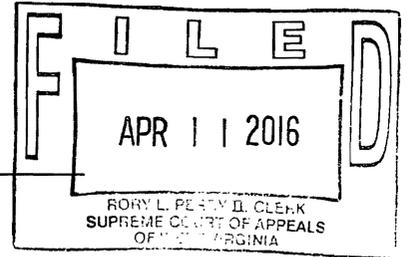


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 15-1001



---

MONICA BOGGS,

Petitioner Below, Petitioner,

v.

LORI NOHE,  
Warden, Lakin Correctional Center,

Respondent Below, Respondent.

---

**REPLY BRIEF**

---

Appeal from Circuit Court of Berkeley County, West Virginia

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

---

Kevin D. Mills  
WV State Bar No. 2572  
MillsMcDermott, PLLC  
1800 West King Street  
Martinsburg, West Virginia 25401  
(304) 262-9300  
phoupt@wvacriminaldefense.com  
*Counsel for Petitioner*

Shawn R. McDermott  
WV State Bar No. 11264  
MillsMcDermott, PLLC  
1800 West King Street  
Martinsburg, West Virginia 25401  
(304) 262-9300  
smcdermott@wvacriminaldefense.com  
*Counsel for Petitioner*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....ii

REPLY ARGUMENT.....1

I. THE CIRCUIT COURT ERRED IN DENYING MS. BOGGS  
AN EVIDENTIARY HEARING ON HER PETITION FOR WRIT OF HABEAS  
CORPUS.....1

II. THE CIRCUIT COURT ERRED IN FINDING THAT MS. BOGGS WAS NOT  
DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF  
COUNSEL.....6

A. False Confession and Involuntary Statement  
of Ms. Boggs.....6

B. Trial Counsel's Failure to Adequately Investigate State's Expert  
Evidence and Hire and Consult a Medical Expert on the Behalf  
of Ms. Boggs.....6

C. Trial Counsel's Inadvertent Waiver of His Only Theory of Defense that Ms.  
Boggs' Actions Were Negligent But Not Criminal.....8

CONCLUSION.....10

**TABLE OF AUTHORITIES**

**CASES**

*Coleman v. Alabama*,  
399 U.S. 1, 90 S.Ct. 1999, 26 L.E.2d 387 (1970).....2

*State ex rel. Stroger v. Trent*,  
196 W.Va. 148, 469 S.E.2d 7 (1996).....7

*State v. Vance*,  
162 W.Va. 467, 250 S.E.2d 146 (1978).....2

*Tex S. v. Pszczolkowski*,  
236 W.Va. 245, 778 S.E.2d 694 (2015).....5

**STATUTES**

W. Va. Code § 61-8D-2a (1994).....8

**OTHER MATERIALS**

Innocenceproject.org, False Confessions or Admissions, *at* <http://innocenceproject.org/causes-wrongful-conviction/false-confessions-or-admissions>.....3-4

## REPLY ARGUMENT

### I. THE CIRCUIT COURT ERRED IN DENYING MS. BOGGS AN EVIDENTIARY HEARING ON HER PETITION FOR WRIT OF HABEAS CORPUS

Ms. Boggs reasserts that the circuit court erred in denying her an evidentiary hearing on the issues of ineffective assistance of counsel and the voluntariness of her statement given to police, which formed the basis of Ms. Boggs' conviction. Ms. Boggs has alleged that this statement, the solitary piece of evidence connecting her to the death of her son, has remained to this day unexamined through the adversarial process. Nothing written or cited in the State's Response Brief supports the circuit court's decision not to hold an evidentiary hearing and to leave the statement unexamined.

Just because the officers that conducted the interrogation and obtained the statement testified at trial does not mean that their trial testimony somehow vitiates the need for the examination of the voluntariness of Ms. Boggs' admissions. To the contrary, the record below indicates the need for an opportunity to voir dire the circumstances leading to Ms. Boggs' admissions to police.

Despite the many indicators of the need to challenge the voluntariness of Ms. Boggs' statement, Ms. Boggs' trial counsel waived the opportunity to voir dire the statement and stipulated to its voluntariness. Petitioner would suggest that there could be no legitimate trial strategy reason to waive a hearing on the voluntariness of Ms. Boggs' admissions. However, by denying an evidentiary hearing, the circuit court failed to allow trial counsel, who was available to testify, the opportunity to attempt to explain some trial strategy reason for waiving the right to contest the most incriminatory piece of evidence against his client.

The reasons not to waive the right to voir dire and challenge Ms. Boggs' admissions are numerous, and any criminal defense attorney demonstrating an objective standard of reasonableness would have challenged and subjected to voir dire the admissions.

First, the statement of Ms. Boggs, which contained her admissions, was the only piece of evidence connecting Ms. Boggs' to the death of her son. Any reasonably competent defense attorney would understand that to adequately defend his or her client, you must attack the statement, both legally and factually. Further, any reasonably competent defense attorney would know that there is a great tool available to challenge the statement, which is a win-win situation. By filing a motion to challenge the voluntariness of the statement, the trial court would have been mandated by constitutional law to conduct a hearing on the circumstances surrounding the taking of the statement. *See State v. Vance*, 162 W.Va. 467, 470, 250 S.E.2d 146, 149 (1978) (“As 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.’”). This was not a discretionary decision. Thus, a defense attorney has the ability to force a hearing on the evidence by simply filing a written motion or making an oral motion. Moreover, there is absolutely no downside to conducting a hearing. The worst case scenario is that the court denies your motion, but at the same time being able to position yourself better for trial by having an earlier opportunity to cross-examine the officers involved in the taking of the statement. Thus, even if a defense attorney did not believe that he or she would likely have success in getting the statement excluded, the process of the voir dire of the statement and the cross examination of the State's witnesses has great benefits in and of itself. *See Coleman v. Alabama*,

399 U.S. 1, 9, 90 S.Ct. 1999, 26 L.E.2d 387 (1970) (discussing the auxiliary benefits of a preliminary hearing, including the cross-examination of witnesses that may expose fatal weakness in the State's case, as an impeachment tool for use in the cross-examination of the State's witnesses at trial, the preservation of testimony favorable to the accused, and effective discovery of the State's theory of the case).

Thus, in essence the only reason not to conduct voir dire of an incriminatory statement given by one's client to the police would be that the defense attorney believes that the statement would somehow be useful for the client being entered into evidence. Petitioner cannot fathom how the statement obtained from Ms. Boggs could have been conceived to have been beneficial to Ms. Boggs by being entered into evidence. However, by denying the evidentiary hearing, the trial court denied trial counsel the opportunity to come up with some scintilla of a trial strategy for why he felt the statement being entered into evidence was beneficial to Ms. Boggs.

Furthermore, as any reasonably competent defense attorney should be required to know, false confessions are the number one leading cause of wrongful convictions in this country. In fact, according to the Innocence Project, "1 out of 4 people wrongfully convicted but later exonerated by DNA evidence mad a false confession or incriminating statement." *See* <http://innocenceproject.org/causes-wrongful-conviction/false-confessions-or-admissions>. Thus, every statement should be viewed with scrutiny by a competent defense counsel. Leaving such statements unchallenged in the face of the knowledge of the scourge of wrongful convictions based on false confessions is simply inexcusable.

Most crucially, in the instant case, there were a multitude of red flags that Ms. Boggs'

admissions were involuntarily coerced. As the Innocence Project has noted, “[t]he reasons that people falsely confess are complex and varied, but what they tend to have in common is a belief that complying with the police by saying that they committed the crime in question will be more beneficial than continuing to maintain their innocence.” *See* Innocenceproject.org, False Confessions or Admissions, at <http://innocenceproject.org/causes-wrongful-conviction/false-confessions-or-admissions>. Some of the factors that can contribute to a false confession include “duress, coercion, intoxication, diminished capacity, mental impairment, ignorance of the law, the threat of a harsh sentence, and misunderstanding the situation.” *Id.* “Confessions obtained from juveniles are often unreliable— children can be easy to manipulate and are not always fully aware of their situation.” *Id.* Moreover, “People with mental disabilities have often falsely confessed because they are tempted to accommodate and agree with authority figures.” *Id.*

In the instant case, both the trial court and the psychological expert found that Ms. Boggs would change her version of the events based upon who she was speaking to. Thus, there was a finding on the record that Ms. Boggs had a susceptibility to accommodating and agreeing with authority figures, and who has more authority than high ranked police officials? Further, there were findings on the record that Ms. Boggs was young during the time of the interrogation, but also had the mental state of a much younger person and a low IQ, again suggesting that she would be particularly susceptible to coercion. The interrogation of Ms. Boggs was conducted by three very experienced West Virginia State Troopers and lasted for many hours immediately following the death of Ms. Boggs’ infant son. Yet, despite these glaring red flags, trial counsel waived his right to voir dire Ms. Boggs’ statement, and the circuit court further compounded this error by denying Ms. Boggs the post-trial habeas opportunity to finally have the opportunity to

voir dire the statement and have trial counsel explain his inexplicable decision.

Contrary to the State's position, the mere fact that the officers that conducted the interrogation testified at trial and the mere fact that trial counsel had consulted a psychological expert does not vitiate the need for an evidentiary hearing. The officers did testify at trial. However, their testimony was not subjected to the adversarial process and cross-examination, the engine for truth in this legal system, as to the circumstances surrounding the interrogation of Ms. Boggs.

As this Court has held, and the State has failed to address in its Response Brief, "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. Pyszczolkowski*, 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. Therefore, even excluding the requested testimony of the officers who conducted the interrogation of Ms. Boggs, at the very least the circuit court should have required a hearing where trial counsel would have been called as a witness. Nothing in the State's response suggest why the testimony of trial counsel was not required in this case, particularly where the decisions of trial counsel— e.g. waiving the right to voir dire Ms. Boggs' statement and waiving Ms. Boggs' only defense based upon a theory of negligence— were so

inexplicable.

Finally, the State fails to grapple with the fact that this Court had originally denied Ms. Boggs' direct appeal by holding that the claim of ineffectiveness was more appropriately addressable on a habeas petition, where additional evidence regarding trial counsel's choice could be taken. Despite this Court's decision that it would not decide this claim on the record on direct appeal and expression of a strong desire that additional evidence was required at an evidentiary hearing, this Court now finds itself on appeal of the denial of the habeas petition with virtually the same record that had existed at the time of the direct appeal.

Thus, Ms. Boggs suggests that it was clear error for the circuit court to deny her the opportunity to have a contested evidentiary hearing on her omnibus habeas petition.

**II. THE CIRCUIT COURT ERRED IN FINDING THAT MS. BOGGS WAS NOT DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL**

**A. False Confession and Involuntary Statement of Ms. Boggs**

As argued above, Ms. Boggs suggests that trial counsel was ineffective in failing to challenge the admissibility of Ms. Boggs' admissions obtained by police. Ms. Boggs suggests that even without further evidence to be taken at an evidentiary hearing, there is sufficient evidence on the record of the ineffectiveness of trial counsel in failing to challenge Ms. Boggs' statement and as such, Ms. Boggs would request that this Court vacate her conviction and order a new trial.

**B. Trial Counsel's Failure to Adequately Investigate State's Expert Evidence and Hire and Consult a Medical Expert on the Behalf of Ms. Boggs**

Ms. Boggs reasserts that her trial counsel was ineffective in failing to adequately

investigate the State's expert evidence concerning the autopsy of Ms. Boggs' child and the opinion regarding the cause of death. As 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). Here, trial counsel's lack of investigation extended from the failure to adequately investigate the circumstances of Ms. Boggs' admissions to the failure to investigate the medical evidence intended to be introduced by the State.

As stated in Petitioner's Brief, trial counsel is a very experienced and skilled courtroom advocate. However, trial counsel's ability to connect with the jury is completely undercut when he has not done sufficient pre-trial investigation, which in this case looks to have been brought about by trial counsel's busy trial schedule.

Nor is Petitioner's claim one that undersigned counsel would have done things differently in hindsight than trial counsel had done. Trial counsel failed to investigate the State's medical evidence at all. This claim is not that trial counsel should have contacted a different expert or attacked the medical evidence in a different way, but instead that trial counsel should have done something— actually anything at all— to investigate the State's medical evidence. The report of Dr. William Hauda, which was stipulated to be included as part of the record, demonstrates that if trial counsel had done anything, such as even consulting with an expert, he would have learned about the problems with the State's medical evidence and the State's expert opinion about the force used and the cause of Ms. Boggs' son's injuries.

Contrary to the State's argument that the conclusion of their medical expert that it would take more force to break an infant's skull than an adult's skull was immaterial to the jury's deliberation, Petitioner suggests that such an opinion was crucial to the jury's determination as to

whether the injuries were the result of malice or something else. The opinion of the State's expert was presented precisely for the reason that the jury would conclude that it would be hard to cause a crack to an infant's skull and that the only way such an injury could happen would be through an intentional and malicious application of extreme force. Dr. Hauda's report contradicts this opinion and stands for the proposition that in fact there is no scientific basis to conclude that an infant's skull is harder to crack than an adult's skull and that an infant's skull can be cracked through accident, without the necessity of the application of extreme force.

In other words, had trial counsel done the necessary investigation and consulted with his own expert, he would have learned that the State's expert's opinion, which was absolutely material to the conviction, did not have a basis in scientific fact and should not have been presented to the jury at all, or at the very least could have been completely undercut by a rebuttal expert. Such an error based upon a lack of investigation is clearly ineffective.

C. Trial Counsel's Inadvertent Waiver of His Only Theory of Defense that Ms. Boggs' Actions Were Negligent But Not Criminal

Ms. Boggs reasserts that contrary to the State's argument, trial counsel did inadvertently waive his theory of defense— that the injuries to Ms. Boggs' child were not intentional— and then essentially waived the only remaining possible defense— that the infliction of the injuries by Ms. Boggs were not malicious. To be sure, however, this error on the part of trial counsel was exacerbated by the circuit court's erroneous reading of the law as to the definition of the intentional element of the crime.

The most serious offense of conviction, "Death of a child by a parent... by child abuse," pursuant to Chapter 61, Article 8D, Section 2a, Subsection (a) of the West Virginia Code, is

defined as follows, “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.” W. Va. Code § 61-8D-2a. Thus, this code section makes clear that there are two essential intents that the State must prove. First, the State must prove that the parent intentionally inflicted substantial physical pain on the child. Second, the State must prove that the parent maliciously inflicted substantial physical pain on the child. As a corollary to these intent elements, the State must also prove that the physical pain was caused by other than accidental means.

The circuit court found that trial counsel stipulated to Ms. Boggs intentionally inflicting substantial physical pain on the child because trial counsel stipulated that the toss of the child into the crib was intentional. However, this finding completely misconstrues the intent element of the offense. A parent could intentionally toss a child into the crib without the element of intentionally inflicting substantial physical pain on the child. The intentionality of an action is completely separate from the intention to inflict substantial physical pain. Just because trial counsel admitted that an act was intentional, does not mean that he has stipulated that the outcome of that act was intentional. As an example, when our former Vice President, Dick Cheney, went duck hunting, he intentionally pulled the trigger of the firearm, even though he did not intentionally inflict the injuries to his hunting partner. The intentionality of the act and intentionality of the outcome are completely separate inquiries.

Trial counsel should not have accepted the circuit court’s misapplication of the intent element. Yet he did, effectively stipulating to a crucial element of the offense, which trial

counsel had argued in opening argument and formed the basis of Ms. Boggs' defense.

Thus, the only thing left for trial counsel to advocate on the behalf of Ms. Boggs, after he waived her right to contest the voluntariness of her admissions, after he failed to adequately investigate and exclude or impeach the State's medical expert's bunk scientific opinion, and after he accepted a stipulation to a crucial element of the offense, was whether or not Ms. Boggs had malicious intent. Yet, during his closing argument, trial counsel even botched this when he argued before the jury that Ms. Boggs "snapped" and got "mad," *see* App. 795, causing her to throw her child, effectively leaving Ms. Boggs without any defense and stipulating to each and every element of the offense.

Effectively waiving every argument that Ms. Boggs may have had in her defense and inadvertently stipulating to every element that the State was required to prove beyond a reasonable doubt cannot and should not ever be considered effective assistance of counsel. Effective assistance cannot be achieved by holding one client's hand and walking her to the gallows.

### CONCLUSION

WHEREFORE Petitioner Monica Boggs respectfully requests that this Honorable Court vacate her conviction and order a new trial or vacate the order denying her habeas petition and remand for an evidentiary hearing.

Respectfully Submitted,

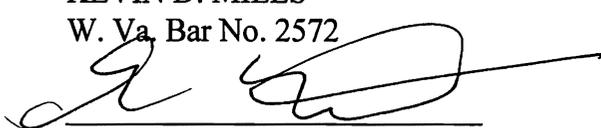
MONICA BOGGS, PETITIONER  
By Counsel



---

KEVIN D. MILLS

W. Va. Bar No. 2572



---

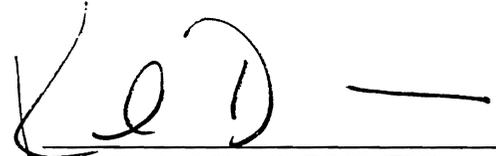
SHAWN R. MCDERMOTT

W. Va. Bar No. 11264

MillsMcDermott, PLLC  
1800 West King Street  
Martinsburg, WV 25401  
Phone: (304) 262-9300  
Fax: (304) 262-9310  
[phoupt@wvacriminaldefense.com](mailto:phoupt@wvacriminaldefense.com)

CERTIFICATE OF SERVICE

We, Kevin D. Mills and Shawn R. McDermott of MillsMcDermott Criminal Law Center do hereby certify that we have served an original and ten (10) copies of the attached PETITIONER'S REPLY 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 8<sup>th</sup> day of April, 2016 by Federal Express; one (1) copy upon Cheryl Saville, Assistant Prosecuting Attorney of Berkeley County by hand-delivering same to 380 W. South Street, Martinsburg, WV 25401 on this the 11<sup>th</sup> day of April, 2016.

  
\_\_\_\_\_  
KEVIN D. MILLS, ESQUIRE

  
\_\_\_\_\_  
SHAWN R. MCDERMOTT, ESQUIRE