FILED
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0081

STATE OF WEST VIRGINIA
Plaintiff-below, Respondent,

v.

MATTHEW JONATHAN ROBEY,
Defendant-below, Petitioner.

REPLY BRIEF

Matthew Robey, DOC No. 51865
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P.O. Box 1
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REPLY BRIEF

I. THE ISSUE ON APPEAL IS THE TIMELINESS OF THE RULE 35(b) MOTION, NOT THE MERITS OF THE MOTION.

The sole issue on appeal is the timelines of the Rule 35(b) motion. (Petr's. Brief 1 (Assignment of Error).) However, Respondent's entire Summary Response is devoted to the merits of the Rule 35(b) motion, and concludes "[n]one of these grounds, however, require a judge to grant a Rule 35(b) motion," (Summ. Resp. 4).

While that conclusion is correct,[1] the argument is flawed because the circuit judge himself did not address the merits of the Rule 35(b) Motion; instead, he found the Motion untimely. (Appx. 1.) However, Respondent does not dispute that the Rule 35(b) Motion was filed "within 120 days after the entry of the mandate of the supreme court of appeals upon affirmance of a judgment of conviction," R.Crim.P., Rule 35(b).[2] Accordingly, the Rule 35(b) Motion was timely.

State v. Head, 198 W.Va. 298, 480 S.E.2d 507 (1996), is on point. There, "[t]he jurisdictional question was the critical issue in the circuit court's refusal to consider the appellant's [Rule 35(b)] motion on the merits." *Id.* at 303, 480 S.E.2d at 512. Because Head's motion was timely, this Court remanded for consideration of its merits. *Id.* at 300 n. 4, 304-305, 480 S.E.2d at 509 n. 4, 513-514.

Likewise, the Court should remand this case for consideration of the merits, which is the province of the circuit court in the first instance.

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[1] Indeed, there are *no* grounds that "*require* a judge to grant a rule 35(b) motion." *State v. Head*, 198 W.Va. 298, 301, 480 S.E.2d 507, 510 (1996) (Rule 35(b) motion "is directed to the sound discretion of the circuit court").

[2] This Court issued the mandate upon affirmance of Petitioner's conviction on **March 15, 2012**. (Appx, 10 (Mandate, SCAWV No. 11-0874).) On **July 13, 2012**, 120 days after issuance of the mandate, the circuit clerk filed the Rule 35(b) "Motion for Reduction of Sentence." (Appx. 37, line 54 (Roane County Circuit Court docket sheet, No. 10-F-6).)

II. ON A RULE 35(b) MOTION, THE CIRCUIT COURT CAN CONSIDER PETITONER'S REHABILITATIVE EFFORTS IN PRISON.

As an initial matter, Petitioner's Rule 35(b) Motion was not based solely on his rehabilitative efforts The impetus for the instant 2012 Rule 35(b) Motion was that the circuit judge in denying the original 2011 Rule 35(b) Motion, (Appx. 36, lines 47 and 49), stated that one reason he was denying the 2011 Motion was that, at that time, Petitioner had not spent any time in prison, (Appx. 4, para.1 (Rule 35(b) Motion ("Reasons For Granting The Motion"))); Petitioner now has spent time in prison, (*ibid.*)

Respondent quotes a *federal* case for his proposition that Petitioner's "commendable" rehabilitative efforts in prison "'do not provide grounds to support a Rule 35 motion,'" (Summ. Resp. 3 (quoting *United States v. LaMorte*, 940 F. Supp. 572, 578 (S.D.N.Y. 1996))). However, in *West Virginia*, a circuit court may consider any "events that occur within the 120-day filing period." Syl. Pt. 5, in part, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).[3] A circuit "judge is not required to close his eyes to developments favorable to the movant's request." *Id.* at 305, 480 S.E.2d at 514 (quotation marks and citation omitted). All of the information in the instant Rule 35(b) Motion necessarily occurred before expiration of the 120-day filing period.

Furthermore, on remand the circuit court "may consider matters beyond the filing period when such consideration serves the ends of justice," Syl. Pt. 5, in part, *State v. Head*, *supra*, and "the circuit court does not usurp the role of the parole board," *ibid.* Petitioner is serving a twenty-year sentence, (Appx. 34 (Amend. Sent'g Order)), and will not see the Parole Board until

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[3] Syllabus Point 5 reads in full:

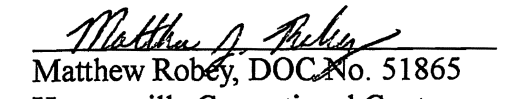
> When considering West Virginia Rules of Criminal Procedure 35(b) motions, circuit courts generally should consider only those events that occur within the 120-day filing period; however, as long as the circuit court does not usurp the role of the parole board, it may consider matters beyond the filing period when such consideration serves the ends of justice.

July 2014. *See Head* at 304, 480 S.E.2d at 513 ("The circuit court need not worry that considering facts and events which occurred during the delay will interfere with any activity of the parole board because the parole board has not acted.").

III. CONCLUSION

WHEREFORE, Petitioner prays this Honorable Court will vacate the December 21, 2012 Order of the Circuit Court of Roane County and remand the case for consideration of the July 13, 2012 Motion for Reduction of Sentence, and will grant such other relief as justice requires.

Respectfully submitted,



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PLAINTIFF,

v. **Case No. 13-0081**

MATTHEW JONATHAN ROBEY,
DEFENDENT.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **Reply Brief** was served on by placing it in an envelope, addressed as below, first-class postage prepaid, and giving it to prison officials on May 10, 2013 for delivery to the U.S. Postal Service.

Andrew Mendelson, AAG
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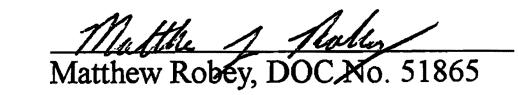

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