IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0744

STATE OF WEST VIRGINIA,

Respondent,

v.

A.B.,

Petitioner.

RESPONDENT'S SUPPLEMENTAL BRIEF

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

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In her Supplemental Brief, Petitioner A.B.[1] contends that Respondent, State of West Virginia, failed to disclose certain impeachment evidence before trial. In reality, Petitioner's counsel possessed the evidence in question before trial started, the State disclosed all the evidence *it* had before trial, and any omitted evidence would not have made any difference in the result anyway. For any one of these reasons, the Court can and should reject Petitioner's newly asserted *Brady* claim and affirm the Circuit Court of Raleigh County's September 22, 2020, Order.

I. SUPPLEMENTAL ASSIGNMENT OF ERROR

This Court asked the parties to file supplemental briefs "on the issue of any potential *Brady* violations as defined by Syllabus Point 2 of *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007)." Petitioner now advances the following supplemental assignment of error:

> Despite a specific *Brady* request for its witnesses' juvenile records, the State withheld evidence on the mistaken belief that Petitioner could not impeach its juvenile witness with confidential information.
>
> Did the State violate *Brady v. Maryland* and *State v. Youngblood* by not disclosing evidence (I) Petitioner could use for impeachment, (II) that it possessed, and (III) would call into the question the credibility of a witness central to its case?

Pet'r Supp. Br. 1.

II. STATEMENT OF THE CASE[2]

In September 2016, a Raleigh County Grand Jury indicted Petitioner on three counts: one count of child neglect resulting in death of five-month-old G.B. in violation of West Virginia Code § 61-8D-4(a) (Count 1); one count of child neglect with risk of serious bodily injury or death of four-year-old D.B. in violation of West Virginia Code § 61-8D-4(c) (Count 2); and, one count of

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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)

[2] Respondent focuses here on only those facts relevant to the Court's *Brady* question.

child neglect with risk of serious bodily injury or death of two-year-old J.B., in violation of West Virginia Code § 61-8D-4(c) (Count 3). A.R. 1039. A jury convicted Petitioner of all those counts. *Id.* at 1054.

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

Fourteen days before trial below, Petitioner's counsel, Assistant Public Defender Sarah Smith, filed a motion to withdraw from the case. *Id.* at 1041. According to the motion, Ms. Smith had recently discovered that one of the State's witnesses, K.S., was a client of another lawyer in the same public defender office. During a later hearing, Ms. Smith advised that K.S. was a client of the Public Defender Corporation on "unrelated matters" that she thought were "still pending." *Id.* at 141–42. (In fact, the juvenile proceedings against K.S. had been dismissed a year before. *See* A.R. 137, 145.) The juvenile matters involving K.S. "were not filed until the end of 2017," *id.* at 158, two years after G.B.'s death, *see id.* at 1039. Ms. Smith had reviewed K.S.'s file and purportedly gained "information about th[is] juvenile[ ] that I would not have but for that representation by my office[.]" *Id.* When the circuit court asked whether any facts from the juvenile matters overlapped with evidence or facts material to A.B.'s case, Ms. Smith said 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. Ms. Smith believed she would "absolutely" have a duty to use it in cross-examining K.S. *Id.* at 144. She thought that continuing to represent A.B. would create 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. Among other things, the State emphasized that Ms. Smith did not and could not establish that information in K.S.'s juvenile records could be used for impeachment. *Id.* at 145–46. In support, the State submitted K.S.'s juvenile files to the

circuit court (placed under seal as Exhibit 1) for review. *Id.* Those files contained the status offense complaint against K.S., her grade reports, her transcripts, and the dismissal order. A.R. 1062-98.

The circuit court examined those records and found K.S.'s juvenile proceedings were "not the same or substantially-related proceedings" to those of Petitioner. *Id.* at 160. Accordingly, the circuit court denied the motion to withdraw. *Id.* at 161.

At the end of the hearing, the parties discussed how to address any potential impeachment material of K.S. while respecting the rules of confidentiality. *Id.* at 168. The circuit court and the parties agreed that, before any cross-examination of K.S., the court would conduct an *in camera* hearing to determine whether K.S.'s juvenile records could be used to impeach her.[3] *Id.*

2. The trial testimony of K.S. and other pertinent witnesses.

The State called K.S. as its second witness at trial. App. 470–73. K.S. offered only a few short minutes of testimony on direct examination that addressed only seconds of G.B.'s death. The entire testimony, covering just three transcript pages, read:

Q Would you tell us your name, please.

A [K.S.]

. . .

A I'm 16.

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

A Yeah.

. . .

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

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[3] This *in camera* review was also consistent with Syl. Pt. 2, *State ex rel. Lorenzetti v. Sanders*, 238 W. Va. 157, 792 S.E.2d 656 (2016), in which this Court explained how a circuit court should address confidential juvenile records that might be exculpatory.

A She was my cousin.

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

A Yes.

Q And was that also with the defendant, [Petitioner]?

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.S.]?

A My grandma.

Q And is that Gina B[.]?

A Yes.

Q On the day that [G.B.] 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.B.] died? What did you see?

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

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

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.B.], out from under [Petitioner]?

A Yes, but I couldn't.

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

A Yeah.

Q How did you try to do that?

A I just touched her and I said, "[Petitioner], 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.B.] 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.

Id. at 470–73.

Outside the presence of the jury, Ms. Smith announced that she intended to cross-examine K.S. about juvenile case number 17–JS–167, a truancy matter. *Id.* at 477. Ms. Smith explained that the records mentioned that K.S. had used marijuana and alcohol, though the records did not say when that substance use began. *Id.* at 477–78. She then theorized that substance use might have affected K.S.'s memory of G.B.'s death, at least if K.S. was using marijuana or alcohol at the time of G.B.'s that day. *Id.* at 478–79. But in an *in camera* hearing, K.S. denied having used alcohol or drugs on the day of G.B.'s death or the day before. *Id.* at 481. Based on that denial, Ms. Smith said she was "satisfied," that she did not believe "any of this [that is, the juvenile records] would be admissible," and that she "would not move to admit anything based on [K.S.'s] responses." *Id.* In fact, she had no questions at all for the witness. *Id.*

Trial resumed, and the State called its next witness, Gina B. *Id.* at 484. In contrast to K.S.'s terse description, Gina B.'s testimony spanned 21 pages of transcript and included a detailed account of how G.B. was found:

> I was downstairs and [K.S.] came down to me saying that the baby – [Petitioner] was on the baby and the baby wasn't moving, and so I ran up there to see what was going on and found [Petitioner] on the baby and pulled the baby out – moved her and pulled the baby and went running downstairs screaming while the girls were calling 911. Then when I got downstairs, my husband started CPR.

Id. at 489. At the time Gina B. found G.B., Petitioner was "unresponsive" and would not wake up. *Id.* at 490. Petitioner, meanwhile "didn't have any clothes on," and if she was talking, "it wasn't coherent." *Id.* at 492-93. She never asked about G.B. or expressed concern for her. *Id.* at 493. And when Gina B. came into the room, she noticed empty alcohol bottles in the room. *Id.* at 504.

Several other witnesses confirmed Petitioner's extremely intoxicated state around the time of G.B.'s death. A paramedic treating Petitioner on the scene described her condition as "alcohol abuse." *Id.* at 526. He found Petitioner lying in bed, *id.* at 527, and he noted "a lot of different sizes of different types of alcohol" on the nightstand. *Id.* at 528. Petitioner admitted to him "that she had been drinking numerous alcoholic beverages starting [that] morning . . . ." *Id.* at 529. Sgt. Morgan Bragg likewise noted various alcohol bottles and cans in the bedroom, including Four Loko cans (12-14% alcohol per can) and 100 proof Smirnoff vodka. *Id.* at 562. Petitioner admitted to Sgt. Bragg that she consumed the 100 proof vodka that day. *Id.* Behind the head of the bed, Sgt. Bragg observed "various pill bottles," blister packs of other medications, and bottles of cough syrup. *Id.* at 567–68. The responding officer, Cpl. Timothy Hughes, testified that Petitioner was incoherent and disoriented at the hospital, and "the strong odor of alcohol" permeated her room. *Id.* 516. Emergency Department physician Dr. Hanibal Mahdi testified that he treated Petitioner for alcohol intoxication on the day of G.B.'s death. *Id.* at 615. Dr. Mahdi's records showed that

Petitioner had a "recent/heavy" alcohol intake, with Petitioner consuming her last drink that day. *Id.* Petitioner's blood alcohol at that time was 0.289. *Id.* at 621.

Other testimony further explained when and how G.B. died. The first responding paramedic, for instance, testified that G.B. was already exhibiting signs of rigor mortis and lividity (pooling of the blood) when he arrived on the scene and found G.B.'s grandfather administering CPR. *Id.* at 509. The paramedic testified that it could take "a couple hours" for rigor mortis to set in on a small child. *Id.* at 511. Forensic pathologist Dr. Can Metin Savasman then determined that G.B.'s cause of death was "asphyxia due to having been overlain during sleep by a presumed alcohol-impaired adult co-sleeper." *Id.* at 644. Cpl. Hughes testified that Petitioner was approximately five feet and seven inches tall and weighed approximately 190 pounds, while G.B. was just 14 pounds when she died. *Id.* at 520, 635.

Each of these witnesses also testified to the deplorable condition of the family's living quarters. Garbage, rotting food, and milk lay strewn about. A broken toilet sat filled with human feces. *See e.g.* A.R. 492, 518–19, 527, 549–70.

A jury ultimately convicted Petitioner of one count of child neglect resulting in death and two counts of child neglect creating risk of injury. *Id.* at 1054.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter has been docketed for Rule 19 re-argument before the Court in the September 2022 term of court.

IV. SUMMARY OF THE ARGUMENT

Petitioner mistakenly claims that the State withheld certain evidence concerning K.S. at trial. In making this claim under *Brady v. Maryland*, 373 U.S. 83 (1963), Petitioner must prove that the evidence at issue was: (1) favorable to her as exculpatory or impeachment evidence; (2)

suppressed by the State, either willfully or inadvertently; and (3) material, i.e., its absence must have prejudiced the defense at trial. But here, there was no *Brady* violation for at least three reasons. First, *Brady* does not even apply, as Petitioner's defense counsel actually possessed the evidence that she now claims the State withheld. Second, the State separately provided Petitioner with all the juvenile-related evidence that it possessed before trial. Finally, the evidence at the heart of Petitioner's *Brady* claim was not material to either the State's case or to Petitioner's defense and, therefore, Petitioner was not prejudiced at trial.

V. ARGUMENT

"In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), the U.S. Supreme Court [] held that due process requires prosecutors to reveal all potentially exculpatory evidence to the defendant." *State v. Thomas*, 187 W. Va. 686, 692, 421 S.E.2d 227, 233 (1992). This Court has recognized that the West Virginia Constitution requires the same. *Frank A. v. Ames*, 246 W. Va. 145, ___, 866 S.E.2d 210, 226 (2021). This *Brady* rule has since been expanded to require the State to turn over material *impeachment* evidence (as well as material exculpatory evidence), regardless of whether the defendant requests it. *See, e.g., State v. Salmons*, 203 W. Va. 561, 573, 509 S.E.2d 842, 854 (1998) (observing that "the United States Supreme Court [has] held that there [i]s no difference between exculpatory and impeachment evidence for *Brady* purposes.").

But even where something is not disclosed, "not every violation" of "the prosecution's broad duty of disclosure" "necessarily establishes that the outcome was unjust." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). A party making a *Brady* claim must prove three essential elements. First, "the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence." Syl. Pt. 2, *State v. Youngblood,* 221 W. Va. 20, 650 S.E.2d 119 (2007).

Second, "the evidence must have been suppressed by the State, either willfully or inadvertently." *Id.* And third, "the evidence must have been material, i.e., it must have prejudiced the defense at trial." *Id.*; *Strickler*, 527 U.S. at 281–82 (listing same elements). The test is "conjunctive," and each prong of the test must be met in order for a petitioner to prevail on a *Brady* claim. *See State ex rel. Hubley v. Pszczolkowski*, No. 19-0211, 2020 WL 7214158, at *10 (W. Va. Dec. 7, 2020) (memorandum decision). And Petitioner bears the burden of proving all three prongs. *See Skinner v. Switzer*, 562 U.S. 521, 536 (2011) ("To establish that a *Brady* violation undermines a conviction, a convicted defendant must make each of three showings[.]").

Petitioner cannot meet her burden here. Petitioner's argument focuses on certain juvenile records related to K.S., just one of the State's many witnesses. *See generally* Supp. Pet'r Br. Petitioner asserts that those records "were 'absolutely' favorable to the defense because they impeached [the testimony of K.S.]" *Id.* at 5. Petitioner's *Brady* claim fails, however, because Petitioner cannot satisfy all of the prongs of the *Brady* test.

A. Defense counsel already possessed K.S.'s juvenile court records, so no *Brady* violation occurred.

" '[T]he *Brady* rule does not apply if the evidence in question is available to the defendant from other sources.'" *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (quoting *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986)). More pointedly, "information actually known by the defendant falls outside the ambit of the *Brady* rule." *United States v. Roane*, 378 F.3d 382, 402 (4th Cir. 2004); *see also Fullwood v. Lee*, 290 F.3d 663, 686 (4th Cir. 2002) ("Certainly, then, information that is not merely available to the defendant but is actually known by the defendant would fall outside of the Brady rule."). The record—and Petitioner's own argument—make clear that K.S.'s juvenile records were always in the possession of defense counsel. *See* A.R. 140–44; 473-74; Pet'r Br. 2; Supp. Pet'r Br. 3, 11. In arguing her motion to

withdraw, Ms. Smith acknowledged that she was aware of K.S.'s prior juvenile record because her office had represented K.S. in those matters, and her office's *own file* contained the information that she believed was impeachment evidence. A.R. 141 ("There are statements of these juveniles in the State's discovery and, further in reviewing our files, I have information about these juveniles that I would not have but for that representation by my office . . . ."); 143 ("I wouldn't have that information if they weren't clients of the public defender office."). And Petitioner now points to K.S.'s psychological records, which are *not* part of the State's juvenile file, further demonstrating that the defense was in possession of the evidence of which it now complains all along. *Compare* Supp. Pet'r Br. 7 *with* A.R. 1062-98.

Petitioner conflates the issue of her counsel's own knowledge with one of imposing a burden of "due diligence" on the part of a defendant to discover exculpatory evidence on his or her own accord, Supp. Pet'r Br. 8–13, but the latter argument is irrelevant to the matter at hand. The question here is not whether a little shoe-leather work by the defense would have uncovered the juvenile records. On the contrary, here, Petitioner's defense counsel *actually possessed* the juvenile records. Supp. *See* A.R. 140–44; Pet'r Br. 2; Supp. Pet'r Br. 3, 11. Indeed, Petitioner acknowledges that defense counsel had "actual knowledge" of the records. Supp. Pet'r Br. 11. Again: "to establish a *Brady* violation, the exculpatory material must be known to the government *but not to the defendant*." *United States v. Catone*, 769 F.3d 866, 872 (4th Cir. 2014) (emphasis added); *see also United States v. Agurs*, 427 U.S. 97, 103, (1976) ("The rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, arguably applies in three quite different situations. Each involves the discovery, after trial of information which had been known to the prosecution but *unknown to the defense*." (emphasis added)). So "evidence is not 'suppressed' if the defendant knows about it and has it in her possession." *Lambert v. Blackwell*, 387 F.3d 210, 265 (3d Cir.

2004); *see also Roane*, 378 F.3d at 402; *People v. Martin*, 27 N.Y.S.3d 633, 634 (App. Div. 2016) ("Evidence which is known to the defendant, or which is in his possession, is not *Brady* material"). Accordingly, the Court should not be distracted by Petitioner's "due diligence" argument.

Because the alleged *Brady* evidence actually known to the defense, this Court should find there was no *Brady* violation. *Roane*, 378 F.3d at 402.

B. The State disclosed all the records on K.S. that it possessed to Petitioner before trial, so no *Brady* violation occurred.

"[A]s long as a defendant possesses *Brady* evidence in time for its effective use, the government has not deprived the defendant of due process simply because it did not produce the evidence sooner." *State v. Cooper*, 217 W. Va. 613, 618, 619 S.E.2d 126, 131 (2005). A *Brady* violation happens only when "earlier disclosure of the evidence would have produced a different result at trial." *Id.* (finding that disclosure of exculpatory evidence one week before trial was not a *Brady* violation). Even disclosures made after trial has begun do not violate *Brady*, as long as the *Brady* information is made available to the defense in time for its use later in the trial. *See United States v. Shifflett,* 798 F. Supp. 354 (W.D. Va. 1992) (finding no constitutional violation of duty to disclose criminal records of witnesses after they testified on direct examination because the nature of the materials permitted its effective use if available for cross-examination); *United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527, 531 (4th Cir. 1985), *cert. denied sub nom., Dellinger. Inc. v. United States*, 474 U.S. 1005 (1985) (finding that *Brady* information that was made known to the defendant during the cross-examination of the State's first witness did not violate due process under *Brady* because the information was available for use in the defendant's cross-examination of all further government witnesses as well as in the defendants' case-in-chief.).

The State provided all these records to the circuit court (and served them on defense counsel) at the February 19, 2020, pretrial hearing—six days before K.S. testified. A.R. 145, 431-

33. Defense counsel was then able to use those materials to inform her decision as to how to question K.S., even though she ultimately chose not to do so in the jury's presence. Petitioner does not even attempt to argue that earlier disclosure would have changed the result at trial. This Court should, thus, find that there was no *Brady* violation. *See, e.g.*, *White v. State*, 816 A.2d 776, 778 (Del. 2003) (finding no *Brady* violation from supposedly untimely disclosure of impeachment material for state witness, where material was disclosed one week before trial, defense counsel chose not to use that material after he questioned the witness outside the jury's presence, and where defense counsel never sought a continuance or objected to the delay).

In truth, Petitioner identifies just one thing that she says the State failed to disclose before trial: certain unspecified Highland Hospital records about K.S. Supp. Pet'r Br. 13–15. Yet Petitioner has failed to demonstrate that *the State* possessed any Highland Hospital records. "A *Brady* claim can not [sic] be premised upon speculation." *State v. Shanton*, No. 16-0266, 2017 WL 2555734, at *4 (W. Va. Supreme Court, June 13, 2017) (memorandum decision); *accord State v. Kobayashi*, No. 18-0897, 2020 WL 598324, at *4 (W. Va. Supreme Court, Feb. 7, 2020) (memorandum decision). A *Brady* claim will not lie where the defendant has not shown that the State possessed the evidence in question at the time of trial. *See State v. White*, 228 W. Va. 530, 547, 722 S.E.2d 566, 583 (2011). And this Court has not been willing to *assume* a prosecutor's knowledge of facts unless some member of his or her investigation team actually knows of them. *See, e.g., Brian W. v. Martin*, No. 17-0185, 2018 WL 317374, at *2 (W. Va. Supreme Court, Jan. 8, 2018) (memorandum decision) (finding that no *Brady* violation occurred where prosecutor did not disclose information known only to Child Protective Services worker who was not on investigation team).

Here, Petitioner argues that "[i]t is inconceivable that the State . . . would be unaware of a commitment [to Highland Hospital], Supp. Pet'r Br. 14, but she offers no evidence that the State *did* have knowledge or records of such a commitment. On the contrary, the record—and Petitioner's own argument—demonstrates that when the State turned over K.S.'s juvenile records, those records did not include medical or psychological records. A.R. 473–74; Supp. Pet'r Br. 14. Petitioner engages in a great deal of speculation, arguing that it is "inconceivable" that the State did not know about the alleged hospitalization. Supp. Pet'r Br. 14–15. However, this Court should find that "[t]he [Petitioner's] argument, which is solely based on conjecture and speculation, cannot support a *Brady* violation." *United States v. Horton*, 756 F.3d 569, 575 (8th Cir. 2014). In fact, neither the Appendix Record nor the Supplemental Appendix Record contain any records from Highland Hospital, so it is impossible to say with specificity what records Petitioner even thinks were withheld. *See Frank A. v. Ames*, 246 W. Va. 145, 866 S.E.2d 210, 227 (2021) (finding no *Brady* violation where "nothing in the appendix record support[ed] th[e] assertion [that the evidence was suppressed]; there [we]re no documents in the case file showing what the State did or did not turn over in discovery"); *State v. McGuirk*, No. 15-0113, 2016 WL 3369560, at *5 (W. Va. Supreme Court, June 17, 2016) (memorandum decision) (finding no *Brady* violation from alleged failure to disclose accusations against testifying officer where "[t]here [wa]s no evidence regarding the accusations against Cpl. Blevins in the appendix record").

In short, the State produced all the potential impeachment material related to K.S. that it had in its possession before trial.

C. K.S.'s testimony was not material to either the State's case or Petitioner's defense, so no *Brady* violation occurred.

Petitioner argues that K.S. "was critical to the State's case" and that "[t]here is a reasonable probability that Petitioner would have received a more favorable outcome if unconflicted counsel

had access to all *Brady* material." Supp. Pet'r Br. 15. Petitioner's argument is a red herring because even if unconflicted counsel had been provided K.S.'s juvenile records by the State, the evidence was not material and would not have affected the outcome of the trial. *See United States v. Morrone*, No. CRIM. 79-71-1, 1986 WL 20911, at *5 (E.D. Pa. Dec. 31, 1986), *aff'd sub nom. Appeal of Morrone*, 822 F.2d 53 (3d Cir. 1987), and *aff'd*, 822 F.2d 54 (3d Cir. 1987) (finding that the State's failure to disclose a potential conflict of interest of trial counsel did not constitute a *Brady* violation because any information affected by the conflict was not favorable or material).

"The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Peterson*, 239 W. Va. 21, 29–30, 799 S.E.2d 98, 106–07 (2017) (citations omitted). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "In assessing whether the verdict is worthy of confidence, a court considers, among other things, the other evidence that supports the government's case." *United States v. Clarke*, 767 F. Supp. 2d 12, 40 (D.D.C. 2011), *aff'd sub nom. United States v. Straker*, 800 F.3d 570 (D.C. Cir. 2015). Where, as here, the evidence against the defendant is overwhelming, an alleged *Brady* violation is not material. *Wood v. Bartholomew*, 516 U.S. 1, 8 (per curiam) (no reversible *Brady* error where the case against the defendant was "overwhelming").

While Petitioner avers that "[the State] needed [K.S.] to prove causation and criminal neglect," Petitioner exaggerates K.S.'s role in the State's case. As demonstrated in Respondent's supplemental Statement of the Case, K.S.'s testimony was but a small piece of the State's case.

Eleven witnesses testified in this case over the course of four days. K.S.'s testimony consisted of just 24 answers, including her *in camera* examination by the defense. A.R. 470–73, 481. Her testimony was limited to finding Petitioner asleep on top of G.B., trying to rouse Petitioner, trying to pull G.B. out from under Petitioner, and summoning help. *Id.* at 470–73. All that testimony was cumulative of other witness testimony. When asked *in camera* whether she had consumed alcohol or drugs on the day G.B. died, or the day before that, K.S. answered that she had not. *Id.* at 481. That testimony rendered her juvenile records irrelevant under the lone theory advanced by defense counsel. Supp. Pet'r Br. 15; *see also Brown v. Coleman*, No. 14-0134, 2014 WL 6607517, at *4 (W. Va. Supreme Court, Nov. 21, 2014) (memorandum decision) (finding that allegedly suppressed mental-health records were immaterial, "particularly in light of the fact that petitioner had the opportunity to examine [the witness] regarding his criminal and mental health history to the extent that the trial court may have permitted such testimony").

Hours of corroborating testimony from several other witnesses followed K.S.'s testimony, including K.S.'s grandmother, Gina B. Like K.S., Gina B. testified to finding an unresponsive Petitioner lying on top of G.B., trying unsuccessfully to rouse Petitioner, and having to pull G.B. out from under her. A.R. 489. Five witnesses testified to Petitioner's extreme intoxication on the day of G.B.'s death. A.R. 493, 516, 529, 562, 615. Four of those witnesses testified to seeing various alcohol and pill bottles strewn around the room where Petitioner was found lying on top of G.B. A.R. 504, 528, 562, 567–68. And the emergency department doctor who treated Petitioner on that day testified that her blood alcohol level was a staggering 0.289. A.R. 621.

In light of all that damning testimony, Petitioner simply cannot demonstrate that she did not receive a fair trial in the absence of K.S.'s juvenile and psychological records—which her defense counsel possessed but chose not to introduce. *Kyles*, 514 U.S. at 434. That is, Petitioner

has not established any reasonable probability that her trial would resolved differently had that information been introduced. *Snow v. Simmons*, 474 F.3d 693, 711 (2007). This Court should find that K.S.'s testimony was not material to the State's case or Petitioner's defense and, thus, there was no *Brady* violation.

VI. CONCLUSION

For these reasons (and the reasons set forth in Respondent's original brief and oral argument), this Court should affirm Petitioner's conviction and sentence.

Respectfully submitted,

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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, Lara K. Bissett, 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 Supplemental Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, May 23, 2022, and addressed as follows:

Matthew Brummond
Public Defender Services
1 Players Club Drive, Suite 301
Charleston, WV 25311

Lara K. Bissett

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