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

NICHOLAS VARLAS Petitioner v. **STATE OF WEST VIRGINIA** Respondent	Appeal from Sentencing Order of the Circuit Court of Brooke County (13-F-63)

PETITIONER'S BRIEF

Counsel for Petitioner, Nicholas Varlas

Carl A. Frankovitch, Esq. (WV Bar #12150)
Counsel of Record
M. Eric Frankovitch, Esq. (WV Bar # 4747)
FRANKOVITCH, ANETAKIS, SIMON, DECAPIO & PEARL, LLP
337 Penco Road
Weirton, WV 26062
(304) 723-4400
cfrankovitch@faslaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutes and Regulations

Other Authorities

ASSIGNMENT OF ERROR

AS A MATTER OF LAW, THE TRIAL COURT ERRED AND DENIED PETITIONER DUE PROCESS IN SENTENCING HIM TO TEN (10) TO TWENTY-FIVE (25) YEARS OF INCARCERATION BECAUSE IT IS A HARSHER PENALTY THAN HIS ORIGINAL SENTENCE OF FIVE (5) YEARS' PROBATION.

STATEMENT OF THE CASE

On August 12, 2012, Petitioner, Nicholas Varlas, held a small social gathering at his home in Follansbee, West Virginia, which was attended by N.S.[1] (A.R. 60-61). At one point during the evening, N.S. went alone with Petitioner to watch a pornographic movie. (A.R. 83-100; 263-66). While watching the pornographic movie, they began to kiss each other, which culminated with sexual intercourse. *Id.* The following day, after receiving a barrage of text messages from her boyfriend pressuring her to report the sexual encounter as rape and threatening to leave her if she did not, N.S. reported the incident to the police alleging that the sexual intercourse was nonconsensual. (A.R. 110-12; 408-11). Petitioner has maintained throughout these proceedings that the intercourse was completely consensual.

Petitioner was subsequently indicted on one count of "Sexual Assault in the Second Degree" (W.Va. Code § 61-8B-4) and one count of "Attempt to Commit Sexual Abuse in the First Degree" (W.Va. Code § 61-11-8(2) and W.Va. Code § 61-8B-7). (A.R. 13-15). Following a trial on September 3-4, 2014, before the Circuit Court of Brooke County, the jury returned a guilty verdict on both counts of the Indictment. (A.R. 309).

On December 18, 2014, the Circuit Court entered a Sentencing Order (the "Original Sentencing Order") that sentenced Petitioner to not less than one (1) nor more than three (3) years for "Attempt to Commit Sexual Abuse in the First Degree" and not less than ten (10) nor more

[1] Alleged victim referred to by initials pursuant to W.Va. Rules of Appellate Procedure 40(e)(1).

than twenty-five (25) years for "Sexual Assault in the Second Degree." (A.R. 394-99). The Original Sentencing Order suspended the ten (10) to twenty-five (25) years of incarceration in lieu of a five (5) year period of probation to begin upon Petitioner being paroled or completing his sentence of one (1) to three (3) years. (A.R. 398). Petitioner was further required to register as a sexual offender for life and complete ten (10) years of extended sexual offender supervision following his completion of the five-year period of probation. *Id.*

Petitioner appealed the conviction, arguing that the Circuit Court violated Petitioner's constitutional right to a fair trial by barring him from introducing the text messages from N.S.'s boyfriend into evidence at trial based upon West Virginia's rape shield law. (A.R. 418). Petitioner also contended that the Circuit Court erred in admitting the investigating officer's hearsay testimony. *Id.*

This Court agreed with Petitioner and found that the Circuit Court abused its discretion in excluding the text messages under the rape shield law. (A.R. 407); *State v. Varlas*, 237 W.Va. 399, 401-08, 787 S.E.2d 670, 672-79 (2016). This Court recognized that evidence of N.S.'s credibility and motive to fabricate the charges was "critical to [Petitioner's] defense," especially since the convictions were predominantly dependent on the uncorroborated testimony of N.S. (A.R. 423) (citing *State v. Jonathan B.*, 230 W. Va. 229, 240, 737 S.E.2d 257, 268 (2012)). As a result, this Court found that the "exclusion of the subject text messages placed the underlying fairness of the entire trial in doubt...." (A.R. 422-23), 237 W. Va. at 408, 787 S.E.2d at 679. Accordingly, on June 16, 2016, the convictions were reversed, and this case was remanded for a new trial in which Petitioner could introduce the previously excluded evidence. (A.R. 407); 237 W. Va. at 409, 787 S.E.2d at 680.

Prior to the reversal of his conviction, Petitioner completed his entire sentence of incarceration for "Attempt to Commit Sexual Abuse in the First Degree" and began his five (5) year period of probation for his conviction of "Sexual Assault in the Second Degree." (A.R. 610). His probation was discontinued following the reversal of his conviction on June 16, 2016. *Id.*

The State retried Petitioner in May 2018. The retrial ended in a mistrial due to the prosecution's introduction of improper and unfairly prejudicial testimony. *Id.*

On October 1, 2018, Petitioner was tried again on the original charges of "Sexual Assault in the Second Degree" and "Attempt to Commit Sexual Abuse in the First Degree" and on October 3, 2018, was found guilty by a jury on both counts. (A.R. 611).

Following a sentencing hearing held on December 3, 2018, the Circuit Court entered a "Sentencing Order" dated December 4, 2018 (the "Second Sentencing Order"). (A.R. 607-15). In the Second Sentencing Order the Circuit Court acknowledged that it could not impose a harsher sentence on Petitioner than he received prior to his successful appeal, because such a sentence would violate due process as recognized by this Court in *State v. Eden*, 163 W. Va. 370, 256 S.E.2d 868 (1979). (A.R. 612). Notwithstanding its recognition of the appropriate standard, the Circuit Court failed to apply it and concluded that a sentence of ten (10) to twenty-five (25) years of incarceration was not a harsher sentence than a sentence of five (5) years' probation in lieu of incarceration. (A.R. 613).

Consequently, for his conviction of "Sexual Assault in the Second Degree," the Circuit Court sentenced Petitioner to ten (10) to twenty-five (25) years of incarceration, without suspending the same for five (5) years of probation as Petitioner was originally sentenced. (A.R. 614-15). For the conviction of "Attempt to Commit Sexual Abuse in the First Degree," Petitioner was sentenced to one (1) to three (3) years of incarceration, to run concurrently, and given credit

for time served, thereby discharging that sentence. *Id.* Petitioner was required to register as a sexual offender for life and complete ten years of extended sexual offender supervision following his incarceration. *Id.* The Court denied Petitioner bond pending this appeal and is currently serving a sentence of ten (10) to twenty-five (25) years of incarceration in the West Virginia Northern Regional Correctional Facility. (A.R. 604-05). It is from this sentence that Petitioner now appeals.

SUMMARY OF THE ARGUMENT

The Second Sentencing Order violated Petitioner's right to due process and should be overturned. In sentencing Petitioner for his reconviction following his successful appeal, the Circuit Court imposed a much harsher penalty on Petitioner than he received for his initial conviction by requiring him to serve ten (10) to twenty-five (25) years of incarceration rather than five (5) years' probation as he was initially sentenced. Unquestionably, the Circuit Court violated Petitioner's constitutional right to due process.

In West Virginia, the imposition of an increased penalty following a reconviction after the successful prosecution of an appeal violates due process and "the original sentence must act as a ceiling above which no additional penalty is permitted." *State v. Eden*, 163 W. Va. 370, 382–83, 256 S.E.2d 868, 875 (1979). In *Eden*, this Court recognized that increased sentencing results in an impermissible burden on a defendant's constitutional right to an appeal because it deters individuals from challenging invalid convictions. *Id.* This Court explained that "when a defendant refuses to prosecute an appeal to which he is entitled by law for fear he will receive a heavier sentence on retrial, he has been denied his right to appeal" and such conviction is rendered void. *Id.* Accordingly, this Court proclaimed a "blanket prohibition" on imposing increased penalties for a reconviction following a successful appeal. *Id.* 163 W.Va. at 380, 256 S.E.2d at 874 (citing *Patton v. State of N.C.*, 381 F.2d 636, 641 (4th Cir. 1967)).

In the case at bar, the Circuit Court expressly held that *Eden* mandated that Petitioner could not receive a harsher sentence than he received following his initial conviction. (A.R. 612). Nonetheless, the Circuit Court, misguided by inapplicable caselaw, found that the probation that Petitioner received in lieu of incarceration in the Original Sentencing Order was not part of Petitioner's sentence. (A.R. 613). In so finding, the Circuit Court violated Petitioner's constitutional right to due process because had Petitioner known that the Circuit Court would attempt to sentence him to ten (10) to twenty-five (25) years of incarceration instead of the five (5) years' probation that he initially received, he would have been deterred from, and in all likelihood decided against, appealing his initial conviction following the first trial in which his due process rights were in fact violated. *See Varlas*, 237 W.Va. at 408, 787 S.E.2d 679.

The fundamental standard of procedural fairness guaranteed by the West Virginia Constitution forbids placing limitations on Petitioner's right to a fair trial by requiring him to barter his freedom for the opportunity of exercising his constitutional rights. *Eden*, 163 W. Va. at 379 n. 8, 256 S.E.2d at 873 n. 8; *see also State v. Bonham,* 173 W. Va. 416, 419, 317 S.E.2d 501, 504 (1984). Petitioner was denied his constitutional right to due process, and therefore, this Court should reverse the Second Sentencing Order.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal presents a constitutional question of law that carries serious consequences for Petitioner and all future criminal defendants presented with the decision of whether to appeal a guilty verdict resulting from an unfair or prejudicial trial. Although the principal issue in this case has been authoritatively decided by this Court's decision in *State v. Eden*, 163 W. Va. 370, 256 S.E.2d 868 (1979), Petitioner submits that oral argument will significantly aid the decisional process.

This case is especially appropriate for oral argument under Rule 20 of the Rules of Appellate Procedure as it involves the constitutionality of the Circuit Court's ruling and is a matter of fundamental public importance.

This matter is also appropriate for oral argument pursuant to Rule 19 of the Rules of Appellate Procedure in that it involves the assignment of error in the application of a narrow issue of settled law.

ARGUMENT

AS A MATTER OF LAW, THE TRIAL COURT ERRED AND DENIED PETITIONER DUE PROCESS IN SENTENCING HIM TO TEN (10) TO TWENTY-FIVE (25) YEARS OF INCARCERATION BECAUSE IT IS A HARSHER PENALTY THAN HIS ORIGINAL SENTENCE OF FIVE (5) YEARS' PROBATION.

Standard of Review

The Supreme Court of Appeals accords plenary review to questions of law. *In re Petition of Carter*, 220 W. Va. 33, 35, 640 S.E.2d 96, 98 (2006). Where the issue on an appeal from the circuit court is a question of law this Court applies a *de novo* standard of review. *State v. Finley*, 219 W. Va. 747, 748, 639 S.E.2d 839, 840 (2006)(citing Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

While sentencing orders are generally reviewed under an abuse of discretion standard, in cases involving questions of whether the circuit court's sentencing order violates constitutional commands, the Court applies a *de novo* standard. *State v. Georgius*, 225 W. Va. 716, 719, 696 S.E.2d 18, 21 (2010)(*citing* Syl. Pt. 1, *State v. Lucas,* 201 W.Va. 271, 496 S.E.2d 221 (1997)).

This case is on appeal from a sentencing order of the circuit court and clearly involves a question of law – specifically, whether Petitioner's constitutional right to due process has been violated. Accordingly, the question of constitutional law presented herein is subject to a *de novo* review. *Id.*

Argument

A. PETITIONER WAS DENIED DUE PROCESS WHEN HE WAS RESENTENCED TO A HEAVIER PENALTY THAN HIS ORIGINAL SENTENCE FOLLOWING HIS SUCCESSFUL APPEAL.

Our government is "a government of laws, and not of men."[2] The principle of the "rule of law" dictates that all persons and institutions are bound by and accountable under those laws that are clear, publicized, certain and just and are duly enacted, administered and enforced in a fair and nonprejudicial manner. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646, 72 S. Ct. 863, 875, 96 L. Ed. 1153 (1952)("[O]urs is a government of laws, not of men, and [] we submit ourselves to rulers only if under rules.")

It is the rule of law that the Due Process clause of United States and West Virginia Constitutions seek to promote and protect. Due process consists of procedural protections to guarantee that the government will not make arbitrary decisions affecting an individual's fundamental rights, but will only do so through the reasoned application of the rule of law. Due

[2] John Adams, Novanglus; Or, A History Of The Dispute With America From Its Origin, In 1754, To The Present Time, 1775.

process is therefore the constitutional regulator of overreaching official power which must be guarded by a judiciary that is "unbiased, neutral between the parties, free of passion, prejudice and arbitrariness, loyal to the law alone."[3]

One of the most basic and primary tenets of due process is a fair trial. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 2259, 173 L. Ed. 2d 1208 (2009). A fair trial requires that justice be administered in criminal proceedings that are orderly, impartial, and just. A fair trial necessitates that the accused be afforded, *inter alia*, the opportunity to present relevant evidence critical to his defense.

In furtherance of this dedication to the rule of law, West Virginia has imbedded in its Constitution the absolute right to apply for an appeal of a decision resulting from a trial in which the principles of a fair trial have been violated. *Eden*, 163 W. Va. at 381–82 n. 14, 256 S.E.2d at 875 n. 14. (citing W.Va. Const. art. 3, § 10). The constitutional right to an appeal cannot be abridged or deterred without offending due process and rendering the conviction void. *Id.* It is this procedural protection of the West Virginia Constitution that requires that the Second Sentencing Order be reversed.

1. Due process in West Virginia prohibits the imposition of a heavier penalty than the original sentence upon reconviction following a successful appeal.

The Second Sentencing Order is unconstitutional and must be reversed. Due process in West Virginia prevents the constitutional right to appeal from being impaired by imposing on a defendant who demonstrates the error of his conviction the risk that he may be penalized with a harsher sentence for having done so. *Eden*, 163 W. Va. at 382–83, 256 S.E.2d at 875. The risk of

[3] Brian Z. Tamanaha, On the Rule of Law 123 (2004).

increased punishment upon reconviction "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." *Id.* Therefore, in resentencing a defendant following a retrial "the original sentence must act as a ceiling above which no additional penalty is permitted." *Id.* 163 W.Va. at 384, 256 S.E.2d at 876. The failure to adhere to this procedural protection afforded by the West Virginia Constitution in resentencing a reconvicted defendant violates the defendant's constitutional right to due process. *Id.* at Syl. Pt. 2.

In *Eden,* the defendant was initially fined fifty dollars by a justice of the peace for reckless driving. 163 W.Va. at 371-72, 256 S.E.2d at 870-71. Subsequently, he chose to have a trial *de novo* in the circuit court. *Id.* In the circuit court he was again convicted of reckless driving, fined two hundred dollars, and sentenced to thirty days in jail. *Id.* The *Eden* Court reversed the conviction and held that a defendant who is convicted of an offense 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. *Id.* at Syl. Pt. 2 (citing W.Va. Const. art. 3, § 10)(emphasis added); *Bonham*, 173 W. Va. at 417, 317 S.E.2d at 502–03.

In *Eden*, this Court explained that "when a defendant refuses to prosecute an appeal to which he is entitled by law for fear he will receive a heavier sentence on retrial, he has been denied his right to appeal." 163 W.Va. at 382, 256 S.E.2d at 875. Accordingly, the *Eden* Court proclaimed a "blanket prohibition" on imposing increased penalties for a reconviction following a successful appeal. 163 W. Va. at 380, 256 S.E.2d at 874 (citing *Patton*, 381 F.2d at 641).

In *State v. Bonham*, this Court incorporated the following rationale behind the due process bar against imposition of a higher penalty:

> We believe if a more severe sentence may be imposed after retrial for any reason, there will always be a definite apprehension on the part of the accused that a heavier sentence may be imposed. Such apprehension or fear would place the defendant in an 'incredible dilemma' in considering whether to appeal the conviction. A 'desperate' choice exists, and may very well deter a defendant from exercising the right to assert his innocence and request a retrial. Such deterrence violates the due process clause of the...Constitution. The fundamental standard of procedural fairness, which is the basic due process right claimed in this case, forbids placing a limitation on the defendant's right to a fair trial by requiring a defendant to barter with freedom for the opportunity of exercising it.

Bonham, 173 W. Va. at 418–19, 317 S.E.2d at 503–04 (1984)(quoting *Shagloak v. State,* 597 P.2d 142, 145 (Alaska 1979)); see also *Patton.*, at 641 (4th Cir. 1967)(quoting Note, Unconstitutional Conditions, 73 Harv.L.Rev. 1595, 1599-1600 (1960)("Denying a benefit because of the exercise of a right in effect penalizes that exercise, making it tantamount to a crime. Punishing constitutionally protected activities seems clearly a violation of substantive due process.").

Examined with an understanding of the importance of due process in safeguarding the rule of law and the rationale behind West Virginia's blanket prohibition on harsher penalties for a reconviction following a successful appeal, there can be no doubt that the Second Sentencing Order must be reversed.

It has already been determined that Petitioner was denied the right to a fair trial prior to his original conviction. *Varlas*, 237 W.Va. at 408, 787 S.E.2d at 679. He was precluded from introducing substantial evidence "critical" to his defense. *Id.* 237 W.Va. at 401, 787 S.E.2d at 672. The fact that Petitioner was later found guilty on the same charges does not inject fairness into the first trial. If this Court had allowed the initial conviction to stand, then the rule of law would have been forsaken.

Fortunately, this Court recognized that fact and afforded Petitioner the right initially denied him by the trial court. *Id.* Yet, had Petitioner known that by exercising his constitutional right to appeal the conviction to receive the fair trial he was entitled to he would be risking an additional ten (10) to twenty-five (25) years of incarceration, Petitioner, in all probability, would have sacrificed his right to a fair trial. The decision to sacrifice his constitutional right would have been made solely out of fear of receiving a harsher penalty on retrial. This barter of his Constitutional rights in exchange for conditional freedom is the exact scenario that *Eden* expressly prohibited.

The fact that Petitioner appealed his initial conviction in no way suggests that Petitioner was not denied due process in this case. The only reason Petitioner was not deterred from exercising his right to an appeal is because he understood (correctly) that he could not be given a harsher penalty than he originally received. In this instance, the Circuit Court's supposed ability to impose a harsher penalty in the form of revoking the Court's "grace" was concealed until after his decision to appeal was made, making the violation of due process even more egregious. "Perhaps the most basic of due process's customary protections is the demand of fair notice" and "[r]udimentary justice requires that those subject to the law must have the means of knowing what it prescribes." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225, 200 L. Ed. 2d 549 (2018)(J. Gorsuch concurring in part and concurring in judgment); Antonin Scalia, The Rule of Law As A Law of Rules, 56 U. Chi. L. Rev. 1175, 1179 (1989).

Affirming the Second Sentencing Order would be detrimental to the application of the rule of law in West Virginia. Future criminal proceedings that are unfair, biased, arbitrary, or prejudicial would go unchallenged due to defendants' fear of receiving a more severe punishment on retrial. If the Second Sentencing Order is affirmed, courts seeking to nullify defendants' constitutional right to a fair trial, or to simply avoid having its decisions overturned on appeal, will

be given the means to do so by imposing prison sentences and then suspending the same by its grace in lieu of lenient probation with the intent to discourage the filing of an appeal, lest the court's grace be lost. "It has been said with much truth, 'Where law ends, tyranny begins.'" *Merritt v. Welsh*, 104 U.S. 694, 702, 26 L. Ed. 896 (1881); John Locke, Two Treatises of Government, Book II, Chap. XVIII, Section 202 (Peter Laslett ed., Cambridge Univ. Press, 2d ed. 1967) (1690). In order to preserve the rule of law and to prevent the invitation of tyranny into our judicial system, the Second Sentencing Order must be reversed.

2. Incarceration is a heavier penalty than probation.

In the Second Sentencing Order, the Circuit Court found that "imposing a sentence of no less than ten (10) years and no more than twenty-five (25) years [of incarceration] upon Defendant, without suspending the same for five (5) years probation, is not a 'harsher sentence' than what Defendant received in his original sentence." (A.R. 613). Such a finding demonstrates either a flagrant disregard of the clear and binding precedent established by this Court in *Eden*, or a complete misunderstanding of the rationale for the "blanket prohibition" on the imposition of increased penalties for a reconviction following a successful appeal. Regardless of the reasons behind the Circuit Court's error, the Second Sentencing Order must be reversed.

It is completely irrational to contend that serving ten (10) to twenty-five (25) years in the State penitentiary is a less harsh penalty than serving five (5) years of probation. If given the choice, no sane person would choose the former over the latter as a punishment for his crime. So instead of positing such an absurd comparison between the two punishments, the Circuit Court found, as a matter of law, that probation is not a "sentence" at all. The Circuit Court based its specious conclusion on syllabus point two of *State ex rel. Strickland v. Melton*, 152 W.Va. 500,

165 S.E.2d 90 (1968) which states, "Probation is not a sentence for a crime but instead is an act of grace upon the part of the State to a person who has been convicted of a crime." *Id.*

First, the Circuit Court ignored the fact that *Eden* proscribed not only imposing a harsher "*sentence*" but also a harsher "*penalty*" upon a defendant who is reconvicted at retrial following a successful appeal. *Eden*, at Syl. Pt. 2. The Circuit Court further failed to appreciate the specific meaning of the word "sentence" as used in *Strickland* and its progeny, as compared to the normal meaning of the word as used in *Eden.*

"Sentence" is defined as "The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer." Black's Law Dictionary 1132 (Abr. 8th ed. 2005). This was the intended meaning of "sentence" when this Court adopted a "blanket prohibition on imposing increased sentences at retrial." *Eden*, 163 W. Va. at 380, 256 S.E.2d at 874. Used in this manner, "sentence" is synonymous with "penalty"[4] and "punishment."[5] The threat of an increased penalty or punishment will obviously deter a defendant from exercising his constitutional right to an appeal, which is the effective denial of a defendant's constitutional right that *Eden* sought to prevent.

Notably, "probation" is defined as "A court-imposed criminal **sentence** that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison." Black's Law Dictionary 1108 (Abr. 8th ed. 2005)(emphasis added). When a defendant is given probation for committing a crime, probation is part of his sentence, *i.e.* his punishment, for that offense. Therefore, a defendant who is granted probation as part of his

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[4] "Penalty" is defined as "Punishment imposed on a wrongdoer, usu. in the form of imprisonment or fine." Black's Law Dictionary 1031 (Abr. 8th ed. 2005).

[5] "Punishment" is defined as "A sanction – such as a fine, penalty, confinement, or loss of property, right, or privilege – assessed against a person who has violated the law." *Id.* at 1031.

punishment for a crime cannot be resentenced to a punishment harsher than the first, which includes the reduction or loss of probation.

It is true that West Virginia recognizes that probation is a matter of grace granted in the discretion of the circuit court. *Strickland*, at Syl. Pt. 2; *State v. Duke*, 200 W. Va. 356, 365, 489 S.E.2d 738, 747 (1997); *State v. McClain*, 211 W. Va. 61, 69, 561 S.E.2d 783, 791 (2002). This grace is bestowed upon the defendant in the form of a reduced "***alternative sentence***" for the crime committed. *McClain*, 211 W. Va. at 67, 561 S.E.2d at 789 (emphasis added). Instead of the complete deprivation of freedom occasioned by incarceration, a defendant is granted the privilege of conditional liberty. *Duke*, 200 W. Va. at 364, 489 S.E.2d at 746. Hence, probation is a reduced punishment for a crime that substitutes for the suspended, statutorily-prescribed sentence. *Id.*; W.Va. R. Crim. P. 35(b)("[C]hanging a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence..."). Thus, while probation is an act of discretionary grace, it is also a sentence, *i.e.* a designated punishment, for a crime, albeit reduced from the statutorily-prescribed punishment.

To hold that *Eden* simply prohibits a harsher "sentence" as the term was utilized by the Circuit Court in the Second Sentencing Order would open the door to the threat of harsher punishments in the form of the revocation of any sentence short of the statutorily-prescribed sentence, such as house arrest, probation, or parole eligibility. Such a holding would render the prohibition against harsher penalties established in *Eden* completely meaningless because then the no second sentence could ever be harsher than the original sentence.

In the context of due process, which protects against the chilling or deterring of a defendant's exercise of his basic constitutional right to appeal, the meaning of West Virginia's "blanket prohibition" of a harsher sentences is clear. The second sentence cannot be a punishment

for a crime that exceeds the first in appearance, effect, or magnitude. *Eden* 163 W.Va. at 380, 256 S.E.2d at 874; *State v. Gwinn*, 169 W. Va. 456, 456, 288 S.E.2d 533, 534 (1982); *State v. Frazier*, No. 13-1122, 2014 WL 5529734, at *4 (W. Va. Oct. 30, 2014)(unpublished opinion). The penalty imposed in the Second Sentencing Order exceeds the penalty in the Original Sentencing Order in appearance, effect, and magnitude. Indeed, this Court has consistently upheld *Eden* to prohibit the type of sentence imposed by the Circuit Court in this case.

In *Gwinn*, the defendant was initially convicted of first-degree murder with a recommendation of mercy. 169 W. Va. at 456-57, 288 S.E.2d at 535-37. Upon retrial following post-conviction *habeas corpus* relief, he was convicted of first-degree murder without a recommendation of mercy and was sentenced to life in the penitentiary without chance of parole. *Id.* This Court in *Gwinn* held that the trial court's decision to not sentence the defendant pursuant to a recommendation of mercy was "clearly erroneous" in light of the prohibition of an imposition of a "greater penalty than imposed at the appellant's first trial." *Id.* Using the Circuit Court's reasoning below, the two sentences in *Gwinn* were the same - the defendant was sentenced to life in the penitentiary for both convictions and the potential for parole did not affect the sentence. This flawed and erroneous reasoning was expressly rejected in *Gwinn* because the absence of the chance of parole made the second punishment harsher than the first. *Id.*

Similarly, in *Frazier*, the defendant was sentenced to forty years imprisonment for his initial conviction of second-degree murder. 2014 WL 5529734, at *1-2. The defendant appealed the decision and was granted a new trial on the basis that his constitutional rights had been violated. *Id.* On retrial, the State sought and obtained a finding that the defendant used a firearm in the commission of the crime, although the State did not seek this finding in the first trial. *Id.* The finding effectively increased the defendant's sentence because he was then required to serve one-

third of his sentence of incarceration prior to being eligible for parole, instead of the usual one-fourth. *Id.* at *4 (citing W.Va. Code 62–12–13(b)(1)(A)).

This Court found that "Because parole is a means of shortening a sentence, the restriction thereof necessarily operates as a form of punishment." *Id.* at *4 (quoting *State v. Sears*, 196 W. Va. 71, 77 n. 13 468 S.E.2d 324, 330 n. 13 (1996)). Relying on *Eden*, this Court held that the additional punishment imposed by the second sentence exceeded the punishment ceiling established by the original sentence and violated the defendant's right to due process. *Id.* As in *Frazier*, the second sentence imposed upon Petitioner that failed to grant probation in lieu of incarceration was an additional punishment that exceeded the ceiling established by the original sentence. *See also United States v. Hawthorne*, 532 F.2d 318, 323–24 (3d Cir. 1976)(Holding that a second sentence of the same ten year term, but with further restriction on parole eligibility constituted a more severe sentence).

The cases relied upon by the Circuit Court that make the distinction between probation and a sentence for a crime do not appreciate that probation is still part of the penalty for the crime because the observance of such fact was unnecessary for the analysis of the issue in each of those cases. *See State v. Workman*, No. 13-0133, 2013 WL 6183989, at *1-2 (W. Va. Nov. 26, 2013); *State v. Jones*, 216 W. Va. 666, 669, 610 S.E.2d 1, 4 (2004); *Strickland*, 152 W. Va. at 505, 165 S.E.2d at 94; and *Jett v. Leverette*, 162 W. Va. 140, 144–45, 247 S.E.2d 469, 471–72 (1978).

In its decision, the Circuit Court primarily relied upon the unpublished opinion of *State v. Workman*. In *Workman*, a divided Court affirmed the sentence of one-year supervised probation in lieu of one-year of incarceration imposed by a circuit court following a *de novo* bench trial. *Id.* Although the defendant was initially sentenced to one-year unsupervised probation by the magistrate court, the majority, relying on inapplicable caselaw, believed that the defendant did not

receive a harsher sentence following the second trial to the circuit court. *Id.* (citing *Jones*, 216 W. Va. at 669, 610 S.E.2d at 4; *Strickland*, 152 W. Va. at 505, 165 S.E.2d at 94; and *Jett*, 162 W. Va. at 144–45, 247 S.E.2d at 471–72).

As an initial matter, the *Workman* decision is an unpublished opinion and is "of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of *res judicata,* collateral estoppel, or law of the case." *Pugh v. Workers' Comp. Com'r*, 188 W. Va. 414, 414–15, 424 S.E.2d 759, 759–60 (1992). Accordingly, the Circuit Court's reliance thereon was prohibited, and this Court should not be persuaded by a decision deemed unsuitable for official publication. *Id.* Moreover, the conclusory decision in *Workman* was misguided by the same inapplicable caselaw upon which the Circuit Court relied.

None of the cases relied upon by *Workman* or the Circuit Court in this case involved the resentencing of a defendant after a successful appeal with a harsher penalty than the first sentence. Rather, each case involved a situation where a defendant received probation in lieu of a statutorily-prescribed sentence and then complained of the conditions or revocation of the more lenient alternative sentence. *Id.* Since probation is always a preferred alternative to the statutorily-prescribed sentence, the Court differentiated between the two punishments to find that the defendants' rights were not violated in each instance since the defendants could have had it worse if it were not for the Court's grace. In no way do these cases controvert this Court's precedent that once the grace of the court has been granted and a defendant receives probation as part of his punishment for a crime, that such grace cannot be revoked upon resentencing and the punishment following a successful appeal cannot increased.

In *Strickland*, the Court held that a defendant was not entitled to be represented by counsel when he was placed on probation because he received a sentence less severe than the sentence

called for by statute. 152 W. Va. at 509, 165 S.E.2d at 95–96. The Court recognized, however, that the defendant was entitled to the assistance of counsel when probation was revoked because in that instance the defendant was being deprived of his conditional freedom. *Id.*

In *Jett*, the Court juxtaposed probation and parole to determine that the "***probation sentence***" operates independently of the underlying criminal sentence such that a defendant is not entitled to credit for time served on probation. Syl. Pt. 2, *Jett*, 162 W. Va. at 140, 247 S.E.2d at 469 (emphasis added). Notably, the Circuit Court in this case relied on *Jett* for its proposition that probation has no correlation to the underlying criminal sentence. (A.R. 613-14). However, *Jett* actually held "The **term** of probation has no correlation to the underlying criminal sentence." *Id.* at Syl. Pt. 1. (emphasis added). The *Jett* Court's holding meant that the length of time to be served on probation does not correlate to the length of time one could be incarcerated. *Id.* The unaltered holding in *Jett* provides no support to a finding that probation is not part of a criminal sentence.

In *Jones*, the defendant challenged a condition of his one-year probation that required him to serve 100 days of incarceration, which the judge indicated he would reconsider if the defendant accepted responsibility for the crime. *Jones,* 216 W. Va. at 668, 610 S.E.2d at 3. The defendant appealed the sentence alleging that the trial judge violated his constitutional right against self-incrimination by requiring him to admit criminal responsibility in order to avoid incarceration. *Id.* 216 W. Va. at 667, 610 S.E.2d at 2. The Court disagreed and affirmed the sentence because regardless of whether the defendant accepted responsibility, he received the benefit of one-year probation instead of serving that time incarcerated. 216 W.Va. at 671, 610 S.E.2d at 6.

These cases in no way stand for the proposition that probation is not a form punishment for a crime, nor could any reasonable argument be made that they could. Probation is still a limitation on one's liberty – just not as great a limitation as incarceration. The restriction of one's liberty is

a form of punishment which must have an underlying criminal conviction to be imposed. Accordingly, the statement that "probation is not a sentence for a crime" is a fallacy when taken out of the context of the cases in which the statement was made. Rather, when imposed as part of the punishment for a crime, probation is part and parcel of the sentence.

In the Original Sentencing Order, the Circuit Court exercised its discretion and granted Petitioner its grace by suspending the execution of the statutorily-prescribed sentence of ten (10) to twenty-five (25) years of incarceration for the crime of "Sexual Assault in the Second Degree" and granted Petitioner probation for the maximum term of five (5) years. (A.R. 398-99); W.Va. Code §61-8B-4(b). In so doing, the Circuit Court imposed a reduced "alternative sentence" for this crime. *Id.* Thus, Petitioner's entire punishment for the crime of "Sexual Assault in the Second Degree" was five (5) years of conditional liberty dependent on the observance of the probation restrictions. *Id.*; *see Duke*, 200 W. Va. at 365, 489 S.E.2d at 747.

Consequently, five (5) years' probation was Petitioner's punishment, his penalty, his sentence for the conviction of the crime. It became the ceiling above which no additional penalty could be added following a retrial. *Eden*, 163 W. Va. at 382–83, 256 S.E.2d at 875. Petitioner knew this ceiling when he decided to exercise his constitutional right to appeal, and he knew it when he decided to decline a plea bargain prior to his retrial. Any increase in punishment, especially such a dramatic increase from five (5) years' probation to up to twenty-five (25) of incarceration, would have undoubtedly chilled Petitioner's exercise of his basic constitutional right to appeal a decision in order to obtain a fair trial. Therefore, the Circuit Court unquestionably denied the Petitioner his right to due process by imposing a harsher sentence following his retrial.

B. EDEN'S BLANKET PROHIBITION ON HARSHER PENALTIES ON RESENTENCING FOLLOWING A SUCCESSFUL APPEAL REMAINS THE LAW IN WEST VIRGINIA.

Recognizing the error of the Circuit Court's reasoning, Respondent will argue, as it did below, that *Eden* and its progeny have been overturned and was, therefore, not applicable to the sentencing of Petitioner for his reconviction. (A.R. 569-72). Yet, Respondent cannot cite to a single case in which this Court has overturned or even weakened its "blanket prohibition" on harsher penalties for convictions following a successful appeal. *Id.*

On the contrary, this Court has unremittingly relied upon *Eden* to apply such "blanket prohibition" on harsher penalties following a successful appeal during the forty years since its inception. *State v. Young*, 173 W. Va. 1, 8, 311 S.E.2d 118, 125 (1983)("[A] court may not impose judgment for a more serious degree of homicide than that imposed at the original trial."); *Bonham*, 173 W. Va. at 417, 317 S.E.2d at 502 ("[C]ircuit court was precluded by our holding in [*Eden*] imposing a more severe sentence than that imposed by the municipal court."); *McClain*, 211 W. Va. at 67, 561 S.E.2d at 789 (2002)("[A]n increased penalty may not be imposed upon remand."); *State v. Gwinn*, 169 W. Va. 456, 461, 288 S.E.2d 533, 537 (1982)("Under our holdings in *Eden* and *Cobb* the trial court's imposition of a greater penalty than that imposed at the appellant's first trial is clearly erroneous."); and *Frazier*, 2014 WL 5529734, at *4 (2014)("[R]estriction [of parole] operates as a form of punishment" and was thus an imposition of an increased sentence and violative of due process).

While subsequent federal cases have, to some extent, undermined the rationale of *Patton v. North Carolina,* 381 F.2d 636, which was relied upon by this Court in *Eden,* and allowed for the imposition of harsher penalties for reconvictions under specific, limited circumstances, those federal cases have not abrogated the longstanding precedent of this State.

Certainly, the Constitution of West Virginia may require higher standards of protection than afforded by the Federal Constitution and this Court "may set its own constitutional protections at a higher level than that accorded by the federal constitution." *Bonham*, 173 W. Va. at 418, 317 S.E.2d at 503. Indeed, this Court has expressly observed that the due process clause of the West Virginia Constitution affords greater protections than that of the Federal Constitution in regard to resentencing after a successful appeal. *Eden*, 163 W. Va. at 380, 256 S.E.2d at 874 (rejecting the federal approach set forth in *Pearce* that allows for increased punishment when it is justified by additional evidence introduced at retrial). Therefore, the federal cases upon which Respondent relies are inapplicable to the case at bar.

Even if this Court were inclined to somehow find that *Eden* has been overturned by such inapposite federal cases, the abrogation of the long-standing precedent has not been done with such manifest clarity that it can be found to apply to Petitioner in this case. Even the Circuit Court was unpersuaded by the State's argument and found that the prohibition on harsher penalties set forth in *Eden* is still the law in West Virginia. (A.R. 612).

To find that *Eden* was overturned by federal cases decided forty years ago, while this Court continued to decide cases based upon its holding as recently as 2014 (*State v. Frazier*, 2014 WL 5529734), would clearly result in a violation of Petitioner's due process protection of the right to fair notice. One of the most basic of due process's customary protections is the demand of fair notice, which is "an essential element of the rule of law." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225, 200 L. Ed. 2d 549 (2018) (J. Gorsuch concurring in part and concurring in judgment)(*quoting* Note, Textualism as Fair Notice, 123 Harv. L. Rev. 542, 543 (2009). "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, **but also of the**

severity of the penalty that a State may impose." *State v. Miller,* 197 W.Va. 588, 599, 476 S.E.2d 535, 546 (1996) (quoting *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574, 116 S.Ct. 1589, 1598, 134 L.Ed.2d 809, 826 (1996)(emphasis added); *State v. Easton,* 203 W. Va. 631, 640–41, 510 S.E.2d 465, 474–75 (1998).

Therefore, to the extent that this Court were to find *Eden* was overturned prior to Petitioner's appeal of his initial conviction, the Due Process Clause of the United States and West Virginia Constitutions entitled him to fair notice of the potential of the loss of probation granted to him as part of his original sentence if he was reconvicted. Petitioner was irrefutably denied such notice. Consequently, even if this Court were to accept Respondent's argument that *Eden* has been overturned, the harsher penalty imposed upon him by the Circuit Court would still violate Petitioner's right to due process. As such, even if this Court determines that *Eden* has been overturned, the Second Sentencing Order is unconstitutional as applied to the Petitioner and must be reversed.

C. IF THE COURT IS INCLINED TO OVERTURN EDEN, SUCH DECISION CANNOT BE APPLIED RETROACTIVELY TO PETITIONER.

For the same reason that the Court cannot apply a decision holding that *Eden* was previously overturned to Petitioner, a decision to now overturn *Eden* cannot be applied retroactively to Petitioner. If the Court were to adopt a new rule for resentencing a defendant following a retrial, applying such rule in this case will deprive Petitioner of due process.

"Criminal defendants are constitutionally protected against retroactive application of law-changing decisions adverse to the defendants' interests." John Bernard Corr, Retroactivity: A Study in Supreme Court Doctrine 'As Applied', 61 N.C. L. Rev. 745, 797, fn. 179 (1983). "Under *ex post facto* principles of the United States and West Virginia Constitutions, a law passed

after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him." Syl. Pt. 1., *State ex rel. Carper v. W. Virginia Parole Bd.*, 203 W. Va. 583, 588, 509 S.E.2d 864, 869 (1998). "[L]imitations on *ex post facto* judicial decision making are inherent in the notion of due process." *Rogers v. Tennessee*, 532 U.S. 451, 456, 121 S. Ct. 1693, 1697 (2001). "[T]he *ex post facto* prohibition extends to any alteration, even one labeled procedural, "which in relation to the offense or its consequences, alters the situation of a party to his disadvantage." *State ex rel. Carper*, 203 W. Va. at 587, 509 S.E.2d at 868. Applying a judicial opinion which adopts a new rule to conduct that occurred before the change in law was announced is fundamentally unfair and constitutes a denial of due process. *Rogers*, 532 U.S. at 471-78 (J. Scalia Dissenting).

The adoption of a new rule that would allow probation initially granted to a defendant as part of his initial sentence to be rescinded under any circumstance in the resentencing following a successful appeal, would undoubtedly be adverse to Petitioner's interest as it would allow the Circuit Court the opportunity to again deny Petitioner probation. Such a rule would mark an unpredicted departure from this Court's precedent that has been relied upon as grounds for many decisions over many years in this State. Not only would the retroactive application of such a rule violate Petitioner's right to notice and fair warning but would also violate a "fundamental fairness interest ... in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533, 120 S. Ct. 1620, 1633 (2000). Thus, the retroactive application of any new rule adopted in this case that diverges from the blanket prohibition established in *Eden* would violate Petitioner's constitutional right to due process. Therefore, Second Sentencing Order must be overturned.

CONCLUSION

The following vindication of a reversal of a sentence of life without parole for a heinous murder based upon the defendant being compelled to wear prison garb during the penalty phase of his trial is instructive for the issue now before the Court:

> The public must be able to take the Court's impartiality and dedication to the rule of law and the protection of the People's rights as a certainty, even when it might be easier or more popular for the Court to simply ignore the error. We ought to be judges, not politicians. As judges, we must choose the path which safeguards all of our protections and breathes vitality into our rights. When we uphold the law on an issue such as that before us, despite public sentiment to go with a more palatable result, we are not siding with the criminal, we are protecting the system from the excesses of the State. Justice is not a rush to judgment. We do justice when we support, protect, defend and enforce the federal and state constitutions and the rule of law-as difficult as that sometimes may be.

Finley, 219 W. Va. at 758, 639 S.E.2d at 850.

The issue on appeal is more than whether Petitioner's constitutional right to due process has been violated; it is whether West Virginia will adhere to the rule of law even when it may be unpopular to do so. This Court must now do justice by reversing the Second Sentencing Order and remanding this case with instructions to the Circuit Court to resentence Petitioner in accordance with his original sentence and pursuant to the principles of the West Virginia Constitution as announced in *Eden*. Anything less would be a miscarriage of justice and a violation of the Petitioner's constitutionally guaranteed rights.

Signed: _____

Carl A. Frankovitch, Esq. (WV Bar # 12150)
Counsel of Record for Petitioner