ORIGINAL

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

Supreme Court No.: 21-0162
Case No. 20-F-51
Circuit Court of Nicholas County

SHAUN RICHARD DUKE,

Defendant below, Petitioner.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

A co-defendant delivered Fentanyl she believed was heroin, causing death. The State charged Petitioner as acting in concert because the co-defendant drove his car to the deal while Petitioner was unconscious from taking the same Fentanyl.

IV. Is a jailhouse snitch's testimony, that Petitioner premeditated a murder on his own, relevant to the unintentional and vicarious homicide charged in the indictment or does it concern an uncharged bad act?

V. Do Petitioner's convictions and consecutive sentences for both delivery and delivery causing death violate double jeopardy?

VI. Where the co-defendant opted to use Petitioner's car for a drug deal after Petitioner lost consciousness, could the State show an agreement/concerted action?

STATEMENT OF THE CASE

After initially deadlocking,[1] a Nicholas County jury convicted Petitioner of acting in concert with a drug dealer who used his car to deliver a controlled substance causing death.[2] Petitioner appeals because the dealer did not decide to sell drugs until after Petitioner lost consciousness from taking the same Fentanyl that caused the decedent's overdose.[3] The jury convicted only after a jailhouse snitch—who faced a possible life sentence in federal prison for importing 177,000 pounds of methamphetamine into West Virginia[4]—testified to a different act altogether: that Petitioner alone injected an overdose to intentionally murder the decedent.[5]

Because the State could not prove its charged offense and the circuit court permitted it to introduce evidence of an uncharged one instead, Petitioner requests that the Court reverse his conviction.

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[1] A.R. 686.
[2] A.R. 690–92.
[3] *See* A.R. 463; A.R. 489; A.R. 491–92.; *see also* A.R. 7.
[4] A.R. 867; *see* 21 U.S.C.A. § 841.
[5] A.R. 372–73.

a. Petitioner let a friend drive his car so he could do drugs and she could buy cigarettes before returning home.

Petitioner's convictions stem from allegations that he acted in concert with a drug dealer to deliver methamphetamine and Fentanyl (that everyone believed was heroin)[6] to a buyer and her boyfriend, the decedent, causing the latter's death due to inhalation.[7]

The State reached a plea agreement with the dealer but did not present it to the court until after she testified against Petitioner.[8] In 2019, she did not own a car and dealt drugs from her home.[9] To run errands or sell drugs outside her home, she relied upon friends and neighbors to drive her.[10] She would repay them with money or drugs.[11]

On September 23, 2019, the dealer was at home.[12] The decedent's girlfriend, the buyer,[13] texted asking permission to visit the dealer's home to buy drugs.[14] But they made no plans to meet because she wanted heroin; the dealer only had methamphetamine.[15]

The dealer's supplier then arrived and fronted her more meth and what they thought was heroin.[16] The dealer texted the buyer that she now had heroin.[17] However, the buyer lost cell service and did not receive the text.[18]

After the supplier left and the dealer failed to secure a sale with the buyer, Petitioner stopped by the dealer's home in the early morning of September 24.[19] She was friends with Petitioner, who did not own a cell phone, but would stop by to socialize.[20] Petitioner

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[6] A.R. 555; A.R. 948; A.R. 950.
[7] A.R. 951.
[8] A.R. 483; A.R. 510.
[9] A.R. 437.
[10] A.R. 433–34; A.R. 453.
[11] A.R. 434.
[12] A.R. 437–38.
[13] A.R. 598–99.
[14] A.R. 955–60; A.R. 577–79.
[15] A.R. 442–43.
[16] A.R. 440–41; A.R. 443; A.R. 447; A.R. 488.
[17] A.R. 442–43.
[18] A.R. 537; A.R. 544.
[19] A.R. 449; A.R. 490.
[20] A.R. 431–32.

had previously given her rides to run errands, but this night Petitioner arrived spontaneously to socialize.[21] Petitioner never bought from his friend, but would accept drugs in exchange for rides and the two would share drugs socially.[22]

Petitioner and the dealer left for a secluded holler that they frequented to smoke drugs.[23] The dealer drove Petitioner's car and he sat in the passenger seat.[24] They spent the next three hours talking and smoking from her supply.[25] She still owed her supplier and intended to make up the difference by selling to the buyer at some point.[26]

The dealer assumed she would have mentioned her earlier texts,[27] but never relates telling Petitioner she imminently planned a sale or proposing that he drive her.[28] Even this was an assumption, though;[29] she could not recall any specific subject matter they discussed.[30] She did not recall Petitioner responding or expressing an opinion on her future intention, presuming she expressed her intention at all.[31]

b. Petitioner used the Fentanyl believing it to be a weaker opioid. His friend drove to a drug deal while he was unconscious in the passenger seat.

During their three-hour session, the dealer mostly used meth while Petitioner smoked the Fentanyl, believing it was heroin.[32] The dealer then told Petitioner she wanted to drive to Summersville for cigarettes.[33]

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[21] A.R. 450–51.
[22] *See* A.R. 452–53.
[23] A.R. 439; A.R. 453–55.
[24] A.R. 456.
[25] A.R. 455.
[26] A.R. 447.
[27] A.R. 462; 484.
[28] A.R. 455; A.R. 459; A.R. 462; A.R. 483–84; A.R. 491.
[29] A.R. A.R. 462; 483–84.
[30] A.R. 455; A.R. 459; A.R. 483–84.
[31] A.R. 484.
[32] A.R. 455; 459–60; A.R. 485; A.R. 598; A.R. 601.
[33] A.R. 463; A.R. 489.

Opioids are sedating,[34] and Petitioner was in and out of consciousness.[35] The dealer characterized him as "sleeping" since leaving the holler for Summersville, and he remained in this state for as long as the dealer drove towards Summersville.[36]

Petitioner also remained unconscious when the dealer changed her mind about traveling so far.[37] She was still high, had no driver's license, and had a sellable quantity of drugs on her person.[38] She worried the long trip was risky, and did a U-turn for home.[39] She passed the holler going the opposite direction she told Petitioner she would drive.[40] After another quarter mile out of the way she was near the buyer's home.[41]At that point—at 4:00am—she decided to stop and sell drugs rather than continue home or go to Summersville as she had told Petitioner.[42]

Petitioner was still asleep in the passenger seat[43] when the dealer arrived at her new destination.[44] The home's occupants were surprised to see her.[45] But, they were still interested in buying so the unexpected visit was welcome.[46]

The dealer returned to the car for her scales.[47] She also sought to wake up Petitioner, though he required coaxing.[48] He was still intoxicated and uninterested in the drug sale, but the dealer roused him enough to move him inside.[49] This is the first conversation the dealer recounts with Petitioner after she said she wanted cigarettes and he fell asleep.[50]

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[34] A.R. 539; A.R. 371.
[35] A.R. 493.
[36] A.R. 493.
[37] A.R. 463; A.R. 490–91; 493.
[38] A.R. 433; 463.
[39] A.R. 463; A.R. 490–91.
[40] *See* A.R. 463; A.R. 489.
[41] A.R. 457.
[42] *See* A.R. 463; A.R. 489; A.R. 491–92.
[43] *See* A.R. 466.
[44] A.R. 464.
[45] *See* A.R. 465.
[46] A.R. 465.
[47] A.R. 467.
[48] A.R. 466–67.
[49] A.R. 467.
[50] *See* A.R. 463–67; 493.

Petitioner and the decedent were on friendly terms and chatted amicably, but otherwise Petitioner did not interact much in the home.[51] He sat to the side while the dealer conducted the transaction.[52] The three—the dealer, buyer, and decedent—also smoked drugs together.[53] Petitioner did not join them.[54]

c. Later, one of the buyers overdosed and died from smoking methamphetamine and the same Fentanyl that caused Petitioner to lose consciousness.

The dealer and Petitioner left about 5:00am and returned to the dealer's home.[55] An hour and a half later, the buyer messaged the dealer that she was "freaking out" and needed to visit.[56] The dealer did not know what she meant by "freaking out."[57] The buyer also could not explain what she meant.[58]

The buyer arrived at the dealer's home between 8:30 and 9:00am and asked if she and Petitioner would like to accompany her to a gas station.[59] They accepted; the buyer drove her car with the dealer in the passenger seat and Petitioner in the back.[60] Surveillance footage shows all three at the gas station.[61]

They then returned to the dealer's home. Petitioner left in his car at 11:00am and the buyer left around noon.[62] From about midnight the late evening of September 23 until 11:00am of September 24, Petitioner was continuously with the dealer and/or buyer.[63]

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[51] A.R. 537–38.
[52] A.R. 468–69.
[53] A.R. 469–70; A.R. 537.
[54] A.R. 469; A.R. 596.
[55] A.R. 471.
[56] A.R. 472; A.R. 548.
[57] A.R. 472.
[58] A.R. 548.
[59] A.R. 472.
[60] A.R. 474–75.
[61] A.R. 953; *see also* A.R. 481; A.R. 495.
[62] A.R. 478.
[63] *See* A.R. 449; A.R. 490; A.R. 477–78.

When the buyer returned home, she found the decedent asleep, and went to bed as well.[64] When she awoke, the decedent was no longer breathing and she tried CPR.[65] Instead of 911,[66] she called a friend for help.[67] At around 3:00pm, she arrived at the friend's house which was two minutes away.[68] He returned with her, got the decedent into the car, and they took him to the hospital two hours later.[69]

When she learned her boyfriend was dead, the buyer and her friend fled the hospital.[70] She destroyed the drugs and paraphernalia.[71] She then called the Day Report Director and began driving to the drug court office, but police stopped her along the way.[72]

An autopsy showed no injection sites[73] or heroin—the drug that rendered Petitioner unconscious and killed the decedent (along with meth) was Fentanyl.[74] The official cause of death was an overdose due to inhalation.[75]

d. The State charged Petitioner for acting in concert with the dealer to deliver drugs in addition to delivery causing death.

The State obtained an indictment against Petitioner.[76] The State asserted that the sole basis for Petitioner's liability was acting in concert by letting the dealer drive his car.[77] The indictment charged Petitioner with: 1) delivery of methamphetamine, 2) delivery of heroin, 3) conspiracy to deliver, 4) delivery causing death, and 5) possession of

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[64] A.R. 560–61.
[65] A.R. 561.
[66] A.R. 563.
[67] A.R. 561.
[68] A.R. 479; A.R. 564.
[69] A.R. 564; *see also* A.R. 6.
[70] A.R. 564–65.
[71] A.R. 565–66.
[72] A.R. 565; *see* A.R. 602.
[73] A.R. 402.
[74] A.R. 950.
[75] A.R. 951.
[76] A.R. 776–77.
[77] *E.g.* A.R. 78; A.R. 799–801.

Fentanyl.[78] All of these counts refer to the transaction between the dealer and the buyer.[79] All the counts specify that Petitioner committed the crimes either by agreement or by acting in concert with the dealer.[80]

Petitioner moved to dismiss the delivery counts.[81] He argued that one cannot deliver drugs resulting in death without first delivering drugs.[82] Thus, a conviction for both would violate double jeopardy.[83] The State responded that the legislature intended the offenses to stack, and the court deferred ruling until after trial to see the evidence.[84]

At trial, the evidence showed a single transaction of two drugs: the dealer sold meth and Fentanyl, mistaking it for heroin.[85] The court denied the motion to dismiss post-trial.[86] The court then ran all of the counts—including one (delivery of meth), two (delivery of heroin), five (possession of Fentanyl) and four (delivery causing death)—consecutively for a twenty-nine to fifty-five year prison sentence.[87]

e. Though contradicted by all other witnesses, the autopsy, and surveillance footage, a jailhouse snitch testified that Petitioner murdered the decedent.

About a month before trial, the State informed Petitioner that a federal defendant housed with Petitioner would testify to statements he allegedly made.[88] The government charged the snitch with importing 177,000 pounds of methamphetamine into West Virginia.[89] For the right price, he would testify that Petitioner did not act in concert with the dealer, but rather intentionally murdered the decedent on his own.[90] However, the State

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[78] A.R. 776–77.
[79] A.R. 776–77; A.R. 797; *see also* A.R. 3 *et seq.* (Grand Jury testimony).
[80] A.R. 776–77.
[81] A.R. 66–70.
[82] A.R. 66–70; A.R. 850–51.
[83] *See* A.R. 844–46.
[84] A.R. 70–71.
[85] *See* A.R. 468.
[86] A.R. 924; 934.
[87] A.R. 938–41.
[88] A.R. 866.
[89] A.R. 867.
[90] A.R. 858; *see* A.R. 867.

later informed Petitioner that the jailhouse snitch was unsatisfied with his plea offer and had ceased cooperating.[91]

About five days before trial, the State reached an accord with the snitch.[92] Where the snitch had been charged with importing 177,000 pounds of methamphetamine, he would plead guilty to "possession and/or distribution of methamphetamine of more than 50 grams."[93] He faced a mandatory minimum of ten years with a maximum of life, and the offense carries a minimum of twenty years if the drugs caused death or serious bodily injury.[94] The record is silent as to whether any of the 177,000 pounds of drugs the snitch imported harmed any West Virginians. However, federal law permits downward departures from mandatory minimums for defendants who assist the government.[95] The district court sentenced the snitch after Petitioner's trial.[96] Rather than receive either a ten- or twenty-year mandatory minimum, the Federal Bureau of Prisons projects that the snitch will discharge his sentence on August 15, 2023.[97]

At trial, the snitch said he was testifying because it was the right thing to do.[98] He said that Central Regional Jail celled him with Petitioner and the two were friends.[99] According to the snitch, Petitioner told him he was in for murder.[100] The snitch said that Petitioner believed the decedent was an informant and wanted to kill him.[101] He testified that after the drug transaction, the decedent "nodded out" under the influence of the

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[91] A.R. 867.
[92] A.R. 858; A.R. 867; *compare* A.R. 48–49 *with* A.R. 111.
[93] A.R. 867; *see* 21 U.S.C.A. § 841.
[94] 21 U.S.C. § 841.
[95] 18 U.S.C. § 3553(e).
[96] *See* A.R. 374–75.
[97] Federal Bureau of Prisons Database Search for COREY DAVONTA SMITH, https://www.bop.gov/inmateloc/, (click "Find by Number," Number "66858-060" click "Search").
[98] A.R. 373.
[99] A.R. 367–69.
[100] A.R. 370
[101] A.R. 371; A.R. 373.

opioid and everyone else left to visit a gas station.[102] According to the snitch, Petitioner separated himself and doubled back to the home.[103] While the buyer and dealer shopped at the gas station alone,[104] Petitioner injected a fatal dose of Fentanyl to intentionally murder the decedent.[105]

The circuit court permitted the snitch to testify over Petitioner's objection.[106] When Petitioner learned a few days before trial about the State's intention, he moved to exclude the testimony[107] and renewed the motion post-conviction.[108] He argued that the snitch's testimony amounted to uncharged bad acts—it was irrelevant to the charged conduct, more prejudicial than probative as to any possible purpose, and too unreliable to be believed.[109] Petitioner proposed that if the State thought he committed an intentional, premeditated murder then it should re-indict him—not charge him with a vicarious, unintentional killing and then enflame the jury with far more serious allegations.[110] The court denied the motion. It ruled that the snitch's testimony—that Petitioner, on his own, premeditated a first degree murder—was "relate[d] directly" to the charge of vicariously committing an unintentional homicide.[111]

Because the circuit court erred in ruling the evidence directly relevant rather than treat the accusation as an uncharged bad act, and because absent the snitch's testimony the originally deadlocked jury likely would have acquitted, Petitioner appeals.

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[102] A.R. 372.
[103] A.R. 372.
[104] A.R. 372.
[105] A.R. 372–73.
[106] A.R. 98–99.
[107] A.R. 92; A.R. 866.
[108] A.R. 866–67.
[109] A.R. 858; A.R. 867.
[110] A.R. 98.
[111] A.R. 98–99.

SUMMARY OF ARGUMENT

This case reads like a law exam fact pattern meant to show the limits of the concerted action principal. The State's theory overlooks that the same Fentanyl that killed the decedent rendered Petitioner unconscious. He therefore could not agree to a conspiracy or knowingly "contribute[] to the criminal act."[112] Petitioner only let the dealer drive his car so they could do drugs and she could buy cigarettes. He never authorized her to drive to a drug deal.

Given the skeletal nature of the State's case, it is likely that the snitch's inflammatory testimony tipped the formerly deadlocked jury. But his testimony that Petitioner solely killed the decedent through a pre-meditated act is wholly different conduct than the charges. Ruling that the jury could convict for the charged act based on evidence of an uncharged offense created a fatal variance. The State couldn't prove its charges, so it introduced evidence of a completely different crime instead.

Had the court screened the uncharged bad acts evidence per WVRE 404(b), it could not have admitted it. The State had no legitimate use for the testimony. And circuit courts must themselves be satisfied that the uncharged acts occurred. Given the benefit the snitch received for his bargained-for testimony and the fact that the State's other witnesses, the autopsy, and gas station surveillance all contradict his incredible story, it is unlikely the court would fall for the snitch's story and admit his testimony.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner's conviction presents an issue of first impression: is delivery of a controlled substance a lesser included offense to delivery of a controlled substance causing death, and does convicting a defendant of both offenses when they arise from the same transaction violate the constitutional prohibition against double jeopardy?

Petitioner therefore requests a Rule 20 oral argument and a signed opinion.

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[112] Syl. Pt. 7, *State v. Foster*, 221 W. Va. 629, 656 S.E.2d 74 (2007) (per curiam); Syl. Pt. 11, *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812 (1989)).

ARGUMENT

The criminal justice system has a simple presupposition: society should punish people based on their charged conduct—not someone else's,[113] and not conduct for which they have no notice.[114] Here, the State had a glaring logical gap in its charged theory of culpability—no one could testify that Petitioner loaned the dealer a car to commit a drug deal because the evidence showed that the dealer acted alone after Petitioner overdosed—thankfully non-lethally—from the same drugs that killed the decedent.[115]

Unable to prove the crimes charged by the grand jury, the State enlisted a snitch to testify to a completely different criminal act.[116] One of which Petitioner had no constitutional notice[117] and which, by its nature, was likely to enflame the passions of the jury.[118] The circuit court should have treated this testimony as uncharged bad acts evidence if it was to admit it at all. Admitting it as evidence to prove the charged offenses constituted a fatal variance and this Court should reverse.

I. The circuit court should have excluded the snitch's accusation of uncharged misconduct.

The State charged Petitioner with vicariously causing an unintentional homicide by assisting the dealer to deliver drugs.[119] Nothing in the indictment charged that Petitioner personally premeditated an intentional murder.[120] The snitch's allegation, therefore, concerned uncharged misconduct and permitting the jury to convict Petitioner of the charged conduct on its basis constituted a fatal variance.

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[113] *Foster*, 221 W.Va. 629 at Syl. Pt. 5 ("Merely witnessing a crime, without intervention, does not make a person a party to its commission ...").
[114] *See* Syl. Pt. 1, *State v. Corra*, 223 W. Va. 573, 678 S.E.2d 306 (2009).
[115] *See* A.R. 493.
[116] *See* A.R. 372–73.
[117] *See* W. Va. Const. Art. III, § 4.
[118] *See State v. McGinnis*, 193 W. Va. 147, 153, 455 S.E.2d 516, 522 (1994); *cf. Price v. Georgia*, 398 U.S. 323, 331, n. 10 (1970) ("There is a significant difference to an accused whether he is being tried" for intentional or unintentional homicide.).
[119] *See* A.R. 776–77.
[120] *Id.*; *see also* A.R. 3 *et seq.* (Grand Jury testimony).

"Typically, evidence of other uncharged crimes is not admissible against a defendant in a criminal case."[121] "[W]hen a person is placed on trial for the commission of a particular crime he is to be convicted, if at all, on evidence showing his guilt of the specific offense charged in the indictment against him."[122] However, WVRE 404(b) provides an exception for uncharged bad acts introduced for a purpose other than character.[123] If the State offers the evidence for a proper purpose, the evidence's probative value outweighs the risk of misuse, and the court concludes by a preponderance of the evidence that the defendant committed the uncharged act, then the court may read a cautionary instruction to the jury and admit the evidence.[124] "[The trial court] alone stands as the trial barrier between legitimate use of Rule 404(b) evidence and its abuse."[125] "[W]here a trial court erroneously admits Rule 404(b) evidence, prejudicial error is likely to result."[126]

Normally, this Court defers to trial courts' evidentiary rulings.[127] But here, the court misinterpreted the rules of evidence and applied the wrong conceptual framework for evaluating the evidence's admissibility. It treated the jailhouse snitch's testimony as evidence of the charged offense subject only to WVRE rules 401 and 403, rather than screening it per rule 404.[128] This is a mistake of law that this Court reviews de novo.[129]

First and foremost, the court erred in finding that the snitch's testimony "relate[d] directly" to the charged crime.[130] Ancillary aspects of his testimony touched upon the drug sale and possession, but the core of his testimony—the portion Petitioner

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[121] *State v. McDaniel*, 211 W. Va. 9, 12, 560 S.E.2d 484, 487 (2001) (per curiam); *see also* WVRE 404.
[122] *State v. Thomas*, 157 W. Va. 640, 654, 203 S.E.2d 445, 455 (1974).
[123] *See* Syl. Pt. 3, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).
[124] *McGinnis*, 193 W. Va. 147 at Syl. Pts. 1 and 2.
[125] *Id.*, 193 W. Va. at 155.
[126] *Id.* at 153.
[127] *See State v. Blake*, 197 W. Va. 700, 705, 478 S.E.2d 550, 555 (1996).
[128] A.R. 98–99.
[129] *See* Syl. Pt. 1, *Gentry v. Mangum*, 195 W. Va. 512, 514, 466 S.E.2d 171, 173 (1995).
[130] A.R. 98–99.

challenges—was an utterly novel homicide theory with no basis in the charges.[131] The indictment exclusively charged that Petitioner conspired and acted in concert with the dealer: "[Petitioner,] acting in concert with [the dealer] did deliver unto [the decedent] Fentanyl, a Schedule II Narcotic Controlled Substance, and Methamphetamine, a Schedule II Non-Narcotic Controlled Substance, which when ingested in combination with one another, was the proximate cause of his death[.]"[132] The snitch's story—that Petitioner intentionally administered a fatal dose into an unconsenting victim as a pre-meditated murder—does not make it more probable that the dealer and decedent conducted a drug sale or that the decedent died from his voluntary use of its proceeds.[133]

Because of this fundamental mistake, the court did not conduct a 404(b) hearing.[134] It did not require the State to propose a legitimate purpose for the evidence or read a limiting instruction. And of course, the State—which asked the judge to admit the snitch's testimony as direct evidence of a vicarious, unintentional homicide—did not notice an intent to use 404(b) evidence.[135] And the court did not rule whether the alleged murder actually occurred. In the first instance, the snitch's testimony was too unreliable even if the State did have a conceivable purpose. Therefore, this Court should reverse Petitioner's conviction.

1. The State did not have a legitimate purpose for the evidence, and its use created a fatal variance that prejudiced Petitioner.

The State did not propose a legitimate purpose for the uncharged bad acts evidence[136]—it did not even have one. Instead, it argued that the snitch's testimony intrinsically related to its case.[137] However, the murder accusation had no relevance to the

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[131] *See* A.R. 95–96.
[132] *See* A.R. 776–77.
[133] *See* WVRE 401.
[134] *McGinnis*, 193 W. Va. 147 at Syl. Pts. 1 and 2.
[135] A.R. 96.
[136] *See* WVRE 404(b); *see also McGinnis*, 193 W. Va. 147 at Syl. Pt. 1.
[137] A.R. 96.

vicarious and unintentional homicide the indictment charged. Treating it as intrinsic evidence created a prejudicial, fatal variance, and basic fairness requires reversal.

Due process requires notice of all charges.[138] The West Virginia Constitution provides that only an indictment, as charged by a grand jury, provides notice for felonies.[139] "If an indictment alleges that an offense was done in a particular way, the proof must support such charge or there will be a fatal variance."[140] Though a variance in the commission of an offense may be non-prejudicial,[141] the same cannot be said when the evidence shows a different crime altogether. "When a defendant is charged with a crime in an indictment, but the State convicts the defendant of a charge not included in the indictment, then per se error has occurred, and the conviction cannot stand and must be reversed."[142]

Permitting the snitch to accuse Petitioner of an uncharged murder functioned as a material, fatal variance.[143] By calling the evidence intrinsic, the State and court took the position that the jury could convict Petitioner of delivery causing death as charged if it believed the snitch's testimony.[144] And there is no telling whether the jury convicted based on the charged or uncharged conduct. But the grand jury did not hear evidence of a premeditated murder.[145] The indictment charged only that Petitioner acted in concert with the dealer to sell drugs, and that death resulted from their voluntary use,[146] Therefore, if jurors credited the snitch's story, it could not legitimately convict Petitioner as charged.[147]

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[138] U.S. Const. Amend. XIV; W. Va. Const. Art. III § 10.
[139] W. Va. Const. Art. III § 4.
[140] Syl. Pt. 2, *State v. Scarberry*, 187 W. Va. 251, 252, 418 S.E.2d 361, 362 (1992) (per curiam) (quoting Syl. Pt. 8, *State v. Crowder*, 146 W.Va. 810, 123 S.E.2d 42 (1961)).
[141] *See id.*
[142] *Corra*, 223 W. Va. 573 at Syl. Pt. 7.
[143] *See Scarberry*, 187 W. Va. 251 at Syl. Pt. 2.
[144] *See* A.R. 96–99; A.R. 653.
[145] *See* A.R. 3 *et seq.*
[146] A.R. 776–77.
[147] *See Corra*, 223 W. Va. 573 at Syl. Pt. 7 (per se error when jury convicts the defendant of an indicted charge where the evidence only establishes an unindicted offense); *see also Thomas*, 157 W. Va. at 654.

And the variance was not simply a material deviation from the charged mode of commission.[148] The elements of first degree murder testified to by the snitch clash with the elements of delivery causing death. His testimony contradicted the charged offense, and thus, paradoxically, was exculpatory. Delivery causing death requires a delivery—i.e., an "actual, constructive or attempted transfer" of ownership.[149] And it requires that the decedent was "using, ingesting or consuming" the drug.[150] But administering a fatal dose of a controlled substance to an unconscious individual is not a property transaction—shooters are not transferring ownership of bullets to shootees. And an individual cannot be said to be "using, ingesting or consuming" a drug administered without their consent. Due to the State's failure to charge the correct offense, if the jury believed the snitch, it should have acquitted. But the court placed no limits on the evidence, and there can be no presumption the jury followed the law when the court did not.[151]

The State proffered no legitimate use for the uncharged murder accusation because it didn't have one. Any prejudice, however slight, would thus outweigh its proper use. And here, the prejudice was tremendous. By ruling the snitch's testimony directly relevant to the charged conduct, the circuit court created a fatal variance requiring reversal.

2. The snitch's testimony was insufficiently reliable for a court to find it truthful by a preponderance of the evidence.

Additionally, before admitting uncharged bad acts, a court must find that the defendant committed the bad act.[152] Here, the snitch was so incredible that the circuit court likely could not have made that finding, and this Court should reverse.

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[148] *See Scarberry*, 187 W. Va. 251 at Syl. Pt. 2.
[149] W. Va. Code § 60A-1-101.
[150] W. Va. Code § 60A-4-416.
[151] *Cf. State v. Sites*, 241 W. Va. 430, 442, n. 20, 825 S.E.2d 758, 770, n. 20 (2019) (presumption that jurors follow the court's instructions, but only where they are instructed).
[152] *McGinnis*, 193 W. Va. 147 at Syl. Pt. 2.

Importantly, West Virginia has rejected the 404(b) test used in the federal system and requires the court to itself find that the defendant committed the bad act.[153] Where a witness testifies to truly intrinsic acts, relevant to proving the charged offense, the court has a limited role in screening for reliability—credibility is a matter for the jury.[154] However, in *State v. McGinnis*, this Court found this an insufficient safeguard for uncharged bad acts.[155] To better fulfill WVRE 404(b)'s policy, the Court ruled that the trial court must *itself* be satisfied by a preponderance of the evidence that the defendant committed the uncharged act.[156] Because the circuit court failed to screen the evidence at all, it did not make such a finding. And because the snitch's testimony is too unreliable to satisfy the West Virginia test, the circuit court ought to have excluded it notwithstanding the jury's credulity.

For the circuit court to find that Petitioner more likely than not murdered the decedent, it would have to ignore too much contrary evidence. The court would have to ignore the State's other witnesses who testified to being with Petitioner all day.[157] The court would have to conclude that the autopsy's conclusion of an accidental death was erroneous.[158] It would have to assume the medical examiner erred in concluding that the decedent smoked the drugs.[159] And the court would have to ignore its own eyes, and the surveillance video showing Petitioner at a gas station at the same time the snitch claimed he was in the home murdering the decedent.[160]

The inflammatory nature of the snitch's outrageous allegations may have overridden the reason of lay jurors, but it is highly doubtful a learned judge would find this evidence

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[153] *McGinnis*, 193 W. Va. 147 at Syl. Pt. 2.; *see also id.* at 157.
[154] *See State v. Guthrie*, 194 W. Va. 657, 669, 461 S.E.2d 163, 175 (1995); *see also See Huddleston v. U.S.*, 485 U.S. 681, 690 (1988).
[155] *See McGinnis*, 193 W. Va. at 155, n. 10.
[156] *See McGinnis*, 193 W. Va. at 155, n. 10.
[157] *See* A.R. 449; A.R. 490; A.R. 477–78.
[158] A.R. 948.
[159] A.R. 951.
[160] A.R. 953.

persuasive—especially considering the great benefit the snitch received. A few years in prison instead of ten (or twenty) to life for importing 177,000 pounds of methamphetamine into West Virginia is a sizeable windfall.[161]

In abdicating its role in screening uncharged bad acts, the court created a variance and allowed the jury to convict based on uncharged misconduct that Petitioner likely did not even commit. He therefore requests that the Court reverse his conviction.

II. The circuit court violated the Double Jeopardy Clauses of the United States and West Virginia constitutions by permitting the jury to convict Petitioner of both delivery and delivery causing death.

Though this Court has not yet ruled upon the issue, delivery is a lesser included offense of delivery causing death. The circuit court therefore erred by permitting the jury to convict Petitioner of both for the same transaction, and it compounded this error by sentencing Petitioner consecutively.

The Double Jeopardy Clauses of the United States and West Virginia Constitutions prohibit multiple trials and punishments for the same conduct.[162] "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[163] However, this is a rule of construction and may be overcome by "a clear indication of contrary legislative intent."[164] To ascertain "a clear indication of contrary legislative intent,"[165] the Court looks to the language used in the statutes and, if necessary, the legislative history.[166] Where the

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[161] *See Supra.* n. 97.
[162] W. Va. Const. Art. III § 5; U.S. Const. Amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 795–96 (1969) (incorporating the Double Jeopardy Clause as applying to the states via Fourteenth Amendment's Due Process Clause).
[163] Syl. Pt. 4, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992) (quoting *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932).
[164] *Gill*, 187 W. Va. 136 at Syl. Pt. 5.
[165] *Id.*
[166] *Gill*, 187 W. Va. 136 at Syl. Pt. 8.

legislature has not indicated otherwise, and one offense strictly dominates the other, a jury may not convict a defendant of both from the same transaction.[167]

Here, there is no reasonable question as to whether delivery causing death, W. Va. Code § 60A-4-416, strictly dominates delivery per W. Va. Code § 60A-4-401. Section 416 explicitly incorporates a Section 401 delivery as an essential element: "Any person who knowingly and willfully delivers a controlled substance or counterfeit controlled substance *in violation of the provisions of section four hundred one, article four* of this chapter ..."[168] Thus, an individual cannot violate Section 416 without first violating Section 401.

Rather, the State below argued that the legislature intended the offenses to stack because it created Section 416 anew rather than add it to Section 401.[169] However, this clerical choice falls far short of "a clear indication of contrary legislative intent" as the Double Jeopardy Clauses require.[170] First, the State roots its argument in an editorial choice about organization rather than the clearly expressed language or history of the statute.[171] On the contrary, the legislature attaches no import to how it titles code sections.[172] To divine legislative intent, this Court should not read meaning into a clerical choice that the legislature has said carries no meaning.

And second, the legislature knows how to make its intention explicit, and here it did not do so. The statute prohibiting child sexual abuse by a parent illustrates this.[173] Just as with delivery causing death, one cannot violate the sexual abuse by a parent statute without first violating other sections in the criminal code.[174] And just as with delivery and delivery causing death, the legislature carved out a new statute rather than nest its new

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[167] *See Gill*, 187 W. Va. 136 at Syl. Pt. 8.
[168] W. Va. Code § 60A-4-416.
[169] A.R. 70–71.
[170] *See Gill*, 187 W. Va. 136 at Syl. Pt. 5.
[171] *See Gill*, 187 W. Va. 136 at Syl. Pt. 8.
[172] *See* W. Va. Code § 2-2-10.
[173] *See* W. Va. Code § 61-8D-5.
[174] *See State v. George W.H.*, 190 W. Va. 558, 566, 439 S.E.2d 423, 431 (1993).

criminal offense within those pre-existing sex abuse statutes.[175] But the legislature knew this alone would not show its intention, so it explicitly said the offenses should stack. The sexual abuse by a parent statute begins, "In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection[.]"[176] Section 416 carries no such prefatory language.

If the legislature intended Sections 401 and 416 to stack, it would have said so. It did not. Without "a clear indication of contrary legislative intent," Section 401 is a lesser included offense, and a defendant cannot be guilty of both when they arise from the same transaction. As a matter of first impression, the circuit court therefore erred in permitting the jury to convict Petitioner of both the deliveries and delivery causing death, and it further erred by running those convictions consecutively.[177]

III. The State introduced insufficient evidence that Petitioner knowingly "contributed to the criminal act" or conspired with the dealer.

The crux of Petitioner's culpability (as charged) is whether he had an agreement for the conspiracy or otherwise acted in concert with the dealer to effectuate a common goal.[178] All of Petitioner's charges depend on one or the other. The State repeatedly asserted that without Petitioner's car, the dealer could not have delivered drugs.[179] But without Petitioner's agreement or even complicity, he is a bystander—not a conspirator. And on the facts of this case, the State approached its burden, but ultimately fell short.[180]

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[175] *See* W. Va. Code § 61-8D-5.
[176] *Id.*; *see also George W.H.*, 190 W. Va. 558 at Syl. Pt. 7.
[177] *See* A.R. 938–41.
[178] *See* A.R. 776–77; *see also Foster*, 221 W.Va. 629 at Syl. Pt. 7.
[179] A.R. 643–44.
[180] At a minimum, the State plainly introduced insufficient evidence to support convictions for delivery of methamphetamine, heroin, and possession of Fentanyl with intent. The evidence is clear that there was one delivery of two substances—methamphetamine and an opioid. *See* A.R. 468. Everyone believed the opioid to be heroin, but per the autopsy toxicological screen, it was actually pure Fentanyl. A.R. 950. The fact an initially deadlocked jury went down the verdict form and convicted of all three charged drugs on this record further shows the extent to which the uncharged bad acts enflamed the jurors.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits state criminal convictions not supported by sufficient proof of each element.[181] "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden."[182] However, constitutional sufficiency is not a "no evidence" test.[183] The standard must account for the State's burden in a criminal case, and therefore a conviction cannot stand if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt."[184] Accordingly, although the evidence should be viewed in the light most favorable to the fact finder's decision,[185] all inferences must be rational and the application of the law to the facts must be reasonable.[186] A modicum of evidence may satisfy a "no evidence" test, but "it [can] not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt."[187]

On the somewhat unusual facts of this case, the State fell short of its burden to introduce sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. To show a conspiracy, the State must show an agreement—at least tacitly—between Petitioner and the dealer.[188] Conversely, to show concerted action it must show that Petitioner knowingly and intentionally contributed to the criminal act regardless of a prior agreement.[189] But even in the light most favorable to the State, its evidence shows that Petitioner authorized the dealer to use his car so that they could do drugs together and so that she could buy cigarettes in Summersville.[190] Petitioner was unconscious from a Fentanyl

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[181] US Const. Amend. XIV; *See Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *see also* W. Va. Const. Art. 3, § 10.
[182] Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).
[183] *Compare Jackson*, 443 U.S. at 316 *with Thompson v. Louisville*, 362 U.S. 199, 80 S. Ct. 624 (1960).
[184] *Jackson*, 443 U.S. at 324.
[185] *id.* at 319.
[186] *See id.* at 317.
[187] *Id.* at 320.
[188] *See State v. Legg*, 243 W. Va. 372, 380, 844 S.E.2d 143, 151 (2020).
[189] *See also Foster*, 221 W.Va. 629 at Syl. Pt. 7.
[190] *See* A.R. 463; A.R. 489.

overdose when the dealer decided to drive to the drug sale and he did not regain awareness until after they had arrived.[191]

First, there was no pre-arranged plan for the dealer to drive to the decedent's home. Prior to Petitioner ever arriving, the dealer attempted to schedule a sale with the buyer.[192] However, her efforts failed—first because she did not have the drugs the buyer and decedent wanted, and then because poor cell service prevented a meeting of the minds once the dealer did have an opioid.[193]

Nor did the buyer extend an open invitation for the dealer to visit them. She had asked to visit the dealer, not the other way around.[194] And as far as the buyer knew, the dealer did not have what she wanted.[195] Thus her surprise when the dealer showed up at 4:00am—many hours after she sought, but failed, to visit the dealer.[196]

Petitioner's visit was also unconnected with any plan to sell drugs. He arrived spontaneously to socialize and did not even own a cell phone with which to plan any deal.[197] Bolstering this is the fact that they did, in fact, then socialize—their activity may have been illicit, but they did not get together to sell drugs—only to use them.[198]

And while socializing, they made no plans to sell drugs. The State once asked a vague, leading question—"you had previously discussed, you believe, that you were going to go there to deliver drugs; is that correct?" In response, the dealer—whose deal depended on pleasing the questioner[199]—said yes.[200] But all of the her specific recollections show that this "plan" was at best ideation.[201] She wanted to sell drugs in the abstract

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[191] A.R. 467; A.R. 493.
[192] A.R. 955–60.
[193] *See* A.R. 442; A.R. 537; A.R. 544.
[194] A.R. 955–60; A.R. 577–79.
[195] *See* A.R. 955–60.
[196] A.R. 463; A.R. 465; A.R. 489; A.R. 491–92.
[197] A.R. 449–51; A.R. 490.
[198] A.R. 439; A.R. 453–55.
[199] A.R. 483; A.R. 510.
[200] A.R. 466.
[201] *See e.g.* A.R. 459; A.R. 462.

because she owed her supplier.[202] She assumed—with no actual recollection—that she would have mentioned the text conversation with the buyer.[203] But that is it. She did not testify to proposing that they drive to the decedent's home at 4:00am.[204] And she did not recall Petitioner expressing any opinion on her inchoate, future intention.[205] The only plan she discussed with Petitioner was buying cigarettes.[206]

Rather, the evidence shows that at the pertinent time—when the dealer decided to realize her intention—Petitioner was unconscious from a non-lethal Fentanyl overdose.[207] Everyone believed the opioid in question was heroin—and dosed it accordingly.[208] But Fentanyl is fifty times more powerful than heroin, and the appropriate dosage is much lower.[209] Petitioner had been smoking it for three hours.[210] It is unsurprising he passed out—the dealer is lucky she only faced one delivery causing death charge.

And the dealer did not decide to sell drugs until after the overdose compromised Petitioner. The last thing she recalls telling Petitioner before they left the holler was that she wanted to drive to Summersville for cigarettes.[211] She is silent as to whether he could respond. But the dealer is clear that from the moment she left the holler, Petitioner was out.[212] The entire time she drove towards Summersville, the entire time she turned around to go home, and the entire time up until she arrived at the decedent's home, Petitioner was more or less unconscious.[213] The dealer relates no conversation between leaving the holler and arriving at the buyer's home.[214] The next time she speaks to Petitioner

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[202] A.R. 462.
[203] A.R. 483; A.R. 491.
[204] A.R. 455; A.R. 459; A.R. 483-84.
[205] A.R. 484.
[206] A.R. 489.
[207] *See* A.R. 493.
[208] *See* A.R. 455; A.R. 460.
[209] *See* 44 No. 2 Quinlan, Narcotics Law Bulletin NL 4.
[210] A.R. 455.
[211] A.R. 489.
[212] A.R. 493.
[213] *See* A.R. 493; A.R. 466-67.
[214] *See* A.R. 463-67; A.R. 493.

at all, she had already parked.[215] She had already gone inside to speak with the occupants.[216] The buyer and decedent had already expressed an interest in buying.[217] Petitioner is unaware of anything until the dealer returns for scales and rouses Petitioner from his stupor.[218]

The State's evidence thus shows no agreement—actual or tacit. And Petitioner did nothing that meaningfully and intentionally "contribute[d] to the criminal act."[219] He was unconscious and nearly himself a victim. And that gap—the need for agreement or complicity, and Petitioner's utter incapacity for either—sunk the State's case. No wonder the State was so eager to woo the snitch to its side, no matter the consequences.

CONCLUSION

The State charged Petitioner with a vicarious, unintentional homicide, but could not prove the key facts. Instead, it cut a deal to help a drug smuggler responsible for delivering 177,000 pounds of methamphetamine to West Virginians. In exchange for his assistance, the government will release the snitch to the streets in 2023.

Petitioner did not contribute to West Virginia's drug epidemic on September 24, 2019—he was nearly its victim. For the harm the State has inflicted, Petitioner requests that this Court reverse his conviction.

Respectfully submitted,
Shaun Richard Duke,
By Counsel

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[215] *See* A.R. 464; A.R. 467.
[216] *See* A.R. 465–66.
[217] *See* A.R. 466.
[218] *See* A.R. 466–67.
[219] *See Foster*, 221 W.Va. 629 at Syl. Pt. 7.

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CERTIFICATE OF SERVICE

I, Matthew D. Brummond, counsel for Defendant, Shawn Richard Duke, do hereby certify that I have caused to be served upon counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Brief"* and *"Appendix Record"* to the following:

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by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 11th day of June, 2021.

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