IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0234

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

On Certified Questions from the Circuit Court of Monongalia County (Case No.: 20-F-105)

TIMOTHY MICHAEL CONNER, II,

Defendant Below, Petitioner.

PETITIONER'S BRIEF

Submitted by:

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I. CERTIFIED QUESTIONS

A. Whether the following phrase in West Virginia Code § 60A-4-416(b) is unconstitutionally vague: "Any person who, while engaged in the illegal use of a controlled substance with another"?

B. Whether the undefined phrase "seek medical assistance" in the context of West Virginia Code § 60A-4-416(b) provides an adequate standard for adjudication?

II. STATEMENT OF THE CASE

This matter comes before the Court on two certified questions concerning the constitutionality of W. Va. Code § 60A-4-416(b), titled "Failure to Render Aid." That code section, which was enacted in 2017, reads in whole:

> Any person who, while engaged in the illegal use of a controlled substance with another, who knowingly fails to seek medical assistance for such other person when the other person suffers an overdose of the controlled substance or suffers a significant adverse physical reaction to the controlled substance and the overdose or adverse physical reaction proximately causes the death of the other person, is guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one year nor more than five years.

The circuit court concluded that the statute is unconstitutionally vague because it first fails to identify the type of person to which it applies. Does the statute apply to individuals who are personally using a controlled substance along with the overdoser[1] or does it apply to individuals who are not personally using a controlled substance but who are physically present with the overdoser? Upon further analysis of the statute, the circuit court secondly found that the undefined phrase "seek medical assistance" fails to provide adequate standards for adjudication and invites

[1] The Petitioner acknowledges that that W. Va. Code § 60A-4-416(b) identifies the victim as another person who "suffers an overdose of the controlled substance" or another person who "suffers a significant adverse physical reaction to the controlled substance." For simplicity and consistency, the Petitioner will refer to this individual as an "overdoser" throughout this Brief.

arbitrary enforcement due to the varying and subjective opinions on what type of conduct may constitute "seek medical assistance."

A. Statement of Facts[2]

On the evening of March 28, 2019, Shane Cebulak (hereinafter "Mr. Cebulak") drove his grandparents' vehicle to pick up the Petitioner. (App. 034, 166). After picking up the Petitioner, Mr. Cebulak drove to an apartment complex on Van Voorhis Road in Morgantown with the Petitioner riding as a passenger. (App. 034, 170). Mr. Cebulak went inside the apartment complex and purchased heroin from two unknown males, who were from Detroit, Michigan. *Id.* According to law enforcement, Mr. Cebulak was a known heroin user and had been purchasing heroin from the "Detroit crew" for quite some time prior to March 28, 2019. (App. 174).

The Petitioner did not go inside the apartment complex; rather, he stayed in the vehicle while Mr. Cebulak went inside and purchased the heroin. (App. 002, 034, 178). The Petitioner did not purchase heroin or any other controlled substance. *Id.* There is no allegation that the Petitioner supplied Mr. Cebulak with the heroin, paid for the heroin, provided Mr. Cebulak with transportation to the apartment complex, or assisted Mr. Cebulak in any manner in purchasing the heroin. (App. 028-038). Mr. Cebulak purchased the heroin on his own accord and for his own personal use. *Id.*

After purchasing the heroin, Mr. Cebulak then drove to the District Apartments,[3] another apartment complex in Morgantown. (App. 034, 177-178). There in the parking lot, Mr. Cebulak smoked the heroin voluntarily. *Id.* The Petitioner did not assist, aid, or abet Mr. Cebulak in any

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[2] Based upon the procedural posture of this case, the *Statement of Facts* are derived from the information provided in the State's Discovery Disclosure and the testimony elicited at the preliminary hearing held on September 9, 2019.

[3] The District Apartments are now named Campus Evolution Villages and are located on District Drive in Morgantown. (App. 034).

manner in using the heroin. *Id.* Critically important here, there is no allegation, much less any evidence, that the Petitioner ever used or was under the influence of a controlled substance during the applicable time period that he was with Mr. Cebulak in this case. (App. 028-038, 175, 185-186). Mr. Cebulak used the heroin freely and willingly. *Id.* The Petitioner did not. *Id.*

At some point after smoking the heroin, the Petitioner indicated that Mr. Cebulak "began acting funny [like he was] possibly having a seizure." (App. 034, 170). In response, the Petitioner called Joseph Choma (hereinafter "Mr. Choma") – a friend that the Petitioner knew to be a nurse. *Id.* The Petitioner informed Mr. Choma that he believed Mr. Cebulak was overdosing and asked him to help Mr. Cebulak. *Id.* The Petitioner used Mr. Cebulak's grandparents' vehicle to drive him to Mr. Choma's residence, which was located on McLane Avenue in the Sunnyside area of Morgantown. *Id.* The Petitioner parked the vehicle in a gravel alley near Mr. Choma's residence and went inside. (App. 034, 171). Mr. Cebulak, who remained in the vehicle, was still alive and breathing at the time the Petitioner arrived at Mr. Choma's residence. *Id.*

Mr. Choma telephoned his girlfriend, Amy Dolin (hereinafter "Ms. Dolin"), who was in South Carolina at the time. (App. 033, 035). Ms. Dolin called 911 to report an overdoes at McLane Avenue at approximately 8:55 p.m. (App. 057). The 911 dispatcher contacted Mr. Choma directly after speaking with Ms. Dolin. *Id.* Mr. Choma provided the following details to the 911 dispatcher:

- The person overdosing was in a white in color vehicle, which was parked in an alleyway behind Mr. Choma's residence, on the Grant Avenue side.
- The person was breathing, but appeared to be dying.
- The person was slumped over in the passenger seat.
- Mr. Choma could hear the person breathing, and it sounded like snoring.

Id.

Apparently, the 911 dispatcher instructed Mr. Choma to go back outside where the white vehicle was located. *Id.* When Mr. Choma went back outside, he advised the 911 dispatcher that he could no longer see the vehicle and it was unknown where it went. *Id.* Police, Fire, and EMS personnel arrived at McLane Avenue, but they were unable to locate the white in color vehicle or Mr. Cebulak. (App. 035, 057, 168). After speaking with emergency personnel, Mr. Choma went back inside his residence and informed the Petitioner that emergency personnel did not locate Mr. Cebulak. (App. 003, 008-009). Mr. Choma further informed the Petitioner that Mr. Cebulak must have "came to" and left. *Id.* Approximately two hours later, Mr. Choma took his dog outside for a walk and discovered Mr. Cebulak in the white vehicle parked in the alley. (App. 003, 035, 168). Mr. Choma called 911 and advised that he did not believe Mr. Cebulak was breathing. (App. 157). When emergency personnel arrived the second time, Mr. Cebulak was deceased in the vehicle. (App. 033).

On August 20, 2019, detectives with the Morgantown Police Department traveled to Harrison County to interrogate the Petitioner during his regularly scheduled meeting with his parole officer. (App. 003, 034). The detectives had an arrest warrant in hand,[4] ready to execute on the Petitioner. (App. 034). In response to direct questioning, the Petitioner explained what happened on March 28, 2019. *Id.* The detectives repeatedly informed the Petitioner that it was a "shitty situation" and that he made the "wrong decision" to take Mr. Cebulak to Mr. Choma's residence. (App. 009). The detectives further criticized the Petitioner for not personally calling 911 himself or driving Mr. Choma directly to the hospital. *Id.* These events form the basis of the felony charge against the Petitioner.

[4] The arrest warrant was obtained 12 days before on August 8, 2019.

B. Procedural History

On August 20, 2019 – five months after the incident – the Petitioner was arrested for the felony offense of Failure to Render Aid. (App. 034). The Petitioner's parole was revoked based upon this charge. (App. 185). He has been incarcerated since August 20, 2019. *Id.* A preliminary hearing was held on September 9, 2019 in magistrate court. (App. 163). After the magistrate court found probable cause, the matter was bound over for presentation to a grand jury. (App. 181).

The Petitioner was indicted on January 10, 2020 and arraigned on January 21, 2020. (App. 024). On February 10, 2020, the Petitioner filed a *Motion to Dismiss Based Upon W. Va. Code § 60A-4-416(b) Being Unconstitutionally Vague*. (App. 007-016). The State filed a response on February 20, 2020, arguing that "the assertions of the defendant regarding the specific language of the statute are more appropriately made in a closing argument to a jury." (App. 017-020). The Petitioner filed a reply to the State's response later the same day on February 20th. (App. 021-023). A hearing was held on February 21, 2020. (App. 184-190). The circuit court entered the *Order of Certification* on March 13, 2020. (App. 001-006).

III. SUMMARY OF THE ARGUMENT

A criminal statue must identify illegal conduct with sufficient certainty, definiteness, and specificity to provide fair notice that the contemplated conduct is prohibited by law. It must also provide adequate standards for adjudication to avoid arbitrary enforcement. W. Va. Code § 60A-4-416(b) does neither. Instead, it is cloaked in ambiguity. Individuals cannot be required to guess at the meaning of a statute, especially when a criminal penalty is involved.

"Any person who, while engaged in the illegal use of a controlled substance with another" is vague. Does it apply to individuals who are personally using a controlled substance with an overdoser? Or, does it apply to persons who are physically present with an overdoser but who are

not themselves personally using a controlled substance? The wording the Legislature chose is anything but clear. Based upon the statutory language, meritorious arguments can be made for each separate interpretation, which creates uncertainly in the category of person to which the statute applies.

The phrase "seek medical assistance" is undefined and, as a result, is problematic in its enforceability. What did the Legislature mean by requiring a person to "seek medical assistance" for another? Does an individual have to directly seek medical assistance by, for example, driving the overdoser to the hospital? Or, can an individual indirectly seek medical assistance by, for example, driving the overdoser to a third party who, in turn, contacts 911? By failing to define this critical phrase, the Legislature has left open to debate what is required under the statute to avoid criminal punishment.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court has set this matter for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure during the September 2020 Term of Court.

V. ARGUMENT

Claims of unconstitutional vagueness in a criminal statute are derived from the due process clauses of the Fourteenth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution. *See* Syl. Pt. 3, *State v. DeBerry,* 185 W.Va. 512, 408 S.E.2d 91 (1991); *State v. Bull*, 204 W. Va. 255, 261, 512 S.E.2d 177, 183 (1998).

The Supreme Court of the United States has recognized that "[o]ur cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, -- U.S. --, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson,* 461 U.S. 352, 357–358 (1983)). "The

prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson*, -- U.S. --, 135 S. Ct. at 2556–57 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

This Court has further recognized that unconstitutional vagueness claims "also implicate the provisions of W.Va. Const. art. III, sec. 14, that states in part: 'In all such [criminal] trials, the accused shall be fully and plainly informed of the character and cause of the accusation ....'" *State v. Bull*, 204 W. Va. 255, 261, 512 S.E.2d 177, 183 (1998).

While statutes are presumed to be constitutional, "[i]t is generally recognized that in construing an ambiguous criminal statute, the rule of lenity applies which requires that '[p]enal statutes must be strictly construed against the State and in favor of the defendant.'" *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 262, 465 S.E.2d 257, 262 (1995) (quoting Syl. pt. 3, *State ex rel. Carson v. Wood,* 154 W.Va. 397, 175 S.E.2d 482 (1970)). The rule of lenity is intended to prevent "expansive judicial interpretations [that] may create penalties for offenses that were not intended by the legislature." *State v. Brumfield,* 178 W.Va. 240, 246, 358 S.E.2d 801, 807 (1987). The Supreme Court of the United States observed that the rule of lenity "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States,* 494 U.S. 152, 158 (1990).

As discussed herein, W. Va. Code § 60A-4-416(b) is unconstitutionally vague and so standardless that it violates the most basic essence of the due process clause embodied within both our State and Federal Constitutions.

A. Standard of Review

"The constitutionality of a statute is a question of law which this Court reviews *de novo*." Syl. Pt. 1, *State v. Rutherford*, 223 W. Va. 1, 672 S.E.2d 137 (2008). "The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*[,]" Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996), meaning that this Court will "give plenary consideration to the legal issues that must be resolved to answer the question" certified by the circuit court. *Michael v. Appalachian Heating, LLC*, 226 W.Va. 394, 398, 701 S.E.2d 116, 120 (2010).

B. The Circuit Court Correctly Found that W. Va. Code § 60A-4-416(b) is Unconstitutionally Vague Because It is Unclear Who It Applies To – Individuals Who are Personally Using a Controlled Substance Along with an Overdoser *or* Individuals Who are Physically Present with an Overdoser.

Criminal statutes must be clear. The Supreme Court of the United States has recognized that "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . ." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). The *Connally* Court further explained that a "statute which either forbids or requires the doing of an act in terms so vague that men [or women] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id.* (citations omitted). Along the same times, this Court has held:

> A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.
>
> Criminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied.

Syl. Pt. 1 & 3, *State v. Flinn,* 158 W.Va. 111, 208 S.E.2d 538 (1974).

Since *Flinn*, criminal statutes have been "properly subjected to careful scrutiny, to ensure that they are not so vague or broad that they improperly include, impair, punish, or chill protected or desirable behavior." *State v. Bull*, 204 W. Va. 255, 262, 512 S.E.2d 177, 184 (1998). This Court has further recognized that

> There is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions. The basic requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language.

Syl. Pt. 1 of *State ex rel. Myers v. Wood,* 154 W.Va. 431, 175 S.E.2d 637 (1970).

Applying these principles to the case at bar, W. Va. Code § 60A-4-416(b) does not provide adequate notice of what is required and what is prohibited. At the forefront, the statute fails to identify the category of persons to which it applies. "The vagueness may be from uncertainty in regard to persons within the scope of the act[.]" *Winters v. New York*, 333 U.S. 507, 515 (1948) (citing *Lanzetta v. State of New Jersey*, 306 U.S. 451 (1939)). In this vein, the pertinent portion of statute reads: "Any person who, while engaged in the illegal use of a controlled substance with another, who knowingly fails to seek medical assistance . . . ."

The language adopted by the Legislature gives rise to two entirely different readings as to whom the statute is directed: 1) individuals who are personally using a controlled substance alongside or together with an overdoser; and 2) individuals, who are *not* personally using a controlled substance, but who are physically present when an overdose occurs. Stated otherwise, does W. Va. Code § 60A-4-416(b) require proof that the individual charged was also using a controlled substance with the overdoser or does it require proof that the individual charged was

only physically present with the overdoser? This uncertainly in the statute makes it impossible for an average person to know who has a duty to render aid and who does not.

At the February 21, 2020 hearing, the circuit court recognized the differing, yet reasonable, interpretations of the statute:

> THE COURT: But doesn't the statute require that he [the defendant] is participating in the drug use?
>
> MS. DECHRISTOPER: It doesn't say that the defendant needs to be using controlled substances. He needs to be engaged in the use of controlled substances. Right. Like I think that would encompass someone – taking someone to buy drugs. I think it would encompass someone participating in the drug use. I think it would encompass someone with someone who is engaging in drug use. And like I said, there isn't any direct evidence of drug use, but certainly I think that there could be circumstantial evidence of that.
>
> THE COURT: And you just actually illustrated a problem with the statute because when I read it, I read it the other way. But I understand how you could read it your way . . . .

(App. 186-187).

"A statute is ambiguous if it is susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *State v. Woodrum*, No. 18-1043, 2020 WL 2820379, at *5 (W. Va. May 29, 2020) (citations and quotations omitted). *See also, Crockett v. Andrews,* 153 W.Va. 714, 718, 172 S.E.2d 384, 387 (1970) ("Ambiguity is a term connoting doubtfulness, doubleness of meaning or indistinctness or uncertainty of an expression used in a written instrument."). This Court has previously found that "dueling, but reasonable, interpretations are indicative of the statute's ambiguity." *United Services Automobile Ass'n. v. Lucas*, 233 W. Va. 68, 73, 754 S.E.2d 754, 759 (2014).

To further illustrate the ambiguity in W. Va. Code § 60A-4-416(b), the term "use" is utilized in subsection (a) to mean ingestion or consumption. W. Va. Code § 60A-4-416(a) states

"[a]ny person who knowingly and willfully delivers a controlled substance ... for an illicit purpose and the *use, ingestion or consumption* of the controlled substance ... proximately causes the death of a person *using, ingesting or consuming* the controlled substance " is guilty of a felony. (emphasis added). The term "use" in subsection (b) should also be given the same meaning it has in subsection (a) of W. Va. Code § 60A-4-416. "When two statutes relate to the same general subject, and the two statutes are not in conflict, they are to be read *In pari materia.*" Syl. Pt. 2, *Tug Valley Recovery Ctr., Inc. v. Mingo Cty. Comm'n*, 164 W. Va. 94, 261 S.E.2d 165 (1979); *See also Young v. State*, 241 W. Va. 489, 826 S.E.2d 346 (2019).

Noteworthy, W. Va. Code § 60A-4-416(b) uses the adjective "illegal" to describe "use." It is not illegal, in and of itself, for an individual to merely be present or in proximity when another person is using a controlled substance. Guilt by association is not contemplated by our system of criminal justice. Because being present with someone who is using a controlled substance is not illegal, it would seem to suggest that the Legislature intended to impose criminal liability under this code section only on those individuals who were also personally using – *i.e.*, ingesting or consuming – a controlled substance alongside or together with an overdoser. If that was the Legislature's intention in enacting this law, it was not clearly specified in the wording of the statute.

On the other hand, if W. Va. Code § 60A-4-416(b) punished all sober individuals simply because they were physically present when an overdose occurred, it would inevitably create a slippery slope for purposes of enforcement. Where is the line drawn for what constitutes physically present – the same room, the same house, the same vehicle, the same building, etc.?

Interpreting the statute to apply to those individuals physically present would also have the potential for overreaching and impracticable implications. Does a person charged under this

statute have to know or have some type of familiarity with the overdoser? Or, can the statute be enforced against a complete stranger? What if an individual is attending a concert or sporting event and happens to be in some degree of proximity to a fellow spectator who is suffering an overdose? If that fellow spectator/stranger fails to render aid, he or she could conceivable be prosecuted for a felony under this code section. At large events where individuals are packed in close proximity, that could lead to hundreds or thousands of criminal prosecutions.

Individuals who have no association whatsoever with an overdoser could be prosecuted under this statute. Surely, the Legislature did not contemplate that type of overbreadth in the applicability of this particular statute. However, as written, the statue could arbitrarily be applied and enforced with such broad strokes.

Unlike an overwhelming majority of the State's criminal code, this statute imposes an obligation to perform an affirmative act after a specific event has transpired – *i.e.*, render aid to a person overdosing. Most criminal statutes identify prohibited conduct. Statutes like this one, which require certain actions to be taken upon a triggering event, should be especially careful to clearly define the category of persons to whom the statute is directed.

Ordinary individuals should not have to guess if they are required to do something by law, particularly when there are criminal penalties involved. Indeed, vagueness concerns are intensified where a statute imposes criminal penalties. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982) ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

As drafted, the statute does not state with clarity or specificity whether it applies to joint users of controlled substances or sober persons who simply nearby. W. Va. Code § 60A-4-416(b)

fails to notify average persons who has the statutory duty to render aid – those personally using or those physically present. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. State of New Jersey*, 306 U.S. 451, 453 (1939) (footnote omitted).

The opening phrase of W. Va. Code § 60A-4-416(b) creates uncertainty in its meaning and fails to specify who has a duty to render aid. Therefore, this Court should find that the statute is unconstitutionally vague and declare it void for vagueness.

C. The Circuit Court Correctly Found that the Undefined Phrase "Seek Medical Assistance" Fails to Provide an Adequate Standard for Adjudication and Invites Arbitrary Enforcement.

The essence of due process is also violated when a criminal statute is "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, --U.S.--, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson,* 461 U.S. 352, 357–358 (1983)). "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *See also* Syl. Pt. 4, *State ex rel. White v. Todt*, 197 W. Va. 334, 475 S.E.2d 426 (1996).

A criminal law is vague where it lacks "any ascertainable standard," *Smith v. Goguen*, 415 U.S. 566, 578 (1974), and the meaning of its terms depends on "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *United States v. Williams*, 553 U.S. 285, 306 (2008). W. Va. Code § 60A-4-416(b) is a prime example.

The statute requires a person to "seek medical assistance." The Legislature did not give this phrase any definite meaning. In fact, there was not even an attempt to define or explain, in

any manner, what is required to "seek medical assistance" in order to comply with the statute. The Legislature's failure to define this critical phrase creates ambiguity about what the law demands. Ordinary people have no way of knowing what they need to do to satisfy this statutory provision and avoid criminal prosecution. If a law is going to require a person to do something – or else face criminal prosecution – it should be very specific in stating what needs to be done.

It is unclear whether an individual must *directly* seek medical assistance to comply with the statute or whether he or she can do so *indirectly* by, for example, aiding or assisting a third person in contacting medical assistance. Does an individual's action in directing a third person to call 911 satisfy the statutory duty? If an overdose is occurring in a crowded place, would a person's conduct in yelling "someone call 911" comply with the statute? It is not clear.

At least one other jurisdiction utilizes the phrase "seek medical assistance" in a statutory provision. However, it also includes a definition to provide notice of the type of conduct that is required to comply with the statute's requirements. The State of Hawaii has defined "seeks medical assistance" for purposes of its "Overdose Prevention; Limited Immunity" statute as follows:

> "Seeks medical assistance" or "seeking medical assistance" includes but is not limited to reporting a drug or alcohol overdose to law enforcement, the 911 system, a poison control center, or a medical provider; assisting someone so reporting; or providing care to someone who is experiencing a drug or alcohol overdose while awaiting the arrival of medical assistance.

HI Rev. Stat. § 329-43.6 (2015).

Unlike W. Va. Code § 60A-4-416(b), the Hawaii statute specifies what a person is required to do in order to "seek medical assistance." It provides specific examples of the type of conduct that satisfies the statutory conduct. Notably, under the Hawaii statute, "assisting someone so reporting" provides immunity from prosecution. Thus, an individual can also indirectly seek medical assistance by assisting a third person who reports an overdoes to the proper authority.

"What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008). The issue here is not whether the basic facts can be proven – the Petitioner drove Mr. Cebulak to a friend's house who he knew to be a nurse, and 911 was contacted. The issue is whether the Petitioner's actions satisfy the statutory duty to "seek medical assistance."

In *State v. Blair*, 190 W. Va. 425, 438 S.E.2d 605 (1993), this Court was faced with the question of whether W. Va. Code § 24-3-1[5] was unconstitutionally vague. In finding the language of W. Va. Code § 24-3-1 broad, subjective, and unconstitutional, this Court reasoned:

> What is "maintain[ing] adequate and suitable facilities"? What is "perform such service ... as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees"? ***It would not be until after the trial before anyone would be able to answer the above questions***, and the answer would depend on the jury's subjective interpretation of what is adequate or safe.

Blair, 190 W. Va. at 428, 438 S.E.2d at 608 (emphasis added).

Like in *Blair*, it would not be until after trial before anyone knew what "seek medical assistance" actually means. Importantly, the answer would totally depend on a jury's subjective interpretation and the arguments of counsel. Most problematic, a person charged under this statute would not know whether their actions violated the statute before trial. The conclusion of a jury trial is not the time for a person to be apprised if his or her conduct was prohibited by law.

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[5] W. Va. Code § 24-3-1 provides in pertinent part that "[e]very public utility subject to this chapter shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees, and in all respects just and fair, and without any unjust discrimination or preference."

The statute at hand presents a serious concern to attorneys tasked with representing criminal defendants. Criminal defense attorneys have a duty to inform their clients of the nature and elements of the charge against them. At the minimum, counsel should be able to advise whether the facts alleged by the State, if proven, would constitute a violation of the law. When the charging statute is vague, ambiguous, and subject to subjective interpretations, that duty cannot be performed. In turn, a criminal defendant cannot possibly make an informed decision about whether accept a plea or go to trial, among the many other things to consider during the course of a criminal case. In the case at bar, it is unknown whether the Petitioner's actions fall within the ambit of "seek medical assistance." That uncertainty presents problems on many different levels.

The phrase "seek medical assistance" is incapable of an objective meaning. When a statute's meaning depends on subjective determinations, enforcing agencies are free to construe it as broadly or narrowly as they desire to suit their fancy. This, in turn, affords prosecutors and law enforcement officers unrestrained discretion and, therefore, invites arbitrary and selective enforcement.

Based upon the discovery produced in this case, the State is undoubtedly taking the position that the Petitioner was required to take Mr. Cebulak to the hospital or personally call 911. (App. 019, 034). Indeed, the Petitioner was charged because he did not do that the detectives subjectively thought he should have done under the circumstances. The evidence thus far demonstrates that the Petitioner called Joey Choma, a friend whom the Petitioner knew to be a nurse, and asked him if he would save Mr. Cebulak. (App. 034, 170). The Petitioner drove Mr. Cebulak to Mr. Choma's residence. *Id.* Mr. Choma's girlfriend called 911 to report the overdose. (App. 033, 035). The State deems this conduct violative of the statute because the Petitioner "pass[ed] hospitals, fire stations, and a police department" on the way to Mr. Choma's residence. (App. 034). Additionally,

during the Petitioner's interrogation, the Detectives repeatedly stated that all the Defendant had to do was call 911 or drop Mr. Cebulak off at Ruby Memorial Hospital. (App. 009).

Contrary to the State's position in the trial court, W. Va. Code § 60A-4-416(b) does not state that a person must take an overdoser to the hospital or call 911. Based upon the language used by the Legislature, the statute does not provide adequate standards for adjudication or set forth with sufficient definiteness the specific action required by a person to fulfill his or her duty to render aid. As demonstrated by the State's interpretation of the statute in this case, the wording of the statute invites arbitrary enforcement based upon what the prosecution subjectively decides constitutes "seek medical assistance."

In *State v. Flinn,* 158 W. Va. 111, 208 S.E.2d 538 (1974), this Court was presented with an unconstitutional vagueness challenge to the definition of a delinquent child statute, codified at W. Va. Code § 49-1-4. This Court found "the language of subsection 7, 'immoral or vicious persons', is so broad and subjective in nature that there is an inherent danger that a trial court could not keep purely subjective standards out of the consideration of juries." *Flinn*, 158 W. Va. at 130, 208 S.E.2d at 549. Further, this Court found that "the language of subsection 9, 'injure or endanger the morals or health of himself or others', is so utterly subjective that an attempt to make it certain would strain the interpretative process." *Id.*

The very same dangers recognized in *Flinn* are also present in this case. Without an instruction on what constitutes "seek medical assistance," it would be impossible to keep the jury from considering their own purely subjective standards. Without a definition from the Legislature, any attempt by the circuit court to define "seek medical assistance" would only serve to strain the interpretative process.

The failure to identify specifically what a person has to do in order to "seek medical assistance" exacerbates the vagueness problem by potentially extending criminal liability against an individual who failed to make the wisest decision under the circumstances, even though that decision was not necessarily an illegal one. Stated otherwise, W. Va. Code § 60A-4-416(b) can certainly be used to charge someone, not because they had a criminal intent to harm another, but rather because they made a poor decision. The specific fact pattern in this case highlights the potential risk created by the statute.

The Petitioner did not abandon Mr. Cebulak and leave him to die when he overdosed. (App. 034, 170). He attempted to save Mr. Cebulak by driving him to a friend who the Petitioner knew to be a nurse. *Id.* While that may not have been the best decision or the most rational decision, it was nonetheless an effort to get Mr. Cebulak medical assistance. There is no evidence that the Petitioner intended to harm Mr. Cebulak. Rather, he simply failed to make the decision that the detectives deem appropriate under the circumstances. It is this type of subjectivity that creates the potential for arbitrary and selective enforcement. And, that is exactly what occurred in this case. The Petitioner was charged because the detectives personally disagreed with his decision.

A final problem with W. Va. Code § 60A-4-416(b) is that the term "medical assistance" is broad and also subjective. There are numerous approaches to medical practices, including, allopathic, osteopathic, naturopathic, homeopathic, and holistic. The Legislature has not defined "medical assistance" as professional allopathic care at a hospital. If the Legislature intended to require an individual to take an overdoser to the hospital, it would have expressly stated so. That type of express language, however, is not present in W. Va. Code §60A-4-416(b).

Without a definition of what constitutes "seek medical assistance," the statute lacks an adequate standard for adjudication and invites arbitrary enforcement and prosecution. Therefore, this Court should find that W. Va. Code § 60A-4-416(b) is unconstitutionally vague and declare it void for vagueness.

VI. CONCLUSION

The certified questions are critically important in this case because there is no evidence that the Petitioner was using a controlled substance and the evidence shows that the Petitioner called and drove Mr. Cebulak to a person he knew as a nurse who, in turn, was in direct communication with 911 about the overdose.

WHEREFORE, based upon the foregoing reasons, Petitioner requests that this Honorable Court answer the first certified question in the affirmative and the second certified question in the negative and, as a result, remand this matter to the circuit court with instructions to enter a dismissal order based upon W. Va. Code § 60A-4-416(b) being unconstitutionally vague.

Respectfully submitted,
Petitioner,
By Counsel.

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CERTIFICATE OF SERVICE

I, Jared T. Moore, counsel for the Petitioner herein, do hereby certify that a true copy of the foregoing *Petitioner's Appeal Brief* was served upon the following counsel of record via United States Mail on this 22nd day of June, 2020:

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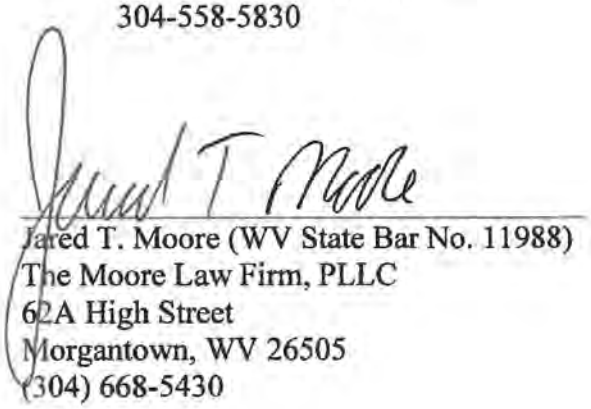

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