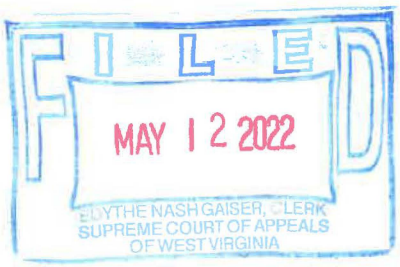

No. 21-0873

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA,
Plaintiff below,
Respondent,

vs.

MICAH A. McCLAIN,
Defendant below,
Petitioner.

On Certified Questions from the Circuit Court of Monongalia County, West Virginia
Case No. 21-F-76

PETITIONER'S BRIEF

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No. 21-0873

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On Certified Questions from the Circuit Court of Monongalia County, West Virginia
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PETITIONER'S BRIEF

The Petitioner Micah A. McClain ("Petitioner McClain") hereby submits this brief, accompanied by the appendix, as directed by this Court in its *Order* entered March 17, 2022, and pursuant to Rules 7, 10, and 17 of the West Virginia Rules of Appellate Procedure.

I. CERTIFIED QUESTIONS

The Circuit Court, in accordance with W.Va. Code § 58-5-2, granted *Defendant's Motion to Certify Question* and entered its *Amended Order of Certification* setting forth the following certified questions relating to West Virginia's hit-and-run statute:[1] JA 11-15.

[1] In *State v. Tennant*, 173 W.Va. 627, 319 S.E.2d 395 (1984), the Court explained that "West Virginia Code, 17C-4-1 and 3, and the "hit-and-run" statutes in a large number of other states, are modeled after § 10-104 of the Uniform Vehicle Code. *See* Traffic Laws Ann. § 10-104, at 80-92 (1972)."

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

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

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

4. If ambiguity does not exist, should the Court allow the word "crash," as used in West Virginia Code § 17C-4-1, to be given its common, ordinary and accepted meaning? Further, is it a question of fact as to whether or not the driver of any vehicle was involved in a "crash" as contemplated in West Virginia Code § 17C-4-1(a) & (d)?[2]

For the reasons set forth below, Petitioner McClain asserts that Certified Question Nos. 1 and 2, above, should be answered "Yes"; and Certified Question Nos. 3 and 4 are confusing and unnecessary and should be disregarded or reformulated; as drafted, both questions should be answered "No."

STATEMENT OF THE CASE

A. Statement of Facts

Just past noon, on September 5, 2019, Petitioner McClain was driving his employer's 2012 Peterbilt tractor, towing a lowboy trailer loaded with a bulldozer in the eastbound lane of

[2] The Appendix Record is designated as "JA" throughout Petitioner's Brief. The *Order of Certification* entered by the Circuit Court of Monongalia County, Division No. 3, in the related civil action, *Eddy, et al. v. Strike LLC, et al.*, Civil Action No. 20-C-50, where Petitioner McClain is named as a Defendant, is pending before this Court in No. 21-0981. The *Order of Certification* in No. 21-0981 recites *verbatim Certified Questions* No. 1 and 2 set forth herein. JA 562-572. This Court recently lifted the stay and has yet to make a decision whether to consolidate the instant case with No. 21-0981. At present, the undersigned counsel has been informed that the related civil action has been remanded from the United States Bankruptcy Court for the Northern District of West Virginia to the Circuit Court of Monongalia County, for further proceedings, including a hearing on a tentative settlement reached between the Strike Defendants and Plaintiffs, Eddy and Lippert.

County Route 7 (Mason Dixon Highway), a marked, two-lane, narrow, and curvy road near Core, West Virginia, in the western part of Monongalia County. At that time, he was employed as a truck driver for Strike, LLC ("Strike")[3], and was tasked "to transport a D6 Caterpillar Dozer weighing over 39,000 pounds, from its operation off of or near Jakes Run Road, in Core, West Virginia, to its operations off of or near Pedlar Run Road, also in Core, West Virginia." JA 120-129, 357. For this short haul equipment transport of a few miles, Strike provided an escort vehicle, a Ford F250 pickup truck with lights and an "oversized load" banner, being driven by another one of its employees, a distance ahead of the tractor trailer rig. JA 130-134.

As Petitioner McClain was coming out of the first curve east of Statler's Country Store, his tractor trailer rig was being followed by two passenger vehicles. The first vehicle trailing behind was driven by Allison Lippert ("Lippert"), and the second was being driven by Stephanie Eddy ("Eddy"). JA 354. Then, at approximately 12:16 p.m., a 2018 Peterbilt triaxle dump truck, owned by Anderson Excavating, LLC ("Anderson")[4], and being driven by its employee Nicholas Ali ("Ali"), carrying 47,937 pounds of 300-degree asphalt on its way to a paving project, was first encountered, approaching in the westbound lane of Route 7, by Addey Bennett ("Bennett"), who was driving the escort vehicle ahead of Petitioner McClain's tractor trailer rig. JA 16, 362. Bennett immediately radioed Petitioner McClain to warn him of the fast-approaching, oncoming triaxle dump truck. JA 16.

Within a short period of time after passing the escort vehicle and Bennett's urgent radio report of the oncoming triaxle dump truck, the left front tire of the triaxle dump truck struck the

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[3] At the time of the incident, Strike, LLC, was one of largest oil and gas pipeline construction companies in the United States, employing significant numbers of employees across the country. Strike, LLC's principal place of business was Texas. Petitioner McClain was employed to work on the construction of a large pipeline operation then being built in Monongalia County, West Virginia. JA 350, 356.

[4] Anderson Excavating, LLC, is a West Virginia registered business. JA 351.

edge of the blade of the bulldozer being transported by Petitioner McClain. JA 17, 25. The dump truck then careened out of control, crossed the centerline of the roadway, and sideswiped the driver's side of the Lippert vehicle. JA 25, 354-363. It proceeded on and eventually rolled over on its passenger side, landing on the Eddy vehicle and dumping its load of asphalt, thereby crushing it and entrapping Eddy. JA 25, 44-45, 354-363, 380-381. In the *Second Amended Complaint* filed in the related civil action, it was asserted that, "As Defendant Ali approached the location where the D6 Dozer's blade struck his dump truck (a commercial motor vehicle), Defendant Ali was carrying on a text message conversation and/or otherwise engaging in distracted driving." JA 362, 380-381. Because of the physical contact with the triaxle dump truck, Lippert sustained minor physical injuries and was treated at and released from the scene by local EMTs; and Eddy succumbed to her injuries before she could be extracted from her vehicle. JA 25, 356.

Notably, neither the Lippert nor the Eddy vehicles made any physical contact with Petitioner McClain's tractor trailer rig or the D6 bulldozer it was transporting. JA 25. Nor was there any physical contact made between the triaxle dump truck driven by Ali and Petitioner McClain's tractor trailer rig. JA 28. It is undisputed that the only physical contact between the triaxle dump truck driven by Ali and Petitioner McClain's tractor trailer rig was the contact between the left front tire of the dump truck and the edge of the bulldozer blade extending laterally from the lowboy trailer carrying the bulldozer. JA 229. There was no reported or identified damage to Petitioner McClain's tractor trailer rig or the D6 bulldozer it was transporting resulting from physical contact with the triaxle dump truck's front left tire. JA 120-129.

Because there was no place to safely or lawfully stop, park along, or pull the tractor trailer rig off of the roadway, both Bennett and Petitioner McClain continued for a short distance to the Pedlar Run delivery destination initially planned for the short haul transport of the D6 bulldozer. JA 16, 17-18, 91-100, 111-113, 227-235. Due to the rural and remote location, there was limited radio communication between them and no cellular telephone coverage available. JA 16, 17-18. After parking the escort vehicle and tractor trailer rig at the location where additional Strike personnel were present, including employees engaged in flagging operations who could secure the tractor trailer, Petitioner McClain and Bennett and other personnel working for Strike returned to the scene and waited to speak with the investigating police officer, Deputy Jason D. Morgan ("Deputy Morgan"). He was coordinating multiple first responder and emergency rescue extraction and life-saving measures that were being performed in an attempt to save Eddy's life.[5] JA 16, 17-18, 67-70, 91-100.

Bennett's written statement given to Deputy Morgan at the scene recounted her observations of the triaxle dump truck as it passed her escort vehicle immediately before its tire made contact with the bulldozer blade:

> [E]scorting lowboy to access 10 on Peddler [sic] run [sic] road [sic]. On Hwy 7 coming through curves in the narrow road dump truck hugging the inside line spooked me. I had to swerve over to avoid him. Immediately radioed Micah [Petitioner] saying "18 18" you have an 18 coming watch him. Then I didn't get a response except static over the CB. Kept calling over the radio to try and get someone to answer to call our safety or our boss. I didn't know what to do. I was almost to Peddler [sic] before it came through

[5] Petitioner McClain, Bennett, and the other Strike, LLC employees were forced to park away from the scene of the accident due to the presence of emergency vehicles and stopped traffic on the narrow, two-lane road. They proceeded to walk to the actual scene of the accident and sought out appropriate law enforcement personnel. JA 67-70.

> the CB about the wreck. All I knew to do was get ahold of my safety and found a safe place to pull off. Came back to the scene.
>
> /s/ Addey Layne Bennett
> 9-5-19, JA 16.

No further information was requested by Deputy Morgan from Bennett.

Similarly, Petitioner McClain also spoke to Deputy Morgan at the scene and provided him with his driver's license and information required by W.Va. Code § 17C-4-2, and the encounter was fully documented by the bodycam recorder being used by the officer. JA 65-70. Remarkably, the bodycam recording disclosed by the State in discovery reveals that the first action taken by Deputy Morgan, once he freed himself from directing the emergency response efforts and first encountered Petitioner McClain, was to radio 9-1-1 MECCA dispatch and communicate:

> Disregard that BOLO on that oversize load vehicle. They've returned to scene. They parked down the road here but they didn't flee. JA 67-70.

As shown on the bodycam video, the next action taken was to request Petitioner McClain to provide a written statement as to his recollection of the events. JA 17-18, 65-66, 67-70. Petitioner McClain's written statement given at the scene is as follows:

> [L]oaded dozer on right of way [sic] off of Jakes Run Road. Followed my esscort [sic] truck off of Jakes Run Rd out to Hwy 7 where we made a right. The drop off point was on Pedlar rd [sic] off of Hwy 7. As I'm driving down Hwy 7 headed E my esscort [sic] calls over the radio that an eighteen wheeler [triaxle] was headed my way, so I immediately dropped a gear and hugged the shoulder of my side of the road to prepare myself to meet the eighteen wheeler. When I saw the truck I could tell he was going way to [sic] fast around the curve so I hugged the shoulder even more with my foot on the brake steadily slowing down. As he passed me his driver side tire hit the dozer's blade causing him to lose control of his truck. I immediately called over the radio to my esscort [sic] that someone just clipped me and wrecked. At that point my goal was to get somewhere where we could get someone

with a phone due to us having no cell phone signal. After finding our supervisor we came back to the accident as quickly as possible.

/s/ Micah McClain
9-5-19, JA 17-18.

Like with Bennett, no further information was requested by Deputy Morgan from Petitioner McClain concerning the physical contact between the triaxle dump truck's left front tire and the bulldozer blade. Neither McClain nor Bennett was placed in custody at that time. Hence, these facts and the following procedural history of this case and the related civil action clearly demonstrate the real-life significance of the ambiguity and uncertainty created when the operative language of W.Va. Code §§ 17C-4-1(a) and (d) was amended in 2010.

B. Procedural History

On December 9, 2019, more than three (3) months after the crash between the triaxle dump truck driven by Ali and the Lippert and Eddy vehicles resulting in Eddy's death, Deputy Morgan filed the *State of West Virginia Uniform Traffic Crash Report*. JA 24-55. The narrative contained in Deputy Morgan's report demonstrates clearly that Petitioner McClain's vehicle (Vehicle #1) made no physical contact with the Lippert vehicle (Vehicle #3) and the Eddy vehicle (Vehicle #4), and reads:

VEHICLE #2 WAS TRAVELING WEST ON MASON DIXON HIGHWAY OR COUNTY RT 7. VEHICLE #1, #3, AND #4 WERE ALL THREE TRAVELING EAST ON MASON DIXON HIGHWAY. VEHICLE #2, A TRI-AXEL [sic] DUMP/COAL TRUCK, WAS ENTERING A RIGHT HAND TURN VEHICLE #1, AN OVER SIZE LOAD HAULING A BULLDOZER, WAS ENTERING A LEFT HAND TURN. VEHICLE #2 AND VEHICLE #1 MADE CONTACT IN THE TURN CAUSING VEHICLE #2 TO GO UP ON ITS RIGHT SIDE WHEELS AND STRIKING VEHICLE #3 AND THEN FLIPPING OVER ON TOP OF VEHICLE #4. THE DRIVER OF VEHICLE #4 WAS KILLED IN THE CRASH.

Vehicle #2 was the triaxle dump truck driven by Ali. JA 25.

Thereafter, on February 18, 2020, the first complaint was filed in the related civil action in the Circuit Court of Monongalia County, West Virginia. JA 320. That Complaint, as well as the Second Amended Complaint, asserted in Count 2 that Strike, Bennett, and Petitioner McClain each violated "Erin's Law," W.Va. Code §§ 17C-4-1, *et seq.* JA 373-375. Discovery and exchange of documentation ensued in the related civil action, and it was then learned that Deputy Morgan had filed his crash report and concluded, in spite of the known, undisputed facts—presence of the escort vehicle traveling ahead of Petitioner McClain and that he had not fled the scene—that Petitioner McClain failed to yield the right-of-way, operated his vehicle in an unlawful manner, and was suspected of "Hit and Run, Failure to Stop After Accident." JA 30. Given the developments with regard to the investigation, because responsive pleadings and discovery were due to be filed and served in the related civil case, and after it was learned that members of Eddy's family and legal counsel representing her Estate were communicating with Deputy Morgan, Petitioner McClain's counsel transmitted correspondence dated May 8, 2020, to the Prosecuting Attorney of Monongalia County, West Virginia, inquiring as to the status of any pending investigation and notice of any charging decision. JA 56-59. Having received no response thereto, *Defendant Micah A. McClain's Motion to Stay Proceedings* was filed in the related civil action on May 28, 2020, in order to fully protect Petitioner McClain's constitutional rights due to the uncertainty presented as to whether he would ever be charged with a criminal offense. JA 19-23.

On October 15, 2020, after over a year and three Grand Jury terms, it was first learned that a criminal complaint had been filed by Deputy Morgan on June 16, 2020, against Petitioner McClain and that a felony arrest warrant against him had been issued. This critical information was transmitted by Deputy Morgan per instructions from the Prosecuting Attorney; however, no

criminal complaint or arrest warrant was provided as requested at that time. JA 75. On November 2, 2020, the Circuit Court held the hearing on the previously filed motion to stay; and, by *Order* entered December 8, 2020, all pleadings required from, and discovery directed to, Defendant McClain were stayed in the civil action until May 1, 2021. JA 60-61.

It was not until January 26, 2021, that Petitioner McClain was first provided the criminal complaint previously filed by Deputy Morgan and the arrest warrant issued by Magistrate Pocius on June 16, 2020, in Case No. 20-M31F-00244. JA 75-76. Importantly, Ali, the driver of the triaxle dump truck which careened out of control, crossed the centerline, striking first the Lippert vehicle, and, then, proceeding on into the curve, rolling over on top of the Eddy vehicle, crushing it, entrapping her, and thereby causing her death, was not charged with a violation of W.Va. Code § 17C-5-1, (negligent homicide), a misdemeanor, nor any other traffic offense. JA 76. Yet, Petitioner McClain was charged with felony fleeing under § 17C-4-1, even though he returned to the scene once he safely stopped and parked his tractor trailer rig and cooperated fully with the investigating officer on the day of the incident. JA 17-18, 67-70.

Shortly after receiving the criminal complaint and arrest warrant, arrangements were made for Petitioner McClain to voluntarily appear for his initial appearance before the Magistrate Court on February 8, 2021. JA 76. At that time, he was released on bond and requested a preliminary hearing in Magistrate Court and same was scheduled for February 18, 2021. Due to scheduling conflicts, a motion to continue the preliminary hearing was made, but it was not rescheduled before the January 2021 term of the Grand Jury convened belatedly on February 25, 2021. JA 76. The one-count *Indictment* was returned on February 26, 2021; and Petitioner McClain appeared for his arraignment on March 15, 2021, before the Circuit Court, over eighteen (18) months following the accident. JA 5, 76. Defendant McClain requested

discovery from the State at the arraignment, and the Circuit Court ordered that pretrial motions be filed on or before March 22, 2021, that a status conference be held on April 5, 2021, and that trial commence during the period April 13-16, 2021. JA 76-77. A number of pretrial motions were filed once discovery was obtained from the State; and those motions included challenges to the ambiguity and unconstitutional vagueness of § 17C-4-1 [2018]. JA 71, 135, 140, 217, 236. Following the continuance of the trial, on July 19, 2021, *Defendant's Motion to Certify Question* was filed. JA 3, 241-254. The Circuit Court heard argument on August 31, 2021, and entered its initial *Order of Certification* on October 18, 2021, and entered its *Amended Order of Certification* on October 26, 2021. JA 4, 6-10, 11-15.

In the related civil action, Strike and Bennett filed their *Motion for Judgment on the Pleadings, or, Alternatively, Motion to Certify Questions* on July 28, 2021, and *Defendant Micah A. McClain's Motion to Join Motion for Judgment on the Pleadings, or, Alternatively, Motion to Certify Questions Filed by Strike, LLC, and Addey L. Bennett* was filed on October 6, 2021. JA 459-465. The Circuit Court heard argument on November 2, 2021, and entered its *Order of Certification* on November 9, 2021 JA 562.

Both orders certifying questions contain the same *verbatim* two questions which are dispositive on the criminal charge and civil claim made against Petitioner McClain, and they are pending in this Court and awaiting ruling on Petitioner McClain's motion to consolidate filed in No. 21-0981.

C. Legislative History and Related Statute

This State's hit-and-run statute, W.Va. Code §§ 17C-4-1, *et seq.* [2018] is known as "Erin's Law." The enactment was amended in 2010 in response to the community outcry resulting from Erin Keener's untimely death in 2005. Ms. Keener was 21 years old and a Marion

County resident at the time of her death. She was killed after being "hit by a car in an alley-way next to a bar back in 2005." JA 224-225. The driver of the vehicle which struck and killed Ms. Keener did not stop or return to the scene and never has been conclusively identified. Local media reports at the time confirmed the events of this tragedy and expressed community sentiment for legislative action. The 2005 incident was a classic hit-and-run occurrence, obviously distinguishable from the instant case.

It is important to note that § 17C-4-1, as it existed from 1999 until being amended by the Legislature in 2010, read, in pertinent parts, as follows:

> (a) The driver of any vehicle **involved in an accident resulting in injury to or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible, but shall then forthwith return to and shall remain at the scene of the accident until he or she has complied with the requirements of section three of this article**: *Provided*, That the driver may leave the **scene of the accident** as may reasonably be necessary for the purpose of rendering assistance to an injured person as required by said section three. Every such stop shall be made without obstructing traffic more than is necessary. (Emphasis added.)
>
> (b) Any person violating the provision of subsection (a) of this section after being **involved in an accident resulting in the death of any person** is guilty of a felony and, upon conviction thereof, shall be punished by confinement in a correctional facility for not more than three years or fined not more than five thousand dollars, or both. (Emphasis added.)

Five years after Ms. Keener's death, House Bill 4534 was introduced by a number of Delegates, and it amended § 17C-4-1, [2010], renamed the enactment, substituted the word "crash" for the word "accident," required drivers involved in a crash to stop "as close to the scene as possible," and removed the time element on when the driver must return to the scene. The statute was again amended in 2018 and provides, in its current form, as follows:

> (a) **The driver of any vehicle involved in a crash resulting in the injury to or death of any person shall immediately stop the vehicle at the scene of the crash or as close to the scene as possible and return to and remain at the scene of the crash until he or she has complied with the requirements of § 17C-4-3 of this code**: *Provided,* That the driver may leave the scene of the crash as may reasonably be necessary for the purpose of rendering assistance to any person injured in the crash, as required by § 17C-4-3 of this code. (Emphasis added.)
>
> **********
>
> (d) Notwithstanding the provisions of § 17C-4-1(b) or § 17C-4-1(c) of this code, any **driver who is involved in a crash** that proximately causes the death of another person who intentionally violates § 17-C-4-1(a) of this code when he or she knows or has reason to believe that another person has suffered physical injury in said crash is guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned in a state correctional facility for not less than one year nor more than five years, or both fined and imprisoned: *Provided*, That any death underlying a prosecution under this subsection must occur within one year of the crash. (Emphasis added.)

The 2018 version of § 17C-4-1 is the one charged in the instant *Indictment*. JA 5.

In the 2010 amendment to § 17C-4-1, the Legislature made the following changes:

1. Substituted the word "crash" for the more general term "accident,"

2. Expressed that the driver "shall immediately stop the vehicle at the scene of the crash or as close to the scene as possible," and

3. Removed the time-limiting term "forthwith" in mandating when the driver must return to the scene.

First, these amendments individually and collectively create confusion, uncertainty, and indistinctiveness as to whether actual physical contact is required between a vehicle and any other person, thereby forming the basis of criminal liability. Next, the phrase "as close to the scene as possible" creates additional uncertainty and provides "no fair warning of the boundaries

of criminal conduct," thereby leaving the courts to impermissibly define criminal liability in all circumstances. Likewise, by removing the time element "forthwith" from the statute, reasonable minds will differ and disagree as to how fast a person must return to the scene to be in compliance with this statute. Notably, however, these concerns arise from a careful evaluation of West Virginia law as to the statutory vagueness and ambiguity doctrines imbued in this State's jurisprudence.[6]

Moreover, the West Virginia Legislature enacted W.Va. Code § 33-6-31 in 1967, mandating certain provisions and coverages for all automobile insurance policies issued in the State of West Virginia. In its most recent amendment in 2015, the Legislature continued to require proof that injury, death, and property damage caused by a "hit-and-run" motor vehicle must arise "out of physical contact of such motor vehicle." W.Va. Code § 33-6-31(e)(3) [2015]. In *State Farm Mut. Auto. Ins. Co. v. Norman,* 191 W.Va. 498, 446 S.E.2d 720 (1994), this Court stated '[t]he physical contact requirement is unquestionably an explicit part of West Virginia's uninsured motorist statute." The *Norman* Court further explained that "[t]his Court must remain cognizant of the fact that the insertion of a physical contact requirement in the uninsured motorist statue was a matter of legislative choice." *Id.* at 729. Thus, these two statutes relating to hit-and-run and insured vehicles and the physical contact requirement may be read in *pari materia*. *See Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984).

Although this Court expressed that absolute enforcement of the physical contact requirement in § 33-6-31 is contrary to public policy, it nonetheless held that a close and substantial physical nexus must exist between an unidentified hit-and-run vehicle and the insured vehicle for uninsured motorist coverage to be available. *See Hamric v. Doe*, 201 W.Va. 615, 499

[6] See *State v. Fuller*, and *State v. Davis, infra.*

S.E.2d 619 (1997), and *Dunn v. Doe*, 206 W.Va. 684, 527 S.E.2d 795 (1999). Regardless of the distinction that the insurance statute is remedial in nature and must be liberally construed, and a criminal statute, like §17C-4-1 [2018], being penal in nature, must be strictly construed against the State upon a showing of ambiguity, the factual point which should not be overlooked is that physical contact between the alleged hit-and-run vehicle (Petitioner McClain's tractor trailer rig) and the Eddy vehicle certainly did not occur here. In spite of the type of evidence which may be produced to satisfy the physical contact requirement of § 33-6-31(e)(3), the specific physical contact requirement continues to exist in the statutory language. Lastly, the Legislature has not, to date, defined "crash" in §§ 17C-1-1, *et seq.*, nor has it expressed in any legislative report, journal, or enactment that the phrases "involved in an accident" or "involved in a crash" are intended to be synonymous. These points are discussed in more detail, below.

II. STANDARD OF REVIEW

The standard of review applicable to this case and the certified questions before this Court were concisely articulated in *State v. Connor*, 244 W.Va. 594, 855 S.E.2d 902 (2021):

> This Court has established that "[t]he appellate standard of review of questions of law and certified by a circuit court is *de novo*." Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996). Similarly, "[t]he constitutionality of a statute is a question of law which this Court reviews *de novo*." Syl. Pt. 1, *State v. Rutherford*, 223 W.Va. 1, 672 S.E.2d 137 (2008)." *Accord*, Syl. Pt. 2, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). Still, we evaluate the certified questions with caution, keeping in mind the importance of judicial restraint because a statute is presumed to be constitutional.
>
> "When 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, *Willis v. O'Brien*, 151 W.Va. 628, 153 S.E.2d 178 (1967).

Syl. Pt. 3, *James*, 227 W.V. at 410, 710 S.E.2d at 101. In recognition of this standard, Petitioner McClain submits the following argument.

III. SUMMARY OF THE ARGUMENT

Petitioner McClain asserts that § 17C-4-1(a) [2018] is unconstitutionally vague and violates his due process rights protected by the Fifth and Fourteenth Amendments to the United States Constitution and Article III, Section 10 of the West Virginia Constitution. In addition, as written, the word "crash" as used in the phrase "involved in a crash" creates ambiguity in the interpretation of § 17C-4-1(a) under the facts and circumstances of the instant case and all other cases where direct physical contact between the hit-and-run vehicle and a person or vehicle is absent. Therefore, construing § 17C-4-1(a) and applying the rule of lenity, the statute should be strictly construed against the State and in favor of Petitioner McClain; the Court should hold that direct physical contact is required under the existing language of the statute to impose criminal liability upon the driver of a motor vehicle "involved in a crash" in this State; that the Certified Question Nos. 1 and 2 should be answered "Yes"; and that the case be remanded with instructions to dismiss the pending Indictment because there was no direct physical contact which occurred between Petitioner McClain's vehicle and the Eddy vehicle on September 5, 2019.

IV. ARGUMENT

1. **Erin's Law, as amended in 2010, is unconstitutionally vague because the Legislature's intent in modifying the language of § 17C-4-1, requiring "the driver of any vehicle involved in a crash" to "immediately stop the vehicle at the scene of the crash or as close to the scene as possible," and removing the time element as to when a driver must return to the scene, is uncertain and unclear; and the statute is ambiguous and fails to provide fair notice of what conduct is prohibited by statute and adequate standards for adjudication.**

At the outset, Petitioner McClain simply requests this Court to determine whether W.Va. Code § 17C-4-1(a) [2018] is unconstitutionally vague. The Court, in *State v. Connor*, *supra,* performed the void for vagueness analysis under a separate criminal statute. In doing so, the Court correctly stated that all claims of constitutional vagueness in criminal statutes are grounded in the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and West Virginia Constitution Article III, Section 10. Previously, in *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974), this Court instructed that:

> "[a] criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication."

Id. at Syl. Pt. 1, *State v. Flinn.* Equally applicable here is the holding established in Syl. Pt. 1, *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (1970), and reaffirmed in Syl. Pt. 2, *State v. Blair*, 190 W.Va. 425, 438 S.E.2d 605 (1993), that:

> "[t]here is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions. The basic requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language."

In other words, "[t]he void for vagueness doctrine is an aspect of the due process requirement that statutes set forth impermissible conduct with sufficient clarity that a person of ordinary intelligence knows what conduct is prohibited and the penalty if he transgresses these limitations." *State ex rel. Appleby v. Recht*, 213 W.Va. 503, 518, 583 S.E.2d 800, 815 (2002). The notice mandate supporting the doctrine is grounded in "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State

may impose." *State v. Miller*, 197 W.Va. 588, 599, 476 S.E.2d 535, 546 (1996) (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589, 1598, 134 L.Ed.2d 809, 826 (1996) (footnote omitted).

Minimal fair notice requires motorists to be informed, by definition or other descriptive language, that the phrase "involved in a crash" as utilized in § 17C-4-1(a) means that the hit-and-run vehicle must have direct or indirect physical contact with another person or vehicle to be within the scope of criminal liability. The Legislature did not describe or define the criminal offense in this way; and there simply is no other means by which a person of ordinary intelligence, like Petitioner McClain, could know with any certainty when he has violated this criminal statute where, as here, his vehicle is separated from the person who was injured or killed by time, distance, and intervening collisions among other vehicles. Likewise, the Legislature did not set the boundaries, in place or time, as to where a motorist must stop[7] "as close to the scene as possible," given the distinctions between passenger and large commercial vehicles, narrowness, type, size, and width of the roadways, and available parking[8] and, also, within what time period the motorist who is involved in a crash must return to the scene. Given these significant deficiencies, the constitutional due process right of fair notice is violated facially and as applied when this statute is considered in its totality. The issues presented concerning the lack of boundaries in place or time as to where a motorist must stop are especially problematic when the statute's practical application is analyzed through the prism of prosecutorial discretion and the potentially high cost of a felony indictment to any motorist, but especially a commercial

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[7] The Legislature did define certain relevant terms, such as: "motor vehicle" – § 17C-1-3; "truck" - § 17C-1-12; "semitrailer" - § 17C-1-16; "driver" § 17C-1-31; "laned roadway"- § 17C-1-39; "traffic" – § 17C-1-50; "stop" – §§ 17C-1-50 and 53; and "parking area" - § 17C-1-60.

[8] Importantly, West Virginia Code § 17C-13-3(18) [2000] prohibits any person from stopping or parking a vehicle "at any place on a highway where the safety and convenience of the traveling public is thereby endangered," and at other locations relevant to this case.

driver. Simply stated, the statute lacks sufficient guideposts by which a driver can conform his or her conduct to avoid felony prosecution.

2. Section 17C-4-1 is ambiguous because its language is susceptible to two or more doubtful constructions, which reasonable minds could understand to be double or indistinctive in meaning and subject to uncertainty, dueling interpretations, and disagreement.

The review of a criminal statute is a fundamental judicial process which requires adherence to a defined set of principles. These principles have been repeatedly articulated by this Court in its decisions. First among them is deciding the meaning of a statutory provision and whether the language and text of the statute answers the interpretive question. *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995); and *Syllabus Point 2, Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970). In doing so, "[i]f the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Id.*, *see also State v. Fuller*, 239 W.Va. 203, 800 S.E.2d 241 (2017). In *State v. Woodrum*, 243 W.Va. 503, 845 S.E.2d 278 (2020), the Court reminded that the primary object in reviewing a statute is to give effect to the intent of the Legislature. In determining the Legislature's intent,

> [a] statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statue to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Dale v. Painter, 234 W.Va. 343, 350, 765 S.E.2d 232, 239 (2014), (*citing* Syl. pt. 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908)).

Like here, in the absence of any explicit expression of Legislative intent, "one method for determining legislative intent is to compare the ambiguous statute to other portions of the West Virginia Code." *Dale*, 765 S.E. 2d at 239, (*citing Community Antenna Service, Inc. v. Charter Communications VI, LLC*, 227 W.Va. 595, 712 S.E.2d 504 (2011)). Accordingly, statutes which relate to the same subject matter, persons or class of persons, things, and statutes which have a common person should be read and applied together, in *para materia*, so that the Legislature's intention can be ascertained from the enactments. *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975); *Community Antenna Service, Inc.* at 712 S.E.2d 504; and *Dale*, 765 S.E. 2d at 239. Importantly, the Court also instructed "[i]t is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but it must be drawn from the context in which it is read." *State v. Louk*, 237 W.Va. 200, 204, 786 S.E.2d 219, 223 (2016).

Furthermore, this Court has held that "[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it 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." *Fuller,* 800 S.E.2d at 245 (*citing Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998)). In *Fuller*, this Court succinctly stated "[a] statute is ambiguous when the statute's language connotes doubtfulness, doubleness of meaning or indistinctness or uncertainty of an expression[.]" *Fuller,* 800 S.E.2d at 246 (*citing United Services Auto Ass'n v. Lucas*, 233 W.Va. 68, 73, 754 S.E.2d 754, 759 (2014)). *Fuller* further articulated that "[w]hen a statute's language is ambiguous, a court often must venture into extratextual territory in order to distill an appropriate construction. Absent explicatory legislative history for an ambiguous statute … this Court is obligated to consider the …

overarching design of the Statute." *Fuller*, 800 S.E.2d at 246, (*citing State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995)).

With these principles in mind, Petitioner McClain requests that this Court find that § 17C-4-1(a) is ambiguous. As noted above, the modification of the statute in 2010 with the substitution of the word "crash" for "accident" clearly limited the reach and narrowed the scope of criminal liability. *See Gaulden v. State of Florida*, 195 So.3d 1123 (Fla. 2016). In reviewing its hit-and-run statute modeled like West Virginia's, the Florida Supreme Court, in *Gaulden*, acknowledged that Florida's Legislature decided "to narrow the statute by replacing *accident* with *crash* in section 316.027." *Gaulden*, 195 So.3d at 1128. The Court in *Gaulden* went on to conclude that:

> To the degree that this alteration of the statute creates ambiguity as to the statute's applicability, this Court is required under the rule of lenity to construe it in favor of the accused. Accordingly, we hold that the operative phrase "any vehicle involved in a crash" means that a vehicle must collide with another vehicle, person, or object.

Gaulden, 195 So.3d at 1128. Moreover, the Legislature did not define the word "crash" anywhere in § 17C-4-1 or in the entirety of the West Virginia Code. Nor did it explicitly state that the words "crash" and "accident" were synonymous. At least one other State has done so to eliminate uncertainty, doubtfulness, doubleness of meaning, and the susceptibility of multiple constructions and disagreement in the interpretation and application of its hit-and-run statute. *See State v. Bridges*, 232 N.C.App. 184, 754 S.E.2d 260 (2014), (holding that physical contact was not required because of the statutory definition of "crash" in N.C. Gen.Stat. § 20-4.01(4b), which states unequivocally that "crash" is defined as "[a]ny event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load. These terms collision, accident, and crash and their cognates are synonymous.")

Had West Virginia's Legislature simply expressed its intent in substituting the operative words and defined "crash" in a manner consistent with the way North Carolina did in its hit-and-run statute, there would be little room for § 17C-4-1(a) to be reasonably susceptible to two or more constructions or disagreement as to its meaning. Given the absence of any expression of legislative intent, legislatively created definition, judicial definition, or definition in Black's Law Dictionary as to the word "crash," reasonable minds are left to doubt and uncertainty as to its meaning, interpretation, and application in relation to § 17C-4-1(a). Lastly, when reading the Legislature's physical contact requirement set forth in its uninsured motorist hit-and-run provision, § 33-6-31(e)(3), in *pari materia* with § 17C-4-1(a), it is evident that physical contact between the hit-and-run vehicle and the insured vehicle must occur for there to be liability, civil or criminal. Therefore, Petitioner McClain urges this Court to conclude that that phrase "involved in a crash" is ambiguous and must be construed in accordance with this State's longstanding rules of statutory construction.

3. Being that the Legislature's intent, meaning, and purpose of the language used in its 2010 amendments of § 17C-4-1 are unclear, the rule of lenity must be applied in construing it to ensure that Petitioner McClain is not punished for his conduct where his vehicle made no physical contact with the Eddy vehicle, he stopped it at the closest safe place, and he returned to the scene where he waited for the investigating officer so he could provide information and documentation required by law.

The undisputed facts establish that Petitioner McClain did not make or have any physical contact with the Lippert and Eddy vehicles which trailed behind him as he proceeded in the eastbound lane of Route 7 on September 5, 2019. Upon encountering the triaxle dump driven by Ali oncoming in the westbound lane, Petitioner McClain took evasive action but was still unable to prevent Ali from making physical contact between the front left tire of his dump truck and the blade of the bulldozer. Clearly, Ali violated a number of West Virginia traffic safety statutes

(failure to maintain control, speeding, texting while driving, etc.) immediately prior to and at the time of making contact with Petitioner McClain's load. As a consequence and proximate result of Ali's acts and omissions, his large, commercial vehicle careened out of control, crossed the center line, and first struck the Lippert vehicle, traveling some distance behind Petitioner McClain.

The dump truck continued on, out of control, swerved, tipped over, and landed on the top of the Eddy vehicle traveling farther behind in the eastbound lane. There is no evidence produced, thus far, to prove or tend to prove that Petitioner McClain knew that Ali's triaxle dump truck had made contact with the Eddy vehicle. Aware that physical contact had been made with Ali's dump truck, Petitioner McClain slowed his tractor trailer rig, looked for a safe location to stop and park, and attempted communication with Bennett, his escort driver. Finding no safe location to stop and park the tractor trailer rig (semitrailer) and bulldozer and recognizing that he had no cell phone reception, he proceeded the short distance to the Pedlar Run drop off location and parked his rig. He and Bennett and others then returned to the scene and waited to speak to Deputy Morgan, where he fully cooperated and provided all required information. At that time, Deputy Morgan called off the BOLO and declared that the driver had not fled the scene, thereby conclusively and logically resolving that this was not a hit-and-run scenario as contemplated by the Legislature and its enactment, § 17C-4-1(a).

However, instead of charging Petitioner McClain with making physical contact with Ali's triaxle dump truck, the State waited more than nine months to obtain an arrest warrant and another six months to seek an indictment against him for a violation of Erin's Law. Remarkably, Ali, the local driver, was never charged with any traffic law violation. For the reasons stated above, this Court, upon finding ambiguity exists with the interpretation of § 17C-4-1(a) in this

case, should utilize the rule of lenity and strictly construe this criminal statute against the State, in accordance with the holdings in *Fuller, supra,* and *State v. Davis*, 229 W.Va. 695, 735 S.E.2d 570 (2012).

In *State ex rel. Morgan v. Trent*, 195 W.Va. 257, 262, 465 S.E.2d 257, 262 (1995) the Court emphasized:

> It is generally recognized that in construing an ambiguous criminal statute, the rule of lenity applies which requires that penal statutes must be strictly construed against the State and in favor of the Defendant...The rational for the rule of lenity is to preclude expansive judicial interpretations [that] may create penalties for offenses that were not intended ... The rule of lenity serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.

See Davis, 735 S.E.2d at 574, (reaffirming the holding in *Trent.*) To ensure fair warning of the boundaries of criminal conduct is delineated under § 17C-4-1(a) and to preclude the Circuit Courts' expansive judicial interpretation of the word "crash," this Court should hold that a reasonable construction of the statute, under its existing language, "involved in a crash" requires physical contact between Petitioner McClain's vehicle and the Eddy vehicle to establish criminal culpability in this case. Accordingly, under the undisputed facts and circumstances presented in this case, establishing no such physical contact occurred between the two vehicles, there is no factual or legal basis for the prosecution of Petitioner McClain to continue. Therefore, Petitioner McClain respectfully requests that this Court answer Certified Question Nos. 1 and 2 in the affirmative and disregard or reformulate Certified Question Nos. 3 and 4 as there is no legal basis to expand "crash" to allow indirect physical contact to form the basis of criminal liability under the existing language of § 17C-4-1(a).

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In the *Order* entered March 17, 2022, this Court set this case for oral argument pursuant to Rule 20, West Virginia Rules of Appellate Procedure, during the September 2022 Term of Court. Petitioner McClain respectfully requests that said *Order* not be modified in this regard, and that his counsel be permitted to present such argument as intended and specified in the *Order*.

VI. CONCLUSION AND REQUEST FOR RELIEF

The first two certified questions presented are case dispositive and should be answered in the affirmative. In doing so, and upon the undisputed facts of the instant case, it is specifically requested that this Court make instructions directed to the Circuit Court to enter, upon remand, an order dismissing with prejudice the *Indictment* pending against Petitioner McClain and to conduct further proceedings consistent with its opinion.

Respectfully submitted this 12th day of May, 2022.

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No. 21-0873

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA,
Plaintiff below,
Respondent,
vs.

MICAH A. McCLAIN,
Defendant below,
Petitioner.

CERTIFICATE OF SERVICE

I, J. Michael Benninger, counsel for Petitioner, hereby certify that on May 12, 2022, the foregoing *Petitioner's Brief* and a copy of the *Joint Appendix* were duly served upon counsel of record by depositing a true and exact copy thereof in the regular course of the United States Mail, First Class, postage prepaid, addressed as follows:

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