

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1292

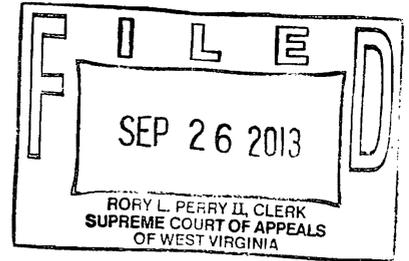
STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JUSTIN SEAN GUM,

Defendant Below, Petitioner.



BRIEF ON BEHALF OF THE RESPONDENT

PATRICK MORRISEY
ATTORNEY GENERAL

LAURA YOUNG
ASSISTANT ATTORNEY GENERAL
State Bar No. 4173
E-mail: lly@wvago.gov

DEREK KNOPP
LEGAL INTERN

812 Quarrier Street 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
E-mail: dak@wvago.gov

Counsel for Respondent

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE	1
II.	SUMMARY OF THE ARGUMENT	8
III.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION	9
IV.	ARGUMENT	10
	A. A HEARING PURSUANT TO WEST VIRGINIA CODE CHAPTER 27-6A-6 IS NOT UNCONSTITUTIONAL IN SO FAR AS IT REQUIRES THE TRIAL COURT TO SIT WITHOUT A JURY	10
	B. THE CIRCUIT COURT PROPERLY CONSIDERED LESSER INCLUDED OFFENSES WHEN IT FOUND THAT A JURY COULD NOT HAVE CONVICTED THE PETITIONER OF FIRST DEGREE MURDER	16
	C. THE CIRCUIT COURT HAD SUFFICIENT EVIDENCE TO PROPERLY CONCLUDE THAT A JURY COULD HAVE CONVICTED THE PETITIONER OF SECOND DEGREE MURDER	17
V.	CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
<i>Com. v. Hatch</i> , 438 Mass. 618, 783 N.E.2d 393 (2003)	14
<i>Jackson v. Indiana</i> , 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972)	8, 11
<i>Markey v. Wachtel</i> , 164 W. Va. 45, 264 S.E.2d 437 (1979)	11
<i>People v. Waid</i> , 221 Ill. 2d 464, 851 N.E.2d 1210 (2006)	8, 14-15
<i>State ex. rel. State v. Hill</i> , 201 W. Va. 95, 104, 491 S.E.2d 765, 774 (1997)	17
<i>State v. Browning</i> , 199 W. Va. 417, 485 S.E.2d 1 (1997)	19
<i>State v. Guthrie</i> , 194 W. Va. 675, 467 S.E.2d 163 (1995)	18
<i>State v. Hall</i> , 172 W. Va. 138, 304 S.E.2d 43 (1983)	17
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996)	18, 19
<i>State v. Williams</i> , 126 Ohio St. 3d 65, 930 N.E.2d 770 (2010)	12, 13
STATUTES	
W. Va. Code § 27-6A-3(h)	10, 11-12, 13
W. Va. Code §§ 27-6A-3(h), 27-6A-6	15
W. Va. Code § 27-6A-6	<i>Passim</i>

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1292

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JUSTIN SEAN GUM,

Defendant Below, Petitioner.

BRIEF ON BEHALF OF THE RESPONDENT

Comes now the Respondent, by counsel, Laura Young, and by legal intern, Derek Knopp and files the within response to the Petitioner's Brief.

I.

STATEMENT OF THE CASE

A sadly troubled son killed his father with a shotgun. From that tragic event, we are now asked to address the procedure under which the State of West Virginia will ensure the rights of mentally ill and dangerous men while protecting the rest of society.

According to the criminal complaint, on September 10, 2010, after an argument with his father, the petitioner went to his father's bedroom, retrieved a 16 gauge shotgun from the closet, loaded the gun, and when he encountered his father on the stair way, shot him in the chest. (App. at 392-93.)

The Lewis County Grand Jury returned an indictment charging the petitioner with murder in the first degree. (*Id.* at 396.)

Following the indictment, routine, reciprocal discovery, which shall not be cited in detail transpired between the State and defense counsel. The report from the medical examiner's office indicated that both son and father had been drinking heavily. (*Id.* at 407.)

The petitioner was interviewed on September 10. The petitioner signed a waiver of rights form. (*Id.* at 417.) The petitioner indicated that both he and his father had been drinking a lot of alcohol, and that the petitioner himself often drank heavily. (*Id.* at 421-22.) The father and son were apparently drinking separately, and then the petitioner joined his father in drinking whiskey. (*Id.* at 424.) The petitioner stated that although his father hadn't done anything to him, that he could tell that his father was getting angry. (*Id.* at 425.) The petitioner stated the two argued, and then he was going to get the gun, which normally would be hanging "in my dad's closet." (*Id.* at 427.) The gun was a single barrel 16 gauge shotgun. (*Id.* at 427-28.) The petitioner had to go upstairs and down the hallway to the father's room. (*Id.* at 428.) The shells were in the petitioner's bedroom, hidden. The son's room was on a different floor of the house. Therefore, the son retrieved the gun from his dad's closet, went to his own room, found the hidden shells and then loaded the gun. (*Id.* at 429-30.) The petitioner stated that he told his father not to (inaudible) down the steps and that he had "let the gun go off." (*Id.* at 432.) Although he denied wanting to shoot his father, he admitted pulling the trigger. (*Id.*) There was no struggle over the gun. (*Id.* at 433.) The petitioner agreed that he pointed the gun at his father, and that he had a "suspicion" his father would try to take the gun away. (*Id.* at 434.) The petitioner did not try to help his father after he shot him. (*Id.* at 440-41.)

A second statement was taken that same day from the petitioner. A second waiver of rights form was signed. (*Id.* at 444.) In that statement, the petitioner stated that he did not remember his father abusing him, "not without me starting something." (*Id.* at 447.) He again stated that he got

the shotgun, and loaded it with shells. (*Id.* at 449.) The petitioner admitted pulling the trigger but blamed the murder on “too much liquor and stuff.” (*Id.* at 450.) The petitioner stated that he had previously tried to shoot his father “a year or two ago.” (*Id.* at 451.)

Very obviously, both the petitioner’s competence to stand trial and criminal responsibility were significant issues. By order entered June 13, 2012, the circuit court determined that the petitioner was not competent to stand trial. (*Id.* at 464.) That order also determined that the petitioner was unlikely to regain competency and that the indictment charged an act of violence. Defense counsel moved for and was granted a trial on defense under W. Va. Code 27-6A-6. (App. at at 465.) In the same motion, defense counsel requested the circuit court to declare W. Va. Code 27-6A-6 unconstitutional which the circuit court denied. (App. at 465.)

The petitioner was evaluated by more than one practitioner. The evaluations were not necessarily in harmony with one another. Dr. Adamski determined in a report completed in June, 2011, that the petitioner was not presently competent to stand trial because of his alcohol dependence and depression. However, Dr. Adamski believed he could be restored to competence. Dr. Adamski, in that report, did not address criminal responsibility. (*Id.* at 493-94.)

The petitioner was committed to Sharpe Hospital for three months, and by order entered December 21, 2011, the commitment was extended for a period of up to six months to attempt to attain petitioner’s competency. (*Id.* at 567.)

A lengthy preliminary hearing was held which, besides confirming that the petitioner admitted shooting his father, also noted that the petitioner’s blood alcohol content at or near the time of the shooting was .24. (*Id.* at 314.)

On June 13, 2012, the matter of the petitioner's competency and the likelihood of becoming competent was addressed at a pre-trial hearing. Dr. Massoud testified to the conclusions arrived at Sharpe Hospital, which determined that the petitioner had "the DSM IV-TR psychiatric diagnosis of schizophrenia, paranoid type, major depressive disorder, single episode, and polysubstance dependence in a controlled environment." (*Id.* at 360.) The petitioner lacked competence and was unlikely to regain competence in the reasonably foreseeable future. (*Id.* at 361.) Despite being described as a generally easy patient, on at least one occasion, Gum became physical with another patient. The aggression occurred more than once. (*Id.* at 363.) The petitioner occasionally heard voices, and believed that peers and staff at the hospital were out to harm him. (*Id.* at 365.) He believed others could read his thoughts and control his mind, and that he could read the thoughts of others. (*Id.*) The petitioner had impaired thought and marked difficulty in communication. (*Id.* at 367.)

The judge determined that the petitioner was not competent to stand trial, because he did not exhibit sufficient present ability to consult with his lawyer, nor rationally nor factually understand the proceedings against him. Further, he found that the petitioner was unlikely to regain competence, and that the indictment charging first degree murder involved an act of violence. (*Id.* at 380.)

Defense counsel notified the judge and the prosecutor that they intended to assert defenses to the crime, and also asked the judge to declare the procedure in W. Va. Code § 27-6A-6 unconstitutional because it provided for a bench trial, rather than a jury trial. (*Id.* at 381.)

The judge noted that the statute specifically required that the evidence should be heard by the court of record sitting without a jury. (*Id.* at 382.) Therefore, a bench trial was ordered, and commenced in September, 2012.

The parties stipulated that the .16 gauge shotgun was the weapon which caused the death of the victim. (*Id.* at 8.)

Dr. Adamski submitted another report in May, 2011, which opined that the petitioner was not then competent. (*Id.* at 34.) Dr. Adamski could not pick a date for the onset of the petitioner's schizophrenia, but stated that the petitioner appeared to follow the pattern of young men with substance abuse issues who become socially avoidant and use alcohol and drugs to quell symptoms of being detached, uninterested, and unmotivated. (*Id.* at 36.) The petitioner had long standing alcohol problems including being placed in alternative schooling, receiving two DUI's, and being evicted from the home where his younger siblings lived. (*Id.* at 37.) The petitioner confided to Dr. Adamski that "he drank pretty heavily." (*Id.*)

Additionally, Dr. Adamski determined that the petitioner had a serious mental affliction, being preoccupied with voices and persecutory delusions. (*Id.* at 39.) Dr. Adamski noted that "if he is to be believed, he is capable of handling very, very large amounts of alcohol, perhaps double what his blood alcohol level was on the day for which he was arrested and charged." (*Id.* at 42.) With regard to the effects of alcohol, Dr. Adamski noted that individuals who have imbibed "know what they are doing, but don't care about the consequences." (*Id.* at 47.) With regard to the petitioner's ability to function after imbibing a great deal of alcohol, Dr. Adamski opined that generally, the thinking on how much alcohol can be tolerated has risen dramatically, and that people can act relatively normally with very high blood alcohol levels. (*Id.* at 56.) Further, individuals who can handle large amounts of alcohol can make decisions that are not influenced to the degree one would suspect. (*Id.* at 58.)

Deputy Davis testified that he was dispatched to a specific location in Lewis County and was informed while en route that the caller had stated he had shot his father. (*Id.* at 91.) When he arrived at the house, the petitioner was outside. The deputy found the victim inside, in a kneeling position, with his legs sticking out past the stair well, somewhat up the steps from the basement. (*Id.* at 96.) The victim was in the foyer with his knees on the ground, body bent forward, with his hand on the murder weapon, in a large pool of blood. (*Id.* at 97.) The petitioner had blood on his foot, shorts, and t-shirt, but it appeared as if he had washed his hands and forearms, and his face. (*Id.* at 101.)

The audiotaped statement of the petitioner, summarized earlier in this statement of the case was played for the judge. (*Id.* at 117.) The court determined that a portion of the first statement relating to a previous incident in which the petitioner had pulled a gun on his father before the murder would be stricken. (*Id.* at 118.)

Dr. Mahmoud did the autopsy in this matter. (*Id.* at 122.) Mr. Gum was shot in the chest with a shot gun. The range was not contact but was close range. (*Id.* at 124-25.) The victim had an elevated blood alcohol content of .24. (*Id.* at 130.) The range of the shot was approximately 30 inches or perhaps an arm's length. (*Id.* at 132.)

Deputy Davis resumed the stand. The second audiotaped statement from the petitioner was also admitted into evidence. (*Id.* at 155.)

Former Deputy Kirkpatrick testified that the petitioner stated he had worked the day of the murder with his father at Fox's Pizza, and that after work, the petitioner bought two 18 packs of beer along with a 24 ounce bottle and went home. The petitioner then told Kirkpatrick that he drank 8 to 12 cans of beer, went upstairs, and drank shots of whiskey with his father. After drinking whiskey, the petitioner said that he and his father began to argue. (*Id.* at 224.) Kirkpatrick testified

that after the petitioner told him (Kirkpatrick) that he went and got the gun, the petitioner said nothing for quite a while and then asked “Did my dad make it?”, to which Kirkpatrick answered no. (*Id.* at 225.)

William Conrad, a civilian firearms examiner, testified that the trigger pull of the shotgun was six pounds, ten ounces, which was within normal parameters for a firearm of that type, “on the high side of midway.” (*Id.* at 238.) Further, to shoot the gun, an individual actually had to cock the hammer fully back. (*Id.* at 244.)

From the bench, the court made the following findings of fact: The petitioner was not competent, and could not be restored to competence. The petitioner was mentally ill on September 19, 2010. The victim died as a result of a shotgun wound to the chest, inflicted at close range, but not a contact wound. (*Id.* at 265-66.) The court noted that the petitioner stated “I pointed the shotgun at him, turned my head and pulled the trigger.” (*Id.* at 267.) The court found that the victim grabbed the gun at the time he was falling. (*Id.*) The gun had a normal to high-normal trigger pull. (*Id.* at 268.) The gun had to be cocked to fire and would not go off by itself. The judge determined that the pertinent legal questions were whether the State had sufficient evidence to justify a conviction, and if so, of what offense? (*Id.* at 269.) The court reviewed the elements of murder in the first degree, lesser included offenses, the law of self defense, and evidentiary rules.

The court determined that reasonable doubt existed as to the elements of premeditation and deliberation. (*Id.* at 274.) However, the judge determined that a jury could find the petitioner guilty of second degree murder in that the petitioner intentionally, maliciously, and unlawfully did slay, kill and murder the victim. (*Id.*)

Therefore, since the petitioner was not competent and not likely to regain competence, he would be placed at Sharpe Hospital, and the court would retain jurisdiction for forty years. (*Id.* at

275.) The judge noted that, should the petitioner's condition improve, an application could be made for release. (*Id.*)

The findings were reduced to writing, and an order entered. (*Id.* 469-81.) The Notice of Appeal, Appendix and Petitioner's Brief ensued.

II.

SUMMARY OF THE ARGUMENT

The petitioner essays that W. Va. Code § 27-6A-6 is unconstitutional because it does not provide a jury trial for a petitioner who is not competent and who is accused of committing a violent offense. The statute in question and its procedures are constitutional. While West Virginia has not previously squarely addressed the constitutionality of this statutory provision, the statute in question was enacted in response to the Supreme Court's decision in *Jackson v. Indiana*, 400 U.S. 715 (1972). Other jurisdictions including, but not limited to Ohio, Massachusetts and Illinois have enacted similar statutes which similarly do not provide the same procedural safeguards as a full criminal prosecution. Those states have determined that the statutes in question are not criminal but rather civil in nature. The statutes require the court to consider public safety as well as an incompetent's welfare. This type of hearing is not a criminal prosecution but more in line of a dispositional proceeding. For example, the Supreme Court of Illinois examined a very similar statute and determined that it was an innocence only proceeding, and not a criminal trial. Further, the potential maximum prison sentence is a ceiling, rather than a floor, for the treatment period. *People v. Waid*, 221 Ill. 2d 464, 851 N.E.2d 1210 (2006).

Therefore, as the hearing under W. Va. Code § 27-6A-6 is not a criminal trial, but rather a civil hearing at which the court weighs all the evidence to determine what a rational jury might have

convicted the petitioner of, and the continuous jurisdiction is the ceiling for treatment duration rather than the floor, the statute is constitutional and more civil than criminal in nature, and no jury trial is required.

The petitioner also essays that the State did not produce evidence sufficient to show the petitioner could have been convicted of murder in the second degree. It is the respondent's position that the court actually could have found the evidence supported first degree murder. To find that a jury could have convicted the petitioner of second degree murder, the State had to present evidence that a jury could have found that the petitioner did intentionally, maliciously, and unlawfully kill his father. The evidence showed, beyond a reasonable doubt, that the petitioner was not acting in self defense in that the victim never said or did anything threatening towards him on the night in question. The petitioner retrieved a shotgun from one location in the house, shells from another location, deliberately loaded the gun, approached his father, cocked the weapon and pulled the trigger. Intent and malice may be inferred. A person generally intends the consequences of his action, and malice may be inferred from the use of a deadly weapon in circumstances which do not justify the use of a deadly weapon. Therefore, the evidence was sufficient to convince the trier of fact—the judge—that a separate trier of fact—a jury—could find the petitioner guilty of second degree murder.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issue of the constitutionality of the statute does not appear to have been previously addressed by this Honorable Court, therefore, this matter is appropriate for oral argument. This matter would appear not to be appropriate for a memorandum decision.

IV.

ARGUMENT

A. A HEARING PURSUANT TO WEST VIRGINIA CODE CHAPTER 27-6A-6 IS NOT UNCONSTITUTIONAL INsofar AS IT REQUIRES THE TRIAL COURT TO SIT WITHOUT A JURY.

The petitioner argues he is constitutionally entitled, as a matter of due process, to a jury trial in regard to the hearing requested by the petitioner under W. Va. Code § 27-6A-6, in which the issue to be determined is what crime, if any, could the petitioner have been found guilty of, considering the evidence of the State, the evidence of the defendant, and any defenses fairly raised.

The statute in question, W. Va. Code § 27-6A-6, provides specifically that an individual who is not competent to stand trial may request the opportunity to offer a defense of not guilty, other than not guilty by reason of insanity. If, in its discretion, the trial court grants such a request, the court sits without a jury and hears evidence from both the State and the defendant. If the court determines that there is insufficient evidence to support a conviction, the indictment is dismissed, but a prosecutor may still institute civil commitment. This section does not speak specifically as to the action taken if the court finds sufficient evidence to support a conviction. However, W. Va. Code § 27-6A-3(h) provides that if an individual is found not competent and not likely to regain competence, and the charged offense involves an act of violence against a person, then the court shall determine the offense of which the person otherwise would have been convicted and the maximum sentence he could have received. It further provides that the person shall remain under the jurisdiction of the court until the expiration of the maximum sentence, unless he regains competency and the “criminal charges reach resolution” or the court dismisses the charge. The person shall be committed to a mental health facility that is the least restrictive environment to manage the defendant

and that will allow for the protection of the public. If the court is notified by the mental health facility that the individual is no longer a significant danger to self or others, a hearing shall be held to determine if the individual may be released to a less restrictive alternative.

West Virginia case law on involuntary commitment is sparse, to say the least. It does not appear as if there has been any judicial interpretation of W. Va. Code § 27-6A-6. Involuntary commitment was examined in *Markey v. Wachtel*, 164 W. Va. 45, 264 S.E.2d 437 (1979). The court determined that the West Virginia Constitution does not require a jury trial in an involuntary commitment proceeding. Although petitioner's counsel attempts to distinguish *Markey* from the case at bar by comparing the lengths of time of commitments, such distinction is inapt. Although an initial commitment under Chapter 27, Article 5, has time limits, it is clear that after a final commitment hearing an individual may be committed for an indeterminate period. Such indeterminate period of commitment lasts two years, but may be extended, apparently ad infinitum upon the appropriate findings. (W. Va. Code § 27-5-4(k) (4)). Therefore, should the requisite findings be made one involuntarily committed under civil commitment could indeed remain hospitalized for forty years.

W. Va. Code § 27-6A-6 along with the rest of the statutory scheme contained within Chapter 27 Article 6A of the W. Va. Code was enacted after the U.S. Supreme Court's opinion in *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed.2d 435 (1972). The central mandate that *Jackson* gave to states was that a defendant may not be indefinitely committed solely because the defendant is incompetent to stand trial. *Id.* at 738, 92 S. Ct. at 1858. States have responded to the mandate in a variety of ways. West Virginia is among the states whose statutes permit commitment with an upper "bright line" termination date of the maximum penalty of the underlying offense. W. Va.

Code § 27-6A-3(h). The West Virginia statute is similar to those in other states, notably Ohio, Massachusetts, and Illinois.

Those states also permit an incompetent defendant to present defenses to the substantive charge prior to commitment.

Ohio Rev. Code 2945.38 and 2945.39, permit the court or prosecuting attorney to seek to have the court retain jurisdiction over a criminal defendant who has been charged with a violent first or second degree felony. In order to retain jurisdiction, the court must determine that the defendant committed the offense, and that the person is mentally ill and subject to hospitalization. A finding of mentally ill subject to hospitalization includes those who represent a substantial risk of physical harm to others because of violent behavior. R.C. 2945.39 also requires that the defendant be placed in the least-restrictive commitment alternative available that is consistent with both the defendant's welfare and the public's safety.

Under R.C. 2945.401(J)(1)(a) through (c), a commitment pursuant to R.C. 2945.39 terminates upon the earlier of (a) the trial court's determination that the defendant is no longer a mentally ill person subject to hospitalization by court order, (b) *the expiration of the maximum prison term the defendant could have received if the defendant had been convicted of the most serious offense charged*, or (c) the trial court's termination of the commitment under R.C. 2945.401(J)(2)(a)(ii), which requires findings that the defendant is competent to stand trial and is no longer a mentally ill person subject to hospitalization by court order. (emphasis added)

State v. Williams, 126 Ohio St. 3d 65, 68-69, 930 N.E.2d 770, 774 (2010). (footnote omitted.)

In *Williams*, the defendant argued that § 2945.39 of the Ohio Code was unconstitutional because it did not provide for procedural safeguards constitutionally required for criminal prosecutions. *Id.* at 66-67, 930 N.E.2d. at 773. The court in *Williams* applied an intent/effects test in determining that the challenged statute was not a criminal statute but rather a civil one that did not

require the constitutional rights afforded to a defendant in a criminal prosecution. *Id.* at 73, 930 N.E.2d at 778. The court placed a great amount of weight on the fact that the statute requires the court to consider both the public's safety as well as the defendant's welfare by requiring the court to order the least restrictive alternative. *Id.* at 71-72, 930 N.E.2d at 776-77. The court saw the statute as designed to simply protect the public as opposed to securing retribution or deterrence. *Id.* The court gave credence to where the statute was placed within the code and that it did not require any findings of scienter. *Id.* Indeed, the court also stated that the seriousness of the offense charged plays a permissible and highly relevant role in the trial court's commitment determination. *Id.*

It is clear that the West Virginia statutory scheme also is a civil rather than criminal statute. The statutory scheme provides that the incompetent shall be committed to the least restrictive environment that not only manages the defendant, but also will allow for the protection of the public. W. Va. Code § 27-6A-3(h). Further, the seriousness of the offense is highly relevant to the determination of commitment. *Id.* Therefore, much like the Ohio statute, the procedural safeguards accorded in a criminal trial are not constitutionally mandated in the disposition of an incompetent who has been found to have committed an offense of violence against a person.

A Massachusetts statute states as follows:

If either a person or counsel of a person who has been found to be incompetent to stand trial believes that he can establish a defense of not guilty to the charges pending against the person other than the defense of not guilty by reason of mental illness or mental defect, he may request an opportunity to offer a defense thereto on the merits before the court which has criminal jurisdiction. The court may require counsel for the defendant to support the request by affidavit or other evidence. If the court in its discretion grants such a request, the ***evidence of the defendant and of the commonwealth shall be heard by the court sitting without a jury.*** If after hearing such petition the court finds a lack of substantial evidence to support a conviction it shall dismiss the indictment or other charges or find them defective or insufficient and order the release of the defendant from criminal custody. (emphasis added)

Mass. Gen. Laws ch. 123, § 17. In *Com. v. Hatch*, 438 Mass. 618, 783 N.E.2d 393 (2003), Massachusetts considered the proper standard for a judge sitting without a jury under the above statute. The court found that the burdensome standard used by the judge offset the detriment to the defendant of possibly being incarcerated for long periods of time without a trial. The court stated as follows:

The ‘substantial evidence to support a conviction’ standard is more burdensome to the Commonwealth than the required finding of not guilty standard. The former requires the judge to measure the Commonwealth’s case against the entire record, including the contrary evidence presented by the defendant; the latter only requires the judge to consider “the evidence in its light most favorable to the Commonwealth, notwithstanding the contrary evidence presented by the defendant.” *Commonwealth v. Latimore*, 378 Mass. 671, 676–677, 393 N.E.2d 370 (1979). The Legislature may well have required this more demanding standard because incompetent defendants may be incarcerated for lengthy periods, even for life, without a trial. To offset this detriment, the Commonwealth must show more than that it is entitled to have a jury consider its case. Further justification for this approach is that, because jeopardy never attaches, a dismissal under § 17 (b) is not a final determination. The Commonwealth may re-indict if it obtains additional evidence.

Id. at 438 Mass. at 623-24, 783 N.E.2d at 397-98.

Illinois has a similar statute allowing an incompetent defendant to present evidence to a trial court sitting without a jury to establish his innocence before commitment. 725 Ill. Comp. Stat. Ann. 5/104-25. In *People v. Waid*, 221 Ill. 2d 464, 851 N.E.2d 1210 (2006), the Supreme Court of Illinois, similarly to Ohio, found that a hearing pursuant to the above statute was not a criminal proceeding, but a civil one in which the Sixth Amendment confrontation clause did not apply to.

In summation of this point the court found:

A discharge hearing to determine whether defendant who is unfit to stand trial should be acquitted or found not guilty by reason of insanity is not a criminal prosecution, but is civil; the hearing is an innocence only proceeding, the question of guilt is deferred until defendant is fit to stand trial unless defendant is acquitted or

found not guilty by reason of insanity, and the potential maximum prison sentence serves as a ceiling, rather than a floor, for the treatment period.

People v. Waid, 221 Ill. 2d 464, 851 N.E.2d 1210 (2006).

The hearing in question in West Virginia is available upon request to the defendant to present defenses. The court listens to all the evidence, and determines what a rational jury could have found. The commitment can last no longer than the maximum term, which is a ceiling or upper limit of time as referred to by the *Waid* court. As noted by the judge in this case, application may be made to move the petitioner to lesser restrictive environments if such is consistent with his progress and with the safety of the public.

Therefore, the proceeding under 27-6A-6 is not a criminal trial for which a jury is required, but rather a dispositional civil hearing. The petitioner is not constitutionally entitled to a jury trial under these circumstances. The stated purpose of the statute is not only to ensure appropriate treatment for the criminally violent incompetent, but also, as noted in 27-6A-3(h), to provide “the least restrictive environment to manage the defendant that will allow for the protection of the public.”

Under West Virginia’s statutory scheme, the petitioner is not found guilty of a criminal offense. If the crime involves an act of violence against a person, the court, expressly sitting without a jury, must determine the maximum sentence the person could have received, and the individual is to remain under the jurisdiction of the court until the expiration of that maximum sentence or regains competency. W. Va. Code §§ 27-6A-3(h), 27-6A-6. As the statute expressly permits the criminal proceedings to go forward in the unlikely event that an incompetent regains competency, the hearing

under this section is not a criminal proceeding and does not place the individual in jeopardy. Therefore, again, no jury is constitutionally required.

Further, West Virginia is not the only State which ties the length of judicial supervision to the offense for which one could have been found guilty, particularly in dealing with the offense of murder. For example, Virginia allows indefinite commitment for an individual charged with capital murder (Va. Code 19.2-169.3 (C) (D) (F)). Pennsylvania allows indefinite commitment of those charged with first or second degree murder. 50 P.S. 7403 (f).

The petitioner argues that he was constitutionally entitled to a jury trial. However, an examination of the procedure in question, as well as examination of similar statutes in other jurisdictions reveals that the procedure followed by the State of West Virginia is in fact a civil proceeding offered to the defendant for the purpose of proffering defenses, other than the defense of insanity. The trier of fact determines what factually a rational jury could have convicted the petitioner of. This is not a criminal trial, as the statute expressly provides that should an individual attain competence, the criminal proceedings can proceed. The statutory scheme is constitutional, both in the safeguards offered to the incompetent so that he does not languish forever in the tender mercies of either the judicial or mental health systems, but is also consistent with the legislative intent of protecting the public from those individuals who are sadly, both mentally ill, and dangerous to others.

B. THE CIRCUIT COURT PROPERLY CONSIDERED LESSER INCLUDED OFFENSES WHEN IT FOUND THAT A JURY COULD NOT HAVE CONVICTED THE PETITIONER OF FIRST DEGREE MURDER.

The petitioner argues that once the trial court determined that a jury could not have convicted the petitioner of murder in the first degree, the charging document was somehow invalidated, and

had to be dismissed. The law is well settled in West Virginia that there are not indictments for first and second degree murder.

In West Virginia, we do not have indictments for first and second degree murder. *State v. Justice*, 191 W. Va. 261, 267, 445 S.E.2d 202, 208 (1994) (citing *State v. Schnelle*, 24 W. Va. 767 (1884)). Instead, we permit indictments for “murder,” with the degree of murder contingent upon the proof presented at trial. *Id.* (citing *State v. Johnson*, 49 W. Va. 684, 39 S.E. 665 (1901)). “A general form of indictment for murder” is sufficient for a first or second degree murder conviction, or a conviction for any lower grade of homicide. *Id.* (citing *State v. Douglass*, 41 W. Va. 537, 23 S.E. 724 (1895)).

State ex rel. State v. Hill, 201 W. Va. 95, 104, 491 S.E.2d 765, 774 (1997).

The terms of the indictment adequately inform an accused of his jeopardy to a conviction for murder in the first degree. Jeopardy to lesser degrees of homicide, should the evidence adduced at trial support a lesser verdict, we consider an inherent and natural consequence of this greater jeopardy. We therefore consider the indictment sufficient to support a conviction for any of our several degrees of homicide.

State v. Hall, 172 W. Va. 138, 144, 304 S.E.2d 43, 49 (1983) (footnote omitted, case remanded on other grounds.)

Therefore, the indictment in form and substance was valid. The trial court having determined that a jury could not have found beyond a reasonable doubt, the elements of premeditation and deliberation, perforce determined that a jury could not have found the petitioner guilty of first degree murder. The court then properly considered the lesser included offenses and determined that a jury could have found beyond a reasonable doubt the petitioner committed murder in the second degree.

C. THE CIRCUIT COURT HAD SUFFICIENT EVIDENCE TO PROPERLY CONCLUDE THAT A JURY COULD HAVE CONVICTED THE PETITIONER OF SECOND DEGREE MURDER.

The evidence was sufficient for the trial court to conclude that a jury could have convicted the petitioner of murder in the second degree.

The test for reviewing the sufficiency of the evidence is the same whether the trier of fact is the judge or a jury.

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 675, 467 S.E.2d 163 (1995).

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilty so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

Syl. Pt. 3, in part, *Guthrie, supra*.

When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt.

Syl. Pt. 2, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

As enunciated by the trial court, the State, in order to convict the petitioner of murder in the second degree must overcome the presumption of innocence and prove beyond a reasonable doubt that the petitioner on September 19, 2010, in Lewis County, did intentionally maliciously and unlawfully slay, kill and murder James Grover Gum, II. (App. at 476.)

As noted by the court, there is no evidentiary dispute that the victim died in Lewis County, and that he died as a result of a shotgun fired by the petitioner. The dispute is over the elements of intention, lawfulness, and malice.

The mental elements of an offense are seldom susceptible of direct proof, as it is the rare criminal defendant who announces “I am going to kill the victim, and I am doing it unlawfully, maliciously and intentionally.” Therefore, West Virginia law allows the trier of fact to draw certain permissible inferences from the actions taken by a defendant.

In noting the issues with determining the mental processes of any defendant, the *LaRock* Court noted that those processes are wholly subjective, not susceptible to direct proof. Therefore, “if one voluntarily does an act, the direct and natural tendency of which is to destroy another’s life, it fairly may be inferred, in the absence of evidence to the contrary, that the destruction of that other’s life was intended.” *Id.* at 305, 470 S.E.2d at 624.

In the absence of evidence that the petitioner actually was acting in self-defense, the shooting was unlawful. Further, as to the issue of malice, the trier of fact may infer malice and the intent to kill where a person, without legal justification or excuse, or provocation, uses a firearm to shoot another. Syl. Pt. 2, in part, *State v. Browning*, 199 W. Va. 417, 485 S.E.2d 1 (1997).

The judge made findings of fact which are supported by the appendix. In brief, the petitioner and his father, both of whom were intoxicated argued over alcohol. The petitioner left the area where the two were drinking, went to the victim’s bedroom and retrieved a shotgun, went to another bedroom and retrieved the shells, loaded the gun, and when he encountered his father on the stairway, shot him in the chest. (App. at 392-93, 407.) The petitioner stated his father had not done anything to him before he retrieved the gun. (*Id.* at 425.) The petitioner admitted pulling the trigger

and there was no struggle over the gun. (*Id.* at 432-33.) The petitioner pointed the gun at his father, pulled the trigger, and did not try to help his father after he shot him. (*Id.* at 433, 440-41.)

There is no evidence in the record whatsoever that the victim threatened the petitioner. There is no credible evidence that the petitioner was acting in self-defense. The gun in question had to be fully cocked and the trigger pull was on the high side of normal. (*Id.* at 238, 244.)

Therefore, the evidence indicated that the petitioner left his father, got a gun, took it to another room, loaded it, and then aimed the gun at the victim and fired. The victim died as a result of the gunshot wound. There was no justification or excuse for the use of a deadly weapon, and therefore the trier of fact could infer both intention and malice. Additionally, the trier of fact could infer intent from the reasonable and foreseeable consequences of shooting an individual in the chest with a .16 gauge shotgun at close range. The petitioner did not fairly raise self-defense, and even if he did, the evidence shows that the State disproved beyond a reasonable doubt that the petitioner acted in self-defense. Therefore, the evidence, taken in the light most favorable to the State, and crediting all permissible inferences to the State, was more than sufficient for the court to conclude that jury could have found that the petitioner committed murder in the second degree.

V

CONCLUSION

Based upon the foregoing recitations of fact and arguments of law, the respondent respectfully requests that this Honorable Court affirm the order of the Circuit Court of Lewis County, retaining jurisdiction over the petitioner for a period of forty years, and further affirm that a jury trial is not constitutionally required under this statute and factual circumstances.

Respectfully submitted,

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL



LAURA YOUNG
ASSISTANT ATTORNEY
State Bar No. 4173
E-mail: lly@wvago.gov



DEREK KNOPP
LEGAL INTERN
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
E-mail: dak@wvago.gov

Counsel for Respondent

CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and Derek Knopp, Legal Intern, counsel for the respondent do hereby verify that I have served a true copy of the *BRIEF ON BEHALF OF THE RESPONDENT* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 26th day of September, 2013, addressed as follows:

To: James E. Hawkins, Jr., Esquire
P.O. Box 2286
Buckhannon, WV 26201



LAURA YOUNG



DEREK KNOPP