IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0234

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

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

TIMOTHY MICHAEL CONNER, II,

Defendant Below, Petitioner.

PETITIONER'S REPLY BRIEF

Submitted by:

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I. CERTIFIED QUESTIONS

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

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

II. STATEMENT OF THE CASE

The State of West Virginia's attempt to provide clarity to W. Va. Code § 60A-4-416(b) only adds to the confusion of its construction and meaning. A criminal statute is ambiguous if it is susceptible to two or more constructions such that reasonable minds might disagree as to its meaning. To avoid arbitrary enforcement, a criminal statute must provide explicit standards for those who apply and enforce them.

With regard to the first certified question, the *State's Response Brief* construes the statute in an entirely different manner from how it was construed in the circuit court, which clearly demonstrates that reasonable minds disagree as to its meaning. Concerning the second certified question, this Court has long recognized that undefined terms are given their common, ordinary, and accepted meaning. There is no common, ordinary, and accepted meaning of "seek medical assistance" because other states that have statutorily defined that phrase have afforded it different meanings.

W. Va. Code § 60A-4-416(b) is ambiguous and unconstitutionally vague. The only way to bring the criminal statute in line with constitutional requirements is to rewrite it. According to the separation of powers doctrine, which is the touchstone of our system of government, only the Legislature can rewrite a statute.

A. Statement of Facts

The facts of this case are critically important to prove that W. Va. Code § 60A-4-416(b) is susceptible to different constructions such that reasonable minds have disagreed on its meaning – particularly with regard to the category of persons to which it applies. According to the record evidence, the Petitioner was charged and prosecuted with violating W. Va. Code § 60A-4-416(b) because he was physically present with Shane Cebulak (hereinafter "Mr. Cebulak") when he overdosed and because the Petitioner failed to drive Mr. Cebulak to a hospital, fire station, or police department or otherwise call 911 directly. (App. 002-003, 009, 032-35).

On the evening of March 28, 2019, Mr. Cebulak picked up the Petitioner, drove to an apartment complex, entered an apartment, and purchased heroin. (App. 034, 166, 170). The Petitioner did not drive the vehicle, did not enter the apartment, did not supply Mr. Cebulak with funds to purchase the heroin, and did not assist or encourage Mr. Cebulak to purchase the heroin. (App. 002, 009, 028-038, 178). Thereafter, Mr. Cebulak drove to another apartment complex and voluntarily smoked the heroin that he had recently purchased from the "Detroit crew." (App. 034, 174, 177-178). The Petitioner did not aid or abet Mr. Cebulak in any way in using the heroin. (App. 034, 177-178). The Petitioner did not use heroin or any other controlled substance. (App. 028-038, 175, 185-186). The Petitioner was not under the influence. *Id.* The Petitioner was physically present with Mr. Cebulak, nothing more.

When Mr. Cebulak began exhibiting signs of a drug overdose, the Petitioner telephoned Joseph Choma (hereinafter "Mr. Choma"), a friend who the Petitioner knew to be a nurse, and asked him for help. (App. 034, 170). The Petitioner drove Mr. Cebulak to Mr. Choma's residence, which was located on McLane Avenue. (App. 034, 170). The Petitioner parked in a gravel alley near Mr. Choma's residence and went inside. (App. 034, 171). Mr. Choma called his girlfriend

who then contacted 911. (App. 033, 035). The 911 dispatcher then directly contacted Mr. Choma. (App. 057). During his initial telephone call with the 911 dispatcher, Mr. Choma: 1) identified the vehicle that Mr. Cebulak was in and described where it was located, 2) advised that Mr. Cebulak was breathing but appeared to be dying, 3) described that Mr. Cebulak was slumped over in the passenger seat, and 4) stated that he could hear Mr. Cebulak breathing, and it sounded like snoring. (App. 057). Based upon the information Mr. Choma provided to the 911 dispatcher, Mr. Choma had walked outside, located the vehicle and Mr. Cebulak, and got close enough to see the situation inside the vehicle. *Id.*

As a result of Mr. Choma's telephone call with 911, Police, Fire, and EMS personnel arrived at McLane Avenue where they met Mr. Choma. (App. 035, 057, 168). However, no one was able to locate the white vehicle or Mr. Cebulak, even though Mr. Choma had observed the vehicle and Mr. Cebulak a short time earlier. *Id.* It was believed that Mr. Cebulak "came to" and left. (App. 003, 008-009). Approximately two hours later, Mr. Choma went back outside to walk his dog. (App. 003, 035, 168). Mr. Choma again came across the white vehicle parked in the alley. *Id.* Mr. Cebulak was deceased inside the vehicle. *Id.* Mr. Choma contacted 911, and emergency personnel arrived at McLane Avenue a second time that night. (App. 033, 157).

Contrary to the State's suggestion, the Petitioner did not abandon Mr. Cebulak when he overdosed. The Petitioner telephoned Mr. Choma and drove Mr. Cebulak to Mr. Choma's residence. (App. 002, 034, 170). Mr. Cebulak was alive when the Petitioner parked the vehicle and when Mr. Choma initially spoke with the 911 dispatcher. (App. 034, 057, 171). The Petitioner's actions resulted in Mr. Cebulak's overdose being reported to 911, which, in turn, caused Police, Fire, and EMS personnel to arrive at McLane Avenue. Mr. Cebulak died at some point in time

after Police, Fire, and EMS personnel arrived at McLane Avenue but were unable to locate him. *Id.*

III. ARGUMENT

A. The Phrase "Any Person Who, While Engaged in the Illegal Use of a Controlled Substance with Another" has Been Construed Differently by Reasonable Minds in This Case, Which Shows that the Phrase is Ambiguous and Unconstitutionally Vague.

The meaning of the phrase "any person who, while engaged in the illegal use of a controlled substance with another" is susceptible to two or more constructions such that reasonable minds might disagree as to its meaning. This is highlighted by the fact that the aforementioned phrase has been construed one way by the Prosecuting Attorney of Monongalia County in circuit court, but is now being construed a different way by the Attorney General's Office on this certified question. Both constructions,[1] however, are reasonable given the language of the statute.

i. The State Has Taken Inconsistent Positions with Regard to Whether the Statute Applies to Persons Who are Physically Present with, or in Close Proximity to, an Overdoser.

In the circuit court, the State, by and through the Prosecuting Attorney of Monongalia County, construed the phrase "any person who, while engaged in the illegal use of a controlled substance with another" to apply to a person who was physically present with, or in close proximity to, an overdoser. As the Prosecuting Attorney of Monongalia County argued at the February 21, 2020 hearing, "I think it would encompass someone with someone who is engaging in drug use." (App. 187). This construction is further reinforced by the fact that the *only* evidence against the

[1] As the circuit court correctly found, the following two constructions are reasonable as it relates to the category of person within the scope of the statute: 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 with, or in close proximity to, an overdoser. On this certified question, the State has introduced a third category of person that it contends is within the scope of the statute – *i.e.*, those persons who possess, procure, or sale a controlled substance. As discussed below, the Petitioner disagrees that W. Va. Code § 60A-4-416(b) includes such persons.

Petitioner, as it relates to the first certified question, is that he was physically present with Shane Cebulak when he overdosed. (App. 002-003, 032-035, 175, 186).

The State has not alleged, and there is absolutely no evidence, that the Petitioner supplied Mr. Cebulak with the heroin, paid for the heroin, provided Mr. Cebulak with transportation to the apartment complex where he purchased the heroin, or assisted Mr. Cebulak in any manner in purchasing the heroin. *Id.* Moreover, there is no evidence that the Petitioner was personally using heroin or that the Petitioner was aiding or abetting Mr. Cebulak in his personal use of the heroin. *Id.* As it relates to the first certified question, the Petitioner was prosecuted by the Prosecuting Attorney of Monongalia County because he was physically present with Mr. Cebulak when he overdosed.

Additionally, detectives with the Morgantown Police Department construed the statute in the same manner, as did the magistrate who issued the warrant as well as the magistrate who found probable cause at the preliminary hearing. A Monongalia County Grand Jury, consisting of 16 people of ordinary intelligence, also construed W. Va. Code § 60A-4-416(b) to apply to individuals who were physically present with, or in close proximity to, an overdoser as evidenced by their return of a true bill against the Petitioner.

On this certified question, the State, by and through the Attorney General's Office, has taken a completely different approach by conceding that W. Va. Code § 60A-4-416(b) does not apply to someone by virtue of their physical presence with, or proximity to, an overdoser. *See State's Response* at pp. 9-10. The State submits that "[b]y its plain and unambiguous terms, the statue does ***not*** apply to someone who is merely in close proximity to the overdoser . . . ." *Id.* at p. 9 (emphasis in original). It flows from the State's position on this certified question that the

construction of the statute by the Prosecuting Attorney of Monongalia County in circuit court "finds no support in the language of this statute." *Id.* at p. 10.

The Prosecuting Attorney of Monongalia County argued for probable cause at the preliminary hearing, presented evidence to and procured an indictment from a grand jury, and prosecuted the Petitioner based upon the construction that the statute applied to a person who was physical present with, or in close proximity to, an overdoser. For the State to now contend that W. Va. Code § 60A-4-416(b) is so clear and unambiguous, as to overcome this constitutional challenge on vagueness grounds, it would necessarily have to acknowledge that the statutory construction employed by the esteemed and duly elected Prosecuting Attorney of Monongalia County was unreasonable. *State v. Woodrum*, No. 18-1043, 2020 WL 2820379, at *5 (W. Va. May 29, 2020) ("A statute is ambiguous if it is susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.") (citations and quotations omitted).

The Prosecuting Attorney of Monongalia County and the Attorney General's Office – both having reasonable minds – have construed the statute differently, thereby illustrating the ambiguity in the language of W. Va. Code § 60A-4-416(b). Because attorneys for the State cannot agree on the meaning of the phrase "any person who, while engaged in the illegal use of a controlled substance with another," this Court should find that it is ambiguous and declare the statute unconstitutionally vague.

ii. Undefined Words Must be Given Their Common, Ordinary, and Accepted Meaning; Yet, the State Contends that the Word "Use" Should Be Given Different Meanings in the Context of W. Va. Code § 60A-4-416.

The circuit court found that W. Va. Code § 60A-4-416(b) is ambiguous inasmuch as it fails to identify the category of person to whom the statute is directed. Accordingly to the circuit court,

two categories of persons could reasonably be included within the scope of the statute: 1) individuals who are personally using a controlled substance alongside or together with an overdoser; or 2) individuals, who are *not* personally using a controlled substance, but who are physically present or in some type of close proximity when an overdose occurs. (App. 004).

In its *Response Brief*, the State construes W. Va. Code § 60A-4-416(b) to include a third category of person, which was not proposed by the Petitioner, the Prosecuting Attorney of Monongalia County, or the circuit court. According to the State, the phrase "engaged in the illegal use of a controlled substances" also includes the illegal possession, procurement, or sale of drugs to or with another. *See State's Response* at pp. 10-14.

In enacting W. Va. Code § 60A-4-416(b), the Legislature did not define any term or phrase. Based upon this Court's long-standing precedent on statutory interpretation, undefined terms are given their normal, everyday meaning in the context in which they are used. "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. Pt. 1, *Miners in General Group v. Hix,* 123 W.Va. 637, 17 S.E.2d 810 (1941), *overruled, in part, on other grounds by Lee–Norse Co. v. Rutledge,* 170 W.Va. 162, 291 S.E.2d 477 (1982); *See also State v. Sulick*, 232 W. Va. 717, 753 S.E.2d 875 (2012). "Generally the words of a statute are to be given their ordinary and familiar significance and meaning[.]" Syl. Pt. 4, in part, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959); *See also State v. Butler*, 239 W. Va. 168, 799 S.E.2d 718 (2017).

After acknowledging the above principles, the State contends that "the illegal 'use' of controlled substances includes both the consumption *and* illegal possession, procurement, or sale

of drugs to or with another." *See State's Response* at p. 11 (emphasis in original). Stated otherwise, the State is suggesting that the common, ordinary meaning of the word "use" is consumption ***and*** it is simultaneously suggesting that the common, ordinary meaning of the word "use" is possession, procurement, or sale. The problem with the State's argument is that it is attempting to afford the word "use" different meanings in the context of a single statute.

Generally, the word "use" – when used in the context of drugs or controlled substances – means to consume or to take. For example, a police report that references evidence of "drug use" means that there was evidence that a person was consuming or taking drugs. Evidence of "drug use" does *not* ordinarily mean that there was evidence of drug possession, procurement, or sale. Similarly, a term of probation that prohibits the "use a controlled substance" ordinarily means that a defendant shall not consume or take a controlled substance.

In arguing for a different and broader use of the word "use," the State relies on *Smith v. United States*, 508 U.S, 223 (1993) wherein the Supreme Court of the United State interpreted the word "use" as utilized in 21 U.S.C. § 924(c)(1). The relevant portion of that federal code reads "any person who, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm . . . ." The State's reliance on *Smith* is unavailing to the meaning of the word "use" as utilized in W. Va. Code § 60A-4-416(b). Clearly, the word "use" – as applied in the federal firearm statute – means something other than consumption. The word "use" has an entirely different meaning when applied to firearm as compared to when the word "use" is applied to a controlled substance. Simply put, a person uses a firearm differently than a person uses a controlled substance. There is no indication that the Legislature intended the word "use" to be applied so broadly as to include the possession, procurement, or sale of a controlled substance.

Another hurdle the State faces in construing the word "use" to include the sale or supply of drugs is that particular scenario is already covered in subsection (a) of W. Va. Code § 60A-4-416. Subsection (a) imposes a more severe penalty upon a person who knowingly and willfully delivers a controlled substance and the use of the controlled substance proximately causes the death of the person using it. There would be no legitimate basis for the Legislature to enact a separate subsection that prohibits the very same conduct that is embodied within a prior subsection of the very same code section.

It is also important to note that the word "use" in subsection (a) means consumption. The relevant portion of W. Va. Code § 60A-4-416(a) reads: "[a]ny person who knowingly and willfully delivers a controlled substance ... for an illicit purpose and the *use, ingestion or consumption* of the controlled substance ... proximately causes the death of a person *using, ingesting or consuming* the controlled substance" is guilty of a felony. (emphasis added). It logically follows that the term "use" should be afforded the same meaning – *i.e.,* consumption – in subsection (b). As this Court has previously recognized, "[w]hen two statutes relate to the same general subject, and the two statutes are not in conflict, they are to be read *In pari materia.*" Syl. Pt. 2, *Tug Valley Recovery Ctr., Inc. v. Mingo Cty. Comm'n*, 164 W. Va. 94, 261 S.E.2d 165 (1979); *See also Young v. State*, 241 W. Va. 489, 826 S.E.2d 346 (2019). The word "use" cannot have one meaning in W. Va. Code § 60A-4-416(a) but a different meaning in W. Va. Code § 60A-4-416(b).

The State's attempt to construe W. Va. Code § 60A-4-416(b) to apply to the possession, procurement, and sale of a controlled substance only serves to highlight that it is susceptible of different constructions and that the wording of the statute has an obscure meaning.

B. The Undefined Phrase "Seek Medical Assistance" is Unconstitutionally Vague Because It Does Not Have a Common, Ordinary, and Accepted Meaning, and It Can Only Be Explained by Rewriting W. Va. Code § 60A-4-416(b) to Include a Statutory Definition.

As it relates to the second certified question, the basis of the Petitioner challenge, as well as the circuit court's finding, is that the undefined phrase "seek medical assistance" fails to provide an adequate standard for adjudication and invites arbitrary enforcement.

i. W. Va. Code § 60A-4-416(b) Must Be Construed in Light of the Conduct with Which the Petitioner is Charged.

The State first argues that this Court should demur on deciding the merits of the second certified question because, in its opinion, there are plainly instances in which an individual's conduct will fall within the scope of statute. Contrary to the State's contention that the statute should be analyzed in a vacuum, the constitutionality of W. Va. Code § 60A-4-416(b) must be tested in light of the conduct that resulted in the Petitioner being charged and prosecuted.

"Criminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness ***by construing the statute in light of the conduct to which it is applied.***" Syl. Pt. 3, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974) (emphasis added). "In determining the sufficiency of the notice a statute ***must of necessity be examined in the light of the conduct with which a defendant is charged.***" *Parker v. Levy*, 417 U.S. 733, 757 (1974) (citing *Robinson v. United States*, 324 U.S. 282 (1945)). "A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

Using a hypothetical scenario, the State argues that W. Va. Code § 60A-4-416(b) is plainly applicable where two people are jointly engaged in the consumption of heroin and one refuses to

tell anyone of the other's overdose. *See State's Response* at pp. 16-17. That hypothetical, however, is simply not applicable to the facts here. The Petitioner was not using a controlled substance. (App. 028-038, 175, 185-186). The Petitioner did not refuse to tell anyone about Mr. Cebulak's overdose. (App. 002, 034, 170). Instead, the Petitioner called a friend who he knew to be a nurse and drove Mr. Cebulak to that individual's house. *Id.* The overdose was reported to 911. *Id.* Police, Fire, and EMS personnel arrived at the overdoser's location. *Id.* Because the State's hypothetical is not supported by the record evidence, this Court should test W. Va. Code § 60A-4-416(b) in light of the facts as charged.

Moreover, the State's argument prematurely assumes that the first portion of the statute – "any person who, while engaged in the illegal use of a controlled substance with another" – conclusively applies to a person who is also using a controlled substance along with an overdoser. As discussed above, W. Va. Code § 60A-4-416(b) is unclear as to the category of persons to which it applies. Therefore, this Court should address the merits of the second certified question and test the constitutionality of W. Va. Code § 60A-4-416(b) in light of the conduct with which the Petitioner stands charged.

ii. The Phrase "Seek Medical Assistance" is Vague, and the Legislature's Intent Remains Unknown.

A criminal law is vague where it is "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, --U.S.--, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson,* 461 U.S. 352, 357–358 (1983)), and the meaning of its terms depends on "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *United States v. Williams*, 553 U.S. 285, 306 (2008).

What one person may believe satisfies the requirement to "seek medical assistance" another person may not. That is to say, the question of whether a person does or does not "seek

medical assistance" can only be answered by applying a purely subjective standard given the Legislature's failure to provide an explicit standard. The record evidence[2] proves this very point. As it relates to the second certified question, the Petitioner was charged by detectives with the Morgantown Police Department because he failed to drive Mr. Cebulak to a hospital, fire station, or police department or otherwise call 911 directly. (App. 009, 032-35). Because the Petitioner failed to "seek medical assistance" based upon what the detectives subjectively believed that meant, he was charged with violating W. Va. Code § 60A-4-416(b). The Petitioner's actions resulted in the overdose being reported to 911 and Police, Fire, and EMS personnel arriving at the overdoser's location. Had there been a mere difference in law enforcement officer, prosecutor, or accused, the very same facts may very well have ***not*** been criminally prosecuted. However, the Legislature's failure to define "seek medical assistance" has invited arbitrary enforcement.

The State's effort to give the phrase "seek medical assistance" meaning by ascertaining legislative intent is also unconvincing. The State has not cited any material from the legislative history of W. Va. Code § 60A-4-416(b) to show an expression of the Legislature's intent in enacting this particular code section. Similarly, the Petitioner has been unable to locate anything in the legislative history to demonstrate legislative intent. By failing to express its intent in enacting W. Va. Code § 60A-4-416(b), either in the language of the statute or in the legislative history, the 2017 Legislature has hamstrung this Court's ability to construe the statute.

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[2] *See* Syl. Pt. 3, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974); *Parker v. Levy*, 417 U.S. 733, 757 (1974); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

iii. There is No Common, Ordinary, and Accepted Meaning of "Seek Medical Assistance" as Demonstrated by the Different Definitions Other States Have Given that Phrase.

When terms are undefined by the Legislature, this Court will, in interpreting a statute, give those undefined terms their "common, ordinary and accepted meaning in the connection in which they are used." Syl. Pt. 1, *Miners in General Group v. Hix,* 123 W.Va. 637, 17 S.E.2d 810 (1941), *overruled, in part, on other grounds by Lee–Norse Co. v. Rutledge,* 170 W.Va. 162, 291 S.E.2d 477 (1982); *See also State v. Sulick*, 232 W. Va. 717, 753 S.E.2d 875 (2012).

Correctly, the State points out that several other states have defined the phrase "seek medical assistance" for purposes of immunity statutes.[3] The noticeable point, however, is that those states have defined the phrase differently. For example,

- In Hawaii, "'seeks medical assistance' or 'seeking medical assistance' includes but is not limited to reporting a drug or alcohol overdose to law enforcement, the 911 system, a poison control center, or a medical provider; assisting someone so reporting; or providing care to someone who is experiencing a drug or alcohol overdose while awaiting the arrival of medical assistance." HI Rev. Stat. § 329-43.6 (2015).

- In Ohio, "'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." Ohio Rev. Code § 2925.11(d)(2)(a)(ix).

- In Tennessee, "'Seeks medical assistance' means: (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).

[3] The Petitioner has been unable to locate another state statute akin to W. Va. Code § 60A-4-416(b) and accordingly submits that West Virginia stands alone in the endeavor to criminalize certain persons who fail to "seek medical assistance" to an overdoser.

- In Arizona, "'Seeks medical assistance' means to call 911 or otherwise contact law enforcement, poison control or a hospital emergency department." Ariz. Rev. Stat. §13-3423(F)(2).

- In South Carolina, "'Seeks medical assistance' means seeking medical assistance by contacting the 911 system, a law enforcement officer, or emergency services personnel." S.C. Code § 44-53-1910(3).

- In Arkansas, "'Seeks medical assistance" means 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). (emphasis added).

- In Vermont, "'Seeks medical assistance' shall include providing care to someone who is experiencing a drug overdose while awaiting the arrival of medical assistance to aid the overdose victim." 18 V.S.A. § 4254(a)(3).

As outlined above, the states that have defined "seek medical assistance" have done so in different fashions. The definitions range from 1) reporting or contacting law enforcement, 911, a poison control center, or medical provider; 2) transporting an overdoser to a health care facility; 3) accessing medical assistance; 4) assisting in reporting, contacting, or accessing medical assistance; 5) providing care; or 6) some combination of the above. Because the states cannot agree on a common or consistent definition of "seek medical assistance," but instead have adopted different standards, there simply cannot be a common, ordinary, and accepted meaning of the phrase.

If the statute was plain and unambiguous, as the State argues, then it would not be necessary to recommend that this Court define "seek medical assistance" in a certain manner. As the *State's Response* illustrates, the only possible way to inform an average person what "seek medical assistance" means is to rewrite W. Va. Code § 60A-4-416(b) and add a specific definition. That, however, cannot be done by this Court.

This Court has previously cautioned that "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advocate Division v. Public Service Commission,* 182 W.Va. 152, 386 S.E.2d 650 (1989). The State attempts to do just that. *See State's Response* at p. 24 (suggesting a definition of "contacting 9-1-1, a poison control facility, a healthcare facility, or any first responder (e.g. law enforcement, fire departments), with directly or indirectly.").

Because the phrase "seek medical assistance" does not have a common, ordinary, and accepted meaning, the only way to provide reasonable notice of what that phrase requires is to amend W. Va. Code § 60A-4-416(b) to include a definition. Only the Legislature can take such action under the separation of powers doctrine. As such, this Court should find that the statute is ambiguous and unconstitutionally vague.

IV. CONCLUSION

The State has not, and indeed cannot, provide meaning to W. Va. Code § 60A-4-416(b) without violating the rules of statutory interpretation. The statute fails to provide fair notice that the contemplated conduct is statutorily prohibited and further fails to provide adequate standards for adjudication to avoid arbitrary enforcement. Accordingly, it should be declared unconstitutionally vague.

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

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CERTIFICATE OF SERVICE

I, Jared T. Moore, counsel for the Petitioner herein, do hereby certify that a true copy of the foregoing *Petitioner's Reply Brief* was served upon the following counsel of record via United States Mail on this 4th day of September, 2020:

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