



## DECISIONS, NOTICES AND ORDERS

**Monday, January 13, 2020**

The Supreme Court of Appeals of West Virginia has taken action in the following cases. This list contains only the action taken by the Court, not the content or actual date of orders or decisions.

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### REHEARINGS

The Court took the following action on petitions for rehearing:

State of West Virginia v. Jack R. Watts, No. 18-1055 (Ohio 11-F-24)  
Petition refused (5-0)

Mark H. v. Delores M., No. 18-0230 (Putnam 11-D-516)  
Petition refused (5-0)

Mitchell Brozik v. Betty Parmer, No. 18-0565 (Monongalia 13-C-651)  
Petition refused (5-0)

Alex Rahmi v. Pill & Pill, PLLC, No. 18-0533 (Jefferson 17-C-201)  
Petition refused (5-0)

### MEMORANDUM DECISIONS

In accordance with Rule 21, memorandum decisions were entered in the following cases:

State of West Virginia v. Richard F., No. 18-0666 (Marion CC-24-2014-F-34)  
Affirmed (5-0)

Yeshiareg Mulugeta v. Dimitri Misailidis, No. 18-0840 (Berkeley 14-D-1146)  
Reversed and remanded (5-0)

City of Fairmont v. WV Municipal League, Inc., No. 18-0873 (Marion 12-C-102) Affirmed (5-0)

Stephanie M. v. John M., No. 18-1091 (Kanawha 00-D-1154)  
Affirmed (4-0) (Justice Workman disqualified)

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Jaeger Energy Development, LLC, et al. v. Terry W. Moore and Cedar Branch Mining,  
No. 18-0409 (McDowell 15-C-24-S, 15-C-43-M)  
Affirmed (5-0)

John W. v. Rechelle H., No. 19-0202 (Kanawha 17-D-56)  
Affirmed and remanded (5-0)

State of West Virginia v. William N., No. 18-0769 (Monongalia 09-F-68)  
Affirmed (5-0)

Desislava Vladimirov v. Nedeltcho Vladimirov, No. 18-0689 (Kanawha 13-D-1714)  
Affirmed (5-0)

John Scotchel v. State Farm Mutual Automobile Insurance Company, No. 18-1029  
(Marion CC-24-2016-C-269)  
Affirmed (4-0) (Justice Workman disqualified)

State of West Virginia v. Alan Hicks, No. 19-0123 (Putnam 88-F-59, 88-F-2)  
Affirmed (5-0)

State of West Virginia v. Nicholas Heaton, No. 18-0862 (Mercer 17-F-7)  
Affirmed (5-0)

Jeremy Brown v. State Farm Mutual Automobile Insurance Company, No. 19-0114  
(Wood 16-C-432)  
Affirmed (5-0)

Richard Cantarelli v. Myra Jan Grisso, No. 18-0839 (Harrison 16-C-255)  
Affirmed (5-0)

Nancy Geary v. WesBanco Bank, Inc., No. 18-0885 (Marshall 16-C-159)  
Affirmed (5-0)

Keith D. v. Donnie Ames, Mt. Olive Correctional Complex, No. 16-0860 (Cabell 15-C-337)  
Affirmed (5-0)

State of West Virginia v. Kenneth Andrew Rogers, II, No. 18-1036 (Berkeley 18-F-197)  
Affirmed (5-0)

State of West Virginia v. Anthony Raheem Arriaga, No. 18-0137 (Mingo J17-F1)  
Affirmed (5-0)

State of West Virginia v. Brandon Fitzpatrick, No. 18-0273 (Mingo J17-F8)  
Affirmed (5-0)

State of West Virginia v. Daniel Amsler, No. 18-0908 (17-F-178-3)  
Affirmed (5-0)

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State of West Virginia v. Elizabeth Jenkins, No. 18-0283 (Harrison 17-F-205-3)  
Affirmed (5-0)

Anthony L. v. Shelbi P., No. 18-0959 (Harrison 18-DV-69-3)  
Affirmed (5-0)

Thomas J. v. Donnie Ames, Superintendent, No. 18-0233 (Harrison 14-C-33-1)  
Affirmed (5-0)

**RULE 19 ARGUMENT GRANTED**

The following cases will be scheduled for Rule 19 oral argument:

Robert Heavner v. Three Run Maintenance Association, No. 18-1080  
(Berkeley CC-02-2017-P-412)

State ex rel. Navient Solutions v. Hon. Ronald Wilson, Judge; and Rebecca L. Brogan-Johnson, No. 19-0874 (Original Prohibition)

State ex rel. EAN Holdings, LLC, et al. v. Hon. Ronald Wilson, Judge; et al., No. 19-0900  
(Original Prohibition)

**RULE 20 ARGUMENT GRANTED**

The following cases will be scheduled for Rule 20 oral argument:

Antero Resources Corporation v. State Tax Commissioner, No. 18-1106  
(Kanawha 18-AA-218)

Estate of Wayne A. Jones v. The City of Martinsburg, No. 18-0927 (Berkeley 16-C-490)

Estate of Wayne A. Jones v. Berkeley County Prosecuting Attorney, No. 18-1045  
(Berkeley CC-02-2018-P-318)

Terra Goins and Division of Highways v. Michael Powell, Nos. 18-0929 and 18-0932  
(Kanawha 17-AA-15)

State of West Virginia v. Justin K. Legg, No. 19-0875 (Certified Questions)

QUESTIONS CERTIFIED BY THE FAYETTE COUNTY CIRCUIT COURT

1. 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 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

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indictments alleging a single conspiracy involving the same co-conspirator, when those other persons are not named in the indictment?

Answer: Yes. First, the State is not required to identify all of the members of the conspiracy in the indictment. See *United States v. Camara*, 908 F.3d 41, 46 (4th Cir. 2018) (“The existence of the conspiracy, rather than the particular identity of the conspirators, is the essential element of the crime.” Indeed, the government need not identify any co-conspirators. “While two persons are necessary to constitute a conspiracy, ‘one person can be convicted of conspiring with persons whose names are unknown.’”); *Rogers v. United States*, 340 U.S. 367, 375, 71 S.Ct. 438, 95 L.Ed. 344 (1951); *United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991) (“It is the grand jury’s statement of the existence of the conspiracy agreement rather than the identity of those who agree which places the defendant on notice of the charge he must be prepared to meet.”). Therefore, if sufficient circumstantial evidence of the existence of a conspiracy, and of the petitioner’s involvement in that conspiracy, is introduced, it is not necessary that other members of the conspiracy be named in the indictment or otherwise identified. The question of whether there is a single or multiple conspiracies is a factual question for the jury based on the totality of the circumstances. See *State v. Judy*, 179 W.Va. 734, 737, 372 S.E.2d 796, 799 (1988); see also *United States v. Urbanik*, 801 F.2d 692, 695 (4th Cir. 1986) (question for jury). If the evidence presented at trial related to the scope and nature of the conspiracy for purposes of West Virginia Code § 60A-4-414(f) varies from the allegations in the indictment, the issue is a matter of variance to be addressed on a motion for judgment of acquittal, not pre-trial dismissal. See *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); *United States v. Cannady*, 924 F.3d 94, 97 (4th Cir. 2019); Syl. Pts. 15 and 16, *State v. McIntosh*, 207 W.Va. 561, 566, 534 S.E.2d 757, 762 (2000). Whether the variance is serious enough to warrant dismissal depends on whether the variance has prejudicially affected the petitioner’s substantial rights. See *Kotteakos*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557; *Cannady*, 924 F.3d 94; *McIntosh*, 207 W.Va. 562, 534 S.E.2d 757; see also, e.g., *United States v. Swafford*, 512 F.3d 833 (6th Cir. 2008); *United States v. Johnson*, 719 F.3d 660 (8th Cir. 2013); *United States v. Glenn*, 828 F.2d 855 (1st Cir. 1987); *United States v. Felder*, 214 F.Supp.3d 220 (S.D.N.Y. 2016).

2. For purposes of a crime under West Virginia Code § 60A-4-414(b), does section 4-414(f) incorporate the common law principle 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”?

Answer: Yes. Reading West Virginia Code §§ 60A-4-414(b) and 60A-4-414(f) together and based on the elements of conspiracy under the general conspiracy statute, West Virginia Code § 61-10-31, the jury can only attribute to the petitioner the quantity of the controlled substances the unindicted co-conspirator or other co-conspirators delivered or possessed with intent to deliver so long as that delivery and/or possession with intent to deliver was an overt act in furtherance of the conspiratorial agreement between the petitioner and the unindicted co-conspirator and other co-conspirators. See *State v. Less*, 170 W.Va. 259, 265, 294 S.E.2d 62, 67 (1981) (“The purpose of the overt act requirement is merely to show ‘that the conspiracy is at work.’ . . . It is not necessary that each conspirator involved in the conspiracy commit his or her own overt act. The overt act triggering the conspiracy as to all the conspirators can be committed by anyone of their number.”).

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3. 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 with others not named or identified in the indictment admissible for the jury's consideration in determining the amount of controlled substance 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?

Answer: Yes. First, the State is not required to identify all of the members of the conspiracy in the indictment. See *United States v. Camara*, 908 F.3d 41, 46 (4th Cir. 2018) ("The existence of the conspiracy, rather than the particular identity of the conspirators, is the essential element of the crime." Indeed, the government need not identify any co-conspirators. "While two persons are necessary to constitute a conspiracy, 'one person can be convicted of conspiring with persons whose names are unknown.'"); *Rogers v. United States*, 340 U.S. 367, 375, 71 S.Ct. 438, 95 L.Ed. 344 (1951); *United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991) ("It is the grand jury's statement of the existence of the conspiracy agreement rather than the identity of those who agree which places the defendant on notice of the charge he must be prepared to meet."). Therefore, if sufficient circumstantial evidence of the existence of a conspiracy, is introduced, it is not necessary that other members of the conspiracy be named in the indictment or otherwise identified. However, the scope of the conspiracy is critical to the application of West Virginia Code § 60A-4-414(f). For purposes of section 4-414(f), under the principles in *Pinkerton v. United States*, 328 U.S. 640 (1946), *United States v. Collins*, 415 F.3d 304 (4th Cir. 2005), *United States v. Foxx*, 544 F.3d 943 (4th Cir. 2008) and similar cases, the defendant may only be held responsible for reasonably foreseeable drug quantities that were delivered and/or possessed with intent to deliver by others within the scope of the conspiratorial agreement he jointly undertook. Therefore, for purposes of section 4-414(f), the defendant may be held responsible for (i) the quantity of controlled substances he personally delivered or possessed with intent to deliver in furtherance of the conspiracy; and (ii) the quantity of controlled substances delivered or possessed with intent to deliver by co-conspirators if their activities were (a) in furtherance of the conspiracy with the defendant and (b) were either known to the defendant or were reasonably foreseeable to the defendant.

4. 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 co-conspirator 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?

Answer: Yes. See answer to Question No. 3.

5. 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

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with the same, named unindicted co-conspirator 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 substance attributed to the defendant under West Virginia Code § 60A-4-414(f)?

Answer: No. The court must be satisfied that it is not setting up an appeal either on right to counsel grounds or ineffective assistance grounds based on an actual or potential conflict of interest in the defendant's representation. Here, the State's case is positioned to use evidence of drug transactions involving persons both of whom are represented by the same attorney and whom are both alleged to have obtained controlled substances from the same supplier, the unindicted conspirator in this indictment. There is a likelihood that counsel for the defendant will be forced to choose between clients at trial if one or more of counsel's other clients are called to testify, especially since competing issues of remaining silent under the Fifth Amendment and confrontation under the Sixth Amendment would come into play. Additionally, each individual client may possess knowledge or information that could be helpful to one client at trial but harmful to another client and vice versa. These matters create a potential conflict of interest for counsel. See *United States v. Thomas*, 977 F.Supp. 771, 775 (N.D.W.Va. 1997).

Patrick Morrissey, Attorney General v. Diocese of Wheeling-Charleston and Michael J. Bransfield, Former Bishop of the Diocese of Wheeling-Charleston, No. 19-1056  
(Certified Questions)

QUESTIONS CERTIFIED BY THE WOOD COUNTY CIRCUIT COURT

1. Do the provisions of Article 6 of the Consumer Credit and Protection Act, respecting unfair methods of competition and unfair or deceptive acts or practices, apply to religious institutions in connection with their sale or advertisement of educational or recreational services?

Answer: No.

2. Does the cumulative impact of the entire relationship between Church and State arising from the Attorney General's application of the Act constitute an excessive entanglement of Church and State prohibited by the constitutions of the United States and the State of West Virginia?

Answer: Yes

**ORDERS**

Orders of note were entered in the following cases:

State ex rel. Mason's Transport v. Hon. Andrew Dimlich, Judge; and Michael Scott Edward Atkins, No. 19-0828 (Original Prohibition)  
Petition refused (3-2) (Chief Justice Armstead and Justice Jenkins would issue a rule to show cause.)

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State ex rel. Travis Lambert v. Hon. William Sadler, Judge; and George Sitler, Prosecuting Attorney, No. 19-0911 (Original Prohibition)  
Petition refused (4-1) (Justice Walker would issue a rule to show cause.)

State ex rel. Constellium Rolled Products Ravenswood, LLC v. Hon. Jennifer Bailey, Judge, No. 19-0592 (Original Mandamus)  
Rule to show cause issued returnable May 20, 2020, unless sooner mooted. (5-0)

In the Matter of: Carrie Wilfong, Magistrate of Pocahontas County, No. 19-0289 (Judicial Disciplinary)  
Respondent reinstated immediately (5-0)

Lawyer Disciplinary Board v. Timothy M. Sirk, No. 19-0996 (Lawyer Disciplinary)  
License to practice law in the State of West Virginia annulled by consent. (5-0)

Lawyer Disciplinary Board v. Franklin D. Cornette, No. 18-1096 (Lawyer Disciplinary)  
License to practice law in the State of West Virginia annulled. (4-0) (Chief Justice Armstead not participating.)