IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0764

STATE OF WEST VIRGINIA,

Plaintiff Below/
Respondent,

vs.

AARON GLENN HOARD,

Defendant Below/
Petitioner.

Appeal from the Circuit Court of Preston County
Criminal Action No. 20-F-92

PETITIONER'S BRIEF

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2. The circuit court erred when it refused to give Petitioner's proposed jury instructions regarding self defense and instead gave a series of insufficient instructions, thereby depriving Petitioner of his rights under the state and federal constitutions.

3. The circuit court erred when, despite a complete lack of supporting evidence, it instructed the jury on offenses containing the element of intent—first degree murder, second-degree murder, and voluntary manslaughter—thereby depriving Petitioner of his rights under the state and federal constitutions.

4. The circuit court erred when it instructed the jury twice regarding malice, thereby depriving Petitioner of his rights under the state and federal constitutions.

5. The circuit court erred when it denied Petitioner's motion for change of venue or, in the alternative, to conduct a change of venue survey, thereby depriving Petitioner of his rights under the state and federal constitutions.

6. The circuit court erred when it denied Petitioner's motion to strike jurors for cause, thereby depriving Petitioner of his rights under the state and federal constitutions.

7. The circuit court erred when it denied Petitioner's motion for judgment of acquittal or a new trial because cumulative errors denied him the constitutional right to a fair trial.

II. STATEMENT OF THE CASE

In November 2019, the Petitioner, Monongalia County resident Aaron Glenn Hoard, along with his fiancée and several other friends, attended a concert and costume party at Shorthorns, a restaurant and bar in Preston County. Throughout the evening, their relationship with the local

crowd soured, and an individual named Grant Felton—surrounded by other local residents—battered Mr. Hoard and physically forced him into his vehicle. At the same time, Mr. Hoard's fiancée was pulled from the vehicle and stomped on the ground. Mr. Hoard retrieved a handgun from inside his vehicle and fired four shots into the air, attempting to defend himself and his friends by dispersing the crowd.

Mr. Hoard's act of self-defense had the opposite of its intended effect. Mr. Felton tackled him onto the floor of the vehicle and, along with several individuals accompanying Mr. Felton, struggled with Mr. Hoard to dispossess him of the handgun. Multiple sets of hands were on the gun. During the struggle, five additional rounds discharged. Four of those rounds struck Mr. Felton, who unfortunately died as a result of the injuries he sustained.

Following this tragic incident, the State indicted Mr. Hoard for first-degree murder, alleging that he made a deliberate and premeditated decision to kill Mr. Felton. On the other hand, Mr. Hoard has maintained that he retrieved the firearm to use in self-defense, and all of the rounds that struck Mr. Felton during the struggle were discharged accidentally. The case was tried in May 2021. The jury found Mr. Hoard guilty of second-degree murder; the circuit court sentenced him to the statutory maximum of 40 years imprisonment.

This verdict was the product of numerous reversible errors by which the State and the circuit court deprived Mr. Hoard of his right to a fair trial. Most fundamentally, the State deprived Mr. Hoard of his constitutional right to remain silent when, during both its opening statement and its cross-examination of Mr. Hoard, the State broadly commented on his decision not to speak with investigators. Under black-letter law from both the Supreme Court of the United States and the Supreme Court of Appeals of West Virginia, there simply can be no debate that the State's conduct was impermissible, prejudicial, and warrants reversal.

Additional errors infected the proceeding. The circuit court erroneously instructed the jury by instructing it on intent-based offenses, refusing to give full instructions on self-defense that were crucial, and giving duplicative instructions on malice. The circuit court also deprived Mr. Hoard of his right to the effective assistance of counsel when, despite ample evidence of community hostility, it denied his motion to conduct a survey in support of his motion for change of venue; it also forced Mr. Hoard to use preemptory strikes on jurors that obviously should have been stricken for cause. At the very least, the cumulative effect of these errors—which all warrant reversal by themselves—was to deprive Mr. Hoard of any semblance of a fair trial.

A. The Incident

Mr. Hoard is a lifelong resident of Monongalia County, West Virginia. (App. 02597) On November 2, 2019, Mr. Hoard and his fiancée, Machaela[1] Jeffries, traveled with their friend, Nathan Lanham, to Preston County, West Virginia, to meet their friends Kristina Andrews and Brian Teets. (App. 02623-02625) They went to Shorthorns, a restaurant and bar in Terra Alta, to attend a live music performance and Halloween costume party. (App. 01332, 02624) Ms. Jeffries was the designated driver and was not consuming alcohol. (App. 02520) Mr. Hoard and Mr. Teets had a few drinks, and the group stood near the front of the stage to enjoy the band. Witnesses described the stage area as "elbow to elbow" crowded. (App. 02074-02075)

Multiple witnesses testified that the crowd was aggressive that evening. Jason Peaslee, the bar owner, testified that the crowd was "starving for attention and getting a little wound up." (App. 01328, 01391-01392) While the crowd was aggressive, Mr. Peaslee testified that he did not witness Mr. Hoard or Mr. Teets take any violent actions which would have warranted requesting assistance from an off-duty law enforcement officer that was present at the bar or calling 911 to ask for police

[1] In various portions of the trial transcript, Ms. Jeffries' name is improperly spelled "Mackayla."

assistance.[2] (App. 01376) Shilo Robertson, the only Shorthorns bouncer on duty that evening, also testified that the atmosphere in the bar that night was "hostile". (App. 01949)

Mr. Hoard was dancing near the stage, and some bystanders accused him of knocking into people. (App. 01334) The decedent, Grant Felton, a man of significant stature, standing approximately 6 feet, 2 inches, and weighing 220 pounds, was part of the crowd that night. Mr. Felton approached Mr. Hoard, who was significantly smaller than Mr. Felton, and demanded Mr. Hoard exit the bar. (App. 01954, 01967; Exhibit A, Surveillance Video Clips, introduced at trial as State's Exhibit 7A.) Mr. Felton was not employed by Shorthorns and did not have authority to ask Mr. Hoard to leave. (App. 01967) Mr. Hoard was not physically aggressive towards Mr. Felton. (App. 01967-01968)

Nonetheless, Mr. Robertson approached Mr. Hoard to escort him out of the bar after his interaction with Mr. Felton. (App. 01335, 01963-64) While being taken out of the bar by Mr. Robertson, Mr. Hoard was shouting "Don't hit me! Don't hit me!" (App. 01957) Mr. Hoard willingly left with Mr. Robertson, was not aggressive with him, and did not use profanity. (App. 01364, 01461, 01971, Ex. A). At the same time, members of the hostile crowd grabbed Mr. Teets, carried him across the road, and forcibly threw him into the parking lot. (App. 02352) Mr. Teets suffered injuries to his head. (App. 02356) Shawn Moats, another bar patron, was worried that the crowd's hostility put Mr. Teets in danger. (App. 02080, 02264) Mr. Moats testified the crowd was like a "swarm of bees" following Mr. Hoard as he was being escorted out the door. (App. 02053)

Mr. Hoard, while upset with being asked to leave, voluntarily got into his truck to leave with Mr. Teets, Ms. Jeffries, Mr. Lanham, and Ms. Andrews. (App. 02531-02532) Ms. Jeffries was driving the truck. (App. 02531-02532, 02632) As they were pulling out, Ms. Andrews realized

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[2] Justin Childers, an off-duty Preston County Sherriff's Deputy, was working as the sound engineer for the band that evening. (01661).

she had left her cell phone behind, and Mr. Teets realized he had left his hat and vest. (App. 02059-02060, 02536) Ms. Jeffries stopped the truck slightly off the road near the Shorthorns entrance. (App. 02534) Mr. Hoard, Ms. Andrews, and Mr. Teets exited the vehicle to retrieve the personal items. *Id.* The crowd was still present outside the bar entrance, but neither Mr. Hoard nor Mr. Teets acted in a violent or aggressive manner toward any of the patrons. (App. 01383-01384, 01471, 01473, Ex. A)

Surveillance video shows that Mr. Felton then grabbed Mr. Hoard by the neck, shoved him across the street, and pursued him toward the truck. (Ex. A, Clip 3) Mr. Hoard was not aggressive toward Mr. Felton and can be observed attempting to free himself from Mr. Felton's grip and putting hands up as a gesture of surrender. *Id.* However, Mr. Felton continued to pursue Mr. Hoard to the passenger side of the vehicle. *Id.* Angela Freeland, a member of the crowd, testified that, after Mr. Felton grabbed Mr. Hoard and shoved him across the street, Mr. Hoard said "here comes my car." (App. 02030, 02040) Mr. Felton then told Mr. Hoard "[y]ou're leaving, you're getting in your car" and physically shoved him into the truck. (App. 02040)

A crowd of people surrounded Mr. Felton, Mr. Hoard, and the truck. (App. 01554) Mike Felton and D.J. Wilt grabbed Mr. Teets and attempted to force him into the truck. (App. 01448, 01476, 01488, 01495-01496) Grant Felton also "violently ripped" Ms. Jeffries out of the driver's seat of the truck and began "stomping" her as she lay on the sidewalk. (App. 02442-02443, 02084) Mr. Hoard was on the front passenger side of the truck and was aware that Ms. Jeffries had been pulled from the truck. *Id.* Kenneth McCrobie, another member of the crowd, testified that he made attempts to prevent further escalation of the incident by holding Mr. Felton and Mr. Wilt back. (App. 01907-01909)

Multiple witnesses confirm that Mr. Felton was aggressively shoving Mr. Hoard into the truck and had his arms or hands around Mr. Hoard's neck. (App. 01549-01551, 01912, 02642-43)

In frightened response, Mr. Hoard pulled a firearm out of a bag in the center of the truck. (App. 02643-02644) In an effort to disperse the aggressive crowd, Mr. Hoard stood on the running board of the truck and fired four warning shots in the air, not pointed at any individual. (App. 01554-01555, 02088-02089) The warning shots did not disperse the crowd or Grant Felton. *Id.* After the warning shots, Grant Felton and Mike Felton tackled Mr. Hoard inside the truck and attempted to wrestle the firearm away from Mr. Hoard, who was thrown into the floorboard of the truck onto his back. (App. 01898, 01910, 01453, 01483) Mr. McCrobie testified that he heard four shots while Grant Felton was inside the truck wrestling with Mr. Hoard. (App. 01917) Mike Felton grabbed Mr. Hoard by the wrists, and from that moment on, Mr. Hoard did not have control of the firearm. (App. 01526, 01555-01556, 01570)

The State's witnesses, including Mike Felton, confirmed that they did not see Mr. Hoard intentionally point the firearm at anyone. (App. 01556) Samuel Sisler confirmed this account, testifying that, after the warning shots were fired into the air, Grant Felton "hit or drove" Mr. Hoard into the floorboard of the truck. (App. 02002-02005) Mr. Sisler recalled that, when he heard the shots inside the truck, the firearm was straight up in the air, and he saw more than one set of set of hands on the firearm. (App. 02006-02007)

Mr. Wilt was outside the rear passenger door, engaged in a struggle with Mr. Teets, when he heard the warning shots discharged by Mr. Hoard towards the sky. (App. 01452) Mr. Wilt then heard three shots after he saw Mike Felton grab Mr. Hoard. Mr. Wilt testified that a fourth shot was discharged when he grabbed the firearm and twisted it out of Mr. Hoard's hand. (App. 01455, 01486) Mr. Wilt testified that he grabbed the firearm by the slide while it was in Mr. Hoard's hands, and that the firearm discharged for the last time that night. (App. 01491-01492) Mr. Wilt gave conflicting testimony regarding the shot that discharged while his hands were on the firearm

and admitted that it was possible that shot could have it been the one that struck Grant Felton in the head. (App. 01489-01492, 01494)

The State called Ms. Andrews, who confirmed that when Mr. Hoard was the only one handling firearm, it was pointed in the air or toward the top of the truck, not toward any members of the crowd. (App. 02179, 02204) Ms. Andrews stated that, during the struggle inside the truck, at least three individuals had their hands on the firearm, pulling it downward. (App. 02182) Ms. Andrews testified that Mr. Hoard could not have let go of the firearm. (App. 02203-02204) Once Mr. Hoard was tackled into the truck by Grant Felton, Mr. Hoard did not have sole control over the firearm. (App. 02549-02550)

After the shots were fired, in the early morning hours of Sunday, November 3, 2019, Ms. Jeffries was able to get back into the driver's seat of the truck and drove away from the crowd. *Id.* Ms. Jeffries and Mr. Hoard did not know that Grant Felton had been fatally shot when they left Shorthorns that night. (App. 02552-02555, 02653-02656) Later that day, Mr. Hoard learned of Mr. Felton's passing through a media outlet, contacted counsel, and turned himself in to law enforcement the next day. (App. 02656-02657)

B. The Investigation

Lieutenant Jason Rodeheaver, a deputy with the Preston County Sheriff's Office, responded to Shorthorns at approximately 1:00 a.m. on November 3, 2019. (App. 02215) At the scene, Lieutenant Rodeheaver and other officers interviewed several witnesses. (App. 02218) Lt. Rodeheaver also interviewed others after leaving the scene. (App. 02229) Lieutenant Rodeheaver called in the West Virginia State Police's crime scene response team. *Id.* Lieutenant Rodeheaver indicated that he learned that Mr. Hoard was "the shooter" through a Facebook post. (App. 02220) West Virginia State Police Trooper First Class Levi Hall, conducted the forensic investigation of

the scene. (App. 01726) As part of the investigation, Trooper Hall found four bullet holes located inside Mr. Hoard's truck. (App. 01740-01741)[3]

Mr. Felton's body was autopsied by medical examiner Elisabeth Rouse. (App. 01619, 01621) Dr. Rouse testified that Mr. Felton suffered four gunshot wounds. (App. 01622-01623) Dr. Rouse concluded that a gunshot wound located near the top of Mr. Felton's head was likely immediately incapacitating and fatal. (App. 01639-01641)

Throughout the investigation and pretrial phase, Mr. Hoard, upon advice of counsel, exercised his right to remain silent and did not submit to an interview regarding the incident. (App. 01219-01222)

C. The Community Reaction

Grant Felton was 38 years old when he died. (App. 01266) He was a lifelong resident of Terra Alta and frequented Shorthorns. (App. 01266, 01275) Mr. Felton was part of a large family that is well known in the area, and the shooting garnered immediate attention in the community. (App. 00013-00019, 01275) There was a flood of social media posts, news accounts, and general local public reaction to the incident – many of which were hostile toward Mr. Hoard. (App. 00013-00019) The community's support for Mr. Felton's family was prominently displayed on a sign in front of the Terra Alta Volunteer Fire Department, just across the street from the community's elementary school. The sign read "We Stand Felton Strong." (App. 00010, 00020)

Prior to trial, Mr. Hoard engaged Orion Strategies, a research firm, to conduct a news and social media audit to measure the community's potential bias and hostility toward Mr. Hoard. (App. 00009-00010) Orion's audit found nearly 30,000 items and interactions online involving the

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[3] The bullet holes were located 1) inside the front passenger door near the window weather stripping, 2) inside the front passenger door at the top of the window frame near the mirror, 3) on the frame of the truck below the pillar connecting the windshield to the body of the vehicle, 4) through the front windshield of the truck. (App. 01742-01747)

November 3, 2019 shooting. (App. 00013) Preston County's population in 2019 was approximately 33,000. (App. 00010, 00033) Mr. Hoard used the report and specific hostile social media posts as support for his request that the circuit court allow him to conduct a pretrial phone survey to assess potential juror bias. (App. 00009-00011) Despite this showing of potential pervasive community bias against Mr. Hoard, the circuit court denied Mr. Hoard's motion for a survey and held his motion for change of venue in abeyance until *voir dire* demonstrated whether a fair and impartial jury could be seated. (App. 00026-00036) Ultimately the change of venue motion was denied. (App. 00115).

D. The Trial

The circuit court summonsed 98 potential jurors, and approximately 90 appeared and participated in the jury selection process. (App. 00013) Of those 90 potential jurors, 70 indicated during preliminary questioning that they had heard about the case prior to appearing for service. (App. 00262-00263, 00744) While the circuit court granted several for cause strike motions for both Mr. Hoard and the State, it denied four of Mr. Hoard's well-founded for cause strike motions. Each of the four individuals who the circuit court refused to strike for cause had knowledge of the case or was familiar with the victim's family or key witnesses in the case. One juror that the circuit court refused to strike for cause admitted that she was familiar with the incident and had provided a prayer quilt to Grant Felton's family after he passed away. (App. 00117) The circuit court denied these cause strike motions because the subject jurors did not make "clear statement[s] indicating a disqualifying prejudice." *Id.* Mr. Hoard was forced to use preemptory strikes to prevent the four subject jurors from trying the case.

Once trial began, the errors continued. During opening statements, the State described the investigation undertaken by law enforcement in the days following the November 3, 2019 incident and told the jury that law enforcement conducted "a considerable number of interviews." (App.

01219-01222) It went on to tell the jury that the witnesses would describe for the jury what occurred. Then the State drew stark attention to Mr. Hoard's invocation of his right to remain silent by stating that "[t]he one interview we didn't get was with Aaron Hoard...." *Id.* Mr. Hoard's trial counsel objected and moved for a mistrial. (App. 01222, 01228-01229) The circuit court overruled the objection and denied the motion for mistrial. *Id.*

The State again drew the jury's attention to Mr. Hoard's invocation of his constitutionally protected right to remain silent during its cross examination of him. During the cross examination, Mr. Hoard stated "I did not murder that man." The State then used Mr. Hoard's pretrial silence against him by stating "But you never told the police that; did you?" Mr. Hoard's trial counsel again objected to the State's improper use of the defendant's invocation of his right to remain silent and moved for a mistrial. (App. 02682-02683) The circuit court overruled the objection and denied the motion for mistrial. *Id.*

The circuit court permitted the case to go to the jury, and prior to their deliberations, it erroneously instructed them on several points of law. The circuit court refused to give instructions fully explaining the law governing Mr. Hoard's affirmative defense of self-defense. (App. 00104-00105, 02764-2765) It also improperly instructed the jury regarding First- and Second-Degree Murder, crimes which require intent, of which no evidence was introduced at trial. (App. 02752-02761) The circuit court further tainted the jury's deliberations by instructing it not once, but twice, on the definition of malice. (App. 00093-00094; 00097-00098, 02753-02754, 02757-02758)

After a nine-day trial, the jury returned a verdict finding Mr. Hoard guilty of Second-Degree Murder. The circuit court denied Mr. Hoard's motion for judgment of acquittal and motion for new trial, and sentenced Mr. Hoard to the maximum term of 40 years' imprisonment. (App. 000141, 00143-00145) Mr. Hoard timely filed a notice of appeal, and requests that this Court remand his case for a new trial.

III. SUMMARY OF THE ARGUMENT

Mr. Hoard was denied his right to a fair trial due to multiple reversible errors by the circuit court. Most importantly, the circuit court erroneously denied Mr. Hoard's motions for mistrial after the State impermissibly commented on his exercise of his constitutionally protected right to remain silent. The circuit court also erred by seating a hostile and biased jury after it denied Mr. Hoard's motion for change of venue and well-founded cause strike motions. Furthermore, the circuit court improperly instructed the jury when it gave instructions on First and Second-Degree murder despite a total lack of competent evidence that Mr. Hoard intended to kill the decedent. The error was compounded with the circuit court gave the jury duplicative instructions on the element of malice. The circuit court also failed to provide full and complete instructions on self-defense, despite ample evidence supporting Mr. Hoard's affirmative defense. While each of these constitute reversible error, at the very least, the cumulative effect of these errors denied Mr. Hoard his right to a fair trial.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary under Rule 18(a) because the dispositive issues have been authoritatively decided and dictate that Petitioner is entitled to relief. Petitioner contends, however, that oral argument is warranted under the following categories found in Rule 19(a): "(1) cases involving assignments of error in the application of settled law; (2) cases claiming an unsustainable exercise of discretion where the law governing that discretion is settled; [and] (3) cases claiming insufficient evidence or a result against the weight of the evidence."

V. ARGUMENT

A. The circuit court erred when it denied Petitioner's motions for mistrial following repeated impermissible statements by the State regarding his right to remain silent, thereby depriving Petitioner of his rights under the state and federal constitutions.

A bedrock principle of the American criminal justice system is that a defendant has the right to remain silent in the face of accusation. The Fifth Amendment to the Constitution of the United States provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This protection extends to the States under the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 1492 (1964). Likewise, Article III § 5 of the Constitution of West Virginia provides, "nor shall any person, in any criminal case, be compelled to be a witness against himself." W. Va. Const. art. III § 5.

Decades of precedent recognize the importance of the right against self-incrimination and have laid a framework for preventing its impingement; it is well-recognized that a person is protected from being "a witness against himself" long before he sets foot in a courtroom for trial. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination," including warning the person that "he has the right to remain silent"); *Griffin v. California*, 380 U.S. 609, 615 (1965) (ruling that Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the jury that such silence is evidence of guilt.").

In this case, Mr. Hoard was deprived of his right not to speak with law enforcement at any time regarding the incident; the State commented during opening statement and cross-examined about the fact that Mr. Hoard had never spoken with police.

Mr. Hoard was not at the scene when law enforcement arrived, and he retained an attorney before turning himself in the next day. (App. 02236) Mr. Hoard made his initial appearance shortly

thereafter and was advised by the magistrate judge that he was "not required to make a statement, and that any statement [he made] may be used against [him]." (App. 02994-02997); W. Va. R. Crim. P. 5(c). Mr. Hoard "exercised his right to remain silent on advice of counsel." (App. 02449) Mr. Hoard never submitted to an interview with law enforcement or the State.

At trial, the State made much of this fact. It wanted the jury to believe that, because Mr. Hoard had exercised his Fifth Amendment right, he had intended to kill Mr. Felton. Its opening statement stressed broadly—as a summation of substantive evidence—that the investigating officer "did a considerable number of interviews," but that "[t]he one interview we didn't get was with Aaron Hoard or his girlfriend[.]" (App. 01221-01222) Then, during its cross-examination of Mr. Hoard, the State again highlighted the invocation of his right to remain silent:

A. It was a complete and total accident. I never murdered that man.

Q. You didn't murder him?

A. I did not murder that man.

Q. But you never told the police that; did you?

(App. 02682) Mr. Hoard moved for a mistrial following both of these statements by the State, and the circuit court denied both motions. (App. 01223, 02683) The circuit court also rejected Mr. Hoard's post-trial motion on this basis. (App. 00118-00123)

1. The state and federal constitutions forbade the State from mentioning during opening statements and cross-examining Petitioner about his pre-trial silence following his arrest and being advised of his *Miranda* rights.

"[T]he use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving Miranda warnings" is a federal constitutional violation. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). "Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights." *Id.* at 617. *Miranda* warnings carry an implicit "assurance that

silence will carry no penalty," and subsequent use of post-*Miranda* silence at trial is "fundamentally unfair and deprivation of due process." *Id.* at 618.

West Virginia has adopted this reasoning with regard to its own constitution.

> Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury.

Syl. Pt. 1, *State v. Walker*, 207 W. Va. 415, 533 S.E.2d 48 (2000) (citation omitted). The State simply is forbidden from discussing post-*Miranda* silence. *Id.* at 420-21, 533 S.E.2d at 53-54.

Here, the time during which Mr. Hoard did not talk to the police encompassed both pre-*Miranda* and post-*Miranda* periods. By making a broad reference to Mr. Hoard's silence during its opening statement and by questioning Mr. Hoard regarding the fact that he "never" told the police his side of the story, the State undoubtedly made both periods of silence an issue in the case. It does not matter whether the State meant to reference both periods; the language used by the State clearly encompasses both. *See, e.g.*, *United States v. Baker*, 999 F.2d 412, 415 (9th Cir. 1993) ("Even if counsel for the government intended his comments to refer only to post-arrest/pre-Miranda silence, the actual language used contains no such limitation and it is highly doubtful that the jury understood any such limitation.").

There simply can be no dispute the State acted improperly and thus violated Mr. Hoard's right to remain silent when it commented on his post-*Miranda* silence.

2. The state and federal constitutions forbade the State from using Petitioner's pre-arrest and pre-*Miranda* silence both as substantive evidence of guilt in its opening statement and during cross-examination.

In addition to making improper use of Mr. Hoard's post-arrest and post-*Miranda* silence, the State impermissibly used his pre-arrest and pre-*Miranda* silence by referencing the same as substantive evidence of guilt in its opening statement.

Mr. Hoard does not dispute that pre-arrest and pre-*Miranda* silence may be used by the State as impeachment evidence when cross-examining a defendant that takes the stand. This limited use is recognized by both federal and state courts. *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980); *Fletcher v. Weir*, 455 U.S. 603 (607 (1982); *State v. Walker*, 207 W. Va. 415, 419 n.2, 533 S.E.2d 48, 52 n.2 (2000) (relying on *Jenkins v. Anderson*).

In this case, however, the State used Mr. Hoard's pre-arrest and pre-*Miranda* silence as substantive evidence of guilt. The State made sure to tell the jury that, although it did a lot of interviews, "[t]he one interview we didn't get was with Aaron Hoard." (App. 01221-01222) The only possible purpose for this would be to imply that he was guilty because he chose not to explain his actions to the police. This was improper.

"[T]he right to remain silent exists independently of the fact of arrest." *United States v. Okatan*, 728 F.3d 111, 118 (2d Cir. 2013) (citation omitted). Pre-arrest and pre-*Miranda* silence, though proper impeachment evidence, cannot be used by the State as substantive evidence of guilt in its opening statement and case-in-chief. *See, e.g.*, *United States v. Wilchcombe*, 838 F.3d 1179, 1190-91 (11th Cir. 2016) (collecting cases); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000) (collecting cases); *Commonwealth v. Molina*, 33 A.3d 51, 61-62 (Sup. Ct. Pa. 2011) (collecting cases); *State v. Kulzer*, 186 Vt. 264, 269-71, 979 A.2d 1031, 1036-37 (2009) (collecting cases); *State v. Burke*, 163 Wash.2d 204, 181 P.3d 1 (2008); *State v. Brown*, 190 N.J. 144, 159 & n.1, 919 A.2d 107, 116 & n.1 (2007); *Taylor v. Commonwealth*, 26 Va. App. 485, 495 S.E.2d 522 (1998).[4]

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[4] The Supreme Court of the United States granted a writ of certiorari to resolve a split of authority regarding this issue, but it instead decided the case on a technicality. *Salinas v. Texas*, 570 U.S. 178 (2013). The non-binding plurality opinion reasoned that it need not review whether pre-arrest silence was protected because the defendant had voluntarily participated in a noncustodial interview: "Before petitioner could rely on the privilege against self-incrimination, he was required to invoke it." *Id.* at 191. Since *Salinas*, courts have looked askance on the reasoning of the plurality, and it certainly is not clear that the Court would countenance use of pre-arrest silence as substantive evidence of guilt. *See, e.g.*, *State v. Horwitz*, 191 So.3d 429, 441 (Fla. 2016) (declining to apply plurality reasoning in *Salinas*).

In a decision regarding this issue, a Virginia court persuasively explained why "the substantive use of the appellant's pre-arrest silence substantially burden[s] the policies underlying the privilege against requiring a person to give statements that may be incriminating." *Taylor*, 26 Va. App. at 497, 495 S.E.2d at 528. "First, such use offends the privilege's unwillingness to subject persons to the 'cruel trilemma' of perjury, contempt or self-accusation." *Id.* (quoting *Murphy v. Waterfront Com'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964), *abrogated on other grounds by United States v. Balsys*, 524 U.S. 666 (1998)). "Second, the substantive use of silence conflicts with the privilege's function to 'require[] the government in its contest with the individual to shoulder the entire load' of producing incriminating evidence." *Id.* at 498, 495 S.E.2d at 528-29 (quoting *Murphy*, 378 U.S. at 55). "Third, substantive use of silence impairs the privilege's 'preference for an accusatorial rather than an inquisitorial system of criminal justice.'" *Id.* at 498, 495 S.E.2d at 529 (quoting *Murphy*, 378 U.S. at 55). The Virginia court further explained:

> Moreover, to permit the Commonwealth to prove that the appellant tacitly admitted his guilt by remaining silent is tantamount to allowing the Commonwealth to derive an involuntary admission of guilt from the appellant. To accord a suspect less protection where he exercises the basic and fundamental right to not speak in response to non-custodial questions, when the constitutions protect the right to remain silent in a custodial situation, would be illogical. By allowing the jury to decide that the appellant's silence was an admission of guilt, the Commonwealth, in effect, "compelled" him to provide incriminating testimony at trial. When the appellant remained silent and did not speak to Deputy Inge or testify at trial, the Commonwealth was allowed to prove that he nonetheless admitted ownership of the handgun. We can think of few other techniques that would bring to bear this degree of direct compulsion on a criminal defendant to "speak his guilt" before the jury.

Id. at 499, 495 S.E.2d at 529 (citation omitted).

The policy concerns outlined by the Virginia court demonstrate exactly why Mr. Hoard's constitutional rights were violated by the State's use of his pre-arrest and pre-*Miranda* silence in its opening statement. Put simply, the State used Mr. Hoard's silence against him.

In its presentation—long before Mr. Hoard took the stand—the State used his silence to imply that he was guilty. This meant that, although he had chosen not to speak with investigators, Mr. Hoard became a witness against himself nonetheless. In making Mr. Hoard a witness against himself, the State essentially flipped the burden of proof. It was the State's burden to accuse Mr. Hoard and present evidence of his guilt, but the State implied just the opposite: that Mr. Hoard should have provided evidence of his innocence to investigators. If this were permissible, the right to remain silent would be rendered meaningless.

For these reasons, the Court should hold that the State violated Mr. Hoard's rights when it used his pre-arrest and pre-*Miranda* silence as substantive evidence of his guilt.

3. These violations of Petitioner's right to remain silent clearly warrant reversal and a new trial under this Court's precedent.

The improper use of Mr. Hoard's silence is not only an unquestionable violation of his constitutional rights, but also an unquestionable basis for reversal.

Whether this type of error is grounds for reversal has already been decided in West Virginia in a nearly identical case. In *State v. Walker*, the defendant claimed self-defense after shooting another patron at a nightclub. 207 W. Va. 415, 533 S.E.2d 48 (2000). The defendant, who had invoked his Fifth Amendment right before trial, took the stand and testified that the decedent had "cut him and verbally threatened him." *Id.* at 420, 533 S.E.2d at 53. The State then improperly cross-examined the defendant and asked him why he had not relayed these facts to an investigator following the incident. *Id.* at 420-21, 533 S.E.2d at 53-54. The Court said that this questioning was an unqualified "reversible error." *Id.* at 421, 533 S.E.2d at 54.

Also in *Walker*, the State improperly remarked during argument about how the defendant "never said anything to police officers" about the facts supporting self-defense. *Id.* at 421, 533 S.E.2d at 54. To determine whether the improper prosecutorial comment was "so damaging as to require reversal," the Court looked at the four *Sugg* factors:

> (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Id. (citing Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995)). The Court had "little difficulty in finding reversible error" because the "attack on [the defendant's] post-*Miranda* silence . . . was highly prejudicial":

> Mr. Walker's defense was self-defense. The state told the jury, in essence, that the shooting was not in self-defense. Had it been self-defense, according to the State, Mr. Walker would have so advised the police. To permit the State to do what occurred in this case, would effectively make *Miranda* warnings meaningless.

Id. The Court thus reversed and remanded for a new trial. *Id.*

The same analysis must apply in this case. The State not only commented on both Mr. Hoard's pre-arrest and post-*Miranda* silence during its opening statement, but also improperly cross-examined Mr. Hoard about his post-*Miranda* silence in an effort to undercut his self-defense argument. This use of Mr. Hoard's silence was reversible error just as it was in *Walker*, and the use was obviously prejudicial just as it was in *Walker*.

The State wanted the jury to believe that, because Mr. Hoard was silent, it meant he had a guilty conscience and that his explanation of self-defense was a fabrication. (App. 01221-01222, 02682) As the Court reasoned in *Walker*, this is exactly the kind of prejudicial conduct that, absent correction, would nullify the right to remain silent. *Walker*, 207 W. Va. at 421, 533 S.E.2d at 54. Mr. Hoard is entitled to reversal and a new trial.

B. The circuit court deprived Petitioner of his rights under the state and federal constitutions when it gave insufficient, unsupported, and incorrect jury instructions.

The instructions given below were incorrect or unsupported and deprived Mr. Hoard the opportunity to effectively defend himself.

The circuit court has "broad discretion" when giving jury instructions, but a verdict cannot be based on instructions that are inaccurate and unfair when considered "as a whole." Syl. Pt. 2, *State v. Blankenship*, 208 W. Va. 612, 542 S.E.2d 433 (2000) (citation omitted). And, '[o]f course, . . . review of the legal propriety of the trial court's instructions is *de novo*." *Id.* at 617, 542 S.E.2d at 438 (citation omitted). As this Court has explained:

> 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 mislead 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.

Id. at 617-18, 542 S.E.2d at 438-39 (citation omitted).

The instructions given by the circuit court below do not satisfy this standard. Although self-defense was a central tenet of Mr. Hoard's defense, the circuit court refused to give fulsome instructions. The circuit court also gave instructions on offenses that required intent—first-degree murder, second-degree murder, and voluntary manslaughter—despite a complete lack of supporting evidence. The error regarding intent-based offenses was compounded by the circuit court's repetitious instructions on the element of malice.

1. The circuit court erred when it refused to give Petitioner's proposed jury instructions regarding self defense and instead gave a series of insufficient instructions, thereby depriving Petitioner of his rights under the state and federal constitutions.

At trial, there was no dispute that Mr. Hoard had his hands on the gun that shot Mr. Felton. The theme of Mr. Hoard's defense was that use and discharge of the firearm began in self-defense and then became accident during the struggle. When he submitted his proposed jury instructions, Mr. Hoard asked the circuit court to instruct the jury on self-defense as follows:

Defendant's Proposed Instruction No. 22 . . . :

The Court instructs the jury that it is not essential to the right of self-defense that the danger should in fact exist. If, to the defendant, it reasonably appeared that the danger in fact existed, he had the right to defend against it to the same extent and under the same rules that would apply in case the danger had been real.

In passing upon the danger, if any, to which the accused was exposed, you will consider the circumstances as they reasonably appeared to him and draw such conclusions from these circumstances as he could reasonably have drawn, situated as he was at the time. In other words, the Court instructs you that the accused is entitled to be tried and judged by the facts as they reasonably appeared to him and not by any intention that may or may not have existed in the mind of the deceased.

Defendant's Proposed Instruction No. 23 . . . :

The Court instructs the jury that as to the imminency of the danger which threatened the defendant, and the necessity of action in the first instant, the defendant is the judge; and that the jury must pass upon the defendant's action in the circumstances presented, viewing said action from the defendant's standpoint at the time of his action; and if the jury believe from all the facts and circumstances in the case, viewed from the standpoint of the defendant at the time of the action, that the defendant had reasonable ground to believe, and did believe, the danger imminent, and that the action was necessary to preserve his own life, or to protect him from great bodily harm, he was excusable for using a deadly weapon in his defense and the jury should find the defendant not guilty.

Defendant's Proposed Instruction No. 24 . . . :

The Court instructs the jury that where a man is threatened with danger, the law authorizes him to determine from appearances and the actual state of things surrounding him as to the necessity of resorting to force, and if he acts from reasonable and honest conviction, he will not be held criminally responsible for a mistake as to the actual danger. Where other and more judicious men would have been mistaken: for when one man attempts to injure another, it gives the injured the right to make use of such means to prevent injury as his behavior and the situation necessitates.

Defendant's Proposed Instruction No. 25 . . . :

The Court instructs the jury that a person has a right to repel force by force in the defense of his person, his family or his habitation, and if in so doing he may use only so much force as the necessity, or apparent necessity, of the case requires, he is not guilty of any offense, though he kills or injures his assailant in so doing.

Defendant's Proposed Instruction No. 31 . . . :

> If the defendant was not the aggressor, and had reasonable grounds to believe and actually did believe that he or she was in imminent danger of death or serious bodily harm from which he or she could save him or herself only by using deadly force against his or her assailant, he or she had the right to employ deadly force in order to defend him or herself. By "deadly force" is meant force which is likely to cause death or serious bodily harm.
>
> In order for the defendant to have been justified in the use of deadly force in self-defense, he or she must not have provoked the assault on him or her or have been the aggressor. Mere words, without more, do not constitute provocation or aggression.
>
> The circumstances under which he acted must have been such as to produce in the mind of a reasonably prudent person, similarly situated, the reasonable belief that the other person was then about to kill him or to do him or her serious bodily harm. In addition, the defendant must have actually believed that he or she was in imminent danger of death or serious bodily harm and that deadly force must be used to repel it.
>
> If evidence of self-defense is present, the State of West Virginia must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty. In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty.

(AP 00124-00125) (footnotes omitted) The circuit court rejected almost all the instructions requested by Mr. Hoard and instead decided to give only a modified version of Defendant's Proposed Instruction No. 31. (App. 00104-00105, 02764-02765)

"A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense." Syl. Pt. 11, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994). These elements are readily satisfied.

First, the rejected instructions are correct statements of law. They focused on the facts and circumstances that the jury should consider when deciding whether, from his perspective, Mr. Hoard had a reasonable belief that he or his friends were in imminent danger of death or serious

bodily harm. Defendant's Proposed Instruction Nos. 22 and 24 are taken directly from instructions approved by this Court in *State v. Gibson*, 186 W. Va. 465, 472 & n.3, 413 S.E.2d 120, 127 & n.3 (1991). Defendant's Proposed Instruction No. 23 has also been approved by this Court. *See, e.g.*, *State v. Donahue*, 79 W. Va. 260, 90 S.E. 834, 837 (1916). Similarly, Defendant's Proposed Instruction No. 25 has been approved by this Court. *State v. Cook*, 204 W. Va. 591, 598, 515 S.E.2d 127, 134 (1999); *see also State v. Hamrick*, 74 W. Va. 145, 81 S.E. 703, 705 (1914).

Second, these instructions were not substantially covered in the single self-defense instruction given to the jury. As a result, the jury was not given a complete statement of the law regarding reasonable belief. The instruction given by the circuit court mentioned only the bare legal phrases "reasonable grounds to believe" and "reasonably prudent person, similarly situated." (App. 00104-00105, 02764-02765)

The rejected instructions provided crucial context to understand these legal terms and apply them to the evidence. For example, the circuit court did not instruct the jury that "it is not essential that the danger should in fact exist" and that one should "not be held criminally responsible for a mistake as to the actual danger." (App. 00124) It did not instruct the jury that Mr. Hoard should be judged by his own reasonable perceptions rather Mr. Felton's intentions: "[T]he accused is entitled to be tried and judged by the facts and circumstances as they reasonably appeared to him and not by any intention that may or may not have existed in the mind of the deceased." *Id.* The circuit court did not instruct the jury that Mr. Hoard "is the judge" of his circumstances and to judge from his "standpoint at the time." *Id.* The instruction gave no indication that "reasonable grounds to believe" meant what "appeared" necessary to Mr. Hoard. *Id.*

Third, the absence of these correct statements of the law not only seriously impaired Mr. Hoard's ability to present his defense—their omission gutted his theory of the case. The State wanted the jury to believe that Mr. Hoard was an inherently bad actor who came "into [a] quiet

community from out of town and wreak[ed] havoc," (App. 02772-02773, 02781, 02784, 02786), rather than someone who was assaulted and battered by Mr. Felton. It wanted the jury to believe that Mr. Hoard, despite all the evidence of an accidental shooting, chose maliciously to "execut[e]" Mr. Felton by using "a skill set" to intentionally shoot him four times at close range. (App. 02776, 02784) It wanted the jury to believe that it was unreasonable for Mr. Hoard to defend himself against Mr. Felton, a man who it said was just trying to protect his family.

Against these accusations, it was critical for the jury to understand that the benefit of hindsight and reflection had no place in their analysis. *Mr. Hoard's* perspective is what mattered. *Mr. Hoard's* perspective included an angry and inebriated crowd. *Mr. Hoard's* perspective included a sizeable man who battered him, pursued him across the road, placed him into a headlock, and physically forced him onto the floor of his vehicle. *Mr. Hoard's* perspective included seeing his fiancée pulled from their vehicle and stomped on the ground.

Instructions on this were particularly important because the State repeatedly played a surveillance tape showing a perspective far away from Mr. Hoard, and it implored the jury during closing arguments to watch that tape. (App. 02796) On the other hand, self-defense was the key theme for Mr. Hoard during closing argument, and *his* perspective was the most important factor. But counsel was confined to discussing the law as it had been incompletely described. (App. 02789-02790, 02795) Mr. Hoard was impaired in his presentation of self-defense because the circuit court refused to instruct the jury on his perspective. This is reversible error.

2. The circuit court erred when, despite a complete lack of supporting evidence, it instructed the jury on offenses containing the element of intent, thereby depriving Petitioner of his rights under the state and federal constitutions.

Inflamed rhetoric aside, the actual evidence the State presented included no indication that Mr. Hoard intended to shoot Mr. Felton. The circuit court should not have instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter.

"Instructions must be based upon the evidence and an instruction which is not supported by evidence should not be given." Syl. Pt. 12, *State v. Henson*, 239 W. Va. 898, 806 S.E.2d 822 (2017) (citation omitted). "Jury instructions on possible guilty verdicts must only include those crimes for which substantial evidence has been presented upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt." Syl. Pt. 5, *State v. Bowling*, 232 W. Va. 529, 753 S.E.2d 27 (2013) (citation omitted). The Court applies an abuse of discretion standard to these questions. And, "[i]n criminal cases where a conviction results, the evidence and any reasonable inferences are considered in the light most favorable to the prosecution." Syl. Pt. 1, *State v. Wilson*, 244 W. Va. 370, 853 S.E.2d 610 (2020) (citation omitted).

Over Mr. Hoard's objection, (App. 02709), the circuit court instructed the jury that it could convict him of murder and voluntary manslaughter, all of which would require the jury to find intent. (App. 2752 – 2761) Both first- and second-degree murder require the accused "intend to kill." *See State v. Guthrie*, 194 W. Va. 657, 673-74, 461 S.E.2d 163, 179-80 (1995); *see also* W. Va. Code § 61-2-1 (defining first- and second-degree murder). "[I]ntent to kill" is also a "necessary element[] of . . . voluntary manslaughter." *State v. Drakes*, 243 W. Va. 339, 348, 844 S.E.2d 110, 119 (2020); *see also* W. Va. Code § 61-2-4 (defining voluntary manslaughter).

Instructing the jury on these crimes was prejudicial error, as the State had failed to produce sufficient evidence to support of finding of guilt. The evidence demonstrated that Mr. Hoard first retrieved the firearm while his fiancée was being stomped on the ground and Mr. Felton had him in a headlock, shoving Mr. Hoard inside the vehicle. After pulling the firearm out of his bag, he stood up on the truck and fired four shots into the air. (App. 02084, 01549-01551, 01554, 02088-02089) Grant Felton and Michael Felton then tackled Mr. Hoard, and a struggle over the firearm ensued among the three. (App. 01453, 01483, 01898, 01910) Michael Felton testified that he never saw Mr. Hoard intentionally point the firearm at anyone. Rather, Michael Felton grabbed Mr.

Hoard by the wrists, at which point Mr. Hoard lost control of the firearm. (App. 01555-01556, 01570) Another of the State's witnesses testified that there were at least three sets of hands on the firearm, and Mr. Hoard could not have let go. (App. 02203-02204)

Put simply, even viewing the State's case in the most favorable light, there was no direct or circumstantial evidence that Mr. Hoard intentionally pointed his firearm at Mr. Felton or intentionally pulled the trigger. Because there was no evidence upon which the jury could find beyond a reasonable doubt that Mr. Hoard intended to kill Mr. Felton, *Bowling*, 232 W. Va. 529, 753 S.E.2d 27, Syl. Pt. 5, the instructions for first-degree murder, second-degree murder, and voluntary manslaughter should not have been given by the circuit court.

3. The circuit court erred when it instructed the jury twice regarding malice, thereby depriving Petitioner of his rights under the state and federal constitutions.

This Court has long held that "[d]uplication of instructions is neither desirable nor necessary." Syl. Pt. 6, *Thrasher v. Amere Gas Utilities Co.*, 138 W. Va. 166, 75 S.E.2d 376 (1953). In the criminal context, "[i]nstructions that are repetitious . . . should not be given to the jury[.]" Syl. Pt. 4, *State v. Phelps*, 197 W. Va. 713, 478 S.E.2d 563 (1996) (citation omitted).

The Court has regularly affirmed decisions *not* to include "repetitious" instructions. *See, e.g.*, *State v. Phelps*, 197 W. Va. 713, 478 S.E.2d 563, 570-71 (1996); *State v. Maynard*, 183 W. Va. 1, 8, 393 S.E.2d 221, 228 (1990); *State v. Crouch*, 178 W. Va. 221, 358 S.E.2d 782, 784 (1987); *State v. Meadows*, 172 W. Va. 247, 255-56, 304 S.E.2d 831, 839-40 (1983); *State v. Less*, 170 W. Va. 259, 267, 294 S.E.2d 62, 70 (1981); *State v. Cokeley*, 159 W. Va. 664, 672, 226 S.E.2d 40, 45 (1976). Indeed, courts observe that duplication can create "jury confusion and prejudicial error." *Smith v. E.R. Squibb & Sons, Inc.*, 405 Mich. 79, 91, 273 N.W.2d 476, 480 (1979).

Despite acknowledging on multiple occasions that it did not want "to give the same instruction more than once" or read something "double," (App. 02719, 02763), the circuit court

did just that. It instructed the jury twice on malice as it pertains to first- and second-degree murder. Mr. Hoard objected to this but was overruled by the Court. (App. 02724-02725)

There is no dispute that malice is an element of both first- and second-degree murder. But the circuit court unnecessarily duplicated the instruction on malice. It gave the following instruction, stretching more than a page, when it instructed the jury on first-degree murder:

> In order to find the defendant guilty of murder of the first degree, you must find that the defendant acted with malice. Malice is the intentional doing of a wrongful act without a just cause or excuse with an intent to inflict an injury or under circumstances that the law will imply an evil intent. Malice is also a condition of the mind showing a heart fatally bent on mischief without regard to social duty. Malice is a term of art importing wickedness and excluding a just cause or excuse.
>
> The word malice, as used in these instructions, is used in a technical sense. It may be either expressed or implied and includes not only anger, hatred, and revenge, but other unjustifiable motives. It may be inferred or implied by you from all of the evidence in this case if you find such inference is reasonable from the facts and circumstances in this case which have been proven to your satisfaction beyond a reasonable doubt. It may be inferred from any deliberate and cruel act done by the defendant without any reasonable provocation or excuse however sudden. Malice is not confined to ill will towards any one or more particular person, but malice is every evil design in general and by it is meant that the fact has been attended by such circumstances as ordinarily symptoms of a wicked, depraved, and malignant spirit and 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. It is sufficient if malice springs into the mind before the accused did the killing.

(App. 2753- 2754; *see also* App. 93-94) Then, almost immediately, just three pages later, the Court gave the exact same malice instruction when it recounted the elements for second-degree murder. (App. 00097-00098, 02757-02758)

This Court has previously reasoned it is possible that a "trial court's selective re-reading of instructions would unfairly prejudice the jury." *State v. Pannell*, 175 W. Va. 35, 39, 330 S.E.2d 844, 848 (1985) (addressing narrow issue of whether it was prejudicial to re-read instructions specifically requested by the jury). Courts hold that duplicative instructions are prejudicial if there was a "reasonable probability" or a "reasonable chance" that the "defendant would have achieved

a more favorable result in the absence of the error." *Mendoza v. Sullivan*, 2021 WL 310937, at *11 (C.D. Cal. Jan. 29, 2021) (citation omitted). This determination should be made by looking at, among other things, "the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict." *Id.* (citation omitted).

Looking at the duplicative malice instruction in the context of the entire case, it is clear that Mr. Hoard was prejudiced. Repeating it placed undue emphasis on the State's case. The State focused heavily on the concept of malice during its closing argument, repeatedly mentioning the term (App. 02771, 02773, 02776-02777, 02783-02784). In support of that theory, it wanted the jury to believe that Mr. Hoard was a drunk, was "out of control," was "arrogant," was a "disrupter of the peace," "wreak[ed] havoc," was "wicked," had an unhealthy attitude about firearms, and did not care about his family (App. 02772-02773, 02781, 02784, 02786).

The circuit court gave prejudicial credence to this theory when it twice instructed the jury on things like cruelty, a "wicked, depraved, and malignant spirit," and a "heart fatally bent on mischief." *See supra.* Indeed, a copy of the duplicative charge was sent back with the jury. (App. 02836-02837) In contrast, other instructions regarding Mr. Hoard's theory of the case—like self-defense and accident—were not similarly repeated to the jury. As the circuit court noted below, malice was a critical question in the case as it separated first- and second-degree murder from other lesser offenses like voluntary and involuntary manslaughter. (App. 00127)

The fact that the jury was confused about malice is evidenced by its question for "more definition of the word malice." (App. 02845) The jury convicted Mr. Hoard of second-degree murder, the lowest possible offense that contained the element of malice. (App. 02847).[5] The term was obviously a deciding factor in the jury's decision to convict Mr. Hoard.

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[5] In its contrary decision below, the circuit court reasoned that the "better approach" was to "affirmatively state the elements of each crime." (App. 00127) (quoting *State v. McGuire*, 200 W. Va. 823,

In sum, the duplicative instructions, the focus of the State's closing argument, the confused question from the jury, and the verdict itself all indicate that Mr. Hoard was prejudiced when the circuit court unduly emphasized the concept of malice. There is a reasonable probability that the outcome would have been different—at least a conviction for the lesser offense of voluntary manslaughter—in the absence of the erroneously duplicative instruction.

C. The circuit court deprived Petitioner of his rights under the state and federal constitutions when it failed to ensure the empaneling of a fair and impartial jury.

"The right to an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14, of the West Virginia Constitution." Syl. Pt. 2, in part, *State v. Dellinger*, 225 W. Va. 736, 696 S.E.2d 38 (2010). "[A] criminal defendant is entitled to insist upon a jury 'composed of persons who have no interest in the case, have neither formed nor expressed any opinion, who are free from bias or prejudice, and stand indifferent in the case.'" *Id.* at 741, 696 S.E.2d at 43 (quoting *State v. Ashcraft*, 172 W. Va. 640, 647, 309 S.E.2d 600, 607 (1983)).

Despite ample evidence of hostility in Preston County, the circuit court wrongly denied Mr. Hoard's request to conduct a change-of-venue survey, and it wrongly denied Mr. Hoard's motion to change venue. The resulting prejudice to Mr. Hoard was compounded when he was forced to use preemptory strikes on jurors that the circuit court should have stricken for cause. These errors deprived Mr. Hoard of "an impartial, objective jury."

831-32, 490 S.E.2d 912, 920-21 (1997)). But the circuit court misunderstood both the decision in *McGuire* and Mr. Hoard's argument. Unlike this case, *McGuire* involved an instruction for involuntary manslaughter that "unartfully" defined the offense by asking the jury to disregard elements of first-degree murder upon which it had already been instructed. Here, Mr. Hoard did not want the circuit court to exclude malice as an element; he merely wanted it not to give a duplicative instruction about what constitutes malice.

1. The circuit court erred when it denied Petitioner's motion for change of venue or, in the alternative, for permission to conduct a survey of Preston County residents to ascertain their level of hostility, thereby depriving Petitioner of his rights under the state and federal constitutions.

In January 2021, Mr. Hoard retained Orion Strategies to conduct media research regarding the criminal case against him. The results of that research were overwhelming. The venue in which Mr. Hoard was indicted, Preston County, has approximately 33,000 residents. (App. 00033) Orion Strategies identified 105 media stories and social media posts regarding the subject incident and criminal prosecution, which had generated a staggering 29,461 interactions "such as Comments, Likes, Shares, and Retweets." (App. 00013) Notably, the research did not capture private posts, and it did "not capture the permeation . . . by word-of-mouth," which "would likely create a significant secondary source of information." (App. 00015)

In addition to the stories, posts, and interactions outlined above, Orion Strategies located a Facebook group called "Grant Felton's Christmas for the Kids," established to benefit kids "in memory of Grant 'Goofy' Felton." This group had 778 followers, and the page had been liked by 746 users. (App. 00013). There was also evidence that the first responder building across from Terra Alta Elementary School, the town where the incident occurred, had erected a sign stating "We Stand Felton Strong" following the incident. (App. 00010, 00020).

Due to the reasonable assumption that many, if not all, county residents had heard of the case and had a hostile sentiment toward Mr. Hoard, he moved for a change of venue, or in the alternative, to conduct a telephonic survey of 300 residents—less than 1% of Preston County—to gather evidence in support of his request. (App. 00009-00011)

At the hearing on that motion, Mr. Hoard presented additional compelling evidence of the hostility against him. (App. 00038-00075) For example, users on Facebook had said:

- "THERE IS NO JUSTIFICATION IN WHAT YOU DID" (App. 00038);
- The shooting was premediated (App. 00038-00039);

- Mr. Hoard is a "POS," "piece of s***," "coward," "F***ing coward," "little b****," "p****," "scumb bag," and "murderer" (App. 00039-00040, 00045-00046, 00050, 00052);
- People would "tear him apart" at a Preston County trial (App. 00041);
- Everyone "knows what happened" and "wouldn't be good jurors" (App. 00041);
- "[H]e needs to get the worst punishment" (App. 00041);
- Deactivating his Facebook account was evidence of guilt (App. 00044);
- Mr. Hoard had "senselessly" and "callously" taken life (App. 00049);
- They "hope one of our redneck Preston County people get him" before law enforcement, and "[h]e is lucky he has been found by the police instead of this town" (App. 00058, 00060);
- They hope he "rot[s] in hell" (App. 00058)
- "I hope he gets jumped in prison" (App. 00063); and
- "Hang him he is one sick guy" (App. 00064).

The State opposed a change of venue but did not oppose a survey (App. 00029).

Nonetheless, the circuit denied the motion in its entirety. It found only that the "case has generated some publicity." (App. 00028) The circuit court indicated that it "had not been shown that a present hostile sentiment exists," and it denied the request for a survey because it was "concerned that a telephone survey [would] taint the jury." More particularly, it worried that anyone from whom a survey response was sought could search "murder" and "Preston County" thereafter and discovery information about the case, "possibly form[ing] opinions or hostility." (App. 00033-00034) This ruling prejudiced Mr. Hoard and deprived him of his constitutional rights to the effective assistance of counsel and an unbiased and impartial jury.

a. The standard for change of venue.

To protect the constitutional right to a fair and impartial jury, the *West Virginia Rules of Criminal Procedure* contemplate transfer from the county of indictment:

> **For prejudice in the county of indictment.** — The circuit court upon motion of the defendant shall transfer the proceedings as to that defendant to another county if the circuit court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he or she cannot obtain a fair and impartial trial at the place fixed by law for holding the trial.

W. Va. R. Crim. P. 21(a); *see also* W. Va. Code § 62-3-13. As this Court has held:

> To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests upon defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused.
>
> . . .
>
> A present hostile sentiment against an accused, extending throughout the entire county in which he is brought to trial, is good cause for removing the case to another county.
>
> . . .
>
> One of the inquiries on a motion for a change of venue should not be whether the community remembered or heard the facts of the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt or innocence of the defendant.

Syl. Pts. 1 – 3, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994) (quotation and citation omitted). To determine whether an abuse of discretion occurred in a pretrial ruling on venue, the Court also considers "actual voir dire." *Id.* at 171, 451 S.E.2d at 737.

b. The circuit court denied Petitioner his right to the effective assistance of counsel when it rejected his request to conduct a survey.

"The Sixth Amendment guarantees the accused in all criminal prosecutions the right to . . . the 'Assistance of Counsel.'" *Herring v. New York*, 422 U.S. 853, 856-57 (1975). A deprivation occurs where there is "actual or constructive denial of the assistance of counsel altogether," "state interference with the ability of counsel to render effective assistance," or counsel does not provide reasonably effective assistance. *Strickland v. Washington*, 466 U.S. 668, 683-84 (1984).

Claims regarding "ineffective assistance of counsel are" typically "governed by the two-pronged test established in *Strickland v. Washington.*" There is constitutional error if counsel's performance was objectively unreasonable and made it reasonably probable that the result would have been different but for the errors. Syl. Pt. 1, *State v. Frye*, 221 W. Va. 154, 650 S.E.2d 574

(2006). But the Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage." *United States v. Cronic*, 466 U.S. 648, 659 & n.25 (1984) (collecting cases).

"Section 14 of Article III of the West Virginia Constitution and the Sixth Amendment to the United States Constitution guarantee the right to counsel . . . at critical stages" of "the adversary proceedings." Syl. Pt. 5, *State ex rel. Bess v. Legursky*, 195 W. Va. 435, 465 S.E.2d 892 (1995) (citation omitted). "A critical stage of a criminal proceeding is where the defendant's right to a fair trial will be affected." *State ex rel. Myers v. Painter*, 213 W. Va. 32, 37, 576 S.E.2d 277, 282 (2002) (quoting Syl. Pt. 2, *State v. Tiller*, 168 W. Va. 522, 285 S.E.2d 371 (1981)). Empaneling of an unbiased jury is undoubtedly a critical stage. *See, e.g.*, *James v. Harrison*, 389 F.3d 450, 456 (4th Cir. 2004) (citing *Gomez v. United States*, 490 U.S. 858, 873 (1989)) ("[V]oir dire and jury selection proceedings constitute a critical stage of the trial.").

Here, a constructive denial of counsel occurred when the circuit court prevented counsel from even investigating hostility to inform the critical stage of empaneling a jury.[6]

There simply is no reasonable explanation for the circuit court's decision to forbid a change-of-venue survey.[7] The evidence submitted with the motion demonstrated the possibility, if not the plain existence, of "a community with sentiment so poisoned against [Mr. Hoard] as to impeach the indifference of jurors who displayed no animus of their own." *Derr*, 192 W. Va. at

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[6] An ineffective assistance of counsel claim "is generally not ripe for direct appellate review" because the record is normally not clear regarding "that which motivated trial counsel to act as they did." The best course of action is typically to develop the record of ineffective assistance in a habeas corpus proceeding. *State v. Hutchinson*, 215 W. Va. 313, 323, 599 S.E.2d 736, 746 (2004). Here, the record is clear that counsel wanted to conduct a survey to fulfill her role in a critical stage, and the record is equally clear that the circuit court prevented her from doing so. The record need not be developed further.

[7] In fact, the circuit court did not even appear to believe its own stated reason of preventing a tainted jury pool. The majority of jurors had heard of the case, and many were not stricken. Some jurors who were personally acquainted with witnesses were not even excused by the circuit court. It simply makes no sense that the circuit court forbade counsel from investigating community hostility based on its speculation that someone might search the internet after taking part in the survey.

172, 451 S.E.2d at 738 (citing *Murphy v. Florida*, 421 U.S. 794, 803 (1975)). The comments on social media regarding Mr. Hoard were venomous and indicated that members of the small community had not only made up their mind about the case but also wished harm on Mr. Hoard that could not be accomplished by the criminal justice system. (App. 00038-00075)

Coupled with the extensive internet activity—nearly as many interactions as residents in the county—effective representation needed to involve investigation of the potential for overwhelming animus and hostility. As in every case, a critical stage involved ensuring that he had "an impartial, objective jury" as was his constitutional right. Syl. Pt. 2, in part, *Dellinger*, 225 W. Va. 736, 696 S.E.2d 38. The circuit court denied counsel the opportunity to investigate evidence that such a jury could not be empaneled, regardless of whether *voir dire* appeared to produce unbiased jurors. This decision impaired counsel's ability to "competently investigate the circumstances" and discover "a more substantial basis for challenging venue." *State ex rel. Bess v. Legursky*, 195 W. Va. 435, 441, 465 S.E.2d 892, 898 (1995).[8]

The circuit court's decision is doubly confounding because it goes against typical practice. Gathering affidavits and conducting surveys is a mainstay of evidence that counsel investigates, making it a hallmark of reasonable representation where community hostility is concerned. *See, e.g.*, *Meadows v. Mutter*, 243 W. Va. 211, 228, 842 S.E.2d 764, 781 (2020) (survey); *State v. Skeens*, 233 W. Va. 232, 236, 757 S.E.2d 762, 766 (2014) (survey); *State v. Blevins*, 231 W. Va. 135, 145-46, 744 S.E.2d 245, 255-56 (2013) (survey); *State v. Horton*, 203 W. Va. 9, 18, 506 S.E.2d 46, 55 (1998) (survey); *State v. Doman*, 204 W. Va. 289, 292-93, 512 S.E.2d 211, 214-15 (1998) (survey); *State v. Derr*, 192 W. Va. 165, 171, 451 S.E.2d 731, 737 (1994) (considering

[8] For these same reasons, there would still be a constitutional violation even if the two-prong *Strickland* test applied. Syl. Pt. 4, *State ex rel. Bess v. Legursky*, 195 W. Va. 435, 465 S.E.2d 892 (1995) (reasoning that presumption of reasonableness does not apply if counsel made inadequate investigation).

affidavits submitted by both parties); *State v. Beegle*, 188 W. Va. 681, 683-84, 425 S.E.2d 823, 825-26 (1992) (survey); *State v. Lassiter*, 177 W. Va. 499, 501, 354 S.E.2d 595, 597 (1987) (survey); *State v. McFarland*, 175 W. Va. 205, 213, 332 S.E.2d 217, 225-26 (1985) (survey); *State v. Zaccagnini*, 172 W. Va. 491, 494-95 (1983) (affidavits).

To summarize, the circuit court improperly denied Mr. Hoard's venue motion and prevented his attorney from conducting a reasonable investigation. Prejudice is presumed from this deprivation at a critical stage, and the conviction must be vacated.

2. The circuit court erred during *voir dire*, including when it denied Petitioner's motion to strike jurors for cause, thereby depriving Petitioner of his rights under the state and federal constitutions.

After indicating that it would assess potential juror bias during the *voir dire* process, the circuit court simply ignored a multitude of indicators of bias and seated a jury that was not fair or impartial. "The right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14 of the West Virginia Constitution. A meaningful and effective *voir dire* of the jury panel is necessary to effectuate that fundamental right." Syl. Pt. 4, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994) (citation omitted). "The official purpose[ ] of *voir dire* is to elicit information which will establish a basis for challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges." Syl. Pt. 3, *State v. Dellinger*, 225 W. Va. 736, 696 S.E.2d 38 (2010) (citation omitted).

"Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror had such prejudice or connection with the parties at the trial that bias is presumed." Syl. Pt. 1, *State v. Sutherland*, 231 W. Va. 410, 745 S.E.2d 448 (2013) (internal citations omitted). "In conducting *voir dire*, judges cannot rehabilitate a prospective juror who shows bias or prejudice simply by asking the 'magic question': 'After you hear the evidence and

my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law?'" § 6:13. Challenges For Cause, Trial Handbook for West Virginia Lawyers (citing *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002)). "A fair and impartial trial by jury can only be ensured by removing, for cause, prospective jurors who have experiences or attitudes that indicate a significant potential for prejudice in the matter at trial. Accepting such jurors' statements, that they can set aside their biases and be fair, creates the great risk of seating biased jurors, and clear appearance of prejudice to a party." *O'Dell*, 211 W. Va. at 288-89, 565 S.E.2d at 410-11.

While this Court has held that a "trial court's failure to remove a biased juror from a jury panel . . . does not violate a criminal defendant's right to a trial by an impartial jury if the defendant removes the juror with a peremptory strike[,]" a new trial may be warranted where the defendant shows that he has suffered prejudice from the court's failure to properly remove a juror. *State v. Sutherland*, 231 W. Va. 410, 745 S.E.2d 448 (2013).

Here, the circuit court erroneously denied four motions to strike potential jurors for cause. The four jurors that the court refused to strike each had connections, in some cases familial connections, with key witnesses in the case and had prior knowledge of the case from media sources or community discussion. These facts show that these jurors were not fair and impartial, and thus were not able to provide Mr. Hoard with a trial free from undue bias.

First, the circuit court denied Mr. Hoard's motion to strike Juror No. 1[9], who was not only familiar with the case, but had personal interactions with Grant Felton's family after the shooting. (App. 00281) Juror No. 1 explained that she had made "prayer quilts" for Grant Felton's widow and his parents, visited them, and prayed with them after the shooting occurred. (App. 00281,

[9] For clarity and privacy of the prospective jurors, Mr. Hoard will refer to the jurors subject to the motions by the number on their strike sheet and in the post-trial motions and order. (App. 00117)

00294) In response to questioning about how those interactions may affect her ability to render an unbiased verdict, Juror No. 1 simply stated that she "would hope" she could put aside bias, but she "[couldn't] say for sure." (App. 00294) Juror No. 1's nephew, Jason Peaselee, was the owner of Shorthorn's bar and one of the State's main witnesses. (App. 00271) Juror No. 1 also recalled reading that Mr. Hoard turned himself in after the shooting, and she believed he did so upon advice of his mother. (App. 00297) Despite these intimate connections and prior knowledge of the case, the circuit court refused to grant Mr. Hoard's motion to strike Juror No. 1 for cause, and Mr. Hoard was forced to use a preemptory strike to remove Juror No. 1 from the venire. (App. 00117)

Likewise, Juror No. 24 indicated that she was familiar with the case, and reported that she was friends with Michael Felton and his wife. (App. 00439-00442) Michael Felton was a witness for the State and was part of the aggressive crowd that was violent with Mr. Hoard and his companion, Brian Teets, on the night of the shooting. Mr. Felton's wife was an employee at Shorthorns. (App. 00117) During individual *voir dire*, Juror No. 24 referred to the Felton family as "big shots" in the community. (App. 00450) Despite these connections, the circuit court again denied Mr. Hoard's motion to strike.

Mr. Hoard also challenged the circuit court's denial of his motion to strike Juror No. 21. (App. 00117-00118) Juror No. 21 admitted that she had read about the case on social media before the trial and that her family members' band had performed at Shorthorns a few nights before. (App. 00400, 00405-00406) She also knew two of the law enforcement officers involved in the case. *Id.* As explained in detail above, the social media response to Mr. Hoard after the shooting was swift, vicious, and pervasive. Despite Juror No. 21's admission that she engaged with social media posts regarding the case, the circuit court denied Mr. Hoard's motion to strike. Similarly, Juror No. 34 had knowledge of the incident and was familiar not only with Michael Felton, but also with two

law enforcement officers involved in the case and Megan Fields, the assistant prosecuting attorney representing the State of West Virginia on the case. (App. 00117).

Mr. Hoard moved to strike these jurors based on the express or implicit biases that were revealed during the *voire dire* process, but the circuit court denied these motions and allowed these jurors to remain on the venire. While Mr. Hoard exercised his preemptory strikes to remove these particular individuals from the jury that ultimately decided the case, he was prejudiced by the circuit court's erroneous failure to grant his motions.

Mr. Hoard was prejudiced because even after exercising his preemptory strikes, he was unable to strike every juror who had prior knowledge about the case or a connection to the key witnesses or the victim's family. The prejudice to Mr. Hoard began when the circuit court denied him his right to survey the potential jurors, and by denying his change of venue motion even when *voir dire* revealed pervasive bias against him. The prejudice continued when the court denied Mr. Hoard's motions to strike for cause, and ultimately a hostile, biased jury was seated. Therefore, because Mr. Hoard's well-founded, legitimate motions to strike biased jurors were denied by the circuit court, and because he was prejudiced by their presence on the venire, Mr. Hoard's constitutional rights were violated, and a new trial is warranted. As discussed in more detail below, even if this Court finds that the circuit court's error in denying Mr. Hoard's motions to strike was not prejudicial in and of itself, the error is one of many that had the cumulative effect of denying Mr. Hoard his right to a fair trial.

D. The circuit court erred when it denied Petitioner's motion for judgment of acquittal because the cumulative errors denied Petitioner his constitutional right to a fair trial.

Even if the Court determines the above errors are harmless standing alone—which they are not—the conviction nonetheless must be set aside because the numerous errors prevented Mr. Hoard from receiving a fair trial, thus depriving him of his constitutional right.

"Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." Syl. Pt. 7, *State v. Tyler G.*, 236 W. Va. 152, 778 S.E.2d 601 (2015) (citation omitted). One or two errors are not "numerous," and numerous errors must be more than "insignificant or inconsequential." *Id.* at 166, 778 S.E.2d at 614; *but see United States v. Martinez*, 277 F.3d 517, 532 (4th Cir. 2002).

But the cumulative error doctrine should be used when qualifying errors were objected to below and "are apparent from the record." *State v. Peterson*, 239 W. Va. 21, 35, 799 S.E.2d 98, 112 (2017). Although sparingly applied, this Court has used the cumulative error doctrine when warranted. *See, e.g.*, *State v. Wilson*, 157 W. Va. 566, 571, 202 S.E.2d 828, 832 (1974); *State v. Harr*, 156 W. Va. 492, 500, 194 S.E.2d 652, 657 (1973) (concluding that errors "deprive[d] the trial and the attendant proceedings of the appearance of evenhanded justice which is at the core of due process, and without which the defendant cannot be afforded a fair trial"); *State v. Smith*, 156 W. Va. 385, 391, 193 S.E.2d 550, 554 (1972); *cf. State v. Foster*, 221 W. Va. 629, 645, 656 S.E.2d 74, 90 (2007) (rejecting cumulative error argument because there was "no instructional error, no error in failing to strike jurors for cause, and no ineffective assistance of counsel").

Here, the errors were numerous, significant, and consequential, such that the trial completely lacked "the appearance of evenhanded justice" to which Mr. Hoard was

constitutionally entitled. Errors of constitutional magnitude occurred throughout the proceeding, as the State and circuit court undermined the fairness of Mr. Hoard's trial at every step.

The circuit court began the pattern of deprivation when it prevented counsel from investigating whether community hostility was pervasive enough to warrant a change of venue. The shaky foundation upon which the jury stood was further undermined when the circuit court denied justified motions to strike for cause, forcing Mr. Hoard to use preemptory strikes.

Then, the State used Mr. Hoard's silence against him repeatedly during the trial, commenting in its opening statement and cross-examining Mr. Hoard about his silence pre-arrest and pre-*Miranda*, as well as post-arrest and post-*Miranda*. This behavior had its intended effect, undercutting the defenses of self-defense and accident.

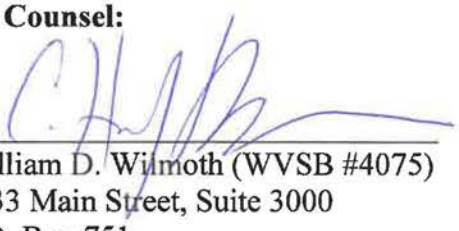
The final blow came when the circuit court erroneously instructed the jury. It allowed the jury to consider crimes that required intent despite the absence of supporting evidence. It refused to give fulsome instructions on self-defense that would have allowed Mr. Hoard to present his case. And it repeated the instruction on malice, giving undue credence to the State.

Taken together, the errors throughout the trial deprived Mr. Hoard of his right to an "evenhanded" proceeding. The Court should vacate Mr. Hoard's conviction because the cumulative effect of the errors made the trial unfair.

VI. CONCLUSION

For the reasons set forth above, multiple reversible errors occurred during the trial of this matter that denied Aaron Hoard his constitutionally protected right to a fair trial. Each of these errors warrants reversal, and most certainly, the cumulative effect of the errors resulted in an unconstitutional conviction which cannot stand. Mr. Hoard respectfully requests that this Court reverse his conviction, vacate his sentence, and remand the case for a new trial.

AARON GLENN HOARD,
By Counsel:



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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February 2022, a true and accurate copy of the foregoing "**Petitioner's Brief**" was deposited in the U.S. Mail, contained in a postage-paid envelope, and addressed to counsel for all other parties to this appeal as follows:

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