**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 20-0744**

**STATE OF WEST VIRGINIA,**

***Respondent,***



**v.**

**A.B.,**

***Petitioner.***

# RESPONDENT'S BRIEF

Appeal from a September 22, 2020, Order
Circuit Court of Raleigh County
Case No. 16-F-429

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Respondent State of West Virginia, by counsel, Holly M. Flanigan, Assistant Attorney General, respectfully responds to A.B.'s ("Petitioner") Brief.[1] Because Petitioner fails to demonstrate the existence of error by the circuit court, this Court should affirm the Circuit Court of Raleigh County's September 22, 2020, Order in Case No. 16-F-429.

## I. ASSIGNMENT OF ERROR

Petitioner advances the following 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?

Pet'r Br. 1.

## II. STATEMENT OF THE CASE

On September 12, 2016, a Raleigh County Grand Jury indicted Petitioner on one count of child neglect resulting in the November 7, 2015, death of G.B., age five months, in violation of West Virginia Code § 61-8D-4(a) (Count 1); child neglect with risk of serious bodily injury or death of D.B., age four, in violation of West Virginia Code § 61-8D-4(c) (Count 2); and, child neglect with risk of serious bodily injury or death of J.B., age two, in violation of West Virginia Code § 61-8D-4(c) (Count 3). App. 1039. A jury convicted Petitioner of all counts. *Id.* at 1054.

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[1] Consistent with this Court's traditional practice in cases with sensitive facts and Rule 40(e) of the Rules of Appellate Procedure, the State will use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

In accordance with West Virginia Rule of Appellate Procedure 10(d), Respondent adds the following facts to Petitioner's Statement of the Case to present a complete picture of the relevant proceedings below.

**1. Trial counsel's motion to withdraw as counsel.**

On February 10, 2020, 14 days before trial, Petitioner's counsel, Public Defender Sarah Smith, filed a short, three-sentence motion to withdraw based on her February 7, 2020, discovery that the State's witness, K.S.,[2] was a client of another lawyer in the same public defender office. App. 1041. Ms. Smith's bare-bones motion alleged only that K.S. was a client of the Public Defender Corporation. *Id.*

**2. The hearing on the motion to withdraw as counsel.**

The circuit court promptly conducted a hearing on the motion. *See id.* at 140–74. During the hearing, Ms. Smith advised the court that K.S. was a client of the Public Defender Corporation on "unrelated matters but matters that [we]re still pending."[3] *Id.* at 141–42. The juvenile matters involving K.S. "were not filed until the end of 2017," *id.* at 158, two years after the death of G.B., *see id.* at 1039. Ms. Smith advised that she had reviewed K.S.'s file and gained "information about th[is] juvenile[ ] that I would not have but for that representation by my office[.]" *Id.* Ms. Smith represented, without elaborating, that she spoke with the Ethics Board and was told concurrent representation was not possible and that because K.S. was a juvenile, K.S. could not consent to the concurrent representation. *Id.* Upon questioning by the circuit court whether there was an overlap

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[2] The motion identified both K.S. and M.S. as clients of the public defender office. The State, however, informed Petitioner and the circuit court that it would not be calling M.S. as a witness. App. 145. As a result, the relationship between K.S and Ms. Smith was the only one addressed both in circuit court and appeal. Respondent likewise limits its discussion to K.S. only.

[3] As discussed later in the Statement of the Case, this representation by Ms. Smith was incorrect. The juvenile proceedings against K.S. had been dismissed on February 19, 2019, exactly one year before the hearing on the motion to withdraw. *See* App. 137, 145.

of evidence or facts material to A.B.'s case, Ms. Smith stated only that the office had records that "would call into question I would say things that they would say, whether or not they were true, conduct records, that sort of thing." *Id.* at 142–43. Responding to the circuit court's question of whether the information was such that Ms. Smith would have a duty to use it in cross-examining K.S., Ms. Smith stated, "absolutely." *Id.* at 144. Yet, despite this definitive statement, Ms. Smith did not proffer any of K.S.'s records, either as exhibits to the motion or as material for *in camera* review or otherwise indicate to the circuit court what K.S.'s "conduct records, that sort of thing" contained that would call into question the credibility of anything K.S. said (or would testify to) relating to the charges against A.B. *See id.* at 139, 141–43. Further, Ms. Smith did not suggest that K.S.'s public defender case file contained privileged information or communications between K.S. and her public defender. *See generally id.* at 138–43. Ms. Smith concluded her presentation to the circuit court with the general statement that she believed continuing to represent A.B. was a conflict because she "wouldn't have that information if they weren't clients of the public defender office." *Id.* at 143.

The State objected to the motion to withdraw. The State submitted the circuit court's February 19, 2019, order dismissing the juvenile matters against K.S., patently disproving Ms. Smith's statement that her office currently represented K.S. in pending juvenile proceedings. *Id.* at 145. The State argued that there was no conflict of interest per Rule 1.9 of the West Virginia Rules of Professional Conduct, because there was no connection whatsoever between K.S.'s juvenile proceedings and A.B.'s felony charges of child neglect causing the death of G.B. and gross child neglect of D.B. and J.B. *Id.* at 144–50. The State advised the court that both K.S. and K.S.'s guardian stated they "would absolutely give informed consent" to waive any conflict. *Id.* at 150–51. The State also emphasized that Ms. Smith did not and could not meet the threshold

requirement that material in K.S.'s juvenile records constituted impeachment information. *Id.* at 145–46. To support this statement, the State submitted K.S.'s juvenile files to the circuit court (placed under seal as Exhibit 1)[4] for its review. *Id.*

The State also informed the circuit court that although Ms. Smith stated she recently learned that K.S. was a witness and a client of the Raleigh County Public Defender Office, Ms. Smith had a lengthy tenure as A.B.'s counsel. *Id.* at 147–49, 153. The State's discovery disclosures on December 4, 2015, and multiple disclosures thereafter, identified K.S. as a witness and listed her by her full name, as evidenced by the documents themselves and copies of the related certificates of services (admitted into evidence as State's Exhibits 2 and 3). *Id.*

The State analogized the present case with *State v. Rogers*, 231 W. Va. 205, 744 S.E.2d 315 (2013), wherein a public defender sought to withdraw as counsel three weeks before trial claiming a conflict of interest existed because multiple witnesses for the State had been prior clients of the same public defender office. App. 151. This Court affirmed the circuit court's finding that no actual conflict existed because the attorney had not represented any of the witnesses and the information about the witnesses' prior proceedings were known to others than their attorneys. *Rogers*, 231 W. Va. at 214, 744 S.E.2d at 324. The State next pointed out that although K.S.'s proceedings were closed proceedings, "a whole bunch of other people knew about" them, and, therefore, the conduct records and "similar things" Ms. Smith claimed contained material for impeachment of K.S. did not constitute "confidential information unknown to other parties." App. at 152–53. Thus, the State argued the information was "generally known" and could not serve as a basis for disqualification under Rule 1.9. *Id.* at 153. The State concluded that per Rule 1.9 and *Rogers*, the motion should be denied. *Id.*

[4] These exhibits from this hearing are not included in the Appendix Record.

Ms. Smith did not reply to the State's arguments pursuant to Rule 1.9 and *Rogers* and she did not point to any legal authority or rules to support her position. As to knowing about K.S. being a witness, Ms. Smith acknowledged receiving the State's witness lists identifying K.S. in 2015 and 2016, but stated that because the juvenile petition involving K.S. was not filed until December 2017 and another public defender received the case, she did not know about the conflict until recently. *Id.* at 158.

**3. The circuit court's discussion and denial of the motion to withdraw.**

After hearing arguments of counsel, the circuit court denied the motion to withdraw and explained its ruling as follows:

> The Court has a great deal of respect for all counsel who are present and counsel in general -- in fact, not present, everybody who does this hard work -- and understands that the motion filed by defense counsel is done so because she believes that -- and there is a duty to do so if reasonably believed by counsel to be necessary as her duty toward other clients of the agency, the public defender's office, as well as the present defendant.
>
> The state's response, however, calls upon the court to consider the various balancing factors. The primary one, as alluded to by the state, is that the subject matter of the representations of the witness and the present defendant must be the same or substantially-related matters. That has not been shown.
>
> I do have before me the sealed -- the exhibits which will be sealed, which are records of the juvenile proceedings. The Court has, in preparation for today's hearing, examined those matters, because the Court is allowed access to otherwise closed files, and without disclosing the subject matter of those files, it does appear that things are not substantially -- not the same or substantially -- related proceedings. They're separate entirely.
>
> The Court also is knowledgeable and is cognizant of the principles in *Rogers* that pertain to the imputation of knowledge in otherwise unrelated matters that happened to be handled by another lawyer in the same agency and the limitations on that.
>
> We do not have the supporting affidavits associated with motions of this nature. I understand the short time spent on that.
>
> There is representation by the prosecuting attorney that the child's guardian, who is a guardian in general, is charged with the duty to represent or to protect the

child's interests substantive and procedural. That suggested consent has not yet been presented and I won't require it.

It may be helpful to supplement with that, but the subject matter as disclosed today and otherwise within the scope of the court's separate abilities to research the point is not related -- sufficiently related or the same that would require withdrawal of counsel.

The Court also has a healthy respect for the opinions of the agency called upon to supervise and to assist lawyers in making decisions of this nature and listens, reads, and pays attention to them, but the court has the ultimate duty to decide this point as to this case under these specific circumstances.

For that reason -- for those reasons the motion to withdraw based upon the present record should be refused.

The Court should not assume that counsel is unable to supplement the record. I don't know what that would be, but if another factor can be introduced that is substantial enough to justify re-examining this in a timely way, the Court would have the duty to, but the Court's duty is also, based upon what I just said, to refuse the motion for those points.

. . .

And so for all of those reasons, the motion to withdraw should be refused: subject, as I say, to the opportunity that should be allowed to Ms. Smith as an officer of the court if she discovers other points that must be raised to allow her that opportunity.

App. 159–62. Trial counsel did not object to any aspect of this ruling, including the umbrella under which the circuit court addressed the motion to withdraw. *See generally id.* at 162–72.

**4. The process for assessing the admissibility of any potential impeachment material of K.S. under the rules of confidentiality.**

At the conclusion of the hearing, a discussion took place regarding the appropriate way to address any potential impeachment material of K.S. under the rules of confidentiality. *Id.* at 168. Petitioner paints the exchange as one in which the State sought to limit Petitioner's ability to cross-examine K.S., to which trial counsel then readily acquiesced. *See* Pet'r Br. 4. The exchange itself, however, reveals the context of what was said:

THE COURT: All right, that completes the pretrial motions and the Court has ruled, otherwise disposed of all of those. What other points must be -- should be reviewed today in preparation for trial anticipated on Monday?

MS. KELLER: Your Honor, if we could, given what at least was argued as to the motion to withdraw, I would ask the court that prior to any cross-examination of the juvenile that we have an *in camera* hearing to determine whether or not, under the rules of confidentiality, those matters can be used to cross-examine the juvenile witness. I think we're required to do that.

THE COURT: This would be taken up, I assume, during trial when we reach that point in trial?

MS. KELLER: That's what I would ask the Court, Your Honor.

THE COURT: Ms. Smith?

MS. SMITH: That's fine with me, Your Honor.

App. 168.

**5. The trial testimony of K.S. and the *in camera* hearing addressing whether confidential impeachment material existed and was admissible under the rules of confidentiality.**

The State called K.S. as its second witness at trial. App. 470–73. K.S. testified as follows:

BY MS. KELLER ("State"):

Q Would you tell us your name, please.

A K[.] S[.]

. . .

A I'm 16.

Q And do you remember the day that G[.] died?

A Yeah.

. . .

Q And how was G[.] B[.] related to you?

A She was my cousin.

Q And then on the day that G[.] died and for a period of time before, did you live in the same house but on a different floor with G[.]?

A Yes.

Q And was that also with the defendant, A[.] B[.]?

A Yes.

Q And then the defendant's husband, A[.] B[.]?

A Yes.

Q And then who is raising you and your little sister, M[.]?

A My grandma.

Q And is that Gina B[.]?

A Yes.

Q On the day that G[.] died, if you're 16 now, were you a 12-year-old?

A Yeah.

Q And would you just tell the jury what happened on that day that G[.] died? What did you see?

A I walked into the room where they all lived and I saw A[.] on top of G[.] and she was not alive.

Q Here's some tissue, right here. Could you see any part of G[.]?

A Yeah, I could see her arm.

Q And tell the jurors, what did you do when you saw that?

A I touched her arm and I tried to see if she was moving or breathing and she wasn't, so I called the police and tried to call an ambulance.

Q And did you try to get the baby, G[.], out from under A[.] B[.]?

A Yes, but I couldn't.

Q And did you try to wake A[.] B[.] up so she'd move?

A Yeah.

Q How did you try to do that?

A I just touched her and I said, "A[.], get up, please," and she wouldn't wake up.

Q And then did you also call for Gina B[.], your grandma?

A Yeah.

Q Did you ever see G[.] after that?

A Yeah.

Q Where?

A Downstairs when they were trying to give her CPR.

Q And then after you saw her when they were trying to give her CPR, did you ever see G[.] again?

A No.

STATE: Thank you, K[.]. And if there is cross, we needed a hearing.

COURT: I beg your pardon, come to the bench please.

*Id.* at 470–73. As set forth hereafter, a sidebar then occurred wherein the issue of whether confidential material in K.S.'s juvenile case could be used for impeachment on cross-examination was addressed as contemplated during the hearing on the motion to withdraw:

(Sidebar begins)

COURT: I didn't understand your question.

STATE: The pretrial hearings, the Court had ruled that if there is to be any cross-examination of this witness that there would be an in camera hearing as to whether any of her history is admissible on cross of juvenile matters.

. . .

COURT: Ms. Smith, do you intend to cross-examine in that area?

SMITH: I do. I'm aware that, of course, she had juvenile delinquency charges and that she was in juvenile drug court due to some substance abuse issues that she had and I'm aware she had a psychological evaluation, I believe has been committed to maybe Highland Hospital, and I've got all that in her juvenile file and, of course, I would ask her to the extent possible about all of that.

COURT: What issues does the state believe should be addressed?

STATE: First of all, before the court would allow the impeachment of a juvenile by these records, I believe by statute the court must make a finding that its importance to this proceeding outweighs confidentiality.

The only cross-examination, even of an adult, is to matters which affect the witness's credibility. I think the Court has said it has reviewed the records. The juvenile drug court was marijuana. There is no evidence that the witness was consuming marijuana today, this time or the time of the events, and marijuana use is not impeachable.

The only other matter she had was truancy court. Truancy, obviously, does not go to credibility of a witness, and I have not received any copies of any psychological records or supposed commitments, but I would want to see those if she's going to impeach by them.

And, again, witnesses, whatever she may or may not have been treated for, is not necessarily a matter that goes to the credibility of the witness. It could be depression, it could be posttraumatic stress disorder. You can't just open those up without an in camera hearing.

COURT: All right. I'll send the jury out and take that matter up. Did you wish to be heard any further?

MS. SMITH: Yeah.

THE COURT: Now or at the in camera?

MS. SMITH: I can wait until the in camera.

THE COURT: Okay.

*Id.* 473–75. The circuit court dismissed the jury to the jury room and proceeding with an *in camera* hearing, set forth in relevant part below.

COURT: Inasmuch as the direct examination is complete, the issue before the Court is whether the matters that the defense counsel wishes to explore on cross-examination may be placed before the jury and made part of the public record.

Ms. Smith?

SMITH: Yes, Your Honor, At a prior hearing, I believe the Court was provided with the juvenile's file from the State, Case No. 17-JS-167, naming the juvenile, K[.] S[.], as the defendant.

That case originated as a truancy case, I believe, and then I'm not entirely aware of what happened after that, but I know that there were at least several interviews, psychological evaluations conducted, and specifically mentioned

in the psychological evaluation is substance abuse by K[.] S[.] of both alcohol and marijuana.

It does not disclose when that started, so, of course, that would be something that I would inquire about. Of course, that would go to credibility if any of that was being abused during the time of these events. It may alter her recollection.

It just says in this one report until recently she routinely abused marijuana. It says that she has experimented with alcohol in the past. Again, doesn't specify when, and I believe this evaluation was done, of course, pursuant to that juvenile case, so it would've been after 2017, but that's all things I would have to get from the witness.

COURT: And how do you believe that this evidence is relevant in the present proceedings?

SMITH: The events in this case happened while the defendant was allegedly intoxicated. If the witness to this case was also experimenting with marijuana and alcohol at the time, of course I believe that would be relevant to what she remembers happening. Of course, people who are using those substances don't always remember things exactly as they happened.

COURT: Do you wish to make any inquiry of the witness on that subject?

SMITH: I do.

COURT: Ms. Keller, do you wish to be heard before that is done?

STATE: I believe for the purposes of this hearing she can simply ask the witness, "Were you under the influence of alcohol or drugs at the time of G[.]'s death?"

And I've got problems -- I mean I know there was a motion to withdraw but now they've pulled a juvenile witness's psychological records which they would never have had access to, the public would never have had access to, and the witness's psychological they need help or treatment or therapy does not go to the credibility. Truancy obviously doesn't go to credibility and the consumption of alcohol or marijuana does not go to credibility.

So the simple question is, for this purpose, "were you under the influence when you saw and heard the things you saw and heard?"

COURT: Ms. Smith, do you take issue with Ms. Keller's -- the prosecutor's proposed limitation on the scope of cross-examination and the use of these records?

SMITH: I do not. And I would also add that in this report it indicates that both K[.] and her sister were removed from the custody of the grandparents, being Gina B[.], due to substance abuse issues within the home.

No, I'm sorry, that would not be Gina B[.], that would be the other grandparents.

I would just inquire about her history of, again, the use, when this started.

Juveniles don't have the experience that adults have with the effects of alcohol and drugs and I would just like to explore that.

COURT: All right, you may inquire of the witness by way of this -- as a part of this in camera hearing, as to her -- as to her condition on the day in question and, if you believe that inquiry opens a basis to inquire into the records in the in camera part of this hearing, I will then decide whether you should.

So you may cross-examine the witness on the question of her condition on the day of the events to which she testified.

(Cross-Examination of K.S.)

BY MS. SMITH:

Q K[.], on November 7th of 2015, had you used any alcohol or drugs?

A No.

Q Either that day or the day before?

A No.

SMITH: Okay.

COURT: Now, with that response, do you believe that permits you to make further inquiry about the records and the psychological report?

SMITH: I'm satisfied with that.

COURT: All right. What position do you take now as to the admissibility of those records and the report, the record of the truancy charge and the psychological report and the record that contains a history -- a claimed history of the use of alcohol and marijuana, whether any of those things, those points may be admitted or should be admitted in this trial?

SMITH: I do not believe any of this would be admissible given her response.

COURT: I'm sorry, I didn't hear you.

SMITH: I do not believe any of this should be admissible given her response.

COURT: All right. May I conclude then that the subject matter of this in camera hearing, which is to determine whether those things can be admitted on the issue of credibility, the conclusion proposed or agreed to by counsel for defendant is they are not admissible?

SMITH: That is correct, Your Honor. I would not move to admit anything based on her responses.

COURT: All right. What cross-examination -- what subject areas of cross-examination do you propose to present, if any, in the presence of the jury?

SMITH: I do not believe that I'll be doing any cross in the presence of the jury.

COURT: So may I conclude you have no questions for the witness to be asked in the presence of the jury?

SMITH: That's correct, Your Honor.

App. 474–82. Trial resumed, and Ms. Smith stated she had no cross-examination of K.S., and the State called its next witness. *Id.* at 483.

## III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

There is no need for oral argument in the case as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

## IV. SUMMARY OF THE ARGUMENT

Petitioner claims she is entitled to a new trial because her trial counsel had a conflict of interest, specifically, that K.S., a witness for the State, was previously represented in a juvenile proceeding by a different lawyer in the Raleigh County Public Defender Office on a prior, unrelated matter. Petitioner, however, has not satisfied the two necessary factors for relief: (1) her attorney labored under an actual conflict of interest and (2) that actual conflict of interest adversely affected her lawyer's performance. In the circuit court, Petitioner failed to offer anything but factually unsupported assertions that a conflict of interest existed, falling far short of satisfying her

burden of proof. Petitioner also asserts for the first time that the circuit court assessed the motion to withdraw under West Virginia Rule of Professional Conduct 1.9 rather than Rule 1.7. Because this claim was not advanced below, it was not preserved for appellate review. *See, e.g.*, *State v. Sites*, 241 W. Va. 430, 438, 825 S.E.2d 758, 766 (2019) ("[t]o preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect."). Alternatively, Petitioner's argument is meritless because, again, the record is devoid of factual support establishing a conflict of interest under either Rule 1.9 or 1.7. Petitioner is attempting on appeal to create an actual conflict of interest where none exists, as evidenced by both the Rules of Professional Conduct and this Court's jurisprudence. Because the Petitioner has not shown there was any *actual* conflict of interest, Petitioner's Sixth Amendment right to effective assistance of counsel was not violated, and this appeal fails.

In addition, because there was no actual conflict, it necessarily follows that there is no adverse effect or deficiency in trial counsel's representation caused by a conflict of interest. While Petitioner attempts to show an adverse effect by pointing to trial counsel's decision to forego cross-examination of K.S., for example, Petitioner has not demonstrated that trial counsel's choice was motivated by anything other than sound strategy or tactic. Therefore, Petitioner has not satisfied the second factor necessary to obtain a new trial based on a Sixth Amendment violation, and this appeal should be denied.

## V. ARGUMENT

### A. Standard of Review

"'In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion

standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.' Syllabus Point 3, *State v. Vance,* 207 W. Va. 640, 535 S.E.2d 484 (2000)." Syl. Pt. 1, *State v. Williams*, 236 W. Va. 130, 778 S.E.2d 579, 580 (2015).

**B. Petitioner has not demonstrated that trial counsel had an actual conflict of interest that adversely affected her representation of Petitioner in violation of the Sixth Amendment right to conflict-free counsel.**

Petitioner contends trial counsel labored under an actual conflict of interest that adversely affected her representation of Petitioner. Pet'r Br. 7–14. "The question of whether counsel labored under an actual conflict of interest that affected counsel's performance is a mixed question of law and fact that we review de novo." *Williams v. French*, 146 F.3d 203, 212 (4th Cir. 1998). Because Petitioner has not carried her burden to show an actual conflict of interest existed, and much less one that adversely affected counsel's representation, her conviction should be affirmed.

The Sixth Amendment to the United States Constitution provides, in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The effective assistance of counsel requires meaningful compliance with the duty of loyalty and the duty to avoid conflicts of interest, and a breach of these basic duties can lead to ineffective representation. *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991). When a petitioner bases a Sixth Amendment claim of ineffective assistance of counsel on the existence of a conflict of interest, the claim is subjected to the specific standard spelled out in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Per *Cuyler*, a petitioner must show that (1) his attorney labored under "an actual conflict of interest" and (2) that conflict of interest "adversely affected his lawyer's performance." *Id.* at 348. An actual conflict of interest exists if, during the course of representation, the interests of counsel's clients "diverge with respect to a material factual or legal

issue or to a course of action." *Id.* at 356 n.3 (Marshall, J., concurring in part and dissenting in part). Establishing that an actual conflict of interest exists, therefore, is not easy, as "[a] mere theoretical division of loyalties" is insufficient. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).

A petitioner, in addition to demonstrating the existence of an actual conflict, must also demonstrate that the actual conflict adversely affected his lawyer's performance, as "an adverse effect is not presumed from the existence of an actual conflict of interest." *United States v. Nicholson*, 475 F.3d 241, 249 (4th Cir. 2007). If a defendant demonstrates both that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance," prejudice is presumed. *Strickland v. Washington*, 466 U.S. at 692 (internal quotation marks and footnote omitted) quoting *Cuyler*, 446 U.S. at 350); *State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 203, 691 S.E.2d 183, 194 (2010) (per curiam) (internal quotation marks omitted) (quoting *Cuyler*, 446 U.S. at 349–50); *see also Bennett v. Ballard*, No. 16-0535, 2017 WL 3821805, at *7 (W. Va. Supreme Court, Sept. 1, 2017) (memorandum decision) (citing *Mickens v. Taylor*, 240 F.3d 348, 355 (4th Cir. 2001), *aff'd*, 535 U.S. 162 (2002)). In the instant case, Petitioner has not demonstrated that an actual conflict of interest existed and that it adversely affected counsel's performance.

**1. Petitioner fails to demonstrate that an actual conflict existed.**

Per *Cuyler*, Petitioner must satisfy the threshold requirement that trial counsel labored under an actual conflict of interest. *See Cuyler*, 446 U.S. at 348. Petitioner wholly failed to make this showing in circuit court and correspondingly has no factual basis to animate the claim on appeal.

**a. The record is devoid of evidence that an actual conflict of interest existed, wholly defeating this appeal.**

In circuit court, Petitioner failed to offer anything but factually unsupported assertions that a conflict of interest existed, falling far short of satisfying her burden of proof. This Court has made clear that a motion to withdraw based on a conflict of interest requires factual support: a trial court presented with a disqualification motion must "carefully examine all relevant evidence which bears on the pivotal issue of whether confidential information was disclosed" so as to pit zealous advocacy for a current client against the preservation of confidences to another. Syl. Pt. 6, *State ex rel. Youngblood v. Sanders*, 212 W. Va. 885, 575 S.E.2d 864 (2002). It has also made clear that confidential material that is 'generally known' or otherwise disclosed to individuals other than counsel does not create a disqualifying conflict of interest. *Id.* at Syl. Pt. 7. Instead, it is where a conflict of interest rests on an attorney's receipt of *privileged* information from a person formerly represented by that attorney that a disqualifying conflict of interest may exist. *See id.*; *see also* Syl. Pts. 6 and 7, *Rogers,* 231 W. Va. 205, 744 S.E.2d 315. Thus, "[b]efore disqualification of counsel can be ordered on grounds of conflict arising from confidences presumably disclosed in the course of discussions . . . the court must satisfy itself from a review of the available evidence, including affidavits and testimony of affected individuals, that confidential information was in fact discussed." *Rogers*, 231 W. Va. at 214, 744 S.E.2d at 324 (expanding Syllabus Point three of *Youngblood* to attorney-client relationships that are already well-established before a potential conflict of interest is discovered).

Here, trial counsel presented no evidence or factual basis to support the motion to withdraw. Trial counsel's three-sentence motion averred only that K.S. was a client of the Public Defender Corporation. App. 1041. Although during the hearing Ms. Smith represented to the circuit court that K.S.'s "conduct records, that sort of thing," included material she "absolutely"

would have a duty to use in cross-examining K.S., *id.* at 144, Ms. Smith did not offer any affidavits or other material, under seal or otherwise, for *in camera* review, to demonstrate that confidential or privileged information existed so as to pit zealous advocacy for A.B. against the preservation of confidences to K.S., *cf. State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 417–18, 624 S.E.2d 844, 854–55 (2005) (authorizing counsel to submit confidential information to a court for *in camera* review for purposes of determining whether a conflict exists). Ms. Smith unequivocally based her motion on "conduct records" and other material contained in K.S.'s juvenile file—material that would have been disclosed to others in the course of K.S.'s juvenile matter—*not* confidential or privileged communications between K.S. and her public defender. The circuit court had even reviewed K.S.'s juvenile files before the hearing and found nothing in them requiring counsel to withdraw. App. 160. Ms. Smith, therefore, did not satisfy the threshold requirement for demonstrating the existence of an actual conflict of interest.

What is more, the circuit court offered Ms. Smith carte blanche to supplement the record after the hearing with any type of confidential material implicating the existence of a conflict. App. 161. The fact trial counsel did not do so leads to the inescapable conclusion that no such material existed. As this Court has recognized, an attorney's unsupported statements are not evidence, and yet in this case, counsel's unsupported statements are all there is. *See, e.g.*, *State v. Benny W.*, 242 W. Va. 618, 837 S.E.2d 679, 690 (2019) ("[A] party can not establish facts in a case by asserting them in a brief. Those are nothing more than an attorney's statements, which are not evidence." (internal citations omitted)); *see also United States v. Diaz*, 533 F.3d 574, 578 (7th Cir. 2008) ("Counsel's unsupported statements are, of course, not evidence."). Given the factual abyss of support for Ms. Smith's motion to withdraw, the circuit court correctly denied the motion, as trial counsel did not demonstrate that a conflict of interest existed.

The same lack of factual support that defeated the motion to withdraw in circuit court likewise defeats Petitioner's claim on appeal. This Court has made clear that "[a]n appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment." Syl. Pt. 5, *Morgan v. Price*, 151 W. Va. 158, 150 S.E.2d 897 (1966). Here, despite Petitioner's castigations of trial counsel and averments that trial counsel "knew confidential information" about K.S. to use for impeachment, *see, e.g.*, Pet'r Br. 10, the record (as fully set forth in the Statement of the Case, *supra*) simply does not contain any factual basis to support this claim. Petitioner, therefore, has failed to show the circuit court abused its discretion in denying the motion to withdraw. *See Rogers*, 231 W. Va. at 214, 744 S.E.2d at 324 (citing *Hatcher*, 218 W. Va. at 417–18, 624 S.E.2d at 854–55 (adopting an abuse of discretion standard of review of a circuit court's determination to disqualify a criminal defense attorney due to a conflict of interest)). Petitioner likewise has failed to satisfy the *Cuyler* requirement that an actual conflict existed. Accordingly, for this reason alone, Petitioner's appeal wholly fails.

**b. Petitioner's contention that the circuit court should have applied Rule 1.7 of the West Virginia Rules of Professional Conduct is raised for the first time on appeal and, therefore, should be disregarded.**

On appeal, Petitioner takes issue with the framework the circuit court applied to the motion to withdraw, arguing it should have assessed the motion under Rule 1.7 of the Rules of Professional Conduct rather than Rule 1.9 and *Rogers*. *See* Pet'r Br. 8. Because this argument was not raised below, the Court should disregard it. *See* App. 1041, 137–71. "[I]f any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal. We have invoked this

principle with a near religious fervor." *State v. Miller*, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996); *see also State v. Rodoussakis*, 204 W. Va. 58, 64, 511 S.E.2d 469, 475 (1998) (quoting *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996)). It is, therefore, incumbent upon a litigant to raise a timely and proper objection or she will generally waive her right to contest it on appeal. *See State v. McGilton*, 229 W. Va. 554, 558–59, 729 S.E.2d 876, 880–81 (2012) (quoting and citing, in part, *Peretz v. United States*, 501 U.S. 923, 936–37 (1991)). As this Court has explained, this "raise or waive rule" prevents a party from "making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error." *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996); *see State v. Lively*, 226 W. Va. 81, 92, 697 S.E.2d 117, 128 (2010) (discussing a party's obligation to raise a contemporaneous objection such that the party does not gain an "unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error"). Here, trial counsel had every opportunity to provide the circuit court with the framework applicable to the motion to withdraw, yet she did not do so and she did not object or otherwise alert the circuit court to the alleged deficiencies she now raises on appeal. It is now too late to cry foul. Petitioner waived consideration of the motion under Rule 1.7. Alternatively, as discussed below, Rule 1.7 affords Petitioner no solace.

**c. Trial counsel had no conflict of interest under the West Virginia Rules of Professional Conduct and West Virginia jurisprudence.**

Relevant here, West Virginia Rule of Professional Conduct 1.9 protects a former client by prohibiting a lawyer from using confidences gained during representation of the former client by a lawyer's present or former firm to the disadvantage of the former client.[5] W. Va. R. Prof.

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[5] Rule 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter

Conduct 1.9(c). Rule 1.7 of the West Virginia Rules of Professional Conduct protects current clients by precluding a lawyer from representing a client if the representation involves a concurrent conflict of interest (with certain exceptions), which exists "if there is a significant risk that the representation of one . . . client[ ] will be materially limited by the lawyer's responsibilities to . . . a former client . . . ." W. Va. R. Prof. Conduct 1.7(a).[6] The facts in this case do not establish a conflict of interest under either Rule 1.9 or 1.7.

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represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer has acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer . . . whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

W. Va. R. Prof. Conduct 1.9.

[6] Rule 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

As reflected by the record, the circuit court considered the motion under the umbrella of Rule 1.9 and found no basis to grant it. App. 159–62. It was proper for the circuit court to consider the motion in this manner. Rule 1.9(c) applies to "a lawyer . . . whose present . . . firm . . . has formerly represented a client in a matter . . . ." It is undisputed that A.B.'s trial counsel, Ms. Smith, is a public defender in the Raleigh County office. *See, e.g.*, App. 138, 1041. It is also undisputed that a different public defender in the Raleigh County office represented K.S. in a juvenile proceeding that began in late 2017 and ended on February 19, 2019. *See id.* at 145, 158. Likewise, it is uncontested that the juvenile matter against K.S. was instituted two years *after* G.B.'s death, and was dismissed one year *before* trial counsel moved to withdraw as A.B.'s counsel. *Id.* at 158, 1039. K.S., therefore, was a former client of the public defender office and protected by Rule 1.9.

Per Rule 1.9, then, Ms. Smith could not use confidential information obtained by the public defender representing K.S. against K.S. But, as revealed by the abject lack of evidence proffered prior to, during, or after the hearing on the motion to withdraw, Ms. Smith possessed no such information. This lack of information became even more apparent during the *in camera* hearing at trial, where it was revealed that the only information in K.S.'s juvenile matter that could have potentially been used against her at trial was her statement during a psychological evaluation that she had experimented with marijuana and alcohol. *See* App. 473–83. Ms. Smith directly asked

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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

W. Va. R. Prof. Conduct 1.7.

K.S. whether she had used drugs or alcohol at the time of G.B.'s death (two years before the juvenile matter), and K.S., under oath, said "no." *Id.* at 481. Plainly, no actual conflict existed.

Moreover, the circuit court found no conflict under Rule 1.9(a) or (b), because the matters involving K.S. were entirely unrelated to the criminal charges against A.B. Subsections (a) and (b) of Rule 1.9 prohibit a lawyer from representing a person in the same or a substantially related matter to that in which a lawyer or a lawyer's former firm represented a former client with interests that were materially adverse to that person. W. Va. R. Prof. Conduct 1.9(a), (b). Here, the circuit court examined the case files of K.S.'s juvenile proceedings in preparation for the hearing on the motion to withdraw. App. 160. Based on its review, the circuit court found that the matters against K.S. and the criminal charges against A.B. were "not the same or substantially-related proceedings. They're separate entirely." *Id.* The circuit court further explained that "the subject matter as disclosed today and otherwise within the scope of the Court's separate abilities to research the point is not related -- sufficiently related or the same that would require withdrawal of counsel." *Id.* at 161. Additionally, had the circuit court required it, both K.S. and her legal guardian "would absolutely [have] give[n] informed consent" to waive any conflict. *Id.* at 151. The record makes clear that trial counsel did not have a conflict of interest under any aspect of Rule 1.9.

As to Rule 1.7, the record defeats Petitioner's attempt to wrangle out a conflict of interest under its provisions by pitting trial counsel's duty of zealous advocacy for A.B. against a duty of loyalty owed to K.S. by the public defender office. *See generally* Pet'r Br. But the mere fact that a prior client of a public defender office would be a witness in the trial of a current client of the public defender office does not create a conflict. *See* W. Va. R. Prof. Conduct 1.7; *Rogers*, 231 W. Va. 205, 744 S.E.2d 315; *cf. People v. Free*, 492 N.E.2d 1269, 1274 (Ill. 1986) (finding no *per se* conflict where the public defender office "contemporaneously" represented a witness and a

criminal defendant), *cert. denied*, 479 U.S. 871 (1986). Instead, Rule 1.7 requires a showing that a "significant risk" exists that Ms. Smith's representation of A.B. would be materially limited by the duty owed to K.S. by the public defender office. W. Va. R. Prof. Conduct 1.7(a)(2). As discussed above, there simply was no such showing. In addition to the complete absence of factual support presented to the circuit court, the circuit court examined K.S.'s court files in preparation for the hearing on Ms. Smith's motion to withdraw and found that they were "not the same or substantially-related proceedings. They're separate entirely" from A.B.'s proceedings. App. 159–62. While the circuit court expresses this finding in language more akin to language contained in Rule 1.9(b)(2), it demonstrates that the circuit court would have found any risk of K.S.'s juvenile truancy matter impacting Ms. Smith's ability to represent A.B. to be low rather than the "significant risk" required for a conflict of interest under Rule 1.7(a)(2). Regardless, the record before the circuit court contained no evidence of any kind that satisfied Rule 1.7.

Moreover, where disqualification of counsel is sought on the basis of the duty owed to a former client purportedly conflicting with the duty owed to a present client, disqualification "should only be considered upon a clear showing that the present and former clients' interests are adverse." Syl. Pt. 7, *State ex rel. Youngblood*, 212 W. Va. 885, 575 S.E.2d 864 ("[I]n the criminal context, disqualification on the basis of the attorney's receipt of privileged information from a codefendant formerly represented by that attorney should only be considered upon a clear showing that the present and former clients' interests are adverse."). Petitioner has not done so. For these reasons as well as those discussed previously in this Brief, neither Rule 1.7 nor Rule 1.9 afford Petitioner relief, and the circuit court correctly denied the motion to withdraw.

What is more, *State v. Rogers* further underscores the correctness of the circuit court's ruling. In *Rogers*, a public defender sought to withdraw as counsel three weeks before trial. 231

W. Va. at 212, 744 S.E.2d at 322. Trial counsel argued that a conflict of interest existed under Rule 1.9 because multiple witnesses for the State had been represented by other lawyers in the same public defender office on unrelated criminal matters and Rule 1.10 extended a conflict with those lawyers to the whole office. *Id.* at 212–13, 744 S.E.2d at 322–23. Rogers' lawyer had not represented any of the potential witnesses and had not accessed any confidential information involving any of the public defender office's prior clients at issue. *Id.* at 213, 744 S.E.2d at 323. Also, trial counsel would cross-examine the prior clients with material that was public record, *i.e.*, complaints and criminal records, not privileged information. *Id.* The circuit court denied the motion finding, in part, that "the benefit that Mr. Rogers has had of representation and the knowledge that comes and familiarity that comes with the representation you've provided, this Court finds extraordinarily important." *Id.* Petitioner's counsel voiced no argument or objection to the trial court's ruling denying his motion to withdraw. *Id.*

This Court affirmed the decision, noting that while the petitioner went to great lengths in arguing that an actual conflict existed below, the record simply did not support that claim. *Id.* at 214, 744 S.E.2d at 324. The petitioner's trial counsel was not privy to any confidential information arising out of these prior representations by the Kanawha County Public Defender Office, as he had not represented any of the State's witnesses who were clients of the Kanawha County Public Defender Office, he had not accessed any confidential information about them from the Kanawha County Public Defender Office, and he would impeach the witnesses using information in public records. *Id.* Thus, there was a *potential* conflict only, which was insufficient to establish a disqualifying conflict of interest. *See id.*

Like *Rogers*, here Petitioner argues that an actual conflict existed below. *See* Pet'r Br. 9–10. Also like *Rogers*, the record simply does not support Petitioner's claim. Shortly before trial,

Public Defender Smith sought to withdraw as counsel because K.S., a witness for the State, had been previously represented by a different lawyer in the same public defender office. Ms. Smith candidly acknowledged that the juvenile matters were unrelated to the charges against A.B. Like *Rogers*, there was a *potential* conflict only because Petitioner failed to show she possessed confidential information about K.S. that she would use against K.S. "[T]he possibility of conflict is insufficient to impugn a criminal conviction." *See Cuyler*, 446 U.S. at 350; *Tatum*, 943 F.2d at 375 (emphasizing that "[m]ore than a *mere possibility* of a conflict . . . must be shown." (emphasis in original)).

Petitioner attempts to distinguish the present matter from *Rogers* by arguing that unlike *Rogers*, Ms. Smith accessed confidential information about K.S. and that her cross-examination of K.S. would rest on non-public information. Pet'r Br. 9–10. According to Petitioner, this creates an actual conflict, whereas *Rogers* was affirmed because Rule 1.9 imputes a firm's duty of loyalty, not constructive knowledge, thereby creating a potential conflict for trial counsel, not an actual one. Pet'r Br. 9. But, here, though the record reflects Ms. Smith making these bold representations to the circuit court, the record also reflects that Ms. Smith possessed no factual basis for them. Moreover, even with the express opportunity to supplement the record with information demonstrating that an actual conflict existed, Ms. Smith did not do so. App. 161. Here, there was a *potential* conflict only, which falls far short of the threshold requirement that Ms. Smith demonstrate she represented interests which "diverge[d] with respect to a material factual or legal issue or to a course of action." *See Cuyler*, 446 U.S. at 356 n.3. Therefore, like *Rogers*, the facts of this case and the law concerning disqualification of defense counsel demonstrate that disqualifying Petitioner's trial counsel on the basis of a conflict of interest would have been

inappropriate as there was no actual conflict, and a "mere possibility" of a conflict is insufficient to disqualify defense counsel.

Next, Petitioner's reliance on *State ex rel. Blake v. Hatcher*, 218 W. Va. 410, 624 S.E.2d at 847, is misplaced. *See* Pet'r Br. 10–11. In *Hatcher*, the State—not trial counsel—moved to disqualify trial counsel from representing Mr. Carroll in *State v. Carroll* because trial counsel had represented Charles Keenan, who was a material State witness against Mr. Carroll, on unrelated matters that had concluded shortly before Mr. Carroll's indictment. 218 W. Va. at 411, 624 S.E.2d at 848. Trial counsel, John Mitchell, obtained an informal legal ethics opinion from the Office of Disciplinary Counsel. *Id.* The letter expressed concern regarding Mr. Mitchell's ability to cross-examine his prior client without disclosing confidential information. *Id.* The circuit court denied the motion without addressing its substance, finding that the State lacked standing to pursue it. *Id.* The State then sought a Writ of Prohibition, and the former client at issue moved to intervene. The former client expressed "fear that John R. Mitchell will be compelled to disclose some or all of those confidential communication[s] upon cross-examination of [Mr. Keenan] in order to publically discredit [Mr. Keenan's] testimony." *Id.* at 412, 624 S.E.2d at 849. Mr. Keenan thus requested both the disqualification of Mr. Mitchell from Mr. Carroll's defense and that the Court protect his interest in confidential communications made with Mr. Mitchell during Mr. Mitchell's representation of him. *Id.* at 411–12, 624 S.E.2d at 848–49. The Court granted the writ because the circuit court did not develop an adequate record. *Id.* at 418, 624 S.E.2d at 855. The Court then remanded the matter with directions for the circuit court to hold a hearing to afford the State, the defendant and the State's witness an opportunity to present evidence regarding their competing interests. *Id.* Notably, the Court expressly provided the means

by which a lawyer who moves to withdraw as counsel based on an alleged conflict of interest to demonstrate the existence of a conflict without violating the Rules of Professional Responsibility:

> The circuit court shall not require the client to disclose confidential information during the hearing, but may, in appropriate circumstance where there is a significant question regarding the possibility of disclosure of confidential information at trial, conduct an *in camera* review of the purported confidential information.

*Id.*

Here, unlike *Blake*, the circuit court conducted a hearing during which the parties had the opportunity to present evidence regarding their positions on Ms. Smith's motion. *See* App. 137–71. During the hearing, the circuit court heard from the parties and accepted exhibits tendered by the State to demonstrate that K.S.'s juvenile matter itself did not contain material that created a conflict of interest for Ms. Smith. Ms. Smith could have submitted for *in camera* review any confidential material from the public defender's file on K.S. that she believed constituted impeachment evidence, but she did not do so. Ms. Smith offered nothing to demonstrate that an actual conflict existed, instead resting on general, unsupported statements that she possessed confidential information to use to impeach K.S. and acknowledging that K.S.'s juvenile case was unrelated to the charges against A.B. App. 137–43. The circuit court even gave Ms. Smith permission to supplement the record post-hearing with any information implicating a conflict of interest, *id.* at 161, yet she did not do so. The circuit court had nothing before it indicating that Ms. Smith's representation of A.B. violated any duty owed to K.S. or A.B. With absolutely no factual underpinning suggesting an actual conflict existed, not merely a potential one, there was no basis for the circuit court to grant Ms. Smith's motion to withdraw. It, therefore, soundly exercised its discretion in denying the motion. The same tenets apply on appeal and defeat Petitioner's attempt to generate a disqualifying conflict of interest out of a record that reflects no conflict existed.

Petitioner has wholly failed to satisfy the burden of demonstrating that an actual conflict of interest existed. For these reasons, Petitioner has not satisfied the first *Cuyler* factor. Correspondingly, because there is no *actual* conflict of interest, Petitioner's Sixth Amendment right to effective assistance of counsel was not violated.

**2. Petitioner fails to demonstrate the existence of any adverse effect or deficiency in trial counsel's representation**

To invoke the presumed prejudice rule so as to constitute a Sixth Amendment violation entitling a petitioner to a new trial, a petitioner must also establish that counsel's actual conflict adversely affected the representation. *Mickens*, 535 U.S. at 171; *see Cuyler*, 446 U.S. at 348. Petitioner is unable to do so, because there is no actual conflict and there is no adverse affect. The required adverse effect must be traceable to the conflict itself. *United States v. Burgos-Chaparro*, 309 F.3d 50, 53 (1st Cir. 2002) ("[S]ome adverse action or inaction is required that can be traced to the conflict in loyalty."); *see also Mickens*, 240 F.3d at 361 ("[T]he petitioner must establish that the defense counsel's failure to pursue [an alternate] strategy or tactic was linked to the actual conflict."); *Perillo v. Johnson*, 79 F.3d 441, 449 (5th Cir. 1996) ("Following the approach of our sister circuits, we hold that to show adverse effect, a petitioner must demonstrate that some plausible defense strategy or tactic might have been pursued but was not, because of the conflict of interest."). "Merely to speculate that the divided loyalty could have caused such a step is not enough." *Burgos-Chaparro*, 309 F.3d at 53.

Regarding this prong of *Cuyler*, Petitioner denounces trial counsel's various actions and inactions relating to the so-called confidential impeachment information of K.S. as a basis to show a lack of zealous advocacy. Pet'r Br. 12–13. Petitioner's aspersions of trial counsel focus in large part on Ms. Smith's choices during the *in camera* hearing regarding the possible impeachment material of K.S., trial counsel not "actively fight[ing]" for the admission of K.S.'s past use of

marijuana and alcohol for impeachment purposes, and trial counsel's decision to forego cross-examining K.S. *See id.* at 12–13. Petitioner, however, continues to operate under the unfounded assertions that an actual conflict of interest as well as confidential impeachment material exist. *See id.* But, as discussed above and as reflected in the transcripts of the pretrial and trial proceedings, there is no actual conflict of interest and there is no confidential impeachment material of K.S. It is axiomatic, then, that because no actual conflict exists Petitioner has not and cannot demonstrate an adverse effect or deficiency in Ms. Smith's representation that is traceable to an actual conflict. Moreover, Petitioner has not demonstrated that so-called deficiencies in trial counsel's advocacy were anything other than sound recognition of the law and strategic decisions. Consequently, Petitioner has failed to carry her burden on appeal.

To begin, the record reflects that there was no confidential impeachment material of K.S. The only potential confidential impeachment material identified both below and on appeal is that K.S. admitted during a psychological evaluation as part of her juvenile proceedings to having used marijuana and alcohol. *See* App. 477–78; *see also State v. Tyler G.*, 236 W. Va. 152, 161–62, 778 S.E.2d 601, 610–11 (2015) (explaining that the strong protection of the confidentiality of juvenile files does not prohibit the use of juvenile records in a criminal case as rebuttal or impeachment evidence). The evaluation did not indicate when K.S. began using marijuana and alcohol. *See* App. 478. Trial counsel was thus permitted to question K.S., under oath and *in camera*, to determine whether K.S. had used drugs or alcohol at the time of G.B.'s death, which was at least two years *before* the psychological evaluation in Case No. 17-JS-167.[7] *Id.* at 477–78.

[7] *Nelson v. Ferguson*, 184 W. Va. 198, 399 S.E.2d 909 (1990) (finding that mental health records are confidential information which may be disclosed if the trial court first finds that the information sought is sufficiently relevant to the proceeding to outweigh the importance of confidentiality, and that confidentiality of a child's mental health records should be treated with particular care).

K.S. testified she did *not* use drugs or alcohol during the timeframe of G.B.'s death. *Id.* at 481. Therefore, whatever marijuana or alcohol K.S. may have consumed at the time of her juvenile matter simply was not relevant. That is, it did not bear on K.S.'s credibility or her ability to remember the events that occurred on November 7, 2015.

*State v. Perrine* underscores the appropriateness of trial counsel's actions. *State v. Perrine*, No. 16-0475, 2017 WL 1535076, at *1 (W. Va. Supreme Court, Apr. 28, 2017) (memorandum decision). In *Perrine*, this Court rejected a similar challenge to a circuit court's ruling that prohibited a petitioner from cross-examining a victim about the victim's prior drug use.[8] Perrine, like Petitioner, claimed the prior drug use went to the victim's credibility and ability to recall information. *Id.* The circuit court found it to be irrelevant because exploring the victim's drug use more than one year before the crime did not bear on the victim's behavior at the time of the crime or her ability to remember events that occurred at the time of the crime. *Id.* Here, the same principles hold true. Hence, even if Ms. Smith had zealously advocated for the admission of K.S.'s use of marijuana and alcohol as impeachment material or otherwise, Petitioner has not demonstrated that Ms. Smith's failure to do so adversely affected her case. Furthermore, Petitioner has not demonstrated that Ms. Smith's decision to refrain from an obviously futile argument was due to an actual conflict in loyalty as opposed to trial counsel's sound understanding of the law. Petitioner has not pointed to any legal authority requiring counsel to advance a meritless argument in order to satisfy counsel's ethical responsibilities to a client.

Furthermore, Petitioner's conjecture that K.S. lied about not using drugs or alcohol at the time of G.B.'s death and Petitioner's corresponding speculation about what Ms. Smith would have

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[8] The issue in *Perrine* was raised as a violation of the petitioner's constitutional right to cross-examine his accusers.

done (or failed to do) if K.S. had testified to being intoxicated at the timeframe of G.B.'s death, Pet'r Br. 13, are entirely unfounded. Sixteen-year-old K.S. was under oath during the *in camera* hearing when she testified she had not used drugs or alcohol at the time of G.B.'s death. *See* App. 470, 481.[9] The record is devoid of anything suggesting this was untruthful. Petitioner fails to demonstrate any deficiency here, much less one traceable to an actual conflict of interest.

As to trial counsel's decision to forego cross-examining K.S., Petitioner has not demonstrated that this choice was anything but sound strategy. K.S.'s trial testimony was extremely succinct and it was consistent with both her call to 9-1-1 on November 7, 2015, and her statement to law enforcement on November 9, 2015. *Compare* App. 471–73, *with* Ex. 5. Added to that, K.S. was likely a sympathetic witness given her young age when she discovered G.B.'s body underneath A.B., and her still young age at the time of trial. It is entirely reasonable for trial counsel to choose to limit K.S.'s time in front of the jury as much as possible, particularly given the lack of impeachment material and the consistency of K.S.'s testimony with the 9-1-1 call and her statement to law enforcement. To risk alienating the jury in order to avoid post-trial aspersions of professional inadequacy or to satisfy appellate counsel's desire for cross-examination exemplify why this Court has held that "[t]he method and scope of cross-examination 'is a paradigm of the type of tactical decision that [ordinarily] cannot be challenged as evidence of ineffective assistance of counsel.'" *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 328, 465 S.E.2d 416, 430 (1995) (quoting *Hutchins v. Garrison*, 724 F.2d 1425, 1436 (4th Cir.1983)). Trial counsel is in the best

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[9] K.S.'s voice and speech patterns during her statement to law enforcement on November 9, 2015, compared with K.S.'s voice and speech patterns on November 7, 2015, during her telephone call to 9-1-1 as the events were unravelling, reflect that 12-year-old K.S. lacked any signs of being affected by drugs or alcohol on November 7, 2015. *See* App. Ex. 5 (K.S. 9-1-1 call and 11/9/2015 interview). Further, the similarity of contents between K.S.'s 9-1-1 call, her statement to law enforcement, and her testimony on February 25, 2020, left little ground for impeachment. *Compare* App. Ex. 5, *with* App. 471–72.

position to determine the extent and scope of cross-examination. *Coleman v. Painter*, 215 W. Va. 592, 596, 600 S.E.2d 304, 308 (2004) ("The extent of cross-examination is within the trial counsel's discretion."). Furthermore, while Petitioner appears to suggest that trial counsel's advocacy was lacking because she agreed to state on the record in the presence of the jury that she had no cross-examination of K.S., *see* Pet'r Br. 5, Petitioner has not demonstrated that this was improper or, more importantly, that it adversely affected her case in any fashion.

## VI. CONCLUSION

Because Petitioner fails to demonstrate the existence of error by the circuit court, this Court should affirm Petitioner's conviction and sentence.

Respectfully Submitted,

The State of West Virginia,
By counsel,

PATRICK MORRISEY
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hfw

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 20-0744**

**STATE OF WEST VIRGINIA,**

***Respondent,***

**v.**

**A.B.,**

***Petitioner.***

## CERTIFICATE OF SERVICE

I, Holly M. Flanigan, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, March 19, 2021, and addressed as follows:

Matthew Brummond
Public Defender Services
1 Players Club Drive, Suite 301
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