



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

JERRY LONGFORD-MYERS, )  
 )  
 Defendant Below, )  
 Appellant, )  
 ) No. 494, 2018  
 v. )  
 )  
 STATE OF DELAWARE, )  
 )  
 Plaintiff Below, )  
 Appellee. )

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
DELAWARE IN AND FOR NEW CASTLE COUNTY

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**APPELLANT'S OPENING BRIEF**

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DATED: November 29, 2018

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## NATURE OF THE PROCEEDINGS

Mr. Longford-Myers was serving multiple probationary sentences related to various prior convictions when he entered a guilty plea to a new offense on January 30, 2018 in the Superior Court.<sup>1</sup> Violation of Probation proceedings were pending in case numbers 1104021979 (hereinafter “the Maintaining a Dwelling Case”) and 1205003223 (hereinafter “the Drug and Firearm Case”) at the time Mr. Longford-Myers entered his plea.<sup>2</sup>

On February 6, 2018, Mr. Longford-Myers appeared before the Superior Court for his alleged Violations of Probation.<sup>3</sup> The Appellant admitted that he violated his probation by committing a new criminal offense and was subsequently sentenced by the Superior Court in both cases.<sup>4</sup> The Maintaining a Dwelling Case had one conviction upon which the trial court could sentence Mr. Longford-Myers<sup>5</sup>, and the Drug and Firearm Case had two prior convictions.<sup>6</sup> The Superior

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<sup>1</sup> A006; A013; A019.

<sup>2</sup> A006; A013.

<sup>3</sup> A006; A013; A020-33.

<sup>4</sup> A025.

<sup>5</sup> A001.

<sup>6</sup> A010.

Court imposed a sentence of one year of unsuspended Level V time for each of the three convictions.<sup>7</sup>

On April 19, 2018, the Appellant filed a motion pursuant to Superior Court Criminal Rule 35(a) in which he sought to correct the Superior Court's sentence Order as to the Maintaining a Dwelling Case after realizing that he had already served all of the Level V time originally levied, thus leaving no additional jail time for the trial court to have imposed.<sup>8</sup>

The Superior Court ordered the State to respond to the Appellant's Rule 35(a) motion.<sup>9</sup> The State conceded the accuracy of Mr. Longford-Myers's contention.<sup>10</sup> The Department of Justice, within its Response, also requested a modification of the sentence Order related to the Drug and Firearm Case, claiming the original sentence in that matter was illegal.<sup>11</sup>

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<sup>7</sup> A031; A034-35.

<sup>8</sup> A006-07; A037-64.

<sup>9</sup> A007; A014; A065.

<sup>10</sup> A067 ("Given the convoluted sentencing calculations involved with multiple stacked sentences and the extension of conditional release, the State is unable to dispute this contention.").

<sup>11</sup> A068.

The Superior Court granted the requests made by both parties, modifying both the February 6, 2018 Violation of Probation sentence Order and the original sentence Order from 2012 in the Drug and Firearm Case.<sup>12</sup>

A timely notice of appeal was filed on September 24, 2018. This is Mr. Longford-Myers's Opening Brief.

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<sup>12</sup> A094-95; A100-01.

## **SUMMARY OF ARGUMENT**

The trial court improperly concluded that a sentence imposed in 2012 was illegal where, under the Possession of a Deadly Weapon by a Person Prohibited statute, the sentencing court imposed the required three-year mandatory sentence and, in its discretion, imposed additional Level V time which it suspended. Absent illegality in the sentence, the trial court lacked both statutory and inherent authority to modify a legal sentence to increase the amount of Level V time imposed. Moreover, even though a separate portion of the sentence was illegal, Rule 35 does not allow a sentencing court to do anything but strike the illegal portion of the sentence, leaving the legal provisions in place as they were originally imposed.

## STATEMENT OF FACTS

On February 6, 2018, Appellant, Jerry Longford-Myers, appeared before the Superior Court for a Violation of Probation hearing in which he was alleged to have violated the terms of probation in two separate matters, the Maintaining a Dwelling Case and the Drug and Firearm Case.<sup>13</sup> Mr. Longford-Myers admitted the violation.<sup>14</sup> The Superior Court subsequently sentenced the Appellant as follows:

- As to the Maintaining a Dwelling Case, the Court imposed a sentence of two years at supervision Level V, suspended after one year, to be followed by one year of Level III probation.<sup>15</sup> This related to a conviction for the offense of Maintaining a Dwelling for Keeping Controlled Substances (hereinafter “Maintaining a Dwelling”).<sup>16</sup>
- As to the Drug and Firearm Case, the Court first imposed a sentence of four years at Level V incarceration, suspended after serving one year, for one year of Level III supervision in relation to the original offense of Possession of a Firearm During the Commission of a Felony (hereinafter “PFDCF”).<sup>17</sup> As to the original offense of Drug Dealing, the Court imposed a sentence of five years at supervision Level V, suspended after one year of incarceration for one year of Level III probation.<sup>18</sup>

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<sup>13</sup> A006; A013.

<sup>14</sup> A025.

<sup>15</sup> A031; A034.

<sup>16</sup> A001; A031; A034.

<sup>17</sup> A010; A031; A034-35.

<sup>18</sup> A010; A031; A035.



In total, the Superior Court imposed a total of three years of unsuspended Level V incarceration, one year in the Maintaining a Dwelling Case and two years in the Drug and Firearm Case.<sup>19</sup>

On April 19, 2018, Mr. Longford-Myers, by and through counsel, filed a Motion to Correct Illegal Sentence pursuant to subsection (a) of Superior Court Criminal Rule of Procedure 35 (hereinafter “Rule 35”) as to the sentence imposed in the Maintaining a Dwelling Case.<sup>20</sup> Therein, the Appellant alleged that he had already served all of the Level V time initially imposed by the Superior Court in its original sentence dated August 10, 2011 for his conviction of Maintaining a Dwelling, thus rendering the Court’s sentence in that case illegal.<sup>21</sup> One week later, the Superior Court requested that the State file a response to Mr. Longford-Myers’s motion.<sup>22</sup>

The State did so on June 1, 2018.<sup>23</sup> In its Response, the State conceded that the Court’s sentence in the Maintaining a Dwelling Case was illegal, as Mr. Longford-Myers had served all of the Level V time originally imposed by the

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<sup>19</sup> A031; A034-35.

<sup>20</sup> A006; A037-64.

<sup>21</sup> A038-43.

<sup>22</sup> A007; A014; A065.

<sup>23</sup> A007; A014-15; A066-93.

Superior Court for his conviction under the Maintaining a Dwelling statute.<sup>24</sup> The State went further, however, and raised a new claim—that the sentence originally imposed by the Superior Court in the Drug and Firearm Case was illegal as it related to the PFDCF conviction.<sup>25</sup>

The PFDCF sentence, originally imposed on November 7, 2012, required Mr. Longford-Myers to serve eight years of Level V incarceration, suspended after three years for descending levels of quasi-incarceration and probation.<sup>26</sup> The State’s contention that such sentence was illegal was based on the language found in Section 1447A(d) of Title 11 that “[a]ny sentence imposed for a violation of [the PFDCF statute] shall not be subject to suspension.”<sup>27</sup> Because of this alleged illegality, the State moved the Court—presumably pursuant to Rule 35(a), though the State did not specify in its Response—to “enter a modified sentencing order that is consistent with 11 Del. C. § 1447A(d).”<sup>28</sup> Moreover, the State sought an additional modification of the February 6, 2018 sentence as it related to the convictions in the Drug and Firearm Case, requesting that the Court impose three

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<sup>24</sup> A067.

<sup>25</sup> A068.

<sup>26</sup> A082.

<sup>27</sup> A068 (quoting 11 *Del. C.* § 1447A(d)).

<sup>28</sup> A068. *See also* A070.

years of unsuspended Level V incarceration connected to the Drug Dealing offense, rather than the one year originally imposed.<sup>29</sup>

While claiming that the 2012 sentence Order was illegal, the State supported its request to modify the nearly six-year old Order by stating it was a means “to effectively clean up the docket and make the record more clear.”<sup>30</sup> The State also asked the Court to reallocate the Level V time from the illegal portion of the February 2018 sentence Order in consideration of the “Court’s original intentions of Defendant receiving an aggregate VOP prison sentence of 3 years.”<sup>31</sup>

The Superior Court did not seek a response from Mr. Longford-Myers as to the State’s requests for modification to the sentences imposed in the Drug and Firearm Case, but issued an Order ten days later on June 11, 2018.<sup>32</sup> While the disposition indicates that only Mr. Longford-Myers’s Motion to Correct an Illegal Sentence was granted in reference to the Maintaining a Dwelling Case<sup>33</sup>, the Court

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<sup>29</sup> A070-71.

<sup>30</sup> A070.

<sup>31</sup> A070-71.

<sup>32</sup> A007-08; A015; A094-95. Undersigned counsel mailed Mr. Longford-Myers a copy of the Court’s June 11, 2018 Order on June 13, 2018. A096. The Appellant did not receive the correspondence. A096. Subsequently, undersigned counsel requested that the Court vacate and reissue the June 11, 2018 Order so as to allow Mr. Longford-Myers to file a timely Notice of Appeal. A096. The Court did so on August 23, 2018. A099-101.

<sup>33</sup> A094; A100.

also granted the State's request to modify both the November 7, 2012 and February 6, 2018 sentence Orders in the Drug and Firearm Case.<sup>34</sup>

Ultimately, the Superior Court granted the State's request for modification and amended the February 6, 2018 sentence from one year of active Level V incarceration for each of the three distinct convictions in two separate cases to three years of Level V incarceration for the Drug Dealing conviction alone.<sup>35</sup>

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<sup>34</sup> A094-95; A100-01.

<sup>35</sup> A094-95; A100-01.

## ARGUMENT

### **CLAIM I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY MODIFYING ITS SENTENCE IN THE DRUG AND FIREARM CASE AS THE ORIGINAL SENTENCE WAS NOT ILLEGAL AND THE COURT LACKED JURISDICTION TO MODIFY THE LEGAL PORTION OF THE VIOLATION OF PROBATION SENTENCE.**

#### **A. Question Presented**

Whether the trial court committed reversible error when it improperly concluded that a legal portion of its sentence was illegal and subsequently increased the lawful portion of the sentence rather than merely striking the portion of the sentence that was actually illegal under Superior Court Rule of Criminal Procedure Rule 35. This issue was preserved via the filing of a Motion to Correct Illegal Sentence by the defense, and the State’s request for modification in its Response thereto.<sup>36</sup>

#### **B. Standard and Scope of Review**

This Court reviews a trial court’s determination whether to modify a sentence under an abuse of discretion standard.<sup>37</sup> Under this standard, “a reviewing court should resist a tendency to substitute its views for those of the judge exercising the initial power,” but rather to determine “whether the trial court acted within a zone of reasonableness or stayed within ‘a range of choice.’”<sup>38</sup>

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<sup>36</sup> A006-07; A037-64; A066-93.

<sup>37</sup> *State v. Lewis*, 797 A.2d 1198, 1202 (Del. 2002).

<sup>38</sup> *Id.* (quoting *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)).

### **C. Merits of Argument**

The trial court committed reversible error by resentencing Mr. Longford-Myers in the Drug and Gun Case as it lacked jurisdiction to modify a legal sentence. Despite the State's assertion to the contrary, the Superior Court erred as a matter of law in holding that the original sentence imposed was illegal. Absent such illegality, the trial court could only modify its February 6, 2018 sentence Order insofar as it was illegal. The trial court's error in modifying its prior sentence in the Drug and Gun Case requires reversal.

#### ***The Original Sentence in the Drug and Gun Case was Legal.***

In modifying its prior sentence, the trial court adopted the State's argument that its November 2012 sentence in the Drug and Gun Case was illegal because it suspended a period of Level V incarceration when imposing a sentence for a violation of Section 1447A of Title 11. The State contended that because the statute states that "[a]ny sentence imposed for a violation of [the PFDCF statute] shall not be subject to suspension," the Superior Court erred in imposing an eight year sentence at Level V incarceration of which five years were suspended.<sup>39</sup> Both the State and the trial court were mistaken.

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<sup>39</sup> A068.

Two provisions of Section 1447A are relevant to this Court’s analysis. First, subsection (b) of the statute mandates that any person convicted of possessing a firearm during the commission of a felony is subject to a mandatory period of incarceration of at least three years.<sup>40</sup> Thus, the range of sentences any defendant convicted under Section 1447A may face is three to twenty-five years.<sup>41</sup> Second—and as the State noted below—“[a]ny sentence imposed for a violation of [Section 1447A] shall not be subject to suspension and no person convicted for a violation of this section shall be eligible for good time, parole or probation during the period of the sentence imposed.”<sup>42</sup> The prohibition against such suspension, however, applies only to the mandatory three years a sentencing court must impose by law, not any additional Level V time the Superior Court may choose to mete out in its discretion.

This Court was confronted with a challenge to a sentence similar to that raised by the State in this case in *Oliver v. State*.<sup>43</sup> The *Oliver* defendant was convicted, in relevant part, of one count of Possession of a Deadly Weapon by a

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<sup>40</sup> 11 *Del. C.* § 1447A(b).

<sup>41</sup> “Possession of a firearm during the commission of a felony is a class B felony.” 11 *Del. C.* § 1447A(a). Class B felonies are punishable up to a maximum penalty of twenty-five years. *See* 11 *Del. C.* § 4205(b)(2).

<sup>42</sup> 11 *Del. C.* § 1447A(d).

<sup>43</sup> 2012 WL 1187742 (Del. Supr. Apr. 5, 2012).

Person Prohibited (hereinafter “PDWBPP”) in violation of Section 1448 of Title 11.<sup>44</sup> Like the PFDCF statute, the PDWBPP statute prescribed a mandatory period of incarceration of at least three years for a conviction under that statutory provision.<sup>45</sup> The PDWBPP statute also includes nearly identical language to that of the PFDCF statute, as it prohibits suspension of any sentence imposed pursuant to that section of the statute.<sup>46</sup>

The *Oliver* defendant was sentenced to eight years at Level V incarceration, suspended after serving three years for decreasing levels of supervision.<sup>47</sup> The defendant appealed the sentence, arguing to this Court that because of the prohibition in the statute against suspending any portion of a sentence imposed pursuant to the statute, the Superior Court erred by imposing a sentence greater than the three years of unsuspended Level V time.<sup>48</sup> This Court rejected that argument, holding that:

The Superior Court was required to impose a minimum sentence of three years but could have sentenced [the defendant] to a maximum

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<sup>44</sup> *Id.* at \*1.

<sup>45</sup> *Id.* at \*1 (citing 11 *Del. C.* § 1448(e)(1)(b)). Although Section 1448(e)(1)(b) required a three-year mandatory sentence at the time the *Oliver* defendant was sentenced, the statute has subsequently been modified so that subsection (e)(1)(b) mandates a mandatory five-year period of incarceration. See Del. H.B. 36 (2013).

<sup>46</sup> Compare 11 *Del. C.* § 1447A(d) with 11 *Del. C.* 1448(e)(4).

<sup>47</sup> *Oliver*, 2012 WL 1187742 at \*1.

<sup>48</sup> *Id.*



sentence of eight years. Pursuant to 11 *Del. C.* § 4205(e), the Superior Court was permitted to suspend any portion of [the defendant]’s sentence in excess of the mandatory minimum sentence. Accordingly, the Superior Court was legally permitted to sentence [the defendant] to eight years in prison to be suspended after serving three years.<sup>49</sup>

This Court consequently affirmed the denial of the *Oliver* defendant’s motion for correction of illegal sentence.<sup>50</sup>

The rationale of *Oliver* governs the instant case. When sentencing Mr. Longford-Myers in 2012 in the Drug and Firearm Case, the Superior Court was statutorily barred from suspending any of the three years of Level V incarceration it was required to impose as a minimum-mandatory sentence.<sup>51</sup> Any period of Level V time imposed beyond the mandatory three years, however, was discretionary and subject to suspension.<sup>52</sup>

The November 2012 sentence imposed by the trial court in the Drug and Firearm Case was legal at the time it was imposed and remained legal six years later. The sentencing court properly imposed a three-year mandatory Level V sentence for Mr. Longford-Myers’s PDWBPP conviction in 2012, then exceeded

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*2.

<sup>51</sup> *See* 11 *Del. C.* § 1447A(b).

<sup>52</sup> *Oliver*, 2012 WL 1187742 at \*1.

that sentence in its discretion by suspending additional Level V time. The trial court erred in finding that the sentence was illegal and subject to modification.

***The Trial Court Lacked Authority to Modify the Drug and Firearm Case Sentence.***

The Superior Court “may modify a sentence pursuant to two sources of authority: its statutory authority and its inherent authority.”<sup>53</sup> The trial court’s statutory authority arises from two sources: Section 4217 of Title 11 and Rule 35.<sup>54</sup> Section 4217 applies only when the Department of Correction files an application to modify the sentence of a convicted inmate.<sup>55</sup> Rule 35(a) is triggered when necessary to correct an illegal sentence or when a sentence is imposed in an illegal manner.<sup>56</sup> The trial court can only exercise its inherent authority to modify a sentence “where a judge, in his sentencing Order, reserves that authority to modify a sentence upon the occurrence of certain conditions.”<sup>57</sup>

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<sup>53</sup> *State v. Johnson*, 2006 WL 3872849 at \*3 (Del. Super. Ct. Dec. 7, 2006) (citing *State v. Sloman*, 886 A.2d 1257, 1260 (Del. 2005)).

<sup>54</sup> *Johnson*, 2006 WL 3872849 at \*3.

<sup>55</sup> 11 *Del. C.* § 4217.

<sup>56</sup> *Sup. Ct. Crim. R.* 35(a). The latter option is only available if a party makes an application for modification under Rule 35 within ninety days. *See Sup. Ct. Crim. R.* 35(a)-(b).

<sup>57</sup> *State v. Sloman*, 886 A.2d 1257, 1265 (Del. 2005). *See also State v. Remedio*, 108 A.3d 326, 330 (Del. Super. 2014) (“Delaware law defining the contours of this ‘inherent authority’ elucidates its obligatory criteria. A sentencing judge must reserve the authority to modify a sentence: (1) upon the occurrence of a certain condition or conditions; (2) ‘expressly and affirmatively’; (3) either in the original sentencing order *or* upon a first and timely filed Rule

Neither the original 2012 sentence Order nor the 2018 Violation of Probation sentence Order as to the Drug and Firearm Case were illegal or illegally imposed. Neither Order reserved the authority to modify the sentence upon the occurrence of certain conditions. Absent statutory authority or its inherent authority to do so, the trial court lacked the ability to modify its sentence as to the Drug and Firearm Case. Doing so constituted reversible error.

***The Illegality of the Sentence Imposed in the Maintaining a Dwelling Case Did Not Allow the Trial Court to Modify Any Other Lawful Portion of its Sentence.***

Rule 35(a) as it exists today is identical to the former version of Federal Rule of Criminal Procedure Rule 35(a) before its amendment in 1987.<sup>58</sup> Both the Delaware Rule and the pre-1987 Federal Rule state that “[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.”<sup>59</sup> Where a Delaware court rule is virtually identical to its federal counterpart, “the reasoning in the federal cases must be given great weight in interpreting the rule.”<sup>60</sup>

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35(b) motion; and (4) solely to ensure that the primary goal of the original sentence is preserved.”) (internal citations omitted) (emphasis in original).

<sup>58</sup> See, e.g., *United States v. Ackerman*, 619 F.2d 285, 287 n.4 (3d Cir. 1980).

<sup>59</sup> Compare *Del. R. Crim. P. 35(a)* with *Fed. R. Crim. P. 35(a)* (prior to Nov. 1, 1987).

<sup>60</sup> *Hoffman v. Cohen*, 538 A.2d 1096, 1098 (Del. 1988) (quoting *Tiffany v. O’Toole Realty Co.*, 153 A.2d 195, 199 (Del. Super. 1959)).

In *United States v. Henry*, the Fifth Circuit was confronted with the question of what portion of a sentence Order a sentencing court could modify when the Order was both legal and illegal in part.<sup>61</sup> In *Henry*, the Circuit Court assessed the legality under Rule 35 of a sentencing court’s Order increased the legal part of a sentence to compensate for a vacated illegal sentence.<sup>62</sup> The *Henry* Court engaged in a lengthy analysis of the text and history of Rule 35, concluding that a court’s power to correct an illegal sentence “was not a real power in anything like the normal sense; rather, it was more in the nature of a duty to confess error and acknowledge that the imposition of the initial sentence exceeded the court’s statutory authority and was therefore a legal nullity.”<sup>63</sup> The Circuit Court looked to precedent established by the Supreme Court of the United States stating that:

[T]he sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence.<sup>64</sup>

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<sup>61</sup> 709 F.2d 298 (5th Cir. 1983).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 308.

<sup>64</sup> *Id.* (quoting *United States v. Pridgeon*, 153 U.S. 48, 62 (1894)). See also *Williams v. United States*, 168 U.S. 382, 389 (1897) (holding that where part of a sentence is illegal, the method of proceeding is to strike the excessive or illegal portion of the sentence and leave the rest undisturbed).

The *Henry* Court also looked to the text of the Rule, holding that the word “sentence” referred to “the *specific* consequence of a *specific* violation of a *specific* federal statute.”<sup>65</sup> Using such definition, the Court rejected the Government’s argument that a “sentence” within the meaning of Rule 35 “means all of the sentences taken together.”<sup>66</sup>

The Fifth Circuit ultimately held that the sentencing court erred in increasing the length of the legal portion of the defendant’s sentence subsequent to the vacation of the illegal portion.<sup>67</sup> In so holding, the Court looked to a comment from the Third Circuit to support its decision:

The [Rule 35] motion was made by the defendant, and yet because his attack has been proven justified and the sentence under three of the counts must be declared invalid, the government in effect has been given an increase in the sentence under the valid count. To permit this would be to convert the relief provided by Rule 35 on behalf of defendants into a measure by which a kind of compensating remedy could be obtained by the government to preserve the effect of the invalid sentences.

The result sought by the government [also] may not be justified by resort to what is said to be the intention of the sentencing judge.<sup>68</sup>

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<sup>65</sup> *Henry*, 709 F.2d at 310 (emphasis in original).

<sup>66</sup> *Id.* at 312.

<sup>67</sup> *Id.* at 317.

<sup>68</sup> *United States v. Welty*, 426 F.2d 615, 618 (3d Cir. 1970).

The warning of the Third Circuit is prescient when evaluating the instant case. Mr. Longford-Myers raised a valid challenge to the legality of a portion of the Superior Court’s sentence. The State conceded the accuracy of the Appellant’s claim. To insure that the length of his prison sentence did not change, the State sought to have another portion of the sentence Order deemed illegal, thus commandeering Rule 35—a rule that is intended to protect defendants who were sentenced illegally.<sup>69</sup> The Rule does not exist to permit the State to seek modification of an already legal sentence. In arguing for a modified sentence, the State contended that the increase of the Drug Dealing sentence was appropriate “considering the Court’s original intentions of Defendant receiving an aggregate VOP prison sentence of 3 years.”<sup>70</sup>

As in *Henry*, the Superior Court erred in modifying the legal portions of its February 6, 2018 sentence Order. Rule 35 required the sentencing court to strike the illegal portion of its Order and leave the legal portions in place as they were originally imposed. Failure to do so constituted reversible error.

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<sup>69</sup> See, e.g., *Deputy v. State*, 2005 WL 3358527 at \*1 (Del. Supr. Dec. 8, 2005) (“The purpose of Rule 35(a) is to permit correction of an illegal sentence, not to re-examine alleged errors occurring at the trial or during other proceedings prior to the imposition of sentence.”).

<sup>70</sup> A068.

**CONCLUSION**

For the reasons stated herein, Mr. Longford-Myers respectfully requests that this Honorable Court reverse his conviction and remand the case for resentencing.

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