

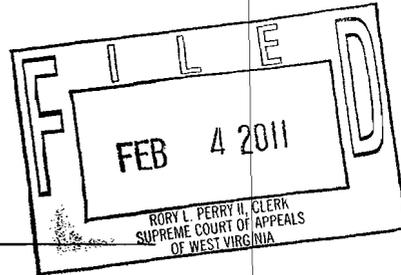
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff

V.

CASE NO.: _____
MCDOWELL CO. CASE NO.: 94-F-169

FRANKLIN JUNIOR KENNEDY,
Defendant



PETITION OF APPEAL,
BY DEFENDANT BELOW,
OF TRIAL COURT'S DENIAL
OF DEFENDANT'S MOTION FOR NEW TRIAL

A handwritten signature in cursive script, appearing to read "Steven K. Mancini".

Steven K. Mancini
Counsel for Petitioner,
Franklin Junior Kennedy
State Bar ID#: 5921
P.O. Box 5514
Beckley, WV 25801
(304) 256-8388

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff

V.

CASE NO.: _____
MCDOWELL CO. CASE NO.: 94-F-169

FRANKLIN JUNIOR KENNEDY,
Defendant

DESIGNATION OF RECORD

Petitioner, by counsel, hereby designates all pleadings, documents, exhibits, and transcripts found in the file of the Circuit Court of McDowell County, for the action herein.



Steven K. Mancini
Counsel for Petitioner,
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MEMORANDUM OF PARTIES

The following constitutes all the parties and counsel as appear in the action herein
in the Circuit Court below:

Franklin Junior Kennedy
Petitioner here
Defendant below
By: Steven K. Mancini
P.O. Box 5514
Beckley, WV 25801
(304) 256-8388

The State of West Virginia
Plaintiff below
By: Sidney H. Bell, Esq.
McDowell Co. Prosecuting Atty.
93 Wyoming St.
Welch, WV 24801
(304) 436-8551

MEMORANDUM OF AUTHORITIES

Case Law

- State of West Virginia v. Franklin Junior Kennedy*, 205 W.Va. 224, 517 S.E.2d 457 (1999)
..... p. 1, 2, 3, 4
- State of West Virginia v. James Allen Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006)
..... p. 2, 3
- State of West Virginia v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990)
..... p. 3, 4
- Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1990)
..... p. 3
- United States v. Inadi*, 475 U.S. 387 (1986)
..... p. 3
- Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004)
..... p. 3
- Melendez-Diaz v. Massachusetts*, 557 U.S. ____, 129 S.Ct. 2527 (2009)
..... p. 3, 4
- Briscoe v. Virginia*, 559 U.S. ____, 130 S.Ct. 1316 (2010)
..... p. 3
- Magruder v. Commonwealth*, 275 Va. 283, 657 S.E.2d 113 (2008)
..... p. 4
- State of West Virginia v. Jackson*, 171 W.Va. 329 (1992)
..... p. 4

Now before this Honorable Court comes your Petitioner, Franklin Junior Kennedy, Defendant in the McDowell County Circuit Court criminal matter below. Petitioner petitions this Court to grant an appeal of the Order of the Circuit Court of the Eighth Judicial Circuit, the Hon. Booker T. Stephens presiding, *Memorandum Opinion Order*, entered September 23, 2010, denying *Defendant's Motion for New Trial*.

I.: Statement of Facts and Procedural History.

On July 28, 1994, the body of the victim, Lashonda Viars, was discovered in Bartley, McDowell County. Ms. Viars had died from trauma to the head.

Petitioner was arrested that day and charged with Ms. Viars' murder. At trial November, 1996, Petitioner testified that his wife had killed Ms. Viars, as the result of jealousy and anger over Petitioner's relationship with Ms. Viars.

Petitioner was convicted of first-degree murder, with a recommendation of mercy.

Petitioner filed two new-trial motions in the trial court, based upon newly-discovered evidence and prosecutorial non-disclosure of evidence. These were denied by the trial court.

Additionally, Petitioner previously filed a *Petition of Appeal* with this court, which appeal was granted (*State of West Virginia v. Franklin Junior Kennedy*, 205 W.Va. 224, 517 S.E.2d 457

(1999)).

One of the issues raised by Petitioner as Appellant in his prior appeal to this Court was that his Constitutional right to confront witnesses against him had been violated. This ground was based on the fact that while a Dr. Livingston of the West Virginia Medical Examiner's Office had performed the autopsy, and prepared the autopsy report in this case, a Dr. Zia Sabet, of said Office, had appeared and testified upon the autopsy report and results.

Defendant's conviction was affirmed by this Court.

This Court, in *State of West Virginia v. James Allen Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006), has overruled *State v. Kennedy* upon this Confrontation Clause issue.

On September 15, 2010, *Defendant's Motion for New Trial* was heard in the trial court. Therein, relying upon *Mechling*, and United States Supreme Court opinions since, Petitioner moved the trial court to grant a new trial in this matter.

The trial Court's *Memorandum Opinion Order* denied Petitioner's new-trial motion. (Said *Order*, entered by the trial court, was prepared by the Prosecuting Attorney, although this is not reflected in the *Order* itself.)

It is from this *Memorandum Opinion Order* that Petitioner appeals.

II.: Assignment of Error.

That, in light of *West Virginia v. Mechling* overruling *West Virginia v. Kennedy*, and decisions subsequently by the United States Supreme Court, the trial court erred in denying *Defendant's Motion for New Trial* below.

In the alternative, and in the least, the Confrontation Clause issue raised by Petitioner here

is left unsettled in West Virginia by the referenced West Virginia Supreme Court and United States Supreme Court decisions, and is ripe for this Court to consider.

III.: Argument.

In deciding *West Virginia v. Kennedy*, this Court modified *State of West Virginia v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), which had established a two-prong standard for the admissibility of extrajudicial testimony: demonstration of witness' unavailability; and proving the reliability of the out-of-court statement.

In light of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1990), as modified by *United States v. Inadi*, 475 U.S. 387 (1986), this Court in *Kennedy* modified *James Edward S.*, requiring that the unavailability prong of Confrontation Clause analysis is only invoked when the extrajudicial statement in question was made in a prior judicial proceeding.

Mechling overruled *Kennedy*, and also overruled *James Edward S.*, relying on *Crawford v. Washington*, 541 U.S.36, 124 S.Ct. 1354 (2004). That is, admission of testimonial statements by a witness who does not appear at trial, regardless of the witness' unavailability, is not permitted.

Crawford v. Washington had overruled *Ohio v. Roberts*.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. ____, 129 S. Ct. 2527 (2009), the United States Supreme Court ruled that admission of laboratory certificates which show the results of forensic tests without the testimony of the laboratory analysts who had signed those certificates, violates a defendant's Sixth Amendment right to confront those witnesses against him.

Further, in *Briscoe v. Virginia*, 559 U.S. ____, 130 S.Ct. 1316 (2010), the issue presented to the United States Supreme Court was whether an accused's Sixth Amendment Confrontation

Right is not violated provided that he, as the defendant, has the opportunity to call as a witness the analyst who signed the lab certificates.

The United States Supreme Court vacated the Virginia Supreme Court's decision (*Magruder v. Commonwealth*, 275 Va. 283, 657 S.E.2d 113 (2008)), where the Virginia court found no Sixth Amendment violation, and remanded for further proceedings in light of *Melendez-Diaz*.

The trial court in Petitioner's case acknowledges that "[t]he effect these cases may have on Confrontation Clause issues in West Virginia has not yet been address [*sic*] by the state Supreme Court." *Memorandum Opinion Order*, p. 5.

Also, the trial Court states that "[t]he state Supreme Court of Appeals has not yet address [*sic*] whether the *Melendez-Diaz* decision has any bearing on [Syl. Pt. 5, *State v. Jackson*, 171 W.Va. 329 (1992)]." *Order*, p. 6.

The trial court does cite two cases which it finds to be persuasive authority. *Order*, p. 6.

IV.: Prayer for Relief.

Petitioner asserts that the trial court has erred in distinguishing the United States Supreme Court decisions in *Melendez-Diaz* and *Magruder* from Petitioner's case. Petitioner further avers that these decisions, together with this court's ruling in *Mechling*, overruling *Kennedy* (and *James Edward S*), present this Court with an opportunity to clarify Confrontation Clause jurisprudence in West Virginia.

Petitioner prays this Court to accept his *Petition of Appeal*; to reverse the trial court's *Memorandum Opinion Order*; and to grant a new trial, or other relief as deemed meet.

A handwritten signature in cursive script, appearing to read "S. Mancini", written over a horizontal line.

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Counsel for Petitioner
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304-256-8388

CERTIFICATE OF SERVICE

This is to certify that the undersigned has served, by hand, delivered today, January 24, 2011, a true and accurate copy of the foregoing *Petition of Appeal* upon the following:

Sidney H. Bell, Esq.
McDowell Co. Prosecuting Atty.
93 Wyoming St.
Welch, WV 24801



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