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

**NO. 12-1309**

**STATE OF WEST VIRGINIA,**

*Plaintiff Below, Respondent,*

**v.**

**JAMES SCOTT Y.,**

*Defendant Below, Plaintiff.*

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**RESPONDENT'S BRIEF**

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**RESPONDENT'S BRIEF**

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**I. ASSIGNMENTS OF ERROR**

1. The Circuit Court of Marshal County, West Virginia, erred in denying the Petitioner's motion seeking dismissal of the underlying matter, as section 61-6-24(b) of the West Virginia Code, relating to terroristic threats, is unconstitutionally vague.
2. The Circuit Court of Marshal County, West Virginia, erred in denying the Petitioner's motion seeking acquittal in this matter, given that the conduct proscribed by section 61-6-24(b) of the West Virginia Code, if it be constitutional, requires a "terroristic threat" "likely to result in serious bodily injury," and not mere words which, at the time uttered, have no basis in reality; particularly, when the person uttering such words is handcuffed in the back of a police cruiser, on his way to jail.

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<sup>1</sup>Because the allegations in this case deal with sexual conduct towards minors "we follow our traditional practice in cases involving sensitive facts and use only petitioner's last initial." *State ex rel. William S. v. Ballard*, No. 11-1640, slip op at 1 n.1 (W. Va. Supreme Court, Jan. 14, 2013) (Memorandum Decision).

## II.

### STATEMENT OF THE CASE

Shortly after midnight on February 9, 2012, Moundsville Police Officer A.<sup>2</sup> and his partner responded to a domestic violence call. App. at 171. After an investigation, the officers arrested the Petitioner, a forty-eight-year-old man, *id.* at 197, for domestic violence. *Id.* at 173. When Officer A. booked the Petitioner at the Police Department, the Petitioner did not complain of illness or injury. *Id.* at 174. When Officer A. took the Petitioner to the Northern Regional Jail, however, the Petitioner complained of chest pains and the jail refused to accept him. *Id.* at 175. Officer A. drove the Petitioner to Reynolds Hospital in Glen Dale. *Id.*

While in the hospital, the Petitioner was loud, profane, and uncooperative. *Id.* at 176. *See also id.* at 209 (Petitioner admits that at the hospital he was “loud, vulgar, and combative” to Officer A). Officer A. had to handcuff the Petitioner at the doctor’s insistence. *Id.* at 176. The doctor at Reynolds determined nothing was wrong with the Petitioner and released him to Officer A.’s custody. *Id.* at 177-78. As he did in the hospital, the Petitioner insisted numerous times he was not going to jail, using profanity and yelling. *Id.* at 178.

While the Petitioner was in Officer A.’s police car, the Petitioner leaned up onto the car’s partition and yelled to Officer A. that he knew where Officer A. lived and that he (the Petitioner) was going to “fu\*k (Officer A.’s) daughter.” *Id.* at 179. Officer A. testified that the Petitioner repeated his threat. *Id.* at 180. The Petitioner testified that he (the Petitioner) said, “[y]eah, after I get out of jail, I’ll be fu\*king your wife, and I’ll fu\*k your daughters.” *Id.* at 201. Officer A. did not know

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<sup>2</sup>Because this case involves threats against Officer A.’s family, the State will not name the Officer.

if the Petitioner did know where he lived or whether Officer A. actually had daughters. *Id.* at 180, 184.

At the time of trial, Officer A. had two (step)daughters, *id.* at 184, one nine-year-old and one twelve-year-old. *Id.* at 180. The Petitioner was 48. *Id.* at 197. Officer A. testified that after the Petitioner's threat he (Officer A.) was always armed (where as before he was only occasionally armed), that he talked to his wife and children so that no one of them go outside alone, that the door to his house is always locked both day and night, and that his children are to use extreme caution when going outside. *Id.* at 181.

The Petitioner was indicted for threatening to commit a terrorist act under West Virginia Code § 61-6-24, App. at 29, and a petit jury returned a guilty verdict of threatening to commit a terrorist act. *Id.* at 247-48.

### III.

#### SUMMARY OF ARGUMENT

Because West Virginia Code § 61-6-24 does not prohibit constitutionally protected speech, the Petitioner must prove the statute as applied to him is unconstitutional. He has failed to do. The Petitioner's words and conduct here show that he threatened Officer A.'s daughters with sexual assault. Further, the Petitioner misunderstands the statute. The Petitioner believes that the threat must be likely to be carried out. This is wrong. All that matters is that the nature of the threat be one that if carried out would likely result in serious bodily injury. A forty-eight-year-old man sexually assaulting a nine or twelve-year-old girl cannot help but create the likelihood of serious bodily injury to the victims. The Petitioner has failed to carry his burden to show that the statute is unconstitutional and the State proved that the Petitioner violated the statute. As such, the circuit court should be affirmed.

IV.

ORAL ARGUMENT

Oral argument is unnecessary.

V.

ARGUMENT

- A. **The Circuit Court of Marshal County, West Virginia, did not err in denying the Petitioner’s motion to dismiss as West Virginia Code § 61-6-24(b) is constitutional.**

“The constitutionality of a statute is a question of law which this Court reviews *de novo*.” Syl. Pt. 1, *State v. Rutherford*, 223 W. Va. 1, 672 S.E.2d 137 (2008). This Court “proceed[s] with caution in examining constitutional challenges to legislative enactments because a statute is presumed to be constitutional.” *State v. James*, 227 W. Va. 407, 413, 710 S.E.2d 98, 104 (2011). A party challenging the constitutionality of a statute bears a weighty burden as this Court has “repeatedly and unequivocally stated that [this Court] will not find a statute to be unconstitutional unless its constitutional defect appears beyond any reasonable doubt.” *State v. Legg*, 207 W. Va. 686, 693–94, 536 S.E.2d 110, 117–18 (2000).

The statute under which the Petitioner was convicted provides, in pertinent part, “[a]ny person who knowingly and willfully threatens to commit a terrorist act, with or without the intent to commit the act, is guilty of a felony . . . .” W. Va. Code § 61-6-24(b). The statute further defines a terrorist act as an act:

- (A) Likely to result in serious bodily injury or damage to property or the environment; and,
- (B) Intended to:

- (i) Intimidate or coerce the civilian population;
- (ii) Influence the policy of a branch or level of government by intimidation or coercion;
- (iii) Affect the conduct of a branch or level of government by intimidation or coercion; or
- (iv) Retaliate against a branch or level of government for a policy or conduct of the government.

*Id.* § 61-6-24(a)(3).

The Petitioner claims that West Virginia Code 61-6-24(a)(3) is void for vagueness. Pet'r's Br. at 5. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "The void for vagueness doctrine is an aspect of the due process requirement that statutes set forth impermissible conduct with sufficient clarity that a person of ordinary intelligence knows what conduct is prohibited and the penalty if he transgresses these limitations." *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 518, 583 S.E.2d 800, 815 (2002) (*per curiam*). While the "[v]agueness doctrine is [not] an outgrowth . . . of the First Amendment," *United States v. Williams*, 553 U.S. 285, 304 (2008), whether a statute reaches First Amendment protected speech is important because the void for vagueness doctrine is applied more stringently in First Amendment cases. *See, e.g., Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (quoting *Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982)) ("We have said that when a statute 'interferes with the right of free speech or of association, a more stringent vagueness test should apply.'"); *Smith v. Goguen*, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine

demands a greater degree of specificity than in other contexts.”). Furthermore, how void for vagueness challenges are made also are impacted by whether the statute at issue impacts First Amendment protected speech. “Statutes involving a criminal penalty, which govern potential First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by interpreting their meaning from the face of the statute[.]” Syl. Pt. 2, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974), while “[c]riminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied.” *Id.* Syl. Pt. 2. West Virginia Code § 61-6-24 does not punish protected speech.

While the Petitioner contends that “[w]ords are speech, and the First Amendment . . . provides that ‘Congress shall make no law abridging freedom of speech[.]’” Pet’r’s Br. at 6<sup>3</sup>, “not all words[.]” 16A *Am. Jur.2d Constitutional Law* § 498 and “[n]ot all speech . . . receives First Amendment protection.” *Doe v. Boland*, 698 F.3d 877, 883 (6th Cir. 2012) (Sutton, J.). For example, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, and fraud, all fall outside of the protection of the First Amendment. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012). And, pertinently here, threats are not within the protection of the First Amendment. *Id.*

“‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual . . . [even if] not actually intend[ing] to carry out the threat.” *Virginia v. Black*, 538 U.S. 343, 359 (2003).

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<sup>3</sup>The First Amendment was made applicable to the States through the Fourteenth Amendment’s Due Process Clause in *Gitlow v. New York*, 268 U.S. 652, 666 (1925). *Accord City of Ladue v. Gilleo*, 512 U.S. 43, 45 n.1 (1994).

Here, West Virginia Code § 61-6-24 penalizes conduct (or the threat of conduct) “[l]ikely to result in serious bodily injury or damage to property or the environment.” Section 24 captures, therefore, only true threats (i.e., violence is required to do serious bodily injury or damage to property or the environment). Additionally, under Section 24, the threats must be aimed at accomplishing an illegal result—intimidation or retaliation with the goal of circumventing the will of the people or punishing government for carrying that will out. And such conduct is not protected by the First Amendment. *Cf. State v. Berrill*, 196 W. Va. 578, 584, 474 S.E.2d 508, 514 (1996) (quoting *Barker v. Hardway*, 283 F. Supp. 228, 238-39 (S.D. W. Va.1968) (quoting *Baines v. City of Danville*, 337 F.2d 579, 586 (4th Cir.1964)), *aff’d*, 399 F.2d 638 (4th Cir.1968)) (“First Amendment rights “are not a license to trample upon the rights of others. They must be exercised responsibly and without depriving others of their rights, the enjoyment of which is equally precious”). *See also United States v. McCray*, 914 F.2d 1497 (9th Cir. 1990) (Table) (text available at 1990 WL 138571, at \*6) (“ . . . defendants were charged with threatening and intimidating government officials . . . . Such speech and conduct is not protected by the First Amendment.”). Consequently, West Virginia Code § 61-6-24 must be “tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied.” Syl. Pt. 2, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974).

The Petitioner, however, does not make such an argument. Rather, he simply asserts that because his counsel and the State’s counsel disagreed on what the term “likely to result in serious bodily injury” means, the phrase is vague. Pet’r’s Br. at 6. This is wrong. The mere fact that the State and the Petitioner’s counsel disagree does not mean the statute is ambiguous or vague. *See, e.g., In re Resseger’s Estate*, 152 W. Va. 216, 220, 161 S.E.2d 257, 260 (1968) (“That the parties disagree as to the meaning or the applicability of each provision does not of itself render either

provision ambiguous or of doubtful, uncertain or obscure meaning.”); *State v. Mattioli*, 556 A.2d 584, 587 (Conn.1989) (“Honest disagreement about the interpretation of a statutory provision does not, however, make the statute ambiguous or vague”); *Planned Parenthood v. Arizona*, 718 F.2d 938, 948 (9th Cir. 1983) (“Substantial numbers of lawsuits arise out of disagreements over the precise meaning of a statute. The potential for such differences of opinion cannot be enough to render a statute void for vagueness.”); *Southwestern Bell Telephone Co. v. City of El Paso*, 168 F. Supp.2d 640, 645 (W.D. Tex. 2001) (“While the parties argue over the interpretation of the word ‘public’ in the statute, this disagreement does not render it void for vagueness.”). The Petitioner’s claim that West Virginia Code § 61-6-24 is facially void for vagueness must fail and the circuit court should be affirmed.

“It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.” *United States v. Mazurie*, 419 U.S. 544, 550 (1975). “One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.” *Parker v. Levy*, 417 U.S. 733, 756 (1974). *See also State ex rel. Appleby v. Recht*, 213 W. Va. 503, 519, 583 S.E.2d 800, 816 (2002) (*per curiam*) (“Because Mr. Appleby has three prior convictions for the felony crimes of DUI, third offense, and one conviction for the felony of unlawful wounding, he clearly falls within the parameters of West Virginia Code § 61-11-18(c) and lacks standing to raise a facial challenge to the statute.”). Because West Virginia Code § 61-4-26 does not infringe on protected speech, the Petitioner’s “vagueness claim must be evaluated as the statute is applied to the facts of this case[,]” *Chapman v. United States*, 500 U.S. 453, 467 (1991), that is, on “an as-applied basis.” *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988).

The Petitioner's hurdle in such regard, indeed, one he cannot overcome, is that West Virginia Code §61-6-24(b) contains two mental states (or *mens rea* or scienter requirements, these terms generally being identical and used to describe the necessity of blameworthiness of the defendant's acts before criminal liability is imposed)—that of knowledge and willfulness. *State v. Young*, 185 W. Va. 327, 339, 406 S.E.2d 758, 770 (1991) (describing “knowingly” as a *mens rea*); *State v. Nicholas*, 182 W. Va. 199, 202, 387 S.E.2d 104, 107 (1989) (*per curiam*) (citation omitted) (describing “knowingly” as a mental state); *Dixon v. United States*, 548 U.S. 1, 7 (2006) (observing that “knowingly” and or “willfully” are mental states). The Supreme Court “has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.” *Colautti v. Franklin*, 439 U.S. 379, 395 (1979), *limited on other grounds by Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989). The Court explained nearly sixty years ago that “where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law.” *Screws v. United States*, 325 U.S. 91, 102 (1945) (plurality). This is so because to meet the statute's *mens rea* requirement, a defendant must consciously behave in a way the law prohibits, “and such conduct is a fitting object of criminal punishment.” *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978).

**B. The State adduced sufficient evidence for the jury to have concluded the State proved all the elements of the crime.**

West Virginia follows the *Jackson v. Virginia*, 443 U.S. 307 (1979) standard in reviewing sufficiency of the evidence claims. *State v. LaRock*, 196 W. Va. 294, 303, 470 S.E.2d 613, 622 (1996) (“In *State v. Guthrie*, 194 W. Va. 657, 667–70, 461 S.E.2d 163, 173–76 (1995), we recently

revised our standard of review when a criminal defendant challenges the sufficiency of the evidence in support of a jury verdict. We adopted, both generally and in cases with circumstantial evidence, the standard set forth by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979).” Under *Jackson*, a court asks “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” 443 U.S. at 318–19. “A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden.” Syl. Pt. 3, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

Syl. Pt. 3, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

*Jackson* does not simply supplant the jury with the reviewing court. Sufficiency of the evidence review does not give a court the power to usurp or supplant the trial jury and sit as a second jury under the guise of discharging an appellate function. See *State v. Stowers*, 66 S.E. 323, 326 (W. Va. 1909) (“We are not jurors . . .”). Therefore, *Jackson* does not ask if the jury made the right decision, it only asks if it made a rational one. *Herrera v. Collins*, 506 U.S. 390, 402 (1993).

The Petitioner first contends “[a]ccording to the evidence actually presented, the Petitioner said to Officer A. ‘I know where you live and I am going to fu\*k your daughter.’ . . . He allegedly said it twice, and provided no further elaboration.” Pet’r’s Br. at 7 (emphasis deleted) (footnote

deleted).<sup>4</sup> In fact, the testimony was not simply that the Petitioner “said” to Officer A. that “I am going to fu\*k your daughter.” The Petitioner, who was under arrest for a domestic violence charge and in the backseat of a police car, yelled at Officer A. that he knew where Officer A. resided, and that the Petitioner was going to “fu\*k (Officer A.’s) daughter.” *Id.* at 179. Officer A. testified that the Petitioner repeated his threat. *Id.* at 180. The Petitioner *himself* testified that he said to Officer A., “[y]eah, after I get out of jail, I’ll be fu\*king your wife, and I’ll fu\*k your daughters.” *Id.* at 201.

The Petitioner contends that his statement was nothing more than him saying “‘I know where you live and I am going to engage in coitus [have sex with] your daughter;’ or ‘I know where you live and I am going to deal with your daughter unfairly or harshly[,]’” Pet’r’s Br. at 7, neither of which carried with it a threat of sexual assault or rape. *Id.*

Here, it was up to the jury to determine if the Petitioner’s statements and conduct was a threat

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<sup>4</sup>The Petitioner tries to make some point about Officer A. having step-daughters, not, apparently from the Petitioner’s perspective, “real” daughters. Pet’rs Br. at 7 n.3. The care and concern that a parent shows to an offspring is not necessarily generated by sanguinary bonds; a step-father can love and care for his step-children in no different a manner than a biological parent or adoptive parent. “A stepparent may be as devoted and concerned about the welfare of a stepchild as a natural parent would be.” *Spells v. Spells*, 172, 378 A.2d 879, 881 (Pa. Super. Ct. 1977). Indeed, in his testimony, Officer A. referred to the nine and twelve-year-old with whom he resides (along with their mother) as his “daughters.” App. at 180. To the extent that the Indictment referred to daughters and Officer A. had stepdaughters, the Petitioner is not prejudiced by this variance as it did not mislead him in his defense, or subject him to any added burden of proof, or otherwise prejudice him. Therefore, its is a variance and he is not entitled to relief. *See* Syl. Pt. 3, *State v. Johnson*, 197 W. Va. 575, 476 S.E.2d 522 (1996). Finally, to the Petitioner’s argument that “a threat to a fictional being violates section 61-6-24 of the West Virginia [Code], serves to further illuminate the danger of the State’s position as to what the phrase ‘likely result in serious bodily harm’ means[,]” Pet’r’s Br. at 11 n.10, the Petitioner here cannot argue about a case that does not exist. He is limited to an as applied challenge here. “The defendant has the burden of establishing that the law is vague as applied to the facts of his case, rather than a hypothetical situation.” *United States v. Tichenor*, 683 F.3d 358, 366 (7th Cir. 2012). “Therefore, this Court is only concerned with whether defendants’ specific conduct was fairly within the constitutional scope of the statute.” *People v. Lockett*, 814 N.W.2d 295, 301 (Mich. Ct. App. 2012).

of sexual assault upon Officer A.'s daughters. In making this determination, the jurors were instructed that they were allowed to "make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and the evidence of this case." App. at 59. "Common knowledge and common sense do not depart from a man upon his entering a jury box." *Smith v. Slack*, 26 S.E.2d 387, 389 (W. Va. 1943). "Jurors are not expected in their deliberations to lay aside matters of common knowledge or their own observation and experience to the affairs of life, but are expected to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct." 89 C.J.S. *Trial* § 956. In other words, in determining whether the Petitioner was threatening sexual assault or not, it should be remembered that "juries are not stupid." *Miller v. Monongahela Power Co.*, 184 W. Va. 663, 669, 403 S.E.2d 406, 412 (1991), *overruled on other grounds by Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999).

While the Petitioner cites to [www.merriam-webster.co/dictionary/fu\\*k](http://www.merriam-webster.co/dictionary/fu*k) for a definition of fu\*k, he neglects to include that this authority characterizes the word fu\*k as obscene. But even if the word fu\*k is innocent in the abstract, "[i]nnocent words can, no doubt, be given evil meanings by the way they are said, the gestures and facial expressions that accompany their utterance, and indeed the entire setting surrounding the speaking." *Commonwealth v. Davis*, 305 A.2d 715, 722 (Pa. 1973) (Pomeroy, J., concurring). Indeed, the Petitioner cites to *Lofgren v. Commonwealth*, 684 S.E.2d 223, 226 (Va. Ct. App. 2009), but even that case observed<sup>5</sup> "the word[] 'fuc\*ing' . . . can have [a] sexual connotation[] when utilized in certain contexts." *Cf. People v. O'Leary*, 583 N.Y.S.2d 881, 890- 91 (N.Y. City Ct. 1992) ("This Court believes therefore that the interpretation

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<sup>5</sup>Whether or not *Lofgren* reached the right result is a matter beyond this brief.

that must be applied to the statute of Disorderly Conduct is not merely the words used but the context in which they are said.” “[A] ‘true threat’ is a statement that is intended to convey, and does convey to a reasonable listener, a serious expression of an intent to inflict harm. In making this determination, the totality of the circumstances at the time of the statement must be considered, including what was said, how it was said, by whom and to whom, and in what context.” *In re Douglas D.*, 626 N.W.2d 725, 747 (Wis. 2001) (Bablitch, J., concurring).

Here, the Petitioner was yelling at Officer A. (after Officer A. had arrested him for domestic violence) that he was not going back to jail, the Petitioner was using other profanity and was agitated. The Petitioner leaned up to the partition in the police car and yelled that he was going to “fu\*k my daughter.” App. at 179. Further, the Petitioner testified that he told Officer A. in the police car that “[y]eah, after I get out of jail, I’ll be fu\*king your wife, and I’ll fu\*k your daughters.” *Id.* at 201. All of which was coupled with the Petitioner yelling to Officer A. “I know where you live. . . .” App. 84 at n.7.

It is a perfectly reasonable inference for the jury to draw that Petitioner, agitated and yelling that he was not going to jail, was not informing Officer A. of the Petitioner’s anticipated intimate consensual tryst with the Petitioner’s daughter, a girl (or really two girls) he had never met before. The jury in this case could reasonably conclude the Petitioner was threatening a sexual assault on Officer A.’s daughter(s). *See, e.g., People v. Garza*, No. G045499, 2012 WL 3194938, at \*4 (Cal. Ct. App. August 8, 2012) (“Orellana immediately closed the inner front door after defendant said ‘I want to fuck you,’ because she feared he would rape her. She was scared to leave the apartment to take out the trash.”); *Powell v. Collins*, 332 F.3d 376, 394 (6th Cir. 2003) (“In addition, after being apprehended, Petitioner admitted to police that he had taken Trina because he intended to ‘fuck’ her,

thereby admitting to the predicate felonies of kidnaping and rape.”); *Yawili v. California*, No. 2:10-cv-2867-TJB, 2012 WL 1552424, at \*4 (E.D. Cal. Apr. 30, 2012) (“‘I’m going to fuck your girl’ was a threat . . . [to the victim’s] girlfriend that he would commit a sexual assault on her”).

The Petitioner quotes West Virginia Code § 61-6-24(b) which provides, “[a]ny person who knowingly and willfully threatens to commit a terrorist act, with or without the intent to commit the act, is guilty of a felony . . . .” Pet’r’s Br. at 8. The Petitioner then focuses on West Virginia Code § 61-6-24(3)(A), which defines a terrorist act as an act “[l]ikely to result in serious bodily injury or damage to property or the environment[.]” He then quotes from *Webster’s Dictionary* that “likely” means “‘having a high probability of occurring or being true[.]’” Pet’r’s Br. at 8. The Petitioner ties all these threads into the following statement, “the threat of an act, which must likely result in serious bodily injury, must have a high probability of occurring or being true when uttered.” Pet’r’s Br. at 8. This is incorrect.

Collapsed together, subsections (a)(3)(A) and (b) read “any person who knowingly and willfully threatens to commit an act likely to result in serious bodily injury or damage to property or the environment, with or without the intent to commit the act, is guilty of a felony.” The Petitioner misreads where “likely” fits into the statutory scheme. It is not the likeliness the defendant will carry out his threat that is crucial under the statute; rather, it is the likeliness of the consequences of the act that is important. Indeed, the Petitioner’s reading of the statute simply reads out the language “with or without the intent to commit the act.” This reading is faulty as it is “[a] cardinal rule of statutory construction . . . that significance and effect must, if possible, be given to every section, clause, word or part of the statute.” Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.

Va. 203, 530 S.E.2d 676 (1999). All that matters is the nature of what is threatened—if the threat would be carried out, it would “[l]ikely . . . result in serious bodily injury or damage to property or the environment[.]” “It is not necessary that the speaker actually intended to carry out the threat or that the speaker had the actual ability to carry out the threat; it is only necessary that the speaker intended to convey a serious expression of an intent to inflict harm.” *In re Douglas D.*, 626 N.W.2d 725, 747 (Wis. 2001) (Bablitch, J., concurring). And here that standard is met.

The Petitioner threatened to have carnal relations with Officer A.’s two daughters (or stepdaughters if the Petitioner prefers). App. at 179, 201. These stepdaughters were nine and twelve at the time of trial, *id.* at 180, and the Petitioner was 48. *Id.* at 197. Had the Petitioner “fu\*ked” the nine-year-old (or had sex or coitus in the Petitioner’s view) , the Petitioner would have (contrary to the Petitioner’s view point, Pet’r’s Br. at 7) been guilty of first degree sexual assault. W. Va. Code § 61-8B-3(a)(2) (“A person is guilty of sexual assault in the first degree when . . . The person, being fourteen-years-old or more, engages in sexual intercourse or sexual intrusion with another person who is younger than twelve-years-old and is not married to that person.”). Had the Petitioner fu\*ked the twelve-year-old, he would be guilty of third-degree sexual assault. W. Va. Code § 61-8B-5(a)(2) (“A person is guilty of sexual assault in the third degree when . . . The person, being sixteen-years-old or more, engages in sexual intercourse or sexual intrusion with another person who is less than sixteen-years-old and who is at least four years younger than the defendant and is not married to the defendant.”).<sup>6</sup> Child sexual assault carries with it the likelihood of serious bodily injury.

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<sup>6</sup>Third Degree Sexual Assault is also considered statutory rape. *State v. Roy*, 194 W. Va. 276, 280 n.1, 460 S.E.2d 277, 281 n.1 (1995).

Prepubescent girls are not fully developed physically and sex with a child having underdeveloped physiology can lead to serious injuries. “By its very nature, intercourse between an adult and a prepubescent child involves the application of force, violence, and coercion, and presents a significant risk of serious physical injury to the child.” *United States v. Rondon-Herrera*, 666 F. Supp.2d 468, 474 (E.D. Pa. 2009). “[C]hildren covered by statutory rape laws are those most susceptible to physical injury. It is clear . . . that statutory rape presents serious risks of physical harm even to older teens[.]” Serena M. Holder, Note, *Resolving the Post-Begay Maelstrom: Statutory Rape as a Violent Felony under the Armed Career Criminal Act*, 60 Clev. St. L. Rev. 507, 526 (2012). “[I]ndecent sexual contact crimes perpetrated by adults against children categorically present a serious potential risk of physical injury.” *United States v. Cadieux*, 500 F.3d 37, 45 (1st Cir. 2007). In summary, “statutory rape often causes extensive physical harm to its victim[.]” Robert E. Cleary, Jr., *Georgia Criminal Offenses and Defenses* § 30 (2012), and the jury here could have concluded that involuntary sex between a forty-eight-year-old man and a nine or twelve-year-old girl constituted a likelihood of serious bodily injury. See, e.g., *People v. Clair*, 129 Cal. Rptr.3d 35, 40 (Ct. App. 2011) (“Given Doe’s ‘tender age and fragile physical development’ the jury could have reasonably inferred that the manner of the abuse created a risk of serious injury to Doe’s vagina and urogenital tract”); Thomas H. Peyton, Note, *State v. Kennedy: Death Penalty for Non-Homicidal Aggravated Rape of a Child*, 9 Loy. J. Pub. Int. L. 87, 87 (2007) (“Childhood rape has not only been found to cause serious psychological effects to children, but serious physical damage is produced as well, including weight loss, vomiting, perineal tears, and even the possibility of early onset of cervical cancer.”).

Last, the jury could have found that the purpose of the threat was to intimidate Officer A. into disregarding his duty of ensuring that the Petitioner was incarcerated at the Northern Regional Jail. Here, the Petitioner had stated that he was fine while being booked, App. at 174, but once taken to Northern Regional Jail, complained of chest pains. *Id.* at 175. The Petitioner became loud and profane when taken to the hospital and continued this behavior in the hospital. *Id.* at 209. The Petitioner's conduct became so disruptive that a doctor asked that the Petitioner be handcuffed to the bed. *Id.* The Petitioner spent two hours at the hospital where the Petitioner continued to say he was not going to jail. *Id.* At the hospital the Petitioner admitted to being "loud, vulgar, and combative" to Officer A. *Id.* at 209. Once the hospital determined that nothing was wrong with the Petitioner, *id.* at 178, Officer A. drove the Petitioner to Northern Regional Jail. *Id.* The Petitioner was agitated and profane during that trip. *Id.* It was during this trip that the Petitioner leaned up to the partition in the police car and yelled at Officer A. that the Petitioner knew where Officer A. lived and was going to fu\*k Officer A's daughter. *Id.* at 179. The Petitioner himself admitted telling Officer A. that "[y]eah, after I get out of jail, I'll be fu\*king your wife, and I'll fu\*k your daughters." *Id.* at 201.

The Petitioner's statements to Officer A., coupled with his expressed desire not to go to jail, was sufficient for a reasonable jury to conclude that the Petitioner's threat to Officer A.'s (step)daughters was meant to intimidate Officer A. into not taking the Petitioner to jail.

VI.

CONCLUSION

For the forgoing reasons, the circuit court should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Respondent,*

By counsel,

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**CERTIFICATE OF SERVICE**

I, Scott E. Johnson, Senior Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Respondent's Brief* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 21<sup>st</sup> day of March, 2013, addressed as follows:

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