

FILE COPY

DEC 30 2019

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 18-0654**

STATE OF WEST VIRGINIA,
Respondent,

**DO NOT REMOVE
FROM FILE**

v.

DEAN E. GAMBLE, SR.,
Petitioner.

RESPONDENT'S BRIEF

Appeal from the June 22, 2018, Order
Circuit Court of Fayette County, West Virginia
Case Nos. 18-F-19 and 18-F-20

**PATRICK MORRISEY
ATTORNEY GENERAL**

**LARA K. BISSETT
ASSISTANT ATTORNEY GENERAL
W.Va. State Bar # 9102
812 Quarrier Street, 6th Floor
Charleston, WV 25301
(304) 558-5830
Fax: (304) 558-5833
lara.k.bissett@wvago.gov
*Counsel for Respondent***

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Assignments of Error	1
Statement of the Case.....	1
Statement Regarding Oral Argument.....	5
Summary of Argument	5
Standard of Review.....	6
Argument	7
A. The circuit court did not plainly err by separately enhancing Petitioner’s two sentences for delivery of a controlled substance because West Virginia Code §60A-4-408 expressly provides for the enhancement of a sentence on a second or subsequent conviction under the Uniform Controlled Substance Act.....	7
B. The circuit court did not demonstrate bias against Petitioner, nor did Petitioner suffer from ineffective assistance of counsel. Moreover, Petitioner’s allegations do not present a cognizable claim under a Rule 35(b) appeal.....	14
C. The circuit court did not impose an illegal and/or disproportionate sentence on Petitioner when it enhanced both of his sentences for Delivery of a Controlled Substance pursuant to West Virginia Code §60A-4-408. Moreover, Petitioner’s allegation does not present a cognizable claim under a Rule 35(b) appeal.....	17
D. There is no conflict between the statutes governing the scheduling of controlled substances that requires effective repeal of one statute in favor of another. Again, Petitioner’s allegation does not present a cognizable claim under a Rule 35(b) appeal....	18
E. Petitioner’s guilty plea was made voluntarily and was not induced by illegal threats nor undermined by an illegal sentence. Additionally, Petitioner’s allegations do not present a cognizable claim under a Rule 35(b) appeal.....	18
F. The circuit court did not abuse its discretion or otherwise err in denying Petitioner’s motion for alternative sentence. Once again, Petitioner’s allegation does not present a cognizable claim under a Rule 35(b) appeal.....	20
Conclusion	21

TABLE OF AUTHORITIES

Cases	Page
<i>Banker v. Banker</i> , 196 W.Va. 535, 474 S.E.2d 465 (1996).....	13
<i>Carr v. Coiner</i> , 296 F. Supp. 1058, 1063 (N.D.W. Va. 1969)	19
<i>Crandon v. United States</i> , 494 U.S. 152, 110 S.Ct. 997, 1002, 108 L.Ed.2d 132 (1990).....	14
<i>DeVane v. Kennedy</i> , 205 W.Va. 519, 519 S.E.2d 622 (1999).....	13
<i>Farley v. Buckalew</i> , 186 W.Va. 693, 414 S.E.2d 454 (1992).....	13
<i>Hutchison v. Dietrich</i> , 183 W.Va. 25, 393 S.E.2d 663 (1990).....	11
<i>Liberty Mut. Ins. Co. v. Morrissey</i> , 236 W. Va. 615, 760 S.E.2d 863 (2014).....	13
<i>Machibroda v. United States</i> , 368 U.S. 487, 82 S.Ct. 510 (1961).....	19
<i>McClure v. Boles</i> , 233 F.Supp. 928 (N.D.W.Va.1964)	19
<i>Ohio County Comm'n v. Manchin</i> , 171 W.Va. 552, 301 S.E.2d 183 (1983).....	13
<i>Smith v. State Workmen's Comp. Comm'r</i> , 159 W.Va. 108, 219 S.E.2d 361 (1975).....	12, 14
<i>State ex rel. Davis v. Boles</i> , 151 W.Va. 221, 151 S.E.2d 110 (1966).....	8
<i>State ex rel. Daye v. McBride</i> , 222 W.Va. 17, 658 S.E.2d 547 (2007).....	11, 12, 17
<i>State ex rel. Felters v. Hott</i> , 173 W.Va. 502, 318 S.E.2d 446 (1984).....	14

<i>State ex rel. Morgan v. Trent</i> , 195 W. Va. 257, 465 S.E.2d 257 (1995).....	13, 14
<i>State v. Brown</i> , 2018 WL 4944193 (W.Va. Oct. 12, 2018) (memorandum decision)	12
<i>State v. Doom</i> , 237 W. Va. 754, 791 S.E.2d 384 (2016).....	20
<i>State v. Epperly</i> , 135 W.Va. 877, 65 S.E.2d 488 (1951).....	12
<i>State v. General Daniel Morgan Post No. 548, V.F.W.</i> , 144 W.Va. 137, 107 S.E.2d 353 (1959).....	13
<i>State v. Georgius</i> , 225 W. Va. 716, 696 S.E.2d 18 (2010).....	10
<i>State v. Goodnight</i> , 169 W. Va. 366, 287 S.E.2d 504 (1982).....	9, 18, 20
<i>State v. Head</i> , 198 W. Va. 298, 480 S.E.2d 507 (1996).....	7, 8, 15
<i>State v. Lucas</i> , 201 W.Va. 271, 496 S.E.2d 221 (1997).....	20
<i>State v. Marcum</i> , 238 W. Va. 26, 792 S.E.2d 37 (2016).....	8, 15, 19, 20
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114, (1995).....	7, 16
<i>State v. Rutherford</i> , 223 W. Va. 1, 672 S.E.2d 137 (2008).....	12
<i>State v. Stover</i> , 179 W. Va. 338, 368 S.E.2d 308 (1988).....	11
<i>State v. Sugg</i> , 193 W.Va. 388, 456 S.E.2d 469 (1995).....	10
<i>State v. White</i> , 188 W.Va. 534, 425 S.E.2d 210 (1992).....	14

<i>Stephen L.H. v. Sherry L.H.</i> , 195 W.Va. 384, 465 S.E.2d 841 (1995).....	13
---	----

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	16
---	----

<i>Turner v. Holland</i> , 175 W.Va. 202, 332 S.E.2d 164 (1985).....	7, 11
---	-------

Rules

W.Va. R. Crim. P. 35(b)	6, 8, 14, 15, 18, 20
W.Va. R. App. P. 18(a)(3) and (4).....	5

Statutes

W. Va. Code § 60A-4-408	6, 7, 9, 10, 11, 12, 13, 14, 17
W. Va. Code § 61-11-18	7, 11, 12, 17
W. Va. Code § 61-11-19	11, 17

I. ASSIGNMENTS OF ERROR

In his primary brief (referred to parenthetically as “Pet’r Br”), Petitioner argues that the circuit court committed plain error by separately enhancing two of his sentences pursuant to West Virginia Code § 60A-4-408 for convictions rendered on the same date and in the same proceeding in the absence of express language authorizing separate sentence enhancements for convictions rendered on the same date and in the same proceeding. In his supplemental brief¹ (referred to parenthetically as “Supp Br”), Petitioner argues: (1) ineffective assistance of counsel, (2) denial of a fair and impartial judge, (3) conflicting statutes, (4) illegal and/or disproportionate sentence, and (5) abuse of discretion in denying an alternate sentence.

II. STATEMENT OF THE CASE

On January 9, 2018, Petitioner was indicted in case number 18-F-20 on one count of Conspiracy to Commit a Felony, one count of Burglary, and one count of Grand Larceny. (Appx. R. 10-11). On January 10, 2018, Petitioner was indicted in case number 18-F-19 on two counts of Delivery of a Controlled Substance (Suboxone). (Appx. R. 8). At a hearing on March 6, 2018, defense counsel, Scott Stanton, moved to suppress two factory-sealed foil packages containing the suboxone strips that Petitioner delivered to a confidential informant, as alleged in the two counts of the indictment in 18-F-19. (Appx. R. 23). Per the State Police Forensic Laboratory’s Drug Identification Case Acceptance Policy, the laboratory had returned the samples without opening the packages and testing the contents. (Appx. R. 33). The circuit court granted Petitioner’s motion to suppress the suboxone evidence, ruling that foil packages were “not admissible as it is” unless

¹ Petitioner filed a motion for leave to file a *pro se* supplemental brief in accordance with Rule 10(c)(10)(b) of the West Virginia Rules of Appellate Procedure, which this Court granted.

the State tested the contents of the packages. (Appx. R. 55). The State subsequently had the contents of the packets tested. (Appx. R. 67).

On March 16, 2018, the State and the Petitioner entered into a plea agreement. (Appx. R. 68). Thereafter, on March 26, 2018, Petitioner entered a plea of guilty to Counts One and Two of the indictment in 18-F-19 and to Count One of the indictment in 18-F-20. (Appx. R. 64-65). The remaining counts of the indictment in 18-F-20 were dismissed. (Appx. R. 65). In the State's recitation of the plea agreement at the plea hearing, the State explained that "[Petitioner] understands that if at the time of sentencing in this matter you can double the delivery charges, the penalty for the delivery charges, because he does have a prior felony drug conviction." (Appx. R. 66).

For his part, counsel for Petitioner stated, "[The State] has correctly spread this agreement upon the record, Your Honor. That is the agreement between the State of West Virginia and Mr. Gamble." (Appx. R. 67). Counsel for Petitioner went on to say, "My client does have a prior felony drug conviction. I've explained that to my client, but in this Court's discretion you have the ability to double those sentences and he fully comprehends and understands that." (*Id.*) Petitioner, by counsel, acknowledged at that same plea hearing that the State had timely and properly filed a recidivist information after the plea agreement was reached on March 16, 2018. (Appx. R. 68). The State agreed, though, as part of the plea agreement, not to pursue the recidivist information if the court accepted the plea agreement. (*Id.*)

In an extensive colloquy with Petitioner to assure that he was competent and capable of entering a plea, the circuit court confirmed with Petitioner that the plea agreement put upon the record by the State and counsel for Petitioner was the entire plea agreement as Petitioner understood it. (Appx. R. 72-77). Nonetheless, the circuit court reviewed the terms of the plea

agreement one more time with Petitioner. (Appx. R. 78-81). The circuit court then reviewed the possible sentencing consequences for the plea agreement with Petitioner, saying, “Now, do you understand that I could double [the sentence for delivery of suboxone] and make it not less than two years, no more than ten years?” (Appx. R. 82). Petitioner replied, “Yes, sir, I do.” (*Id.*) Regarding the second count of delivery of suboxone, the circuit court, again, said, “I could double that sentence also and make that no less than two, no more than ten years.... Do you understand that?” (Appx. R. 83). Again, Petitioner replied, “Yes, sir.” (*Id.*) The circuit court went on to explain that he could order the sentences to be served concurrently or consecutively. (*Id.*) Petitioner took a moment to have an off-the-record discussion with his attorney before assuring the circuit court that he understood. (Appx. R. 83-84). The circuit court went one step further still to actually spell out that Petitioner was facing up to five to 25 years in prison if the court chose to double both sentences for the two counts of delivery of suboxone and run all three sentences—including one to five years for conspiracy—consecutively to one another. (Appx. R. 85-86). Petitioner assured the circuit court that he understood. (Appx. R. 86). In fact, when the circuit court made a math error—saying “four to 25 years”—counsel for Petitioner spoke up and corrected the court, pointing out that it was five to 25 years. (*Id.*) The circuit court went on *one more time* to ask, “And do you understand that in this case, I have the authority to double those two sentences in this case? Do you understand?” (Appx. R. 89). One more time, Petitioner answered, “I understand.” (Appx. R. 90).

After that exhaustive discussion between the circuit court and Petitioner about the terms and potential consequences of the plea agreement, the court made an equally exhaustive inquiry to confirm that Petitioner had not been made any promises in exchange for his plea, that Petitioner understood that he could still opt to exercise his right to a jury trial and what that would entail, and

that Petitioner felt that he did not need further time to discuss these matters with his attorney. (Appx. R. 90-109). Petitioner then pled guilty to Count One (Delivery of a Controlled Substance) and Count Two (Delivery of a Controlled Substance) of the Indictment in 18-F-19 and to Count One (Conspiracy to Commit a Felony) of the Indictment in 18-F-20. (Appx. R. 110). The circuit court accepted Petitioner's guilty plea. (Appx. R. 125).

The sentencing hearing followed on May 15, 2018.² (Appx. R. 130). On Count One (Delivery of a Controlled Substance) of the Indictment in 18-F-19, the circuit court sentenced Petitioner to a term of two to ten years in prison, which represented an enhancement of the sentence pursuant to West Virginia Code § 60A-4-408 due to Petitioner's prior drug conviction.³ (Appx. R. 131). On Count Two (Delivery of a Controlled Substance) of the Indictment in 18-F-19, the circuit court also sentenced Petitioner to a term of two to ten years in prison, which, again, represented an enhancement of the sentence pursuant to West Virginia Code § 60A-4-408 due to Petitioner's prior drug conviction. (Appx. R. 132). On Count One (Conspiracy to Commit a Felony) of the Indictment in 18-F-20, the circuit court sentenced Petitioner to a term of one to five years in prison. (*Id.*) The circuit court further ordered that the sentences run consecutively to one another. (*Id.*)

The circuit court noted that it was denying Petitioner's request for probation due to his extensive criminal history, which included 23 convictions spanning 42 years and three states.⁴

² The Appendix Record does not contain a transcript of the sentencing hearing.

³ Petitioner was convicted of Delivery of a Controlled Substance (Cocaine) on May 29, 2007. (Appx. R. 133).

⁴ Petitioner's criminal history includes convictions for DUI (1987), Public Intoxication (1993), Aiding/Abetting 1st Degree Sexual Abuse (1994), Driving SRO (1997), False Information to an officer (1998), Attempt to Commit Forgery (2000), Driving SRO (DUI) 2nd Offense (2000), Driving SRO (DUI) (2006), Conspiracy to Commit a Felony (2007), Delivery of a Controlled Substance (Cocaine) (2007), Failure to Register as a Sex Offender (2007 and 2015), 2 Misdemeanor Larcenies (North Carolina, 1999), Worthless Check (North Carolina, 1999), 2 Breaking and Enterings (North Carolina, 2002), 3 Felony Larcenies (North Carolina, 2002),

(Appx. R. 133-134). The circuit court specifically found that “[b]ased on the defendant’s record, there is a substantial likelihood that he would commit more crimes in the future.” (*Id.*) The circuit court continued that “to put the defendant on probation will unduly depreciate the seriousness of this offense.” (Appx. R. 134).

Subsequent to his sentencing, Petitioner filed a motion for reduction of sentence pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure. (Appx. R. 136). On June 22, 2018, the circuit court denied the motion. (*Id.*) Petitioner now appeals.

III. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision because the record is fully developed, and the arguments of both parties are adequately presented in the briefs. W.Va. R. App. P. 18(a)(3) and (4).

IV. SUMMARY OF THE ARGUMENT

Petitioner approaches this appeal as though it were a direct appeal of his conviction and sentence. However, if that is the case, then the appeal has not been timely filed.⁵ The Sentencing and Commitment Order in this matter was entered on May 29, 2018. Petitioner did not file his notice of appeal until July 30, 2018, which is outside of the 30 days allowed under Rule 37(b) of the West Virginia Rules of Criminal Procedure. Accordingly, then, in order for Petitioner’s appeal to be timely, this matter must be treated as an appeal of the circuit court’s June 22, 2018, Order denying Petitioner’s motion for a reduction in sentence pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure. In that case, the circuit court did not abuse its discretion in denying

Armed Robbery (Illinois, 1976), Possession of Marijuana (Illinois, 1983), and Damage to Property (Illinois, 1987).

⁵ Petitioner admits that he did not properly preserve the sentencing error assigned in his brief. (Pet’r Br. 8).

Petitioner's Rule 35(b) motion for reduction of sentence, nor did it err in finding that Petitioner's extensive criminal history made him an unsuitable candidate for alternative sentencing.

Petitioner argues that if the sentencing error was not properly preserved, then it should be reviewed under the standard of plain error. The circuit court did not plainly err by separately enhancing Petitioner's two sentences for Delivery of a Controlled Substance, though, because West Virginia Code § 60A-4-408 expressly provides for the enhancement of a sentence on a second or subsequent conviction under the Uniform Controlled Substances Act. Petitioner's two convictions in this matter were his second and third convictions under the Uniform Controlled Substances Act, and nothing in West Virginia Code § 60A-4-408 prohibits the enhancement of two sentences for two convictions rendered on the same day. The circuit court's sentencing order was well within statutory limits; it did not adversely affect the substantial rights of Petitioner; nor did it seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

The remainder of the issues raised by Petitioner—biased and/or unethical behavior on the part of the circuit court, ineffective assistance of counsel, illegal and/or disproportionate sentence, conflict between statutes, involuntary and/or unlawfully induced guilty plea, and abuse of discretion in failing to grant Petitioner's motion for an alternative sentence—are not cognizable on appeal of the denial of a Rule 35(b) motion for reduction of sentence.

V. STANDARD OF REVIEW

“In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and

questions of law and interpretations of statutes and rules are subject to a *de novo* review.” Syl. Pt. 1, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996).

“To trigger application of the “plain error” doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114, (1995).

VI. ARGUMENT

A. The circuit court did not plainly err by separately enhancing Petitioner’s two sentences for delivery of a controlled substance because West Virginia Code § 60A-4-408 expressly provides for the enhancement of a sentence on a second or subsequent conviction under the Uniform Controlled Substances Act.

Petitioner argues that the language in West Virginia Code § 60A-4-408 of the Uniform Controlled Substances Act mirrors the language in West Virginia Code § 61-11-18, which is more commonly known as the recidivist statute. He asserts that this Court has previously held that, with regard to the recidivist statute, a trial court may not separately enhance multiple sentences for convictions rendered on the same date and in the same proceedings absent some express language. Petitioner argues that, like the recidivist statute, West Virginia Code § 60A-4-408 lacks the express language that would allow a court to separately enhance multiple sentences for convictions rendered on the same date and in the same proceedings. *See Turner v. Holland*, 175 W.Va. 202, 332 S.E.2d 164 (1985). (Pet’r Br 4). Petitioner further argues that given the ambiguity in the statutes and case law, the circuit court committed plain error in enhancing both sentences. (Pet’r Br. 8). “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114, (1995).

First and foremost, this Court does not have jurisdiction to entertain this matter. As noted previously, a direct appeal of Petitioner's conviction and sentence would be untimely. Petitioner's only option to challenge his sentence at this point is an appeal of the denial of his motion for relief under Rule 35(b) of the West Virginia Rules of Criminal Procedure. In *State v. Marcum*, 238 W. Va. 26, 31, 792 S.E.2d 37, 42 (2016), this Court recognized that "it is abundantly clear that Rule 35(b) cannot be used as a vehicle to challenge a conviction or the validity of the sentence imposed by the circuit court, whether raised in the Rule 35(b) motion or in the appeal of the denial of the Rule 35(b) motion. In other words, challenges to convictions or the validity of sentences should be made through a timely, direct criminal appeal before this Court will have jurisdiction to consider the matter. See Syl. Pt. 2, *State ex rel. Davis v. Boles*, 151 W. Va. 221, 151 S.E.2d 110 (1966) ("An appellate court is without jurisdiction to entertain an appeal after the statutory appeal period has expired.')." To put a finer point on it, "Rule 35(b) of the West Virginia Rules of Criminal Procedure only authorizes a reduction in sentence. Rule 35(b) is not a mechanism by which defendants may challenge their convictions and/or the validity of their sentencing." Syl. Pt. 2, *State v. Marcum*, 238 W. Va. 26, 792 S.E.2d 37 (2016). Accordingly, Petitioner cannot challenge the validity of his sentence at this point in the judicial process. He can only challenge whether the circuit court abused its discretion or erred in denying his Rule 35(b) motion.

"In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review." Syl. Pt. 1, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996). In the instant case, the circuit court did

not abuse its discretion in denying Petitioner's motion. The circuit court's decision was based on the uncontroverted facts that Petitioner has a lengthy and varied criminal record, which includes a prior conviction for delivery of a controlled substance. Therefore, the circuit court appropriately applied West Virginia Code § 60A-4-408 when it enhanced Petitioner's sentences in his most recent convictions.

Nonetheless, Petitioner cannot meet the *Miller* test. Here, there was no "error," much less "plain" error. As Petitioner has pointed out, the statute has no express language addressing whether more than one sentence can be enhanced in the event of multiple convictions on the same day. Accordingly, the circuit court did not plainly err in enhancing both.

West Virginia Code § 60A-4-408, pursuant to which Petitioner's sentences were enhanced, provides that:

(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, fined an amount up to twice that otherwise authorized, or both. When a term of imprisonment is doubled under section 406, such term of imprisonment shall not be further increased for such offense under this subsection (a), even though such term of imprisonment is for a second or subsequent offense.

(b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

(c) This section does not apply to offenses under section 401(c).

This Court has repeatedly stated that "[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 366, 287 S.E.2d 504, 505 (1982). This Court has made clear that it gives deference and discretion to the trial court in matters of sentencing:

Moreover, in *State v. Sugg*, 193 W.Va. 388, 406, 456 S.E.2d 469, 487 (1995), we held that “[a]s a general proposition, we will not disturb a sentence following a criminal conviction if it falls within the range of what is permitted under the statute.”

It is not the proper prerogative of this Court to substitute its judgment for that of the trial court on sentencing matters, so long as the appellant's sentence was within the statutory limits, was not based upon any impermissible factors, and did not violate constitutional principles.

State v. Georgius, 225 W. Va. 716, 722, 696 S.E.2d 18, 24 (2010). Indeed, Petitioner acknowledges that this Court has repeatedly upheld sentence enhancements pursuant to West Virginia Code § 60A-4-408 where a defendant had multiple convictions rendered on the same date and in the same proceeding. (Pet’r Br 7).

Here, Petitioner has not shown that the circuit court relied upon any impermissible factor or that his sentence is not within statutory limits. On the contrary, the circuit court relied on Petitioner’s 42-year, 23-conviction criminal history, which led the court to the conclusion that “there is a substantial likelihood that he would commit more crimes in the future.” (Appx. R. 133-134). Accordingly, the circuit court denied Petitioner’s application for probation.⁶ (Appx. R. 134). That left open the question of sentence.

As part of the plea agreement, the State had agreed to not exercise its discretion to pursue a recidivist information pursuant to the recidivist statute. (Appx. R. 68). Nonetheless, because Petitioner’s criminal history included a May 29, 2007, conviction for Delivery of a Controlled Substance (cocaine), the circuit court determined that Petitioner’s sentences for both counts of Delivery of a Controlled Substance could and should be enhanced pursuant to West Virginia Code § 60A-4-408. (Appx. R. 132). While Petitioner argues that this was error, the sentence imposed

⁶ The circuit court relied on that same reasoning in denying Petitioner’s motion for reduction of sentence. (Appx. R. 136).

by the circuit court is clearly within statutory limits because there is no provision in West Virginia Code § 60A-4-408 that indicates that only one sentence may be doubled under the Uniform Controlled Substances Act. Rather, the statute clearly states that any “second or subsequent offense” may be doubled. Petitioner’s two convictions for Delivery of a Controlled Substance represent “second or subsequent” offenses.

Petitioner relies on *Turner v. Holland*, 175 W.Va. 202, 332 S.E.2d 164 (1985), *State v. Stover*, 179 W. Va. 338, 368 S.E.2d 308 (1988), and *Hutchison v. Dietrich*, 183 W.Va. 25, 393 S.E.2d 663 (1990) to argue that the circuit court erroneously doubled both sentences. (Appx. R. 7). The cited cases are inapposite, though, as they address the general recidivist statute and not West Virginia Code § 60A-4-408. Petitioner argues that West Virginia Code § 60A-4-408 and the recidivist statute are “two sides of the same coin.” (Pet’r Br. 6). However, this Court has long held that, although the Uniform Controlled Substances Act enhancement provision may somewhat mimic the general recidivist statute, the two statutes are *not* the same and should not be treated the same.

For instance, in *State ex rel. Daye v. McBride*, 222 W.Va. 17, 658 S.E.2d 547 (2007), this Court recognized several important distinctions between West Virginia Code § 60A-4-408 and West Virginia Code § 61-11-18:

The Uniform Controlled Substances Act, W.Va.Code, 60A-4-408 (1971), provides a lesser, and discretionary, enhancement in any case involving a repeat drug offender. Furthermore, the judge, not the prosecuting attorney, makes the enhanced sentencing decision under this drug offense statute. The statute applies to both misdemeanor and felony offenses. It does not require the filing of an information by the prosecuting attorney.

In contrast, the general habitual offender statute is utilized only in cases where the totality of a criminal defendant's criminal history makes a mandatory sentence of life imprisonment an appropriate punishment. The procedural provisions of the general habitual criminal offender statute, W.Va.Code, 61-11-19 (1943), require

the filing of an information by the prosecuting attorney within certain time limits, and the defendant has a right to a jury trial with attendant procedural safeguards.

Daye, 222 W.Va. at 23, 658 S.E.2d at 553. “West Virginia Code § 60A-4-408, on the other hand, requires only the fact of a prior conviction prior to enhancement, and thus does not mandate additional procedural safeguards.” *State v. Rutherford*, 223 W. Va. 1, 6, 672 S.E.2d 137, 142 (2008). The *Rutherford* Court also explained that “the appellant concludes that a defendant whose sentence is enhanced under W.Va.Code § 60A-4-408 should have the same procedural safeguards as those required under W.Va.Code § 61-11-18. Again, we disagree.” 223 W. Va. at 5, 672 S.E.2d at 141. Moreover, this Court has noted that “[i]n light of the significant differences between W.Va.Code § 60A-4-408 and W.Va.Code § 61-11-18, this Court is not persuaded that because W.Va.Code § 61-11-18 contains procedural safeguards not included by the Legislature in W.Va.Code § 60A-4-408, that these procedural safeguards should be considered constitutional imperatives applicable to all instances of sentence enhancement.” *Rutherford*, 223 W. Va. at 6, 672 S.E.2d at 142; *see also State v. Brown*, 2018 WL 4944193 (W.Va. Oct. 12, 2018) (memorandum decision) (finding language of general recidivist statute, West Virginia Code § 61-11-18(a) “entirely inapplicable” to a case where the petitioner’s sentence was enhanced pursuant to West Virginia Code § 60A-4-408).

Furthermore, the legislative intent in West Virginia Code § 60A-4-408 was not to limit a circuit judge’s ability to double multiple sentences, or the statute would have read as such. This Court has discussed legislative intent in depth:

This Court has stated that “[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975). We then examine the precise words chosen by the Legislature in adopting the statute. “A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951). Accord *DeVane*

v. Kennedy, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999) (“Where the language of a statutory provision is plain, its terms should be applied as written and not construed.” (citations omitted)); Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959) (“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.”). Where, however, the statutory language is not plain, its language must be construed before it can be applied: “[a] statute that is ambiguous must be construed before it can be applied.” Syl. Pt. 1, *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992). Accord Syl. Pt. 1, *Ohio County Comm’n v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983) (“Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent.”).

Liberty Mut. Ins. Co. v. Morrissey, 236 W. Va. 615, 624, 760 S.E.2d 863, 872 (2014).

Petitioner argues that the Legislature is presumed to have had full knowledge of prior judicial decisions when it enacted West Virginia Code § 60A-4-408. See *Stephen L.H. v. Sherry L.H.*, 195 W.Va. 384, 465 S.E.2d 841 (1995). Therefore, when it enacted West Virginia Code § 60A-4-408 in 1971, it was aware of this Court’s previous decisions wherein it held that two or more convictions entered on the same day are considered one conviction for the purposes of habitual offender statutes. (Pet’r Br 9). However, in *Banker v. Banker*, 196 W.Va. 535, 546–47, 474 S.E.2d 465, 476–77 (1996) this Court stated, “[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.”

Finally, Petitioner argues that the Rule of Lenity requires that this Court resolve this issue in favor of Petitioner. He cites Syllabus Point 5 of *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d 257 (1995), which states, “In construing an ambiguous criminal statute, the rule of lenity applies which requires that penal statutes must be strictly construed against the State and in favor of the defendant.” *Trent* cites the United States Supreme Court in *Crandon v. United States*,

494 U.S. 152, 158, 110 S.Ct. 997, 1002, 108 L.Ed.2d 132, 140 (1990), which found that “[the rule of lenity] serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.” *Trent* at 262, 262. However, Petitioner ignores the *Trent* Court’s further instruction that:

Although the rule of lenity applies where a criminal statute contains ambiguous language, it does not mean that words of common understanding and usage may be deemed ambiguous. Moreover, lenity does not foreclose a court from looking “not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.” *Crandon*, 494 U.S. at 158, 110 S.Ct. at 1001, 108 L.Ed.2d at 140. This principle of statutory construction is echoed in Syllabus Point 2 of *State v. White*, 188 W.Va. 534, 425 S.E.2d 210 (1992):

“ ‘ “In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.” Syl. Pt. 2, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).’ Syl. Pt. 3, *State ex rel. Fetters v. Hott*, 173 W.Va. 502, 318 S.E.2d 446 (1984).”

Id. at 263, 263. Here, there is no ambiguity in the common language of West Virginia Code § 60A-4-408. It speaks very plainly that “any person convicted of a second or subsequent offense under this act may be imprisoned for a term up to twice the term otherwise authorized....” The legislative intent of the statute is equally plain: to empower a circuit court to double sentences in cases where defendants offend over and over again under the Uniform Controlled Substances Act. There is no need to invoke the Rule of Lenity.

B. The circuit court did not demonstrate bias against Petitioner, nor did Petitioner suffer from ineffective assistance of counsel. Moreover, Petitioner’s allegations do not present a cognizable claim under a Rule 35(b) appeal.

Petitioner argues that the circuit court demonstrated its bias when it found in its August 8, 2018, Order Relieving the Public Defenders Office as Counsel for the Defendant that there were no errors to present on appeal and relieving trial counsel from further representation of Petitioner. (Supp Br 1) Petitioner argues further that the circuit court lied to this Court when it claimed to

have sentenced Petitioner to concurrent sentences. (*Id.*) Finally, Petitioner argues that the circuit court was under an ethical obligation to dismiss the charges when it granted Petitioner's motion to suppress the suboxone evidence the State sought to offer at trial but, instead, gave the State an opportunity to have the drug evidence submitted for further testing. (*Id.*)

Petitioner also argues that he suffered from ineffective assistance of counsel because Mr. Stanton did not move to dismiss the charges against petitioner after the circuit court granted his motion to suppress the suboxone evidence (*Id.*), did not object to the State being allowed to re-submit the evidence for further forensic testing (Supp Br 2), presented no theory in defense (*Id.*), failed to move for Petitioner to be transferred to the drug court (*Id.*), lied to Petitioner about whether a recidivist information had been filed (Supp Br 4), and failed to object to Petitioner's illegal sentence (*Id.*). Petitioner suggests that Mr. Stanton was "acting in concert with the presiding Judge and not representing the defendants [sic] best interests but the interests of the Judge to convict, not defend." (Supp Br 2).

Petitioner's argument does not raise a cognizable claim under his current appeal pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure. "Rule 35(b) of the West Virginia Rules of Criminal Procedure only authorizes a reduction in sentence. Rule 35(b) is not a mechanism by which defendants may challenge their convictions and/or the validity of their sentencing." Syl. Pt. 2, *State v. Marcum*, 238 W. Va. 26, 792 S.E.2d 37 (2016). The *Marcum* Court made clear, "Indeed, a motion to reduce a sentence under Rule 35(b) 'is essentially a plea for leniency from a presumptively valid conviction.' [*State v.*] *Head*, 198 W.Va. 298, 306, 480 S.E.2d 507, 515 (Cleckley, J., concurring). In short, it is abundantly clear that Rule 35(b) cannot be used as a vehicle to challenge a conviction or the validity of the sentence imposed by the circuit

court, whether raised in the Rule 35(b) motion or in the appeal of the denial of the Rule 35(b) motion.” *Id.* at 31, 42 (2016).

Nonetheless, Petitioner can demonstrate no harm or prejudice from what he alleges as the circuit court’s bias, whether real or imagined. He has been appointed competent counsel to represent his rights in this very appeal. His rights are being preserved, and he is being afforded his day in court.

Furthermore, the record is clear that Petitioner did not suffer from ineffective assistance of counsel. At his plea hearing, when asked by the circuit court whether he believed Mr. Stanton had done a good job, Petitioner answered, “Yes, I do,” and then, “He is doing a great job.” (Appx. R. 109). Certainly, Petitioner cites to nothing in the record which would draw scrutiny under this Court’s test established in Syllabus Point 5 of *State v. Miller*, 194 W. Va. 3, 6, 459 S.E.2d 114, 117 (1995):

In the West Virginia courts, 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.

Here, Petitioner pled guilty to three of the five counts pending against him after the State produced forensic testing results and video evidence to the defense. (Appx. R. 68). Of course, most of Mr. Stanton’s representation of Petitioner was conducted under the umbrella of privacy of their attorney-client relationship and in unrecorded plea negotiations; however, there is certainly nothing in the record which would support any argument that Mr. Stanton’s performance was deficient under an objective standard of reasonableness or that, but for Mr. Stanton’s errors, the result of this case would have been any different. Accordingly, Petitioner’s arguments of judicial bias and ineffective assistance of counsel have no merit.

C. The circuit court did not impose an illegal and/or disproportionate sentence on Petitioner when it enhanced both of his sentences for Delivery of a Controlled Substance pursuant to West Virginia Code § 60A-4-408. Moreover, Petitioner's allegation does not present a cognizable claim under a Rule 35(b) appeal.

Petitioner cites Syllabus Point 5 of *State ex rel. Daye v. McBride*, 222 W. Va. 17, 18, 658 S.E.2d 547, 548 (2007) to argue that:

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 therefor 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 the second or subsequent offense provisions of *W.Va.Code*, 60A-4-408 (1971).

(Supp Br 6). However, Syllabus Point 5 of *Daye* is not applicable in this case because, as agreed upon in the plea agreement (Appx. R. 68), the State never filed a recidivist information in accordance with West Virginia Code § 61-11-19, so § 61-11-18 was not triggered. That is, Petitioner could not be sentenced under West Virginia Code § 61-11-18 because a recidivist information was never filed and there was no jury finding or admission of Petitioner's previous conviction of felonies.

Petitioner then argues that the circuit court abused its discretion in enhancing his sentence because the enhanced sentence was disproportionate to the offense of delivery of suboxone, a drug used to treat opioid addiction. Interestingly, if Petitioner had been sentenced under West Virginia Code § 61-11-18, as he seems to suggest he should have been, he would now be serving a life term in prison.

Again, though, Petitioner does not raise a cognizable claim under his current appeal pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure. Any challenges to the

legality of his sentence should have been brought on a direct appeal or should be addressed under a Rule 35(a) motion for correction of sentence. However, any challenge to the sentence imposed in this case would fail. “Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). Here, Petitioner’s sentence was well within the statutory limits, as discussed previously in this brief. Again, Petitioner’s argument is without merit.

D. There is no conflict between the statutes governing the scheduling of controlled substances that requires effective repeal of one statute in favor of another. Again, Petitioner’s allegation does not present a cognizable claim under a Rule 35(b) appeal.

Petitioner argues suboxone should not fall under the same scheduling classification as subutex or buprenorphine because suboxone contains naloxone to neutralize the effects of opioids in the body, which, in his mind, is a good thing. Therefore, suboxone should be re-classified as a Schedule V drug. (Supp Br 11). Petitioner’s argument is wholly based on his personal feelings and experiences, and he cites no legal authority for his argument that suboxone is misclassified. Moreover, and again Petitioner does not raise a cognizable claim under his current appeal pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure. Accordingly, and again, his argument is without merit.

E. Petitioner’s guilty plea was made voluntarily and was not induced by illegal threats nor undermined by an illegal sentence. Additionally, Petitioner’s allegations do not present a cognizable claim under a Rule 35(b) appeal.

Petitioner argues that because his enhanced sentence was an illegal sentence and because he was induced to accept the plea offer under threat of a recidivist information, his guilty plea was involuntary. (Supp Br 13-14). Once again, though, “Rule 35(b) of the West Virginia Rules of Criminal Procedure only authorizes a reduction in sentence. Rule 35(b) is not a mechanism by

which defendants may challenge their convictions and/or the validity of their sentencing.” Syl. Pt. 2, *State v. Marcum*, 238 W. Va. 26, 792 S.E.2d 37 (2016). So, Petitioner does not raise a cognizable claim under his current appeal pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure.

Even so, there was no untoward or illegal action on the part of the State to induce Petitioner to enter a plea of guilty by threat of filing a recidivist action. Indeed, Petitioner has a long and varied criminal history, which would make the filing of a recidivist information upon conviction certain. (Appx. R. 133). In *Carr v. Coiner*, 296 F. Supp. 1058, 1063 (N.D.W. Va. 1969), the United States District Court of the Northern District of West Virginia held, “The proper inquiry here regarding the voluntariness of [a] Petitioner’s plea [...] is whether [the] Petitioner was promised he would not be treated as a recidivist should be plead guilty. Such a promise, if it induced him to enter a plea he otherwise would not have entered, would render the plea involuntary. *Machibroda v. United States*, 368 U.S. 487, 82 S.Ct. 510 (1961); *McClure v. Boles*, 233 F.Supp. 928 (N.D.W.Va.1964).”

In the present matter, the record indicates that what induced Petitioner to enter into a plea agreement with the State was the scientific and video evidence against him. (Appx. R. 67-68). After reviewing the evidence and going over everything else with Petitioner, Mr. Stanton and Petitioner determined that they did not have a defense in law or in fact. (Appx. R. 69). Petitioner reviewed all of that information with his attorney on the same day the plea deal was offered, and Petitioner agreed to take the deal that day. (Appx. R. 68). After the agreement was made, the State indicated to Mr. Stanton that it would be filing a recidivist information. (*Id.*) The State later agreed not to pursue the recidivist information as part of the plea deal. (*Id.*) Clearly, there was no

unlawful inducement underlying the guilty plea which would render the plea involuntary. Petitioner's argument, then, is without merit.

F. The circuit court did not abuse its discretion or otherwise err in denying petitioner's motion for an alternative sentence. Once again, Petitioner's allegation does not present a cognizable claim under a Rule 35(b) appeal.

Petitioner argues that due to his age, his disability, the fact that he cooperated with authorities, and his assertion that he does not pose a threat to society, he should have been granted an alternative sentence. Petitioner further argues that housing drug addicts like himself in prison puts a strain on the financial resources of the State. He also asserts that his chemical dependency on drugs is a mental illness, and it is cruel and unusual punishment to incarcerate the mentally ill.

First of all, and yet again, Petitioner does not raise a cognizable claim under his current appeal pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure. "Rule 35(b) of the West Virginia Rules of Criminal Procedure only authorizes a reduction in sentence. Rule 35(b) is not a mechanism by which defendants may challenge their convictions and/or the validity of their sentencing." Syl. Pt. 2, *State v. Marcum*, 238 W. Va. 26, 792 S.E.2d 37 (2016).

Second of all, this Court has said, "We have held that '[t]he Supreme Court of Appeals reviews sentencing orders ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.' Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997)." *State v. Doom*, 237 W. Va. 754, 757, 791 S.E.2d 384, 387 (2016). Also, "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). As discussed previously in this brief, Petitioner's sentence is well within statutory limits, and the denial of an alternative sentence in this case was based not upon any impermissible factor but upon Petitioner's lengthy and varied criminal history, which

tends to show that he has not been and cannot be rehabilitated such that an alternative sentence would be an effective or prudent choice. Accordingly, this argument, too, is without merit.

VII. CONCLUSION

The circuit court did not err in denying Petitioner's Motion for Reconsideration under Rule 35(b) of the West Virginia Rules of Criminal Procedure, nor did it plainly err by separately enhancing Petitioner's two sentences for Delivery of a Controlled Substance pursuant to West Virginia Code § 60A-4-408. Accordingly, this Court should affirm the May 29, 2018, and June 22, 2018, Orders of the Circuit Court of Fayette County.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent, by Counsel.

PATRICK MORRISEY
ATTORNEY GENERAL



LARA K. BISSETT
ASSISTANT ATTORNEY GENERAL
W.Va. State Bar # 9102
812 Quarrier Street, 6th Floor
Charleston, WV 25301
(304) 558-5830, ext. 2353
Fax: (304) 558-5833
lara.k.bissett@wvago.gov
Counsel for Respondent