IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 20-0765

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

DAVID GILBERT RIFFLE,

Defendant Below, Petitioner.

RESPONDENT'S BRIEF

Appeal from September 15, 2020 Sentencing Hearing Order
Circuit Court of Braxton County
Case No. 19-F-5

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I. ASSIGNMENT OF ERROR

Petitioner presents a single assignment of error: "The circuit court erred when it illegally increased the Petitioner's sentence on remand from a successful appeal." (Pet'r's Br. 1.)

II. STATEMENT OF THE CASE[1]

On February 5, 2019, a twenty-count indictment was returned against Petitioner, charging felony solicitation of a minor via computer to travel and engage the minor in prohibited sexual activity, in violation of West Virginia Code § 61-3C-14b(b) (Count One); felony solicitation of a minor via computer, in violation of West Virginia Code § 61-3C-14b(a) (Count Two); and felony use of obscene matter with intent to seduce a minor, in violation of West Virginia Code § 61-8A-4 (Counts Three through Twenty). (App. 37–76.) On March 21, 2019, Petitioner entered guilty pleas to Counts One, Three, Four, and Five. (App. 111–15.) The remaining counts were dismissed. (App. 115.)

Following entry and acceptance of Petitioner's guilty pleas, the circuit court scheduled a sentencing hearing for May 7, 2019. (App. 116.) Petitioner failed to appear for his May 7 sentencing, and a bench warrant for his immediate apprehension was issued. (App. 118–19, 197.) "It was later determined that the [Petitioner] fled to the State of South Carolina." (App. 242.)

After Petitioner was apprehended, his sentencing hearing was rescheduled for August 8, 2019. (*See* App. 139, 242.) Petitioner appeared in person and through his counsel for the hearing. (App. 142.) Via order entered August 22, 2019, Petitioner was sentenced to an indeterminate sentence of not less than five nor more than thirty years in the penitentiary for his conviction on Count One (felony solicitation of a minor via computer to travel and engage the minor in prohibited

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[1] Although Petitioner references his competency proceedings and includes related court filings, the competency proceedings in the underlying criminal case are not at issue in this appeal and, therefore, Respondent will not address them.

sexual activity, in violation of West Virginia Code § 61-3C-14b(b)), and five years each for Counts Three, Four, and Five (felony use of obscene matter with intent to seduce a minor, in violation of West Virginia Code § 61-8A-4).[2] (App. 144.) The sentences were ordered to run consecutively to each other. (App. 144.) Petitioner appealed his sentence to this Court.

Via Memorandum Decision entered on July 30, 2020, this Court agreed with Petitioner insofar as his indeterminate five- to thirty-year sentence for his violation of West Virginia Code § 61-3C-14b(b) was illegal. *See State v. Riffle*, No. 19-0843, 2020 WL 4355303, at *3 (W. Va. Supreme Court, July 30, 2020) (memorandum decision). The statute requires the imposition of a *determinate*, as opposed to an indeterminate, sentence. *See id.*; *see also* W. Va. Code § 61-3C-14b(b) (providing a penalty of "not more than $25,000 or imprison[ment] in a state correctional facility for a determinate sentence of not less than five nor more than thirty years, or both"). As a result, this Court "reverse[d] the sentencing order, and remand[ed] th[e] matter to the circuit court, with the direction for the circuit court to enter a sentencing order that is consistent with the controlling statute." *Riffle*, 2020 WL 4355303, at *3.

On August 24, 2020, a hearing was held to correct Petitioner's illegal sentence. (*See* App. 224–28, 250–66.) Prior to imposing sentence, the circuit court acknowledged its error:

> The Court acknowledges that . . . it committed an error there and the Supreme Court was right. The Court sentenced [Petitioner] to not less than 5 nor more than 30 years, an indeterminate sentence, when it [should have been] a determinate sentence. So the [Petitioner] appealed that [sentence] and the Supreme Court, correctly, on July 3[0], 2020, sent it back to this Court to correct the sentence.

[2] Petitioner's sentences for his convictions on Counts Three, Four, and Five were the maximum permitted under the statute. (*See* App. 144, 225–27; *see also* W. Va. Code § 61-8A-4.) The sentences on these three counts did not change following Petitioner's appeal in *State v. Riffle*, No. 19-0843, 2020 WL 4355303 (W. Va. Supreme Court, July 30, 2020) (memorandum decision). (*See* App. 144, 225–27.) Because the circuit court did not alter these sentences, and because they are not at issue in this appeal, they will not be further discussed in this Brief.

(App. 258–59.) The circuit court then imposed a thirty-year determinate sentence with respect to Count One, felony solicitation of a minor via computer to travel and engage the minor in prohibited sexual activity, in violation of West Virginia Code § 61-3C-14b(b). (App. 226, 262.)

On September 1, 2020, Petitioner filed a Motion to Correct Illegal Sentence. (App. 236–41.) In that Motion, Petitioner argued that the thirty-year determinate sentence constituted an unlawful increase post-successful appeal in violation of *State v. Varlas*, 844 S.E.2d 688 (2020). (App. 238–39.) Via order dated September 9, 2020, the circuit court denied the Motion. (App. 242–47.) In that order, the circuit court explained:

> Clearly, it was an oversight and error by the Circuit Court to sentence the Defendant to an indeterminate sentence when the statute called for a determinate sentence. It was clearly the intent of the Circuit Court to sentence the Defendant to the maximum allowable by law on all counts.
>
> . . . .
>
> There is no evidence that this Court imposed the maximum sentence of thirty (30) years as to Count 1 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 1 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.

(App. 243, 245.) In summary, the circuit court merely misread the statute; its intent in imposing the original sentence was to provide the maximum allowed by law. (*See* App. 243, 245.) Petitioner appealed.

III. SUMMARY OF ARGUMENT

Petitioner's determinate sentence of thirty years, which is a result of the circuit court's correction of an unlawful, void sentence, does not violate West Virginia law. Contrary to

Petitioner's contention, *State v. Eden*, 163 W. Va. 370, 256 S.E.2d 868 (1979), and *State v. Varlas*, 844 S.E.2d 688 (2020), are inapplicable to the facts of this case. Both *Eden* and *Varlas* concern retrial and reconviction post-successful appeal. Both cases also presume a previously-imposed legal and valid sentence—not a sentence that is, on its face, void *ab initio*. Here, because Petitioner's original "sentence" was illegal and, thus, void *ab initio*, *Eden* and *Varlas* are inapplicable to the issue presented in this appeal. Accordingly, this Court should deny Petitioner's assignment of error.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter is unnecessary as the case involves issues of settled law and Petitioner's assignment of error is meritless. Accordingly, a memorandum decision affirming the circuit court's September 15, 2020 Sentencing Hearing Order is appropriate.

V. STANDARD OF REVIEW

This is an appeal from the Circuit Court of Braxton County's September 15, 2020 Sentencing Hearing Order. Unless the sentencing proceedings violate statutory or constitutional commands, imposition of sentences by circuit courts are reviewed under a deferential abuse of discretion standard. *See* Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). A circuit court's sentence will not be reviewed if it is within the statutory limit and not based on an impermissible factor. *See State v. Slater*, 222 W. Va. 499, 507–08, 665 S.E.2d 674, 682–83 (2008); Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982).

VI. ARGUMENT

A. Neither *State v. Eden* nor *State v. Varlas* is applicable to this appeal.

Petitioner's sole argument in this appeal is that the circuit court committed plain error "when it illegally increased [his] sentence on remand from a successful appeal." (*See* Pet'r's Br. 1,

8–9.) In support, Petitioner relies on *State v. Eden*[3] and *State v. Varlas*.[4] However, both of these cases concern *reconviction* following *retrial* and the potential vindictiveness that may arise from such proceedings. Most importantly, these cases involve, and presume, the imposition and existence of a legal, valid sentence prior to appeal. Here, because the original sentence imposed by the circuit court was illegal and, thus, void *ab initio*, *Eden* and *Varlas* are inapplicable to the issue presented in this appeal.

Indeed, Petitioner does not contest, and has never contested, the validity of his conviction, and this appeal does not involve reconviction or retrial. Rather, this appeal involves the circuit court's imposition of a legal, thirty-year determinate sentence following this Court's reversal and remand of Petitioner's original, illegal five- to thirty-year indeterminate sentence for felony solicitation of a minor via computer to travel and engage the minor in prohibited sexual activity, in violation of West Virginia Code § 61-3C-14b(b).

In *Eden*, following a trial in the justice of the peace court, "the petitioner was found guilty of a misdemeanor and fined fifty dollars, together with costs of ten dollars." 163 W. Va. at 372, 256 S.E.2d at 870. The legality of the sentence imposed following the petitioner's first trial was not at issue. *See id.* at 372, 256 S.E.2d at 870–71. Rather, the petitioner's appeal was an appeal as of right to "a trial De novo in the Circuit Court of Jackson County." *Id.* at 372, 256 S.E.2d at 870. Following retrial, the petitioner was again found guilty, but the circuit court sentenced him to a more severe sentence of thirty days in jail with a fine of two hundred dollars, plus court costs. *Id.* at 372, 256 S.E.2d at 871. The petitioner then appealed to this Court, raising five assignments of error, including that "the increased sentence imposed" by the circuit court was in violation of

[3] 163 W. Va. 370, 256 S.E.2d 868 (1979).

[4] 844 S.E.2d 688 (2020).

due process of law guaranteed under the United States and West Virginia Constitutions. *Id.* at 373, 256 S.E.2d at 871. This Court found the argument to be "meritorious" and vacated the petitioner's sentence. In so doing, this Court analyzed *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967), and *North Carolina v. Pearce*, 395 U.S. 711 (1969).[5] As noted by the Court, "[i]n both *Patton* and *Pearce*, the petitioners had been successful in challenging their original *convictions* on appeal and were given harsher sentences *upon conviction at retrial*." *Eden*, 163 W. Va. at 378–79, 256 S.E.2d at 873 (emphases added). Indeed, this Court recognized that "*Pearce*, while condemning punitive increases in sentencing *on retrial*, stopped short of prohibiting imposition of heavier sentences in all cases." *Id.* at 381, 256 S.E.2d at 874 (emphasis added). This Court advised that "the question of increased sentencing *on reconviction* after remand from an appellate court is a matter of grave concern." *Id.* at 381, 256 S.E.2d at 875 (emphasis added).

The *Eden* Court, citing Justice Marshall's dissent in *Colten v. Kentucky*, 407 U.S. 104 (1972), emphasized that

> "whenever a defendant is *tried twice* for the same offense, there is inherent in the situation the danger of vindictive sentencing the second time around, and that this danger will deter some defendants from *seeking a second trial*."

Eden, 163 W. Va. at 385, 256 S.E.2d at 877 (quoting *Colten*, 407 U.S. at 126) (emphases added). This Court "agree[d] with Justice Marshall's analysis of *Pearce*" and found that "[t]he opportunity for vindictive sentencing is inherent in any system which permits increased sentencing *upon conviction at a new trial*." *Id.* at 386, 256 S.E.2d at 877 (emphasis added). *Eden's* holding was, therefore, quite narrow:

> [W]e hold that under W.Va.Const. art. 3, [§] 10 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*

[5] *Pearce* was overruled in part on other grounds by *Alabama v. Smith*, 490 U.S. 794, 803 (1989) ("[T]here 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.").

> *conviction at his second trial*, the sentencing judge imposes a heavier penalty than the original sentence.

Id. at 386–87, 256 S.E.2d at 877 (emphases added). Unlike in this case, *Eden* presupposes the existence of a previously-imposed legal and valid sentence.

Recently, in *Varlas*, this Court revisited *Eden* and announced the prohibition against increasing a "term of probation, or withholding probation entirely, when sentencing the defendant *upon reconviction at a later trial* for the same crime or crimes, post-appeal." Syl. Pt. 4, 844 S.E.2d 688 (emphasis added). In *Varlas*, the petitioner was convicted of two offenses, including sexual assault in the second degree. *Id.* at 689. For his conviction of sexual assault in the second degree, the circuit court imposed a *lawful* sentence[6] of "ten to twenty-five years' incarceration, but that sentence was suspended in favor of five years' probation." *Id.* Thereafter, the petitioner appealed to this Court, which "reversed [the] *convictions* and remanded *for a new trial*." *Id.* (emphases added). The "second trial ended in a mistrial" and a third trial ended in a jury conviction on both counts. *Id.* at 689–90. At sentencing following the third trial, the circuit court "failed to suspend the sentence of ten to twenty-five years' incarceration in favor of probation." *Id.* at 690. In holding that the later "sentence [was] an impermissible increase in penalty under *State v. Eden*," the *Varlas* Court "affirm[ed] the due process principles which underlie *Eden*—principles that prohibit increased penalties *upon reconviction* post-appeal." *Id.* at 694 (emphasis added). Like *Eden*, *Varlas* presupposes the existence of a previously-imposed legal and valid sentence.

Unlike *Eden* and *Varlas*, here there was no retrial or reconviction in Petitioner's underlying criminal case and, more importantly, the original sentence imposed—the five- to thirty-year

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[6] The penalty for sexual assault in the second degree is "imprison[ment] in the penitentiary [for] not less than ten nor more than twenty-five years, or [a] fine[ ] [of] not less than one thousand dollars nor more than ten thousand dollars and imprison[ment] in the penitentiary [for] not less than ten nor more than twenty-five years." W. Va. Code § 61-8B-4(b).

indeterminate sentence—was illegal. In this case, Petitioner's convictions remained intact and the circuit court, after freely admitting its error in applying § 61-3C-14b(b), sentenced Petitioner to a corrected, *legal* sentence.

> It is well settled that "the chilling [effect on] appeals does not in and of itself offend due process." *United States v. Henry*, 709 F.2d 298, 316 n. 26 (5th Cir.1983). More specifically, due process is not offended by all possibilities of increased punishment after appeal, only by those which involve "actual retaliatory motivation" or "pose a realistic likelihood of 'vindictiveness'." *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); *Henry*, 709 F.2d at 315–16. *It is readily apparent that a significant distinction may be drawn between vindictiveness which, after appeal, increases a defendant's sentencing exposure or increases a legal sentence, and the pro forma correction of an illegal sentence. When an illegal sentence is corrected, even though the corrected sentence is more onerous, there is no violation of the defendant's constitutional rights. Llerena v. United States*, 508 F.2d 78 (5th Cir.1975); *Reyes v. United States*, 262 F.2d 801, 802 (5th Cir.1959). Simply stated, when a court complies with a nondiscretionary sentencing requirement, i.e., a mandatory minimum term or special parole provision(s), no due process violation is implicated because neither actual retaliation nor vindictiveness exists.

State v. Brown, 164 So.3d 395, 402 (La. Ct. App. 2015) (emphasis added) (quoting *State v. Williams*, 800 So.2d 790, 798 (La. 2001)). Here, although the circuit court's thirty-year determinate sentence was not a mandatory minimum statutory requirement, the imposition of a *determinate* sentence of not less than five nor more than thirty years, as opposed to the previously-imposed, illegal, *indeterminate* sentence of not less than five nor more than thirty years, was required. *See* W. Va. Code § 61-3C-14b(b).

Simply put, this Court's decisions in *Eden* and *Varlas* do not address the narrow issue presented by this appeal[7]: whether a violation of due process occurs when a sentencing court, *on remand for the limited purpose of correcting an illegal sentence* following a petitioner's successful

[7] Given the facts of this case, Petitioner's assignment of error and Brief in support attempts to present a much broader issue than is warranted. Therefore, Respondent restructured the assignment of error.

appeal, imposes a sentence that is within statutory limits but "lengthier"[8] than the previously-imposed illegal and, thus, void sentence. This Court has spoken to the nature of illegal sentences: they are void *ab initio*. *See Jenkins v. Plumley*, No. 14-1068, 2015 WL 3952679, at *2 n.3 (W. Va. Supreme Court, June 26, 2015) (memorandum decision) (citing *State ex rel. Hill v. Parsons*, 194 W. Va. 688, 691, 461 S.E.2d 194, 197 (1995), and advising "there is a distinction between an illegal sentence, which is void *ab initio*, and a sentence that is merely voidable").[9] Accordingly, because Petitioner's original "sentence" was illegal and, thus, void, it cannot be used as a valid comparator to determine whether his subsequent, legal sentence is more severe and, therefore, violative of the directives provided by this Court in *Eden* and *Varlas*.[10] *Eden* and *Varlas* are irrelevant here.

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[8] Even if Petitioner's original "sentence" were valid, in light of the potential for good conduct credit, Respondent does not necessarily agree that Petitioner's subsequent, legal sentence (determinate thirty years) would be more severe than his original, illegal sentence (indeterminate five to thirty years). *See* W. Va. Code § 15A-4-17 (permitting day-for-day credit "deducted from the maximum term of indeterminate sentences or from the fixed term of determinate sentences").

[9] *See also* Syl. Pt. 2, *State v. Wilson*, 226 W. Va. 529, 703 S.E.2d 301 (2010) ("The general rule supported by the weight of authority is that a judgment rendered by a court in a criminal case must conform strictly to the statute which prescribes the punishment to be imposed and that any variation from its provisions, either in the character or the extent of the punishment inflicted, renders the judgment absolutely void." (internal quotations and citations omitted)); Syl. Pt. 3, *State ex rel. Powers v. Boles*, 149 W. Va. 6, 138 S.E.2d 159 (1964) (holding, in part, that "[a] sentence at variance with statutory requirements is void and may be superseded by a new sentence in conformity with statutory provisions" (internal quotation and citation omitted)); *State ex rel. Truslow v. Boles*, 148 W. Va. 707, 709, 137 S.E.2d 235, 236 (1964) ("It has been held that where the statute provides for a definite sentence and an indeterminate sentence is imposed, such sentence is void.").

[10] *See, e.g., State v. Wagner*, No. 14-06-30, 2006 WL 3771771, at *2 (Ohio Ct. App. 2006) ("[W]e are not convinced that the traditional review for vindictiveness following an appeal invoked in the foregoing authorities . . . is specifically applicable to sentencings . . . where the original sentence has not simply been found to be in error but has been found to be *void*." (emphasis in original)); *see also People v. Garcia*, 688 N.E.2d 57, 65–66 (Ill. 1997) (advising that because original sentences were "void," they would not, on remand, "be greater than, less, or equal to defendants' original sentences" and, therefore, defendants' arguments against improper increase of sentences were "inapplicable because they are premised on the erroneous assumption that there is a valid

B. The potential "chilling effect" on a defendant's due process right to appeal is not present here.

Petitioner argues that his increased sentence will have a "chilling effect . . . on all other defendants who wish to appeal an illegal sentence." (Pet'r's Br. 13.) However, the "chilling effect" on a defendant's due process right to appeal, which was emphasized in *Varlas*, is not present in this case. *See* 844 S.E.2d at 692–93. Regardless of a defendant's appeal, or his intent to appeal, an illegal sentence may be corrected by the trial court "at any time." *See* W. Va. R. Crim. P. 35(a). The State may also move to correct an illegal sentence. Moreover, there is "no sound public policy [that] supports granting defendants 'a right to benefit from illegal sentences.'" *State ex rel. Gessler v. Mazzone*, 212 W. Va. 368, 374 n.4, 572 S.E.2d 891, 897 n.4 (2002) (quoting *People v. District Court*, 673 P.2d 991, 997 (Colo. 1983)). Petitioner's argument, in essence, is that he should benefit from the circuit court's mistaken reading of § 61-3C-14b(b). He claims that the bottom end of the initially-imposed illegal, invalid, and void sentence should act as a ceiling in the subsequent imposition of a lawful sentence. This argument offends public policy and is not supported by law. Various courts have spoken to the propriety of increasing a sentence in order to correct a previously-imposed void or illegal sentence.[11] Petitioner is, quite simply, not entitled, and has no right, to benefit from an illegal sentence.

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sentence to increase"); *In re Pruitt*, 301 S.E.2d 481, 481 (Ga. 1983) ("The present sentence cannot be measured against an earlier sentence which was void ab initio. Therefore, it cannot be more harsh or less harsh than the original void sentence."); *United States v. Howell*, 103 F. Supp. 714, 718 (S.D. W. Va. 1952) ("The deprivation of Howell's inchoate right to be considered for parole did not increase his punishment. Even if the sentence had been increased, the law is settled that this may be done, on the theory that a void sentence in contemplation of law is non-existent.").

[11] *See, e.g.*, *Safit v. Garrison*, 623 F.2d 330, 332 (4th Cir. 1980) ("It is clear, of course, that a void or illegal sentence may be corrected, even though the correction may result in an increase in the sentence."); *Greco v. State*, 48 A.3d 816, 834–35 (Md. 2012) ("We disagree with Petitioner's assessment of the limitations on the sentencing court to correct an illegal sentence on remand. We conclude that Maryland law does not set a previously imposed, illegal sentence as the upper bound for the sentence that a trial court may impose to correct an illegal sentence after remand from the

Accordingly, because the thirty-year determinate sentence imposed on remand is valid under the statute, and there is no argument or evidence in the record that demonstrates the circuit court considered any impermissible sentencing factor, the circuit court's September 15, 2020 Sentencing Hearing Order should be affirmed. *See Slater*, 222 W. Va. at 507, 665 S.E.2d at 682 ("We conclude that the appellant's sentence is not subject to our review because the sentence imposed for each conviction is within the statutory limit and the appellant has identified no impermissible factor upon which his sentence is based."); Syl. Pt. 4, *Goodnight*, 169 W. Va. 366, 287 S.E.2d 504.

VII. CONCLUSION

In light of the foregoing, Respondent requests that this Court affirm the Circuit Court of Braxton County's September 15, 2020 Sentencing Hearing Order.

STATE OF WEST VIRGINIA,
By Counsel

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Court of Special Appeals or this Court. Rather, the sentencing court must look through the illegal sentence to a previous lawful sentence imposed, if any, to determine the maximum sentence that may be imposed on remand. Alternatively, the trial court must remove the illegality, with the resulting legal sentence serving as the maximum for purposes of resentencing."); *State v. Draper*, 457 N.W.2d 600, 606 (Iowa 1990) ("We have stated many times that an illegal sentence is a nullity subject to correction, even though correction may result in an increase in the sentence on remand. Our law on this point is in accord with the general rule in the United States." (internal citations omitted)); *Brown*, 164 So.3d at 402 ("Additionally, the [Louisiana] supreme court's decision in *Williams* clearly recognizes that, where an illegal sentence is corrected, a defendant's rights are not violated, even if the sentence is more onerous, unless there is a showing of vindictiveness." (citing *State v. Williams*, 800 So.2d 790)); *People v. Neely*, 176 Cal. App. 4th 787, 799–800 (Cal. Ct. App. 2009) ("Neely contends that a defendant may not be subject to an aggregate sentence that is greater than initially imposed when a case is remanded for resentencing. But the sentence imposed by the trial court is a legally unauthorized sentence. A more severe sentence may be imposed following a successful appeal if the initial sentence was unlawful or unauthorized." (internal citations omitted)).

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STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

DAVID GILBERT RIFFLE,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, Katherine M. Smith, counsel for Respondent, hereby certify that on February 26, 2021, I served the foregoing "Respondent's Brief" on the below-listed counsel by depositing a true and accurate copy of the same in the United States mail, first class postage prepaid, in an envelope addressed as follows:

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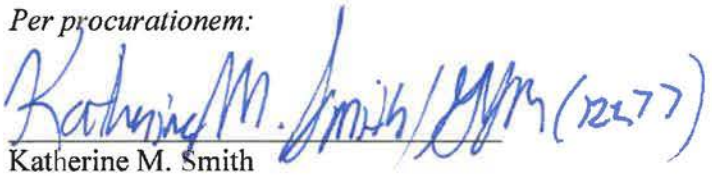

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