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COURT OF APPEALS
DIVISION II

2018 JUN -5 AM 11: 25

STATE OF WASHINGTON

BY  _____

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

JENNIFER LYNN MOTHERSHEAD

Petitioner

NO. 51119-3-II

PETITIONER'S
REPLY TO STATE'S
RESPONSE

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION

1. THE COURT SHOULD REVIEW AND NOT DISMISS THE PETITIONER'S GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL.
2. THE COURT SHOULD REVIEW ALLOF THE PETITIONER'S CLAIMS OF HER PERSONAL RESTRAINT PETITION AND THE PETITIONER'S REPLY TO STATE'S RESPONSE

B. ARGUMENT

The petitioner has met the criteria outlined in 16.4 (c)(2), 16.4 (c)(5), 16.4 (c)(6), and 16.4 (c)(7), as stated in the original petition.

1. THE COURT SHOULD REVIEW AND NOT DISMISS THE PETITIONER'S GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL.

TRIAL COUNSEL FOR THE PETITIONER HAS SUBMITTED A DECLARATION IN THIS PERSONAL RESTRAINT PETITION, TESTIFYING TO HER INEFFECTIVENESS

A successful ineffective assistance of counsel claim requires the petitioner to show counsel's performance was unconstitutionally deficient and prejudicial. The state argues that the petitioner did not provide a declaration (EXHIBIT A) from her trial counsel. However, the petitioner mailed a Motion to Supplement/Amend Personal Restraint Petition on 11/16/17 which was received by the courts on 11/20/17. This is only a few business days after the Personal Restraint Petition was filed. This supplement contained a declaration from the petitioner's trial counsel and this is both new and material to this case.

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.

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.

- a) Defense Counsel Failed to Pursue the Preliminary Exculpatory Opinion Offered by Defense Expert Richard Pleus at Interlox, Inc.

The tentative-engagement letter issued by a toxicologist defense counsel did not call at trial *is* basis to reverse petitioner's conviction because the declaration provided by defense counsel states that it was a *mistake not* strategy.

The state argues that the decision whether to call a witness can be presumed to be a matter of trial tactics. In this case, Ms. Pierson wrote a declaration (EXHIBIT A) that states:

"I recently was advised that Dr. Pleus was referring to laboratory data from the FDA Lab and WSP Crime Lab, in which case Dr. Pleus's initial opinion constituted exculpatory evidence that I possibly could have offered in Ms. Mothershead's defense. Had I correctly understood the import of Dr. Pleus's initial opinion, I would have more vigorously sought additional funding to complete Dr. Pleus's work."

It is clear that the counsel's decision whether or not to call Dr. Pleus was not strategic but a mistake on her part. Ms. Pierson did not see this as a "kind of *bait letter*" as stated by the respondent or a reason of "steering clear of him." The respondent makes a leap not supported by logic or the declaration, by stating the witness was not used because he was

to “keep his bad news a secret.” Trial counsel for the petitioner misunderstood the contents of the letter, as verified by her declaration. This is an error of significant and constitutional magnitude as the evidence trial counsel ignored was material and exculpatory to Ms. Mothershead.

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 did not use it. She offered no excuse to Ms. Mothershead (Ms. Mothershead was unaware of the results and findings). Counsel’s failures 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 trail. 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 the 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. 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.

b) Counsel failed to Prepare the Petitioner to Testify

The state argues that the defense counsel did prepare the petitioner to testify based on the record stating she “Number one... represent [petitioner]. Number two, I am not going to engage in a discussion about communications between my client and myself.” Just because there is communication between counsel and petitioner, it does not mean that there was trial preparation happening in regards to preparing the petitioner to testify. The state argues that she has advised my client of her right to testify or not. That does not fit into preparing the petitioner to testify. If one looks at the declaration (EXHIBIT A) from Ms. Pierson, it will show that she declares that “we never had a meeting that was devoted solely to preparing her to testify.” This shows that the defense attorney never sat down and devoted time specifically to testifying to explain the process of testifying and to discuss some of the questions the petitioner could be asked on cross examination.

c) Counsel Failed to Assert and Argue Petitioner's Innocence

The state argues that the Petitioner argued that the counsel failed to argue for acquittal. First, the petitioner is not arguing whether or not the defense counsel asked for acquittal. The point of this argument was that while the petitioner was testifying she was not specifically asked if she adulterated her daughter's eye drop medication. In Ms. Pierson's declaration (EXHIBIT A), she says:

22. "In my direct examination of Ms. Mothershead, I failed to ask Ms. Mothershead if she added anything to her daughter's eye drop medication. This was a mistake. Ms. Mothershead always maintained her innocence of the charges and consistently denied having adulterated the medication in any way. I intended to ask her this, and I should have, but I did not."

23. "My failure to ask her this question was not a strategic decision on my part."

24. During her closing, the prosecutor mentioned on two occasions that Ms. Mothershead failed to deny that she adulterated her daughter's eye drop medication. As a result of my mistake the prosecutor argued that Ms. Mothershead's failure to deny the charge on the stand should be considered as substantive evidence of her guilt."

There is no evidence that defense counsel feared an answer would be delivered with incriminating demeanor or tone as the respondent has suggested. In fact, this is clear evidence that defense counsel made a mistake by not specifically asking the petitioner if she altered the drops and it was not a strategic plan.

d) Defense Counsel's Failure to Object Resulted in Prejudice

The state argues that Dr. Weiss' testimony was valid. Dr. Weiss' testimony, in fact, was perjured. He contradicted himself in many places and should be reviewed de novo.

The 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.

The petitioner's like or dislike for Dr. Weiss is not in question. It is his testimony that is in question. This issue at hand is that he continually made contradicting statements that undermined his credibility and the credibility of the information he proved. As stated in the PRP brief, Dr. Weiss said "that K.M. had periorbital cellulitis," (an infection typically treated with antibiotics) (9/12/13 p.20). He later stated that he did not believe the K.M. had an infection in her eye (9/12/13 p. 100). He then testified that others prescribed her with "higher gun" antibiotics because of the high degree of toxicity that they create (9/12/13 p.45). However, he then admitted that he had prescribed these very same "higher gun" antibiotics (9/12/13 p. 90-91). This shows that he is both unreliable and contradictory.

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. For this reason, the judgment and sentence should be reversed.

2. THE COURT SHOULD REVIEW ALLOF THE PETITIONER'S CLAIMS OF HER PERSONAL RESTRAINT PETITION AND THE PETITIONER'S REPLY TO STATE'S RESPONSE

- a) 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. This questionable chain of custody there creates reasonable doubt regarding the validity of the drops as evidence

As stated in the petitioner's original personal restraint petition, there are many discrepancies that are on the record. First, Dr. Sugar, from Harborview Medical Center, acted as a state agent when she requested that the drops be tested and she herself ordered the testing of the medication. This shows that Dr. Sugar was indeed acting as a state agent. Second, Dr. Heistand testified that when he completed the testing, he followed protocol by placing the medications back into the cooler, 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' stations (9/19/13 p.26 & 36). At some point they ended up in at least two different nurses' pockets (potentially more than two nurses), before they were finally handed off to a Pierce County Officer. How did medication in a cooler, inside a paper bag stapled shut, end up in nurses' pockets? And who

removed them from the paper bag? The state cannot prove that the drops were not tampered with by any number of individuals in the hospital nor can it verify how many individuals had access to the drops. Any evidence relied upon in relation to the drops must be deemed inadmissible and this of itself is grounds for reversal.

The state also argues that “Seattle Children’s provided a police reference sample of the Tobramycin that likely came from the same batch as K.M.’s Tobramycin.” According to Ms. Bournay from Seattle Children’s Pharmacy, the lot number for the Tobramycin drops is different between the reference sample and the two prescriptions (9/30/13 p. 59). The state’s facts of this are wrong and misleading. The difference between the lot number between the reference sample and the two prescriptions is significant and material.

b) The state committed reversible error by not proving an essential element: Intent

The state failed to prove any intent on the part of the petitioner to harm her child. This case has many parallels to *State v.*

Cantu, 156 Wn.2D 819; 132 p.3D 725 (2006). The state never proved any criminal intent on the part of the petitioner 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. There is no testimony that even shows that the petitioner intentionally harmed her child. The state argues that “it is clear why on appeal she ‘concede[d] affirmative evidence allowed a reasonable inference [she] did ... assault K.M. ...’ Apx. B at 44. First, this citation is incorrect, please refer to Apx. B at 44. Second, no affirmative evidence supported the idea that the petitioner assaulted K.M. and the respondent overreaches this point both in its brief and in the incorrect citation. If this inference were to stand, it is therefore equally plausible that the petitioner has presented affirmative evidence that she did NOT assault K.M. Third, a denial of guilt is not affirmative evidence that a crime of any nature took place. Such a presumption is an insult to the very concept of justice under the United States Constitution.

Hypothesis is not affirmative evidence. Not pursuing other possible guilty parties does not create affirmative evidence towards the petitioner. In this case, affirmative evidence, particularly the new evidence brought forth by the petitioner via the declaration of her trial attorney (EXHIBIT A), supports an inference of a wrongful conviction and a constitutional violation of her right to effective counsel.

C. CONCLUSION

These errors in this matter, whether separately or through their cumulative effect, require reversal in this case. The issues raised in this brief as well as the personal restraint petition filed on November 8, 2017 should be considered for the court's decisions. 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 of 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 *State v. Rogers*, 2004 Wash.App. LEXIS 1754, all warrant reversal. The

constitutional violations in this matter are numerous and of a significant magnitude and the petitioner's convictions should be reversed.

Respectfully Submitted by:

5/31/18
Date


Signature
Jennifer Mothershead #370440
Pro Se
Washington Correction Center for Woman
9601 Bujacich Rd NW
Gig Harbor, WA. 98332

EXHIBIT A

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

<p>IN RE THE PERSONAL RESTRAINT OF JENNIFER LYNN MOTHERSHEAD, Petitioner.</p>	<p>Case No. _____ Direct Appeal No. 73634-5-I Pierce County Superior Court No. 12-1-01509-2 DECLARATION OF JANE C. PIERSON</p>
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I, Jane C. Pierson, declare the following to be correct and true under penalty of perjury under the laws of the State of Washington:

1. In 2012, I was a public defender at the Department of Assigned Counsel (DAC) in Tacoma, Washington. I was assigned to represent Jennifer Lynn Mothershead on an Assault of a Child in the First Degree charge in Pierce County Cause Number 12-1-01509-2
2. I no longer work at the DAC and am currently retired.
3. My declaration is based upon my memory of the case and a review of relevant parts of my file. While I do not remember every single detail, I do remember well Ms. Mothershead, her case, and the issues it presented.
4. When DAC was first appointed to Ms. Mothershead's case, DAC attorney Jack McNeish was assigned to represent her. Mr. McNeish was a senior trial attorney with a designation of Attorney 4 within DAC. Attorneys 4 handle the most complex felonies within the office, and accordingly carry a smaller caseload. At the time, DAC had just four Attorneys 4 ~~out of attorney~~ ^{JP}

5. ~~Shortly before trial,~~ ^{AP} The case was reassigned to me. I was an Attorney 3. As such, I handled felonies, but not the most complex felonies within the office. When I received the case, I discovered that Mr. McNeish had done little or no investigation. The file contained little more than the discovery materials provided by the prosecution.
6. I had sufficient experience to meet the minimum standards to handle this level of felony case pursuant to the Washington State Bar Association Standards for Indigent Defense. However, Ms. Mothershead's case was an extremely serious, complex and difficult case. Much of the case involved specialized chemistry, toxicology, and medical issues. I have no background in chemistry, toxicology, or medicine.
7. During the entire time I represented Ms. Mothershead, I had a full caseload. In the year in which the Mothershead case was tried, I handled a number of trials.
8. No one was assigned to be my co-counsel for the Mothershead case.
9. Ms. Mothershead adamantly and consistently maintained her innocence throughout my representation of her. I worked hard to defend her, but in hindsight and after reviewing materials in the case, there are mistakes that I made in the midst of this difficult case.

Expert Consultation

10. When Ms. Mothershead's case was reassigned to me, I requested and received assignment of a defense investigator. The investigator helped me research possible experts to review the records, including the toxicology records from the Washington State Patrol Crime Laboratory and the Food and Drug Administration Laboratory. The investigator ultimately found Dr. Richard Pleus at Intertox, Inc., a toxicology consulting firm in Seattle. Dr. Pleus was a qualified pharmacologist/toxicologist with a post-

doctoral specialization in neuropharmacology and experience as a lecturer in eye toxicology.

11. On March 14, 2013, I submitted an Authorization for Professional Services to DAC management to retain Dr. Pleus as a consulting and testifying expert. I requested initial expert funding in the amount of \$5,000, and my office granted the request. Using those funds, I hired Dr. Pleus to, among other things, evaluate the data underlying the prosecution's scientific claims that the suspect eye drops were adulterated and caused injury to Jennifer Mothershead's daughter, Kelsey Mothershead (KM). I provided Dr. Pleus with laboratory data from both the Washington State Patrol Crime Laboratory (WSP Crime Lab) and the Food and Drug Administration Laboratory (FDA Lab), along with KM's medical records and records describing the history of the case.
12. In mid-May 2013,, Dr. Pleus sent me a Memorandum containing his initial opinion. In that Memorandum, Dr. Pleus stated: "My initial opinion, subject to completing my research thoroughly, is that the data provided to me does not scientifically support the [prosecution's] case that the medication that was administered to Kelsey Mothershead caused the adverse effects that are reported in the medical records." See Memorandum from Richard C. Pleus, PhD to Jane Pierson, dated May 13, 2013. A true and correct copy of that Memorandum is attached hereto as Exhibit A and incorporated herein by reference. Also in that Memorandum, Dr. Pleus outlined the additional work needed to render a final opinion, which he estimated would cost an additional \$8,000.
13. In addition to the May 13, 2013, Memorandum, Dr. Pleus sent me a letter, dated June 27, 2013, in which he reiterated his initial opinion and provided a more detailed description of the work needed to complete his analysis. See Letter from Richard C. Pleus, PhD to

Jane Pierson, dated June 27, 2012. A true and correct copy of that Letter is attached hereto as Exhibit B and incorporated herein by reference.

14. I did not contact Dr. Pleus or anyone from Intertox to further discuss the meaning of Dr. Pleus's initial opinion. (JP) My request (to DAC Director Kawamura) for further work by Dr. Pleus was denied.

15. Likewise, I did not request additional funding for Dr. Pleus to complete his review. (JP)

16. I did not request Dr. Pleus or any other expert's help to prepare me to cross-examine the State's six forensic science witnesses at trial.

17. I did not present any expert testimony at trial on behalf of Ms. Mothershead.

18. After receiving the June 27, 2013, letter, I do not recall contacting Dr. Pleus again. (JP)

19. My failure to seek additional funding for Dr. Pleus to complete his work was not a strategic decision. Recently, I learned that I misinterpreted Dr. Pleus's initial opinion. At the time, I understood that Dr. Pleus was referring to data from the compounding pharmacy. I recently was advised that Dr. Pleus was referring to laboratory data from the FDA Lab and WSP Crime Lab, in which case Dr. Pleus's initial opinion constituted exculpatory evidence that I possibly could have offered in Ms. Mothershead's defense. Had I correctly understood the import of Dr. Pleus's initial opinion, I would have sought ^{more vigorously} additional funding to complete Dr. Pleus's work. (JP)

Ms. Mothershead's Testimony

20. Ms. Mothershead and I met numerous times over the course of my representation of her.

I generally advised her on how to testify, but we never had a meeting that was devoted ^{solely} entirely to preparing her to testify. Specifically, I never practiced the questions I (JP)

~~intended to ask her on direct examination or potential questions the prosecutor might ask her on cross.~~ JP

21. Shortly before trial, Ms. Mothershead wrote out direct examination questions that she wanted me to ask her. I incorporated some of these questions into my examination of her. I never provided her with a similar list of questions that I intended to ask her on direct examination.
22. In my direct examination of Ms. Mothershead, I failed to ask Ms. Mothershead if she added anything to her daughter's eye drop medication. This was a mistake. Ms. Mothershead always maintained her innocence of the charges and consistently denied having adulterated the medication in any way. I intended to ask her this, and I should have, but I did not.
23. My failure to ask her this question was not a strategic decision on my part.
24. During her closing, the prosecutor mentioned on two occasions that Ms. Mothershead failed to deny that she adulterated her daughter's eye drop medication. As a result of my mistake, the prosecutor argued that Ms. Mothershead's failure to deny the charge on the stand should be considered as substantive evidence of her guilt.

Pre-Trial Motions

25. I did not make a motion to exclude evidence of KM's hematoma, which did not form the basis of the assault charge. I intended to, and I should have, but I did not.

26. My failure to make such a motion was not a strategic decision.

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

November 10, 2017 - Palm Springs, California
DATE & PLACE

Jane C. Pierson, WSBA # 23085

A handwritten signature in black ink, appearing to read "Jane C. Pierson", written over a horizontal line.

