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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

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Plaintiff Below, Respondent

v.

Supreme Court No.: 21-0943
Case Nos.: 21-F-130, 21-F-156 & 20-B-244
Fayette County, West Virginia

TIMOTHY MAICHLE,

Defendant Below, Petitioner.

PETITIONER'S BRIEF

GARY A. COLLIAS
West Virginia State Bar #784
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
gary.a.collias@wv.gov

Counsel for Petitioner

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ASSIGNMENT OF ERROR

The circuit court erred in failing to grant the Petitioner's pretrial motion to dismiss the malicious assault count of the indictment for the reason that it did not allege "intent to maim, disfigure, disable or kill," since said intent is an essential element of the offense.

STATEMENT OF THE CASE

The Petitioner Timothy R. Maichle was tried by jury and convicted in Fayette County circuit court of the offenses of "attempted murder in the second degree" in violation of W.Va. Code §§ 61-11-8 and 61-2-1, "malicious assault" in violation of W.Va. Code § 61-2-9, and "third offense domestic battery" in violation of W.Va. Code § 61-2-28(d). A.R. 557-58, 654-59, 675-77. Petitioner was sentenced to one to three years for the attempted second degree murder, four to ten years for malicious assault, and one to five years for the domestic battery. A.R. 604-05, 675-77, 678-83. The sentence for malicious assault was increased from the normal two to ten years to four to ten years as the result of a recidivist proceeding on that count of conviction pursuant to W.Va. Code §§ 61-11-18 and 19. A.R. 604-05, 662-64, 680-81. All sentences were imposed consecutively by the circuit court resulting in an effective sentence of six to eighteen years. A.R. 604-05, 675-77, 680-81.

The Petitioner was indicted on May 11, 2021. A.R. 609-10. On June 8, 2021, the Petitioner filed a "Motion To Dismiss Count 2" of the indictment, that being the malicious assault count. A.R. 612. Petitioner argued, among other things, that the indictment was deficient as to Count Two "because the element of 'intent to maim, disfigure, disable, or kill' is not present in Count 2" and that the "statutory requirements of malicious assault are not met by the language contained in Count 2 of the indictment." A.R. 612. Count Two of the indictment read as follows:

And the Grand Jurors, upon their oaths aforesaid, do further present that TIMOTHY R. MAICHLE, or about the 9TH day of September, 2020, in the said County of Fayette, committed the offense of "malicious assault" in that he did

unlawfully, intentionally, feloniously, and maliciously wound Amanda Maichle, by pushing her from a moving motor vehicle, against the peace and dignity of the State.

A.R. 609. The malicious assault and unlawful assault statute reads as follows:

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. If the act is done unlawfully, but not maliciously, with the intent aforesaid, the offender is guilty of a felony and, upon conviction thereof, shall either be imprisoned in a state correctional facility not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding \$500.

W.Va. Code § 61-2-9(a). Absent from Count Two of the indictment was the language “with intent to maim, disfigure, disable or kill.”

The State filed a response to the motion to dismiss Count Two. A.R. 614. The State argued that malicious assault could be committed one of two ways. “First, if a defendant maliciously shoots, stabs, or wounds any person.” A.R. 616. Second, it can be violated “if a defendant maliciously and by any means causes another person bodily injury with the intent to maim, disfigure, disable or kill.” A.R. 616. It was the position of the State that as long as the indictment alleged that the Petitioner maliciously wounded Amanda Maichle it was not necessary that the indictment allege intent to maim, disfigure, disable or kill.

A hearing on pretrial motions was held on June 29, 2021. A.R. 62. The motion to dismiss Count Two of the indictment was argued by the parties. A.R. 80-84. The State argued that Count Two was sufficient because the element of “intent to maim, disfigure, disable or kill” was not necessary as long as the indictment alleged that the accused maliciously wounded the victim. A.R. 81-83. The circuit court erroneously agreed with the State and denied the motion to dismiss Count Two. A.R. 84. An order denying the motion and agreeing with the reasoning of the State

was entered on July 14, 2021. A.R. 620. The court again denied the motion to dismiss Count Two in a post-trial order. A.R. 655.

Petitioner's jury trial commenced on August 18, 2021. A.R. 97. While the court was taking up preliminary trial matters the Petitioner moved the court to reconsider its earlier ruling not dismissing Count Two because of the missing "intent to maim, disfigure, disable or kill" language. A.R. 112. The State made the same argument that "intent to maim, disfigure, disable or kill" was not a proper element of malicious assault as alleged in Count Two of the indictment. A.R. 113. The court once again agreed with the State. A.R. 114.

The evidence at trial is not essential to the legal issues presented in this appeal, but briefly was as follows. The Petitioner and his wife Amanda Maichle were riding on Route 60 in Fayette County on September 9, 2020. A.R. 372-77. The Petitioner was driving, and his wife was in the front passenger seat. A.R. 375. They were arguing. A.R. 377-81. Mrs. Maichle asked the Petitioner to stop the vehicle and let her out. A.R. 380. He slowed down the vehicle. A.R. 381. She unbuckled her seat belt, turned her body toward the car door. A.R. 381. Mrs. Maichle testified the Petitioner then pushed her out the door. A.R. 381-82. The Petitioner maintained that she jumped from the vehicle in an audio statement that was played for the jury and came into evidence. A.R. 686-87 (Defendant's Exhibit 15 digital audio file on disk at A.R. 711.). Mrs. Maichle was severely injured by falling from the vehicle and by having her legs run over by the right rear wheel of their vehicle. A.R. 383-85. A paramedic testified that he believed she may have said she jumped from the vehicle. A.R. 419-20. At Charleston Area Medical Center Mrs. Maichle stated that she jumped from the vehicle. A.R. 231, 236-38, 255, 258, 715, 725, 727, 738. On September 28, 2020, she gave a statement to police indicating that

the Petitioner pushed her out of the vehicle but that she was not sure if he did it intentionally. A.R. 385-86.

Over the objection of the Petitioner, and after rejecting the proposed instruction of the Petitioner, the circuit court gave the State's jury instruction that did not include the element of intent to maim, disfigure, disable or kill for either malicious assault or unlawful assault. A.R. 488-95, 514-16, 643-646.

The jury returned a verdict of guilty on the malicious assault count and the third offense domestic battery charge, but only convicted the Petitioner of the lesser included offense of attempted second degree murder. A.R. 557-58, 654-56, 675-77. The State filed a second offense recidivism information pursuant to W.Va. Code §§ 61-11-18 and 19 seeking to double the minimum sentence for the most serious of the Petitioner's convictions., that is, the malicious assault count. A.R. 662. The Petitioner filed a motion for a new trial. A.R. 666. That motion sought a new trial, for among other reasons, because the language "with intent to maim, disfigure, or kill" was missing from Count Two of the indictment. A.R. 666-67. The State filed a response to the motion for new trial. A.R. 668. The State advanced the same argument as before noting that the court twice before heard the Petitioner's argument regarding Count Two and rejected it on both occasions. A.R. 669.

The Petitioner was arraigned on the recidivist information. A.R. 567. He admitted that he was the same person convicted of the predicate felony offense. A.R. 576. A sentencing hearing took place on October 4, 2021. A.R. 580. During this hearing the Petitioner once again argued the motion to dismiss Count Two because of the missing language concerning "intent to maim, disfigure, disable or kill." A.R. 587-88. The State again argued that that language was not an element of malicious assault as charged and the court once again agreed and denied the

motion for new trial. A.R. 588-90. Based upon the recidivist information the court doubled the minimum sentence for malicious assault, from two to ten years to four to ten years imprisonment. A.R. 604-05. The court then imposed a sentence of one to three years for attempted second degree murder, four to ten years for malicious assault and one to five years imprisonment for third offense domestic battery, with all sentences to be served consecutively. A.R. 604-05, 675-77, 680-81.

The circuit court entered a final order denying the motion for new trial and sentencing the Petitioner on October 20, 2021. A.R. 678. In this order the court again adopted the reasoning of the State that intent to maim, disfigure, disable or kill was not a necessary element of malicious assault and set forth the sentence as described in the above paragraph. It is from this final order of the circuit court that the Petitioner brings this appeal.

The Petitioner is not asserting any issues or errors with regard to his convictions or sentences for attempted second degree murder or third offense domestic battery. The Petitioner is also not asserting any error with regard to the recidivist proceeding or his sentence for malicious assault. As set forth above in the Assignment of Error, the Petitioner is only alleging error with regard to his indictment and conviction for malicious assault.

SUMMARY OF ARGUMENT

The circuit court erred when it denied Petitioner's pretrial motion to dismiss Count Two of the indictment that alleged malicious assault because it did not contain the essential element of the "intent to maim, disfigure, disable or kill." At least five West Virginia cases are directly on point and stand for the proposition that "intent to maim, disfigure, disable or kill" is an essential element of this offense. *State v. Combs*, 166 W.Va. 149, 151, 280 S.E.2d 809, 810 (1980); *State v. Stalnaker*, Syl. Pt. 3, 138 W.Va. 30, 76 S.E.2d 906 (1953); *McComas v. Warth*, 113 W.Va.

163, ___, 167 S.E. 96, 96-97 (1932, rehearing denied 1933); *State v. Taylor*, Syl. Pt. 3, 105 W.Va. 298, ___, 142 S.E. 254, 256 (1928) and *State v. Meadows*, 18 W.Va. 658, 668-69 (1881). There are no cases holding otherwise. Even the stock instructions of both the West Virginia Prosecuting Attorneys Institute and West Virginia's Public Defender Services provide that the jury must be instructed that intent to maim, disfigure, disable or kill is an element of malicious assault. See Exhibits C and D attached, respectively.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests a Rule 19 oral argument, as counsel believes that a Rule 19 oral argument would be helpful to the Court and this case presents a fundamental question of what the elements are of a commonly prosecuted statute. The interpretation of the elements of malicious assault by the circuit court, that is the subject of this appeal is inconsistent with settled law as to how this statute has been understood in case law from at least 1881 to the present. Furthermore, the circuit court's decision as to the elements of malicious assault is inconsistent with the stock jury instructions of both West Virginia Public Defender Services and the West Virginia Prosecuting Attorneys Institute that are used on a daily basis in circuit courts throughout West Virginia.

ARGUMENT

The circuit court erred in failing to grant the Petitioner's pretrial motion to dismiss the malicious assault count of the indictment for the reason that it did not allege "intent to maim, disfigure, disable or kill," since said intent is an essential element of the offense.

STANDARD OF REVIEW: This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*." *State v. Grimes*, Syl. Pt. 1, 226 W.Va. 411, 701 S.E.2d 449 (2009); *State v. Johnson*, Syl. Pt. 1, 219 W.Va. 697, 639 S.E.2d 789 (2006) and *State v. Miller*, Syl. Pt. 2, 197 W.Va. 588, 476 S.E.2d 535 (1996).

The issue presented is straight forward. Do all convictions for malicious assault under W.Va. Code § 61-2-9(a) require the element of “intent to maim, disfigure, disable or kill” to be included in the indictment? The court below ruled in the negative. The Petitioner, history, case law, and the statute itself disagree. Code § 61-2-9(a) in reads as follows:

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. If the act is done unlawfully, **but not maliciously, with the intent aforesaid**, the offender is guilty of a felony and, upon conviction thereof, shall either be imprisoned in a state correctional facility not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding \$500. [emphasis added]

It was the position of the State and the ruling of the circuit court that there are two ways of indicting and violating under this statute. The first is by the State indicting that the accused:

- **maliciously shoots, stabs, cuts or wounds any person.**

In the present case the State only alleged that the Petitioner maliciously wounded Amanda Maichle. This is how the Petitioner was indicted. A.R. 514-16, 609. The second way of violating and indicting under this statute according to the State and the circuit court is if the accused:

- **by any means cause ... bodily injury with intent to maim, disfigure, disable or kill.**

The question then is whether the “intent to maim, disfigure, disable or kill” is an essential element of malicious assault even when the defendant is accused of maliciously shooting, stabbing, cutting or wounding the victim, or whether when a defendant maliciously shoots, stabs, cuts or wounds a person no such intent is necessary to qualify as the felony of malicious assault, and therefore the indictment need not allege any such intent.

A. The lesser included offense.

In addition to the history and case law concerning this statute set forth below, there is a profound problem with the State's and circuit court's interpretation of this statute presented by the statute itself. W.Va. Code § 61-2-9 is titled "Malicious and unlawful assault; assault; battery; penalties." The second sentence of subsection (a) of § 61-2-9, which is block quoted in its entirety above, provides that "[i]f the act is done unlawfully, *but not maliciously, with the intent aforesaid*, the offender is guilty..." of the lesser included felony of unlawful assault. Obviously, the difference between the lesser included offense of unlawful assault and malicious assault is that malicious assault requires the element of malice, while unlawful assault does not. That is why it is a lesser included offense. Lesser included offenses, by definition, "are composed of some, but not all, of the elements of the greater crime, and [do] not have any element not included in the greater offense," in this case, malicious assault. Black's Law Dictionary, 5th Ed., definition of "lesser included offense." In no case can a lesser included offense contain any additional elements that are not present in the greater offense. In all cases a person who is guilty of the greater offense of malicious assault must logically also be guilty of unlawful assault. This, however, presents a problem to the State's and circuit court's position as to the elements of malicious assault. The second sentence of § 61-2-9(a) block quoted above also provides that in order to be guilty of the lesser included offense of unlawful assault a person must act "with the intent aforesaid." The only "intent" that is "aforesaid" in the first sentence of § 61-2-9(a) is the "intent to maim, disfigure, disable or kill." That means that all persons that are guilty of unlawful assault must have the "intent to maim, disfigure, disable or kill." Therefore, even if an accused "maliciously shoots, stabs, cuts or wounds" a person he must have the "intent to maim, disfigure, disable or kill." Otherwise, the lesser included offense of unlawful assault would have an element not necessarily present in the greater offense of malicious assault, and it would be

possible to be guilty of the greater offense of malicious assault without necessarily being guilty of the lesser included offense of unlawful assault. The inescapable conclusion is that all indictments and convictions for both malicious assault and its lesser include offense of unlawful assault require the element of “intent to maim, disfigure, disable or kill.”

B. History of the malicious assault statute.

West Virginia’s malicious assault statute can be traced back to the British Offences Against the Person Act of 1828. 9 George IV, chapter XXXI [31], section XII [12]. See *State v. Gibson*, 67 W.Va. 548, ___, 68 S.E. 295, 295-96 (1910); *State v. Coontz*, 94 W.Va. 59, ___, 117 S.E. 701, 703 (1923) and *Harris v. Commonwealth*, 150 Va. 580, 583, 142 S.E. 354, 355 (1928). For the convenience of the Court a copy of this 1828 British statute is attached to this brief as Exhibit A. The pertinent language appears in section XII [12] on pages 103-04 and reads as follows:

And be it further enacted, That if any Person unlawfully and maliciously shall shoot at any Person, or shall, by drawing a Trigger, or in any other Manner, attempt to discharge any Kind of loaded Arms at any Person, or *shall unlawfully and maliciously stab, cut or wound any Person, with Intent, in any of the Cases aforesaid, to maim, disfigure, or disable such Person*, or to do some other grievous bodily Harm to such Person, or with Intent to resist or prevent the lawful Apprehension or Detainer of the party so offending ... shall be guilty of felony [emphasis added]

The plain language of this British statute expressly provides that the malicious wounding of a person requires the element of intent to maim, disfigure or disable in order to be a felony.

By 1860 the language from the 1828 British statute was adopted by the Commonwealth of Virginia. By that year the Virginia malicious assault statute read as follows:

If any free person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury, with intent to maim, disfigure, disable or kill, he shall, except where it is otherwise provided, be punished by confinement in the penitentiary not less than one, nor more than ten years.

Va. Code 1860, chapter CXCI [191], section 9. See *Harris v. Commonwealth*, 150 Va. 580, 583, 142 S.E. 354, 355 (1928). For the convenience of the Court a copy of this 1860 Virginia statute is attached to this brief as Exhibit B. The pertinent language appears in section 9 on page 784. This Virginia statute is in all relevant respects identical to the present West Virginia Statute.

West Virginia separated from Virginia in 1863. The West Virginia Constitution provided in Article VIII, § 13 that laws in effect on the adoption of the Constitution remained the law of West Virginia. Thus, the Virginia malicious assault statute became the law of West Virginia.

By 1881 what was the Virginia malicious assault statute was now located in what was Section 9 of Chapter 144 of the West Virginia Code and read as follows:

If any person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury, with intent to maim, disfigure, disable or kill, he shall ... be punished by confinement in the penitentiary not less than two nor more than ten years.

Once again, the statute for all relevant purposes was identical to today's version and the earlier Virginia statute. In 1881 this Court decided the case of *State v. Meadows*, 18 W.Va. 658 (1881), that involved a shooting, in which the statute was quoted and interpreted with regard to the very same issue that is now before this Court in the present appeal. *Id.* at 660. The *Meadows* Court expressly ruled with regard to the malicious assault statute that:

The essence and gist of the statutory offence is the intent with which the act may be done. If any of the acts be done, the party may be liable as for a common law offence, but without the intent, as laid down in the statute, there could be no conviction under the statute. The intent mentioned in the statute must be "to maim, disfigure, disable or kill," not any other intent. Under this statute proof of intent to rob, to commit a rape, or any other offence known to the law except to "maim, disfigure, disable or kill," would not satisfy the terms of the statute.... [A]ccording to the express language of both the sections of this statute, the prohibited acts must be committed with "intention to maim, disfigure, disable or kill."

Id. at 668-69. The *Meadows* Court continued:

A person might do any of the acts with intent to do *less* bodily harm than to “maim, disfigure, disable or kill,” which are made felony; and under these instructions, be convicted of felony for a mere misdemeanor.

Id. at 669. What the *Meadows* Court was saying is that maliciously shooting, stabbing, cutting or wounding a person is only a misdemeanor without the “intent to maim, disfigure, disable or kill.” The *Meadows* decision is directly on point and makes it clear that the element of the “intent to maim, disfigure, disable or kill” is an essential element of all malicious assault cases and the defendant must be indicted accordingly.

From the time of the *Meadows* decision in 1881 to the present, the West Virginia malicious assault statute was amended in 1882, 1978, 2004, 2014 and 2017. None of these changes affect the issue before this Court. W.Va. Code § 61-2-9(a) now reads, [i]f 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....” There has been no relevant substantive change since 1881. The only changes are the adding the feminine pronouns “her” and “she” and putting the letter “s” at the end of the words “shoot,” “stab,” “cut,” and “kill.” The offense of “malicious assault” is sometimes referred to as “malicious wounding” in the case law and in this brief and the lesser included offense of “unlawful assault” is sometimes referred to as “unlawful wounding.”

In *State v. Taylor*, 105 W.Va. 298, 142 S.E. 254 (1928) this Court revisited the issue of the intent necessary to violate the West Virginia malicious assault statute then still located at section 9 of chapter 144 of the Code. While this case dealt with a conviction for the lesser included offense of unlawful wounding under the statute, it involved the same issue of the intent necessary to be convicted. If intent to maim, disfigure or disable is an element of the lesser included offense it would also have to be an element of the greater offense of malicious assault.

The indictment indicated and the jury was instructed that intent to maim, disfigure, disable or kill was necessary to convict. The issue before the Court was whether there must be intent to *permanently* maim, disable or disfigure. *State v. Taylor*, 105 W.Va. at ___, 142 S.E. at 256. This Court answered this question in the affirmative. *State v. Taylor*, Syl. Pt. 3. The *Taylor* case stands for the proposition that not only do all indictments for malicious assault and the lesser included offense of unlawful wounding require the “intent to maim, disfigure, disable or kill,” but that that intent must be to do so permanently.

While only persuasive authority, there is a Virginia case that deals with the same issue of the intent required for a conviction under the then existing Virginia maiming act. In *Harris v. Commonwealth*, 150 Va. 580, 142 S.E. 354 (1928) the Supreme Court of Appeal of Virginia traced its statute back to the British statute, 9 George IV, chapter 31, section 12 from 1828, the same statute that is the source of the wording of the present West Virginia malicious assault statute. *Harris v. Commonwealth*, 150 Va. at 583, 142 S.E. at 355. At the time of the *Harris* case the Virginia statute read as follows: “If any person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury, with intent to maim, disfigure, disable, or kill,” he shall be guilty of a felony. *Id.* This is in all relevant respects identical to the present West Virginia malicious assault statute. In discussing the history of the Virginia statute, that was for all practical purposes the same as the current and historical West Virginia statute, the Virginia Supreme Court opined:

The true purpose and meaning of the statute was doubtless conceived to be to define and punish as felonies those acts which had theretofore been considered misdemeanors only in those cases where it also appeared that there was felonious intent to maim, disfigure, disable or kill. However this may be, we find no sufficient reason for departing from a rule which has been so long established. It should cause no failure of justice if those engaged in criminal prosecutions are properly careful in drawing indictments, for in the very same clause of the statute it is provided that if the assailant shall cause any person bodily injury, with the

same intent, it constitutes a similar crime. This indictment is too narrow in its terms to include as a felony the bruise which was in fact inflicted upon Collins by the accused. If the indictment had also charged that the assault and bodily injury were done maliciously with the felonious intent to maim, etc., the evidence would have been sufficient to support the conviction of felony.

Harris v. Commonwealth, 150 Va. at 585, 142 S.E. at 355. It is plain from this Virginia case that the court believed it was the “intent to maim, disfigure, disable or kill” that converted what would otherwise be a misdemeanor into a felony based upon the same statutory language as the West Virginia law.

This Court in the case of *McComas v. Warth*, 113 W.Va. 163, 167 S.E. 95 (1932, rehearing denied 1933) quoted with approval the statement of the Virginia Supreme Court in *Harris v. Commonwealth* case, *supra*, with regard to the Virginia statute that was identical to W.Va. Code § 61-2-9, as follows. “The true purpose and meaning of such act was doubtless conceived to be to define and punish as felonies those acts which have theretofore been considered misdemeanors only in those cases where it also appeared that there was the felonious intent to maim, disfigure, disable, or kill.” *McComas v. Warth*, 113 W.Va. at ___, 167 S.E. at 96-97. The *McComas* Court continued: “To support a finding of unlawful wounding under our statute, [§ 61-2-9] above cited, there must be intent to produce a permanent disability or disfigurement.” *Id.*, citing *State v. Taylor*, *supra*. Since unlawful wounding or assault is a lesser included offense of malicious assault, logically the “intent to maim, disfigure, disable or kill” must also be an element of malicious assault.

In 1953 this Court decided *State v. Stalnaker*, 138 W.Va. 30, 76 S.E.2d 906 (1953).

Syllabus point 3 reads as follows:

To support a finding of unlawful wounding under Section 9 of chapter 144 of the Code [Code, 61-2-9], there must be intent to produce a permanent disability or disfiguration.” [Brackets in original quote]

Although logically “intent to maim, disfigure, disable or kill” must be an element of malicious assault if it is an element of the lesser included offense of unlawful assault or wounding, this Court said it explicitly in the *Stalnaker* opinion. “To support a finding of malicious wounding or unlawful wounding under Code, 61-2-9, the intent to produce a permanent disability or disfiguration is the essence of the crimes of malicious wounding and unlawful wounding.” *State v. Stalnaker*, 138 W.Va. at 41, 76 S.E.2d at 912; citing *State v. Taylor*, *supra*, *State v. Meadows*, *supra* and *McComas v. Warth*, *supra*. By citing the *Taylor*, *Meadows* and *McCommas* cases, it is clear that this Court in *Stalnaker* understood the meaning and significance of this entire line of cases. The *Stalnaker* case is directly on point and supports the Petitioner’s position that both the indictment and the jury instruction were deficient since they did not include the element of “intent to maim, disfigure, disable or kill.” See also *State v. King*, Syl. Pt. 1, 140 W.Va. 362, 84 S.E.2d 313 (1954) (“...Code, 61-2-9, providing that malicious wounding and unlawful wounding, as defined in the statute, are felonies, an indictment charging malicious wounding with intent ‘to maim, disfigure, disable, and kill’ the person alleged to have been wounded, charges a felony.”) and *State v. Daniel*, 144 W.Va. 551, 558, 109 S.E.2d 32, 36 (1959) (“...the required statutory intent, that it was done with intent to maim, disable and kill.”).

Finally, in the case of *State v. Combs*, 166 W.Va. 149, 151, 280 S.E.2d 809, 810 (1980) this Court stated unequivocally with regard to W.Va. Code § 61-2-9 that “[t]he statute makes it clear, as does the case law in this State, that intent [to maim, disfigure, disable or kill] is an essential element of both malicious wounding and unlawful wounding.” [Brackets added]. *Id.*, citing the *Stalnaker*, *Taylor*, *Daniel*, *McComas* and *Meadows* cases back to 1881.

C. Current status of malicious assault jury indictments and instructions.

So far as Petitioner's counsel can determine, circuit court judges routinely instruct jurors that the "intent to maim, disfigure, disable or kill" is an essential element of both malicious assault and unlawful assault cases under W.Va. Code § 61-2-9. Attached as Exhibit C to this brief is a copy of the stock jury instruction of the West Virginia Prosecuting Attorneys Institute, Instruction 116, obtained from its website, <https://pai.wv.gov> , covering malicious assault and its lesser included offenses. Attached as Exhibit D to this brief is a copy of the stock jury instruction of West Virginia's Public Defender Services, Instruction 7.2.16.1, obtained from its website, <https://pds.wv.gov> , covering malicious wounding and its lesser included offenses. The instructions of both agencies of West Virginia State Government agree that in all cases the jury must be instructed that they cannot convict of either the felony of malicious assault or unlawful assault without proof beyond a reasonable doubt of the intent to maim, disfigure, disable or kill, although using slightly different language.

Petitioner's counsel has not been able to locate a single case, either appellate or trial level, where an indictment for felony malicious assault or felony unlawful assault has been upheld if it did not include the essential element of the intent to maim, disfigure, disable or kill, as the case may be. But this is to be expected. If the indictment in this case is sufficient it would mean that anyone who maliciously wounds another person would be guilty of a felony. If this is true then if A becomes angry at B and punches him in the mouth with his fist without lawful cause, and cuts his lip, he has caused a wound and committed a felony. If the State's position below and the circuit court's rulings are correct, a new felony has been created. W.Va. Code § 61-2-9(c) provides for the misdemeanor of battery. If the indictment below is proper, then any battery that is committed maliciously and results in any physical harm or a wound would be a

felony. The mere malicious or unlawful wounding of another person without the intent to maim, disfigure, disable or kill, is not now, and has never been, a felony in West Virginia. That, however, is what the Petitioner was indicted for and convicted of.

D. The deficient indictment.

The law with regard to the requirements for indictments is well developed. “In order to lawfully charge an accused with a particular crime it is imperative that the essential elements of the crime be alleged in the indictment.” *State v. Johnson*, Syl. Pt. 3, 219 W.Va. 697, 639 S.E.2d 789 (2006); quoting *State v. Palmer*, Syl. Pt. 4, 210 W.Va. 372, 557 S.E.2d 779 (2001); quoting *State ex rel. Combs v. Boles*, Syl. Pt. 1, 151 W.Va. 194, 151 S.E.2d 115 (1966). “An indictment for a statutory offense is sufficient if in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.” *State v. Johnson, supra*, Syl. Pt. 4; quoting *State v. Bull*, Syl. Pt. 8, 204 W.Va. 255, 512 S.E.2d 177 (1998); quoting *State v. Hall*, Syl. Pt. 3, 172 W.Va. 138, 304 S.E.2d 43 (1983). See also *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 41, 475 S.E.2d 37, 41 (1996); citing *Russell v. U.S.*, 369 U.S. 749, 764-64 (1962).

The indictment for malicious assault in the present case meets none of the requirements for indictments set out above, other than enabling the circuit court to determine the statute on which the charge is based. A.R. 609. Even that could not be determined by the elements set forth in Count Two. The court could determine that only because the indictment itself lists W.Va. Code § 61-2-9 as the offense charged. A.R. 609. Otherwise Count Two of the indictment is deficient. It leaves out the essential element of “intent to maim, disfigure, disable or kill.” It does not follow the language of the statute. Finally, it does not inform the accused of the

particular offense with which he is charged because it cites to the statute, that is malicious assault under § 61-2-9, and then lists only the elements for simple battery.

In the present case Count Two alleges no more than simple battery. The Petitioner, however, was tried for and convicted of felony malicious assault. “When a defendant is charged with a crime in an indictment, but the State convicts the defendant of a charge not included in the indictment, then *per se* error has occurred, and the conviction cannot stand and must be reversed.” *State v. Corra*, Syl. Pt. 7, 223 W.Va. 573, 678 S.E.2d 306 (2009). “When a defendant is convicted of charges not included in the indictment an amendment has occurred which is *per se* reversible error.” *State v. Corra*, 223 W.Va. at 582-83, 678 S.E.2d at 315-16; quoting *U.S. v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996) and citing *U.S. v. Redd*, 161 F.3d 793, 795 (4th Cir. 1998). This Court has held “that a fundamental principle stemming from Section 5 of Article III of the *West Virginia Constitution* is that a criminal defendant only can be convicted of a crime charged in the indictment.” *State v. Miller*, 197 W.Va. 588, 599-600, 476 S.E.2d 535, 546-47 (1996). Accordingly, deficient indictments, such as the Count Two malicious assault charge in this case are not subject to harmless error analysis. Even if it were, it could hardly be harmless error to indict, try, convict and sentence a defendant for a felony based on an indictment that at most alleges a misdemeanor.

Finally, West Virginia Rule of Criminal Procedure 12(b)(2) requires that defenses and objections based on defects in the indictment must be raised prior to trial. *State v. Miller*, Syl. Pt. 1, *supra*. In the present case the objection to the indictment that is the subject of this appeal was raised by pretrial motion, oral argument on the record at the motion hearing and when the circuit court took up preliminary matters before the trial began. A.R. 612, 80-84, 112-14.

The history and case law cited above and the malicious assault and unlawful assault statute itself demonstrate that the indictment as to Count Two is deficient. The issue of the deficiency of Count Two of the indictment alleged by the Petitioner was preserved in the pretrial record below, not subject to harmless error analysis, and a *de novo* standard of review applies. *State v. Corra*, Syl. Pt. 7, *supra*, and *State v. Grimes*, Syl. Pt. 1, *supra*. Therefore, this Court should reverse the Petitioner's conviction for malicious assault.

CONCLUSION

In light of all the above it is apparent that Count Two of the indictment in this case alleging malicious assault was deficient and contrary to the law. This issue was preserved for appeal by timely motion and objection and has a *de novo* standard of review. Accordingly, this Court should reverse, set aside and void the Petitioner's indictment and conviction for malicious assault and remand this case to the circuit court for further action consistent with this Court's order.

Respectfully Submitted,

TIMOTHY R. MAICHLE

By Counsel



GARY A. COLLIAS
West Virginia State Bar #784
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
gary.a.collias@wv.gov

Counsel for Petitioner

C A P. XXX.

An Act for applying surplus Ways and Means to the Service of the Year One thousand eight hundred and twenty-eight.
[19th June 1828.]

352,050*l.* 8*s.* 7½*d.* being the Surplus of Ways and Means granted for 1823, and the Four following Years, to be applied for the Service of 1828.

C A P. XXXI.

An Act for consolidating and amending the Statutes in *England* relative to Offences against the Person.

[27th June 1828.]

WHEREAS it is expedient to repeal various Statutes now in force in that Part of the United Kingdom called *England*, relative to Offences against the Person, in order that the Provisions contained in those Statutes may be amended and consolidated into this Act; Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That so much of the Great Charter made in the Ninth Year of the Reign of King *Henry* the Third, as relates to Inquisitions of Life or Member; and so much of a Statute made in the Fifty-second Year of the same Reign, as relates to murder; and so much of a Statute made in the Third Year of the Reign of King *Edward* the First, as relates to Inquests of Murder, and the Writ of *Odio et Atia*, and to any Person ravishing or taking away by Force any Female as therein mentioned; and so much of a Statute made in the Fourth Year of the same Reign, intituled *The Statute of Bigamy*, as relates to Bigamists; and so much of a Statute made in the Sixth Year of the same Reign, as relates to any Person killing another by Misfortune or in his own Defence, or in other Manner without Felony; and so much of a Statute made at *Westminster* in the Thirteenth Year of the same Reign, as relates to the Writ of *Odio et Atia* and to Rape; and so much of a Statute made in the Ninth Year of the Reign of King *Edward* the Second, commonly called *Articuli Cleri*, as relates to laying violent Hands on a Clerk; and so much of a Statute made in the Eighteenth Year of the Reign of King *Edward* the Third, as relates to Bigamists; and so much of a Statute made in the Twenty-fifth Year of the same Reign, as relates to Petit Treason; and so much of a Statute made in the Fiftieth Year of the same Reign, as relates to the Arrest of Persons of Holy Church; and so much of a Statute made in the First Year of the Reign of King *Richard* the Second, as relates to the like Arrests; and so much of a Statute made in the Sixth Year of the same Reign, as relates to Ravishers, and to Women ravished; and so much of a Statute made in the Fifth Year of the Reign of King *Henry* the Fourth, as relates to cutting the Tongues or putting out the Eyes of any the King's Liege People, and to any Assault upon the Servant of a Knight of the Shire in Parliament; and so much of a Statute made in the Second Year of the Reign of King *Henry* the Fifth, as relates to

Repeal of
9 H. 3. c. 26.
52 H. 3. c. 25.
3 Ed. 1. c. 11.
& 13.

4 Ed. 1. c. 3.
c. 5.
6 Ed. 1. c. 3.

13 Ed. 1. c. 1.
c. 29. & 34.

9 Ed. 2. c. 1.
c. 3.

18 Ed. 3. c. 3.
c. 2.

25 Ed. 3. c. 5.
Part of c. 2.

50 Ed. 3. c. 5.

1 Ric. 2. c. 15.

6 Ric. 2. c. 1.
c. 6.

5 H. 4. c. 5.
5 H. 4. c. 6.

2 H. 5. c. 1.
Persons c. 2.

9 Geo. IV.

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Persons

EXHIBIT

A

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- Persons fleeing for Murders, Manslaughters, Robberies, and Batteredies; and so much of a Statute made in the Eleventh Year of the Reign of King Henry the Sixth, as relates to any Assault or Affray made to any Lord, Knight of the Shire, Citizen, or Burgess being and attending at the Parliament or other Council of the King; and an Act passed in the Third Year of the Reign of King Henry the Seventh, intituled *An Act against taking away Women against their Wills*; and an Act passed in the same Year intituled *An Act that the Steward, Treasurer, and Controller of the King's House, shall enquire of Offences done within the same*; and an Act passed in the Twelfth Year of the same Reign, intituled *An Act to make some Offences Petty Treason*; and an Act passed in the Twenty-fourth Year of the Reign of King Henry the Eighth, intituled *An Act where a Man killing a Thief shall not forfeit his Goods*; and an Act passed in the Twenty-fifth Year of the same Reign, intituled *An Act for the Punishment of the Vice of Buggery*; and so much of an Act passed in the Thirty-third Year of the same Reign, intituled *An Act for Murther and malicious Bloodshed within the Court*, as relates to the Punishment of Manslaughter and of malicious Striking, by reason whereof Blood shall be shed; and an Act passed in the same Year, intituled *An Act to proceed by a Commission of Oyer and Determiner against such Persons as shall confess Treasons, without remanding the same to be tried in the same Shire where the Offence was committed*; and so much of an Act passed in the First Year of the Reign of King Edward the Sixth, intituled *An Act for the Repeal of certain Statutes concerning Treasons, Felonies, etc.*, as relates to Petty Treason and Murder, and to Bigamists, but nothing therein now in force relating to Foreign Pleas or Dower; and so much of an Act passed in the Fifth and Sixth Years of the same Reign, intituled *An Act against quarrelling and fighting in Churches and Churchyards*, as relates to the Punishment of Persons convicted of striking with any Weapon, or drawing any Weapon with Intent to strike as therein mentioned; and an Act passed in the Fourth and Fifth Years of the Reign of King Philip and Queen Mary, intituled *An Act that Accessories in Murder and divers Felonies shall not have the Benefit of Clergy*; and an Act passed in the same Years, intituled *An Act for the Punishment of such as shall take away Maidens that be Inheritors, being within the Age of Sixteen Years, or that marry them without Consent of their Parents*; and so much of an Act passed in the Fifth Year of the Reign of Queen Elizabeth, intituled *An Act touching divers Orders for Artificers, Labourers, Servants of Husbandry, and Apprentices*, as relates to the Punishment of any Servant, Workman, or Labourer making any Assault or Affray as therein mentioned; and an Act passed in the same Year, intituled *An Act for the Punishment of the Vice of Sodomy*; and an Act passed in the Eighteenth Year of the same Reign, intituled *An Act to take away Clergy from the Offenders in Rape and Burglary*, and an Order for the Delivery of Clerks convicted without Purgation; and an Act passed in the Thirty-ninth Year of the same Reign, intituled *An Act for taking away of Clergy from Offenders against a certain Statute made in the Third Year of the Reign of King Henry the Seventh, concerning the taking away of Women against their Wills unlawfully*; and an Act passed in the

11 H. 6. c. 11.

3 H. 7. c. 2.

3 H. 7. c. 14.

12 H. 7. c. 7.

24 H. 8. c. 5.

25 H. 8. c. 6.

33 H. 8. c. 12.
Part of s. 6.
to s. 18.

33 H. 8. c. 23.

1 Ed. 6. c. 12.
s. 10. 13. 16.
& 22.5 & 6 Ed. 6.
c. 4. s. 3.4 & 5 P. & M.
c. 4.4 & 5 P. & M.
c. 8.5 Eliz. c. 4.
s. 21.5 Eliz. c. 17.
18 Eliz. c. 7.

39 Eliz. c. 9.

the First Year of the Reign of King James the First, intituled *An Act to take away the Benefit of Clergy from some Kind of Manslaughter*; and an Act passed in the same Year, intituled *An Act to restrain all Persons from Marriage until their former Wives and former Husbands be dead*; and an Act passed in the Twenty-second and Twenty-third Years of the Reign of King Charles the second, intituled *An Act to prevent malicious Maiming and Wounding*; and so much of an Act passed in the same Years, intituled *An Act to prevent the Delivery up of Merchant Ships, and for the Increase of good and serviceable Shipping*, as relates to any Mariner laying violent Hands on his Commander, as therein mentioned; and so much of an Act passed in the Eleventh Year of the Reign of King William the Third, intituled *An Act for the more effectual Suppression of Piracy*, as relates to any Master of a Merchant Vessel, who shall force any Man on Shore, or wilfully have him behind, or refuse to bring Home any Man as therein mentioned; and so much of an Act passed in the Ninth Year of the Reign of Queen Anne, intituled *An Act for the better preventing of excessive and deceitful Gaming*, as relates to the Forfeiture and Punishment of any Person assaulting and beating or challenging or provoking to fight any other Person on account of any money won as therein mentioned; and an Act passed in the same Year, intituled *An Act to make an Attempt on the Life of a Privy Counsellor in the Execution of his Office to be Felony without Benefit of Clergy*; and so much of an Act passed in the Twelfth Year of the Reign of King George the First, intituled *An Act to prevent unlawful Combinations of Workmen employed in the Woollen Manufactures, and for better Payment of their Wages*, as creates any Felony; and an Act passed in the Second Year of the Reign of King George the Second, intituled *An Act for the Trial of Murders in Cases where either the Stroke or Death only happens within that Part of Great Britain called England*; and so much of an Act passed in the Eleventh Year of the same Reign, intituled *An Act for punishing such Persons as shall do Injuries and Violences to the Persons or Properties of His Majesty's Subjects, with Intent to hinder the Exportation of Corn*, as relates to any Person who shall beat, wound, or use any other Violence to any Person or Driver, and so much thereof as makes any Second Offence Felony; and so much of an Act passed in the Twenty-second Year of the same Reign, intituled *An Act for the more effectual preventing of Frauds and Abuses committed by Persons employed in the Manufacture of Hats, and in the Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair, and Silk Manufactures*; and for preventing unlawful Combinations of Journeymen Dyers and Journeymen Hotpressers, and of all Persons employed in the said several Manufactures, and for the better Payment of their Wages, as extends to the Persons therein mentioned† that Part of the Act of the Twelfth Year of King George the First which is hereinbefore referred to; and the whole of an Act passed in the Twenty-fifth Year of the Reign of King George the Second, intituled *An Act for better preventing the horrid Crime of Murder*, except so far as relates to Rescues and Attempts to rescue; and so much of an Act passed in the Twenty-sixth Year of the same Reign, intituled *An Act for enforcing the Laws*

Vulgo 2J.1. c.8.
Vulgo 2J.1. c.11.
22 & 23 C.2. c.1.
22 & 23 C.2. c.11. s.9.
Vulgo 11 & 12 W.3. c.7. s.18.
9 Ann. c.14. s.8.
9 Ann. c.16.
12 G.1. c.34. s.6.
2 G.2. c.21.
11 G.2. c.22. Part of s. 1. & 2.
22 G.2. c.27. Part of s.12.
† Sic.
25 G.2. c.37. except s.9. & 10.
26 G.2. c.19. s.11.

- against Persons who steal or detain Shipwrecked Goods, and for Relief of Persons suffering Loss thereby, as relates to any Person who shall be assaulted, beaten, and wounded for the Exercise of his Duty in the Salvage of any Vessel, Goods, or Effects therein mentioned; and so much of an Act passed in the Thirtieth Year of the Reign of King George the Third, intituled *An Act for discontinuing the Judgment which has been required by Law to be given against Women convicted of certain Crimes, and substituting another Judgment in lieu thereof*, as relates to Petit Treason: and so much of an Act passed in the Thirty-third Year of the same Reign, intituled *An Act for better preventing Offences in obtaining, destroying, or damaging Ships or other Vessels, and in obstructing Seamen, Keelmen, Casters, and Ship Carpenters from pursuing their lawful Occupations*, as relates to any Seaman, Keelman, Caster, Ship Carpenter, or other Person, who shall prevent, hinder, or obstruct, or assault, beat, wound, or do any bodily Violence or Hurt to any Seaman, Keelman, Caster, or Ship Carpenter, as therein particularly mentioned; and an Act passed in the Thirty-fifth Year of the same Reign, intituled *An Act for rendering more effectual an Act passed in the First Year of the Reign of King James the First, intituled 'An Act to restrain & Persons from Marriage until their former Wives and former Husbands be dead'*; and so much of an Act passed in the Thirtysixth Year of the same Reign, intituled *An Act to prevent Obstructions to the free Passage of Grain within the Kingdom*, as relates to any Person who shall beat, wound, or use any other Violence to any Person or Driver, and so much thereof as makes any Second Offence Felony; and an Act passed in the Forty-third Year of the same Reign, intituled *An Act for the further Prevention of malicious shooting, and attempting to discharge loaded Fire Arms, stabbing, cutting, wounding, poisoning, and the malicious using of Means to procure the Miscarriage of Women, and also the malicious setting fire to Buildings*; and also for repealing a certain Act made in England in the Twenty-first Year of the late King James the First, intituled *'An Act to prevent the destroying and murdering of Bastard Children'*, and also an Act made in Ireland in the Sixth Year of the Reign of the late Queen Anne, also intituled *'An Act to prevent the destroying and murdering of Bastard Children'*, and for making other Provisions in lieu thereof; and an Act passed in the same Forty-third Year, intituled *An Act for the more effectually providing for the Punishment of Offences in wilfully casting away, burning, or destroying Ships and Vessels, and for the more convenient Trial of Accessories in Felonies, and for extending the Powers of an Act made in the Thirty-third Year of the Reign of King Henry the Eighth, as far as relates to Murders, to Accessories to Murders, and to Manslaughters*; and an Act passed in the Fifty-fourth Year of the Reign of King George the Third, intituled *An Act for the more effectual Prevention of Child-stealing*; and so much of an Act passed in the Fifty-eighth Year of the same Reign, intituled *An Act to extend and render more effectual the present Regulations for the Relief of seafaring Men and Boys, Subjects of the United Kingdom of Great Britain and Ireland, in Foreign Parts*, as relates to the Trial of Offences against the Act of King William the Third, hereinbefore mentioned; and so much of an Act

90 G.S. c. 48.

33 G.S. c. 67.
c. 2.

35 G.S. c. 67.

36 G.S. c. 9.
Part of s. 1.
& 2.

43 G.S. c. 58.

45 G.S. c. 113.

54 G.S. c. 101.

58 G.S. c. 38.
c. 1.

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Act passed in the First Year of the Reign of His present Majesty, 1 G.4. c.90.
 intituled *An Act to remove Doubts and to remedy Defects in the Law, with respect to certain Offences committed upon the Sea or within the Jurisdiction of the Admiralty*, as refers to the Act of the forty-third Year of the Reign of King George the Third, hereinbefore first mentioned; and an Act passed in the same First Year, 1 G.4. c.115.
 intituled *An Act to repeal so much of the several Acts passed in the thirty-ninth Year of the Reign of Elizabeth, the Fourth of George the First, the Fifth and Eighth of George the Second, as inflict Capital Punishment on certain Offences therein specified, and to provide more suitable and effectual Punishment for such Offences*; and so much of an Act passed in the First and Second Years of the present Reign, intituled *An Act for the Amendment of the Law of Rescue*, as relates to the Offences of assaulting, beating, and bounding therein mentioned; and an Act passed in the Third Year of the present Reign, intituled *An Act for the further and more adequate Punishment of Persons convicted of Manslaughter, and of Servants convicted of robbing their Masters, and of Accessories before the Fact of Grand Larceny, and certain other Felonies*; and so much of an Act passed in the same Year, intituled *An Act to provide for the more effectual Punishment of certain Offences by Imprisonment with hard Labour*, as relates to any of the Assaults therein mentioned; shall continue in force until and throughout the last Day of June in the present Year, and shall from and after that Day, as to that Part of the United Kingdom called England, and as to Offences committed within the Jurisdiction of the Admiralty of England, be repealed, except so far as any of the said Acts may repeal the Whole or any Part of any other Acts, and except as to Offences committed before or upon the said last Day of June, which shall be dealt with and punished as if this Act had not been passed; and this Act shall commence and take effect (except as is hereinbefore excepted) on the First Day of July in the present Year.

Commencement of this Act.

II. And be it enacted, That every Offence, which before the Commencement of this Act would have amounted to Petit Treason, shall be deemed to be Murder only, and no greater Offence; and all Persons guilty in respect thereof, whether as Principals or as Accessories, shall be dealt with, indicted, tried, and punished as Principals and Accessories in Murder.

Petit Treason to be treated in all respects as Murder.

III. And be it enacted, That every Person convicted of Murder, or of being an Accessory before the Fact to Murder, shall suffer Death as a Felon; and every Accessory after the Fact to Murder shall be liable, at the Discretion of the Court, to be transported beyond the Seas for Life, or to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for any Term not exceeding Four Years.

Punishment of Principals and Accessories in Murder.

IV. And be it enacted, That every Person convicted of Murder shall be executed according to Law on the Day next but One after that on which the Sentence shall be passed, unless the same shall happen to be Sunday, and in that Case on the Monday following; and the Body of every Murderer shall, after Execution, either be dissected or hung in Chains, as to the Court shall seem meet; and Sentence shall be pronounced immediately after the Conviction of every Murderer, unless the Court shall see reasonable

Period of Execution, and Marks of Infamy.

Sentence to be pronounced immediately.

Power to
respite.

As to the Dis-
section of the
Bodies of Mur-
derers.

Prison Regu-
lations as to
Murderers
under Sentence.

British subjects
may be tried in
England for
Murder or
Manslaughter
committed
Abroad.

able Cause for postponing the same; and such Sentence shall express not only the usual Judgment of Death, but also the Terms hereby appointed for the Execution thereof, and that the Body of the Offender shall be dissected or hung in Chains, whichsoever of the Two the Court shall order: Provided always, that if such Sentence shall have been pronounced, it shall be lawful for the Court or Judge to stay the Execution thereof, if such Court or Judge shall so think fit.

V. And be it enacted, That whenever Dissection shall be ordered by such Sentence, the Body of the Murderer, if executed in the County of *Middlesex* or City of *London*, shall be immediately conveyed by the Sheriff or Sheriffs, or his or their Officers to the Hall of the Surgeons' Company, or to such other Place as the said Company shall appoint, and shall be delivered to such Person as the said Company shall appoint, for the Purpose of being dissected; and the Body of the Murderer, if executed elsewhere, shall in like Manner be delivered to such Surgeon as the Court or Judge shall direct, for the same Purpose.

VI. And be it enacted, That every Person convicted of Murder shall, after Judgment, be confined in some safe Place within the Prison, apart from all other Prisoners, and shall be fed with Bread and Water only, and with no other Food or Liquor, except in case of receiving the Sacrament, or in case of any Sickness or Wound, in which Case the Surgeon of the Prison may order other Necessaries to be administered; and no Person but the Gaoler and his Servants, and the Chaplain and Surgeon of the Prison, shall have access to any such Convict, without the Permission in Writing of the Court or Judge before whom such Convict shall have been tried, or of the Sheriff or his Deputy: Provided always, that in case the Court or Judge shall think fit to respite the Execution of such Convict, such Court or Judge may, by a Licence in Writing, relax, during the Period of the Respite, all or any of the Restraints or Regulations hereinbefore directed to be observed.

VII. And be it enacted, That if any of His Majesty's Subjects shall be charged in *England* with any Murder or Manslaughter, or with being accessory before the Fact to any Murder, or after the Fact to any Murder or Manslaughter, the same being respectively committed on Land out of the United Kingdom, whether within the King's Dominions or without, it shall be lawful for any Justice of the Peace of the County or Place where the Person so charged shall be, to take Cognizance of the Offence so charged, and to proceed therein as if the same had been committed within the Limits of his ordinary Jurisdiction: and if any Person so charged shall be committed for Trial, or admitted to bail to answer such Charge, a Commission of Oyer and Terminer under the Great Seal shall be directed to such Persons, and into such County or Place as shall be appointed by the Lord Chancellor, or Lord Keeper, or Lords Commissioners of the Great Seal, for the speedy Trial of any such Offender: and such Persons shall have full Power to enquire of, hear, and determine all such Offences, within the County or Place limited in their Commission, by such good and lawful Men of the said County or Place as shall be returned before them for that Purpose, in the same Manner as if the Offences had been actually committed

committed in the said County or Place: Provided always, that if **Proviso.**
 any Peers of the Realm, or Persons entitled to the Privilege of
 Peerage, shall be indicted of any such Offences, by virtue of
 any Commission to be granted as aforesaid, they shall be tried
 by their Peers in the Manner heretofore used: Provided also,
 that nothing herein contained shall prevent any Person from being
 tried in any Place out of this Kingdom for any Murder or Man-
 slaughter committed out of this Kingdom, in the same Manner as
 such Person might have been tried before the passing of this Act.

VIII. And be it enacted, That where any Person, being felo- **Provision for**
 niously stricken, poisoned, or otherwise hurt upon the Sea, or at **the Trial of**
 any Place out of *England*, shall die of such Stroke, Poisoning, or **Murder and**
 Hurt in *England*, or being feloniously stricken, poisoned, or **Manslaughter,**
 otherwise hurt at any Place in *England*, shall die of such Stroke, **where the**
 Poisoning, or Hurt, upon the Sea, or at any Place out of *England*, **Death, or the**
 every Offence committed in respect of any such Case, whether the **Cause of Death**
 same shall amount to the Offence of Murder or of Manslaughter, **only, happens in**
 or of being accessory before the Fact to Murder, or after the Fact **England.**
 to Murder or Manslaughter, may be dealt with, enquired of, tried,
 determined, and punished in the County or Place in *England* in
 which such Death, Stroke, Poisoning, or Hurt shall happen, in
 the same Manner, in all respects, as if such Offence had been
 wholly committed in that County or Place.

IX. And be it enacted, That every Person convicted of Man- **Punishment of**
 slaughter shall be liable, at the Discretion of the Court, to be **Manslaughter.**
 transported beyond the Seas for Life, or for any Term not less
 than Seven Years, or to be imprisoned, with or without hard
 Labour, in the Common Gaol or House of Correction, for any
 Term not exceeding Four Years, or to pay such Fine as the Court
 shall award.

X. Provided always, and be it enacted, That no Punishment **As to Homicide**
 or Forfeiture shall be incurred by any Person who shall kill **not felonious.**
 another by Misfortune, or in his own Defence, or in any other
 Manner without Felony.

XI. And be it enacted, That if any Person unlawfully and ma- **Attempts to**
 liciously shall administer or attempt to administer to any Person, **murder, when**
 or shall cause to be taken by any Person, any Poison or other **evidenced by**
 destructive Thing, or shall unlawfully and maliciously attempt to **certain Acts,**
 drown, suffocate, or strangle any Person, or shall unlawfully and **shall be Capital.**
 maliciously shoot at any Person, or shall, by drawing a Trigger,
 or in any other Manner, attempt to discharge any Kind of loaded
 Arms at any Person, or shall unlawfully and maliciously stab, cut,
 or wound any Person, with Intent, in any of the Cases aforesaid,
 to murder such Person, every such Offender, and every Person
 counselling, aiding, or abetting such Offender, shall be guilty of
 Felony, and being convicted thereof, shall suffer Death as a Felon.

XII. And be it further enacted, That if any Person unlawfully **Shooting at, or**
 and maliciously shall shoot at any Person, or shall, by drawing a **stabbing, cut-**
 Trigger, or in any other Manner, attempt to discharge any Kind **ting, or wound-**
 of loaded Arms at any Person, or shall unlawfully and maliciously **ing any Person,**
 stab, cut, or wound any Person, with Intent, in any of the Cases **with intent to**
 aforesaid, to maim, disfigure, or disable such Person, or to do **maim, &c.**
 some other grievous bodily Harm to such Person, or with Intent **shall be Capital,**
 to **provided the**

Case would
have been
Murder if
Death had
ensued.

to resist or prevent the lawful Apprehension or Detainer of the Party so offending, or of any of his Accomplices, for any Offence for which he or they may respectively be liable by Law to be apprehended or detained, every such Offender, and every Person counselling, aiding, or abetting such Offender, shall be guilty of a Felony, and being convicted thereof, shall suffer Death as a Felon. Provided always, that in case it shall appear, on the Trial of any Person indicted for any of the Offences above specified, that such Acts of shooting, or of attempting to discharge loaded Arms, or of stabbing, cutting, or wounding as aforesaid, were committed under such Circumstances, that if Death had ensued therefrom the same would not in Law have amounted to the Crime of Murder, in every such Case the Person so indicted shall be acquitted of Felony.

Administering
Poison or using
any Means to
procure the
Miscarriage of
a Woman quick
with Child.
The like as to
a Woman not
quick with
Child.

XIII. And be it enacted, That if any Person, with Intent to procure the Miscarriage of any Woman then being quick with Child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any Poison or other noxious Thing, or shall use any Instrument or other Means whatever with the like Intent, every such Offender, and every Person counselling, aiding, or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall suffer Death as a Felon; and if any Person, with Intent to procure the Miscarriage of any Woman not being, or not being proved to be, then quick with Child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any Medicine or other Thing, or shall use any Instrument or other Means whatever with the like Intent, every such Offender, and every Person counselling, aiding, or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall be liable, at the Discretion of the Court, to be transported beyond the Seas for any Term not exceeding Fourteen Years nor less than Seven Years, or to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for any Term not exceeding Three Years, and, if a Male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such Imprisonment.

A Woman
secretly the
dead Body of
her Child, to
conceal the
Fact of its
Birth, guilty of
Misdemeanor.

XIV. And be it enacted, That if any Woman shall be delivered of a Child, and shall, by secret burying or otherwise disposing of the dead Body of the said Child, endeavour to conceal the Birth thereof, every such Offender shall be guilty of a Misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for any Term not exceeding Two Years; and it shall not be necessary to prove whether the Child died before, at, or after its Birth: Provided always, that if any Woman tried for the Murder of her Child shall be acquitted thereof, it shall be lawful for the Jury, by whose Verdict she shall be acquitted, to find, in case it shall so appear in Evidence, that she was delivered of a Child, and that she did, by secret burying or otherwise disposing of the dead Body of such Child, endeavour to conceal the Birth thereof, and thereupon the Court may pass such Sentence as if she had been convicted upon an Indictment for the Concealment of the Birth.

Proviso.

XV. And

- XV. And be it enacted, That every Person convicted of the heinous Crime of Buggery, committed either with Mankind or with any Animal, shall suffer Death as a Felon. **Sodomy.**
- XVI. And be it enacted, That every Person convicted of the Crime of Rape shall suffer Death as a Felon. **Rape.**
- XVII. And be it enacted, That if any Person shall unlawfully carnally know and abuse any Girl under the Age of Ten Years, every such Offender shall be guilty of Felony, and being convicted thereof, shall suffer Death as a Felon; and if any Person shall unlawfully and carnally know and abuse any Girl, being above the Age of Ten Years and under the Age of Twelve Years, every such Offender shall be guilty of a Misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for such Term as the Court shall award. **Carnal Knowledge of a Girl under 10. The like of a Girl above 10 and below 12.**
- XVIII. And Whereas upon Trials for the Crimes of Buggery and of Rape, and of carnally abusing Girls under the respective Ages hereinbefore mentioned, Offenders frequently escape by reason of the Difficulty of the Proof which has been required of the Completion of those several Crimes; for Remedy thereof it is enacted, That it shall not be necessary, in any of those Cases, to prove the actual Emission of Seed in order to constitute carnal Knowledge, but that the carnal Knowledge shall be deemed complete upon Proof of Penetration only. **What shall be sufficient Proof of carnal Knowledge in the Four preceding Cases.**
- XIX. And be it enacted, That where any Woman shall have any Interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any Real or Personal Estate, she shall be an Heiress presumptive or next of Kin to any one having such Interest, if any Person shall, from Motives of Lucre, take away or detain such Woman against her Will, with Intent to marry or defile her, or to cause her to be married or defiled by any other Person, every such Offender, and every Person counselling, aiding, or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall be liable to be transported beyond the Seas for Life, or for any Term not less than Seven Years, or to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for any Term not exceeding Four Years. **Forcible Abduction of a Woman on account of her Fortune, with Intent to marry her, &c.**
- XX. And be it enacted, That if any Person shall unlawfully take, or cause to be taken, any unmarried Girl, being under the Age of Sixteen Years, out of the Possession and against the Will of her Father or Mother, or of any other Person having the lawful Care or Charge of her, every such Offender shall be guilty of a Misdemeanor, and being convicted thereof, shall be liable to suffer such Punishment, by Fine or Imprisonment, or by both, as the Court shall award. **Unlawful Abduction of a Girl from her Parents or Guardians.**
- XXI. And be it enacted, That if any Person shall maliciously, either by Force or Fraud, lead or take away, or decoy or entice away, or detain, any Child under the Age of Ten Years, with Intent to deprive the Parent or Parents, or any other Person having the lawful Care or Charge of such Child, of the Possession of such Child, or with Intent to steal any Article upon or about the Person of such Child, to whomsoever such Article may belong; or if any Person shall, with any such Intent as aforesaid, receive or harbour any **Child-stealing.**

Not to extend
to Fathers
taking their
illegitimate
Children.

Bigamy.

Place of Trial.

Exceptions.

Arresting a
Clergyman
during Divine
Service.

Punishment
for Assaults on
Officers, &c. for
their Endeavours
to save
shipwrecked
Property.

any such Child, knowing the same to have been, by Force or Fraud, led, taken, decoyed, enticed away, or detained as hereinbefore mentioned; every such Offender, and every Person counselling, aiding, or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall be liable to be transported beyond the Seas for the Term of Seven Years, or to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for any Term not exceeding Two Years, and, if a Male, to be whipped twice, or thrice publicly or privately (if the Court shall so think fit), in addition to such Imprisonment: Provided always, that no Person who shall have claimed to be the Father of an illegitimate Child, or to have any Right to the Possession of such Child, shall be liable to be prosecuted by virtue hereof, on account of his getting Possession of such Child, or taking such Child out of the Possession of the Mother, or any other Person having a lawful Charge thereof.

XXII. And be it enacted, That if any Person, being married, shall marry any other Person during the Life of the former Husband or Wife, whether the Second Marriage shall have taken Place in *England* or elsewhere, every such Offender, and every Person counselling, aiding, or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall be liable to be transported beyond the Seas for the Term of Seven Years, or to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for any Term not exceeding Two Years, and any such Offence may be dealt with, enquired of, tried, determined, and punished in the County where the Offender shall be apprehended or be in Custody, as if the Offence had been actually committed in that County: Provided always, that nothing herein contained shall extend to any Second Marriage contracted out of *England* by any other than a Subject of His Majesty, or to any Person marrying a Second Time, whose Husband or Wife shall have been continually absent from such Person for the Space of Seven Years then last past, and shall not have been known by such Person to be living within that Time, or shall extend to any Person who at the Time of such Second Marriage shall have been divorced from the Bond of the First Marriage, or to any Person whose former Marriage shall have been declared void by the Sentence of any Court of competent Jurisdiction.

XXIII. And be it enacted, That if any Person shall arrest a Clergyman upon any Civil Process, while he shall be performing Divine Service, or shall, with the Knowledge of such Person, be going to perform the same, or returning from the Performance thereof, every such Offender shall be guilty of a Misdemeanour, and being convicted thereof, shall suffer such Punishment, by Fine or Imprisonment, or by both, as the Court shall award.

XXIV. And be it enacted, That if any Person shall assault and strike or wound any Magistrate, Officer, or other Person whatsoever lawfully authorized, on account of the Exercise of his Duty in or concerning the Preservation of any Vessel in Distress, or of any Vessel, Goods, or Effects wrecked, stranded, or cast on Shore, or lying under Water, every such Offender, being convicted thereof, shall be liable to be transported beyond the Seas for the Term of Seven Years, or to be imprisoned, with or without hard Labour, in the

Common Gaol or House of Correction, for such Term as the Court shall award.

XXV. And be it enacted, That where any Person shall be charged with and convicted of any of the following Offences as misdemeanors; that is to say, of any Assault with Intent to commit Felony, of any Assault upon any Peace Officer or Revenue Officer in the due Execution of his Duty, or upon any Person acting in aid of such Officer; of any Assault upon any Person with Intent to resist or prevent the lawful Apprehension or Detainer of the Party so assaulting, or of any other Person, for any offence for which he or they may be liable by Law to be apprehended or detained; or of any Assault committed in pursuance of any Conspiracy to raise the Rate of Wages; in any such Case the Court may sentence the Offender to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for any Term not exceeding Two Years, and may also (if it all so think fit) fine the Offender, and require him to find Sureties for keeping the Peace.

XXVI. And be it enacted, That if any Person shall unlawfully and with Force hinder any Seaman, Keelman, or Caster from working at or exercising his lawful Trade, Business, or Occupation, shall beat, wound, or use any other Violence to him, with Intent to deter or hinder him from working at or exercising the same; or if any Person shall beat, wound, or use any other Violence to any Person, with Intent to deter or hinder him from selling or buying any Wheat or other Grain, Flour, Meal, or Malt, in any Market or other Place, or shall beat, wound, or use any other Violence to any Person having the Care or Charge of any Wheat or other Grain, Flour, Meal, or Malt, whilst on its Way to or from any City, Market Town, or other Place, with Intent to stop the Conveyance of the same, every such Offender may be convicted thereof before Two Justices of the Peace, and imprisoned and kept to hard Labour in the Common Gaol or House of Correction, for any Term not exceeding Three Calendar Months: Provided always, that no Person, who shall be punished for any such Offence by virtue of this Provision, shall be punished for the same Offence by virtue of any other Law whatsoever.

XXVII. And Whereas it is expedient that a summary Power of punishing Persons for Common Assaults and Batteries should be provided under the Limitations hereinafter mentioned; Be it therefore enacted, That where any Person shall unlawfully assault or beat any other Person, it shall be lawful for Two Justices of the Peace, upon Complaint of the Party aggrieved, to hear and determine such Offence, and the Offender, upon Conviction thereof before them, shall forfeit and pay such Fine as shall appear to them to be meet, not exceeding, together with Costs (if ordered), the Sum of Five Pounds, which Fine shall be paid to some One of the Overseers of the Poor, or to some other Officer of the Parish, Township, or Place in which the Offence shall have been committed, to be by such Overseer or Officer paid over to the Use of the general Rate of the County, Riding, or Division in which such Parish, Township, or Place shall be situate; whether the same shall or shall not contribute to such general Rate; and the Evidence of any Inhabitant of the County, Riding, or Division shall be

Assaults with Intent to commit Felony; Assaults on Peace Officers; or to prevent the Arrest of Offenders; or in pursuance of a Conspiracy to raise Wages; punishable with hard Labour.

Assault on any Seaman, &c. to prevent him from working; Assaults with Intent to obstruct the buying or selling of Grain, or its free Passage; punishable before Two Magistrates, with Imprisonment not exceeding Three Months.

Persons committing any Common Assault or Battery may be compelled by Two Magistrates to pay Fine and Costs not exceeding 5*l*.

Application of
the Fine.
Commitment
on Nonpay-
ment.

If the Magis-
trates dismiss
the Complaint,
they shall make
out a Certificate
to that Effect.

Such Certificate
or Conviction
shall be a Bar
to any other
Proceedings.

These Provi-
sions not to
apply to aggra-
vated Cases, &c.

Punishment for
the Master of a
Merchant
Vessel forcing a
Seaman on
Shore, or re-
fusing to bring
him Home.

Mode of Trial,
&c.

be admitted in Proof of the Offence, notwithstanding such Application of the Fine incurred thereby; and if such Fine as shall be awarded by the said Justices, together with the Costs (if ordered) shall not be paid, either immediately after the Conviction, or within such Period as the said Justices shall at the Time of Conviction appoint, it shall be lawful for them to commit the Offender to the Common Gaol or House of Correction, there to be imprisoned for any Term not exceeding Two Calendar Months, unless such Fine and Costs be sooner paid; but if the Justices upon the Hearing of any such Case of Assault or Battery, shall deem the Offence not to be proved, or shall find the Assault or Battery to have been justified, or so trifling as not to merit Punishment, and shall accordingly dismiss the Complaint, they shall forthwith make out a Certificate under their Hands, attesting the Fact of such Dismissal, and shall deliver such Certificate to the Party against whom the Complaint was preferred.

XXVIII. And be it enacted, That if any Person against whom any such Complaint shall have been preferred for any Conviction of Assault or Battery, shall have obtained such Certificate as aforesaid, or having been convicted shall have paid the whole Amount adjudged to be paid under such Conviction, or shall have suffered the Imprisonment awarded for Nonpayment thereof, in every such Case he shall be released from all further or other Proceedings in Civil or Criminal, for the same Cause.

XXIX. Provided always, and be it enacted, That in case the Justices shall find the Assault or Battery complained of to have been accompanied by any Attempt to commit Felony, or shall be of Opinion that the same is, from any other Circumstances, a fit Subject for a Prosecution by Indictment, they shall abstain from any Adjudication thereupon, and shall deal with the Case in all respects in the same Manner as they would have done before the passing of this Act: Provided also, that nothing herein contained shall authorize any Justices of the Peace to hear or determine any Case of Assault or Battery in which any Question shall arise as to the Title to any Lands, Tenements, or Hereditaments, or any Interest therein or accruing therefrom, or as to any Bankruptcy or Insolvency, or any Execution under the Process of any Court of Justice.

XXX. And be it enacted, That if any Master of a Merchant Vessel shall, during his being Abroad, force any Man on Shore, or wilfully leave him behind in any of His Majesty's Colonies or elsewhere, or shall refuse to bring Home with him again all or any of the Men whom he carried out with him, as are in a Condition to return when he shall be ready to proceed on his homeward-bound Voyage, every such Master shall be guilty of a Misdemeanor, and being lawfully convicted thereof, shall be imprisoned for such Term as the Court shall award; and all such Offences may be prosecuted by Indictment or by Information, at the Suit of His Majesty's Attorney General, in the Court of King's Bench, and may be alleged in the Indictment or Information to have been committed at *Westminster*, in the County of *Middlesex*; and the said Court is hereby authorized to issue One or more Commissions, if necessary, for the Examination of Witnesses Abroad; and the Depositions taken under the same shall be received

ived in Evidence on the Trial of every such Indictment or
rmation.

XXI. And be it enacted, That every Accessory before the
t, to any Felony punishable under this Act, for whom no
ishment has been hereinbefore provided, shall be liable, at
Discretion of the Court, to be transported beyond the Seas
any Term not exceeding Fourteen Years nor less than Seven
rs, or to be imprisoned, with or without hard Labour, in the
mon Gaol or House of Correction, for any Term not ex-
ling Three Years; and every Accessory after the Fact to any
ny punishable under this Act (except Murder), shall be liable
e imprisoned, with or without hard Labour, in the Common
l or House of Correction, for any Term not exceeding Two
rs; and every Person who shall counsel, aid, or abet the Com-
sion of any Misdemeanor punishable under this Act, shall be
le to be proceeded against and punished as a principal Of-
der.

Provision for
Accessories to
Offences
against this Act.

XXII. And be it enacted, That all indictable Offences men-
ed in this Act, which shall be committed within the Jurisdic-
n of the Admiralty of *England*, shall be deemed to be Offences
the same Nature, and liable to the same Punishments, as if
y had been committed upon the Land in *England*, and may be
lt with, enquired of, tried, and determined in the same Man-
: as any other Offences committed within the Jurisdiction of
: Admiralty of *England*: Provided always, that nothing herein
ntained shall alter or affect any of the Laws relating to the
vernment of His Majesty's Land or Naval Forces.

As to Offences
against this Act
committed at
Sea.

XXXIII. And for the more effectual Prosecution of Offences
nishable upon summary Conviction by virtue of this Act, be it
acted, That where any Person shall be charged on the Oath of a
edible Witness before any Justice of the Peace with any such
ffence, the Justice may summon the Person charged to appear
efore any Two Justices of the Peace at a Time and Place to be
amed in such Summons, and if he shall not appear accordingly,
en (upon Proof of the due Service of the Summons upon such
erson by delivering the same to him) the Justices may either
roceed to hear and determine the Case *ex parte*, or may issue
heir Warrant for apprehending such Person and bringing him
efore them; or the Justice before whom the Charge shall be
nade may (if he shall so think fit) issue such Warrant in the first
Instance, without any previous Summons.

Not to affect the
Laws relating
to the Forces.

Provision for
Offences
against this Act
punishable on
summary Con-
viction.

XXXIV. Provided always, and be it enacted, That the Prose-
cution for every Offence punishable on summary Conviction by
virtue of this Act shall be commenced within Three Calendar
Months after the Commission of the Offence, and not otherwise.

Time for sum-
mary Proceed-
ings.

XXXV. And be it enacted, That the Justices before whom any
Person shall be summarily convicted of any Offence against this
Act may cause the Conviction to be drawn up in the following
Form of Words, or in any other Form of Words to the same Ef-
fect, as the Case shall require; (that is to say,)

Form of Con-
viction.

BE it remembered, That on the
in the Year of our Lord
in the County of

Day of
at
(or Riding, Di-
vision,

' vision, Liberty, City, etc. as the Case may be], A. O. is convicted before us [naming the Justices], Two of His Majesty's Justices of the Peace for the said County [or Riding, etc.], for that the said A. O. did [specify the Offence, and the Time and Place when and where the same was committed, as the Case may be] and we the said Justices adjudge the said A. O. for his said Offence to be imprisoned in the [] and there kept to hard Labour for the Space of [] we adjudge the said A. O. for his said Offence to forfeit and to pay the Sum of [here state the Amount of the Fine imposed]. and also to pay the Sum of [] for Costs; and in default of immediate Payment of the said Sums, to be imprisoned in the [] for the Space of [] unless the said Sums shall be sooner paid; [or, and we order that the said Sums shall be paid by the said A. O. on or before the [] of []], and we direct that the said Sum of [i. e. the Amount of the Fine] shall be paid to the [] aforesaid, in which the said Offence was committed to be by him applied according to the Directions of the Statute in that Case made and provided; and we order that the said Sum of [] for Costs shall be paid to C. D. [the Party aggrieved]. Given under our Hands the Day and Year first above mentioned.'

No Certiorari,
etc.

1 B. + Ad. 382

XXXVI. And be it enacted, That no such Conviction shall be quashed for Want of Form, or be removed by Certiorari or otherwise into any of His Majesty's superior Courts of Record; and no Warrant of Commitment shall be held void by reason of any Defect therein, provided it be therein alleged that the Party has been convicted, and there be a good and valid Conviction to sustain the same.

Not to repeal
any Act relating
to High Treason,
the Revenue, or Com-
binations.

XXXVII. Provided always, and be it enacted, That nothing in this Act contained shall affect or alter any Act, so far as it relates to the Crime of High Treason, or to any Branch of the Public Revenue, or shall affect or alter any Act for the Prevention of Smuggling, or any Part of the Act passed in the Sixth Year of the present Reign, intituled *An Act to repeal the Laws relating to the Combination of Workmen, and to make other Provisions in relation thereto*.

Not to extend
to Scotland or
Ireland.

XXXVIII. Provided also, and be it enacted, That nothing in this Act contained shall extend to Scotland or Ireland.

C A P. XXXII.

An Act for amending the Law of Evidence in certain Cases.
[27th June 1828.]

' WHEREAS it is expedient that Quakers and Moravians should be allowed to give Evidence upon their solemn Affirmation in all Cases, Criminal as well as Civil; and that in Prosecutions for Forgery, the Party interested should be required a competent Witness: Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That

THE
CODE OF VIRGINIA.

SECOND EDITION,

INCLUDING LEGISLATION TO THE YEAR

1860

PUBLISHED PURSUANT TO LAW.



RICHMOND:
PRINTED BY RITCHIE, DUNNAVANT & CO.
1860.



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| <p><i>Sec.</i>
1. Treason defined; how proved and punished.
2. Of imprisonment of treason.</p> | <p><i>Sec.</i>
3. Attempting, or instigating others, to establish, usurped government.
4. Advising or conspiring with slave, to rebel, &c.</p> |
|--|--|
1. Treason shall consist only in levying war against the state, or adhering to its enemies, giving them aid and comfort, or establishing, without authority of the legislature, any government within its limits, separate from the existing government, or holding or executing, in such usurped government, any office, or professing allegiance or fidelity to it, or resisting the execution of the laws, under color of its authority; and such treason, if proved by the testimony of two witnesses to the same overt act, or by confession in court, shall be punished with death.
2. If a free person, knowing of any such treason, shall not, as soon as may be, give information thereof to the governor, or some conservator of the peace, he shall be punished by fine not exceeding one thousand dollars, or by confinement in the penitentiary not less than three nor more than five years.
3. If a free person attempt to establish any such usurped government, and commit any overt act therefor, or, by writing or speaking, endeavor to instigate others to establish such government, he shall be confined in jail not exceeding twelve months, and fined not exceeding one thousand dollars.
4. If a free person advise or conspire with a slave to rebel or make insurrection, or with any person, to induce a slave to rebel or make insurrection, he shall be punished with death, whether such rebellion or insurrection be made or not.

CHAPTER CXCI.

OF HOMICIDE AND OTHER OFFENCES AGAINST THE PERSON.

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| <p><i>Sec.</i>
1. Definition and punishment of murder.
2. Punishment of manslaughter.
3. How and where homicide prosecuted and punished, if death occur without the state.
4. Attempt to poison or produce abortion.
5. Shooting, stabbing, &c. with intent to kill, maim, &c.
6. Shooting, &c. in committing or attempting a felony.
7. Shooting in a place of public resort.
8. Robbery, extorting money, &c.
9. Rape; carnal knowledge of female child; or abduction of white female.</p> | <p><i>Sec.</i>
17. Kidnapping.
18. Injuries by drivers, &c. of public conveyances.

<i>Duelling.</i>
19. Any previous agreement in this state, being engaged in a fatal duel out of the state; how and where prosecuted and punished.
20. For being engaged in a duel, when death does not occur; or for accepting or carrying a challenge or advising a duel.
21. When party leaves the state to evade the law and engages in a duel.
22. Plea of former conviction or acquittal.
23. For posting or upbraiding another for not being engaged in a duel.
24. Duty of a justice having cause to suspect a duel is about to be fought.</p> |
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*Homicide and poisoning.**

1. Murder by poison, lying in wait, imprisonment, starving, or any

* The sale of poisonous drugs to free negroes and slaves is prohibited. See ante, c. 104, § 6.

1847-8, p. 95,
c. 3, § 2
13 Gratt. 634

willful, deliberate and premeditated killing, or in the commission of, or attempt to commit arson, rape, robbery or burglary, is murder of the first degree. All other murder is murder of the second degree.*

1 R. C. p. 617, § 4
1819-20, p. 14,
c. 20
1847-8, p. 96

2. Murder of the first degree shall be punished with death.

3. Murder of the second degree, by a free person, shall be punished by confinement in the penitentiary not less than five nor more than eighteen years.

1 R. C. p. 618
1847-8, p. 96, § 5

4. Voluntary manslaughter, by a free person, shall be punished by confinement in the penitentiary not less than one nor more than five years.

1 R. C. c. 183
1847-8, p. 96, § 6
1833-40, p. 80,
c. 59, § 2
1847-8, p. 96,
§ 7, 8
Post, c. 109
2 Va. Cas. 203

5. Involuntary manslaughter, by a free person, shall be a misdemeanor.

6. If a person be stricken or poisoned in, and die, by reason thereof, out of this state, the offender shall be as guilty, and be prosecuted and punished, as if the death had occurred in the county or corporation in which the stroke or poison was given or administered.

1839-40, p. 50,
c. 85, § 1
1847-8, p. 97,
c. 3, § 17
1 Vict. c. 85, § 2, 3

7. If any free person administer, or attempt to administer, any poison or destructive thing in food, drink, medicine, or otherwise, or poison any spring, well or reservoir of water, with intent to kill or injure another person, he shall be confined in the penitentiary not less than three nor more than five years.

1847-8, p. 98,
c. 3, § 9
1 Vict. c. 85, § 6

8. Any free person who shall administer to, or cause to be taken by, a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be confined in the penitentiary not less than one nor more than five years. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child.

Shooting, stabbing, robbery, or extorting money.

1 R. C. p. 682,
c. 156, § 1, 2
1847-8, p. 96, § 10
1 Vict. c. 85,
§ 2, 4, 5
1 Va. Cas. 184
2 Va. Cas. 198,
231, 379
5 Mand. 660

9. If any free person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury, with intent to maim, disfigure, disable or kill, he shall, except where it is otherwise provided, be punished by confinement in the penitentiary not less than one, nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall, at the discretion of the jury, if the accused be white, or of the court, if he be a negro, either be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months, and fined not exceeding five hundred dollars.

1847-8, p. 97, § 12

10. If any free person, in the commission of, or attempt to commit, a felony, unlawfully shoot, stab, cut or wound another person, he shall, at the discretion of the jury, if the accused be white, or of the court, if he be a negro, either be confined in the penitentiary not less than one, nor more than five years, or be confined in jail not exceeding one year, and fined not exceeding five hundred dollars.

1846-7, p. 67, c. 70

11. If a free person unlawfully shoot at another person, in any street in a town, or in any place of public resort, whether in a town or else-

* See 1 Va. Cas. 10, 210; 2 Va. Cas. 70, 71, 111, 387, 483; 6 Rand. 721; 1 Leigh 596; 2 Leigh 745; 11 Leigh 681; 2 Rob. 772; 3 Gratt. 594; 5 Gratt. 600.

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where, he shall be confined in jail not less than six months, nor more than three years, and be fined not less than one hundred, nor exceeding one thousand dollars.

12. If any free person commit robbery, being armed with a dangerous weapon, he shall be confined in the penitentiary not less than five nor more than ten years; if not so armed, he shall be confined therein not less than three nor more than ten years. 1 R. C. p. 617, § 5
1810-20, p. 18,
c. 23
1847-8, p. 66,
§ 11, 13
1 Vict. c. 67

13. If any free person threaten injury to the character, person or property of another person, or to accuse him of any offence, and thereby extort money or pecuniary benefit, he shall be confined in the penitentiary not less than one nor more than five years. 1847-8, p. 66, § 10
1 Vict. c. 67, § 4
10 and 11 Vict.
c. 66, § 1, 2

14. If any free person seize, take or secrete a child from the person having lawful charge of such child, with intent to extort money or pecuniary benefit, he shall be confined in the penitentiary not less than one nor more than five years. 1847-8, p. 66, § 14
8 Geo. IV, c. 31,
§ 21

Rape, abduction and kidnapping.

15. If any white person carnally know a female of the age of twelve years or more, against her will, by force, or carnally know a female child under that age, he shall be confined in the penitentiary not less than ten nor more than twenty years.

16. If any white person take away or detain, against her will, a white female, with intent to marry or defile her, or cause her to be married or defiled by another person, or take from any person, having lawful charge of her, a female child under twelve years of age, for the purpose of prostitution or concubinage, he shall be confined in the penitentiary not less than three nor more than ten years. 1 R. C. p. 401, 2,
c. 106, § 24, 25
1847-8, p. 37, § 16
8 Geo. IV, c. 31,
§ 19, 20
3 Rand. 638

17. If any free person sell a free person as a slave, or kidnap a free person with intent to use or sell him as a slave, knowing him to be free, he shall be confined in the penitentiary not less than three nor more than ten years. 1 R. C. p. 427,
§ 28
1847-8, p. 37, § 19
2 Va. Cus. 144
1 Leigh 588
11 Leigh 636

Injury in public conveyance.

18. If any driver, conductor or captain of any vehicle or boat for public conveyance, being free, shall, in the management of such vehicle or boat, willfully or negligently inflict bodily injury on any person, he shall be punished as for a misdemeanor. 1847-8, p. 37, § 20

Duelling.

19. If any free person, resident in this state, by previous agreement made within the same, fight a duel without the state, and in so doing inflict a mortal wound, he shall be deemed guilty of murder in this state.

20. If any free person, resident in this state, by like agreement, be the second of either party in such duel as is mentioned in the preceding section, and be present as such, when such mortal wound is inflicted, he shall be deemed an accessory before the fact, to the crime of murder in this state. 1 R. C. p. 524, § 6
1830-31, p. 103,
c. 37, § 1
1847-8, p. 37, § 8,
§ 22, 24

21. An offender, under either of the two preceding sections, may be id. § 21 to 24

¹ 1 R. C. p. 585, c. 138, § 1, 2. 1847-8, p. 37, § 15. 9 Geo. IV, c. 31, § 17. 1 Va. Cus. 307.

² Va. Cus. 215.

³ As to who may be witnesses in prosecutions for duelling, see ante, c. 12 § 1.

⁴ 1809-10, p. 9, c. 10. 1 R. C. p. 564, § 6. 1830-31, p. 103, c. 37, § 1. 1847-8, p. 37, § 21, 22.

prosecuted in the county or corporation in which the death occurs, if it occur within this state; and if not, in any county or corporation in which such offender may be found.

1d. p. 96, § 25
2 Va. Cas. 514
3 Leigh 603

22. If any free person fight a duel, with any deadly weapon, though no death ensue, or send or deliver to another a challenge, or message intended to be a challenge, oral or written, to fight a duel, though no duel ensue, he shall be confined in jail not more than one year and be fined not exceeding one thousand dollars.

1847-8, p. 69,
c. 3, § 26

23. And if any free person accept, or knowingly carry or deliver, any such challenge or message, or advise, encourage or promote such duel, he shall be confined in jail not more than six months and fined not exceeding five hundred dollars.

1d. § 27
2 Va. Cas. 172

24. If any free person, resident in this state, leave the same for the purpose of eluding the provisions herein contained, respecting dueling or challenges to fight, and without the state engage in a duel (though no death ensue), or challenge another, or send or deliver a message, intended to be a challenge to fight such duel, or accept, or knowingly carry or deliver any such challenge or message, or be present at the fighting of such a duel, with deadly weapons, as an aid, second or surgeon, or advise, encourage or promote such duel, he shall be deemed as guilty and subject to the like punishment, as if the offence had been committed in this state.

1d. § 28

25. A person indicted in this state under the nineteenth, twentieth, twenty-first, or twenty-fourth section, may plead his conviction or acquittal of the same offence in another state, in bar of such indictment.

1d. § 29

26. If any free person post another, or, in writing or in print, use any reproachful or contemptuous language to or concerning another, for not fighting a duel, or for not sending or accepting a challenge, he shall be confined in jail not more than six months, or fined not exceeding one hundred dollars.

1 R. C. p. 584, § 5
1830-31, s. 104,
c. 37, § 5
1847-8, p. 96, § 30

27. If any justice or judge have good cause to suspect, that any persons are about to be engaged in a duel, he may issue his warrant to bring them before him, and if he think proper to take from them a recognizance to keep the peace, he shall insert therein a condition, that they will not, during the time for which they may be bound, be concerned in a duel, directly or indirectly.

CHAPTER CXII.

OF OFFENCES AGAINST PROPERTY.

Sec.	Sec.
1. Burning dwelling house, jail or prison, at night.	11. Of burglary.
2. Burning such house in the day time.	12. Entering dwelling or other house or a vessel, with intent to commit robbery, rape or murder.
3. What not deemed a dwelling house.	13. As to same act, done with intent to commit larceny or any felony.
4. Burning certain other houses, or piles of wood, or stacks of wheat, &c.	14. Grand larceny and petit larceny.
5. Burning any house not previously mentioned.	15. Stealing writings or book of accounts;
6. Burning a bridge, dam, &c. or a vessel.	16. How value thereof estimated.
7. Setting fire to fences, &c. capable of spreading fire.	17. Larceny may be of things fixed to the freehold.
8. Intentionally setting fire to woods.	18. Taking or secreting a child.
9. Willfully burning property with intent to injure an owner.	19. Stealing a slave.
	20. Receiving stolen goods, deemed larceny; when and how prosecuted.

STATE'S INSTRUCTION NO. ____

The offense charged in Count ____ of the Indictment in this case is Malicious Assault. One of five verdicts may be returned by you under this Count of the Indictment. They are: (1) guilty of Malicious Assault; (2) guilty of Unlawful Assault; (3) guilty of Battery; (4) guilty of Assault; and (5) not guilty.

Malicious assault is committed when any person maliciously shoots, stabs, cuts or wounds or by some other means causes bodily injury to another with the intent to kill or permanently maim, disfigure or disable the other person.

Unlawful assault is committed when any person unlawfully, but not maliciously, shoots, stabs, cuts, wounds or by some other means causes bodily injury to another with intent to kill or permanently maim, disfigure or disable the other person.

Battery is committed when any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another, or unlawfully and intentionally causes physical harm to another person.

Assault is committed when any person unlawfully attempts to commit a violent injury to the person of another or unlawfully commits an act which places another in reasonable apprehension of immediately receiving a violent injury.

The burden is on the State to prove the guilt of the Defendant beyond a reasonable doubt and the Defendant, XXX is not required to prove himself innocent. He is presumed by the law to be innocent of this charge and this presumption remains with him throughout the entire trial.

Before the Defendant, XXX can be convicted of Malicious Assault, the State of West Virginia must overcome the presumption that the Defendant, XXX is innocent and prove to the satisfaction of the jury beyond a reasonable doubt that:

1. The Defendant, XXX,
2. in YYY County, West Virginia,



3.on or about the ____ day of _____, 199__,

4.did unlawfully and maliciously (cut) (stab) (wound) (shoot) (or describe other
means _____) cause bodily injury to

5.ZZZ,

6.with the intent to (kill) (permanently maim) (permanently disfigure)
(permanently disable),

7.ZZZ.

If after impartially considering, weighing and comparing all the evidence,
(both that of the State and that of the Defendant) the jury and each member of
the jury is convinced beyond a reasonable doubt of the truth of the charge as
to each of these elements of Malicious Assault, you may find XXX guilty of
Malicious Assault as charged in Count ____ of the indictment. If the jury and
each member of the jury has a reasonable doubt of the truth of the charge as
to any one or more of these elements of Malicious Assault, you shall
find the Defendant XXX not guilty of Malicious Assault (and deliberate on the
lesser included offense of Unlawful Assault as hereinafter instructed).

Before the Defendant, XXX can be convicted of Unlawful Assault, the State
of West Virginia must overcome the presumption that the Defendant, XXX is innocent
and prove to the satisfaction of the jury beyond a reasonable doubt that:

1.The Defendant, XXX,

2.in YYY County, West Virginia,

3.on or about the ____ day of _____, 199__,

4.did unlawfully but not maliciously (cut) (stab) (wound) (shoot) (or describe other
means _____) cause bodily injury to

5.ZZZ,

6.with the intent to (kill) (permanently maim) (permanently disfigure)
(permanently disable),

7.ZZZ.

If after impartially considering, weighing and comparing all the evidence, (both that of the State and that of the Defendant) the jury and each member of the jury is convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Unlawful Assault, you may find XXX guilty of Unlawful Assault as charged. If the jury and each member of the jury has a reasonable doubt of the truth of the charge as to any one or more of these elements of Unlawful Assault, you shall find the Defendant XXX not guilty of Unlawful Assault (and deliberate on the lesser included offense of Battery as hereinafter instructed).

Before the Defendant, XXX can be convicted of Battery, the State of West Virginia must overcome the presumption that the Defendant, XXX is innocent and prove to the satisfaction of the jury beyond a reasonable doubt that:

- 1.The Defendant, XXX,
- 2.in YYY County, West Virginia,
- 3.on or about the ____ day of _____, 199__,
- 4.did unlawfully and intentionally (make physical contact of an insulting or provoking nature with the person of _____) (cause physical harm to the person of _____).

If after impartially considering, weighing and comparing all the evidence, (both that of the State and that of the Defendant) the jury and each member of the jury is convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Battery, you may find XXX guilty of Battery as charged. If the jury and each member of the jury has a reasonable doubt of the truth of the charge as to any one or more of these elements of Battery, you shall find the Defendant XXX not guilty of Battery (and deliberate on the lesser included offense of Assault as hereinafter instructed).

Before the Defendant, XXX can be convicted of Assault, the State of West Virginia must overcome the presumption that the Defendant, XXX is innocent and prove to the satisfaction of the jury beyond a reasonable doubt that:

- 1.The Defendant, XXX,
- 2.in YYY County, West Virginia
- 3.on or about the ____ day of _____, 199__,
- 4.did unlawfully (commit an act which placed _____ in
reasonable apprehension of receiving a violent injury) (attempt to commit
a violent injury to the person of _____).

If after impartially considering, weighing and comparing all the evidence, (both that of the State and that of the Defendant) the jury and each member of the jury is convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Assault, you may find XXX guilty of Assault as charged. If the jury and each member of the jury has a reasonable doubt of the truth of the charge as to any one or more of these elements of Assault, you shall find the Defendant XXX not guilty.

JURY VERDICT FORM

We, the members of the Petit Jury, as to the issues joined as to the Indictment find the Defendant XXX:

_____ Guilty of Malicious Assault

_____ Guilty of Unlawful Assault

_____ Guilty of Battery

_____ Guilty of Assault

_____ Not guilty.

Date: _____

Foreperson

IN THE CIRCUIT COURT OF [county] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

[case number]
Hon. [name]

[name-all caps],

Defendant.

DEFENDANT'S INSTRUCTION NO. ____

Malicious Assault (including lesser offenses) (effective June 29, 2017)

Count ____ of the indictment charges the defendant with Malicious Assault. You may return one of five verdicts under this Count of the indictment:

1. guilty of Malicious Assault;
2. guilty of Unlawful Assault;
3. guilty of Battery;
4. guilty of Assault; or
5. not guilty.

Malicious Assault occurs when a person maliciously shoots, stabs, cuts or wounds or by any means causes bodily injury to another with the intent to permanently maim, permanently disfigure, permanently disable, or kill the other person. Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.



Unlawful Assault occurs when a person unlawfully, but not maliciously, shoots, stabs, cuts, wounds, or by any means causes bodily injury to another with intent to permanently maim, permanently disfigure, permanently disable, or kill the other person.

Battery occurs when a person unlawfully and intentionally makes physical contact of an insulting or provoking nature to another person, or unlawfully and intentionally causes physical harm to another person.

Assault occurs when a person unlawfully and intentionally attempts to commit a violent injury to another person or unlawfully commits an act which places another person in reasonable apprehension of immediately receiving a violent injury.

The burden is on the State to prove the defendant's guilt beyond a reasonable doubt and the defendant is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the defendant can be convicted of Malicious Assault, the State must overcome the presumption that the defendant is innocent and prove beyond a reasonable doubt that:

1. the defendant
2. in [insert county] County, West Virginia,
3. on or about the ____ day of [insert month], [insert year],
4. did maliciously (cut) (stab) (wound) (shoot) (or by any means) cause bodily injury to
5. [insert name(s) of victim(s)],
6. with the intent to permanently maim, permanently disfigure permanently disable, or kill

7. [insert name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the defendant), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the defendant guilty of Malicious Assault as charged in Count ___ of the indictment. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the defendant not guilty of Malicious Assault (and deliberate on the lesser included offense of Unlawful Assault as instructed).

Before the defendant can be convicted of Unlawful Assault, the State must overcome the presumption that the defendant is innocent and prove beyond a reasonable doubt that:

1. the defendant,
2. in [insert county] County, West Virginia,
3. on or about the ___ day of [insert month], [insert year],
4. did unlawfully but not maliciously (cut) (stab) (wound) (shoot) (by any means) cause bodily injury to [insert name(s) of victim(s)],
5. with the intent to permanently maim, permanently disfigure, permanently disable, or kill
6. [insert name(s) of victim(s)].

If, after impartially considering, weighing, and comparing all the evidence (that of both the State and the defendant), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the defendant guilty of Unlawful Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you must find the defendant not guilty of Unlawful Assault, and deliberate on the lesser included offense of Battery as instructed.

Before the defendant can be convicted of Battery, the State must overcome the presumption that the defendant is innocent and prove beyond a reasonable doubt that:

1. the defendant
2. in [insert county] County, West Virginia,
3. on or about the __ day of [insert month], [insert year],
4. did unlawfully and intentionally [make physical contact of an insulting or provoking nature] [cause physical pain or injury] to
5. [insert name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the defendant), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the defendant guilty of Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the defendant not guilty of Battery (and deliberate on the lesser included offense of Assault as instructed).

Before the defendant can be convicted of Assault, the State must overcome the presumption that the defendant is innocent and prove beyond a reasonable doubt that:

1. the defendant
2. in [insert county] County, West Virginia
3. on or about the __ day of [insert month], [insert year],
4. did unlawfully {attempt to commit a violent injury to [insert name(s) of victim(s)]} {unlawfully commit an act that placed [insert name(s) of victim(s)] in reasonable apprehension of immediately receiving a violent injury}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the defendant), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the defendant guilty of Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the defendant not guilty.

GIVEN: _____

REFUSED: _____

MODIFIED: _____

JUDGE

CERTIFICATE OF SERVICE

I, Gary A. Collias, counsel for Petitioner, Timothy Maichle, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying "*Petitioner's Brief*" and "*Appendix Record*" to the following:

Andrea Nease Proper
Assistant Attorney General
Office of the Attorney General
Appellate Division
1900 Kanawha Blvd. East
State Capitol, Bldg. 6, Ste 406
Charleston, WV 25305

Counsel for Respondent

via hand-delivery and by depositing the same in the United States mail in a properly addressed, postage paid, envelope, as stated above, on the 18th day of February, 2022.



GARY A. COLLIAS
West Virginia State Bar #784
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
gary.a.collias@wv.gov

Counsel for Petitioner