ORIGINAL

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia,

Plaintiff below, Respondent,

v.

Supreme Court No.: 20-0744
Case No. CC-41-2016-F-429
Circuit Court of Raleigh County

A.B.,

Defendant below, Petitioner.

PETITIONER'S BRIEF
Contains Confidential Information

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ASSIGNMENT OF ERROR

In Petitioner's criminal trial, her lawyer knew confidential information about a State's witness and could impeach her because the lawyer's firm once represented the witness. The circuit court denied trial counsel's motion to withdraw.

Did the circuit court violate Petitioner's Sixth Amendment right to conflict-free counsel where her lawyer, unable to zealously advocate for Petitioner and protect the confidences of the State's witness, chose not to impeach, or even cross-examine, her firm's former client?

STATEMENT OF THE CASE

In the light most favorable to the State, it introduced sufficient evidence to convince a jury that Petitioner committed child neglect resulting in death and two counts of child neglect resulting in a substantial risk of injury.[1] However, trial counsel had a concurrent conflict between Petitioner and a State's witness that counsel's firm formerly represented.[2] Because this actual conflict of interest adversely affected counsel's performance, the lower court erred and violated Petitioner's Sixth Amendment right to conflict-free counsel.[3]

a. A jury convicted Petitioner of child neglect resulting in the death of her five-month-old daughter and neglect resulting in a substantial risk of injury to her other children.

Per the State's trial theory, Petitioner co-slept with her five-month-old daughter after drinking heavily.[4] The child asphyxiated, and the police investigation which followed showed unkempt living conditions that endangered Petitioner's two older children as

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[1] *See* A.R. 988–89.
[2] *See* A.R. 140–41.
[3] *See Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).
[4] *See* A.R. 440–41.

well.[5] To prove its case, the State used police statements from Petitioner and her husband, photographs from inside the home, and empty alcohol containers from the scene.[6]

It also relied upon testimony from first responders, investigating officers, medical experts, and family members who lived in the duplex's lower level.[7] A key family witness was Petitioner's juvenile niece, K.S.[8] K.S. testified that she was the first person who found Petitioner passed out on the child.[9] She could not rouse her aunt or move the child, so K.S. called 911 and notified her adult guardian.[10] The jury convicted Petitioner of all counts.[11]

b. Counsel discovered a concurrent conflict between Petitioner and a State's witness, but the circuit court denied her motion to withdraw.

Prior to trial, defense counsel notified the court of an actual conflict within the Public Defender Corporation.[12] When the PDC first received the case and ran a conflict check, no one involved triggered an alert.[13] But in the four years that it took the State to try Petitioner, K.S. became criminal justice involved and the PDC represented her.[14] Trial counsel had actual knowledge of confidential information she could use to impeach K.S. that she would not possess but for her firm's prior representation.[15] Trial counsel believed the confidential information would "[a]bsolutely" be useful at trial to cross-examine K.S. and her adult guardian, who also testified for the State.[16] As an advocate for Petitioner, trial counsel had a duty to use the information.[17] But due to her imputed duty of loyalty to

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[5] *Id.*
[6] *See* A.R. 997–1004; *see also* A.R. 1158 *et seq.*
[7] *See* A.R. 433; A.R. 600; A.R. 837.
[8] *See* A.R. 470.
[9] *See* A.R. 471.
[10] *See* A.R. 472.
[11] *See* A.R. 988–89.
[12] A.R. 1041.
[13] A.R. 158.
[14] A.R. 142.
[15] A.R. 141; A.R. 142–43; *see also* A.R. 479.
[16] A.R. 143–44.
[17] *Id.*; *see also* WV R RPC Rule 1.7(a)(2).

her firm's prior client, she could not impeach her with it.[18] Trial counsel contacted the Office of Disciplinary Counsel, which advised that she could not represent her present and the former client's conflicting interests concurrently and that the conflict was unwaivable.[19] Counsel therefore moved to withdraw.[20]

The State objected[21] that Petitioner merely sought to delay the trial.[22] It argued that the PDC no longer represented K.S., the confidential information trial counsel possessed did not impeach her, and she believed K.S. would be willing to waive confidentiality.[23] The State further argued that WV R RPC Rule 1.9 only creates a potential conflict where the present case relates to the former client's representation.[24] Finally, the State argued that trial counsel did not have an actual conflict because she had not personally represented K.S. and K.S.'s juvenile record was generally known.[25]

Per the State's argument, the lower court treated the issue as a potential conflict rather than an actual one.[26] The court ruled that the present and former cases were dissimilar and counsel's imputed conflict did not require disqualification.[27] It then denied the motion to withdraw,[28] and required trial counsel to represent Petitioner at the trial five days later.[29]

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[18] *See* A.R. 143; *see also* WV R RPC Rule 1.9.
[19] *See* A.R. 141; *see also* WV R RPC Rule 1.7 ("A concurrent conflict of interest exists if: ... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a former client[.]").
[20] A.R. 1041; *see also* A.R. 140.
[21] A.R. 144.
[22] *See* A.R. 156.
[23] *See* A.R. 145–46, 151.
[24] A.R. 150. *But see* WV R RPC Rule 1.9(c).
[25] *See* A.R. 151–53 (citing *State v. Rogers*, 231 W. Va. 205, 744 S.E.2d 315 (2013)); *but see* W. Va. Code Ann. § 49-5-103(b) ("Records of a juvenile proceeding conducted under this chapter are not public records and shall not be disclosed to anyone unless disclosure is otherwise authorized by this section."); *also but see* A.R. 479 (State complaining that Petitioner could not have accessed the records but for the PDC's representation of both clients).
[26] *See* A.R. 159.
[27] A.R. 159–60.
[28] A.R. 161–62.
[29] *Compare* A.R. 137 *with* 204.

c. Trial counsel did not contest the State's efforts to limit her advocacy and opted not to cross-examine her firm's former client.

Within minutes of the circuit court's decision to deny the defense motion,[30] the State sought to limit trial counsel's ability to confront her firm's former client[31] and counsel acquiesced.[32] The State moved that trial counsel submit any cross-examination to in camera review prior to confronting K.S. in the jury's presence.[33] Trial counsel responded, "That's fine with me, your honor."[34]

At trial, counsel said she intended to cross K.S. based upon the confidential information she knew due to her firm's prior representation.[35] The State insisted that Petitioner could not impeach the witness without finding that the evidence's relevance outweighed the witness's interest in confidentiality, and trial counsel did not object.[36]

Outside the jury's presence, trial counsel said that the State charged her firm's former client first for truancy and delinquency but deferred the matter to juvenile drug court.[37] K.S. underwent a psychological evaluation and had been committed to Highland Hospital.[38] Trial counsel said that she "would ask [K.S.] to the extent possible about all of that."[39] Trial counsel represented that this information was relevant to credibility.[40]

The State proposed that trial counsel ask only one question to establish a foundation and that unless this question, asked in camera, opened the door, that the court exclude the evidence.[41] The State dictated the question: "Were you under the influence when you saw and heard the things you saw and heard?"[42] The court asked "[Trial counsel], do you

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[30] *See* A.R. 162.
[31] *See* A.R. 168.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] A.R. 473.
[36] A.R. 474–76.
[37] A.R. 473–74.
[38] *Id.*
[39] A.R. 474.
[40] A.R. 478.
[41] A.R. 479.
[42] *Id.*

take issue with ... the prosecutor's proposed limitation on the scope of cross-examination and the use of these records?"[43] Trial counsel replied "I do not,"[44] and then paraphrased the question dictated by the State: "[K.S.], on November 7th of 2015, had you used any alcohol or drugs?"[45] K.S. said no, and then confirmed in response to a follow up question that she had not used drugs either that day or the day before.[46]

Based upon that answer to trial counsel's paraphrasing of the State's cross-examination question, the court asked counsel if she found the answer satisfactory and if she had a position on admissibility.[47] Trial counsel said she was "satisfied with that" and "[did] not believe any of this would be admissible given [K.S.'s] response."[48] There was no need for the State to move to exclude the records; trial counsel elaborated that she "would not move to admit anything based on [K.S.'s] responses."[49]

Still in camera, the court asked if trial counsel intended to offer any cross-examination in the jury's presence, and she said she did not.[50] The court proposed to reopen the courtroom to let the witness step down.[51] The State objected and asked the court to also inquire about cross-examination so that the jury would hear trial counsel say she had no questions for the witness.[52] The court and trial counsel acquiesced.[53]

Petitioner now appeals. Trial counsel could not both zealously advocate for Petitioner by impeaching K.S. and keep her duty of loyalty to K.S. by withholding confidential information.

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[43] A.R. 479–80.
[44] A.R. 480.
[45] A.R. 481.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] A.R. 482.
[50] *Id.*
[51] A.R. 482–83.
[52] A.R. 483.
[53] *Id.*

SUMMARY OF ARGUMENT

That one "cannot serve two masters is a principle as true in law as it is in morals."[54] Forced to represent concurrent, conflicting interests, counsel acquiesced when the prosecutor demanded an in camera hearing to screen counsel's cross-examination of the former client. Counsel acquiesced when the prosecutor demanded that she ask only one question during in camera cross-examination of the former client. Counsel acquiesced when the prosecutor chose the question that she was allowed to ask during in camera cross-examination of the former client. And after the former client answered the scripted question that counsel was allowed to ask, counsel acquiesced to the State's efforts to exclude the confidential information. Even though—incredibly—the former client's testimony opened the door to impeachment, trial counsel did not seek to admit it.

Perhaps the lawyers believed this charade to be an elegant solution. If the information was otherwise inadmissible, then neither client could complain. But this stunning lack of advocacy only highlights the fundamental problem. Trial counsel could not honor both her duty of loyalty to the former client and duty of zealous advocacy to her current one. And in choosing devotion[55] to the former, the conflict adversely affected her performance.

STATEMENT REGARDING ORAL ARGUMENT

Per *Cuyler v. Sullivan*, where a defense lawyer "actively represent[s] conflicting interests"[56] courts must reverse if the conflict adversely affected counsel's performance.[57] And this Court has ruled that "[w]here representation is affected by an actual conflict of interest, the defendant can not be said to have received effective assistance[.]"[58] Petitioner therefore requests a Rule 19 oral argument and a signed opinion reversing and remanding her case for a new trial.

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[54] *Guthrie v. Huntington Chair Co.,* 71 W. Va. 383, 76 S.E. 795, 796 (1912).
[55] *See id.*; *see also* Matthew 6:24.
[56] *Nix v. Whiteside*, 475 U.S. 157, 176 (1986) (quoting *Sullivan*, 446 U.S. at 350).
[57] *See Sullivan*, 446 U.S. at 349–50.
[58] *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 413–14, 624 S.E.2d 844, 850–51 (2005).

ARGUMENT

Trial counsel had a disqualifying conflict because she could not both protect the confidential information of her firm's former client and impeach her with it.

The Sixth Amendment to the United States Constitution entitles a criminal defendant to "the Assistance of Counsel for his defence."[59] Beyond prohibiting outright deprivation,[60] the Counsel Clause also entails a right to effective assistance[61] from conflict-free counsel.[62] "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[63] Without regard for its impact on the trial's outcome,[64] a conflict violates the Sixth Amendment and entitles a defendant to a new trial if: 1) it was actual, not potential, and 2) it "adversely affected his lawyer's performance."[65] And defense lawyers' representations as to a disqualifying conflict are entitled to considerable deference.[66] Where counsel objects that she cannot ethically represent a client, an actual conflict that adversely affects performance almost certainly exists.[67]

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[59] U.S. Const. Amend. VI; *see also* W. Va. Const. Art. III § 14.

[60] *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (federal defendants entitled to counsel); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (incorporating the Counsel Clause as applicable to the states via the Fourteenth Amendment Due Process Clause).

[61] *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also* Syl. Pt. 1 *Cole v. White*, 180 W. Va. 393, 376 S.E.2d 599 (1988).

[62] *Sullivan*, 446 U.S. at 350; *Cole*, 180 W. Va. 393 at Syl. Pt. 2; *see also Wood v. Georgia*, 450 U.S. 261, 271–72 (1981).

[63] *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978).

[64] *See Strickland*, 466 U.S. at 692; *see also Cole*, 180 W. Va. 393 at Syl. Pt. 4.

[65] *Sullivan*, 446 U.S. at 350; *cf. Cole*, 180 W. Va. 393 at Syl. Pt. 5 (actual concurrent conflict requires reversal irrespective of prejudice); *see also Perillo v. Johnson*, 205 F.3d 775, 798 (5th Cir. 2000) ("A conflict of interest may exist by virtue of the fact that an attorney has confidential information that is helpful to one client but harmful to another."); *State v. Kirk N.*, 214 W. Va. 730, 740, 591 S.E.2d 288, 298 (2003) ("[T]he test in ineffective assistance of counsel cases based upon asserted conflicts of interest is actual, not theoretical or speculative, conflict, leading to an adverse effect upon counsel's performance.").

[66] *Holloway*, 435 U.S. at 485–86.

[67] *See Mickens v. Taylor*, 535 U.S. 162, 168–69 (2002) (*comparing Halloway v. Arkansas*, *supra* at n. 63, *with Cuyler v. Sullivan*, *supra* at n. 3); *cf. Halloway*, 435 U.S. at 485 ("[S]ince the decision in *Glasser*, [*infra* at n. 114,] most courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted.").

Here, the court applied the wrong standard as a matter of law. It apparently analyzed WV R RPC Rule 1.9(a) and (b) and found that the "primary factor" was whether the current and former clients' cases substantially related and concluded that they did not.[68] However, "[A] current matter is deemed to be substantially related to an earlier matter in which a lawyer acted as counsel if (1) the current matter involves the work the lawyer performed for the former client; *or (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client*, unless that information has become generally known."[69] Also, under Rule 1.7, trial counsel's obligation to her firm's former client "materially limited" her advocacy for Petitioner.[70] Rule 1.9(c) prohibited trial counsel from impeaching the former client with confidential information, regardless of subject matter.[71] The Court's review is therefore de novo.[72]

1. Trial counsel had an actual conflict because she could not be loyal to the former client without violating her duty to zealously advocate for Petitioner.

Applying the correct standard in the first instance, trial counsel had an actual, concurrent conflict due to her duty of loyalty to her firm's former client and her duty of zealous advocacy to Petitioner.[73] A lawyer may not represent a defendant if an obligation to a former client "materially limits" advocacy.[74] And here, trial counsel could not impeach her firm's former client without revealing confidential information.[75]

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[68] A.R. 159–60.
[69] Syl. Pt. 1, *State ex rel. Keenan v. Hatcher*, 210 W. Va. 307, 557 S.E.2d 361 (2001) (*emphasis added*).
[70] WV R RPC Rule 1.7(a)(2) ("[A] lawyer shall not represent a client if ... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a former client[.]").
[71] WV R RPC Rule 1.9(c); *see also* WV R RPC Rule 1.6.
[72] *State v. Kirk N.*, 214 W. Va. 730, 737, 591 S.E.2d 288, 295 (2003) (quoting *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 320, 465 S.E.2d 416, 422 (1995); *cf.* Syl. Pt. 3, *Comm. on Legal Ethics of the W. Va. State Bar v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994).
[73] *Cf. Strickland*, 466 U.S. at 688–89 (professional rules and norms serve as informative guides for evaluating counsel's performance).
[74] WV R RPC Rule 1.7(a).
[75] WV R RPC Rule 1.9(c).

First, Petitioner had a duty of loyalty to the State's witness.[76] Subject to limited caveats, WV R RPC Rule 1.9(c) prohibits "A lawyer ... whose present or former firm has formerly represented a client" from using "information relating to the representation to the disadvantage of the former client[.]"[77] This rule does not end with the representation. "Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented."[78]

Further, it does not matter whether trial counsel personally represented the State's witness—it is enough that her firm did, and that she actually possessed confidential information as a result.[79] The court relied upon *State v. Rogers*[80] to discount the conflict,[81] but the case is distinguishable. In *Rogers*, a court denied a public defender's motion to withdraw.[82] Other lawyers in counsel's firm had represented State witnesses,[83] but he did not access any confidential information held by their firm.[84] This Court affirmed because Rule 1.9 imputes the firm's duty of loyalty—not constructive knowledge. Since counsel did not possess the witnesses' confidences and could not use them, he had no actual conflict—just a potential one.[85]

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[76] *See*, e.g., *U.S. v. Martinez*, 630 F.2d 361, 362–63 (5th Cir. 1980) (Defendant denied right to conflict-free counsel where trial counsel represented he could not adequately cross-examine prosecution witness he had previously represented without revealing confidential information).
[77] WV R RPC Rule 1.9(c); *see also* WV R RPC Rule 1.6.
[78] Commentary to WV R RPC Rule 1.9, ¶ 7.
[79] *See* WV R RPC Rule 1.9(c); *see also* WV R RPC Rule 1.10; *cf. U.S. v. Ross*, 33 F.3d 1507, 1523–24 (11th Cir. 1994) (Firm's prior representation could disqualify trial counsel if "the conflict could cause the defense attorney improperly to use privileged communications in cross-examination" or "the conflict could deter the defense attorney from intense probing of the witness on cross-examination to protect privileged communications with the former client or to advance the attorney's own personal interest.").
[80] *State v. Rogers*, 231 W. Va. 205, 744 S.E.2d 315 (2013) per curiam.
[81] A.R. 160.
[82] *Rogers*, 231 W. Va. at 213.
[83] *Id.* at 212.
[84] *Id.* at 213.
[85] *Id.* at 214.

But here, trial counsel represented, as an officer of the court,[86] that she knew confidential information and that her cross-examination would depend upon non-public evidence that she would not possess but for the prior representation.[87] The lower court's reliance on *Rogers* was therefore misplaced. Trial counsel had a continuing duty to not use confidential information she personally knew against her firm's former client.[88]

Second, counsel had a duty to Petitioner.[89] "The relationship of attorney-at-law and client is of the highest fiduciary nature, calling for the utmost good faith and diligence on the part of such attorney."[90] "Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest."[91] As long as the lawyer's conduct is otherwise lawful, she must zealously pursue the client's ends.[92] Zeal not only serves the client's interests, but is essential to the adversary system.[93] And a lawyer cannot allow any obligation to a third party to compromise that duty.[94]

This Court considered a similar issue in *State ex rel. Blake v. Hatcher* and found that conflicting duties of loyalty and zealous advocacy could require disqualification even over the defendant's waiver.[95] There, the State sought to disqualify a defense lawyer who had previously represented one of its witnesses in unrelated matters.[96] The Court found that in cases where a defense lawyer previously represented a State's witness, it is possible that the lawyer's duties to protect the witness's confidentiality and to advocate for their current client could conflict.[97] The Court remanded for a hearing to determine whether

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[86] *See Holloway*, 435 U.S. at 485–86.
[87] A.R. 143–44.
[88] WV R RPC Rule 1.9(c).
[89] *See* WV R RPC Rule 1.1.
[90] Syl. Pt. 4, *Bank of Mill Creek v. Elk Horn Coal Corp.*, 133 W. Va. 639, 57 S.E.2d 736 (1950).
[91] *Strickland v. Washington*, 466 U.S. 668, 688 (1984).
[92] *See* WV R RPC Rule 1.2; *see also Nix v. Whiteside*, 475 U.S. 157, 166 (1986).
[93] *Cf.* Syl. Pt. 2, *State v. Boyd*, 166 W.Va. 690, 276 S.E.2d 829 (1981).
[94] *See* WV R RPC Rule 1.7; *cf. Clark v. Druckman*, 218 W. Va. 427, 431–32, 624 S.E.2d 864, 868–69 (2005) (Duty to zealously advocate for the client is incompatible with duties for third parties).
[95] *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 410, 624 S.E.2d 844, 847 (2005).
[96] *Blake*, 218 W. Va. at 410–11.
[97] *See id.* at 416.

counsel actually possessed confidential knowledge he could use against his former client.[98] If counsel actually knew confidential information, as trial counsel below represented to the court, disqualification would be appropriate.[99]

Here, these competing obligations created an actual, concurrent conflict because her responsibilities to the former client "materially limited" her advocacy for Petitioner.[100] Trial counsel stated, as an officer of the court,[101] that but for her ethical obligation to maintain K.S.'s confidences, she would be duty-bound to use confidential information actually known to her to advocate for Petitioner.[102] The circuit court therefore erred in finding no disqualifying conflict. Trial counsel could not remain faithful to Petitioner without betraying her firm's former client, and vice-versa.

2. This actual conflict adversely affected trial counsel's performance because counsel acquiesced to the State on admissibility rather than meaningfully test the former client's credibility.

By denying the motion to withdraw and forcing trial counsel to actively represent conflicting interests, the court placed counsel in an impossible position that adversely affected her performance. To avoid an ethical problem with her firm's former client, trial counsel restrained her advocacy for Petitioner.[103]

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[98] *See id.* at 418.

[99] *See id.*; *see also U.S. v. Kliti*, 156 F.3d 150, 155 (2d Cir. 1998) (Previously representing a State's witness may create a disqualifying conflict); *Doe v. U.S.*, 666 F.2d 43, 49 (4th Cir. 1981) (Lower court properly disqualified defense lawyer who previously represented State's witness); *U.S. v. Millsaps*, 157 F.3d 989, 996 (5th Cir. 1998) (Trial court could disqualify defense counsel who previously represented prosecution witness.); *U.S. v. Shepard*, 675 F.2d 977, 979–80 (8th Cir. 1982) (disqualification appropriate if defense counsel possessed confidential information from representing prosecution witness).

[100] *See* WV R RPC Rule 1.7(a)(2) ("[A] lawyer shall not represent a client if ... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a former client[.]").

[101] *See Holloway*, 435 U.S. at 485–86.

[102] A.R. 143–44.

[103] *Sullivan*, 446 U.S. at 348; *Cf. Ross*, 33 F.3d at 1523 (An actual conflict could adversely affect a lawyer's performance by "deter[ring] the defense attorney from intense probing of the witness on cross-examination to protect privileged communications with the former client or to advance the attorney's own personal interest.").

Rather than zealously advocate for Petitioner, so far as K.S. was concerned trial counsel simply acquiesced to the State's efforts to exclude the impeachment information. This arrangement benefited the former client's confidentiality and trial counsel's interest in avoiding an ethics complaint from her, but at the expense of her ethical obligations towards Petitioner. Trial counsel offered no resistance to the State's demand that the court screen any cross-examination before confronting K.S. in the jury's presence.[104] Trial counsel even acquiesced when the State insisted that the court should weigh the evidence's relevance against the witness's interest in confidentiality[105]—without any basis in law to support this extra gatekeeping step.[106]

Trial counsel then served as a mouthpiece for the State. The State—not defense counsel—dictated the scope, topic, and the specific question that trial counsel would ask.[107] Other than hearing it in defense counsel's voice, the so-called cross-examination came from the same lawyer who prepped and called the witness to testify in the first place.[108]

And in the end, the State did not need to object to the evidence coming in.[109] Despite earlier stating as an officer of the court that it was her duty to use the impeachment evidence at trial,[110] counsel did not even seek to admit it.[111] Trial counsel declined to cross-examine her firm's former client at all.

This lack of advocacy is all the more incredible because, if anything, the former client's answer—that she did not use drugs on the day of the incident—should have opened

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[104] A.R. 168.
[105] A.R. 474–76.
[106] *Compare* Syl. Pt. 2 *State ex rel. Lorenzetti v. Sanders*, 238 W. Va. 157, 792 S.E.2d 656 (2016) (in camera review to decide whether to *disclose* confidential information to counsel) *with* Syl. Pt. 4 *State v. Tyler G.*, 236 W. Va. 152, 778 S.E.2d 601 (2015) (no weighing of confidentiality to impeach with records already possessed).
[107] A.R. 479–80.
[108] *See* A.R. 481.
[109] A.R. 481–82.
[110] A.R. 143–44.
[111] A.R. 481–82.

the door to impeaching her with her admissions to past drug use.[112] If the former client testified to being under the influence, then trial counsel could not have impeached her because her prior admissions to her firm and in court would have been consistent.[113] So either denying drug use—the only other definitive answer—opened the door and counsel chose not to walk through it, or trial counsel connived with the State to limit in camera cross-examination to a question that could not open the door regardless of the answer—all for the benefit of the former client and/or herself.[114]

Given the impossible situation in which the court placed trial counsel, her silence and inaction are shocking but unsurprising.[115] On an unreflective level, trial counsel's capitulations appear to resolve the dilemma—if the confidential information is otherwise inadmissible, then neither client has a basis to complain about trial counsel's decision not to use it. But this misses the point that the right to counsel entitled Petitioner to a lawyer who would actively fight for its admission. One purpose of disqualification under these circumstances is "to foster vigorous advocacy on behalf of the lawyer's current client by removing from the case a lawyer who would otherwise have to be conscious of preserving her former client's confidences."[116] "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."[117] But here, trial counsel had a personal interest in not admitting the evidence. It is unsurprising she did not try.

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[112] *See* Syl. Pt. 1, *State v. Blake*, 197 W. Va. 700, 478 S.E.2d 550 (1996) (to impeach with prior statement, current testimony must be inconsistent but need not diametrically oppose the prior statements.).
[113] *See id.*; *see also* WVRE 613.
[114] *Cf. Ross*, 33 F.3d at 1523.
[115] *Cf. Holloway*, 435 U.S. at 489–90 ("Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.").
[116] *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 158, 697 S.E.2d 740, 750 (2010) (quoting Richard E. Flamm, *Lawyer Disqualification: Conflicts of Interest and Other Bases* § 7.3, at 126–30 (2003 & Cum.Supp.2010)).
[117] *Holloway*, 435 U.S. at 490.

Placed in an impossible situation, trial counsel opted not to confront a State's witness with whom she had an imputed attorney-client relationship and actual knowledge of impeaching, but confidential, information. Though the circumstances of the actual conflict differ, this omission is precisely the sort of adverse effect the Supreme Court had in mind when it crafted the constitutional standard for conflict-free counsel.[118] The circuit court therefore erred when it denied the motion to withdraw, and Petitioner should receive a new trial.

CONCLUSION

Trial counsel could not serve two masters, and her attempt to jointly represent divergent interests only made matters worse. "[I]n a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to refrain from doing[.]"[119] Petitioner therefore requests a new trial with conflict-free counsel.

Respectfully submitted,
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[118] *Sullivan*, 446 U.S. at 348–49 (discussing *Glasser v. U.S.*, 315 U.S. 60, 63 (1942).
[119] *Holloway*, 435 U.S. at 490.

CERTIFICATE OF SERVICE

I, Matthew Brummond, counsel for Petitioner, Ariel Ladawn Bennett, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Brief"* and *"Appendix Record"* to the following:

Holly M. Flanigan
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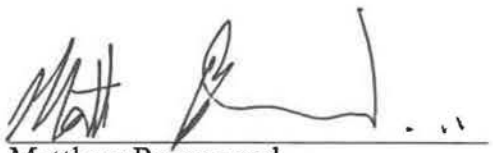
by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 4th day of February 2021.



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