IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0263

STATE OF WEST VIRGINIA,

Respondent,

v.

IZZAC CHRISTOPHER WEISTER,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the March 8, 2021, Order
Circuit Court of Jefferson County
Case No. 20-F-9

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I. INTRODUCTION

Respondent, State of West Virginia, by counsel, Lara K. Bissett, Assistant Attorney General, responds to Izzac Weister's ("Petitioner") brief filed in the above-styled appeal. Petitioner has failed to demonstrate the existence of reversible error and, therefore, the circuit court's order should be affirmed.

II. ASSIGNMENTS OF ERROR

Petitioner advances two assignments of error in his brief:

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 [Petitioner] for a period of twenty-five years?

Pet'r Br. 1.

III. STATEMENT OF THE CASE

Petitioner was indicted on January 21, 2020, in the Circuit Court of Jefferson County (20-F-9) on two counts of Soliciting a Minor via a Computer and one count of Use of Obscene Matter with Intent to Seduce a Minor. App. 10-12. The charges stem from a June 11, 2019, report to police that Petitioner sent his 14-year-old half-sister obscene text messages on the social media platform Instagram. App. 128, 131. He asked her, "Have you ever wondered what it would be like if u had sex with a brother," to which the victim replied, "No." App. 133. Petitioner asked, "Y Not Cutie," and the victim responded, "For one you are my brother 2 you are 19." App. 133-134. Petitioner's response was, "So what[?]" App. 134. The victim pointed out to him that she was 14 (App. 134), but he persisted, saying, "So ur my half sister it's not a big deal" (App. 135). He later demanded, "Send me ur boobs," followed by, "I want to fuck u." App. 137. He also sent

the victim a photo of his penis. App. 128, 131. The victim alerted her grandmother about the messages, and the grandmother contacted police. App. 128, 131.

At some point after his indictment, Petitioner was evaluated by two experts regarding his competency to stand trial. App. 15-41. Petitioner's medical history indicates that he was exposed to drugs *in utero* (App. 40) and then suffered a bacterial infection in 2017 which resulted in an extensive injury to the frontal and temporal lobes of his brain (App. 18, 20, 40). The result of his organic brain injuries is extensive: changes in personality, including increased impulsivity; poor judgment; disinhibition; difficulty regulating emotions; speech, auditory, and visual impairments; memory impairment; and sensory difficulties. App. 20, 40. Both the State's expert, Dr. David Clayman, and the defense's expert, Dr. Sarah E. Boyd, agreed that Petitioner was not competent to stand trial or assist his attorney in his defense. App. 24-26, 40-41. Neither believed that Petitioner would ever be restored to competency. App. 28-29, 40-41.

On January 5, 2021, the circuit court made a preliminary finding that Petitioner was "not competent to stand trial and is unlikely to attain competency within the next three months." App. 53. The circuit court noted that Petitioner sought further consultation with his expert as to whether competency could eventually be restored. App. 53. On January 22, 2021, however, both the State and Petitioner stipulated that Petitioner did "not have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational, as well as factual, understanding of the proceedings against him and that the Defendant [was] not substantially likely to attain competency within the next ensuing three months." App. 55.

The parties then briefed the issue as to whether Petitioner's offenses involved "an act of violence" pursuant to West Virginia Code § 27-6A-3(h). App. 56-84. The State pointed to this Court's decisions in *State v. George K.*, 233 W. Va. 698, 760 S.E.2d 512 (2014), *State ex rel. Smith*

v. Hon. David J. Sims, 235 W. Va. 124, 772 S.E.2d 309 (2015), and *State v. Riggleman*, 238 W. Va. 270, 798 S.E.2d 846 (2017), to argue that this Court has consistently held that offenses such as those committed by Petitioner constitute acts of violence within the meaning of West Virginia Code § 27-6A-3(h), despite the fact that they do not involve actual violence or the threat of violence. App. 61-66. The State urged the circuit court to commit Petitioner to the custody of the West Virginia Department of Health and Human Resources for the maximum time he could have been incarcerated if he was convicted, which is 25 years. App. 65.

Petitioner acknowledged this Court's precedents in *George K.* and *Riggleman* but argued that this Court "has never addressed whether [Petitioner's] charged offenses involve acts of violence against a person." App. 69-70. He argued that a "plain language and common sense" reading of § 27-6A-3(h) leads to the conclusion that Petitioner's offenses are not acts of violence. App. 70. He further argued that even if the term "act of violence" is ambiguous, the Rule of Lenity should apply in favor of Petitioner. App. 73. He also argued that because his offenses would not subject him to extended supervision under West Virginia Code § 62-12-26 if convicted, he should not be subjected to supervision pursuant to § 27-6A-3(h). App. 76-79.

The circuit court heard oral arguments from the parties on March 8, 2021. App. 90-125. Petitioner argued that *George K.* and *Riggleman* were incorrectly decided. App. 94-99. He then argued that the victim herein could not have been harmed because it was an isolated incident and because the victim and Petitioner "did not know that they were related until a few weeks before this incident." App. 99-101.

The State responded that Petitioner "solicited a child to engage in an illegal sex act, that solicited a child to engage in a crime of incest, that solicited a child to make and then send him nude photographs, and then sent a child an obscene image, so he could accomplish those acts."

App. 103. The State argued that action is "much more serious and [sic] some guy downloading a picture and be in possession of a picture that he got off the internet." App. 103. The State also pointed out that the very injuries that make Petitioner incompetent to stand trial make him a continued danger to society. App. 104.

The circuit court found that it "simply doesn't have the authority . . . to define contrary to the binding precedent, that's been relied upon by both parties here." App. 105-106. Accordingly, the circuit court found that Petitioner's offenses constituted acts of violence (App. 106) and ordered that he be committed to a mental health facility for a maximum period of 25 years[1] (App. 117). In its written order, entered March 8, 2021, the circuit court found that Petitioner was not competent to stand trial and not substantially likely to attain competency within the ensuing three months, the indicted offenses are felony offenses involving an act of violence against a person, Petitioner could have been convicted of the indicted offenses, and the maximum sentence he could have received is 25 years. App. 6-7. The circuit court further found that it would maintain jurisdiction over Petitioner for 25 years or until he regains competency and the criminal charges are resolved. App. 7. Petitioner now appeals.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3), (4).

[1] Pursuant to West Virginia Code § 61-3C-14b, the sentence for solicitation of a minor via computer is not less than two nor more than ten years in prison. Pursuant to West Virginia Code § 61-8A-4, the sentence for use of obscene matter with intent to seduce a minor is a term of five years in prison.

V. SUMMARY OF THE ARGUMENT

Petitioner acknowledges himself that the law is settled, and it is. This Court's precedent demands that Petitioner be committed to an appropriate mental health inpatient facility for a period equal to the maximum sentence he would have faced had he been found competent to stand trial and convicted. As found in *George K.*, 233 W. Va. 698, 760 S.E.2d 512, and *Riggleman*, 238 W. Va. 270, 798 S.E.2d 846, Petitioner's offenses involve an act of violence against the mental and emotional safety of his victim, who is his minor half-sister. Accordingly, pursuant to West Virginia Code § 27-6A-3(h), the circuit court was bound to commit Petitioner for a period of 25 years. Therefore, the circuit court did not err or otherwise abuse its discretion, and this Court should affirm its decision.

VI. ARGUMENT

A. 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." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

B. This Court has made clear that for purposes of West Virginia Code § 27–6A–3, the term "act of violence against a person" is not limited to the risk of physical harm but includes the risk of severe emotional or psychological harm to children.

In arguing that his charged offenses—two counts of solicitation of a minor and one count of use of obscene material to seduce a minor—do not involve "acts of violence against a person," Petitioner acknowledges that this Court has previously and clearly found otherwise. Pet'r Br. 4. He argues, though, that the Court's broad definition of violence "is a derelict on the sea of law that defines 'violence' as the use of physical force." Pet'r Br. 4. Accordingly, he asks this Court to "correct an error that was previously-made" in its line of decisions. Pet'r Br. 4. Petitioner's

argument is meritless, and this Court should not depart from its carefully considered and correctly decided precedent.

At the time of Petitioner's offenses and indictment, West Virginia Code § 27-6A-3(h) (2007) provided that

> [i]f at any point in [criminal] 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.

The issue, as argued by Petitioner, is whether his offenses were acts of violence. He urges this Court to take a "common sense" approach to defining the term "violence" and find that it requires physical force. Pet'r Br. 5. His argument fails for two reasons: 1) this Court has already decided this issue and 2) this Court's precedent is in line with the interests of justice and public policy and, thus, should not be revisited.

1. ***George K.* and *Riggleman* are well-reasoned decisions grounded in public safety which make clear that acts of violence take many forms and are not exclusively acts of physical violence.**

Petitioner recognizes the history of this Court's decisions in interpreting the term "act of violence against a person" as contemplated in West Virginia Code § 27-6A-3(g) and (h) but points out that this Court has not directly addressed whether Petitioner's particular offenses are acts of violence. Pet'r Br. 6-8. In *George K.*, the defendant was indicted on two counts of third degree sexual assault and two counts of sexual abuse by a custodian. 233 W. Va. at 702, 760 S.E.2d at 516. George K. was found incompetent to stand trial, but the parties disagreed as to whether charges should be dismissed pursuant to § 27-6A-3(g) or whether he should be committed pursuant to § 27-6A-3(h). *Id.* at 703, 760 S.E.2d at 517. The circuit court ultimately came down on the side of the State, finding that George K.'s offenses involved acts of violence and, therefore, he should be committed. In affirming the decision of the lower court, this Court held that "[a]n '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." *Id.* at Syl. Pt. 2. In coming to that conclusion, the Court specifically noted that "the Legislature has not given us any explicit guidance; nowhere in W. Va. Code §§ 27-6A-1 to -11 has the Legislature defined the term 'violence.'" *Id.* at 698, 706, 760 S.E.2d at 520. Because of this ambiguity, the Court turned to the intent of the statute. The Court acknowledged that neither the statute itself nor the legislative history shed any light on the legislative intent; however, it looked to prior case law[2] in which it held that "[t]he purpose of a commitment statute is . . . to treat the illness and protect society." *Id.* at 708, 760 S.E.2d at 522.

[2] Syl. Pt. 4, *State v. Smith*, 198 W. Va. 702, 482 S.E.2d 687 (1996) ("The purpose of West Virginia Code § 27-6A-3 is not to punish someone suffering a mental illness; rather, it is to treat the illness and protect society.").

With that purpose in mind, the Court turned to determining what "act of violence against a person" entails, asking whether an incompetent defendant's offenses indicate that he or she poses a future risk of harm to the public. *Id.* Observing that George K.'s charged offenses did not include an "act of violence" as an element of the crimes but noting that other crimes which are obviously violent—for instance, battery—do not explicitly include an "act of violence" as an element, the Court concluded that common sense dictates that the elements of a crime do not determine whether an offense involves an "act of violence." *Id.* at 709, 760 S.E.2d at 523.

Again relying on a prior decision,[3] the Court held that the term "act of violence" is not constrained by physical violence; rather, "physical, psychological, and emotional harm all constitute violence within the meaning of W. Va. Code § 27–6A–3 when the charged crime involves children." *Id.* at 711, 760 S.E.2d at 525. The Court acknowledged that the record before it contained nothing that would indicate that George K.'s victim suffered any harm—physical, psychological, emotional, or otherwise—but noted that the focus was not only on the instant victim but also on the future harm that George K. could visit on other children if he was not committed. *Id.*

Three years later, the Court had occasion to revisit the issue in *Riggleman*. In that case, the defendant was indicted on a felony charge of possession of child pornography and, like George K. and Petitioner, was found not competent to stand trial. *Riggleman*, 238 W. Va. at 722, 798 S.E.2d at 848. As in *George K.*, the lower court determined that Riggleman's offenses constituted an "act of violence against a person." *Id.* at 723, 798 S.E.2d at 849. Again, in a carefully-thought and well-reasoned opinion, the *Riggleman* Court extended its holding in *George K.* to include the

[3] *State ex rel. Spaulding v. Watt*, 188 W. Va. 124, 126, 423 S.E.2d 217, 219 (1992) (finding that "the word 'violence' in our post-conviction bail statute is not limited by the adjective 'physical'" and that "sexual assaults on young children result in severe emotional and psychological harm.").

possession of child pornography in the litany of offenses which do not directly implicate physical violence but which "pose[ ] a risk of physical, emotional or psychological harm to children." *Id.* at 727-728, 798 S.E.2d at 853-54. The Court determined that "the issue is not whether the incompetent defendant *committed* an act of violence against a person; the language of West Virginia Code § 27-6A-3(h) does not require the State to make that showing. Rather, the relevant inquiry is whether the crime charged *involves* an act of violence against a person." *Id.* at 725, 798 S.E.2d at 851. The Court found that "[i]t is axiomatic that child pornography harms children and 'the victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from the arguably more culpable offenses of producing or distributing child pornography.' *United States v. Norris*, 159 F.3d 926, 930 (5th Cir. 1998)." *Id.* at 728, 798 S.E.2d at 854. Accordingly, the Court found that Riggleman's offenses involved an "act of violence" and, thus, Riggleman posed "a sufficient risk of dangerousness to the community to justify the circuit court's exercise of jurisdiction over him pursuant to West Virginia Code § 27-6A-3(h)." *Id.* at 728-729, 798 S.E.2d at 854-855.

2. This Court's rulings in *George K.* and *Riggleman* are highly instructive in the instant case, and this Court should extend them to find Petitioner's offenses to be "acts of violence against a person."

Petitioner argues that the "plain and common sense reading of the phrase 'involves an act of violence against a person' should control the determination in this case" and charges that this Court's prior ruling in *George K.* "went through extraordinary leaps of logic to get the outcome [the Court] wanted" and "led to absurd results." Pet'r Br. 9. He advocates for this Court to overturn precedent and "give the term its common, ordinary, and accepted meaning." Pet'r Br. 10. Petitioner is wrong because this Court's prior rulings in *George K.* and *Riggleman* are consonant with its overarching jurisprudence and with that of other jurisdictions.

While Petitioner argues that the term "act of violence against a person" should be attributed "its ordinary common sense meaning" (Pet'r Br. 10), the "ordinary meaning" of violence is not limited to either an inherently violent *act* or *bodily* injury to the victim. *See State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817, 821 (2019) ("For purposes of a life recidivist conviction under West Virginia Code § 61-11-18(c), two of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, *or (3) substantial impact upon the victim such that harm results*." (Emphasis added)); *State v. Norwood*, 242 W. Va. 149, 158, 832 S.E.2d 75, 84 (2019), *cert. denied sub nom. Norwood v. W. Va.*, 140 S. Ct. 1297 (2020) ("The delivery and ultimate use of heroin carries with it an *inherent risk of violence* to a person." (Emphasis added)); *State ex rel. Smith v. Sims*, 235 W. Va. 124, 131, 772 S.E.2d 309, 316 (2015) (finding that a juvenile who carried a gun to school "posed a risk of physical harm *and severe emotional and psychological harm* to children and, therefore, he committed an offense involving an act of violence against a person within the meaning of West Virginia Code § 27–6A–3." (Emphasis added.)); *State ex rel. Spaulding v. Watt*, 188 W. Va. 124, 126, 423 S.E.2d 217, 219 (1992) ("[T]he word 'violence' in our post-conviction bail statute is not limited by the adjective 'physical.' There can be no dispute that *even in the absence of any significant physical trauma, sexual assaults on young children result in severe emotional and psychological harm*." (Emphasis added.)); *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 716, 356 S.E.2d 464, 470 (1987) ("Aside from acts of abuse to the body and mind of a child, first degree murder of a child's parent is the ultimate act of savagery to that child. *The emotional and psychological scarring the child has sustained as a result of his mother's death at the hands of his father is no doubt substantial*." (Emphasis added)). Indeed, "*[p]sychological* or sexual *abuse or exploitation*, including rape, molestation, incest (if the victim is a minor), or forced prostitution *shall be considered acts of violence*." 8 C.F.R. § 204.2

(2007) (held invalid on other grounds) (emphasis added); *see also Kaur v. Wilkinson*, 986 F.3d 1216, 1225 (9th Cir. 2021) ("*Sexual assault is more than just a violation of bodily autonomy.* Just as rape's severe psychological effects include shame and a clouded memory, *Bringas-Rodriguez*, 850 F.3d at 1071, sexual assault's *psychological effects* include 'self-blame, a pervasive feeling of loss of control, and memory loss or distortion.'" (Citations omitted.) (Emphasis added)).

Therefore, even if the current Court rejects the *George K.* Court's finding that the term "act of violence against a person" is ambiguous, it should not reject the *George K.* Court's ultimate reasoning because situations such as the one presented in Petitioner's case and the *George K.* line of cases are those "rare circumstances where a statute's literal meaning may be disregarded because to do so would lead to clearly unintended results." *In re Greg H.*, 208 W. Va. 756, 760, 542 S.E.2d 919, 923 (2000).

3. The 2021 amendment to the statute does not support Petitioner's argument.

Petitioner next argues that the 2021 amendment to West Virginia Code § 27-6A-3 "makes it clear that a violent offense under the code requires bodily injury, not psychological or emotional injury to a person." Pet'r Br. 11-12. Petitioner fails to cite to what particular provision in the amended statute he refers, but, assumedly, he is referring to § 27-6A-3(g)(2). That subparagraph states:

> If, at the end of the maximum period for inpatient competency restoration treatment as provided in this subsection, the court finds that the defendant has not attained competency and is not substantially likely to attain competency in the foreseeable future, 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 and the defendant released unless civil commitment proceedings have been initiated pursuant to § 27-5-1 *et seq.* of this code. Notwithstanding anything in this article to the contrary, the court, in its discretion, may continue its oversight of the individual and the court's jurisdiction over the individual: *Provided,* That notwithstanding any provision of this article to the contrary, an individual may not be released as provided in this subsection until the court reviews and approves a

> recent dangerousness risk assessment of the individual and the chief medical officer's recommended release plan for the individual based on the needs of the individual and the public. The court shall order the discharge of the individual if it finds by a preponderance of the evidence that the individual has recovered from his or her mental illness and that he or she no longer creates a substantial risk of bodily injury to another person.

W. Va. Code § 27-6A-3(g)(2) (2021).[4] The amended statute, however, provides no refuge to Petitioner. For one, the only provision in the statute that contains the term "bodily injury"—§ 27-6A-3(g)(2)—applies to a defendant who "has a substantial probability of regaining competency" and who has been held "for inpatient competency restoration treatment" for the maximum period. *See* W. Va. Code § 27-6A-3(g)(1) and (g)(2). The record is clear that Petitioner will never regain competency (App. 28-29, 40-41), and that is not the purpose of his current hospitalization (App. 6-7).

For another, as it pertains to Petitioner's situation, the amended statute is largely unchanged and, so, does not require this Court to revisit its prior decisions regarding the definition of an "act of violence against a person." Petitioner's commitment was ordered pursuant to § 27-6A-3(h)(2007):

> (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

[4] The amendment to the statute became effective July 9, 2021.

> 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.

(Emphasis added). The related passage in the amended statute is § 27-6A-3(f) (2021):

> (f) Subject to subsection (i)[5] of this section, if at any point in the proceedings a *defendant who has been indicted or charged with a misdemeanor or felony involving an act of violence against a person is found not competent to stand trial and is found not substantially likely to attain competency* after having received competency restoration services for 180 days, he or she shall be placed in the least restrictive setting and shall remain under the jurisdiction of the court upon any conditions that the court considers appropriate and the charges against him or her shall be held in abeyance. Release of the defendant may be stayed by the court for up to 30 days or longer for good cause shown, upon the filing of a motion to challenge the individual's release to a less restrictive setting. The circuit court may, *sua sponte* or upon motion, order that a dangerousness evaluation be performed by a qualified forensic evaluator to aid in its consideration of the proposed placement and supervision of the defendant. The dangerousness evaluation shall be paid for by the department and completed within 30 days. The defendant shall be immediately released from any inpatient facility to the least restrictive setting necessary under § 27-5-1 *et seq.* of this code, unless civilly committed.

(Emphasis added). The relevant language in both passages is substantially the same and, so, this Court's prior precedent in *George K.* and *Riggleman* remains the relevant instructive authority. That is, physical bodily injury is not the standard. *See George K.*, 233 W. Va. at 711, 760 S.E.2d at 525; *Riggleman*, 238 W. Va. at 727-728, 798 S.E.2d at 853-54.

Furthermore, at the time of Petitioner's commitment, all the circuit court had to guide its decision was the statute as it was enacted in 2007 and this Court's jurisprudence. Indeed, the circuit court found that it "simply doesn't have the authority . . . to define contrary to the binding

[5] (i) Any defendant found not competent to stand trial may at any time petition the court of record for a hearing on his or her competency but may do so not more than every six months. W. Va. Code § 27-6A-3 (2021).

precedent, that's been relied upon by both parties here." App. 105-106. So, to the extent that Petitioner is alleging error because the circuit court found that Petitioner's offenses equated "acts of violence" where there was no "bodily injury," his argument fails because that was not the standard at the time the circuit court made its decision. Respondent would argue that it is not the standard even now, W. Va. Code § 27-6A-3(g)(2) notwithstanding.

> "'A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to the subject-matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.' Syllabus Point 5, *State v. Snyder,* 64 W. Va. 659, 63 S.E. 385 (1908)." Syllabus Point 3, *Buda v. Town of Masontown,* 217 W. Va. 284, 617 S.E.2d 831 (2005).

Syl. Pt. 4, *Davis Mem'l Hosp. v. W. Va. State Tax Com'r*, 222 W. Va. 677, 671 S.E.2d 682 (2008). To that end, if the Legislature intended to supplant this Court's rulings in *George K.* and *Riggleman*, it would have expressly stated that emotional and psychological injuries do not rise to the level of an "act of violence against a person" when it amended § 27-6A-3 in 2021. It did not, so this Court should read the amended statute in harmony with its prior rulings in *George K.* and *Riggleman.* This Court should affirm the lower court's decision.

4. The Rule of Lenity does not apply.

Seeming to surrender to the notion that this Court will not turn away from its established precedent, Petitioner next argues that the Rule of Lenity should apply in his favor, construing the term "involves an act of violence against a person" against the State. Pet'r Br. 12. He acknowledges that this Court already dispensed with that notion in *George K.* Pet'r Br. 12; *see George K.*, 233 W. Va. 698, 706, 760 S.E.2d 512, 520 (finding that the statute is not punitive in nature and, therefore, "the rule requiring the Court to construe penal statutes in favor of the

defendant is inapplicable to the present case."). Petitioner persists, though, arguing that the Rule applies to laws which are punitive in effect as well as in nature. Pet'r Br. 12. He argues that if he was tried, convicted, and sentenced to the maximum sentence, he would be eligible for parole in six and one-half years and, with credit for good time, would fully discharge his sentence in 15 years rather than being confined for the full 25 years.[6] His argument fails.

First, his present commitment is subject to review pursuant to West Virginia Code § 27-6A-3, and Petitioner could be released early if his mental condition improves and a dangerousness assessment reflects that he no longer needs constant supervision.

> If the defendant has been ordered to a mental health facility pursuant to subsection (h) of this section *and the court receives notice from the medical director or other responsible official of the mental health facility that the defendant no longer constitutes a significant danger to self or others, the court shall conduct a hearing within thirty days to consider evidence, with due consideration of the qualified forensic evaluator's dangerousness report or clinical summary report to determine if the defendant shall be released to a less restrictive environment.* The court may order the release of the defendant only when the court finds that the defendant is no longer a significant danger to self or others. When a defendant's dangerousness risk factors associated with mental illness are reduced or eliminated as a result of any treatment, the court, in its discretion, may make the continuance of appropriate treatment, including medications, a condition of the defendant's release from inpatient hospitalization. The court shall maintain jurisdiction of the defendant in accordance with said subsection. Upon notice that a defendant ordered to a mental health facility pursuant to said subsection who is released on the condition that he or she continues treatment does not continue his or her treatment, the prosecuting attorney shall, by motion, cause the court to reconsider the defendant's release. Upon a showing that defendant is in violation of the conditions of his or her release, the court shall reorder the defendant to a mental health facility under the authority of the department which is the least restrictive setting that will allow for the protection of the public.

[6] Later in his brief, Petitioner argues that with credit for good time, he would discharge his sentence in twelve and one-half years. Pet'r Br. 20.

W. Va. Code § 27-6A-3(i) (2007) (emphasis added). Clearly, then, the statute is not designed to lock up a defendant and throw away the key but to monitor and treat his or her mental health concerns, and Petitioner's punitive effect argument fails.

Second, Petitioner's most recent Dangerousness Risk Assessment, performed April 23, 2021, belies his argument that with credit for good time or parole he could be released in as little as six and one-half years. That assessment finds that Petitioner "has both static (historical unchanging) and dynamic (changeable) risk factors for future *violence* and/or sexual misconduct." Supp. App.[7] 4. It notes that since his hospitalization, he has demonstrated "problematic interpersonal behavior" on several occasions. Supp. App. 8. When confronted about his behavior, he has become "loud and angry[,] denying any [wrongful] action." Supp. App. 8. The evaluator, Dr. Nicholas Jasinski, notes that such behavior "indicat[es] an ongoing difficulty maintain[ing] safe and appropriate boundaries and behavior with others . . . He continues to manifest problematic behavior that makes him inappropriate for release into the community." Supp. App. 13. The evaluator concluded that "[g]iven [Petitioner's] clear impairment in cognitive functioning and behavioral control, as well as ongoing behavioral and treatment compliance issues, placement in a locked facility with 24-hour supervision and on-site mental health treatment services is necessary." Supp. App. 5, 14.

With that in mind, it is hard to imagine that, had he been convicted and incarcerated, Petitioner would have been able to conform his behavior to accumulate good time credit or demonstrate that he is a suitable candidate for parole. Petitioner's argument that the Rule of Lenity

[7] Respondent has filed a Motion to Supplement the Appendix Record contemporaneously with this Response Brief.

should apply in his case in the face of this Court's precedent in *George K.* is meritless and should be disregarded.

5. *George K.* and *Riggleman* are controlling in this case, and they support the finding that Petitioner's offenses involve acts of violence.

Petitioner goes on to argue again that neither of his charged offenses involves an "act of violence against a person." Pet'r Br. 13. He points to the elements of the crime, noting that violence is not a factor. Pet'r Br. 13. Again, though, he acknowledges that *George K.* and *Riggleman* have already addressed this matter, holding that the elements of the crime are not relevant to an assessment of whether an offense involves an "act of violence against a person." Pet'r Br. 13; *see George K.*, 233 W. Va. at 709, 760 S.E.2d at 523 (finding that common sense dictates that the elements of a crime do not determine whether an offense involves an "act of violence."). Nonetheless, Petitioner propounds that this Court should abandon its prior line of reasoning and adopt the federal standard "that courts should only look to the elements of the offense in determining whether a state court conviction constitutes a violent felony." Pet'r Br. 13. This Court should disregard the argument and find that its prior rulings in *George K.* and *Riggleman* include Petitioner's offenses.

First of all, Petitioner was not *convicted* of any crime. He cannot be convicted because he is not competent to stand trial and will never be competent to stand trial. App. 24-26, 28-29, 40-41. Therefore, the single United States Supreme Court case he cites to support his position holds no weight in this matter. Second of all, he cites no legal authority that suggests that this Court's prior reasoning is flawed and should now be abandoned. "A [petitioner] assumes upon himself the burden of showing error in the judgment complained of." Syl. Pt. 2, *Griffith v. Corrothers*, 42 W. Va. 59, 24 S.E. 569 (1896). Petitioner cannot meet that burden simply by stating that he disagrees with the controlling law.

Petitioner's offenses are no different than the sexual offenses committed against children by George K. and Riggleman. As discussed at length above, this Court undertook a very careful, very thoughtful analysis of their offenses and found quite pointedly that "'[c]hildren are the most vulnerable of victims, suffering traumatic and frequently life-long physical and emotional damage.' *State v. Goff,* 203 W.Va. 516, 522, 509 S.E.2d 557, 563 (1998) (internal quotation omitted)." *George K.*, 233 W. Va. at 711, 760 S.E.2d at 525. The Court also noted that the focus was not only on the instant victim but also on the future harm that George K. could visit on other children if he was not committed. *Id.*

The Court extended that reasoning to the offenses committed by Riggleman, which, arguably, were further removed from the actual victims than those committed by George K. Unlike George K. who committed sexual assault and sexual abuse against his girlfriend's teenage daughter,[8] Riggleman downloaded over 100 images depicting child pornography. *Riggleman*, 238 W. Va. at 722, 798 S.E.2d at 848. Much like Petitioner, Riggleman did not have any physical contact with his victims, let alone cause physical harm to them. Nonetheless, the Court found that Riggleman's act "pose[d] a risk of physical, emotional or psychological harm to children." *Id.* at 727-728, 798 S.E.2d at 853-54. This Court should now extend that reasoning to the offenses committed by Petitioner.

Indeed, an extension of this Court's prior holdings in *George K.* and *Riggleman* to Petitioner's offenses is consistent with decisions rendered in other jurisdictions. In *Schlosser v. State*, 965 N.E.2d 430, 432 (2012), the Appellate Court of Illinois considered whether indecent solicitation of a child constitutes a "forcible felony." The court observed that indecent solicitation of a child is not one of the enumerated "forcible felony" offenses as defined in the Illinois Criminal

[8] *George K.*, 233 W. Va. at 702, 760 S.E.2d at 516.

Code. *Id.* at 433. Nonetheless, the court held "that since sexual abuse of a minor involves an act of violence against a child, that inherent in the act of soliciting a child for sex is the threat of violence against that child." *Id.* at 434.

In *United States v. Ramos-Sanchez*, the defendant pleaded no contest to indecent solicitation of a child in violation of Kansas Statute § 21-3510(a)(1). 483 F.3d 400, 401 (5th Cir. 2007). Ramos-Sanchez was later indicted for illegal re-entry to the United States following deportation, and the question was whether his Kansas conviction was a "crime of violence"—to-wit the enumerated offense of "sexual abuse"—for purposes of the federal enhancement guidelines. *Id.* The Fifth Circuit held that "soliciting or enticing a minor to perform an illegal sex act, as prohibited by section 21-3510(a)(1), is also abusive *because of the psychological harm it can cause*." *Id.* at 403 (emphasis added); s*ee also United States v. Izaguirre-Flores*, 405 F.3d 270, 275–76 (5th Cir. 2005) ("Taking indecent liberties with a child to gratify one's sexual desire constitutes 'sexual abuse of a minor' because it involves taking undue or unfair advantage of the minor and causing [ ] psychological-if not physical-harm."); *United States v. Zavala-Sustaita*, 214 F.3d 601, 605 (5th Cir. 2000) (finding that "[s]ince psychological harm can occur without physical contact, a distinction based only on physical contact would miss the essential nature of 'sexual abuse'" for purposes of the federal enhancement statute).

It matters not that Petitioner's "entire charged act occurred within a matter of minutes" or that there was not "any extended solicitation" of his victim, as argued by Petitioner. Pet'r Br. 14. That is likely only because the incident was reported almost immediately to police and Petitioner did not have an opportunity to act further. *See* App. 126-138. Moreover, Petitioner's text messages to his victim and his unabashed and aggressive behavior, even in the controlled environment of hospitalization, demonstrate that it is reasonable to believe that with the opportunity, he would

have attempted to act on his sexual desires. Nor does it matter that the record does not reflect that the victim suffered any psychological or emotional harm.[9] As this Court noted in *George K.*, the focus is not solely on the instant victim but also on the future harm that Petitioner could visit on other children if he was not committed. *George K.*, 233 W. Va. at 711, 760 S.E.2d at 525.

Again, the latest risk assessment clearly advises continued "placement in a locked facility with 24-hour supervision and on-site mental health treatment services is necessary" (Supp. App. 5) due to Petitioner's "risk factors for future violence and/or sexual misconduct" (Supp. App. 4). Petitioner's argument fails, and this Court should extend its prior holdings to include the specific offenses which Petitioner committed against his 14-year-old half-sister.

6. Petitioner's most recent Dangerousness Risk Assessment belies his argument that he should not be subjected to extended supervision under § 27-6A-3.

Petitioner further argues 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," which does not encompass his specific offenses. Pet'r Br. 15. He asserts that the legislature "did not intend to have these offenses qualify as involving acts of violence as to require [Petitioner] to be in State custody for decades in order to protect the public." Pet'r Br. 18. He goes on to argue, "[l]ooking 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 [Petitioner's] freedom." Pet'r Br. 18. Petitioner's recent risk assessment proves, though, that his argument rings hollow.

[9] Just because the record does not contain evidence of harm to the victim does not mean she did not suffer any harm. The record in this case is obviously tailored to address Petitioner's history—social, medical, and criminal—and not the victim's.

As discussed previously, Petitioner's most recent Dangerous Risk Assessment notes multiple behaviors—even under supervision—which indicate "risk factors for future violence and/or sexual misconduct." Supp. App. 4. Therefore, the evaluator finds that continued "placement in a locked facility with 24-hour supervision and on-site mental health treatment services is necessary." Supp. App. 5. For this reason alone, Petitioner's argument fails.

Also, and again, the *George K.* Court already tackled this issue:

> Following our holdings in this case, we reiterate that the determination of whether a charged crime involves an act of violence under W. Va. Code § 27-6A-3 is only a threshold inquiry. With regard to incompetent defendants who are charged with a crime involving an act of violence pursuant to W. Va. Code § 27-6A-3(h), the duty of the court is not to "lock them up and throw away the key." Instead, under W. Va. Code § 27-6A-3(h) the condition of those defendants must at a minimum be reviewed annually, and reports regarding their conditions must be submitted to and considered by the court. W. Va. Code § 27-6A-3(h). Additionally, W. Va. Code § 27-6A-3(h)-(i) require that an incompetent defendant be committed to the least restrictive environment necessary to treat the defendant while simultaneously providing for the protection of the public.

George K., 233 W. Va. at 712, 760 S.E.2d at 526. At this time, Petitioner cannot allege that the system has failed to fairly consider his liberties as weighed against the protection of the public. If at some point a risk assessment finds that he *does not* exhibit risk factors that require continued round-the-clock supervision in a locked facility, *then* he can petition the Court for relief if he is not released. The record is clear, though, that he does not meet that standard at this time.

Accordingly, this Court should disregard his argument that he is being unfairly subjected to extended supervised release.

C. The circuit court did not err in finding that the maximum sentence Petitioner could have received upon conviction is 25 years.

Petitioner's final argument is "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." Pet'r

Br. 19. He further argues that his sentence violates principles of double jeopardy. Pet'r Br. 20. Finally, he argues that his sentence should reflect a credit for good time. Pet'r Br. 20.

First and foremost, Petitioner has not been *sentenced* at all. He has not been convicted and, so, cannot be sentenced; rather, he has been committed to a state hospital under the circuit court's jurisdiction for a period of time equal to what he *could have been sentenced* had he been competent to stand trial and convicted. Second, that period—25 years—reflects a correct application of the law. Petitioner's argument fails.

By Petitioner's own admission, there is no case law interpreting § 27-6A-3(h)(2007) regarding how long a defendant can remain under the circuit court's jurisdiction once it has been found that he or she is not competent and cannot be restored to competency to stand trial. Pet'r Br. 19. The relevant language of the statute is this:

> 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.

W. Va. Code § 27-6A-3(h)(2007). Petitioner claims that he could not have been convicted of and sentenced for two counts of solicitation of a minor because that would have violated his double jeopardy rights (Pet'r Br. 20), but he is plainly wrong.

The statute prohibiting the solicitation of minors states:

> Any person over the age of eighteen, who knowingly uses a computer to solicit, entice, seduce or lure, or attempt to solicit, entice, seduce or lure, a minor known or believed to be at least four years younger than the person using the computer or a person he or she believes to be such a minor, in order to engage *in any illegal act proscribed by the provisions of article eight, eight-b, eight-c* **or** *eight-d* of this chapter, or any felony offense under section four hundred one, article four, chapter

> sixty-a of this code, is guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000 or imprisoned in a state correctional facility not less than two nor more than ten years, or both.

W. Va. Code § 61-3C-14b. Instructively, in *State v. Rummer*, this Court noted "the legislative use of the word 'or' throughout [the] definition [of the term sexual contact as it relates to sexual abuse], which, under our rules of statutory construction, is clearly designed to separate the various acts that may constitute 'sexual contact.'" 189 W. Va. 369, 377, 432 S.E.2d 39, 47 (1993). The *Rummer* Court went on to find

> that the principal element of W. Va. Code, 61-8B-7, which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W. Va. Code, 61-8B-1(6), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles.

Id.

Similarly, here, a person is guilty of solicitation of a minor if he or she who knowingly uses a computer to attempt to solicit a minor to engage in an "act proscribed by the provisions of article eight, eight-b, eight-c *or* eight-d." In this case, Petitioner solicited his victim to commit the illegal act of incest as defined in § 61-8-12(b) (App. 133, 135) and of the production and distribution of nude images by a juvenile as defined in § 61-8c-3b(a) (App. 137). Incest and the production and distribution of nude images by a juvenile each require proof of facts that the other does not. *See* W. Va. Code § 61-8-12(b); W. Va. Code § 61-8c-3b(a). Therefore, pursuant to *Rummer* soliciting a person to commit incest is a separate and distinct act from soliciting a juvenile to produce and distribute nude images. Therefore, Petitioner's double jeopardy claim is without merit, and the circuit court did not err in calculating the maximum penalty which he would have faced had he been convicted.

Petitioner next argues that because "there is no language under the competency statute to suggest whether the sentences should be run concurrently or consecutively" to one another. Pet'r Br. 20. He advocates for the Rule of Lenity to come down on the side of concurrent sentencing. Pet'r Br. 20. His argument is flatly wrong. Section 27-6A-3(h)(2007) specifically instructs the circuit court to determine "the maximum sentence he or she could have received" if convicted. There is no ambiguity in that language and common sense dictates that the "maximum sentence" a person can receive is one in which his sentences are run consecutively to one another. Indeed, our jurisprudence indicates that "[w]hen an individual is convicted of two or more offenses, before sentence is pronounced for either, the confinement will commence at the termination of the previous term or terms of confinement, unless, in the discretion of the trial court, the second or any subsequent conviction is ordered by the court to run concurrently." Syl. Pt. 3, *Keith v. Leverette*, 163 W. Va. 98, 254 S.E.2d 700 (1979). Accordingly, the circuit court did not err in calculating Petitioner's maximum term of commitment based on consecutive terms.

Petitioner's final plea is that even if consecutive sentencing is appropriate, "the maximum sentence that a defendant could receive should be based upon the maximum sentence, less any good time allowance." Pet'r Br. 20. Petitioner's argument misapprehends the law. The statute upon which Petitioner bases his argument—West Virginia Code §61-11-16—states, "Imprisonment 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 as is provided by sections twenty-seven and twenty-seven-a, article five, chapter twenty-eight of this Code,[10] in the case of persons sentenced for a definite term." (Emphasis added.) First, good time credit is a

[10] West Virginia Code § 28-5-27 was repealed and re-codified as § 15A-4-17, which was amended effective April 29, 2021.

function of calculating a prospective discharge date *by the Division of Corrections* and not by a sentencing court. *See* West Virginia Code § 15A-4-17(j) ("There shall be no grants or accumulations of good time or credit to any inmate serving a sentence in the custody of the Division of Corrections and Rehabilitation except in the manner provided in this section.") Second, "the accumulation of good time is dependent upon the prisoner's behavior or 'good conduct' while incarcerated" and, thus, is not a given. *State ex rel. Gordon v. McBride*, 218 W. Va. 745, 749, 630 S.E.2d 55, 59 (2006). Therefore, a person is not entitled to credit for good time on the front end of his or her sentence, and the circuit court did not err in not failing to account for it.

Because the circuit court did not err in calculating the period of its continued jurisdiction over Petitioner's commitment, this Court should not disturb its decision.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the March 8, 2021, Order of the Circuit Court of Jefferson County.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent, by Counsel.

PATRICK MORRISEY
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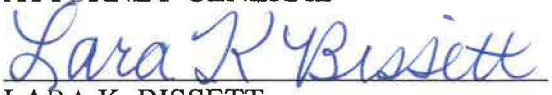

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0263

STATE OF WEST VIRGINIA,

Respondent,

v.

IZZAC CHRISTOPHER WEISTER,

Petitioner.

CERTIFICATE OF SERVICE

I, Lara K. Bissett, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief, Motion to File Supplemental Appendix Record, and Respondent's Supplemental Appendix** upon counsel for Petitioner, by depositing said copy in the United States mail, first class postage prepaid, on this 19th day of August 2021, and addressed as follows:

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