

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

MELISSA CATHERYN MCMILLEN,

Petitioner.

NO. 45586-2-II

STATE'S RESPONSE TO
PERSONAL RESTRAINT PETITION

A. ISSUES PERTAINING TO DISCRETIONARY REVIEW

1. Is the evidence sufficient to support petitioner's conviction for murdering her newborn daughter by abandonment when it established the elements of the offense through proof she was an educated adult with first-aid training who concealed her pregnancy, clandestinely delivered a healthy baby into a toilet, permitted the partially submerged infant to die from exposure, and concealed the body in the basement to avoid detection?

2. Should petitioner's claim that trial counsel ineffectively failed to pursue a mental health defense be dismissed when it is not supported by competent evidence a qualified expert would endorse such a theory, reducing the claim to a request for reversal to explore the possibility of advancing a different theory than the one reasonably pursued at trial?

1 3. Should the ineffective assistance of counsel claim also be dismissed since it is a
2 hindsight challenge to a reasonably selected trial strategy to attack the State's proof of live birth
3 instead of attempting a yet to be generally accepted diminished capacity defense aimed at
4 excusing a competent adult's decision to let an unwanted newborn die from exposure?

5 B. STATUS OF PETITIONER

6 Petitioner is restrained pursuant to a judgment entered in Pierce County Cause Number
7 11-1-02357-7 on November 18, 2013. CP 376, 395. Sentence was imposed by the judge who
8 presided over the bench trial that concluded with petitioner's conviction for second degree
9 felony murder predicated on the second degree abandonment of her particularly vulnerable
10 newborn. *Id.* The petition, initially filed under No. 47503-1-II, was consolidated to petitioner's
11 pending direct appeal. (Order of 6/23/15). The direct appeal alleges there is insufficient
12 evidence petitioner's newborn died from abandonment and contends defense counsel was
13 ineffective for failing to present mental-health evidence in addition to an assortment of other
14 claimed errors. (App.Br. at 1-2; St.Rsp. at 1).

15 The petition expands on the insufficiency claim by more precisely challenging the
16 evidence of causation while contending petitioner had a constitutional right to refrain from
17 summoning medical aid for the newborn she left partially submerged in toilet water for ninety
18 minutes before hiding the infant in a sealed bag for several days. Without demonstrating any
19 admissible evidence capable of corroborating the claim, petitioner further alleges her counsel
20 was constitutionally ineffective for neglecting to pursue a diminished capacity defense
21 predicated on a psychological condition that is not generally accepted as valid.

22 C. ARGUMENT

23 Personal restraint procedure has its origins in the State's *habeas corpus* remedy,
24 guaranteed by article 4, section 4, of the State Constitution. A personal restraint petition, like a
25

1 petition for a writ of *habeas corpus*, is not a substitute for an appeal. *In re Pers. Restraint of*
2 *Hagler*, 97 Wn.2d 818, 823-824, 650 P.2d 1103 (1982). Collateral relief undermines the
3 principles of finality of litigation, degrades the prominence of the trial, and sometimes costs
4 society the right to punish admitted offenders. *Id.*; *In re Pers. Restraint of Woods*, 154 Wn.2d
5 400, 409, 114 P.3d 607 (2005). These significant costs require collateral relief to be limited in
6 the state as well as federal courts. *Id.*

7
8 In this collateral action, petitioner must show constitutional error resulted in actual
9 prejudice. Mere assertions are insufficient to demonstrate actual prejudice. The rule
10 constitutional errors must be shown to be harmless beyond a reasonable doubt has no
11 application in the context of personal restraint petitions. *In re Pers. Restraint of Mercer*, 108
12 Wn.2d 714, 718-721, 741 P.2d 559 (1987); *Hagler*, 97 Wn.2d at 825; *Woods*, 154 Wn.2d 409.
13 A petitioner must show "a fundamental defect which inherently results in a complete
14 miscarriage of justice" to obtain collateral relief from an alleged nonconstitutional error. *In re*
15 *Pers. Restraint of Cook*, 114 Wn.2d 802, 812 792 P.2d 506 (1990); *Woods*, 154 Wn.2d 409.
16 This is a higher standard than the constitutional standard of actual prejudice. *Cook*, at 810. Any
17 inferences must be drawn in favor of the validity of the judgment and sentence and not against
18 it. *Hagler*, 97 Wn.2d at 825-826. "This high threshold requirement is necessary to preserve the
19 societal interest in finality, economy, and integrity of the trial process. It also recognizes the
20 petitioner ... had an opportunity to obtain judicial review by appeal." *Woods*, 154 Wn.2d at 409.

21 The petition must include a statement of facts upon which the claim of unlawful restraint
22 is based and the evidence available to support the factual allegations. RP 16.7(a)(2); *Petition of*
23 *Williams*, 111 Wn.2d 353, 759 P.2d 436 (1988). Claims must be supported by affidavits stating
24 particular facts, certified documents, certified transcripts, and the like. *Williams*, 111 Wn.2d at
25 364; *see also In re Per. Restraint of Connick*, 144 Wn.2d 442, 28 P.3d 729 (2001). "If [a]
petitioner's allegations are based on matters outside the existing record, the petitioner must

1 demonstrate ... [s]he has competent, admissible evidence to establish the facts that entitle h[er]
2 to relief." *Connick*, 144 Wn.2d at 451. Reviewing courts have three options in evaluating
3 personal restraint petitions:

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

15 *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263. A petition must be dismissed
16 when its claims are not supported by sufficient evidence. *Williams*, 111 Wn.2d at 364.

- 17 1. AMPLE EVIDENCE ESTABLISHED PETITIONER MURDERED
18 HER NEWBORN BY ABANDONMENT THROUGH PROOF SHE
19 WAS AN EDUCATED ADULT WITH FIRST-AID TRAINING WHO
20 CONCEALED AN UNWANTED PREGNANCY, CLANDESTINELY
21 DELIVERED A HEALTHY BABY INTO A TOILET, ALLOWED
22 THE PARTIALLY SUBMERGED INFANT TO DIE FROM
23 EXPOSURE, AND CONCEALED THE BODY IN A BAG TO
24 AVOID DETECTION.

25 Petitioner's arguments against Judge Cuthbertson's well supported factual findings and
carefully considered conclusion of her guilt are wrongly predicated on a defense-centric
interpretation of the evidence incapable of being reconciled with the applicable standard of
review, which requires the conviction-supporting evidence to be accepted as true with all
reasonable inferences capable of being drawn in support of its validity. *See State v. Joy*, 121
Wn.2d 333, 338, 851 P.2d 654 (1993); *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d
632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278,
401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981); *State v.*

1 *Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Petitioner's disagreements with Judge
2 Cuthbertson's weighing of the evidence is incompatible with the deference rightly extended to a
3 trier of fact's resolution of factual disputes. See *In re Dependency of A.V.D.*, 62 Wn. App. 562,
4 568, 815 P.2d 277 (1991); *In re Interest of Infant Perry*, 31 Wn. App. 268, 269, 641 P.2d 178
5 (1982); *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Reviewing courts defer to the
6 trier of fact regarding conflicting testimony and the persuasiveness of evidence. *In re Detention*
7 *of Broten*, 130 Wn. App. 326, 335, 122 P.3d 942 (2005)(citing *State v. Camarillo*, 115 Wn.2d
8 60, 71, 794 P.2d 850 (1990)). Equally reliable circumstantial and direct evidence is sufficient to
9 support a conviction if it permits any rational trier of fact to find the essential elements of the
10 crime beyond a reasonable doubt when viewed most favorably to the State. *State v. White*, 150
11 Wn. App. 337, 342, 207 P.3d 1278 (2009)(citing *State v. Thomas*, 150 Wn.2d 821, 874, 83
12 P.3d 970 (2004)).

13 Petitioner's claim of insufficiency of the evidence requires this Court to apply the
14 evidence to the crime of conviction's statutory elements. Statutory interpretation is reviewed *de*
15 *novo*. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The statute's plain meaning is
16 given effect as the expression of legislative intent. *Id.* (quoting *Dep't of Ecology v. Campbell &*
17 *Gwinn*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). Plain meaning is assessed according to the
18 language's ordinary usage, the statute's context, and the statutory scheme's related provisions.
19 *Jacobs*, 154 Wn.2d at 600. Interpretations leading to constitutional deficiencies or absurd
20 results should be avoided. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010); *State v.*
21 *J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *State v. Delgado*, 148 Wn.2d 723, 733,
22 63 P.3d 792 (2003)).

23 A person is guilty of second degree felony murder when she commits or attempts to
24 commit any felony other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of
25 and in furtherance of such crime or in immediate flight therefrom, causes the death of a person

1 other than one of the crime's participants. RCW 9A.32.050 (1)(b). Abandonment of a dependent
2 person in the second degree is such a felony. A person is guilty of that offense when:

- 3 (a) The person is the parent of a child ...; and
4 (b) The person recklessly abandons the child ...; and
5 i. As a result of being abandoned, the child ... suffers substantial
6 bodily harm; or
7 ii. Abandoning the child ... creates an imminent and substantial risk
8 that the child ... will die or suffer great bodily harm.

9 RCW 9A.42.070(1). Subpart (a)'s terms are defined as follows: "Parent" has its ordinary
10 meaning. RCW 9A.42.010 (6). "Child" means a person under the age of eighteen years of age.

11 RCW 9A.42.010(3). "Abandons" means leaving a child ... without the means or ability to
12 obtain one or more of the basic necessities of life." RCW 9A.42.010(7). The "basic necessities
13 of life" include:

14 food, water, **shelter**, clothing, and **medically necessary health care**, including
15 but not limited to **health related treatment** or activities, hygiene, **oxygen**, and
16 medication.

17 RCW 9A.42.010(1) (emphasis added). "Shelter" refers to "protection from the elements." *State*
18 *v. Jackson*, 137 Wn.2d 712, 728-29, 976 P.2d 1229 (1999). "Elements" in this context means
19 "one of the simple substances air, water, fire and earth..." and "weather conditions viewed as
20 activities of the elements"; in other words, environmental circumstances. *See Webster's Third*
21 *International Dictionary*, 734 (2002).

22 Subpart (b)'s *mens rea* component: "recklessly" is defined in RCW 9A.08.010(1)(c):

23 A person is reckless or acts recklessly when he or she knows of and disregards a
24 substantial risk that a wrongful act may occur and his or her disregard of such
25 substantial risk is a gross deviation from conduct that a reasonable person would
exercise in the same situation.

1 Such a person "knows" of a substantial risk when she has information which would lead a
2 reasonable person in the same situation to believe the facts described by the statute defining an
3 offense exist. RCW 9A.08.010(1)(b). Reckless conduct, therefore, includes a subjective and
4 objective component because it depends both on what the defendant knew and how a reasonable
5 person would have acted knowing those facts. *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d
6 1253 (1999). A trier of fact is permitted to find actual subjective knowledge if there is sufficient
7 information to lead a reasonable person to believe such knowledge was present. *Id.*

8
9 The statute's two degrees of requisite harm are also defined in RCW 9A.42.10.
10 Conviction under subpart (b)(i) requires proof of "substantial bodily harm", meaning: "bodily
11 injury ... which causes a temporary but substantial loss or impairment of the function of any
12 bodily part or organ" RCW 9A.42.010 (2)(b). Subpart (b)(ii) requires a showing of "great
13 bodily harm", defined by RCW 9A.42.010(2)(c) as "bodily injury which creates a high
14 probability of death ... or which causes a permanent or protracted loss or impairment of the
15 function of any bodily part or organ."

16 The statute does not similarly define RCW 9A.42.070(b)(ii)'s phrase "imminent and
17 substantial risk"; however, "imminent" is elsewhere defined to mean "the state or condition of
18 being likely to occur at any moment or near at hand, rather than distant or remote." RCW
19 71.05.020(20); *see also* Webster's Third International Dictionary, 1130 (2002)("reading to take
20 place ... near at hand ... impending"). In the context of injuries, the Washington Supreme
21 Court approved of interpreting "substantial" to mean "considerable in amount, value, or worth."
22 *State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011).

23
24 The judge who presided over defendant's bench trial evaluated the testimony of twenty
25 witnesses and considered 280 exhibits, including audio recordings of petitioner's statements to
police. 10RP 91, 119, 135, 169, 188, 202, 211; 11RP 235-36, 285, 311, 341; 12RP 364, 375,

1 452, 482, 384-87; CP 390-91, 406-27. In the months leading up to the murder, petitioner was a
2 Tacoma Community College student employed by the North Tacoma Montessori Center as an
3 assistant teacher of elementary school children. 3RP 92, 95. She was qualified for that
4 employment partly due to her successful completion of a 20-hour course that covered "all
5 aspects of child care ... from social and development to ... health ... nutrition and safety." 3RP
6 96. She also received 10 hours of continuing education each of her four years of employment
7 and was certified to perform CPR. 3RP 93, 97-98, 102. The Center had a very supportive
8 environment comprised of long-term personal relationships among faculty. 3RP 94-95. Yet
9 petitioner repeatedly denied the fact of her pregnancy to those friends in the months leading up
10 to the murder. 4RP 288-89, 344; CP 391. When a parent with children taught by petitioner
11 broached the subject of another teacher becoming pregnant at eighteen, petitioner made it clear
12 she "wouldn't be stupid enough to do that", meaning to become pregnant like her coworker. 3RP
13 216. Sometime later (about a month before the victim's birth) the same parent noticed petitioner
14 was pregnant. 3RP 218. Petitioner adamantly denied the pregnancy and refused the parent's
15 offer to accompany her to a doctor's office. 3RP 218-19. Petitioner nevertheless told detectives
16 she experienced "morning sickness" during a work-related trip to Spokane in October, 2010.
17 5RP 394-96. She was also obviously pregnant in a picture taken January 28, 2011. 6RP 582-83;
18 Ex. 292. Petitioner's stated reason for concealing the pregnancy was to avoid being seen in a
19 negative light. 5RP 402, 406-08.

20 Petitioner also had the support of the victim's father, petitioner's boyfriend of two years,
21 Zach Beale. 4RP 312. They discussed the pregnancy several times, during which their options—
22 "abortion, adopt[ion], keep[ing] it"—were addressed. 4RP 314-15. Eventually petitioner told
23 Beale she was too far along for an abortion. 4RP 316-17. Petitioner informed detectives she
24 "attempted ... Planned Parenthood" to deal with "the situation", referring to the pregnancy. 5RP
25

1 398. She also told them she did not believe she and Beale "[we]re really fit to be parents." 5RP
2 414.

3 Petitioner went into labor on or about June 4, 2011. 4RP 317-18. Beale woke up to find
4 her missing from the bed they shared in a bottom floor room of her father's house. 4RP 313,
5 319-20. There were blood stains on the floor by the door. 4RP 319. He found petitioner on the
6 stairway leading upstairs. 4RP 313, 320. Petitioner assured him she was fine. 4RP 320. Later
7 that morning, Beale asked petitioner about the blood. She was initially dismissive, suggesting it
8 was menstrual, but reluctantly revealed the birth in response to Beale's persistent questioning.
9 4RP 321. She claimed the child was stillborn, and assured Beale her mother was on the way to
10 help. *Id.* Concerned, Beale reached out to his mother, Mary Beale-Kuhlman¹, who contacted
11 petitioner by telephone. 4RP 324-25, 327. Toward the end of the conversation, petitioner asked:
12 **"What if the baby wasn't dead when it was born?"** 5RP 371(emphasis added). Mary told
13 petitioner to call 911. Petitioner said she would call her mother. 5RP 372. At trial, petitioner's
14 mother initially denied receiving such a call. 7RP 607-08. On re-direct, petitioner's mother
15 somewhat dubiously responded to defense counsel's leading question:

16 Isn't it true that [petitioner] did try to call you but you didn't answer because of
17 other things going on, on Saturday?

18 By stating: "Oh, okay. Yes." 7RP 607-08.

19 Roughly three days after the birth, on June 7, 2011, petitioner disclosed to Beale that the
20 infant's body was still in the basement. 4RP 328-29. Unbeknownst to petitioner, Beale called
21 the police from another room. 3RP 140; 4RP 329-30. Officers arrived around 11:00 o'clock.
22 3RP 137. Petitioner first responded to their presence by casting an "upset look" at Beale. 3RP
23 140. It is worth pointing out the petition glosses over the substance of this interaction,
24 understandably preferring to focus on the account petitioner subsequently gave to detectives

25 _____
¹ Ms. Beale-Kuhlman will be referred to by first name to avoid confusion. No disrespect is intended.

1 after having more time to evaluate her circumstances. 5RP 384-85. In that later version,
2 petitioner claimed to be more immediately attentive to the infant until delivery-related
3 exhaustion purportedly incapacitated her. *E.g.* Pet. at 2; Ex. 374. More material to a collateral
4 attack, where evidence supporting the verdict must be accepted as true, is the more inculpatory
5 account she more spontaneously gave to the responding officer:

6 [a] couple of days prior she had been feeling uncomfortable, went to use the
7 bathroom and at that point gave birth to a child and that the child was left where it
8 was birthed, [petitioner] went and took a shower, approximately an hour-and-a-
half later came back and put the body away. ... [A]t that point - - she said it was
deceased and she put it away.

9 3RP 142-43. Which was later explained in greater detail:

10 Looking at my report, [petitioner] says [sic] that it was a Saturday early in the
11 morning, about 0500 hours, she said that she was feeling uncomfortable and
12 constipated. She said she went to the bathroom, sat on the toilet trying to use the
13 bathroom and then gave birth to the child. She said she left the baby there for
about an hour-and-a-half, went and took a shower and then came back to it,
wrapped it up, placed it in a bag and kind of concealed it in the basement.

14 3RP 145.² Petitioner gave a similar account to Dr. Hitchcock the next day:

15 [Petitioner] said that after she delivered, she left the baby in the toilet for about 90
16 minutes, took a shower. She said the baby looked purple and she just kind of left
it there while she took a shower.

17 6RP 453, 475. Petitioner tried to clean the blood in her bathroom with Pine-Sol and bleach. 5RP
18 417-18. Once everything was clean, she wrapped the infant in a towel she placed in a garbage
19 bag, which she concealed in a backpack to "keep it" more "hidden". 5RP 418-19, 421; Ex. 388,
20 pg.7; Ex. 286. Then she laid down to rest. 5RP 417-18. Police found the infant inside a plastic
21 bag either sealed or rolled closed. 3RP 176-77. The bag was buried beneath "a bunch of bloody
22 ... towels" inside the book bag, which had been placed underneath a cork board in the basement
23 laundry room. 3RP 145-46, 176-78; 4RP 307. Contrary to the petition's rather grandiose
24

25 ² An objection was sustained immediately after the last comment about concealing the infant. There was no motion to strike the preceding testimony. It appears from the surrounding record the objection was aimed at the officer's use of the word "conceal" to characterize petitioner's description of what occurred.

1 characterization of petitioner's decision not to call 911 as an exercise of her constitutional right
2 to refuse medical treatment, petitioner told the responding officer she did not call 911 or tell
3 anybody "because she was scared" and did not want to call an ambulance on account of the
4 anticipated cost. 3RP 146.

5 Ample evidence established that petitioner gave birth to a healthy baby girl who died of
6 abandonment instead of natural causes. Petitioner was seen by board certified OB/GYN
7 Christina Hitchcock about four days after giving birth. 6RP 453. Dr. Hitchcock had delivered
8 over 4,000 babies by the time of her trial testimony. 6RP 453. According to Dr. Hitchcock,
9 petitioner described the blood attending the delivery as "red", which is typical of normal
10 delivery. 6RP 460-61. Petitioner denied seeing dark brown blood indicative of placenta
11 abruptions—a complication that can cause stillbirth. 6RP 460-61. Blood screening revealed
12 petitioner did not have blood disorders associated with stillbirth. 6RP 463-64, 67-68. Dr.
13 Hitchcock noted petitioner's "abnormal" act of "laugh[ing]" when the victim's weight was
14 discussed. 6RP 462. Dr. Hitchcock noted petitioner "always referred to the baby as it". 6RP 642.
15 Contrary to representations made at sentencing, petitioner denied experiencing depression when
16 discussing the pregnancy with Dr. Hitchcock. 6RP 462.

18 Live birth was further established through the autopsy conducted by Pierce County
19 Medical Examiner and forensic pathologist Dr. Thomas Clark. 6RP 486, 489-90. Dr. Clark
20 completed "more than 3,000" autopsies while working as a medical examiner for North
21 Carolina and approximately 1000 more since taking over the Pierce County Medical Examiner's
22 Office. 6RP 483-84, 486. Those autopsies included one or two stillborn neonates a year over the
23 course of the twenty three years he worked in North Carolina; the victim was the first he
24 encountered in Washington. 5RP 485, 545. He concluded defendant's infant daughter died of "a
25 combination of drowning and hypothermia", likely contributed to by blood loss through the

1 umbilical cord and into her scalp. 6RP 527, 534-38. This opinion was rendered in consultation
2 with child abuse expert Dr. Duralde and Deputy Medical Examiner Dr. Morhaime. 6RP 556.
3 Dr. Clark was "completely comfortable" in "logical[ly] concluding the victim was "born alive"
4 due to "compelling" evidence of "live birth." 6RP 537-38, 573, 575-76; CP 392. Based on the
5 uncontroverted circumstances: the victim was born into a toilet. 6RP 527-29. In that
6 environment, hypothermia and death by drowning could set in within a "few minutes." 6RP
7 550-51. It remained possible the victim "could have been suffocated" without leaving evidence
8 of its occurrence. 6RP 538.

9
10 There was no countervailing evidence of fetal or natural death. The case did not meet the
11 definition of sudden infant death syndrome (SIDS) because the child was too young and SIDS
12 requires a negative autopsy and negative scene investigation. 6RP 570. Despite early signs of
13 decomposition capable of reducing her weight by the time the autopsy was completed on June
14 9, 2011; she was identified to be full-term or close to term at the moment of birth. 6RP 492-93,
15 519-20. Her organs were not impaired by abnormalities or fatal birth defects. 6RP 516, 525.
16 There was no evidence of pneumonia. 6RP 521-22. There was no fat in her liver as there would
17 be if she was afflicted by a number of genetic diseases that cause death before or shortly after
18 birth. 6RP 522. There was no evidence of bacterial infection in the placenta capable of causing
19 the fetus to abort. 6RP 524, 555-56. The absence of placental blood corroborated Dr. Hitchcock's
20 observation that a fetus killing placental abruption did not occur. 6RP 460-61, 523-24.
21 Toxicology and metabolic-disease screening performed on the victim's tissue did not reveal any
22 abnormalities. 6RP 524-25, 553-54; CP 393-94.

23
24 An X-ray showed the victim's lungs were uniformly and fully inflated with air,
25 "mean[ing] that [she] took enough breaths to completely open the lungs." 6RP 496, 498, 566-

1 67, 576-77; CP 392. This would not occur before the infant emerged from her mother. 6RP 577.
2 Manipulation short of injecting positive pressure into the lungs would not have caused the
3 uniform distribution. 6RP 576-77. The distribution pattern was also inconsistent with off-
4 gassing associated with decomposition, and there was no gas producing bacteria in the lungs.
5 6RP 498-99, 567. There was additional air in the gastrointestinal track, stomach and duodenum
6 consistent with the infant having swallowed air after leaving petitioner's body, but before death.
7 6RP 496-98, 500. The victim had blood inside her scalp which could not have accumulated if
8 her heart had stopped beating in utero. 6RP 502-03, 507. Blood found in her skull was similarly
9 indicative of life evincing blood pressure. 6RP 508-09. The bleeding was consistent with, but
10 "unlikely" to be from, birth trauma. 6RP 574. It was more likely sustained from cranial contact
11 with an external force, such as her head striking the toilet after delivery. 6RP 511, 533, 574-75.
12 An examination of the umbilical cord led Dr. Clark to conclude it was likely cut with a "sharp
13 object" like scissors, which was inconsistent with petitioner's account. 6RP 525-26, 549, 561-
14 62, 578. There is no evidence the cord was clamped after being severed as would be necessary
15 to prevent life-threatening blood loss. 6RP 549.

17 Dr. Clark explained the conceptual flaw underlying the conflicting opinions of
18 petitioner's retained medical expert, *i.e.*, "if one went by his guidelines, there would never be
19 any babies ... born alive and immediately asphyxiated, because babies ... born alive and
20 immediately asphyxiated would not have any detectable injuries and would not have any food in
21 their stomach[s]." 6RP 548. The opinion of petitioner's medical expert was further impeached
22 by his use of the same methodology he criticized as unreliable in petitioner's case to interpret
23 nearly identical evidence in an earlier case where he reached a conclusion consistent with the
24 one Dr. Clark rendered in petitioner's case. 8RP 742-49; see also 8RP 734. Petitioner's expert
25

1 ultimately conceded the victim's head trauma evinced her heart was beating during the delivery.
2 8RP 752. He further conceded his opinion about the infant's cause of death would change if
3 petitioner admitted to leaving her in the toilet for an unknown period of time prior to death. 8RP
4 753-54. He also conceded the plausibility of the infant dying from hypothermia under those
5 conditions. 8RP 754-55.

6 The conclusions reached by Dr. Hitchcock and Dr. Clark were reinforced by Dr.
7 Duralde's rebuttal testimony. Dr. Duralde has been the medical director of the Child Abuse
8 Intervention Department at Mary Bridge Hospital for twenty years. 9RP 779. Her work includes
9 examining newborns for evidence of abuse. 9RP 780. She is board certified in family practice,
10 and has delivered approximately forty two babies in her career, to include babies born with a
11 "caput", which is the medical condition petitioner attributed the victim's blood loss to despite
12 the incompatibility of that theory with the rapid delivery she described. 9RP 782, 805, 809. As
13 a child abuse expert, Dr. Duralde regularly examined at least four to five infants with head
14 trauma a year and received regular training on the subject. 9RP 782-84. She is familiar with
15 child birth in general, and in particular, injuries commonly associated with birth. 9RP 781. The
16 trial court recognized her to be "an expert in pediatric injuries, including trauma to newborns."
17 9RP 791.

18
19 Dr. Duralde's examination of the victim's head injuries led her to conclude the victim
20 was alive when they were sustained as a result of her head hitting something hard, like "the
21 toilet" after being delivered. 9RP 796-97. There was no evidence of complications capable of
22 producing those injuries inside the birth canal. 9RP 797-98. Attending this conclusion was an
23 opinion to a degree of reasonable medical certainty that the victim had a postpartum heartbeat.
24 9RP 797, 799-800. Dr. Duralde described the "purple" hue petitioner claimed to observe in her
25

1 infant as being consistent with "some blood flow", but "possibly" with "poor oxygenation." 9RP
2 810. The infant would have presented "white" if she was without blood flow. 9RP 809-10.

3 **A. Petitioner's abandonment of her healthy newborn, either by leaving**
4 **the unwanted infant unattended in toilet water for ninety minutes, or**
5 **sealing the infant in a garbage bag buried beneath bloody rags in a**
6 **backpack for several days, is a reasonably inferred proximate cause of**
7 **the infant's death given the absence of any superseding cause when**
8 **the evidence is properly viewed in a light most favorable to the State**
9 **with all reasonable inference drawn in support of petitioner's**
10 **conviction.**

11 "The purpose of the felony murder rule is to deter felons from killing negligently or
12 accidentally by holding them strictly responsible for killings they commit." *State v. Leech*, 114
13 Wn.2d 700, 708, 790 P.2d 160 (1990). "[C]ause of death is a question of fact for the [trier of
14 fact] to decide from all the facts and circumstances. It is generally customary to introduce
15 expert medical testimony to establish the cause of death; however, proof thereof need not be
16 confined to that character of testimony." *State v. Engstrom*, 79 Wn.2d 469, 476, 487 P.2d 205
17 (1971). The thrust of petitioner's claim is that mathematical calculations cannot "100%
18 unquestionably" place her failure to summon postpartum medical aid for her newborn as the
19 sole cause of death. There can, of course, be more than one proximate cause of the death
20 supporting a murder conviction. *State v. Perez-Cervantes*, 141 Wn.2d 468, 479-80, 6 P.3d 1160
21 (2000); *State v. Jacobson*, 78 Wn.2d 491, 494, 477 P.2d 1 (1970). Contrary to petitioner's
22 erroneous contention, a murder conviction should be affirmed where criminal agency combines
23 with natural circumstances, such as a victim's medical condition, to concurrently cause the
24 death. *Id.*

25 When crimes are defined to require both conduct and a specified result of that conduct,
the defendant's conduct generally must be the 'legal' or 'proximate' cause of the result. *State v.*
Christman, 160 Wn. App. 741, 753-54, 249 P.3d 680 (2011)(citing 1 Wayne R. LaFave,

1 Substantive Criminal Law § 6.4, at 646 (2d ed. 2003)). As summarized by LaFave:

2 [I]t must be determined that the defendant's conduct was the cause in fact of the
3 result, which usually (but not always) means that but for the conduct the result
4 would not have occurred. In addition, even when cause in fact is established, it
5 must be determined ... any variation between the ... hazard (with reckless ...
6 crimes) and the result actually achieved is not so extraordinary ... it would be
7 unfair to hold the defendant responsible for the actual result.

8 *Id.* "With respect to cause in fact, tort and criminal situations are exactly alike." *Id.* (citing *State*
9 *v. McDonald*, 90 Wn. App. 604, 612, 953 P.2d 470 (1998), *aff'd*, 138 Wn.2d 680, 981 P.2d 443
10 (1999)). "There are several tests for factual causation, the most common of which is the 'but for'
11 test, although the 'substantial factor' test applies in some circumstances...[such as] where
12 multiple causes could have produced the identical harm, thus making it impossible to prove the
13 'but for' test." *Id.* (quoting *Allison v. Housing Auth.*, 118 Wn.2d 79, 94, 821 P.2d 34 (1991)).
14 "Under the substantial factor test, all parties whose actions contributed to the outcome are ...
15 liable." *Id.*

16 "The second component—the fairness of holding defendant responsible—is the province
17 of legal causation." *Id.* Determination of legal liability is dependent on mixed considerations of
18 logic, common sense, justice, policy and precedent. *Id.* "Legal cause in criminal cases ... is
19 narrower than ... legal cause in tort cases." *State v. Bauer*, 180 Wn.2d 929, 940, 329 P.3d 67
20 (2014). In the homicide context, proximate cause "means a cause which, in a direct sequence,
21 unbroken by any new independent case, produces the death and without which the death would
22 not have happened. *There may be more than one proximate cause of a death.*" WPIC 25.02
23 (emphasis added) (citing *Perez-Cervantes*, 141 Wn.2d at 468; *Leech*, 114 Wn.2d at 700; *State*
24 *v. Little*, 57 Wn.2d 516, 522, 358 P.2d 120 (1961)).

25 The evidence adduced at trial firmly established petitioner's abandonment of her
newborn in an unattended toilet for ninety minutes and the act of stuffing the newborn in a

1 sealed bag for several days were at least proximate causes, if not the only causes, of her
2 daughter's death. Petitioner triggered the unbroken sequence of events from birth to
3 abandonment to death. The evidence supports a reasonable inference the victim was born alive
4 through a rapid delivery without complications. *E.g.*, 3RP 142-43, 145; 5RP 418-19, 421, 460-
5 61 492-93, 516, 519-25, 553-56, 570; 6RP 453, 475, 496, 498-99, 502-03, 507-09, 566-67, 576-
6 77; 9RP 797, 799-800. The trier of fact was free to infer petitioner indirectly admitted to
7 knowing as much while betraying consciousness of guilt for that knowledge when she asked her
8 boyfriend's mother: "What if the baby wasn't dead when it was born?" 5RP 371. Petitioner
9 admitted to perceiving a pre-abandonment purple hue in the newborn's skin, which Dr. Duralde
10 identified as consistent with oxygenated-blood flow. 6RP 453, 475; 9RP 810. Petitioner also
11 described observing effluent blood during the delivery that was inconsistent with stillbirth and
12 conceded the umbilical cord was not restricting the infant in any way. 6RP 460-61.

14 An inference of vitality criminally cut short by abandonment can be reasonably found in
15 expert testimony the victim was born without a physical condition known to naturally cause
16 death. *See People v. Strawbridge*, 299 A.D.2d 584, 586-881, 751 N.Y.S. S.2d 606 (2002). A
17 postpartum examination conducted by Dr. Hitchcock revealed petitioner to be free from medical
18 conditions known to cause stillbirth. 6RP 463-64, 67-68. The red, rather than dark brown, blood
19 attending the birth was inconsistent with stillborn causing placental abruption. The autopsy
20 conducted by Dr. Clark similarly revealed the victim to be at or near term without fatal birth
21 defects or stillbirth causing conditions. *E.g.*, 6RP 453, 475, 496, 498-99, 502-03, 507-09, 566-
22 67, 576-77. A natural cause of death cannot be rationally inferred from evidence of its absence.

24 Testimony from Dr. Clark and Dr. Duralde supports an inference the head trauma only
25 identified as a *contributing* cause of death was sustained when the living newborn's head struck

1 the toilet after birth. 6RP 511, 533, 536, 574-75; 9RP 796-98. This was also an event petitioner
2 recklessly set in motion by delivering the baby into a toilet. The injury sustained as a
3 consequence of that decision exacerbated the hypothermia or drowning that *primarily* caused
4 death. *E.g.*, 3RP 142-43, 145; 4RP 328-29; 5RP 418-19, 421; 6RP 453, 475. Petitioner admitted
5 to leaving the infant partially submerged in waste deep toilet water for ninety minutes. *E.g.*,
6 3RP 142-43, 145; 4RP 328-29; 5RP 418-19, 421; 6RP 453, 475. The heat depleting or
7 suffocating effects of that condition would kill a newborn within "a few minutes". 6RP 527-29,
8 534-38, 550-51. And if the ninety minute abandonment in toilet water did not kill the newborn,
9 petitioner's act of sealing her heat-depleted body in an oxygen-deficient bag for several days
10 certainly did. *E.g.*, *Id.*; 6RP 538. The evidence consequently permitted the trier of fact to find
11 the newborn's death was proximately caused by petitioner "deliberately allowing [her] to be
12 born under ... unnecessarily unfavorable circumstances." See *State v. Shepard*, 255 Iowa 1218,
13 1235, 124 N.W2d 712 (1963) (murderer "chose to have [a] baby unattended on ... very cold
14 bathroom floor" where the child was "allowed to remain ... unattended for several minutes,
15 making no effort to determine if [the baby] was alive or [to] keep [the baby] alive."). Petitioner's
16 lethal acts of abandonment *at least recklessly* deprived her newborn the basic necessities of
17 shelter, medically necessary care, and oxygen, in a way that would be reasonably expected to
18 create an imminent and substantial risk the infant would die or suffer great bodily harm. See
19 RCW 9A.42.010(1), (7); .070(1)(b)(ii).

21
22 Petitioner's argument against the existence of proximate cause is fatally flawed in at
23 least three respects. First, it begins by inappropriately assuming petitioner's less inculpatory
24 account of her conduct is true. From that erroneous premise, she draws defense-oriented, often
25

1 unfounded, inferences in support of her theory of innocence instead arguing against the most
2 inculpatory version of the incident the evidence can support, as she must to prevail.

3 The second fatal flaw is apparent in petitioner's attempt to excuse the inexcusable
4 decision to leave a newborn partially submerged in toilet water by suggesting the need to
5 *immediately* remove her was not foreseeable. *E.g.* Pet. at 11. But foreseeability is not a
6 necessary predicate of proximate cause, which only requires the death fall within a reasonably
7 anticipated general field of danger. *Leech*, 114 Wn.2d at 711; WPIC 25.03 (citing *Perez-*
8 *Cervantes*, 141 Wn.2d at 475-76). The prerequisite was readily established in petitioner's case,
9 for "[a]ny [parent] who places [a] newborn baby into a toilet bowl, or who allows [a] newborn
10 ... to remain there after a delivery into the bowl, knows ... [he or she] is committing acts that
11 can produce death or great bodily harm." *People v. Feldmann*, 314 Ill.App.3d 787, 795, 732
12 N.E.2d 685 (2000). It is also "self-evident" a reasonable twenty-year-old person trained to
13 provide first aid to children "would understand and expect ... the deliberate failure to obtain
14 medical attention for a newborn ... would lead to ... death or serious injury." *See State v.*
15 *Robat*, 49 A.3d 58, 80 (2012). Especially when the infant is birthed headfirst into the hard and
16 restrictive confines of a toilet bowl.

17
18 Petitioner's third error is in confusing conviction supporting concurrent causes for
19 liability severing superseding causes. Superseding causes must be independent forces petitioner
20 could not have reasonably anticipated to occur that broke the causal connection between her act
21 of abandonment and the resulting death. *See State v. Meekins*, 125 Wn. App. 390, 397-99, 105
22 P.3d 420 (2005); *State v. McAllister*, 60 Wn. App. 654, 660-61, 806 P.2d 772 (1991)(*abrogated*
23 *on other grounds recognized in State v. Roggenkamp*, 153 Wn.2d 615, 106 P.3d 196 (2005)).
24
25 The State is not required to prove the absence of superseding causes, particularly speculative

1 ones, provided each element of the charged offense is proved at trial and supported by the
2 record on review. *McAllister*, 60 Wn. App. at 660-61.

3 Petitioner appears to suggest the supposed response time of the ambulance she chose not
4 to call is a superseding cause of death because it is not "100%" certain medical aid providers
5 could have revived the newborn by the time petitioner removed her from the toilet water. Pet. at
6 12. Putting aside the fact "100%" certainty is not an evidentiary burden the State must meet, any
7 inability of emergency responders to prevent the death petitioner set in motion is not a
8 superseding cause as her conduct created the need for medical intervention. *State v. Yates*, 64
9 Wn. App. 345, 351, 824 P.2d 519 (1992); *Little*, 57 Wn.2d at 521-22. The most that can be said
10 for any alleged, supposed, or established circumstances coinciding with the infant's death is
11 such circumstances were potentially concurrent causes that contributed to or accelerated an
12 untimely end primarily brought about by ninety minutes of unnecessary exposure to waste-deep
13 toilet water followed by a several day interment in a garbage bag. See *In Interest of B.L.M.*,
14 288 Ga.App.644, 664-65, 492 S.E.2d 700 (1997); Pet. at 2.

15
16 Petitioner predominately relies on *Com. v. Pugh*, 462 Mass. 482, 969 N.E.2d 672 (2012)
17 to support the requested reversal. Her reliance on the case is misplaced for several obvious
18 reasons. The decision in *Pugh* is predicated on the Commonwealth's inability to prove the infant
19 in that case was born alive. *Id.* at 483, 488, 494. That factual difference from this case sent
20 *Pugh* down an analytical path which necessarily excluded consideration of the criminal
21 abandonment at issue in this case:

22
23 "[b]ecause the judge specifically found the evidence insufficient to prove ...the
24 baby was born alive these bases of criminal liability [*i.e.*, a parent's "duty to
25 provide medical services to ... independently living children..."] are
inapplicable."

1 *Id.* at 494. From the factual starting point of an undetermined cause of death, *Pugh*
2 unremarkably reasoned there was insufficient evidence to conclude failure to summon medical
3 aid was a proximate cause of death. *Id.* at 499-500. Without proof of postpartum life apart from
4 the defendant, the case shifted its focus to the defendant's privacy rights to the end of
5 determining whether the law places a duty on "a woman in labor ... to summon medical
6 assistance", which in *Pugh* specifically referred to the defendant's improvisational attempt to
7 rescue a breech baby from the birth canal and resuscitate the child upon delivery. *Id.* at 486-88,
8 492, 494, 497, 501, 503. The conduct at issue in *Pugh* cannot be usefully compared to
9 petitioner's decision to leave a living newborn unattended in waste deep toilet water for over an
10 hour and to refrain from summoning medical assistance to assuage her fears and save money.
11

12 Petitioner's case presents this Court with the lamentably common fact pattern *Pugh*
13 recognized to support criminal liability "without question". *Id.* at 494. A survey of this grim
14 corner of the law establishes petitioner's case to fall well within the main. "For over a hundred
15 years, it has been commonly accepted a parent has a duty to maintain his [or her] children, and
16 this maintenance includes ... medical attendance...." *State v. Norman*, 61 Wn. App. 16, 22, 808
17 P.2d 1159 (1991). "This duty has been referred to as a 'natural' or even a 'sacred' duty, and 'a
18 basic tenet of our society and law ... generally recognized throughout this country." *Id.*; *State v.*
19 *Williams*, 4 Wn. App. 908, 910, 915-19, 484 P.2d 1167 (1971)(negligent failure to obtain
20 medical treatment for baby with abscessed tooth sufficient to support manslaughter conviction).
21 In spite of this "natural" "sacred" duty, too many parents have responded to unwanted
22 pregnancies like petitioner did and have been similarly convicted of murder. *E.g.*, *Robat*, 49
23 A.3d at 77-81 (mature defendant hid pregnancy, sought no prenatal care, gave birth while
24 secreted in bathroom, and rebuffed help); *People v. Portellos*, 298 Mich.App. 431, 444-446, 827
25

1 N.W.2d 725 (2012)(defendant trained in first aid hid pregnancy, gave birth at home, did not call
2 for assistance, and placed the baby in a garbage bag); *Com. v. Dupre*, 866 A.2d 1089, 1096-
3 1100 (2005) (defendant initially denied pregnancy, delivered full-term baby without defects and
4 air-inflated lungs into a bathtub, allowed the baby to drown, and placed the baby in garbage
5 bag); *Strawbride*, 299 A.d.2d at 586 (deferred to trier of fact's resolution of conflicting experts
6 where defendant recklessly delivered infant into a toilet and placed her into a bag); *Feldmann*,
7 314 Ill.App.3d at 789-91, 795 (living newborn that drew breath placed or left in toilet); *State v.*
8 *Collins*, 986 S.W.2d 13, 15-19 (1998)(college student hid pregnancy, did not seek prenatal care,
9 delivered baby into a toilet, and rebutted help); *B.L.M.*, 228 Ga.App. at 666 (juvenile recklessly
10 abandoned motionless newborn with slim chance of survival in a trash bag); *Shepard*, 255 Iowa
11 at 1235 (*supra*); *People v. Ryan*, 9 Ill.2d 467, 475-76, 138 N.E.2d 516 (1956)(nurse who
12 surreptitiously gave birth in bathroom placed the baby in case overnight even though it is
13 "common knowledge ... placing ... [an] infant in [a] case ... [is] sufficient to cause death.").
14 Petitioner's conviction for similarly murdering her daughter by abandonment should be
15 affirmed.
16

17 **B. Petitioner did not have a constitutional right to withhold medical care**
18 **from the newborn she left in a toilet long enough to die from hypothermia**
19 **or drowning.**

20 A parent can be constitutionally held criminally liable for failing to secure necessary
21 medical care for a minor child as the common law criminalized such an omission since before
22 the state constitution's ratification. *Norman*, 161 Wn. App. at 22; *Prince v. Massachusetts*, 321
23 U.S. 158, 166-69, 64 S.Ct. 438 (1944). "[T]he state has a wide range of power for limiting
24 parental freedom ... in things affecting [a] child's welfare ... include[ing], to some extent,
25 matters of conscience...." *Prince*, 321 U.S. at 166-69. A parent's fundamental right to refuse

1 medical treatment for himself or herself has never been understood as a right to expose a living
2 child to ill health or death. *Prince*, 321 U.S. at 166-69; *Norman*, 161 Wn. App. at 22. "Parents
3 may be free to become martyrs themselves. But it does not follow they are free, in identical
4 circumstances, to make martyrs of their children...." *Prince*, 321 U.S. at 170; *Wisconsin v.*
5 *Yoder*, 406 U.S. 205, 233-34, 92 S.Ct. 1526 (1972). After birth, parental autonomy interests
6 must bend to the state's interest in protecting newborns. *See Id.*; accord *State v. Collins*, 986
7 S.W.2d 13, 17-19 (1998)(failing to get medical care during and following childbirth when the
8 need to get medical care for infant delivered into a toilet was apparent).

9
10 This case is not, as petitioner contends, about whether women have a fundamental right
11 to undertake homebirth unassisted by physicians or midwives. Pet. at 23. Petitioner's
12 *postpartum* decision to withhold necessary medical care from her purportedly unresponsive, but
13 nonetheless living infant, fearing the consequences of detection and to avoid a medical bill does
14 not place her in the vanguard of the homeopathic "freebirthing" movement. *E.g.*, 3RP 146.
15 There is no evidence petitioner ever intended the child to have life beyond the moment of her
16 birth; quite the contrary, petitioner actively attempted to conceal the little girl's existence before
17 and after birth by extreme and ultimately criminal means. This case consequently does not call
18 upon the Court to decide whether a parent can be exposed to criminal liability for failing to
19 summon medical aid *amid* an unassisted home delivery (the issue in *Pugh*, 482 Mass. at 507)
20 because the criminal liability in this case is based on petitioner's post-birth decision to withhold
21 the basic necessities of life from an infant proven to have life apart from her mother.
22

23 Petitioner's misplaced request for this Court to use her case as a vehicle to bring *Pugh's*
24 holding to Washington inherently urges the Court to violate two fundamental rules of judicial
25 restraint when deciding the constitutionality of laws: "one, never to anticipate a question of

1 constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule
2 of constitutional law broader than is required by the precise facts to which it is to be applied."
3 *United States v. Vilches-Narvarrete*, 523 F.3d 1, 9 n.6 (1st Cir., 2008)(citing *Liverpool, N.Y. &*
4 *Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352 (1885); *United States*
5 *v. Resendiz-Ponce*, 549 U.S. 102, 127 S.Ct. 782, 785 (2007); *Spector Motor Serv. v.*
6 *McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152 (1944) ("If there is one doctrine more deeply
7 rooted than any other in the process of constitutional adjudication, it is that we ought not to pass
8 on questions of constitutionality ... unless such adjudication is unavoidable.").

9
10 As with petitioner's challenge to proximate cause, her rather unfortunate claim the
11 murder conviction violates a fundamental liberty interest in unassisted birth falls apart the
12 moment her healthy infant's live birth into a toilet is accepted as true consistent with the
13 applicable standard of review. This case only calls upon the Court to apply the criminal
14 abandonment statute to petitioner's now proven act of bringing a criminally expedient end to the
15 daughter she never wanted. The constitutionality of that statute, as applied in this case, is
16 beyond debate for, in one form or another, the crime it defines predates our state constitution,
17 has lawfully persisted under the both the state and federal constitution since the state's entry into
18 the union and no doubt will continue to persist so long as a parent's "sacred" duty to provide the
19 basic necessities of life to his or her living children remains a basic tenant of our society and
20 law. See *Prince*, 321 U.S. at 166-69; *Norman*, 61 Wn. App. at 22; RCW 9A.42. 005, 010 (1),
21 .070.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

2. THE CLAIM TRIAL COUNSEL INEFFECTIVELY FAILED TO PURSUE A MENTAL HEALTH DEFENSE SHOULD BE DISMISSED BECAUSE IT IS NOT SUPPORTED BY COMPETENT EVIDENCE A QUALIFIED EXPERT WOULD ENDORSE SUCH A THEORY, REDUCING THE CLAIM TO A REQUEST FOR REVERSAL TO EXPLORE THE POSSIBILITY OF ADVANCING A DIFFERENT THEORY THAN THE ONE REASONABLY PURSUED AT TRIAL.

A "petitioner must present evidence showing his [or her] factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886-87, 828 P.2d 1086 (1992). Petitions must be supported by factual statements entitling the petitioner to relief if proved. *Id.* "[A] mere statement of evidence ... the petitioner believes will prove [the] factual allegations is not sufficient." *Id.* Allegations based on matters outside the existing record must be supported by the petitioner's demonstrated possession of competent, admissible, evidence establishing entitlement to relief. *Id.* "If the petitioner's evidence is based on knowledge in the possession of others, [the petitioner] may not simply state what he [or she] thinks those others would say, but must present their affidavits or other corroborative evidence." *Id.* The affidavits, in turn, must contain matters which the affiants may competently testify. *Id.*

Expert opinions are not admissible unless rendered by a person qualified to express an opinion helpful to a trier of fact. ER 702. An opinion about a petitioner's mental capacity is not helpful unless it explains how a proven condition is reasonably and logically connected to the petitioner's mental state at the time of a relevant crime. *See In re Pers. Restraint of Gentry*, 137 Wn.2d 387, 403-04, 972 P.2d 1250 (1999); *Rice*, 118 Wn.2d at 888; *State v. Griffin*, 100 Wn.2d 417, 419-20, 670 P.2d 265 (1983); *State v. Mitchell*, 102 Wn. App. 21, 26-27, 997 P.2d 373 (2000); *State v. Swagerty*, 60 Wn. App. 830, 836, 810 P.2d 1 (1991). Evidence of a psychological condition alone is insufficient. *See Id.*; *In re Pers. Restraint of Yates*, 177 Wn.2d

1 18-19, 34-35, 296 P.3d 872 (2013); *see also State v. Finley*, 97 Wn. App. 129, 135, 982 P.2d
2 681 (1999)(citing *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996)); *State*
3 *v. Knapp*, 14 Wn. App. 101, 110, 540 P.2d 898 (1975)(citing *State v. Smythe*, 148 Wash. 65,
4 268 P. 133 (1928)).

5 Petitioner relies on a heavily redacted letter from a retired OB/GYN who candidly
6 conceded that he no longer possessed the expertise required to render an opinion in her case.
7 Pet. Apx. A. at 1, 3. Despite that responsibly expressed caveat, he goes on to share his
8 impression of petitioner's veracity as well as the psychological pressures he perceived in the
9 narrative provided by the defense even though he offers no reason to believe he possesses any
10 more expertise in the fields of lie detection or psychology. *Id.* at 2. The retired doctor supposed
11 "it might be helpful" to retain a "forensic psychiatrist" to evaluate petitioner's "deposition" or to
12 perform a "psychiatric or psychological examination." *Id.*

13 From this redacted hearsay and the fact a diminished capacity defense was not pursued
14 at trial, petitioner asks this Court to make two unwarranted assumptions: (1) that the absence of
15 the diminished capacity defense was due to counsel's failure to follow-up on the retired doctor's
16 suggestion; and (2) there was a qualified expert willing to offer an admissible opinion favorable
17 to such a defense that counsel failed to retain. A fatal flaw running through these assumptions
18 is their dependence on the logical fallacy that the absence of evidence is evidence of absence;
19 which is to say, the absence of a complete account of the hitherto confidential activities counsel
20 undertook on petitioner's behalf is evidence of inactivity and failure. This reasoning is
21 particularly problematic in a PRP where petitioner bears the burden of proving her claims by a
22 preponderance of the evidence. A problem compounded by the fact pre-trial ineffective
23 assistance of counsel claims can only be fairly assessed through careful review of counsel's
24 entire case file with supplemental affidavits wherever necessary to account for undocumented
25 activities and counsel's reason for proceeding as she did.

1 From the available record, it is just as likely counsel diligently searched for but could
2 not find a qualified expert willing, or ethically able, to offer an admissible opinion favorable to
3 the defense. Counsel very well may have confidentially shopped several experts who rendered
4 opinions harmful to the defense, which would explain the absence of any reference to them in
5 the record. And petitioner, who bears the burden of proof in this collateral attack where she
6 again has the benefit of counsel, has herself failed to establish the existence of an admissible
7 opinion capable of supporting the defense she claims counsel was deficient for failing to raise.

8 Petitioner's claim defeating evidentiary failing is plain when her collateral attack is
9 compared to the presentation of a similar claim in *In re Yates*, where it was properly supported
10 with three evaluations from qualified experts who endorsed the petitioner's position on the
11 utility of psychological testing trial counsel neglected to pursue. 177 Wn.2d at 38-39. Whereas,
12 petitioner's claim is based on pure conjecture about the hypothetical utility of a yet to be—
13 perhaps never to be—expressed expert opinion, which, if obtained, may prove inadmissible or
14 too obviously unpersuasive to underwrite a credible diminished capacity defense. So she has not
15 proved by a preponderance of the evidence that trial counsel unreasonably left a viable
16 diminished capacity defense on the table that was so obviously superior to the medical defense
17 pursued that petitioner's trial was unfair. See *Strickland v. Washington*, 466 U.S. 668, 688-89,
18 104 S.Ct. 2052 (1984).

19 The substantial redactions to the retired doctor's letter also make it unfit for
20 consideration. A party seeking review bears the burden of perfecting the record. An inadequate
21 record precludes meaningful review. *State v. Vazquez*, 66 Wn. App. 573, 583, 832 P.2d 883
22 (1992); *State v. Locati*, 111 Wn. App. 222, 226, 43 P.3d 1288 (2002). Courts cannot determine
23 the significance of omissions unless they are credibly informed of the missing substance. See
24 *State v. Jury*, 19 Wn. App. 256, 265, 576 P.2d 1302 (1978). Petitioner elected to attach a letter
25 twice redacted in a way that appears to conceal information material, potentially harmful, to her

1 claim. There is no explanation as to why further steps were not taken to present the letter in its
2 entirety, for if she does not already possess such a copy, one presumably has been retained by
3 the initial recipient who remains beholden to her as former counsel. RPC 1.9; *see State v.*
4 *Garcia*, 57 Wn. App. 927, 934, 791 P.2d 244 (1990)(a defendant may not avoid the requirement
5 of perfecting the record by claiming trial counsel refused to provide the evidence necessary for
6 review). A petitioner bearing the burden of production in a PRP cannot expect to receive the
7 extraordinary expenditure of scarce societal resources required for post-conviction review to
8 test the presumptive effectiveness of trial counsel by arguing inferences from an evidentiary
9 void the petitioner ensured by failing to produce critical components of the record she is
10 responsible for perfecting. The ineffective assistance of counsel claim should be summarily
11 dismissed as inadequately presented for review.

12 3. THE INEFFECTIVE ASSISTANCE CLAIM SHOULD ALSO BE
13 DISMISSED BECAUSE IT IS A HINDSIGHT CHALLENGE TO A
14 REASONABLY SELECTED TRIAL STRATEGY TO MEDICALLY
15 ATTACK THE STATE'S PROOF OF LIVE BIRTH INSTEAD OF
16 ATTEMPTING A YET TO BE ESTABLISHED DIMINISHED
CAPACITY DEFENSE AIMED AT EXCUSING A MANIFESTLY
COMPETENT ADULT'S DECISION TO LET AN UNWANTED
NEWBORN DIE FROM EXPOSURE.

17 A successful ineffective assistance of counsel claim requires petitioner to show counsel's
18 performance was deficient and that petitioner was prejudiced by the deficiency. *In re Pers.*
19 *Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012)(citing *Strickland*, 466 U.S. at
20 687). To show counsel's performance was "deficient", requires a petitioner to establish that
21 counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by
22 the Sixth Amendment." *Strickland*, 466 U.S. at 687. If a constitutional deficiency is shown,
23 petitioner must establish she was "prejudiced" by errors so serious as to deprive her a fair trial
24 by calling the outcome into doubt. *Id.*; *Crace*, 174 Wn.2d at 840, 847.

25 The essence of petitioner's ineffective assistance claim is trial counsel should have found
some qualified expert willing to recast the inadmissible diagnosis of "neonaticide syndrome"

1 she relied on at sentencing into a diminished capacity defense. As aptly acknowledged below,
2 the psychological theory of "neonaticide syndrome" is not a defense admissible under the *Frye*
3 test as it is not generally accepted in the applicable scientific community. *E.g.* RP(11/13/15) 10,
4 14, 23; *Nonnon v. City of New York*, 819 N.Y.S. 2d 705, 713, 32 A.D.3d 91 (2006)(citing
5 *People v. Wernick*, 89 N.Y.2d 111, 114-15, 674 N.E.2d 322 (1996)(information "concerning
6 novel syndrome of neonaticide" properly excluded because the pattern of behavior, *i.e.*, brief
7 reactive psychosis which causes a mother to kill a new born, is not generally recognized in the
8 relevant medical community); *Frye v. United States*, 293 F. 1013 (D.C., 1923). Short of buying
9 into such a dangerously extravagant excuse for infanticide, there is no reason to assume
10 petitioner suffered from anything more debilitating than a commitment to avoid the burdens she
11 associated with parenthood by any means. There is no evidence she committed the crime under
12 the influence of a mental disorder that impaired her demonstrated ability to recklessly abandon a
13 child. *See State v. Atsbeha*, 142 Wn.2d 904, 921, 16 P.3d 646 (2001).

14 The evidence adduced at trial showed petitioner to be goal oriented *to a fault* and
15 without psychological impairments. She was a happy, outgoing child who obtained high marks
16 in school. 7RP 599. She began working for the North Tacoma Montessori Center at the age of
17 sixteen, and ascended to the trusted position of assistant elementary school teacher in the years
18 that followed. 3RP 92, 95. She denied experiencing depression, contrary to representations
19 made at sentencing. 6RP 462. And when the murder occurred, she was completing her
20 Associates Degree in elementary education to the end of becoming a teacher. 5RP 404. She
21 nevertheless very explicitly deemed having a child of her own at her age, with her boyfriend,
22 out of wedlock, to be inconsistent with her goals, reputation, and self-image. 3RP 216; 5RP
23 402, 406-08, 414. The circumstances of the victim's death and petitioner's attempt to conceal
24 any evidence of the child's existence manifested a concerted effort to apply her fully
25 functioning faculties to eliminating what she perceived to be an impediment to her progress and

1 avoiding the consequences attending that act. The trial court, aware of these facts, imposed a
2 standard sentence, instead of the downward departure requested by the defense, because:

3 I[t] d[i]dn't question ... [petitioner] had the capacity to appreciate her conduct and
4 the capacity to conform her conduct....

5 RP (11/15/13) at 24.

6 **A. Petitioner failed to prove trial counsel was deficient in electing to**
7 **pursue a plausible medical defense over an attenuated diminished**
8 **capacity defense that tended to undermine the medical defense and**
9 **could be easily impeached by the known circumstances of petitioner's**
10 **life before, during, and after the victim's birth.**

11 The Supreme Court has never held effective representation requires counsel to undertake
12 an independent investigation of a criminal defendant's case. *State v. A.N.J.*, 168 Wn.2d 91, 109,
13 225 P.3d 956 (2010). Counsel must make reasonable investigations *or* make a reasonable
14 decision that makes particular investigations unnecessary. *Strickland v. Washington*, 466 U.S.
15 668, 691, 104 S. Ct. 2052 (1984)(emphasis added). Judicial scrutiny of counsel's performance is
16 highly deferential. *Id.* The investigation required, if any, varies according to the facts of each
17 case. *A.N.J.*, 168 Wn.2d at 111-112. Defense attorneys are not called upon "to scour the globe
18 on the off chance something will turn up...." *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S. Ct.
19 2456 (2005); *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S. Ct. 2527 (2007). Reasonably diligent
20 counsel may draw a line when they have good reason to think further investigation would be a
21 waste. *Id.* The fact useful evidence might have come from additional investigation may likewise
22 fail to establish the overseeing attorney was constitutionally deficient, for defendants are not
23 entitled to perfect counsel. *State v. Adams*, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978) (quoting
24 *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974)). Counsel is only constitutionally
25 required to evaluate the evidence against the accused and the likelihood of conviction if the case
proceeds to trial. See *Lockhart*, 474 U.S. at 57-58; *A.N.J.*, 168 Wn.2d 109, 111-12.

1 There is no evidence before the Court counsel failed to investigate a diminished capacity
2 defense, much less made a decision to forego investigating the merits of such a defense, which
3 would be necessary for the Court to assess the reasonableness of the decision while "giving
4 great deference to counsel's judgments." *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 252,
5 172 P.3d 335 (2007). "In assessing performance, the court must make every effort to eliminate
6 the distorting effects of hindsight." *State v. Brown*, 159 Wn. App. 336, 371, 245 P.3d 776
7 (2011). Petitioner's failure to adduce evidence of an admissible diagnosis capable of supporting
8 a diminished capacity defense makes it impossible to address the ineffective assistance claim in
9 any but the most general of terms, which is why it is rightly fatal to the claim. Nevertheless, it is
10 clear petitioner's mind was not obviously compromised by intoxicants, mental illness, sickness,
11 or excitement. It is also clear that counsel opted for a medical defense aimed at calling the
12 predicate fact of live birth into question, which would have been a complete defense to the
13 charge if successful. Counsel ably supported that defense with a qualified forensic pathologist
14 who worked as an assistant medical examiner for the State of Oregon. Casting petitioner as a
15 credible paraeducator capable of recognizing the absence of life in a newborn tended to support
16 the medical defense. Conversely, characterizing petitioner as psychologically overcome by
17 circumstances, and thereby more likely capable of leaving an obviously living newborn in a
18 toilet long enough to die from hypothermia, tended to undermine that defense by undermining
19 the credibility of petitioner's less incriminating account of her conduct. Thus, on its face,
20 counsel made a sound strategic decision, which in the absence of evidence to the contrary,
21 defeats petitioner's deficient performance claim, for to prevail she "must show *in the record* the
22 absence of legitimate strategic ... reasons supporting the challenged conduct..." *Elmore*, 162
23 Wn.2d 236, 253, 172 P.3d 335 (2007)(emphasis added); *State v. Grier*, 171 Wn.2d 17, 42, 246
24
25

1 P.3d 1260 (2011)(to rebut the strong presumption counsel's performance was reasonable the
2 petitioner bears the burden of establishing the absence of any conceivable legitimate strategy
3 explaining counsel's performance.).

4 Nor can counsel be fairly faulted for failing to advance a yet to be substantiated
5 diminished capacity defense as an alternative to the reasonably pursued medical defense. A
6 decision to refrain from drawing the trier of fact's attention away from, or indirectly
7 undermining, petitioner's medical defense can be readily characterized as sound strategy, even
8 in the abstract. Many trial-advocacy experts recommend attorneys eschew alternative
9 arguments, and it is with that consideration in mind the Supreme Court recognized the
10 legitimacy of risky all-or-nothing approaches. *See Elmore*, 162 Wn.2d 253 ("Once counsel
11 reasonably selects a defense ... it is not deficient performance to fail to pursue alternative
12 defenses...."); *State v. Carson*, ___ Wn.2d __, __ P.3d __ (Sept. 17, 2015, No. 90308-5; 2015
13 WL 5455671); *see also Grier*, 171 Wn.2d at 42. Appellate courts are to resist the urge to
14 "indulg[e] in the natural tendency to speculate as to whether a different trial strategy might have
15 been more successful." *Maryland v. Kulbicki*, 577 U.S. __, __ S. Ct. ____ (No. 14-848,
16 2015). That admonition is especially easy to abide by in this case where petitioner neglected to
17 provide any evidence of a viable diminished capacity defense to compare against the medical
18 defense that cannot be characterized as unreasonably pursued. Deficient performance has not
19 been established.

20 **B. Petitioner failed to prove she was prejudiced by the medical defense**
21 **counsel reasonably pursued.**

22 Prejudice only exists if there is a reasonable probability the result of the proceeding
23 would have been different but for counsel's deficient performance. *See State v. Jeffries*, 105
24
25

1
2 Wn.2d 398, 418, 717 P.2d 722, *cert denied*, 497 U.S. 922 (1986); *State v. Neff*, 163 Wn.2d 453,
3 466, 181 P.3d 819 (2008).

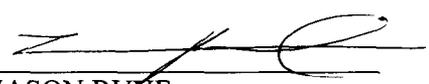
4 Petitioner does not even try to explain how she was prejudiced by her counsel's alleged
5 failure to investigate a diminished capacity defense. She simply opines in conclusory terms that
6 the outcome of her trial would have been different. Prejudice like deficiency is impossible to
7 assess due to petitioner's failure to provide evidence of a diagnosis capable of supporting a
8 diminished capacity defense, which in turn would be capable of being compared against the
9 medical defense pursued. The only purported proof of prejudice petitioner offers is the trial
10 court's expressed belief that the mitigation evidence she presented at sentencing provided useful
11 insight into her apparent lack of full appreciation for the gravity of her situation during the trial.
12 Pet. at 30. But of course that observation was made by the same judge who nevertheless
13 expressed unwavering confidence in petitioner's "capacity to appreciate her conduct and the
14 capacity to conform her conduct..." and did not perceive the mental health information to be
15 mitigating enough to warrant a downward departure from the standard-range. RP (11/15/13) at
16 24. There is consequently no reason to believe the same court would have felt any less confident
17 about petitioner's capacity had counsel devised a way to legitimately expose the court to some
18 permutation of that mental health information during the trial.
19
20
21
22
23
24
25

1 D. CONCLUSION

2 The conviction is amply supported by the evidence when it is properly viewed in a light
3 most favorable to the State. Meanwhile, petitioner's ineffective assistance of counsel claim is
4 inadequately presented for review, and apparently meritless, so the petition should be dismissed.
5

6 RESPECTFULLY SUBMITTED: October 19, 2015.

7 MARK LINDQUIST
8 Pierce County
9 Prosecuting Attorney

10 
11 JASON RUYF
12 Deputy Prosecuting Attorney
13 WSB No. 38725

13 Certificate of Service:
14 The undersigned certifies that on this day she delivered by U.S. mail
15 to petitioner true and correct copies of the document to which this
16 certificate is attached. This statement is certified to be true and
correct under penalty of perjury of the laws of the State of Washington.

15 Signed at Tacoma, Washington, on the date below.

16 10.20.15 Therex Kar
Date Signature

17
18
19
20
21
22
23
24
25

PIERCE COUNTY PROSECUTOR

October 20, 2015 - 9:32 AM

Transmittal Letter

Document Uploaded: 4-prp2-455862-Response.pdf

Case Name: In RE: The PRP of McMillen

Court of Appeals Case Number: 45586-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion:

Answer/Reply to Motion:

Brief:

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes:

Hearing Date(s):

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other:

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

mungerlaw@gmail.com

KARSdroit@aol.com