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

Docket No. 22-0252



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**STATE OF WEST VIRGINIA,  
Plaintiff-Below, Respondent**

**v.**

**JUAN MCMUTARY,  
Defendant-Below, Petitioner**

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**PETITIONER'S BRIEF**

**Upon Appeal from the Circuit Court of Wood County, West Virginia  
Case No. 21-F-266  
The Honorable Judge J.D. Beane Presiding**

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Docket No. 22-0252

STATE OF WEST VIRGINIA,  
Plaintiff-Below, Respondent.

v.

JUAN MCMUTARY,  
Defendant-Below, Petitioner

**BRIEF OF THE PETITIONER**

Now comes JUAN MCMUTARY, Defendant-below and Petitioner herein and pursuant to the *Scheduling Order* of this Court and Rule 10 of the West Virginia Rules of Appellate Procedure, hereby submits his *Brief* in support of his appeal.

**ASSIGNMENTS OF ERROR**

1) The Circuit Court erred in denying Petitioner's *MOTION TO SUPPRESS FRUITS OF SEARCH*, thereby violating his rights under West Virginia Constitution Article Three, Section Five and the Forth Amendment to the Constitution of the United States of America

2) The Circuit Court erred by denying the Defendant's Motion for Judgement of Acquittal relevant to sentencing enhancement statute West Virginia Code Chapter 60A, Article 4, Section 415, Repealed as of June 10, 2022. Consequently the Appellant was sentenced to an inappropriate and longer term of incarceration on Count Two of the Indictment below then the evidence in the case supported.

## **STATEMENT OF THE CASE**

### **TYPE OF PROCEEDING AND RULINGS BELOW**

This proceedings below were a criminal case. The Petitioner, JUAN MCMUTARY, ("Petitioner") appeals the sentence imposed by the Circuit Court of Wood County, West Virginia, the Honorable J. D. Beane presiding, following a trial and verdict of guilty one count of *Persons Prohibited from Possessing a Firearm*, one count of *Delivery of a Controlled Substance, (fentanyl)*. and a count of misdemeanor possession of a controlled substance (methamphetamine)

On March 3, 2022, the Defendant was sentenced pursuant to Count One of the Indictment, *Persons Prohibited from Possessing a Firearm*, to the custody of the West Virginia Davison of Corrections for confinement in the penitentiary for a period of five (5) years with actual jail credit of two hundred and twenty (220) days previously served. Further, on said date the defendant was sentenced pursuant to Count Two, *Possession of a Controlled Substance, Fentanyl*, to the custody of the West Virginia Davison of Corrections for confinement in the penitentiary for a period of not less than three (3) nor more than fifteen (15) years, with credit for time served of zero (0) days; and, further, was sentenced pursuant to Count Three, Possession of a Controlled Substance (Methamphetamine) to the custody of the Regional Jail Authority for confinement in the Regional Jail for a period of six (6) months, with actual jail credit of one hundred and eight days (180) previously served.

The sentence on Count Two, *Possession of a Controlled Substance, Fentanyl*, implicated an enhancement statute, West Virginia Code Chapter 60, article 4, section 415. On June 10, 2022, a repeal of the sentencing enhancement West Virginia Code Chapter 60,

Article 4, Section 415 became effective, repealing said statute and amending West Virginia Code Chapter 60, Article 4, Section 401 to provide for more severe sentences for delivering or possessing with intent to deliver fentanyl as opposed to other similarly scheduled controlled substances. . A Rule 35 Motion to Reconsider, based in part upon that repealed enhancement statute is pending before the Circuit Court of Wood County. Your Petitioner has moved for an enlargement of time to perfect this appeal so that that motion might be heard, and issues related to that motion can be included in this appeal if necessary.

### **STATEMENT OF THE CASE**

On December 31, 2020, Wood County Sheriff's Deputy T.K. Phillips was observing a home at 2511 Division Street in the City of Parkersburg West Virginia. Deputy Phillips was informed from PNTF (task force) agents that a Toyota Camry located at the house was possible involved in trafficking narcotics. After observing the Appellant lawfully operating his vehicle, the Defendant, per the testimony of Deputy Phillips crossed the center line in his case and she initiated a traffic stop. Ultimately, a search of the Defendant and the vehicle was conducted revealing a weapon and purported drugs. The traffic stop and subsequent search were subject of a Motion to Suppress Fruits of Search. A hearing was had on November 4, 2021, and an Order denying same was entered on or about November 12, 2021. A transcript of the hearing is included in the transcript appendix of this case, as are the written Motion to Suppress Fruits of Search with attachments (Non transcript Appendix p. 11), and a detailed Order denying same (Non transcript Appendix p. 17.)

Trial was held January 5 and January 6, 2022. A full copy of the trial transcript is included in the appendix. At trial, after close of the State's evidence, Appellant moved for Acquittal on the sentencing enhancement elements included in the Indictment by the State of West Virginia and the insufficiency of the evidence offered at trial. The testimony of a Forensic Scientist named Courtney Miller was the evidence offered by the State on the sentencing enhancement element. Ms. Miller's testimony is contained in pages 337 through 366 of the trial transcript which reports her testimony. Prior to sentencing, defendant filed a Motion for Post Judgment for Post-Verdict Judgement of Acquittal (Non transcript Appendix p. 11), Said issues were again argued prior to the sentencing hearing. The Court denied any relief to the Appellant on those issues.

Appellant argued that the enhancement evidence presented at trial were insufficient to prove the quantification which is a necessary element of the enhancement. The statutory enhancement elements provided that if the "fentanyl involved in the offense be one gram or more but less than five grams, then the such person shall be imprisoned not less than three nor more than fifteen years. Ms. Miller repeatedly testified that she could not quantify the amount of the controlled substance contained in the tested sample. Ms. Miller's testimony is contained in pages 337 through 366 of the trial transcript reports her testimony.

### **SUMMARY OF ARGUMENT**

The Circuit Court erred in denying Petitioner's *Motion to Suppress Fruits of Search*. Appellant, a black male in his early forties, was witnessed by a Wood County Sheriff's Deputy to be at a house she was ordered to observe. After being informed by narcotics task force officers that he might be involved in trafficking narcotics, she observed him leave the site of the

house she was observing, and whose occupants were suspected of being involved in drug trafficking. She proceeded to follow him and made a pre-textual traffic stop based his purported crossing a center line in the road, a minor traffic violation for which any ordinary citizen would not be stopped. The Appellant places significance on the fact that there is no video evidence of his purported traffic violations. The Appellant, given his race and status as a black male, believes that he was profiled racially and stopped pre-textually because he happened to appear at a suspected drug house and was African American , in violation of his rights under West Virginia Constitution Article Three, Section Five and the Fourth Amendment to the Constitution of the United States of America. The issues were argued and evidenced thoroughly at the suppression hearing held on November 4, 2021,

In regards to the Assignment that the trial Court erred in denying the Appellants motions for acquittal on the enhancement portions of Count 2, the Appellant moved for acquittal on the enhancement issues .both at trial and post judgement.

The elements of the enhancement statue (now repealed), West Virginia Code Chapter 60A, Article 4, Section 315 require a quantification that the State did not meet at trial. In order to enhance the penalty for delivering fentanyl of some amount less than one gram, to a more severe sentence for possessing with intent to deliver between one and five grams. The expert witness Courtney Miller testified she could not quantify the substance tested. She could only testify that it contained Fentanyl. The Trial Court erred by not granting an relief in the form of partial acquittal or sentence limitation based on that evidentiary insufficiency.

In the Court below, there is a pending Motion for Reconsideration which includes the issue of the repeal of 60A, Article 4, Section 315 and its impact and relevance on this case.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioner asks for oral argument as the facts and legal arguments cannot be adequately presented in the briefs and record on appeal, and the decisional process would be significantly aided by oral argument.

### **ARGUMENT**

The Appellant claims he was racially profiled, stopped pre-textually, and ultimately arrested the facts and arguments were made in the suppression hearing and would be adequately reviewed by reference thereto.

As to the sentencing issues occasioned by the application of West Virginia Code Chapter 64, Article 4, section 415, the state could not prove the quantitative content of fentanyl in the sample tested. To enhance his sentence from a two to ten year sentence for a statute which is now repealed because of those difficulties, is unfair and unjust. The trial court erred by not mitigating the sentence and the degree of the conviction to lower level enhancement for [possession with intent to deliver some fentanyl as opposed to delivering a purported quantitative sum.


### **CONCLUSION**



The Petitioner prays that this Supreme Court will grant his appeal, review the record of this matter, and direct that the conviction in this matter be overturned or set aside, or alternatively the sentence appropriately limited on COUNT 2 IN THE Indictment in the case below, and for such further relief the Court deems appropriate.

**JUAN MCMUTARY,  
Petitioner**

**By Counsel**




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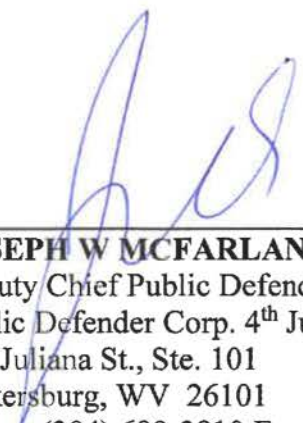
**CERTIFICATE OF SERVICE**

I, **JOSEPH W. MCFARLAND, JR.**, counsel for the Appellant, **JUAN RODRIGUEZ MCMUTARY**, do hereby certify that I served a true copy of the attached **Petitioenr's Brief** by **REGULAR MAIL** , to **William E. Longwell, Assistant Attorney General, Office of the Attorney General, Appellate Division, 1900 Kanawha Blvd East. State Capitol, Bld 6., Ste. 406, Charleston, West Virginia, 25305, [William.E.Longwell@wvago.gov](mailto:William.E.Longwell@wvago.gov)** on the   5TH   day of July 2022.



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