IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 25-_____

STATE OF WEST VIRGINIA *ex rel.*
STATE OF WEST VIRGINIA,

Petitioner,

v.

THE HONORABLE JOSEPH BARKI,[1]
Judge, Circuit Court of Ohio County, West Virginia,
and SHAWN PETHEL,
Defendant Below,

Respondents.

PETITION FOR A WRIT OF PROHIBITION

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[1] The Honorable Ronald E. Wilson, former Judge of the Circuit Court of the First Judicial Circuit, issued the order that is the subject of the petition for a writ of prohibition. Judge Wilson subsequently retired and the Honorable Joseph Barki has been assigned to preside over this matter.

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QUESTION PRESENTED

Did the circuit court exceed its authority by erroneously granting Shawn Pethel's ("Pethel") motion to correct an illegal sentence under Rule 35(a) of the West Virginia Rules of Criminal Procedure without finding that the sentence itself was illegal or imposed in an illegal manner, and despite this Court's prior ruling that Pethel's sentence was lawful?

INTRODUCTION

The order forming the basis of this Petition for a Writ of Prohibition represents a disregard for the law, for the finality of a criminal defendant's sentence, and for the doctrine of res judicata. Rule 35(a) of the West Virginia Rules of Criminal Procedure allows a circuit court to correct a sentence that is illegal or was imposed in an illegal manner at any time after its imposition. It does *not* allow a court to modify a legally-sound sentence twenty-four years after its imposition based on its subjective belief that the sentencing judge was too harsh. Nevertheless, that is precisely what the circuit court did here. In particular, it granted Respondent Pethel's Rule 35(a) motion without finding that the sentence imposed was illegal or illegally imposed and without citing to any legal authority to justify its disregard of the law, thereby essentially granting relief under Rule 35(b) despite the expiration of the time limits imposed by the rule.

The circuit court exceeded its legitimate authority in granting Pethel's motion under Rule 35(a) of the West Virginia Rules of Criminal Procedure because Pethel's sentence was wholly within the bounds of the law. Pethel was convicted of twenty-four felony sex offenses following a jury trial, and he subsequently plead guilty to two additional felony counts covering offenses charged in the same indictment, but severed for trial purposes. Each of Pethel's sentences were in accordance with the relevant statutory provisions, and the circuit court properly exercised its sentencing discretion by imposing consecutive sentences.

Moreover, this is not the first time this Court has reviewed Pethel's sentence under Rule 35(a) of the West Virginia Rules of Criminal Procedure. In *State v. Pethel*, this Court rejected Pethel's request for relief under Rule 35(a) and noted that the circuit court properly denied the previously filed motion because "petitioner was properly sentenced pursuant to each statute." No. 12-0838, 2013 WL 3242792, at *2 (W. Va. Supreme Court, June 28, 2013) (memorandum decision). Despite this Court's prior decision finding that Pethel was sentenced in accordance with the relevant statutory provisions, the circuit court chose to modify the same sentence after finding, not that it was illegal or imposed in an illegal manner, but merely that the sentence was "unacceptable."

Unlike the trial and sentencing court—which observed Pethel throughout the pendency of the criminal proceedings and trial and was immersed in the evidence—the circuit court predicated its actions on abject speculation and obvious disdain for the severity of the sentence for this sex offender. Nothing in the circuit court's order provides a legal basis for the relief it granted Pethel. Because a circuit court's authority is limited to correcting an illegal sentence when deciding a motion filed pursuant to Rule 35(a), the circuit court's order granting Pethel's motion without finding any illegality in the sentence is blatantly unlawful. Therefore, because the circuit court exceeded its authority by granting relief in violation of the law, this Court should grant this writ of prohibition to halt enforcement of the circuit court's order.

STATEMENT OF THE CASE

A. Underlying Convictions and Sentence

On September 13, 1999, an Ohio County Grand Jury returned a thirty-two count felony indictment charging Pethel with twenty counts of third-degree sexual assault in violation of West Virginia Code § 61-8B-5(a)(2) (1984); three counts of filming a minor engaged in sexually explicit

conduct in violation of West Virginia Code § 61-8C-2(b) (1984); two counts of possession of a controlled substance with intent to deliver in violation of West Virginia Code § 60A-4-401 (1983); one count of nighttime burglary in violation of West Virginia Code § 61-3-11(a) (1993); five counts of conspiracy to commit a felony in violation of West Virginia Code § 61-10-31; and one count of grand larceny in violation of West Virginia Code § 61-3-13(a). App. 84-97. Petitioner proceeded to a two-day jury trial in November 2000, upon each count of the indictment that alleged a sexual offense.[2] App. 106-08. The evidence at trial proved that Pethel engaged in sexual intercourse and oral sex with two minor female children on multiple occasions. App. 211-13, 243-47. The evidence also demonstrated that Pethel covertly filmed himself and both minor children engaged in various sexual acts. App. 216-17, 248-51. The jury ultimately found Pethel guilty of each of the twenty-four sexual offenses charged in the indictment. App. 425-29.

Following Pethel's jury trial, he and the State entered into a plea agreement to dispose of the remaining counts of the indictment that had been severed for trial purposes. App. 445-78. Pethel agreed to plead guilty to one count of possession of a controlled substance with the intent to deliver and one count of nighttime burglary in exchange for the State agreeing to dismiss the remaining six counts. App. 462-63, 477.

The parties appeared before the circuit court on December 5, 2000, for sentencing on all of Pethel's convictions. App. 483. Pethel appeared in person with his counsel and advised the circuit court that he received a copy of his presentence report and that he and his counsel reviewed it prior to the hearing. App. 484. Pethel declined to offer any statement at sentencing. App. 487. Pethel's

[2] The circuit court ordered that any of the non-sexual charges contained in the indictment be severed for trial purposes. Thus, Petitioner was not tried on the counts charging possession of a controlled substance with intent to deliver, nighttime burglary, grand larceny, and four of the five conspiracy counts. Thus, Pethel's jury trial was only upon the twenty-four counts of the indictment that charged a sex offense.

counsel, however, argued that the court should refrain from imposing a maximum sentence because Pethel did not know the children were minors when he sexually assaulted them. App. 488. Counsel argued that the sexual offenses were not "brutal, assaultive rape[s]," but that "[t]hese girls, if the jury believed that they came back at least [ten] times a piece," had somehow consented to the acts. App. 488-89. Counsel also alleged that there was no evidence that Petitioner "induced [the victims] with any drugs or alcohol or money or anything like that." App. 489. Counsel opined that "It appears it was just part of the promiscuity of young people having sex without regard to any kind of responsibility, and I hope that the Court will take that into account and not sentence him [as] harshly as it might." App. 489.

The State, on the other hand, argued that Pethel's convictions warranted the maximum allowable sentence, which totaled not less than fifty-three years, nor more than one-hundred twenty-five years in prison. App. 489-90. The State asserted that Pethel presented a serious risk to the community if released, and that he was likely to reoffend. App. 490. While not disagreeing that Pethel was a danger, the court noted that Pethel had been charged in the past with numerous criminal offenses, but many had been dismissed by the prosecuting attorney's office without conviction. App. 490-92. While the State asserted that it could not speak to any issues regarding the strength of any cases related to those prior offenses, it did emphasize that Pethel is a dangerous person who posed a serious recidivist risk. App. 491-92.

Prior to pronouncing sentence, the circuit court advised Pethel that it read the entire presentence report, considered the offenses of conviction, observed the tapes Pethel made of his sexual assaults perpetrated upon the child victims, and "listened to [Pethel] refer to a young woman who was [not] yet an adult as a little bitch that [he] pimp[ed] out[.]" App. 492-93. The court also noted Pethel had "shown no remorse whatsoever," and that he declined the opportunity to make a

statement on his own behalf. App. 493. The court finally explained that it had taken into account Pethel's age, his personal and criminal history, education, health, lack of employment or military service, financial condition, and the impact that his crimes had on his victims. App. 493. The court concluded that all these factors demonstrated that if Pethel were released, there would be a "substantial risk that [he] will reoffend again," that he would likely "[n]ever rehabilitate" himself, and that he needed long-term correctional treatment as a result. App. 492-95.

The court sentenced Pethel to a term of one to five years of incarceration for each of his third-degree sexual assault convictions; a determinate term of incarceration of ten years for each conviction of filming a minor engaged in sexually explicit conduct; a term of one to five years of incarceration for his conspiracy conviction; a term of one to five years of incarceration for his possession of a controlled substance with intent to deliver conviction; and a term of one to fifteen years of incarceration for his nighttime burglary conviction. App. 480-82, 494-95. The court ordered that each sentence run consecutive to the others, leaving Pethel with an aggregate sentence of fifty-three to one-hundred twenty-five years in prison. App. 480-82, 495.

B. Post-Conviction Proceedings

Following his conviction and sentence, Pethel initiated numerous post-conviction proceedings. First, Pethel filed a petition for a writ of habeas corpus in the circuit court. *Pethel v. McBride*, 219 W. Va. 578, 587, 638 S.E.2d 727, 736 (2006) ("*Pethel I*"). After Pethel filed this petition, he temporarily abandoned it and filed a direct appeal of his conviction with this Court in December 2003. *Id.* at 586-87, 638 S.E.2d at 735-36. In his direct appeal, Pethel argued that the State had violated the anti-shuttling provisions of the Interstate Agreement on Detainers Act ("IAD") during the pretrial stages of his underlying criminal proceedings. *Id.* This Court unanimously rejected Pethel's appeal by order entered in April 2004. *Id.* at 587, 638 S.E.2d at 736.

While his direct appeal with this Court was pending, Pethel also filed a petition for a writ of prohibition with this Court in March 2004, asserting that the State's violation of the IAD's anti-shuttling provision mandated that his convictions and sentences be vacated. *Id.* Similarly, this Court unanimously rejected Pethel's petition by order entered in May 2004. *Id.*

After obtaining no relief from these attempts to escape responsibility for his crimes, Pethel returned to his previously filed petition for habeas corpus relief. *Id.* Like in his other proceedings, Pethel argued that the Ohio County Circuit Court did not have jurisdiction to try, convict, or sentence him because it had violated the IAD's anti-shuttling provisions. *Id.* This time, however, the circuit court agreed with Pethel and granted his petition for a writ of habeas corpus on September 14, 2004. *Id.* The circuit court stayed the order so that the State could seek an appeal in this Court. *Id.*

On appeal, this Court reversed the circuit court's order granting Pethel's petition and held that a violation of the IAD's anti-shuttling provision does not serve to strip a circuit court of its jurisdiction to hold a trial on an indictment or to sentence a criminal defendant following a conviction. *Id.* at 598, 638 S.E.2d at 747. As a result, Pethel's convictions and sentences remained intact. *Id.*

Pethel tried yet another approach to obtain post-conviction relief in March 2012, when he filed his first motion to correct an illegal sentence under Rule 35(a) of the West Virginia Rules of Criminal Procedure. *State v. Pethel*, No. 12-0838, 2013 WL 3242792, at *1 (W. Va. Supreme Court, June 28, 2013) (memorandum decision) ("*Pethel II*"). He claimed that his sentences related to his convictions for filming the two minor females engaged in sexually explicit conduct was illegal because the title of the relevant statute—Chapter 61, Article 8C of the West Virginia Code—used the word "filming," which Pethel interpreted as limiting the statute's scope to cover only the

use of analog technology. *Id.* Pethel claimed that because he used digital technology rather than analog, his conduct did not fall under the actions criminalized by the statute. *Id.* Pethel also argued that because his actions did not fall within the prohibited conduct under the statute, his conviction for conspiracy to commit the offense of filming a minor engaged in sexually explicit conduct should also be thrown out. *Id.*

After the circuit court denied his Rule 35(a) motion, Pethel sought an appeal with this Court. This Court rejected Pethel's claims and reiterated that "[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." *Id.* at *2 (quoting syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982)). This Court also noted that Rule 35(a) "governs only illegal sentences or sentences that were imposed in an illegal manner. The nature of Petitioner's argument is not that his is an illegal sentence or that his sentence was imposed in an illegal manner." *Id.* Resultingly, this Court found "no error in the circuit court's denial of petitioner's . . . Rule 35(a) motion because *petitioner was properly sentenced pursuant to each statute.*" *Id.* (emphasis added).

Finally, Petitioner sought another appeal of a previously filed post-conviction motion to dismiss the indictment with this Court in *State v. Pethel*, No. 13-1139, 2014 WL 5311391, at *1 (W. Va Supreme Court, Oct. 17, 2014) (memorandum decision) ("*Pethel III*"). Like Petitioner's prior attempts to overturn his convictions and sentences, this Court rejected Petitioner's request for relief and affirmed the Ohio County Circuit Court's order denying his motion to dismiss. *Id.* at *4.

C. Instant Rule 35(a) Motion and Circuit Court's Order

In April 2024, Pethel filed a new motion to correct an illegal sentence pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure. App. 37-49. In his motion, Pethel asserted

four grounds challenging his convictions, none of which were raised at any point in his decades of prior post-conviction proceedings. Pethel claimed: (1) that the circuit court violated his right to remain silent at his sentencing hearing when it noted that Pethel made no statement in mitigation of sentence when given the opportunity to do so; (2) that the circuit court extrajudicially found him to be a sexually violent predator without affording him statutorily mandated procedural protections;[3] (3) that he was not provided a copy of his presentence investigation report prior to his sentencing hearing; and (4) that the circuit court did not provide him with credit for time served at various points during the pretrial proceedings. App. 37-49.

In July 2024, the parties appeared for a hearing on Pethel's motion before Respondent Circuit Court Judge.[4] App. 68. During the hearing, the State argued that Pethel's sentence was neither illegal nor imposed in an illegal manner. App. 72-74. Although Pethel had not expressly invoked Rule 35(b), the State emphasized that Pethel had no right to a reduction of sentence, as his opportunity to request such relief under Rule 35(b) had long since expired. App. 72. The State asserted that for Pethel to obtain Rule 35(a) relief, his sentence must be illegal or imposed in an illegal manner. App. 75-76.

At no point during the hearing did the circuit court suggest that Pethel's sentences were illegal. Instead, the circuit court focused on its belief that his sentence was too harsh. App. 79-80. The record also reflects that the judge was more focused on reducing a sentence he considered too

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[3] The circuit court does not address this in its order. While it does appear that the circuit court found Pethel to be a sexually violent predator without affording a hearing on that issue, Pethel has waived this claim because he never raised it in any of his prior post-conviction proceedings. Moreover, the impact of this is largely irrelevant, because Pethel's convictions of third-degree sexual assault involved minors, thereby requiring that he register as a sex offender for life under West Virginia Code § 15-12-4(a)(2)(E) (previously codified in West Virginia Code § 15-11-4(a)(2)(E) (1999)).

[4] As of January 13, 2025, Respondent Circuit Court Judge is no longer on the bench.

punitive than on correcting an illegal sentence. During the hearing, the court asked Pethel how long he had been in prison for his convictions. App. 79. Pethel advised that he had spent approximately twenty-five years in prison, to which the judge responded by stating: "I do find that troubling in that [Pethel is] not even eligible for parole yet." App. 79. The judge further explained:

> I don't think you take a man's life away for crimes other than murder and where you do permanent damage to others. Certainly, in this case what he did and what he's convicted of is horrible. But he did that as what? A 24-year old? He's no longer 24 years old.
>
> And it really troubled me that Judge Risovich had to view all those films in order to make a decision about them. It seems to me that it wasn't contested what was in them and that no judge needed to look at them. But nevertheless, that doesn't impact the argument on this motion. It's just something that bothers me as a judge.

App. 79-80.

The circuit court's order on December 26, 2024, granting Pethel's motion reflects that those so-called "troubling" things determined the judge's ruling. The circuit court opined that "[o]ne important legal factor in support of [Pethel's] Rule 35 motion is that one of the reasons for the harsh sentence was that the judge accused [Pethel] of not showing any remorse whatsoever by not making a statement on his behalf." App. 60. The circuit court's order goes on to speculate as to the motivations behind the sentencing judge's decision to impose the maximum sentence, and even lobbed accusations that the sentencing judge behaved unethically by summarily concluding that the sentencing judge believed its duty was to help the prosecution protect the community. App. 60-63. The court's order also took umbrage with the tone of the sentencing court when imposing sentence, claiming that "the judge harshly told [Pethel] all the reasons he was going to impose a maximum sentence." App. 61.

The circuit court also offered extended criticisms of the statutory sentences, describing how Pethel's sentence "is worse than the sentence imposed upon criminals who murder people and are given a life sentence with the possibility of mercy." App. 62. The court opined:

> A criminal defendant who has committed serious crimes retains basic human dignity in our judicial system and should be treated as a human being in sentencing by a judge focusing on rehabilitation and addressing the root causes of his behavior rather than solely punishing him through a life sentence. This is especially true at this time in our history when so many people are addicted to controlled substances and commit crimes caused by their addiction.

App. 62. Nothing about this comment by the circuit court points to any illegality with respect to Pethel's sentence.

Although the circuit court granted Pethel's motion to correct an illegal sentence, its order expressly articulates the finding that "any of the allegations of misconduct by the judge alone would not mean that it was an illegal sentence." App. 62. But the court reasoned that when taking all of the concerns it had with the original sentence, along with "our duty to support and believe in Due Process in the Constitution of the United States and in the Constitution of West Virginia," that Pethel's sentence "certainly is not an *acceptable* sentence nor [was] it acceptable conduct by a judge." App. 62-63 (emphasis added).

The circuit court's order concluded by modifying various aspects of Pethel's sentence; namely, specifying that many of the sentences would now run concurrently, and reducing two of Pethel's ten-year determinate sentences to a determinate term of five years. App. 63-64. At no point does the circuit court's order purport to correct anything illegal about Pethel's sentence. Indeed, the modifications made by the circuit court reflect nothing more than a more lenient sentence under the same sentencing provisions used when determining Pethel's original sentence.

Because the circuit court acted without authority when it reduced Pethel's convictions under Rule 35(a), the State seeks a writ of prohibition to prohibit the enforcement of this illegal order.

SUMMARY OF THE ARGUMENT

The circuit court, by reducing Pethel's sentence nearly two decades after it was imposed, in clear violation of the law, exceeded its authority. The order entered by the court is *not* an order granting a motion to correct an illegal sentence under Rule 35(a) of the West Virginia Rules of Criminal Procedure. The circuit court's order constitutes one granting a motion to reduce or reconsider sentence more akin to Rule 35(b)—a motion the circuit court had no authority to entertain, let alone grant. Because of this, the circuit court acted with a manifest disregard for procedural or substantive law. Finally, the issue presented in the instant case is an important one, because if the circuit court's action is permitted to stand, it would eviscerate the meaning and purpose of Rule 35(a). While Rule 35(a) motions have an important role in our criminal justice system, they are limited to correcting illegal sentences and should not be expanded or interpreted to allow a circuit court judge to subjectively decide whether previously imposed sentence should be reduced where the sentence offends a particular court's subjective view of fairness. As this Court has already found, the circuit court sentenced Pethel on December 5, 2000, in complete accordance with the law. The 20-year hindsight review of the "fairness" of that sentence by a different circuit court is wrong, an affront to the criminal justice system, and oversteps legal bounds. For these reasons, a writ of prohibition should issue to stop the continued enforcement of the circuit court's illegal order as this is the State's only recourse for relief.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a)(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 in the record, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

I. Legal Standard

The State may seek a writ of prohibition in a criminal case "where the trial court has exceeded or acted outside its jurisdiction." Syl. pt. 3, *State ex rel. State v. Gwaltney*, __ W. Va. __, 908 S.E.2d 192 (2024). This Court has held that "[w]here the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction." *Id.* When deciding whether a writ of prohibition shall issue, this Court looks to five "general factors":

> (1) whether the party seeking the writ has no other adequate means, such as an appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). While these factors are general and not all must be shown to warrant relief, "it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." *Id.*

II. The Ohio County Circuit Court illegally reduced Pethel's sentence in contravention of Rule 35(a) of the West Virginia Rules of Criminal Procedure.

A. The State has no right to appeal the circuit court's illegal order, thereby leaving no other adequate means to obtain relief outside of the instant petition for writ of prohibition.

Beginning with the first two *Hoover* factors, this Court has recognized that the state "has [only] a narrow opportunity to request review of an action of a trial court in a criminal proceeding." *State ex rel. Forbes v. Canady*, 197 W. Va. 37, 41, 475 S.E.2d 37, 41 (1996), *superseded by rule on other grounds as recognized in State v. Hartman*, 229 W. Va. 749, 735 S.E.2d 898 (2012). As a general rule, "the State has no right of appeal in a criminal case, except as may be conferred by the Constitution or statute." Syl. pt. 1, *State v. Jones*, 178 W. Va. 627, 363 S.E.2d 513 (1987). The limited circumstances in which a State may petition for appeal in a criminal setting arise when: "(1) the case relates to the public revenue, W. Va. Const. art. VIII, § 3 and W. Va. Code 51-1-3 [1931], or if (2) an indictment is held to be 'bad or insufficient' by order of a circuit court." *State v. Walters*, 186 W. Va. 169, 171, 411 S.E.2d 688, 690 (1991); *see also* W. Va. Code § 58-5-30 (1998) (providing the State may appeal to the West Virginia Supreme Court of Appeals when an order dismissing an indictment as "bad or insufficient" is entered by a circuit court).

Although the State's ability to petition for appeal in criminal matters is limited, "the State is armed with another right to appellate review in the form of prohibition." *SER Forbes*, 197 W. Va. at 42, 475 S.E.2d at 42. As noted above, prohibition is an appropriate avenue for the State to seek in a criminal proceeding when a circuit court "has exceeded or acted outside of its jurisdiction." Syl. pt. 3, *Gwaltney*, ___ W. Va. ___, 908 S.E.2d 192.

Here, the circuit court acted outside its legitimate authority and effectively released an unrepentant sex offender into the community years before he would have otherwise been eligible for parole. The circuit court's actions were made with a complete disregard of the fact that the

sentencing judge had the opportunity to view the evidence in support of Pethel's guilt, to observe his behaviors during the course of the underlying criminal trial, and concluded that a severe sentence was necessary. The Respondent Circuit Court Judge, sitting in review of Petitioner's sentence approximately twenty-four years after the fact, unilaterally decided that Pethel had served enough time, and entered an order unilaterally modifying Pethel's legally valid sentence to make him immediately eligible for parole years before he would have been otherwise.

The impact of the Respondent Circuit Court Judge's order was that a dangerous and unrepentant sex offender was released into the community prior to him serving his legally imposed sentence. The State as a substantial interest in ensuring those whom it convicts, particularly those convicted of sexual offenses against minors, serve their sentences in accordance with the law. Here, Pethel was given an proverbial "get-out-of-jail-free" card simply because a judge sympathetic to his situation happened to hear his motion. But whether a judge is sympathetic to a criminal defendant's cause does not authorize that judge illegally modifying a sentence so that it comports with that judge's sense of fairness. Rather, the circuit court judge is still bound by the law. Here, the judge illegally reduced Pethel's sentence under Rule 35(a) of the West Virginia Rules of Criminal Procedure without finding that any portion of the sentence illegal.

The State has an obligation to ensure that defendants serve the sentences imposed for their convictions. The Respondent Circuit Court Judge allowed Pethel to be released without having served his legally imposed sentence. Because the State does not have the ability to seek a direct appeal of the circuit court's illegal order, a writ of prohibition is the only appropriate avenue to ensure that Pethel is placed back in prison to serve the remainder of his sentence as originally imposed.

B. The circuit court's order is clearly wrong as a matter of law.

The circuit court made multiple, independent clear errors of law in its order, any one of which would justify issuing the writ of prohibition.

1. The circuit court's order was barred by res judicata.

The Respondent Judge's first clear error of law was in not finding the second Rule 35(a) motion barred by the doctrine of res judicata. "An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto[.]" Syl. pt. 4, *State ex rel. Richey v. Hill*, 216 W. Va. 155, 603 S.E.2d 177 (2004) (internal quotation marks and citations omitted). Indeed, so long as "the parties might have had the matter disposed of on its merits" in the prior proceedings is sufficient for res judicata to apply. *Id.* For res judicata to apply, three factors must be established: (1) "there must have been a final adjudication on the merits in the prior action by a court having jurisdiction over the proceedings"; (2) "the two actions must involve either the same parties or persons in privity with those same parties"; and (3) "the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." *Id.* at syl. pt. 5 (quoting syl. pt. 4, *Blake v. Charleston Area Medical Center*, 201 W. Va. 469, 498 S.E.2d 41 (1997)).

Res judicata should have barred this successive Rule 35(a) motion. First, there was a final adjudication on the merits; the circuit court directly addressed Pethel's prior Rule 35(a) motion, and this Court subsequently affirmed. *See Tolley v. Carboline Co.*, 217 W. Va. 158, 164, 617 S.E.2d 508, 514 (2005) ("[T]here has been a final adjudication on the merits of the *Tolley I* action, insofar as this Court affirmed the summary judgment order in favor of ACF."). Second, the parties are the

same: Pethel and the State. And third, the identical cause of action *was* resolved or, at the very least, could have been resolved. The same issue was resolved in that this Court's prior review of Pethel's sentence during his previous Rule 35(a) appeal led it to reach the conclusion that "petitioner was properly sentenced pursuant to each statute." *Pethel II*, 2013 WL 3242792, at *2. And at the very least, Pethel has had numerous opportunities following his conviction and sentence to raise the very issues raised in his most recent Rule 35(a) motion. Recall that that Pethel pursued a direct appeal, a post-conviction habeas corpus proceeding, a petition for a writ of prohibition, and a prior Rule 35(a) motion.

Res judicata thus applies, and the Respondent Judge clearly erred by failing to find that the doctrine of res judicata barred Pethel from obtaining relief.

2. The circuit court improperly conflated Rule 35(a) and Rule 35(b).

The circuit court inappropriately jumbled timing provision from Rule 35(a) of the West Virginia Rules of Criminal Procedure with substantive standards from Rule 35(b). Rule 35(a) allows a court to correct an illegal sentence at any time. "[A]n illegal sentence is a void sentence and being a nullity, may be superseded by a valid sentence[.]" *State v. Riffle*, 247 W. Va. 14, 21, 875 S.E.2d 152, 159 (2022) (internal citation and quotation marks omitted). Thus, an illegal sentence is void and can be corrected and superseded at any time with a valid sentence. A Rule 35(b) motion, on the other hand, "is essentially a plea for leniency from a presumptively valid conviction." *State v. Marcum*, 238 W. Va. 26, 31, 792 S.E.2d 37, 42 (2016) (quoting *State v. Head*, 198 W. Va. 298, 306, 480 S.E.2d 507, 515 (1996) (Cleckley, J., concurring)). But the opportunity for a defendant to make a plea for lenience—and a circuit court's authority to grant it—ends 120 days following the imposition of sentence. Outside of that timeframe, a circuit court has no authority to reduce or modify a valid sentence. *See* syl. pt. 3, *State v. Keefer*, 247 W. Va. 384, 880

S.E.2d 106 (2022); syl. pt. 2, *State ex rel. State v. Sims*, 239 W. Va. 764, 806 S.E.2d 420 (2017) ("A circuit court does not have jurisdiction to rule upon the merits of a motion for reduction of sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure when the motion is filed outside of the 120-day filing period set out under the statute.").

Given the more than twenty-years that have passed since Pethel was sentenced, the circuit court had no authority to disturb the sentence imposed absent a finding that the sentence was illegal. It had no authority to "reduce" or "modify" Pethel's sentence under Rule 35(b) more than twenty years after the statutory timeline to pursue such relief had expired. Nor did it have the authority to grant relief under Rule 35(a), as the sentence was not illegal, and the circuit court admitted as much. App. 62. Whether the circuit court judge subjectively believed that a lengthy prison sentence was "unacceptable" is irrelevant. The sentence is lawful, and, therefore, must stand.

3. Pethel's sentence was lawful and based on permissible factors.

The Respondent Judge's third clear error of law was in reducing Respondent Pethel's sentences, which were already within statutory limits and not based on any impermissible factors.

Statutory Limits. To begin, Pethel's sentence was within statutory limits. Pethel was convicted of a total of twenty-six felony counts, twenty-four of which were determined by a jury. For his twenty convictions of third-degree sexual assault, Pethel received the statutorily prescribed sentence of not less than one, nor more than five years imprisonment in accordance with West Virginia Code § 61-8B-5 (1984). For his three convictions for filming a minor engaged in sexually explicit conduct, Pethel received the statutorily prescribed determinate sentence of ten years imprisonment in accordance with West Virginia Code §61-8C-2 (1984). For his conviction of conspiracy to film a minor engaged in sexually explicit conduct, Pethel received the statutorily

prescribed indeterminate sentence of not less than one, nor more than five years in accordance with West Virginia Code § 61-10-31. For his conviction of possession of a controlled substance with the intent to deliver, Pethel received the statutorily prescribed indeterminate sentence of not less than one, nor more than five years imprisonment in accordance with West Virginia Code § 60A-4-401(a)(ii) (1983). Finally, for his conviction of nighttime burglary, Pethel received the statutorily prescribed indeterminate sentence of not less than one, nor more than fifteen years imprisonment in accordance with West Virginia Code § 61-3-11(a) (1993). All of these were sound sentences. Not even the circuit court suggested that the sentences were imposed in contravention of the relevant statutory provisions.

It may be that the circuit court though these statutes provide for sentences that are unduly punitive—but that is not a judgment the circuit court can make. This Court has consistently recognized that "the Legislature has a broad power in defining offenses and prescribing punishments, limited in severity only by the constitutional prohibition against cruel or unusual or disproportionate sentences." *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 533, 276 S.E.2d 205, 211 (1981). The Legislature has determined that sexual crimes against children should be punished severely. This Court has recognized the same: "[t]here can be little debate that sexual assault of a minor is profoundly tragic. 'Children are the most vulnerable of victims, suffering traumatic and frequently life-long physical and emotional damage.'" *State v. Goff*, 203 W. Va. 516, 522, 509 S.E.2d 557, 563 (1998) (citation omitted). The circuit court had no room to second guess the Legislature's choice to call for aggressive punishment of these heinous offenses.

Consecutive Sentences. The circuit court appeared to believe that total length of the sentence here somehow rendered it improper, but it was mistaken. Pethel's sentence is indeed a lengthy one because the sentencing court ordered the sentence for each of his twenty-six felony

convictions be served consecutive to one another. App. 480-82. Despite the Respondent Judge's disdain, consecutive sentences are the default sentencing scheme in West Virginia. West Virginia Code § 61-11-21 provides: "When any person is convicted of two or more offenses, before sentence is pronounced for either, the confinement to which he may be sentenced upon the second, or any subsequent conviction, shall commence at the termination of the previous term or terms of confinement." It is within the sentencing court's discretion, however, to order that multiple sentences be run concurrently with the others. *Id.* That consecutive sentences for two or more convictions is the default sentencing scheme has long been recognized by this Court: "When a defendant has been convicted of two separate crimes, before sentence is pronounced for either, the trial court may, in its discretion, provide that the sentences run concurrently, and unless it does so provide, the sentences will run consecutively." Syl. pt. 3, *State v. Allen*, 208 W. Va. 144, 539 S.E.2d 87 (1999) (quoting syl. pt. 3, *Keith v. Leverette*, 163 W. Va. 98, 254 S.E.2d 700 (1979)).

Consideration of Remorse. Nor was the sentence imposed in an illegal manner because the sentencing court opined on Petitioner's remorse. The circuit court suggested that the sentencing court inappropriately "accused [Pethel] of not showing any remorse whatsoever by not making a statement on his behalf." App. 60. The order also notes that the "judge considered that [Pethel] did not address the Court and did not accept responsibility for his crimes." App. 60. But nothing in the record actually indicates that the sentencing court imposed the sentence it did because Pethel chose not to speak in mitigation of sentencing when given the opportunity to do so.

More to the point, it is appropriate for a sentencing judge to account for remorse (or lack thereof) when deciding an appropriate sentence. "[T]his Court has identified remorse, or the lack thereof as a factor to be taken into account by a trial judge when sentencing a defendant." *State v. Jones*, 216 W. Va. 666, 669, 610 S.E.2d 1, 4 (2004); *see also State v. Mann*, 205 W. Va. 303, 316,

518 S.E.2d 60, 73 (1999) (holding that the defendant's sentence was appropriate based, in part, on the fact that he "refused to express any remorse for his crime"); *State v. Phillips*, 199 W. Va. 507, 515, 485 S.E.2d 676, 684 (1997) (upholding defendant's sentence following a disproportionality claim, and finding sentence was proper given that "trial judge, who was able to observe Phillips' demeanor, concluded that Phillips felt no remorse for his actions"); *State v. Brown*, 177 W. Va. 633, 642, 355 S.E.2d 614, 623 (1987) (upholding defendant's 60-year prison term for aggravated robbery and first degree sexual abuse after the trial judge noted that the defendant "expressed no remorse for the crimes which had been committed or sympathy for the victim"); and *State v. Black*, 175 W. Va. 770, 774, 338 S.E.2d 370, 374 (1985) (upholding a sentence in which the trial judge stated, "[Y]ou don't have any conscience. I feel that you are still not even sorry for the things you did . . . [Y]ou have never shown any real remorse for the things you have done.").

Other Factors. The circuit court also took issue with certain other actions of the sentencing court. It criticized the sentencing court for purportedly failing to give sufficient weight to counsel's argument in support of a lesser sentence, App. 60; for expressing frustration with the prosecuting attorney's office for the number of criminal charges it had dismissed against Pethel in the past, App. 60-61; for imposing a sentence based on its belief that it had a duty to protect the community, App. 61; for "harshly t[elling] the Petitioner all the reasons he was going to impose a maximum sentence," App. 61; and for considering law enforcement's version of the crime, as well as Pethel's age, lack of military service, and its belief that respondent was a substantial risk to reoffend, App. 61-62.

But ultimately, none of these factors were cited by the circuit court as the basis for its decision. For good reason: none of them land on the list of impressible factors. "[T]he impermissible factors a court should not consider in sentencing include such matters as 'race, sex,

national origin, creed, religion, and socioeconomic status[.]'" *State v. Evan O.*, No. 21-0573, 2022 WL 3936184, at *2 (W. Va. Supreme Court, Aug. 31, 2022) (memorandum decision) (quoting *State v. Moles*, No. 18-0903, 2019 WL 5092415, at *2 (W. Va. Supreme Court, Oct. 11, 2019) (memorandum decision)); *United States v. Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991). And although this Court has repeatedly been faced with claims of impermissible factors, it has yet to expand its holding past those noted above.

* * *

In the end, the circuit court's respect for the statutes and appropriate consideration of relevant facts should be the end of the matter. This Court has routinely *refused* to review sentences on appeal that are within the statutory limits and not based on impermissible factors. Syl. pt. 4, *Goodnight*, 169 W. Va. 366, 287 S.E.2d 504; *see also State v. Sugg*, 193 W. Va. 388, 406, 456 S.E.2d 469, 487 (1995) ("As a general proposition, we will not disturb a sentence following a criminal conviction if it falls within the range of what is permitted under the statute."). Rule 35(a) imposes the exact same restraint on a circuit court's authority to review a sentence. If anything the circuit court should have been even *more* restrained here, seeing as how the sentencing judge sat through the trial, heard the evidence, observed the victims testify, observed Pethel throughout, and determined that the facts and circumstances warranted the maximum sentence allowable under the law. Whether the Respondent Judge would have imposed a less severe sentence is irrelevant. and is no basis for it to grant Pethel's Rule 35(a) motion in the instant case.

All this demonstrates that the circuit court's December 26, 2024, order is clearly wrong as a matter of law.

C. The circuit court's order meets the fourth and fifth *Hoover* factors, as the order amounts to a flagrant disregard of the law and presents an important issue regarding a circuit court's limited authority under Rule 35(a).

The circuit court's order, if allowed to stand, would eviscerate Rule 35(a), and fundamentally change the finality of sentences imposed in West Virginia. Indeed, Rule 35(a) would be rendered meaningless and any sentence, whether valid or not, could be modified at any time based on little more than the subjective whims of the presiding judge. Rule 35(a) is an important component of our criminal justice system in that a defendant may seek review of a sentence and have that sentence corrected if an illegality is present. But a line must be drawn between an objective illegality and a subjective disagreement between two circuit court judges over how punitive a particular sentence is or whether one circuit court judge would have exercised his or her legitimate sentencing discretion differently. While these subjective differences are appropriate considerations within the context of a Rule 35(b) motion filed within the 120-day statutory time period, they have no place in a Rule 35(a) motion filed two decades after the sentence was imposed. Enforcing the distinction between Rule 35(a) and Rule 35(b) gives due deference to decades of legal precedent.

Moreover, allowing enforcement of the order at issue would invade the province of the Legislature whose duty it is to determine sentence length. "[R]eviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes[.]" *State v. James*, 227 W. Va. 407, 416, 710 S.E.2d 98, 107 (2011) (quoting *Solem v. Helm*, 463 U.S. 277, 290 (1983)). Even if the Respondent Judge disagreed with the legislative sentencing scheme at issue, his legal duty was to give deference to those sentences. He did not. Judges cannot substitute their individual opinion on

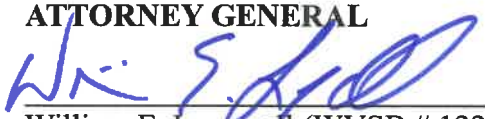
sentence length in violation of statutes enacted by the Legislature, and this is a blatant disregard for the law. Thus, a writ should issue to prevent this manifest injustice.

CONCLUSION

The State respectfully requests a writ of prohibition preventing the lower court from enforcing its December 26, 2024, order and reinstating the originally imposed sentence in case number 99-F-72.

Respectfully Submitted,

JOHN B. McCUSKEY
ATTORNEY GENERAL



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VERIFICATION

State of West Virginia,
County of Kanawha; to-wit

I, William E. Longwell, Assistant Attorney General and counsel for Petitioner named in the foregoing Petition for Writ of Prohibition, being duly sworn, state that the facts and allegations contained in the Petition for Writ of Prohibition are true, except insofar as they are stated to be on information, and that, insofar as they are stated to be on information, I believe them to be true.

William E. Longwell
Assistant Attorney General

Taken, sworn to, and subscribed before me this 5 day of February, 2025.

[SEAL]

Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 25-_____

STATE OF WEST VIRGINIA *ex rel.*
STATE OF WEST VIRGINIA,

***Petitioner*,**

v.

THE HONORABLE JOSEPH BARKI,
Judge, Circuit Court of Ohio County, West Virginia,
and SHAWN PETHEL,
Defendant Below,

Respondents.

CERTIFICATE OF SERVICE

I, William E. Longwell, do hereby certify that on the 5th day of February, 2025, I served a true and accurate copy of the foregoing **Petition for a Writ of Prohibition** upon the below-listed individual via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure:

John M. Jurco
P.O. Box 783
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Counsel for Shawn Pethel

And via first-class mail, postage prepaid, addressed as follows, to the non-e filing Respondents:

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Defendant Below

The Honorable Joseph Barki
Circuit Court Judge for the
First Judicial Circuit Court
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