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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,
Respondent,

v.

Appeal No. 19-0005

NICHOLAS VARLAS,
Petitioner.

**BRIEF OF RESPONDENT,
STATE OF WEST VIRGINIA**

Appeal from a December 4, 2018
Sentencing Order
Circuit Court of Brooke County
Case No. 13-F-63

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I. ASSIGNMENT OF ERROR

Nicholas Varlas, (“Petitioner”), by counsel, advances one assignment of error in this appeal. Pursuant to Rule 10(d) of the West Virginia Revised Rules of Appellate Procedure, the assignment of error is not restated here but will be addressed below.

II. STATEMENT OF THE CASE

On the evening of August 12, 2012, N.S. went with her friend J.L. to a party at Petitioner’s home in Brooke County, West Virginia. (App. at 60-64.) Later in the evening, J.L. left the house, while N.S. stayed. (App. at 65.) Eventually, in the early morning hours of August 13, 2012, N.S. and Petitioner were the only two people remaining at the house. (App. at 82.) Petitioner took his shirt off and started kissing N.S., which she tried to avoid. (App. at 85.) N.S. attempted to push Petitioner off, but could not, and she expressly told Petitioner “no,” to indicate that she did not want to engage with him sexually. (App. at 87.) Despite her expressed non-consent, Petitioner proceeded to engage in sexual intercourse with N.S. (App. at 87-90.) N.S. reported this assault later that day to Officer Timothy Robertson Jr. of the Follansbee Police Department. (App. at 163-64.)

On November 4, 2013, a Brooke County grand jury returned a two-count indictment against Varlas, charging him in Count One with sexual assault in the second degree in violation of West Virginia Code § 61-8B-4 (1991), and in Count Two with attempting to commit sexual abuse in the first degree in violation of West Virginia Code § 61-11-8(2) (2002) and § 61-8B-7(a)(1) (2006). (App. at 14-15.)

Petitioner’s first trial commenced on September 3, 2014. (App. at 17.) The State introduced testimony from a number of witnesses, including N.S. (App. at 59-212.) Petitioner testified in this trial that he and N.S. had indeed engaged in sexual intercourse, but that she had

consented. (App. at 264-266.) At the end of trial, the jury found Petitioner guilty of both counts. (App. at 309-311.)

Petitioner's first sentencing hearing was held on December 18, 2014. (App. at 356.) At the hearing, Petitioner made a statement, in which he stated "I just want to apologize for this whole situation anyways. I would never force myself on anybody." (App. at 380.) His counsel also made a statement on his behalf, stating "[Petitioner] is remorseful that this whole incident happened. He's apparently had a misunderstanding with the victim. He did not intend to force himself on her. That being said, you know, he has, you know, sincere regret that this whole incident did happen." (App. at 382.)

The Circuit Court ultimately sentenced Petitioner to a period of one to three years incarceration on the attempted sexual abuse in the first degree conviction, and a period of ten to twenty-five years on the sexual assault in the second degree conviction, to run consecutively. (App. at 385-86.) However, the Court suspended execution of the ten to twenty-five year sentence and ordered Petitioner be placed on a period of probation for a term of five years. (App. at 386.) The Court noted "I am taking this position partially because of his age and his involvement in the community. He seems to be a good enough person who just did not understand no." (App. at 386.) The Court also ordered him to register as a sex offender for life and instituted a period of ten years of extended supervised release. (App. at 398.)

The Circuit Court entered its sentencing order on January 8, 2015. (App. at 7, 395-99.) Petitioner subsequently appealed his conviction on evidentiary issues and this Court granted him a new trial in an opinion issued June 16, 2016. (App. at 405-25.) Petitioner's retrial commenced on May 22, 2018, but was ultimately declared a mistrial upon Petitioner's motion. (App. at 610.)

Petitioner's retrial began again on October 1, 2018. (App. at 427.) A different judge presided over Petitioner's second trial than in his 2014 trial. (App. at 17, 427.) Petitioner was once again convicted of both counts of his indictment. (App. at 611.)

Petitioner's sentencing hearing was held on December 3, 2018. At that hearing, Petitioner's counsel informed the Court that Petitioner did not wish to make any statement because he was maintaining his innocence to the charges. (App. at 582.) The Circuit Court then considered the issue of how *State v. Eden*, 163 W. Va. 370, 256 S.E.2d 868 (1979) impacted its sentencing decision. (App. at 586.) In *Eden*, this Court held:

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. W. Va. Const. art. 3, s 10.

Syl. Pt. 2, *State v. Eden*, 163 W. Va. 370, 256 S.E.2d 868, 870 (1979); *see also* Syl. Pt. 1, in part, *State v. Gwinn*, 169 W. Va. 456, 288 S.E.2d 533, 534 (1982) (acknowledging application of the *Eden* rule in a retrial following a successful appeal). *Eden* relied heavily on the United States Supreme Court's decision in *North Carolina v. Pearce* that "[d]ue process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." 395 U.S. 711, 725 (1969). While the State argued that, due to subsequent federal caselaw *Eden* was no longer applicable, Petitioner asserted that it was. (App. at 586-87.)

The Circuit Court ultimately decided that *Eden* was still applicable law, but that it did not apply to probation, noting "it is black letter law or virtually black letter law in West Virginia that probation is not considered part of a sentence." (App. at 588.) The Circuit Court relied on this Court's decision in *State v. Workman*, No. 13-0133, 2013 WL 6183989, at *2 (W. Va. Nov. 26, 2013) (memorandum decision), in which it relied on the same principle—that probation is not part

of a sentence—to determine that only the criminal sentence imposed, not any probation term imposed, should be considered when determining whether a sentence imposed after retrial is harsher than the original sentence. *See Workman*, No. 13-0133, 2013 WL 6183989, at *2. The Court thus determined that, for the purposes of the rule in *Eden*, the sentence from Petitioner’s first trial to be considered was his sentence of one to three years for his attempted first degree sexual abuse conviction and his ten to twenty-five year sentence for his second degree sexual abuse conviction. (App. at 589-90.)

The Circuit Court then sentenced Petitioner to a term of one to three years incarceration on his attempted first degree sexual abuse conviction, and a term of ten to twenty-five years on his second degree sexual assault conviction, to be run concurrently. (App. at 590.) However, the Court did not suspend execution of any part of Petitioner’s sentence, and did not place him on probation. (App. at 589-90.) The Court also found that by running his sentences concurrently, Petitioner’s sentence was actually less severe than his prior sentence. (App. at 590.) The Court also ordered him to register as a sex offender for life and instituted a period of ten years of extended supervised release. (App. at 590.) In discussing both postconviction bond and probation, the Circuit Court noted that Defendant still had not taken responsibility for his crimes, and that “putting him on post-conviction bond at this point or any type of probation makes him a danger to the public for reoffending.” (App. at 592-93.)

The Court entered its Sentencing Order on December 4, 2018, embodying these rulings. (App. at 608-15.) It is from this order that Petitioner now appeals.

III. SUMMARY OF ARGUMENT

Petitioner’s sole assignment of error is that the Circuit Court violated his due process rights by sentencing him to a harsher sentence on the same offenses after he was convicted for a second

time following his successful appeal. This Court should find that this argument is meritless, because the Circuit Court correctly determined that Petitioner was not given a harsher sentence after his retrial, because probation is not a criminal sentence. After his first trial, Petitioner was sentenced to a term of one to three years of incarceration and a term of ten to twenty-five years of incarceration, to be served consecutively. Petitioner was given the same sentence after his retrial and subsequent conviction, except that the terms were ordered to run concurrently. That the Circuit Court suspended execution of Petitioner's ten to twenty-five year term and ordered that he be placed on probation is irrelevant to the inquiry as to whether the second sentence was harsher, as it is not a sentence for a crime.

Additionally, even if this Court finds that the Circuit Court sentenced Petitioner to a harsher sentence by not granting probation after his retrial, it should affirm the Circuit Court's sentencing order. This Court's prior holding that an increase in sentencing after retrial is a due process violation was predicated on federal caselaw which has since been significantly curtailed. The concern of judicial vindictiveness is not implicated in this case, because Petitioner's second trial and sentencing were before a different judge than the first trial. Additionally, the United States Supreme Court has recognized that the speculative possibility of a higher sentence upon retrial is not a significant deterrent to the right to appeal and does not give rise to a constitutional violation.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Revised Rules of Appellate Procedure 18(a)(3) and (4), to the extent the Court decides this case on the grounds relied on by the Circuit Court, oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record, and this case is appropriate for resolution by memorandum decision. To the extent this Court reaches the question of the continued viability of *State v. Eden*, Rule 20 argument would be appropriate.

V. ARGUMENT

A. **Standard of Review**

“This Court reviews the circuit court’s final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 179, 469 S.E.2d 114, 115 (1996). This appeal addresses a legal issue and this Court’s review should be *de novo*.

B. ***State v. Eden* is Not Implicated in this Case Because Probation is Not a Sentence for a Crime.**

Petitioner’s lone assignment of error asserts that the Circuit Court committed legal error in determining that his due process rights were not violated by its decision not to grant him probation after his retrial. (Pet’r’s Br. at 6.) Petitioner argues that ten to twenty-five years “is a harsher penalty than his original sentence of five (5) years’ probation.” (Pet’r’s Br. at 6.)

Petitioner’s argument on this point misstates the issue. The Circuit Court did not decide that a sentence of ten to twenty-five years of incarceration was not harsher than a term of five years of probation; rather, it found that for the purpose of comparing the magnitude of his two sentences, it must only consider the criminal sentence imposed. (App. at 586-90.) As the Circuit Court noted, after his first trial, Petitioner was sentenced to a term of one to three years of incarceration and a consecutive term of ten to twenty-five years of incarceration. (App. at 583-84.) After his retrial, the Court imposed the same terms, but order that the two terms run concurrently. (App. at 589-90.) The Circuit Court found that this sentence was actually less severe than his prior sentence, (App. at 590), because the terms were ordered to run concurrently rather than consecutively; because the second sentence was not harsher, *Eden* had no application.

As noted, this Court has already addressed the applicability of *State v. Eden* in the context of suspended sentences in *State v. Workman*, No. 13-0133, 2013 WL 6183989 (W. Va. Nov. 26, 2013) (memorandum decision). In *Workman*, the petitioner was found guilty of domestic battery in magistrate court and sentenced to one year in jail; the Court then suspended his sentence and imposed one year of unsupervised probation. *See Workman*, No. 13-0133, 2013 WL 6183989, at *1. The petitioner appealed, and after a *de novo* bench trial, the Circuit Court found him guilty of domestic battery and sentenced him to one year in jail; the Circuit Court suspended the jail sentence and imposed one year of supervised probation. *See id.* The petitioner appealed the Circuit Court's decision, asserting that it violated *Eden* because the supervised probation imposed by the Circuit Court on appeal was harsher than the unsupervised probation imposed by the magistrate court. *See id.* at *2.

Relying on its long-standing precedent that “[p]robation 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,” this Court found that *Eden* was not implicated by probation terms instituted in lieu of suspended sentences. *Workman*, No. 13-0133, 2013 WL 6183989, at *2 (quoting Syl. Pt. 2, *State ex rel. Strickland v. Melton*, 152 W. Va. 500, 165 S.E.2d 90, 91 (1968)). Instead, the Court considered only the legal sentence imposed by each lower court: observing that each court “sentenced petitioner to one year in jail for the offense of domestic battery,” this Court found that “it is clear that petitioner did not receive a harsher sentence on appeal.” *Workman*, No. 13-0133, 2013 WL 6183989, at *2

Petitioner asserts that *Workman* has no precedential value and that this Court should simply ignore it. He then also claims that it was incorrect, and that the *Eden* analysis should consider grants of probation in assessing the magnitude of a sentence. Petitioner is incorrect; this Court

should affirm the Circuit Court's decision, both because *Workman* is an opinion of this Court with precedential value which already decided this exact legal issue, and because the principles it relies on are longstanding and compel the same result.

1. This Court's Decision in *Workman* is Legal Precedent.

Petitioner seeks to avoid the straightforward application of *Workman* and the well-settled principle it relies on by attacking the precedential value of *Workman* itself. (Pet'r's Br. at 17.) According to Petitioner, *Workman* is an "unpublished opinion" and this Court "should not be persuaded by a decision deemed unsuitable for official publication." (Pet'r's Br. 17.) Petitioner invokes this Court's holding that "[u]npublished opinions of this Court are 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," Syl. Pt. 3, *Pugh v. Workers' Comp. Com'r*, 188 W. Va. 414, 424 S.E.2d 759, 759–60 (1992), for the proposition that the Circuit Court actually erred in relying on *Workman*. (Pet'r's Br. at 17.)

The State acknowledges, as it must, that *Workman* is technically unpublished, and that it is a memorandum decision rather than a signed opinion. *See generally Workman*, No. 13-0133, 2013 WL 6183989. However, this Court has held that "memorandum decisions may be cited as legal authority, and are legal precedent." Syl. Pt. 5, in part, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303, 306 (2014). Of course, "their value as precedent is necessarily more limited[, and] where a conflict exists between a published opinion and a memorandum decision, the published opinion controls." *Id.* Since *McKinley*, this Court has taken the opportunity to explicitly "reaffirm the precedential value of our memorandum decisions." *In re T.O.*, 238 W. Va. 455, 463, 796 S.E.2d 564, 572 (2017).

This Court explained in *McKinley* that memorandum decisions were adopted by the 2010 amendments to the West Virginia Rules of Appellate Procedure to accommodate this Court's

transition in from a system of appeals by permission to appeals by right. *See McKinley*, 234 W. Va. 143, 151, 764 S.E.2d 303, 311 (2014). Though the *McKinley* Court did not explicitly overrule *Pugh*, it is clear that *Pugh*'s bar on citation to unpublished opinions is not controlling law as to memorandum decisions. Indeed, in finding that unpublished opinions have no precedential value, the *Pugh* Court relied on the fact that "such opinions are not generally made available to members of the public." *Pugh*, 188 W. Va. at 417, 424 S.E.2d at 762. This Court has made clear that this is no longer a concern, as "[o]ur memorandum decisions, like our signed opinions, are readily available on the Court's website at www.courts.wv.gov, as well as through the databases of legal research providers, such as Westlaw and LexisNexis." *In re T.O.*, 238 W. Va. at 463, 796 S.E.2d at 572.

Thus, Petitioner is mistaken in his assertion that this Court should ignore *Workman*. While *Workman*'s precedential value would obviously yield to a contrary signed opinion, no such opinion exists. *Workman* is this Court's most definitive application of its settled principle that probation is not a criminal sentence to a challenge under *State v. Eden*. As Petitioner argues the same principle this Court rejected in *Workman*—that probation is a part of a criminal sentence for the purpose of determining the relative harshness of two sentences—this Court should follow *Workman* and affirm the Circuit Court.

2. Probation is Not Part of a Criminal Sentence in West Virginia and Should Not Be Considered in Determining Whether Petitioner's Sentence was Harsher After Retrial.

Petitioner also asserts that the reasoning relied on in *Workman*—that probation is not part of criminal sentence—is incorrect. (Pet'r's Br. at 17-19.) As he sees it, "probation is part and parcel of the sentence." (Pet'r's Br. at 19.) Petitioner's argument is incorrect, as it is well-established under West Virginia law that probation is not part of a criminal sentence.

In West Virginia, the power of courts to place an offender on probation is controlled by the legislature. See Syl. Pt. 1, *Spencer v. Whyte*, 167 W. Va. 772, 280 S.E.2d 591 (1981) (“The right to probation was a legislative prerogative since courts did not possess the inherent power to grant probation.”). The legislature granted that authority in West Virginia Code § 62-12-1, which provides that “[a]ny circuit court of this State shall have authority as provided in this article to place on probation any person convicted of a crime.” W. Va. Code § 62-12-1. To exercise this authority, “upon the conviction of any person eligible for probation . . . the court, upon application or of its own motion, may suspend the imposition or execution of sentence and release the offender on probation for such period and upon such conditions as are provided by this article.” W. Va. Code § 62-12-3. Clear from this language is the principle that probation is inherently separate from the sentence imposed for a conviction, as a person can only be placed on probation when the circuit court “suspend[s] imposition or execution of sentence.” W. Va. Code § 62-12-3.

As recognized in *Workman*, this Court has long explicitly recognized the principle inherent in the language of § 62-12-3: that “[p]robation 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.” Syl. Pt. 2, *State ex rel. Strickland v. Melton*, 152 W. Va. 500, 165 S.E.2d 90, 91 (1968). When placing a defendant on probation, where a court suspends imposition of sentence, the defendant still “could be sentenced” for his offenses if he violates the terms of probation, and where the court suspends execution, the defendant in fact “has been sentenced.” Syl. Pt. 4, in part, *State v. Duke*, 200 W. Va. 356, 489 S.E.2d 738, 741 (1997). When a court properly revokes probation based on violations of its conditions, it can then impose sentence for the first time if imposition was suspended, or order the already imposed sentence to be executed if execution was suspended. See W. Va. Code § 62-12-10 (a).

Petitioner seeks to distinguish this Court's prior cases treating probation as separate from the sentence by noting that none—other than *Workman*—addressed the resentencing of a defendant after a successful appeal and a subsequent conviction on retrial. (Pet'r's Br. at 17.) He contends that the *Workman* court took these long-standing principles out of context, and thus erred in finding *Eden* inapplicable. (Pet'r's Br. at 17-18.) While Petitioner is correct that the cases relied on in *Workman* never dealt with the retrial and resentencing issue, he errs in his assertion that they “in no way stand for the proposition that probation is not a form [of] punishment for a crime.” (Pet'r's Br. at 18.)

In *Jett v. Leverette*, this Court addressed a petitioner's contention that, after having his probation revoked and his underlying sentence imposed, it was a violation of the Double Jeopardy Clause of the West Virginia Constitution's prohibition on multiple punishments for the same offense. *Jett v. Leverette*, 162 W. Va. 140, 141 n.1, 247 S.E.2d 469, 470 n.1 (1978). The petitioner relied principally on the Court's prior recognition that time spent on parole must be credited against the underlying sentence. *See id.* at 141, 247 S.E.2d at 470. This Court distinguished between probation and parole, holding “that there are fundamental statutory differences between probation and parole in the relationship they bear to the underlying criminal sentence. The term of probation has no correlation to the underlying criminal sentence, while parole is directly tied to it.” *Jett*, 162 W. Va. at Syl. Pt. 1, 247 S.E.2d at 469. The Court ultimately rejected Petitioner's claim that his probation term and underlying sentence were multiple punishments for the same offense, holding that “[t]he separation of the probation term from the underlying criminal sentence, coupled with the significant statutory differences between probation and parole, warrants the finding that our State's Double Jeopardy Clause is not violated by the failure to credit the time spent on probation upon its revocation.” *Jett*, 162 W. Va. at Syl. Pt. 2, 247 S.E.2d at 469; *see also Hall v. Bostic*, 529

F.2d 990, 992 (4th Cir. 1975) (“Nor is the refusal to credit probation time against the prison sentence double jeopardy.”).

Petitioner contends that “[t]he unaltered holding in *Jett* provides no support to a finding that probation is not part of a criminal sentence.” (Pet’r’s Br. at 18.) This is simply an incorrect reading of the case; were it true, as Petitioner suggests, that probation is “imposed as part of a punishment for a crime” and “part and parcel of the sentence,” (Pet’r’s Br. at 19), it is 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. Indeed, far from being distinguishable as Petitioner suggests, *Jett* recognizes the exact principle *Workman* relied on—that a probation term is distinct from the criminal sentence.

Jett also demonstrates the error in Petitioner’s attempt to analogize parole eligibility with probation for the purposes of an *Eden* analysis. Petitioner points to *State v. Frazier*, a memorandum decision in which this Court found that *Eden* was violated when—after the defendant successfully challenged his conviction for second degree murder—on retrial a finding that the petitioner used a firearm in the offense led to his being eligible for parole after serving one third, rather than one fourth of his sentence. *State v. Frazier*, No. 13-1122, 2014 WL 5529734, at *4 (W. Va. Oct. 30, 2014) (memorandum decision). Noting that “[b]ecause parole is a means of shortening a sentence, the restriction thereof necessarily operates as a form of punishment,” the Court found that this was an impermissible increase in sentence. *Frazier*, No. 13-1122, 2014 WL 5529734, at *4 (quoting *State v. Sears*, 196 W. Va. 71, 78, 468 S.E.2d 324, 331 (1996)). As discussed, however, *Jett* makes clear that probation and parole are fundamentally different in that “[t]he term of probation has no correlation to the underlying criminal sentence, while parole is

directly tied to it.” *Jett*, 162 W. Va. at Syl. Pt. 1, 247 S.E.2d at 469. Thus, *Frazier* does not mandate that this Court find *Eden* applicable to probation.

Notably, other jurisdictions that treat probation as West Virginia does have determined that probation should not be considered when determining whether a sentence imposed after retrial is harsher than the first sentence. In *Lechuga v. State*, 532 S.W.2d 581, 582 (Tex. Crim. App. 1975), the Texas Court of criminal appeals found that *Pearce* was potentially implicated where a defendant who had been convicted and sentenced to three years of confinement successfully appealed his conviction, was retried and convicted again, and sentenced to five years, but placed on probation. *Lechuga v. State*, 532 S.W.2d 581, 582 (Tex. Crim. App. 1975). The Court found that the second five-year sentence was more severe than the three-year sentence without consideration of the fact that the defendant was placed on probation, noting that “probation is no sentence at all.” *Lechuga*, 532 S.W.2d at 582. The Court succinctly stated “whether imposition of sentence is suspended or not, the punishment assessed was 3 years at the first trial and 5 years at the second.” *Id.*

The same court considered the issue again in *Wiltz v. State*, 863 S.W.2d 463 (Tex. Crim. App. 1993), with procedural facts more similar to Petitioner’s. In that case, the defendant was convicted of attempted aggravated sexual assault, sentenced to ten years, but placed on probation. *See Wiltz v. State*, 863 S.W.2d 463, 464 (Tex. Crim. App. 1993). The defendant successfully appealed his conviction, was convicted on retrial, then sentenced to five years, and was not placed on probation. *See id.* An intermediate Court found that the second sentence was a harsher—a *Pearce* violation—and remanded for resentencing. *See id.* On discretionary review, the Court of Criminal Appeals found that the trial court had not erred and that *Pearce* was not implicated because under Texas law probation is not part of the criminal sentence; the Court held that “the

comparison to be considered in a *Pearce* resentencing situation is the assessment of the punishment provided for under the Texas Penal Code, which does not include probation.” *Id.* at 465.

Missouri courts have reached the same conclusion. As in West Virginia, under Missouri law probation “is not part of the sentence imposed upon a defendant.” *McCulley v. State*, 486 S.W.2d 419, 423 (Mo. 1972). As this Court has recognized, “probation operates independently of the criminal sentence.” *State v. Fernow*, 328 S.W.3d 429, 432 (Mo. Ct. App. 2010). In the context of *Pearce*, the Supreme Court of Missouri has explained “that probation . . . could not be considered as part of the ‘sentence’ imposed in making the determination of whether or not a second sentence is more severe than the original.” *Nicholson v. State*, 524 S.W.2d 106, 110 (Mo. 1975). That the courts of Texas and Missouri—states in which probation is recognized not to be a criminal sentence—do not consider probation when determining if a sentence imposed after retrial is harsher is persuasive authority that the approach this Court has already adopted in *Workman* is correct.

For the foregoing reasons, this Court should reject Petitioner’s invitation to ignore *Workman* and break with the longstanding principle that probation is not a criminal sentence in West Virginia. In this case, after his conviction, Petitioner was sentenced to one term of one to three years of incarceration and a term of ten to twenty-five years of incarceration, to be served consecutively. (App. at 395-99.) After his successful appeal, retrial, and conviction on the same offenses, he was given the same two sentences, except that they were ordered to run concurrently. (App. at 614-15.) That execution of his ten to twenty-five year sentence was suspended after his first conviction, and probation granted, does not alter the fact that the sentence imposed after his second conviction was not harsher. *Eden* prohibits the sentencing judge in a retrial following an appeal from “impos[ing] a heavier penalty than the original sentence.” *Eden*, 163 W. Va. at Syl.

Pt. 2, 256 S.E.2d at 870. Because probation is “not a sentence for a crime,” it plays no role in the consideration of whether a sentence imposed after retrial is harsher than the prior sentence. Accordingly, the Circuit Court did not err in sentencing Petitioner.

C. This Court Should Find That the Circuit Court Erred In Determining that *State v. Eden* Controlled Under the Facts of Petitioner’s Case.

While this Court should affirm the Circuit Court based on its conclusion that *Eden* was not implicated in Petitioner’s case because probation is not a criminal sentence, even if it determines the Circuit Court erred and finds that Petitioner’s second sentence was harsher, it should still affirm Petitioner’s sentence on the basis that *Eden* is no longer controlling under the facts of Petitioner’s case in light of the development of federal law in the wake of *Pearce*. See Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 246, 140 S.E.2d 466, 467 (1965) (“This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.”). The State recognizes, of course, that the Court need not reach this issue if it affirms the Circuit Court on the basis that probation is not a criminal sentence for the purposes of *Eden*. See *Matter of Hey*, 192 W. Va. 221, 226, 452 S.E.2d 24, 29 (1994) (“If a case can be decided by the application of general law, a court should forego deciding it on constitutional grounds.”).

As noted above, *State v. Eden*’s holding precluding the imposition of harsher sentences after the exercise of the statutory right to appeal *de novo* relied heavily on federal law. Principally, *Eden* relied on Fourth Circuit Court of Appeals case—*Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967)—and the United States Supreme Court’s subsequent decision in *North Carolina v. Pearce*, 395 U.S. 711 (1969). Each of these cases addressed challenges to a harsher sentence imposed after a successful appeal and subsequent conviction on the same offense.

In *Patton*, the Fourth Circuit held on due process grounds that “the fixed policy must necessarily be that the new sentence shall not exceed the old.” *Patton v. North Carolina*, 381 F.2d 636, 641 (4th Cir. 1967). The Court found the possibility of vindictiveness could deter defendants from taking valid appeals, and that it would be too difficult a burden to force defendants to affirmatively show presumptiveness. *See Patton*, 381 F.2d at 640-41. The Supreme Court in *Pearce* reached a similar conclusion:

Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant’s exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

Pearce, 395 U.S. at 725. However, the *Pearce* Court did not find that due process required a blanket prohibition on harsher sentences on retrial, holding instead:

whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Pearce, 395 U.S. at 726.

As noted, in *Eden* this Court relied on both cases, but ultimately took a position more consistent with *Patton*. The *Eden* Court found:

Protection of the criminal defendant’s fundamental right to appeal and avoidance of any possible vindictiveness in resentencing would force us to hold that upon a defendant’s conviction at retrial following prosecution of a successful appeal, imposition by the sentencing court of an increased sentence violates due process and the original sentence must act as a ceiling above which no additional penalty is permitted.

Eden, 163 W. Va. at 384, 256 S.E.2d at 876 (1979). Essentially, there were two concerns animating this Court's decision in *State v. Eden*: (1) the potential of judicial vindictiveness on retrial and (2) the chilling of the right to an appeal. However, due to the development of federal law in the wake of *Pearce*, this Court should find that neither of these concerns continue to justify the blanket rule established in *Eden* to cases such as Petitioner's.

1. The United States Supreme Court Has Recognized that the Concerns of *Eden* Do Not Justify a Bar Against a Harsher Sentence Where the Second Sentencer Has No Personal Stake in the First Trial.

In the wake of *Pearce*, the United States Supreme Court has recognized a number of exceptions to the presumption of vindictiveness from a higher sentence after retrial. In *Colten v. Kentucky*, the Supreme Court found that the *Pearce* presumption did not apply to Kentucky's two-tiered system under which a defendant convicted in an inferior court could obtain a *de novo* trial in a superior court. *See Colten v. Kentucky*, 407 U.S. 104, 116 (1972). The Court found that there was no reason to presume vindictiveness because "the court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had already done correctly." *Colten*, 407 U.S. at 116–17. In *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), the Court held that no presumption of vindictiveness arose when a second jury, on retrial following a successful appeal, imposed a higher sentence than a prior jury. *See Chaffin v. Stynchcombe*, 412 U.S. 17, 24–27 (1973). The Court found that the "second sentence [was] not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction" and thus that a second jury was unlikely to have a "personal stake" in the prior conviction or to be "sensitive to the institutional interests that might occasion higher sentences." *Id.* at 27. In *Texas v. McCullough*, the Court found *Pearce* did not apply where the second trial came about as a result of the trial judge herself granting a new

trial, and also where the jury assessed punishment in the first trial, and the judge assessed a higher penalty after the retrial. *See Texas v. McCullough*, 475 U.S. 134, 138-39 (1986). The Court once again noticed the impropriety of the presumption of vindictiveness where “different sentencers assessed the varying sentences.” *McCullough*, 475 U.S. at 140.¹

Based on these cases, this Court should explicitly recognize, in the context of a retrial after a successful appeal, that if a “second sentencer” assesses punishment, there is no reason to assume vindictiveness. Here, as noted, a different judge presided over Petitioner’s second trial and sentencing than his first. (App. at 17, 356, 427, 580.) Thus, the judge who imposed Petitioner’s allegedly harsher sentence had no “personal stake” in the prior proceedings, and was not being “asked to do over what it thought it had already done correctly.”

The State recognizes, of course, that this Court already considered and rejected a form of this exception in *Eden*, which like *Colten* involved a statutory right to a *de novo* trial rather than a retrial following a successful appeal. The *Eden* Court considered and rejected the *Colten* exception, noting that even in the absence of vindictiveness, “the deterrent effect of increased sentencing on the exercise of the right to obtain a new trial deprives a defendant of his statutory right to a trial *De novo*, his only avenue of post-conviction relief, in the same way it deprives a defendant desiring to attack his conviction of his right to appeal.” *Eden*, 163 W. Va. at 386, 256 S.E.2d at 877. This Court expanded on this rejection in *State v. Bonham*, explaining that the “critical issue” preventing its acceptance of *Colten* the Supreme Court’s failure to explain how “a defendant, who believes that the evidence against him at the trial in the municipal or magistrate

¹ In a case less relevant to the facts at issue here, the Supreme Court held “there is no basis for a presumption of vindictiveness where a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty plea.” *Alabama v. Smith*, 490 U.S. 794, 803 (1989); *see also State ex rel. State v. Sims*, No. 18-0672, 2019 WL 1976033, at *5 (W. Va. May 3, 2019) (memorandum decision) (recognizing this holding).

court was insufficient to convict or was otherwise constitutionally infirm, can correct this error without utilizing the de novo appeal.” *State v. Bonham*, 173 W. Va. 416, 418, 317 S.E.2d 501, 503 (1984).

In the context of a retrial in Circuit Court following a successful appeal, this “critical issue” is not present. The *Bonham* court recognized that a defendant convicted in municipal or magistrate court “who wished to challenge the validity of his conviction, had to seek a de novo trial.” *Bonham*, 173 W. Va. at 418, 317 S.E.2d at 503. A petitioner convicted in circuit court does not face such a limitation, as he can appeal limited, discrete issues to this Court. Notably, if a defendant convicted in circuit court challenges the sufficiency of the evidence against him and succeeds on appeal, double jeopardy bars his retrial. See Syl. Pts. 4-5, *State v. Frazier*, 162 W. Va. 602, 252 S.E.2d 39, 40 (1979). Thus, the “critical issue” which prevented this Court’s acceptance of *Colten*—that a defendant convicted in an inferior court whose only avenue for post-conviction relief is a trial *de novo* cannot be burdened by the threat of a higher sentence—is not present in this case, where Petitioner could have challenged the sufficiency of the evidence against him without the possibility of a second trial. Accordingly, in the context of a retrial after a successful appeal, this Court should recognize that where a second judge presides over the retrial, there is no issue of vindictiveness.

Of Course, this does not end the inquiry. As noted, *Eden* was concerned not just with vindictiveness, but with the chilling of the right to an appeal. See *Eden*, 163 W. Va. at 386, 256 S.E.2d at 877 (recognizing “the deterrent effect of increased sentencing” even in the absence of vindictiveness). However, the United States Supreme Court addressed this issue in *Chaffin* and found that the chilling of the right to an appeal did not amount to a due process issue. The Court found that “the likelihood of actually receiving a harsher sentence is quite remote at the time a

convicted defendant begins to weigh the question whether he will appeal” and that “we doubt that the ‘chill factor’ will often be a deterrent of any significance.” *Chaffin*, 412 U.S. at 33. The Court held that “[t]he choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be ‘difficult,’ does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction.” *Chaffin*, 412 U.S. at 17.

Of course, the State must note the obvious—*Chaffin* was decided prior to *Eden*. However, the *Eden* Court did not cite to *Chaffin* at all. See generally *Eden*, 163 W. Va. 370, 256 S.E.2d 868. This Court did, however, consider the impact of *Chaffin* a few years later. See *State v. Young*, 173 W. Va. 1, 8, 311 S.E.2d 118, 125 (1983). This Court took notice of *Chaffin*’s holdings that “the possible chilling effect occasioned by the possibility of a harsher sentence does not place an impermissible burden on the right of a criminal defendant to appeal or collaterally attack his conviction” and observed that “*Chaffin* undermines the rationale of *Patton v. North Carolina*, *supra*, relied upon by this Court in *State v. Eden*.” *Young*, 173 W. Va. at 8, 311 S.E.2d at 125. The *Young* Court declined to set aside or abrogate *Eden* at the time, however, noting that *Chaffin* “is not controlling in the case at bar because the appellant herein was not reconvicted of the ‘same offense’ as was the defendant in *Chaffin*.” *Id.* Unlike the petitioner in *Young*, who was first convicted of second degree murder and then convicted of first degree murder on retrial, *see id.*, Petitioner was convicted of the same offenses on retrial as he was in his first trial. Accordingly, this Court should now take the step it declined to take in *Young* due to its inapplicability to the facts, and adopt the holding of *Chaffin* that any incidental burden a defendant may feel upon the right to appeal by the possibility of a higher sentence on retrial does not rise to the level of a constitutional concern.

The United States Supreme Court jurisprudence demonstrates that there is no reason to presume vindictiveness where a second sentencer presides over a retrial after a successful appeal, as well as the reality that incidental chilling of the right to appeal is not a matter of constitutional concern. As these were the two concerns animating this Court's holding in *Eden*, this Court should find that *Eden* does not apply to bar harsher sentences imposed after a retrial where a different judge presides.

2. The Circuit Court Offered a Specific, Rational Reason For Not Granting Petitioner Probation After His Retrial.

Though the Circuit Court during Petitioner's second sentencing believed he was still bound by *Eden*, to the extent this Court finds that the refusal to grant probation resulted in a harsher sentence but that *Eden* was no longer controlling, the State notes that the Circuit Court offered objective reasons for not granting probation. In West Virginia, a Circuit Court may grant probation where "it shall appear to the satisfaction of the court that the character of the offender and the circumstances of the case indicate that he is not likely again to commit crime and that the public good does not require that he be fined or imprisoned." W. Va. Code § 62-12-3. "[T]he decision as to whether the imposition of probation is appropriate in a certain case is entirely within the circuit court's discretion." *Duke*, 200 W. Va. at 364, 489 S.E.2d at 746.

As noted, during Petitioner's first sentencing hearing, he made a statement in which, though he maintained that "I would never force myself on anybody" he expressed some remorse, noting, "I just want to apologize for this whole situation anyways." (App. at 380.) His counsel also indicated a greater degree of acceptance on his behalf, explaining "[Petitioner] is remorseful that this whole incident happened. He's apparently had a misunderstanding with the victim. He did not intend to force himself on her. That being said, you know, he has, you know, sincere regret that this whole incident did happen." (App. at 382.) In explaining its decision to suspend execution

of Petitioner's ten to twenty-five year sentence and grant probation, the Circuit Court cited his age as well as its understanding that "[h]e seems to be a good enough person who just did not understand no." (App. at 386.)

In his second sentencing proceeding, however, Petitioner did not make any statement, with his counsel indicating that he was maintaining his innocence. (App. at 582.) In explaining Petitioner's lack of fitness for postconviction bond or probation, the Circuit Court cited Petitioner's failure to accept responsibility, his apparent lack of remorse, and found that "any type of probation makes him a danger to the public for reoffending." (App. at 593.)

Thus, at the sentencing hearings following each of Petitioner's trials, the Circuit Court judge—a different judge in each case—reached a reasonable decision within its discretion as to whether Petitioner was an appropriate candidate for probation. To the extent the decision not to grant probation in his second sentencing constitutes an increased sentence, but that *Eden* does not automatically bar such an increase, the Circuit Court in Petitioner's second sentencing offered a reasonable, non-vindictive reason for such an increase.

3. If This Court Abrogates *Eden*, Its Decision Should Apply to Petitioner.

Petitioner asserts that, even if this Court finds that *Eden* no longer controls cases like his, the Court should find that its decision is prospective only; that is, such a decision should not apply to his case. (Pet'r's Br. at 22-23.) "The Supreme Court of Appeals of West Virginia, like all courts in the country, adheres to the common law principle that, "[a]s a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases.'" *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 156, 690 S.E.2d 322, 350 (2009) (quoting *Crowe v. Bolduc*, 365 F.3d 86, 93 (1st Cir.2004)). "We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in

which the new rule constitutes a ‘clear break’ with the past.” *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). This Court has explained that “a judicial decision in a criminal case is to be given prospective application only if: (a) It established a new principle of law; (b) its retroactive application would retard its operation; and (c) its retroactive application would produce inequitable results.” Syl. Pt. 5, in part, *State v. Blake*, 197 W. Va. 700, 478 S.E.2d 550, 552 (1996).

Although the abrogation of *Eden* the State advocates today is new in the technical sense, it was clearly foreshadowed by prior decisions. As discussed above, the trend of federal law, as interpreted by the United States Supreme Court, has been towards the rule the State seeks in this case. Additionally, this Court recognized in *Young* that the federal case *Eden* principally relied on, *Patton*, had been “undermine[d]” by the Supreme Court’s decision in *Chaffin*. *Young*, 173 W. Va. at 8, 311 S.E.2d at 125. This Court has recognized that a rule is not “totally new law” where a “holding simply clarifies an existing principle of federal law,” and where a prior decision of this Court “foreshadowed and gave notice that” prior decisions misstated the law. *State v. Guthrie*, 205 W. Va. 326, 343 n.25, 518 S.E.2d 83, 100 n.25 (1999); *see also Michigan v. Payne*, 412 U.S. 47, 55 (1973) (observing that it counsels against retroactivity where a decision was not foreshadowed by prior decisions). Accordingly, to the extent the Court abrogates *Eden* to follow the trend of federal cases like *Chaffin*, such a rule would not be totally new.

Petitioner argues that retroactivity would be inequitable, asserting that “retroactive application of such a rule would violate Petitioner’s right to notice and fair warning.” (Pet’r’s Br. at 23.) However, the decision on this issue should be controlled by the decision to abrogate *Eden*. That is, to the extent the Court disagrees with the United States Supreme Court’s reasoning in *Chaffin* that the speculative possibility of a higher sentence on retrial is not a significant deterrent to appeal, the Court will presumably not abrogate *Eden*, and will not reach the issue of

retroactivity. To the extent this Court accepts *Chaffin*'s reasoning and abrogates *Eden*, it follows that this change would not create inequities by retroactive application. Essentially, if this Court finds that the speculative possibility of a higher sentence does not play a significant role in a convicted defendant's decision to appeal, retroactive application of an abrogation of *Eden* would not create inequities, because it would not have played a significant role in the decision of whether or not to appeal.

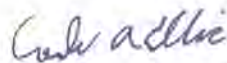
Accordingly, as an abrogation of *Eden* would not be a totally new rule, but rather an adoption of federal law, because there is no indication that retroactive application of this case would impede its operation, and because the rule would not produce inequitable results, to the extent this Court abrogates *Eden*, the decision should apply to Petitioner.

VI. CONCLUSION

For either of the foregoing reasons, this Court should affirm the Circuit Court of Brooke County's December 4, 2018 Sentencing Order.

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