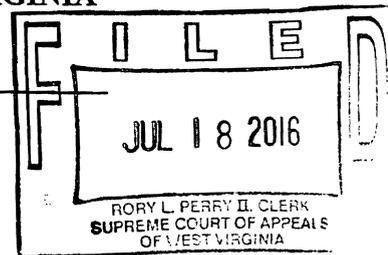

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0714



STATE OF WEST VIRGINIA,

Respondent,

v.

GERALD DOOM,

Petitioner.

RESPONDENT'S SUPPLEMENTAL BRIEF

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QUESTION PRESENTED

Does the West Virginia Supreme Court of Appeals have jurisdiction to consider a direct appeal of a sentencing order when a motion filed under Rule 35 of the West Virginia Rules of Criminal Procedure is pending before the circuit court?

STATEMENT OF THE CASE

On June 14, 2014, Petitioner Gerald Doom (“Petitioner”) attempted to steal a flashlight and three air fresheners from an automotive parts store in Braxton County, West Virginia.¹ A store employee observed Petitioner trying to abscond with those items and called the police. Petitioner was eventually charged, via a single-count indictment, with Shoplifting – Third Offense, a felony. He initially pled not guilty, but changed his plea after the State offered him a plea bargain.

A sentencing hearing was held on June 22, 2015. The circuit court determined that Petitioner’s recidivist tendencies – he had been charged with, convicted of, or plead no contest to shoplifting at least 7 times since 2012 and was on home confinement for a prior shoplifting conviction at the time of the Braxton County incident – made him highly likely to reoffend and therefore a poor candidate for alternative sentencing. Accordingly, the court imposed the statutorily-mandated sentence of 1 to 10 years imprisonment and a \$50 fine. On October 12, 2015, Petitioner filed a Rule 35 “Motion to Reconsider Sentence” in the circuit court.² About two

¹ The facts and relevant procedural history of this case are set forth in the previously filed Respondent’s Brief. The statement of the case in this brief simply summarizes what was previously set forth therein.

² Neither the West Virginia Rules of Criminal Procedure nor the Rules of Civil Procedure contemplate a “Motion for Reconsideration.” See *Powderidge Unit Owners Ass’n v. Highland Properties, Ltd.*, 196 W. Va. 692, 704, n. 22, 474 S.E.2d 872, 884 (1996); see also *Richardson v. Kennedy*, 197 W.Va. 326, 329, 475 S.E.2d 418, 421 (1996) (“Despite our repeated direction to the bench and bar of this State that a ‘motion to reconsider’ is not a properly titled pleading in West Virginia, it continues to be used.”). Rule 35 of the West Virginia Rules of Criminal

weeks later, on October 25, 2015, Petitioner perfected the instant appeal. His only assignment of error is a constitutional challenge to the imposed sentence: Petitioner contends that the sentence constitutes cruel and unusual punishment and therefore violates the Eighth Amendment and/or the analogous provision contained in Article II, Section 5 of the West Virginia Constitution. At the time he perfected his appeal, Petitioner's Rule 35 motion had not been ruled upon by the circuit court. As of the filing of this brief, it remains pending.³

On April 6, 2016, this Court issued an order scheduling oral argument in this case for September 14, 2016. 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:

[Does] this Court ha[ve] jurisdiction to consider a direct appeal of a sentencing order when a subsequent Rule 35 motion is pending before the circuit court?

This brief presents Respondent's answer to that question. The answer is yes.

SUMMARY OF THE ARGUMENT

The West Virginia Code provides that this Court has jurisdiction to hear appeals from final orders issued by a circuit court. In a criminal case resulting in a conviction it is the imposition of a sentence (via a sentencing order) that represents the final judgment of the circuit court. Thus, applying the clear language of the statute, this Court has jurisdiction to hear a direct appeal of a criminal case when the sentencing order has been issued. Of course, after the sentence has been imposed, a convicted defendant has the ability to collaterally attack that

Procedure permits convicted individuals to pursue two different remedies with respect to their sentence: 1) correction and 2) modification/reduction. Petitioner's motion, made pursuant to Rule 35(b), is, therefore, properly classified as a motion for modification/reduction. *See State v. Head*, 198 W. Va. 298, 306, 480 S.E.2d 507, 515 (1996) (Cleckley, J. concurring).

³ The undersigned confirmed via telephone conversation with a law clerk for Judge Facemire (the circuit judge who presided over Petitioner's trial) that Petitioner's Rule 35 motion remains pending and that it will not be ruled upon during the pendency of this appeal.

sentence or conviction in circuit court (which may even occur under the auspices of the same “case” in which the sentence was imposed), but such a filing does not render the circuit court’s sentencing order nonfinal because a collateral attack is not part of the regular trial or appellate process. A Rule 35 motion – which is a collateral attack – therefore does not impact this Court’s jurisdiction to hear an appeal. The sentencing order is still final.

Recognizing that this Court has jurisdiction, even in the event of a subsequently filed Rule 35 motion, policy considerations counsel in favor of adopting a procedural rule that divests the circuit court of jurisdiction over any issue that is under consideration by this Court during the pendency of the appeal. Such a rule advances the interest of judicial economy, prevents the circuit court from mooting the appeal, and avoids the possibility of an issuance of inconsistent opinions concerning the same subject. The rule also streamlines the process by which criminal defendants challenge their sentence. The alternatives – either allowing concurrent jurisdiction or holding that a Rule 35 motion divests this Court of jurisdiction – create more problems than they solve. As described in more detail below, divesting the circuit court of jurisdiction is the appropriate rule and Respondent strongly advocates its adoption.

ARGUMENT

This Court’s jurisdiction to consider criminal appeals is statutorily defined by W. Va. Code § 58-5-1, which reads, in pertinent part:

The defendant in a criminal action may appeal to the supreme court of appeals from a final judgment of any circuit court in which there has been a conviction or which affirms a conviction obtained in an inferior court.

W. Va. Code § 58-5-1; *see also* W. VA. CONST. art. VIII, § 3 (providing that this Court shall “have appellate jurisdiction in criminal cases, where there has been a conviction for a felony or misdemeanor in a circuit court” as well as “such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law.”). This statutory provision is a codification of

the “final judgment rule,” a venerated principle which generally precludes an appellate court from exercising its power of review unless a lower tribunal has spoken definitively upon the merits of a case or controversy. *See e.g., Cobbledick v. United States*, 309 U.S. 323, 324 (1940) (“Finality as a condition of review is an historic characteristic of . . . appellate procedure”). As this Court has previously recognized, the final judgment rule is “designed to ‘prohibit piecemeal appellate review of trial court decisions which do not terminate the litigation[.]’” *James M.B. v. Carolyn M.*, 193 W. Va. 289, 292, 456 S.E.2d 16, 19 (1995) (quoting *Flanagan v. United States*, 465 U.S. 259, 263 (1984)). The policy considerations underlying the final judgment rule are “especially compelling in the administration of criminal justice.” *Flanagan*, 465 U.S. at 264.

“A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.” Syl. pt. 3, in part, *James M.B.*, 193 W. Va. 289, 291, 456 S.E.2d 16, 18 (1995). “Final judgment in a criminal case means sentence. The sentence is the judgment.” *Berman v. United States*, 302 U.S. 211, 212 (1937); *see also Flanagan*, 465 U.S. at 264 (“In a criminal case the [final judgment] rule prohibits appellate review until conviction and imposition of sentence.”) (citing *Berman*, 302 U.S. at 212). The *Berman* court’s explanation as to why the sentencing order is the final judgment in a criminal case is nearly identical to language utilized by this Court in the syllabus of *James M.B.* Compare Syl. pt. 3, *James M.B.*, 193 W. Va. at 291, 456 S.E.2d at 18 with *Berman*, 302 U.S. at 212-13 (“In criminal cases, as well as civil, the judgment is final for the purpose of appeal when it terminates the litigation between the parties on the merits and leaves nothing to be done but to enforce by execution what has been determined.”) (internal quotation marks and citations omitted). Thus, it is undeniable that a circuit court’s imposition of

a sentence in the wake of a criminal conviction is a final judgment subject to appellate review in this Court.

Rule 35 of the West Virginia Rules of Criminal Procedure provides convicted individuals two distinct pathways to attack the validity or seek modification of their sentence. W. Va. R. Crim. P. 35.⁴ 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). The other remedy – reduction (sometimes called modification), set forth in subsection (b) – is “essentially a plea for leniency from a presumptively valid conviction.” *State v. Head*, 198 W. Va. 298, 306, 480 S.E.2d 507, 515 (1996) (Cleckley, J. concurring). A Rule 35(a) motion seeking correction can be filed “at any time.” W. Va. R. Crim. P. 35(a). A Rule 35(b) motion seeking a reduction 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 following the completion of a direct appeal. W. Va. R. Crim. P. 35(b). It is evident, both in light of these timing restrictions (or in the case of a Rule 35(a) motion, the lack of a restriction) and as a matter of simple logic (one

⁴ 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.

cannot seek to correct or modify a sentence which has not yet been imposed) that a Rule 35 motion is necessarily filed in the circuit court after that court has issued a final order – the sentence itself – which triggers the jurisdiction of this Court. *See Head*, 198 W. Va. at 305, 480 S.E.2d at 514 (“At the time a Rule 35(b) motion is filed, a final sentence order has been entered.”) (Cleckley, J., concurring). The ability for a defendant to file a substantive motion, in the same case, *after* what would otherwise be a final order has been issued, gives life to the question at the heart of this matter: Does the filing of a Rule 35 motion render the circuit court’s imposition of a sentence nonfinal and thereby divest this Court of jurisdiction? For the reasons set forth below, the Respondent contends that it does not.

- 1) A Rule 35 motion is a collateral attack and neither the availability of a collateral attack, nor a convicted defendant’s actual pursuit of such an attack, renders the underlying conviction or sentence nonfinal.**

A convicted individual, even one who believes that his sentence is illegal or otherwise incorrect, is under no obligation to file a Rule 35 motion of either variety; he or she can raise purported errors involving the sentence on direct appeal without any intermediate step. *See Head*, 198 W. Va. at 305, 480 S.E.2d 514 (noting that “[i]ndependent[] of Rule 35(b), the sentencing order itself is subject to appellate review. . . .”). Thus, a Rule 35 motion – which takes place outside of both the trial and direct appeal process – is properly classified as a collateral attack. *See Wall v. Kholi*, 562 U.S. 545, 552 (2011) (explaining that “a ‘collateral attack’ is an attack on a judgment in a proceeding other than a direct appeal” and holding that a motion made under Rhode Island’s version of Rule 35 qualified as “an application for collateral review.”) (internal quotation marks and citations omitted).

The mere availability of a collateral pathway to attack a conviction or sentence does not render the underlying conviction nonfinal. *See e.g., Agero v. McElroy*, 901 F. Supp. 146, 146 (S.D.N.Y. 1995) (“[T]he mere prospect of collateral attack on a conviction does not undermine

the finality of [a] conviction . . .”). Nor does it matter if such an attack is actually pursued. *See United States v. Allen*, 24 F.3d 1180, 1187 (10th Cir. 1994) (rejecting the argument that “four of [the defendant-petitioner’s] five prior convictions were under collateral attack at the time of sentencing and therefore were not final.”); *see also United States v. Guzman-Colores*, 959 F.2d 132, 134 (9th Cir. 1992). As one federal court aptly noted, “[i]f the filing of a collateral attack rendered a conviction non-final, it is easy to imagine that many convictions would never be considered to be final.” *United States v. Acosta*, 861 F. Supp. 1, 3 (D.R.I. 1994), *aff’d*, 67 F.3d 334 (1st Cir. 1995).

A petition for a writ of habeas corpus, the most common form of collateral attack in the criminal context,⁵ provides a useful analog. Convicted individuals in West Virginia are, generally speaking, entitled to one fully-litigated habeas corpus proceeding as a matter of right. *See generally Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981). Some claims cognizable in habeas – like ineffective assistance of trial counsel – are practically impossible to raise in a direct appeal. *See State v. Miller*, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995) (“The very nature of an ineffective assistance of counsel claim demonstrates the inappropriateness of review on direct appeal.”). Moreover, this Court has specifically held that habeas relief can be pursued prior to the prosecution of a direct appeal. 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.”). Yet, the fact that a petitioner could choose to pursue a habeas action predicated on his trial counsel’s ineffectiveness immediately after his

⁵ *See Wall*, 562 U.S. at 552 (“[I]t [is] clear that habeas corpus is a form of collateral review.”).

conviction (before or even in lieu of a prosecuting a direct appeal)⁶ does not render the underlying conviction any less final. *Cf State v. VanHoose*, 227 W. Va. 37, 705 S.E.2d 544 (2010) (per curiam) (petitioner sought habeas relief predicated on ineffective assistance before eventually perfecting direct appeal); *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.”). The finality of a sentence under attack in a habeas proceeding is evident when one takes into account that the writ is only available to incarcerated prisoners. *Cline v. Mirandy*, 234 W. Va. 427, 435, 765 S.E.2d 583, 591 (2014) (holding that because petitioner was “no longer incarcerated” he was “not not entitled to seek post-conviction habeas relief pursuant to West Virginia Code § 53–4A–1(a).”). That is, a circuit court which has imposed a sentence has nothing left to do but execute that sentence, i.e., remand the defendant to the custody of the Department of Corrections, and, applying the standard articulated in *James M.B.*, when a trial court reaches that point it has issued a final order. As noted above, the West Virginia Code expressly provides that this Court has jurisdiction to hear a direct appeal of a final order issued by a circuit court in a criminal case. Moreover, this Court has, on at least one recent occasion, heard an appeal when a habeas petition was pending (albeit stayed) in circuit court. *See Johnson v. Ballard*, No. 13-0894, 2014 WL

⁶ Given the limited timeframe for perfecting a direct appeal and the fact that errors raised in a habeas proceeding must have a constitutional dimension, the decision to pursue habeas relief before or in lieu of a direct appeal would likely result in the waiver of non-constitutional trial errors and otherwise limit the scope of an eventual appeal, direct or otherwise, in this Court. *See* Syl. pt. 4, *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 130, 254 S.E.2d 805, 806 (1979) (“A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.”). Nevertheless, as demonstrated by *SER Burgett*, *supra*, there is no structural impediment to a petitioner who wishes to proceed in such a fashion, and it is not impossible to imagine a scenario in which a petitioner might perceive a tactical advantage of so doing. *See e.g., State v. VanHoose* 227 W. Va. 37, 705 S.E.2d 544 (2010) (per curiam).

1672936, at * 2 (W. Va. Apr. 25, 2014) (memorandum decision) (observing that the petitioner’s direct appeal was heard while his previously filed petition for habeas corpus was pending in circuit court). It necessarily follows that this Court has jurisdiction to hear a direct appeal of a criminal case, even if a collateral attack is pending in circuit court.⁷

2) The prevailing rule in other jurisdictions is that the prosecution of an appeal divests the lower court of jurisdiction with respect to the substantive issues under consideration in that appeal.

Concluding that a pending or subsequently filed collateral attack does not impact this Court’s ability to hear a direct appeal does not resolve all of the issues embedded in the question presented. Practical considerations and logistical quandaries abound. Is there concurrent jurisdiction in this Court and the circuit court? If so, what happens when the respective tribunals disagree on the disposition of similar or identical issues? Is there a race to judgment? Can this

⁷ Respondent acknowledges that in civil cases the circuit court’s judgment does not become final, at least for purposes of perfecting an appeal, until the trial court rules on any “motion for reconsideration” or other motion made pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. *See James M.B.*, 193 W. Va. at 294, 456 S.E.2d at 21 (1995) (“[I]n West Virginia, a ‘motion for reconsideration’ filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal.”); *see also McCormick v. Allstate Ins. Co.*, 194 W. Va. 82, 85, 459 S.E.2d 359, 362 (1995) (holding that “the trial court retained its jurisdiction over this case as a result of the pending Rule 59(a) motion filed by the defendants”). Although at first glance there may seem to be parallels between the motions at issue in *James M.B.* and *McCormick* and a Rule 35 motion – in both cases the losing party is asking the trial court to reverse or modify its prior decision – there is a critically important distinction; namely, the failure of a civil litigant to file a Rule 59 motion effectively precludes that litigant from pursuing an appeal of the decision. *See* W. Va. R. Civ. P. 59(f) (“If a party fails to make a timely motion for a new trial . . . the party is deemed to have waived all errors occurring during the trial which the party might have assigned as grounds in support of such motion . . .”). Thus, as a practical matter, a Rule 59 motion is a prerequisite for pursuing a direct appeal of a civil case and thus does not qualify as a collateral attack. *Cf. Wall*, 562 U.S. 552 (“[C]ollateral review is review that is lying aside from the main review, i.e., that is not part of direct review.”) (internal quotation marks omitted). Respondent therefore contends that this Court’s practice with respect to Rule 59 is not analogous and should not control the resolution of the question presented.

Court continue to hear an appeal if the lower court reduces but does not discharge a sentence, or does the modification of the sentence render the appeal moot?

Although the question presented is one of first impression in West Virginia, other jurisdictions have addressed the issue and these related considerations. The clear majority rule is that a criminal defendant's prosecution of a direct appeal strips the trial court of jurisdiction over any substantive issue which is directly implicated in that appeal. *See e.g., United States v. Ledbetter*, 882 F.2d 1345, 1347 (8th Cir. 1989) (noting that "[several] federal courts have held that a district court lacks jurisdiction to entertain a Rule 35 motion to vacate or reduce a sentence during the pendency of an appeal from the initial judgment of conviction" and holding that "the District Court lacked jurisdiction to consider and rule on [the defendant's] Rule 35 motion during the pendency of his appeal of his conviction");⁸ *United States v. Mack*, 466 F.2d 333, 340 (D.C. Cir. 1972) ("[N]umerous cases have held that a trial court may not entertain . . . [a] motion to reduce sentence – a motion also available under Rule 35 – during the pendency of an appeal.") (citing, *inter alia*, *Berman, supra*); *Daniels v. State*, 712 So. 2d 765, 765 (Fla. 1998) ("[Precedent] make[s] it clear that during the pendency of a defendant's direct appeal, the trial court is without jurisdiction to rule on a motion for postconviction relief."); *People v. Dist. Court In & For Second Judicial Dist.*, 638 P.2d 65, 67 (Colo. 1981) (holding, in appeal by the State of trial court order granting a defendants Rule 35 motion for reduction while his direct appeal was

⁸ 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. *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."). However, prior to the enactment of the Sentencing Reform Act, Federal Rule 35 was substantially similar to West Virginia's Rule 35. *See State v. Head*, 198 W. Va. 298, 304, 480 S.E.2d 507, 513 (1996).

pending, that there is “settled authority that after an appeal of a final judgment has been perfected, the trial court is without jurisdiction to entertain any motion for an order affecting the judgment” and therefore that “an appeal of a final judgment terminates trial court jurisdiction”); *King v. United States*, 271 A.2d 556, 559 (D.C. 1970) (“With the case on appeal the trial court had jurisdiction to entertain the motion [for correction of sentence] and to deny it; but action purporting to grant the motion was beyond its power at that time.”) (internal citation omitted).

A review of the authority from these various jurisdictions, and the attendant reasoning offered therein, demonstrates the wisdom of this rule, and Respondent urges the Court to adopt it.

A) Divesting trial courts of jurisdiction over issues being considered on appeal promotes judicial economy and eliminates the possibility of inconsistent or conflicting decisions.

The notion that the filing of an appeal strips the lower court of jurisdiction over the subject matter of the appeal is not a practice unique to criminal law; rather it is a widely accepted procedural mechanism designed to preserve judicial resources and avoid the confusion and discord that might arise from inconsistent rulings in separate tribunals. *See e.g., Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (“The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the [trial] court of its control over those aspects of the case involved in the appeal.”) “The principle is well established that an appeal generally divests the trial court of jurisdiction to proceed except in furtherance of the appeal.” *Castillo v. Industrial Commission*, 21 Ariz. App. 465, 467, 520 P.2d 1142, 1144 (1974) (citing, *inter alia*, *Whitfield Transportation v. Brooks*, 81 Ariz. 136, 140 302 P.2d 526 (1956)); *see also United States v. Distasio*, 820 F.2d 20, 23 (1st Cir. 1987) (“As a general rule with only limited exceptions, entry of a notice of appeal divests the [trial] court of jurisdiction to adjudicate any matters related to [an] appeal.”); *Daniel v. Daniel*,

42 P.3d 863, 867 (Okla. 2001) (recognizing the “the long standing rule that while an appeal is pending in the appellate courts, the district court is without jurisdiction to make any order materially affecting the rights of the parties to that appeal.”); *In re Emileigh F.*, 355 Md. 198, 202-03, 733 A.2d 1103, 1105 (1999) (“After an appeal is filed, a trial court may not act to frustrate the actions of an appellate court. Post-appeal orders which affect the subject matter of the appeal are prohibited.”); *Kimmel v. State*, 629 So. 2d 1110, 1111 (Fla. Dist. Ct. App. 1994) (“The general rule is that an appeal of an order divests the trial court of jurisdiction except to those matters which do not interfere with the power of the appellate court to determine the issues which are on appeal.”).

There are numerous reasons why this rule has gained widespread application. The two most obvious are 1) the conservation of judicial resources and 2) avoiding the prospect of inconsistent or contradictory decisions. As the Supreme Court of Florida explained in *State v. Meneses*, permitting concurrent jurisdiction essentially ensures that at least one tribunal’s efforts will be wasted, invites additional litigation, and creates conditions ripe for inconsistent determinations of a singular question:

The orderly administration of justice requires . . . that the defendant pursue in one court at a time whatever legal remedies he desires to employ in attacking his criminal conviction. While pursuing his appellate remedies, the defendant ought not be allowed to simultaneously seek collateral attack relief in the trial court. Unnecessary confusion and needless expenditure of judicial time and effort are avoided by such a rule.

* * *

[Permitting concurrent jurisdiction in the lower and appellate courts will force] a busy trial judge . . . to hold an evidentiary hearing on a motion to vacate, which, if denied, will be a complete waste of time and effort should the Florida Supreme Court later grant certiorari in the cause . . . and reverse the defendant's conviction. On the other hand, if the trial judge grants the motion to vacate, the Florida Supreme Court will, in effect, be ousted of jurisdiction to further entertain the defendant's petition for certiorari, an anomaly in itself, after expending, and thus wasting, its judicial labor thereon. To further complicate the matter, it should be noted that (a) either party may appeal an unfavorable ruling by the trial court on the motion to vacate,

and (b) successive motions to vacate may be filed and appeals taken from rulings thereon so long as new grounds are raised in each motion. [R]equiring the trial court to entertain such motions and the appellate courts to review rulings thereon regardless of the status of other appellate remedies being simultaneously pursued by the defendant, a practice [will have] been adopted which is likely to lead to the proliferation of a single criminal case in various courts resulting in considerable confusion as to the status of each remedy as well as needless expenditure of judicial time and effort on remedies later mooted at both the trial and appellate levels.

State v. Meneses, 392 So. 2d 905, 906-07 (Fla. 1981) (quoting *Meneses v. State*, 372 So. 2d 1152, 1155 (Fla. Dist. Ct. App. 1979) (Hubbart, J., dissenting)); *see also People*, 638 P.2d at 67 (“[D]ual jurisdiction in the trial court and the appellate court to modify, reverse, affirm, or vacate [a] judgment could result in chaotic judicial administration and wasted court resources.”). Or, as the Eighth Circuit succinctly explained:

The rule [that a trial court is divested of jurisdiction upon the filing of an appeal] serves two important interests. First, it promotes judicial economy for it spares a trial court from considering and ruling on questions that possibly will be mooted by the decision of the court of appeals. Second, it promotes fairness to the parties who might otherwise have to fight a confusing ‘two front war’ for no good reason, avoiding possible duplication and confusion by allocating control between forums.

Ledbetter, 882 F.2d 1345, 1347 (8th Cir. 1989).⁹

Directly implicated when one considers interest of judicial economy is the doctrine of mootness. This Court has “traditionally held that courts will not . . . adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies. Likewise, courts [will not] resolve mere academic disputes or moot questions or render mere advisory opinions which are unrelated to actual controversies.” *Zaleski v. W. Virginia Mut. Ins. Co.*, 224 W. Va. 544, 552, 687 S.E.2d 123, 131 (2009) (internal quotation

⁹ *Ledbetter* cites the following federal decisions as holding that the trial court lacked jurisdiction to hear a Rule 35 motion during the pendency of an appeal: *United States v. Kerley*, 838 F.2d 932, 941 (7th Cir.1988); *United States v. Russell*, 776 F.2d 955, 956 (11th Cir.1985); *United States v. Holloway*, 740 F.2d 1373, 1382 (6th Cir.), *cert. denied*, 469 U.S. 1021 (1984); *United States v. Johns*, 638 F.2d 222, 224 (10th Cir.1981); *United States v. Bello*, 588 F.Supp. 102, 103–05 (D. Md.1984).

marks and citations omitted); *see also* Syllabus, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S.E. 873 (1908) (“Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court.”). If this Court permits concurrent jurisdiction, it is possible for a circuit court to moot a pending appeal by granting the relief requested in a Rule 35 motion or otherwise modifying the defendant-petitioner’s sentence. The procedural implications are neatly summarized in two concurring opinions issued in a recent case from the Supreme Court of Wyoming:

I agree with the majority's determination that no error occurred at sentencing and that the original sentence should be affirmed. I write separately because I cannot ignore a serious procedural infirmity encompassed in this appeal.

The majority opinion states that, while this appeal was pending, the district court granted a motion by [defendant-petition] to reduce his original 8 – to 12–year prison sentence. The existence of the district court's sentence reduction order is problematic. This Court simply cannot disregard the order because, if it is allowed to stand, it supersedes the sentencing order before the Court on appeal. The end result would be that the appeal would be moot and should be dismissed. If, on the other hand, the district court lacked jurisdiction to reduce [defendant-petitioner’s] sentence, then its order is void and of no effect, and this Court can address the merits of this appeal.

Capellen v. State, 161 P.3d 1076, 1084 (Wyo. 2007) (Golden, J., concurring) and:

The question of the district court's authority to reduce a sentence after an appeal is docketed is before this Court because it happened in this very case, and it raised a question of jurisdiction. If the district court had jurisdiction to reduce the sentence, then the subject of the appeal was moot, and we should not have issued an opinion about it.

* * *

Once a criminal sentence has been appealed, the district court loses jurisdiction of that sentence until this Court issues its mandate in the case. Otherwise, we are just down here spinning our wheels, reading briefs, listening to oral argument, and writing an opinion on a moot point, which obviously is what [the relevant rule of Wyoming Appellate procedure concerning jurisdiction] is trying to avoid. The point is best illustrated by this question: If this Court reverses the original judgment and sentence, what is the effect of the sentence reduction?

Id., at 1085, 1086 (Voigt, J., concurring).

As demonstrated by the *Cappellen* concurrences, if the circuit court grants a Rule 35 motion and thereby modifies the sentence while an appeal is pending, the order on appeal is no longer the order which controls – it is no longer the legal command from which the petitioner’s sentence would flow – and thus an evaluation of the legality of that order is an academic exercise, which is to say, it is a moot question as to which this Court cannot speak. *See State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W. Va. 525, 533 n. 7, 514 S.E.2d 176, 184 (1999) (“As we frequently have said before, this Court cannot issue an advisory opinion with respect to a hypothetical controversy.”); *Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W.Va. 183, 185–86, 27 S.E.2d 486, 487–88 (1943) (“Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes”). Even the granting of a Rule 35(b) motion which resulted in a substantially similar sentence to the one on appeal would still render the earlier order moot, and, thus would preclude this Court from assessing the propriety of the revised sentence in an already pending appeal.

Divesting the trial court of jurisdiction while an appeal is pending eliminates this problem. It ensures that the effort of the slower acting tribunal (be it this Court or the lower court) will not be wasted. Moreover, it avoids the possibility that this Court and the circuit court, perhaps due to a breakdown in communication, release inconsistent opinions concerning the sentence that must then be reconciled.

This Court has, in other contexts, adopted or endorsed procedural rules which serve the aforementioned interests. *See e.g., Conley v. Spillers*, 171 W. Va. 584, 588, 301 S.E.2d 216, 220 (1983) (discussing the shared public policy rationales underlying the doctrines of *res judicata* and collateral estoppel, which include the “conserve[ation] of judicial resources” and “minimizing the possibility of inconsistent decisions.”); *Sorsby v. Turner*, 201 W. Va. 571, 575,

499 S.E.2d 300, 304 (1997) (“The purpose of Rule 13 is to prevent the fragmentation of litigation, multiplicity of actions and to conserve judicial resources.”) (internal quotation marks and citation omitted). Holding that the prosecution of an appeal strips the circuit court of jurisdiction over the issues presented in that appeal would establish a straightforward, easy-to-apply rule that does not deprive criminal defendants, in any material respect, of the ability to challenge the legality of or ask for a modification/reduction of their sentences.¹⁰ If, in the wake of a conviction, a petitioner believes his sentence is illegal, he can raise that issue in his direct appeal. If instead he acknowledges the legality of the sentence as imposed but believes he has been prejudiced by other errors and wants to ask for a modification or reduction, nothing will prevent him from doing so. Rather than file his Rule 35 motion in the immediate aftermath of the trial, the proper procedure would be to pursue a direct appeal and then, assuming his conviction is upheld, file a Rule 35(b) motion for reduction within 120 days of the issuance by this Court of the mandate order affirming the conviction. *See* W. Va. R. Crim. P. 35(b) (providing that “[a] motion to reduce a sentence may be made . . . within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction . . .”). Waiting until after the completion of the direct appeals process to file a Rule 35(b) motion has the added

¹⁰ Some jurisdictions which have adopted such a rule hold that the filing of the notice of appeal divests the trial court of jurisdiction. *See e.g., Taylor v. United States*, 603 A.2d 451, 453 n. 7 (D.C. 1992) (“The trial court had no jurisdiction to vacate the original sentence after the notice of appeal from that sentence was filed.”). Others hold that jurisdiction is not removed until the appeal is perfected. *See People*, 638 P.2d 65, 66 (“[A]fter an appeal of a final judgment has been perfected, the trial court is without jurisdiction to entertain any motion for an order affecting the judgment.”). Although Respondent would be content with the adoption of either standard, the date of perfection is preferable, because the circuit court would retain jurisdiction and could, in some instances, decide a Rule 35 motion in such a way that would obviate the need for the appeal. Judicial economy concerns are less pressing before perfection, because the relatively barebones nature of a notice of appeal (as well as the possibility that the Petitioner’s assignments of error will change upon perfection) prevent, as a practical matter, attorneys for the State from engaging in significant substantive efforts prior to receiving a petitioner’s brief.

benefit of provided defendants with a longer timeframe in which to pursue rehabilitative programs and therefore maximize the potential that their Rule 35(b) motion will be granted. It is worth nothing that Rule 35(b) already permits convicted defendants to file a motion for reduction within 120 days of the issuance of a mandate order from this Court affirming their conviction. Thus, the adoption of this procedural requirement will require no revision to the text of Rule 35. Finally, the proposed rule does not prevent a Petitioner who chooses not to challenge the legality of his sentence during the direct appeal from later filing a Rule 35(a) motion for correction. *See* W. Va. R. Crim. P. 35(a) (providing that a “court may correct an illegal sentence at any time”).¹¹

As nothing of substance is lost via the adoption of this jurisdictional rule, and valuable interests are promoted, Respondent urges the court to hold that the circuit court is divested of jurisdiction to consider a Rule 35 motion while an appeal encompassing the sentence is pending in this Court.

¹¹ The language in Rule 35(a) permitting correction of an illegal sentence “at any time” is best understood as demonstrating that there is no applicable statute of limitations or other temporal restriction on the filing of such a motion; it was not intended confer jurisdiction or permit a defendant to file a motion for correction of sentence during the pendency of an appeal *Cf Mack*, 466 F.2d 333, 340 (explaining that “the inclusion of the words ‘at any time’ in the illegal sentence provision of [federal] Rule 35 has been understood to refer to the court’s power to correct an illegal sentence after the expiration of the term¹¹ rather than to the district court’s power to act while an appeal is pending.”) (citing *Heflin v. United States*, 358 U.S. 415, 422 (1959) (Stewart, J., concurring). The lack of a temporal restriction to raising a challenge to a purportedly illegal sentence flows from the fact that an illegal sentence is “beyond the power of [a] court to impose,” *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001), and thus such a sentence is, in effect, a nullity. With that said, a jurisdictional rule that prevents a circuit court from correcting such a sentence while an appeal is pending does not interfere with the intent of Rule 35(a), because a Petitioner always has the ability to challenge the legality of his sentence: through the appeal while it is pending, and by Rule 35 motion at any other time.

B) Adopting a contrary rule (namely, that a pending or subsequently filed Rule 35 motion divests this Court of jurisdiction to hear an appeal) spawns logistical questions and provides incentives for defendant-petitioners to abuse the rule via tactical filings.

It is true that the adoption of a rule whereby this Court, not the circuit court, is divested of jurisdiction would offer similar benefits to judicial economy and avoid the mootness problems and potentially inconsistent decisions discussed above. However, such a division of labor gives rise to other issues which counsel against it.

First, there are the logistical questions. As a practical matter, for this Court to adhere to a rule whereby its jurisdiction is extinguished upon the filing of a Rule 35 motion in circuit court, it must be aware that such a motion has been filed. Obviously, a check of the docket sheet (or phone call to the relevant circuit clerk's office) at the time the notice of appeal is filed or perfected will reveal if a Rule 35 motion is currently pending. Similarly, once 120 days have elapsed after the entry of the sentencing order, a second check would reveal if a Rule 35(b) motion had been timely filed. However, because a Rule 35(a) motion can be filed at "any time" (and under this rule, the circuit court would retain jurisdiction to hear such a motion) some mechanism would be needed to put in place to ensure that this Court was made aware of a motion filed after these initial stages. The Court could, in theory, periodically examine the docket of the relevant circuit court on its own. Alternatively, the Court could impose upon one or both parties a duty to inform it in the event such motion is filed. Either way, it would be necessary for the Court to maintain a vigilant watch, because "jurisdiction can never be conferred by either the court or the parties by consent or waiver." *Gaines v. Hawkins*, 153 W. Va. 471, 476, 170 S.E.2d 676, 679 (1969). Once a Rule 35 motion was filed, the absence of jurisdiction would require this Court to immediately cease consideration of the pending appeal. *See Blankenship v. Estep*, 201 W. Va. 261, 264, 496 S.E.2d 211, 214 (1997) ("It is well-settled

law that for a court to hear and determine an action, suit or other proceeding it must have jurisdiction”) (internal quotation marks omitted). Any effort already expended, either by Court or the parties, would be rendered instantly superfluous.

A rule that divests this Court of jurisdiction over a pending appeal when a Rule 35 motion is filed is essentially a rule which hands to appealing criminal defendants the ability to determine when they want their appeal to be heard. The lack of a temporal restriction as to when a Rule 35(a) motion can be filed means that a criminal defendant could file such a motion the day before oral argument is scheduled (or a day before an opinion was set to be issued) and divest this Court of jurisdiction. The potential for abuse and misuse of such a rule is obvious. A petitioner who determines that his brief on appeal does not contain all of the assignments of error he wishes to pursue, or who believes his case will be better handled by a different attorney, or who simply wants more time to prepare could file a Rule 35 motion in the circuit court, divest this Court of jurisdiction, and suffer no future impediment to bringing his direct appeal in the future. When one party has the power to rip a case away from this Court after months of litigation, in order to send the case to an inferior tribunal, and still retains the ability to return to this Court at a later date, the judicial economic benefits of having a single tribunal evaluating sentencing issues at any one time are mostly, if not entirely, lost. Moreover, the tactical advantage that this rule would hand to petitioners is striking: petitioners could perfect an appeal containing a multitude of assignments of error, wait until after the State filed a brief in response, determine which assignments of error were strongest (and see how the State sought to attack those claims) then file a Rule 35 motion mooting their appeal. The petitioner would then have the entire pendency of the Rule 35 motion to craft their subsequent appeal, and would be able to do so with the benefit of knowing the State’s responsive arguments before filing. It is not hard to

imagine that the practice of filing of a “test appeal” would become commonplace, filed solely for the purpose of peeking at the State’s “playbook,” that is promptly mooted by a subsequent Rule 35 motion. The unfairness of a rule which permits such a practice is matched only by amount of additional, often unnecessary work that would fall onto the shoulders of the attorneys who represent the State in criminal cases, who could be routinely required to respond to petitioners’ appeals twice. It should come as no surprise, therefore, that the undersigned dreads even the mere thought of such a regime. Thankfully, the wisdom of the alternate rule – divesting the circuit court, not this Court – is, as discussed above, manifestly apparent.

CONCLUSION

This Court is not divested of jurisdiction if a criminal defendant initiates an appeal while a Rule 35 motion is pending, or if he subsequently files one after initiating the appeal, because a sentencing order is a final order, and this Court has jurisdiction to review any the final order issued by a circuit court in a criminal case. Given that this Court clearly has jurisdiction, policy considerations counsel in favor of adopting a procedural rule wherein the circuit court is divested of jurisdiction over any substantive issues under consideration in the appeal.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 15-0714

STATE OF WEST VIRGINIA,

Respondent,

v.

GERALD DOOM,

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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