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COURT OF APPEALS  
DIVISION II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BY \_\_\_\_\_  
DEPUTY

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In RE THE PERSONAL RESTRAINT PETITION OF:

JENNIFER MOTHERSHEAD  
Petitioner

STATE OF WASHINGTON  
Respondent

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PERSONAL RESTRAINT PETITION

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Pierce County Superior Court No. 12-1-01509-2

Jennifer Mothershead #370440  
PRO SE  
Washington Corrections Center for Women  
9601 Bujacich Rd NW  
Gig Harbor, WA 98332

**TABLE OF CONTENTS**

I.	STATUS OF PETITIONER.....	1
II.	PERSONAL RESTRAINT PETITION – RELIEF VIA COLLATERAL ATTACK.....	1-2
III.	STATEMENT OF THE CASE/PRCEDURAL BACKGROUND...	2-8
IV.	FOUNDATIONS FOR RELIEF .....	8-49
	<u>First Ground:</u>	
	THE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING HER TRIAL.....	8-16
	<u>Second Ground:</u>	
	THE CIRCUMSTANTIAL EVIDENCE IN THIS CASE WAS INSUFFICIENT AND REQUIRES REVERSAL.....	16-20
	<u>Third Ground:</u>	
	THE STATE COMMITTED REVERSIBLE ERROR BY NOT PROVING AN ESSENTIAL ELEMENT: INTENT.....	21-22
	<u>Fourth Ground:</u>	
	THE STATE DID NOT PROPERLY INVESTIGATE ALL OF THE INDIVIDUALS THAT HAD CONTACT WITH K.M. THE STATE’S REFUSAL TO INVESTIGATE IS GROUNDS FOR REVERSAL.....	22-28
	<u>Fifth Ground:</u>	
	THE CHAIN OF CUSTODY, AS WELL AS THE ACTUAL POSSESSION AND DOMINION AND THE CONTROL OF THE MEDICATION AT THE HANDS OF VARIOUS NURSES LED TO A QUESTIONABLE CHAIN OF CUSTODY AND POSSESSION, THEREFORE CREATING REASONABLE DOUBT REGARDING THE VALIDITY OF THE DROPS AS EVIDENCE.....	28-31
	<u>Sixth Ground:</u>	
	THE SENTENCING IN THIS CASE IS GROSSLY DISPROPORTIONATE TO SIMILARLY SITUATED DEFENDANTS AND REQUIRES RESENTENCING.....	32-35

Seventh Ground:

THE RULING IN STATE V. ROGERS BEARS CONTROLLING WEIGHT IN THIS CASE AND SHOULD BE RELIED UPON HEAVILY BY THIS COURT AS GROUNDS FOR REVERSAL..... 35-39

Eighth Ground:

DESPITE RULING THAT THE SUBDURAL HEMATOMA WAS NOT PART OF THE APPELLANT'S CHARGES AND COULD NOT BE RELATED TO THE APPELLANT IN ANY WAY, THE CONTINUOUS DISCUSSION OF THE SUBDURAL HEMATOMA DURING TRIAL CAUSED INCURABLE PREJUDICE AND REQUIRES REVERSAL..... 39-42

Ninth Ground:

DR. WEISS, AS A WITNESS, OFFERED TESTIMONY FULL OF CONJECTURE, SPECULATION, AND UNRELIABLE CONTENT. THIS TESTIMONY, RELIED ON HEAVILY BY THE STATE, SHOULD HAVE BEEN DISMISSED AND SHOULD BE DISMISSED BY THIS COURT..... 42-49

V. REQUEST FOR RELIEF..... 49-50

VI. OATH..... 50

EXHIBIT A: Exculpatory Evidence from Intertox - 1

EXHIBIT B: Exculpatory Evidence from Intertox -2

EXHIBIT C: Closing Argument – State

EXHIBIT D: Table of Tester's Findings

EXHIBIT E: Comparability Chart

## TABLE OF AUTHORITIES

### State Cases

<i>State v. Thomas</i> , 109 Wn.2d 222, 229, 743 P.2d 816 (1987).....	8
<i>State v. McFarland</i> , 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995).....	8, 11
<i>State v. Stenson</i> , 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), <i>cert denied</i> , 523 U.S. 1008 (1998).....	9
<i>State v. Green</i> Wn. 2d. 216 (1980).....	18
<i>State v. Baeza</i> , 100 Wn. 2d 487, 491 (1983).....	18
<i>State v. Ortega-Martinez</i> 124 Wn. 2d at 702; 881 P.2d 231 (1994).....	20
<i>State v. Kitchen</i> , 110 Wn. 2d 403, 410, 756 P.2d 105 (1998).....	20
<i>State v. LaRoche</i> , 1999 Wash.App. LEXIS 1113.....	20
<i>State v. Cantu</i> , 156 Wn.2d 819; 132 P.3d 725 (2006).....	21-22
<i>State v. Deal</i> , 128 Wn.2d 693, 699-700, 911 P.2d 996 (1996).....	21-22
<i>State v. O'Dell</i> , 46 Wn. 2d 206, 279 P.2d 1087 (1995).....	22
<i>State v. Calegar</i> , 133 Wn.2d 718; 947 P.2d 235 (1997).....	24
<i>State v. Maupin</i> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	25
<i>State v. Rehak</i> , 67 Wash. App. 157, 162, 834 P.2d 651 (1992).....	25-26
<i>State v. Mak</i> , 105 Wn.2d 692, 716, 718 P.2d 407, <i>cert denied</i> , 479 U.S. 995, 93 L.Ed. 2d 500, 107 S.Ct. 599 (1986).....	25
<i>State v. Downs</i> , 168 Wash. 664, 667, 13 P.2d 1 (1932).....	26
<i>State v. Clark</i> , 78 Wash.App. 471, 478-79, 898 P.2d 854 (1995).....	26
<i>State v. Callahan</i> , 77 Wn. 2d 27, 29, 459 P. 2d 400 (1969).....	29
<i>State v. Staley</i> , 123 Wn. 2d 794, 801, 872 P. 2d 502 (1994).....	29
<i>State v. Davis</i> , 2016 Wash. App. LEXIS 1722.....	30
<i>State v. Hayes</i> 182 Wn. 2d 556; 342 P.3d 1144 (2015).....	32
<i>State v. Handley</i> 115 Wn.2d 275, 289, 976, P.2d 1266 (1990).....	32
<i>State v. Davis</i> 175 Wn.2d 287, 290 P.3d 43 (2012).....	32
<i>State v. Yates</i> 161 Wn.2d 714; 168 P.3d 359 (2007).....	32
<i>Olsen v. Delmore</i> , 48 Wn.2d 545, 295 P.2d 324 (1956).....	33
<i>State v. Gamble</i> 168 Wn.2d 161; 225 P.3d 973 (2010).....	33
<i>State v. Harner</i> 153 Wn.2d 228 (2004).....	33

<i>In re Det. Of Thorell</i> , 149 Wn.2d 724, 745, 72 P.3d 708 (2003).....	33
<i>State v. Rogers</i> , 2004 Wash.App. LEXIS 1754.....	35-39, 45-46
<i>State v. Tilton</i> , 149 Wn.2d 775, 786, 72 P.3d 735 (2003).....	36
<i>State v. Hescock</i> , 98 WnApp. 600, 605, 989 P.2d 1251 (1999).....	37
<i>State v. Hager</i> 171, Qn. 2d 151; 248 P.3d 512 (2011).....	41
<i>State v. Clausing</i> , 147 Wn. 2d 620 (2002).....	41
<i>State v. Stafford</i> , 2011 Wash app. LEXIS 2396 (2011).....	41-42
<i>Cedar Courts Apts. LLC v. Colorado</i> , 2017 Wash. App. LEXIS 81 (2017).....	43
<i>Ayers v. Johnson &amp; Johnson Baby Prod. Co.</i> , 117 Wn. 2d 747, 753, 838, P. 2d 1337 (1991).....	43
<i>Marshall v. Bally's Pacwest, Inc.</i> , 94 Wn. App. 372, 379, 972 P. 2d 475 (1999)..	44
<i>State v. Copeland</i> , 130 Wn. 2d 244; 922 P.2d 1304 (1996).....	44
<i>State v. Prestegard</i> , 108 Wn. App. 14, 23, 38 P. 3d 817 (2001).....	46
<i>State v. Dolan</i> , 118 Wn. App. 323; 73 P.3d 1011 (2003).....	46

**Federal Cases**

<i>Strickland v. Washington</i> , 466 U.S., 668, 689-91, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).....	8-16
<i>Britt v. North Carolina</i> , (1971) 404 U.S. 226, 227.....	15
<i>Ake v. Oklahoma</i> (1985) 470 U.S. 68.....	15
<i>Corenevsky v. Superior Court</i> (1984) 36 Cal.ed 307, 319-320.....	15
<i>Starr v. Lockhart</i> (8 <sup>th</sup> Cir. 1994) 23F.3d 1280, 1289-1290.....	15
<i>Holmes v. South Carolina</i> (2006) 547 U.S. 319, 324.....	16
<i>Crane v. Kentucky</i> (1986) 476 U.S. 683, 690.....	16
<i>In re. Winship</i> . 397 US 358, 364, 90 S. Ct. 1068 (2000).....	18
<i>Piaskowski v. Bett</i> (7 <sup>th</sup> Cir. 2001) 256 F.3d 687.....	20
<i>Moore v. Parke</i> (7 <sup>th</sup> Cir. 1998) 148 F.3d 705.....	20
<i>Mikes v. Borg</i> (9 <sup>th</sup> Cir. 1991) 947 F.2d 353.....	20
<i>Summit v. Blackburn</i> (5 <sup>th</sup> Cir. 1986) 795 F.2d 1237, 1244.....	20
<i>Jackson v. Virginia</i> (1979) 443 U.S. 307.....	20
<i>Arizona v. Youngblood</i> (1988) 488 U.S. 51, 58.....	27

<i>Miller v. Vasquez</i> (9 <sup>th</sup> Cir. 1989) 868 F.2d 1116.....	27
<i>Commonwealth of the Northern Mariana Islands v. Bowie</i> (9 <sup>th</sup> Cir. 2001) 236 F.3d 1083.....	27
Citing <i>Baxtrom v. Herold</i> , 383 U.S. 107, 111, 86,S. Ct. 760, 15 L.Ed. 2d 620 (1996).....	33
<i>Burks v. U.S.</i> , 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed 2d1 (1978).....	37
<i>Lockhard v. Nelson</i> , 488, 1988 U.S. 33, 109 S.Ct. 285 1102 L.Ed. 2d 265 (1998)..	37-38
<i>United States v. Nobari</i> (9 <sup>th</sup> Cir. 2009) 574 F.3d 1065.....	42
<i>Parle v. Runnels</i> (9 <sup>th</sup> Cir. 2007) 505 F.3d 922.....	49
<i>Mak v. Blodgett</i> (1992) 970 F.2d 614, 622.....	49
<i>People v. Hill</i> (1998) 17 Cal. 4 <sup>th</sup> 8000, 844-845.....	49

### **Statutes**

RCW 9A.36.120(1)(b)(i),(b)(i)(A)or(b)(i)(B) .....	1, 7
RCW 9.94A.535(3)(a), (b), and (n).....	7
RCW 9.94A.510.....	8
RCW 9A.52.040.....	22
RCW 9.94A.010 (1),(3).....	32
RCW 9A.36.120(1)(b)(i).....	36
RCW 10.73.150(4).....	50

### **Rules**

RAP 16.4.....	1
16.4(c)(2).....	1
16.4(c)(5).....	1
16.4(c)(6).....	1
16.4(c)(7).....	1
ER 403.....	39

### **Constitutional Provisions**

Fifth Amendment.....	15-16, 25-28
Sixth Amendment .....	8-16, 25-28
Fourteenth Amendment.....	15-16, 20, 25-28

## **I. STATUS OF PETITIONER**

Petitioner Jenifer Mothershead is applying for relief from her sentence. She is currently incarcerated at the Washington Corrections Center for Women. The court in which she was tried and sentenced is Pierce County court. In a trial by jury, Ms. Mothershead was convicted of assault of a child in the first degree of her 13 month old daughter K.M. under RCW 9A.36.120(1)(b)(i),(b)(i)(A)or(b)(i)(B). She was also found guilty of the aggravators that she used her position of trust to facilitate the crime, knew the child was particularly vulnerable, her conduct manifested deliberate cruelty, and the assault resulted in substantial bodily harm. The court imposed an exceptional sentence of 480 months and prohibited her from having contact with minor children. Ms. Mothershead then filed a direct appeal and Division I affirmed her convictions. She filed a petition for review with the WA State Supreme Court and it was denied. She now timely files this Personal Restraint Petition (PRP).

## **II. PERSONAL RESTRAINT PETITION – RELIEF VIA COLLATERAL ATTACK**

The Petitioner in this matter now timely comes before this court to challenge her convictions and sentencing in this case, pursuant to RAP 16.4. As specified in RAP 16.4, the appellate court will grant appropriate relief to a petitioner if the petitioner is under a “restraint” if the petitioner is confined. The restraint of the petitioner is unlawful via RAP rule

16.4(c)(2):

“The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution of the State of Washington.”

16.4(c)(5):

“Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government.”

16.4(c)(6):

“The conviction or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.”

16.4(c)(7):

“Other grounds exist to challenge the legality of the restraint of the petitioner.”

For the reasons listed above and for the grounds listed below, the petitioner respectfully submits her Personal Restraint Petition.

### **III. STATEMENT OF THE CASE/PROCEDURAL BACKGROUND**

From the time her daughter was born, Jennifer Mothershead took K.M. to regular medical checkups with a family medicine doctor in Enumclaw.<sup>1</sup>

K.M. was a healthy child.<sup>2</sup>

On March 23, 2011, K.M. sustained an eye irritation playing in a barn while being watched by Matthew Bowie.<sup>3</sup> Ms. Mothershead rode horses

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<sup>1</sup> 9/26/13 RP 108, 111-12, 119; 10/1/13 RP 39, 42-43

<sup>2</sup> 9/26/13 RP 111-12; 10/1/13 RP 42-43; see CP\_\_ (Letters in support of defendant, pp.2, 3, 6, 10-11 (Nov. 15, 2013)(noting Ms. Mothershead’s love for children as well as horses). A supplemental designation of clerk’s papers has been filed for the documents identified by “CP\_\_” and the document name.

and coached an equestrian drill team.<sup>4</sup> It was not uncommon for K.M. to go to the barn with her mother.<sup>5</sup> At the time, Ms. Mothershead was separated from K.M.'s father, Cody Mothershead.<sup>6</sup> Ms. Mothershead had moved out of their home and stayed with her father or the couple's friends, Matthew Bowie and Courtney Valvoda (whose last name has now changed to Bowie.)<sup>7</sup> Ms. Mothershead was K.M.'s primary caretaker.<sup>8</sup> K.M. was about 13 months old.<sup>9</sup> Ms. Mothershead took K.M. to her family medicine physician that day to have her eye irritation checked.<sup>10</sup> Over the next seven to eight weeks, Ms. Mothershead took K.M. back to her family medicine doctor and to numerous specialists for initial appointments and follow up, including the Chief of Optometry at Seattle Children's Hospital.<sup>11</sup> Despite numerous appointments, tests and procedures, no one was able to pinpoint a cause for K.M.'s eye troubles.<sup>12</sup> Over the course of time, Ms. Mothershead

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<sup>3</sup> 9/23/13 RP 167-68; 9/24/13 RP 50-51; 9/24/13 RP 105-06; 119-20; 9/30/13 RP 13, 53; 10/1/13 RP 57-60.

<sup>4</sup> 9/24/13 RP 102-03; 9/30/13 RP 55-56; 10/1/13 RP 44-52

<sup>5</sup> 9/12/13 RP 120; 10/1/13 RP 136-37; see 9/24/13 RP 145-48

<sup>6</sup> 9/30/13 RP 6-8; 10/1/13 RP 46-47. To avoid confusion, because Jennifer Mothershead and her ex-husband share a last name, Mr. Mothershead will be referred to as Cody or Cody Mothershead. No disrespect is intended.

<sup>7</sup> 9/23/13 118-20, 122-23; 142-43; 9/24/13 RP 99-101; 10/1/13 RP 52-54

<sup>8</sup> *E.g.*, 9/23/13 RP 122-23; 9/30/13 RP 10-11, 16-18

<sup>9</sup> 9/24/13 RP 103; 9/26/13 RP 118

<sup>10</sup> 9/26/13 RP 109-13; 10/1/13 RP 60-62

<sup>11</sup> 9/12/13 RP 4, 15-50, 90-91, 103-07; 9/18/13 RP 30, 38-44; 9/23/13 RP 86, 91-92, 97-98; 102; 9/24/13 RP 27, 31, 60, 141-42; 9/26/13 RP 113-17, 120-24, 126-27; 10/1/13 RP 61-72, 74-96

<sup>12</sup> *Id*

received prescriptions for several medications to treat K.M.'s irritation, including Tobramycin eye drops.<sup>13</sup> Tobramycin, which is compounded specially by the Seattle Children's pharmacy, was prescribed twice, the first bottle was dated April 26, 2011, and the second was dated May 2, 2011.<sup>14</sup> It was not easy to administer eye drops to K.M.; a combination of Ms. Mothershead, Mr. Bowie and Courtney Valvoda would use one person to hold K.M. in place and another to place the drops into her eyes.<sup>15</sup> Over time, K.M.'s eye condition worsened, and spread to both eyes.<sup>16</sup>

Mr. Bowie was watching K.M. and his own son one evening in May when he noticed a "squishy" spot on K.M.'s head.<sup>17</sup> He showed his girlfriend Ms. Valvoda, who said they needed to tell Ms. Mothershead about the spot.<sup>18</sup> Ms. Mothershead agreed that K.M. needed to be seen by a doctor.<sup>19</sup> She could think of a couple falls K.M. had recently had, but none seemed to explain the spot, which was later diagnosed as a subdural hematoma.<sup>20</sup> K.M.'s most recent caretakers, Mr. Bowie and Ms. Valvoda, claimed to

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<sup>13</sup> 9/12/13 RP 21-50; 92-93, 97-101, 103-05, 109, 111; 9/18/13 RP 44-45; 9/24/13 RP 39-41; 10/1/13 RP 168-69

<sup>14</sup> 9/12/13 RP 95; 9/17/13 RP 75-76; 9/24/13 RP 41; 9/26/13 RP 12, 16-17, 22-23, 47

<sup>15</sup> 9/18/13 RP 71-72; 141; 9/23/13 RP 22-24, 133-34, 173-77; 9/23/13 RP 138 (Bowie and Cody administered the drops together once when Bowie decided to show Cody how); 9/24/13 RP 67-69, 117; 10/1/13 RP 96-98, 160-61

<sup>16</sup> *E.g.* 9/23/13 RP 97, 102-03, 132-33; 9/24/13 RP 109-10

<sup>17</sup> 9/23/13 RP 33, 139, 158-60, 163

<sup>18</sup> 9/23/13 RP 140; 9/24/13 RP 125, 152-55

<sup>19</sup> 9/24/13 RP 126; 10/1/13 RP 101-16

<sup>20</sup> 9/18/13 RP 69-71; 9/19/13 RP 17, 113

not have an explanation for the spot.<sup>21</sup> Ms. Mothershead contacted K.M.'s doctors the next morning, May 12, 2011.<sup>22</sup> She was referred from Enumclaw Medical Center to St. Elizabeth's Hospital who in turn had K.M. airlifted to Harborview Medical Center in Seattle, Washington ("Harborview") based on the results of a head scan showing a slight bleed on the brain.<sup>23</sup> Ms. Mothershead picked up her cooler with K.M.'s medications inside and her friend Ms. Valvoda, and drove immediately to Harborview.<sup>24</sup>

Law enforcement arrived and spoke with Ms. Mothershead, Ms. Valvoda and Cody Mothershead, who had arrived separately, for about 40 minutes.<sup>25</sup> After law enforcement also spoke with Child Protective Services and medical providers, the police informed Ms. Mothershead that K.M. would be taken into protective custody and Ms. Mothershead and the others had to leave the hospital.<sup>26</sup> Complying with law enforcement orders, Ms. Mothershead, Cody and Ms. Valvoda left the hospital.<sup>27</sup>

Concerned with K.M.'s eye condition, a Harborview resident and attending physician in charge of K.M.'s care decided to test the pH levels

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<sup>21</sup> 9/23/13 RP 140

<sup>22</sup> 10/1/13 RP 115-19

<sup>23</sup> 10/1/13 RP 115-19

<sup>24</sup> 9/24/13 RP 126-27, 161-62; 10/1/13 RP 119-20, 123

<sup>25</sup> 9/18/13 RP 63-68; 79-80; 9/23/13 RP 17-18, 24, 59-60; 9/30/13 RP 22-23

<sup>26</sup> 8/21/13 RP 41-42; 59; 9/18/13 RP 60-63, 73-74, 81-83; 9/23/13 RP 17-18, 26-27

<sup>27</sup> 8/21/13 RP 41-43; 9/23/13 RP 29; 10/1/13 RP 125

of the medications inside Ms. Mothershead's cooler.<sup>28</sup> Without obtaining a warrant and without obtaining consent from Ms. Mothershead, Dr. Justin Heistand unzipped the cooler, which was still in K.M.'s room, removed the medication and tested them.<sup>29</sup> While the pH levels were normal, he noticed the Tobramycin had a noxious odor.<sup>30</sup> Following Harborview's evidence policies, Dr. Heistand packaged up the medication and it was turned over to the Pierce County Sheriff's Department.<sup>31</sup>

Pierce County opened the medications themselves and then had them tested by the Washington State Patrol Crime Lab and the Federal Drug Administration Lab.<sup>32</sup> Neither lab determined the actual makeup of the medications.<sup>33</sup> Over Ms. Mothershead's objection, the evidence was admitted at trial despite the warrantless search of the cooler.<sup>34</sup>

The state charged Ms. Mothershead<sup>35</sup> with assault of a child in the first degree "on or about the period between the 23<sup>rd</sup> of March, 2011 and the

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<sup>28</sup> 8/21/13 RP 9-10, 15-16, 41; *see* 8/21/13 RP 45-46 (doctor informed Sergeant Berg that she was going to have medication tested); 9/18/13 RP 88-89 (same)

<sup>29</sup> 8/21/13 RP 16-19, 75-77

<sup>30</sup> 8/21/13 RP 19-20, 27

<sup>31</sup> 8/21/13 RP 22-23, 25, 38-39. Citations to the record here and in the argument challenging the trial court's suppression ruling below are to those portions of the record that were before the trial court during the Criminal Rule 3.6 hearing.

<sup>32</sup> 8/21/13 RP 47-48, 51-55, 62, 65, 68-69, 78-79; 9/17/13 RP 7, 13-14, 38-40; 9/18/13 RP 10-12, 95-99, 104-107, 130-32; 9/23/13 RP 34-38; *see* 9/18/13 RP 28 (FDA testimony on why it is bad practice to open medication bottle of evidentiary value)

<sup>33</sup> 9/17/13 RP 61-62, 86-87, 116, 136; 9/18/13 RP 109-10; 9/19/13 RP 91, 94-95

<sup>34</sup> CP 42-57, 88-93, 234-39

<sup>35</sup> The state did not determine the cause of the subdural hematoma, but provided immunity to Matt Bowie and Courtney Valvoda. 9/24/13 RP 72-73; 10/3/13 RP 80. The

12<sup>th</sup> day of May, 2011” alleging an assault with reckless infliction of great bodily harm, or “causing substantial bodily harm and the person has previously engaged in a pattern or practice of assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks” or “causing substantial bodily harm and the person has previously engaged in a pattern or practice of causing the child physical pain or agony that is equivalent to that produced by torture.” CP 1-3 (charging under RCW 9A.36.120(1)(b)(i), (b)(i)(A) or (b)(i)(B) in the alternative); CP 9-11 (same).<sup>36</sup> The state also alleged three aggravators: “defendant’s conduct during the commission of the current offense manifested deliberate cruelty to the victim”; “defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance”; and “defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.” CP 1-3 (citing RCW 9.94A.535(3)(a), (b), and (n)); CP 9-11 (same). After Ms. Mothershead was denied a lesser offense instruction for third degree assault, the jury convicted under all three alternatives and found each of the charged aggravators.<sup>37</sup> Because she has no criminal record, Ms. Mothershead’s standard range sentence

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assault charge here was based exclusively on the eye condition. *E.g.*, CP 173; 10/3/13 RP 80

<sup>36</sup> CP

<sup>37</sup> CP 123, 126-31, 194-99; 10/2/13 RP 20-23, 31, 33, 37-39, 43-53

was 93 to 123 months. CP 203; RCW 9.94A.510. The court imposed an exceptional sentence of 480 months – four times the high-end of the standard range and two times the low end of the standard range with an offender score of nine or more points. CP 206, 231-33; RCW 9.94A.510. The sentencing conditions included an order barring contact with all minors for life. CP 205, 207, 209, 211.

#### **IV. GROUNDS FOR RELIEF**

##### **FIRST GROUND**

##### **THE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING HER TRIAL**

The Sixth Amendment to the United States Constitution and article 1, second 22 of the Washington Constitution grants criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S., 668, 689-91, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Under *Strickland*, courts apply a two-prong test: whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). Deficient performance occurs when counsel's performance falls

below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert denied*, 523 U.S. 1008 (1998). To show prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 227.

In this case, the petitioner's trial defense attorney's performance, fell below the standard of reasonableness and that actual prejudice resulted from these failures.

A.) Defense Counsel Failed to Pursue the Preliminary Exculpatory Opinion Offered by Defense Expert Richard Pleus at Intertox, Inc.

Defense counsel had exculpatory testimony from Richard C. Pleus, PhD, from Intertox (EXHIBIT A – Communication from Dr. Pleus Dated May 13, 2013 and June 27, 2013). In this communication, Dr. Pleus states that he reviewed data associated with the case: forensic laboratory data, medical records, diagnoses, and objective observations, including signs, symptoms, and medical tests performed by or under the direction of a physician. Dr. Pleus also conducted independent research and compared and contrasted those data with data in the toxicological literature. Dr. Pleus stated the data he reviewed in reaching his initial opinion was “the forensic laboratory reports from the Washington State Crime Lab and the

FDA Forensic Chemistry Center,” “the medical records regarding [KM]’s condition and proscribed medication,” and “court documents and witness statements. He also reviewed the medical records regarding K.M.’s condition and prescribed medication. All court documents and witness statements were reviewed by Dr. Pleus as well. Dr. Pleus communicated to defense counsel:

**“the data provided to me does not scientifically support the Plaintiff’s case that the medication was administered to [KM] caused the adverse effects that are reported in the medical records.”**

In another communication from Dr. Pleus to defense counsel, (EXHIBIT B – Dated June 27, 2013), he echoes his findings stated above. Defense counsel never introduced the research and statements by Dr. Pleus to the court, never pursued additional contact with Dr. Pleus, never gave copies of any communication with Dr. Pleus to Ms. Mothershead, and in effect, completely ignored and/or failed to utilize critical evidence in this case.

In applying the *Strickland* test:

(1) Counsel’s performance did fail to meet a standard of reasonableness. Counsel had an expert who conducted a myriad of tests to evaluate the medication, medical history, lab results, and records pertaining to K.M., and the findings made by the crime lab and the FDA and did not use it. She offered no excuse to Ms. Mothershead (Ms. Mothershead was

unaware of the results and findings). Counsel's failure to introduce this expert to refute other theories in this case would have been monumental. There is no reasonable explanation why counsel would exclude an expert witness that found results in favor of the defendant. This cannot stand as a strategic decision. Counsel failed to adequately investigate, prepare and present critical findings in this trial. To do so is a standard of the profession, and counsel fell below a standard and reasonable level.

(2) Actual prejudice did result from counsel's failures. To show that deficient performance was prejudicial, the defendant must show that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *McFarland*. No expert evidence of this nature was introduced by the defense in this trial. To leave these findings unanswered by an expert rebuttal, especially when an expert rebuttal was available, conducted, and revealed findings in favor of the defendant, demonstrates substantial prejudice. The jury was never aware of the expert findings that contradicted the Plaintiff's findings and theories in this case. There is a direct prejudicial correlation between counsel's failure to present expert evaluation and exculpatory findings and the unchallenged findings presented at trial. Counsel failed to adequately investigate and prepare for trial, which is unreasonable and rendered

counsel ineffective.<sup>38</sup> But for counsel's deficient performance regarding the omission of expert testimony and lack of bringing forth any experts (when they were available and had valuable exculpatory information), the result of the trial would have been different.

The petitioner was unaware that her counsel was in possession of this exculpatory expert opinion and that, to her knowledge, she did not pursue it, nor did she present any such evidence at trial in her defense.

B.) Counsel Failed to Prepare the Petitioner to Testify

Counsel did not prepare the petitioner prior to trial regarding testimony. They had one meeting which was short and asked the petitioner only a few questions. At the time, the petitioner wasn't sure the purpose of the meeting was to prepare for trial because of the brief and informal nature of the meeting. Counsel asked the petitioner to write the questions counsel would ask the petitioner on the stand. The petitioner effectively wrote her own direct examination by providing her attorney with a list of questions that defense counsel asked her at trial. This falls below a standard of reasonableness. Counsel clearly failed to prepare for trial by her lack of preparation of the defendant and fell even lower on the scale of reasonableness when she asked the defendant, unschooled in the law, to

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<sup>38</sup> *State v. Smith*, 2017 Wash.App. LEXIS 1782 No. 76742-9-I. It should be noted that if any opinions cited here are unpublished, the decision has no precedential value, is not binding on any court and is cited for persuasive value as the court deems appropriate GR 14.1

orchestrate her own questioning for trial. This satisfies the first prong of the *Strickland* standard and it is arguable that this therefore satisfies the second prong because the defendant's assignment to draft her own questioning is inherently prejudicial because of her inexperience in law and her unfamiliarity with the complexities of the case.

Defense counsel failed to have a meeting with the petitioner in which she explained the process of testifying and discuss some of the questions the petitioner would be asked or that the petitioner might be asked on cross examination. Defense counsel failed to practice questions and answers with the petitioner.

C.) Counsel Failed to Assert and Argue Petitioner's Innocence

Defense counsel failed to ask the petitioner "the ultimate question" of whether she did or did not add bleach to or alter the eye drops.

Counsel did not make any statements throughout the trial that the defendant was innocent of the allegations made against her. This deficiency resulted to prejudice to the petitioner that the prosecutor, in her closing argument, commented to the jury, "The defendant never said that she didn't intentionally do something to the drops." (EXHIBIT C).

The petitioner wants to state, for the record, that had she been asked the question of whether she did or did not add bleach to or alter the eye drops, the answer would have been "no" and that the petitioner would have fully

denied adding bleach, adding any foreign substance, or in any way altering or tampering with the eye drops.

Throughout the entire trial, defense counsel never stated the petitioner was innocent. When representing a defendant that pleads not guilty and pleads her innocence, it is unjustifiable not to make this assertion in the trial.

Again, using the *Strickland* standard, the first prong is met because this omission is clearly not reasonable or strategic in nature. Regarding the second prong, this failure created clear prejudice. How would a jury interpret and regard a defendant who has counsel that does not assert her innocence? This is unprofessional, unreasonable, and highly prejudicial.

D.) Defense counsel failed to retain a medical doctor

Defense counsel failed in providing the petitioner with an adequate defense by not hiring a medical doctor to review the medical records and testimony before the trial. Counsel's failure to retain a medical doctor also harmed the petitioner because no expert was available to help prepare defense counsel to cross examine the doctors offered by the State. Defense counsel also failed to retain a medical doctor to testify as a defense witness. The failure in all of these aspects caused substantial prejudice to the petitioner's ability to present a defense.

E.) Defense Counsel's Failure to Object Resulted in Prejudice

Lastly, defense counsel was ineffective for failing to object to the obviously contradictory and perjured testimony by Dr. Weiss nor did defense counsel have Dr. Weiss' testimony dismissed by the court. The failure of counsel to do so has rendered the damage in this case to severe levels. This case should be reversed and remanded on the grounds of ineffective assistance of counsel for failing to object to Dr. Weiss' testimony and for not moving for dismissal of Dr. Weiss based on conjecture, perjury, speculation, and unreliable content.

These errors, either individually or cumulatively, warrant reversal. The petitioner was denied, by her own attorney, the opportunity to present a reasonable defense. This lack of opportunity to present a reasonable defense violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Sixth Amendment right to counsel, and the Fifth, Sixth, and Fourteenth Amendment rights to present a defense. *Britt v. North Carolina*, (1971) 404 U.S. 226, 227; *Ake v. Oklahoma* (1985) 470 U.S. 68; *Corenevsky v. Superior Court* (1984) 36 Cal.ed 307, 319-320. More specifically, in *Starr v. Lockhart* (8<sup>th</sup> Cir. 1994) 23F.3d 1280, 1289-1290, the court ruled that "[D]ue process requires access to an expert who will conduct not just any, but an appropriate examination," and the right to experts who will "assist in evaluating the preparation and presentation of

the defense.” “[T]he Constitution guarantees criminal defendants a ‘meaningful opportunity to present a complete defense.’” *Holmes v. South Carolina* (2006) 547 U.S. 319, 324, quoting *Crane v. Kentucky* (1986) 476 U.S. 683, 690. This clearly did not happen in this case and it was counsel’s failure that caused these constitutional violations.

### **SECOND GROUND:**

THE CIRCUMSTANTIAL EVIDENCE IN THIS CASE WAS INSUFFICIENT AND REQUIRES REVERSAL.

A.) There are serious issues in this case regarding the reliability of evidence in this case. In looking at these:

#### Direct Evidence

- K.M. had an eye injury (corneal abrasion and an infection that spread to both eyes.
- The petitioner, in concern for her child, acted reasonably and took K.M. to Enumclaw Medical Center, Mary Bridge Children’s Hospital, Seattle Children’s Hospital, and Saint Elizabeth’s Hospital, where the doctors prescribed several antibiotics and steroid drops. They also diagnosed her with a corneal abrasion and periorbital cellulitis.
- The petitioner only gave the prescribed medications to K.M., just as the doctors had prescribed them.

#### Circumstantial Evidence

- The state speculated that the mother tampered with the medications by putting a toxic substance into them and then administering them into K.M.’s eyes.

There is no clear and convincing evidence that the mother purposely put tampered drops into K.M.'s eyes. No one saw the mother tampering with them. In fact, there was *no proof* that anyone had tampered with them.

Others also had access to the medication.

- This entire case is based off a nebulous motivation of exclusionary theories, arriving at guilt because the petitioner was the mother.
- Doctors did not know what was wrong with K.M. and could never identify the cause of K.M.'s eye condition/s.
- Many people were directly involved with the care of K.M. that were not investigated.
- The FDA nor the WA State Crime Lab was not sure of the nature of the issue of the medication. They assumed the drops had been tampered with by a substance, and hypothesized bleach, because the test results were similar, but results were not conclusive to bleach. The ambiguous nature of the results combined with the statements of the experts creates reasonable doubt about the drops.

For example, tester Boysen, of the Washington State Crime Lab, specifically noted:

*“It could be ratio or perhaps bleach is not the substance used. I don't know. None of my testing made it clear to me what was reacting with the case sample to give me those results.” (9/19/13 p.91) (emphasis added)*

In another example, tester Lanzarotta, of the FDA, stated:

*the “difference (in the drops) could be storage conditions or other conditions” (9/17/13 p.176) (emphasis added)*

Not a single tester could positively identify the substance found in the drops. Most significantly, tester Lanzarotta testified that the differences in the testing of the drops could be the storage conditions. It is a fact that the

drops were taken out of refrigeration once the hospital took them under their control and into the pockets of many nurses. These are not the conditions recommended by the manufacturer for the care and storage of the drops. The petitioner offers EXHIBIT D with a table that further clarifies the statements of the testers to show that not one evaluation proved conclusive.

B.) While circumstantial evidence can be no less reliable than direct evidence, evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *In re. Winship*, 397 US 358, 364, 90 S. Ct. 1068 (2000); *State v. Green* Wn. 2d. 216 (1980); *State v. Baeza*, 100 Wn. 2d 487, 491 (1983). In this case, the circumstantial evidence did not establish the requisite facts beyond a reasonable doubt. The direct evidence is listed above.

The circumstantial speculation in this case suggested that the mother “must have” tampered with the medications by putting an unknown toxic substance into them and then administering them into K.M.’s eyes. There is no clear and convincing evidence that the mother tampered with the drops or purposely put tampered drops into K.M.’s eyes. No one saw the mother tampering with the drops. In fact, there was no proof that anyone had tampered with them. The theory of tampering with the drops evolved from speculation and no direct evidence and the state had to speculate

even further by asserting the mother was the one who tampered with the drops. This logic is a fallacy because it is speculation built on speculation and cannot stand. In addition, many others had access to the drops. There is no evidence to support this conviction and the entire case is circumstantial. No one else in the care of K.M. was ever investigated, in fact, they were granted immunity. The doctors could not identify the problem and made a diagnosis of exclusion, which was not specific and identified no origin or cause. The rulings in *Winship, Green, and Baeza* therefore apply as no evidence was ever presented that proved, beyond a reasonable doubt, that Ms. Mothershead was guilty of any mistreatment. It also gives one pause to consider that if Ms. Mothershead was intentionally harming her child, why would she go to such great lengths to seek care for her child, taking her to numerous providers, and if she had tampered with the drops, why would she bring them to the hospital? These questions create reasonable doubt and it must again be stated that there are too many ends left untied in this case (the chain of custody, immunity for other caregivers, etc.) to make any assertions about Ms. Mothershead's guilt. None of the circumstantial evidence used in this case ever positively identifies the petitioner as the culprit nor does it designate a culprit even exists. Her convictions should be overturned.

C.) In addition, when there is insufficient evidence to convict on one of the alternative means and no way to determine upon which means the jury relied, the conviction cannot stand. *State v. Ortega-Martinez* 124 Wn. 2d at 702; 881 P.2d 231 (1994); *State v. Kitchen*, 110 Wn. 2d 403, 410, 756 P.2d 105 (1998). In *State v. LaRoche*, 1999 Wash.App. LEXIS 1113<sup>39</sup>, the court reasoned that there was evidence that others were around the child at the time of the alleged assault and because the evidence against LaRoche was circumstantial, the evidence was insufficient to rule out the others that had access to the child for their guilt and participation and there was no direct evidence to link the defendant to the child's injuries. It is the Exact Same in this case. The evidence in this case is insufficient to rule out the others that had access to the child for their guilt and participation and there is no direct evidence to link the petitioner as the cause of the child's injuries. For these reasons, the conviction must be overturned. Insufficient evidence to support the jury's verdicts and findings violates the due process clause of the Fourteenth Amendment and is grounds for reversal. *Piaskowski v. Bett* (7<sup>th</sup> Cir. 2001) 256 F.3d 687; *Moore v. Parke* (7<sup>th</sup> Cir. 1998) 148 F.3d 705; *Mikes v. Borg* (9<sup>th</sup> Cir. 1991) 947 F.2d 353; *Summit v. Blackburn* (5<sup>th</sup> Cir. 1986) 795 F.2d 1237, 1244; *Jackson v. Virginia* (1979) 443 U.S. 307.

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<sup>39</sup> It should be noted that if any opinions cited here are unpublished, the decision has no precedential value, is not binding on any court and is cited for persuasive value as the court deems appropriate GR 14.1

**THIRD GROUND:**

**THE STATE COMMITTED REVERSIBLE ERROR BY NOT PROVING AN ESSENTIAL ELEMENT: INTENT.**

The state failed to prove any intent on the part of Ms. Mothershead to harm her child. In *State v. Cantu*, 156 Wn.2d 819; 132 P.3d 725 (2006), the conviction was overturned because the state failed to prove intent. This element, like in *Cantu*, is missing from this case and is grounds to overturn the conviction. Basic principles of due process require the state to prove every essential element of a crime beyond a reasonable doubt *Cantu, State v. Deal*, 128 Wn.2d 693, 699-700, 911 P.2d 996 (1996).

Thus, the court in *Cantu* ruled the state bore the burden of proving every element of burglary, including criminal intent. In *Cantu*, *Cantu* contended that the trial judge employed an impermissible mandatory presumption, shifting the burden of persuasion is deemed to be shifted if the trier of fact is required to draw a certain inference upon the failure of the defendant to prove by some quantum of evidence that the inference should not be drawn – also cited in *Deal*. *Cantu* maintained that the Court of Appeals impermissibly applied a mandatory presumption in this case when it held; “the defense offered no evidence to rebut the statutory inference of [criminal] intent.”

Here, the parallels to this case are striking. The state never proved any criminal intent on the part of Ms. Mothershead and attempted to draw

inferences upon the failure of the defendant to prove that the inference should not be drawn. In fact, no single expert, investigator, or other state representative was able to confirm any concrete intent for this crime. They offered hypotheses, but there was no evidence of anything clear and cogent, to prove any of their hypotheses. The state may use evidentiary devices, such as presumptions and inferences, *Cantu*, to assist it in meeting its burden of proof, though they are not favored in criminal court... The permissible inference of criminal intent is found in RCW 9A.52.040. Criminal intent per RCW 9A.52.040 was not found in *Cantu* and it cannot be found in this case.

The burden of proving intent and knowledge rests on the state. *State v. O'Dell*, 46 Wn. 2d 206, 279 P.2d 1087 (1995). Intent was never proven in this case. Because intent was never proven, and the burden of proving a lack of intent shifted to the defense, the conviction must be reversed. A conviction that relies on a hypothesis that is not proven and where no clear, convincing or cogent evidence was ever produced regarding intent and every other aspect of the crime, must be overturned.

**FOURTH GROUND:**

THE STATE DID NOT PROPERLY INVESTIGATE ALL OF THE INDIVIDUALS THAT HAD CONTACT WITH K.M. THE STATE'S REFUSAL TO INVESTIGATE IS GROUNDS FOR REVERSAL.

A.) Others had motive and opportunity to alter the medications and were never thoroughly investigated by the state or by the hospital (who were clearly acting as investigative agents for the state).

The drops were almost always with K.M. when Ms. Mothershead left K.M. in the care of Matthew Bowie (who was a frequent caregiver for K.M.), the drops were left in the Bowie's refrigerator. Matt watched K.M. throughout the weeks after the drops were prescribed and when Bowie cared for K.M., others had access to the medications in the Bowies refrigerator. The last time Ms. Mothershead administered the medications was Wednesday, May 11, 2011 at approximately 5pm. Courtney Valvoda administered drops to K.M. around 9pm the same night. Ms. Mothershead left the drops in the Bowie's refrigerator while she was running errands during the next day, May 12, 2011. Ms. Mothershead then picked up the drops on her way to Harborview around 1pm on May 12, 2011. She left the drops in Valvoda's car while she went into the hospital to see K.M. Later that night Valvoda and Cody Mothershead went to the car to retrieve the medications at the nurses request. Ms. Mothershead was told she could stay the night with K.M. in the hospital (Harborview), but she had to leave the room temporarily while K.M. went for a C-Scan. Ms. Mothershead was never allow back into that room. None of these individuals were every

thoroughly investigated by the state, despite their repeated access to K.M. and the drops.

B.) *State v. Calegar*, 133 Wn.2d 718; 947 P.2d 235 (1997), bears a striking resemblance to this case. In *Calegar*, the state's case depended entirely upon the theory that Calegar was guilty because he was the only one who had motive or opportunity to alter the prescriptions. But there was a gap in the chain of custody. No one knew what happened to the prescriptions after the doctor wrote it and before the discharge nurse handed it to Mr. Calegar. It is not clear how long the prescription hung on the clip-board outside of Calegar's examining room, and the state did not call the discharge nurse to testify. Second, the state's expert could not conclude whether the mark was a "1" or whether it was made before or after the prescription was written. Given the inferences the state asked the jury to make, it is "reasonably probable" the fact that Calegar was a convicted felon tipped the balance against time and therefore determined the outcome of the trial. Because of this, Calegar's conviction was overturned on appeal.

The same is true for this case. This case has depended upon the theory that Ms. Mothershead was guilty because she was the only one who had motive or opportunity to contaminate the drops. There are long periods of time where the medications were not in her possession: At the Bowie's

home, in Valvoda's car, in Valvoda's and Cody Mothershead's possession, and they were left unattended at the hospital where many doctors, nurses, detectives, CPS, and countless individuals could have had access to and done something to the drops. This is a major gap in the chain of custody and Ms. Mothershead is not the only person who had motive or opportunity. Using the same premise as *Calegar*, Ms. Mothershead's conviction should be overturned.

C.) The trial court erred when it did not allow Ms. Mothershead to introduce alternate theories regarding the case. Both the State and Federal Constitutions guarantee the accused the right to present evidence in defense of the crimes charged. U.S. Const. amendments 5, 6, 14, WA Const. art 1 sec 22. A trial court is required to permit the defense to present evidence where the evidence is material. *State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996). But, the right to present a defense is not unfettered. *State v. Rehak*, 67 Wash. App. 157, 162, 834 P.2d 651 (1992). While it is proper for a defendant to present evidence that someone else committed the charged crime, a proper foundation must be laid. *State v. Mak*, 105 Wn.2d 692, 716, 718 P.2d 407, *cert denied*, 479 U.S. 995, 93 L.Ed. 2d 500, 107 S.Ct. 599 (1986). Establishing a proper foundation requires proof of connection with the crime, such as train of facts or circumstances that clearly points out that someone other than the accused

is the guilty party. *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932); *State v. Rehak*, 67 Wash.App. at 162-63 (1992). (Finding that the court did not err in excluding evidence of other suspects when there was no evidence other than motive that the suspect could have committed the crime). But, **“if the prosecution’s case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime.”** (emphasis added). *State v. Clark*, 78 Wash.App. 471, 478-79, 898 P.2d 854 (1995). In this case, this right was denied and but for this denial, this case may have turned out differently. It is therefore grounds for reversal. There were others that were around K.M. during the timeframe outline in this case. When the detectives and CPS took K.M. away from Ms. Mothershead, they took her away from Bowie and Valvoda as well. During trial, Ms. Mothershead attempted to introduce evidence that Bowie or Valvoda could have been responsible for K.M.’s injuries, but the court would not allow it. The court stated trial was trial, not the time for discovery. If the defense would have been able to discuss what was in the man room (at the residence of Bowie and Valvoda), especially the syringe of unknown substance (found in the man room), the outcome would have been different. Valvoda’s testimony would have confirmed the presence of

a syringe of a mysterious substance in the man room, where K.M. slept while in the care of Bowie and Valvoda, as well as the testimony of Ms. Mothershead. The contents that were found in the room where K.M. slept in should be relative to the case and the trial. The omission of this information and the refusal of the state to investigate this is grounds for reversal.

This error further exacerbated by the failure of the state's to preserve the evidence in this case is a violation of *Arizona v. Youngblood* (1988) 488 U.S. 51, 58 and *Miller v. Vasquez* (9<sup>th</sup> Cir. 1989) 868 F.2d 1116. This point is further demonstrated in *Commonwealth of the Northern Mariana Islands v. Bowie* (9<sup>th</sup> Cir. 2001) 236 F.3d 1083. The 9<sup>th</sup> circuit determined that, by failing to investigate the authorship of a letter found in the possession of the codefendant after his arrest, suggesting the existence of a conspiracy to present false testimony to implicate defendant, and presenting the testimony of the accomplices at trial, the prosecution violated its federal due process obligation to collect potentially exculpatory evidence, to prevent fraud on the court and to elicit the truth, and interfered with defendant's Sixth Amendment right to present witnesses in his behalf. Here, the state failed to investigate all individuals within the chain of custody of the drops and cannot definitively determine

if there was any tampering nor can the state definitively determine, if tampering occurred, who was responsible for it.

**FIFTH GROUND:**

THE CHAIN OF CUSTODY, AS WELL AS THE ACTUAL POSSESSION AND DOMINION AND THE CONTROL OF THE MEDICATION AT THE HANDS OF VARIOUS NURSES LED TO A QUESTIONABLE CHAIN OF CUSTODY AND POSSESSION, THEREFORE CREATING REASONABLE DOUBT REGARDING THE VALIDITY OF THE DROPS AS EVIDENCE.

A.) Dr. Heistand tested the medications on May 13, 2011 at K.M.'s bedside instead of in the lab, as protocol dictates. He found the cooler near the sink with the medications in it and tested the pH levels of the medications. When he was completed with the testing, he followed protocol by placing the medications back into the cooler, he placed the cooler inside of a paper bag, then sealed it with staples, marked it, where he kept them in a refrigerator at the nurses' station (9/19/13 p. 26 & 36). At some point the medications were taken out of the paper bag and cooler and kept inside of the nurses pockets. The nurses handed them off to other nurses, and no one can account for which nurses or how many nurses were in possession, only that at least two nurses had possession. When the prosecutor asked Gena Claytor, a Harborview nurse, if she received the eye drop medication she said "yes, the off-going nurse handed me eye drops; took them out of her pocket, handed them to me, told me I needed

to hang onto them for the detective that was coming to retrieve them, so I stuck them in my pocket and that's where they remained until he came" (9/23/13 p. 113-115). No one can account for the drops with any clear and convincing evidence while they were in any of the nurses' pockets.

The nurses had domination and control of the medications (which she placed in her pocket, which is improper due to the fact that it had to be refrigerated) and therefore denied Ms. Mothershead's rights, beyond a reasonable doubt, to know the care and custody of the evidence. Anne Bournay, pharmacist, testified that the Tobramycin is good for 14 days total if refrigerated and only two days at room temperature.<sup>40</sup> There is no way to account for the drops while in the possession of various nurses as the proper care of the medication (refrigerated) was not being followed nor is there any way to account for what happened to the drops while in the possession of various nurses. Bournay's testimony proves proper storage procedures were not followed. A person actually possesses something that is in his or her physical custody but is still within his or her dominion and control. *State v. Callahan*, 77 Wn. 2d 27, 29, 459 P. 2d 400 (1969). Here it is clear that the nurses (an unidentified amount) actually possessed the drops. To establish possession, actual control must be proven. *State v. Staley*, 123 Wn. 2d 794, 801, 872 P. 2d 502 (1994).

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<sup>40</sup> 9/26/13 p. 52

Keeping the drops in pockets is a clear demonstration of actual control and possession. Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition when the crime was committed. Factors that the trial court may consider include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. Minor discrepancies affect only the evidences weight, not its admissibility. Thus, failure to establish an unbroken chain of custody does not make the item inadmissible if the state properly identifies[s] [it] as being the same object and in the same condition as it was when it was initially acquired. *State v. Davis*, 2016 Wash. App. LEXIS 1722<sup>41</sup>. In this case, however, cannot prove there was no tampering of the drops (whether intentional or unintentional due to the disregard of the refrigeration requirement), nor can it be proven beyond a reasonable doubt that the drops were in the same condition as when they were initially acquired. In fact, the only thing that can be proven is that the drops were not in the same condition when they were acquired because they had been removed from the cooler, sealed bag, and refrigerator and been placed into various pockets, over a long period of time, without refrigeration.

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<sup>41</sup> It should be noted that if any opinions cited here are unpublished, the decision has no precedential value, is not binding on any court and is cited for persuasive value as the court deems appropriate GR 14.1

B.) The question then becomes, how did the medication get out of the sealed paper bag that they were placed in? Who took them out and why? This leads to highly suspect activities by staff regarding the care of the drops and the evidence relied upon in this case related to the drops is therefore inadmissible. The state cannot prove the drops were not tampered with by any number of individuals in the hospital nor can it even verify how many individuals handled the drops. Any evidence relied upon in relation to the drops must therefore be deemed inadmissible and this in and of itself is grounds for reversal.

C.) Dr. Sugar was the doctor that asked that the drops be tested. She was acting as a state agent when she ordered testing of the medication. The fact that she passed away made it so no further inquiries could be made of her intent. It is difficult to assume that the hospital wasn't acting in partnership with the detectives about the drops given the order from Dr. Sugar. The doctors would never ask someone to bring in medication to give a patient. Protocol dictates that they would just have the pharmacy make new medication available. Dr. Weiss and Dr. Sugar discussed that something could have been instilled into the eyes as one hypothesis and Dr. Weiss assumed that Dr. Sugar was investigating the situation.<sup>42</sup> Therefore, she was acting as a state agent.

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<sup>42</sup> 9/12/13 p. 55

**SIXTH GROUND:**

THE SENTENCING IN THIS CASE IS GROSSLY DISPROPORTIONATE TO SIMILARLY SITUATED DEFENDANTS AND REQUIRES RESENTENCING.

A.) The sentencing in this case is a violation of the SRA in Washington.

“The Sentencing Reform Act of 1981 (SRA), Wash. Rev. Code Ch. 9.94A was meant to bring proportionality and uniformity to what had been a highly discretionary sentencing scheme. Its purpose was to ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history and that such punishment be commensurate with the punishment imposed on others committing similar offenses. Wash. Rev. Code 9.94A.010 (1),(3).” *State v. Hayes* 182 Wn. 2d 556; 342 P.3d 1144 (2015). The sentencing in this case does not commensurate with the punishment imposed on others committing similar offenses. EXHIBIT E.

B.) The petitioner offers the Handley (*State v. Handley* 115 Wn.2d 275, 289, 976, P.2d 1266 (1990)) and Davis/Yates standards (*State v. Davis* 175 Wn.2d 287, 290 P.3d 43 (2012), *State v. Yates* 161 Wn.2d 714; 168 P.3d 359 (2007)) in demonstrating how she was similarly situated to other cases involving parents and 1<sup>st</sup> degree assault charges. EXHIBIT E. This exhibits examines these standards and showing how disparate the sentencing is in this case when using these standards.

In *Olsen v. Delmore*, 48 Wn.2d 545, 295 P.2d 324 (1956), the court approved a rule that an act which prescribes different punishments for the same act committed under the same circumstances, denies the equal protection of the law. In this case, the act involves a mother and first degree of assault of her child and is outlined thoroughly in its comparability in Exhibit E. The Petitioner's punishment is distinctly different than the other similar cases.

An equal protection claim requires proof that the claimant is similarly situated to others treated more favorably under the law, *State v. Gamble* 168 Wn.2d 161; 225 P.3d 973 (2010) and that those similarly situated receive like treatment. *State v. Harner* 153 Wn.2d 228 (2004).

In examining this using the proportionality review offered in *Handley and Davis/Yates*, it is clear that there is no justifiable basis for the disparate sentencing. "Although equal protection does not require that the state treat all persons identically, and classification must be relevant to the purpose for the disparate treatment." *In re Det. Of Thorell*, 149 Wn.2d 724, 745, 72 P.3d 708 (2003) (Citing *Baxtrom v. Herold*, 383 U.S. 107, 111, 86, S. Ct. 760, 15 L.Ed. 2d 620 (1996)).

C.) It is perhaps the most distressing to note the sentencing disparity in this case as opposed to those of the sentencing in *Jamison and Morris* (EXHIBIT E). In *Jamison*, the infant was repeatedly choked, smothered,

squeezed and bounced. The CT scan showed internal bleeding in the infant's skull, recent rib fractures, brain swelling, brain damage due to lack of oxygen, eye injuries, and blindness. The infant in Jamison, due to its abuse, was in a permanent vegetative state, had to use a feeding tube to be nourished and would never recover from the injuries. Jamison was convicted of two counts of first degree assault of a child with three aggravators: vulnerable victim, abuse of trust, and the defendant's conduct had a destructive and foreseeable impact on persons other than the victim. Jamison was sentenced to 180 months on each count. In contrast, the injury sustained in Ms. Mothershead's case was an eye injury of unknown origin. Ms. Mothershead was convicted of one count of first degree assault of a child with three aggravators: abuse of position of trust, vulnerable victim, and conduct manifested deliberate cruelty. She was sentenced to 480 months on that one count. How is this disparity in line with the SRA? This suggests that had the crime involved more serious and life-altering damage to K.M.'s brain, body, and ability to live outside of a vegetative state, Ms. Mothershead would have received a lesser sentence. The sentencing in this case is a serious and grave error. Likewise in Morris, the infant sustained bleeding of the retina, bruises on the chin, swelling of the brain, bleeding of the brain, brain damage, seizures, problems breathing (has to be assisted by a breathing tube), the retinas were disconnected by

blood, and the infant was partially paralyzed on the right side. Morris was charged with one count of first degree assault of a child with the aggravator of vulnerable victim. Morris received a sentence of 147 months. Again, one must ask, how is this sentencing proportionate to the 480 months given to Ms. Mothershead? This is a clear violation of the SRA and requires resentencing with a proportionality review.

### **SEVENTH GROUND**

THE RULING IN STATE V. ROGERS BEARS CONTROLLING WEIGHT IN THIS CASE AND SHOULD BE RELIED UPON HEAVILY BY THIS COURT AS GROUNDS FOR REVERSAL.

#### A.) Summary of State v. Rogers/Cases used in the Rogers Ruling

In *State v. Rogers*, 2004 Wash.App. LEXIS 1754<sup>43</sup>, the rationale of the Division II Court of Appeals bears significant weight in this case. Tera Lynn Rogers appealed her conviction for first degree assault of a child and her conviction was vacated and remanded for dismissal based on insufficiency of evidence. In the Rogers' case, the two-year-old child (E.H.R.) of Rogers suffered an injury to his duodenum, a part of the small intestine near the stomach. Due to the helpless nature of the child and the critical nature of the injury, there was a compelling desire to locate and ascertain who was responsible for the tear in his duodenum, which almost

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<sup>43</sup> It should be noted that if any opinions cited here are unpublished, the decision has no precedential value, is not binding on any court and is cited for persuasive value as the court deems appropriate. GR 14.1

killed E.H.R. Focus immediately turned to his mother, Tera Rogers, who had called an advice nurse about E.H.R. about 10pm on Sat. September 7, 2002. Rogers told the nurse that E.H.R. was having difficulty breathing and vomiting. The nurse asked if E.H.R. had been assaulted in any way. Rogers said no but E.H.R. did fall off a slide at the playground. The case against Rogers was entirely circumstantial. Detectives immediately looked to Rogers as causing the injury to E.H.R. Rogers did admit that she expressed anger and insulted the detectives when they interviewed her, but she fervently denied injuring E.H.R. There was no meaningful explanation of why they accused Rogers of hurting E.H.R. when there was no concrete evidence to suggest she was responsible.

To prove first degree assault of a child, the state needed to show that Rogers “intentionally assaulted” by E.H.R. by “recklessly inflicting great bodily harm.” RCW 9A.36.120(1)(b)(i). Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the state, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). When Rogers moved for dismissal based on insufficiency of evidence at trial, the court relied on the argument that (1) the medical evidence indicated more force than being hit by the slide would be required for this injury to occur; (2) E.H.R. was solely under Rogers’

control during the critical time period; (3) Rogers made some inconsistent statements; (4) Krader's (a witness)' testimony, was an admission by Rogers. The court rejected the argument that refusing to assist the State in locating her other children indicated guilty knowledge by Rogers.

The court of appeals, in this case, stated it must examine all the evidence in light most favorable to the state, to see if a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.

Rogers asserted that this evidence did not substantially identify her as the perpetrator and the court of appeals agreed. Even including Krader's and Stamatakis's improperly admitted evidence, the evidence is sufficient. The court ruled that sufficient evidence does not exist for a reasonable person to determine beyond a reasonable doubt that Rogers intentionally assaulted E.H.R. and recklessly caused grave bodily harm. While he did suffer great bodily harm, there is no direct evidence of a blow or strike to E.H.R. by Rogers, nor is there evidence of her acting in a manner that was a gross deviation from conduct of a reasonable person in the same situation. *Burks v. U.S.*, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed 2d 1 (1978), (See also *State v. Hescok*, 98 WnApp. 600, 605, 989 P.2d 1251 (1999) (citing *Burks* when stating "if an appellate court has held that evidence is insufficient to support the conviction, then retrial for that offense is prohibited.") Even under *Lockhard v. Nelson*, 488, 1988 U.S.

33, 109 S.Ct. 285 1102 L.Ed. 2d 265 (1998), the court ruled dismissal is mandated. The appellate court stated that the record did not suggest a corresponding ability (as in *Lockhart*) i.e., the State presented all the evidence it had at trial, thus the Double Jeopardy Clause Prevents a second trial under U.S. Constitution Amend 5; Wash. Const. art 1 § 9. Thus, the court of appeals vacated Roger's conviction and remanded to the trial court for dismissal.

B.) The Applicability of *Rogers* to This Case

The logic applied in *Rogers* and the circumstances surrounding the conviction in *Rogers* are extremely similar to this case. Rogers was convicted on a theory of exclusion, just as the petition was in this case. Rogers was immediately designated as a suspect with little investigation or attention paid to the others that had access to E.H.R., just as the petitioner in this case. Rogers was convicted by speculative testimony of the hospital staff with no direct evidence, just as the petitioner in this case was. None of the evidence has substantially identified Ms. Mothershead as the perpetrator. While E.H.R. did suffer great bodily harm, there was no direct or circumstantial evidence of a blow or strike to E.H.R. by Rogers. While K.M. did suffer great bodily harm, there was no direct or circumstantial evidence of any intentional mistreatment of K.M. by Ms. Mothershead. There was no evidence of Rogers acting in a manner that was a gross

deviation from conduct of a reasonable person in the same situation, as she reached out to medical personnel to aid in the care of E.H.R. Likewise, the petitioner acted reasonably and carefully when she repeatedly reached out to health care professionals to aid in the care of K.M.'s condition. The logic used in *Rogers* should be used in this case and it should therefore be dismissed.

**EIGHTH GROUND:**

DESPITE RULING THAT THE SUBDURAL HEMATOMA WAS NOT PART OF THE APPELLANT'S CHARGES AND COULD NOT BE RELATED TO THE APPELLANT IN ANY WAY, THE CONTINUOUS DISCUSSION OF THE SUBDURAL HEMATOMA DURING TRIAL CAUSED INCURABLE PREJUDICE AND REQUIRES REVERSAL.

A.) The consistent discussion of the subdural hematoma and the bruising should be inadmissible because it caused unfair prejudice and confusion of issues. ER 403 – Exclusion of Relevant evidence on grounds of prejudice, confusion, or was of time – has specific application related to this ground. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This applies in this case because the trial was not based off of the subdural hematoma or the bruising. The defendant was never charged in connection with the subdural hematoma or bruising and no clear and convincing

evidence was ever provided that this had any relation to Ms. Mothershead. However, throughout the entire trial the subdural hematoma and the bruising was referred to over **212 times during twelve different witness testimonies**. There was also speculation as to how the subdural hematoma and bruising occurred and that Matthew Bowie noticed the subdural hematoma first. If indeed, this was for informational purposes only, then why did so many testimonies include the hematoma and bruising details and why was there discussion as to when and how it happened? This evidence should never have been admitted to trial at the level it is because of the unfair prejudice it caused. Any rational person would be affected by something as concerning as a subdural hematoma and bruising and it is unreasonable to assume that one would be able to ignore or dismiss 212 references to such.

B.) This prejudice could not be overcome by any curative instruction because it was so prolific throughout the trial. The mention of the subdural hematoma and bruising permeated every aspect of the trial. Thus, a single limiting instruction could not cure the resulting prejudice. The court assumed that a simple limiting jury instruction would be enough for the jury to understand and follow. To issue one instruction to the jury to just disregard evidence that was mentioned 212 times is not logical. A simple curative instruction could not have remedied the prejudice that was created

by the constant reminders of the subdural hematoma and created a prejudice that is irreversible.

Improper testimony may not always be susceptible to a curative instruction. While it is presumed that juries follow the instructions of the court, the instruction in this case to disregard evidence in Jury Instruction #5<sup>44</sup> cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudiced and of such a nature as to likely impress itself upon the minds of the jurors. *State v. Hager* 171, Qn. 2d 151; 248 P.3d 512 (2011). By mentioning of a subdural hematoma and bruising 212 times, it became so prolific in the minds of the jurors as to create incurable prejudice. This fact requires reversal.

The evidence was then improperly admitted. And the courts cautionary instruction to the jury was not curative. *State v. Clausing*, 147 Wn. 2d 620 (2002). The frequent mention of the subdural hematoma and bruising cased inadmissible evidence to become admissible by the sheer quantity of its mention. Further, no limiting instruction can make inadmissible evidence admissible. *State v. Stafford*, 2011 Wash app. LEXIS 2396

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<sup>44</sup> Jury Instruction #5 – “Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of evidence regarding a head injury/subdural hematoma that was sustained by K.M. and may be considered by you only for the purpose of explaining how K.M.’s eye condition came to the attention of the Pierce County Sheriff’s Department. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.”

(2011)<sup>45</sup>. *Hager, Clausing and Stafford* make it clear that the continuous and prolific mention of the subdural hematoma and bruising caused incurable prejudice and improperly introduced inadmissible evidence. The rulings on these cases make it clear that the ruling in this case should be reversed on similar grounds.

The ruling in *United States v. Nobari* (9<sup>th</sup> Cir. 2009) 574 F.3d 1065, applies in this case. In *Nobari*, the court determined that the government violated the defendants' federal due process and equal protection rights by introducing minimally relevant but prejudicial evidence of ethnic generalizations about the roles that different ethnic groups play in the drug trade. In this case, the state introduced the hematoma, despite the fact that it was never connected to the petitioner, and this caused a highly prejudicial effect.

**NINTH GROUND:**

DR. WEISS, AS A WITNESS, OFFERED TESTIMONY FULL OF CONJECTURE, SPECULATION, AND UNRELIABLE CONTENT. THIS TESTIMONY, RELIED ON HEAVILY BY THE STATE, SHOULD HAVE BEEN DISMISSED AND SHOULD BE DISMISSED BY THIS COURT.

A.) Dr. Weiss's testimony should not have been allowed because he was admitted as an expert, but his testimony was not based completely off of

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<sup>45</sup> It should be noted that if any opinions cited here are unpublished, the decision has no precedential value, is not binding on any court and is cited for persuasive value as the court deems appropriate. GR 14.1

scientific knowledge, since many of his statements are based off of his own opinion and not actual medical science. No evidence ever existed that confirmed Ms. Mothershead's participation in the charged crime. Dr. Weiss stated that it was a "diagnosis of exclusion" (9/12/13 p. 74).

Rule 702 states:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Dr. Weiss did not offer any specific scientific information nor did he include any technical information to explain his diagnosis. The most he supplied was a "diagnosis of exclusion," which is insufficient to give any weighted determination of a highly scientific and technical nature as required of a medical diagnosis. A diagnosis of exclusion merely explains what is "not," not what **IS**.

In *Cedar Courts Apts. LLC v. Colorado*, 2017 Wash. App. LEXIS 81 (2017)<sup>46</sup>, the court ruled that inferences drawn from evidence must be reasonable and not based on speculation (also found at *Ayers v. Johnson & Johnson Baby Prod. Co.*, 117 Wn. 2d 747, 753, 838, P. 2d 1337 (1991).

Additionally, a verdict cannot be founded on mere theory or speculation.

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<sup>46</sup> It should be noted that if any opinions cited here are unpublished, the decision has no precedential value, is not binding on any court and is cited for persuasive value as the court deems appropriate. GR 14.1

*Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P. 2d 475 (1999). If there is nothing more tangible than two or more conjectural theories, each asserting opposite ends of a liability, a jury will not be permitted on conjecture how the event occurred. *Marshall*, 94 Wn. App. At 379. A diagnosis of exclusion, from a contradictory source, cannot be reasonable as it is based purely on speculation. The jury should not have been allowed to weigh Dr. Weiss' testimony as it offered no concrete facts, scientific process, or specific diagnosis. A "shot in the dark" guess based on exclusion does not explain the cause, much less the source, of an injury.

However, the requirement that the expert's testimony pertain to "scientific...knowledge" assigns to the trial court the task of ensuring that the expert's testimony rests on a reliable foundation and is relevant in that it has a valid scientific connection to the pertinent inquiry as a precondition to admissibility. *Id.*@591-92. *State v. Copeland*, 130 Wn. 2d 244; 922 P.2d 1304 (1996) applies here. Under the Copeland analysis, the trial judge must determine at the outset, under Rule (a), whether the expert will be testifying to scientific knowledge which will assist the trier of fact. This will require a preliminary determination whether the reasoning or methodology underlying the testimony is "scientifically valid" and whether it can be applied to the facts at issue. Here, the testimony offered

by Dr. Weiss was clearly not scientifically valid. Ms. Mothershead's counsel was ineffective for not requesting a dismissal and was ineffective for not retaining an expert medical doctor to testify regarding Dr. Weiss' assertions.

Dr. Weiss was admitted as an expert witness but he based a lot of his testimony on his opinions and not the facts of the case. Dr. Weiss himself said he does not treat empirically (9/12/13 p. 36) but he stated that K.M. was empirically treated with topical anti-infectives (9/12/13 p. 37) and he diagnosed K.M. by a "diagnosis of exclusion" (9/12/13 p. 74). When asked what is empirically treated he responded that "you treat without knowing what you are treating" (9/12/13 p. 37). This is a frightening premise to uphold a conviction upon.

Over the seven weeks that K.M. was being seen by Seattle Children's Hospital, Dr. Weiss performed several examinations and tests (9/12/13 p. 31-32). At no point did Dr. Weiss ever confirm that the results of any of these indicated that the presence of bleach or outside chemical agent was responsible. Based simply on a theory of exclusion, he speculated through exclusion. Evidence relating to the existence of any fact cannot rest of guess, speculation, or conjecture. *State v. Rogers*, 2004 Wash. App.

LEXIS 1754 No. 30205-5-11<sup>47</sup> and *State v. Prestegard*, 108 Wn. App. 14, 23, 38 P. 3d 817 (2001). This argument was used to overturn the convictions of defendant *Dolan*, in *State v. Dolan*, 118 Wn. App. 323; 73 P.3d 1011 (2003). In *Dolan*, the evidence that led to Dolan's conviction was that the only other person around the child was Dolan, and the state's case was entirely based on personal knowledge and theories of exclusion, not proper expert opinion based on scientific, technical, or specialized knowledge. Further, the opinions violated Dolan's constitutional right to a jury trial where the opinions were expressed by a government official, such as a police officer, whose opinion may influence the jury and deny the defendant a fair and impartial trial. Like in *Dolan*, the case against *Rogers* was entirely circumstantial and was likewise overturned. A process of exclusion that leads to no certainties is not enough. This process cannot stand and should not stand to affirm Ms. Mothershead's conviction.

B.) Dr. Weiss made many contradictory statements, thus undermining his credibility and the credibility of the information he provided. He stated that K.M. had periorbital cellulitis (an infection that is traditionally treated with antibiotics) (9/12/13 p. 20). Later, he stated that he did not believe K.M. had an infection to her eye (9/12/13 p. 100). He then testified that others

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prescribed her with the “higher gun” antibiotics because of the high degree of toxicity that they create (9/12/13 p. 45). However, he later admitted that he had prescribed these very “higher gun” antibiotics (9/12/13 p. 90-91). This testimony shows that Dr. Weiss was both unreliable and contradictory. The contradictory statements made by Dr. Weiss show that Dr. Weiss lied about prescribing the medications. It is reasonable to ask that if the drops prescribed by him were of a high degree of toxicity (the high degree of toxicity of the “higher gun” antibiotics Dr. Weiss later admitted he prescribed permeated his testimony), why would Dr. Weiss be so reluctant to admit he prescribed them? Would these prescribed toxic drops reflect poorly on the doctor? The same exact logic can be used to ask why these drops and their toxicity were not considered a primary factor in K.M.’s injury and why is this not a feasible “diagnosis of exclusion”? Toxicity does not exist in a vacuum and it is not harmless. If it was harmless, it would not be rendered toxic.

K.M. was diagnosed on March 23, 2011 with a corneal abrasion. Dr. Weiss contradicted himself in his testimony. First he stated that K.M. never had an infection but she was prescribed over seven antibiotics and steroid drops. Over the seven week course she was on various systemic antibiotics (9/12/13 p. 24), Erythromycin Ointment – antibiotics (9/12/13 p. 20), Polysporin – antibiotics (9/12/13 p. 35), Corticosteroid drops

(9/12/13 p. 41), Tobramycin – antibiotics (9/12/13 p. 43), Cefazolin – antibiotics (9/12/13 p. 44), and Oral Augmentin – antibiotics. Once she was admitted to Harborview she was then put on Unasyn, which is a powerful IV antibiotic. If K.M. never had an infection then why was she on all of these antibiotics? When asked why switch from Polysporin antibiotics to the Corticosteroids he said because he “wasn’t getting anywhere” with the Polysporin antibiotics. At no point again was there even a suspicion of any outside agent playing a role in K.M.’s condition. Furthermore, it is unclear why, given the “big gun” antibiotics being used in conjunction with steroids, there was never further inquiry as to what this cocktail of strong medicines might do to a child’s eye. Dr. Weiss’ opinion on the matter is clearly unreliable.

Dr. Weiss also stated that some of the medication cause toxicity, so could this have been the toxic substance he believes he saw? When talking about Cefazolin he stated that they are “big-gun antibiotics. But usually those are -- I go to the smallest gun that takes care of the problem. Because this drugs, you get more toxicity” (9/12/13 p. 45). In his own words, Dr. Weiss confirms that the toxicity levels were high in the medicines he was prescribing.

When K.M. was tested for infections, she tested positive for strep, staph, and e coli. Dr. Weiss thought the contamination was from whichever nurse

or doctor from Seattle Children's Ophthalmology Department must have touched the slide or eye lid region and contaminated the slide. He never stated why the medical testing procedures were so deficient at Seattle Children's Hospital as to render lab work to be prolifically contaminated with strep, staph, and e coli. If medical procedures ensuring samples are not tainted are not followed, why order a lab test? He must have thought K.M. had an infection because he still prescribed her the "higher gun antibiotics" that he said he would never prescribe but later realized that he had prescribed them. In fact, Dr. Weiss prescribed several different antibiotics for K.M.

## V. CONCLUSION

The errors in this matter, whether separately or through their cumulative effect, require reversal in this case. (*Parle v. Runnels* (9<sup>th</sup> Cir. 2007) 505 F.3d 922; *Mak v. Blodgett* (1992) 970 F.2d 614, 622; *People v. Hill* (1998) 17 Cal. 4<sup>th</sup> 8000, 844-845). The improper reliance on insufficient circumstantial evidence, the ineffectiveness of the petitioner's defense counsel, the prejudice created by the improper mentioning of the subdural hematoma, the unreliable testimony by Dr. Weiss, the reasonable doubt created by a questionable chain of custody, the failure to prove intent, the grossly disproportionate sentencing, the failure by the state to properly investigate all individuals who had contact with K.M., and the ruling in

*Rogers*, all warrant reversal. The Constitutional violations in this matter are numerous and of a significant magnitude and the petitioner's convictions should be reversed.

#### **VI. REQUEST FOR RELIEF**

- 1.) The petitioner requests that her judgment and sentence vacated and that this Honorable court grant a retrial or order an evidentiary hearing.
- 2.) In the alternative, the petitioner further requests that counsel be appointed pursuant to RCW 10.73.150(4) and that discovery and an evidentiary hearing be ordered pursuant to RAP 16 to resolve any factual disputes about petitioner's unlawful restraint.

#### **VII. OATH OF PETITIONER**

THE STATE OF WASHINGTON, COUNTY OF PIERCE

On oath and under penalty of perjury, I saw that I am the petitioner, that I have read the petition, know its contents and I believe the petition is true.

DATED this 6<sup>th</sup> day of November, 2017.

Respectfully submitted,

  
\_\_\_\_\_  
Jennifer Mothershead  
PRO SE  
Washington Corrections Center for Women  
9601 Bujacich Rd NW  
Gig Harbor, WA 98332

**EXHIBIT A**

**MEMORANDUM****To: Jane Pierson, Esq., Attorney, Department of Assigned Counsel****From: Richard C. Pleus, PhD****Re: Request for Additional Scope of Work****Date: May 13, 2013**

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You have asked me to evaluate whether claims made by the Plaintiff (the State of Washington) that alleged exposures to adulterated medication resulted in the adverse health effects observed in the Defendant's daughter, Kelsey Mothershead. To do so, I have reviewed information you have provided, including forensic laboratory data, medical records, diagnoses, and objective observations, including signs, symptoms, and medical tests performed by or under the direction of a physician. I have also conducted independent research and compared and contrasted those data with data in the toxicological literature.

More specifically, I have analyzed the forensic laboratory reports from the Washington State Crime Lab and the FDA Forensic Chemistry Center. In addition, I have reviewed the medical records regarding Kelsey Mothershead's condition and prescribed medication. All court documents and witness statements have been reviewed as well.

My initial opinion, subject to completing my research thoroughly, is that the data provided to me does not scientifically support the Plaintiff's case that the medication that was administered to Kelsey Mothershead caused the adverse effects that are reported in the medical records. I have considered a number of possible scenarios, including that Ms. Mothershead did adulterate the medication.

You have also asked me to provide you with an additional budget and general scope of work to complete my opinion including a brief report. The scope of work includes reviewing any additional case documents, completing my research and summarizing my opinion in a short report (e.g., scientifically referenced report). To complete this work, I estimate a budget of \$8000. Please note this estimate does not include preparation for trial or trial attendance as an expert witness.

**EXHIBIT B**

June 27, 2013

Jane Pierson, Attorney  
Pierce County  
Department of Assigned Counsel  
949 Market Street, Suite 334  
Tacoma, WA 98402-3696  
(253) 798-3982  
[jpierso@co.pierce.wa.us](mailto:jpierso@co.pierce.wa.us)

RE: Proposed Scope of Work for Toxicological Analysis

Dear Ms. Pierson:

You have asked me to evaluate whether claims made by the Plaintiff (the State of Washington) that alleged exposures to adulterated medication resulted in the adverse health effects observed in the Defendant's daughter, Kelsey Mothershead. To do so, I have reviewed the information that you have provided, including forensic laboratory data, medical records, diagnoses, and objective observations, including signs, symptoms, and medical tests performed by or under the direction of a physician. I have also conducted independent research and compared and contrasted those data with data in the toxicological literature.

More specifically, I have analyzed the forensic laboratory reports from the Washington State Crime Lab and the FDA Forensic Chemistry Center. In addition, I have reviewed the medical records regarding Kelsey Mothershead's condition and prescribed medication. All court documents and witness statements have been reviewed as well.

My initial opinion, subject to completing my research, is that the data provided to me does not scientifically support the Plaintiff's case that the medication that was administered to Kelsey Mothershead caused the adverse effects that are reported in the medical records. I have considered a number of possible scenarios, including those supposing that Ms. Mothershead did adulterate the medication.

You have also asked me to provide you with a scope of work, including a brief written report, and the budget required to complete this work. The scope of work includes:

- Task 1- Complete research and assessment of the case:
  - Analysis of the forensic laboratory reports from the Washington State Crime Lab and the FDA Forensic Chemistry Center
  - Review of the medical records regarding Kelsey Mothershead's condition and prescribed medication
  - Review of court documents and witness statements
  - Toxicological issues that may have contributed to Kelsey Mothershead's

June 27, 2013

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condition

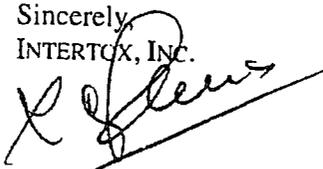
- Task 2- Summarize my assessment in a short, scientifically referenced report.

To complete this work, I estimate a budget of \$5,300 for Task 1 and \$2,700 for Task 2, for a total budget of \$8,000. This budget assumes that I currently have all the case documentation needed to complete my report.

I raise one concern: this budget does not include reviewing any additional case documents, attending meetings, etc. from now until trial, or preparation for and attending trial as an expert witness. If you anticipate the omission of any of the above tasks to be a concern, we can discuss them and provide you with a budget.

Please feel free to contact me with any questions concerning this proposed scope of work. I look forward to working with you.

Sincerely,  
INTERTOX, INC.



Richard C. Pleus, PhD  
Managing Director & Toxicologist

June 27, 2013

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**EXHIBIT C**

1 Defendant argued that the head injury -- which is  
2 not the subject of your charges, right -- occurred while  
3 the defendant wasn't even there that night, May 11<sup>th</sup>.  
4 There's no evidence of that. None. Not a shred. We  
5 don't know when it happened. We don't know how it  
6 happened. I submit to you that you can completely  
7 disregard that portion of the argument because there's  
8 no evidence of it. The head injury that Kelsey  
9 sustained, the subdural hematoma, explains for you how  
10 this all eventually came to the attention of law  
11 enforcement. Her eyes. The medication issue. And they  
12 didn't even suspect anything at first. There wasn't  
13 anything to do with the medications. That didn't come  
14 until later. The defendant had been getting away with  
15 it all of this time.

16 Defense counsel argues that you don't have an  
17 intentional assault if there was something wrong with  
18 the medications and the defendant didn't know about it.  
19 You know, she's being prescribed this medication, doing  
20 what the doctor tells her and giving her medications.  
21 But again, I submit to you, I submit to you that this is  
22 the case. The defendant never said that she didn't  
23 intentionally do something to the drops.

24 MS. PIERSON: Objection. Burden shifting.

25 MS. SANCHEZ: She's a witness, Your Honor.

**EXHIBIT D**

## TESTERS OF THE DROPS AND THEIR FINDINGS

	<u>Employer/Testing Source</u>	<u>Findings</u>
<b>Jackson</b>	FDA	We <i>think</i> we found what was present
<b>Kaine</b>	FDA	Testing (was) <i>similar</i> (to bleach)
<b>McCauley</b>	FDA	There <i>may</i> have been bleach in drops
<b>Crowe</b>	FDA	Had experience testing bleach residue but did not find any conclusively in his test
<b>Lanzarotta</b>	FDA	Stated the discrepancy in the tests could be storage conditions or other conditions
<b>Boysen</b>	WSP Crime Lab	Could not find a ratio with bleach that matched the drops in question and suggested or perhaps bleach was not the substance used. She stated she didn't know and that none of her testing made it clear to her what was reacting with the case sample to give those results

**EXHIBIT E**

**HANDLEY AND DAVIS/YATES<sup>1</sup> COMPARISONS**

	<u>Romaneschi<sup>2</sup></u>	<u>Jamison<sup>3</sup></u>	<u>Morris<sup>4</sup></u>	<u>Pennick<sup>5</sup></u>	<u>Mothershead</u>
<b>Role: Parent</b>	Same	Same	Same	Same	Same
<b>Handley Culpability (Parent charged with 1<sup>st</sup> degree assault of child)</b>	Same	Same	Same	Same	Same
<b>Number of Victims:</b>	1	1	1	1	1
<b>Age of Victim/s:</b>	6 weeks	Infant	6 weeks	7 years old	15 months
<b>Primary Charge:</b>	1 <sup>st</sup> Deg. Assault of a child (1 count)	Same/ 2 counts	Same	Same 3 counts	Same
<b>Other Charge/s:</b>	0	0	0	3 <sup>rd</sup> Deg. Assault of child	0
<b>Injury to Child:</b>	Weight loss, Infection, Fractured ribs/limbs	Choked, Internal bleed, Rib fracture, Brain Swelling, Brain Damage, Eye Injuries, Blind, Permanent veg.state	Internal bleed- of retina, Brain Swelling, Brain Damage, Seizures, Paralyzed	Broken legs Slashes from whip, Burn marks	Damage to eyes
<b>Aggravator/s:</b>	Vulnerable Vic. Pos. of Trust	Vulnerable Vic. Pos. of Trust Impact on Others	Vulnerable Vic.		Pos. of Trust Vulnerable Vic.
<b>Sentence:</b>	<b>120 Months</b>	<b>180 Months</b> (each count, consecutive for a total of 360 Months)	<b>147 Months</b>	<b>119 Months</b> (for ct. 1, 108 months ct. 2, 108 ct. 3 total 335)	<b>480 Months</b>

<sup>1</sup> State v. Handley 115 Wn.2d 275, 289, 976, P.2d 1266 (1990)

<sup>2</sup> State v. Davis 175 Wn.2d 287, 290 P.3d 43 (2012)

<sup>3</sup> State v. Yates 161 Wn.2d 714; 168 P.3d 359 (2007)

<sup>2</sup> State v. Romaneschi 2015 Wash. App. LEXIS 2163

<sup>3</sup> State v. Jamison 2014 Wash.App.LEXIS 1287

<sup>4</sup> State v. Morris 2013 Wash.App.LEXIS 284

<sup>5</sup> State v. Pennick 131 Wn.App. 1048 (2006)

FILED  
COURT OF APPEALS  
DIVISION II  
2017 NOV -8 AM 11:50  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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

STATE OF WASHINGTON, )  
Respondent, )  
) NO:  
v. )  
) MOTION AND ORDER TO  
Jennifer Mothershead, ) PROCEED INFORMA PAUPERIS  
Appellant. )

---

COMES NOW, the Appellant, above named and moves the  
Honorable Court for an Order to Proceed In Forma Pauperis, for the  
purpose of PRP - Personal Restraint Petition.

This Motion is based upon the attached Declaration of Income and  
Expenses of the above named Appellant.

Dated: 11/6/17

  
Signature  
Jennifer Mothershead #370440  
Print Name & DOC

STATE OF WASHINGTON )      DECLARATION OF INCOME  
COUNTY OF PIERCE    ) ss.    AND EXPENSES

1.    Appellant Full Name: *Jennifer Mothershead*  
      Address: 9601 Bujacich Rd. NW, Gig Harbor, WA 98332  
      Appellant Telephone: None  
      Appellant Employer: Washington Corr. Center for Women  
      Type of Work: Prison Labor  
      Hours Worked: —  
      Gross Pay per Month (Before Taxes): —  
      Net Pay per Month (After Taxes): —

OTHER BENEFITS NOW RECEIVING:

Unemployment	\$ <u>0</u> Per _____
Workman's Comp.	\$ <u>0</u> Per _____
Welfare/SSI	\$ <u>0</u> Per _____
Social Security	\$ <u>0</u> Per _____
Veteran's Admin.	\$ <u>0</u> Per _____
Retirement/Pension	\$ <u>0</u> Per _____
Annuities/Trust	\$ <u>0</u> Per _____

OTHER INCOME:

None

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2.    Spouse's Full Name:  
      Spouse's Address:  
      Spouse's Telephone:  
      Spouse's Employer:  
      Type of Work:  
      Hours Worked:  
      Gross Pay per Month (Before Taxes)  
      Net Pay per Month (After Taxes)

OTHER BENEFITS NOW RECEIVING:

Unemployment	\$ _____	Per _____
Workman's Comp.	\$ _____	Per _____
Welfare/SSI	\$ _____	Per _____
Social Security	\$ _____	Per _____
Veteran's Admin.	\$ _____	Per _____
Retirement/Pension	\$ _____	Per _____
Annuities/Trust	\$ _____	Per _____

CHILDREN AND OTHER DEPENDENTS: *none*

Name:  
Address:  
Name:  
Address:  
Name:  
Address:

CURRENT ASSETS OF THE APPELLANT:

BANK/CREDIT UNION      AMOUNT      TYPE OF ACCOUNT

ANY OTHER MONIES TO BE RECEIVED WITHIN NEXT 90 DAYS

GENERAL DESCRIPTION OF REAL ESTATE, VEHICLES, OR  
OTHER PROPERTY OWNED OR AFFIANT HAS INTEREST IN

CURRENT DEBTS OF APPELLANT:

CREDITOR	REASON FOR DEBT	OWED	MONTHLY
	Pierce County Superior Court		

MONTHLY HOUSEHOLD EXPENSES:

Rent/Home Payment	\$ _____	Per _____
Electricity	\$ _____	Per _____
Water/Sewer/Garbage	\$ _____	Per _____
Telephone	\$ _____	Per _____
Heating	\$ _____	Per _____
Food	\$ _____	Per _____
Clothing	\$ _____	Per _____
Medical/Dental	\$ _____	Per _____
Auto/Gas/Oil/Auto Ins.	\$ _____	Per _____

Dated: 11/6/17

  
\_\_\_\_\_  
Signature  
Jennifer Mothershead #370440  
Print Name & DOC  
Washington Corr. Center for Women  
9601 Bujacich Rd. NW  
Gig Harbor, WA 98332-8300

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

STATE OF WASHINGTON,	)	
Respondent ,	)	
	)	NO:
v.	)	
	)	ORDER TO PROCEED
<u>Jennifer Mothershead</u> ,	)	INFORMA PAUPERIS
Appellant.	)	

---

The above named Appellant, having presented to the Court a sufficient declaration to Proceed In Forma Pauperis and the Court being of the opinion that the Order should be issued, now therefore, it is:

ORDERED, ADJUDGED AND DECREED, that the Appellant is hereby authorized to proceed with this action in forma pauperis, and the Clerk of this Court is ordered to file papers and pleadings as requested by the Appellant without payment of any fee, cost or charge whatsoever. In approving this Order, the Court reverses the right to review this order and require the payment of the fee if justified at the time of final hearing.

[] It is further ORDERED, ADJUDGED AND DECREED, that the Court Clerk be directed to release the Documents/Transcripts to the Appellant, for commencement of this action in forma Pauperis.

Dated: \_\_\_\_\_

Judge

FILED  
COURT OF APPEALS  
DIVISION II

2017 NOV -8 AM 11:50

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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

THE STATE OF WASHINGTON )  
COUNTY OF PIERCE ) ss. DECLARATION OF MAILING

I, Jennifer Mothershead, state that on this 6<sup>th</sup> day of November,  
2017, I deposited in the mail of the United States of America a properly stamped  
envelope containing a copy of the following described documents:

PRP- Personal Restraint Petition  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I further state that I sent these copies to the following addresses:

Court of Appeals - Division II  
950 Broadway #300, M/S TB-06  
Tacoma, WA. 98402-4454  
\_\_\_\_\_

Dated: 11/6/17

Jennifer Mothershead \_\_\_\_\_  
Signature

Jennifer Mothershead #370440  
Print Name & DOC

Washington Correction Center for Women  
9601 Bujacich Rd. N.W.  
Gig Harbor, Washington 98332-8300