IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0234

TIMOTHY MICHAEL CONNER, II,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

THE STATE OF WEST VIRGINIA'S RESPONSE BRIEF

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

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities iii

Certified Questions 1

Statement of the Case 1

1. Indictment and underlying facts 1

2. Petitioner's constitutional challenge to West Virginia Code § 60A-4-416(b), hearing, and the circuit court's certification order 2

Summary of the Argument 2

Statement Regarding Oral Argument and Decision 4

Standard of Review 4

Argument 5

1. The phrase "Any person who, while engaged in the illegal use of a controlled substance with another" is not unconstitutionally vague 5

   A. Vagueness challenges and this Court's Rules of Statutory Construction 6

   B. The phrase employs plain and unambiguous language and applies to those "engaged in the illegal use of a controlled substance"—which includes "user-user" scenarios—but does not include individuals who merely share close proximity to the overdoser 8

   C. The statute also applies to "seller-user" scenarios and those individuals otherwise engaged in the "use" of a controlled substance with another 10

2. The phrase "seek medical assistance" provides an adequate standard for adjudication and does not invite arbitrary enforcement 14

   A. The contested language does not make West Virginia Code § 60A-4-416(b) facially unconstitutional and resolution of an as-applied challenge is not appropriate in this proceeding 15

   B. The phrase "seek medical assistance" is not void for vagueness because the language is unambiguous 17

C. In the alternative, even assuming the phrase "seek medical assistance" is ambiguous, this Court can, and should, define the phrase consistent with the wording of the statute, viewed in context, and considering Legislative intent 19

Conclusion 25

TABLE OF AUTHORITIES

Cases **Page**

Appalachian Power Co. v. State Tax Dep't of W. Virginia,
195 W. Va. 573, 466 S.E.2d 424 (1995) 4

Bailey v. United States,
516 U.S. 137 (1995) 12, 13

Biddle v. Luvisch,
266 U.S. 173 (1924) 25

Citizens United v. Fed. Election Comm'n,
558 U.S. 310 (2010) 16

Consumer Advocate Div. of Pub. Serv. Comm'n v. Pub. Serv. Comm'n,
182 W.Va. 152, 386 S.E2d 650 (1989) 8

Davis Mem'l Hosp. v. W. Virginia State Tax Com'r,
222 W. Va. 677, 671 S.E.2d 682 (2008) 7

Gallapoo v. Wal-Mart Stores, Inc.,
197 W. Va. 172, 475 S.E.2d 172 (1996) 4

Hallowell v. United States,
209 U.S. 101 (1908) 25

Jahn v. The Folmina,
212 U.S. 354 (1909) 25

MDK, Inc. v. Vill. of Grafton,
345 F. Supp. 2d 952 (E.D. Wis. 2004) 15

Lawrence v. State,
489 S.E.2d 850 (Ga. 1997) 25

Liberty Mut. Ins. Co. v. Morrisey,
236 W. Va. 615, 760 S.E.2d 863 (2014) 3, 4, 5, 7, 9, 19, 20

William J. Moxley v. Hertz,
185 F. 757 (7th Cir. 1911) 25

Osborne v. United States,
211 W. Va. 667, 567 S.E.2d 677 (2002) 3, 9, 10, 12, 18

Rozsavolgyi v. City of Aurora,
102 N.E.3d 162 (Ill. 2017) 17, 24

Smith v. State Workmen's Comp. Com'r,
159 W. Va. 108, 219 S.E.2d 361 (1975) 19

Smith v. United States,
508 U.S. 223 (1993) 10, 11, 12, 13, 18

State ex rel. Appalachian Power Co. v. Gainer,
149 W. Va. 740, 143 S.E.2d 351 (1965) 21

State ex rel. Cogar v. Kidd,
160 W. Va. 371, 234 S.E.2d 899 (1977) 6

State ex rel. Morgan v. Trent,
195 W. Va. 257, 465 S.E.2d 257 (1995) 6, 20

State v. Blair,
190 W. Va. 425, 438 S.E.2d 605 (1993) 6

State v. Bull,
204 W. Va. 255, 512 S.E.2d 177 (1998) 6

State v. S.C.,
672 A.2d 1264 (N.J. Super. Ct. App. Div. 1996) 13

State v. Davis,
229 W. Va. 695, 735 S.E.2d 570 (2012) 20

State v. Elder,
152 W. Va. 571, 165 S.E.2d 108 (1968) 7

State v. Farmer,
193 W. Va. 84, 454 S.E.2d 378 (1994) 17

State v. James,
227 W. Va. 407, 710 S.E.2d 98 (2011) 6, 7, 15, 21

State v. Melms,
101 N.E.3d 747 (Ohio Ct. App. 2018) 22

State v. Norwood,
242 W. Va. 149, 832 S.E.2d 75 (2019), *cert. denied sub nom. Norwood v. W. Virginia*, 140 S. Ct. 1297 (2020) 24

State v. Romage,

7 N.E.3d 1156 (Ohio 2014) 15

State v. Smith,
No. 19-0143, 2020 WL 3406467, at *6, ___ S.E.2d ___, ___ (W. Va. June 16, 2020) 6

State v. Tamez,
169 W. Va. 382, 290 S.E.2d 14 (1982) 13

State v. Weber,
132 N.E.3d 1140 (Ohio Ct. App. 2019), *appeal not allowed*, 125 N.E.3d 941 (Ohio 2019) 15

State v. Wyatt,
198 W. Va. 530, 482 S.E.2d 147 (1996) 17

United States v. Cox,
324 F.3d 77 (2d Cir. 2003) 13

Statues

Ariz. Rev. Stat. § 13-3423(F)(1) 23

Ariz. Rev. Stat. § 13-3423(F)(2) 23

Ark. Code § 20-13-1703(4) 23

Fla. Stat. § 893.21 23

Ga. Code § 16-13-5(a)(3) 23

Haw. Rev. Stat. § 329-43.6(b) 21, 22

Iowa Code § 124.418 23

Mich. Comp. Laws § 333.7404(6)(b) 23

Miss. Code § 41-29-149.1(2)(d) 22

Ohio Rev. Code § 2925.11(d)(2)(a)(ix) 22

S.C. Code § 44-53-1910(3) 23

Tenn. Code § 63-1-156(a)(5)(A)-(C) 22

Vt. Stat. tit. 18 § 4254(a)(3) 23

Wash. Rev. Code § 69.50.315 23

W. Va. Code § 58-5-2 24

W. Va. Code § 60A-4-401(a) 13

W. Va. Code § 60A-4-401(c) 13

W.Va. Code § 60A-4-416 8

W.Va. Code § 60A-4-416(b) ..... passim

21 U.S.C. § 924 ..... 11, 13

Other Sources

Black's Law Dictionary 1541 (6th ed. 1990) 12

Merriam-Webster Dictionary 11, 18

Expanding Naloxone use could reduce drug overdose deaths and save lives, CDC Newsroom, April 24, 2015, available at https://www.cdc.gov/media/ releases/2015/p0424-naloxone.html ... 16

The Opioid Epidemic in West Virginia, Merino et al., Health Care Manag (April-June 2019) 24

Number of fatal drug overdoses in 2017 surpasses 1,000 mark in WV, Caity Coyne, West Virginia Gazette Mail (August 30, 2018) 24

WVDHHR, Violence & Injury Prevention Program, *CDC Data, available at* https://dhhr.wv.gov/vip/Pages/cdc-data.aspx 24

CERTIFIED QUESTIONS

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

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

STATEMENT OF THE CASE

1. Indictment and underlying facts.

On January 20, 2020, Timothy Michael Conner, II ("Petitioner") was indicted by a Monongalia County Grand Jury for the felony offense of "Failure to Render Aid Resulting in Death," as criminalized in West Virginia Code § 60A-4-416(b). (Cert. Order at 1-2). The basis for the indictment flowed from a March 28, 2019, incident occurring in Morgantown. (*Id.* at 2). Petitioner and an acquaintance, Shane Cebulak ("Shane") drove to an apartment complex. (*Id.* at 2). Once there, Shane entered one of the apartments and purchased heroin from a third party. (*Id.* at 2). Petitioner remained in the vehicle. (*Id.* at 2).

After returning to the vehicle, Shane ingested the heroin and began suffering from an overdose. (J.A. at 170). Petitioner, who was on parole, did not want to call 9-1-1 or take Shane to a hospital for fear of getting in trouble. (*See id.* at 33). Instead, he called a friend, Joseph Choma ("Joseph"). (*Id.* at 35). Joseph told Petitioner that Petitioner needed to take Shane to a hospital. (*Id.* at 35). Petitioner did not do so. (*See id.*). Petitioner also told Joseph that he would bring Shane to Joseph's house because Shane "need[ed] help" due to an overdose. (*Id.* at 168). Petitioner failed to do this, and instead, abandoned Shane and the vehicle in an alleyway. (*Id.* at 121, 165, 170-71). Joseph, primed that Shane had overdosed somewhere nearby, located the vehicle thereafter. (*Id.* at 35). Shane was inside it, facedown, and dead from an overdose. (*Id.* at 32, 165-66).

2. Petitioner's constitutional challenge to West Virginia Code § 60A-4-416(b), hearing, and the circuit court's certification order.

On February 10, 2020, Petitioner filed a motion to dismiss the indictment, arguing that West Virginia Code § 60A-4-416(b) is facially unconstitutional on vagueness grounds. (J.A. 7-15). The State responded in opposition and Petitioner replied. (J.A. at 17-23).

The circuit court held a hearing on the matter on February 21, 2020, which culminated in the circuit court certifying two questions to this Court (set forth above). In its certification order, the circuit court concluded that West Virginia Code § 60A-4-416(b) was facially unconstitutional in two respects. First, the circuit court ruled that the statute's phrase "Any person who, while engaged in the illegal use of controlled substance with another" was unconstitutionally vague. (Cert. Order at 4). According to the circuit court, this phrase "fails to give notice to a person under specific circumstances of what would make a person subject to punishment under the code section." (*Id.* at 4). The circuit court questioned whether the statute would apply to individuals who are "merely physically present when another is using a controlled substance?" (*Id.* at 4).

Second, the circuit court concluded that the phrase "seek medical assistance" is "susceptible to differing subjective interpretations, which precludes the public from knowing what the law requires of citizens of the State of West Virginia." (Cert. Order at 5); (*Id.* at 5) ("Does 'seek medical assistance' mean calling 911, transporting the person in need of assistance to a medical facility, or some other specific behavior?").

SUMMARY OF THE ARGUMENT

West Virginia Code § 60A-4-416(b) is a narrow statute which employs plain, unambiguous language. Contrary to Petitioner's claims, the statute is not unconstitutionally vague, nor is it susceptible to multiple interpretations. By its plain terms, "[a]ny 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[.]" *Id.*

Petitioner's contention that this statute may be read to include individuals who merely share a close proximity to the overdoser would require reading words into the statute that are not there and would violate this Court's rules of statutory construction. *See* Syl. Pt. 8, *Liberty Mut. Ins. Co. v. Morrisey*, 236 W. Va. 615, 760 S.E.2d 863, 865 (2014) ("'A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten.'"); Syl. Pt. 3, in part, *Osborne v. United States*, 211 W. Va. 667, 567 S.E.2d 677 (2002) ("It is presumed the [L]egislature had a purpose in the use of every word, phrase and clause found in a statute[.]"). There is no language in the statute from which any reasonable person could infer that the statute itself applies to mere passersby or any other bystander. Instead, to fall within the scope of West Virginia Code § 60A-4-416(b), such individual ***must*** be actually engaged in the illegal use of a controlled substance with the overdoser.

Petitioner's second argument—his claim that the statute fails to provide an adequate standard for adjudicating what it means to "seek medical assistance"—is equally unavailing. The phrase is not ambiguous. Even if it were, Petitioner's analysis falls short. This Court has long-recognized that it will interpret ambiguous language in a criminal statute, and, where such interpretation does not violate constitutional principles, the statue will be upheld. In the event this Court deems the phrase "seek medical assistance" ambiguous, because the purpose of the statue is plain, and the legislative intent apparent, this Court can—and should—define "seek medical assistance" to mean "contacting 9-1-1, a poison control facility, a healthcare facility, or any first

responder (e.g., law enforcement, fire departments), either directly or indirectly." Such a definition is supported by the text of the statute, case law, and in-line with virtually every jurisdiction that has enacted similar legislation.

For these reasons, this Court should answer the first certified question in the negative and the second in the affirmative.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By Order entered May 21, 2020, this Court set the case for oral argument under Rule 20 of the Rules of Appellate Procedure for the September 2020 Term of Court. Given the purpose of Rule 20, this case is appropriate for a signed opinion.

STANDARD OF REVIEW

This case concerns the interpretation of a statute—West Virginia Code § 60A-4-416(b)—which is reviewed *de novo*. Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (observing that interpretation of a statute present a purely legal question and is subject to *de novo* review); *see also* Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996) ("The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*."). "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. Pt. 5, *Liberty Mut. Ins. Co. v. Morrisey*, 236 W. Va. 615, 760 S.E.2d 863, 865 (2014) (quoting Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959)). "Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent." Syl. Pt. 7, *Liberty Mut. Ins.*

Co., 236 W. Va. 615, 760 S.E.2d 863 (quoting Syl. Pt., *Ohio County Comm'n v. Manchin,* 171 W. Va. 552, 301 S.E.2d 183 (1983)).

ARGUMENT

1. The phrase "Any person who, while engaged in the illegal use of a controlled substance with another" is not unconstitutionally vague.

West Virginia Code § 60A-4-416(b) criminalizes the failure to seek medical assistance for someone who overdoses in a limited number of circumstances:

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

W. Va. Code § 60A-4-416(b) (emphasis added).

The animating thrust of Petitioner's first argument is that the preceding bolded language in subsection (b) is ambiguous. (Pet'r's Br. at 8-9). According to Petitioner, this language can be read to apply to individuals who are engaged in the use of an illicit substance *and* to those who are simply "physically present" with an overdoser, such as someone "attending a concert or sporting event and happens to be in some degree of proximity to a fellow spectator who is suffering an overdose[.]" (Pet'r's Br. at 8, 12). Petitioner's claims are misplaced. As discussed below, the statute plainly and unambiguously applies to an individual who is ***engaged*** in the illegal use of a controlled substance ***with another person***. It encompasses "user-user" situations and those engaged in the "use" of a drug with the overdoser, such as someone who sells or gives the controlled substance to the overdoser. The statute, however, plainly does not include passersby or individuals who are simply in close proximity to the overdoser. Both Petitioner's and the circuit court's determinations otherwise are meritless.

A. Vagueness challenges and this Court's Rules of Statutory Construction.

"'[T]he right of the Legislature to create and define crimes and to regulate their prosecution is extremely broad[.]'" *State v. Smith*, No. 19-0143, 2020 WL 3406467, at *6, ___ S.E.2d ___, ___ (W. Va. June 16, 2020) (quoting Syl. Pt. 4, in part, *State ex rel. Cogar v. Kidd*, 160 W. Va. 371, 234 S.E.2d 899 (1977)). Nonetheless, criminal statutes must "be couched in language so as to notify a potential offender . . . as to what he [or she] should avoid doing in order to ascertain if he [or she] has violated the offenses provide and it may be couched in general language." *State v. Bull*, 204 W. Va. 255, 262, 512 S.E.2d 177, 184 (1998) (quoting Syl. Pt. 1, *State ex rel. Myers v. Wood*, 154 W. Va. 431, 175, S.E.2d 637 (1970)). If a criminal statute fails to meet this threshold, then it violates the due process clauses of the Fourteenth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution. *Id.* at 262, 512 S.E.2d at 184; *see also Kidd*, 160 W. Va. at 376–77, 234 S.E.2d at 902 ("The Legislature is required to define a criminal offense with some particularity. Otherwise, it may be unconstitutionally vague."). "There is no satisfactory formula to decide if a statute is so vague as to violate the[se] due process clauses[.]" Syl. Pt. 2, in part, *State v. Blair*, 190 W. Va. 425, 438 S.E.2d 605 (1993). Instead, a criminal statute need merely provide "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. 6, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d 257 (1995) (internal citations and quotations omitted).

In other words, "vagueness challenges seek to vindicate two principles of due process: fair notice by defining prohibited conduct so that such behavior can be avoided, and adequate standards to prevent arbitrary and discriminatory law enforcement." *State v. James*, 227 W. Va. 407, 419, 710 S.E.2d 98, 110 (2011) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

When gauging whether statutory language comports with these principles:

> courts must exercise due restraint, in recognition of the principle of the 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.

Syl. Pt. 4, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (quoting Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965)).

Against this backdrop, when evaluating the constitutionality of a statute, this Court employs well-established rules of statutory construction. First and foremost, "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). *Cf. Davis Mem'l Hosp. v. W. Virginia State Tax Com'r*, 222 W. Va. 677, 678, 671 S.E.2d 682, 683 (2008) ("A statute that is ambiguous must be construed before it can be applied.") (quoting Syl. Pt. 1, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992)); *see also* Syl. Pt. 5, *Liberty Mut. Ins. Co. v. Morrisey*, 236 W. Va. 615, 760 S.E.2d 863 (2014) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."). That is, a court need only read—not interpret—an unambiguous statute. Syl. Pt. 4, *Liberty Mut. Inc. Co.*, 236 W. Va. 615, 760 S.E.2d 863 ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."). Bearing these canons in mind, this Court has cautioned that "[a] statute, or an administrative rule, may not, under the guise of 'interpretation' be modified, revised,

amended or re-written." Syl. Pt. 1, *Consumer Advocate Div. of Pub. Serv. Comm'n v. Pub. Serv. Comm'n*, 182 W.Va. 152, 386 S.E2d 650 (1989).

B. The phrase employs plain and unambiguous language and applies to those "engaged in the illegal use of a controlled substance"—which includes "user-user" scenarios—but does not include individuals who merely share close proximity to the overdoser.

The scope of West Virginia Code § 60A-4-416(b)—the category of persons who fall within the statute—is unambiguous. The statute employs easily-understood language, which gives citizens fair notice of how to comport their conduct to the strictures of the law. It provides, in relevant part, that "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 . . . is guilty of a felony." W. Va. Code § 60A-4-416. Thus, Person A will be guilty of a felony where Person A, while engaged in the illegal use of a controlled substance with Person B, fails to seek medical assistance for Person B when Person B suffers from an overdose. *Id.*

Parsing out application of this statute upon the two groups of individuals identified by Petitioner in his Brief confirms this understanding. Petitioner argues that the statute can be interpreted to include two groups of people: "1) individuals who are personally using a controlled substance alongside or together with an overdoser; and 2) individuals, who are *not* personally using a controlled substance, but who are physically present when an overdose occurs." (Pet'r's Br. at 9).[1]

The first category of people identified by Petitioner—"individuals who are personally using a controlled substance alongside or together with an overdoser"—unequivocally fall within

[1] Similarly, the circuit court believed—mistakenly—that the statute would apply to individuals who are simply nearby. (Cert. Order at 4). As discussed herein, such an interpretation cannot be squared with the plain language of the statute.

the ambit of this statute. When two individuals (say, Person A and Person B) are engaged in the illegal use of a controlled substance and Person B suffers from an overdose, Person A is guilty of a felony under West Virginia Code § 60A-4-416(b) where he or she fails to seek medical assistance for Person B. *Id.* ("[A]ny person whom 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 . . . is guilty of a felony."). This type of "user-user" scenario clearly falls within the scope of statute.

The notion that this statute also applies to individuals who have no connection to the illegal use of the controlled substance—Petitioner's proposed second class of individuals—finds no support in the language of the statute. To the contrary, the statute clearly requires that Person A actually be "engaged in the illegal use of a controlled substance" with Person B. W. Va. Code § 60A-4-416(b). By its plain and unambiguous terms, the statute does ***not*** apply to someone who is merely in close proximity to the overdoser, such as a passersby or, using Petitioner's hypothetical, a spectator at a concert or sporting event who sees someone overdose. (*See* Pet'r's Br. at 12). Such hypothetical person is not "*engaged in the illegal use of a controlled substance with another*," and to interpret the statute to include this hypothetical individual would either require ignoring words that are there ("engaged . . . with another") or reading words into the statute that are not—something this Court will not do. Syl. Pt. 8, *Liberty Mut. Ins. Co.*, 236 W. Va. 615, 760 S.E.2d 863 ("'A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten.'") (quoting Syl. Pt. 1, *Consumer Advocate Div. v. Pub. Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989)); Syl. Pt. 3, in part, *Osborne v. United States*, 211 W. Va. 667, 567 S.E.2d 677 (2002) ("It is presumed the [L]egislature had a purpose in the use of every word, phrase and clause found in a statute[.]").

Simply put, the position that this statute can apply to someone who simply shares some sort of proximity with the overdoser finds no support in the language of this statute. Instead, to fall within its scope, a person must first be "engaged in the illegal use of a controlled substance." Concluding that the statute applies to people who are simply near the overdoser ignores the statutory language itself.

C. The statute also applies to "seller-user" scenarios and those individuals otherwise engaged in the "use" of a controlled substance with another.

In addition to the "user-user" scenario outlined above, it is evident from the Legislature's use of the phrase "while engaged in the use of an illegal substance with another" that West Virginia Code § 60A-4-416(b) also includes any individual who makes "use" of the controlled substance and is present when the consumer of the drug overdoses. This plain language necessarily includes "seller-user" and "provider"- or "procurer"-user situations where the user suffers from an overdose in the presence of such individual(s). The relevant statutory language is:

> 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.

W. Va. Code § 60A-4-416(b). As set forth above, this language is unambiguous and should be afforded its ordinary meaning. *See Smith v. United States*, 508 U.S. 223, 228 (1993) ("In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning"); Syl. Pt. 4, in part, *Osborne v. United States*, 211 W. Va. 667, 567 S.E.2d 677 (2002) ("Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.").

An examination of two key words in the statute—"engaged" and "use"—establishes the parameters of the statute, thereby giving West Virginia citizens fair notice of the criminal conduct.

The statute employs the transitive form of the verb "engaged," which means to "participate."[2] "Use" in this statute appears in noun form, and means, *inter alia*, "the privilege or benefit of using something," "the act or practice of employing something," or "the fact or state of being used."[3] The plain meaning of these terms establishes that the illegal "use" of controlled substances under this statute includes both the consumption *and* illegal possession, procurement or sale of drugs to or with another (conversion). In other words, one who sells drugs for monetary gain or possesses and gives drugs to another is "using" the drug as contemplated under this statute in the same way as one who "uses" the drug by consuming it.

A review of relevant case law confirms that the illegal "use" of controlled substances includes both the consumption *and* illegal possession, procurement or sale of drugs to or with another. In *Smith v. United States*, the Supreme Court of the United States was called upon to decide the definition of the word "use" in 21 U.S.C. § 924(c)(1), which criminalized the use of a firearm in relation to a drug trafficking crime. *Smith v. United States*, 508 U.S. 223, 226 (1993). In that case, it was uncontested that Mr. Smith traded a firearm in exchange for drugs. He did not shoot or brandish it during the sale. *Id.* at 227-28. The issue in *Smith* was whether "use" as employed in 21 U.S.C. § 924 required that a firearm be "used" for a specific purpose (e.g., brandished or discharged during the course of a drug sale) or whether "use" included trading the gun in exchange for drugs. For his part, Smith

> argued that § 924(c)(1)'s penalty for using a firearm during and in relation to a drug trafficking offense covers only situations in which the firearm is used as a weapon. According to [Smith], the provision does not extend to defendants who use a firearm solely as a medium of exchange or for barter.

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[2] "Engage," *Merriam-Webster* Online, available at https://www.merriam-webster.com /dictionary/engage (last accessed Aug. 12, 2020).

[3] "Use," *Merriam-Webster Online*, available at https://www.merriam-webster.com /dictionary/use (last accessed Aug. 12, 2020).

Smith, 508 U.S. at 227.

The Supreme Court of the United States rejected such a narrow interpretation of the word "use." Relying on its cannons of statutory construction—the same canons this Court employs[4]—the High Court recognized that:

> When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning. Surely petitioner's treatment of his [firearm] can be described as "use" within the everyday meaning of that term. Petitioner 'used' his [firearm] in an attempt to obtain drugs by offering to trade it for cocaine.

Smith v. United States, 508 U.S. 223, 228–29 (1993) (quoting, inter alia, *Astor v. Merritt*, 111 U.S. 202, 213 (1884)).[5] The Court ruled that:

> Petitioner's handling of the [firearm] in this case falls squarely within those definitions. By attempting to trade his [firearm] for the drugs, he 'used' or 'employed' it as an item of barter to obtain cocaine; he 'derived service' from it because it was going to bring him the very drugs he sought.

Id. at 229.

Against this backdrop, there can be little doubt that the word "use" carries with it a broad meaning when not expressly cabined by a legislative body. *See, e.g., Bailey v. United States*, 516 U.S. 137, 143 (1995) ("As the debate in *Smith* illustrated, the word 'use' poses some interpretational difficulties because of the different meanings attributable to it. Consider the paradoxical statement: 'I *use* a gun to protect my house, but I've never had to *use* it.' 'Use' draws meaning from its context, and we will look not only to the word itself, but also to the statute and

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[4] Syl. Pt. 4, in part, *Osborne v. United States*, 211 W. Va. 667, 668, 567 S.E.2d 677, 678 (2002) ("Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.")

[5] The Court ascribed the "common and ordinary" definition of "use" largely by looking to dictionary definitions of the term. *Smith*, 508 U.S. at 227-28 (explaining that "Webster's defines "to use" as "[t]o convert to one's service" or "to employ." Webster's New International Dictionary 2806 (2d ed. 1939). Black's Law Dictionary contains a similar definition: "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Black's Law Dictionary 1541 (6th ed. 1990)).

the sentencing scheme, to determine the meaning Congress intended."); *State v. S.C.*, 672 A.2d 1264, 1267 (N.J. Super. Ct. App. Div. 1996) (rejecting a narrow interpretation of the word "use" on the basis that its everyday meaning is broad, including "to put into action or service; . . . employ" or "to carry out a purpose or action by means of; make instrumental to an end or process; apply to advantage; turn to account; utilize.") (internal citations omitted); *see also United States v. Cox*, 324 F.3d 77, 83 (2d Cir. 2003) (citing *Bailey*, 516 U.S. at 148) (explaining that "use" means more than possession—in *Bailey*, the Court made clear that the defendant "used" the gun by "bartering" with it); *Cox*, 324 F.3d at 83 ("[I]t is settled that one who *tenders* a firearm as barter for drugs is 'using' it within the meaning of Section 924(c)(1).")

Here, the manner in which the Legislature employed the word "use" tracks the same language as the federal statute at issue in *Smith*, and it should be afforded the same meaning, which is to say its regular, nontechnical meaning. Thus, an individual who illegally sells a controlled substance to another person is engaged in the "use" of that illegal controlled substance within the meaning of the statute as he has used it for his own personal (e.g., financial) gain.[6] *See Cox*, 324 F.3d at 83. That is, the "use" of a controlled substance for monetary gain constitutes a use of the drug. The same is true for someone who possesses a controlled substance and shares that substance with another.[7] While the latter individual does not enjoy a financial benefit from simply sharing or procuring a drug from another, he or she is no less employing the drug for a benefit (i.e.,

[6] To be sure, such conduct satisfies the statute's requirement that the use be "illegal." *See, e.g.*, W. Va. Code § 60A-4-401(a) (criminalizing the possession of a controlled substance with the intent to deliver); Syl. Pt. 4, *State v. Tamez*, 169 W. Va. 382, 290 S.E.2d 14 (1982) ("[T]he possession and delivery (transfer) of a controlled substance are separate offenses, possession being an offense pursuant to W. Va. Code [§] 60A-4-401(c) [1971] and delivery or possession with the intent to deliver being an offense pursuant to W. Va. Code [§] 60A-4-401(a) [1971].").

[7] *See, e.g.*, W. Va. Code § 60A-4-401(c) (criminalizing the unlawful possession of a controlled substance); *see also* FN 6, *supra*.

possessing and then sharing that drug with the other individual). Both archetypes are making "use of" the drug in an illegal manner and fall squarely within the scope of this statute. Consequently, where such an individual is present when the user overdoses, he or she falls within the ambit of West Virginia Code § 60A-4-416(b) and has a duty to seek medical assistance on behalf of the overdoser, or be guilty of a felony offense.

While Petitioner contends that the statute "fails to identify the category of persons to which it applies," (Pet'r's Br. at 9), such an interpretation simply cannot be squared with the plain language of the statute. For these reasons, the phrase "Any person who, while engaged in the illegal use of a controlled substance with another" is not ambiguous, much less unconstitutionally vague.

2. The phrase "seek medical assistance" provides an adequate standard for adjudication and does not invite arbitrary enforcement.

Section (b) provides:

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

W. Va. Code § 60A-4-416(b) (emphasis added).

The circuit court below believed—and Petitioner argues here—that this standard is void for vagueness because it provides no standard for adjudication. (*See* Pet'r's Br. at 13). But that is not the case for the following three reasons: (A) the statute is not facially unconstitutional; (B) the phrase "seek medical assistance" is not ambiguous; and (C) in the alternative, even assuming the phrase "seek medical assistance" is ambiguous, this Court is well-equipped to define that phrase by considering the statute's wording and legislative intent.

A. The contested language does not make West Virginia Code § 60A-4-416(b) facially unconstitutional and resolution of an as-applied challenge is not appropriate in this proceeding.

A facial challenge to the constitutionality of a statute requires a demonstration that the statute "is unconstitutional is every aspect of the law itself," that the challenged law "contains a defect that renders it unconstitutional under the applicable substantive constitutional standards." *MDK, Inc. v. Vill. of Grafton*, 345 F. Supp. 2d 952, 960 (E.D. Wis. 2004) (citing, *inter alia*, *Munson*, 467 U.S. at 967 n.13). "Facial challenges present a higher hurdle than as-applied challenges because, in general, for a statute to be facially unconstitutional, it must be unconstitutional in all applications" *State v. Romage*, 7 N.E.3d 1156, 1159 (Ohio 2014); *see also State v. Weber*, 132 N.E.3d 1140, 1145 (Ohio Ct. App. 2019), *appeal not allowed*, 125 N.E.3d 941 (Ohio 2019) ("In a facial challenge, the challenging party must demonstrate that there is no set of facts under which the statute would be valid, that is, the statute is unconstitutional in all of its applications."). In addition, "[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. James*, 227 W. Va. 407, 710 S.E.2d 98, 101 (quoting Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967)).

The circuit court's determination that the statute is unconstitutional on its face and Petitioner's corresponding argument are without merit. Accepting any reasonable interpretation of the statutory language at issue confirms that there are plainly instances in which an individual's conduct will fall within its scope. For instance, it can hardly be disputed that the following scenario qualifies within the statute: Person A and Person B are jointly engaged in the consumption of

heroin. Person B begins suffering from an overdose. Person A recognizes Person B's plight, but refuses to tell anyone about it.

Under this scenario, it is manifestly apparent that Person A and B were jointly engaged in the illicit use of a controlled substance, Person B began suffering from an overdose, Person A knew about that overdose, and Person A knowingly refused to seek any medical assistance for Person B. Under these facts, Person A is guilty of a felony pursuant to West Virginia Code § 60A-4-416(b).

For the same reasons, there are plainly instances where an individual's conduct falls outside the scope of the statute. Consider the above hypothetical, but, instead of refusing to seek medical assistance for Person B, instead, Person A calls 9-1-1, informs the operator of the situation, and provides information as to their location. Because of Person A's actions, an ambulance arrives and first responders administer Naloxone.[8] Person A is clearly not in violation of West Virginia Code § 60A-4-416(b) because Person A actually sought medical assistance for Person B. The same is true if Person A drives Person B to the hospital or flags down a first responder.

These hypotheticals demonstrate that West Virginia Code § 60A-4-416(b) is not facially unconstitutionally. Consequently, the only remaining challenge to the statute must be an "as-applied" challenge. *See Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 331 (2010) (observing that as-applied challenges are constitutional challenges to the validity of a statute based upon the specific facts of a case). As-applied challenges are fact-based and, because they do not resolve a pure question of law, may not be resolved on a certified question. *See, e.g., Rozsavolgyi*

[8] Naxolone (or Narcan) is a drug commonly used by first responders to reverse the effects of an overdose. *See generally Expanding Naloxone use could reduce drug overdose deaths and save lives,* CDC Newsroom, April 24, 2015, available at *https://www.cdc.gov/media/releases/2015/p0424-naloxone.html*

v. City of Aurora, 102 N.E.3d 162, 169 (Ill. 2017) ("Certified questions must not seek an application of the law to the facts of a specific case."). For these reasons, this Court can—and should—demur, and send the case back down to the circuit court so that Petitioner's criminal proceedings can resume. To be clear: Petitioner's claim he did not violate West Virginia Code § 60A-4-416(b) is contingent upon establishing specific facts which cannot be heard here in the first instance, nor has an appropriate record yet been developed below. Resolution of such fact-dependent issues are not appropriate undertakings for an appellate court exercising certified question jurisdiction.

B. The phrase "seek medical assistance" is not void for vagueness because the language is unambiguous.

In the event this Court does consider whether this language renders West Virginia Code § 60A-4-416(b) facially unconstitutional, the language is not ambiguous. This section contains both a *mens rea* (guilty mind) and *actus reas* (guilty act) requirement.[9] Read together, an individual will be guilty of a felony offense where, when engaged in the illegal use of a controlled substance with another, such other person suffers from an overdose, that individual knowingly fails to seek medical assistance for the overdoser. W. Va. Code § 60A-4-416(b).

The *mens rea* requirement is clear: The alleged offender must be "knowingly" aware that the overdoser is suffering from an overdose and, with that knowledge, fails to seek medical assistance. "Knowingly" means to "to be aware of." Syl. Pt. 1, *State v. Wyatt*, 198 W. Va. 530, 533, 482 S.E.2d 147, 150 (1996) ("A person acts knowingly with respect to a material element of an offense when: (1) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

[9] *See State v. Farmer*, 193 W. Va. 84, 91, n.11, 454 S.E.2d 378, 385 n.11 (1994) (providing definitions for *mens rea* and *actus reas*).

(2) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.").

The *actus reus* is also clear and does not invite "arbitrary standards of adjudication." The failure to seek medical assistance is the criminalized conduct. W. Va. Code § 60A-4-416(b). While Petitioner is correct that the Legislature did not define what it means to "seek medical assistance," the lack of an express definition does not mean the statute must be stricken down as unconstitutional. Indeed, when words or terms are left undefined by the Legislature, this Court will afford such terms "their common, ordinary and accepted meaning." Syl. Pt. 4, in part, *Osborne v. United States*, 211 W. Va. 667, 668, 567 S.E.2d 677, 678 (2002); *see also Smith v. United States*, 508 U.S. 223, 228 (1993) ("In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning").

"Seek" as employed in this statute is a transitive verb, and, means "to go in search of," or "look for."[10] "Assistance" is a noun and means "the act of helping or assisting someone."[11] The word "medical" is an adjective—it is used to modify the noun, assistance.[12] "Medical" is defined, in part, as "requiring [ ] medical treatment."[13] Taken together, to "seek medical assistance" means to "go in search of" or "look for" "medical treatment."

Petitioner's contention that this phrase contains no objective measure cannot be squared with the easy-to-understand meaning of the language itself. This phrase—"seek medical

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[10] "Seek,"" *Merriam-Webster Online*, available at https://www.merriam-webster.com/dictionary/ seek (last accessed Aug. 12, 2020).

[11] "Assistance," *Merriam-Webster Online*, available at https://www.merriam-webster.com/dictionary/assistance (last accessed Aug. 12, 2020).

[12] "Adjective", *Merriam-Webster Online*, available at https://www.merriam-webster.com/dictionary/adjective (last accessed Aug. 12, 2020).

[13] "Medical," *Merriam-Webster Online*, available at https://www.merriam-webster.com/dictionary/medical (last accessed August 12, 2020).

assistance"—is not a technical phrase beyond the common understanding of a reasonable person. It means, quite simply, to go in search of, or look for, medical treatment. In the context of this statute, this language plainly includes contacting—directly or indirectly—9 -1-1, a poison control facility, any type of first responder, or a medical facility capable of treating an overdoser. And whether a defendant's conduct falls within the scope of this statute in a given case is a question of fact for the jury. Because the meaning of this language is clear, it is not void for vagueness. Syl. Pt. 5, *Liberty Mut. Ins. Co. v. Morrisey*, 236 W. Va. 615, 760 S.E.2d 863 (2014) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."). *Cf.* Syl. Pt. 4, *Liberty Mut. Inc. Co.*, 236 W. Va. 615, 760 S.E.2d 863 ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.").

C. In the alternative, even assuming the phrase "seek medical assistance" is ambiguous, this Court can, and should, define the phrase consistent with the wording of the statute, viewed in context, and considering Legislative intent.

As the discussion above establishes, West Virginia Code § 60A-4-416(b) is not unconstitutionally vague. Nonetheless, this Court has long-recognized that it will not strike down an ambiguous statute as facially invalid if it is able to interpret the statute in a manner consistent with the legislative intent of the statute and the defined language comports with constitutional principles. Accordingly, and arguing purely in the alternative, this Court can—and should—define the phrase "seek medical assistance" consistent with the wording of the statute, the obvious legislative intent, and well-established cannons of statutory construction.[14]

[14] *Smith v. State Workmen's Comp. Com'r*, 159 W. Va. 108, 115, 219 S.E.2d 361, 365 (1975) ("We do not agree that this statute is clear on its face and consequently, we look to well-

It is entirely appropriate for this Court to define ambiguous language in a criminal statute. *See, e.g., State v. Davis*, 229 W. Va. 695, 699, 735 S.E.2d 570, 574 (2012). And, while the rule of lenity generally requires ambiguous language in a criminal statute be strictly construed, *see* Syl. Pt. 5, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 259, 465 S.E.2d 257, 259 (1995),[15] "[application of the Rule of Lenity] does not mean that words of common understanding and usage may be deemed ambiguous. Moreover, lenity does not foreclose a court from looking 'not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" *Id.* at 263, 465 S.E.2d at 263 (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)). "[I]t 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." *Id.* at 263, 465 S.E.2d at 263 (quoting Syl. Pt. 2, *Pristavec v. Westfield Insurance Co.*, 184 W. Va. 331, 400 S.E.2d 575 (1990)).

While Petitioner argues that "[t]he phrase 'seek medical assistance' is incapable of an objective meaning," (Pet'r's Br. at 16) such a claim ignores this Court's well-established canons of statutory construction. When a statute contains ambiguous language, this Court's initial step to give meaning to the subject language "is to ascertain the legislative intent [behind the enactment]." Syl. Pt. 7, *Liberty Mut. Ins. Co.*, 236 W. Va. 615, 760 S.E.2d 863 (quoting Syl. Pt., *Ohio County Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983)). Critically, "[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

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established canons of construction to interpret its meaning. The primary object in construing a statute is, of course, to ascertain and give effect to the intent of the Legislature.").

[15] The rationale for such construction "is to preclude 'expansive judicial interpretations [that] may create penalties for offenses that were not intended by the legislature.'" *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 262, 465 S.E.2d 257, 262 (1995) (quoting *State v. Brumfield*, 178 W.Va. 240, 246, 358 S.E.2d 801, 807 (1987) and citing *State v. Choat*, 178 W.Va. 607, 616, 363 S.E.2d 493, 502 (1987)).

of the constitutionality of the legislative enactment." Syl. Pt. 3, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (quoting Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967)); Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965).

Here, the legislative intent is reflected in the statute itself. West Virginia Code § 60A-4-416(b) creates a felony offense for instances where one individual, who is engaged in the illicit use of a controlled substance with another, knowingly fails to seek medical attention for such other person when such other person suffers from an overdose. In other words, the statute is designed to incentivize reporting drug overdoses among those who engage in the illegal use of controlled substances by criminalizing the failure to do so. Thus, "seek medical assistance" means precisely what it says.

Petitioner's comparison of the Hawaii statute, Haw. Rev. Stat. § 329-43.6(b), does not support his argument. Section 329-43.6(b) provides that someone who seeks medical assistance for an overdoser shall be immune from prosecution where he or she, "in good faith, seek[s] medical assistance for someone who is experiencing a drug or alcohol overdose[.]" Haw. Rev. Stat. § 329-43.6(b). While Petitioner claims that the Hawaii statute specifically identifies what a person is required to do to fall within its scope, that simply is not the case. *See* Haw. Rev. Stat. § 329-43.6. In fact, Haw. Rev. Stat. § 329-43.6(a) provides examples of such conduct, but expressly cautions that such examples are non-exhaustive: "Seeks medical assistance" or "seeking medical assistance" ***includes, but is not limited to*** . . . ." Haw. Rev. Stat. § 329-43.6(a).[16] And Hawaii is

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[16] Haw. Rev. Stat. § 329-43.6(a) provides the following:

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

Id.

not the only State to provide a definition setting forth merely illustrative type of conduct rather than an exhaustive list. Ohio, for instance, defines the phrase "Seek or obtain medical assistance" in a similar fashion. To "seek or obtain medical assistance" includes, "***but is not limited to***[,] making a 9–1–1 call, contacting in person or by telephone call an on-duty peace officer, or transporting or presenting a person to a health care facility." *State v. Melms*, 101 N.E.3d 747, 752 (Ohio Ct. App. 2018) (quoting Ohio Rev. Code § 2925.11(d)(2)(a)(ix)).

A survey of States that have enacted legislation relating to reporting drug overdoses and where those State legislatures have statutorily-defined the phrase "seeks medical assistance" confirms that the phrase means contacting law enforcement (e.g., first responders or 9-1-1) or some other person or entity who has medical training and is able to provide medical aid to someone experiencing the effects of an overdose. Those States include: Tennessee,[17] Mississippi,[18]

[17] Under Tennessee law, "'Seeks medical assistance' means someone who "(A) Accesses or assists in accessing medical assistance or the 911 system; (B) Contacts or assists in contacting law enforcement or a poison control center; or (C) Provides care or contacts or assists in contacting any person or entity to provide care while awaiting the arrival of medical assistance to aid a person who is experiencing or believed to be experiencing a drug overdose." Tenn. Code § 63-1-156(a)(5)(A)-(C).

[18] Mississippi law defines "Seeks medical assistance" to mean "accesses or assists in accessing the E-911 system or otherwise contacts or assists in contacting law enforcement or a poison control center or provides care to a person experiencing or believed to be experiencing a drug overdose while awaiting the arrival of medical assistance to aid the person." Miss. Code § 41-29-149.1(2)(d).

Georgia,[19] Arizona,[20] South Carolina,[21] Arkansas,[22] and Michigan.[23] Other States have defined the phrase to be more general—particularly in the context of immunizing the reporter from prosecution, as opposed to penalizing a failure to seek medical assistance.[24] A third group of States, like West Virginia, use the phrase but have not statutorily defined it.[25]

The salient point is that every definition requires affirmative conduct seeking actual medical intervention—be that by calling 9-1-1 (or other first responders) or a poison control facility or other healthcare facility, either directly or indirectly. These definitions makes sense, because they are simply a reflection of the plain, every day, common-sense understanding of the phrase "seek medical assistance." *See* Section 2(B), *supra*. This definition embraces the purpose

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[19] Georgia defines "medical assistance" as "aid provided to a person by a health care professional licensed, registered, or certified under the laws of this state who, acting within his or her lawful scope of practice, may provide diagnosis, treatment, or emergency medical services." Ga. Code § 16-13-5(a)(3).

[20] Arizona defines "medical assistance" as "aid provided by a health care professional who is licensed, registered or certified in this state, who is acting within the health care professional's scope of practice and who provides a diagnosis, treatment or other medical service." Ariz. Rev. Stat. § 13-3423(F)(1). It defines "seeks medical assistance," as "to call 911 or otherwise contact law enforcement, poison control or a hospital emergency department." Ariz. Rev. Stat. § 13-3423(F)(2).

[21] South Carolina defines "Seeks medical assistance" to mean "seeking medical assistance by contacting the 911 system, a law enforcement officer, or emergency services personnel." S.C. Code § 44-53-1910(3).

[22] Arkansas defines "Seeks medical assistance" to mean "accesses or assists in accessing the 911 system or otherwise contacts or assists in contacting law enforcement or a poison control center and provides care to a person experiencing or believed to be experiencing a drug overdose." Ark. Code § 20-13-1703(4).

[23] Michigan defines "Seeks medical assistance" as "reporting a drug overdose or other medical emergency to law enforcement, the 9-1-1 system, a poison control center, or a medical provider, or assisting someone in reporting a drug overdose or other medical emergency." Mich. Comp. Laws § 333.7404(6)(b).

[24] Vermont, for instance, defines "Seeks medical assistance" broadly, to even include "providing care to someone who is experiencing a drug overdose while awaiting the arrival of medical assistance to aid the overdose victim." Vt. Stat. tit. 18, § 4254(a)(3).

[25] Florida, Washington, and Iowa have similar statutes, each of which employs the phrase "seeks medical assistance," without further defining such language within the statute itself. Fla. Stat. § 893.21; Wash. Rev. Code § 69.50.315; Iowa Code § 124.418.

of West Virginia Code § 60A-4-416(b), which is obviously to incentivize individuals to report overdoses, and to help combat the drug epidemic that has so terribly ravaged this State.[26] Accordingly, in the event this Court concludes that this phrase "seek medical assistance" is ambiguous, it should define the phrase to mean "contacting 9-1-1, a poison control facility, a healthcare facility, or any first responder (e.g., law enforcement, fire departments), either directly or indirectly."

Petitioner's remaining arguments are fact-based and pose questions for the jury, not this Court. He claims he drove Shane to a nurse's home for the purpose of seeking medical attention. (Pet'r's Br. at 15). Even the undeveloped record directly belies that contention. (J.A. at 121, 165, 170-71, 32, 165-66). But more importantly, this case is before the Court on a certified question—a pure question of law—and this is not the appropriate forum to engage in fact-finding or to resolve fact-bound questions. *See* W. Va. Code § 58-5-2 (emphasis added) ("Any *question of law* . . . may, in the discretion of the circuit court in which it arises, be certified by it to the Supreme Court of Appeals for its decision"). That is a function for the trial court and the jury, not an appellate forum and certainly not as the case is currently postured. Whether Petitioner falls within the scope of this statute is ***not*** the question that is to be answered today. *Rozsavolgyi v. City of Aurora*, 102 N.E.3d 162, 169 (Ill. 2017) ("Certified questions must not seek an application of the law to the

[26] *See, e.g.*, *The Opioid Epidemic in West Virginia*, Merino et al., Health Care Manag (April-June 2019) (noting that West Virginia is the "epicenter" of the opioid epidemic "with the highest rates of overdoses" in the United States); *Number of fatal drug overdoses in 2017 surpasses 1,000 mark in WV*, Caity Coyne, West Virginia Gazette Mail (August 30,2018) (noting a rise in fatal drug overdoses in West Virginia); *State v. Norwood*, 242 W. Va. 149, 832 S.E.2d 75, 84 (2019), *cert. denied sub nom. Norwood v. W. Virginia*, 140 S. Ct. 1297 (2020) (referring to heroin as a [ ] scourge that has saturated our State" and observing that "[t]he West Virginia Department of Health and Human Resources documents that between 2010 and 2017, 1,086 West Virginians died from heroin overdoses."); *see also* WVDHHR, Violence & Injury Prevention Program, *CDC Data*, *available at* https://dhhr.wv.gov/vip/Pages/cdc-data.aspx ("Heroin-involved overdose deaths have increased by nearly 5 times since 2010 (from 3,036 in 2010 to 14,996 in 2018).").

facts of a specific case."); *Lawrence v. State*, 489 S.E.2d 850, 850 (Ga. 1997) (per curiam) ("The questions certified seek application of the specific facts of this case to the law and seek resolution of the ultimate issue on appeal. Under our case law, when the answer to a certified question would constitute the decision in the main case, this court will decline to answer the question."); *see also Hallowell v. United States*, 209 U.S. 101, 105 (1908) ("T]he authority to certify . . . questions c[an]not be used for the purpose of sending to this court the whole case, with all its circumstances, for consideration and decision."); *Biddle v. Luvisch*, 266 U.S. 173, 174–75 (1924); *Jahn v. The Folmina*, 212 U.S. 354, 363 (1909) ("So far as the second question is concerned, it does not propound a distinct issue of law, but, in effect, calls for a decision of the whole, case, and therefore need not be answered."); *William J. Moxley v. Hertz*, 185 F. 757, 758 (7th Cir. 1911) ("[T]he Supreme Court has no jurisdiction upon certified questions of law to direct what disposition shall be made of the case as a whole."). Instead, the question presented in this matter is purely legal in nature—whether West Virginia Code § 60A-4-416(b) is facially constitutional. For the reasons set forth above, the statute passes constitutional muster.

CONCLUSION

The circuit court and Petitioner are incorrect. West Virginia Code § 60A-4-416(b) is not unconstitutional. This Court should answer the first certified question in the negative and the second in the affirmative.

THE STATE OF WEST VIRGINIA,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0234

TIMOTHY MICHAEL CONNER, II,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I, Gordon Mowen, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **The State of West Virginia's Response Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, August 24, 2020, and addressed as follows:

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