**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 18-1043**


**STATE OF WEST VIRGINIA,**
**Plaintiff below/Respondent,**

**v.**

**KEVIN WOODRUM,**
**Defendant below/Petitioner**

# RESPONSE OF RESPONDENT STATE OF WEST VIRGINIA

Appeal from an October 15, 2018, Order
Circuit Court of Boone County, West Virginia
Case No. 17-F-74

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## RESPONSE OF RESPONDENT STATE OF WEST VIRGINIA

Respondent State of West Virginia, by counsel, Holly M. Flanigan, Assistant Attorney General, respectfully responds to Petitioner's Brief. For the reasons discussed below, this Court should affirm the October 15, 2018, Order of the Circuit Court of Boone County, West Virginia.

## I. RESPONSES TO ASSIGNMENTS OF ERROR

The circuit court did not err in its construction of W.Va. Code §61-2-14a(2) and thus did not err in denying Petitioner's Motion for a New Trial.

The circuit court did not violate double jeopardy by sentencing Petitioner for his convictions of Malicious Assault and Assault During the Commission of a Felony, because the two offenses are separate and distinct, each offense requiring proof the other does not.

## II. STATEMENT OF THE CASE

Petitioner's statement of the case does not include any citations to the record[1] and appears to reflect the self-serving portions of his trial testimony. Because Petitioner does not contest the sufficiency of the evidence, Respondent will not quibble about his somewhat skewed version of the events on December 9 and 10, 2016, or delve into a detailed recitation of witness testimony

[1] The Appendix consists of two volumes. Volume I contains consecutively-numbered documents from the trial court proceedings. Volume II contains the consecutively-paginated transcript of trial. Respondent will cite to the Appendix as "Vol. I" or "Vol. II" followed by the page(s) being referenced therein.

corroborating Jessica Woodrum's[2] account of the matter. However, because Petitioner reduces the vicious beating and night of torture he inflicted on Jessica—which included him pouring water over her face like the waterboarding "they use to interrogate terrorists"[3]—to a mere "fight" between husband and wife, Pet'r Br. at 3, Respondent sets forth the following statement of the case to append Petitioner's convenient omission of every single detail of his atrocities. W.Va. Rule. App. Proc. 10(d).

Jessica Woodrum, Petitioner's then-wife and victim, endured a night of extreme violence and torture that lasted from approximately 12:30 a.m. to 12:20 p.m. on December 10, 2016.[4] Jessica was already "very scared" by the time they arrived home. Vol. II at 293-294. Petitioner ordered Jessica into the house and followed her inside. *Id.* at 294. He then "grabbed [her] by the back of the neck and threw [her] down on the floor," locked the door behind them with a key and slid the key into his pocket. *Id.* at 294, 299-300 He took Jessica's phone and searched it, interrogating her all the while. *Id* at 295. At finding selfies she took inside the bar, he "obsessed" over them, yelling and "interrogating" her for "I don't know how long," until he ordered her "to get upstairs." *Id.* at 294-295, 297-298. As she moved to comply, he "ripped off my – the clothes off my body and down to my boots," "[he] ripped them apart." *Id.* at 297-298. Then, as ordered, Jessica walked up the stairs "afraid he was going to kick in my knee or something." *Id.* at 298. When they reached the bedroom, "he threw me on the floor again" and resumed the interrogation while continuing to search her phone. *Id.* at 299. At some point, Petitioner located photographs

[2] Although Jessica was the victim of Petitioner's atrocities, using the term "victim" to describe her devalues the strength of mind and body and utter perseverance it took to survive that night and the time since then, including testifying at trial and having photographs of her naked, bruised and battered body displayed to a courtroom of strangers. Respondent will therefore refer to her as "Jessica."

[3] Context and details of Petitioner's acts referred to at trial as "waterboarding" were elicited during the cross-examination of Jessica. Vol. 2 at 375-377.

[4]The time frame was established via the testimony of Danielle Nunnery, Vol. II at 391, and Corporal S.M. Boyles, *Id.* at 421. Jessica testified to the timeframe. *Id.* at 374.

and messages between Jessica and a man named Dave.[5] *Id.* at 296-297.[6] The situation continued to escalate. Petitioner took scissors and chopped off Jessica's long hair despite her protests and attempts to cover her head. *Id.* at 299. He ordered Jessica to lay on the bed. *Id.* at 299. As Jessica described it, refusing to comply was not an option: "He's so much bigger and stronger than me…I had no, no help, so I knew the best thing to do was to comply." *Id.* at 299. Plus Petitioner had locked the house door and the bedroom door, neither of which could be unlocked without the keys he placed in his pocket. *Id.* at 299-300.[7] By then Petitioner also had Jessica's cell phone and the house phone in his pockets, eliminating any hope for her to seek help. *Id.*

Once Jessica was on the bed, the real nightmare began. Petitioner tightly duct taped lengths of rope around her arms and legs,[8] spread her arms and legs apart and fastened them to the bed so "[t]here was no wiggle room." *Id.* at 299, 301. And there she remained, splayed and helpless "until I saw sunlight again." *Id.* at 302. During those hours, the attacks were relentless. Petitioner straddled her chest and choked her with both hands tight around her neck, squeezing, while looking her right in the eyes.[9] *Id.* at 301-302. When Jessica would lose or begin to lose consciousness, he would slap her and say, "Wake up bitch."[10] *Id.* at 302. Petitioner slapped her and punched her in the face and hit her in the head with the phone.[11] *Id.* at 302-303. Petitioner

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[5] At that point in time, Jessica and Dave had been having an extramarital relationship for approximately one month. Vol. II at 297.

[6] Jessica could not recall whether Petitioner located these messages while he had her on the floor downstairs or upstairs. Vol. II at 296.

[7] Officer testimony corroborated that the lock on the bedroom door was located on the outside of the room. Vol. II at 431.

[8] Photographs show the bruising to her wrists from the rope. Vol. II at 349.

[9] Photographs captured the swelling and bruising to her neck and under her chin. Vol. II at 351, 354.

[10] Although the bruising to Jessica's face and eyes could not be attributed to specific slaps, punches, or squeezes, photographs captured her "very swollen" eyes –which later turned black– and her swollen and bruised face and nose. Vol. II at 343, 351, 355. She also sustained bruising and swelling to the bottom of her hand, the top of her shoulder under her collar bone, her wrist and elbow, and her knees, and her back and buttocks. Vol. II at 350-351.

[11] *See id.* at n.8.

did not limit the slapping and the punching to Jessica's face; he "kept punching my vagina really hard." *Id.* at 303. If he did not like her answer to his questions, "he would just keep punching it."[12] Petitioner grabbed the hair at Jessica's temples, and "just pull[ed]," jerking out chunks of hair.[13] At times, he grabbed her face and squeezed her jaw "really hard."[14] *Id.* At other times, Petitioner attempted to break Jessica's jaws by shoving both hands in her mouth and opening them wide.[15] *Id.* at 306. Jessica's jaws did not break, but her lips separated from her gums, causing significant bleeding. *Id.* Petitioner also repeatedly attempted to burst Jessica's breast implants by severely squeezing her breasts and twisting her nipples. *Id.* at 303, 351, 354-355. As if this was not enough, Petitioner used an open flame to burn Jessica's body: her nose, her neck, her left breast, and all the way down to her feet.[16] *Id.* at 305-306. He also "water boarded" her: he poured "lots of water" in her face, from which she had no escape.[17] *Id.* at 303, 377.

Petitioner took brief hiatuses from the physical abuse during which he broke her jewelry piece by piece.[18] *Id.* at 306. He also removed items of clothing from her wardrobe and ripped them apart. *Id.* He called her a whore and told her what a bad mother she was. *Id.* at 304. Petitioner warned her, "[y]ou know I'm going to kill you tonight; right?" *Id.* And he blamed her for it all. *Id.* at 313.

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[12] The bruising to her vagina and pubic area was also captured in photographs. Vol. II at 351, 355.

[13] The chunks of missing hair were reflected in the photographs taken later at the hospital. Vol. II at 343-344, 352.

[14] Photographs captured her swollen and bruised facial area. Vol. II at 343, 351, 355.

[15] *See id.*

[16] Photographs captured the burns on her neck, her face, her breast and rib cage, and under her chin. Vol. II at 343, 349, 351-352, 354.

[17] Photographs captured the "huge knot," Vol. II at 344 or "giant dread," Vol. II at 352, in the hair at the back of Jessica's head from where she moved her head back and forth in attempt to escape the onslaught of water "dumped" in her face. *Id.*

[18] Photographs and police officer testimony reflected the destruction. Vol. II at 430-431.

When Jessica saw morning dawning, she was still restrained on the bed and naked.[19] *Id.* at 303, 306. At some point thereafter, she told Petitioner her mawmaw was expecting her to pick up the kids, hoping Petitioner would allow her to make a call. *Id.* at 307. Instead, Petitioner stuffed a sock in her mouth and slashed duct tape over it,[20] then called Jessica's mawmaw and asked her to keep the kids awhile longer. *Id.* at 306-307. Turning to Jessica, he said, "We've got all day," then choked her again while the sock was still duct taped in her mouth. *Id.* at 307.

As the morning passed, Jessica's aunt began a barrage of messages attempting to make contact with Jessica. *Id.* at 308. Petitioner read those messages to Jessica and told the aunt Jessica was asleep. *Id.* When the aunt's continued requests to speak with Jessica went unheeded, the phone calls began. *Id.* Before answering the phone, Petitioner would shove the sock in Jessica's mouth and again secure it with duct tape. *Id.* During one of these telephone calls, Jessica's aunt told Petitioner she would call the police if he did not let them speak. *Id.*

It was either during or shortly after that telephone call that Jessica's body started to give out, to the point she could not hear Petitioner speak, her head was "killing" her, and could not concentrate enough to answer the questions for which he continued to demand answers. *Id.* Jessica told him maybe coffee and Tylenol would help. *Id.* He untied her leg that was hurting "so badly" and "turning blue," brought her coffee, and then untied her fully. *Id.* at 308. But after only sip of the coffee, Petitioner smacked the mug of hot liquid into Jessica's face and forced her back down on the bed. *Id.* at 308-309. This time, instead of restraining her with rope and duct tape, he sat his full weight on one of her legs, spread the other leg open and began punching her vagina

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[19] It was the middle of December, yet it appears Petitioner turned the heat down once he had stripped Jessica of her clothing, and Petitioner forced her to remain naked in the cold house until late the next morning. Vol. II at 272, 299, 312.

[20] Photographs, officer testimony, and testimony from forensic analysts corroborated that a sock attached to duct tape was found next to the bed, and Jessica's saliva was located on the sock. *Id.* at 333, 432, 535.

again, "over and over." *Id.* at 309. He rammed his fingers inside Jessica's vagina, forcing her to say "Dave" and "make noises like I was enjoying it." *Id.* When she asked Petitioner to stop, he did it harder, spread her legs open farther and "just punch[ed] and punch[ed]" *Id.* Through all this, the interrogations continued and any unwelcomed answers resulting in more punches to Jessica's face and vagina. *Id.* at 309-310. Jessica recalled standing up at some point, at which time Petitioner grabbed her right arm and wrist and twisted them around. She heard something tear and screamed from the pain and began crying.[21] Petitioner let go and told her to "get some F'ing clothes on." *Id.* at 312. However, when she bent down to retrieve a piece of clothing from the floor, Petitioner kicked her in the ribs,[22] knocking her to the ground. *Id.* at 312-313. When she fell, she was crying. Petitioner called her names, told her stop whining, and to get up. *Id.* at 313. She did finally manage to dress, and they both went downstairs. *Id.* Petitioner told her the police had been called and repeatedly told her, "you did this." *Id.*

Petitioner told Jessica he knew the police had been called, and allowed her to go downstairs and he permitted her to finally use the restroom. *Id.* But he did not allow her to be alone and unrestrained, following her into the restroom where he remained until she was finished. *Id.* Jessica then went to the couch to sit. *Id.* She described her eyes as being "so swollen" and her head "felt so big it was hard to think." *Id.* Jessica heard Petitioner breaking items in the kitchen and bathroom.[23] *Id.* She just sat there, exhausted. "I just wanted him to kill me. Just do it. I was tired. I was hurting all over." *Id.*

Shortly thereafter, at approximately 12:20 p.m. on December 10, 2016, Corporal S.M. Boyles and Sergeant Flippen of the West Virginia State Police arrived at the home of Jessica and

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[21] Jessica suffered tears to two muscles in her shoulder. Vol. II at 347.
[22] Jessica sustained three broken ribs. *Id.*
[23] Again, photographs and officer testimony corroborate this destruction. *See id.* at n. 16.

Kevin Woodrum. *Id.* at 421.[24] Petitioner argued with the troopers several minutes before letting them inside. *Id.* at 317, 423. When Cpl. Boyles entered the home, he saw Jessica sitting on the couch "but I did not initially recognizer her." *Id.* at 423. Cpl. Boyles described Jessica's appearance as "[b]reathtaking. Breathtaking. I mean, it was – she was in a horrible physical state." *Id.* at 426. "Just the swelling and bruising of her face…I actually struggled to really recognize that that was her standing there." *Id.* She was in shock, and "struggle[d] with words, and trying to find the words to actually tell me." *Id.* at 427.[25] Cpl. Boyles stated that Jessica's appearance was one of the few "breathtaking events" he experienced in his thirteen-year State Police career. *Id.* at 433-434. Petitioner was arrested, *id.*, and Jessica arranged to give a brief statement at the State Police detachment prior to seeking medical treatment. *Id.* at 428-429.

Petitioner was indicted on six felony offenses. Appendix Volume I at 1-6, of which he was convicted on Counts I, III, IV, and V. Count I charges Petitioner with committing the offense of Kidnapping "by unlawfully and feloniously restraining another person with the intent to terrorize such other person, to wit: by restraining Jessica Woodrum against her will to coerce her with violence." *Id.* at 1. Count II charges Petitioner with committing Second Degree Sexual Assault "by unlawfully and feloniously engaging in sexual intrusion with another person without that person's consent, and the lack of consent resulted from forcible compulsion." *Id.* at 2. Count III charges Petitioner with committing the offense of Malicious Wounding "by unlawfully, feloniously, and maliciously wounding and causing bodily injury to Jessica Woodrum to wit: by burning her with a lighter, and beating her about her body, with intent then and there to maim,

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[24] Jessica's aunt and parents arrived a short time before the police, but Petitioner would not let them see or speak with Jessica. Vol. II at 314.

[25] It is alarming that Petitioner attempts to portray Jessica's injuries as insignificant because of "sporadic" medical care, the uncertainty of whether hospitalization occurred, and the uncertainty whether the injuries were permanent. Pet'r Br. at 3, 13. The record speaks for itself and plainly depicts injuries that no person should ever suffer at the hand of another.

disfigure, disable or kill Jessica Woodrum." *Id.* at 3. Count IV charges Petitioner with committing Assault During Commission of a Felony "by unlawfully, intentionally, and feloniously wounding another person during the commission of a felony, to wit: by wounding Jessica Woodrum during the commission of the felony offenses set forth in Counts One and Two." *Id.* at 4. Count V charges Petitioner with committing the offense of Strangulation "by knowingly, willfully, feloniously, strangle [sic] another without that person's consent and thereby caused the other person bodily injury or loss of consciousness." *Id.* at 5. Count VI charges Petitioner with committing the offense of Domestic Battery–Second Offense "by unlawfully and intentionally causing physical harm to his family and household member…at a time when he…was previously convicted of Domestic Battery…for an offense occurring on February 2, 2009." *Id.* at 6.

On August 31, 2018, after a four-day jury trial, Petitioner was found guilty of Kidnapping, Malicious Assault, Assault During Commission of a Felony, and Domestic Battery Second Offense. Vol. I at 72-78. On October 10, 2018, the circuit court denied Petitioner's motion for new trial, *Id.* at 118-120, and sentenced him to consecutive terms of no less than ten years for kidnapping pursuant to the mercy allocation of the jury; two to ten years for malicious wounding; two to ten years for assault during commission of a felony; and one year for second offense domestic battery. *Id.* at 114-117. Petitioner appeals the circuit court's Order Denying Motion for New Trial entered on October 15, 2018.

## III. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Revised Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the issues presented have been authoritatively decided, and the

facts and issues are adequately presented in the record and the briefs. This case is appropriate for resolution by memorandum decision affirming the circuit court's order.

## IV. SUMMARY OF THE ARGUMENT

The circuit court correctly construed W.Va. Code §61-2-14a(2) and thus did not abuse its discretion in denying Petitioner's Motion for a New Trial. In this case, the State indicted Petitioner for violating the second part of Subsection (a)(2), charging Petitioner with Kidnapping "by unlawfully and feloniously restraining another person with the intent to terrorize such other person." Petitioner's proposed construction of Subsection (a)(2) —that "transport" is a necessary element of a violation of that subsection—is untenable because it requires the Court to violate cardinal rules of statutory construction by eliminating language the Legislature specifically included and by disregarding the context in which the word is used. Aptly recognizing that Petitioner was charged with and convicted of one of the two alternate means by which Kidnapping could occur under Subsection (a)(2), the circuit court correctly concluded the State was not required to prove "transport" of the victim occurred and denied Petitioner's motion for a new trial.

Next, Petitioner erroneously claims that being sentenced for his convictions of Malicious Assault and Assault During the Commission of a Felony violates double jeopardy principles. The Double Jeopardy clause unquestionably prohibits punishing a person more than once for a single offense. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). However, applying the *Blockburger* test to the elements of these two offenses unequivocally establishes that the crimes are separate and distinct, each offense requiring proof the other does not. Therefore, Petitioner's sentences pass constitutional muster, and the circuit court correctly imposed the statutory penalties.

## V. ARGUMENT

As a preliminary matter, Petitioner has not demonstrated where either assignment of error was presented to the circuit court for disposition. According to Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure, a petitioner's brief must include "citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal." W. Va. R. App. P. 10(c)(7). In direct contravention of Rule 10, Petitioner does not cite any aspect of the record demonstrating where he raised such issue or where the circuit court addressed it. Failure to do so is sufficient basis for the Court to decline review. *Id.* Should the Court nonetheless proceed to the merits of the case, Respondent submits the following standards of review and arguments.

### A. Standard of Review

The following standard applies to review of a circuit court's decision denying a motion for new trial:

> In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl. Pt. 3, *State v. Vance,* 207 W.Va. 640, 535 S.E.2d 484 (2000).

The Kidnapping instruction involves the interpretation of W.Va. Code §61-2-14a, and is thus a question of law subject to *de novo* review. *State v. Davis*, 229 W. Va. 695, 698, 735 S.E.2d 570, 573 (2012) citing Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.)

*De novo* review also applies to Petitioner's double jeopardy challenge, as it also is a question of law. *See* Syl. Pt. 1, in part, *State v. Sears*, 196 W.Va. 71, 468 S.E.2d 324 (1996) ("[A] double jeopardy claim [is] reviewed de novo.").

**B. The circuit court correctly construed W.Va. Code §61-2-14a(2) and thus did not abuse its discretion in denying Petitioner's Motion for a New Trial.**

Count I of the Indictment charged Petitioner with Kidnapping in violation of W.Va. Code §61-2-14a(a)(2) "by unlawfully and feloniously restraining another person with the intent to terrorize such other person." Vol. I at 1. At the close of the State's evidence at trial, Petitioner moved for a judgment of acquittal based on the State's failure to prove "transport" of the victim, which Petitioner claimed was an element of the crime. Vol. II at 543-545. The circuit court denied the motion on the record, ruling that because W.Va. Code §61-2-14a(a)(2) is written in the disjunctive, it creates two separate ways in which a kidnapping could occur: one requiring an intent to transport the victim, one not. *Id.* at 548-551. The circuit court thus concluded the language in Subsection (a)(2) did not require "transport" as an element of Kidnapping where the accused is charged with having unlawfully restrained the victim with the intent "to terrorize the victim or another person." Vol. II. 550-551.

After the jury convicted Petitioner of kidnapping, he renewed this argument in his motion for a new trial. Vol. I at 111. The circuit court again ruled against him:

> 4. That in reviewing the statute, the Court FINDS that section 61-2-14(a)(2) is written in the disjunctive with two separate and distinct acts in subparagraph (a)(2) that form the criminal offense of Kidnapping.
>
> 5. That as such, the State was not required to prove that the Defendant transported the victim in order to prove the Defendant guilty of the offense of kidnapping.

Vol. I at 118-119.

Petitioner appealed, asserting the circuit court erred by allowing the jury to consider the kidnapping charge without the element of transport. Pet'r Br. at 1. Specifically, he challenges the circuit court's construction of W.Va. Code §61-2-14a(a)(2), advancing essentially the same grammar-based and ambiguity arguments raised below. Pet'r Br. 9-12. He also raises a new argument asserting for the first time that the kidnapping in this case was incidental to the vicious beating of his wife. *Id.* at 13-14.

**a. Because the offense of kidnapping occurs where a person unlawfully restrains another person with the intent to terrorize the victim, Petitioner was not entitled to a jury instruction including "transport" as an element of the crime.**

West Virginia Code §61-2-14a (2012)[26] sets forth multiple ways the crime of Kidnapping may be committed, two of which are contained in Subsection (a)(2). Specifically, the Kidnapping statute provides that:

> (a) Any person who unlawfully restrains another person with the intent:
>
> (1) To hold another person for ransom, reward, or concession;
>
> (2) To transport another person with the intent to inflict bodily injury *or* to terrorize the victim or another person; or
>
> (3) To use another person as a shield or hostage, shall be guilty of a felony and, upon conviction, shall be punished by confinement by the division of corrections for life, and, notwithstanding the provisions of article twelve, chapter sixty-two of this code, shall not be eligible for parole.

W.Va. Code §61-2-14a (emphasis added). Based on this statutory language, the State indicted Petitioner for violating the second part of Subsection (a)(2), charging Petitioner with Kidnapping "by unlawfully and feloniously restraining another person with the intent to terrorize such other person." Vol. I at 1. Correspondingly, to obtain a conviction of Kidnapping, the State was

[26] Petitioner includes the correct statutory language in his Brief; however, his citation to the statute mistakenly identifies it as a 2016 version. No such version exists. *See* Pet'r Br. at 7. The kidnapping statute in effect on December 9-10, 2016—the dates of Petitioner's offenses—was the 2012 version, effective June 8, 2012, through July 1, 2017. (Acts 1933, 2nd Ex. Sess., c. 70; Acts 1965, c. 40; Acts 1999, c. 74, eff. 90 days after March 13, 1999; Acts 2012, c. 90, eff. June 8, 2012.)

required to prove beyond a reasonable doubt that Petitioner "unlawfully restrain[ed] another person with the intent: . . . to terrorize the victim or another person[.]" W.Va. Code §61-2-14a(a)(2). Aptly recognizing that Subsection (a)(2) provides two alternate means by which Kidnapping could occur, the circuit court concluded the State was not required to prove transport of the victim occurred. Vol. I at 118-119.

On appeal, Petitioner contends it was error for the jury to consider the Kidnapping charge without the element of "transport." Pet'r Br. at 7. In other words, Petitioner submits that "transport" is a required element in proving a violation of Subsection (a)(2). Petitioner's single argument in support of his proposed reading of Subsection (a)(2) boldly—and incorrectly—states that "the verb transport following the preposition to requires the word transport to be used throughout the sentence." Pet'r Br. at 9. However, Petitioner's categorization of "to" as a preposition is incorrect. "To" is not a preposition when followed by a verb in its base form; it is an infinitive, Diana Hacker, *A Writer's Reference* 133 (2nd ed. 1992), and Petitioner points to no authority requiring its use throughout the entire subsection. To the contrary, the significance of the Legislature's decision to insert the disjunctive word "or" followed by a second infinitive and corresponding modifier in Subsection (a)(2) requires the exact reading adopted by the circuit court: that a kidnapping is committed where a person unlawfully restrains another with the intent to terrorize the victim. Vol. I at 118-119; *See Carper v. Kanawha Banking & Trust Co.*, 157 W.Va. 477, 517, 207 S.E.2d 897, 921 (1974)("Recognizing the obvious, the normal use of the disjunctive 'or' in a statute connotes an alternative or option to select.) The circuit court correctly instructed the jury that "[k]idnapping is the unlawful restraining of another person with the intent to terrorize such other person," Vol. II at 658-659, and the jury's verdict should be affirmed.

**b. W.Va. Code §61-2-14a(a)(2) unambiguously expresses the Legislature's intent to create alternate ways in which Kidnapping may occur.**

As an extension of his first contention, Petitioner next claims Subsection (a)(2) of the Kidnapping statute is ambiguous. Pet'r Br. at 10-11. The relevant portion of the statute provides:

> (a) Any person who unlawfully restrains another person with the intent:
>
> (2) To transport another person with the intent to inflict bodily injury *or* to terrorize the victim or another person; *or* . . .

W.Va. Code §61-2-14a(a)(2)(emphasis added). Petitioner submits that "transport" is a required element in proving violation of Subsection (a)(2).[27] In contrast, Respondent, like the circuit court, reads the plain language of Subsection (a)(2) in the disjunctive so as to result in a violation where a person unlawfully restrains another person with the intent "to terrorize the victim or another person[.]" The undersigned can certainly understand how at first glance one might read Subsection (a)(2) so as to conclude transport is an element of a kidnapping where the intent is "to terrorize the victim." However there are several fundamental flaws with such an interpretation of the statutory text.

To begin, assuming *arguendo* there is uncertainty as to the meaning of a statute, the statute must be evaluated to give effect to the intent of the Legislature. Syl. pt. 4, *Mace v. Mylan Pharm., Inc.*, 227 W.Va. 666, 714 S.E.2d 223 (2011) (" ' "The primary object in construing a

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[27] The relevant portion of the Kidnapping statute is set forth, *supra*, p.11 For the Court's convenience, Respondent includes it here as well:

> (a) Any person who unlawfully restrains another person with the intent:
> (1) To hold another person for ransom, reward, or concession;
> (2) To transport another person with the intent to inflict bodily injury *or* to terrorize the victim or another person; or
> (3) To use another person as a shield or hostage, shall be guilty of a felony and, upon conviction, shall be punished by confinement by the division of corrections for life, and, notwithstanding the provisions of article twelve, chapter sixty-two of this code, shall not be eligible for parole.

statute is to ascertain and give effect to the intent of the Legislature." In so doing, the Court is "required to operate under the presumption that the Legislature attaches specific meaning to every word and clause set forth in a statute. *State v. Saunders*, 219 W.Va. 570, 576-577, 638 S.E.2d 173, 179-180 (2006). Of particular significance here, are the words "or" and "to terrorize."

Had the Legislature intended for Subsection (a)(2) to be read in the manner Petitioner proposes, it would not have made "terrorize" the infinitive verb, "to terrorize." Instead, the Legislature would have drafted Subsection (a)(2) just as it drafted Subsections (a)(1) and (3)— neither of which include a second infinitive and modifier— making Subsection (a)(2) read: "to transport another person with the intent to inflict bodily injury or [ ] terrorize the victim or another person." Such wording would precisely parallel the wording and sentence structure the Legislature chose to use in Subsections (a)(1) and (3). *Cf. Randolph County Bd. of Educ. v. Adams,* 196 W.Va. 9, 16, 467 S.E.2d 150, 157 (1995)(it is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but it must be drawn from the context in which it is used); *Smith v. United States,* 508 U.S. 223, 229, 113 S.Ct. 2050, 2054, 124 L.Ed.2d 138, 149 (1993)("the meaning of a word that appears ambiguous if viewed in isolation [will] become clear when the word is analyzed in light of the term that surrounds it.") Thus, the fact the Legislature crafted Subsection (a)(2) differently than Subsections (a)(1) and (a)(3) by including a second infinitive verb and corresponding modifier signals a significance that cannot be ignored.

Coupling the Legislature's inclusion of the second infinitive with its use of the disjunctive "or" demonstrates a clear legislative decision to establish multiple ways in which the Kidnapping statute can be violated. *See e.g. Carper v. Kanawha Banking & Trust Co.,* 157

W.Va. 477, 517, 207 S.E.2d 897, 921 (1974) ("Recognizing the obvious, the normal use of the disjunctive 'or' in a statute connotes an alternative or option to select."). Thus, Subsection (a)(2) plainly sets forth alternate methods by which Kidnapping may occur: *either* where a person unlawfully restrains another person with the intent to transport that person with the intent to inflict bodily injury *or* where a person unlawfully restrains another person with the intent to terrorize the victim or another person.[28]

Furthermore, the construction of Subsection (a)(2) advocated by Petitioner would render statutory language—in this case the word "to"—superfluous, and would thereby violate a "cardinal rule of statutory construction." Syl. Pt. 3, *Meadows v. Wal–Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999)("A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute."); *See e.g.*, *Com. of Va. v. Browner*, 80 F.3d 869, 877 (4th Cir. 1996) ("A court should not—and we will not—construe a statute in a manner that reduces some of its terms to mere surplusage."); *W. Virginia Div. of Izaak Walton League of Am. v. Butz*, 522 F.2d 945, 948 (4th Cir. 1975) (citing the "well known maxim of statutory construction" that "all words and provisions of statutes are intended to have meaning and are to be given effect. . . ."). This Court has long held that statutes are to be construed so as to give meaning to every word in them. *Keatley v. Mercer Cty. Bd. of Educ.*, 200 W. Va. 487, 493, 490 S.E.2d 306, 312 (1997)(citation omitted); *See Ex Parte Watson,* 82 W.Va. 201, 205, 95 S.E. 648, 649 (1918) (stating that "[a]n interpretation of a statute or clause thereof which gives it no function to perform ... must be rejected as unsound; for it is presumed that the Legislature had a purpose in the use of every word and clause found in a

[28] The hypothetical Petitioner includes on page 11 of his Brief is in no manner analogous to the statutory language at issue because it simply does not parallel the sentence structure of Subsection (a)(2), as it includes only a single infinitive.

statute, and intended the terms used to be effective"). Petitioner's proposed reading of the statute not only relegates the word "to" to mere surplusage, it violates the central maxim of statutory construction by reading the "to" in "to terrorize" out of the statute entirely. Because this Court does not "eliminate through judicial interpretation words that were purposely included," Syl. Pt. 11, in part, *Brooke B. v. Ray*, 230 W.Va. 355, 738 S.E.2d 21, only one conclusion can be reached: the Legislature plainly intended to craft W.Va. Code §61-2-14a(a) so as to make it a "kidnapping" where a person unlawfully restrains another person with the intent "to transport with the intent to inflict bodily injury" or where a person unlawfully restrains another person with the intent "to terrorize" the victim or another person. And, because legislative intent is plain, "it is the duty of the courts not to construe but to apply the statute." Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959). Accordingly, this Court should reject Petitioner's proposed construction of the statute and affirm Petitioner's conviction for Kidnapping.

**c. Petitioner's assertion that kidnapping the victim was incidental to viciously beating her is an argument that was not raised below and was therefore, waived.**

It is not clear from Petitioner's Brief whether he actually is advancing a claim that the kidnapping was incidental to the night of terror and savage beating he inflicted on his then-wife. *See* Pet'r Br. at 13-14. He fails to cite the record; he fails to point to where it was raised in circuit court; he fails to set forth how the circuit court ruled on the issue; and other than briefly setting forth *State v. Lewis*, 238 W.Va. 627, 797 S.E.2d 604 (2017) and minimizing the utter horror to which he subjected Jessica, Petitioner fails to make any discernible argument. Pet'r Br. at 13-14. To the extent any argument is made, it is not reviewable on appeal per the Rules of Appellate Procedure and the dictates of West Virginia jurisprudence. Rule 10 of the Rules of Appellate Procedure mandates that

> the argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal.

W. Va. R. App. P. 10(c)(7)[2010]. In direct contravention of Rule 10, Petitioner does not cite any aspect of the record demonstrating where he raised this issue below or where the circuit court addressed it. Failure to do so is sufficient basis for the Court to decline review. *Id.* What is more, this Court has long held it "will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syl. Pt. 4, *State v. Redman*, 213 W. Va. 175, 181, 578 S.E.2d 369, 375 (2003) *citing* Syl. Pt. 2, *Sands v. Security Trust Co.,* 143 W.Va. 522, 102 S.E.2d 733 (1958). The reason for such a position is clear: the Court must have a record to review because the Court is "obligated to rule based upon the record brought to [it] by the parties[.]" *State v. Snider*, 196 W.Va. 513, 519, 474 S.E.2d 180, 186 (1996). The raise or waive rule is designed "to prevent a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error." *State v. Juntilla*, 227 W. Va. 492, 500, 711 S.E.2d 562, 570 (2011)(citations omitted). Accordingly, because "[e]rrors assigned for the first time on appeal will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court had objection been raised there," Petitioner's failure to preserve this issue excludes it from consideration on appeal. *State v. Berry*, 227 W. Va. 221, 225, 707 S.E.2d 831, 835 (2011) citing Syl. pt. 17, *State v. Thomas,* 157 W.Va. 640, 203 S.E.2d 445 (1974).

If this Court should nonetheless consider the issue, it is meritless. Like in *Lewis,* 238 W.Va. 6 at 638-639, 797 S.E.2d at 615, where this Court upheld a kidnapping conviction where the kidnapping occurred in the victim's own, small apartment, Petitioner kidnapped Jessica in

their marital home. Where the *Lewis* victim was stabbed seven times and left to Lewis's mercy in obtaining medical care (which he denied her for approximately seven hours), Jessica was physically restrained with no means of escaping Petitioner's savagery and left to Petitioner's mercy in obtaining medical care (from late in the night through the following morning). And like the *Lewis* victim, Jessica's risk of serious harm substantially increased every moment. Where the *Lewis* victim's risk of harm was bleeding to death, Jessica's risk of harm was death at Petitioner's hands. Vol. II at 304 (Petitioner: "You know I'm going to kill you tonight; right?" Jessica: "Yeah. I know you are.") *See generally*, Syl. Pt. 2, *State v. Miller*, 175 W.Va. 616, 336 S.E.2d 910 (1985)(setting forth factors to show that a kidnaping was not incidental or intrinsic to the other crimes). Thus, just as the kidnapping was not incidental to the other crimes committed in *Lewis*, neither was Petitioner's kidnapping of Jessica incidental to his other.

This claim fails for each of the reasons set forth above.

**C. The Double Jeopardy claim affords Petitioner no relief in sentencing, because he failed to raise this issue below and because Malicious Wounding and Assault During Commission of a Felony are distinct offenses, each offense requiring proof the other does not.**

Upon review of the record it becomes apparent that Petitioner did not previously raise a double jeopardy argument predicated on malicious wounding and assault during commission of a felony; instead, he advanced the argument that *sexual assault* and assault during commission of a felony constituted double jeopardy. Vol. II at 561-562. Petitioner's failure to preserve this issue should exclude it from consideration on appeal. *Thomas,* at 640, 203 S.E.2d at 445 ("[e]rrors assigned for the first time on appeal will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court had objection been raised there.") Should the Court nonetheless consider the merits of the Double Jeopardy contention, it is of no avail to Petitioner. It is axiomatic that the double jeopardy prohibits punishing a person

more than once for a single offense, *Blockburger v. United States*, 284 U.S. 299, 304 (1932), However, Petitioner was not charged, convicted, or punished for multiple instances of the same crime.

"The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth, provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" *Brown v. Ohio*, 432 U.S. 161, 164 (1977). The clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Petitioner's challenge concerns the last of these three purposes. Pet'r Br. at 17.

Notwithstanding the general rule that an individual may not be punished twice for a single offense, *see, e.g.*, *Ex parte Lange*, 85 U.S. 163, 168 (1873) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence."), double jeopardy does not preclude the imposition of multiple punishments for multiple crimes that arise during a single factual occurrence. "The Legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the Legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." *Id.*; *see also Ohio v. Johnson*, 467 U.S. 493, 499 (1984) ("Because the substantive power to prescribe crimes and determine punishments is vested with the Legislature, the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent."). Thus, where multiple sentences are imposed after a singular criminal transaction, "the role of the

constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown*, 432 U.S. at 165.

Consistent with the Legislature's power to prescribe penalties for any particular crime, double jeopardy is not offended by the existence of multiple offenses that are specifically intended to criminalize—and thus amplify the punishment—for a specific factual occurrence. *Garrett v. United States*, 471 U.S. 773, 778 (1985) ("Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the Legislature—in this case Congress—intended that each violation be a separate offense."); *Missouri v. Hunter*, 459 U.S. 359, 368-369 (1983) ("Where . . . a Legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes proscribe the 'same' conduct . . . a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment."). Put another way, the *Blockburger* test is not controlling where there is a clear indication of legislative intent. Syl. Pt. 5, *Gill*, at 138, 416 S.E.2d at 225.

When, however, the Legislature has not specifically expressed its intent to impose double punishment, the presumption is that it intends not to do so. *See Whalen v. United States*, 445 U.S. 684, 691-92 (1980) (explaining that is assumed that "Congress ordinarily does not intend to punish the same offense under two different statutes."); *see also Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975). Thus, in the absence of expressed legislative intent to impose multiple punishments, double jeopardy requires the courts to determine if multiple sentences for multiple crimes that arose from a singular factual occurrence represent the imposition of independent punishments for separate and distinct crimes, or a constitutionally impermissible double punishment. *United States v. Dixon*, 509 U.S. 688, 745 (1993) ("Courts enforcing the

federal guarantee against multiple punishment . . . must examine the various offenses for which a person is being punished to determine whether, as defined by the Legislature, any two or more of them are the same offense"). "In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the Legislature has made a clear expression of its intention to aggregate sentences for related crimes. Syl. Pt. 8, *Gill*, at 138, 416 S.E.2d at 255. "If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in [*Blockburger*]...." *Id.* "The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger v. United States*." *Brown*, 432 U.S. at 166.

In *Blockburger*, the Supreme Court of the United States ("SCOTUS") articulated what has come to be known as the "same elements" or "*Blockburger*" test:

> [w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

*Blockburger v. United States*, 284 U.S. 299, 304 (1932); Syl. Pt. 4, 6, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992). As SCOTUS succinctly explained in *Dixon*, "where the two offenses for which [a] defendant is punished or tried cannot survive the 'same-elements' test," "they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *Dixon*, 509 U.S. at 696. If, however, an offense contains an element of proof that the other does not, then it is presumed the Legislature intended to create separate offenses. *Gill*, at 138, 416 S.E.2d at 255. Once the determination is made that statutory offenses are separate under the *Blockburger* test by virtue of the fact that each provision requires proof of an additional fact which the other does not, then multiple punishments are appropriate. *State v.*

*Zaccagnini*, 172 W.Va. 491, 502, 308 S.E.2d 131, 142 (1983)(adopting *Blockburger*'s "same elements" test); *see, e.g., State v. Pancake*, 170 W. Va. 690, 695, 296 S.E.2d 37, 42 (1982).

In the present matter, the two statutory provisions at issue define the offenses of Malicious Wounding and Assault During the Commission of a Felony.[29] First examining the statutory elements of malicious wounding pursuant to W.Va. Code §61-2-9(a), it is clear "malice" is an essential element of the offense:

> If any person *maliciously* shoots, stabs, cuts or wounds any person, or by any means cause him or her bodily injury *with intent* to maim, disfigure, disable or kill, he or she, except where it is otherwise provided, is guilty of a felony and, upon conviction thereof, shall be punished by confinement in a state correctional facility not less than two nor more than ten years.

*Id.* (emphasis added). So too is the perpetrator's specific "intent to maim, disfigure, disable or kill." In contrast, it is likewise clear the statutory elements of Assault During Commission of a Felony do *not* include proof of "malice" or "intent" as elements of the crime:

> If any person in the commission of, or attempt to commit a felony, unlawfully shoot, stab, cut or wound another person, he shall be guilty of a felony and, upon conviction, shall, in the discretion of the court, either be confined in the penitentiary not less than two nor more than ten years, or be confined in jail not exceeding one year and be fined not exceeding one thousand dollars.

W.Va. Code §61-2-10. What proof Assault During Commission of a Felony requires, which Malicious Assault does not, is that a person be committing or attempting to commit a felony at the time such person causes bodily injury to another. Per *Blockerburger*, it could not be clearer that these two offenses are separate and distinct crimes with separate and distinct punishments.

Accordingly, the circuit court's imposition of the statutory punishment of two to ten years for each crime was not an abuse of its discretion. What is more, the sentences fully comport with

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[29] It is of no moment that the titles of both statutes include the word "assault" because per *Blockburger* and its progeny, it is the elements of the crime that define the proscribed conduct. *See generally* Vol. II at 563-564 (circuit court recognizing the wording of the statute controls the double jeopardy analysis, not the respective titles of the statutes).

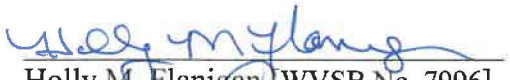
double jeopardy principles and were fully within the statutory limits.[30] Thus, Petitioner's punishment for Malicious Wounding and Assault During Commission of a Felony are not subject to appellate review and should be affirmed in their entirety. Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)("Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.").

## VI. CONCLUSION

Accordingly, Petitioner's conviction should be affirmed in full and all requested relief denied.

STATE OF WEST VIRGINIA
Respondent,

By counsel
PATRICK MORRISEY
ATTORNEY GENERAL



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[30] The circuit court's findings and conclusions are set forth on page 119 of Volume I.