

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0433

STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

GEORGE A. K.,

*Defendant Below,
Petitioner.*

BRIEF ON BEHALF OF THE RESPONDENT

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BRIEF ON BEHALF OF THE RESPONDENT

George A. K., (hereinafter “petitioner”) appeals from an order entered by the Preston County Circuit Court on February 21, 2012, placing him under the jurisdiction of the court pursuant to W. Va. Code §27-A-6-1, *et. seq.* following a determination that he is incompetent to stand trial. The State of West Virginia, by counsel, Laura Young, Assistant Attorney General, files the within brief. As the matter involves a minor victim, the petitioner’s last name will be referred to only by initial.

I.

STATEMENT OF THE CASE

During the June, 2011, term of court, the Preston County Grand Jury indicted petitioner, aged 39, with two counts of Sexual Abuse by a Custodian (Counts 1 & 3) in violation of W. Va. Code § 61-8D-5 and two counts of Third Degree Sexual Assault (Counts 2 & 4) in violation of W. Va. Code § 61-8B-5) for having sexual contact with the fifteen year old daughter of his live-in girlfriend. (App. A at 2-3.)

Pursuant to a motion filed by the defense under the terms of W. Va. Code § 27-6A-3 (*Competency of defendant to stand trial determination; preliminary finding; hearing; evidence; disposition*), the lower court ordered that petitioner be evaluated by psychiatric health-care professionals to determine his competency to stand trial. The court granted the motion and petitioner was examined by a court appointed psychologist who issued a report concluding that petitioner was not competent to stand trial but could possibly attain competency. (App. A at 4-10.)

The court conducted a hearing on August 18, 2011, and determined that petitioner was incompetent to stand trial. The court further ordered that petitioner be returned to Sharpe Hospital for further evaluation and treatment to determine if he could attain competency. (App. B at 2.) On February 21, 2012, the court conducted a hearing pursuant to W. Va. Code § 27-6A-3(h) to consider arguments by the parties in light of the results of petitioner's evaluation and diagnostics. (App. B.) The mental health professionals who evaluated petitioner submitted reports concluding that petitioner was mildly retarded, had anxiety disorders, substance abuse problems and had a disturbing criminal history that included charges for sexual abuse, domestic violence and animal cruelty. (App. A.)

During the hearing, the State argued, *inter alia*, that petitioner's crimes were "of a violent nature as a matter of law" and asked that petitioner be committed to "either Sharpe's [sic] or such other facility which is the least restrictive [environment for a period of confinement] . . . not to exceed 50 years which is the maximum allowable time based upon the four charges of the indictment." (App. B at 4.) The defense countered that because there was no "force, threats, or violence used against the alleged victim" that petitioner's "crimes should not be deemed crimes of violence that would support a finding that he should be placed under the jurisdiction of the court."

(*Id.* at 7.) Rather, the defense argued, the appropriate remedy in light of the charges was to proceed on a civil commitment pursuant W. Va. Code § 27-6A-3(g).

At the conclusion of the hearing, the court adopted the findings of the medical providers and declared petitioner incompetent to stand trial. The court then went on to hold that under the terms of W. Va. Code § 27-6A-3(h), the court was required to make a determination on the record of whether or not the crimes charged with were acts of violence.¹ (App. B at 11.) After setting down the charges the court found that “[petitioner] is charged with four felonies which do involve acts of violence against a person.” (*Id.* at 12.) The court then ordered that, petitioner be committed to a mental health facility designated by Department of Health and Human Resources, and placed under the jurisdiction of the court for fifty years which was the maximum sentence allowable under the charges in the indictment.

The petitioner was committed to Sharpe Hospital and evaluated for dangerousness. That letter and evaluation dated March 21, 2012, indicated that the petitioner presented a danger to himself and to others, and needed continued placement in an inpatient facility. (App. A at 41.)

Among his diagnoses were panic attacks, mild mental retardation, and alcohol abuse. (*Id.* at 43.) The petitioner’s relevant legal information included a plethora of offenses ranging from insignificant, such as improper registration, to fraudulent schemes, issuing worthless checks, cruelty

¹The statute does *not* specifically state that the court is to make a determination on the record of whether the crimes charged “involve an act of violence.” The statute states in pertinent part: “If at any point in the proceedings the defendant is found not competent to stand trial and is found not substantially likely to attain competency, and if the defendant has been indicted or charged with a misdemeanor or felony in which the misdemeanor or felony does involve an act of violence against a person, then the court shall determine on the record the offense or offenses of which the person otherwise would have been convicted, and the maximum sentence he or she could have received.” W. Va Code § 27-6A-3(h).

to animals, domestic battery, violation of a protective order (more than once), third degree sexual abuse, and the instant offenses. (*Id.* at 44.)

In assessing dangerousness, the evaluator noted that the petitioner did not understand that having sex with a “14 year old girl” was inappropriate, and while understanding there were consequences, he did not understand why there were consequences and did not appreciate that it is wrong to have sex with a teenage girl. “His limited insight and poor judgment put him at risk to reoffend. . . .” (*Id.* at 46.)

It is from this Order of February 21, 2012, that petitioner appeals. (*Id.* at 36.)

II.

SUMMARY OF THE ARGUMENT

As grounds for the present petition, petitioner argues that the trial court erred by finding that sexual abuse by a custodian and third degree sexual assault as charged in the indictment in the present case, are crimes of violence sufficient to place petitioner under the continuing jurisdiction of the court pursuant to the provisions of W. Va. Code § 27-6A-3(h).² Petitioner supports this claim by arguing that because the nature of the sexual acts that formed the foundation of the charges was consensual, indeed initiated by the victim, the crimes were not violent in nature and therefore, the appropriate disposition under the facts herein, was the less restrictive civil commitment provided for in W. Va. Code § 27-6A-3(g).

²As will be more fully set forth below, under the statute where the defendant is found incompetent to stand trial, an offender who has committed an “act of violence” is placed under the jurisdiction of the court for the maximum sentence allowable for the crimes charged. In the absence of a crime that is an “act of violence” the charges are dismissed and the offender is civilly committed. Both provisions of the statute allow for an offender to be moved to a less restrictive environment when a defendant attains competency or ceases to be a “significant danger to self or others”. W. Va. Code § 27-6A-3(i).

However, the fatal flaw in petitioner's argument is that it rests solely on the facts underlying the present charges. Not all victims in crimes charged under W. Va. Code § 61-8D-5 (Sexual Abuse by a Parent, Guardian or Custodian) and § 61-8B-5 (Third Degree Sexual Assault) (sometimes "the charges") are consenting, willing victims who initiate acts of sex with their parents, or adults decades older, or adults in a position of trust or authority. Some victims of these same crimes are manipulated or coaxed through intimidation into engaging in sex with a person in a position of authority or a family member. Others incur massive, long term psychological damage as the result of such encounters. The crimes petitioner was indicted for have a great potential for physical harm and long-term psychological harm under a myriad of fact based scenarios. Indeed, the "willing" child in the case at bar may well suffer long-term emotional harm because of her manipulation by a person in a position of trust.

As will be more fully discussed below, psychological damage and risk of physical harm flowing from certain crimes that otherwise lack the elements of force or injury, have been held to constitute "violence" within the meaning of unrelated statutes under West Virginia jurisprudence as well as in other jurisdictions. The term "violence" is an evolving, broadly interpreted, and fact-specific term that has been applied for a myriad of statutory purposes under both state and federal authority.

In order to best serve the ends of justice, there can be no bright line definitions for the term "violence" under the challenged statute. To enumerate specific crimes or adopt a bright line definition of "violence" for purposes of the disposition of mentally ill offenders would be to remove discretion from the courts and encroach on legislative intent. Limiting the discretion of the courts in this regard could be a knife that cuts both ways in that offenders who otherwise lack a criminal history or a criminal nature but who commit certain crimes as a result of a temporary mental illness,

could be doomed to the jurisdiction of the court when a civil commitment would be far more appropriate.

Therefore, the term “act of violence” must be applied under a fact based analysis on the record as a whole, and within the discretion of the trial courts in order to carry out the legislative intent set forth in § 27-6A-1 *et seq.*

The crimes of third degree sexual assault and sexual assault by a custodian carry great potential both for physical harm and long-term psychological damage. That psychological damage and risk of harm constitutes “violence” within the meaning of the statute providing a mechanism for the circuit court to maintain jurisdiction over this and similarly situated petitioners. The circuit court properly exercised its discretion.

III.

ARGUMENT

A. Authorities Relied Upon.

“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, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

[I]n Syllabus Point 1, in part, of *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996), the Court held that, “[o]stensible findings of fact, which entail the application of law or constitute legal judgements which transcend ordinary factual determinations, must be reviewed de novo.” Moreover, “[t]his 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.” Syllabus Point 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

State v. Malfregeot, 224 W. Va. 264, 269, 685 S.E.2d 237, 242 (2009).

“Through the probation statute, the Legislature has afforded trial courts the flexibility to fashion reasonable conditions appropriate to the circumstances in each case. *See* W. Va. Code § 62-12-9(b). Such flexibility does not amount to a vague law.” *State v. James*, 227 W. Va. 407, 410, 710 S.E.2d, 98, 110 (2011).

“We further recognize[] . . . that statutes prescribing punishment for crimes either causing or having the potential for causing violence to the person are more likely to be upheld.” *Id.* at 227 W. Va at 233, 262 S.E.2d at 432.

West Virginia Code §§ 27-6A-3 and -4 (Supp.1996), read in *pari materia*, generally provide a court flexibility in exercising and retaining its jurisdiction up to the maximum sentence period, with consideration given to the current mental state and dangerousness of a person found not guilty by reason of mental illness. If not sooner terminated by the court, its jurisdiction automatically will expire at the end of the maximum sentence period.

Syl. Pt. 2 *State v. Smith*, 198 W. Va. 702, 482 S.E.2d 68 (1996)

As we said in Syllabus Point 1 of *State ex rel. Holbert v. Robinson*, 134 W. Va. 524, 531, 59 S.E.2d 884, 889 (1950):

A statute is enacted as a whole with a general purpose and intent, and each part should be considered in connection with every other part to produce a harmonious whole. Words and clauses should be given a meaning which harmonizes with the subject matter and the general purpose of the statute. The general intention is the key to the whole and the interpretation of the whole controls the interpretation of its parts.

State ex rel. Appleby v. Recht, 213 W. Va. 503, 510, 583 S.E.2d 800, 807 (2002).

B. The Sex Offender Registration Act is Inapplicable for the Distinct Purposes of W. Va. Code § 27-6A-1 et. seq.

§ 27-6A-3. Competency of defendant to stand trial determination; preliminary finding; hearing; evidence; disposition.

(h) If at any point in the proceedings the defendant is found not competent to stand trial and is found not substantially likely to attain competency, and if the defendant has been indicted or charged with a misdemeanor or felony in which the

misdemeanor or felony *does involve an act of violence* against a person, then the court shall determine on the record the offense or offenses of which the person otherwise would have been convicted, and the maximum sentence he or she could have received. A defendant shall remain under the court's jurisdiction until the expiration of the maximum sentence unless the defendant attains competency to stand trial and the criminal charges reach resolution or the court dismisses the indictment or charge. The court shall order the defendant be committed to a mental health facility designated by the department that is the least restrictive environment to manage the defendant and that will allow for the protection of the public. Notice of the maximum sentence period with an end date shall be provided to the mental health facility. The court shall order a qualified forensic evaluator to conduct a dangerousness evaluation to include dangerousness risk factors to be completed within thirty days of admission to the mental health facility and a report rendered to the court within ten business days of the completion of the evaluation. The medical director of the mental health facility shall provide the court a written clinical summary report of the defendant's condition at least annually during the time of the court's jurisdiction. The court's jurisdiction shall continue an additional ten days beyond any expiration to allow civil commitment proceedings to be instituted by the prosecutor pursuant to article five of this chapter. The defendant shall then be immediately released from the facility unless civilly committed.

(Emphasis added).

In support of the present petition, petitioner cites to the Sex Offender Registration Act (now the Child Protection Act of 2006 (hereinafter "the Act"), W. Va. Code §15-12-1 for guidance in determining whether the courts or the legislature view the crimes charged herein as being categorically violent. Petitioner correctly points out that defendants convicted of the crimes charged herein are excluded from the definition of "sexually violent predator" for purposes of registration under the Act.

Because this is a case of first impression, there is little guidance in existing West Virginia authority on this issue. However, the Sex Offender Registration Act cannot be relied on even persuasively or as guidance under the present set of facts given the utterly parallel nature of the purpose of both statutes.

Although known in the vernacular as a “Scarlet Letter” law or a “Mark of Cain” law that forever condemns registrants to a special sort of inescapable societal mantle, the Sex Offender Registration Act was nonetheless implemented as a method of providing notice to communities when violent sexual offenders were in their midst for the purpose of protecting society’s most vulnerable members—children. The Act is also a tool for law enforcement to track and monitor offenders who have been classified as violent sexual predators. The Act is neither punitive nor remedial in nature but rather it is a unique regulatory mechanism in the criminal system that operates ancillary to the trial court proceedings. It is not penal in nature. Moreover, registration as a sex offender is the result of fully developed trial court proceedings against an otherwise competent defendant. Because of the insurmountable nature of the implications of registration under the Act, the language of the statute is specific and the triggering offenses enumerated.

The Act does, however, provide an element of discretion in determining whether an offender should be registered by setting forth the following: “For purposes of this article, the term ‘predatory act’ means an act directed at a stranger or at a person *with whom a relationship has been established or promoted for the primary purpose of victimization.*” W. Va. Code § 15-12-2(m). Although highly speculative and unsupported by the record, any evidence demonstrating that petitioner encouraged his relationship with the victim for purposes of sex would support a finding that petitioner’s crime was a “predatory act.” Moreover, if the victim in this case was seeking petitioner out for sex, it may have come out in the proceedings that petitioner was perpetuating his relationship with both the victim and her mother for purposes of sex with a minor. It would surely not be the first time in West Virginia jurisprudence that a man sought out a relationship with a woman to gain access to her children for purposes of sex.

But more significantly, while the Act does not designate the charges as grounds for registration, W. Va. Code § 62-12-26 (Extended supervision for certain sex offenders; sentencing; conditions; supervision provisions; supervision fee) does provide for the imposition of additional supervision and other restrictions on defendants who are convicted of the same crimes as petitioner.

In *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011) this Court upheld the imposition of an additional ten years post-release supervision pursuant to W. Va. § 62-12-26, for a 20 year old man (one of three petitioners combined in one appeal) who was convicted of third degree sexual assault for having a long term sexual relationship with a fourteen year old girl whom he ultimately impregnated. While the *James* court did not reach the issue of whether third degree sexual assault was categorically a violent crime, it did, nonetheless, find that the legislative intent of W. Va. § 62-12-26 was to protect society from the particularized danger presented by defendants who had been convicted of the same charges as petitioner.

It is obvious that the Legislature has determined that in order to adequately protect society, the crimes enumerated in the supervised release statute require community-based supervision and treatment over and above incarceration. Supervised release is a method selected by the Legislature to address the seriousness of these crimes to the public welfare and to provide treatment during the transition of offenders back into society with the apparent goal of modifying the offending behavior.

State v. James 227 W. Va. 416, 710 S.E.2d 107.

While supervised release is a far less restrictive remedy than long term commitment, the legislature and this Court have found sufficient indicia of dangerousness to impose additional, long term restraints on the liberty of defendants convicted of the exact same crimes as petitioner.

The *James* Court in examining the legislative intent of the extended supervision statute found that even though the statute provided supervision after conviction of specific enumerated offenses, it still allowed for discretion on a case by case basis: “[t]hrough the probation statute, the Legislature

has afforded trial courts the flexibility to fashion reasonable conditions appropriate to the circumstances in each case. . . . Such flexibility does not amount to a vague law.” *Id.* at 419, 710 S.E.2d. at 110.

In the cases this Court has examined for purposes of determining whether crimes are acts of violence, it has found that both the potential for physical harm and psychological harm can constitute violence under other statutes. In the case of *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 583 S.E.2d 800 (2002) this Court examined whether DUI is a crime of violence within the context of West Virginia’s repeat offender statute. The *Recht* Court considered previous holdings in federal court in light of the federal courts’ definition of crimes of violence within the context of immigration law and Eighth Amendment challenges to repeat offender statutes:

We reject the application of federal immigration law. To the extent that any federal law should guide us, we think a more appropriate measurement for a crime of violence is that contained in the United States Sentencing Guidelines. United States Sentencing Guideline § 4B1.2, application note 1, provides “Other offenses are included as ‘crimes of violence’ if (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted . . . by its nature, presented a serious potential risk of physical injury to another.” Consistent with our reasoning in *Gustke*, the federal courts have recognized that, “the very nature of the crime of DWI [Driving While Intoxicated] presents a ‘serious risk of physical injury’ to others, and makes DWI a crime of violence.” *United States v. DeSantiago-Gonzalez*, 207 F.3d 261, 264 (5th Cir.2000) (citation omitted). Furthermore, a “reckless indifference to the value of human life may be every bit as shocking to the moral sense as an ‘intent to kill.’” *Tison v. Arizona*, 481 U.S. 137, 157, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127, 144 (1987). Thus, we do not find Mr. Appleby’s ARGUMENTS PERSUASIVE.

Id. at 517, 583 S.E.2d at 814.

The *Recht* Court went on to find that any statute being examined for its meaning must consider the statute as a whole in light of its purpose. *Id.* at 510, 583 S.E.2d at 807.

Likewise, this Court has examined the “violent” nature of emotional harm within the context of sex between minors and adults. Although the victims in *State ex rel. Spaulding v. Watt* were

children of tender years, this Court's discussion of the emotional harm that can result from sex between adults and minors is relevant:

In *People v. Hetherington*, 154 Cal. App.3d 1132, 201 Cal. Rptr. 756 (1984), the court considered a statute which provided for an enhanced sentence upon conviction of a "violent felony." The statute defined the term "violent felony" as including sexual acts against children under the age of fourteen. The defendant was convicted under the portion of the child molestation statute which did not require proof of forcible compulsion. . . .

In determining whether this was a violent felony for purposes of the enhancement statute, the court in *Hetherington* initially focused on the interplay between these statutes. The court held that the legislature had expressly stated in the enhancement statute that "these specified crimes merit special consideration when imposing a sentence to display society's condemnation for such extraordinary crimes of violence against the person." (Italics added.) 154 Cal. App.3d at 1139-40, 201 Cal. Rptr. at 760. The court then analyzed the phrase "violence against the person" to determine whether the enhancement statute applied only to crimes involving physical violence:

"We consider it significant that the statute refers simply to 'violence' rather than to 'physical violence,' 'physical injury' or 'bodily harm.' The statute's unadorned language indicates the Legislature intended to impose increased punishment . . . not only for certain felonies which are 'violent' in a physical sense but also for other selected felonies which cause extraordinary psychological or emotional harm." 154 Cal. App.3d at 1140, 201 Cal. Rptr. at 760.

See also *People v. Stephenson*, 160 Cal. App.3d 7, 206 Cal. Rptr. 444 (1984) (child molestation a violent felony).

There is, we believe, sound logic to this reasoning. As in *Hetherington*, the word "violence" in our post-conviction bail statute is not limited by the adjective "physical." There can be no dispute that even in the absence of any significant physical trauma, sexual assaults on young children result in severe emotional and psychological harm.

State ex rel. Spaulding v. Watt 188 W. Va.124, 126, 423 S.E.2d 217, 219 (1992)

Spaulding is a twenty-one year old case. The defendant in *Spaulding* was convicted of the sexual abuse of his five year old stepdaughter and seven year old stepson. The societal shift since *Spaulding* is vividly demonstrated by the dissent of Justice Neely in light of the present day view

of child sexual abuse. It's shocking by today's standards. In dissenting, Justice Neely vehemently minimized the seriousness of the defendant's crimes, as well as the crime of child sexual abuse in general, by calling the case at bar a "witch" hunt in the spirit of a "Woody and Mia" divorce. Justice Neeley opined: "In its holding today, the majority yields to the mass hysteria surrounding today's crime of fashion: sexual abuse of one's own children." (Neely, J., Dissenting). 188 W. Va. at 127, 423 S.E.2d at 220. In arguing against child sexual abuse being designated an "act of violence" Justice Neely unleashed:

Mr. McClelland [the defendant] did not grab a random woman off the street and threaten her life or beat her; Mr. McClelland did not rob a Seven-Eleven store at gunpoint; and Mr. McClelland did not commit a murder. The majority's attempt to draw the crime of statutory rape under the "use of violence" provision perverts the meaning of the statute.

Id. 129, 423 S.E.2d at 222.

"Mr. McClelland" *only* engaged in sex acts with his five year old stepdaughter and seven year old stepson. Justice Neeley opines that a grown man having sex with a five year old is not all that bad when compared to really violent crimes like murder and kidnapping or armed robbery. Rather child sexual abuse is just an hysteria generating crime *du jour*.

Although petitioner claims that the minor in this case actually initiated the sex, petitioner was nonetheless, an adult in a position of authority by virtue of his age and position in the household as the live-in companion of the victim's mother (if nothing else). While the present set of facts do not suggest an overt act of violence within the meaning of forcible compulsion against a victim's will, sexual encounters between adults in a position of authority and underage minors present not only the potential for physical harm or violence but for long term emotional damage to the victim.

The penitentiary is not a place where they put teenage lovers. It's a place where they put parents and teachers and coaches and relatives who exploit their positions of authority to have sex

with underage children in their control. While fifteen year olds may be physically mature, few will argue that a fifteen year old has a capacity for maturity sufficient to make a decision to engage in sex with an adult authority figure many years her senior. Not only was the victim in this case fifteen, arguably she was most probably mentally challenged herself in some capacity if she sought out petitioner to impregnate her at age 15.

For this Court to eliminate the crimes committed by petitioner from the definition of “acts of violence” would serve to exclude many adult perpetrators of sex with children who inflict emotional harm on their victims or put their victims in situations where an otherwise consensual situation can turn violent. The purpose of the Sex Offender Registration Act is not to designate teenage lovers as sexually violent predators. Clearly the legislature contemplated such scenarios when it excluded consensual sex from the crimes requiring registration under the Act.

The Sex Offender Registration Act is in place to protect society from people who seek out children for sex or commit acts of overt forcible sex acts on others against their will. The purpose of the challenged statute is to protect society from dangerous incompetent offenders. Moreover, although the Act does not include the crimes charged *sub judice* within the context of being a “violent” act, neither does it include murder or armed robbery or kidnapping. Nor is the criminal commitment statute restricted to sex crimes – two statutes, two distinct purposes.

Therefore, the Sex Offender Registration Act cannot support a finding that consensual sex between a minor and an adult is excluded from “acts of violence” within the meaning of 27-6A-3(g).

C. The Word “Violence” in *Para Materia* with the word “Dangerousness” under W. Va. Code §§ 27-6A- 2 and 3 Allows For a Fact Based Determination by the Trial Court Based on the Record as a Whole.

While this court has consistently held that where there is vagueness in a statute, the language in dispute is to be construed with lenity in favor of the accused and against the State, this Court has

still nonetheless found that “lenity does not foreclose a court from looking ‘not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.’” *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 263, 465 S.E.2d 257, 263 (1995) (quoting *Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990)).

It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.

Syl. Pt. 2, *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925).

In support of the present petition, petitioner further argues that under the rule of lenity, the courts must construe the language of statutes challenged for vagueness in favor of defendants as set forth in *Morgan, supra*. Petitioner argues, under the rule of lenity, this Court must find that petitioner’s crimes were non-violent because such a ruling would render petitioner eligible for civil commitment which is a lesser restrictive remedy.

When called upon to interpret the meaning and purpose of a statute this Court has consistently held that the paramount concern in giving lenity is to “preclude ‘expansive judicial interpretations [that] may create penalties for offenses that were not intended by the legislature.’” *Morgan*, 195 W. Va at 262, 465 S.E.2d at 262 (quoting *State v. Brumfield*, 178 W. Va. 240, 246, 358 S.E.2d 801, 807 (1987)). However, the language of a statute need not be defined *ad infinitum* to avoid being vague. The courts have long recognized that legislative intent in a statute should be free from overweening judicial interpretation. When reading W. Va. Code §§ 27-6A-2 and 3, in light of its overall intent, it becomes clear that the purpose of the statute does not spring from a finding on the issue of whether a defendant’s crimes were violent. Rather, the statute sets forth a specific set of procedures a court must satisfy before arriving at a disposition of an incompetent defendant.

Were this Court or the legislature to adopt a bright line definition of the word “acts of violence” under W. Va. Code § 27-6A-1 *et. seq.* it would essentially negate many of the other facts the court is required to develop on the record before arriving at a determination on the disposition of the case. The intent of the legislature becomes clear when examining the elements the court is *required* to consider in both a civil and criminal commitment. The language in W. Va. Code § 27-6A-2(b)(1)(4) specifically requires that “[a] copy of the defendant’s criminal record” must be before the court. The court must also order a “qualified forensic evaluator” to conduct a “dangerousness evaluation” of the defendant under both a criminal *or* a civil commitment. After the court has complied with the terms of the statute it must consider the fully developed record and determine a disposition of the case that will “allow for the protection of the public.” *See* W. Va. Code § 27-6A-3(h)

Although the statute does not enumerate offenses, it is nonetheless, replete with language suggesting that the determining factor in placing a defendant under the jurisdiction of the court is actually “dangerousness.” It cannot be argued that the entire statute and its remedies are premised on whether or not the crime that put a defendant before the court was an “act of violence.”

Petitioner has a long criminal history that includes sex crimes, domestic violence and animal cruelty. The providers who examined petitioner concluded that petitioner had little if any chance of attaining competency. The evidence before the court strongly suggests that petitioner is very low functioning and has little capacity to comprehend a moral compass. There is little to suggest that petitioner would not engage in sex with a much younger child if approached as well given that petitioner’s own explanation for his actions was that he was “horny.” (Pet’r’s Br. at 7.) Further, the petitioner is diagnosed as at risk to reoffend sexually. (App. A at 46.) All of this born out by the record before the court and developed pursuant to the terms of the statute in light of its legislative

intent—to protect the public from mentally incompetent offenders who pose a risk to society. Any over-emphasis on the violent nature of the triggering crime would defeat the purpose of the statute.

Although arising from a factually distinguishable issue, the words of the New Mexico Supreme Court in examining the legislative intent of its own criminal commitment statutes concluded: “We believe the legislature intended to make *dangerous, incompetent defendants*, who have been found to have committed the acts that form the basis of the criminal charges, subject to long-term commitment rather than that provided in the civil short-term statute.” *State v. Werner* 796 P.2d 610, 613 (N.M. 1990) (emphasis added).

A general overview of federal and state cases challenging criminal commitment statutes on a *variety* of grounds demonstrate that the operative word when the courts analyze criminal commitment proceedings is “dangerousness” as much as whether or not the underlying crimes were violent. *See e.g. State v. Chorney*, 29 P.3d 538, 542 (N.M. 2001). “‘At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.’ Dangerousness is an element necessary to sustain a commitment of an incompetent person”. *Id.* quoting *Jackson v. Indiana*, 406 U.S. 715, (1972). “[D]ue process prohibits indefinite commitment of a mentally incompetent criminal defendant merely because he cannot stand trial; rather, dangerousness to self or others, need for treatment or similar proof required; *Craft v. Superior Court*, 140 Cal. App. 4th 1533, 1544, 44 Cal. Rptr. 3d 912, 920 (2006) citing *Robinson v. California* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

Washington State provided the following as guidance for its courts under its “Washington State’s Criminally Insane” statute for determining whether a defendant has committed a violent act in the past for which he was convicted, pleaded guilty, or was found not guilty by reason of insanity.:

10.77.260. Violent act--Presumptions

(1) In determining whether a defendant has committed a violent act the court must:

(a) Presume that a past conviction, guilty plea, or finding of not guilty by reason of insanity establishes the elements necessary for the crime charged;

(b) Consider that the elements of a crime may not be sufficient in themselves to establish that the defendant committed a violent act; and

(c) Presume that the facts underlying the elements, if unrebutted, are sufficient to establish that the defendant committed a violent act.

(2) The presumptions in subsection (1) of this section are rebuttable.

(3) In determining the facts underlying the elements of any crime under subsection (1) of this section, the court may consider information including, but not limited to, the following material relating to the crime:

(a) Affidavits or declarations made under penalty of perjury;

(b) Criminal history record information, as defined in chapter 10.97 RCW; and

(c) Its own or certified copies of another court's records such as criminal complaints, certifications of probable cause to detain, dockets, and orders on judgment and sentencing.

Wash. Rev. Code § 10.77.260 (2000).

Petitioner argues that the phrase “act of violence against a person” should be taken on its face, in light of the record as a whole, yet standing separate and apart from the remainder of the statute nonetheless. (Pet’r’s Br. at 8.) Petitioner, however, is isolating the word “violent” from the legislative intent of the statute. This is a much too simplistic approach that has been rejected under a myriad of applications and circumstances when it comes to defining violence by the courts and enacting bodies. While petitioner argues that the meaning of “violence” is plain and everyday, other courts have viewed a definition of “violence” under particularized meanings in the context of whatever statute they are applying.

The Fifth Circuit in rejecting a bright line definition of a statutory word in contention, adopted a common sense approach in examining whether a jury had sufficient instruction to arrive at a determination of guilt on essential elements of a state capital murder statute by citing to a collection of previous cases that had addressed the same issue:

Leal also argues that the Texas capital sentencing scheme's special issues are unconstitutionally vague because they fail to define certain words and phrases, including “probability,” “criminal acts of violence,” and “continuing threat to society.”
...

This court has already rejected the arguments Leal makes regarding the terms employed in the Texas capital sentencing scheme. *See Hughes*, 191 F.3d at 615 (holding that the term “probability,” as used in the Texas capital sentencing special issues, does not require definition); *West v. Johnson*, 92 F.3d 1385, 1406 (5th Cir.1996) (rejecting claim that the Texas capital sentencing scheme special issues work as aggravating factors and therefore require detailed definitions of the terms employed therein); *Woods v. Johnson*, 75 F.3d 1017, 1033-34 (5th Cir.1996) (rejecting argument that the terms used in the special issues are “aggravating factors” and unconstitutionally vague absent definition); *James v. Collins*, 987 F.2d 1116, 1120 (5th Cir.1993) (holding that the terms “deliberately,” “probability,” “criminal acts of violence,” and “continuing threat to society,” “have a common-sense core of meaning that criminal juries should be capable of understanding”) (citation omitted); *Milton v. Procunier*, 744 F.2d 1091, 1095-96 (5th Cir.1984) (“deliberately,” “probability,” and “criminal acts of violence” “have a plain meaning of sufficient content that the discretion left to the jury” is “no more than that inherent in the jury system itself”). Reasonable jurists could not find the district court’s resolution of this issue debatable.

Leal v. Dretke, 428 F.3d 543, 553 (5th Cir. 2005)

This Court has also rejected attempts to intrude on the discretion of trial courts in determining the appropriate disposition of mentally incompetent defendants found not guilty by reason of insanity. *See State v. Catlett*, 207 W. Va. 740, 745, 536 S.E.2d 721, 726 (1999) (“Thus, both by statute and case law, a trial court has broad discretion to determine the appropriate disposition of those found not guilty by reason of insanity.”)

Petitioner cites to Syl. Pt. 2 of *State v. Elder*, 152 W. Va 571, 165 SE.2d 109 (1968) for the holding that “where the language of a statute is clear and without ambiguity, the plain meaning is to

be accepted without resorting the rules of interpretation.” (Pet’r’s Br. at 8.) But the meaning of violence varies so widely that it’s impossible to characterize it as “clear” under any analysis. The courts in West Virginia have interpreted the word “violence” so broadly that crimes with merely the “potential” for violence have held to be violent for within the meaning of the word within the context of an analysis for proportionality of sentence and on sentencing enhancement statutes.

In finding that

We reject the application of federal immigration law. To the extent that any federal law should guide us, we think a more appropriate measurement for a crime of violence is that contained in the United States Sentencing Guidelines. United States Sentencing Guideline § 4B1.2, application note 1, provides “Other offenses are included as ‘crimes of violence’ if (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted . . . by its nature, presented a serious potential risk of physical injury to another.” Consistent with our reasoning in *Gustke*, the federal courts have recognized that, “the very nature of the crime of DWI [Driving While Intoxicated] presents a ‘serious risk of physical injury’ to others, and makes DWI a crime of violence.” *United States v. DeSantiago-Gonzalez*, 207 F.3d 261, 264 (5th Cir.2000) (citation omitted). Furthermore, a “reckless indifference to the value of human life may be every bit as shocking to the moral sense as an ‘intent to kill.’” *Tison v. Arizona*, 481 U.S. 137, 157, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127, 144 (1987). Thus, we do not find Mr. Appleby’s arguments persuasive.

State ex rel. Appleby v. Recht 213 W. Va. 124, ___, 577 S.E.2d 734, 1747-48 (2002) (footnote omitted).

When examining a potential loophole in W. Va. Code § 61-2-28, this Court took a common sense approach to a whether out-of-state convictions for domestic violence could serve as a predicate offense to enhance the penalty for third offense domestic assault:

The State convincingly posits that nothing in the objectives articulated in West Virginia Code § 48-2A-1, or in the language of West Virginia Code § 61-2-28, evinces a legislative concern to limit the scope of this state’s policy against domestic violence to those offenses that occur in this State. Given the legislative decision to treat repeat domestic offenders more severely, combined with the legislative recognition of the seriousness of domestic violence, we agree with the State’s contention that permitting out-of-state domestic violence offenses to serve as predicate offenses for enhancement purposes is consistent with the Legislature’s articulated policy of preventing and deterring domestic violence. *See* West Virginia Code § 48-2A-1. Upon a careful

examination of the Domestic Violence Act in conjunction with West Virginia Code § 61-2-28, we are convinced that the Legislature intended to punish second or third instances of domestic violence more severely, regardless of where the earlier conduct occurred. To do otherwise, would invite repeat domestic offenders to move to this state to take advantage of the proverbial “clean slate,” thereby enabling them to continue committing acts of domestic violence in this state similar to acts they previously committed elsewhere without realizing the legislatively-intended effects of enhanced punishment for repeat offenders. Accordingly, we hold that prior domestic violence convictions in other states may be used to enhance the penalty for subsequent domestic violence convictions under West Virginia Code § 61-2-28.

State v. Hulbert, 209 W. Va. 217, 221-22, 544 S.E.2d 919, 923-24 (2001) (footnote omitted).

Likewise, it cannot be argued that the legislature intended that a trial court be prohibited from putting a mentally disturbed offender with a history of violence under its jurisdiction because of the triggering offense was not enumerated in the statute or fell under a bright line definition of violence. If petitioner’s argument is taken to its logical conclusion and trial courts would be restricted to a purist definition of “violence”, a myriad of crimes with the strong potential for violence will be exempt from many criminal and administrative remedies. While petitioner does argue in favor of a fact based analysis in tandem with a widely accepted definition of the term “violence”, petitioner restricts that argument to the facts supporting the charges herein—*i.e.* that the sex in this case was consensual. However, petitioner excludes the record as a whole in this case when arguing for a fact based analysis, thereby excluding his long, disturbing history of sex crimes and animal cruelty.

The Black’s Law Dictionary definition cited by petitioner is from the 1979 edition. In 1979, there was no such crime as those we now know in layman’s terms as spousal rape, date rape, stalking, domestic battery, domestic assault, and kiddie porn. Many sex crimes and other crimes considered “violent” by today’s standards were misdemeanors in those days as well. Societal notions change and the word “violence” differs among a wide spectrum of religious, philosophical, legal and societal notions. To reduce the word “violence” to a definition of only a few words is to render it all but

meaningless. Any person who has been victimized by a non-violent offense within the meaning of a strict interpretation may feel differently such as a man or woman who was sexually exploited as a minor by a person in a position of trust, or a person who has been stalked or a person who was forced to view pornographic material as a child by a person who was supposed to be their protector.

Petitioner has had a long, disturbing criminal history. Further, the outlook is poor that petitioner will ever achieve a level of cognitive functioning that would eliminate the threat he poses to society. To find that his crimes were not violent enough *this time* to place him under the jurisdiction of court based on a bright line definition of one word in a statute would be to defeat not only the ends of justice but the intent of W. Va. Code § 27-6A-1 *et. seq.*

D. Definitions of “Violence” in Other Jurisdictions and In West Virginia Case Law and Statutory Law Common Law and under a “Common Sense” Analysis.

To begin with, a restrictive, e.g. legal definition is not necessarily a precise definition because even if we focus upon an extremely limited notion of violence, it will immediately become apparent that ‘violence’ - however narrowly defined - represents a surprisingly broad spectrum of incidents. Restricting *a priori* what qualified as ‘violence’ would unduly and unhelpfully limit our understanding of how violence is socially constructed. An important benefit of a more inclusive definition of ‘violence’ is also that it allows researchers to penetrate the persona experience and subjective meaning of a broad inclusive definition of ‘violence’ for those involved either as victim (or perpetrator).

William de Hann, *Violence as an Essentially Contested Concept*, in *Violence in Europe: Historical and Contemporary Perspectives*, 37 (Sophie Body-Gendrot & Pieter Spirerenberg eds. 2009).

Also, we have held that sexual offenses involving minors. . . . are crimes of violence under U.S.S.G. § 4B1.2(a)(2) because “[s]exual contact between parties of differing physical and emotional maturity carries a substantial risk that physical force may be used in the course of committing the offense.” *United States v. Banks*, 514 F.3d 769, 780 (8th Cir.2008) (quotations, alteration, and citation omitted) (finding that a conviction for sexual assault on a child under 16 was one for a crime of violence even though “the crime [could] be committed by mere sexual contact with a minor”); *see also United States v. Bauer*, 990 F.2d 373, 374-75 (8th Cir.1993) (per curiam) (holding statutory rape is a crime of violence under U.S.S.G. § 4B1.2 notwithstanding “that the acts with the child were consensual and did not involve physical violence”); *cf. United States v. Scudder*, 648 F.3d 630, 633-34 (8th Cir.2011) (determining that

child molestation under an Indiana statute prohibiting sexual acts between a person 16 and older and a child 12 or older but under 16 is categorically a violent felony under 18 U.S.C. § 924(e)(1)); *United States v. Tharp*, 323 Fed.Appx. 478, 478 (8th Cir.2009) (unpublished per curiam) (finding that the defendant's previous conviction for statutory rape qualified as a violent felony under § 924(e)); *United States v. Anderson*, 438 F.3d 823, 824 (8th Cir.2006) (holding that "sexual contact with a complainant under the age of 13 years by an actor more than 36 months older than the complainant" is a violent felony under § 924(e)); *United States v. Mincks*, 409 F.3d 898, 900 (8th Cir.2005) (holding that second-degree statutory rape and second-degree statutory sodomy in Missouri are crimes of violence under 18 U.S.C. § 924(e)(1)); *United States v. Alas-Castro*, 184 F.3d 812, 813 (8th Cir.1999) (per curiam) (holding that a crime committed under a Nebraska statute criminalizing sexual contact between an adult 19 or older and a child 14 or younger constituted a crime of violence under 18 U.S.C. § 16(b)); *United States v. Rodriguez*, 979 F.2d 138, 141 (8th Cir.1992) (holding offense of lascivious acts with a child, by its nature, poses a substantial risk of physical force, and, therefore, is a crime of violence under 18 U.S.C. § 16(b)).

United States v. Dawn, 685 F.3d 790, 796-97 (8th Cir. 2012).

We recognize that some of our sister Circuits have suggested that where, as here, a statute encompasses not only forcible assault but also sexual contact to which a child professes to consent, even if not legally able to do so, the crime thereby defined creates a serious risk of physical injury only when the victim is particularly young. *See, e.g., United States v. Sawyers*, 409 F.3d 732, 742 (6th Cir.2005) (holding that violations of "statutory rape statutes that include more mature victims [(i.e. seventeen-year-olds)] and do not contain aggravating factors" do not qualify as violent felonies, absent more specific information as to the age of the victim); *United States v. Thomas*, 159 F.3d 296, 299-300 (7th Cir.1998) (concluding that the Government had neglected to present evidence to establish a serious risk of injury to a child of sixteen, but noting that sexual contact does present such a risk to a child of thirteen). Vermont's statute, however, applies only to children and young teens -- in the version applicable here, to those fifteen years old and younger. *See* Vt. Stat. Ann. tit. 13, § 3252(3) (1986) (since amended). Even assuming, as these cases implicitly do, that only injury arising from the sexual act itself may be considered when determining whether the commission of the crime will typically involve a serious risk of physical injury, young teens such as those within the compass of Vermont's statute not infrequently face such risk from even purportedly consensual contact. *See United States v. Sacko*, 247 F.3d 21, 23-24 (1st Cir.2001) (summarizing evidence indicating that twelve to thirty-three percent of fourteen-year-old girls are not yet fully developed, and therefore face risk of physical injury from intercourse, as well as increased risk of contracting various sexually-transmitted diseases); *see also United States v. Shannon*, 110 F.3d 382, 387-88 (7th Cir.1997) (en banc) (noting risks of injury to thirteen-year-old girls from intercourse).

More importantly, the potential risks of serious physical injury flowing from violation of Vermont's sexual assault statute are not limited to the direct physical consequences of sexual contact. We must also consider the risk of injury traceable to the fact that the violation of statutes criminalizing sexual contact with victims who, for reasons of physical or emotional immaturity, are deemed legally unable to consent "inherently involves a substantial risk that physical force may be used in the course of committing the offense." *Chery v. Ashcroft*, 347 F.3d 404, 408 (2d Cir.2003); see also *James*, 550 U.S. at 203, 127 S.Ct. 1586 (classifying attempted burglary as a violent felony primarily because of the risk of injury arising "from the possibility of a face-to-face confrontation between the burglar and a third party"). When an adult inflicts a sexual act upon a child, the nature of the conduct and the child's relative physical weakness give rise to a substantial likelihood that the adult may employ force to coerce the child's accession, thereby creating a serious risk that physical injury will result. See *Dos Santos v. Gonzales*, 440 F.3d 81, 85 (2d Cir.2006) ("[B]ecause '[a] child has very few, if any, resources to deter the use of physical force by an adult intent on touching the child[,] there is a significant likelihood that physical force may be used to perpetrate the crime.'" (second alteration in original) (quoting *Chery*, 347 F.3d at 409)); see also *United States v. Eastin*, 445 F.3d 1019, 1022 (8th Cir.2006) ("Even if the sexual act with a child were consensual, such conduct between individuals of differing physical and emotional maturity carries a substantial risk that physical force may be used, causing injury to the child."). We therefore have no difficulty in concluding that a sexual act inflicted upon a child by an adult ordinarily creates a serious potential risk of physical harm to the child.

United States v. Daye, 571 F.3d 225, 232 (2nd Cir. 2009).³

Over the spectrum of federal and state jurisdictions, including our own, the definition of violence varies according to interpretation and context. The *Daye* court found that consensual sex between an adult and child was an "act of violence" but went on to note that there would be variations of interpretation of the term "violence" under a myriad of scenarios. The courts have examined many elements when discerning what constitutes an act of violence including elements of a crime such as:

³*Daye* is cited herein for purposes of illustrating the ongoing debate and the differing view among jurisdictions on this issue. Two cases cited in *Daye* have since been overturned - *United States v. Sawyer* 409 F.3d 7332 (6th Cir. 2005) and *United States v. Shannon* 110 F.3d. 382 (7th Cir. 1997). *Sawyer* was remanded for a determination of whether defendant's state-court conviction for statutory rape was a "violent felony" under applicable state rules for purposes of sentencing enhancement. *Shannon* was reversed on its finding that statutory rape was a crime of violence within the context of a Wisconsin sentencing enhancement statute.

degree of risk; whether force is implied because of the innate intimidation children and adolescence feel towards authority figures; whether consent is competent and; whether the act is likely to cause injury or carries a risk where physical force can develop during the crime.

Consensual sex may also have a more violent implication under some circumstances than others, particularly where mental impairment or mental illness is coupled with a disturbing criminal history as in the present case. Petitioner engaged in sex with a fifteen year old child of his household because he was “horny” and she wanted to have a baby. These facts alone actually work against petitioner’s argument by strongly suggesting that while the victim in this case may have consented, she was not mentally competent to do so. Wanting a baby at fifteen and seeing the petitioner as father material could arguably be *prima facie* evidence the victim was mentally impaired herself. Also, given petitioner’s criminal history, it could be argued that there was a far higher likelihood that consensual sex carried a high risk of becoming violent. Moreover, if the victim in this case was seeking petitioner out for sex, it could surely be argued that petitioner could possibly have been perpetuating the relationship with the mother and the victim for purposes of sex with the victim. So rather than working in his favor, the flip side of petitioner’s argument is that the facts in this case, if put into evidence at trial for instance, would render the charges far more likely to be viewed as violent where otherwise they might not have been. This is but a perfect example of how notions of violence turn on the facts.

Therefore, the wide range of authorities and varying views of the notions of “violence” demonstrate that a bright line definition thereof is not appropriate in light of the purpose of the challenged statute.

E. The Applicable Statute Protects Due Process in the Context of a Liberty Interest.

In further support of the present petition, petitioner argues that because there is a liberty interest involved in a criminal commitment, it is penal in nature and therefore, the language of the statute should be “strictly construed against the State and in favor of the defendant” as provided for in Syllabus Point 3 of *State ex rel. Carson v. Wood*, 154 W. Va. 397, 175 S.E.2d 482 (1970).

It is axiomatic that a deprivation of a liberty interest requires due process. However, it is also a violation of due process to try a person who is incompetent. *Drope v. Missouri* 420 U.S. 162, (1975). The statute challenged herein implicates a liberty interest no matter how it is imposed, whether a defendant is placed under the jurisdiction of the court or civilly committed. If petitioner were to be civilly committed he would remain in the custody of a mental healthy facility until he gained competency. In petitioner’s case, the qualified medical experts who have evaluated him concluded that he’s simply not capable of ever attaining competency. As a result, petitioner is exposed to a long term commitment either way.

Moreover, this Court has addressed this issue and held that the mechanism built into the statute for discharging an incompetent defendant in the event he or she attains competency, cures any due process challenges to the statute on the basis of a deprivation of liberty interest.

First, although it is not mentioned by either Appellant or the State, the very next statute, West Virginia Code § 27-6A-4, goes directly to the heart of Appellant’s argument. The 1995 amendment to section four took effect simultaneously with the now challenged amended version of section three. Section four gives the circuit court the authority to terminate its jurisdiction prior to the time period established by section three when the circuit court finds an acquittee is no longer mentally ill and poses no danger to self or others. Section four also provides, however, a circuit court may not release its jurisdiction if the acquittee’s “mental illness is in remission solely as a result of medication or hospitalization or other mode of treatment if it can be determined within a reasonable degree of medical certainty that without continued therapy or hospitalization or other mode of treatment,” the acquittee’s mental illness will create a danger to the acquittee or others. Despite some restrictions, it is obvious from a fair reading of section four that a circuit court has the discretion to tailor its jurisdiction in

conformance with the acquittee's mental condition. In addition, section four clearly gives the circuit court the power to terminate such jurisdiction upon a finding that a person acquitted by reason of mental illness "is no longer mentally ill . . . and . . . is no longer a danger to self or others." W. Va. Code § 27-6A-4. Accordingly, Appellant's argument that section three imposes an arbitrary term of jurisdiction must fail.

State v. Smith, 198 W. Va. at 707-08, 482 S.E.2d at 692-93 (footnotes omitted).

Although the *Smith* Court addressed a situation where the defendant was found not guilty by jury by reason of insanity and placed under the jurisdiction of the court under a prior version of the statute, the reasoning in *Smith* should still apply. Although the statute has been completely overhauled since the *Smith* decision, it still contains a mechanism wherein a defendant committed to the jurisdiction of the court can be placed in a less restrictive environment upon a showing the he or she no longer "constitutes a significant danger to self or others". W. Va. Code § 27-6A-3(i). Moreover, criminal commitment is not necessarily penal given that mental illness and a finding of incapacity negate a defendant's criminal responsibility as provided for under the statute.

Therefore, because the statute contains a mechanism that mandates a continuing process for reevaluating a defendant to provide a means to achieve a less restrictive environment, the rule of lenity does not apply in the context of a due process challenge on the grounds that the statute is penal in nature.

IV.

STATEMENT REGARDING ORAL ARGUMENT

In light of the fact that the present petition raises a case of first impression, the State agrees with petitioner's assertions that oral argument is appropriate and necessary because of the unique nature of the issues presented.

V.

CONCLUSION

The only case in which this Court has addressed the issue of whether sex between adults and minors is an act of violence, was issued 21 years ago at which time Justice Neely characterized child sexual abuse as a stylish crime *du jour* exploited by vindictive women. Moreover, the *Spaulding* case involved victims who had no capacity for consent and were children of tender years.

The State requests this Court to revisit this issue through the spectrum of modern day societal views and hold that it is within the discretion of the lower courts to determine if the crimes charged are acts of violence under a fact based determination on the record as a whole for purpose of placing a defendant under the jurisdiction of the court pursuant to W. Va. Code § 27-6A-1 *et. seq.*

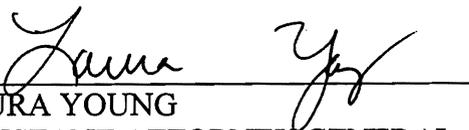
For the reasons herein stated, the State respectfully requests that the Court uphold the findings of the Preston County Circuit Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
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By counsel

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CERTIFICATE OF SERVICE

I, Laura Young, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *BRIEF ON BEHALF OF THE RESPONDENT* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 22nd day of February, 2013, addressed as follows:

To: Cheryl L. Warman, Esq.
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