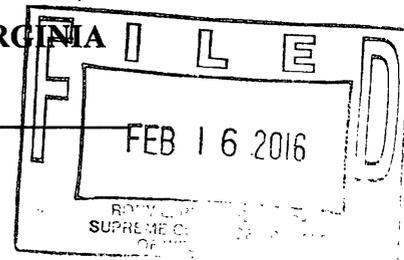


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 15-0958

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STATE OF WEST VIRGINIA,

*Plaintiff below, Respondent,*

v.

PATRICK SHAWN COLLINS

*Defendant below, Petitioner.*

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SUMMARY RESPONSE

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**SUMMARY RESPONSE**

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The State of West Virginia, by counsel, Gordon L. Mowen, II, Assistant Attorney General, hereby files this summary response to Petitioner Patrick Shawn Collins' ("Petitioner") brief. Succinctly, Petitioner was sentenced by the Gilmer County Circuit Court to serve ten to 25 years after he failed—three times—to register as a sex offender pursuant to W. Va. Code § 15-12-3. On appeal, Petitioner asserts the lower court abused its discretion in denying his Rule 35(b) motion to reduce his sentence. Despite this, and as further discussed herein, Petitioner's sentence is well within the relevant statutory guidelines and Petitioner has failed to establish the Circuit Court acted improperly or otherwise abused its discretion in this matter. Accordingly, the Gilmer County Circuit Court's Order should be affirmed.

**I. STATEMENT OF THE CASE**

In 2006, Petitioner, then twenty years old, had sex with a fourteen year old girl and was convicted of third degree sexual abuse. (*See* Appendix, hereinafter "App.," at 1; *see also* Pet.

Brief at 1, ¶ 1). Petitioner served ninety days in jail and, upon release, was required to register as a sex offender. (*See* App. at 1). Petitioner did not properly register and, as a result, he was twice convicted of “failure to register” in 2007 and 2008 pursuant to W. Va. Code § 15-12-8(c). (Supplemental Appendix, hereinafter “Supp. App.,” at 18-25; 26-27; *see also* Pet. Brief at 1, ¶ 2). Consequently, Petitioner was sentenced to two terms of one to five years with the sentences probated contingent upon his completing a rehabilitative program at the Anthony Center and subsequently registering as a sex offender. (Pet. Brief at 1, ¶ 3). While Petitioner completed the program and was released on probation, he again—and for the third time—failed to register as a sex offender. (Supp. App. at 1-17). Accordingly, his probation was revoked on June 1, 2012, by the Gilmer County Circuit Court and he was ordered to serve a term of ten to 25 years. (App. at 3-5; *see also* Supp. App. at 26-30).

Petitioner subsequently filed a Rule 35(b) motion with the Gilmer County Circuit Court and requested his sentence be reduced to either a ten or 12 year “flat” sentence. (App. at 14). After duly considering Petitioner’s motion, the Court denied it on September 9, 2015. (App. at 1). Thereafter, Petitioner filed the instant appeal. He continues to demand a reduction in his sentence—indeed he now seeks an order from this Court overturning the lower court’s denial of his Rule 35(b) motion *and* requiring the Circuit Court to immediately release him with instructions to attend college and address his alcohol problem. (Pet. Brief at 6). For the reasons discussed herein, Petitioner has failed to establish the lower court abused its discretion in denying his 35(b) motion and his appeal must be denied.

## II. STANDARD OF REVIEW

On appeal, a circuit court’s ruling with respect to a Rule 35 motion is reviewed under an abuse of discretion standard, while the underlying facts are reviewed under a clearly erroneous

standard. *State v. Head*, 198 W. Va. 298, 299, 480 S.E.2d 507, 508 (1996). Questions of law or statutory interpretation are reviewed *de novo*. *Id.* at 299, 480 S.E.2d at 508. This Court has previously explained that a denial of a Rule 35 motion is generally not reviewable “absent an abuse of discretion,” because a trial court is entitled to significant deference in matters of sentencing. *Id.* at 301, 480 S.E.2d at 510; *see also* Syl. Pt. 2, *State v. Eilola*, 226 W. Va. 698, 704 S.E.2d 698 (2010) (citing Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)). In fact, 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.” *State v. Georgius*, 225 W. Va. 716, 722, 696 S.E.2d 18, 24 (2010) (quoting *State v. Sugg*, 193 W.Va. 388, 406, 456 S.E.2d 469, 487 (1995)).

### III. ARGUMENT

The entire basis of Petitioner’s appeal is simply that Petitioner believes his sentence of ten to 25 years is unfair. Petitioner “advances” his position by arguing a reduction in his sentence is necessary because he (1) has not committed a sex crime since he last committed a sex crime; (2) promises not to commit a new sex crime; and (3) has a friend on the outside and some ambiguous plans to attend college should he be released from prison.<sup>1</sup> (Pet. Brief at 3-4). Yet, even if true, such arguments fail to establish that the Circuit Court abused its discretion in denying his Rule 35(b) motion and his appeal must be denied.

As a threshold matter, 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

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<sup>1</sup> Petitioner also fails to mention how long he has known this friend or how this friend may provide support.

defendant, although sentenced in conformity with applicable laws, nevertheless presents some compelling *non-legal* justification that warrants mercy.”) *abrogated on other grounds Wall v. Kholi*, 562 U.S. 545 (2011). Generally, a circuit court’s sentencing decision will not be overturned where (1) the sentence imposed by the trial court is within statutory limits; and (2) the sentence was not based upon an impermissible factor(s). Syl. Pt. 10, *State v. Payne*, 225 W. Va. 602, 605, 694 S.E.2d 935, 938 (2010) (citing Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982)); *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.”).

Without dispute, Petitioner’s ten to 25 year sentence is valid: 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 ten nor more than 25 years. (App. at 4). Accordingly, there is nothing improper with Petitioner’s sentence; it conforms to the statutory guidelines set forth in W. Va. Code § 15-12-8.<sup>2</sup>

Petitioner has failed to establish—or even argue—that the Circuit Court engaged in any impropriety or otherwise considered any improper factor in determining his sentence. Further, there is nothing in the record tending to show that the Court abused its discretion in denying

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<sup>2</sup> Notably, Petitioner requested the lower court modify his sentence to a 10 or 12 year “flat” sentence. Even if the Court wanted to grant such relief (and it clearly did not), such a sentence would constitute merely a recommendation to the Board of Probation, 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).

Petitioner’s 35(b) motion. For these reasons alone his appeal must fail. *See, e.g., Georgius*, 225 W.Va. at 722, 696 S.E.2d at 24. Petitioner instead baldly asserts—without supporting citation to the record—that the Court abused its discretion in not reducing his sentence. Despite this, the record plainly shows the Court underwent an appropriate review of this matter before ruling on his motion. It considered (1) Petitioner’s rationale and basis for seeking a reduction in his sentence; (2) the reasons set forth at the time of Petitioner’s sentencing; and (3) the sentence originally imposed upon Petitioner. (App. at 1). After a review of these items, the Court determined that it was appropriate to deny Petitioner’s motion. (*Id.*). These considerations cut entirely against Petitioner’s unsupported position that the Court abused its discretion.

Moreover, Petitioner’s entire brief is predicated upon “the dictates of *State v. Arbaugh*, 215 W. Va. 132, 595 S.E.2d 289 (2004).” (Pet. Brief at 2). He argues that, under *Arbaugh*, the Court abused its discretion in denying his 35(b) motion because he has a viable plan for release; has not committed any new sexual offenses; and does not intend on being a sexual threat to anyone in the future. (Pet. at 4). Petitioner points to these factors as controlling under the guise that *Arbaugh* somehow changed the legal landscape surrounding Rule 35(b) motions. (*See id.* at 1, 4). Yet, as this Court has previously explained, *Arbaugh* “was confined to the very specific facts of that case” and is not to be broadly applied. *Georgius*, 225 W. Va. at 721, 696 S.E.2d at 23. In fact, *Arbaugh* “did not create any new standards, guidelines, or requirements to be followed by the circuit courts of this State[.]” *Id.* at 721, 696 S.E.2d at 23; *see also State v. Williams*, No. 11-0939, 2012 WL 3079157, at \*2 (W. Va. May 29, 2012) (noting the same).<sup>3</sup> For

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<sup>3</sup> Consider, for instance, *State v. Georgius*, wherein the petitioner appealed a circuit court’s denial of his motion for a reduction in sentence under Rule 35(b). 225 W. Va. 716, 696 S.E.2d 18 (2010). Upon review, this Court noted that the petitioner failed to provide a supporting legal argument, aside from relying upon *Arbaugh*, or cite to new evidence to support his contention that the lower court abused its discretion in denying his motion. Absent a showing that the circuit court acted improperly, the Court explained that the circuit court’s decision must be upheld. *Id.* at 722, 696 S.E.2d at 24.

these reasons, Petitioner's heavy reliance upon *Arbaugh* does nothing to advance his position and he is still required to establish that the Circuit Court abused its discretion by considering impermissible factors in effecting his sentencing. As discussed, Petitioner has failed to make such a showing.

Summarily, the law is clear: A sentence must conform to statutory and constitutional norms and may not be based upon impermissible factors. *See State v. Broughton*, 196 W. Va. 281, 291, 470 S.E.2d 413, 423 (1996). Here, Petitioner was sentenced to serve ten to 25 years in full compliance with W. Va. Code § 15-12-8(c). The Court considered Petitioner's 35(b) motion and also considered the previous sentencing hearing and relevant record. (*See App. at. 3-4*). After this review, the Court ruled that justice was best served by denying Petitioner's request for a reduction in his sentence. It is clear that the lower court did not abuse its discretion in making this determination and Petitioner has failed to establish otherwise.

#### IV. CONCLUSION

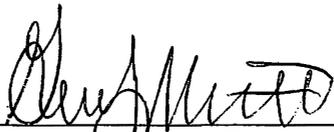
The Respondent respectfully requests this Honorable Court affirm the order of the Circuit Court of Gilmer County denying Petitioner's Rule 35(b) motion to reduce his sentence.

Respectfully Submitted,

STATE OF WEST VIRGINIA  
*Plaintiff Below, Respondent*

By counsel,

PATRICK MORRISEY  
ATTORNEY GENERAL



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*Counsel for Respondent*

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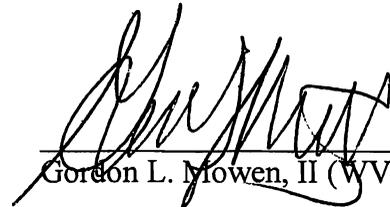
PATRICK SHAWN COLLINS

*Defendant below, Petitioner.*

**CERTIFICATE OF SERVICE**

I, Gordon L. Mowen, II, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the foregoing *Summary Response* upon the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 16<sup>th</sup> day of February, 2016, addressed as follows:

Patrick Shawn Collins  
Huttonsville Correctional Center  
P.O. Box 1  
Huttonsville, WV 26273

  
\_\_\_\_\_  
Gordon L. Mowen, II (WVSB No. 12277)