IN THE INDIANA SUPREME COURT
CAUSE NO. 21S-CR-427

JOHN LARKIN,	)	**Appeal from LaPorte Superior Ct 1**
Appellant/Defendant,	)	
	)	**Appellate Ct No.: 19A-CR-02705**
v.	)	**Trial Court No.: 46D01-1212-FA-610**
	)	
STATE OF INDIANA,	)	**The Honorable Roger Bradford,**
Appellee/Plaintiff.	)	**Special Judge.**

APPELLANT'S PETITION FOR REHEARING

Stacy R. Uliana
#20413-32
5 N. Baldwin Street
P.O. Box 744
Bargersville, IN 46106
(317) 422-1686
Fax (317) 732-1830
stacy@ulianalaw.com

Jack Kenney
#16766-49
5 N. Baldwin Street
P.O. Box 744
Bargersville, IN 46106
jkenney@pdc.in.gov

Attorneys for Appellant

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONS

SECONDARY SOURCES

TABLE OF CONTENTS

STATEMENT OF ISSUE

Whether Indiana's lesser included instruction test, as applied in this case, protects an Accused's constitutional rights.

PETITION FOR REHEARING

In Larkin v. State, No. 21S-CR-427 (Ind. Sept. 14, 2021), slip op. at 5, this Court noted that "the door swings both ways" when it comes to whether a party can obtain a lesser included offense in the middle of trial or even moments before closing argument. But the door should swing far wider when the defense is pushing on it rather than the State. When the State requests a lesser included instruction as a Plan B in a trial that is not going well, their door should, at some point, run up against a constitutional door stop.

Larkin's case involves where to place that constitutional door stop. For the first time, this Court held that under the Due Process Clause, a State-requested lesser included offense instruction can be based on an act different than that on which the charged offense is based. This Court also held, for the first time, that a defendant facing a vague charge that fails to specify any act can be on notice that he is defending against multiple acts. This Court should grant rehearing to consider and hear oral argument regarding whether Indiana's lesser included instruction test, as applied in Larkin, protects an Accused's constitutional rights.

I. Indiana's factually lesser-included test, as applied in Larkin, violates due process.

In Larkin, this Court acknowledged that the original voluntary manslaughter charge against Larkin was based on an allegation of shooting,

while the involuntary manslaughter conviction was likely based on the pushing.[1] Slip Op., p. 8. The court described this change of act a "wrinkle." Id. However, the change of act, in and of itself, violates due process.[2] A defendant's right to due process is violated if there is a possibility that he was tried and convicted for a crime other than that alleged in the indictment. Stirone v. United States, 361 U.S. 212, 219, 80 S. Ct. 270, 274 (1960) (citing Cole v. Arkansas, 333 U.S. 196, 201 68 S. Ct. 514 (1948)). Even if the charging information provided Larkin notice of a battery, i.e., a shooting, there is more than a possibility that he was convicted of a different battery, i.e., the pushing.[3]

The Larkin Opinion asserts that the change in act is constitutionally acceptable because both acts (the pushing and shooting) were committed by the same "means," a handgun, which was alleged in the charging information. Larkin, slip op., p. 6, 8. The problem with this logic is that crimes, and thus defenses to those crimes, are based on acts, not the means to commit the acts. "The Latin phrase 'actus reus' refers to the 'wrongful deed that comprises the

---

[1] The Court claims that the prosecutor argued the pushing in closing. Slip Op., p. 8. But the prosecutor also requested the lesser included instruction based on the pushing. Tr. Vol. 5, p. 233.

[2] It also undermines precedent that involuntary manslaughter is a factually lesser included offense. Emery v. State, 717 N.E.2d 111, 114 (Ind. 1999) (Boehm and Selby, JJ., concurring and suggesting that a factually lesser included offense cannot be based on a different act, even in "relatively close temporal proximity," to the charged act).

[3] See also State v. Cross, 387 P.3d 465, 466 (Ore. Ct. App. 2016) (where the lesser included offense instruction on third degree sexual abuse was based on a different sexual encounter than the charged offense of first degree sexual abuse, the conviction violated due process despite both encounters occurring during the charged time period).

physical components of a crime and that generally must be coupled with the *mens rea* [the criminal state of mind], to establish criminal liability.'" Hampton v. State, 961 N.E.2d 480, 487 (Ind. 2012) (citing Black's Law Dictionary 41-42 (9th ed. 2009)). One of the purposes of "clear notice" under both Due Process and Article I, Section 13 is to "allow[] an accused to prepare his defense." Wright v. State, 658 N.E.2d 563, 565 (Ind. 1995).

There can be many different crimes and acts committed with a weapon. A defense to pointing a firearm, battery with a firearm or threatening someone with a firearm would be different than shooting someone with the same firearm, even in the same confrontation.

Moreover, for decades, Indiana's lesser included offense test required more than just the "means" for committing the two offenses be the same: it required the "manner and means" to be the same. "An offense may be included if the charging instrument reveals that the manner and means used to commit the essential elements of the charged crime include all the elements of the lesser crime." See, e.g., Jones v. State, 519 N.E.2d 1233, 1234-35 (Ind. 1988); Roddy v. State, 182 Ind. App. 156, 170, 394 N.E.2d 1098, 1107 (1979); and Johnson v. State, 464 N.E.2d 1309, 1310 (Ind. 1984).

But in 1995, when the Indiana Supreme Court readdressed the issue of lesser included offenses in the seminal case, Wright v. State, the court omitted "manner" and only used the word "means." 658 N.E.2d 563, 566 (Ind. 1995) (quoting Lynch v. State, 571 N.E.2d 537, 538 (Ind. 1991)). The Court never explained why it omitted the word "manner" or if it did so intentionally.

Although Lynch also omits the word "manner," the case to which the Court in Lynch cites, Jones v. State, 438 N.E.2d 972 (Ind. 1983), includes the word "manner."

The language "manner and means" can be traced back to at least Madison v. State, 234 Ind. 517, 535, 130 N.E.2d 35 (1955), in which the Indiana Supreme Court held that a charging information must provide notice of both the "manner and means a crime is committed." Id. at 43. Specifically, the Court held that under Article I, Section 13 of the Indiana Constitution, "in an indictment for murder, a statement of the manner of the death and the means by which it was effected, is indispensable." Id.

This Court should grant rehearing to consider whether due process requires the State to provide a defendant with notice of both the manner and means that a crime was committed, or just the means. This is especially vital in a case like Larkin's, where the crime for which he was charged for almost seven years was committed in a different manner than that for which he was convicted. In Wright, this Court explained the importance of clear guidance on lesser included instructions. "What we say will determine both how prosecutors draft indictments and informations and what notice defendants in criminal cases will have of the charges brought against them. Due process will brook no confusion on the subject." Wright, 658 N.E.2d at 565. This Court should not affirm Larkin's conviction without considering whether Lynch and Wright inexplicably and unconstitutionally or at least unfairly expanded the lesser included offense test.

Further, this Court held Larkin had fair notice that he was facing a battery charge because he "himself alerted the State to a possible theory of the case." Slip op., p. 8. Larkin assumes the Court is referring to Larkin's interview in which he explained he pushed his wife with a gun. But the Court's holding is misplaced, as notice cannot come for any other place than the charging information. Ind. Const., Art. 1, Sec. 13 requires that the indictment or information sufficiently inform the accused of the nature of the charges against him so that he may anticipate the State's proof and prepare a defense in advance of trial. Flores v. State, 485 N.E.2d 890 (Ind. 1985). And Larkin should be able to rely on the State's charging information to know not only what he is charged with, but what he is not. Young v. State, 30 N.E.3d 719, 725 (Ind. 2015) ("If the State may wield factual omissions as a sword to preclude lesser offenses, an accused should be able to similarly rely on them as a shield 'to limit his defense to those matters with which he stands accused.'").

"No principle of procedural due process is more clearly established than that of notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514 (1948). It is not "any reproach to the law or administration of justice to compel the state to allege what it expects to prove, and then prove what it represents it will prove." Madison, 234 Ind. at 537, 130 N.E.2d at 44. Here, as this Court recognized, "the allegation in the information—killing with a handgun—invokes a shooting, not a pushing." Slip

op., p. 8. Allowing a conviction to stand where there is more than a possibility it was based on the pushing is unconstitutional.

II. Indiana's factually lesser- included test, as applied in Larkin, rewards the State for failing to allege the specific act upon which the charge is based in its information.

Vagueness should never be the basis for a lesser included offense, and that was the law in Indiana before Larkin.

> In Wadle v. State, this Court recently explained:
>
> Because our legislature has expanded the potential range of included offenses beyond their mere statutory elements, the prosecutor must draft her charging instrument with *sufficient precision* to give the defendant proper notice of those offenses. Otherwise, deficient pleading notice—*whether due to the omission of a statutory element or the omission of an operative fact*—may bar an instruction on an alleged included offense, let alone a conviction on that offense.

Wadle v. State, 151 N.E.3d 227, 251 (Ind. 2020) (emphasis added). Thus, the prosecutor, who controls the drafting of a charge, must include operative facts to obtain a lesser included instruction. "The State may only foreclose instruction on a lesser offense that is not inherently included in the crime charged by omitting from a charging instrument factual allegations sufficient to charge the lesser offense." Wright, 658 N.E.2d at 570.

But after Larkin, this Court has authorized the exact opposite. Here, the State obtained a lesser included instruction *because* the State did not use precision and omitted the specific operative fact, i.e., the "shooting." Because of the omitted battery, the Court construed the information as if it includes both a shooting and "an otherwise use of the handgun," even if the otherwise uses of the handgun could have never supported the voluntary manslaughter

in the first place. Slip Op., p. 6. Had the State alleged the shooting (which this Court recognized as the sole basis for the original charge), then other uses of the gun would not have been included in the charge. See, e.g., McGill v. State, 465 N.E.2d 211 (Ind. Ct. App. 1984) (where the State alleged certain acts as a substantial step towards an attempted rape, the trial court erroneously gave a lesser included instruction on an act that was not alleged). Thus, the State obtained a lesser included instruction through implication, where specificity would have precluded it.

This Court has long held that if the State wants to include involuntary manslaughter in a murder charge, the State must specify the operative fact, i.e., the battery. Champlain v. State, 681 N.E.2d 696, 702 (Ind. 1997). Killing with a gun can be a battery in cases where there is only one battery involved. But, where, as here, the killing with a gun could be accomplished in multiple ways, the State's failure to specify the manner the gun was used or the battery on which it is relying in the original charge leaves the defendant guessing. Where there is no specificity, there is reasonable doubt as to what offenses with which the defendant is charged. "Where an indictment or affidavit is uncertain or ambiguous, or where its language admits of more than one construction, all reasonable doubts are to be resolved in favor of the accused and it will be construed most strongly against the state." Bruce v. State, 230 Ind. 413, 417, 104 N.E.2d 129, 131 (1952); see also Garcia v. State, 433 N.E.2d 1207 (Ind. Ct. App. 1982).

In his dissent, Justice David explained, "We don't read words into statutes when interpreting them and I do not believe we should read them into charging information either." Slip op., Dissent, p. 1. Indiana Courts have been expressing the same sentiment in different ways as far as 1893.[4] The Larkin Opinion is rolling the clock backwards on a long-held constitutional right to know the charges in order to prepare a defense and to require the State to use vagueness as a tool to foreclose a lesser included instruction rather than obtain one.

As this Court noted, "[t]he necessary physical contact occurs when the defendant shoots the victim, *id.*, or otherwise uses the handgun to cause a rude, insolent, or angry touching." Slip Op., p. 6. But the State never alleged either a shooting or another use of a handgun. Because of that, Larkin was expected to be prepared to defend against all acts that could result in killing with the handgun.

This Court should grant rehearing to address whether it is ever constitutional for the State to include other acts and lesser included offenses

---

[4] McNamare v. State, 203 Ind. 596, 181 N. E. 512 (1932); Hunt v. State, 199 Ind. 550, 159 N. E. 149 (1927); Littell v. State, 133 Ind. 577, 33 N. E. 417 (1893); see also Belcher v. State, 162 Ind. App. 411, 413, 319 N.E.2d 658, 660 (1974) ("(a) an affidavit must charge in direct and unmistakable terms the offense with which the defendant is accused; (b) if there is a reasonable doubt as to what offense(s) are set forth in the affidavit, that doubt should be resolved in favor of the defendant; and (c) where the defendant is convicted of an offense not within the charge, the conviction may not stand for the reason the defendant is entitled to limit his defense to those matters with which he stands accused.").

through implication rather than specificity. "Consistency in this area of our law is imperative, for the very manner in which an information is drafted depends upon the case law." Jones, 438 N.E.2d at 975. Here, for the first time, prosecutors can obtain a lesser instructions by failing to specifically allege the battery. This is contrary to all other caselaw. Even in Lynch, the case relied upon by this Court, the battery for the voluntary manslaughter and involuntary manslaughter was the same and specifically alleged.

III. Under the circumstances of this case, Larkin was not prepared to defend against the involuntary manslaughter charge based on pushing.

Although Larkin knew the night before closing that the State intended to request a lesser included offense instruction on involuntary manslaughter, he had no idea what underlying crime, let alone act, the State would claim as the basis for the instruction until the State proffered the instruction five minutes before closing.

The involuntary manslaughter statute in effect in 2012 reads, in relevant part:

> A person who kills another human being while committing or attempting to commit:
> (1) a class C or D felony that inherently poses a risk of serious bodily injury;
> (2) a Class A misdemeanor that inherently poses a risk of serious bodily injury; or
> (3) battery.
> Commits involuntary manslaughter.

Ind. Code § 35-42-1-4.

Larkin could have speculated that the State was going to base the involuntary manslaughter instruction on a battery, i.e., the shooting or the

pushing. But just the day before, the trial court had rejected the State's request for a reckless homicide instruction based on those two acts. Tr. Vol. 5, pp. 42. In fact, after the court denied the request for a reckless homicide instruction, the State asked to file a "Count II to conform to the evidence." Tr. Vol. 2, p. 45. The trial court rightfully denied the State's request as "far too late." Id. Thus, it is reasonable that the court would also deny the request for an involuntary manslaughter under the same logic which it applied to the reckless homicide instruction. [5]

With its pushing and shooting arguments already rejected, it was also possible the State would creatively argue the underlying crime as a Class C or D felony that inherently poses a risk of serious bodily injury, such as pointing a firearm, confinement with a firearm, or some other offense that Larkin had not even contemplated. See, e.g., Blackburn v. State, 130 N.E.3d 1207, 1212 (Ind. Ct. App. 2019) (assuming without deciding that involuntary manslaughter based on pointing a firearm is a lesser included of murder). Under Larkin, counsel should have been prepared to defend against any one of those offenses or the batteries, despite his differing defenses to each, because they all involved use of a handgun.

[5] The arguments against the reckless homicide instruction applied equally or with greater force to the involuntary manslaughter instruction. Tr. Vol. 5, p. 39-42, 232-33. As to the involuntary manslaughter instruction, there was an additional argument that under Jones v. State, 966 N.E.2d 1256, 1258 (Ind. 2012), the State did not allege a battery in its charging information and therefore foreclosed an instruction.

Even though both parties can and often do obtain instructions on lesser included offenses after the close of evidence, it is generally not five minutes before closing. Nor is there generally a potpourri of acts and charges from which the State could choose stemming from a vague charge and a broad involuntary manslaughter statute. When the State is asking for an involuntary manslaughter lesser included instruction, the need for specificity in the original charge is heightened.

When the trial court granted the State's request to instruct the jury on involuntary manslaughter based on a pushing as the battery, the record shows counsel was not prepared. Tr. Vol. 5, p. 240 (counsel stating that she is "taken off guard."); Tr. Vol. 6, p. 62 (counsel later explaining how unprepared they were to address the battery in closing argument). If Larkin's counsel had fair notice that they would have to defend against the battery by pushing, they were ineffective. And if Larkin remains the law, there will be other counsel who find themselves in similar situations.

CONCLUSION

This Court never ordered an oral argument on transfer. Although discretionary, oral arguments can be valuable to answer legal and practical questions not addressed in briefs and to persuade in ways the briefing may not. Just in 2021, this Court has repeatedly referenced concessions or arguments made at oral argument as a factor in its decision-making process. See Ramirez v. State, __ N.E.3d __ , 2021 Ind. LEXIS 591, 2021 WL 4316079 (Ind. 2021); Culver Cmty. Teachers Ass'n v. Ind. Educ. Empl. Rels. Bd., __

N.E.3d __, 2021 Ind. LEXIS 571, *14, 2021 WL 4204818 (Ind. 2021) (noting concession); and State v. Timbs, 169 N.E.3d 361, 370 (Ind. 2021) (noting acknowledgment of the law).

The issue in this case is not easy. Out of eight appellate judges, their opinions are equally divided. More importantly, the issue involves the fundamental rights set forth in Due Process, the Sixth Amendment and Article I, Section 13 of the Indiana Constitution, and a line of precedent from this Court. See Madison v. State, 234 Ind. 517, 130 N.E.2d 35 (1955); Griffin v. State, 439 N.E.2d 160 (Ind. 1982), Wright v. State, 658 N.E.2d 563, 565 (Ind. 1995); Young v. State, 30 N.E.3d 719 (Ind. 2015); and Wadle v. State, 151 N.E.3d 227, 251 (Ind. 2020).

Due to the importance of clear notice and the issues raised by this Court's Opinion, Larkin respectfully requests rehearing and an oral argument. Larkin further requests this Court vacate its Opinion and either affirm the Court of Appeals or issue an Opinion reversing Larkin's conviction for involuntary manslaughter, and for all other relief just and proper in the premises.

Respectfully submitted,

__/s/ Stacy Uliana
Stacy R. Uliana #20413-32
stacy@ulianalaw.com

__/s/ John H. Kenney
John H. Kenney #16766-49
jkenney@pdc.in.gov

Attorneys for Appellant

VERIFICATION OF WORD COUNT

I verify that this Petition for Rehearing, including footnotes, contains no more than 4,200 words according to the word count function on the Microsoft word processing program used to prepare this Petition for Rehearing.

__/s/ Stacy Uliana
Stacy R. Uliana #20413-32
stacy@ulianalaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been delivered through E-service using the Indiana E-filing System to Justin Roebel, Deputy Attorney General of Indiana this 14th day of October, 2021.

__/s/ Stacy Uliana
Stacy R. Uliana #20413-32
stacy@ulianalaw.com