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STATE OF WASHINGTON

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

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IN RE THE PERSONAL RESTRAINT PETITION OF  
MELISSA McMILLEN

Petitioner.

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON IN AND FOR PIERCE COUNTY

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BRIEF OF PETITIONER

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**STATUS OF PETITIONER**

Ms. McMillen is currently incarcerated in Washington correction center for Women at Purdy. She is being held upon sentence imposed in the case in which she is currently appealing from Pierce County Superior Court number 11-1-02357-7. Her guilty conviction was entered on September 5, 2013 after trial in which the jury was waived. Ms. McMillen has filed a direct appeal under Division II cause number 45586-2-II. Her direct appeal is pending a decision by this court.

### STATEMENT OF THE CASE

On June 8, 2010 at 2:58 am Melissa McMillan was interviewed by Tacoma Police officer's in connection with a deceased newborn found at her residence. On June 9<sup>th</sup> she was interviewed for a second time. The following facts are supported in those interviews and the trial transcripts.

On June 3, 2011, Melissa McMillen attended dinner with family members in the upstairs dining room at the residence she and her boyfriend shared with her father. Melissa complained of back pain and constipation to several people who attended dinner and was given a laxative medication by her father. Melissa and her boyfriend, Zachary Beale retired to their room in the lower level of the residence and went to sleep. No one at the dinner suspected Melissa of being pregnant or being in labor. Melissa 's sleep was fitful that evening as she was experiencing back pain and often got up to walk around as that helped to relieve the pain.

Around five am on the morning of June 4, 2011, Melissa awoke feeling a need to evacuate her bowels. She went to the bathroom attached to the laundry room in the downstairs of her residence. The laundry room was across the hall from where she and Zach Beale slept. Believing she had experienced a bowel movement Melissa attempted to get off the toilet and realized she was attached to something. She looked in the toilet and

saw an infant, feet down, in the water up to its waste with an umbilical cord still attaching her to the baby. The baby's head and chest were out of the water. Melissa sat back down feeling like she had to urinate. She pushed as if to urinate and after a while, the placenta came out. Her back pains were then alleviated.

After delivering the placenta, Melissa removed the child and the placenta from the toilet with a towel. She then laid down on the floor with the child. Melissa described the child as purple, unmoving and unresponsive. She felt extreme exhaustion at this point and was unable to get up. According to Melissa's interview with the police, she laid on the floor for what she thought was about an hour. Interviews with, and testimony from, Mr. Beale during trial place the actual time frame for Melissa being on the laundry room floor between two and four hours. When Melissa woke up she wrapped the apparently deceased body of her child into a bag and cleaned up the laundry room. She then went to take a shower. In route to take her shower, Melissa stopped on the stairs to rest and was found there by Zach Beale when he first awoke. This was his testimony at trial. After taking a shower. Melissa returned to her bed where Zach Beale was sleeping.

Zach Beale was also interviewed on June 8, 2011. He stated in his interview that he awoke around 10 am and noticed blood on the carpet. He

got worried and found Melissa on the staircase. She looked tired but stated that she was ok. She had not yet taken a shower. Zach then went back to bed. Zach told officers that he never heard a sound from Melissa that morning and that her father, who sleeps directly above the laundry room bathroom, also did not hear anything from Melissa in the early morning hours of June 4, 2011.

Neither Melissa nor Zach called for aid.

This Personal Restraint Petition now follows.

#### **ASSIGNMENTS OF ERROR / GROUNDS FOR RELIEF**

1. There Was Insufficient Evidence To Convict The Defendant Of Abandonment As There Was No Evidence That The Injuries Suffered By The Baby During Birth Were Survivable And The State Had The Burden To Prove Survivability In Order To Establish The Proximate Cause Of Death As The Fault Of The Mother.
2. Convicting Mcmillen For Failing To Call 911 During Or Immediately After An Unexpected Home Delivery Invades Her Fundamental Rights To Privacy And Equal Protection Under The United States Constitution, First And Fourteenth Amendments.
3. Trial Counsel Was Ineffective For Failing To Prepare Adequately For Trial, Including Seeking Qualified Experts To Testify For The Defendant And Adequately Cross Examining Witnesses.

## LAW AND ARGUMENT

1. **There Was Insufficient Evidence Presented By The State Upon Which To Convict Ms. Mcmillen.**

McMillian was charged by information with Second Degree Felony Murder under RCW 9A.32.050. The State charged the underlying felony as Abandonment of a Dependent Person in the Second Degree under RCW 9A.42.070. The Felony Murder statute provides in pertinent part:

(1) A person is guilty of murder in the second degree when:

...

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants...

RCW 9A.32.050 (2014).

The Felony Murder Statute functions on the concept of transferred intent. The requisite intent of underlying felony is transferred to the homicide. Felony murder requires an intended felony and an unintentional death. The unintended death adopts the intent element of the underlying felony.

The Abandonment Statute provides in pertinent part:

(1) Except as provided in subsection (2) of this section, a person is guilty of the crime of abandonment of a dependent person in the second degree if:

(a) The person is the parent of a child, a person entrusted with the physical custody of a child or other dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or other dependent person any of the basic necessities of life; and

(b) The person recklessly abandons the child or other dependent person; and:

.....

(ii) Abandoning the child or other dependent person creates an imminent and substantial risk that the child or other dependent person will die or suffer great bodily harm.

RCW 9A.42.070 (2014).

The requisite intent element of the criminal abandonment statute is recklessness. Recklessness is defined under RCW 9A.08.010(c) as, “A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(c).

The RCW’s do not define “abandonment” or “basic necessities of life” in the criminal statutes however the WPIC’s contain definitions that

are provided to jurors to aid them in their understanding during deliberations. The WPICs define abandonment for purposes of the above mentioned statute as follows: ““Abandons” means leaving a child or other dependent person without the means or ability to obtain one or more of the basic necessities of life.” WPIC 38.24. The WPIC define basic necessities of life as, ““Basic necessities of life” means food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication.” WPIC 38.20.

The Court found McMillian guilty of Second Degree Felony Murder predicated upon finding her guilty of Second Degree Criminal Abandonment. CRP, September 5, 2013, pg 8 lns 3-6. The Court predicated its finding of abandonment on McMillen’s failure to call 911 and failure to provide shelter, nutrition and other basic necessities of life. CRP September 5, 2013 at Pg 7 lns 24-25 and pg 8 lns 1-3.

This is a case of first impression in Washington State. No appellate or Supreme Court cases have addressed the unique issue of criminal liability resulting from a fetus’ death subsequent to an unassisted home birth where the testifying experts all agreed that the mother inflicted no intentional or actual physical injury on the child. This is a case where the cause of death is a presumption based upon no actual finding of cause

of death. Because of the unique facts of this case, legal issues are raised including proximate cause of death, Fundamental Privacy Rights, and Equal Protection.

Where an Appellate Court is faced with a case of first impression, it is not uncommon to seek guidance from other jurisdictions to see how other courts have addressed similar matters. In the instant case, there is very little case law in this country speaking to a substantially similar fact pattern. Massachusetts has one case with substantially similar facts and closely aligned statutes upon which the defendant was convicted. The Supreme Judicial Court of Massachusetts made a very thoughtful analysis of not only the facts of the case and the criminal statutes at issue but also the Constitutional Rights, Privacy and Equal Protection, implicated as a result of the charges and conviction.

In 2012 the Supreme Judicial Court of Massachusetts heard the case of *Commonwealth v. Pugh*, 462 Mass. 482, , 969 N.E. 2d 672 (2012). In the Pugh case the defendant was found guilty of involuntary manslaughter for both inflicting fatal injuries on her unborn fetus by bearing down and pulling during an unassisted birth and for failing to summon medical aid upon realizing that she was giving birth. The trial court found that Pugh committed a reckless act and disregarded a substantial likelihood of harm both as a result of bearing down and pulling

and for failing to call 911 during the birth. The matter was timely appealed but transferred to the Supreme Judicial Court on that court's motion. The defendant raised issues of legal sufficiency of the evidence, duty of a woman in childbirth to seek medical assistance, and, if a duty existed, the judge erred in concluding that the defendant disregarded a substantial risk of harm and breached that duty with an unaided home birth. The Supreme Judicial Court, after soliciting additional briefing on the issues raised, ultimately reversed Pugh's conviction and entered judgment for the defendant. *Pugh*, 490-494

The facts in *Pugh* are perhaps more ominous than those of the instant case. Unlike McMillen in the instant case, Pugh acknowledged that she was pregnant although, like McMillen she did not have regular periods. Pugh had an elementary aged child already and had been through the birthing process at least once before. Pugh did not know how far along she was in the pregnancy. Like McMillen, Pugh did not seek prenatal care and told no one of her pregnancy. *id*

In October of 2006 Pugh began to have contractions and, based upon her calculation of the pregnancy length, believed she was miscarrying the child. She left work in the late afternoon and returned to the residence she shared with her eight year old, her boyfriend and his aunt. Approximately thirty minutes after returning home she sat on a toilet

and her water broke. She reached inside herself and felt a foot. At that moment she became aware that the baby was in a breach position. Pugh believed that a rapid delivery would give the breach baby its best chance of survival so she pulled on the foot, legs and torso while bearing down and delivered the baby within in approximately five minutes. Per Pugh, the baby was blue. She attempted rescue breaths but the baby did not ever cry or move. Pugh did not call for help, nor did she seek medical aid during or after the delivery. She disposed of the newborn in the trash and the police discovered the body several days later. *id*

Among other findings, and what is pertinent to the case at bar, is that the trial court found that when Pugh felt the foot she became aware that there was a risk of substantial harm to the child unless Pugh sought professional help. The trial court then found that she breached her duty to provide medical care by failing to summon aid during and after the delivery. *id*

The Supreme Judicial Court of Massachusetts analyzed the Pugh case from both the commission and omission perspectives - commission being physical acts to dislodge the child (and not applicable to the facts of the instant case) and omission being failure to seek medical assistance, which is directly in line with the case at bar. First, the Supreme Judicial Court found that reckless conduct may be satisfied by either the

commission of an act or the omission where there is a duty to act. *Pugh* at 497. Washington takes an identical stance. “The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.” *Adkisson v. Seattle*, 42 Wn.2d 676, 685 (Wash. 1953). In *Pugh*, as in the case at bar, there was no testimony or admission that the defendant acknowledged or recognized a substantial risk of harm to the child, which, she disregarded during the birthing process.

Next, the Supreme Judicial Court found that in *Pugh* there was no testimony regarding whether the baby would have survived if emergency aid had been summoned when the defendant's water broke. *Pugh* at 500. In the instant case, there was no testimony regarding whether the child would have survived if aid were summoned after delivering the placenta (the earliest point in the delivery process when a mother is detached from a child and potentially able to call 911). The Supreme Judicial Court found that the defendant's failure to summon aid could not be the legal or proximate cause of the baby's death and stated, in dicta, that proximate

cause is a cause which, in the natural and continuous sequence, produces death and, without which, the death would not have occurred. *Pugh* at 500.

In Washington, “the term “proximate cause” means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.” *State v. Berube*, 150 Wash.2d 498, 510 (2003). The *Pugh* court found that the state had the burden of proving proximate cause and that absent any testimony that the newborn would have survived with medical intervention, the state did not meet its burden. *Pugh* at 501.

This court should reach the same conclusion in the instant case. Pursuant to the courts findings, the delivery was rapid, into a toilet where the child’s head was out of the water, and the delivery of the placenta was delayed. CRP Sept. 5, 2013 at pg 4, lns 15-16. The expert testimony indicated that the child may have attempted to breathe but the lungs, at best, only partially inflated. Given the amount of time that McMillen would have had to remain on the toilet attached to the child because of the delayed delivery of the placenta, the amount of time that it would have taken McMillen to summon 911 aid, and the time it would have taken aid to reach the child, it is extremely reasonable to conclude that the child would have suffered severe oxygen deprivation and likely death prior to aid arriving. The child’s death cannot be 100% unquestionably the result

of failing to call 911 because the child may have died despite any call. The burden of producing evidence that the child would have survived rested with the prosecution, otherwise burden shifting is affected. That is the very definition of proximate cause.

There is a parental duty to provide medical care for a dependent minor child was recognized at common law and characterized as a natural duty. *State v. Williams*, 4 Wn.App. 908, 912 (1971). "In Washington, the existence of the duty is commonly assumed and is stated at times without reference to any particular statute. See, e.g., *In re Adoption of Lybbert*, 75 Wn.2d 671, 453 P.2d 650 (1969); *In re Hudson*, 13 Wn.2d 673, 693, 126 P.2d 765 (1942); *In re Guardianship of Rudonick*, 76 Wn.2d 117, 125, 456 P.2d 96 (1969)." *Williams*, 4 Wn. App. at 912. In *Williams*, the defendants were convicted of manslaughter for failing to provide medical care to their sick seventeen month old baby. *Id.* The information charged the violation of "the legal duty of providing necessary . . . medical attention to said . . . minor child . . ." The Court found that the general language of the information in that case permits reliance upon the existence of the legal duty no matter the source from which it is derived. The defendants had challenged the sufficiency of their conviction because the Court did not find a violation of RCW 26.20.030 (1)(b). RCW 26.20.030 (1) (b) is consistent with and therefore does not supersede the

common law natural duty of parents to provide medical care for their minor dependent children. Thus, should RCW 26.20.030 (1) (b) be repealed, it could not reasonably be claimed that parents were thereby absolved from their natural duty to provide necessary medical care for their minor dependent children. We therefore hold that the violation of the parental duty to furnish medical care to a minor dependent child, the other elements of manslaughter being present, is a sufficient basis on which to rest a conviction of the crime of manslaughter under RCW 9.48.060 and 9.48.150." *Williams*, 4 Wn.App. at 915. However, the *Williams* Court then addressed the issue of proximate cause and specifically found:

The remaining issue of proximate cause requires consideration of the question of when the duty to furnish medical care became activated. If the duty to furnish such care was not activated until after it was too late to save the life of the child, failure to furnish medical care could not be said to have proximately caused the child's death. Timeliness in the furnishing of medical care also must be considered in terms of "ordinary caution." The law does not mandatorily require that a doctor be called for a child at the first sign of any indisposition or illness. The indisposition or illness may appear to be of a minor or very temporary kind, such as a toothache or cold. If one in the exercise of ordinary caution fails to recognize that his child's symptoms require medical attention, it cannot be said that the failure to obtain such medical attention is a breach of the duty owed." *Williams*, 4 Wn. App. at 916.

In the instant case, McMillen informed the police that her child was purple when she looked at her. McMillen stated on numerous

occasions that she never felt the child breathe and that the baby never moved or made a sound. McMillen said that she believed that the baby was dead when she gave birth to her. While parents may have a duty to seek medical aid for their living children, that duty begins when the parents are aware that medical aid is needed for the child. Here, McMillen believed that the baby was dead and therefore was beyond the need for medical aid. Under Washington State Law, McMillen had no duty to summon medical aid for the child. Therefore, the trial judge in this matter, erred in finding that McMillen acted recklessly by failing to perform a duty that she did not have under the law. The judge further erred by finding the duty had been breached in a reckless manner because the reckless element requires that the actor knows of and disregards a substantial risk that a wrongful act would occur. In this instance, the wrongful act was clearly the death of the child; however, McMillen believed the child had been stillborn and thus beyond the need for medical assistance.

In the instant case, the Court found that the failure to summon aid for the child was enough for a finding of abandonment as the underlying felony. Because abandonment is not defined in the statutes, the court resorts to the common definition of the word, Miriam Webster's Dictionary defines abandon as: "to leave completely or finally, to forsake

utterly, or desert.” However, there was absolutely no evidence that McMillen left her child while it was alive. In fact, the testimony indicated that that she remained with the child at least several minutes after the child was expelled while she delivered the placenta and removed the child from the toilet. In fact, the only time she left the room, per all testimony on the issue, was to shower upstairs. According to the only person present at the residence that day, Zach Beale, that shower was at least 2-4 hours after delivery of the child. Therefore, McMillen cannot be said to have abandoned her child in the legal sense as required under the statute.

2. **Convicting McMillen For Failing To Call 911 During Or Immediately After An Unexpected Home Delivery Invades Her Fundamental Rights To Privacy And Equal Protection Under The United States Constitution, First And Fourteenth Amendments.**

Although the Massachusetts Supreme Judicial Court could have stopped its analysis at this point and reversed the conviction, the court found that the facts of the case and the matter of criminal liability as applied was of significant public importance and subject to recurrence in the future. *Pugh* at 484. The court elected to address the additional issues that had been raised in the Amicus briefing and entered into a lengthy discussion of the fundamental rights of women similarly situated. The issues addressed by the Supreme Judicial Court are equally relevant to the

case at bar and the analysis and conclusions drawn by the Massachusetts Court are equally applicable in the instant case. Drawing substantially from Federal case law, The *Pugh* court stated:

“We begin with the bedrock principle that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of [the individual's] own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891). The fundamental right of bodily integrity encompasses freedom from involuntary medical treatment. See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (“a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment”). This right is “deeply personal,” *id.* at 281, and “arises both from the common law and the unwritten and penumbral constitutional right to privacy.” *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 430, 497 N.E.2d 626 (1986). “Every competent adult has a right ‘to for[ ]go treatment, or even cure, if it entails what for him [or her] are intolerable consequences or risks however unwise his [or her] sense of values may be in the eyes of the medical profession.’ ” *Harnish v. Children's Hosp. Med. Ctr.*, 387 Mass. 152, 154, 439 N.E.2d 240 (1982), quoting *Wilkinson v. Vesey*, 110 R.I. 606, 624, 295 A.2d 676 (1972).” *Commonwealth v. Pugh*, 462 Mass. 482, 503, 969 N.E. 2d 672 (2012)

The *Pugh* court, citing *Commissioner of Correction v. Myers*, 97 Mass. 255, 263, 399 N.E.2d 452 (1979) went on to state, “Even the state’s interest in the preservation of life does not invariably control the right to

refuse treatment, and individuals, including pregnant women, therefore retain their right to forgo medical treatment even in life-threatening situations". *Pugh* at 504

Washington has held similarly that "The interest in autonomy is recognized as a fundamental right and is thus accorded the utmost constitutional protection. ... Government action which infringes on this right is given strict scrutiny and the State must identify a compelling governmental interest for such action to be justified." The interest in autonomy includes the right to refuse medical treatment. *Butler v. Kato*, 137 Wn. App. 515, 527 (Wash. Ct. App. 2007).

Federal courts have also recognized a competent individual's right to refuse "life-sustaining treatment" deriving from the common law right to be free from bodily invasion and the informed consent doctrine. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 270, 110 S.ct. 2841, 111 L.Ed 2d 224 (1990); *In re Welfare of Colyer*, 99 Wn.2d 114, 121, 66P.2d 738. Based on Washington courts' reliance on the federal constitution, we conclude the protection granted under article I, section 7 in this context is coextensive with, but not greater than, the protection granted under the federal constitution. *McNabb v. Dep't of Corr.*, 163 Wn.2d 393, 401 (Wash. 2008).

The McNabb court went on to state:

Washington courts have considered the right to refuse medical treatment, including artificial nutrition and hydration, only in the context of nonincarcerated individuals who suffer from a terminal or debilitating condition. In most of those cases, the individual's right has been upheld. *In re The Guardianship of Grant*, 109 Wn.2d 545, 565 (1988). (granting a mother's request to authorize future withholding of life sustaining procedures from her daughter who was suffering from a terminal illness, noting that we did not endorse suicide or euthanasia, and withholding of treatment would not be the cause of death); *In re Guardianship of Ingram*, 102 Wn.2d 827, 829, 689 P.2d 1363 (1984) (reversing a trial court order imposing surgery rather than an alternative treatment for a woman with multiple physical ailments and malignant cancer of the larynx who opposed surgery to correct the cancer); *Colyer*, 99 Wn.2d at 123 (concluding there were "no compelling state interests opposing the removal of life sustaining mechanisms from [a patient in a chronic vegetative state] that outweighed her right to refuse such treatment"). *McNabb v. Dep't of Corr.*, 163 Wn.2d 393, 401-402 (Wash. 2008)

The *Pugh* court discussed the fundamental right of bodily integrity and stated that the right "encompasses freedom from involuntary medical treatment." The *Pugh* court then held, "that there is no affirmative duty to summon medical assistance during an unassisted labor. *Pugh* stated that "a requirement for women to summon aid during labor would absurdly result in the criminalization of medically unassisted childbirth, including home births. Unassisted childbirth has always been a legally recognized alternative to medically assisted childbirth." The Court held that "the duty

to summon and accept medical assistance as imposed by the trial court would amount to a significant incursion on a birthing woman's liberty interest in freedom from unwarranted degree of government surveillance and coercion." *Pugh* at 506

Washington State has long held that the decision to refuse medical treatment is a Right to Privacy issue that does not allow for state intrusion in most cases. *In re the Welfare of Colyer* 99Wn.2d 114, 660 P.2d 738 (1983),

The Pugh court then stated:

The judge noted correctly that criminal liability may be imposed on a person—whether a woman in the late stages of pregnancy, a physician, or a third party—who intentionally kills a viable fetus. But we are not presented here with a case in which a woman forgoes medical treatment during childbirth with the specific intent of ensuring the death of her viable fetus. Contrast *State v. Collins*, 986 S.W.2d 13, 18–19 (Tenn.Crim.App.1998) (affirming conviction of murder in second degree on theory that defendant intentionally chose not to seek medical care during and after delivery because she did not want child). Nor are we presented with a case where a woman embarks on unassisted childbirth after having been informed that doing so will severely imperil the baby's life. Instead, we are presented with the situation of a woman undergoing unassisted childbirth who had no reason to suspect complications at its outset. There is no affirmative duty in such circumstances to summon—and, implicitly, to accept—medical assistance, even where the failure to do so might result in unintentional harm to a fetus.

Requiring pregnant women in such circumstances to summon medical treatment during childbirth would also result in the effective criminalization of medically unassisted childbirth, such as unattended births or home births with a lay midwife. Although the vast majority of women elect hospital births, medically unassisted births continue to take place both by choice and by necessity.<sup>28</sup> “Children are born of unattended mothers on trains, in taxis, and in other out of the way places, and we fear to open up a field for unjust prosecutions of actually innocent women.” *State v. Osmus*, 73 Wyo. 183, 201, 276 P.2d 469 (1954). Unassisted childbirth has always been a legally recognized alternative to medically assisted childbirth. All births, regardless of venue, carry inherent risks; in the ordinary course, competent women who are pregnant may weigh these risks themselves and make decisions about the course of their own pregnancies and childbirths. *Pugh* at 505

Then the Pugh court held:

Recognition of the broad and ill-defined duty to summon, and accept, medical assistance imposed by the judge in this case would amount to a significant incursion on a birthing woman's liberty interest in freedom from an unwarranted degree of government surveillance and coercion. The duty to summon medical assistance imposed in this case implicitly carries with it the duty for a woman to accept medical intervention, including potentially risky surgical procedures such as a cesarean section, if necessary to advance fetal survival. Such a duty would create an undesirable adversity of interests between the pregnant woman and the fetus in utero. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (“the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State”); *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the

decision whether to bear or beget a child”). Going into labor is not itself a life-threatening risk to the unborn baby that always requires medical assistance. Based on the usual risks of childbirth, the decision to proceed with an unassisted home birth cannot by itself permit a finding of wanton or reckless conduct necessary to establish involuntary manslaughter when the baby unintentionally dies in childbirth.

Moreover, the duty imposed by the judge raises issues of due process, for such a duty would be impossible to cabin and would be highly susceptible to selective application. See *Commonwealth v. Quinn*, 439 Mass. 492, 499, 789 N.E.2d 138 (2003). Pregnancy presents a unique circumstance because “anything which a pregnant woman does or does not do may have an impact, either positive or negative, on her developing fetus.” *Stallman v. Youngquist*, 125 Ill.2d 267, 276, 531 N.E.2d 355 (1988). As a consequence, every decision a woman makes during her pregnancy, medical or otherwise, could have a profound impact on the fetal life inside her. Drawing the line between what is lawful and what is criminal conduct on the part of pregnant women and women in labor would be left to individual law enforcement officials and judges. Given the socially freighted nature of questions surrounding a pregnant woman’s relationship to her fetus, it is not difficult to foresee a patchwork of unpredictable and conflicting prosecutorial and judicial actions resulting from the newly created duty to summon medical assistance at issue here. Pugh at 506-507

Finally the Pugh court ruled as follows:

Indeed, neither the judge nor the Commonwealth delimited the duty to summon medical help, either temporally, in relation to the kind and degree of difficulty during childbirth, the advance knowledge of significant risks to the fetus posed by unassisted labor, or on any other criteria. If the duty is premised on the likelihood of harm to viable fetuses inherent in all pregnancies, any such duty is not only unduly broad, it also could readily be expanded to

encompass not just the time of childbirth, but the latter stages of pregnancy as well. Given the countless ways in which a woman can be perceived to endanger her fetus during pregnancy or childbirth, see [*Remy v. McDonald* 440 Mass. 675, 801 N.E.2d 260 (2004)] at 677–678, 801 N.E.2d 260, recognition of a duty as formulated here risks criminalizing constitutionally protected conduct. See *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky.1993), quoting *Commonwealth v. Kemp*, 18 Pa. D. & C. 4th 53, 63 (1992) (imposition of criminal liability for fetal abuse “might lead to a ‘slippery slope’ whereby the law could be construed as covering the full range of a pregnant woman’s behavior—a plainly unconstitutional result”). “A pregnant woman may place her fetus in danger by engaging in activities involving a risk of physical harm or by engaging in activities, such as most sports, that are generally not considered to be perilous. A pregnant woman may jeopardize the health of her fetus by taking medication (prescription or over-the-counter) or, in other cases, by not taking medication.” *Remy v. MacDonald*, supra at 678, 801 N.E.2d 260. The duty to summon medical assistance as imposed by the judge in this case is thus inchoate, creating impermissible uncertainty as to just what conduct is and is not included within its purview. See *Commonwealth v. Quinn*, supra. Because the scope of the duty the Commonwealth would have us establish cannot be logically confined, we decline to impose it.

Finally, “[p]regnancy does not come only to those women who have within their means all that is necessary to effectuate the best possible prenatal environment.” *Stallman v. Youngquist*, supra at 279, 126 Ill.Dec. 60, 531 N.E.2d 355. Women in all circumstances give birth: “the well-educated and the ignorant; the rich and the poor; those women who have access to good health care and good prenatal care and those who, for an infinite number of reasons, have not had access to any health care services.” *Id.* We are not free to ignore that the imposition of criminal liability on a woman in labor for breach of the duty at issue here is likely to have the greatest impact on the most vulnerable groups of pregnant women—young teens,

victims of rape and incest, the undocumented, residents of remote areas—who may have no realistic alternatives than to give birth unassisted. The Commonwealth asks us to impose a duty that all women cannot reasonably be expected to bear. We decline to do so. *Pugh* at 509-510 (case site added)

The Pugh court's reasoning is sound and logical. That court's findings are rooted in our federally protected Fundamental Rights to Privacy, Autonomy and Equal Protection under the law. Because it analyzed the issues raised in light of well established Federal Constitutional case law, this courts analysis should reach the same conclusions. This court should find that prosecution in the instant case violates the rights of pregnant women. Reversal and dismissal are appropriate under the facts of this case.

3. **McMillen's Trial Counsel Was Ineffective For Failure To Investigate The Mental State Of The Defendant.**

Both the *Sixth Amendment to the United States Constitution* and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77,

917 P.2d 563 (1996). Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. *Strickland*, 466 U.S. at 687-88. Prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78 (citing *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all of the circumstances. *Strickland*, 466 U.S. at 689-90. To provide constitutionally adequate assistance, "counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client." *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (citing *Strickland*, 466 U.S. at 691).

Ineffective assistance of counsel is a mixed question of law and fact. *Strickland*, 466 U.S. at 698. Because claims of ineffective assistance of counsel present mixed questions of law and fact, we review them de novo. See, e.g., *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000) (citing *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310

(1995)). *Personal Restraint of Brett*, 142 Wn.2d 868, 873; 16 P.3d 601 (2001).

A personal restraint petition will be granted if the petitioner establishes actual and substantial prejudice resulting from a violation of his or her constitutional rights or a fundamental error of law. *In re Personal Restraint of Benn*, 134 Wn.2d 868, 884-85, 952, P.2d 116 (1998), *rev'd sub nom. on other grounds by Benn v. Wood*, 2000 U.S. Dist. LEXIS 12741, No. C98-5131RDB, 2000 WL 1031361 (W.D. Wash. June 30, 2000). The burden of proof is a preponderance of the evidence. *In re Personal Restraint of Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990) (citing *In re Personal Restraint of Hews*, 99 Wn.2d 80, 89, 660 P.2d 263 (1983)). *Personal Restraint of Brett*, 142 Wn.2d 868, 874; 16 P.3d 601 (2001).

It has long been established that defense counsel have a responsibility to their clients to conduct an investigation that will allow counsel to determine what, if any, experts are needed for that case. *Caro v. Calderon*, 165 F.3d 1223, 1226 (1999). Once counsel has done that investigation, Counsel must provide the experts with all of the information necessary to form an opinion. *Id.* Washington has further defined this duty to include a reasonable investigation into the defendant's medical and mental health, where the counsel knows or has reason to know of any

medical and mental problems that are relevant to making an informed defense theory. *Brett*, 142 Wn.2d at 880. Counsel has a further duty to have any medical or mental problems “fully assessed and, if necessary, retain qualified experts to testify accordingly.” *Brett*, 142 Wn.2d at 880.

In *Brett*, the defendant was charged with murder and the State sought the death penalty. 877. *Brett* was appointed a public defender who did almost nothing. 881. In *Brett*, the defendant was diagnosed with fetal alcohol syndrome, Bi-polar disorder, and Type 1 diabetes. 874-875. Counsel testified that he was aware of *Brett*’s mental and medical issues, was aware that background information was needed for an expert opinion and did not obtain those records or experts in a timely manner. 877. Counsel retained a psychologist one month prior to the capital murder trial. 878. The expert was not appointed until nineteen days prior to the beginning of trial and was unable to testify because he was not licensed in Washington State. 878. The expert was aware that he was unqualified and informed *Brett*’s counsel immediately. 878. Counsel for *Brett* did not deliver the appropriate records to the expert until two days before trial. 878. The Appellate Court found that had Counsel for *Brett* obtained the medical expert in time to prepare for trial, “at least some type of informed defense theory could have been argued in both the guilt and penalty phases.” *Brett*, 881-882. The Court found six instances where *Brett*’s

Counsel was ineffective. 882-883. Among those six, failing to promptly investigate relevant mental health issues, seek timely appointment of investigators, seek timely appointment of qualified mental health experts and to adequately prepare for the penalty phase by having the relevant mental health issues assessed; were the most egregious. 882-883. The Court specifically found that “While the failure to perform one of these actions alone is insufficient to establish ineffective assistance of counsel, the failure to perform the combination of these actions establishes that defense counsel’s actions in Brett’s trial were not reasonable under the circumstances of the case.” 882-883. The failure to conduct a reasonable investigation into Brett’s medical conditions, and the possible mental effects of such severe conditions, resulted in an inability to make informed decisions about how to proceed with the case. 882-883.

The Brett court followed principles similar to those set out in *Caro v. Calderon*, 165 F.3d 1223 (9th Cir.), cert. denied, 527 U.S. 1049, 119 S. Ct. 2414, 144 L. Ed. 2d 811 (1999). In *Caro*, counsel was aware of Caro’s extraordinary acute and chronic exposure to neurotoxins, yet failed to consult either a neurologist or a toxicologist, both being experts on the effects of chemical poisoning. *Caro*, 165 F.3d at 1226. Counsel further failed to provide the “experts” who did examine Caro with the information necessary to make an accurate evaluation of Caro’s neurological system.

*Caro*, 165 F.3d at 1226-27. The Ninth Circuit discussed counsel's ineffective assistance in relation to both the guilt and penalty phases, although the court ruled only on the penalty phase. *Caro*, 165 F.3d at 1228. The court found the type of mitigating evidence omitted to be precisely the type of evidence most likely to affect a jury's evaluation of *Caro*'s punishment. *Caro*, 165 F.3d at 1227. Concluding *Caro* had received ineffective assistance of counsel, the court stated:

Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert.

*Caro*, 165 F.3d at 1226; see also *Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997), cert. denied, 523 U.S. 1145, 140 L. Ed. 2d 1104, 118 S. Ct. 1856 (1998). *Personal Restraint of Brett*, 142 Wn.2d 868, 880-881; 16 P.3d 601 (2001).

In the instant case, McMillen exhibited a flat affect and was unemotional and unreactive from the first contact with police through her trial. The first police officer mentioned in his report that McMillen's responses were atypical. A review of the initial discovery and any contact with McMillen would have and did inform Counsel that there were mental health issues that needed to be investigated. Indeed, Counsel for McMillen contacted Dr. Duenholter to evaluate McMillen. Dr.

Duenholter met with McMillen early in the case. Dr. Duenholter's letter clearly states that he was uncomfortable with doing an evaluation because he was retired and had been out of actual practice for several years. (Attachment 1). McMillen's counsel was informed by Dr. Duenholter that McMillen needed a forensic psychiatric evaluation. (Attachment 1). Dr. Duenholter's letter was dated January 6, 2012, a year and a half prior to McMillen's trial.

In fact, McMillen's counsel failed and refused to obtain any mental health expert or investigate any diminished capacity defense, even though it was clear that there was an issue. McMillen's counsel only obtained a psychological evaluation after the trial court made a finding of guilt. McMillen's counsel then unsuccessfully tried to use the psychological evaluation to mitigate the penalty to McMillen. However, had McMillen been able to undergo a forensic psychiatric evaluation, it is highly likely that a diminished capacity defense would have been not only appropriate but also very likely successful. Particularly in light of the trial court's statements at sentencing in which the trial judge inferred that the outcome might have been different if he had had that information at trial. The trial court found specifically;

“even in court, it is my observation, that until sentence was handed down in this case – the verdict was actually handed down in this case, at times it would appear that Ms.

McMillen wasn't aware of how serious this was at all, that she was being tried of murder of her child, and that she was looking at a long time in prison. And, candidly, I didn't understand her affect and her conduct, but I think Dr. Comte explains it."

CRP Nov 15, 2013at pg 22 ln 14-22

The court further found, "This is a classic case of neonaticide."

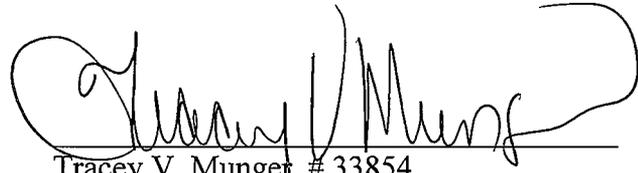
CRP Nov 15, 2013, pg 23 ln 11-12. The trial court went on to state that based upon this new information, the State's request for forty years in prison was not warranted. That counsel waited until the sentencing phase of the case to seek a forensic psychological evaluation of Ms. McMillen, and that the evaluation produced such an impactful diagnosis, and especially in light of the fact that one expert put defense counsel on notice that the evaluation was needed almost two years prior to trial, it must be found that defense counsel was deficient in her representation of the defendant to the detriment of the defendant. This court should find ineffective assistance of counsel and reverse this conviction.

### CONCLUSION

For the reasons set forth herein, this court should reverse the conviction of Melissa McMillen and, in consideration of the constitutional issues raised herein, find that prosecution under these facts violates Constitutionally protected rights. This court should reverse the conviction and enter an order to dismiss the charges against her.

**OATH AND ATTORNEY VERIFICATION**

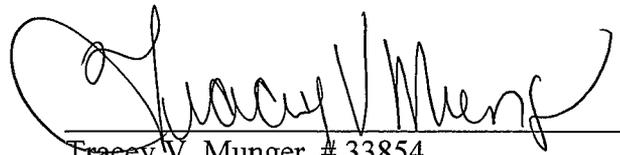
I declare under penalty of perjury under the laws of the State of Washington that I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true. Signed this 26<sup>th</sup> day of April, 2015 at Tacoma, WA.

  
Tracey V. Munger, # 33854

**CERTIFICATE OF SERVICE**

The undersigned certifies that on April 26, 2015, this Personal Restraint Petition was filed to (1) the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and (2) Jason Ryuf, Pierce County Prosecutor, 930 Tacoma Ave. S. Room 936, Tacoma, WA 98402, and a copy was mailed by first class mail to Melissa McMillen, DOC 370439, Washington Correction Center For Women, 9601 Bujacich Rd NW, Gig Harbor, WA 98332-8300

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on November 29, 2012.

  
Tracey V. Munger, # 33854

**MOTION FOR ORDER WAIVING FILING FEES**

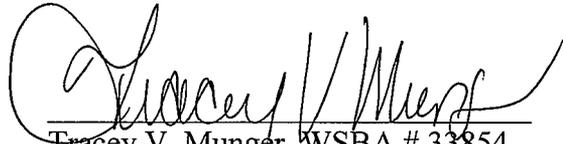
**NOW INTO COURT**, through undersigned counsel, comes Melissa McMillen, petitioner in this matter, and moves this court for an order waiving filing fees for this Personal Restraint Petition. Melissa McMillen is currently incarcerated at Washington State Correction Center for Women, Purdy. She was employed at a daycare prior to being arrested in 2011. She has not been employed since the verdict in her case was rendered in September 2013. She has no real assets, no bank accounts or funds, and no personal property at this time. She was residing with her father prior to being arrested and incarcerated. She was sentenced to 123 months in November, 2013 and has remained in custody pending the outcome of her appeal and this Personal Restraint Petition. Her financial status was reviewed by the court when her Appeal was filed and she was found to be indigent. Ms. McMillen's financial status has not changed. A copy of Motion, Declaration and Order of Indigency from the lower court follow.

Whereas the lower court found that the Petitioner in this matter was indigent for purpose of filing her Appeal, and whereas the status of the petitioner has not changed since the filing of that motion, Petitioner

now prays that this court find her indigent and waive the filing fee associated with this petition.

I declare and affirm that the foregoing facts contained in the motion for waiver of fees are true and correct.

Signed at Tacoma, Washington on this 27 day of April, 2015.

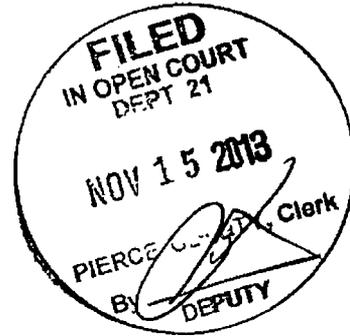
A handwritten signature in black ink, appearing to read "Tracey V. Munger", written over a horizontal line.

Tracey V. Munger, WSBA # 33854  
Attorney for Melissa McMillen

LOWER COURT ORDER OF INDEGENCY



11-1-02357-7 41574193 MTA FIND 11-18-13



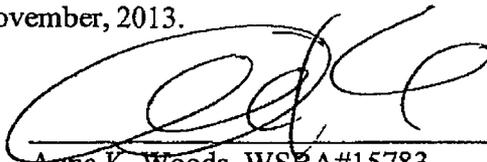
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,	)	Superior Court No. 11-1-012357-7
Plaintiff,	)	
	)	
v.	)	MOTION AND DECLARATION
	)	FOR ORDER AUTHORIZING THE
	)	DEFENDANT TO SEEK REVIEW
MELISSA CATHRYN McMILLEN,	)	AT PUBLIC EXPENSE AND
Defendant.	)	PROVIDING FOR APPOINTMENT
	)	OF ATTORNEY ON APPEAL

A. MOTION

COMES NOW the defendant and moves the Court for an order allowing the defendant to seek review at public expense and providing for appointment of attorney on appeal. This motion is based on RAP 2.2(a)(1) and is supported by the following declaration.

DATED this 15th day of November, 2013.

  
 \_\_\_\_\_  
 Anna K. Woods, WSBA#15783  
 Attorney for Defendant

MOTION AND DECLARATION FOR  
ORDER AUTHORIZING THE DEFENDANT TO  
SEEK REVIEW AT PUBLIC EXPENSE AND  
PROVIDING FOR APPOINTMENT  
OF ATTORNEY ON APPEAL

**ORIGINAL**

## B. DECLARATION

I was tried and convicted of Felony Murder in the Second Degree before the Honorable Frank E. Cuthbertson. A judgment and sentence was entered in this matter on the 15th day of November, 2013. I desire to appeal the conviction and the judgment imposed. I believe that the appeal has merit and is not frivolous and make the following assignments of error: 404(b) Motions; sufficiency of the evidence, Failure to exclude testimony of Dr. Daralde, exclusions of other autopsy information, ineffective assistance of counsel; and sentencing.

I have previously been found to be indigent. The following declaration provides information as to my current financial status:

- 1.) That I am the defendant in the above-captioned cause;
- 2.) That I do not own any real estate;
- 3.) That I do not own any stocks, bonds, or notes;
- 4.) That I am not the beneficiary of a trust account or accounts;
- 5.) That I own the following motor vehicles or other substantial items of personal property:

ITEM	VALUE/AMOUNT OWED ON ITEM
Clothing	Nominal

- 6.) That I do not have income from interest or dividends;
- 7.) That I have approximately \$0 in checking account(s), \$0 in savings account(s), and \$0 in cash.);
- 8.) That I am not married;
- 9.) That the following persons are dependent on me for their support: None
- 10.) That I have the following substantial debts or expenses: None
- 11.) That I am personally receiving public assistance from the following sources:  
None
- 12.) That I am not employed;

MOTION AND DECLARATION FOR  
ORDER AUTHORIZING THE DEFENDANT TO  
SEEK REVIEW AT PUBLIC EXPENSE AND  
PROVIDING FOR APPOINTMENT  
OF ATTORNEY ON APPEAL



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

SIGNED in Tacoma, Washington this 15 day of November, 2013.



Signature

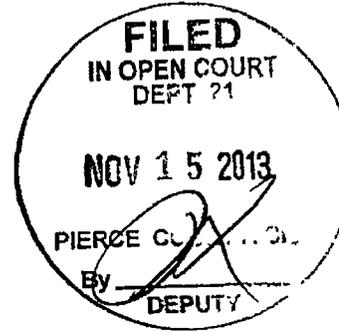
Melissa Cathryn McMillen

Printed Name

MOTION AND DECLARATION FOR  
ORDER AUTHORIZING THE DEFENDANT TO  
SEEK REVIEW AT PUBLIC EXPENSE AND  
PROVIDING FOR APPOINTMENT  
OF ATTORNEY ON APPEAL



11-1-02357-7 41574198 ORIND 11-18-13



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

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 11-1-02357-7
vs.	)	
	)	
MELISSA CATHRYN McMILLEN,	)	ORDER OF INDIGENCY AND
	)	SETTING APPEAL BOND
Defendant.	)	
	)	

**THIS MATTER** having come on regularly before the undersigned judge upon the motion of the defendant for an order authorizing the defendant to seek review at public expense and the Court having considered the records and files herein, now therefore,

**IT IS HEREBY ORDERED** that the defendant shall be allowed to appeal from the certain judgment and sentence and every part thereof in the above-entitled cause, entered on November 15, 2013, at public expense -- to include the following :

- 1.) All filing fees;
- 2.) Attorney fees and the cost of preparation of briefs (including copying costs);
- 3.) Costs of preparation of the statement of facts which shall contain the verbatim report of the following proceedings, all of which are necessary for review:

**ORIGINAL**

- ( ) Pre-trial hearing Date(s)/Judge:
- ( x ) Trial Date(s): 08/05/13-09/04/13 with breaks  
Judge(s): Frank E. Cuthbertson
- ( ) Post-trial hearing Date(s): \_\_\_\_\_  
Judge(s): \_\_\_\_\_
- ( x ) Sentencing hearing(s) Date(s): 11-15-13  
Judge(s): Frank E. Cuthbertson
- ( ) Other: Date(s): \_\_\_\_\_  
Judge(s): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4.) Cost of a copy of the above record for the joint use of defendant's counsel and the prosecuting attorney; and

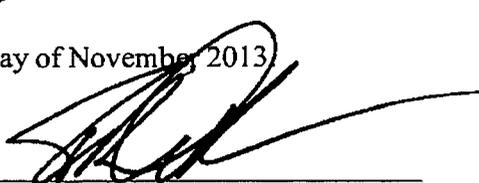
5.) Costs of the preparation of necessary clerk's papers.

**IT IS FURTHER ORDERED** that counsel on appeal, or his/her representative, is authorized to remove the clerk's file from the Clerk's Office for the purpose of reproducing clerk's papers and designating the record for review.

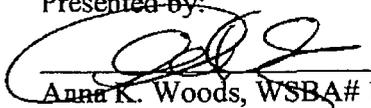
**IT IS FURTHER ORDERED** that, pursuant to RCW 10.73.040, bail pending appeal be set at the amount of \$\_\_\_\_\_. Upon the posting of said bond by two sureties possessing the qualifications required for sureties on appeal bonds to the State of Washington the defendant shall be released from custody. Pursuant to RCW 10.73.040, such bond shall be conditioned on defendant appearing whenever required by either the trial or appellate court.

**AND IT IS FURTHER ORDERED** that trial counsel is allowed to withdraw and that counsel on appeal be appointed by the Court of Appeals pursuant to RAP 15.2. Payment for expenses of this appointment is authorized under contract with the Office of Public Defense.

DONE IN OPEN COURT this 15 day of November, 2013

  
\_\_\_\_\_  
JUDGE FRANK E. CUTHBERTSON

Presented by:

  
\_\_\_\_\_  
Anna K. Woods, WSBA# 15783  
Attorney for the Defendant



## APPENDIX A

redacted portion is  
work product  
Anna Woods

## Johann H. Duenhoelter, MD, FACOG

12321 137th Avenue East  
Puyallup, WA 98374  
Telephone: (253) 848-8916  
E-mail: [JDuenhoelter@comcast.net](mailto:JDuenhoelter@comcast.net)

January 6, 2012

Ms. Anna Woods  
Attorney at Law  
615 Yakima Avenue  
Tacoma, WA 98405

Dear Ms. Woods:

Below you will find my evaluation of the McMillen case after reviewing the material you provided. I am 75 years old and retired and tried to be of help although I have not kept up with my specialty but rather enjoyed retirement. During my years in Puyallup I have delivered more than 4600 babies both at Good Samaritan and at Tacoma General Hospital. Although I was one of the first people certified in Maternal-Fetal Medicine I decided to also include general obstetrics and gynecology to serve a broader patient base in the town of Puyallup, which did so much for me as a 17-year old.

Just for your information I am attaching a copy of my CV.

### **Significant findings at autopsy: Dr. Thomas Clark:**

1. Large left parietal scalp hematoma and a thin, bilateral film of subdural hematoma
2. Air in the lungs and air in the stomach

Conclusion: Infant was born alive and death was most likely due to a combination of drowning and hypothermia.

Conclusion: No external evidence of trauma, i.e. it is unlikely that Ms. McMillen contributed to the death by using force.

### **Significant conclusions of Dr. Nelson's report:**

1. No evidence of external trauma
2. Air in lung and gastrointestinal tract is not proof of live birth.



### Deposition of Melissa McMillen

Melissa McMillen appears to me a woman under great psychological pressure. She must have looked for a partner in her boyfriend Zach, who was too immature to deal with the problem of an unwanted pregnancy. She was afraid to lose him and appeared at times wanting to face the problem of a possible pregnancy but at most times denying the pregnancy to herself. Most obstetricians have dealt with patients who denied symptoms and signs of pregnancy when they fear the emotional cost of admitting to being pregnant, which at the moment appears larger than they feel they can bear. Fear of the reaction of parents and fear of losing a partner are probably the biggest factors here and both were present in Ms. McMillens case. As I mentioned in our telephone conversation a forensic psychiatrist might be helpful to you by evaluating Ms. McMillen's deposition or through personal psychiatric and psychological examination.

As an obstetrician I find Ms. McMillen's narrative convincing. She had great difficulty admitting the pregnancy to herself and her boyfriend although early on - at a time when she could have done something about it - she tried to face it by making an appointment at a clinic. However she did not go through with it. Later it became increasingly harder to face the consequences that she felt would impact her work, her relationship with her boyfriend (which she apparently valued highly) and the relationship with her alcoholic father. Her actions, which are not those of a normal adjusted self-assured adult, are at least in my opinion consistent with a mentally immature (although sexually mature) woman who is overwhelmed by the problems a pregnancy made her face. Denial was her way of dealing with it. Denial is a powerful coping mechanism, with which most of us are familiar.

Her reaction to the birth process are consistent with those of a woman who is now forced by natural events to deal with the process of delivery. Rather than trusting herself to someone she dealt with it alone, by herself. She still was in denial interpreting labor pains as needing to have a bowel movement. Many women think in the second stage of labor that they are having a bowel movement because the anal sphincter is stretched maximally. Ms. McMillens description makes sense to me. Her reaction after delivery: "I tried to... not uh... really look at it too much" again indicating her refusing to

face the reality of just having given birth. She must have been terribly overwhelmed and described her inability to touch the newborn and the placenta until after it had been delivered.

Her story does make sense to me because she says: "it was not uh... moving or making a noise. Uh ... with it not doing anything uh... it kind of scared me too much to touch it. Uh... I mean it had been... if it had been moving, if it had been crying then of course I would've taken it out and uh... had to deal with ... a different way". She described her situation that convinces me as the reaction of an immature helpless woman clearly overwhelmed by her situation. In other words she appears credible to me.

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### Summary

In my opinion Ms. McMillen with your help, a good forensic psychiatric expert and an educated jury can be found not guilty. I am sure that an experienced practicing obstetrician or expert in Maternal Fetal Medicine, my former specialty, will also be able to help you win this case.

I have been out of practice long enough to realize that I cannot serve as an expert witness any longer. Nevertheless I hope to have been a help with this evaluation.

Sincerely,

Johann H. Duenhoelter