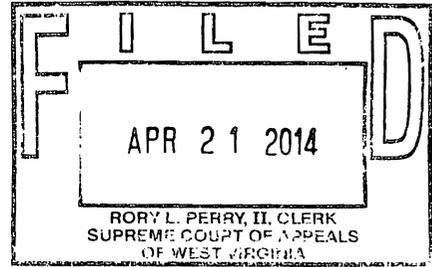


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

v.

DANIEL L. HERBERT,
Defendant Below, Petitioner.

DOCKET NO.: 13-1264
(Berkeley County Case No.: 12-F-204)

RESPONDENT STATE OF WEST VIRGINIA'S BRIEF

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TABLE OF CONTENTS

	Page
Petitioner’s Assignments of Error.....	1
Statement of the Case.....	1
Summary of Argument.....	3
Statement Regarding Oral Argument and Decision.....	4
Argument, Assignment I.....	5
Argument, Assignment II.....	10
Argument, Assignment III.....	28
Conclusion.....	34
Certificate of Service.....	35

TABLE OF AUTHORITIES

<u>Statutes</u>	Page
W.Va. Code §61-11-18.....	2, 3
W.Va. Code §61-2-1.....	2, 3
W.Va. Code §61-2-9.....	2-3
W.Va. Code §61-5-17.....	3
W.Va. Code §61-7-12.....	3

Rules

W.Va.R.Evid. 608.....	26-27
W.Va.R.Evid. 611.....	10

Cases

<u>Gable v. Kroger Co.</u> , 186 W.Va. 62, 410 S.E.2d 701 (1991).....	10
<u>Gentry v. Mangum</u> , 195 W.Va. 512, 466 S.E.2d 171.....	10-11
<u>Gladden v. State</u> , 273 Md. 383, 330 A.2d 176 (1974).....	33
<u>Grillis v. Monongahela Power Co.</u> , 176 W.Va. 662, 346 S.E.2d 812 (1986).....	10
<u>Holt v. State</u> , 266 Ind. 586, 365 N.E.2d 1209 (1977).....	33
<u>McDougal v. McCammon</u> , 193 W.Va. 229, 455 S.E.2d 788 (1995).....	10
<u>Michael v. Sabado</u> , 192 W.Va. 585, 453 S.E.2d 419 (1994).....	10
<u>Riddick v. Commonwealth</u> , 226 Va. 244, 308 S.E.2d 117 (1983).....	33
<u>State v. Boggess</u> , 204 W. Va. 267, 512 S.E.2d 189 (1998).....	10, 25, 26
<u>State v. Boyd</u> , 160 W.Va. 234, 233 S.E.2d 710 (1977).....	5, 7

<u>State v. Briggs</u> , 58 W.Va. 291, 52 S.E. 218 (1905), <i>overruled on other grounds</i> , <u>State ex rel. May v. Boles</u> , 149 W.Va. 155, 139 S.E.2d 177 (1964).....	33
<u>State v. Calloway</u> , 207 W.Va. 43, 528 S.E.2d 490 (1999).....	5, 7
<u>State v. Cole</u> , 121 R.I. 39, 394 A.2d 1344 (1978).....	33
<u>State v. Cozart</u> , 177 W.Va. 400, 352 S.E.2d 152 (1986).....	5, 7
<u>State v. Gardner</u> , 57 Del. (7 Storey) 588, 203 A.2d 77 (1964).....	33
<u>State v. Guthrie</u> , 194 W.Va. 657, 461 S.E.2d 163 (1995).....	28, 33
<u>State v. Hall</u> , 174 W.Va. 599, 328 S.E.2d 206 (1985).....	33
<u>State v. Harris</u> , 216 W.Va. 237, 605 S.E.2d 809 (2004).....	5, 7
<u>State v. Hinkle</u> , 200 W.Va. 280, 489 S.E.2d 257 (1996).....	26, 28
<u>State v. Jett</u> , 220 W. Va. 289, 647 S.E.2d 725 (2007).....	26, 28
<u>State v. Julius</u> , 185 W.Va. 422, 408 S.E.2d. 1 (1991).....	29, 32-33
<u>State v. Miller</u> , 194 W. Va. 3, 459 S.E.2d 114 (1995).....	8, 9, 10, 28-29, 33
<u>State v. Omechinski</u> , 196 W. Va. 41, 468 S.E.2d 173 (1996).....	10-11, 26
<u>State v. Riley</u> , 201 W.Va. 788, 500 S.E.2d 524 (1997).....	7
<u>State v. Rogers</u> , 273 N.C. 330, 159 S.E.2d 900 (1968).....	33
<u>State v. Whitt</u> , 220 W.Va. 685, 649 S.E.2d 258 (2007).....	11, 12, 24, 25, 26, 27
<u>State ex rel. Myers v. Sanders</u> , 206 W.Va. 544, 526 S.E.2d 320 (1999).....	26
<u>United States v. Griffin</u> , 66 F.3d 68, 70 (5th Cir. 1995).....	24

PETITIONER'S ASSIGNMENT OF ERROR

- I. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO STRIKE, OR BY FAILING TO GIVE A LIMITING INSTRUCTION WITH REGARD TO, A STATEMENT MADE BY DETECTIVE DOYLE IN THE COURSE OF HIS TRIAL TESTIMONY?
- II. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN THE HANDLING OF A WITNESS WHO REFUSED TO TESTIFY?
 - a. WHETHER THE DEFENDANT'S RIGHTS OF CONFRONTATION AND TO COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR WAS VIOLATED BY THE CIRCUIT COURT'S HANDLING OF THE WITNESS?
 - b. WHETHER THE CIRCUIT COURT ERRED IN REFUSING TO GIVE A NEGATIVE INFERENCE INSTRUCTION REGARDING THE WITNESS?
- III. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN ITS INSTRUCTIONS TO THE JURY REGARDING THE DOCTRINE OF TRANSFERRED INTENT?

STATEMENT OF THE CASE

The Petitioner was indicted by a Berkeley County Grand Jury in October of 2012, for two (2) felony counts of attempted murder, three (3) felony counts of malicious assault, five (5) felony counts of wanton endangerment, one (1) felony count of being a convicted felon in possession of a firearm, and one (1) misdemeanor count of fleeing from a law enforcement officer by means other than the use of a vehicle. [Appendix Record, hereinafter referred to as AR, 1-5.] The charges arose from the Petitioner firing five (5) shots from a .38 caliber revolver at the City of Martinsburg's Fourth of July celebration at War Memorial Park on July 4, 2012, shooting a twenty-five year old man and an eight-year-old girl. The Petitioner then fled on foot and was chased by Martinsburg City Police Officers until he was apprehended. The Petitioner had previously been convicted of the felony offense of Aggravated Robbery.

On or about March 20, 2013, the Petitioner filed a motion asking for severance of Count Eleven (11) of the indictment, the charge of being a convicted felon in possession of a firearm. [AR, 26-29.] The State did not object to the severance of Count Eleven (11) and elected to

proceed on that charge first. [AR, 21-23.] On May 29, 2013, the Petitioner was convicted following a trial by jury of the felony offense of being a felon in possession of a firearm and was thereafter sentenced to a determinate term of five (5) years of incarceration upon that conviction.¹ [AR, 43-47.]

The Petitioner's trial by jury on Counts One through Ten and Twelve began on September 3, 2013. [AR, 151-153, 233-916.] At the close of the evidence on September 5, 2013, the State agreed to dismiss Counts Six, Seven, and Eight charging Wanton Endangerment. [AR, 151-153, 815-816.] The Petitioner was subsequently found guilty by the jury of two (2) felony counts of attempted murder, three (3) felony counts of malicious assault, two (2) felony counts of wanton endangerment, and one (1) misdemeanor count of fleeing from a law enforcement officer by means other than the use of a vehicle. [AR, 151-153, 903-907.] On or about October 1, 2013, the State filed a recidivist information alleging that the Petitioner had been previously convicted of three felony offenses (which prior felonies arose out of the same transaction) and asking that the circuit court enhance the Petitioner's sentence pursuant to **W.Va. Code §61-11-18**. [AR, 950.] On October 3, 2013, the Petitioner entered an admission before the court that he was the same individual so previously convicted. This was memorialized in the Arraignment Order Upon Recidivist Information. [AR, 950-951.]

On October 24, 2013, upon consideration of the presentence investigation and the presentation of the parties, the circuit court sentenced the Petitioner to not less than three (3) nor more than fifteen (15) years of incarceration upon his conviction of Attempted Murder in the First Degree (**W.Va. Code §61-2-1**) as contained in Count One of the indictment; not less than two nor more than ten years of incarceration on each charge of Malicious Assault (**W.Va. Code**

¹ The Petitioner's appeal of that conviction and sentence is currently pending before this Honorable Court. Docket No. 13-0962.

§61-2-9(a)) as contained in Counts Two, Three, and Five of the indictment; not less than six (6) nor more than fifteen (15) years of incarceration upon his conviction of Attempted Murder in the First Degree (**W.Va. Code** §61-2-1) as contained in Count Four of the indictment with a recidivist sentence enhancement pursuant to **W.Va. Code** §61-11-18; a determinate term of five (5) years of incarceration on each of the convictions for Wanton Endangerment with a Firearm (**W.Va. Code** §61-7-12) as contained in Counts Nine and Ten of the indictment; and one (1) year in jail for his conviction of Fleeing a Law Enforcement Officer (**W.Va. Code** §61-5-17(d)) as contained in Count Twelve of the indictment. [AR, 164-166, 917-941.] The circuit court ordered the sentences for Counts One, Two, Four, Five, Nine and Ten to run consecutively to each other and consecutively to the sentence imposed previously for Count Eleven. [Id.] The court further ordered the sentences for Counts Three and Twelve to run concurrently with the other sentences. [Id.]

SUMMARY OF ARGUMENT

The circuit court committed no error by failing to strike the officer's statement concerning the timing of the testing of the Petitioner for gunshot residue, as the officer's statement was not a commentary on the Petitioner's assertion of any Constitutional right. Furthermore, although the Petitioner initially requested a cautionary instruction to which the State did not object, the Petitioner did not offer a cautionary instruction to the circuit court nor did the Petitioner object to the circuit court's instructions to the jury which did not include a cautionary instruction. Furthermore, the State does not believe the doctrine of plain error would apply: first, because the State does not believe there was any error, and, secondly, even if this Honorable Court believes there was, the error was not plain because Petitioner's counsel likely did not ask for the instruction purposefully based upon trial strategy. Furthermore, there was no

prejudice to the Petitioner shown.

The Petitioner's reliance on State v. Whitt, is misplaced, as Whitt is clearly distinguishable from the case at hand. The Petitioner's Sixth Amendment right to confront his accusers was not violated, as McGuire refused testify for the State, and was, therefore, not an "accuser" whom the Petitioner did not get to cross examine. Further, the Petitioner's Sixth Amendment right to compulsory process for obtaining witnesses was also not violated. Once the court brought the witness, who was being combative with bailiffs, into the courtroom and the witness refused to take the stand or take the oath, the Petitioner's right to compulsory process was exhausted. Even if this Court finds Whitt to be controlling despite the fact that the witness was not a person whom the Petitioner was claiming committed the crimes instead of him, the Petitioner's right to compulsory process was still not violated, as there is no reason to believe the witness's testimony would have been favorable to the Petitioner. Finally, the circuit court took measures to insure that the Petitioner's defense was not prejudiced by the witness's refusal to testify. However, there is no legal basis for giving a jury instruction in a criminal case stating that the jury may take a negative inference from a witness' assertion of the Fifth Amendment or any refusal to testify.

Finally, the circuit court's instructions to the jury, including the instruction on transferred intent, were a correct statement of law, supported by the evidence adduced at trial, and properly informed the jury as to their duties, the elements of the offenses charged, and the standard of proof, beyond a reasonable doubt.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State believes that the facts and legal arguments are adequately presented in the briefs and record on appeal and that the decisional process would not be significantly aided by

oral argument. As such, oral argument would be unnecessary in this matter pursuant to Rule 18. If, however, this Honorable Court in its discretion were to find oral argument necessary, the State believes argument pursuant to Rule 20 would be appropriate, as there appear to be issues of first impression.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED THE PETITIONER'S MOTION TO STRIKE DETECTIVE DOYLE'S STATEMENT AND NO ERROR RESULTED IN THE CIRCUIT COURT'S FAILING TO GIVE A CAUTIONARY INSTRUCTION.

A. Standard of Review

“The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syl. Pt. 1, State v. Harris, 216 W.Va. 237, 605 S.E.2d 809 (2004)(per curiam), Syl. Pt. 1, State v. Calloway, 207 W.Va. 43, 528 S.E.2d 490 (1999).

B. Discussion

The Petitioner alleges that the circuit court's failure to strike Detective Doyle's brief statement with regard to the Petitioner's level of cooperation with officers immediately following the shooting was a violation of the Petitioner's Constitutional rights under State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977), and then goes on to allege error for the circuit court's failure to follow a similar procedure as set forth in State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986) concerning the offering of a “refusal instruction.” However, the testimony of Detective Doyle did not amount to commentary on the Defendant's assertion of his rights and the Petitioner did not submit any cautionary instruction.

The Martinsburg City Police Department obtained a search warrant in order to take a gunshot residue sample from the Petitioner following the shooting. [AR, 394-395.] Detective Doyle testified that the lifters for testing were not taken until approximately 3-4 hours after the

shooting occurred. [AR, 396-397.] When the gunshot residue (GSR) kits were sent to the West Virginia State Police Forensic Lab for testing, there was no trace of gunshot residue on any of the samples. [AR, 617-630.] The State presented the testimony of nine (9) eyewitnesses who positively identified the Petitioner as the shooter and the testimony of three (3) officers who saw the Petitioner carrying and disposing of the firearm immediately following the shooting. [AR, 233-701.] Forensic testing positively established that the firearm recovered by the officers upon their chase of the Petitioner fired a bullet recovered from the pavilion, which was the scene of the shooting. [AR, 598-617.] The State then sought to explain to the jury why there was no gunshot residue recovered from the Petitioner.²

In so doing, the State attempted to question Detective Scott Doyle about the evanescent nature of gunshot residue. After testifying that he had obtained a search warrant to collect gunshot residue from the Petitioner, the following exchange took place:

PROSECUTOR: Okay. Do you have any information as to what time the GSR was taken from Daniel Herbert?

A: There was some time in the past, several hours following. I believe if they do it like three or four hours afterwards that we took the GSR from Mr. Herbert. Maybe less, three or four. Somewhere in that timeframe.

Q: Okay.

A: Anyway, it wasn't immediate.

Q: Okay. Anywhere from two to four hours, took the GSR from the Defendant?

A: That's correct.

Q: Is that ideal?

A: Ultimately you would like to take them as quick as

² In the Petitioner's case in chief, the Petitioner himself also admitted to being the shooter, but claimed he was doing so in self defense. [AR, 723-767.]

possible. Mr. Herbert was not cooperating with us at the time.

[AR, 396-397.]

The State was merely attempting to inquire of the witness about the extremely perishable nature of gunshot residue and the need to lift for GSR as expeditiously as possible following the discharge of the firearm.³ The officer's comment was both not responsive to the prosecutor's question regarding the effects of a delay in collecting the samples and was stated by the officer in passing simply as a means to explain the delay in obtaining the samples.

The Petitioner's argument that the officer's response was violative of the Boyd rule is misplaced. First, the prosecutor was not cross-examining the Petitioner (or the officer) with regard to the Petitioner's exercise of his right to pretrial silence. Secondly, because of the highly evanescent character of gunshot residue and the extremely minimal intrusiveness involved in lifting a sample, it has been established that lifting for GSR without consent and without a warrant in the face of probable cause does not implicate a defendant's Fourth and Fourteenth Amendment rights against illegal searches and seizures. *See, State v. Riley*, 201 W.Va. 788, 500 S.E.2d 524 (1997). Therefore, such a passing comment about the means by which the sample was obtained was harmless, and it was not an abuse of discretion for the court to have allowed such testimony. State v. Harris, *supra.*; State v. Calloway, *supra.*

The Petitioner also argues that the circuit court erred by not giving a cautionary instruction to cure any prejudice that may have existed. The Petitioner cites State v. Cozart, *supra.*, with reference to the giving of a cautionary instruction.⁴ While it is true that the

³ Koren Powers, supervisor of the trace evidence section of the West Virginia State Police Forensic Laboratory, later testified extensively about the fleeting nature of gunshot residue and the issues presented with sample collection and testing. [AR, 617-630.]

⁴ In State v. Cozart, the Court found that the State would be allowed to inquire about the defendant's refusal to submit to a breathalyzer test following an in camera determination by the trial court. The Court determined that a cautionary instruction should also be given explaining the weight that a jury may give

Petitioner made an objection on the record to the officer's response and asked the court for a cautionary instruction, the Petitioner did not submit a cautionary instruction to the court nor did he object to the instructions- sans a cautionary one- during the course of finalizing the instructions or once the instructions had been read to the jury. [AR, 102-120, 815-830, 866.] As such, the State asks this Court to consider this issue to be waived.

Recognizing that he failed to submit a cautionary instruction and failed to object to the instructions given, the Petitioner then asks this Honorable Court to consider the lack of a cautionary instruction as plain error.

To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).

It is the State's position, first, that no cautionary instruction was necessary based upon the above argument that the officer did not implicate the Petitioner's assertion of his Constitutional rights, so there was no error.

Secondly, even if this Court finds that a cautionary instruction should have been given, it is not *plain* error. It is the position of the State that the decision on behalf of the Petitioner not to include a cautionary instruction considering the circumstances of this case was a deliberate one based upon trial strategy.

As the circuit court pointed out during one of the discussions of the issue with the parties,

"if the defendant wants a cautionary instruction on that, the State's already just said it would agree to it, so, I think I'll give a cautionary instruction in the jury instructions if that's requested. My question about something like that is whether it emphasizes it more than...emphasizes it more to bring it up."

such refusal evidence.

[AR, 707.] The circuit court clearly believed, as does the State, that the brief aside of the officer at the very beginning of the trial was negligible at best and worried about the overemphasis that would be placed on it should a cautionary instruction be given at the close of all of the evidence heard by the jury in the course of the trial. The Petitioner may have ultimately agreed with the circuit court in choosing not to submit a cautionary instruction.

More likely than that, however, the Petitioner did not want the jury to hear any instruction concerning a lack of cooperation with law enforcement not being held against anyone considering his entire trial strategy hinged on the lack of cooperation of the victim, Gabriel McGuire. In fact, the Petitioner fought to get a jury instruction that the victim's lack of cooperation with law enforcement and the court should carry a negative inference against him. Petitioner's counsel clearly chose not to submit a cautionary instruction under the circumstances because he wanted to freely and without confusion to the jury emphasize the victim's lack of cooperation with law enforcement and wanted the jury to hold that lack of cooperation against the victim.

Next, the Petitioner also cannot demonstrate that the court's lack of a cautionary instruction affected his substantial rights.

Assuming that an error is "plain," the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. Pt. 9, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Considering the overwhelming amount of evidence presented against the Petitioner in the form of eyewitness testimony that the Petitioner began shooting at Gabriel McGuire, chased

McGuire through the park as McGuire was running away from the Petitioner while continuing to shoot at him, hit both McGuire and eight year old A.C. with bullets during his shooting spree, and threw away the firearm as he was running from police right before he was apprehended at the scene, the Petitioner cannot show that a lack of cautionary instruction on this issue prejudiced him or affected the outcome of the proceedings. State v. Miller, *supra*.

II. THE CIRCUIT COURT DID NOT ERR IN ITS HANDLING OF WITNESS McGUIRE AND MADE SURE THE DEFENDANT'S RIGHTS WERE SAFEGUARDED UNDER THE CIRCUMSTANCES OF THIS CASE.

A. Standard of Review

The West Virginia Rules of Evidence state

the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

W.Va.R.Evid. 611(a).

Under Rule 611(a) of the West Virginia Rules of Evidence [1985], the trial judge has discretion to 'exercise reasonable control over the mode and order of interrogating witnesses in presenting evidence'; and in doing so, he must balance the fairness to both parties." Syl. Pt. 2, Gable v. Kroger Co., 186 W.Va. 62, 410 S.E.2d 701 (1991).

Syl. Pt. 4, State v. Boggess, 204 W. Va. 267, 512 S.E.2d 189 (1998).

This Court accords substantial deference to rulings and factual determinations of a trial court regarding the qualifications, competency, and extent of a witness's testimony. McDougal v. McCammon, 193 W.Va. 229, 235, 455 S.E.2d 788, 794 (1995); Michael v. Sabado, 192 W.Va. 585, 595, 453 S.E.2d 419, 429 (1994). We review these determinations either under a clearly erroneous or an abuse of discretion standard. Grillis v. Monongahela Power Co., 176 W.Va. 662, 666-67, 346 S.E.2d 812, 817 (1986). On the other hand, where a trial court's determination involves a construction of the West Virginia Rules of Evidence and

rulings of law, our review is plenary. *See Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (No. 22845 12/8/95).

State v. Omechinski, 196 W. Va. 41, 44, 468 S.E.2d 173, 176 (1996).

B. Discussion

i. The Petitioner's rights to confront witnesses and to compulsory process of obtaining witnesses in his favor were not violated.

The Petitioner alleges error in the circuit court's decision regarding the handling of the witness Gabriel McGuire. The Petitioner alleges that his right to confront witnesses and his right to compulsory process of obtaining witnesses in his favor were denied by the circuit court's rulings. In making his argument, the Petitioner relies heavily on the case of State v. Whitt, 220 W.Va. 685, 649 S.E.2d 258 (2007); however, State v. Whitt is clearly distinguishable from the instant case and is not supportive of the Petitioner's claims.

In Whitt, the defendant alleged that his right to compulsory process was denied when he sought to call his co-defendant to the stand. The defendant claimed that his co-defendant was the actual perpetrator of the crime and that he simply helped her dispose of the victim's body. The trial court held an *in camera* hearing at which the co-defendant stated that she was going to assert her Fifth Amendment right to remain silent if she were to be called to testify. The trial court both determined that the co-defendant did not have a valid Fifth Amendment claim and granted the co-defendant immunity to attempt to secure her testimony. The co-defendant continued to state her refusal to testify. The trial court then held the co-defendant in contempt of court and jailed her for the duration of the proceedings.

In finding that the defendant was denied compulsory process, this Court carved out a specific, limited exception to the general rule against allowing a witness to take the stand solely for the purpose of exercising his Fifth Amendment:

“Where a defendant in a criminal case seeks to call a witness to the stand who intends to invoke his or her Fifth Amendment privilege against self-incrimination **and the defendant has presented sufficient evidence to demonstrate the possible guilt of the witness for the crime the defendant is charged with committing**, the trial court has the discretion to compel such witness to invoke his or her Fifth Amendment privilege in the presence of the jury.”

Syl. Pt. 7, State v. Whitt, *supra*.(emphasis added).⁵

In the case at hand, there is no evidence that demonstrates that McGuire was the shooter. As discussed in the previous section, the State presented the testimony of nine (9) eyewitnesses who positively identified the Petitioner as the shooter and the testimony of three (3) officers who saw the Petitioner carrying and disposing of the firearm immediately following the shooting. [AR, 233-701.] Whitt is simply not applicable to the facts at issue in this case.

The Petitioner did allege, however, that he was acting in self defense because McGuire was actively threatening him with a knife at the time of the shooting. To that end, the circuit court took appropriate steps to insure the Petitioner’s right to present his defense was not hampered.

The State attempted to call Gabriel McGuire as a witness in its case in chief on the second day of trial. [AR, 534.] At the close of the first day of trial, both counsel informed the circuit court of what they anticipated from Mr. McGuire:

PROSECUTOR: I may be calling Gabriel McGuire in the afternoon...tomorrow afternoon. I just don’t know how he’s going to react in the courtroom. I just want...I think I want to make the court aware that he’s telling the State that he’s not going to cooperate with us, and no one’s going to get him on the stand, and I don’t know if there’s going to be physical resistance or what, but I just want to make the court aware of that. I don’t know what’s going to happen tomorrow, so, I just wanted to let the court know...

⁵ It should also be noted that even this exception leaves the decision as to whether or not to force said witness to take the stand in the trial court’s discretion.

...

COURT: Do we need extra bailiffs or anything?

DEFENSE: You may...

[AR, 465-466.]

When the State called Gabriel McGuire, the court excused the jury and there was argument by counsel as to what procedure should be followed.

PROSECUTOR: I think we should make the effort to bring him in. That's a security issue. Make sure the jury knows. If he doesn't testify I think the jury needs to know that we couldn't physically bring him in here.

COURT: What, I'm going to have him...drag him here?

DEFENSE: Yes...

...

COURT: ...I mean, if they can't get him in here I'll tell the jury that they can't get him in here. I'm not sure they're going to get him in here.

DEFENSE: He doesn't have a choice, Your Honor. If you tell him to be here, he has to be here. Your Honor, again, so that the record's clear, I know that she was typing while there was a lot of white noise, so I'm going to go over a few things while they're attempting to get him in here, but I would like the record to reflect that I think it's strongly prejudicial to my client that the jury had to be excused because the State didn't want them to see Ziggy McGuire brought into the courtroom, and how, you know, as the trier of fact they get to examine everyone's demeanor, which includes the way they walk, how they're presented, their defiance to the court, their defiance to the prosecutor, their defiance to the defense attorney.

All that's relevant. We're talking about a self-defense case here, and we can't even get the daggone victim. How is that not relevant to my client? And the victim of the character...or the character of the victim who is the aggressor?

PROSECUTOR: And, Your Honor, that's not what I said, first of all. I think this is a court security issue. We do not need a fight in front of the jury, and what takes place until that witness gets on the witness stand is not evidence.

What happens on the witness stand is evidence, and this would be highly prejudicial to the State, and so it...what defense is saying what happens in the back, how the person walks in the back, how the person walks from the jail to the courthouse, none of that is evidence. It's only until he's sworn and testifies, but I think we've got a major court security issue here. We do not want any fighting. We don't want a mistrial.

If we can get him to take the stand, I think we should, and this is not a matter of he doesn't have a choice. This is a matter of whether we can physically put the body on the stand, and we might not be able to, Judge.

COURT: Well, and just for the record, I've been informed by the chief bailiff that it's a security issue.

MCGUIRE: Get off me, man. How can you (inaudible) in the fucking courtroom, man? I don't care. I'm not coming in here, man.

COURT: Okay. You need to bring him over here to be sworn in. Right here. Okay. Right there. Now, I'm going to bring in the jury.

PROSECUTOR: Judge, I object. This is too final. This is not evidence. He physically should not be in the courtroom with the jury. I think this is a court security issue, and I would say hold him in contempt and get him out of here. I do not want to see the officers tackle him in front of the jury. That's not evidence.

COURT REPORTER: Mr. McGuire, is your last name spelled M-C-G-U-I-R-E?

MCGUIRE: (No response.)

CLERK: Do you want me to swear him in?

COURT: You can.

PROSECUTOR: Judge, I'm not going to call him to the stand now.

COURT: What's that?

PROSECUTOR: I mean, if this is going to be an issue of court security issue, I withdraw him as a witness.

COURT: Well, there's two different issues. The one is whether I hold him in contempt, and I assume that if I'm going to do that somebody has to move that he has been in contempt, and then the other question is, what good does that do if he's already in federal custody?

PROSECUTOR: Well, the court, Your Honor, well, I'll take that back of not holding him. Maybe based, I think that was a little bit premature. Your Honor, the court could hold him in contempt because he's clearly violating an order to appear and to testify...

...I guess what the State is asking for is that the defendant [sic], because he is physically resisting the officers, be held in contempt. I'm moving for it now, and then I would ask that he be excused because it is a danger to put him on the stand unless he's willing to voluntarily get on the stand and be a good person now...

...so I would ask the Court to inquire of the defendant [sic] whether he's going to take the stand and physically not resist.

COURT: Sir, are you willing to take the stand?

MCGUIRE: No, I'm not.

COURT: Okay. I'm going to hold you in contempt...

...

DEFENSE: Your Honor, I'm calling him in my case, so we're going to do this now or later.

PROSECUTOR: He's not going to do it in my case, Judge.

COURT: Well, you can call him in your case.

...

PROSECUTOR: Judge, I will object to him being called in here if he's going to be acting like this tomorrow.

DEFENSE: Your Honor, that's fine. I understand why the State doesn't want to do it, because it hurts their case.

PROSECUTOR: No, Judge. It's a danger in this courtroom. What are they going to do? Let him go there, bring him in here like Hannibal Lector? Confine him and then ask him if he's going to testify? This is not...this does not need to be presented before the judge [sic].

[AR, 534-545.]

The circuit court then held Mr. McGuire in contempt of court. The court further ordered that Mr. McGuire be held at the Eastern Regional Jail so that the Petitioner could call him as a witness in his case-in-chief the following day. The circuit court informed Mr. McGuire that if he again refused to testify or cooperate, he could be subject to additional contempt proceedings. Mr. McGuire only had this to say in response:

MCGUIRE: You might as well do that now, because I ain't coming out here and testifying, period.

[AR, 545.]

Mr. McGuire was then removed from the courtroom. After that the following was placed upon the record:

PROSECUTOR: Your Honor, may the record reflect that the witness, Gabriel McGuire, refused to take the stand, not even to testify, and physically resisted the officers in the court's presence over here and had to be held by two officers for the safety of all persons in this courtroom?

COURT: And I just want to say for the record that I was informed by the chief bailiff that he appears to be a danger to the jurors if he's forced to take the stand. I guess the question is whether I inform the jurors that he refused to take the stand...

...

PROSECUTOR: Your Honor, I would, since I called him to the stand, State would request that the jury be informed that the defendant physically resisted and would not take the stand and was held in contempt.

COURT: Not the defendant.

PROSECUTOR: I mean, Mr. McGuire. Yes. I'm sorry...

...

COURT: Well, I'm going to do that now, and then there's the question again tomorrow. That's a different story.

DEFENSE: Your Honor, I think character has now come into...has come into question...

As someone who's aggressive. A man who won't even take the stand under the threat of being held in jail, and physically...we saw him hit his head against the wall over here; physically resisted coming in here, and was aggressive with the bailiffs. I think his character is definitely a pertinent trait at this point.

COURT: It's not a question of whether his character is a pertinent trait, but it's a question of whether or not self defense has been.

DEFENSE: Well, it shows that goes towards whether he was the initial aggressor or not...

...

PROSECUTOR: Judge, it's not a pertinent trait until the defense shows that this was self defense, and just because a person has a bad history and just because they're physically resistant to testifying does not...is not sufficient evidence for self defense. The defense has not raised any evidence that this is a self defense case yet, so, therefore I don't know what he wants out of this. I don't think...character is not an issue because of pertinent trait of or any evidence of self defense has not been proven...

COURT: Well, that 's something I'll take up when the defendant presents his evidence...

[AR, 546-548.]

The Court then made certain findings with regard to his contempt ruling:

COURT: ...for the record, there was an attempt to bring him in here. He made it very clear that he would not cooperate, that he would refuse to testify, and wouldn't even take the oath, and there were two bailiffs that had to restrain him when he was in

the courtroom. Several other bailiffs who were standing around, and I noticed it appeared, based upon his behavior and his demeanor that he would actually pose a danger to the jurors and a court security issue if he were to get here. I was notified there would be a fight in front of the jury.

DEFENSE: And, Your Honor, he didn't...he just refused to cooperate. He didn't plead the Fifth.

COURT: No, he did not plead the Fifth.

DEFENSE: Right, for the record...

[AR, 549-550.]

The jury was then brought back into the courtroom, and the circuit court informed them as follows:

COURT: I will inform the jury that Gabriel McGuire was subpoenaed by the prosecution to come in here and testify; that he refused to either take the oath or to testify; that he was physically brought in here, and I did not feel that he could be physically forced to take the oath or testify, and I held him in contempt. And with that I'm going to ask the State to call its next witness.

[AR, 552.]

It later came to light that only one week prior to trial, witness Michael Jackson indicated that he had witnessed McGuire with a knife on July 4, 2012. [AR, 678, 794.] No other witness saw McGuire with a knife that day. Jackson testified that he, McGuire, and another man were sitting at Mr. Jackson's family picnic at War Memorial Park. [AR, 667-684.] Mr. Jackson indicated, as did the other witnesses, that the Petitioner approached Mr. McGuire. [Id.] Mr. Jackson stated that during the course of their heated discussion, he witnessed the Petitioner pull up his shirt to show McGuire something but from Mr. Jackson's vantage point Mr. Jackson could not see what Petitioner was showing McGuire.⁶ [Id.] Mr. Jackson stated that thereafter, Mr. McGuire, while still seated at the picnic table, pulled a folding knife out of his pocket, unfolded

⁶ Other witnesses testified to seeing the Petitioner pull up his shirt to show McGuire the firearm the Petitioner had in the waistband of his shorts.

it, refolded it, and placed it back into his pocket. [Id.] Mr. Jackson stated that shortly thereafter, the shooting occurred. [Id.]

Knowing that Mr. Jackson's testimony would be legally insufficient to warrant a self defense instruction, the Petitioner decided to take the stand to testify on his own behalf. [AR, 723-767.] Petitioner testified that McGuire pulled this knife on him, threatened him with it and lunged at him with it. [Id.] This testimony was contrary to that of all of the eye witnesses. The Petitioner then admitted to pulling out and shooting the firearm that he had tucked into the waistband of his shorts. [Id.] The Petitioner stated that he did not remember where he got the gun. [Id.] The Petitioner also would not give a clear answer to questions about the Petitioner chasing after McGuire following the first shot when McGuire ran away from the Petitioner and the Petitioner continuing to shoot the weapon at McGuire as the Petitioner chased him. [Id.]

Considering there was some evidence introduced to support a theory of self defense, the circuit court allowed the Petitioner broad leeway in introducing evidence of McGuire's propensity for violence and his reputation for being aggressive and armed. [AR, 774-781.] The Petitioner testified to numerous acts of violence he had witnessed McGuire commit as well as McGuire's reputation for being aggressive and unpredictable, especially when he was intoxicated. [AR, 723-767.] The Petitioner also testified that McGuire was usually armed and was in a prison gang called DMI. [Id.]

The Petitioner also introduced testimony from Deputy Steerman with the Berkeley County Sheriff's Department concerning an investigation he had conducted wherein McGuire pled guilty to the charge of brandishing for pointing a handgun at someone in the course of an argument. [AR, 781-786.] Dep. Steerman also testified concerning McGuire's reputation with law enforcement as being violent, aggressive, and often armed. [Id.] He reported that he was

well known in the Sheriff's Department from the frequency of calls they receive with regard to him. [Id.] Sgt. Cole with the West Virginia State Police testified concerning an investigation he had conducted wherein McGuire had pled no contest to an assault charge for making a verbal threat to "cut" a female's "guts out with a knife." [AR, 787-793.] He also testified concerning McGuire's reputation with law enforcement as being into drug activity and often armed. [Id.] Lastly, the Petitioner recalled Det. Doyle with the Martinsburg City Police. Det. Doyle testified concerning McGuire's total lack of cooperation with the investigation, disrespect to officials, and reputation for violence. [AR, 793-801.]

Detective Doyle also testified with regard to what McGuire told Detective Doyle when Detective Doyle spoke to him about whether or not McGuire would be willing to testify.

WITNESS: ...his exact words to me, he said, 'You can tell the prosecutors they can shit in one hand and wish in the other and see which one fills first.'

[AR, 801.] Detective Doyle stated that comment was pretty representative of Mr. McGuire's attitude.

The Petitioner then called Gabriel McGuire as a witness. Once Mr. McGuire was brought out of holding, the follow took place:

COURT: Are you prepared to testify today?

MCGUIRE: I plead the Fifth.

DEFENSE: Your Honor, I would ask he be granted immunity. You have heard the State also speak earlier that there is any crime that he could be convicted of in State court. And his presence is necessary, he was the victim. He was beside my client whether he this incident happened. It could be potentially exculpatory. The testimony puts a knife in his hand and it is essential for my client that he be compelled to testify and the ends of justice do serve so and would permit the court to grant immunity...

...

PROSECUTOR: Your Honor, I don't see how the defendant [sic] has grounds to take the Fifth, unless it's dealing with his Federal charges, that anything he testifies may affect his federal supervised release...I don't know, but then I would ask the court to inquire whether he is willing to take the oath, and if he would be civilized in court here, and at least testify whether he can take the Fifth or not, but at least take the stand and follow the court's direction. That needs to be inquired into as well.

So, basically, for this testimony today, the defendant is requesting immunity because he took the Fifth. I don't think they have to ask that. I think the court can direct him to testify unless it's related to his federal charges, but for these state charges, the State has no objection for the court to grant him immunity based upon his testimony about what happened at the park if that will get him to testify.

DEFENSE: Your Honor, this needs to be done in the presence of the jurors.

COURT: Not this part...

...
...if he takes the Fifth, that needs to be done in the presence of the jury...

...
We're in preliminary legal proceedings to determine whether he has immunity. I don't think the jury has a right to watch proceedings as to whether or not he has immunity...

...
Based on the agreement of the prosecution and the motion of the defendant to grant immunity with respect to any charges involved in this incident, and that's the way I understand the immunity is, I will grant immunity.

PROSECUTOR: For State charges?

COURT: For State charges arising out of this incident. Based on that, sir, do you have any reason to think that your testimony would somehow implicate federal charges against you?

MCGUIRE: I mean, I have no intentions on testifying. I am not taking the stand and I am not testifying.

COURT: Are you saying that you refuse to take the stand?

MCGUIRE: That's what I'm saying. I refuse to take the stand and I refuse to testify.

COURT: Are you saying—so you are no longer taking the Fifth? You're just saying you refuse—

MCGUIRE: I refuse to talk, period, that's what I'm saying. I refuse to talk. I refuse to take the stand and I refuse to testify.

COURT: Would you raise your right hand and be sworn in?

MCGUIRE: No, I am not.

COURT: Okay. I'm not going to make any further inquiry. You may take him back...

[AR, 803-807.]

The circuit court then instructed the jury as follows:

COURT: While the jury was out, Mr. McGuire was brought into the courtroom in custody. He was physically restrained. Both sides have sought to call him as a witness. Yesterday, the State sought to call him as a witness. Today the Defendant sought to call him as a witness, and they both have a right to compel witnesses to come before the court.

As with yesterday, Mr. McGuire refused to testify. He does not have grounds to refuse to take the stand and he does not have grounds to refuse to take the oath. However, my powers are limited to holding him in contempt until he testifies and because he is in federal custody and he is here for purposes of testimony only from federal custody, I don't have much force or influence in terms of doing that since he is already in federal custody.

The bailiffs have determined yesterday that it was a court security issue in bringing him here in the presence of the jury and that it would be a safety issue for those involved. And I think it's kind of pointless to go through the exercise again today when it's already been determined and I determined that he is not going to testify today, even if both sides wish for him to testify. I don't see how we can do it. Is there anything that I missed that I said I was going to say?

DEFENSE: No, Your Honor.

COURT: I did say I granted him immunity.

PROSECUTOR: I don't believe so, Judge.

COURT: I did grant him immunity for his testimony. That did not make any difference. Does that cover everything?

PROSECUTOR: Yes, Your Honor.

DEFENSE: Yes, Your Honor. Your Honor, the defense rests.

[AR, 811-812.]

The circuit court then allowed the Petitioner's proposed self defense instructions based upon the Petitioner's testimony even though "it may be a little bit of a stretch" so that the jury would have the opportunity to hear and consider those instructions. [AR, 820.]

During closing arguments, the Petitioner was allowed to argue that the jury should take a negative inference from McGuire's refusal to cooperate with the investigation and with officials and that they should take McGuire's lack of cooperation as a sign that McGuire had something to hide and had been the actual aggressor in the altercation which led to the shooting. Petitioner's counsel also impermissibly referenced the demeanor and actions of McGuire when the circuit court had brought him into the courtroom outside of the presence of the jury to attempt to get him to take the stand by describing to the jury that McGuire had beat his own head off of the wall on the first occasion the court had him brought into the courtroom. [AR 882-892.]

Petitioner's counsel even made reference to the rumor that McGuire had beaten a murder charge somewhere even though there was a sustained objection made to that question. [AR, 798.]

It is well settled law that a defendant has a right under the Sixth Amendment to confront his accusers. However, the circuit court said it best when it found that there is "no right to cross examine someone who didn't testify." [AR, 708.] The State presented an abundance of evidence in this case to establish the guilt of the Petitioner beyond a reasonable doubt without the

testimony of Gabriel McGuire. The State frequently has to prosecute crimes without the testimony of the victim, such as murder cases and often domestic violence cases, and juries are able to hear the testimony introduced and make findings based upon the evidence received and the instructions given by the court. Because McGuire did not testify, he was not “an accuser” for Sixth Amendment purposes.

As far as the Petitioner’s Sixth Amendment right to compulsory process, the well settled general rule is that

Once a witness appears in court and refuses to testify, a defendant's compulsory process rights are exhausted. It is irrelevant whether the witness's refusal is grounded in a valid Fifth Amendment privilege, an invalid privilege, or something else entirely.

United States v. Griffin, 66 F.3d 68, 70 (5th Cir. 1995). Therefore, once the court attempted to have Gabriel McGuire sworn in and take the stand and McGuire refused to so much as take the oath, the Petitioner’s compulsory process rights were exhausted. U.S. v. Griffin, *supra*.

Should this Court find Whitt to be persuasive in the case at hand, in order to establish a possible violation of his right to compulsory process the Petitioner would have to demonstrate that McGuire’s testimony would have been both material and favorable to the defense. Syl. Pt. 3, State v. Whitt, *supra*. There is absolutely no basis to believe that, had McGuire taken the stand, McGuire would have testified favorably for the Petitioner. Even if McGuire would have testified that he had a folding knife in his pocket, all of the testimony presented from all of the eye witnesses (with the exception of the Petitioner) was that the knife was not being brandished at the time the Petitioner pulled out his gun and shot at McGuire, nor while the Petitioner chased McGuire through the chaos of the fleeing crowd of people, shooting after him as he chased him.

Should this Court nevertheless find that McGuire’s testimony would have been material and favorable to the Petitioner, the circuit court still did not abuse its discretion in not having

officers forcibly place and hold McGuire on the stand so that he could refuse to give testimony before the jury. Whitt states that in making a determination as to whether a witness should be called to the stand, the circuit court should consider the issue of unfair prejudice to the defendant. Syl. Pt. 7, State v. Whitt, *supra*.

The circuit court below had to also consider the safety and security issues involved with attempting to physically place Gabriel McGuire on the witness stand. The record is absolutely clear even from the description of defense counsel that despite the fact that he was in handcuffs and shackles, McGuire was shouting and fighting the two bailiffs who were physically escorting him into the courtroom. McGuire apparently even banged his own head off of the wall of the courtroom as the bailiffs were trying to pull him into the well of the court. McGuire consistently refused to so much as take the oath to be sworn in as a witness. Even with this difficult to manage behavior occurring on the second day of trial during the State's case in chief, the circuit court still had Mr. McGuire brought back on the third day of trial during the Petitioner's case in chief to see if Mr. McGuire had changed his mind or had become more willing to cooperate. McGuire's behavior was the same as it had been the day before.

Considering the extreme nature of the situation, the circuit court properly balanced the interests of both the State and the Petitioner in the handling of witness McGuire. State v. Boggess, *supra*. In order to combat any prejudice to the Petitioner considering McGuire's total refusal to cooperate, the circuit court allowed in a great deal of character and reputation evidence concerning not only McGuire's character and reputation for violence but also his criminal history, rumors of specific acts of violence, and rumors of gang affiliation. The circuit court instructed the jurors fully on the circumstances surrounding McGuire's refusal to testify, including that he was physically restrained, had no grounds to refuse to cooperate, was a safety

and security risk, and was in federal custody. Additionally, the court gave the Petitioner's jury instructions on self defense despite the painfully weak evidence supporting such an instruction. Lastly, the court gave Petitioner's counsel leeway to argue that the jury should give a negative inference to Gabriel McGuire's lack of cooperation with law enforcement and with the court.

Under the circumstances presented, the circuit court did everything in its power to insure that the Petitioner's right to compulsory process was protected and to insure that there was no prejudice to the Petitioner's defense in light of the witness's refusal to testify. State v. Boggess, *supra.*; State v. Omechinski, *supra.*; State v. Whitt, *supra.*

ii. The circuit court did not err in failing to give an instruction for a negative inference.

As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*. Syllabus Point 1, State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996).

Syl. Pt. 2, State v. Jett, 220 W. Va. 289, 647 S.E.2d 725 (2007).

First, as discussed above, McGuire's refusal to testify was not clearly based on any assertion of his Fifth Amendment right against self incrimination, valid or invalid. It is clear that McGuire refused to take the oath and refused to answer any questions on the two separate occasions on which the circuit court had him dragged into the courtroom by court security.

The State conceded, as it concedes now, that it has been established in *civil* actions that an adverse inference may be taken against a party choosing to plead the Fifth Amendment in the face of probative evidence being offered against him or her. *See State ex rel. Myers v. Sanders*, 206 W.Va. 544, 526 S.E.2d 320 (1999). However, there is no like precedent for witnesses in criminal cases.⁷ In fact, in the Myers case, *supra.*, this Honorable Court took great pains to

⁷ The State further notes that **W.V.R.E.** 608 specifically allows a witness in a criminal trial to maintain

emphasize the existing precedent's applicability to civil cases only.⁸

Ultimately, the court decided not to instruct the jury on any inference. [AR, 823-827.] The court specifically noted that it did not believe the Whitt case was on point and that such an instruction could be confusing for the jury. [Id.] That confusion to the jury is very real considering a defendant's right to remain silent in a criminal trial absolutely cannot be held against him. The court gives clear instruction to the jury that it may not draw a negative inference against the defendant based upon his Fifth Amendment silence. That issue is not as impactful in this instance since the Petitioner herein did decide to take the stand, but the court's note that it could be found to be confusing by the jury is still well taken. It would be easy to see why a defendant would object to a negative inference instruction being given as to a witness in his case wherein he also wishes to assert his right to remain silent.

Rather than going as far as to give an instruction about any inference that may be drawn for or against a witness who asserts his Fifth Amendment right against self-incrimination or simply refuses to testify in the course of a criminal trial, the court made the decision to omit instruction on the issue. [Id.] However, the circuit court expressly allowed Petitioner's counsel to argue that the jury should take a negative inference from McGuire's non-cooperation with the court and his refusal to testify during the course of his closing argument considering the facts and

his or her silence based upon an assertion of his or her Fifth Amendment right against self-incrimination.

⁸ "The extraordinary remedy of habeas corpus is a civil, as opposed to criminal proceeding." Myers, 206 W.Va. at 548. "We recently addressed whether or not alleged assailants could be prohibited by a trial court from refusing to answer deposition questions, based on the Fifth Amendment, in a civil personal injury proceeding for damages..." 206 W.Va. at 548-549. "The prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.'" 206 W.Va. at 549(emphasis in original). "In the instant case, the issue is not silence in the face of criminal accusations, but silence by Petitioner in a civil action in response to discovery deposition questions propounded to him." 206 W.Va. at 549. "Accordingly, we hold that a habeas corpus petitioner may invoke the privilege against self-incrimination, as found in the Fifth Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution, in response to a deposition question in a civil habeas corpus proceeding." 206 W.Va. at 550.

circumstances of this case. [Id.]

Based upon the court's careful consideration of the issue and the court's balancing of fairness to both parties in light of legal precedent, the State asks this Court to find no abuse of discretion. State v. Hinkle, *supra.*, State v. Jett, *supra.*

III. THE CIRCUIT COURT PROPERLY INSTRUCTED THE JURY WITH REGARD TO TRANSFERRED INTENT.

A. Standard of Review

“A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.”

Syl. Pt. 4, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

B. Discussion

The Petitioner argues that the jury was improperly instructed, specifically with regard to the doctrine of transferred intent.

First, the Petitioner did not object to the State's proposed instruction on transferred intent, which was ultimately utilized in the court's charge to the jury, and the parties agreed on the elemental instructions to be given the jury with regard to each offense. [AR, 815-830, 866.] As such, the State maintains this issue is waived.

However, the Petitioner asks the Court to consider the instructions as plain error.

To trigger application of the “plain error” doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and

(4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).

The Petitioner first seems to concede that the circuit court's instruction on transferred intent is a correct statement of the law based on State v. Julius, 185 W.Va. 422, 408 S.E.2d. 1 (1991), which states

The doctrine of transferred intent provides that where a person intends to kill or injure someone, but in the course of attempting to commit the crime accidentally injures or kills a third party, the defendant's criminal intent will be transferred to the third party.

Id at Syl. Pt. 6. [Petitioner's brief, pg. 38.] The transferred intent instruction given by the circuit court in this case reads as follows:

If an illegal, yet unintended act results from the intent to commit a crime, that act is also considered illegal. Under the doctrine of "transferred intent," original malice is transferred from one against whom it was entertained to the person who actually suffers the consequences of the act. For example, if a person intentionally directs force against one person wrongfully but, instead, hits another, his intent is said to be transferred from one to the other and he is liable to the other though he did not intend in the first instance.

So, where the State of West Virginia introduces evidence that shows beyond a reasonable doubt that the defendant intended to kill or injure someone under circumstances which you do not believe afforded the defendant excuse, justification or provocation for his or her conduct, but in the course of attempting to commit that crime, accidentally injures or kills another person, the jury may find that the defendant's criminal intent will be transferred to the injured or killed unintentional victim.

[AR, 130, 840-841.]

The Petitioner goes on to argue that the circuit court's instruction, while correct, was incomplete, in that it did not specifically state that the jury had to find that the State had proven all of the remaining elements of each charge to the standard of beyond a reasonable doubt before

finding the Petitioner guilty even if they determined that the Petitioner's intent was transferred. However, the Petitioner is trying to urge this Court to look at the circuit court's transferred intent instruction in a vacuum without also considering the rest of the jury charge.

Following the above instruction on transferred intent, the circuit court went on to instruct the jury as to the elements of each of the counts of the indictment along with all of the elements of the lesser included offense instructions. Particularly applicable to the Petitioner's argument, the circuit court's instructions gave an overview of the offense of attempted murder in the first degree and what distinguishes that offense from its lesser included offenses.

Malicious means characterized by or involving malice. The word malice, as used in these instructions, is used in the technical sense. Malice may be either express or implied and it includes not only anger, hatred, and revenge, but other unjustifiable motives as well. It may be inferred or implied by you from all of the evidence in the case if you find such inference reasonable from the facts and circumstances in this case which have been proven to your satisfaction beyond all reasonable doubt. Malice may be inferred for any deliberate and cruel act done by the defendant without any reasonable provocation or excuse, however sudden. Malice is not confined to ill will toward any one or more particular persons, but malice is every evil design in general. By malice it is meant that the event in question occurred under such circumstances as are ordinarily symptomatic of a wicked, depraved and malignant spirit, and which carry with them the plain indications of a heart, regardless of social duty, fatally bent on mischief. It is not necessary that malice must have existed for any particular length of time and it may come into existence at the time of the act or at any previous time.

Malice and intent to kill or permanently maim, disfigure or disable may be inferred by you from a defendant's use of a deadly weapon, if found by you from the evidence beyond a reasonable doubt, under circumstances which you do not believe afforded the defendant excuse, justification or provocation for his conduct...

...the offenses charged in Count One and Four of the Indictment are Attempted Murder. One of four verdicts may be returned by you under each count, they are: Guilty of Attempted Murder of the First Degree, Guilty of Attempted

Murder of the Second Degree, Guilty of Attempted Voluntary Manslaughter or Not Guilty. **You are not required to return the same verdict for each count.**

Attempted Murder of the First Degree is the willful, deliberate, premeditated, intentional and malicious attempted killing of another person.

To deliberate is to reflect, with a view to making a choice. If a person reflects even for a moment before he acts, it is sufficient deliberation.

Premeditation is to think of a matter before it is executed. Premeditation implies something more than deliberation, and may mean the party not only deliberated but formed in his mind the plan of destruction. The duration of that period of time cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ, and according to the circumstances in which they may be placed.

Attempted Murder of the Second Degree is the unlawful, intentional, and malicious attempted killing of another person but without deliberation or premeditation.

There must be some evidence tending to show that a defendant considered and weighed his decision to kill in order for you to find premeditation and deliberation for attempted first degree murder. Any other malicious, intentional attempted kills, by its spontaneous and nonreflective nature is attempted second degree murder.

Attempted Voluntary Manslaughter is the unlawful and intentional attempted killing of another person but without malice. This, it is the element of malice which forms the critical distinction between Attempted Murder of the Second Degree and Attempted Voluntary Manslaughter.

The court instructs the jury that Voluntary Manslaughter requires a specific intent on the part of the defendant to kill another person. It is not necessary that this intention to kill exist for any particular length of time prior to the actual killing. It is only necessary that such intention come into existence for the first time at the time of the killing or at any previous time thereto...

[AR, 130-132, 841-846.](Emphasis Added.)

The circuit court also went on to give detailed elemental instructions for each offense as contained in the indictment along with the lesser included offenses of each, including the following:

As to Count Four, before the Defendant, Daniel L. Herbert, can be convicted of Attempted Murder of the First Degree, the State of West Virginia must prove to the satisfaction of the jury beyond a reasonable doubt that:

1. The Defendant, Daniel L. Herbert,
2. In Berkeley County, West Virginia,
3. On or about July 4, 2012,
4. Did unlawfully, intentionally, maliciously, willfully, deliberately and premeditatedly,
5. Attempt to kill Amaya Cross.

If after impartially considering, weighing and comparing all the evidence, the jury and each member of the jury is convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Attempted Murder of the First Degree, you may find the Defendant guilty of Attempted Murder of the First Degree as charged in Count Four. If the jury and each member of the jury has a reasonable doubt of the truth of the charge as to any one or more of these elements of Attempted Murder of the First Degree, you shall find the Defendant not guilty of Attempted Murder in the First Degree as to this count and deliberate upon the lesser included offense of Attempted Murder of the Second Degree...

[AR, 134-135, 849-852.](Emphasis added.)

It is clear that the circuit court instructed the jury that they had to find proof of each element of each offense beyond a reasonable doubt before they could find the Petitioner guilty of said offense. It is also clear that the court specifically instructed the jury that they did not have to return the same verdict for each count of attempted first degree murder and should consider the merits of each count on its own. Further, it is similarly clear that the circuit court's instruction on transferred intent was a correct statement of the law as put forth in State v. Julius, *supra*.⁹

⁹ The State recognizes that Julius was a case dealing with malicious wounding charges and not with

Looking at the trial court's instruction as a whole, it properly informs the jury as to their duties, the elements of the offenses charged, and the standard of proof, beyond a reasonable doubt. It is a correct statement of law, supported by the evidence adduced at trial. [AR, 125-147, 830-866.] State v. Guthrie, *supra*. The circuit court, therefore, did not abuse its discretion in instructing the jury as it did, and there was no plain error. State v. Miller, *supra*.

indictments for murder or attempted murder. The case at hand involves both. Julius is, however, the primary case with a syllabus point setting forth the doctrine of transferred intent. The State is aware, however, that this Honorable Court considered and affirmed a murder case involving the doctrine of transferred intent wherein an instruction was given that if the jury believed the that "the defendant, without lawful excuse or justification, attempted to intentionally, maliciously, and deliberately kill James Lowe but actually shot and killed David Lowe, then the elements of intent, malice, and deliberation could be transferred to the person actually shot..." State v. Hall, 174 W.Va. 599, 601-602, 328 S.E.2d 206, 209 (1985). The Court did not expressly consider or approve the instruction in that case, however, because the defendant therein did not object to said instruction. The Court merely noted

The defendant does not contend that it was improper to give a transferred intent instruction. We have apparently not had occasion to discuss this doctrine at any length, although it is recognized in Syllabus Point 3 of State v. Briggs, 58 W.Va. 291, 52 S.E. 218 (1905), *overruled on other grounds*, State ex rel. May v. Boles, 149 W.Va. 155, 139 S.E.2d 177 (1964). The doctrine of transferred intent generally stated is that where one shoots at another intending to kill him and accidentally kills a third party, the same intent is transferred to the killing of the third party. State v. Gardner, 57 Del. (7 Storey) 588, 203 A.2d 77 (1964); Holt v. State, 266 Ind. 586, 365 N.E.2d 1209 (1977); Gladden v. State, 273 Md. 383, 330 A.2d 176 (1974); State v. Rogers, 273 N.C. 330, 159 S.E.2d 900 (1968); State v. Cole, 121 R.I. 39, 394 A.2d 1344 (1978); Riddick v. Commonwealth, 226 Va. 244, 308 S.E.2d 117 (1983); W. LaFave & A. Scott, *Handbook on Criminal Law* § 35 at 252-55 (1972).

Id. at fn. 2. This Court thereafter took up consideration of the doctrine at length in Julius, but has not revisited instructions on the doctrine in the context of a murder case as far as the State could find. The State maintains that the instruction of the circuit court regarding the transfer of criminal intent in conjunction with the particularized elemental instructions provided sufficient guidance to the jury under the law.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to affirm the conviction and sentence of the Petitioner and deny the Petition for Appeal.

Respectfully submitted,
State of West Virginia,

A handwritten signature in cursive script, reading "Cheryl K. Saville", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Cheryl K. Saville, Assistant Prosecuting Attorney, hereby certify that I have served a true and accurate copy of the foregoing Respondent State of West Virginia's Brief by mailing of the same, United States Mail, postage paid to the following on this 18th day of April, 2014:

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