Original



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Appeal No. 21-0263



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STATE OF WEST VIRGINIA,

Respondent, Plaintiff-below

v.

IZZAC CHRISTOPHER WEISTER,

Petitioner, Defendant-below

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Appeal from the Jefferson County Circuit Court

Case No. 20-F-9
The Honorable David Hammer

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# PETITIONER'S BRIEF

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## ASSIGNMENTS OF ERROR

1. Whether the circuit court erred when it found that the offenses of solicitation of a minor via a computer and use of obscene matter with intent to seduce a minor involved acts of violence against a person?
2. Whether the circuit court erred when it found that it had jurisdiction over Mr. Weister for a period of twenty-five years?

## STATEMENT OF THE CASE

This appeal comes from an order of the Jefferson County Circuit Court that found Izzac Weister incompetent and committed him to William R. Sharpe Jr. Hospital. App. 6. The circuit court found that Mr. Weister's charged offenses involved acts of violence against a person and that the court would have jurisdiction over Mr. Weister for twenty-five (25) years. App. 6-7.

A Jefferson County Grand Jury indicted Mr. Weister on three felony counts– two counts of solicitation of a minor via a computer, in violation of W. Va. Code § 61-3C-14b and one count of use of obscene matter with intent to seduce a minor, in violation of § W. Va. Code 61-8A-4. App. 11. These charges were based upon Mr. Weister sending several instant messages to his 14-year-old half sister asking whether she would be willing to have sex with him, requesting a nude picture, and sending a picture of his penis. App. 11, 126.

A forensic psychologist, Dr. Sara Boyd, hired by Mr. Weister found that he was not competent and not substantially likely to attain competency. App. 15. The State also had a forensic psychologist, Dr. David Clayman, evaluated Petitioner, who concurred in Dr. Boyd's opinion. App. 30. Based upon these findings, the circuit court entered a preliminary finding that Petitioner was not competent to stand trial and was unlikely to attain competency within the next

three months. App. 53. Following that order, the parties stipulated to a finding that Petitioner was not competent. App. 55. The case was set out for litigation of the issue of whether the indicted offenses involved acts of violence against a person. App. 53.

Following briefing and argument regarding this legal issue, the court found that the offenses involved an act of violence against a person and committed Mr. Weister to Sharpe Hospital, finding that the court had jurisdiction over Mr. Weister for a period of twenty-five years. App. 6.

Mr. Weister now seeks review of the court's order finding that the offenses involved an act of violence against a person and the period of jurisdiction found by the court.

**SUMMARY OF ARGUMENT**

Petitioner argues that his indicted offenses do not involve acts of violence against a person and therefore he should be procedurally treated under the competency statute in the manner afforded defendants who are charged with non-violent offenses.

Petitioner first argues that this Court's previous cases addressing the definition of violent offenses related to the competency statute were decided in error. Petitioner argues that the plain language of the competency and a common sense reading of the phrase make it clear that "an act of violence against a person" requires physical force and actual or threatened bodily injury. Petitioner further argues that even if the phrase is found ambiguous, the rule of lenity should apply because while the competency statute may not be penal in purpose, it is penal in effect. Petitioner further argues that the amendment to the competency statute, which specifically provides that the dangerousness assessment should look as to whether a defendant poses a substantial risk of bodily injury to another person, enlightens the court to the Legislature's

meaning that the term violence refers to physical force and bodily injury, not emotional or psychological injury.

Second, Petitioner argues that even if this Court decides not to revisit its prior holdings, that the charged offenses in this case– solicitation and use of obscene matter– are substantially different from the offenses in the prior cases and should be treated differently.

Third, Petitioner argues that the competency statute should be read in *pari materia* with the statute regarding extended supervision for certain sex offenders. The offenses charged in this case, if resulting in a conviction, would not require a sentence of extended supervision in addition to the statutory penalties. Both statutes were designed with the same purpose– the protection of the public. As such, this Court should find that the charged offenses do not require extended jurisdiction of the court under the competency statute.

Finally, Petitioner argues that the circuit court erred in finding the maximum prison sentence that Petitioner would have faced if he was convicted at trial. Petitioner argues that the maximum prison sentence should be calculated by taking the statutory sentence from the most serious offense, which in this case would have been not less than two nor more than ten years.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Mr. Weister suggests that oral argument is necessary pursuant to Rule 18(a). The parties have not waived oral argument, the appeal is not frivolous, and the Court would be aided by oral argument. Because Mr. Weister is arguing, in part, for a reinterpretation of a previously-decided issue, Mr. Weister suggests that this Court would be aided by oral argument.

Mr. Weister requests that this case should be set for a Rule 19 argument. Mr. Weister suggests that the case involves an issue of fundamental importance regarding the interpretation of

the competency statute, particularly in light of the recently enacted amendments to the statute.

**ARGUMENT**

I. STANDARD OF REVIEW

"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." *State v. George K.*, 233 W.Va. 698, 703, 760 S.E.2d 512, 517 (2014) (quoting Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

II. THE OFFENSES OF SOLICITATION OF A MINOR AND USE OF OBSCENE MATTER WITH INTENT TO SEDUCE A MINOR DO NOT INVOLVE ACTS OF VIOLENCE AGAINST A PERSON

Petitioner first argues that his charged offenses of solicitation of a minor, in violation of W. Va. Code § 61-3C-14b, and use of obscene matter with intent to seduce a minor, in violation of W. Va. Code § 61-8A-4, do not involve acts of violence against a person.

The question presented for this Court is whether Mr. Weister was indicted on felony offenses which do or do not involve acts of violence against a person. While past cases from this Court have defined the term "involve an act of violence against a person" very broadly, Petitioner suggests that such a definition is a derelict on the sea of law that defines "violence" as the use of physical force. As such, Petitioner argues that this Court should not stubbornly adhere to the principle of *stare decisis*, but rather correct an error that was previously-made.

This matter of statutory interpretation has vastly different outcomes based upon how this Court rules on this matter. Mr. Weister, a 21-year-old with an organic brain injury and without almost any functioning of his frontal lobe, has been found not competent by both psychologists for the defense and the State and has legally been found not competent by the Jefferson County

Circuit Court. If this Court finds that Mr. Weister's charges do not involve an act of violence against a person, the pending charges are dismissed. If this Court finds that Mr. Weister's charges do involve an act of violence against a person, Mr. Weister can be held in State custody up to the maximum sentence of the offense.

The common, plain definition of "violence" is "the use of physical force so as to injure, abuse, damage, or destroy." *See* www.merriam-webster.com/dictionary/violence. Black's Law Dictionary states that "[t]he term 'violence' is synonymous with 'physical force,' and the two are used interchangeabley." Moreover, federal law generally defines "crime of violence" as

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and 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.

18 U.S.C. § 16 (1984). Petitioner suggests that this Court should look to the common sense and plain definitions of the term "violence" and find that the previous definition offered by this Court was in error. Further, assuming *arguendo* that this Court finds that the previously decided definition applies, Petitioner suggests that this case can be differentiated from the cases finding sexual contact offenses and child pornography offenses to be violent.

A. Jurisprudence Regarding the Application of the Phrase 'Involve an Act of Violence Against a Person' in Criminal Competency

Pursuant to Chapter 27, Article 6A, Section 3, subsection g,

> 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 which does not involve an act of violence against a person, the criminal charges shall be dismissed. The dismissal order may, however, be stayed for twenty days to allow civil commitment proceedings to be

instituted by the prosecutor pursuant to article five of this chapter.

W. Va. Code § 27-6A-3(g) (2007).

Pursuant to subsection 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.

W. Va. Code § 27-6A-3(h) (2007).

These code sections were enacted to the criminal competency statute in 2007. This Court did not have an opportunity to discuss the definition of an offense that "involves an act of violence against a person" until 2014 in *State v. George K.*, 233 W.Va. 698, 760 S.E.2d 512. At issue in that case was whether the offenses of third degree sexual assault and sexual abuse by a parent or guardian by a thirty-nine-year old man against the fifteen-year-old daughter of a live-in girlfriend constituted acts of violence against a person. *George K.*, 233 W.Va. at 702, 760 S.E.2d

at 516.

The *George K.* majority held,

> If protection of the public is a purpose of the statute, then the reason for determining whether an act of violence against a person has occurred is prospective due to the risk of recurrence. The examination of crimes that have allegedly been committed indicates whether the incompetent defendant poses a future risk of harm. Logic dictates that if the Legislature intended these subsections to provide for the protection of the public, then a crime that does not involve an act of violence against a person that therefore allows for the release from supervision of a person deemed incompetent to stand trial pursuant to W. Va.Code § 27–6A–3(g) must necessarily be a crime that does not indicate that the incompetent defendant poses a future risk of harm to the public. Similarly, if the crime warrants commitment pursuant to W. Va.Code § 27–6A–3(h), then the incompetent defendant poses a future risk of harm to the public. Therefore, an "act of violence against a person" within the meaning of W. Va.Code § 27–6A–3 is an act that indicates an incompetent defendant poses a future risk of harm to the public.

*George K.*, 233 W.Va. at 708, 760 S.E.2d at 522.

The Court concluded that "crimes causing extraordinary psychological or emotional harm are violent within the meaning of the sentence enhancement statute." *George K.*, 233 W.Va. at 710, 760 S.E.2d at 525. "[S]exual assaults on children—the most vulnerable members of society—result in severe emotional and psychological harm." *George K.*, 233 W.Va. at 711, 760 S.E.2d at 525. Thus, the Court found,

> We now hold that an "act of violence against a person" within the meaning of W. Va.Code § 27–6A–3 (2007) encompasses acts that indicate the incompetent defendant poses a risk of physical harm, severe emotional harm, or severe psychological harm to children. Accordingly, we further hold that third degree sexual assault pursuant to W. Va.Code § 61–8B–5(a)(2) (2000) is a crime that involves an "act of violence against a person" within the meaning of W. Va.Code § 27–6A–3 because it causes physical harm and severe emotional and psychological harm to children. Additionally, we hold that sexual abuse by a parent, guardian, custodian, or a person in a position of trust to a child pursuant to W. Va.Code § 61–8D–5 (2005) is a crime that involves an "act of violence against a person" within the meaning of W. Va.Code § 27–6A–3 because it causes physical harm and severe emotional and psychological harm to children.

*George K.*, 233 W.Va. at 711-12, 760 S.E.2d at 525-26.

In *State v. Riggleman*, this Court extended its holding in *George K.* to offenses involving child pornography. 238 W.Va. 720, 798 S.E.2d 846 (2017). The Court reasoned in finding that the possession of child pornography involved acts of violence against a person:

> We therefore find the acts prohibited by West Virginia Code § 61-8C-3 are sufficiently involved with the victimization of the children harmed in the images that they trigger the application of West Virginia Code § 27-6A-3(h). The "end user" of child pornography is not just tenuously involved with the commission of those violent, abhorrent crimes against children; those acts of violence were committed, videotaped, and distributed electronically for his or her use. Simply stated, those acts are so intrinsically related to the abuse of children, they result in criminal prosecution and lengthy terms of incarceration and supervised release. It necessarily follows that those acts are sufficiently involved with the physical, emotional, and psychological harm to children to support the determination that the incompetent defendant poses the risk of dangerousness necessary to satisfy the requirements of West Virginia Code § 27-6A-3(h).

*Riggleman*, 238 W.Va. at 728, 798 S.E.2d at 854.

This Court has never addressed whether Petitioner's charged offenses involve acts of violence against a person.

While Mr. Weister's case has been pending, the West Virginia Legislature has amended the competency statute, with the amendments to be effective on July 9, 2021. While the amended code still maintains the distinction between offenses that do "not involve an act of violence against a person" versus offenses that do "involve an act of violence against a person," relevant to the instant question before this Court, a defendant who is detained pursuant to the competency statute shall be discharged by the court if the court "finds by a preponderance of the evidence... that he or she no longer creates a substantial risk of bodily injury to another person." W. Va. Code § 27-6A-3(g)(3).

B. The Plain Language and Common Sense Reading of the Statute Leads to the Conclusion that Neither of the Charged Offenses Involve Acts of Violence Against a Person

Petitioner suggests that a plain and common sense reading of the phrase "involves an act of violence against a person" should control the determination in this case. There is no ambiguity in this phrase and as such this Court need not construe the statute.

From the time that the current version of the competency statute was enacted in 2007 until the ruling in 2014 in *George K.*, courts had no issues in determining what offenses involved acts of violence against a person. That is because the meaning of the phrase is plain. The majority in *George K.* went through extraordinary leaps of logic to get the outcome that they wanted– lifetime custody of a defendant who otherwise would have had his charges dismissed as a result of his incompetency. The ruling in *George K.* has now led to absurd results, with the offense of possession of child pornography now ruled as a violent offense in West Virginia. However, the jurisprudence should never have gotten to this point because there was no reason for any court to attempt to construe the statute because the statute is not ambiguous.

In *George K.*, the majority found that the term "violence" is ambiguous in the statute because there is no "explicit statutory definition" of the term in the competency code sections. *George K.*, 233 W.Va. at 705, 760 S.E.2d at 519. However, what the majority elided in its decision was that many statutes do not define all of their terms, and in the absent of a statutory definition, such terms should be given their plain and ordinary meaning.

"While there may be rare circumstances where a statute's literal meaning may be disregarded because to do so would lead to clearly unintended results, courts are generally required to straightforwardly apply unambiguous statutory language. 'Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.'" *In re Greg H.*, 208 W.Va. 756, 759, 542 S.E.2d 919, 922 (2000)

(quoting Syl. pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968)). "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." *In re Greg H.*, 208 W.Va. at 760, 542 S.E.2d at 922 (quoting Syl. Pt. 1, *Miners in General Group v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941)).

As indicated by Justice Ketchum in his dissent in *George K.*,

> the phrase "an act of violence against a person" is unambiguous and should be afforded its plain meaning. Black's Law Dictionary defines "violent offense" as "[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon." Black's Law Dictionary at 1188 (9th ed.2009). This Court has held that in deciding the meaning of a statutory provision, 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.

*George K.*, 233 W.Va. at 713, 760 S.E.2d at 527 (Ketchum, J., dissenting). The majority opinion in *George K.* completely missed the crucial step in statutory interpretation to give the term its common, ordinary, and accepted meaning. Just because the term is not specifically defined does not mean that it is ambiguous. Giving the term its ordinary common sense meaning, it is clear that none of the charged offenses against Mr. Weister involve an act of violence against a person.

It would seem that Justice Benjamin, in writing the *George K.* majority opinion, had omitted the important step in construing a statute that he had previously routinely critiqued other courts for missing. Approximately a year after *George K.* was decided, Justice Benjamin wrote in another opinion, "Upon our review of the circuit court's order, we observe that the circuit court has skipped the vital first step in construing a statute: making a determination that the statute is ambiguous." *State ex rel. Lorenzetti v. Sanders*, 235 W.Va. 353, 360, 774 S.E.2d 19, 26 (2015). In that case, Justice Benjamin found that the verb "use" in a criminal statute, which was not

specifically defined, was unambiguous by resorting to the definition in Black's Law Dictionary and the context clues in the statue. *Id.* Justice Benjamin skipped this important required step in his opinion in *George K.*, rendering the rest of the opinion incorrectly decided as it is clear that the phrase is unambiguous by applying the ordinary definition.

Moreover, Mr. Weister suggests that the legislative intent of the competency statute should compel this Court to look at the *actus reas* of the offense in determining whether it involves an act of violence against a person. The competency statute specifically delineates between an offense that involves an act of violence against a person and other offenses to protect the public from a mentally incompetent person whose incompetence may cause him or her to act violently. Contrary to the *Riggleman* decision, the statute defines these violently dangerous offenses by action not by effect. The statute specifically requires that the offense involve an *act* of violence, not a harmful effect. This makes sense as after all almost every crime involves a risk of a harmful effect to either a specific victim or to society in general– whether the offense is larceny, burglary, or the distribution of heroin. The victim of a larceny from his home might suffer the psychological effects of not feeling safe at home. The distribution of heroin can result in overdoses and has a severe toll on the psychological well being of addicts. However, while harmful either individually or generally, none of these crimes involve an act of violence against a person. In this case, there is no act of violence. There is a text message. While it might be illegal and repugnant it is not violent.

### C. The 2021 Amendment to the Statute Makes It Clear That an Offense that Involves an Act of Violence Against a Person Requires the Risk of Bodily Injury to a Person

Petitioner further suggests that the 2021 amendment to the competency statute makes it

clear that a violent offense under the code requires bodily injury, not psychological or emotional injury to a person. The new code section makes it clear that the danger that an offender poses that allows continued jurisdiction and potential detention is the danger of bodily injury to another person. The *George K.* majority specifically relied upon the risk of harm to another person being psychological or emotional, not physical or bodily. However, the amendment makes it clear that the focus should be on "bodily injury." The phrase "act of violence against a person" must be read in *pari materia* with phrase "risk of bodily injury" when both are contained under the same code section and deal with the exact same subject matter.

D. Rule of Lenity

However, even if the phrase "involves an act of violence against a person" is found to be ambiguous, the rule of lenity should still apply in construing the term in favor of a defendant and against the State. In *George K.*, the majority opinion quickly dispenses with the rule of lenity, finding that the commitment of a defendant who is not criminally competent is not penal in nature because its purpose is to protect the public and not punish. *George K.*, 233 W.Va. at 705, 760 S.E.2d at 519. However, the rule of lenity applies to not only laws that are punitive in purpose but also punitive in effect. Syl. Pt. 4, *Hensler v. Cross*, 210 W.Va. 530, 558 S.E.2d 330 (2001). Here, the application of the criminal competency statute in holding the Petitioner in custody for the maximum sentence of the charged counts, while the purpose is not specifically punitive, is certainly punitive in effect. Under the criminal competency statute, Mr. Weister can be held in custody for much longer than if he was convicted at trial and sentenced to the maximum consecutive sentences, as he would be eligible for parole in 6 ½ years and would discharge the sentence with good time in 15 years. The effect on Petitioner, whether held at

Sharpe Hospital or in prison is no different– his custody under the criminal competency statute is punitive in effect if not in purpose. Therefore, the rule of lenity should apply and the definition of an offense that involves an act of violence against a person should be strictly construed in favor of Petitioner.

E. Even if *George K.* and *Riggleman* Apply the Offenses of Solicitation of a Minor and Use of Obscene Matter to Solicit a Minor Do Not Involve an Act of Violence Against a Person

Petitioner suggests that neither of the charged offenses involve acts of violence against a person.

First, in looking at the language of the statutes and the elements of the offense, it is clear beyond peradventure that the offenses do not have any element of an act of violence against a person. There is no such element in either solicitation of a minor, under W. Va. Code § 61-3C-14b or W. Va. Code § 61-8A-4. Petitioner suggests that this fact standing alone should be sufficient to answer the question, even with the rulings of *George K.* and *Riggleman* to the contrary. The specific statutory language states that extended custody only occurs if the offense (the charged misdemeanor or felony) involves an act of violence against a person. Similar to how the United States Supreme Court has ruled that courts should only look to the elements of the offense in determining whether a state court conviction constitutes a violent felony under federal law, *see, e.g., Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265 (2010), reviewing courts under the competency statute should not go beyond the elements of the charged offense.

However, if this Court goes beyond the elements of the charged offenses, it is still clear that Isaac's charges do not involve an act of violence against a person. There is nothing in this case that suggests that Mr. Weister "poses a risk of physical harm, severe emotional harm, or

severe psychological harm to children." *See George K.*, 233 W.Va. at 711, 760 S.E.2d at 525. The entire act for which Mr. Weister is charged in a series of short text messages to his 14-year-old half sister in which he asks whether she has ever considered having sex with her brother and sends a picture of his penis. Unlike in *George K.*, there is no physical sexual contact that occurred or that even came close to occurring. Mr. Weister did not have sexual intercourse, sexual intrusion, or sexual contact with any minor.

Nor was there any extended solicitation of a minor by Mr. Weister. The entire charged act occurred within a matter of minutes. There is no evidence of any grooming or other behaviors that would suggest that Mr. Weister is a predator. Nor is there any evidence of prior acts with minor or any interest in minors outside this one momentary interaction. This would suggest that Mr. Weister is not a continuing danger to the public and that he does not pose a risk of physical harm, severe emotional harm, or severe psychological harm to children.

Furthermore, this case can be differentiated from *Riggleman*. While *Riggleman* involved possession of child pornography and not a completed sexual act like in *George K.*, the child pornography in *Riggleman* contained acts of violence against other persons, specifically the rape and sado-masochistic abuse of prepubescent children. While the defendant in *Riggleman* did not actually abuse the children, his possession and trading of large quantities of the child pornographic material perpetuated the abuse of the children, resulting in severe psychological and emotional harm. There is no such child pornographic materials that involve acts of violence against children in the instant case. The instant case involves a handful of text messages, none of which contain acts of violence against children.

Moreover, there is no evidence of severe emotional or psychological harm to the victim in

the instant case. While the victim was Mr. Weister's half-sister, he had only found out that the victim was related to him shortly before the at-issue text messages. While the victim received the text messages from Mr. Weister, the police report indicated that she never opened the picture of the penis that was sent. While Mr. Weister's questions would certainly be disturbing to a fourteen-year-old, these are not the type of actions that are likely to cause severe emotional or psychological harm.

As such, the acts in this case are much less heinous and egregious than the acts in *Riggleman* and not the type of acts that should be considered violent against a person.

F. The Charged Offenses Do Not Require Extended Supervision Pursuant to W. Va. Code § 62-12-26 and Therefore Should Not Required Extended Supervision Under the Criminal Competency Statute

Petitioner further suggests that as a matter of statutory interpretation, the criminal competency statute should be read in *pari materia* with the extended supervision for sex offenders statute. Both statutes have been enacted for the same purpose– the protection of the public. The extended supervision statute omits the offenses for which Mr. Weister is charged, but includes the offense of possession of child pornography, suggesting that child pornography offenses but not the offenses for which Mr. Weister was charged are the type that required long-term protection for the public.

In *George K.*, the majority opinion decided that it was appropriate to compare the treatment of an offense under the criminal bail statute and the competency statute because both statutes shared the same purpose- to protect the public.

> The post-conviction bail statute examined in Spaulding, W. Va.Code § 62–1C–1, is similar to the statute at issue in the present matter, W. Va.Code § 27–6A–3. Both statutes involve determinations as to whether a person has committed an act of violence. Under

> W. Va.Code § 62–1C–1 a person may be denied bail—freedom from incarceration—if his or her acts involve acts of violence, and under W. Va.Code § 27–6A–3, an incompetent defendant may be committed if his or her acts involve acts of violence. Furthermore, it appears from the pertinent language of each statute, that each statute shares a similar purpose: to protect the public from harm.

*George K.*, 233 W.Va. at 711, 760 S.E.2d at 525.

Similarly, the criminal competency statute under W. Va. Code § 27-6A-3 and the extended supervision statute pursuant to W. Va. Code § 62-12-26 also share the same purpose– the protection of the public and therefore allow this Court to look to the extended supervision statute to attempt to interpret the criminal competency statute. The West Virginia Legislature implemented W. Va. Code § 62-12-26 to provide extended supervision for certain sexual offenders, which the Legislature viewed as the most dangerous to the public. *See State v. James*, 227 W.Va. 407, 416, 710 S.E.2d 98, 107 (2011) (indicating that the extended supervision statute was implemented to protect the public). Similarly, "[t]he purpose of West Virginia Code § 27-6A-3 (Supp.1996) is not to punish someone suffering a mental illness; rather, it is to treat the illness and protect society." *Riggleman*, 238 W.Va. at , 798 S.E.2d at (2017) (quoting *State v. Smith*, 198 W.Va. 702, 482 S.E.2d 687 (1996)). Therefore, under the reasoning of the West Virginia Supreme Court in *George K.*, the statutes should be read in pari materia to each other as "it appears from the pertinent language of each statute, that each statute shares a similar purpose: to protect the public from harm." *George K.*, 233 W.Va. at 711, 760 S.E.2d at 525.

Of particular import, the offenses charged against Mr. Weister, violations of W. Va. Code §§ 61-3C-14b and 61-8A-4 do not require extended supervision pursuant to W. Va. Code § 62-12-26. The Legislature has mandated that "any defendant convicted after the effective date of this section of a violation of § 61-8-12 of this code or a felony violation of the provisions of §

61-8B-1 et seq., § 61-8C-1 et seq., and § 61-8D-1 et seq. of this code shall, as part of the sentence imposed at final disposition, be required to serve, in addition to any other penalty or condition imposed by the court, a period of supervised release of up to 50 years" W. Va. Code § 62-12-26(a). There is no reference to either of the statutes under which Mr. Weister is charged. On the other hand, the offense that the West Virginia Supreme Court found to be a violent offense– possession of child pornography– is specifically included in the extended supervision statute (61-8C-1 et seq.).

In language very similar to the language contained in *George K.*, the West Virginia Supreme Court has held that inclusion of possession of child pornography as a basis for extended supervision is justified because of the "heinous nature of the acts involved in producing child pornography" and the "psychological violence to the children involved." *State v. Hargus*, 232 W.Va. 735, 744, 753 S.E.2d 893, 902 (2013). As the Court reasoned,

> First, the crime which qualified Mr. Hargus for sentencing under the extended supervision statute, possession of child pornography, is a serious offense. Child pornography victimizes children—the most vulnerable members of society. In addition, the heinous nature of the acts involved in producing child pornography is likely to cause immeasurable emotional and psychological violence to the children involved. While Mr. Hargus's crime did not involve sexual contact, his consumption of child pornography made him an active participant in its production and dissemination.

*Hargus*, 232 W.Va. at 744, 753 S.E.2d at 902.

Moreover, in *Riggleman*, the West Virginia Supreme Court, in finding that the offense of possession of child pornography involves an act of violence to a person, specifically referenced the fact that such an offense is included under the extended supervision statute. The Court held,

> the Legislature concluded that certain sex offenders pose a significant risk to society when it directed the courts to sentence those convicted of the crimes enumerated in West Virginia Code § 62-12-26 to a period of supervised release of up to fifty years. Possession

> of child pornography clearly is a serious offense. It is an unassailable proposition that "[c]hild pornography harms and debases the most defenseless of our citizens." In addition, the "heinous nature of the acts involved in producing child pornography" encourage and foment such conduct and likely "cause immeasurable emotional and psychological violence to the children involved."

*Riggleman*, 238 W.Va. at 727, 798 S.E.2d at 853 (quoting *United States v. Williams*, 553 U.S. 285, 307, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) and *Hargus*, 232 W.Va. 735, 744, 753 S.E.2d 893, 902).

The West Virginia Legislature did not view the offenses of solicitation of a minor and use of obscene matter with the intent to solicit a minor as being as heinous or psychologically violent as possession of child pornography to require extended supervision to protect the public. Similarly, this Court should find that the Legislature did not intend to have these offenses qualify as involving acts of violence as to require Mr. Weister to be in State custody for decades in order to protect the public.

Looking at this case in a prospective nature, there is nothing about this case that suggests that the public needs to be protected from any future harm that may be occasioned by Mr. Weister's freedom. There is nothing to suggest that Mr. Weister is dangerous and the nature of the offenses charged do not suggest a future dangerousness. Importantly, Defendant suggests that while the question of dangerousness will have to be addressed if Mr. Weister is committed in future years, the question of dangerousness should be the driving consideration in the Court's decision. This is the inquiry that is suggested by *George K.* and which is mandated by the United States Supreme Court. *See Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867 (2002) ("Federal Constitution does not allow civil commitment under the Kansas Sexually Violent Predator Act without any determination of whether the sexual offender lacked control over his dangerous

behavior."). Petitioner suggests that this Court should find that Mr. Weister does not present a risk of future danger and that his charged offenses do not involve acts of violence against a person.

## III. THE MAXIMUM SENTENCE THAT MR. WEISTER COULD HAVE RECEIVED SHOULD BE BASED UPON THE MOST SERIOUS OFFENSE

Petitioner further argues that the circuit court erred when it found the term of the court's jurisdiction over him to be twenty-five years based upon running each of the sentences for the three counts consecutive to each other. Petitioner argues that the maximum sentence and term of jurisdiction should be based upon the sentence he would have received if convicted of the most serious offense.

The amended statute, effective on July 9, 2021, provides that if the offense involves an act of violence against a person, "the defendant shall be released to the least restrictive setting upon any conditions the court determines to be appropriate and the charges against him or her held in abeyance for the maximum sentence he or she could have received for the offense[.]" W. Va. Code § 27-6A-3(g)(2)(2021). Under the statute in effect at the time of the circuit court's ruling, after finding that the offense involved a crime of violence, the court was directed to "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[.]" W. Va. Code § 27-6A-3(h)(2007). There is no case law interpreting the calculation of the maximum sentence either under the old statute or the amended statute.

First, Petitioner suggests that he could not have legally received consecutive sentences for

two alleged violations of W. Va. Code § 61-3C-14b(a). The unit of prosecution under this code is the solicitation or the attempt to solicit a minor. In the instant case, there was only one act of solicitation– the text messages sent to the minor requesting either sex or nude pictures– using a single communication service. As such, a consecutive sentence on both counts of solicitation would have violated his right to be free from double jeopardy. *See Pinder v. State*, 128 So.3d 141 (Fla. 2013).

Furthermore, Petitioner suggests that there is no language under the competency statute to suggest whether the sentences should be run concurrently or consecutively to each other in the case of multiple offenses. Petitioner suggests that in light of this ambiguity, the rule of lenity should apply and the maximum sentence should be based upon concurrent sentences.

Finally, Petitioner argues that even if all of the sentences are appropriately run consecutively to determine the maximum sentence, the maximum sentence that a defendant could receive should be based upon the maximum sentence, less any good time allowance. *See* W. Va. Code § 61-11-16 (providing that "[i]mprisonment under a general sentence shall not exceed the maximum term prescribed by law for the crime for which the prisoner was convicted, less such good time allowance" provided by the code). Petitioner suggests that based upon assumption of a good time allowance, the maximum discharged date for Petitioner would have been 12.5 years, not twenty-five years.

CONCLUSION

Based on the foregoing, Mr. Weister respectfully requests that this Honorable Court vacate the order committing him to Sharpe Hospital, remand to the circuit court and order proceedings in accordance with W. Va. Code § 27-6A-3(e) for offenses which do "not involve an

act of violence against a person."

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I, Shawn R. McDermott, do hereby certify that I have caused a true and correct copy of the foregoing Petitioner's Brief and Appendix to be served upon Assistant Attorney General Lara K. Bissett by United States Postal Service First Class Mail at 812 Quarrier Street, 6th Floor, Charleston, WV 25301 on this 7th day of July, 2021.

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