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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0023

STATE OF WEST VIRGINIA,

Respondent,

DO NOT REMOVE
FROM FILE

v.

CHARLES LEE FINLEY,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the January 3, 2022, Order
Circuit Court of Wayne County
Case No. 21-F-137

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ASSIGNMENTS OF ERROR

A. The Circuit Court erred in denying Petitioner's Motion to Dismiss Count Four (4) of the Indictment Because the Petitioner Should Not Have Faced the Possession of Pseudoephedrine in an Altered State Charge Based on the Undisputed Evidence Possessed by the State.

1. The Plain Language and the Intent of the Possession of Pseudoephedrine in an Altered State Statute and the Opinions of This Court Clearly Show that Possession of the Final Form of Methamphetamine Cannot Be Prosecuted Under that Statute.

2. Making the Defendant [Petitioner] Face Charges in Counts Three (3) and Four (4) of the Indictment Would Potentially Result in a Double Jeopardy Violation Under the Facts of this Case.

STATEMENT OF THE CASE

A. Procedural Background.

On November 1, 2021, a grand jury for Wayne County, West Virginia returned a four-count Indictment against the Petitioner alleging one Count of Receiving or Transferring a Stolen Vehicle, one Count of Fleeing other than in a Vehicle, Possession with the Intent to Deliver a Controlled Substance, and Possession of Pseudoephedrine in an altered State. Appendix Record, 6-8 (hereafter, "A.R."). Afterward, the Petitioner entered a plea of no contest to the offense of Attempt to Commit the Offense of Possession of a Stolen Vehicle, and conditional pleas of no contest to the offenses of Attempt to Possess with the Intent to Deliver Methamphetamine, a lesser-included offense of Count 3 of the Indictment, and Attempt to Commit Possession of Pseudoephedrine in an Altered State, a lesser-included offense of Count 4 of the Indictment. *Id.* at 50-51. On December 20, 2021, the circuit court sentenced the Petitioner to indeterminate terms of imprisonment

of not less than one nor more than three years on each Count pled, and further, ordered each sentence to run concurrently with one another. *Id.* at 103-106.

B. Pretrial Proceedings.

1. Petitioner's Motion to Dismiss

On December 2, 2021, the Petitioner filed a Motion to Dismiss Count Four (4) of the Indictment. *Id.* at 12-18. Petitioner asserted that he should not have been subjected to charge under West Virginia Code 60A-10-4(d) since 1) the plain language of the statute only contemplated possession of pseudoephedrine in an altered state coexistent with the intent to manufacture methamphetamine, and 2) conviction on possession of a controlled substance and possession of pseudoephedrine in an altered state offended double jeopardy as both required the same proof of guilt and, therefore, possessed no different elements that the State must prove. *Id.* at 13-16. On that same date, the State responded to the Petitioner's motion to dismiss. *Id.* at 19-21. Once again on that same date, the Petitioner replied to the State's Response. *Id.* at 22-26.

On December 6, 2021, the parties appeared before the circuit court for a hearing on the Petitioner's Motion to Dismiss. *Id.* at 27. At that time, Petitioner placed on the record his legal and factual support for dismissal of Count Four of the Indictment. *See generally id.* at 29-36. The State countered different elements exist between the two charges of Possession with the Intent to Deliver and Possession of Pseudoephedrine in an Altered State and, therefore, no double jeopardy violation exits. *Id.* at 36-41. Upon conclusion of argument by both parties, the circuit court denied the Petitioner's Motion. *Id.* at 42. The court found that "as it stands today, there's an additional element that the state has to prove with Possession with Intent as it relates to that Count...[s]o I don't believe the matter

should be dismissed under a *Blockburger* analysis." *Id.* The court memorialized its ruling via written Order filed on January 3, 2022. *Id.* at 99.

2. The Conditional Plea

After the conclusion of the motion to dismiss, the parties negotiated a plea agreement which they reduced to writing. *See generally id.* at 50-51. The Petitioner agreed to plead no contest to Attempt to Commit the Offense of Possession of a Stolen Vehicle, a conditional plea of no contest to Attempt to Commit Possession with the Intent to Deliver Methamphetamine, and a conditional plea of no contest to Attempt to Commit Possession of Pseudoephedrine in an Altered State. *Id.* at 50. In the written document, the parties agreed as follows:

> The conditional pleas on Count 3 and Count 4 is [sic] being made with the consent of the State, and the Defendant reserves the right to appeal his conviction for Possession with the Intent to Deliver Methamphetamine and Possession of Pseudoephedrine in an Altered State. Should Mr. Finley prevail on appeal, he shall be allowed to withdraw his NO CONTEST pleas to Count 3 and Count 4. At that time he will be permitted to enter a GUILTY plea to Simple Possession, a misdemeanor, which carries a potential sentence of not less than 90 days nor more than six (6) months, or fined not more than $1,000, or both fined and confined. Furthermore, should Mr. Finley prevail on appeal, the State would agree to DISMISS Count 4 of the Indictment.

Id. No specific ground or grounds for appeal, however, were included in the written plea agreement. *See generally id.* at 50-51.

At the behest of the circuit court, however, counsel for the Petitioner outlined the exact issues he intended to raise on appeal to this Court during the plea colloquy:

> [E]ssentially, my argument is if [the Petitioner] uses a defense at trial of possession that was for his own use, he is, in effect, admitting simple possession. But, that kind of --- it's my argument it's a double jeopardy argument if he is subjected to, both, simple possession and a possession of Pseudoephedrine in an altered state. It's my opinion that would be a double jeopardy violation… It's my opinion that Count 4, Pseudoephedrine in an

> Altered State, only applies to precursors, or the ingredients used to make Methamphetamine and it does not apply to the final product of Methamphetamine.

Id. at 60.

The Petitioner, then, pled no contest to the charges outlined in the written plea agreement. *Id.* at 71-76. Further, the State provided a factual basis for each charge which the Petitioner did not dispute. *See generally id.* at 61-82. The circuit court accepted the Petitioner's pleas and found him guilty of Attempt to Commit the Offense of Possession of a Stolen Vehicle, Attempt to Commit Possession with the Intent to Deliver Methamphetamine, Attempt to Commit Possession of Pseudoephedrine in an Altered State. *Id.* at 80. The court memorialized the plea hearing via written Order filed on December 10, 2021. *Id.* at 92.

3. Sentencing of the Petitioner.

On December 20, 2021, the parties appeared before the circuit court for sentencing. *Id.* at 103. At that time, the circuit court sentenced the Petitioner in line with the terms of the plea agreement: sentences of incarceration for indeterminate terms of not less than one nor more than three years on each Count to which he pled no contest, to run concurrently with each other. *Id.* at 104-105. The court memorialized the sentences via Order filed January 3, 2022. *Id.* at 103-106.

STANDARD OF REVIEW

The standard of review concerning a motion to dismiss an indictment is, generally, *de novo*. However, in addition to the *de novo* standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's 'clearly erroneous' standard of review is invoked concerning the circuit court's findings of fact." Syl. Pt. 1, *State v.*

Holden, 243 W. Va. 275, 843 S.E.2d 527, 529 (2020)(citing Syl. Pt. 1, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009)).

Double jeopardy claims are reviewed *de novo*. Syl. Pt. 1, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996).

Interpretation of a statute presents a purely legal question subject to *de novo* review. Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dept. of West Virginia,* 195 W.Va. 573, 466 S.E.2d 424 (1995).

SUMMARY OF THE ARGUMENT

The Petitioner overarching argument is that the circuit court erred in not dismissing Count Four of the Indictment as he should not have faced prosecution for possession of pseudoephedrine in an altered state. This Court reviews a motion to dismiss an indictment *de novo* and the circuit court's findings under a clearly erroneous standard. In the matter below, the circuit court's ruling and findings were not clearly erroneous as the clear intent of the Legislature supports the prosecution of methamphetamine also as pseudoephedrine in an altered state.

The Petitioner's overarching argument is divided into two subsections. First, the Petitioner asserts that the intent of possession of the pseudoephedrine in an altered state statute, West Virginia Code § 60A-10-4(d), does not support prosecution of the final form of methamphetamine. However, the Petitioner's argument is belied by the plain meaning and legislative intent of West Virginia Code §§ 60A-10-1 to 60A-10-9 and West Virginia Code §§ 60A-4-401 to 60A-4-417 which must be read together. Therefore, the circuit court did not err in refusing to dismiss Count Four of the Indictment.

Secondly, the Petitioner argues that charging him with Possession with the Intent to Deliver Methamphetamine (Count Three of the Indictment) and Possession of Pseudoephedrine in an Altered State (Count Four of the Indictment) violates double jeopardy. However, a fair reading of both statutes reveal each statute contains an element foreign to the other statute. Therefore, no double jeopardy violation exists.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

ARGUMENT

A. The Circuit Court did not err in denying the Motion to Dismiss Count Four of the Indictment.

The Petitioner asserts that the circuit court erred in denying his Motion to Dismiss Count Four of the Indictment based upon based upon two premises: 1) that the plain language of the possession of pseudoephedrine in an altered statute does not support a conviction for possession of methamphetamine in its final form, and 2) that a conviction for both possession of pseudoephedrine in an altered state and possession of methamphetamine in its final form violates double jeopardy. Pet.Br. at 1. Because there was no error in the circuit court's decision to deny the motion to dismiss, the judgment of the circuit court must be affirmed.

1. The plain language and legislative intent of West Virginia Code §§ 60A-10-1 to 60A-10-9 does not exclude the final form of methamphetamine from prosecution under that statute.

The Petitioner asserts that the West Virginia Legislature intended that the Methamphetamine Laboratory Eradication Act ("the Act"), West Virginia Code §§ 60A-10-1 to 60A-10-9, applies only to the prosecution of those engaged in running methamphetamine laboratories, not to prosecute crimes involving possession methamphetamine. Pet.Br. at 6. While the Legislature did not define "altered state" in the Act, other statutes in the Code should be read in conjunction with the Act provide a definition of the term "altered state." Because this Court may imminently determine the Legislature's intent in this matter, the ruling of the circuit court must be affirmed and the Petitioner's conviction upheld.

B. According to Syl. Pt. 4 of *Community Antenna Service, Inc. v. Charter Communications VI*, LLC, 227 W.Va. 595,604, 712 S.E.2d 504, 513 (2011), "[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Id.

Indeed, statutes are not to be construed in a vacuum, but must be read in the context of the general system of law of which the Legislature intended it to be a part:

> 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 of 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 statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Id. at Syl. Pt. 5. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly." *Id.* at Syl. Pt. 6.

Even without a definition of "altered state," this Court may determine the Legislative intent of the Act by reading the language of the Act in light of other provisions

in the West Virginia Uniform Controlled Substances Act. *See generally,* W. VA. CODE §§ 60A-1-101 to 60A-4-411. In examining the text of both acts, the Legislature, clearly, intended both to operate together in a single, unified, and general system of law, whose intent is the protection of the health and safety of the citizens of West Virginia from the use and manufacture of methamphetamine. *See, e.g. State v. Poling*, 207 W. Va. 299, 306, 531 S.E.2d 678, 685 (2000) (Supporting classifying marijuana as a Schedule I Controlled Substance):

> "[The] West Virginia Constitution, Article VI, Section 1, reposes the legislative power in the legislative department," *State v. Grinstead,* 157 W.Va. 1001, 1012, 206 S.E.2d 912, 920 (1974), and the "constitutional powers of the Legislature are particularly broad in matters of health[.]" *Id.* at 1010, 206 S.E.2d at 918. The Uniform Controlled Substances Act, West Virginia Code §§ 60A–1–101 to 60A–9–7 (1997 & Supp.1999), contains the following proviso:
>
> The state board of pharmacy shall recommend to the legislature that a substance be included in Schedule I if it finds that the substance:
>
> (1) Has high potential for abuse; and
>
> (2) Has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

The Legislature determined that methamphetamine use is dangerous and addictive. *See generally,* W. VA. CODE §§ 60A-10-2(a) to (g). Specifically, the Legislature found the "methamphetamine is a substance that 'has a high potential for abuse…[and] abuse of the substance may lead to severe psychic or physical dependence." W. VA. CODE § 60A-2-205(1), (3). To that end, the Legislature determined that methamphetamine is a Schedule II Controlled Substance. W. VA. CODE § 60A-2-206(d). The Legislature, however, did not stop there, finding further that:

> "...the illegal production and distribution of methamphetamine is an increasing problem...in West Virginia.... [t]hat methamphetamine is a highly addictive drug that can be manufactured in small and portable laboratories....[and][that] these laboratories are operated by individuals who manufacture the drug in a clandestine and unsafe manner, often resulting in explosions and fires that can injure not only the individuals involved, but their families, neighbors, law-enforcement officers and firemen.... [t]hat use of methamphetamine can result in fatal kidney and lung disorders, brain damage, liver damage, blood clots, chronic depression, hallucinations, violent and aggressive behavior, malnutrition, disturbed personality development, deficient immune system and psychosis. Children born to mothers who are abusers of methamphetamine can be born addicted and suffer birth defects, low birth weight, tremors, excessive crying, attention deficit disorder and behavior disorders.... [t]hat in addition to the physical consequences to an individual who uses methamphetamine, usage of the drug also produces an increase in automobile accidents, explosions and fires, increased criminal activity, increased medical costs due to emergency room visits, increases in domestic violence, increased spread of infectious diseases and a loss in worker productivity.... [t]hat environmental damage is another consequence of the methamphetamine epidemic. Each pound of methamphetamine produced leaves behind five to six pounds of toxic waste. Chemicals and byproducts that result from the manufacture of methamphetamine are often poured into plumbing systems, storm drains or directly onto the ground. Clean up of methamphetamine laboratories is extremely resource-intensive, with an average remediation cost of $5,000."

W. VA. CODE §§ 60A-10-2(a) to 60A-10-2(e). Further still, the Legislature reasoned '[t]hat it is in the best interest of every West Virginian to develop a viable solution to address the growing methamphetamine problem in the State of West Virginia...[and] [t]hat it is further in the best interests of every West Virginian to create impediments to the manufacture of methamphetamine...." W. VA. CODE §§ 60A-10-2(e), (f).

In order to address the growing methamphetamine problem -- both use and manufacture -- the Legislature criminalized every conceivable act associated with it. The Legislature criminalized possession of methamphetamine. W. VA. CODE § 60A-4-401(c). Further, the Legislature made possession with the intent to deliver and delivery of methamphetamine felony offenses. W. VA. CODE § 60A-4-401(a). Additionally, the

Legislature felonized the manufacture of methamphetamine. W. VA. CODE § 60A-4-411 (Operating or attempting to operate clandestine drug laboratories). Next, to further combat clandestine drug laboratories, the Legislature criminalized possession of substances to be used as precursors in methamphetamine production. W. VA. CODE § 60A-10-4(d). Even more specifically, the Legislature criminalized the possession of three enumerated precursors – ephedrine, pseudoephedrine, and phenylpropanolamine – in an altered state to be used in methamphetamine production. *Id.* Moreover, the Legislature made products containing those three enumerated precursors Schedule V Controlled Substances. W. VA. CODE § 60A-2-212(d). These products are available without a prescription, and are subject to controlled dispensation rather than requiring prescriptions by a physician. *See* W. VA. CODE R. § 15-11-3.1.[1]

Additionally, in order to combat the production and use of methamphetamine, the Legislature restricted the sale of drug products containing designated precursors. W. VA. CODE 60A-10-5(a). Also, the Legislature restricted the sale of methamphetamine to minors and ordered products containing designated precursors were to be locked behind pharmacy counters. *Id.* at (b) and (c). Additionally, the Legislature required identification for the purchase of products containing designated precursors. *Id.* at (e). Lastly, the Legislature

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[1] Schedule V pseudoephedrine products may be sold, delivered, or provided only in licensed pharmacies, behind the pharmacy counter, by a pharmacist, registered pharmacy intern, or registered pharmacy technician. This limitation applies to consumer transactions or dispensings, and does not apply to wholesale or distribution transactions between licensed manufactures, wholesale drug distributors, pharmacies or other healthcare practitioners holding the products as stock. Schedule V pseudoephedrine products may not be sold, delivered, or provided to any person who is under the age of eighteen.

ordered that those purchasing products with designated precursors sign a logbook which monitored individual purposes. *Id.*

In his brief, the Petitioner completely misapprehends that legislative intent behind the Act. Pet.Br. at 6. He asserts that the Act is meant to solely prosecute methamphetamine production, i.e. methamphetamine laboratories. *Id.* Yet, in reading the Act in conjunction with the remainder of the UCSA, both statutes criminalize methamphetamine production. *See generally* W. VA. CODE §§ 60A-4-401, 60A-4-411, 60A-10-4(d). The Act, however, differs from the West Virginia Code §§ 60A-4-401 to 60A-4-417 in that it seeks to control the distribution of products containing designated precursors commonly used in methamphetamine *manufacture*. *See generally* W. VA. CODE § 60A-10-5. Further, the Act criminalized the possession of ephedrine, pseudoephedrine, phenylpropanolamine or other designated precursor with the intent to use it in the manufacture of methamphetamine *or* "*a substance containing ephedrine, pseudoephedrine, or phenylpropanolamine in a state or form which is, or has been altered or converted from the state or form in which these chemicals are, or were commercially distributed*…." W. VA. CODE § 60A-10-4(d) (emphasis added).

The plain language of the Code envisions the prosecution of methamphetamine as an altered precursor. Where the Legislature has not defined a term in the statute, the undefined term is given its 'common, ordinary, and accepted meaning." Syl. Pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 336 S.E.2d 171 (1984); *see also Taniguchi v. Kan Pac. Saipan, Ltd.,* 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). "Courts frequently turn to dictionaries for help in determining a term's ordinary meaning." *United States v. Leak*, 426 F. Supp.3d

206, 213 (W.D.N.C. 2019); *see generally Nielson v. Shinseki*, 607 F.3d 802, 805-806 (Fed. Cir. 2010) (citations omitted) ("When terms are not defined, it is a basic principle of statutory interpretation that they are deemed to have their ordinary meaning. For that meaning, it is appropriate to consult dictionaries."). To that end, B*lack's Law Dictionary* 77 (6th ed. 1990), defines "alter" as:

> To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed; to increase or diminish.

"Convert" is defined as "to alter the physical or chemical nature or properties of especially in manufacturing." MIRIAM-WEBSTER, Definition of Convert (March 31, 2022, 2:45 PM), https://www.merriam-webster.com/dictionary/convert.

Knowing the definitions, one must also be familiar with the general techniques to manufacture methamphetamine. There are multiple ways to manufacture methamphetamine, usually by production in a laboratory setting or by what is known as the "shake and bake" or "one-pot" method. See, *e.g.* West Virginia Department of Environmental Protection, One-pot Methamphetamine Cooks Pose New Danger (March 31, 2022, 3:46 PM), https://dep.wv.gov/environmental-advocate/reap/ppod/Documents/Shake%20and%20Bake%20Method.pdf. Without outlining an exact recipe, cooking methamphetamine involves the following, general steps:

> 1) the precursor is necessary, such as ephedrine or pseudoephedrine; 2) if the precursor is not already in a powder form, the ephedrine or pseudoephedrine must be separated from the tablet; 3) the ephedrine or pseudoephedrine tablets are mixed with a solvent into a solution which is, then, filtered and exposed to low temperatures to separate and remove the inert material of the tablet; 4) the pure ephedrine or pseudoephedrine is mixed with red phosphorus and hydriodic acid; 5) the red phosphorus is filtered out and the remaining acid is neutralized by adding a lye solution;

> 6) a substance is added that will bind to the methamphetamine and the liquid methamphetamine is drained out; 7) hydrogen chloride gas is bubbled through the liquid methamphetamine, making it a crystalline hydrochloride salt; 8) this mixture is poured through a filter cloth, usually a coffee filter, and the meth that is left on the filter is then dried; 9) once dry, the methamphetamine is used by the cooker or cut with inert filler in order to maximize profits for future sale.

Howstuffworks, How Meth Works: How to Make Meth (March 31, 2022, 3:29 PM), https://science.howstuffworks.com/meth3.htm. The "shake and bake" or "one-pot method of manufacturing methamphetamine occurs just as the name implies:

> Methamphetamine cooks, using the "shake and bake" method, combine the anhydrous ammonia, or the fertilizer from which it is extracted, the pseudoephedrine tablets, water, and reactive material (i.e. lithium) into one container, often a 2-liter soda bottle. After the chemical reaction, what is left is a crystalline powder that can be smokes, snorted or injected. The idea behind this method is to reduce the amount of time needed to produce the methamphetamine.

See West Virginia Department of Environmental Protection, *supra*; *see also State v. Hypes*, 230 W. Va. 390, 393, 738 S.E.2d 554, 557 (2013) (listing ingredients commonly used in manufacturing methamphetamine).[2]

Knowing how methamphetamine is made, and having defined the relevant words in West Virginia Code § 60A-10-4(d), one may determine whether the Legislature intended for methamphetamine to be prosecuted as pseudoephedrine in an altered form. The substance containing pseudoephedrine is either made into a powdered form, (i.e. altered)

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[2] During investigation of clandestine drug laboratory, police found peroxide bottles, matchbooks, and a couple of bottles attributed to the defendant. One bottle had some brownish-red liquid in it and another had some coffee filters stuffed in the end of it. [T]here was a smoking bottle in the garbage, commonly referred to as a "gas generator." The gas generator as rock salt and another chemical in it that would cause a chemical reaction, and it would fume and smoke. Also found was a HEET bottle and used blister bags. The officer stated that HEET contains alcohol, which is a key ingredient for manufacturing methamphetamine. Also found was a Bernzomatic propane bottle, a camp fuel container, iodine, a hotplate and a methamphetamine recipe book called "The Secret of Methamphetamine Manufacture, Uncle Fester's 7th Edition.

or pseudoephedrine tablets are placed into the reactive substance (e.g. anhydrous ammonia or lithium), whether cooked in a laboratory setting or subjected to shake and bake. *See* Howstuffworks and West Virginia Department of Environmental Protection, *supra.* During the process in the reactive substance, whether or not heat (i.e. fire) is applied, the pseudoephedrine is removed and separated via a chemical reaction. *Id.* Thus, in manufacturing the methamphetamine the pseudoephedrine is altered or converted from its original state (i.e. tablets or powder) into the end product of methamphetamine. *See* W. VA CODE § 60A-10-4(d); *see also Black's Law Dictionary* 77, MIRIAM-WEBSTER, Definition of Convert, *supra*. Hence, based on the plain language of West Virginia Code § 60A-10-4(d), methamphetamine is pseudoephedrine in an altered state.

In the case at bar, the Petitioner acknowledged that he attempted to possess with the intent to deliver 3.3 grams of methamphetamine. A.R. at 50-51, 74. He neither contested this fact nor the fact that the methamphetamine was pseudoephedrine in an altered state. *See generally id.* at 52-82. In so doing, the Petitioner acknowledged that the pseudoephedrine had been altered or converted in the past to make to make the methamphetamine. *See Black's Law Dictionary* 77, MIRIAM-WEBSTER, Definition of Convert, *supra; see also* Howstuffworks and West Virginia Department of Environmental Protection, *supra;* A.R. at 52-82.

In support of his position that the final form of methamphetamine may not be prosecuted under West Virginia Code § 60A-10-4(d), the Petitioner relies on five memorandum decisions from this Court. *See generally* Pet.Br. at 11. However, the Petitioner misapprehends these cases as none of them stands for the proposition that methamphetamine may not be prosecuted as pseudoephedrine in an altered state under that

specific Code section. A.R. at 30. The only similarity in the five cases the Petitioner claims supports his position is that the defendant in each was charged and convicted of felony offenses where one of the charges alleged was a violation of West Virginia Code 60A-10-4(d). Moreover, in none of those cases does this Court hold that methamphetamine may not be prosecuted under that specific Code section or define what pseudoephedrine in an altered state is.[3]

Wherefore, based on the foregoing, the West Virginia Legislature clearly intended methamphetamine to be prosecuted as pseudoephedrine in an altered state. The circuit court, therefore, must be affirmed.

1. No Double Jeopardy Violation Exists in this Matter.

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[3] *State v. Ward*, No. 13-0648 (West Virginia Supreme Court, August 29, 2014)(memorandum decision)(guilty plea to felony possession of substances to be used as precursor to manufacture methamphetamine under West Virginia Code § 60A–10–4(d); Petitioner's sole argument on appeal is that the circuit court erred by enhancing his sentence under West Virginia Code § 60A–4–408); *State v. Hamrick*, No. 15-0716 (West Virginia Supreme Court, May 23, 2016)(memorandum decision)(challenge of severity of sentence after plea of guilty to conspiracy to operate a clandestine drug laboratory, possession of methamphetamine precursors, conspiracy to possess with intent to deliver a controlled substance, and possession with intent to deliver a controlled substance; court did not rule on prosecution of crushed pseudoephedrine as only available under 60A-10-4(d)); *State v. Palmer*, No. 16-0075 (West Virginia Supreme Court, April 10, 2017)(conviction for operating a clandestine drug lab and conspiracy appealed on the basis that the State did not prove every statutory element beyond a reasonable doubt; court did not rule on prosecution of crushed pseudoephedrine as only available under 60A-10-4(d)); *State v. Bookheimer*, No. 17-0446 (West Virginia Supreme Court, April 9, 2018)(memorandum decision)(defendant pled guilty to prohibited person in possession of a firearm after search of her home revealed evidence of a meth lab, materials involved in making meth and multiple firearms; court did not rule on prosecution of crushed pseudoephedrine as only available under 60A-10-4(d) nor were precursors part of the Court's analysis); *State v. Morgan,* No. 18-0065 (West Virginia Supreme Court, April 6, 2020)(memorandum decision)(challenging conviction on multiple counts, including W. Va. Code 60A-4-401(a)(ii) and 60A-10-4(d), on sufficiency of the evidence grounds; court did not rule on prosecution of crushed pseudoephedrine as only available under 60A-10-4(d)).

The Petitioner contends that convictions on the Counts of Possession of a Controlled Substance with the Intent to Deliver and Possession of Pseudoephedrine in an Altered State violates double jeopardy. Pet. Br. at 17. Because the Petitioner's convictions do not offend double jeopardy, the judgment of the circuit court must be affirmed.

Both the United States and West Virginia Constitutions contain prohibitions against double jeopardy. U.S. Const. amend. V,[4] W. Va. Const. Art. III, § 5.[5] Further, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. Syl. Pt. 4, *State v. Gill,* 187 W.Va. 136, 416 S.E.2d 253 (1992)(citing *Blockburger v. United States,* 284 U.S. 299 (1932)).

Possession with the Intent to Deliver a Controlled Substance occurs under West Virginia Code § 60A-4-401(a) when "any person to manufacture[s], deliver[s], or possess[es] with [the] intent to manufacture or deliver, a controlled substance." Methamphetamine, its salts, isomers, and salts of its isomers is a Schedule II Controlled Substance. W. VA. CODE § 60A-2-206(d). Possession of Pseudoephedrine in an Altered State occurs under the Code when:

> "...any person...knowingly possesses a substance containing ephedrine, pseudoephedrine or phenylpropanolamine or their salts, optical isomers or salts of optical isomers in a state or form which is, or has been altered or converted from the state or form in which these chemicals are, or were, commercially distributed is guilty of a felony...."

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[4] The Fifth Amendment's Double Jeopardy Clause provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb[.]"

[5] Article III, § 5 of the West Virginia Constitution contains a double jeopardy clause which provides, "[n]o person shall . . . twice put in jeopardy of life or liberty for the same offence."

W. VA. CODE § 60A-10-4(d).

Petitioner claims that the State "would only have to prove that [he] possessed altered pseudoephedrine contained in the final form of methamphetamine...a clear violation of *Blockburger*." Pet. Br. at 18. "There are no different elements that the State would have to prove between Possession of Altered Pseudoephedrine and Simple Possession [sic]." *Id.* "The State would garner a conviction based on [Petitioner's] defense on both Possession of Altered Pseudoephedrine and Simple Possession...." *Id.* at 18-19.

The Petitioner's claims are meritless. In order to possess methamphetamine with the intent to deliver, one must: 1) possess, 2) with the intent to deliver, 3) a controlled substance. W. VA. CODE § 60A-4-401(a). Methamphetamine is a Schedule II Controlled Substance. W. VA. CODE § 60A-2-206(d). Possession of Pseudoephedrine in an Altered State is committed when any person: 1) knowingly possesses, 2) pseudoephedrine (or their salts, optical isomers or salts of optical isomers), 3) in a state or form which is, or has been altered or converted from the state or form in which these chemicals are, or were, commercially distributed. W. VA. CODE § 60A-10-4(d). Clearly, different elements exist between West Virginia Code § 60A-4-401(a) and West Virginia Code § 60A-10-4(d) that the State must prove at any trial on the merits. *See Gill*, 187 W.Va. at 138, 416 S.E.2d at 255. West Virginia Code § 60A-10-4(d) requires a defendant to possess pseudoephedrine (or any other enumerated precursor under that Code section) in a state that was altered or changed from its original tablet form. Absent in West Virginia Code § 60A-10-4(d) is the requirement of "intent to deliver" as found in West Virginia Code § 60A-4-401(a).

Conversely, West Virginia Code § 60A-4-401(a) requires a defendant to possess with the intent to deliver any scheduled controlled substance. Conspicuously absent from

this Code section is the requirement to possess pseudoephedrine (or any other enumerated precursor) in an altered state. As such, the Petitioner cannot make a prima facie case that a finding of guilt on both charges constitutes a violation of double jeopardy. Syl. Pt. 1, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996).

In the recent past, this Court recognized that convictions for possession of substances to be used as precursors to manufacture methamphetamine and conspiracy to possess such precursors alleged separate crimes, and therefore, do not violate double jeopardy. *State v. Pauley*, No. 11-0462 (2012 WL 2915012, at *2-*3 (W. Va. Supreme Court, February 14, 2012)) (memorandum decision). This is consistent with the recognition by other states that convictions for both manufacturing methamphetamine and for possession of methamphetamine precursor do not offend double jeopardy. *See, e.g. Shemwell v. Commonwealth*, 294 S.W.3d 430, 432-434 (Ky. 2009) (separate convictions for manufacturing methamphetamine and possession of methamphetamine precursor did not violate prohibition against double jeopardy), *Webb v. State*, 275 S.W.3d 22, 25-26 (Tex. Crim. App. 2008) (convictions for manufacturing methamphetamine and possession of precursor materials did not violate double jeopardy), *State v. Unruh*, 281 Kan. 520, 533-534, 133 P.3d 35, 45-46 (2006) (the crimes of possession of methamphetamine, possession of anhydrous ammonia in an unapproved container, and possession of ephedrine or pseudoephedrine as a precursor require proof of an element not required to be proved for a conviction of manufacture of methamphetamine, [and] [t]herefore, none of the convictions…resulted in a violation of double jeopardy), *Tilley v. State*, 202 S.W.3d 726, 738 (Mo. Ct. App. 2006) (convictions for attempting to manufacture a controlled substance

and possession of precursor ingredients for methamphetamine with the intent to manufacture that drug did not violate double jeopardy).

Notwithstanding the general rule that an individual may not be punished twice for a single offense, *see, e.g.*, *Ex parte Lange*, 85 U.S. 163, 168 (1873) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence."), double jeopardy does not preclude the imposition of multiple punishments for multiple crimes that arise during a single factual occurrence. "The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the Legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *see also Ohio v. Johnson*, 467 U.S. 493, 499 (1984) ("Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent." (internal citations omitted)). Thus, where multiple sentences are imposed after a singular criminal transaction, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown*, 432 U.S. at 165.

Consistent with the Legislature's power to prescribe penalties for any particular crime, double jeopardy is not offended by the existence of multiple offenses that are specifically intended to criminalize—and thus amplify the punishment for—a specific factual occurrence. *See Garrett v. United States*, 471 U.S. 773, 778 (1985) ("Where the same conduct violates two statutory provisions, the first step in the double jeopardy

analysis is to determine whether the Legislature—in this case Congress—intended that each violation be a separate offense."); *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983) ("Where . . . a legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes proscribe the 'same' conduct . . . a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment."). Put another way, the *Blockburger*[6] test is not controlling where there is a clear indication of legislative intent. Syl. Pt. 5, *Gill*, 187 W. Va. 136, 416 S.E.2d 253.

This Court has correspondingly held that "[a] claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment." *Id.* at Syl. Pt. 7. "In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes." *See id.* at Syl. Pt. 8. "Where the language of a statute is clear and without ambiguity the plain meaning is to be

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[6] The test in *Blockburger v. United States*, which this Court adopted in Syl. Pt. 8, *State v. Zaccagnini*, 172 W. Va. 491, 308 S.E.2d 131 (1983), states that "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." 284 U.S. 299, 304 (1932). The *Blockburger* test "applies to determinations of whether [a legislature] intended the same conduct to be punishable under two criminal provisions." *State v. McGilton*, 229 W. Va. 554, 563, 729 S.E.2d 876, 885 (2012) (alteration in *McGilton*) (internal quotation and citation omitted). "Under *Blockburger* . . . , if two statutes contain identical elements of proof, the presumption is that double jeopardy principles have been violated *unless there is a clear and definite statement of intent by the Legislature that cumulative punishment is permissible*." Syl. Pt. 5, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996) (emphasis added).

accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).

The legislature made its intent crystal clear: "possession with the intent to deliver a controlled substance" is a separate, distinct felony subject to separate punishment from "possession of pseudoephedrine in an altered state." *See* W.VA. CODE §§ 60A-4-401, 60A-10-4. The legislature, clearly, intended the offense of "pseudoephedrine in an altered state" to be an additional crime exclusive of a simple felony drug possession charge. Double jeopardy is not violated in the instant case.

Importantly,

> [T]he Supreme Court has expressly recognized that where the legislature intended to make the same conduct the subject of two criminal acts and, therefore, separately punishable, this could be done even though under the *Blockburger* test, the crimes would constitute the same offense:
>
> > Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature-in this case Congress-intended that each violation be a separate offense . . . .
> >
> > * * * * * *
> >
> > . . . We have recently indicated that the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history.

State v. Rummer, 189 W. Va. 369, 374–75, 432 S.E.2d 39, 44–45 (1993) (internal quotations and citations omitted). In other words, "simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes." *Gill*, 187 W. Va. at 142, 416 S.E.2d at 259 (internal quotation and citation omitted).

Consequently, because the legislative intent to punish a single instance of drug-related conduct under multiple statutes is abundantly clear from the face of the statutes. W. VA. CODE §§ 60A-4-401, 60A-10-4. Punishing the Petitioner for possession with the intent to deliver and possession of pseudoephedrine in an altered state does not violate Double Jeopardy as they are two, separate and distinct acts. In the case at bar, one commits possession with the intent to deliver methamphetamine by possessing that controlled substance with the requisite intent to sell or transfer it to another person. W. VA. CODE §§ 60A-2-206, 60A-4-401. One must alter pseudoephedrine in some manner in order to get to the final product of methamphetamine. W. VA. CODE § 60A-10-4, A.R. at 37. This clearly shows that had the Legislature wished to combine the two into one statute it was quite aware that it was creating a wholly separate statutory proscription, not simply an either-or choice of prosecuting methamphetamine offenses solely under West Virginia Code § 60A-4-401. Further, the Legislature added West Virginia Code §§ 60A-10-1 to 60A-10-9 in 2005, well after it adopted West Virginia Code 60A-4-401 in 1971. This fact lends further credence to the fact that the Legislature never intended to combine simple or felony possession of methamphetamine and possession of pseudoephedrine in an altered state into one statutory scheme. The Legislature always intended the two Code sections to be separate crimes.

Based on the foregoing facts contained in the Appendix and applicable law, the Petitioner's convictions for Possession with the Intent to Deliver Methamphetamine and Possession of Pseudoephedrine in an Altered State do not violate double jeopardy. Accordingly, the judgment of the circuit court should be affirmed.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the judgment of the Circuit Court of Wayne County, West Virginia must be affirmed and the plea agreement enforced.

Respectfully Submitted,

STATE OF WEST VIRGINIA
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0023

STATE OF WEST VIRGINIA,

Respondent,

v.

CHARLES LEE FINLEY,

Petitioner.

CERTIFICATE OF SERVICE

I, R. Todd Goudy, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, April 21, 2022, and addressed as follows:

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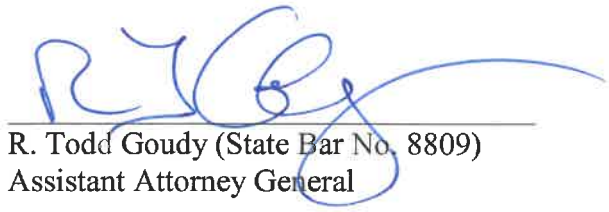

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