

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

CHRISTOPHER MILLS,

Petitioner.

Case No.: 18-1132
Circuit Court No.: 18-F-82
Mingo County, West Virginia

PETITIONER'S REPLY

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REPLY ARGUMENT

The statutory distinction between aggravated and simple felon in possession of a firearm is whether the prior felony was “a crime of violence.”¹ Neither the statute or case law defines this phrase or otherwise provides objective criteria to inform felons whether owning a firearm will subject them to the felony or misdemeanor version of the offense.²

Petitioner appeals because, in the absence of objective criteria, the circuit court had to both define the element and then judge whether Kentucky’s wanton endangerment statute—the prior felony charged by the State—met its subjective definition.³ Because this analysis necessarily occurs after the unlawful possession,⁴ Petitioner had no advance notice whether his conduct would subject him to a short jail sentence or a long prison term, in violation of the Due Process Clause’s void for vagueness doctrine.⁵

The response does not address this temporal problem. Instead, it argues in conclusory terms that Kentucky’s wanton endangerment offense is “clearly a crime of violence,”⁶ but never explains why. The response asserts that the definition is obvious based on the plain language of the statute, but the response and its authorities never articulate what that definition actually is.⁷ To satisfy the Due Process Clause, “crime of violence” must have a sufficiently concrete definition for people of ordinary intelligence to know what conduct will trigger it.⁸ If the response cannot define the term, Petitioner and others in his situation are at an impossible disadvantage.

¹ W. Va. Code § 61-7-7.

² *See id.*; *see also* Petr.’s Br. at n. 25.

³ *See* A.R. 27, 54.

⁴ *Connally v. General Constr. Co.*, 269 U.S. 385, 392 (1926) (“[The meaning of an element] cannot be left to conjecture, or be supplied by either the court or jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain[.]”).

⁵ *Connally*, 269 U.S. at 393; *see also* U.S. Const. Amend. XIV.

⁶ Resp.’s Br. 9.

⁷ Resp.’s Br. at 5–10; *see, e.g., State v. Riggleman*, 238 W. Va. 720, 724, 798 S.E.2d 846, 850 (2017) (“This Court found that the meaning of ‘violence,’ as set forth in West Virginia Code § 27-6A-3, was ambiguous due to the absence of a statutory definition.”) (citing *State v. George K.*, 233 W. Va. 698, 706, 760 S.E.2d 512, 520 (2014)).

⁸ *Johnson v. U.S.*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983)).

Nor does the response indicate how courts should apply its obvious yet ineffable definition. Here, the court considered whether a generic, prototypical wanton endangerment offense was violent. It did not analyze the prior conviction's facts (Petitioner said it was for reckless driving),⁹ and it examined the statute only to imagine a typical occurrence (the State suggested a bank robber waving a gun).¹⁰ However, in *Johnson v. U.S.*, the Supreme Court of the United States declared this approach unconstitutionally vague.¹¹

The response seeks to distinguish *Johnson* by arguing differences in the statutory language—that West Virginia's "crime of violence against the person of another" is more specific than the federal "[felony] involve[ing] conduct that presents a serious potential risk of physical injury to another."¹² This assertion alone is dubious, but it also is beside the point. *Johnson* ruled the language void because it was impossible to quantify either the degree of risk the legislature meant to target or the risk posed by a subjective, generic crime imagined by the sentencing court.¹³ The statute's wording was less important than the trial court's after-the-fact guessing at what the legislature meant.¹⁴

Here, the circuit court conducted this same unconstitutional analysis, and the response, in seeking to preserve the outcome, does not defend the actual process that reached it. Just like its federal counterpart, this analysis involved so much indeterminacy that no one—not the lawyers and certainly not Petitioner—could know whether his prior conviction would subject him to a misdemeanor or a felony until after the judge ruled. As this cannot occur until after the unlawful possession, the enhancement violates the Due Process Clause of the Fourteenth Amendment.

⁹ A.R. 27; A.R. 4.

¹⁰ *Id.*; A.R. 25.

¹¹ *Johnson*, 135 S. Ct. at 2557, 2563.

¹² Resp.'s Br. at 4.

¹³ *Johnson*, 135 S. Ct. at 2557, 2563; *see also U.S. v. Davis*, 139 S. Ct. 2319, 2323 (2019).

¹⁴ *Id.*; *see also Davis*, 139 S. Ct. at 2326 ("What do *Johnson* and *Dimaya* have to say about the statute before us? Those decisions teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'").

CONCLUSION

Petitioner appeals because West Virginia's felon in possession statute does not define "crime of violence" to put people of ordinary intelligence on notice as to whether an unlawful possession will subject them to a misdemeanor or felony. The fact that, in fifteen pages, the response cannot state the definition either, is telling.

In the absence of any objective criteria, the circuit court had to both define the element and decide whether the prior felony met it. Because this necessarily occurs after the unlawful possession, it cannot provide advance notice and the crime fails the void for vagueness doctrine of the Due Process Clause.

Respectfully submitted,
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