No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Larry Hayes,

Petitioner,

v.

Marvin Plumley,

Respondent

Appendix to Petition for Writ of Certiorari

Thomas V. Burch
Counsel of Record
Appellate Litigation Clinic
University of Georgia School of Law
225 Herty Drive
Athens, Georgia 30602
tvburch@uga.edu
(706) 542-5236

Table of Contents of Appendix to Petition for Certiorari

Table of Contents of Appendix to Petition for Certiorari

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-7537

LARRY HAYES,

Petitioner - Appellant,

v.

MARVIN PLUMLEY,

Respondent - Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Thomas E. Johnston, Chief District Judge. (2:15-cv-15636)

Argued: May 8, 2018 Decided: July 3, 2018

Before KING, AGEE, and HARRIS, Circuit Judges.

Affirmed by unpublished opinion. Judge Harris wrote the opinion, in which Judge King and Judge Agee joined.

ARGUED: Ryan Swindall, UNIVERSITY OF GEORGIA SCHOOL OF LAW, Athens, Georgia, for Appellant. Zachary Aaron Viglianco, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellee. **ON BRIEF:** Thomas V. Burch, Taryn P. Winston, Third-Year Law Student, Appellate Litigation Clinic, UNIVERSITY OF GEORGIA SCHOOL OF LAW, Athens, Georgia, for Appellant. Patrick Morrisey, Attorney General, Shannon Frederick Kiser, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA,

Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PAMELA HARRIS, Circuit Judge:

Larry Hayes is serving a 40-year prison term in West Virginia for child abuse by a parent, guardian, or custodian resulting in death. A jury convicted Hayes after his girlfriend's 18-month-old daughter fell unconscious while under his care and died several days later. Hayes seeks federal habeas corpus relief under 28 U.S.C. § 2254 on two grounds. First, he claims that he was convicted on the basis of an involuntary statement to law enforcement, in violation of due process. Second, he argues that his trial attorney was ineffective for failing to cross-examine the State's medical expert as to whether he had completed a nationally accredited fellowship in forensic pathology, as required by state statute for employees of the coroner who perform autopsies. The district court declined to grant relief, but certified these issues for appeal. We find no error in the district court's judgment dismissing the petition, and thus affirm.

I.

A.

On September 30, 2010, Hayes was babysitting his girlfriend's 18-month-old daughter, R.M., while his girlfriend, Meredith Bush, was at work. Although the child had been her usual self that morning, by the time Hayes arrived to pick Bush up from work, R.M. was slumped over in her car seat and unresponsive. The child was taken by EMTs to the hospital, where she was placed on a ventilator and eventually declared brain dead due to a skull fracture. R.M. was then removed from the ventilator, and died shortly thereafter.

On October 4, 2010, the day after R.M.'s death, Hayes was taken to the police station, where he signed a valid *Miranda* waiver before being interviewed by detectives in the station's kitchen. At first, Hayes denied any knowledge of what happened to the child on the day of her death. The only incident of which he was aware, he told the detectives, was a fall from a bottom step several days before the events of September 30. The detectives repeatedly questioned that account, and after approximately 90 minutes, Hayes changed his story, now claiming that R.M.'s injuries were the result of an accident on September 30, when he fell down the stairs while holding the child and then landed on top of her.

Hayes was indicted for child abuse by a parent, guardian, or custodian resulting in death, *see* W. Va. Code § 61-8D-2a (2010), and tried before the Kanawha County Circuit Court. Hayes objected to admission of his statement about the alleged accident on September 30, arguing that it was involuntary and thus inadmissible under the Due Process Clause. After a two-day suppression hearing, the trial court rejected that claim, and Hayes's statement was admitted. The parties agreed, however, that the statement was not to be taken as true. Hayes's defense at trial was that an earlier injury to the child's head – perhaps sustained when she fell off a step the week before she fell unconscious – caused a posttraumatic seizure while Hayes was babysitting on September 30. The State introduced Hayes's statement to show that he had given a prior account inconsistent with that defense, and argued that R.M.'s injuries were not caused by an accidental fall of any kind but instead by child abuse at Hayes's hands on September 30.

Both parties proffered testimony in support of their theories. The State called R.M.'s mother, Meredith Bush, who testified that her daughter had been happy and well on the morning of September 30, when Bush went to work. Bush corroborated Hayes's claim that R.M. had fallen from the bottom step of the stairs in her home on September 24, about a week before losing consciousness. But according to Bush, R.M. had fallen backward, not onto her head, and had shown no signs of a head injury at the time or in the days leading up to September 30.

The State also called Dr. Allen Mock, then employed as a deputy at the West Virginia Office of the Chief Medical Examiner. Mock testified that R.M.'s autopsy, which he performed, revealed multiple bruises on the child's scalp and a swollen and hemorrhaging brain. Mock focused on a five-inch skull fracture with, he opined, no evidence of healing. According to Mock, it would have taken significant force, typical of a "high energy motor vehicle accident," to cause the wound. The September 24 fall from a step on which Hayes was relying, he explained, would have been unlikely to produce that level of damage. And because the fracture did not show signs of healing, it likely would have occurred nearer in time to the September 30 hospital admission. In Mock's opinion, R.M.'s death was caused by blunt force injuries to the head sustained on September 30 as a result of child abuse.

The State also presented testimony from Dr. Manuel Caceres, the pediatrician who cared for R.M. when she was admitted to the hospital, recognized by the trial court as an expert in pediatric intensive care. Caceres agreed with Mock that R.M.'s injuries were too severe to have been caused by an accidental fall, whether from the first step (Hayes's

trial theory) or while being held in Hayes's arms (as per his statement to the detectives). Like Mock, he believed that R.M.'s fracture was sufficiently acute when examined that it must have been sustained more recently than September 24. And, Caceres opined, the defense theory that R.M.'s death could have been a delayed reaction to the September 24 fall was inconsistent with the medical evidence: A fracture of the magnitude of R.M.'s would have been accompanied by immediate symptoms such as vomiting or headaches, and R.M.'s brain exhibited swelling that likely could not have been caused by the defense's hypothesized posttraumatic seizure.

The defense called as its expert Dr. Thomas Young, a board-certified pathologist. Young's view was that the fall on September 24 fractured R.M.'s skull but did not harm her brain, so that the child showed no signs of brain injury. Then, on September 30, R.M. suffered a posttraumatic seizure that stopped her breathing and ultimately caused her death. Unlike the State's experts, Young opined that R.M.'s fracture did show signs of healing by September 30, consistent with the theory that it was caused by a fall several days earlier.

After evaluating this competing testimony, the jury returned a guilty verdict and the trial court sentenced Hayes to 40 years in prison, followed by ten years of supervised release. The Supreme Court of Appeals of West Virginia affirmed the conviction.

B.

Hayes sought state post-conviction relief, raising multiple claims of ineffective assistance of counsel. As relevant here, Hayes argued that his trial lawyer was ineffective in opposing admission of his statement to the detectives, failing to call Hayes as a witness

or to cite the most relevant precedent in support of suppression. He also contended that his lawyer failed to meaningfully cross-examine Dr. Mock as to whether he met state-law qualifications for employment to conduct autopsies in the Office of the Chief Medical Examiner, or to investigate the issue independently.

The state post-conviction review ("PCR") court – once again, the Kanawha County Circuit Court – denied the petition. As to Hayes's first claim of ineffective assistance, the court found no deficient performance, given that counsel "zealously argued" the voluntariness question and the trial court was "clearly within its discretion to find that the statement was voluntary." J.A. 201. And even had there been deficient performance, the court concluded, Hayes could not show the necessary prejudice: Hayes's October 4 statement did not constitute a confession, and there was no "credible argument" that its exclusion likely would have changed the outcome of the trial. *Id.*

On Hayes's second ineffective-assistance claim, the court again found that Hayes had not established any deficiency in counsel's performance. Counsel "vigorously cross-examined" Mock as to his experience and credentials, the court determined, and offered a competing expert to refute Mock's opinions. *Id.* at 203. The court also found that Hayes had "fail[ed] to establish" that Mock actually was not qualified for employment to conduct autopsies under state law. *Id.* at 202. The state statute cited by Hayes, the court explained, allows the chief medical examiner to employ, for purposes of performing autopsies, a pathologist who either "holds board certification or board eligibility in forensic pathology" or "has completed an American Board of Pathology fellowship in

forensic pathology." *Id.* (quoting W. Va. Code § 61-12-10(a) (2010)).[1] Focusing on the second path to qualification, the court rested on Mock's testimony that he had served as a forensic pathology fellow in New Mexico. But it did not address whether that fellowship was accredited by the American Board of Pathology, as required by § 61-12-10(a), an issue on which the record appears to be silent.

The Supreme Court of Appeals of West Virginia affirmed the PCR court's decision to deny relief, adopting and incorporating its conclusions.

C.

Hayes filed a timely 28 U.S.C. § 2254 petition in federal district court. The petition set forth four grounds for relief, two of which are relevant here. First, Hayes asserted that the trial court's admission of his October 4 statement violated the Due Process Clause because the statement was coerced. Second, he reiterated his claim of ineffective assistance of counsel with respect to Mock's qualifications, arguing that his trial lawyer failed to investigate whether Mock met state-law requirements for performing autopsies as an employee of the chief medical examiner. The district court rejected both claims, granted the State's motion for summary judgment, and dismissed Hayes's petition.

[1] In relevant part, the statute provides that under certain circumstances, "an autopsy shall be conducted by the chief medical examiner or his or her designee, by a member of his staff, or by a competent pathologist designated and employed by the chief medical examiner under the provisions of this article. For this purpose, *the chief medical examiner may employ any county medical examiner who is a pathologist who holds board certification or board eligibility in forensic pathology or has completed an American Board of Pathology fellowship in forensic pathology to make the autopsies*[.]" W. Va. Code § 61-12-10(a) (2010) (emphasis added).

Before addressing the merits, the district court considered whether Hayes's due process claim had been exhausted and adjudicated on the merits at the state level. Hayes's claim that his October 4 statement was coerced and thus inadmissible under the Due Process Clause, the court concluded, was related to but distinct from the ineffective assistance claim he raised before the state PCR court, based on his counsel's failure to have the statement excluded. Accordingly, Hayes had not "fairly presented" his due process claim to the PCR court, and that court had "evaluated [the] coercion argument solely through the lens of ineffective assistance of counsel." J.A. 1930. Nevertheless, the district court chose to resolve the due process issue on the merits, explaining that "further consideration of [procedural] default is unwarranted where," as in Hayes's case, "the [c]ourt can more easily dispense with the claim on the merits." *Id.* at 1932 (citing *Yeatts v. Angelone*, 166 F.3d 255, 261 (4th Cir. 1999)).

Turning to the merits, the district court held that under the totality of the circumstances, *see Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), Hayes's October 4 statement was not involuntary under the Due Process Clause. The court's careful and thorough analysis began with the circumstances of the interview, which lasted for no more than two and a half hours, was conducted in the kitchen of the police station, and – critically – was preceded by a valid *Miranda* waiver executed by Hayes. The detectives repeatedly reminded Hayes that he was not under arrest, offered him breaks, and generally conducted themselves without "the slightest hint of threats or intimidation." J.A. 1938.

The detectives did make clear that they disbelieved Hayes's initial account, the district court recognized, calling him a liar and then presenting him with a different option: Instead of continuing to "feign ignorance" and being treated as a "remorseless killer," he could "confess to an accident resulting from a brief fit of rage or lapse in judgment and receive mercy." *Id.* at 1934. As the court acknowledged, "illusory promises of leniency may be sufficient to overbear the will" of a defendant and render a resulting statement involuntary. *Id.* at 1935. But here, no such promises were made: "[I]n [the] context of the entire interview transcript, it is plain that the detectives never promised or impliedly offered exoneration in exchange for a confession." *Id.* at 1936. Indeed, the detectives expressly told Hayes that his imminent arrest was "more than likely" regardless of his story, and Hayes signaled his understanding when he predicted that he would leave the station "in handcuffs." *Id.* at 1937. Rather, the detectives had "truthfully suggested the possibility of more lenient treatment" if Hayes had been involved in an accidental death, *id.* at 1936, and truthful statements about a suspect's legal prospects "are not the type of 'coercion' that threatens to render a statement involuntary," *id.* (quoting *United States v. Pelton*, 835 F.2d 1067, 1073 (4th Cir. 1987)).

The district court also rejected Hayes's argument that his counsel performed ineffectively by failing to raise an adequate challenge to Mock's qualifications. There was no dispute, the district court began, that Hayes's trial counsel had vigorously questioned Mock about his qualifications as well as his medical opinions, so the sole basis for Hayes's claim was the "factual question of whether . . . Mock was, in fact, qualified to perform autopsies on behalf of the State of West Virginia." J.A. 1941. And

that question boiled down to whether Mock had satisfied the second prong of § 61-12-10(a), by completing an "American Board of Pathology fellowship in forensic pathology." W. Va. Code § 61-12-10(a) (2010). Because the state PCR court had not addressed whether Mock's New Mexico fellowship was recognized by the American Board of Pathology, the district court reasoned, there was no factual finding on that question to which AEDPA deference was owed. *See Merzbacher v. Shearin*, 706 F.3d 356, 364 (4th Cir. 2013) (discussing deferential AEDPA review of state-court factual findings). Instead, the district court considered in the first instance whether Hayes was entitled to an evidentiary hearing into Mock's credentials.

Hayes was not entitled to a hearing, the district court held, because even assuming the facts he alleged were true – assuming, that is, that Mock's fellowship was not certified by the American Board of Pathology – he could not prevail on his ineffective assistance claim. The court assumed both that Mock did not meet the state's minimum employment qualifications and that Hayes's trial counsel had performed deficiently in failing to elicit that information at trial. Even so, the court held, Hayes's claim would fail because he could not show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). First, whether or not Mock's fellowship was Board-certified had only "limited implications" for Mock's credibility as a witness: Mock's hypothesized "failure to meet the employment qualifications for a particular office" did not render him "unfit to perform autopsies generally," J.A. 1949, and thus did "little to undermine the intrinsic validity of [his] autopsy findings," *id.* at 1950. And second, Mock's testimony was substantially corroborated by other trial evidence, including Dr. Caceres's testimony that

R.M.'s injury was both too severe and too fresh to have been sustained by her September 24 fall from the first step, and the testimony of R.M.'s mother that R.M.'s behavior after that fall was not consistent with that of a child who just had suffered a large skull fracture. Because there was no "reasonable probability" of a different trial outcome even if Mock were shown to fall short under § 61-12-10(a), the court concluded, Hayes had failed to allege facts that would entitle him to relief under *Strickland*'s prejudice prong and thus to an evidentiary hearing. *Id.* at 1952.

Though it dismissed his petition, the district court granted Hayes a certificate of appealability as to two issues: "first, the voluntariness of his October 4, 2010 statement to law enforcement, and second, the effectiveness of trial counsel in cross-examining Dr. Mock." *Id.* at 1959. This timely appeal followed.

II.

We review the district court's denial of habeas relief de novo. *Lee v. Clarke*, 781 F.3d 114, 122 (4th Cir. 2015). Our analysis is circumscribed, however, by the amendments to 28 U.S.C. § 2254 enacted by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, we may not grant relief on a claim that has been adjudicated on the merits in a state court proceeding unless, as relevant here, the state court's determination is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Thus, § 2254 relief is barred unless the petitioner can show that the state court applied a legal standard that is contrary to federal law as "clearly

established in the holdings of [the Supreme] Court," *Harrington v. Richter*, 562 U.S. 86, 100 (2011), or, having "identifie[d] the correct governing legal principle," applied that principle to the facts of the case in a way that is "objectively unreasonable," *Wiggins v. Smith*, 539 U.S. 510, 520, 521 (2003).

A.

We begin with Hayes's claim that his October 4 statement was involuntary, and that its admission by the state trial court therefore violated his due process rights. Although the district court began its analysis by considering whether Hayes properly presented that claim to the state PCR court – where Hayes alleged the involuntariness of his confession only in connection with an ineffective assistance claim, and not under the Due Process Clause – we need not resolve that issue here. Because the State expressly and unconditionally waived any exhaustion argument in its answer to Hayes's § 2254 petition,[2] we decline to address the issue of procedural default. *See Hedrick v. True*, 443 F.3d 342, 364 (4th Cir. 2006) (holding that exhaustion requirement is "technically met when exhaustion is unconditionally waived by the state"); *Yeatts v. Angelone*, 166 F.3d 255, 261 (4th Cir. 1999) (courts need not reach procedural default where not preserved by state). And whether or not the state PCR court adjudicated Hayes's due process claim on the merits, the state trial court assuredly did, admitting Hayes's statement at trial over the

[2] The State's answer includes a "Statement Regarding Exhaustion," which expressly avers that Hayes's claims – including his due process claim – "appear to be the same grounds previously adjudicated by both the circuit court and [the state supreme court] throughout his underlying habeas corpus proceedings," and, "[a]s such . . . are now ripe for review" by the district court under § 2254. J.A. 27.

defense's due process objection and after a two-day suppression hearing. Accordingly, our review is under AEDPA, limited to whether the state trial court unreasonably applied clearly established federal law in deeming Hayes's statement voluntary under the Due Process Clause.

A statement is involuntary for due process purposes only if "the defendant's will has been overborne or his capacity for self-determination critically impaired." *United States v. Umaña*, 750 F.3d 320, 344 (4th Cir. 2014) (quoting *United States v. Braxton*, 112 F.3d 777, 780 (4th Cir. 1997) (en banc)). In making that determination, we consider the totality of the surrounding circumstances, *Schneckloth*, 412 U.S. at 226, and ask whether the statement was "extracted by any sort of threats or violence," or by "direct or implied promises" or other "improper influence," *Braxton*, 112 F.3d at 780. Under that well-established standard, we find nothing "unreasonable" about the state trial court's voluntariness determination.

We cannot much improve on the district court's detailed analysis of Hayes's interrogation and statement, summarized above. As the district court explained, the circumstances of Hayes's questioning – relatively short in duration, conducted in a station-house kitchen, punctuated by frequent reminders that Hayes was not under arrest and offers of breaks – include no threats or violence, nor any indicia of the kind of "improper influence" that might overbear the will. On the contrary, and as the district court properly emphasized, Hayes's execution of a valid *Miranda* waiver is a strong indication that his subsequent statement was the product of his own voluntary effort to minimize his legal exposure. *See Missouri v. Seibert*, 542 U.S. 600, 608–09 (2004)

(noting that "litigation over voluntariness tends to end with the finding of a valid waiver"). And while the detectives certainly highlighted the potential benefits of accepting responsibility for an accidental death, they were careful not to cross the line into the kind of "illusory promises of leniency" that the district court recognized might render a statement involuntary. J.A. 1935. Under all of the relevant circumstances, the state court's voluntariness determination involved no unreasonable application of clearly established law.

B.

We turn next to Hayes's ineffective assistance claim regarding the cross-examination of Dr. Mock and, in particular, to his argument that he should have been afforded an evidentiary hearing to explore Mock's qualifications to perform autopsies as a State employee. The district court rejected the request for a hearing, holding that Hayes failed to allege facts that, if proven, would entitle him to relief on his claim of ineffective assistance of counsel. We agree with the district court.[3]

As the district court explained, Hayes is entitled to an evidentiary hearing only if he has alleged facts that, if true, would allow him to prevail on his ineffective assistance claim. *See Conaway v. Polk*, 453 F.3d 567, 588–90 (4th Cir. 2006). That claim, in turn, is evaluated under the familiar standard of *Strickland v. Washington*, 466 U.S. 688

[3] Accordingly, we need not consider whether the district court erred in failing to apply AEDPA deference on this issue, on the ground that the PCR court neglected to consider whether Mock's pathology fellowship was Board-accredited and thus could not find as a matter of fact that Mock was qualified for employment under the terms of § 61-12-10(a). Even if, as the district court assumed, Hayes was entitled to de novo review of his claim, we agree with the district court that he cannot prevail.

(1984), requiring that a petitioner show both constitutionally deficient performance by his lawyer and prejudice to his defense, *id.* at 690, 694, with prejudice defined as a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Harrington*, 562 U.S. at 104. An insufficient showing under either prong ends the inquiry, so when it can be ascertained that there is no prejudice, it is unnecessary to reach *Strickland*'s deficiency prong. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). Like the district court, we think that principle ends the inquiry here.

For present purposes, we will assume, as did the district court, that Mock's New Mexico fellowship was not accredited by the American Board of Pathology, so that he should not have been hired by the Office of the Chief Medical Examiner to perform autopsies under § 61-12-10(a). And we also will assume that Hayes's trial attorney, though he vigorously cross-examined Mock as to his credentials and medical opinions, fell "outside the wide range of professionally competent assistance," *id.* at 690, by failing to investigate and elicit testimony on this specific provision of state employment law. It nevertheless remains the case, as the district court held, that Hayes cannot prevail on his *Strickland* claim because he cannot show a "reasonable probability" that the outcome of his trial would have been different had the jury been informed that Mock did not meet the employment standards laid out in § 61-12-10(a).

First, as the district court explained, there is a significant gap between a finding that Mock was ineligible for employment to perform autopsies under § 61-12-10(a)

because his forensic pathology fellowship was not affiliated with the American Board of Pathology, on the one hand, and a finding that he was generally "unfit to perform autopsies," on the other. J.A. 1949. Nor did Hayes present any evidence to fill that gap by showing that the (presumed) nature of Mock's fellowship rendered him unqualified to conduct autopsies; on the contrary, the "trial transcript reveals that Dr. Mock was a well-qualified pathologist." *Id.* at 1950. In other words, even accepted as true, Hayes's allegations about Mock's fellowship and his state-law employment qualifications "do little to undermine the intrinsic validity" of his autopsy findings and related testimony. *Id.*

Second, and again in keeping with the district court's analysis, Mock's testimony was corroborated in critical respects by other trial evidence, and in particular, by the testimony of Dr. Caceres. Hayes's defense theory had two key components, as presented at trial by defense expert Dr. Young. According to Young, R.M.'s skull fracture was not fresh but instead was showing signs of healing when she died, suggesting that she was injured on September 24 (when she fell from the bottom step) and not on September 30 (when she fell unconscious while under Hayes's care). And, Young opined, R.M.'s lack of symptoms after the September 24 fall could be explained: The September 24 fall cracked R.M.'s skull but did not injure her brain, so that it was not until the child experienced a posttraumatic seizure on September 30 that she exhibited head-trauma distress. Mock disagreed with both these opinions, but – crucially – so did Caceres. Like Mock, Caceres testified that R.M.'s fracture was too severe to have been caused by a fall from the stairs, and did not show the signs of healing that would be expected had it been

sustained on September 24. And Caceres discredited the notion that R.M. could have sustained a five-inch skull fracture on September 24, remained symptom-free for almost a week, and then experienced the trauma of September 30: According to Caceres, symptoms like headaches and vomiting would have been immediate, and the brain swelling identified on September 30 was not consistent with the posttraumatic seizure put forth by the defense.

Under these circumstances, we agree with the district court that Hayes cannot show a "reasonable probability" that the result of his trial would have been different had the jury been informed that Mock's forensic pathology fellowship did not meet the standards set out by state law for employees of the Office of the Chief Medical Examiner who conduct autopsies. Because it follows that Hayes would not be entitled to relief on his *Strickland* claim even assuming the truth of his allegations, we affirm the district court's denial of his request for an evidentiary hearing and dismissal of his claim.

III.

For the reasons given above, the judgment of the district court is

AFFIRMED.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v. **Case No. 11-F-41**
(Judge Paul Zakaib, Jr.)

LARRY ALLEN HAYES, JR.

ORDER

On the 28th day of October, 2011, came the defendant, **LARRY ALLEN HAYES, JR.**, together with his counsel, Richard E. Holicker and Joseph Mosko, and also came the State of West Virginia by Jennifer D. Meadows and Daniel L. Holstein, Assistant Prosecuting Attorneys in and for Kanawha County, West Virginia.

Upon the jury's verdict of guilty to the felony offense of Death of a Child by Parent, Guardian, and Custodian by Child Abuse, as contained in Felony Indictment Number 11-F-41, entered in this Court on the 29th day of August, 2011, with his counsel then present, it is the judgment of this Court that the defendant, **LARRY ALLEN HAYES, JR.**, is guilty of Death of a Child by Parent, Guardian, and Custodian by Child Abuse.

THEREUPON, it was demanded of the said **LARRY ALLEN HAYES, JR.**, if anything he had or knew to say why the Court should not now proceed to pronounce the sentence of the law against him, and no valid reason being offered or alleged in delay of judgment, it is **CONSIDERED** and **ORDERED** by the Court that the defendant, **LARRY ALLEN HAYES, JR.**, be confined in the penitentiary of this State for a determinate term of forty (40) years, with credit for time spent in jail awaiting trial and conviction, which credit for time so spent in jail is three hundred, eighty-nine (389) days.

The Court further **ORDERS** that upon the expiration of said sentence, the defendant is required to serve 10 years of extended supervision pursuant to WVa Code §62-12-26.

And it is further **ORDERED** that the proper officer do, as soon as practicable, remove and safely convey the said **LARRY ALLEN HAYES, JR.**, from the South Central Regional Jail to the Department of Corrections, to be kept imprisoned and maintained in the manner prescribed by law.

WHEREUPON, the prisoner was remanded to jail.

It is further **ORDERED** that the Clerk shall send a certified copy of this Order to all counsel of record, South Central Regional Jail, and the Department of Corrections.

ENTERED THIS 28th **day of** October, **2011**

PAUL ZAKAIB, JR., JUDGE
Thirteenth Judicial Circuit

RECORDED

APPROVED BY:

JENNIFER D. MEADOWS, Assistant
Prosecuting Attorney in and for
Kanawha County, West Virginia
301 Virginia Street, East
Charleston, WV 25301
WV State Bar ID No. 9619

DANIEL L. HOLSTEIN, Assistant
Prosecuting Attorney in and for
Kanawha County, West Virginia
301 Virginia Street, East
Charleston, WV 25301
WV State Bar ID No. 6909

11-2-11
cc:
certified copies sent to: counsel of record PA, PD
parties
other DOC, MT OLIVE, PAROLE
(please indicate)
certified/1st class mail
fax SCRJ, DOC
hand delivery
interdepartmental DAVE FONTALBERT
other directives accomplished:
Deputy Circuit Clerk

INSPECTED BY:

RICHARD E. HOLICKER
Deputy Public Defender
Post Office Box 2827
Charleston, WV 25330
Counsel for Defendant
WV State Bar ID No. 7173

JOSEPH MOSKO
Deputy Public Defender
Post Office Box 2827
Charleston, WV 25330
Counsel for Defendant
WV State Bar ID No. 11478

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-1641 (Kanawha County 11-F-41)

Larry Allen Hayes Jr.,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Larry Allen Hayes Jr., by counsel Jason D. Parmer, appeals his jury conviction of the death of a child by a parent, guardian, or custodian by abuse in violation of West Virginia Code § 61-8D-2A. The Circuit Court of Kanawha County entered petitioner's judgment order on October 28, 2011. The State, by counsel, the Office of the Attorney General, filed a response to which petitioner replied.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner was indicted during the January of 2011 term of court on one count of the death of a child by a parent, guardian, or custodian by abuse in violation of West Virginia Code § 61-8D-2A. The underlying facts are these: On September 30, 2010, petitioner had sole care of his girlfriend's daughter, eighteen-month-old B.M., while his girlfriend, Ms. B., was at work. As petitioner drove to pick up Ms. B. from work, he called her and said, "Something is wrong with B.M." When petitioner arrived at Ms. B.'s workplace, Ms. B. pulled B.M. out of her car seat. Blood was coming from B.M.'s nose and mouth, and she was not breathing. Ms. B. began CPR. Firemen arrived and took B.M. to the hospital where she was resuscitated and placed on a ventilator. When it was determined that B.M. had no brain activity, her mother removed B.M. from the ventilator. B.M. died shortly thereafter, on October 3, 2010.

Petitioner initially denied knowledge of the source of the injuries that resulted in B.M.'s death. However, after considerable questioning by the police, petitioner claimed that he had fallen down a set of steps while holding B.M.

Four months prior to petitioner's trial, the State disclosed to the defense its expert witness, Allen Mock, M.D., West Virginia's deputy chief medical examiner, together with Dr. Mock's curriculum vitae.

Petitioner's trial was held in August of 2011. On August 24, 2011, Dr. Mock testified on direct examination that B.M.'s death was a homicide and the result of blunt force head trauma that likely occurred on September 30, 2010, when B.M. was in petitioner's sole care. Dr. Mock opined that 25% of B.M.'s skull was fractured, there were no signs that the fractures had begun to heal, and skull fractures like B.M.'s were typically seen in high energy motor vehicle accidents. In regard to his credentialing, Dr. Mock testified that he was eligible to become certified in clinical pathology and anatomic pathology by the American Board of Pathology (the "Board").

At the conclusion of Dr. Mock's direct testimony, the court recessed for the day, in part so the defense could confer with its expert, Dr. Thomas Young, a Board-certified pathologist. Dr. Young had listened to Dr. Mock's testimony remotely, by phone, from Kansas City. The trial court had agreed to this arrangement and had also agreed to give the defense a brief recess after the testimony of each of the State's witnesses to allow the defense to consult with Dr. Young.

The defense cross-examined Dr. Mock on August 25, 2011, for about ninety minutes. Defense counsel began the examination by questioning Dr. Mock about his credentialing. Dr. Mock testified that, in an effort to obtain certification from the Board, he had taken and passed the clinical pathology examination, he was scheduled to take the *anatomic pathology* examination in October of 2011, and he would eventually take a forensic pathology examination. *Dr. Mock specifically testified that he had not previously taken the anatomic pathology examination.* Thereafter, the defense excused Dr. Mock and did not reserve the right to recall him.

Following Dr. Mock's cross-examination, defense counsel again consulted with Dr. Young. Dr. Young told defense counsel that he believed Dr. Mock had lied under oath when he said he had not yet taken the anatomic pathology examination. Dr. Young based this opinion on his belief that clinical pathology *and* anatomic pathology were tested together, as one examination. Therefore, they could not be taken separately as Dr. Mock had testified. Based on this premise, Dr. Young assumed that Dr. Mock had already taken the clinical pathology and anatomic pathology examination; had failed the anatomic pathology portion; and, therefore, was required to take the anatomic pathology portion again.

In response, the defense subpoenaed Dr. Mock for its case-in-chief for the purpose of impeaching Dr. Mock's statement that he had not yet taken the anatomic pathology examination. The subpoena was delivered to Dr. Mock at about 10:30 a.m., on August 26, 2011. The subpoena commanded Dr. Mock to appear at 1:30 a.m.[1] that same day. When Dr. Mock failed to appear at 1:30 p.m., defense counsel moved the trial court to enforce the subpoena. The State objected on the ground that defense counsel had already had ample opportunity to cross-examine Dr. Mock regarding his credentialing. The defense countered that it had learned of Dr. Mock's alleged lie only after it had spoken to Dr. Young following Dr. Mock's cross-examination. The trial court denied the defense's motion to enforce the subpoena. The defense timely objected.

[1] Some discussion was had regarding the erroneous 1:30 a.m. time notation but that error is not a deciding issue in this appeal.

During the defense's case-in-chief, Dr. Young testified that B.M. had died as a result of blunt force head trauma. However, Dr. Young opined that B.M.'s head trauma might have been accidental and could have occurred when B.M. fell backward off a single step six days before her death.[2] Dr. Young based his opinion on his finding of microscopic evidence of healing of B.M.'s skull fractures. The defense then attempted to introduce Dr. Young's opinion that Dr. Mock had lied on the stand about the anatomic pathology portion of the certification test. However, the trial court, over the defense's objection, precluded Dr. Young's opinion testimony on that issue.

The jury found petitioner guilty as charged. The trial court imposed a determinate sentence of forty years in prison to be followed by a ten-year term of supervised release.

On appeal, petitioner first argues that the trial court denied him the right to compulsory process when it refused to enforce petitioner's subpoena of Dr. Mock. Petitioner cites to Rule 17(b) of the West Virginia Rules of Criminal Procedure which provides, in part, that "[t]he court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that . . . the presence of the witness is necessary to an adequate defense...." Petitioner also cites to Syllabus Point 3 of *State v. Whitt*, 220 W.Va. 685, 649 S.E.2d 258 (2007), which provides that due process requires a trial court to enforce a defendant's subpoena "that the witness' testimony would have been both material and favorable to the defense." Petitioner argues that evidence showing that Dr. Mock may have lied about failing the anatomic pathology examination was both material and favorable to the defense, particularly given that Dr. Mock performed B.M.'s autopsy, testified at length about his findings, and offered opinion testimony regarding the manner and cause of B.M.'s death.

> "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syllabus point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds*, *State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994).

Syl. Pt. 1, *State v. Calloway*, 207 W.Va. 43, 528 S.E.2d 490 (1999).

The trial court neither denied petitioner's right to compulsory process nor abused its discretion when it refused to enforce petitioner's subpoena of Dr. Mock. First, the defense had ample opportunity to investigate Dr. Mock's credentials prior to trial given that the State disclosed Dr. Mock and his curriculum vitae to the defense four months before trial. Second, Dr. Mock's direct testimony regarding his credentialing put the defense on notice of a need to inquire on cross-examination. Third, following Dr. Mock's direct testimony, the trial court granted the defense's motion to postpone its cross-examination of Dr. Mock until the following day, thereby allowing the defense to review Dr. Mock's testimony with Dr. Young at length. The next day, the defense had its opportunity to confront Dr. Mock when it questioned him for an hour and a half on cross-examination on various issues including his credentialing process.

[2] As B.M. appeared to be limping following this minor accident, her mother took B.M. to a doctor immediately thereafter and to a follow-up appointment with a second doctor the next day. Neither doctor mentioned signs of head trauma.

Fourth, when Dr. Mock's cross-examination ended, the defense did not reserve a right to recall him on cross-examination. Finally, the defense sought to subpoena Dr. Mock for its case-in-chief to ask him a question he had already answered when he testified that he had not yet taken the anatomic pathology examination.

Petitioner's reliance on *Whitt*, for the proposition that Dr. Mock's testimony would have been both material and favorable to the defense, is misplaced. In *Whitt*, the trial court refused to allow the defendant to call his co-defendant to the stand in an attempt to prove that the co-defendant was actually the perpetrator of the crime with which petitioner was charged. *Id.* at 691-93, 649 S.E.2d at 264-66. Conversely, here, the defense engaged in extensive cross-examination of Dr. Mock regarding his credentialing.

Petitioner also failed to vouch the record that Dr. Mock actually lied about his credentialing to conceal an academic failure. Petitioner's only proffer was that Dr. Mock "likely failed half of the test" because Dr. Mock was *probably* required to sit for "two portions of one test." Thus, the Court cannot determine whether the trial court's ruling was prejudicial to the defense. As we stated in Syllabus Point 1, of *Horton v. Horton*, 164 W.Va. 358, 264 S.E.2d 160 (1980),

> [i]f a party offers evidence to which an objection is sustained, that party, in order to preserve the rejection of the evidence as error on appeal, must place the rejected evidence on the record or disclose what the evidence would have shown, and the failure to do so prevents an appellate court from reviewing the matter on appeal.

In this case and under these particular facts, the trial court exercised its discretion over the mode of interrogating witnesses and presenting evidence, and properly denied petitioner's request to enforce the subpoena.

Petitioner's second assignment of error is that the trial court violated his due process right to present a complete defense when it refused to allow Dr. Young to give his opinion regarding Dr. Mock's testimony and thereby indirectly impeach that testimony. The defense sought to have Dr. Young testify that the only possible explanation for Dr. Mock's testimony was that he failed the anatomic pathology examination and then lied about it. Petitioner argues that Dr. Young was an expert regarding the Board's certification examinations because he had been a Board-certified pathologist for over twenty years. Alternatively, petitioner argues that even if Dr. Young was not an expert in Board credentialing pursuant to Rule 702 of the Rules of Evidence, the trial court deprived petitioner of his fundamental right to present a defense by refusing to allow Dr. Young to give his opinion about Dr. Mock's testimony.

Petitioner also argues that if there is any "reasonable possibility" that the trial court's ruling contributed to petitioner's conviction, the Court must reverse his conviction pursuant to Syllabus Point 20 of *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974) ("Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction."). Petitioner claims that there was a reasonable possibility that the court's refusal to allow Dr. Young to indirectly impeach Dr. Mock

contributed to his conviction. Specifically, petitioner claims that if the jury had learned that Dr. Mock might have lied about the anatomic pathology examination, he might have been acquitted.

> "'Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.' Syl. Pt. 5, *Overton v. Fields*, 145 W.Va. 797, 117 S.E.2d 598 (1960)." Syllabus Point 5, *Jones v. Patterson Contracting, Inc.*, 206 W.Va. 399, 524 S.E.2d 915 (1999).

Syl. Pt. 1, *Kiser v. Caudill*, 215 W.Va. 403, 599 S.E.2d 826 (2004).

The trial court did not deny petitioner the right to present a complete defense by prohibiting Dr. Young from *speculating*, in the presence of the jury, whether Dr. Mock *may* have failed the anatomic pathology exam. The trial court could not reasonably have allowed the defense to present evidence that Dr. Mock gave false evidence under oath without a reliable basis for the testimony. Here, petitioner proffered no evidence that Dr. Young was an expert on the Board's examination procedures, other than to state that Dr. Mock was certified by the Board as a pathologist, nor did petitioner present any evidence setting forth the Board's testing procedures.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 17, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 17th of June, 2013, the following order was made and entered:

State of West Virginia, Plaintiff Below,
Respondent

v.) No. 11-1641

Larry Allen Hayes, Jr., Defendant Below,
Petitioner

11-F-41

MANDATE

Pursuant to Revised R.A.P. 26, the memorandum decision previously issued in the above-captioned case is now final and is hereby certified to the Circuit Court of Kanawha County and to the parties. The decision of the circuit court is hereby affirmed, and it is hereby ordered that the parties shall each bear their own costs. The Clerk is directed to remove this action from the docket of this Court.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court

SUPREME COURT OF APPEALS WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LARRY HAYES

Petitioner

v. **14-P-163**
Judge Paul Zakaib, Jr.

MARVIN C. PLUMLEY, WARDEN,
HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

ORDER DENYING PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

On a previous date, came Larry Hayes, (Petitioner), pro se, and came the Respondent, by counsel, Jennifer D. Gordon, Assistant Special Prosecuting Attorney in and for Kanawha County, West Virginia and Counsel for the Respondent, filed a response to the Petition for Writ of Habeas Corpus previously filed by Petitioner. After reviewing arguments of Petitioner and counsel and a thorough review of the Petition for Writ of Habeas Corpus and accompanying memorandum, the Respondent's Response, exhibits, and other documentary evidence and applicable case law, the Court **FINDS** the matters ripe for decision and makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Rebecca Grace McDaniel was only eighteen months old when she died. *See* Tr. Aug. 24, 2011 trial at pp. 62-63. She was the daughter of Meredith Bush and T.J. McDaniel. *Id.* Rebecca's family referred to her as "Becca." *Id.* at 61.

2. At the time of Becca's death, Meredith was dating the Petitioner. They lived together in South Charleston. *Id.* at 62-63.

3. Meredith testified that when Becca hurt herself, she referred to it as a "boo boo." She would point to her "boo boo" and ask her mom to kiss it or put a band-aid on it. *Id.* at 66.

4. Petitioner watched Becca while Meredith worked as a waitress at IHOP. Becca would also stay with her paternal grandparents on the weekends. *Id.*

5. Meredith was working at IHOP in South Charleston on September 30, 2010. Petitioner drove her to work. Becca was in the car with him. They dropped her off at 8:00 a.m. *Id.* at 67. When Meredith last saw her daughter that morning, she was strapped in her car seat. She waived bye to her mom and was happy. There were no stains on Becca's car seat straps. *Id.* at 68. Petitioner was the only one with Becca for the entire day of September 30, 2010. *Id.* at 72.

6. Meredith was scheduled to get off work around 1:30 or 2:00 p.m. that day. Throughout the morning, Petitioner never gave Meredith any indication that Becca wasn't feeling well. It was only when Petitioner called Meredith as he was pulled into the IHOP parking lot that he told her that something was wrong with Becca. *Id.* at 72. Lamar Mosely, a co-worker of Meredith's, called 911. *Id.* at 73.

7. Becca was wearing a red shirt and overalls with cherries on them. *Id.* at 74. Meredith testified that normally Becca would only change out of her pajamas if she had bathed. However, Petitioner had told Meredith earlier in the day that Becca needed a bath. Therefore, it was unusual that she was not still wearing her pajamas. The pajamas Becca had been wearing on that morning were purple with a butterfly on it. Meredith found those pajamas in the bottom of the washer a few weeks after Becca's death. *Id.* at 81. They were damp and mildewed. Meredith testified that she had not washed the pajamas. *Id.* at 82.

8. Petitioner started getting Becca out of her car seat when Meredith took her from him and laid her out on the ground. Becca was not breathing, her lips were blue, and she was cold to the touch. *Id.* at 74. Lamar Mosely likewise testified that Becca was extremely pale—almost purple when he observed her on the sidewalk. *Id.* at 163. He also testified that when CPR was being performed on Becca, a large quarter-sized clot of blood came out of Becca's mouth. *Id.* at 169.

9. EMS arrived and transported Becca to Thomas Memorial which was the nearest hospital. Petitioner continued to tell Meredith that it had just been a "normal day." *Id.* at 84. Becca remained at Thomas for approximately two hours before she was transported to CAMC Women's and Children's Hospital. *Id.* at 85.

10. Becca was not breathing on her own and was hooked up to a ventilator. Once she was transported to CAMC, she was seen by Dr. Carceres. *Id.* at 86. The doctors performed numerous tests to determine whether Becca had any brain activity. Each of these tests showed no activity at all. Based upon the doctors' findings, Meredith and T.J. decided to take Becca off the ventilator on October 3, 2010. *Id.* at 88.

11. Meredith remained in the room while Becca was taken off the ventilator. She never regained consciousness and was never able to breathe on her own. Meredith stayed until Becca's lips turned blue—which was the way she looked when Meredith pulled her out of her car seat. *Id.* at 89-90.

12. Meredith also testified regarding an incident that occurred six days prior to Becca's hospitalization. Only Becca and Meredith were home at the time. *Id.* at 91-92. Becca was sitting on the bottom step of her stairwell playing with her toys. *Id.* at 92. She was sitting on that first step with her foot behind her other leg. *Id.* at 96. Meredith called to her and when

Becca went to get up, her foot got caught and she fell backwards. Meredith testified that Becca landed on her butt and she never saw Becca hit her head. *Id.* at 97. Detective Cook from the South Charleston Police Department testified that as part of his investigation, he measured the bottom step in Meredith's house. Tr. Aug. 26, 2011 Trial at p. 99. The step measured six and a half inches. *Id.*

13. There was a plastic toy-four-wheeler at the bottom of the steps. *See* Tr. Aug. 24, 2011 trial at p. 107. Meredith never saw Becca hit the four-wheeler and never saw the four-wheeler move forward. *Id.* Between the time of Becca's fall and her admission to the emergency room on September 30, 2010, Meredith bathed and washed Becca's hair every day. She never felt any swelling or knots. She never observed any bruises and Becca never complained that her head hurt. *Id.* at 108-109.

14. After the fall, however, Becca's behavior indicated that her leg was hurting her. To be safe, Meredith took her to Urgent Care to have Becca's leg examined. *Id.* at 98 She testified that the medical personnel at Urgent Care checked Becca's pupils. *Id.* at 99. When Becca still would not put weight on her leg, she took her to the emergency room at Women's & Children's Hospital. *Id.* at 101-102. Again, Becca's pupils were checked by medical personnel. *Id.* at 102.

15. Becca never gave Meredith any indication that her head was hurting her. She never held her head or acted any differently, except for not wanting to use her leg. *Id.* at 102-103. She never vomited or lost consciousness. *Id.*

16. Trial in this matter began on August 22, 2011. An issue of contention during pre-trial matters was the admissibility of a statement that was taken by police after Becca had passed away. The Court held a suppression hearing prior to jury selection. *See* Tr. Aug. 22, 2011 trial

at pp. 6-27, 83-104, 133; *see also* Tr. Aug. 23, 2011 at pp. 35-61. Petitioner's trial counsel vigorously objected to the admission of the Petitioner's statement. *See* Tr. August 23, 2011 trial at pp. 36-61. There was no dispute that Petitioner was *Mirandized* prior to giving the statement to police. However, Petitioner's counsel argued that the statement was coerced given the length of the statement and the conduct of the officers. *See* Tr. Aug. 22, 2011 trial at p. 26.

17. Additionally, the Court ruled admissible a reenactment that was videotaped after Petitioner's statement. Tr. Aug. 23, 2011 trial at p. 59. In this reenactment, the Petitioner claimed that he was carrying Becca down the stairs when he fell with her and she hit her head. However, at trial, Petitioner's counsel argued that Petitioner was coerced into making up the story regarding the fall and that the video depicted a "ridiculous demonstration." *Id.* at 58-59. The State agreed that the fall depicted in the reenactment did not occur but argued it was relevant because it was an inconsistent statement given by the Petitioner. *Id.* at 58.

18. To establish that the statement was voluntary, the State called Detective B.A. Paschall. Det. Paschall testified at length regarding the circumstances surrounding the statement. *See* Tr. August 22, 2011 trial at pp. 6-26. Importantly, he testified that the interview took place in the kitchen area of the South Charleston Police Department. *Id.* at 18. He was *Mirandized* prior to given the statement. *Id.* at 20-21. Petitioner was given cigarette breaks and was not handcuffed the entire time of the interview and the reenactment. *Id.* at 92-93. Petitioner never requested a lawyer and never indicated he did not want to continue speaking with detectives. *Id.* at 94.

19. Additionally, the Court listened to the recorded statement between the first day and second days of trial. *Id.* at 84-85; *see also* Tr. Aug. 23, 2011 trial at 36. The Court ruled the statement admissible and while there was some discussion about playing portions of the

statement, the entire recording was played at trial. *Id.* at 45-61; *see also* Tr. Aug. 25, 2011 trial at p. 139.

20. At trial, Dr. Allen Mock testified for the State as an expert witness. *Id.* at 181. At the time, Dr. Mock worked at the West Virginia Medical Examiner's Office as a forensic pathologist. *Id.* at 188. Dr. Mock is currently Chief Medical Examiner for the State of West Virginia.

21. As to his education and training, Dr. Mock received his degrees in microbiology and biochemistry as well as a master's degree in microbiology, immunology, and parasitology. He received his medical degree from Louisiana State University. After that he trained in anatomic and forensic pathology at the University of Tennessee followed by training at the New Mexico University Office of the Chief Medical Examiner. *Id.* at 182. At the time of trial, he was board eligible in anatomic pathology and clinical pathology. *Id.* at 183.

22. Dr. Mock performed Becca's autopsy on October 4, 2010. *Id.* at 187-188. Becca had multiple contusions on her head. *Id.* at 198. She also had a laceration just left of her frenulum—the tissue that connected Becca's lips to her gums. That laceration was approximately an eighth of an inch long.

23. Once Dr. Mock was able to observe Becca's scalp and brain, he found numerous hemorrhages. Becca had subscapular hemorrhages and swelling, which occurred within the soft tissues in the scalp. *Id.* at 212. She had a subgaleal hemorrhage which measured approximately five inches by three inches. *Id.* at 213. She also had subdural and subarachnoid hemorrhages. *Id.* at 226. Her brain was also severely swollen. *Id.* at 230. The hemorrhages appeared to be acute—meaning they had occurred recently. *Id.* at 232-34. Additionally, Dr. Mock prepared

microscopic slides containing tissue from Becca's eyes—which showed diffuse intraretinal hemorrhages. *Id.* at 241.

24. Becca also had a skull fracture that measured five inches long and comprised approximately twenty percent of Becca's skull. *Id.* at 214-15. The fracture originated at the base of her skull and contained a hemorrhage within the fracture. *Id.* Importantly, Dr. Mock testified that he did not see any evidence of healing in Becca's skull fracture. *Id.* at 223.

25. Dr. Mock testified that it would have taken a significant amount of force to cause the injuries sustained by Becca. Typically in children under the age of two, skull fractures of this severity are generally seen in high energy motor vehicle crashes. *Id.* at 247.

26. Dr. Mock also reviewed medical records and witness accounts regarding Becca's fall that occurred six days prior to her admission to the hospital. In his opinion, a fall of that nature would be insufficient to cause the degree of injury that Becca had. *Id.* at 248-49.

27. Dr. Mock found Becca's cause of death to be blunt force trauma and determined the manner of death to be homicide. *Id.* at 253-54.

28. Petitioner had retained an expert, Dr. Thomas Young, a board-certified forensic pathologist. The Court granted the Petitioner's motion to have his expert listen by telephone to the testimony of the State's expert witnesses. (*See* Tr. Aug. 22, 2011 trial at pp. 60-62). The Court also granted Petitioner's counsel's motion for a brief recess to confer with his expert prior to beginning his cross-examination. *Id.* at 67-68.

29. After Dr. Mock testified, the jury was adjourned for the evening—giving Petitioner's counsel the entire evening to consult with his expert witness before cross-examining Dr. Mock. *See* Tr. Aug. 24, 2011 trial at pp. 254-55.

30. On cross-examination, Petitioner's counsel questioned Dr. Mock extensively regarding his educational background. Dr. Mock testified that once you are board eligible—meaning you meet the minimal educational requirements as determined by the American Board of Pathology—then you may sit for the board examinations for anatomic pathology and clinical pathology if trained in that area. Once you receive board certifications in both of those areas of pathology, then you are eligible for the forensic pathology boards. *See* Tr. Aug. 25, 2011 trial at p. 9.

31. He also testified that he had taken the clinical pathology portion of the American Board of Pathology boards and was scheduled to take the anatomic portion of the boards in October of 2011. *Id.* at 10-11. Dr. Mock passed the clinical pathology portion the first time he took the test. *Id.* at 11.

32. In addition to his credentials, Petitioner's counsel cross-examined Dr. Mock at length regarding his experience, his methods during his autopsies, and possible other explanations for Becca's injuries. *Id.* at 5-61. In fact, the Court noted that the cross-examination lasted for an hour. *Id.* at 61.

33. The Court excused Dr. Mock as a witness the morning of August 25, 2011. *See* Tr. Aug. 25, 2011 trial at p. 95. After that, Petitioner's counsel had subpoenaed Dr. Mock to appear for trial on August 26, 2011 at 1:30 a.m. *See* Tr. Aug. 26, 2011 trial at pp. 200-201. The sole purpose for subpoenaing Dr. Mock was to impeach his testimony regarding the board certification examinations. *Id.* at 201-207. The Court refused to direct Dr. Mock to appear. *Id.* at 208

34. In addition to the testimony of Dr. Mock, the State also introduced expert testimony from Dr. Manuel Caceres. Dr. Caceres specializes in pediatric intensive care and

pediatrics. *Id.* at 147. Dr. Caceres testified that that in his opinion, Becca's injuries were consistent with shaken baby syndrome with impact. *Id.* at 176. He also reviewed the Petitioner's reenactment of the alleged fall down the stairs. In his opinion, a fall of that nature could not have caused Becca's injuries. *Id.* at 176-177.

35. Additionally, Dr. Caceres testified in the form of a hypothetical that a fall from a six-inch step would have been insufficient to cause the skull fracture and brain swelling suffered by Becca McDaniel—even if her head had struck a plastic four-wheeler. *Id.* at 178-179.

36. As with Dr. Mock's testimony, the Court allowed the Petitioner's expert, Dr. Young, to listen to Dr. Caceres's testimony by phone. Petitioner's counsel was also allowed to confer with this expert by phone before cross-examining him. *Id.* at 198-199.

37. Dr. Young testified as an expert witness for the defense. He testified that in his opinion, Becca's five-inch skull fracture was caused by her fall off of a six-inch step that had occurred approximately six days before her admission to the ER. *Id.* at 284. Dr. Young testified on direct examination that in his opinion, the diagnosis of shaken baby syndrome has been falsified. *Id.* at 294. He also testified that he disagreed with Dr. Mock's assessment that Becca's skull fracture was a "fresh" fracture. *Id.* at 308. From his review of the photographs, Dr. Young's opinion was that the fracture showed signs of healing. *Id.* at 309.

38. On cross examination, Dr. Young opined that the "fall" depicted in the video reenactment when Petitioner alleged to have fallen down the steps while holding Becca did not happen. *Id.* at 353. His basis for that opinion was that the fall did not "fit the evidence." *Id.* Dr. Young also characterized Becca's skull fracture as a complex fracture. *Id.* at 357. Dr. Young also testified that his opinion was based upon the assumption that Becca actually hit her head on the plastic four-wheeler toy. *Id.* at 366.

39. Petitioner's counsel began to ask Dr. Young regarding the board certification process. Counsel for the State objected and during a bench conference, Petitioner's counsel stated that he intended to ask Dr. Young about the board testing process and to make a conclusion that Dr. Mock must have failed part of the anatomical/clinical pathology boards. *Id.* at 324-328. The Court ruled that such questioning of Dr. Young would not be permitted. *Id.* at 329.

40. Petitioner's trial continued into Saturday, August 27, 2011 when the parties presented closing arguments and the jury began deliberations. *See* Tr. Aug. 27, 2011 trial.

41. On August 29, 2011—one week after trial began—the jury returned its verdict. The jury found Petitioner guilty of death of a child by parent, guardian, or custodian. *See* Tr. Aug. 29, 2011 trial at p. 14. On October 28, 2011, the Court sentenced the Defendant to a determinate term of forty (40) years in the penitentiary.

42. On or around November 24, 2011, Petitioner filed a Notice of Intent to Appeal with the Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court"). His petition raised assignments of error relating to the testimony of Dr. Mock. *See State v. Hayes*, 2013 WL 2149870 (May 17, 2013) (Memorandum Opinion). First, he argued that the trial court denied him the right to compulsory process when it refused to enforce Petitioner's subpoena of Dr. Mock. *Id.* at * 3. Second, he argued that the trial court violated his due process rights by refusing to allowing Dr. Young to given an opinion regarding Dr. Mock's testimony and directly impeach Dr. Mock's testimony regarding his credentials. *Id.* at * 4.

43. In its opinion, the Court found that Petitioner was not entitled to the requested relief. Specifically, the Court noted the following regarding Dr. Mock's testimony: (a) Petitioner had been granted ample opportunity to investigate Dr. Mock's credentials prior to trial;

(b) Dr. Mock's direct testimony regarding his credentials put the defense on notice of a need to inquire on cross-examination; (c) the trial court postponed the Petitioner's cross-examination of Dr. Mock until the following day to allow the Petitioner to review Dr. Mock's testimony with Petitioner's expert; (d) the defense did not reserve the right to call Dr. Mock after the cross-examination was finished; and (e) Petitioner subpoenaed Dr. Mock to answer a question that had already been answered—that he had not yet taken the anatomic pathology examination. *Id.* at *3.

44. The Court also found that the trial court did not deny the Petitioner the right a complete defense "by prohibiting Dr. Young from *speculating*, in the presence of the jury, whether Dr. Mock *may* have failed the anatomic pathology exam." *Id.* at *5 (emphasis in original). Petitioner offered no evidence that Dr. Young was an expert regarding board examination procedures. *Id.*

45. On April 2, 2014, Petitioner filed the instant Petition for Writ of Habeas Corpus asserting that both his trial counsel and appellate counsel were ineffective. Specifically, he alleges that his trial counsel was ineffective by (a) deficient performance relating to the Petitioner's statement that was introduced against him at trial; (b) deficient performance in failing to meaningfully cross-examining Dr. Mock; and (c) deficient performance in litigating the issue of insufficient evidence. Regarding his appellate counsel, Petitioner alleges that his counsel was ineffective by failing to raise additional claims on direct appeal.

II. CONCLUSIONS OF LAW

46. West Virginia's post-conviction habeas corpus statute "clearly contemplates that [a] person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one postconviction habeas corpus proceeding." Syl. Pt. 1, *Markley v. Coleman*, 215 W.Va. 729

(2004) (citations omitted). Such proceeding gives the Petitioner an opportunity to "raise any collateral issues which have not previously been fully and fairly litigated." *Id.* at 732. The initial habeas corpus hearing is *res judicata* as to all matters raised and to all matters known or which, with reasonable diligence, could have been known. *Id.* at Syl. Pt. 2.

47. A circuit court having jurisdiction over habeas corpus proceedings has broad discretion in dealing with habeas corpus allegations. *Id.* at 733. It may deny the petition without a hearing and without appointing counsel if the petition, exhibits, affidavits and other documentary evidence show to the circuit court's satisfaction that the Petitioner is not entitled to relief. *Id.* at Syl. Pt. 3. A circuit court may also find that the habeas corpus allegation has been previously waived or adjudicated and if so, the court "shall by order entered of record refuse to grant a writ and such refusal shall constitute a final judgment." *Id.* at 733 (citing W.Va. Code section 53-4A-3(a)).

48. When determining whether to grant or deny relief, a circuit court is statutorily required to make specific findings of fact and conclusions of law relating to each contention advanced by the petitioner and to state the grounds upon which each matter was determined. *Id.* at Syl. Pt. 4. *See also* W.Va. Code section 53-4A-3(a).

49. In West Virginia, ineffective assistance of counsel claims are to be governed by the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See State v. Miller*, 194 W.Va. 3 (1995); *State ex rel. Quinone v. Rubenstein*, 218 W.Va. 388 (2005); *State v. Frye*, 221 W.Va. 154 (2006). First, a court must determine if counsel's performance was deficient under an objective standard of reasonableness. Second, a court must determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Miller*, 194 W.Va. at 16.

50. The West Virginia Supreme Court has long held that:

> 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 reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

51. As to the sufficiency of Petitioner's trial counsel's performance, the Petitioner first alleges that trial counsel's performance was deficient for failing to convince the Court that the third statement Petitioner gave to the South Charleston Police Department was coerced.

52. The Court **FINDS** that Petitioner's allegation regarding the statement fails. Petitioner's counsel argued vigorously over the course of a suppression hearing that ran into two days that Petitioner's statement was coerced. The Court considered the arguments of counsel and the testimony regarding the circumstances under which the statement was taken.

53. When determining the voluntariness of a statement, the Court must look at the totality of the circumstances. Syl. Pt. 2, *State v. Bradshaw*, 193 W.Va. 519 (2009). Factors to be considered include the defendant's age, intelligence, background and experience with the criminal justice system, the purpose and flagrancy of police misconduct, and the length of the interview. Furthermore, the moral and psychological pressure to confess should also be considered. *Id.* at 527.

54. Rulings on the admissibility of evidence are largely within the trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syl. Pt. 9, *State v. Newcomb*, 223 W.Va. 843 (2009). It is a well-established rule in West Virginia "that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review." A trial court's decision regarding the voluntariness

of a confession will not be disturbed unless it is plainly wrong or against the weight of the evidence. *State v. Black*, 227 W.Va. 297, 304 (2010).

55. The Court **FINDS** that the length of Petitioner's interview with police was zealously argued by Petitioner's counsel. The interview lasted for approximately two and a half hours. He was never handcuffed during the interrogation and he was given cigarette breaks. In *Bradshaw*, the Court found a statement that was given during a six-hour interrogation was voluntary. 193 W.Va. at 526, 535. In *Bradshaw*, similar to the circumstances here, the Petitioner was not deprived of any necessities and was given the opportunity for smoke breaks. This Court was clearly within its discretion to find that the statement was voluntary.

56. Even if it is assumed that Petitioner's counsel's performance was deficient in failing to convince the trial court to exclude the statement, Petitioner still must establish that the outcome would have been different if the statement had been excluded. It is important to note that the Petitioner never "confessed" to shaking, striking, or otherwise abusing Becca. Towards the end of the statement, he told the police that he fell while carrying Becca down the stairs. He also performed a reenactment of this "fall." All the experts—even Petitioner's expert—agreed that the fall that was depicted by Petitioner would not have caused the injuries to Becca. Given that the Petitioner made no real admissions to hurting Becca, the Court **FINDS** there Petitioner has failed to present any credible argument that excluding the statement would have resulting in the Petitioner being acquitted.

57. As to Petitioner's allegations regarding Dr. Mock, the Court **FINDS** that these allegations fail as well. Dr. Mock is the current Chief Medical Examiner for the State of West Virginia. Petitioner alleges that Dr. Mock was not qualified to perform autopsies in West Virginia in October of 2010. In support of that assertion, he cites W.Va. Code section 61-12-10

which provides that a county medical examiner must be "a pathologist who holds board certification or board eligibility in forensic pathology or has completed an American Board of Pathology fellowship in forensic pathology."

58. There is no dispute that Dr. Mock, at the time Becca's autopsy was performed, was not board certified in forensic pathology. However, Dr. Mock testified that he completed fellowship training in forensic pathology at the New Mexico University Office of the Chief Medical Investigator in Albuquerque. Tr. Aug. 24, 2011 Trial at p. 182. Dr. Mock also testified that he had testified as an expert witness in the field of forensic pathology in both New Mexico and West Virginia state courts and federal courts. *Id.* at 184.

59. Additionally, the State provided Petitioner's counsel with an expert witness disclosure prior to trial. Dr. Mock's curriculum vitae clearly indicates that he served as a Forensic Pathology Fellow from July 2009 until June 2010. The Court **FINDS** Petitioner simply fails to establish that Dr. Mock was not qualified to perform an autopsy in West Virginia and fails to establish that Dr. Mock was not qualified as an expert witness.

60. In addition to Petitioner's counsel's vigorous cross-examination of Dr. Mock, Petitioner presented his own expert witness, Dr. Young, to present an alternative theory as to the cause of Becca' s skull fracture and injuries. The jury heard testimony from Dr. Young that he was board certified in forensic pathology and that he had many years of experience in the field. The jury heard Dr. Young criticize certain aspects of Dr. Mock's autopsy on Becca—particularly that he did not take tissue samples of the skull fracture to further test for evidence of healing. The Court **FINDS** that the jury heard all of the evidence and gave what weight and credibility to Dr. Young's testimony that it believed it deserved.

61. Again, Petitioner must show that trial counsel's performance was deficient. The Court **FINDS** that Petitioner fails to establish any deficiency. Trial counsel vigorously cross-examined Dr. Mock regarding his experience and credentials. Petitioner's counsel also offered a competing expert to refute Dr. Mock's opinions—which the jury rejected. The opinion offered by Dr. Young was that Becca suffered a five-inch skull fracture six days prior to her admission to the hospital. He opined that she suffered such an injury when she fell from a six-inch step, hitting her bottom on the floor, and her head hiting a plastic toy four-wheeler. Furthermore, he opined that Becca remained asymptomatic until six days later when she had a post-traumatic seizure which led to the hemorrhages and additional complications, which eventually led to her death. The Court **FINDS** that the jury heard all of this evidence and presumably rejected Dr. Young's opinion.

62. Additionally, the State presented evidence from another expert witness, Dr. Manuel Caceres. Dr. Caceres was board certified in pediatrics and treated Becca in the pediatric intensive care unit. There were no possible attacks on his credentials in his respective field. He also testified that he believed, to a reasonable degree of medical certainty, that Becca had been the victim of abuse—specifically shaken baby syndrome with impact. In his opinion, that was the only medical explanation for the injuries she received.

63. Given the weight of the evidence the State presented at trial, this Court **FINDS** that Petitioner has presented no credible evidence that if the Petitioner had been given the opportunity to question Dr. Mock again regarding his credentials, the outcome of the trial would have been different. Therefore, his claim for relief on that ground must fail.

64. Petitioner also alleges that his trial counsel was ineffective in failing to litigate the issue of insufficient evidence. He simply argues that "had counsel argued for acquittal on the

basis that there was insufficient evidence to convict as outlined in *State v.* Guthrie, supra, a reasonable probability exists that Petitioner would have prevailed." *See* Petitioner's Memorandum in Support of Writ of Habeas Corpus Ad-Subjiciendum at p. 27.

65. Attacks on sufficiency of the evidence must overcome a high burden to be considered by a court. Specifically, the Supreme Court has found

> [a] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with ever conclusion save that of guilt so long as the jury can find guilty beyond a reasonable doubt. Credibility determinations are for a jury and not for an appellate court. Finally a jury verdict should only be set aside when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

Syl. Pt. 3, *State v. Guthrie*, 194 W.Va. 657 (1995).

66. While Petitioner asserts that under *Guthrie*, his counsel would have likely prevailed on an insufficient evidence argument, the Court **FINDS** that this is nothing more than a bald assertion. *Guthrie* makes it clear that "a jury verdict should only be set aside when the record contains *no* evidence....from which the jury could find guilt." *Id.* (emphasis added). There was more than ample evidence presented in this case to convict Petitioner.

67. This Court **FINDS** that that the weight of evidence presented against Petitioner at trial was more than sufficient to sustain his conviction. It is undisputed that the Petitioner was the only one with Becca the day of September 30, 2010. She had been fine that morning when they dropped Meredith off at work. He gave statements to the police that did not make sense. He told police that she slumped over when they were pulling into Trace Fork and that was the first time he noticed anything wrong. However, when he pulled into IHOP—just yards from the

Trace Fork turn—she was already blue from loss of oxygen. Meredith testified that there would have been no reason to have changed Becca out of her pajamas because she had not yet been bathed. However, Petitioner had changed her clothes and weeks later, Meredith found those pajamas in the washing machine. Petitioner made a statement in a jail call to his father that he didn't mean to hurt her [Becca] like that.

68. In addition to the circumstantial evidence that existed in the case, the Court **FINDS** there was ample medical evidence that Becca's injuries were the result of abuse and that her injuries were acute to her admission to the emergency room on September 30, 2010. The medical evidence presented by the State was compelling and credible—even when compared to the expert testimony provided by Petitioner's expert, Dr. Young.

69. As to Petitioner's allegation that his appellate counsel was ineffective, the analysis begins with the question as to whether the counsel's failure to appeal was so "outside the broad range of professionally competent assistance" that it constituted ineffective assistance of counsel. *See* Miller, 194 W.Va. at Syl. Pt. 6. It should be assumed that an attorney's performance was reasonable and adequate and Petitioner must rebut that presumption. *Id.* The Petitioner must also show that the result of the proceedings would have been different had counsel raised this issue on appeal. *Id.*

70. As with his trial counsel, the Court **FINDS** that Petitioner cannot meet the heavy burden imposed on him in establishing ineffective assistance of appellate counsel. Petitioner's memorandum is not clear as to what issues he believes appellate counsel should have raised on appeal, but it can be assumed that Petitioner is referring to the claims for relief raised in his habeas corpus petition. Attorney Jason Parmer, who works in the Appellate Division of the Public Defender's office, handled the appeal for Petitioner. He appealed the trial court's refusal

to enforce Petitioner's subpoena for Dr. Mock and its refusal to allow trial counsel to elicit an opinion from Dr. Young regarding Dr. Mock's credentials. *See Hayes, 2013 WL 2149870* at *1-3. The Court found that the trial court's rulings were proper. *Id.* at *3-5.

71. This Court **FINDS** that the fact that his appellate counsel chose not to appeal the trial court's decision regarding the admission of Petitioner's statement and trial counsel's failure to litigate sufficiency of the evidence to convict Petitioner does not establish that his performance on appeal was deficient. Furthermore, Petitioner cannot show that had counsel raised those issues on appeal, the West Virginia Supreme Court would have reversed Petitioner's conviction. In fact, given the well-established jurisprudence on the subject matter, Petitioner's appellate counsel was well within "professional competence" so as to not present frivolous arguments on appeal. Appellate counsel could not show that the trial court abused its discretion in admitting the statement and likewise, could not show that there was "no evidence" of guilt to support the jury verdict. Therefore, the Court **FINDS** that Petitioner's claim for relief based upon ineffective assistance of appellate counsel also fails.

III. RESOLUTION

Based upon the foregoing, the Court **DENIES** Habeas Petition 14-P-163 and **ORDERS** the matter stricken from the docket. The Court notes the Petitioner's objection and exception to its ruling. The Court further **ORDERS** certified copies of this Order be provided to counsel of record and Petitioner.

ENTER THIS 22nd day of Aug., 2014

Paul Zakaib, Jr.

The Honorable Paul Zakaib, Jr., Judge
Thirteenth Judicial Circuit

Date: 8-29-14
Certified copies sent to:
— counsel of record
— parties
— other (please indicate)
By:
— certified/1st class mail
— fax
— hand delivery
— interdepartmental
Other directives accomplished:
Deputy Circuit Clerk

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Larry Hayes,
Petitioner Below, Petitioner

vs) **No. 14-0915** (Kanawha County 14-P-163)

Marvin C. Plumley, Warden, Huttonsville Correctional Center, Respondent Below, Respondent

FILED
September 11, 2015
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Larry Hayes, appearing *pro se*, appeals the order of the Circuit Court of Kanawha County, entered August 22, 2014, denying his petition for writ of habeas corpus. Respondent Marvin C. Plumley, Warden, Huttonsville Correctional Center, by counsel Laura Young, filed a response, and petitioner filed a reply.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

On September 30, 2010, petitioner had sole care of his girlfriend's daughter, eighteen-month-old B.M., while his girlfriend was at work. As petitioner drove to pick up his girlfriend from work, he called her and said, "Something is wrong with B.M." When petitioner arrived at his girlfriend's workplace, the girlfriend pulled B.M. out of her car seat. Blood was coming from B.M.'s nose and mouth, and she was not breathing. Petitioner's girlfriend began CPR. Firemen arrived and took B.M. to the hospital where she was resuscitated and placed on a ventilator. When it was determined that B.M. had no brain activity, her mother removed B.M. from the ventilator. B.M. died shortly thereafter, on October 3, 2010.

Petitioner was indicted in January of 2011 on one count of the death of a child by a parent, guardian, or custodian by abuse in violation of West Virginia Code § 61-8D-2a(a), which provides 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.

The indictment tracked the language of West Virginia Code § 61-8D-2a(a) in that it charged petitioner with "unlawfully, feloniously, maliciously[,] and inflict[ing] upon [B.M.[1]], substantial physical pain, illness[,] and impairment of physical condition by other than accidental means, and . . . thereby caus[ing] the death of [B.M], in violation [West Virginia Code § 61-8D-2a(a)], against the peace and dignity of the State."

Petitioner's trial was held in August of 2011. The jury found petitioner guilty of the death of a child by a parent, guardian, or custodian by abuse in violation of West Virginia Code § 61-8D-2a(a). The circuit court sentenced petitioner to a determinate term of forty years in prison, followed by a ten-year term of supervised release. Petitioner appealed his conviction to this Court, resulting in the issuance of a memorandum decision in *State v. Hayes*, No. 11-1641, 2013 WL 2149870 (W.Va. Supreme Court, May 17, 2013). In his appeal, petitioner made the following assignments of error: (1) the trial court denied petitioner the right to compulsory process when it refused to enforce petitioner's subpoena of Dr. Allen Mock, West Virginia's deputy chief medical examiner;[2] and (2) the circuit court violated petitioner's due process right to present a complete defense when it refused to allow his expert, Dr. Thomas Young, to give his opinion regarding Dr. Mock's testimony and thereby indirectly impeach that testimony. *Id.* at *3-4. This Court rejected petitioner's arguments and affirmed his conviction. *Id.* at *3-5.

On April 2, 2014, petitioner filed a petition for writ of habeas corpus raising two grounds of relief. First, petitioner alleged that trial counsel provided ineffective assistance by (a) failing to have a statement petitioner made to the police suppressed; (b) failing to meaningfully cross-examine Dr. Mock; (c) failing to correctly argue a post-trial motion for judgment of acquittal based on insufficiency of evidence. Second, petitioner alleged that appellate counsel failed to raise unspecified issues on direct appeal in *Hayes*. After requiring a response by respondent warden, the circuit court entered a nineteen page order on August 22, 2014, denying the petition.

Petitioner now appeals to this Court. We apply the following standard of review in habeas cases:

> 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, 418, 633 S.E.2d 771, 772 (2006).

---

[1] Only the initials of the minor victim are used pursuant to Rule 40(e)(1) of the West Virginia Rules of Appellate Procedure.

[2] Dr. Mock, who has since become the chief medical examiner, testified as part of the State's case-in-chief and then was cross-examined by petitioner's counsel.

On appeal, petitioner raises the following issues: (1) the indictment was deficient; (2) trial counsel was ineffective because counsel failed to (a) have a statement petitioner made to the police suppressed; (b) meaningfully cross-examine Dr. Mock due to a lack of an adequate investigation; and (c) correctly argue a post-trial motion for judgment of acquittal based on insufficiency of evidence; (3) appellate counsel was ineffective because of a failure to raise (a) the deficiency of the indictment, and (b) ineffective assistance of trial counsel; and (4) the circuit court erred in denying petitioner's petition without holding a hearing, appointing counsel, and authorizing an investigator and a medical expert. Respondent warden counters that the circuit court adequately rejected the claims raised by petitioner in his habeas petition in a well-reasoned order, and that the issues petitioner raised only on appeal lack merit.

We agree with respondent warden and find that the circuit court's order adequately rejected those claims raised in the habeas petition; therefore, we address only those errors petitioner first alleged on appeal: (1) the allegedly deficient indictment; (2) appellate counsel's alleged failure to raise (a) the claim regarding the indictment, and (b) ineffective assistance of trial counsel; and (3) the circuit court's alleged error in denying petitioner's petition without holding a hearing, appointing counsel, etc. We reject petitioner's claim that the indictment was deficient. Based on our review of the indictment, we find that it closely tracks the language of West Virginia Code § 61-8D-2a(a)—the statute under which petitioner was charged—and was, therefore, proper. *See* Syl. Pt. 3, *Pyles v. Boles*, 148 W. Va. 465, 135 S.E.2d 692, 694 (1964).

Second, regarding the performance of appellate counsel, we note that counsel had no obligation to raise meritless claims. In this case, petitioner's claim regarding the indictment lacked merit. As explained in the circuit court's order, petitioner's claim that trial counsel was ineffective also lacked merit and, therefore, the same would not have been addressed in petitioner's direct appeal even if it was raised. *See* Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 762-63, 421 S.E.2d 511, 513-14 (1992) (rarely do we address ineffective assistance claims on direct appeal). Accordingly, petitioner's claim regarding his appellate counsel's performance is also without merit.

Finally, petitioner argues that the circuit court had a duty to provide whatever facilities and procedures were necessary to afford petitioner an adequate opportunity to demonstrate his entitlement to habeas relief. Respondent warden counters that in Syllabus Point 1 of *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657, 658 (1973), we held as follows:

> A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief.

As reflected by Syllabus Point 10 of *Triplett*, a habeas proceeding is the proper forum for litigating claims alleging ineffective assistance of counsel; however, such claims need to be litigated only when they have merit. In this case, we find that the circuit court correctly determined that

petitioner's ineffective assistance claims have no merit for reasons given in its order.[3] Therefore, we determine that the circuit court properly denied the habeas petition without holding a hearing or granting petitioner's other requests pursuant to Syllabus Point 1 of *Perdue*.

As to the issues raised in the instant petition, we have reviewed the circuit court's "Order Denying Petitioner's Petition for Habeas Corpus," entered on August 22, 2014, and hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions.[4] The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we find no error in the decision of the Circuit Court of Kanawha County and affirm its August 22, 2014, order denying petitioner's petition for writ of habeas corpus.

Affirmed.

ISSUED: September 10, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Allen H. Loughry II

---

[3] For example, while petitioner contends that trial counsel failed to meaningfully cross-examine Dr. Mock, we noted in *Hayes* that counsel's cross-examination lasted "an hour and a half" and covered "various issues." 2013 WL 2149870, at *3.

[4] Certain names have been redacted. *See* fn. 1, *supra*.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

LARRY HAYES,

Petitioner,

v. **Case No. 2:15-cv-15636**

MARVIN C. PLUMLEY, Warden,
Huttonsville Correctional Complex,

Respondent.

PROPOSED FINDINGS AND RECOMMENDATIONS

Pending before the Court are Petitioner's *pro se* Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, (ECF No. 2), and Respondent's Motion for Summary Judgment, (ECF No. 9). This case is assigned to the Honorable Thomas E. Johnston, United States District Judge, and by standing order is referred to the undersigned United States Magistrate Judge for submission of proposed findings of fact and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B). As a preliminary matter, the undersigned notes that the record before the Court is well-developed and provides a sufficient basis upon which to resolve this case without need for an evidentiary hearing. *See* Rule 8, Rules Governing Section 2254 Cases.

After thorough consideration of the record, the undersigned conclusively **FINDS** that (1) there are no *material* factual issues in dispute and (2) Petitioner is not entitled to the relief requested. Therefore, for the reasons that follow, the undersigned

respectfully **RECOMMENDS** that the District Court **GRANT** Respondent's Motion for Summary Judgment; **DENY** Petitioner's Petition for a Writ of Habeas Corpus; and **DISMISS** this case from the docket of the Court.

I. Relevant Facts and Procedural History

A. Indictment, Trial, and Direct Appeal

In January 2011, Petitioner Larry Hayes ("Hayes") was indicted by a Kanawha County, West Virginia grand jury on one count of death of a child by a parent, guardian, or custodian by abuse, contrary to West Virginia Code § 61-8D-2a. (ECF No. 9-1 at 2-3). The indictment alleged that, in September 2010, Hayes "unlawfully, feloniously, maliciously[,] and intentionally" harmed R.M., his girlfriend's eighteen-month-old daughter, causing her death.[1] (*Id.* at 3, 127).

Prior to Hayes's trial, he was interviewed on two separate occasions by several officers from the South Charleston Police Department. The first interview occurred on October 1, 2010 in the kitchen area of the South Charleston Police Station, which was located in close proximity to the home where Hayes, R.M., and R.M.'s mother, M.B., resided at the time of R.M.'s death. (ECF No. 9-6 at 140-42). Hayes agreed to accompany South Charleston Police Detectives Benjamin Paschall and Charles Cook to the police station after the detectives arrived at his home and asked him to walk over to the station to discuss R.M.'s injuries. (*Id.* at 142-43). Shortly before their initial contact with Hayes, the detectives had visited the hospital where R.M. was being treated and learned from medical personnel that R.M.'s injuries were non-accidental. (*Id.*) During the first interview, Hayes indicated that he spent the day on September 30

[1] Pursuant to Local Rule of Civil Procedure 5.2.1(a), the undersigned refers to the minor victim by her initials. The undersigned also refers to the minor victim's mother by her initials.

watching R.M. and that the day was normal. (ECF No. 9-7 at 131). Hayes reiterated this story at a subsequent interview on October 2 with a Child Protective Services worker, during which Detective Paschall was present. (*Id.* at 132-33, 153-54; ECF No. 9-3 at 34-35).

Hayes's second interview with the police took place on October 4, 2010, the day after R.M. was removed from a ventilator because she had no brain activity. (*Id.* at 103, 111; ECF No. 9-1 at 129). Detective Paschall and Detective Andrew Gordon traveled to Hayes's residence and asked Hayes to walk to the station to speak with them. (ECF No. 9-6 at 155-56). Hayes agreed and walked with the detectives back to the police station. (*Id.* at 156). According to Detective Paschall, Hayes did not advise the detectives that he did not want to speak with them or that he desired an attorney, and Hayes appeared to be "of sound mind and body." (*Id.*) Hayes was not placed in handcuffs prior to or during the walk to the police station. (*Id.*) The interview again took place in the kitchen of the South Charleston Police Department and was conducted by Detectives Paschall and Gordon, who were joined by South Charleston Police Detectives Joel Gray and Cook. (*Id.* at 156, 171). At the outset, Detective Paschall informed Hayes that he was a suspect in R.M.'s death, and Detective Gordon read Hayes his *Miranda*[2] rights and filled out a notification and waiver of rights form, which Hayes signed. (ECF No. 9-2 at 129-31). Detective Gordon also informed Hayes that he was not under arrest and that he was free to leave at any time. (*Id.* at 130-31).

After signing the waiver of rights form, Detective Paschall asked Hayes to describe the events of September 30, 2010, the day that R.M. was hospitalized. (*Id.* at

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

131). Hayes explained that he and M.B. awoke R.M. that day around 7:30 a.m., and R.M. was acting normal. (*Id.* at 131-32). The three drove to IHOP, where M.B. worked, and dropped off M.B. at approximately 8:10 a.m. (*Id.* at 131-32, 134). Hayes and R.M. returned home at approximately 8:30 a.m., and Hayes carried R.M. upstairs to put her down for a nap. (*Id.* at 132). R.M. awoke from her nap between 11:00 and 11:30 a.m., and the two played an Xbox game together. (*Id.* at 133). Hayes then played on the living room floor with R.M., and they ate lunch together around noon. (*Id.*) After eating, the two continued playing until M.B. texted Hayes and told him that she was going to be off of work at 2:00 p.m. (*Id.* at 134). Hayes began to get ready for work upstairs with R.M. nearby. (*Id.*) He then carried R.M. downstairs, dressed her, and placed her in the car. (*Id.*) At that time, R.M. was conscious. (*Id.* at 143). During the car ride, Hayes looked back and saw R.M. slumped over. (*Id.* at 134). He tried to rouse her to no avail. (*Id.*) At that point, Hayes called M.B. while entering the IHOP parking lot and told M.B. to come outside. (*Id.*) After he got R.M. out of her car seat, M.B. took R.M. and placed her on the sidewalk. (*Id.*) Thereafter, fire department workers responded and picked up R.M. to transport her elsewhere. (*Id.*)

Detective Paschall inquired whether Hayes knew the extent of R.M.'s injuries, and Hayes responded that he knew R.M. had a skull fracture. (*Id.* at 135). When asked how R.M. received the skull fracture, Hayes indicated that R.M. had fallen off of some steps in the home three or four days before she was hospitalized, but she was acting normal on September 30. (*Id.* at 135-36). Detective Gordon then pressed Hayes to tell him what really happened and repeatedly assured Hayes that "good people make mistakes all the time." (*Id.* at 137). Hayes insisted that he had told the detectives the truth and that he did not hurt R.M. (*Id.*) Hayes accused the detectives of attempting to

get him to lie and to admit to doing something to R.M. that he did not do. (*Id.* at 139). Detectives Paschall and Gordon replied that Hayes should not lie. (*Id.*)

Subsequently, Detectives Cook and Gray entered the kitchen area, and Detective Cook informed Hayes that he had attended R.M.'s autopsy that morning and he wanted to know from Hayes what happened to R.M. (*Id.* at 142). Hayes maintained that he had told the truth, to which Detective Cook responded, "You're telling me that's going to be your story?" (*Id.*) Detective Cook added that he was "one hundred percent sure" that Hayes caused R.M.'s death and that the "[o]nly thing we can do is start right now and start doing damage control." (*Id.*) Hayes continued to assert that he was telling the truth, at which time Detective Cook called Hayes a liar. (*Id.* at 147). Shortly thereafter, Detective Cook remarked, "I feel confident that you didn't do this on purpose which to me makes a big difference." (*Id.* at 150). Later during the questioning, Detective Cook told Hayes, "If it's an accident, we would deal with it. Accidents happen all the time," to which Hayes retorted, "And you'd still put me jail." (*Id.* at 155). In response, Detective Cook stated, "That is not true. If an accident happened, an accident happened. … There's a difference between an accident and something with malice." (*Id.*) Detective Gray joined in, "[T]here's a difference between a cold blooded killer and somebody who had an accident. … [T]he prosecutor who['s] the first step in deciding what's gonna' be done with you, looks at that seriously. … [A]nd the only thing they have to look at right now, all the evidence says this guy's a cold blooded killer who doesn't care what he did." (*Id.*) Hayes asked the detectives what would happen if he told them that he "did something," and Detective Gray informed Hayes that he would be processed and brought before a magistrate; Hayes would then "work it out with the prosecutor." (*Id.* at 156). Detective Gray warned that if Hayes told the detectives

nothing, then he would be charged as a "cold blooded killer." (*Id.* at 156-57).

Hayes then asked Detective Cook what would happen if R.M.'s death were an accident. (*Id.* at 161). Detective Cook responded, "If it was a hundred percent an accident, you would probably be free to leave once it's dealt with. You might get charged with lying to us at the beginning of this because … you shouldn't have done that." (*Id.*) Detective Cook mentioned that it was "more than likely" that Hayes would be leaving the station in handcuffs that day given R.M.'s injuries. (*Id.*)

Detectives Gray and Cook subsequently took Hayes out for a cigarette break and walked him across the street to the building where the Detective Bureau was located. (*Id.* at 161). The detectives continued to ask Hayes to "come clean" and told him that he would feel relief if he told the truth. (*Id.* at 164). Approximately ninety minutes into the second interview, Hayes stated that, before leaving to pick up M.B. on September 30, he tripped while descending the stairs with R.M. in his arms and landed on her. (*Id.* at 164; ECF No. 9-7 at 23-24, 133). Hayes explained that he fell from the third or fourth step and that he landed "flat" on top of R.M.; however, according to Hayes, she was acting normal when he placed her in the car. (ECF No. 9-2 at 164-65). Hayes then acknowledged that he knew R.M. was not "alright," but he thought she would be fine. (*Id.* at 166). He also indicated that he did not call 911 or take R.M. to the hospital because he was scared. (*Id.* at 166-67). When asked how he fell, Hayes described falling onto his legs and hitting his head. (*Id.* at 168). After additional questioning about Hayes's fall while holding R.M., Hayes asserted that the fall occurred from the fifth or sixth step and that R.M. cried for a few seconds after the fall. (*Id.* at 176). During the drive to IHOP, Hayes noticed that R.M. was bleeding from her nose. (*Id.* at 177). At the conclusion of the two and one-half hour interview, Hayes and the detectives departed

so that Hayes could demonstrate how he fell at his home while being video recorded. (*Id.* at 183, 187-88).

Hayes's trial counsel moved to suppress the statement given by Hayes on October 4. The trial court held a suppression hearing on August 22, 2011. At the hearing, Detective Paschall testified that during the October 4 interview, Hayes was informed he was being questioned concerning R.M.'s death and advised of his *Miranda* rights. (ECF No. 9-3 at 41). Detective Paschall indicated that Hayes signed a waiver of rights form before the questioning began. (*Id.* at 42). A recording of the interview was introduced through Detective Paschall. (*Id.* at 44-45). Hayes's counsel argued that the statement should be suppressed because Hayes was coerced into fabricating a story about an accident occurring that resulted in R.M.'s death. (*Id.* at 46-47, 69-70, 105, 109). The trial court rejected defense counsel's argument and denied the motion. (ECF No. 9-4 at 37, 56-57; ECF No. 9-1 at 109).

Hayes's trial began on August 23, 2011. The State's first witness was M.B. She testified that she was dating and living with Hayes in September 2010. (ECF No. 9-5 at 63). Hayes would watch R.M. while M.B. was at work. (*Id.* at 67). M.B. indicated that when R.M. would get hurt, she was able to communicate where she was hurt. (*Id.*) She recalled that R.M. was happy on the morning of September 30 when Hayes dropped M.B. off for work. (*Id.* at 69). M.B. sent a text message to Hayes that day informing him to pick her up in the afternoon. (*Id.* at 73). M.B. recounted Hayes calling her as he was pulling into the parking lot and asking her to come outside because something was wrong with R.M. (*Id.* at 73-74). M.B. went outside to Hayes's vehicle, and she took R.M. from Hayes and placed her on the ground to perform CPR. (*Id.* at 75). M.B. testified that R.M.'s lips were blue, she felt cold, and she was not breathing. (*Id.*) M.B.

remembered that R.M. was not wearing the pajamas that she had been wearing in the car that morning, which M.B. described as unusual since R.M.'s clothes were not typically changed unless she was bathed and Hayes did not bathe her that day.[3] (*Id.* at 82). M.B.'s coworker, Lamar Mosley, called 911, and fire department workers arrived in a matter of minutes to transport R.M. (*Id.* at 74, 84). R.M. was taken to Thomas Hospital, and Hayes and M.B. followed. (*Id.* at 85). During the drive to the hospital, M.B. asked Hayes what happened. (*Id.*) Hayes responded that it had been a normal day. (*Id.*) At Thomas Hospital, R.M.'s pulse returned, but she was unable to breath on her own, and she was placed on a ventilator. (*Id.* at 86). After approximately two hours at Thomas Hospital, R.M. was transferred to CAMC's Women and Children's Hospital in Charleston, West Virginia. (*Id.*) While at Women and Children's Hospital, M.B. learned that R.M. had a skull fracture. (*Id.* at 88). She was also informed that R.M. had no brain activity. (*Id.* at 89). R.M. was taken off of the ventilator on October 3. (*Id.*)

M.B. also testified about an incident involving R.M. on September 24, 2010 when R.M. was sitting on the bottom step of the stairs in their home playing with toys. (*Id.* at 93). As R.M. attempted to get up from the step, she fell backwards and landed on her bottom. (*Id.* at 98). Behind R.M. was a child's four-wheeler toy, but M.B. did not witness the four-wheeler toy move. (*Id.*) She also did not see R.M. hit her head during the fall, and R.M. did not act as if her head hurt afterward. (*Id.*) Although R.M. cried after the fall, she acted "fine" once M.B. picked her up. (*Id.*)

The following day, M.B. took R.M. to an urgent care center because R.M. was not putting any weight on one of her legs. (*Id.* at 99-100). M.B. testified that medical

[3] M.B. later found R.M.'s pajamas in the washer, and they were damp and mildewed. (ECF No. 9-5 at 83).

personnel checked R.M.'s pupils and that there was no indication by the medical staff that there was anything wrong with R.M.'s head. (*Id.* at 100). X-rays of R.M.'s knee were taken at that visit. (*Id.* at 101). The next day, R.M. was still not placing any weight on her leg, and so, M.B. took her to the emergency room. (*Id.* at 102). At that time, M.B. testified that R.M. did not act like anything was wrong with her head. (*Id.* at 103). M.B. did not recall R.M. acting differently other than her leg issue. (*Id.* at 103-04). Between September 24 and September 30, M.B. bathed R.M. each night and did not notice any physical deformity with respect to her head. (*Id.* at 109-10). In addition, M.B. stated that she did not witness R.M. have any other incidents of falling after September 24. (*Id.* at 118-19).

On cross-examination, M.B. acknowledged that she told police that she was unsure whether R.M. hit her head when she fell from the step on September 24. (*Id.* at 142-43). M.B. elaborated that she also told medical personnel the same thing on September 25 and 26, which led to them checking R.M.'s pupils. (*Id.* at 143). According to M.B., the medical staff did not have any concern about an injury to R.M.'s head after examining her pupils, and as such, they did not perform an x-ray, MRI, or CAT scan on R.M.'s head. (*Id.*) M.B. also testified that she did not recall seeing blood on R.M.'s face until she began performing CPR, at which time R.M. began to bleed from her nose and mouth. (*Id.* at 149).

The State's next witness was Mr. Mosley, who worked at IHOP with M.B. On September 30, 2010, Mr. Mosley recalled exiting the IHOP and seeing R.M. lying on the ground outside of the restaurant surrounded by M.B. and Hayes. (*Id.* at 163-64). Mr. Mosley described R.M. as looking "real pale in the face" and "almost purple." (*Id.* at 164). He recounted Hayes performing CPR on R.M., and during the attempt to

resuscitate R.M., Mr. Mosley witnessed a "ball of blood" leave R.M.'s mouth. (*Id.* at 164, 170).

The State also called Allen Mock, M.D., a Deputy Chief Medical Examiner for the West Virginia Office of the Chief Medical Examiner. (*Id.* at 182; ECF No. 9-6 at 98-99). At the time of Hayes's trial, Dr. Mock had worked approximately one year for that office. (ECF No. 9-5 at 182-83). Dr. Mock testified that he received his medical degree from Louisiana State University and trained in anatomic and forensic pathology at the University of Tennessee. (*Id.* at 183). He also trained in forensic pathology at the New Mexico University Office of the Chief Medical Investigator. (*Id.*) Dr. Mock explained that prior to working for the West Virginia Office of the Chief Medical Examiner, he was in fellowship training, and before his fellowship training, he was employed as an assistant medical examiner in Tennessee. (*Id.*) As for certifications, Dr. Mock testified that he was board eligible in the American Board of Pathology for both anatomic and clinical pathology and that he was taking a certification for anatomic pathology in October 2011. (*Id.* at 184; ECF No. 9-6 at 10). As of the time of his testimony, Dr. Mock had taken and passed the clinical pathology examination administered by the American Board of Pathology. (ECF No. 9-6 at 12). Dr. Mock denied previously taking the anatomic pathology examination. (*Id.*) After describing his education and experience, the State moved for Dr. Mock to be recognized as an expert in forensic pathology, to which the defense did not object. (ECF No. 9-5 at 186, 188).

Dr. Mock performed R.M.'s autopsy on the morning of October 4, 2010, approximately twenty-three hours after R.M. was pronounced dead. (*Id.* at 188-89, 193). Dr. Mock's external examination of R.M. revealed dot-like bruises and two small abrasions on R.M.'s left forehead as well as bruising about her mid forehead. (*Id.* at

198). Dr. Mock also observed a faint contusion and edema in the skin around R.M.'s right eye along with a laceration and bruise on the inside of R.M.'s upper lip. (*Id.* at 198-99, 202). On the back of R.M.'s head, Dr. Mock identified a two-inch bruise, and behind R.M.'s ears, Dr. Mock noted bruising as well. (*Id.* at 205). On internal examination of R.M.'s head, Dr. Mock observed subscalpular hemorrhages, subgaleal hemorrhages, and edema. (*Id.* at 214). When examining the back of R.M.'s skull, Dr. Mock found a five and one-quarter inch skull fracture near the middle of the skull. (*Id.* at 215-16). The fracture encompassed approximately twenty-five percent of the circumference of R.M.'s skull. (*Id.* at 216). After grossly examining the fracture, Dr. Mock saw no evidence of healing in the fracture. (*Id.* at 224). Dr. Mock testified that, if he had observed signs of healing, then he would have taken samples of the skull or surrounding tissue to perform additional studies. (*Id.* at 225). When asked how much force would be required to produce such a fracture, Dr. Mock responded that a significant amount of force would be necessary and that a skull fracture as extensive as R.M.'s would typically be seen in "high energy motor vehicle accidents." (*Id.* at 247-48). In addition to the skull fracture, Dr. Mock noted acute subdural and subarachnoid hemorrhages and that R.M.'s brain was severely swollen. (*Id.* at 225-35). Regarding R.M.'s eyes, Dr. Mock observed bleeding into the optic nerve sheath, caused by intracranial pressure, and retinal hemorrhaging in both eyes. (*Id.* at 242-43). As for any additional testing that Dr. Mock performed, he testified that he performed microscopic examinations and iron staining on various tissue samples, which confirmed that R.M.'s injuries were acute. (*Id.* at 245-46). Dr. Mock indicated that his findings were consistent with a closed head injury. (*Id.* at 248-49). He also concluded that neither the September 24 incident nor the September 30 fall described by Hayes

could have caused R.M's injuries. (*Id.* at 249-50). As to the cause of R.M.'s death, Dr. Mock opined that R.M. died as a result of blunt force injuries to her head. (*Id.* at 254). Additionally, Dr. Mock opined that R.M.'s death was a homicide. (*Id.* at 255). Dr. Mock's autopsy report containing these findings was cosigned by James Kaplan, M.D., the Chief Medical Examiner for West Virginia. (*Id.* at 192).

On cross-examination, Dr. Mock acknowledged that he was "very new" in his career at the time that he performed R.M.'s autopsy. (ECF No. 9-6 at 14). Continuing on the subject of his experience, Dr. Mock testified that, at the time R.M.'s autopsy, he had performed approximately ten autopsies on children under the age of two where the cause of death was abuse. (*Id.* at 36). He stated that he was unsure as to how many of those cases involved skull fractures, but he estimated between five and ten. (*Id.* at 37). Of those five to ten cases, Dr. Mock was uncertain that any involved a healing skull fracture. (*Id.*) Turning to his specific findings in R.M.'s case, Dr. Mock stated that his opinion as to whether the September 24 incident could have caused R.M.'s injuries was based on photographs and information that he was told by the police. (*Id.* at 30-31). Dr. Mock testified that he did not review M.B.'s statement regarding the September 24 incident before performing the autopsy, and he conceded that information about a prior potential head injury would be important when writing his autopsy report. (*Id.* at 33). However, Dr. Mock denied that it was necessary for him to take samples from R.M.'s skull fracture to determine the fracture's age. (*Id.* at 34). Although Dr. Mock admitted that "very few gross observations are definitive," he maintained that his gross observation of the fracture indicated that taking a sample of the bone and examining it under a microscope was unnecessary. (*Id.* at 38, 49). Dr. Mock noted that the "arguabl[e] best practice is to take samples of everything," but that was "not practical."

(*Id.* at 39). Additionally, Dr. Mock testified that certain falls backwards or on carpeted floors could cause a skull fracture. (*Id.* at 55). As to the cause of R.M.'s injuries, Dr. Mock opined that it was "more than probable" that the injuries were a result of abuse. (*Id.* at 83). Notwithstanding, without the additional information received from witness reports, law enforcement, and R.M.'s medical records, based on the physical findings alone, Dr. Mock indicated that it was possible R.M.'s death was accidental. (*Id.* at 125). On redirect examination, Dr. Mock testified that the iron stain test results indicated that R.M.'s injuries occurred in close temporal proximity to her hospital admission. (*Id.* at 101).

Detective Paschall also testified for the State. He recalled learning that R.M.'s injuries were non-accidental from medical personnel and speaking with Hayes on October 1, 2010. (*Id.* at 143). A recording of that first interview was introduced into evidence. (*Id.* at 145-46). Detective Paschall also remembered being present for an interview conducted by a Child Protective Services worker on October 2 at Hayes's home. (*Id.* at 153-54). At that interview, Hayes's story remained the same. (*Id.* at 154). In addition, Detective Paschall recounted the October 4 interview with Hayes, and the State played nearly the entirety of that interview for the jury. (*Id.* at 163-64, 166; ECF No. 9-7 at 6). After the interview, Paschall and other detectives walked to Hayes's residence and video recorded a reenactment of the fall described by Hayes at the interview. (*Id.* at 7). The video recording was introduced into evidence and played for the jury. (*Id.* at 8-9).

On cross-examination, Detective Paschall testified that he was unsure whether R.M.'s skull fracture occurred on September 30 when she was alone with Hayes. (*Id.* at 21). Detective Paschall also acknowledged that Hayes's story was consistent across

interviews until approximately ninety minutes into the October 4 interview. (*Id.* at 23, 27). Detective Paschall stated that Hayes insisted September 30 was a normal day until he changed his story at the second police interview. (*Id.* at 27-29). Detective Paschall added that he was unaware of any previous reports of Hayes acting violently toward R.M. and that he did not know what specifically caused R.M.'s skull fracture. (*Id.* at 34-35, 48-49). On redirect examination, Detective Paschall testified that he had found no evidence that anyone else was around R.M. on September 30 and that no other reports of R.M. falling before that day were relayed to him. (*Id.* at 42).

The State's next witness was Hayes's father, Larry Hayes, Sr. Mr. Hayes testified that he received a phone call from Hayes on October 5, 2010 after Hayes was arrested. (*Id.* at 61-63). The State played a recording of a portion of that phone call for the jury. (*Id.* at 64). While a transcription of the recording is not in the record, in arguing over the admissibility of the recording, the State represented that Hayes told his father "I didn't mean to hurt her like that," and that "it was an accident." (*Id.* at 52).

The State next called Detective Cook, who testified about his investigation in the case. Detective Cook recalled photographing the stairs at M.B.'s and Hayes's home, and he measured that the bottom stair that R.M. fell from was six and one-half inches from the ground. (*Id.* at 96-99). He also photographed Hayes's head on October 1. The photographs did not depict that Hayes had any bump on his head, contrary to what he told the detective during the second police interview. (*Id.* at 94-95) Detective Cook testified that he executed a search warrant on Hayes's car and observed what appeared to be blood stains on R.M.'s car seat. (*Id.* at 102-03). During a search of the home, Detective Cook was unable to identify any bodily fluids using an alternate light source. (*Id.* at 113). Like Detective Paschall, Detective Cook remembered that Hayes repeatedly

asserted that September 30 was a normal day until approximately ninety minutes into the second police interview. (*Id.* at 130-33). On cross-examination, Detective Cook conceded that he did not know how R.M. obtained her skull fracture. (*Id.* at 144).

The State's final witness was Manuel Caceres, M.D., a pediatrician working at Women and Children's Hospital when R.M. was admitted on September 30, 2010. Dr. Caceres remembered receiving information from Thomas Hospital about R.M.'s condition before her transfer. Upon arriving at Thomas Hospital, R.M. was in full cardiac arrest. (*Id.* at 152). R.M. was resuscitated at Thomas Hospital, but she was "in [a] coma, basically." (*Id.* at 151-52). Dr. Caceres spoke with Hayes at Women and Children's Hospital, and he indicated that R.M. was playful and healthy during the day. (*Id.* at 156). After stabilizing R.M., Dr. Caceres ordered a CT scan of R.M.'s brain, which was taken within three hours of R.M.'s arrival at Women and Children's Hospital. (*Id.* at 159-60, 164). Reviewing the CT scan, he observed swelling of the brain and suspected that there was a skull fracture. (*Id.* at 160). A preliminary report from a radiologist reviewing the CT scan results indicated that there was no fracture; however, a subsequent review by a pediatric radiologist noted a "pretty large skull fracture posteriorly." (*Id.* at 161-62). Dr. Caceres testified that R.M.'s brain swelling and skull fracture were consistent with head trauma. (*Id.* at 162). In addition to the CT scan, Dr. Caceres ordered an MRI of R.M.'s head. (*Id.* at 166). The MRI revealed generalized brain swelling, a herniation of the cerebellum (where the brain pushes into the lower structures of the body due to swelling), small bilateral subdural hemorrhages, and a skull fracture. (*Id.* at 167-68). Dr. Caceres described the fracture as "very big" and stated that such a fracture in a child was "very rarely" seen, typically in car accidents or where a child has suffered "very significant trauma." (*Id.* at 168-69). As to external

observations, Dr. Caceres noted that R.M. had a bruise near her forehead, and a "pretty large" bruise on the right side of her head that extended to the front under her hairline. (*Id.* at 162-65). Dr. Caceres also indicated that R.M. exhibited bilateral retinal hemorrhaging. (*Id.* at 169-70).

Given these findings, Dr. Caceres opined that R.M.'s condition was consistent with shaken baby or shaken impact syndrome and that R.M.'s injuries were non-accidental. (*Id.* at 170, 176). Dr. Caceres explained that shaken baby syndrome means that a child is shaken with sufficient force to cause an acceleration/deceleration injury to the child's brain, which results in significant brain swelling and hemorrhages. (*Id.* at 170-71). Dr. Caceres further explicated that shaken impact syndrome involves the same type of acceleration/deceleration injury, but the child is also hit against an object causing a fracture. (*Id.* at 171). Dr. Caceres also opined that R.M.'s injuries could not have been caused by the fall that Hayes described to the police on October 4. (*Id.* at 176-77). Additionally, Dr. Caceres testified that R.M.'s skull fracture and brain swelling could not have been caused by the September 24 incident, even if R.M. hit her head on the four-wheeler toy. (*Id.* at 178-80). Dr. Caceres remarked that such a fall could produce a "small fracture," but not the brain swelling and subdural hemorrhages that R.M. exhibited. (*Id.* at 179-80). Moreover, Dr. Caceres indicated that, if the skull fracture he observed were caused during the September 24 incident, R.M. would have acted noticeably different immediately afterward. (*Id.* at 183-84). Lastly, Dr. Caceres testified that he had reviewed the defense's medical expert's opinion, Thomas Young, M.D., as to the cause of R.M.'s death, and he disagreed with the opinion because it was inconsistent with the medical findings. (*Id.* at 190-97).

Before cross-examining Dr. Caceres, defense counsel asked the trial court to enforce a subpoena issued for Dr. Mock. (*Id.* at 200). Defense counsel explained that, after consulting with Dr. Young, he believed that Dr. Mock made a misrepresentation during his testimony. (*Id.* at 203). Specifically, defense counsel asserted that the American Board of Pathology examinations for anatomic and clinical pathology were not two separate tests, but one test with two parts (one for anatomic pathology and one for clinical pathology) that must be taken at the same time. (*Id.*) Because Dr. Mock testified that he had passed the clinical pathology test and was taking the anatomic pathology test at a later date, defense counsel argued that Dr. Mock must have failed the anatomic pathology portion of the examination on his first attempt. (*Id.* at 203-04). Furthermore, defense counsel asserted that Dr. Mock was "an addict" and had medical licensure problems in New Mexico due to his addiction. (*Id.* at 205). The trial court denied defense counsel's request to enforce the subpoena and stated that defense counsel possessed the opportunity to investigate Dr. Mock's credentials before trial began. (*Id.* at 206-07).

On cross-examination, Dr. Caceres acknowledged that there were studies demonstrating that, if a child were shaken severely enough to cause brain damage, then the child's neck would break. (*Id.* at 212). Dr. Caceres conceded that R.M.'s neck was not broken. (*Id.*) However, Dr. Caceres remarked that he disagreed with those studies. (*Id.* at 230). Dr. Caceres also admitted that he was unsure precisely what caused R.M.'s skull fracture. (*Id.* at 231). Although Dr. Caceres noted that R.M. experienced a hypoxic ischemic event and disseminated intravascular coagulation, both of which were key to Dr. Young's opinion, he opined that both of those events occurred after R.M. suffered from head trauma that shortly thereafter caused cardiac arrest, which resulted in a

hypoxic ischemic injury. (*Id.* at 214, 223; ECF No. 9-8 at 4-5). Dr. Caceres added that R.M.'s brain swelling would have started immediately after the head trauma and that the severity of the swelling could not be explained by a hypoxic ischemic injury alone. (ECF No. 9-8 at 5). Lastly, Dr. Caceres noted that the head trauma suffered by R.M. would have occurred within two hours of R.M. entering cardiac arrest. (*Id.* at 2).

The first witness for the defense was Dr. Young, an American Board of Pathology certified forensic pathologist and the former Chief Medical Examiner for Kansas City, Missouri. (*Id.* at 29-30, 37). As a medical examiner, Dr. Young worked on approximately one hundred cases involving children under the age of two with skull fractures and brain injuries. (*Id.* at 36, 41-42). With respect to R.M.'s death, Dr. Young opined that R.M. could have suffered a skull fracture from the September 24 fall, which M.B. and Hayes may not have noticed. (*Id.* at 48-49). Dr. Young testified that, on September 30, R.M. experienced a posttraumatic seizure as a result of the head trauma she suffered on September 24, which caused her to stop breathing and go into cardiac arrest. (*Id.* at 51-52, 59). Dr. Young indicated that the lack of oxygen caused R.M.'s brain to swell and that R.M.'s brain injury combined with the resumption of blood circulation after R.M. was resuscitated caused her brain and scalp to easily bleed. (*Id.* at 54-58).

On the subject of R.M.'s skull fracture, Dr. Young opined that the September 24 fall could have caused the fracture, and in support of his opinion, Dr. Young cited a 2001 study concluding that a child could receive a skull fracture from a two-foot drop. (*Id.* at 70-71). In addition, Dr. Young testified that he looked at a photograph of the skull fracture taken during R.M.'s autopsy, and he determined that the skull fracture was a healing fracture, not a "fresh fracture." (*Id.* at 75-76). Dr. Young noted that the

bleeding in the tissue around the fracture was not bright red, as one would expect with a "fresh fracture"; rather, the tissue around the fracture was "dull, brown, [or] yellowish brown." (*Id.* at 76). Moreover, Dr. Young contended that the difficulty in dissecting the scalp and the presence of hemorrhagic tissue bridging the skull fracture evidenced that the fracture was a healing fracture. (*Id.*) Dr. Young stated that the failure to recognize healing fractures is a common mistake by pathologists and that Dr. Mock should have sampled the area of the fracture to analyze it under a microscope. (*Id.* at 78-79).

As for Dr. Caceres's opinion that R.M.'s condition was consistent with shaken baby or shaken impact syndrome, Dr. Young testified that shaken baby syndrome was "falsified scientifically." (*Id.* at 61). He cited a study that concluded a person could not shake a child with enough force to cause a subdural hematoma or hemorrhage. (*Id.* at 61-63). Furthermore, if such force were exerted on a child, Dr. Young asserted that the child's neck would break. (*Id.* at 64). Dr. Young concluded that R.M.'s death was an accident, not a homicide. (*Id.* at 75).

Defense counsel also attempted to elicit testimony from Dr. Young regarding the American Board of Pathology certification process. (*Id.* at 90). Specifically, Dr. Young was asked to comment on Dr. Mock's testimony that he had taken the clinical pathology examination, but not the anatomic pathology examination. (*Id.*) The State objected, and during a bench conference, defense counsel explained that the purpose of the testimony was to demonstrate that Dr. Mock had failed the anatomic pathology examination on his first attempt, yet, he testified that he had never taken the anatomic pathology examination. (*Id.* at 92). The trial court sustained the State's objection. (*Id.* at 96).

On cross-examination, Dr. Young conceded that in his performance of autopsies on children with skull fractures, he did not always take samples of those fractures; instead, he would sometimes rely on gross observation of the fractures to determine whether they were healing fractures. (*Id.* at 119). In addition, Dr. Young opined that the September 30 fall described by Hayes would not have caused R.M.'s injuries. (*Id.* at 120). Dr. Young also acknowledged that the medical findings concerning R.M.'s condition were consistent with some cases of child abuse. (*Id.* at 142). Dr. Young further admitted that he had performed an autopsy on a child in 1995 and testified at the trial related to that child's death that shaken baby syndrome caused the child's death. (*Id.* at 150-52). Moreover, Dr. Young conceded that he had previously testified that a short distance fall could not cause a skull fracture in a child. (*Id.* at 166). However, Dr. Young indicated that he had changed his opinions on both issues after further research and learning. (*Id.* at 172, 176-77).

The defense also called five additional witnesses to testify to Hayes's character and his interactions with R.M. Those witnesses generally stated that Hayes got along well with children, particularly R.M., and that Hayes was not a violent person. (*Id.* at 200-03, 210, 219-22, 228; ECF No. 9-9 at 12-13). After being advised of his right to testify, Hayes declined to testify. (ECF No. 9-9 at 20-21).

During jury instructions, the trial court instructed the jury that it should disregard any confession unless it found that the State had proved by a preponderance of the evidence that the confession was voluntarily made. (*Id.* at 35). Upon the jury retiring to deliberate, the defense made a motion for judgment of acquittal, which the trial court denied. (*Id.* at 114, 116). On the second day of deliberations, the jury found Hayes guilty of death of a child by parent, guardian, or custodian by child abuse. (ECF

No. 9-10 at 15). On October 28, 2011, the trial court sentenced Hayes to forty years' imprisonment and ten years' supervised released. (*Id.* at 58; ECF No. 9-1 at 13-14).

On January 9, 2012, the trial court held a hearing on Hayes's post-trial motion for judgment of acquittal, which raised multiple assignments of error. (*Id.* at 66). In particular, defense counsel argued that Hayes was entitled to acquittal because the trial court failed to enforce the defense's subpoena for Dr. Mock; the trial court prevented Dr. Young from testifying regarding Dr. Mock's credentials; the trial court failed to suppress Hayes's statement to police; the State offered no evidence regarding malice or intent; and a juror revealed post-trial that he believed R.M.'s death was an accident, but he voted guilty because Hayes was the last person with R.M. before the onset of her symptoms. (ECF No. 9-1 at 5-8). An investigator for the defense supplied an affidavit attesting to the juror's post-trial revelations. (*Id.* at 9). At the conclusion of the hearing, the trial court denied Hayes's motion. (ECF No. 9-10 at 87-88).

On November 23, 2011, Hayes filed a petition for appeal with the Supreme Court of Appeals of West Virginia ("WVSCA"). (ECF No. 9-1 at 17-25). Therein, Hayes raised twelve issues:

> 1. The jury was improperly exposed by the State to media coverage, when over Hayes's objection, the State played a recording of a certain jail call in which Hayes and his father discussed media coverage of the case;
>
> 2. The trial court denied Hayes's motion for a mistrial when the above recording was played for the jury by the State;
>
> 3. The trial court refused to enforce the subpoena served by the defense on Dr. Mock, which denied Hayes his right to call witnesses and confront his accusers;
>
> 4. The trial court refused to permit Dr. Young to testify concerning Dr. Mock's credentials and Dr. Mock's false and misleading testimony;
>
> 5. The trial court refused to exclude certain gruesome photographs objected to by the defense;

6. The trial court denied Hayes's motion to suppress the third statement given by Hayes, which was coerced;

7. The trial court exposed the jury to a toy car that the State argued, but did not prove, was identical to the toy on which R.M. hit her head;

8. The trial court did not give a limiting instruction after Detective Cook characterized R.M.'s scalp injuries as bruises;

9. The trial court refused to excuse for cause a juror who acknowledged a relationship with the prosecutor;

10. The trial court refused to grant Hayes a directed verdict when the State offered no evidence with regard to the elements of malice or intent;

11. The evidence was insufficient to convince a rational trier of fact that the elements of the crime were proven beyond a reasonable doubt; and

12. The jury did not follow the trial court's instructions.

(*Id.* at 24-25). Hayes subsequently perfected his appeal on July 16, 2012, limiting his appeal to two issues: (1) the trial court denied Hayes's right to compulsory process when it refused to enforce the defense's subpoena for Dr. Mock; and (2) the trial court denied Hayes's right to present a complete defense when the court prohibited Dr. Young from testifying as to how the American Board of Pathology's test-taking procedures impeached Dr. Mock's testimony. (*Id.* at 27, 31).

On May 17, 2013, the WVSCA issued a memorandum decision affirming Hayes's conviction. As to Hayes's first assignment of error, the WVSCA held that the trial court "neither denied [Hayes's] right to compulsory process nor abused its discretion when it refused to enforce [Hayes's] subpoena of Dr. Mock." (*Id.* at 55). The court reasoned that Hayes's counsel had "ample opportunity to investigate Dr. Mock's credentials prior to trial given that the State disclosed Dr. Mock … to the defense four months before trial." (*Id.*) Moreover, the court found that Dr. Mock's direct testimony concerning his qualifications "put the defense on notice of a need to inquire on cross-

examination" related to the issue. (*Id.*) The court also pointed out that the trial court permitted defense counsel to delay cross-examination of Dr. Mock until after defense counsel could consult with Dr. Young about Dr. Mock's testimony. (*Id.*) Furthermore, the court noted that Dr. Mock was cross-examined for approximately ninety minutes, during which time Dr. Mock unequivocally stated that he had not previously taken the anatomic pathology examination. (*Id.* at 55-56). The court found Hayes's first assignment of error unconvincing for two additional reasons: (1) defense counsel failed to reserve the right to recall Dr. Mock, and (2) defense counsel "failed to vouch the record that Dr. Mock actually lied about his credentialing to conceal an academic failure." (*Id.* at 56).

Regarding Hayes's second assignment of error, the WVSCA held that "[t]he trial court did not deny [Hayes] the right to present a complete defense by prohibiting Dr. Young from *speculating*, in the presence of the jury, whether Dr. Mock *may* have failed the anatomic pathology exam." (*Id.* at 57) (emphasis in original). The court noted that Hayes had presented no evidence that Dr. Young was an expert on the American Board of Pathology's examination procedures, nor had Hayes put forth any evidence regarding the Board's testing procedures. (*Id.*) The WVSCA issued its mandate on June 17, 2013. (*Id.* at 58).

B. State Habeas Proceedings

On April 2, 2014, Hayes filed a petition for a writ of habeas corpus in the Circuit Court for Kanawha County. (ECF No. 9-1 at 60-100). The petition raised four grounds for relief:

> 1. Counsel rendered ineffective assistance under the State and Federal Constitution by virtue of his deficient performance in protecting and litigating the denial of [Hayes's] right to be free from a coerced statement.

> 2. Counsel rendered ineffective assistance under the State and Federal Constitution by virtue of his deficient performance in denying [Hayes] of his defense for failing to meaningfully cross-examine the State['s] expert witness [Dr.] Mock.
>
> 3. Counsel rendered ineffective assistance under the State and Federal Constitution by virtue of his deficient performance in litigating the issue of insufficient evidence.
>
> 4. Counsel rendered ineffective assistance under the State and Federal Constitution by virtue of his failure to raise claims herein on direct appeal.

(*Id.* at 71-97). In support of his first ground for relief, Hayes attached an affidavit to his petition wherein he stated that, during the second interview with police, "[t]he detective's coercive tactics caused [his] free-will to be over-come [*sic*]," which resulted in Hayes providing an "involuntary statement." (*Id.* at 99).

On August 22, 2014, the circuit court entered an order denying Hayes's state habeas petition without appointing counsel or conducting an evidentiary hearing. (*Id.* at 127). The circuit court recognized in its written order that a court may deny a state habeas petition "without a hearing and without appointing counsel if the petition, exhibits, affidavits and other documentary evidence show to the circuit court's satisfaction that the [p]etitioner is not entitled to relief." (*Id.* at 127, 138). On Hayes's first ground for relief, the circuit court found that defense counsel "argued vigorously" at the suppression hearing that Hayes's statement to the police during his second interview was coerced. (*Id.* at 139). The court noted that Hayes's second police interview lasted two and one-half hours, during which time Hayes was never handcuffed and was given cigarette breaks. (*Id.* at 140). The court indicated that it was within the trial court's discretion to find that Hayes's statement was voluntary. (*Id.*) The court also found that Hayes could not demonstrate that prejudice resulted from

the introduction of the statement. (*Id.*) The court pointed out that Hayes did not confess in his statement to shaking or abusing R.M., and as such, the court concluded that excluding Hayes's statement would not have resulted in a different outcome at trial. (*Id.*)

With respect to Hayes's second ground for relief, the circuit court found that defense counsel thoroughly cross-examined Dr. Mock on the subject of his experience and credentials, and as such, counsel's performance was not deficient. (*Id.* at 141-42). Moreover, the circuit court found that Dr. Mock was qualified to perform autopsies pursuant to West Virginia Code § 61-12-10 because Dr. Mock testified that he completed fellowship training in forensic pathology at the New Mexico University Office of the Chief Medical Investigator. (*Id.* at 141). The court also noted that Hayes offered his own expert to explain the cause of R.M.'s death; however, the court found that the jury must have rejected Dr. Young's opinion. (*Id.* at 142). Furthermore, the court emphasized that Dr. Caceres testified that R.M. was the victim of abuse, and "there were no possible attacks on his credentials in his respective field." (*Id.*) In light of the above and the other evidence presented by the State at trial, the court found that Hayes could not demonstrate any prejudice resulting from defense counsel's failure to more meticulously cross-examine Dr. Mock. (*Id.*)

Turning to Hayes's third ground for relief, the circuit court found that "the weight of the evidence presented against [Hayes] at trial was more than sufficient to sustain his conviction." (*Id.* at 143). The court pointed out that Hayes was the only person with R.M. on September 30, 2010, after Hayes dropped M.B. off at work. (*Id.*) According to both Hayes and M.B., R.M. was in good health that morning. (*Id.*) The court highlighted Hayes's phone call to his father wherein he insisted that he did not

mean to hurt R.M. "like that." (*Id.* at 144). In addition, the court found "there was ample medical evidence that [R.M.'s] injuries were the result of abuse and that her injuries were acute to her admission to the emergency room on September 30, 2010." (*Id.*) The court asserted that "[t]he medical evidence presented by the State was compelling and credible—even when compared to the expert testimony provided by [Hayes's] expert, Dr. Young." (*Id.*)

Lastly, the circuit court rejected Hayes's ineffective assistance of appellate counsel argument. (*Id.* at 145). The court found that "the fact that [Hayes's] appellate counsel chose not to appeal the trial court's decision regarding the admission of [Hayes's] statement and trial counsel's failure to litigate sufficiency of the evidence to convict [Hayes] does not establish that his performance on appeal was deficient." (*Id.*) Separately, the court found that Hayes could not demonstrate prejudice resulting from appellate counsel's failure to raise those issues on appeal. (*Id.*)

On September 15, 2014, Hayes appealed the circuit court's denial of state habeas relief. (ECF No. 9-2 at 2-6). On appeal, Hayes raised four assignments of error:

> 1. Did the lower [c]ourt have jurisdiction to enter judgment of conviction and sentence under the indictment when said indictment failed to allege facts and circumstances constituting the offense charged.
>
> 2. Did the lower [c]ourt abuse its discretion by denying [Hayes's] Petition for Writ of Habeas Corpus without finding that trial counsel rendered ineffective assistance of counsel by:
>
> > a. Not arguing the proper standard for review on his challenge of insufficiency of the evidence when the evidence did not establish all [of] the elements of the crime....
> >
> > b. (i) Failing to have [Hayes] take the witness stand, during the hearing to suppress statement, to introduce testimonial evidence that his statement to detectives was in fact the product of coercion which resulted in [Hayes's] free will having been overborne.... (ii)

> Failing to provide the trial [c]ourt with binding authority to support the claim that [Hayes's] statement was involuntary ....
>
> c. Denying [Hayes] a complete defense by failing to conduct a reasonable investigation into [Dr. Mock's] qualifications ....
>
> 3. Did the lower [c]ourt abuse its discretion by denying [Hayes's] Petition for Writ of Habeas Corpus without finding that [d]irect [a]ppeal [c]ounsel rendered ineffective assistance of counsel by his failure to raise with the [WVSCA] the claims regarding ineffective assistance of trial counsel and jurisdiction of the trial court due to void indictment[.]
>
> 4. Did the lower [c]ourt abuse its discretion by failing to provide [Hayes] with the facilities and procedures needed to establish his entitlement to relief.

(*Id.* at 14-15). Respondent filed a response brief on April 7, 2015, which attached a 2012 Booklet of Information from the American Board of Pathology demonstrating that the anatomic pathology and clinical pathology examinations could be taken separately. (*Id.* at 52, 97).

On September 11, 2015, the WVSCA issued a memorandum decision affirming the circuit court's denial of state habeas relief. (*Id.* at 122). The WVSCA held that the circuit court's order "adequately rejected" the claims raised in Hayes's state habeas petition, and the court adopted and incorporated the circuit court's order. (*Id.* at 124-25). Accordingly, the WVSCA solely addressed the errors raised by Hayes for the first time on appeal. (*Id.* at 124). First, the WVSCA found that the indictment "closely track[ed]" the language of the charging statute, and therefore, the indictment was not defective. (*Id.*) Second, the WVSCA held that appellate counsel was not ineffective for failing to raise "meritless" claims. (*Id.*) The court noted that any claim on direct appeal regarding the indictment was destined to fail. (*Id.*) Similarly, the court observed that any ineffective assistance of trial counsel claim would have been unsuccessful on direct appeal, particularly when one considers that the WVSCA "rarely" addresses claims of

ineffective assistance of counsel on direct appeal. (*Id.*) Lastly, the WVSCA concluded that the circuit court properly denied Hayes's state habeas petition without holding an evidentiary hearing. (*Id.* at 125). The WVSCA issued its mandate affirming the circuit court's decision on October 13, 2015. (*Id.* at 127).

C. Federal Habeas Petition

On November 30, 2015, Hayes filed his § 2254 petition seeking a writ of habeas corpus. (ECF No. 2). Therein, Hayes asserts the following grounds in support of his § 2254 habeas petition:

> 1. Hayes stands convicted and imprisoned in violation of the Fifth Amendment to the United States Constitution by the denial of his Constitutional right to be free from a coerced statement. (*Id.* at 5).
>
> 2. Trial counsel rendered ineffective assistance under the Sixth Amendment to the United States Constitution by denying Hayes his defense when counsel failed to meaningfully cross-examine Dr. Mock. (*Id.* at 9).
>
> 3. Trial counsel provided ineffective assistance under the Sixth Amendment to the United States Constitution by his deficient performance in litigating the issue of insufficient evidence. (*Id.* at 14).
>
> 4. Appellate counsel rendered ineffective assistance of counsel when he failed to raise the preceding three claims on direct appeal. (*Id.* at 16).

In support of his first ground for relief, Hayes asserts that his statement was coerced because the detectives informed Hayes that, if he confessed that R.M.'s death was an accident, then he would be free to leave. (*Id.* at 7). Hayes insists that "[i]f not for the coerced statement, there would not be any evidence that an accidental incident may have occurred." (*Id.*) With respect to his second ground for relief, Hayes argues that trial counsel failed to investigate whether Dr. Mock was qualified under West Virginia state law to perform an autopsy on R.M. (*Id.* at 12). According to Hayes, if trial counsel had conducted an investigation into Dr. Mock's qualifications, a reasonable

probability exists that counsel would have discovered that Dr. Mock did not possess the requisite qualifications for performing an autopsy on R.M., a fact which could have been relayed to the jury. (*Id.*) Given the conflicting expert opinions as to R.M.'s death, Hayes contends that information related to Dr. Mock's lack of qualifications was crucial to the defense and could have led the jury to accept Dr. Young's opinion concerning the cause of R.M.'s death. (*Id.* at 13). As for Hayes's third ground for relief, he claims that defense counsel was ineffective in failing to argue the sufficiency of the evidence in Hayes's post-trial motion for judgment of acquittal. (*Id.* at 15). Hayes insists that there is a reasonable probability that counsel would have prevailed if counsel had raised such an argument. (*Id.*) Lastly, Hayes asserts that his counsel was ineffective for failing to raise the aforementioned claims on direct appeal. (*Id.* at 16).

On December 11, 2015, the undersigned ordered Respondent to answer the petition. (ECF No. 7). On February 9, 2016, Respondent filed an answer, (ECF No. 8), and a motion for summary judgment with an accompanying memorandum of law, (ECF Nos. 9 & 10). In Respondent's Answer, he asserts that Hayes has exhausted his state court remedies for the claims contained in his § 2254 petition. (ECF No. 8 at 2). In his memorandum, Respondent argues that Hayes is not entitled to federal habeas relief. (ECF No. 10). First, Respondent argues that the state court did not unreasonably apply federal law in finding that Hayes's ineffective assistance of counsel claim related to his October 4 statement was meritless. (*Id.* at 20). Respondent asserts that Hayes's trial counsel forcefully argued at the suppression hearing that the statement should not be admitted at trial. (*Id.* at 21). In addition, Respondent points out that the circuit court found that Hayes's statement was not coerced. (*Id.*) Moreover, Respondent contends that Hayes's "statement to police was of little relevance to the State's case-in-chief

beyond [Hayes's] outlandish and likely impossible statement of events in which he fell down the stairs while holding the minor victim." (*Id.*) Respondent emphasizes that Hayes did not admit to abusing R.M. in his statement. (*Id.*)

Second, Respondent argues that the circuit court did not unreasonably apply federal law in denying Hayes's claim that trial counsel failed to adequately cross-examine Dr. Mock. (*Id.* at 22-23). Respondent asserts that Dr. Mock was qualified to perform autopsies under West Virginia law at the time that he performed R.M.'s autopsy. (*Id.* at 22). Moreover, Respondent highlights the circuit court's finding that defense counsel "vigorous[ly]" cross-examined Dr. Mock concerning his qualifications. (*Id.*) Separately, Respondent contends that Hayes cannot demonstrate prejudice for his claim. (*Id.*) Respondent argues that Dr. Caceres offered an opinion that R.M.'s death was caused by abuse, which corroborated Dr. Mock's testimony. (*Id.*) Additionally, Respondent notes that the jury heard Dr. Young's criticisms of Dr. Mock's autopsy, but nevertheless found Hayes guilty. (*Id.*)

Third, Respondent asserts that the State introduced sufficient evidence of Hayes's guilt at trial. (*Id.* at 23). Respondent points out that R.M. was in the care of Hayes on September 30 and was in good health until left alone with Hayes that morning. (*Id.* at 23-24). Respondent stresses that Hayes later gave a statement to police that was illogical and told his father that he did not intend to hurt R.M. "like that." (*Id.* at 24). In addition, Respondent cites the testimony of the State's two expert witnesses, who both opined that R.M.'s death was the result of abuse. (*Id.*)

Lastly, Respondent insists that Hayes's fourth ground for relief is meritless. (*Id.* at 25). Respondent asserts that the aforementioned grounds for relief are frivolous, and therefore, appellate counsel was not ineffective for failing to raise those claims on

direct appeal. (*Id.*) Ultimately, Respondent maintains that all four grounds for relief in Hayes's § 2254 petition are meritless, and thus, Hayes's petition should be dismissed. (*Id.*)

On March 4, 2016, the undersigned entered an order notifying Hayes of his right to file a response to Respondent's motion for summary judgment and permitting Respondent to file a reply memorandum to any response brief tendered by Hayes. (ECF No. 13). On March 11, 2016, Hayes filed a response to Respondent's motion for summary judgment. (ECF No. 14). On the subject of his first ground for relief, Hayes argues that Respondent neglected to respond to Hayes's position that trial counsel failed to have Hayes testify at the suppression hearing and that trial counsel failed to cite authority in support of the motion to suppress; however, Hayes did not raise these issues in his § 2254 petition. (*Id.* at 5; ECF No. 2 at 5-7). Hayes insists that his statement was coerced because the detectives implicitly promised that he would be free to go if he told them that R.M.'s death was an accident. (*Id.*) Hayes contends that the State used his statement against him at trial and that the admission of the statement rendered Hayes unable to testify on his own behalf at trial for fear of impeachment. (*Id.* at 6). Hayes asserts that he would have testified at trial consistent with his initial statement to police and his statement to the Child Protective Services worker. (*Id.*) As to Hayes's second ground for relief, he argues that Dr. Mock was not qualified to perform an autopsy on R.M. pursuant to West Virginia Code § 61-12-10(a). (ECF No. 14 at 7). Hayes maintains that defense counsel's cross-examination of Dr. Mock would have been more effective if counsel had investigated and discovered before trial that Dr. Mock lacked the requisite qualifications to perform an autopsy. (*Id.*) Hayes asserts that he was prejudiced by counsel's deficient performance because further

impeachment of Dr. Mock may have led the jury to assign more weight to Dr. Young's opinion. (*Id.* at 8-10). Relatedly, Hayes contends that the state circuit court abused its discretion by failing to hold an evidentiary hearing on the issue of Dr. Mock's qualifications. (*Id.* at 8). Finally, regarding Hayes's third ground for relief, he argues that the State produced no evidence at trial that he maliciously and intentionally harmed R.M. (*Id.* at 11-13). Hayes supports his claim by citing to the defense investigator's affidavit described above, which purportedly bolsters his claim that the State failed to prove that he caused R.M.'s death and that R.M.'s death was a result of Hayes's intentional and malicious actions. (*Id.* at 12).

II. Standard of Review

Title 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214, authorizes a federal district court to entertain a petition for habeas corpus relief from a prisoner in state custody, "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). When determining the merits of a § 2254 petition, the district court applies the standard set forth in § 2254(d), which provides that the habeas petition of a person in State custody "shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim" is:

> (1) contrary to, or involves an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d) (1) and (2). Moreover, the factual determinations made by the state

court are presumed to be correct and are only rebutted upon presentation of clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). Thus, when reviewing a petition for habeas relief, the federal court uses a "highly deferential lens." *DeCastro v. Branker,* 642 F.3d 442, 449 (4th Cir. 2011).

A claim is generally considered to have been "adjudicated on the merits" when it is "substantively reviewed and finally determined as evidenced by the state court's issuance of a formal judgment or decree." *Thomas v. Davis*, 192 F.3d 445, 455 (4th Cir. 1999). The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have separate and independent meanings. *Williams v. Taylor,* 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision warrants habeas relief under the "contrary to" clause "if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to the Supreme Court's." *Lewis v. Wheeler*, 609 F.3d 291, 300 (4th Cir. 2010) (quoting *Williams,* 529 U.S. at 405) (internal quotations omitted). A habeas writ may be granted under the "unreasonable application" clause if the state court "identifies the correct governing legal rule from the [Supreme] Court's cases but unreasonably applies it to the facts of the particular case." *Id.* at 300-01 (internal marks omitted).

Accordingly, the AEDPA limits the habeas court's scope of review to the reasonableness, rather than the correctness, of the state court's decision. A federal court may not issue a writ under this standard "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather the application must also be unreasonable." *Williams*, 529 U.S. at 365.

Here, Respondent has moved for summary judgment. (ECF No. 9). Summary judgment under Rule 56 of the Federal Rules of Civil Procedure "applies to habeas proceedings." *Brandt v. Gooding*, 636 F.3d 124, 132 (4th Cir. 2011) (quoting *Maynard v. Dixon*, 943 F.2d 407, 412 (4th Cir. 1991)). Summary judgment will be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[A] fact or facts are material if they constitute a legal defense, or if their existence or nonexistence might affect the result of the action, or if the resolution of the issue they raise is so essential that the party against whom it is decided cannot prevail." Charles Alan Wright, Arthur R. Miller &, Mary Kay Kane, *Federal Practice and Procedure*: *Civil* § 2725 (3d ed. 2005). On the other hand, a fact is not material when it is of no consequence to the outcome, or is irrelevant in light of the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Assertions of material facts must be supported by "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c). In addition, only genuine disputes over material facts "will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248; *JKC Holding Co. v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). A dispute is "genuine" when "there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party." *Cox v. Cnty. of Prince William*, 249 F.3d 295, 299 (4th Cir. 2001) (citing *Anderson*, 477 U.S. at 248).

Motions for summary judgment impose a heavy burden on the moving party as

it must be obvious that no material facts are in dispute and no rational trier of fact could find for the nonmoving party. *See Miller v. F.D.I.C.*, 906 F.2d 972, 974 (4th Cir. 1990). Nonetheless, the "mere existence of a scintilla of evidence" favoring the non-moving party will not prevent entry of summary judgment. *Anderson,* 477 U.S. at 252. While any permissible inferences to be drawn from the underlying facts "must be viewed in the light most favorable to the party opposing the motion," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Felty v. Graves-Humphreys Co.,* 818 F.2d 1126, 1128 (4th Cir. 1987) (quoting *Anderson*, 477 U.S. at 249-50).

III. Discussion

A. Whether Hayes's Statements to the Police During the Second Police Interview were Coerced

In his first ground for relief, Hayes contends that he "stands convicted and imprisoned in violation of the Fifth Amendment to the United States Constitution by the denial of his Constitutional right to be free from a coerced statement." (ECF No. 2 at 5). Specifically, Hayes argues that the trial court erred by admitting his statements from his October 4, 2010 interview with police. (*Id.* at 5-7). Hayes insists that the detectives implicitly promised that he would be free to leave if he admitted that R.M.'s death was an accident. (*Id.* at 7).

Respondent does not raise a lack of exhaustion, even though Hayes primarily argued this issue in state court under the guise of ineffective assistance of counsel. Nevertheless, the undersigned **FINDS** that Hayes exhausted his state court remedies by fairly presenting the underlying federal claim, i.e. the voluntariness of his

statements, to the state courts.[4] *See Ramdass v. Angelone*, 187 F.3d 396, 409 (4th Cir. 1999) (holding that petitioner's claim regarding due process right to mental health expert was exhausted where petitioner argued in state court that counsel was ineffective for failing to secure mental health expert and cited federal standard for appointing mental health expert). Moreover, the state circuit court partially based its decision denying Hayes's claim on a finding that the trial court properly exercised its discretion in admitting Hayes's statements. Therefore, exhaustion is accepted, and AEDPA deference is applied to the state court's decision denying the claim.

In his state habeas petition, Hayes asserted that his trial counsel was ineffective in litigating the admissibility of his October 4 statements because counsel failed to have Hayes testify at the suppression hearing and neglected to provide any authority to the trial court supporting his arguments for suppression. (ECF No. 9-1 at 86-87). However, in the memorandum in support of his petition, Hayes not only cited the standard for ineffective assistance of counsel, but also the Supreme Court's decision in *Hutto v. Ross*, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976), which describes the standard for the admissibility of a confession under federal law. (ECF No. 9-1 at 86). After noting the proper inquiry under *Hutto*, Hayes argued that the State could not meet its burden in demonstrating that his statements to the police were voluntary. (*Id.* at 87).

The state circuit court denied Hayes's claim, finding that defense counsel "argued vigorously over the course of [the] suppression hearing ... that [Hayes's] statement was coerced." (*Id.* at 139). Yet, the circuit court's discussion of the issue did

[4] To the extent that this claim may be unexhausted or exhausted and procedurally defaulted, it may still be dismissed on the merits for the reasons set forth below. 28 U.S.C. § 2254(b)(2); *see Smith v. Mirandy*, No. 2:14-cv-18928, 2016 WL 1274592, at *17 (S.D.W.Va. Mar. 31, 2016).

not end there. The circuit court noted the standard for determining the voluntariness of a confession explicated in *State v. Bradshaw*, 457 S.E.2d 456 (W. Va. 1995). (ECF No. 9-1 at 139). In *Bradshaw*, the WVSCA looked to both United States Supreme Court precedent and WVSCA precedent when describing the test for admitting "extrajudicial inculpatory statements." 457 S.E.2d at 464 (citing, *inter alia*, *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972)). Applying the *Bradshaw* standard, the circuit court concluded that the trial court "was clearly within its discretion to find that [Hayes's] statement was voluntary." (ECF No. 9-1 at 140). On appeal to the WVSCA, Hayes again cited and argued the federal standard for the admissibility of a confession under federal law. (ECF No. 9-2 at 38) (citing *Lego*, 404 U.S. at 489). The WVSCA adopted the circuit court's findings and conclusions on the issue. (*Id.* at 124-25).

"[T]he Fourteenth Amendment is grievously breached when an involuntary confession is obtained by state officers and introduced into evidence in a criminal prosecution which culminates in a conviction." *Blackburn v. Alabama*, 361 U.S. 199, 205, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). "The test for determining whether a statement is voluntary under the Due Process Clause is whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." *United States v. Braxton*, 112 F.3d 777, 780 (4th Cir. 1997) (quoting *Hutto*, 429 U.S. at 30) (markings omitted). "The mere existence of threats, violence, implied promises, improper influence, or other coercive police activity, however, does not automatically render a confession involuntary. The proper inquiry is whether the defendant's will has been overborne or his capacity for self-determination critically impaired." *Id.* (quoting *United States v. Pelton*, 835 F.2d 1067, 1071 (4th Cir. 1987)) (markings omitted); *see also United States v. Umana*, 750

F.3d 320, 344-45 (4th Cir. 2014) (same); *Rose v. Lee*, 252 F.3d 676, 685 (4th Cir. 2001) ("[T]he existence of a promise in connection with a confession does not render a confession per se involuntary."). "To determine whether a defendant's will has been overborne or his capacity for self-determination critically impaired, courts must consider the totality of the circumstances, including the characteristics of the defendant, the setting of the interview, and the details of the interrogation." *Braxton*, 112 F.3d at 781 (quoting *Pelton*, 835 F.2d at 1071) (markings omitted). "Any statement given freely and voluntarily without any compelling influences is admissible in evidence." *Id.* Admissibility of a confession at trial depends on "the prosecution [proving] at least by a preponderance of the evidence that the confession was voluntary."[5] *Lego*, 404 U.S. at 489.

Hayes maintains his confession was involuntary because the interviewing detectives implicitly promised that Hayes would be free to leave if he admitted that he had a role in R.M.'s death, but her death was purely accidental. (ECF No. 2 at 7). However, it does not appear that the detectives explicitly promised Hayes anything in exchange for an inculpatory statement. Although Detective Cook equivocally informed Hayes, "If it was a hundred percent an accident, [Hayes] would *probably* be free to leave once it's dealt with," other federal courts have determined that similar interrogation tactics do not automatically render a confession involuntary. *See Ramirez v. Montgomery*, No. 12-1472, 2014 WL 333556, at *15-*18 (C.D. Cal. Jan. 29,

[5] Even then, in some jurisdictions, admission of the confession is not the end of the query. For instance, in West Virginia, "[a] jury can consider the voluntariness of the confession, and [the WVSCA] approve[s] 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, *State v. Vance*, 250 S.E.2d 146, 148 (W. Va. 1978). Indeed, such a jury instruction was given in Hayes's case.

2014) (finding that state court's determination that petitioner's confession was voluntary was not unreasonable where officers contrasted consequences of "purposeful shooting" with those of "some type of accident"); *United States v. Hunter*, 912 F. Supp. 2d 388, 400-01 (E.D. Va. 2012) (finding that defendant's confession to shaking baby was voluntary where interviewing officer repeatedly assured defendant that no one would fault defendant and that baby's death was accident); *Adams v. Hornbeak*, No. 1:10-cv-02110, 2011 WL 2946281, at *17 (E.D. Cal. July 21, 2011) (finding that confession was voluntary where polygraph examiner told petitioner that case would "remain a homicide" unless petitioner explained that death of victim was accident); *cf. United States v. Lopez*, 437 F.3d 1059, 1064-65 (10th Cir. 2006) (holding district court did not clearly err in finding that agent's use of pieces of paper during interrogation labeled "murder" and "mistake" along with "60" years and "6" years was promise of leniency because agent conveyed that admitting killing was "mistake" would carry much lesser sentence and holding that this tactic was coercive).

Likewise, the Fourth Circuit has "consistently declined to hold categorically that a suspect's statements are involuntary simply because police deceptively highlight the positive aspects of confession." *Umana*, 750 F.3d at 344. Nor are a suspect's statements involuntary because an officer admonishes the suspect "to tell the truth or face consequences." *United States v. Tisdale*, 80 F. App'x 843, 844 (4th Cir. 2003). Here, the interviewing detectives certainly emphasized the positive aspects of Hayes providing a statement describing R.M.'s death as accidental; however, the detectives never unambiguously promised that Hayes would receive a lesser sentence or would not be criminally charged for R.M.'s death. Moreover, the detectives consistently encouraged Hayes to tell the truth, and Detective Cook informed Hayes that it was

"more than likely" that Hayes would be leaving the police station in handcuffs that day given R.M.'s injuries. Viewing the detectives' statements about an accident in the context of the entire interview, Hayes could not have sensibly understood the officers to have promised him freedom in exchange for a confession.

Additionally, "a law enforcement officer may properly tell the truth to the accused." *United States v. Holmes*, 670 F.3d 586, 592 (4th Cir. 2012). "[S]tatements by law enforcement officers that are merely 'uncomfortable' or create a 'predicament' for a defendant are not ipso facto coercive." *Id.* a 592-93 (quoting *Pelton*, 835 F.2d at 1072-73). Here, the detectives informed Hayes that he might be free to leave if R.M.'s death were confirmed to be a complete accident, which was probably true. Although this may have created a predicament for Hayes by encouraging him to construct an accident narrative, that alone is not coercive.

Furthermore, assessing the totality of the circumstances, there is no indication that the location or the length of the questioning, or Hayes's personal characteristics made him particularly susceptible to the aforementioned tactics overbearing his will and causing him to provide a damaging statement. The second police interview took place in the kitchen area of the South Charleston Police Department and lasted approximately two and one-half hours, during which time Hayes was never handcuffed and was given breaks. (ECF No. 9-1 at 140). Before the interview began, Hayes was read his *Miranda* rights and also informed that he was not under arrest and that he was free to leave at any time. (ECF No. 9-2 at 130-31). After confirming that he could read, Hayes signed a written waiver of these rights. (*Id.*) Detective Paschall testified at the suppression hearing that Hayes appeared to be "of sound mind and body" before the interview. At one point during the interview, Hayes remarked that he was "not

uneducated." (*Id.* at 155). Hayes's responses demonstrate that he could understand and intelligently answer the detectives' questions. *See United States v. Ayesh*, 702 F.3d 162, 169 (4th Cir. 2012) (affirming district court's finding that defendant's statements to police were freely and voluntarily given where defendant was intelligent, signed form indicating that he understood and wished to waive *Miranda* rights, and "spoke confidently on his own behalf"). Although Hayes may have been emotionally vulnerable the day after learning of R.M.'s death, that factor is not dispositive in the voluntariness analysis.

The AEDPA limits the Court's review to whether the state court's denial of Hayes's involuntary confession claim was contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1). Notwithstanding the recognition that Hayes may have been emotionally liable at the time of the second police interview and that some of the detectives' specific questions could be interpreted as inducing, the undersigned **FINDS** that state court's decision on this claim is not contrary to, or an unreasonable application of, clearly established federal law. Therefore, the undersigned **RECOMMENDS** that Hayes's first ground for relief be **DENIED**, and Respondent be **GRANTED** summary judgment on ground one of Hayes's § 2254 petition.[6]

B. Ineffective Assistance of Counsel

In his next three grounds for relief, Hayes argues that his trial counsel and

[6] Insofar as Hayes contends in his response memorandum that trial counsel was ineffective in arguing the voluntariness of his statements, his contention is without merit. As the state court found, trial counsel argued vehemently at both the suppression hearing and during trial that Hayes's statements to police were coerced. The state circuit court's determination that Hayes's trial counsel did not perform deficiently in arguing this issue, which was adopted by the WVSCA, is not contrary to, or an unreasonable application of, clearly established federal law. (ECF No. 9-1 at 139-40; ECF No. 9-2 at 124-25).

appellate counsel were ineffective. The Sixth Amendment to the United States Constitution guarantees a criminal defendant "the right to the effective assistance of counsel." *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). While "assistance which is ineffective in preserving fairness does not meet the constitutional mandate … defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation." *Mickens v. Taylor,* 535 U.S. 162, 166, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2001). To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 694. When reviewing counsel's performance, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690. Moreover, counsel's performance should be assessed with "a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time," and a court should not allow hindsight to alter its review. *Wiggins v. Smith,* 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). In addition, trial strategy devised after investigating the law and facts is "virtually unchallengeable." *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995).

In a § 2254 proceeding, the standard of review differs somewhat from the standard used in the direct review of a *Strickland*-based challenge where the state court adjudicated the petitioner's ineffective assistance of counsel claims on the merits. *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). "The standards created by *Strickland* and § 2254(d) are both highly deferential, and when

the two apply in tandem review is doubly so." *Id.* at 105 (internal citations and quotations omitted). "'Surmounting *Strickland's* high bar is never an easy task[;]' ... Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Id.* (quoting *Padilla v. Kentucky,* 559 U.S. 356, 371, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)). When a state court has adjudicated an ineffective assistance of counsel claim on the merits in summary fashion, the issue is "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

1. Trial Counsel's Cross-Examination of Dr. Mock

In his second ground for relief, Hayes contends that trial counsel was ineffective for failing to meaningfully cross-examine Dr. Mock. (ECF No. 2 at 9). Hayes insists that counsel should have conducted an investigation into Dr. Mock's credentials prior to trial, which he asserts would have revealed that Dr. Mock was not qualified to perform R.M.'s autopsy under West Virginia Code § 61-12-10(a). (ECF No. 2 at 12; ECF No. 14 at 7-8). Hayes argues that his counsel could have confronted Dr. Mock on cross-examination with his lack of qualification to perform autopsies under state law. (ECF No. 2 at 12). Had counsel done so, Hayes asserts that the jury may have chosen to assign more weight to Dr. Young's opinions concerning the cause of R.M.'s injuries. (*Id.* at 13).

The state circuit court rejected Hayes's claim and found that trial counsel had "vigorously cross-examined Dr. Mock regarding his experience and credentials." (ECF No. 9-1 at 142). The court also emphasized that trial counsel presented an expert to refute Dr. Mock's opinions. (*Id.*) Consequently, the state circuit court found that trial counsel did not perform deficiently. Separately, the circuit court found that Hayes

could not establish prejudice for his claim. The court found that Dr. Mock was qualified to conduct R.M.'s autopsy because he testified that he had completed a fellowship in forensic pathology. (*Id.* at 141). The court also emphasized Dr. Caceres's testimony that R.M. was the victim of abuse, which caused her injuries. (*Id.* at 142). The circuit court concluded that, "[g]iven the weight of the evidence the State presented at trial," additional questioning of Dr. Mock concerning his credentials would not have altered the outcome of Hayes's trial. (*Id.*) The WVSCA adopted the circuit court's findings and conclusions. (ECF No. 9-2 at 124-25).

"Defense counsel's determinations concerning witness examination fall within the ambit of trial strategy that federal habeas courts are not inclined to second-guess." *Williams v. Bishop*, No. 13-3755, 2015 WL 4984396, at *8 (D. Md. Aug. 18, 2015) (citing *United States v. Terry*, 366 F.3d 312, 317 (4th Cir. 2004)). "Decisions about questioning witnesses require the balancing of risks and benefits and therefore warrant 'enormous deference' from reviewing courts." *Id.* (quoting *Terry*, 366 F.3d at 317). The state court's determination that defense counsel thoroughly cross-examined Dr. Mock is supported by the record. Before questioning Dr. Mock, defense counsel consulted with Dr. Young in preparation. (ECF No. 9-5 at 255). According to the WVSCA, defense counsel's cross-examination of Dr. Mock lasted approximately ninety minutes. (ECF No. 9-1 at 55). During that time, defense counsel extensively questioned Dr. Mock about his qualifications, findings, and opinions. Defense counsel also zealously questioned Dr. Mock on the crucial issue of whether R.M.'s skull fracture was a healing fracture.

Furthermore, defense counsel did not perform deficiently in failing to investigate and subsequently question whether Dr. Mock was qualified to perform

autopsies under West Virginia law. West Virginia Code § 61-12-10(a) provides:

> If in the opinion of the chief medical examiner, or of the county medical examiner of the county in which the death in question occurred, it is advisable and in the public interest that an autopsy be made, or if an autopsy is requested by either the prosecuting attorney or the judge of the circuit court or other court of record having criminal jurisdiction in that county, an autopsy shall be conducted by the chief medical examiner or his or her designee, by a member of his or her staff, or by a competent pathologist designated and employed by the chief medical examiner under the provisions of this article. For this purpose, the chief medical examiner may employ any county medical examiner who is a pathologist who holds board certification or board eligibility in forensic pathology or has completed an American Board of Pathology fellowship in forensic pathology to make the autopsies ....

West Virginia Code § 61-12-10(a) permits autopsies to be performed by "a competent pathologist designated and employed by the chief medical examiner under the provisions of this article." Looking to another provision of Article 61, West Virginia Code § 61-12-6 states, "the chief medical examiner may, in order to provide for the investigation of the cause of death as authorized in this article, employ and pay qualified pathologists and toxicologists to make autopsies .... Qualified pathologists shall hold board certification or board eligibility in forensic pathology or have completed an American board of pathology fellowship in forensic pathology."

As the circuit court found, Dr. Mock indicated that he completed a fellowship in forensic pathology at the New Mexico University Office of the Chief Medical Examiner. (ECF No. 9-1 at 141). The circuit court also pointed out that Dr. Mock's curriculum vitae stated the same. (*Id.*) Although the circuit court's findings and Dr. Mock's testimony do not specify whether the fellowship completed by Dr. Mock was an American Board of Pathology fellowship, Hayes has not offered any evidence that Dr. Mock's fellowship was not an American Board of Pathology fellowship. Accordingly, Hayes has failed to rebut the state court's finding that Dr. Mock was qualified to perform R.M.'s autopsy.

See 28 U.S.C. § 2254(e)(1). Given that Dr. Mock was qualified to perform R.M.'s autopsy under West Virginia state law, defense counsel was not ineffective for refraining from questioning Dr. Mock on that particular issue.

For that same reason, Hayes cannot demonstrate prejudice. There is no reasonable probability that the result of the proceeding would have been different had defense counsel questioned Dr. Mock on the issue. In fact, Dr. Mock would have almost certainly responded that he was qualified under state law, which might have bolstered his credibility. Moreover, given the evidence introduced by the State at trial, no reasonable probability exists that additional cross-examination on the issue of Dr. Mock's qualifications would have resulted in a different outcome. Indeed, Dr. Mock's findings were cosigned by Dr. Kaplan, the Chief Medical Examiner, and Dr. Caceres's opinions supported much of Dr. Mock's testimony. Lastly, the jury heard testimony from the defense's well-qualified expert, Dr. Young, critical of Dr. Mock's techniques and opinions, but the jury nevertheless found Hayes guilty. It is unlikely that further inquiry into Dr. Mock's qualifications would have altered the jury's rejection of Dr. Young's opinions.

Because a reasonable argument exists that defense counsel satisfied *Strickland*'s deferential standard, *Richter*, 562 U.S. at 105, and Hayes cannot demonstrate prejudice from any alleged error by defense counsel in cross-examining Dr. Mock, the undersigned **FINDS** that the state court's decision on this claim is not contrary to, or an unreasonable application of, clearly established federal law. Therefore, the undersigned **RECOMMENDS** that Hayes's second ground for relief be **DENIED**, and Respondent be **GRANTED** summary judgment on ground two of Hayes's § 2254 petition.

2. Trial Counsel's Performance in Litigating the Issue of Insufficient Evidence in Hayes's Post-Trial Motion for Judgment of Acquittal

In his third ground for relief, Hayes argues that his trial counsel "rendered ineffective assistance under the Sixth Amendment to the United States Constitution by his deficient performance in litigating the issue of insufficient evidence." (ECF No. 2 at 14). Hayes asserts his counsel failed to argue in the post-trial motion for acquittal that the evidence introduced at trial was insufficient to support the jury's verdict; instead, Hayes claims that his counsel argued for acquittal by erroneously attempting to impeach the jury's verdict using a juror's affidavit. (*Id.* at 14-15). The state circuit court denied the claim because there was "more than ample evidence presented in [Hayes's] case to convict [him]." (ECF No. 9-1 at 143). In addressing Hayes's contention, the state court applied the WVSCA's holding in *State v. Guthrie*, 461 S.E.2d 163, 173 (W. Va. 1995), which adopted the standard for reviewing sufficiency of the evidence claims announced in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). (ECF No. 9-1 at 143). The WVSCA adopted the circuit court's findings and conclusion on the issue. (ECF No. 9-2 at 124-25).

To begin, the undersigned notes that Hayes's trial counsel *did* argue in Hayes's post-trial motion for judgment of acquittal that the State failed to present any evidence regarding the elements of malice and intent. (ECF No. 9-1 at 7). Trial counsel also argued the issue at the hearing on the motion. (ECF No. 9-10 at 72-73). Thus, to the extent that Hayes asserts that trial counsel neglected to raise the issue, his assertion is belied by the state court record. Accordingly, Hayes cannot demonstrate that counsel's performance was deficient because counsel raised and adequately argued the sufficiency of the evidence in Hayes's post-trial motion for acquittal.

Moreover, as the state court found, Hayes cannot establish that he was prejudiced by any inadequacy in trial counsel's presentation of the issue because there was sufficient evidence for a reasonable jury to convict Hayes of violating West Virginia Code § 61-8D-2a, which provides:

> 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.

In rejecting Hayes's contention, the state court applied the *Jackson* standard. In *Jackson*, the Supreme Court held that "the Due Process Clause of the Fourteenth Amendment protects a defendant in a [state] criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Jackson*, 443 U.S. at 315 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). In considering the issue, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. "[U]nder the AEDPA … [federal courts] inquire whether a state court determination that the evidence was sufficient to support a conviction was an objectively unreasonable application of [the standard enunciated in] *Jackson*." *Williams v. Ozmint*, 494 F.3d 478, 489 (4th Cir. 2007) (internal citations and quotations omitted).

Having extensively reviewed the state court record, the undersigned **FINDS** that the state court's determination that Hayes could not demonstrate prejudice for his claim was reasonable. M.B. testified that, immediately prior to September 30, R.M. did not exhibit any signs of head trauma. Moreover, M.B. indicated that R.M. was happy

on the morning of September 30, and Hayes confirmed in his statements to police that R.M. was acting normal that morning. Hayes was then alone with R.M. until he arrived at IHOP that afternoon with an unresponsive R.M. in the backseat of his car. Eventually, R.M. was transported to the Women and Children's Hospital where Dr. Caceres treated her. Dr. Caceres testified that R.M.'s injuries included a "pretty large" bruise on the right side of her head extending to the front of her head, generalized brain swelling, herniation of the cerebellum, small bilateral subdural hemorrhages, bilateral retinal hemorrhaging, and a "very big" skull fracture. Dr. Caceres opined that R.M.'s injuries were non-accidental and that R.M.'s condition was consistent with shaken baby or shaken impact syndrome. He rejected the notion that R.M.'s injuries could have been caused by the September 24 incident or the fall described by Hayes on October 4. Indeed, Dr. Caceres concluded that the head trauma that R.M. suffered must have occurred within two hours of her experiencing cardiac arrest.

At R.M.'s autopsy, Dr. Mock documented subscalpular hemorrhages, subgaleal hemorrhages, acute subdural and subarachnoid hemorrhages, severe brain swelling, bleeding in the optic nerve sheath, retinal hemorrhaging in both eyes, and a five and one-quarter inch skull fracture near the middle of R.M.'s skull. Both Dr. Mock and Dr. Caceres testified that R.M.'s skull fracture was consistent with head trauma involving significant or severe force, which might be seen in a car crash, for example. Similar to Dr. Caceres, Dr. Mock opined that neither the September 24 incident nor the September 30 fall described by Hayes could have caused R.M's injuries. Dr. Mock also testified that iron stain test results indicated that R.M.'s injuries occurred in close proximity to her hospital admission. Given his findings, Dr. Mock determined that R.M.'s death was a homicide and that the cause of R.M.'s death was blunt force injuries

to her head. Dr. Mock's autopsy report containing these conclusions was cosigned by Dr. Kaplan.

In addition, other evidence tended to demonstrate Hayes's guilt. For example, Hayes lied to the police, either in telling the detectives that the day was normal or that he tripped down the stairs while holding R.M. (or both). As the circuit court pointed out, Hayes also told the detectives that he first noticed R.M. slumped over when he was "just yards" from the turn into the shopping complex where IHOP is located, yet, Hayes also stated that R.M. had already turned blue (presumably from a lack of oxygen) by the time the two arrived at IHOP. (ECF No. 9-1 at 143-44). Moreover, Hayes never called 911 or took R.M. to the hospital on September 30, which is damning in that, if R.M.'s injuries were accidental, then one would expect Hayes to have sought emergency aid. Finally, and significantly, after his arrest, Hayes called his father and told him that he "didn't mean to hurt her like that."

Viewing the evidence in the light most favorable to the State, a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. Insofar as Hayes argues that the State failed to introduce any evidence of malice or intent, the extent of R.M.'s injuries found by Dr. Caceres and Dr. Mock permits a reasonable juror to infer that Hayes maliciously and intentionally inflicted physical harm on R.M. *Moceri v. Stovall*, No. 2:06-CV-15009, 2008 WL 4822063, at *15 (E.D. Mich. Nov. 4, 2008) (rejecting sufficiency of evidence claim in first-degree child abuse case where intent to injure child could be inferred from nature and extent of child's injuries). Moreover, both Dr. Caceres and Dr. Mock testified that the skull fracture suffered by R.M. would typically result from the application of significant force and that R.M.'s death was not the result of an accident. *See Sivo v.*

Wall, 644 F.3d 46, 50-51 (1st Cir. 2011) (rejecting sufficiency of evidence claim in first-degree child abuse case where petitioner was only person with child before child's death and two treating physicians testified that child's subdural hematoma could have only been caused by "an extremely powerful blow"); *Perodin v. Miller*, No. 11-4172, 2013 WL 5818565, at *6 (C.D. Cal. Oct. 29, 2013) ("The doctors' testimony that the application of great force was required to cause the child's injury and that the injury was not accidently caused allowed the jury to deduce that the injury was intentionally caused.") (quoting *People v. Mills*, 2 Cal. Rptr. 2d 614, 629 (Cal. Ct. App. 1991)) (markings omitted). Turning to the remaining elements of the crime, sufficient evidence exists that Hayes was R.M.'s custodian at the time that R.M. suffered her injuries and that the physical injuries sustained by R.M. caused her death.

Ultimately, Hayes cannot demonstrate that his trial counsel acted unreasonably in arguing the sufficiency of the evidence during post-trial proceedings or that prejudice resulted from any error by trial counsel. Of course, it follows that a reasonable argument exists that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 105. Accordingly, the undersigned **FINDS** that the state court's decision on this claim is not contrary to, or an unreasonable application of, clearly established federal law. Therefore, the undersigned **RECOMMENDS** that Hayes's third ground for relief be **DENIED**, and Respondent be **GRANTED** summary judgment on ground three of Hayes's § 2254 petition.

3. Ineffective Assistance of Appellate Counsel

Lastly, in his fourth ground for relief, Hayes argues that his counsel was ineffective for failing to raise the three issues discussed above on direct appeal to the WVSCA. (ECF No. 2 at 16). In his state habeas petition, Hayes asserted that his

appellate counsel was ineffective for neglecting to raise three claims of ineffective assistance of *trial* counsel on direct appeal: (1) trial counsel failed to adequately argue for suppression of Hayes's statement; (2) trial counsel failed to meaningfully cross-examine Dr. Mock; and (3) trial counsel performed deficiently when arguing the sufficiency of the evidence in Hayes's post-trial motion for judgment of acquittal. (ECF No. 9-1 at 66, 96). The state circuit court denied Hayes's ineffective assistance of appellate counsel claim. First, the circuit court noted that Hayes's "memorandum [was] not clear as to what issues he believe[d] appellate counsel should have raised on appeal, but it [could] be assumed that [Hayes was] referring to the claims for relief raised in his [state] habeas corpus petition." (*Id.* at 144). The circuit court generally found that Hayes could not "meet the heavy burden imposed on him in establishing ineffective assistance of appellate counsel." (*Id.*) The circuit court went on to explicitly address two claims of ineffective assistance of appellate counsel: (1) appellate counsel's decision to refrain from appealing the admission of Hayes's statement to the police, and (2) appellate counsel's decision not to appeal trial counsel's purported shortcomings in litigating the sufficiency of the evidence. (*Id.* at 145). The circuit court found that Hayes could not establish either prong of the *Strickland* test on these two issues because appellate counsel was not required to present frivolous issues on direct appeal. (*Id.*)

On appeal from the circuit court's decision, Hayes argued that appellate counsel was ineffective for failing to raise on direct appeal the issues of ineffective assistance of trial counsel and the adequacy of the indictment. (ECF No. 9-2 at 45-46). The WVSCA's memorandum decision recognized that Hayes's habeas appeal raised the issue of appellate counsel's ineffectiveness. (*Id.* at 124). The WVSCA noted that Hayes argued

his appellate counsel was ineffective for failing to raise claims of ineffective assistance of trial counsel on direct appeal, including a claim related to Dr. Mock's qualifications. The WVSCA denied Hayes's ineffective assistance of appellate counsel claim, concluding that appellate counsel "had no obligation to raise meritless claims" and that any claims of ineffective assistance of trial counsel raised would not have been addressed on direct appeal. (*Id.* at 124). The WVSCA also adopted the findings and conclusions of the circuit court. (*Id.* at 124-25).

Taking the circuit court's and the WVSCA's decisions together, the undersigned **FINDS** that Hayes exhausted his state court remedies for his ineffective assistance of appellate counsel claim contained in his § 2254 petition. The state circuit court addressed Hayes's claim that appellate counsel was ineffective for failing to argue the voluntariness of his statements to police. In addition, the WVSCA resolved Hayes's contentions that appellate counsel was ineffective for failing to argue the ineffectiveness of trial counsel, including the adequacy of counsel's cross-examination of Dr. Mock and trial counsel's arguments regarding the sufficiency of the evidence. Accordingly, Hayes has exhausted his claim of ineffective assistance of appellate counsel, and the undersigned applies AEDPA deference to the state court's decision denying the claim.

A criminal defendant enjoys a right to effective assistance of counsel on direct appeal. *See Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "Claims of ineffective assistance of appellate counsel are examined under the same *Strickland* standards applicable to claims of ineffective assistance of trial counsel." *Shrader v. United States*, No. 1:09-cr-27, 2016 WL 299036, at *4 (S.D.W.Va. Jan. 25, 2016). "In deciding which issues to raise on appeal, [counsel] is entitled to a

presumption that he decided which issues were most likely to afford relief on appeal." *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993). Importantly, appellate counsel is not ineffective for refraining from raising every nonfrivolous issue identified by a defendant on direct appeal. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, "sometimes [arguing] a weaker non-frivolous issue would have the effect of diluting stronger arguments on appeal." *Moultrie v. United States*, 147 F. Supp. 2d 405, 409 (D.S.C. 2001). Certainly then, counsel does not render deficient performance in declining to raise issues on appeal that are destined to fail. *See, e.g.*, *Bumpass v. United States*, No. 1:14CV1036, 2015 WL 5712490, at *2 (M.D.N.C. Sept. 29, 2015); *Van Wart v. United States*, No. 12-0912, 2013 WL 3788535, at *9 (E.D. Va. July 18, 2013); *Robinson v. United States*, No. 5:09-1324, 2012 WL 5472299, at *5 (S.D.W.Va. July 20, 2012), *report and recommendation adopted by* 2012 WL 5469159 (S.D.W.Va. Nov. 9, 2012); *Moultrie*, 147 F. Supp. 2d at 409.

Because the underlying claims that form the bases of Hayes's ineffective assistance of appellate counsel are meritless, the undersigned **FINDS** that Hayes's ineffective assistance of appellate counsel claim must fail. Hayes's appellate counsel did not perform deficiently in declining to raise issues on appeal that would not have garnered relief. Moreover, with respect to Hayes's claims of ineffective assistance of trial counsel, the WVSCA rarely addresses claims of ineffective assistance of trial counsel on direct appeal. *State v. Frye*, 650 S.E.2d 574, 576 (W. Va. 2006). As such, appellate counsel acted reasonably in declining to raise those claims on direct appeal.

For the same reasons, Hayes has failed to demonstrate that he was prejudiced by any error committed by his appellate counsel. Since the claims that Hayes wishes his appellate counsel would have raised are meritless or rarely recognized by the

WVSCA on direct appeal, Hayes cannot establish that there is a reasonable probability that a different result would have occurred on direct appeal had his appellate counsel raised those claims. Therefore, the undersigned **FINDS** that the state court's decision denying Hayes's ineffective assistance of appellate counsel claim was not contrary to, or an unreasonable application of, clearly established federal law. Therefore, the undersigned **RECOMMENDS** that Hayes's fourth ground for relief be **DENIED**, and Respondent be **GRANTED** summary judgment on ground four of Hayes's § 2254 petition.

IV. Proposal and Recommendations

The undersigned respectfully **PROPOSES** that the District Court confirm and accept the foregoing findings and **RECOMMENDS** as follows**:**

1. Respondent's Motion for Summary Judgment, (ECF No. 9), be **GRANTED**;
2. Petitioner's Petition for a Writ of Habeas Corpus by a Person in State Custody, (ECF No. 2), be **DENIED**; and
3. That this action be **DISMISSED, with prejudice**, and removed from the docket of the court.

The parties are notified that this "Proposed Findings and Recommendations" is hereby **FILED**, and a copy will be submitted to the Honorable Thomas E. Johnston, United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, Petitioner shall have fourteen days (filing of objections) and three days (mailing) from the date of filing this "Proposed Findings and Recommendations" within which to file with the Clerk of this Court, specific written objections, identifying the portions of the "Proposed Findings and Recommendations" to which objection is made and the basis of such objection. Extension of this time period may be granted by the presiding

District Judge for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. *Snyder v. Ridenour*, 889 F.2d 1363 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be provided to the opposing party, Judge Johnston, and Magistrate Judge Eifert.

The Clerk is instructed to provide a copy of this "Proposed Findings and Recommendations" to Petitioner, Respondent, and any counsel of record.

FILED: May 19, 2016

Cheryl A. Eifert
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

LARRY HAYES,

Petitioner,

v. CIVIL ACTION NO. 2:15-cv-15636

MARVIN PLUMLEY,

Respondent.

MEMORANDUM OPINION AND ORDER

Pending before the Court are Petitioner Larry Hayes' 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus ("the § 2254 Petition") (ECF No. 2) and Respondent Marvin Plumley's Motion for Summary Judgment (ECF No. 9). This matter was referred to United States Magistrate Judge Cheryl A. Eifert for submission of proposed findings and a recommendation for disposition ("PF&R"). On May 19, 2016, Magistrate Judge Eifert submitted a PF&R (ECF No. 15) recommending the Court grant Respondent's motion for summary judgment and dismiss the § 2254 Petition. Petitioner filed objections to the PF&R on June 7, 2016 (ECF No. 16), which the Court will treat as timely. For the reasons that follow, the Court **OVERRULES** Petitioner's objections, **ADOPTS** the PF&R save for the exceptions noted in this Memorandum Opinion, **GRANTS** the Motion for Summary Judgment, and **DISMISSES** the § 2254 Petition.

I. BACKGROUND

This case involves a collateral attack by a state prisoner on his conviction pursuant to 28 U.S.C. § 2254. On August 29, 2011, Petitioner was convicted upon jury verdict of death of a child by a parent, guardian, or custodian. *See* W. Va. Code § 61-8D-2a; (ECF No. 9-10 at 15–18). The criminal charge stemmed from the death of R.M., an eighteen-month-old child who fractured her skull while allegedly in Petitioner's exclusive care and died days later from her injuries. Following the verdict, the trial court imposed a sentence of forty years' imprisonment—the maximum penalty allowed by state law—followed by a ten-year term of supervised release. (*Id.* at 57–59.)

A summary of the evidence presented at Petitioner's jury trial, as well as the factual and procedural history of his direct appeal and collateral challenge in state court, are set forth in detail in the PF&R and need not be repeated here. The § 2254 Petition sets forth four grounds of relief. Ground One alleges a violation of Petitioner's due process right to be free from a coerced confession. The remaining three grounds allege ineffective assistance of counsel arising from trial counsel's failure to properly cross-examine the pathologist who conducted the victim's autopsy (Ground Two), failure to litigate the issue of insufficient evidence (Ground Three), and failure to raise the preceding claims on direct appeal (Ground Four). After a review of the record and Petitioner's legal arguments, the magistrate judge recommended that this Court grant Respondent's motion for summary judgment (ECF No. 9) and dismiss this matter from the Court's docket. In his objections, Petitioner raises anew his arguments with respect to Grounds One, Two, and Three of the § 2254 Petition.

II. LEGAL STANDARDS

A. Review of Magistrate Judge's Findings and Recommendation

Pursuant to Rule 72(b)(3) of the Federal Rules of Civil Procedure, the Court must determine *de novo* any part of a magistrate judge's disposition to which a proper objection has been made. The Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). Failure to file timely objections constitutes a waiver of *de novo* review and the Petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); *see also Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir. 1989); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984). In addition, this Court need not conduct a *de novo* review when a party "makes general and conclusory objections that do not direct the Court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982).

B. Section 2254 Standard of Review

A federal court may grant habeas relief for a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Section 2254(d), as modified by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides for a deferential standard of review to be applied to any claim that was "adjudicated on the merits" in state court proceedings. In such a case, a federal court may grant habeas relief only if the adjudication of the claim in state court:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Section 2254(d)(1) describes the standard of review to be applied to claims challenging how the state courts applied federal law. "A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). "The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." *Id.* The latter inquiry focuses on whether the state court's application of clearly established federal law was "unreasonable," as distinguished from whether it was "correct." *See Renico v. Lett*, 559 U.S. 766, 773 (2010); *Bell*, 535 U.S. at 694; *Williams v. Taylor*, 529 U.S. 362, 410 (2000). Moreover, the factual determinations made by the state court are "presumed to be correct," and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

A habeas claim has been "adjudicated on the merits" when it is "substantively reviewed and finally determined as evidenced by the state court's issuance of a formal judgment or decree." *Thomas v. Davis*, 192 F.3d 445, 455 (4th Cir. 1999) (citation omitted). "The phrase 'adjudication on the merits' in section 2254(d) excludes only claims that were not raised in state court, and not claims that were decided in state court, albeit in a summary fashion." *Thomas v. Taylor*, 170 F.3d 466, 475 (4th Cir. 1999); *see also Harrington v. Richter*, 562 U.S. 86, 98 (2011) (section 2254(d) applies even if the state court issued a summary decision unaccompanied by an explanation).

C. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. That rule provides, in relevant part, that summary judgment should be granted if "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(a). Summary judgment is inappropriate, however, if there exist factual issues that reasonably may be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "Facts are 'material' when they might affect the outcome of the case, and a 'genuine issue' exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *The News & Observer Publ. Co. v. Raleigh–Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010). When construing such factual issues, the Court must view the evidence "in the light most favorable to the [party opposing summary judgment]." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

III. DISCUSSION

A. Voluntariness of Petitioner's October 4, 2010 Confession

The Court proceeds with review of Petitioner's due process claim by first considering the issue of exhaustion. Finding the claim unexhausted, the Court will nevertheless consider the claim on its merits.

i. Exhaustion and Procedural Bar

On October 4, 2010, and just one day following R.M.'s death, Petitioner gave a statement to law enforcement in which he claimed that R.M. fractured her skull when he accidentally fell with her down the stairs in their home. The prosecution admitted the statement into evidence at Petitioner's trial. Petitioner now objects to the magistrate judge's conclusion that his October 4, 2010 statement to law enforcement was not the product of coercion.

Before taking up the merits of this objection, the Court addresses whether the claim has been adjudicated on the merits at the state level. In his state habeas corpus petition, Petitioner presented the substance of his coercion argument as an ineffective assistance of counsel claim based upon trial counsel's failure to successfully exclude the statement from admission into evidence. The § 2254 Petition, however, raises the claim as a violation of his due process right to be free from a coerced statement.[1] In other words, though the claims share the same factual basis, the source of relief differs. The magistrate judge noted this distinction but did not find it significant. She thus found that Petitioner exhausted the claim and applied AEDPA deference.

As stated previously, a § 2254 habeas petitioner must exhaust available state court remedies before a federal district court can entertain his claims. 28 U.S.C. § 2254(b)(1)(A); *see Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (noting that principles of comity allow the state judicial system "the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights"). "To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court." *Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998) (citing *Matthews v. Evatt*, 105 F.3d 907, 910–11 (4th Cir. 1997)). This requirement is not met "if the petitioner presents new legal theories or factual claims for the first time in his federal habeas

[1] More precisely, Petitioner's state habeas petition stated: "Counsel rendered ineffective assistance under the State and Federal Constitution by virtue of his deficient performance in protecting and litigating the denial of Petitioner's Constitutional right to be free from a coerced statement." (Resp. Ex. 7 At 3, ECF 9-1 at 71.) On appeal from the denial of that petition, Petitioner again couched the coercion argument in terms of ineffective assistance, claiming his counsel "[f]ail[ed] to have Petitioner take the witness stand, during the hearing to suppress statement, to introduce testimonial evidence that his statement to detectives was in fact the product of coercion which resulted in Petitioner's free will having been overborne [and] [f]ail[ed] to provide the trial [c]ourt with binding authority to support the claim that Petitioner's statement was involuntary." (ECF No. 9-2 at 14.) By contrast, the § 2254 Petition takes up the argument as a direct due process challenge, alleging that "Petitioner stands convicted and imprisoned in violation of the Fifth Amendment to the United States Constitution by the denial of his Constitutional right to be free from a coerced statement." (ECF No. 2 at 5.)

petition." *Id.* Rather, the grounds upon which the petitioner relies must have been presented "face-up and squarely," with the federal question "plainly defined." *Mallory v. Smith*, 27 F.3d 991, 995 (quoting *Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1998)). Satisfaction of the "fairly presented" requirement thus requires reference to "a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue. Presenting a claim that is merely similar to the federal habeas claim is not sufficient[.]" *Cox v. Burger*, 398 F.3d 1025, 1031 (8th Cir. 2005) (quoting *Barrett v. Acevedo*, 169 F.3d 1155, 1161–62 (8th Cir. 1999)); *see Duncan v. Henry*, 513 U.S. 364, 366 (per curiam) ("[M]ere similarity of claims is insufficient to exhaust." (citation omitted)). "[T]he petitioner bears the burden of demonstrating that state remedies have, in fact, been exhausted." *Mallory*, 27 F.3d at 994.

The Court finds that Petitioner's due process claim was not fairly presented to the state court and is therefore unexhausted. Though the October 4, 2010 statement to police serves as the factual predicate for the both claims, "ineffective assistance and due process are analytically distinct." *Medicine Blanket v. Brill*, 425 Fed. Appx. 751, 754 (10th Cir. 2011); *see Gattis v. Snyder*, 278 F.3d 222, 237 (3d Cir. 2002) (finding due process claim unexhausted at the federal level where it had been presented to the state court as an ineffective assistance claim); *see also Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) (noting Fourth and Sixth Amendment claims "are distinct, both in nature and in the requisite elements of proof"). The state court evaluated Petitioner's coercion argument solely through the lens of ineffective assistance of counsel and never considered the merits of Petitioner's related due process claim. *See Baldwin v. Reese*, 541

U.S. 27, 32 (2004) ("[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief.").

This conclusion does not end the matter, however, because "[a] claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally barred under state law if the petitioner attempted to present it to the state court." *Baker v. Corcoran*, 220 F.3d 276, 288 (4th Cir. 2000) (citing *Gray v. Netherland*, 518 U.S. 152, 161 (1996)). Stated differently, "[a] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer available to him." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (citations omitted). In such a case, the procedural bar "provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default." *Id.* (internal quotation marks omitted); *Dretke v. Haley*, 541 U.S. 386, 388 (2004) ("[A] federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default.").

Under West Virginia law, a habeas claim that has not been presented to state court has generally been defaulted. *See* W. Va. Code § 53-4A-1(c);[2] *Talbert v. Plumley*, No. 3:14-cv-

[2] This statute states, in pertinent part:

> [A] contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been waived when the petitioner could have advanced, but intelligently and knowingly failed to advance, such contention or contentions . . . in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, unless such contention or contentions and grounds are such that, under the Constitution of the United States or the Constitution of this State, they cannot be waived under the circumstances giving rise to the alleged waiver.

W. Va. Code § 53-4A-1(c).

22222, 2015 WL 5726945, at *1 (S.D.W. Va. Sept. 30, 2015) (interpreting § 53-4A-1(c) to find that habeas petitioner procedurally defaulted on claims that he failed to advance "on either his direct appeal or his state habeas appeal"). Though it appears that Petitioner has defaulted on his due process claim, further consideration of default is unwarranted where the Court can more easily dispense with the claim on its merits. *Yeatts v. Angelone*, 166 F.3d 255, 261 (4th Cir. 1999) ("[O]n occasion the determination of whether a petitioner has defaulted his claims will present difficult issues of state law that are not readily susceptible to decision by a federal court, while the claim advanced by the petitioner patently is without merit. In such a situation, a federal habeas court would not be justified in considering the procedural default issue."); *see also Clagett v. Angelone*, 209 F.3d 370, 383 (4th Cir. 2000) ("[B]ecause we reject the ineffective assistance of trial counsel claim on its merits, we do not also address whether Clagett has shown cause for his failure to exhaust the claim in state court and for its certain procedural default if brought now."). This approach also avoids any need to invite briefing on the procedural default issue, which neither party has addressed.

ii. Merits of Due Process Claim

An involuntary statement violates the Due Process Clause incorporated in and held against the states by the Fourteenth Amendment. A confession is involuntary if "the defendant's will has been overborne or his capacity for self-determination critically impaired." *United States v. Umaña*, 750 F.3d 320, 344 (4th Cir. 2014) (quoting *United States v. Braxton*, 112, F.3d 777, 780 (4th Cir. 1997) (en banc). The Court must consider the totality of the surrounding circumstances in making this determination, such as the characteristics of the defendant, including his age, level

of education, and intelligence, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), as well as the setting of the interview and the details of the interrogation. *United States v. Pelton*, 835 F.2d 1067, 1071 (4th Cir. 1987) (citation omitted). The analysis rarely turns on the "presence or absence of a single controlling criterion." *Schneckloth*, 412 U.S. at 226. Although at trial the prosecution bears the burden to establish the voluntariness of a confession by a preponderance of the evidence, on collateral review that burden shifts to the petitioner. *See Degraffenreid v. McKellar*, 883 F.2d 68, *2 (4th Cir. 1989) (table decision) (citing *Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir.) (on remand from 474 U.S. 104), *cert. denied*, 479 U.S. 989 (1986)).

Petitioner claims that his limited admission to his role in R.M.'s death was coerced by law enforcement.[3] Detectives coaxed the statement at issue from him during a two and one-half hour interview held on October 4, 2010, the day following R.M.'s death. The interview took place in the kitchen of the South Charleston Police Station, where Petitioner agreed to be interviewed, acknowledged his understanding that he was not under arrest and free to leave at any time, and executed a waiver of his *Miranda* rights.[4] (ECF No. 9-2 at 130–31.) Petitioner was familiar with both the setting and his interviewers because he had given them an initial statement at the same location three days earlier. The interview began casually, with Petitioner offering a chronological

[3] The Court purposefully avoids labeling this statement as a confession because the parties agreed at trial that Petitioner's description of the manner in which R.M. was injured was incredible. Not only was it unlikely that Petitioner fell down his stairs in the manner he described, but R.M.'s injuries were not consistent with this type of fall. The prejudice that resulted from the admission of this evidence was perhaps lessened somewhat because the jury could not reasonably have accepted this account of events as fact. Still, the statement is the only piece of direct evidence affirmatively linking Petitioner to R.M.'s injuries and imparting responsibility to him for their commission.

[4] Petitioner's valid Miranda waiver is critical to the evaluation of his coercion claim, as the Supreme Court has established that a suspect who has executed a valid waiver of his right against self-incrimination will rarely be able to establish a colorable challenge to the voluntariness of a subsequent confession. *Berkemer v. McCarty*, 468 U.S. 420, 433 n. 20 (1984).

account of his activities with R.M. on the day in question. Petitioner insisted that the day had proceeded normally until R.M. suddenly lost consciousness in the car on the way to pick up her mother from work. He repeatedly denied knowledge of how the child fractured her skull, though he admitted that she was in his exclusive care during the time the State medical examiner surmised the injury must have been inflicted.[5] His claim of ignorance was met with increasing skepticism from the detectives, who repeatedly petitioned him to confess the truth. (ECF No. 9-2 at 143–44, 147, 152.) The detectives made no attempt to hide their suspicion that Petitioner perpetrated the injury. As he continued to deny hurting the child, they called him a liar. (*See id.* 142–143.)

Given their view of the evidence, the detectives presented Petitioner's predicament in terms of two options: he could either continue to feign ignorance and, from his silence, be treated as a remorseless killer, or otherwise confess to an accident resulting from a brief fit of rage or lapse in judgment and receive mercy. As the interview proceeded, Petitioner became obviously intrigued by the idea that confession to an accidental injury could result in a less severe sentence. He asked the detectives if he would be "put away" if R.M.'s injuries were accidentally inflicted. (ECF 9-2 at 154–55.) It is the detectives' subsequent attempts to distinguish between an accidental, as opposed to a deliberately inflicted, injury which Petitioner claims amounted to coercion. He finds the following two portions of dialogue particularly objectionable:

> Q: . . . If it's an accident, we would deal with it. Accidents happen all the time.
>
> A: And you'd still put me in jail.
>
> Q: That's not true. If an accident happened, an accident happened. Accidents happen all the time. I investigate lots of accidents.

[5] R.M.'s autopsy was conducted between Petitioner's first and second interviews with law enforcement. Detective Cook, who was present for at least part of the autopsy, was so convinced that the autopsy findings implicated Petitioner in the child's death that he sought out Petitioner for a second interview.

A: And do those people still do time?

Q. No. There's a difference between an accident and something with malice.

(ECF No. 9-2 at 155.) Later on, Petitioner again pressed the detectives to tell him the "best case scenario" if he admitted knowledge of the circumstances surrounding R.M.'s death:

A: I'm saying what is a judge going to do to me?

Q: I . . . I will tell you if we go in there and you tell him that this baby was a hundred percent fine . . . when you put her in the car seat[,] [a]nd you showed up ten minutes later with this much damage . . . they're gonna' say you're just a fat liar and . . .

Q: I'm saying that it's an accident.

A: . . . If it's a hundred percent an accident, it'll be a completely different story.

Q: That's what I want to know.

A: If it was a hundred percent an accident, you would probably be free to leave once it's dealt with. You might get charged with lying to us at the beginning of this because you . . . you had no . . . you shouldn't have done that.

(ECF No. 9-2 at 160–61.)

Reviewing this transcript, the magistrate judge concluded that while the interviewing detectives "certainly emphasized the positive aspects of Hayes providing a statement describing R.M.'s death as accidental . . . the detectives never unambiguously promised that Hayes would receive a lesser sentence or would not be criminally charged for R.M.'s death." (PF&R at 39.) Petitioner disagrees, arguing that the detectives unequivocally promised him that "if he informed [them] of what they wanted to hear, they would allow him to leave." (Objs. to PF&R at 1.)

Petitioner rightly notes that illusory promises of leniency may be sufficient to overbear the will of the criminal accused. *United States v. Braxton*, 112 F.3d 777, 780 (4th Cir. 1997) (finding

that the existence of implied promises "does not automatically render a confession involuntary," because the root issue is whether the suspect's capacity for self-determination was overcome); *see United States v. Lewis*, 24 F.3d 79, 82 (10th Cir. 1994) (distinguishing false promises from "limited assurances" that do not taint the voluntariness of an ensuing statement). Even when viewed from Petitioner's perspective, however, *Grades v. Boles*, 398 F.2d 409, 412 (4th Cir. 1968), the Court is unconvinced that the detectives' statements could have led to an involuntary admission. Examining the statements in context of the entire interview transcript, it is plain that the detectives never promised or impliedly offered exoneration in exchange for a confession. Rather, they truthfully suggested the possibility of more lenient treatment on Petitioner's truthful and accurate admission to his involvement in an accidental event.

A detective's truthful statements about a suspect's predicament "are not the type of 'coercion' that threatens to render a statement involuntary." *United States v. Pelton*, 835 F.2d 1067, 1073 (4th Cir. 1987). The detectives arrived at the interview armed with evidence clearly pointing to Petitioner's culpability. Met with his incredible claim of ignorance, the detectives did not coerce his admission to an accidental event by merely pointing out the harsher reception he would face if he continued to deny the obvious. As the Supreme Court has recognized, "very few people give incriminating statements in the absence of official action of some kind." *Schneckloth*, 412 U.S. at 224; *see Williams v. Withrow*, 944 F.2d 284, 289 (6th Cir. 1991) ("[W]e have no doubt that effective interrogation techniques require, to some extent, a carrot-and-stick approach to eliciting information from an uncooperative suspect."). Moreover, drawing Petitioner's attention to the potential legal consequences of his actions was not patently coercive. "[T]elling the defendant in a noncoercive manner of the realistically expected penalties and encouraging him to

tell the truth is no more than affording him the chance to make an informed decision with respect to his cooperation with the government." *United States v. Nash*, 910 F.2d 749, 753 (11th Cir. 1990) (internal quotation marks and citation omitted).

Furthermore, the Court simply does not accept Petitioner's assertion that he believed the detectives to be promising immediate release in exchange for an inculpatory statement. The detectives told Petitioner that regardless of the content of any confession, he would be processed, presented before a magistrate, and then left to "work it out with the prosecutor." (ECF No. 9-2 at 156.) They acknowledged that his admission to any involvement in the child's death might result in him being "put away," but that the "putting away part [would] be a lot worse for somebody who shows no remorse." (ECF No. 9-2 at 157.) Petitioner's own statements during the interview prove that he was acutely aware of the risks before him and belie his current assertion that he inculpated himself with the belief that he would not be criminally charged. Immediately following their discussion of the difference between accidental and malicious acts, Petitioner remarked, "[y]ou're going to take me and process me any way it goes." (*Id.* at 161.) The detective agreed, admitting that Petitioner's imminent arrest was "[m]ore than likely." (*Id.*) Again, Petitioner acknowledged his understanding, stating, "[w]hen I leave here today, it's going to be in handcuffs." (*Id.*) He even asked before offering the critical statement which one of the detectives would take him "downtown" for booking. (*Id.* at 164.)

Furthermore, even if the detectives' statements highlighting the benefits of confessing to an accidental incident constituted implied promises of leniency, the surrounding circumstances do not indicate that Petitioner's "will [was] overborne or his capacity for self-determination critically impaired." *Umaña*, 750 F.3d at 344. Petitioner maintained an awareness throughout the interview

that the evidence inexorably pointed to him as the one who caused R.M.'s injuries and appeared to be weighing the benefits of implicating himself in an accidental, as opposed to a purposeful, event. And for the detectives' best efforts, Petitioner never offered an account of the alleged accident that comported with the medical evidence. *See id.* at 345 (placing significance on the fact that the defendant withstood the interviewer's attempt to extract a murder confession when evaluating the voluntariness of his limited statement). For all their frustration, the detectives conducted the interview in an amiable manner. They reminded Petitioner at several points during the interview that he was not under arrest, (ECF No. 9-2 at 130–31, 161), and invited him outside to take a smoke break, (*id.* at 159–60, 183, 187–88). There is not the slightest hint of threats or intimidation on their part. In fact, the interview concludes with a surprisingly lighthearted discussion of the video game Petitioner played on the day R.M. allegedly sustained her fatal injuries. (ECF No. 9-2 at 185–87.)

In light of the countervailing contextual factors, the Court does not believe that the detectives' suggestion that Petitioner would not serve prison time if R.M.'s injuries were purely accidental overcame his capacity for self-determination. Therefore, the Court **FINDS** that Petitioner has not met his burden to demonstrate that his limited—and subsequently discredited—admission to injuring R.M. was involuntary.

B. Ineffective Assistance of Counsel Claims

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. XI. As established by *Strickland*, "[a]n ineffective assistance claim has two components: [1] [a] petitioner must show that counsel's performance was deficient, and [2] that the deficiency prejudiced the defense."

Wiggins v. Smith, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "A defendant asserting an [ineffective assistance] claim must . . . satisfy both prongs, and a failure of proof on either prong ends the matter." *United States v. Roane*, 378 F.3d 382, 404 (4th Cir. 2004) (citing *Williams v. Kelly*, 816 F.2d 939, 946–47 (4th Cir. 1987)).

Under the deficient-performance prong, the petitioner's burden is to "demonstrate that his counsel's performance fell below an objective standard of reasonableness." *Clagett*, 209 F.3d at 380 (citing *Strickland*, 466 U.S. at 687). "[C]ounsel's performance will not be deemed deficient except in those relatively rare situations where, 'in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'" *Tice v. Johnson*, 647 F.3d 87, 102 (4th Cir. 2011) (quoting *Strickland*, 466 U.S. at 690). In an effort to avoid "the distorting effects of hindsight," *Strickland*, 466 U.S. at 689, a court reviewing an ineffective assistance of counsel claim "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689).

"Once a petitioner has established deficient performance, he must prove prejudice—'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Winston v. Pearson*, 683 F.3d 489, 505 (4th Cir. 2012) (quoting *Richter*, 562 U.S. at 104). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 694 (internal quotation marks omitted)). "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' . . . The likelihood of a different result must be substantial, not just conceivable." *Id.* at 104, 112 (quoting *Strickland*, 466 U.S. at 693). "In

sum, '[t]aking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.'" *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011) (quoting *Strickland*, 466 U.S. at 696).

"Surmounting *Strickland*'s high bar is never an easy task[, and] [e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 562 U.S. at 105 (citation and internal quotation marks omitted). This is so because a federal court reviewing a state court's habeas decision must apply the AEDPA and the *Strickland* standards simultaneously. *Richardson v. Branker*, 668 F.3d 128, 139 (4th Cir. 2012) (citing *Richter*, 562 U.S. at 105). "The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (citations omitted); *see also Burt v. Titlow*, 134 S. Ct. 10, 13 (2013) (explaining that the "doubly deferential" standard of review "gives both the state court and the defense attorney the benefit of the doubt"). "The *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Richter*, 562 U.S. at 105 (citation omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable." *Id.* Rather, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* A reviewing court may decide either component of an ineffective assistance claim first and need not address both the deficient performance and prejudice prongs if the petitioner makes an insufficient showing on one. *Strickland*, 466 U.S. at 697.

i. Effectiveness of Counsel in Cross-Examination of Dr. Allen Mock

Petitioner argues that the magistrate judge erred by finding that the West Virginia Supreme Court of Appeals did not unreasonably apply the *Strickland* standard when it affirmed the denial of Petitioner's ineffective assistance of counsel claim related to counsel's cross-examination of Allen Mock, M.D. Though the Court finds itself in ultimate agreement with the magistrate judge, its reasoning differs.

At the time of trial, Dr. Mock was employed as a deputy chief medical examiner at the West Virginia Office of the Chief Medical Examiner. (ECF No. 9-5 at 182; ECF No. 9-6 at 98–99.) He performed R.M.'s autopsy on October 4, 2010. (ECF No. 9-5 at 189.) He testified at trial on behalf of the prosecution and opined to a reasonable degree of medical certainty that R.M.'s skull fracture was the product of child abuse. (ECF No. 9-6 at 83.) Petitioner now claims that Dr. Mock was unqualified to perform autopsies under West Virginia law and that his trial attorney provided ineffective assistance by failing to identify and highlight Dr. Mock's vocational deficiencies on cross-examination. It appears uncontroverted that defense counsel "extensively questioned Dr. Mock about his qualifications, findings, and opinions."[6] (PF&R at 44.) Thus, Petitioner's argument on the "deficient performance" prong appears to be limited to the factual question of whether Dr. Mock was, in fact, qualified to perform autopsies on behalf of the State of West Virginia.

West Virginia law sets forth mandatory minimum qualifications for pathologists performing autopsies on behalf of the state medical examiner. There are two routes to qualification. By statute, the chief medical examiner may employ pathologists who either "hold[] board certification or board eligibility in forensic pathology or ha[ve] completed an American

[6] In the same vein, the state circuit court found that defense counsel "vigorously cross-examined Dr. Mock regarding his experience and credentials." (ECF No. 9-1 at 142.)

board of pathology fellowship in forensic pathology to make the autopsies." W. Va. Code § 61-12-10(a) (2000). Petitioner disputes whether Dr. Mock met these qualifications at the time of trial. It is uncontroverted that Dr. Mock was neither board certified nor board eligible in forensic pathology at the time of trial.[7] The locus of this dispute centers on whether he had completed the required fellowship. Though Dr. Mock testified that he completed a forensic pathology fellowship at the New Mexico University Office of the Chief Medical Examiner, (ECF No. 9-5 at 183), neither the state prosecutor nor Petitioner's defense attorney inquired whether that fellowship was recognized by the American Board of Pathology. Since Dr. Mock and the defense pathology expert offered competing opinions regarding the age of R.M.'s skull fracture, Dr. Mock's credibility—and, similarly, the weight his opinions deserved—was a key issue at trial. Petitioner claims his counsel rendered ineffective assistance by failing to ascertain whether Dr. Mock was qualified to perform the autopsy in the first place.

Petitioner raised this argument in his state habeas petition, where it was rejected as non-meritorious by the state circuit court. In considering Petitioner's claim, the circuit court noted that the first method of employment qualification, board certification or eligibility, was inapplicable since Dr. Mock admitted that he was not board eligible in forensic pathology. This left the second method, that requiring completion of an American Board of Pathology fellowship, as the only option. *See* W. Va. Code § 61-12-10(a) (2000). The circuit court noted that Dr. Mock had completed a pathology fellowship with the University of New Mexico. Conspicuously absent from the circuit court's order, however, is a finding that Dr. Mock's prior fellowship met the

[7] Dr. Mock testified that he was board eligible in anatomic pathology, but that he had not yet gained board eligibility in forensic pathology. (*See* ECF No. 9-5 at 184.) He explained that the American Board of Pathology requires successful passage of the anatomic and clinical pathology boards before a pathologist is board eligible in forensic pathology. (ECF No. 9-6 at 10.)

statutory requirements for employment with the medical examiner. Though its ultimate decision to reject Petitioner's claim must have hinged on that assumption, the circuit court offered no explanation for this conclusion.[8] (ECF No. 9-1 at 141.) The West Virginia Supreme Court of Appeals summarily adopted this aspect of the circuit court's opinion. (ECF No. 9-2 at 124–25.) On this point, the magistrate judge concluded that the state court made a factual finding entitled to deference.

AEDPA sets forth two "independent requirements" for review of state-court factual findings. *See Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). Section 2254(d)(2) provides that a federal court may not grant habeas relief unless the state court proceedings "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Further, under § 2254(e)(1), the state court's determination of a factual issue must be presumed to be correct. The petitioner bears the burden to rebut this presumption by clear and convincing evidence. *Id.* "The two provisions, operating in tandem, require that 'to secure habeas relief, petitioner must demonstrate that a state court's finding . . . was incorrect by clear and convincing evidence, and that the corresponding factual determination

[8] With regard to this claim, the circuit court stated in conclusory manner:

> There is no dispute that Dr. Mock, at the time [R.B.]'s autopsy was performed, was not board certified in forensic pathology. However, Dr. Mock testified that he completed fellowship training in forensic pathology at the New Mexico University Office of the Chief Medical Investigator in Albuquerque. Dr. Mock also testified that he had testified as an expert witness in the field of forensic pathology in both New Mexico and West Virginia state courts and federal courts. . . . Dr. Mock's curriculum vitae clearly indicates that he served as a Forensic Pathology Fellow from July 2009 until June 2010. The Court **FINDS** Petitioner simply fails to establish that Dr. Mock was not qualified to perform an autopsy in West Virginia and fails to establish that Dr. Mock was not qualified as an expert witness.

(ECF No. 9-1 at 141.)

was objectively unreasonable in light of the record before the court.'" *Merzbacher v. Shearin*, 706 F.3d 356, 364 (4th Cir. 2013) (quoting *Miller-El*, 537 U.S. at 348).

AEDPA thus poses a formidable hurdle for a habeas petitioner challenging the correctness of a state court's factual findings. Nonetheless, the Court disagrees with the magistrate judge that the state court made a factual determination of this issue. The state court simply made no finding as to Dr. Mock's fellowship, and its summary conclusion that Petitioner "failed to establish that Dr. Mock was not qualified to perform an autopsy in West Virginia," (ECF No. 9-1 at 141), does not suffice—particularly where, as discussed below, Petitioner requested an evidentiary hearing to develop his factual allegations. Section 2254(d) deference does not apply. *Winston v. Kelly*, 592 F.3d 535, 557 (4th Cir. 2010) (finding where state court "passed on the opportunity to adjudicate [the petitioner's] claim on a complete record," the district court should not afford any deference to the state court's application of the *Strickland* standard).

1. Standard for Evidentiary Hearing

A related question is whether Petitioner has been prevented from developing evidence to undermine Dr. Mock's qualifications. In his objections, Petitioner claims that he has "*consistently* been trying to obtain counsel and a hearing" for the purpose of developing his theory that Dr. Mock was unqualified at the time of trial to perform autopsies. (ECF No. 16 at 2 (emphasis in original).) Petitioner did not request an evidentiary hearing in his § 2254 Petition, nor has he explicitly done so in his objections to the PF&R. Still, because Petitioner raises the underlying factual question, the Court finds that the § 2254 Petition and subsequent objections, construed liberally, request an evidentiary hearing. *See Jehovah v. Clarke*, 798 F.3d 169, 176 (4th Cir. 2015) (affording pro se pleadings liberal construction).

Section 2254(e)(2) "controls whether [a] petitioner may receive an evidentiary hearing in federal district court on . . . claims that were not developed in the [state] courts." *Taylor*, 529 U.S. at 429. That statute provides the following:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

"The Supreme Court has held that the word 'failed' in the opening line of this section connotes fault." *Winston*, 592 F.3d at 552 (citing *Taylor*, 529 U.S. at 431). Specifically, the Supreme Court stated that, "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Taylor*, 529 U.S. at 432. "Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court . . . ." *Id.* at 435. "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437. "Importantly, the [Supreme] Court further explained that, in determining whether a petitioner has

been diligent, '[t]he question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts.'" *Wolfe v. Johnson*, 565 F.3d 140, 167 (4th Cir. 2009) (quoting *Taylor*, 529 U.S. at 435). "If the petitioner was diligent in pursuing the claim in state court, he cannot have 'failed to develop' the claim, and § 2254(e)(2) does not bar an evidentiary hearing." *Id.* at 167 (citing *Taylor*, 529 U.S. at 430).

Nonetheless, "[f]ederal evidentiary hearings ought to be the exception, not the rule." *Kelly*, 592 F.3d at 552 (citation omitted). Evidentiary hearings "are not 'intended to provide a forum in which to retry state cases,' but rather their 'prototypical purpose [is] to fill a gap in the record or to supplement the record on a specific point.'" *Id.* (alteration in original) (quoting *Pike v. Guarino*, 492 F.3d 61, 70 (1st Cir. 2007)). "[A] § 2254 petitioner bears the burden of demonstrating that he was diligent in pursuing his claims in state court." *Wolfe*, 565 F.3d at 167 (citing *Taylor*, 529 U.S. at 440). In sum, if Petitioner failed to develop the factual basis for his claim in state court, this Court is precluded from granting an evidentiary hearing unless Petitioner satisfies one of § 2254(e)(2)'s narrow exceptions.

From the state court post-conviction record originally provided, it appeared that Petitioner had not diligently sought to develop the factual basis for his claim in state court. There was no record evidence, for example, that Petitioner had requested discovery or an evidentiary hearing. However, in his brief appealing the circuit court's denial of his habeas petition to the West Virginia Supreme Court of Appeals, Petitioner cited previously-filed motions for appointment of counsel, for an expert witness, for a private investigator, and for an omnibus habeas corpus hearing, all of which he alleged the circuit court had essentially ignored. (ECF No. 9-2 at 5.) None of these motions were present in the record before this Court. By Order entered in this case on August 17,

2016, the Court ordered Respondent to supplement the record with these motions. (ECF No. 18.) Respondent complied on August 18, 2016 and submitted the following as supplementation of the state court post-conviction record: Petitioner's motion for appointment of counsel, motion for expert witness, Petitioner's motion for omnibus habeas corpus hearing, and Petitioner's motion for private investigator.[9]

These motions each constitute an attempt by Petitioner to factually develop his challenge to Dr. Mock's qualifications during the pendency of the state post-conviction proceeding. For example, in support of his motion for a private investigator, Petitioner alleged:

> Petitioner has raised in his habeas corpus petition, the claim that the State Medical Examiner, at the time of the autopsy on R.M., did not possess the qualifications to be Chief Medical Examiner pursuant to West Virginia Code § 61-12-3(c) or the qualifications to perform autopsies pursuant to West Virginia Code § 61-12-3(c). . . . A private investigator is needed in the instant case to investigate and obtain the evidence needed to establish the qualifications of Doctor Mock at the time of his conducting the autopsy on R.M.

(ECF No. 19-1 at 9.) Respondent included with its supplementation an order from the state circuit court denying Petitioner's motion for appointment of counsel.[10] (ECF No. 19-2.) It appears that the circuit court did not rule on the other motions, including Petitioner's motion for an evidentiary hearing. Further, the circuit court's order denying habeas relief does not mention, much less consider the necessity of, Petitioner's request for an evidentiary hearing.

The circuit court's oversight is particularly problematic because Rule 9(a) of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings require the circuit court,

[9] The four motions were stamped by the Circuit Court of Kanawha County as filed on April 24, 2014—approximately four months before the circuit court issued its decision denying Petitioner's request for collateral relief.

[10] The circuit court's order denying the motion for appointment of counsel was not issued until November 6, 2014, months after the court denied Petitioner's habeas petition.

whether or not a motion for an evidentiary hearing is presented, to "include in its final order specific findings of fact and conclusions of law as to why an evidentiary hearing was not required." The circuit court's order did not comply with this directive. *Conway v. Polk*, 453 F.3d 567, 576–77 (4th Cir. 2006) (finding § 2254(e)(2) does not preclude an evidentiary hearing where the petitioner's failure to fully develop his claim was due to external causes). It is clear Petitioner exercised diligence in pursuing the factual development of this claim in state court, and the Court **FINDS** that § 2254(e)(2) does not bar an evidentiary hearing.

2. Petitioner's Entitlement to Evidentiary Hearing

"Even if the petitioner's claim is not precluded by § 2254(e)(2), that does not mean he *is* entitled to an evidentiary hearing—only that he *may* be." *Fullwood v. Lee*, 290 F.3d 663, 681 (4th Cir. 2002) (quoting *McDonald v. Johnson*, 139 F.3d 1056, 1059–60 (5th Cir. 1998)) (internal quotation marks omitted, emphasis in original). Fourth Circuit precedent dictates that a § 2254 petitioner

> who has diligently pursued his habeas corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if he satisfies one of the six factors enumerated by the Supreme Court in *Townsend v. Sain*, 372 U.S. 293, 313 (1963).

Conaway, 453 F.3d at 582. The six *Townsend* factors are: (1) the merits of the factual dispute were not resolved at the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason

it appears that the state trier of fact did not afford the habeas petitioner a full and fair fact hearing. 372 U.S. at 313.

First, the Court finds that because Petitioner raises a legitimate suspicion that Dr. Mock was not credentialed at the time of trial to perform autopsies for the state medical examiner but was not afforded a hearing to develop the issue, he satisfies at least one of the *Townsend* factors. *See Fullwood*, 290 F.3d at 681 (finding habeas applicant satisfied *Townsend* factors where state court had refused him an evidentiary hearing).

Second, the Court must consider where Petitioner has alleged facts that, if true, would permit him to prevail on his ineffective assistance claim. This places the Court back at the starting point to consider Petitioner's likelihood of satisfying *Strickland's* "deficient performance" and "prejudice" prongs. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700. The Court begins by assuming that Dr. Mock did not meet minimum employment qualifications and then considers whether Petitioner can show prejudice resulting from his counsel's failure to bring this fact to the jury's attention.

In considering *Strickland*'s prejudice prong, the Court must stress the limited implications of Petitioner's factual allegations. Accepting as true the allegation that Dr. Mock's fellowship was not an American Board of Pathology fellowship, Dr. Mock would have been unqualified at the time of trial to conduct autopsies on behalf of the State of West Virginia. Petitioner has presented no evidence, however, to show that Dr. Mock's failure to meet the employment qualifications for a particular office rendered him unfit to perform autopsies generally. To the

contrary, the trial transcript reveals that Dr. Mock was a well-qualified pathologist.[11] Neither has Petitioner presented evidence calling into question the trial court's decision to recognize Dr. Mock as an expert in the field of forensic pathology. (ECF No. 9-5 at 186–87.) In other words, Petitioner's allegations do little to undermine the intrinsic validity of Dr. Mock's autopsy findings. Dr. Mock's opinion that the fracture was caused by a high impact force, his description of the age of the fracture, and, importantly, his characterization of R.M.'s death as a homicide, could have reasonably been adopted by the jury even if Dr. Mock's fellowship was not an American Board of Pathology fellowship. Petitioner's arguments notwithstanding, this fact does not lead to the inexorable conclusion that the jury would have accepted the opinions of his pathologist over Dr. Mock's. Dr. Mock's findings were also reviewed and endorsed by James A. Kaplan, the then-chief medical examiner for the State of West Virginia, (*id.* at 189), and Petitioner has not challenged Dr. Kaplan's qualifications.

Even if Dr. Mock was unqualified to work in the Chief Medical Examiner's office, his crucial finding that R.M.'s skull fracture was fresh, and more than likely inflicted while she was in Petitioner's sole care, was bolstered by the testimony of R.M.'s treating pediatrician, Manuel Caceres, M.D., and by the testimony of R.M.'s mother. Dr. Caceres presided over R.M.'s medical care once she was admitted to the pediatric intensive care unit of Women and Children's Hospital on September 30, 2010. (ECF No. 9-7 at 150.) The trial court recognized him as an expert in

[11] Dr. Mock testified that he had completed a master's degree in microbiology, immunology, and parasitology before entering and completing medical school. Following medical school he had training in anatomic and forensic pathology at the University of Tennessee, and completed his fellowship training in forensic pathology at the New Mexico University Office of the Chief Medical Examiner. (ECF No. 9-5 at 183.) Though he had only been employed with the West Virginia Office of the Chief Medical Examiner for approximately twelve months at the time of trial, he estimated that he had already performed 550 autopsies during the course of his career. Approximately ten percent of those autopsies were conducted on children. (*Id.* at 185.)

the field of pediatric intensive care. (*Id.* at 149.) Dr. Caceres agreed with Dr. Mock that R.M.'s skull fracture was of the size typically only observed on children in high-impact car accidents or who have sustained other significant trauma. (*Id.* at 169.) He sided with Dr. Mock over defense expert Dr. Thomas Young, who would later testify that R.M.'s skull injury could have resulted from a minor fall from the living room stairs that occurred several days prior to September 30, 2010. Further, Dr. Caceres opined that Dr. Young theory that R.M.'s cardiac arrest was triggered by a post-traumatic seizure was fanciful. The child's brain swelling was too severe, he reasoned, to have been brought about merely by oxygen deprivation. He testified that the head injury, not a seizure, was responsible for cutting off the oxygen supply to the brain and precipitating the chain of events resulting in the child's death.

The testimony of R.M.'s mother, M.B., also undermined Dr. Young's opinion and, in turn, lent credibility to Dr. Mock's conclusions. M.B. offered a crucial first-hand account of R.M.'s fall from the living room stairs on September 24, 2010.[12] M.B. testified that her daughter was sitting on the bottom step of the stairwell when M.B. called to her. As R.M. stood to respond to her mother, she fell backward and landed on her backside. (ECF No. 9-5 at 98.) A four-wheeler toy was present on the living room floor adjacent to the steps, and though M.B. admitted that her view of R.M.'s fall was partially blocked by this toy, she testified that the four-wheeler did not move as her daughter fell. She added that she did not see or hear R.M. hit her head as she was falling. (*Id.* at 98.) Further, her description of R.M.'s reaction to the fall was not consistent with that of a child who had just sustained a five-inch skull fracture. M.B. testified that her daughter cried briefly, but calmed immediately and "was fine." (*Id.*) M.B. testified that apart from this

[12] Dr. Young would later opine that R.M. fractured her skull during this fall on September 24, and not on September 30 while she was in Petitioner's care. (ECF No. 9-8 at 48–49.)

incident, she knew of no other falls or accidents in the days preceding R.M.'s admission to the hospital on September 30, 2010. (*Id.* at 119.)

Petitioner's assertion that Dr. Mock was not qualified to perform autopsies on behalf of the West Virginia Medical Examiner's Office, if true, would not satisfy *Strickland*'s prejudice prong. Even if the facts as Petitioner alleges them are true, the Court cannot find that a reasonable probability exists that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694. To receive an evidentiary hearing, Petitioner was required to allege facts in the § 2254 Petition entitling him to relief under *Strickland*. *Conway*, 453 F.3d at 582. Because he has failed in this regard, the Court must deny his request for an evidentiary hearing.

ii. Effectiveness of Counsel in Arguing Motion for Acquittal

Lastly, Petitioner challenges the magistrate judge's finding that the state court did not unreasonably apply *Strickland* by denying Petitioner's ineffective assistance of counsel claim relating to the sufficiency of the evidence. Here, the Court again sustains the position of the magistrate judge and denies Petitioner's claim.

Petitioner contends that his trial counsel failed to litigate the issue of insufficient evidence in his post-trial motion for judgment of acquittal. On habeas review, the West Virginia circuit court found "more than ample evidence" to support Petitioner's conviction and denied the ineffective assistance claim. (ECF No. 9-1 at 121–22, 17–18.) The West Virginia Supreme Court of Appeals adopted the lower court's findings and conclusion on the matter. (ECF No. 9-2 at 124.) Upon review of the record, the Court notes that the circuit court based its decision entirely on the prejudice prong and did not express discuss the performance prong. (ECF No. 9-1 at 142–44.) The Court therefore reviews the finding that Petitioner was not prejudiced with

AEDPA deference, but conducts a plenary review of whether trial counsel's performance was deficient. *See Ferrell v. Hall*, 640 F.3d 1199, 1224 (11th Cir. 2011) ("[Where] the state court has denied the petitioner's claim on only one prong of the *Strickland* test . . . we review *de novo* the prong that the state court never reached."); *Earls v. McCaughtry*, 379 F.3d 489, 492 (7th Cir. 2004) (reviewing performance prong *de novo* when state court decided case only on prejudice prong).

Nonetheless, Petitioner fails to satisfy the deficient performance element, in part because he inaccurately portrays his trial counsel's post-trial arguments. Petitioner creates the impression that his counsel simply did not challenge the sufficiency of the evidence. The state record reveals otherwise. Trial counsel attacked the sufficiency of the evidence in both the renewed motion for acquittal and at the subsequent hearing.[13] (ECF No. 9-1 at 7; ECF No. 9-10 at 72–73.) Admittedly, counsel's post-trial arguments as to insufficiency of the evidence were based predominantly on a juror affidavit acquired after the jury rendered its verdict. This particular juror, counsel argued, had been unpersuaded by the State's evidence and voted for a verdict of guilty simply because Petitioner was the last person alone with R.M. before the onset of the symptoms.

Counsel's arguments were not limited to the affidavit, however. He introduced the affidavit at the hearing by calling the trial court's attention to the motion for judgment of acquittal made by the defense following the close of the State's case-in-chief, during which time counsel had strenuously, and methodically, attacked the sufficiency of the State's evidence with regard to malice. (*See* ECF No. 9-8 at 13–19.) And in renewing this argument at the post-trial motions

[13] As one of many grounds for acquittal, counsel stated: "The conviction should be set aside because the evidence was insufficient to convince a rational trier of fact that the elements of the crime were proven beyond a reasonable doubt[.]" (ECF No. 9-1 at 7.)

hearing, counsel again argued that "the State had put on no evidence whatsoever with regard to the elements of malice or intent."[14] (ECF No. 9-10 at 73.) The Court cannot identify any deficiency in counsel's performance, and, perhaps more importantly, Petitioner does not point to any.[15] Far from "[falling] below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, the Court finds that counsel quite ably presented the sufficiency challenge for the trial court's consideration. Thus, the Court **FINDS** that Petitioner has failed to show deficient performance of counsel in litigating the sufficiency of the evidence.

AEDPA deference applies to the prejudice prong. Here, the Court finds that the state court reasonably determined the evidence to be sufficient to support Petitioner's conviction and therefore Petitioner was not prejudiced by any failure by counsel to argue the issue more expansively. Evidence is sufficient to support a conviction when "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Parker v. Matthews*, 132 S. Ct. 2148, 2152 (2012) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). Stated conversely, "[a] reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 132

[14] In response to the post-trial motion, the trial judge noted that most of the Petitioner's arguments had been previously raised and that he was not going to revisit them. He then summarily denied the motion. (ECF No. 9-10 at 88–88.) The transcript of the post-trial motions hearing leaves one with the impression that the proceeding was basically a *pro forma* opportunity for the trial court to hear brief argument and deny the motion, and that no amount of advocacy would have changed that result.

[15] In fact, in his objections on this issue, Petitioner circles back to draw in his previously recited arguments about Dr. Mock's qualifications, arguing that "[h]ad his trial counsel conducted a thorough review of Dr. Mock's credentials and cross-examined him on his lack of certifications[,] Petitioner would have 'tipped' the scales towards Dr. Young's testimony." (ECF No. 16 at 3.) The Court has already addressed these arguments in its discussion of Petitioner's other ineffective assistance claim, *see* Section III.B.i, *supra*, and Petitioner's decision to rehash them here tells the Court that he has nothing new to offer on the insufficient evidence issue.

S. Ct. 2, 4 (2011) (per curiam). In evaluating a sufficiency of the evidence challenge, whether in the context of a habeas proceeding or on direct appeal, the jury's verdict is entitled to deference.[16] 28 U.S.C. § 2254(d); *see Cavazos*, 132 S. Ct. at 3 (citation omitted).

Petitioner's statutory offense of conviction provides:

> 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(a). This offense is similar to the West Virginia offense for second degree murder, *see* W. Va. Code § 61-2-1, with an important difference. Unlike second degree murder, the offense of death of a child by a parent, guardian, or custodian requires only an intent to harm, not an intent to kill. *Gerlach v. Ballard*, 756 S.E.2d 195, 202–03 (W. Va. 2013). Thus, the offense of conviction required proof beyond a reasonable doubt (1) that Petitioner, as R.M.'s custodian; (2) caused the death of R.M., a child; (3) by maliciously or intentionally inflicting substantial physical pain, illness, or any physical impairment; (4) other than by accidental means; (5) while R.M. was in his care, custody, and control. (*See Jury Instructions*, ECF No. 9-9 at 37–38); *see also id.* (noting generally the distinctions between the elements of proof on second degree murder and death of a child by a parent, guardian, or custodian).

It is undisputed that Petitioner was R.M.'s custodian and that R.M. was in his exclusive care, custody, and control between 8:00 a.m. and 2:00 p.m. on September 30, 2010.[17] (ECF No.

[16] Section 2254(d) applies to the state court's conclusion of law, while § 2254(e) governs findings of fact. To the extent the state court made factual findings in ruling on this particular ineffective assistance claim, they are entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1). Further, the Court finds that Petitioner has failed to rebut any factual findings by clear and convincing evidence.

[17] For purposes of Petitioner's offense, the West Virginia Code defines a "custodian" as "a person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-

9-5 at 68, 72–73.) Neither can Petitioner reasonably dispute, given his expert's agreement on this point, that the skull fracture and subsequent brain edema caused the child's death. The central point of contention, as identified by Petitioner's trial counsel, is whether Petitioner maliciously or intentionally caused the injury. West Virginia criminal law uses malice and intent interchangeably, *State v. Davis*, 648 S.E.2d 354, 358 (W. Va. 2007), and defines malice, in part, as "the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent."[18] *State v. Burgess*, 516 S.E.2d 491, 493 (W. Va. 1999) (quoting Black's Law Dictionary 956 (6th ed. 1990)). The West Virginia high court has held that malice can be implied from "any deliberate cruel act." *State v. Williams*, 543 S.E.2d 306, 312 (W. Va. 2000) (citing *Burgess*, 516 S.E.2d at 493).

At trial, the jury was presented with only two theories explaining R.M.'s fatal injury: either R.M. suffered the skull fracture when she fell from the living room stair on September 24, 2010, or Petitioner inflicted the injury on the child on September 30, 2010 during the hours R.M.'s mother was at work. Defense expert Dr. Young was the only witness to present evidence consistent with the first theory. The verdict indicates that the jury accepted the second theory as more persuasive. Their choice was thoroughly rational. Viewed in the light most favorable to the prosecution, *Parker*, 132 S. Ct. at 2152, the medical evidence more plausibly supports a theory of intentional injury. Both Dr. Mock and Dr. Caceres testified that a skull fracture as extensive

---

time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding." § 61-8D-1(4).

[18] It appears that the West Virginia Supreme Court of Appeals has never explicitly defined the term "intentional" as it appears in this definition of malice. Nonetheless, a survey of the case law reveals that West Virginia adopts the widely-accepted definition, that is, that an act is done "intentionally" if done voluntarily and "not because of mistake, accident, [or] innocent reason." *State v. Goodman*, 290 S.E.2d 260, 265 n. 4 (W. Va. 1981) (quoting from and upholding a jury instruction used by the lower court).

as R.M.'s generally only results from high impact force, such as a car accident with ejection of the child or a fall from a considerable height. (ECF No. 9-6 at 54; ECF No. 9-7 at 169.) Though Dr. Young disagreed with this testimony and opined that a fall from a height of just two feet could have produced the fracture, the prosecution impeached him with his own sworn testimony in a previous case in which he had testified that significant force, such as that produced in a vehicular accident, would be required to cause a five-inch fracture like R.M.'s. (ECF No. 9-8 at 166–67.)

The plausibility of Dr. Young's theory was independently undermined by Dr. Caceres. Dr. Caceres testified that if a post-traumatic seizure occurred on September 30, 2010 as Dr. Young claimed, it would not have caused a cessation of breathing, would not have resulted in the severe, sudden brain swelling observed upon R.M.'s admission to the hospital, and could not have accounted for the brain hemorrhaging observed in the hospital CT scan. (ECF No. 9-7 at 190–93.) Rather, Dr. Caceres opined to a reasonable degree of medical certainty that the injury to R.M.'s skull occurred first. (ECF No. 9-8 at 4.) Dr. Mock's autopsy findings were all consistent with Dr. Caceres' impressions. Though Petitioner may remain skeptical of Dr. Mock's qualifications, his opinion that R.M. suffered her injury while in Petitioner's care was supported both by the other medical expert opinion and by the eyewitness account offered by R.M.'s mother of the September 24, 2010 fall. As explained above, Dr. Young's explanation for the head injury was simply factually inconsistent with the account of R.M.'s mother, who insisted that R.M. did not hit her head when she fell on September 24. (ECF No. 9-5 at 98.) Altogether, the medical evidence accepted by the jury clearly pointed to a deliberately inflicted head injury that occurred shortly before Petitioner drove with R.M. to pick up her mother from work on September 30, 2010.

(*See* ECF No. 9-8 at 2 (in which Dr. Caceres testifies that the injury occurred within two hours of R.M. going into cardiac arrest).)

Critical evidence in support of the malice element also came from Petitioner himself. Petitioner gave a statement to law enforcement that he fell down five or six stairs with R.M. in his arms, and that she hit her head as he landed on top of her. The implausible story conflicted with the overwhelming medical testimony and was accepted by both sides as a fabrication. Still, the jury could reasonably have concluded from this statement that Petitioner was responsible for R.M.'s injury, although unwilling to divulge the facts with accuracy. The jury also heard evidence, admitted as part of Petitioner's recorded interview with law enforcement, that he knew R.M. had suffered a head injury but did not call 911 and kept quiet at the hospital while emergency personnel furiously tried to diagnosis R.M.'s condition. (ECF No. 9-2 at 166–67.) The jury could infer malice and intent from Petitioner's lie as well as his refusal to divulge the child's head injury to the treating physicians who were desperately trying to identify the cause of her distress and save her life. *See State v. Fannin*, 2015 WL 2364295, at *5 (W. Va. May 15, 2015) (memorandum decision) (finding the jury was able to infer malice from the defendant's fabricated and discredited account of the victim's injuries). The trial court reasonably found that sufficient evidence existed to support the malice element.

To conclude, the Court finds that Petitioner fails to show deficient performance on the part of his trial counsel in litigating the issue of insufficient evidence. Further, because the state court did not unreasonably apply *Strickland* in determining that Petitioner could not prove prejudice, the state court's overarching conclusion is entitled to deference. Accordingly, Petitioner's claim to ineffective assistance of counsel on this basis is **DENIED**.

IV. CONCLUSION

For the foregoing reasons, the Court **OVERRULES** Petitioner's objections (ECF No. 16), **ADOPTS** the PF&R to the extent consistent with this Memorandum Opinion, (ECF No. 15), **GRANTS** Respondent's Motion for Summary Judgment (ECF No. 9), **DISMISSES** the § 2254 Petition, and **DIRECTS** the Clerk to remove this case from the Court's docket.

The Court has also considered whether to grant a certificate of appealability. *See* 28 U.S.C. § 2253(c). A certificate will be granted only if there is "a substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2). The standard is satisfied only upon a showing that reasonable jurists would find that any assessment of the constitutional claims by this Court is debatable or wrong and that any dispositive procedural ruling is likewise debatable. *Miller–El v. Cockrell*, 537 U.S. 322, 336−38 (2003); *Slack v. McDaniel*, 529 U.S. 437, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). The Court finds that some of the rulings made herein are debatable and therefore **GRANTS** a certificate of appealability on two of the three issues made the subject of Petitioner's objections: first, the voluntariness of his October 4, 2010 statement to law enforcement, and second, the effectiveness of trial counsel in cross-examining Dr. Mock.

As to the claim that his counsel rendered ineffective assistance in litigating the sufficiency of the evidence, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right and **DENIES** a certificate of appealability. Pursuant to Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254, Petitioner may not appeal the Court's denial of a certificate of appealability, but he may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: September 30, 2016

THOMAS E. JOHNSTON
UNITED STATES DISTRICT JUDGE

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

THE STATE OF WEST VIRGINIA

Plaintiff,

VS 11-F-41/Judge Zakaib

LARRY ALLEN HAYES, JR.

Defendant.

==========

DAY 1 TRIAL

08-22-11 @ 1:30 p.m.

Before: Judge Paul Zakaib, Jr.

==========

Christy L. Bellville, CCR

Official Reporter

304.357.0487

5

114

A P P E A R A N C E S

COUNSEL FOR PLAINTIFF

Jennifer Meadows, Esquire
Dan Holstein, Esquire

Prosecuting Attorney's Office
301 Virginia Street, East
Charleston, West Virginia 25301

COUNSEL FOR DEFENDANTS:

Richard Holicker, Esquire
Joseph Mosko, Esquire

Public Defender's Office
723 Kanawha Boulevard, East
Charleston, West Virginia 25301

Defendant, Larry Hayes, Jr - Present, in person

INDEX

DAY 1 - Trial

State of West Virginia v. Larry Allen Hayes, Jr.

11-F-41

SUPPRESSION HEARING

THE COURT: This is the matter of State of West Virginia versus Larry Allen Hayes, Jr. Are you ready?

THE STATE: Yes, Your Honor.

THE COURT: Go ahead.

THE STATE: Yes, Your Honor.

THE STATE: Judge, the State would call Detective Paschall with the South Charleston Police Department to the stand, please. Judge, prior to any witnesses, we would, I assume, make a joint motion to sequester any witnesses who may testify at this hearing and/or at trial.

MR. HOLICKER: We join in that motion.

THE COURT: All right. All of those who are here on this case as witnesses, please step out into the hall.

(WHEREUPON, the witnesses leave the courtroom.)

(Witness sworn.)

THE STATE: May I proceed, Your Honor?

THE COURT: Yes.

THEREUPON came,

BENJAMIN PASCHALL, after being duly sworn according to law, testified as follows:

DIRECT EXAMINATION

BY THE STATE:

Q Detective Paschall, could you please state your name?

A Benjamin Paschall.

Q Where do you work?

A South Charleston Police Department.

Q How long have you worked there?

A A little over a year or so.

Q And what are you current duties?

A I am currently assigned as a detective.

Q What are your responsibilities as a detective?

A Investigate crimes, also keep the evidence at South Charleston.

Q What's your background in law enforcement?

A I've been an employee here for eight years.

Q Eight years.

A Yeah.

Q You started out as a patrol?

A Patrolman and then became a detective.

Q In October 2010, were you assigned to assist in an investigation regarding the death of a Rebecca Grace McDaniel?

A Yes.

Q In the course of your investigation, did you assist in an interview of an individual named Larry Hayes?

A Yes.

Q Is that Larry Hayes, Jr.?

A Yes.

Q Is that person in the courtroom here

today?

A Yes.

Q Can you identify him by where he is seating and what he's wearing?

A He's sitting directly in front of me wearing orange.

THE STATE: Judge, will the record reflect that the witness has identified the defendant?

THE COURT: It will reflect that fact.

BY THE STATE:

Q Detective Paschall, I'm directing your attention to October 1st, 2010. Did you interview the defendant on that day?

A Yes.

Q Where did that interview occur?

A In the South Charleston Police Department, in the upstairs area in the kitchen.

Q And do you recall how that was arranged with him to come there?

A It was a preliminary interview. It was the first time we had spoken to him so we asked if he's come over and agreed to the interview. He freely walked over to the station. He understood

he was free to leave and we just talked to him about the events.

Q Okay. And at that point, was Rebecca McDaniel still in the hospital?

A Yes.

Q And you said that he walked over to the station. Can you explain for the Judge how close he lives to the station?

A It's about as close as you can get, maybe 150 feet. It's right down the alley.

Q Was he under arrest when he came in?

A No.

Q Okay. Was he restrained in anyway?

A No.

Q Who was present for the interview?

A Myself, Mr. Hayes, and Detective Cook.

Q Was he informed that he as free to leave at any time?

A Yes. That may not have been the exact words but something very similar.

Q Was the interview recorded?

A Yes.

Q Okay. Do you recall how it was

recorded?

A With a digital recording device.

Q Was it successfully memorialized in a digital form?

A Yes.

THE STATE: Judge, if I may have just a moment.

(WHEREUPON, the recorded interview referred to was marked for identification as State's Exhibit No. 1.)

BY THE STATE:

Q Detective Paschall, I have here what's been marked for identification purposes as State's Exhibit 1. I'm going to put it in my computer. Would you listen to the beginning of this and see if you recognize this?

(WHEREUPON, a portion of the recorded interview was played.)

BY THE STATE:

Q Detective Paschall, was that your voice in the beginning?

A Yes.

Q And who was the other voices on that recording?

A Detective Cook and Mr. Hayes.

Q And do you recognize that if I -- well, do you recognize that is the recording from that interview?

A It sounds like the interview, yes ma'am.

Q Okay. I'm going to play this for the Judge, okay.

(WHEREUPON, the recorded interview was played.)

MR. HOLICKER: Judge, I can't really make this out.

THE COURT: Turn it up.

(WHEREUPON, the recorded interview

continued.)

BY THE STATE:

Q Detective Paschall, was that the entire conversation that you had with Larry Hayes, Jr., on October 1st, 2010?

A Yes.

Q And what happened after the conversation ended?

A He walked back home.

THE STATE: Judge, at this time, I'd move for -- and did that recording that was just played accurately reflect the recorded interview from that day?

THE WITNESS: Yes.

THE STATE: Judge, at this time, I would move for the admission of what's been previously marked as State's Exhibit 1 into evidence.

MR. HOLICKER: For purposes of trial or for purposes of this hearing?

THE STATE: Judge, you haven't ruled on the admissibility so it would be for purposes of this hearing.

MR. HOLICKER: For purposes of this hearing, I have no objection.

THE COURT: It will be received.

(WHEREUPON, State's Exhibit No. 1 was admitted and received into the record.)

BY THE STATE:

Q Detective Paschall, did there - - was there also a time when you accompanied a person named Natalie Blevins to an interview?

A Yes.

Q And who is Natalie Blevins?

A CPS employee.

Q Was that the following day after this interview?

A Yes.

Q Did you record that interview?

A Yes.

Q Okay. Did you question the defendant during that interview?

A No, she just asked that I stand by in

the room.

Q But you were present, though?

A I was present.

Q And did you actually work the recording device?

A Yes.

Q Where did that interview take place, if you can recall?

A In this living room.

(WHEREUPON, the recorded interview referred to was marked for identification as State's Exhibit No. 2.)

BY THE STATE:

Q Detective Paschall, I'm going to play for you State's Exhibit 2 - - what's been marked for identification purposes as State's Exhibit 2, which is the - - what I characterized as CPS interview with Natalie Blevins for which you were present.

THE COURT: What interview?

THE STATE: CPS, Judge.

(WHEREUPON, a portion of the recorded interview was played.)

BY THE STATE:

Q I'll ask you do you recognize those voices that you just heard?

A Yes.

Q And who was the female voice?

A Natalie Blevins.

Q And who was the male voice?

A Mr. Hayes.

Q And that is the recording that you started the recording device and recorded the interview?

A Yes.

Q And you were there for the entire time?

A Yes.

Q I'd like to go ahead and play that, Judge.

(WHEREUPON, the recorded interview was played.)

BY THE STATE:

Q Was that the conversation that you witnessed between Natalie Blevins and Larry Hayes, Jr.?

A Yes.

Q What happened after that conversation ended?

A We left.

Q And does that recording accurately reflect the recorded interview between Larry Allen Hayes, Jr., and Natalie Blevins?

A Yes.

THE STATE: Your Honor, I would at this time move for the admission into evidence what's been previously marked as State's Exhibit 2.

MR. HOLICKER: For purposes of this hearing, no objection.

THE COURT: It will received.

THE STATE: Thank you, Judge.

(WHEREUPON, State's Exhibit No. 2 was admitted and received into the record.)

BY THE STATE:

Q Detective Paschall, are you aware of when Rebecca McDaniel actually passed away?

A Specific time, no. I believe it was October 4th. Off the top of my head, I'm not sure. It was a Sunday.

Q Okay. Do you recall it possibly being October 3rd?

A Yes.

Q Now, was Larry Allen Hayes - -

THE COURT: Was that 2011?

THE STATE: 2010, Judge.

THE COURT: Pardon?

THE STATE: 2010, Judge.

BY THE STATE:

Q I'll call your attention to October 4th, 2010. Did you assist in another interview of the defendant Larry Hayes, Jr.?

A Yes.

Q And tell me where did that interview take place?

A In the South Charleston Police Station, upstairs in the kitchen area.

Q Okay. And where - - who was present at the beginning of the interview?

A Myself and the Detective Gordon.

Q Was the interview recorded?

A Yes.

Q Okay. So at the beginning it was just you and Detective Gordon; is that correct?

A And Mr. Hayes, yes ma'am.

Q Where you present when Larry Hayes signed a document entitled SCPD Interview and Miranda Rights Form?

A Yes.

THE STATE: Detective Paschall - - may I approach the witness?

THE COURT: Yes.

(WHEREUPON, the document referred to was marked for identification as State's Exhibit No. 3.)

BY THE STATE:

Q I'm showing you what's been marked for identification purposes as State's Exhibit 3. Do you recognize that exhibit?

A Yes.

Q How do you recognize it?

A I recognize it as a SCPD Interview and Miranda Rights form that was filled out prior to our second interview, rather third, with Mr. Hayes.

Q Okay. And the top of the form, what information does that contain?

A The top of the form has the interviewee's name, his address, his phone number, date of birth, race, sex, height, hair, eyes, social security number. It also indicates whether or not he can read and understand English. In both cases, he indicated he could.

Q Okay. Just for clarification purposes, did Larry Hayes, Jr., fill out the top part?

A Yes.

Q Or was it the detective?

A Detective Gordon filled out the top

part for him by asking him the questions.

Q Based on - - he answered it based on the defendant's responses?

A Yes.

Q What else is on that form?

A He indicated that he could - - by initially checking that he could read and understand English. We have a pre-interview section, which he initialed that he understood - - that he was being questioned in regard to Rebecca McDaniel's death and that he was free to leave at any time. He also signed the pre-interview portion of that form.

Under that, we have the Miranda warning for his rights. Each of these he initialed that he understood his rights. Would you like for me to read his rights out?

Q Yes, please.

A It says that he had the right to remain silent and refuse to answer any questions. Anything you do say may be used against you in the court of law. I'm sorry. Anything you do say may be used against you in a court of law.

You have the right to consult an attorney before speaking to the police and to have an attorney present during any questioning now or in the future. If you cannot afford an attorney, one will be appointed for you without cost.

If you do not have an attorney available, you have the right to remain silent until you have had the opportunity to consult with one. Once again, beside each of those, is a space where Mr. Hayes' initialed indicating that he understood and we read them out to him.

Underneath that, there's a waiver of his rights. He read this and we read it to him and he signed it. It says that I have had this statement of my rights read to me and I understand them. I do not want a lawyer at this time.

Q Okay. And did you actually witness Larry Hayes initial each of those rights that you just read aloud?

A Yes.

Q And did you also witness him sign the form?

A Yes.

Q Okay. And what has been marked as State's Exhibit 3, is it in the same condition that you recall it being in on October 4th, 2010?

A Yes.

THE STATE: Your Honor, at this time, I would move for what has been previously marked as State's Exhibit 3. For identification purposes, I move that to be admitted into evidence for purposes of this suppression hearing.

MR. HOLICKER: Before I respond, I'd like to take a look at the document. May I approach the witness?

THE COURT: Yes.

MR. HOLICKER: No objection.

THE COURT: It will be received.

(WHEREUPON, State's Exhibit No. 3 was admitted and received into the record.)

(WHEREUPON, the recorded interview referred to was marked for

identification as State's Exhibit No. 4.)

BY THE STATE:

Q Detective Paschall, I think I already asked this but I'm going to ask you it again, was this interview recorded?

A Yes.

Q Digital recording?

A Yes.

Q Memorialized in some digital format?

A Yes.

Q I'm going to play a portion of this for you and see if you recognize the beginning part of this interview.

(WHEREUPON, a portion of the recorded interview was played.)

BY THE STATE:

Q Detective Paschall, do you recognize the voices on that recording?

A Yes.

Q Can you identify them for me?

A Detective Gordon, Mr. Hayes and myself.

Q And I know you haven't listened to the entire thing but does that accurately reflect how the interview started?

A Yes.

MR. HOLICKER: Judge, I don't know how long the Court - - how late the Court intends to go today but Mr. Holstein and I were just conferring and my recollection and his both are that this recording goes well over two hours. It's about 4:00 now. We had discussed whether - - I would be okay with not playing the recording or perhaps relying on the transcript. I don't think I could do either. I think the Court needs to hear the recording in context and I'm not sure that either Mr. Holstein's transcript or the one that we've had prepared is completely accurate.

Also, there are other issues that I wish to raise in this hearing today. I don't know if the Court wants to start on this and continue in the morning or just go until we're

done. There's another recording as well, a video that we'll want the Court to be reviewing.

THE COURT: What's the purpose - - why do you want to play the recording?

THE STATE: Judge, for our purposes we just wanted to play the beginning to establish that the Miranda rights were read. As far as - - I think the only thing that the Court has to make a determination, I guess of the voluntariness of it. I don't know if - - I had provided the Court with a copy of the transcript as well as the statement. I don't know if Mr. Holicker - - the Court wants Mr. Holicker to raise specific points or specific - -

THE COURT: I'd like to have specific points raised by you, Mr. Holicker.

MR. HOLICKER: Well, specifically, Your Honor, I think you need to listen to this recording in context so that you can hear the tone and tenor of my client's voice, of the officers and frankly, my client in all of the recordings you've heard so far has been completely consistent in his story and he continues to be consistent in his story for about an hour and a half of this recording that the

State intends to play until he breaks down after the officers coerce him into making up a story about how some accident occurred, an accident that I don't believe ever occurred. That will also be the subject of the video recording where they have my client demonstrate how he supposedly fell down the stairs with this baby.

This statement despite the fact that he was Mirandized was in fact coerced. That's out position and I don't believe the Court can adequately make a determination on that issue without listening to the entire recording in context. I understand that it's boring, Judge, but unfortunately I believe it's necessary.

THE COURT: Wouldn't a transcript of that recording suffice?

MR. HOLICKER: I don't believe so, sir.

THE COURT: Each party's got a copy of it.

MR. HOLICKER: Well, there are spots in the State's version of the transcript where things are inaudible and there are spots in the transcript that we have prepared that where things are inaudible. You cannot get the full tone and tenor

of - - listening to the recording is essentially like being there. You can't get that from words on a paper, particularly when we don't know what all of the words were.

I understand it's extraordinarily time consuming, sir, but my client's future is on the line.

THE COURT: Well, we could listen to part of the recording now and the rest of it in the morning, half of it now and half of it in the morning.

MR. HOLICKER: Yes, Judge. There are other issues that I'm going to want to raise and I suppose in the nature of motions in limine. I don't know if the Court wants to - - it would be helpful to me if the Court can take care of those issues tonight, assuming that we're going to give opening statements.

THE COURT: What, the motions in limine?

MR. HOLICKER: Yes, sir. Things that I want - - not really in the nature of suppression, more in the motion of excluding, but it's essentially - -

THE STATE: And the jury has to see that skull fracture, number one, for our medical examiner to discuss it, to talk about whether there was any indications of healing and the jury has to see that skull fracture to determine whether they believe that hitting that four wheeler could have caused a skull fracture. Judge - -

MR. HOLICKER: The jurors are not medical experts.

THE COURT: Just a second, just a second. Let me ask you a question. Have you had an opportunity to listen to the tape of the interview of October the 4th?

MR. HOLICKER: Yes.

THE COURT: You've heard it?

MR. HOLICKER: Yes.

THE COURT: And it's your opinion that there is flexion voice of the troopers to do - - of the police officers to do what?

MR. HOLICKER: You will hear through the course of that that my client as the first hour and a half go by becomes more and more beaten down as the officers insist that he has to tell them a

story of what happened, that it was an accident - -

THE COURT: That's going to be part of your argument, that his being in custody for that length of a time caused him to become weak and make statements that he would not otherwise make.

MR. HOLICKER: That combined with the - - yes, absolutely. There's a lot more to it than that.

THE COURT: You don't have to watch the film, listen to the tape because you're going to be able to argue that to the jury and to indicate to the jury how long he's been in custody and in this interview.

THE COURT: Yes, Judge, but he told a story at the end of an hour and a half that frankly I don't think is plausible. The State takes the position and the medical examiner takes the position that the scene that my client acted out is not what caused the child's death. He told that story because the officers I would argue pressed and pressed and pressed until he lost his will and he told the story. Certainly I can argue that to the jury, Judge, but I shouldn't have to argue that

to the jury because the State will be in the position of saying he lied to the police about what happened and how the child sustained these injuries and that's highly prejudicial to him.

My argument is that it was not a completely voluntary statement. I think it is prejudicial to him for that statement to be played. I think it should be suppressed and that's why I want the Court to hear this and rule on suppression.

THE STATE: Judge, I think that there should be, you know, Mr. Holicker can make specific direction as to what parts he finds to be coerced. I've listened to the statement.

THE COURT: I think you should - - you've already heard it. You can hear it again this evening at your office and tell us what section - - what part of that interview was coercive.

MR. HOLICKER: Judge, perhaps I'm not being clear. It is the - -

THE COURT: I think you're being perfectly clear.

MR. HOLICKER: - - it is the entirety of

the pressure put on him for 90 minutes before he finally tells the story about how this injury occurred that their expert and our expert will both say is not how the injury occurred. I think the Court needs to hear that pressure being put upon him, unless it just wants to grant suppression without hearing it. If the Court doesn't hear it, I don't think the Court can make an adequate ruling.

THE COURT: Well, I'm going to look at these photos.

MR. HOLICKER: Yes, sir.

THE COURT: Let's take a break.

(WHEREUPON, a recess was taken, after which the following proceedings were had.)

THE COURT: Mr. Holicker, let me get something straight here, you're want this tape to be played in front of the jury?

MR. HOLICKER: No, Judge. My position is that the tape shouldn't be played in front of

the jury and that the Court needs to hear that in order - -

THE COURT: Couldn't be played?

MR. HOLICKER: Should not be played. The State wants it played.

THE COURT: The tape, we're talking about the October 4 interview?

MR. HOLICKER: The one that you haven't heard yet.

THE STATE: Yes, Judge.

THE COURT: You want that tape played to the jury?

THE STATE: We want portions of it, yes, Judge.

MR. HOLICKER: If they're going to play portions, I'm going to insist that under the Rule of Completeness, that the jurors hear the whole thing, but my position is that they should hear none of it. If they are going to hear portions, they shouldn't hear portions. They should hear the entirety of it. Otherwise, we can't make our defense.

THE COURT: How long is that tape?

THE STATE: I believe it is just right at two hours, two and a half, sorry.

THE COURT: Two and a half hours?

THE STATE: Yes, Judge. The other alternative is to have the officer testify as to the contents of the interview.

MR. HOLICKER: And we would object.

THE COURT: Have the officer testify how?

THE STATE: To the contents of the interview.

MR. HOLICKER: We would object even more strongly with that, then the jury certainly isn't going to hear it in contents. We don't think the jury should hear from the officer about what my client said because it believe it was coerced and if the officer is going to be permitted to testify about it, the only alternative is for the jury to hear the entire recording in contexts.

I believe that when the Court hears the entire recording in context and keeps in mind the consistent story that my client had been telling from the beginning up until the officers weakened his resolve.

THE COURT: Well - -

THE STATE: And, Judge, the State has already established and got into evidence the Miranda form. You've already heard - - we can play the Miranda rights gone over at the beginning. At that time he was not in custody, Judge. All of those factors weigh towards admission. As far as the coercion, there has been no specific showing of coercion. It's a high burden, Judge.

You have a Mirandized statement that was voluntarily given, an intelligent waiver of rights. It was signed. It was memorialized. We have it in the exhibit. We have it on the tape.

MR. HOLICKER: With respect, that's not the entirety of it. First of all, I don't even know my client was told that he was free to leave. He was in a closed room at the police station with police officers being told that he is a suspect in the death of a baby. No reasonable person would believe that he was free to leave, even though those words were spoken but that's not even the point.

That's why - - I don't know that

the burden is on me to show that the statement was involuntarily. I think that once we raise the issue, it's the State's burden to show that it was voluntary. That aside, the Court cannot make a determination by just looking at the fact that there was Miranda form. The Court needs to hear the entire recording in context.

THE STATE: Judge, I believe that whether it's playing the video or having the officers testify, that they can testify as to the circumstances behind the interview. He walked over. He was given a cigarette, not once but at least a couple of times. He was asked if he wanted anything to drink. He was asked if he needed anything. He was given something to drink. Judge, there is nothing in this statement to show that it was coercive. That is somehow in violation of his due process rights. This is a high burden.

MR. HOLICKER: And we're asserting that it was coercive and the only way the Court can make a determination is by listening.

THE COURT: You're going to make a motion in the trial of the case to play that portion of

his statement to the jury, that is the Miranda rights statement; right?

THE STATE: Yes, Judge, that he was Mirandized.

THE COURT: And you're going to object to it?

MR. HOLICKER: We don't object to the Miranda portion if that's all the State wants to play but that's what the State wants to play. What I am certain the State wants to play is the portion of the recording after the officers have been working on my client for an hour and a half on top of the hours that you've already heard telling him that he needs to explain to them how this accident occurred, if it was an accident and then he makes up a story to satisfy them about falling down the stairs with a baby. I'm sure that's a portion that they want to play.

THE COURT: If the State desires to play selected portions out of interview, then you're going to ask that the entire interview be played to the jury; is that correct?

MR. HOLICKER: That is correct, but my

first line of defense is that the recording should not be played at all.

THE STATE: And Judge, after the defendant gave that statement, he walked over, back over to his house and gave this video re-enactment. At that time, the detectives said you know you don't have to do this. You know you don't have to do this. You don't have to show us this, Judge, and we have that here. Mr. Holicker does not want this statement to come in because it's an inconsistent statement and is inconsistent with the evidence, Judge, but it is still - - the State has shown that there was a Mirandized - -

THE COURT: How many days is it going to take to try this case?

THE STATE: Three.

MR. HOLICKER: Are you saying your side or the entire case?

THE COURT: I'm talking about trying the entire case.

MR. HOLICKER: The State previously indicated to me that they believe their case would take about a day and a half, roughly. Is that

the criminal history issue or do you need me to file a written motion?

MS. MEADOWS: Judge, I said I'd do it.

THE COURT: Pardon?

MS. MEADOWS: Judge, I said I would do it.

MR. HOLICKER: All right, so I will not be filing a motion on that.

THE COURT: But you're requesting the same information - -

MS. MEADOWS: I am, Judge.

THE COURT: - - about his client? I'm going to grant that, also.

MR. HOLICKER: All right, over my objection.

THE COURT: Your objection is noted.

MR. HOLICKER: Yes, sir. Thank you.

THE COURT: Now, going back to this - - is that what you call an audio, the disc interview of October 4th, 2010?

MR. HOLICKER: Yes, Judge.

THE COURT: Why again do you want us to

play this this evening?

MR. HOLICKER: Well, Judge, It's 5:30. I don't know that I necessarily want us to play it this evening. We might all have to have a pajama party if we do that. I want the Court to hear it so that the Court can rule on my motion understanding the perspective that I'm bringing to this, that my clients - - after telling the truth in statement after statement after statement, including this very statement for an hour and a half, he was pressured by the officers into making up a story about how an accident happened because he was afraid of what would happen if he didn't. The only way that the Court can rule on that is by hearing the progression up until the time when I believe they break him and he makes up a false story about an accident that never even happened.

THE COURT: Okay. You want me to listen to it?

MR. HOLICKER: Yes, sir.

THE COURT: I'll take it home and listen to it and then come back tomorrow morning and if I tell you that I don't feel that that is coercive on

your client, then what?

MR. HOLICKER: First, and with no disrespect, I would rather that it be played here in Court but if the Court's going to take that approach and the Court is going to find that the statement is admissible, then I would want the entire statement played when the State attempts to introduce only a portion of it. Again, my position is it was coerced and it is prejudicial and it is inadmissible. If the Court deems it's admissible, then the jury needs to hear the entire two and a half hours - -

THE COURT: You're asking me to rule on a subjective matter; right?

MR. HOLICKER: That's what coercion is, Judge, is subjective.

THE COURT: Okay, I'll listen to it and then tomorrow morning, I'll tell you what I'm going to do.

MR. HOLICKER: Yes, sir. And there's one more - - there's a video recording. If the Court finds that admissible, then my client gave a demonstration of this accident that never occurred

where he demonstrates twice falling down the stairs using a stuffed animal as a stand in for the baby. Our position is that that was coerced as well, not in that moment but through the entire two and a half hours of having - - of leading to him making up this story about an accident that never occurred and that that should be suppressed as well. The video should be suppressed.

The State's position is that's not how the baby was injured. It's the defense's position that that's not how the baby was injured. It has no relevance.

MS. MEADOWS: Judge, it most definitely has relevance. Inconsistent statements are considered a hallmark of child abuse regarding this that he kept changing - -

THE COURT: Speak up, I can't hear you.

MS. MEADOWS: I'm sorry, that he kept changing his statement, not just once but over a period of time. Yes, it is our contention that the stairwell fall was fabricated but not because the officers were coercing him but because he wasn't telling them the truth about what happened, which

was what really happened was child abuse. Judge, inconsistent statements are extremely relevant in these type of cases. When you have a situation where you have a defendant who is the only one there with this child, who's 18 months old and no longer with us, no other witnesses, he was the only one, her sole custody care and control.

Judge, I think that you can - - I think when you view the statement, you're going to find that it wasn't coerced. When you view the video re-enactment, you're going to find that it wasn't coerced. It is most certainly relevant because it's an inconsistent statement by the defendant.

MR. HOLICKER: It's only relevant if the Court finds - -

THE COURT: Pardon?

MR. HOLICKER: - - it's only relevant if the Court finds that it was not, my client was not pressured into making up a story. It's our position that if the Court listens to that recording and all of it, minute by minute - -

THE COURT: You're talking about the

video?

MR. HOLICKER: No, I'm talking about the audio, the two and a half hour audio. The video followed that, the making of the video. If you find that my client's statement was coerced, I think it naturally follows that the Court has to exclude the video as well. Nevertheless, I'm separately asking that the Court exclude that video.

He made up a story after being pressured to make up a story. They didn't say make up a story but they kept saying "Buddy, it was an accident. Just tell how it happened. That's the best way to deal with this", that sort of thing. He made up a story because he was afraid of going to prison otherwise.

THE COURT: The video - - you're asking that the video be played?

MR. HOLICKER: No, I'm asking that the video be excluded as well. I'm asking that this two and a half hour statement be excluded and that the video be excluded.

THE COURT: How long is that video?

MS. MEADOWS: The video is like three minutes, Judge, if that.

THE COURT: Pardon?

MS. MEADOWS: If that.

THE COURT: Okay. Well - -

MR. HOLICKER: Judge, in terms of figuring out what's going to happen when, I assume we - - if the Court's going to listen to this tonight, then there's still the video to watch before we pick a jury.

THE COURT: The video is what, three minutes?

MR. HOLICKER: Right.

MS. MEADOWS: Judge, we can - - yeah. I can get it marked and we can watch it right now, if you'd like.

THE COURT: Yeah, let's look at it now while we're still here. I'm sorry we've got a witness that's been sitting here for an hour.

(WHEREUPON, the video referred to were marked for identification purposes as Exhibit No. 19.)

BY MS. MEADOWS:

Q For identification purposes, this is State's Exhibit 19. It's labeled SCPD number 2010-01350, Larry Hayes' stairs demo. Were you present when this was videoed?

A Yes.

Q And where was it videoed?

A In the living room of Mr. Hayes' residence.

Q Was he handcuffed at the time?

A No.

Q Did this occur after the interview of October 4th, 2010?

A Yes.

Q I'm going to play this and I want you to tell me - - can you see on the screen, Detective Paschall?

A Yes.

Q I'll pause it for a minute while we get the volume up.

MS. MEADOWS: I'm trying to get the volume, Judge. Let me start it over.

(WHEREUPON, the video was played.)

BY MS. MEADOWS:

Q Detective Paschall, after reviewing what's been identified - - what has been marked for identification purposes as State's Exhibit 19, does that accurately reflect the re-enactment?

A Yes.

Q It was a little, looked like a little, I guess you would call it a glitch there. Was that - - let me just back up, was that - - how was that videotaped? Was it videotaped with the actual digital recorder? Explain it to us.

A It was an older videotape. It was an older video recorder that we hadn't used in quite some while. I think it was an eight millimeter tape and that glitch halfway through it where it looks like a half second was taken out, I have no idea how that occurred. It was probably just an error with the tape itself. You can tell there's not much time lapse. At the end of the video, it was inadvertently clipped while we were pulling it out.

Q There was nothing else substantive on that video?

A No, nothing else.

Q And that - - I think I already asked you that, accurately reflects the re-enactment?

A Yes.

MS. MEADOWS: Judge, I would ask that what's been previously marked for identification purposes as State's Exhibit 19 be admitted for purposes of this hearing.

THE COURT: Exhibit 19?

MS. MEADOWS: Yes, Judge.

MR. HOLICKER: For purposes of this hearing, I have no objection.

MS. MEADOWS: All right, it will be received.

(WHEREUPON, State's Exhibit No. 19 was admitted and received into the record.)

BY MS. MEADOWS:

Q Could I ask a couple of follow-up

questions from Detective Paschall? And we may have already touched on this but I just want to make it clear. This re-enactment occurred when in relation to the interview?

A Right after the interview, we took another cigarette break and then - - I actually went and brought him cigarettes, and then we walked over and at no point were there handcuffs applied. We just walked from our office, which is a block away, not a long block, away from his residents. We just walked up the alley to his residents. He let us inside and we went from there.

Q And was he cuffed when he made the walk?

A We at no point pulled out the cuffs. The cuffs never came out the entire time.

Q And you may not know this, I may have to get this in with another witness but do you know was there any follow-up investigation done regarding his story regarding the fall with medical personnel?

A I didn't speak with medical personnel.

Q Okay. And we've seen the tape and

it's been admitted but you asked yourself the defendant regarding Miranda; is that correct?

A Yes.

Q Did he ever ask for a lawyer at any time?

A No.

Q Ever say he didn't want to speak with you all anymore?

A No.

Q Okay.

MS. MEADOWS: I don't think we have anything further from this witness at this time, Your Honor.

THE COURT: Any cross?

MR. HOLICKER: Yes.

CROSS EXAMINATION

BY MR. HOLICKER:

Q With regard to that little video demonstration, how tall was Becca and what did she weigh?

A I don't know.

Q So you have no idea if that floppy eared bunny in any way resembled her weight or her shape?

A We were mainly using it for demonstrative purposes.

Q I understand but it's a demonstration, I would suggest that doesn't compare to an actual child in size, weight. Certainly Rebecca didn't have floppy ears but that aside, that was a pretty big rabbit and she was a pretty little girl; right?

A Like I said, I don't know her size and weight off of the top of my head.

Q Okay.

MR. HOLICKER: Judge, I don't want to ask this witness any other questions at this point but after the Court has had an opportunity to review the two and a half hour recording and listened to it all, when the Court has that context, I may want to cross examine this officer on how that recording came into be made and the coercion that I believe was - -

THE COURT: I can't hear you drifted off.

MR. HOLICKER: - - I may want to cross

examine him after the Court has listened to the recording about the recording.

THE COURT: All right.

MR. HOLICKER: But for now I have no further questions.

THE COURT: You want to reserve the right to call him back?

MR. HOLICKER: Yes, on cross, not on direct.

THE COURT: Pardon?

MR. HOLICKER: As continued cross examination, rather than direct examination.

THE COURT: Okay. Anything else?

MS. MEADOWS: No, Judge.

MR. HOLICKER: Not from the defense, Your Honor.

THE COURT: Any other motions?

MR. HOLICKER: I'm sorry.

THE COURT: Any other motions?

MR. HOLICKER: No, I think you want me to file a motion in the morning about dismissing the indictment and I will do that.

THE COURT: Okay.

MR. HOLICKER: I may have other motions in limine in the morning but right now, at a quarter til 6:00 in the evening, I don't have anything else.

THE COURT: Let me ask a question, was that stairway carpeted or was it wood?

THE WITNESS: The stairway itself was wood. At the bottom, there was carpet.

THE COURT: And the flooring?

THE WITNESS: We actually had sections of the padding underneath the carpet and the carpet itself.

THE COURT: Okay. So we'll see you tomorrow morning at 9:00.

MR. HOLICKER: Judge, before we break, can we try and figure out a rough schedule so that I can know when I need to have this video facility reserved. Right now given where we are, I'm thinking after lunch on Thursday to start our case.

THE COURT: I thought you were going to have him on Wednesday.

MR. HOLICKER: Well, tomorrow is Tuesday. We need to finish this up in the morning

THE COURT: I'm not going to help carry them.

MR. HOLICKER: Nor am I.

MS. MEADOWS: - - never actually admitted into evidence, State's Exhibit 4, which is the October 4, 2010 audio statement, I would move for its admission now for purposes of this hearing.

MR. HOLICKER: For purposes of this hearing, I have no objection.

(WHEREUPON, State's Exhibit No. 4 was admitted and received into the record.)

MR. HOLICKER: Is the Court going to be taking home the actual marked exhibit? I have some concern about that.

MS. MEADOWS: Judge, I actually provided a copy to your law clerk of all three of the interviews on one disc that your law clerk has as well as the transcript.

THE COURT: Let me see.

(WHEREUPON, day one of the trial is concluded.)

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

THE STATE OF WEST VIRGINIA

Plaintiff,

VS

11-F-41/Judge Zakaib

LARRY ALLEN HAYES, JR.

Defendant.

DAY 2 TRIAL

08-23-11 @ 9:30

Before: Judge Paul Zakaib, Jr.

Christy L. Bellville, CCR

Official Reporter

304.357.0487

A P P E A R A N C E S

COUNSEL FOR STATE OF WEST VIRGINIA

Jennifer Meadows, Esquire
Dan Holstein, Esquire
Office of Prosecuting Attorney
310 Virginia Street,
Charleston, West Virginia 25301

COUNSEL FOR DEFENDANTS:

Richard Holicker, Esquire
Joseph Mosko, Esquire
Office of Public Defender
723 Kanawha Boulevard, East,
Charleston, West Virginia 25301

Defendant, Larry A. Hayes, Jr., present in person

I N D E X

Q So you're saying the word skull crusher completely came out of Detective Paschall's mouth and not your own?

A That's correct.

MR. HOLSTEIN: One moment, Your Honor. That's all the questions I have for him.

THE COURT: All right. Thank you. You may step down.

(WHEREUPON, the witness was excused.)

THE COURT: I'm going to - - after hearing the testimony of witnesses and argument of counsel, I'm going to deny the defendant's motion to dismiss the indictment.

MR. HOLICKER: Please note my objection and exception.

THE COURT: Defendant's objection will be noted and reserved. Are you ready to have the jury come up here or do you have any motions?

MR. HOLICKER: No, Your Honor. We still have a major issue left from yesterday.

THE COURT: I'm sorry, what was that?

MR. HOLICKER: Your Honor, I had moved to suppress all of the statements of my client but especially the two and a half hour recording that the Court didn't want to play in Court but indicated that it would take home and listen to it for two and a half hours.

THE COURT: I listened to it. If you want to use any - - I'm not going to subject the jury to listening to two hours and a half of testimony. If you - - I would entertain you selecting portions of that interview but I'm not going to have the jury read the entire - - listen to the entire tape.

MR. HOLICKER: Your Honor, that's the State's desire to present out of context portions. As I indicated yesterday, if the Court is not going to suppress the entire recording, then the jury has to hear the entire recording so that I can make my argument. I'm trying to make it to the Court that my client was pressured and coerced into making up a story about an incident that never occurred after the officers bullied him essentially for an hour and a half. It is clear on the record that that's

what happened.

The Court should exclude this entire recording but if the Court isn't going to exclude the entire recording, then under the Rule of Completeness, I have the right and the Court has the duty - - I have the right to request and the Court has the duty to grant the request that the entirety of the recording be played.

I think none of it should come in but if the Court is going to allow the State to pick and choose, that would be a disservice to my client. It would be a denial of due process. It would be - - two and a half hours is a very long time for the jury to sit and listen to a recording but if any of it is going to come in, it all has to come in. That's our position.

THE COURT: Do you want to respond to that?

MR. HOLSTEIN: Judge, the only response I would make is that - -

THE COURT: Pardon me?

MR. HOLSTEIN: - - the only response I want to make is that it's always the case that the

State can choose what evidence it wants to put on. I'm not obligated to play a part of it, a fraction of it, all of it. If it comes into evidence, if the Court grants, you know, denies the motion to suppress, then we're free to use whatever parts, you know, we choose subject to the Court's limitations, of course. If the Court doesn't want us to play the whole - - that's fine. I don't see any point in subjecting, you know, the jurors to repetitive, repetitive, you know, same thing all the way through.

Our point in offering it is that he starts with one story and switches to another. That's the only purpose. We don't need to play the whole thing. The defense, you know, they can make the motion and put the whole thing and address that but that's something other than our case in chief. In our case in chief, we only want to use certain portions of it. I don't think the defense can require us to play it during our case in chief, the whole thing. I think your ruling is absolutely right.

MR. HOLICKER: Judge - - he hasn't ruled

yet, first of all. Second of all, that's why we had a Rule of Completeness. As I understand the Rule of Completeness, if the party who is not the proponent of evidence that is offered in part requests that the evidence come in in total, the Court has to grant that. They want to present to the jury yet another false and misleading case. They want to suggest to the jury that my client is guilty because he changed his story.

Yes, he changed his story. He changed his story after he had been bullied for an hour and a half by officers who told him that if he didn't explain how it was an accident, then he was a cold blooded murder and you know what happens to cold blooded murders, and judges need to hear people express remorse and judges - - if it's an accident, you need to tell the judge and you'll be in a much better position if you do that.

For an hour and a half, he was subjected to this bullying before he finally made up a story about falling down the stairs with the child, a story that never - - it never happened. The State's witnesses don't believe it happened.

Our expert doesn't believe it happened. It didn't happen.

Our client changed his story but if the State intends to introduce evidence that our client changed his story and intends for the jurors to infer guilt from that, we are absolutely entitled to require that the State play it in context. I want it out. But if it's not out, the whole thing has to come in. That is why there is a Rule of Completeness.

THE COURT: I'm going to deny your request that this statement - -

MR. HOLICKER: Your Honor, then my client can't receive a fair trial. You're denying us our defense and it's a legitimate defense. I understand that two and a half hours is a long time but my client is entitled to a defense. The police put my client in a position where he felt coerced and felt that he had to make up a story about how this injury occurred by accident.

If you're telling us that we can't present that defense, Judge, then absolutely my client will not have a fair trial. I mean no

disrespect to the Court but you cannot present evidence to the jurors out of context and expert a fair trial.

THE COURT: Are you saying that what the State wants to do is improper?

MR. HOLICKER: I am saying that under the Rule of Completeness, if the State wants to introduce a portion, we are entitled to ask that the Court subject the jurors to it in its entirety in context and that the Court needs to grant that. It's black letter law, Judge. I don't want any of it in and let's save the jurors two and a half hours by keeping it out but if they want to introduce some of it, then the jurors need to hear all of it.

THE COURT: Okay, let me take this - - let's take a break here for a couple of minutes.

MR. HOLICKER: Judge, I'd like to read the Rule of Completeness. It's Rule 106 of the Rules of Evidence and what it says is when a writing or recorded statement or part thereof is introduced by a party an adverse party, and that would be us, may require the introduction at that

time of any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. That is exactly the situation that we have. It is not fair to exclude the entirety if the part is in. It's in our rules, Judge.

THE COURT: Let me see that.

MR. HOLICKER: May I approach, Your Honor?

THE COURT: Yes. Let's take a 10 minute break.

(WHEREUPON, a recess was taken, after which the following proceedings were had.)

MR. HOLICKER: Your Honor?

THE COURT: Yes.

MR. HOLICKER: Before the Court rules, Mr. Mosko actually did the bulk of the research on the Rule of Completeness and if he might say a few words.

THE COURT: All right.

MR. MOSKO: Your Honor, I think just initially I think we need to have a conversation about the language of the rule itself. The Rule of Completeness says that an adverse party may require the introduction of the completed statement. I think that no one in the courtroom is in disagreement as to the fact that the trial judge has brought discretion with regard to evidentiary issues. I think that discretion is granted to this Court within the scheme of the Rules of Evidence.

Rule 106 regarding the Rule of Completeness is one situation where I would respectfully offer to this Court that there is no discretion. I think the rule says we, as an adverse party, may require the introduction of the complete statement if it is to be used in the State's case in chief. The rule goes onto say that the statements need to be introduced when the remainder of the statement ought to in fairness be considered with the portion that's being introduced by the adverse party.

Our whole position, Your Honor, is that over the course of two and half hours, Mr.

Hayes sat in a room with police officers and at one point, he was marandized. At a later point, he brought up this story. Our entire position, Your Honor, is that the hour and a half, hour and 45 minutes between those two incidents, are the only way to accurately let the jury hear the statement in its whole context. At the 10 minute mark, he's sticking to his story. The 15 minute mark, he's sticking to his story. The 20 minute mark, he's sticking to his story. The 25 minute mark and on and on and on through constant pressure of police officers.

Finally after suffering over an hour and a half of rigorous unrelenting pressure from police officers, he finally changed his story. Now we can come in and we can say, "Ladies and gentlemen of the jury, we want you to know that there was this hour and a half span in which he stuck to his story." They are not going to get the benefit of the context and the reality of what happened in that room unless they are there for that hour and a half period, minute by minute by minute by minute feeling and hearing what Larry

Hayes did.

It's simply impossible and it's simply an untintable position for the State to take to think that we are not being extremely prejudiced by not having the jury hear the entire recording so they can with the best evidence available, which is the recording itself, understand and feel what Larry Hayes felt.

THE COURT: Do you want to say something before I - -

MR. HOLSTEIN: Judge, the Rule of Completeness, I mean, you heard it read here and that's not what it says. The Court does have discretion and the discretion is on interpreting what portions and the language says "in fairness to be considered contemporaneously with it", that being the part that we would seek to offer. When you look at the notes of decisions down below it, there's one case that interprets the federal rule, which I believe is - -

THE COURT: That's the one I was going to discuss but go ahead.

MR. HOLSTEIN: - - well, you've seen it

then, Judge, and the purpose is to prevent a party from misleading it in terms of content. We don't want to mislead the jury by giving one part and not the other. I have no problem with them hearing portions to where both sides - - both versions of what he said or the progression of his version of events.

The officers - - if they want to talk about - - they could play certainly selected portions and use that cross examine officers about how they asked him questions, about whether any pressure was brought to bear, about their tone of voice and they can use selected portions to demonstrate that and they can certainly offer the testimony that this went on for an hour and a half before, you know, his story started changing. There's a lot of ways that they can do that absent playing the entire statement.

THE COURT: When do you plan on putting your - -

MR. HOLSTEIN: It will be through Detective Cook and his testimony would likely be tomorrow, probably tomorrow morning.

THE COURT: Okay, thank you.

MR. HOLICKER: Your Honor, if the Court is thinking of deferring a ruling, I need to know the Court's ruling.

THE COURT: I'm not going to defer the ruling. What I'm going to do is order that you have time to select from that transcript those portions that you rely upon in your defense to counteract the effect of his - -

MR. HOLICKER: Judge, the portion that I'm relying on is the entire hour and a half - -

THE COURT: I'm not going to let you have the entire hour and a half.

MR. HOLICKER: Then, Judge, my client is not going to get a fair trial.

THE COURT: That's what you think but he will get a fair trial.

MR. HOLICKER: With all due respect, there are two important words in Rule 106. One is require, the adverse party may require not the Court may grant, the adverse party may require and then the Court has my copy of Rule 106 so I'm not quoting verbatim here but it goes onto say

essentially may require the introduction of those portions, which in all fairness the jury needs to hear in order to put this in context.

It is our assertion, our strong assertion while my client's very future is on the line, that it is impossible in the interest of fairness for the jurors to be able to come to any fair or rational decision in the absence of having heard it in context. An hour and a half - - the hour and a half that led up to that is a long time to sit and listen to a recording, I acknowledge that but the 40 years that my client is facing is an even longer time, Your Honor.

With all due respect to the Court, this Court is opening the door to a very strong appeal issue if it denies our request. Honestly, Judge, as I read Rule 106, it is not a request. It is a requirement that we may assert and we are asserting it.

MR. MOSKO: Your Honor, just briefly, very briefly, to again discuss the language of Rule 106, when a writing or a recorded statement or a part thereof is introduced by a party, in this case the

State, an adverse party may require as we've discussed what that language means, may require at any time to introduce any other part or any other writing or recorded statement.

I think the rule very plainly says not only can we require the introduction of the statement but we can require any part. By any part I think we can require that all of the statement come in and I think that's absolutely explicitly clear from the language of Rule 106.

MR. HOLICKER: If the Court is going to deny our motion, respectfully I would ask for a continuance so that we can submit the question to the Supreme Court as a certified question.

THE COURT: What about that certified question to the Supreme Court?

MR. HOLSTEIN: I don't think there's any reason to do that, Your Honor. The closing phrase is "which ought in fairness to be considered with it". That's a discretionary ruling. It's your determination what ought in fairness out to be considered. That's why you're there, Your Honor.

MR. MOSKO: Your Honor, it's not a

discretion ruling. The beginning of the phrase I think it's controlling: when a writing or recorded statement is introduced. There's no other qualifiers on that. When someone in trial introduces a statement, an adverse party may require. It's our call. We get to pick whether or not we want any part or all of that statement to come in.

In other words, I think it's the adverse party's discretion if we feel like in fairness the remaining statement needs to be considered contemporaneously with what's been introduced. I think the rule is very, very, very clear. I think this is one of those rare rules in the Rule of Evidence that gives an adverse party an absolute entitlement. I don't think the rule says anything else other than that.

MR. HOLSTEIN: Then what's all of this case law about, Judge? Why are courts ruling about this issue where the courts have to decide to omit those portions that are necessary to clarify or explain, under number four, relevancy issues in the case? That's the headnote under four.

THE COURT: Relevant issues in the case, that portion of the - - the State is relying upon your client's change of story during the questioning period.

MR. HOLICKER: Yes, they are going to assert that the fact that my client changed his story is evidence of his guilt.

THE COURT: And you're going to assert that he changed his story because of the pressure, the heavy handedness of the police during that interview. You're entitled in that same - - going through the transcript of that hearing, you're entitled to pull out whatever you want to rely on to counteract what the State is relying.

MR. MOSKO: Your Honor, I would say I think the Court is exactly right. The Court said we are entitled to pull out what we want to rely on. We want to use the entire statement and I think the Court is right we are entitled to use any portion we want. The portion that we want to use, as is we're entitled to under the rule, is the entire statement.

THE COURT: But there's portions of that

statement -- I've read it and I've heard it. I think portions of it are not applicable here. Certain conversations, certain things that transpired are not applicable in this particular case. I don't want to subject the jury to hear the whole two hours.

MR. HOLICKER: Judge, our entire defense is based around this. It either -- the statement either needs -- an out of context version of the statement needs to stay out entirely and it needs to be suppressed, or if the Court is not going to grant suppression and from the fact that we're having this conversation, I must assume that the Court is not going to grant the suppression motion. In the interest of fairness and completeness as set forth in the rule, we are entitled to designate that portion that we think puts it in fair context and we would designate the entire statement. It's a matter of fairness.

Under the Rule of Completeness, we've set forth what our position is. Under the Best Evidence Rule, the best evidence is the recording itself. Under both the Best Evidence

Rule and the Rule of Completeness, if any of it comes in, we have the absolute right to require that all of it comes in. I'm not trying to beat a dead horse while being adamant about this, because without this, the Court is denying my client a defense. It's an hour and a half out of the jury's life versus 40 years out of my client's life.

THE COURT: I'm going to deny your request that the entire record be played to the jury. You have until tomorrow to select that portion of the transcript or the recording that you want the jury to hear and there is certain areas in there that clearly - - and are to your benefit so you have the right to select those portions of the transcript that you want the jury to hear. You can do that - - let us know. You have until tomorrow morning. That's when you're going to be presenting your side of the case - -

MR. HOLSTEIN: Yes, Your Honor.

THE COURT: On that particular issue.

MR. HOLSTEIN: Yes, on that issue.

MR. HOLICKER: Please note my strong objection and exception.

THE COURT: Well, your objection is noted.

MR. HOLSTEIN: Your Honor, I take it from your ruling that -- it sort of implies that you're not suppressing any of the statements that we've offered. I think we probably ought to make a record about that, and I would argue that the evidence that we've put on about them is certainly -- that they're all voluntary. There was Miranda done on the one occasion where he was at the -- there was a first statement at the police station, clearly free to go. They talk to -- he comes there of his own volition. He leaves of his own volition.

The second statement is where Child Protective Services and Officer Paschall accompanies and just sits there and listens to their questions at his house, again not in custody so there was no requirement for Miranda.

The third statement at the police station, Miranda is done right at the very beginning and then it's the one that we've been talking about that you've heard it all, Judge, and so I'm not going to go through it all. I would ask

- - following that, they walk down the street, not in cuffs, walk to his house. He does the video demonstration, which you watched yesterday, and I would assert that all of those were voluntary statements.

Miranda was done even though he was not in custody but they went ahead and gave him his warnings and referred to it a couple of times throughout it, that those are still in play here because the questioning was going on for a lengthy period of time and back at the house, you watched on the video where he said you don't have to reenact this for us if you don't want to. Do you understand your Miranda rights still apply? Do you have any questions about that?

All of that being voluntary and support that they would legally admissible in Court and should not be suppressed. I sort of took that that was your ruling but I wanted to make sure that that's where we're at.

THE COURT: I don't see a problem with the Miranda warning having been given to the defendant.

MR. HOLSTEIN: Thank you, Judge.

MR. HOLICKER: Your Honor, Miranda is not all of it. Despite his having been given Miranda warnings, he was coerced into giving the portion of that statement that the State wants to introduce in the third interview. If the Court listened to it, the Court heard it. He was coerced, the words of Miranda notwithstanding.

THE COURT: I made my ruling.

MR. HOLICKER: I thought we were still arguing, Judge.

THE COURT: Pardon?

MR. HOLICKER: I think we were arguing the point, I'm sorry.

THE COURT: No.

MR. HOLICKER: I hadn't actually heard a ruling so I apologize.

THE COURT: The statements - - what is it that you're - -

MS. MEADOWS: Judge, I think it was implied that the statement was admissible based on your prior ruling that the State could admit part of it. We just wanted to make that clear for the record, and the video, also, Judge, that followed

the statement that that would be admissible as well.

MR. HOLICKER: Judge, we haven't even watched the video yet.

THE COURT: I thought you saw it with me.

MR. HOLICKER: That's right, we watched it yesterday, sorry. It's been a long day and I've been up since 3:00 in the morning work, so I apologize. I think that we need to suppress that as well.

THE COURT: On what basis?

MR. HOLICKER: On the reason - - for the same reasons that I think that the third statement at the very least needs to be suppressed because my client was coerced into making up this story and then he went with the officers to his house to put on what is a ridiculous demonstration. Aside from the issue of coercion, there's the issue of whether it's even a realistic recreation. They didn't use - - certainly they could use a doll but they didn't use a baby shaped or sized doll. They used a ridiculous floppy eared rabbit, that's at least twice the size of a baby and does not accurately

reflect what my client said in his false admission happened. Plus he's shown falling down the stairs two different ways. It just - - it's a ridiculous demonstration and it does not go to prove anything that the State has to prove in this case.

THE COURT: I think it goes to show that he tripped. We're not - - that's all that scene shows, he tripped. He claims he tripped down the stairs.

MR. HOLICKER: What will the jury get out of this? Absolutely nothing.

MS. MEADOWS: Judge, it's a credibility issue. It is, as I said yesterday, inconsistent statements are hallmark of abuse. Judge, and this is one of the statements that he gave to the police, one of the statements.

Mr. Holicker has every right to cross examine the police about the size of the bunny, the size of the Rebecca McDaniel, how the video was created. He has every right to cross examine that but that's not the issue. The issue is whether it was voluntarily performed and you saw the video. You remember the video. Detective

Paschall said, "You know your Miranda rights still apply. You don't have to do this, say yes or no." He said, yes.

THE COURT: I'm going to let it in.

MR. HOLICKER: Judge, let me make one further argument. This is supposed to be some sort of scientific - -

THE COURT: Pardon me?

MR. HOLICKER: I'd like to make one other argument just to vouch the record.

THE COURT: Okay.

MR. HOLICKER: If this is supposed to be some kind of scientific demonstration, it doesn't meant the Daubert Standards, which I think - -

MS. MEADOWS: No one is alleging that it makes any kind of - - that it is a scientific demonstration.

MR. HOLICKER: It is not relevant to the extent the Court finds it is relevant, it is more prejudicial than probative.

MR. MOSKO: Just additionally, I think, Judge, I think the risk that we're going to run is the jury is going to look at the video and the jury

is going to think this is how this fall happened. I think the State's argument is this is another inconsistent statement and the State's going to introduce this evidence not to show that a fall happened, this is how it happened but this is yet another inconsistent statement.

I don't know if the jury is going to pick up on that. I think they're going to latch on to this one irrelevant issue, this one demonstration when both sides agree that that has nothing to do with how the injuries were even sustained.

MS. MEADOWS: Sure they are, Judge. They're going to pick up it because I'm going to tell them in my opening that it's an inconsistent statement. We are - - it's going to be - - are we doubting the jury's ability to understand inconsistent statements? This is just ridiculous.

MS. MOSKO: I think the value of the video being played as an inconsistent statement is outweighed by the potential prejudice and confusion of the video being interpreted as an actual scientific - - and I say scientific, I won't say

scientific, an actual demonstration that has any -- we just don't want the jury taking from that video anything other than the fact that it is yet another inconsistent statement.

MS. MEADOWS: Judge, you have ruled on this issue. I think we need to move on. They have every right to cross examine - -

THE COURT: I just said - - two minutes ago I said I'm letting it in.

MS. MEADOWS: Yes, Judge. We've ruled on this. It's time to move on.

THE COURT: We don't need to hear any argument. If I'm wrong, you're going to take me upstairs, I'm sure.

MS. MEADOWS: Thank you, Judge.

THE COURT: Anything else?

MR. HOLICKER: Yes, Judge. We would make a motion in limine to exclude the XBOX logs, which go on for, I don't know, maybe 80 pages. It's irrelevant. We'll be happy to stipulate that our client spent a lot of time on the XBOX. The words "skull crusher" which we now know was not a screen name appears all through it. There's no

reason for it to come in. It will prejudice my client.

We will stipulate that he spent untold hours playing XBOX but the jury does not have to see pages printed out apparently from the internet indicating in places the words "skull crusher". It is more prejudicial - - it is not relevant. It is more prejudicial than probative and even a redacted version would be prejudicial because the jurors would want to know what it is that's being hidden from them.

There is nothing in those documents that makes the State's case. To the extent again that it's relevant, it is highly prejudicial, far more prejudicial than probative.

THE COURT: What about - -

MR. HOLSTEIN: Judge, I understand their concern about the use of the word "skull crusher" and I have no problem with that. I like their suggestion, rather than redacting it, I think it would be simpler because the purpose of it is to show the amount of time he's been playing. If they are willing to stipulate and that is, it will be

read to the jury as a stipulation that the parties stipulate that the defendant spends untold hours of time on the XBOX, then that's fine.

MR. HOLICKER: We're willing to craft a stipulation.

MR. HOLSTEIN: We will agree to that.

THE COURT: All right, craft a stipulation.

MR. HOLICKER: Judge, I just want to look through my notes from yesterday because I'm not sure everything was ruled on, or if it was, I didn't understand. Judge, I think for the moment that covers everything. I do want to make a - - yesterday there was a joint motion to sequester witnesses for purposes of the suppression hearing. I would make that motion again in connection with the trial and trust that it will be a joint motion.

MS. MEADOWS: Yes.

THE COURT: All right.

MS. MEADOWS: Judge, just one housekeeping matter, I have here sealed records that were dropped of this morning by a CAMC medical records custodian and I'd like to have those marked

as State's Exhibit 20, I believe. My discussions with Mr. Holicker indicate that he's stipulating to their authenticity.

MR. HOLICKER: Judge, I'll fight to the death anything that needs to be fought over. That doesn't need to be fought over.

THE COURT: All right.

(WHEREUPON, the document referred to was marked for identification purposes as State's Exhibit 20.)

MS. MEADOWS: Judge, based on the stipulation of authenticity, I think they can - - I would move for them to be admitted into evidence at this time.

MR. HOLICKER: In their entirety? I would want to - - I have no problem with them being marked and I have no problem stipulating to their authenticity, I'm not sure I'm prepared at this moment to agree to their admission.

THE COURT: Well, we can - -

MR. HOLICKER: What I had agreed to,

Judge, was to save them the trouble of having the records custodian from the hospital - -

THE COURT: I understand that.

MS. MEADOWS: Judge, I guess we can deal with it as it comes forward.

THE COURT: Okay.

MS. MEADOWS: Marked is as State's Exhibit 20.

MR. HOLICKER: And we have no objection to that. Judge, there is one more housekeeping matter that just came to mind. If I am to spend this evening editing the recording, how do we get to a point where we agree on what's going to be admitted from what I edit? Is the Court just going to trust me and let me play my edited version or do we need to do something affirmative?

MR. HOLSTEIN: If I may I make a suggestion, Your Honor, is to maybe just like the portions on the transcript that you want to play and shoot me a copy of that, and then I'll listen to those parts. We can do it that way.

THE COURT: Get a transcript of the testimony, mark off what you need, and that will be

played to the jury.

MR. HOLICKER: I'm more than happy to do that, preserving my previous objection. My concern is I'm not going to have another opportunity to then go back and edit more. I'm just not sure in practical sense, how this is going to work. For example, if Mr. Holstein objects to portions that I want in, I won't have the opportunity to go back to my computer and do more editing.

THE COURT: Can I discuss - - no. We'll wait and see what portion of the - - if there's objection on the part of the State and we'll deal with that issue when it arises.

MR. HOLICKER: Yes, Your Honor. And finally, also in the nature of housekeeping, the Court ruled yesterday that my expert can listen in my telephone as the State's experts or medical witnesses testify. I do have a phone number where he can be reached. I don't know how mechanically how the Court wants me to handle that.

THE COURT: Our bailiff handles that for us.

MR. HOLICKER: Okay, and the other part

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

versus

Civil Action 11-F-41

Honorable Paul Zakaib, Jr.

LARRY ALLEN HAYES, JR.,

Defendant.

DAY 5 TRIAL

August 26, 2011

Before: Judge Paul Zakaib, Jr.

Kanawha County Circuit Court

Charleston, West Virginia

CHRISTY L. BELLVILLE, CCR
Official Court Reporter
304-357-0487

116

APPEARANCES

Appearing on behalf of the Plaintiff:

JENNIFER MEADOWS, Esquire
DAN HOLSTEIN, Esquire

Kanawha County Prosecuting Attorney's Office
310 Virginia Street,
Charleston, West Virginia 25301

Appearing on behalf of the Defendant:

RICHARD HOLICKER, Esquire
JOSEPH MOSKO, Esquire

Kanawha County Public Defender's Office
723 Kanawha Boulevard
Charleston, West Virginia 25302

Defendant, Larry A. Hayes, Jr., present in person

INDEX

THE COURT: Okay.

All right. We'll go ahead and proceed. The State rests?

MS. MEADOWS: Yes, Judge.

MR. HOLICKER: Judge, I believe we need to be out of the presence of the jury for motions.

THE COURT: Okay. Will you please return to the jury room while we -- while we listen to a couple motions here?

(Jurors exit the courtroom.)

THE COURT: All right. You may be seated.

Do you have some motions, Mr. Holicker?

MR. HOLICKER: Yes, Your Honor. I would move for a directed verdict of not guilty. The State has not carried its burden of proof in this case.

In order for them to prove the offense charged, they would have to establish several

things, one, that Larry Allen Hayes, Jr. is the parent, guardian, and custodian of Rebecca McDaniel. I think they've established that.

A child under the age of 18 years, I think they've established that.

Under his care, custody, and control on the -- it says, on the indictment, the blank day, but the State has narrowed that to the 30th day of September 2010, so that on the 30th day of September 2010 and prior to the date of the indictment, that I think is established.

In Kanawha, I think that is established.

Here's what the State has not established. Did unlawfully, feloniously, maliciously, and intentionally inflict upon the said Rebecca McDaniel substantial physical pain, illness, and impairment of physical condition by other than accidental means and did thereby cause the death of the said Rebecca McDaniel. That is what the State has to prove, and that is what the State has not proven.

And I understand that at this point

the Court needs to look at the evidence in the light most favorable to the State, but let's look at what the evidence is. The evidence is unequivocal that Rebecca died on the -- I believe the 4th of October.

MS. MEADOWS: 3rd.

MR. HOLICKER: -- on the 3rd of October and that she died as a result of trauma to her brain, but how that trauma was inflicted has not been established and that Larry Hayes inflicted that trauma has not been established.

Each of the officers who testified that they do not know how this injury occurred. Each of the medical professionals the State put on testified that they do not know how this injury occurred. Doctor Mock testified that based purely on science the brain injuries and the skull fracture could have been deemed -- in the absence of the input he received from police agencies, would likely have been deemed undetermined and could have been an accident.

We have heard from Doctor Mock that the injuries that were sustained could have been

the result of the accident. We do not know how these injuries occurred. Certainly, there's been no evidence that Larry Hayes intentionally -- I'm sorry -- unlawfully, feloniously, maliciously, and intentionally inflicted these injuries.

The State's entire case, as I pointed out in the opening, hinges on the notion that the injuries to Rebecca occurred on the 30th of September 2010 during the discrete period of time after he and Becca had taken Meredith to work and before he went to pick up Meredith with Becca from work.

It's a false assumption. There is no evidence to support that assumption. We do not know when this injury occurred, and we cannot know when this injury occurred because we do not know how the injury occurred. There was nothing found in the house to support that this injury occurred in the house.

We heard from Detective Cook that the house was scanned with, I believe, black light or something akin to that to determine whether there were any bodily fluids. He said specifically he

was looking for blood and that none was found.

The State seems to be hanging its hat on the so-called confession that was extracted from Mr. Hayes after an hour and a half of emotional torture when he was being told -- when he was trying to tell what happened, the same story he had told time and time again, the same story that he continued to insist was the truth, the same story that law enforcement continued to insist wasn't the truth. They hammered him and hammered him with the notion that if this was somehow an accident he could be in a better -- in a better posture than if he was a cold-blooded killer, which is what he would be if this was not an accident. And finally he broke, and he made up a story about an accident that never happened in which supposedly he was coming down the stairs with Becca and he tripped and fell and landed on her.

Nobody on the State's side -- and I will proffer nobody on the defense side -- believes that that happened, so that's not a confession. It's a an accident that happened that was told because the police hammered on him and hammered on

him that if this was some kind of an accident you'll be in better shape than if you're a cold-blood killer. You'll be treated better by the judge. You'll have a life still, but otherwise, man, you're a cold-blooded killer.

The Court could hear from the recording the tone in his voice. He was a broken man. He was a broken man at the time that he gave the statement that the State wants to characterize as a confession and that the medial yesterday characterized as a confession. It can't possibly be a confession because nobody believes it, but -- and so it didn't happen. There is nobody who is going to get on that stand and say what Larry Hayes, quote, unquote, confessed to actually happened.

But let's assume that it really did happen hypothetically. It was still not an accident that gave rise to the charge. It does not support unlawfully, feloniously, maliciously, and intentionally inflicting pain, illness, and impairment of physical condition upon Rebecca, let alone that it was other than by accidental means.

If that happened -- and we assert it didn't. If that happened, it was an accident.

The State has proffered no theory of the case to support the elements of this offense. In order for them to prevail, looking at the evidence in the light most favorable to the State, they would have to establish that Larry Hayes performed an intentional act, that it was not an accident, and that as a result Rebecca died. They haven't presented any theory that would support that. They have not presented any evidence in support of a theory.

Your Honor, respectfully, Ms. Meadows is chuckling in her seat, and I think that's incredibly disrespectful, not only to me but to the Court. This is serious business, and I would ask that she be admonished for that.

MS. MEADOWS: Judge, I was -- I was --

MR. HOLSTEIN: Judge, let me respond to that. Judge, may I respond to something that Mr. Holicker said. He said there was no evidence, and I leaned over to Ms. Meadows and I said, well, the

doctor just said there was shake and impact. There wasn't any disrespect intended. I think it's out of character for an attorney to ask that the Court reprimand another attorney for something like that. That was in my ear. No one else heard it, unless Mr. Holicker must've heard something. I think that the Court should not grant his motion and should not even give the light of day to some kind of suggestion that there's anything improper here.

We know how serious this case is. We've got the victim's family here in the courtroom with us, and we take it seriously. I think attorneys sometimes think that each other talks silly in courtrooms and makes silly notions and things and things that -- you know, that have to be made, and maybe we all don't talk so well and sometimes say things that the other side thinks is, well, that's laughable when you think about the evidence, but that's --

THE COURT: By all accounts of the officers of the Court, I mean, there's a certain decorum that's required, and I'm sure that you all will adhere to it.

MR. HOLICKER: Thank you, Judge.

THE COURT: There you go.

MR. HOLICKER: With regard to the supposed shaken baby syndrome, the doctor to whom Mr. Holstein just referred acknowledged that it's a controversial theory, acknowledged that he is aware of studies that show it's not possible to create the injuries that have been collectively called, in quotes, shaken baby syndrome, because in order for enough force to be applied to the baby to cause those symptoms, the neck has to be broken, and there was testimony from Doctor Caceres that in fact Becca's neck was not broken.

So the fact that you had testimony from a doctor about a so-called syndrome that many say doesn't even exist and that studies show can't possibly exist, that's not in support of the State's case.

And even if the State is correct that that is how the baby died, there has been no evidence presented to suggest the person - - but that the person was Larry Hayes, nothing, nothing. The State has not met its burden of proof.

And if you add to that, by -- I think it was Detective Cook -- no, it was Detective Paskell -- that there was no evidence gathered in the course of the investigation of this case to suggest anything other than that Larry and Becca had a loving relationship. Nobody came forward to talk about any incidents whatsoever at any time where Larry was violent towards Becca.

Becca's own mother testified on the stand that it had been a close, loving relationship. The only time she quibbled with me was when I said it was like a parent/child relationship, and she insisted that T.J. is the father, Larry is not the father, but that's not the point. The point is not the biological relationship. It is the emotional relationship. This was father and daughter, and by every report, they had a close, loving relationship, and by no report did they have any kind of relationship other than that.

The evidence is that Mr. Hayes has no past history whatsoever -- that was heard in the recordings, and it wasn't challenged. He has no criminal history. He's never been in trouble for

anything. Is he going to start by killing a baby he loves? Makes no sense.

The State hasn't met its burden, ask for a directed verdict.

MS. MEADOWS: Judge, I assure you that I have never taking -- taken a case more seriously in my seven years of being an attorney, and if I caused the Court any disrespect, I do apologize. This was a private conversation between my co-counsel and myself. Time is wasting, so I won't belabor the point.

Judge, looking at the evidence most favorable to the State, you have heard un -- you have heard the evidence of the detectives that it's uncontroverted that Rebecca was in the care, custody, and control of Larry Hayes who was her custodian at that time on September 30th, 2010.

We have -- you've heard from two experts, most recently Doctor Caceres, who gave testimony in his opinion as an expert in his 20-plus years of doing pediatrics and pediatric critical care, that he is of the opinion that this was nonaccidental, that it's consistent with shaken

impact and -- shaken baby with impact, that it would've occurred prior to around two hours prior to her going into this cardiac arrest which occurred approximately 2:00, 2:30 on the day of September 30th when she was in the care, custody, and control of Larry Hayes.

You also heard the testimony of Doctor Mock who testified about all the injuries, the different types of injuries, that the bruises were all confined to her head, that she had a five and a quarter inch skull fracture that comprised 25 percent of her entire head, that this, Judge, was, in both his opinion and Doctor Caceres' opinion, something that's consistent with a severe force that would've been inflicted on her on that day just prior to her hospital admission, that it -- that there would've been effects -- particularly Doctor Caceres talked about effects on her mouth and her nose, which the evidence shows that she was and she could have lost consciousness and stopped breathing. All that, Judge, shows the timing of this.

Our expert testimony, we have definitely

met our burden to get past a directed verdict in this matter.

THE COURT: Let me ask the State, assuming you have shown how the trauma was -- how the trauma occurred, how do you connect the trauma to the Defendant again?

MS. MEADOWS: Judge, he was the only one at her -- he was the only one who she was in -- he -- it's undisputed. She was in his sole care, custody, and control during the whole -- the entire time of September 30th between 8:00 -- approximately 8:10 and 2:00, 2:30 p.m., Judge.

They're -- and based on our medical experts, the -- Doctor Caceres and Doctor Mock, the injury would've have to have occurred during that time period, and he was the only one. Doctor Mock and Doctor Caceres both say that this was nonaccidental, that this would take a significant amount of force, as a matter of fact, the type of force that you would see in a unrestrained motor vehicle accident or a motor vehicle accident in -- with ejection.

Judge, you also had any -- and I've

never characterized Mr. Hayes' statement as a confession. It's an inconsistent statement. Now, the inconsistent statement, it's inconsistent with his prior statement, and you also have it as being inconsistent with the evidence. Her statement was that this child --

THE COURT: I got -- I know. I know that.

MS. MEADOWS: Sorry, Judge.

THE COURT: All right. Do you wish to --

MR. HOLICKER: The State's entire case hangs on the assumption that Becca was injured between the stated hours on the 30th of September 2010 when she was alone with Mr. Hayes. It's a false assumption, and it should not result in the conviction.

THE COURT: I think that's an issue for the jury.

MS. MEADOWS: Yes, Judge. I mean, and we don't have an eyewitness to state that he hit or what he hit her with, but I think circumstantial evidence is component evidence for

the jury to decide and that's a issue for closing argument.

THE COURT: Anything else?

MR. HOLICKER: No, sir.

THE COURT: I'm going to deny the motion. There's sufficient facts for this case to go to the jury. You've raised jury issues.

Anything else?

MS. MEADOWS: None from the State.

MR. HOLICKER: Nothing else. But with respect, might I have a brief break before I start my -- what I expect to be a somewhat lengthy examination of Doctor Young?

THE COURT: Okay.

MR. HOLICKER: Thank you.

(WHEREUPON, a short break was taken, after which the following proceedings were had.)

THE COURT: You can call your first witness.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

v.

Case No. 11-F-41
Hon. Paul Zakaib

LARRY HAYES,
Defendant.

POST-TRIAL MOTION FOR JUDGMENT OF ACQUITTAL

Comes now the Defendant by Counsel, Richard E. Holicker, and respectfully moves this Honorable Court to enter a Judgment of Acquittal. In support of this motion, the Defendant avers:

1. The conviction should be set aside because the jury was improperly exposed by the State to media coverage when, over the Defendant's objection, it played a recording of a certain jail call in which the Defendant and his father discussed media coverage of this case;
2. The conviction should be set aside because the Court denied the Defendant's motion for a mistrial when that certain recording was played for the jury by the State, which knew or should have known of the recording's nature;
3. The conviction should be set aside because the Court refused to enforce the subpoena served by the Defense on State witness Dr. Allen R. Mock, who failed to respond to the subpoena, which action by the Court denied the Defendant his right to call witnesses and to fully confront his accusers;

4. The conviction should be set aside because the Court wrongly refused to permit the Defense expert, Dr. Thomas Young, to testify about Dr. Mock's credentialing issues and his false and misleading testimony, which action by the Court denied the Defendant his right to call witnesses and confront his accusers by exposing Dr. Mock's false and misleading testimony;

5. The conviction should be set aside because the Court refused to exclude certain gruesome photographs objected to by the Defendant, which were not necessary to the State's case, and which served no purpose other than to inflame the jurors;

6. The conviction should be set aside because the Court denied the Defendant's Motion to suppress the "third statement" given by the Defendant, which statement was clearly coerced;

7. The conviction should be set aside because, over the defendant's objection, the Court exposed the jurors to a toy car which the State argued, but did not prove, was identical to the toy car on which Rebecca McDaniels had hit her head;

8. The conviction should be set aside because the Court did not give a limiting instruction after Detective Cook wrongly characterized Rebecca McDaniels' scalp injuries as bruises;

9. The conviction should be set aside because the Court refused to excuse for cause a juror who acknowledged a relationship with the prosecutor;

10. The conviction should be set aside because the Court refused to grant the Defendant a directed verdict following the close of the State's case when the State put on no evidence with regard to the elements of malice or intent;

11. The conviction should be set aside because the evidence was insufficient to convince a rational trier of fact that the elements of the crime were proven beyond a reasonable doubt to the satisfaction of all twelve jurors, as supported by the "Affidavit of Deborah Cmiel," appended hereto as Motion Exhibit A, to wit:

    a. Juror Larry Shrewsbury believed that the death of Rebecca McDaniel was an accident;

    b. Juror Larry Shrewsbury believed that the State did not prove Larry Hayes did anything to Rebecca McDaniels to cause her injuries;

    c. Juror Larry Shrewsbury voted guilty simply because Larry Hayes was the last person to be with Rebecca McDaniels before the onset of symptoms that resulted in her eventual death;

12. The conviction should be set aside because the jury did not follow the Court's instructions, as supported by the "Affidavit of Deborah Cmiel," to wit:

    a. Because Juror Larry Shrewsbury believed that the death of Rebecca McDaniel was an accident, it is clear that the jury did not follow the

instruction requiring that each element must be proven to the satisfaction of all twelve jurors before convicting;

b. Because Juror Larry Shrewsbury voted guilty simply because Larry Hayes was the last person to be with Rebecca McDaniels before the onset of symptoms that resulted in her eventual death, it is clear that the jury did not follow the instruction requiring that if there are two, competing, plausible explanations for what occurred, one of which favored the State and one of which favored the Defendant, they were bound to adopt the theory that favored the Defendant and to find him not guilty.

Wherefore, the Defendant respectfully requests the relief requested herein, and such other and further relief as the Court deems proper.

LARRY HAYES
By Counsel

Richard E. Holicker
Deputy Public Defender
W.Va. Bar ID No. 7173
P.O. Box 2827
Charleston, WV 25330
(304) 348-2323

AO 241
(Rev. 06/13)

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: S.D.W.Va.
Name (under which you were convicted): LARRY HAYES	Docket or Case No.: 2:15-15636
Place of Confinement: HUTTONSVILLE CORRECTIONAL CENTER POST OFFICE BOX 1 HUTTONSVILLE, W.Va. 26273	Prisoner No.: 3507522
Petitioner (include the name under which you were convicted): LARRY HAYES	Respondent (authorized person having custody of petitioner): v. MARVIN PLUMLEY, WARDEN
The Attorney General of the State of: WEST VIRGINIA	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
CIRCUIT COURT of KANAWHA COUNTY, WV.

(b) Criminal docket or case number (if you know): 11-F-41

2. (a) Date of the judgment of conviction (if you know): AUGUST 29, 2011

(b) Date of sentencing: OCTOBER 28, 2011

3. Length of sentence: TEN to FORTY (10-40) YEARS in prison

4. In this case, were you convicted on more than one count or of more than one crime? ☐ Yes ☒ No

5. Identify all crimes of which you were convicted and sentenced in this case: DEATH of a CHILD by a PARENT, GAURDIAN or CUSTODIAN by ABUSE.

6. (a) What was your plea? (Check one)

☒ (1) Not guilty ☐ (3) Nolo contendere (no contest)

☐ (2) Guilty ☐ (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: WEST VIRGINIA SUPREME COURT of APPEALS

(b) Docket or case number (if you know): 11-1641

(c) Result: AFFIRMED

(d) Date of result (if you know): MAY 17, 2013

(e) Citation to the case (if you know): STATE v. HAYES, 2013 W.Va. LEXIS 478

(f) Grounds raised: (1) Trial Court denied petitioner right to compulsory process when it refused to enforce petitioner's subpoena of Dr. Mock; (2) Trial Court violated petitioner's due process right to present a complete defense when it refused to allow Dr. Young to give his opinion regarding Dr. Mock's testimony and thereby indirectly impeach that testimony.

(g) Did you seek further review by a higher state court? ☐ Yes ☐ No

If yes, answer the following:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Result: N/A

(4) Date of result (if you know): N/A

AO 241
(Rev. 06/13)

(5) Citation to the case (if you know): N/A

(6) Grounds raised:

N/A

(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☒ No

If yes, answer the following:

(1) Docket or case number (if you know): N/A

(2) Result: N/A

(3) Date of result (if you know): N/A

(4) Citation to the case (if you know): N/A

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☒ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: KANAWHA COUNTY CIRCUIT COURT

(2) Docket or case number (if you know): 14-P-163

(3) Date of filing (if you know): APRIL 2, 2014

(4) Nature of the proceeding: PETITION for WRIT of HABEAS CORPUS

(5) Grounds raised: (1) Counsel rendered ineffective assistance by virtue of his performance in protecting the denial of petitioner's right to be free from a coerced statement, (2) Counsel rendered ineffective assistance by virtue of his performance in denying petitioner of his defense for failing to meaningfully cross-examine State expert witness Dr. Mock; (3) Counsel was ineffective of his performance in litigating the issue of insufficient evidence; (4) Counsel rendered ineffective assistance by virtue of his failure to raise these claims on direct appeal.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No

(7) Result: PETITION DENIED

(8) Date of result (if you know): AUGUST 22, 2014

AO 241
(Rev. 06/13)

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

❒ Yes ❒ No

(7) Result: N/A

(8) Date of result (if you know): N/A

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application or motion? No

(7) Result: Circuit Court denied petition

(8) Date of Result: August 22, 2014

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes

(2) Second petition: N/A

(3) Third petition: N/A

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: N/A

12. ➤ **GROUND ONE: Petitioner stands convicted and imprisoned in violation of the Fifth Amendment to the United States Constitution by the denial of his Constitutional right to be free from a coerced statement.**

(a) Supporting Facts:

On October 4, 2010, Petitioner was visited at his home by detectives Mr. Charles Cook and Mr. Ben Pascal. Detectives requested that Petitioner go with them to the police department to answer some questions. Petitioner then requested that the detectives speak with him in his kitchen. Detectives declined and insisted that Petitioner accompany them to the police department. Petitioner submitted to lawful authority and went with detectives to the police department. At the police department Petitioner was escorted to a small room where he was vigorously questioned by four different detectives, Mr. Ben Pascal, Mr. Charles Cook, Mr. Joe Gray and a fourth detective Mr. Grant (first name inknown).

This October 4, 2010, interview was the third time Petitioner spoke with authorities, which Petitioner maintained his account of the events leading up to the victim, R.M., being taken to the hospital. During the interrogation, the following coercive tactics (not in complete sequence) was developed:

Q: ...There's going to be some other officers come in here and talk to you in a minute, okay?

A: Okay.

Q: You need to do the right thing here, though, okay? Today is going to be Larry's opportunity to tell his side of the story okay? Not everyone get's that chance. I'm not - - here me out, okay? They're going to come in here and they're going to talk to you and your going to get your opportunity. Good people make mistakes. It happens, okay?

A: You guys are going to put me in jail for something I didn't do. I've been terrified.

Q: …The only thing we can do is start right now and *start doing damage control* and start trying to figure out what happened.

Q: You don't take any drugs do you?

A: No.

Q: So it couldn't have been the fact where you lost your mind. I mean, you had to be conscious.

Q: I feel confident that you didn't do this on purpose, which to me makes a *big difference*.

Q: I'm not even saying you done it intentionally. I don't believe that you done this intentionally. I don't believe that you would intentionally hurt this little girl.

A: But there's no difference.

Q: Yes, *there is a difference. There is a big difference. There is a big difference.*

Q: I feel that you've done this unless you're going to tell me what really happened. I do not think that you walked up to this girl with a sledgehammer and hit her in the back of the head. I don't think that.

A: Even if it was an *accident*…

Q: *Even if it was an accident. If it was an accident we will deal with it.* Accidents happen all the time.

A: *- - you'd still put me in jail.*

Q: *That is not true.* If an accident happened - - accidents happen all the time. I investigate lots of accidents.

A: *And those people still do time*?

Q: *No. There's a difference between an accident and something with malice…*

Q: As an accident? *If it's a hundred percent an accident, that's a completely different story.*

A: That's what I want to know.

Q: If it was a hundred percent an accident, *you'd probably be free to leave once* it's…

Q: We're at the point now where you're you just. We have to present your side. Because your side of it right now is cold blooded killer. That's just not you.

A: Who takes me downtown?

Q: Me and him. Tell me, man, you're going to feel relief come off you like someone's took a thousand pound boulder off your shoulders.

A: …I went up stairs and got ready for work. When I came back down, I had a hold of her and I tripped and I landed on her.

On August 22, 2011, a suppression hearing was held on the voluntariness of Petitioner's statement to detectives. At said hearing, the Court requested that trial counsel for Petitioner raise specific points in regards to the statements voluntariness. Counsel then stated:

> Well, specifically, your Honor, I think you need to listen to this recording in context so that you can hear the tone and tenor of my client's voice, of the officers and frankly, my client in all of the recordings you've heard so far has been completely consistent in his story and he continues to be consistent in his story for about an hour and a half of this recording that the State intends to play until he breaks down after the *officers coerce him* into making up a story about how some *accident* occurred, an accident that I don't believe ever occurred. That will also be the subject of the video recording where they have my client demonstrate how he supposedly fell down the stairs with this baby.
>
> This statement despite the fact that he was Mirandized was in fact coerced. That's our position and I don't believe the Court can adequately make a determination on that issue without listening to the entire recording in context. T.T. Pg. 25-26 (day-1).

Later in the suppression hearing trial counsel argued that Petitioner "told that story because the officers I would argue pressed and pressed and pressed until he lost his will and he told the story." T.T. Pg. 49 (day-1). The story being referred to is Petitioner falling down steps with R.M. in his arms.

On August 23, 2011, the Court without making findings of facts or conclusions of law denies counsel's request to suppress Petitioner's statements generally by saying:

> I listened to it. If you want to use any - - I'm not going to subject the jury to listen to two hours and a half of testimony. If you - - I would entertain you selecting portions of that interview but I'm not going to have the jury read the entire - - listen to the entire tape." T.T. Pg. 36 (day-2).

The constitutional infirmity with the officers' interrogation was at the point when they notified that if the Petitioner confesses that it was an accident then he would be able to leave at once. By the officers implying to the Petitioner that he was free to leave if he admitted to the death of R.M., resulting from an accident, was legally improper.

Petitioner's statement was critical evidence to the State's theory that the Petitioner had inflicted harm upon R.M. There is no other evidence except for the coerced statement. In fact, in a post-trial motion for judgment of acquittal, counsel pointed out that Juror Larry Shrewsburry voted guilty only because the Petitioner was the last one with R.M. before her death. If not for the coerced statement, there would not be any evidence that an accidental incident may have occurred.

(b) If you did not exhaust you State remedies on Ground One, explain why: N/A

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: The claims of ineffective assistance of trial counsel must be brought in habeas corpus. Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992).

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a State trial court? Yes

(2) If your answer to question (d)(1) is "Yes," state:

Type of Motion or petition: Habeas Corpus

Name and Location of the court where the motion or petition was filed: Kanawha County Circuit Court, WV.

Docket or case number (if you know): 14-P-163

Result (attach a copy of the court's opinion or order, if available): Order Denying Petitioner's Petition for Writ of Habeas Corpus (see attachment).

(3) Did you receive a hearing on your motion? No

(4) Did you appeal form the denial of your motion or petition? Yes

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: West Virginia Supreme Court of Appeals, Charleston , WV.

Docket or case number (if you know): 14-0915

Result (attach a copy of the court's opinion or order, if available): Affirmed the lower court's denial (see attachment).

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: N/A

➤ **GROUND TWO: Counsel rendered ineffective assistance under the Sixth Amendment of the United States Constitution by denying Petitioner of his defense for failing to meaningfully cross-examine the State's expert witness Doctor Mock.**

(a) Supporting Facts:

During Petitioner's trial the State admitted Doctor Allen Mock (Dr. Mock) as an expert in the field of forensic pathology. T.T. Pg. 185 (day-3). Without objection from defense counsel. T.T. Pg. 187 (day-3).

During cross-examination of Dr. Mock it was developed that to become board certified in pathology, among other things, one must "…go to a residency":

> In the case of Pathology, you would go into a residency that's either combined surgical pathology and clinical pathology or in the case of forensic pathology; you can do an anatomic only residency.
>
> At the completion of your residency, you have the option - - at that point you become board eligible, which means you have - - the education that the board - - in this case the American Board of Pathology, would deem as minimal to sit for their examination. Once you're board eligible, you can sit for the anatomic pathology, the clinical pathology if you were trained as such, and then when you're board certified in both of those, then you can be eligible for the forensic pathology boards, which would occur after your fellowship training. T.T. Pg. 8-9 (day-4).

During cross-examination, Dr. Mock testified that he was "board eligible in the American Board of Pathology, Anatomic Pathology or Surgical Pathology and Clinical Pathology." T.T. Pg. 9 (day-4).

An issue of importance in Petitioner's trial was the age of the skull fracture, *i.e.*, whether R.M.'s skull was fractured six days prior to her death or on the day of her death. During cross-examination of Dr. Mock the following was developed:

Q: …did you review a statement from the child's mother?

A: I did.

Q: Prior to the time you performed the autopsy?

A: No.

Q: Are you aware that the statement was taken prior to the time you performed the autopsy?

A: I'm not aware of that.

Q: Let's assume a hypothetical that it was.

A: Okay.

Q: An let's assume as a hypothetical that the statements talked about this fall onto the toy some six days before the 30th of September.

A: Okay.

Q: Do you got that?

A: Sure.

Q: And let's assume as a hypothetical that the statement opened the possibility that R.M. hit her head on the toy. Does that not suggest to you that the age of the skull fracture might be an issue, if you had known that at the time?

A: If I had known prior to autopsy that there was a previous head injury, then that certainly would have been an important piece of information.

Q: And so I think you are acknowledging that in that context, the age of R.M.'s skull fracture would likely have been an issue.

A: I think that given a history of head trauma at a known date and time, then of course, the dating of the injury would become of paramount importance.

Q: You would agree, would you not, that a forensic pathologist must anticipate what issues are going to come up when a case goes to trial?

A: I would agree.

Q: And you would agree, would you not, that being fully prepared to address those issues are part of a forensic pathologist's job?

A: I would agree.

Q: And would you not agree that given my hypothetical and given what we now know, it would have been wise to take samples from the fracture so that the age of the fracture could be scientifically determined?

A: I would disagree. T.T. Pg. 31-33 (day-4).

It was further developed at trial that Dr. Mock, prior to R.M.'s autopsy, had not performed an autopsy on a child under two that had evidence of a healing skull fracture. T.T. Pg. 36-37 (day-4). Thereafter the following was developed through cross-examination of Dr. Mock:

Q: You said yesterday that it is not necessary to look under a microscope to see if a skull fracture is healing; correct?

A: That's correct.

Q: You said that you only have to look at the fracture grossly or, with the naked eye, to make that determination correct?

A: That's correct.

Q: You said that a gross observation of the fracture is definitive; correct?

A: I think the word definitive might be a little strong but it's compelling.

Q: So it's not definitive?

A: I think that very few gross observations are definitive.

Q: Given that very few gross observations are definitive, given that it is possible or likely that prior to performing the autopsy of R.M., you had never before personally performed an autopsy on a child under two with a healing skull fracture?

A: It is possible that in cases that I was solely responsible for, that I might not have encountered a case under two with a healing skull fracture.

Q: Given that, given your limited experience, given that you now acknowledge that gross observations aren't necessarily definitive, given that we know that there was a fall six days before that could have caused an injury to the back of R.M.'s head, given all of that and understanding that you didn't know at the time about the injury that occurred six days before, understanding that completely but looking back, wouldn't it have been wise to take samples from the fracture so that the age of the fracture could be definitively determined?

A: I'm not sure I would use the term wise. It's within a range of practice techniques.

Q: It's on the lower end of the spectrum of that range?

A: I would disagree.

Q: You think it's the best practice not to take samples of a fracture to determine its age?

A: Arguably the best practice is to take samples of everything. It's not practical. T.T. Pg. 37-38 (day-4).

At trial, counsel called Doctor Thomas Young (Dr. Young), a Board Certified Forensic Pathologist to testify (day-5). Dr. Young gave an alternative theory of R.M.'s cause of death. He gave his opinion on the skull fracture and found that:

> It was pretty clear from my looking at it that this is not a fresh fracture. The bleeding in the tissues around the fracture was not the bright red glistening areas of hemorrhage like seen at other areas of the scalp, but it was this dull, brown, yellowish-brown kind of hemorrhage.
>
> Furthermore, you could tell by when they were dissecting the scalp that by the time you got to that part it had gotten pretty hard to dissect that off of the skull because he had to make numerous cuts in order to get that. That's from fibrous healing of that fracture there to the scalp, and you can see that. I've seen that multiple times now.
>
> And furthermore, the fracture, because of the brain swelling, even though it was healing, it was being spread apart because of the brain swelling, and you can see hemorrhagic stuff there right in the crack. That's basically young fibrous tissue that is being stretched and stretched and stretched by the swelling in the brain, and so you get hemorrhagic tissue bridging the skull fracture.
>
> You can see that in the photographic, and you don't even have to have a microscope to see that. You can spot it if you know what you're looking at.
>
> But the thing is here is that he misinterpreted that. If you had a fresh fracture, you would have fresh blood around the fracture, even when the child is dead two days later. You would not have the multiple cuts they're trying to dissect off the scalp. It would

easily come off. And there would be liquid blood that would be oozing from the crack rather than this hemorrhagic tissue that's bridging it. And you can look at these items, and you can tell it's healing, but one of the things that I've discovered over and over again is that even seasoned pathologist have a hard time spotting healing in skull fractures. It's not that easy to do.

And particularly,...if you're not experienced at it and you're not accustomed to seeing these sorts of things, you're going to miss these details." T.T. Pg. 309-310 (day-5).

Counsel: Is there something Dr. Mock could have done in light of his inexperience to scientifically determine whether it's a fresh fracture or a healing fracture?

Dr. Young: Well, he could have removed all doubt on the matter if he had basically sampled the area so that it could be looked at under the microscope. Once that's put under the microscope, it should be pretty clear that was the case, all right? He failed to do that."

Counsel: Would that have been typical to have had done under the circumstances that exist with this case?"

Dr. Young: If you're doing an autopsy like this and you've got a fracture here that might be healing and you recognize that this is an important sort of distinction to make here, it could be all the difference here between a homicide and an accident.

If you're a forensic pathologist and you're on the ball and you've got experience, then you're going to recognize that this is going to be an issue and that people are going to argue about it, and so what you want to do to settle the argument is you want to make sure that you sample that area so that it can be studied under the microscope so that all doubt can be removed.

T.T. Pg. 312 (day-5).

Dr. Mock's admissions at trial tend to establish that he is not a diplomat of the American Board of Pathology nor board eligible in forensic pathology. It tends to establish that he has not completed an American Board of Pathology fellowship in forensic pathology to make autopsies.

Trial counsel rendered deficient performance under an objective standard of reasonableness by failing to conduct an investigation to determine if Dr. Mock was a diplomat of the American Board of Pathology, was board eligible in forensic pathology or completed an American Board of Pathology fellowship in forensic pathology. Counsel also rendered deficient performance under an objective standard of reasonableness by failing to conduct an investigation into the legislative mandates in regards to the required qualifications needed to be Chief Medical Examiner and to perform autopsies. Had counsel conducted a reasonable investigation, a reasonable probability exists that he would have discovered that Dr. Mock did not possess these qualifications at the time of the autopsy on R.M. and had counsel known this, he would have relayed to the jury that the legislature mandates said qualification and that Dr. Mock did not posses said qualifications.

Had trial counsel relayed to the jury Dr. Mock's lack of qualifications, a reasonable probability exists that the jury would have provided Dr. Mock's testimony less weight and/or would have found Dr. Mock's performance to be deficient. Counsel's deficient investigation deprived the Petitioner of his Constitutional right to a meaningful cross-examination. Thereby further depriving Petitioner of his Constitutional right to a meaningful opportunity to present a complete defense. Had the jury provided Dr. Young's testimony more weight than Dr. Mock's, a reasonable probability exists that the jury would have found R.M.'s skull fracture happened six days prior to her death. Thus, acquitting the Petitioner.

(b) If you did not exhaust you State remedies on Ground Two, explain why: N/A

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: The claims of ineffective assistance of trial counsel must be brought in habeas corpus. Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992).

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a State trial court? Yes

(2) If your answer to question (d)(1) is "Yes," state:

Type of Motion or petition: Habeas Corpus

Name and Location of the court where the motion or petition was filed: Kanawha County Circuit Court, WV.

Docket or case number (if you know): 14-P-163

Result (attach a copy of the court's opinion or order, if available): Order Denying Petitioner's Petition for Writ of Habeas Corpus (see attachment).

(3) Did you receive a hearing on your motion? No

(4) Did you appeal form the denial of your motion or petition? Yes

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: West Virginia Supreme Court of Appeals, Charleston , WV.

Docket or case number (if you know): 14-0915

Result (attach a copy of the court's opinion or order, if available): Affirmed with lower court and denied (see attachment).

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: N/A

➤ **GROUND THREE: Counsel rendered ineffective assistance under the Sixth Amendment to the United States Constitution by his deficient performance in litigating the issue of insufficient evidence.**

(a) Supporting Facts:

On October 27, 2011, trial counsel filed a post-trial motion for judgment of acquittal. In paragraph number eleven (11) of said motion, counsel argued:

> The conviction should be set aside because the evidence was insufficient to convince a rational trier of fact that the elements of the crime were proven beyond a reasonable doubt to the satisfaction of all twelve jurors, as supported by the Affidavit of Deborah Smiel appended hereto as Motion Exhibit – A, to wit:
>
> a. Juror Larry Shrewsbury believed that the death of R.M. was an accident;
> b. Juror Larry Shrewsbury believed that the State did not prove Larry Hayes did anything to R.M. to cause her injuries;
> c. Juror Larry Shrewsbury voted guilty simply because Larry Hayes was the last person to be with R.M. before the onset of symptoms that resulted in her eventual death.?

On January 9, 2012, at a hearing on post-trial motions counsel argued:

> The issue is simply this; the jurors in their deliberation did not agree that all of the elements of the charge against my client had been proven by the State beyond a reasonable doubt.

The State opposed the motion by arguing:

> As to the issue about the juror, Judge, 603 of the West Virginia Rules of Evidence is clear. It could not be more clear on this issue. The rule says that when you're inquiring as to the validity of a verdict, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any

> other juror's minds or emotions as influencing the juror to ascent or descent from the verdict, except that a jury may testify on the question whether extraneous, prejudicial information was improperly brought to the juror's attention or whether any outside influence was improperly brought to bear upon any juror nor may a jury's affidavit or evidence of any statement by the jury would have been precluded from testifying be received for these purposes.

The Court subsequently denied the post-trial motion for judgment of acquittal.

Trial counsel's attempt to impeach the jury verdict by arguing that the jurors did not agree on the verdict had no place in law in light of the jury's verdict. However, had counsel argued for acquittal on the basis that there was insufficient evidence to convict as outlined in *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), a reasonable probability exists that Petitioner would have prevailed.

(b) If you did not exhaust you State remedies on Ground Three, explain why: N/A

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: The claims of ineffective assistance of trial counsel must be brought in habeas corpus. Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992).

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a State trial court? Yes

(2) If your answer to question (d)(1) is "Yes," state:

Type of Motion or petition: Habeas Corpus

Name and Location of the court where the motion or petition was filed: Kanawha County Circuit Court, WV.

Docket or case number (if you know): 14-P-163

Result (attach a copy of the court's opinion or order, if available): Order Denying Petitioner's Petition for Writ of Habeas Corpus (see attachment).

(3) Did you receive a hearing on your motion? No

(4) Did you appeal form the denial of your motion or petition? Yes

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: West Virginia Supreme Court of Appeals, Charleston , WV.

Docket or case number (if you know): 14-0915

Result (attach a copy of the court's opinion or order, if available): Affirmed with lower court and denied (see attachment).

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: N/A

➤ **GROUND FOUR: Counsel rendered ineffective assistance under the Sixth Amendment of the United States Constitution by virtue of his failure to raise claims herein on direct appeal.**

(a) Supporting Facts:

Petitioner contends that to the extent that he is deemed to have waived the claims for relief by his failure to raise them on direct appeal, he has been denied the effective assistance of counsel on appeal, that but for counsel's deficient performance Petitioner would have insisted that said claims be raised on direct appeal. The issues that have been deemed to have waived are meritorious and contain such Constitutional violations.

(b) If you did not exhaust you State remedies on Ground Four, explain why: N/A

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: The claims of ineffective assistance of trial counsel must be brought in habeas corpus. Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992).

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a State trial court? Yes

(2) If your answer to question (d)(1) is "Yes," state:

Type of Motion or petition: Habeas Corpus

Name and Location of the court where the motion or petition was filed: Kanawha County Circuit Court, WV.

Docket or case number (if you know): 14-P-163

Result (attach a copy of the court's opinion or order, if available): Order Denying Petitioner's Petition for Writ of Habeas Corpus (see attachment).

(3) Did you receive a hearing on your motion? No

(4) Did you appeal form the denial of your motion or petition? Yes

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: West Virginia Supreme Court of Appeals, Charleston, WV.

Docket or case number (if you know): 14-0915

Result (attach a copy of the court's opinion or order, if available): Affirmed the lower court's denial (see attachment).

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: N/A

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☒ Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: N/A

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

N/A

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. N/A

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A

AO 241
(Rev. 06/13)

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Jason Parmer, Kanawha County Public Defenders Office, P.O. Box 2827, Charleston, WV. 25330

(b) At arraignment and plea: Richard Hollicker, Kanawha County Public Defenders Office, P.O. Box 2827, Charleston, WV. 25330

(c) At trial: Richard Hollicker (SAME AS ABOVE)

(d) At sentencing: Richard Hollicker (SAME AS ABOVE)

(e) On appeal: Jason Parmer (SAME AS ABOVE)

(f) In any post-conviction proceeding: PRO-SE

(g) On appeal from any ruling against you in a post-conviction proceeding: PRO-SE

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☒ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

N/A

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: TO REVERSE THE TRIAL COURTS CONVICTION AND GRANT A NEW TRIAL, OR ANY OTHER RELIEF DEEMED JUST.

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on Nov. 24th 2015 (month, date, year).

Executed (signed) on Nov. 24th 2015 (date).

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

SOUTH CHARLESTON POLICE DEPT. CASE # 2010-01350 STATEMENT TRANSCRIPTION

Statement from: Larry Hayes, Jr.
Taken by: Det. Benjamin Paschall
Det. Andrew Gordon
Det. Charles Cook
Date: October 4, 2010

PASCHALL Um…our uh…our…our thing is…is…right now is essentially you are a suspect in this…in this because, you know, you were the last one with the child. Uh…so we've gotta' read you this form and then uh…we'd still like to talk to you afterwards, but I want you to understand your rights.

HAYES I don't want you guys to take me to jail for something I didn't do. ????

GORDON That's what we want to talk to you about today, okay. Like I said, we have some unanswered questions and that's why we're going through everything again, okay.

HAYES Yeah.

GORDON We just want to give you the opportunity to tell us everything again, go through it again, okay? Um…I know we got that door shut right now…we just got that shut so that uh…

PASCHALL We can get privacy…

GORDON Yeah, privacy and uh…

HAYES I understand.

GORDON …the recorder picks up okay. You want anything to drink or anything like that?

HAYES No, I'm fine.

GORDON Nothing to drink?

HAYES I'm okay.

GORDON What' your uh…full name for me, Larry?

HAYES Larry Allen Hayes, Jr.

GORDON What's your address, Larry?

HAYES 236…

GORDON Okay.

HAYES …Fifth Avenue…South Charleston.

GORDON What's your phone number, Larry?

HAYES 304…

GORDON Okay.

HAYES …541…

GORDON Okay.

HAYES …2014.

GORDON What's your date of birth?

HAYES [redacted]

GORDON How tall are you?

HAYES Five eleven.

GORDON What color are your eyes there?

HAYES Uh…hazel.

GORDON Okay.

HAYES Blue…something like that.

GORDON What's your social security number?

HAYES [redacted]

GORDON Okay.

HAYES [redacted]

GORDON Alright. This first part of this form, Larry, um…it's just uh…your personal information, okay. It states where we're at right now, states your name, your date of birth, your height, eye color uh…your social security number, your telephone number and your address, okay.

HAYES Okay.

GORDON This first part right here just basically states, can you read English, can you?

HAYES Yes.

GORDON If you can, check yes and initial right next to there. And do you understand English, if you do, check yes. This is the pre-interview section of this form, okay. Um…you're not under arrest right now. You're here on your own free will. Like I said, we've got some questions to ask for you. That door's shut right now, but it's only shut so that the recorder can record this accurately, okay.

HAYES Okay.

GORDON You're free to leave at any time. And uh…you're not under arrest, do you understand that?

HAYES Mmm hmm.

GORDON Okay. You are being questioned in regard to uh…Rebecca McDaniel's death, okay. Uh…again however, you're not under arrest, you feel uh…free to leave at any time. If you understand that, initial right there. Sign your signature right there. Okay. The next thing is your Miranda Warning, okay. Um…you have the right to remain silent and refuse to answer any questions. Anything you do say may be used against you in a court of law. You have the right to consult an attorney before speaking to the police and to have an attorney present during any questioning now or in the future. If you cannot afford an attorney, one will be appointed for you without cost. If you do not have an attorney available, you have the right to remain silent until you have had an opportunity to consult with one. If you understand each one of those, just sign your initials right next to that…yeah. Okay. This final statement down here is the waiver of your rights, okay. It states that, I have had this read…uh...statement of my rights read to me and I understand them. I do not want a lawyer at this time. I understand what I am doing. No promises or threats or coercion of any type or pressure of any type has been used against me in connection with this interview. I agree to be interviewed and answer questions and make a statement. I just need you to sign right there. And date it.

PASCHALL It's the fourth.

GORDON And the time now is uh…1658. And I'm going to sign that form as well now, okay.

PASCHALL Larry, to start off with, we just walk through the events of the day like we did the last time. Um…if you would, I would just like you to start with…with waking up and…and just tell me how the day went from there.

HAYES Okay. We got up, got ready, took her mom to work.

PASCHALL Mmm hmm.

HAYES Dropped her off about ten after eight.

PASCHALL We're gonna' write down these times so we can get a ???? Say about ten after eight? That's…who woke you up?

HAYES Uh…Meredith.

PASCHALL Was uh…the child already awake?

HAYES No, we got her out of bed.

PASCHALL Did you notice anything unusual about her when you got her out of bed?

HAYES No. She was talking up a storm to her mom.

PASCHALL Okay, what happened next?

HAYES Um…took her mom to work, dropped her off at eight-ten, went…after I dropped her off we came back and I laid her back down for nap about eight-twenty-five, eight-thirty, thirty-five, something like that.

PASCHALL Okay, what time do you think you woke up? Like you said, eight-ten for dropping her off or…

HAYES Probably about seven-thirty.

PASCHALL Probably at seven-thirty up? Okay. So at eight-ten you were dropping her off, did she…what time did she have to be at work at?

HAYES She's supposed to be there at eight. She was a couple of minutes late.

PASCHALL At eight? Okay. Then eight-twenty-five, when she got back home, you notice anything different on the ride home?

HAYES No, she was acting fine.

PASCHALL Okay.

HAYES Brought her back and laid her back down for a nap when we got home.

PASCHALL What do you mean by laid her back down for a nap, where did you…where did she sleep at?

HAYES Put her in my son's bed.

PASCHALL Okay. Where's that at?

HAYES Uh…upstairs.

PASCHALL Did you carry her upstairs? Do you always carry her up and down the stairs?

HAYES Yeah.

PASCHALL 'Cause she doesn't ever walk up and down…

HAYES Sometimes she'll walk up, but she's holding on to one of our hands.

PASCHALL Okay.

HAYES We don't let her go up by herself.

PASCHALL But you carried her up this time?

HAYES Yeah.

PASCHALL Okay.

HAYES She was falling back to sleep on me which is nothing out of the ordinary.

PASCHALL Okay.

HAYES She got up about eleven…

PASCHALL What…

HAYES …eleven-thirty, something like that. We sat there and played for a little bit.

PASCHALL Now uh…what did you do between the time she was asleep and the time she woke back up?

HAYES I was downstairs playing video games and Halo.

PASCHALL Were you just playing single player or were you playing online?

HAYES I was playing online.

PASCHALL Okay. How did you know she got up?

HAYES I heard her toys going off upstairs. She'd pull off her toys off the shelf and was sitting in bed playing with them.

PASCHALL Okay.

HAYES After that, we played for a little bit and then at about twelve, twelve-thirty we had some lunch. We ate some cheese pizza bread, some gummy worms. We drank some Capri Sun.

PASCHALL What do you mean by you said you played for a little bit? What do you mean by that?

HAYES We were playing with toys in the floor. She sat on the couch with me and watched me play Halo. So…

PASCHALL So you were just in the living room?

HAYES Mmm hmm.

PASCHALL Hanging out?

HAYES Yeah.

PASCHALL Did she fall down or nothing…nothing unusual…she was up and running around and fine?

HAYES Yeah. She was playing on the floor with her toys and mostly my son's toys that he got for his birthday.

PASCHALL Do you remember what toys she was playing with?

HAYES It's a plastic dump truck uh…the shape sorting barn thing my son got, some new Little Pet Shop toys.

PASCHALL Okay.

HAYES Probably some other things, she just pulled everything out of the bag.

PASCHALL What did you guys do uh…after you ate?

HAYES We sat there and played a little bit more. Mom called, told me she…texting and told me she was cut. Texting a little bit later, probably around ten till two, two o'clock, something like that and told me to come get her. So I got ready for work, got Becca dressed, put her in the car and she went to sleep like normal.

PASCHALL Now when you got ready for work, where was uh…where was Rebecca at?

HAYES She was with me.

PASCHALL She was in your room or upstairs room?

HAYES I carried her upstairs. Yeah. Set her down in my son's room, went and got my clothes, shaved and all that. Came back out and got her dressed downstairs. Carried her back downstairs with her clothes, laid her in the floor, put her clothes on her and got her in the car.

GORDON What happened then, Larry?

HAYES We went to get her…get her mom from work. She went to sleep in the car, I looked back, she was slumped over, she was slumped forward. And I tried to get her attention to get her to sit up. I didn't like her sitting like that when we're in the car. I don't want her to hurt her neck. And she wasn't responding to me. So I flew into IHOP and called her mom before I got all the way into the parking lot. Just told her to get outside. Took her out of the car and her mom took her from me and laid her on the sidewalk. The paramedics picked her up from there…or the fire department I guess.

PASCHALL Did you guys stop at any time on the way out there? Straight there?

HAYES Straight there.

PASCHALL Which way do you go? Do you go uh…over the Central Avenue…

HAYES Yeah…down Central…

PASCHALL …and then down Kanawha Turnpike?

HAYES Yeah. And then I went Jefferson.

PASCHALL Did…have you…did you ever get a chance to talk with uh…Dr. Kasogs???

HAYES Uh uh. [no]

PASCHALL Did uh…did uh…Meredith tell you anything about it? So you don't know how…what her injuries…do you know the extent of her injuries or anything like that? Did you ever…

HAYES They told me she had a skull fracture.

PASCHALL Who told you that?

HAYES Um…her grandmother.

PASCHALL Grandma told you that?

HAYES Becca's grandmother.

PASCHALL When did she tell you that?

HAYES I guess after they told Meredith and them. Meredith was hysterical when she came out.

PASCHALL What did…was this…what day was this on? Was this on Thursday?

HAYES No, it was Friday.

PASCHALL It was Friday they told her?

HAYES I guess so.

PASCHALL Was it Friday late in the…this is while you were still at the hospital?

HAYES Yeah. It was the last time I was at the hospital.

PASCHALL Okay.

HAYES Then they told me that T.J. would like it if I left.

PASCHALL Yeah. That's when you came home? Have you gone to work since then?

HAYES No.

PASCHALL Umm. Spend most of time at the house?

HAYES [inaudible]

PASCHALL How do think she got a skull fracture?

HAYES The only time I know she got hurt was when she fell off the steps.

PASCHALL When was that?

HAYES A couple of days before that…three, four days probably.

PASCHALL Doesn't seem like she'd get a skull fracture then. 'Cause you don't, you know, get a skull fracture, you don't wait three or four days before you go to a hospital. You…you…it's something you'd notice, right?

HAYES I think so.

PASCHALL So you don't…was she acting out of normal, like mentally maybe, you said she was limping a little bit last time, right?

HAYES Yeah.

PASCHALL But did she just seem normal other than being limping a little a bit?

HAYES Yeah, she was fine. She was walking perfect. I thought she was finally okay.

GORDON Let's go back to um…back to when she woke up from her nap. How long after that did you say you guys started getting ready?

HAYES Uh…it was two…almost two o'clock when ????

GORDON And what did you do to get ready?

HAYES Uh…went and got my work clothes out of the dryer…

GORDON Mmm hmm.

HAYES …went upstairs, brushed my teeth, shaved.

GORDON I know you're hurting, man.

HAYES Yeah. That's my little girl. I'm losing everything right now. My little girl ???? and my little boy. I feel like my fiancé's mad at me.

GORDON Why do think she's mad at you?

HAYES 'Cause of the way she's acting. I know she's hurting right now and I really think that's all it is.

GORDON She's hurting. I know you're hurting right now, too, man, alright.

HAYES I'm trying to stay strong for her.

GORDON You know good people make mistakes, right? Good people make mistakes. It happens.

HAYES I don't feel like I made a mistake, man, I was with my little girl.

GORDON Look…look at me, okay. You care about Rebecca don't you? You loved her, didn't you?

HAYES She's my little princess, man, my little Jedi.

GORDON I know you care about her mom, too, don't you?

HAYES They're my world, man.

GORDON There comes a time when we've gotta' do what's right. And we've gotta' talk about what really happened, okay.

HAYES So what happened, man?

GORDON Larry, we've gotta' talk about what really happened, man.

HAYES I'm telling you…I've told you guys a hundred times and everybody knows what happened. I was with that little girl. I would not let anything happen to her. Anybody that knows me knows that. This is my kids, man. I don't just watch them. I watch other kids, too.

GORDON Right. Like I said…like I said though, Larry, we...good people make mistakes all the time. All it takes is one…one…one mistake. And it doesn't mean we're not good people anymore, but it's what we do once we've made that mistake. I know you're hurting. The only thing that's going to make you feel any better is to talk about what really happened that day. Rebecca….Rebecca…Rebecca deserves that, man.

HAYES I've told you…

GORDON Rebecca deserves that. Rebecca deserves it, Larry. Meredith deserves that.

HAYES I've told you everything. I'm not the bad guy here, please don't make me out to be.

GORDON I…I…I've never once called you a bad guy. I wouldn't be sitting here talking with you right now if I didn't think that you were a good guy that had a good heart. Like I said, Larry, good…good people make mistakes. And how we handle those mistakes, that's what we're judged by.

HAYES I wouldn't hurt my little girl.

GORDON Rebecca…Rebecca's not here to tell us about it. Larry's the one that knows what really happened, and she deserves it, man. She deserves to have that truth known. Meredith deserves to have that truth known.

HAYES I told you the truth. I've told you everything I know, man, I'm telling you now. If my little girl was here, she'd tell you that she loved me.

GORDON Oh, I don't doubt it one bit.

HAYES I tell you I didn't hurt her. I didn't do anything to her. I don't know what …

GORDON I want to…I want to…I want to…I want to believe you that you loved her, I really want to believe you.

HAYES I don't know what you want me to tell you.

GORDON The truth, Larry.

HAYES I told you guys the truth. Why can't you guys believe me? This is only the second time I've had someone close to me die.

GORDON Who else died that you knew?

HAYES My grandmother.

GORDON When she'd die?

HAYES Last year in September. It's a little over a year.

GORDON What did she die of?

HAYES Cancer.

GORDON What kind? Was it lung cancer?

HAYES Me and my cousin were the only two people she recognized before she ???. I wouldn't hurt my little girl.

GORDON How long have you and Meredith been together?

HAYES Since November of last year.

GORDON So a year pretty much, right?

HAYES Do what?

GORDON A year pretty much, right?

HAYES Almost.

GORDON How old was Rebecca when you two first got together?

HAYES She was seven months, almost eight months. I've been with her eleven months of that little girl's life.

GORDON Yeah. Some other officers are going to come in here and talk to you in minute, okay.

HAYES Okay.

GORDON You need to do the right thing here though, okay. Today…today's going to be Larry's opportunity to uh…to tell his side of the story, okay.

HAYES I told you…

GORDON Not everyone gets that chance. I know…I know…hear me out, okay. They're gonna' come in here, they're gonna' talk to you and you'll get your…your opportunity. Like I said, people…good people make mistakes. It happens, okay.

HAYES You guys are going to put me in jail for something I didn't do. I've been terrified of this.

GORDON That's not…that's not the case, Larry, okay. We said these…these other officers are going to talk with you, okay. They're the ones, this is their case, they're going to talk with you. Like I said, I…I think…I think you're a good, you're hurting, you're obviously hurting, okay. If I thought you were just some piece of crap that didn't have a soul or some heartless monster that just would do something like that, not feel any remorse, just do it intentionally, then I wouldn't be sitting here talking to you the way I am right now.

HAYES What am I supposed to tell you guys? Tell you that I did something that I didn't do?

PASCHALL That's not what we're looking for. We're not looking for anything like that. We're looking for what actually happened.

HAYES You're trying to get me to lie to you and I'm not going to do that.

PASCHALL I'm not trying to get you to lie to you. I'm trying to get you to lie to us at all.

GORDON We don't want you to lie, Larry.

HAYES My little girl died yesterday and you guys are trying to get me to lie to you.

GORDON No, we're not. I just feel Rebecca deserves the truth. And Meredith deserves the truth no matter how bad that may seem.

HAYES What makes you think that I lied to you? Can you tell me that?

GORDON Yeah, those other officers are going to talk with you about it.

PASCHALL I don't think you're…I don't think you're being completely honest. You're not lying to us. I..I think that the day went like it did and I think you love your daughter dearly. But uh…but we…we need to figure out exactly what happened. Somehow something happened to her that caused her to get a…a fracture in her skull like the doctor told you, right?

HAYES Only time she was away from me is when I set her in my son's room when I was shaving and brushing my teeth. That's the only time she was out of my sight.

PASCHALL Was she normal once you got back in to her?

HAYES I took her downstairs and I laid her down.

GORDON Was she out of your sight, where was she at?

HAYES Right around the corner.

PASCHALL Was the door open? Was the door shut in room?

HAYES The door was open.

PASCHALL The door was open in the room?

HAYES I took her downstairs, I laid her down and put her clothes on. And she got fussy with me. I said I figured it was normal, it's nap time. She always…she's always ready to take a nap around two, two-thirty. If she got hurt under my watch, I don't know how.

GORDON What…what do you think Meredith would do if something happened to Rebecca while you were watching her and it was your fault? What do think Meredith would do? Do you think she'd break up with you? Do you think she'd leave you?

HAYES She'd definitely leave me.

GORDON Even it were an accident? Even if you didn't intend for that happen?

HAYES I think she would.

GORDON Are you afraid to lose her now?

HAYES Yeah, I am. Even though I didn't do anything. She just hasn't been the same lately.

GORDON What do you mean by lately? Since Rebecca died?

HAYES Since before then. You just have good and bad times, I guess that's normal with every relationship.

GORDON What do you mean by good and bad times? I mean, do you guys fight a lot or what?

HAYES No, not really. We just disagree on small things.

GORDON That's normal. Just about every relationship I've ever been in has been that way. Is this your…is this your longest relationship?

HAYES It's the most serious one I've ever been in though.

GORDON You've got another kid, right, you said? A son? How old is he?

HAYES He's turning a year on Tuesday or Wednesday.

GORDON You get along with his mom or no?

HAYES I don't talk to his mom.

GORDON How long were you two together?

HAYES Six months.

GORDON You want to marry Meredith? Was that the plan?

HAYES I asked her to marry me months ago.

GORDON Did she say yes? When did you set the date for?

HAYES We haven't set the date. We're just going to go the courthouse for now. She didn't really have the extra money.

GORDON So you're just going to make it official and then maybe do something later on?

HAYES Yeah.

GORDON When…when was that day going to be?

HAYES Whenever we get to the courthouse and get it done.

GORDON Oh, you didn't really pick a day? Just however long it took? How long you guys been planning that?

HAYES Not very long.

GORDON How'd you two meet?

HAYES IHOP.

GORDON So you worked…how long has she worked there? She work there longer than you or…

HAYES Yeah.

GORDON How long has she been up there?

HAYES She's been with that company for five years. And I was with them for four almost five.

GORDON Mmm hmm. She always been out at South?

HAYES Do what?

GORDON Has she always been out at Southridge or did ever work at that one in Kanawha City?

HAYES She worked at both of them at the same time for a long time.

GORDON This is uh…this is Detective Cook and Detective Gray, okay. So these are the other officers that I told you that wanted to talk to you, alright.

HAYES Okay.

COOK Today I sat through the autopsy, okay.

HAYES Okay.

COOK You want to tell me what happened.

HAYES I've already given the story. I talked to you and I told you.

COOK You're telling me that's going to be your story?

HAYES That's what I…

COOK I…look…if…if she fell off the…the roof of that house and landed on top of her head, she wouldn't have sustained this type of skull fracture. This isn't something she fell off the step. This isn't something…and..and I'm…the thing is I…I…you know, I go through your My Space. I…you…you look like a uh…an actual caring father figure. I just need to know um…why Rebecca is no longer with us and your story isn't jiving. I know that that's not the truth. You know that that's not the truth. There's no…the medical evidence that I looked at….there's no difference that, if say he wasn't here and I just shot you and walked out of this room, I'd be convicted of shooting you. There's no medical difference between what we've seen today and what…what I…what I just said. You understand that part?

HAYES Yeah.

COOK There was a very…that was the largest…that was the worst skull fracture that that medical examiner had ever seen. If you're trying to tell me that happened in a car seat, you've lost your mind.

HAYES What could I have done to hurt…to hurt her like that?

COOK I don't know. I…I'm thinking you either, you know, I…I would think you meant to kill her, okay. But you…you…you are the reason that she is not here today.

HAYES No.

COOK Yes.

HAYES No.

COOK Yeah. Hundred percent sure. I am one hundred percent sure.

HAYES I would not hurt my little girl. I did nothing to hurt her.

GRAY Who did then? You understand you're still under Miranda…you're still…you're still under Miranda.

HAYES You guys are trying to scare me into saying something I didn't do…

GRAY No, no. No, no. We want to get ???? Listen, we want to get whatever happened yesterday or the day before, the day before that we can't change. Only thing we can do is start right now and start doing damage control. And start trying to figure out what happened with this…

HAYES Well he's saying you're a hundred percent that I did this. And I…you guys are going to put me in jail for something I didn't do.

GRAY Okay. Well here's what you told us. You said you were with her all day from the time you dropped mom off, eight o'clock in the morning, till you picked her up a little after two. You were with her. You and her alone. Her injuries occurred in that time period. There was nobody else there to do it. She couldn't have done it herself.

HAYES Well what could I have done to her?

COOK That's kind of what we're asking you.

GRAY What happened?

HAYES She's a one-year-old girl. I would not hurt my child.

GRAY Well, maybe you didn't mean to.

HAYES He's saying I could have dropped her off the top of the house and I…and I couldn't have hurt her like that. Then what could I have done that's even equal to that?

COOK That's why I'm asking you.

HAYES I've done nothing to my little girl. I did nothing. I told everybody the same story. I've told it…

COOK Your…your story is not true.

GRAY It's not the facts though.

COOK There is no way that this child's got this skull fracture or even a skull fracture in a car seat. There's no way that that child would have been normal.

GRAY She had to be unconscious when you put her in that car seat. Had to be.

HAYES She was conscious.

GRAY There's no way.

HAYES I told her to go to sleep.

GRAY There was…you may have told her, but she…she was not conscious.

COOK You…you're telling me that…about that…did she bleed when you put her in her car seat?

HAYES No.

COOK Did you stop and clean it up?

HAYES No. Why would I do anything like that? She wasn't bleeding when I put her in the car. She was fully conscious. She was…she was talking to me, she was mad at me because I was making her put clothes on.

COOK You see that? You see that? She…she…that little girl looks like she trusts and loves you.

HAYES I love her.

GRAY She uh…she can't speak to us right now, alright? So we're gonna' have to speak for her. If you really truly love her like you say you did, you're gonna' help us figure out what happened.

COOK See there? That's her car seat, isn't it?

HAYES Looks like it, yeah.

COOK Looks like it?

HAYES Yeah.

COOK Do you see anything on there just off the top of your…your eye there that you'd notice? That would…that would make me think that she had to be bleeding while she was in the car?

HAYES There was blood on it when he pulled her out. When…when I pulled her out.

GRAY Well, I agree with you. Had to have been.

COOK How come it's wiped off of the…this little clip thing here, I'm going to call it a breast clip. How come it's wiped off that? It just down in the cracks.

HAYES I didn't wipe anything off.

GRAY Let's just take a minute then. Let's just go back over that day. I mean, man, when you go ahead and…and…and tell us you're going to feel relief like you won't believe. You really are.

HAYES What am I supposed to tell you guys? Something that…something wrong, something that I didn't do, so you can take me to jail for the death of my little girl. My sunshine.

GRAY Oh, we believe you loved her. I believe you loved that girl. I think something happened. Something happened that day that we can't explain. We don't need all these pictures….

COOK No, I'm just looking for something here.

HAYES I told you guys. I told you what went on that day.

GRAY Some of it. Not all of it.

HAYES I told you all of it.

GRAY It can't be, man…

HAYES The only time she was away from me is when I'm sitting in the bathroom…

GRAY What were you doing?

HAYES …brushing my teeth and shaving, getting ready for work. And she was sitting in my son's room playing.

GRAY She…she wouldn't have …the injuries that she sustained, she couldn't walk, she couldn't talk and she couldn't breathe. Okay. She didn't get up and walk away from you. She didn't…and you had to go to her. She had to be with you. That's…that's the medical facts. If there's something else…if…was there somebody else in the house that day?

HAYES I was the only one there.

GRAY Was there something happened?

HAYES She was conscious.

GRAY Was she injured?

HAYES No. Nothing more than she had the day before. The bruise on her forehead is all I knew about.

GRAY That injury didn't happen the day before. It couldn't have.

HAYES What, the bruise on her forehead?

GRAY No the bruise in the back of her head. Not the bruise, the concussion.

HAYES I didn't hurt my little girl. I didn't do anything to her.

COOK So if we had a time machine and we could go back to Thursday, would she be with us today?

HAYES Obviously not.

COOK Why not?

HAYES I didn't do anything to her.

COOK Do you think if I watched her that day she'd be here?

HAYES Probably not. I don't know what you want me to tell you. You all tell me to tell you the truth. But I tell you the truth. But you all try to bully me into lying to you and I'm not going to lie.

COOK This…we…what your story is…is…I'm not just gonna' say it did not jive, it is not possible. There's no possible way that this child got a skull fracture this big, that bad and you not know. And it definitely didn't happen in that car seat. Did not happen in that car seat.

HAYES I don't know what to tell you guys.

GRAY ???? I'm sure you don't know what to tell us. It's a tough situation.

HAYES I've told you the truth. I've told you this is the truth.

GRAY I want you to tell me what you're seeing when you look out…when you think about the end of day.

HAYES I see my little girl.

GRAY Okay.

HAYES I see her playing. I see her sitting on the couch next to me laughing and playing.

GRAY Okay. And then what?

HAYES I see her slumped over in the car.

GRAY Okay. We need…we need that time frame in between that laughing and playing and when she's slumped over in the car. You think you…

HAYES ????

GRAY It's not a…you know, somebody has a brain tumor or somebody has something that all…that eventually erupts in their head, takes over their body. This is not the case here. That's not what happened here. This was something happened just shortly before you put her in that car seat.

HAYES I didn't do anything to my little girl.

COOK You did.

HAYES Like I said ????

COOK So if you were in my shoes, what would you think?

HAYES I just don't know what to think.

COOK Okay.

HAYES I just don't know what to think. My little girl died yesterday. And I've been berated with questions. Judges…

GRAY Well, it's not about you, it's about her though. Okay?

HAYES And I understand that.

GRAY Like I said we're speaking for her now.

HAYES And I understand that.

GRAY If you love her, you understand why we're doing this.

HAYES I know she wouldn't want you coming after me saying that I'm the one that did it, 'cause I didn't.

COOK Do you know what happened to her?

HAYES I don't know what happened to her.

GRAY That's all we're trying to find out, is what happened to her.

COOK Do you know what happened to her?

HAYES I do not know what happened to her.

COOK You're trying to insult your intelligence. There's no way on earth this gets ???? in a death like this. Not possible without you knowing.

HAYES I'm not insulting your intelligence. But you are calling me a liar.

COOK I am calling you a liar. You are lying to me right now.

HAYES No I'm not.

COOK You know more than you telling us.

HAYES You're trying to make me confess to something that I didn't do.

GRAY No we're not.

COOK I'm not trying to make you…

GRAY Absolutely not.

COOK I am trying to get the truth. Your story…

GRAY All we want is truth.

COOK …needs to match what I'm gonna' call medical science. Your story does not match…no where close match your story. Your story is she walked around, played video games, you know, eat cheesy bread and gummy bears, had a good time, had a good day, had a normal day, you put her in a car seat and seven, ten minutes, whatever later, and uh…went in there in Trace Fork, her head slumps over and all of a sudden….. before you told me no blood. She didn't bleed. You also said she was pale…pale is not what everybody else said.

HAYES I told you there was no blood. She was not bleeding in the car until we…

COOK How…how…do you see this picture?

HAYES Yeah.

COOK What is that?

HAYES That's…I guess it's blood.

COOK How did it get there?

HAYES It was there when we pulled her out of the car.

COOK Hmm?

HAYES It was there when we pulled her out of the car.

GRAY Was anybody else in the car with you all?

HAYES Just me.

GRAY Did you stop anywhere on the way to Southridge?

HAYES No.

GRAY Or Trace Fork? You didn't stop? I'm not going to find a video anywhere of you stopping?

HAYES No.

COOK Just this alone makes your story not match. There was blood all the way across that at one point in time. Somebody's wiped it off. Or shall I say tried to wipe it off.

HAYES I didn't hurt my little girl.

COOK What happened to her? I know that you know and you know that you know.

HAYES If you know it then why are you asking me?

COOK I know that you know. I know that you know what happened.

GRAY We're asking you because you have put yourself in a position of the only one who has the answers.

HAYES But I don't have the answer. I've done nothing but try to help guys.

GRAY Okay. Then help us identify what's going on here.

[inaudible conversation]

COOK Could you answer me how we went from this to what you're ???? ? Did you take this off his My Space?

GRAY Yeah, I just…we won't…this is…there's nothing wrong with the way I…you can see right here ???? I…I've ????. We're not questioning that. I wouldn't question that at all. But that…she trusted you. This here…see that right there? That's…that's busted. That is completely split. Now you need to tell us…help us…help us find who did this. Help us. We have to speak for her. We have to speak for her. That's all the way across her head.

COOK That didn't happen in a car seat.

GRAY That did not happen in a car seat.

HAYES I didn't do that to my little girl. You showed me pictures of her skull. I didn't do that to my little girl.

COOK How did it happen?

HAYES That's my little angel.

GRAY Your little angel wants…wants peace. Okay? We want to help her achieve that and I'm sure you do too.

HAYES I didn't do anything to my little girl.

GRAY Who did? Who did? You can stand here…it's right on the tip of your tongue, you've got to tell us.

HAYES I don't have the answers to ????

COOK You…you do have the answers.

GRAY You do. Absolutely you do.

COOK We know that you know.

HAYES You keep telling me that I know what you want, but I don't know.

GRAY You do know.

COOK There's no way that that happened without you knowing.

HAYES She's so fragile.

GRAY Yes.

COOK She is very, very fragile. I agree with you.

HAYES I'm gentle with my little girl.

GRAY Okay.

COOK You called her your…a little trooper…that she was. I know she was a tough little girl, bouncing off everything in the house. But this is way beyond that. Way beyond that.

GRAY You see why we have to have answers, right?

HAYES I understand, but I didn't do anything to her.

GRAY Who could have? She couldn't have done it to herself.

HAYES How could…I've done nothing to her.

GRAY How…you couldn't…you're…you're the only one that can answer that question. It could have been in…in a second. She could have interrupted your game. You could have…took you off guard…you could have…

HAYES ???? I'd throw that game out the window before I'd let her interrupting me bother me.

COOK You said it was an addictive game. How…how many hours do you think you played it that day?

HAYES Six, seven, eight. I don't know.

COOK And that was just before Meredith got off work, right?

HAYES It couldn't have been that long, six hours maybe. [inaudible]

GRAY You don't take any kind of drugs, do you?

HAYES No.

GRAY So it…it couldn't been a thing where you lost your mind, I mean…you had to be conscious.

COOK I feel confident that you didn't do this on purpose which to me makes a big difference.

HAYES It doesn't matter very much even if I did do it, they'd still throw me in jail all the same.

GRAY But you've got to remember when you're in front of the judge, you either have remorse or you don't have remorse.

COOK The judge isn't going to buy that this happened in a car seat.

GRAY Do you have remorse? Do you have remorse now?

HAYES I didn't do anything to my little girl.

COOK Something happened to this little girl.

GRAY You know this isn't going to go away. You know we've gotta' get it on the…on the level. We've gotta' take care of this.

COOK Is there anybody you wouldn't lie to in this situation?

HAYES I'm not lying to anyone.

GRAY Don't lie to her.

HAYES She's my little girl.

GRAY Then help us give her peace, man.

HAYES I don't know what you want me to tell you.

GRAY I want you to tell me what happened to her.

HAYES I told you what happened.

GRAY You've told us a lot. She was unconscious when you put her in that car seat wasn't she?

HAYES No.

GRAY Yes she was. She had to be.

COOK We can't really change what's happened. You know this isn't right and I know this isn't right. And I know that you know something that you're not telling us.

HAYES She was conscious. She was fine.

COOK Then what happened?

GRAY Did something happen on the way up?

COOK It's obvious that, you know, atmospheric pressure didn't make her head do this. How come you're more attached to those pictures than like say, this picture?

HAYES Because I lost it when I saw her like this.

COOK What's that?

HAYES I lost my mind when I saw her like this.

COOK Say you lost your mom when you was little like this?

HAYES I lost my mind.

GRAY My mind.

COOK Oh. Okay.

HAYES No one should have to see a baby like this.

GRAY You're right.

HAYES Last thing I said to her was go to sleep, man, I didn't think she would never wake up.

COOK What was that?

HAYES Last thing I said to her was go to sleep. I put her in the car seat and told her to go to sleep. I didn't think she'd never wake up again.

GRAY Look…I believe you told her that. I believe you said that. This kid's head is busted open. Her skull is completely fractured from the backside to the other backside and all the way down in her spine. She wasn't going to wake up.

HAYES I didn't do that to her.

GRAY Who did?

HAYES How could I have done something like that to her?

GRAY You could have…you could have…you could have held…held her in your arms with your body…her body could have hit an object or you could had an object that could have hit her. It's physically possible. It's not physically possible for her to be sitting in that house and do it to herself. You're the only one that could have done it to her. You're the only one that was with her. Now's the time for you to do the right thing and tell us what happened. Be a man. Stand up and take responsibility for what you did.

HAYES I didn't do this to her.

GRAY How did it happen?

HAYES You guys can tell me how I did this all day, but…

GRAY You're telling…you know you…I see it in your eyes, buddy. I see it in your eyes. When you let it out, you're gonna' feel such relief that like you've never felt in your life.

HAYES I understand that you guys job is to try to scare me into…

GRAY Don't worry about my job.

HAYES …but it's…

GRAY I'm not trying to scare you. I'm just trying to get justice for this girl. When I say that, I mean I'm trying to figure out what happened. She has a right. We have a right to know what happened to her. Her mother has a right to know what happened to her daughter.

HAYES I didn't do this to her.

COOK Has she ever bled before while she was in the car seat?

HAYES Not that I know of.

COOK Aren't you the only one in the…the immediate family there with a driver's license? So you would know. I tell you what...whoever that guy is right there in that picture would know if she ever bled in that car seat. That looks a whole lot like you, don't it? Do you see how much blood that is? How does that happen?

HAYES Detective, I told you.

COOK Why was she blue when you pulled her out? Was she blue? You said pale earlier. Everybody else says blue. Like blue. Like her whole body is blue.

HAYES I've never seen anyone been blue. It's the first time I've been around something like this.

COOK Well, this is not my first time and I know this is…there's no way your story makes sense. It did not happen like you're saying. You're leaving something out. Something that I will know one day. Something that you know right now. How did the blood get on the car seat? You didn't put her back in the car after you…she started…everybody started CPR, right? That's when everybody thought she started bleeding. Why is that?

HAYES There was blood coming out of her nose when I took her out of the car.

COOK This much?

HAYES It was on her car seat. Her head was right here.

COOK How come there's no blood on the buckles? And down in the cracks? Do you ever watch CSI or…any of that stuff?

HAYES I watch "House" and "Bones" all the time.

COOK Okay. Then you know what I'm looking at and you know what you're looking at.

HAYES But I didn't do anything like this.

COOK 'Cause I'm gonna' send this to the lab. It's her car seat. I'm gonna' send it to the lab and they're gonna' tell me this is her blood. And this is her blood all the way up the strap. It's even farther down. And I'll probably find more than that on there. Won't I?

HAYES I didn't do this to her.

COOK What happened to her?

HAYES She was fine when I put her in the car.

COOK No. No, she wasn't. She was not fine. She was not fine…she…she had one of the worst skull fractures…

HAYES I would never hurt a child.

COOK I'm not even saying you done it intentionally. I don't believe that you done this intentionally. I don't believe you would intentionally hurt this little girl.

HAYES But there's no difference.

COOK Yes there is a difference. There is a big difference. There is a big difference. See this guy right here? No way he would intentionally hurt this little girl. You see him looking at her? You see there? Look at both those photos. Look at both those photos. You can keep that. You see those? You tell me how you go from this to hurting one like this.

HAYES I don't have an answer for you.

COOK You do have an answer. You do have an answer. Because I know that you know what has happened to this little girl. And it matters to me if you purposely done this or if you unintentionally done it. What your intent was. Trying to get her to leave you alone, trying to get her to stop crying, I do not believe for a minute that this guy right here would intentionally hurt this girl. I do not believe that. Now what happened?

HAYES I've told you everything I know.

COOK No…you…you…like I said, it matters…it matters…

HAYES I just want to see my fiancé right now. I want my little girl to be okay.

COOK This little girl's not okay now.

HAYES I know that.

COOK And there's…there is nothing I can do to change that. But if we had a time machine and we went back to Thursday morning I believe that she would be here today. And that's something that I want to know. I want to know that you know that. I believe if we did you would…you would make a lot of different choices. You would do something differently that day and she would be here, she would be fine, looking like this right here. See that…full of life, happy.

HAYES I wouldn't let go of her.

COOK Hmm?

HAYES I wouldn't let go of her. If I knew something like this was gonna' happen I'd never let go of my little girl.

COOK You know that I got these from your face…or your My Space, right? You realize that? I can you you loved this kid. I would stand in front of anybody and say that I believed that you loved this kid. I do not believe that you…whatever happened, I do not believe that you had intentions…uh…for this…this child's life to end. The fact of the matter is this child's life has ended. And you were with her. And you know what happened.

HAYES No matter how much I loved her, you guys already have it settled in your head. You're gonna' put me away. Tell me I'm wrong.

COOK I...I...I feel that you've done this unless you're gonna' tell me what really happened. I...I do not think that you walked up to this girl with a sledge hammer and hit her in the back of the head. I do not think that.

HAYES Even if it was an accident?

COOK Even if it was an accident. If it's an accident, we would deal with it. Accidents happen all the time.

HAYES And you'd still put me in jail.

COOK That is not true. If an accident happened, an accident happened. Accidents happen all the time. I investigate lots of accidents.

HAYES And those people still do time?

COOK No. There's a difference between an accident and something with malice. Do you...do you understand what that word means? Okay.

HAYES I'm not uneducated Mr. Cook.

COOK Well, it's...it's a word that I use a lot that a lot of people maybe...it's not an everyday word. Okay, I just wanted to make sure you knew what that meant. If there is an accident that happened in this situation, I just have to know what happened to this little girl. And I know...I know...and I mean I know, I'm a hundred percent sure that this...this baby did not just crack...her head did not just do this. And I...I do not believe that this guy would intentionally do this.

GRAY I agree. I mean, I...I'm out here running things through my head. You seem like a guy who...who loved this...this girl here. And it's just...this is just not adding up.

COOK And you proposed to her mom. You were going to be a family. Regardless if she was biologically yours or not, she...you couldn't convince her right here that this isn't her daddy, could you?

HAYES I saw her more than her dad. I was with that little girl every day. I fed her, clothed her, bathed her, changed her diapers.

COOK So what happened? What happened on Thursday?

HAYES But even if I did something to her, nobody would ever forgive me.

GRAY But the thing is, there's a difference between a cold blooded killer and somebody who had an accident. Somebody who had a second of rage. Somebody who was maybe holding a kid by the feet and they slipped. Somebody...there's a difference. And I'm gonna' tell you right now, the prosecutor whose the first step in deciding what's gonna' be done with you, looks at that seriously. If they...and the only thing they have to look at right now, all the evidence says this guy's a cold blooded killer who doesn't care what he did. He has no remorse and he's taking no responsibility. Versus somebody who takes

responsibility and says this is what happened. I believe you loved this girl. You didn't mean to kill this girl. There's no way. But we got...you know, we gotta' start somewhere, we gotta' damage control, we gotta' figure out what's going on here.

HAYES Did you tell her mom that I did this to her?

GRAY I...I did not say that you killed her daughter. I just showed her the evidence that we have. She can make up her own mind.

HAYES What happens to me?

GRAY What happens to you? You explain to us what happened. And that makes all the difference in the world as to what happens to you. See we're...we're a part of this deal right here where this is the beginning. This is where we say something happened, what happened, and we discover that what happened. And then our prosecutors take what we have, depending on what you give us, that they can work with. Either they go to court with a cold blooded killer who has no remorse or they go to court with a dad who loved his daughter and made a mistake.

COOK Here's another one. See this one? Your son's probably almost jealous because of that right there. I'm not saying you didn't love your son or you don't love your son.

HAYES I was closer to my little girl.

COOK I...that's what I'm getting at here. I mean, look at these pictures right here. You're...you're not going to convince anybody that you were not close to this little girl, you weren't a father figure, biological or not, this little girl thought you were her daddy.

GRAY Yep. And that's the side of it right now that's...everybody, you know...anybody from the outside looking in is saying, well this guy said he was with this girl all day and she...she's had this horrific accident. He's a killer and he doesn't care. I don't...I don't believe that. Help us tell people that that's not the case. I'm not...I'm not just here...I'm not trying...just here to hem you up or trick you. I want the truth. Like I said, we're speaking for Rebecca right now, because she can't speak.

HAYES What happens to me after I tell you guys if I did something?

GRAY What happens is...we process you and you go in front of a magistrate. And the magistrate sets a bond and then you work it out with the prosecutor.

COOK The truth is the strongest thing here.

GRAY Absolutely.

COOK It's definitely the strongest thing here. It's...it's going to be your only option.

GRAY I can tell what happens if you don't tell us anything.

COOK We're gonna'...

GRAY You're going to be charged as a cold blooded killer and that's how you're going to be presented to the court.

HAYES Any way it goes…

GRAY No. That's not any way it goes.

HAYES My little girl's not with us today.

COOK This is true.

GRAY She's not. But look, you know…

HAYES But if I go in front of any judge, they're gonna' look at the fact that she's not here.

GRAY Well that is a fact. That's a fact that we can't change.

HAYES And they're gonna' put me away.

GRAY Well…the…the…the putting away part is gonna' be a lot worse for somebody who shows no remorse.

COOK I assure you that. If I wrote down…

GRAY I can't speak for a judge or a prosecutor, but I can tell you I've seen guys stand in front of a judge and I've seen 'em stand and lie to 'em and play a game with 'em and…and judges don't take very kindly to that. And I've seen guys who were men and stood up for the truth, who took responsibility for their actions and they…like I said, you can't change what's happened. We can move forward though. We can't move backwards.

HAYES Can I see my fiancé?

GRAY Can you see her? I don't think she wants to see you right now. This is…this is…this is not a good time. This would…this wouldn't be a good time to see her. We've gotta' settle up with Rebecca first.

COOK Once this is all done, I'll personally go and tell her if you're…

GRAY Whatever you want us to tell you…tell her.

COOK We will…we will help you out in any way at that end.

HAYES I just want to see her. I don't care if she hits me in the face.

COOK Well…

GRAY I don't think she'll see you right now.

COOK What would you tell her?

HAYES That I love her.

COOK What else? That's all you'd tell her? I don't believe that's all you'd tell her. That's not all you'd tell her, is it? You'd tell her you were sorry? Would you tell her what really happened?

HAYES I told you guys.

GRAY No, mm mm. See, we're going back now. We're past that point. You know we're past that point.

HAYES I don't want to go to jail for murdering this little girl.

COOK Why don't you…

GRAY Then tell us what happened. Tell us what happened, man.

COOK What did she call you?

HAYES Poppy.

COOK That should tell you something right there. No matter what happens when we leave out of here, we'll let you take these pictures. Just these right here, okay. So what happened?

HAYES I need to see Meredith.

GRAY I don't think she'll see you.

HAYES Will you find out? Will you let me see her if she will? I just want to see my fiancé.

COOK What's going to happen when…I mean is there going to be a big eruption in here?

HAYES I just want to see my fiancé. Do you smoke, detective?

COOK I don't.

HAYES I didn't either.

COOK Didn't smoke? Heard you were smoking earlier. How have you been sleeping?

HAYES Alright I guess.

COOK You know I ???? I haven't really slept all that much since Friday.

HAYES I'd sleep for about two hours and be up.

COOK Yeah, the day we woke you up, did we wake you up the day we came and got your cell phone?

HAYES I'd just fallen asleep.

COOK Yeah. I probably got about forty-five minutes of sleep that night. Back out. We're pulling the same thing the next day.

HAYES I just want to smoke a cigarette and see my fiancé.

COOK Then what? If I can find you a cigarette, then what?

HAYES Is she gonna' see me?

GRAY I don't have her number. You got her number?

HAYES She's with Tessa.

COOK I've got Tessa's number…

GRAY Let's uh…you want a cigarette now?

COOK What do you…what…what do you smoke?

HAYES Camel Menthols.

GRAY Let's…let's go over to our office and get out of here. You want to do that?

HAYES Where's that at?

GRAY It's across the street.

COOK Across the street here.

HAYES Are you going to hand cuff me and take me there?

GRAY No. We're just gonna' walk over there.

HAYES I'm not…still not under arrest? I don't know if everything's still the same as when I walked in this room.

GRAY Is everything still the same as when you walked in this room?

COOK What…what do you mean by that?

HAYES Everything on that paper?

GRAY Mmm hmm.

COOK Everything on this paper?

GRAY No, the Miranda form. Yeah…

COOK Oh, okay.

GRAY …you're still under Miranda.

COOK Yeah. I thought you meant this…this here's just um…your time frame, what you done that day. Is it still the same?

HAYES I just want to see my fiancé.

GRAY Well, like I told you, man, I don't think she's going to see you.

HAYES She knows me better than this. [inaudible]

COOK I'll take him out for a cigarette and then come right back.

GRAY ???? over there.

COOK Okay.

GRAY He'll go find you a cigarette, buddy.

COOK We have a cigarette on the way over, how's that?

HAYES Please see if she'll come see me.

GRAY ????

HAYES Okay. What happens from here?

COOK I'm going to let you smoke a cigarette and we'll see if Meredith will see you. Is that what you mean?

HAYES I want you to tell me best case scenario for me.

COOK You tell us the truth, if what it looks like happened happened, might be at a moment of…should I say, maybe stupidity or…uh…I don't…I don't really…I don't…I don't really know how you'd phrase that right.

HAYES I understand what you're saying.

COOK Maybe you had a moment that uh…you kind of lost it…lost your anger…I…that's what it looks like to me right now. It's hard for me to believe that this would do that to that. Just…it's…it's hard for me to comprehend. And I…I consider myself a…a fairly intelligent guy.

HAYES I don't doubt that. Well what's…what's the best case scenario?

COOK I don't…I don't know what you're asking. Are you asking me will we ever go away with this without knowing what happened? No, that will never happen. I picked this profession for this. I find answers. I find the truth.

HAYES I'm saying what is a judge going to do to me?

COOK I um…I will tell you if we go in there and you tell him that this baby was a hundred percent fine and uh…when you put it in the car…when you put her in the car seat. And you showed up ten minutes later with this much damage, that he just…he's probably going to be smarter than me, okay, he's a judge. Or she. Be smarter than me,

they'll…they'll also um…be…they'll probably be doctors um…people who went to school for twelve and nineteen years, so…to look at things like this. And you know, with your story that you have right now, they're gonna' say you're just a fat liar and…

HAYES I'm saying that it's an accident.

COOK …and just draw…and just draw…as an accident? If it's a hundred percent an accident, it'll be a completely different story.

HAYES That's what I want to know.

COOK If it was a hundred percent an accident, you would probably be free to leave once it's dealt with. You might get charged with lying to us at the beginning of this because you…you had no…you shouldn't have done that. Whenever those first…

HAYES Are you guys going to take me and process me?

COOK What's that?

HAYES You're going to take me and process me any way it goes.

COOK More than likely.

HAYES When I leave here today, it's going to be in handcuffs.

COOK More than likely. With this amount of injuries um…I can't lie to you on that.

HAYES Then I'm gonna' go in front of a judge and they're going to put me in jail.

COOK Well that's…that's maybe not true. You've not been placed under arrest yet. You…you are still considered a…I mean I'd like for you to…to talk to me and I'll…I'll talk to you until you're finished talking. If you want me to just stand here and look at you while you tell me everything, I'm fine with that.

HAYES Did you get hold of Meredith?

GRAY Not yet, I have to go over here. Across the road and get her number.

COOK We had a cig…we had a cigarette. ????

GRAY ????

COOK We're going to walk over my office or our office, should I say.

HAYES You said I could keep these.

COOK Yeah, when we're done. Not yet though, okay.

[walking over to Detective Bureau office]

[inaudible conversation]

GRAY Ready to go up? Have a seat ???

HAYES Where at?

GRAY Anywhere. You got that number?

HAYES It's 419-7389.

GRAY 73…

HAYES 89.

COOK You know I can't leave you alone with her if she comes, right?

HAYES I understand that. Are you in charge of this?

COOK Um…not really in charge of it, per say, there's…as far as…my name's going to be on a lot of the paperwork, yes. I'm the one writing down what the facts are. Like I said, I don't think I have all the facts. You know what I mean?

HAYES I don't think I'd kill her in accident.

COOK Well, right now it…it doesn't…your story, it doesn't jive. The story…the injuries doesn't look…you know, maybe she had just fallen or ???? We know for a fact that ???? Even since, you know, I…I don't know how old you are. Actually I do know how old you are – twenty-one. But uh…

HAYES I'll be twenty-two in a couple of days.

COOK Yeah. But uh…you know, I 'm sure you've heard me ???? You know even…even a lot of stuff you see on TV, I mean, it…???? came a long way. There's…there's things that you…we can find uh…exact object or…they'll say it's ???? and whatever caused the actual fracture on…on….on… that will give us an actual object. And that's gotta' match your story.

HAYES Yeah.

COOK ???? Like I said, I don't see you doing this on purpose. You may have lost your…you know, your coolness for a minute. It'd be hard for me to believe that you…you're not a cold…I mean you're not a cold blooded guy. You know, I know that you loved this little girl.

HAYES Do you think I'm a bad person?

COOK I do not think you're a bad person. I think you had a moment you wish you had back. And I wish we had back.

GRAY I wasn't getting anything but voice mail right now.

COOK I mean I wish we could have met under different circumstance. This is one ???? and this is ???? And I've done this for a long time for a living. And I've heard plenty of BS stories. If they don't match with the evidence, they're not true. It's that…it's that simple for me.

HAYES I wanted to be a detective. But I didn't finish my school.

COOK Yeah.

GRAY ????

HAYES I just want to see Meredith.

GRAY Well…I don't…know what they're doing right now, but…. I really doubt that she's gonna' to talk to you.

COOK All she knows is…you know, she doesn't know what I know. But she does know some of the facts. She knows that this wasn't something that…we know a hundred percent sure that this didn't happen while she was sitting in the car seat.

GRAY She know that?

COOK She knows that. Like I said, the truth is the strongest thing.

GRAY It's tough, man, but you can do it. You can do it.

COOK That guy right there, you know him? You know that guy?

HAYES Yeah.

COOK There's…there's one reason I'm talking to you this much that I have, instead of just writing the facts I have down. That's because…one…one big reason is because I know you loved her.

HAYES I love all children. I just loved her a lot more than…

COOK I know you were attached to her. You loved her like she was yours. I can tell that. You don't…you don't…don't have anything to prove to me on that, but I…I know that this just didn't happen in a car seat. You know that this didn't happen in a car seat.

GRAY And we're way past that, I mean we know that.

COOK I mean we believe you.

GRAY We're just…we're at the point now where you're…you're…

COOK You need to just come to grips…

GRAY …you're supposed to come to grips with this. We have to present your side of it. 'Cause your side of it right now is cold blooded killer. That ain't…that ain't gonna'…that's just not you. It's not ???? you right there.

HAYES Who takes me downtown?

GRAY Me and him. I'm telling you, man, you're gonna' feel a release come off you like someone took a thousand pound boulder off your shoulders.

HAYES It's never gonna' bring her back.

GRAY No, it's not, but it's gonna' let everybody know the truth. It's gonna' give her the peace she deserves.

HAYES My life's over.

GRAY No. It's not. Your life's not over.

HAYES I've lost everyone that I love.

GRAY Well, if you don't come to grips with this, come clean with everybody, there's no chance of having ????

COOK You still have a son. I'm sure your son still loves you and you still love your son. As a matter of fact, on you're My Space I've seen you have a…complete little section there of just Ayden. That's the same name as my nephew. I thought that was pretty neat. I don't know if you got to name him or not.

HAYES I didn't even know he was mine until he was four months old. His mommy never told me.

COOK So what happened?

GRAY How often do you get to see him?

HAYES Once a week. Everything was going ???? I went upstairs and got ready for work, when I came back down I had a hold of her and I tripped and I landed on her.

GRAY Alright man.

HAYES And she acted like she was fine. Then I put her in the car. [crying] She kept waking up.

GRAY Okay. That's what we gotta' hear. That's what we gotta' hear.

HAYES I would never hurt my little girl. [crying] It's all my fault she's not here. I know everybody's gonna' see me as a killer. My life's over because I was clumsy.

COOK How far up the steps do you think you were?

HAYES Third stair, fourth stair.

GRAY From the top or the bottom?

HAYES Bottom.

COOK You think you can show me how you landed?

HAYES Flat. ??? She broke my fall. ????

COOK What happened after this?

HAYES I put her in the car and went to get her mom. When I looked back and saw her slumped over, I knew she wasn't okay.

COOK Did you clean the…the blood off the car seat?

HAYES No.

COOK How did that blood get on the car seat?

HAYES Came…came out of her nose and her mouth.

COOK Where were you at when you seen her slumped over?

HAYES Getting on 119. I looked back

COOK How come you went to…why didn't you go to the hospital? Just call 911?

HAYES 'Cause I was scared. I just wanted her to be okay. What happens now?

GRAY Let's just sit here a few minutes, okay?

HAYES Can I smoke another cigarette before you take me away? [crying]

GRAY We'll find you another, but we don't have one right now. You just sit here a few minutes, alright?

HAYES I'm really not a bad person. [crying]

GRAY I know you're not. Didn't say you was.

COOK Here you go.

HAYES [crying] How do they say she got hurt?

COOK How do they say she got hurt? What do you mean? At the medical examiner's? They…they haven't come out with the…an official report yet. There's a…a large skull fracture on the back of her head. One that…I don't know how much she weighed…twenty-five, twenty-three pounds at most? But there's no way…

HAYES She just broke twenty.

COOK …there's no way that she…that she had ???? okay? I knew that and you knew that.

HAYES I landed on her.

COOK And you think she was normal after that? You didn't notice any droopy eyes or…

HAYES She didn't look damaged. She closed her eyes like she was gonna' go to sleep. ????? to go to sleep.

COOK What's that? ????

HAYES When I put her in the car she wasn't gasping or anything. She cried a little bit.

COOK But you knew she wasn't okay then, didn't you? Right…right when you got her up didn't you?

HAYES I didn't hear anything crack or…

COOK I noticed you shook your head on that last one, is that a…that's a yes you did realize that she wasn't…she wasn't okay?

HAYES I knew she wasn't alright. But I didn't think she was hurt like that. I thought I'd just ???? her. I thought she'd be okay.

COOK Did you still drive like grandpa on the way up here? Or were you just trying to get her to her gramps…or her mom's as fast as you could ????

HAYES I was probably going seventy-five, eighty on 119. [crying]

COOK How'd you go to get there?

HAYES On the way I turned into Trace Fork.

COOK No, I mean like, from your…from…you left the house right here?

HAYES Went up Central Avenue, got on Jefferson.

COOK Were you driving like a race car driver all through there?

HAYES No. I didn't realize anything was really wrong till I got to Davis Creek. Am I going to go to jail for a long time?

COOK I don't know. I don't know. You don't think we should? Have you called 911 at the house?

HAYES I was scared.

COOK You were scared?

HAYES I was scared I'd really hurt her.

COOK You…you did.

HAYES I didn't know what to do.

COOK Hadn't you ever called 911 for a baby or anything like before?

HAYES- No.

COOK You think this might have turned out a little different if you called…you called in?

HAYES I don't know. Do you think it would have?

COOK I think that it would have.

HAYES Do you believe ????

COOK I believe she would have. I um…I actually had a…I'm not a doctor, okay, by any means, but I know that they can relieve pressure on…on the brain by boring holes in the head. I'm not gonna' lie to you. There's a…there's a…a chance that she could have been here with us. ???? You still show a certain amount of responsibility for that, okay.

GRAY Well…I think we still…there still some questions that I…I…I don't…I'm not getting answers to.

HAYES What's that?

GRAY Well, according to the medical examiner, there was more than one blow to her head. There's one large fracture, but there's other what we call hematomas, which are spots on the brain that…that were hit.

HAYES That's all that happened. I fell on my little girl and I killed her. If anything else happened to her, it wasn't from me. I swear on this little girl, that's all.

GRAY Why did you lie all this time? Why didn't you, you know…

HAYES I've never been in trouble before.

GRAY Why didn't you take her to the hospital?

HAYES 'Cause I was scared. I just wanted to get her to her mom. I thought she'd be okay.

GRAY So you think you can demonstrate how this happened?

HAYES Said I tripped coming down the stairs. I was wearing these pants. And my toe caught the inside of them.

GRAY You got any bruises on you?

HAYES No. She broke my fall.

GRAY Where did you hit?

HAYES Do what?

GRAY Where did you hit?

HAYES The bottom of the stairs.

COOK Did you land on your elbows?

HAYES I landed on my…I landed flat on her.

COOK You didn't try to catch yourself is what you're telling me?

HAYES I was worried about her. I had hold of her tight. I tried to turn and couldn't turn.

COOK So you're telling me you didn't even hit the ground.

HAYES ???? hit the ground.

COOK What's that mean?

HAYES My legs hit the ground.

COOK Your legs hit the ground? You didn't get any carpet burn or anything from it?

HAYES My head hit.

COOK Your head hit?

HAYES I was having a ???? my forehead for a couple of days.

COOK Is it on there now?

HAYES A little bit. It doesn't hurt anymore.

GRAY I don't know if the uh…doctors are going to go along with this all the way.

HAYES That's what happened. I know I didn't tell you guys the truth before.

GRAY Which makes us very suspicious now.

HAYES I know.

COOK Is this the story you want to ???? right now? The medical examiner is still going to say that there's multiple…multiple things to the head, okay?

HAYES Like I said I didn't do this.

COOK Are they gonna' come back and say that no…her head didn't land on a flat surface?

HAYES What happened…

GRAY Well, let's talk about something else for a second.

HAYES Okay.

GRAY It's obvious that the blood on this strap was wiped off.

HAYES I didn't wipe anything off. She wasn't bleeding when I put her in the car. There was blood dripping off when I looked back. And I tried to push her head back up. I reached back and her…she wasn't breathing.

GRAY Did you get blood on your hand?

HAYES [inaudible]

GRAY What did you do with it? Your hand then?

HAYES I wiped it off.

GRAY On those pants you're wearing right there? Where at?

HAYES ????

GRAY So we'll find blood on those pants?

HAYES Probably.

GRAY Have you washed them?

HAYES [inaudible]

GRAY Huh?

HAYES Right here.

GRAY Okay.

COOK How much you weigh?

HAYES Close to two hundred pounds if I had to guess.

COOK How come the front of her face doesn't have any ??? If you landed on her, I mean…if you landed on the front of my face, my nose would fold over and I'd probably have two black eyes and a busted lip. Can you agree with that?

HAYES I guess so.

COOK You guess so.

HAYES But I landed on her.

COOK Have…have you told anybody else this?

HAYES No.

COOK You've just kept this all balled up inside for…these past couple of days. Did you think we weren't smart enough to figure this out? That she didn't just…nothing happened to her?

HAYES I didn't mean to hurt my little girl.

GRAY Would you ask Ben to come in here a second?

COOK Hmm?

GRAY Have Ben come in here a second. Just have Ben come here a second.

PASCHALL ????

HAYES No, my little girl's not here. Everybody that I know and love is gonna' hate me now. They're just gonna' call me a killer. A horrible person. I'm not a bad person.

PASCHALL It was an accident wasn't it?

HAYES I'm scared.

PASCHALL Why did you wait so long to tell people?

HAYES I was so afraid of what was gonna' happen.

PASCHALL What do you think is gonna' happen?

HAYES I'll go to jail for a long time.

PASCHALL Do you think you should go to jail?

HAYES It was an accident. I would never hurt my little girl on purpose. Do you think I should go to jail?

PASCHALL I don't know. I'm…I'm just catching the tail end of this, man. I haven't really heard what you said happened.

HAYES I fell down on the stairs. I landed on her.

PASCHALL Right when you were going out?

HAYES When I was coming down.

PASCHALL When you were getting ready to leave to get your old lady?

HAYES I went back upstairs to get my wallet. And then came back down after I'd ????

PASCHALL Did she ever talk after that?

HAYES [inaudible]

PASCHALL What…???? Did she say then? Did she cry out?

HAYES She cried a little, then she stopped. She looked at me and she laid her head on my shoulder. So I put her in the car. I knew she was hurt, but I didn't think she was hurt that bad. What are they gonna' do to me?

PASCHALL I don't know. I think there uh…I think there still might be some inconsistencies with what…with what the…the medical people found.

HAYES They said she had other blows to her head, I guess.

PASCHALL And you had just the one big fall, right? Nothing else happened? Could nothing…nothing earlier?

HAYES I'd never hurt my little girl. She falls all the time. But that never hurt her. My life's over, detective.

PASCHALL No it's not. What uh…

HAYES ???? I just know Meredith's gonna' think I did this on purpose.

PASCHALL What did she think before this?

HAYES That I didn't do it. I'd never hurt her little girl. And I wouldn't.

PASCHALL How long you been with…been with her for over a year now, right?

HAYES Pretty close.

PASCHALL You think an accident's gonna' change the way she feels about you?

HAYES She's hurting right now, man.

PASCHALL Well…

HAYES I think the fact that I didn't tell her is what screwed up ???

PASCHALL Well, one of the big things that…that…that really catches us up and…and…and taking…taking what you say as the truth now is…is the fact that it took you so long to get to this point, you know what I mean? So, there were so many rumors the other day when I was talking to you and I asked you if anything had happened like that?

HAYES I was scared. I'm still scared. I should have told you guys then. I should have told everybody what happened. But it doesn't make it any better that I didn't. It doesn't make it any better that I'm telling you now.

PASCHALL Doesn't…it might seem that much better right now, and I…and I'm not…I'm not trying to down play the seriousness of this, you know, and the horrible, horrible way this child passed. But coming out and telling the truth is generally the first…first…first step on the way to ????. Now we are probably going to ask you a…a bunch more questions on

exactly how it happened and uh…???? this is not uh…we're not done talking to you and I…and I hope that you keep talking to us because we need to…we need to kind of hash out the series of events. That way you can kind of…we gotta'…we gotta' kind of believe you now…you gotta'…you gotta' tell us why this is an accident. We need to work it out so that we can believe what you say happened to the child is what the ME has told us has happened to the child.

HAYES You've talked to me enough, detective, even before all this, you should know when I'm lying.

PASCHALL It's tough to see inside a person's head. And I…I'm not, you know, I'm not a mind reader.

HAYES I guess my perspective on detectives is a little skewed.

PASCHALL Yeah, it's not like on TV. I wish I was as smart as some of those guys, but you know I make mistakes all the time. I made a mistake today as a matter of fact.

HAYES I watch "Criminal Minds" all the time.

PASCHALL Yeah? And that…I wish that were true. I wish that guy worked here. He said your left fingers trembling and that means that the right side of your body is telling the left side of your body that you had Cheerios for breakfast. And I don't know how he knows that.

HAYES I wish it was that simple for you guys to see that.

PASCHALL Okay. Let's…let's…let's go through it one more time. After you got ready for work and she got…you got her dressed, did you already get her dressed?

HAYES We came downstairs and I got her dressed.

PASCHALL Okay.

HAYES I went back upstairs to get my wallet…

PASCHALL And you took her with you? Okay, you carried her up the stairs?

HAYES I was going to find her some socks.

PASCHALL Where was your wallet at?

HAYES In the bedroom on my bed.

PASCHALL On your bed? How long did it take you to find it?

HAYES A couple of seconds. I knew it was there.

PASCHALL Were you carrying her when you got it or was she walking?

HAYES I had her in my arm.

PASCHALL Did you go look for her socks?

HAYES Yeah. I couldn't find any, so I was gonna' go downstairs and get her some.

PASCHALL Do you think you were rushing? Were you late to pick her up?

HAYES I was in a hurry.

PASCHALL How long since when she said she needed a ride until when you left?

HAYES Fifteen, twenty minutes.

PASCHALL Do you think she gets mad when she waits that long?

HAYES Sometimes.

PASCHALL Why did it take you fifteen or twenty minutes?

HAYES I was still playing a game…

PASCHALL Playing that…playing that game and you wanted to finish that match?

HAYES Yeah.

PASCHALL So you were rushing a little bit?

HAYES Yeah. I finished the match and I started rushing around getting ready.

PASCHALL Then were you…

HAYES I didn't even take a shower. I was gonna' come back and take a shower.

PASCHALL What the…when you…when you went upstairs and when you came back down, were you…were you kind of jogging the up the steps or were you just kind of walked up and down? 'Cause those are some difficult steps. I…I've…I've been up 'em and I about fell.

HAYES I don't care for 'em. I don't know, but I was coming down kind of quick when I got to the straight…

PASCHALL You got to the straight and was coming a little fast and…did you have shoes on?

HAYES No. I didn't even have socks on yet.

PASCHALL Do you remember what pants you were wearing?

HAYES These.

PASCHALL These pants right here? These pants are pretty baggy.

HAYES Yeah, they come down below my…my foot.

PASCHALL If you don't have your shoes on, they'll hang down to your foot?

HAYES Even with my shoes on, most of the time they fall behind 'em.

PASCHALL What size pants are those?

HAYES Uh…thirty-eight/forties.

PASCHALL Thirty-eight/forties? I'm six foot nine and I wear thirty-six/thirty-eights, so for you to have a forty inch pants…pretty long.

HAYES I don't mean they're forty inches long, I just meant waistband.

PASCHALL Oh, okay, okay. You don't know how long they are?

HAYES I don't know…thirty-eights.

PASCHALL Thirty-eights? That's still a pretty good size. How tall are you?

HAYES Just five eleven.

PASCHALL Five eleven?

COOK Why did you keep this a secret so long?

HAYES I was scared.

COOK You didn't tell anybody at the hospital. I mean they're try…they're fighting to save her life, you don't think this would have, if they'd known what had happened, would it have helped out? When they're fighting to save her life?

HAYES It probably would have.

COOK What's that?

HAYES It probably would have.

COOK Why…why didn't you…why didn't you say something? Did you think that…that we wouldn't figure this out?

HAYES I was so afraid of what everybody was gonna' do. I don't' like it for people to get mad at me. Even though it was an accident, I know everybody would have hated me.

COOK We were just talking about what the ME says…it still doesn't jive. The marks are distinct on the back of her head and that's how it happened?

HAYES I landed on her head and on my knees. I told you. I know I lied, but I'm telling you guys that I fell down the steps on her.

COOK How come you didn't tell any…I don't know understand why you didn't tell anybody that was fighting to help save her life. You didn't tell anybody.

HAYES I didn't think it might make a difference. I thought that they were just already done. I was so scared.

COOK So if you broke your arm, you wouldn't go to the hospital? You ???? already done? I mean would you not tell them that you broke your arm? I mean I don't…I don't understand what your…why you wouldn't tell somebody.

PASCHALL What I don't understand is my wife and I were going for a hike last year. And she was carrying my three-year-old, maybe four-year-old, niece, Reesie. And when she was…we were walking on this trail to a waterfall and it was pretty steep and she was carrying her 'cause she was tired of walking. And I was like, honey, let me carry her, I don't want you to fall. And sure enough my wife fell over. But she did everything in her power…she…she…her entire body was scraped up, but she didn't land on that kid.

HAYES I tried.

COOK I don't…I don't even see a bump on your head.

PASCHALL Yeah, I don't see any marks on you, man.

COOK I don't see nothing on your elbows, I don't see nothing on your hands.

HAYES Because I had hold of her.

COOK What's that?

HAYES I had a hold of her like this.

PASCHALL And you just fell flat on your chest? You didn't try to hit a shoulder? 'Cause I…I don't know…

HAYES I tried to move off the stair rail…

COOK I mean you…

HAYES …it didn't turn me.

COOK …you're saying now that, her body was like this or are you…are you saying that her head was between your arms?

HAYES Her head was here and I had her…

COOK So in fact your…your elbows and everything should have hit the ground?

PASCHALL See I…I don't…that's an awkward carrying position, too. I...I don't really see…people will carry them up on a hip or to one side, but not…I don't…I don't know of anybody…I've never seen anybody carry a child where their head is set right there like…like that. That…that doesn't make any sense.

HAYES I carry her ???? Just to hold her.

PASCHALL That…that is a very awkward position to be going up those stairs 'cause most people when they're going to…up…up and down stairs, like keep at least one of their hands available, especially if you're holding a child. I…I don't understand, I mean if you…if you picked her up and set her one hip, I'd understand you fell on her sideways. But I don't understand you…you hugging her and walking up the stairs. That's just…that doesn't…that doesn't mesh in my head. Especially if you're falling down. If you fall three ??? of stairs, nobody falls straight down.

HAYES I didn't fall straight down.

PASCHALL How'd you…how'd you fall, man?

HAYES I fell sideways and I tried to push myself back around and I pushed myself onto her.

PASCHALL Did you stumble a couple of steps? Or did you just…just trip?

HAYES I just stumbled from ???? fifth or sixth stair and I tried to catch my balance and fell.

COOK I'm going to be honest with you, you've told us third or…third and now we're at fifth to sixth.

HAYES [inaudible] I stumbled forward.

PASCHALL What happened after you fell? Did you pick her up and shake her? You didn't try to shake her back…wake her or anything?

HAYES She wasn't asleep. She looked at me and started crying a little a bit, then she stopped.

PASCHALL How many…how long do you think she was crying?

HAYES Four or five seconds maybe.

PASCHALL Four or five seconds? Like when she cried…loud or did she did she whimper? Was she screaming like a little kid screams? Was she like yelling like real loud or was it just like a…

HAYES It was just like a little tantrum really. Just like she had just ????

PASCHALL I mean like…like real loud, like ear piercing loud or like…like quiet…like…just like, ow! Or was it like screaming loud?

HAYES She was screaming, but not like ear piercing loud. I picked her up and she laid her head on my shoulder.

PASCHALL What did you do with her then?

HAYES I took her and put her in the car.

PASCHALL When did she start…

HAYES She still had her eyes open.

PASCHALL When did she start bleeding?

HAYES I guess when I got to Davis Creek and I looked back and there was blood coming out of her nose.

PASCHALL Did you stop and clean it up?

HAYES No. I reached back and pushed her head back and tried to wake her up.

PASCHALL How much blood was coming out of her nose? A whole bunch?

HAYES I wouldn't say…you know, enough to fill a tissue. It just looked like a nose bleed.

PASCHALL Now…put us in…in…I know, I'm…I hate doing this, but put yourself in our position right now. And…and…and think if…if you were talking to somebody for this long and that uh…and that they finally said it was an accident, which is…I understand being scared, but this is…this is your life here, man, this ain't no game. But uh…what do you think we should do? Do you think that somebody who denied medical treatment to a child and…and then didn't…didn't tell the doctors what was wrong so they had to sit there and figure it out for an hour, do you think that that…do you think that was a bad choice?

HAYES I know it was a bad choice.

PASCHALL What do you think you should have done?

HAYES I should have called an ambulance. I should have called someone.

PASCHALL Why didn't you call an ambulance?

HAYES Because I was scared. I didn't know what to do. I've never been in this situation.

PASCHALL Why were you scared? I don't understand that. If…if…if my kid got hurt and my dog got hurt, I…I'd get it treated…I…I'd…I'd take care of it first.

HAYES Like I said, I didn't think she was hurt like that. I didn't think I had hurt her like that.

PASCHALL She was crying and then she stopped. And she just…yeah…I don't understand.

HAYES She was still awake.

PASCHALL How long was she awake? Was she awake when you put her in the car?

HAYES She looked at me and I told her, just go to sleep. She laid her head on my shoulder, so I thought she was tired.

COOK Was that before you got in the car? When you thought she was dying?

HAYES I didn't think she was dying. I just thought she was tired.

COOK Tired?

PASCHALL Now when you put her in the car, was she still awake? What do you mean…was she…how do you know she was awake?

HAYES 'Cause she looked at me and she was looking at the back of my seat I guess. And I just told her to go to sleep.

PASCHALL So she still had her eyes open? Now did she help you get to the car seat? Did she help put her arms through it or anything?

HAYES She never really does.

PASCHALL She never really does?

HAYES She'll get out of it, but she doesn't really help me put her in there. ????

COOK ???? She didn't seem limp…she didn't seem…that's what you're telling me?

HAYES No. She wasn't limp. About like she was when I took her out of the car.

PASCHALL We're still missing some stuff. The uh…the damage to her was such that she took other violent injuries.

HAYES I didn't do anything else to her.

PASCHALL I'm not saying you did anything on purpose or that you did anything else to her, we're just trying to figure out where these other…there were several marks on her head that were bruised. And they were from more than one…one traumatic event. They were from several traumatic events.

HAYES Also from that day?

PASCHALL I don't know.

HAYES I didn't…I mean, I didn't do anything to her. That was all that happened.

PASCHALL Nothing…nothing else at all? Because, like I say, man, this…

HAYES This is my life.

PASCHALL This is your life and…

HAYES It's already over. I don't need to lie anymore. If I lie it just makes it that much worse. I'm done lying. You're right. I feel a million times better about this since [inaudible].

But I still feel horrible that that little girl's life was lost because of me. I don't know what else I can tell you guys.

PASCHALL I heard that exact same line from you an hour or two…an hour ago. You said, I…what do you want from me? And I'm gonna' tell you the same thing, is I just want you to tell me the truth.

HAYES But I've you the truth now.

PASCHALL You said that same thing too. Now what I don't understand about it is once again, your carrying position, and why you didn't try hit a shoulder or something? And if…and if you took such a spill like that, how come you don't have any marks on you? Do you not have any bruises on you at all? Did you not feel sore from the fall?

HAYES My shoulder hurt.

PASCHALL I mean there's…I don't even know…from the end of your…your thing to your storage chest, is maybe four feet. And if you fell from the third step, four feet down, then I don't know how you could have fell flat on that girl. 'Cause it…it's…like how far is it from…you know how you got that little chest down there? At the bottom of your stairs? What is that , like a tote? You have some totes there? That's right. How far between the steps to those totes?

HAYES Probably two, three foot.

PASCHALL Two, three foot? You just said you were five eleven. And if you fell from the third foot or the third step, two, three foot to the...to the tote, three steps and they were six and a half inch steps…

HAYES I'm not…

PASCHALL …so we got three to four six and a half inch steps…plus three feet is only four and a half feet. And you're five foot eleven. You see how I…you…you can understand why I don't believe you, right? 'Cause it doesn't make any sense. 'Cause I've never seen somebody carry a child up the stairs in the middle of their chest. There's not enough room for you to fall down there. You…you…you see what's going through my mind? You understand what I'm saying?

HAYES If you want, I can go fall down the steps again.

PASCHALL No, I don't want you to fall down the steps. We might have you walk through what you're telling us. And we probably will. But I…you know, I'm just trying picture in my head, I'm trying to, like I said, man, what we're trying to do here is that we're trying to figure out how this happened and…and find out the truth so we can…we can figure out what's going on. We need to know. We need to know exactly what happened. We need to know everything ???? and it still…it still seems like I'm missing stuff, right? Does that seem that way to you?

COOKS Your story isn't agreeing with the doctors.

PASCHALL The story…your story does not agree with the doctors. And…and in my mind, I don't see how it's physically possible for you…for you to fall and land like that and not ???? Do you…do you…that's…that's what I've got going on right now. If…

HAYES I don't know how I…how you couldn't see that I fell there. You've been at my house.

PASCHALL I hadn't been to your house. Well…what I'm saying is…I'm six foot nine. If I were to fall, I…my head would hit approximately, you know, six to six foot nine away. Right? If I've got only two feet to fall in…

HAYES I didn't fall right there. I fell…

PASCHALL I would have hit the tote. I'm just…yeah…yeah…after you fall…if you start falling, this uh…you know…I…I just don't see how you could hit…I…I'm trying to work it out, but I…I don't see it.

HAYES Here's the steps.

PASCHALL Okay.

HAYES Here's the totes. Here's the door. When I tried to turn myself off the banister, it turned me this way.

PASCHALL Well, I mean…but…like you're…okay…okay. You're falling. You're like, you're starting to trip over your pants. You're still going down a couple of steps.

HAYES Right.

PASCHALL Okay.

HAYES Right. Tried…tried to get the banister…

PASCHALL And you tried to reach out with one hand?

HAYES Right.

PASCHALL Okay. So you're holding your kid with just one arm now. Okay. And then what happens?

HAYES When I tried to get the banister I was….I fell sideways.

PASCHALL You miss and you fell like…like this or you fell like this? Which shoulder did you land on? Your right shoulder or left shoulder?

HAYES I didn't land on my shoulder. I landed right here.

PASCHALL You said your shoulder was sore.

HAYES Well, yeah…

PASCHALL Okay.

HAYES …'cause I hit here.

PASCHALL Okay.

HAYES But I fell like this…and turned toward the door.

PASCHALL Where was her…where was she at?

HAYES She'd have been on my chest.

PASCHALL She'd have been on your chest? So you had this arm like this…

HAYES …this arm's here…

PASCHALL …so she was…she was over here

HAYES …when I was falling down the stairs I had her here.

PASCHALL Okay.

HAYES When I fell down the steps I had her like this.

PASCHALL You had her like that. Now was she facing you or…

HAYES Yeah, she was facing me.

PASCHALL She was facing towards you. Okay.

HAYES Does it make more sense now?

PASCHALL I don't know. I'm gonna' have to…we'll…we'll probably have to go there and walk through just like…and see it in the…in the steps and see…and see uh…see how it goes, but…I…I…I'm picturing what you're telling me.

HAYES Does that make more sense to you know falling in that small area?

PASCHALL It…it…I…it's still a pretty tight area. It's still pretty small. And what…and what bothers me is it doesn't mesh with the…what the ME says. I'm not a doctor. I'm many years away from being a doctor.

HAYES I know I lied to you guys and I didn't tell you. But even when I tell you the truth, you tell me I'm not telling the truth. I would take a polygraph if you wanted me to.

PASCHALL That ????? can be an option. You would be willing to do that?

HAYES To prove to you that that's what happened.

PASCHALL What would be the consequences if you didn't pass?

HAYES I don't understand what the difference would be. Seems like I'm…I'm going to jail anyway it goes.

PASCHALL I've gotta' be honest, you're probably gonna' go to jail for…for…the big…the big thing is uh…is…you didn't…you didn't call for immediate medical attention. Even if you waited ten minutes, you then didn't…didn't give...give what was wrong with her. One of the biggest things with dealing with…with this type of injury was diagnosing what's wrong. And then if they did diagnose her then…then they very well could have saved her. So knowing…

HAYES I was scared.

PASCHALL …knowing what's wrong right away instead of having to look for…look at heart problems, at chest problems…that's where they're gonna'…they're gonna' start with the S-68…where…where she stopped that breathing. The first thing they're gonna' look at is your chest and why isn't the chest working. Then look at her heart and they do the EKGs and they do that other stuff and then they start looking around. And having to look around like that, you know, that's what took the time. So you made a mistake, but we can get through it if we can just figure out exactly how this went down.

HAYES That's what happened. Can I see my fiancé, please? Before you guys tell her all this horrible stuff.

PASCHALL When's the last time you talked to her? When she came over here?

HAYES Before she came to talk to you guys.

PASCHALL What'd you guys talk about?

HAYES What she had to go do.

PASCHALL And what'd she have to go do?

HAYES She had to go, ???? go print some pictures off from Walmart.

PASCHALL Have you guys planned a date? ????

HAYES I just want to see her and tell her I love her even if she hates me right now.

PASCHALL If you were to tell her what happened now, what do you think she'll…what do you think she'll say to you? Do you think she'll believe you? Do you think so?

HAYES She would know if I was lying.

PASCHALL Is she able to tell if you're lying? If we were to get her here, would you tell her what happened?

HAYES And then she'd leave.

PASCHALL And then she'd leave? You think she'd ever talk to you again? Even if it was just an accident?

HAYES I don't think she would. Can you get her to talk to me?

PASCHALL Do you still have your phone on you? Did you bring with? Yeah, probably uh…something like that probably can be arranged here just shortly. What uh…what I think we're gonna' do is, if it's alright with you, we'll probably have you walk through and uh…and we'll just kind of…kind of see how you got it and we might even do that on video tape if you're alright with that. Just so we can uh…get that on record and then uh…then after that or before that depending on what Detective Gray wants to do, we'll uh…I'm pretty sure we'll…we'll be able to get your…your old lady over here to talk to her.

HAYES I'd just like to smoke a cigarette.

PASCHALL You'd like to smoke another cigarette? Have…have…do you have any on you?

HAYES No, Tessa was supposed to go get me some.

PASCHALL Who was?

HAYES Tessa.

PASCHALL Oh, okay.

HAYES That was before all of this.

PASCHALL We can do a cigarette break, we've been in here for awhile. Do you want to take another break?

HAYES Please.

PASCHALL Okay. Let's go…let's go over and get the cigarettes. Detective Gray?

GRAY Yeah?

PASCHALL Um…he want s to see the…he's got a couple of requests. He wants to uh…let's…let's come back in here. Uh…he would like to uh…take a cigarette break and then uh…he said he'd walk us through it if we wanted to get a video tape up and running, he'd walk us through how he fell down the stairs. And then uh…he was hoping to be able to speak to his uh…his girl, which I don't know if…

GRAY She ain't gonna' talk to him.

PASCHALL She…you don't think so? Okay, then.

GRAY You got any cigarettes?

PASCHALL I don't have any cigarettes. If you want us, we can run to 7-11 real quick or I can get some or uh…

GRAY Yeah.

PASCHALL Then uh…then we have a video…I have a tandem bag in the car, right?

GRAY I don't know if it works or not.

PASCHALL Okay.

GRAY Just have a seat here and we'll run out and we'll go get you something to smoke. [moving recorder] I don't know how long that works.

PASCHALL I think it's got uh…I don't know how long it goes either. I've never used it this long. I think those are like four or five hours. Uh…okay, I'm gonna' go get cigarettes. What kind…what do you smoke?

HAYES Anything menthol really.

PASCHALL Anything menthol. Do you care which kind?

HAYES I prefer Camels, but it….

PASCHALL Camels? Camel Menthols. And then uh…do you want anything else? Do you want a bag of chips or something, man? Okay. Um…then I'll look and see if I've got a camera.

HAYES Does that have to stay on the whole time?

PASCHALL No. It…it…we like to do it. It…it's just…

HAYES Even if I don't say anything else pertaining to this? If I have something to say, can I tell you to turn it on?

PASCHALL No, uh, it's up to you, man, like I said…

GRAY It doesn't…

PASCHALL I…I prefer to keep it on just for records keeping purposes. That way uh…I don't have to take notes, you know what I mean? I…I write down a lot notes and it takes forever. But uh…I…I prefer to keep it on if that's alright.

HAYES Okay.

PASCHALL Okay, let me uh…let me go get uh…Camel Menthols and uh look for that…and then uh…what's uh…do you have the girl's number so I can call her?

GRAY Check the…

PASCHALL [inaudible]

GRAY Let's…what all have you got in your pockets right now? So we're not getting any surprises here.

HAYES I already showed you everything.

GRAY You can just lay it out there so you'll know where it is.

HAYES Can I throw this away? That's all I have.

GRAY You can have a seat there.

[inaudible conversation]

GRAY I'm still just having a hard time matching the injuries to the description.

HAYES I know that you guys don't believe me now.

GRAY Uh…it's matching the…what we've gone over all along, you know, the medical side of it.

COOK [inaudible]

GRAY Hmm?

COOK I'm gonna' see if it's all right if we have…have him walk us through it.

GRAY Alright with who? It's alright.

COOK It's alright? Okay. I'm gonna' try to get your X-Box times two, okay? Off your live…you were playing with…online? What's your uh…what's your uh…name ???

HAYES Raptures Legacy.

COOK What's that?

HAYES Raptures Legacy.

COOK And then just all ????

HAYES Yeah.

COOK So just R-A-P…

HAYES Rapture with an "s" at the end, Raptures.

COOK R-A-P-T-U-R-S? Or E-S?

HAYES E-S.

COOK And then Legacy…L…

HAYES E-G-A-C-Y.

COOK A-C-Y? What's that about?

HAYES Have you ever played Bio Shock?

COOK What's that?

HAYES Have you ever played Bio Shock?

COOK No, I don't even know what it is. What's Bio Shock?

HAYES It takes place in the city of Rapture.

COOK That's one…another one of the uh…X-Box games? That…were you on…you were online all day on that? Or you…were you just playing the actual video game?

HAYES I was just playing Halo. I was doing some achievements offline, doing some matchmaking online.

COOK What's this other game about? The Rapture ???? Jurassic Park or something or?

HAYES It's a underground…underground city. It's just a science fiction game. It's supposed to take place in 1958. The guy pretty much created his own society underneath the ocean that he could cover genetic development, they had just to call people and go crazy. You start-off the game, your plane crashes and you ended up finding the city.

COOK How much time do you think you spent playing that game?

HAYES First time, a day…but I didn't get all the way through.

COOK How far did you get through on…on Halo three there…is it Halo three?

HAYES No, Halo Reach.

COOK Halo Reach, that's the name of it? How far do you think you got through on that?

HAYES I think I'm on like the seventh mission.

COOK Seventh mission?

GRAY Is it any good?

HAYES It's a great game. It's the best one they've released.

[discussing video game]

COOK So this Halo Reach, that's uh…that's your newest one? What day did you get it?

HAYES When it came out…on the thirteenth I think.

COOK How long does it take you normally to get through a mission?

HAYES I haven't got to play it very much since I got it.

COOK Oh.

HAYES I had a little Halo party the night that I got it and everybody came up and we played some multi-player. I didn't really get to mess with it until about two weeks ago, I guess.

COOK You been playing it since?

HAYES Off and on when I had time. Between work.

COOK When you say you got cut from…is that…from work? Is that what you're talking about/

HAYES Mmm hmm.

COOK Kind of a new phrase, I hadn't heard ???? Hearing a lot of people say that here lately.

HAYES Saying I'm cut or I'm phased…just ???? from the floor, they're not taking tables any more.

COOK That happened what…like you…you get put on a schedule and then they cut you? Is that what you're…

HAYES You go in at a certain time and will work to like…the volume…what the volume is is when you stop getting business, when it slows down. They'll cut people to try to save labor cost. So they get them off the floor and get them out of there so they're not spending more money on people that aren't doing anything.

COOK That happen a lot?

HAYES Every day.

COOK Yeah.

HAYES They have to. ????

COOK Do they do that by like seniority or anything? Random?

HAYES When you get there, I come in at four and everybody else came in at five, I'll be one of the first ones out. First in, first out I guess, you know. [inaudible]

COOK Did you eat? ???? You already get you a new cell phone? I bet that thing takes a long time to text on, don't it?

HAYES I don't like to text anyway, but she does. So I did it for her. [inaudible, phone ringing] Can you tell if I'm probably going to jail tonight?

GRAY We still need to go over there and uh…and go through what you said you was gonna' show us. You want to go smoke a cigarette?

HAYES Leave my stuff there?

GRAY Just leave it there. It'll be fine.

HAYES Leave my phone, too?

GRAY Yep. Just walked outside to smoke a cigarette. The time right now is 1929 hours. This is Detective Gray and we're gonna' go off tape.

END OF STATEMENT