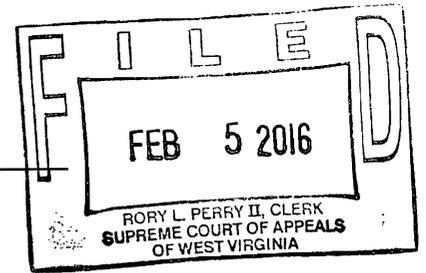


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 15-1001



STATE OF WEST VIRGINIA,

Respondent-Plaintiff,

v.

MONICA BOGGS,

Petitioner-Defendant.

PETITION FOR APPEAL

Appeal from Circuit Court of Berkeley County, West Virginia

Case No. 13-C-321
Honorable Gray Silver, III

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ASSIGNMENTS OF ERROR

1. Whether the Circuit Court erred in failing to grant an evidentiary hearing on Petitioner's claim of ineffective assistance of counsel, where Petitioner would have presented testimony from the trial counsel, from the multiple police officers that took statements from Petitioner, and expert witnesses, regarding issues that had not been previously litigated and for which there was no record?
2. Whether the Circuit Court erred in failing to find that Ms. Boggs received ineffective assistance of counsel by her trial counsel?
 - a. Whether trial counsel was ineffective when he failed to move to suppress Ms. Boggs' confessions and statements as involuntary, failed to adequately investigate the circumstances of the confessions, and failed to request a jury instruction on the voluntariness of Ms. Boggs' confessions?
 - b. Whether trial counsel was ineffective when he failed to request a continuance of Ms. Boggs' trial so that he would have an adequate amount of time to prepare a defense?
 - c. Whether trial counsel was ineffective when he failed to adequately investigate the State's medical evidence and expert opinion regarding the injuries suffered by the child?
 - d. Whether trial counsel was ineffective when he made admissions regarding the intent element of the offense?
 - e. Whether trial counsel was ineffective when he failed to adequately voir dire a presumptively biased juror and when he failed to object to the State's use of a gruesome autopsy photo in closing?

STATEMENT OF THE CASE

On September 3, 2009, a Berkeley County petit jury found Monica Boggs, a then 20 year old female, guilty of three counts: death of a child by a parent, guardian, or custodian, 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 creating substantial risk of bodily injury, in violation of W. Va. Code § 61-8D-4(e). On June 7, 2010, the Berkeley County Circuit Court sentenced Ms. Boggs to the maximum sentence on all three counts, with the sentences on each count running consecutively. Ms. Boggs is currently serving a 40 year determinate sentence, consecutive with a 1 to 5 year sentence, consecutive with another 1 to 5 year sentence, as the result of being convicted by jury for offenses related to the death of her son. On September 21, 2015, the Berkeley County Circuit Court issued an order denying Ms. Boggs' petition for a writ of habeas corpus and denying Ms. Boggs an evidentiary hearing on her habeas petition. This petition seeks review of the denial of her habeas petition and denial of an evidentiary hearing.

The convictions stem from the death of Ms. Boggs' 7-month old son, Skylar Trigg Boggs, who was born when Ms. Boggs was only 19 years old. There were no eyewitnesses to the alleged offenses. Nor was there physical evidence linking Monica to the death of her son. The only evidence linking Monica to the death of her son was a number of statements that Monica gave to West Virginia State Troopers during an interrogation. However, the voluntariness and veracity of these statements were never challenged by her trial counsel either during pretrial proceedings or at trial. To this day, the voluntariness of these statements, the lynchpin evidence against Monica, has not been subjected to any adversarial process.

A. Defense Counsel's Pre-Trial Waiver of the Issue of the Voluntariness of Monica Boggs' Confessions

Even though the State recognized that there was a substantial issue regarding the Defendant's multiple statements given to the State Police, defense counsel waived this issue at a

pretrial hearing on August 10, 2009. App. 1174-75. The State responded to the court,

Judge, I think the defense has a motion here, but I can tell the Court one of the big issues that we would have had for you today is the statements made by the Defendant to police officers and we've discussed that with Mr. Manford and he believes he does not have a challenge to those and does not wish to challenge them. So we're not going to be taking testimony.

App. 1174. Defense counsel then agreed and waived the right to challenge the statements.

As far as the statements are concerned, we've had all of the recorded statements transcribed. We've also been provided with an EPS79, I think it is, a waiver of rights form, executed by Ms. Boggs.

In the transcripts of the – the troopers go through the waiver with her, confirm that she understands her rights and she wants to go ahead and proceed with the statement.

The initial statement is rather early in the morning because the child was taken to the hospital late at night. I don't see any problem with that under those circumstances. We've also had Ms. Boggs evaluated by a forensic psychologist to make sure she has no problems with intelligence or being able to understand. That's Dr. Bernie Lewis and we met on Friday at Dr. Lewis' office and went through all of that. We don't see any possible challenges there.

Ms. Boggs can understand or appreciate the nature of what she was doing at the time. Her statements were given intelligently and knowingly after a waiver of her rights. At least that is what, from my own investigation, reveals that I don't have any grounds to challenge that.

App. 1175-76. There would be no further inquiry into the voluntariness of Ms. Boggs'

confession either at the pre-trial hearings or at the trial.

B. The Court's Denial of Defense Counsel's Motion to Continue the Trial

At the August 10, 2009 pretrial hearing, defense counsel made a motion to continue the trial, which was scheduled for August 18, 2009, based upon Ms. Boggs' pregnancy as well as his busy trial schedule, which had precluded him from engaging in plea negotiations with the State.¹

¹ In fact, both the State and defense counsel admitted to having been very busy with other trials. The State put on the record, "[A]nd to be honest about it, Mr. Manford and I have not had suitable schedules to sit down and even discuss this case. That's a reality. Even with me going away next week, he's in trial next week or this week, I'm gone this week, so there's no chance of getting this done in between." App. 1179.

The court allowed the State and the defense to have a recess to engage in plea negotiations and ruled that the trial would go on as scheduled. App. 1181-82. No plea agreement was reached. Defense counsel informed the court, “[W]e don’t have much to lose if we go to trial and we’re convicted of that and, of course, it would be whether or not there’s an intentional versus accidental situation.” App. 1183-84. The Court held that despite everyone’s busy schedule, he was sure that both parties could work hard to be ready for trial and that the trial would go on as scheduled. App. 1190-91.

However, on August 17, 2009, the court was forced to continue the trial date until September 1, 2009 because defense counsel was still involved in another jury trial that had gone on longer than expected.

C. Jury Trial

1. Opening Arguments

On September 1, 2009, a jury was impaneled and the jury trial began with opening arguments. App. 4. During his opening, defense counsel informed the jury that “[t]he key elements of the State’s case [are] maliciously and intentionally, and gross negligent. This is really what it’s going to come down to – that they have to convince you beyond a reasonable doubt.” App. 310. Defense counsel further told the jury, “Monica was at fault, but the evidence shows she did snap. She lost it.... She did throw Skylar in the crib. We’re not going to deny that. She didn’t realize the toy piano was in the crib.” App. 311. “Bottom line. Monica is at fault for throwing him into the crib. The facts, however, won’t prove the State’s allegation that she did this maliciously. She was tired, frustrated, stressed-out, over many things. Not a justification, but it does tell you what’s going on at the time.” App. 311-12.

2. State’s Case-in-Chief

a. Two Statements Made by Ms. Boggs to Trooper Bowman

Senior Trooper J.J. Bowman testified that he had spoken with Ms. Boggs at the hospital and had Ms. Boggs take him and the County Coroner Donald Shirley to her residence to show them Skylar's bedroom. App. 356-58. The statement at the hospital was not recorded. Trooper Bowman took photographs of Skylar's bedroom and at that time Ms. Boggs made a statement to Trooper Bowman that Skylar had hit his eye on a toy piano. App. 367. At 1:04 a.m. in the morning, a few hours after her son was pronounced dead, Trooper Bowman took a recorded statement from Ms. Boggs. App. 371. The State published this recorded statement to the jury. App. 372.

b. Issue with Juror Perkey

On the second day of trial, before the jury was called, the court security officer indicated that Juror Perkey had told her that she did not realize that she knew the biological father of Skylar Boggs. App. 391. Juror Perkey had indicated to the court security officer that she had grown up as a next door neighbor to Skylar's biological father. App. 392. Defense counsel did not make a motion to strike Juror Perkey. *Id.* Nor did the court conduct voir dire of this juror regarding whether this relationship might affect the juror's fairness in adjudging the facts. App. 392-94. The court stated, "in light of everything she said to you, we do not see it as a problem and don't feel the need to question her." App. 394.

c. Testimony of Deputy Medical Examiner Matrina Schmidt

On the second day of trial, the State continued its case-in-chief by calling Dr. Matrina Schmidt, an employee of the Office of the Chief Medical Examiner, as an expert witness in the field of forensic pathology. App. 398-99. Defense counsel stipulated to Dr. Schmidt's qualification as an expert in forensic pathology. App. 399. Dr. Schmidt testified that she had performed the autopsy on Skylar, and the State introduced autopsy photos into evidence. App.

400-02.

Dr. Schmidt testified about the injuries that she observed and the differences between infant skulls and adult skulls in that infant skulls are not yet fused along sutures and in that infant skull are thinner than adult skulls. App. 414-15. Dr. Schmidt offered the opinion that it would take more force to break an infant's skull bone than it would take to break an adult's skull bone. App. 418-21. Dr. Schmidt further opined that based upon this information, she believed that Skylar's death was homicide. App. 418. Defense counsel then made an objection as to such an opinion not being disclosed in Dr. Schmidt's report, but characterized the objection as more "form over substance."² App. 420.

After the parties had no further questions for Dr. Schmidt, the Court *sua sponte* held a sidebar conference. App. 470. At sidebar, the court stated that though he tries "not to inject [himself] in these cases very much,..." he was concerned because he "didn't hear any of the opinions elicited by the State or the Defendant, for that matter, to a reasonable degree of medical certainty." *Id.* The court continued, "I was waiting for that question at the end to come in, all the testimony you have offered here today is based upon your education, training, experience, and your examination, which included an autopsy, you know, asking for an opinion, is that necessary or not." *Id.* The State then responded, "She said the cause and manner of death was homicide. She said the cause and manner of death was homicide. She said that. And the head injury is what caused— is what caused the death, trauma." *Id.* Defense counsel then interjected, "Would you have any objection, ... I mean, I can get one more shot in, I could just simply say, all the

² Defense counsel objected, "Just to the extent that his has not been... disclosed. But certainly it would be flowing from the report. I would note that objection is form over substance... but, nevertheless, ... that's not an opinion I've been made aware of." App. 420. The court then asked, "Is there any real surprise or prejudice that needs further discussion at the bench to cure?" App. 420-21. Defense counsel responded, "In all honesty, no. I mean, I certainly expected it, but I hadn't been— I have not been noticed of it." App. 421.

opinions that you've rendered today in court..." App. 471-72. The State then interrupted, "That's fine... That's fine." App. 472. The court then further clarified, "when you say 'all,' you might clarify the State's as well... as the Defendant." *Id.* Defense counsel stated, "That's what I was going to do. Yeah." *Id.* Thereafter, defense counsel stated that he had one more question and asked Dr. Schmidt, "You've given us some opinions today, both for the State and for the defense.... Would all the opinions you gave today, would they all be to a reasonable degree of medical certainty," and Dr. Schmidt responded, "Yes." App. 473. Thus, even though defense counsel had attempted to impeach Dr. Schmidt's expert opinions in cross-examination, by the end of the questioning, based upon the last question being asked by Dr. Schmidt, defense counsel ended up in the eyes of the jury vouching the credibility of Dr. Schmidt's testimony.

d. Testimony of Sgt. Pansch

The next witness called by the State, Sgt. Kevin Pansch of the West Virginia State Police, testified that he and Sgt. David Boober questioned Monica Boggs at the West Virginia State Police barracks on August 20, 2008. App. 476-77. Sgt. Pansch testified that at the beginning of the questioning at approximately 9:00 p.m., he did not record it. App. 477. Sgt. Pansch testified that Monica had initially told him that Skylar had fallen on a toy piano, resulting in his black eye. App. 478. Sgt. Pansch then confronted her with the medical examiner's finding of blunt force trauma to the skull and told her that he understood that she was under a lot of pressure and that in such a situation you may do things you do not want to do. App. 480. Sgt. Pansch testified that Monica then "dropped her head and... advised that she had killed her baby." App. 481. Sgt. Pansch testified that Monica had initially indicated that she tossed her baby into the crib and later changed her story to having thrown her baby into the crib. *Id.* Sgt. Pansch testified that Monica further indicated that on August 14, 2008, she had thrown a bottle into Skylar's crib, striking Skylar in the eye. App. 483. Following this unrecorded statement, Sgt. Pansch left the

interrogation room, and Sgt. Boober took a recorded statement from Ms. Boggs. *Id.*

On cross-examination, Sgt. Pansch testified that his unrecorded questioning of Ms. Boggs lasted for approximately an hour and twenty minutes. App. 485. Sgt. Pansch testified that one recorded statement was taken at 10:20 p.m. statement and that another statement was recorded at 11:36 p.m. App. 487.

e. Testimony of Sgt. Boober

Next, the State called Sgt. David Boober as a witness, who testified about the numerous interviews he conducted with Ms. Boggs. App. 498-500. Sgt. Boober testified that he had advised Monica of her *Miranda* rights and had her sign a waiver of rights form at approximately 9:05 p.m. on August 20, 2008. App. 500-01. During the unrecorded questioning, Sgt. Boober stated that Monica had initially told him that she believed that Skylar may have died due to an allergic reaction to medications. App. 504. Sgt. Boober testified that he did not believe that statement due to the medical examiner's report that listed cause of death as blunt force trauma. App. 505. Sgt. Boober then testified that he and Sgt. Pansch interjected some social reasons why a mother might have killed her baby. App. 506. At that point, Sgt. Boober stated that Monica's demeanor changed and that she admitted to killing her baby. *Id.* Sgt. Boober testified that Monica had told him that she had thrown her baby into the crib in the motion of a chest pass in basketball. App. 507. Sgt. Boober further testified as to his reasons of conducting multiple interviews, "As the interview progressed, things changed within her statement. Towards the end of the first interview, I felt like it was fairly close to probably what happened but wasn't completely comfortable." App. 510. The 10:20 p.m. audio recorded statement was then played in open court. App. 511-12.

Sgt. Boober testified that they conducted another interview at 11:36 p.m. because he had determined that the head injury "couldn't have occurred on the Saturday when she said it did."

App. 513. The 11:36 p.m. audio recorded statement was then played in open court. App. 514. Sgt. Boober then indicated that he allowed Monica to speak with her boyfriend, Robert Hicks, in his presence, before she was placed under arrest. App. 515. This conversation was also recorded. *Id.*

Defense counsel focused his entire cross of Sgt. Boober on whether Monica had told him that she tossed her baby underhand or overhand in a chest pass fashion. App. 518-23. Defense counsel asked Sgt. Boober to find the part of the statement where Monica had indicated that it was an overhand throw and stated, “My only point is, I mean, we know she threw him in the bed.” App. 522. Sgt. Boober then admitted that there was no portion of the transcript that references an overhand chest pass rather than an underhand toss. App. 523. Sgt. Boober further indicated that Monica had lied during her initial statement, had lied about the time line in her second statement, and had largely told the truth in her third statement. App. 527.

3. Defendant’s Rule 29 Motion

Following the testimony of Sgt. Boober, the State rested its case, and defense counsel made a motion pursuant to Rule 29 of the West Virginia Rules of Criminal Procedure to direct a verdict of acquittal. App. 531. During the Rule 29 argument, defense counsel made some admissions and stipulations as to elements of the charged offenses. Defense counsel argued that as to the child abuse by a parent resulting in death count, the State had the duty “to show maliciousness and intentional.” Defense counsel then conceded the intentional prong of this charge, while maintaining the State did not prove malice. “Now, they played the statement of Monica where she said, I threw him in the crib, without a doubt, and so that’s an intentional act. It wasn’t accidental. The baby didn’t levitate into the crib. I know all that. So the intentional element’s there.” App. 532. On Count 2, defense counsel again conceded the element of intent. “She threw the bottle at the baby, okay? Again, the intent’s there and the evidence has been that

it was overhanded.” App. 536.

The court denied the Rule 29 motion. App. 556. In so holding, the court stated, “I believe there’s been some concession that intent was there just from her throwing the baby in the crib.... Did I get that right?” *Id.* Defense counsel responded, “No, Judge, I can’t say it’s an accident. I mean, it was...” *Id.* The court then interjected, “All right. So there’s concession of intent. So, really, the focus is just on malice[.]” *Id.*

4. Defendant’s Case-in-Chief

Defense counsel called numerous family members of Ms. Boggs as witnesses, including Donna Boggs, Montana Boggs, Michael Boggs, and Matthew Boggs as well as Robert Hicks, Ms. Boggs’ boyfriend, and a neighbor, Irvin Cosner. These witnesses mainly testified as to their belief that Ms. Boggs was a good mother.

Defense counsel also called Dr. Bernard Lewis as an expert witness in the field of clinical and forensic psychology. Defense counsel elicited testimony from Dr. Lewis that Ms. Boggs was competent to stand trial and that Dr. Lewis believed that even though Monica “was under a great deal of stress and distress” at the time of her questioning by the State Police, “that the statements were, in fact, voluntary.” App. 686-87. Dr. Lewis further testified that on the standardized IQ test, Monica “attained a full scale IQ score of 80.” App. 688. This score of 80 placed Monica “at the bottom of what is referred to as the low average range of intellectual ability.” *Id.* Moreover, on the verbal comprehension portion of the IQ test, Monica score was 76, which “falls in the borderline range of intellectual ability.” *Id.* Dr. Lewis testified, “[O]verall, her intellectual functioning would be described as between the borderline and the low average range of intellectual ability.” App. 689.

Dr. Lewis also testified regarding his conclusion that she was suffering from a number of psychological issues and problems. App. 690. Dr. Lewis concluded that Monica “demonstrated

a chronic low self-esteem” and “has been depressed much of her life, who has never felt good about herself. At the age of nineteen, when I was doing this assessment, she had probably been depressed since her early teenage years, if not even possibly earlier.” App. 690-91. Dr. Lewis also found that she was very dependent and socially immature and “running her life in a manner consistent with a person much younger than the age of nineteen.” App. 691. Dr. Lewis concluded that “[s]he did not come across as an aggressive or hostile individual, but, rather, one who just was a person with a low average IQ, with a great deal of immaturity, who reacted, and in another case probably reacted impulsively to stress, and who is very dependent on others to help her through life.” App. 692.

Speaking to what defense counsel called Monica’s initial dishonesty with the police, Dr. Lewis opined, “particularly knowing Monica and the results of this evaluation– somebody who’s that immature; who’s that frightened; that overwhelmed– it did not surprise me that she would’ve initially tried to be less than honest.” App. 694.

While discussing Monica’s relationship with Skylar, the following colloquy occurred:

Dr. Lewis: Both her mother, her boyfriend, and Monica herself, consistently stated that she had never had let any kind of temper or anger out towards Skylar; that, while, like any parent, she could be frustrated, none of them ever saw it come out towards Skylar.

Defense counsel: But we know it did, correct?

Dr. Lewis: Pardon me?

Defense counsel: We know that... nevertheless that she didn’t see this or report it, no one saw it coming, it, in fact, happened, right?

Dr. Lewis: That’s my understanding of the evidence that has been presented here today, yes.

App. 698-99.

Ms. Boggs did not testify on her own behalf. App. 704.

5. Jury Instructions

During the charge conference, the circuit court held that defense counsel had waived his right to argue about intent. “Evidence in the case demonstrates Defendant committed an intentional— and that’s agreed, by the way, you know— then it says malicious— that’s disputed— act of abuse upon a child which was in her custody or control, thereby causing the death of her child.” App. 740. “There’s simply been no evidence, the State argues, presented that there was any neglect on the part of the Defendant which led to the injury which caused the death of the child.” *Id.* The court continued,

[S]econdly,... I’ll highlight that the Defendant did agree in the Rule— during the Rule 29 motion— two stages of the case, at the close of the State’s evidence and close of Defendant’s evidence— that the Defendant’s act in throwing the infant into the crib was an intentional act, which is one of the elements under Count I.

App. 741. “Really, that just leaves us the primary focus arguing whether or not the intentional act was malicious or not; whether there was malice involved.” *Id.* “It’s agreed or undisputed that we have had an intentional act.” App. 742. The court continued to drive the point home, “Again, here it’s undisputed that we have general criminal intent. Do you agree with that part, Mr. Manford?” *Id.* Defense counsel then responded, “Just so the record’s clear, the intent that... I agreed to... [was that] it wasn’t an accident. That’s the intent that I was speaking— It’s not intent to kill. It’s intent to commit an act or do... an action.” App. 743. The State then responded, “I think... [t]here was no argument on either side that the intent was to kill. I think that’s the agreement that we both have.” The court replied, “All right. As long as that’s stitched in, too. I think it allows the argument later for the Defendant, but allows the argument for the State.” *Id.* The Court again continued, “But the Defendant, I believe, can still make their argument— the theory... that the... what the Defendant did was not malicious; that... if you want to use the word, she did snap.” App. 744. “But you can certainly argue— and, of course, you’re not going to say it

wasn't intended because you— there's an agreement to that, by you— in the context it wasn't malicious." App. 745. Defense counsel then requested clarification. "I can argue the malice, and I'm going to say she did not intend to fracture his skull. I mean, she intended to throw the baby in the crib. I'm going to go all through that. But, I mean, I'm not bound— I'm not limited in any way by that, am I, Judge?" *Id.* The court then stated, "She just intended the act which she did of throwing the baby into the crib." *Id.* Defense counsel replied, "Yeah." *Id.* The colloquy continued:

The Court: Now, Pam's going to say she intended to cause the—

Prosecutor: Yeah.

The Court: — whatever the element is, the bodily— serious bodily—

Defense counsel: Right.

The Court: Whatever....

Prosecutor: I have no problem with him arguing that point because I think that is his theory.

The Court: ... So you could argue all of your evidence... And your defense and your case. You just have to come at it from a different direction.

App. 746.

The court then continued, "But I wanted to clarify that I don't think you want to say— go with negligence or even gross negligence— or talk about negligence. And I wanted to clarify that because sometimes you could almost use the same words from the instructions and— without a problem." App. 747.

6. Closing Arguments

The State opened its closing argument by putting one of the gruesome autopsy photographs of Skylar on an overhead projector. App. 768.

The State argued,

In that moment in time, every piece of anger she had in her life came out when she threw that child into a cluttered baby bed. And I say cluttered because the argument in this case is, well, maybe she didn't know that this particular toy had been placed into the crib. Maybe she knew that; maybe she didn't. That had been in the crib on several occasions. But she picks up this child, and she throws a seven-month-old baby with such force that the child merely doesn't bump his head, the child... fractures the skull.

App. 772. "What she meant to do... in that abuse, is to throw him. We don't throw seven-month old babies anywhere, and especially not with enough force to do this." App. 773. "Instead, [Monica], in [her] heart, threw him. That's malice, folks. You meant the consequence of what you did." *Id.*

Defense counsel then presented argument which focused on whether Monica's action in throwing Skylar in the crib was malicious. App. 781. "I really want to focus in, because I think that's where the real... battle is, on Count I. That's the throwing the child in the crib, maliciously and intentionally." *Id.* Defense counsel continued, "Monica snapped. She lost control.... [She] didn't meant to do it. So it wasn't malicious. That's the whole bottom line I'm trying to point out to you. This is not a malicious situation." App. 785. Defense counsel continued, "[W]hat we heard was this: What she intended? She intended only to throw Skylar into the crib. She wasn't out to cause this terrible injury. She wasn't out to inflict pain. There's a mattress in the crib." App. 788.

At one point during defense counsel's closing argument, the State objected.

Defense counsel: Monica is at fault for being negligent, for being stupid, for not thinking, for lack of self-control in that one instant, but none of those are crimes.

Prosecutor: Your Honor, I'm going to impose an objection based on the Court's earlier ruling.

App. 789. The court then stated, "Okay. I'd leave it there though. Thank you." *Id.*

Defense counsel concluded his argument, "[C]an you honestly say that she intended to cause that substantial injury? And was it malice? She snapped. She got mad— poor choice of

words– got upset– she’s going to jump all over that one– and threw the baby in. That’s what she’s guilty of, not malice.” App. 795.

7. Jury’s Verdict of Guilt to All Three Counts

At 1:47 p.m., after deliberating for exactly one hour, the jury returned a verdict of guilty on all three counts. App. 810-11.

D. Sentencing Hearing

On June 7, 2010, Monica appeared before the court, with counsel, for sentencing. App. 838. Prior to sentencing, a pre-sentence investigation report was completed by the probation officer, and Ms. Boggs had undergone a 60-day pre-sentence psychological evaluation. App. 826. The pre-sentence report contains an interview with Ms. Boggs by the probation officer, which offers another version of the events that led to Skylar’s injury. App. 829.

The court imposed the maximum sentence allowable by law– 40 years imprisonment on Count I, one to five years imprisonment on Count II, and one to five years imprisonment on Count III, with all sentences to run consecutive. App. 902. In part, the court reasoned that such a sentence was appropriate because of

the Defendant’s multiple versions of events [which] make it clear that to the Defendant telling the truth is an elastic concept, that she will change her version of events depending on her audience, to make her story, quote, more believable, end quote. That’s from the pre-sentence investigation, the Defendant’s version....

Therefore, I believe it is highly unlikely that we can ever know the true extent of Sylar’s suffering at his mother’s hands.

App. 900.

E. Direct Appeal

Following the judgment and sentencing order of the court, Monica Boggs, with new counsel, filed an appeal of her conviction and raised the following issues: 1) that her conviction should be overturned because it was based on a false and involuntary confession; 2) that the

Circuit Court should have *sua sponte* read the jury an instruction regarding the voluntariness of the confession; 3) that her trial counsel's assistance was ineffective where he failed to challenge the voluntariness of the confession; 4) that the State's medical expert testified to areas not disclosed to defense counsel and outside her areas of expertise; 5) that the Circuit Court failed to conduct proper voir dire of a juror who indicated, after the jury was impaneled, that she knew the biological father of the deceased infant; 6) that the State's closing argument was unfairly prejudicial where it began with showing the jury a gruesome autopsy photograph of the deceased infant; and 7) that the Circuit Court erred in failing to allow defense counsel to present his theory of the case that Ms. Boggs' actions were negligent and not intentional and malicious.

On May 27, 2011, this Court issued a four to one decision to deny Ms. Boggs' direct appeal. As to the issue of the voluntariness of Ms. Boggs' confession, the Court found that trial "counsel clearly waived this issue." App. 1198. The Court further ruled that it would not consider Ms. Boggs' claim of ineffective assistance on direct appeal. The majority of the Court held,

Petitioner also asserts that it was ineffective assistance of counsel for her trial lawyer not to challenge the voluntariness of the statement. This Court's ability to review a claim of ineffective assistance of counsel is very limited on direct appeal. Such a claim would be more appropriately developed in a petition for writ of habeas corpus. Accordingly, we decline to rule on any claims of ineffective assistance of counsel in the context of this direct appeal. If she desires, petitioner may pursue a petition for writ of post-conviction habeas corpus. We express no opinion on the merits of petitioner's ineffective assistance claims or of any habeas petition.

Id. As to the issue of the failure to voir dire the juror with the potential conflict, the majority of the Court again ruled that trial counsel had waived the issue and that Ms. Boggs' may litigate the issue in a habeas petition. *Id.*

F. HABEAS CORPUS PETITION

In April of 2013, Petitioner filed a petition for writ of habeas corpus in the Circuit Court of

Berkeley County. App. 922. Over the course of multiple status hearings, Petitioner requested that the court grant Ms. Boggs an evidentiary hearing so that she could put on evidence regarding the voluntariness of her multiple statements made to police, so that she could call her trial counsel as a witness, and so that she could present medical and psychological expert testimony. The court allowed Ms. Boggs to proffer the report of a medical expert, Dr. William Hauda, regarding the State's medical evidence, but denied Petitioner any further evidentiary hearing. The court further denied Ms. Boggs' habeas petition in full by written order on September 21, 2015. App. 1126.

SUMMARY OF ARGUMENT

Petitioner first argues that the Circuit Court erred in failing to grant a full evidentiary hearing on Ms. Boggs' petition for writ of habeas corpus. The main contention in Ms. Boggs' petition was that trial counsel was ineffective when he failed to move to suppress or challenge multiple statements and confessions made by Ms. Boggs' to police. Trial counsel waived any challenge to these statements, which were the exclusive evidence linking Ms. Boggs to the injuries to her child that led to the child's death. Ms. Boggs raised this issue on direct appeal, but the issue was not addressed by this Court because this Court found that it was necessary for further development of the record through a habeas proceeding. Had the circuit court granted an evidentiary hearing, Petitioner intended to call the following witnesses: 1) the trial counsel whose effectiveness is being challenged, 2) the three police officers that took multiple statements from Ms. Boggs, and 3) Dr. Bernard Lewis, the psychologist who had evaluated Ms. Boggs. Petitioner would have further presented the testimony of Ms. Boggs as to the circumstances of her interrogation by police. Petitioner argues that the failure to grant an evidentiary hearing, where the issue of the voluntariness of Ms. Boggs' confessions and statements had not previously been subjected to any adversarial process and where all of the witnesses were available, was error.

Second, Petitioner argues that the Circuit Court erred in denying all of the issues raised in

the petition for writ of habeas corpus. Petitioner suggests that even on the limited record that exists, it is clear that Petitioner was subject to ineffective assistance of counsel. Petitioner argues that even though trial counsel is a very good attorney, his busy trial schedule at the time of Petitioner's trial, as well as the Circuit Court's denial of his motion for a continuance, did not allow trial counsel adequate time to prepare a defense. Further, Petitioner argues that trial counsel's waiver of the right to contest the admissibility of Ms. Boggs' multiple statements and confessions, which were the only evidence linking her to the injuries suffered by her child, fell below an objective standard of reasonableness and that had trial counsel challenged these statements and confessions, they would either have been found to be inadmissible or not credible by the jury due to the coercive interrogation techniques used by the police. Petitioner also argues that trial counsel's inadvertent waiver of the intent element of the offense left Petitioner without a defense to the charges against her and was clear ineffectiveness. Finally, Petitioner argues that all of these errors, plus multiple other errors cumulatively and singularly, such as trial counsel's failure to properly voir dire a presumptively-biased juror, trial counsel's failure to object to the State's use of a gruesome autopsy photograph in closing, and trial counsel's failure to consult with a medical expert resulted in Ms. Boggs being subjected to ineffective assistance of counsel.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Ms. Boggs suggests that oral argument is necessary pursuant to Rule 18(a). The parties have not waived oral argument, the appeal is not frivolous, and the Court would be aided by oral argument.

Petitioner requests that this case should be set for a Rule 19 argument. Petitioner suggests that the case involves an issue of law— ineffective assistance of counsel— that has been well-litigated in West Virginia, but that several of the specific sub-issues raised, such as a counsel's inadvertent stipulation to an element of the offense and counsel's waiver of a suppression hearing

on the voluntariness of a confession based upon a forensic psychologist's opinion, are unique factual and legal circumstances of an ineffective assistance claim that have not been addressed by this Court.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

II. THE CIRCUIT COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING ON THE HABEAS PETITION

As the first assignment of error, Ms. Boggs asserts that the circuit court abused its discretion in failing to grant an evidentiary hearing where the habeas petition established probable cause that Ms. Boggs may be entitled to some relief and where there were outstanding factual issues that the circuit court needed to resolve prior to ruling on the habeas claims.

Rule 9(a) of the West Virginia Post-Conviction Habeas Corpus Rules provides,

(a) Determination by Court. If the petition is not dismissed at a previous stage in the proceeding, the circuit court, after the answer is filed, shall, upon a review of the record, if any, determine whether an evidentiary hearing is required. If the court determines that an evidentiary hearing is not required, the court shall include in its final order specific findings of fact and conclusions of law as to why an evidentiary hearing was not required.

Post-Conviction Habeas Corpus, Rule 9. Chapter 53, Article 4A, Section 7(a) of the West Virginia Code provides, *inter alia*,

(a) ...If it appears to the court from said petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or any such record or records referred to above, that there is probable cause to believe that the petitioner may be entitled to some relief and that the contention or contentions and grounds (in fact or law) advanced have not been previously and finally adjudicated or waived, the court shall promptly hold a hearing and/or take evidence on the contention or contentions and grounds

(in fact or law) advanced, and the court shall pass upon all issues of fact without a jury. The court may also provide for one or more hearings to be held and/or evidence to be taken in any other county or counties in the state.

W. Va. Code § 53-4A-7(a).

The circuit court erred because the issues raised by Petitioner established probable cause that she may be entitled to some relief and an evidentiary hearing was necessary to rule upon the disputed issues of fact raised in the petition.

The main issue raised in the habeas petition, as well as previously on direct appeal, was that trial counsel was ineffective in waiving his right to challenge the voluntariness of the multiple statements, admission, and confessions made by Ms. Boggs to various police officers. Even though this issue was waived by trial counsel, the record below clearly shows that the voluntariness of the statements obtained by the police during interrogation should have been challenged. The record demonstrates that there were coercive police tactics combined with an unusually susceptible, gullible, and suggestible defendant. Ms. Boggs was a teenager, had a very low IQ, had little education, had no experience with the criminal justice system, and had a multitude of emotional and mental issues, such as depression, immaturity, and low self-esteem. Moreover, Ms. Boggs was being interrogated immediately after the death of her 7-month-old son. Further, Ms. Boggs was questioned by multiple police officers at multiple times, including questioning by two very experienced interrogators from the West Virginia State Police. During this longer interrogation session, the first approximately hour and a half of interrogation was not recorded. Furthermore, the officers testified that they had made suggestions to Ms. Boggs during the interrogation about reasons why a mother may be justified in hurting a child.

Had a hearing been granted, Petitioner would have called trial counsel, Craig Manford, Sgt. Boober, Sgt. Pansch, Trooper Bowman and Dr. Lewis as witnesses, as well as presenting testimony from Ms. Boggs, herself. All of these witnesses were available, including trial counsel

whose effectiveness was being questioned, and none of these witnesses had ever been questioned on the issue of voluntariness or in trial counsel's case, his reason for not contesting the statements made by his clients.

Just recently, this Court issued a ruling that "the primary purpose of an omnibus [habeas] hearing is grounded in providing the Court with evidence from the most significant witness, the trial attorney, in order to give that individual the opportunity to explain the motive and reason behind his or her trial behavior." *Tex S. v. Pszczolkowski*, 236 W.Va. 245, 778 S.E.2d 694, 702-03 (2015). "It is the need for the trial attorney's testimony that generally precludes this Court from reviewing any ineffective assistance of counsel claim on direct appeal." *Tex S.*, 236 W.Va. 245, 778 S.E.2d at 703. "[T]he focus of any habeas evidentiary hearing as it relates to ineffective assistance of counsel is affording a petitioner's trial counsel an opportunity to explain his actions during the underlying trial." *Tex S.*, 236 W.Va. 245, 778 S.E.2d at 703.

In fact, in this very case, this Court issued an opinion on direct appeal that the appropriate avenue for redress for a claim of ineffective assistance of counsel would be through the habeas process. However, now, many years after the direct appeal, this Court is again being asked to address the issue of ineffectiveness with virtually the same record before it as it had on direct appeal. Ms. Boggs is simply requesting that this Court remand her case so that she can have a full and fair evidentiary hearing on the still-unlitigated issues that were raised on her direct appeal and in her habeas petition.

III. PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY HER TRIAL COUNSEL'S DEFICIENT AND PREJUDICIAL PERFORMANCE

Petitioner contends that her trial counsel provided ineffective assistance of counsel where his performance fell below an objective standard of reasonableness and where trial counsel's errors, singularly and cumulatively, prejudiced the outcome of Petitioner's trial. Petitioner avers

that her state and federal constitutional rights to effective assistance of counsel were denied by the performance of her trial counsel. The circuit court abused its discretion in finding otherwise. Petitioner asserts that if the circuit court had ordered an evidentiary hearing, it would become apparent that his trial counsel failed to provide effective assistance. However, based upon current record, it is clear beyond peradventure that Petitioner was deprived of effective assistance of counsel.

A. Ineffective Assistance of Counsel Jurisprudence in West Virginia

“In the 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 (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).

“In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error.” Syl. Pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). “One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence.” Syl. Pt. 22, *Thomas*, 157 W.Va. 640, 203 S.E.2d 445.

This Court has held, “The fulcrum for any ineffective assistance of counsel claim is the

adequacy of counsel's investigation.” *State ex rel. Stroger v. Trent*, 196 W.Va. 148, 153, 469 S.E.2d 7, 12 (1996). “Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.” *Id.* (quoting Syl. Pt. 3, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995)); *see also State ex rel. Bess v. Legursky*, 195 W.Va. 435, 441, 465 S.E.2d 892, 898 (1995) (citing *In re Neely*, 864 P.2d 474, 6 Cal.4th 901 (1993) (“[I]neffective assistance of counsel can be established by showing that counsel failed to investigate a factual basis for suppression of a tape recording.”)).

B. Petitioner’s State and Federal Constitutional Rights to Effective Assistance of Counsel Were Violated by Trial Counsel’s Defective Performance, Which Allowed Petitioner to Be Convicted Based Upon an Involuntary Statement

Petitioner avers that her state and federal constitutional right to effective assistance of counsel was denied by the performance of her trial counsel. Petitioner suggests that trial counsel’s ineffectiveness, in failing to contest the voluntariness of Petitioner’s statement, caused not only a violation of her Sixth Amendment right to counsel but also a violation of her due process rights because her conviction was based in substantial part on an involuntary confession.

Ms. Boggs suggests to this Court that her convictions should be reversed and her case be remanded for a new trial because she was convicted based upon an involuntary confession and/or admission. Ms. Boggs argues that trial counsel provided ineffective assistance of counsel when he failed to raise the issue of voluntariness in regard to the admissibility of the confession and when he failed to submit the issue of voluntariness to the jury.

While this issue was raised in her direct appeal, this Court ruled that the issue should

properly be raised in a habeas corpus petition and deferred ruling on the issue. However, because the circuit court denied holding an evidentiary hearing, the record before this Court now is substantially the same as the record on direct appeal, with the addition of a proffered report from a medical expert.

I. West Virginia Jurisprudence on the Issue of Voluntariness of Confessions

Under West Virginia law, the voluntariness of a confession may be challenged both at pretrial, to determine its admissibility, and at trial by the jury.

As to the pretrial proceeding, “[a]s a matter of constitutional law in this country ‘(t)he State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.’” *State v. Vance*, 162 W.Va. 467, 470, 250 S.E.2d 146, 149 (1978) (citations and quotations omitted).

Moreover, the West Virginia Courts follow the “Massachusetts” or “humane” rule in regard to confessions or admissions. *Vance*, 162 W.Va. at 471, 250 S.E.2d at 150. Under “the “Massachusetts” or “humane” rule,” after the trial court has ruled upon the admissibility of the confession, “the jury can consider the voluntariness of the confession, and [this Court has] approve[d] of an instruction telling the jury to disregard the confession unless it finds that the State has proved by a preponderance of the evidence it was made voluntarily.” Syl. Pt. 4, *Vance*, 162 W.Va. 467, 250 S.E.2d 146. “In other jurisdictions following the “Massachusetts” or “humane” rule, the trial court makes an initial determination as to voluntariness, and if the court finds the confession voluntary, the jury is instructed that it must find the confession to be voluntary before they can consider it as evidence in the case.” *Vance*, 162 W.Va. at 471, 250 S.E.2d at 149-50. Thus, the *Vance* Court held, “In all trials conducted hereafter where a confession or admission is objected to by the defendant at trial or prior to trial on the grounds of

voluntariness, the trial court must instruct the jury on this issue if requested by the defendant.”

Syl. Pt. 4, *Vance*, 162 W.Va. 467, 250 S.E.2d 146.

“[A]s a general rule trial courts have no duty to give instructions *Sua sponte* on collateral issues not involving an element of the offense being tried.” *Vance*, 162 W.Va. at 473, 250 S.E.2d at 151. However, Justice McGraw, the writer of the *Vance* opinion, was “of the view that the better rule is that the trial court is under a duty to instruct on the issue of voluntariness whether counsel requests it or not.” *Vance*, 162 W.Va. at 473, 250 S.E.2d at 151.

2. *Petitioner Asserts that Defense Counsel Was Ineffective in Failing to Challenge the Voluntariness of Her Confession Either at the Pretrial or During Trial*

First, Petitioner asserts that defense counsel was ineffective in failing to challenge the voluntariness of her confession either in the pretrial proceedings or during the trial.

In *State v. Jenkins*, this Court considered whether the failure to make a motion to suppress statements amounting to admissions after an arrest constituted ineffective assistance of counsel.

The defendant first claims that his counsel failed to move to suppress the statements made after his arrest. It appears from the record that the trial court *sua sponte* conducted a voluntariness hearing on the statements and found them to be voluntary. Where defense counsel fails to make motions that an attorney reasonably knowledgeable of criminal law would make, but the attorney's omission is not prejudicial and does not influence the outcome of the case, the omission must be regarded as harmless. In view of the fact that the court in the present case *sua sponte* conducted a voluntariness hearing, we cannot find that defense counsel's failure to make a motion for such a hearing was prejudicial.

State v. Jenkins, 176 W.Va. 652, 654, 346 S.E.2d 802, 805 (1986). Thus, by implication, *Jenkins* seems to suggest that failing to move to suppress statements may, in many circumstances, fall below an objective standard of reasonableness.

In *Bess*, this Court awarded relief in habeas corpus from a conviction by a jury of murder of the first degree where defense counsel failed to investigate the circumstances leading up to a defendant's confession to the police. Although counsel, in *Bess*, moved to suppress the confession, the record indicated that counsel was unaware of the facts surrounding the confession and failed to consider the defendant's physical and mental state when the confession was given.... [W]e noted, in *Bess*, that “[a] command of all facts and

circumstances surrounding a confession is essential to adequate representation.’ Specifically, we acknowledged, in *Bess*, that had counsel competently investigated the circumstances surrounding the confession, he could potentially have provided the defendant with a more substantial basis for challenging the confession's admissibility.

Strogen, 196 W.Va. at 153, 469 S.E.2d at 12 (quoting *Bess*, 195 W.Va. at 441, 465 S.E.2d at 898).

In *Strogen*, the Court found,

The petition asserts that Mr. Truman “failed to investigate the circumstances regarding *Strogen*'s statement to the police officers to determine whether or not it could be challenged.” Regrettably, we must agree with that assertion. Mr. Truman did not file a motion to suppress the statement, or any other motions, upon the petitioner's behalf. While, as suggested in *Levitt*, the absence of a motion to suppress a confession is not, per se, ineffective assistance of counsel, the record in this proceeding shows that Mr. Truman lacked “a command of all facts and circumstances” surrounding the petitioner's statement and, thus, could not have made an informed decision concerning the statement's validity. See *Bess*, supra. Certainly, the burden is upon the attorney, rather than upon the accused, to conduct an analysis concerning the legal validity of a confession. Here, Mr. Truman was largely unaware of the forty-five minute drive of the petitioner to the Houston airport, and he made no inquiry as to whether the petitioner had asked to remain silent or asked for an attorney. Undoubtedly, an investigation of those particular matters was critical.

Strogen, 196 W.Va. at 154, 469 S.E.2d at 13.

Here, trial counsel waived the right to contest the voluntariness of the statement at the pretrial hearing, even though the State had informed the circuit court that she believed the main pretrial issue was the statements involved in this case. App. 1174-75. Defense counsel informed the court that he had the Petitioner evaluated by a forensic psychologist and that based upon the forensic psychologist’s report, he did not see any possible challenge to the confessions. Petitioner asserts that first and foremost, any inquiry into the voluntariness of statements involves an investigation into the police interrogation. One way to do this, generally recognized by most defense counsel, is to hold the State to its burden of proving that a statement is voluntary. In such a case, the State would have to put the interrogating officers on the stand to be subject to cross-examination. Therefore, even where no issue of involuntariness is evident from the discovery, any competent defense counsel, not just a good defense counsel, particularly in a case where the

confession is the only evidence linking a defendant to the alleged offense, would hold the state to its burden in order to determine whether there is in fact any possible issue as to voluntariness.

Moreover, though, in this case, there is multiple indications that there might be an issue as to the voluntariness of Petitioner's confessions. First, Monica Boggs was a young woman, 19 years of age, who according to the defense expert, exhibits substantial social immaturity, chronic depression, chronic low self-esteem, and other personality disorders. These personal characteristics would make Monica extremely vulnerable to coercive interrogation. Furthermore, Ms. Boggs has a low IQ— 80— which is in the borderline range for mental retardation, little education, and no experience with the criminal justice system. Furthermore, the interrogation occurred at night and only a day after Monica's infant son had died. As such, Monica was in an extremely susceptible condition, by both her innate characteristics as well as her situation.

Furthermore, the State Police had taken multiple statements from Monica. The first two statements were taken by Trooper Bowman. The third statement on August 20, 2008 was not recorded by the State Police and was conducted by Sgt. Boober and Sgt. Pansch, both skilled and experienced interrogators. Two subsequent statements were recorded by Sgt. Boober and Sgt. Pansch after they had elicited a confession from Monica during the non-recorded interrogation. Thus, because the initial interrogation was not recorded, there is a serious question as to what interrogation techniques and what inducements were offered by the State Police during that interrogation. The only way to test that would be to cross-examine the officers, which defense counsel failed to do by failing to move to suppress the statements.

Finally, defense counsel cannot contract out his duty to investigate the voluntariness of a statement to a forensic psychologist. While such an expert can offer an opinion as to the psychological disposition of a defendant, he or she cannot be expected to conclusively decide whether a statement is in fact voluntary or involuntary. Voluntariness is a legal standard that

considers the totality of the circumstances, not just the psychological makeup of the defendant. Moreover, the report from the forensic psychologist indicates multiple factors that would tend to make Ms. Boggs suggestible to coercive interrogation techniques.

Therefore, Petitioner suggests that trial counsel was ineffective when he failed to litigate the issue of voluntariness of the confession, even though there was sufficient alerting circumstances to any objectively competent defense counsel.

The prejudice is compounded by the fact that Monica's confession was the only piece of evidence linking Monica to the injury and death of her son. Even if the circuit court had ruled that the confession was voluntary, defense counsel could have submitted the issue to the jury. As such, Petitioner respectfully requests that this Court order a new trial based upon the ineffectiveness of defense counsel to either challenge the admissibility of the potentially involuntary confession or submit the issue of voluntariness to the jury.

3. *Trial Counsel Was Ineffective in Failing to Request that the Circuit Court Give a Vance Instruction to the Jury*

Petitioner suggests to this Court that trial counsel was further ineffective when he failed to request that the court give a *Vance* instruction to the jury. The failure to either hold a hearing on the voluntariness of the confession or request the *Vance* instruction resulted in prejudicial error, requiring that a new trial be held.

Here, as stated above, evidence at trial established that Monica was suffering from depression, chronic low self-esteem and other personality disorders, that she had a low IQ, that she had less than a high school education, that she was only a teenager at the time of the interrogation, and that the interrogation was conducted by multiple officers immediately after the tragic death of her son. Ms. Boggs' interrogators were experienced in the techniques of interrogation, did not record the interrogation session where Ms. Boggs first "confessed," and

admitted during testimony to making suggestions to Ms. Boggs regarding the answers that they wanted to hear.

Moreover, it is readily apparent, even by the circuit court's admission, that Monica's story changed based upon her audience. At the sentencing hearing, the circuit court held, "the Defendant's multiple versions of events make it clear that to the Defendant telling the truth is an elastic concept, that she will change her version of events depending on her audience, to make her story, quote, more believable, end quote.... Therefore, I believe it is highly unlikely that we can ever know the true extent of Sylar's suffering at his mother's hands." App. 900. These multiple and conflicting statements include the statement given to Trooper Bowman on the night of the infant's death, the unrecorded statement given to Sgt. Boober and Sgt. Pansch, the statement recorded at 10:20 p.m., the statement recorded at 11:36 p.m., and the statement given to the probation officer in the pre-sentence report.

Even more troubling is the fact that Monica got key factual assertions wrong in her confessions, even though such factual assertions did not have any exculpatory effect. For instance, in the 10:20 p.m. statement, Monica admitted to throwing a bottle at her baby and tossing her baby into the crib, yet stated that both incidents occurred on the same day. At 11:36 p.m., the State Police, after learning that the time line did not match up, went back to get a new statement with a 'correct' time line. Not only does this indicate that Monica's statements were involuntary and untrue, but this also indicated that the State Police were easily able to coerce Monica to change her story to match up to what the State Police believed was the evidence in the case. Such information raises a strong suspicion that Monica, a 19-year old borderline mentally retarded woman, with low self-esteem, would tell the police anything that they wanted to hear. Thinking that they wanted to hear a confession, Monica obliged them.

Thus, Petitioner asserts that there were strong alerting circumstances for trial counsel and

the circuit court that raised an issue as to the voluntariness of her confession. With such evidence being adduced at trial, even if trial counsel was not aware of it previously, trial counsel should have requested a *Vance* instruction so that the jury could consider the question of voluntariness. The failure to do so fell below an objective standard of reasonableness.

Based on the foregoing, Petitioner would ask this Court to vacate the judgment and order that a new trial be held so that the voluntariness of her confession may be litigated in accordance with the above-cited law and with her right to due process of law.

C. Petitioner's Right to Effective Assistance of Counsel Was Violated When Trial Counsel Failed to Object to the Testimony of the State's Medical Expert, Failed to Request a *Daubert* Hearing to Challenge the Admissibility of the State's Medical Expert's Opinions, and Failed to Hire a Medical Expert to Challenge the State's Expert

Petitioner next contends that trial counsel was ineffective when he failed to object to the testimony of the State's medical expert, failed to move for a *Daubert* hearing for the State's medical expert, and failed to hire any experts on Ms. Boggs' behalf to challenge the State's medical expert.

Rule 16(a)(1)(E) of the West Virginia Rules of Criminal Procedure provides, "Upon request of the defendant, the state shall disclose to the defendant a written summary of testimony the state intends to use under Rule 702, 703, or 705 of the Rules of Evidence during its case in chief at trial. The summary must describe the witnesses' opinions, the bases and reasons therefor, and the witnesses' qualifications." W. Va. R. Crim. Pro. 16(a)(1)(E). Rule 16 requires disclosure of an expert's opinion so that defense counsel may have sufficient time to investigate the expert's opinion, bases and reasons therefor, and qualifications. Without such disclosure, defense counsel cannot perform his important duty to his client of investigation. *See Stroger*, 196 W.Va. at 153, 469 S.E.2d at 12.

Furthermore, pursuant to Rule 702 of the West Virginia Rules of Evidence, a court may

allow scientific expert testimony, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” W. Va. R. Evid. 702. “The first and universal requirement for the admissibility of scientific evidence is that the evidence must be both ‘reliable’ and ‘relevant.’” Syl. Pt. 3, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995). “It is ‘the trial judge[’s] ... task ... [to] ensur[e] that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.’” *Gentry*, 195 W.Va. at 520, 466 S.E.2d at 180. (quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993)). “*Daubert/Wilt* mandates that when scientific evidence is proffered, the circuit court make a preliminary assessment ‘at the outset pursuant to Rule 104(a) of whether the reasoning or methodology underlying the testimony is scientifically valid[.]’” *Id.* “Rule 103(c) of the Rules of Evidence permits and encourages pretrial motions in limine as the appropriate procedure for determining the admissibility of time consuming and difficult evidentiary issues.... [T]he best time to review and resolve scientific issues is at the pretrial level. At that point, there is nothing to lose.” *Id.*

At trial, the State’s expert, Dr. Schmidt offered an opinion on the amount of force it would take to break an infant’s skull and opined that it would take more force than the force necessary to break an adult’s skull. Trial counsel raised a wishy-washy objection, to form not to substance and Dr. Schmidt was permitted to offer such testimony.

Dr. Schmidt was qualified as an expert in the field of forensic pathology. She was not qualified in the field of physics. The question of how much force it takes to break an infant’s skull versus how much force it takes to break an adult’s skull is necessarily a question of physics. Moreover, according to Dr. William Hauda, a forensic medical expert hired by Petitioner for the habeas proceeding, medical literature does not support Dr. Schmidt’s opinion. App. 1077.

This was an area of testimony that was simply beyond the expertise of the medical examiner and was an opinion not supported by the consensus of the scientific community. Had this area of testimony been disclosed to any diligent defense counsel, defense counsel would have been able to counter such testimony with cross-examination on the physics issue or by testimony of a defense expert. Having such an issue disclosed at trial, in the course of direct examination, did not leave defense counsel, who is not an expert in physics or forensic pathology, enough time to research the issue so that he could offer effective cross-examination. Defense counsel's objection was not "form over substance" as he indicated, but rather an objection that goes directly to the issue about notice and preparedness. Even though defense counsel stated that he could infer that the State's expert would offer such testimony from the expert disclosure, defense counsel's actions belie such an assertion. Defense counsel never consulted an expert on the issue and did not offer cross-examination on point to suggest that he was prepared to attack such an opinion.

Petitioner suggests that this violation of providing notice and trial counsel's failure to adequately object to such an opinion or consult an expert prejudiced her inasmuch as the medical expert's testimony regarding the force that it would take to break an infant's skull was crucial to the State's argument that Ms. Boggs did not just toss the infant into the crib, but instead threw the infant into the bed with an extreme amount of force. Had this area of expert testimony been disclosed, an effective defense counsel would have been able to counter the expert opinion of the State's medical expert. Because this opinion was extremely important in securing the guilty verdict, Petitioner suggests that the failure to provide proper notice and trial counsel's failure to adequately contest such an expert opinion prejudiced the outcome of the trial, which necessitates that this Court grant a new trial.

D. Petitioner's Sixth Amendment Right to a Fair and Impartial Jury and Right to Effective Assistance of Counsel Was Violated When Her Trial Counsel Failed to Move to Strike or Conduct Voir Dire on a Juror Who Knew the

Biological Father of the Deceased Child

Petitioner asserts that her Sixth Amendment right to an impartial jury and her right to effective assistance of counsel were violated when trial counsel failed to conduct a voir dire and move to strike a juror who indicated, after the trial had begun, that she knew the biological father of the child that the Defendant, Monica Boggs, had been charged with killing. Trial counsel's failure to conduct voir dire of such a juror and failure to move to strike the juror resulted in Petitioner being convicted by a partial and biased jury, in violation of her Sixth Amendment rights.

“[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.” *Irvin v. Dowd*, 366 U.S. 717, 721, 81 S.Ct. 1639, 1643 (1961). In concurring with such a holding, the West Virginia Supreme Court of Appeals has held that “[t]he right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendment of the United States Constitution and Article III, Section 14 of the West Virginia Constitution.” *State v. Varner*, 212 W.Va. 532, 537, 575 S.E.2d 142, 147 (2002). The Court continues that “[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.” *Varner*, 212 W.Va. at 537, 575 S.E.2d at 147. Furthermore, the West Virginia legislature has statutorily protected such interests by “barr[ing] from service potential jurors who might be biased or prejudiced in a particular cause.” *Varner*, 212 W.Va. at 537, 575 S.E.2d at 147 (citing W. Va. Code § 56-6-12 (1923) (Repl. Vol. 1997)).

The *Varner* Court further provides,

The object of jury selection is to secure jurors who are not only free from improper

prejudice and bias, but who are also free from the suspicion of improper prejudice or bias. As far as is practicable in the selection of jurors, trial courts should strive to secure jurors who are not only free from prejudice or bias, *but also are not even subject to any well-grounded suspicion of any prejudice or bias.*”

Varner, 212 W.Va. at 537, 575 S.E.2d at 147. Thus, “[a]ny doubt the court might have regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the potential juror.” *Varner*, 212 W.Va. at 538, 575 S.E.2d at 148. Any “procedure which would offer a possible temptation to the average man as a [juror] to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.” *Varner*, 212 W.Va. at 538, 575 S.E.2d at 148.

In *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987), this Court upheld the decision of the lower court in deciding to dismiss a juror who became aware during trial that she knew one of the testifying witnesses and stated that she would not be able to judge the testimony of the witness free from bias. In measuring potential juror bias, a court must look to the juror’s own admission of bias or proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed. *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Bias, in its usual meaning, is an inclination toward one side of an issue rather than the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality. Prejudice is more easily defined, for it means prejudgment and consequently embraces bias; the converse is not true.

O’Dell v. Miller, 211 W.Va. 285, 288, 565 S.E.2d 407, 410 (2002) (citation omitted).

“[T]he manner in which the voir dire is conducted is a matter resting within the sound discretion of the trial court.” *State v. Lassiter*, 177 W.Va. 499, 354 S.E.2d 595 (1987).

Accordingly,... the trial court is free to determine whether voir dire shall be conducted by the court

or by counsel.” *Lassiter*, 177 W.Va. at 503-04, 354 S.E.2d at 599-600. “Jurors who on voir dire of the panel indicate possible prejudice should be excused, or should be questioned individually either by the court or by counsel to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse.” Syl. Pt. 3, *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978). “The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instruction of the court.” Syl. Pt. 1, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

Here, on the beginning of the second day of trial, the circuit court received a note from the court security officer indicating that Juror Perkey had told her that she did not realize that she knew the biological father of Skylar Boggs, the victim in the instant case. The fact that Juror Perkey knew the biological father of the infant victim in this case raises a strong and well-grounded suspicion of prejudice or bias. *See Varner*, 575 S.E.2d at 147. Juror Perkey was sitting in judgment of the woman accused of killing the infant son of a person that she not only knew, but had also grown up as neighbors with. That raises the strongest of suspicions of potential bias.

Such a strong suspicion of prejudice should have compelled the defense counsel to move to strike the juror or to request voir dire of the juror. Moreover, such a strong suspicion of prejudice should have compelled the court “to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse.” Syl. Pt. 3, *Pratt*, 161 W.Va. 530, 244 S.E.2d 227. As well-founded by West Virginia law, the true test is whether the juror could render a verdict solely on the evidence, Syl. Pt. 1, *Wilson*, 157 W.Va. 1036, 207 S.E.2d 174, yet the court never engaged in voir dire of the juror to determine whether she could do so. Instead, the court accepted the statement of the court security officer, who had told the court that Juror Perkey told her that she could remain impartial. Petitioner suggests that the failure to voir dire this juror in open court prevented Petitioner from being tried by a panel of jurors that are free from all bias

and prejudice and free from even a well-founded suspicion of bias and prejudice.

At the very least, the circuit court should have conducted voir dire of the juror and not relied upon the statement of the court security officer that the juror could remain impartial. There was a strong presumption of bias based upon the juror's relationship with the biological father of the deceased infant. While it may have been unpalatable for defense counsel to conduct voir dire of the juror in the case that the trial court refused to remove the juror for cause, the trial court should have conducted this inquiry. There were alternate jurors who were available to take Juror Perkey's place if Juror Perkey was removed from the jury.

Further, if this information had been disclosed before the jury was impaneled and during voir dire, defense counsel would have had an opportunity to adequately examine this issue. Moreover, had the trial court not dismissed the juror for cause, trial counsel may have been compelled to use a peremptory strike on the juror. Instead, however, a juror with a strong possibility of prejudice remained on the jury without further examination by defense counsel or the trial court.

As such, Petitioner asserts that defense counsel's failure and the trial court's to conduct voir dire of Juror Perkey, who exhibited a well-founded suspicion of prejudice, based upon her statement that she knew the biological father of the infant victim, violated Petitioner's due process right to have a fair and impartial jury. Trial counsel's failure to require further voir dire of this juror that had at least a well-grounded suspicion of bias amounts to ineffective assistance. Therefore, Petitioner requests that this Court order a new trial so that she can be tried before a fair and impartial jury.

E. Petitioner's Due Process Right to a Fair Trial and Sixth Amendment Right to Effective Assistance of Counsel Were Violated When Trial Counsel Failed to Object to the State's Closing Argument Which Began by a Presentation of a Gruesome Autopsy Photo of the Deceased Infant

Petitioner asserts that the State prejudiced the jury, in violation of Rule 403 of the West Virginia Rules of Evidence and her due process rights, when the State presented an image of the gruesome autopsy photograph of the infant at closing argument, where the State was not arguing regarding any relevant medical issue that the autopsy photograph was meant to demonstrate. Petitioner suggests that trial counsel was ineffective in failing to object to the State using this photograph in a manner to prejudice the jury.

“We begin by observing that ‘[t]he general rule is that pictures or photographs that are relevant to any issue in a case are admissible.’” *State v. Mongold*, 220 W.Va. 259, 272, 647 S.E.2d 539, 552 (2007) (citation omitted). “The admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence.” *Id.*

Here, the gruesome autopsy photographs, which show the infant with his scalp peeled back to show the fracture of the skull, were certainly relevant to the State’s case in regard to the extent of the infant’s injury. Moreover, the State and defense counsel were able to use black and white copies in order to downplay the gruesomeness of the photographs. However, there was simply no relevant use for the State to use the gruesome autopsy photographs at the beginning of her closing argument when she was not discussing any relevant use of the photographs. As such, it is clear that the prejudicial nature of the photographs far outweighed the non-existent relevancy of the photographs at that point of closing argument. The picture was used by the State simply to inflame the jury’s passion and prejudice.

Effective counsel would have objected to such use of the gruesome photograph.

Therefore, Petitioner requests that this Court grant a new trial.

F. Trial Counsel Rendered Ineffective Assistance of Counsel When He Waived Petitioner’s Theory of the Defense By Admitting that Her Actions Were Intentional, Rather than Negligent, Rendering Petitioner Without Any Theory

of the Defense By Which the Jury Could Find Her Not Guilty

Petitioner asserts that trial counsel rendered ineffective assistance of counsel when he waived Petitioner's only theory of the defense by admitting that her actions were intentional, thus depriving Petitioner of any potential theory by which the jury could find her not guilty. Petitioner suggests that this contention is really the crux of her argument regarding trial counsel's ineffectiveness. Trial counsel had decided to forego challenging Petitioner's statements made to the police and also failed to present any potential mental defense to the alleged crime. While these decisions could arguably have been a matter of strategy, with trial counsel deciding to focus on the theory of the defense that Petitioner's actions were negligent, but not malicious as to support the charges, when trial counsel waived this theory of the defense, by making an admission as to Petitioner's actions being intentional, trial counsel (and more importantly Ms. Boggs) was left without *any* theory of defense to present to the jury. If trial counsel's strategy was to forego other potential avenues of defense to argue that Petitioner's actions were negligent, not malicious, when trial counsel waived this sole avenue of defense, trial counsel was left with nothing to argue before the jury.

In West Virginia, the case law is clear that a defendant is entitled to an instruction on her theory of the defense and can argue that theory of defense so long as the theory has support in the law. "A criminal defendant is entitled to an instruction on the theory of his or her defense if he or she has offered a basis in evidence for the instruction, and if the instruction has support in law." *State v. Hinkle*, 200 W.Va. 280, 285, 489 S.E.2d 257, 262 (1996). "Thus, an instruction offered by the defense should be given if the proposed instruction: (1) is substantively correct, (2) is not covered substantially in the charge actually delivered to the jury, and (3) involves an important issue in the trial so the trial court's failure to give the instruction seriously impairs the defendant's ability to effectively present a defense." *Hinkle*, 200 W.Va. at 285, 489 S.E.2d at 262. "If these

prerequisites are met, the trial court abuses its discretion in refusing the instruction ‘no matter how tenuous that defense may appear to the trial court.’” *Id.*

Here, defense counsel’s entire theory of defense was that Petitioner’s action in tossing the infant into the crib and tossing a bottle toward the infant was negligent, but not malicious. At the pre-trial hearing, in his opening statement, and during cross-examination of witnesses, defense counsel argued that Ms. Boggs may have been negligent but did not intentionally seek to harm her child. This was the theory of the case.

However, despite that the sole theory of defense for Petitioner was that her actions were negligent, but not malicious, the trial court ruled that defense counsel could not argue nor would the jury get instructions that her actions were negligent rather than malicious.

During the Rule 29 argument, defense counsel made some admissions as to his client’s case. Defense counsel argued that as to the child abuse by a parent resulting in death count, the State had the duty “to show maliciousness and intentional.” Defense counsel then conceded the intentional prong of this charge. The circuit court took this as a stipulation as to the element of intent, interjecting, “All right. So there’s concession of intent. So, really, the focus is just on malice[.]”

After conceding the intentionality of Ms. Boggs’ actions, defense counsel concluded his closing argument as follows: “[C]an you honestly say that she intended to cause that substantial injury? And was it malice? She snapped. She got mad— poor choice of words— got upset— she’s going to jump all over that one— and threw the baby in. That’s what she’s guilty of, not malice.” App. 795. Seemingly, defense counsel through his “poor choice of words” conceded malice— that Monica Boggs’ actions were intentional and were motivated by anger.

With these two concessions as to intentionality and malice, there was no way that a jury could decide the case in Ms. Boggs’ favor. All of the elements of the offenses were met and Ms.

Boggs essentially had no defense presented. Her counsel waived the issues of the voluntariness of her confessions, stipulated to the element of intent, and then through “poor choice of words” virtually stipulated to the element of malice. Thus, Petitioner suggests that trial counsel left her with no defense whatsoever.

G. Trial Counsel Rendered Ineffective Assistance When He Failed to Move for a Continuance of the Trial Based Upon His Inability to Prepare for Ms. Boggs’ Trial Due to a Busy Trial Schedule

Petitioner further suggests that trial counsel rendered ineffective assistance of counsel when he failed to move for a continuance of the trial to allow himself adequate time to prepare a defense for Ms. Boggs.

“[B]ecause of the particular wording in Article III, Section 14 of the West Virginia Constitution that the accused ‘shall have the assistance of counsel, and a reasonable time to prepare his defense’, there is, independent of the Due Process Clause in our Constitution, a constitutional right to a continuance if the defendant is not accorded a reasonable time to prepare his defense.” *Wilhelm v. Whyte*, 161 W.Va. 67, 72, 239 S.E.2d 735, 740 (1977).

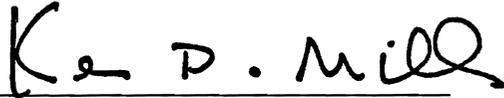
Here, trial counsel had a jury trial immediately prior to the trial of Ms. Boggs. This lengthy trial obviously impeded his ability to be able to effectively prepare a defense for Ms. Boggs’ trial. Trial counsel should have moved and would have been entitled to a continuance based upon not being accorded a reasonable time to prepare Ms. Boggs’ defense. The failure to move for a continuance constituted ineffective assistance.

CONCLUSION

Ms. Boggs would respectfully request that this Honorable Court reverse the circuit court’s decision and remand this case for a new trial based upon her claim of ineffective assistance of counsel or in the alternative remand this case for a full and fair evidentiary hearing on the issue of ineffective assistance.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Shawn R. McDermott of Kevin D. Mills & Associates do hereby certify that I have served an original and ten (10) copies of the attached PETITIONER'S BRIEF upon Rory L. Perry, II, Clerk of Court, Supreme Court of Appeals at his address of State Capitol, Room E-317, 1900 Kanawha Blvd., East, Charleston, West Virginia 25305 by overnighting same this 4th day of February, 2016 by Federal Express and by hand-delivering a copy to Cheryl Saville, Assistant Prosecuting Attorney of Berkeley County at her address of 380 W. South Street, Martinsburg, West Virginia 25401 on this 5th day of February, 2016.


SHAWN R. MCDERMOTT, ESQUIRE