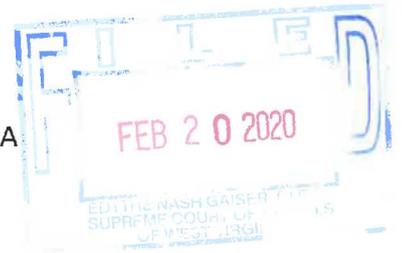


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO.: 19-0875



State of West Virginia
Respondent

Consolidated Case on Certified Questions
from the Circuit Court of Fayette County

v.

Justin K. Legg (Fayette Indictment 19-F-134)
Petitioner

Co Petitioners:

Patrick Bragg	19-F-74	Alisha A. Loeffler	19-F-135
Leslie P. Copeland	19-F-84	Steven M. Nowlin	19-F-142
Brittany N. Farrell	19-F-98	Joshua L. Pittman	19-F-145
Louis A. Figueroa	19-F-100	Windy D. Pittman	19-F-146
Blade Goodman	19-F-108	Tyler G. Randall	19-F-147
Rodger D. Hancock	19-F-118	Patricia A. Rivers	19-F-148
Brandon C. Johnson	19-F-124	Kevin M. Walton	19-F-152

PETITIONER'S BRIEF ON CERTIFIED QUESTIONS

James Adkins (WV Bar # 9892)
Assistant Public Defender
Edward S. Stanton (WV Bar # 6299)
Deputy Chief Public Defender
12th Judicial Circuit
102 Fayette Avenue
Fayetteville, WV 25840
PH: 304.574.2583
FAX: 304.574.2674
jadkinspd12@suddenlinkmail.com

TABLE OF AUTHORITIES

United States v. Brock, 789 F.3d 60 (2d Cir. 2015).....14-16

United States v. Camara, 908 F.3d 41 (4th Cir. 2018).....9

United States v. Hawkins, 547 F.3d. 66 (2d Cir. 2008).....15

United States v. Jackson, 696 F. 2d 578 (8th Cir. 1982).....14

Kotteakos v. United States, 328 U.S. 750 (1946).....7

United States v. Miller, 471 U.S. 130 (1985).....6

United States v. North, 960 F.2d 131 (8th Cir. 1990).....10,14,16

United States v. Parker, 554 F.3d 230 (2d Cir. 2009).....13

Pinkerton v. United States, 328 U.S. 640 (1946).....1,4,9,11-12,14

United States v. Tarantino, 846 F. 2d 1384 (D.C. Cir., cert. denied 488 U.S. 867(1988).....11,14

TABLE OF CONTENTS

CERTIFIED QUESTIONS.....1-2

STATEMENT OF THE CASE.....2-4

SUMMARY OF ARGUMENT.....4-5

STATEMENT REGARDING ORAL ARGUMENT AND DECISIONS.....5

ARGUMENT

 QUESTION I.....6-9

 QUESTION II.....10-11

 QUESTION III.....11-13

 QUESTION IV.....13-16

 QUESTION V.....17-18

CONCLUSION.....18-19

CERTIFICATE OF SERVICE.....20

CERTIFIED QUESTIONS¹

- I. For purposes of a crime under West Virginia Code §60A-4-414(b), is an Indictment specifically alleging a conspiracy involving a single defendant and only one other co-conspirator sufficient, under constitutional principles, to put the defendant on notice that he/she may be held responsible under section 4-414(f) for the quantity of drugs delivered or possessed with intent to deliver solely by the co-conspirator to other persons, who have also been charged in separate indictments to other persons, who have also been charged in separate indictments alleging a single conspiracy involving the same co-conspirator, when those other persons are not named in the indictment?
- II. For purposes of a crime under West Virginia Code § 60A-4-414(b), does section 4-414(f) incorporate the common law principles that overt acts have to be in furtherance of the conspiracy before the jury can attribute to the defendant “all of the controlled substances manufactured, delivered or possessed with intent to deliver or manufacture by other participants or members of the conspiracy?”
- III. For purposes of the jury’s determination under West Virginia Code § 60A-414(f), is evidence of an unindicted co-conspirator’s drug transactions with others not named or identified in the Indictment admissible for the jury’s consideration in determining the amount of controlled substances attributable to the Defendant for purposes of West Virginia Code §60A-4-414(b) subject to the knowing and foreseeable principles outlined in *Pinkerton v. United States*, 328 U.S. 640 (1946) and its progeny?
- IV. For purposes of a crime under West Virginia Code § 60A-4-414(b), can the jury consider the volume of controlled substances distributed by the named, unindicted coconspirator as part of his separate conspiracies with others not named or identified in the Indictment for purposes of the jury’s determination under West Virginia Code § 60A-4-414(f), even when the State does not intend to introduce evidence to show that the defendant had any connection or dealings with any of the unindicted co-conspirator’s other alleged, separately indicted co-conspirators?

¹ This section ‘Certified Questions’ replaces ‘Assignments of Error’

- V. Where the Indictment charges a conspiracy in violation of West Virginia Code § 60A-4-414(b) involving the defendant and only one other named, but unindicted co-conspirator, may counsel for the defendant continue to represent similarly situated, but separately indicted defendants who were not named in the defendant's indictment but who are alleged to have had separate conspiracies with the same, named unindicted coconspirator as identified in the indictment, when the State seeks to offer evidence in the defendant's trial of drug transactions between the named, unindicted co-conspirator and the other separately indicted individuals for the jury to consider in determining the quantity of controlled substance attributed to the defendant under West Virginia Code § 60A-4-414(f)?

STATEMENT OF THE CASE²³

The Petitioner was indicted by the May 2019 Fayette County Grand Jury for conspiracy to deliver or possess with intent to deliver; one kilogram or more of heroin; and/or fifty grams or more of methamphetamine; and/or a quantity of oxycodone under West Virginia Code §60A-4-414(b). The sole co-conspirator named in the indictment is Greg Coleman. [A.R. 1]

In October 2017, the Central West Virginia Drug Task Force began an investigation of Greg Coleman and Ryan Johnson after a confidential informant made controlled purchases of controlled substances from Coleman's Residence. On May 23, 2018 the United States Drug Enforcement Administration working with the Task Force obtained a Wire Intercept Order permitting them to listen to conversations of Greg Coleman, Ryan Johnson, and Bobby Mack. [A.R. 13]

The wiretap conversations and surveillance of the subjects' residences revealed that Ryan Johnson bought heroin and oxycodone from James Terry and associates of Terry. Greg

² Citations to the Appendix Record are in the format [A.R. Page#]

³ The correct number for a reference to the Appendix Record is the handwritten and circled number near the bottom center of each page, though individual documents contained in the Appendix Record may have received their own pagination at the time of creation.

Coleman bought heroin, oxycodone from Ryan Johnson and Bobby Mack. Coleman also bought oxycodone and methamphetamine from Gary Harvey and Carla and Terry Remy. [A.R. 13, 63]

The Petitioner(s) contacted Greg Coleman via telephone to arrange the purchase of controlled substances and would travel to Coleman's residence to procure drugs. [A.R.13-14]

Upon arrest, Greg Coleman gave a recorded statement to the DEA where he identified the Petitioner(s) as he was listening to his own recorded conversation(s). [A.R. 14, 43-48]

Coleman confessed to delivering over 16 kilograms of heroin during his statement to the DEA. [A.R. 14]

The investigation revealed that Coleman had at least 20 retail customers and Johnson had at least 4 retail customers in addition to supplying Coleman. [A.R. 63]

The State does not have any evidence that the Petitioner(s) conspired with other Fayette County indictees other than their primary "dealer" either Coleman or Johnson. Individual Fayette County defendants may be acquainted with one another and may be aware that the other was purchasing drugs from Coleman. [A.R.14, 60-61]

The State has announced its intention to present evidence concerning Coleman's transactions with his other customers, other Fayette County indictees. [A.R. 19, 20] The State has also asserted a theory that because it is foreseeable that Coleman sold to other purchasers (State alleges redistributors), then the Petitioner is liable for the quantities of drugs sold to those other customers. [A.R. 19-20] The State has no specific evidence of controlled substance transactions conducted by the Petitioner other than his interactions with Coleman. [A.R. 22-23]

A total of 16 cases have been consolidated for a determination of answers to Certified Questions presented herein. [A.R. 64-69]

Both the State and the Petitioner(s) have acknowledged that the quantity of drugs that the Petitioner purchased from Coleman, whether the Petitioner delivered drugs to others, and whether any delivery to others is a product of the Petitioner(s)'s agreement with Coleman is a matter for the jury. [A.R. 14]

SUMMARY OF ARGUMENT

The indictment for an alleged violation of West Virginia Code § 60A-4-414 does not place the Petitioner on notice that he may be held responsible for the quantity of drugs delivered, manufactured, or possessed with intent to deliver because by the unindicted coconspirator, because the State has defined the scope of this conspiracy to include only alleged transactions between the Petitioner and the unindicted co-conspirator when it crafted the indictment and has admitted that the Petitioner does not interact with Coleman's other customers, co-petitioners in this combined case.

West Virginia Code § 60A-4-414 requires that overt acts be in furtherance of the conspiracy before the jury can attribute to the Petitioner all of the controlled substances, manufactured, delivered or possessed by another member of the conspiracy. Evidence of transactions should be excluded at trial when it is apparent from facts agreed to by the State and admitted in responses to pleadings, those transactions are not in furtherance of the conspiracy alleged.

Evidence of the unindicted co-conspirator's drug transactions with others is not attributable to the Petitioner for purposes of West Virginia Code § 60A-4-414 under the knowing and foreseeable principles of *Pinkerton v. United States*, because based upon the facts

agreed to by the State and admitted in responses to pleadings, those transactions were not in furtherance of any alleged agreement between the Petitioner and the unindicted co-conspirator or of any benefit to the Petitioner.

Under West Virginia Code § 60A-4-414, the jury may not consider the volume of drugs distributed by the unindicted co-conspirator to other not named in the indictment because based upon facts agreed to by the State and admitted to in response to pleadings, those transactions were done without the knowledge of the Petitioner and were of no benefit to the Petitioner.

In the event that the Court finds that the unindicted co-conspirator's transactions apart from the Petitioner are not relevant to the conspiracy alleged in the indictment and are inadmissible, then no conflict of interest exists. However, if the State is permitted to present evidence of the co-conspirator's transactions with people other than the Petitioner, the Public Defender's Office should withdraw and the Fayette County Circuit Court should appoint each co-Petitioner in this combined case, separate counsel.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is already scheduled for a Rule 20 argument on Tuesday May 19, 2020.

ARGUMENT

- I. For purposes of a crime under West Virginia Code § 60A-4-414(b), is an indictment specifically alleging a conspiracy involving a single defendant and only one other co-conspirator sufficient, under constitutional principles, to put the Defendant on notice that he/she may be held responsible under section 4-414(f) for the quantity of drugs delivered or possessed with intent to deliver solely by the co-conspirator to other persons, who have also been charged in separate indictments alleging a single conspiracy involving the same co-conspirator, when those other persons are not named in the indictment?

An indictment which names only the Petitioner and one named co-conspirator which alleges a violation of West Virginia Code § 60A-4-414(b) is not sufficient to place the Petitioner on notice that he may be held responsible under § 4-414(f) for the quantity of drugs delivered or possessed with intent to deliver solely by the coconspirator to other persons, who have been charged in separate indictments alleging a single conspiracy involving the same co-conspirator, when those other persons are named in the indictment under the facts of this case because the State crafted the indictment to included only the Petitioner and Coleman as co-conspirators and has agreed that the Petitioner did not interact with other Fayette County indictees.

A variance between what was found in the Grand Jury's indictment may narrow, but may not broaden the charge(s) contained in the indictment. *U.S. v. Miller*, 471 U.S. 130, 144-145, 105 S.Ct. 1811, 1819 (1985).

Due to the stipulated facts and the State's responses to pleadings, the scope of this conspiracy is the alleged agreement or common scheme between the Petitioner and Coleman and the transactions alleged between Coleman and the Petitioner. Under the facts of this case, Coleman's procurement activities and transactions with his other customers are not a part of the conspiracy alleged in the indictment. [A.R. 1, 19-20]

Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), is illustrative of the principle that in a conspiracy case where there are a relatively large number of alleged conspirators and factually there may be several conspiracies, though similar in nature, it is necessary to define the scope of the conspiracy or conspiracies alleged and apply proper joinder of both offenses and defendants.

In *Kotteakos*, 32 people were indicted for conspiring to violate the National Housing Act. Of the 32 defendants, 19 proceeded to trial. Of that 19, 13 cases were submitted to the jury, 2 defendants were acquitted, 7 were found guilty and the jury disagreed on the remaining 4.

Each of the defendants had a relationship with a central figure, Brown, who would assist each in obtaining a fraudulent National Housing Act loan. *Id.* at 328 U.S. at 753

The issue was one of variance and the Court found that there was not a single conspiracy as alleged in the indictment, but several conspiracies, with the common actor in each being Brown, but no connection between the individuals or groups that apart from one another used Brown as an agent to procure loans. The Court noted that the Government has described the pattern as that of separate spokes meeting at a common center, though without the rim to enclose the spokes. *Id.* at 328 U.S. 754-55.

The Court reversed the conviction(s) due to a fatal variance between the single conspiracy alleged and the factual finding that there was not one large single conspiracy, but a series of smaller, yet similar in nature conspiracies. *Id.* at 772-77.

The State has pled in the indictment in this case a narrow conspiracy between the Petitioner and Coleman. The State has agreed that it has no evidence that the Petitioner interacted with other Fayette County indictees. The State is aware of the identities of

Coleman's suppliers and customers [A.R. 63, 19-20] and has elected not to name them in the indictment. In addition, the State has announced that it wishes to proceed under a theory because it is foreseeable that a drug dealer, Coleman, will sell to other customers, it wishes to present evidence of those transactions at the Petitioner's trial.[A.R. 19-20] Yet, the State has not pled in its responses any ability or intent to produce evidence that Coleman's sales to others (co-petitioners in this combined case), that those sales are part of the common scheme or plan alleged between the Petitioner and Coleman or of any mutual benefit between the Petitioner and Coleman.

The indictment only places the Petitioner on notice that he conspired with Greg Coleman. The inchoate offense of conspiracy does not always have boundaries as concise as an underlying substantive offense, which in a controlled substance case, an underlying substantive offense might be traced to an act or acts of possession or one or more actual transactions. While the boundaries of conspiracy are not as concise as an underlying substantive offense, they are also not so nebulous as to defy scope.

The scope of the alleged conspiracy is defined in part by the Indictment which in this case names only the Petitioner and the unindicted coconspirator Greg Coleman. However, in this case, the scope of the conspiracy is discernible due to the stipulated facts and states responses to pleadings. The facts are that there is no evidence of transactions between the Petitioner and other customers of Greg Coleman [A.R. 19-20]

Under *Pinkerton*, liability may stem when the acts of “coconspirators” are foreseeable. However, the State has already agreed that there is not an evidentiary relationship between Coleman’s other customers, which have been indicted separately and the Petitioner. [A.R. 19-20]

Therefore, because the State has named only the Petitioner and Coleman in the indictment excluding all other actors, has agreed that the Petitioner did not transact with Coleman’s suppliers or other customers and has not placed the Petitioner in notice that he may be held responsible under West Virginia Code §60-4-414(f) for the delivery of drugs by co-conspirator Coleman to others not named in the indictment.

However, the trial court has relied on *United States v. Camara*, 908 F.3d 41, 4th Cir. 2018) for the proposition that a Grand Jury’s finding of the existence of a conspiracy, rather than the identity of the coconspirators is the essential element of a crime.

But, in *Camara*, at least the indictment pled unknown conspirators as members of the conspiracy. *Id.* at 908 F.3d 43-44. In this case, the identities of Coleman’s suppliers and customers are known. The fact that there are no documented transactions between the Petitioner and Coleman’s other customers is also known.

Therefore, due to the pleadings which name only the Petitioner and Coleman and the stipulated facts, in which the State admits that the Petitioner does not interact with Coleman’s other customers, the Petitioner is not placed on notice that he may be held responsible for independent acts of the unindicted co-conspirator.

- II. For purposes of a crime under West Virginia Code § 60A-4-414(B), does section § 4-414(f) incorporate the common law principal that overt acts have to be in furtherance of the conspiracy before the jury can attribute the defendant with “all of the controlled substances, manufactured, delivered or possessed with intent to deliver or manufacture by other participants or members of the conspiracy?”

Overt acts must be in furtherance of the conspiracy alleged between the Petitioner and the unindicted coconspirator before the jury can attribute the Petitioner with all of the other controlled substances, manufacture, delivered, or possessed with intent to deliver or manufacture by other participants or members of the conspiracy.

Independent acts by a member of a conspiracy, which are similar in nature (the purchase and sale of drugs) to the acts alleged in the conspiracy should not be attributed to an individual defendant (Petitioner) unless those acts were in furtherance of the conspiracy.

United States v. North, 960 F. 2d 131, 133-34 (8th Cir. 1990).

The issue in *North* was whether eight ounces of methamphetamine which codefendant Murphy attempted to sell to an undercover informant could be used to determine North’s Base Offense Level for purpose of sentencing. The government argued that since Murphy and North were both guilty of a conspiracy and the purpose of that conspiracy was to sell cocaine and methamphetamine in the Northern District of Iowa then those eight ounces of methamphetamine should be attributed to North. *Id.* at 132-33. After a fact specific inquiry, the Eight Circuit concluded that Murphy’s actions were independent of North’s and Murphy’s joint venture and vacated the district court’s determination because it was based on an improper quantity of drugs which were not all within the scope of the conspiracy between Murphy and North.

Therefore, after a fact specific inquiry as to the scope of the conspiracy, over acts must be in furtherance of the conspiracy before a jury can attribute the Petitioner with all controlled substances delivered, manufactured, or possessed with intent to delivery by other members of the conspiracy.

- III. For purposes of the jury's determination under West Virginia Code § 60A-4-414(f) is evidence of an unindicted co-conspirator's drug transactions not named or identified in the Indictment admissible for the jury's consideration in determining the amount of controlled substances attributable to the Defendant for purposes of West Virginia Code § 60A-4-414(b) subject to knowing and foreseeable principles outlined in *Pinkerton v. United States*, 328 U.S. 640 (1946) and its progeny.

Evidence of an unindicted co-conspirator's drugs transactions with persons not named or identified in the indictment is not admissible for the jury's consideration in determining the amount of controlled substances attributable to the Petitioner for the purposes of West Virginia Code § 60A-4-424(f) subject to the knowing and foreseeable principles outlined in *Pinkerton v. United States*, 328 U.S. 640 (1946) and it's progeny unless those transactions are in furtherance of the conspiracy charged within the indictment.

Independent acts of a coconspirator of which the Petitioner had, no knowledge, received no benefit from, and did not participate cannot be considered to have been in furtherance of their conspiracy. See *United States v. Tarantino*, 846 F. 2d 1384, 1393 (D.C. Cir., cert denied, 488 U.S. 867, 109 S.Ct. 174, 102 L.Ed. 143 (1988)).

The vicarious liability where a defendant is liable for the acts of his coconspirator is recognized in *United States v. Pinkerton*, where two brothers, Walter and Daniel Pinkerton where charged with conspiracy and ten counts of the substantive offense of concealing commodities subject to taxation. *United States v. Pinkerton*, 328 U.S. at 641 The evidence in

the case showed that: there was an agreement to commit the substantive offenses; Walter Pinkerton committed the substantive offenses; and there was no evidence that Daniel Pinkerton directly participated in the commission of the substantive offenses. *Id.* at 328 U.S. 645-47. In upholding Daniel Pinkerton's conviction, the Court noted that there was no evidence of affirmative action on the part of Daniel to withdraw from the conspiracy. The Court upheld the conviction reasoning that the act(s) in furtherance of the conspiracy committed by one conspirator was attributable to the other. *Id.* at 328 U.S. at 646-47.

However, the court in *Pinkerton* acknowledged limitations on vicarious liability when it stated, a different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. *Id.* at 328 U.S. at 647-48.

For the vicarious liability of *Pinkerton* to apply, the coconspirator's actions must not only be reasonably foreseeable, those actions must be in furtherance of the conspiracy. It is undisputed that Greg Coleman was a drug dealer and as such it was foreseeable that he would both: (1.) Procure drugs from various sources to sell and (2.) Sell drugs to people other than the Petitioner. The debatable issue is whether Greg Coleman's other activities were in furtherance of the conspiracy alleged between the Petitioner and Greg Coleman. *United States v. North* as cited in response to question III, stands for the proposition that independent undertakings by a co-conspirator, even though similar in nature to crimes alleged in the indictment (drug sales), should not be attributed to the Petitioner.

The mere purchases and sale of drugs does not, without more, amount to a conspiracy to distribute narcotics. *United States v. Parker*, 554 F.3d 230, 235 (2d Cir. 2009). The State has agreed that there is no evidence that the Petitioner interacted with Coleman's other customers, separately indicted co-Petitioner's. In response to a Bill of Particulars, the State has acknowledged that it does not have specific evidence of the Petitioner further distributed drugs that he procured from Coleman. [A.R. 22-23] Yet, the State has announced its intention to proceed on a theory that because Coleman sold to other customers, then the Petitioner should be held liable for the amounts of drugs Coleman sold to others, but without any pleading or good faith demonstration that those transactions were part of the alleged agreement between the Petitioner and Coleman or of any benefit to the Petitioner.

Therefore, following fact specific inquiry, with the facts being those agreed to by the State and/or admitted to in responses to pleadings, those acts are independent acts by co-conspirator Coleman and should not be admitted because the prejudicial effect of that evidence would exceed the probative value.

IV. For purposes of a crime under West Virginia Code § 60A-4-414(b), can the jury consider the volume of controlled substances distributed by the, unindicted coconspirator as part of his separate conspiracies with others not named or identified in the Indictment for purposes of the jury's determination under West Virginia Code § 60A-4-414(f), even when the State does not intend to introduce evidence to show that the defendant had any connection or dealings with any other unindicted coconspirators or other alleged, separately indicted co-conspirators?

The jury may not consider the volume of controlled substances distributed by the unindicted co-conspirator (Coleman) as part of his separate conspiracies, agreements, or transactions with other individuals not named in the Indictment for purpose of the jury's determination under West Virginia Code §60-A-4-414(f) when the State does not intend to

introduce evidence to show that the Petitioner had any connection or dealings with any other unindicted coconspirators or other alleged separately indicted coconspirator.

Simple knowledge that the supplier supplies (drugs to) other persons is not enough however, to assess all quantities distributed by the supplier to each person who purchased drug from that supplier. *United States v. North*, 900 F.2d 131, 134 (1990); See *Pinkerton v. United States*, 328 U.S. 640, 647-48. 66 S.Ct. 1180, 184, 90 L.Ed. 1489 (1946); *United States v. Tarantino*, 846 F.2d. 1384, 1392-1393 (D.C. Cir. 1988); *United States v. Jackson*, 696 F. 2d, 578, 582-583 (8th Cir. 1982).

In *United States v. North*, 900 F.2d at 133-34 as discussed in response to Question II above, the Eight Circuit reasoned that distribution of drugs by Murphy, of which North had no knowledge, received no benefit, and did not participate, cannot be in furtherance of their conspiracy. The Eight Circuit reversed the district court's determination of North's Base Offense level because it improperly relied on quantities of drugs that should not have been attributable to North. *Id.* at 900 F. 2d 134.

In *United States v. Brock*, 789 F 3d. 60 (2d Cir. 2015), defendant Dickerson was indicted along with thirty-seven (37) with conspiracy to deliver or possess with intent to deliver crack cocaine, known collectively as "The Jackson Enterprise." The leader of the group employed several people, including to Brock, to distribute crack cocaine. *Id.* at 62-64

Brock testified that Dickerson was a regular customer and purchased two eight balls at a time several days each week. Captured telephone calls revealed that Dickerson contacted

Brock 129 times between June and September 2010. Brock testified that he did not have resale agreements with customers and did not know or care what they did with drugs after they purchased them. *Id.* at 62.

Additional evidence revealed that Dickerson sold an eight ball and eight \$20 baggies of crack to an undercover officer in October 2010. Dickerson also made a statement that that he purchased crack from Brock and others and broke down each eight ball and sold it in \$20 baggies. *Id.* at 62.

Dickerson argued at trial and on appeal that he was not a member of The Jackson Enterprise conspiracy, but merely a customer. Dickerson was convicted at trial of both conspiracy (the Jackson enterprise) and distribution of crack. *Id.* at 62-64.

On appeal, the Second Circuit considered that a relevant factor to the analysis of whether a buyer seller relationship was part of a distribution conspiracy was whether there was a prolonged cooperation between the parties, a level of mutual trust, standardized dealings, sales on credit, and the quantity of drugs in involved. *Id.* at 64, citing *United States v. Hawkins*, 547 F.3d. 66, 74 (2nd Cir. 2008). The Second Circuit found that there was insufficient evidence of a shared conspiratorial purpose because Dickerson not only bought from Brock, but others not involved in the Jackson enterprise, there were no sales on credit, there were no restrictions on whether Dickerson used or resold the drugs that he bought and Brock's testimony that he did not consider Dickerson to be a part of the organization and he did not care what Dickerson did with the drugs after he bought them. The court found that Dickerson had no connection to the Jackson enterprise other than using Brock as

one of various suppliers of crack for his personal use and resale and that Brock viewed him only as a customer. *Brock*, 789 F. 3d at 65.

The Second Circuit concluded that despite the volume of drug sales from Brock to Dickerson and the fact that Dickerson resold some of the drugs he purchased from Brock, there was not mutual dependency and a very good customer is just a customer unless there is a common stake. *Id.* at 65.

The Petitioner is situated like the Defendant in *North*, in that his coconspirator, Coleman, purchased drugs wholesale and sold to his other customers, Fayette County indictees and co-Petitioners in this combined case, but those transactions were independent of Coleman's conversations and transactions with the Petitioner. The Petitioner is also situated like defendant Dickerson in *U.S. v. Brock*, wherein while it appears the he is making purchases from a larger enterprise, he is not a member of that enterprise and vicarious liability for the acts of others and the volume of drugs sold by the unindicted co-conspirator or exchanged should not be attributed to the Petitioner.

Therefore, the jury cannot consider the volume of drugs sold to others by Coleman in this alleged conspiracy under West Virginia Code § 60A-4-414, because under the specific facts of this case agreed to by the State and admitted in responses to pleading, there is not a good faith basis to believe that those transactions are within the scope of the agreement between the Petitioner and Coleman or of any benefit to the Petitioner.

- V. Where the Indictment charges a conspiracy in violation of West Virginia Code § 60A-4-414(b) involving the Defendant and only one other named, but unindicted co-conspirator, may counsel for the Defendant continue to represent similarly situated, but separately indicted defendants who were not named in the defendant's indictment but who are alleged to have had separate conspiracies with the same, named unindicted coconspirator as identified in the defendant's Indictment, when the State seeks to offer evidence in the defendant's trial of drug transactions between the named, unindicted co-conspirator and the other separately indicted individuals for the jury to consider in determining the quantity of controlled substances attributed to the defendant under West Virginia Code § 60A-4-414(f)?

The Fayette County Public Defender's represents the Petitioner and several other Fayette County indictees in this combined case. The Public Defender's Office has already conflicted some cases where an additional coconspirator is named on the face of an indictment or other conflicts already exist due to unrelated cases. The State has plead a narrow conspiracy between the Petitioner and Greg Coleman in the indictment and the State has already stipulated that the Petitioner and other indictees in this combined action did not transact with one another. As such, the relevant evidence should be that of the conversations and transactions between Coleman and the Petitioner and whether there was a plan or agreement for the Petitioner to redistribute drugs received from Coleman. This fact pattern does not logically lead to a conclusion that a conflict of interest exists between individual indictees.

However, if the Court when answering the proceeding questions determines that Coleman's interactions with his suppliers and the other indictees in this combined action then a conflict of interest(s) exists that would require the Public Defender's Office to withdraw and for the court to appoint separate counsel for the Petitioner and each indictee. If the Petitioner faces an enhanced penalty due to volume of controlled substances, because the State has a theory that the Petitioner, as an alleged purchaser of drugs from Coleman, is vicariously liable

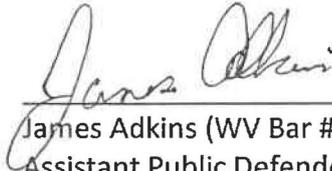
for all of Coleman's business volume, and the State is permitted to advance this theory, then the Petitioner may need to subpoena every individual that Coleman transacted with in order to demonstrate that the Petitioner is not responsible for those quantities of drugs. Under those circumstances, a conflict of interest(s) exists.

CONCLUSION

Based upon the foregoing, the Petitioner requests that the court:

- I. Find that the indictment for an alleged violation of West Virginia code § 60A-4-414 does not place the Petitioner on notice the he may be held responsible for the quantity of drugs, delivered, possessed with intent to deliver by an unindicted co-conspirator because the State limited the scope of the conspiracy when it crafted the indictment to include only the Petitioner and Coleman and has already admitted that there is no evidence the Petitioner interacted with Coleman's other customers.
- II. Find that West Virginia Code § 60A-4-414 requires that overt acts be in furtherance of the conspiracy before the jury can attribute to the Petitioner all of the controlled substances, manufactured delivered, or possessed with intent to delivery by another member of the conspiracy. In addition, the Petitioner, requests the court rule that evidence of transactions be excluded at trial when it is apparent from facts agreed to by the State and in admitted response to pleadings are not in furtherance of the conspiracy alleged.

- III. Find that evidence of an unindicted co-conspirators drug transactions with others is not attributable to the Petitioner for purposes of West Virginia Code § 60A-4-414 under the knowing and foreseeable principles of *Pinkerton v. United States*, because based upon Facts agreed to by the State and admitted to in responses to pleadings, those transactions were not in furtherance of any alleged agreement between the Petitioner and the unindicted co-conspirator or of any benefit to the Petitioner.
- IV. Find that under West Virginia Code, 60A-4-414, the jury may not consider the volume of drugs distributed by the unindicted co-conspirator with others not named in the indictment because given the facts agreed to by the State and admitted to in responses to pleadings, those transactions by the co-conspirator, were done without the knowledge of the Petitioner and were of no benefit to the Petitioner.
- V. Find that no conflict of interests exists if the Court holds the State to its pleadings and facts admitted to and permit the Public Defender's office continue to represent the Petitioner and similarly indicted co- petitioners in this combined case. However, in the event that the Court determines that evidence of the unindicted co-conspirator's transactions with people other than the Petitioner is relevant and admissible, the Court should direct that the 12th Judicial Public Defender's Office withdraw from this group of cases and direct the Fayette County Circuit Court to appoint separate counsel to each co-petitioner within this group of combined cases.



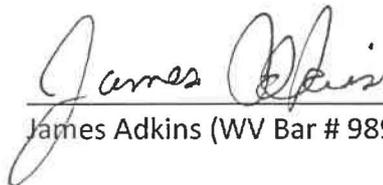
James Adkins (WV Bar # 9892)
Assistant Public Defender
102 Fayette Avenue
Fayetteville, WV 25840
PH: (304) 574-2583
FAX: (304) 574-2674
jadkinspd12@suddenlinkmail.com



Edward S. Stanton (WV Bar # 4299)
Deputy Chief Public Defender
102 Fayette Avenue
Fayetteville, WV 25840

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Petitioner's Brief was served upon Scott Johnson, Assistant Attorney General, State Capitol Complex, building 1 Room E-26, Charleston, WV 25305 by regular mail delivery postage prepaid this the 19th day of February 2020.



James Adkins (WV Bar # 9892)