No. 21-0873

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA,
Respondent,

Vs.

MICAH A. MCCLAIN,
Petitioner.

BRIEF OF THE MONONGALIA COUNTY PROSECUTING ATTORNEY AS *AMICUS CURIAE* AS A MATTER OF RIGHT

Urging the Court to Affirm the Circuit Court of Monongalia County's Amended Order of Certification and Answer Certified Questions (1) and (2) in the Negative, and Answer Certified Questions (3) and (4) in the Affirmative.

From the Circuit Court of Monongalia County, West Virginia, Case No.: 21-F-76

Respectfully Submitted,

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QUESTIONS PRESENTED

1. Does the Legislature's 2010 amendment of West Virginia Code § 17C-4-1, replacing the word "accident" with "crash" create ambiguity in the interpretation of the statute?

2. In applying the rule of lenity, does the operative phrase "vehicle **involved** in a crash" in West Virginia Code § 17C-4-1(a) and (d) [2018], mean that a vehicle must make direct physical contact with or collide with a person or vehicle being driven or occupied by a person resulting in his or her injury or death?

3. Does the phrase "involved in a crash" as contemplated in West Virginia Code § 17C-4-1(a)&(d), include a driver who makes contact with a single vehicle and that vehicle makes contact with other vehicles in an unbroken chain resulting in injury or death to persons in other vehicles?

4. If ambiguity does not exist, should the Court allow the word "crash" as used in West Virginia Code 17C-4-1, to be given its common, ordinary and accepted meaning? Further, is it a question of fact as to whether or not the driver of any vehicle was involved in a "crash" as contemplated in West Virginia Code § 17C-4-1(a)&(d)?

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This appeal is about the separation of powers. Further, it is about giving words and terms in a legislative enactment their common, ordinary and accepted meaning. The Petitioner is asking this Court to find that West Virginia Code § 17C-4-1 (2018) Crashes involving death or personal injuries; Erin's Law, is unconstitutionally vague and ambiguous.

This appeal is about upholding Legislative enactments and giving proper deference to the powers bestowed upon the West Virginia Legislature by Article VI of the Constitution of West Virginia (1872). As early as 1928, this Court first upheld the constitutionality of a law in West Virginia requiring anyone involved in a vehicle crash or accident to stop, provide information and render aid. Syl. Pt. 3, *State v. Masters*, 106

W.Va. 46, 144 S.E. 718, 719 (1928)[1], *overruled on other grounds, State v. Tennant*, 173 W.Va. 627, 633–34, 319 S.E.2d 395, 401 (1984). Now, almost 100 years since this Court first considered *State v. Masters*, the Petitioner is asking it to disregard the Legislature's authority, decision making, and policy.

The Monongalia County Prosecuting Attorney is the elected "constitutional officer charged with the responsibility of instituting prosecutions and securing convictions on behalf of the State of those who violate the criminal law. [She] is charged with the duty of prosecuting all crimes[.]" *State ex rel. Skinner v. Dostert*, 166 W.Va. 743, 750, 278 S.E.2d 624, 630 (1981) (citations omitted). The underlying criminal case originates out of a multiple vehicle crash on Route 7 in Monongalia County, West Virginia. That crash resulted in the horrific death of Stephanie Eddy. Petitioner failed to immediately stop at the scene of the crash and continued on for approximately four to five miles before stopping his vehicle at his previously planned destination. He returned to the scene of the crash approximately 50 minutes later with his supervisors. The Petitioner was subsequently charged and arrested for violation of Section 17C-4-1, for leaving the scene of a crash with death.

As the constitutional officer charged with instituting prosecutions and securing convictions on behalf of the State for those who violate the law in Monongalia County, West Virginia, the Monongalia County Prosecuting Attorney files this *amicus curiae* brief as a matter of right to assert the position of her office regarding the certified questions before this Court. *See* W. Va. R. App. P. 30(a). The Monongalia County Prosecuting Attorney indicted the underlying criminal matter and has been prosecuting this case since

[1] "An act of the Legislature (chapter 43, section 97, Code) making it a misdemeanor for an automobilist upon striking a person to fail to stop, give his name, and render such assistance as may be reasonable or necessary, or to do any one of the same, is not violative of sections 10 and 14 of article 3 of the state Constitution."

February of 2021. This includes reviewing the investigation of the criminal matter, meeting and communicating with the victim's family, conducting extensive discovery, filing pre-trial motions and responding to numerous dispositive motions. As such, the Monongalia County Prosecuting Attorney has every intention of continuing to prosecute this criminal matter against the Petitioner, Micah McClain, and hold him responsible for his illegal conduct in Monongalia County. An adverse finding by this Court may result in the dismissal of the indictment and justice denied to the family of the Stephanie Eddy and the citizens of Monongalia County. As such, it is important this Court hear from the elected constitutional officer and her office that is prosecuting this case.

RELIEF SOUGHT BY *AMICUS CURIAE*

The Monongalia County Prosecuting Attorney respectfully requests this Court affirm the Circuit Court of Monongalia County's *Amended Order of Certification* and answer certified questions (1) and (2) in the negative, and answer certified questions (3) and (4) in the affirmative.

SUMMARY OF ARGUMENT

The circuit court correctly found Section 17C-4-1(a) is not vague or ambiguous. Further, that Section 17C-4-1(a) applies to the driver of any vehicle involved in a crash resulting in death or injury, including vehicles that do not come into direct physical contact with the victim.

I. Section 17C-4-1(a) is not unconstitutionally vague when its language is given its common, ordinary and accepted meaning. Further, by parsing through the definition of each word challenged by Petitioner, this Court will find Section 17C-4-1(a) is sufficiently

definite to give a person of ordinary intelligence fair notice that the driver of any vehicle involved in a crash with death or injury must stop immediately at the scene.

II. Section 17C-4-1(a) is not ambiguous, nor is it subject to reasonable differing interpretations. First, the word "crash" in the phrase "involved in a crash" is not ambiguous when attributed is plain and ordinary meaning. Second, Section 17C-4-1(a) is not subject to reasonable differing interpretation because direct physical contact with the victim is not required. Further, numerous other states with similar hit-and-run statutes also do not require direct physical contact with the victim.

III. Section 17C-4-1(a) (Erin's Law) should not be read *pari materia* with Section 33-6-31(e)(3) (Uninsured Motorist Statute), because they relate to two entirely different subjects. However, even if this Court reads the two statutes *pari materia*, it will find that Section 33-6-31(e)(3) does not require direct physical contact between vehicles.

IV. If this Court finds Section 17C-4-1(a) is ambiguous, the rule of lenity requires consideration of the design of the statute as a whole, its object, and policy. Further, the rule of lenity should not be construed in a way that would lead to an absurd and unjust result.

This appeal is about the Court giving proper deference to the powers bestowed upon the Legislature by Article VI of the Constitution of West Virginia. The Legislature carefully crafted and enacted Section 17C-4-1 for the benefit and protection of the citizens of West Virginia. Accordingly, the decision below should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Rule of Appellate Procedure 30(f), the Monongalia County Prosecuting Attorney believes extraordinary circumstances exist as outlined herein,

and respectfully requests the opportunity, through her assistant and counsel of record, to participate in oral argument.

STATEMENT OF FACTS

On September 5, 2019, the Petitioner was involved in a multiple vehicle crash on Route 7 in Monongalia County, West Virginia, that resulted in the horrific death of Stephanie Eddy. ACA069-092. More specifically, the Petitioner was towing a lowboy trailer loaded with a bulldozer in the eastbound lane. ACA097, 122-123. He was transporting the bulldozer from a location on Jakes Run Road in Monongalia County, to a location approximately 10-12 miles away off Pedlar Run Road. ACA 122-123. Following behind the Petitioner on Route 7 in the eastbound lane were two passenger vehicles, the first vehicle was a silver Hyundai driven by Allison Lippert ("Ms. Lippert"), and the second vehicle was a red GMC sport utility vehicle driven by Stephanie Eddy ("Mrs. Eddy"). ACA070, 126.

Around the same time, a tri-axle dump truck driven by Nicholas Ali ("Mr. Ali") was carrying a full load of hot asphalt traveling in the westbound lane on Route 7. ACA125. Just east of Statler's Country store on a curve, Petitioner crashed into the tri-axle dump truck driven by Mr. Ali.[2] ACA069-092, 097, 122-123, 125-127. It was determined by officers that the right front corner of the bulldozer's blade struck the front right tire of the tri-axle dump truck causing it to lose control. ACA097. The crash caused the tri-axle dump truck to shift weight to the right side. *Id.* This caused the tri-axle dump truck to cross the center line where it struck Ms. Lippert's vehicle and rolled towards its passenger side where it landed on top of Ms. Eddy's vehicle. *Id.*

[2] Petitioner and Mr. Ali dispute who is at fault for the crash and that issue is the subject of a civil lawsuit pending in the Circuit Court of Monongalia County, West Virginia, Case No. 20-C-50.

Ms. Lippert was following directly behind the Petitioner and witnessed the initial crash. ACA126. In her written statement to officers Ms. Lippert stated, in part:

> "We went around the bend, and I noticed the oversize load [lowboy trailer loaded with a bulldozer driven by Petitioner] in front of me was kind of in the left lane. There was another tractor trailer [tri-axle dump truck driven by Mr. Ali] in the oncoming lane. The oversized load swiped the oncoming tractor trailer. I tried to move over right to avoid getting hit, but tractor trailer (sic) from the oncoming lane hit my driver side. My airbags went off and my drivers (sic) side windows were busted. The oversize load kept going. *Id.*

Mr. Ali also provided a written statement to officers. ACA125. He stated, in part,

> "... white in color with lowboy pulling dozer trailer was in my lane[.] I slowed down[.] [H]is trailer hit me sending me across the eastbound lane into ditch rolling me over[.] [I] kicked out windshield to get out of truck." *Id.*

Linda Statler ("Ms. Statler") was approximately 100 yards away and inside her store when she heard the crash. ACA127, 144. She described the crash as sounding like an explosion. *Id.* Ms. Statler ran down to the scene where she saw the tri-axle dump truck laying on its right side on top of the red GMC. *Id.* She observed hot asphalt had spilled into the red GMC covering Mrs. Eddy who was conscious but trapped in her seat. *Id.* She immediately called 911 and did her best to comfort Mrs. Eddy. ACA144. Ms. Statler further told the 911 operator the road was completely blocked. *Id.*

Deputy Jason D. Morgan with the Monongalia County Sheriff's Department ("Dep. J.D. Morgan") arrived first on scene approximately nine minutes after Ms. Statler's 911 call. ACA099-101. He encountered a chilling and chaotic scene. He found Mrs. Eddy trapped inside of her vehicle covered by hot asphalt. ACA146. Dep. J.D. Morgan then did his best to try and get any help he could find, including attempting to locate a bulldozer from a local construction company to try and remove the tri-axle dump truck that was

laying on top of Mrs. Eddy's vehicle. *Id.* at 2:05 to 6:00. Emergency Medical Services ("EMS") arrived but realized there is nothing they could do to help Mrs. Eddy while she was trapped under the hot asphalt. *Id.* at 6:38. Unfortunately, EMS and others were unable to extract Ms. Eddy from her vehicle to save her life.

Dep. J.D. Morgan did his best to determine what happened during the highly emotional scene of the crash while EMS and others attempted to save Mrs. Eddy. He learned from the driver of the tri-axle dump truck and an EMS worker that an oversized load was involved in the crash and did not stop. *Id.* at 6:48 and 12:50. At the time, Dep. J.D. Morgan was receiving information from several parties and incorrectly believed there were five vehicles (instead of four) involved in the crash. He stated to Damone Eddy[3]:

> Right now, we are looking for another vehicle, an oversized load truck, supposedly clipped an 18-wheeler down here which shot him into this truck [tri-axle dump truck] here … trying to locate that vehicle now . . ."

Id. at 17:30. During the chaos immediately following the crash, Dep. J.D. Morgan was initially under the impression the five vehicles, not four, were involved in the crash. He further believed that two vehicles had fled the scene following the crash. Notably, for forty minutes after Dep. J.D. Morgan's arrived on scene, his body camera shows that the Petitioner is nowhere to be found. *Id.* at 0:28 to 50:00. Approximately fifty minutes after the initial 911 call, Dep. J.D. Morgan was told by someone on scene that "the other 18-wheeler driver is down there." *Id.* at 46:50.

The Petitioner returns to the scene with his supervisors more than fifty minutes after the crash. ACA099-121, 144 & 146. The interaction between Deputy J.D. Morgan and the Petitioner took place next to a fire truck down from the crash scene. ACA146 at

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[3] Damone Eddy was the husband of the victim, Stephanie Eddy. He arrived on scene shortly after the crash and long before Petitioner returned to the scene with his supervisors.

53:00. Without any prompting, Petitioner starts telling his version of the events leading up to the crash. *Id.* at 53:20. Dep. J.D. Morgan later asked Petitioner to write down what happened to the best of his knowledge. *Id.* at 56:11. Petitioner then asked to go and speak with his supervisors before writing anything down. *Id.* at 57:55. Deputy Morgan has no objection and Petitioner walked off with his supervisors. *Id.* During this time, Dep. J.D. Morgan was frantically running around doing his best to obtain written statements from all parties involved and assist other emergency personnel while Petitioner is consulting with his supervisors for over fifteen minutes. *Id.* at 58:10 to 1:14:29.

Only after this consultation did Petitioner provided a written account of the crash. Petitioner's statement provides, in part:

> As he passed me his driver side tire hit the dozers (sic) blade causing him to lose control of his truck. I immediately called over the radio to my escort that someone just clipped me and wrecked. At that point my goal was to get somewhere where we could get someone with a phone, due to us having no cell phone signal. After finding our supervisors we came back to the accident as quickly as possible. ACA122-123.

Following the crash, Petitioner continued driving for approximately four or five miles on his previously-planned route past numerous pull off locations. ACA148-163. Notably, the road was blocked following the crash and no other vehicles would have been traveling behind Petitioner. ACA140-141, 144. He finally stopped at his previously planned destination and returned to the crash approximately fifty minutes later in a different vehicle along with his supervisors. ACA099-123, 144, 146. There is no record that Petitioner or his supervisors called 911. It was later revealed the Petitioner did not have the proper permit to transport the bulldozer he was carrying. He was cited by the WV Public Service Commission – Transportation Division, for a permit violation relating to the vehicle he was driving in the crash. ACA128-129.

ARGUMENT

I. West Virginia Code § 17C-4-1(a) is not unconstitutionally vague and its language should be given its common, ordinary and accepted meaning.

When considering argument that a statute is "unconstitutionally vague," this Court has held '"because a statute is presumed to be constitutional,' our examination of a constitutional challenge to a legislative enactment necessarily involves judicial restraint." *State v. Yocum*, 233 W.Va. 439, 443, 759 S.E.2d 182, 186 (2014) (citing *State v. James*, 227 W.Va. 407, 413, 710 S.E.2d 98, 104 (2011). "The reasons for such restraint were fully articulated in syllabus point one of *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965):

> In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Id.

Given this Court's clear preference for upholding legislative enactments, it has said it "will interpret legislation in any reasonable way which will sustain its constitutionality." *Id.* (*State v. Legg*, 207 W.Va. 686, 694, 536 S.E.2d 110, 118 (2000); *accord* Syl. Pt. 3, *Slack v. Jacob*, 8 W.Va. 612, 1875 WL 3439 (1875) ("Wherever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts."). The West Virginia Supreme Court has previously held that "[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." Syl. Pt. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

In a 2021 case, this Court reiterated "'[w]hen the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.'" Syl. Pt. 3, *State v. Connor*, 244 W.Va. 594, 855 S.E.2d 902 (2021) (*citing* Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967) (citation omitted). Further, that "'[u]ndefined words and terms in a legislative enactment will be given their common, ordinary and accepted meaning." Syl. Pt. 5, *State v. Connor* (*citing* Syl. Pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 336 S.E.2d 171 (1984)).

In *Connor*, a case also originating from the Circuit Court of Monongalia County, the petitioner asserted that W. Va. Code § 60A-4-416(b)[4], was unconstitutionally vague. *Id.* at 598, 906. In that case, the petitioner failed to call 911 or seek any help for his vehicle passenger who was suffering from a drug overdose. *Id.* Petitioner was subsequently charged with violation of Section 60A-4-416(b). *Id.* Petitioner argued the phrase "any person who, while engaged in illegal use of a construed substance with another" could apply to individuals who are using a controlled substance with the individual who overdoses, and to individuals who are not using a controlled substance but

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[4] West Virginia Code § 60A-4-416(b) (2017). Drug delivery resulting in death; failure to render aid, provides, in part:

> (b) 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. . .

physically present when the overdose occurs. *Id.* at 600, 908. Further, that the statute did not define the degree of physical proximity an individual must be to the overdose to be charged with violating the statute. *Id.* The State disagreed arguing "the plain and ordinary meaning of the challenged statutory language clearly and unambiguously encompasses individuals who are themselves illegally using controlled substances together with the overdoser." *Id.*

This Court agreed with the State and held Section § 60A-4-416(b), was sufficiently definite to give a person of ordinary intelligence fair notice that his or her contemplated conduct was prohibited. *Id.* at 600-601, 908-909. The Court reasoned that "the mere fact that the parties disagree about the meaning of the statutory language at issue does not compel the conclusion that the statute is void for vagueness." *Id.* (*citing Yocum*, 233 W. Va. at 443, 759 S.E.2d at 186). The Court further reasoned the "challenged language – '[a]ny person who, while engaged in the illegal use of a controlled substance with another[,]' W. Va. Code § 60A-4-416(b) – contains undefined words and phrases that we perceive to be plain and unambiguous nonetheless. 'Undefined words and terms in a legislative enactment will be given their common, ordinary and accepted meaning.' Syl. Pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 336 S.E.2d 171 (1984). The common, ordinary, and accepted meaning ascribed to the term 'engage[ ] in' is 'to do (something)' or 'to cause (someone) to take part in (something).'" *Id.* 601, 909.[5] As such, this Court held that under Section 60A-4-416(b), "'[a]ny person who, while engaged in the illegal use of a controlled substance with another' means any individual who personally and illegally uses, takes, or otherwise consumes a controlled substance together with

[5] *citing* fn. 10, https://www.merriam-webster.com/dictionary/engage%20in, Accessed 26 Feb. 2021.

another, as well as any individual who provides or procures the controlled substance for, or sells the controlled substance to, another to illegally use, take, or otherwise consume." *Id.*

Here, Petitioner similarly argues the language from Section 17C-4-1(a) is unconstitutionally vague. *See* Pet. Brief at pp. 12-18. Specifically, he challenges the phrase "[t]he driver of any vehicle involved in a crash resulting in the injury to or death of any person shall immediately stop the vehicle at the scene of the crash or as close to the scene as possible . . ." as vague because the 2010 legislative revision removed the time element. *See* Pet. Brief at p. 15. However, Petitioner is simply attempting to claim vagueness where none exists. In fact, the language of Section 17C-4-1, is arguably easier for a person of ordinary intelligence to understand and comprehend than Section 60A-4-416(b), at issue in *Connor*. As such, this Court should consider each word challenged by the Petitioner and give each word its common, ordinary and accepted meaning.

First, the Petitioner's argues that the Legislature removed the "time element as to when a driver must return" when it revised Section 17C-4-1. Pet. Brief at p. 15 & 17. He argues the removal of the word "forthwith" creates confusion as to when the driver must return to the scene. *Id.* at p. 12. However, he ignores the word "immediately" as found in the relevant statute. If anything, the 2010 revision to Section 17C-4-1, removed duplicative legalese making the challenged statute easier for someone or ordinary intelligence to understand. ACA198-199. The current statue reads, in pertinent part, ". . . shall **immediately** stop the vehicle at the scene of the crash or as close to the scene as possible and return to and remain at the scene of the crash until he or she has complied with the requirements of § 17C-4-3 . . . ." Section 17C-4-1(a) (emphasis added). There is no confusion or vagueness that the statute requires anyone to stop immediately following a

vehicle crash. Further, the word, "immediately" is defined as "without interval of time: straightway." https://www.merriam-webster.com/dictionary/immediately, Accessed 9 June 2022. The word "immediately" is sufficiently definite to give a person of ordinary intelligence fair notice that he is to stop immediately when involved in a vehicle crash. Not only is this a legal requirement, but a company manual found in Petitioner's vehicle requires him to stop and secure the scene of an accident. ACA135. As such, the Petitioner had fair notice to stop immediately (and not four to five miles down the road where his supervisors were located) when he was involved in the crash with the tri-axle dump truck. ACA122-123.

Second, Petitioner's Brief challenges the statutory language "involved in a crash." Pet. Brief at p. 17. Addressing each word in turn, "involved" is defined as "having a part in something: included in something." https://www.merriamwebster.com/dictionary/involved, Accessed 9 June 2022. The word, "crash" is defined as "to fall, land, or hit with destructive force." https://www.merriam-webster.com/dictionary/crash, Accessed 9 June 2022. The common, ordinary, and accepted meaning ascribed to the term "involved in a crash" is "having a part in (something)" or "included in (something)" a "(fall, land or) hit with destructive force."

Here, Petitioner does not dispute the bulldozer he was carrying on a trailer hit the tri-axle dump truck and admitted the same in his written statement. ACA122-123. He knew he was involved in a crash. *Id.* Further, that hit or crash led to the tri-axle dump truck striking Ms. Lippert's vehicle and landing on Stephanie Eddy's vehicle. ACA097. As such, Petitioner was involved in a "crash" when his vehicle hit the tri-axle dump truck with such force it sounded like an "explosion." ACA127 & 144. There is no question that

Petitioner was "involved in a crash", regardless of whether or not he made direct physical contact with Stephanie Eddy's vehicle. The crash between the Petitioner and tri-axle dump truck was the start of an unbroken chain of events that concluded with the horrific death of Stephanie Eddy. ACA097, 125. Accordingly, Section §17C-4-1(a) clearly and unambiguously encompasses the Petitioner, the driver of the lowboy trailer loaded with a bulldozer, when it hit or crashed into the tri-axle dump truck that then rolled onto Stephanie Eddy's vehicle, resulting in her death.

Third, Petitioner challenges the statutory language "as close to the scene as possible." Pet. Brief at p. 17. Addressing each word in turn, "close" is defined as "to reduce a gap closed to within two points" or "to draw near." https://www.merriam-webster.com/dictionary/close, Accessed 9 June 2022. The word "scene" is defined as "the place of an occurrence or action: locale." https://www.merriam-webster.com/dictionary/scene, Accessed 9 June 2022. Finally, the word "possible" is defined as "being within the limits of ability, capacity, or realization." https://www.merriam-webster.com/dictionary/possible, Accessed 9 June 2022. The common, ordinary, and accepted meaning ascribed to the term "as close to the scene as possible" is to "to draw near" to "the place of an occurrence or action: locale" "within the limits of ability, (capacity, or realization)."

There is simply no alternative interpretation to the phrase "as close to the scene as possible." The Petitioner had fair notice to stop his vehicle as close to the crash as possible. His employer manual directs drivers to stop and secure the scene following a crash. ACA135. Petitioner argues that the closest location to stop was approximately four to five miles away at his previously planned destination where his supervisors were located. Pet.

Brief at pp. 5, 9 & 22. The Monongalia County Prosecuting Attorney's Office takes the position that the road was blocked due to the crash and he could have stopped immediately, and that there were numerous safe locations less than five miles away to stop. ACA140-141, 144, 148-163. However, whether or not the Petitioner stopped "as close to the scene as possible" is a factual question for a jury.

While the parties disagree as to whether or not Petitioner complied Section 17C-4-1(a), the statute itself provides clear notice as to its requirements when someone is involved in a crash with injury or death. Like in *Connor*, this Court should parse through the definition of each challenged word in Section 17C-4-1(a). In doing so, this Court will find that each undefined word is clear and unambiguous, when attributed its common, ordinary and accepted meaning. Further, Section 17C-4-1(a) is sufficiently definite to give a person of ordinary intelligence, such as the Petitioner, fair notice that the driver of any vehicle involved in a crash with death or injury must stop immediately at the crash scene. Accordingly, this Court should find that Section 17C-4-1 is not vague, and sustain the statute's constitutionality.

II. West Virginia Code § 17C-4-1(a) is not ambiguous, nor is it subject to reasonable differing interpretations because direct physical contact is not required.

In 2010, the Legislature made several revisions to Section 17C-4-1. ACA165-199. One of the revisions included replacing the word "accident" with "crash." *Id.* First, Petitioner argues that the Legislature's modification of Section 17C-4-1(a) in 2010 by replacing the word "accident" with "crash" narrowed the scope of liability, and "crash" is ambiguous because it is not defined. Pet. Brief at pp. 20-21. However, Petitioner is claiming ambiguity where none exists. As discussed above, the Legislature's decision not

to define a word does not automatically imply ambiguity. Syl. Pt. 5, *Connor*, at 594, 902. By looking at the context in which "crash" is used with the complete phrase "the driver of any vehicle involved in a crash," the plain and ordinary meaning ascribed to the term "involved in a crash" is "having a part in (something)" or "included in (something)" a "(fall, land or) hit with destructive force."[6] Accordingly, the modification of Section 17C-4-1(a) replacing the word "accident" with "crash" does not create ambiguity when attributed its common, ordinary and accepted meaning.

Second, Section 17C-4-1(a) is not subject to reasonable differing interpretation because direct physical contact is not required. Petitioner fails to put forward any reasonable differing interpretations of Section 17C-4-1(a). It appears Petitioner's entire ambiguity argument relies on the fact that the Legislature did not define the word "crash" and that direct physical contact is required for prosecution under the statute. *Id.* at 15, 20-21. However, nowhere in Section 17C-4-1 does it state that direct physical contact is required. Further, numerous other states have likewise found that hit-and-run statutes using the phrase "involved in" do not require direct physical contact between vehicles.

Regarding claims of differing statutory interpretation, this Court has held that a statute is ambiguous only where it "is susceptible of two reasonable constructions." *Bd. Of Trs. of Firemen's Pension & Relief Fund of Fairmont v. City of Fairmont*, 215 W. Va. 366, 370, 599 S.E.2d 789, 793 (2004). Ambiguity does not arise simply because "different interpretations are conceivable," *State v. Chapman*, No. 13-0111, 2013 WL 5676630, at *4 (W. Va. Oct. 18, 2013) (quotations omitted), or the "parties disagree about the meaning of

[6] The word "involved" is defined as "having a part in something: included in something." https://www.merriamwebster.com/dictionary/involved, Accessed 9 June 2022. The word "crash" is defined as "to fall, land, or hit with destructive force." https://www.merriam-webster.com/dictionary/crash, Accessed 9 June 2022.

a statute," *T. Weston, Inc. v. Mineral Cnty.*, 219 W. Va. 564, 568, 638 S.E.2d 167, 171 (2006) (citation omitted). The question is not whether there is "[m]ere informality in phraseology or clumsiness of expression," but rather "if the language imports one meaning or intention with reasonable certainty." *Jessee v. Aycoth*, 202 W. Va. 215, 218,503 S.E.2d 528, 531 (1998) (quotation omitted).

In *State v. Sene*, 443 N.J.Super. 134, 137, 128 A.3d 175, 177 (N.J.Super. 2015), the appellant was driving a taxi when a pedestrian stepped into his lane of traffic. The pedestrian fell into the adjoining lane and was run over by a bus. *Id.* The appellant then left the scene without speaking to anyone. *Id.* He was subsequently convicted of leaving the scene of a fatal motor vehicle accident in violation of N.J.S.A. 2C:11–5.1.[7] *Id.* The appellant challenged his conviction arguing "involved in an accident" requires he make contact with the victim. *Id.* at 139, 178-179. The court disagreed, and found that "[n]othing in the plain meaning of the phrase "involved in an accident" requires the element of contact between the vehicle driven by defendant and the victim." *Id.* at 140, 179.[8] The court further analyzed the Merriam-Webster dictionary definitions of each word

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[7] N.J.S.A. 2C:11–5.1., provides, in part:

> A motor vehicle operator who knows he is involved in an accident and knowingly leaves the scene of that accident under circumstances that violate the provisions of R.S.39:4-129 shall be guilty of a crime of the second degree if the accident results in the death of another person.

[8] Likewise, numerous other states have found that drivers were "involved" in those accidents even if the vehicle they were driving did not collide with another vehicle. *See State v. Korovkin*, 202 Ariz. 493, 497, 47 P.3d 1131, 1135 (Ariz. 2002) (holding in a prosecution for leaving the scene of an accident that a driver, by racing with another driver, actively participated in the immediate chain of events culminating in a collision between the other driver and a third car); *Armstrong v. State*, 848 N.E.2d 1088, 1092 (Ind. 2006) (holding that the duties imposed under a statute governing a driver's failure to stop after an accident causing death are triggered regardless of whether the driver's vehicle struck anything), *cert. denied*, 549 U.S. 996, 127 S.Ct. 513, 166 L.Ed.2d 370 (2006); *Steen v. State*, 640 S.W.2d 912, 914 (Tex.Crim.App.1982) (holding in a prosecution for failure to stop and render aid that the defendant was "involved" in the collision where his improper lane change caused a passing vehicle to swerve to avoid hitting the defendant, resulting in a head-on collision between the passing vehicle and an oncoming vehicle); *cf. State v. Perebeynos*, 121 Wash.App.

and found that the "phrase 'involved in an accident' does not suggest that defendant's vehicle needed to come into contact with the victim. *Id.* Instead, the plain reading of those words means that a driver whose actions contribute to an accident, and who knows of the causal relationship, must not leave the scene of the accident." *Id.* at 141, 179.

Here, Petitioner does not dispute he hit the tri-axle dump truck. ACA122-123. He knew he was involved in a crash. Further, that hit or crash caused the tri-axle dump truck to lose control and wreck. *Id.* Like *Sene*, there is no question that Petitioner was "involved in a crash", regardless of whether or not he made direct physical contact with Stephanie Eddy's vehicle. The crash between the Petitioner and the tri-axle dump truck was the start of an unbroken chain of events that concluded with the horrific death of Stephanie Eddy. ACA097. As such, it is not a reasonable interpretation that the word "crash" in Section 17C-4-1(a) requires direct physical contact with the victim.

Petitioner cites to a Florida case, *Gaulden v. State*, 195, So.3d 1123 (Fl. 2016), to support his position. Pet. Brief at p. 20. However, upon review it is clear the facts are plainly distinguishable. In *Gaulden*, the victim was a passenger in the defendant's vehicle. *Id.* at 1124. The defendant and victim were in a fight and the victim opened the passenger door. *Id.* The truck accelerated and swerved, then the victim was no longer in the truck. *Id.* The defendant drove off and the victim's body was found on the ground adjacent to the roadway. *Id.* Upon reviewing Florida's hit-and-run statute, the court in *Gaulden* reasoned that "[t]he plain language of the statute contemplates that a vehicle will 'crash' into an object, a person, or an animal." *Id.* at 1127. As such, the court held that the operative

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189, 192-195, 87 P.3d 1216, 1218-19 (Wash. Ct. App. 2004) (holding that the evidence was sufficient to support the finding that the defendant was "involved in an accident" within the meaning of the hit-and-run statute, even though he made no contact with another vehicle because the defendant's erratic driving caused another driver to swerve and hit a truck).

phrase "any vehicle involved in a crash" means that a vehicle must collide with another vehicle, person, or object. *Id.* at 1128.

Here, the Defendant admits in his written statement that he collided with a tri-axel dump truck hauling hot asphalt causing it to lose control and wreck. ACA122-123. There is no dispute that within moments of colliding with the Defendant, the dump truck landed on the vehicle driven by Stephanie Eddy, resulting in her death. ACA097. So even if the Court were to accept the reasoning of the *Gaulden* case, there is no dispute that the Defendant was in a collision, thus satisfying that a "crash" occurred under Florida's hit-and-run statute.[9] Accordingly, this Court should reject Petitioner's argument and find Section 17C-4-1(a) is not ambiguous when afforded its plain meaning in the context in which it is used, nor is it subject to reasonable differing interpretations.

III. West Virginia Code § 17C-4-1 should be read *pari materia* with West Virginia Code § 33-6-31 (2015).

A. Section 17C-4-1(a) and Section 33-6-31(e)(3), relate to two entirely different subjects.

Petitioner's assertion that Section 33-6-31(e)(3), can be read *pari materia* with Section 17C-4-1, is without merit. Pet. Brief at 13-14 & 21. This Court previously held that "[s]tatutes relating to different subjects are not in *pari materia*. *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995) (citing Syl. Pt. 5, *Commercial Credit Corp. v. Citizens National Bank*, 148 W.Va. 198, 133 S.E.2d 720 (1963) (citation omitted). In *Chrystal*, the Court found that the paternity section, West Virginia Code § 48A–6–1 *et seq.*, was separate and distinct from the adoption section, West Virginia Code § 48–4–1 *et*

[9] Petitioner notes North Carolina defined "crash" as: "[a]ny event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load. The terms collision, accident, and crash and their cognates are synonymous." *See* N.C. Gen. Stat. § 20-4.01 (4c). It is notably less stringent than the definition of "crash" found in Merriam-Webster's dictionary: "to fall, land, or hit with destructive force." https://www.merriam-webster.com/dictionary/crash, Accessed 9 June 2022.

seq. Id. at 141, 418. Further, insomuch as the statutes serve two entirely different interests, the court held they are not considered to be in *pari materia. Id.*

Here, Section 33-6-31(e)(3), also known as the Uninsured Motorist Statute, is intended to protect victims who are injured by the negligence of unknown drivers who have failed to comply with the liability insurance requirements of financial responsibility law. *Boniey v. Kuchinski*, 223 W.Va. 486, 491, 677 S.E.2d 922, 927 (2009). Conversely, Section 17C-4-1, also known as Erin's Law, deals directly with criminal liability for identified drivers of vehicles involved in crashes with death or injury that flee the scene. As such, Petitioner's argument is similar to comparing apples and oranges. Therefore, the above statutes relate to two entirely different subjects and should not be considered *pari materia*. *Chrystal*, 194 W.Va. at 141, 459 S.E.2d at 418.

B. Even if this Court reads the two statutes *pari materia*, it will find Section 33-6-31(e)(3), does not require direct physical contact between vehicles.

Petitioner argues direct physical contact must occur when reading Section 33-6-31(e)(3), in *pari materia*, with Section 17C-4-1(a). Pet. Brief at p. 21. In fact, this Court previously held that "in order to satisfy the 'physical contact' requirement set forth in W.Va.Code § 33-6-31(e)(iii), it is necessary to establish a close and substantial physical nexus between an unidentified hit-and-run vehicle and the insured vehicle." Syl. Pt. 2, *State Farm Mut. Auto. Ins. Co. v. Norman*, 191 W.Va. 498, 446 S.E.2d 720 (1994); *see e.g. State Farm Mutual Automobile Ins. Co. v. Carlson*, 130 Ga.App. 27, 29-30, 202 S.E.2d 213, 215 (Ga. Ct. App. 1973) (Hit-and-run cases involving indirect physical contact and finding coverage exists have included facts involving an unidentified vehicle hitting an intervening vehicle which in turn hits the insured's car.). This Court adopted the rationale

"that absolute enforcement of the physical contact requirement is contrary to public policy. We believe the physical contact requirement should not bar recovery when there is sufficient independent third-party evidence to conclusively establish that the sequence of events leading to an injury was initially set in motion by an unknown hit-and-run driver or vehicle." *Hamric v. Doe*, 201 W.Va. 615, 620, 499 S.E.2d 619, 624 (1997).

In *Ellison v. Doe*, 215 W.Va. 517, 519, 600 S.E.2d 229, 231 (2004), appellants were passengers in a van driven by Kristy Foutty ("Ms. Foutty"). Ms. Foutty lost control of the van, struck a retaining wall then rolled onto its top. *Id.* She gave a statement to police that she lost control after swerving to avoid another vehicle that had veered into her lane. *Id.* All other passengers were asleep at the time of the accident. *Id.* The Court denied appellants claim for uninsured motorist benefits under W.Va.Code, 33–6–31(e)(iii). *Id.* at. 520, 232. The Court reasoned that "to recover uninsured motorist coverage, the insured must show through sufficient corroborative evidence, a 'close and substantial physical nexus' between the phantom vehicle and the vehicle in which the insured were riding." *Id.* Specifically, the corroborative evidence is established by independent third-party evidence. *Id.* However, the Court found that no one other than Ms. Foutty viewed the accident. *Id.* The Court reasoned the corroborative evidence offered must be independent and free from taint or suspicion. *Id.* At 521, 233. As the driver of the wrecked van, Ms. Foutty was neither an independent nor disinterested witness. *Id.* As such, the appellants were unable to recover uninsured motorist benefits.

Applying the holding in *Ellison* to a hypothetical factual scenario involving a hit-and-run with an unknown driver, rather than the Petitioner, Stephanie Eddy's estate would be entitled to recover uninsured motorists benefits under Section 33-6-31(e)(3). Here,

Allison Lippert gave her written statements immediately following the crash, having never left the scene of the crash, and prior to being taken for medical evaluation by EMS. Her statement noted that the oversized load [Petitioner's vehicle] swiped the oncoming tractor trailer [Mr. Ali's vehicle], and that the oversized load [Petitioner] kept going. ACA126. She did not know the Petitioner, Mr. Ali or the victim, Stephanie Eddy. Additionally, Deputy S. McRobie performed a crash reconstruction following the accident. ACA093-097. He determined that Petitioner's vehicle struck the tri-axle dump truck causing it to lose control. *Id.* The crash caused the tri-axle dump truck to shift weight to the right side causing it to cross the center line where it struck Ms. Lippert's vehicle and roll towards its passenger side and land on top of Mrs. Eddy's vehicle. *Id.* Mrs. Eddy was trapped in her vehicle and conscious as hot asphalt covered her body. ACA144.

Ms. Lippert's written statement and Dep. S. McRobie's crash reconstruction provide sufficient corroborative evidence, of a "close and substantial physical nexus" between Petitioner's vehicle and the other three crashed vehicles he left in his rear-view mirror, including a trapped and dying Stephanie Eddy. Ms. Lippert's statement and Sgt. S. McRobie's crash reconstruction provide corroborative evidence that was independent and free from taint or suspicion at the time they were made.[10]

Accordingly, in the context of Section 33-6-31(e)(iii), the "physical contact" requirement is satisfied because independent third-party evidence (Ms. Lippert's statement and Sgt. S. McRobie's cash reconstruction) conclusively establishes that the sequence of events leading to an injury (Stephanie Eddy's death) was initially set in motion by an unknown hit-and-run driver or vehicle (Petitioner's crash with the tri-axle dump truck).

[10] Upon information and belief, on February 18, 2020, over five months after the September 5, 2019 crash, Ms. Lippert filed a civil suit against Petitioner, Nicholas Ali, and other parties involved in the crash, in the Circuit Court of Monongalia County, West Virginia, Case No. 20-C-50.

ACA097, 126. Furthermore, a "close and substantial physical nexus" existed between Petitioner's vehicle and the other vehicles he left at the scene of the crash on Route 7, including the victim, Stephanie Eddy.

IV. Even if this Court find the statutory language of West Virginia Code § 17C-4-1(a), is ambiguous, the rule of lenity requires consideration of the design of the statute as a whole, its object, and policy. Further, the rule of lenity should not construe Section 17C-4-1(a) in a way that would lead to an absurd and unjust result.

This court has previously found that if statutory language is deemed to be ambiguous, the language must be strictly construed pursuant to the rule of lenity, however it must also be defined consistent with the intent of the Legislature. *Connor*, 244 W.Va. at 602, 98, 855 S.E.2d at 910 (citation omitted). The Court to consider not only the particular statutory language, but the design of the statute as a whole, its object, and policy.. Lenity allows the Court to consider relevant amendments that have been made to the particular criminal statute under inquiry. *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 263, 465 S.E.2d 257, 263 (1995). Further, this Court has held that lenity should not be extended to mean that a statute can be construed so literally that an absurd result will occur that defies common sense. *Id.* This Court stated in Syl. Pt. 2 of *Pristavec v. Westfield Insurance Co.*, 184 W.Va. 331, 400 S.E.2d 575 (1990):

> " 'It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.' Syl. pt. 2, Click v. Click, 98 W.Va. 419, 127 S.E. 194 (1925)."

Id.

In 2010, the purpose of the Legislature's revisions to Section 17C-4-1, were to increase the criminal penalty for failing to stop and render aid after a motor vehicle crash;

to clarify the intent requirement; to extend the suspension period; and to name the code section "Erin's Law". ACA166-199. In 2018, it was further revised and amended by the Legislature to:

> . . . amend and reenact § 17C–4–1 of the Code of West Virginia, 1931, as amended, relating generally to motor vehicle crashes involving death or personal injuries; defining terms; clarifying circumstances under which a driver may leave the scene of a crash for the purpose of rendering assistance to an injured person in the crash; clarifying essential elements of the offenses of leaving the scene of a crash that causes bodily injury, serious bodily injury, or death; creating the felony offense of leaving the scene of a crash that causes another person serious bodily injury and providing criminal penalties therefor; clarifying knowledge requirement; and clarifying that the offense of leaving the scene of a crash that causes death requires death to occur within one year of the crash. ACA200-209.

Almost 100 years ago, this Court recognized that the law requiring anyone involved in a vehicle crash or accident to stop, provide information and render aid, was humanitarian in nature. *Masters*, 106 W.Va. 46, 144 S.E. at 719 (citation omitted). Based on the summary provided as part of each revision, it is clear the Legislature gave great thought and consideration to its language and scope for the protection of the citizens of West Virginia. Further, the Legislature intentionally increased the potential penalty for leaving the scene of a crash with death or injury in an effort to deter such reprehensible conduct. As such, the Legislature intended any driver involved in a crash to stop, whether it is a one-on-one vehicle crash or a crash involving multiple vehicles.

The Petitioner is asking the Court to interpret Section 17C-4-1(a) as requiring direct physical contact between the driver of a vehicle and the victim. Pet. Brief at pp. 14-15, 17, 21 & 23. This interpretation would lead to absurd and unjust results. *Trent*, 195 W. Va. at 263, 465 S.E.2d at 263. For example, in the situation of a multiple vehicle crash, only the vehicle that came into direct physical contact with the victim would be required to

immediately stop. Every other vehicle involved in that multiple vehicle crash would be free to flee the scene without providing information or rendering aid. This is counter to the humanitarian intent of Section 17C-4-1. In another example, the driver of a vehicle that strikes a telephone pole that then falls and injures a crowd of people would be free to flee the scene because he did not come into direct physical contact with the victims. Another example, the driver of a vehicle crashes into parked vehicle that then knocks over and kills a pedestrian on a sidewalk. The driver of the vehicle that caused the crash would not be subject to 17C-4-1 because he did not come into direct physical contact with the deceased pedestrian. Each of the examples above would result in absurd and unjust results if this Court interprets Section 17C-4-1(a) as proposed by the Petitioner,as the drivers in the above examples may be subject to W. Va. Code § 17C-4-4[11] and W. Va. Code § 17C-4-5[12], respectively, each would escape prosecution and punishment under Section 17C-4-1.

Accordingly, even if the Court were to apply the rule of lenity, the design of West Virginia Code § 17C-4-1, as a whole, its object, and policy, is to discourage the driver of any vehicle involved in a crash from leaving the scene with death or injury prior to providing the necessary information and aid required by Section 17C-4-3.

CONCLUSION

The Monongalia County Prosecuting Attorney respectfully requests this Court affirm the Circuit Court of Monongalia County, West Virginia, and answer certified questions (1) and (2) in the negative, and answer certified questions (3) and (4) in the affirmative, and allow this matter to proceed to jury trial.

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[11] Violation of Section 17C-4-4 (Duty upon striking unattended vehicles) is a misdemeanor with a penalty of a fine of not more than $100.00 or imprisonment for not more than ten days for a first offense. *See* W.Va. Code § 17C-18-1.

[12] Violation of Section 17C-4-5 (Duty upon striking fixtures upon highway) is a misdemeanor with a penalty of up to a $150.00 fine.

CERTIFICATE OF SERVICE

I, Robert J. Zak, Jr., counsel for *Amicus Curiae*, hereby certifies that on June 24, 2022, I served the foregoing BRIEF OF THE MONONGALIA COUNTY PROSECUTING ATTORNEY AS *AMICUS CURIAE* AS A MATTER OF RIGHT, on counsel of record by mailing a true and exact copy of the same via United States mail, postage prepaid, addressed as follows:

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