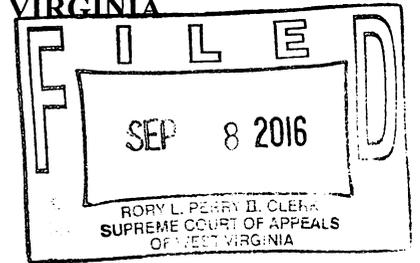

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0958



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

PATRICK SHAWN COLLINS,

Defendant Below, Petitioner.

RESPONDENT'S SUPPLEMENTAL BRIEF

**PATRICK MORRISEY
ATTORNEY GENERAL**

**GORDON L. MOWEN, II
ASSISTANT ATTORNEY GENERAL**
West Virginia Bar #12277
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
Email: Gordon.L.Mowen@wvago.gov
Counsel for Respondent

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR.....1

II. STATEMENT REGARDING ORAL ARUGMENT.....1

III. STATEMENT OF THE CASE.....1

 A. At age 20, Petitioner has sex with a 14 year old girl, pleads guilty to sexual abuse in the third degree, and is required to register as a sex offender for life.....1

 B. Petitioner is convicted of his first felony for failing to properly update his information on the sex offender registry.....2

 C. Petitioner is convicted of a second felony for failing to properly update his information on the sexual offender registry.....2

 D. Petitioner is convicted of a third felony for failing to properly update his information on the sex offender registry and is sentenced to an indeterminate term of 10 to 25 years.....2

 E. Petitioner’s Rule 35(b) motion and appeal to this Court.....3

IV. SUMMARY OF THE ARGUMENT.....4

V. STANDARD OF REVIEW.....4

VI. ARGUMENT.....5

 A. The claims raised in Petitioner’s Supplemental Brief are not properly before this Court.....5

 1. The assignments of error presented in Petitioner’s supplemental brief fall outside the scope of West Virginia Rule of Criminal Procedure 35(b) and cannot be raised in this appeal.....5

 2. These claims were not presented below and cannot be raised for the first time in this appeal.....9

 B. Petitioner’s claims fail on the merits.....10

 1. The Circuit Court did not abuse its discretion in denying Petitioner’s motion for a reduction of sentence.....10

 2. Petitioner’s 10 to 25 year sentence is not unconstitutional.....15

- a. Petitioner’s proportionality claim fails as a matter of law.....16
- b. In the alternative, Petitioner’s sentence is not unconstitutionally disproportionate.....18
 - i. Petitioner’s sentence does not meet the subjective test.....18
 - ii. Petitioner’s sentence does not meet the objective test.....21
- 3. Lifetime registration requirements are not punitive and this Court has previously held that such a requirement is not unconstitutional.....27
- VIII. CONCLUSION.....29

TABLE OF AUTHORITIES

Cases	page
<i>Andrews v. State</i> , 82 So. 3d 979 (Fla. Dist. Ct. App. 2011)	21
<i>Bradshaw v. State</i> , 284 Ga., 675 S.E.2d 485 (2008).....	22, 23
<i>Connecticut Dept. of Public Safety v. Doe</i> , 538 U.S. 1 (2003).....	28
<i>Cunningham v. W. Virginia</i> , No. 606-CV-00169, 2007 WL 895866 (S.D.W. Va. Mar. 22, 2007)	27
<i>Cunningham v. Lemmon</i> , 251 F. App'x 829 (4 th Cir. 2007).....	27
<i>Doe v. Poritz</i> , 142 N.J. 1, 662 A.2d 367 (1995).....	29
<i>Gaertner v. United States</i> , 763 F.2d 787 (7th Cir. 1985)	8
<i>Gonzalez v. Duncan</i> , 551 F.3d 875 (9th Cir. 2008)	22, 25
<i>Haislop v. Edgell</i> , 215 W. Va. 88, 593 S.E.2d 839 (2003).....	28, 29
<i>Harmelin v. Michigan</i> , 501 U.S. 957 (1991).....	28
<i>Hensler v. Cross</i> , 210 W. Va. 530, 558 S.E.2d 330 (2001).....	19, 27, 28
<i>In re Coley</i> , 55 Cal. 4th 524, 283 P.3d 1252 (Cal. 2012)	24, 25, 27
<i>In re Jimmy M.W.</i> , No. 13-0762, 2014 WL 2404298 (W. Va. May 30, 2014).....	28
<i>People v. Carmony</i> , 127 Cal. App. 4th 1066, 26 Cal. Rptr. 3d 365 (Cal. Ct. App. 2005)	24, 25, 26
<i>People v. Fields</i> , 448 Mich. 58, 528 N.W.2d 176 (Mich. 1995)	26
<i>People v. Meeks</i> , 123 Cal. App. 4th 695, 20 Cal.Rptr.3d 445 (Cal. Ct. App. 2004)	22
<i>Rummel v. Estelle</i> , 445 U.S. 263 (1980).....	19, 22
<i>State v. Allen</i> , 208 W. Va. 144, 539 S.E.2d 87 (1999).....	10, 16, 18
<i>State v. Allman</i> , 177 W. Va. 365, 352 S.E.2d 116 (1986).....	12
<i>State v. Arbaugh</i> , 215 W. Va. 132, 595 S.E.2d 289 (2004).....	14
<i>State v. Baxley</i> , 94-2982 (La. 5/22/95), 656 So. 2d 973 (La. Ct. App. 1995)	25
<i>State v. Beegle</i> , No. 15-0302, 2016 WL 1619871 (W. Va. Apr. 21, 2016).....	15, 19

<i>State v. Cooper</i> , 172 W. Va. 266, 304 S.E.2d 851 (1983).....	16, 17, 18, 20
<i>State v. Deel</i> , No. 15-0345, 2016 WL 3147658 (W. Va. June 3, 2016).....	28
<i>State v. Fields</i> , No. 14-0726, 2015 WL 6181504 (W. Va. Oct. 20, 2015)	16
<i>State v. Frank D.</i> , No. 15-0779, 2016 WL 1547234 (W. Va. Apr. 15, 2016).....	11
<i>State v. Georgius</i> , 225 W. Va. 716, 696 S.E.2d 18 (2010).....	<i>passim</i>
<i>State v. Golden-Kerns</i> , No. 12-1530, 2013 WL 4726436 (W. Va. Sept. 3, 2013).....	19
<i>State v. Goodnight</i> , 169 W.Va. 366, 287 S.E.2d 504 (1982).....	11
<i>State v. Gordon</i> , 539 A.2d 528 (R.I. 1988)	8
<i>State v. Graham</i> , No. 15-1464, 2016 WL 3556539 (Iowa Ct. App. June 29, 2016)	23
<i>State v. Head</i> , 198 W.Va. 298, 480 S.E.2d 507 (1996).....	<i>passim</i>
<i>State v. Judge</i> , 228 W. Va. 787, 724 S.E.2d 758 (2012).....	15, 21
<i>State v. Layton</i> , 189 W. Va. 470, 432 S.E.2d 740 (1993).....	11
<i>State v. Manley</i> , 212 W. Va. 509, 575 S.E.2d 119 (2002).....	<i>passim</i>
<i>State v. McClain</i> , 211 W. Va. 61, 561 S.E.2d 783 (2002).....	6
<i>State v. Miller</i> , 197 W. Va. 588, 476 S.E.2d 535 (1996).....	16
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995).....	16
<i>State v. Mosqueda</i> , 123 Idaho 858, 853 P.2d 603 (Idaho Ct. App. 1993).....	8
<i>State v. Mueller</i> , 2010-0710 (La. Ct. App. 4 Circ. 12/8/10), 53 So.3d 677 (La. Ct. App. 2010).....	22
<i>State v. Nolte</i> , No. 13-0774, 2014 WL 2404323 (W. Va. May 30, 2014).....	15, 19, 21, 26
<i>State v. Radke</i> , 2003 WI 7, 259 Wis. 2d 13, 657 N.W.2d 66 (Wis. 2003)	25, 32
<i>State v. Redman</i> , 213 W. Va. 175, 578 S.E.2d 369 (2003).....	9, 10
<i>State v. Rodoussakis</i> , 204 W. Va. 58, 511 S.E.2d 469 (1998).....	9
<i>State v. Shaw</i> , 208 W. Va. 426, 541 S.E.2d 21 (2000).....	11

<i>State v. Slater</i> , 222 W. Va. 499, 665 S.E.2d 674 (2008).....	13
<i>State v. Ussery</i> , 34 Kan. App. 2d 250, 116 P.3d 735 (Kan. Ct. App. 2005).....	19
<i>State v. Vance</i> , 164 W.Va. 216, 262 S.E.2d 423 (1980).....	16
<i>State v. Williams</i> , No. 11-0939, 2012 WL 3079157 (W. Va. May 29, 2012).....	12
<i>Thompson v. State</i> , No. 2-02-318-CR, 2003 WL 22923066 (Tex. App. Dec. 11, 2003).....	22
<i>United States v. Labreche</i> , 933 F.2d 1017 (9th Cir. 1991)	8
<i>United States v. Riffe</i> , 550 F.2d 1013 (5th Cir. 1977)	8
<i>United States v. Rovetuso</i> , 840 F.2d 363 (7th Cir. 1987)	8
<i>Walden v. United States</i> , 366 A.2d 1075 (D.C. 1976)	8
<i>Walkowiak v. Haines</i> , 272 F. 3d 234 (4th Cir. 2001)	13, 14
<i>Wall v. Kholi</i> , 562 U.S. 545 (2011).....	14
<i>Wanstreet v. Bordenkircher</i> , 166 W.Va. 523, 276 S.E.2d 205 (1981).....	16, 17, 18

Statutes

Article III Section 5 to the West Virginia Constitution	<i>passim</i>
La. R. S. 15:542.1.4(A)(1)	22
W. Va. Code § 15-12-1(a).....	27, 28
W. Va. Code § 15-12-4(a)(2)(E).....	27
W. Va. Code § 15-12-8.....	17, 26
W. Va. Code § 15-12-8(c).....	<i>passim</i>
W. Va. Code § 15-2-3	13
W. Va. Code § 61-2-12	20,25
W. Va. Code § 61-2-14a	25
W. Va. Code § 61-2-2.....	25
W. Va. Code § 61-3E-2.....	21
W. Va. Code § 61-8B-3(c).....	25
W. Va. Code § 61-8B-5	27
W. Va. Code § 61-8B-9	17
W. Va. Code § 61-8B-9b	21
W. Va. Code § 61-11-18.....	21
W. Va. Code § 61-11-18(c).....	26

Rules

W. Va. R. Crim. P. 35(a).....	<i>passim</i>
W. Va. R. Crim. P. 35(b)	<i>passim</i>
W. Va. Rev. R. App. P. 16.....	8

I. ASSIGNMENTS OF ERROR

In accordance with Rule 10(d), the Assignments of Error raised in Petitioner's Supplement Brief ("Pet'r Supp. Brief") are not restated but will be addressed separately herein.

II. STATEMENT REGARDING ORAL ARGUMENT

This matter is scheduled for oral argument under Rule 19 on October 12, 2016.

III. STATEMENT OF THE CASE

A. **At age 20, Petitioner has sex with a 14 year old girl, pleads guilty to sexual abuse in the third degree, and is required to register as a sex offender for life.**

Petitioner was charged with sexual assault in the third degree, a felony, under W. Va. Code § 61-8B-5, (Pet'r Supp. App. at 1) after he had sex with a 14 year old girl. (Pet'r Brief at 2). On August 18, 2006, he pled guilty to sexual abuse in the third degree, a misdemeanor, criminalized under W. Va. Code § 61-8B-9. (*See* Pet'r Supp. App. at 3-4). Petitioner served the maximum sentence for this offense and was ordered to register as a sexual offender for life pursuant to W. Va. Code § 15-12-4(a)(2)(E). (Pet'r Supp. Brief at 3, 4).

As Petitioner notes in his supplemental brief, there are several regulations he was required to follow regarding the sex offender registration. (*See id.* at 5). These regulations require, *inter alia*, that a sexual offender timely inform the police when he changes his residence and various internet account information. W. Va. Code § 15-12-3 (*See also* Pet'r Supp. Brief at 6). The failure to properly update this information constitutes a felony punishable by incarceration. W. Va. Code § 15-12-8(c). The first offense is punishable by an indeterminate term of 1 to 5 years; the second or subsequent offense is punishable by an indeterminate term of not less than 10 nor more than 25 years. *Id.* (*See also* Pet'r Supp. Brief at 6) (noting the same).

B. Petitioner is convicted of his first felony for failing to properly update his information on the sex offender registry.

On September 10, 2007, Petitioner was charged with four counts of failing to provide a change in his information under the West Virginia Sex Offender Registration Act (“the Act”). (Pet’r Supp. App. at 22-24; *see also* Pet’r Supp. Brief at 7). Petitioner admitted to this violation, as reflected in the police narrative attached to the criminal complaint. (Pet’r Supp. App. at 22-24). He pled guilty on February 8, 2008, to one of these counts, as criminalized under W. Va. Code § 15-12-8. (Pet’r Supp. App. at 25-31; *see also* Pet’r Supp. Brief at 7). The remaining three counts were dismissed.

In accordance with W. Va. Code § 15-12-8, the circuit court sentenced Petitioner to an indeterminate term of incarceration of 1 to 5 years. (Pet’r Supp. App. at 26-27; *see also* Pet’r Supp. Brief at 7). The court suspended this sentence and placed Petitioner on probation. (*See* Pet’r Supp. App. at 25-31).

C. Petitioner is convicted of a second felony for failing to properly update his information on the sexual offender registry.

On July 28, 2008, Petitioner pled guilty to a second count of failing to maintain up-to-date information on the sex offender registry. (*See* Pet’r Supp. App. at 32, 37-41). This conviction stemmed from Petitioner’s failure to timely report opening a Yahoo account. (*Id.* at 32). The circuit court ordered Petitioner undergo rehabilitation at the Anthony Center and, after his release, he was placed on probation for this felony conviction and the previously-ordered probation on his first felony conviction was reinstated. (*See* Respondent’s Supp. App. at 18-25).

D. Petitioner is convicted of a third felony for failing to properly update his information on the sex offender registry and is sentenced to an indeterminate term of 10 to 25 years.

On March 6, 2012, Petitioner was charged with three felonies of failure to report a

change in his information. (Respondent's Supp. App. at 1-3; *see also* Pet'r Supp. Brief at 9-10). The charges stemmed from Petitioner's failure to timely report the creation of an online Facebook profile, as well as a change in his address. (*Id.*). On June 1, 2012, he pled guilty to one count and the other two were dismissed. (*Id.*). Thereafter, and in accordance with W. Va. Code § 15-12-8(c), Petitioner was sentenced to an indeterminate term of 10 to 25 years of incarceration. (Pet'r App. at 3-5; *see also* Respondent's Supp. App. at 4). His probation on the two previous convictions was revoked. The sentences for each of these charges were ordered to run consecutively with one another, but concurrently with his 10 to 25 year sentence. (*See* Pet'r Brief at 10) (internal citations omitted).

E. Petitioner's Rule 35(b) motion and appeal to this Court.

On July 14, 2015, Petitioner, proceeding *pro se*, filed a motion for reconsideration of sentence with the Circuit Court of Gilmer County. (*See* Pet'r App. at 1). The circuit court denied this motion on September 9, 2015. (*See id.*). Petitioner appealed the circuit court's order denying his motion for reconsideration of sentence and filed a *pro se* brief. Generally (it was previously briefed in the Respondent's Summary Response), Petitioner sought leniency and pointed to *State v. Arbaugh*, 215 W. Va. 132, 595 S.E.2d 289 (2004) for relief. (Pet'r Brief at 2). Respondent filed a summary response, arguing, *inter alia*, that the circuit court did not abuse its discretion in denying Petitioner's request for leniency, and that, as this Court has previously stated, *Arbaugh* was a narrow decision with no application to Petitioner's case. (*See generally* Respondent's Summary Response at 6). Petitioner filed a reply.

By Order entered June 27, 2016, this Court set the matter for oral argument, appointed Petitioner counsel, and ordered supplemental briefing. Petitioner's supplemental brief advances three entirely new assignments of error; this Response follows.

IV. SUMMARY OF THE ARGUMENT

This appeal involves the denial of a motion for a reduction of sentence under West Virginia Rule of Criminal Procedure 35(b). In that motion, Petitioner requested a reduced sentence for equitable reasons; he acknowledged the validity of his convictions and merely sought leniency. Now, in this appeal, Petitioner's supplemental brief raises claims that challenge the legal basis for his sentence. These claims should have been raised by filing a motion with the circuit court under Rule 35(a). They were not. Consequently, these claims fall outside the scope of this appeal. Petitioner should be required to raise them in the proper proceedings and should not be permitted to sneak them into this appeal.

In the alternative, assuming this Court addresses Petitioner's claims on the merits, the claims fall flat. The lower court did not abuse its discretion in sentencing Petitioner as his sentence falls within the statutory range (an indeterminate term of 10 to 25 years) and it did not consider any impermissible factor in sentencing him (nor is that even alleged). The circuit court followed the law to the "t."

Petitioner's sentence is also not unconstitutionally disproportionate. The sentence itself—an indeterminate term—is expressly set by statute. Moreover, it is neither subjectively or objectively excessive, particularly since Petitioner's sentence is the result of his repeated criminal conduct. Finally, Petitioner's requirement to remain a registered sex offender for the rest of his life is not punitive in nature and therefore not unconstitutional under either the Eighth Amendment to the United States Constitution or Article III Section 5 of the West Virginia Constitution.

V. STANDARD OF REVIEW

A circuit court's ruling on a Rule 35 motion is reviewed under a three-pronged standard of review. Syl. pt. 1, *State v. Georgius*, 225 W. Va. 716, 696 S.E.2d 18 (2010) (quoting Syl. pt.

1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996)). The lower court's ruling is examined under "an abuse of discretion standard," while the underlying facts are analyzed under a clearly erroneous standard. *Id.* Questions of law are reviewed *de novo*. *Id.* A circuit court's decisions regarding sentencing matters will not be disturbed "so long as the appellant's sentence was within the statutory limits, was not based upon any impermissible factors, and did not violate constitutional principles." *Id.* at 722, 696 S.E.2d at 24 (quoting *State v. Sugg*, 193 W.Va. 388, 406, 456 S.E.2d 469, 487 (1995)); *see also* Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). Interpretation of a statute is reviewed *de novo*. *See* Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

VI. ARGUMENT

A. The claims raised in Petitioner's Supplemental Brief are not properly before this Court.

1. The assignments of error presented in Petitioner's supplemental brief fall outside the scope of West Virginia Rule of Criminal Procedure 35(b) and cannot be raised in this appeal.

Petitioner's Rule 35(b) motion sought leniency from the circuit court. As reflected in his brief on appeal, he requested a reduction in his sentence because he believed there were equitable factors which warranted such reduction. (*See* Pet'r Brief at 3). Thus, the circuit court was presented with a very straightforward claim: whether Petitioner was entitled to leniency for non-legal reasons, and the subsequent appeal involved only whether the circuit court abused its discretion in addressing and denying this motion. (*See generally* Pet'r Brief and the Respondent's Summary Response).

Petitioner's supplemental brief completely reshapes the landscape of this appeal. He now advances three assignments of error, all of which generally allege that his sentence is

unconstitutionally severe. (*See* Pet’r Supp. Brief at iii).¹ In his first supplemental assignment of error, Petitioner alleges that the circuit court abused its discretion by not granting Petitioner leniency because Petitioner’s sentence is “40 to 100 times greater than the 90-day maximum penalty for Petitioner’s underlying offense.” (*Id.*). As he clarifies in the argument section supporting this assignment of error, Petitioner asserts the circuit court abused its discretion because this sentence is unconstitutionally excessive “to the point of constituting cruel and unusual punishment.” (*Id.* at 17). Relatedly, Petitioner’s second supplemental assignment of error alleges that his sentence is unconstitutionally disproportionate to his criminal conduct. (*Id.*). His third supplemental assignment of error similarly claims that the lifetime registration requirements are “cruel and unusual” under Article III, Section 5 of the West Virginia Constitution. (*Id.*).

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. Under Rule 35(a), an individual may seek to have his sentence “corrected” by filing a motion with the circuit court. Notably, a petitioner must establish (or the circuit court must otherwise find) that the sentence as originally imposed is “illegal.” *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). Such a motion may be filed any time after sentencing. The basis for this rule is obvious: a circuit

¹ Respondent acknowledges that the first assignment of error raised in Petitioner’s supplemental brief alleges that the circuit court abused its discretion in denying his motion to reconsider his sentence, which would generally fall within the scope of this appeal. However, the substance of Petitioner’s argument is that the sentence is unconstitutionally “excessive” as it is “40 to 100 times longer than [Petitioner’s] underlying [criminal conduct].” (Pet’r Brief at 19). Thus, Petitioner’s first assignment of error may be cloaked as a claim challenging the court’s denial of the Rule 35(b) motion, but the argument in support of this assignment of error raises a legal challenge to the sentence itself. In the alternative, it is undeniable that the remaining supplemental assignments of error fall challenge the legality of the sentence and therefore fall outside the scope of this appeal.

court does not have the authority to impose an “illegal” sentence and an individual illegally sentenced should be entitled to have such a sentence set aside (or modified such that it becomes legal) at any point in time and whenever the error is realized.

Alternatively, W. Va. R. Crim. P. 35(b)—which is the type of motion at issue in this appeal—provides that an individual may seek a “reduction” of his sentence by filing a motion within 120 days of sentence or after the entry of a mandate order by this Court affirming the judgment of a conviction. The remedy set forth in this section 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). As Justice Cleckley observed in *Head*, “[a]ppellate 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. 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 upon legal principles; instead it is an appeal to the mercy of the trial judge and must be timely filed.

In the case at hand, Petitioner filed a motion under Rule 35(b),² and sought leniency. (App. at 13-14). The circuit court denied the motion and this appeal followed. Petitioner’s initial briefed attacked the circuit court’s ruling from the perspective that he should be entitled to

² Petitioner’s Rule 35(b) motion was filed over three years after he was sentenced. The record demonstrates that Petitioner filed a state habeas petition and his relief was denied. (*See* Pet’r Supp. App. at 52). The circuit court did grant Petitioner leave to file a motion for reconsideration of sentence, noting that it could hear such a motion at “any time.”(*Id.*). Petitioner’s Rule 35(b) motion followed shortly thereafter. Respondent notes that Rule 35(b) requires such a motion be filed within 120 days of a circuit court’s sentencing order or a mandate order from this Court. W. Va. R. Crim. P. 35(b). It would appear, then, that Petitioner’s Rule 35(b) motion was untimely and that the circuit court did not actually have the authority to entertain an untimely motion under Rule 35(b), as the timeliness requirement seems to be jurisdictional. *See Head*, 198 W. Va. at 303 n.11, 480 S.E.2d at 512 n.11.

leniency. (Pet'r Brief at 3-5), Petitioner's supplemental brief, however, challenges the *constitutionality* of his sentence. (See Pet'r Supp. Brief at iii). Such a claim is *not* a claim for leniency under Rule 35(b), but is properly characterized as a Rule 35(a) claim because he challenges the legality of the sentence. *Head*, 198 W. Va. at 306, 480 S.E.2d at 515. This appeal involves only the denial of a Rule 35(b) motion. Therefore, the claims raised in Petitioner's supplemental brief—challenging the legal grounds of Petitioner's sentence—fall outside the scope of this appeal and should not be addressed by this Court *in this proceeding*. Instead, insofar as Petitioner wishes to challenge the legality of his sentence, he should be required to file a motion under Rule 35(a) with the circuit court (which he can do at any time) and, if that motion is denied, appeal the circuit court's ruling to this Court. Alternatively, he can seek habeas relief in circuit court (or federal court) or even relief vis-à-vis an extraordinary writ under this Court's original jurisdiction. See W. Va. R. App. P. 16. But these claims should not be permitted in the appeal of a Rule 35(b) motion.³

³ Numerous 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 involve 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. 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.").

2. These claims were not presented below and cannot be raised for the first time in this appeal.

While this Court should *not* review Petitioner's new assignments of error because they fall outside the scope of Rule 35(b), there is a second and far more basic reason for this Court to reject review: None of the claims raised in Petitioner's supplemental brief were presented to the circuit court. (*See* Pet'r App. at 1; 13-15). *State v. Rodoussakis*, 204 W. Va. 58, 64, 511 S.E.2d 469, 475 (1998) (quoting *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996) (“[T]he contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.”)); *see also id.* at Syl. pt. 1, 511 S.E.2d at 472 (“To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect.”); *State v. Miller*, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996) (“[I]f any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal. We have invoked this principle with a near religious fervor.”).⁴ It was not asked to address whether the sentence or lifetime registration requirements were unconstitutionally excessive or even whether Petitioner was entitled to a reduction in his sentence predicated upon some legal basis. (*Id.* at 13-15 (Petitioner's Rule 35(b) motion) and App. at 1 (the Circuit Court's Order Denying the Motion)).

⁴ There are narrow exceptions which allow a party to bring claims on appeal which were not properly preserved. Consider, for instance, the plain error doctrine. However, these exceptions are generally reserved for instances where a party will otherwise lose the right to pursue such a claim. *See generally State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995) (noting that the failure to assert a right during trial generally will “result in the imposition of a procedural bar to an appeal of that issue”) (internal citations omitted). Here, Petitioner can raise the claims presented in his supplemental brief by filing one of at least three motions or writs at any point in time outside of this appeal (including filing a Rule 35(a) motion in the circuit court; instituting habeas proceedings; or even filing an extraordinary writ under this Court's original jurisdiction authority).

Petitioner's supplemental brief is attempting to sneak issues and claims into this appeal that were not raised, presented, or considered below. While this Court is indisputably the highest Court in this state, it is a court of review. *See, e.g.,* Syl. Pt. 3, *State v. Redman*, 213 W. Va. 175, 181, 578 S.E.2d 369, 375 (2003). It has been a long-standing rule that this Court will not address questions raised in an appeal which were not decided by the trial court in the first instance. *Id.* at Syl. pt. 3, 578 S.E.2d at 375 (quoting Syl. pt. 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958)). The circuit court was not presented with these claims and Petitioner should be required to follow the rules of criminal and appellate procedure and raise these claims in the proper proceedings. Accordingly, this Court should decline to address Petitioner's supplemental assignments of error.

B. Petitioner's claims fail on the merits.⁵

In the alternative, and assuming this Court addresses Petitioner's supplemental brief on the merits, his claims fail. The circuit court did not abuse its discretion in denying Petitioner's motion for reduction of sentence because Petitioner's sentence is in full accord with W. Va. Code § 15-12-8(c). Petitioner's supplemental brief fails to discuss how or why he believes the circuit court relied upon an "impermissible factor" in sentencing him, and his 10 to 25 year sentence is indisputably provided by statute. Second, the length of Petitioner's sentence is not unconstitutional. This Court need not evaluate whether his sentence is disproportionate because his sentence is not a life sentence and is within the statutory range. *See State v. Allen*, 208 W. Va. 144, 156, 539 S.E.2d 87, 99 (1999). Moreover, while Petitioner's "underlying offense" was a misdemeanor, his complaint that it was his *misdemeanor* related conduct which gave rise to his 10 to 25 year sentence is a red herring. Petitioner is serving a 10 to 25 year sentence because he

⁵ Respondent's summary response set forth the grounds upon which Petitioner's *pro se* claims fail. This supplemental response addresses only the claims raised in Petitioner's supplemental brief.

committed multiple *felonies*. Finally, the lifetime registration requirements are not punitive in nature and his challenge to the same falls flat.

1. The Circuit Court did not abuse its discretion in denying Petitioner's motion for a reduction of sentence.

It has been a long-standing principle of this Court that “[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” *See, e.g.*, Syl. pt. 4, *State v. Manley*, 212 W. Va. 509, 575 S.E.2d 119 (2002); Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982); Syl. Pt. 3, *State v. Georgius*, 225 W. Va. 716, 696 S.E.2d 18 (2010); Syl. pt. 2, *State v. Shaw*, 208 W. Va. 426, 541 S.E.2d 21 (2000); Syl. pt. 7, *State v. Layton*, 189 W. Va. 470, 432 S.E.2d 740 (1993). The same principle applies to Rule 35 appeals. *See, e.g.*, *State v. Frank D.*, No. 15-0779, 2016 WL 1547234, at *2 (W. Va. Apr. 15, 2016) (memorandum opinion) (“[T]he denial of a motion under Rule 35 is generally “not reviewable” in a case in which no abuse of discretion occurs.”) (internal citations omitted). In fact, appellate review is only warranted where “it is alleged that a sentencing court has imposed a penalty beyond the statutory limits or for impermissible reasons[.]” *Georgius*, 225 W. Va. at 719, 696 S.E.2d at 21 (quoting *Goodnight*, 169 W. Va. at Syl. pt. 4, 287 S.E.2d at 505).

In this appeal, Petitioner has failed to explain how or why he believes the circuit court relied upon an impermissible factor in sentencing him; indeed, he offers absolutely no argument or even discussion on this subject. (*See generally* Pet'r Supp. Brief at 15-19). Moreover, Petitioner's 10 to 25 year sentence is a valid sentence: He was convicted of failing to register as a sex offender three times. (*See, e.g.*, App. at 3-5; Supp. App. at 13-17; 18-25). West Virginia Code § 15-12-8(c) expressly provides that “[a]ny person convicted of a second or subsequent offense under this subsection is guilty of a felony and, upon conviction thereof, shall be

imprisoned in a state correctional facility for **not less than ten nor more than twenty-five years.**” W. Va. Code § 15-12-8(c). (emphasis added). The circuit court sentenced Petitioner to not less than 10 nor more than 25 years. (App. at 4). Accordingly, there is nothing improper with Petitioner’s sentence.⁶ Given the limited nature of appellate review—that it will only be undertaken in instances where a petitioner alleges the circuit court’s imposition of a sentence was beyond statutory limits or based upon an impermissible factor—and Petitioner’s failure to address this standard, appellate review of this claim is unwarranted. *Georgius*, 225 W. Va. at 719, 696 S.E.2d at 21 (quoting *Goodnight*, 169 W. Va. at Syl. pt. 4, 287 S.E.2d at 505).

This point alone dispositively resolves this assignment of error in the State’s favor.⁷ Even then, Petitioner devotes a substantial amount of ink discussing various opinions from this Court in the context of an appeal of a circuit court’s denial of a Rule 35 motion. (Pet’r Brief at 16-17) (discussing *State v. Cirigliano*, *State v. Frank D.*, *State v. Nathan B.*, *Rhodes v. Ballard*, *Riley v. Vest*, *State v. Fugate*, and *State v. Georgius*). Critically, *none* of these cases support Petitioner’s position. First, aside from *Arbaugh*, every decision Petitioner cites to or discusses represents an instance where this Court, in fact, *upheld* a circuit court’s denial of a Rule 35(b) motion. (Pet’r Brief at 16-17). The *only* case Petitioner relies upon to establish an instance where this Court found a circuit court’s denial of a Rule 35(b) motion to be an abuse of discretion is *Arbaugh*, which this Court has previously explained was a narrow decision, limited to the unique circumstances of that case. *Georgius*, 225 W. Va. at 721, 696 S.E.2d at 23 (explaining that

⁶ As previously briefed, Petitioner requested the lower court modify his sentence to a 10 or 12 year “flat” sentence. Even if the circuit court wanted to grant such relief (and it clearly did not), such a sentence would constitute merely a recommendation to the Board of Parole, as W. Va. Code § 15-12-8(c) mandates the imposition of an indeterminate sentence. *See State v. Allman*, 177 W. Va. 365, 367, 352 S.E.2d 116, 118 (1986).

⁷ Petitioner concludes this argument section by claiming his sentence is unconstitutionally disproportionate. (Pet’r Supp. App. at 19). Petitioner further advances this argument in his second assignment of error, and, for clarity’s sake, so will Respondent.

Arbaugh “was confined to the very specific facts of that case” and that it did not create any new standards, guidelines, or requirements to be followed by the circuit courts of this State[.]”); *see also State v. Williams*, No. 11-0939, 2012 WL 3079157, at *2 (W. Va. May 29, 2012) (memorandum opinion) (noting the same). Thus, Petitioner can find no relief in the numerous, but inapposite, cases he cites.

Finally, it is axiomatic that in order to establish that the circuit court abused its discretion, Petitioner must demonstrate that he was entitled to a different—more lenient—sentence. Petitioner now insists that the circuit court *could* have ordered he be placed on probation. (Pet’r Supp. Brief at 18-19).⁸ Whether the circuit court *could* have ordered probation is not the proper inquiry in this appeal. Instead, the question before this Court on appeal is whether the circuit court (1) imposed a sentence within “legislatively prescribed limits” and (2) considered an “impermissible factor.” *State v. Slater*, 222 W. Va. 499, 507-08, 665 S.E.2d 674, 682-83 (2008) (“We deem it generally to be the better practice to decline to review sentences that are within statutory limits and where no impermissible sentence factor is indicated.”); *see also Manley*, 212 W. Va. at 513, 575 S.E.2d at 123 (2002) (“[H]istorically, this Court has not interfered with sentences which have been imposed within legislatively prescribed limits as long as the trial judge has not considered any impermissible factors.”); *Georgius*, 225 W. Va. at 719, 696 S.E.2d at 21 (“As a general rule, the sentence imposed by a trial court is not subject to appellate

⁸ Curiously, Petitioner posits that his case is “an extreme outlier under West Virginia law.” (Pet’r Supp. App. at 18). This colorful rhetoric lacks substance. Petitioner committed multiple felonies for failing to timely update changes of information on the sex offender registry. He pled guilty to 3 felonies over the course of 4 years. (Pet’r Supp. App. at 25-32; 37-41; Respondent’s Supp. App. at 1-3). Petitioner was given probation for the first two felony convictions. Finally, after pleading guilty to a third felony, the circuit court ordered that he be incarcerated as provided by statute: a period of 10 to 25 years. (Respondent’s Supp. App. at 4). There is nothing “extreme” about this case other than Petitioner’s consistent failure to properly follow W. Va. Code § 15-2-3. Petitioner committed multiple felonies. He admits to it. He now must serve the corresponding sentence as set by our state legislature and as ordered by the circuit court. This is not extreme. This is how our law works.

review.”). This is because a Rule 35(b) motion seeking reduction in sentencing is “essentially a plea for leniency from a presumptively valid conviction.” *Head*, 198 W. Va. at 306, 480 S.E.2d at 515 (Cleckley, J. concurring); *see also Walkowiak v. Haines*, 272 F. 3d 234, 238 (4th Cir. 2001) (“The only issue before [a West Virginia] court on a Rule 35(b) motion is whether the defendant, although sentenced in conformity with applicable laws, nevertheless presents some compelling *non-legal* justification that warrants mercy.”) *abrogated on other grounds in Wall v. Kholi*, 562 U.S. 545 (2011).

As discussed above, the circuit court’s denial of Petitioner’s Rule 35(b) motion and decision *not* to modify Petitioner’s sentence cannot be an abuse of discretion when the circuit court followed the law to the “t”. Moreover, even if this Honorable Court believes Petitioner should have been placed on probation, “[c]ircuit court judges have a right to believe that so long as they have not violated a law or acted in a nefariously discriminatory way in imposing sentences, this Court will not sift through the nooks and crannies of their decisions determined on finding that which is not there.” *Head*, 198 W. Va. at 306, 480 S.E.2d at 515 (Cleckley, J. concurring). Consider, for instance, *Manley*, where this Court noted that it would perhaps not have sentenced the petitioner to “such a lengthy sentence.” *Id.* at n.10, 575 S.E.2d at 123 n.10. However, in affirming the lower court’s denial of Petitioner’s motion for a reduction of sentence under Rule 35, this Court further explained that “given the discretion afforded the circuit court with respect to sentencing, we must affirm its ruling today.” *Id.* Thus, “[i]t is not the proper prerogative of this Court to substitute its judgment for that of the trial court on sentencing matters” *Georgius*, 225 W. Va. at 722, 696 S.E.2d at 24 (quoting *Sugg*, 193 W.Va. at 406, 456 S.E.2d at 487); *see also Arbaugh*, 215 W. Va. at 140, 595 S.E.2d at 297 (Davis, J., dissenting) (noting that the “[a]buse of discretion review does not allow [this Court] to

“substitute [its] judgment for the circuit court’s.”) (citing *State v. Taylor*, 215 W.Va. 74, 83, 593 S.E.2d 645, 654 (2004)). For these reasons, Petitioner’s claim that the circuit court abused its discretion fails.

2. Petitioner’s 10 to 25 year sentence is not unconstitutional.

Petitioner contends that W. Va. Code § 15-12-8(c) is unconstitutional “as applied” to him in that his sentence is unconstitutionally disproportionate under either the subjective or objective tests previously articulated by this Court. (Pet’r Supp. Brief at 20). He repetitiously argues that his 10 to 25 year sentence is disproportionate because his “underlying charge is a misdemeanor, punishable by a maximum of only 90 days in jail.” (*Id.*). But this argument misses the mark: Petitioner’s 10 to 25 year sentence stems from his conviction of *multiple felonies* under W. Va. Code § 15-12-8 for failing to comply with the registration requirements under W. Va. Code § 15-2-3. Respondent wholeheartedly agrees that, in the abstract, a 10 to 25 year sentence for the commission of a misdemeanor would likely be unconstitutional. But, as discussed herein, Petitioner’s claim glosses over critical, dispositive facts. His 10 to 25 year sentence arises from multiple felony convictions—not a single misdemeanor.

Petitioner was ordered to register for life as a sex offender under W. Va. Code § 15-12-4(a)(2)(E). (Pet’r Supp. Brief at 4). Because “[t]he act is meant to allow the public and law enforcement to monitor the whereabouts of sex offenders” (including work and home location, as well as internet activity), *State v. Nolte*, No. 13-0774, 2014 WL 2404323, at *3 (W. Va. May 30, 2014) (memorandum opinion), “a sex offender has a ‘specific obligation’ to report changes in his information.” *State v. Beegle*, No. 15-0302, 2016 WL 1619871, at *3 (W. Va. Apr. 21, 2016) (citing W. Va. Code § 15-2-3) (memorandum opinion); *see also State v. Judge*, 228 W. Va. 787, 791, 724 S.E.2d 758, 762 (2012) (citing W. Va. Code § 15-12-4). “As the statute makes clear, an

individual subject to the Registration Act commits a felony when he or she . . . knowingly fails to register; or knowingly fails to provide a change in required information.” *Judge*, 228 W. Va. at 789, 724 S.E.2d at 760 (citing W. Va. Code § 15-18-8(c)). The failure to properly update information two or more times carries a sentence of 10 to 25 years. W. Va. Code § 15-12-8(c).

a. Petitioner’s proportionality claim fails as a matter of law.

While this Court has previously recognized that “[t]here are two tests to determine whether a sentence is so disproportionate to a crime that it violates our constitution,”⁹ it has also consistently stated that it will not apply these tests in cases where an individual is sentenced to a term other than life in prison or for first degree robbery. *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 531, 276 S.E.2d 205, 211 (1981) (“While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.”); *Allen*, 208 W. Va. at 156, 539 S.E.2d at 99 (“Because this case involves neither the possibility of unlimited sentences nor a life recidivist statute, we decline Allen's invitation to apply proportionality principles herein.”); *see also Manley*, 212 W. Va. at 511, 575 S.E.2d at 121. In fact,

[t]he robbery by violence statute is one of the few criminal statutes in our jurisdiction that enables the court to set a determinate sentence without reference to any statutory maximum limit. With the exception of the life recidivist statute discussed in *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980), we do not believe that the disproportionality principle can have any significant application other than to this type of sentencing statute.

State v. Fields, No. 14-0726, 2015 WL 6181504, at *2 (W. Va. Oct. 20, 2015) (citing *Manley*, 212 W.Va. at 512-13, 575 S.E.2d at 122-23) (quoting *Wanstreet*, 166 W.Va. at 531-32, 276 S.E.2d at 211)).

⁹ *State v. Cooper*, 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983); *see also State v. Allen*, 208 W. Va. 144, 156 n.19, 539 S.E.2d 87, 99 n.19 (1999) (recognizing the same).

Consider, for instance, *State v. Manley*. There, the petitioner was sentenced to 88 years after pleading guilty to five felony counts. *Manley*, 212 W. Va. at 511, 575 S.E.2d at 121 (“forgery and uttering under the first indictment; one count of conspiracy to commit forgery and one count each of forgery and uttering under the third indictment; and one count of burglary under the fourth indictment”). The circuit court sentenced her within the statutory range for each count and ordered that the sentences run consecutively. “Essentially, [she] was given an eight-to-eighty year sentence. *Id.* at 511, 575 S.E.2d at 121. The petitioner filed a motion for reduction of sentence under Rule 35(b), which the circuit court denied, and she appealed to this Court. *Id.* On appeal, the petitioner asserted that her sentence violated the disproportionality provision under our state constitution and as articulated by this Court in *Wanstreet*. This Court declined to evaluate this claim, noting that petitioner’s sentence was within the prescribed statutory limits and that the disproportionality principles, while in theory could potentially apply to any sentence, truly only applied to West Virginia’s life recidivist statute and robbery. *Id.* at Syl. pt. 4, 575 S.E.2d at 120.

In the case at hand, Petitioner’s sentence conforms—exactly—to W. Va. Code § 15-12-8(c); an indeterminate term of 10 to 25 years. It is not a life sentence. Consequently, this Court should decline to apply the proportionality tests articulated in *Wanstreet* and *Cooper*.

b. In the alternative, Petitioner’s sentence is not unconstitutionally disproportionate.

Of the two tests employed by this Court to determine whether a sentence is unconstitutionally disproportionate, “[t]he first [test] is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.” *Cooper*, 172 W. Va. at 272, 304 S.E.2d at 857. When the sentence does not meet this

standard,

a disproportionality challenge is guided by the objective test we spelled out in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981): In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

Id.; see also *Allen*, 208 W. Va. at 156 n.19, 539 S.E.2d at 99 n.19 (recognizing the same). As discussed herein, Petitioner cannot satisfy either the subjective or objective tests underpinning a proportionality claim under the Eighth Amendment to the United States Constitution or Article III Section 5 of the West Virginia Constitution.

i. Petitioner's sentence does not meet the subjective test

Petitioner's sentence does not "shock the conscience." He has been convicted of committing three felonies, all of which pertain to his repeated failure to update his information on the sex offender registry. (*See App.* at 3-4). As provided by statute, he was initially sentenced to a term of 1 to 5 years, which was suspended and he was placed on probation. (*See Pet'r Supp. App.* at 32, 37-41). He received the same sentence for his second felony offense. (*Id.*) Petitioner's supplemental brief concedes that Petitioner knew he needed to timely update his information and he certainly knew that the failure to do so was a felony. (Pet'r Supp. Brief at 7). After his third conviction for the same offense, he received what is essentially a recidivist-enhanced sentence of 10 to 25 years, which is expressly provided by W. Va. Code § 15-12-8(c). (*App.* at 3-4). There is nothing in this progression to indicate that his sentence "shocks the conscience." He knew he was required to update his information and knew that it was a felony if he failed to do so.¹⁰

¹⁰ While Petitioner's supplemental brief highlights that he successfully updated his status seven

Despite this, Petitioner claims he committed the “most insignificant” sexual offense under West Virginia law,¹¹ and that his failure to timely update his information is a victimless and nonviolent crime. Neither of these claims, even if true, establish that Petitioner’s sentence “shocks the conscience.” In fact, the Supreme Court of the United States has observed that “the presence or absence of violence does not always affect the strength of society’s interest in deterring a particular crime” *Rummel v. Estelle*, 445 U.S. 263, 275 (1980). And the Sex Offender Registry Act serves a critical regulatory purpose—to help society monitor sexual offenders. *Nolte*, No. 13-0774, 2014 WL 2404323, at *3. The Legislature put “teeth” into the Act by making it a felony for a sex offender who fails to report information, and this legislative scheme has previously been found to be constitutional. *See generally Hensler v. Cross*, 210 W. Va. 530, 531, 558 S.E.2d 330, 331 (2001); *see also State v. Golden-Kerns*, No. 12-1530, 2013 WL 4726436, at *1 (W. Va. Sept. 3, 2013) (affirming a one to five year sentence for a petitioner who pleaded guilty to first offense failure to provide notice of registration changes under W. Va. Code § 15-12-8(b) and where her “underlying offense” was third degree aiding and abetting sexual assault) (memorandum opinion).

It is notable that Petitioner’s discussion of cases wherein this Court found a petitioner’s sentence to be subjectively unconstitutional involved sentences with no statutory maximum or range. In *Cooper*, for instance, the petitioner was convicted of robbery and was sentenced to 45 years. *Cooper*, 172 W. Va. at 268, 304 S.E.2d at 852. There, this Court noted that a trial judge has “very broad [discretion] in sentencing for robbery,” but further explained that such discretion

(7) times before he violated the registry/updating requirements, such an argument does not excuse his criminal conduct. Occasional or partial compliance is insufficient and each failure—irrespective of previous compliance—is a felony in and of itself. *See Beegle*, No. 15-0302, 2016 WL 1619871, at *3 (citing W. Va. Code § 15-2-3); W. Va. Code § 15-12-8(c).

¹¹ There is no such thing as an “insignificant” sexual offense. The trauma inflicted upon a victim of a sexual crime—even in cases of statutory rape—is great. *Cf. State v. Ussery*, 34 Kan. App. 2d 250, 259, 116 P.3d 735, 743 (Kan. Ct. App. 2005).

“must be tempered by W. Va. Const. art. III § 5, requiring sentences to be proportional to the character and degree of the offense.” *Id.* at 271, 304 S.E.2d at 855. *Cooper* is distinguishable from this case because of the statutory penalties at issue. Aside from a minimum of 10 years, there is no set maximum length of incarceration for a conviction of first degree robbery; a circuit court *could* sentence an individual to a clearly disproportionate term, say 500 or 1,000 years. *See generally* W. Va. Code § 61-2-12. Here, however, the statutory penalty for failing to register two or more times is set by an indeterminate sentence of 10 to 25 years. W. Va. Code § 15-12-8(c). Thus, while this Court found the sentence in *Cooper* to be disproportionate because the circuit court abused its discretion in selecting a determinate term from a potentially unlimited maximum sentence, here, the circuit court simply followed the law, W. Va. Code § 15-12-8(c).

Finally, Petitioner’s direct comparison of the sentence he received for the underlying offense (90 days) to the sentence he received for failure to register (10 to 25 years) fundamentally misses the mark. While it is true that the latter sentence is “40 to 100 times longer,” the difference is explained by the nature of the conduct being penalized. That is, the 90 day sentence was punishment imposed for a single instance of misdemeanor conduct. In contrast, the 10 to 25 year sentence reflects the Legislature’s proscribed punishment for multiple instances (in this case three) of felonious conduct. The fact that Petitioner’s felonies are related to (in fact flow from) the underlying misdemeanor is of no moment. The West Virginia Code is replete with examples wherein the Legislature has authorized enhanced penalties for repetitious criminal conduct. *See generally* W. Va. Code § 61-3E-2 (cumulative penalties for offenses involving explosives); W. Va. Code § 61-11-18 (recidivist statute); W. Va. Code § 61-8B-9b (providing for enhanced penalties for subsequent sexual offenses against children).¹²

¹² Petitioner also relies upon cases from Georgia, California, and the Ninth Circuit. These case will be addressed under the “objective test,” *infra* section ii, as that test expressly employs an

ii. **Petitioner's sentence does not meet the objective test.**

Application of the second test to the matter at hand leads to the same result. The nature of the offense is, as Petitioner argues, non-violent. (Pet'r Supp. Brief at 26). A 10 to 25 year sentence for a non-violent offense may, at first blush, appear quite lengthy. But Petitioner's sentence is also not the result of a single, isolated act. It instead stems from his repeated criminal conduct (felonies). The legislative purpose behind requiring a sex offender to timely update changes in information is well-established: It is designed so that the public and law enforcement are able to monitor the whereabouts of sex offenders. *Nolte*, No. 13-0774, 2014 WL 2404323 at *3. Moreover, a sex offender is "obligated" to timely update this information and each failure to do so is a felony. *Judge*, 228 W. Va. at 789, 724 S.E.2d at 760 (citing W. Va. Code § 15-18-8(c)). This legislative purpose—making sure that sex offenders timely update their information—logically correspondences to the penalty and nature of the offense as it is a felony each and every time an individual fails to timely update this information. *Id.* at 789, 724 S.E.2d at 760; W. Va. Code § 15-18-8(c).

As to the third factor—how the punishment in West Virginia compares with other jurisdictions—a felony charge for failing to timely update sex offender registry information is *not* unique to West Virginia. *See generally Andrews v. State*, 82 So. 3d 979, 984 (Fla. Dist. Ct. App. 2011) (collecting authority). In Louisiana, for instance, the failure to register or properly update sex offender registry information is a felony, and each offense carries with it a thousand dollar fine and "imprison[ment] with hard labor of not less than two years nor more than ten years without the benefit of parole, probation or suspension of sentence." La. R. S. 15:542.1.4(A)(1). In *Mueller*, the defendant was sentenced to 10 years for a single count of failure to register. On appeal, he alleged, *inter alia*, that this sentence was unconstitutionally

interjurisdictional comparison to gauge proportionality.

disproportionate, which the appellate court rejected. *State v. Mueller*, 2010-0710 (La. Ct. App. 4 Cir. 12/8/10), 53 So.3d 677, 685 (La. Ct. App. 2010). Under Louisiana law, it appears that Petitioner would be facing a potential sentence of up to 30 years *without* the possibility of probation or parole.

Nor is the length of Petitioner's sentence out-of-line when compared with other states.¹³ For instance, in *People v. Meeks*, a California court of appeal held that imposition of a 25 year-to-life sentence for failure to register a change of address and a consecutive sentence of two years imprisonment for failure to update registration annually did not violate the Eighth Amendment. 123 Cal. App. 4th 695, 706, 20 Cal.Rptr.3d 445, 453 (Cal. Ct. App. 2004). Similar sentences are routinely handled down in states which enhance the sentence based upon previous felonious conduct. *See, e.g., Thompson v. State*, No. 2-02-318-CR, 2003 WL 22923066, at *2 (Tex. App. Dec. 11, 2003) (noting that a single failure to register as a sex offender carries a two to 10 year sentence and upholding an enhancement of that sentence to 60 years where defendant had previously been convicted of felony offenses); *see also Bradshaw v. State*, 284 Ga. 675, 682, 671 S.E.2d 485, 492 (2008) (gathering cases which provide for enhanced sentences for the felony of failure to properly register as a sex offender). *See generally State v. Graham*, No. 15-1464, 2016 WL 3556539, at *5 (Iowa Ct. App. June 29, 2016) (upholding lifetime supervision and registration requirements where defendant, at age 17, had sexual intercourse with a thirteen year old).

¹³ It is not surprising that the penalties for such violations vary state by state (although it appears that the vast majority of states classify the failure to properly update sex offender registry information as a felony, *see Bradshaw*, 284 Ga. at 681, 671 S.E.2d at 491). "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, 445 U.S. at 282; *Gonzalez v. Duncan*, 551 F.3d 875, 888 (9th Cir. 2008) ("[S]ex offender registration laws vary widely among the several states and are frequently changed.").

Petitioner also cannot find sanctuary in the cases he relies upon. His discussion of *Bradshaw* is misleading, at best. There, the defendant was found guilty of failing to update his current address within 72 hours as required under Georgia law. *Bradshaw*, 284 Ga. at 675, 671 S.E.2d at 487. It was his second violation. *Id.* A second violation under Georgia’s sex offender laws resulted in a “mandatory sentence of life imprisonment.” *Id.* The Supreme Court of Georgia found this sentence was unconstitutionally excessive. *Id.* *Bradshaw*, however, is markedly different from the case at hand. Under West Virginia law, a second or greater offense of failure to timely update a change in information carries a 10 to 25 year sentence—not life in prison demanded by Georgia’s law. W. Va. Code § 15-12-8(c). Moreover, while, Petitioner points out that in *Bradshaw*, the defendant needed to serve 7 years before he was parole eligible, the Supreme Court of Georgia, in finding the life in prison sentence was unconstitutional, expressly rejected the *State’s* argument that it was a 7 year sentence. *Bradshaw*, 284 Ga. at 680, 671 S.E.2d at 490. The sentence in *Bradshaw* was a life sentence; parole was entirely discretionary and could not be considered in determining whether the sentence was unconstitutional. *Id.* Instead, the appropriate comparison is *Bradshaw’s* holding, which found a sentence of life in prison for a second offense unconstitutional, and West Virginia’s law, which imposes a 10 to 25 year sentence for a second or subsequent offense. Georgia’s statutory penalty was substantially greater than West Virginia’s penalty.

Petitioner’s reliance upon *Carmony* is similarly misplaced. *People v. Carmony*, 127 Cal. App. 4th 1066, 26 Cal. Rptr. 3d 365 (Cal. Ct. App. 2005). There, the petitioner was sentenced to a 25-year-to-life sentence for failure to provide “duplicate registration information.” *Id.* at 1072, 26 Cal. Rptr. 3d at 368. That is, the petitioner, a registered sex offender, provided a change in address in accordance with California law one month before his birthday. *Id.* He did not re-

register within five days of his birthday (which was approximately one month after he updated his address) as was required by the California registration law. Consequently, he was arrested and convicted of failing to register within five days of his birthday (a felony) and also admitted that he had three prior felony convictions under California's three strikes law. *Id.* at 1072, 26 Cal. Rptr. 3d at 368. A California appellate court found that his sentence was unconstitutionally disproportionate, given that there was no new information to update and that the State was aware of the new address. *Id.* at 1073, 26 Cal. Rptr. 3d at 369. Thus, the court held that "a sentence of 25-years-to-life constitutes cruel and unusual punishment *in the circumstances of this case.*" *Id.* at 1066, 1075, 26 Cal. Rptr. 3d at 371 (emphasis added).

This case is distinguishable from the matter at hand because the defendant's sentence in *Carmony*, 25-to-life with a minimum of 25 years—is far greater than Petitioner's sentence, 10 to 25 years. The criminal conduct is also different. In *Carmony*, the petitioner updated his information just days earlier and the State knew it. *Id.* at 1073, 26 Cal. Rptr. 3d at 369. Here, Petitioner *admits* to failing to timely update his information. (Pet'r Supp. Brief at 27).

Moreover, the *Carmony* opinion is not far-reaching. *Carmony* was expressly rejected by a different California appellate court shortly thereafter. *See In re Coley*, 55 Cal. 4th 524, 530, 283 P.3d 1252, 1256 (Cal. 2012) (discussing the split). The Supreme Court of California took occasion in *In Re Cooley* to clarify that a 25-to-life sentence for failure to provide or update sex offender registry information is not *per se* unconstitutionally disproportionate. And *In re Coley*, the Supreme Court of California, in fact, upheld a 25-to-life sentence for a failure to properly register as a sex offender. *Id.* at 530-62, 283 P.3d 1252, 1256-78. Thus, under California law, an individual can receive a 25-to-life sentence for failure to properly update his or her registration information. It is the most stringent law in the nation, *Carmony* at 1083, 26 Cal. Rptr. 3d at 377,

and has been upheld as constitutional. *In re Coley*, 55 Cal. 4th at 530-62, 283 P.3d at 1256-78. For the same reasons *Gonzalez* is also distinguishable. *Gonzalez v. Duncan*, 551 F.3d 875, 882 (9th Cir. 2008) (involving a 28 to life sentence for failure to properly register).

Finally, the intrajurisdictional comparison between Petitioner's punishment and penalties of other offenses within this State demonstrate that his sentence is not unconstitutionally disproportionate. There are, of course, several offenses which carry far greater penalties than the sentence at hand. These crimes include, *inter alia*, treason (W. Va. Code § 61-2-2 – up to life), robbery (W. Va. Code § 61-2-12 – no set maximum); kidnapping (W. Va. Code § 61-2-14a – life); and first degree sexual assault (W. Va. Code § 61-8B-3(c)). These crimes and their related penalties are *both more* severe than Petitioner's criminal conduct *and* his sentence. The Legislature's decision to punish an individual who commits kidnapping with a potential life sentence is reflective of our state's values, and the value we place on personal freedom and safety, relative to the criminal conduct being penalized. *Cf. State v. Radke*, 2003 WI 7, ¶ 29, 259 Wis. 2d 13, 33, 657 N.W.2d 66, 75-76 (Wis. 2003) (“[T]he legislature has the responsibility for enacting laws reflecting society's appreciation of the seriousness of one crime as opposed to another. The legislature also has the obligation to measure the kinds of sanctions that will, in society's judgment, best deter future criminality.”) (internal quotations and citations omitted); *State v. Baxley*, 94-2982 (La. 5/22/95), 656 So. 2d 973, 979 (La. Ct. App. 1995) (“The penalties provided by the legislature reflect the degree to which the criminal conduct affronts society.”); *People v. Fields*, 448 Mich. 58, 94, 528 N.W.2d 176, 191 (Mich. 1995) (Evaluating whether the length of a sentence was permissible by considering, *inter alia*, “the Legislature's, and thus society's, determination that the length of the sentences contained in the statute are necessary to discipline the offender”). Where the nature of the criminal conduct is severe (such as

kidnapping and murder) so is the related penalty (up to life imprisonment). Similarly, a sex offender who fails to properly update his information commits a felony which initially carries a 1 to 5 year sentence. W. Va. Code § 15-12-8. This is because our Legislative (and our society) deems it vital to keep track of convicted sex offenders. *See Nolte*, No. 13-0774, 2014 WL 2404323 at *3. An offender's repeated failure to update his information undermines this monitoring scheme and so, to incentivize compliance, the Legislature has ratcheted up the penalty for subsequent failures: 10 to 25 years. W. Va. Code § 15-12-8(c). Nonetheless, this sentence—for the commission of two (or in this case, three) felonies—is still a far lighter sentence than an individual who commits kidnapping, or any of the very serious offenses listed, *supra*. It is not disproportionate to the criminal conduct being penalized.

Also, it is worth noting that West Virginia's recidivist statute provides for a potential life sentence for the commission of three or more felonies. W. Va. Code at § 61-11-18(c). Thus, Petitioner *could* be facing a life sentence had he been convicted under this statute (he certainly qualifies under it). There are, of course, constitutional implications based upon the cases Petitioner relies upon in his brief; for instance *Carmony*, which found such application of a similar California law and sentence to be unconstitutionally disproportionate. 55 Cal. 4th at 530-62, 283 P.3d at 1256-78. But those same jurisdictions have also found the application of a recidivist statute imposing a life sentence for failure to properly register to be constitutional. *See, e.g., In Re Coley*, at 530-62, 283 P.3d 1252, 1256-78. The takeaway here is that Petitioner's sentence is a 10 to 25 year sentence (with two additional felony sentences of 1 to 5 years each to run concurrent to his 10 to 25 year sentence). It arises from the repetition of Petitioner's criminal conduct *and is not the result of a single criminal act*. It is also *not* a life sentence and is therefore distinguishable from the cases relied upon by Petitioner in his brief.

3. Lifetime registration requirements are not punitive and this Court has previously held that such a requirement is not unconstitutional.

Petitioner was initially charged with sexual assault in the third degree, a felony, under W. Va. Code § 61-8B-5 (Pet'r Supp. App. at 1) and he pled down to sexual assault in the third degree, a misdemeanor. (*See id.* at 3-4). Because the victim was only 14 years of age, Petitioner was required to register as a sex offender under W. Va. Code § 15-12-4(a)(2)(E) for life. (Pet'r Supp. Brief at 3, 4). Petitioner claims that because he only committed a misdemeanor offense, the fact that he has to register for life is punitive and therefore, unconstitutional. (*Id.* at 30). To be clear, Petitioner's challenge to the lifetime registration requirements is not an "as applied" challenge. He alleges that the portion of the Act which requires individuals who commit the misdemeanor crime of sexual abuse in the third degree to register for life is unconstitutionally excessive. (Pet'r Supp. Brief at Assignment of Error No. 2). In order to award relief, this Court would need to strike. W. Va. Code § 15-12-8's inclusion of individuals convicted under W. Va. Code § 61-8B-9 and required to register under W. Va. Code § 15-12-4(a)(2)(E). This is a facial challenge to the statute. To prevail, Petitioner faces a heavy burden:

The question whether an Act is civil or punitive in nature is initially one of statutory construction. A court will reject the Legislature's manifest intent only when a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the Legislature's intention.

Syl. pt. 4, *Hensler v. Cross*, 210 W. Va. 530, 558 S.E.2d 330 (2001).

Petitioner's claims fail. This Court has made clear on at least three separate occasions that the Sex Offender Act, including lifetime registration, is regulatory and *not* punitive in nature.¹⁴ In the context of an *ex post facto* constitutionality claim to the lifetime registration

¹⁴ Moreover, the statute suffers from no federal constitutional infirmity. *See, e.g., Cunningham v. W. Va.*, No. 606-CV-00169, 2007 WL 895866, at *7 (S.D.W. Va. Mar. 22, 2007), *aff'd sub nom. Cunningham v. Lemmon*, 251 F. App'x 829 (4th Cir. 2007) ("It is clear from the statement of intent and

provision in a case pertaining to an individual convicted of misdemeanor sexual abuse in the third degree—the exact same “underlying offense” as that presented in this appeal—this Court found that the lifetime registration requirement is “not so punitive as to override the regulatory purpose.” *Hensler*, 210 W. Va. at 535, 558 S.E.2d at 335. It found that “the Sex Offender Registration Act, W. Va. Code §§ 15-12-1 to 10, is a regulatory statute” and that it was not “punitive in overall effect.” *Id.* at 536, 558 S.E.2d at 335. Similarly, in *Haislop v. Edgell*, this Court has found that “the civil, nonpunitive nature of the Act has been well established.” 215 W. Va. 88, 95, 593 S.E.2d 839, 846 (2003). This Court also found that lifetime registration does not impugn upon a petitioner’s procedural due process rights and rejected an equal protection clause challenge. *Haislop*, 215 W. Va. at 97, 593 S.E.2d at 848 (relying upon *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003)); see also *State v. Deel*, No. 15-0345, 2016 WL 3147658, at *5 n.11 (W. Va. June 3, 2016) (memorandum opinion) (noting that the Act is civil and not punitive in nature).¹⁵

From an Eighth Amendment perspective, the United States Supreme Court has upheld imposition of a mandatory life sentence without parole on a defendant convicted of possessing a large quantity of narcotics. *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991). It is difficult, then, when painting upon such a canvas, to colorably argue that Petitioner should not be exempted from the lifetime registration requirements—a regulatory measure designed to protect society.¹⁶

findings in section 15-12-1a of the West Virginia Code that it was the objective of the West Virginia Legislature that the [Act] be regulatory and non-punitive in nature.”).

¹⁵ Respondent acknowledges that in a dissenting opinion in *In Re Jimmy M.W.*, members of this Court believed lifetime registration for misdemeanants could implicate due process. *In re Jimmy M.W.*, No. 13-0762, 2014 WL 2404298, at *3 (W. Va. May 30, 2014) (Ketchum, J., dissenting, joined by J. Davis). In this appeal, Petitioner asserts that the lifetime registration is punitive and therefore excessive under the Eight Amendment and/or West Virginia Constitution Article III Section 5. (Pet’r Supp. App. at 30). **He has not raised a due process claim.**

¹⁶ While compliance with the West Virginia Sex Offender Act’s registration regulations may be onerous (as Petitioner alleges), the Supreme Court of New Jersey’s discussion of registration laws is

When Petitioner was 20, he had sex with a 14 year old girl. While initially charged with a felony sexual offense, he pled guilty to third degree sexual abuse. (See Pet'r Brief at 1-4). The Legislature, in enacting this Act, sought to "provide citizens with information about convicted sexual offenders. This is an issue of great concern to all the citizens of this State. While one may argue that the Legislature could improve upon this statute, unless we find it to be violative of the constitution, we must accept it as it is." *Haislop*, 215 W. Va. at 97, 593 S.E.2d at 848.

VII. CONCLUSION

For these reasons, Respondent, the State of West Virginia, respectfully requests this Court affirm the lower court's ruling and deny Petitioner's requested relief entirely.

Respectfully submitted,

STATE OF WEST VIRGINIA\
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



GORDON L. MOWEN, II
ASSISTANT ATTORNEY GENERAL

W.Va. State Bar #: 12277

812 Quarrier Street, 6th Floor

Charleston, WV 25301

(304) 558-5830

Email: Gordon.L.Mowen@wvago.gov

Counsel for Respondent

insightful. In upholding one of the nation's first registry requirements, the court recognized that to find that a Legislature cannot criminalize an individual's failure to maintain and update his information on a sex offender registry "[would be] to find that society is unable to protect itself from sexual predators by adopting the simple remedy of informing the public of their presence. That the remedy has a potentially severe effect arises from no fault of government, or of society, but rather from the nature of the remedy and the problem; it is an unavoidable consequence of the compelling necessity to design a remedy." *Doe v. Poritz*, 142 N.J. 1, 109-10, 662 A.2d 367, 422 (1995).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0958

STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

PATRICK SHAWN COLLINS,

Defendant below, Petitioner

CERTIFICATE OF SERVICE

I, Gordon L. Mowen, II, Assistant Attorney General and counsel for the Respondent, hereby certify that I have served a true and accurate copy of "RESPONDENT'S SUPPLEMENTAL BRIEF" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this day, September ^{8th}, 2016, addressed as follows:

George Castelle
Senior Counsel
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330


GORDON L. MOWEN, II (WVSB #12277)