No. 21304 -- State of West Virginia ex rel. O.C. Spaulding, Prosecuting Attorney for Putnam County v. Honorable Clarence L. Watt, Judge of the Circuit Court of Putnam County, et al.

Neely, J., dissenting:

Mr. McClelland may well be a mean and nasty fellow who is guilty of the distasteful crime of statutory rape of his stepdaughter and his stepson. As I have pointed out before, however, when courts decide "easy" cases such as this one, they make bad law. See State v. Delaney, ___ W.Va. ___, 417 S.E.2d 903 (1992)(Neely, J., dissenting); Charlton v. Charlton, 186 W.Va. 670, 413 S.E.2d 911 (1991) (Neely, J., dissenting). In its holding today, the majority yields to the mass hysteria surrounding today's crime of fashion: sexual abuse of one's own children.

It is a deplorable fact that transgressions which used to be considered immoral are now shrugged off as not that important: drug use, promiscuity, marital infidelity, abandoning one's family, divorce for light or transient causes, and bearing children out of wedlock. We are no longer "judgmental" about these moral lapses; we merely provide "treatment" whenever the social services lobby can get a transgression covered by Medicaid. Sexually abusing one's own children is truly the only moral offense left that shocks us.

It is true that in some cases, perhaps even this one, parents or step-parents do indeed molest their children. However, the hysteria surrounding this crime has grown beyond imagination. From the Elizabeth Morgan - Eric Foretich case in the Washington, D.C., area[1] to the celebrated accusations of Mia Farrow against Woody Allen surrounding their seven-year-old child Dylan, to the frequency of

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[1]In the Morgan-Foretich dispute, Ms. Morgan accused Mr. Foretich of sexually abusing their child. After a trial in which Foretich was acquitted of such charges, Ms. Morgan sent her parents into hiding with the child. Ultimately, they landed in Christchurch, New Zealand, where they remained undiscovered until the grandparents attempted to register the child for school. Ms. Morgan was cited for contempt of court and jailed until she would divulge the whereabouts of the child. She refused and stayed in prison for approximately two years. Public sentiment was on Ms. Morgan's side, and Congress passed a law limiting the time one could be held for civil contempt to eighteen months. Accordingly, Ms. Morgan was released from jail. The child was located by private detectives hired by the father.

Despite the fact that a criminal court acquitted Mr. Foretich of all charges; the fact that the domestic relations court awarded Mr. Foretich visitation rights; and the fact that the source of the charges was Elizabeth Morgan's father's dislike of Mr. Foretich, Mr. Foretich has sustained permanent damage to his reputation. A movie is currently being produced glorifying Ms. Morgan's illegal behavior which will serve only further to degrade the reputation of an apparently innocent man.

such charges in divorce actions today,[2] the mere accusation of sexual abuse instantaneously produces a stain that mars the reputation of the accused whether, indeed, the accused even committed the offense. Thus, like witchcraft of yesteryear, today's sexual abuse is a showstopper. There is no way to disprove the accusation of sexual abuse to the complete satisfaction of the public.

Indeed, like witchcraft, child sexual abuse charges can seldom be proven conclusively one way or the other. There is certainly no way to disprove such an accusation unless the accused was absent beyond the seas during the entire relevant period. However, proving such an accusation is equally difficult. Traditionally, courts have developed the rules of evidence and presumptions of innocence in order to protect us all from unjust accusation and unfounded convictions. However, we have also had a disturbing willingness to set aside these rules when we "know" what really is going on. In Salem, Massachusetts, in 1695, they relaxed the burden of proof for witchcraft to mere tales told by children about how they dreamed someone was trying to steal

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[2]Today, it is de rigueur in a hostile child custody battle to level this type of sexual abuse charge. Indeed, it would almost be attorney malpractice not to level such a charge judging by the frequency and success of such charges, whether proven.

their souls.[3] Even more disturbing was the way the U.S. Supreme Court gave in to mass hysteria during World War II and ratified the interment of Japanese Americans solely because of their ancestry in Korematsu v. United States, 323 U.S. 214 (1944). Such cases do little to inspire confidence in the rule of law.

In yielding to the mass hysteria surrounding the charges of sexual abuse of children, we have lowered the standards of proof in order to obtain convictions at the expense of justice. For example, in State v. Delaney, ___ W.Va. ___, 417 S.E.2d 903 (1992), the majority required the normal standard of proof, expert qualifications of the examining and treating physician, and full and fair cross-examination of witnesses, in order to prove physical injuries. However the "expert" psychological testimony (the damning evidence in the case where the "expert" testified that the assaults actually occurred) was not given the same level of scrutiny:

> On the other hand, the "expert psychological" testimony was provided by Ms. Pamela Rockwell, a sexual

[3]The unbeliever need only read Servants of Satan: The Age of the Witch Hunts by Joseph Klaits, Indiana University Press (1985), or any other historical account of the Salem witch trials (or an accurate literary adaptation, Arthur Miller's The Crucible) for a description of how hundreds of innocent people were put to death on the basis of three children's testimony, which was given because the children had to cover up staying out late.

> assault counselor with a bachelor's degree. Ms. Rockwell testified from her meetings with the victims that their behavior was consistent with having been sexually assaulted. However, she did not inquire into the children's backgrounds concerning other possible causes for their behavior; she did not talk to their teachers; and she did not talk to anyone who knew them before the assaults. She also testified that in her line of work she is basically an advocate for victims. This is ridiculous! [Emphasis original]

State v. Delaney, ___ W.Va. ___, ___, 417 S.E.2d 903, 909 (1992) (Neely, J., dissenting). Yet the majority commanded that such evidence was indeed admissible, and now such unreliable evidence has become the fuel that drives our system toward convictions and away from impartial adjudication according to ancient, time-tested criteria for truth-finding.[4]

The majority, with today's decision, has perverted a statute grotesquely simply to add additional punishment to a crime of fashion. W.Va. Code, 62-1C-1(b) [1983] is designed to give judges discretion

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[4]For the record, after reviewing an additional dozen rape and rape trauma cases since Delaney, supra in text, was decided, I still adamantly reaffirm my conclusion that "the so-called rape-trauma experts who testify in criminal cases in this State could not be less credible if they wore bones in their noses and prognosticated by throwing colored stones." Delaney, ___ W.Va. ___, ___, 417 S.E.2d 903, 909 note 2 (Neely, J., dissenting).

about bail pending a post-conviction appeal. However, the legislature opted to withdraw a trial court's authority to grant post-conviction bail in a limited number of circumstances: If the crime is punishable by life imprisonment or was committed with a deadly weapon, or by "the use of violence to a person." W.Va. Code, 62-1C-1(b) [1983]. Even in those cases, this Court is given the power to allow post-conviction bail, if it deems such bail proper. Clearly, the legislature intended to tighten bail requirements only in a narrow set of cases.

What was the rationale for selecting these cases? Obviously, the purpose of the statute was to keep exceedingly dangerous people off the streets. W.Va. Code, 62-1C-1(b) was not intended to be punitive, but rather prophylactic. The legislature made a judgment that people who are extremely dangerous to society at large should not be given post-conviction bail because of the high-likelihood that they will attack another random, innocent victim. Mr. McClelland 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.[5]

[5] The majority places undue reliance on the language of a California statute that explicitly includes statutory rape in its

This post-conviction bail statute must be construed narrowly against the state, for bail should not be readily foreclosed. If we hold that "use of violence" under W.Va. Code, 62-1C-1(b) [1983] does not cover a conviction of statutory rape, that would not hand Mr. McClelland a get-out-of-jail-free card, but merely would allow the Circuit Court to use his discretion to determine the likelihood of flight and the likelihood of a repeat offense. The legislature has pre-defined exceedingly dangerous cases, but any enlargement of that category must come from legislative deliberation, not from mob psychology.

Just as in Korematsu, the majority opinion today is a bending of judicial integrity to the winds of popular opinion. And just like Korematsu, future commentators will look back and wonder how a court could ever allow itself to stray so far from its own principles. Accordingly, I dissent.

(..continued)

definition of "violent felony" for sentencing purposes. From there, for some unfathomable reason, the majority takes the California legislature's explicit language in a sentencing statute, and attempts to apply it to a post-conviction bail statute passed by the West Virginia Legislature. On second thought, there is a reason for the majority to torture the law in this manner: there is not one shred of legitimate support for the majority's untenable position.