IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0875

STATE OF WEST VIRGINIA,

Plaintiff below,
Respondent,

v.

JUSTIN K. LEGG,

Defendant below,
Petitioner.

RESPONDENT'S BRIEF

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II. 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"?

III. For purposes of the jury's deliberation under West Virginias Code Section 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 Section 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 Section 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 Section 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?

V. Where the Indictment charges a conspiracy in violation of West Virginia Code Section 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 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 Section 60A-4-414(f)?

STATEMENT OF THE CASE

On May 15, 2019, the Petitioner, Justin K. Legg, was indicted by a Fayette County, West Virginia, Grand Jury for the offense of conspiracy. A.R. 1. Specifically, the Grand Jury found that Mr. Legg:

> between the 29th day of May 2018 and the 16th day of July 2018, in the said County of Fayette, committed the offense of "conspiracy," in that the said **JUSTIN K. LEGG**, did unlawfully, willfully, and feloniously conspire with Greg Coleman, an unindicted co-conspirator, to deliver or possess within intent to deliver: one kilogram or more of heroin; and/or fifty grams or more of methamphetamine; and/or a quantity of oxycodone; and the said **JUSTIN K. LEGG** and/or Greg Coleman did act to effect the object of the conspiracy, against the peace and dignity of the State.

A.R. 1. This mirrors Indictments returned by the Fayette County Grand Jury in a number of other cases. *See* A.R. 3 ("In this Indictment, as in the other similar indictments, the State has alleged that the Defendant conspired with a single named, unindicted co-conspirator to deliver or possess with intent to deliver one kilogram or more of heroin, and that the Defendant and/or the unindicted co-conspirator did act to effect the object of the conspiracy."). *See also* A.R. 70.

In October 2017, the Central West Virginia Drug Task Force ("Task Force") began an investigation into individuals named Greg Coleman and Ryan Johnson after controlled purchases were made from Mr. Coleman's residence. A.R. 16. On May 23, 2018, the Federal Drug Enforcement Administration ("DEA"), working in conjunction with the Task Force, obtained a wire intercept order permitting them to listen in and record conversations between Greg Coleman, as well as Ryan Johnson and Bobby Mack. A.R. 16. During this wiretap investigation, the DEA and the Task Force instituted heavy surveillance of subjects associated with Messers Coleman and Johnson. A.R. 16. The wiretap investigation revealed that Ryan Johnson would purchase heroin

and oxycodone from another subject of the investigation, James Terry, and from Mr. Terry's associates. A.R. 16. Mr. Coleman was found to buy oxycodone and heroin from Ryan Johnson and Bobby Mack. A.R. 16. Mr. Coleman purchased oxycodone and methamphetamine from Gary Harvey and Carla and Terry Remy. A.R. 16. The wiretap investigation revealed Mr. Coleman sold drugs to more than twenty individuals in Fayette County, A.R. 17, including Mr. Legg, A.R. 63, who the State asserted were redistributors. A.R. 63.[1]

The State does not have any evidence that the individuals who were the subject of the DEA/Task Force investigation were in business with each other. A.R. 17. There is evidence that the separate defendants run in the same social circle and knew about each other's dealings with Mr. Coleman, although there is no evidence to present at trial that the individual defendants conspired with each other. A.R. 17.

In this case, the State indicted Mr. Legg for conspiring with Greg Coleman to distribute over one kilogram of heroin. A.R. 1, 19. It does not currently appear Mr. Legg distributed over one kilogram of heroin himself, A.R. 19, but the State below asserted that Mr. Coleman admitted to having done so. A.R. 19. *See also* A.R. 17 ("Greg Coleman gave a recorded Statement to the DEA wherein he identified several of the defendants charged in these indictments. Coleman admitted to distributing over 16 Kilograms of Heroin.").

Thus, the State below asserted that "[w]hile [Mr. Legg] may not have distributed over one kilogram of heroin himself, legally he is responsible for the heroin that Mr. Coleman distributed as part of the overall conspiracy to redistribute because he acted in furtherance of the conspiracy by repackaging and reselling the heroin that Mr. Coleman sold him." A.R. 19-20.

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[1]A redistributor is someone who resells drugs purchased from another. A.R. 33.

On September 27th, 2019, the Circuit Court of Fayette County, West Virginia, certified the following questions to this Court:

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?

Circuit Court's answer: **Yes**.

A.R. 6.

II. 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"?

Circuit Court's answer: **Yes**.

A.R. 7.

III. For purposes of the jury's deliberation under West Virginias Code Section 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 Section 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?

Circuit Court's answer: **Yes**.

A.R. 8.

IV. For purposes of a crime under West Virginia Code Section 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 Section 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?

Circuit Court's answer: **Yes**.

V. Where the Indictment charges a conspiracy in violation of West Virginia Code Section 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 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 Section 60A-4-414(f)?

Circuit Court's answer: **No**.

A.R. 9-10. On that same day, the circuit court consolidated the related cases solely for purposes of this certified question proceeding. A.R. 66.

SUMMARY OF ARGUMENT

The circuit court has certified five questions to this Court. The circuit court answered questions 1 through 4 in the affirmative and answered certified question 5 in the negative. Likewise, this Court should answer questions 1 through 4 in the affirmative and question 5 in the negative.

First, the circuit court correctly found that in a conspiracy indictment, the indictment need not name or identify any of the co-conspirators. The circuit court also correctly found that any claims raised by Mr. Legg relating to any alleged variance in the indictment is premature because a variance is a matter of proof and not pleading so a claim of variance is not ripe until after all the evidence is introduced at trial.

Second, the circuit court correctly found that a defendant is only liable under West Virginia Code § 60A-4-414(f) for the amount of controlled substances manufactured, delivered or possessed with intent to deliver or manufacture by other participants or members of the conspiracy charged in the indictment. This is consistent not only with the language of West Virginia Code § 60A-4-414, but general conspiracy law as well.

Third, the circuit court also correctly found an unindicted co-conspirator's drug transactions with others not identified in the indictment is admissible for the jury's consideration in determining the amount of controlled substances attributable to a defendant under West Virginia Code § 60A-4-414(b). The circuit court also found that this is subject to the knowing and foreseeability principles contained in *Pinkerton v. United States*, 328 U.S. 640 (1946).

Fourth, the circuit court correctly found that evidence of other sales between Coleman and unnamed co-conspirators is relevant to demonstrating the existence of the conspiracy of which Mr. Legg was alleged to be a member.

Finally, given that the answer to the preceding certified questions was yes, the circuit court correctly concluded that the Fayette County Public Defender's Office cannot represent Mr. Legg and other separately indicted defendants growing out of the Coleman conspiracy as such continued representation would constitute a conflict of interest for the Public Defender.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is set for oral argument before this Court on May 19, 2020. This case is not suitable for memorandum decision.

ARGUMENT

The standard of review for this certified questions case is de novo. Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 172, 475 S.E.2d 172, 172 (1996) ("The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.").

A. This Court should answer the first certified question in the affirmative as an indictment need not name any of the defendant's co-conspirators and any questions relating to a claimed variance in the indictment is not ripe for review in a certified question.

The circuit court answered the first certified question in the affirmative by concluding that (1) an indictment for conspiracy does not need to identify all the members of the conspiracy in the indictment and (2) that it was premature to determine whether a fatal variance exists between the indictment in this case and the evidence the State may offer at trial. A.R. 6-7. These were correct conclusions.

1. A conspiracy indictment need not contain the names or identities of all, or any, of the co-conspirators.

Mr. Legg's indictment in this case reads:

> The Grand Jurors of the State of West Virginia, in and for the body of the County of Fayette, upon their oaths and now attending the said Court, present that **JUSTIN K. LEGG** between the 29th day of May 2018 and the 16th day of July 2018, in the said County of Fayette, committed the offense of "conspiracy," in that the said **JUSTIN K. LEGG**, did unlawfully, willfully, and feloniously conspire with Greg Coleman, an unindicted co-conspirator, to deliver or possess with the intent to deliver: one kilogram or more of heroin; and/or fifty grams or more of methamphetamine; and/or a quantity of oxycodone; and the said **JUSTIN K. LEGG** and/or Greg Coleman did act to effect the object of the conspiracy, against the peace and dignity of the State.
>
> W. Va. Code § 60A-4-414(b)
>
> W. Va. Code § 60A-4-414(a)

A.R. 1.

The indictment in this case alleged Mr. Legg violated the conspiracy section of the Uniform Controlled Substances Act. Under that Code section, W. Va. Code § 60A-4-414(a) (footnote added):

> Any person who willfully conspires with one or more persons to commit a felony violation of section four hundred one[2] of this article, if one or more of such persons does any act to effect the object of the conspiracy, is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for a determinate sentence of not less than two nor more than ten years: Provided, That the provisions of this subsection are inapplicable to felony violations of section four hundred one of this article prohibiting the manufacture, delivery or possession with intent to manufacture or deliver marijuana.

West Virginia Code § 60A-4-414(b) provides:

> Notwithstanding the provisions of subsection (a) of this section, any person who willfully conspires with one or more persons to manufacture, deliver or possess with intent to manufacture or deliver one kilogram or more of heroin, five kilograms or more of cocaine or cocaine base, one hundred grams or more of phencyclidine, ten grams or more of lysergic acid diethylamide, or fifty grams or more of methamphetamine or five hundred grams of a substance or material containing a measurable amount of methamphetamine, if one or more of such persons does any act to effect the object of the conspiracy, is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for a determinate sentence of not less than two nor more than thirty years.

The first certified question in this case asks if the indictment in this case was constitutionally sufficient even though it did not list the names or identities of all the co-conspirators comprising the alleged conspiracy. A.R. 5-6. The circuit court properly answered this question in the affirmative.

Article III, § 14 of the West Virginia Constitution provides, in pertinent part, "[i]n all [criminal trials], the accused shall be fully and plainly informed of the character and cause of the accusation[.]" "The purpose of an indictment is to plainly inform the defendant of the nature of

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[2]West Virginia Code § 60A-4-401(a) provides, "[e]xcept as authorized by this act, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance."

the crime charged and to protect him against further or double jeopardy." *State v. Bull*, 204 W. Va. 255, 263, 512 S.E.2d 177, 185 (1998). Thus, an indictment need only "be a plain, concise and definite written statement of the essential facts constituting the offense charged." W. Va. R. Crim. P. 7(c)(1). Consequently, "[a]n indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations." Syl. Pt. 2, in part, *State v. Miller*, 197 W. Va. 588, 593, 476 S.E.2d 535, 540 (1996). This Court has held:

> An indictment is sufficient under Article III, § 14 of the West Virginia Constitution and W. Va. R. Crim. P. 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy.

Syl. Pt. 6, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999). The indictment in this case was sufficient even though it did not name or identify all the co-conspirators in the alleged conspiracy.

"Conspiracy requires an agreement—and in particular an agreement to do an unlawful act—between or among two or more separate persons." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). "The agreement to commit an offense is the essential element of the crime of conspiracy—it is the conduct prohibited by the statute." *State v. Less*, 170 W. Va. 259, 265, 294 S.E.2d 62, 67 (1981). Therefore, "[i]t is well established that the unlawful agreement is the essential element which is the gist or essence of the crime of conspiracy even in those jurisdictions where an overt act is required to render a conspiracy subject to criminal prosecution." 16 Am. Jur. 2d *Conspiracy* § 10 (footnotes omitted). Thus, in a conspiracy indictment, it is the agreement—rather than the identity of the participants—that is crucial in drafting an indictment. "The existence of the conspiracy, rather than the particular identity of the conspirators, is the essential element of the

crime." *United States v. Am. Waste Fibers Co.*, 809 F.2d 1044, 1046 (4th Cir. 1987). Consequently, "[a] defendant may be indicted and convicted despite the names of his co-conspirators remaining unknown, as long as the government presents evidence to establish an agreement between two or more persons, a prerequisite to obtaining a conspiracy conviction." *United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991). As the United States Supreme Court has explained, "at least two persons are required to constitute a conspiracy, but the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown." *Rogers v. United States*, 340 U.S. 367, 375 (1951). In short, "the government need not identify *any* co-conspirators." *United States v. Camara*, 908 F.3d 41, 46 (4th Cir. 2018) (emphasis in original). The circuit court correctly found that an indictment for conspiracy need not name all the co-conspirators.

2. *The lack of restrictive or expansive conspiracy language in the indictment in this case does not void the indictment and the indictment should be read as an expansive one.*

Admittedly, conspiracy indictments usually contain either restrictive language (that co-conspirators named in the indictment conspired "with each other") or expansive language (that the named co-conspirators in the indictment conspired "with others known and unknown"). *United States v. Pingleton*, 216 F. App'x 526, 529 (6th Cir. 2007). In the instant case, the Indictment contains neither restrictive nor expansive language. A.R. 1. This, though, is not fatal to the indictment.

In *United States v. Pingleton*, 216 F. App'x 526 (6th Cir. 2007), Count 1 of an indictment provided, "'Johnny E. Pingleton and John E. Rodefer did conspire to knowingly and intentionally manufacture fifty grams or more of methamphetamine.'" *Id.* at 528. Pingleton argued that this language alleged that he and Rodefer conspired with each other and no one else. *Id.* At trial, the judge permitted the government to introduce evidence of a conspiracy concerning other persons

and so instructed the jury. *Id.* Pingleton complained that this was an impermissible constructive amendment of the indictment. *Id.* at 528–29. The appeals court applied a de novo review and disagreed. *Id.* at 529.

While the appeals court was "troubled by the atypical wording the government employed here and d[id] not sanction the future use of similarly phrased indictments," "under the particular circumstances of this case, [it] conclude[d] the indictment charge[ed] a conspiracy involving two *or more* persons." *Id.*

The appeals court first observed the prosecution provided Pingleton with discovery evidence that indicated the charged conspiracy was not limited to him and Rodefer. *Id.* The appeals court next concluded that "not to construe this indictment to charge a conspiracy involving two or more persons might create tension with the general rule that the prosecution need not furnish co-conspirators' names as long as the defendant has notice of the conspiracy with which he is charged." *Id.*

Like Pingleton, Mr. Legg is on notice the State is going to try to hold him criminally liable for the distribution of controlled substances by Mr. Coleman to others besides Mr. Legg. As the State asserted in response to the Defendant's Motion in Limine to not hold Mr. Legg liable for distribution of more than one kilogram of heroin:

> In this case, the State Indicted [sic] this defendant for conspiring with Greg Coleman to distribute a quantity of heroin, over one kilogram. Mr. Coleman admitted he distributed over one kilogram of heroin in Fayette County, and through this defendant as well as others charged in similar Indictments—redistributed that heroin. While this defendant may not have distributed over one kilogram of heroin himself, legally he is responsible for the heroin that Mr. Coleman distributed as part of the overall conspiracy to redistribute because he acted in furtherance of the conspiracy by repackaging and reselling the heroin that Mr. Coleman sold him.
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> This defendant knew that Mr. Coleman distributed large quantities of heroin because that is what this defendant bought from Mr. Coleman and then redistributed to his own customers. In the case at bar, it is reasonable to believe that this

> defendant knew or could foresee that he was not Mr. Coleman's only redistributor. Based on his business dealings with Mr. Coleman, this defendant could reasonably foresee that the distribution of heroin by Mr. Coleman was on a larger scale than that of just the heroin bought from Mr. Coleman by the defendant.

A.R. 19-20.

And, like the appeals court in *Pingleton*, this Court should be reticent to create tension with the general rule that the identity of co-conspirators need not be contained in an indictment.

3. Mr. Legg's reliance on Kotteakos v. United States, 328 U.S. 750 (1946) is misplaced.

Mr. Legg relies on *Kotteakos v. United States*, 328 U.S. 750 (1946). Pet'r Br. at 7-8. This reliance on *Kotteakos* is misplaced at this time because *Kotteakos* was a variance case and variance claims cannot be addressed pretrial.

In *Kotteakos*, the indictment charged a single conspiracy but the evidence at trial established multiple conspiracies. 328 U.S. at 755 ("The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment."). The Supreme Court found that the variance was not harmless error. *Id.* at 776.

Any reliance on *Kotteakos* is misplaced because, in that case, the Supreme Court was confronting a variance issue. "A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment." *Dunn v. United States*, 442 U.S. 100, 105 (1979). *See generally* 41 Am. Jur. 2d *Indictments and Informations* § 242 ("A 'variance' occurs when the evidence presented at trial proves facts different from those alleged in the information or indictment."). Thus, a variance cannot be addressed pretrial because "by definition, a variance cannot arise prior to the close of proof in a criminal trial." *United States v. Walker*, 514 F. Supp. 294, 302 (E.D. La. 1981). In other words, the existence of a variance must be determined by comparing evidence adduced *at trial* against what is alleged in the indictment; a "Court cannot

prospectively determine the existence of a variance." *United States v. Walker*, 514 F. Supp. 294, 302 n.2 (E.D. La. 1981).

Thus, as the circuit court concluded in its certified question order:

> If the evidence presented at trial related to the scope and nature of the conspiracy for purposes of W. Va. 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.

A.R. 6-7. The circuit court correctly concluded that the issue of a variance is not ripe in this case and is not properly subject to a pretrial proceeding.

For the above reasons, this Court should answer the first certified question in the affirmative.

B. This Court should answer the second certified question in the affirmative because under West Virginia Code § 60A-4-414(f), the amount of controlled substances attributable to the defendant by other co-conspirators is limited to the amount distributed as part of the conspiracy charged in the indictment under which the defendant is being tried.

The conspiracy section of the Uniformed Controlled Substances Act, W. Va. Code § 60A-4-414, provides for an increasing scale of punishment based upon the amount of controlled substances at play in the conspiracy. The amount of controlled substances attributable to a defendant indicted under West Virginia Code § 60A-4-414 is greater than the amount personally attributable to the defendant and includes "all of the controlled substances manufactured, delivered or possessed with intent to deliver or manufacture by other participants or members of the conspiracy." W. Va. Code § 60A-4-414(f). The circuit court found that:

> the jury can only attribute to the Defendant 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 or [sic] possession with intent to deliver was an overt act in furtherance of the conspiratorial agreement between the Defendant and the un-indicted co-conspirator or other co-conspirators.

A.R. 7. In essence, the circuit court found that a defendant is only liable under West Virginia Code § 60A-4-414(f) for the amount of controlled substances manufactured, delivered, or possessed with intent to deliver or manufacture by other participants or members of the conspiracy charged in the indictment.[3] The circuit court was correct in its conclusion.

This Court has held that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). *See also State v. Gen. Daniel Morgan Post No. 548*, 144 W. Va. 137, 137, 107 S.E.2d 353 (1959) ("When a

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[3]In its certified question, the circuit court referred to the "common law principle that overt acts have to be in furtherance of the conspiracy[.]" At common law, the crime of conspiracy contained no overt acts requirement. *State v. Less*, 170 W. Va. 259, 265 n.6, 294 S.E.2d 62, 67 n.6 (1981) ("At common law there was no overt act requirement. The offense of conspiracy related alone to the agreement."). "The commission of an overt act in furtherance of the conspiracy requirement is a creature of statute." *United States v. Jones*, 36 M.J. 778, 778 (U.S.A.C.M.R. 1993). West Virginia Code § 60A-4-414 is an overt acts statute. *See, e.g., id.* § 60A-4-414(b) (including the language "if one or more of such persons does any act to effect the object of the conspiracy . . . ."). Thus, consistent with the language of West Virginia Code § 60A-4-414, an overt act must be in furtherance of the conspiracy. It is also consistent with "settled law that to obtain a conviction for conspiracy the government need prove the commission of only one overt act in furtherance of the conspiracy." *United States v. Forzese*, 756 F.2d 217, 221 (1st Cir. 1985). *See, e.g., United States v. Pomranz*, 43 F.3d 156, 160 (5th Cir. 1995) ("An overt act, is an act performed to effect the object of a conspiracy, although it remains separate and distinct from the conspiracy itself. Though the act need not be of a criminal nature, it must be done in furtherance of the object of the conspiracy."); *United States v. Anderson*, 611 F.2d 504, 510 (4th Cir. 1979) ("Proof that at least one overt act was committed in furtherance of the conspiracy is sufficient."). While "[t]he substantive crime which is the object of the conspiracy can be proven as the overt act[,]" *Less*, 170 W. Va. at 265, 294 S.E.2d at 67, this is not necessarily required as an overt act need not be criminal in nature, *Braverman v. United States*, 317 U.S. 49, 53 (1942) ("The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime."), and may otherwise be completely innocent. *United States v. Mitlof*, 165 F. Supp. 2d 558, 567 (S.D.N.Y. 2001) ("it is well settled that an act innocent in and of itself can satisfy the 'overt acts' requirement of the federal conspiracy statute."). *See, e.g., Iannelli v. United States*, 420 U.S. 770, 786 (1975) ("The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy."). Nevertheless, whatever overt act or acts the State pursues, the State must still be able to prove the amount of drugs distributed through the conspiracy.

statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."). Consequently, "unambiguous statutes are applied, not construed." *State v. Butler*, 239 W. Va. 168, 175 n.12, 799 S.E.2d 718, 725 n.12 (2017). West Virginia Code § 60A-4-414(f) is plain and unambiguous and its meaning is evident.

West Virginia Code § 60A-4-414(f) (emphasis added) provides, "[t]he determination of the trier of fact as to the quantity of controlled substance attributable to the defendant *in a charge under this section* may include all of the controlled substances manufactured, delivered or possessed with intent to deliver or manufacture by other participants or members of *the conspiracy*." West Virginia Code § 60A-4-414(f) refers to a "charge under this section" and "the conspiracy." A plain reading of West Virginia Code § 60A-4-414(f) establishes that "the conspiracy" referenced in that Code section refers to the conspiracy as alleged in the indictment, i.e., the "charge under this section." Therefore, this Court should answer the second certified question number 2 in the affirmative.

C. This Court should answer the third certified question in the affirmative because the evidence of an unindicted co-conspirator's drug transactions with others not identified in the indictment is admissible for the jury's consideration in determining the amount of controlled substances attributable to a defendant under West Virginia Code § 60A-4-414(b) subject to the foreseeability principles of *Pinkerton v. United States*, 328 U.S. 640 (1946) and its progeny.

The circuit court concluded that the evidence of an unindicted co-conspirator's drug transactions with others not identified in the indictment is admissible for the jury's consideration in determining the amount of controlled substances attributable to a defendant under West Virginia Code § 60A-4-414(b). A.R. 8. The circuit court also found that this is subject to the knowing and foreseeability principles contained in *Pinkerton v. United States*, 328 U.S. 640 (1946).

The circuit court first found that the State is not obligated to name or identify all the members of the conspiracy in the indictment. A.R. 8. The circuit court found, "[i]f sufficient circumstantial evidence of the existence of a conspiracy, and of the Defendant'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." A.R. 8. It continued:

> However, the scope of the conspiracy is critical in the application of W. Va. Code § 60A-4-414(f). For purposes of section 4-414(f), under the principles of *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.

A.R. 8-9.

The circuit court correctly found that it is not required that all the members of a conspiracy be identified in the indictment. A.R. 8. For example, in *United States v. Marshall*, 78 F. App'x 239, 241 (4th Cir. 2003), Marshall argued the evidence was insufficient to support his conviction conspiracy to distribute more than five grams of cocaine base. Marshall asserted that the evidence was insufficient because two of the three witnesses who testified about his drug trafficking activities during the time of the conspiracy alleged in the indictment were not named as co-conspirators in the indictment. *Id.* The court of appeals rejected this claim finding "there is no requirement that a conspiracy indictment name all co-conspirators." *Id.*

Additionally, the circuit court found that

> 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.

A.R. 8-9. Such a conclusion is consistent with the United States Supreme Court opinion in *Pinkerton v. United States*, 328 U.S. 640 (1946). *Pinkerton* is the leading authority on the issue of vicarious conspirator liability. *See United States v. Collado*, 975 F.2d 985, 993 n.7 (3d Cir. 1992) (describing *Pinkerton* as the "leading case"). In *Pinkerton*, the United Supreme Court held that a co-conspirator may be vicariously liable for a substantive offense committed by a co-conspirator if the act is done "in furtherance of the conspiracy" and is "reasonably foreseen as a necessary or natural consequence of the unlawful agreement." 328 U.S. at 647-48. "The *Pinkerton* doctrine makes a person liable for substantive offenses committed by a co-conspirator when their commission is reasonably foreseeable and in furtherance of the conspiracy." *United States v. Ashley*, 606 F.3d 135, 142–43 (4th Cir. 2010). *See also United States v. Cummings*, 937 F.2d 941, 944 (4th Cir. 1991) (*Pinkerton* "makes conspirators liable for all reasonably foreseeable acts of their co-conspirators done in furtherance of the conspiracy."). "'The idea behind the *Pinkerton* doctrine is that the conspirators are each other's agents; and a principal is bound by the acts of his agents within the scope of the agency.'" *United States v. Aramony*, 88 F.3d 1369, 1379 (4th Cir. 1996) (quoting *United States v. Manzella*, 791 F.2d 1263, 1267 (7th Cir. 1986)). The Fourth Circuit has recognized that "a trial court is obliged to 'instruct a jury to use *Pinkerton* principles' to determine the quantity of drugs attributable to each individual defendant involved in a drug conspiracy." *United States v. Brooks*, 524 F.3d 549, 558 (4th Cir. 2008).[4] The circuit court's

[4]Mr. Legg asserts that the State cannot make this showing of furtherance and foreseeability. Pet'r Br. at 13. Such an argument violates the "whole case doctrine" of certified questions that prohibits a superior court from accepting a certified question simply to determine how the certifying lower court should decide the case on the facts. *Rozsavolgyi v. City of Aurora*, 102 N.E.3d 162, 169 (Ill.

answered the third certified question in the affirmative because this affirmative answer is consistent with *Pinkerton*. This Court should also answer the third certified question in the affirmative.

D. This Court should answer the fourth certified question in the affirmative because a jury can consider the amount 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 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.

The circuit court concluded that a jury can consider the amount 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 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. A.R. 9. The circuit court did not err.

2017) ("Certified questions must not seek an application of the law to the facts of a specific case."); *Lawrence v. State*, 489 S.E.2d 850, 850 (Ga. 1997) (per curiam) ("The questions certified seek application of the specific facts of this case to the law and seek resolution of the ultimate issue on appeal. Under our case law, when the answer to a certified question would constitute the decision in the main case, this court will decline to answer the question."). Indeed, certified questions must answer only questions of law, *see* W. Va. Code § 58-5-2 (emphasis added) ("Any *question of law* . . . may, in the discretion of the circuit court in which it arises, be certified by it to the Supreme Court of Appeals for its decision"); and the questions of furtherance and foreseeability are factual questions for the jury. *See, e.g., United States v. Bruno*, 873 F.2d 555, 560 (2d Cir. 1989) ("Whether a particular substantive crime is foreseeable and in furtherance of the conspiracy is a factual question to be determined by the jury."); *United States v. Mothersill*, 87 F.3d 1214, 1217 (11th Cir. 1996) ("the application of the *Pinkerton* doctrine to the facts of a case lies within the jury's domain."); *United States v. Fitzwater*, No. TCA 95-10017, 2018 WL 6133187, at *10 n.10 (N.D. Fla. Mar. 24, 2018) ("The application of the *Pinkerton* doctrine is a jury question.").

A conspiracy can have an elusive quality, and "a defendant may be convicted of conspiracy with little or no knowledge of the entire breadth of the criminal enterprise[.]" *United States v. Burgos*, 94 F.3d 849, 858 (4th Cir. 1996).

> It is of course elementary that one may be a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities or over the whole period of its existence. Critically, it is not necessary to proof of a conspiracy that it have a discrete, identifiable organizational structure; the requisite agreement to act in concert need not result in any such formal structure, indeed frequently, in contemporary drug conspiracies, contemplates and results in only a loosely-knit association of members linked only by their mutual interest in sustaining the overall enterprise of catering to the ultimate demands of a particular drug consumption market . . . .

United States v. Banks, 10 F.3d 1044, 1054 (4th Cir. 1993). An important consideration to tying a defendant to a conspiracy is:

> whether the various participants had to know "from the nature of the contraband and the vastness and regularity of their own dealings . . . that [the illegal efforts of others] were required to make their own dealings possible." *United States v. Burman*, 584 F.2d 1354, 1356 (4th Cir. 1978). And, by like token, a[nother] . . . important consideration . . . in determining the membership of particular actors in an overall conspiracy to supply such a market is whether the actor "demonstrated a substantial level of commitment to the conspiracy, [for example] by engaging in a consistent series of smaller transactions" that furthered its ultimate object of supplying the consumer demand of the market. *United States v. Edwards*, 945 F.2d 1387, 1393 (7th Cir. 1991).

Banks, 10 F.3d at 1054.

Furthermore, the State need only prove the defendant's association with the conspiracy was slight. As the Fourth Circuit has explained, "[w]e have adhered repeatedly to this principle, explaining that while the existence of the conspiracy and the defendant's connection to it must be proved beyond a reasonable doubt, the defendant's connection to the conspiracy need only be 'slight.'" *Burgos*, 94 F.3d at 861 (citations omitted). The term "slight" should not be misunderstood. Slight does not describe the amount of evidence the prosecution must elicit to establish the conspiracy; the term slight describes the connection the defendant must have with the

conspiracy. *Id.* "Requiring a 'slight connection' between the defendant and the established conspiracy complements the canons of conspiracy law that a defendant need not know all of his coconspirators, comprehend the reach of the conspiracy, participate in all the enterprises of the conspiracy, or have joined the conspiracy from its inception." *Id.* Thus, evidence of Mr. Coleman's dealings with other defendants beside Mr. Legg is admissible to establish the amount of controlled substances that can be attributed to Mr. Legg under West Virginia Code § 60A-4-414(f). As the State asserted to the circuit court:

> In this case, the State Indicted [sic] the defendant for conspiring with Greg Coleman to distribute a quantity of heroin, over one kilogram. Mr. Coleman admitted he distributed over one kilogram of heroin in Fayette County, and through this defendant [i.e., Justin Legg] as well as others charged in similar Indictments-redistributed that heroin. While this defendant may not have distributed over one kilogram of heroin himself, legally he is responsible for the heroin Mr. Coleman distributed as part of the overall conspiracy to redistribute because he acted in furtherance of the conspiracy by repackaging and reselling the heroin that Mr. Coleman sold him.
>
> This defendant knew that Mr. Coleman distributed large quantities of heroin because that is what this defendant bought from Mr. Coleman and then redistributed to his own customers. In the case at bar, it is reasonable to believe that this defendant knew or could foresee that he was not Mr. Coleman's only redistributor. Based on his business dealings with Mr. Coleman, this defendant could reasonably foresee that the distribution of heroin by Mr. Coleman was on a larger scale than that of just the heroin bought from Mr. Coleman by the defendant.
>
> Evidence at trial in this matter will inform the jury of the nature and layout of the entirety of the conspiracy and investigation with regards to Mr. Coleman and will not unduly prejudice the defendant any further than the evidence as it individually pertains to his conspiracy with Mr. Coleman.

A.R. 19-20. The evidence of other sales between Coleman and unnamed co-conspirators is relevant to demonstrating the existence of the conspiracy of which Mr. Legg was alleged to be a member.

The circuit court's affirmative answer to certified question 4 was correct. This Court should also answer certified question 4 in the affirmative.[5]

E. This Court should answer certified question number five in the negative because the Fayette County Public Defender cannot represent the Defendant and other separately indicted defendants growing out of the Coleman conspiracy as such continued representation would constitute a conflict of interest for the Public Defender.

The Fayette County Public Defender represents Mr. Legg and other indictees in the alleged Coleman conspiracy. Pet'r Br. at 17. The circuit court has certified a question as to whether the continued representation by the Public Defender is permissible or whether the Public Defender should be conflicted from this case. A.R. 9-10. Because the Public Defender cannot ethically continue to represent the defendants indicted in the alleged Coleman conspiracy, this Court should agree with the circuit court and find that the Fayette County Public Defender ethically unable to continue representation of the defendants.

"The Sixth Amendment of the United States Constitution and Article III, Section 14 of the West Virginia Constitution both guarantee to the criminally accused the right to counsel." *State ex rel. Humphries v. McBride*, 220 W. Va. 362, 366, 647 S.E.2d 798, 802 (2007) (per curiam). The constitutionally guaranteed right to counsel is the right to the effective assistance of such counsel. *See, e.g.*, Syl. Pt. 1, *Cole v. White*, 180 W. Va. 393, 376 S.E.2d 599 (1988) ("The right of a criminal

[5]To the extent the Petitioner asks this Court to adjudicate whether the evidence at trial will be sufficient to show Mr. Legg was a member of a conspiracy, Pet'r Br. at 14-16, that is a question entrusted to the jury and is not properly before this Court on a certified question. *See supra* fn. 4. *See also Hallowell v. United States*, 209 U.S. 101, 105 (1908) ("the authority to certify . . . questions c[an]not be used for the purpose of sending to this court the whole case, with all its circumstances, for consideration and decision."); *Biddle v. Luvisch,* 266 U.S. 173, 174–75 (1924); *Jahn v. The Folmina*, 212 U.S. 354, 363 (1909) ("So far as the second question is concerned, it does not propound a distinct issue of law, but, in effect, calls for a decision of the whole, case, and therefore need not be answered."); *William J. Moxley v. Hertz*, 185 F. 757, 758 (7th Cir. 1911) ("the Supreme Court has no jurisdiction upon certified questions of law to direct what disposition shall be made of the case as a whole.").

defendant to assistance of counsel includes the right to effective assistance of counsel."); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). Effective counsel is conflict free counsel. Syl. Pt. 2, *Cole v. White*, 180 W. Va. 393, 376 S.E.2d 599 (1988) ("Where a constitutional right to counsel exists under W.Va. Const. art. III, § 14, there is a correlative right to representation that is free from conflicts of interest."); *Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."). Furthermore, the right to conflict free counsel is not a right advancing the interests of a particular defendant only but advances the institutional interests of the judiciary to ensure "that criminal trials are conducted within the ethical standards of the [legal] profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988).

Here, the circuit court found:

> . . . 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).

A.R. 10.

In his Brief to this Court, Mr. Legg concedes that if this Court answers certified questions 1 through 4 in the affirmative, then a conflict of interest would exist:

> . . . if the Court when answering the proceeding questions determines that Coleman's interactions with his suppliers and the other indictees in this combined action [is admissible] then a conflict of interest(s) exists that would require the Public Defender's Office to withdraw and for the [circuit] court to appoint separate counsel for the Petitioner and each indictee.

Pet'r Br. at 17. Mr. Legg explains in his Brief before this Court:

> 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 [Mr. Legg] 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.

Pet'r Br. 17-18.

Because this Court should answer the first four certified questions in the affirmative, the Fayette County Public Defender has a conflict of interest and should be conflicted from continuing in this case or any others related to the alleged Coleman conspiracy.

CONCLUSION

For the foregoing reasons, this Court should, as did the circuit court, answer certified questions 1 through 4 in the affirmative and should answer certified question 5 in the negative.

Respectfully submitted,

The State of West Virginia,

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CERTIFICATE OF SERVICE

I, Scott E. Johnson, Assistant Attorney General and Counsel for the Respondent, do hereby certify that I served the foregoing Respondent's Brief upon the Petitioner's counsel by depositing a true and correct copy thereof in the United States Mail, first class postage prepaid, on this 3rd day of April, 2020, addressed as follows:

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