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. \_\_\_\_

Count \_\_ of the indictment charges the defendant with Third Offense Domestic Violence.

You may return one of three verdicts under this Count of the indictment:

(1) guilty of Third Offense Domestic Violence;

(2) guilty of Domestic Assault or

(3) not guilty.

Domestic Battery occurs when a family or household member unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member, or unlawfully and intentionally causes physical harm to another family or household member.

Domestic Assault occurs when a person unlawfully attempts to commit a violent injury to another family or household member, or unlawfully commits an act which places the family or household member in reasonable apprehension of immediately receiving a violent injury.

Third Offense Domestic Violence occurs when a family or household member commits either Domestic Assault or Domestic Battery, having been previously twice convicted of Domestic Assault or Domestic Battery or other predicate offense, [insert predicate offense under W. Va. Code §§ 61–2–9(b), 61–2–9(c), or 61–2–14g(a), where the victim was a family or household member], specifically, [insert description of offense]; or having previously been granted a period of pretrial diversion pursuant to W. Va. Code § 61–11–22 for a violation of W. Va. Code §§ 61–2–28(a), 61–2–28(b), 61–2–9(a) or (b) or (c), or 61–2–14g(a)], specifically, [insert particular offense at issue], where such third Domestic Assault or Domestic Battery occurs within ten years of the prior convictions.

“Family member’ or “Household member” means a current or former spouse, a current or former sexual or intimate partner, a person with whom the defendant has a child in common, a person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant’s child or ward, or a member of the defendant’s household at the time of the offense.

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 Third Offense Domestic Violence, the State must overcome the presumption that the defendant is innocent and prove to your satisfaction 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

5. {attempt to use force capable of causing physical pain or injury to [insert name(s) of victim(s)], being a family or household member} {commit an act which placed [insert name(s) of victim(s)], being a family or household member, in reasonable apprehension of immediately suffering physical pain or injury),

6. [insert name(s) of victim(s)] being a family or household member,

7. of which family or household the defendant is also a member,

8. and on the \_\_ day of [insert month], [insert year],

9. the defendant was previously {convicted of Domestic [Battery] [Assault] {a violation of [61–2–9(a)] [61–2–9(b)] [61–2–9(c)] [61–2–14g(a)]} {given a Pretrial Diversion based upon a charge of [Domestic Battery] [Domestic Assault] [insert other predicate offense ]}

10. and on the \_\_ day of [insert month], [insert year],

11. the defendant was previously {convicted of Domestic [Battery] [Assault] {a violation of [61–2–9(b)] [61–2–9(c)] [61–2–14g(a)]} {given a Pretrial Diversion based upon a charge of [Domestic Battery] [Domestic Assault] [insert other predicate offense ]} on the \_\_ day of [insert month], [insert year],

12. and said convictions were within ten (10) years of the current violation.

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 of Third Offense Domestic Violence you may find the defendant guilty of Third Offense Domestic Violence as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements of Third Offense Domestic Violence you shall find the defendant not guilty of Third Offense Domestic Violence (and deliberate on the lesser included offense of Domestic Assault).

Before the defendant can be convicted of Domestic Assault, the State must overcome the presumption that the defendant is innocent and prove to your satisfaction 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)], being a family or household member} {commit an act which placed [insert name(s) of victim(s)], being a family or household member, in reasonable apprehension of immediately receiving a violent injury},

5. of which family or household the defendant is also a member.

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 of Domestic Assault, you may find the defendant guilty of Domestic Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements of Domestic Assault, you shall find the defendant not guilty.

GIVEN:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

REFUSED:\_\_\_\_\_\_\_\_\_\_\_\_\_

MODIFIED:\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

JUDGE