FILED
AUG - 1 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff below,
Respondent,

vs. **Supreme Court Docket No. 12-0439**

JEREL ADDISON GARNER,
Petitioner below,
Petitioner.

PETITIONER'S BRIEF

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, Plaintiff below,
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Vs. Supreme Court Docket No. 12-0439

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III. ASSIGNMENTS OF ERROR

1. The trial court's comments and actions throughout the Petitioner's trial denied the Petitioner the right to cross-examination, the presumption of innocence by shifting the burden of proof, the right to be present at all critical stages, and generally denied him a fair trial under due process of law.[1]

a. The trial court denied the Petitioner the right to meaningful cross-examination and improperly denied the presumption of innocence by shifting the burden of proof.

b. The trial court denied the Petitioner the right to be present at all critical stages.

c. The trial court's comments and actions throughout trial generally denied the Petitioner his right to a fair trial under due process of law.

2. The trial court erred in failing to grant the Petitioner credit for time served on this offense on post-conviction home-confinement and in jail.

3. The trial court erred by failing to strike Juror Jenkins for cause due to her admitted actual bias, or, in the alternative, it was reversible error for Juror Jenkins not to be further probed after her inconclusive statement of bias.

4. The trial court erred in failing to grant the Petitioner's motion for acquittal and motion for a new trial due to insufficient evidence to convict the Petitioner beyond a reasonable doubt.

5. The trial court erred in refusing to give the Petitioner proper materials and/or time to prepare for jury selection and in denying the Petitioner's request to use his proposed Jury Questionnaire.

6. The trial court erred in refusing to give several of the Petitioner's proposed jury instructions on involuntary manslaughter, self-defense, brandishing, and the immunity of a witness.

7. The State violated *Brady v. Maryland* and Rule 16 of the W. Va. Rules of Criminal Procedure by failing to disclose certain statements made by witness Wilber Hargrove.

8. The State made improper comments during closing, compounded by the trial court's failure to give a curative instruction, both constituting reversible error.

a. The State improperly commented on the Petitioner's right not to call witnesses in his defense during closing arguments. Moreover, the trial court failed to give a

[1] Retired Senior Status Judge L.D. Egnor replaced Judge Ferguson after the second day of the six-day trial, due to injury to Judge Ferguson.

requested curative instruction, compounding this error.

b. The State improperly opined on the character of the Petitioner during closing arguments inflaming the jury.

9. The trial court erred by denying the Petitioner the right to use witness Krystal Lee's pre-trial statement as impeachment evidence that the deceased owned a firearm.

10. The trial court erred in admitting the hearsay notes of Officer Christopher Sperry.

11. Due to these many errors, the cumulative error doctrine requires reversal of the Petitioner's conviction.

IV. STATEMENT OF THE CASE

In the earlier morning hours of July 5, 2008, the Petitioner Jarel Addison Garner ("The Petitioner") was shot three times in a confrontation outside of Fluid Nightclub in Huntington, WV. (A.R. 1, Vol. IV, 807; A.R. 18.) The Petitioner also shot and fatally wounded one Donte "Tae" Newsome. The undisputed evidence showed that an incident occurred inside the nightclub between the Petitioner and another person, stemming from an exchange between this other person and the Petitioner's girlfriend, and due to this incident, later that evening Curtis Keyes approached the Petitioner's vehicle in the nightclub's parking lot and somehow struck the passenger's rear window. (A.R. 1, Vol. III, 558, 561, 569-572, 641-644, 650-652, 714-717, 726.) One witness described Keyes' action as a "punch" to the back rear portion of the vehicle. (*Id.* at 726.) The Petitioner argued that he was being attacked by multiple assailants, two of whom were former Marshall Football players. The Marshall Football player connection added to heightened pre-trial publicity. It is undisputed that the Petitioner was in his vehicle when at least one individual approached his car and struck it; the Petitioner was ultimately shot three times by one or more of these individuals; and the Petitioner fatally shot Newsome.

The Petitioner was charged with First Degree Murder, Attempted First Degree Murder, Wanton Endangerment, Destruction of Property, and Second Offense Carrying a Concealed Weapon. (A.R. 20). At trial, the Petitioner argued that several assailants attacked his car, at least one carrying a gun, shot him three times, and in an attempt to save himself and his girlfriend's lives, he returned fire on several of his assailants. (A.R.1, Vol. V, 1047-1061.) The State argued, largely through testimony of the alleged victim's friends and/or members of the "Fab Five," to show that the Petitioner shot first. (See generally A.R. 1, Vol. II, 313-505; Vol. III, 538-706; Vol. IV, 928-935.) The alleged victim's friends involved in the events of that evening included Curtis

Keyes, Wilbur Hargrove, Ivan Clark, and Keith and Krystal Lee, among others. Several of these individuals, including the alleged victim, were members of a group known as the "Fab Five." (A.R. 1, Vol. III, 541-542, 634-635.)

The police recovered two firearms used that night, the gun used by the Petitioner and a gun owned by Ivan Clark. Clark's gun was recovered several days later, when the police found Clark standing on a boat dock attempting to throw the gun into the river, and perhaps having already thrown one gun into that river. (A.R. 1, Vol. IV, 879.)

It is important to note, Retired Senior Status Judge L.D. Egnor replaced Judge Ferguson after the second day of the six-day trial, due to Judge Ferguson somehow being injured.

Following the jury trial, the Petitioner was acquitted of First-Degree Murder of Donte Newsome and Attempted First-Degree Murder of Curtis Keyes, but he was found guilty of Voluntary Manslaughter, Wanton Endangerment, and Carrying a Concealed Weapon. (*Id.* at 17). The trial court, Judge Engor presiding, sentenced the Petitioner to the maximum sentence on each count, with said sentences ordered to run consecutively. (*Id.* at 2, 3). The Petitioner now appeals that conviction.

V. SUMMARY OF ARGUMENT

The Petitioner's conviction should be reversed. The trial court's actions and statements denied the Petitioner the right to cross-examination, the presumption of innocence, shifting the burden of proof, the right to be present at all critical stages, and generally denied him a fair trial under due process of law. The trial court also failed to certify familiarity with the record of the trial when the Honorable Judge Ferguson was unable to proceed after the second day of trial due to injury.

Several other material errors require reversal. The trial court failed to grant the Petitioner

credit for time served on post-conviction home confinement and certain time served in jail prior to trial. West Virginia law, and principles of Double Jeopardy and Equal Protection, clearly state that credit shall be given to criminal defendants for time served on post-conviction home confinement and served in jail when served for the related offense.

The trial court failed to grant a motion to strike a juror with an actual express bias. Juror Jenkins stated during voir dire that she would "probably" agree with a Huntington policeman she knew, who was on the State's witness list for this trial, over another person. Juror Jenkins should not have sat on the Petitioner's jury panel when the Petitioner made use of his limited peremptory challenges, nor should she have deliberated on the Petitioner's jury.

The trial court failed to grant the motion for acquittal and the motion for new trial based upon insufficient evidence. The evidence was insufficient to convict the Petitioner of these three offenses beyond a reasonable doubt. The Petitioner's self-defense theory was never properly overcome by the State. No evidence existed to prove beyond a reasonable doubt that the Petitioner's firearm was ever hidden under the legal definition of a concealed weapon, and no evidence existed to prove beyond a reasonable doubt that the Petitioner fired his firearm in a wanton fashion.

The trial court failed to give the Petitioner proper time to review materials for jury *voir dire* and failed to allow use of the Petitioner's Jury Questionnaire. This was crucial to allow the Petitioner to select a fair jury, due to the massive pre-trial publicity because of the Marshall Football players' connection.

The trial court erred in failing to give several proposed jury instructions. The trial court failed to give the Petitioner's instruction pertaining to involuntary manslaughter and incorrectly stated the law relating to involuntary manslaughter. Involuntary manslaughter does not require

an intentional act causing death. This alone constitutes reversible error. Moreover, Ivan Clark received immunity from the State in order for him to testify, and the lay jury was entitled to hear that such immunity is a factor to consider in weighing the credibility of that witness. It was error to refuse to give proper self-defense, self-defense from multiple assailants, and defense of another instructions. These refusals were error given the evidence presented at trial, and the limited self-defense instruction given was incorrect and incomplete. And it was error to fail to give an instruction on brandishing, which is a lesser-included offense of Wanton Endangerment. The Petitioner was entitled to such instruction, and such refusal was also highly prejudicial error.

The State made improper and prejudicial statements during closing arguments that inflamed the jury, and the State violated the Petitioner rights under Brady and Rule 16 of the West Virginia Rules of Criminal Procedure by failing to disclose pertinent statements made by witness Wilbur Hargrove.

The trial court again erred in denying use of Krystal Lee's pre-trial statement as impeachment evidence. The Petitioner was entitled to broad cross-examination, and the same was denied by the trial court. Lastly, the trial court erred in admitting hearsay evidence.

These many significant errors constitute cumulative error, denying the Petitioner his right to a fair trial under due process of law.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the Revised Rule of Appellate Procedure 18, oral argument is necessary in this case. The Petitioner respectfully requests Rule 19 oral argument as this case involves errors regarding settled law, insufficient evidence, unsustainable exercises of trial court discretion, and other assignments of error requiring such argument. A memorandum decision is not appropriate in this matter given the substantial errors that occurred at the Petitioner's trial requiring reversal.

VII. ARGUMENT

1. The trial court's comments and actions throughout the Petitioner's trial denied the Petitioner the right to cross-examination, the presumption of innocence by shifting the burden of proof, the right to be present at all critical stages, and generally denied him a fair trial under due process of law.[2]

a. The trial court denied the Petitioner the right to meaningful cross-examination and improperly denied the presumption of innocence by shifting the burden of proof.

This Court has long held that "The Sixth Amendment to the United States Constitution guarantees an accused the right to confront the witnesses against him. The Sixth Amendment right of confrontation includes the right of cross-examination." Syllabus Point 1, *State v. Mullens*, 179 W.Va. 567, 371 S.E.2d 64 (1988). Also, "The fundamental right to confront one's accusers, which contemplates the opportunity of *meaningful cross-examination*, is guaranteed by Article III, Section 14 of the West Virginia Constitution." Syllabus Pt. 1, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330, (1975). (emphasis added). It has also long been the law that "the presumption of innocence is an integral part of criminal due process and ... such presumption is itself a constitutional guarantee embodied in Article III, Section 10 of the West Virginia Constitution." *State v. Boyd*, 160 W.Va. 234, 241, 233 S.E.2d 710, 716 (1977). Therefore, "the burden of alleging and proving each element of a criminal offense beyond a reasonable doubt rests with the state and may not be shifted to the defendant." *Id.*

Moreover, this Court held in *State v. Pendry* that a defendant may not be required to introduce evidence on his behalf:

> In a criminal prosecution, the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged, and it is error for the court to instruct the jury in such a manner as to require it to accept a presumption as proof beyond a reasonable doubt of any material element of the crime with which the defendant is charged *or as requiring*

[2] Retired Senior Status Judge L.D. Egnor replaced Judge Ferguson at the beginning of the third day of trial, due to injury to Judge Ferguson. Judge Egnor failed to certify his ability to take over the trial.

the defendant either to introduce evidence to rebut the presumption or to carry the burden of proving the contrary.

Syllabus point 4, *State v. Pendry*, W.Va., 227 S.E.2d 210 (1976), 227 S.E.2d 210 (W.Va. 1976), overruled on other grounds, *Jones v. Warden, West Virginia Penitentiary,* 161 W.Va. 168, 241 S.E.2d 914. (emphasis added).

While it is true that trial judges may control the regular course of proceedings in their courtrooms, including that of cross-examination to an extent, the ability to control proceedings may not interfere with a criminal defense's presentation of his case or otherwise prejudice his trial. The Court has explained the judicial role as follows:

> A trial judge in a criminal case has a right to control the orderly process of a trial and may intervene into the trial process for such purpose, *so long as such intervention does not operate to prejudice the Petitioner's case.* With regard to evidence bearing on any material issue, including the credibility of witnesses, the trial judge should not intimate any opinion as these matters are within the exclusive province of the jury.

Syllabus Point 3, *State v. Bennett*, 172 W.Va. 131, 304 S.E.2d 35 (1983) (emphasis added).

In this case, the trial court erred by interrupting the Petitioner's cross-examination and requiring him, in the presence of the jury, to "promise" to introduce evidence on his behalf. During cross-examination, as discussed above, the Petitioner's counsel was questioning Clark regarding his attempts to throw one or two guns into the Ohio River, including a gun he admitted shooting at the Petitioner on the night in question. (A.R. 1, Vol. II, 676-678.) Clark testified on direct examination that he had only one gun he attempted to throw into the river, but a Gallia County police report stated that Clark told police he had already thrown a gun in the river and was found with another gun behind his back ready to throw into the river. Whether Clark had one or two guns was critical to the Petitioner's defense, as the Petitioner maintained that multiple assailants had guns on the night in question forcing him to fire back in self-defense whereas the

assailants maintained that only Clark had a gun that night and he shot the Petitioner in self-defense. The Petitioner's counsel attempted to impeach Clark with a Gallia County Police report wherein Clark indicated he tried to get rid of two guns, which would corroborate the Petitioner's version of events. (*Id.* at 673.)

The trial court interrupted the Petitioner's counsel throughout the trial, asking counsel to explain aspects of the case, slow down, speak more distinctly, or in one instance asking defense counsel to "help the witness to be discerned" (A.R.1, Vol. III, 674.). During the cross-examination of Ivan Clark, the trial court stopped the Petitioner's counsel repeatedly and on two occasions seriously prejudiced the Petitioner's cross-examination. First, in the presence of the jury, the trial court made defense counsel "promise" he would call a policeman as a witness in his defense before allowing him to use a police report for impeachment purposes. The following exchange occurred in the middle of cross-examination and in the presence of the jury:

> The Court: Question. Are the Gallia County police who prepared that report available for –
> Mr. William Forbes: Yes –
> The Court: -- questioning?
> Mr. William Forbes: Yes, Your honor. And we have one on call who is going to be in the Grand Jury on Monday and they agreed to let me ask questions off that in order to not have to delay this trial any more than it has already been, and I won't have to call that witness.
> The Court: What are you saying?
> Mr. William Forbes: The Ohio County police officer that took that statement and did the investigative report is tied up on Monday. We have been trying to shorten aspects of this trial given its length and they agreed to let me ask questions off of this without objection.
> The Court: What questions? Off of what?
> Mr. William Forbes: Off of the Incident Report, part of the Prosecution file.
> The Court: The Court will not allow you to do that. I won't.
> Mr. William Forbes: Well, then –
> The Court: That is too crucial.
> Mr. William Forbes: Then I will tie it up with the Ohio police officer Monday or Tuesday when he comes to testify, Your Honor.
> The Court: All right.
> Mr. William Forbes: I will have him testify to the authenticity of his report.

The Court: He will be subject to cross-examination.
Mr. William Forbes: Yes, sir.
The Court: Is that a promise?
Mr. William Forbes: Yes, sir. They know it is his report. They talked to him.
The Court: I am asking the questions.
Mr. William Forbes: Yes, sir. He is under subpoena and we are going to have him and I will ask him if that is his report and that what happened.
The Court: And he will be subjected to cross-examination?
Mr. William Forbes: Yes, sir.
The Court: Otherwise this will be stricken from the record.

(*Id.* at 676-678.)

This impeachment evidence was crucial to the Petitioner's ability to attack Clark's credibility, as well as being critical to the Petitioner's assertion of self-defense, as the police never identified what gun was used to shoot the Petitioner three times, and Clark's prior inconsistent statement in the report indicated that an unidentified gun had been thrown into the Ohio River.

Defense counsel proceeded with the cross-examination of Clark, but a few moments later, the trial court again stopped defense counsel and requested defense counsel, the prosecutor, and the witness confer off the record on what questions defense counsel would ask of the witness. Again during cross-examination and in the presence of the jury (except as indicated), the following exchange took place:

The Court: I am going to take a five, ten minute recess and ask you to prepare questions for your witness.
Mr. William Forbes: Your Honor, I –
The Court: No, just a moment. Have them prepared. Have him address those questions to you so that you will be expecting those answers and get them straight.
Mr. William Forbes: Your Honor, I am cross-examining the witness. I don't have any idea what he is going to say.
The Court: Well, I am going to help you. We are going to take a ten minute recess, and you – and counsel for the State can be present – and get them straight. This is a ten minute recess.
Mr. William Forbes: Thank you, Your Honor.

Whereupon the jury retired into the jury room, and the following proceeding were had out of the presence and hearing of the jury:

The Court: One of you will go with Mr. Forbes. Give him use of one of the rooms and – the adjacent rooms. Quit messing around. You have got ten minutes.
Mr. William Forbes: Your Honor, this is the way I cross-examine people. I ain't going to be able to change. I have been doing it for thirty years. This is the first time I have had this problem.
The Court: Well, maybe you better sharpen up.
Mr. William Forbes: I would like to make a motion that I think my client's rights for a fair trial are being denied by interference of my ability to cross-examine this witness, and I want that on the record.
The Court: It may be on the record.
Mr. Chiles: May we go back in Judge Ferguson's chambers?
The Court: Yes, wherever, just get it done.

Whereupon at 2:36 p.m. a recess was had until 2:45 p.m., after which the trial continued, there being present the same parties as heretofore noted, including the Defendant and his counsel.

The Court: Bring the jury out.

Whereupon the jury returned into the courtroom and the proceedings were resumed within the presence and hearing of the jury, as follows:

[...]

Mr. William Forbes: If I may in all due respect to the Court in the humblest manner possible, when we broke I ended up with two Prosecutors, their witness, and myself and I believe the direction was to go over his future testimony with him.
The Court: I recall the directions of the Court.
Mr. William Forbes: All right.
The Court: And I remember them well, and you may put your objections on the record later. Proceed.

(Id. at 684-687.)

The trial court erred in *sua sponte* denying the Petitioner the right to cross-examine Clark on proper impeachment material without objection from the State. The trial court's directive to the Petitioner that he promise to produce a witness to substantiate his cross-examination of Clark in the presence of the jury flies in the face of the presumption of innocence and improperly,

prejudicially, and unconstitutionally shifted the burden of proof from the State to the Petitioner to prove his case.

Furthermore, forcing the Petitioner, two prosecutors, and a State's witness in the middle of cross-examination to prepare questions for future cross-examination for the purpose that the witness, in the words of the trial court, will "be expecting those answers" was highly improper, highly prejudicial, and an unconstitutional abuse of discretion restricting the Petitioner's fundamental right to cross-examination. The trial court prevented the Petitioner from a meaningful cross-examination of Ivan Clark, a key eye-witness for the State, to the events for which the Petitioner stood charged, to the detriment and prejudice of the Petitioner and in violation of his constitutional rights. As this Court explained in *State v. Ladd*:

> Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is co-extensive with, and limited by, the material evidence given on direct examination. *The second is that a witness may also be cross-examined about matters affecting his credibility. The term 'credibility' includes the interest and bias of the witness, inconsistent statements made by the witness*, and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination.

Syllabus Point 25, *State v. Ladd*, 210 W.Va. 413, 557 S.E.2d 820 (W.Va. 2001)*(emphasis added)*.

The trial court substantially abused its discretion and prejudiced the Petitioner in the meaningful cross-examination of Clark and shifted the burden of proof, thereby violating the Petitioner's rights. Such a request in front of a jury during critical cross-examination also undermined the effectiveness of cross by implying defense counsel was somehow incorrectly crossing Clark.

Furthermore, as discussed *supra*, during the cross-examination of Krystal Lees, the trial court refused to allow the Petitioner to cross-examine Krystal Lee about her pre-trial statement that the deceased owned a gun. (A.R. 1, Vol. II, 345-346). Then, during the cross-examination of

Steve Compton, the trial court continually interrupted the Petitioner's cross-examination affecting the ability of the Petitioner to attack the credibility and factual foundations of his testimony. (A.R. 1, Vol. IV, 936-970, 947-951, 974-977).

Therefore, following this Court's holdings in *Bennett*, *Pendry*, and the constitutional safeguards noted above, the trial court's actions violated the Petitioner's rights and such violations constitute reversible error.

b. The trial court denied the Petitioner the right to be present at all critical stages.

In *State ex rel. Grob*, this Court held as follows:

> Correlative with the constitutional right of confrontation is the right of presence which requires that an accused charged with a felony shall be present in person at every critical stage of a criminal trial where anything may be done which affects the accused; the right of presence, originating in the common law, is secured to an an accused by W.Va. Code 1931 62-3-2.
>
> W.Va. Code 1931 62-3-2 requires that one accused of a felony shall be present at every stage of the trial during which his interest may be affected; and if anything is done at trial in the accused absence which may have affected him by possibly prejudicing him, reversible error occurs.

Syllabus Points 2-3, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

During the cross-examination of Justin Ross, a State's witness, the trial court called a protracted in-chambers proceeding that was held without the presence of the Petitioner. In this in-chambers proceeding, the trial court discussed and ruled upon an objection by the State as to the extent of allowable cross-examination. There appears to be an omission in the trial transcript that does not reflect a portion of cross-examination read back to the trial court in chambers before the court made its decision on the objection. This proceeding directly related the effectiveness of the Petitioner's cross-examination of a State witness at trial, and therefore, this proceeding was indeed critical. (A.R. 1, Vol. III, 749-751.)

Therefore, the absence of the Petitioner at a critical proceeding was error. Such error alone demands reversal.

c. The trial court's comments and actions throughout trial generally denied the Petitioner his right to a fair trial under due process of law.

The Honorable Justice Ceckley has explained:

> A criminal defendant is entitled to an impartial and neutral judge in both jury and nonjury trial. *If a judge's conduct exceeds this impartiality limitation imposed by the Sixth Amendment, that alone should constitute reversible error.*

Franklin D. Cleckley, Handbood on Evidence for West Virginia Lawyers § 6-14(A)(1) at 6-228 (4th ed. 2000), as cited in State v. Thompson, 220 W.Va. 398, 647 S.E.2d 834 at 876 (2007).

Occurrences of judicial actions amounting to error abound in the record. As noted above, the trial court substantially interfered with the Petitioner's rights to a meaningful cross-examination of witness Ivan Clark, but the trial court also, *sua sponte*, conducted its own inquiry of witness Clark relating to the witness' trip to Ohio to throw guns into the Ohio River.

This Court has explained that:

> Thus, in defining the role of a judge in interrogating a witness, Rule 614 permits the judge to ask questions to prevent misunderstanding, but extended examination of any witness has not been favored... 'a judge may ask questions for the purpose of clearing up points that seem obscure, and supplying omissions which the interest of justice demands, but it is not proper that he conduct an extended examination of any witness.'

State v. Thompson, 220 W.Va. 398, 647 S.E.2d 834 (2007).

The trial court's numerous questions to Clark centered on the circumstances under which Clark had gone to Gallipolis to dump the guns several days after the shooting, which had already been established by previously testimony. The focus was largely on the route Clark had taken to Gallipolis, which was not at issue in the case, and the court questioned him several times as to how many bridges he had crossed to get there. (A.R. 1, Vol. IV., 930-934.) At one point during

the questioning, the prosecutor stopped the trial court's questioning and agreed with the court that it was "mixed up." (*Id.* at 931.)

The trial court returned to questioning Clark, and the following exchange occurred:

> The Court: Did it ever occur to you that there are some obvious questions that people wonder about?
> A [Ivan Clark]: Yes, sir.
> Q. Like what?
> A. Like I said, I guess people want to know about what route I took. I'm not sure sir.
> Q. What?
> A. The route that I took.
> [...]
> Q. Do you recall crossing any bridges along the way?
> A. No, sir. I don't recall it.
> Q. So you have no memory of crossing bridges?
> A. No, sir. I don't remember crossing bridges.

(*Id.* at 933.)

None of the trial court's questions served to clarify any outstanding matter, but instead served to confuse and mislead the jury as to the importance of these wholly extraneous matters and distract from the matters at hand.

The Petitioner's right to a fair trial was further prejudiced by the trial court's failure to properly advise the jury of usual instructions, or failing to give the jury any instructions at all, before each of the many recesses, in-chambers proceedings, lunches, and other breaks. (See many examples: A.R. 1, Vol. III, 627-628, 685-686, 698-699, 750-751, 773-775; Vol. IV, 816, 821, 870, 873, 935, 947, 981; Vol. V, 1015, 1086-1087, 1098-1099, 1106, 1216-1218). Particularly the failure to give any instructions to the jury whatsoever before a long break, such as concerning media exposure, jurors talking to others, jurors talking amongst themselves, etc., given the profile of this case, involving the death of a former Marshall Football Player was erroneous and contributed to the Petitioner receiving an unfair trial. (See A.R. 1, Vol. V. 1099-

1105).

On Friday, March 26, 2010, for example, prior to the close of evidence and upon excusing the jury for the *entire weekend*, the Petitioner's counsel had to remind the trial court to give instruction to the jury to refrain from media coverage during the weekend break in the trial. (A.R. 1, Vol. IV, 981). The trial court then did give a limited instruction to the jury about refraining from media coverage; however, said instruction failed to advise the jury to refrain from discussing the case among themselves or with others, again for the *entire weekend*. (*Id.*) Thus, Petitioner was substantially prejudiced prior to the close of evidence by the trial court's plain error in failing to instructions or giving inadequate instructions to the jury, particularly prior to a weekend break in a high profile murder case of a former Marshall Football player.

The Petitioner notes that he did not contemporaneously object at each instance of these failures, but the plain error doctrine applies to the cumulative error of the trial court. The Petitioner should not have to remind the trial court of his proper role and duties. Such omissions are: 1) plain; 2) error; 3) affecting substantial rights; and seriously affecting the fairness, integrity, or public reputation of the proceedings. See Syllabus Point 7, *State v. Miller,* 194 W.Va. 3, 459 S.E.2d 114 (1995). Moreover:

> The plain error doctrine contained in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, *including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court.* However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.

Syllabus Point 2, *State v. Thompson, supra.* (emphasis added).

These failures of the trial court constitute reversal, plain error. Failure to instruct the jury properly, or at all, before each extended break creates serious doubt as to the fundamental

fairness of Petitioner's trial and the validity of the jury's verdict.

The presiding trial judge also failed to familiarize himself with the record prior to taking over the proceedings and generally evidenced his lack of knowledge with the proceedings on several occasions, adding to the reversible error in the Petitioner's trial.

Rule 25 of the West Virginia Rules of Criminal Procedure states that when a sitting judge has a disability requiring his removal from an active trial, a new judge may be assigned "upon certifying his familiarity with the record of the trial." In this case, Judge Egnor took over for Judge Ferguson, who had a disabling injury, after the second day of trial.

On the fifth day of trial, several days after having taken over the trial, the new trial court judge admitted that "I have not seen the indictment." (A.R.1, Vol. V, 1101.) Later, the Petitioner informed the trial court that the Petitioner would not testify and that the trial court must go over his right to testify/not-testify with him. (A.R.1, Vol. V, 1107-1108; see also *State v. Neuman,* 179 W.Va. 580, 371 S.E.2d 77 (1988)). The trial court then castigated the Petitioner's counsel for failing to have the necessary colloquy ready for him, which is a judicial colloquy between defendant and judge. While attempting to subsequently give the Petitioner's *Neuman* colloquy, the trial court appears to have read the colloquy pertaining to the acceptance of plea bargains. The trial court asked the Petitioner a litany of questions, including *making the Petitioner write out by hand all the elements of the charges against him*, but at the end of this long colloquy, the prosecutor has to inform the court that he has not yet asked whether he understood that the jury would be instructed that they must consider his testimony as any other witness if he testified but could not hold his silence against him if he did not. (*Id.* at 1110-1123.)

Later in the proceeding, the trial court again stated his confusion and unfamiliarity with the case regarding the admission of the Petitioner's redacted medical records. The parties were

discussing relevant jury instructions, and the Petitioner's medical records were discussed. The trial court explained that the parties would be bound by the earlier judge's decisions regarding the medical records. Both parties expressed their confusion at this because the sitting trial judge himself had ruled on the admission of those records earlier that morning. (A.R. 1, Vol. V. 1125; see prior proceeding at *id.* at Vol. V, 1036-1041).

After the close of evidence, the trial court attempted to read the jury instructions to the jury. Although not properly reflected in the dry written page of the transcript, the charge was largely incoherent to those in the audience, likely including the jury, given the trial court problems with volume, repeatedly paraphrasing, leaving out words, making distracting remarks, repeatedly beginning sections again causing constant interruptions, and conveying the proper order of the charge which at times required the aid of counsel. (A.R. 1, Vol. VI, 1254-1295).

Further, the trial court committed prejudicial error amounting to plain error by going off the record at crucial times during the in-chambers proceedings wherein arguments were being made by counsel as to whether the court would grant or deny a motion for acquittal or give Petitioner's offered instructions versus the State's offered instructions as well as other matters of law. (A.R. 1, Vol. V, 1103, 1160).

Therefore, due to the many instances of erroneous trial court conduct, the Petitioner's right to a fair trial was jeopardized. Under the cumulative error doctrine, even if one of these examples of erroneous conduct is not enough to reverse, the weight of them all require reversal. See Syllabus Point 9, *State v. Lively*, 226 W.Va. 81, 697 S.E.2d 117 (2010).

2. The trial court erred in failing to grant the Petitioner credit for time served on this offense on post-conviction home-confinement and in jail.

This Court has held that a convicted offender is entitled to credit for time served on home confinement against his sentence:

> [I]t is clear that pursuant to the provisions of the Home Incarceration Act, West Virginia Code §§ 62-11B-1 to -12, when an offender is placed on home incarceration as a condition of post-conviction bail, if the terms and conditions imposed upon the offender are set forth fully in the home incarceration order and encompass, at a minimum, the mandatory, statutory requirements enunciated in West Virginia Code § 62-11B-5, then *the offender is entitled to receive credit toward any sentence imposed for time spent on home incarceration*, whether or not the offender violates the terms and conditions of home incarceration and whether or not the order specifically references the Home Incarceration Act.

State v. McGuire, 207 W.Va. 459, 533 S.E.2d 685, 690 (2000) (emphasis added).

Furthermore, this Court has similarly held as follows:

> Although West Virginia Code § 61-11-24 states that the grant of credit for time served prior to conviction is within the discretion of the sentencing court, this Court has held that "[t]he Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that credit for time spent in jail, either pre-trial or post-trial, shall be credited on an indeterminate sentence where the underlying offense is bailable." Syl. Pt. 1, *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39 (1978). As Appellant correctly notes, although our holding in Martin only referred to indeterminate sentences, we later explained that the rule announced in Martin applies equally to determinate sentences since the same concerns are raised:
>
> Constitutional protections are implicated because a person who is unable to make bail will be incarcerated before trial. If such person is not given credit for the jail time, a longer period of incarceration will occur than for the person who commits the same offense but is released on pretrial bail. *State ex rel. Roach v. Dietrick*, 185 W.Va. 23, 25 n. 5, 404 S.E.2d 415, 417 n. 5 (1991)

State v. McClain, 211 W.Va. 61, 561 S.E.2d 783, 788 (2002).

In this case, despite the Petitioner's arguments and communications with the State, the trial court erroneously failed to credit the Petitioner with any time served on home confinement post-conviction and for any time served in jail pre-trial. (See A.R. Vol. III, § 6, 41; Id. at §§ 7-15.) As to post-conviction home confinement, although the Order does not set forth the terms and conditions expressly, the Petitioner was placed on post-conviction home confinement on or about April 4, 2011, subject to terms and conditions set by the Alternative Sentencing Office, and the Petitioner was therefore an offender under the Home Incarceration Act. The same was revoked on or about October 24, 2011. Thus, the Petitioner served approximately 203 days on

post-conviction home confinement. As to jail time, the Petitioner was arrested on or about July 6, 2008, and was released on pre-trial bail on or about September 2, 2009. Thus, the Petitioner served approximately 421 days in pre-conviction jail on the underlying charges for which he is not being credited.

Wherefore, under *McGuire* and *McClain* cited above, the Petitioner should be credited with time served on approximately 203 days on post-conviction home confinement and approximately 421 days in pre-conviction jail on the underlying charges for which he is not being credited, for a total credit of time served at approximately 624 days for which the Petitioner is, to the understanding of the Petitioner, not now being credited.

3. The trial court erred by failing to strike Juror Jenkins for cause due to her admitted actual bias, or, in the alternative, it was error to fail to further probe Juror Jenkins after her inconclusive statement of bias.

West Virginia Code § 62-3-3 states in relevant part:

> In a case of felony, twenty jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel cannot be procured in this way, the court shall order others to be forthwith summoned and selected, until a panel of twenty jurors, free from exception, be completed, from which panel the accused may strike off six jurors and the prosecuting attorney may strike off two jurors.

This Court has interpreted this code section to mean that a defendant has the right to a jury panel free from exception before the use a single peremptory challenge, and if a defendant makes a valid challenge for cause, refusal to strike the potential juror is reversible error whether or not the potential juror deliberates on the jury:

> The language of W.Va. Code, 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error.

Syllabus Point 8, *State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75 (1995).

It is axiomatic to point out:

> The right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14, of the West Virginia Constitution.
>
> [...]
>
> Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed.

Syllabus Points 2 and 4, *State v. Dellinger*, 225 W.Va. 736, 696 S.E.2d 38 (2010).

In this case, the Petitioner's statutory and constitutional rights were violated by the trial court's failure to strike Juror Jenkins. During *voir dire*, Juror Jenkins admitted knowing a Huntington policeman who was on the State's witness list. She stated she could be fair, but upon further questioning by the Petitioner's counsel, the following exchange occurred:

> Mr. William Forbes: But if it came down to that it was [the State's witness Officer Coffey's] word against somebody else's word you didn't know –
> Juror Jenkins: Okay –
> Mr. William Forbes: and you had to believe one of them or the other, would you tend to believe Coffey because you know him a little more than you believe the person you didn't know? Directly opposing testimony?
> Juror Jenkins: Probably.

(A.R. 1, Vol. I, 139-142). The Petitioner's counsel moved for her to be stricken for cause, but the trial court denied the motion without explanation.

Juror Jenkins admitted to an actual bias. Juror Jenkins admitted that she would "probably" believe the testimony of an officer of the Huntington police, whom she knew and who was a potential witness listed on the State's witness list for this trial, more than another person. Juror Jenkins' statement at least required further questioning. If a juror makes an inconclusive or vague statement reflecting the possibility of bias or prejudice, *further*

questioning is required. See Syllabus Point 6, *State v. Newcomb*, 223 W.Va. 843, 679 S.E.2d 675 (2009).

The Petitioner was entitled to a jury panel of twenty jurors free from exception and a jury free from unconstitutional bias, and Juror Jenkins' presence on that jury panel and subsequent jury constituted error. Juror Jenkins made a clear statement of actual bias. On the other hand, even if the Court finds that Juror Jenkins' comments constituted merely a vague statement reflecting the possibility of bias, further questioning was required to clear up the statement. As no further questioning occurred, the statement was reversible error.

4. The trial court erred in failing to grant the Petitioner's motion for acquittal and motion for a new trial due to insufficient evidence to convict the Petitioner beyond a reasonable doubt.

This Court has stated that if no rational trier of fact could find guilt beyond a reasonable doubt based upon the evidence submitted at trial, the evidence is insufficient, and the conviction should be reversed. The Court has explained:

> 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.

Syllabus Point 6, *State v. White*, 227 W.Va. 231, 707 S.E.2d 841 (2011).

In this case, the Petitioner was convicted of three offenses: 1) Voluntary Manslaughter; 2) Wanton Endangerment; and 3) Carrying a Concealed Weapon. The evidence was insufficient to convict the Petitioner on any of these charges. The Petitioner moved for a motion for acquittal after the State's case in chief due to insufficient evidence.

Voluntary Manslaughter is the intentional, felonious, and unlawful killing of another without premeditation, deliberation, or malice, performed in the heat of passion. However, once there is sufficient evidence that a criminal defendant acted in self-defense, even in correlation to Voluntary Manslaughter, the prosecution must then prove beyond a reasonable doubt that the defendant did not act in self-defense. Syllabus Point 6, *State v. Harden*, 223 W.Va. 796, 679 S.E.2d 628 (2009). This Court has explained:

> 'In a trial upon an indictment for murder in which the defendant is convicted of voluntary manslaughter and the evidence is not sufficient to justify a verdict of guilty of voluntary manslaughter, such verdict and the sentence of imprisonment entered upon it will be set aside and reversed by the appellate court.' Point 2, Syllabus, *State v. Duvall*, 152 W.Va. 162, 160 S.E.2d 155."
>
> The judgment here must be reversed and defendant released because the evidence was insufficient to sustain a voluntary manslaughter conviction. Her evidence supporting her self-defense defense was not materially disputed, and as a matter of law, certainly created a reasonable doubt about her guilt of either voluntary or involuntary manslaughter. See, *State v. Kirtley*, W.Va., 252 S.E.2d 374 (1978), syllabus point 4. [3] The judgment is reversed and defendant unconditionally discharged from custody. *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

State v. Gialdella, 163 W.Va. 60, 254 S.E.2d 685 (1979).

In this case, the State failed to overcome the Petitioner's assertion of self-defense beyond a reasonable doubt. (A.R. V, 1047-1061). On the evening of these underlying incidents, the Petitioner suffered three gunshot wounds and a severe laceration to his lip and mouth during his fight for his life with multiple assailants, which injuries were proven at trial by the admission of Petitioner's medical records and photographic evidence of his wounds, admitted as Petitioner's Exhibits 43 and Exhibits 16-42. (A.R. 1, Vol. V. p. 1042; Vol. IV, p. 951). The evidence adduced at trial, even when taken in the light most favorable to the State, showed that the Petitioner was shot three times by an unknown assailant(s). These assailant(s) were unknown because the Petitioner's bullet wounds and the actual bullet(s) removed from his body at the

hospital were never examined for a ballistic comparison with the bullets from Ivan Clark's gun or any other gun. (A.R. 1, Vol. IV, p. 911-913).

The Petitioner asserted self-defense at trial. (A.R. 1, Vol. I, 197-210; Vol. III, 747-749, 752, 757-759; Vol. V, 1047-1061; and Vol. Vi, 1323-1361.) The Petitioner's statement, the cross-examination of the State's witnesses tending to show that Curtis Keyes was the original aggressor, and the fact that the Petitioner was shot three times and struck in the face causing injuries was competent evidence that the Petitioner was attacked by an assailant(s). (A.R. 1,, Vol. V, 1047-1061). Therefore, the Petitioner carried his burden to show that it was reasonable to believe it was self-defense. The State did not overcome that showing. The evidence at trial was manifestly insufficient to disprove self-defense beyond a reasonable doubt, and had the jury been properly instructed, Petitioner would have been acquitted as he clearly was acting in self-defense, as he was shot three times by an unknown assailant, and had a severe laceration to his face from being hit by one of his assailants. (A.R. 1, Vol. V, pp. 1042, pp. 1047-1061, A.R. 18).

Moreover, the majority of the State's eyewitnesses were inherently incredible, with the possible exceptions of Justin Ross and Keith Lee. The State's forensics and reconstruction expert, Steve Compton, based his conclusions and theories of the crime scene reconstruction on incompetent evidence, as Steve Compton admitted in his testimony that no ballistics testing was performed on the bullet removed from Petitioner's body at the hospital (the police did not even seize it as evidence); no one examined the Petitioner's wounds for evidence; no one examined the driver's side door of the Petitioner's car for fingerprints; no trajectory or distance determination testing had been performed; and no gunshot residue testing of the Petitioner's clothes had been performed. Thus, Compton's testimony and report amounted to nothing more than unsupported speculation as to where Petitioner was located when he was grievously shot

three separate times, and by whom. The Petitioner's statement, however, was competent evidence that the deceased had opened the driver's side door of the Petitioner's SUV and attacked him, striking him in the face and ultimately shooting him. Furthermore, the Petitioner's statement combined with the Petitioner's medical records constituted competent and compelling evidence that the Petitioner was struck by the assailant at the driver's door and then one of the assailants shot the Petitioner three times before the Petitioner returned fire. (A.R. 1, Vol. V, 1047-1061, 1062; A.R. 18, 1-130). Keith Lee's testimony provided corroborating evidence that one of the assailants fired at the Petitioner before the Petitioner returned fire, as Keith heard the lower sounding gun first and testified that two separate guns were going off in a shootout at the outset of shooting. (A.R. 1, Vol. II, 376, 405-406). Justin Ross also testified two guns went off simultaneously. (A.R.1, Vol. III, 752).

The verdict on this charge is further compromised due to the trial court's refusal to give the jury a legally proper self-defense instruction regarding multiple assailants that was offered by the Petitioner. (A.R. 1, Vol. V, pp. 1169-1172, 1202-1203). "Voluntary manslaughter requires a specific intent to kill." *State v. Hamrick*, 160 W.Va. 673, 236 S.E.2d 247 (1977). The evidence at trial from Petitioner's statement, was competent and convincing proof that he did not intend to kill anyone, rather he was defending himself and his girlfriend from the attack of multiple assailants, whom he believed to be armed with guns, and who were in fact armed with guns as Petitioner was shot by an unknown assailant three times. (A.R. 1, Vol. V, 1042, 1047-1061; A.R. 18). Hence, the jury's ability to properly consider whether or not Petitioner acted in self-defense was substantially prejudiced by the trial court's unwarranted abuse of discretion in its refusal to give the Petitioner's offered instruction on self-defense from multiple assailants, which was supported by competent evidence of record from Petitioner's statement, as well as Justin Ross'

testimony. Absolutely no evidence was admitted, which a rational trier of fact could have found beyond a reasonable doubt, to support the Petitioner's *specific* intention to kill, a required legal element for the offense. The Petitioner submits that the evidence adduced at trial was totally non-existent as to him having any specific intent to kill, and therefore the verdict was irrational and based on a misapprehension of the law. The verdict on this charge is further compromised due to the trial court's refusal to give the jury legally proper self-defense instructions (A.R. 1, Vol. V, 1169-1172, 1202-1203), and the trial court's refusal to give Petitioner's offered instruction on involuntary manslaughter, noting the critical distinctions between involuntary and voluntary manslaughter. (*Id.* at 1201-1202).

Additionally, the evidence introduced at trial was further manifestly insufficient to sustain the jury's verdict of wanton endangerment and carrying a concealed weapon. To find a verdict of guilty for Wanton Endangerment, there must be evidence that the defendant "wantonly perform[ed] any act with a firearm which create[d] a substantial risk of death or serious bodily injury to another." W. Va. Code § 61-7-12. The only acts involving the Petitioner's use of a firearm born out in testimony at trial were that the Petitioner fired a firearm at an assailant or assailants, which the Petitioner maintains was in self-defense. There was absolutely no evidence or testimony that the Petitioner *wantonly* fired his firearm at anything or anyone, which expresses a reckless act. The act of discharging a firearm is not wanton merely because it is fired.

To be found guilty of Carrying a Concealed Weapon, the weapon must be "hidden from ordinary observation so as to prevent disclosure or recognition. A deadly weapon is concealed when it is carried on or about the person in such a manner that another person in the ordinary course of events would not be placed on notice that the deadly weapon was being carried." W.

Va. Code § 61-7-2(10). At trial, several witnesses, including Justin Ross, Keith Lee, Crystal Lee, testified that they did not see the Petitioner's firearm at all due to view or timing. (A.R. 1, Vol. III, 734). None of the State's witnesses who testified to seeing the Petitioner's firearm, including Ivan Clark, Curtis Keyes, and Wilbur Hargrove, indicated that the firearm was at any time hidden from ordinary observation. (A.R. 1, Vol. III, 572; id. at 653; A.R. 1, Vol. II, 440).

While it is true that the Petitioner takes on a heavy burden in challenging the sufficiency of the evidence, the burden is not an impossible one to carry. Here, the Petitioner has carried his burden and shown that insufficient evidence existed to find the Petitioner guilty beyond a reasonable doubt. This Honorable Court should reverse these convictions due to insufficient evidence presented to the jury.

5. The trial court erred in refusing to give the Petitioner proper materials and/or time to prepare for jury selection and in denying the Petitioner's request to use his proposed Jury Questionnaire.

This Court has long held that a criminal defendant is entitled to an effective voir dire, without which the fundamental right to an impartial, objective jury is violated. In State v. Dellinger, the Court held:

> The right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14, of the West Virginia Constitution. A meaningful and effective *voir dire* of the jury panel is necessary to effectuate that fundamental right.

Syllabus Point 2, *State v. Dellinger*, 225 W.Va. 736, 696 S.E.2d 38 (2010). The *Dellinger* Court went on to explain that "Clearly, then, a fair trial requires a meaningful and effective *[v]oir dire* examination." *Id.*, 696 S.E.2d at 43.

In this case, the Petitioner was denied a meaningful and effective *voir dire*. The Petitioner noted his strenuous objections on the record. (A.R. 1, Vol. I, 6-10). On the first day of

trial, counsel for the State claimed that he had only received a copy of pretrial jury panel information on the Sunday before trial; however, he neglected to provide a copy to the Petitioner's counsel at any time prior to the trial. (A.R. 1,, Vol. I, 7). Due to the high profile nature of the case, the Petitioner's counsel moved for a continuance, to allow Petitioner time to review the juror information to be able to adequately select a fair and impartial jury. (A.R. 1, Vol. I, 7-11); (A.R. 1, Vol. 1, 43-49; A.R. 19; A.R. 1, Vol. 1, 43-7). The trial court's refusal to supply this information or a continuance resulted in the loss of the opportunity to formulate informed *voir dire* questions and to adequately prepare for jury selection to prevent potential familiarity and bias toward the State given the high-profile nature of the Petitioner's case involving former members of Huntington's Marshall University Football Program.

Additionally, given the lack of provision of the jury panel information to the Petitioner, the Petitioner moved for the trial court to use a Juror Questionnaire prepared by the Petitioner. The trial court denied the Petitioner's motion to use said Questionnaire to the detriment and prejudice of the Petitioner, especially in light of the denial of a continuance to allow any meaningful time to prepare for jury selection with the jury panel information provided to the State.

Wherefore, the trial court erred in denying the Petitioner a meaningful and effective *voir dire* by failing to provide proper pretrial jury panel information collected prior to trial; denying a continuance to review such information provided the morning of trial; and denying use of the Petitioner's Jury Questionnaire given the widespread media exposure because several people associated with the case were former Marshall Football players, resulting in prejudicial harm to the Petitioner in selecting the jury.

6. The trial court erred in refusing to give several of the Petitioner's proposed jury instructions on involuntary manslaughter, self-defense, brandishing, and the immunity of a

witness.

A trial court commits reversible error in refusing to give proposed jury instructions when the following three criteria are met:

> A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense.

State v. Wade, 200 W.Va. 637, 646, 490 S.E.2d 724, 733 (1997). Moreover, "it is reversible error for a trial court to refuse to instruct a jury on lesser offenses charged in the indictment if there is any evidence in the record to prove such lesser offenses." *State v. Wayne*, 162 W .Va. 41, 46, 245 S.E.2d 838,842 (1978), *overruled on other grounds, State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983); see also *State v. Davis*, 205 W.Va. 569, 585, 519 S.E.2d 852, 868 (1999).

In this case, the trial court committed reversible error in refusing to give numerous instructions of law offered by Petitioner that were competently supported by evidence and testimony of record, and which instructions were correct statements of law. (A.R. 1, Vol. V. 1157-1160, 1169-1173, 1189-1191, 1196-1197, 1198-1201, 1201-1202, 1203-1204). The Petitioner requested a number of instructions relating to the offenses of which he stood charged, including proper instructions on involuntary manslaughter, self-defense, self-defense from multiple assailants, the lesser included offense of battery, bias from immunity of the State's witness, Ivan Clark, and other instructions offered by the Petitioner at trial. The trial court, however, refused to give such instructions resulting in an abuse of discretion and reversible error. The lack of the Petitioner's proposed instructions in the final charge substantially prejudiced the jury's ability to apply the law to the evidence in the Petitioner's trial.

First, the trial court denied the Petitioner's request to use his proposed instruction on the

distinction between voluntary and involuntary manslaughter. (A.R. 1, Vol. V, 1201-1202.) Although the Court read a different instruction pertaining to involuntary manslaughter earlier in the charge, the trial court then read the following to the jury:

> Before the Defendant can be convicted of Involuntary Manslaughter, the State of West Virginia must overcome the presumption that he is innocent and prove to the satisfaction of the jury beyond a reasonable doubt that: The Defendant, Jerel Garner, in Cabell County, West Virginia, on or about the 8th [sic] day of July, 2008, did *intentionally*, with reckless disregard for human life and the safety of others, cause the death of Donte Newsome.

(*Id.* at Vol. VI, 1271; see *id.* at 1267-1268.) (Emphasis added.)

This Court has clearly held: "[t]he offense of involuntary manslaughter is committed when a person, while engaged in an unlawful act, unintentionally causes the death of another, or where a person engaged in a lawful act, unlawfully causes the death of another." Syllabus Point 7, *State v. Barker*, 128 W.Va. 744, 38 S.E.2d 346 (1946).

The trial court's instruction that involuntary manslaughter requires a finding of "intentionally" causing death was error, and the trial court should not have denied the Petitioner's motion to properly instruct the jury on this distinction.

Second, the trial court's instruction as a whole constituted an incorrect statement of the law of self-defense as it pertains to multiple assailants and self-defense in general. The Petitioner requested an instruction on self-defense, the defense of another, and self-defense as it pertains to multiple assailants, which were correct statements of the law, supported by competent evidence at trial, and not fully covered by the jury instructions as a whole. The trial court refused to give these instructions, depriving the jury of the correct statement of the law on self-defense and defense of another, which was central to the Petitioner's defense at trial.

The instruction on self-defense given was incorrect and incomplete for several reasons. First, the instruction stated "No apprehension of danger previously entertained will justify the

commission of homicide." (A.R. 1, Vol. VI, 1280.) Under *State v. Harden*, 679 S.E.2d 628, 223 W.Va. 796 (2009) and its progeny, that is not a correct statement of West Virginia law on self-defense. Second, the self-defense instruction stated that in order to find self-defense the jury must have found that apprehension of danger "existed at the time that the defendant attacked the victim." (A.R. 1, Vol. VI, 1279-1280.) The trial court's language stating that the Petitioner "attacked" the "victim" is by definition not self-defense, as this Court has envisioned it. Under this instruction, the jury would have to have found that the Petitioner "attacked" his assailant in order to find self-defense. If the jury decided the Petitioner did not "attack" his assailant, then they could not find he acted in self-defense.

Moreover, no instruction was given on the defense of another, despite the evidence clearly showing that the Petitioner was in the car with his girlfriend during this incident. The Petitioner's statement, introduced as evidence by the State, showed that the Petitioner believed he and his girlfriend were in danger for their lives, and in fact, the Petitioner was shot three times. Under *State v. Cook*, 515 S.E.2d 127, 204 W. Va. 591 (1999), all the elements of the defense of another were met, and due to the evidence from the Petitioner's statement, the jury was entitled to hear an instruction on the Petitioner's defense of his girlfriend. The refusal to give such an instruction was error. Finally, as to self-defense, an instruction should have been given on self-defense from multiple assailants. When multiple assailants attack, self-defense is different than with one assailant. The jury was entitled to hear an instruction on self-defense regarding multiple assailants.

The Petitioner's statement, admitted at trial, was compelling evidence that the Petitioner and his girlfriend were being attacked while sitting in their vehicle by a man at the passenger side door with a gun, that another individual with a gun was approaching the driver's door, and

that an additional assailant was approaching. (A.R. 1, Vol. V, 1053, 1047-1061). The Petitioner asserted self-defense and defense of another at trial, and the Petitioner's statement constituted competent and sufficient evidence to support the requested instructions. It was reversible error for the trial court to refuse to give Petitioner's offered instructions of Defense Instruction No. 6 relating to self-defense rather than the State's version, which was a less complete statement of the law and less applicable to the evidence in this case (Id. p. 1157-1160); Defense Instruction No. 7 relating to self-defense from multiple assailants (A.R. 1, Vol. V, 1169-1172, 1203-1204), supported by competent evidence at trial from Petitioner's statement and the testimony of Justin Ross (A.R. 1, Vol. V, 1047-1061; A.R. 1, Vol. III, 748, 752-754, 757-758); and an instruction on the defense of others.

Third, the Petitioner offered an instruction on brandishing, a lesser-included offense of wanton endangerment, as the law requires lesser-included offense instructions if the jury could make such a finding. (A.R. 1, Vol. II, 1149-1190)[3]; see *State v. Bell*, Syl. Pt. 5, 211 W.Va. 308, 565 S.E.2d 430 (2002) ("The offense of brandishing as defined by West Virginia Code § 61-7-11 is a lesser included offense within the definition of wanton endangerment under West Virginia Code §61-7-12. Additionally, 'a trial court must give an instruction for a lesser included offense when evidence has been produced to support such a verdict.'"). Despite the law and evidence, the trial court refused to give the Petitioner's offered brandishing instruction.

Finally, the trial court committed a substantial abuse of discretion and reversible error in refusing to give Petitioner's offered instruction on to offers of immunity tending to cause bias, which related to the testimony of Ivan Clark. (A.R. 1, Vol. V, 1196-1197). The Petitioner asked

[3] Petitioner's offered brandishing instruction appears in the record at A.R. 1, Vol. II, 1189-1190. However, the court had previously refused to give said instruction at 1149-1150, wherein Petitioner noted his objection to the court's refusal at 1190. The court then directed counsel to withdraw the instruction, but without withdrawing it counsel continues with additional defense instructions.

for this additional separate instruction relating to the bias from immunity of Clark, due to all the irregularities which occurred during Petitioner's cross-examination of Clark and the State having failed to disclose a copy of the any written "use" immunity agreement between the State and Clark. (A.R.1, Vol. III, 703-705). Clark admitted in his testimony to having repeatedly fired a gun at Petitioner, and further testified that he had been granted immunity by the prosecution for any criminal charges relating thereto. (Id.)

Nonetheless, the trial court refused to give the Petitioner's offered instruction, as the State argued that Clark was cross-examined and that such bias was covered in the general charge and to draw attention to Clark would be improper. (A.R. 1, Vol. V, p. 1197). This refusal was an abuse of discretion and reversible error because the lay jury, perhaps uncertain of what immunity is, should have been instructed that immunity given to a witness in exchange for testimony, is a factor to consider in weighing the credibility of that witness. Although a general instruction on credibility, including several factors to consider when weighing credibility, was given (A.R. 1, Vol. VI, 1258-1260), no instruction relating to immunity was given.

Therefore, the trial court's refusal to give Petitioner's offered instructions constituted reversible prejudicial error, as did the reading of incorrect law to the jury pertaining to involuntary manslaughter instead of the correct statement of law offered by the Petitioner. Had these instructions properly been given the outcome would likely have been different.

7. The State violated *Brady v. Maryland* and Rule 16 of the W. Va. Rules of Criminal Procedure by failing to disclose certain statements made by witness Wilber Hargrove.

Under *Brady v. Maryland* and its progeny, the State has a mandatory obligation to disclose all material exculpatory or impeachment evidence. *Brady v. Maryland*, 373 U.S. 83 (1963); see also *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982) and *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007). Furthermore, Rule 16 of the W.Va. Rules of

Criminal Procedure is broader than the constitutional requirement under *Brady* and its progeny. The standard of review for Rule 16 violations is as follows:

> The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case.

Syllabus Point 2, *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994).

Prior to trial, the Defendant moved for the State to disclose all witness statements in its possession, pursuant to W.Va. Rule of Criminal Procedure 16, which provides a continuing duty to disclose and sanctions for failure to furnish discoverable material. Although Wilbur Hargrove was disclosed as a witness, and the State provided an audio CD containing a statement he made to the police, such audio statement made no mention of any alleged statements made by the deceased, Donte Newsome, nor were any such alleged statements disclosed to the Defendant by the State prior to trial nor any pre-trial diagrams made by Hargrove. Had such statements and the diagram been disclosed to the Defendant prior to trial, the Defendant would have been afforded the opportunity to move to suppress such statements and/or to move for a cautionary instruction to limit the prejudicial effect of the same.

Thus, the Defendant was unpleasantly and unfairly surprised at trial by the State's direct examination of Wilbur Hargrove, in which Wilbur Hargrove emotionally related the deceased's alleged dying words made to this witness, causing quite a stir in the courtroom, from crying friends and relatives. The Defendant submits that the State had a duty, upon discovery of these alleged statements, to disclose the same to the Defendant.

8. The State made improper comments during closing, compounded by the trial court's failure to give a curative instruction, both shifting the burden of proof and constituting reversible error.

This Court has held that:

> The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.

Syllabus Point 3, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

a. The State improperly commented on the Petitioner's right not to call witnesses in his defense during closing arguments, shifting the burden of proof. Moreover, the trial court failed to give a requested curative instruction, compounding this error.

During closing, the prosecutor stated that if the Petitioner's counsel "wants to hear from Sergeant Williams so badly, he could have called him." (A.R. 1, Vol. VI,1366). Such a statement, especially in consideration of the trial court's earlier comment forcing the Petitioner to "promise" to call a witness to substantiate his defense (*supra*, Assignment of Error 1.a) constitutes reversible error. The prosecutor's remark was highly prejudicial and improper and shifted the burden of proof to Petitioner to call witnesses to prove his case.

The Petitioner's counsel objected to this comment and requested a curative instruction. The trial court failed to grant such request. The prosecutor's erroneous comment was thus compounded by the trial court's failure to give a curative instruction. This highly improper comment to the jury requires reversal of this jury's convictions.

b. The State improperly opined on the character of the Petitioner during closing arguments inflaming the jury.

In West Virginia, a prosecutor cannot "(A)ssert his personal opinion as to the justness of a cause, as to the credibility of a witness ... or as to the guilt or innocence of the accused ...." Syllabus Point 3, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981).

During closing arguments, the prosecutor stated as follows: "Use your reason and

common sense when you are considering this case and you will know who is the thug." (A.R. 1, Vol. VI, 1297.) Although defense counsel had used similar language in reference to witnesses in this case, for a prosecuting attorney representing the State of West Virginia in front of a jury in a criminal case to indicate that the defendant on trial, who still benefits from the presumption of innocence, is a "thug" is improper opinion on the character of the accused.

The prosecutor also made improper comments stating that he was the only person with an oath to do justice and comments on facts not in evidence. This Court has held that:

> "Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters."

State v. Kendall, 639 S.E.2d 778, 219 W.Va. 686 (2006).

The prosecutor stated during closing argument that he was the "only one in this courtroom in some way whose oath is to do justice." (A.R. 1, Vol. VI, 1371.) Furthermore, the prosecutor commented on facts not in evidence. The prosecutor stated that there was only one picture of the inside of the Petitioner's car, but "that doesn't mean others of those weren't taken." (*Id.* at 1367.) The prosecutor went on to say that only one of the witnesses had a criminal record of a DUI. (Id. at 1297-1298.) However, the Petitioner introduced as an exhibit 44 tending to show that Ivan Clark had a criminal record with FBI. (Id. at 1094-1095.)

Therefore, due to the prosecutor's opinion of the accused during closing arguments, the jury's convictions should be reversed. Although defense counsel failed to object, perhaps as not to draw attention to the statement, the prosecutor's statement was plain error. Such arguments merely inflame the passions of the jury.

9. The trial court erred by denying the Petitioner the right to use witness Krystal Lee's pre-trial statement as impeachment evidence that the deceased owned a firearm.

West Virginia law holds that a criminal defendant has broad rights to impeach the State's witnesses as to their credibility and by use of prior inconsistent statements:

> A criminal defendant has a broad right to impeach prosecution witnesses on cross-examination with prior inconsistent statements. While the scope of cross-examination is generally within the discretion of the trial court and usually limited to matters brought out on direct, the trial court may not control the scope of cross-examination so far as to prejudice the defendant. Furthermore, we are advised that cross-examination to impeach is not, in general, limited to matters brought out on direct examination. The right to an effective cross-examination is an integral part of the confrontation clause of the Sixth Amendment to the United States Constitution[.]

State v. Foster, 171 W. Va. 479, 482-83, 300 S.E.2d 291, 294-95 (1983).

> Three requirements must be satisfied before admission at trial of a prior inconsistent statement allegedly made by a witness: (1) The statement actually must be inconsistent, but there is no requirement that the statement be diametrically opposed; (2) if the statement comes in the form of extrinsic evidence as opposed to oral cross-examination of the witness to be impeached, the area of impeachment must pertain to a matter of sufficient relevancy and the explicit requirements of Rule 613(b) of the West Virginia Rules of Evidence - notice and an opportunity to explain or deny - must be met; and, finally, (3) the jury must be instructed that the evidence is admissible only to impeach the witness and not as evidence of a material fact.

Syllabus Point 1, *State v. Blake*, 197 W. Va. 700, 478 S.E.2d 550 (1996).

In this case, during the cross-examination of Krystal Lees, the trial court refused to allow the Petitioner to cross-examine Krystal Lees about her pre-trial statement she had made that the deceased owned a firearm. (A.R. 1, Vol. II, 345-346). Prior to trial, the Petitioner offered evidence that showed the deceased owned a pistol-grip shotgun, as well as the evidence from Krystal Lee's pre-trial statement to police that the deceased owned a firearm. At trial, the Petitioner asked Krystal Lees whether the victim had a firearm, but before the witness could answer, the State objected and the trial court sustained the objection, allowing the witness only to answer whether or not the deceased had a gun on the night in question. The State's witnesses

repeatedly testified that the deceased was a fun-loving peacemaker. (A.R. 1, Vol. II, 345-346, Vol. II, 416, 493; Vol. III, 543-545; 635-636, 731-732). Thus, the trial court's exclusion of the Petitioner's cross-examination questions for the purpose of impeaching the witness was error.

Therefore, the trial court's refusal to allow admission of evidence of the deceased's gun ownership offered by the Petitioner to rebut the State's repeated introduction of the deceased's peacemaking character constituted reversible error. (A.R. 1, Vol. II, 416, 493; Vol. III, 543-545; 635-636, 731-732, Vol. VI, 1298).

10. The trial court erred in admitting the hearsay notes of Officer Christopher Sperry.

Under Rule 801 of the West Virginia Rules of Evidence, et seq., it is improper to admit out of court statements for the truth of the matter asserted.

In this case, the prosecutor moved the admission, at the trial court's behest, of personal notes made out of court by Officer Christopher Sperry for the purposes of proving the truth of what those notes stated, specifically that the Petitioner's girlfriend Robyn Christie did not say the men that approached the vehicle on the night of the shooting had guns. (A.R. 1, Vol. VI, 1082-1088.) The prosecutor relied upon the contents of those notes again during closing arguments. The claim that this out-of-court statement established that the assailants who attacked the Petitioner's car did not have guns was a critical factual difference between the State's and the Petitioner's theories of the case, and admitting these notes was prejudicial error. Officer Sperry testified at the preliminary hearing that Robyn Christie told him the assailants did in fact have guns.

Therefore, the admission of these notes was error requiring reversal.

11. Due to these many errors, the cumulative error doctrine requires reversal of the Petitioner's conviction.

This Court has held that even where errors are by themselves found to be harmless, the

cumulative effect of many harmless errors may constitute reversible error:

"Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." Syllabus Point 9, *State v. Lively*, 226 W.Va. 81, 697 S.E.2d 117 (2010).

Even if this Court finds that any of the errors enumerated above are harmless, the cumulative effect of so many errors deprived the Petitioner of the right to a fair trial. Therefore, the Petitioner's conviction should be reversed.

VIII. CONCLUSION

Wherefore, for all the foregoing reasons and authorities cited herein, the Petitioner respectfully requests that this Honorable Court reverse the erroneous conviction below and grant the Petitioner a new trial. The Petitioner further prays that this Honorable Court will order his release from incarceration forthwith as the sentence under which he is incarcerated is unlawful, and readmit Petitioner to bail while awaiting a new trial. The Petitioner prays for such further relief as the Court deems fair, just, and appropriate in the interests of justice and equity.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Supreme Court Docket No. 12-0439

STATE OF WEST VIRGINIA,

V. **(In Re: Appeal from a final order of the Circuit Court of Cabell County, Case No. 09-F-47)**

JEREL ADDISON GARNER,

PETITIONER.

CERTIFICATE OF SERVICE

I, William C. Forbes, Esq., Forbes Law Offices, PLLC, co-counsel for the Defendant, Jerel Addison Garner, hereby certify that a true and exact copy of the foregoing **"Petitioner's Brief,"** was duly served upon counsel for the respondent upon this appeal, via hand delivery on this the 1 day of August 2012, addressed as follows:

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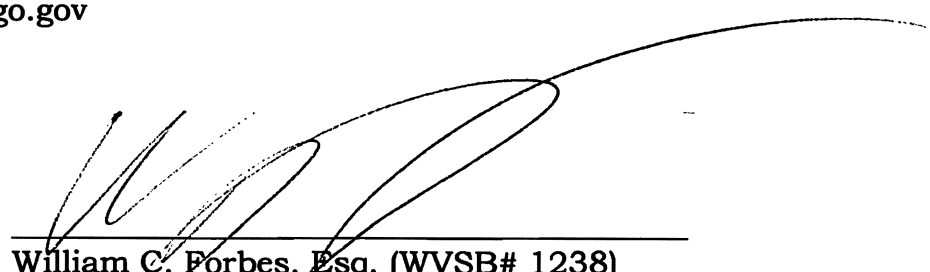

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