In the
Indiana Supreme Court

De'Andrae Shawn Terrell Brannon,
Appellant,

v.

State of Indiana,
Appellee.

Supreme Court Case No.
26S-CR-38

Court of Appeals Case No.
24A-CR-3080

Trial Court Case No.
79D02-2307-F2-49

Published Order

By order dated February 3, 2026, the Court granted a petition seeking transfer of jurisdiction from the Court of Appeals. After further review, including consideration of the points presented by counsel at oral argument and discussion among the Justices in conference after the oral argument, the Court has determined that it should not assume jurisdiction over this appeal and that the Court of Appeals decision reported as *Brannon v. State*, No. 24A-CR-3080 (Ind. Ct. App. Nov. 4, 2025) (mem.), should be reinstated as Court of Appeals precedent.

Accordingly, the order granting transfer is VACATED and transfer is hereby DENIED. Pursuant to Appellate Rule 58(B), this appeal is at an end.

Done at Indianapolis, Indiana, on 5/27/2026.

FOR THE COURT

Loretta H. Rush
Chief Justice of Indiana

Massa, Slaughter, and Goff, JJ., concur.
Rush, C.J., dissents from the denial of transfer with separate opinion in which Molter, J., joins.

Rush, C.J., dissenting.

Over time, our criminal statutes have expanded with myriad enhancements that elevate the penalty level of offenses and add serious prison time. The battery statute, for example, contains eight subsections defining enhancing circumstances that can elevate the offense from a Class B misdemeanor, punishable by up to 180 days in prison, all the way to a Level 2 felony, punishable by up to thirty years in prison. Ind. Code §§ 35-42-2-1(c)–(k), 35-50-2-4.5, 35-50-3-3. Given the severe penal consequences of such enhancements and the broad discretion they afford prosecutors to escalate criminal charges, courts must strictly hold the State to its burden of proving them. In this case, the State failed to prove the defendant conspired to deliver at least ten grams of cocaine in a single delivery, as required to support his conviction for Level 2 felony conspiracy to deal cocaine. We should grant transfer to clarify the State's burden when charging a conspiracy to deal cocaine as an elevated offense and to hold the State to that burden. Ind. Appellate Rule 57(H)(4), (6).

In 2023, De'Andrae Brannon and his girlfriend, Theresa Holcomb, were working together on cooking cocaine into crack, breaking it up, bagging it, and selling it. Police in Lafayette set up two controlled buys from Brannon eight days apart that netted 0.58 and 0.96 grams of the drug, respectively. They then arrested Brannon, but even from jail he continued to direct Holcomb to cook, break up, bag, and sell crack. So, police conducted a controlled buy from Holcomb, netting 0.43 grams. The next day, on a phone call from jail, Brannon told Holcomb about "fourteen [grams]" stashed "at the house" that needed to be "converted over." Police then conducted a second controlled buy from Holcomb, netting 1.13 grams. Three days later, Brannon instructed Holcomb to obtain "fourteen [grams] hard," *i.e.*, crack, from a supplier and to "do it one more time." At that point, police arrested Holcomb and searched an apartment where they found 13.43 grams of crack inside a safe.

Brannon was ultimately convicted of Level 2 felony conspiracy to deal at least ten grams of cocaine, among other offenses. On appeal, he argued that there was insufficient evidence to prove the charge because the evidence showed only an agreement "to deliver very small amounts of

cocaine," not ten grams or more in any single delivery. But the Court of Appeals disagreed and affirmed Brannon's conviction, finding sufficient evidence that he and Holcomb conspired to sell the 13.43 grams of crack that police found in the safe. *Brannon v. State*, No. 24A-CR-3080, at *10–11 (Ind. Ct. App. Nov. 4, 2025) (mem.). Though we initially granted transfer and held oral argument, my colleagues have ultimately decided to rescind transfer. I disagree with that decision because the Court of Appeals misconstrued how the enhancing circumstance—the amount of cocaine involved—relates to the base offense of conspiracy to deal cocaine. App. R. 57(H)(6). And we are passing up an important opportunity to provide lower courts clarity and guidance on what the State must prove to sustain elevated dealing conspiracy charges like the offense alleged here. App. R. 57(H)(4).

A person who knowingly or intentionally delivers cocaine or a narcotic drug commits dealing in cocaine or a narcotic drug as a Level 5 felony. I.C. § 35-48-4-1(a)(1)(C).[1] But the offense may be elevated depending on the amount of the drug involved and becomes a Level 2 felony if that amount is at least ten grams. *Id.* § -1(e)(1). Additionally, if the drug is heroin or a fentanyl-containing substance, several provisions allow the amount required for the Level 2 felony to be aggregated over a period of up to ninety days. *Id.* § -1(e)(3)–(6). Thus, the State may combine multiple deliveries of those drugs to satisfy the ten-gram threshold. But no comparable aggregation provision exists for cocaine.

For this reason, the State appropriately conceded during oral argument that separate cocaine deliveries cannot be aggregated to reach the ten-gram threshold. *See Simmons v. State*, 828 N.E.2d 449, 455 (Ind. Ct. App. 2005) (explaining that the State may not "link several independent buys" to enhance a cocaine-dealing charge). Thus, to prove the Level 2 felony conspiracy to deliver at least ten grams of cocaine charged here, the State had to prove beyond a reasonable doubt that Brannon, acting with intent

[1] Aside from delivering the cocaine, other acts, including manufacturing and possessing with intent to deliver, may also constitute dealing offenses. I.C. § 35-48-4-1(a)(1)(A), (2)(C). But the State has argued only that Brannon conspired to deliver cocaine.

to deliver at least ten grams of cocaine in a single delivery, agreed with Holcomb to do so, and that one of them performed an overt act in furtherance of that agreement. *See* I.C. §§ 35-41-5-2(a)–(b), 35-48-4-1(a)(1)(C), (e)(1).

Yet the State failed to produce any evidence showing that Brannon intended or agreed with Holcomb to deliver at least ten grams of cocaine to any buyer in a single delivery. The evidence shows only that they regularly broke crack cocaine into smaller quantities for individual sales. And neither the 13.43 grams they had stashed nor the "fourteen hard" they planned to obtain establishes that either of them intended or agreed to deliver at least ten grams at once. Thus, the evidence was insufficient to support Brannon's Level 2 felony conspiracy conviction. And by relying on the 13.43 grams without evidence that Brannon intended or agreed with Holcomb to sell it all in one transaction, the Court of Appeals failed to hold the State to the proper burden of proof.

Still, the State asserts that when it charges a conspiracy to deliver at least ten grams of cocaine, it may rely on the possibility that the conspirators, having agreed to deliver at least ten grams of cocaine in aggregate sales, might happen upon a buyer seeking that amount and sell it to them all at once. But the State's case cannot rest on "evidence which is uncertain or speculative or which raises merely a conjecture or possibility." *Vasquez v. State*, 741 N.E.2d 1214, 1216 (Ind. 2001) (quoting *Shutt v. State*, 117 N.E.2d 892, 894 (Ind. 1954)); *see also United States v. Dewberry*, 790 F.3d 1022, 1030 (10th Cir. 2015) (explaining that a defendant may be held accountable only for a drug quantity within the scope of the agreement and reasonably foreseeable). And the State produced no evidence that Brannon either intended or agreed with Holcomb to sell ten grams or more at once. Indeed, such a delivery would have deviated from their consistent practice of breaking up the crack into smaller quantities for individual sales. So, on this record, the State's hypothesis about what Brannon and Holcomb might have done is purely speculative and cannot support Brannon's conviction.

By denying transfer, the Court passes up an important opportunity to clarify what the State must prove when it charges a conspiracy to deal

cocaine as an elevated offense, to remind courts of the need for proof of intent and agreement to commit the specific offense alleged in any conspiracy case, and to hold the State to its burden of proof on the enhancement here. App. R. 57(H)(4), (6). For these reasons, I respectfully dissent from the denial of transfer.

Molter, J., joins.