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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0546

**Jamie Lynn Metheny,
Defendant Below, Petitioner,**

vs.

**State of West Virginia,
Plaintiff Below, Respondent.**

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**Appeal from the Circuit Court of Harrison County
Honorable James A. Matish, Judge
Criminal Action No. 15-F-128**

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

A. The Circuit Court Committed Reversible Error by Extending the Petitioner's Sentence of Probation Beyond Five Years.

The circuit court below committed reversible error in ruling it had the authority to extend the Petitioner's sentence to a probationary period beyond five (5) years. While the Respondent concedes this ruling is erroneous, the Respondent urges this Court to avoid the constitutional question regarding the application of *ex post facto* principles to sentences of probation. Should this Court agree with the Respondent, that the circuit court's ruling can be overturned upon solely statutory authority and that the ultimate remedy is reversal, the Petitioner would welcome the result—regardless of methodology. However, should the Court believe that this matter cannot be resolved by the Respondent's proposed statutory rationale, the Petitioner maintains that *ex post facto* principles apply to sentences of probation and therefore, extending probation in this matter was unconstitutional.

i. Ex Post Facto principles apply to probation is a punitive part of a sentence.

Respondent argues that *ex post facto* principles do not apply to sentences of probation, as probation is merely a grant of leniency, and urges this Court to limit the application of its decision in *State v. Varlas*. See Resp't's Br. at 8–9, 10. While it is true that this Court answered a narrow question in *Varlas* regarding the application of *State v. Eden* to a failure to grant probation after successful appeal, the underlying rationale and logic are inescapable in this context as well. *Eden* prohibits harsher sentences after successful appeal, and as this Court ruled, specifically overturning the memorandum decision in *Workman*¹, that “imposing a longer term of probation . . . when sentencing the defendant upon reconviction” was a violation of *Eden*. *State v. Varlas*, ____ W.Va. ____, 844 S.E.2d 688, 697 (2020) (June 11, 2020).

¹ *State v. Workman*, No. 13-0133, (November 26, 2013) (memorandum decision).

If the length of a probationary term, in and of itself, is a penalty when gauging the harshness and severity of a sentence for the purposes of an *Eden* challenge, surely the length of probationary term, in and of itself, is a penalty when gauging an increase of punishment, a lengthening of sentence, or an operation to the detriment of the accused when applying *ex post facto* principles to increased sentences articulated in *Adkins v. Bordenkircher*.² Just as the Court held in *State v. Deel* that supervised release was not a “civil remedy,” this Court’s logic in *Varlas* eschews the argument that probation is merely a lenient grace of the state. See *State v. Deel*, 237 W.Va. 600, 788 S.E.2d 741, 746–47 (2016); see also *Varlas*, ___ W.Va. ___, 844 S.E.2d at 696.

Indeed, this Court specifically addressed the Respondent’s argument, citing language from Syllabus Point 2 of *State ex rel. Strickland v. Melton* in its defeat of *Workman*:

Returning to *Workman*, we also cited Syllabus Point 2 of *State ex rel. Strickland v. Melton*, which states 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.” That holding clearly stands for the proposition that a defendant is not entitled to probation as a matter of law, but that the court may, in its discretion, grant probation to those it finds deserving of a more lenient punishment than incarceration. . . . We still agree with the holding that a criminal defendant is not *entitled* to probation, but we also see that it has limited applicability in the unique context of an *Eden* challenge.

Varlas, ___ W.Va. ___, 844 S.E.2d at 696 (emphasis in the original) (citing Syl. Pt. 2, *Strickland v. Melton*, 152 W.Va. 500, 165 S.E.2d 90 (1968)).

In this context, the holding from *Melton* also has limited applicability, as this challenge relates to the fundamental due process rights against *ex post facto* punishments at and after sentencing. This Court found that:

Melton involved a criminal defendant's due process right to counsel and to a fair trial—not his right to an appeal. As such, *Melton* does not guide us in terms of the due process right to appeal, so we must undertake an analysis here to determine whether a defendant has been deprived of due process

² Syl. Pt. 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980).

when a sentencing court extends to him or her a grant of probation at the original sentencing, but fails to extend that same grant of probation when he or she is convicted of the same crime or crimes post-appeal.

Varlas, ___ W.Va. ___, 844 S.E.2d at 696.


The indispensable tenant of *ex post facto* prohibitions is to bar application of any “. . . law passed after the commission of an offense which *increases the punishment, lengthens the sentence or operates to the detriment of the accused.*” Syl. Pt. 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980) (emphasis added). Just as the holding in *Melton* does not control an *Eden* analysis regarding the increase of sentencing after appeal, which implicates appellate due process rights, *Melton* does not control an analysis regarding *ex post facto* applications of law regarding the due process of determining the timeliness of a particular punishment to a crime.

Just as *Varlas* announced, the length of probation is indeed a part of a sentence for due process purposes. The extension of the Petitioner’s probation did indeed have the effect of (1) “increasing her punishment,” (2) “lengthening her sentence” and (3) “operating to her detriment”—all key facets of the holding in *Adkins*. Therefore, this Court should reverse the orders of the circuit court extending the Petitioner’s probationary period beyond five years and remand the matter to the court below with instructions to discharge the Petitioner from probation supervision.

CONCLUSION

Wherefore, for the reasons set forth above, the Petitioner, Jamie Lynn Metheny, prays that this Honorable Court enter an Order reversing the orders of the circuit court below, which extended her probation beyond five (5) years, with instructions to discharge the Petitioner from her probationary sentence.

Respectfully Submitted,
By Counsel,



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CERTIFICATE OF SERVICE

I certify that I have caused a copy of the foregoing "Petitioner's Reply Brief" to be served on January 26, 2021 via U.S. Mail to the West Virginia Attorney General's Office, Appellate Division, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301.



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