IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : 539 WDA 2008
V.
WILLIAM MANGINO II

APPELLANT'S REPLY BRIEF

NOW COMES PRO SE APPELLANT WILLIAM MANGINO II, M.D., TO ADDRESS CERTAIN LEGAL ARGUMENTS AND ERRONEOUS FACTUAL CLAIMS ESPOUSED IN THE COMMONWEALTH'S "BRIEF FOR APPELLEE". APPELLANT WILL PRESENT HIS NOT PREVIOUSLY "HASHED OUT" COUNTER ARGUMENT [FILOON V. PENNSYLVANIA PUBLIC UTILITY COM'N, 648 A.2d 1339, PARK V. CHRONISTER, 617 A.2d 863, PA. R.A.P. 2113 (a)], IN CHRONOLOGICAL ORDER CO-TERMINUS WITH COMMONWEALTH'S SEQUENCING.

APPELLANT REQUESTS LEAVE TO NOT HAVE THESE ARGUMENTS, SUCCINTLY PUT FORTH, QUASHED OR WAIVED AS THEY ARE NOT INTENDED TO DENIGRATE OR INSULT THE COMMONWEALTH

ATTORNEYS, OR TO FORCE UPON THIS HONORABLE COURT A VERBATIM REPETITIOUS RE-ARGUMENT [Airo Die Casting, Inc. v. Westmoreland County Bd. of Assessment Appeals, 706 A. 2d 1279. Cmwlth. 1998] OF POINTS PREVIOUSLY ADVANCED; NOR DO THESE ARGUMENTS PREJUDICE THIS COMMONWEALTH. THIS BRIEF IS SUBMITTED 16 DAYS AFTER RECEIVING THE COMMONWEALTH'S BRIEF ON ACCOUNT OF CERTAIN SCHEDULING AND LOGISTICAL DELAYS PREVENTING ACCESS TO LAW LIBRARY BOOKS AND COMPUTERS OVER THE HOLIDAY PERIOD. APPELLANT ASKS THIS COURT TO CONSIDER THIS IN LIGHT OF THE NORMAL 14 DAY REQUIREMENT UNDER WHICH THIS BRIEF SHOULD HAVE BEEN FILED.

ARGUMENT

1.) COMMONWEALTH IMPROPERLY MISREPRESENTS MEDICAL FACTS :

1- AT PAGE 5 (LAST PARAGRAPH), OF 'APPELLEE'S BRIEF' [SEE JARED, ALEJANDRO R., BROWMAN GEORGE P., " THE WHO ANALGESIC LADDER FOR CANCER PAIN MANAGEMENT " JAMA. 274 No. 23 1870-73, DEC. 20 1995 : WHERE A SYSTEMATIC REVIEW

(40 REFERENCES) OF MEDLINE, TEXTBOOKS, AND DIRECT CONTACT WITH AUTHORS AND MEETING PROCEEDINGS, FROM 1982-1995 COVERING STUDIES AND EVALUATING THE EFFECTIVENESS OF THE WHO ANALGESIC "LADDER"

- CONCLUDED THAT EVIDENCE PROVIDED WAS "INSUFFICIENT TO ESTIMATE CONFIDENTLY THE EFFECTIVNESS OF THE LADDER"... OR TO "JUDGE THE PERFORMANCE OF CLINICIANS OR DESIGN POLICIES BASED ON SUCH EVIDENCE..." AND THAT "LIMITED EFFECTIVENESS IS RARELY ACKNOWLEGED"... AND THAT "REAL MYTHS" LEAD TO INADEQUATE ANALGESIA WHICH ALSO IMPEDE ADEQUATE PROVISION OF EFFECTIVE ANALGESIC INTERVENTIONS. THAT THE GUIDELINES FAIL TO ADDRESS 'CONTAMINATED CONTROL GROUPS' AND THAT "IT WOULD BE INAPPROPRIATE, UNFAIR, AND POSSIBLY HARMFUL IF CURRENT ESTIMATES OF THE POPULATION OF PATIENTS IN WHOM THE APPLICATION OF THE "LADDER" RESULTS IN INADEQUATE ANALGESIA ARE USED TO SET TREATMENT GOALS AND JUDGE THE PERFORMANCE OF CLINICIANS."

AND KRAMES, ELLIOT S. "INTRASPINAL ANALGESIA FOR NONMALIGNANT PAIN" IN WALDMAN, STEVEN D., M.D., J.D., INTERVENTIONAL PAIN MANAGEMENT, SECOND EDITION. 2001 PP. 610-611. W.B. SAUNDERS COMPANY:

"THERE IS NO PHYSIOLOGIC DOWNSIDE TO THE LONG-TERM USE OF STRONG OPIOID MEDICATIONS. IF OPIOIDS ARE TO BE USED, THE STRENGTH OF THE DRUG SHOULD BE TAILORED TO THE INTENSITY OF PAIN. DOSAGES SHOULD BE DETERMINED EMPIRICALLY AND NOT DEPEND ON SOME ARBITRARY AVERAGE DOSE."

A PAIN TREATMENT CONTINUUM IS OUTLINED IN FIGURE 60-1, PAGE 610, SIMILAR TO THE WORLD HEALTH ORGANIZATION "LADDER," WHICH DOES NOT MANDATE A SEQUENTIAL SERIES (AS COMMONWEALTH CLAIMS - AND HAD DR. EVANKO TOLD JURORS) OF INTERVENTIONS BY ORDER OF INCREASING INVASIVENESS, OR CLASS OF MEDICATION. THESE THERAPIES CAN BE USED IN PARALLEL TRYING ONE OR MORE AT THE SAME TIME.

2.) COMMONWEALTH'S CLAIM (AT PAGE 27) THAT NARCOTIC PRESCRIPTIONS, "SOME IN DOSES SUITABLE FOR TERMINAL CANCER PATIENTS" IS AN EXAMPLE OF 'CIRCULAR ARGUMENTS' WHERE THIS APPELLANT

HAS PREVIOUSLY ASSERTED THAT 'ROUGH-DRAFT INTERVIEW NOTES' SUPPORT HIS CLAIM THAT AGENTS OF THE ATTORNEY GENERAL RECORDED THE THEN CONTEMPORANEOUS STATEMENTS MADE BY APPELLANT CONTRADICTING LATER TESTIMONY THAT APPELLANT PRESCRIBED BASED UPON DR. WAGMAN'S COMMANDS TO DO SO. APPELLANT'S STATEMENTS TO AGENTS WERE FRANKLY EXCULPATORY IN NATURE.

THE ACCEPTANCE OF THIS TESTIMONY BY THE FACT-FINDER THAT WAGMAN'S PRACTICE PATTERN WAS WHAT "DR. MANGINO WILLINGLY CONTINUED TO DO FOR THESE PATIENTS" IS PREDICATED UPON FACTS WHICH WERE NEVER PLACED INTO EVIDENCE; THOSE BEING THAT

1.) ALL OF "THESE PATIENTS" RECEIVED DOSAGES THAT WERE TOO HIGH [CANCER PAIN DOSAGES].
2.) ONLY CANCER PATIENTS COULD POSSIBLY NEED SUCH HIGH DOSAGES.
3.) "DEFENDANT DID NOT TAKE THE NECESSARY STEPS TO DETERMINE" THE NECESSITY. (APPENDIX A. P.18 COMMONWEALTH'S BRIEF.

ALL OF THESE ARE ASSUMPTIONS NOT BASED ON SCIENCE OR FACTS. APPELLANT ASKS THE COURT TO TAKE NOTICE THAT THERE ARE NO DIFFERENCES,

AS A MATTER OF SCIENCE OR LAW, BETWEEN THE VARIOUS INTENSITY LEVELS OF PAIN WHICH ARE STRICTLY DEPENDENT UPON THE ETIOLOGY OF THE CONDITION CAUSING THE PAIN. THE PAIN OF PHANTOM LIMB SYNDROME, LATERAL LUMBAR RECESS PAIN FROM EVEN MILD FACET DISRUPTION, TRIGEMINAL NEURALGIA, BEE STINGS, AND EXTREMITY RSD, IS AS INTENSE TO ANY GIVEN PATIENT AS IS ALL CANCER PAIN - REGARDLESS OF ITS SOURCE. THE PAIN OF POST-HERPETIC NEURALGIA IS AS INTENSE AS METASTATIC CANCER TO THE RIBS.

FURTHERMORE "USE OF 'HIGH-DOSE' OPIOID THERAPY FOR CHRONIC NON-MALIGNANT PAIN IS CLEARLY <u>IN THE SCOPE OF MEDICINE</u>."

[SEE LETTER FROM RUSSELL K. PORTENOY, M.D., AND SEVERAL OTHER PAST PRESIDENTS OF THE AMERICAN PAIN SOCIETY TO MARVIN D. MILLER, ESQ., P.O. BOX 663, 1203 DUKE STREET, ALEXANDRIA, VA., 22313; CRITICIZING "FACTUALLY WRONG SERIOUS MISSTATEMENTS" OF DR. MICHAEL ASHBURN, CLAIMING THAT THE USE OF HIGH-DOSE OPIOIDS WAS AN INDICATION OF DRUG ABUSE IN POPULATIONS OF PATIENTS WITH CHRONIC NONCANCER PAIN.]

IN HOOVER V. AGENCY FOR HEALTH CARE ADMINISTRATION, 676 SO. 2D 1380 COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, THE COURT OPINED:

"DESPITE ... PAUCITY OF EVIDENCE, LACK OF FAMILIARITY, AND SEEMING LACK OF EXPERTISE, THE AGENCY'S PHYSICIANS TESTIFIED AT THE HEARING THAT THE DOCTOR HAD PRESCRIBED EXCESSIVE, PERHAPS LETHAL, AMOUNTS OF NARCOTICS, AND HAD PRACTICED BELOW THE STANDARD OF CARE."

THE IMPORTANT INSTRUCTION IN HOOVER IS THAT THE COURT CORRECTLY DETERMINED THAT THERE SHOULD NOT BE - AS A MATTER OF LAW - DIFFERENCES IN DOSAGE GUIDELINES BETWEEN CANCER PAIN AND NONMALIGNANT PAIN. AND WHERE TOLERANCE TO OPIOIDS IS GENETICALLY DETERMINED, NO INFERENCE THAT DOSAGES ARE, PER SE, INAPPROPRIATE CAN BE ALLOWED TO BE DRAWN BY ANY FACT-FINDER. [SEE (AMONG HUNDREDS OF SIMILAR TYPE ARTICLES): "CHRONIC EXPOSURE TO MU-OPIOID AGONISTS PRODUCES CONSTITUTIVE ACTIVATION OF MU-OPIOID RECEPTORS IN DIRECT PROPORTION TO THE EFFICACY OF THE AGONIST USED FOR PRETREATMENT," IN MOLECULAR PHARMACOLOGY 2001 JUL: 60 (1): 53-62. (COMMON

MECHANISMS IN TOLERANCE AND DEPENDENCE WITH TISSUE TO TISSUE VARIATION RELATIVE TO OPIOID RECEPTORS.)

3- AND WHERE COMMONWEALTH'S 'BRIEF' ON THEIR "COUNTER-STATEMENT OF THE CASE" (AT PAGE 12), WITH SPECIFIC REFERENCE TO MELISSA LASTORIA, WHO WAS REERRED TO A NEUROSURGEON BY DR. WILKINS (WHO IS ALSO INCARCERATED), COMMONWEALTH TELLS US THAT "THE NEUROSURGEON RECOMMENDED LUMBAR EPIDURAL STEROID INJECTIONS." APPELLANT BELIEVES THAT THIS RECOGNITION ON THE PART OF THE NEUROSURGEON THAT AN EPIDURAL MIGHT PLAY SOME ROLE IN THE ALLEVIATION OF PAIN EXPERIENCED BY MS. LASTORIA SUPPORTS APPELLANT'S ARGUMENT THAT THE LOWER COURT ABUSED DISCRETION (WHICH IS UNDERSTANDABLE GIVEN THAT THESE CASES, IN GENERAL, CALL UPON COMPLEX INTERWEAVING OF MEDICAL INFORMATION THAT EVEN STATE'S MEDICAL BOARD MEMBERS ARE OFTEN UNABLE TO ACHIEVE) BY NOT GRANTING POST-CONVICTION ACQUITTAL ON ALL COUNTS CHARGED; SINCE IN EVERY PATIENT (COUNTS CHARGED) THERE WAS EVIDENCE PRESENTED BY COMMONWEALTH ALONE SUFFICIENT TO ESTABLISH PRESENCE OF UNDERLYING SPINAL DYSMORPHIC CHANGES SUGGESTIVE OF A 'REASON' TO HAVE PAIN; THUS CALLING INTO QUESTION

(APPELLEE'S 'BRIEF' REFERENCES "APPENDIX A": PAGE 18)
THE MEDICAL OPINION OF DR. EVANKO THAT THERE WAS
"NO MEDICAL EVIDENCE IN THE CHARTS TO SUGGEST OR
CORROBORATE THE PATIENT'S COMPLAINT [S] OF PAIN."
THIS IS WHAT APPELLANT CLAIMS AS AN EXAMPLE OF
THE "CIRCULAR" REASONING TYPICAL OF THIS PROSECUTION
AND THE REASON WHY DIRECT PATIENT TESTIMONY OR
"UNDERCOVER" PENETRATION [U.S. v. MOORE 423 U.S. 122]
SHOULD PROVIDE THE STANDARDS FOR THE DETERMINATION
WHEN SEEKING THE TRUTH.

2.) COMMONWEALTH UNINTENTIALLY MISQUOTES
PRIOR CASE LAW.

FOR THE SAKE OF BREVITY APPELLANT NOW
CHALLENGES COMMONWEALTH'S CLAIMS THAT CERTAIN
ISSUES ARE NOT MERITORIOUS (PAGE 22 OF COMM. BRIEF)
WITH REGARD TO APPELLANT'S BRIEF [QUESTIONS 4, 5, AND 6
AT P. ix] BECAUSE THEY ARE "UNSUPPORTED BY RECORD
EVIDENCE". ATTORNEY SHUMAN SPOKE WITH AGENTS
AND GAVE TESTIMONY AT A SUPPRESSION HEARING PRIOR TO
THE TRIAL. THIS TESTIMONY ON OCTOBER 6, 2006 WAS
TAKEN BEFORE JUDGE MOTTO AT PP. 53-63., AND SUPPORTS
APPELLANT'S CLAIM THAT MR. SHUMAN'S DECISIONS, RIGHTLY
OR WRONGLY, WERE BASED ON MISLEADING INFORMATION

PROVIDED BY AGENT SMITH:

MR. SHUMAN AT P. 61 "THERE WAS NEVER ANY INDICATION TO ME THAT DR. MANGINO MAY AGAIN BECOME A TARGET OR A SUBJECT, AND IF I THOUGHT THAT THAT WAS A POSSIBILITY, I WOULD HAVE TOLD DR. MANGINO THAT HE WAS NOT TO SAY ANOTHER WORD UNLESS AND UNTIL I WAS PRESENT."

MR. BAXTER AT P. 62

"WOULD IT SURPRISE YOU TO LEARN THAT AGENT SMITH DID NOT KNOW THAT DR. MANGINO WAS PART OF THIS PRACTICE UNTIL HE WAS NOTIFIED BY THE DEPARTMENT OF STATE"?

AGENT SMITH CONTRADICTS THIS AT PAGE 25:

"I HAD JUST LEARNED THAT HE WAS EVEN AROUND... HE WAS EVEN THERE ... A WEEK OR TWO BEFORE AND I KNEW NOTHING ABOUT HIM."

AND AT PAGE 27 - AGENT SMITH THEN CHANGES HIS STORY ABOUT WHEN HE "PULLED" PHARMACY PROFILES, AND ADMITS THAT HE 'TOOK' NOTES AT THE INTERVIEW, AND ("WE DESTROY THEM") AT P. 28., DESTROYED THEM. APPELLANT HAS ASSERTED IN HIS

ORIGINAL BRIEF, UNDER U.S. v. RAMOS AT 27F.3d 65, [P.13, P.28] THIS TO BE A BRADY VIOLATION WHICH IMPACTS THE FAIRNESS OF THE TRIAL. THE RELEVANT QUESTION SUPPORTED BY THE RECORDS IS WHETHER, UNDER STANSBURY V. CALIFORNIA, 511 U.S. 318, THE AGENTS BY WORD OR DEED TRANSMITTED OR MANIFESTED THEIR SUSPICIONS TO APPELLANT BY ABRUPTLY REFERRING TO "HIS" PRESCRIBING OR INCREASING THE DOSAGE ON A PARTICULAR PATIENT AS THEY MADE REFERENCE TO A PHARMACY PRINTOUT WHICH THEY SPECIOUSLY ARGUE THEY HAD NO KNOWLEDGE OF BECAUSE THEY DIDN'T KNOW WHO THIS 'GUY' WAS; DESPITE THEIR AFFIRMATIONS THAT THEY WERE INVESTIGATING AN OFFICE FOR AT LEAST TWO MONTHS PRIOR, WITH CAMERAS, CHASING PEOPLE AROUND GETTING LICENSE NUMBERS, AND VISITING PHARMACIES FROM THE INCEPTION OF THEIR INVESTIGATION, AND WHETHER THIS APPELLANT BELIEVED HE COULD JUST EXCUSE HIMSELF AT HIS PERCEPTION OF THEIR SUSPICIONS AND WALK OUT GIVEN HIS INTERPRETATION OF THE CIRCUMSTANCES IN WHICH HE FOUND HIMSELF. THE RECORD IS SUFFICIENT. THE STATE BOARD ISSUE IS ONE OF "FIRST IMPRESSION"

PROPERLY BROUGHT BEFORE THIS COURT UNDER U.S.C.A. 5 AND 14, WITH NO PRIOR CASE LAW DECISIONS. ALSO PROPERLY RAISED ON DIRECT APPEAL IS THE ISSUE OF INEFFECTIVENESS SINCE APPELLANT BROUGHT IT TO THE COURTS <u>AT HIS EARLIEST OPPORTUNITY</u> AFTER BEING ALLOWED TO REPRESENT HIMSELF. (COMM. BRIEF AT P. 31)

AT PAGE 28 COMMONWEALTH ASSERTS THAT THE STATUTE S. 780-113 (a)(14) CURRENTLY IN EFFECT "HAS NO RELEVANCE" TO A PRIOR VERSION. APPELLANT BELIEVES THIS IS A MISUNDERSTANDING ON THE PART OF COMMONWEALTH AND THAT THEIR ABSOLUTE BURDEN OF PROOF IS TO SHOW THAT APPELLANT DID NOT VISUALLY OR PHYSICALLY EXAMINE ANY PATIENT. THEY FAILED TO MEET THE REQUISITE BURDEN AND THE COURT DID ERR ON NOT INSTRUCTING JURORS AS TO THESE "ELEMENTS OF THE CRIME," AS APPELLANT HAS ARGUED. (COMM. ARGUMENT BRIEF AT P. 35 2ND PARAGRAPH, AND P. 27-28, AND P. 20.)

AND IN ALL INSTANCES WHERE COMMONWEALTH ARGUES THAT APPELLANT'S ISSUES WERE NOT PROPERLY DEVELOPED AND NOT PRESERVED FOR APPEAL APPELLANT ASSERTS THAT <u>COMMONWEALTH V. RODGERS</u>, 605 A. 2d 1228,

COMMONWEALTH V. MONTALVO, 641 A.2d 1176, AND COMMONWEALTH V. MARIS, 629 A.2d 1014, (PRIMARILY ARGUED IN COMMONWEALTH APPELLEE 'BRIEF' IN PAGES 35-40, ARGUMENT NOS. IX-XII.) DO NOT STAND FOR THE PROPOSITION THAT THIS HONORABLE COURT HAS IN THE PAST REJECTED BRIEFS WHERE APPELLANTS HAVE PRESENTED ARGUMENTS SUFFICIENT TO SUPPORT THEIR CLAIMS. MOST CASE LAW COMMENTARY HAS FOCUSED ON WHETHER OR NOT 1925 (b) ISSUES WERE RAISED, THE FORM OF THE BRIEF, THE NATURE OF THE PRINT AND MARGINS, AND HOW UNDERSTANDABLE WAS THE FOCUS. APPELLANT IS NOT 'LORD COKE', BUT DID THE BEST HE COULD. HE CERTAINLY LEARNED MORE ABOUT THE LAW THAN DID COMMONWEALTH ABOUT THE REQUISITE ISSUES CONCERNING THE MANAGEMENT OF PAIN.

COMMONWEALTH ARGUES AT P. 19 OF THEIR BRIEF THAT THE EVIDENCE WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE - THAT IT WAS "SUFFICIENT." APPELLANT RESPECTFULLY DISAGREES. A VERDICT IS AGAINST THE WEIGHT OF EVIDENCE WHERE THE LAW IS NOT APPLIED. MORRISON V. COMMONWEALTH, 538 Pa. 122, 134, 646 A.2d 565, 571 (1968). THE PATIENTS WERE ADVISED, COUNSELLED, AND EXAMINED ON EACH VISIT. THIS IS THE STANDARD IN PENNSYLVANIA.

APPELLANT'S JUDGEMENT OF SENTENCE ON ALL COUNTS CONVICTED AND ENTERED ON SEPTEMBER 19, 2007 AT NO. 1181 OF 2004 IN THE COURT OF COMMON PLEAS OF LAWRENCE COUNTY SHOULD BE VACATED IN THE INTEREST OF FAIRNESS AND JUSTICE

RESPECTFULLY SUBMITTED PRO SE
DEC. 28, 2008

William Mangino II
WILLIAM MANGINO II APPELLANT
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CRESSON, PA. 16699-0001

I HEREBY CERTIFY THAT I AM THIS DAY SERVING (4) COPIES INCLUDING ORIGINAL TO THE SUPERIOR COURT OF PENNSYLVANIA AND (1) COPY TO ANDREA F. McKENNA, ESQ. FOR THE COMMONWEALTH: EACH AT THEIR ADDRESS OF RECORD BY FIRST CLASS U.S. MAIL, SUBJECT TO ALL PENALTIES FOR FALSIFICATION OF STATEMENTS TO AUTHORITIES UNDER PACC (Pa. C.S.A.) 18, § 4904.

APPELLANT