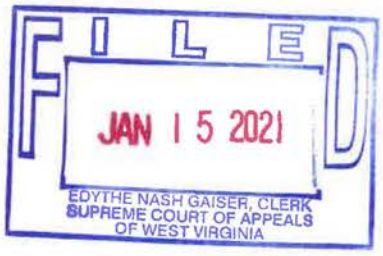
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Case No.: 20-0765**




**State of West Virginia,**
**Respondent,**

**v.**

**David Gilbert Riffle,**
**Petitioner**

Appeal from a final order of the
Circuit Court of Braxton County, West Virginia
Case No.: 19-F-5

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# PETITIONER'S APPELLATE BRIEF

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Counsel for Petitioner,
M. Tyler Mason (WV State Bar No. 12775)
*Counsel of Record*
HUGHART LAW OFFICE
Post Office Box 13365
Sissonville, West Virginia 25360
Telephone: 304-984-0100
hughartlawoffice@yahoo.com

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## ASSIGNMENT OF ERROR

**ERROR #1: The circuit court erred when it illegally increased the Petitioner's sentence on remand from a successful appeal.**

## KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE CIRCUIT COURT

This is an appeal from the Circuit Court of Braxton County, Judge Richard Facemire presiding. The Petitioner is currently serving a determinate sentence of thirty (30) years for "Soliciting a Minor via Computer to Travel and Engage Minor in Prohibited Sexual Activity," pursuant to W. Va. Code Ann. § 61-3C-14b(b), followed by three consecutive five (5) year sentences for three counts of "Use of Obscene Matter to Seduce a Minor" under W. Va. Code Ann. § 60A-84-4 (West).

This matter was previously appealed to this Honorable Court, in Case Number 19-0843, where the Petitioner raised the error of imposition of illegal sentence, as the circuit court originally sentenced the Petitioner to an indeterminate five to thirty (5-30) year sentence for "Soliciting a Minor via Computer to Travel and Engage Minor in Prohibited Sexual Activity," pursuant to W. Va. Code Ann. § 61-3C-14b(b), along with the three counts under W. Va. Code Ann. § 60A-84-4 (West), for which the Petitioner was also ordered to serve consecutive sentences.

This Honorable Court vacated the indeterminate sentence of five to thirty (5-30) years. The case was remanded back to the circuit court for resentencing in compliance with the statute, which calls for a determinate five to thirty (5-30) year sentence. At resentencing, the circuit court resentenced the Petitioner to thirty (30) years in the penitentiary for "Soliciting a Minor via Computer," pursuant to W. Va. Code Ann. § 61-3C-14b(b), and three counts of "Use of Obscene Matter to Seduce a Minor" under W. Va. Code Ann. § 60A-84-4 (West), for which he was sentenced to five (5) years in the Penitentiary on each count, said sentences to run consecutive for a total of forty-five (45) years.

The Petitioner seeks relief in the form of a vacation of the resentencing order of the Circuit Court of Braxton County.

## STATEMENT OF THE CASE

According to the narrative of the criminal complaint in this case, between November 8, 2017, and December 8, 2017, the Petitioner became engaged in an online conversation with an undercover Homeland Security officer who was posing as a young teenage girl from Minnesota.[1] *Appendix Record* (hereafter *AR*) at 6-8. It is undisputed at this point that the conversation became flirtatious and eventually erotic. *Id.* The Petitioner, while under the influence of certain controlled substances, eventually began to send the undercover officer photos

[1] The Petitioner previously appealed this matter to this Honorable Court in 19-0843. In the interest of judicial economy, and because the underlying facts are not of particular concern with regard to this appeal, the Petitioner will abridge these issues.

of his daily life. Over the month that the online conversation went on, the Petitioner sent the officer some nude images of himself. *Id.*

On March 15, 2018, The West Virginia State Police, Sutton Detachment, brought the Petitioner in for an interview, and an arrest warrant was issued for the Petitioner that day from the Magistrate Court of Braxton County. *Id.* at 9. He was arrested by the West Virginia State Police for twenty-six counts of "Soliciting a Minor via Computer to Travel and Engage Minor in Prohibited Sexual Activity," pursuant to W. Va. Code Ann. § 61-3C-14b(b), twenty counts of "Use of Obscene Matter to Seduce a Minor" under W. Va. Code Ann. § 60A-8A-4 (West). *Id.* at 10-12. Attorney Andrew Shafer was appointed to represent the Petitioner and filed a Notice of Appearance on March 21, 2019.[2] *Id.* at 13.

The Petitioner received a mental competency examination from Clayman and Associates, and the results concluded that, despite displaying signs of mental health deficiencies, the Petitioner was competent to stand trial. *Id.* at 84-96.

The Grand Jury of Braxton County for the February 2019, term returned a twenty (20) count indictment against the Petitioner. *Id.* at 37-76. He was charged with one (1) count of "Soliciting a Minor Via Computer to Travel to Engage in Prohibited Sexual Activity," One Count of "Soliciting a Minor Via Computer," and Eighteen (18) Counts of Use of Obscene Matter with Intent to

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[2] Mr. Shaffer represented the Petitioner through the entirety of the underlying circuit court case. At the conclusion of the Petitioner's circuit court proceedings, the Petitioner made it clear to the court that he found Mr. Shafer's representation lacking. Consequently, the circuit court relieved Mr. Shafer and appointed Hughart Law Office was appointed to represent the Petitioner shortly after sentencing for appellate purposes.

Seduce a Minor. *Id.* The Petitioner was arraigned on February 9, 2019. *Id.* at 78-81.

After a period of negotiation between the State and trial court counsel Andrew Shafer, the Petitioner agreed to enter into a plea deal wherein the Petitioner would, "plead guilty to the felonious offense of "Soliciting a Minor via a Computer, as contained in Count One [1) of the Indictment, a felony punishable by fine of not more than $25,000 or imprisoned in a state correctional facility for a determinate sentence of not less than five nor more than thirty years, or, [sic] as contained in West Virginia Code §61-3C-14b(b)." *Id.* at 99. Further, the Petitioner would plead guilty to three counts of Use of Obscene Matter with the Intent to Seduce a Minor, as contained in Counts Three (3), Four (4), and] Five (5) of the Indictment, a felony punishable by a fine of not more than $25 ,000, or imprisonment in a state correctional facility for not more than five (5) years, or both, as contained in West Virginia Code §6l-8A-4." *Id.* at 99-100.

At the plea hearing on March 21, 2019, the Petitioner plead guilty to one count of "Soliciting a Minor via a Computer," pursuant to West Virginia Code §61-3C-14b(b), and three counts of "Use of Obscene Matter with the Intent to Seduce a Minor," as contained in Counts 1, 2, and 3 of the indictment, pursuant to West Virginia Code §6l-8A-4. *Id.* at 111-114. The other charges were dismissed, and a Pre-Sentence Investigation was ordered. *Id.* at 187.

At sentencing, the Petitioner, through counsel, brought to the circuit court's attention that he felt that he was not of a sound mind at the plea

hearing and that he lacked the requisite capacity to enter his guilty plea. *Id.* at 203. The Petitioner's trial counsel argued on for alternative sentencing. *Id.* at 207.

The circuit court found that he was competent and refused to vacate the plea. *Id.* at 204. The circuit court was unmoved by the Petitioner's argument, denied his motion for alternative sentencing, then ordered that:

> ...you, David Gilbert Riffle, shall be and are hereby sentenced to the penitentiary of this state for a period of not less than 5, or no more than 30 years, as a result of your conviction of count one of soliciting a minor via computer, in the matter. I'm not going to impose a fine. It is the judgment and order of the court that you, David Gilbert Riffle, as to count 3, charging with use of obscene matter with intent to seduce a minor, in violation of Chapter 61, Article SA, Section 4; shall be and are hereby sentenced to the penitentiary of this state for a period of 5 years, in the matter. I'm not going to impose a fine. It is further the judgment and order of the court that you, David Gilbert Riffle, shall be and are hereby sentenced to the penitentiary of this state for a period of 5 years, as a result of your conviction of count four, of use of obscene matter with intent to seduce a minor. Further, it is the judgment and order of the court that you, David Gilbert Riffle, shall be and are hereby sentenced to the penitentiary of this state for a period of five years, as a result of your conviction of count five, of use of obscene matter with intent to seduce a minor. It is the judgment and order of the court that the sentences shall be and shall run consecutive, in the matter, for a period of not less than 20, no more than 30 years in the penitentiary, in the case.

*Id.* at 211-212. The Commitment Order accurately reflected the sentence imposed at the hearing. The Sentencing Order also imposes the same punishment of *not less than 20, nor more than 30 years in the penitentiary. Id.* at 140-141, 142-146.

Shortly thereafter, based on the Petitioner's claims of ineffective assistance of counsel, the circuit court relieved Mr. Shafer as counsel for the

Petitioner, and appointed current counsel to represent Petitioner on appeal. *Id.* at 148-152.

The Petitioner then appealed to this Honorable Court, in Case Number 19-0843, wherein the Petitioner raised the error of imposition of illegal sentence, as the circuit court had originally sentenced the Petitioner to a five to thirty (5-30) year sentence for "Soliciting a Minor via Computer to Travel and Engage Minor in Prohibited Sexual Activity," pursuant to W. Va. Code Ann. § 61-3C-14b(b), despite the code calling for a determinate sentence between five (5) and thirty (30) years.[3] *Id.* at 221-222.

This Honorable Court vacated the sentence of five to thirty (5-30) years and remanded the matter back to the circuit court for resentencing in compliance with the statute. *AR* at 222-223.

Resentencing occurred on August 24, 2020. *Id.* at 224. At resentencing, the Petitioner took full responsibility for his actions and admitted that he could not blame all his poor decisions on his psychiatric issues. *Id.* at 256-257. He admitted that error of his ways, and though there was technically no victim in this crime, he stated that the real victims of the Petitioner's mistakes were his family and children who had to go through life with a father in prison. *Id.*

The prosecutor was then asked for a recommendation. *Id.* at 258. Despite noting at the outset of her statement that the State agreed to remain silent, the prosecutor began to list off negative traits of the Petitioner until

[3] The Petitioner also raised certain errors relating to the Petitioner's mental state and the constitutional proportionality of his sentences. The ruling of the circuit court was affirmed on these matters, and they are not at issue on this appeal.

counsel for the Petitioner objected. *Id.* The circuit court noted the objection and said it would "not consider" the prosecutor's remarks. *Id.*

The circuit court, again unmoved by the Petitioners repentance, resentenced the Petitioner to a greater sentence than he initially received before his appeal. *Id.* at 230-232. In accordance with the statutory requirements of W. Va. Code Ann. § 61-3C-14b(b), the Petitioner was resentenced to the maximum of thirty years in the Penitentiary. *Id.* For his conviction of three counts of "Use of Obscene Matter to Seduce a Minor," under W. Va. Code Ann. § 60A-84-4 (West), he was resentenced to five (5) years in the Penitentiary on each count, said sentences to run consecutive for a total of forty-five (45) years. *Id.* Afterward, the State entered a proposed sentencing order.

Thereafter, the Petitioner filed a "Motion to Correct Illegal Sentence." *Id.* at 236-241. Said motion was based on this Honorable Court's decision in *State v. Varlas*, which stated that "[i]t is clear to us that when a defendant refuses to prosecute an appeal to which he is entitled by law for fear that he will receive a heavier sentence on retrial, he has been denied his right to appeal." *State v. Varlas*, 844 S.E.2d 688, 693 (W. Va. 2020) quoting *State v. Eden*, 163 W. Va. 370, 381, 256 S.E.2d 868, 875 (1979).

The circuit court initially set the matter for hearing on the Petitioner's motion. *Id.* at 233. Then the circuit court cancelled the hearing and entered its own order on September 9, 2020, which denied the Petitioner's Motion to Correct Illegal Sentence and affirmed its imposition of a greater sentence on the Petitioner after he had successfully prosecuted an appeal. *Id.* at 242-249. The

prosecutor's proposed sentencing order was entered by the circuit court on September 15, 2020. *Id.* at 224-229.

It is from this Order that the Petitioner appeals.

## SUMMARY OF ARGUMENT

The Petitioner's contention on this appeal is that the circuit court committed plain error when it sentenced the Petitioner to a greater term of imprisonment after successful prosecution of an appeal.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issue in this case has not been authoritatively decided in the Court's jurisprudence, oral argument under the Revised Rules of Appellate Procedure Rule 19 may be necessary. If the Court finds that oral argument is not necessary, after considering the facts of the case and issues of law raised, then decision by memorandum may be more appropriate, pursuant to Revised Rules of Appellate Procedure Rule 19.

## STANDARD OF REVIEW

"The Supreme Court of Appeals reviews sentencing orders... made in connection with a defendant's sentencing under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an

interpretation of a statute, we apply a de novo standard of review." Syl. Pt. 1, *State v. Paynter*, 206 W.Va. 521, 526 S.E.2d 43 (1999).

## ARGUMENT

### ASSIGNMENT OF ERROR

**ERROR #1: The circuit court erred when it illegally increased the Petitioner's sentence on remand from a successful appeal.**

The language of West Virginia Code § 61-3C-14b "Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties," states that:

> (a) Any person over the age of eighteen, who knowingly uses a computer to solicit, entice, seduce or lure, or attempt to solicit, entice, seduce or lure, a minor known or believed to be at least four years younger than the person using the computer or a person he or she believes to be such a minor, in order to engage in any illegal act proscribed by the provisions of article eight, eight-b, eight-c or eight-d of this chapter, or any felony offense under section four hundred one, article four, chapter sixty-a of this code, is guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000 or imprisoned in a state correctional facility not less than two nor more than ten years, or both.
> (b) Any person over the age of eighteen who uses a computer in the manner proscribed by the provisions of subsection (a) of this section and who additionally engages in any overt act designed to bring himself or herself into the minor's, or the person believed to be a minor's, physical presence with the intent to engage in any sexual activity or conduct with such a minor that is prohibited by law, is guilty of a felony and ***shall be fined not more than $25,000 or imprisoned in a state correctional facility for a determinate sentence of not less than five nor more than thirty years, or both***: Provided, That subsection (a) shall be deemed a lesser included offense to that created by this subsection.

W. Va. Code Ann. § 61-3C-14b (West) (emphasis added).

The original Sentencing Order was entered on August 22, 2019. It reads that:

> The Court noted that based on the Defendant's lack of work history, his anti-social attitude, his significant criminal history, his substance abuse problem, and the deliberate nature of the offense, it is accordingly ADJUDGED, ORDERED and DECREED, *that upon his conviction, by the entry of a plea to one (1) count of the felonious offense of Soliciting a Minor via a Computer to Travel and Engage the Minor in Prohibited Sexual Activity, as contained in Count One (1) of the Indictment*, and three (3) counts of the felonious offense of Use of Obscene Matter with the Intent to Seduce a Minor, as contained in Counts Three (3), Four (4) and Five (5) of the Indictment, the Defendant, DAVID GILBERT RIFFLE, *is hereby sentenced to not less than five (5) nor more than thirty (30) years in the penitentiary for Count One (1)*; five (5) years in the penitentiary for Count Three; five years (5) in the penitentiary for Count Four; and five (5) years in the penitentiary for Count Five (5). **The Court further ORDERED that said sentences shall run consecutively for a total of not less than twenty (20) years nor more than thirty (30) years.**

*Id* at 144.

The sentence imposed by the circuit court was obviously incongruous with the language of W. Va. Code Ann. § 61-3C-14b(b). The Petitioner raised this issue in his initial appeal and did so successfully.

This Honorable Court granted the Petitioner relief and reversed the matter back to the circuit court for resentencing. *Id.* at 222-223.

For his trouble, the circuit court resentenced the Petitioner to a greater term of imprisonment than he initially received before his appeal. The Petitioner was resentenced to the maximum of thirty years in the Penitentiary "Solicitation of a Minor." For his conviction of three counts of "Use of Obscene Matter to Seduce a Minor," under W. Va. Code Ann. § 60A-84-4 (West), he was

resentenced to five (5) years in the Penitentiary on each count, said sentences to run consecutive **for a total of forty-five (45) years.**

In effect, the successful prosecution of the Petitioner's appeal led him to receive **a fifteen (15) year increase in his total term of incarceration.**

This is patently unconstitutional under West Virginia law. The Petitioner brought this issue to the attention of the circuit court via his "Motion to Correct Illegal Sentence." *Id.* at 236-241. The court set the matter for hearing, and then cancelled said hearing via its September 9, 2020 Order. *Id.* at 246.

Quite recently, in *State v. Varlas*, this Honorable reaffirmed the long-standing principle under West Virginia Law that:

> 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.

*State v. Varlas*, 844 S.E.2d 688, 693 (W. Va. 2020). The Court based its findings that a Defendant cannot receive a harsher sentence on appeal on two legal theories: "(1) concerns about vindictiveness in sentencing, and (2) the chilling effect such harsher penalties may have on appeals." *Id.* at 844 S.E.2d 688, 692 (W. Va. 2020).

This Court further reasoned that:

> In West Virginia a person convicted of a crime is entitled to the right to appeal his conviction and a denial of that right constitutes a violation of both federal and state due process clauses and renders the conviction void. *It is clear to us that when a defendant refuses to prosecute an appeal to*

> *which he is entitled by law for fear that he will receive a heavier sentence on retrial, he has been denied his right to appeal.*

*State v. Varlas*, 844 S.E.2d 688, 693 (W. Va. 2020) quoting *State v. Eden*, 163 W. Va. 370, 381, 256 S.E.2d 868, 875 (1979).

In the instant case, the Petitioner filed his previous appeal under the protection afforded by *Varlas* and *Eden*, where he was guaranteed his constitutional right to an appeal without "fear that he [would] receive a heavier sentence on retrial[.]" *Id.*

The circuit court, in its resentencing order, attempted to circumvent this clear constitutional barrier, which would prevent it from imposing the harsher sentence after the Petitioner's successful appeal. The circuit court stated that:

> The Defendant cites the case of *State of West Virginia v. Varlas*, 844 S.E.2d 688,693 (W. Va. 2020) wherein the West Virginia Supreme Court of Appeals held that a Court could not impose a greater sentence upon a Defendant than what was imposed in the original sentence since that would be vindictive. However, the Court believes that the facts of the case cited by the Defendant are contrary to the facts in this case. There is no evidence that this Court imposed the maximum sentence of thirty (30) years as to Count I out of vindictiveness or ill intent. In fact, it is clear from the Court's original Sentencing Order that the Court intended to impose the maximum sentence upon the Defendant on each count of the indictment/conviction and run it consecutively. If the Circuit Court would have realized that Count I was a determinate sentence and. not an indeterminate sentence, then it would have imposed the maximum sentence of thirty (30) years. While the Court treated the sentence in Count 1 as an indeterminate sentence which was clearly error, the Defendant's argument at re-sentencing that the Circuit Court could not impose more than five (5) years, (the minimum indeterminate sentence), is not sound legal logic or basis. The Court does not believe that the Supreme Court intended that type of result in the *Varlas* case.

*AR* at 245.

It does not matter whether the circuit court was being vindictive in increasing the Petitioner's sentence. The supposed intent of the circuit court at the Petitioner's original sentencing hearing is not at issue on this appeal. At issue on this appeal is whether the increase of fifteen years on the Petitioner's sentence is a violation of his absolute right to an appeal. Also at issue is the chilling effect that the Petitioner's increased sentence will have on all other defendants who wish to appeal an illegal sentence.

It should be noted that the circuit court had the ability to resentence the Petitioner within the parameters of his initial thirty (30) year maximum sentence at the resentencing hearing. If the circuit court had resentenced the Petitioner to a determinate fifteen (15) year sentence for his violation of "Solicitation of a Minor," under W. Va. Code Ann. § 61-3C-14b(b), followed by consecutive five (5) year sentences for all three counts of "Use of Obscene Matter to Seduce a Minor," under W. Va. Code Ann. § 60A-84-4, the Petitioner would still receive a total thirty (30) year sentence.

Plainly, the Petitioner did nothing that would merit a fifteen (15) year increase in his maximum total sentence between the original sentencing date in August 2019, and his resentencing date in August 2020. He has been incarcerated the entire time. The only thing his has done in the interim is sit in jail and direct his lawyer to file an appeal.

Had he not filed an appeal, he would be still be serving an *illegal* sentence with a thirty (30) year maximum. By successfully prosecuting his

appeal and bringing to light his illegal sentence, he unwittingly caused himself to receive an increased maximum sentence of forty-five (45) years.

This is the fundamental problem that this Honorable Court intended to solve with *Eden* and *Varlas*. An inmate with knowledge of an error in his case should not be afraid to speak up and pray for relief from a higher court for fear that his prayers will be answered in vain, and he will end up with an even harsher disposition than that with which he began. A criminal defendant should not be sorry that he won his appeal.

*A Note on Parole:*

The Petitioner assumes the State's response will attempt to draw attention to the fact that the Petitioner's new sentence affords him a more favorable parole eligibility date. The State will try to tell this Court that it ought to use the minimum parole eligibility date as the measuring stick for length of sentence. The Petitioner must preemptively point out that the Court has already extinguished that argument. This Honorable Court slapped down the claim that the constitutionality of a defendant's sentence should be assessed by his earliest possible release date decades ago, stating:

> ...however, the parole-moderating argument tends to overlook several harsh practical facts. First, there is no automatic right to parole once the prisoner crosses the threshold of eligibility. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); *State v. Lindsey*, W.Va., 233 S.E.2d 734 (1977). Second, parole even if granted does not automatically obliterate the life sentence. As indicated by the facts in this case, a relatively minor infraction while on parole, such as driving a car without a license, can result in a revocation of the parole.

*Wanstreet v. Bordenkircher*, 166 W. Va. 523, 536–37, 276 S.E.2d 205, 213 (1981).

Because the circuit court illegally increased the Petitioner's maximum sentence after the Petitioner successfully prosecuted his appeal, the Petitioner is entitled to resentencing in accord with the protections afforded him by the West Virginia Constitution.

## CONCLUSION

For the reasons detailed above the Petitioner believes that his sentence should be vacated, and the matter remanded to the circuit court for resentencing in accordance with the State Constitution.

Respectfully Submitted,
By Counsel,

M. Tyler Mason (WV State Bar No. 12775)
HUGHART LAW OFFICE
Post Office Box 13365
Sissonville, West Virginia 25360
Telephone: 304-984-0100
Fax: 304-984-1300
hughartlawoffice@yahoo.com

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**CASE NO. 20-0765**

**STATE OF WEST VIRGINIA**
**Plaintiff Below, Respondent,**

**V.** **Appeal from a final order of the Circuit Court Braxton County (19-F-5)**

**DAVID RIFFLE**
**Respondent Below, Petitioner.**

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**Certificate of Service**

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I, M. Tyler Mason, Hughart Law Office, attorney for the Petitioner, do hereby state that true and accurate copies of the Petitioner's Appellate Brief and corresponding Appendix have been served on the following parties, by First Class U.S. mail, this **15th** day of **January 2021**:

Katherine Smith, Esq.
Asst. Attorney General
Appellate Division
812 Quarrier St.
6th Floor
Charleston, WV 25301

M. Tyler Mason, WVSB No. 12775