precluded the Washington Supreme Court from considering them in the PRP, and that the claims were therefore procedurally defaulted. The district court agreed. Report and

Recommendation at 7-10; ER 73-76. As discussed above, this Court rejected such reasoning in Pirtle v. Morgan.

E. IF THE COURT FINDS THAT APPELLATE COUNSEL FAILED TO ARGUE THAT THE PROSECUTOR'S CLOSING ARUMENT VIOLATED *****'S FIRST AMENDMENT RIGHTS, THEN ***** WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

***** included this claim in his PRP and habeas petition to establish "cause" for any procedural default on his First Amendment claim. In view of Pirtle v. Morgan, this claim would appear to be superfluous. ***** will argue it further only if the State contends that Pirtle is somehow not applicable here.

F. CUMULATIVE ERROR

Even when no individual error is sufficiently prejudicial to warrant relief, the cumulative effect of the errors may require reversal. Cargle v. Mullin, 317 F.3d 1196, 1206-07 (10th Cir. 2003); Mak v. Blodgett, 970 F.2d 614, 624- 25 (9th Cir. 1992), cert. denied 507 U. S. 951 (1993).

As discussed above, this case pitted *****'s claim that he acted in self-defense against Calloway's claim that ***** started the altercation by engaging in armed robbery. Counsel's ineffectiveness deprived ***** of a corroborating witness. Instruction 15, and the argument based on it, deprived ***** of *any* defense based on his testimony alone. The prosecutor's other improper questions and arguments unfairly demeaned *****'s credibility. In combination, at least, these errors deprived ***** of a fair trial.

VI. CONCLUSION

For the foregoing reasons, ***** is entitled to a writ of habeas corpus. In the alternative, he is at least entitled to an evidentiary hearing on his claim of ineffective assistance of counsel.

VIII. RELATED CASES

Petitioner is not aware of any cases related to this one.

RESPECTFULLY SUBMITTED this 15th day of April, 2003.

DAVID B. ZUCKERMAN
Washington State Bar No. 18221
Attorney for ****** *** *****, Jr.

JS 44 (Rev. 10/20)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

HUMAN RIGHTS DEFENSE CENTER,

(b) County of Residence of First Listed Plaintiff Palm Beach County, FL
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Jesse Wing and Katie Chamberlain, MacDonald Hoague & Bayless, 705 2nd Avenue, Suite 1500, Seattle, WA 98104

DEFENDANTS
COYOTE RIDGE CORRECTIONS CENTER SUPERINTENDENT JEFFREY A. UTTECHT; COYOTE

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
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- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
First and Fourteenth Amendments to the United States Constitution

Brief description of cause:
Government censorship and denial of due process to publisher

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. **Origin.** Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

JS 44 (Rev. 10/20)

CIVIL COVER SHEET

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I. (a) PLAINTIFFS

HUMAN RIGHTS DEFENSE CENTER,

(b) County of Residence of First Listed Plaintiff Palm Beach County, FL
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Jesse Wing and Katie Chamberlain, MacDonald Hoague & Bayless, 705 2nd Avenue, Suite 1500, Seattle, WA 98104

DEFENDANTS

COYOTE RIDGE CORRECTIONS CENTER SUPERINTENDENT JEFFREY A. UTTECHT; COYOTE

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

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- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
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- ☐ 560 Civil Detainee - Conditions of Confinement

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Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
First and Fourteenth Amendments to the United States Constitution

Brief description of cause:
Government censorship and denial of due process to publisher

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 12/8/2020

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Washington

HUMAN RIGHTS DEFENSE CENTER

Plaintiff(s)

v.

JEFFREY A. UTTECHT, SUPERINTENDENT OF COYOTE RIDGE CORRECTIONS CENTER OF the WASHINGTON DEPARTMENT OF CORRECTIONS, in his individual and official capacities; et al

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* JEFFREY A. UTTECHT
c/o Coyote Ridge Corrections Center
1301 N Ephrata Ave
Connell, WA 99326

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Jesse Wing
Kathleen Chamberlain
MacDonald Hoague & Bayless
705 Second Avenue, Suite 1500
Seattle, WA 98104

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Washington

HUMAN RIGHTS DEFENSE CENTER

Plaintiff(s)

v.

JEFFREY A. UTTECHT, SUPERINTENDENT OF COYOTE RIDGE CORRECTIONS CENTER OF the WASHINGTON DEPARTMENT OF CORRECTIONS, in his individual and official capacities; et al

Defendant(s)

Civil Action No.

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c/o Coyote Ridge Corrections Center
1301 N Ephrata Ave
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A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Jesse Wing
Kathleen Chamberlain
MacDonald Hoague & Bayless
705 Second Avenue, Suite 1500
Seattle, WA 98104

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset