

15-1001

S. McDermott

3 SCANNED

notice of intent to appeal due 10/21/15 David-ph

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE ex rel. MONICA BOGGS, Petitioner,

v.

LORI NOHE, Warden, Lakin Correctional Center, Respondent.

Case No. 13-C-321

Division III, Judge Silver

RECORDED 21 11:51 AM

FINAL ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM UNDER W.VA. CODE §53-4A-1

On this 21st day of September, 2015, this matter came before the Court pursuant to a Petition for Writ of Habeas Corpus ad Subjiciendum filed by the Petitioner, Monica Boggs, by counsel Kevin D. Mills, Esq. and Shawn R. McDermott, Esq., a Return to and Motion to Dismiss said Petition filed by the Respondent Warden, by counsel, Cheryl K. Saville, Assistant Prosecuting Attorney, and other filings of the parties herein. Upon review of the papers and proceedings read and had herein, review of the underlying criminal case State v. Monica Boggs, Berkeley County Case Number 09-F-6, and review of pertinent legal authorities, the Court hereby DENIES the Petition.

FINDINGS OF FACT

1. The Petitioner was indicted for three (3) felony offenses: Death of a Child by a Parent, in violation of W. Va. Code § 61-8D-2a(a); Child Abuse Causing Bodily Injury, in violation of W. Va. Code § 61-8D-3(a); and Gross Child Neglect Causing Substantial Risk of Serious Bodily Injury, in violation of W. Va. Code § 61-8D-4(e). [Indictment, 2/17/09, State of West Virginia v. Monica Boggs, Case No.: 09-F-6.]

1 client w/letter cc: Robert - 10/13/15 -

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2. On September 3, 2009, following a three-day trial, the jury found the Petitioner guilty of all three felony counts, and the Court thereupon ordered and adjudged the Petitioner convicted of Death of a Child by a Parent, Child Abuse Causing Bodily Injury and Gross Child Neglect Causing Substantial Risk of Serious Bodily Injury. [Jury Verdict Form, 9/3/09, Jury Verdict Order, 10/30/09.]

3. Following the completion of both a presentence investigation report and a diagnostic evaluation at Lakin Correctional Center and after the evidence and argument at the sentencing hearing, the Court sentenced the Petitioner to a determinate term of forty (40) years of incarceration for her conviction of Death of a Child by a Parent, the statutory term of not less than one (1) nor more than five (5) years of incarceration for her conviction of Child Abuse Causing Bodily Injury, and the statutory term of not less than one (1) nor more than five (5) years of Gross Child Neglect Causing Substantial Risk of Serious Bodily Injury. Those sentences were ordered to run consecutively. [Sentencing Order, 6/14/10.]

4. The Petitioner filed a timely Notice of Intent to Appeal through her newly retained counsel on or about June 29, 2010. [Notice of Intent to Appeal, 6/29/10.]

5. The Petitioner perfected her Petition for Appeal, which was fully responded to in a timely manner by the State. [Petition for Appeal, 12/6/10, Memorandum Decision, 6/30/11.]

6. The West Virginia Supreme Court of Appeals issued a Memorandum Decision and subsequent Mandate affirming the Petitioner's conviction and sentence. [Memorandum Decision, 6/30/11, Mandate, 6/30/11.]

7. On or about April 26, 2013, the Petitioner filed a verified Petition for Writ of Habeas Corpus and Losh list. [Petition for Writ of Habeas Corpus, 4/26/13, Checklist of Grounds for Post-Conviction Habeas Corpus Relief, 4/26/13.]

8. The Court held at status hearing on June 3, 2013, and directed the Respondent to file a full and complete response to said Petition. [Order from June 3, 2013, Hearing, 6/5/13.]

9. On or about September 3, 2013, the Respondent filed a timely Return to and Motion to Dismiss the petition herein. [Respondent's Return to and Motion to Dismiss Petition for Writ of Habeas Corpus, 9/3/13; Respondent's Memorandum in Support of Motion to Dismiss Petition for Habeas Corpus, 9/3/13.]

10. Thereafter, the Petitioner sought an evidentiary hearing on the issue of ineffective assistance of counsel, conceding that the other issues raised in the Petition were legal issues and/or capable of being decided upon a review of the record. The Petitioner, however, wished to continue all proceedings so that potential expert witnesses could be consulted in support of Petitioner's claims. Respondent objected to the holding of an evidentiary hearing, stating that there was sufficient evidence present in the record to dispose of all of the Petitioner's claims. [Order from September 30, 2013, 10/2/13; Order Scheduling Status Hearing, 10/31/13; Order from November 3, 2013 Status Hearing, 11/7/13; Agreed Continuance Order, 2/26/14; Agreed Continuance Order, 4/21/14; Agreed Continuance Order, 6/6/14; Agreed Continuance Order, 7/28/14; Order from September 8, 2014, Status Hearing, 9/29/14.]

11. Following the disclosure of the Petitioner's proposed expert witness and the report of that expert and following the filing of briefs from the parties concerning the admissibility of said testimony and report, the parties entered into a stipulation whereby the Court would consider Dr. Hauda's report in assessing the Petitioner's claims without the necessity of taking testimony from Dr. Hauda. [Respondent's Motion in Opposition to the Introduction of Proposed Expert Testimony, 12/17/14; Petitioner's Response to Respondent's Motion in Opposition to the

Introduction of Proposed Expert Testimony, 1/22/15; Stipulation Regarding the Report of Dr. William Hauda, 5/15/15.]

12. Thereafter, the Petitioner orally moved the Court for an evidentiary hearing for the taking of testimony from the arresting officer in the underlying felony case regarding the voluntariness of the Petitioner's statement. The Respondent objected to the holding of a hearing for this purpose, stating that the voluntariness of the Petitioner's statement to officers in the underlying felony case had been explored and could be readily determined from the record of that case. The Court agreed and directed the parties to submit proposed orders for the Court's consideration taking into account the record of the underlying felony and the evidence introduced by the Petitioner herein with regard to the medical evidence presented in the case.

### CONCLUSIONS OF LAW

1. A habeas corpus procedure is "civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case." State ex rel. Harrison v. Coiner, 154 W.Va. 467, 176 S.E.2d 677 (1970); W. Va. Code § 53-4A-1(a).

2. A convicted criminal has the right to one omnibus post-conviction habeas proceeding.

The West Virginia Supreme Court of Appeals holds:

In general, the post-conviction habeas corpus statute...contemplates that every person convicted of a crime shall have a fair trial in the circuit court, an opportunity to apply for an appeal to this Court, and one omnibus post-conviction hearing at which he may raise any collateral issues which have not previously been fully and fairly litigated.

Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606, 609 (1981).

3. "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial

error not involving constitutional violations will not be reviewed. Syl. Pt. 4, State ex rel. McMannis v. Mohn, 163 W.Va. 129, 254 S.E.2d 805 (1979), *cert. den.*, 464 U.S. 831, 104 S.Ct. 110, 78 L.Ed.2d 112 (1983).” Syl. Pt. 9, State ex rel. Azeez v. Mangum, 195 W. Va. 163, 465 S.E.2d 163 (1995); Syl. Pt., State ex rel. Phillips v. Legursky, 187 W. Va. 607, 420 S.E.2d 743 (1992).

4. Moreover, “[t]here is a strong presumption in favor of the regularity of court proceedings and the burden is on the person who alleges irregularity to show affirmatively that such irregularity existed.” Syl. Pt. 2, State ex rel. Scott v. Boles, 150 W. Va. 453, 147 S.E.2d 486 (1966); State ex rel. Massey v. Boles, 149 W. Va. 292, 140 S.E.2d 608 (1965); Syl. Pt. 1, State ex rel. Ashworth v. Boles, 148 W. Va. 13, 132 S.E.2d 634 (1963).

5. Due to this strong presumption of regularity, statutory law requires that a petition for writ of habeas corpus ad subjiciendum shall “specifically set forth the contention or contentions and grounds in fact or law in support thereof upon which the petition is based[.]” W. Va. Code § 53-4A-2.

6. The reviewing court shall refuse, by written order, to grant a writ of habeas corpus if the petition, along with the record from the proceeding resulting in the conviction and the record from any proceeding wherein the petitioner sought relief from the conviction show that the petitioner is entitled to no relief or that the contentions have been previously adjudicated or waived. W. Va. Code § 53-4A-3(a), -7(a); State ex rel. Markley v. Coleman, 215 W.Va. 729, 601 S.E.2d 49, 54 (2004); Perdue v. Coiner, 156 W.Va. 467, 469-470, 194 S.E.2d 657, 659 (1979).

7. In order to prevail on an issue previously adjudicated during the criminal proceeding,

the petitioner must prove that the trial court's ruling is "clearly wrong". W. Va. Code § 53-4A-1(b).

8. Grounds not raised by a petitioner in his petition are waived. Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606, 612 (1981); *see also*: State ex rel. Farmer v. Trent, 206 W. Va. 231, 523 S.E.2d 547 (1999), at 550, n. 9.

9. Any ground that a habeas petitioner could have raised on direct appeal, but did not, is presumed waived. Syl. Pts. 1 & 2, Ford v. Coiner, 156 W. Va. 362, 196 S.E.2d 91 (1972).

10. The reviewing court has a mandatory statutory duty to enter an order denying the relief requested in a habeas petition if the record demonstrates that a habeas petitioner is entitled to no relief. That statute reads, in part:

If the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or the record in the proceedings which resulted in the conviction and sentence, or the record or records in a proceeding or proceedings an a prior petition or petitions filed under the provisions of this article, or the record or records in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, show to the satisfaction of the court that the petitioner is entitled to no relief, or that the contention or contentions and grounds (in fact or law) advanced have been previously and finally adjudicated or waived, the court shall enter an order denying the relief sought.

W. Va. Code § 53-4A-7(a); *see also* W. Va. Code § 53-4A-3(a) and Perdue v. Coiner, 156 W. Va. 467, 469-470, 194 S.E.2d 657, 659 (1979).

11. Furthermore, W. Va. Code § 53-4A-1, *et seq.*, "contemplates the exercise of discretion by the court", authorizing even the denial of a writ without hearing or the appointment of counsel. Perdue v. Coiner, *supra*.

12. When denying or granting relief in a habeas corpus proceeding, the court must make specific findings of fact and conclusions of law relating to each contention raised by the petitioner. State ex rel. Watson v. Hill, 200 W. Va. 201, 488 S.E.2d 476 (1997).

### Ineffective Assistance of Counsel

13. The West Virginia Supreme Court of Appeals reiterated the standards necessary to prove ineffective assistance of counsel:

“1. ‘In West Virginia Courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d 674 (1984): (1) Counsel’s performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.’ Syl. Pt. 5, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

“2. ‘In reviewing counsel’s performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel’s strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.’ Syl. Pt. 6, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

“3. ‘Where a counsel’s performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client’s interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused.’ Syl. Pt. 21, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).

“4. ‘One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, one must prove the allegation by a preponderance of the evidence.’ Syl. Pt. 22,

State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).”

Syl Pt. 1-4, State ex rel Kitchen v. Painter, 226 W.Va. 278, 700 S.E.2d 489 (2010).

*Statement of the Petitioner*

14. The Petitioner argues that trial counsel was ineffective for failing to challenge the voluntariness of her statements to law enforcement and for failing to request a Vance instruction be given to the jury; however, the Petitioner fails to state what legal basis she had to challenge her statements.

15. The Petitioner’s statements were non-custodial, she was still Mirandized and made a written waiver of her Miranda rights, the final two statements were recorded so the interactions between the Petitioner and officers were memorialized in real time, and she was evaluated by an expert whom she hired who concluded that the Petitioner’s statements were knowingly and voluntarily made.

16. Based upon the above factors, the Petitioner fails to demonstrate that trial counsel was objectively unreasonable for failing to file a frivolous motion. State v. Miller, *supra.*, Strickland v. Washington, *supra.*, State ex rel. Kitchen v. Painter, *supra.*

17. Furthermore, the officers who took statements from the Petitioner testified during the course of the trial concerning the circumstances surrounding their non-custodial discussions with the Petitioner, the fact that Sgt. Boober took the extra step of Mirandizing the Petitioner even though he was not legally obligated to at the time, and the demeanor of the Petitioner during questioning. These officers were subject to cross examination by trial counsel. The actual recorded statements, which included the reading of the Petitioner her rights and her waiver of those rights, were then played for the jury. Finally, among the opinions the Petitioner asked her

expert witness to give was an opinion regarding the voluntariness of her statements, and Dr. Lewis testified that they were freely, knowingly, and voluntarily given.

18. Therefore, there is no reasonable probability that the result would have been different had a full suppression hearing been held and an additional instruction been given to the jury.

State v. Miller, supra., Strickland v. Washington, supra., State ex rel. Kitchen v. Painter, supra.

#### *Expert Testimony*

19. The true crux of the Petitioner's argument with regard to expert testimony is that trial counsel was ineffective for failing to hire an additional expert witness to combat the testimony of the medical examiner, Dr. Martina Schmidt, who performed the autopsy on the infant. To that end, the Petitioner presented the report of Dr. William Hauda who reviewed the materials in the underlying felony and the trial testimony of Dr. Schmidt.

20. First, Petitioner's trial counsel did object to the line of questioning of the State concerning what amount of force it would take to break an infant's skull. [Tr., 9/2/09, pg. 33-34.] However, the State clearly provided notice that Dr. Schmidt would testify about the contents and photographs of her autopsy findings and may testify about the difference between adult and child bone structure in the skull. [Designation of Expert, 8/28/09.] As such, the Court overruled that objection.

21. When asked by the State if she had any idea how much force it would take to break an infant's skull, Dr. Schmidt testified, "No, I can't testify to how much force was used." When asked if it would take more force to break a child's skull bone or an adult's, she responded that, in her opinion, it would take more force to break a child's. She reiterated thereafter that she did not know how much force it would take. [Tr. 9/2/09, 33-34, 34-82.] Dr. Schmidt never testified

about how much force it would take to break a either a child's or an adult's skull because, as she candidly admitted, she did not know.

22. The Petitioner's expert herein, Dr. Hauda, states that it is his opinion that it takes more force to fracture an adult skull than that of an infant and states that Dr. Schmidt's opinion fails to take into consideration the complexity of the skull under stress. [Dr. Hauda report, pg. 4.] Dr. Hauda also does not offer an opinion as to how much force it would take to break either an infant or adult skull. [Dr. Hauda's report, *passim*.]

23. Also in his report, Dr. Hauda offers that falls from being seated on the floor would not be expected to have enough force for this type of injury. [Dr. Hauda's report, pg. 7.] He then offers that "skull fractures may occur...with falls from a caregiver's arms, particularly if the fall occurs during movement of the caregiver imparting additional velocity to the infant." [Id.] This opinion does not materially differ from that of Dr. Schmidt. Dr. Schmidt testifies that an infant could generate enough force on his own to cause a skull fracture if he fell from "a great height" but states it is unlikely that he would have caused such an injury on his own from merely crawling around or bumping into a wall. [Tr. 9/2/09, pg. 73, 77.] Dr. Schmidt, like Dr. Hauda, states that the skull fracture would have required some force, but neither doctor discusses the degree or amount of force that would be required. [Tr. 9/2/09, pg. 82.]

24. Dr. Schmidt further conceded, as Dr. Hauda states in his report, that although Dr. Schmidt indicated in her autopsy report that there were two blows to the back of the infant's head based upon the two contusions present, the fracture could have been caused by a single blow given the explanation of the toy piano. Dr. Schmidt indicated that she did not have information concerning the toy piano in performing the autopsy or issuing her report but stated

that a single blow on such an object could be consistent with the two contusions and fracture present. [Tr. 9/2/09, pg. 58-60, 78-79.]

25. In sum, the only opinion Dr. Hauda offers in contradiction to that of Dr. Schmidt is whether it would take more force to fracture the skull of an infant or an adult. This distinction would have no practical material impact on the jury's decision with neither expert offering any opinion as to the actual amount of force it would take to break either skull. Both opine that it would have taken force to break the infant's skull. As a layperson, that is the opinion that is relevant and material- not whether it theoretically would have taken more or less force to break someone else's skull. As such, Dr. Hauda's report provides no substantive support for the Petitioner's claim of ineffective assistance of Petitioner's defense counsel.

26. Trial counsel was able to get Dr. Schmidt to concede that the injuries to the child were consistent with the Petitioner's explanation thereof. [Tr. 9/2/09, pg. 58-60, 78-79.]

27. Trial counsel was also able to get Dr. Schmidt to agree that typical symptoms exhibited by an infant with a subdural hemorrhage would be similar to ordinary symptoms exhibited by an infant with a cold and/or an infant who is teething. [Tr. 9/2/09, pg. 61-69, 80-81.]

28. Not to be overlooked with regard to the consideration of the medical evidence concerning force is the Petitioner's own statement given to law enforcement that she threw the infant into the crib "pretty hard," so there was not a great deal of controversy surrounding whether or not there was *some* force involved. The Petitioner's defense was one based upon her state of mind, intent, and lack of malice. The actions of the Petitioner were less in question than her intentions.

29. Defense counsel's cross examination of the expert witness was wholly competent and

allowed him to argue the Petitioner's position that the injuries to her child were not inflicted with malicious intent. Strickland v. Washington, supra.; State v. Miller, supra., State v. Thomas, supra., State ex rel. Kitchen v. Painter, supra.

30. Based upon the above, the Petitioner fails to show that her counsel's performance fell below an objective standard of reasonableness. Strickland v. Washington, supra.; State v. Miller, supra., State v. Thomas, supra., State ex rel. Kitchen v. Painter, supra.

31. Furthermore, even with the addition of the facts contained in Dr. Hauda's report, the Petitioner fails to show that the outcome of the proceeding would have been different but for the actions and decisions of her counsel. State v. Miller, supra., Strickland v. Washington, supra., State v. Thomas, supra., State ex rel. Kitchen v. Painter, supra.

### *Juror*

32. At the beginning of day two of the jury trial, a juror had taken the bailiff aside and reported that after Petitioner's counsel had shown a scrapbook to the jury that the Petitioner had kept of her son's life, the juror recognized a photograph of the biological father of the deceased child as someone she knew growing up. The juror had reported to the bailiff that it would not affect her ability to be an impartial juror, but the juror did not want to hide this from the Court. [Tr. 9/2/09, pg. 4-7.]

33. The Court addressed the parties with the issue. The Petitioner was present. Both parties decided to rely on prior individual voir dire of this juror, did not believe that it would affect the outcome of the trial, and did not believe that further voir dire would be necessary. The Petitioner's counsel confirmed to the Court that he had fully discussed the issue with the Petitioner and that the Petitioner had no objection to the continued service of this juror. [Tr., 9/2/09, pg. 4-7.]

34. The Petitioner cites a long litany of case law concerning the meaning of juror bias and the obvious importance of securing an impartial jury. However, the Petitioner makes no real argument as to how this juror could have been biased or prejudiced for or against the Petitioner.

35. The record in the case demonstrates that the infant's biological father had not been involved in the child's life at all. He was not around the child and had no contact with the child. He was, therefore, never a suspect in the case and was not even so much as a potential witness in the case. The only way his identity was even disclosed was through the presentation of a scrapbook the Petitioner had begun for her son, which contained a picture of the biological father. In practical terms, the infant's biological father had no relevance to the case whatsoever.

36. Considering the above, the fact that the parties had conducted individual voir dire of this juror prior to trial, and the juror's statements that she could and would continue to be fair and impartial in hearing and deciding the facts of the case, the Petitioner agreed to proceed with this juror on the panel. [Tr., 9/1/09, pg. 92-99, Tr., 9/2/09, pg. 4-7.] Trial counsel indicated that he had discussed the issue and all of the options with the Petitioner and that it was their desire to continue with the trial. [Tr., 9/2/09, pg. 4-7.]

37. Additionally, deference is accorded to the trial court in jury selection because "[t]he trial court is in the best position to judge the sincerity of a juror's pledge to abide by the court's instructions; therefore, its assessment is entitled to great weight." *Id.*, 476 S.E.2d at 553 (citing State v. Phillips, 194 W. Va. 569, 590, 461 S.E.2d 75, 96 (1995) ("[g]iving deference to the trial court's determination, because it was able to observe the prospective jurors' demeanor and assess their credibility, it would be most difficult for us to state conclusively on this record that the trial court abused its discretion"). The trial court, having been able to judge the juror's demeanor

during the previous day's voir dire and during the trial proceedings, likewise foresaw no legal reason to remove this juror.

38. Based upon the above, the Petitioner fails to demonstrate that the actions of trial counsel in this regard were objectively unreasonable. Furthermore, the Petitioner offers no evidence to show that the outcome of the proceedings would have been different had he insisted that the juror be subject to additional voir dire or that he insisted the juror be removed from the case and an alternate appointed in her place. State v. Miller, *supra.*, Strickland v. Washington, *supra.*, State ex rel. Kitchen v. Painter, *supra.*

#### *Closing Argument*

39. The Petitioner concedes that trial counsel properly brought before the Court pretrial issues related to the use of autopsy photographs and concedes that the Court utilized proper procedure in admitting certain relevant photographs copied in black and white during the course of the trial.

40. It was wholly appropriate for the State to refer in its closing to the evidence that was admitted at trial.

41. The West Virginia Supreme Court holds that:

“The purpose of closing arguments is not only to summarize the evidence, but to afford counsel the opportunity to persuade jurors, within acceptable boundaries, to view the evidence in the light most favorable to their client. Thus, advocates are given great latitude in arguing their cases but are also required to “keep within the evidence and not make statements calculated to inflame the minds of jurors intending to induce verdicts warped by prejudice [.]” State v. Kennedy, 162 W.Va. at 249, 249 S.E.2d at 191 (1978) ( *quoting* State v. Lohm, 97 W.Va. 652, 663, 125 S.E. 758, 762 (1924)).

Smith v. Andreini, *supra.*, 223 W.Va. 605, 678 S.E.2d 858, 869 (2009).

42. Closing arguments are not evidence. See Perrine v. E.I. du Pont de Nemours and Co., 225 W.Va. 482, 694 S.E.2d 815 (2010).

43. References in closing arguments to evidence admitted at trial do not constitute error. See State v. Gilman, 226 W.Va. 453, 702 S.E.2d 276 (2010).

44. Elements of the offense of Death of a Child by a Parent, W. Va. Code § 61-8D-2a(a)<sup>1</sup> include malice and intent to inflict “physical pain, illness or any impairment of physical condition by other than accidental means.” In its closing, the State referenced photos that were admitted into evidence of the child’s skull fracture to demonstrate to the jury by the severity of the child’s injuries and the malice and intent of the Petitioner to inflict physical pain and physical impairment on the child. [Tr., 9/3/09, pg. 35-44.]the child’s injuries and the malice and intent of the Petitioner to inflict physical pain and physical impairment on the child. [Tr., 9/3/09, pg. 35-44.]

45. In support of Count Three, charging Gross Child Neglect Causing Substantial Risk of Serious Bodily Injury, in violation of W. Va. Code § 61-8D-4(e)<sup>2</sup>, the State also had to demonstrate the element of “gross neglect” by the Petitioner for not seeking medical attention for the injuries she inflicted upon her child. Simple neglect is defined as “the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health.” W. Va. Code § 61-8D-1(6). Reference in the State’s closing to the severity of the

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<sup>1</sup>W. Va. Code § 61-8D-2a(a) reads: “If any parent, guardian or custodian shall maliciously and intentionally inflict upon a child under his or her care, custody or control substantial physical pain, illness or any impairment of physical condition by other than accidental means, thereby causing the death of such child, then such parent, guardian or custodian shall be guilty of a felony.”

<sup>2</sup>W. Va. Code § 61-8D-4(e)reads in part: “Any person who grossly neglects a child and by the gross neglect creates a substantial risk of serious bodily injury or of death to the child is guilty of a felony[.]”

child's injuries were wholly germane to establishing the elevated element of "gross" neglect of the child.

46. In support of Count Three, charging Gross Child Neglect Causing Substantial Risk of Serious Bodily Injury, in violation of W. Va. Code § 61-8D-4(e)<sup>2</sup>, the State also had to demonstrate the element of "gross neglect" by the Petitioner for not seeking medical attention for the injuries she inflicted upon her child. Simple neglect is defined as "the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health." W. Va. Code § 61-8D-1(6). Reference in the State's closing to the severity of the child's injuries was wholly germane to establishing the elevated element of "gross" neglect of the child.

47. Trial counsel had no objection to the State's closing because the use of photographs that were admitted as evidence to demonstrate the necessary elements of the charged offenses was wholly proper.

48. As such, the Petitioner fails to prove that her trial counsel's performance fell below an objective standard of reasonableness for not objecting to the use of the photographs.

Strickland v. Washington, supra., State ex rel. Kitchen v. Painter, supra.

49. Additionally, the Petitioner does not show that her rights were prejudiced had there been an objection; therefore, there has been no showing that if counsel had objected, the results of the proceeding would have been different . Smith v. Andreini, supra.; State v. Miller, supra.,

Strickland v. Washington, supra., State ex rel. Kitchen v. Painter, supra.

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<sup>2</sup>W. Va. Code § 61-8D-4(e) reads in part: "Any person who grossly neglects a child and by the gross neglect creates a substantial risk of serious bodily injury or of death to the child is guilty of a felony[.]"

### *Jury Instructions*

50. Trial counsel never waived the right to argue that a more appropriate finding for the jury to make would be one of neglect nor did trial counsel leave the Petitioner without any theory of defense to present to the jury.

51. The Petitioner's theory of the case, based upon the totality of the evidence, was that she did not have the malicious intent necessary for a conviction under **W.Va. Code § 61-8D-2a**, Death of a Child by a Parent. Further, defense counsel argued to the Court that an instruction should be given for Child Neglect by a Parent Resulting in Death pursuant to **W.Va. Code § 61-8D-4a**, arguing that it was a lesser included offense of Death of a Child by a Parent.

52. The Court had the parties file briefs regarding whether or not Child Neglect by a Parent Resulting in Death was in fact a lesser included offense of Death of a Child by a Parent.

53. After briefing and extensive argument, the Court made detailed findings of fact and conclusions of law denying the Petitioner's instruction, finding first that Child Neglect by a Parent Resulting in Death was not a lesser included offense of Death of a Child by a Parent as charged in Count One. Further, the Court also found based upon the evidence adduced at trial that there was no factual basis for an instruction on neglect given the statements of the Petitioner. [Memorandum in Support of Defendant's Motion to Instruct the Jury Upon the Lesser Included Offense of Child Neglect by a Parent Resulting in Death, 9/3/09, Tr., 9/2/09, pg. 334-341, Tr., 9/3/09, pg. 2-16.]

54. Petitioner implies that the sole theory of her case below was that she was neglectful and not malicious; however, the evidence adduced at trial made it clear that the Petitioner stated that she threw or tossed the baby and not that the baby merely slipped out of her grasp. The evidence established that the Petitioner clearly meant to throw the baby, so it was unquestionably

an intentional act in that sense. The issue was what her state of mind- her specific intent- was at the time. Hence, her trial counsel argued that her actions were not malicious or done with the intent to harm the child in any way, which was the most objectively reasonable argument he could have made under the circumstances.

55. Even despite the aforementioned obstacles, trial counsel wrote a six-page memorandum of law to the Court arguing that Child Neglect by a Parent Resulting in Death was a lesser included offense of Death of a Child by a Parent as charged in Count One of the indictment and asking the Court to give that instruction to the jury. Counsel clearly did everything he could to advance Petitioner's theory of the case.

56. The Petitioner fails to show that counsel's performance in arguing for jury instructions fell below an objective standard of reasonableness. By all accounts, defense counsel zealously argued and briefed the Court on the issues presented and the Court simply decided against those arguments based upon the facts and the law. The Petitioner also fails to show that counsel committed any errors adversely affecting the outcome of the case in the course of his arguments regarding jury instructions. State v. Miller, supra., Strickland v. Washington, supra., State ex rel. Kitchen v. Painter, supra.

### *Change of Venue*

57. 'To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused.' Point 2, Syllabus, State v. Wooldridge, 129 W.Va. 448, 40 S.E.2d 899 (1946). Syllabus Point 1, State v. Sette, 161 W.Va. 384, 242 S.E.2d 464 (1978).

Syl. Pt. 1, State v. Derr, 192 W. Va. 165, 451 S.E.2d 731 (1994).

58. “One of the inquiries on a motion for a change of venue should not be whether the community remembered or heard the facts of the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt or innocence of the defendant.”

Syl. Pt. 3, State v. Derr, 192 W. Va. 165, 451 S.E.2d 731 (1994).

59. In other words,

“‘Widespread publicity, of itself, does not require change of venue, and neither does proof that prejudice exists against an accused, unless it appears that the prejudice against him is so great that he cannot get a fair trial.’ Syllabus Point 1, State v. Gangwer, W.Va., 286 S.E.2d 389 (1982).”

Syl. Pt. 2, State v. Young, 173 W. Va. 1, 311 S.E.2d 118 (1983).

60. The Petitioner has failed to show that there was any basis for trial counsel to have made a motion for a change of venue, considering the burden rests on the Petitioner to show good cause for the change-- not just that there was pretrial publicity, but that the community was so prejudiced against the Petitioner and that their opinions were so fixed that the Petitioner could not get a fair trial. State v. Derr, *supra.*, State v. Young, *supra.*

61. While the Petitioner cites a dozen articles that appeared in local newspapers on the Petitioner’s case prior to the start of trial, the Petitioner fails to mention that these few articles spanned a period of over two (2) years beginning with the death of the child.

62. Further, the parties agreed to call additional jurors in for the selection process than they would normally based upon both the nature of the case and the possibility of jurors having heard or read news coverage related to the case. [Tr., 8/10/09, pg. 20-21.]

63. The Court conducted extensive voir dire with the potential jurors and allowed the

parties to ask additional questions of them in individual voir dire. [Tr., 9/1/09, pg. 3-257.] The parties were able to agree that a qualified pool of 20 jurors had been assembled for them to make their strikes. [Tr., 9/1/09, pg. 245.]

64. There was no indication that any juror was influenced by any pretrial publicity. There was no indication of an overriding influence of any media coverage on members of the pool. There was no indication that the Court was having problems seating a jury.

65. Based upon the above, the Petitioner has failed to demonstrate that counsel was objectively unreasonable in not moving for a change of venue when he had little facts to present to the Court as a basis therefor. Additionally, the Petitioner has failed to demonstrate that had counsel moved for a change of venue the result of the proceedings would have been different. State v. Miller, supra., Strickland v. Washington, supra., State ex rel. Kitchen v. Painter, supra.

#### *Subpoenaing of Witnesses*

66. The Petitioner alleges that her counsel was ineffective for failing to subpoena or call certain witnesses for her case. All of the witnesses cited by the Petitioner under this heading were not factual witnesses present during any of the events surrounding or leading up to the death of the infant. The Petitioner indicates that all of the witnesses cited are family members of the Petitioner who would have taken the stand to say that the Petitioner was a good parent and was good at caring for other children.

67. Trial counsel called the Petitioner's mother, three brothers, boyfriend, and a neighbor to the stand to testify concerning those exact same things. Calling four more witnesses, all family members of the Petitioner, to testify identically to the numerous witnesses already called

would have added little to the case and may have drawn objection from the State as being cumulative.

68. Furthermore, the calling of witnesses is in that category of representation arising from occurrences involving strategy, tactics and arguable courses of action that should not generally be second-guessed by a reviewing court. State v. Miller, *supra.*, State v. Thomas, *supra.*

69. Based upon the above, the Petitioner fails to show that her counsel's performance in this regard fell below an objective standard of reasonableness or that had counsel called any one or all of these witnesses the outcome of the proceedings would have been different. State v. Miller, *supra.*, Strickland v. Washington, *supra.*, State ex rel. Kitchen v. Painter, *supra.*

#### *Questioning of Witnesses*

70. The Petitioner argues that her counsel was ineffective for failing to ask witnesses about their observations concerning the Petitioner's care of children; however, a review of the record affirmatively establishes that trial counsel **did** ask witnesses about those very things.

71. Donna Boggs, the Petitioner's mother, testified that the Petitioner took good care of the infant and that "he was her life." [Tr., 9/2/09, pg. 184-217 \*207.]

72. Michael Boggs testified that the Petitioner was "great" with the baby, that she loved him, and that she was always carrying him around with her everywhere she went. [Tr., 9/2/09, pg. 227-233 \*230.]

73. Robert Hicks, Jr. testified that the Petitioner and the infant had a "wonderful" relationship and that they loved each other very much. He described the way the infant would reach for the Petitioner and cling to her, and he described the way that the Petitioner would care for the infant. [Tr., 9/2/09, pg. 238-292, \*241-243.]

74. The Petitioner's expert witness, Dr. Bernard Lewis, testified concerning the

Petitioner's relationship and bond with the infant and how he positively affected her life and gave her purpose and direction. [Tr., 9/2/09, pg. 297-317, \*310-313.]

75. Based on a review of the record, the Petitioner has failed to demonstrate that counsel's performance in the questioning of witnesses was objectively unreasonable or that but for counsel's alleged inadequate questioning of these witnesses the outcome of the proceedings would have been different. State v. Miller, supra., Strickland v. Washington, supra., State ex rel. Kitchen v. Painter, supra.

76. Further, the questioning of witnesses is again in that category of representation arising from occurrences involving strategy, tactics and arguable courses of action that should not generally be second-guessed by a reviewing court. State v. Miller, supra., State v. Thomas, supra.

#### *Investigation of the Case*

77. The Petitioner presented numerous witnesses at trial who had seen and interacted with the infant in the two days prior to his passing. All of them indicated that the baby was behaving simply as though he was teething and/or had a cold and did not notice anything out of the ordinary. Further, Robert Hicks, Jr., who interacted with the baby on the day of his death, testified that the baby slept a lot that day and periodically looked as though he was in a daze.

78. The Petitioner does not assert that any of the evidence that any additional unnamed witnesses would or could have offered was at variance with the testimony and evidence that the Petitioner did offer during the course of the trial.

79. Due to the strong presumption in favor of the regularity of court proceedings and Petitioner's burden to affirmatively show the existence of irregularity, specificity is required in habeas pleadings. W. Va. Code § 53-4A-2; *see also* Syl. Pt. 2, State ex rel. Scott v. Boles, 150

W. Va. 453, 147 S.E.2d 486 (1966); State ex rel. Massey v. Boles, 149 W. Va. 292, 140 S.E.2d 608 (1965); Syl. Pt. 1, State ex rel. Ashworth v. Boles, 148 W. Va. 13, 132 S.E.2d 634 (1963).

80. The Petitioner fails to allege any additional, non-cumulative contribution that any witness could have offered.

81. Furthermore, as discussed in previous subsections, the presentation of witnesses is in that category of representation arising from occurrences involving strategy, tactics and arguable courses of action that should not generally be second-guessed by a reviewing court. State v. Miller, supra., State v. Thomas, supra.

82. Based on the above, the Petitioner has failed to demonstrate that counsel's performance regarding the investigation and presentation of evidence related to the appearance of the child in the days prior to his death fell below an objective standard of reasonableness or that but for counsel's alleged inadequate performance in this regard the outcome of the proceedings would have been different. State v. Miller, supra., Strickland v. Washington, supra., State ex rel. Kitchen v. Painter, supra.

#### *Continuance*

83. The Petitioner offers no factual basis for her allegation that her counsel was ineffective for failing to request a continuance of her trial based upon his busy schedule aside from the fact that defense counsel had a trial immediately prior to the Petitioner's trial.

84. Furthermore, the Petitioner offers no factual basis to believe that her counsel's busy schedule resulted in a lack of preparedness for her trial.

85. Trial lawyers, especially quality trial lawyers with the upstanding reputation of the Petitioner's trial lawyer, try cases. They try them often. Because of the busy dockets of the courts, sometimes trials fall back to back without a great deal of time in between.

86. Trial counsel had been retained and had represented the Petitioner since the inception of her case in August of 2008. There had been numerous hearings in the case. Trial had already been scheduled and rescheduled previously. Trial counsel was abundantly familiar with the facts and nuances of the Petitioner's case by the time the matter came on for trial.

87. The fact that defense counsel had just finished a jury trial at the start of the Petitioner's jury trial does not mean that defense counsel was unprepared or ineffective. Again, specificity is required in habeas pleadings. *W. Va. Code* § 53-4A-2; *see also* Syl. Pt. 2, State ex rel. Scott v. Boles, 150 W. Va. 453, 147 S.E.2d 486 (1966); State ex rel. Massey v. Boles, 149 W. Va. 292, 140 S.E.2d 608 (1965); Syl. Pt. 1, State ex rel. Ashworth v. Boles, 148 W. Va. 13, 132 S.E.2d 634 (1963). The Petitioner simply fails to cite anything in the record of the case that supports this claim.

88. Based upon the above, the Petitioner has failed to demonstrate that counsel was objectively unreasonable in not moving the Court for a continuance. Furthermore, the Petitioner has failed to show that had defense counsel asked for a continuance that the outcome of the proceedings would have been different.<sup>1</sup> State v. Miller, *supra.*, Strickland v. Washington, *supra.*, State ex rel. Kitchen v. Painter, *supra.*

89. In sum, the Petitioner has failed to meet either prong of the two-prong standard necessary to prove ineffective assistance claims pursuant to Strickland v. Washington, *supra.*, State v. Miller, *supra.*, State ex rel. Kitchen v. Painter, *supra.*, for each and every allegation contained under this subheading. As such, the Petitioner is not entitled to relief based upon a claim of ineffective assistance of counsel.

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<sup>1</sup> The Petitioner had just moved the Court for a continuance based upon her pregnancy. The Court denied that request for a continuance. Even if defense counsel had moved for a continuance for more time, there is no guarantee that the Court would have granted it nor that any continuance would have affected the outcome of the proceedings.

### The Petitioner's Statement

90. The Petitioner advanced the argument that her confession was involuntary on direct appeal to the West Virginia Supreme Court. The Court considered this argument of the Petitioner and affirmed the conviction and sentence of the Petitioner. As such, this allegation has been previously finally adjudicated. Losh v. McKenzie, *supra.*, Ford v. Coiner, *supra.*

91. Furthermore, the Petitioner failed to advance the argument that her confession was false on direct appeal to the Supreme Court. Any ground that a habeas petitioner could have raised on direct appeal, but did not, is presumed waived. Syl. Pts. 1 & 2, Ford v. Coiner, 156 W. Va. 362, 196 S.E.2d 91 (1972).

92. 1. 'A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.' Syl. Pt. 3, State v. Vance, 162 W.Va. 467, 250 S.E.2d 146 (1978).

3. 'When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.' Syl. Pt. 1, State v. Lacy, 196 W. Va. 104, 468 S.E.2d 719 (1996).

Syl. Pts. 1 & 3, State v. Jones, 220 W. Va. 214, 640 S.E.2d 564 (2006).

93. In this case, there was no suppression hearing because the Petitioner recognized that her statements given to police were voluntarily given outside of a custodial setting. Despite the fact that Miranda warnings were not required in that non-custodial setting, the Petitioner was informed of her Miranda warnings and knowingly and intelligently waived them in writing. See Syl. pt. 3, State v. Bradshaw, 193 W.Va. 519, 457 S.E.2d 456, *cert. denied* 516 U.S. 872 (1995),

*holding* “To the extent that any of our prior cases could be read to allow a defendant to invoke his Miranda rights outside the context of custodial interrogation, the decisions are no longer of precedential value.” At pre-trial, the defense informed the trial court that the Petitioner’s recorded statement was transcribed, the Petitioner executed a written Miranda waiver (which execution is reflected on the recorded statement), and the Petitioner was evaluated by a psychologist secured by the defense who reported that there were no issues concerning the Petitioner’s understanding of her rights or her knowing and intelligent waiver of those rights. The defense conceded that it had no legal grounds for a challenge to the admissibility of the statement. [Pre-Trial Hearing Order, 10/30/09; Tr., 8/10/09, pg. 3-4.]

94. The West Virginia Supreme Court of Appeals holds:

“ [w]hen there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.’ Syl. Pt. 8, in part, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995)” Syl. Pt. 1, *State v. White*, 223 W.Va. 527, 528, 678 S.E.2d 33, 34 (2009).

Syl. Pt. 1, *State v. Day*, 225 W.Va. 794, 696 S.E.2d 310 (2010).

95. The West Virginia Supreme Court, with facts paralleling the voluntary non-custodial scenario of the Petitioner’s case, upheld a trial court’s determination that a criminal defendant’s voluntary non-custodial statements to police were admissible because the defendant was not entitled to invoke his Miranda rights. *State v. Gilman*, 226 W.Va. 453, 702 S.E.2d 276 (2010), citing *Bradshaw, supra*; *State v. Middleton*, 220 W. Va. 89, 640 S.E.2d 152 (2006); and *State v. McCracken*, 218 W. Va. 190, 624 S.E.2d 537 (2005). The Supreme Court also found that the trial court did not err in finding the *Gilman* defendant to have voluntarily signed a waiver of the Miranda rights. *Gilman*, 226 W.Va. at 459.

96. The trial testimony of Troopers Bowman, Pansch and Boober was consistent with the Petitioner's recited understanding of the facts of her voluntary statement. Trooper Bowman took a voluntary statement from the Petitioner in her home, when she was not in custody, shortly after the death of the child as part of his preliminary investigation into how the child died. Troopers Pansch and Boober received a voluntary oral statement from the Petitioner when she voluntarily presented herself to the police detachment and after she was advised of her Miranda warnings and waived them. The Petitioner's subsequently recorded statement taken while she was still at the detachment, but not in custody, reflected the execution of her written Miranda waiver, which written waiver was admitted into evidence without objection.

97. Further, the trial court was under no duty to conduct a suppression hearing in light of the Petitioner's waiver of that hearing. The West Virginia Supreme Court has never developed such a rule. In deciding State v. Jenkins, 176 W.Va. 652, 346 S.E.2d 802 (1986), the Supreme Court never held that trial courts must *sua sponte* conduct suppression hearings of criminal defendant's statements to police.

98. Based upon the record and applicable law, there was no clear error in the trial court's admission of the statements of the Petitioner. State v. Jones, *supra*.

99. Further, the Petitioner fails to cite in what way her statements were involuntary or demonstrate that the holding of a suppression hearing would have resulted in the suppression of her statements to the police when such statements were plainly admissible as a voluntary non-custodial statement under State v. Gilman, *supra*; Bradshaw, *supra*; Middleton, *supra*; and McCracken, *supra*.

100. The Petitioner also fails to give any factual support for the allegation that her

confession was false considering it was freely and voluntarily given, she provided the same version of events to her family and evaluating psychologists, and it was consistent with the physical evidence found in the course of the investigation.

101. Due to the strong presumption in favor of the regularity of court proceedings and Petitioner's burden to affirmatively show the existence of irregularity, specificity is required in habeas pleadings. *W. Va. Code* § 53-4A-2; *see also* Syl. Pt. 2, State ex rel. Scott v. Boles, 150 W. Va. 453, 147 S.E.2d 486 (1966); State ex rel. Massey v. Boles, 149 W. Va. 292, 140 S.E.2d 608 (1965); Syl. Pt. 1, State ex rel. Ashworth v. Boles, 148 W. Va. 13, 132 S.E.2d 634 (1963).

102. Considering the lack of factual support offered in the Petition and based upon the clear record of the underlying proceeding which demonstrates that the Petitioner's statement was an accurate, true, voluntary, knowing, and intelligent statement, the Petitioner is entitled to no relief on this claim.

### Double Jeopardy

103. The Petitioner alleges two separate instances where the conviction and sentence of the Petitioner supposedly violates Double Jeopardy principles. First, she alleges that Count Two of the Indictment is actually a lesser included offense of Count One such that her conviction for both is unconstitutional. Secondly, she alleges that the nature of the offense of Count Three makes it constitutionally impermissible to sentence the Petitioner for consecutive sentences for both Counts One and Three.

104. 2. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects

against multiple punishments for the same offense.’ Syllabus Point 1, State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992).

3. ‘The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.’ Syllabus Point 1, Conner v. Griffith, 160 W.Va. 680, 238 S.E.2d 529 (1977).” Syllabus Point 2, State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. Pts. 2 &3, State v. McGilton, 229 W. Va. 554, 729 S.E.2d 876 (2012).

105. In order to establish a double jeopardy claim, the defendant must first present a *prima facie* claim that double jeopardy principles have been violated. Once the defendant proffers proof to support a nonfrivolous claim, the burden shifts to the State to show by a preponderance of the evidence that double jeopardy principles do not bar the imposition of the prosecution or punishment of the defendant.

Syl. Pt. 2, State v. Sears, 196 W. Va. 71, 468 S.E.2d 324 (1996).

106. In this case, the Petitioner fails to present even a *prima facie* case that double jeopardy principles were violated.

107. The Petitioner first claims that the child abuse resulting in bodily injury charge was a lesser included offense of the child abuse resulting in death charge. A plain reading of the record shows that these were two separate and distinct events that occurred on different dates. The testimony of defense witnesses Donna Boggs and Robert Hicks, Jr. as well as the statements of the Petitioner clearly establish that the infant had a bruise under his left eye on Saturday and Sunday—the weekend before the infant’s death. This bruise was a direct result of the Petitioner throwing a bottle at the baby, striking him in the face. The child abuse resulting in death claim was based upon the Petitioner throwing the infant into the crib on top of the toy piano, causing

the infant's skull to fracture and other head trauma, which led to the death of the infant. The Petitioner stated that this happened on Monday evening, the day before the child's death.

108. The Petitioner then argues that the indictment does not make it clear that these were two separate events, but she does not allege that the indictment was defective or insufficient.

109. "An indictment is sufficient under Article III, §14 of the West Virginia Constitution and W.Va.R.Crim. P. 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy."

Syl. Pt. 6, State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999).

110. "An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations."

Syl. Pt. 3, Id.

111. "The requirements set forth in W.Va.R.Crim. P. 7 were designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure." Syl.

Pt. 4, Id.

112. The Counts as contained in the indictment clearly follow the statutory language for each of the offenses as contained in the West Virginia Code, encompassing all of the elements of the offenses charged. State v. Wallace, *supra*.

113. The Petitioner argues that since Count One does not allege the specific physical injury that resulted in the death of the child, it implies that the actions as alleged in Count Two must be considered a part of Count One. Not only is this flawed logic, but the Petitioner cites absolutely no case law in support of this cross-count implication that she urges. Furthermore, the

Petitioner fails to cite any law that would require the State to specify within the indictment the exact nature of the injury causing the death of the child.<sup>2</sup>

114. The record demonstrates that the Petitioner was provided full discovery in the case and obviously had firsthand knowledge of the confession she had provided to the police, detailing the instances of abuse and timeline of events leading up to the death of the infant; therefore, she was on fair notice of the charges against which she was defending. State v. Wallace, supra.

115. Finally, the Petitioner is easily able to assert a conviction to guard against being tried for the offenses herein in the future. State v. Wallace, supra. The West Virginia Supreme Court of Appeals has explained that a conviction under a charged indictment still precludes subsequent indictment on the exact same material facts even though proof may be at variance regarding immaterial factors, such as the dates upon which the offenses were alleged to have occurred. See State v. David D. 214 W.Va. 167, 162, 588 S.E.2d 156, 173; citing State ex rel. State v. Reed, 204 W.Va. 520, 524, 514 S.E.2d 171, 175 (1999).

116. It is abundantly clear from a reading of the record that Counts One and Two are separate and distinct offenses and that a conviction on both counts as well as consecutive sentences on those counts do not violate double jeopardy principles. State v. McGilton, supra., State v. Sears, supra.

117. The Petitioner also alleges that the child neglect charge as contained in Count Three of the Indictment is a lesser included offense of child abuse resulting in death as contained in Count One. In support of this argument, the Petitioner states that the neglect alleged, i.e., not

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<sup>2</sup> The State is not even required to include in an indictment for Murder in the First Degree the manner or means by which the death of the deceased was caused. See W.Va. Code § 61-2-1.

taking the child for medical treatment, was a part of the same transaction that caused the death of the child. However, the Petitioner fails to properly analyze the offenses pursuant to legal precedent.

118. The West Virginia Supreme Court of Appeals holds:

“The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.” Syllabus Point 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981) [overruled on other grounds].

Syl. Pt. 7, *State v. Noll*, 223 W.Va. 6, 672 S.E.2d 142 (2008).

119. The elements of the offense of Death of a Child by a Parent, W. Va. Code § 61-8D-2a(a), include malice and intent to inflict “physical pain, illness or any impairment of physical condition by other than accidental means.” “Neglect” is not an element of this offense. Further, the offense necessitates the death of the child as a result of the abuse suffered. Finally, the statute itself indicates that it does not apply to circumstances where a parent fails (without malice) to seek medical care for his or her infant. See W.Va. Code § 61-8D-2a(d).

120. Further, neither “intent” nor “malice” are elements of the offense of Gross Child Neglect Creating a Substantial Risk of Serious Bodily Injury or Death, W.Va. Code § 61-8D-4(e). See *State v. DeBerry*, 185 W.Va. 512, 408 S.E.2d 91, *certiorari denied* 112 S.Ct. 592, 502 U.S. 984, 116 L.Ed.2d 616 (1991) (felonious child neglect does not require proof of criminal intent, interpreting W. Va. Code § 61-8D-4, child neglect resulting in bodily injury.) Also, a child does not have to have necessarily been seriously injured or died in order to charge this offense but only been placed in a situation where there was a substantial risk of the same based

upon the neglect of the caretaker.

121. Based upon a simple review of the statutory elements and construction of these offenses, it is clear that Gross Child Neglect Creating a Substantial Risk of Serious Bodily Injury or Death under W.Va. Code § 61-8D-2a(a) is not a lesser included offense of Death of a Child by a Parent under W.Va. Code § 61-8D-4(e). The Petitioner's conviction of both of these offenses, therefore, do not offend double jeopardy principles. State v. McGilton, supra., State v. Sears, supra.

122. Lastly, the West Virginia Supreme Court has declined to find that cumulative punishments imposed for separate offenses arising out of the same transaction violate constitutional principles. See State v. Fortner, 182 W.Va. 345, 364, 307 S.E.2d 812, 831 (1990).

123. Based upon the foregoing analysis, the Petitioner is entitled to no relief on these grounds.

#### **Excessive or Disproportionate Sentence**

124. The Petitioner failed to advance this argument on direct appeal to the West Virginia Supreme Court. Any ground that a habeas petitioner could have raised on direct appeal, but did not, is presumed waived. Syl. Pts. 1 & 2, Ford v. Coiner, 156 W. Va. 362, 196 S.E.2d 91 (1972).

125. Furthermore, the West Virginia Supreme Court of Appeals holds that "sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review." Syl. Pt. 7, State v. Layton, 189 W.Va. 470, S.E.2d 740 (1993); Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982).

126. The Petitioner does not argue that she received sentences that were outside of the

statutory guidelines for the crimes of conviction, and she further fails to allege any impermissible factors considered by the trial court when imposing such sentences. As such, the Petitioner's sentence is not subject to review. State v. Layton, supra.; State v. Goodnight, supra.

127. The West Virginia Supreme Court of Appeals stated in Syllabus Point 5 of State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983):

"Punishment may be constitutionally impermissible, although not cruel and unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense."

128. Furthermore, the Supreme Court sets forth in State v. Glover, 177 W.Va. 650, 658, 355 S.E.2d 631, 639 (1987) the applicable tests for disproportionate sentence consideration:

"In State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), we set forth two tests to determine whether a sentence is disproportionate to the crime that it violates W.Va. Const. art. III §5. The first test 'is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.' 172 W.Va. at 272, 304 S.E.2d at 857. Cooper then states the second test: If it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test spelled out in syllabus point 5 of Wanstreet v. Bordenkicher, 166 W.Va. 523, 276 S.E.2d 205 (1981):

'In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.'"

(Id.)

129. The West Virginia Supreme Court noted its reluctance to apply the

proportionality principle inherent in the cruel and unusual punishment clause as an expression of due respect for and in substantial deference to legislative authority in determining the types and limits of punishments for crimes. State v. James, 227 W.Va. 407, 710 S.E.2d 98, 106 (2011).

130. The Petitioner was sentenced to a determinate term of forty (40) years of incarceration for her conviction of Death of a Child by a Parent. W.Va. Code § 61-8D-2a(a). The Petitioner was further sentenced to the statutory term of not less than one (1) nor more than five (5) years of incarceration for her conviction of Child Abuse Causing Bodily Injury. W.Va. Code § 61-8D-3(a). Lastly, the Petitioner was sentenced to the statutory term of not less than one (1) nor more than five (5) years of Gross Child Neglect Causing Substantial Risk of Serious Bodily Injury or Death. W.Va. Code §61-8D-4(e). Those sentences were ordered to run consecutively. [Sentencing Order, 6/14/10; Tr. 6/7/10, pg. 60-65.]

131. The evidence clearly demonstrated that the Petitioner threw a bottle at her crying infant, hitting him in the face and causing bruising under his left eye. The evidence also demonstrated that the Petitioner intentionally and forcefully threw her baby into his crib on top of a toy piano, causing a skull fracture and other head trauma. The Petitioner described hearing a loud popping sound when the baby hit the piano and also stated that the baby cried when it occurred. The evidence further showed that, despite having the knowledge that she delivered a significant blow to the head of her infant and there being obvious reason to believe that the child was ill and/or impaired, the Petitioner failed to seek medical attention for the baby who was obviously in distress. This seven-month-old child ultimately died at the hands of his own mother. Based upon the facts and circumstances of the case, an aggregate sentence of 42-50 years does not “shock the conscience.” State v. Cooper, *supra.*, State v. Glover, *supra.*

132. The Petitioner was convicted of and sentenced on three separate felony offenses

involving the abuse and/or neglect of her seven-month-old infant. The infant died as a direct result of the actions of the Petitioner. It is universally accepted that the State has a compelling and necessary public interest in protecting children, perhaps our most vulnerable citizens, from abuse and neglect. *See W.Va. Code §§49-1-1 et seq.; W.Va. Code §§15-13-1 et seq.* While jurisdictions vary somewhat in their classification and punishment for child abuse and neglect depending on the facts of each case, including whether there has been abuse or there has been neglect and whether there was actual injury to the child, all see these offenses as significant. The Petitioner cites several statutes in arguing that the 40-year determinate sentence imposed for Death of a Child by a Parent is disproportionate and excessive, among them DUI with death, negligent homicide, involuntary manslaughter, and voluntary manslaughter. However, the Petitioner fails to take into consideration that Death of a Child by a Parent is a felony offense involving an intentional and affirmative act of harm to the victim by the defendant, which distinguishes it from DUI with death, negligent homicide and involuntary manslaughter. The reason the penalty can be greater<sup>3</sup> than that of voluntary manslaughter is precisely due to the particularly egregious nature of the offense. It is quite possible for someone to commit voluntary manslaughter in the killing of a stranger to which one owes no extraordinary duty of care. The offense of Death of a Child by a Parent was created and designed to punish parents, charged with the duty to protect and care for their often defenseless children, for serious acts of intentional abuse that lead to the deaths of their own children. While the State did not allege that the Petitioner had the specific intent to kill her baby, had the same been alleged and had the jury

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<sup>3</sup> The Respondent states the penalty *can be* greater because the range of penalty for Voluntary Manslaughter is a definite term of imprisonment of not less than three (3) nor more than fifteen (15) years. The range of penalty for Death of a Child by a Parent is a definite term of imprisonment of not less than ten (10) nor more than forty (40) years. Therefore, the sentence for Voluntary Manslaughter may be greater than the penalty for Death of a Child by a Parent or vice versa. *W.Va. Code § 61-2-4, W.Va. Code § 61-8D-4a.*

returned a verdict of guilty, the Petitioner would be serving a life sentence. *See W.Va. Code § 61-2-2.*

133. Based upon the foregoing analysis, the Petitioner has failed to demonstrate that her sentences are excessive or disproportionate to the offenses of conviction. *State v. Cooper, supra., State v. Glover, supra.* As such, she is entitled to no relief on this claim.

#### Pretrial Publicity

134. The Petitioner failed to advance this argument on direct appeal to the West Virginia Supreme Court. The Petitioner also did not advance any argument that the jury was unqualified or biased due to media influence. Any ground that a habeas petitioner could have raised on direct appeal, but did not, is presumed waived. Syl. Pts. 1 & 2, *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91 (1972).

135. Furthermore,

‘To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused.’ Point 2, Syllabus, *State v. Wooldridge*, 129 W. Va. 448, 40 S.E.2d 899 (1946). Syllabus Point 1, *State v. Sette*, 161 W. Va. 384, 242 S.E.2d 464 (1978).

Syl. Pt. 1, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

136. “One of the inquiries on a motion for a change of venue should not be whether the community remembered or heard the facts of the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt or innocence of the defendant.”

Syl. Pt. 3, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

137. In other words,

“‘Widespread publicity, of itself, does not require change of venue, and neither does proof that prejudice exists against an accused, unless it appears that the prejudice against him is so great that he cannot get a fair trial.’ Syllabus Point 1, State v. Gangwer, W. Va., 286 S.E.2d 389 (1982).”

Syl. Pt. 2, State v. Young, 173 W. Va. 1, 311 S.E.2d 118 (1983).

138. The Petitioner never moved for a change of venue, and, therefore, never demonstrated good cause for a change of venue.

139. Furthermore, there is no basis in the record that the jury was in any way tainted by pretrial publicity.

140. While the Petitioner cites a dozen articles that appeared in local newspapers on the Petitioner’s case prior to the start of trial, the Petitioner fails to mention that these few articles spanned a period of over two (2) years.

141. When the Court conducted voir dire, specific inquiry was made into whether or not potential jurors heard any media coverage with respect to the Petitioner’s case. [Tr., 9/1/09, pg. 21.] The Court went on to make more general inquiries with regard to impartiality. [Tr., 9/1/09, pg. 28-29.] When getting into defense counsel’s requested voir dire, the Court again made inquiry into the potential pool’s exposure to media coverage of the matter and asked for a general show of hands as to whether any potential juror developed an opinion on the case based upon what they had seen or heard. [Tr., 9/1/09, pg. 51.] The Court did not leave the subject there, however. The parties conducted individual voir dire with all individuals who had indicated that they had seen or heard something about the case. [Tr., 9/1/09, pg. 62-227.]

142. After this extensive questioning and the process of eliminating some potential jurors for cause based upon a variety of reasons, the Petitioner agreed that a qualified pool of 20 jurors had been arrived at prior to the parties making strikes. [Tr., 9/1/09, pg. 245.]

143. Alternates were also selected and the finalized panel of jurors were sworn by the Court. [Tr., 9/1/09, pg. 245-257.]

144. Throughout the course of the trial, the Court admonished jurors to avoid media coverage. [Tr., 9/1/09, pg. 261-262, Tr., 9/2/09, pg. 143, 333, Tr., 9/3/09, pg. 73.]

145. There was absolutely no indication that any juror was influenced by any pretrial publicity.

146. The Petitioner cites trial counsel's statement at a pretrial hearing that the parties were hopeful that a plea could be worked out because of possible prejudicial treatment by a jury if the case were to go to trial as support for this allegation. However, looking at that statement in context, trial counsel was worried about the emotional nature of the case- the fact that the death of an infant would be the focus of the trial itself- as a concern and not that the defense was worried about prejudicial pretrial publicity. [Tr., 8/10/09, pg. 6.]

147. Considering the extensive voir dire of potential jurors in this case, the Petitioner has failed to demonstrate that pretrial publicity prejudiced her ability to have a fair trial with an impartial jury. State v. Derr, *supra.*, State v. Young, *supra.* As such, the Petitioner is entitled to no relief on this allegation.

#### Continuance for Pregnancy

148. "A motion for continuance is addressed to the sound discretion of the trial court and the ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syl. Pt. 2, State v. Bush, 163 W.Va. 168, 255 S.E.2d 539 (1979).

149. Petitioner's counsel moved the Court to continue her trial until such time as her

pregnancy progressed and she gave birth. The basis of the motion was that it could inflame the jury if they were to discover that the Petitioner, on trial for the death of her infant, was pregnant with another child. The Petitioner conceded that there were no medical reasons that she could not sit through trial. The concern was simply one of appearance and possible prejudice.

150. The Court, being sensitive to the basis of the Petitioner's motion, heard argument at sidebar to prevent the fact that the Petitioner was pregnant from leaking to the public. After a lengthy discussion as well as the Court having an opportunity to view the Petitioner to assess how visibly obvious her pregnancy was at that stage, the Court denied the Petitioner's motion. [Tr., 8/10/09, pg. 14-20.]

151. The Petitioner's suggests that the jury was surely aware of her condition and held the same against her. The Petitioner also suggests that the situation would have been remedied with a "short" continuance to allow her to give birth. However, the Court clearly considered the Petitioner's motion and took seriously the basis therefor before denying the motion. The Court determined that, at the stage of her pregnancy at the time, the Petitioner was not showing to the point that her pregnancy was obvious. Furthermore, the Court noted that if a continuance were to be granted, it would be months before the matter could be rescheduled considering (a) the Petitioner was still months away from giving birth and (b) the Court's docket was filling up quickly and making room again for such a lengthy trial would be complicated. [Tr., 8/10/09, pg. 14-20.]

152. Considering the Court's thorough consideration of the Petitioner's motion and reasoned denial of the same, the Petitioner as failed to show an abuse of discretion. State v. Bush, *supra*. As such, the Petitioner is entitled to no relief on this claim.

### Waived Grounds

153. The Petitioner expressly waived on her filed, signed and verified Losh list the following grounds:

- Trial court lacked jurisdiction
- Statute under which conviction obtained unconstitutional
- Indictment shows on face that no offense was committed
- Denial of right to speedy trial
- Involuntary guilty plea
- Mental competency at time of crime
- Mental competency at time of trial cognizable even if not asserted at proper time or if resolution not adequate
- Incapacity to stand trial due to drug use
- Language barrier to understanding the proceedings
- Denial of counsel
- Unintelligent waiver of counsel
- Failure of counsel to take an appeal
- Suppression of helpful evidence by the prosecutor
- State's knowing use of perjured testimony
- Falsification of transcript by prosecutor
- Unfulfilled plea bargains
- Information in presentence report erroneous
- Irregularities in arrest
- Excessive or denial of bail
- No preliminary hearing
- Illegal detention prior to arraignment
- Irregularities in arraignment
- Challenges to the composition of the grand jury or its procedures
- Failure to provide copy of indictment to defendant
- Defects in indictment
- Pre-trial delay

- Prejudicial joinder of defendants
- Lack of full public hearing
- Nondisclosure of grand jury minutes
- Refusal to turn over witness notes after witness has testified
- Claim of incompetence at time of offense, as opposed to time of trial
- Claims concerning use of informers to convict
- Instructions to the jury
- Claims of prejudicial statements by trial judge
- Claims of prejudicial statements by State
- Acquittal of co-defendant on the same charge
- Defendant's absence from part of the proceedings
- Improper communications between prosecutor and witnesses or jury
- Question of actual guilt upon an acceptable guilty plea
- Mistaken advice of counsel as to parole or probation eligibility
- Amount of time served on sentence, credit for time served

[Losh List.] Losh v. McKenzie, *supra*.

154. The record is plain that the Petitioner is not entitled to any relief on the above expressly waived grounds. *W. Va. Code* § 53-4A-3(a), -7(a); Perdue v. Coiner, *supra*.

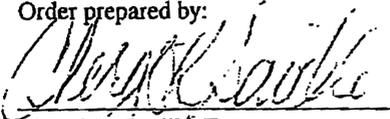
### CONCLUSION

For each of the reasons detailed above, the Petitioner fails to allege any set of facts in this habeas corpus proceeding upon which relief may be granted. No evidentiary hearing is required for the Court to make its findings and conclusions because all of the matters alleged can readily be determined by reference to the record in State v. Monica Boggs; Case No.: 09-F-6 and evidence presented in the report of Dr. Hauda, which admission was stipulated to by the parties.

**ACCORDINGLY**, the Petition for Writ of Habeas Corpus is **DENIED**.

The Clerk shall enter this Order as of the date first noted above and shall transmit attested copies to all counsel of record. The Clerk shall further remove this case from the active docket of the Court and place it among matters ended.

Order prepared by:



Cheryl K. Saville, Esq.  
Assistant Prosecuting Attorney  
State Bar No.: 9362  
380 W. South Street, Ste. 1100  
Martinsburg, West Virginia 25401  
(304) 264-1971

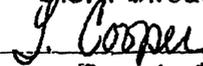


Honorable Judge Gray Silver III  
23<sup>rd</sup> Judicial Circuit Court

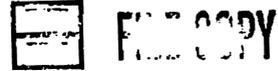
A TRUE COPY  
ATTEST

Virginia M. Sine  
Clerk Circuit Court

By:



Deputy Clerk

 FILE COPY

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE ex rel. MONICA BOGGS,  
PETITIONER

VS.

CASE NO. 13-C-321  
Judge Silver

LORI NOHE, WARDEN  
Lakin Correctional Center,  
RESPONDENT

EX PARTE MOTION FOR APPOINTMENT FOR INDIGENT PERSON

Comes now the Petitioner, Monica Boggs, and moves this Court to appoint as her counsel of record MillsMcDermott Criminal Law Center to represent her in the appeal of this criminal proceeding. As grounds for this motion, the Petitioner states as follows:

1. That due to her incarceration, she is financially unable to retain the services of MillsMcDermott Criminal Law Center in this matter;
2. That an Affidavit of Indigency has been completed by the Petitioner and is attached hereto;
3. MillsMcDermott Criminal Law Center is willing to accept appointment in this case due to their familiarity with the legal issues raised;

Wherefore, based upon the foregoing, the Defendant requests that MillsMcDermott Criminal Law Center be appointed to represent her in this proceeding.

PETITIONER  
BY COUNSEL



SHAWN R. MCDERMOTT ESQUIRE  
WV STATE BAR ID #11264  
MILLSMCDERMOTT CRIMINAL LAW CENTER

1800 WEST KING STREET  
MARTINSBURG, WV 25401  
(304) 262-9300

CERTIFICATE OF SERVICE

I, Shawn R. McDermott do hereby certify that I have served a true copy of the attached Motion for Appointment and proposed Order upon the following individuals at their respective addresses listed below, hand-delivered this 14 day of October, 2015:

The Honorable Gray Silver, III  
Berkeley County Judicial Center  
380 W. South Street  
Martinsburg, WV 25401

Monica Boggs  
c/o Lakin Correctional Center  
11265 Ohio River Road  
West Columbia, WV 25287



SHAWN R. MCDERMOTT