IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

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

SHAUN RICHARD DUKE,

Defendant below, Petitioner.

PETITIONER'S REPLY

Matthew Brummond
W. Va. State Bar No. 10878
Appellate Counsel
Public Defender Services
Appellate Advocacy Division
One Players Club Drive, Suite 301
Charleston, W. Va. 25311
Phone: 304-558-3905
Fax: 304-558-1098
matt.d.brummond@wv.gov

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions

Statutes and Rules

Other Sources

INTRODUCTION

The State indicted Petitioner for loaning his car to a co-defendant to deliver drugs resulting in death.[1] But it had a problem. The evidence showed that Petitioner loaned his car so the co-defendant could buy cigarettes.[2] Petitioner was unconscious from an overdose when the co-defendant instead decided to use the car for a drug sale.[3]

Unable to prove that Petitioner knowingly assisted the transaction, the State introduced evidence of a different crime entirely. The indictment charged a vicarious, unintentional homicide.[4] But a jail house snitch—contradicted by the State's fact witnesses,[5] medical experts,[6] and surveillance video proving an alibi[7]—testified that Petitioner confessed to personally committing a premeditated first degree murder.[8]

Enflamed by the accusation, the jury convicted Petitioner of all counts including three delivery charges—despite undisputed evidence there were only two drugs[9]—and delivery resulting in death.[10] The court ran all counts consecutively.[11]

Petitioner appeals. The indictment charged a vicarious, unintentional homicide.[12] By not screening the murder accusation as uncharged bad act evidence, the court created a fatal variance.[13] One cannot deliver resulting in death without first delivering.[14] And for Petitioner to be a principle in the second degree, he must share the co-defendant's criminal intent and assist her.[15] He cannot do that when unconscious.

---

[1] A.R. 776–77; *see also* A.R. 78; A.R. 799–801.
[2] A.R. 463; A.R. 489.
[3] A.R. 463; A.R. 490–91; 493.
[4] A.R. 776–77.
[5] *See* A.R. 449; A.R. 490; A.R. 477–78.
[6] *See* A.R. 948; A.R. 951.
[7] A.R. 953.
[8] A.R. 372–73.
[9] *See* A.R. 468; A.R. 950.
[10] A.R. 690–92.
[11] A.R. 938–41.
[12] A.R. 776–77.
[13] *See* Syl. Pt. 4, *State v. Corra*, 223 W. Va. 573, 678 S.E.2d 306 (2009).
[14] *Compare* W. Va. Code § 60A-4-416 *with* W. Va. Code § 60A-4-401.
[15] *See State v. Fortner*, 182 W. Va. 345, 356, 387 S.E.2d 812, 823 (1989).

The response argues that evidence of a premeditated murder is directly relevant to the vicarious, unintentional homicide charge,[16] the legislature intended the delivery resulting in death to stack,[17] and Petitioner's presence for the drug transaction satisfies the concerted action principle.[18] These arguments are not persuasive. I) Premeditated murder is not an unintentional homicide.[19] II) When the legislature intends offenses to stack, it explicitly says so and here did not.[20] And III) bystanders are not conspirators.[21] Because the response cannot refute these basic propositions, Petitioner asks that this Court reverse his conviction.

REPLY STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests a Rule 20 argument to resolve a question of first impression: whether simple delivery is a lesser included offense of delivery resulting in death.[22] The response brief does not appear to dispute that this Court has never ruled on the issue.[23] That the response asks the Court to answer the question differently than Petitioner does not change the fact it is an issue of first impression.

Furthermore, the response brief itself relies upon a novel interpretation of the delivery resulting in death statute and argues that it (and its three-to-fifteen-year penalty) should apply to premeditated, intentional, malicious murder where the weapon is a syringe, and it raises a novel unit of prosecution issue.[24] Thus the response brief itself presents issues of first impression.

A Rule 20 argument and signed opinion are therefore appropriate.

---

[16] Resp.'s Br. 12.
[17] Resp.'s Br. 22.
[18] Resp.'s Br. 26.
[19] *Compare* W. Va. Code § 60A-4-416 (liability based upon "proximately caus[ing]" death) *with* W. Va. Code § 61-2-1 (in relevant part, liability for intentional killing).
[20] *Compare* W. Va. Code § 60A-4-416 *with* W. Va. Code § 61-8D-5.
[21] *See Fortner*, 182 W. Va. at 356.
[22] Petr.'s Br. 10.
[23] Resp.'s Br. 20–24.
[24] Resp.'s Br. 17–18, 23–24.

REPLY ARGUMENT

I. Premeditated first degree murder and delivery resulting in death are different offenses. By not screening the snitch's accusation as an uncharged bad act, the circuit court created a fatal variance.

The court erred by not treating the snitch's murder accusation as an uncharged bad act. The grand jury heard evidence that Petitioner loaned his car to a friend.[25] The friend used the car to sell drugs, and the voluntary use of those drugs resulted in an unintended death.[26] The indictment authorized conviction on this theory alone.[27]

But at trial, this evidence was lacking.[28] So, the State called a snitch who testified to a completely different homicide.[29] The snitch said that Petitioner believed the decedent was a CI.[30] The snitch said that Petitioner decided to murder him, that he did so alone, and that he intentionally injected an overdose into an unconscious victim.[31] There is no reasonable way to reconcile the snitch's novel accusation with the fundamentally different crime charged in the indictment.[32] The State was not even aware of the snitch's story when it presented to the grand jury.[33]

The court therefore created a fatal variance by ruling that the jury could convict Petitioner of the charged act if it believed the snitch's accusation.[34] Where trial evidence shows a different means than that charged, defendants must show prejudice[35]—which, given the lackluster evidence for the charged offense, Petitioner certainly can. But not so where the evidence shows a different crime.[36] It is inherently prejudicial to allow a jury to convict for a charged crime based upon evidence that shows only an uncharged one.[37]

---

[25] A.R. 13–14.
[26] *Id.*
[27] *See State v. Thomas*, 157 W. Va. 640, 654, 203 S.E.2d 445, 455 (1974).
[28] *See* A.R. 463; A.R. 489; A.R. 491–92.
[29] A.R. 372–73.
[30] *Id.*
[31] *Id.*
[32] *See* A.R. 77. (charging that Petitioner acted in concert with the co-defendant).
[33] *See* A.R. 1–19; A.R. 866.
[34] *See* A.R. 98–99.
[35] *See* Syl. Pt. 2, *State v. Scarberry*, 187 W. Va. 251, 252, 418 S.E.2d 361, 362 (1992) (per curiam).
[36] *See* Syl. Pt. 7, *State v. Corra*, 223 W. Va. 573, 678 S.E.2d 306 (2009).
[37] *Id.*

1. The murder accusation was not directly relevant to the charges.

The response brief argues that other aspects of the snitch's testimony were relevant because they placed Petitioner at the time and place of his co-defendant's drug transaction.[38] But the snitch did not receive a significant downward departure from his mandatory minimum for providing a hearsay account of what the other witnesses personally saw. Nor is that the basis for Petitioner's appeal.[39] The problem is the snitch's novel accusation that Petitioner premeditated an intentional murder.[40] The snitch's accusation differed from the indictment both in the manner that death occurred[41] and in the crime committed.[42] This is a fatal variance that this Court rightly treats as structural—even plain—error.[43]

The response also argues that the delivery resulting in death statute covers the conduct the snitch testified to: a premeditated, intentional, killing.[44] To be clear, it argues that a premeditated, intentional murder with a hot shot syringe violates both the first degree murder and the delivery proximately causing death statutes, and it is up to the prosecutor to decide which to charge.[45] It is mistaken. If the same conduct violates both statutes, then it is not entirely up to the prosecutor. A defendant is entitled to a lesser included offense instruction if the evidence would also support conviction, [46] and according to the response, the facts always would. So even if the State sought to charge only murder, it could not prevent the jury from considering delivery proximately causing death.

It is not credible that the legislature intended murderers to receive three-to-fifteen-year sentences if their weapon of choice was an overdose-packing syringe but life if they

---

[38] Resp.'s Br. 14.
[39] Petr.'s Br. 12–13.
[40] *See* A.R. 372–73.
[41] *Compare id. with* A.R. 776–77.
[42] *Compare* W. Va. Code § 60A-4-416 *with* W. Va. Code § 61-2-1.
[43] *See State v. Corra*, 223 W. Va. 573, 577, 678 S.E.2d 306, 310 (2009).
[44] Resp.'s Br. 17–18.
[45] *Id.*
[46] *See* Syl. Pt. 5, *State v. Bell*, 211 W. Va. 308, 565 S.E.2d 430 (2002).

used any other instrumentality. Besides the irrationality of such a distinction,[47] the history suggests that the legislature intended to specifically target unintentional homicides. Previously, this Court had interpreted West Virginia's felony murder statute to reach overdose deaths.[48] Otherwise, these serious crimes would only be misdemeanor involuntary manslaughters.[49] In response, the legislature passed the delivery resulting in death statute in 2017.[50] It is much more likely that the legislature intended to moderate the sentences for unintentional homicides rather than premeditated murders.

The statutes' plain language also shows the offenses cover different conduct. Premeditated murder requires that the defendant intended to kill.[51] In contrast, the delivery resulting in death statute requires that the intentional delivery must "proximately cause[]" the death. The whole notion of proximate causation speaks to criminal negligence and foreseeable, rather than intended, consequences.[52] Proximate causation is not a lesser form of intent—it is a different theory of culpability altogether.[53] Additionally, delivery resulting in death requires a delivery—*i.e.,* a property transfer.[54] It also entails the decedent "using, ingesting, or consuming" the drugs—actions that all require volition. The snitch described none of this. He accused Petitioner of intentionally injecting an overdose against the decedent's will.[55] Shooters are not transferring ownership of bullets, and unconscious victims are not ingesting a drug administered by another.[56]

---

[47] *See* W. Va. Code § 61-2-1 (providing that murder by poison is a first degree murder punishable by life imprisonment).
[48] *See e.g. Jenkins v. Ballard*, No. 15-0454, 2016 WL 1455611, at *21 (W. Va. Apr. 12, 2016).
[49] *See* W. Va. Code § 61-2-5.
[50] W. Va. Code Ann. § 60A-4-416 (West).
[51] *See* Syl. Pt. 6, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).
[52] *See* Syl. Pts. 1–5, *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W. Va. 639, 639, 77 S.E.2d 180, 182 (1953).
[53] *See McKenzie v. Sevier*, 244 W. Va. 416, 854 S.E.2d 236, 246 (2020) (Foreseeability and proximate causation irrelevant where one intends the consequences).
[54] W. Va. Code § 60A-1-101(h) ("'Deliver' or 'delivery' means the actual, constructive or attempted transfer from one person to another[.]".
[55] *See* A.R. 372–73.
[56] *See* W. Va. Code § 60A-1-101(a) and (h) (distinguishing "deliver" from "administer").

Finally, the response brief also argues that the indictment contains the word "intentionally," and therefore it charged an intentional homicide.[57] But the record is unambiguous: the indictment charges that the *delivery* was intentional, not the *death*.[58] The response argument requires an unreasonable reading of the record.

2. The snitch's accusation is not res gestae.

The response argues in the alternative that the snitch's accusation was res gestae evidence.[59] It is generally accepted that WVRE 404(b) does not exclude other bad acts if they are necessary to tell the complete story.[60] For example, if the State charges a continuing offense that crosses state lines, it may disclose the uncharged out-of-state conduct to complete its timeline.[61] That does not apply here. The snitch's accusation does not complete the State's story—it refutes it. But only by implicating Petitioner in a far more serious crime likely to enflame jurors to convict anyway.[62]

Further, the res gestae label—even if it applied—does not save the conviction. Res gestae exempts bad acts evidence from WVRE 404(b) only.[63] The State still cannot charge one offense and then ask the jury to convict for a completely different one.[64] "When a defendant is charged with a crime in an indictment, but the State convicts the defendant of a charge not included in the indictment, then per se error has occurred, and the conviction cannot stand and must be reversed."[65] The response argument is unavailing to its position.

---

[57] Resp.'s Br. 17.
[58] A.R. 777.
[59] Resp.'s Br. 15.
[60] *See State v. Baker*, 230 W. Va. 407, 414, 738 S.E.2d 909, 916 (2013).
[61] *See, e.g., State v. Fred S. Jr.*, No. 12-1182, 2013 WL 6605199, at *1 (W. Va. Dec. 16, 2013).
[62] *See State v. McGinnis*, 193 W. Va. 147, 153, 455 S.E.2d 516, 522 (1994); *cf. Price v. Georgia*, 398 U.S. 323, 331, n. 10 (1970) ("There is a significant difference to an accused whether he is being tried" for intentional or unintentional homicide.).
[63] *See State v. Harris*, 230 W. Va. 717, 721, 742 S.E.2d 133, 137 (2013) (per curiam).
[64] *See State v. Thomas*, 157 W. Va. 640, 654, 203 S.E.2d 445, 455 (1974).
[65] Syl. Pt. 7, *State v. Corra*, 223 W. Va. 573, 678 S.E.2d 306 (2009).

3. Even if the State had a legitimate use, the court should have excluded the snitch as too incredible to satisfy WVRE 404(b).

Before admitting other bad acts evidence, the circuit court must itself believe the act more likely than not happened and that the defendant committed it.[66] Here, it is unlikely a court could make this finding for the snitch. Doing so would require it to overlook too much contradictory evidence—including surveillance video proving an alibi—and ignore what the snitch stood to gain by telling a story reminiscent of *The Wire*.[67]

The response brief argues that, in general, credibility determinations are for the jury.[68] This is correct—in general.[69] But not for uncharged bad acts. This Court has ruled that uncharged bad act evidence—even if the State has a proper purpose—is too likely to prejudice defendants unfairly without additional safeguards.[70] One such safeguard is that it is not enough that reasonable jurors could believe the testimony—the court itself must find by a preponderance of the evidence that the bad act actually happened, and the defendant committed it.[71] And on this record, where the murder accusation depends upon a single, deeply flawed witness, such a finding is unlikely.

First, virtually all the State's other evidence contradicted the snitch's accusation. The State's eyewitnesses testified they were with Petitioner all day when the murder allegedly happened.[72] The medical professionals noted no injection sites.[73] The autopsy concluded an accidental overdose due to drug inhalation killed the decedent.[74] Most significantly, the snitch claimed Petitioner separated himself from the co-defendant when she went to a gas station and that he circled back to murder someone he had spoken with

---

[66] *See* Syl. Pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).
[67] David Simon, *The Wire*, Season 2, Episode 3, "Hot Shots" (HBO) (originally aired June 15, 2003).
[68] Resp.'s Br. 18–19.
[69] *Cf.* Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).
[70] *See McGinnis*, 193 W. Va. at 158.
[71] *Id.*
[72] *See* A.R. 449; A.R. 490; A.R. 477–78.
[73] *See* A.R. 402.
[74] A.R. 951.

amicably[75] a few hours earlier.[76] Yet the surveillance video from the gas station shows Petitioner is present with the State's eyewitnesses.[77] To believe the snitch, one must disbelieve one's own eyes.

And second, the snitch had a significant interest in the case's outcome. He was arrested and federally charged for importing 177,000 (one hundred and seventy-seven thousand) pounds of methamphetamine into West Virginia.[78] He broached the subject of testifying against Petitioner in the context of plea negotiations.[79] It is a record fact that the snitch bargained for his testimony: he did not like his initial plea offer, refused to testify, and the State believed it would have to try Petitioner without it.[80] It is a record fact that a week before trial, the snitch decided a new plea was satisfactory and he would testify after all.[81] When the State asked, the snitch said he testified to do the right thing.[82] But what's right shouldn't depend on what the snitch could get.

For importing 177,000 (one hundred and seventy-seven thousand) pounds of methamphetamine into West Virginia, the snitch pled guilty to "possession and/or distribution of methamphetamine of more than 50 grams."[83] And after he testified against Petitioner, he received a significant downward departure from the United States Sentencing Commission Guidelines.[84] By statute, the snitch's mandatory minimum should have been ten years in prison, or twenty years if any of the 177,000 (one hundred and seventy-seven thousand) pounds of methamphetamine harmed any West Virginians.[85] But that is the

---

[75] A.R. 537–38.
[76] *See* A.R. 372–73.
[77] A.R. 953.
[78] A.R. 867.
[79] *See* A.R. 858; *see* A.R. 867.
[80] A.R. 867.
[81] A.R. 858; A.R. 867; *compare* A.R. 48–49 *with* A.R. 111.
[82] A.R. 373.
[83] A.R. 867; *see* 21 U.S.C.A. § 841.
[84] *See* 18 U.S.C. § 3553(e) (authorizing downward departures for assisting the government).
[85] 21 U.S.C. § 841.

minimum. The federal sentencing guidelines for methamphetamine top out at 45 kilograms.[86] For maxing out the guidelines eleven-fold, the snitch's starting point should have been 235 to 293 months in prison.[87] Instead, The Federal Bureau of Prisons estimates that the snitch will walk free on August 15, 2023.[88]

The response finds it distasteful that anyone would infer that the snitch lied.[89] But the issue is not whether the State made any promises, it's whether the snitch thought he might benefit from assisting the government. And as the record currently stands, Petitioner takes no position on whether prosecutors acted in good faith nor does he presume to know what they personally believed.[90] However, they may want to be more discerning in whom they place their faith.[91]

II. If the legislature intended convictions for both delivery and delivery causing death, it would have explicitly said so.

The response does not dispute that one cannot deliver drugs resulting in death without first delivering drugs.[92] Section 416, the delivery resulting in death statute, invokes simple delivery, Section 401, by name.[93] Thus, normally one could not be separately punished when both violations arise from the same conduct.[94]

---

[86] *See* U.S.S.G. § 2D.1.1(1).
[87] *Compare* U.S.S.G. § 2D.1.1(1) *with* U.S.S.G. Ch. 5 Pt. A (Sentencing Table). This assumes no criminal history. Depending on other aggravating circumstances, the snitch's starting point could have been as high as 360 months to life. *Id.*
[88] Federal Bureau of Prisons Database Search for COREY DAVONTA SMITH, https://www.bop.gov/inmateloc/, (click "Find by Number," Number "66858-060" click "Search").
[89] Resp.'s Br. 19–20.
[90] *See Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (Due process prohibits prosecutors from *deliberately* presenting testimony they *know* to be perjured).
[91] Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 Wake Forest L. Rev. 1375 (2014) ("Jailhouse snitch testimony is arguably the single most unreliable type of evidence currently used in criminal trials. Snitches are deeply unreliable witnesses. Many are con artists, congenital liars, and practiced fraudsters. As compensated witnesses, all snitches have deep conflicts of interest. What is worse, jailhouse snitch testimony as a class is not only the least credible type of evidence, but it is also among the most persuasive to jurors[.]").
[92] Resp.'s Br. 20–24.
[93] *See* W. Va. Code § 60A-4-416.
[94] Syl. Pt. 4, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992) (quoting *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932).

Instead, the response argues that "[t]he legislature could not have made its intent any clearer" that Sections 401 and 416 should stack.[95] Petitioner disagrees. When the legislature wants offenses to stack, it says so. For example, the legislature wrote into the sexual abuse by parent statute: "In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection[.]"[96] The delivery resulting in death statute contains no such language. The response's position that the legislature could not be clearer is simply mistaken.

The response also argues that because there was evidence of multiple drugs,[97] there was sufficient evidence to justify convictions for both the greater and the lesser.[98] It is mistaken. First, a premeditated murder with a syringe is not a drug delivery. The legislature's delivery definition controls, not the response's, and it requires a property transaction.[99] But more fundamentally, and as a matter of first impression, the response presumes the wrong unit of prosecution for delivery causing death.[100] The co-defendant sold both drugs—methamphetamine and fentanyl—as a single transaction.[101] Unlike simple delivery, the unit of prosecution for delivery resulting in death is each death, not each drug. Therefore, the greater offense subsumes all counts of simple delivery stemming from the same property transfer.

The Fifth Amendment to the United States Constitution prohibits multiple punishments for the same offense.[102] "The analysis of whether a criminal defendant may be separately convicted and punished for multiple violations of a single statutory provision turns

---

[95] Resp.'s Br. 22.
[96] W. Va. Code § 61-8D-5; *see also* Syl. Pt. 7, *State v. George W.H.*, 190 W. Va. 558, 439 S.E.2d 423 (1993).
[97] *See* Resp.'s Br. 1–2, n. 1.
[98] Resp.'s Br. 23–24.
[99] *See* W. Va. Code § 60A-1-101(h).
[100] *See* Resp.'s Br. 23–24.
[101] A.R. 468–69.
[102] U.S. Const. Amend. V; *see also* W. Va. Const. Art. III § 5.

upon the legislatively-intended unit of prosecution."[103] "The unit of prosecution of a statutory offense is generally a question of what the legislature intended to be the act or course of conduct prohibited by the statute for purposes of a single conviction and sentence."[104] Absent an explicit legislative statement, "the best indicator of legislative intent regarding the unit of prosecution is the gravamen or focus of the offense."[105]

The unit of prosecution is offense-specific, and there is only one unit for an offense.[106] And for Section 416, the obvious unit of prosecution is each death. The legislature had previously criminalized delivery,[107] so its chief concern in crafting the new statute was the risk of unintentional but foreseeable deaths.[108] And the statute accounts for the possibility of multiple drugs contributing to death.[109] That is especially important here where the co-defendant delivered two drugs in one transaction and the autopsy cannot say which was fatal.[110] Finally, avoiding unintentional deaths is the common thread uniting Sections 416(a) and 416(b).[111] Read together, the legislature wanted to prevent overdose deaths. That is the unit of prosecution, not the type of drug delivered.

Further, the response reading leads to anomalous results the legislature would not have intended.[112] Here, there was only one death, but it is not difficult to imagine a single delivery of a pure, single substance resulting in multiple fatalities—the snitch, after all, imported 177,000 (one hundred and seventy-seven thousand) pounds of a single drug to

---

[103] Syl. Pt. 4, *State v. Goins*, 231 W. Va. 617, 748 S.E.2d 813, 815 (2013).
[104] *State v. Dubuque*, 239 W. Va. 660, 665, 805 S.E.2d 421, 426 (2017) (quoting *Brown v. State*, 311 Md. 426, 535 A.2d 485, 489 (1988)).
[105] *Goins*, 231 W. Va. at 622 (quoting *Harris v. State*, 359 S.W.3d 625, 630 (Tex.Crim.App.2011)).
[106] *See State v. Dubuque*, 239 W. Va. 660, 667, 805 S.E.2d 421, 428 (2017) (rejecting State's argument that the unit of prosecution should shift depending on context).
[107] *See* W. Va. Code § 60A-4-401.
[108] *See State v. Norwood*, 242 W. Va. 149, 158, 832 S.E.2d 75, 84 (2019) (Section 416 is a recognition of the inherent threat to life posed by the illegal drug trade).
[109] *See* W. Va. Code § 60A-4-416.
[110] A.R. 950.
[111] *Cf. State v. Connor*, 244 W. Va. 594, 855 S.E.2d 902, 911 (2021) (purpose of Section 416 (b) is to save lives and avoid overdose deaths).
[112] *See State v. Dubuque*, 239 W. Va. 660, 667, 805 S.E.2d 421, 428 (2017) (rejecting State's interpretation as leading to absurd results).

West Virginia. If this Court endorses the response brief's position, then a bad actor like the State's snitch could import a bad batch of drugs, cause a mass homicide in a community, and only violate Section 416 once. This is not what the legislature had in mind when it sought to combat the rash of overdoses impacting West Virginians.

Therefore, as matters of first impression, the unit of prosecution for delivery resulting in death is each death, and Petitioner cannot be guilty of both simple delivery and delivery resulting in death. Petitioner asks that the Court resolve these issues—raised by the response—through a Rule 20 argument and signed opinion to provide needed guidance to the lower courts, the State, and defendants.

III. Bystanders are not conspirators. Without proof of a shared criminal intent and affirmative assistance, Petitioner is not responsible for the co-defendant's actions.

As charged, Petitioner was only guilty of anything by virtue of an agreement or concerted action with the co-defendant.[113] The problem is that during the crucial time that mattered—when the co-defendant exceeded the license Petitioner granted her to use his car—Petitioner was unconscious and unable to assist or assent to anything.[114]

The response does not specifically address whether Petitioner was unconscious during the relevant timeframe—from the time the co-defendant received permission to drive to Summersville (for cigarettes) and their arrival at the decedent's home, in the opposite direction from Summersville.[115] This is the pertinent time for Petitioner to make any sort of agreement or assist the co-defendant because this is when she decided to conduct the drug sale. But according to the co-defendant, Petitioner was unconscious from an overdose and could not give her permission to do anything.[116] After leaving for Summersville,

---

[113] *See* A.R. 776–77.
[114] A.R. 467; A.R. 493.
[115] Resp.'s Br. 24–27.
[116] *See* A.R. 467; A.R. 493.

the co-defendant does not report any conversation with Petitioner until after she has arrived at the decedent's home and after the decedent and his girlfriend have agreed to buy drugs.[117] Unable to marshal any evidence to contradict the State's own witness, the response instead tries to shift the focus to irrelevant time periods before and after Petitioner's overdose.[118] The Court should resist this strawman argument and the State's unreasonable reading of the record.

The response represents that the co-defendant "specifically testified that she discussed the pending drug exchange with Petitioner."[119] The record does not bear this out and Petitioner urges the Court to read the co-defendant's testimony carefully. The co-defendant said she had no recollection of anything they discussed.[120] She presumed she would have mentioned she needed to sell drugs to pay back her supplier and that she had tried—and *failed*—to arrange a sale to the decedent's girlfriend.[121] She did not discuss "the pending drug exchange" with Petitioner because there was no pending drug exchange.[122] She and the would-be buyers failed to have a meeting of the minds,[123] and the co-defendant's arrival caught the decedent and his girlfriend by surprise—they were not expecting company.[124] The response's reading of the record is not reasonable.

The response also argues that after the co-defendant arrived, she coaxed Petitioner inside and therefore he knew a drug transaction occurred.[125] Petitioner has never contended otherwise. Though good judgment may counsel against watching people buy and consume drugs (the State's witnesses said Petitioner did not even join them),[126] there is

---

[117] *See* A.R. 463–67; 493.
[118] *See* Resp.'s Br. 24–27.
[119] Resp.'s Br. 26.
[120] A.R. 455; A.R. 459; A.R. 483–84.
[121] A.R. 462; A.R. 484.
[122] A.R. 442–43; A.R. 537; A.R. 544.
[123] *Id.*
[124] *See* A.R. 465.
[125] Resp.'s Br. 26.
[126] A.R. 469; A.R. 596

no legal duty to absent oneself from the situation. Sitting out of the way while others break the law is not a basis for criminal liability under the concerted action principle.

Contrary to the response's position, concerted action requires concerted action.[127] Bystanders are not criminals.[128] And the record is clear that while Petitioner may have poor judgment, he did nothing to contribute to the delivery. He let his friend drive his car so they could do drugs.[129] When they finished, the friend announced she wanted to buy cigarettes in Summersville,[130] and Petitioner passed out.[131] Along the way, the friend grew afraid police would pull her over.[132] So she turned around and went the opposite direction she had told Petitioner. And when she passed the decedent's home she decided to drop in without invitation.[133] Petitioner was unable to assent to any of this.[134]

Upon this record, it is no wonder the State needed the snitch. And after his inflammatory testimony it is no wonder the jury convicted Petitioner anyway. It even convicted him of distributing heroin,[135] a drug that the evidence showed no one delivered.[136] This—and the remainder of the verdict—is indefensible.

CONCLUSION

This is a simple case that only appears complicated because of the untenable reasoning applied below. Premeditated murder and delivery proximately resulting in death are different offenses. One cannot deliver drugs resulting in death without first delivering drugs. And bystanders are not conspirators. Petitioner therefore requests that the Court reverse his conviction.

---

[127] Syl. Pt. 7, *State v. Foster*, 221 W. Va. 629, 656 S.E.2d 74 (2007).
[128] *See Fortner*, 182 W. Va. at 356.
[129] A.R. 439; A.R. 453–56.
[130] A.R. 463; A.R. 489.
[131] A.R. 493; A.R. 489–92; A.R. 493; A.R. 466–67.
[132] A.R. 433; 463; *see also* A.R. 493; A.R. 489–92; A.R. 493; A.R. 466–67.
[133] *See* A.R. 463; A.R. 489.
[134] A.R. 493; A.R. 489–92; A.R. 493; A.R. 466–67.
[135] *See* A.R. 938–41.
[136] *See* A.R. 468; A.R. 950.

Respectfully submitted,
Shaun Richard Duke,
By Counsel

Matthew Brummond
W. Va. State Bar No. 10878
Appellate Counsel
Public Defender Services
Appellate Advocacy Division
One Players Club Drive, Suite 301
Charleston, W. Va. 25311
Phone: 304-558-3905
Fax: 304-558-1098
Matt.D.Brummond@wv.gov

Counsel for Petitioner

CERTIFICATE OF SERVICE

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

Andrea Nease Proper
Assistant Attorney General
Office of the Attorney General
Appellate Division
8 Office of the Attorney General
1900 Kanawha Boulevard East
State Capitol
Building 6, Suite 406
Charleston, WV 25305

Counsel for the Respondent

by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 13th day of August, 2021.

Matthew Brummond
West Virginia State Bar #10878
Appellate Counsel
Public Defender Services
Appellate Advocacy Division
1 Players Club Drive, Suite 301
Charleston, WV 25311
304-558-3905
matt.d.brummond@wv.gov

Counsel for Defendant