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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JENNIFER LYNN MOTHERSHEAD, Petitioner-Appellee, v. DEBORAH JO WOFFORD, Superintendent, Washington Corrections Center for Women, Respondent-Appellant.	No. 22-35756 D.C. No. 3:21-cv-05186-MJP-JRC Western District of Washington, Tacoma ORDER

Before: HAWKINS, GRABER, and McKEOWN, Circuit Judges.

The panel has voted to deny Appellee's petition for panel rehearing.

The panel recommends denying Appellee's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellee's petition for panel rehearing and petition for rehearing en banc are denied.

NOT FOR PUBLICATION

FILED

SEP 12 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JENNIFER LYNN MOTHERSHEAD, Petitioner-Appellee, v. DEBORAH JO WOFFORD, Superintendent, Washington Corrections Center for Women, Respondent-Appellant.	No. 22-35756 D.C. No. 3:21-cv-05186-MJP-JRC MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted August 23, 2023
Seattle, Washington

Before: HAWKINS, GRABER, and McKEOWN, Circuit Judges.

Deborah Jo Wofford, Superintendent of the Washington Corrections Center for Women, appeals from the district court's order granting an evidentiary hearing in connection with Washington State prisoner Jennifer Lynn Mothershead's 28 U.S.C. § 2254 habeas petition. We have jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(b). We reverse and remand.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

The district court erred in its predicate determination that Mothershead's claim was procedurally barred and not subject to review under § 2254(d). *See ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1132–33 (9th Cir. 2022) (explaining interlocutory jurisdiction extends to issues material and inextricably tied to order under review). The Washington Supreme Court rendered the "last reasoned [state court] decision." *See Tamplin v. Muniz*, 894 F.3d 1076, 1086 (9th Cir. 2018). Although the court noted that the Washington Court of Appeals also denied Mothershead's petition for failing to submit the necessary affidavit regarding Dr. Pleus's testimony, the Washington Supreme Court held that, in light of the strength of the State's case and the evidence presented at Mothershead's trial, the court of appeals properly concluded that "Mothershead failed to show there is a reasonable probability the testimony of Dr. Pleus would have altered the outcome." The Washington Supreme Court did not clearly rely on a procedural bar; accordingly, we treat its decision as a determination on the merits, which is subject to review under § 2254(d). *See Chambers v. McDaniel*, 549 F.3d 1191, 1197 (9th Cir. 2008). Review under § 2254(d) is limited to the state court record. *See* § 2254(d)(2); *Cullen v. Pinholster*, 563 U.S. 170, 180–81 (2011). Therefore, we need not consider the potential application of § 2254(e)(2) or *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022).

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 23 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JENNIFER LYNN MOTHERSHEAD, Petitioner-Respondent, v. DEBORAH JO WOFFORD, Respondent-Petitioner.	No. 22-80073 D.C. No. 3:21-cv-05186-MJP-JRC Western District of Washington, Tacoma ORDER

Before: BRESS and VANDYKE, Circuit Judges.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 14 days after the date of this order, petitioner shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d).

LCC/MOATT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNIFER LYNN MOTHERSHEAD,

Petitioner,

v.

DEBORAH J. WOFFORD,

Respondent.

CASE NO. C21-5186 MJP

ORDER GRANTING MOTION TO CERTIFY INTERLOCUTORY APPEAL AND STAY PROCEEDINGS

This matter comes before the Court on Respondent's Motion to Certify an Interlocutory Appeal and to Stay Proceedings. (Dkt. No. 67.) Having reviewed the Motion, Petitioner's Opposition (Dkt. No. 72), the Reply (Dkt. No. 73), and all supporting materials, the Court GRANTS the Motion. The Court AMENDS and CERTIFIES its Order re: Shinn v. Martinez Ramirez and Evidentiary Hearing (Dkt. No. 65) ("Order") for interlocutory appeal and STAYS the proceedings pending the interlocutory appeal.

BACKGROUND

The Court's Order resolved the impact of Shinn v. Martinez Ramirez, No. 20-1009, 596 U.S. ___, 142 S. Ct. 1718 (2022) on the scheduled evidentiary hearing. The Court found that the evidentiary hearing could proceed because 28 U.S.C. § 2254(e)(2) and Shinn did not apply to bar the evidentiary hearing. Respondent now asks the Court to certify the Order for interlocutory appeal and to stay the proceedings pending the appeal.

ANALYSIS

A. Certification of Interlocutory Appeal

To certify an interlocutory appeal, the court "must determine that the order meets the three certification requirements outlined in § 1292(b): '(1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion [as to that question], and (3) that an immediate [resolution of that question] may materially advance the ultimate termination of the litigation.'" ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union, 22 F.4th 1125, 1130 (9th Cir. 2022) (quoting In re Cement Antitrust Litig. (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1981)).

1. Controlling Question of Law

The Court finds that the Order contains a controlling question of law that Respondent seeks to appeal. "As is evident from the plain text of § 1292(b), for a question to confer interlocutory jurisdiction on this court it must be a 'question of law.'" ICTSI, 22 F.4th at 1132 (quoting 28 U.S.C. § 1292(b)). Here, the controlling question of law is whether or not postconviction counsel's lack of diligence will always undermine the petitioner's otherwise diligent efforts to pursue an ineffective assistance of counsel claim and subject the claim to § 2254(e)(2) and Shinn's bar on evidentiary hearings. In its Order, the Court found that

postconviction counsel's lack of diligence will not always require § 2254(e)(2) to apply. Applying this legal determination to the unique factual record before it, the Court concluded that although postconviction counsel's lack of diligence must be imputed to Petitioner, Petitioner and postconviction counsel had been sufficiently diligent to cause her IAC claims to fall outside of § 2254(e)(2). While the Court agrees with Petitioner that the Order required weighing unique factual issues, its outcome necessarily relied on the Court's legal conclusion that postconviction counsel's lack of diligence will not always require applying § 2254(e)(2). As such, there is a controlling question of law that Respondent seeks to present on appeal.

Respondent's Reply also suggests that another controlling question of law is whether the claim itself is procedurally defaulted. (Reply at 1-2 (Dkt. No. 73).) But this legal issue is not one contained in the Order. As such, it would be improper to certify the appeal based on an issue not actually contained in the Order.

2. Substantial Grounds for Difference of Opinion

The Court finds that there are substantial grounds for a difference of opinion on the controlling legal question.

The "substantial grounds" prong is satisfied if "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010). As is particularly relevant here, "[t]he 'substantial grounds' prong is satisfied when 'novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions.'" ICTSI, 22 F.4th at 1130 (quoting Reese v. BP Expl. (Alaska) Inc., 643 F.3d 681, 688 (9th Cir. 2011)). And the district court need not

"await[ ] development of contradictory precedent" before concluding that the question presents a "substantial ground for difference of opinion." Reese, 643 F.3d at 688.

The Court is satisfied that there are substantial grounds on which fair-minded jurists might reach a contradictory conclusion on the controlling legal question. The legal issue resolved by the Court in the Order is novel and requires consideration and application of a new Supreme Court decision—Shinn. The legal issue also presents novel considerations as to the diligence inquiry under § 2254(e)(2) that do not appear to have been resolved by any appellate court. Indeed, none of the cases the Court could locate provides express guidance on how to resolve the diligence inquiry under § 2254(e)(2) in the context of an ineffective assistance of counsel claim where there is a mixed record of the petitioner's diligence and her postconviction counsel's lack of diligence. As such, the Court finds that its Order makes a novel determination on the controlling legal question on which fair-minded jurists could disagree.

3. Immediate Appeal Materially Advances Resolution

The Court finds that an interlocutory appeal will materially advance the ultimate resolution of the case. "[T]he 'materially advance' prong is satisfied when the resolution of the question 'may appreciably shorten the time, effort, or expense of conducting' the district court proceedings." ICTSI, 22 F.4th at 1131 (quoting In re Cement, 673 F.2d at 1027). Here, the interlocutory appeal will resolve the question of whether § 2254(e)(2) applies and whether an evidentiary hearing may proceed. Should the evidentiary hearing not be proper, then the Court will receive important guidance as to the scope of the record it may consider in resolving Petitioner's claims. This will ensure that the Court focuses on the correct record in resolving the ineffective assistance of counsel claims and avoid unnecessary expenditure of time and money. And allowing the interlocutory appeal pays heed to the Supreme Court's guidance in Shinn that

if § 2254(e)(2) applies then the district court "may not conduct an evidentiary hearing. . . ." Shinn, 142 S. Ct. at 1734. So while there will be delay and effort required to complete the interlocutory appeal, the Court nonetheless finds that the interlocutory appeal will materially advance resolution of the claims.

* * *

The Court finds that there is a controlling question of law that presents a novel issue on which reasonable jurists might disagree, and the resolution of that question will materially advance resolution of the case. As such, the Court GRANTS the Motion and AMENDS and CERTIFIES the Order for interlocutory appeal. See Fed. R. App. 5(a)(3); 28 U.S.C. § 1292(b).

B. Stay

The Court finds that a stay pending appeal is appropriate.

Before staying proceedings pending an interlocutory appeal, the Court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken v. Holder, 556 U.S. 418, 426 (2009) (quotation omitted).

The Nken factors weigh in favor of a stay. First, the Court notes that Respondent has failed to make a strong showing that she is likely to succeed on the merits. Second, Respondent has not clearly demonstrated that she will suffer an irreparable injury absent a stay. Respondent argues she will "be deprived of the fruits of her interlocutory appeal" if the Court holds an evidentiary hearing and the Ninth Circuit finds that the hearing should not have occurred. (Dkt. No. 73 at 5.) But as Respondent admits, the harm she identifies is monetary—she wishes to avoid the "costs" of the evidentiary hearing. (Id.) This harm is not irreparable. Third, Petitioner

has not identified any substantial injury that she will suffer pending a stay. Although Petitioner argues that her trial counsel has retired, she has not provided any evidence to suggest that witnesses will likely become unavailable during the pendency of the appeal. And while Petitioner is incarcerated and challenges the validity of her incarceration, that alone is not a substantial injury. Fourth, the Court here finds that the public interest weighs in favor of a stay. As Respondent notes, the Court's Order involves an issue of law that has public importance and relevance to other pending habeas petitions. (See Dkt. No. 73 at 5 (citing two cases pending in this District involving similar issues).) Staying this case pending the appeal will ensure that only one court—the Ninth Circuit—provides guidance on this issue. Considering these factors, the Court finds that they favor entry of a stay. Staying the proceedings will allow for an orderly process through which the Court will obtain clarity on the scope of the record to be considered to resolve Petitioner's ineffective assistance of counsel claims. While Respondent has not shown any likelihood of success on appeal or an irreparable injury, Petitioner has not identified a substantial injury she might suffer pending the appeal. At the same time, the public will be served by having the Court await the Ninth Circuit's guidance on whether to hold the evidentiary hearing, by avoiding unnecessary costs and duplication of effort, and by ensuring that Petitioner's claim is properly and efficiently resolved. The Court therefore STAYS the proceedings pending resolution of the appeal.

CONCLUSION

The Court GRANTS the Motion in full. The Court AMENDS its Order by CERTIFYING it for interlocutory appeal. The Court further STAYS the proceedings pending resolution of the appeal.

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The clerk is ordered to provide copies of this order to all counsel.

Dated July 14, 2022.

Marsha J. Pechman
United States Senior District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNIFER LYNN MOTHERSHEAD, Petitioner, v. DEBORAH J. WOFFORD, Respondent.	CASE NO. C21-5186 MJP ORDER RE: SHINN V. MARTINEZ RAMIREZ AND EVIDENTIARY HEARING

This matter comes before the Court on the issue of whether the Court may hold an evidentiary hearing in light of the Supreme Court's decision in Shinn v. Martinez Ramirez, No. 20-1009, 596 U.S. ____, 142 S. Ct. 1718 (2022). The Court raised this issue with the Parties sua sponte, and has both received and reviewed the Parties' responsive briefing (Dkt. Nos. 48-51, 61, 63, 64) and held oral argument on June 14, 2022. Having considered the arguments of the Parties and all supporting materials, the Court finds that the evidentiary hearing shall proceed.

BACKGROUND

A full summary of the relevant background is contained in Chief Magistrate Judge Creatura's Report and Recommendation, to which the Court refers the reader. (Dkt. No. 24.) But the Court provides the following brief summary.

Petitioner's habeas action under 28 U.S.C. § 2254 contains a claim that she received ineffective assistance of trial and post-conviction counsel. (Dkt. No. 1 at 5-9.) Petitioner argues that trial counsel failed to retain and present the testimony of a rebuttal toxicology expert and that her postconviction counsel failed to develop and provide additional evidence in her personal restraint petition (PRP) to support her trial counsel ineffective assistance of counsel (IAC) claim. The Court next reviews some of the relevant procedural issues underlying these claims that are relevant to the narrow issue the Court considers in this Order.

Petitioner filed a pro se PRP in which she raised her IAC claim. (Dkt. No. 11 at 379-83; Dkt. No. 14 at 656-61.) She asked for an evidentiary hearing on the claim as well as appointment of counsel. (Dkt. No. 11 at 421.) And she supplemented the trial court record with a declaration from her trial counsel, as well as the expert's preliminary opinion that had been provided to trial counsel. (Dkt. No. 11 at 422-26, 440-52.) She also provided a summary chart identifying gaps in the State's scientific evidence. (Dkt. No. 11 at 429-30.)

Before ruling on the PRP, Division II of the Court of Appeals granted Petitioner's request for court-appointed counsel "at public expense" under the Washington Rule of Appellate Procedure 16.11(b) and 16.15(h). (Dkt. No. 13 at 679-680.) Appointed postconviction counsel was then given leave to file a renewed PRP and to ensure the state-court record was fully presented. Counsel did not supplement the record further, but, like Petitioner, asked for an evidentiary hearing on the IAC claim and argued that the declaration of trial counsel and

preliminary opinions of the expert were at least enough to merit a "reference hearing"—the state analog to an evidentiary hearing. (Dkt. No. 13 at 703-06.)

The Court of Appeals denied Petitioner's request for an evidentiary hearing and rejected her claim because she "failed to meet her prima facie burden of showing prejudice." (Dkt. No. 13 at 198.) And the Washington Supreme Court reached the same conclusion, affirming the Court of Appeal's determination that Petitioner failed to meet her prima facie burden: "Mothershead did not show what Dr. Pleus's ultimate opinion would have been or what his testimony would have consisted of. . . ." (Dkt. No. 14 at 48.) The Supreme Court similarly denied her request for an evidentiary hearing.

Considering her federal habeas petition, this Court concluded that Petitioner procedurally defaulted on her IAC claim. (Dkt. No. 27 at 4.) Specifically, the Court found that her failure to meet her prima facie burden in the PRP is considered a procedural default under Washington's inadequate briefing rule. See Corbray v. Miller-Stout, 469 F. App'x 558, 559 (9th Cir. 2012). This holds true even though the State court alternatively opined on the merits. (See Dkt. No. 27 (citing Bennett v. Mueller, 322 F.3d 573, 580 (9th Cir. 2003); Zapata v. Vasquez, 788 F.3d 1106, 1112 (9th Cir. 2015)).). And invoking Martinez v. Ryan, 566 U.S. 1 (2012), the Court set an evidentiary hearing to determine whether there are grounds to set aside the procedural default. (Id. at 6.)

After the Supreme Court issued its opinion in Shinn, the Court found it necessary to reconsider whether it could proceed with the evidentiary hearing. The Court invited briefing and held oral argument. This Order follows.

ANALYSIS

A. Applicability of Martinez and Trevino

As a threshold issue, the Court considers whether Petitioner has satisfied one of the procedural requirements in order to invoke Martinez and Trevino v. Thaler, 569 U.S. 413 (2013). Specifically, the Court considers whether under Washington law, a prisoner cannot bring an IAC claim on direct appeal, or whether the prisoner has been denied a meaningful opportunity to do so "as a matter of procedural design and systemic operation" of state law. See Trevino, 569 U.S. at 429. This issue was not explicitly addressed in the Report and Recommendation of Chief Magistrate Judge Creatura or the undersigned's Order Adopting the Report and Recommendation. (See Dkt. Nos. 24 and 27.) Given its apparent threshold importance, the Court examines the issue after a brief consideration of the legal framework applicable to procedurally-defaulted habeas claims.

"A federal habeas court generally may consider a state prisoner's federal claim only if he has first presented that claim to the state court in accordance with state procedures." Shinn, 142 S. Ct. at 1727. A claim not raised before the state courts is procedurally defaulted, but the procedural default can be overcome if the prisoner "demonstrate[s] 'cause' to excuse the procedural defect and 'actual prejudice' if the federal court were to decline to hear his claim." Id. at 1728 (quoting Coleman v. Thompson, 501 U.S. 722, 750 (1991)). Ineffective assistance of postconviction of counsel can be "'cause' to forgive procedural default of an ineffective-assistance-of-trial-counsel claim." Id. (citing Martinez, 566 U.S. 1). But as the Supreme Court has held, the ineffective assistance of postconviction counsel can only be grounds for "cause" if "the State required the prisoner to raise that claim for the first time during state postconviction proceedings," Id. (citing Martinez), or if a State "procedural system—as a matter of its structure,

design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal," Trevino, 569 U.S. at 428. The Supreme Court has held that "[o]therwise, attorney error where there is no right to counsel remains insufficient to show cause." Shinn, 142 S. Ct. at 1733.

The limitations in Martinez and Trevino require careful study in the context of this habeas petition. In Martinez, the Court found that in order to "protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in Coleman that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." Id., 566 U.S. at 9. The Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Id. But the Court limited the reach of this decision to situations where state law forbid the petitioner from raising an IAC claim on direct appeal. Id. at 17. In Trevino, the Court then expanded the reach of Martinez to situations where "a State that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity" to a petitioner to raise an IAC claim on direct appeal. Trevino, 569 U.S. at 429. The Trevino Court concluded that Martinez reaches situations where a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal. . . ." Id.

The question remains, then, whether prisoners in Washington may not or "as a matter of procedural design and systemic operation" cannot meaningfully raise IAC claims on direct appeal. There is no bar to bringing IAC claims on direct appeal and courts in Washington

"regularly consider such claims on direct appeal." State v. McFarland, 127 Wn.2d 322, 338 n.5 (1995), as amended (Sept. 13, 1995) (noting that "[t]here is nothing intrinsic in a claim of ineffective assistance of counsel that requires it to be considered only in a collateral proceeding such as a personal restraint petition."). But in Washington, if a prisoner "wishes a reviewing court to consider matters outside the record, a personal restraint petition is the appropriate vehicle for bringing those matters before the court." Id. at 338. This distinction has critical importance to the claims presented in the pending habeas petition. As the Court in Trevino explained, to vindicate the right to adequate assistance of counsel at trial, "practical considerations, such as . . . the need to expand the trial court record, and the need for sufficient time to develop the claim, argue strongly for initial consideration of the claim during collateral, rather than on direct, review." Trevino, 569 U.S. at 428. This is evident in Petitioner's trial counsel IAC claim, which relies on materials outside of the trial court record. Under the Washington's procedural and systemic framework, Petitioner's first opportunity to present her trial counsel IAC claim with materials outside the trial court record was through her postconviction petition. By operation of and design of Washington law, Petitioner was therefore denied a "meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." See Trevino, 569 U.S. at 428; Weber v. Sinclair, No. C08-1676RSL, 2014 WL 1671508, at *8 (W.D. Wash. Apr. 28, 2014), aff'd, 679 F. App'x 639 (9th Cir. 2017) (finding Washington law denied the petitioner a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal). This satisfies the threshold inquiry as to whether Martinez and Trevino can apply.

B. Petitioner's Diligence and the Evidentiary Hearing

The Supreme Court's decision in Shinn calls into question whether the Court may proceed with the scheduled evidentiary hearing on Petitioner's IAC claims. That stems from Shinn's holding that "under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." Shinn, 142 S. Ct. at 1734. Based on the Court's analysis, it finds that the hearing may only proceed if Petitioner's claim is not subject to § 2254(e)(2). The Court finds that the unique record before it shows that Petitioner's claims are not subject to § 2254(e)(2) and that the evidentiary hearing shall proceed.

To explain its conclusion, the Court first considers Shinn's reach. The Court then examines the standards for determining whether § 2254(e)(2) applies in light of Shinn. And the Court concludes with an application of that standard to the record here.

1. The Boundaries of Shinn

The Court begins its analysis of Shinn by recognizing the limits that the Supreme Court placed on its holding.

The most relevant limitation in Shinn is that it applies only to claims subject to § 2254(e)(2)—where the petitioner is "at fault" for the undeveloped state-court record. This limitation is apparent in the plain text of Court's holding: "under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." Shinn, 142 S. Ct. at 1734 (emphasis added). The Court also reaffirmed the longstanding jurisprudence that § 2254(e)(2) does not reach every procedurally-defaulted claim. The Court explained that "§2254(e)(2) applies only when a [person] 'has failed to develop the factual basis of a claim.'"

Id. at 1734 (emphasis added). And the Court reaffirmed the holding of Williams v. Taylor, 429 U.S. 420 (2000) (Michael Williams) that § 2254(e)(2) will not apply to a procedurally defaulted claim "'unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.'" Id. at 1735 (quoting Michael Williams, 529 U.S. at 432). The Court therefore recognized that not every postconviction IAC claim will be subject to § 2254(e)(2).

Shinn's holding is further constrained by the procedural posture of the consolidated appeals on review. Both involved trial-counsel and postconviction-counsel IAC claims that were presented for the first time in the federal habeas actions. See Shinn, 142 S. Ct. at 1728-29 (noting that petitioner Ramirez brought no IAC claim in his initial state postconviction petition and that Jones raised a different trial-counsel IAC claim in his state postconviction petition than the one he raised in his federal habeas petition). The Court was therefore faced with a record devoid of diligence by either petitioner. And the petitioners "concede[d] that they d[id] not satisfy § 2254(e)(2)'s narrow exceptions." Id. at 1734. In other words, Shinn considered claims that necessarily were subject to § 2254(e)(2).

To summarize, Shinn reaches only claims subject to § 2254(e)(2) and left open the possibility of holding an evidentiary hearing on procedurally-defaulted IAC claims that are not subject to § 2254(e)(2).

2. The Diligence Inquiry of § 2254(e)(2)

Given the limitations of Shinn's bar on evidentiary hearings, the Court must consider the standard by which to measure whether § 2254(e)(2) applies to Petitioner's claims or not.

By its express terms § 2254(e)(2) applies if the "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). Failure in this context means "that the prisoner must be 'at fault' for the undeveloped record in the state court."

Shinn, 142 S. Ct. at 1734 (quoting Michael Williams, 529 U.S. at 432). "A prisoner is 'at fault' if he 'bears responsibility for the failure' to develop the record." Id. (quoting Michael Williams, 529 U.S. at 432.) And "failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Michael Williams, 529 U.S. at 432. "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." Id. at 437 The Ninth Circuit has also held that "[a] petitioner who has previously sought and been denied an evidentiary hearing has not failed to develop the factual basis of his claim." Hurles v. Ryan, 752 F.3d 768, 791 (9th Cir. 2014). "The proper question when considering a petitioner's diligence 'is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts.'" Libberton v. Ryan, 583 F.3d 1147, 1165 (9th Cir. 2009) (quoting Michael Williams, 529 U.S. at 435).

The diligence inquiry takes on greater meaning by considering the underlying purpose of the test. As the Supreme Court has made clear, the "at fault" inquiry ensures that State courts are fairly presented with constitutional claims before they appear in federal court. See Michael Williams, 529 U.S. at 437. Comity requires that "'state courts should have the first opportunity'" to review claims that the prisoner's confinement for a state court conviction violates federal law. Id. (quoting O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999)). "For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error." Id. And "[i]f the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met." Id. But "comity is not served by

saying a prisoner 'has failed to develop the factual basis of a claim' where he was unable to develop his claim in state court despite diligent effort." Id.

In the context of diligence, the Court cannot overlook Shinn's conclusion that "under § 2254(e)(2), a prisoner is 'at fault' even when state postconviction counsel is negligent." Shinn, 142 S. Ct. at 1735. In other words, "state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner." Shinn, 142 S. Ct. at 1734. And Shinn's conclusion appears to apply even if the claims fall within the ambit of Martinez or Trevino, given that Martinez had procedural application to the claims in Shinn but was not cited as a reason to find postconviction counsel's negligence to be an external factor—i.e., not imputed to the client. The Court must therefore heed Shinn's conclusion that postconviction counsel's negligence is imputed to the client in the analysis of diligence and § 2254(e)(2)'s application.

3. Petitioner's Diligence Bars § 2254(e)(2)'s Application

Considering this case's unique factual record, the Court finds that Petitioner was diligent and is not "at fault" for the lack of development of the state court record.

The record here shows Petitioner's consistent efforts to squarely present the merits of her IAC claim to the State courts in her PRP. Not only did she request an evidentiary hearing, but she also supplemented the record with a declaration from her trial counsel and the preliminary opinion from the expert she believes should have been retained and testified at trial. (Dkt. No. 11 at 421, 422-26, 440-52.) Those efforts were remarkable for an indigent prisoner who lacked legal expertise or access to funding necessary to retain the expert to develop his opinions further. This far exceeds the minimum requirements for diligence. See Michael Williams, 529 U.S. at 437; Hurles, 752 F.3d at 791. Petitioner did the best she could to give the State court an opportunity to

assess the merits of her IAC claim. This was "a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." Michael Williams, 529 U.S. at 435. In fact, Petitioner was so diligent that the Court of Appeals granted her request for appointment of postconviction of counsel. And appointed counsel continued to ask for an evidentiary hearing and rely on the same materials Petitioner provided to supplement the trial-court record. As such, counsel continued the same level of diligence that Petitioner did as a pro se. See id.

This clear record of diligence becomes unsettled by the fact that Petitioner's appointed counsel did not take further steps to supplement the record. As Petitioner herself argues, postconviction counsel negligently failed to seek funding to retain the expert or move to supplement the state-court record with an admissible opinions from the expert. This is perhaps the only evidence, though, of a lack of diligence. The Court is not convinced that postconviction counsel's alleged negligence in failing to secure funding for the expert or supplementing the record undermines this record of diligence. Under Shinn, this oversight, must be attributed to Petitioner. See Shinn 142 S. Ct. at 1735 ("[A] state prisoner is responsible for counsel's negligent failure to develop the state postconviction record.") But while counsel's failure to act may rise to the level of cause to excuse the procedural default, the Court is not convinced that this oversight undermines the otherwise sound record of diligence. The reason Petitioner faults her counsel is that it prevented her from succeeding on the claim in the PRP. But as the Supreme Court has made clear, the test of diligence turns not on the success on the underlying constitutional claim, but on whether the petitioner made "a reasonable attempt" to raise it:

> Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend, as the Commonwealth would have it, upon whether those efforts could have been successful.

Michael Williams, 529 U.S. at 435. Here, postconviction counsel's oversights impacted the success of the trial counsel IAC claim, but it did not undermine the fact that Petitioner diligently sought to present the claim to the State court. Under existing authority, these efforts were sufficient to show diligence. See West v. Ryan, 608 F.3d 477, 484 (9th Cir. 2010) (finding sufficient diligence to avoid § 2254(e)(2) where the petitioner, represented by counsel, was "persistent, though imperfect, [in his] efforts to obtain a hearing" even though he failed to make sufficiently clear request and failed to submit admissible evidence); Libberton, 583 F.3d at 1165 (finding diligence even though the petitioner was not successful in obtaining an evidentiary hearing and where he later developed new affidavits to present to the federal court as part of a habeas petition).

To hold that counsel's negligence undermines all of the record of diligence would effectively overextend the holding in Shinn. The Court in Shinn explained at length that its holding only applies to postconviction IAC claims subject to § 2254(e)(2) and not every postconviction IAC claim. If postconviction counsel's negligence not only inures to the petitioner but also undercuts any other record of diligence, then § 2254(e)(2) will apply to every procedurally-defaulted postconviction IAC claim. But Shinn did not reach that far. Shinn's bar on evidentiary hearing reaches only those postconviction IAC claim subject to § 2254(e)(2). The Court's opinion left open for consideration a postconviction IAC claims where there is a record of diligence that might render § 2254(e)(2) inapplicable even if there is a postconviction IAC claim. This is one such case. And the overwhelming majority of the record shows Petitioner was diligent and that § 2254(e)(2) has no application.

As an aside, the Court has found little guidance in how to parse the mixed record of diligence before it. Though not perfectly on point, the Third Circuit has held that a petitioner's

diligence was sufficient to avoid § 2254(e)(2) where he asked for an evidentiary hearing, but where his court-appointed postconviction counsel filed a "no merit" letter and moved to withdraw. Rivera v. Superintendent Houtzdale SCI, 738 F. App'x 59, 61, 63 (3d Cir. 2018) (unpublished). But the Court recognizes that Rivera does not grapple with the question of whether his counsel's decision to file a "no merit" letter should be imputed to the client or undermine the record of diligence. Nor did the case contain a postconviction IAC claim. The Court has otherwise not identified any appellate authority that presents similar legal and factual issues to the those pending before the Court.

Given the unique record and the legal landscape, the Court finds that Petitioner was sufficiently diligent in trying to raise her IAC claims and that she is not "at fault" for the lack of a fully-developed state-court record. The Court concludes that § 2254(e)(2) does not apply and that Shinn does not bar the holding of an evidentiary hearing on trial counsel's and postconviction counsel's alleged IAC. The Court continues to find that an evidentiary hearing should be held.

C. Evidentiary Hearing

The Court will reschedule the evidentiary hearing. To do so, the Court directs the Courtroom Deputy to find a date as soon as practical with input from the Parties. Should Respondent appeal this Order and ask the Court to stay the hearing, she must promptly and timely file a stay request for the Court to consider.

CONCLUSION

Having considered the decision in Shinn and its application to the claims presented in this habeas action, the Court finds that the evidentiary hearing should proceed. The Court finds that Petitioner's IAC claims are not subject to § 2254(e)(2) given the strong record of diligence in her

efforts to present her claim to the State courts. As such, the claims are not subject to the bar on evidentiary hearings announced by Shinn. And the Court continues to find that the hearing should proceed, which the Court will reset.

The clerk is ordered to provide copies of this order to all counsel.

Dated June 23, 2022.

Marsha J. Pechman
United States Senior District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNIFER LYNN MOTHERSHEAD, Petitioner, v. DEBORAH J WOFFORD, Respondent.	CASE NO. C21-5186 MJP-JRC ORDER ADOPTING REPORT AND RECOMMENDATION AND OVERRULING OBJECTIONS

This matter comes before the Court on Respondent Deborah J. Wofford's Objections (Dkt. No. 25) to the Report and Recommendation of Magistrate Judge Creatura (Dkt. No. 24). Having reviewed the Report and Recommendation, Wofford's Objections, Petitioner Jennifer Lynn Mothershead's Response to the Objections (Dkt. No. 26), and all supporting materials, the Court OVERRULES the objections and ADOPTS the Report and Recommendation. The Court will hold an evidentiary hearing consistent with this Order.

BACKGROUND

Petitioner Mothershead's habeas action under 28 U.S.C. § 2254 presents six challenges to the constitutionality of her conviction for first-degree assault of her thirteen-month child. The first and second grounds for relief center, in part, on Mothershead's claim that she received ineffective assistance of trial and post-conviction counsel. (Dkt. No. 1 at 5-9.) Mothershead argues that trial counsel failed to retain and present the testimony of a rebuttal toxicology expert and that her post-conviction counsel failed to provide additional evidence in her personal restraint petition to support her claim that this constituted ineffective assistance of counsel. The Court notes that only the first ground challenges the actions of post-conviction counsel. Mothershead's second ground for relief also asserts that trial counsel failed to ask her about her guilt or adequately prepare her for trial. (Id. at 8-9.) The remaining four grounds concern Mothershead's assertion of: (1) prosecutorial misconduct; (2) cumulative error; (3) unconstitutionally vague aggravating factors found by the jury; and (4) double jeopardy. (Id. at 9-12.)

Judge Creatura issued a thorough and detailed Report and Recommendation on Mothershead's petition and request to expand the record. (Dkt. No. 24.) As to the first and second grounds for relief, Judge Creatura recommends the Court hold an evidentiary hearing to rule on Mothershead's claim that she received ineffective assistance of counsel as to the expert toxicologist. In reaching this conclusion, Judge Creatura first reasons that Mothershead procedurally defaulted on this claim when she filed her personal restraint petition. (Id. at 9.) Although this should generally deprive the Court of jurisdiction to review the claim, Judge Creatura notes that judicial review may be permitted if Mothershead can establish cause and prejudice to excuse the procedural default. (Id. at 9, 14.) Based on his review of the record, Judge

Creatura recommends the Court hold an evidentiary hearing on whether (1) the procedural default may be excused and, if so, whether (2) Mothershead's trial counsel rendered ineffective assistance related to the failure to develop and present the toxicologist's testimony. But Judge Creatura otherwise recommends dismissal with prejudice of Mothershead's other grounds for relief and that no certificate of appealability be issued for those claims. This includes dismissal of Mothershead's second ground for relief premised on counsel's failure to prepare her for trial or ask her about her guilt. And it includes grounds three through six in the petition.

Wofford challenges the Report and Recommendation's determinations that Mothershead's ineffective assistance of counsel claim was procedurally defaulted in the post-conviction litigation and that Martinez v. Ryan, 566 U.S. 1 (2012) allows for an evidentiary hearing to determine whether the procedural default may be excused and, if so, whether trial counsel rendered ineffective assistance of counsel. Mothershead has not objected to the Report and Recommendation.

ANALYSIS

A. Legal Standard

The Court reviews de novo those portions of a magistrate judge's report and recommendation to which a party properly objects. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). A party properly objects when he or she files "specific written objections" to the magistrate judge's report and recommendation as required under Federal Rule of Civil Procedure 72(b)(2).

B. Procedural Default

The Court agrees with Judge Creatura's determination that Mothershead's ineffective assistance of counsel claim as to the toxicologist—Dr. Pleus—was procedurally defaulted. The

Court of Appeals rejected Mothershead's claim because she "failed to meet her prima facie burden of showing prejudice." (Dkt. No. 13 at 198.) And the Washington Supreme Court reached the same conclusion, affirming the Court of Appeal's determination that Mothershead failed to meet her prima facie burden: "Mothershead did not show what Dr. Pleus's ultimate opinion would have been or what his testimony would have consisted of. . . ." (Dkt. No. 14 at 48.) Mothershead's failure to meet her prima facie burden in the personal restraint petition is considered a procedural default under Washington's inadequate briefing rule. See Corbray v. Miller-Stout, 469 F. App'x 558, 559 (9th Cir. 2012). This conclusion holds true even though both state courts considering Mothershead's petition provided alternative rulings on the merits. As Judge Creatura correctly noted, "[w]here a state court both applies a procedural rule to deny a claim and alternatively opines that the claim lacks merit, procedural default still applies." (Dkt. No. 24 at 10 (citing Bennett v. Mueller, 322 F.3d 573, 580 (9th Cir. 2003); Zapata v. Vasquez, 788 F.3d 1106, 1112 (9th Cir. 2015)).). The Court finds no error in that conclusion.

Wofford argues that Judge Creatura "incorrectly determined that the state court applied a procedural bar because the Washington Court of Appeals had cited to In re Rice, 118 Wn.2d 876, 828 P.2d 1086 (1992) in one portion of its decision denying the personal restraint petition." (Dkt. No. 25 at 6.) This argument mischaracterizes the Report and Recommendation. Judge Creatura found the state courts applied a procedural bar after carefully considering the actual reasoning of both the Court of Appeals' and the Washington Supreme Court's opinions. He correctly determined that both courts applied a procedural bar—the inadequate briefing rule as announced by In re Rice, 118 Wn.2d at 886. While Wofford is correct that the Supreme Court did not expressly cite to In re Rice, it affirmed the Court of Appeals' reasoning and reliance on this rule in denying the petition. The absence of an express citation to the case is therefore irrelevant. Both courts denied the petition on procedural grounds.

The Court further rejects Wofford's argument that holding an evidentiary hearing as recommended by Judge Creatura would run afoul of Blodgett v. Lambert, 393 F.3d 943 (9th Cir. 2004). Blodgett remains distinguishable because the petitioner's ineffective assistance of counsel claim was not procedurally defaulted. Rather, "[t]he record more than demonstrate[d] that the Washington courts adjudicated Lambert's constitutional claims on the merits." Lambert, 393 F.3d at 969.) But here, Mothershead procedurally defaulted on her ineffective assistance of counsel claim and did not present sufficient evidence to meet her prima facie burden to allow for a decision on the merits. Under Martinez v. Ryan, Mothershead's post-conviction counsel's inadequate assistance can be grounds to excuse a procedural default. 566 U.S. at 1, 5, 9. And in this instance, it is proper to consider additional evidence to determine whether the procedural default may be excused and, if so, whether the claim might succeed on the merits. See Ramirez v. Ryan, 937 F.3d 1230, 1240-41 (9th Cir. 2019), cert granted Shinn v. Ramirez, No. 20-1009 (May 17, 2021); Jones v. Shinn, 943 F.3d 1211 (9th Cir. 2019), cert granted Shinn v. Ramirez, No. 20-1009 (May 17, 2021); Jones v. Ryan, 1 F.4th 1179 (9th Cir. 2021). This is true despite the fact that the Court's review is generally limited to the record as presented before the state court. See Cullen v. Pinholster, 563 U.S. 170, 181 (2011). As the Ninth Circuit explained in Jones v. Shinn, the general rule announced in Pinholster does not apply here where the habeas claim was found to be procedurally defaulted. 943 F.3d at 1221-22. The Court therefore finds an evidentiary hearing as recommended by Judge Creatura to be proper.

The Court also rejects Wofford's argument that the evidentiary hearing should not consider whether Mothershead's post-conviction counsel failed to provide effective assistance of counsel. (Dkt. No. 25 at 12.) That argument cannot be squared with Martinez, which held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. Considering that

holding, the Court must allow evidence to be presented at the evidentiary hearing as to whether Mothershead's post-conviction counsel failed to provide effective assistance of counsel by failing to provide the toxicology expert's declaration. This will allow the Court to determine whether the procedural default should be excused. Additionally, the Court will allow Mothershead to present evidence at the evidentiary hearing as to what Dr. Pleus's testimony would have been had he be called at trial. This will permit the Court to determine whether Mothershead's trial counsel rendered ineffective assistance of counsel consistent with the unchallenged legal framework the Report and Recommendation provides and which the Court adopts. (See Dkt. No. 24 at 14 (citing Ramirez v. Ryan, 937 F.3d at 1242).).

C. Certificate of Appealability

Judge Creatura recommends dismissal with prejudice of grounds two (as to trial counsel's failure to prepare Mothershead for trial or ask her of her guilt) and grounds three through six of Mothershead's habeas petition. Mothershead has not challenged that portion of the Report and Recommendation, which the Court therefore ADOPTS. The Court DISMISSES grounds 2 (in part) through 6 of the habeas petition with prejudice and finds that no certificate of appealability should issue as to these claims.

CONCLUSION

The Court ADOPTS the Report and Recommendation in full and OVERRULES all of Wofford's objections, none of which identifies an error of law or fact. The Court will therefore hold an evidentiary hearing at a time and date to be set at the mutual convenience of the Court and Parties. The evidentiary hearing will allow for testimony and evidence on: (1) whether the procedural default may be excused and, if so, whether (2) Mothershead's trial counsel rendered ineffective assistance related to the failure to develop and present Dr. Pleus's testimony.

The remaining grounds for relief in the habeas petition are DISMISSED with prejudice and no certificate of appealability shall issue as to these grounds.

The clerk is ordered to provide copies of this order to all counsel.

Dated February 16, 2022.

Marsha J. Pechman
United States Senior District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JENNIFER LYNN MOTHERSHEAD,

Petitioner,

v.

DEBORAH JO WOFFORD,

Respondent.

CASE NO. 3:21-cv-05186-MJP-JRC

REPORT AND RECOMMENDATION

NOTED FOR: December 31, 2021

The District Court has referred this petition for a writ of habeas corpus under 28 U.S.C. § 2254 to Chief United States Magistrate Judge J. Richard Creatura, as authorized by 28 U.S.C. § 636(b)(1)(A)–(B) and local Magistrate Judge Rules MJR3 and MJR4.

On October 4, 2013, a jury found petitioner guilty of first-degree assault of her 13-month-old child (hereinafter "KM"), occurring in 2011. Dkt. 11-1, at 2, 16. The State's theory of the case was that petitioner put bleach into KM's eyes over approximately seven weeks (*see* Dkt. 11-1, at 2), including contaminating KM's eye medication, which caused permanent damage to KM's eyes. The State relied on circumstantial evidence, primarily scientific and witness

testimony, including testimony from five laboratory analysts supporting the conclusion that petitioner had contaminated the eyedrops with bleach.

Petitioner, who is represented by counsel, challenges the constitutionality of her conviction by presenting six grounds for relief. Petitioner's initial ground for relief concerns the admitted failures of petitioner's trial and collateral review counsel to adequately investigate and develop the record by not submitting the full opinions of a toxicologist, Richard C. Pleus, M.D., or retaining him as a defense witness. Dr. Pleus states that he had offered preliminary opinions to petitioner's trial counsel and that he could have provided important evidence casting doubt on plaintiff's guilt, but that until now, he had never been requested to complete his work.

Dr. Pleus' full affidavit has now been presented for the first time with this habeas petition. Trial counsel states that she failed to secure funding or to retain Dr. Pleus to complete his work because she misunderstood the significance of Dr. Pleus' preliminary opinions. She now concedes that this was a mistake. Petitioner's collateral review counsel also says that due to her lack of experience representing criminal defendants in personal restraint petition ("PRP") proceedings, she misunderstood the rules that would have allowed her to submit additional information concerning Dr. Pleus' opinions to the state court. So, again, Dr. Pleus' full opinions were not developed or submitted to the state courts to substantiate the petitioner's argument that trial counsel rendered ineffective assistance. Not surprisingly, the state courts who considered petitioner's PRP rejected the claim based on lack of substantiation.

The state court's denial of the PRP because the claim was not substantiated is considered a procedural default. Procedurally defaulted claims generally cannot be heard in federal court. However, petitioner has shown that she is entitled to an evidentiary hearing on whether (1) the procedural default may be excused and, if so, whether (2) her trial counsel rendered ineffective

assistance related to the failure to develop and present Dr. Pleus' testimony. Therefore, the District Court should conduct an evidentiary hearing to answer these questions. And the Court should grant petitioner's requests for consideration of extra-record evidence, which addresses both of these issues (Dkts. 3, 19).

The remaining grounds raised in the petition do not merit habeas relief. Therefore, the District Court should deny the habeas petition as to grounds two through six, which should be dismissed with prejudice.

BACKGROUND

Petitioner brought suit in this court in March 2021. Dkt. 1. Briefing on her habeas petition is complete, including her pending motion to expand the record. Dkts. 3, 10, 19–21. The State has filed the state court record in this matter (Dkts. 11–14), which includes the following account of proceedings in the state courts.

At petitioner's trial, the parties presented evidence that on May 23, 2011, petitioner's one-year-old daughter, KM, sustained an eye injury outdoors, while she was in the care of a person other than petitioner. Dkt. 14, at 1990–91. Petitioner brought KM to a doctor and obtained a prescription for an eye ointment. Dkt. 14, at 1995.

The State presented various doctors' testimony that KM's eye injury persisted, spreading to both of her eyes, and perplexing doctors, who could not understand why the condition was not resolving. Dkt. 14, at 762–63. KM's doctors prescribed an antibiotic eyedrop called Tobramycin on April 26, 2011. *See* Dkt. 14, at 860, 1743. On May 2, 2011, petitioner brought KM to the doctor for a prescription refill, and a doctor observed that KM's condition was severe—KM was "quite distressed" and "would not open her eyes," which were red and swollen. Dkt. 14, at 1575.

At this time, petitioner was primarily staying at the home of her former friend, Courtney Valvoda, and Valvoda's husband, Matthew Bowie. Dkt. 11-1, at 17. On May 11, Bowie noticed a "soft spot" on KM's head and alerted Valvoda and petitioner, who said that KM "seemed to be just fine." Dkt. 14, at 1525, 2047. Although Valvoda urged petitioner to take KM to the doctor, petitioner did not do so until the next morning. *See* Dkt. 14, at 1692–94. Doctors then observed that KM had a "very large bleed" in her brain, and she was airlifted to a medical center, where staff contacted authorities about the suspicious head trauma. Dkt. 14, at 1120, 1336, 1362. According to investigators, by this time, KM's appearance was "shocking"—her eyes were swollen shut, she was bruised, and the top part of her face looked "extremely painful." Dkt. 14, at 1371.

A doctor and a social worker both testified that petitioner had an unusual, "disinterested" reaction when informed of her daughter's brain injury. Dkt. 14, at 1807–08, 1946. Petitioner also gave conflicting versions of whether she or Bowie initially noticed the head injury, and investigators did not believe petitioner's account of how KM sustained the injury. Dkt. 14, at 1125, 1129–30, 1379. Detectives took KM into protective custody, and they testified at petitioner's trial that when they informed her of this, petitioner was unusually focused—even insistent on—returning to KM's hospital room to give her the eye drops. Dkt. 14, at 1141, 1144, 2121–22. Until this point, petitioner had been the person who primarily administered KM's medication, according to petitioner's account to detectives. Dkt. 14, at 1131, 1369. A doctor later testified that although it was "the last thing on [his] mind" at the time, petitioner having put "something on the eye" would account for KM's eye injuries.

Detectives confiscated the eye drops from petitioner. *See* Dkt. 14, at 248. The May 2 Tobramycin prescription appeared to be full (despite having been filled more than a week

earlier), and when a detective opened it, she smelled an "overwhelming" "noxious" odor that caused a burning sensation and a welt on her wrist. Dkt. 14, at 238, 242–43, 259, 268–69, 1384. A doctor similarly testified that when he opened the Tobramycin to perform a test on it, a strong noxious smell filled the room. Dkt. 14, at 209. Bowie testified that he remembered the eye drops "stunk," and Valvoda testified that she thought they smelled "mediciny [sic]." Dkt. 14, at 1482, 1656.

Five scientists testified for the State that after analyzing the medication, they concluded that it had been adulterated with bleach. Dkt. 14, at 913, 936, 985, 1005–06, 1028, 1048. In addition, a doctor who treated KM testified that the clinical picture for KM was most consistent with "some noxious agent being instilled on the eye" and that KM suffered irreversible and permanent damage to her eyes. Dkt. 14, at 799, 813. A pediatrician described KM's head injury as "life threatening" and stated that in his opinion, KM's eye injuries appeared to be a chemical type of irritation, not an infection. Dkt. 14, at 1336, 1343. An ophthalmologist testified that KM's condition was consistent with bleach having been put in her eyes. Dkt. 14, at 1585.

KM was discharged from the hospital to her father's custody, and her eye condition significantly improved. Dkt. 14, at 1393, 1396. However, KM continued to suffer from sensitivity to light and sustained permanent eye damage. Dkt. 14, at 811.

Based on this evidence, the State argued at petitioner's trial that she had contaminated her daughter's eye drop medication with bleach in an attempt to garner sympathy from Valvoda and Bowie and to remain living in their home. Dkt. 14, at 2208, 2210. The State also pointed to Bowie's testimony that he and petitioner had been having an affair. Dkt. 11-1, at 17, 27.

Petitioner testified in her defense. She denied having "any personal knowledge as to what's been described from these drops of being a dark color and smell and all that stuff[.]" Dkt. 14, at 2064. No other witness testified for the defense.

Petitioner's trial counsel had consulted with an expert toxicologist, Dr. Pleus, who provided a preliminary report that there was a lack of scientific support for the conclusion that "the medication that was administered to [KM] caused the adverse effects that are reported in the medical records." Dkt. 11-1, at 425. Dr. Pleus required an additional $8,000 to complete his opinion and provide a brief report and noted that he would require additional funding to prepare for and attend trial as an expert witness. Dkt. 11-1, at 425. Trial counsel never retained Dr. Pleus to complete his opinion or to testify. She explained in her brief affidavit that her request for additional funding was denied, and she now acknowledges that due to an oversight, she abandoned further efforts to retain Dr. Pleus as an expert witness. Dkt. 11-1, at 449. Petitioner's trial counsel did not present any medical evidence to rebut the prosecution.

The jury found petitioner guilty, including rendering a special verdict that petitioner used her position of trust to facilitate the crime, knew the child was particularly vulnerable, manifested deliberate cruelty, and caused substantial bodily harm. *See* Dkt. 11-1, at 3, 16. The sentencing court entered an exceptional sentence of 480 months in prison. *See* Dkt. 11-1, at 6–7.

Plaintiff appealed to Division One of the Washington State Court of Appeals. She did not argue that her trial counsel rendered ineffective assistance at this juncture, instead focusing on other arguments. *See* Dkt. 11-1, at 16–17. Division One affirmed, and petitioner sought direct review. Dkt. 11-1, at 283. The Washington State Supreme Court denied review without comment. Dkt. 11-1, at 362.

In 2017, petitioner filed a personal restraint petition ("PRP"), acting *pro se*. Dkt. 11-1, at 366. She argued, among other things, that her trial counsel rendered ineffective assistance, and she provided her trial counsel's declaration and Dr. Pleus's 2013 preliminary statements. Dkt. 11-1, at 367; *see also* Dkt. 11-1, at 454 (allowing petitioner to supplement her PRP). Petitioner's trial counsel affirmed that she made a mistake related to Dr. Pleus, misunderstanding the import of his preliminary opinions and leading her not to more vigorously attempt to have the Department of Assigned Counsel pay to retain him. Dkt. 11-1, at 449.

Division Two of the Court of Appeals appointed counsel for petitioner and referred the matter to a panel of judges for a decision on the merits. Dkt. 13, at 26. This was the first PRP client whom PRP counsel had represented. PRP counsel did not ask Dr. Pleus to finalize his opinions or to provide additional information regarding how he would have testified if called as a witness, even though the state courts allowed for such submissions. *See* Dkt. 3-2, at 1–5. And, in May 2020, Division Two denied the PRP, holding, among other things, that petitioner "failed to meet her prima facie burden of showing prejudice" related to the failure to retain Dr. Pleus as an expert witness. Dkt. 13, at 188, 198; *see also* Dkt. 14, at 2. Petitioner sought discretionary review of the denial of her petition. Dkt. 14, at 5. However, the Supreme Court Commissioner denied review, citing with approval Division Two's reasoning that petitioner could not show a reasonable probability that Dr. Pleus's testimony would have altered the outcome of petitioner's trial. Dkt. 14, at 47–49; *see also* Dkt. 14, at 61 (denying motion to modify the Commissioner's ruling).

In support of her habeas petition, petitioner now also provides the declarations of her PRP counsel and of Dr. Pleus. *See* Dkts. 3-1, 3-2, 19-1. Her PRP counsel concedes that she

mistakenly believed that she could not obtain additional funding for expanded opinions from Dr. Pleus or that she could supplement the PRP with additional evidence. Dkt. 3-2, at 3.

Dr. Pleus has also now provided the court with extensive and detailed reasons why he believes that the state's evidence did not establish that petitioner added bleach to the Tobramycin eyedrops, causing KM's eye injuries. Dkt. 19-1, at 2; *see also* Dkt. 3-1. Dr. Pleus states that he completed his review of the trial testimony, laboratory reports, and medical records related to petitioner's case and that if he had been called at trial, he "could have testified to all the gaps, errors, assumptions, and deficiencies at [petitioner's] trial" and "cast[ed] serious doubt on" the "scientific veracity" of the evidence. Dkt. 19-1, at 4, 6, 15. Among other things, Dr. Pleus states that he could testify as to fundamental flaws in the laboratory analysis of the Tobramycin sample collected by investigators. *See* Dkt. 19-1, at 2. He states that due to issues with record keeping and documentation, the laboratory scientists' conclusions are not dependable and cannot be validated. *See* Dkt. 19-1, at 2–4. He asserts that the scientists could have inadvertently contaminated the Tobramycin themselves when they tested it. Dkt. 19-1, at 5. In addition, Dr. Pleus asserts that the analysis did not rule out whether some other substance was present in the Tobramycin that caused KM's injuries. *See* Dkt. 19-1, at 5. He also states that lack of documentation from the pharmacy that compounded the Tobramycin prescription calls into question whether the eye drops were somehow contaminated before they were in petitioner's possession. *See* Dkt. 19-1, at 5. And he claims that the State did not show that petitioner's other medication was not somehow contaminated or that some other issue altogether caused KM's eye injuries. Dkt. 19-1, at 10, 13–14.

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DISCUSSION

I. Ineffective Assistance of Counsel Related to Dr. Pleus (Grounds 1 and 2)

A. Overview

A federal court generally may not hear a habeas claim that is "procedurally defaulted." *See Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir. 2011). Procedural default occurs when a state court denies a claim on procedural grounds. *See, e.g.*, *Zichko v. Idaho*, 247 F.3d 1015, 1021 (9th Cir. 2001); *Coleman v. Thompson*, 501 U.S. 722, 729–30, 746–47 (1991). Because the state court necessarily did not fully address procedurally defaulted claims on the merits, such claims are also not "subject to the deferential review of 28 U.S.C. § 2254(d)." *Ramirez v. Ryan*, 937 F.3d 1230, 1240 (9th Cir. 2019), *cert. granted sub nom. Shinn v. Ramirez*, 141 S. Ct. 2620 (2021).

Even though procedural default generally bars habeas claims, there is a limited exception where in an initial review collateral proceeding (such as the PRP proceedings here), "there was no counsel or counsel in that proceeding was ineffective." *Martinez v. Ryan*, 566 U.S. 1, 17 (2012). Under *Martinez*, the federal court may still hear the procedurally defaulted claim if the underlying claim of ineffective assistance of trial counsel is "substantial." *Id.*

Petitioner raises a claim related to trial counsel's failure to call Dr. Pleus as a defense witness. This is exactly the situation discussed in *Martinez*. Petitioner asserts that her trial counsel rendered ineffective assistance by not calling Dr. Pleus and that her PRP counsel compounded this error by failing to investigate and support her PRP with evidence about how Dr. Pleus would have testified. In *Martinez*, the Supreme Court held that such "inadequate assistance of counsel at initial review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9.

B. Procedural Default of Trial Counsel Ineffectiveness Claim

First, the Court agrees with petitioner that the issue related to Dr. Pleus is procedurally defaulted due to petitioner's PRP counsel's failure to better support the PRP's arguments on collateral review. *See* Dkt. 20, at 8. Both courts that considered the claim of trial counsel's ineffectiveness related to Dr. Pleus concluded that petitioner had not adequately supported her claim. Division Two explained that petitioner had to present affidavits or other corroborative evidence to establish what another person would say and that petitioner had not established what Dr. Pleus ultimately would have said at trial. *See* Dkt. 13, at 226–27. The Supreme Court Commissioner, who rejected the petition for review in the collateral review proceedings, reiterated that petitioner had not shown prejudice in the Court of Appeals because she did not show what Dr. Pleus's opinion would have been. *See* Dkt. 14, at 48.

Respondent, for his part, asserts that the state courts did, in fact, adjudicate this issue on the merits. *See* Dkt. 21, at 5. Respondent notes that the state courts alternatively concluded that, based on the limited evidence presented in support of the PRP, the failure to call Dr. Pleus as a witness did not prejudice petitioner. *See* Dkt. 13, at 226–27; Dkt. 14, at 48. But the state courts' rulings on the merits addressed this issue based on only a limited record—without the benefit of Dr. Pleus's full opinions—and could not have fully considered the merits of the issue of whether trial counsel rendered ineffective assistance. Even if the state courts expressed an alternate holding on the merits, the underlying claim that trial counsel rendered ineffective assistance was still procedurally defaulted. Where a state court both applies a procedural rule to deny a claim and alternatively opines that the claim lacks merit, procedural default still applies. *See Bennett v. Mueller*, 322 F.3d 573, 580 (9th Cir. 2003); *Zapata v. Vasquez*, 788 F.3d 1106, 1112 (9th Cir. 2015).

Before this Court can find that petitioner procedurally defaulted her claims related to Dr. Pleus, the Court must also find that the procedural rule that the state courts applied was "independent and adequate." *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The rule applied by the state courts as support that petitioner failed to provide adequate evidence to support her claim (the holding of *In re Rice*, 118 Wn.2d 876, 886 (1992)) meets this requirement. *E.g. Corbray v. Miller-Stout*, 469 F. App'x 558, 560 (9th Cir. 2012); *Draggoo v. Miller-Stout*, No. C13-5054 RBL/KLS, 2013 WL 5176760, at *6 (W.D. Wash. Sept. 12, 2013); *Parmelee v. Fraker*, No. C09-5273BHS, 2010 WL 546933, at *8 (W.D. Wash. Feb. 11, 2010).

Accordingly, the issue regarding trial counsel's effectiveness for not further investigating and calling Dr. Pleus as a witness was procedurally defaulted. The Court turns to what evidence it may consider in connection with petitioner's claims that the Court should excuse her procedural default of this issue.

C. Extra-Record Evidence Allowed

Petitioner asks this Court to consider evidence that she did not present to the state courts in support of her claims. *See* Dkt. 3. Specifically, petitioner asks this Court to consider Dr. Pleus's declarations about how he would have testified at petitioner's trial, if called for the defense (*see* Dkts. 3-1, 3-2, 19-1) and also to consider her PRP counsel's declaration about her failure to file a declaration by Dr. Pleus as part of her briefing in the PRP. Dkt. 3-2. The Court recommends granting petitioner's requests.

In general, review under § 2254 is limited to the record that was before the state courts. *See* 28 U.S.C. §§ 2254(d)(2), (e)(2). However, where the Court considers a claim under *Martinez* for an exception from procedural default, the Court may "consider evidence not

previously presented to the state court." *Jones v. Shinn*, 943 F.3d at 1221. The Ninth Circuit reasoned in *Jones v. Shinn* that—

> [t]he Supreme Court explained in *Martinez* that if the prisoner's state court attorney is ineffective, "the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims." 566 U.S. at 11[.] The Court's concern was with the prisoner's opportunity to "vindicat[e] a substantial ineffective-assistance-of-trial-counsel claim," a claim which "often depend[s] on evidence outside the trial record." *Id.* at 11, 13[.] The Court held that the federal habeas court may hear a claim of ineffective assistance of trial counsel where the initial state collateral proceeding "may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.* at 14[.]
>
> . . . . Determining whether counsel's performance was deficient often requires asking the attorney to state the strategic or tactical reasons for his actions, and determining prejudice often requires discovery and an evidentiary hearing to assess the effect of the deficient performance. [Citation omitted.]
>
> . . . .
>
> While the Supreme Court held in *Cullen v. Pinholster* that a federal habeas court is ordinarily confined to the evidentiary record from state court, it held that the court was limited to "the record that was before the state court *that adjudicated the claim on the merits*." 563 U.S. 170, 180 [] (2011) (emphasis added). Because the underlying claim in a *Martinez* case has not been adjudicated on the merits in a state-court proceeding, "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him." *Detrich* [*v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc) (plurality)]. We have explained that "*Martinez* may provide a means to show 'cause' to overcome the default and reach the merits of the new claim." *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014). The Supreme Court in *Martinez* recognized that "[c]laims of ineffective assistance at trial often require investigative work." 566 U.S. at 11[.] Courts may require expanded records to reach the merits of these claims.

Jones, 943 F.3d at 1221–22.

Proper evaluation of these witnesses' testimony is critical to deciding whether petitioner's trial and PRP counsel failed to provide effective assistance and whether Dr. Pleus's testimony at trial had a reasonable probability of changing the outcome. Therefore, the District Court should grant the requests for consideration of extra-record evidence. Dkts. 3, 19. In the

remainder of this analysis, this Court will consider the extra-record evidence, consisting of two declarations from Dr. Pleus and a declaration from petitioner's PRP counsel.

Dr. Pleus gives extensive and detailed reasons why he believes that the state's evidence did not establish that petitioner added bleach to the Tobramycin eyedrops, causing KM's eye injuries. Dkt. 19-1, at 2; *see also* Dkt. 3-1. Petitioner's PRP counsel explains that she mistakenly believed she could neither obtain additional funding for expanded opinions from Dr. Pleus nor supplement petitioner's PRP with additional evidence. Dkt. 3-2, at 3.

Also relevant to petitioner's procedurally defaulted claim that trial counsel rendered ineffective assistance are the declaration from her trial counsel and the memoranda that Dr. Pleus provided in 2013. Dr. Pleus initially opined that "the data provided to me does not scientifically support the Plaintiff's case that the medication that was administered to [KM] caused the adverse effects that are reported in the medical records." Dkt. 11-1, at 423, 425. Trial counsel explains that she misunderstood the import of Dr. Pleus's initial opinion, believing that he meant that the eye drops as compounded by the pharmacy that prepared them could not have harmed KM. *See* Dkt. 11-1, at 449. Trial counsel states that had she accurately understood Dr. Pleus's initial statements, she would have "more vigorously sought additional funding to complete Dr. Pleus's work." Dkt. 11-1, at 449.

The Court turns to whether this evidence is adequate to merit an evidentiary hearing. *See Detrich*, 740 F.3d at 1246 ("For procedurally defaulted claims, to which *Martinez* is applicable, the district court should allow discovery and hold an evidentiary hearing where appropriate to determine whether there was 'cause' under *Martinez* for the state-court procedural default and to determine, if the default is excused, whether there has been trial-counsel IAC.").

D. Colorable Claim of "Cause" and "Prejudice" to Excuse the Default

The Ninth Circuit has explained that—

> [T]o establish cause and prejudice in order to excuse the procedural default of his ineffective assistance of trial counsel claim, [petitioner] must demonstrate the following: (1) post-conviction counsel performed deficiently; (2) "there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different," [citation omitted]; and (3) the "underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14[].

Ramirez v. Ryan, 937 F.3d at 1242.

Petitioner's evidence creates colorable issues on each of these three points.

1. Substantiality of Underlying Claim

Beginning with the third point from *Ramirez*, petitioner has provided materials demonstrating that her claim of ineffective assistance of trial counsel has at least "some merit." *See Ramirez v. Ryan*, 937 F.3d at 1242.

Petitioner must show that her counsel's performance "fell below an objective standard of reasonableness" measured by "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The Court must indulge a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689–90. Nevertheless "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691.

Trial counsel admits in her declaration that she misunderstood the import of Dr. Pleus's memoranda when she was preparing for petitioner's trial, thinking that he would not provide exculpatory testimony. Dkt. 11-1, at 449. "[S]trategic choices made after less than complete

investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation[.]" *Strickland*, 466 U.S. at 690–91. Here, the materials that petitioner has provided support that the limitation on investigation and retention of Dr. Pleus may have been based on a mistake, not reasonable professional judgment.

Respondent argues that the inquiry into counsel's performance is objective, so that even if counsel made a mistake, the Court cannot find that counsel rendered deficient performance so long as there might be a strategic reason not to pursue retaining Dr. Pleus. *See* Dkt. 10, at 47. Respondent asserts that such a reason is apparent here: trial counsel *did* ask for additional funding for Dr. Pleus to complete his opinions but the Department of Assigned Counsel ("DAC") denied her request. Dkt. 11-1, at 449. But respondent ignores that trial counsel continues by saying that she still would have "more vigorously" sought additional funding had she not been under the mistaken belief that Dr. Pleus could not provide exculpatory evidence. Dkt. 11-1, at 449.

Trial counsel's declaration creates more questions than it answers. For instance, it is not entirely clear whether trial counsel's misunderstanding of Dr. Pleus's opinion led to her failure to obtain additional funding to finalize Dr. Pleus's opinions or whether her failure to receive funding may have been the result of other factors beyond her control. *See also Thomas v. Chappell*, 678 F.3d 1086, 1104 (9th Cir. 2012) (holding that trial counsel rendered ineffective assistance by not calling a witness based on an incorrect understanding of the witness's testimony and a lack of sufficient information to make an informed decision). This can best be determined by an evidentiary hearing giving both sides an opportunity to explore that issue.

Nor is the Court convinced by respondent's citation to *Harrington v. Richter*, 562 U.S. 86, 96 (2011). That case involved review of a claim fully examined by state courts, so that the

state courts' decision was entitled to AEDPA deference. Indeed, in *Harrington*, the Court acknowledged that "[i]f this case presented a *de novo* review of *Strickland,* the foregoing might well suffice to reject the claim of inadequate counsel, but that is an unnecessary step" in light of the nature of the review. *Harrington*, 562 U.S. at 109.

The Court also finds that petitioner has shown at least a colorable claim of prejudice from her trial counsel's failure to retain Dr. Pleus to testify as a defense witness. As noted, Dr. Pleus asserts that his testimony would have cast serious doubt on the State's scientific evidence and whether the eye drops contained bleach. In addition, he states that his testimony would have illuminated various gaps and deficiencies in the trial evidence. *See* Dkt. 19-1, at 4, 15. Dr. Pleus primarily addresses the flaws in the laboratory analysis leading him to question the dependability of the analysts' conclusions. But he also asserts that the State could not rule out that some other substance in the eye drops caused KM's injuries or that the eye drops were contaminated by some other means before they came into petitioner's possession. Dkt. 19-1, at 5, 10, 13–14.

At petitioner's trial, five laboratory analysts testified for the prosecution that the Tobramycin medicine had been spiked with bleach. Dkt. 14, at 913, 936, 985, 1005–06, 1028, 1048. Petitioner, for her part, took the stand in her defense and denied knowledge of issues with the eye drops. Dr. Pleus's testimony, as he describes it, would have provided expert testimony supporting the defense and could have cast doubt on the analysts' methods and conclusion, lending credence to petitioner's general denial that there were issues with the eye drops. *See* Dkt. 19-1, at 2–5. Petitioner has made a reasonable argument that Dr. Pleus's testimony could have made a difference by rebutting the otherwise uncontroverted and detailed expert testimony.

The State presented other evidence that there was bleach in the eye drops. Namely, doctors who treated KM testified that her injuries were consistent with repeated exposure to a

caustic agent and that they did not believe that there was another, unidentified cause for the injuries. *See* Dkt. 14, at 748, 812–13, 857, 861, 863, 866, 1101, 1342–43, 1585. But Dr. Pleus's testimony could also have created factual issues related to this evidence, if believed and if he testified as he describes. He would have raised the issues that bleach could have been added by the compounding pharmacy (not petitioner), that the Tobramycin or another eye medication had been contaminated with some other substance that injured KM's eyes, or that there was some other explanation altogether for the injuries. Dkt. 19-1, at 5, 10.

It is not unusual for a trial to hinge on "a battle of the experts," and it is often difficult to decide which expert to believe. But here, there was no battle because no expert was called by the defense to support her denials. Therefore, considering the efficacy of Dr. Pleus' testimony is important to determine if plaintiff's trial counsel failed to provide adequate representation.

2. Post-Conviction Counsel's Performance

Next, the Court examines whether petitioner has provided evidence that could support a finding that her post-conviction counsel performed deficiently. *See Ramirez*, 937 F.3d at 1242.

PRP counsel states that she rested on the evidence (Dr. Pleus's initial memoranda and her trial counsel's declaration) that petitioner had provided, acting *pro se*, when petitioner first filed her PRP. The state courts found this evidence inadequate to show a *prima facie* case that trial counsel rendered ineffective assistance. *See* Dkt. 14, at 48 (the Supreme Court commissioner's ruling that "[petitioner] did not show what Dr. Pleus's ultimate opinion would have been or what his testimony would have consisted of. . . ."). And PRP counsel acknowledges that was her first case representing a petitioner in a PRP proceeding and that she failed to seek funding to retain Dr. Pleus for further opinions or to move to submit supplemental evidence in support of the PRP even though she now understands that she could have done so. *See* Dkt. 3-2, at 4; *see also In re*

Skylstad, 160 Wn.2d 944, 947 (2007) (granting motion to supplement the record in a PRP proceeding); *Matter of Pauley*, 17 Wash. App. 2d 1043 (similar); RAP 16.11(b), 16.17. This evidence supports a viable claim that petitioner's PRP counsel's actions were not the result of a defensible professional judgment but an oversight founded on a mistaken understanding of the law.

Further, petitioner's evidence creates a viable claim that this Court could find a reasonable probability that, absent PRP counsel's deficient performance, the result of the post-conviction proceedings would have been different. As noted, the state courts rejected the claim that trial counsel rendered ineffective assistance due to PRP counsel's failure to substantiate the claim with admissible evidence during the PRP proceedings. Although the state courts opined that petitioner could not show that Dr. Pleus's opinions would have changed the outcome of the trial, these holdings relied on Dr. Pleus's cursory, incomplete statements provided to trial counsel in 2013. And this limited record was, according to petitioner's materials, the consequence of her PRP counsel's mistakes.

G. Remedy

In sum, petitioner has provided evidence that creates colorable issues regarding whether (1) her claim of ineffective assistance of trial counsel is "substantial," and (2) her counsel in initial review collateral proceedings was ineffective. These are the prerequisites for allowing a federal court to hear an otherwise procedurally defaulted claim that trial counsel rendered ineffective assistance. *Martinez*, 566 U.S. at 17. Similarly, she has also created colorable issues regarding whether on the merits, her habeas petition should be granted because she has shown that her trial counsel rendered ineffective assistance.

The appropriate remedy in this circumstance is to hold an evidentiary hearing pursuant to *Martinez v. Ryan*, 566 U.S. 1. At the evidentiary hearing, the Court should consider "whether there was 'cause' . . . for the state-court procedural default" (*Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc) (plurality))—that is whether PRP counsel rendered ineffective assistance by failing to submit Dr. Pleus' full opinion to the state courts during the PRP. And the Court should consider, ""if the default is excused, whether there has been trial-counsel [ineffective assistance]" because trial counsel did not obtain Dr. Pleus' completed analysis or testimony at trial. *Id.* Depending upon the outcome of the evidentiary hearing, the Court can decide whether petition should be granted.

Consistent with the Advisory Notes to the Rules Governing Section 2254 and 2255 petitions, it is appropriate for this Court to issue a Report and Recommendation to the District Court on the issue of whether to hold an evidentiary hearing. *See* 5C West's Fed. Forms, District Courts-Criminal Appendix B (5th ed.) ("Subdivision (b) [of the Rules] provides that a magistrate [judge], when so empowered by rule of the district court, may recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed, provided [the magistrate judge] gives the district judge a sufficiently detailed description of the facts so that the judge may decide whether or not to hold an evidentiary hearing."); *see also Orand v. United States*, 602 F.2d 207, 208 (9th Cir. 1979) (explaining that Congress has clearly expressed its intent that magistrate judges *may* conduct evidentiary hearings). The undersigned defers to the District Court on the issue of whether the undersigned or the District Court judge should conduct the hearing.

The Court turns to the remaining grounds for relief, which fail.

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II. Remaining Grounds

A. Legal Standard

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), petitioner is barred from relitigating any claim presented to the state courts unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" (28 U.S.C. § 2254(d)(1)), or if the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.§ 2254(d)(2); *see Harrington*, 562 U.S. at 98.

B. Trial Counsel's Failure to Ask Petitioner about Her Guilt (Ground 2)

Petitioner briefly argues that the state courts wrongly decided her claim that trial counsel rendered ineffective assistance by not directly asking her whether she contaminated the eye drops. *See* Dkt. 2, at 13–14.

A petitioner bringing a claim that counsel rendered ineffective assistance must "do more than show that [s]he would have satisfied *Strickland*'s test if [her] claim were being analyzed in the first instance." *Bell v. Cone*, 535 U.S. 685, 698–99 (2002) (citations omitted). "[U]nder § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, [s]he must show that the [state court] applied *Strickland* to the facts of [her] case in an objectively unreasonable manner." *Id.* at 699.

Here, the Supreme Court Commissioner ruled that "the Court of Appeals sustainably held that counsel procured an effective denial, and that [petitioner] otherwise demonstrated no prejudice." Dkt. 14, at 49. In support of this conclusion, the Commissioner pointed to defense

counsel's question whether petitioner "had any 'personal knowledge as to what's been described from these drops of being a dark color and smell and all that stuff'" and petitioner's response of "'[n]o. That's nothing that I've seen.'" Dkt. 14, at 49. Based on this testimony, "[e]ffectively, [petitioner] denied contaminating the eye drops, but even if counsel failed to procure an unequivocal denial, the Court of Appeals properly found no showing of prejudice." Dkt. 14, at 49–50. The Commissioner also concluded that petitioner failed to support to other grounds for relief with argument showing that they merited the Supreme Court's review. Dkt. 14, at 50.

Petitioner points out that the prosecutor highlighted the lack of any explicit denial by petitioner (*see* Dkt. 2, at 14) and that in contrast to petitioner, Bowie and Valvoda explicitly denied adding anything to the eye drops. Dkt. 2, at 14. However, as the state courts reasonably concluded, petitioner's denial of knowledge that the eye drops had been contaminated was tantamount to claiming she was innocent of contaminating the eye drops. Defense counsel reiterated in closing that petitioner did not know about issues with the eye drops. *See* Dkt. 14, at 2233, 2236. Lack of an even more explicit denial from petitioner did not prevent defense counsel from arguing that her client was not guilty—nor did it give the State additional evidence that it did not already have. Petitioner fails to show that the state courts unreasonably applied federal law or unreasonably determined the facts when they rejected this claim.

C. Trial Counsel's Failure to Prepare Petitioner for Trial (Ground 2)

Petitioner argues that her trial counsel failed to adequately prepare petitioner for her trial, particularly for her trial testimony. Dkt. 2, at 14. She points to her trial counsel's statement acknowledging that there was never a meeting devoted "solely" to preparing petitioner to testify and that trial counsel never provided petitioner with a list of questions that would be asked on direct. Dkt. 11-1, at 450.

The parties agree that this Court looks to Division Two's decision, as the Supreme Court Commissioner did not address the issue on the merits. *See* Dkt. 2, at 16; Dkt. 10, at 52. Division Two denied the claim on the basis that petitioner had not shown that the alleged deficient representation prejudiced her. Dkt. 13, at 229. The Court held that petitioner "testified articulately and thoroughly throughout her direct and cross-examinations." Dkt. 13, at 229. Moreover, "she has not established that more preparation would have had any practical effect on the outcome of her trial, especially since she was testifying about recent events from her own life that she should have been able to recall without extensive preparation." Dkt. 13, at 229.

The Court does not agree with petitioner that this was an unreasonable application of clearly established federal law or an unreasonable determination of the facts in light of the evidence presented. Notably, petitioner does not rely on evidence that her trial counsel utterly failed to prepare her for trial. That was not the case. *See* Dkt. 11-1, at 449 (trial counsel's statement that she met "numerous times" with petitioner over the course of the representation, that counsel "generally advised [petitioner] on how to testify," and that counsel incorporated some of petitioner's questions for direct examination of petitioner). "[T]here is no established 'minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.'" *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005) (internal citation omitted).

Petitioner points to one part of her trial testimony as support that she was "unprepared" and the prosecutor "took advantage" of this. Dkt. 2, at 16. The excerpt she points to is a brief portion of her testimony in which she corrected herself about whether she had starting using prescriptions filled on May 2. Dkt. 14, at 2090. Her citation to the record fails to show that the state courts unreasonably determined the facts in light of the evidence presented. As Division

Two observed, on cross-examination petitioner had clearly testified regarding the chronology of events. *See* Dkt. 14, at 2067–101. Her limited self-correction is not enough to conclude that the state courts unreasonably found that petitioner had failed to show prejudice. For instance, petitioner fails to explain how she otherwise would have testified differently had she had a meeting with counsel before trial that "solely" focused on preparing her for trial.

Petitioner cites to *Pierce v. Administrator New Jersey State Prison*, 808 F. App'x 108, 113 (3d Cir. 2020), which is not binding authority on this Court. Even if it were, this case presents distinct circumstances, as in *Pierce*, there was clearly prejudice from counsel's failure to meet with the defendant and advise him to take the stand, where only minimal evidence supported the conviction. Petitioner also cites to *Kimmelman v. Morrison*, 477 U.S. 365, 386, 106 S. Ct. 2574, 2589, 91 L. Ed. 2d 305 (1986), which deals with a distinct situation, in which there was "a total failure to conduct pre-trial discovery[.]"

Petitioner fails to show that the state courts unreasonably determined the facts or applied clearly established federal law to this claim.

D. Prosecutorial Misconduct (Ground 3)

1. Comment on Failure to Deny Tampering Eye Drops

Petitioner argues that the prosecutor committed misconduct in closing argument by referring to petitioner's lack of denial at trial that she tampered with the eye drops. Dkt. 2, at 18.

During closing argument, the prosecutor argued (without the defense objecting) that petitioner "never said she didn't put anything into [KM'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." Dkt. 14, at 2212.

Division One reasoned that "[a]n argument that the defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense." Dkt. 11-1, at 62 (internal citation omitted). Further, Division One concluded that the argument relied on reasonable inferences from petitioner's testimony and that, in any event, the lack of objection waived this alleged error. Dkt. 11-1, at 63–64.

This conclusion is consistent with clearly established federal law. In *Demirdjian v. Gipson*, 832 F.3d 1060, 1071 (9th Cir. 2016), the Ninth Circuit rejected an argument that counsel should have objected to the prosecutor shifting the burden of proof, when a prosecutor's arguments in closing essentially attacked the weakness of the defense case and invited counsel to provide admissible evidence to support it. The comment on the failure to present exculpatory evidence was permissible because the burden of proof was neither expressly nor implicitly shifted and because the prosecutor expressly told the jury that the government bore the burden of proof. *Id.*

Petitioner argues that similar argument, here, shifted the burden of proof. But as in *Demirdjian*, the prosecutor repeatedly stated that the State bore the burden of proof. *E.g.*, Dkt. 14, at 2185, 2187, 2210–11. This is not like petitioner's cited case *United States v. Sandoval-Gonzalez*, where the prosecutor told the jury that certain evidence created a presumption against the defendant for one element of a crime. *See* 642 F.3d 717, 721, 726 (9th Cir. 2011). Here, the prosecutor told the jury that the state bore the burden but that the defense's case was weak for reasons including that petitioner did not specifically deny tampering with the eye drops.

Petitioner also points to the rebuttal closing argument. On rebuttal, the prosecutor referred to defense counsel's closing argument that "you don't have an intentional assault if there was something wrong with the medications and the defendant didn't know about it." Dkt. 14, at

2250. The prosecutor argued, that, however, it was not a case of petitioner being ignorant about the contamination: "[b]ut again, I submit to you that this is the case. The defendant never said that she didn't intentionally do something to the drops." Dkt. 14, at 2250. Defense counsel objected on the basis of burden shifting, but the trial court overruled the objection. Dkt. 14, at 2250–51.

Division One cited authority that "[e]ven where the comments are improper, the remarks by the prosecutor are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to [her] acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." Dkt. 11-1, at 64 (internal citations and quotation marks omitted). Division One held that the comments in rebuttal were "in pertinent reply to the argument of defense" and were not improper. Dkt. 11-1, at 65.

A prosecutor may respond in rebuttal to an attack made in the defendant's closing argument. *See Lawn v. United States*, 355 U.S. 339, 359 n. 15 (1958). And as noted, the comment on petitioner not explicitly denying tampering with the eye drops was a reasonable inference from the evidence, which the prosecutor was allowed to draw. Petitioner fails to show that Division One unreasonably applied federal law when deciding this issue.

2. Brownie Analogy

Petitioner next argues that the prosecutor "trivialized" the State's burden of proof by using an analogy about a parent determining who took brownies. Dkt. 2, at 18. Petitioner also references a "puzzle" argument but does not develop or explain the basis for this argument, so that the Court does not address it further. Dkt. 2, at 18.

The prosecutor discussed a jury instruction describing the difference between direct and circumstantial evidence, explaining that "[t]he law does not give one type of evidence any more

weight . . . than the other." Dkt. 14, at 2182. She used an analogy to illustrate the point: a parent who leaves a stack of brownies on the kitchen counter with her child staring intently at them and returns ten minutes later to see the stack smaller, the child with a "little smudge on his check," and a sticky remote control. Dkt. 14, at 2183. The prosecutor argued, "[y]ou didn't see [the child] take anything, you didn't see him actually eat it, but what can you reasonably infer based on what you did see?" Dkt. 14, at 2183. And if the child tried to blame the family dog, "what's the reasonable inference? . . . There will always be other possibilities. But what's the reasonable conclusion based on what you do have? That your son ate the brownies." Dkt. 14, at 2183.

Division One disagreed that this analogy misstated or trivialized the burden of proof. Dkt. 11-1, at 62. The Court does not agree with petitioner that this holding was contrary to or an unreasonable application of clearly established federal law. Prosecutors may use analogies during closing argument (*e.g.*, *United States v. Swanson*, 703 F. App'x 487, 489 (9th Cir. 2017)), and this argument did not lower the State's burden of proof. Rather, it permissibly conveyed that circumstantial evidence was equally probative as direct evidence.

Petitioner argues that this analogy conflates reasonable inferences with proof beyond a reasonable doubt and implies that the existence of alternative possibilities does not create a reasonable doubt. Dkt. 2, at 19. She argues that the argument "misstated the government's burden by likening it to a reasonable inference." Dkt. 2, at 19. Her argument fails to show that the state court misapplied clearly established federal law when it rejected her arguments. A criminal verdict certainly may rest on reasonable inferences from the State's evidence. *Cf. Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (sufficient evidence supports a conviction if the evidence viewed in the State's favor—including reasonable inferences therefrom—could result

in a rational trier of fact finding the essential elements of the crime beyond a reasonable doubt). Moreover, the prosecutor repeatedly reminded the jury that the State's burden of proof was proof beyond a reasonable doubt during her closing argument. Dkt. 14, at 2185, 2187–88, 2210, 2211.

Petitioner points to cases in which the prosecutor explicitly told the jury that there would be a "presumption of guilt" (*United States v. Perlaza*, 439 F.3d 1149, 1169 (9th Cir. 2006)) and a "presumption" against the defendant on one of the elements of the offense. *Sandoval-Gonzalez*, 642 F.3d at 725. But the prosecutor's argument herein did not create a "presumption" against petitioner, and these cases therefore do not control the outcome here. Nor does the Court agree that the brownie analogy was similar to impermissible argument in *United States v. Velazquez*, 1 F.4th 1132, 1136–38 (9th Cir. 2021), where the prosecutor told the jury that a "reasonable doubt" was something used to make daily decisions with casual judgment. Here, the analogy did not exhort the jury to rest on "fallacious" assumptions about daily life (*see id.* at 1138) but explained that the jury should compare the viability of reasonable alternative assumptions from the evidence.

Petitioner fails to show that the state court unreasonably applied clearly established federal law or unreasonably determined the facts when it rejected her prosecutorial misconduct claim in this regard.

E. Cumulative Error (Ground 4)

Petitioner argues that cumulative error requires granting her habeas petition. Dkt. 2, at 21. "[T]he combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 298, 302–03 (1973)). "Even if no single

error [is] sufficiently prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless, be so prejudicial as to require reversal.'" *Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002) (quoting *United States v. de Cruz*, 82 F.3d 856, 868 (9th Cir. 1996)).

Division One held that petitioner had failed to show cumulative error justifying reversal. Dkt. 11-1, at 65. As noted above, the Court finds that an evidentiary hearing related to the issue of trial counsel's failure to call Dr. Pleus as a defense witness is appropriate. However, the Court does not conclude that the other bases for alleged ineffective assistance of counsel—that is, failure to better prepare petitioner for trial or to elicit her denial that she tampered with the eye drops—would accumulate with any error related to Dr. Pleus's testimony in a manner otherwise depriving petitioner of a fair trial. *See Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011) (granting habeas relief under the cumulative effects doctrine is appropriate when there is a "unique symmetry" of otherwise harmless errors, such that they amplify each other in relation to a key contested issue in the case). Petitioner fails to show that the state court unreasonably applied clearly established federal law when it rejected her cumulative error claim.

F. Arguments Related to Aggravating Factors (Grounds 5 and 6)

1. Unconstitutionally Vague

Petitioner argues that the aggravating factors (deliberate cruelty and particular vulnerability of the victim) found by the jury at her trial are unconstitutionally vague. Dkt. 2, at 24. However, the Supreme Court has not clearly established that aggravating factors used to impose an exceptional sentence in a non-capital case can be void for vagueness.

"[T]he Due Process Clause prohibits the Government from 'taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Beckles v.*

United States, 137 S. Ct. 886, 892 (2017) (internal citation omitted). "Applying this standard, the Court has invalidated two kinds of criminal laws as 'void for vagueness': laws that define criminal offenses and laws that fix the permissible sentences for criminal offenses." *Id.*

Washington law lists two circumstances ("aggravating factors'), as relevant here, which may "support a sentence above the standard range." First, that "[t]he defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim." RCW 9.94A.535(3)(a). And second, that "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." RCW 9.94A.535(3)(b). If proven to a jury beyond a reasonable doubt, the sentencing court "may" impose "a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds . . . that the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(3), (5).

Division One addressed petitioner's arguments on direct appeal, explaining that the Washington State Supreme Court had held that sentencing guidelines could not be void for vagueness. *See* Dkt. 11-1, at 65. Division One rejected petitioner's argument that U.S. Supreme Court case law holding that a sentencing enhancement requires jury findings or a defense stipulation required a different outcome. Dkt. 11-1, at 66. Division One held that "[t]hese aggravating [factors] do not define conduct, authorize arrest, inform the public of criminal penalties, or vary legislatively defined criminal penalties." Dkt. 11-1, at 66.

Petitioner cites a trio of U.S. Supreme Court cases in support of her argument that due process concerns apply to the aggravating factors here. In *Apprendi v. New Jersey*, the Supreme Court held that other than the fact of a prior conviction, any fact increasing the penalty for a

crime beyond the prescribed statutory maximum had to be found by a jury and proved beyond a reasonable doubt. 530 U.S. 466, 490 (2000). In *Blakely v. Washington*, the Supreme Court clarified that the relevant "statutory maximum" is the maximum sentence a judge may impose without the additional findings (such as, in that case, deliberate cruelty). 542 U.S. 296, 303 (2004). And in *Alleyne v. United States*, the Supreme Court held that any fact increasing a mandatory minimum sentence was an "element" of the crime that had to be submitted to the jury and found beyond a reasonable doubt. 570 U.S. 99, 103 (2013). As petitioner points out, *Apprendi* referenced due process as the basis for its holding. But the specific due process protection extended by *Apprendi* is the "indisputabl[e]" entitlement of "a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." 530 U.S. at 477 (internal quotation marks and citation omitted). None of the three cases relied upon by petitioner extend due process's protection against vague laws to aggravating factors.

Indeed, after each of the three cited cases, the Supreme Court decided *Beckles v. United States*, holding that a clause in a federal sentencing enhancement was not subject to a void for vagueness challenge. 137 S. Ct. at 890; *but see Tuilaepa v. California*, 512 U.S. 967, 972 (applying void for vagueness principles to special circumstances required to be found in capital cases). *Beckles* explained that pertinent to sentencing issues, the Court has invalidated laws "that *fix the permissible sentences* for criminal offenses" because "statutes fixing sentences . . . must specify the range of available sentences with sufficient clarity." *Id.* at 892 (internal quotation marks and citations omitted). However, *Beckles* contrasted the enhancement guideline at issue in that case—which "merely guide[d] the exercise of a court's discretion in choosing an appropriate sentence within the statutory range"—with a situation in which sentencing courts were

"required" to increase a defendant's prison term from the statutory maximum. The former situation was not subject to a challenge that it was impermissibly vague.

Here, as in *Beckles*, the aggravating factor is discretionary, not mandatory. *See* RCW 9.94A.537(3), (5). The aggravating factors may allow a trial court to impose an exceptional sentence above the standard range, not to exceed the statutory maximum, which is set by reference to a different portion of the state's sentencing scheme. *See* RCW 9A.20.021. Division One's ruling properly applied *Beckles* and did not amount to an unreasonable application of clearly established federal law.

The Court is not persuaded to the contrary by petitioner's reliance on *United States v. Hudson*, 986 F.3d 1206, 1210 (9th Cir. 2021). This case did not hold that aggravating factors such as the ones in RCW 9.94A.535(3) are subject to a void for vagueness challenge. Indeed, the Ninth Circuit did not address whether the statute at issue was subject to such a challenge, finding instead that the language was not void for vagueness. In any event, the statute at issue in *Hudson* was mandatory and increased the maximum penalty, in contrast to the aggravating factors at issue here. *See* 986 F.3d at 1210.

2. Double Jeopardy

Petitioner alternatively argues that it violated double jeopardy to both convict her of assault and find the aggravating factors of deliberate cruelty and particular vulnerability. Dkt. 2, at 26.

The Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also "against multiple punishments for the same offense." *Whalen v. United States*, 445 U.S. 684, 688 (1980) (citing *North Carolina v. Pierce*, 395 U.S. 711, 717 (1969)).

Division One addressed petitioner's argument and applied Washington State precedent holding that petitioner's cited case law does not implicate the double jeopardy clause. Dkt. 11-1, at 66. Petitioner reiterates her argument that *Apprendi*, *Blakely*, and *Alleyne* "require double jeopardy principles apply to aggravating circumstances outside the death penalty context," but none of these cases mention double jeopardy. *See* Dkt. 2, at 26. Petitioner also cites *Ring v. Arizona*, but this case concerns the Sixth—not the Fifth—Amendment. *Ring v. Arizona*, 536 U.S. 584, 588 (2002). Indeed, the Supreme Court has held that the Double Jeopardy Clause's protections do not apply to non-capital sentencing enhancements. *See Monge v. California*, 524 U.S. 721, 728 (1998) ("Historically, we have found double jeopardy protections inapplicable to sentencing proceedings . . . because the determinations at issue do not place a defendant in jeopardy for an 'offense'. . . . Nor have sentence enhancements been construed as additional punishment for the previous offense; rather, they act to increase a sentence 'because of the manner in which [the defendant] committed the crime of conviction.'" (Citations omitted)).

Petitioner fails to show that Division One unreasonably applied clearly established federal law when it rejected her arguments.

G. Evidentiary Hearing and Certificate of Appealability (Grounds 2 through 6)

The decision to hold an evidentiary hearing is committed to this Court's discretion. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 474 (citations omitted). "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.* "[A]n evidentiary hearing is not required on issues that can be resolved

by reference to the state court record." *Id.* (citation and internal quotation marks omitted). Applying this standard, the Court finds that an evidentiary hearing is not necessary to resolve the issues raised by petitioner in grounds two through six. The Court also recommends that no certificate of appealability be granted as to grounds two through six, as petitioner has not made a substantial showing of the denial of a constitutional right related to these grounds.

As to the first ground, for the reasons stated above, this Court recommends that the District Judge conduct an evidentiary hearing.

CONCLUSION

The motions for consideration of extra-record evidence should be granted. Dkts. 3, 19. The District Court should set an evidentiary hearing regarding ground one of the habeas petition. Grounds two through six of the petition should be denied and dismissed with prejudice, with no certificate of appealability as to these grounds.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo* review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985); *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on December 31, 2021, as noted in the caption.

Dated this 10th day of December, 2021.

J. Richard Creatura
Chief United States Magistrate Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of: JENNIFER LYNN MOTHERSHEAD, Petitioner.	No. 98679-7 Court of Appeals No. 51119-3-II RULING DENYING REVIEW

Jennifer Mothershead was convicted of first degree assault of a child. After the Court of Appeals affirmed her judgment and sentence, she timely filed a personal restraint petition, mainly arguing her trial counsel was ineffective in several respects. Finding no basis for relief, the Court of Appeals denied the petition in an unpublished opinion. Ms. Mothershead now seeks this court's discretionary review. RAP 16.14(c).

To obtain this court's review, Ms. Mothershead must show that the Court of Appeals decision conflicts with a decision of this court or with a published Court of Appeals decision, or that she is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). She does not make this showing. She contends, first, that in reviewing her claim of ineffective assistance of counsel, the Court of Appeals erroneously required her to prove prejudice by a preponderance of the evidence. But it did not. Although the court preliminarily recited the general principles of error and prejudice applicable to personal restraint petitions (which require showing prejudice by a preponderance of the evidence), later, in relation

to Ms. Mothershead's claim of ineffective assistance, it recited the showing that must be made specifically as to that claim: that counsel was professionally deficient and that counsel's deficiency was prejudicial in the sense that, in the absence of the deficiency, there is a reasonable probability the outcome of the trial would have been different. *See In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

Second, Ms. Mothershead argues that the Court of Appeals erred in not ordering a reference hearing on whether she was prejudiced by counsel's failure to further pursue an expert opinion on whether bleach-contaminated eye drops, which Ms. Mothershead allegedly administered, caused the adverse effects the child suffered. The expert who counsel did consult, Dr. Richard Pleus, came to a preliminary conclusion that the data provided to him did not scientifically support a finding that the medication caused the reported adverse effects, but the Department of Assigned Counsel denied a request for additional funding for Dr. Pleus to conduct a more complete review. Ms. Mothershead asserts that the department's denial stemmed from defense counsel's misinterpretation of Dr. Pleus's preliminary opinion. But the Court of Appeals found no showing of prejudice for two reasons: first, Ms. Mothershead did not show what Dr. Pleus's ultimate opinion would have been or what his testimony would have consisted of, and second, given the overwhelming expert testimony provided by the State (15 experts), there was no reasonable probability the outcome would have been different had Dr. Pleus testified.

Ms. Mothershead does not show that a reference hearing is necessary to resolve these issues. She relies mainly on *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 363 P.3d 577 (2015), but the deficiency there (failure to procure the assistance of an interpreter) potentially affected the trial in a way that could not reasonably be ascertained without further factual development as to the effect the lack of an interpreter had on the defendant's understanding of the proceedings and his ability to assist

counsel. *See id*. at 692. As the Court of Appeals here observed, a claim that counsel failed to conduct an adequate investigation is evaluated in light of the strength of the State's case. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). Ten physicians who were involved in the child's treatment testified on the nature of the child's eye condition, their unsuccessful efforts to diagnose and treat her, and the possible explanations for the child's condition. Five forensic chemists testified about the chemical composition of the eye drops Ms. Mothershead administered, and all agreed they contained chloride, an expected byproduct of contamination with bleach. Dozens of witnesses in all testified for the State. The Court of Appeals could properly conclude without a reference hearing that Ms. Mothershead failed to show there is a reasonable probability the testimony of Dr. Pleus would have altered the outcome.[1]

Ms. Mothershead next argues that defense counsel was ineffective during her direct testimony in failing to elicit from her a specific denial that she had contaminated the eye drops. But the Court of Appeals sustainably held that counsel procured an effective denial, and that Ms. Mothershead otherwise demonstrated no prejudice. A physician at the hospital where the child was taken testified that when he opened the bottle containing the child's eye medication, noxious smells permeated the room and triggered eye burning and nausea. Detectives examined the medications and also experienced the odor and burning sensations. Defense counsel asked Ms. Mothershead whether she had any "personal knowledge as to what's been described from these drops of being a dark color and smell and all that stuff." Verbatim Report of Proceedings (Oct. 1, 2013) at 131. She responded, "No. That's nothing that I've seen." *Id*. Effectively, Ms. Mothershead denied contaminating the eye drops, but even if counsel

[1] Ms. Mothershead also contends that the Court of Appeals decision conflicts on this point with this court's decision in *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). But like *Khan*, *Thomas* depends on its own facts and circumstances.

failed to procure an unequivocal denial, the Court of Appeals properly found no showing of prejudice.

Finally, Ms. Mothershead asserts other grounds for relief that she argued below, but she devotes no argument to them showing that they merit this court's review.

The motion for discretionary review is denied.

DEPUTY COMMISSIONER

October 20, 2020

Filed
Washington State
Court of Appeals
Division Two

May 19, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint of JENNIFER LYNN MOTHERSHEAD, Petitioner.	No. 51119-3-II UNPUBLISHED OPINION

GLASGOW, J.—In 2013, a jury convicted Jennifer Lynn Mothershead of first degree assault of a child. Between March and May 2011, Mothershead put prescription eye drops that had been contaminated with bleach into the eyes of her 13-month-old daughter, who suffered painful damage to her eyes and permanent vision loss. Mothershead received an exceptional 480-month sentence based on the jury's finding of three aggravating factors.

Mothershead filed a personal restraint petition (PRP), challenging her conviction on several grounds, including ineffective assistance of counsel. Mothershead's two main ineffective assistance claims are that her counsel was ineffective (1) when she did not retain or continue consulting with an expert after commissioning him for an initial assessment of the scientific evidence, and (2) when she did not elicit a statement from Mothershead during her testimony directly denying that she added anything to the eye drops.

Neither of these ineffective assistance claims merits reversal or a reference hearing. Mothershead has not shown that she was prejudiced by counsel's failure to retain an expert because she has not shown what the expert would have said or a reasonable likelihood that expert testimony would have changed the outcome of her trial. Mothershead also has not shown that she was

prejudiced by counsel's failure to ask whether she added anything to the eye drops because counsel posed questions at the end of her direct examination that elicited the functional equivalent of a denial. We also hold that none of Mothershead's multiple other arguments entitles her to relief.

We deny Mothershead's PRP.

FACTS

Jennifer and Cody Mothershead married in 2007. They had a daughter, KM, in February 2010. Jennifer[1] and Cody were friends with another couple, Matthew Bowie and Courtney Valvoda.[2]

At some point in 2010, Jennifer and Matthew began having an affair, unbeknownst to Cody and Courtney. By early 2011, Jennifer and Cody were separated, and Jennifer was staying most nights with Matthew and Courtney at their home in Black Diamond, Washington.

Jennifer was KM's primary caretaker, and Cody saw KM rarely. Courtney worked full time and was gone most of the day. Matthew worked sporadically in construction. Jennifer stayed home with KM.

On March 23, 2011, Jennifer went horseback riding. KM played in the barn while Matthew watched her. When Jennifer returned, KM's left eye was swollen and "'red around the edges,'" so Jennifer took KM to her family physician, Dr. James Merril. *State v. Mothershead*, No. 73634-5-I, slip op. at 3 (Wash. Ct. App. Mar. 28, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/736345.pdf. He thought KM had a scratched cornea, but could not find

[1] We refer to Jennifer Mothershead by her first name only in the beginning of the facts section to distinguish her from Cody, but we refer to her as "Mothershead" throughout the rest of the opinion.

[2] Courtney Valvoda became Courtney Bowie when she married Matthew Bowie in 2011.

evidence of a foreign body in KM's eye, so he referred her to Mary Bridge Children's Hospital in Tacoma. The doctor at Mary Bridge was not able to detect any foreign body, but he prescribed antibiotic ointment.

When Dr. Merril saw KM again on March 29, 2011, both of her eyes were red and her eyelids were peeling and bleeding. He referred KM to Seattle Children's Hospital, where she was ultimately seen by the chief of the ophthalmology department, Dr. Avery Weiss, on April 11, 2011.

Between April 11 and May 12, 2011, KM's condition continued to worsen. KM's eyes became nearly swollen shut, she was extremely light sensitive, her eyelids were red and irritated, and blood vessels began growing into her corneas. Despite multiple office visits, tests, and research by top experts at Seattle Children's Hospital, no one could determine the cause of KM's worsening symptoms. Because her condition appeared most consistent with a bacterial infection, KM's doctors prescribed strong antibiotics (tobramycin and cefazolin), corticosteroid eye drops, generic polysporic ointment, and oral antibiotics.

KM's tobramycin and cefazolin were eye drops that had to be applied four times a day. Jennifer usually administered them, often with Matthew's or Courtney's help. KM "'fought'" against having the drops put in her eyes, and this required more than one person because someone had to hold KM down. *Id.* at 24. Matthew sometimes administered the eye drops. Courtney testified that she may have also given the eye drops to KM herself. Cody testified at trial that he watched Matthew administer the drops once, but never did it himself.

On May 11, 2011, Matthew and Courtney noticed that KM had a "'soft spot'" on her head. *Id.* at 6. Courtney insisted that she and Jennifer take KM to the doctor. The Enumclaw Medical

Center doctor who saw KM did a CAT[3] scan and found a subdural hematoma. KM was airlifted to Harborview Medical Center.

Harborview doctors diagnosed KM with a traumatic brain injury. *Id.* at 8. A hospital social worker interviewed Jennifer, Courtney, and Cody when they arrived at Harborview because they suspected child abuse. Harborview doctors also asked to examine the eye drops that Jennifer had brought with her to Harborview.

Two Pierce County Sheriff's detectives observed KM's condition and interviewed Jennifer, Courtney, and Cody. The detectives then placed KM in protective custody. One of the Harborview doctors then opened the bottle containing KM's eye medications. "'[N]oxious smells filled the room'" triggering "'eye burning and nausea.'" *Id.* at 11. The detectives examined the medications and also experienced the noxious odor and burning sensations. The detectives acquired control samples of KM's eye drops from the Seattle Children's Hospital pharmacy for comparison and brought the medications to the Washington State Patrol Crime Laboratory, where they were placed in the evidence room.

Forensic scientists with the State Patrol crime lab and the United States Food and Drug Administration (FDA) analyzed KM's eye drops and the control samples, and all of them observed differences between the tobramycin that KM had been receiving and the control sample. Based on their tests, the FDA chemists concluded that KM's tobramycin appeared to have been contaminated with bleach.

Mothershead was charged with first degree assault of a child under RCW 9A.36.120(1)(b)(i), (ii)(A) and (ii)(B). Mothershead's trial lasted one month. Dozens of witnesses

[3] Computerized axial tomography.

testified for the State, including 15 expert witnesses. Ten medical doctors who were involved in KM's treatment testified about the nature of KM's eye condition, their unsuccessful efforts to diagnose and treat her, and the causes they considered as possible explanations for KM's symptoms.

Five forensic chemists from the FDA testified about the chemical composition of the tobramycin eye drops. They agreed that KM's eye drops contained chloride, a by-product that would be expected if the eye drops had been contaminated with bleach.

The defense did not call its own expert witness to testify at trial. Defense counsel cross-examined the State's experts, seeking to discredit their testimony and cast doubt on the State's scientific evidence.

However, the dominant defense theory did not depend on raising doubt about the State's conclusions that a foreign chemical substance had been added to the eye drops. The defense instead focused on creating reasonable doubt that Mothershead was the one who tampered with the eye drops. During cross-examinations of the State's witnesses and during direct examination of Mothershead, the defense developed the theory that someone else had contaminated the eye drops.

During her testimony, Mothershead did not directly deny that she did not tamper with or add anything to the eye drops. But her defense counsel's final direct examination question was: "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?" Verbatim Report of Proceedings (VRP) (Oct. 1, 2013) at 131. Mothershead responded, "No. That's nothing that I've seen." *Id.*

In closing, the defense pointed out inconsistencies in the doctors' testimony, emphasized testimony about other potential causes of KM's eye problems, and questioned whether the State

Patrol crime lab's testing of the eye drops was "scientific." VRP (Oct. 3, 2013) at 61. But the defense essentially conceded that the drops were contaminated with a "noxious" substance, arguing instead "that's not stuff that Jenny did to it." VRP (Oct. 3, 2013) at 63. Counsel argued that Mothershead did not act guilty—she kept bringing KM back to doctors, she answered the detectives' questions, and she voluntarily handed over the eye drops. Counsel also emphasized that Mothershead was not present just before KM's first eye injury in the barn, nor was she present just before KM's head injury was discovered.

The jury convicted Mothershead of first degree assault. The jury also found by special verdict that Mothershead used her position of trust to facilitate commission of the crime, that Mothershead's conduct manifested deliberate cruelty to KM, and that Mothershead knew or should have known that KM was a particularly vulnerable victim. Based on the special verdicts, the trial court sentenced Mothershead to an exceptional sentence of 480 months, followed by 36 months of community custody, and a prohibition on contact with minor children.

Mothershead filed a timely appeal. *Mothershead,* No. 73634-5-I, slip. op. at 1-2. Division One affirmed the judgment and sentence. *Id*. at 2. Mothershead timely filed this PRP.

ANALYSIS

A. PRP Standards

Relief via a collateral challenge to a conviction is an "extraordinary" remedy, and a petitioner bringing a PRP "must 'meet a high standard before [we] will disturb an otherwise [final] judgment.'" *In re Pers. Restraint of Finstad,* 177 Wn.2d 501, 506, 301 P.3d 450 (2013) (quoting *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011)). A personal restraint petitioner must establish that his or her restraint was the product of either a constitutional error that

caused "actual and substantial prejudice" or a nonconstitutional fundamental defect that "'inherently result[ed] in a complete miscarriage of justice.'" *In re Pers. Restraint of Swagerty*, 186 Wn.2d 801, 807, 383 P.3d 454 (2016) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810-12, 792 P.2d 506 (1990)). The petitioner must prove error by a preponderance of the evidence. *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010). We hold a pro se petitioner to the same standard as an attorney. *In re Pers. Restraint of Rhem*, 188 Wn.2d 321, 328, 394 P.3d 367 (2017).

When considering whether an error alleged in a PRP was prejudicial, courts look to "the practical effects that result from the error." *In re Pers. Restraint of Yates*, 180 Wn.2d 33, 41, 321 P.3d 1195 (2014); *see also State v. Buckman*, 190 Wn.2d 51, 64, 409 P.3d 193 (2018). The petitioner has the burden of proving prejudice by a preponderance of the evidence under the totality of the circumstances. *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 539, 309 P.3d 498 (2013). The petitioner must support the petition by identifying the facts on which the claims are based and the evidence supporting the factual allegations. RAP 16.7(a)(2)(i); *Monschke*, 160 Wn. App. at 488. The petitioner cannot "rely solely on conclusory allegations." *Id.*

In evaluating a timely PRP, we have three options. We may: (1) deny the PRP "if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error" resulting in prejudice, (2) remand for a reference hearing "if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record," or (3) grant the PRP with no hearing if the petitioner has proved both the required error and actual prejudice or a miscarriage of justice. *In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 176-77, 248 P.3d 576 (2011).

"If the petitioner's allegations are based on matters outside the existing record, [they] must demonstrate . . . competent, admissible evidence to establish the facts that entitle [them] to relief." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). A party's own affidavit, without corroborating evidence, may be insufficient to create a material disputed issue of fact warranting a reference hearing. *In re Pers. Restraint of Reise*, 146 Wn. App. 772, 789, 192 P.3d 949 (2008).Where a petitioner relies on the knowledge of others to support a request for a reference hearing, the petitioner must present a declaration or other corroborative evidence, rather than merely speculating about what that person might say. *Rice*, 118 Wn.2d at 886. The declarant must establish that the person can competently testify about the subject matter discussed in the declaration. *Id.* The State is held to this same standard in its response. *Reise*, 146 Wn. App. at 780; *see also* RAP 16.9.

B. Ineffective Assistance of Counsel

Mothershead raises several claims of ineffective assistance of counsel, contending that they entitle her to a grant of her PRP, or at least a reference hearing. All of these claims lack merit.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Ineffective assistance of counsel is a two-pronged inquiry. *Grier*, 171 Wn.2d at 32. To prevail, Mothershead must show that her counsel's performance was deficient and that counsel's deficient performance prejudiced her. *Id.* at 32-33. A failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Appellate courts apply "exceptional deference" when "evaluating counsel's strategic decisions," and "[i]f trial counsel's conduct can be characterized as legitimate trial strategy or tactics," it will not support a claim of ineffective assistance. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "To rebut the presumption of reasonableness, a defendant must establish an absence of any legitimate trial tactic that would explain counsel's performance." *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 539, 397 P.3d 90 (2017). The petitioner must prove that "counsel's performance fell below an objective standard of reasonableness in light of all the circumstances." *Id.* at 538.

The petitioner must also prove prejudice. A petitioner must show that, but for counsel's deficient performance, "there is a reasonable probability that the result of the proceeding would have been different." *Id.* We examine the "practical effects" of alleged ineffective assistance. *Yates*, 180 Wn.2d at 41; *see also Buckman*, 190 Wn.2d at 64. "[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" for PRP purposes. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

1. Defense expert

Mothershead first argues that her trial counsel provided ineffective assistance of counsel because she did not "adequately investigate a qualified defense expert's exculpatory opinion." Pet'r's Suppl. Opening Br. at 18-19, 22. Even if this were deficient performance, an issue we do not decide, Mothershead has not demonstrated any resulting prejudice.

While preparing for trial, Mothershead's counsel contacted Richard Pleus PhD, the director of a private Seattle-based toxicology consulting firm. Dr. Pleus has a "post-doctoral specialization

in neuropharmacology and experience as a lecturer in eye toxicology." *Id.*, App. A at 2-3. Mothershead's counsel requested and received $5,000 from the Department of Assigned Counsel for initial funding to retain Dr. Pleus.

Mothershead's counsel sent Dr. Pleus lab data from the eye drop tests from the State Patrol crime lab and the FDA laboratory. She also sent Dr. Pleus KM's medical records and information about the history of the case. In response, Dr. Pleus sent two letters to Mothershead's counsel. In the first, he gave what he referred to as his "initial opinion, subject to completing my research thoroughly." *Id.*, App. B at 1. His initial opinion was that "the data provided . . . does not scientifically support the Plaintiff's case that the medication that was administered to [KM] caused the adverse effects that are reported in the medical records." *Id.* Dr. Pleus further noted, "I have considered a number of possible scenarios, including that Ms. Mothershead did adulterate the medication." *Id.* Dr. Pleus briefly described the "general scope of work" required to complete his review and estimated that it would cost an additional $8,000 to complete. *Id.*

In his second letter to trial counsel, Dr. Pleus reiterated his initial opinion and indicated that he still needed to complete review of the forensic lab reports and other documents that had already been provided. Mothershead's counsel requested additional funding from the Department of Assigned Counsel to continue working with Dr. Pleus, but her request was denied. She did not continue pursuing Dr. Pleus's investigation. *Id.*

When a petitioner's evidence "is based on knowledge in the possession of others," the petitioner "must present their affidavits or other corroborative evidence" explaining what that person would say. *Rice*, 118 Wn.2d at 886; *see also In re Pers. Restraint of Davis*, 152 Wn.2d 647, 740, 101 P.3d 1 (2004). Mothershead fails to establish what Dr. Pleus's opinion ultimately would

have been or what he would testify. Mothershead has therefore failed to meet her prima facie burden of showing prejudice.

Moreover, courts assessing the prejudice prong of "'ineffective assistance claims based on a duty to investigate must . . . [consider the claim] in light of the strength of the government's case.'" *Davis*, 152 Wn.2d at 739 (internal quotation marks omitted) (quoting *Rios v. Rocha*, 299 F.3d 796, 808-09 (9th Cir. 2002)). The State's experts' testimony amply demonstrated that the eye drops were contaminated and that the contamination caused KM's severe injuries. Even if the defense had called Dr. Pleus to testify, the practical effect on the jury of one defense expert, weighed against the testimony of the State's 15 expert witnesses, would likely have been minimal. *Yates*, 180 Wn.2d at 41. Defense counsel's primary strategy at trial tacitly acknowledged this by focusing on raising reasonable doubt as to who had contaminated the eye drops rather than on trying to prove that the eye drops were not contaminated.

We also reject Mothershead's argument that her counsel's failure to continue working with Dr. Pleus prejudiced her by interfering with counsel's preparation for trial. Mothershead's counsel proficiently cross-examined the State's expert witnesses, and in closing arguments effectively recapped salient details of KM's medical history and pointed out some inconsistencies about the medical testimony.

Even if her counsel were deficient in not pursuing Dr. Pleus's opinion as an expert, an issue we do not decide, Mothershead has failed to make a prima facie showing that the alleged deficiency caused prejudice. This claim of ineffective assistance of counsel therefore fails.

2. Failure to elicit a denial during Mothershead's direct testimony

Mothershead argues that she was denied effective assistance of counsel when, during her testimony, her counsel failed to elicit a direct denial that Mothershead tampered with the eye drops. Had she been asked whether she added anything to the eye drops, Mothershead asserts that her answer would have been "'no.'" Personal Restraint Pet. at 13. Mothershead contends that her counsel's decision not to ask the "ultimate question" prejudiced her because the State "capitalized" on her lack of denial. Pet'r's Suppl. Opening Br. at 43-44. Even if Mothershead's counsel were deficient by not asking a question that elicited a direct denial of guilt, an issue we again do not decide, we conclude that Mothershead has not shown any resulting prejudice.

Mothershead testified that she did not know that the eye drops were contaminated, an answer that was obviously inconsistent with guilt. Mothershead's counsel argued vigorously in her closing argument that Mothershead was not guilty. She reiterated that Mothershead did not know the eye drops were contaminated. She argued that other people had the motive and opportunity to contaminate the eye drops. The overwhelming majority of the State's closing argument was comprised of arguments based on the evidence the State elicited from the 33 witnesses it called at trial.

The fact that Mothershead did not explicitly deny that she had added anything to the eye drops did not prevent defense counsel from arguing that Mothershead was not guilty, nor did it give the State evidence it did not already have to argue Mothershead's guilt. Mothershead has not shown prejudice because she has not demonstrated that there was a reasonable probability that, but for counsel's failure to ask directly whether she tampered with the eye drops, the outcome of her

trial would have differed. *See Grier*, 171 Wn.2d at 34. This claim of ineffective assistance of counsel also fails.

3. Preparing the defendant to testify

Mothershead argues that her counsel was ineffective by failing to sufficiently prepare her to testify. Mothershead maintains that counsel never had a meeting "'devoted solely'" to preparing her to testify, counsel made her write her own direct examination questions, and counsel did not explain the process of testifying or prepare her for cross-examination. Personal Restraint Pet., App. A; Pet'r's Reply to State's Resp. at 7. Even if Mothershead's counsel were deficient by failing to prepare her to testify, an issue we do not decide, Mothershead has not shown that she was prejudiced.

Mothershead testified articulately and thoroughly throughout her direct and cross-examinations. Mothershead has not shown prejudice, because she has not established that more preparation would have had any practical effect on the outcome of her trial, especially since she was testifying about recent events from her own life that she should have been able to recall without extensive preparation. *See Yates*, 180 Wn.2d at 41. This ineffective assistance claim also fails.

4. Failure to object during Dr. Weiss's testimony

Mothershead argues that she received ineffective assistance of counsel because her counsel never objected during Dr. Weiss's testimony. But contrary to this assertion, Mothershead's counsel did object during Dr. Weiss's testimony. Counsel was thus not deficient for failure to object.

To the extent Mothershead argues that her counsel was ineffective by failing to object specifically on the basis that Dr. Weiss's testimony was "based on conjecture, perjury, speculation,

and unreliable content," Personal Restraint Pet. at 15, this claim is based on matters outside the record and Mothershead has not demonstrated that she has competent, admissible evidence supporting the allegations. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 18, 296 P.3d 872 (2013). This ineffective assistance claim also fails.

5. Failure to retain medical doctor

Mothershead argues that her counsel was ineffective by not retaining a medical doctor. For the same reasons Mothershead was not prejudiced by her trial counsel's decision to not continue working with Dr. Pleus, we hold that she has failed to establish any resulting prejudice from the absence of a medical doctor as a defense consultant or witness.

We therefore reject all of Mothershead's claims of ineffective assistance of counsel.

C. Mothershead's Other Arguments

1. State's alleged failure to investigate other suspects

Mothershead argues that the State failed to fully investigate other people who had motive and opportunity to tamper with KM's eye drops including Cody, Courtney, and Matthew. We reject this argument because the State did not improperly fail to investigate other suspects.

The State had a duty to "preserve all potentially material and favorable evidence," but it was not "require[d] . . . to search for exculpatory evidence." *State v. Armstrong*, 188 Wn.2d 333, 345, 394 P.3d 373 (2017). Accordingly, the State had no duty to "search for exculpatory evidence" by investigating the other people Mothershead suggests could have had access to KM and her eye drops. *Id.* Even so, the Pierce County Sheriff's detectives interviewed not just Mothershead, but also Cody, Courtney, and Matthew. We therefore reject this argument.

2. Trial court's exclusion of other suspect evidence

Mothershead further argues that the trial court abused its discretion by excluding testimony about whether Matthew kept syringes with bleach in them in the room where KM slept. We reject this claim because the trial court did not abuse its discretion by ruling against Mothershead's request to present this other suspect evidence.

"The standard for relevance of other suspect evidence is whether there is evidence 'tending to connect' someone other than the defendant with the crime." *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014) (internal quotation marks omitted) (quoting *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932)). This means that "some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." *Id.*

The State filed a motion in limine to exclude other suspect evidence, and the trial court ruled that other suspect evidence would only be admissible if "the defense [showed] a nexus between the other suspect and the crime." VRP (Sept. 9, 2013) at 10. The trial court later sustained the State's objection to evidence about Matthew's syringes on relevancy grounds, citing its pretrial ruling and the defense's own admission that it lacked evidence that "this syringe even existed." VRP (Sept. 23, 2013) at 171. Because Mothershead has not shown nonspeculative evidence with a nexus to the crime, the trial court did not abuse its discretion.

3. Admissibility of eye drop medications

Mothershead argues that the trial court erred by permitting the State to enter the eye drop medications as evidence and permitting witnesses to testify about them. She asserts that the chain of custody for this evidence was questionable, rendering its admission reversible error. We reject this argument because the defense stipulated that the medications were "properly handled . . . in

accordance with evidentiary procedures, protocols, and requirements" and were admissible. VRP (Oct. 1, 2013) at 21. Thus, this issue was not properly preserved.

In addition, even if the parties had not stipulated to the admissibility of KM's medications, there was no need to establish a chain of custody for this evidence and it was properly admitted. "Evidence that is unique and readily identifiable may be identified by a witness who can state that the item is what it purports to be." *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002). Only where evidence is not readily identifiable is it subject to the "more stringent test" that the evidence's proponent "establish a chain of custody '*with sufficient completeness* to render it *improbable* that the original item . . . [was] exchanged . . . or . . . contaminated or tampered with.'" *Id*. (quoting *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir.1989)).

KM's medications were unique and readily identifiable because they were labeled with identifying information. Accordingly, all that was required was for one of the State's witnesses to identify the evidence. *See Roche*, 114 Wn. App. at 436. This is exactly what happened at trial when the State asked Courtney to identify the medication bottles.

4. Sufficiency of the evidence

Mothershead argues that the evidence presented at trial was insufficient to prove her guilt beyond a reasonable doubt. We reject this argument because Mothershead has not shown that the State's evidence was insufficient for a rational jury to find beyond a reasonable doubt that Mothershead committed the charged offense.[4]

[4]To the extent that Mothershead argues there was insufficient evidence that she and not some other suspect committed the crime, those issues were raised and rejected on her direct appeal. *Mothershead*, No. 73634-5-I, slip op. at 32-37; *see also In re Pers. Restraint of Khan*, 184 Wn.2d 679, 693, 363 P.3d 577 (2015). To the extent Mothershead argues there was insufficient evidence of intent, specifically, that argument is addressed below.

To prevail on her sufficiency of the evidence claim, Mothershead needs to clear a high bar. "Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt." *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). "Circumstantial and direct evidence are to be considered equally reliable." *Id.* at 266. We will not review the jury's determinations about witness credibility. *Id.*

To the extent Mothershead argues that circumstantial evidence of her guilt was insufficient, this evidence was as reliable as direct evidence and, taken together, was sufficient for a rational jury to convict. The entire trial lasted over two weeks, and the State presented 33 witnesses, including the doctors who treated KM, forensic scientists who analyzed the eye drops she received, and detectives who interviewed Mothershead, as well as Matthew, Courtney, and Cody. The jury needed only to make rational inferences from their testimony to conclude that Mothershead knew the drops were adulterated when she administered them to KM.

Mothershead also argues that the State did not present sufficient evidence for the jury to infer that she intentionally assaulted KM. We reject this claim, because the jury found that Mothershead acted with deliberate cruelty and because this finding was upheld on appeal. The same evidence presented to show deliberateness is also sufficient to establish intent to harm.

5. Discussion of KM's head injury

Mothershead asserts that the offense for which she was charged did not involve KM's head injury and that the trial court erred under ER 403 by permitting witnesses to discuss this injury at trial. We reject this argument because Mothershead did not preserve it. We will not review arguments based on evidentiary objections unless the objection was preserved at trial. *State v.*

Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Mothershead never objected at trial to the discussion of KM's head injury.

6. Dr. Weiss's expert opinion testimony

Mothershead argues that the trial court erred under ER 702 by permitting Dr. Weiss's testimony as an expert and on the grounds that the testimony was not based on medical science. We reject this argument because Mothershead did not preserve this issue. *See id.* Mothershead did not object to Dr. Weiss's credentials, nor did she object on any other grounds.

7. Disproportionate sentence

Mothershead contends that her 480-month sentence is disproportionate to similarly situated defendants because it was "four times the high end of the standard range" for an offender with an equivalent offender score. Personal Restraint Pet. at 8. She argues that other defendants convicted of first degree assault of a child, including cases in which a jury also found some of the same aggravating factors, received substantially shorter sentences. Mothershead asks this court to remand for resentencing. We reject this claim because Mothershead already raised this argument on direct appeal and Division One rejected it.

A personal restraint petitioner may not raise an issue that was already resolved on direct review unless the petitioner shows that the "interests of justice require reconsideration." *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 693, 363 P.3d 577 (2015). "[R]aised and rejected on direct appeal" means that the ground "presented in the petition was determined adversely to the petitioner on appeal and the prior determination was on the merits." *Davis*, 152 Wn.2d at 671 n.14.

On direct appeal, Mothershead argued that "insufficient evidence supports the jury finding the aggravating factors, and the 480-month sentence imposed by the court is clearly excessive."

Mothershead, No. 73634-5-I, slip. op. at 50. Division One disagreed, holding that "the jury's finding on the aggravating factors constituted 'substantial and compelling reasons justifying an exceptional sentence outside the standard range.'" *Id.* at 55.

We conclude that Mothershead has not established that the interests of justice require reviewing her exceptional sentence again. Division One recognized that a trial court abuses its discretion in imposing an exceptional sentence only where the trial court relies on an impermissible reason or unsupported facts, or where the sentence is so long that it shocks the conscience. *Id.* at 54. Here, the trial court explained that Mothershead repeatedly placed a toxic substance in her young daughter's eyes multiple times per day over a period of weeks. We do not revisit Division One's legitimate conclusion that Mothershead's exceptional sentence was not excessive. *See id.* at 55.

8. Cumulative error

Mothershead finally argues that cumulative error deprived her of her right to a fair trial. She argues the cumulative effect of her counsel's errors collectively caused prejudice sufficient to warrant reversal. Mothershead also points to the cumulative effect of the other errors she raises.

"Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant [their] right to a fair trial, even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). The doctrine does not require reversal where "the errors are few and have little or no effect on the trial's outcome." *Id.* The burden is on the petitioner to prove cumulative error.

Mothershead has not established any error that entitles her to relief. Accordingly, we hold that Mothershead's cumulative error claim fails.

CONCLUSION

We deny Mothershead's PRP.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

Maxa, J.

Sutton, A.C.J.