

FILED  
Court of Appeals  
Division II  
State of Washington  
2/14/2019 3:20 PM

NO. 51119-3-II

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

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In re the Personal Restraint Petition Of:

JENNIFER MOTHERSHEAD

Petitioner

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda Lee, Judge

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PETITIONER'S SUPPLEMENTAL OPENING BRIEF

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MARY T. SWIFT  
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>INTRODUCTION</u> .....	1
B. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	2
C. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Factual Background</u> .....	2
2. <u>State’s Medical and Forensic Experts</u> .....	6
3. <u>Mothershead’s Defense</u> .....	10
4. <u>Conviction, Sentence, Direct Appeal, and Petition</u> .....	11
D. <u>ARGUMENT</u> .....	13
MULTIPLE INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL, SUPPORTED BY COMPETENT EVIDENCE, DEPRIVED MOTHERSHEAD OF A FAIR TRIAL, REQUIRING REVERSAL OF HER CONVICTION. ....	13
1. <u>Ineffective assistance claims made in a personal restraint         petition are subject to the same standard of review as on         direct appeal.</u> .....	13
2. <u>Mothershead’s ineffective assistance claims are supported         by competent evidence, which the State has failed to answer.</u> ..	15
3. <u>Mothershead was denied her constitutional right to effective         representation where her trial counsel failed to adequately         investigate a qualified defense expert’s exculpatory opinion.</u> ..	18
a. <i>Counsel did not make a strategic decision in failing to             pursue the defense expert’s exculpatory opinion.</i> .....	22

**TABLE OF CONTENTS (CONT'D)**

	Page
b. <i>Counsel's error prejudiced Mothershead, where the lack of defense expert left the State's circumstantial case essentially un rebutted.</i> .....	29
c. <i>Reversal of Mothershead's conviction is warranted, but, at the very least, an evidentiary hearing is necessary.</i> .....	34
4. <u>Mothershead was denied her constitutional right to effective representation when her trial counsel failed to elicit critical testimony from Mothershead that she did not adulterate the eye drops in any way</u> .....	36
a. <i>Counsel did not make a strategic decision in failing to elicit Mothershead's denial</i> .....	38
b. <i>Counsel's error prejudiced Mothershead, particularly where the State used Mothershead's lack of denial to bolster its circumstantial case.</i> .....	43
5. <u>The cumulative effect of counsel's unprofessional errors caused enduring prejudice to the outcome of Mothershead's trial.</u> .....	47
E. <u>CONCLUSION</u> .....	48

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Brett</u> 142 Wn.2d 868, 16 P.3d 601 (2001).....	47
<u>In re Pers. Restraint of Crace</u> 174 Wn.2d 835, 280 P.3d 1102 (2012).....	15
<u>In re Pers. Restraint of Davis</u> 152 Wn.2d 647, 101 P.3d 1 (2004).....	7, 28, 38
<u>In re Pers. Restraint of Hews</u> 99 Wn.2d 80, 660 P.2d 263 (1983).....	18
<u>In re Pers. Restraint of Hubert</u> 138 Wn. App. 924, 158 P.3d 1282 (2007).....	24, 27, 34
<u>In re Pers. Restraint of Jeffries</u> 110 Wn.2d 326, 752 P.2d 1338 (1988).....	25
<u>In re Pers. Restraint of Khan</u> 184 Wn.2d 679, 363 P.3d 577 (2015).....	18, 36
<u>In re Pers. Restraint of Lui</u> 188 Wn.2d 525, 397 P.3d 90 (2017).....	15
<u>In re Pers. Restraint of Monschke</u> 160 Wn. App. 479, 251 P.3d 884 (2010).....	35
<u>In re Pers. Restraint of Rice</u> 118 Wn.2d 876, 828 P.2d 1086 (1992).....	16, 17, 35, 36, 44
<u>In re Pers. Restraint of Swagerty</u> 186 Wn.2d 801, 383 P.3d 454 (2016).....	15
<u>Miller v. Likins</u> 109 Wn. App. 140, 34 P.3d 835 (2001).....	29, 40

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Byrd</u> 30 Wn. App. 794, 638 P.2d 601 (1981),.....	40
<u>State v. Estes</u> 188 Wn.2d 450, 395 P.3d 1045 (2017).....	14, 22, 24, 42
<u>State v. Fedoruk</u> 184 Wn. App. 866, 339 P.3d 233 (2014),.....	23, 26, 33, 34
<u>State v. Grier</u> 171 Wn.2d 17, 246 P.3d 1260 (2011).....	38
<u>State v. Jury</u> 19 Wn. App. 256, 576 P.2d 1302 (1978).....	14
<u>State v. Lindsay</u> 180 Wn.2d 423, 326 P.3d 125 (2014).....	44
<u>State v. Maurice</u> 79 Wn. App. 544, 903 P.2d 514 (1995).....	22, 41
<u>State v. Melos</u> 42 Wn. App. 638, 713 P.2d 138 (1986).....	35
<u>State v. Perez-Mejia</u> 134 Wn. App. 907, 143 P.3d 838 (2006).....	44
<u>State v. Piche</u> 71 Wn.2d 583, 430 P.2d 522 (1967).....	39
<u>State v. Saunders</u> 91 Wn. App. 575, 958 P.2d 364 (1998).....	40
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	13, 14, 22, 23, 26, 33, 34

**TABLE OF AUTHORITIES (CONT'D)**

Page

**FEDERAL CASES**

<u>Alcala v. Woodford</u> 334 F.3d 862 (9th Cir. 2003) .....	41
<u>Cooper v. Fitzharris</u> 586 F.2d 1325 (9th Cir. 1978) .....	47
<u>Rios v. Rocha</u> 299 F.3d 796 (9th Cir. 2002) .....	28
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)....	13-15, 36, 43-46
<u>United States v. Tucker</u> 716 F.2d 576 (9th Cir. 1983) .....	47

**OTHER JURISDICTIONS**

<u>State v. Saldana</u> 324 N.W.2d 227 (Minn. 1982).....	29
---	----

**RULES, STATUTES AND OTHER AUTHORITIES**

CrR 3.1 .....	35
GR 3.1 .....	16
RAP 16.8.....	16
RAP 16.9.....	17
RAP 16.11.....	17, 35
RCW 9A.36.120.....	11
RCW 10.73.090 .....	15, 16

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 10.73.100 .....	16
RPC 3.3 .....	42
U.S. CONST. amend. VI.....	13
CONST. art. I, § 22 .....	13

A. INTRODUCTION

Petitioner Jennifer Mothershead was accused of adulterating her young daughter K.M.'s prescription eye drops with bleach. The State presented a litany of medical doctors and forensic experts to support its circumstantial case. Defense counsel met the charge with silence. Without any strategic reason, counsel failed to adequately investigate a qualified defense expert's exculpatory opinion that the State's forensic evidence did not support its claim. Then, when Mothershead elected to testify at trial, counsel failed, again without any strategic reason, to elicit the most important piece of evidence supporting Mothershead's defense: her denial that she adulterated the drops in any way. Because of defense counsel's unreasonable errors, Mothershead was essentially left without a defense: no expert and no denial to rebut the State's evidence. Mothershead deserves a new trial at which she is served by constitutionally effective counsel.

B. ASSIGNMENTS OF ERROR

1. Mothershead's trial counsel was constitutionally ineffective for failing, without any strategic reason, to adequately investigate a qualified defense expert's exculpatory opinion.

2. Mothershead's trial counsel was constitutionally ineffective for failing, without any strategic reason, to elicit Mothershead's testimony that she denied adulterating the eye drops in any way.

Issues Pertaining to Assignments of Error

1. Was Mothershead denied her constitutional right to effective assistance of counsel, where her trial counsel failed, without any strategic reason, to adequately investigate a qualified defense expert's exculpatory opinion, effectively leaving the State's forensic evidence un rebutted at trial?

2. Was Mothershead denied her constitutional right to effective assistance of counsel, where her trial counsel failed, again without any strategic reason, to elicit the key piece of evidence supporting Mothershead's defense—that Mothershead denied adulterating the eye drops in any way—and the State then exploited Mothershead's conspicuous lack of denial in closing and rebuttal arguments?

C. STATEMENT OF THE CASE

1. Factual Background

Jennifer and Cody Mothershead are the parents of a daughter, K.M., born in February of 2010.<sup>1</sup> 10/1 RP 39, 42. From the time K.M. was born, Mothershead regularly took her daughter to see a primary care doctor. 9/26 RP 108, 111-12; 10/1 RP 42-43. K.M. was a healthy baby, up to date on all

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<sup>1</sup> To avoid confusion, this brief refers to Jennifer Mothershead as Mothershead and Cody Mothershead as Cody.

her vaccinations and meeting her developmental markers. 9/26 RP 111-12; 10/1 RP 42-44. Mothershead and K.M. “were a team.” 10/1 RP 62-63.

Mothershead and Cody began having marital problems around the time Mothershead became pregnant with K.M. 10/1 RP 46-47. By early 2011, Mothershead was spending several nights a week with friends Matthew Bowie and Courtney Valvoda (now Courtney Bowie, following their marriage).<sup>2</sup> 9/24 RP 103-04; 9/30 RP 8-10. The group of friends knew each other from riding horses and coaching an equestrian drill team together. 9/24 RP 101-02; 9/30 RP 8-9; 10/1 RP 41.

As K.M.’s primary caregiver, Mothershead always brought K.M. with her to the Bowies’ home. 9/30 RP 11; 10/1 RP 52-53. The Bowies, particularly Matthew who was not working at the time, often watched K.M. along with their own son. 9/23 RP 124-25, 132-33; 10/1 RP 46-48, 107. The Bowies had a horse barn on their property where K.M. would play. 9/24 RP 145-47; 10/1 RP 57-58.

On March 23, 2011, when she was 13 months old, K.M. sustained irritation to her left eye while Mothershead rode and Matthew watched K.M. in the barn. 9/23 RP 167; 10/1 RP 57-58, 66-67. Matthew had no explanation for what happened. 9/23 RP 167; 10/1 RP 60. Mothershead

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<sup>2</sup> To avoid confusion, this brief refers to Matthew Bowie as Matthew, Courtney Valvoda as Courtney, and collectively as the Bowies.

took K.M. to see her primary care doctor that same day. 9/26 RP 109; 10/1 RP 60. The doctor examined K.M.'s eye, observing some signs of corneal abrasion, which suggested a foreign body, possibly hay from the barn. 9/26 RP 110-14, 126-29.

K.M. was initially prescribed antibiotic ointment for her left eye. 9/12 RP 105. Unfortunately, over the next several weeks, K.M.'s eye condition worsened and eventually spread to both eyes. 9/12 RP 40-42; 9/24 RP 109-10; 9/26 RP 114-16, 122. Mothershead repeatedly took K.M. to her primary care doctor in Enumclaw, as well as several specialists in Seattle, in the hopes of identifying the problem and treating K.M.<sup>3</sup> Despite numerous appointments, tests, and procedures, a cause for K.M.'s eye trouble could not be pinpointed. 9/12 RP 23-24, 36-37; 9/24 RP 34.

Following the antibiotic ointment, K.M. was prescribed a steroid eye drop on April 19, 2011. 9/12 RP 36-38. K.M. was later prescribed two antibiotic eye drops, Cefazolin and Tobramycin, to be administered several times a day. 9/12 RP 43-44, 49; 9/24 RP 35-36; 10/1 RP 89. Both drops

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<sup>3</sup> 9/12 RP 105, 9/26 RP 120 (March 23 initial visit with primary care doctor, referral to Mary Bridge Children's Hospital in Tacoma); 9/12 RP 105, 9/24 RP 50-51 (March 25 visit with specialist at Seattle Children's Hospital); 9/12 RP 105, 9/26 RP 115-16 (March 29 visit with primary care doctor, referral to Seattle Children's emergency department); 9/26 RP 123-24 (April 8 visit with primary care doctor); 9/12 RP 25, 10/1 RP 74-75 (April 11 visit with specialist at Seattle Children's); 9/12 RP 34-35, 10/1 RP 82 (April 15 hospital stay at Seattle Children's); 9/12 RP 36, 10/1 RP 84 (April 19 visit with specialist at Seattle Children's); 9/12 RP 43-44, 10/1 RP 87 (April 22, same); 10/1 RP 89 (April 26, same); 9/24 RP 34-41 (May 2, same); 9/12 RP 39-40, 49-50 (May 10, same).

were compounded specially by Seattle Children's pharmacy and were dispensed to K.M. on April 26 and May 2. 9/12 RP 45-46; 9/26 RP 16-17, 47-48, 55-56. K.M. did not like the drops, so it often took some combination of Matthew, Courtney, and Mothershead to administer them. 9/23 RP 134-35; 9/24 RP 115-17; 10/1 RP 90-91, 97-98.

On May 11, 2011, Matthew watched K.M. while Mothershead and Courtney were away. 9/23 RP 69, 139, 159-60; 10/1 RP 108. Matthew discovered a squishy spot on K.M.'s head, which he showed to Courtney later that evening, who showed it to Mothershead. 9/23 RP 139-40; 9/24 RP 125; 10/1 RP 111-13. Matthew again did not have an explanation for K.M.'s head injury. 9/23 RP 150; 9/24 RP 129-30.

Mothershead took K.M. to the hospital the next day, May 12, where it was discovered K.M. had a brain bleed, or subdural hematoma. 9/19 RP 112-13; 10/1 RP 119. K.M. was airlifted to Harborview Medical Center. 9/19 RP 112; 10/1 RP 119. Mothershead called Courtney, "bawling and disoriented," and together they drove to Harborview. 9/24 RP 126-27, 159-61. On the way, Mothershead picked up the cooler with K.M.'s medications from the Bowies' house. 10/1 RP 119-20. She placed the cooler at K.M.'s hospital bedside. 9/19 RP 21; 9/23 RP 29, 66.

Two Pierce County detectives responded to Harborview. 9/18 RP 60-61; 9/23 RP 15-16. They spoke with Mothershead, Courtney, and Cody,

who Mothershead had called about K.M.'s injury. 9/18 RP 63-64; 9/30 RP 23. Mothershead was forthright with the detectives, answering all their questions, explaining the ordeal with K.M.'s eyes, and describing some of K.M.'s recent falls, none of which seemed to explain K.M.'s head injury. 9/18 RP 66-71; 9/23 RP 19-25, 59-60.

After observing K.M.'s eyes and other injuries, the detectives decided to take her into protective custody. 9/18 RP 81-82; 9/23 RP 25-27. The detectives testified when they informed Mothershead, she asked to administer K.M.'s medications. 9/23 RP 28-29. Mothershead explained she "became concerned about the care of [her] child," because "[n]obody would be there to be her advocate." 10/1 RP 125. The detectives insisted the hospital would take care of K.M. 9/18 RP 84-85; 9/23 RP 28-29. Mothershead complied with law enforcement orders, leaving the hospital and K.M.'s medications behind. 9/19 RP 21; 10/1 RP 130.

## 2. State's Medical and Forensic Experts

The State presented a litany of medical doctors and forensic experts at trial. Chief of ophthalmology at Seattle Children's Hospital, Dr. Avery Weiss, saw K.M. several times between March and May of 2011. 9/12 RP 4, 12, 15. Dr. Weiss testified he did not believe K.M. had a viral or bacterial infection. 9/12 RP 74. Instead, he believed K.M.'s symptoms could be best explained by a noxious agent being instilled into the eyes. 9/12 RP 63-64,

68. Pediatric ophthalmologist Dr. Erin Herlihy also treated K.M. 9/24 RP 27, 31-33. She testified viral and bacterial cultures taken from K.M.'s eyes were negative. 9/24 RP 34. Dr. Herlihy believed K.M.'s condition and symptoms were consistent with a noxious agent like bleach being instilled into her eyes. 9/24 RP 47-48.

Multiple other doctors who treated K.M. at Harborview and Seattle Children's also testified. For instance, pediatric intensivist Dr. Michael Davis testified K.M.'s eye symptoms looked more like a chemical irritation than an infection. 9/19 RP 109-10, 118-19. Pediatric infectious disease physician Dr. Danielle Zerr testified no infectious cause could be found for K.M.'s symptoms. 9/23 RP 85-86, 93, 101. Pediatric intensive care unit (ICU) physician Dr. Mary King believed chemical irritation was a possible explanation for K.M.'s eyes. 9/26 RP 95, 102-03. Pediatric dermatologist Dr. Heather Brandling-Bennett testified K.M.'s eye condition was not consistent with a dermatological issue. 9/18 RP 30, 42-44.

Pediatric resident Justin Heistand tested the pH level of K.M.'s eye drops that Mothershead brought to Harborview. 9/19 RP 21-22. When Dr. Heistand opened the Tobramycin drops, "noxious smells filled the room," causing "eye burning and nausea." 9/19 RP 23. Given the concerning smell, K.M.'s medications were seized by Harborview staff and transferred to the

Pierce County Sheriff's Office. 9/18 RP 88-90; 9/19 RP 26; 9/23 RP 113-14; 10/1 RP 21.

The two Pierce County detectives inspected the eye drops on May 18, 2011. 9/18 RP 93-94; 9/23 RP 34-35. They opened the Tobramycin drops and noticed a similar chemical-like noxious smell. 9/18 RP 97-102; 9/23 RP 36-38. The detectives obtained reference samples of both the Cefazolin and Tobramycin drops on May 20 from the pharmacy at Seattle Children's. 9/18 RP 104-05; 9/23 RP 43.

The original medications and reference samples were then transferred to the Washington State Patrol Crime Lab. 9/18 RP 104, 107-10. There, forensic scientist Jane Boysen tested the drops. 9/19 RP 68-70. She noted several differences in the suspect Tobramycin and the control sample. 9/19 RP 94-95. The suspect sample was a dark amber color compared with the clear, colorless reference sample; it had a stronger chemical odor than the reference sample; and it contained 2-chlorophenol, not present in the reference sample. 9/19 RP 80-87. Boysen testified the 2-chlorophenol suggested phenol in the prescription was reacting with a substance containing chlorine. 9/19 RP 91-92. As an experiment, Boysen added bleach to a control and observed a similar reaction to the suspect sample—the Tobramycin turned a dark amber color and the phenol reacted with the

chlorine in the bleach. 9/19 RP 88-89, 104. Boysen could not, however, replicate the suspect Tobramycin. 9/19 RP 90-91, 96-97.

The medications were then transferred to the U.S. Food and Drug Administration (FDA) in Cincinnati for further testing. 9/17 RP 7; 9/18 RP 11-13, 109-14; 9/19 RP 93. Forensic chemist David Jackson specializes in tampering cases and has done extensive studies on bleach, an oxidizing agent. 9/17 RP 6-8, 42. Jackson testified he found chlorate, an oxidizer, in the suspect Tobramycin, but did not find any active bleach. 9/17 RP 46-48. Jackson spiked some of the control sample with a small amount of bleach and got a similar reaction to the suspect sample, including a gradual change in color. 9/17 RP 49-58. Jackson believed the suspect Tobramycin was consistent with the spiked sample and may have once contained bleach. 9/17 RP 61-62, 86-87. But he could not definitively say whether the suspect sample had been adulterated with bleach. 9/17 RP 61, 86-87.

Several other FDA chemists also tested the drops using their various specialties. 9/17 RP 121 (gas chromatography mass spectrometry), 138 (microscopy), 160 (infrared spectroscopy). Lisa Kaine found less benzalkonium chloride—a preservative used in eye drops—in both the suspect Tobramycin and the sample spiked with bleach than in the reference sample. 9/17 RP 95, 105-06. Heather McCauley believed chlorine (present in bleach) reacted with phenol (present in Tobramycin drops) to form

chlorophenol, which she found in both the suspect and spiked samples. 9/17 RP 130-32. John Crowe observed crystalline growth in both the suspect and spiked samples that was not present in the reference sample. 9/17 RP 147-49. Adam Lanzarotta found the suspect sample was chemically consistent with the spiked sample but not the reference sample. 9/17 RP 165-67.

Finally, Seattle Children's pharmacy technician Abdiaziz Mahat testified he compounds prescription eye drops in a sterile environment using a standard procedure. 9/26 RP 9-12, 16-19. Inpatient pharmacy operations manager Anne Bournay testified she has never seen Tobramycin drops change color, and she was not aware of any industry-wide or pharmacy-specific issues with the drops. 9/26 RP 52-53, 58-59. However, Mahat did not compound both the April 26 and May 2 Tobramycin drops, and there was conflicting testimony as to which drops he compounded. 9/26 RP 16-17 (April 26, according to Mahat), 55-56 (May 2, according to Bournay).

### 3. Mothershead's Defense

Appointed counsel Jane Pierson represented Mothershead at trial. Pierson attempted to advance an "other suspect" argument, suggesting Matthew Bowie was responsible, but was prohibited from doing so, given the high evidentiary bar for such a defense. 9/9 RP 10 ("The defense must also demonstrate some step taken by the other suspect that indicates an intent to act on the motive, ability or opportunity."), 30-31; 9/24 RP 9-12; 10/2 RP

12-19. The trial court also denied counsel's request for a lesser third degree assault instruction. 10/2 RP 20-21, 37-39. With the denial of the lesser degree instruction, counsel advanced an "all-or-nothing case." 10/2 RP 23; 10/3 RP 46, 68.

Counsel did not present a single defense expert to rebut the State's evidence. The only defense witness was Mothershead. 10/1 RP 22, 39, 171. Mothershead denied having any personal knowledge as to how K.M. sustained the head injury. 10/1 RP 131. She also denied having any personal knowledge regarding the discoloration and smell of the Tobramycin drops. 10/1 RP 131. But counsel did not elicit any testimony from Mothershead that she denied adulterating the eye drops. 10/1 RP 131.

#### 4. Conviction, Sentence, Direct Appeal, and Petition

The jury found Mothershead guilty, as charged, of one count of first degree child assault, based solely on K.M.'s eye condition.<sup>4</sup> CP 9-11, 173 (instructing jury it could consider the subdural hematoma solely for how K.M. came to the attention of law enforcement), 194. The jury also returned special verdicts finding the three charged aggravating factors: particularly

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<sup>4</sup> The State charged, and the jury found, two alternatives of first degree child assault: (1) an intentional assault that recklessly inflicts great bodily harm and (2) an intentional assault that causes substantial bodily harm, where the accused has previously engaged in a pattern of (a) assaulting the child, causing bodily harm greater than transient physical pain or temporary marks or (b) causing the child physical pain or agony equivalent to torture. CP 9-11, 175-76, 194-95; see also RCW 9A.36.120(1)(b).

vulnerable victim, deliberate cruelty, and abuse of a position of trust to facilitate the offense. CP 9-11, 197-99.

Mothershead had no prior criminal history. CP 203. With her offender score of zero, the standard range sentence was 93 to 120 months. CP 203. Over seventeen of Mothershead's friends and colleagues wrote to the trial court expressing their support for her. CP 291-209. The court nevertheless sentenced Mothershead to an exceptional sentence of 480 months, based on the three aggravating factors found by the jury—30 years beyond the top of the standard range. CP 206, 231-33.

Mothershead pursued a timely direct appeal. CP 229. Division One of the Court of Appeals affirmed Mothershead's conviction and exceptional sentence. State v. Mothershead, No. 73634-5-I, noted at 193 Wn. App. 1009, 2016 WL 1298886 (Mar. 28, 2016), review denied 186 Wn.2d 1006 (Aug. 31, 2016). For the sake of brevity, Mothershead's direct appeal arguments and the court's analysis will not be repeated here. Mothershead's direct appeal became final on November 18, 2016. 11/18/16 Mandate.

Mothershead timely filed a personal restraint petition on November 8, 2017, asserting several bases on which her conviction and sentence should be reversed. Mothershead thereafter timely moved to supplement her petition with a sworn declaration from her trial counsel. 11/16/17 Motion. This court granted Mothershead's motion and accepted the supplemental

materials for filing. 1/3/18 Comm'r Ruling. The State filed its response on April 6, 2018, to which Mothershead replied on June 5, 2018.

On July 30, 2018, this court determined Mothershead's petition was not frivolous and appointed counsel to provide supplemental briefing. 7/30/18 Order. Mothershead rests on her pro se briefing with respect to issues 1B, 1D, 1E, and 2-9. In this brief, Mothershead argues her trial attorney was constitutionally ineffective for (1) failing to adequately investigate a potential defense expert's exculpatory opinion (issue 1A, Pers. Restraint Pet., 9-12) and (2) failing to elicit Mothershead's denial that she adulterated the eye drops (issue 1C, Pers. Restraint Pet., 13-14).

D. ARGUMENT

MULTIPLE INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL, SUPPORTED BY COMPETENT EVIDENCE, DEPRIVED MOTHERSHEAD OF A FAIR TRIAL, REQUIRING REVERSAL OF HER CONVICTION.

1. Ineffective assistance claims made in a personal restraint petition are subject to the same standard of review as on direct appeal.

Every accused person enjoys the constitutional right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and

(2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Performance is not deficient if counsel's conduct can be characterized as legitimate trial strategy or tactics. State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Courts indulge a strong presumption that counsel's representation was reasonable. Id. However, "[t]his presumption can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial." State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).

Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. The accused "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. Rather, a reasonable probability is one sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

To obtain relief on collateral review, a petitioner must show a constitutional error that resulted in “actual and substantial prejudice.”<sup>5</sup> In re Pers. Restraint of Swagerty, 186 Wn.2d 801, 807, 383 P.3d 454 (2016). “[I]f a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice.” In re Pers. Restraint of Crace, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012). Thus, Washington courts “apply the same prejudice standard to ineffective assistance claims brought in a personal restraint petition as [they] do on appeal.” In re Pers. Restraint of Lui, 188 Wn.2d 525, 538, 397 P.3d 90 (2017); accord Crace, 174 Wn.2d at 845 (“[F]or a petitioner on collateral attack claiming ineffective assistance of counsel, no ‘double prejudice’ showing above and beyond the prejudice showing required under Strickland should be imposed.”).

2. Mothershead’s ineffective assistance claims are supported by competent evidence, which the State has failed to answer.

Mothershead’s direct appeal became final when the mandate issued on November 18, 2016. RCW 10.73.090(3)(b). She timely filed her personal restraint petition within one year, on November 8, 2017. RCW 10.73.090(1). On November 16, 2017, Mothershead deposited in the mail a

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<sup>5</sup> For a nonconstitutional error, the petitioner must show a fundamental defect resulting in a complete miscarriage of justice. In re Pers. Restraint of Yates, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). Ineffective assistance of counsel is an issue of constitutional magnitude. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

motion to supplement/amend her petition with trial counsel Jane Pierson's sworn declaration, which was received by this court on November 20, 2017. 11/20/17 Motion. On January 3, 2018, this court granted Mothershead's motion and ruled the supplemental material "will be considered with her original petition."<sup>6</sup> 1/3/18 Comm'r Ruling.

The State responded to Mothershead's petition on April 6, 2018, well after this court accepted the declaration from Mothershead's trial counsel. The State nevertheless repeatedly criticizes Mothershead for "fail[ing] to produce a declaration from her trial counsel," contending the "inadequate record precludes meaningful review." Resp. to Pers. Restraint Pet., 24, 33 (emphasizing Mothershead's "telling failure to deliver a strategy revealing declaration from counsel").

A petitioner must state "the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations." In re Pers. Restraint of Rice, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992). If these allegations "are based on matters outside the existing record, the petitioner must demonstrate that [she] has competent, admissible evidence to establish the facts that entitle [her] to relief." Id. at 886. If such evidence "is

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<sup>6</sup> RAP 16.8(e) ("The appellate court may allow a petition to be amended. All amendments raising new grounds are subject to the time limitation provided in RCW 10.73.090 and 10.73.100."); GR 3.1(a) ("If an inmate confined in an institution files a document in any proceeding, the document is timely filed if deposited in the institution's internal mail system within the time permitted for filing.").

based on knowledge in the possession of others,” the petitioner “must present their affidavits or other corroborative evidence.” Id. “The affidavits, in turn, must contain matters to which the affiants may competently testify.” Id. Mothershead has satisfied this burden by presenting Pierson’s sworn declaration, along with Dr. Richard Pleus’s scope of work letters to Pierson.<sup>7</sup> Pers. Restraint Pet., App. A-B (Pleus letters); Pet. Reply, App. A (Pierson declaration).

“Once the petitioner makes this threshold showing, the court will then examine the State’s response to the petition.” Rice, 118 Wn.2d at 886. The State “must answer the allegations of the petition and identify all material disputed questions of fact.” Id. (citing RAP 16.9(a)). “In order to define disputed questions of fact, the State must meet the petitioner’s evidence with its own competent evidence.” Id. (emphasis added). At this point, the State has failed to meet its burden of answering Mothershead’s evidence with its own.

This court has three available options when reviewing a personal restraint petition. Yates, 177 Wn.2d at 17 (citing RAP 16.11(b), 16.12). First, dismiss the petition where the petitioner fails to make a prime facie showing of actual prejudice for alleged constitutional errors. Id. Second,

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<sup>7</sup> For this court’s ease of reference, the supporting documentation is also attached to this brief.

grant the petition where petitioner proves actual prejudice. Id. Or, third, transfer the petition to the superior court for a reference hearing or a full determination on the merits. Id. at 17-18. This final remedy is appropriate “where the petitioner makes the required prima facie showing ‘but the merits of the contentions cannot be determined solely on the record.’” Id. at 18 (quoting In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983)).

For the reasons discussed below, this court should grant Mothershead’s petition because she has established actual prejudice resulting from two major errors her attorney made that effectively left Mothershead with no defense. Alternatively, remand for a reference hearing is appropriate, where Mothershead has supported her claims with competent evidence. See In re Pers. Restraint of Khan, 184 Wn.2d 679, 689, 363 P.3d 577 (2015) (holding submission of a sworn declaration and supporting affidavits created a “cognizable question” as to whether Khan needed the assistance of an interpreter).

3. Mothershead was denied her constitutional right to effective representation where her trial counsel failed to adequately investigate a qualified defense expert’s exculpatory opinion.

Mothershead argues her trial counsel was ineffective for failing to pursue the preliminary expert opinion offered by Dr. Richard Pleus. Pers. Restraint Pet., 9-12 (Issue 1A); Pet. Reply, 3-7. The facts summarized here

come from trial counsel Jane Pierson's November 10, 2017 sworn declaration, as well as Dr. Pleus's two scope of work letters to Pierson.

At the time of Mothershead's trial, Pierson was a public defender with the Department of Assigned Counsel (DAC) in Tacoma. Pierson Decl., 1. Pierson, now retired, handled felony cases, "but not the most complex felonies within the office." Pierson Decl., 1-2.

DAC attorney Jack McNeish was first assigned to represent Mothershead. Pierson Decl., 1. The case was later reassigned to Pierson, who discovered McNeish "had done little to no investigation." Pierson Decl., 2. Though she met the minimum bar standards for handling Mothershead's case, Pierson acknowledged it was "an extremely serious, complex and difficult case." Pierson Decl., 2. Pierson did not have any background in chemistry, toxicology, or medicine. Pierson Decl., 2.

An investigator helped Pierson identify Dr. Richard Pleus as a potential defense expert. Pierson Decl., 2. Dr. Pleus is the founder of Intertox, Inc., a toxicology consulting firm in Seattle. Pierson Decl., 2. As Pierson described, "Dr. Pleus was a qualified pharmacologist/toxicologist with a post-doctoral specialization in neuropharmacology and experience as a lecturer in eye toxicology." Pierson Decl., 2-3.

Dr. Pleus's website biography corroborates Pierson's summary of his qualifications. Dr. Pleus has a Ph.D. in environmental toxicology from the

University of Washington, where he also completed a master's degree in environmental health. He conducted his postdoctoral training in neuropharmacology at the University of Nebraska Medical Center. He has performed over 400 toxicological assessments and has particular experience in determining the effects of chemicals on medicine and the human body. He has published numerous books, book chapters, and peer-reviewed articles, and has previously been an expert witness.<sup>8</sup> The State does not appear to dispute Dr. Pleus's qualifications as a toxicology expert. See Resp. to Pers. Restraint Pet., 25-28.

In 2013, DAC granted Pierson an initial \$5,000 to retain Dr. Pleus as a consulting and testifying expert. Pierson Decl., 3. Pierson then hired Dr. Pleus to evaluate the data underlying the State's scientific claims that the suspect eye drops were adulterated and caused K.M.'s injury. Pierson Decl., 3. Pierson provided Dr. Pleus with the forensic laboratory data, K.M.'s medical records and diagnoses, as well as "[a]ll court documents and witness statements." Pierson Decl., 3; 5/13/13 Pleus Letter.

On May 13, 2013, Dr. Pleus sent Pierson a memorandum with his initial assessment. Pierson Decl., 3; 5/13/13 Pleus Letter. Dr. Pleus explained he conducted independent research, comparing and contrasting the

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<sup>8</sup> Our Staff: Richard C. Pleus, PhD, INTERTOX, <http://www.intertox.com/our-staff/> (last visited Jan. 31, 2019).

case records “with data in the toxicological literature.” 5/13/13 Pleus Letter.

Based on his review, Dr. Pleus informed counsel:

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

5/13/13 Pleus Letter. Dr. Pleus estimated a budget of \$8,000 to complete his review and write a report. 5/13/13 Pleus Letter.

On June 27, 2013, Dr. Pleus sent another letter to Pierson reiterating his opinion and providing a more detailed description of the work needed to complete his analysis. Pierson Decl., 3-4; 6/27/13 Pleus Letter. Dr. Pleus estimated a budget of \$5,300 to complete his research and assessment of the case, and \$2,700 to summarize his assessment in a short, scientifically referenced report, for a total of \$8,000. 6/27/13 Pleus Letter.

DAC denied Pierson’s additional funding request for further work by Dr. Pleus. Pierson Decl., 4. However, Pierson admitted she misinterpreted Dr. Pleus’s initial opinion. Pierson Decl., 4. She believed Dr. Pleus was referring only to data from the compounding pharmacy. Pierson Decl., 4. Pierson explained in her declaration that she was “recently advised” Dr. Pleus was actually referring to data from the FDA Lab and Washington State Patrol (WSP) Crime Lab. Pierson Decl., 4.

As such, Pierson acknowledged, “Dr. Pleus’s initial opinion constituted exculpatory evidence that [she] possibly could have offered in Ms. Mothershead’s defense.” Pierson Decl., 4. Pierson explained she would have more vigorously sought additional funding for Dr. Pleus’s work had she “correctly understood the import of Dr. Pleus’s initial opinion.” Pierson Decl., 4. Pierson averred that her failure to advocate for additional funding was not a strategic decision. Pierson Decl., 4.

Neither Dr. Pleus nor any other expert helped Pierson prepare to cross-examine the State’s multiple forensic and medical experts at trial. Pierson Decl., 4. Pierson did not present any expert testimony supporting Mothershead’s defense. Pierson Decl., 4.

- a. *Counsel did not make a strategic decision in failing to pursue the defense expert’s exculpatory opinion.*

This is essentially a failure to investigate case. Ordinarily, a decision whether to call a witness is presumed to be a matter of legitimate trial strategy. State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). But the accused can overcome this presumption “by demonstrating ‘that counsel failed to conduct appropriate investigations.’” Estes, 188 Wn.2d at 462-63 (quoting Thomas, 109 Wn.2d at 230).

Case law is replete with examples of courts reversing where counsel failed to make an adequate investigation into a potential defense. For

instance, in State v. Fedoruk, 184 Wn. App. 866, 871, 339 P.3d 233 (2014), Fedoruk had a long history of mental illness. Leading up to the charged crime, Fedoruk engaged in increasingly strange behavior and angry outbursts. Id. at 872. Despite this evidence, Fedoruk’s counsel did not attempt to advance a diminished capacity defense until the eve of trial, instead pursuing the defense that Fedoruk “didn’t do it.” Id. at 875-76.

This court held Fedoruk’s counsel was ineffective for failing to timely investigate a mental health defense by consulting with a qualified expert. Id. at 879. The court acknowledged the record was not “entirely clear what investigation Fedoruk’s counsel may have conducted.” Id. at 881. Nevertheless, given Fedoruk’s extensive history of mental illness, “the decision not to seek to retain an expert to evaluate Fedoruk until the day before jury selection fell below an objective standard of reasonableness.” Id. at 881-82. This was especially true “[i]n light of the State’s strong circumstantial evidence against Fedoruk.” Id. at 882.

Thomas involved another failure to investigate that warranted reversal. 109 Wn.2d at 232. There, counsel (ineffectually) pursued a voluntary intoxication defense to rebut a charge of attempting to elude a police vehicle. Id. at 223-25. Counsel called an “expert” witness, Pamela Hammond, to explain alcoholic blackouts and their effects. Id. at 229-30. Hammond, however, turned out to be only an alcohol counselor trainee. Id.

at 229. Based on her lack of qualifications, the trial court refused to allow her to testify as an expert. Id. No other expert was called. Id.

The record revealed defense counsel was unaware of his so-called expert's total lack of qualifications. Id. at 230-31. The supreme court held counsel's failure to discover Hammond's lack of qualifications to be deficient performance: "Had he conducted any investigation into Hammond's qualifications he would have discovered she was only a trainee with minimal experience." Id. at 230.

Similarly, in Estes, the record revealed defense counsel was unaware Estes was charged with, and ultimately convicted of, a strike offense—his third strike that resulted a mandatory life sentence. 188 Wn.2d at 463. The supreme court held defense counsel's failure to investigate and familiarize himself with Washington's three strikes law was objectively unreasonable and necessitated reversal. Id. at 463, 468.

Defense counsel was likewise ineffective in In re Personal Restraint of Hubert, 138 Wn. App. 924, 932, 158 P.3d 1282 (2007), for failing to identify and present an available statutory defense to the charged crime. Similar to Mothershead's case, counsel provided a declaration attesting he was not familiar with the defense until Hubert's appellate counsel brought it to his attention. Id. at 929. "An attorney's failure to investigate the relevant

statutes under which his client is charged,” the court held, “cannot be characterized as a legitimate tactic.” Id. at 929-30.

By way of contrast, the supreme court rejected an ineffective assistance claim in In re Personal Restraint of Jeffries, 110 Wn.2d 326, 331, 752 P.2d 1338 (1988), where defense counsel neglected to call witnesses whose testimony would have provided mitigation evidence. The court held counsel’s actions were reasonable because (1) the defendant stated his wish that the witnesses not testify and (2) calling the witnesses would have opened the door to the defendant’s extensive criminal record. Id. at 332.

These cases demonstrate Pierson’s failure to adequately investigate Dr. Pleus’s exculpatory opinion was objectively unreasonable. In her sworn declaration, Pierson explained she misunderstood Dr. Pleus’s initial opinion. Pierson Decl., 4. She thought Dr. Pleus was referring only to data from the compounding pharmacy at Seattle Children’s, rather than data from the FDA Lab and WSP Crime Lab. Pierson Decl., 4. The former data would have been relevant only to the reference samples.

In fact, Dr. Pleus believed the latter data did not support the State’s theory of the case—that the suspect Tobramycin drops caused the damage to K.M.’s eyes. 5/13/13 & 6/27/13 Pleus Letters; Pierson Decl., 4. As Pierson acknowledged, such an opinion “constituted exculpatory evidence.” Pierson Decl., 4. Only upon later advisement did Pierson realize her mistake.

Pierson Decl., 4. Pierson warranted that, had she understood the import of Dr. Pleus's initial assessment at the time, she would have advocated more vigorously for additional funding. Pierson Decl., 4. Most significantly, her failure to do so was not a strategic decision. Pierson Decl., 4.

Similar to defense counsel in Fedoruk and Thomas, Mothershead's counsel failed to adequately familiarize herself with Dr. Pleus's exculpatory opinion. An attorney's decision to forgo further investigation or not call a witness is reasonable only when "made after thorough investigation of law and facts relevant to plausible options." Fedoruk, 184 Wn. App. at 880. Mothershead's counsel failed in that regard. Pierson's decision not to advocate for additional funding was based on a misunderstanding of Dr. Pleus's assessment. It was not based on a full investigation or recognition of the true import of his exculpatory opinion.

The State speculates that defense counsel had strategic reasons for not following up on Dr. Pleus's opinion. Resp. to Pers. Restraint Pet., 27-28. For instance, the State claims counsel "reasonably decided to concede the eye drops were contaminated instead of trying to convince jurors to disbelieve medical specialists and FDA chemists called by the State." Resp. to Pers. Restraint Pet., 28. The State contends "[c]ounsel instead directed the defense at trying to persuade jurors that the State failed to prove

[Mothershead] was aware the drops were contaminated when she administered them.” Resp. to Pers. Restraint Pet., 28.

Yet, contrary to the State’s assertion, the record reveals no strategic reason for counsel’s inadequate investigation. Most significantly, counsel attested she did not make a strategic choice in neglecting to advocate for additional funding. Pierson Decl., 4. Like Hubert, she realized her mistake only later when it was brought to her attention. Pierson Decl., 4.

Furthermore, pursuing and presenting Dr. Pleus’s expert opinion was consistent with Mothershead’s defense at trial. On cross-examination of the State’s key forensic expert, FDA chemist David Jackson, counsel emphasized Jackson could not definitively conclude the Tobramycin was adulterated with bleach, only that it might have been at one time. 9/17 RP 86-87. While counsel did not challenge the FDA experts’ methodology in closing argument, she argued, “All the scientists agree they can’t say it was bleach. Best they can say, it’s consistent with it . . . We don’t know if it was bleach.” 10/3 RP 61.

In cross-examining WSP Crime Lab scientist Jane Boysen, counsel likewise highlighted Boysen could not achieve identical results when she experimented by adding bleach to the control Tobramycin. 9/19 RP 104-05. Counsel asserted in closing, regarding Boysen’s experiment, “no way was it scientific.” 10/3 RP 61. Thus, defense counsel attempted to undercut the

State's scientific evidence, consistent with Dr. Pleus's opinion and contrary to the State's current speculation.

Regardless of the defense that counsel actually pursued at trial, though, a constitutionally adequate investigation requires "investigating all reasonable lines of defense." In re Pers. Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). Reasonable investigation—absent here—enables defense counsel to make informed decisions as to how best represent her client. Id. "Counsel's failure to consider alternate defenses constitutes deficient performance when the defense attorney neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so." Id. at 722 (alteration in original) (internal quotation marks omitted) (quoting Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002)).

In this way, defense counsel performed deficiently even though she did not attack the FDA experts' ultimate conclusions. She might have done so, had she conducted a reasonable investigation into Dr. Pleus's exculpatory opinion. Her inadequate investigation inhibited her from making an informed decision as to how best defend Mothershead.

"Not conducting a reasonable investigation is especially egregious when a defense attorney fails to consider potentially exculpatory evidence." Davis, 152 Wn.2d at 721. Mothershead's counsel did just that, failing to adequately investigate Dr. Pleus's exculpatory opinion and then advocate for

the necessary funding. Mothershead has established her attorney's performance was objectively unreasonable and therefore deficient.

- b. *Counsel's error prejudiced Mothershead, where the lack of defense expert left the State's circumstantial case essentially un rebutted.*

The question of prejudice remains. Lay witnesses who knew and interacted with Mothershead, like Matthew Bowie, Courtney Valvoda, and Cody Mothershead, could not testify Mothershead adulterated the drops. See, e.g., 9/23 RP 137 (Matthew never saw Mothershead do anything with the drops other than administer them to K.M.); 9/24 RP 119 (Courtney not aware of anything wrong with the drops); 9/30 RP 22 (Cody knew only that K.M. had an eye infection).

Instead, the State's case hinged largely on the circumstantial testimony of its myriad expert witnesses. Washington courts recognize "the jury may be overly impressed with a witness possessing the aura of an expert." Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001); see also State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) (noting experts carry "an aura of special reliability and trustworthiness" (quoting State v. Saldana, 324 N.W.2d 227, 230 (Minn. 1982))).

By the State's own reckoning, it produced a "distinguished cadre of medical experts." Resp. to Pers. Restraint Pet., 21-22 (detailing 10 of the medical doctors who testified at Mothershead's trial). The collective

testimony of these medical experts established K.M.'s eye trouble was likely caused by installation of a chemical irritant, as no bacterial or viral cause could be pinpointed. See, e.g., 9/12 RP 4, 63-64, 68-69 (Dr. Weiss, chief of ophthalmology at Seattle Children's); 9/18 RP 30, 42-44 (Dr. Brandling-Bennett, pediatric dermatologist); 9/19 RP 9-11, 23 (Dr. Heistand, pediatric resident); 9/19 RP 109-10, 118-19 (Dr. Davis, pediatric intensivist); 9/23 RP 85-86, 93, 101 (Dr. Zerr, pediatric infectious disease physician); 9/24 RP 13-14, 26 (Dr. Grow, pediatrician); 9/24 RP 27, 47-48 (Dr. Herlihy, pediatric ophthalmologist); 9/26 RP 68-69, 77-78 (Dr. Kinghorn, pediatric ICU resident); 9/26 RP 95, 102-03 (Dr. King, pediatric ICU physician).

The State also presented testimony from several forensic experts at the FDA, which, by the State's account, "maintains the most sophisticated laboratory in the country for establishing when commercial products have been tampered with, to include bleach tampering." Resp. to Pers. Restraint Pet., 22. The collective testimony of these forensic experts established the May 2 Tobramycin drops had been potentially contaminated with bleach, as the suspect sample and spiked control sample reacted similarly. See, e.g., 9/17 RP 61-62, 86-87 (David Jackson), 95, 105-06 (Lisa Kaine), 130-32 (Heather McCauley), 147-49 (John Crowe), 165-67 (Adam Lanzarotta). WSP Crime Lab forensic scientist Jane Boysen also testified to indications that the suspect sample was adulterated with bleach. 9/19 RP 88-92.

Mothershead's counsel met this expert testimony with deafening silence. No defense expert rebutted the State's case. The State capitalized on the unanswered expert testimony in closing argument. For instance, the State contended, "You cannot argue with these pictures and the doctor's testimony." 10/3 RP 24. The State asserted, "[i]n addition to the scientists' evidence that bleach was present at one time, which is overwhelming evidence, there's really no other logical conclusion, that at least the May 2nd, 2011, Tobramycin was contaminated by bleach, you also, again, have the medical testimony. A lot of medical testimony." 10/3 RP 32. The State further emphasized "[f]ive different Food and Drug Administration scientists looked at this. This is what they do. This is their job. They specialize in analyzing products that may have been contaminated." 10/3 RP 28-29.

However, there were several areas, at least, where the State's scientific evidence might have been undercut. For instance, the Tobramycin drops were supposed to be refrigerated. 9/26 RP 22; 10/1 RP 119-20. Refrigerated, the drops expired after 14 days; unrefrigerated, they expired after only two days. 9/17 RP 75-76; 9/26 RP 22. Yet Dr. Heistand could not remember whether the cooler containing K.M.'s drops was still cold when he initially tested their pH on May 13. 9/19 RP 21, 35-36. The drops were then kept in a nurse's pocket for several hours before they were handed off to the Pierce County Sheriff's Office. 9/23 RP 113-14. Boysen, too, never

testified she kept the drops refrigerated over the several weeks she had them. 9/19 RP 70-74, 92-93.

No expert could testify to how much bleach had potentially been added to the suspect sample. See, e.g., 9/19 RP 90-91 (Boysen could not achieve identical results with 1:1 or 4:1 mixture of prescription to bleach). FDA chemist Jackson spiked a control sample with a “small amount” of bleach (0.06 milliliters), but did not testify this amount could have caused the damage to K.M.’s eyes. 9/17 RP 49. Nor could any other expert so testify.

The May 2 Tobramycin bottle itself showed no signs of tampering. 9/17 RP 85; 9/23 RP 73. The State also did not establish any other medications were contaminated except the final May 2 Tobramycin prescription. 9/17 RP 40; 9/18 RP 115. K.M. was first prescribed eye drops on April 19 (steroids), but her eye condition had worsened before then. 9/12 RP 36-38; 9/26 RP 114-16. Thus, the forensic evidence did not explain the progression of K.M.’s condition.

Dr. Pleus’s opinion could have significantly undercut the State’s case. Dr. Pleus is an indisputably qualified toxicology expert. Pierson Decl., 2-3. He reviewed the “forensic laboratory data, medical records, diagnoses, and objective observations, including signs, symptoms, and medical tests performed by or under the direction of a physician.” 5/13/13 & 6/27/13 Pleus Letters. In addition, he “conducted independent research and

compared and contrasted those data with data in the toxicological literature.”  
5/13/13 & 6/27/13 Pleus Letters.

Pleus still had to complete his research and assessment of the case.  
5/13/13 & 6/27/13 Pleus Letters. However, based on his initial review, Dr. Pleus opined that “the data provided to me does not scientifically support the Plaintiff’s case that the medication that was administered to [K.M.] caused the adverse effects that are reported in the medical records.” 5/13/13 & 6/27/13 Pleus Letters. In reaching this opinion, he considered “a number of possible scenarios, including those supposing that Ms. Mothershead did not adulterate the medication.” 5/13/13 & 6/27/13 Pleus Letters. Thus, Dr. Pleus was not a biased researcher, set on corroborating Mothershead’s defense, but a qualified expert who seriously doubted the State’s forensic conclusions.

Fedoruk and Thomas are again instructive. In Fedoruk, an expert concluded Fedoruk had a major mental illness, but did not evaluate his legal sanity or capacity to form intent at the time of the crime. 184 Wn. App. at 884-85. “Although not conclusive,” this evidence was sufficient to undermine confidence in the outcome of Fedoruk’s trial. Id. at 885. Similarly, in Thomas, “expert testimony explaining blackouts may have proved crucial to [Thomas’s] defense.” 109 Wn.2d at 232. The court

emphasized the fact that there was no showing of an expert who could have offered helpful testimony “begs the question.” Id.

There is even more supporting evidence in Mothershead’s case than in Fedoruk and Thomas: Dr. Pleus’s exculpatory opinion that the State’s forensic evidence did not support its ultimate conclusion. Counsel’s failure to adequately investigate that opinion and then advocate for additional funding undermines confidence in the outcome of Mothershead’s trial. Mothershead has established prejudice resulting from her attorney’s deficient performance. This court should grant Mothershead’s petition, reverse her conviction, and remand for a new trial. Hubert, 138 Wn. App. at 932.

- c. *Reversal of Mothershead’s conviction is warranted, but, at the very least, an evidentiary hearing is necessary.*

The State will likely argue, as it did in its response to Mothershead’s petition, that Mothershead has failed to demonstrate prejudice because Dr. Pleus offered only a “tentative” opinion. Resp. to Pers. Restraint Pet., 25. The State may also contend the record does not establish DAC would have granted Pierson’s funding request for Dr. Pleus’s further review had she more vigorously advocated for it.

Any such arguments should not preclude reversal. Mothershead’s position is that Pierson’s declaration, together with Dr. Pleus’s initial opinion, establish the deficiency and prejudice necessary for a grant of her

petition. Alternatively, however, remand for a reference hearing would be appropriate to resolve any “material disputed issues of fact.” In re Pers. Restraint of Monschke, 160 Wn. App. 479, 489, 251 P.3d 884 (2010) (quoting Rice, 118 Wn.2d at 886); RAP 16.11(a)-(b) (authorizing reference hearings where necessary).

The matters of Dr. Pleus’s final opinion and DAC funding can be addressed at a reference hearing. With regard to Dr. Pleus’s opinion, the State merely speculates that Dr. Pleus did “little research” to reach his “tentative opinion.” Resp. to Pers. Restraint Pet., 26, 27 (characterizing Dr. Pleus’s opinion as “ostensibly researched”). In fact, Dr. Pleus had already completed half of his research, having been paid \$5,000 for his initial review and estimating another \$5,300 to complete his review (plus \$2,700 to write his final report). 6/27/13 Pleus Letter.

With regard to funding, “[a]s part of an indigent defendant’s constitutional right to effective assistance of counsel, the State must pay for expert services, but only when such services are necessary to an adequate defense.” State v. Melos, 42 Wn. App. 638, 640, 713 P.2d 138 (1986); see also CrR 3.1(f)(2) (mandating authorization of expert services “necessary” to indigent defendant). Defense counsel misunderstood the necessity of Dr. Pleus’s opinion to Mothershead’s defense, so it is no wonder DAC denied her request for additional funding. Pierson Decl., 4.

At the very least, Mothershead has established “the kind of prejudice necessary” to satisfy Strickland, through her attorney’s unreasonable failure to investigate, which inhibited counsel’s ability to make an informed decision regarding Mothershead’s defense and left Mothershead without any expert defense. Rice, 118 Wn.2d at 889 (“No evidentiary hearing is required in a collateral proceeding if the defendant fails to allege facts establishing the kind of prejudice necessary to satisfy the Strickland test.”). Thus, even if this court does not grant Mothershead’s petition outright, remand for a reference hearing on the issue of prejudice is appropriate. See Khan, 184 Wn.2d at 689 (remanding for a reference hearing on prejudice).

4. Mothershead was denied her constitutional right to effective representation when her trial counsel failed to elicit critical testimony from Mothershead that she did not adulterate the eye drops in any way.

Mothershead argues her trial counsel was also ineffective for failing to ask her the “ultimate question” of whether she added anything to the eye drops, which the State then emphasized in closing. Pers. Restraint Pet., 13-14 (Issue 1C); Pet. Reply, 8-9. Because she has established deficiency and prejudice—both in the record and through trial counsel’s supporting declaration—Mothershead’s claim warrants reversal of her conviction.

Mothershead’s defense at trial was denial. Without a third degree child assault instruction, defense counsel pursued “an all-or-nothing case.”

10/2 RP 23. Consistent with this, counsel began her closing argument, “I just have one message for you and one argument. And here it is. I don’t have a PowerPoint. Jennifer is not guilty.” 10/3 RP 46. At the close, counsel reiterated, “She’s not guilty.” 10/3 RP 68. Yet Mothershead’s counsel failed to elicit the most critical piece of evidence supporting that defense: Mothershead denied adulterating the eye drops in any way.

Mothershead elected to testify at trial. 10/1 RP 39. Defense counsel largely asked Mothershead to summarize her recollection of K.M.’s eye injury, medical treatment, and the events leading up to police involvement. At the end of direct-examination, however, counsel did not ask Mothershead whether she added anything to the eye drops:

Q. Do you have -- Jennifer, do you have any personal knowledge as to how [K.M.’s] head got injured?

A. No, I do not.

Q. Do you have any personal knowledge as to what’s been described from these drops of being a dark color and smell and all that stuff?

A. No. That’s nothing that I’ve seen.

Q. Okay.

10/1 RP 131. Direct-examination ended there. 10/1 RP 131.

Defense counsel did not thereafter elicit any denial from Mothershead on her brief redirect. 10/1 RP 168-70. Counsel presented no other witnesses in support of Mothershead's defense. 10/1 RP 171.

- a. *Counsel did not make a strategic decision in failing to elicit Mothershead's denial.*

Introduction of evidence and examination of witnesses are typically strategic decisions to be made by defense counsel "upon consultation with the defendant." State v. Grier, 171 Wn.2d 17, 31, 246 P.3d 1260 (2011). Through Pierson's sworn declaration, however, Mothershead has overcome the presumption that counsel's decision not to elicit her denial was a legitimate strategic choice. See In re Pers. Restraint of Davis, 188 Wn.2d 356, 371, 395 P.3d 998 (2017) (recognizing, to rebut the presumption of reasonableness, "a defendant must establish an absence of any legitimate trial tactic that would explain counsel's performance").

In her declaration, Pierson attested, under penalty of perjury:

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 anyway way.

Pierson Decl., 5; see also Pierson Decl., 2 ("Ms. Mothershead adamantly and consistently maintained her innocence through my representation of her.").

Pierson averred, “My failure to ask her this question was not a strategic decision on my part.” Pierson Decl., 5.

In her petition, Mothershead likewise warrants, “for the record, that had she been asked the question of whether she did or did not add bleach to or alter the eye drops, the answer would have been ‘no.’” Pers. Restraint Pet., 13. Mothershead explains she “would have fully denied adding bleach, adding any foreign substance, or in any way altering or tampering with the eye drops.” Pers. Restraint Pet., 13-14.

This case presents a unique scenario with no apparent direct comparison in the case law. However, reading several lines of cases together demonstrate defense counsel’s failure to ask the ultimate question amounted to deficient performance.

In its response to Mothershead’s petition, the State makes much of the case law recognizing defense attorneys generally have wide latitude in “whether to examine on a fact, whether and how much to cross-examine, whether to put some witnesses on the stand and leave others off.” State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967); see, e.g., Resp. to Pers. Restraint Pet., 32 (“Decisions about how close to the line of inquiring about or arguing factual innocence an advocate should approach is a matter of strategy.”), 33 (quoting another excerpt from Piche).

But the case law makes equally clear that an unreasonable mistake during counsel's direct-examination of her client amounts to deficient performance. For instance, in State v. Saunders, 91 Wn. App. 575, 577, 958 P.2d 364 (1998), Saunders was charged with drug possession. On direct-examination, defense counsel mistakenly elicited from Saunders that he had a previous drug possession conviction. Id. at 578.

The reviewing court held counsel's error fell below an objective standard of reasonableness because counsel "not only failed to object, [but] brought out the conviction himself." Id. at 580. There was no legitimate strategic reason for eliciting the prior conviction where such evidence was inherently prejudicial and not otherwise admissible. Id. Saunders demonstrates not all of defense counsel's decisions on direct-examination of her client are above reproach.

Mothershead's ineffective assistance claim is also akin to cases where defense counsel fails to take the steps necessary to introduce key witness testimony. For instance, in State v. Byrd, 30 Wn. App. 794, 796, 638 P.2d 601 (1981), codefendants Byrd and Miller asserted consent in defense to a charge of rape by kidnapping and forcible compulsion. Yet Miller's counsel failed to interview and call a defense witness who would have testified to the complainant's demeanor around the time of the charged incident. Id. at 799-800. Counsel's failure was not reasonable, where the

witness's testimony would have directly contradicted the complainant, "whose credibility was of the utmost importance." Id. at 799.

Similarly, in Alcala v. Woodford, 334 F.3d 862, 871 (9th Cir. 2003), the Ninth Circuit found defense counsel's conduct deficient where he inexplicably failed to present either of two witnesses who could verify the defendant's alibi. The attorney relied instead on the testimony of witnesses who could only vaguely recall corroborating circumstances. Id. at 872. The Alcala court held, "[w]hen defense counsel undertakes to establish an alibi, but does not present available evidence of the time or even the date of the alibi, or offer a strategic reason for failing to do so, his actions are unreasonable." Id. at 871-72.

Washington courts likewise recognize the presumption of defense counsel's competence can be overcome when she fails to subpoena necessary witnesses. Maurice, 79 Wn. App. at 552.

These cases together demonstrate counsel performs deficiently when she fails to secure or present evidence necessary to her client's defense. Trial counsel did so here by presenting a denial defense by then mistakenly failing to elicit Mothershead's denial that she adulterated the drops.

The State's chief criticism of Mothershead's claim is the purported lack of supporting evidence, "attributable to petitioner's telling failure to deliver a strategy revealing declaration from counsel." Resp. to Pers.

Restraint Pet., 33. The State also hypothesizes that counsel did not want Mothershead to perjure herself by explicitly denying the allegations. Resp. to Pers. Restraint Pet., 32 (noting attorneys “cannot suborn perjury or knowingly urge a tribunal to credit perjury in summation”), 33 (“Counsel could not have asked if petitioner was factually innocent if a perjurious reply was anticipated.”). These assertions are belied by Pierson’s declaration.

Just as the State points out, attorneys owe the court a duty of candor and “shall not knowingly make a false statement of fact or law to a tribunal.” RPC 3.3(a)(1). Pierson has attested, under penalty of perjury, that (1) she intended to ask Mothershead the ultimate question; (2) she made a mistake by not doing so; (3) it was not a strategic decision; and (4) Mothershead consistently maintained her innocence and denied adulterating the eye drops in any way. Pierson Decl., 5. As the Washington Supreme Court recognized in Estes, we must take counsel “at [her] word.” 188 Wn.2d at 461.

Further contrary to the State’s claim, Pierson’s declaration is consistent with her representations below. In closing, counsel argued, “That’s not stuff that Jenny did to it. You better believe she didn’t do that to it.” 10/3 RP 63. Counsel likewise asserted in her sentencing memorandum, “Ms. Mothershead had no idea that there might have been something wrong with the eye drops; she never added (or subtracted) anything from the prescribed medication, nor did she ever administer anything that was not

prescribed.” CP 215. The State’s pure speculation regarding counsel’s motives is not supported by the record.

Given the record below, along with Pierson’s declaration, it cannot be presumed Pierson feared Mothershead’s answer or wanted to prevent Mothershead from perjuring herself. We know what Mothershead’s answer would have been to the ultimate question: No, she did not put bleach or anything else in the drops. Pers. Restraint Pet., 13-14; Pierson Decl., 5.

In summary, counsel failed to elicit the key piece of evidence supporting Mothershead’s denial defense: Mothershead’s denial that she adulterated the drops. By counsel’s own acknowledgment, this unreasonable failing was not a strategic decision. Counsel’s performance was deficient. Mothershead had satisfied the first prong of the Strickland test.

- b. *Counsel’s error prejudiced Mothershead, particularly where the State used Mothershead’s lack of denial to bolster its circumstantial case.*

The most obvious prejudice from counsel’s blunder came during the prosecutor’s closing and rebuttal arguments. Near the end of closing, the prosecutor emphasized, “But I submit to you that she never said she didn’t put anything into [K.M.’s] eye drops. She said that she didn’t know anything about the change of color, no personal knowledge about that or the toxic smell.” 10/3 RP 42. On direct appeal, the court rejected a burden shifting challenge to this argument, holding “[t]he prosecutor’s argument

accurately states Mothershead's testimony and draws reasonable inferences from the evidence." Mothershead, 2016 WL 1298886, at \*28.

Then, near the end of her rebuttal, the prosecutor again highlighted Mothershead's lack of denial, "The defendant never said that she didn't intentionally do something to the drops." 10/3 RP 80. The trial court overruled a burden shifting objection to this argument. 10/3 RP 80. "[C]omments at the end of a prosecutor's rebuttal closing are more likely to cause prejudice." State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014). The trial court further augmented the prejudicial impact "by lending its imprimatur to the remarks." State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006).

In her petition, Mothershead quoted the prosecutor's rebuttal remark to demonstrate prejudice. Pers. Restraint Pet., 13. Significantly, the State does not address the prosecutor's emphasis on Mothershead's lack of denial. See Resp. to Pers. Restraint Pet., 32-34. The State has therefore failed to present competent evidence establishing any material disputed facts as to the Strickland prejudice prong. Rice, 118 Wn.2d at 886.

Moreover, looking past the State's inflammatory comments and literary quotations in its response to Mothershead's petition, the State's case was far from overwhelming. It essentially boiled down to: Mothershead was K.M.'s primary caregiver; she was typically in custody of the drops and

often the one to administer them; K.M.'s eye problems were consistent with instillation of a chemical irritant; and the May 2 Tobramycin drops were potentially contaminated with bleach.

But multiple other people, including Matthew Bowie and Courtney Valvoda, had regular contact with K.M. 9/23 124-25, 132-33; 10/1 RP 46-48, 107. Matthew had no explanation for K.M.'s initial eye injury or subsequent head injury, even though K.M. was in his care both times. 9/23 RP 150, 167; 9/24 RP 129-30; 10/1 RP 60. Mothershead promptly sought medical care for K.M.'s eye condition, seeing numerous doctors and specialists throughout the ordeal. See supra note 3 (detailing doctor and hospital visits on March 23, 25, 29, April 8, 11, 15, 19, 22, 26, May 2, 10). Grasping for evidence, several State's witnesses were encouraged to speculate regarding Mothershead's demeanor.<sup>9</sup> No direct evidence established Mothershead adulterated the drops or knew the drops contained bleach, or any other harmful chemical. The State's experts could not even

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<sup>9</sup> See, e.g., 9/18 RP 81-83 (one detective testifying Mothershead was "very calm, very matter of fact" at Harborview, but admitting Mothershead was a "little teary" when informed K.M. was being taken into protective custody); 9/23 RP 25 (another detective testifying Mothershead was "[v]ery calm," with "[a]lmost a flat affect"); 9/24 RP 161-62 (Valvoda describing Mothershead as "flat" after K.M. was airlifted to Harborview, but acknowledging Mothershead called her "bawling and disoriented"); 9/26 RP 81, 88-89 (doctor testifying Mothershead "was not tearful, she didn't seem distraught," but agreeing people respond differently to shock and trauma); 10/1 RP 13 (Harborview social worker testifying Mothershead "was very matter of fact. Was not emotional at all. Almost seemed disinterested."); but see 10/1 RP (Mothershead explaining she was in shock, scared for K.M., and "didn't know what was going on").

conclusively say the eye drops were contaminated with bleach. 9/17 RP 61-62, 86-87, 154; 9/19 RP 90-91, 96-97.

With the backdrop of the State's circumstantial case, Mothershead's denial was conspicuously lacking. Matthew expressly denied adding anything to the drops. 9/23 RP 139. Courtney, too, testified she did not adulterate the drops. 9/24 RP 119. By contrast, Mothershead did not deny adulterating the drops—because of defense counsel's mistake. 10/1 RP 131. She denied causing K.M.'s head injury, which likely served to highlight her lack of denial regarding the drops. 10/1 RP 131. She also denied having any personal knowledge as to the discoloration and noxious smell of the drops. 10/1 RP 131. This, too, danced around the ultimate question. Perhaps Mothershead simply did not understand the complex chemical processes that confounded even the expert FDA chemists. Or perhaps the jurors leapt to the same damaging conclusion as the State encouraged in closing and reiterated in response to Mothershead's petition: Mothershead could not, in truth, deny adulterating the drops.

Counsel's unreasonable failure to elicit the most important piece of Mothershead's defense—her denial—irreparably harmed the outcome of Mothershead's trial. Mothershead has established the Strickland prejudice prong. This court should grant Mothershead's petition, reverse her conviction, and remand for a new trial. Yates, 177 Wn.2d at 17-18.

5. The cumulative effect of counsel's unprofessional errors caused enduring prejudice to the outcome of Mothershead's trial.

Courts recognize that, even where one error by defense counsel may not establish constitutional ineffectiveness, a combination of unreasonable errors may deny the accused a fair trial. In re Pers. Restraint of Brett, 142 Wn.2d 868, 882-83, 16 P.3d 601 (2001); see also United States v. Tucker, 716 F.2d 576, 595 (9th Cir. 1983) (“[A] court may find unfairness—and thus prejudice—from the totality of counsel’s errors and omissions.”); Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978) (“[P]rejudice may result from the cumulative impact of multiple deficiencies.”).

Such is the case here. Even if this court concludes that one of defense counsel’s errors, standing alone, was not deficient or prejudicial, the combination of those errors was unreasonable. Counsel made not one but two significant blunders in investigating and presenting Mothershead’s defense. By counsel’s own account, these were mistakes, not strategic choices. Pierson Decl., 4-5. Mothershead was effectively left without a defense—no expert and no denial to rebut the State’s circumstantial case.

Though the State bore the burden of proving the elements of the offense beyond a reasonable doubt, Mothershead’s counsel gave the jury little reason to question the State’s case. CP 170 (“A reasonable doubt is one for which a reasons exists and may arise from the evidence or lack of

evidence.”). Counsel’s multiple failures deprived Mothershead of her constitutional right to effective counsel, and thereby her right to a fair trial.

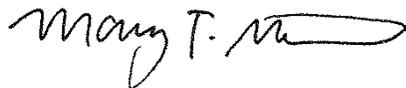
E. CONCLUSION

Mothershead respectfully asks this court to grant her personal restraint petition, reverse her conviction, and remand for a new trial at which Mothershead receives effective representation or, alternatively, remand for a reference hearing.

DATED this 14th day of February, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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MARY T. SWIFT  
WSBA No. 45668  
Office ID No. 91051

Attorneys for Petitioner

# **Appendix A**

Sworn Declaration of Jane Pierson

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  <b>DECLARATION OF JANE C. PIERSON</b></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~~ <sup>JP</sup>

5. ~~Shortly before trial,~~ <sup>AP</sup> 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 <sup>more vigorously</sup> 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 <sup>solely</sup> 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", with a long horizontal flourish extending to the right.

# **Appendix B**

Scope of Work Letters from Dr. Pleus

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

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

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

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

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

June 27, 2013

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

RE: Proposed Scope of Work for Toxicological Analysis

Dear Ms. Pierson:

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

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

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

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

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

June 27, 2013

*Confidential*  
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condition

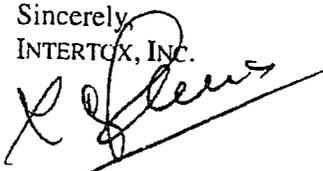
- Task 2- Summarize my assessment in a short, scientifically referenced report.

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

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

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

Sincerely,  
INTERTOX, INC.



Richard C. Pleus, PhD  
Managing Director & Toxicologist

June 27, 2013

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**NIELSEN, BROMAN & KOCH P.L.L.C.**

**February 14, 2019 - 3:20 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51119-3  
**Appellate Court Case Title:** Personal Restraint Petition of Jennifer Lynn Mothershead  
**Superior Court Case Number:** 12-1-01509-2

**The following documents have been uploaded:**

- 511193\_Briefs\_20190214151932D2378538\_1060.pdf  
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**A copy of the uploaded files will be sent to:**

- JasonR2@atg.wa.gov
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**Comments:**

Copy mailed to: Jennifer Mothershead, 370440 Washington Corrections Center for Women 9601 Bujacich Rd. N.W.  
Gig Harbor, WA 98332-8300

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Sender Name: John Sloane - Email: Sloanej@nwattorney.net

**Filing on Behalf of:** Mary Swift - Email: swiftm@nwattorney.net (Alternate Email: )

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