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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

STATE'S RESPONSE TO PERSONAL  
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION

1. Should this Court dismiss petitioner's successive attack upon evidentiary rulings, the sufficiency of evidence she assaulted her infant's eyes with bleach-infused medicine and the exceptional sentence she received for that exceptional cruelty, as she cannot prove the interests of justice would be served through redundant review of those meritless claims?

2. Is dismissal of petitioner's unfounded claims of ineffective assistance of counsel warranted when the record reveals she was justly convicted despite being assisted by a strategic advocate who reasonably defended petitioner against compelling proof that persuaded the jury to convict her and a careful trial judge to impose an exceptional sentence?

1 B. STATUS OF PETITIONER

2 Petitioner is restrained pursuant to a judgment made final by Mandate on November 18,  
3 2016, when the Supreme Court denied her petition for review of Division I's decision affirming  
4 her conviction and sentence. Apx.A-B. A motion to transfer the record was filed by the State.  
5 That record provides petitioner was charged in the alternative with first degree child assault for  
6 putting bleach-infused medicine in her infant daughter's eyes over the course of several months.  
7 CP 4-5, 9-11. Each means was aggravated by the exploitation of petitioner's position of trust to  
8 subject a particularly vulnerable victim to deliberate cruelty. CP 10 (RCW 9.94A.535(3) (n),  
9 (3)(a);10.99.020). The Honorable Linda CJ Lee presided over preliminary motions, trial, and  
10 sentencing.<sup>1</sup> Petitioner was found guilty as charged. Apx.B. Her notice of appeal was timely,  
11 then followed by 88 pages of briefing that raised a broad assortment of claims:  
12

13 (1) the court erred in denying her motion to suppress evidence, (2) the court  
14 violated her right to a public trial, (3) the court's evidentiary rulings violated her  
15 right to present a defense, (4) the court erred in refusing to instruct on the lesser  
16 degree offense of assault of a child in the third degree and giving an abiding belief  
17 reasonable doubt instruction, and (5) prosecutorial misconduct and cumulative  
18 error denied her the right to a fair trial.... [6] the court erred in imposing an  
19 exceptional sentence of 480 months and [7] prohibiting her from having contact  
20 with minor children.

21 Apx.B at 2. Claim (4), regarding the lesser, and claim (6), pertaining to her sentence, required a  
22 review of the evidence for sufficiency.<sup>2</sup> Petitioner "concede[d] affirmative evidence allowed a  
23 reasonable inference [she] actually assault[ed] K.M. [, the victim,] by administering drops from  
24 a contaminated version of the May 2 prescription, but argue[d] the evidence show[ed] "she did  
25 not do so repeatedly from March 23 to May 12." *Id.* at 44. Claim No. 6 unsuccessfully alleged  
there was "insufficient evidence" to support the jury's finding of deliberate cruelty. *Id.* at 53.

<sup>1</sup> *E.g.*, RP (8/21) 6-9; (9/9) 17-18, 21; (9/11) 4; (11/15) 18; CP 198-203 (CrR 3.6 ffcl); 204-06 (CrR 3.5 ffcl).

<sup>2</sup> *Id.* at 44, 53-56.

1           Petitioner challenges evidence underlying the intent element of the child assault she  
2 committed despite conceding the existence of evidence to prove it on appeal. *Id.* at 44. Division  
3 I found evidence to support the jury's conclusion the application of bleach to K.M.'s eyes was  
4 not merely intentional but deliberately cruel when it rejected petitioner's claim that aggravating  
5 factor had not been proved. *Id.* at 53. Petitioner also seeks to relitigate rejected challenges to the  
6 trial court's rulings and the prosecutor's conduct. PRP at 2-3. The successive quality of those  
7 claims is addressed below. The new claim alleges her trial counsel was ineffective in several  
8 ways. *Id.* Review of the PRP will require an understanding of petitioner's insidious method of  
9 abusing her infant daughter and how that abuse was proved beyond a reasonable doubt through  
10 scientific tests, clinical evaluations, incriminating acts as well as the selfish desires that explain  
11 but could never excuse the conscience-shocking crime petitioner committed.

13           K.M. was born February 20, 2010. RP (9/30) 7. She spent her first few months of life  
14 with her father Cody<sup>3</sup> and petitioner. *Id.* K.M.'s parents separated when she was about a year  
15 old. *Id.* at 9-10. She was a healthy baby before the separation.<sup>4</sup> Petitioner took K.M. to live with  
16 Matthew and Courtney Bowie in March, 2011, where petitioner engaged in a protracted affair  
17 with Matthew while Courtney worked as a teacher.<sup>5</sup> Petitioner ultimately became pregnant with  
18 Matthew's child.<sup>6</sup> K.M. remained under petitioner's near exclusive supervision on account of her  
19 unemployment.<sup>7</sup> Petitioner used her position as K.M.'s primary caregiver to restrict Cody's  
20 access to K.M. when he got time away from his work as a math teacher, baseball coach, and  
21 middle school equestrian team supervisor. RP (9/24) 108; (9/30) 5, 11, 39.

24 <sup>3</sup> Some given names will be used to avoid confusion attending shared surnames. No disrespect is intended.

25 <sup>4</sup> RP (9/18) 68; (9/26) 111-12, 119; (10/1) 57, 78.

<sup>5</sup> RP (9/23) 118-19, 126-28, 141; (9/30) 122-23; (9/24) 104, (9/26) 108-09, 116; (10/1) 56.

<sup>6</sup> RP (9/23) 118, 126-28, 141; (9/30) 122-23; (9/24) 107, 114; (9/30) 10; (10/1) 47-50, 54, 132-33.

<sup>7</sup> RP (9/18) 84; (9/23) 122-23; (9/24) 107, 114; (9/30) 10; (10/1) 47-50, 54, 132-33.

1           Petitioner first had K.M.'s eye examined by Dr. Merrill on March 23, 2011. RP (9/26)  
2 108-09, 116. There was obvious left eye irritation. *Id.* at 110. Testing revealed an oddly shaped  
3 diffuse circular abrasion occupying all four quadrants of the left cornea with no sign of a causal  
4 agent. *Id.* at 110-11, 113. K.M. was referred to Mary Bridge Hospital. *Id.* at 113. K.M. returned  
5 to Dr. Merrill on March 25, 2011. *Id.* at 114, 116. Merrill was puzzled by her persistent  
6 symptoms. *Id.* at 114. He arranged for her to be examined by an ophthalmologist at Children's  
7 Medical Center in Seattle. *Id.* at 114. Ophthalmologists Dettori and Herlihy evaluated K.M. at  
8 Seattle Children's on March 25, 2011.<sup>8</sup> Dettori was "perplexed" by K.M.'s condition. RP (9/12)  
9 18. Herlihy subsequently examined K.M. May 2, 2011. RP (9/24) 49-50. At trial, Herlihy  
10 opined K.M.'s condition was consistent with someone putting bleach in K.M.'s eyes. *Id.* at 47-  
11 48. K.M. returned to Merrill on March 29, 2011. RP (9/26) 116. Her eyelids bled as their skin  
12 peeled off. *Id.* The entire left cornea manifested dramatic-generalized trauma. *Id.* at 127. He  
13 secured an emergency ophthalmologist appointment. *Id.* at 117. Dr. Moore treated K.M. in  
14 Seattle Children's E.R. March 29, 2011.<sup>9</sup> He was also "perplexed" by her condition. *Id.*

16           The problems with K.M.'s eyes persisted.<sup>10</sup> Petitioner would not let K.M. spend time  
17 with her father because petitioner "had to administer the eye medication." RP (9/30) 18. Once  
18 when Cody was allowed to visit at least one of K.M.'s eyes was swollen shut, she whimpered  
19 and continually buried her head into his chest.<sup>11</sup> Petitioner never allowed Cody to administer  
20 K.M.'s eye medicine.<sup>12</sup> Petitioner put it in K.M.'s eyes about 4 times a day every day as K.M.  
21 "cried," "screamed" and "fought."<sup>13</sup> Petitioner grew angry when Cody learned the procedure. *Id.*

24 <sup>8</sup> RP (9/12) 15-16, 18; (9/24) 27, 31, 49.

<sup>9</sup> RP (9/12) 16-17, 70, 72; Ex.25.

<sup>10</sup> RP (9/24) 107; (9/30) 16; (10/1) 57, 78.

<sup>11</sup> RP (9/12) 62; (9/30) 13, 15; (10/1) 72-73.

<sup>12</sup> RP (9/23) 137-38; (9/30) 19, 22; (10/1) 72-73, 143-44.

<sup>13</sup> RP (9/18) 71; (9/23) 137; (9/30) 201; (10/1) 64, 91, 160.

1 Petitioner remained primarily responsible for putting the medicine into K.M.'s eyes, but  
2 sometimes enlisted Matthew to hold K.M. down as she feebly struggled to protect her eyes. RP  
3 (9/23) 23, 134-35. Matthew and Courtney noticed a remarkably unpleasant odor emanate from  
4 the medicine, even when the bottle was sealed.<sup>14</sup> Neither Matthew nor Courtney ever tampered  
5 with the medicine. RP (9/23) 139; (9/24) 119. Yet the condition of K.M.'s eyes grew steadily  
6 worse over the course of 12 weeks.<sup>15</sup> Localized redness in one eye progressed to redness and  
7 swelling in both eyes, to envelopment with blister like sores encrusted with scabs which wept  
8 yellow pus.<sup>16</sup> The skin over her eyes thinned so much it would break to the touch. RP (10/1) 64.  
9 K.M.'s energy, appetite, and weight declined as her suffering increased.<sup>17</sup> She started sleeping  
10 22 hours a day only to hide her head to avoid light while awake.<sup>18</sup> This was just the intermediate  
11 phase of the permanently debilitating trauma inflicted on K.M.'s developing eyes; life altering  
12 trauma that petitioner euphemistically describes as a mere "eye injury" in her request for less  
13 punishment. Pet. at 34. The antibiotic "Tobramycin" was prescribed to treat K.M.'s eyes with  
14 another antibiotic. RP (9/12) 44-45.

16 Doctors Dettori and Moore asked Seattle Children's Chief of Ophthalmology, Dr. Weiss,  
17 to assist with K.M.'s diagnosis. RP (9/12) 4, 18. That more than 20 year chief of Ophthalmology  
18 whose advice was sought by two physicians at Seattle Children's Hospital to help diagnosis  
19 K.M.'s condition is the specialist petitioner calls an unreliable liar to attack her conviction. Pet.  
20 at 47. Weiss examined K.M. on April 11, 2011. RP (9/12) 4, 18. Weiss could not make sense of  
21 K.M.'s condition as neither infection nor foreign bodies could account for the collective  
22 symptoms; which included: damage to the eyelid skin, internal eye covering and cornea—  
23

24  
25 <sup>14</sup> RP (9/23) 136-37; (9/24) 117-19, 171, 173.

<sup>15</sup> RP (9/23) 133; (9/24) 105-07, 109; (10/1) 63-65, 69, 81, 87; Ex. 76-78.

<sup>16</sup> RP (9/23) 133; (9/24) 52-53, 105-07, 109; (10/1) 63-65, 69, 81, 87; Ex. 7, 76-78.

<sup>17</sup> RP (9/18) 80; (9/24) 113; (10/1) 69, 165.

1 K.M.'s "window to the world."<sup>19</sup> Like the doctors before her, Weiss was "puzzled." RP (9/12)  
2 23-24. Weiss observed blood vessel growth in K.M.'s cornea in addition to a massive  
3 outpouring of "neutrophils" (white cells which respond to infections or "noxious agents"). *Id.* at  
4 36-37. "[E]xhaustive" diagnostic evaluation led "nowhere." *Id.* at 37. Atypical eye diseases were  
5 ruled out. *Id.* at 31-33. As were dermatological factors.<sup>20</sup> Consultation with Seattle Children's  
6 Medical Director of Infection Prevention and Interim Chief for Pediatric Infectious Diseases  
7 revealed nothing.<sup>21</sup> But K.M.'s symptoms seemed to slightly improve when she was under the  
8 hospital's care instead of the *care* petitioner provided K.M. in the privacy of their home.<sup>22</sup>  
9

10 Matthew watched K.M. with his own kids on several occasions. RP (9/23) 132-33. On  
11 May 11, 2013, Matthew (formerly certified as an emergency medical technician) noticed an  
12 irregular soft spot on K.M.'s head while brushing crumbs off her and his son as they sat together  
13 in the living room with Matthew's other child.<sup>23</sup> Matthew immediately brought the discovery to  
14 his wife's attention, who alerted petitioner in turn.<sup>24</sup> K.M. was seen by a doctor the next day. RP  
15 (9/23) 140. A CAT scan "showed a very large bleed along ... her brain, ... a life threatening  
16 problem," was "pushing the brain off to [the] side." RP (9/19) 112-13. K.M. was airlifted to  
17 Harborview May 12, 2011, as it was the only "level one trauma center in the state to deal with  
18 th[at] kind of problem."<sup>25</sup> The head injury was discovered shortly after petitioner disclosed that  
19 she was pregnant with Matthew's child. RP (9/23) 141-42.  
20  
21  
22

23 <sup>18</sup> RP (9/18) 71; (9/24) 113; (10/1) 165.

24 <sup>19</sup> RP (9/12) 24-26, 29, 35; (9/24) 60; (9/26) 19-20, 61.

25 <sup>20</sup> *Id.* at 33; (9/18) 38, 42-43, 53.

<sup>21</sup> RP (9/23) 89, 95-98, 101-02.

<sup>22</sup> RP (9/12) 34-35.

<sup>23</sup> RP (9/23) 139, 163, 168-69; (9/24) 125.

<sup>24</sup> RP (9/23) 139-40; (10/1) 111-12.

1 At the hospital, treatment providers observed K.M. had a variety of bruises, mostly on  
2 her back, some on her arm, a little unusual in position on uncommon locations.<sup>26</sup> Her eyes were  
3 crusted shut. RP (9/23) 113. She grew "hysterical" when efforts to examine them were made.<sup>27</sup>  
4 Dr. Sharifi perceived the head trauma as "disproportionate to a fall." RP (9/12) 57, 62. There  
5 was a total loss of the right eye's "epithelium" (cornea cover), resulting in a loss of transparency  
6 in both eyes. RP (9/12) 57-58, 72-73; Ex. 7. It was "the most severe corneal abrasion [one]  
7 could have," which caused "a lot of pain." RP (9/12) 58-59. This was a later phase of the life-  
8 altering destruction petitioner euphemistically describes as an "eye injury" in her request for less  
9 punishment. Pet. at 34.

10  
11 Courtney drove petitioner to the hospital with K.M.'s eye medication.<sup>28</sup> Petitioner was  
12 expressionless. RP (9/24) 173. Dr. Kinghorn explained the severity of K.M.'s condition to them.  
13 RP (9/26) 78. Courtney wept. RP (9/26) 80-82, 93. Petitioner exhibited little emotion. RP (9/26)  
14 80-82, 93. She kept interrupting Kinghorn's explanation of K.M.'s traumatic brain injury to talk  
15 about horses. The trial judge whose sentence is again challenged as disproportionate likewise  
16 perceived petitioner's clear preoccupation with horses in moments when her children's welfare  
17 was rightly the preeminent concern of everyone else:

18 Ms. Mothershead, ... I watched you while you were looking at the evidence  
19 presented to the jury. And you are a very calm, stoic ... person. But there w[ere]  
20 points during your testimony where I saw your face light up, and I saw joy wash  
21 over your face, and there was a twinkle in your eye. And those were the times you  
22 were talking about horses. In fact, it happened in front of me today. You gave a  
23 long speech, and you smiled only when you were talking about horses. Not while  
24 you were talking about those good times you were having with K[M.] or your  
love for K[M.] or [your other daughter]. It was only about horses. That's what the  
Court saw, that's what the Court heard.

25 <sup>25</sup> RP (9/19) 112; (9/30) 22-23; (10/1) 119.

<sup>26</sup> RP (9/12) 57; (9/18) 73-75, 127-28; (9/19) 115; (9/23) 25-26; Ex. 12-19, 70-71.

<sup>27</sup> RP (9/23) 113; Ex. 20-22, 24-25.

<sup>28</sup> RP (9/24) 162; (10/1) 119, 121, 123.

1 RP (11/15) 17-18. Moments before, K.M. had been mentioned, then petitioner described the  
2 Bowie home as "somewhere for my horse to live and somewhere for me to ride." *Id.* at 12. At  
3 trial, her life at the Bowie home was revealed to be centered on her having a rent free place to  
4 live, her ability to ride a horse stabled there, and her capacity to continue the affair with  
5 Matthew.<sup>29</sup> Petitioner believed those benefits would end when K.M.'s health improved, for it  
6 marked the day when they were expected to move out. RP (10/1) 149.

7  
8 Detective Sergeant Berg responded to the hospital with Detective Anderson.<sup>30</sup> They  
9 were tasked with investigating K.M.'s suspicious head trauma. *Id.* Berg was a 27 year veteran of  
10 the Sheriff's Department who supervised the special assault unit and served as Pierce County's  
11 child death investigator, yet it was "hard" for Berg to describe "how grotesque" K.M.'s eyes  
12 appeared.<sup>31</sup> Infant eyes so grotesque they were hard for a hardened child death investigator to  
13 describe, yet petitioner easily sums it up as "eye injury" in her request for less punishment. Pet.  
14 at 34. Police took K.M. into protective custody.<sup>32</sup> Petitioner only became argumentative when  
15 police would not let her put more medicine in K.M.'s eyes.<sup>33</sup> Petitioner was so fixated on putting  
16 more of that poison into K.M.'s eyes that petitioner never even asked to say good bye to K.M.  
17 before leaving the hospital.<sup>34</sup>

18 Dr. Heistad treated the blood accumulating in K.M.'s brain May 13th and 14th of 2011.<sup>35</sup>  
19 Concerned the damage to K.M.'s eyes was caused by a chemical burn, pH testing was ordered.  
20 RP (9/19) 20. Heistad performed the test. *Id.* He retrieved K.M.'s medicine (which included  
21 "Tobramycin") from the cooler in K.M.'s hospital room upon seeing K.M.'s name on the bottles.  
22

23 <sup>29</sup> RP (10/1) 56, 134, 136-38.

24 <sup>30</sup> RP (9/18) 60-61.

<sup>31</sup> RP (9/18) 73-74, 78; (9/23) 25; Ex. 20-21, 22-24.

<sup>32</sup> *Id.* at 81-82.

25 <sup>33</sup> *Id.* at 84-85; (9/23) 28.

<sup>34</sup> RP (9/18) 84-85, 148-49; (9/23) 28-29; (10/2) 4-5, 7-8.

<sup>35</sup> RP (9/19) 13-14, 16-17.

1 *Id.* at 21-23. Antibiotics like Tobramycin have a mild odor, and would not normally burn skin  
2 or eyes. RP (9/26) 49. As Heistad opened K.M.'s bottle of Tobramycin an eye-burning, nausea-  
3 inducing odor filled the room, which caused nursing staff to respond from a station more than  
4 20 feet away.<sup>36</sup> The Tobramycin issued to K.M. had been compounded in a sterile environment  
5 and stored in a secure facility within Seattle Children's Hospital, which had "never" received  
6 complaints of adverse symptoms associated with the Tobramycin prescribed to K.M.<sup>37</sup> None of  
7 its compounded ingredients had been recalled by the manufacturers. RP (9/30) 62.

8  
9 Dr. Sugar arranged for police to collect K.M.'s medicine.<sup>38</sup> It was properly stored in a  
10 secure area.<sup>39</sup> Detective Berg examined it with Detective Anderson on May 18, 2011.<sup>40</sup> An  
11 "overwhelming" noxious chemical odor filled the room as Anderson opened the bottle.<sup>41</sup> The  
12 "acid" vapor caused Anderson's eyes as well as the exposed skin between her glove and sleeve  
13 to burn.<sup>42</sup> Seattle Children's provided police a reference sample of the Tobramycin that likely  
14 came from the same batch as K.M.'s Tobramycin.<sup>43</sup> Testing conducted by five FDA forensic  
15 chemists revealed K.M.'s Tobramycin was only consistent with the sample of Tobramycin they  
16 purposely spiked with bleach in the laboratory.<sup>44</sup> Chloride, chlorate with oxidizers—a sign of  
17 bleach tampering—was present in K.M.'s Tobramycin. RP (9/17) 87. Her Tobramycin was also  
18 brown, which differentiated it from the unadulterated-clear reference sample, until it was spiked  
19 with bleach by FDA chemists to make the comparison.<sup>45</sup>

20  
21  
22 <sup>36</sup> RP (9/19) 23, 28-29, 34; (9/26) 53, 58-59; CP 366 (Ex. 146A).

23 <sup>37</sup> RP (9/26) 10, 12, 16-21, 33-34, 40-41, 44, 50, 52, 54-55.

24 <sup>38</sup> RP (9/18) 89-90; (9/19) 26.

25 <sup>39</sup> RP (9/18) 90, 94-98; (9/23) 34, 66.

<sup>40</sup> RP (9/18) 94; (9/23) 34.

<sup>41</sup> RP (9/18) 98-99, 102; (9/19) 82; (9/23) 38, 74-75.

<sup>42</sup> RP (9/18) 98-100; (9/23) 39, 75-76; Ex. 43-44.

<sup>43</sup> RP (9/18) 104-05; (9/19) 49-50, 57-58; (9/30) 62.

<sup>44</sup> RP (9/17) 7, 38-40, 43-44, 46-47, 56, 61-62, 86; (9/18) 110, 113; (9/23) 44-45, 132, 154, 165-66.

1 Dr. Weiss learned of K.M.'s admission to Harborview. RP (9/12) 50. Weiss concluded  
2 K.M.'s condition was consistent with her mother or another "selectively" "instill[ing] some  
3 noxious agent" onto K.M.'s eyes to incite her affliction.<sup>46</sup> She opined K.M.'s 360 degree corneal  
4 blood vessel growth and "epithelium" thinning was induced by the eyes' "severe toxic reaction  
5 to whatever was instilled;" indicative of irreversible damage caused by "toxic epitheliopathy" (a  
6 very noxious agent being repeatedly instilled onto her eyes). RP (9/12) 60-61. Everything other  
7 than "toxic epitheliopathy" was ruled out.<sup>47</sup> K.M. remained in pain most of the time. RP (9/24)  
8 19. She "whimpered a lot" notwithstanding the pain relief medication she received. *Id.* Surgical  
9 intervention will be necessary to address the extensive destruction of her little eyes.<sup>48</sup>

10  
11 K.M.'s condition improved once she was removed from petitioner's *care*.<sup>49</sup> Two years  
12 later a blanket must still be draped over K.M.'s head whenever she ventures into daylight. RP  
13 (9/30) 28. There is scaring, and with it continued concern she will endure permanent blindness.  
14 RP (9/26) 118. Both of K.M.'s eyes are permanently damaged in a way which will cause her to  
15 experience lifelong discomfort. RP (9/12) 64-66. "Neovascularization" (blood vessel expansion  
16 over the eyes) will prevent her from receiving a successful cornea transplant. *Id.* at 66. Her  
17 vision will never improve beyond "20/260." *Id.* at 67. But it is expected to get worse with time.  
18 *Id.* Or as petitioner puts it in her request for less punishment: K.M. has an "eye injury." Pet. at  
19 34. Despite K.M.'s great disabilities, she is once again happy and able to play.<sup>50</sup>

20  
21 This Court transferred petitioner's appeal to Division I, which affirmed her conviction  
22 and sentence. Apx.B. Denial of her motion to suppress K.M.'s medicine was affirmed as there  
23

24 <sup>45</sup> RP (9/17) 36, 56, 180; (9/26) 30, 51-52.

<sup>46</sup> RP (9/12) 50-51, 54-56, 71.

<sup>47</sup> RP (9/12) 64-65, 69, 74, 112-113, 117-19, 123-24; (9/23) 95-98.

<sup>48</sup> RP (9/12) 59-60.

<sup>49</sup> RP (9/23) 47-48; (9/26) 117-18; (9/30) 26-29, 32; Ex. 47-52, 208.

<sup>50</sup> RP (9/30) 29-30.

1 was no evidence to support the claim police directed its investigation by hospital staff. *Id.* at 32-  
2 33. Petitioner's effort to argue a new unsupported theory for suppression was rejected. *Id.* The  
3 three evidentiary rulings petitioner challenged were affirmed. *Id.* at 33-41. Division I could not  
4 find facts to support her effort to blame Matthew for the assault upon K.M. *Id.* Defense counsel  
5 conceded foundation for the theory could not be produced. *Id.* at 35-38. So Division I held:

6  
7       Contrary to repeated assertions on appeal, there was no evidence of the motive of  
8       Matthew Bowie or anyone else and no evidence connecting someone else to the  
9       crime. There is no "combination of facts or circumstances" that "point to a  
10       nonspeculative link" between someone else and the charged crime.

11 *Id.* at 38 (citing *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014)). Petitioner was  
12 nonetheless allowed to argue her theory of Matthew's responsibility for K.M.'s condition. *Id.* at  
13 36-37. Although the PRP challenges references to K.M.'s brain bleed as unduly prejudicial, at  
14 trial Matthew's discovery of the corresponding soft spot on K.M.'s head was tactically employed  
15 by petitioner in closing to deflect blame toward Matthew. *Id.* at 37. The jury did not believe his  
16 conduct raised a reasonable doubt about her guilt. Several claims in the PRP are reformulations  
17 of that same unfounded other-suspect defense.

18       Division I affirmed the exclusion of petitioner's character evidence because the specific  
19 instances of conduct she proffered were prohibited by ER 404(a)(1) and failed to meet ER  
20 405(b)'s requirements as "character" is not an element of, or defense to, child assault. *Id.* at 39  
21 (citing *State v. Stacy*, 181 Wn.App. 553, 566, 326 P.3d 136 (2014)). Petitioner's rejected effort  
22 to elicit self-serving hearsay without an exception was likewise affirmed. *Id.* at 40-41. Division  
23 I refused to consider theories of admissibility that were not supported at trial despite the chance  
24 she was given to do so. *Id.*; *State v. Moham*, 167 Wn.2d 140, 153-54, 217 P.3d 321 (2009)).

25       Division I agreed with the decision not to instruct on the inferior degree offense of third  
degree child assault. Apx.B at 41. Petitioner rightly does not relitigate that claim in the PRP;

1 however, she raises a related challenge to the evidence's sufficiency to prove the intent element  
2 of the assault. Division I's decision the evidence only supported intent based first degree assault  
3 to the exclusion of negligence based third degree assault refutes the claim. *Id.* at 41-44. It was  
4 further refuted in Division I's identification of the evidence that proved petitioner's assault upon  
5 her daughter was *deliberately* cruel:

6  
7 When viewed in the light most favorable to the State, the evidence showed  
8 [petitioner] repeatedly administered to K.M. eye medications that were  
9 contaminated with bleach. The evidence showed K.M. "cried," "screamed," and  
10 "fought" when [petitioner] administered the eye drops. [Petitioner] told  
11 [d]jective[s] ... she knew K.M. was "in a lot of pain." A rational jury could find  
12 physical, psychological, or emotional pain beyond that inherent in the elements  
13 of assault of a child in the first degree.

14 *Id.* at 53-54. Division I decided petitioner's punishment was proportionate to her crime:

15 because [she] repeatedly placed a toxic substance in K.M.'s eyes and [petitioner]  
16 used her position of trust as K.M.'s mother with primary physical custody and  
17 primary caretaking duties to do so.

18 *Id.* at 56. All of which was predicated on evidence of an intentional infliction of harm.

19 C. ARGUMENT

20 Personal restraint procedure has origins in the State's habeas corpus remedy, guaranteed  
21 by article 4, section 4, of the State Constitution. A personal restraint petition is not a substitute  
22 for appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-824, 650 P.2d 1103 (1982).  
23 Collateral relief undermines the principles of finality, degrades the prominence of trial and may  
24 deprive society the right to punish offenders. *Id.*; *In re Pers. Restraint of Woods*, 154 Wn.2d  
25 400, 409, 114 P.3d 607 (2005). These significant costs require collateral relief to be limited. *Id.*

In this collateral action, petitioner must prove constitutional error resulted in actual  
prejudice. Mere assertions are insufficient to demonstrate prejudice. The rule that constitutional  
errors must be proven harmless beyond a reasonable doubt has no application. *In re Pers.*

1 **Restraint of Mercer**, 108 Wn.2d 714, 718-721, 741 P.2d 559 (1987); **Hagler**, 97 Wn.2d at 825;  
2 **Woods**, 154 Wn.2d 409. A petitioner must show a fundamental defect resulted in a complete  
3 miscarriage of justice to obtain collateral relief for alleged nonconstitutional error. *In re Pers.*  
4 **Restraint of Cook**, 114 Wn.2d 802, 812 792 P.2d 506 (1990); **Woods**, 154 Wn.2d 409. This is a  
5 higher standard than actual prejudice. **Cook**, at 810. Inferences must be drawn in favor of the  
6 judgment's validity. **Hagler**, 97 Wn.2d at 825-826. Reviewing courts have three options in  
7 evaluating personal restraint petitions:

- 8 1. If a petitioner fails to meet the threshold burden of showing actual  
9 prejudice from constitutional error or a fundamental defect resulting in a  
10 miscarriage of justice, the petition must be dismissed;
- 11 2. If a petitioner makes a prima facie showing of actual prejudice or  
12 manifest injustice, but the merits cannot be determined on the record, the  
13 court should remand for a hearing on the merits or for a reference hearing  
14 pursuant to RAP 16.11(a) and RAP 16.12;
- 15 3. If the court is convinced a petitioner has proven actual prejudice arising  
16 from constitutional error or a miscarriage of justice, the petition should  
17 be granted.

18 **In re Pers. Restraint of Hews**, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

- 19 1. THIS COURT SHOULD DISMISS PETITIONER'S SUCCESSIVE  
20 ATTACK UPON EVIDENTIARY RULINGS, THE SUFFICIENCY  
21 OF EVIDENCE SHE INTENTIONALLY PUT BLEACH IN K.M.'s  
22 EYES AND THE SENTENCE SHE JUSTLY RECEIVED FOR THAT  
23 EXCEPTIONAL CRUELTY AS PETITIONER HAS NOT PROVED  
24 JUSTICE WOULD BE SERVED BY REDUNDANT REVIEW OF  
25 THOSE STILL MERITLESS CLAIMS.

"A PRP is not a substitute for a direct appeal...." **In re Pers. Restraint of Wolf**, 196  
Wn.App. 496, 502, 384 P.3d 591 (2016). "[T]he availability of collateral relief is limited." *Id.*  
"Relief by way of a collateral challenge to a conviction is extraordinary...." *Id.* A "petitioner  
must meet a high standard before this court will disturb an otherwise settled judgment." *Id.*  
Claims addressed on appeal will not be reconsidered in a subsequent PRP unless the petitioner  
shows the ends of justice would be served thereby. **In re Pers. Restraint of Jeffries**, 114 Wn.2d

1 485, 487-88, 789 P.2d 731 (1990); *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 687, 717  
2 P.2d 755 (1986). "[I]dential grounds may often be proved by different factual allegations. So  
3 also, identical grounds may be supported by different legal arguments, ... or be couched in  
4 different language, ... or vary in immaterial respects." *Jeffries*, 114 Wn.2d at 487; *In re Pers.*  
5 *Restraint of Lord*, 123 Wn.2d 296, 329-30, 868 P.2d 835 (1994). PRP's are not designed to  
6 relitigate reformulated claims; instead, PRPs are reserved for review of fundamental errors that  
7 caused actual prejudice or a complete miscarriage of justice. *Lord*, 123 Wn.2d at 329; *In re*  
8 *Pers. Restraint of Runyan*, 121 Wn.2d 432, 453-54, 853 P.2d 424 (1993).

9         Simply revising a previously rejected argument neither constitutes good cause to permit  
10 successive review nor constitutes good cause to reconsider a claim. *Jeffries*, 114 Wn.2d at 488.  
11 Alleged error in a trial court's admission or exclusion of evidence under ER 403, 404, or 702 is  
12 not of constitutional magnitude. *State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009); *State*  
13 *v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); *City of Seattle v. Heatley*, 70 Wn.App.  
14 573, 585-86, 854 P.2d 658 (1993). So even if successive claims of such evidentiary error were  
15 reviewable, they could not win collateral relief unless the petitioner further established a proven  
16 error resulted in a complete miscarriage of justice. *In re Pers. Restraint of Morris*, 176 Wn.2d  
17 157, 171, 288 P.3d 1140 (2012). Nothing less than proof of an illegal sentence or imprisonment  
18 of an actually innocent person can meet the standard's extraordinarily stringent demands. *See In*  
19 *re Pers. Restraint of Turay*, 153 Wn.2d 44, 55, 101 P.3d 854 (2004); *In re Pers. Restraint of*  
20 *Goodwin*, 146 Wn.2d 861, 876-77, 50 P.3d 618 (2002).

21  
22             a.         The successive challenge to the contaminated eye medicine  
                          should not be reviewed, and is meritless.

23         Division I rightly rejected petitioner's Fourth Amendment challenge to the admissibility  
24 of K.M.'s eye medicine. Apx.B at 30-32. There was no evidence hospital staff who examined its  
25 capacity to burn K.M.'s cornea were state agents due to police direction, as petitioner alleged at

1 trial, or because of the labor they performed (perhaps as contractors) for a public hospital, as she  
2 argued on appeal. *Id.*; Apx.C at 21-22. Where a petitioner received an opportunity for full and  
3 fair litigation of a Fourth Amendment claim, collateral relief for the admission of illegally  
4 seized evidence cannot be granted. *Matter of Rountree*, 35 Wn.App. 557, 559-60, 668 P.2d  
5 1292 (1983); *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037 (1976). Petitioner failed to establish  
6 good cause to reconsider her successive suppression claim.

7 Petitioner attempts to recast it as an attack upon the medicine's chain-of-custody, which  
8 has no better claim to review. See *Jeffries*, 114 Wn.2d at 488. The unfounded chain-of-custody  
9 claim also cannot overcome the miscarriage of justice standard for nonconstitutional error. The  
10 proponent of an exhibit need not eliminate all possibility of alteration or substitution. *State v.*  
11 *Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Uncertainties regarding its integrity affect an  
12 exhibit's weight, not its admissibility. *Id.* A jury is free to disregard an exhibit if questions about  
13 chain-of-custody call the exhibit's integrity into doubt. *Id.*

14 There is no chain-of-custody irregularity in this case, much less one rising to the heights  
15 of a complete miscarriage of justice. Every stage of the medicine's journey from the hospital to  
16 court was covered.<sup>51</sup> *Id.* Also covered was the care with which it was packaged, transported,  
17 documented, and secured. *Id.* Petitioner's claim to the contrary is an attack on the unreviewable  
18 credibility findings jurors implicitly made about the exhibit. *State v. Norris*, 126 Wash. 322,  
19 323, 218 P. 203 (1923). Review of this claim should not be granted though its lack of merit  
20 would require dismissal under the standard applied to PRPs.

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<sup>51</sup> RP (9/17) 15-17, 20-24, 26-30, 67-74, 103-04; (9/18) 10-26, 89-123; (9/19) 21-30, 37-59, 70-74; (9/24) 6-27, 32-62; (10/1) 21 (stipulation).

1           b.     Petitioner's meritless negligent investigation claim is a  
2                    successive reformulation of her already rejected other-suspect  
3                    defense.

4           Division I decided petitioner failed to meet her burden of showing the nexus required for  
5 other suspect evidence because "[t]here is no combination of facts or circumstances that point to  
6 a nonspeculative link between someone else and the crime charged." Apx.B at 38. Nothing in  
7 the PRP calls the accuracy of that well-reasoned decision into doubt. *Id.* at 32-83. So there is no  
8 good cause for successive review. Yet petitioner recasts her other-suspect defense as a negligent  
9 investigation claim, blaming her lack of evidence to effectively accuse another on the State's  
10 alleged refusal to interview relevant witnesses.

11           In addition to being a successive reformation of her other-suspect defense, the negligent  
12 investigation claim is not a cognizable basis for relief. The State's duty to preserve potentially  
13 exculpatory evidence does not oblige it to seek out exculpatory evidence or exhaust every angle.  
14 *State v. Wall*, 52 Wn.App. 665, 677, 763 P.2d 462 (1988). "[P]olice are required only to  
15 preserve that which comes into their possession" if its materiality is reasonably apparent. *State*  
16 *v. Judge*, 100 Wn.2d 706, 717, 675 P.2d 219 (1984). Failings in the State's evidence are  
17 addressed by directing juries to acquit if guilt is not proved. Petitioner's properly instructed jury  
18 plainly had all the proof it needed to convict. Petitioner's negligent investigation claim also has  
19 no basis in fact. For Detective Berg interviewed Courtney, Matthew, Cody, and Dr. Weiss.<sup>52</sup>  
20 They were among 34 witnesses who testified at trial. Apx.D.at 1.

21           Embedded in petitioner's reframed other-suspect defense is an unpreserved evidentiary  
22 objection to facts about K.M.'s head trauma, which led doctors to find her caustic eye drops. A  
23 miscarriage of justice cannot be found in such relevant *res gestae* to the assault that almost took  
24

25 \_\_\_\_\_  
<sup>52</sup> RP (9/18) 91, 124-26.

1 K.M.'s sight. Res gestae is admissible to provide immediate context of a charged crime. *State v.*  
2 *Brown*, 132 Wn.2d 529, 575, 940 P.2d 546 (1997); *State v. Lane*, 125 Wn.2d 825, 831, 889  
3 P.2d 929 (1995). It was Matthew's discovery of a soft spot on K.M.'s head that caused her to be  
4 airlifted to a hospital where the poison petitioner put into K.M.'s eyes was discovered. It was in  
5 the context of medical care precipitated by K.M.'s head trauma that police observed petitioner's  
6 incriminating behavior toward her. Exclusion of those details would have wrongly forced jurors  
7 to decide the case from an artificial version of events skewed by seemingly illogical gaps. *See*  
8 *State v. Lillard*, 122 Wn.App. 422, 431-32, 93 P.3d 969 (2004).

10 Petitioner's unpreserved objection to the head trauma evidence reflects a misperception  
11 of how it was strategically used for her benefit. Her counsel opposed the State's request for an  
12 instruction to limit the jury's consideration of the head trauma to its role in bringing the assault  
13 upon K.M.'s eyes to light. RP (10/2) 33-36. Counsel acknowledged the State had not used head  
14 trauma as proof of petitioner's guilt. *Id.* at 35. Counsel's opposition to limiting its use was part  
15 of a stated strategy to cast suspicion on Matthew. *Id.* at 35-35, 41, 56. For counsel perceived his  
16 discovery of the head trauma while petitioner was away to be a favorable fact for her defense.  
17 *Id.* These circumstances firmly fix the head trauma's use in doctrines that preclude relief. It was  
18 properly limited res gestae. It was an aspect of defense strategy to which invited error applies.  
19 *State v. Woods*, 198 Wn.App. 453, 462, 393 P.3d 886 (2017); *State v. Momah*, 167 Wn.2d 140,  
20 153, 217 P.3d 321 (2009). And unpreserved objections to evidence like it are beyond direct  
21 review, so they cannot be reached in a collateral attack. ER 103(a). A complete miscarriage of  
22 justice is nowhere to be found in these facts. So this claim should be dismissed.

1 c. There is no good cause for successive review of the claim  
2 petitioner's factually appropriate sentence is grossly  
3 disproportionate.

4 Division I decided petitioner's exceptional sentence was within the trial court's discretion  
5 to impose based on the deliberate cruelty she inflicted on her particularly vulnerable infant.  
6 Apx.B at 52-56. Petitioner must establish good cause to revisit the issue and that her exceptional  
7 SRA sentence is a miscarriage of justice. Our Supreme Court rejected the practice of restricting  
8 exceptional sentences to terms proportionate with prior sentences in similar cases with the same  
9 salient facts. *State v. Ritchie*, 126 Wn.2d 388, 391, 894 P.2d 1308 (1995). The Court further  
10 rejected a requirement that a sentence be comparable to standard sentences for the same offense.  
11 *Id.* at 391-92, 397. Exceptional sentences are not to be reversed as "clearly excessive" absent an  
12 abuse of discretion. *Id.* They should be affirmed unless based on untenable reasons or impose  
13 conscience shocking terms of confinement. *Id.* at 393. "Had the Legislature intended to tie the  
14 length of exceptional sentences to standard sentences or to correlate the[ir] length ..., it could  
15 have easily so provided." *Id.*

16 Petitioner's 480 month sentence is just under four times the 123 month high end of her  
17 range for first degree child assault. Exceptional sentences involving even higher multiples than  
18 four times the standard range have been upheld. *State v. Flores-Moreno*, 72 Wn.App. 733, 745,  
19 866 P.2d 648 (1994). Division I understandably could not find it to be conscious shocking that  
20 petitioner received such a sentence for condemning her infant to a lifetime pain and progressing  
21 blindness while coming to grips with the psychological trauma of knowing it was intentionally  
22 caused by her own mother. Or as the trial court's detailed findings put it:

24 [Petitioner's] actions in repeatedly, multiple times a day over a period of weeks,  
25 placing a toxic substance into K.M.'s eyes causing permanent damage to K.M.'s  
vision demonstrated deliberate cruelty. This assault on K.M. was not an incident  
that occurred in a spur of the moment loss of temper or out of pent up frustration.

1           Rather, this was a prolonged assault of K.M.'s eyes over weeks without regard to  
2           the obvious pain and injury caused to K.M.

3           Apx.B at 55; Apx.E. The conscience shocking quality of that crime was deemed substantial and  
4           compelling reason enough to affirm the exceptional sentence petitioner received. *Id.*

5           There is a tragically revealing quality to the lack of compassion for K.M. in petitioner's  
6           plea for less punishment. Put the proof of petitioner's guilt aside. Assume she is the mother of  
7           an infant afflicted with eyes ruined by bleach-infused drops; then assume tortured with them for  
8           weeks. Consider petitioner's presence as veteran police and medical personnel described the  
9           extent of the destruction that bleach caused, and will cause, and how it will never be cured. RP  
10          (9/12) 64-67; (9/26) 118. Visualize the heart wrenching pain *loving* parents would experience if  
11          under their watch something so awful befell their infant, now the homicidal rage they would  
12          have to quell upon learning it was intentionally inflicted by another. Now recall petitioner's  
13          pitiless description of it as "an eye injury of unknown origin" and "[d]amage to eye."

14          A claim the exceptional sentence imposed was being unjustly served due to innocence  
15          would be comprehensible if truth to the contrary had not been proved. But a parent *personally*  
16          downplaying the terrible extent of the permanently disfiguring destruction of K.M.'s developing  
17          eyes to frame it as an act less deserving of punishment is incomprehensible. Yet the argument is  
18          a startling example of the disturbing lack of empathy the trial judge detected while observing  
19          petitioner first hand. RP (11/15) 17-18. There is no miscarriage of justice to redress in the  
20          exceedingly just sentence petitioner received. This successive claim should be dismissed.  
21

1 d. There is no good cause to again review sufficiency of the  
2 evidence supporting petitioner's conviction as inherent to the  
3 holding deliberate cruelty was proved is the predicate condition  
4 of an intentional act.

5 Division I's careful review of the evidence led it to conclude petitioner was deliberately  
6 cruel when she inflicted physical, psychological or emotional pain upon K.M. as an end in itself  
7 which went beyond the intent inherent in the elements of first degree child assault. Apx.B at 54.

8 For when properly viewed in the light most favorable to the State:

9 [T]he evidence showed [petitioner] repeatedly administered to K.M. eye  
10 medications that were contaminated with bleach.

11 *Id.* Petitioner's conviction and sentence for the deliberate cruelty aggravator reflects a finding by  
12 the jury, trial court and Division I that the evidence revealed a form of aggravated intent  
13 exceeding the intent first degree child assault requires. RCW 9A.36.120; RCW 9.94A.535(3)(a);  
14 See *State v. Elmi*, 166 Wn.2d 209, 216, 207 P.3d 439 (2009); *State v. Tili*, 148 Wn.2d 350, 369,  
15 60 P.3d 1192 (2003). Deliberate acts are "characterized by ... slow careful thorough calculation  
16 and consideration of ... consequences...." Webster's Third New International Dictionary 596  
17 (2002); *State v. Brown*, 132 Wn.2d 529, 611, 940 P.2d 546 (1997). Whereas an act need only be  
18 one's objective to be intentional. RCW 9A.08.010. So one cannot unintentionally do something  
19 deliberately. The PRP's challenge to the evidence is consequently a reformulation of an already  
20 rejected claim that should not receive successive review.

21 A painstakingly assembled presentation of the record supporting the jury's verdict in this  
22 case is presented above in the explanation of petitioner's restraint. It is incorporated here, for it  
23 contains so much information based on lengthy citations that it cannot be usefully summarized.  
24 This space will be devoted to explaining why evidentiary theories petitioner raises to challenge  
25 her conviction cannot prevail in a PRP. In different ways petitioner argues her intent was not

1 directly proved. One conceptual problem with her theory is "circumstantial evidence is not to be  
2 considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 637, 618  
3 P.2d 99 (1980). When combined with the demand all reasonable inferences be drawn in support  
4 of her conviction, it is clear why on appeal she "concede[d] affirmative evidence allowed a  
5 reasonable inference [she] did ... assault K.M. ...." Apx.B at 44. The trial court recited some  
6 evidence proving intent in rejecting petitioner's half-time motion. *Id.* at 24. Her attack on the  
7 credibility of witnesses who supplied the evidence is not reviewable. *Norris*, 126 Wash. at 323.  
8

9 This permutation of petitioner's sufficiency challenge takes the form of an unpreserved,  
10 so unreviewable, ER 702 objection. ER 103. Her theory conflates *speculation* about causation  
11 with expert opinions based on "differential diagnosis." Courts "have held that ... methodology  
12 is well-recognized and reliable." *In re Pers. Restraint of Morris*, 189 Wn.App. 484, 495, 355  
13 P.3d 355 (2015); ER 702. It consists of systematically excluding other possible causes of an  
14 injury. *Id.* Which is precisely what occurred in this case, e.g.:

15 K.M.'s 360 degree corneal blood vessel growth and "epithelium" thinning was  
16 induced by the eyes' "severe toxic reaction to whatever was instilled;" indicative  
17 of irreversible damage caused by "toxic epitheliopathy" (a very noxious agent  
18 being repeatedly instilled onto her eyes). ... Everything other than "toxic  
19 epitheliopathy" was ruled out.<sup>53</sup>

20 Special consideration is given to attending physicians, for they are not experts hired to give a  
21 particular opinion consistent with a party's point of view. See *Intalco Aluminum v. Dept. of*  
22 *Labor & Indus.*, 66 Wn.App. 644, 654, 833 P.2d 390 (1992). So ER 702's requirement of  
23 helpful testimony to be weighed according to the jury's instructions was met.

24 ER 702's qualifications requirement was also met by the distinguished cadre of medical  
25 experts who testified at petitioner's trial. RP (9/12) 4 (Dr. Weis: 20 years as Seattle Children's

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<sup>53</sup> RP (9/12) 60-61, 64-65, 69, 74, 112-113, 117-19, 123-24; (9/23) 95-98.

1 Chief of Ophthalmology); (9/18) 12, 30-31 (Dr. Bennett: pediatric dermatologist educated at  
2 Dartmouth and Harvard who specializes in child skin diseases); (9/19) 11 (Dr. Heistad: board  
3 certified in pediatrics), 110 (Dr. Davis: pediatric internist educated at Stanford and Virginia), 86  
4 (Dr. Zerr: pediatric infectious disease specialist); (9/24) 13 (Dr. Grow: educated at Dartmouth  
5 and Univ. of Pennsylvania), 27 (Dr. Herlihy: pediatric ophthalmologist and assistant professor  
6 of medicine educated at Notre Dame and Loyola); (9/26) 65 (Dr. Kinghorn: pulmonology), 95  
7 (Dr. King: ICU pediatric physician educated at Berkley and Irvine), 107 (Dr. Merril: family  
8 physician educated at Stanford and Univ. of Washington).

9  
10 They were joined by five forensic chemists from the Food and Drug Administration that  
11 maintains the most sophisticated laboratory in the country for establishing when commercial  
12 products have been tampered with, to include bleach tampering. (9/17) 7 (FDA Jackson: 21 year  
13 forensic chemist), 95 (FDA Kaine: 17 year FDA chemist), 121 (FDA McCauley: 21 year  
14 forensic chemist) 138 (FDA Crowe: 23 year forensic chemist with 15-20 bleach contamination  
15 cases), 159 (FDA Lanzarotta: 5 ½ year forensic chemist who published 7 papers). Testing  
16 conducted by them revealed K.M.'s eye drops were only consistent with a reference sample of it  
17 spiked with bleach.<sup>54</sup> Chloride, chlorate with oxidizers—a sign of bleach tampering—were  
18 present. RP (9/17) 87. It was brown, different from the unadulterated-clear reference sample,  
19 until it was spiked with bleach for comparison.<sup>55</sup> Seattle Children's pharmacy staff excluded the  
20 chance of the bleach infusion before K.M.'s drops were given to petitioner. RP (9/26) 6, 32, 65.

21  
22 Petitioner heavily relies on the unpublished decision in *State v. Rogers*. PRP at 35  
23 (citing *Rogers*, 122 Wn.App 1050; 2004 Wash.App. Lexis 1715; No. 30205-5-II). Although she  
24 cites GR 14.1, it appears she did not note unpublished cases can only be cited if issued after

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<sup>54</sup> RP (9/17) 7, 38-40, 43-44, 46-47, 56, 61-62, 86; (9/18) 110, 113; (9/23) 44-45, 132, 154, 165-66.

<sup>55</sup> RP (9/17) 36, 56, 180; (9/26) 30, 51-52.

1 March 1, 2013. In accordance with the State's entitlement to make a fair response to improper  
2 arguments,<sup>56</sup> the State adds that the case is inapposite. The failing it addressed was a speculative  
3 identification used to adduce a statement of debatable accuracy argued as Roger's admission of  
4 guilt. Meanwhile, the injury in that case could have been caused by a single abrupt accidental  
5 event like a handlebar injury. But the only cause of the destruction done to K.M.'s eyes over the  
6 course of weeks, which had not been excluded, was a noxious agent repeatedly instilled on her  
7 eyes. So the case petitioner relies on cannot be considered, nor would it help her PRP prevail if  
8 it could. Her attack upon the compelling proof of her guilt remains meritless.  
9

10 2. DISMISSAL OF PETITIONER'S INEFFECTIVE ASSISTANCE OF  
11 COUNSEL CLAIMS IS WARRANTED BECAUSE THE RECORD  
12 REVEALS SHE WAS JUSTLY CONVICTED DESPITE BEING  
13 WELL REPRESENTED BY A STRATEGIC ADVOCATE WHO  
14 REASONABLY DEFENDED HER AGAINST THE COMPELLING  
15 PROOF THAT UNDERSTANDABLY PERSUADED THE JURY TO  
16 CONVICT HER AND A CAREFUL TRIAL JUDGE TO IMPOSE AN  
17 EXCEPTIONAL SENTENCE FAR ABOVE HER RANGE.

18 A successful ineffective assistance of counsel claim requires petitioner to show counsel's  
19 performance was unconstitutionally deficient and prejudicial. *In re Pers. Restraint of Crace*,  
20 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). To prove counsel was "deficient," a petitioner must  
21 establish counsel made errors so serious she was not functioning as the "counsel" guaranteed by  
22 the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2042 (1984).  
23 This in turn requires a petitioner to prove the representation fell below an objective standard of  
24 reasonableness. *Id.* Judicial scrutiny of counsel's performance "must be highly deferential." It is  
25 all too tempting for a petitioner to second-guess counsel's assistance after conviction or adverse  
sentence, as it is all too easy for courts, examining a defense after it has proved unsuccessful, to

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<sup>56</sup> See *State v. Russel*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

1 conclude a particular act or omission was unreasonable. *Id.* at 689. Because of the difficulty  
2 eliminating distorting effects of hindsight, courts "must indulge" a strong presumption counsel's  
3 conduct was reasonable. "Prejudice" requires proof of a reasonable probability the outcome of  
4 the proceeding would have been different but for unprofessional errors. To be reasonable the  
5 probability must undermine confidence in a case's outcome. *Crace*, 174 Wn.2d at 840, 847.

6         Petitioner alleges counsel failed her in five respects: (1) Decision not to call Intertox Inc.  
7 owner Richard Pleus to rebut scientific proof of petitioner's guilt; (2) Petitioner's feeling counsel  
8 did not adequately prepare her to testify; (3) Counsel's decision not to argue petitioner's factual  
9 innocence; (4) Counsel's decision not to call a medical doctor; and (5) Counsel's decision not to  
10 oppose Dr. Weiss's testimony. Each claim fails as neither deficiency nor outcome determinative  
11 prejudice can be established from the available record.

12         Preliminarily petitioner failed to produce a declaration from her trial counsel, nor has  
13 petitioner produced anything comparable to counsel's entire file. So it must be presumed most  
14 of counsel's work product remains outside the record. *Morris*, 189 Wn.App. at 495 ("We note  
15 *Morris* fails to present a declaration from his counsel .... The omission is telling."). Strategic  
16 reasons for counsel's challenged conduct remain confidentially reposed in counsel's file or head.  
17 An inadequate record precludes meaningful review. *State v. Vazquez*, 66 Wn.App. 573, 583,  
18 832 P.2d 883 (1992); *State v. Locati*, 111 Wn.App. 222, 226, 43 P.3d 1288 (2002). For courts  
19 cannot determine an omission's significance without being credibly informed of the omitted  
20 evidence's substance. *See State v. Jury*, 19 Wn.App. 256, 265, 576 P.2d 1302 (1978). PRPs  
21 must be supported by affidavits stating particular facts, certified documents, certified  
22 transcripts, and the like. *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 759 P.2d 436  
23 (1988). Bare assertions are insufficient. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828  
24  
25

1 P.2d 1086 (1992). If a petitioner's allegations are based on matters outside the record, the  
2 petitioner must demonstrate possession of competent, admissible evidence to establish the facts  
3 entitling her to relief. *In re Pers. Restraint of Connick*, 144 Wn.2d 442, 451, 28 P.3d 729  
4 (2001). PRPs must be dismissed when petitioners fail to support their claims. *Williams*, 111  
5 Wn.2d at 364.

- 6  
7 a. The tentative-engagement letter issued by a toxicologist defense counsel  
8 did not call at trial is not a basis to reverse petitioner's conviction, for  
9 there is no record of a foregone final opinion that would have been  
10 outcome determinative, or a declaration documenting counsel's strategic  
11 reason for challenging the State's proof of petitioner's culpability instead  
12 of the fact K.M.'s eye drops were infused with a caustic chemical.

13 "Generally the decision whether to call a particular witness is a matter for differences of  
14 opinion and therefore presumed to be a matter of legitimate trial tactics." *Morris*, 176 Wn.2d at  
15 171 (citing *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 742, 101 P.3d 1 (2004); see *State v.*  
16 *Mannering*, 150 Wn.2d 277, 287, 75 P.3d 961 (2003) (failure to call defense expert strategic)).  
17 PRPs challenging counsel's presumptively reasonable decision not to call an expert must be  
18 supported by declarations from the expert proffering the opinion that would be rendered if a  
19 new trial were granted. *Matter of Davis*, 188 Wn.2d 356, 378-79, 395 P.3d 998 (2017).  
20 Without a supporting declaration from an expert, PRPs purporting to have one able to render an  
21 outcome determinative opinion are "entirely too speculative" to overcome the burden of proving  
22 ineffective assistance of counsel. *Id.*

23 Petitioner alleges her counsel was deficient for not calling private toxicologist Richard  
24 Peleus as an expert based on a tentative opinion in letters Peleus purportedly sent to counsel on  
25 May 13, 2013, and June 27, 2013. The PRP disingenuously presents Peleus's tentative opinion

1 as definitive by presenting part of it in bold without qualifying text that undermines its capacity  
2 to overcome the foundational requirement of ER 702:

3 My initial opinion, subject to completing my research thoroughly, is that the data  
4 provided to me does not scientifically support Plaintiff's case that the medication  
5 that was administered to [K.M.] caused the adverse effects that are reported in the  
6 medical records.

6 PRP Apx.A (letter of May 13, 2013) (emphasis added). The letter then goes on to reveal how  
7 little research the tentative opinion was based on by listing all the work that remained undone:

8 You have also asked me to provide you with an additional budget and general  
9 scope of work to complete my opinion including a report. The scope of work  
10 includes reviewing any additional case documents, completing my research and  
11 summarizing my opinion in a short report.... To complete this work, I estimate a  
budget of \$8,000. Please note this estimate does not include preparation for trial  
or trial attendance as an expert witness.

12 *Id.* (emphasis added). Sophisticated counsel might reasonably interpret this to be a kind of *bait*  
13 *letter, i.e.*, an effort to hook potentially lucrative business by tentatively forecasting a favorable  
14 result the expert is not obliged to deliver once the actual work needed to render a final opinion  
15 is done. Peleus's letter of June 27, 2013, implies counsel diligently responded by requesting a  
16 more thorough description of the work Peleus would need to complete before rendering a final  
17 opinion. Peleus again begins by tentatively forecasting a useful, *ostensibly researched*, opinion.  
18 He claims to have reviewed the medical records and analyzed the toxicology reports. *Id.* Yet he  
19 takes care to make his tentative opinion contingent on his completion of \$8,000 worth of work.  
20 Coincidentally, \$8,000 was the sum his letter of May 13<sup>th</sup> estimated as the cost for completing the  
21 work, which implies nothing more had been done since the review reported May 13<sup>th</sup>.  
22

23 More troubling for counsel contemplating Peleus's utility, is that his tentative opinion of  
24 June 27<sup>th</sup> was purportedly based on his completion of work that matches the \$8,000 worth of  
25 work he still needed to complete before rendering a final opinion:

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

4 \*Task 1-Complete research and assessment of the case:

5 \*Analysis of the forensic laboratory reports from the Washington State  
6 Crime Lab and the FDA Forensic Chemistry Center.

7 \*Review of the medical records regarding [K.M.'s] condition and  
8 prescribed medication.

9 \*Review of court documents and witness statements.

10 \*Toxicological issues that may have contributed to [K.M.'s] condition.

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

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

15 I raise one concern: this budget does not include reviewing any additional case  
16 documents, attending meetings, etc.

17 *Id.* (emphasis added). When one considers all the fundamental work that remained undone, one  
18 might wonder what if anything supported the tentative opinion given to induce the retainer. The  
19 letters make Peleus appear imprecise if not dishonest, by suggesting he completed the very  
20 work he needed \$8,000 to do. These letters at least primed him for devastating impeachment the  
21 moment his placement on the defense witness list vitiated the confidentiality initially attending  
22 them by triggering petitioner's CrR 4.7(b) duty to disclose them to the State. Counsel's integrity,  
23 or prudence, could also explain the decision to stay away from Peleus.

24 Yet petitioner's failure to produce a declaration from counsel or her file leaves one to  
25 speculate about her actual reason for steering clear of him. *E.g.*, *Morris*, 189 Wn.App. at 495.  
For all anyone knows he was paid only to return a final opinion unfavorable to petitioner's case.  
Under this scenario he would have been kept off the witness stand to keep his bad news a secret.  
Or Peleus might have become unavailable due to an intervening retainer. Or counsel may have  
decided his opinions, however favorable, were insufficiently useful when his limited expertise

1 (toxicology) was measured against the combined expertise of the State's medical and toxicology  
2 specialists. One can only speculate without counsel's declaration. *Morris*, 189 Wn.2d at 495.

3 The only relevant certainty is petitioner has yet to produce a final, well-grounded and  
4 thereby ER 702 compliant opinion from Peleus or another that calls her guilt into doubt. That  
5 claim defeating failing was explained in *Davis*, for he likewise failed to produce the expert  
6 opinion he claimed counsel deficiently failed to adduce at trial. 188 Wn.2d at 378-79 (majority),  
7 381-82, fn.2 (McCloud, J., concurring). This PRP depends on the supposition that Peleus, *upon*  
8 *actually completing his research and analysis*, or any other expert could ethically render the  
9 opinion Peleus would only tentatively state in a letter aimed at securing lucrative employment.

10 Putting aside Peleus's impeachability and the record's silence as to strategic reasons for  
11 refraining from his testimony, there is a detectible strategy in the defense counsel advanced.  
12 *Strickland* begins with a strong presumption of proficient performance. *State v. Grier*, 171  
13 Wn.2d 17, 42, 246 P.3d 1260 (2011); *Strickland*, 466 U.S. at 688-92. To rebut it, a petitioner  
14 must establish an absence of any legitimate tactic or strategy for the challenged conduct. *Id.* at  
15 42. "[C]ounsel ... has no duty to pursue [tactics or] strategies that reasonably appear unlikely to  
16 succeed." *State v. Brown*, 159 Wn.App. 366, 371-72, 245 P.3d 776 (2011); *State v. McFarland*,  
17 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Petitioner's counsel reasonably decided to concede  
18 the eye drops were contaminated instead of trying to convince jurors to disbelieve medical  
19 specialists and FDA chemists called by the State. An understandable move when one recalls the  
20 drops were caustic enough to visibly burn skin and emanate an acrid vapor detectable from 20  
21 feet away. Counsel instead directed the defense at trying to persuade jurors that the State failed  
22 to prove petitioner was aware the drops were contaminated when she administered them.

23  
24  
25 Petitioner raises a similar challenge to counsel's decision not to call a doctor. Again, she

1 failed to produce a declaration from counsel about the decision, so her strategy remains beyond  
2 review. Another claim defeating failing is petitioner's failure to produce an ER 702 compliant  
3 opinion from a doctor with an outcome determinative position about the case. The investigation  
4 required, if any, varies according to each case. *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d  
5 956 (2010). Counsel is not required "to scour the globe on the off chance something will turn  
6 up...." *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S. Ct. 2456 (2005); *Wiggins v. Smith*, 539  
7 U.S. 510, 525, 123 S. Ct. 2527 (2007). Diligent counsel may draw a line when they have good  
8 reason to think further investigation would be a waste. *Id.* The fact useful evidence might have  
9 come from more investigation does not establish ineffective assistance, for defendants are not  
10 entitled to perfect counsel. *State v. Adams*, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978). K.M.'s  
11 treating physicians were called. There is no proof an uncalled doctor could have ethically  
12 contradicted their testimony, much less in an outcome-determinative way.

14 An overview of counsel's conduct demonstrates how her reasonable strategy took shape.  
15 She tried to have the contaminated drops suppressed, which, if successful, would have limited  
16 proof of causation.<sup>57</sup> Counsel admittedly planned to spring a foundational challenge on the State  
17 to undermine the persuasiveness of the eye drop evidence late in the proceeding. RP (9/26) 135-  
18 36. Counsel persuaded the court to exclude reference to "Munchausen by Proxy" syndrome—a  
19 mental health problem in which caregivers cause an injury in a child under their care as a means  
20 of securing attention or financial assistance.<sup>58</sup> Counsel moved to exclude police testimony that  
21 could be interpreted as an indirect comment on petitioner's credibility. RP (8/21) 139.

25 <sup>57</sup> RP(8/20) 4; (8/21) 7, 91-95.

<sup>58</sup> RP(8/20) 100-101; (8/21) 140; (9/9) 26-27; ER 201; <https://www.webmd.com/mental-health/tc/munchausen-syndrome-by-proxy-topic-overview#1>

1 A clear marker of counsel's strategy was manifest in her remark regarding how her most  
2 zealous cross examination would be directed at Matthew and Courtney—the people who let  
3 petitioner to live in their home rent free until K.M.'s health improved. RP (8/21) 170. Counsel  
4 made every effort to introduce circumstances she wanted to argue as other-suspect evidence, but  
5 was confounded by a lack of foundation for the defense due to no fault of her own.<sup>59</sup> Counsel  
6 also tried to introduce petitioner's self-serving hearsay under a *creative* notion of the rule of  
7 completeness. RP (9/23) 64; (10/1) 127-28. Further effort was invested in casting petitioner as a  
8 dutiful mother through specific instances of conduct. RP (9/30) 44-46. It was wed to argument  
9 she had no reason to know K.M.'s drops were contaminated. RP (10/1) 24. Counsel sought  
10 instructions tailored to her theory.<sup>60</sup> A theory she ably argued. RP (10/3) 46-48. Petitioner's  
11 problem is not her counsel—it is the compelling proof of her guilt.  
12

13  
14 b. Petitioner's self-serving allegation that counsel failed to prepare her to  
15 testify and did not advocate for her is refuted by the available record,  
16 which has not been contradicted by any extrinsic evidence.

17 Trial counsel have great latitude to decide the level of witness preparation demanded by  
18 a given case. *In re Pers. Restraint of Monschke*, 160 Wn.App. 479, 493-94, 251 P.3d 884  
19 (2010) (citing *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 488, 965 P.2d 593 (1998) (no  
20 absolute need to interview); *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 755, 16 P.3d 1  
21 (2001). For it is a nuanced decision grounded in predications about witness demeanor, which  
22 plays a crucial role in criminal trials. *E.g.*, *In re Detention of Stout*, 159 Wn.2d 357, 383, 150  
23 P.3d 86 (2007). Demeanor consists of:

24 [A] person's manner ... bearing, mien: facial appearance. ... It is the carriage,  
25 behavior, bearing, manner and appearance of a witness.... A witness's demeanor

<sup>59</sup> *E.g.*, RP (9/9) 31; (9/23) 165, 170-84; (9/24) 10, 62-95, 131-52; (9/26) 135; (10/1) 96-114; (10/3) 46-68.

<sup>60</sup> *Id.* at 176-77; (10/2) 26-41.

1 includes the expressions of h[er] countenance, how [s]he sits or stands, whether  
2 [s]he is inordinately nervous, h[er] coloration during critical examination, the  
modulation or pace of h[er] speech and other non-verbal communication.

3 *Id.* at 383. An unprepared-lay witness may struggle to recall details in a way that detracts from  
4 perceived credibility. At the same time overly prepared witnesses can come across scripted, or  
5 worse, coached. Spontaneity may imbue testimony with the trappings of truth. These realities of  
6 trial practice cannot be assessed from a cold record. *See Id.*

7  
8 Counsel had in petitioner a witness whose affect was perceived by witnesses to be oddly  
9 unemotional when her infant's catastrophic condition was discussed. The trial judge made a  
10 similar observation after petitioner recited apparently prepared remarks at sentencing. So there  
11 is reason to believe a veteran trial attorney, like her counsel, adapting to petitioner's decision to  
12 testify, would try to avoid having her answer questions by the card instead of candidly from  
13 recollection, if at all possible under the circumstances of her case.

14 A criminal defendant's decision whether to testify is understood to be difficult. *State v.*  
15 *Brown*, 113 Wn.2d 520, 540, 782 P.2d 1013 (1989); *McGautha v. California*, 402 U.S. 183,  
16 213, 91 S.Ct. 1454 (1971). There is no reason to think petitioner perfected the record of the  
17 confidential communications she had with counsel about testifying. *E.g.*, RP (6/7) 3 ("Ms.  
18 Pierson: "Number one ... I represent [petitioner]. Number two, I am not going to engage in a ...  
19 discussion about communications between my client and myself."). Proof counsel was talking  
20 to petitioner about testifying appears in the record. *E.g.*, 1RP (8/20) 4-5, 87 ("Obviously,  
21 [petitioner] and I have discussed this, and I've given her my advice. It is her decision."); (8/21)  
22 (Ms. Pierson: "I have advised my client of her right to testify or not testify. And I've given her  
23 my advice."); (9/24) 93-96; (9/30) 65-66; (10/1) 37.

1 Petitioner's testimony was not about an obscure event she struggled to recall; it detailed  
2 how she came to live with the Bowies and allegedly responded to K.M.'s symptoms. RP (10/1)  
3 38-171. Without a declaration from counsel, one cannot know how she prepared petitioner for  
4 that testimony. But it has been said: "*If you tell the truth you don't have to remember anything.*"  
5 Mark Twain, 1894. It is not clear how petitioner believes she could have been better prepared to  
6 talk about her life. Counsel could not coach her, and there is no proof more preparation would  
7 have changed the result. *See Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330 (1976).  
8

9 c. Petitioner's claim counsel was not a zealous enough advocate because of  
10 her decision not to ask petitioner if she was factually innocent or argue  
11 factual innocence in summation betrays a lack of appreciation for the real  
12 risks attending that mostly ill-advised strategy of defense.

12 The State bears the burden of proving guilt beyond a reasonable doubt. *State v. Cantu*,  
13 156 Wn.2d 819, 328, 132 P.3d 725 (2006). It is reasonable for counsel to hold the State to it  
14 rather than try to convince jurors of a client's factual innocence. *See Id.*; *State v. Israel*, 113  
15 Wn.App. 243, 271, 54 P.3d 243 (2002). Commonly only convicted offenders endeavor to prove  
16 innocence, and only once they have exhausted every other avenue to relief. *E.g., In re Pers.*  
17 *Restraint of Carter*, 172 Wn.2d 917, 929, 263 P.3d 1241 (2011). Decisions about how close to  
18 the line of inquiring about or arguing factual innocence an advocate should approach is a matter  
19 of strategy. *State v. Stockman*, 70 Wn.2d 941, 945, 425 P.2d 898 (1967) (extent of examination  
20 is strategy); *Israel*, 133 Wn.App. at 271 (reasonably omitted argument). Although attorneys can  
21 raise meritless defenses in criminal cases; as officers of the court, they cannot suborn perjury or  
22 knowingly urge a tribunal to credit perjury in summation. APR 5; RPC 3.1; *Matter of Kerr*, 86  
23 Wn.2d 655, 663, 548 P.2d 297 (1976).  
24  
25

1 Petitioner claims counsel failed to argue for acquittal. That is not true. Almost the first  
2 words out of counsel's mouth in summation forcefully urged the jury to acquit:

3 Thank you, Your Honor. Ms. Sanchez. Jenny. Let's be honest about it. I just have  
4 one message for you and one argument. And here it is .... *Jennifer is not guilty.*

5 RP (10/3) 46 (emphasis added). Counsel argued inferences she drew against the State's case. *Id.*  
6 46-68. Counsel pointed to facts presented as corroborating petitioner's credibility. *Id.* at 64-65.  
7 Counsel then returned to her closing's main point: "[petitioner's] not guilty." *Id.* at 68. A student  
8 of rhetoric might appreciate its structure as reaching for resonance through the textbook tools of  
9 repetition, primacy, and recency.<sup>61</sup>

10 Then there is the reoccurring problem of the unknown, attributable to petitioner's telling  
11 failure to deliver a strategy revealing declaration from counsel. It remains plausible petitioner  
12 confidentially confessed to counsel directly, or indirectly enough to preclude her from ethically,  
13 or very authentically, advancing *factual* innocence as a defense. Counsel could not have asked if  
14 petitioner was factually innocent if a perjurious reply was anticipated. Counsel's duty of candor  
15 would have likewise prevented factual innocence from being argued. Even if petitioner had not  
16 confidentially confessed, putting her to the question of her factual innocence on direct ran the  
17 real risk of jurors detecting deception in her reply. And the evidence of petitioner's guilt gave  
18 counsel reason to fear an answer would be delivered with incriminating demeanor or tone. For  
19 "[e]xperienced lawyers know that what on paper might read as very favorable testimony to the  
20 accused may, ... when given from the witness stand, appear fabricated or suborned and thus far  
21 more damaging that left unsaid." *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). A far  
22  
23  
24

25 <sup>61</sup> H. Mitchell Caldwell et. al., Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into  
the Direct Examination, 76 Notre Dame L. Rev. 423 (2001).

1 safer tactic presents in the course counsel chose—elicit answers close enough in kind to leave  
2 jurors with the impression of asserted innocence without hazarding the direct approach, *e.g.*:

3       When a deceptive subject is asked a question ... he [or she] has essentially four  
4 verbal response options ...: deception, evasion, omission, or truth... An omissive  
5 response implies non-involvement without the use of words ... The implication is  
6 ... the suspect did not engage in the behavior, but no lie is actually being told ...  
7 implying noninvolvement without saying it... Deceptive subjects rely extensively  
8 on implication during verbal responses. The subject hopes the [examiner] will  
9 make unwarranted assumptions about what [he or she] probably meant to say...  
10 During a spontaneous interview, deceptive subjects may deny some narrow aspect  
11 of the [examiner's] question. It must be remembered ... the deceptive subject  
12 knows exactly what the truth is. If he [or she] can truthfully deny some narrow  
13 aspect of the crime, thereby implying total innocence, he [or she] will.

14 Interrogation and Confessions, John E. Reid et al., 5th Ed., p. 111-13 (2013). The prosecutor in  
15 this case caught the tactic in rebuttal, but it might have been missed by a less able practitioner.

16       Arguing petitioner was factually innocent instead of "not guilty" ran the added risk of  
17 impliedly signaling she had assumed the burden of disproving guilt. For such a theory of factual  
18 innocence based on her testimony would subtly invite conviction if her credibility was in doubt.  
19 Reasonable counsel would want the State's high burden of proof to remain the jury's focus due  
20 to its "duty" to acquit if the State came up short irrespective of petitioner's perceived sincerity.  
21 CP 176 (Inst. 10); *Crace*, 174 Wn.2d at 847. Yet now, in the context of an ineffective assistance  
22 claim, this Court "must assume ... the jury would not have convicted [her] ... unless the State  
23 ... met its burden[.]" *Id.* Petitioner has not proved a constitutional deficiency in the reasoned  
24 course counsel took at trial, much less established that an alternate course would have achieved  
25 acquittal instead of reinforced the jury's well-founded belief in petitioner's guilt.

1 d. Counsel's decision to withhold an objection to the testimony of Dr. Weiss  
2 cannot be correctly characterized as deficient, for Weiss was one of K.M.'s  
3 attending ophthalmologists who provided ER 702 testimony that was not  
4 inconsistent with counsel's strategy of conceding K.M.'s eye drops were  
5 contaminated while challenging proof that petitioner was involved.

6 The decision whether to object is a classic example of trial tactics, and only in egregious  
7 circumstances will failure to object constitute ineffective assistance. *State v. Kolesnik*, 146 Wn.  
8 App. 790, 801, 192 P.3d 937 (2008). That rule applies equally to a decision not to challenge an  
9 expert witness. *Id.*; *Morris*, 189 Wn.App. 490, 494-95. Our Supreme Court correctly recognizes  
10 the record each lawyer makes may differ greatly from that of an equally-skilled practitioner.  
11 *Pinche*, 71 Wn.2d at 589-90. "Counsel is not, at the risk of being charged with incompetence  
12 obliged to raise every conceivable point...." *Id.* To prove failure to object rendered counsel  
13 ineffective, petitioner must prove the omission fell below prevailing professional norms, the  
14 objection would likely have been sustained and the result of the trial would have been different  
15 if the evidence at issue had been excluded. *Davis*, 152 Wn.2d at 714. Withholding an objection  
16 to avoid emphasis or projecting concern is tactically sound. *See Davis*, 152 Wn.2d at 714; *State*  
17 *v. McLean*, 178 Wn.App. 236, 247, 313 P.3d 1181 (2013).

18 There is no surprise in petitioner's dislike for what Dr. Weiss had to say about the cause  
19 of K.M.'s condition, for, combined with an array of corroborating evidence, it helped to prove  
20 petitioner's guilt. Yet petitioner's collateral challenges to Weiss's testimony conflate evidence  
21 which is prejudicial in the sense that it is incriminating with *unfair* prejudice, excluded because  
22 it too much "arouse[s] an emotional response rather than a rational" result. *E.g., Carson v. Fine*,  
23 123 Wn.2d 206, 223, 867 P.2d 610 (1994). Weiss's testimony falls within the former category,  
24 for she was one of K.M.'s treating ophthalmologists who was more than qualified to render  
25 helpful opinions about K.M.'s condition under ER 702. Weiss was privy to all possible medical

1 causes of K.M.'s condition, *other than toxic epitheliopathy*, that had been ruled out through the  
2 clinical evaluations undertaken by several other specialists. So there was no foreseeable benefit  
3 attending an objection to Weiss's testimony. The jury was correctly instructed to decide Weiss's  
4 credibility for itself. CP 168 (Inst.1), 172 (Inst. 4). Rather than launching a futile attack upon a  
5 patently credible witness with an opinion corroborated by other patently credible witnesses,  
6 counsel conceded the eye drops were contaminated, then focused on trying to raise doubts about  
7 petitioner's awareness of the contamination. The failure of counsel's effort is attributable to the  
8 proof of petitioner's guilt, not to a lack professionalism on counsel's part. This ineffective  
9 assistance claim should be dismissed with the rest.  
10

11 D. CONCLUSION

12 "Mother is the name for God in the lips and hearts of little children."<sup>62</sup> Yet it is destined  
13 to be the name of K.M.'s pain. It is not a name she will be very likely to read given the  
14 destruction of her eyes. It is a name she will surely hear other children fondly speak. The  
15 contradiction—the cruelty of her mother and the love K.M. will know other mothers to  
16 convey—could not prove anything but excruciating for her to reconcile over the course of what  
17 will be a difficult life. This aggravating attribute of petitioner's crime joins so many others to  
18 make her exceptional sentence extraordinarily just. Successive review of the evidentiary rulings  
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<sup>62</sup> William Makepeace Thackeray, *Vanity Fair*, Vol.II, ch.2.

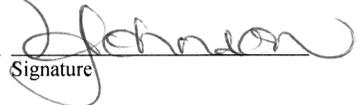
1 and the evidence's sufficiency is unwarranted. And the claims should again fail on the merits if  
2 reconsidered. No more relief should come from the new attacks on the sound service rendered  
3 by her counsel. Dismissal of her PRP is the right result.  
4

5 RESPECTFULLY SUBMITTED: April 6, 2018

6 MARK LINDQUIST  
7 Pierce County  
8 Prosecuting Attorney  
9   
10 JASON RUYF  
11 Deputy Prosecuting Attorney  
12 WSB #38725

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

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

18 4/6/18   
19 Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**April 06, 2018 - 3:01 PM**

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**Appellate Court Case Title:** Personal Restraint Petition of Jennifer Lynn Mothershead  
**Superior Court Case Number:** 12-1-01509-2

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