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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 19-0005**

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<p>NICHOLAS VARLAS, Petitioner</p> <p>v.</p> <p>STATE OF WEST VIRGINIA, Respondent.</p>	<p>Appeal from Sentencing Order of the Circuit Court of Brooke County (13-F-63)</p> <p>JUN 10 2019</p>
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PETITIONER'S REPLY BRIEF

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ARGUMENT

I. TEN (10) TO TWENTY-FIVE (25) YEARS OF INCARCERATION IS A HARSHER PENALTY THAN FIVE (5) YEARS' PROBATION.

The flawed reasoning of Respondent's position that the sentence Petitioner received on resentencing is not harsher than his first sentence for the same crime is highlighted by the following rhetorical question: "For the punishment for a crime, would you rather serve probation for period of five (5) years or serve ten (10) to twenty-five (25) years of incarceration?" The answer is obvious. Five (5) years of conditional freedom during which time you live in your own home and can raise your daughter is *significantly* less harsh than ten (10) to twenty-five (25) years of complete deprivation of freedom during which time you are incarcerated in the State prison while your daughter is left without the love and guidance of her father. The more thought-provoking question is: "What would you do to receive the former sentence over the latter?" More specifically, "Would you give up your Constitutional right to fair trial to prove your innocence and accept a verdict that you wholeheartedly believe to be wrong because the risk of having to spend the next twenty-five (25) years incarcerated is too great to take?"

This is the question that Respondent argues that Petitioner should have asked himself before deciding to appeal his initial conviction in which he was, in fact, denied a fair trial. *See State v. Varlas*, 237 W.Va. 399, 408, 787 S.E.2d 670, 679 (2016). If this Court accepts Respondent's argument, a variation of this question will have to be asked by every defendant who is convicted of a crime and must make the decision of whether to exercise his or her Constitutional right to file an appeal. This is also the very question that this Court has held, time and time again, results in a denial of one's due process if a defendant must even contemplate the answer. Syl. Pt. 2, *State v. Eden*, 163 W. Va. 370, 371, 256 S.E.2d 868, 870 (1979); *State v. Young*, 173 W. Va. 1, 8, 311 S.E.2d 118, 125 (1983); *State v. Bonham*, 173 W. Va. 416, 417, 317 S.E.2d 501, 502 (1984);

State v. McClain, 211 W. Va. 61, 67, 561 S.E.2d 783, 789 (2002); *State v. Gwinn*, 169 W. Va. 456, 461, 288 S.E.2d 533, 537 (1982); and *State v. Frazier*, No. 13-1122, 2014 WL 5529734, at *4 (W. Va. Oct. 30, 2014).

Respondent attempts to misdirect this Court to a quotation from cases inapplicable to the case *sub justice* and to play a game of semantics regarding whether the imposition of five (5) years' probation by a court of law upon a defendant as a consequence of his conviction of a crime constitutes a "sentence." (Resp't Br. 6-7). This argument is entirely disingenuous, especially considering that *Eden* proscribed a subsequent sentence following a successful appeal that contains a harsher "**penalty**" than the initial sentence. The holding contained in Syllabus Point 2 of *Eden* states:

A defendant who is convicted of an offense in a trial before a justice of the peace and exercises his statutory right to obtain a trial De novo in the circuit court is denied due process when, upon conviction at his second trial, the sentencing judge imposes a heavier **penalty** than the original sentence.

Eden, at Syl. Pt. 2 (citing W. Va. Const. art. 3, s 10)(*emphasis added*).¹

Respondent does not even attempt to make the futile argument that twenty-five (25) years of incarceration is not a heavier penalty for a crime than five (5) years' probation. Rather, Respondent sticks to the inapt quote taken out of context to argue that probation is not a sentence for a crime. As used in the context of *Eden*, "sentence" is synonymous with "penalty" and "punishment."

Respondent and the lower court overlooked the rationalization for the holding in *Eden* – that the threat of a harsher penalty following a successful appeal will deter the exercise of one's

¹ The syllabus of a signed opinion sets forth new points of law as required by the West Virginia Constitution and is the highest precedential value. W. Va. Const. art. VIII, § 4; *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303, 306 (2014); *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 386, 787 S.E.2d 650, 657, fn. 10 (2016).

Constitutional right to an appeal and allow unjust and prejudicial decisions to go unchallenged. Undoubtedly, the potential consequence of a successful appeal of having to serve decades more in prison will deter a defendant from exercising his right to appeal an improper conviction.

If this Court desires to curb future appeals of criminal convictions at the expense of due process, then this case presents the Court with the opportunity to do so.² Surely, there will be far fewer appeals if defendants have to gamble with their initial sentences and risk spending decades more in prison in exchange for the opportunity to receive a fair trial. However, this case also presents this Court with the opportunity to secure the rights and liberties of the citizens of West Virginia by adhering to the rule of law through the preservation of due process. The Court's choice of which opportunity to seize will determine whether ours is a government of laws or of men.

1. The memorandum opinion of *State v. Workman* is not controlling in this case.

As set forth in greater detail in Petitioner's initial Brief, the memorandum opinion of *State v. Workman*, No. 13-0133, 2013 WL 6183989, at *1-2 (W. Va. Nov. 26, 2013)(memorandum opinion) is not binding precedent as it resulted in a clear conflict between Syllabus Point 2 of *Eden* and relies upon the same misplaced reasoning of the lower court that is now being advanced by Respondent. Syl. Pt. 5, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303, 306 (2014)("[W]here a conflict exists between a published opinion and a memorandum decision, the published opinion controls.").

In *Workman*, a divided Court found that one-year of supervised probation is not a harsher sentence than one-year of unsupervised probation. *Workman*, at *1-2. Considering the great number of appeals and decisions required to be written by this Court, it is understandable why the

² Even if the Court were inclined to exploit this opportunity, the decision to adopt a more liberal standard for allowing courts to impose harsher penalties on resentencing following a successful appeal can only be applied prospectively as set forth in Petitioner's Brief and *infra*.

Court in *Workman* would have accepted the State’s argument on this issue and summarily decided an appeal regarding whether a relatively short period of probation will be supervised or unsupervised. *See In re T.O.*, 238 W. Va. 455, 463-64, 796 S.E.2d 564, 572-73 (2017). However, the great disparity between the two sentences in the instant appeal requires this Court’s full consideration of the arguments presented and the underlying caselaw so that the issue can be properly decided in accordance with the West Virginia Constitution.

It is also apparent from the memorandum decision in *Workman* that each of the arguments made by Petitioner in the instant appeal were not raised in *Workman* because such points are not addressed in the decision. *Id.* (quoting W.Va. Const., art. VIII, § 4).³ The Court should now disavow the incorrect argument advanced by the State that was erroneously applied in *Workman* and hold that for purposes of determining whether the “blanket prohibition” on harsher penalties is violated in the resentencing of a defendant following a successful appeal, the term and conditions of probation imposed in the first sentence cannot be harsher in the second sentence. *See State v. Deel*, 237 W. Va. 600, 607, 788 S.E.2d 741, 748 (2016)(Disavowing the incorrect argument of the State previously applied in an erroneous memorandum decision). As former Associate Justice of the Supreme Court of the United States Robert H. Jackson stated with much humility and wisdom, “I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.” *Massachusetts v. United States*, 333 U.S. 611, 639–640, 68 S.Ct. 747, 92 L.Ed. 968 (1948) (dissenting opinion).

³ “When a judgment or order of another court is reversed, modified or affirmed by the court, every point fairly arising upon the record shall be considered and decided; the reasons therefor shall be concisely stated in writing and preserved with the record[.]”

2. The Retraction of Probation that was Initially Granted to Petitioner Resulted in the Second Sentencing Order Having a Harsher Penalty than the First Sentencing Order.

Respondent next attempts to analogize the holding of *Jett v. Leverette*, 162 W. Va. 140, 144–45, 247 S.E.2d 469, 471–72 (1978) to the instant appeal as a red herring. Relying on the holding in *Jett*, Respondent argues that probation and parole are fundamentally different, such that a court in resentencing a defendant upon reconviction following a successful appeal, cannot place further restrictions on parole eligibility than was initially imposed, but can deny a defendant a period of probation that was initially granted in the first sentencing order without denying the defendant due process. (Resp't Br. at 11-12).

Respondent admits that since parole is a means of shortening a sentence, the restriction of parole operates as a form of punishment, and therefore, a court cannot impose further restrictions on parole in the resentencing of a defendant reconvicted of a crime following a successful appeal. (Resp't Br. at 12) (citing *State v. Frazier*, No 12-1122, 2014 WL 5529734, at *4 (W. Va. Oct. 30, 2014) and *State v. Sears*, 196 W. Va. 71, 78, 468 S.E.2d 324, 331 (1996)).

However, Respondent seemingly contends that the retraction or revocation of probation is not a form of punishment. This is a perplexing position to say the least. Probation is obviously not revoked as a reward for good behavior, but rather as a punishment for violating the terms of probation. Likewise, the Circuit Court did not retract the probation initially granted to Petitioner as a prize for him being successful in his appeal of his initial conviction, but rather to further punish him for his conviction and for his exercise of his Constitutional rights as discussed *infra*.

Respondent argues that if probation was part of a sentence for a crime, it would be “difficult to see how it would not be a double jeopardy violation for a Court not to credit time spent on probation against the underlying sentence.” *Resp't Br.* at 12; *Cf. Conner v. Griffith*, 160 W. Va. 680, 680, 238 S.E.2d 529, 529 (1977) and *Jett v. Leverette*, 162 W. Va. 140, 247 S.E.2d 469.

Respondent’s difficulty in answering its academic query is indeed a result of the patent similarities between probation and parole. **“Probation, parole and incarceration are restraints upon liberty imposed as a punishment for crime.”** *Jett*, 162 W. Va. at 148, 247 S.E.2d at 473 (dissenting opinion). Moreover, probation is a form of judicial “grace,” while parole is a matter of “legislative grace.” *State ex rel. Strickland v. Melton*, 152 W.Va. 500, 165 S.E.2d 90 (1968); *State v. Sears*, 196 W. Va. 71, 78, 468 S.E.2d 324, 331 (1996).

As an initial answer to Respondent’s question of why a defendant is given credit for time spent on parole but not while on probation, it appears that West Virginia is in the small minority of jurisdictions in holding that the Due Process Clause requires that time spent on parole be credited toward the sentence. The overwhelming majority of courts hold that double jeopardy does not require that credit be given for “street time” spent on either parole or probation. *See* Neil P. Cohen, *The Law of Probation and Parole* § 28:4 *Credit for time on probation or parole—Constitutional issues: Double jeopardy* (2d ed. 2018) (Providing *Connor v. Griffith* as an illustration of the minority position). Further, out of those jurisdictions in the minority, West Virginia may be the only state that grants credit for time spent on parole, but not on probation.

In *Jett*, the Court explained that because a parolee is effectively completing his sentence of incarceration outside of the prison walls, the parolee should be given credit for time served between being paroled and the parole being revoked. *Jett*, 162 W. Va. at 146, 247 S.E.2d at 472–73. In contrast, the Court found that since the “term” (*i.e.* length of time) of the judicially prescribed alternative “probation sentence” does not correlate to the length of the incarceration sentence, credit should not be given for the time spent on probation. *Id.* Yet, the distinctions made by the Court in *Jett* between parole and probation in no way support Respondent’s position that the

retraction of probation does not result in a harsher penalty than a sentence that grants probation in lieu of incarceration.

Further, the Court's holdings in *Connor* and *Jett* can be harmonized by review of the statute regarding the violation of probation – West Virginia Code § 62-12-10– which specifically directs that credit be given for time spent in confinement for prior probation violations, but not for the actual time spent on probation. W. Va. Code Ann. § 62-12-10 (a)(2). Because “[t]he purpose of the Double Jeopardy Clause is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, ... the question under the Double Jeopardy Clause whether punishments are ‘multiple’ is essentially one of legislative intent.” *State v. James*, 227 W. Va. 407, 420, 710 S.E.2d 98, 111 (2011). The legislature's intent to not give credit for time spent on probation is clear based upon a plain reading of West Virginia Code § 62-12-10. However, the legislature's decision in this regard in no way suggests that the retraction of probation that was granted in an initial sentence is not a further penalty or punishment. Thus, the Respondent's attempt to misdirect the Court's attention to the inapplicable holding in *Jett* should be rebuffed.

Respondent's reliance on decisions from Texas and Missouri is similarly misplaced. Neither of these jurisdictions have imposed a “blanket prohibition” on harsher penalties in the sentencing of defendants who have been reconvicted following a successful appeal as West Virginia established in *Eden*. See *Lechuga v. State*, 532 S.W.2d 581, 582 (Tex. Crim. App. 1975); *Wiltz v. State*, 863 S.W.2d 463, 464 (Tex. Crim. App. 1993); and *Nicholson v. State*, 524 S.W.2d 106, 110 (Mo. 1975). Rather, these jurisdictions have adopted the more liberal burden shifting approach of the Federal courts that focuses solely on the vindictiveness of the sentencing judge. *Id.*

In West Virginia, however, possible vindictiveness is only one justification for the “blanket prohibition” on harsher penalties. The second and more important rationale is that the threat of harsher penalties upon resentencing that undoubtedly deters the exercise of one’s Constitutional right to appeal. *Eden*, 163 W. Va. at 382, 256 S.E.2d at 875 (“Increased sentencing upon reconviction after successful prosecution of an appeal inherently gives rise to a fear of harsher penalties and retribution which burdens or chills the defendant's right to appeal and should not be permitted in any circumstances.”). Texas and Missouri thus operate under a separate set of rules for resentencing than West Virginia courts, and cases from those jurisdictions should carry no precedential or persuasive value.

II. THE CIRCUIT COURT PROPERLY HELD THAT *STATE V. EDEN* IS STILL THE CONTROLLING LAW IN THIS CASE.

Respondent apparently asserts a cross-assignment of error by alleging that the Circuit Court erred by applying the controlling precedent of *State v. Eden* in the Second Sentencing Order.⁴ In advocating for this Court to abrogate *Eden* and adopt an exception to the prohibition of harsher penalties on resentencing when a different judge conducts the resentencing, Respondent admits, as it must, that this exception was expressly considered and rejected by this Court in *Eden* and again in *State v. Bonham*. (*Resp’t Br.* at 18) (citing *Eden*, 163 W. Va. at 386, 256 S.E.2d at 877 and *State v. Bonham*, 173 W. Va. 416, 418, 317 S.E.2d 501, 503 (1984)).

1. The Exception of the Bar of Harsher Penalties Recognized by Federal Courts Has Consistently Been Rejected by this Court.

Respondent argues that a defendant who is denied a right to a fair trial can avoid the vindictiveness of the sentencing court and the threat of a harsher sentence if his appeal is limited to challenging the sufficiency of the evidence against him so as to avoid the necessity of a retrial

⁴ This cross-assignment of error fails to adhere to the requirements of Rule 10(f) of the West Virginia Revised Rules of Appellate Procedure.

all together. (*Resp't Br.* at 19). Respondent's contention completely discounts the defendant's Constitutional right to appeal any and all due process violations that resulted in the contestable conviction and highlights the detrimental effect that affirming the Second Sentencing Order will have on the right to due process in West Virginia.

Respondent proposes that a defendant that wishes to avoid the court's wrath in being resentenced following a successful appeal and reconviction, should forgo appealing any procedural or evidentiary decisions of the court and limit the appeal solely to whether the evidence presented by the prosecution was sufficient to sustain a conviction. (*Resp't Br.* at 19). This is the exact scenario that *Eden* and its progeny warned would occur if a defendant is subject to harsher penalties following a successful appeal and prohibited as being an unconstitutional denial of the defendant's right to due process. Nevertheless, Respondent brazenly supports this outcome. *Id.*

Under Respondent's proposal, a defendant who is denied a fair trial due to the exclusion of evidence critical to his defense, as was Petitioner in the first trial, may not appeal the decision to exclude the crucial evidence unless he is willing to take the risk of receiving a harsher sentence if reconvicted. In appealing the first conviction, Petitioner's argument was not that State's evidence was insufficient to convict him, but rather that he was denied his right to introduce evidence to impeach witnesses and controvert the State's evidence. Therefore, Petitioner could not have restricted his appeal to the sufficiency of the evidence against him and avoid a retrial as Respondent proposes. Accordingly, Respondent's argument in this regard should be rejected.

Respondent also endorses a theory that the threat of harsher sentences on resentencing is not a significant deterrent on the exercise of the right to appeal a conviction. (*Resp't Br.* at 19-20)(citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 17, 93 S. Ct. 1977, 1978, 36 L. Ed. 2d 714 (1973)). This Court has consistently rejected this argument over the past 40 years and routinely found that

the chilling effect on the right to appeal is a due process violation in West Virginia. As demonstrated by the questions presented at the beginning of this *Reply Brief*, the risk of receiving a harsher penalty will undoubtedly deter defendants from exercising their Constitutional right to an appeal, which amounts to a due process violation in West Virginia. As Petitioner can attest, the likelihood of actually receiving a harsher sentence is not as remote as the *Chaffin* court predicted. Considering the magnitude of the disparity between the two penalties contained in the First and Second Sentencing Orders, the possibility of receiving the harsher sentence makes the decision to appeal not just a difficult one, but one that will very likely dissuade the exercise of that right.

2. The Circuit Court's specific reason for not granting Petitioner probation after his retrial was unconstitutional in and of itself.

Respondent argues that if this Court finds that *Eden* is somehow no longer controlling law, that the Circuit Court offered objective reasons for imposing a harsher penalty on Petitioner in the Second Sentencing Order. Even under the federal standard advanced by Respondent, a presumption of vindictiveness exists where the second sentence is more severe unless the reasons for the more severe sentence affirmatively appear. *Alabama v. Smith*, 490 U.S. 794, 798, 109 S. Ct. 2201, 2204, 104 L. Ed. 2d 865 (1989).

Petitioner agrees with Respondent that the Circuit Court's reason for imposing a harsher penalty upon Petitioner in the Second Sentencing Order affirmatively appears in the record. However, this specific reason was explicitly vindictiveness against Petitioner for his exercise of his Constitutional rights. In the sentencing hearing, the Circuit Court stated:

Well, the one difference -- and I wasn't sure what the defendant's position was going to be, and he has every right to plead the **Fifth Amendment**, because he has his appeal still pending. However, placing him on some type of bond or probationary period at this point when he is unwilling to -- and I'm not going to punish him for it -- **when he is unwilling to admit to the crime for which he has been convicted, twice, twice**, without remorse, shows me that putting him on post-conviction bond at this point or any type of probation makes him a danger to the

public for reoffending. I have to presume his is guilty at this point and committed the acts which the jury says he committed, twice.

(A.R. 592-593).

Based upon these statements of the Circuit Court, it is evident that its decision to retract the probation initially granted to Petitioner in the First Sentencing Order was based upon Petitioner's exercise of his Fifth Amendment right against self-incrimination and his Constitutional right to appeal his initial conviction. The Circuit Court's consideration of these factors is in and of itself a violation of Petitioner's right to due process.

Punishment cannot be increased merely because one decides to exercise his Constitutional right. *State v. Meadows*, 170 W. Va. 191, 195, 292 S.E.2d 50, 54 (1982). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort' and is 'patently unconstitutional.'" *Id.* (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), *reh. denied*, 435 U.S. 918, 98 S.Ct. 1477, 55 L.Ed.2d 511).

In resentencing Petitioner, the Circuit Court openly considered Petitioner's exercise of his Constitutional right to not be a witness against himself and retracted the probation initially granted to him on this basis, which is "patently unconstitutional." *Id.* see also *United States v. Brick*, 900 F.2d 256 (4th Cir. 1990) ("[I]mposition of a sentence in retaliation for the failure to disclose incriminatory financial information is prohibited."); *Smith v. State*, 62 So. 3d 698, 699 (Fla. Dist. Ct. App. 2011) ("It is impermissible for a trial court to consider a defendant's assertions of his innocence and refusal to admit guilt in imposing sentence."). Thus, the Second Sentencing Order should be reversed for this reason alone.

Further, in resentencing Petitioner, the Circuit Court clearly took into account Petitioner's initial unlawful conviction, which was vacated by this Court. The Circuit Court made it a point to emphasize that Petitioner was convicted twice, evidencing the Circuit Court's consideration of the

prior vacated conviction in making his decision. This is a clear indication of the Court's vindictiveness against Petitioner for successfully appealing his initial conviction.

It is also a violation of Petitioner's due process for the Court to consider a vacated and unlawful conviction. When this Court vacates a conviction, the conviction is annulled, cancelled, rescinded and rendered void as if it never even occurred. *Eden*, 163 W. Va. at 381–82, 256 S.E.2d at 875 (Holding that a conviction of a defendant that is denied due process is rendered void). In sentencing a defendant under the Federal Sentencing Guidelines, it is an error for the federal court to consider a defendant's prior state conviction that has been vacated by the state court since that state conviction no longer exists. *United States v. Guthrie*, 931 F.2d 564, 572 (9th Cir. 1991); *United States v. Cox*, 245 F.3d 126, 131 (2d Cir. 2001); *United States v. Hoey*, 725 F. App'x 58, 63 (2d Cir. 2018). In that regard, a defendant who is given an enhanced sentence due to a prior conviction is entitled to a reduction if the earlier conviction is vacated. *Johnson v. United States*, 544 U.S. 295, 303, 125 S. Ct. 1571, 1577, 161 L. Ed. 2d 542 (2005); *United States v. Dorsey*, 611 F. App'x 767, 769 (4th Cir. 2015). Therefore, it was improper for the Circuit Court to consider the initial conviction of Petitioner that was rendered a nullity by this Court and no longer exists. As such, the Second Sentencing Order should be reversed.

3. If this Court were inclined to abrogate *Eden*, it cannot be applied retroactively to Petitioner.

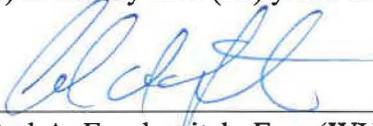
Respondent argues that in the event of an unlikely departure of the longstanding precedent of this Court initially established in *Eden*, the new rules for resentencing a defendant after a successful appeal should be applied retroactively to Petitioner because the abrogation of *Eden* has been foreshadowed by Federal cases such as *Chaffin v. Stynchcombe*. Yet, *Chaffin* was decided prior to *Eden* and almost a half a century ago. There has been no foreshadowing in any decisions of this Court of the remote possibility that the decades of precedent consistently upholding the

“blanket prohibition” on harsher penalties would be overturned. Any exceptions to the “blanket prohibition” will be a totally new rule in West Virginia that will be imposed without any fair warning to Petitioner. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1227, 200 L. Ed. 2d 549 (2018)(quoting The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison) (“Without an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a ‘parchment barrie[r]’ against arbitrary power.”))

Respondent also makes the circular argument that applying a new rule in which exceptions to the blanket prohibition of harsher penalties are established will not result in inequitable results in this case because the holding in *Eden*, which was undeniably the controlling law when Petitioner made his decision to appeal his initial conviction, will be abrogated and will no longer be controlling law. Petitioner made a conscious decision to appeal his initial unlawful conviction with the understanding that he could not receive a harsher penalty if he was subsequently reconvicted. It would be entirely inequitable and a violation of his due process to change the law retroactively and baselessly infer that the blanket prohibition of *Eden* played no part in Petitioner’s decision to appeal. Accordingly, even if this Court desired to abrogate *Eden* at this juncture, any new rules set forth in the decision of this appeal must only be applied prospectively.

CONCLUSION

For the reasons set forth in *Petitioner’s Brief* and herein, this Court should reverse the Second Sentencing Order and remand this case with instructions to the Circuit Court to resentence Petitioner to five (5) years’ probation in lieu of ten (10) to twenty-five (25) years of incarceration.

Signed: 

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