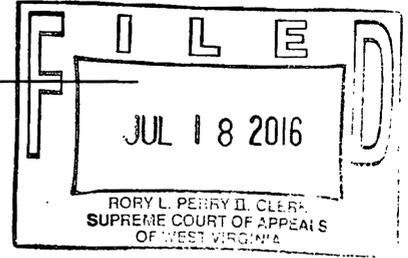

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

N0. 15-0696



STATE OF WEST VIRGINIA,

Respondent,

v.

KENNETH ALLEN MARCUM,

Petitioner.

RESPONDENT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

	Page
I. QUESTION PRESENTED.....	1
II. STATEMENT OF THE CASE.....	1
III. SUMMARY OF THE ARGUMENT.....	3
IV. ARGUMENT.....	4
1. It has been widely held that the scope of review in an appeal of a denial of a Rule 35(b) motion does not embrace issues other than the propriety of the lower court’s denial of the motion.....	6
2. Judicial economy is served when criminal defendants are generally required to bring all claims of pretrial or trial error during their direct appeal.....	8
3. Limiting the scope of review in this circumstance prevents defendants from using the denial of their Rule 35(b) motion as a “test appeal.”.....	12
V. CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<i>Bd. of Educ. of McDowell Cty. v. Zando, Martin & Milstead, Inc.</i> , 182 W. Va. 597, 390 S.E.2d 796 (1990).....	11
<i>Call v. McKenzie</i> , 159 W. Va. 191, 220 S.E.2d 665 (1975).....	8, 11
<i>Carter v. Bordenkircher</i> , 159 W. Va. 717, 226 S.E.2d 711 (1976).....	12
<i>Ford v. Coiner</i> , 156 W. Va. 362, 196 S.E.2d 91 (1972).....	11
<i>Gaertner v. United States</i> , 763 F.2d 787 (7th Cir. 1985)	8
<i>Hill v. United States</i> , 368 U.S. 424 (1962).....	6, 7
<i>Losh v. McKenzie</i> , 166 W. Va. 762, 277 S.E.2d 606 (1981).....	9
<i>Pyles v. Boles</i> , 148 W. Va. 465, 135 S.E.2d 692 (1964).....	9
<i>State ex rel. Bratcher v. Cooke</i> , 155 W. Va. 850, 188 S.E.2d 769 (1972).....	9
<i>State ex rel. Burgett v. Oakley</i> , 155 W. Va. 276, 184 S.E.2d 318 (1971).....	12
<i>State ex rel. Cooper v. Caperton</i> , 196 W.Va. 208, 470 S.E.2d 162 (1996).....	10
<i>State ex rel. Cosner v. See</i> , 129 W. Va. 722, 42 S.E.2d 31 (1947).....	10
<i>State ex rel. Daniel v. Legursky</i> , 195 W. Va. 314, 465 S.E.2d 416 (1995).....	11
<i>State ex rel. Farber v. Mazzone</i> , 213 W. Va. 661, 584 S.E.2d 517 (2003).....	7
<i>State ex rel. Gray v. Ballard</i> , 227 W. Va. 265, 708 S.E.2d 459 (2009).....	13
<i>State ex rel. Kucera v. City of Wheeling</i> , 153 W. Va. 538, 170 S.E.2d 367 (1969).....	10
<i>State ex rel. McMannis v. Mohn</i> , 163 W. Va. 129, 254 S.E.2d 805 (1979).....	9
<i>State v. Davis</i> , 236 W. Va. 550, 782 S.E.2d 423 (2015).....	10
<i>State v. Echard</i> , No. 11-1047, 2012 WL 3104251 (W. Va. May 29, 2012).....	13
<i>State v. Gordon</i> , 539 A.2d 528 (R.I. 1988)	8
<i>State v. Head</i> , 198 W. Va. 298, 480 S.E.2d 507 (1996).....	4, 5, 6, 7
<i>State v. Legg</i> , 151 W.Va. 401, 151 S.E.2d 215 (1966).....	13

<i>State v. McClain</i> , 211 W. Va. 61, 561 S.E.2d 783 (2002).....	4
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995).....	10
<i>State v. Mosqueda</i> , 123 Idaho 858, 853 P.2d 603 (Idaho Ct. App. 1993).....	8
<i>State v. Pethel</i> , No. 13-1139, 2014 WL 5311391 (W. Va. Oct. 17, 2014)	12
<i>State v. Plymail</i> , No. 14-0016, 2015 WL 7628723 (W. Va. Nov. 20, 2015).....	12
<i>State v. Rogers</i> , 189 W. Va. 730, 434 S.E.2d 402 (1993).....	13
<i>State v. Van Hoose</i> , 227 W. Va. 37, 705 S.E.2d 544 (2010).....	12
<i>Tindell v. State</i> , 629 N.W.2d 357 (Iowa 2001)	7
<i>United States v. Labreche</i> , 933 F.2d 1017 (9th Cir. 1991)	7
<i>United States v. Poland</i> , 533 F. Supp. 2d 199 (D. Me. 2008)	6
<i>United States v. Riffe</i> , 550 F.2d 1013 (5th Cir. 1977)	7, 8
<i>United States v. Rovetuso</i> , 840 F.2d 363 (7th Cir. 1987)	7
<i>United States v. Scott</i> , 688 F.2d 368 (5th Cir. 1982)	6, 7
<i>United States v. Townsend</i> , 762 F.3d 641 (7th Cir. 2014)	6
<i>Walden v. United States</i> , 366 A.2d 1075 (D.C. 1976)	8
<i>Woodall v. Laurita</i> , 156 W. Va. 707, 195 S.E.2d 717 (1973).....	10
Rules	
Rule 35 of the Federal Rules of Criminal Procedure.....	7
Rule 35 of the West Virginia Rules of Criminal Procedure	<i>passim</i>
W. Va. R. App. P. 1(b), 10(c)(3).....	11
W. Va. R. App. P. 5(b).....	12

QUESTION PRESENTED

Does this Court have jurisdiction in an appeal of a denial of a Rule 35(b) motion to consider assignments of error unrelated to the circuit court's denial of that motion?

STATEMENT OF THE CASE

On or around March 15, 2013, Petitioner Kenneth Allen Marcum ("Petitioner") vandalized a 2001 Chevrolet Silverado, causing significant damage. Appendix Record ("App") at 4. On or around May 28, 2014, he broke into a storehouse and stole a 2013 Honda Rancher four-wheeler. *Id.* at 5. In September of 2014, the Mingo County Grand Jury returned a four-count indictment against Petitioner, charging him with 1) destruction of property, 2) conspiracy to destroy property, 3) burglary (entry of building other than a dwelling), and 4) grand larceny. *See id.*

The State offered Petitioner a plea bargain, and on November 17, 2014, he pled guilty to conspiracy and attempted grand larceny. *Id.* at 22. Petitioner read and signed a Petition to Enter Guilty Plea, which recounted the rights he was waiving via his plea. *Id.* at 7-15. He also entered a Statement in Support of his Guilty Plea, and his attorney also filed a Statement in Support of the Guilty Plea. *Id.* at 16-17, 18-21. A plea hearing was held, during which the circuit court engaged in thorough plea colloquy, including an examination of the voluntariness of the plea, and Petitioner outlined the factual underpinnings of the crime to which he had agreed to plead guilty. *Id.* at 56-72. The court held that Petitioner's plea was voluntary and accepted it. *Id.; see also id.* at 22-23. After the plea was accepted, Petitioner requested to continue to be held on home confinement pending sentencing, and the Court acquiesced. *Id.* at 66-67.

A sentencing hearing was held on January 22, 2015. *Id.* at 43-55. At the beginning of the hearing, the court noted that Petitioner was incarcerated and inquired as to how long he had been incarcerated. *Id.* at 44. The State responded that Petitioner had failed to attend appointments with

his probation officer and failed to report to the Day Report center, and therefore violated the terms of his home confinement. *Id.* 44, 45. Petitioner's failure to meet those obligations had also prevented the State from preparing a pre-sentence investigation report. *Id.* at 45. The court heard testimony from the victim of the destruction of property charge concerning the cost of repairs to his Silverado. *Id.* at 49-50. The court then imposed a sentence of 1 to 5 years incarceration for destruction of property and 1 to 3 years incarceration for attempted grand larceny, the terms to run consecutively. *Id.* at 52-53; *see also id.* at 24-26. Petitioner was also obligated to pay \$478 in restitution to the owner of the Silverado to cover the out-of-pocket cost of repairs. *Id.* at 25-26.

Petitioner filed a "Motion for Reconsideration of Sentence" on April 20, 2015. *Id.* at 27-29. Petitioner noted in his motion that "the State of West Virginia recommended that the sentences would run concurrently and not consecutively." *Id.* at 27. Petitioner also argued that because the damage he inflicted to the Silverado only amounted to \$478 he should have been charged with and sentenced to misdemeanor, not felony, destruction of property. *Id.* at 28. On May 12, 2015, the court held hearing to consider Petitioner's motion. *Id.* at 68-72. Petitioner's counsel offered argument which the court took under consideration. *See id.* at 71. On June 18, 2015, the court issued an order denying Petitioner's motion. *Id.* at 32-33. Classifying the motion as a Rule 35(b) motion for reduction, the court noted that it had considered the record and the circumstances outlined in Petitioner's motion, but denied his request for the sentences to be run concurrently. *Id.* at 33.

Petitioner proceeded to initiate the present appeal, presenting two assignments of error: 1) that the circuit court erred when it declined to follow the State's recommended sentence because Petitioner failed to keep the appointments necessary for the compilation of a presentence

investigation report, and 2) whether the court erred by sentencing for felony destruction of property – the charge he plead guilty to – when testimony at the sentencing hearing indicated the amount of damage was less than the minimum amount required for a felony. *See Pet. Br.* at 1.

On June 2, 2016, the Court, acting under its inherent authority to examine the metes and bounds of its jurisdiction, ordered the parties to provide supplemental briefs addressing the following question:

Whether, in an appeal from a denial of a Rule 35(b) motion, this Court has jurisdiction to consider assignments of error unrelated to the circuit court’s denial of the Rule 35(b) motion?

This brief presents Respondent’s answer to that question. The answer is no.

SUMMARY OF THE ARGUMENT

A Rule 35(b) motion for reduction or modification of sentence is essentially a plea for leniency from a presumptively valid conviction and sentence. Unlike a Rule 35(a) motion, which challenges the legality of the sentence, a Rule 35(b) motion is, in nearly all cases, not predicated on legal principles; instead it is an appeal to the mercy of the trial judge. Accordingly, a Rule 35(b) motion is directed to the sound discretion of the trial judge, and can be summarily denied. Although the denial of such a motion is appealable, the applicable standard of review is highly deferential and strongly favors affirmance.

Numerous jurisdictions have held that only claims directly related to the denial of the Rule 35 motion are cognizable in a Rule 35 appeal. Such a rule is supported by strong policy considerations because it is beneficial to the interest of judicial economy and prevents defendants from using a Rule 35 appeal to gain a tactical advantage before subsequently pursuing a direct appeal. Respondent contends that existing law demonstrates this Court’s lack of jurisdiction to consider far-flung assignments of error during an appeal of a Rule 35(b) denial, or, to the extent

that the Court disagrees about the current state of the law, that the wisdom of adopting such a rule is apparent and this Court should issue an opinion adopting such a rule.

ARGUMENT

Rule 35 of the West Virginia Rules of Criminal Procedure provides convicted individuals two distinct pathways to attack the validity or seek a modification of their sentence. W. Va. R. Crim. P. 35.¹ The first remedy – correction, set forth in subsection (a) – is properly utilized when an individual believes that there is some legal error related to their sentence. *See e.g., State v. McClain*, 211 W. Va. 61, 63, 561 S.E.2d 783, 785 (2002) (Rule 35(a) motion used to challenge the circuit court’s failure to award time-served credit for time defendant spent in pretrial incarceration). In contrast, the remedy set forth in subsection (b) – reduction (sometimes called modification) – 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 (1996) (Cleckley, J. concurring). While there is no limitation on when a defendant can file a Rule 35(a) motion, a Rule 35(b) motion must be filed within 120 days of the imposition of the sentence, or within 120 days of the entry of a mandate order from this Court affirming the underlying conviction on direct appeal. W. Va. R. Crim. P. 35(b); *see also Head*, 198 W. Va. at 302, 480 S.E.2d at 511 (holding that to be timely

¹ Rule 35 reads, in its entirety:

(a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence.

(b) Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion within 120 days after the sentence is imposed or probation is revoked, or within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction or probation revocation or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

filed “[u]nder the clear language of the rule” a convicted defendant must file his Rule 35(b) motion “within 120 days of one of the measuring events”).

Rule 35 motions are “directed to the sound discretion of the circuit court and, generally, [are] not reviewable absent an abuse of discretion.” *Head*, 198 W. Va. at 301, 480 S.E.2d at 510. “Appellate review under Rule 35(b) is circumscribed.” *Id.* at 305, 480 S.E.2d at 514 (Cleckley, J., concurring). “[T]he only way a circuit court can abuse his discretion on a Rule 35(b) motion is to commit a legal error, or [issue a] ruling [so] marred by a fundamental defect [that it] inherently results in a miscarriage of justice. No other claim of abuse of discretion should be reviewable under Rule 35(b).” *Id.* at 306, 480 S.E.2d at 515.

The question raised by the Court is whether or not it has jurisdiction to consider assignments of error unrelated to the circuit court’s denial of a Rule 35(b) motion during an appeal of a denial of that motion. The aforementioned language from *Head* clearly demonstrates that the scope of appellate review of the denial of a Rule 35(b) motion is limited. This is unsurprising, given that “independent[] of Rule 35(b), [a] sentencing order itself is subject to appellate review, both as to its constitutionality and its compliance with the West Virginia Rules of Criminal Procedure and the applicable statutory provisions.” *Head*, 198 W. Va. at 305, 480 S.E.2d 514 (Cleckley, J., concurring). Thus, to the extent a criminal defendant believes the circuit court committed errors unrelated to the denial of the Rule 35(b) motion, the proper vehicle for redress of those errors is a direct appeal. As discussed below, other jurisdictions have held that appellate review of Rule 35 motions should be limited to issues contemplated by the motion. More fundamentally, judicial economy is served when petitioners are generally required to present their assignments of error in a single proceeding – the direct appeal. Finally, limiting

the jurisdictional scope of an appeal of a Rule 35(b) denial prevents criminal defendants from pursuing postconviction remedies in such a manner that they obtain a “second bite at the apple.”

- 1) **It has been widely held that the scope of review in an appeal of a denial of a Rule 35(b) motion does not embrace issues other than the propriety of the lower court’s denial of the motion.**

Prior to 1985,² Rule 35 of the Federal Rules of Criminal Procedure was substantially similar to Rule 35 of the West Virginia Rules of Criminal Procedure. *See Head*, 198 W. Va. at 304, 480 S.E.2d at 513 (making reference to “pre-1985 federal Rule 35”). In *Hill v. United States*, a 1962 opinion, the Supreme Court delineated the limited scope of the inquiry that occurred upon the filing of a Rule 35 motion under the pre-1985 rules:

[A]s the Rule's language and history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal sentence, *not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence.*

68 U.S. 424, 430 (1962) (emphasis added). Twenty years later, the Fifth Circuit, applying *Hill*, held that it was “unable to consider, on this appeal from a Rule 35 sentencing motion, [the defendant’s] complaints as to the alleged invalidity of the guilty plea conviction upon which the sentence was based.” *United States v. Scott*, 688 F.2d 368, 370 (5th Cir. 1982). The *Scott* court explained that:

[I]f [the defendant] had any complaints as to his guilty plea . . . he was entitled . . . to take a timely appeal from the original sentencing order Having failed to do so, he may not raise issues concerning the validity of his conviction on an appeal from the determination of his Rule 35 [motion] . . . which cannot implicate claims of pre-sentence error.

² In 1984 Congress enacted the Sentencing Reform Act, which substantially altered Rule 35 of the Federal Rules of Criminal Procedure, and heavily curbed the ability of federal trial courts to alter sentences after they have been imposed. *See United States v. Townsend*, 762 F.3d 641, 645 (7th Cir. 2014) (“The Sentencing Reform Act of 1984 explicitly prevents district courts from “modify[ing] a term of imprisonment once it has been imposed” except in three narrow situations.”); *United States v. Poland*, 533 F. Supp. 2d 199, 202 (D. Me. 2008) (“Before the Sentencing Reform Act of 1984 . . . Rule 35 gave district judges wide discretion to reduce a previously imposed sentence, provided that they acted within certain time limits.”).

Id.

Both *Hill* and *Scott* concerned a defendant's attempt to use a Rule 35(a) motion to attack underlying trial errors, not a Rule 35(b) motion for reduction. However, the principles articulated in both cases are equally applicable in the latter context, because a Rule 35(b) motion is, by its very nature, a more circumscribed request for relief relative to a Rule 35(a) motion. *See Head*, 198 W. Va. at 306, 480 S.E.2d at 515 (explaining that a Rule 35(b) motion is "essentially a plea for leniency from a presumptively valid conviction.") (Cleckley, J. concurring).³ There is simply no reasonable argument that the scope of appellate review should be wider during review of a Rule 35(b) motion than it is during review of a Rule 35(a) motion.

Moreover, courts in a variety of jurisdictions have held that a defendant's claims, raised via Rule 35(b) or similar procedural mechanism permitting a "motion for reduction of sentence," are not properly raised if they involves any issue other than the denial of the Rule 35 motion itself. *See United States v. Labreche*, 933 F.2d 1017 (9th Cir. 1991) ("A Rule 35[b] motion is not a means of correcting errors in the trial or other presentencing proceedings."); *United States v. Rovetuso*, 840 F.2d 363, 366 (7th Cir. 1987) (holding that "our scope of review on this appeal is limited to [the district judge's] order denying the defendant's Rule 35 motion."); *United States v.*

³ In contrast, a defendant who files a Rule 35(a) motion is essentially asserting that the sentence he or she received is "beyond the power of [a] court to impose," *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001), and thus a nullity. Thus, a defendant who files a Rule 35(b) motion accepts the legal propriety of the sentence, but seeks mercy from the trial judge, while a defendant who files a Rule 35(a) motion denies that the sentence is even permissible. It is hardly surprising that the scope of appellate review is more expansive when a defendant's claim is "the sentencing court's action exceeded its jurisdiction" and less expansive when the claim is "the sentencing court should have reduced my admittedly legally, but overly harsh, sentence." *Cf State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 666, 584 S.E.2d 517, 522 (2003) ("A void judgment, being a nullity, may be attacked, collaterally or directly, at any time and in any court whenever any claim or right is asserted under such judgment.") (internal quotation marks and citations omitted).

Riffe, 550 F.2d 1013, 1014 (5th Cir. 1977) (per curiam) (holding, in appeal of trial court’s denial of a Rule 35 motion wherein the defendant sought only “to mitigate his sentence,” that the “question of whether [defendant’s] guilty plea was invalid is . . . not properly before this court”); *State v. Mosqueda*, 123 Idaho 858, 859, 853 P.2d 603, 604 (Idaho Ct. App. 1993) (holding in appeal of a “motion for reduction of sentence” that “[o]nly the decision of the Rule 35 motion is within the scope of our review.”); *see also Gaertner v. United States*, 763 F.2d 787, 795 (7th Cir. 1985) (“We note that the decision to grant or deny a timely-filed Rule 35[b] motion is a matter of pure discretion and that the scope of appellate review over Rule 35 rulings is exceedingly narrow”); *State v. Gordon*, 539 A.2d 528, 529 (R.I. 1988) (noting, in appeal of motion to reduce, that the “scope of review in appeals based on Rule 35” is “narrow.”); *Walden v. United States*, 366 A.2d 1075, 1077 (D.C. 1976) (“Although the verbal formulations vary, the scope of appellate review of decisions on sentence reduction motions is very limited.”). Adopting a rule permitting issues unrelated to the denial of a Rule 35(b) would place this Court squarely in the minority. As discussed below, there is no compelling reason to do so, and several reasons why the adoption of such a rule would be unwise.

2) Judicial economy is served when criminal defendants are generally required to bring all claims of pretrial or trial error during their direct appeal.

This Court has long recognized that criminal defendants do not have an unlimited right to seek redress of errors which occur during criminal proceeding (by appeal or otherwise) and that the right to do so must be balanced with the interests of finality and judicial economy. *See e.g., Call v. McKenzie*, 159 W. Va. 191, 194, 220 S.E.2d 665, 669 (1975) (“While a defendant is entitled to due process of law, he is not entitled to appeal upon appeal, attack upon attack, and Habeas corpus upon Habeas corpus.”). As the *Call* court stated, “[t]here must be some end to litigation, and *the proper way to effect this salutary result is to do everything right the first*

time.” *Id.* (emphasis added). A rule precluding criminal defendants from raising issues unrelated to the denial of their Rule 35 motion during an appeal of such a denial serves this interest without depriving defendants of the ability to seek correction of errors.

Both the federal Constitution and the Constitution of this state guarantee criminal defendants the right to pursue an appeal of a criminal conviction. Syllabus, *State ex rel. Bratcher v. Cooke*, 155 W. Va. 850, 850, 188 S.E.2d 769, 769 (1972) (“One convicted of a crime is entitled to the right to appeal that conviction and where he is denied his right to appeal such denial constitutes a violation of the due process clauses of the state and federal constitutions”). Thus, it is undeniable that the primary – and generally appropriate – procedural vehicle for challenging errors which purportedly occurred during a criminal proceeding is a direct appeal. There are, of course, other mechanisms by which the trial court’s errors can be challenged. *See e.g., Losh v. McKenzie*, 166 W. Va. 762, 764, 277 S.E.2d 606, 609 (1981) (“In general [the West Virginia Code] contemplates that every person convicted of a crime shall have a fair trial in the circuit court, an opportunity to apply for an appeal to this Court, and one omnibus post-conviction habeas corpus hearing”). But although various procedural mechanisms other than a direct appeal exist, they are all limited in some way by their specific nature. For instance, the writ of habeas corpus is commonly employed by prisoners to collaterally attack convictions by alleging the existence of a constitutional violation; however, as this Court has oft repeated, “[a] habeas corpus proceeding is not a substitute for a writ of error,” and therefore, “ordinary trial error not involving constitutional violations will not be reviewed.” Syl. pt. 4, *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 130, 254 S.E.2d 805, 806 (1979); *Pyles v. Boles*, 148 W. Va. 465, 490, 135 S.E.2d 692, 707 (1964) (“A habeas corpus proceeding is not a substitute for a writ of error or other appellate process”). A writ of prohibition may be employed by a criminal

defendant when a court or state official (such as the prosecuting attorney) has “exceeded its legitimate powers” or otherwise acted outside of its proper jurisdiction, but a such a writ will only issue in “clear cases of abuse” and “cannot be substituted for a writ of error and appeal unless it appears under all of the facts and circumstances of the case that a writ of error and appeal is an inadequate remedy.” *Woodall v. Laurita*, 156 W. Va. 707, 712, 195 S.E.2d 717, 720 (1973); *see also State ex rel. Cosner v. See*, 129 W. Va. 722, 748, 42 S.E.2d 31, 45 (1947) (granting writ of prohibition to defendant when trial court attempted to empanel jurors from a different county in the absence of any special need to do so). Similarly, a writ of mandamus may lie in a criminal action, but will only issue if “three elements coexist – (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 539, 170 S.E.2d 367, 367 (1969); *see also State v. Davis*, 236 W. Va. 550, 782 S.E.2d 423 (2015) (discussing propriety of a writ of mandamus filed by a criminal defendant seeking a preliminary hearing). These examples demonstrate that while a direct appeal is not the only remedy which may be pursued by a criminal defendant, it is the only remedy which is entirely unrestricted in scope.

The unrestricted nature of a direct appeal – a petitioner is allowed to challenge any error which was preserved during the trial process, *see State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996) (discussing the “raise or waive” doctrine), as well as “fundamental errors” not otherwise preserved, *see State v. Miller*, 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995) (discussing West Virginia’s plain error doctrine) – is indicative of the fact that it is the mechanism which is intended as the primary vehicle by which a criminal defendant addresses errors which arose below. Subject to sundry restrictions (like page limitations) a

Petitioner is permitted to raise any and all errors that he believes worthy of review by this Court. *See* W. Va. R. App. P. 1(b), 10(c)(3). Moreover, the failure to raise an issue ripe for review on direct appeal usually constitutes a waiver of the right to bring that claim in a subsequent action. *See*, Syl. pt. 1, *Ford v. Coiner*, 156 W. Va. 362, 362, 196 S.E.2d 91, 92 (1972) (“[T]here is a rebuttable presumption that [a] petitioner intelligently and knowingly waived any contention or ground in fact or law relied on in support of his petition for habeas corpus which he could have advanced on direct appeal but which he failed to so advance.”).

Considering the aforementioned authorities, there can be little doubt that the law prefers that criminal defendants raise the errors they wish reviewed in a direct appeal. This preference is not absolute; there are some claims, like ineffective assistance of counsel, which are best resolved in other proceedings. *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 318 n. 1, 465 S.E.2d 416, 420 (1995) (“Traditionally, ineffective assistance of counsel claims are not cognizable on direct appeal.”). Exceptions aside, the preference for addressing, to the extent possible, all or nearly all of the defendant’s claims at one time, in one proceeding, is consistent with the Court’s expression in *Call* that the proper way to ensure an expeditious end to litigation is to “do everything right the first time.” *Call*, 159 W. Va. at 194, 220 S.E.2d at 669. Additionally, addressing as many of Petitioner’s claims at one time, rather than in separate proceedings, has a beneficial effect on judicial economy because it “furthers one of the primary goals of any system of justice . . . avoid[ing] piecemeal litigation which cultivates a multiplicity of suits” *Bd. of Educ. of McDowell Cty. v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 603, 390 S.E.2d 796, 802 (1990). When this Court has an opportunity to adopt a rule which boosts judicial economy without depriving litigants, in any meaningful sense, the ability to seek legal redress, it should not hesitate to do so.

3) Limiting the scope of review in this circumstance prevents defendants from using the denial of their Rule 35(b) motion as a “test appeal.”

Under the language of Rule 35(b), a defendant is permitted to bring a motion for reduction of sentence within 120 days of the imposition of sentence. W. Va. R. Crim. P. 35(b). Under normal circumstances, a defendant must also file his notice of appeal within 30 days of the same. W. Va. R. App. P. 5(b). Thus, upon first glance it appears that a Petitioner who wishes to pursue a direct appeal must do either before or contemporaneously with any motion made pursuant to Rule 35(b), or else lose the opportunity to pursue one of those remedies. However, as noted above, the right to pursue a direct appeal of a criminal conviction is constitutionally guaranteed, and it is a not uncommon practice in circuit courts to reissue a criminal defendant’s sentence for the purpose of restarting the timeframe in which to file a direct appeal. *See Carter v. Bordenkircher*, 159 W. Va. 717, 724, 226 S.E.2d 711, 716 (1976) (explaining that “resentencing has been the traditional remedy . . . [when a] convicted defendant [has been deprived] of his opportunity to prosecute a timely appeal.”); *see also State v. Plymail*, No. 14-0016, 2015 WL 7628723, at * 3 (W. Va. Nov. 20, 2015) (memorandum decision) (“[T]he appropriate remedy for denial of a timely appeal . . . [is such] remedial steps [such as resentencing] as will permit the effective prosecution of the appeal.”). Additionally, there is no procedural impediment that prevents a defendant from pursuing a collateral remedy, such as a petition for a writ of habeas corpus, before initiating a direct appeal. *See* Syl. pt. 3, *State ex rel. Burgett v. Oakley*, 155 W. Va. 276, 277, 184 S.E.2d 318, 319 (1971) (“The writ of habeas corpus in criminal cases is not limited to use only after conviction and actual imprisonment and after the right to appeal has been exhausted or the appeal period has expired.”); *see also e.g., State v. Van Hoose*, 227 W. Va. 37, 705 S.E.2d 544 (2010) (per curiam); *State v. Pethel*, No. 13-1139, 2014 WL 5311391, at * 2 (W. Va. Oct. 17, 2014) (memorandum decision) (“Prior to the filing of his direct appeal and

petition for writ of prohibition, petitioner filed a petition for writ of habeas corpus.”). Accordingly, there is no structural impediment to stop a defendant from deferring action with respect to a direct appeal, filing a Rule 35(b) motion within the initial 120 day timeframe and fully litigating that motion (including any appeal of a denial of that motion in this Court), then subsequently initiating a direct appeal.⁴

If a defendant is permitted to explore assignments of error unrelated to the circuit court’s denial of the Rule 35(b) motion, the tactical benefits to pursuing such a course of action are obvious. A defendant would file a Rule 35(b) motion in circuit court, and then, if it was denied, essentially be allowed to pursue “test appeal” when the denial of that motion (and, in the absence of a rule preventing it) any other assignments of error the petitioner wanted to pursue were considered by this Court. One can imagine petitioners trying out novel arguments, or otherwise exploring “moon shot” assignments of error in the Rule 35(b) appeal, secure in the knowledge that even if those claims fail they will still be available to pursue a direct appeal at a later date. The doctrine of *res judicata* would prevent a petitioner from relitigating claims raised in the “test appeal” in the subsequent direct appeal, but, for reasons discussed above, the generally unlimited

⁴ Respondent acknowledges that a defendant who chooses to pursue this course of action risks forfeiting his right to pursue a direct appeal. See *State v. Rogers*, 189 W. Va. 730, 733, 434 S.E.2d 402, 405 (1993) (“[A defendant] may lose the right to appeal if the appeal is not filed in the time prescribed by statute, since ‘[t]he appellate court does not acquire jurisdiction and cannot entertain an appeal unless the appeal petition is filed within the prescribed appeal period.’”) (quoting *State v. Legg*, 151 W.Va. 401, 406, 151 S.E.2d 215, 219 (1966)). Respondent further acknowledges that resentencing for purposes of restarting the timeframe for filing a notice of appeal nominally requires the defendant to show good cause. Cf. Syl. pt. 4, *Rodgers*, 189 W. Va. at 731, 434 S.E.2d at 403. However, both the circuit courts (and this Court) appear to have been generous in the interpretation of what constitutes the good cause necessary to obtain resentencing. See e.g., *State ex rel. Gray v. Ballard*, 227 W. Va. 265, 266, 708 S.E.2d 459, 460 (2009) (noting that defendant had been resentenced for purpose of filing an appeal four times); *State v. Echard*, No. 11-1047, 2012 WL 3104251 (W. Va. May 29, 2012) (memorandum decision) (reversing circuit court’s denial of motion requesting resentencing for purpose of filing appeal).

scope of direct appeal would inure to the defendant-petitioner's benefit and allow any claim not previously raised to be advanced. Thus, adopting a rule by which this Court can examine, in an appeal of a Rule 35(b) denial, assignments of error unrelated to the denial of the Rule 35 motion would effectively grant to defendants the ability to have the proverbial "second bite at the apple" to attack their conviction or sentence. As discussed above, procedural rules which encourage repetitious litigation is disfavored, and criminal defendants need not be granted unfettered leave to seek redress of errors which occur during a criminal adjudication. In recognition of these principles, this Court should specifically hold that the only assignments of error cognizable in an appeal of a Rule 35(b) motion are those directly related to the denial of that motion.

CONCLUSION

For the reasons stated above, Respondent contends that the answer to the question presented is no, and that this Court should issue an opinion reflecting the limited scope of its jurisdiction in appeals from the denial of a Rule 35(b) motion.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 15-0696

STATE OF WEST VIRGINIA,

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v.

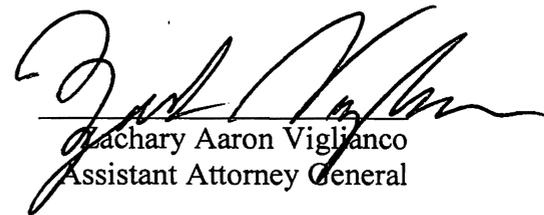
KENNETH ALLEN MARCUM,

Petitioner.

CERTIFICATE OF SERVICE

I, Zachary Aaron Viglianco, counsel for the Respondent, do hereby certify that I caused a true copy of the foregoing *SUPPLEMENTAL BRIEF* to be served on all parties and the court by depositing the same in the U.S. Mail, postage-prepaid, first-class, to each on this 18 day of July, 2016.

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