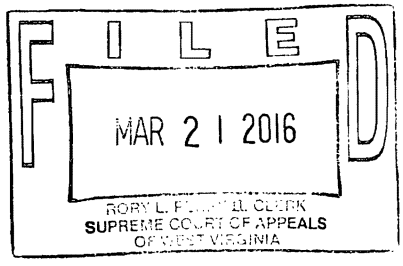
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



MONICA BOGGS,

Petitioner Below, Petitioner,

v.

LORI NOHE, Warden
Lakin Correctional Center,

Respondent Below, Respondent.

DOCKET NO.: 15-1001
(Berkeley County Case No.: 13-C-321)

RESPONDENT STATE OF WEST VIRGINIA'S BRIEF

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PETITIONER'S ASSIGNMENTS OF ERROR

I. WHETHER THE CIRCUIT COURT COMMITTED ERROR BY DENYING THE PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS WITHOUT CONDUCTING AN EVIDENTIARY HEARING?

II. WHETHER THE CIRCUIT COURT COMMITTED ERROR BY DENYING THE PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS ON THE ISSUE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL?

A. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE VOLUNTARINESS OF THE PETITIONER'S STATEMENTS?

B. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN HIS HANDLING OF THE STATE'S EXPERT WITNESS AND FOR FAILING TO RETAIN HIS OWN EXPERT WITNESS?

C. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO STRIKE A JUROR OR CONDUCT ADDITIONAL VOIR DIRE ON SAID JUROR?

D. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S CLOSING ARGUMENT?

E. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN ARGUING FOR JURY INSTRUCTIONS?

F. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A CONTINUANCE BASED UPON HIS SCHEDULE?

STATEMENT OF THE CASE

The Petitioner was indicted for three (3) felony offenses: Death of a Child by a Parent, in violation of **W. Va. Code** § 61-8D-2a(a); Child Abuse Causing Bodily Injury, in violation of **W. Va. Code** § 61-8D-3(a); and Gross Child Neglect Causing Substantial Risk of Serious Bodily Injury, in violation of **W. Va. Code** § 61-8D-4(e). [Appendix Record, hereinafter referred to as AR, 1-2.] These charges arose out of a series of incidents wherein the Petitioner threw a bottle at her seven-month-old son, which struck him in the face leaving a bruise under the infant's eye; threw her infant son overhanded into his crib on top of a toy piano, causing massive and ultimately fatal head injuries to the child; and failed to seek any medical treatment

for her son's injuries following her infliction of the head trauma.

On September 3, 2009, following a three-day trial, the jury found the Petitioner guilty of all three felony counts, and the trial court thereupon ordered and adjudged the Petitioner convicted of Death of a Child by a Parent, Child Abuse Causing Bodily Injury and Gross Child Neglect Causing Substantial Risk of Serious Bodily Injury. [AR, 812-816.]

Following the completion of both a presentence investigation report and a diagnostic evaluation at Lakin Correctional Center and after the evidence and argument at the sentencing hearing, the trial court sentenced the Petitioner to a determinate term of forty (40) years of incarceration for her conviction of Death of a Child by a Parent, the statutory term of not less than one (1) nor more than five (5) years of incarceration for her conviction of Child Abuse Causing Bodily Injury, and the statutory term of not less than one (1) nor more than five (5) years of Gross Child Neglect Causing Substantial Risk of Serious Bodily Injury. Those sentences were ordered to run consecutively. [AR, 838-907, 908-911.]

The Petitioner filed a timely Notice of Intent to Appeal through her newly retained counsel on or about June 29, 2010. The Petitioner perfected her Petition for Appeal, which was fully responded to in a timely manner by the State. The West Virginia Supreme Court of Appeals issued a Memorandum Decision and subsequent Mandate affirming the Petitioner's conviction and sentence. [AR, 1197-1201.]

On or about April 26, 2013, the Petitioner filed a verified Petition for Writ of Habeas Corpus and Losh list. [AR, 922-996.] The lower court held at status hearing on June 3, 2013, and directed the Respondent to file a full and complete response to said Petition. [AR, 998-999.] On or about September 3, 2013, the Respondent filed a timely Return to and Motion to Dismiss

the petition herein. [AR, 1000-1042.]

Thereafter, the Petitioner sought an evidentiary hearing on the issue of ineffective assistance of counsel, conceding that the other issues raised in the Petition were legal issues and/or capable of being decided upon a review of the record. The Petitioner, however, wished to continue all proceedings so that potential expert witnesses could be consulted in support of Petitioner's claims. Respondent objected to the holding of an evidentiary hearing, stating that there was sufficient evidence present in the record to dispose of all of the Petitioner's claims. [AR, 1043-1076.] Following the disclosure of the Petitioner's proposed expert witness and the report of that expert and following the filing of briefs from the parties concerning the admissibility of said testimony and report, the parties entered into a stipulation whereby the court would consider Dr. Hauda's report in assessing the Petitioner's claims without the necessity of taking testimony from Dr. Hauda. [AR, 1077-1110.]

Thereafter, the Petitioner orally moved the lower court for an evidentiary hearing for the purpose of taking testimony from the arresting officer in the underlying felony case regarding the voluntariness of the Petitioner's statement. The Respondent objected to the holding of a hearing for this purpose, stating that the voluntariness of the Petitioner's statement to officers in the underlying felony case had been explored and could be readily determined from the record of that case. [AR, 1111-1125.] The lower court agreed with the Respondent, and, upon consideration of the record of the underlying proceeding as well as the admission of the Petitioner's medical expert's report, the lower court entered a final order denying the Petitioner's writ. [AR, 1126-1168.] It is from that final order that the Petitioner appeals.

SUMMARY OF ARGUMENT

The circuit court did not commit error by denying the Petitioner's Petition for Writ of Habeas Corpus without an evidentiary hearing since the petition, affidavits, exhibits, records, and other documentary evidence demonstrate that the petitioner is not entitled to relief on any ground alleged, including the alleged grounds under ineffective assistance of counsel.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State avers that none of the issues presented are of first impression to the Court, there existing decided authority as precedent to the dispositive issues; that the facts and legal arguments are adequately presented in the briefs and record on appeal; and that the decisional process would not be significantly aided by oral argument. As such, oral argument would be unnecessary in this matter pursuant to Rule 18. If, however, this Court were to find oral argument necessary, the State believes argument pursuant to Rule 19 would be appropriate.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED THE PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

A. Standard of Review

In reviewing the findings of fact made by a circuit court in a habeas corpus proceeding, the Court applies the following standard:

> "Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reverse on appeal by this Court unless such findings are clearly wrong." Syl. Pt. 1, State ex rel. Postelwaite v. Bechtold, 158 W.Va. 479, 212 S.E.2d 69 (1975).

Syl. Pt. 1, State ex rel. Hatcher v. McBride, 221 W.Va. 760, 656 S.E.2d 789 (2007).

The general standard for reviewing circuit court decisions, applicable to this case, is:

> "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).

B. Discussion

In this case, the lower court entered a final order denying the Petitioner's Writ of Habeas Corpus based upon the court's review of the petition, answer, affidavits, exhibits, and all other relevant documentary evidence without a full hearing. [AR, 1126-1168.]

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

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

W. Va. Code § 53-4A-7(a); *see also* **W. Va. Code** § 53-4A-3(a) and Perdue v. Coiner, 156 W.Va. 467, 469-470, 194 S.E.2d 657, 659 (1979). Furthermore, **W. Va. Code** § 53-4A-1, *et seq.*,

"contemplates the exercise of discretion by the court", authorizing even the denial of a writ without hearing or the appointment of counsel. Perdue v. Coiner, *supra*. When denying or granting relief in a habeas corpus proceeding, the reviewing court must make specific findings of fact and conclusions of law relating to each contention raised by the petitioner. State ex rel. Watson v. Hill, 200 W. Va. 201, 488 S.E.2d 476 (1997).

The Petitioner argues that the court should have held an evidentiary hearing on the issue of ineffective assistance of counsel with regard to the voluntariness of the Petitioner's statements. The Petitioner states that the record demonstrates "coercive police tactics" and an "unusually susceptible, gullible, and suggestible defendant." However, the court clearly determined otherwise from a plain reading of the record. The officers who took the Petitioner's statements testified at trial as to the entirety of the circumstances surrounding their conversations with the Petitioner. Furthermore, the Petitioner's recorded statement was admitted into evidence and played for the jury, allowing both them and the court to independently assess the interaction between the officers and the Petitioner. Lastly, the Petitioner hired a psychologist who opined, in part, concerning her mental state at the time of the giving of her statements and who indicated that her statements were freely, knowingly, and voluntarily given.

The Petitioner states that if the court had held a hearing, she would have called trial counsel, Troopers Boober and Bowman, Sgt. Pansch, and Dr. Lewis as witnesses as well as the Petitioner herself. However, Troopers Boober and Bowman, Sgt. Pansch, and Dr. Lewis all testified at trial and the court had their testimony available to it for review. [AR, 354-381, 476-496, 497-530, 684-704.] Furthermore, trial counsel explained to the court in detail at the pre-trial hearing why the Petitioner was not mounting a challenge as to the voluntariness of her statements

given their review of the evidence and investigation of the case, which included a full psychological assessment of the Petitioner and her then-existing state of mind. [AR, 1174-1176.] In other words, there was no utility in the lower court having a hearing to retake testimony that has already been given and preserved in the record below.

The lower court included in its order specific findings of fact and conclusions of law with regard to each of the allegations of error by the Petitioner including citations to the underlying record supporting the court's rulings and findings as to why an evidentiary hearing was unnecessary. [AR, 1126-1168.] The lower court determined with specificity and with regard to every claim that the Petitioner is entitled to no relief or that the contentions have been previously adjudicated or waived. **W. Va. Code** § 53-4A-3(a), -7(a); State ex rel. Markley v. Coleman, 215 W.Va. 729, 601 S.E.2d 49, 54 (2004); Perdue v. Coiner, 156 W.Va. 467, 469-470, 194 S.E.2d 657, 659 (1979). As such, the court is mandated pursuant to **W.Va. Code** § 53-4A-7(a), to enter an order denying the relief sought, and the court properly did so. The court committed no abuse of discretion, and the Petitioner is entitled to no relief on this claim. Mathena v. Haines, *supra.*

II. THE CIRCUIT COURT PROPERLY DENIED THE PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS ON HER ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

This Court has thoroughly discussed the standards of review for claims of ineffective assistance of counsel.

> "An ineffective assistance of counsel claim presents a mixed question of law and fact; we review "the circuit court's findings of historical fact for clear error and its legal conclusions *de novo.* This means that we review the ultimate legal claim of ineffective assistance of counsel *de novo* and the circuit court's findings of

underlying predicate facts more deferentially. State ex rel. Daniel v. Legursky, 195 W.Va. 314, 320, 465 S.E.2d 416, 422 (1995.)"

Syl. Pt. 1, State ex rel. Vernatter v. Warden, 207 W.Va. 11, 528 S.E.2d 207 (1999).

This Court reiterated the standards necessary to prove ineffective assistance of counsel:

> "1. 'In West Virginia Courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.' Syl. Pt. 5, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).
>
> "2. 'In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.' Syl. Pt. 6, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).
>
> "3. 'Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused.' Syl. Pt. 21, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).
>
> "4. 'One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, one must prove the allegation by a preponderance of the evidence.' Syl. Pt. 22, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974)."

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

B. Discussion

The Petitioner specifically cites error with the lower court's denial of six claims of ineffective assistance of counsel alleged by the Petitioner. However, the Petitioner fails to meet the standard necessary to prove ineffective assistance claims pursuant to Strickland v. Washington, *supra.*, State v. Miller, *supra.*, State ex rel. Kitchen v. Painter, *supra.* for each allegation.

1. Petitioner's Statements

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

The Petitioner's statements were non-custodial, she was still Mirandized and made a written waiver of her Miranda rights, the final two statements were recorded so the interactions between the Petitioner and officers were memorialized in real time, **and** she was evaluated by an expert whom she hired who concluded that the Petitioner's statements were knowingly and voluntarily made taking into consideration her mental health and state of mind at the time of the giving of the statements. The Petitioner cites precedent of this Court outlining that a defense's counsel's failure to make a suppression motion regarding a statement *may* rise to the level of ineffective assistance when there has been a failure to investigate the circumstances regarding the statement. *See* State ex rel. Strogen v. Trent, 196 W.Va. 148, 469 S.E.2d 7 (1996). However, the Petitioner fails to cite any of the Court's precedent indicating that there is no ineffective assistance of counsel for failing to make a motion to suppress a defendant's statement where

there was clearly an investigation, which disclosed no grounds upon which to make such a motion. *See* State ex rel. Levitt v. Bordenkircher, 176 W.Va. 162, 342 S.E.2d 127 (1986).

Clearly in this case, trial counsel conducted a thorough investigation regarding the circumstances surrounding the Petitioner's statements. There are written and recorded memorializations of the statements. Although the Petitioner was not in custody, there were executed Miranda waiver forms reviewed and completed with the Petitioner. Trial counsel even went so far as to hire a forensic psychologist to evaluate the Petitioner regarding not only her competence and criminal responsibility, but also to insure that the Petitioner's statements were given freely, knowingly, and voluntarily taking into consideration her age, state of mind, and other factors present during the times of the taking of her statements. The psychologist testified that while the Petitioner was certainly under stress considering the death of her child, she was able to understand her rights and what was being asked of her, and she spoke with the officers freely and voluntarily. [AR, 684-704.] Based upon trial counsel's investigation, there were no grounds upon which to make a suppression motion. State ex rel. Levitt v. Bordenkircher, *supra.* Based upon the above factors, the Petitioner fails to demonstrate that trial counsel was objectively unreasonable for failing to file a frivolous motion. State v. Miller, *supra.*, Strickland v. Washington, *supra.*, State ex rel. Kitchen v. Painter, *supra.*

It follows logically, therefore, that trial counsel was not ineffective for failing to request a Vance instruction be given to the jury. Such an instruction is to be given at the request of counsel where a confession or admission is objected to by the defendant at trial or prior to trial on the grounds of voluntariness. Syl. Pt. 5, State v. Vance, 162 W.Va. 467, 250S.E.2d 146

(1978). Since trial counsel had no grounds upon which to challenge the statements or to object to their admission at trial following a proper foundation, there was no error in this regard.[1]

Furthermore, the officers who took statements from the Petitioner testified during the course of the trial concerning the circumstances surrounding their non-custodial discussions with the Petitioner, the fact that Sgt. Boober took the extra step of Mirandizing the Petitioner even though he was not legally obligated to at the time, and the demeanor of the Petitioner during questioning. [AR, 354-381, 476-496, 497-530.] These officers were subject to cross examination by trial counsel. [Id.] The actual recorded statements, which included the reading of the Petitioner her rights and her waiver of those rights, were also played for the jury. [Id.] Finally, among the opinions the Petitioner asked her expert witness to give was an opinion regarding the voluntariness of her statements, and Dr. Lewis testified that they were freely, knowingly, and voluntarily given. [AR, 684-704.] The record made below with regard to the Petitioner's statements was and is sufficient for the lower court's determination that had a suppression hearing been demanded and held regarding the statements of the Petitioner, the statements would have been found to be admissible. Therefore, there is no reasonable probability that the outcome would have been different had a full suppression hearing been held and an additional instruction been given to the jury. State v. Miller, *supra.*, Strickland v. Washington, *supra.*, State ex rel. Kitchen v. Painter, *supra.*

2. Expert Testimony

The true crux of the Petitioner's argument with regard to expert testimony is that trial counsel was ineffective for failing to hire an additional expert witness to combat the testimony of

[1] This Court has already found that the trial court did not err in failing to sua sponte hold a suppression hearing with regard to the Petitioner's statements or in failing to sua sponte give a Vance instruction to the jury. [AR, 1198-1199.]

the medical examiner, Dr. Martina Schmidt, who performed the autopsy on the infant. In support of that argument, the Petitioner presented the report of Dr. William Hauda who reviewed the materials in the underlying felony and the trial testimony of Dr. Schmidt. The parties in the underlying habeas action entered into a stipulation that the court consider Dr. Hauda's report for the purposes of assessing whether the Petitioner was entitled to relief on this claim. [AR, 1101-1110.]

First, the Petitioner argues that defense counsel did not make a strong enough objection to the questioning of the medical examiner and classifies his objection as merely one of "form and not substance." However, this Court considered the allegations of error concerning the questioning of the medical examiner on direct appeal and determined, as the lower court determined, that the State's line of questioning of the expert was within the scope of the witness's expertise to the extent she answered the questions and within the scope of the expert witness designation that had been filed by the State noticing the general content of the witness's anticipated opinion. [AR, 1199.]

Furthermore, Petitioner's trial counsel did object to the line of questioning of the State concerning what amount of force it would take to break an infant's skull. [AR, 420-421.] However, the State clearly provided notice that Dr. Schmidt would testify about the contents and photographs of her autopsy findings and may testify about the difference between adult and child bone structure in the skull. [AR, 1199.] As such, the Court overruled that objection.

When asked by the State if she had any idea how much force it would take to break an infant's skull, Dr. Schmidt testified, "No, I can't testify to how much force was used." When asked if it would take more force to break a child's skull bone or an adult's, she responded that,

in her opinion, it would take more force to break a child's. She reiterated thereafter that she did not know how much force it would take. [AR, 420-469.] Dr. Schmidt never testified about how much force it would take to break a either a child's or an adult's skull because, as she candidly admitted, she did not know.

The Petitioner's expert, Dr. Hauda, who was retained for the purposes of the habeas case, states that it is his opinion that it takes more force to fracture an adult skull than that of an infant and states that Dr. Schmidt's opinion fails to take into consideration the complexity of the skull under stress. [AR, 1105-1106.] Dr. Hauda also does not offer an opinion as to how much force it would take to break either an infant or adult skull. [AR, 1102-1110.]

Also in his report, Dr. Hauda offers that falls from being seated on the floor would not be expected to have enough force for this type of injury. [AR, 1108.] He then offers that "skull fractures may occur...with falls from a caregiver's arms, particularly if the fall occurs during movement of the caregiver imparting additional velocity to the infant." [Id.] This opinion does not materially differ from that of Dr. Schmidt. Dr. Schmidt testifies that an infant could generate enough force on his own to cause a skull fracture if he fell from "a great height" but states it is unlikely that he would have caused such an injury on his own from merely crawling around or bumping into a wall. [AR, 460, 464.] Dr. Schmidt, like Dr. Hauda, states that the skull fracture would have required some force, but neither doctor discusses the degree or amount of force that would be required. [AR, 469.]

Dr. Schmidt further conceded, as Dr. Hauda states in his report, that although Dr. Schmidt indicated in her autopsy report that there were two blows to the back of the infant's head based upon the two contusions present, the fracture could have been caused by a single

blow given the explanation of the toy piano. Dr. Schmidt indicated that she did not have information concerning the toy piano in performing the autopsy or issuing her report but stated that a single blow on such an object could be consistent with the two contusions and fracture present. [AR, 445-447, 465-466.]

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

Trial counsel was able to get Dr. Schmidt to concede that the injuries to the child were consistent with the Petitioner's explanation thereof. [AR, 445-447, 465-466.] Trial counsel was also able to get Dr. Schmidt to agree that typical symptoms exhibited by an infant with a subdural hemorrhage would be similar to ordinary symptoms exhibited by an infant with a cold and/or an infant who is teething. [AR, 448-456, 467-468.]

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

her intentions.

Defense counsel's cross examination of the expert witness was wholly competent and allowed him to argue the Petitioner's position that the injuries to her child were not inflicted with malicious intent. Strickland v. Washington, *supra.*; State v. Miller, *supra.*, State v. Thomas, *supra,*. State ex rel. Kitchen v. Painter, *supra.* Based upon the above, the Petitioner fails to show that her counsel's performance fell below an objective standard of reasonableness. Strickland v. Washington, *supra.*; State v. Miller, *supra.*, State v. Thomas, *supra,*. State ex rel. Kitchen v. Painter, *supra.*

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

3. Juror

The Petitioner alleges that counsel was ineffective for failing to strike or conduct more thorough voir dire of a juror.

At the beginning of day two of the jury trial, a juror had taken the bailiff aside and reported that after Petitioner's counsel had shown a scrapbook to the jury that the Petitioner had kept of her son's life, the juror recognized a photograph of the biological father of the deceased child as someone she knew growing up. The juror had reported to the bailiff that it would not affect her ability to be an impartial juror, but the juror did not want to hide this from the Court. [AR, 391-394.] The Court addressed the parties with the issue. The Petitioner was present. Both parties decided to rely on prior individual voir dire of this juror, did not believe that it

would affect the outcome of the trial, and did not believe that further voir dire would be necessary. The Petitioner's counsel confirmed to the Court that he had fully discussed the issue with the Petitioner and that the Petitioner had no objection to the continued service of this juror. [Id.]

The Petitioner cites a long litany of case law concerning the meaning of juror bias and the obvious importance of securing an impartial jury. However, the Petitioner makes no real argument as to how this juror could have been biased or prejudiced for or against the Petitioner. The record in the case demonstrates that the infant's biological father had not been involved in the child's life at all. He was not around the child and had no contact with the child. He was, therefore, never a suspect in the case and was not even so much as a potential witness in the case. The only way his identity was even disclosed was through the presentation of a scrapbook the Petitioner had begun for her son, which contained a picture of the biological father. In practical terms, the infant's biological father had no relevance to the case whatsoever.

Considering the above, the fact that the parties had conducted individual voir dire of this juror prior to trial, and the juror's statements that she could and would continue to be fair and impartial in hearing and deciding the facts of the case, the Petitioner agreed to proceed with this juror on the panel. [AR, 94-101, 391-394.] Trial counsel indicated that he had discussed the issue and all of the options with the Petitioner and that it was their desire to continue with the trial. [AR, 391-394.]

Additionally, deference is accorded to the trial court in jury selection because "[t]he trial court is in the best position to judge the sincerity of a juror's pledge to abide by the court's instructions; therefore, its assessment is entitled to great weight." State v. Miller, 197 W.Va.

558, 606, 476 S.E.2d 535, 553 (1996), *citing* State v. Phillips, 194 W. Va. 569, 590, 461 S.E.2d 75, 96 (1995) ("[g]iving deference to the trial court's determination, because it was able to observe the prospective jurors' demeanor and assess their credibility, it would be most difficult for us to state conclusively on this record that the trial court abused its discretion"). The trial court, having been able to judge the juror's demeanor during the previous day's voir dire and during the trial proceedings, likewise foresaw no legal reason to remove this juror.

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

4. Closing Argument

The Petitioner erroneously states that it was ineffective assistance of counsel for trial counsel not to have objected to the State's use of a photograph of the infant that had been admitted into evidence during closing arguments. The Petitioner states that the use of that photograph in closing violated Rule 403 of the West Virginia Rules of Evidence, as it was overly prejudicial to the Petitioner.

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

It was wholly appropriate for the State to refer in its closing to the evidence that was admitted at trial. This Honorable Court holds that:

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

Smith v. Andreini, 223 W.Va. 605, 678 S.E.2d 858, 869 (2009). References in closing arguments to evidence admitted at trial do not constitute error. *See* State v. Gilman, 226 W.Va. 453, 702 S.E.2d 276 (2010).

Elements of the offense of Death of a Child by a Parent, **W. Va. Code** § 61-8D-2a(a) [1] include malice and intent to inflict "physical pain, illness or any impairment of physical condition by other than accidental means." In its closing, the State referenced photos that were admitted into evidence of the child's skull fracture to demonstrate to the jury by the severity of the child's injuries and the malice and intent of the Petitioner to inflict physical pain and physical impairment on the child, the child's injuries and the malice and intent of the Petitioner to inflict physical pain and physical impairment on the child.

In support of Count Three, charging Gross Child Neglect Causing Substantial Risk of

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

Serious Bodily Injury, in violation of **W. Va. Code** § 61-8D-4(e)[2], the State also had to demonstrate the element of "gross neglect" by the Petitioner for not seeking medical attention for the injuries she inflicted upon her child. Simple neglect is defined as "the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health." **W. Va. Code** § 61-8D-1(6). Reference in the State's closing to the severity of the child's injuries were wholly germane to establishing the elevated element of "gross" neglect of the child.

The State clearly used the photograph, which had been properly admitted into evidence during trial, to demonstrate the necessary elements of the offences charged. Therefore, trial counsel's failure to object was wholly proper. Furthermore, this Court considered this exact issue regarding the State's use of said photograph in closing argument on direct appeal and found that use of the photograph was proper using a **W.V.R.E.** 403 analysis.[3] [AR, 1200-1201.]

Since the use of photograph was not error, trial counsel's failure to object to it was not ineffective.

5. Jury Instructions and Intent

Despite the allegations of the Petitioner, the record demonstrates that trial counsel never waived the right to argue that a more appropriate finding for the jury to make would be one of

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

[3] The State would further note that **W.V.R.E.** 403 applies to the admission of evidence. Closing arguments are not evidence. *See* Perrine v. E.I. du Pont de Nemours and Co., 225 W.Va. 482, 694 S.E.2d 815 (2010).

neglect nor did trial counsel leave the Petitioner without any theory of defense to present to the jury.

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

After briefing and extensive argument on the issue of whether or not Child Neglect Resulting in Death was a lesser included offense of Death by a Child by a Parent, the Court made detailed findings of fact and conclusions of law denying the Petitioner's instruction, finding first that Child Neglect by a Parent Resulting in Death was not a lesser included offense of Death of a Child by a Parent as charged in Count One. Further, the Court also found based upon the evidence adduced at trial that there was no factual basis for an instruction on neglect. [AR, 721-728, 735-749.]

Petitioner implies that the sole theory of her case below was that she was merely neglectful; however, the evidence adduced at trial made it clear that the Petitioner stated that she threw or tossed the baby and not that the baby, for lack of a better example, merely slipped out of her grasp. The evidence established that the Petitioner clearly meant to throw the baby, so it was unquestionably an "intentional" act in that sense. The issue was what her state of mind- her *specific intent*- was at the time. Hence, her trial counsel argued that her actions were not malicious or done with the intent to harm the child in any way, which was the most objectively

reasonable argument he could have made under the circumstances. [AR, 777-796.] Counsel clearly did everything he could to advance Petitioner's theory of the case by arguing for the jury instructions on neglect and by hiring an expert witness to testify as to the Petitioner's lack of intent.

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

6. Continuance

The Petitioner makes a blanket statement that because trial counsel had concluded a jury trial the week prior to the beginning of the Petitioner's trial that he was not allowed an adequate time to prepare a defense for the Petitioner and should have moved for a continuance on that basis. However, there is no factual support pointed to by the Petitioner to show that trial counsel was not adequately prepared. As noted above, specificity is required in habeas pleadings. **W. Va. Code** § 53-4A-2; *see also* Syl. Pt. 2, State ex rel. Scott v. Boles, 150 W. Va. 453, 147 S.E.2d 486 (1966); State ex rel. Massey v. Boles, 149 W. Va. 292, 140 S.E.2d 608 (1965); Syl. Pt. 1, State ex rel. Ashworth v. Boles, 148 W. Va. 13, 132 S.E.2d 634 (1963). Because the Petitioner fails to cite any party of the record below in support of this allegation, the Court should refuse relief on that basis alone.

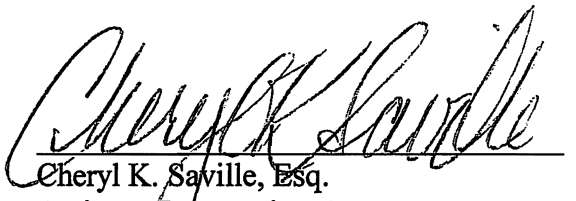
Furthermore, trial lawyers, especially quality trial lawyers with the upstanding reputation of the Petitioner's trial lawyer, try cases often. Because of the busy dockets of the courts, sometimes trials fall back to back without a great deal of time in between. Trial counsel in the Petitioner's case had been retained and had represented the Petitioner since the inception of her case in August of 2008. The case went to trial in September of 2009, over a year later after the death of the child. There had been numerous hearings in the case. Trial had already been scheduled and rescheduled previously. Trial counsel was abundantly familiar with the facts and nuances of the Petitioner's case by the time the matter came on for trial. The fact that defense counsel had just finished a jury trial at the start of the Petitioner's jury trial does not mean that defense counsel was unprepared or ineffective.

In sum, the record clearly demonstrates that the performance of counsel throughout the case was objectively reasonable, and the Petitioner has failed to allege or show that there is a reasonable probability that, but for any errors of counsel, the result of the proceedings would have been different. Strickland v. Washington, *supra*; State v. Miller, *supra.*; State v. Thomas, *supra.*; State ex rel. Kitchen v. Painter, *supra*. Based thereon, the State asks this Court to uphold the lower court's denial of relief on these grounds. The Petitioner is entitled to no relief on this claim. State ex rel. Vernatter v. Warden, *supra*.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to affirm the rulings of the circuit court and deny the petition for appeal.

Respectfully submitted,
State of West Virginia,



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CERTIFICATE OF SERVICE

I, Cheryl K. Saville, Assistant Prosecuting Attorney, hereby certify that I have served a true and accurate copy of the foregoing Respondent State of West Virginia's Brief by mailing of the same, United States Mail, postage paid to the following on this 18th day of March, 2016:

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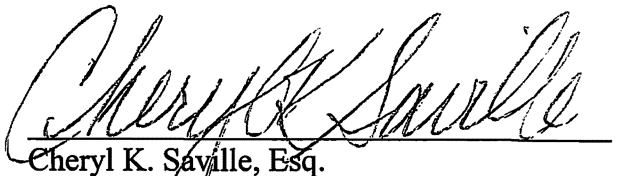

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