No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

Lena Marie Conaway, *Petitioner*,

v.

State of West Virginia, *Respondent.*

_____

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it a violation of due process for a trial court to deny a motion for judgment of acquittal when there is no proof of cause of death in a prosecution for Murder of a Child by a Parent by Failure or Refusal to Provide Necessities, pursuant to W. Va. Code §61-8D-2(a) (2011)?

2. In a prosecution in which cause of death is an element, is it a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) for the prosecution to withhold an opinion from an expert that it would be impossible to testify as to cause of death?

PARTIES TO THE PROCEEDINGS BELOW

1. Lena Marie Conaway.

    a. Ms. Conaway is a criminal defendant in the Circuit Court of Lewis County West Virginia, whose convictions are the subject of the instant Petition for Writ of Certiorari, in case number 17-F-12.

    b. Ms. Conaway is the Petitioner in the direct appeal of his conviction to the Supreme Court of Appeals of West Virginia, in *State v. L.M.C.,* Docket No. 18-0851, (W.Va., July 30, 2020).

2. The State of West Virginia.

    a. The State of West Virginia is the Plaintiff in Ms. Conaway's criminal case in Lewis County, West Virginia, in case number 17-F-12.

    b. The State of West Virginia is the Respondent in Ms. Conaway's direct appeal of her convictions to the Supreme Court of Appeals of West Virginia, in *State v. L.M.C.,* Docket No. 18-0851, (W.Va., July 30, 2020).

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The Petitioner, Lena Marie Conaway, respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Appeals of West Virginia, for the reasons stated herein.

CITATIONS OF OPINIONS AND ORDERS

The Supreme Court of Appeals of West Virginia issued a Memorandum Decision in *State v. L.M.C.,* Docket No. 18-0851, (W.Va. July 30, 2020) (included in the Appendix to this Petition at p. 1). The Supreme Court of Appeals of West Virginia denied Ms. Conaway's timely petition for rehearing by order entered on December 4, 2020. (Appendix, at p. 10).

STATEMENT OF JURISDICTION

The Petitioner's convictions were affirmed on direct appeal by Memorandum Decision issued by the Supreme Court of Appeals of West Virginia on July 30, 2020, and denied a timely petition for rehearing on December 4, 2020. This Honorable Court has jurisdiction over final judgments of the highest court of a state pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

W. Va. Code § 61-8D-2(a) (2011)

(a) If any parent, guardian or custodian shall maliciously and intentionally cause the death of a child under his or her care, custody or control by his or her failure or refusal to supply such child with necessary food, clothing, shelter or medical care, then such parent, guardian or custodian shall be guilty of murder in the first degree.

STATEMENT OF THE CASE

The earliest events underlying this case took place years before a court case was initiated, beginning with the disappearance of the Petitioner's daughter, A.L. in 2011 in Lewis County, West Virginia. Law enforcement received reports that A.L. was missing, and extensive efforts began both to search for the child, and to investigate the circumstances of her disappearance, including collecting numerous statements from the Petitioner. Years passed, without any sign of A.L. In the meantime, the Petitioner's other children had been placed with other families, including her older daughters K.C., and D.C. The sisters made disclosures concerning the Petitioner striking A.L. with a wooden object, the effects of the apparent injuries, A.L.'s death the following morning, and the Petitioner's alleged efforts to conceal her body. Additional major efforts were then undertaken to try and locate A.L.'s remains where the sisters indicated they might be located. (Appendix, at 2-4).

These statements by the sisters were the primary basis of the State's prosecution of the Petitioner. An arrest warrant was obtained and then executed on the Petitioner where she was residing, in Florida. The State's lead investigating officer, Trooper Loudin of the West Virginia State Police, participated in the arrest. (Appendix, at 3). Following extradition and a preliminary hearing, the Petitioner was indicted by the Lewis County Grand Jury for Murder of a Child by Failure to Provide Necessities, Death of a Child by Child Abuse, Child Abuse Resulting in Serious Bodily Injury, and Concealment of a Human Body. (Appendix, at 147-150).

Prior to trial, unbeknownst to the Petitioner or her counsel, Trooper Loudin engaged in a discussion with Dr. Mel Wright concerning the possibility of expert testimony on behalf of the State. Dr. Wright was not disclosed as a witness, and did not ultimately testify. (Appendix, at 6). The case went to jury selection and trial in April of 2018. Jury selection lasted two days, and the guilt phase of the trial lasted six days. There was extensive testimony concerning the investigation, and various individuals who had been the subjects of the investigation; however, the bulk of the probative testimony on the alleged crimes themselves came from the testimony of D.C. at the beginning of the State's case in chief, and the testimony of K.C., at the end of it. The Petitioner did not testify, but put on two witnesses in an effort to demonstrate alternative theories concerning A.L.'s whereabouts. (Appendix, at 62-69).

During Trooper Loudin's testimony on behalf of the State, he testified for the first time about a conversation with Dr. Wright during the course of his investigation, while recounting his own lay medical theories:

> A. When I look at the possibility of whether or not a strike to the head by a board; by an adult to a three (3) year old's head; my opinion is that it's perfectly possible that that caused an internal injury; which vomiting is a symptom of. And it's - - it's been testified that she was

vomiting. There was some orange stuff around her mouth when she was found the next morning. So yes; I would presume that striking on top of the head of a three (3) year old whose skull is not yet fused together; it doesn't take much to cause an internal injury that would not have any external bleeding that would leave any DNA evidence on the scene.

Q. You've got a doctor to support these non-medical opinions? You're not a physician.

A. No, sir. Don't claim to be. No, sir. Just - - just been part of a lot of child fatality investigations and in my experience and sixteen (16) years as a law enforcement officer I've seen a lot of injuries to children and - - and saw what caused those injuries and had a lot of training in what happens to a child's body when - - when they're abused and in those types of cases.

Q. Well, let me begin by asking you this; I mean, we - - we didn't take this story and some board we don't know the thickness of or the length or the weight of - - ; we've not gone to some medical doctor or expert or pathologist and said you know; let's assume this little girl's story is truthful and let's assume this was - - this is a fair - - you know, board to represent what - - what this little girl claims Mommy had in her hand; and let's assume that she hits her in the head here and let's assume all these other facts we know. She's not knocked out; there's no blood; she stays awake for a while; she's checked on in the middle of the night, she's fine; but at some point in the middle of the night after she's checked on and before they check on her again the next morning; she dies. We don't have - - we've got - - ; with all due respect; a police officer's opinion as to whether or not that could've been the cause of death in this case; yes?

A. If I could interrupt you for just a second?

Q. Yes, oh yes.

A. I actually spoke to Dr. Mel Right [sic]; who is a - - he's the leading pediatric trauma physician at WVU; and described to him the board; the type of strike that was possibly occurred; that - - and ask - - I just asked him what his opinion would be; if that injury could be caused and what symptoms could result of it. And he and I did have a conversation about that; but he's not here to testify; no.

Q. Okay. Well, in fairness to you and the doctor; I mean, you - - you wouldn't be able to tell him that this is the board - - we don't know what the board is.

A. Correct.

Trial transcript, day 2, April 17, 2018, at 980-100.

The jury convicted the Petitioner on all counts. Following a mercy phase hearing, the jury did not recommend mercy (i.e., the possibility of parole) for the Petitioner. The Petitioner's trial counsel filed post trial motions concerning the insufficiency of the evidence, and an alleged *Brady* violation stemming from the failure of Trooper Loudin to disclose his discussion with Dr. Mel Wright, both of which motions are the respective points at which the questions in this certiorari petition were first raised to the trial court.

The *Brady* motion alleged the following facts that trial counsel had learned by meeting with Dr. Wright after the trial [emphasis added]:

> 1. Approximately one year ago, Dr. Wright was approached by Trooper Loudin and asked if he could possibly help in this case;
> 2. Dr. Wright indicated to Trooper Loudin that he would be happy to try;
> 3. Dr. Wright believes that there may have been another meeting/conversation or two with Trooper Loudin regarding the case but can not now be certain;
> 4. Trooper Loudin shared with Dr. Wright the State's theory regarding cause-of-death which was simply the story that had been recently shared with the investigators by the defendant's daughter D.L.;
> 5. Dr. Wright has little, if any, memory of the details shared with him by Trooper Loudin. Dr. Wright was not asked nor subpoenaed by anyone on behalf of the State to testify at trial.
> **6. Dr. Wright's testimony would have been that the story related by D.L. regarding the blow to A.L.'s head by the defendant may have represented a plausible explanation for A.L.'s cause-of-death but that it would be impossible to offer that opinion with any degree of medical certainty/reliability in the absence of having A.L.'s body available to examine in order to determine the extent of the injuries she sustained by the blow to her head.**
> 7. The doctor further shared with defense counsel that it was only fair of Trooper Loudin to have testified that "the aspiration of her own vomit" could not be ruled out as a possible cause of death.
> 8. Dr. Wright also shared with defense counsel that the fact that there was no loss of consciousness by A.L. would not affect his opinion regarding the potential plausibility of D.L.'s story respecting cause-of-death. The same would go for the lack of observation of blood, as well as the fact that she remained awake for a few hours and also appeared to be fine while sleeping in the middle of the night.

(Appendix, at 124-125).

The Circuit Court denied these motions, and then denied the Petitioner's pro se post-trial motions. The Petitioner was sentenced to life without the possibility of parole on the violation of W. Va. Code § 61-8D-2(a), as well as consecutive maximum sentences on the other counts. The Petitioner filed a direct appeal with the Supreme Court of Appeals of West Virginia, raising, among other issues, a sufficiency of the evidence claim, a *Brady* claim regarding the failure to disclose the conversation between Trooper Loudin and Dr. Wright, and a plain error claim regarding the non-disclosure of the Petitioner's alleged statement at her arrest. (Appendix, at 11-37). It is by means of those assignments of error that the federal issues currently presented in this petition were raised in the appellate court. The Petitioner was denied relief on appeal, with her convictions and sentence affirmed. (Appendix, at 1-9). The Petitioner filed a timely petition for rehearing that was denied on December 4, 2020. (Appendix, at 10, 118-123). It is from the judgment of the Supreme Court of Appeals of West Virginia that the Petitioner now requests this Court's review.

ARGUMENT AMPLIFYING REASON FOR ALLOWANCE OF THE WRIT

Pursuant to Rule 10(b) of the Rules of the Supreme Court of the United States, the Petitioner asserts that the Supreme Court of Appeals of West Virginia, a state court of last resort, has decided an important question of federal law raised in this petition in a manner which conflicts with the decisions of another state court of last resort and/or a United States court of appeals, in regards to the first question presented. In reference to the second question presented, the Petitioner asserts that a state court of last resort has decided an important federal question in a way that conflicts with relevant decisions of this Court, pursuant to Rule 10(c).

1. Is it a violation of due process for a trial court to deny a motion for judgment of acquittal when there is no proof of cause of death in a prosecution for Murder of a Child by a Parent by Failure or Refusal to Provide Necessities, pursuant to W. Va. Code §61-8D-2(a) (2011)?

It is axiomatic that a challenge to the sufficiency of the evidence implicates federal due process concerns:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 397 U.S. 358, 365 (1970).

In the instant case, although the Petitioner raised the issue of whether the State had sufficiently proven the element of whether A.L.'s death was actually *caused* by the failure of the Petitioner to maintain medical care for her, the lower court did not directly opine on that issue. Instead, it opined on whether she *intended* the death; a separate but distinct issue that the Petitioner also raised. The Petitioner attempted to correct this discrepancy between the assigned error and the ruling in her Petition for Rehearing; however, the lower court denied said petition.

In doing so, the lower court has essentially found that a conviction of W. Va. Code § 61-8D-2(a) may be sustained even when there is no proof that the failure to provide medical care actually caused the death; i.e., that the child would have survived had the medical care been obtained in a timely fashion. In coming to this conclusion, the ruling of the Supreme Court of Appeals of West Virginia is in conflict with the rule established by the state courts of last resort in numerous states.

In *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005), the defendant returned home and noticed her baby was limp and unresponsive. After anonymously calling various

emergency rooms for medical advice, this defendant eventually called her mother-in-law, who told her she should take the baby to the hospital. By the time she arrived, the baby was unresponsive, all life support was discontinued, and the baby was declared brain dead.

This defendant was convicted of knowingly and intentionally failing to provide necessary medical care to a child, causing the child's death. The two physicians, who testified for the State, stated that had this defendant sought medical help earlier, the baby may have survived. This conviction was affirmed by Nebraska's intermediate court. In setting aside the conviction, the Nebraska Supreme Court held:

> Thus, to establish that Muro's unlawful conduct was a proximate cause of Vivianna's death, the State was required to prove beyond a reasonable doubt that but for Muro's delay in seeking medical treatment, Vivianna would have survived her preexisting traumatic head injury. We agree with the dissenting judge that the State did not meet this burden. The State proved only the possibility of survival with earlier treatment. Such proof is insufficient to satisfy even the lesser civil burden of proof by a preponderance of the evidence.

Id., 269 Neb. at 713, 695 N.W.2d at 432.

In *Lucas v. State*, 792 So.2d 1169 (Ala. 2000), the defendant was convicted of failing to obtain medical treatment for her son, causing his death. Neither of the State's medical experts testified that earlier medical treatment would have prevented the child's death. In setting aside this conviction and entering a judgment of acquittal, the Alabama Supreme Court held, "Thus the record does not contain evidence tending to prove that, but for Lucas's failure to seek prompt medical treatment for her injured son, he would have survived, or survived longer. Accordingly, the State failed to prove the essential element of causation." *Id.,* 792 So.2d at 1173.

Additionally, in *State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006), a post-conviction case, it was held that trial counsel's failure to challenge sufficiency of the evidence in a case

involving failure to provide medical treatment, resulting in death of a child, constituted ineffective assistance of counsel because the State's medical expert could not state that earlier treatment would have prevented the death.

The lower court has considered a related case, in the context of West Virginia's child neglect resulting in death statute, W. Va. Code § 61-8D-4a. In *State v. Thornton*, 228 W. Va. 449, 720 S.E.2d 572 (2011), the Supreme Court of Appeals of West Virginia examined an argument predicated on a failure to prove that the child would have survived but for the delay in medical care. Without announcing a specific rule in line with the defendant's argument, the lower court simply examined the facts, and determined that by the terms of the defendant's own argument, there was sufficient evidence in the record for the jury to find that the child would have survived. In *Thornton*, one doctor did, in fact, testify that the child "would have survived." *Id.*, 228 W. Va. 462, 770 S.E.2d 584.

In the instant case, the lower court appears to have moved away from even that watered-down position, by upholding a result where *no* doctor testified at all, and certainly not about whether or not immediate medical attention would have prevented A.L.'s death. In taking that position, the Supreme Court of Appeals of West Virginia has clearly set itself apart from the weight of the authority in its sister jurisdictions. Therefore, the Petitioner requests that this Court consider the question of whether due process is violated by a rule that does not require proof that death was actually caused by the deprivation of necessities in a prosecution under W. Va. Code § 61-8D-2(a).

2. In a prosecution in which cause of death is an element, is it a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) for the prosecution to withhold an opinion from an expert that it would be impossible to testify as to cause of death?

The issue of cause of death, or lack thereof, dovetails with the second question presented. In this case, not only did the trial court and the lower court fail to ensure that each

element of the lead offense was proven, those courts also failed to grant relief when the State had information tending to show that the essential element of the cause of death could not be proven. The Petitioner contends that failing to disclose the results of Trooper Loudin's consultation with Dr. Wright – that Dr. Wright would not be able to testify as to cause of death in this case – constitutes a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). "*Brady* held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' 373 U.S., at 87" *Kyles v. Whitley*, 514 U.S. 419, 432 (1995).

As trial counsel stated in his motion: "[T]he testimony of Dr. Wright would have clearly been favorable to the defendant as he would have described to the jury that in the absence of a body it would be impossible to determine the cause of death. In fact, it is hard to imagine evidence or testimony that could have been more exculpatory." (Appendix, at 125). The Supreme Court of Appeals of West Virginia relied on trial counsel's admission that he had also consulted with physicians, and rejected the *Brady* claim based upon *United States v. Wilson*, 901 F.2d 378 (4th Cir. 199), quoting that case for the proposition that "the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources." *Id.*, at 380. This is a misapplication by the lower court of the rule in *Wilson*. In *Wilson*, the witness who possessed the alleged exculpatory evidence was known to, and available to, the defendant pretrial, and could have been interviewed in the exercise of reasonable diligence.

In the instant case, the Petitioner had no idea that the lead investigator for the State had consulted with a physician in an effort to prove cause of death, only to learn that cause of death (an essential element of the crime) was impossible to establish. If the State had disclosed Dr. Wright as a witness pretrial, and trial counsel had failed to interview him or look further into

the nature of his assessment of the case, then the *Brady* claim could be defeated based on the *Wilson* rule. That is not at all what happened.

The Petitioner did not know about Dr. Wright until mid-trial, and did not know the nature of his opinion until after trial. It does not take a great deal of creativity to imagine that trial counsel's cross-examination of Trooper Loudin would have been materially improved by the opportunity to question him in front of the jurors about Dr. Wright's inability to opine on cause of death. Impeachment evidence is clearly within the scope of *Brady*, per the holding of *United States v. Bagley*, 473 U. S. 667 (1985). Dr. Wright's opinion was undoubtedly exculpatory, both in terms of its tendency to disprove criminal responsibility, and it also because it constituted valuable impeachment evidence against Trooper Loudin, who was all too eager to offer his lay opinion, as seen from the excerpt of his trial testimony *supra*. It was not "available" to the Petitioner within the meaning of the *Wilson* decision cited in the ruling.

It is also notable that under the *Kyles* materiality standard, it is not necessary to demonstrate insufficiency of the evidence, or anything near it, to succeed on that prong of the *Brady* test. Yet the evidence in this case actually does meet that high hurdle:

> The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Kyles, 514 U.S. at 434-35. Dr. Wright's opinion easily meets and surpasses this test. The lower court's memorandum decision conflicts with this Court's opinions in *Brady, Bagley,* and *Kyles*, and merits a grant of certiorari on that basis, in conjunction with split from the state

courts of last resort on the question of whether proof of the cause of death is required to sustain a conviction under W. Va. Code § 61-8D-2(a).

Respectfully Submitted,

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