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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 18-1132

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SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

CHRISTOPHER MILLS,

Petitioner.

RESPONSE BRIEF

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Assignments of Error	1
Statement of the Case	1
Summary of Argument	4
Statement Regarding Oral Argument	4
Argument	5
A. Standard of Review	5
B. When West Virginia Code §61-7-7 is given its plain meaning and construed according to its legislative intent, it does not violate Due Process principles	5
C. This Court has previously defined violent crimes in the context of other statutes, without finding said statutes unconstitutionally vague	9
D. The statute provides the requisite notice to satisfy Due Process	10
E. West Virginia Code §61-7-7 can be differentiated from both *Johnson v. U.S.* and *U.S. v. Davis*	12
Conclusion	15

TABLE OF AUTHORITIES

Case **Page**

Appalachian Power Co. v. State Tax Dep't of West Virginia,
195 W.Va. 573, 466 S.E.2d 424 (1995).....5, 7

Chrystal R.M. v. Charlie A.L.,
194 W.Va. 138, 459 S.E.2d 415 (1995).....5

Crockett v. Andrews,
153 W.Va. 714, 172 S.E.2d 384 (1970).....7

Dunlap v. State Compensation Director,
149 W.Va. 266, 140 S.E.2d 448 (1965).....7

Johnson v. U.S.,
576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015).....12, 13

Leggett v. EQT Prod. Co.,
239 W. Va. 264, 800 S.E.2d 850, 853, cert. denied, 138 S. Ct. 472, 199 L. Ed. 2d 358 (2017)....7

Perito v. Cty. of Brooke,
215 W. Va. 178, 183, 597 S.E.2d 311, 316 (2004).....8

Pond Creek Pocahontas Co. v. Alexander,
137 W.Va. 864, 74 S.E.2d 590 (1953).....7

Rohrbaugh v. State,
216 W. Va. 298, 607 S.E.2d 404 (2004).....5, 6, 8

Sale ex rel. Sale v. Goldman,
208 W. Va. 186, 539 S.E.2d 446 (2000).....8, 11

Smith v. State Workmen's Compensation Commissioner,
159 W.Va. 108, 219 S.E.2d 361 (1975).....8

State ex rel. Appalachian Power Co. v. Gainer,
149 W.Va. 740, 143 S.E.2d 351 (1965).....6

State ex rel. Appleby v. Recht,
213 W.Va. 503, 583 S.E.2d 800 (2002).....9, 10

State ex rel. City of Princeton v. Buckner,
180 W.Va. 457, 377 S.E.2d 139 (1988).....8

State ex rel. Myers v. Wood,
154 W.Va. 431, 175 S.E.2d 637 (1970) 11

State ex rel. Spaulding v. Watt,
188 W.Va. 124, 423 S.E.2d 217 (1992) 10

State v. Beck,
167 W.Va. 830, 286 S.E.2d 234 (1981) 9

State v. Bull,
204 W. Va. 255, 512 S.E.2d 177 (1998) 11

State v. Epperly,
135 W. Va. 877, 65 S.E.2d 488 (1951) 6

State v. Elder,
152 W.Va. 571, 165 S.E.2d 108 (1968) 7

State v. Flinn,
158 W.Va. 111, 208 S.E.2d 538 (1974) 11

State v. Gill,
187 W. Va. 136, 416 S.E.2d 253 (1992) 7

State v. Lane,
241 W.Va. 532, 826 S.E.2d 657 (2019) 9

State v. Norwood,
No. 17-0978, 2019 WL 2332195, at *8 (W. Va. May 30, 2019) 9

State v. Riggleman,
238 W.Va. 720, 798 S.E.2d 846 (2017) 10

U.S. v. Davis,
No. 18-431, 2019 WL 2570623 (U.S. June 24, 2019) 10, 12, 14, 15

United States v. National Dairy Products Corp.,
372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963) 11

Willis v. O'Brien,
151 W.Va. 628, 153 S.E.2d 178 (1967) 8

Statutes

18 U.S.C. § 924(c)(1)(A) 14

18 U.S.C. § 924(e)(2)(B) 12

Ky. Rev. Stat. Ann. § 508.060 ..... 6, 9

W. Va. Code § 61-7-7 ..... 5, 6, 7, 8, 9, 13

ASSIGNMENTS OF ERROR

Christopher Mills ("Petitioner"), by counsel, advances a single assignment of error: Does West Virginia Code §61-7-7 violate the Due Process Clause's void for vagueness doctrine by making the degree of Petitioner's guilt contingent upon a judicial determination that cannot be known prior to committing the offense?

I. STATEMENT OF THE CASE

Christopher Mills ("Petitioner") was found, pursuant to a traffic stop which occurred on June 12, 2018, to have a gun in his possession. A.R.7, 43. Petitioner has a long history of felony convictions, including one for Wanton Endangerment, First Degree in Lawrence County, Kentucky, on December 21, 2015. A.R.4, 8, 35. Based on his prior violent felony convictions, he was charged with being a person in possession of a firearm in violation of West Virginia Code § 61-7-7(b)(1). A.R.43.

Petitioner was indicted in Mingo County in the September 2018 term of court with violating West Virginia Code § 61-7-7(b)(1) and (d), based on his prior felony conviction of Wanton Endangerment First Degree in Lawrence County, Kentucky. A.R.43.

On July 24, 2018, Petitioner appeared for a bond reduction hearing. A.R.3. Corporal Ernie Williams testified that he was searching the Marrowbone area of Mingo County looking for Petitioner in relation to his possible connection to a missing person case. A.R.5. Corporal Williams ran the plates to a vehicle Petitioner was driving, and the plates came back as being issued to another vehicle, so he was pulled over. A.R.6. He was stopped with another man, Christopher Hannah, in the vehicle. A.R.6. Williams removed Petitioner from the vehicle and handcuffed him, at which time a "shots fired" call came across the radio. A.R.7. Based upon the statement of Mr. Hannah, it was determined that Petitioner was the person who had been shooting a gun in the area. A.R.7. Hannah gave the officers the location of where Petitioner had

thrown out the firearm, and it was located in that area. A.R.7. Further, Petitioner was found with six or seven rounds of ammunition for that firearm in his back pocket. A.R.7. Williams further testified that Petitioner has "several" felony offenses. A.R.8. The two felony convictions used to charge him with felony felon in possession were wanton endangerment and criminal mischief. A.R.8. The circuit judge clarified that there were four prior felony convictions in Kentucky. A.R.9. Petitioner's criminal record includes the following charges: disorderly conduct, criminal trespass, first degree robbery, identity theft, second degree escape, wanton endangerment, criminal mischief, receiving stolen property, brandishing, and fleeing from police. A.R.9. Pursuant to Kentucky law, Kentucky Revised Statutes Annotated §508.060, wanton endangerment is described as extreme indifference to the value of human life, manifesting extreme indifference under conditions which create substantial danger of death or serious bodily injury, which is a Class D felony in Kentucky. A.R.11. Petitioner's bond was set at $20,000 cash. A.R.12.

On September 27, 2018, Petitioner appeared for arraignment. A.R.13. The arraignment was a single count indictment on firearm possession. A.R.13. Petitioner pled not guilty. A.R.15. With regard to bond, Petitioner's counsel argued that Petitioner peacefully surrendered, had no failures to appear on his record, and had an ill mother, and, therefore, should have his bond reduced A.R.15-16. The State requested an increased bond of $50,000 based on his extensive criminal history and the penalty for felon in possession of a firearm with a prior felony conviction for violence to the person is up to ten years. A.R.16-17. Bond was thereby increased to $50,000. A.R.17.

Petitioner filed a motion to dismiss the indictment on October 29, 2018. A.R.45. Petitioner's basis was that creating the potential of violence is not actual violence as

contemplated by the West Virginia Legislature when it drafted West Virginia Code § 61-7-7. A.R. 46. The motion further argued that if the circuit court interprets threat of violence to mean actual violence, then the statute is unconstitutionally vague and violates Petitioner's due process. A.R.47.

The motion to dismiss was heard on November 13, 2018. A.R.19. The motion was based on two issues: the fact that the West Virginia Legislature does not designate Petitioner's prior felony as one of violence, and even if the Court believes the crime is violent, Petitioner could not understand any future conduct to be a crime under the indictment. A.R.20. Petitioner argued that "threat of violence" and "violence" are not the same. A.R.20. Petitioner argued that his prior conviction was for the threat of violence, not actual violence. A.R.21. Petitioner argued that the statute herein is clear in that it uses violence, not threat of violence. A.R.22. Petitioner argued that interpreting the statute that broadly is impermissible, and that a person of ordinary intelligence could not understand that the threat of violence means violence, making the statute unconstitutionally vague. A.R.23-24.

In response, the State argued that the clear meaning of the Kentucky statute Petitioner violated is that it is a crime of violence. A.R.25. Petitioner argued that wanton endangerment in Kentucky is not a violent crime. A.R.27. The Court found that it was in fact a crime of violence and denied the motion to dismiss. A.R.27. The order denying the motion to dismiss was filed on November 14, 2018, and found that the Kentucky crime of Wanton Endangerment First Degree is a felony crime of violence as contemplated by West Virginia Code § 61-7-7(b)(1). A.R.54.

Petitioner's plea hearing was held on November 15, 2018. A.R.30. Petitioner entered a conditional guilty plea to firearm possession violation. A.R.31. The Court then examined Petitioner to ensure that he knew the consequences of the guilty plea and his rights therein.

A.R.32-35. Petitioner pled conditionally guilty for purposes of the instant appeal. A.R.38. Petitioner was sentenced to a defined three year term with no fine. A.R.40. Petitioner's Plea and Sentencing Order was entered on November 28, 2018. A.R.74-76.

III. SUMMARY OF ARGUMENT

When West Virginia Code §61-7-7 is given its plain meaning and construed according to its legislative intent, it does not violate Due Process principles. Importantly, this Court is reluctant to find statutes unconstitutional, and rather than doing so, attempts to ascertain the plain, unambiguous meaning of a statute when possible. In this case, given a plain reading of the statute, West Virginia Code §61-7-7 is not void for vagueness.

Even if the term "crime of violence" is not defined in the statute, this Court has shown the propensity to clarify this term in other contexts. Keeping this and the plain meaning of the statute in mind, West Virginia Code §61-7-7 gives adequate notice to potential violators so as to satisfy any Due Process concerns.

Finally, the Supreme Court of the United States cases relied upon by Petitioner take issue with the term "substantial risk of violence" in the statutory text, which does not appear in this statute. Based on all of these reasons, the sentencing order below should be affirmed.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Revised Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. This case is appropriate for resolution by memorandum decision.

V. ARGUMENT

A. Standard of Review.

The standard of review in this matter has been articulated by this Court as follows:

> On the more narrow issue of the circuit court's interpretation and application of W. Va.Code § 61–7–7, we apply a de novo standard of review: "[w]here 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). *Accord* Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia,* 195 W.Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review.").

Rohrbaugh v. State, 216 W. Va. 298, 302, 607 S.E.2d 404, 408 (2004).

B. When West Virginia Code § 61-7-7 is given its plain meaning and construed according to its legislative intent, it does not violate Due Process principles.

Petitioner argues on appeal that the enhancement for aggravated felon in possession is too vague to satisfy the Due Process clause of the Fourteenth Amendment. Petitioner was charged under the following provision, in pertinent part:

> § 61-7-7. Persons prohibited from possessing firearms; classifications; right of nonprohibited persons over twenty-one years of age to carry concealed deadly weapons; offenses and penalties; reinstatement of rights to possess; offenses; penalties
>
> (a) Except as provided in this section, no person shall possess a firearm, as such is defined in section two of this article, who:
> (1) Has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; . . .
>
> (b) Notwithstanding the provisions of subsection (a) of this section, any person:
> (1) Who has been convicted in this state or any other jurisdiction of a felony crime of violence against the person of another or of a felony sexual offense; . . . and who possesses a firearm as such is defined in section two of this article shall be guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not more than five years or fined not more than $5,000, or both.

W.Va. Code § 61-7-7. Specifically, Petitioner takes issue with the fact his charge was enhanced by subsection (b)(1), because the circuit court found that his predicate felony was "a crime of violence against the person of another." Petitioner's predicate felony conviction was a wanton endangerment, first degree charge under the following statute:

> (1) A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.
> (2) Wanton endangerment in the first degree is a Class D felony.

Ky. Rev. Stat. Ann. § 508.060. As the circuit court found, under a basic reading of both statutes, the Kentucky wanton endangerment charge is clearly a crime of violence, satisfying the provisions of West Virginia Code § 61-7-7(b)(1).

This Court has issued strict instructions regarding finding a statute unconstitutional, cautioning that it should be done very rarely:

> "In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt." Syllabus point 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965).

Syl. Pt. 4, *Rohrbaugh*, 216 W. Va. 298, 607 S.E.2d 404 (2004). Furthermore, this Court has repeatedly found that statutes should be read according to their plain meaning and interpreted according to legislative intent. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). "Where the

language of a statute is plain and unambiguous, there is no basis for application of rules of statutory construction; but courts must apply the statute according to the legislative intent plainly expressed therein." Syl. Pt. 1, *Dunlap v. State Compensation Director*, 149 W.Va. 266, 140 S.E.2d 448 (1965). "Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed." Syl. Pt.1, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970). "We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995). "'The basic and cardinal principle, governing the interpretation and application of a statute, is that the Court should ascertain the intent of the Legislature at the time the statute was enacted, and in the light of the circumstances prevailing at the time of the enactment.' Syl. Pt. 1, *Pond Creek Pocahontas Co. v. Alexander,* 137 W.Va. 864, 74 S.E.2d 590 (1953)." *Leggett v. EQT Prod. Co.*, 239 W. Va. 264, 267, 800 S.E.2d 850, 853, cert. denied, 138 S. Ct. 472, 199 L. Ed. 2d 358 (2017).

In the present case, it is easy to determine the Legislature's intent in enacting West Virginia Code § 61-7-7—the Legislature intended to keep felons from possessing weapons, and more specifically, to heighten the punishment for felons with a proven propensity for violence when said felons were found with a weapon. "In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes." Syl. Pt. 8, *State v. Gill,* 187 W. Va. 136, 416 S.E.2d 253 (1992). This Court has

stated, in relation to this very statute, that restricting felons from possessing weapons is valid "'to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment."' Syllabus point 4 (in part), *State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988)." Syl. Pt. 5, in part, *Rohrbaugh,* 216 W. Va. 298, 607 S.E.2d 404.

Petitioner argues that the statute in question is unconstitutional, but this Court has found that "'[w]hen the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.' Syllabus point 3, *Willis v. O'Brien,* 151 W.Va. 628, 153 S.E.2d 178 (1967)." Syl. Pt. 1, *Sale ex rel. Sale v. Goldman*, 208 W. Va. 186, 539 S.E.2d 446 (2000). 'The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975). This Court has previously spoken to the legislative intent of this statute from a review of the statute's plain language, stating that "[t]he obvious purpose of W. Va.Code § 61–7–7 is to guard the public safety. We believe the Legislature's method of achieving this goal has been crafted narrowly so as not to offend the Constitution." *Perito v. Cty. of Brooke*, 215 W. Va. 178, 183, 597 S.E.2d 311, 316 (2004). Notably, this Court has also previously found the statute constitutional in every prior challenge.

In the present case, the circuit court read the statute by its plain, unambiguous meaning. Petitioner was unquestionably a convicted felon. The question here turns on the felony offense used by the prosecution to enhance the sentence under West Virginia Code §61-7-7(b). That

offense, as stated above, was a Kentucky conviction of wanton endangerment. As dictated by West Virginia law, the circuit judge looked at the plain language of the statute, which states that for the felon in possession of a weapon to be enhanced to a felony charge, the predicate felony must have been a "felony crime of violence against the person of another." W.Va. Code § 61-7-7(b)(1). The circuit court then looked to the Kentucky statute describing wanton endangerment as "circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person." Ky. Rev. Stat. Ann. § 508.060. A plain reading of this statute reaches the same conclusion - this is clearly a crime of violence, as the circuit court found. There is no ambiguity in the crime Petitioner plead guilty to in Kentucky - the very statute describes a violent crime. This Court should uphold the circuit court's findings given the plain meaning of both statutes and the reluctance to find easily interpreted statutes unconstitutional.

C. This Court has previously defined violent crimes in the context of other statutes, without finding said statutes unconstitutionally vague.

Although Respondent maintains that the plain meaning of West Virginia Code § 61-7-7(b) is obvious, even if the definition of "violence" is not plain, this Court has previously defined the term in relation to other statutes without finding said statutes unconstitutionally vague. Most recently, this Court reviewed violence or threat of violence in conjunction with West Virginia Code §61-11-18, commonly known as the West Virginia Recidivist Statute. Although the statute does not specify violence or threat of violence, this Court has created a proportionality test in sentencing under the statute. *See*, Syl. Pt. 7, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981); *State v. Norwood*, No. 17-0978, 2019 WL 2332195, at *8 (W. Va. May 30, 2019); *State v. Lane,* 241 W.Va. 532, 826 S.E.2d 657 (2019). *See also*, *State ex rel. Appleby v. Recht*, 213

W.Va. 503, 583 S.E.2d 800 (2002) (finding that a DUI is a crime of violence and that West Virginia Code § 61-11-18 is not void for vagueness). Even though the statute does not address violence at all, this Court has repeatedly addressed the issue without finding the statute unconstitutional.

This Court has also defined violence in the arena of a statute governing defendants who are incompetent to stand trial under West Virginia Code § 27-6A-3(h), without finding the statute void for vagueness for failing to fully define the term. *See*, Syl. Pt. 5, *State v. Riggleman*, 238 W.Va. 720, 798 S.E.2d 846 (2017)("Distributing and exhibiting material depicting minors engaged in sexually explicit conduct in violation of West Virginia Code § 61-8C-3 (2014) is a crime that 'involve[s] an act of violence against a person' within the meaning of West Virginia Code § 27-6A-3(h) (2013) because it derives from and is proximately linked to physical, emotional, and psychological harm to children."). Finally, this Court has examined the meaning of "violence against the person" under West Virginia Code § 62-1C-1(b), regarding post-conviction bail. See, *State ex rel. Spaulding v. Watt*, 188 W.Va. 124, 423 S.E.2d 217 (1992) ("The offense of first degree sexual assault under W.Va.Code, 61-8B-3(a)(2) (1984), involves violence to a person and is, therefore, subject to the provisions of W.Va.Code, 62-1C-1(b) (1983), with regard to post-conviction bail.") Therefore, the failure to define "violence" does not make this statute void for vagueness.

D. The statute provides the requisite notice to satisfy Due Process.

Petitioner also argues that West Virginia Code § 61-7-7 is not "concrete enough to put people on notice." Pet'r. Br. 5. As the Supreme Court of the United States found in *U.S. v. Davis*, a governing body "has to write statutes that give ordinary people fair warning about what the law demands of them." *U.S. v. Davis*, No. 18-431, 2019 WL 2570623 (U.S. June 24, 2019). This

Court has stated the same, finding that "'[a] criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.' Syllabus point 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974)." Syl. Pt. 3, *Sale ex rel. Sale v. Goldman,* 208 W.Va. 186, 539 S.E.2d 446.

First, in the present case, it should have been clear to Petitioner when he pled guilty to wanton endangerment, a crime described as "circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person," that this constituted a crime of violence. Thus, under the specific facts of the case at bar, Petitioner had notice.

This Court has discussed "void for vagueness" in relation to criminal statutes, noting "'[g]eneral criminal statutes, not touching on potential rights of individuals in First Amendment or other constitutional areas sensitive to abuse by potential maladministration of a system of justice, are tested for vagueness not only from examining the face of the statute but by considering the statute in the light of the conduct to which it is applied." *State v. Flinn*, 158 W. Va. 111, 119, 208 S.E.2d 538, 543 (1974) (citing *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561). Moreover,

> There is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions. The basic requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language.

State v. Bull, 204 W. Va. 255, 262, 512 S.E.2d 177, 184 (1998) (citing Syl. Pt. 1, *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (1970)). In the case at bar, the statute is

sufficiently definite to give a person of ordinary intelligence fair notice that his or her contemplated conduct is prohibited by statute. First, anyone convicted of a felony must not possess a firearm. Second, if the crime was violent in nature, which has been defined over and over by this Court without finding the statutes void for vagueness, as discussed above, then the crime is elevated to a felony. The Legislature is not required to lay out each and every crime which would elevate the felon in possession charge from a misdemeanor to a felony, but rather only "notify a potential offender. . . as to what he should avoid doing." *Id.* In the present case, this was simple. Petitioner was not to possess a gun, and as at least one of his lengthy criminal convictions was violent, his crime was properly elevated to a felony charge. The circuit court's sentencing order should be affirmed.

E. West Virginia Code § 61-7-7 can be differentiated from both *Johnson v. U.S.* and *U.S. v. Davis.*

Petitioner's argument centers on *Johnson v. U.S.*, 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), and, in a follow up memoranda, *U.S. v. Davis*, No. 18-431, 2019 WL 2570623. Petitioner argues that *Johnson* applies to this case and strikes down the same analysis used herein. *Johnson*, however, can be differentiated from the case at bar.

To begin, the *Johnson* Court examined a statute somewhat similar to the one at issue here, the Armed Career Criminal Act of 1984, wherein a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). *Johnson*, 576 U.S. __, 135 S. Ct. at 2555, 192 L. Ed. 2d 569. Basically, the statute is a combination of a felon in possession statute and a recidivist statute. The portion of the statute at issue is referred to as the "residual clause." *Id.* at __, 135 S.Ct. at 2556, 192 L.Ed. __. The Court

found that the provision therein required judges to use a form of what the Supreme Court of the United States has called "categorical approach" to determine whether an offense qualified as a violent felony - disregarding how the defendant actually committed his crime - and required a court to imagine the "ordinary case" to determine whether a serious potential risk of physical injury to another" occurred. *Johnson*, supra.

However, portions of the *Johnson* opinion are important to examine in light of the case at bar. The Government argued in *Johnson* that holding the instant clause unconstitutional would put a vast number of statutes at risk of being deemed likewise unconstitutional, but the *Johnson* Court pointed out that "[a]lmost none of the cited laws links a phrase such as "substantial risk" to a confusing list of examples," showing that this specific turn of phrase was important in the Court's analysis of this statute. *Johnson*, 576 U.S. at __, 135 S. Ct. at 2561, 192 L. Ed. 2d at __. This term is not used in the West Virginia statute. Rather, West Virginia Code § 61-7-7(b) uses "a crime of violence against the person of another." This is a much more definitive statement. Indeed, even the Supreme Court of the United States, in Justice Thomas's concurrence, has noted that the terms "violent felony" are not unconstitutionally vague and has shown a propensity to define whether a crime is "violent" or not without that term being specifically defined using specific crimes. In fact, Justice Thomas specifically mentions the portion of the statute noting that a violent felony concerns "use, attempted use, or threatened use of physical force against the person of another" and that the case herein presents a fact pattern, specifically the arrest for possession of a sawed off shotgun, that does not meet this definition. *Johnson*, 576 U.S. at __, 135 S. Ct. at 2564, 192 L. Ed. 2d 569 (J. Thomas, concurring). Thus, the wording in West Virginia Code § 61-7-7 does not meet the *Johnson* definition of unconstitutionally vague and the statute should not be found to be void for vagueness.

Petitioner, by letter to this Court, argues that the opinion released just days ago by the Supreme Court of the United States, *U.S. v. Davis*, No. 18-431, 2019 WL 2570623, is instructive in this matter. Petitioner admits in his letter to this Court that the additional authority provided by *Davis*, is dicta, and we argue that it is wholly inapplicable herein. The statute in *Davis* is distinguishable from the statute herein for several reasons. The statute in question heightened the criminal penalties for using or carrying a firearm "during and in relation to," or possessing a firearm "in furtherance of" any federal "crime of violence or drug trafficking crime." *Davis*, No. 18-431, 2019 WL 2570623, at *3, citing §924(c)(1)(A). The statute then defines the term crime of violence as "an offense that is a felony" and

> (A) Has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (B) That by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Davis, No. 18-431, 2019 WL 2570623, at *3, citing § 924(c)(3). Petitioners in *Davis* were charged based on two predicate crimes: robbery and conspiracy to commit robbery. *Davis,* No. 18-431, 2019 WL 2570623, at *4,. The Fifth Circuit at first found that both crimes were properly charged, but after remand by the Supreme Court of the United States, then found that the robbery charge fell under crime of violence under the statute, but the conspiracy charge did not. *Id.*

The statute at issue in *Davis* is quite different from the statute herein. The *Davis* Court adds that "[v]ague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Davis*, No. 18-431, 2019 WL 2570623, at *4. Additionally, "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.'" *Davis*, No. 18-431,

2019 WL 2570623, at *5. Again, the Court discusses the term "substantial risk" of violence in finding that this term forces a trial judge to employ a categorical approach to which crimes fit the bill. *Davis*, No. 18-431, 2019 WL 2570623, at *11. That term does not appear in the present statute. Again, West Virginia Code § 61-7-7(b) uses "a crime of violence against the person of another." This is a much more definitive statement and Petitioner's conviction under wanton endangerment fits the bill. Thus, the statute herein should not be found to be void for vagueness, and the sentencing order should be affirmed.

VI. CONCLUSION

For the foregoing reasons, the Respondent respectfully asks this Court to deny Petitioner's appeal and affirm the Petitioner's sentence.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

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