NO. 22-0023

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent

v.

(Circuit Court of Wayne County)
(Case No.: 21-F-137)

CHARLES LEE FINLEY
Defendant Below, Petitioner

PETITIONER'S BRIEF

Juston H. Moore, Esq.
W.Va. Bar #12558
P.O. Box 278
526 Cleveland Street
Wayne, West Virginia 25570
T: (304) 840-6647
F: (877) 843-4831
jhmoorelaw@gmail.com
Counsel for
Charles Lee Finley

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

I. 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 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.

II. STATEMENT OF THE CASE

The Petitioner and Defendant below, Charles Lee Finley, was indicted in the Circuit Court of Wayne County on or about November 9, 2021 on a four (4) count indictment. [pp. 6-9]. The four counts of the indictment were as follows: (1) Receiving/Transferring a Stolen Vehicle, a felony; (2) Fleeing other than in a Vehicle, a felony; (3) Possession of Methamphetamine with Intent to Distribute, a felony; and (4) Possession of Pseudoephedrine in an Altered State, a felony. [*Id.*].

The indictment stems from two different underlying events. The first event ("First Event") occurred on or about September 10, 2020 in which Mr. Finley was alleged to have received or transferred a stolen vehicle and then fled on foot from law enforcement. [pp. 6-7]. Mr. Finley presented to Wayne County Circuit Court on July 14, 2021 and was taken into custody after he failed to appear at the Circuit Court as a condition of his bond on the charges from the First Event. [*Id.*].

Upon being taken into custody, Mr. Finley was searched, and law enforcement found approximately 3.3 grams of a controlled substance which appeared to be methamphetamine on Mr. Finley's person. [*Id.*]. The methamphetamine was contained in a baggie inside of a piece of folded notebook paper in Mr. Finley's shoe. [*Id.*]. As a result of this second event ("Second Event"), Mr. Finley faced two (2) separate additional charges: possession of methamphetamine with intent to deliver, as charged in Count Three (3), and possession of pseudoephedrine in an altered state, as charged in Count Four (4). [pp. 7-8].

Prior to trial, Mr. Finley filed a Motion to Dismiss Count Four (4) of the Indictment, arguing that Mr. Finley should not face charges in both Count Three and Count Four based on the undisputed evidence that the State possessed. [pp. 12-18]. A hearing on this Motion was held on December 6, 2021 at which time both Mr. Finley and the State argued their respective positions. [pp. 27-49]. The lower court sided with the State and denied Mr. Finley's Motion to Dismiss Count Four (4) of the Indictment. [pp. 99-102].

After the hearing, the parties engaged in plea negotiations and came to a plea agreement, which was memorialized in writing and placed in the record. [pp. 50-51]. The lower court held a plea hearing on the same date and accepted the plea agreement. [pp. 52-98]. Notably, Mr. Finley entered three (3) no contest pleas to Attempt to Commit the Underlying Felonies in Counts One, Three and Four of the Indictment, and Counts Three and Four were conditional pleas made with the consent of the State pursuant to Rule 11 of the West Virginia Rules of Criminal Procedure. [pp. 92-98]. The conditional pleas permitted Mr. Finley to appeal his convictions for Count Three (3) and Count Four (4). [*Id.*]. If Mr. Finley prevails on appeal, he will be permitted to withdraw his felony guilty plea to Count Three and enter a misdemeanor plea to simple possession. [*Id.*].

Furthermore, Count Four will be dismissed if Mr. Finley prevails on appeal. [*Id.*]. Count Two (2) of the indictment was dismissed per the plea agreement. [*Id.*].

The lower court held a sentencing hearing on December 20, 2021. [pp. 103-107]. The lower court found that Mr. Finley was not a candidate for an alternative sentence and sentenced Mr. Finley to an indeterminate sentence of not less than one (1) nor more than three (3) years in the West Virginia Department of Corrections. [*Id.*]. All three sentences were ordered to run concurrently pursuant to the plea agreement. [*Id.*]. This appeal follows.

III. STANDARD OF REVIEW

"This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*." Syl. Pt. 1, in part, *State v. Grimes,* 226 W.Va. 411, 701 S.E.2d 449 (W.Va. 2009). Further, in light of this case involving an issue that is purely one of statutory interpretation, the Court has previously held as follows: "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (W.Va. 1995). Double jeopardy claims are also reviewed *de novo*. *State v. Sears*, 468 S.E.2d 324 (W.Va. 1996).

IV. SUMMARY OF ARGUMENT

The Petitioner believes that the lower court committed reversible error when it denied Mr. Finley's Motion to Dismiss Count Four of the Indictment. As more fully detailed in this brief, the plain language as well as the legislative intent of the possession of pseudoephedrine in an altered state statute, which is West Virginia Code §60A-10-4, clearly shows that this statute is to prosecute and punish manufacturers of methamphetamine rather than personal users of methamphetamine. Prosecution under this statute also does not apply to the final form of methamphetamine. Furthermore, all of the opinions in this Court with respect to West Virginia Code §60A-10-4

clearly indicate that that statute does not apply to methamphetamine in its final form but rather it applies to precursors to methamphetamine.

If Mr. Finley would have proceeded to trial and faced charges for possession of methamphetamine with intent to deliver as well as possession of pseudoephedrine in an altered state, a double jeopardy violation would have inevitably resulted if the jury found that Mr. Finley did not have the requisite intent to deliver methamphetamine. Mr. Finley's only defense to felony possession with intent to deliver methamphetamine was that he was personally using 3.3 grams of methamphetamine because he is a drug addict. If the jury had believed him, the "intent to deliver" element of that crime would have been negated and he would have been acquitted of the felony offense, but Mr. Finley would have undoubtedly been guilty of misdemeanor possession of methamphetamine.

However, Mr. Finley would have also been guilty of possession of pseudoephedrine in an altered state, despite not possessing any precursors as required by the statute. Given that the State was allowed to proceed with prosecution under this statute, with the only evidence being that Mr. Finley possessed approximately 3.3 grams of the final form of methamphetamine, this would have led to a constitutional violation of double jeopardy because neither of the two statutes (possession of pseudoephedrine in an altered state and simple possession) would have required proof of a fact that the other statute does not. As such, the lower court committed reversible error when it failed to grant Mr. Finley's Motion to Dismiss Count Four (4) of the Indictment.

For these reasons, this Honorable Court must reverse the decision of the lower court and remand this matter to the lower court. Mr. Finley must be permitted to withdraw his felony plea to attempt to commit possession with intent to deliver methamphetamine; to enter a misdemeanor

plea to simple possession; and Count Four (4) should be dismissed pursuant to Mr. Finley's conditional pleas previously entered.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that oral argument is necessary under Rule 20 of the West Virginia Rules of Appellate Procedure because this appeal assigns an error in a case with issues of first impression. However, if the Court is inclined to believe that this case is appropriate for a memorandum decision, the Petitioner believes that the facts and legal arguments are adequately presented herein.

VI. ARGUMENT

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.

Mr. Finley faced a four (4) count indictment in Wayne County Case Number 21-F-137. In Count Three (3), Mr. Finley was charged with Possession of a Controlled Substance (Methamphetamine) with Intent to Deliver in violation of West Virginia Code §60A-4-401(a)(i). Said statute reads as follows:

> "(a) Except as authorized by this act, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance.
>
> Any person who violates this subsection with respect to:
>
> (i) A controlled substance classified in Schedule I or II, which is a narcotic drug or which is methamphetamine, is guilty of a felony and, upon conviction thereof, may be imprisoned in a state correctional facility for not less than one year nor more than 15 years, or fined not more than $25,000, or both fined and imprisoned."

W.Va. Code §60A-4-401(a)(i).

In Count Four (4), Mr. Finley was charged with Possession of Pseudoephedrine in an Altered State in violation of West Virginia Code §60A-10-4(d). Said statute reads as follows:

> (d) Notwithstanding any provision of this code to the contrary, any person who knowingly possesses any amount of ephedrine, pseudoephedrine, phenylpropanolamine or other designated precursor with the intent to use it in the manufacture of methamphetamine or who 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 and, upon conviction, shall be imprisoned in a state correctional facility for not less than two nor more than ten years, fined not more than $25,000, or both imprisoned and fined.

W.Va. Code §60A-10-4(d).

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.**

PLAIN LANGUAGE OF WEST VIRGINIA CODE §60A-10-1 ET SEQ.

West Virginia Code §60A-10-1 et seq. is titled the "Methamphetamine Laboratory Eradication Act" (hereinafter "the Act."). West Virginia Code §60A-10-4(d) is the specific subsection of the Act under which Mr. Finley was charged in Count Four (4) of the Indictment[1]. West Virginia Code §60A-10-4's heading reads as follows: "Purchase, Receipt, Acquisition and Possession of Substances to be Used as Precursor to Manufacture of Methamphetamine or Another Controlled Substance; Offenses; Exceptions; Penalties." *See W.Va. Code* §60A-10-4(d). A person in violation of this subsection would have a felony conviction and face a possibly penalty of not less than two years nor more than ten years, a fine of up to $25,000, or both imprisoned and fined. *Id.* West Virginia Code §60A-10-3 defines several words used throughout the Act. Notably, "precursor" is defined as "any substance which may be used along with other substances as a

[1] This statute's language is cited above on this page.

component in the production and distribution of illegal methamphetamine." *See W.Va. Code* §60A-10-3(k).

This Court has long held "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (W.Va. 1968). The Court has further stated, citing New Jersey law, that:

> "[t]he province of construction lies wholly within the domain of ambiguity. A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. Accordingly, it is only where there is some ambiguity in the statute or some uncertainty as to the meaning intended that resort may be had to rules of construction of statutes."

Crockett v. Andrews, 172 S.E.2d 384, 153 W.Va. 714 (W. Va. 1970).

The Act is clear and without ambiguity. The Act's title, "Methamphetamine Laboratory Eradication Act," makes it unambiguous that the Act is to eradicate meth labs throughout West Virginia. The Legislature thus passed the Act to curb the production of methamphetamine, most commonly done in meth labs. Section 4's title is also clear that subsection 4(d) and the resulting prosecution under that subsection applies to the purchase, receipt, acquisition and possession of substances ***to be used as precursors to manufacture of methamphetamine*** (emphasis added). It is evident from both the title of the Act as well as the title of Section 4 that a criminal defendant should be prosecuted when that person possesses 3.3 grams of a precursor, such as pseudoephedrine, used in the manufacture of methamphetamine. But Mr. Finley, who possessed no such precursors but rather 3.3 grams of the final form of methamphetamine, cannot legally be prosecuted and convicted under this statute.

The plain language of subsection 4(d) also lends support to this argument. The first portion of the statute does not apply to Mr. Finley's case because there is no evidence that he was manufacturing methamphetamine or intended to manufacture methamphetamine. The first portion reads as follows: "any person who knowingly possesses any amount of ephedrine, pseudoephedrine, phenylpropanolamine or other designated precursor with the intent to use it in the manufacture of methamphetamine." *See W.Va. Code* §60A-10-4(d). The State agreed that the first portion of the statute does not apply here. [p. 39].

The second portion, however, also does not apply to Mr. Finley's case based on the plain language of the statute. The second portion reads as follows: "any person ... who 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. . ." *See W.Va. Code* §60A-10-4(d). When one looks at this language by itself or also in conjunction with the title of the Act and Section 4, it is clear that this statute addresses persons who possess precursors in the manufacturing of methamphetamine.

The State's argument was essentially that methamphetamine contains pseudoephedrine which has necessarily been altered and as such, Mr. Finley is guilty of violating West Virginia Code §60A-10-4(d). The State, however, ignores the plain language of the title of the Act, the title of Section 4, and the subsection's language itself, which all are clear and without unambiguity. The State failed to acknowledge that the evidence it possessed could only lead to a conviction under either the Possession of Methamphetamine with Intent to Deliver or the Simple Possession statutes. There was no evidence that Mr. Finley possessed any precursors used in the manufacturing of methamphetamine, and as such, the lower court's decision must be reversed.

LEGISLATIVE INTENT OF WEST VIRGINIA CODE §60A-10-1 ET SEQ.

West Virginia Code §60A-10-2 indicates the purpose of the Act in seven subsections. West Virginia Code §60A-10-2 states as follows:

> The Legislature finds:
>
> (a) That the illegal production and distribution of methamphetamine is an increasing problem nationwide and particularly prevalent in rural states such as West Virginia.
>
> (b) That methamphetamine is a highly addictive drug that can be manufactured in small and portable laboratories. 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.
>
> (c) That 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.
>
> (d) That 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.
>
> (e) That 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.
>
> (f) That 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. The Legislature finds that restricting access to over-the-

> counter drugs used to facilitate production of methamphetamine is necessary to protect the public safety of all West Virginians.
>
> (g) That it is further in the best interests of every West Virginian to create impediments to the manufacture of methamphetamine by requiring persons purchasing chemicals necessary to the process to provide identification.

West Virginia Code §60A-10-2.

This section of the Act makes it abundantly clear that the intent of the Legislature in drafting and passing this law was to stop or inhibit the manufacturing of methamphetamine. Subsection (a) indicates that the Legislature has recognized that the production and distribution of methamphetamine is an increasing problem in this state. Subsections (b) through (e) address the process of manufacturing methamphetamine and the devastating effects of methamphetamine on the person, the family, society, and the environment. The Legislature then states in subsection (f) that ***restricting access to over-the-counter drugs used to facilitate production of methamphetamine*** is necessary to protect the public safety of all West Virginians" (emphasis added). Finally, in subsection (g), the Legislature states that it is in West Virginians' best interest to ***create impediments to the manufacture of methamphetamine by requiring persons purchasing chemicals necessary to the process to provide identification***" (emphasis added).

There can be doubt based on the plain language of the Act as well as the purpose indicated by the Legislature that prosecution under the Act is focused on those engaging in manufacturing methamphetamine. The Act is intended to punish people like Walter White in the television show *Breaking Bad*. Walter White was a high-school chemistry teacher who was diagnosed with cancer. He began worrying about his family's ability to pay for his treatment and other bills, so he began cooking methamphetamine with one of his former students to pay for his future bills for his family. Soon after, drug users who bought Walter White's methamphetamine and their families are destroyed. The West Virginia Legislature passed the Act to make it more difficult for real life

Walter Whites to acquire the ingredients to make methamphetamine and also to punish those Walter Whites when they are caught with precursors or any other substances as a component in the production and distribution of illegal methamphetamine.

There are mechanisms to charge and convict people like Mr. Finley, who was using methamphetamine for his own personal use. Those mechanisms are West Virginia Code §60A-4-401(a)(i), the Possession of Methamphetamine with Intent to Deliver, or West Virginia Code §60A-4-401(c), the Simple Possession Statute. If Mr. Finley was found with actual precursors of methamphetamine, there would be no need for this appeal because he would be guilty of violating West Virginia Code §60A-10-4(d). However, he was only found with 3.3 grams of the final form of methamphetamine, which cannot be addressed under the Possession of Altered Pseudoephedrine statute. Mr. Finley should not have been charged with violating West Virginia Code §60A-10-4(d) because he cannot be legally convicted of violating that statute with the undisputed evidence that the State possessed in this case. Thus, the lower court committed error when it denied Mr. Finley's Motion to Dismiss Count Four (4) of the Indictment.

OPINIONS OF THIS COURT ON WEST VIRGINIA CODE §60A-10-4(d)

There appears to be five (5) cases in which this Court has addressed charges and/or convictions under West Virginia Code §60A-10-4(d), the Possession of Altered Pseudoephedrine statute. Those cases are as follows: (1) *State v. Ward*, Memorandum Decision, No. 13-0648 (W.Va. 2014); (2) *State v. Hamrick*, Memorandum Decision, No. 15-0716 (W.Va. 2016); (3) *State v. Palmer*, Memorandum Decision, No. 16-0075 (W.Va. 2017); (4) *State v. Bookheimer*, Memorandum Decision, No. 17-0446, No. 17-0446 (W.Va. 2018); and (5) *State v. Morgan*, Memorandum Decision, No. 18-0065 (W.Va. 2020).

In *Ward*, there is no discussion of the underlying facts in that case, and the issue on appeal was the appropriateness of the lower court's decision to enhance the defendant's sentence. *Ward* at pp. 1-2. However, it is noted in this Court's opinion in *Ward* that the defendant in that case was indicted on three counts: (1) felony conspiracy; (2) felony operation of a clandestine lab; and (3) felony possession of substances to be used as a precursor to manufacture of methamphetamine in violation of W.Va. Code §60A-10-4(d). *Id.* at p. 1. Therefore, it can be deduced that the defendant in *Ward* was charged with engaging in the process of manufacturing methamphetamine as he was charged with operating a clandestine meth lab as well as "***possession of substances to be used as a precursor to manufacture of methamphetamine***" (emphasis added).

In *Hamrick*, as in *Ward*, there is also no discussion of the underlying facts of the case, and again the issue on appeal was the appropriateness of the lower court's sentence. *Hamrick* at p. 1. However, this Court notes in its opinion in *Hamrick* that the defendant there was charged with "one count of conspiracy to operate a clandestine drug laboratory or attempt to commit that crime; one count of possession of methamphetamine precursors in violation of W.Va. Code §60A-10-4(d); one count of conspiracy to possess with intent to deliver a controlled substance; and possession with intent to deliver a controlled substance." *Id.* The defendant reached a plea agreement with the State and was convicted on the count of possession of methamphetamine precursors as well as the two counts of conspiracy. *Id.* It can also be presumed that the defendant in *Hamrick* was charged with engaging in the process of manufacturing methamphetamine as she was charged with conspiracy to operate a clandestine meth lab.

In *Palmer*, the defendant was indicted on, among other counts, one count of operating or attempting to operate a clandestine meth lab; one count of possession of substances to be used as a precursor to the manufacturing of methamphetamine in violation of W.Va. Code §60A-10-4(d);

and one count of possession of controlled substances with the intent to deliver. *Palmer* at p. 1. The Court stated that the defendant's "charges stemmed from the allegations that petitioner and her co-defendants were manufacturing methamphetamine at her residence." *Id.* Evidence at trial showed that witnesses observed methamphetamine being manufactured at the defendant's house; that witnesses observed the defendant and her co-defendant possessing "methamphetamine-making ingredients"; and that officers found a pull crusher as well as a "grocery list which listed an ingredient used in the production of methamphetamine." *Id.* at pp. 1-2.

A chemist testified at the defendant's trial and testified that samples gathered at the scene of the alleged crime "contained evidence of chemicals commonly associated with the production of methamphetamine." *Id.* at p. 2. The defendant also testified at trial. *Id.* The defendant stated that she bought ephedrine on the day the cops searched her residence and that she and her co-defendants "were just making some sh[**] to smoke." *Id.* The defendant was convicted of one count of conspiracy to operate a meth lab and one count of operating a meth lab. *Id.* There was no evidence that the defendant possessed any amount of the final form of methamphetamine, and she was not found guilty of the count of possession of a controlled substances with the intent to deliver. *Id.*

In *Bookheimer*, a lady was pulled over and found to have drug paraphernalia with methamphetamine residue in Braxton County. *Bookheimer* at p. 1. The lady told law enforcement that she got the drug paraphernalia at a residence at which the defendant was living. *Id.* Officers obtained a search warrant and conducted a search of the home, ultimately finding evidence of a meth lab and "materials used in the production of methamphetamine." *Id.* The defendant was subsequently indicted, among other counts, on one count of attempting to operate a meth lab; one count of conspiracy; and one count of possession of ephedrine with intent to use to manufacture methamphetamine in violation of W.Va. Code §60A-10-4(d). The defendant entered a guilty plea

to a felon in possession of a firearm charge. *Id.* There was no discussion in the Court's opinion that the defendant was found with any amount of the final form of methamphetamine, and the defendant was not charged with possession with intent to deliver methamphetamine.

In *Morgan*, the defendant was charged with one count of possession of a controlled substance with intent to deliver; one count of possession of altered pseudoephedrine in violation of W.Va. Code §60A-10-4(d); one count of operating or attempting to operate a meth lab; and three counts of conspiracy. *Morgan* at p. 1. The evidence at trial indicated that law enforcement officers found the defendant and his co-defendant unresponsive in a vehicle. *Id.* at p. 2. One officer testified that he believed he smelled methamphetamine in the vehicle, and after he searched the vehicle, he found "jars and containers which appeared to be an inactive meth lab." *Id.*

Later in the search, the officer found plastic tubing in the defendant's possession that was tubing that was commonly used in the production of methamphetamine; a black container with a white, crushed up substance inside; a white powder inside a plastic bag; and two envelopes containing powder believed to be heroin in the defendant's wallet. *Id.* The officer testified that he conducted a search to determine if the defendant had recently purchased pseudoephedrine and found out that the defendant had purchased 1.2 grams of pseudoephedrine that day but was later denied from making two additional purchases of pseudoephedrine on the same day. *Id.*

A chemist testified at the trial regarding the identity of the substances. *Id.* The chemist found that some of the samples were methamphetamine while another was "a chemical that is used in the clandestine manufacture of methamphetamine, sodium hydroxide." *Id.* The chemist also testified that the black container "contained pseudoephedrine in 'pieces or chunks.'" *Id.* The defendant was eventually found guilty on all six counts. *Id.* at p. 3.

On appeal, the defendant argued, among other things, that the State did not "present any evidence that he possessed altered pseudoephedrine or possessed any controlled substances with the intent to deliver the same." *Id.* In its analysis, this Court stated "petitioner was prepared with at least 1.2 grams of pseudoephedrine he purchased earlier that month and the tubing required for the clandestine lab, which was later found on his person and identified as related to the manufacture of methamphetamine." *Id.* The Court later stated that "[e]vidence showed that the methamphetamine lab contained a substantial amount of methamphetamine as well as other chemicals necessary for the manufacture of methamphetamine." *Id.* The Court also indicated that "[a]dditional crushed pseudoephedrine was found inside the vehicle with reach of both occupants." *Id.* at p. 5. In its findings, the Court, notably, stated:

> "as the manufacture of methamphetamine necessarily required altered pseudoephedrine and as crushed pseudoephedrine tablets were found in the vehicle, sufficient evidence was also presented that petitioner was in constructive possession of those substances. Likewise, we find that sufficient evidence was presented that petitioner had knowledge of the methamphetamine manufactured in the backseat of the vehicle, exercised dominion and control over that substance, and intended to deliver the same."

Id. The Court ultimately found that there was sufficient evidence that petitioner possessed altered pseudoephedrine and possessed methamphetamine with the intent to deliver that substance. *Id.*

These cases undoubtedly show that, unlike the State argued in the lower court, there is a distinction between altered pseudoephedrine used in the manufacturing of methamphetamine and the final form of methamphetamine. This Court has found that there is a distinction between the two. All five of those cases involve instances in which the defendants were engaged in the process of manufacturing methamphetamine, which is what the Act was intended to address. Here, there is no evidence that Mr. Finley was engaged in the process of manufacturing methamphetamine,

and there is no evidence that he was found with altered pseudoephedrine, which is different than the final form of methamphetamine.

The *Morgan* case shines the most line on the case at hand. This defendant in *Morgan* was found with several different substances – most particularly he was found with crushed up pseudoephedrine as well as the final form of methamphetamine. Based on this evidence, the defendant in that case was properly charged under the two separate statutes. Here, Mr. Finley was found with 3.3 grams of the final form of methamphetamine. Mr. Finley did not have any crushed up or altered pseudoephedrine, nor did he possess any precursors used in the process of manufacturing methamphetamine because he was not engaged in the process of manufacturing methamphetamine.

This Court's language in the *Morgan* opinion clearly shows that there is a difference between altered pseudoephedrine and methamphetamine. The Court indicated that there was a substantial amount of methamphetamine as well as additional crushed pseudoephedrine, which would fit the definition of pseudoephedrine that has been altered. Furthermore, the Court stated that "the manufacture of methamphetamine necessarily required altered pseudoephedrine." The State cannot argue that because methamphetamine contains pseudoephedrine, then Mr. Finley is guilty of violating West Virginia Code §60A-10-4(d). The lower court's decision cannot stand based on this Court's previous opinions. Even if Mr. Finley did not convince the jury that he was only personally using methamphetamine and, as a result, he was convicted of possession of methamphetamine with intent to deliver, he still cannot be found guilty of possession of altered pseudoephedrine based on the plain language of the relevant statutes, the intent of the Act, and the opinions of this Court. There can be no doubt that the lower court erred when it denied Mr. Finley's Motion to Dismiss Count Four (4) of the Indictment, and as such, its decision must be reversed.

2. **Making the Defendant 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.**

The Double Jeopardy Clause of the United States Constitution states that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb[.]" *U.S. Const. Amend. V*. Included in this protection is the protection "against a second prosecution for the same offense after conviction ... and ... multiple punishments for the same crime." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed. 2d 656, 664-65 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Likewise, the West Virginia Constitution affords persons the same protections. *W.Va. Const.* Article III, § 5. *See also Connor v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977).

The United States Supreme Court developed a test in *Blockburger v. United States*, 284 U.S. 299 (1932) to determine whether one act can violate two distinct statutes. The Supreme Court held, "[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 a fact which the other does not." *Blockburger* at p. 304. Stated another way, the government cannot prosecute for separate offenses unless each offense has at least one element that the other does not.

In this case, the State and Mr. Finley agreed on the elements that the State would have to prove in order to convict Mr. Finley of Possession of Altered Pseudoephedrine as well as Simple Possession. [pp. 19-23]. For Possession of Altered Pseudoephedrine, the State would have to prove that (1) Mr. Finley possessed pseudoephedrine that has been altered, and (2) Mr. Finley possessed said altered pseudoephedrine in Wayne County, West Virginia. [p. 20]. For Simple Possession, the State would have to prove that (1) Mr. Finley possessed a controlled substance; (2) the controlled

substance was methamphetamine; and (3) Mr. Finley possessed the methamphetamine in Wayne County, West Virginia. [*Id.*].

Prior to the hearing on Mr. Finley's Motion to Dismiss Count Four (4) of the Indictment, the State had sent proposed jury instructions on Possession of Pseudoephedrine in an Altered State but then revised their proposed jury instructions. [p. 36]. The State stated at the hearing, "Your honor, since the filing[2] of my initial jury instructions, I have revised the jury instruction as to Count 4. … The initial jury instruction did read: The Court instructs the jury that Methamphetamine is a Schedule II Controlled Substance and is also Pseudoephedrine in an Altered State." [pp. 36-37]. As such, prior to that hearing, the State's position was that Methamphetamine and Altered Pseudoephedrine were the same thing.

The State then changed its position and its proposed jury instructions, presumably after Mr. Finley filed his reply to the State's response to the Motion to Dismiss. The State indicated at the hearing, "I have added one word, which is just simply the word "contains." It now reads: The Court instructs the jury that methamphetamine is a Schedule II Controlled Substance and also contains Pseudoephedrine in an Altered State." [p. 37]. The State later indicated at the hearing that methamphetamine and altered pseudoephedrine were different substances. [pp. 37-38].

With the way the State is prosecuting this case, meaning that they would only have to prove that Mr. Finley possessed altered pseudoephedrine contained in the final form of methamphetamine, this is a clear violation of *Blockburger*. There are no different elements that the State would have to prove between Possession of Altered Pseudoephedrine and Simple Possession. The State would garner a conviction based on Mr. Finley's defense on both Possession

[2] The State's proposed jury instructions were not actually filed but instead were emailed to counsel. As such, counsel does not believe the State's proposed jury instructions are officially in the lower court's record. However, counsel for both Mr. Finley and the State addressed the jury instructions at both the hearing on the Motion to Dismiss Count Four (4) of the Indictment as well as their respective motion and/or responses.

of Altered Pseudoephedrine and Simple Possession, assuming it did not find he had intent to deliver methamphetamine. This is because the evidence would show that Mr. Finley possessed altered pseudoephedrine and methamphetamine in Wayne County, West Virginia.

Assuming, *arguendo*, that Mr. Finley had presented to Wayne County Circuit Court and was found with an amount of methamphetamine that is not enough to infer that he had the intent to deliver the methamphetamine. Let's assume that he possessed only residue or an amount shortly more than an amount of residue of methamphetamine inside the baggie inside of his shoe. Assume that Mr. Finley is then only charged with simple possession of methamphetamine rather than possession with intent to deliver. Under the State's theory in the underlying case, the State could have also charged Mr. Finley with felony possession of altered pseudoephedrine. If Mr. Finley admitted that he used methamphetamine that day and was going to finish it later, he would be admitting guilt on simple possession. He would have no defense to the felony charge, and the State would not have to prove any additional elements between the two charges because, as this Court has already stated in *Morgan*, "the manufacture of methamphetamine necessarily required altered pseudoephedrine." *Morgan* at p. 5. Because the final form of methamphetamine necessarily contains altered pseudoephedrine, personal use would not be a defense for possession of altered pseudoephedrine. The same result applies in Mr. Finley's case. According to the State, Mr. Finley possessed altered pseudoephedrine when he possessed methamphetamine. It is clear that this is a violation of *Blockburger* because there are no additional elements that the State would have to prove between the two statutes.

As stated above, in this case, even if Mr. Finley did not convince the jury that he was only personally using methamphetamine and, as a result, he was convicted of possession of methamphetamine with intent to deliver, he still cannot be found guilty of possession of altered

pseudoephedrine. This is abundantly clear when looking at the plain language and intent of West Virginia Code §60A-10-1 *et seq.*, the opinions of this Court addressing said statute, and the Supreme Court's standard for a Double Jeopardy violation as set out in *Blockburger*.

VII. CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for all the reasons set forth above, the Petitioner prays that this Honorable Court reverse the lower court's decision; to remand this matter back to the lower court for proceedings consistent with that decision; and to grant any and all further relief that it deems necessary.

CHARLES LEE FINLEY

BY COUNSEL

Juston H. Moore, Esq. (WVSB #12558)
JUSTON H. MOORE, PLLC
P.O. Box 278
526 Cleveland Street
Wayne, West Virginia 25570
Telephone: (304) 840-6647
Facsimile: (877) 843-4831
Email: jhmoorelaw@gmail.com
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Juston H. Moore, Esq., hereby certify that on the 7th day of March, 2022, I served a true and correct copy of the Petitioner's Appeal Brief and Appendix on the following:

Edythe Nash Gaiser, Clerk of Court
W.Va. Supreme Court of Appeals
State Capitol Room E-317
1900 Kanawha Blvd. East
Charleston, West Virginia 25305
Via first class mail
Original and 10 copies of Brief
Original and 1 copy of Appendix

Scott E. Johnson, Esq.
Assistant Attorney General
Office of the W.Va. Attorney General
Appellate Division
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Via email to Scott.E.Johnson@wvago.gov

Juston H. Moore, Esq. (WVSB #12558)
Counsel for Petitioner