

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN CHARLESTON

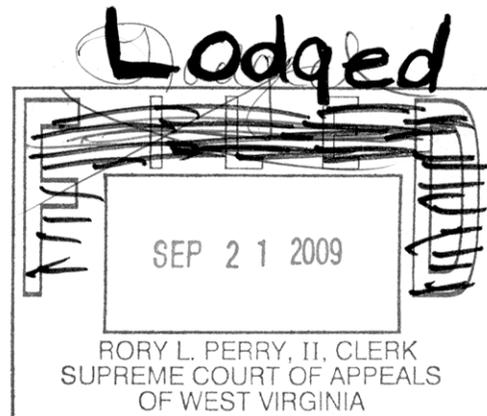
KIMBERLY THOMAS
Petitioner

vs.

No. 35141

JOSEPH B. MORRIS
Respondent

PETITIONER'S BRIEF IN SUPPORT OF APPEAL



Mark A. Toor (WV Bar No. 5228)
Bruce Perrone (WV Bar No. 2865)
Legal Aid of West Virginia, Inc.
922 Quarrier Street, 4th Floor
Charleston, West Virginia 25301
304-414-5424
Counsel for Petitioner

TABLE OF CONTENTS

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW 1

II. ASSIGNMENTS OF ERROR AND RULING OF THE COURT BELOW 1

III. STATEMENT OF FACTS 2

 a) Background 2

 b) Events of July 13, 2008 2

 c) Events after July 13, 2008 5

 d) Proceedings below 5

 i) Initial DVPO Proceedings 5

 ii) First Circuit Court Appeal 6

 iii) Second Family Court Action 6

 iv) Second Circuit Court Action 7

IV. ARGUMENT 7

 A. Standard of Review by this Court 7

 B. The Circuit Court applied an incorrect Abuse of Discretion
 standard of review, instead of a “de novo” standard, to the Family
 Court’s determination of law as to the meaning of the statutory
 words of WV Code §48-27-202 8

 C. The circuit court erred by ruling that the definition of domestic
 violence contained within West Virginia Code §48-27-202(5)
 required confinement caused by actual physical restraint, so that
 confinement caused by reasonable fear based upon the conduct
 of the respondent could not meet that definition. 9

 D. The circuit court erred by ruling that the definition of domestic
 violence contained within West Virginia Code §48-27-202(3)
 required an explicit threat by respondent in order for petitioner to
 have a “fear of physical harm by harassment, psychological abuse
 or threatening acts.” 15

V. CONCLUSION AND RELIEF PRAYED 17

TABLE OF CASES AND AUTHORITIES

CASES

Appalachian Power Company v. State Tax Dep't of West Virginia,
195 W. Va. 573, 466 S.E. 2d 424 (1995) 7-8

Carr v. Hancock, 216 W. VA. 474, 607 S.E. 2d 803 (2004) 7

Chrystal R. M. V. Charlie A. L., 194 W. Va. 138, 459 S.E. 2d 415 (1995) 7

Gillingham v. Ohio River Railroad Co. , 14 S.E. 243, 245 (W. Va. 1891) 12

Howell v. Goode, 674 S.E. 2d 248, 251 (2009) 8

State v. Hanna, 378 S.E.2d 640, 646 (W. Va. 1989) 12,16

State v. Harden, 679 S.E.2d 628 (2009) 14

State v. Totten, 185 S.E. 221, 222 (W.Va. 1936) 12

Weiland v. State, 732 So.2d 1044, 1051-1053 (FL 1999) 14

United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1993), cert. Denied,
415 U.S. 933 (1974) 12

STATUTES

WV Code §48-27-101 et. Seq. 1,9,18

WV Code §48-27-101 11

WV Code §48-27-101 (b) 16

WV Code §48-27-101(b)(1) 10, 15

WV Code §48-27-101(b)(4) 13,15

WV Code §48-27-101(b)(6) 16

WV Code §48-27-202 1,6

WV Code §48-27-202 (3) 1,15,18

WV Code §48-27-202 (5) 1,6,7,8, 9,10,11,14,18

WV Code §48-27-510(d) 8

WV Code §51- 2A-1 et. seq 8

WV Code §51- 2A-14	8
WV Code §51- 2A-14 (c)	8
WV Code §51- 2A-15(b)	8
WV Code §61- 2-9A	12,16
WV Code §61- 2-14	12
WV Code §61- 2-14a	11

OTHER AUTHORITY

Brownridge, Douglas A., <i>Violence Against Women Post-Separation, Aggression and Violent Behavior</i> , Vol. 11, Issue 5 (September/October 2006), pp 514-530	13
West Virginia Benchbook for Domestic Violence Proceedings	12-13, 14

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This case is an appeal from the Circuit Court of Clay County. The Circuit Court affirmed the denial by the Clay County Family Court of petitioner's request for issuance of a Domestic Violence Protective Order pursuant to WV Code 48-27-101 et.seq.

Petitioner sought a Domestic Violence Protective Order based primarily upon an incident when she, by virtue of fear of the respondent, hid in her home for two hours. Throughout that period she was afraid to try to escape from the premises. This fear arose because respondent was outside her home, yelling and demanding to talk to her, and threatening to stay there "all night long." The Circuit Court ruled that because respondent did not "bar the doors" or "physically force" petitioner into her home, his conduct did not meet the statutory element of "holding, confining, detaining or abducting another person against that person's will." See WV Code §48-27-202(5). The Circuit Court also ruled that because there was "no evidence that the Respondent ever threatened the Petitioner with physical harm" the petitioner could not meet the statutory element of "fear of physical harm by harassment, psychological abuse or threatening acts." See WV Code §48-27-202(3)

II. ASSIGNMENTS OF ERROR AND RULING OF THE COURT BELOW

1. The circuit court erred in applying an incorrect Abuse of Discretion standard of review, instead of a "de novo" standard or review, to the Family Court's determination of law as to the meaning of the statutory words of WV Code §48-27-202.
2. The circuit court erred by ruling that the definition of domestic violence contained within WV Code §48-27-202(5) requires confinement caused by actual *physical* restraint, so that confinement caused by reasonable fear could not meet that definition.
3. The circuit court erred by ruling that the definition of domestic violence contained within WV Code §48-27-202(3) requires an explicit threat by respondent in order for petitioner to have a "fear of physical harm by harassment, psychological abuse or threatening acts."

III. STATEMENT OF FACTS

a) Background

Petitioner Kimberly Thomas and respondent Joseph Morris were engaged in a long term romantic relationship. Circuit Court Order of January 13, 2009, at ¶ 1. On December 26, 2007 Ms. Thomas finally and definitively ended the romantic relationship. 09/03/08 Hearing Disc, time signature 10:06:56.

Beginning in May 2008 respondent Morris began to try to renew the relationship. Order of January 13, 2009, ¶ 1. Respondent admitted in his testimony that during the three months between May 2008 and the filing of the DVPO petition on August 1, 2008, he engaged in about 150 attempts to "rekindle the relationship." 9/03/08 Hearing Disc, 10:07:05. These attempts included phone calls, unannounced appearances at her workplace, and unannounced appearances at her home. He admitted that he initiated all but two or three of those contacts. 9/03/08 Hearing Disc, 10:07:05.

Respondent tried promises of marriage; promises to sign over to her a deed to a home; flowers; and notes to her workplace. 9/03/08 Hearing Disc, 11:11:40. During this time period respondent's son sent Ms. Thomas an eviction notice, after which respondent told Ms. Thomas he would take care of the eviction if Ms. Thomas would marry him. His efforts were characterized as "persistent" and "annoying" by both the Family Court, 9/03/08 Hearing Disc, 11:37:50; and the Circuit Court, January 13, 2009 Order Paragraphs 11 and 12.

b) Events of July 13, 2008

Petitioner Kimberly Thomas and Ray Blake, to whom she is now married, were at her rental home moving personal items out of the property on July 13, 2008. At 7:30 in the evening, 09/03/08 Hearing Disc, 10:38:09, Respondent Morris appeared in Thomas' driveway. 09/03/08 Hearing Disc, 10:12:16. Upon seeing Morris, Ms. Thomas ran back into the home, and locked herself and Mr. Blake inside. 09/03/08 Hearing Disc, 10:38:31. Mr. Blake testified that Ms. Thomas was "hysterical," 09/03/08 Hearing Disc, 10:42:15, and appeared to be very

scared throughout their lengthy confinement in the home. 09/03/08 Hearing Disc, 10:42:20.

Morris acknowledged that upon his arrival he knocked on the door over a 5 to 8 minute period, getting no response. 09/03/08 Hearing Disc, 10:09:35.

Morris next moved his car and parked it at an angle on the driveway. Ray Blake testified that it "might" have been possible to maneuver Ms. Thomas' car out the driveway and around Morris' car, but that he and Ms. Thomas were afraid to try it in view of Morris' presence and conduct outside. 09/03/08 Hearing Disc, 10:42:30. Blake also testified this fear was based in part on knowledge that Morris regularly carries a concealed weapon.¹ 09/03/08 Hearing Disc, 10:42:30. Jonalene Marks testified that when she came to the property later that evening, she believed Morris' car was blocking petitioner's exit from the property. 09/03/08 Hearing Disc, 10:56:15. Morris himself admitted that "She could've thought maybe I was blocking it," 09/03/08 Hearing Disc, 10:13:31, and "I don't even know for sure if it was *completely* blocking it. She *might* have been able to get around it." 09/03/08 Hearing Disc, 10:14:02 (emphases added).

After apparently blocking the driveway respondent Morris made further attempts to get Ms. Thomas to talk to him. 09/03/08 Hearing Disc, 10:15:30. He again knocked on the door. When his knock went unanswered, he demanded that Ms. Thomas talk to him. 09/03/08 Hearing Disc, 10:15:33. She refused to respond to him. Blake testified that Morris made a statement to the effect that "you will be in there all night 'cause I'll stay here all night." 09/03/08 Hearing Disc, 10:39:30. Morris admitted in his testimony that he "could have" said that he would stay there all night long if Ms. Thomas did not come out to meet him. 09/03/08 Hearing Disc, 10:17:20. Throughout the two hours, Morris moved around the house, sometimes at the front door and sometimes on the back porch. 09/03/08 Hearing Disc, 10:17:10.²

¹ For which Morris has a lawful permit.

² Ms. Thomas also testified that she had seen Morris pick up a 3 foot length of metal pipe and bang it on the door and the porch. 09/03/08 Hearing Disc, 10:18:05. Blake testified that he had not seen this himself, but that he had seen Ms. Thomas become visibly more afraid

Respondent Morris stayed on the property for one to two hours. Order of January 13, 2008, ¶ 11.³ Ms. Thomas was unable to phone for help because there was no working phone in the home, and her cell phone did not get coverage because her home was located near the bottom of a steep mountain. 09/03/08 Hearing Disc, 11:16:59.

After one to two hours of Morris banging on doors and yelling for petitioner to come out and meet him, Thomas and Blake decided to make an escape attempt on foot. While Morris was on the back porch, the two fled out the front door. They ran through the night darkness to the home of a neighbor, approximately one-quarter mile away. 09/03/08 Hearing Disc, 10:43:23. From the neighbor's home Ms. Thomas called a friend, Jonalene Marks, and asked that Ms. Marks come get her and Mr. Blake. 09/03/08 Hearing Disc, 10:43:41.

Ms. Marks testified that she received Ms. Thomas' call about 9:15 p.m., 09/03/08 Hearing Disc, 10:53:48, and that when she picked the two up Ms. Thomas was clearly upset and concerned for her safety. 09/03/08 Hearing Disc, 10:54:40. According to Ms. Marks, over the next hour she, Blake and Thomas drove by Thomas' home periodically, to see if Morris had left the property so they could recover Thomas' car. 09/03/08 Hearing Disc, 10:56:57. On at least one pass by the home, respondent Morris followed Ms. Marks' car for some distance but then returned to Ms. Thomas' home. 09/03/08 Hearing Disc, 10:57:28.

Eventually respondent Morris did leave, and Marks, Blake and Thomas were able to return to Ms. Thomas' home. In an effort to deceive Morris (should he see them) and thereby protect Thomas, they swapped cars so that Ms. Marks drove Ms. Thomas' car away from the property while Thomas and Blake drove in Marks' car. 09/03/08 Hearing Disc, 10:58:25. Soon afterward they met to exchange cars. Ms. Marks returned to her own home, while Blake and

and upset when she told him she had seen Morris pick up the pipe. 09/03/08 Hearing Disc, 10:41:52. The court below made no finding as to the presence or absence of a piece of pipe.

³ Respondent Morris adamantly claimed that he had been at the property for no more than 15 minutes. 09/03/08 Hearing Disc, 10:13:05. The Family Court and the Circuit Court specifically found otherwise.

Thomas drove elsewhere to a safe haven. 09/03/08 Hearing Disc, 11:00:18.

When Ms. Marks returned to her own home around 10:30 p.m., she saw respondent Morris' car pulling into her driveway. 09/03/08 Hearing Disc, 11:00:29. Ms. Marks testified that at that point she was afraid of Morris due to the fear she had seen in Ms. Thomas and the events Marks herself had witnessed that evening, and that she was concerned that Morris might force his way into Marks' house if he believed Thomas was hiding there. 09/03/08 Hearing Disc, 10:02:14. As a result of these fears, Marks not only locked her front door and refused to answer when Morris knocked, but she also locked herself in her bedroom and remained there until she was sure Morris had left her property. At the hearing some seven weeks after the events of July 13, Ms. Marks broke down in tears and confessed that she was still afraid of Morris. 09/03/08 Hearing Disc, 11:01:45.

c) Events after July 13, 2008

After escaping this situation, Ms. Thomas did not immediately contact law enforcement or seek a protective order. She hoped the events of the evening would demonstrate to Morris she had no intention of resuming a relationship with him, and he would finally leave her alone. 09/03/08 Hearing Disc, 11:08:16. Her hope was unfounded. Morris continued a steady stream of unwanted and unanswered phone calls to her, sometimes as many as a dozen a day. 09/03/08 Hearing Disc, 11:21:00. After concluding Morris would not change his conduct, which caused her to fear what else might happen, Thomas filed for a domestic violence protective order on August 1, 2008.

d) Proceedings below

i) Initial DVPO Proceedings

On August 1, 2008, nineteen days after the July 13 incident, Ms. Thomas filed her petition seeking a domestic violence protective order in the Magistrate Court of Kanawha County. That court issued an Emergency Protective Order (EPO) the same day.

Because the events occurred in Clay County, the Family Court of Kanawha County

subsequently transferred the case to the Family Court of Clay County, by order of August 8, 2008.

After hearing on September 3, 2008, the Clay County Family Court entered an order denying the petition for domestic violence protective order, on two grounds: (1) that petitioner failed to demonstrate a danger of "immediate and irreparable harm" in addition to meeting the statutory requirements for protection; and (2) that the conduct of respondent Morris did not meet the "holding, detaining" definition of domestic violence in WV Code 48-27-202(5).

ii) First Circuit Court Appeal

Petitioner Thomas appealed this denial to the Circuit Court of Clay County. By order entered September 27, 2008, the Circuit Court reversed, on two grounds. First, that the Family Court had applied an "inappropriate legal standard" in requiring proof of immediate and irreparable harm. Circuit Court Order of 09/27/2009, at page 2. Second, the Circuit Court concluded that the Family Court had "failed to reach any conclusion at all on the question of whether the evidence presented to it satisfies the definition of domestic violence under West Virginia Code §48-27-202(5)." Circuit Court Order of 09/27/2009, at page 2. The Circuit Court remanded to the Family Court with instructions to "decide the case exclusively by determining whether Petitioner has, by a preponderance of the evidence, proven an incident of domestic violence as defined by West Virginia code §48-27-202; second the family court shall specifically determine and rule on whether Petitioner was held, confined or detained against her will...." Circuit Court Order of 09/27/2009, at pages 2-3

iii) Second Family Court Action

Upon remand, no new evidence was taken. After hearing the arguments of counsel, the Family Court again denied the petition for domestic violence protective order, finding that Ms. Thomas had not proven the allegation of "domestic violence" as defined in WV Code 48-27-202.

iv) Second Circuit Court Action

On November 5, 2008, petitioner Thomas filed her second appeal to the Circuit Court of Clay County. No new evidence was taken, but argument was presented by both counsel on December 1, 2008. After submission by each party of proposed findings of fact and conclusions of law, the Circuit Court issued the ruling of January 13, 2008, from which the present appeal is taken. The Circuit Court held that "while the Respondent's behavior was less than ideal, it did not rise to the level of domestic violence," because WV Code 48-27-202(5) "contemplates more aggressive and direct action." Order of January 13, 2008, ¶¶11.

The Court acknowledged that "Petitioner testified that she was afraid to leave her home while the Respondent was outside, but she was not physically restrained or confined within her home. There was no testimony that the Respondent barred the doors to the Petitioner's home, or in any way physically forced the Petitioner into her home, and held her there." Order of January 13, 2008, ¶¶11.

IV. ARGUMENT

A. Standard of Review by this Court

In establishing a standard of review for examining a lower tribunal's rulings, this Court has consistently held:

In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law de novo.

Syllabus, Carr v. Hancock, 216 W.Va. 474, 607 S.E.2d 803 (2004). Moreover, "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." *Syl. Pt. 1, Chrystal R.M v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995); see also *Syl. Pt. 1, Appalachian Power*

Co. v. State Tax Dep't of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review."). The Court has reiterated these standards in the family law context as recently as Howell v. Goode, 674 S.E.2d 248, 251 (2009). See also WV Code §51-2A-15(b), that the standard of review by the Supreme Court "is the same as set forth in ... [§51-2A-14];" and WV Code §51-2A-14(c), that the standard of review by the circuit courts of family court decisions "shall review the findings of fact ... under the clearly erroneous standard and shall review the application of law to the facts under an abuse of discretion standard."

B. The Circuit Court applied an incorrect standard of review to the Family Court's determination of law regarding the requirements of WV Code §48-27-202

The Circuit Court correctly cited WV Code §48-27-510(d) in stating that "the Court reviews the findings of fact of the Family Court under the clearly erroneous standard, and the application of the law to the facts under an abuse of discretion standard." Circuit Court Order of January 13, 2009, ¶9.

The Circuit Court, however, failed to recognize the underlying predicate to 'applying law to fact' is the determination of what the law requires. The Circuit Court held that "it was not an abuse of discretion for the Family Court to find that the Petitioner was not held, confined, detained, or abducted against her will as contemplated in W.V. Code §48-27-202(5)." Circuit Court Order of January 13, 2009, ¶ 10 (emphasis added). The highlighted language constitutes a purely legal determination of what the law requires. This legal conclusion is not entitled to deference by reviewing courts.

It is traditional, black letter law that appellate courts review determinations of law by lower courts on a *de novo* basis.⁴ It is precisely the function of reviewing courts to clarify and correct the interpretation of law for the guidance of lower courts, which are then charged with the discretionary tasks of applying the law to each individual case. Nothing in either the

⁴ See Section IV.A. *supra*.

domestic violence prevention and treatment statute, WV Code §48-27-101 et.seq., or the family court statute, WV Code §51-2A-1 et.seq., provides otherwise.

In this case the primary issue presented to the Family Court, and then to the Circuit Court, and now to this Court, is a purely legal question: what do the statutory words “holding, confining, detaining or abducting another person against that person’s will” mean? As petitioner argues below,⁵ those words should be interpreted to include actions causing restraint and detention even without physical touching or barrier. Petitioner asserts that the Family Court committed purely legal error in concluding that the words of the statute required some sort of physical restraint or barrier. Petitioner similarly asserts that the Circuit Court committed purely legal error in concluding that because “petitioner was not physically restrained or confined within her home” Circuit Court Order of January 13, 2009, ¶ 11, she did not meet the definitional requirements of WV Code §48-27-202(5).

If either of the courts below had been correct in their legal conclusion that WV Code §48-27-202(5) requires some sort of physical restraint or barrier, then their discretionary judgment that the facts did not demonstrate a physical restraint or barrier would be entitled to deference upon appellate review. But the predicate legal question is purely a matter of law, and is not entitled to deference upon appellate review.

- C. The circuit court erred by ruling that the definition of domestic violence contained within West Virginia Code §48-27-202(5) required confinement caused by actual physical restraint, so that confinement caused by reasonable fear based upon the conduct of the respondent could not meet that definition.

The rationale of the Circuit Court is set forth primarily in Paragraph 11 of the January 13, 2009 Order. The Circuit Court focused mainly on the absence of evidence of physical touch, contact, or restraint:

- [petitioner] “was not physically restrained or confined within her home;”
- “no testimony that the Respondent barred the doors to the Petitioner’s home;”

⁵ See Section IV.C. at pages 9-13 below.

- “no testimony that the Respondent ... in any way physically forced the petitioner into her home, and held her there;”
- “Petitioner **possibly** could have gotten her car out of the driveway.” (Emphasis added).

The Circuit Court concluded, based on the above-referenced facts, that the petitioner had failed to meet the definition of domestic violence set forth in WV Code §48-27-202(5) of “holding, confining, detaining or abducting another person against that person’s will.”

Petitioner asserts that this interpretation is unsupported by the language of the statute, and is contrary to the Legislature’s intent that the domestic violence statute assure “the maximum protection from abuse that the law can provide.” WV Code §48-27-101(b)(1). Would a detention by threat⁶ fail to meet the lower court’s newly imposed condition? Would detention by a false threat⁷ fail to meet the lower court’s new condition? Would a detention by threat to a third person⁸ fail to meet the lower court’s new condition? Would a detention by muted threat⁹ fail to meet the lower court’s new condition? Would a detention by reasonable fear¹⁰ fail to meet the lower court’s new condition? The answer to all these hypothetical situations is ‘surely not,’ because the statute cannot achieve its purpose if it is interpreted so restrictively.

The words of the statute simply do not contain the condition added by the courts below. The statute does not say “holding, confining, detaining or abducting, by physical touch, contact,

⁶ For example: “if you leave that room I will beat/batter/knife/shoot/kill you.”

⁷ For example: jilted ex-boyfriend calls victim, claims to be sitting in the building across the street with a high-powered rifle aimed at her front door, and says if she leaves her home she will be dead. In fact the ex-boyfriend is sitting in his living room miles away drinking beer and enjoying the panic and fear he is creating.

⁸ For example: “I have your child. If you leave this house, you will never see your child again.”

⁹ For example, abuser who has battered the victim many times before says “If you leave that room, you know what I’m gonna have to do.”

¹⁰ For example, abuser who has battered the victim many times before says “Do not leave that room.”

bar or restraint, against that person's will." The Legislature did not expressly limit the statutory definitions to state that only detentions by physical restraint would qualify as "domestic violence." This was *entirely* a creation by the court below.

Second, adding such words by judicial interpretation is inconsistent with the express purposes of the statute as set forth by the Legislature. At the outset of the statute, setting forth its "Findings and Purposes," the Legislature provided:

(a) The Legislature of this state finds that: (1) Every person has a right to be safe and secure in his or her home...(4) Domestic violence can be deterred, prevented or reduced by legal intervention that treats this problem with the seriousness that it deserves.

* * *

(b) This article ***shall be liberally construed and applied to promote the following purposes:***

(1) To assure victims of domestic violence the maximum protection from abuse that the law can provide;...

(4) To facilitate equal enforcement of criminal law by deterring and punishing violence against family and household members as diligently as violence committed against strangers;

(5) To recognize that domestic violence constitutes serious criminal behavior with potentially tragic results and that it will no longer be excused or tolerated; and

(6) To recognize that the existence of a former or on-going familial or other relationship should not serve to excuse, explain or mitigate acts of domestic violence which are otherwise punishable as crimes under the laws of this state.

WV Code §48-27-101 [emphasis added].

Sub-paragraphs (4), (5) and (6) of the "purposes" statements make reference to equalizing the treatment of domestic violence and criminal laws of this State. An instructive comparison can be drawn between the elements necessary to establish domestic violence under WV Code §48-27-202(5) and those elements required for a conviction for the crime of kidnapping under WV Code §61-2-14a. Both statutes proscribe the wrongful detention or confinement of another individual. Contrary to the holding of the circuit court in the present

case, however, "(i)t is clear that kidnapping can be accomplished under our statute without force or compulsion...." *State v. Hanna*, 378 S.E.2d 640, 646 (W.Va. 1989). In addition, the *Hanna* court held:

Where force or compulsion is an element of the offense of kidnapping under *W. Va. Code*, §61-2-14a, or abduction with intent to defile under *W. Va. Code*, §61-2-14, the State *need not show that the accused used **actual physical force or express threats of violence*** to accomplish the crime. It is sufficient if the victim submits because of a *reasonable fear of harm or injury from the accused*.

Syl. Pt. 4, *State v. Hanna*, 378 S.E.2d 640 (W.Va. 1989) (emphasis added).¹¹

Another comparison may be made with the criminal Stalking statute, WV Code §61-2-9A. That statute defines an offense for:

(a) Any person who repeatedly follows another knowing or having reason to know that the conduct causes the person followed to reasonably fear for his or her safety...; and

(b) Any person who repeatedly harasses or repeatedly makes credible threats against another...."

Nothing in this criminal provision requires any direct physical restraint or physical interaction. It was designed to control the types of behaviors which, while they dance carefully around the traditional boundaries of battery and other physical actions, nevertheless cause fear or emotional distress for reasonable people. Respondent Morris' 150 phone calls and contacts with Thomas over the ten weeks before the July 13 incident, and the July 13 incident, could well be a violation of the criminal offense of Stalking.

The West Virginia Benchbook for Domestic Violence Proceedings is a resource for

¹¹ In substantially more archaic language, it has also been held that false imprisonment need not include any physical or forceful restraint and that mere fear is sufficient: "*Prima facie* any restraint put by fear or force upon the actions of another is unlawful and constitutes false imprisonment." See, *State v. Totten*, 185 S.E. 221, 222 (W.Va. 1936); *Gillingham v. Ohio River Railroad Co.*, 14 S.E. 243, 245 (W.Va. 1891). In addition, the Fourth Circuit has held that a threatening communication may be proven by showing that "an ordinary, reasonable [person] who is familiar with the context of the [communication] would interpret it as a threat of injury." *United States v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1993), *cert. denied*, 415 U.S. 933 (1974).

West Virginia magistrates and judges. At Section 2.B.1, looking at the definition of domestic violence, the Benchbook notes an Illinois case which held, with regard to Harassment, "Harassment results from intentional acts which cause someone to be worried, anxious, or uncomfortable. Harassment *does not necessarily require an overt act of violence.*" WV Benchbook for Domestic Violence Proceedings, page 2-2, quoting People v., Whitfield, 147 Ill.App. 3d 675, 679, 498 N.E.2d 262, 265 (1986) [emphasis added].

If this Court were to uphold the lower courts' restrictive interpretation of the domestic violence statute, with a narrower reach than that of the criminal offense of Kidnapping committed against a stranger or of the criminal offense of Stalking, it would directly contravene the stated statutory purpose of facilitating "equal enforcement of ... violence against family and household members as diligently as violence committed against strangers." WV Code §48-27-101(b)(4). Victims of such acts would be deterred from seeking protection in the civil legal system, and instead forced to resort to the much more difficult criminal legal process. Surely the Legislature did not intend to criminalize the conduct but simultaneously except it from civil domestic violence protection proceedings.

Perhaps the most detrimental effect of the holding of the Circuit Court is that it forces victims of domestic violence to make an unwinnable choice. Where a feared actor has not yet perpetrated direct physical violence, the victim must either: (1) expose oneself to danger, even though the fear is legitimate, because it is necessary to get a protective order; or (2) forego legal protection because it is too dangerous to risk turning 'fear' into 'actuality.' In essence, the holdings below would demand that potential victims of domestic violence to make a "practical safety vs. legal protection" decision at precisely the time victims are most at risk.¹²

¹² Undoubtedly, the Legislature's efforts to reduce domestic violence take into account compelling social research regarding the dangers and risks of violence to women, some of which are most pronounced in the post-separation period. See e.g., Brownridge, Douglas A., *Violence Against Women Post-Separation, Aggression and Violent Behavior*, Vol. 11, Issue, 5 (September/October 2006), pp. 514-530.

Reading into *West Virginia Code* §48-27-202(5) an element requiring some kind of active, direct, physical restraint on personal liberty ignores the most basic dynamic of domestic violence: it is about power and control. This has two dimensions. First, regardless of whether that control is exercised by direct physical violence or “merely” by threat, harassment, or psychological abuse implying violence, a fear of physical harm can be entirely well-founded.

Second, when a stalking abuser’s desire for control is frustrated then the potential for physical harm elevates enormously.¹³ Victims understand this, intuitively, better than anyone. It isn’t about serving his dinner at the right time, or having the house clean enough for him, or ending the friendships that he doesn’t like. All of these are mere manifestations of an obsessive need to be in control of her. In this particular case, blocking her driveway, spending two hours in the night time, banging on her doors, yelling for her to come outside, were not about wanting to “talk to her” - they were about his need to have control of her, to bend her to his will. Kimberly Thomas understood that by refusing these manifestations of control, she was running serious risks to her safety and well-being. That is the reality of the abusive, domestically violent relationship. Any effort to impose power and control over a family member or other intimate relation, through *any means* implicating or suggesting the potential for violence, must be treated as domestic violence. And any effort by a victim to resist the imposition of control must be recognized as carrying a heightened chance of violence.¹⁴ The

¹³ Section 1.L of the WV Benchbook for Domestic Violence Proceedings, in discussing the concept of “Lethality Assessment,” notes that “it is likely that domestic violence will increase in frequency and severity when a victim attempts to terminate a relationship.” WV Benchbook for Domestic Violence Proceedings, page 1-16. Other factors mentioned on that page of the Benchbook are “escalation in severity and frequency of domestic violence incidents;” possession or recent purchase of weapons;” and “the mental state of the perpetrator.” *Id.*

¹⁴ In *State v. Harden*, 679 S.E.2d 628 (2009), this Court approvingly quoted the Florida Supreme Court on a similar point: “It is now widely recognized that domestic violence ‘attacks are often repeated over time, and escape from the home is rarely possible *without the threat of great personal violence or death.*’” *State v. Harden*, 679 S.E.2d 628, 639, quoting *Weiland v. State*, 732 So.2d 1044, 1051-1053 (1999) (emphasis added). The point is that the behavior of attempting to escape and thus break the abuser’s control is what triggers the recognition of risk, of “the threat of great personal violence or death.” This is true regardless of

circuit court's holding in the present case dismisses this now commonly recognized reality of domestic violence and sets this state back several decades in its efforts to reduce domestic violence.

- D. The circuit court erred by ruling that the definition of domestic violence contained within West Virginia Code §48-27-202(3) requires an explicit threat by respondent in order for petitioner to have a "fear of physical harm by harassment, psychological abuse or threatening acts."

The Circuit Court also found that Respondent Morris' actions did not "create fear of physical harm by harassment, psychological abuse, or threatening acts," as per WV Code §48-27-202(3), because there was "no evidence that the Respondent ever threatened the Petitioner with physical harm during this time that would lead the Petitioner to reasonably believe the Respondent was threatening her with physical harm on July 13, 2008." Circuit Court Order of 01/13/09, ¶ 12.

Here again the court below has interpreted the domestic violence protective statute to require an element that simply does not exist in the words of the statute. Using the Circuit Court's interpretation, the actions of a stalker, harasser, or abuser could not be considered "threatening" unless the offender has first made an *explicit* threat. This defies the all-too-common experience of the real world, the rule established in the criminal Stalking statute, and undermines the Legislature's express purpose to achieve "the maximum protection from abuse that the law can provide." WV Code §48-27-101(b)(1). This Court should hold that a reasonable "fear of physical harm" may arise from a wide range of actions and statements, regardless of whether any explicit statement of threat is made.

The analysis on this point is very similar to the preceding argument. To begin, the words of the statute simply do not contain the condition created by the court below. The statute does not say "fear of physical harm by harassment, psychological abuse or threatening acts, if preceded by a threat." The Legislature did not create such a limitation on the reach of the

whether the abuser has made an explicit threat of harm or not.

statute.

Second, adding the requirement of a preceding express threat would be inconsistent with the purposes of the statute as set forth by the Legislature at WV Code §48-27-101(b). The Legislature intended to assure “the maximum protection from abuse that the law can provide.” WV Code §48-27-101(b)(1). The ruling of the Circuit Court actually reduced the protection given to domestic violence victims as compared to the protections given to the general public.

Among the express purposes of the statute was to facilitate equal enforcement of criminal law by deterring and punishing domestic violence as diligently as violence against strangers, WV Code §48-27-101(b)(4); and to recognize that a “former familial or other relationship” does not excuse domestic violence otherwise punishable as criminal conduct if committed by someone who was not in a “former familial or other relationship. WV Code §48-27-101(b)(6). West Virginia criminal law is clear that Kidnapping can be accomplished without “physical force or express threats of violence” because a “reasonable fear of harm or injury from the accused” may be sufficient. Syl. Pt. 4, State v. Hanna, 378 S.E.2d 640 (W.Va. 1989). Similarly the criminal offense of Stalking can be based upon the reasonable fear of the victim. See WV Code §61-2-9a. These purposes of the domestic violence statute would be frustrated if the courts were to interpret the domestic violence statute more narrowly and more restrictively than similar criminal provisions.

The record is compelling that the petitioner Kimberly Thomas was in fear. Her actions demonstrated her fear: running into her home and locking herself in when Morris appeared, 09/03/08 Hearing Disc, 10:38:31; Blake’s testimony that she “turned to jelly” when Morris appeared, 09/03/08 Hearing Disc, 10:38:45; Blake’s testimony that Thomas was “hysterical” even inside the home, 09/03/08 Hearing Disc, 10:42:15; her racing on foot through the dark to a neighbor’s home a quarter-mile away, 09/03/08 Hearing Disc, 10:43:23; and Marks’ testimony that Thomas was “very scared, very shaky” when she called Marks, 09/03/08 Hearing Disc, 10:54:40. That Thomas’ fear was genuine and compelling is further buttressed by Jonalene

Marks' own fear, based on what she had observed of Ms. Thomas' psychological state, what Marks had seen of Morris' actions, and as demonstrated by Ms. Marks' own emotional condition during the hearing when recounting the events of that evening seven weeks earlier.

The only question the court below should have considered is whether Ms. Thomas' fear was "reasonable," i.e., whether a reasonable person placed in the same circumstances would also have had a fear of physical harm. Petitioner suggests that it is the rare woman in America today who would NOT have been afraid when, after two and a half months on the receiving end of 150 phone calls and contacts, at home and at work, from a former lover obsessively seeking to "rekindle" a relationship she had ended six months earlier, the stalker appears at her home, pulls his vehicle across her driveway, apparently blocking her means of escape, and spends 2 hours walking around her house banging on her locked doors and yelling for her to come out and talk to him. Add to this the victim's knowledge that the obsessive ex-lover regularly carried a concealed weapon,¹⁵ and it is hard to imagine any woman with a due regard for her own well-being who would not be fearful.

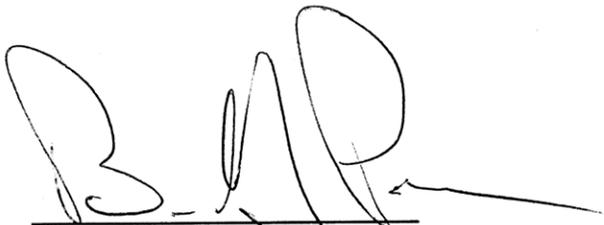
But the court below did not ask about reasonable fear. It asked instead whether the stalker had "ever threatened the Petitioner with physical harm." Circuit Court Order of 01/13/08, ¶ 12. Finding that there had been no explicit prior threat, the court apparently ruled as a matter of law that the events from early May 2008 up to the night of July 13, 2008 could not constitute a "reasonable fear of physical harm." Thus the court below would deny the protections of the domestic violence statute to a victim in circumstances that would induce trembling panic in virtually any sane person in the nation.

V. CONCLUSION AND RELIEF PRAYED FOR

Petitioner Kimberly Thomas asserts that the court below made three clear errors of law:

¹⁵ Even if fully lawfully.

(1) that it wrongly applied an unduly deferential "abuse of discretion" standard of review to what was a pure question of law; (2) that it wrongly required a showing of confinement by actual physical restraint to meet the definition of domestic violence contained in WV Code §48-27-202(5); and (3) that it wrongly required a showing of a prior express threat to meet the definition of domestic violence contained in WV Code §48-27-202(3). Petitioner believes that the evidence of record meets both definitions of Domestic Violence, when properly interpreted. Petitioner therefore asks this Court to reverse the decision of the circuit court; to rule that petitioner has met the requirements for issuance of a protective order pursuant to WV Code §48-27-101 et. seq.; and to remand this matter to the Family Court for entry of a Final Protective Order against respondent Joseph Morris.

A handwritten signature in black ink, appearing to be 'M. Toor', with a horizontal line underneath it. An arrow points from the signature towards the contact information below.

Mark A. Toor (WV Bar # 5228)
Bruce Perrone (WV Bar #2865)
Legal Aid of West Virginia, Inc.
922 Quarrier Street, 4th Floor
Charleston, West Virginia 25301
304-343-4481,
extensions 2131 (Toor)
and 2127 (Perrone)

KIMBERLY THOMAS
Petitioner,
By Counsel.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN CHARLESTON

KIMBERLY THOMAS
Petitioner

vs.

No. 35141

JOSEPH B. MORRIS
Respondent

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing "Petitioner's Brief in Support of Appeal" was served upon respondent by depositing into United States mail, first class postage prepaid, to the following address:

Wayne King
Attorney at Law
P.O. Box 356
Clay, WV 25043

All of which was done this 18th day of September, 2009.



Bruce G. Perrone (WV Bar 2865)