

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Case #18-0654

FAYETTE COUNTY NOS. 18-F-19 and 18-F-20

STATE OF WEST VIRGINIA,
Plaintiff, Respondent,

Vs.

DEAN E. GAMBLE SR.
Defendant, Plaintiff.

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Pro-Se

SUPPLEMENTAL BRIEF ON APPEAL

RULES OF APPELLATE PROCEDURE

3(d)(2)

10(c)10(b)

Dean E. Gamble Sr.

Dean E. Gamble Sr.

Prepared by;
Dean E. Gamble Sr.
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TABLE OF CONTENTS

Page #

Table of Authorities.....ii

Assignments of Errors.....Below

- 1. Ineffective Assistance of Counsel/Deficient Performance.
- 2. Denied a Fair and Impartial Judge.
- 3. Improper Repeal of Statute in Part; as Suboxone with Naloxone does not Qualify.
- 4. Illegal sentence under West Virginia Code §60A-4-408 exceeding Statutory Mandates; Also constituting a Disproportionate Sentence.

West Virginia Codes §60A-4-408 and §61-11-18 are in contravention of the due process clauses of Article III, Section 10 of the *Constitution of West Virginia* or the Fourteenth Amendment to the *United States Constitution*.

- 5. Denied Alternative Sentence under an Abuse of Discretion.

Statement of Case.....Passim

Briefly, this case involves a conspiracy to commit a felony with full cooperation with law enforcement in its investigation of a Burglary committed by others. The Appellant became involved when his heroin dealer (CI) Ray came and sold appellant a half a gram of heroin and then observed stolen property that was to be sold. At that time Ray, the CI then contacted the authorities and informed them of the stolen property, its location and that it was for sale. Petitioner was convicted by plea to the conspiracy and distribution of two Suboxone Strips to this same person, a CI that was also a heroin dealer, each enhanced and served consecutive for a sentence of (5-25) five to twenty-five years in prison.

Summary Argument.....Passim

Summary argument is that defendant was denied a fair and impartial trial with the cooperated ineffective assistance of counsel whom induced a plea through incorrect legal advice and use of threats of life recidivist to an illegal sentence that exceeds statutory authority under §61-11-18. The Court, without jurisdiction to enhance two counts in a single trial making the sentence disproportionate to the character and degree of the offense of the chemical substance, Suboxone and illegal. Previously Scheduled as a Schedule V narcotic and wrongly scheduled as a schedule III narcotic because the opiate base in Buprenorphine is fully neutralized by the added ingredient, Naloxone. Placing Suboxone in another chemical category that does not have an operative opiate base because it has been neutralized.

Conclusion And Relief Sought.....19 to End

Appendix Volumes I + II

INDEX
Authorities relied upon

Page #

Cases;

<i>Barber v. Camden Clark Mem'l Hosp. Corp.</i> , 240 W.Va. 663, 670, 815 S.E. 2d 474, 481 (2018).....	5
<i>Carvey v West Virginia State Board of Education</i> , 206 W.Va. 720, 527 S.E. 2d. 831 (1999).....	6
<i>Ewing v Board of Educ. Of County of Summers</i> , 202 W.Va. 228, 241, 503 S.E 2d. 541, 554 (1998).....	5
<i>Farwell v Astrue</i> , 2009 US Dist LEXIS 68868,	10
<i>Grantv . Baltimore & O.R.R.</i> ,66 W.Va. 175, 66S. E. 709, 1909 W.Va .LEXIS 138 (W.Va.1909).....	13
<i>Haines v. Kerner</i> , <u>404 U.S. 519</u> , <u>30 L. Ed. 2d 652</u> , 92 S. Ct. 594 (1972).....	1, 8,11
<i>Justice v. Hedrick</i> , 177 W. Va. 53, 350 S.E.2d 565, 1986 W. Va. LEXIS 562 (W. Va. 1986);....	6
<i>Lester v Plumley No. 14-0548</i> , 2015 WL 1129037.....	3
<i>Lietz v Flemming</i> (1959, CA6 Mich) 264 F.2d 311, cert den (1959) 361 US 820, 4 L Ed 2d 66, 80 S Ct 66.....	11
<i>Mathena v. Haines</i> , <u>219 W. Va. 417</u> , <u>219 W. Va. 417</u> , <u>633 S.E.2d 771</u> (2006).....	8
<i>McClure v. Boles</i> , 233 F. Supp. 928, 1964 U.S. Dist. LEXIS 7427 (N.D. W. Va. 1964).....	13
<i>SEC v Morgan, Lewis & Bockius</i> (1953, CA3 Pa) 209 F.2d 44.....	9
<i>Securities & Exchange Com. v Morgan, Lewis & Bockius</i> (1953, DC Pa) 113 F Supp 85, affd (1953, CA3 Pa) 209 F.2d 44.....	9
<i>State ex rel. Daniel v. Legursky</i> , <u>195 W. Va. 314</u> , <u>465 S.E.2d 416</u> (1995).....	2
<i>State ex rel. Daye v. McBride</i> , 222 W. Va. 17, 658 S.E. 2d 547,.....	5, 6
2007 W. Va. LEXIS 61 (2007).....	4
<i>State ex rel. Gessler v. Mazzone</i> , 212 W. Va. 368, 572 S.E.2d 891 (2002).....	13
<i>State ex rel Graney v Sims</i> 144 W.Va. 72, 105 S.E. 2d. 886 (1958).....	4, 5
<i>State ex rel. Kitchen v. Painter</i> , 226 W. Va. 278, 700 S.E.2d 489 (2010).....	3

State ex rel. Ringer v. Boles, 151 W. Va. 864, 157 S.E.2d 554, 1967 W. Va. LEXIS 132 (W. Va. 1967);.....6

State ex rel. Morris v. Mohn, 165 W. Va. 145, 267 S.E.2d 443 (1980).....14

State ex. Rel. Boso v Warmuth 165 W.Va. 247 (1980).....7, 8

State ex rel. Vernatter v. Warden, W. Va. Penitentiary, 207 W. Va. 11, 17, 528 S.E.2d 207, 213 (1999).....2

State v Blair No. 12-0407, 2013 WL 1632547 (2013).....7

State v. Cooper, 172 W. Va. 266, 304 S.E.2d 851, 1983 W. Va. LEXIS 545 (W. Va. 1983).....6

State v Lewis 235 W.Va. 694 (2015).....7

State v. McMannis, 161 W. Va. 437, 242 S.E.2d 571 (1978).....7

State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).....2

State v. Myers, 229 W. Va. 238, 246, 728 S.E.2d 122, 130 (2012).....18

State v. Stover, 179 W. Va. 338, 368 S.E.2d 308, 1988 W. Va. LEXIS 40 (W. Va. 1988)....5, 6

State v. Thomas, 157 W. Va. 640, 203 S.E.2d 445 (1974).....3

State v. Tyler G., 236 W. Va. 152, 778 S.E.2d 601 (2015).....2

State v. Vance, 164 W. Va. 216, 262 S.E.2d 423 (1980).....13

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....2

Turner v. Haynes, 162 W. Va. 33, 245 S.E.2d 629, 1978 W. Va. LEXIS 307 (W. Va. 1978).....1

Turner v. Holland, 175 W. Va. 202, 332 S.E.2d 164, 1985 W. Va. LEXIS 490 (W. Va. 1985).....5, 7

UMWA by Trumka v. Kingdon, 174 W. Va. 330, 325 S.E.2d 120 (1984).....5

U.S. v. Greatwater, 285 F.3d 727 (8th Cir. 2002).....13

United States v 24 Cans Containing Butter (1945, CA5 Ala) 148 F.2d 365, reh den (1945) 326 US 808, 90 L Ed 493, 66 S Ct 166.....12

Virginia National Bank v Harris, 220 Va. 336, 257 S.E. 2d. 867, 870 (1979).....5

Wells v. State ex rel. Miller, 237 W. Va. 731, 752, 791 S.E.2d 361, 382 (2016).....4

Wanstreet v. Bordenkircher, 166 W. Va. 523, 276 S.E.2d 205,6
 1981 W. Va. LEXIS 581 (1981).....6
 Powell, 624 F. Supp. 2d 1228, (370 U.S. at 667).....16, 17

Statutes and Rules

§16-5T-6.....16
 Articles §46 and §47 as included under previous filing entitled “Matter of First Impression”
 §16-46-1. Purpose and findings.....12
 §16-46-7.....10
 §16-46-7.12
 §16-47-5 Immunity15
 §61-11-18.”.....Passim
 §61-11-19.....6
 §60A-2-211. Schedule V criteria.....10
 §60A-4-408.....Passim
 Model Penal Code §2.02.....8
 108 Repeal of repealing act.....8
 W. Va. R. Crim. P. 35(a).....4

Constitution

W.Va Const. Article III, Section 10 (due Process).....Passim
 Fourteenth Amendment to the *United States Constitution*.(Due Process).....Passim
 W. Va. Const. art. III, 5 (Due Process /Proportionality).....Passim
 Eighth Amendment of the United States Constitution.....Passim

Others as Exhibits at end; Appendix

Physicians Desk Reference for FDA description of Naloxone.....Exhibit A
 Scheduling of Naloxone..... B
 Newspaper Articles that relate to the issues..... C
 Rehabilitative article..... D

Mindful of the need to construe pro se litigants' pleadings liberally,
Haines v. Kerner, 404 U.S. 519, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972).

ARGUMENT

(Motions Hearing Errors)

I. Judicial bias/Ineffective Assistance of Counsel; Timely Motions and Objections

The very first instance of Judicial bias and usurp of authority is in the **final order** of the Circuit Court where Judge Hatcher finds that there were no errors to present upon appeal and that it would be unethical to appoint counsel to represent the defendant, relieving counsel of record from any further representation of the defendant. An attempt to prevent review of the case and with a direct lie to the Supreme Court when the Judge claimed to have sentenced the defendant to concurrent sentences. The Judge knew or should have known of the law in this regard below.

The obligation of a court-appointed attorney to his client is not discharged merely by his informing such client of his determination that an appeal is without merit and frivolous; it is the appellate court, not counsel, **after a full examination of all the proceedings**, which makes that determination. *Turner v. Haynes*, 162 W. Va. 33, 245 S.E.2d 629, 1978 W. Va. LEXIS 307 (W. Va. 1978).

The lower Court was under an ethical obligation to dismiss the charges when he granted the Motion to Suppress the evidence and defense counsel was required to move to dismiss the charges as any reasonably prudent attorney would have done (Pp. 40 Lns. 22-24). The lower Court indicated (at Pp. 41 lines 17-23) [Judicial bias] in this Hearing that the State would have another opportunity to retest the packages, to the defendants prejudice where no objection was made and is another point of ineffectiveness. Deficient performance is shown from the deliberate failure to move to dismiss the charges after a successful Suppression Motion on the testing methods to prove the contents of the packages to contain a controlled substance. Counsels comment to '**dismiss**', made on the record of the Motions Hearing Transcripts (page 34, lines 14-18) at the time of the Motions/Suppression Hearing is indicative of counsels true knowledge to do so after the ruling was made on the Motion, (Pp. 40 Lns. 22-24). This is evidence of being

deliberately denied a fair trial with effective assistance of counsel, also indicative of a trial in concert with the Judge and Defense Counsel. "A deficient performance {2009 U.S. Dist. LEXIS 27} is one in which counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment." Counsel did not defend the case.

"[w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." Syl. Pt. 7, *State v. Tyler G.*, 236 W. Va. 152, 778 S.E.2d 601 (2015)

Any reasonably prudent attorney would have objected to any second testing of evidence. This case doesn't have a large record for review and the points are clearly made and pointed to upon the record, and what is there, does meet the Strickland Test. How many errors are required to meet the Strickland test, and it has been suggested that two is not enough? But, petitioner Claims that one error can be sufficient if it is clearly wrong and affects the outcome of the proceedings.

In West Virginia, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (1) Counsel's performance was deficient under an **objective standard of reasonableness**; and (2) there is a **reasonable probability that**, but for counsel's unprofessional errors, the result of the proceedings would have been different. Syl. Pt. 5, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Further, an ineffective assistance of counsel claim may be disposed of for failure to meet either prong of the test. Syl. Pt. 5, in part, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995); see also *State ex rel. Vernatter v. Warden, W. Va. Penitentiary*, 207 W. Va. 11, 17, 528 S.E.2d 207, 213 (1999) (citation omitted) ("Failure to meet the burden of proof imposed by either part of the *Strickland/Miller* test is fatal to a habeas petitioner's claim.")

From the appellants perspective, and perception, defense counsel was acting in concert with the presiding Judge and not representing the defendants best interests but the interests of the Judge to convict, not defend. Counsel presented no available theory in defense¹ and failed to move this case to Drug Court after having understood the chemical composition of Suboxone

¹ Diminished capacity defense, immunity from prosecution defense under Article 47 or entrapment.

from his extensive research in his Motion to Suppress. Defense Counsel should have made objections at specific times² that counsel didn't and should have moved to dismiss the charges after winning the Motion to Suppress. The charges could or should have been dismissed, changing the outcome of the proceedings. Had counsel faithfully defended the case, appellant would not have been compelled to enter a plea, but because of counsels deficiency, appellant was at the mercy of the Court and scared not to, because of the past involvement³ with this Judge, appellant was at a disadvantage to proceed to trial with any possible defense of entrapment, or diminished capacity defense from voluntary intoxication of narcotics.

“In discussing claims of ineffective assistance of counsel, we have held that “[o]ne who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence.” Syllabus Point 22, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974).” Syl. Pt. 4, *State ex rel. Kitchen v. Painter*, 226 W. Va. 278, 700 S.E.2d 489 (2010). (*Lester v Plumley* No. 14-0548, 2015 WL 1129037)

Clearly, the evidence of a deficient performance by defense counsel meets the preponderance of evidence in this case and more so when he proceeded to induce a plea as instructed by the lower Court, not the prosecutor. Plea Hearing, **Pp. 7, Ins. 4-24 and on Pp. 28, Ins. 8-10** claiming an information had been properly filed, **without objection**⁴ by counsel. By use of the life recidivist, as well as rendering incorrect legal advice.⁵ Witnessing the cumulative errors by defense counsel resulted in appellant being compelled to plea from coercion, forcible compulsion and fear. Appellant designates the entire record for review of any plain or stated errors. Current

² No objection to retesting of the packages, no objection to the use of the recidivist information to induce a plea, no objection to two sentencing errors or for consecutive sentencing being disproportionate to the character and degree of the offense or having any proposed defense strategy prepared.

³ Judge Hatcher and the Prosecuting Attorney at the time, Paul Blake Jr. were reprimanded for their illegal conduct in kidnapping Dean Jr. under color of law and evidenced by the prosecutor's ransom note demanding that Jr. be returned for further, illegal prosecution of his father or that he would not be returned to his Mother Linda Bigel of Mt Airy, N.C. on his tenth Birthday, day of a sentencing hearing 9-9-94 (*State v D.E.G.*) Judicial Bias

⁴ Objection to the life recidivist information because there is no triggering/qualifying offense of violence.

⁵ Incorrect legal advice because there is no record of any recidivist having been filed against the appellant.

counsel may have been compromised as well having discussed the errors and counsel's refusal to recognized or argue these errors.

While the State is constitutionally obliged to appoint effective counsel to assist an indigent criminal defendant in his appeal, **once this has been done there rests on the indigent criminal defendant some responsibility to make known to the court his counsels inaction.** Rhodes v. Leverette, 160 W. Va. 781, 239 S.E.2d 136, 1977 W. Va. LEXIS 305 (W. Va. 1977).

Trial court properly applied W. Va. R. Crim. P. 35(a) to change a prisoner's sentence where the state filed a timely recidivist information based on his two prior felony convictions, he admitted the allegations in the information, and once that procedure was complete, the trial court had no authority but to impose a life sentence. State ex rel. Daye v. McBride, 222 W. Va. 17, 658 S.E. 2d 547, 2007 W. Va. LEXIS 61 (2007).

This holding presents the point that once the procedure for an information has been initiated, the Court must follow through with that statutory authority to enhance, which the Court failed to do. *"...the court is without authority to impose any sentence other than as prescribed in Code, §61-11-18."* Daye supra. **Counsel lied to his client in this regard because no information was ever filed and the outcome of the case would have been different had appellant been told the truth with a proper defense counsel.**

Counsel's deficient performance was ineffective in defense of this case and the facts show as much on the record. Lastly, at the sentencing hearing, defense counsel failed to object to the illegal sentence for a number of reasons, an abuse of discretion for consecutive sentencing being disproportionate to the character and degree of the offense, being the chemical composition of Buprenorphine/Naloxone mixture used exclusively for the treatment of opiate addiction the improper application of the codes §60A-4-408 & §61-11-18 as being incorrectly applied and in excess of the statutory mandates as stated in Turner, supra. It should be ruled upon that there is sufficient evidence to sustain a ruling that the defendant was denied effective assistance of counsel.

II. Illegal sentence under West Virginia Code §60A-4-408.

West Virginia Codes §60A-4-408 and §61-11-18 are in contravention of the due process clauses of Article III, Section 10 of the *Constitution of West Virginia* or the Fourteenth Amendment to the *United States Constitution*. In;

Wells v. State ex rel. Miller, 237 W. Va. 731, 752, 791 S.E.2d 361, 382 (2016) ("This Court has long recognized that when both a general and a specific statute apply to a given set of facts, our well-established rules of statutory construction instruct that the specific statute governs.")

Even "where two statutes are in apparent conflict, the Court must, if reasonably possible, construe such statutes so as to give effect to each." Syl. pt. 4, in part, *Graney*. On the other hand, "when it is not reasonably possible to give effect to both statutes, the more specific statute will prevail." *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 670, 815 S.E.2d 474, 481 (2018).

The enhancement requirement to enhance for a second drug conviction, which was the Court's intention, must be governed by the habitual criminal statute §61-11-18 for enhancing the minimum term only and only once in a multi-count conviction. (Sentencing Order), *Turner v. Holland*, 175 W. Va. 202, 332 S.E.2d 164, 1985 W. Va. LEXIS 490 (W. Va. 1985); *State v. Stover*, 179 W. Va. 338, 368 S.E.2d 308, 1988 W. Va. LEXIS 40 (W. Va. 1988).

But the procedure to enhance either statute is governed by §61-11-18 as stipulated by *Daye*, supra. "Moreover, the controlled substances enhancements did not take precedence over the recidivist enhancements as the statutes could be reconciled."

(The few select words complained of are emphasized below:)

a) Any person convicted of a second or subsequent offense under this chapter **may be imprisoned for a term up to twice the term otherwise authorized.** (U.C.S.A. §60A-4-408)

"in ascertaining the intent of the legislature, **we must not base our determination on a single term or a few select words. Rather, we must give effect to the entire statute.**" *Ewing v Board of Educ. Of County of Summers*, 202 W.Va. 228, 241, 503 S.E. 2d. 541, 554 (1998), *State ex rel Graney v Sims* 144 W.Va. 72, 105 S.E. 2d. 886 (1958). However, "when one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they

conflict, **the latter prevails.**" Virginia National Bank v Harris, 220 Va. 336, 257 S.E. 2d. 867, 870 (1979).

(§61-11-18 controls the enhancement procedures even when there is no information is filed.)

Syl. Pts 4 & 5 of State ex rel. Daye v McBride 222 W.Va. 17,

4. "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syllabus Point 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984).

5. When any person is convicted of an offense under the Uniform Controlled Substances Act (*W.Va. Code*, Chapter 60A) and is subject to confinement in the state correctional facility therefore and it is further determined, as provided in *W. Va. Code*, 61-11-19 (1943), that such person has been before convicted in the United States of a crime or crimes, **including crimes under the Uniform Controlled Substances Act (W. Va. Code, Chapter 60A)**, punishable by confinement in a penitentiary, **the court shall** sentence the person to confinement in the state correctional facility pursuant to the provisions of *W. Va. Code*, 61-11-18 (2000), **notwithstanding (in spite of or despite)** the second or subsequent offense provisions of *W. Va. Code*, 60A-4-408 (1971). (Emphasis added)

The authority under Syl. Pt. 5 of Daye, the Supreme Court directs that the procedure under §61-11-18 governs the procedure to enhance sentences with specific mandatory words that must be followed. Appellant should be sentenced to a two to five year sentence, not having the sentences run consecutively because the crime is not worthy of consecutive sentencing according to Boso supra. With alternative sentencing being granted.

Being in derogation of the common law, this section requires **a strict construction in favor of the prisoner.** State ex rel. Ringer v. Boles, 151 W. Va. 864, 157 S.E.2d 554, 1967 W. Va. LEXIS 132 (W. Va. 1967); Justice v. Hedrick, 177 W. Va. 53, 350 S.E.2d 565, 1986 W. Va. LEXIS 562 (W. Va. 1986); State v. Stover, 179 W. Va. 338, 368 S.E.2d 308, 1988 W. Va. LEXIS 40 (W. Va. 1988).

"Specific statutory language generally takes precedence over more general statutory provisions." Syl pt. 6 Carvey v West Virginia State Board of Education 206 W.Va. 720, 527 S.E. 2d. 831 (1999).

Under §61-11-18. Punishment for second or third offense of felony. **"Whenever in such case the court imposes an indeterminate sentence, the minimum term shall be twice the term of years otherwise provided for under such sentence."** (There's no discretionary language within these statements.)

Upon a determination that the statutory mandates have been met, is consistent with due process guarantees if the correct procedures were followed. West Virginia Codes §60A-4-408 and §61-11-18 are in contravention of the due process clauses of Article III, Section 10 of the Constitution of West Virginia or the Fourteenth Amendment to the United States Constitution.

The sentence of (5-25); one (1-5) to five year sentence consecutive to four (4) to twenty (20) years for two Suboxone strips is disproportionate to the character and degree of the offense,

There are two tests to determine whether a sentence is so disproportionate to a crime that it violates the constitution. The first is subjective and asks whether the sentence for the **particular crime shocks the conscience of the court and society**. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test spelled out in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205, 1981 W. Va. LEXIS 581 (1981). *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851, 1983 W. Va. LEXIS 545 (W. Va. 1983).

(After careful inquiry, the sentence does shock the conscience of society.)

Illegal for two reasons, by law, it is in excess of statutory mandates because the **minimum term only** can be enhanced as directed by §61-11-18 with only one count being enhanced and in support is the Lewis holding below;

In ***State v Lewis 235 W.Va. 694 (2015)*** citing *Turner v. Holland*, 175 W. Va. 202, 203 332 S.E. 2d. 164 at 166; “Where two convictions are obtained against the defendant on the same day, they are treated as one conviction and **neither can be used to enhance the other** under our recidivist statute” “**only one enhancement is permissible**” *Turner* at 165.

(Two counts enhanced is an illegal sentence)

State v Blair No. 12-0407, 2013 WL 1632547,

“**petitioner argues** that the circuit court erred in doubling only the minimum term of incarceration and asserts that he could only have been sentenced to incarceration for one to five years or **two to ten** years.”

(The very question was answered in this case.)

The Court: “Upon our review, the Court finds **no error** in regard to either of petitioner's assignments of error.” The Supreme Court upheld the correct application of enhancement for **a two to five year sentence.**

[In conformity with State Code §61-11-18]

In the case of *State ex. Rel. Boso v Warmuth* 165 W.Va. 247 (1980) below, the case involved speedy trial rights and principles related to the IAD with some relationship to the recidivist statute. It is Appellants argument that consecutive sentencing is an abuse of discretion and disproportionate to the offense of distributing two Suboxone strips with Naloxone, the over-riding drug that neutralizes the effects of opioids in the body, and primarily used for the treatment of opioid addiction.

However, the policy underlying this gloss is consistent with the overall purpose of criminal law, namely, the rehabilitation of the felon. In this regard we recognize that rehabilitation can be accomplished only if the felon knows that after a reasonable and certain time he will be free to begin a new life. It was this very policy which underlay our holding in *State v. McMannis*, 161 W. Va. 437, 242 S.E.2d 571 {270 S.E.2d 634} (1978), where we determined that the recidivist statute is applicable only if a person has been previously convicted and served a term of imprisonment or probation, and that recidivist penalties cannot be imposed for crimes committed seriatim and prosecuted separately after apprehension, if the defendant had no previous opportunity to reflect upon his antisocial conduct and be rehabilitated. (Supporting **Turner**)

Furthermore, this rehabilitation policy has militated in favor of trial courts' giving concurrent sentences to all but the most "heinous offenders".

While rehabilitative value of imprisonment may be speculative, **the therapeutic value of the aging process has never been questioned;** consequently, it is reasonable to infer that getting older will make transgressors less anti-social. In order for rehabilitation or some combination of rehabilitation and getting older to make sense, it is only logical that transgressors should be shown the consideration of disposing of all of their transgressions simultaneously so that they shall not be compelled to endure their confinement with the constant specter of old cases destroying new lives. *State ex. Rel. Boso v Warmuth* 165 W.Va. 247 (1980)

What is the criminal culpability of the drug Suboxone containing Naloxone, which is used primarily for the treatment of opioid addiction and has an opiate antagonist that neutralizes the effects of opiate in the body. From the Eighth Edition of Blacks Law Dictionary (2004) the term culpability, Model Penal Code §2.02 says; "at the guilt phase, culpability is most often used to refer to the state of mind that the defendant must possess." With this in mind, considering the criminality of the offense, would consecutive sentencing be appropriate for the offense? Is the

substance, Suboxone in a category to be considered in the most "heinous of offenses" Boso Supra. No its not and was provided for the purpose it was made for, to treat heroin addiction. Consecutive sentencing would or should be considered an abuse of discretion in this instance.

Standard of Review

In Syllabus Point 1 of *Mathena v. Haines*, 219 W. Va. 417, 219 W. Va. 417, 633 S.E.2d 771(2006) this Court held: In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.

III. Irreconcilable conflict in repeal of statutes 108. "Repeal of repealing act"

Mindful of the need to construe pro se litigants' pleadings liberally,
Haines v. Kerner, 404 U.S. 519, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972).

The chemical composition of the Buprenorphine and Naloxone mixture creates a new drug when Naloxone over-rides the base ingredient, being an opioid. Since Naloxone neutralizes the effects of opiates completely, it reclassifies Buprenorphine from an opiate base chemical because the opiate is neutralized and has no further force and effect as an opiate drug.

Repeal will not be implied unless there is irreconcilable conflict between two statutes. *SEC v Morgan, Lewis & Bockius* (1953, CA3 Pa) 209 F.2d 44

To work implied repeal of earlier law, new statute must involve "positive repugnancy"; and even then older law is repealed by implication only pro tanto to extent of repugnancy. *Securities & Exchange Com. v Morgan, Lewis & Bockius* (1953, DC Pa) 113 F Supp 85, affd (1953, CA3 Pa) 209 F.2d 44

The conflict has been stated, Naloxone mixed with Buprenorphine creates a new substance that does not have a qualifying base ingredient of opioid that is effective, being neutralized by the chemical Naloxone and in so doing, places it in the Schedule V criteria.

Effect of amendment of 2014.

Acts 2014, c. 23, effective June 6, 2014, deleted former (b), which read: Narcotic drugs. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation containing any of the following

narcotic drugs and their salts, as set forth below: (1) Buprenorphine; redesignated former (c) through (e) as (b) through (d); and added (e).

Scheduling and Classification of the Controlled Substance Suboxone will be argued under the repeal of statutes clause claiming that this specific drug combination does not meet the conditions that caused the higher schedule but **does meet the criteria for a schedule V** narcotic and requires a change in scheduling. If Suboxone is not rescheduled to a lower schedule, it is counterproductive to Societies current need and interests in combating opioid addiction. Appellant is sixty three years old and an experienced addict that has used heroin, Subutex and Suboxone and personally knows from personal experience that Suboxone is the answer to the opiate epidemic in saving lives. This drug has been said to be safe for in home use and has a low risk of addiction or abuse because of the controlling ingredient, Naloxone.

See Farwell v Astrue 2009 US Dist LEXIS 68868;

In October 2002, the FDA approved buprenorphine hydrochloride, marketed in tablet form under the brand name Subutex, and a **buprenorphine/naxolone combination**, marketed in tablet form under the brand name **Suboxone**, for prescription by physicians to treat opioid dependence in an office setting (rather than in a clinic, as in the case of methadone). The combination of buprenorphine and naxolone in Suboxone decreases the potential for abuse by injection because **naxolone is a full opioid antagonist, meaning that it has no opioid effects and blocks the effects of opioids; it also does not produce physical dependence or tolerance.** The use of buprenorphine and buprenorphine/naloxone can trigger opioid {2009 U.S. Dist. LEXIS 12} withdrawal syndrome, whose signs and symptoms include dysphoric mood, insomnia, and distress or irritability. See U. S. Dep't of Health & Human Services, Substance Abuse and Mental Health Services Admin., Buprenorphine, <http://buprenorphine.samhsa.gov/about.html> (last visited June 23, 2009); U. S. Dep't of Health & Human Services, Substance Abuse and Mental Health Services Admin., Center for Substance Abuse Treatment, Clinical Guidelines in the Treatment of Opioid Addiction, Treatment Improvement Protocol ("TIP") Series 40 (hereinafter "Clinical Guidelines") at xv-xviii, 1-9 (2004)(available as a link at)(last visited June 23, 2009); Physicians' Desk Reference, Prescription Drugs Database, 2009 PDR 6632-4000, Suboxone, Subutex (Thomson Healthcare updated February 2009).

60A-2-211. Schedule V criteria.

The State Board of Pharmacy shall recommend to the Legislature that a substance be placed in Schedule V if it finds that:

- (1) The substance has a low potential for abuse relative to the controlled substances listed in Schedule IV;
- (2) The substance has currently accepted medical use in treatment in the United States; and
- (3) The substance has limited physical dependence or psychological dependence liability relative to the controlled substances listed in Schedule IV.

Suboxone meets this criteria for scheduling purposes and is currently in conflict with the repealed statute, Suboxone containing Naloxone is a lower scheduled chemical that is recommended for in home use. Note Attachments herewith, Scheduling of Naloxone.

§16-46-7. Statewide standing orders for opioid antagonist

The classification and schedule of Suboxone, being scheduled as in the same chemical composition as Subutex or Buprenorphine is wrong due to the included ingredient of Naloxone which blocks, neutralizes the effects of opioids in the body and which is praised for the life saving properties it provides. This chemical composition should not have been included in the same instance as that of Buprenorphine or Subutex alone and should have remained a schedule V narcotic, making it more readily available for easier distribution and possession for the treatment of addiction. Addiction is a serious condition that non-addicts cannot understand.

How to argue repeal of a former statute as being correct in part and incorrect in another part is beyond your pro-se appellants ability and is asked for help to this end. Providing this drug to the public as is shown in new Legislation for the substances of any partial or full antagonist drugs, which includes Suboxone, to the public without a prescription for relatives friends and mainly first responders requires this drug to be returned to the previous schedule V of drug classification. The importance of this issue is beyond imagination and I need help to argue it, will you help me for the benefit of all involved?

Where 2 acts cover same subject matter both should be given effect if possible, and if effect can reasonably be given to both statutes presumption is that earlier is intended to remain in effect; to repeal prior act there must be positive repugnancy between new law and old law, and even then old law is repealed only to extent of repugnancy; in order for amending statute to operate as repeal of earlier act, intention of legislature to repeal must be clear and manifest, otherwise later act is to be construed as continuation of, and not substitute for, first act. *Lietz v Flemming* (1959, CA6 Mich) 264 F.2d 311, cert den (1959) 361 US 820, 4 L Ed 2d 66, 80 S Ct 66

The issue of repugnancy is (“inconsistent or irreconcilable with; contrary or contradictory to”) conflict is with two issues as in the ingredients, differences in the chemical composition of Buprenorphine and Buprenorphine/ Naloxone mixture. The chemical Naloxone neutralizes opiates completely and being combined with Buprenorphine which has a opiate base, neutralizes the base ingredient that has caused the combined chemical mixture to be wrongly scheduled as a schedule III narcotic.

Mindful of the need to construe pro se litigants' pleadings liberally, *Haines v. Kerner*, 404 U.S. 519, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972)

Only where it is found that it is not possible for both acts to co-exist can act be held to repeal or limit another, and then only in respect to precise point of conflict. *United States v 24 Cans Containing Butter* (1945, CA5 Ala) 148 F.2d 365, reh den (1945) 326 US 808, 90 L Ed 493, 66 S Ct 166 and cert den (1945) 326 US 752, 90 L Ed 450, 66 S Ct 90

The precise point of conflict is the difference between subutex and Suboxone. Subutex is opiate based Buprenorphine alone and Suboxone is mixed with Naloxone/Buprenorphine which neutralizes the opiate base ingredient. With the opiate base ingredient neutralized, blocked, it cannot be qualified to meet the same criteria because it doesn't have the same effects.

Repeal of statutes by implication is not favored and can arise only in cases of irreconcilable conflict or inconsistency.

The chemical composition of Suboxone is Buprenorphine and Naloxone, with the latter overriding the element of opioid which places it in another category of substance that requires it

to be returned to the previous scheduling. I wish I could convince you to help me with this issue and still allow it to go Pro-se which allows the Court to consider it in a broader and more valuable way. To me and in my perception, this issue is of extreme importance and critical to the welfare of our society. Making Suboxone more available will reduce overdose deaths dramatically which is the main intent of the Legislature.

§16-46-1. Purpose and findings.

(a) The purpose of this article is to prevent deaths in circumstances involving individuals who have overdosed on opiates.

(b) The Legislature finds that permitting licensed health care providers to prescribe opioid antagonists to initial responders **as well as individuals at risk of experiencing an overdose**, their relatives, friends or caregivers may prevent accidental deaths as a result of opiate-related overdoses. *(Your appellant has overdosed three times with the last time being required to attend a detox facility in Bluefield, W.Va.)

§16-46-7. Statewide standing orders for opioid antagonist

A statute, prescribing a new penalty for an old offense, does not destroy the latter nor create a new offense, but, in providing a new penalty, it impliedly repeals the old penalty, and, to that extent, modifies the antecedent law of the subject matter. Grant v. Baltimore & O. R.R., 66 W. Va. 175, 66 S.E. 709, 1909 W. Va. LEXIS 138 (W. Va. 1909).

Relief sought in this error is that the substance/chemical Buprenorphine/Naloxone be ruled as becoming a new substance that is not in the same scheduling criteria as Buprenorphine/Subutex alone because the opiate base in Buprenorphine is neutralized/blocked from the added ingredient Naloxone, a full opioid antagonist drug.

IV. Voluntariness of Guilty Plea

As far as the “legality of the sentence” since the holding in the case of Turner clearly makes the sentence illegal because of enhancing two counts in a single conviction, the plea cannot be made intelligently, cannot plead to an illegal sentence. It is also shown from the ineffective

assistance of counsel through the threat of a life recidivist presented to me by defense counsel from the court and not from the prosecutor. I've cited the hearing and page earlier.

Section cannot be used to inspire plea of guilty.

A plea of guilty inspired by the prosecutions promise not to request that the court apply this section is unfairly obtained and is void on collateral attack by federal habeas corpus. *McClure v. Boles*, 233 F. Supp. 928, 1964 U.S. Dist. LEXIS 7427 (N.D. W. Va. 1964).

In discussing illegal sentences and their effect on the validity of plea agreements, this Court cited the Eighth Circuit Court of Appeals decision of *U.S. v. Greatwater*, 285 F.3d 727 (8th Cir. 2002), which concerned a plea agreement that failed to sentence petitioner to the statutory minimum punishment for the crime with which he was charged. *State ex rel. Gessler v. Mazzone*, 212 W. Va. 368, 572 S.E.2d 891 (2002).

[P]etitioner makes the same argument he made to the circuit court: the parties did not have the authority to enter into-nor did the court have the authority to accept-a plea agreement specifying an illegal sentence. *See State ex rel. Gessler v. Mazzone*, 212 W. Va. 368, 373, 572 S.E.2d 891, 896 (2002).

Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: "Penalties shall be proportioned to the character and degree of the offense." Syllabus Point 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980).

As in the instant case where the sentence complained of is in excess of legislative enactments of sentencing for the offense charged which is guided by the procedures set out in W.Va. Code §61-11-18 for enhancement of the minimum term of an indeterminate sentence and for only one count in a multi count conviction. In this case it is an abuse of discretion to serve these sentences consecutively due to the nature of the offense.

"A recognized corollary to the principle that a guilty plea must be shown to have been intelligently and voluntarily entered is the rule that if the plea is based on a plea bargain which is not fulfilled or is unfulfillable, then the guilty plea cannot stand." Syllabus Point 1, *State ex rel. Morris v. Mohn*, 165 W. Va. 145, 267 S.E.2d 443 (1980).

Appellant cannot plead to an illegal sentence when any part of it is held to be illegal.

V. **Denied Alternative Sentencing** (As was suggested by the 2013 Legislative Acts)

In this regard, I pursue this argument under an abuse of discretion from the criminality of the substance for which I stand convicted of and the aggravating issues of costs to the County and State for housing an elderly man that poses no threat to society and whom cooperated with the authorities with respect to the property taken from a home that was burglarized by others. The totality of the evidence and the seriousness of the offenses did not require incarceration and alternative sentencing with drug treatment for the addiction of heroin was more appropriate. Your petitioner prays that this Honorable Court see the evidence in this case is fitting for alternative sentencing. The conviction for a conspiracy is one in which the defendant cooperated fully with the police investigation, he did not take the property from the area of the home and only became involved when he admittedly tried to sell any of the stolen property that was dropped off at his residence, to his drug supplier, the CI. (Designate all 18-F-20, Motion for Reconsideration, Rule 35 b.) The substance or drug sold to the informant, a heroin dealer, was Suboxone, a drug made exclusively for the treatment of heroin/opiate abuse. The age, disability and health of your appellant, with the fact that he had suitable housing is all mitigating factors to be considered for alternative sentencing. Appellant prays that this Honorable Court take this opportunity to address the issue of alternative sentencing for the benefit of Society, your Appellant and Corrections for rehabilitation and cost effective alternative. Appellant overdosed and died, being revived by his oldest son, Dean Jr., awaking in the hospital and required to detox at the Bluefield facility for a week. The current trend of the lower Courts is not to give alternative sentencing for most of the convictions and to enhance any sentence possible.

Article 46. Access to Opioid Antagonists Act.

Article 47 Alcohol and Drug Overdose Prevention and Clemency Act.

(Previously filed as "A MATTER OF FIRST IMPRESSION" with requested leave of court to admit. A defense strategy counsel failed to consider or pursue.)

§16-47-5. Immunity, alternative sentencing and clemency options for a person for whom emergency medical assistance was sought.

Petitioner was afflicted with the disease of substance abuse prior to his incarceration and has the desire to stop using drugs, having the knowledge needed to do so, with the understanding of triggers to beware of in order to avoid relapse. Please allow the previously filed paperwork that has Article 46 and 47 to be allowed in with this appeal for review and support of alternatives. **Alternatives to incarceration are badly needed right now, not months or years from now.** Just as fast as this epidemic evolved is as fast as this need for more alternative sentencing to be implemented and required by law for the treatment of the disease of chemical addiction. The seriousness of this disease may require Marshall law for a short time in which to place seriously addicted individuals whom cannot be reached, to be involuntarily committed under a public, mental hygiene warrant for the sole purpose of chemical dependency treatment, not being a form of incarceration, but that of medical/mental health treatment.

From the October 9, 2019 Register Herald on an article concerning the financial crisis of the Regional Jail 'Bill' for housing inmates from Wyoming, Fayette, Summers, Monroe, McDowel, Boone, Nicholas and Raliegh Counties, Raliegh County Commissioner, Dave Tolliver expressed concerns of a financial crisis due to a rise in drug related crimes as a result of the opioid epidemic being the root of the problem. Raliegh County having exhausted its own resources for reducing jail bills has 70 county residents on home confinement and 120 people enrolled in the Day Report Center as alternative sentencing, but it's not enough. From the **Charleston Gazette** (9-5-19) (Attached as C) "Addiction Services" \$28 Million set for opioid fight, a grant signed by the President (Article attached as an exhibit). Monies provided for the treatment of addiction for "help to increase access of MAT programs, such as Suboxone or Vivitrol treatments for those in recovery". Alternative sentencing is a must before jail housing debts are out of control.

Treatment facilities must be encouraged, more facilities need to be built causing more employment opportunities in construction workers, employment of professionals in substance abuse counseling, maintenance workers. §16-5T-6 is for a “Community Overdose Response Demonstration Pilot Project” that is meant for the purpose of saving lives, treating addicts, not incarcerating them. The State cannot incarcerate every addict in the State for a number of reasons, because they are not acting on their own free will being addicted to a chemical that controls their reasoning and behaviors. Mainly because addicts suffer a chemically induced mental illness and the mental disorder according to a California Court that said;

In this Court, counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment {2009 U.S. Dist. LEXIS 27} in violation of the Fourteenth Amendment.” Id., 370 U.S. at 667.

It is cruel and unusual punishment to incarcerate the mentally ill person that requires treatment for a substance that controls mental functioning as is illustrated in the case where the mother chooses drugs over the affection of her children. How can it be more dispositive of in fact than an illustration such as that? Our Addicted Society is sick and in need of proper substance abuse treatment and guidance, not incarceration.

Defense attorneys in our State are not pursuing any diminished capacity defenses for addiction to narcotics, and convictions will continue to rise, alternative sentencing is needed very badly, with orders for substance abuse treatment. As stated by a Russian psychiatrist, Pavlov, Conditioning of the mind, a form of hypnosis is required for treatment of those who refuse to be reached due to the chemical dependence of the drug.

“The circuit court specifically found that petitioner **"continues to choose substances over her children."** Based on the evidence of petitioner's continued

substance abuse, it is clear that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and neglect in the near future and that the termination of her parental rights was in the children's best interests."

Appellant contends that the issue of addiction is not fully understood by the Court and that it should be stressed as in the above caption, that substances cause people to act and react according to their real or imagined need for the substance they are dependent on. When a drug can interfere with the maternal instincts of love for her child, the devastating control over that person is ominous, a mental illness that can't be controlled by the addict without treatment and counseling. Chemical dependency is an awesome, controlling thing that overcomes a person's sense of reality with deceptive self-talk that imputes excuses to justify one's actions. Termination of parental rights is not the proper answer to this epidemic and only adds to the problem by destroying the institution of family, familial association making for more dysfunctional and displaced children, contrary to any rehabilitation policy to keep the family together.

Approximately six years later, in Powell, the Supreme Court entertained arguments {624 F. Supp. 2d 1228} from an appellant who "was arrested and charged with being found in a state of intoxication in a public place." 392 U.S. at 517. The Powell Court split with, *inter alia*, four Justices announcing the judgment of the Court, Justice White concurring in the result, and the four remaining Justices issuing a dissent.

In that case, at the appellant's criminal trial, the trial court entered the following "findings of fact: (1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.

(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism. (3) That . . .defendant herein. . .is a chronic alcoholic who is afflicted with the disease of chronic alcoholism." Id., 392 U.S. at 521

To that end, your petitioner prays for this Court to accept this opportunity to make any necessary precedent setting rules for guidance to the public. This substance abuse issue is

destroying the sanctity of the family institution, destroying lives and rendering a sense of hopelessness that increases depression and tends to direct decisions towards overdose.

The evidence of past criminal history cannot be changed and should not be a factor in the eventual rehabilitation of a person. The offense for which I stand guilty of is distribution of Suboxone where I provided two Suboxone strips to a heroin distributor for the purpose of treating heroin addiction.

This issue, presented to the Supreme Court of Appeals to give the Court an opportunity to address this issue because of the overcrowded conditions of the Jails and the Costs involved in housing inmates to each county being an unnecessary expense that has alternatives that should be applied and explored. I have suggestions as to alternative sentencing programs that will be beneficial to everyone, the state, counties and the individual, but requires the Court's direction and help to initiate it. The funding for the opioid epidemic should be used to establish more treatment facilities in conjunction with the Department of Health and Human Services. Again, Suboxone is the answer to heroin addiction and will save more lives.

We also note that "skeletal argument[s]" that are nothing more than assertions of error do not preserve claims. *State v. Myers*, 229 W. Va. 238, 246, 728 S.E.2d 122, 130 (2012).

Mindful of the need to construe pro se litigants' pleadings liberally, *Haines v. Kerner*, 404 U.S. 519, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972)

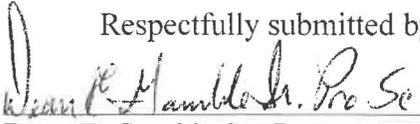
Conclusion

In conclusion, your petitioner, appellant prays that this Honorable Court rule in favor of all claimed errors on appeal. That there has been demonstrated deficient performance of counsel amounting to ineffective assistance of counsel and that the Circuit Court Judge was biased and prejudicial in his findings of fact and conclusions of law that reflects from his abuse of discretion in sentencing and the trial of your petitioner. That the conviction induced by the Courts threat of

a life recidivist information was improper being presented by the Court and not the State. That the Court improperly sentenced the petitioner under the wrong procedural authority under West Virginia Code §60A-4-408 because §61-11-18 controls the procedure that is required to enhance sentences according to Legislative intent for the minimum term only and only one count in a multi count conviction. Continuing the Courts Holding that the only difference in the statutes is that the Judge makes the enhancement decision rather than the prosecutor through a written information being filed. That it was an abuse of discretion by the sentencing Court not to grant alternative sentencing to the petitioner because the criminal culpability of the offenses in this instance does in fact warrant alternative sentencing when all the mitigating factors are reasonably considered, age of appellant, 62, physical and mental health of the appellant, disabled with a chemical dependence, suitable residence and family support. Relief is for the correction of sentence to reflect a sentence of two to five years, suspended to alternative sentencing for any time remaining on such sentence and for any other relief as deemed necessary according to law. Appellant prays that this Honorable Court takes into consideration the issue of the Chemical Composition of Suboxone and considers the benefits of such drug as being a life saving drug and that in the interests of society, the scheduling of this drug be repealed or returned to its previous schedule V Narcotic in order to be made more readily available to society.

Petitioner prays that this Honorable Court take advantage of this case to remark on any related issues for the benefit of society as a whole in an effort to address the opiate epidemic resulting in deaths. The real answer to this epidemic is chemical dependency treatment with Suboxone and conditioning of the mind through counseling as was studied by the Russian Psychiatrist Pavlov, 'Pavlov Dogs' because through the continued use of chemicals the mind has been chemically induced to a patterned behavior over time and has to be countered with the same

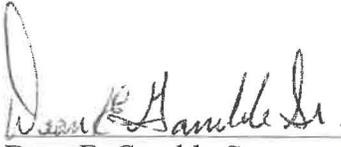
conditioning but without the controlling effects of a chemical and in a more positive direction, a form of brainwashing. Chemical dependency controlling mental function is the problem. Consider the facts that show that if a woman is willing to choose drugs over the love and affection of her child, the control of the chemical is ominous. How do we fight that? With a similarly suited drug (Suboxone) as a substitute drug with mental programming or conditioning. From the mind of a recovering addict from Evergreen Rehab, 301 South, St Pauls, N.C. theirs is the best approach.

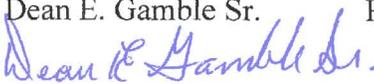
Respectfully submitted by;

Dean E. Gamble Sr., Pro-se 11-12-19
Date

CERTIFICATE OF SERVICE

I, Dean E. Gamble Sr., by my signature below, do hereby certify that I have served upon the respondent, the Deputy Attorney General, a true and exact copy of the Pro-se Supplemental Appeal Brief under Rule 10(c)10(b) and Rule 4(b) with requested leave of Court to do so and any accompanying papers that have been filed with this Honorable Appellate Court by placing same with the United States Postal Service for delivery to the address indicated below on this the 12th day of November, 2019.

Shannon Kiser, Assistant Attorney General
Office of the Attorney General
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812 Quarrier St. 6th Fl.
Charleston, W.Va. 25301

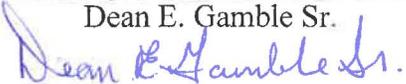


Dean E. Gamble Sr. Pro-se


VERIFICATION

I, Dean E. Gamble Sr., do herein below, verify under penalty of perjury, that the contents, statements and issues upon belief, within the Appellate Brief are true and accurate statements. I have not presented anything under false pretense for any purpose of confusion or disruption of this cause of action.



Dean E. Gamble Sr. Pro-se


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Dean E. Gamble Sr.,
Defendant Below, Petitioner,

Vs.

S. Ct. No. **18-0654**

State of West Virginia, Fayette County,
Plaintiff Below, Respondent

COVER PAGE

APPENDIX

VOLUME I.

Submitted by:

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CONFIDENTIAL

S.Ct. #19-0623

CERTIFICATE OF SERVICE

Appellant, Dean E. Gamble Sr. does herein below certify that a true and correct copy of the Appendix has been provided the respondent and the Court by placing same for delivery with the United States Postal service on 11-12-2019, for delivery at the address indicated below to the Deputy Attorney General.

Karen Villanueva-Matkovich
Deputy Attorney General
Office of the Attorney General
Appellate Division
812 Quarrier St. 6th Floor
Charleston, W.Va. 25301


Dean E. Gamble Sr.
11-12-2019

VERIFICATION

I, do hereby verify under penalty of perjury, that the statements made upon the petition for appeal are true and correct. For the statements made upon information and belief, believe them to be true also.


Dean E. Gamble Sr.
11-12-2019

