IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-344

STATE OF WEST VIRGINIA,
Respondent,

v.

JAMES CARROLL DEPRIEST
Petitioner.

RESPONDENT'S BRIEF

Appeal from the May 9, 2023, Order
Circuit Court of Summers County
Case No. 21-F-11

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INTRODUCTION

Respondent, State of West Virginia, respectfully responds to the appellate brief filed by James C. DePriest ("Petitioner") challenging the Summers County Circuit Court's decision to impose a sentence of ten to twenty-five years in prison for Petitioner's conviction of failure to provide notice of sex offender registration changes, third offense, without providing a presentence investigation or report. Petitioner waived his right to a presentence investigation and report because he voluntarily absconded the jurisdiction of the court after having been advised of the date for his presentence investigation interview, and remained at large for approximately six months. The circuit court provided Petitioner with the opportunity to participate in a presentence investigation report, but his subsequent conduct amounted to an implied waiver. The record further contains the circuit court's reasoning for proceeding with sentencing without a presentence report, and explained why it had sufficient information upon which it could meaningfully exercise its sentencing authority. All of this demonstrates that the Petitioner's sentence was imposed in accordance with Rule 32 of the West Virginia Rules of Criminal Procedure, as well as this Court's precedent as explained in *State v. McDonald*, ___ W. Va. ___, ___ S.E.2d ___, No. 21-0769, 2023 WL 2945044 (W. Va. Supreme Court, April 14, 2023) (to be published). For these reasons, Petitioner's sentence should be affirmed.

ASSIGNMENT OF ERROR

Petitioner raises a single assignment of error in his appellate brief:

> The lower court abused its discretion when it determined that Petition[er] waived his right to a presentence investigation and refused to allow Petitioner a continuance to obtain a pre-sentencing investigation report prior to sentencing in violation of his due process rights pursuant to the Fifth Amendment and the Fourteenth Amendment of the United States Constitution and Article III, Section 10 of the West Virginia Constitution.

Pet'r's Br. 1.

STATEMENT OF THE CASE

Petitioner was indicted by the Summers County Grand Jury on March 2, 2021, and charged with one count of failure to provide notice of sex offender registration changes, third or subsequent offense, as contained in case number 21-F-11. App. 10. Petitioner proceeded to a jury trial on September 14, 2021. App. 72-73. Petitioner admitted to being the same person that had been previously convicted on two prior occasions of failure to provide notice of sex offender registration changes, making the instant conviction a felony offense. App. 77-78.

After adjudging Petitioner guilty of the offense as charged in the indictment, the circuit court ordered that Petitioner remain free on bond and subject to the same terms and conditions as his pre-trial bond, with the additional requirement of home confinement. App. 73. The circuit court "referred the matter to the Probation Department for purposes of preparing a pre-sentence investigation report," App. 73, 74, and scheduled Petitioner's sentencing hearing for December 9, 2022. App. 78.

On October 19, 2022, the State filed a motion to revoke Petitioner's bond, alleging that "[o]n or about October 14, 2022, the Probation Department filed a notice that the Defendant had absconded from home confinement and has failed drug screens." App. 81. The circuit court granted the State's motion and revoked Petitioner's bond, then ordered he be remanded to the regional jail once apprehended, pending further hearing on the State's motion. App. 85. The circuit also issued an order continuing Petitioner's sentencing hearing generally. App. 85.

Petitioner remained at large until he was apprehended in Greenbrier County, West Virginia, on April 25, 2023. App. 89. Following Petitioner's apprehension, the circuit court scheduled Petitioner's sentencing hearing for May 5, 2023. App. 97.

At the May 5, 2023, sentencing hearing, Petitioner moved for a continuance so that a presentence investigation could be conducted, and a report be prepared and submitted to the court and parties. App. 105. The circuit court explained to Petitioner that the probation officer originally tasked with conducting the presentence investigation advised there was no investigation because Petitioner absconded supervision and did not report for his scheduled interview. App. 105. Thus, the circuit court explained that a presentence report had not been prepared or provided to the parties due to Petitioner fleeing the jurisdiction of the court. App. 106. The circuit court also explained that Petitioner "fled the jurisdiction of this Court and we had to hunt him down and he had to deal with the State Police or the Marshalls or something that was able to locate him." App. 106. The court reasoned that Petitioner's conduct and his attempt to evade apprehension for months amounted to a waiver of his right to a presentence report. App. 106.

Petitioner disputed the circuit court's rationale qualifying Petitioner's conduct as a waiver, asserting that "I don't believe he can waive a pre-sentence report." App. 106. Petitioner also asserted that his whereabouts are known now, and that the probation officer "can go do his duties and prepare the report. He waived some portion of it, but it's not going to make a contribution to it." App. 106. Petitioner concluded by arguing that he "may have waived his right to contribute to it, but he certainly does not waive his right to have a pre-sentence report," in reference to the provisions typically included within the reports dealing with sentencing options. App. 107.

The circuit court responded that Petitioner stood convicted of a third-offense failure to provide notice of sex offender registration changes, which the circuit court described as a crime predicated upon the "fail[ure] to do something that you're legally required to do." App. 108. The circuit court pointed to the underlying conviction for a sex offense that triggered Petitioner's registration requirements, and that the Petitioner's choice to cut "the monitor off and flee[ ] [is] a

separate offense in and of itself. But it also means that he's not really a good candidate for any alternative sentence." App. 108. The circuit court concluded by opinion that "I think at this point, really, when a person has a record like that and they would cut the monitor off and they flee, they're just not really good candidates for probation or an alternative sentence. There's no two ways around it." App. 108.

After denying Petitioner's motion for a continuance, the circuit court ordered that Petitioner be sentenced to an indeterminate term of ten to twenty-five years in prison for his conviction. App. 114. The circuit court entered its sentencing order on May 9, 2023, in which it noted that "[o]n or about October 14, 2022, the [Petitioner] improperly disbanded his home confinement monitor and ran from the lawful supervision of his home confinement officer and his bond supervising probation officer." App. 97. The order reflects that a warrant for Petitioner's arrest was issued due to his flight, and that during the time that Petitioner was at large, he "failed to appear for his pre-sentence investigation report interview and for his sentencing hearing." App. 97.

The order also specified that Petitioner moved for a continuance of the May 5, 2023, sentencing hearing so that a presentence investigation and report could be completed, but that motion was denied because Petitioner "waived his right to a pre-sentence investigation report by fleeing from his lawful supervision while on home confinement monitoring and f[a]iling to report for his previously scheduled interview with his probation officer." App. 98. In support of its decision to proceed with sentencing without a presentence report, the circuit court's order specified that:

> the Court had prior hearings and cases with this [Petitioner] for numerous years, knew the [Petitioner's] criminal, mental health, and work history, the [Petitioner's] intentional fleeing from supervision, the [Petitioner's] family involvement and community connections, and understood the nature of the offense and facts from the trial in the case.

App. 98. It is from this order that Petitioner now appeals.

SUMMARY OF THE ARGUMENT

The circuit court did not err in imposing Petitioner's sentence without first obtaining a presentence investigation and report. Petitioner waived his right to a presentence investigation and report by intentionally removing his court-ordered GPS home confinement monitor and absconding the jurisdiction of the circuit court for six months, during which Petitioner missed his appointment for his presentence investigation interview, and the originally scheduled sentencing hearing for his felony conviction. Moreover, the circuit court placed on the record that it possessed sufficient information to meaningfully exercise its sentencing authority, and provided an explanation prior to announcing Petitioner's sentence. The circuit court complied with the provisions of Rule 32(b)(1) and this Court's precedence in *McDonald* and *Brown* in imposing Petitioner's sentence without a presentence investigation and report. Accordingly, the circuit court's sentencing order should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(4), oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and in the record, and the decisional process would not be significantly aided by oral argument. This case is suitable for resolution by memorandum decision.

ARGUMENT

A. Standards of Review

This Court has recognized that sentencing orders are reviewed "under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997).

As to this Court's review of the circuit court's findings and conclusions, "we apply a two-prong deferential standard of review. We review the final order and ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syl. Pt. 1, *In re Jenna A.J.*, 231 W. Va. 159, 744 S.E.2d 269 (2013).

B. The circuit court committed no error in imposing Petitioner's sentence without a presentence investigation and report because Petitioner's actions constituted a waiver.

Petitioner's argument that he was entitled to a continuance so that a presentence investigation and report could be completed is misplaced. The record on appeal demonstrates that Petitioner was present at the hearing in which he was advised that his case was referred to the probation department for a presentence investigation and report, and where he was also advised of when his sentencing hearing would take place. Despite this knowledge, Petitioner chose to remove his GPS home confinement monitor and abscond prior to participating in his presentence investigation report and prior to his sentencing hearing. Petitioner remained at large for approximately six months, resulting in the circuit court generally continuing Petitioner's sentencing proceedings until he was apprehended. Petitioner did not turn himself, and instead forced law enforcement to locate him in another county. When Petitioner was apprehended, he objected to proceeding with the sentencing hearing without a presentence investigation and report, despite being given clear notice of the investigation ordered by the court and his willful decision to completely disregard it by absconding supervision for months until his eventual apprehension. This conduct constituted an implied waiver of his right to demand a presentence investigation and report. And, when his implied waiver is coupled by the circuit court's explanation that it has sufficient information upon which it may rely in exercising its sentencing authority, and the court provides an explanation on the record, the mandatory criteria enunciated in *McDonald* has been

met. In addition, the concept of implied waiver is not a novel concept within our legal jurisprudence. Defendants may implicitly waive numerous rights based upon their conduct, including constitutional ones such as the right to confront witnesses.. Petitioner's claim that the circuit court committed error, or that his constitutional rights were violated in the underlying case is without merit, and should be wholly rejected by this Court.

Rule 32(b)(1) of the West Virginia Rules of Criminal Procedure provides that a probation officer shall conduct a presentence investigation and present a report of that investigation to the Court and parties prior to the imposition of sentence. This requirement, however, may be disregarded if three factors are met, which include: (1) the defendant's waiver of a presentence investigation and report; (2) a finding by the circuit court explaining that the record contains sufficient information to enable it to meaningfully exercise its sentencing authority; and (3) the circuit court provides an explanation on the record that it found the information contained within the record enables it to meaningfully exercise its sentencing authority. W. Va. R. Crim. P. 32(b)(1)(A)-(C).

Recently, this Court explained that all three factors set forth in Rule 32(b)(1) must be met before a circuit court may properly impose sentence without first obtaining a presentence investigation and report. Syl. Pt. 4, *McDonald*, No. 21-0769, 2023 WL 2945044. In *McDonald*, this Court held that "West Virginia Rule of Criminal Procedure 32(b)(1) requires that the sentencing court receive and consider a presentence report before sentencing unless all conditions in (A), (B), and (C) are met." *Id.* This decision clarified that all three factors must be met should the court sentence a defendant without a presentence investigation and report.

There is no dispute that the circuit court imposed Petitioner's sentence without first obtaining and reviewing a presentence investigation report. The question is whether the record

demonstrates that all three of the factors set forth in Rule 32(b)(1) of the West Virginia Rules of Criminal Procedure were met. The record demonstrates that each of the three factors were met, and, accordingly, Petitioner's claim that his constitutional rights were violated is without merit and should be rejected. Respondent will address each of the three factors, in turn.

1. Petitioner's knowing and intentional act of absconding from supervision and failing to appear for his presentence investigation and report amounted to an implied waiver of this right, satisfying Rule 32(b)(1)(A) of the West Virginia Rules of Criminal Procedure.

Petitioner waived his right to a presentence investigation and report by knowingly and voluntarily absconding supervision after being notified that the case was transferred to the probation department for a presentence investigation and report. A waiver consists of an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). A valid waiver may be either express or implied, with the latter being demonstrated from "'a course of conduct' even 'absent formal or express statements of waiver.'" *Hemphill v. New York*, 595 U.S. 140, 156 (2022) (Alito, J. concurring) (quoting *Berghuis v. Thompkins*, 560 U.S. 370 383-384 (2010) (quotation omitted)). In Justice Alito's concurrence in *Hemphill*, he explained that an implied waiver occurs when a defendant engages in conduct that demonstrates an intent "to relinquish the right at issue. But '[a]s a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.'" *Id.* at 156-57 (quoting *Berghuis*, 560 U.S. at 385).

Although Petitioner did not expressly waive his right to a presentence investigation report, his actions constitute a deliberate choice and intentional relinquishment of this right. Petitioner's course of conduct in absconding from the jurisdiction of the court for six months therefore constitutes an implied waiver. The circuit court ordered that Petitioner be placed on home

confinement with GPS monitoring. Petitioner complied with this condition, but then subsequently made the conscious, willful, and voluntary choice to cut the monitor off with the settled purpose to avoid further supervision by the court. This decision to evade the court's jurisdiction necessarily included Petitioner's choice to forego, not only participating in a pre-sentence investigation report conducted for the purpose of providing the circuit court with information relevant to Petitioner's sentencing that may not be contained within the record, but also his choice to forego assisting his attorney in presenting arguments as to why he should be subject to a more lenient penalty for his conviction. Petitioner's decision to remove his home confinement monitor—an act he knew that was not allowed and necessarily carried negative consequences—reflected his assumption of the risk that, should his attempt to evade the circuit court's jurisdiction be unsuccessful, he would likely face additional penalties for his actions.

But the issue is not whether Petitioner committed a separate offense by removing his GPS monitor and absconding the jurisdiction, because he certainly did. Instead, the question is whether his decision to commit an additional offense by removing his GPS monitor and absconding the circuit court's jurisdiction—something that he consciously continued to do for six months—amounted to a waiver of his right to demand a presentence investigation report when he was returned to the court's jurisdiction after he had been found an apprehended. The Respondent asserts that the answer to this issue must be that the Petitioner's actions reflected an implicit waiver of that statutory right.

The concept of "implied waiver" is consistent with the general notion that courts "must guard against a defendant . . . profit[ing] from his own wrong." *Illinois v. Allen*, 397 U.S. 337, 345 (1970). This Court has recognized that one may implicitly waive alleged irregularities in guilty pleas under Rule 7 of the West Virginia Rules of Criminal Procedure by expressly waiving a

constitutional right to an indictment; *Montgomery v. Ames*, 241 W. Va. 615, 623, 827 S.E.2d 403, 411 (2019). This Court has recognized that one may implicitly waive their right to demand a jury trial if such demand is not made within the statutorily-prescribed time period, and when a petitioner cannot demonstrate some "unavoidable cause" for their failure to make a timely demand. *State ex rel. Callahan v. Santucci*, 210 W. Va. 483, 488-89, 557 S.E.2d 890, 895-96 (2001). The United States Supreme Court expressly rejected a claim that a rule holding implicit waiver can never suffice within the context of one's *Miranda* rights went "beyond the requirements of federal organic law," and recognized that one may implicitly waive their right to remain silent and their right to counsel as contemplated in *Miranda v. Arizona*, 384 U.S. 436 (1966). *North Carolina v. Butler*, 441 U.S. 369, 375-76 (1979). In this same vein, the Fourth Circuit Court of Appeals has recognized that one may implicitly waive *Miranda* rights by simply acknowledging that they understand them, and then subsequently being willing to answer questions. *United States v. Mullins*, 2022 WL 3082059, at *3 (4th Cir. 2022). The Fourth Circuit has also recognized that one may implicitly waive various privileges by simply discussing relevant subject matters with those who are not parties to the case. *In re Martin Marietta Corp.*, 856 F.2d 619, 622-23 (4th Cir. 1988). Additionally, the Fourth Circuit held that "when a defendant who is advised of his right to counsel has failed to show that he cannot afford counsel, he impliedly waives his right to counsel by not procuring such from his own resources in a timely fashion." *United States v. Owen*, 407 F.3d 222, 225 (4th Cir. 2005). Similar to this Court's holding in the *Santucci* case, this Court has recognized that a defendant may implicitly waive his right to a jury trial by failing to request one within the statutorily prescribed twenty-day period from the date that the defendant had been appointed counsel. *See State ex rel. Ring v. Boober*, 200 W. Va. 66, 71, 488 S.E.2d 66, 71 (1997) (finding that the defendant had waived his right to a jury trial by "demand[ing] a jury trial more than three

months after being appointed counsel and offer[ing] no reason for his untimely demand."). There is no greater right in criminal law than the right to a trial by jury, yet this Court has found that a defendant's inaction can waive that right.

Likewise, the fundamental right to presence at trial can be waived, specifically by a defendant deliberately absconding. In *United States v. Powell*, the Fourth Circuit Court of Appeals concluded that if a defendant appears at various hearings and receives "actual notice" of the date and time of his jury trial, but then "absconds without a compelling reason . . . and never offers a satisfactory explanation for his absence," the "trial court may find such actions . . . to amount to a knowing and voluntary waiver of his right to be present and may conduct the trial in his absence." *United States v. Powell*, 611 F.2d 41, 43 n.2 (4th Cir. 1979). Such is the case here. Petitioner appeared for all of his prior hearings and knew that he was to appear at the presentence investigation interview as well as sentencing. Instead, he chose to forego those rights and abscond by cutting off his GPS monitoring bracelet.

Moreover, this Court has found that another fundamental right of a criminal defendant, the right to appeal, can be waived by a defendant's choice to abscond. In *State v. Rogers*, this Court recognized that the right to appeal may be implicitly waived when a notice of appeal is not filed within the statutorily prescribed time period, and the reason for that failure is because "the defendant voluntarily absconded from the States' custody and remained at large throughout the duration of the statutorily prescribed appeal period." Syl. Pt. 4, *State v. Rogers*, 189 W. Va. 730, 434 S.E.2d 402 (1993). In reaching that conclusion, this Court found that the "record in this case indicates that the lower court informed the Appellant of her right to appeal her convictions at the sentencing hearing." *Id.* at 734, 434 S.E.2d at 406. In addition, the "Appellant was advised that her appeal had to be filed within the statutorily-prescribed period for filing the appeal." *Id.* But,

"[s]ubsequent to the filing of the notice of intent to appeal, the Appellant voluntarily fled from the State's custody and remained at large for some four-years." *Id.* Again, the deliberate actions of a defendant in absconding can, and have, acted as a waiver for that defendant's fundamental rights.

The facts of the instant case demonstrate Petitioner's implied waiver of a presentence investigation and report. Petitioner was found guilty of the offense of failing to provide notice of sex offender registration changes following a jury trial on September 14, 2022. App. 97. On September 21, 2022, Petitioner, in a bifurcated proceeding, admitted to having been twice convicted previously of failing to provide notice of sex offender registration changes, resulting in the Court adjudging him guilty of the felony offense of failure to provide notice of sex offender registration changes, third or subsequent offense. App. 97. Petitioner was advised that his sentencing hearing was scheduled for December 9, 2022, App. 78-79, 97, and that the matter was referred to the probation department for "preparation of the pre-sentence investigative report." App. 78, 97. Despite this clear information, Petitioner chose to remove his GPS home confinement monitor, and absconded the jurisdiction of the court on or about October 14, 2022. App. 80-83. The circuit court issued an order revoking Petitioner's bond on October 20, 2022, App. 85, and Petitioner remained at large for approximately six more months prior to his apprehension in Greenbrier County on April 25, 2023. App. 89.

During this time, Petitioner failed to appear for his presentence investigation interview, his originally scheduled sentencing hearing, and generally flouted the court-ordered supervision imposed as a result of his felony conviction. Notwithstanding Petitioner's clear attempt to avoid the jurisdiction of the court, including the circuit court's impending exercise of its sentencing authority on the felony conviction, Petitioner nevertheless contended that he never waived his right to a presentence investigation and report. App. 104-06. While the record in this case denotes

Petitioner did not expressly waive his right to a presentence investigation and report, both this Court and the United States Supreme Court have recognized a valid waiver may be made implicitly when one's conduct demonstrates a "deliberate choice to relinquish" the right he or she would ordinarily enjoy. *Hemphill*, 595 U.S. at 156-57 (Alito, J., concurring) (citation omitted).

In this case, Petitioner's decision to remove the GPS home confinement monitor that he was required to wear as a condition of his post-conviction bond and abscond from the court is a clear example of a "deliberate choice to relinquish" his right to demand a presentence investigation and report. Petitioner was aware that he had been convicted, that he was pending sentencing, and his case was referred to the probation department for a presentence investigation and report, but nevertheless decided to flee from the jurisdiction of the circuit court. Petitioner's conduct satisfies the general notion set forth in the relevant legal authorities that one who intentionally and deliberately engages in conduct that shows a clear intention to relinquish a right has provided a valid implicit waiver of that right.

Additionally, Petitioner knew of his pending presentence investigation when he decided to cut his home confinement monitor off and flee the jurisdiction. He knew that he missed his presentence investigation interview and his sentencing hearing during the time that he was at large. The fact that Petitioner chose to remain on the run, without ever attempting to voluntarily avail himself of the circuit court's jurisdiction after his flight, seems to paint his current argument in a disingenuous light, when the record demonstrates that had he not absconded, the presentence investigation would have been completed and provided. But Petitioner apparently was not concerned with whether a presentence investigation and report were prepared on the day that he removed his home confinement monitor and absconded, and that indifference continued each day of his six-month hiatus.

Given the information contained in the record, Petitioner cannot demonstrate that the circuit court abused its discretion in finding his voluntary choice to abscond supervision by removing his GPS home confinement monitor and flee the jurisdiction amounted to a waiver of his right to a presentence investigation and report. Petitioner offered no explanation why he fled the jurisdiction of the Court for six months that could reasonably lead this Court to conclude he did so without the deliberate knowledge and intent to forego the exercise of any right he may have to the investigation and report. Indeed, Petitioner's only argument was that the report was necessary to allow him and his counsel to review the possible sentencing options to ensure they were valid. App. 107. While the possible sentencing options are certainly a critical component of the presentence investigation and report, Petitioner did not explain what potential information would have been added to or changed the existing information considered by the court. Petitioner faced sentencing for a single conviction, which contained a specific indeterminate statutory sentence that left the circuit court with no discretion other than to either grant an alternative sentence, or to impose the statutory sentence. As discussed in depth below, the court had all of the pertinent information necessary to make a meaningful sentencing decision without a presentence investigation and report.

The legal authorities from this State and from the courts of other jurisdictions clearly stands for the proposition that a waiver can be implied by a petitioner's actions or inactions. While a defendant may expressly waive a right by words, he may also waive a right by engaging in conduct that demonstrates a deliberate intent to waive that right. Petitioner was aware that he had been convicted of a felony offense, and that he was required to participate in a presentence investigation and report. Moreover, Petitioner is not new to the criminal justice system. His instant conviction flows from his third failure to provide notice of registration changes, all of which would have

involved the previous preparation of a presentence investigation and report. Thus, there is no meritorious argument that Petitioner somehow did not understand the implications of his choice to abscond from the jurisdiction of the Court. Petitioner knew that the matter had been referred to probation for a presentence investigation and report. He knew that he was scheduled for a sentencing hearing on December 9, 2022, upon his conviction. App. 78. Instead of complying with the terms of his supervision; instead of participating in the preparation of a presentence investigation and report; and instead of appearing for his December 9, 2022, sentencing hearing, Petitioner chose to throw caution to the wind and abscond supervision. The fact that he was eventually found and returned to the jurisdiction of the circuit court does not undo the consequences of his conduct after knowingly, voluntarily, and intentionally remaining at large for the preceding six months. For Petitioner to be returned to the circuit court after he intentionally refused to comply with his obligations, only to demand that the probation department still be required to conduct a presentence investigation that he clearly had no intention of participating in, is tantamount to allowing Petitioner to "profit[] from his own wrong." *Allen*, 397 U.S. at 345. No one forced Petitioner to cut off his monitor and flee. He chose to do that on his own volition with full knowledge that his choice to flee would carry with it serious ramifications. In other words, Petitioner had a clear choice: stay, and accept the consequences of his actions, or remove his GPS monitor and flee in an attempt to avoid them. By choosing the latter, Petitioner should not be permitted to now claim that he should be afforded the same rights and privileges that he could have enjoyed had he decided to remain under the court's supervision, and to take advantage of the opportunities that he had.

Petitioner has failed to demonstrate any error in the circuit court's determination that his conduct amounted to a waiver of his right to a presentence investigation and report. Because the

first factor of Rule 32(b)(1)(A) has been met, the next step is to consider whether (B) and (C) have been satisfied.

2. The circuit court properly found that the information in the record enabled it to meaningfully exercise its sentencing authority, and the court sufficiently explained its finding on the record, satisfying Rule 32(b)(1)(B) and (C) of the West Virginia Rules of Criminal Procedure.

In *McDonald*, this Court's holding was, in large part, its acknowledgement and clear adoption of its prior holding in *State v. Brown*, where the Court explicitly held that all three factors set forth in Rule 32(b)(1) are required before a court may proceed to sentencing without a presentence investigation and report. *See State v. Brown*, 210 W. Va. 14, 28, 552 S.E.2d 390, 404 (2001) ("It is undisputed that a presentence report is mandatory under Rule 32 unless the three factors listed in (A), (B), and (C) are all present."). Petitioner's case, however, can be differentiated from both *Brown* and *McDonald*.

In *Brown*, this Court found that the circuit court had satisfied (B) and (C) of Rule 32, but that the Petitioner's sentence required reversal because there was no waiver sufficient to establish that (A) had been met. *Id.* Therein, the defendant was convicted of two counts of first-degree murder. *Id.* at 19, 552 S.E.2d at 395. After a bifurcated *LaRock* hearing a few days later, the jury returned a recommendation that Petitioner receive a sentence of life with the possibility of parole for both convictions. *Id.* On appeal, one of Petitioner's claims was that the circuit court erred in imposing sentence without first ordering the preparation of a presentence investigation and report. *Id.* at 28, 552 S.E.2d at 404. This Court found that the circuit court, which sat through both the trial and the bifurcated *LaRock* hearing, had satisfied (B) and (C) of Rule 32(b)(1), noting that "the trial court found that the evidence adduced at the bifurcated hearing enabled it to meaningfully exercise its sentencing authority and explained this on the record[.]" *Id.* But, because the Petitioner did not waive the presentence investigation and report, this Court reversed Petitioner's sentence

and remanded the matter back for a new sentencing hearing after a presentence investigation and report had been completed and provided to the parties. *Id.* at 404-05, 522 S.E.2d at 28-29.

In *McDonald*, this Court was faced with the opposite: the Petitioner did waive the presentence investigation and report, but the circuit court had failed to meet the factors set forth in (B) and (C) as required by Rule 32. *McDonald*, 2023 WL 2945044, at *6. In discussing the importance of satisfying the factors set forth in (B) and (C), this Court explained that it "could not gauge whether the sentencing court gave an appropriate sentence, based on accurate information." *Id.* Respondent asserts, however, that what constitutes sufficient information is a determination that is made on a case-by-case basis. While the trial court in *McDonald* may not have had sufficient information to sentence the defendant, the trial court did here.

In the instant case, Petitioner was facing sentencing for a conviction of a single offense: failure to provide notice of sex offender registration changes, third or subsequent offense. App. 77-79. In *McDonald,* the defendant was convicted of first-degree robbery. *McDonald*, 2023 WL 2945044, at *1. In *Brown,* the defendant was convicted of two counts of first-degree murder, with a recommendation of mercy as to both. *Brown,* 210 W. Va. at 18-19, 552 S.E.2d at 394-95. In both *McDonald* and *Brown*, the circuit court possessed broad discretion in terms of the sentence it could impose. In *McDonald*, the circuit court had the authority to impose a sentence of any length from ten years to life in prison for the defendant's first-degree robbery conviction, while the circuit court in *Brown* retained the discretion to order that Petitioner's two sentences of life with the possibility of parole be served consecutively or concurrently. As this Court noted in *Brown*, the circuit court's decision to impose consecutive life sentences meant "that [the defendant] would not be eligible for parole for thirty years, whereas a sentence of concurrent life sentences would result in parole eligibility after fifteen years." *Id.* at 29, 522 S.E.2d at 405. This Court reasoned that "a

presentence investigation and report could result in a *significant change in the defendant's sentence.*" *Id.* (emphasis added). The same is true in this Court's decision in *McDonald.* Indeed, this Court held that the lack of any findings in the record resulted in the Court's inability to review his "sentence to determine its proportionality, pursuant to his appeal, because there is no adequate record to review, and we must conclude that the error affected Mr. McDonald's substantial rights." *McDonald*, 2023 WL 2945044, at *6.

Neither of the issues that this Court faced in *Brown* or *McDonald* are present in the instant case. The circuit court's sentencing authority was limited to either imposing an alternative sentence of probation or home confinement, or the imposition of a statutorily-prescribed indeterminate prison term. Petitioner's conviction for his violation of West Virginia Code § 15-12-8(c) provides that any person convicted of violating said provision "shall be imprisoned in a state correctional facility for not less than ten nor more than twenty-five years." Unlike the facts in *McDonald*, the Petitioner was not subject to a determinate substantial sentencing range that could result in a sentence of anywhere from ten years to life imprisonment. Moreover, unlike the facts before this Court in *Brown*, Petitioner was not at risk of having his parole eligibility date impacted because of the possibility of having to serve his sentences concurrently or consecutively.

The circuit court in the present case presided over Petitioner's jury trial, and accepted Petitioner's admission that the prior felony convictions fall within subsection (c) of West Virginia Code § 15-12-8. This was the only conviction Petitioner faced, and, thus, the circuit court's only determination was whether to impose the underlying prison sentence, or to allow Petitioner to be placed on some alternative sentence such as probation or home confinement.

In this regard, the record is clear that the circuit court was informed of the facts underlying Petitioner's conviction, and had knowledge from having dealt with Petitioner for "numerous

years." To that end, the court was aware of Petitioner's criminal record, his "mental health and work history," his "family involvement and community connections," and that Petitioner had intentionally fled from supervision during the course of the underlying proceedings. App. 98. In terms of deciding whether Petitioner should receive an alternative sentence or a term of imprisonment, the circuit court clearly explained on the record that Petitioner's instant offense is a third offense failure to provide notice of registration changes for "fail[ure] to do something that you're legally required to do." App. 108. This, coupled with the fact that he had removed his GPS monitor and fled, leads to the obvious conclusion that Petitioner was "not a really good candidate of any alternative sentence." App. 108.

The circuit court's decision to impose sentence without a presentence report is wholly consistent with the provisions of Rule 32(b)(1), and this Court's guidance set forth in *McDonald* and *Brown*. While Rule 32(b)(1)(A) is a static factor that either exists or does not exist, the factors set forth in (B) and (C) are determined by the convictions and the underlying facts of each case. As noted above, the primary factor that resulted in this Court's decision in *Brown* was the lack of the defendant's waiver of the presentence report, despite the circuit court satisfying the requirements set forth in (B), and (C). In *McDonald,* the defendant had clearly waived his right to the presentence report, but the circuit court failed to satisfy the requirements of (B) and (C). In this case, all three factors have been satisfied.

Although this Court has not clearly defined what is sufficient for purposes of establishing that (B) and (C) have been met, this must be a fact-based analysis specific to each case. The most reasonable interpretation in the instant matter is that the sufficiency of the record component was satisfied by information contained in the underlying conviction and the manner in which the proceedings progressed. The circuit court's findings and explanation contained within the record

sufficiently demonstrate that it was aware Petitioner had been convicted three times for failing to provide notice of registration changes, in addition to the underlying conviction that triggered his registration requirements in the first instance. The circuit court also was aware of the underlying facts involved in Petitioner's instant offense simply because it presided over the jury trial and the bifurcated hearing that ultimately resulted in Petitioner's conviction. The circuit court clearly provided Petitioner with an opportunity to participate in a presentence investigation and report, but Petitioner's subsequent choice to abscond supervision for months demonstrated that Petitioner was not interested in participation and voluntarily waived this opportunity.

These facts were more than sufficient to enable the circuit court to meaningfully exercise its sentencing authority. Petitioner has not pointed to any information that would have been provided in the presentence investigation and report that would have altered his sentence in any way, especially in light of the fact that the major component of the circuit court's decision was clearly based upon Petitioner's intentional decision to flee the court's jurisdiction. This act alone demonstrates that Petitioner is not the type of offender who is likely to comply with the terms of a period of probation or a sentence to home confinement. This left the Court with only one reasonable option, and that was to impose the statutorily-prescribed indeterminate sentence of not less than ten, nor more than twenty-five years in prison.

For all of these reasons, Petitioner's claim is without merit, and the circuit court's sentencing determination was made in compliance with Rule 32(b)(1) of the West Virginia Rules of Criminal Procedure, and this Court's precedent in *McDonald* and *Brown.*

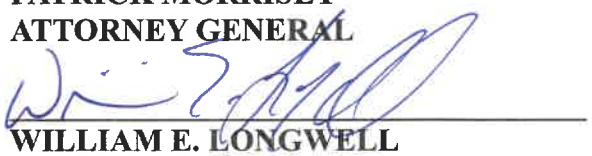
CONCLUSION

For the foregoing reasons, this Court should affirm the sentence imposed by the Summers County Circuit Court as contained in case number 21-F-11.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,
By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-344

STATE OF WEST VIRGINIA,
Respondent,

v.

JAMES CARROLL DEPRIEST,
Petitioner.

CERTIFICATE OF SERVICE

I, William E. Longwell, do hereby certify that on the 14h day of November 2023, I served a true and accurate copy of the foregoing ***"Respondent's Brief"*** on the below-listed individuals *via* the West Virginia Supreme Court of Appeals E-filing System, File & ServeXpress, pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure; and further, a courtesy copy was mailed through the Unites States mail, postage prepaid, to the following at the addresses below:

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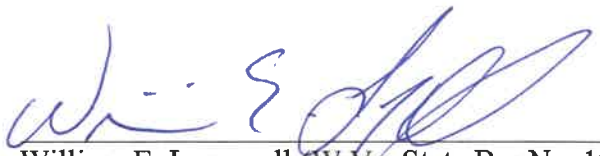

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