IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

N0. 21-0796

STATE OF WEST VIRGINIA,

Respondent,

v.

Appeal from the final order of the Circuit Court of Nicholas County (20-F-56)

CHRISTOPHER MCDONALD,

Petitioner.

RESPONDENT'S BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

COURTNEY M. PLANTÉ
ASSISTANT ATTORNEY GENERAL
W.Va. State Bar #: 12798
Office of the Attorney General – Appellate Division
1900 Kanawha Blvd. East
State Capitol
Building 6, Suite 406
Charleston, WV 25305
(304) 558-5830
Email: Courtney.m.plante@wvago.gov
Counsel for Respondent

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

I. Introduction 1

II. Assignments of Error 1

III. Statement of the Case 1

A. Procedural History 1

B. The Details of the Robbery 3

IV. Statement Regarding Oral Argument 4

V. Summary of Argument 5

VI. Argument 6

A. Standard of Review 6

B. Petitioner's sentence should be reviewed by this Court 6

C. Petitioner's sentence is not constitutionally disproportionate in light of the violent nature of his crime, which he effectuated by threatening to use a weapon 7

D. Petitioner's sentence is not disparate as compared to those received by his co-defendants because he pled guilty to a different, more serious crime 16

E. This Court should not hear Petitioner's Rule 35 Argument 17

F. The circuit court did not err in denying Petitioner's Rule 35 Motion 18

VII. Conclusion 19

TABLE OF AUTHORITIES

Cases **Page**

Commonwealth v. Jackson,
344 N.E.2d 166 (Mass. 1976) 9

Crawford v. Ballard,
No. 11-0783, 2011 WL 8193068 (W. Va. Nov. 28, 2011) 10

Enmund v. Florida,
458 U.S. 782 (1982) 13

Garrett v. State,
486 S.W.2d 272 (Mo. 1972) 5

Jeffrey v. Mutter,
No. 17-0792, 2018 WL 4944959 (W. Va. Supreme Court, Oct. 12, 2018)(memorandum decision) 8

State v. Adams,
211 W. Va. 231, 565 S.E.2d 353 (2002) 7, 9, 10, 12, 13, 14, 15

State v. Boag,
453 P.2d 508 (Ariz. 1969) 15

State v. Booth,
224 W. Va. 307, 685 S.E.2d 701 (2009) 15

State v. Brown,
177 W. Va. 633, 355 S.E.2d 614 (1987) 12

State v. Chester,
No. 18-0140, 2019 WL 1224684 (W. Va. Supreme Court, Mar. 15, 2019)(memorandum decision) 15

State v. Cooper,
172 W. Va. 266, 304 S.E.2d 851 (1983) 5, 8, 9

State v. Dawson,
No. 17-0587, 2018 WL 2192989 (W. Va. Supreme Court, May 14, 2018)(memorandum decision) 18

State v. Dent,
No. 18-0971, 2019 WL 5092951 (W. Va. Supreme court, Oct. 11, 2019)(memorandum decision) 15

State v. England,
180 W.Va. 342, 376 S.E.2d 548 (1988) 12

State v. Glover,
177 W. Va. 650, 355 S.E.2d 631 (1987) 13

State v. Hays,
185 W. Va. 664, 408 S.E.2d 614 (1991) 6

State v. Head,
198 W. Va. 298, 480 S.E.2d 507 (1996) 6, 18

State v. Hill,
No. 16-0138, 2016 WL 6678997 (W. Va. Supreme Court, Nov. 14, 2016)(memorandum decision) 8, 15

State v. King,
205 W. Va. 422, 518 S.E.2d 663 (1999) 10, 12

State v. Lucas,
201 W. Va. 271, 496 S.E.2d 221 (1997) 6, 7

State v. Marcum,
238 W. Va. 26, 792 S.E.2d 37 (2016) 18

State v. Massey,
178 W. Va. 427, 359 S.E.2d 865 (1987) 11

State v. Phillips,
199 W. Va. 507, 485 S.E.2d 676 (1997) 10

State v. Pruitt,
No. 17-0802, 2018 WL 4944559 (W. Va. Supreme Court, Oct. 12, 2018)(memorandum decision) 15

State v. Romero,
No. 2004-UP-461, 2004 WL 6331820 (S.C. Ct. App. Sept. 15, 2004) 9

State v. Ross,
184 W. Va. 579, 402 S.E.2d 248 (1990) 12

State v. Sugg,
193 W. Va. 388, 456 S.E.2d 469 (1995) 6

State v. Tex B.S.,
236 W. Va. 261, 778 S.E.2d 710 (2015) 6

State v. Tyler,
211 W. Va. 246, 565 S.E.2d 368 (2002) 9, 10, 15

State v. Vance,
164 W. Va. 216, 262 S.E.2d 423 (1980) 8

Wanstreet v. Bordenkircher,
166 W. Va. 523, 276 S.E.2d 205 (1981) 8, 9, 13

Rules

W.Va. R. App. P. 5(a) 17

W.Va. R. App. P. 18(a)(3) and (4) 4

W.Va. R. App. P. 21 5

W. Va. R. Crim. P. 35 17

W. Va. R. Crim. P. 35(b) 18

Statutes

W. Va. Code § 61-2-2 17

W. Va. Code § 61-2-12 ..... 5, 7, 14

W. Va. Code § 61-2-12(a) 7

W. Va. Code § 61-2-14a 17

W. Va. Code § 61-8B-3(c) 17

W. Va. Code, § 61-10-31 17

Other Authorities

Hon. Richard Lowell Nygaard, *On the Philosophy of Sentencing: Or, Why Punish?* 11

W. Va. Const. Art. III, § 5 ..... 6, 7

I. INTRODUCTION

The State of West Virginia ("State"), by counsel, Courtney M. Planté, Assistant Attorney General, now responds to the brief on appeal filed by Christopher McDonald ("Petitioner") following his sentence of eighty years in the penitentiary for his conviction of first degree robbery. Because Petitioner has failed to demonstrate reversible error, the judgment of the circuit court should be affirmed.

II. ASSIGNMENTS OF ERROR

Petitioner raises two assignments of error in his brief. First, that the circuit court erred by sentencing Petitioner to a disproportionate sentence of eighty years of imprisonment, and, second, that the circuit court erred in not giving particularized findings to justify the sentence. Pet'r's Br. 3.

III. STATEMENT OF THE CASE

A. Procedural History

This in an appeal from a final order of the Circuit Court of Nicholas County. The indictment that was returned charged Petitioner with Conspiracy to Commit Robbery and Robbery in the First Degree. A.R. 65. Petitioner was arraigned on July 6, 2020. A.R. 7. On August 27, 2020, Petitioner entered into a plea agreement with the State, wherein Petitioner agreed to plead guilty by giving a factual basis, to count two of the indictment, first degree robbery, for which the penalty is not less than ten years of incarceration. A.R. 60. Petitioner also agreed to pay restitution. A.R. 60. In exchange, the State agreed to dismiss count one of the indictment, the conspiracy count. A.R. 60. At the plea hearing on August 21, 2020, the State proffered the evidence they would have presented, and explained to the court that both co-defendants had entered guilty pleas.

A.R. 120.[1] The court also asked Petitioner to explain why he was guilty of first-degree robbery. A.R. 128. Petitioner told the court that he wanted to plead guilty. A.R. 128. The circuit court then conducted a colloquy and made several findings of fact and conclusions of law prior to accepting the plea, including that Petitioner, inter alia: understood the nature and meaning of the charges, had been advised by counsel, *understood the plea agreement was not binding on the court with regard to the imposition of sentence, and understood the possible sentence and that sentencing was the court's sole decision.* A.R. 66-73 (emphasis added). Petitioner waived his right to a Pre-Sentence Investigation Report at the plea hearing. A.R. 133. On December 7, 2020, at the sentencing hearing, Petitioner's then-counsel objected on the record to the lack of a report. A.R. 142. However, when asked by the circuit court, Petitioner reiterated that he did not want to wait for a Pre-Sentence Investigation Report and instead wanted to proceed with sentencing. A.R. 142. Petitioner's counsel requested that the court sentence Petitioner to the minimum sentence allowed by law for his crime, confinement for ten years. A.R. 78. Counsel for the State requested that the court impose the sentence recommended by the Nicholas County Probation Department, eighty years. A.R. 69, 78. By order entered on December 7, 2020, the circuit court sentenced Petitioner to eighty years of confinement in the State penitentiary. A.R. 79.[2] Petitioner filed a Motion to Reconsider Sentence on March 26, 2021. A.R. 81-85. The lower court entered an Order Denying Petitioner's Motion to Reconsider on March 27, 2021. A.R. 86.

---

[1] Derrick Pease and Elizabeth Carraghan both pled guilty to one count of conspiracy to commit robbery. In exchange for their plea they were going to testify against Petitioner. They each were sentenced to an indefinite term of one to five years of incarceration. A.R. 120.

[2] The circuit court originally sentenced Petitioner on December 7, 2020. Subsequently Petitioner filed a handwritten appeal, his defense counsel withdrew from the case, and Petitioner filed a pro se habeas appeal. On September 24, 2021, because Petitioner did not have counsel when he filed his appeal, the circuit court ordered that Petitioner be resentenced to the same eighty-year term and denied the habeas appeal. The second sentence has an effective date of September 22, 2021 and is the subject of Petitioner's appeal.

B. The Details of the Robbery

Petitioner, assisted by two co-defendants, committed first degree robbery on February 4, 2020 (A.R. 5, 7, 30, 32, 38-40) at a Subway restaurant inside a Little General gas station in Birch River, West Virginia. A.R. 32-33, 38. His two co-defendants were Derrick Pease and Elizabeth Carraghan. A.R. 15. The arresting officer, who also participated in the investigation, Trooper First Class G.K. Davis, wrote a police report where he noted that Petitioner used a handgun (A.R. 35, 47) and "did brandish" it (A.R. 38) to the cashier, Vanessa McGlothlin (A.R. 33, 38, 47) to facilitate his theft of $183 (A.R. 36) from Subway.

Ms. McGlothlin informed the investigating officers that she was in the back of the store when Petitioner came in. A.R. 38. He was standing at the counter and was wearing a black hooded jacket, dark pants, and glasses. A.R. 38. Petitioner had the hood of his jacket pulled up around his head. A.R. 38. As Ms. McGlothlin approached the cash register she asked Petitioner what he wanted to eat. A.R. 38. Petitioner declined to buy any food and instead told Ms. McGlothlin to "give [him] the money out of the cash register." A.R. 38. He then pulled a pistol with a black rubber grip out of his waistline and showed it to her. A.R. 38. Ms. McGlothlin opened the cash register, pulled out the money inside, and handed it to Petitioner. A.R. 38, 47. Petitioner ran out of the store and drove off with his co-defendants in a silver SUV "at a high rate of speed." A.R. 39. Petitioner was in the back seat, Derrick Pease was the driver, and Elizabeth Carraghan was the vehicle owner and front seat passenger. A.R. 38-39. TFC Davis, assisted by several police units, began stopping vehicles in the area in an attempt to find the three robbers. A.R. 38. He was informed by another officer, Sheriff's Deputy Groves, that Deputy Groves had stopped a silver SUV that had three occupants inside. A.R. 38-39. The "rear passenger," now known to be Petitioner, told the officer that "their GPS had sent them" onto that particular road and that while

driving over the gravel they got a flat tire. A.R. 39. Deputy Groves observed that the vehicle did have a "donut spare" in place of one of its tires. A.R. 38. He noticed that the subjects were not acting "suspicious or excited." A.R. 38. Deputy Groves, believing that Petitioner and his associates were lost with no connection to the armed robbery, let them go. A.R. 39. Petitioner and his co-defendants fled from the scene of the crime in West Virginia to Arkansas, where all three robbers were apprehended on February 5, 2020. A.R. 33-34.

The investigating officers obtained surveillance footage that showed Petitioner entering Subway and then running out. A.R. 39. The video later showed the vehicle speed toward an intersection and continue to speed through the four-way stop as the vehicle approached the highway. A.R. 39. The officers further learned that Petitioner and Derrick Pease were both wanted in Pennsylvania for another armed robbery they committed the night before they robbed Subway. A.R. 40. A background check revealed Petitioner pled guilty in 2014 to Attempted Second Degree Assault with Intent to Cause Physical Injury with a Weapon or Instrument in New York. A.R. 28.

Subsequent to their arrest, Derrick Pease gave a recorded statement and agreed to testify against Petitioner at trial as a part of a plea agreement. A.R. 14, 58. The conditions of that deal were that Defendant Pease would plead guilty to Conspiracy to Commit Robbery, for which he would receive either confinement of not less than one and no more than five years, or a fine of not more than $10,000, or both. A.R. 60. The State would dismiss Defendant Pease's first degree robbery charge. A.R. 58.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a)(3) and (4) of the West Virginia Rules of Appellate Procedure, oral argument is unnecessary because the facts and legal arguments are adequately presented in the

briefs and the record in this case. This appeal is appropriate for resolution by memorandum decision in accordance with Rule 21 of the West Virginia Rules of Appellate Procedure.

V. SUMMARY OF ARGUMENT

The circuit court did not abuse its discretion when it sentenced Petitioner to eighty years imprisonment for first degree robbery, pursuant to West Virginia Code § 61-2-12. As explained in further detail below, the test to determine the proportionality of a sentence is two-pronged. The first test is subjective and questions whether the sentence is such a severe penalty that it is morally repugnant to this Court. The second, objective test necessitates that the Court consider the nature of the offense, the legislature's purpose in punishing the crime, a comparison of the punishment with that in other jurisdictions, and a comparison with other offenses in West Virginia. As applied to this case, Petitioner has failed to meet the threshold of demonstrating that his eighty-year sentence "shocks the conscience of the court and society." *State v. Cooper*, Syl. Pt. 5, 172 W. Va. 266, 304 S.E.2d 851, 852 (1983). The Petitioner has also failed to meet any of the criteria under the objective test. This Court has upheld robbery sentences similar to the eighty years imposed here under the objective test. Because the sentence handed down does not violate the subjective or the objective tests, the sentence is not unconstitutional. The case law is clear that lengthy sentences for robbery are common and within the discretion of the lower courts. The circuit court did not abuse its discretion; therefore, the sentence should stand.

Finally, the circuit court did not abuse its broad discretion in denying the Petitioner's request for a reduced sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure. The Petitioner's failure to demonstrate an abuse of discretion is fatal to his claim. Consequently, the decision of the circuit court to deny the Petitioner relief under Rule 35(b) should be affirmed.

VI. ARGUMENT

A. Standard of Review

Petitioner raises two claims, each of which require a different standard of review. As to Petitioner's first claim that his sentence violates the proportionality principles as set forth in Article III, Section 5 of the West Virginia Constitution, this Court "reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997).

As to Petitioner's second claim that the circuit court erred in denying his Rule 35(b) motion, this Court has held:

> In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes are subject to a de novo review.

Syl. Pt. 1, *State v. Tex B.S.*, 236 W. Va. 261, 778 S.E.2d 710 (2015), citing Syl. Pt. 1, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996).

B. Petitioner's sentence should not be reviewed by this Court.

Because Petitioner's sentence was within the statutory limits and the circuit court did not consider an impermissible factor, this Court should not review Petitioner's sentence. It is well-established that "sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syllabus Point 9, *State v. Hays*, 185 W. Va. 664, 408 S.E.2d 614 (1991); *see also State v. Sugg*, 193 W. Va. 388, 406, 456 S.E.2d 469, 487 (1995) (holding that "we will not disturb a sentence following a criminal conviction if it falls within the range of what is permitted under the statute.").

Petitioner does not argue that his sentence was outside of the statutory limits or that the circuit court considered an impermissible factor. There is no statutory violation as the eighty-year sentence falls squarely within permissible statutory limit. W. Va. Code § 61-2-12. West Virginia Code § 61-2-12(a) enumerates a mandatory minimum of ten years imprisonment for persons who commit first degree robbery. Eighty years is unambiguously more than ten years, thus the sentence is within the statutory limit. Additionally, there were no discriminatory grounds considered by the court.

Rather, Petitioner merely disagrees with the circuit court's decision, as it "shocks" his own conscience. The circuit court did not err when sentencing Petitioner to eighty years confinement because it apparently found that the aggravating factors: Petitioner's role in the armed robbery, Petitioner's prior drug use, the violent nature of robbery, and Petitioner's presentment of a firearm, outweighed the mitigating factors. A.R. 147. Should the Court decide to review the sentence nonetheless, Respondent will address the proportionality of the sentence below.

C. Petitioner's sentence is not constitutionally disproportionate in light of the violent nature of his crime, which he effectuated by threatening to use a weapon.

Even if this Court reviews Petitioner's claim on the merits, the circuit court did not abuse its discretion when sentencing the Petitioner. This Court reviews sentencing orders "under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *Lucas*, 201 W. Va. 271, 496 S.E.2d 221; *see also* Syl. Pt. 1, in part, *Adams*, 211 W. Va. 231, 565 S.E.2d 353. The Petitioner contends his eighty-year robbery sentence is constitutionally disproportionate. Pet'r Br. 5. Because the Petitioner's sentence is not constitutionally disproportionate, this Court should affirm the Petitioner's robbery sentence.

"Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has

an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offence.'" Syl. Pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980). "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." Syl. Pt. 4, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). Robbery does not contain an upper sentencing limit and, thus, robbery is one of the offenses that is cognizable in a disproportionality challenge. *See State v. Hill*, No. 16-0138, 2016 WL 6678997, at *1 (W. Va. Supreme Court, Nov. 14, 2016) (memorandum decision). In the present case, though, the Petitioner has failed to show he is entitled to any relief under a disproportionality challenge.

West Virginia employs both a subjective and an objective test to determine if a given sentence is constitutionally disproportionate. *See Jeffrey v. Mutter*, No. 17-0792, 2018 WL 4944959, at *5 (W. Va. Supreme Court, Oct. 12, 2018) (memorandum decision) ("Two tests are employed in determining whether a sentence is constitutionally disproportionate: a subjective test and an objective test.").

Under the subjective test,

> [p]unishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.

Syl. Pt. 5, *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983).

If a sentences passes the subjective test, an objective test is then employed:

> [i]n 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.

Syl. Pt. 5, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205. The Petitioner fails to meet either the subjective or objective disproportionality tests and, as such, his sentence should be affirmed.

1. *The subjective test*

"Under the subjective test, we must determine whether the sentence imposed . . . shocks the conscience." *State v. Adams*, 211 W. Va. 231, 233, 565 S.E.2d 353, 355 (2002) (per curiam). In invoking the "shocks the conscience" test, the Petitioner undertakes a heavy burden. *See, e.g.*, *Commonwealth v. Jackson*, 344 N.E.2d 166, 170 (Mass. 1976); *State v. Romero,* No. 2004-UP-461, 2004 WL 6331820, at *1 (S.C. Ct. App. Sept. 15, 2004). *Cf. State v. Tyler*, 211 W. Va. 246, 251, 565 S.E.2d 368, 373 (2002) (per curiam) (quoting *People v. Weddle*, 2 Cal.Rptr.2d 714, 718 (Ct. App. 1991)) ("It is indeed an 'exquisite rarity' in Eighth Amendment jurisprudence where a sentence shocks the conscience and offends fundamental notions of human dignity."). The instant case does not present one of those exquisite rarities that shocks the conscience so the judgment of the circuit court should be affirmed.

"In making the determination of whether a sentence shocks the conscience, we consider all of the circumstances surrounding the offense." *Adams*, 211 W. Va. at 233, 565 S.E.2d at 355. A sentence is subjectively unreasonable only when, upon consideration of these factors, this Court "cannot conceive of any rational argument that would justify th[e] sentence." *Cooper*, 172 W. Va. at 274, 304 S.E.2d at 859. The surrounding circumstances justify Petitioner's sentence. The Petitioner planned to execute a robbery, and he carried out that plan. He took active steps to take a gun into a Subway restaurant, show his firearm to the cashier, and demand that she give him the money in the register under the threat of being shot. A.R. 93. Petitioner puts great stock into the fact that he did not shoot the cashier, as though that makes his crime less offensive. Pet'rs Br. 5,

15. It does not take away from the threat of violence inherent in the act of brandishing his firearm to the cashier. *See* Syl. Pt. 2, in part, *State v. Phillips*, 199 W. Va. 507, 485 S.E.2d 676 (1997) ("'The threat of the use of a firearm or other deadly weapon constitutes robbery by putting in fear." Syllabus point 1, State v. Young, 134 W.Va. 771, 61 S.E.2d 734 (1950).") Given the extreme, inherent danger that accompanies the commission of a robbery, the legislature has seen fit to grant "the circuit courts . . . broad discretion in sentencing [robbery] defendants," *State v. King*, 205 W. Va. 422, 428, 518 S.E.2d 663, 669 (1999), even when the victim or victims in a particular case suffered no physical harm, *see Crawford v. Ballard*, No. 11-0783, 2011 WL 8193068, at * 4 (W. Va. Nov. 28, 2011) (explaining that although "there was no physical injury to the victims in this case, given the inherent potential for harm in an aggravated robbery, the legislature has granted trial courts broad discretion in sentencing defendants convicted of the crime of first degree robbery."). *See also Adams,* 211 W. Va. at 234, 565 S.E.2d at 356 (2002) ("Although [defendant] correctly argues that there was no injury to the victim in this case, this fact does not diminish the inherent potential for injury or even death that can occur in an aggravated robbery crime."); *cf State v. Tyler*, 211 W. Va. 246, 251–52, 565 S.E.2d 368, 373–74 (2002) ("Even where victims have not been harmed during armed robberies, this Court has considered the emotional damage suffered by the victim. This Court has also repeatedly explained that even where no actual injury occurred, use of a deadly weapon creates '[t]he potential for bodily harm or loss of life . . .'") (internal citations omitted) (quoting *State v. England*, 180 W.Va. 342, 356, 376 S.E.2d 548, 562 (1988)).

Petitioner argues that there is nothing in the record to indicate that the cashier "experienced any fear above and beyond what would normally be felt when such a crime is perpetuated," but this line of reasoning does not negate the significant threat to one's safety inherent in being the

victim of a robbery in the first place, whether the gun was real or not. "We have specifically held that the 'threat . . . of firearms,' as the phrase is used in W. Va. Code, 61-2-12, does not require the actual use or presentment of a firearm. It requires only such action by the defendant as would reasonably lead the victim to believe he had possession of a firearm." *State v. Massey*, 178 W. Va. 427, 432, 359 S.E.2d 865, 870 (1987). The fact that Ms. McGlothlin, thankfully, was not hurt has no bearing on the threat that was presented to her safety. Moreover, there is no indication that the she did *not* believe Petitioner's threat or that she knew that the gun was not real. In fact, when Petitioner showed her the firearm, she complied with his demand by giving him the money. A.R. 38. Petitioner made a threat to Ms. McGlothlin that he would use a deadly weapon on her if she did not give him the cash from the register. That is demonstrative of the high potential for violence and loss of life that an armed robbery causes. Petitioner caused significant risks to human life. He acknowledged that when he pled guilty to first degree robbery. Courts are given broad discretion at sentencing for cases just as these, where the Petitioner disregarded the life of Ms. McGlothlin by demanding that she give him money and then brandishing a weapon to her when she hesitated. Petitioner compelled Ms. McGlothlin to give him the money from the register out of fear for her life.

As explained above, Petitioner pled guilty, knowingly and voluntarily, to first degree robbery. A.R. 60, 78. He knew there was a mandatory minimum of ten years. A.R. 118. The circuit court put on the record that Petitioner used illicit drugs and that he pled guilty to the robbery, a serious and violent offense. A.R. 147. The court also noted that the seriousness of the crime was not mitigated by what kind of gun it was, but by the perceived threat to the life of the victim of such crime. A.R. 119, 147. Petitioner did not only intentionally commit a violent crime upon Ms. McGlothlin, causing her to fear for her safety and her life. He then sped off in the getaway

car, further putting other people at risk. A.R. 37-40, 47. He perpetrated the same offense just the day before in Pennsylvania. A.R. 40. During the plea hearing the State noted that Petitioner had been on a "whirlwind of crime" that spanned several states. A.R. 146. Petitioner committed and pled to a second degree assault just four years prior. A.R. 28-29. He has developed a pattern of committing inherently violent crimes that pose a danger to other people. When the nature of criminal conduct is severe, so too is the accompanying penalty. Given that the key purposes of a court's imposition of a criminal sentence are to prevent offender recidivism, deter others from committing similar offenses, and protect the public from those that commit dangerous crimes, there is no question that the court's sentencing decision was subjectively reasonable. *See generally, e.g.*, Hon. Richard Lowell Nygaard, *On the Philosophy of Sentencing: Or, Why Punish?*, 5 Widener J. Pub.L. 237 (1996). Further, this conclusion is consistent with the majority of this Court's jurisprudence which has frequently upheld the constitutionality of robbery sentences similar to (and even much longer than) the eighty-year sentence imposed for the robbery conviction in this case. *See e.g.*, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988) (life sentence for armed robbery of a gas station was constitutionally permissible); *State v. Ross*, 184 W. Va. 579, 581-82, 402 S.E.2d 248, 250-51 (1990) (per curiam) (rejecting proportionality challenge to 100-year sentence for attempted aggravated robbery); *King*, 205 W. Va. 422, 428 518 S.E.2d 663, 669 (1999) (84-year sentence for knifepoint robbery "do[es] not shock the conscience of the Court and society"); *State v. Brown*, 177 W. Va. 633, 642, 355 S.E.2d 614, 623 (1987) (60-year sentence for robbery during which defendant brandished a knife was not constitutionally disproportionate).

2. *Objective Test*

If the sentence does not shock the conscience under the subjective test, the objective test is then employed. Under the objective test, this Court must consider (a) the nature of the offense, (b) the legislative purpose behind the punishment, (c) a comparison of the punishment with what would be inflicted in other jurisdictions, and (d) a comparison with other offenses within the same jurisdiction. Syl. Pt. 5, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205. Applying these factors demonstrates that the Petitioner's eighty-year robbery sentence is not disproportionate to his offense.

a. The nature of the offense

The Petitioner pled guilty to first degree robbery. A.R. 130. "We have no doubt that robbery is a serious crime deserving serious punishment." *Enmund v. Florida*, 458 U.S. 782, 797 (1982). "Robbery has always been regarded as a crime of the gravest character." *State v. Glover*, 177 W. Va. 650, 659, 355 S.E.2d 631, 640 (1987). "We have previously observed that '[a]ggravated robbery in West Virginia has been recognized as a crime that involves a high potentiality for violence and injury to the victim involved.'" *Adams*, 211 W. Va. at 234, 565 S.E.2d at 356 (quoting *State v. Ross*, 184 W.Va. 579, 582, 402 S.E.2d 248, 251 (1990) (per curiam)). Petitioner demanded that Ms. McGlothlin give him money from the register at Subway. A.R. 38, 93, 128. When she hesitated and questioned him, he brandished a weapon. A.R. 35-38, 93. Ms. McGlothlin did in fact hand over the money. A.R. 38, 93. There was a high potential that Ms. McGlothlin could have been gravely injured that night. She was fearful for her own mortality, solely because of Petitioner. He victimized her by forcefully taking what was not his, both the money and Ms. McGlothlin's sense of physical safety. The nature of the offense supports the eighty-year sentence.

b. The Legislative purpose behind the punishment

West Virginia Code § 61-2-12 provides, in pertinent part:

(a) Any person who commits or attempts to commit robbery by:

(1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon, is guilty of robbery in the first degree and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than ten years.

"Pursuant to the [First Degree] robbery statute, it is mandatory that the trial court sentence a defendant to not less than ten years imprisonment. The statute does not impose a maximum sentence for aggravated robbery." *Adams*, 211 W. Va. at 234, 565 S.E.2d at 356.[3] "Our cases have recognized that the legislatively created statutory minimum/discretionary maximum sentencing scheme for aggravated robbery serves two purposes." *Id.* at 234, 565 S.E.2d at 356. "'First, it gives recognition to the seriousness of the offense by imposing a minimum sentence below which a trial court may not go. Second, the open-ended maximum sentencing discretion allows trial courts to consider the weight of aggravating and mitigating factors in each particular case.'" *Adams*, 211 W. Va. at 234–35, 565 S.E.2d at 356–57 (quoting *State v. Mann*, 205 W.Va. 303, 316, 518 S.E.2d 60, 73 (1999) (per curiam) (citation omitted)). The circuit court acknowledged on the record that it considered factors such as the seriousness of this crime of violence and the danger it poses to the community. A.R. 147. The court used its discretion to impose an eighty-year sentence. The sentence is in line with the legislative purpose and was fitting for Petitioner's brandishing a weapon and threatening the safety of Ms. McGlothlin.

[3]For all intents and purposes, aggravated robbery is first degree robbery.

c. Comparison of the punishment in other jurisdictions

This Court has "previously recognized that other jurisdictions permit long prison sentences for the crime of aggravated robbery." *Adams*, 211 W. Va. at 235, 565 S.E.2d at 357; *accord State v. Hill*, No. 16-0138, 2016 WL 6678997, at *2 (W. Va. Supreme Court, Nov. 14, 2016) (memorandum decision) (same); *State v. Pruitt*, No. 17-0802, 2018 WL 4944559, at *2 (W. Va. Supreme Court, Oct. 12, 2018) (memorandum decision) ("[T]his Court has previously recognized that other jurisdictions also permit long prison sentences for first-degree robbery."). Indeed, "[i]n surveying sentences imposed for comparable crimes in other jurisdictions, this Court has previously recognized that other jurisdictions condone severe penalties for the crime of aggravated robbery." *State v. Tyler*, 211 W. Va. 246, 252, 565 S.E.2d 368, 374 (2002) (per curiam); *see, e.g.*, *State v. Boag*, 453 P.2d 508 (Ariz. 1969) (en banc) (seventy-five to ninety-nine years for robbery is not cruel and unusual punishment); *Garrett v. State*, 486 S.W.2d 272 (Mo. 1972) (approving ninety-nine years for first degree robbery, with a prior felony). Thus, a comparison of robbery sentences handed down in other jurisdictions supports the eighty-year sentence the circuit court imposed on Petitioner for committing first-degree robbery.

d. Comparisons with other offenses in the State

"[T]his Court has rejected proportionality challenges in a number of cases involving aggravated robbery sentences." *Adams*, 211 W. Va. at 235, 565 S.E.2d at 357 (2002) (per curiam); *see, e.g., id.* at 232, 565 S.E.2d at 354 (affirming 90-year robbery sentence against disproportionality challenge); *State v. Booth*, 224 W. Va. 307, 309, 685 S.E.2d 701, 703 (2009) (affirming 80 year robbery sentence against disproportionality challenge); *State v. Chester*, No. 18-0140, 2019 WL 1224684, at *5 (W. Va. Supreme Court, Mar. 15, 2019) (memorandum decision) (affirming 90 year robbery sentence against disproportionality sentence); *State v. Dent*,

No. 18-0971, 2019 WL 5092951, at *1 (W. Va. Supreme court, Oct. 11, 2019) (memorandum decision) (affirming 90-year robbery against disproportionality challenge).

In his appeal Petitioner argues that the sentence he received is "entirely disproportionate with other, far more serious actions in this State." Pt'r's. Br. 15. Therefore, he argues, his sentence – which he describes as harsher than the penalty for first degree murder without mercy – violates the proportionality principle contained in the West Virginia Constitution. Pt'r's. Br. 15-16. It does not. Furthermore, Petitioner's position that he received is a "draconian sentence," Pt'r's. Br. 18, is unpersuasive. There are many offenses that carry much harsher penalties than the sentence Petitioner received. These crimes include, inter alia, kidnapping (W. Va. Code § 61-2-14a—life), first degree sexual assault (W. Va. Code § 61-8B-3(c) —up to 100 years), and treason (W. Va. Code § 61-2-2—life). These crimes and their accompanying penalties are more severe than Petitioner's robbery offense and more severe than his eighty-year sentence.

D. Petitioner's sentence is not disparate as compared to those received by his co-defendants because he pled guilty to a different, more serious crime.

Petitioner's comparison of the sentences received by his co-defendants is akin to comparing apples and oranges. His two co-defendants pled guilty to felony conspiracy and each got one to five year sentences, whereas Petitioner pled guilty to first-degree robbery -- an entirely different offense with a dissimilar, and harsher punishment. A.R. 120, 130.

On the one hand, Petitioner argues that an assessment of the nature of an offense must consider the actual conduct committed. Pet'r Br. 8. Yet on the other, when more favorable to his position, he argues that each of the three defendants in this case all committed "the same legally repugnant conduct." Pt'r's. Br. 17. As explained above, Petitioner was the only one of the three who entered Subway. A.R. 38-39, 128. He was the one who presented a gun to the cashier. A.R. 120, 128. He was the one who demanded that she give him money out of the cash register. A.R.

120, 128. His co-defendants played far lesser roles as mere co-conspirators and get-away drivers. The record does not include any information regarding the potential criminal records of the co-defendants.

The punishment for conspiracy to commit robbery carries a minimum one year and a maximum of five years confinement,[4] which is what each of Petitioner's co-defendants received. A.R. 58-59, 82. All three defendants received sentences in conformity with the sentencing guidelines and which *each agreed to*, including Petitioner. Petitioner made a knowing and voluntary decision, at the advice of counsel, to plead guilty. The sentence he received, while more than the statutory minimum, was one that he was fully aware that he may receive prior to receiving his sentence. The court noted the pending sentence was for first-degree robbery with a firearm, which it found to be "very serious" and the type of violent threatening crime that...deserves a stiff sentence." A.R. 147. The circuit court handed down an appropriate and just sentence for the violent crime the Petitioner committed, which is distinguishable from the minor roles played by his co-defendants.

E. This Court should not hear Petitioner's Rule 35 argument.

Petitioner's Rule 35 argument is not cognizable. Petitioner filed a notice of appeal from an order of the Circuit Court of Nicholas County entered on September 24, 2021. Neither of the two assignments of error raised in Petitioner's Notice of Appeal, filed on October 7, 2021, raise a Rule 35 issue. It was not until Petitioner filed his brief on January 7, 2022, that he alleged a Rule 35 issue. This does not comply with Rule 5 of the Rules of Appellate Procedure, which requires notice to be filed within thirty days of entry of the judgment. W.Va. R. App. P. 5(a). Petitioner did file a Rule 35 motion on March 26, 2021 requesting that the circuit court reduce his sentence

[4] W. Va. Code, § 61-10-31

from the prior December 7, 2020 order. The circuit denied the motion. It does not appear that Petitioner filed a motion based on the re-sentencing order issued on September 24, 2021. Further, the Petitioner's deadline for perfection has passed, as it has been more than four months since the September 24, 2021 entry of judgement. The Court should decline review of Petitioner's Rule 35 argument. Even if this Court allow argument on this matter, Petitioner is not entitled to relief.

F. The circuit court did not err in denying Petitioner's Rule 35 motion.

Petitioner alleges the circuit court did not provide a factual basis for the sentence, did not order a PSI or other diagnostic reports, and did not state its reasons or alternatively include them in the record in written form, for selecting the "particular" sentence of eighty years. Pet'rs Br. 18. None of these claims entitle the Petitioner to relief.

"Rule 35(b) of the West Virginia Rules of Criminal Procedure only authorizes a reduction in sentence. Rule 35(b) is not a mechanism by which defendants may challenge their convictions and/or the validity of their sentencing." Syl. Pt. 2, *State v. Marcum*, 238 W. Va. 26, 792 S.E.2d 37 (2016). The *Marcum* Court made clear, "Indeed, a motion to reduce a sentence under Rule 35(b) 'is essentially a plea for leniency from a presumptively valid conviction.' [*State v.*] *Head*, 198 W.Va. 298, 306, 480 S.E.2d 507, 515 (Cleckley, J., concurring). In short, it is abundantly clear that Rule 35(b) cannot be used as a vehicle to challenge a conviction or the validity of the sentence imposed by the circuit court, whether raised in the Rule 35(b) motion or in the appeal of the denial of the Rule 35(b) motion." *Id.* at 31, 42 (2016). Accordingly, Petitioner's argument is wholly misplaced and meritless.

Furthermore, the court did not have to hold a hearing on the Rule 35 motion. A circuit court is not obligated to hold a hearing on a Rule 35(b) motion. *State v. Dawson*, No. 17-0587, 2018 WL 2192989, at *2 (W. Va. Supreme Court, May 14, 2018) (memorandum decision).

Indeed, as stated in Syl. Pt. 5 of *Head*, "circuit courts generally should consider only those events that occur within the 120-day filing period [proscribed by Rule 35]; 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." Petitioner's motion to reconsider does not allege any events occurring within the 120-day filing period that should justify the court's reconsideration of his sentence. A.R. 81-85. He reiterates the facts of the lower case and asks for leniency due to the Petitioner's age and the lower sentences received by his co-defendants. A.R. 81-85. Thus, without providing the court with the foundational information to entertain its consideration of the motion, Petitioner cannot provide that the court erred in denying his motion without a hearing, or without setting forth findings.

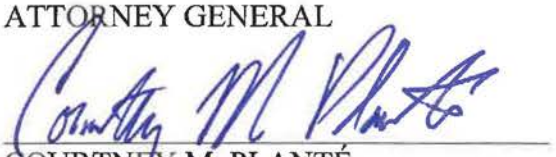
VII. CONCLUSION

For the foregoing reasons, the order entered by the Circuit Court of Nicholas County on September 24, 2021 should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent, by Counsel.

PATRICK MORRISEY
ATTORNEY GENERAL



COURTNEY M. PLANTÉ
ASSISTANT ATTORNEY GENERAL
W. Va. State Bar # 12798
1900 Kanawha Blvd., East, Building 6, Suite 406
Charleston, WV 25305
Telephone: (304) 558-5830
Facsimile: (304) 558-5833
Email: Courtney.m.plante@wvago.gov
Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0796

STATE OF WEST VIRGINIA,

Respondent,

v.

CHRISTOPHER MCDONALD,

Petitioner.

CERTIFICATE OF SERVICE

I, Courtney M. Plante, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, February 22, 2022, and addressed as follows:

Jason T. Gain, Esquire
Losh Mountain Legal Services
P.O. Box 578
Anmoore, WV 26323

Courtney M. Plante (WVSB. 12798)
Deputy Attorney General