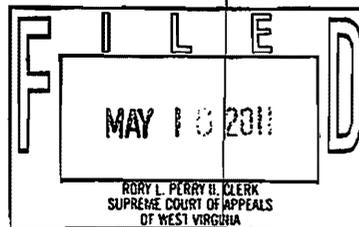


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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 11-0223**



**STATE OF WEST VIRGINIA,**

*Respondent,*

**v.**

**FRANKLIN JUNIOR KENNEDY,**

*Petitioner.*

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**BRIEF OF THE RESPONDENT,  
STATE OF WEST VIRGINIA**

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---

**BRIEF OF THE RESPONDENT,  
STATE OF WEST VIRGINIA**

---

Comes now the State of West Virginia, by counsel, Barbara H. Allen, Managing Deputy Attorney General, and files this brief in response to the Petition for Appeal. This will be the second time this Honorable Court has had the opportunity to review this case, following the Petitioner's conviction of first degree murder in the bludgeoning death of his 15-year-old girlfriend.

I.

**ASSIGNMENTS OF ERROR**

1. Whether this case is on direct review rather than collateral review by virtue of the Petitioner's election to file a Motion for New Trial – eleven years after his case was previously and finally adjudicated – rather than a Petition for Writ of Habeas Corpus.

2. Whether *Crawford v. Washington*, 541 U.S. 36 (2004), and/or *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), overruled *State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999), with respect to the particular Confrontation Clause issue in this case: does admission of an

autopsy report into evidence violate the Confrontation Clause when the pathologist who testified at trial was not the pathologist who performed the autopsy.

3. Assuming arguendo that the answer to Question No. 2 is yes, whether *Crawford* and/or *Mechling* have retroactive application to a case that was previously and finally adjudicated years before *Crawford* and *Mechling* were decided.

4. Assuming arguendo that the answer to Question No. 3 is yes, whether admission of the autopsy report was harmless error in light of the particular facts and circumstances of this case.

## II.

### STATEMENT OF THE CASE

The critical facts of this case are cogently set forth in this Court's opinion in *State v. Kennedy*, 205 W. Va. 224, 227, 517 S.E.2d 457, 460 (1999):

On July 28, 1994, the body of fifteen-year-old Lashonda Viars was discovered in Bartley, West Virginia. Ms. Viars died as a result of a severe head wound. [Petitioner] was arrested that same day and charged with murder. At the trial held on November 20 and 21, 1996, [Petitioner] testified that his wife, Tonya Kennedy, had committed the murder. The evidence presented by the State at trial included a blood sample of the victim taken from the exterior of [Petitioner's] personal vehicle; the autopsy of the victim; testimony placing [Petitioner] with Ms. Viars on the night of the murder; and testimony of investigative law enforcement officers. Following a jury conviction for first degree murder with a recommendation of mercy, [Petitioner] is serving a life sentence with parole eligibility.

On August 17, 2010, more than eleven years after his case was previously and finally adjudicated, six years after the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), and four years after this Court's decision in *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), the Petitioner filed a Motion for New Trial, arguing that *Mechling* had expressly overruled *Kennedy* and that his conviction should therefore be reversed under both *Mechling* and *Crawford*. (Record II, p. 218.) The factual basis of the Petitioner's argument was

that admission of the autopsy report into evidence at the trial violated his Confrontation Clause rights because Dr. Livingston, the pathologist who performed the autopsy, was not called as a witness.<sup>1</sup> Instead, another pathologist, Dr. Sabet, reviewed the report, as well as all of the autopsy photographs, and testified as to cause and manner of death.

On September 23, 2010, the court below issued a Memorandum Opinion Order denying relief. (Record II, p. 230.)

This appeal followed.

### III.

#### SUMMARY OF ARGUMENT

This case is on collateral appeal, not direct appeal, notwithstanding the Petitioner's procedural maneuver of bringing the issue to the court below on a Motion for New Trial, rather than a Petition for Writ of Habeas Corpus. Nothing in the Rules of Criminal Procedure permits a defendant to file a post-trial motion in a case that was previously and finally adjudicated eleven years earlier. Rather, the law, and specifically West Virginia Code § 53-4A-1 *et seq.*, permits him to bring a collateral proceeding to allege, *inter alia*, a change in the law that should be retroactively applied to void his conviction.

In *State v. Mechling*, 219 W. Va. 366, 373, 633 S.E.2d 311, 318 (2006), this Court overruled what it deemed "the fundamental holding" of *State v. Kennedy*, 205 W. Va. 224, 517 S.E.3d 457 (1999), specifically, that under *Ohio v. Roberts*, 448 U.S. 56 (1980), the testimonial statements of a witness who does not appear at trial may be admissible in evidence so long as the statements fit

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<sup>1</sup>Dr. Livingston was unavailable, having moved to Syracuse, New York. (Trial Transcript, p. 254.)

within a recognized hearsay exception and thus have an indicia of reliability. It is unclear whether, in so doing, this Court held by necessary implication that the autopsy report prepared by the absent pathologist was “testimonial.” However, the Supreme Court’s recent decision in *Melendez-Diaz v. Massachusetts*, \_\_\_ U.S. \_\_\_, 174 L. Ed. 2d 314 (2009), supports a finding that an autopsy report is testimonial, as it is not “created for the administration of an entity’s affairs [but rather] for the purpose of establishing or proving some fact at trial . . . .” *Id.*, \_\_\_ U.S. at \_\_\_, 174 L. Ed. 2d. at 329.

The decision of the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), incorporated into West Virginia’s jurisprudence in *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), should not be applied retroactively to a case that was previously and finally adjudicated five years prior to *Crawford*. The Supreme Court specifically held that *Crawford* was not retroactive, *Whorton v. Bockting*, 549 U.S. 406, 417, 421 (2007), and although it subsequently concluded that the states could afford retroactivity in their own proceedings if they so chose, *Danforth v. Minnesota*, 552 U.S. 264, 282, 288 (2008), the overwhelming majority of jurisdictions that have considered the issue have declined to do so.

Assuming *arguendo* that this Court holds *Crawford* to be fully retroactive in West Virginia proceedings, the Court should apply a harmless error analysis since the Confrontation Clause error in the Petitioner’s case was evidentiary, not structural. Admission of the autopsy report into evidence was harmless beyond a reasonable doubt, in that nothing contained therein was a matter of dispute. The Petitioner did not contest that the victim died of multiple blunt force injury to the head, causing acute subdural, subarachnoid hemorrhage; rather, his defense was that his wife had killed Lashonda Viars and that his only participation was as an accessory after the fact, getting rid of the body.

IV.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The State believes that this case is appropriate for consideration under Rule 20 of the Revised Rules of Appellate Procedure. First, the issue of whether or not *Crawford/Mechling* will be afforded full retroactive application in West Virginia is of critical importance to litigants, attorneys and judges, as it can be reasonably anticipated that a huge number of habeas corpus petitions would be filed in the wake of the Court's decision to afford retroactivity. Second, the issue of whether or not an autopsy report can be admitted into evidence where its author is not available to testify, or at least be utilized by another pathologist as a basis for his or her opinion testimony, is also of critical importance, given the mobility of medical examiners and the difficulty and expense of securing the attendance of a long-gone witness.

V.

**ARGUMENT**

- 1. WHETHER THIS CASE IS ON DIRECT REVIEW RATHER THAN COLLATERAL REVIEW BY VIRTUE OF THE PETITIONER'S ELECTION TO FILE A MOTION FOR NEW TRIAL – ELEVEN YEARS AFTER HIS CASE WAS PREVIOUSLY AND FINALLY ADJUDICATED – RATHER THAN A PETITION FOR WRIT OF HABEAS CORPUS.**

Standard of review: "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." *Crystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995), Syl. Pt. 1; *State v. Hicks*, No. 35670 (W. Va., Apr. 14, 2011), Syl. Pt. 1.

The Petitioner elected to bring his challenge by filing a Motion for New Trial rather than a Petition for Writ of Habeas Corpus, which presents a significant threshold issue in this case: by the

simple expedient of filing something other than a petition for relief under W. Va. Code § 53-4A-1 *et seq.*, has the Petitioner effectively converted this into a direct appeal rather than a collateral proceeding?

The State contends that the answer is, and must be, no. The court below did not even consider whether a Motion for New Trial was the proper procedural vehicle in this case – he just proceeded to decide the merits – but this Court must do so because the distinction between direct and collateral proceedings is critical in an analysis of retroactivity.

The Petitioner's case was previously and finally adjudicated in 1999, when this Court affirmed his conviction. *State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999). The case of *Crawford v. Washington*, 541 U.S. 36 (2004), upon which he bases his claim for relief, was decided in 2004. The case of *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), in which this Court revised West Virginia evidentiary procedure to conform to *Crawford*, and in so doing specifically overruled *Kennedy*, was decided in 2006.

Not until August 17, 2010 did the Petitioner file his Motion for New Trial. (Record II, p. 230.)

Rule 33 of the West Virginia Rules of Evidence provides, in pertinent part, that:

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice . . . A motion for a new trial based on the ground of newly discovered evidence may be made only after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within ten days after verdict or finding of guilty or within such further time as the court may fix during the ten day period.

Clearly, the Petitioner's claim for relief was not properly brought as a motion under Rule 33. The language "in the interest of justice" refers to the Petitioner's burden of proof, *State v. Rager*,

199 W. Va. 294, 484 S.E.2d 177 (1997); it is *not* a mechanism with which to reopen a case that has been previously and finally adjudicated. To the extent that “newly discovered evidence” may be analogized to “newly announced law” as a basis for relief, the Petitioner was required to exercise diligence in filing the motion and raising the issue. *State v. Crouch*, 191 W. Va. 272, 445 S.E.2d 213 (1994). *State v. Helmick*, 201 W. Va. 163, 495 S.E.2d 262 (1997). As noted, *Crawford* was issued in 2004 and *Mechling* in 2006, yet the Petitioner waited six and four years, respectively, to bring these authorities to the attention of the court below as the basis of his claim for relief. As a matter of law, this fails any due diligence test.

Just as clearly, the Petitioner’s claim for relief *could* have been properly brought under West Virginia Code § 53-4A-1(d), which provides that:

For the purposes of this article, and notwithstanding any other provisions of this article, no such contention or contentions and grounds shall be deemed to have been previously and finally adjudicated or to have been waived where, subsequent to any decision upon the merits thereof or subsequent to any proceeding or proceedings in which said question otherwise may have been waived, any court whose decisions are binding upon the supreme court of appeals of this State or any court whose decisions are binding upon the lower courts of this State holds that the Constitution of the United States or the Constitution of West Virginia, or both, impose upon State criminal proceedings a procedural or substantive standard not theretofore recognized, *if and only if such standard is intended to be applied retroactively* and would thereby affect the validity of the petitioner’s conviction. (Emphasis supplied.)

*See also Bowman v. Leverette*, 169 W. Va. 589, 289 S.E.2d 435 (1982), Syl. Pt. 2.

Under different circumstances, the State would move this Court to deny the Petitioner’s appeal and remand with leave for him to file a Petition for Writ of Habeas Corpus. In this case, however, that would be a meaningless act, since the claims are purely legal, the court below has already ruled on the merits thereof, and there is no reason to think that the ruling would be any different in a subsequent proceeding. Ultimately, this Court would be addressing yet another

Petition for Appeal raising the exact same issue; the only difference is that considerably more time would have elapsed prior to the Court's resolution of the important retroactivity issue presented in this case.

What the State does respectfully request is that this Court treat the instant case as a collateral proceeding, which is what it is despite the Petitioner's attempt to transform it, through a clever procedural maneuver, into a case "in litigation or on appeal where the same legal point has been preserved." *State v. Gangwer*, 168 W. Va. 190, 282 S.E.2d 839 (1981), Syl. Pt. 3; *State v. Reed*, 218 W. Va. 586, 625 S.E.2d 348 (2005), Syl. Pt. 1. The Petitioner's case was not "in the pipeline" when *Crawford* was decided, was not "in the pipeline" when *Mechling* was decided, and is not "in the pipeline" fourteen years after his conviction.

**2. WHETHER *CRAWFORD* v. *WASHINGTON*, 541 U.S. 36 (2004), AND/OR *STATE* v. *MECHLING*, 219 W. VA. 366, 633 S.E.2D 311 (2006), OVERRULED *STATE* v. *KENNEDY*, 205 W. VA. 224, 517 S.E.2D 457 (1999), WITH RESPECT TO THE PARTICULAR CONFRONTATION CLAUSE ISSUE IN THIS CASE: ADMISSION OF AN AUTOPSY REPORT INTO EVIDENCE WHEN THE PATHOLOGIST WHO TESTIFIED AT TRIAL WAS NOT THE PATHOLOGIST WHO PERFORMED THE AUTOPSY.**

Standard of review: "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." *Crystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995), Syl. Pt. 1; *State v. Hicks*, No. 35670 (W. Va., Apr. 14, 2011), Syl. Pt. 1.

**A. The Autopsy Report Itself**

The court below held that the Petitioner's case, *State v. Kennedy*, 205 W. Va. 224, 517 S.E.3d 457 (1999), had not been overruled by either *Crawford* or *Mechling* with respect to the particular issue in this case, admission of the autopsy report into evidence, for four reasons. The

State does not agree with most of the court's reasoning and, it must be said with reluctance, does not agree with the court's ultimate conclusion.

First, the court below found that the autopsy report was not "testimonial" within the meaning of *Crawford* and/or *Mechling* since it did not fall within this Court's enumeration of what it designated a "core class of 'testimonial' statements."

Various formulations of this core class of "testimonial" statements exist: ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. These formulations all share a common nucleus and then define the [Confrontation] Clause's coverage at various levels of abstraction around it.

(Record II, p. 230, Memorandum Opinion Order of 9/23/10, citing *State v. Mechling, supra*, 219 W. Va. at 373, 633 S.E.2d at 318.)

The problem with the court's analysis is that this Court acknowledged in *Mechling*, immediately after reciting the "core class of 'testimonial' statements," that this formulation did not purport to be comprehensive. *State v. Mechling, supra*, 219 W. Va. at 374, 633 S.E.2d at 319, citing *Crawford v. Washington, supra*, 541 U.S. at 68, and *Davis v. Washington*, 547 U.S. 813, 822 (2006). Further, this Court has not had the occasion since *Mechling* to expand upon the "core class"; thus, the Court must look to later decisions from the United States Supreme Court, and to cases from other jurisdictions. See pp. 10-11, 16-20, *infra*.

Second, the court below found that Rule 803(8)(B) of the West Virginia Rules of Evidence, the hearsay rule pursuant to which the autopsy report was admitted, was not a rule at issue in *Crawford*, and hence not in *Mechling*. The State believes that this is a somewhat crabbed view of

these precedents, since both cases dealt with broad principles underlying the Confrontation Clause, not the application of those principles to specific hearsay rules. Additionally, since *Mechling* squarely overruled *Kennedy*, and since 803(8)(B) was the one and only hearsay rule at issue in *Kennedy*, it is difficult to say that 803(8)(B) was not at issue in *Mechling*.

Third, the court below found that autopsy reports are materially different from certificates of analysis prepared by analysts at a state laboratory, which were found to be “testimonial” in *Melendez-Diaz v. Massachusetts*, \_\_ U.S. \_\_, 174 L. Ed. 2d 314 (2009). The court below premised its holding on *United States v. Gitarts*, 341 F. App’x 935, 940 n.2 (4th Cir. 2009), an unpublished opinion from the United States Court of Appeals for the Fourth Circuit. In *Gitarts*, the Fourth Circuit noted, in a footnote, that in *Melendez-Diaz* the Supreme Court had specifically reaffirmed that “traditional business records” are not testimonial. From this the court below reasoned that “[t]he business records hearsay exception is similar to the public records and reports exception, and the Fourth Circuit’s reasoning is persuasive in the present case.” (Record II, p. 230, Memorandum Opinion Order of 9/23/10, p. 6.)

The court’s reasoning is quite unpersuasive with respect to either the applicability of *Gitarts* or the non-applicability of *Melendez-Diaz* to this case. The State does not believe that *Gitarts* is applicable here, since it was a business records case, not a public records and reports case, and thus fell squarely within the *Crawford* exclusion for non-testimonial documents. In contrast, this Court specifically overruled *Kennedy*, which was a public records and reports case, on the basis of *Crawford*. *State v. Mechling*, *supra*, 219 W. Va. at 373, 633 S.E.2d at 318. Thus, it must be presumed that this Court did not consider public records and reports to be indistinguishable from “traditional business records” for purposes of its *Crawford* analysis.

Additionally, the Supreme Court's discussion of business records in *Melendez-Diaz, supra*, does not support the broad conclusion of the court below that public records and business records are functionally indistinguishable. Rather, the Supreme Court concluded that the Confrontation Clause issue requires an examination of the *purpose* for which the records were created.

Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial.

*Id.*, 174 L. Ed. 2d at 329.

Thus, under *Melendez-Diaz*, the question is whether an autopsy report is prepared “for the purpose of establishing or proving some fact at trial.” In this regard, West Virginia Code § 61-12-3 provides in relevant part that:

(d) The chief medical examiner shall be responsible to the director of the division of health in all matters except that the chief medical examiner shall operate with independent authority for the purposes of:

(1) The performance of death investigations conducted pursuant to section eight of this article;

(2) The establishment of cause and manner of death; and

(3) The formulation of conclusions, opinions or testimony in judicial proceedings.

*See also Davis v. Washington*, 547 U.S. 813, 822 (2006), where the United States Supreme Court distinguished testimonial from non-testimonial statements utilizing a functional test similar to the *Melendez-Diaz* purpose test:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing

emergency, and that *the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.* (Emphasis supplied.)

In light of the statutory language enumerating the authority of medical examiners, the State concedes that West Virginia autopsy reports appear to be testimonial records under *Crawford*, as the reports fall squarely within the *Davis* and *Melendez-Diaz* “purpose” test.

Fourth and finally, the court below found that the Petitioner had failed to preserve the Confrontation Clause issue on appeal, citing the following language from *Kennedy*:

Since the Appellant failed to preserve the Confrontation Clause issue for appellate review, the State contends that this court should not even address this issue. While we agree with the state, both on the fundamental requirement of preserving issues for review and Appellant’s failure to do so with regard to the Confrontation Clause issue, because the law upon which this Court relied in *James Edward S.* [184 W. Va. 408, 400 S.E.2d 843 (1990)] has been modified by subsequent rulings of the United States Supreme court, we choose to address this issue to discuss the effect of those modifications on this State’s law.

*State v. Kennedy, supra*, 205 W. Va. at 228 n.5, 517 S.E.2d at 461 n.5 (citations in original omitted).

The court concluded that the Petitioner “certainly is not entitled to a third bite at the apple when it took extraordinary circumstances for him to get a second.” (Record II, p. 230, Memorandum Opinion Order of 9/23/10, p. 9.)

The problem with the court’s analysis is that it fails to take into account the effect of this Court’s decision to address the Confrontation Clause issue in *Kennedy* notwithstanding the Petitioner’s forfeiture.<sup>2</sup> The State can find no case law to support the proposition that after this

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<sup>2</sup>Rule 52(b) of the West Virginia Rules of Criminal Procedure provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” In this regard, this Court has held that the simple failure to assert a right by not objecting, known as forfeiture, is distinct from an intentional relinquishment of that right, known as waiver, and that forfeiture may be reviewed under plain error analysis. Compare *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998) (forfeiture) with *State v. Crabtree*, 198 W. Va. 620, 482 S.E.2d 605 (1996) (waiver). Further, this Court has long held that where unassigned prejudicial (continued...)

Court has addressed an issue on the merits, notwithstanding the defendant's forfeiture, the issue then reverts to being forfeited for purposes of any subsequent review. Indeed, under the law governing federal habeas corpus review of state court convictions, 28 U.S.C. § 2254, courts have uniformly held that if a state court addressed an issue on the merits, the state is precluded from relying on waiver to defeat the claim on collateral review. See *Coleman v. Thompson*, 501 U.S. 722, 735 (1991); *Williams v. Parke*, 133 F.3d 971 (7th Cir. 1997); *United States ex rel. Harding v. Marks*, 403 F. Supp. 946 (E.D. Pa. 1975), *vacated on other grounds*, 541 F.2d 402 (3d Cir. 1976).

### B. The Testifying Pathologist

Notwithstanding the inadmissibility of an autopsy report, however, the State contends that it is proper to have a testifying pathologist review the autopsy report and autopsy photographs in order to testify at trial as to the cause and manner of death.

In this regard, this Court's Confrontation Clause analysis in *Mechling* does not appear to undermine that portion of its opinion in *Kennedy* in which it noted that:

This Court has consistently held that one pathologist can give testimony by referencing information provided in an autopsy report completed by another pathologist. See *State v. Linkous*, 177 W. Va. 621, 625, 355 S.E.2d 410, 414 n. 3 (1987) (citing Syl. Pt. 5 of *State v. Jackson*, 171 W. Va. 329, 298 S.E.2d 866 (1982) in which we held that "[a]ny physician qualified as an expert may give an opinion about physical and medical cause or injury or death" and that "[t]his opinion may be based in part on an autopsy report"). Accordingly, it is beyond dispute that a medical examiner can testify as to the physical and medical cause of death. See *State*

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<sup>2</sup>(...continued)

errors involve fundamental constitutional rights, the Court will take notice of them. *State v. Wyer*, 173 W. Va. 720, 320 S.E.2d 92 (1984), *overruled on other grounds*, *State v. Tenley*, 179 W. Va. 209, 366 S.E.2d 657 (1988); *State v. McKinney*, 178 W. Va. 200, 358 S.E.2d 596 (1987). Finally, this Court has always had the authority, under Rule 2 of the West Virginia Rules of Appellate Procedure and now under Rule 2 of the Revised Rules of Appellate Procedure, to suspend or construe its rules "to allow the Supreme Court to do substantial justice."

*v. Triplett*, 187 W. Va. 760, 767, 421 S.E.2d 511, 518 (1992); *State v. Clark*, 171 W. Va. 74, 77-78, 297 S.E.2d 849, 853 (1982). Thus, Dr. Sabet was permitted to testify, based on his review of Dr. Livingston's report, concerning the origin of the wounds on the victim's body.

*State v. Kennedy, supra*, 205 W. Va. at 231, 517 S.E.2d at 464.

This is completely consistent with West Virginia Rule of Evidence 703, which provides that if an expert bases his or her opinion upon facts or data reasonably relied upon by experts in the particular field, the facts or data need not be admissible in evidence.

This conclusion is particularly compelling where, as here, the autopsy report was completely silent with respect to the only contested medical issue at trial: the manner in which the fatal injuries were inflicted. (The Petitioner's defense was that his wife had committed the crime, and that he had seen her strike the victim with a rock. The pathologist testified, on the basis of the autopsy photographs, not the autopsy report, that the injuries were not consistent with blows from a rock or stone.)

**3. ASSUMING ARGUENDO THAT THE ANSWER TO QUESTION NO. 2 IS YES, WHETHER CRAWFORD AND/OR MECHLING HAVE RETROACTIVE APPLICATION TO A CASE THAT WAS PREVIOUSLY AND FINALLY ADJUDICATED YEARS BEFORE CRAWFORD AND MECHLING WERE DECIDED.**

Standard of review: "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." *Crystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995), Syl. Pt. 1; *State v. Hicks*, No. 35670 (W. Va., Apr. 14, 2011), Syl. Pt. 1.

In *Bowman v. Leverette*, 169 W. Va. 589, 289 S.E.2d 435 (1982), Syl. Pt. 1, this Court held that a ground for relief is not deemed waived in collateral proceedings if it is "based upon

subsequent court decisions which impose new substantive or procedural standards in criminal proceedings *that are intended to be applied retroactively.*” (Emphasis supplied.)

The initial question is whether the United States Supreme Court intended *Crawford v. Washington*, 541 U.S. 36 (2004), to be retroactive, and to that question we have a definitive answer.

In *Whorton v. Bockting*, 549 U.S. 406, 417 (2007), the Court first held that:

Because *Crawford* announced a “new rule” and because it is clear and undisputed that the rule is procedural and not substantive, that rule cannot be applied in this collateral attack on respondent’s conviction unless it is a “watershed rule of criminal procedure” implicating the fundamental fairness and accuracy of the criminal proceeding. This exception is “extremely narrow.” (Internal citations omitted.)

The “watershed rule of criminal procedural procedure” language came from the seminal case of *Teague v. Lane*, 489 U.S. 288 (1989), which set forth a two-part test: first, that the new rule was necessary to prevent an impermissibly large risk of an inaccurate conviction; and second, that the new rule must alter jurisprudential understanding of the bedrock procedural elements essential to the fairness of a proceeding. In *Whorton*, following an exhaustive analysis under *Teague* and its progeny, the Court concluded that:

[I]t is apparent that the rule announced in *Crawford*, while certainly important, is not in the same category with *Gideon* [*v. Wainwright*, 372 U.S. 335 (1963)]. *Gideon* effected a profound and “sweeping” change. The *Crawford* rule simply lacks the “primacy” and “centrality” of the *Gideon* rule, and does not qualify as a rule that “alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” In sum, we hold that *Crawford* announced a “new rule” of criminal procedure and that this rule does not fall within the *Teague* exception for watershed rules.

*Id.* at 421 (internal citations omitted).

The second question is whether states may nonetheless apply *Crawford* retroactively in state court proceedings, and to that question we also have a definitive answer. In *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008), the United States Supreme Court held that:

In sum, the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed “nonretroactive” under *Teague*.

The third question, then, is whether this Court made *Crawford* relief retroactive in *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006); and if not, whether it should do so.

In *Mechling*, the Court did not address the question of retroactive relief, as the Confrontation Clause issues were presented on direct appeal from *Mechling*’s conviction. In the later case of *State ex rel. Humphries v. McBride*, 220 W. Va. 362, 647 S.E.2d 798 (2007), a habeas proceeding wherein numerous *Crawford* issues were raised, the Court was not required to decide the retroactivity issue because it concluded that the evidence in question would have been inadmissible even under what one Justice termed “an outdated, overruled analytical scheme.” *Id.*, 220 W. Va. at 375, 647 S.E.2d at 811. Thus, we turn to general principles governing retroactivity.

It is well settled that with respect to non-constitutional error, a new decision is given limited retroactive effect: the decision will be applied to cases in litigation or on appeal during its pendency, where the issue has been properly preserved. *State v. Gangwer*, 168 W. Va. 190, 283 S.E.2d 839 (1981); *State v. McCraine*, 214 W. Va. 188, 205 n.21, 588 S.E.2d 177, 194 n.21 (2003).

With respect to constitutional error, the State can find only two cases in which this Court has extended full retroactivity to one of its decisions. In *Jones v. Warden*, 161 W. Va. 168, 173, 241 S.E.2d 914, 916 (1978), the Court made its earlier decision in *State v. Pendry*, 159 W. Va. 738, 227 S.E.2d 210 (1976) fully retroactive, concluding “that the duty of the state to prove beyond a reasonable doubt every element of a crime is so significant and fundamental as to go to the very heart of the factfinding process; and that where that duty has been avoided, trials in which the avoidance occurred have been illegal.” And in *In re An Investigation of the West Virginia State*

*Police Crime Laboratory, Serology Division*, 190 W. Va. 321, 328, 438 S.E.2d 501, 508 (1993), the Court made its decision fully retroactive, (apparently) on the ground that the actions of Fred Zain “are shocking and represent egregious violations of the right of a defendant to a fair trial. They stain our judicial system and mock the ideal of justice under law.”<sup>3</sup>

Although framed in different terms by this Court, it appears that its test for full retroactivity is fully consistent with that enunciated by the United States Supreme Court: the only decisions given full retroactivity are those announcing a “watershed rule of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” *Whorton v. Bockting*, 549 U.S. 406, 417 (2007), citing *Teague v. Lane*, 489 U.S. 288 (1989).

With this in mind, we turn to case law from the United States Supreme Court and from other jurisdictions for guidance as to (1) whether *Crawford* was a new rule, (2) whether it was a “watershed rule,” and (3) whether *Crawford* violations strike at the “very heart of the factfinding process” and “stain our judicial system and mock the ideal of justice under law.”

New Rule. The first question has been conclusively decided by the very Justices who decided *Crawford*. As set forth earlier, the United States Supreme Court specifically held that *Crawford* was a new rule, and thus generally applicable only to cases that are still on direct review. *Whorton v. Bockting, supra*, 549 U.S. at 416-17, citing *Griffith v. Kentucky*, 479 U.S. 314 (1987).

As the Court noted:

The *Crawford* rule was not “dictated” by prior precedent. Quite the opposite is true: The *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts* [*Ohio v. Roberts*, 448 U.S. 56 (1980)], which *Crawford* overruled.

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<sup>3</sup>The Court did not do any retroactivity analysis in the text of its opinion.

Watershed Rule. As to the second question, the *Whorton* Court determined that *Crawford* was not a watershed rule, both because it was not necessary to prevent an impermissibly large risk of an inaccurate conviction, and because it did not “alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.” *Whorton v. Bockting, supra*, 549 U.S. at 420-21 (citations omitted; emphasis in original). With respect to the first prong of the “watershed rule” test, the Court found that:

The *Crawford* rule is in no way comparable to the *Gideon* [*v. Wainwright*, 372 U.S. 335 (1963)] rule. The *Crawford* rule is much more limited in scope, and the relationship of that rule to the accuracy of the factfinding process is far less direct and profound. *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of factfinding in criminal trials.

*Id.* at 419.

With respect to the second prong of the “watershed rule” test, the Court found that:

In this case, it is apparent that the rule announced in *Crawford*, while certainly important, is not in the same category with *Gideon*. *Gideon* effected a profound and “sweeping” change. The *Crawford* rule simply lacks the “primacy” and “centrality” of the *Gideon* rule, and does not qualify as a rule that “alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.”

*Id.* at 421 (internal citations omitted).

Heart of the Factfinding Process; Mockery of the Law. As to the third question, the *Whorton* Court’s finding is subsumed within its discussion of the first and second. In essence, the Court found that in cases tried prior to *Crawford*, analyzing the admissibility of testimonial statements under established hearsay rules, rather than under the constitutional command of the Confrontation Clause, did not create an impermissibly large risk of inaccurate convictions because the evidence was in most cases reliable. The Court summed up as follows:

Rather, “the question is whether testimony admissible under *Roberts* is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is ‘one without which the likelihood of an accurate conviction is *seriously diminished*.’” *Crawford* did not effect a change of this magnitude.

*Id.* at 420 (internal citations omitted; emphasis in original).

The State urges this Court to adopt the reasoning of the United States Supreme Court in *Whorton* as the basis on which to conclude that the *Crawford/Mechling* rule does not meet West Virginia’s test for full retroactivity. *Crawford* violations do not go to “the very heart of the factfinding process . . .,” *Jones v. Warden, supra*, 161 W. Va. at 173, 241 S.E.2d at 916, and do not “represent egregious violations of the right of a defendant to a fair trial . . .,” *In re An Investigation of the West Virginia State Police Crime Laboratory, Serology Division, supra*, 190 W. Va. at 328, 438 S.E.2d at 508.

The State has found only a handful of cases in which state courts have had occasion to determine whether *Crawford* would be given full retroactivity in their respective jurisdictions.

Prior to *Danforth v. Minnesota, supra*, which specifically authorized states to give retroactive application to *Crawford* if they so chose, a number of states had already held that *Crawford* would not be retroactive to cases on collateral review. *Drach v. Bruce*, 136 P.3d 390 (Kan. 2006); *Edwards v. People*, 129 P.3d 977 (Colo. 2006); *Chandler v. Crosby*, 916 So.2d 728 (Fla. 2005); *In re Moore*, 34 Cal. Rptr. 3d 605 (Cal. App., 4th Dist., Div. 1, 2005); *In re Markel*, 111 P.3d 249 (Wash. 2005); *State v. Williams*, 695 N.W.2d 23 (Iowa 2005); *People v. Edwards*, 101 P.3d 1118 (Colo. App. 2004).<sup>4</sup>

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<sup>4</sup>To be fair, a close reading of the cases indicates that some of the courts considered themselves bound by *Whorton v. Bockting, supra*, with respect to the retroactivity issue.

Post-*Danforth*, the few states that have examined the retroactivity issue have declined to grant full retroactivity to *Crawford* claims – with one very limited exception, set forth below.

On remand from *Danforth*, the Minnesota Supreme Court declined to give retroactive application to *Crawford* (thus making Mr. Danforth’s victory in the United States Supreme Court a pyrrhic one). *Danforth v. State*, 761 N.W.2d 493 498-99 (Minn. 2009). The court first quoted *Teague v. Lane, supra*, 489 U.S. at 309, for the proposition that “[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system . . .,” and then concluded with a trenchant observation made in *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980):

The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

In *Ex parte Lave*, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008), the Court of Criminal Appeals of Texas held that “[a]lthough not required by the United States Supreme Court to do so, we adhere to our retroactivity analysis in *Keith* [*Ex parte Keith*, 202 S.W.3d 767 (Tex. Crim. App. 2006)] and its holding that *Crawford* does not apply retroactively to cases on collateral review in Texas state courts.”

In *State v. Forbes*, 119 P.3d 144 (N.M. 2005), *cert. denied*, *New Mexico v. Forbes*, 549 U.S. 1274 (2007), a case brought by the Attorney General challenging the trial court’s action in granting retroactive *Crawford* relief to a defendant named Earnest, the New Mexico Supreme Court affirmed

the extension of retroactivity to Mr. Earnest but did not fashion a rule granting full retroactivity to all other *Crawford* claims. To the contrary, the court noted that “[o]ur decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest’s case twenty years ago has now been vindicated, which entitles him now to the same new trial he should have received back then.” *Id.* at 148-49.<sup>5</sup> Additionally, it must be noted that the court in *Forbes* premised its retroactivity ruling on its earlier finding that *Crawford* had not announced a “new rule,” a finding that was rejected by a unanimous United States Supreme Court in *Whorton v. Bockting, supra*, 549 U.S. at 406.

Finally, the State points out that with respect to the equities that underlie the court’s decision in the *Forbes* case, the situations of Petitioner Earnest and this Petitioner could not be more different. Petitioner Earnest diligently pursued his remedies, filing a new petition for relief immediately after *Crawford v. Washington, supra*, and then again immediately after *Whorton v. Bockting, supra*. In contrast, this Petitioner did nothing for six years after *Crawford* was decided, and did nothing for four years after *Mechling* was decided. Thus, this Petitioner has no basis to support a claim that he should be the Earnest of West Virginia, i.e., the only person “for whom relief will ever be available based on a retroactive application of *Crawford*.” *See fn. 5, infra*.

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<sup>5</sup>One commentator has noted that “it appears there may simply be no [New Mexico] defendant other than Earnest himself for whom relief will ever be available based on a retroactive application of *Crawford*.” J. Thomas Sullivan, *Danforth, Retroactivity, and Federalism*, Okla. L. Rev., Vol. 61, No. 3 (Fall 2008), p. 493. Indeed, Mr. Sullivan later wrote a second article, with a somewhat whimsical title, making the point over seventy-two pages of scholarly analysis, that Earnest stands alone. J. Thomas Sullivan, *Crawford, Retroactivity, and the Importance of Being Earnest*, Marquette L. Rev., Vol. 92, No. 2 (Winter 2008).

**4. ASSUMING ARGUENDO THAT THE ANSWER TO QUESTION NO. 3 IS YES, WHETHER ADMISSION OF THE AUTOPSY REPORT WAS HARMLESS ERROR IN LIGHT OF THE PARTICULAR FACTS AND CIRCUMSTANCES OF THIS CASE.**

Standard of review: “Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.” *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975); *State ex rel. Humphries v. McBride*, 220 W. Va. 362, 374, 647 S.E.2d 798, 810 (2007).

It is well established in this Court’s jurisprudence, as well as in federal jurisprudence, that constitutional errors are subject to harmless error analysis when they occur “during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented . . . .” *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993), citing *Arizona v. Fulminante*, 499 U.S. 279, 307-307 (1991).<sup>6</sup> This Court adopted the *Sullivan* analysis in *State v. Omechinski*, 196 W. Va. 41, 48 n.11, 468 S.E.2d 173, 180 n.11 (1996), wherein Justice Cleckley noted that “[m]ost errors, including constitutional ones, are subject to harmless error analysis . . . simply because it makes no sense to retry a case if the result assuredly will be the same.” *See also United States v. Decoster*, 624 F.2d 196, 255 n.86 (D.C. Cir. 1976), and cases cited therein; *United States v. Gaudin*, 515 U.S. 506, 526 (1995); *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975), Syl. Pt. 5.

When assessing the harmlessness of a Confrontation Clause violation, courts consider the importance of the testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony, the extent of cross-examination permitted,

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<sup>6</sup>The court distinguished between evidentiary error and structural error, i.e., the giving of an instruction that incorrectly describes the burden of proof, thus vitiating all of the jury’s findings.

and the overall strength of the prosecution's case. *Johnson v. Oregon Board of Parole and Post-Prison Supervision*, 2011 WL 1655421 (D.Or. 5/2/11), p. 7, citing *Delaware v. VanArsdall*, 475 U.S. 673, 684 (1986).

In the instant case, the Petitioner's claim for relief rises or falls on his argument that admission into evidence of the autopsy report prepared by Dr. Livingston, who did not testify at trial, violated the Confrontation Clause.

With this in mind, we turn to the contents of the autopsy report, which the State has secured and moved to include with the record on appeal. Following a description of the body, the wounds, and the results of microscopic examination, Dr. Livingston set forth his diagnoses and opinion.

**DIAGNOSES:**

1. Cerebral edema and concussion secondary to multiple blunt force impacts to head.
2. Multiple abrasions, contusions, and lacerations over upper body, neck and head.

**OPINION:**

In consideration of the circumstances surrounding death, age of decedent and findings noted upon autopsy of body, the death of Lashonda Viars, a 16 year old white female, is considered due to multiple blunt force injuries of head. The manner of death is homicide.

Significantly, the autopsy report contains not one word as to the identity of the assailant or the mechanism by which the injuries were inflicted, the only two issues which were disputed at the trial. Thus, assuming *arguendo* that admission of the autopsy report violated the Confrontation Clause, this evidentiary error was harmless beyond a reasonable doubt.

For the Court's ease of reference in performing its harmlessness analysis, Dr. Sabet's testimony is contained at pages 252-276 of the trial transcript, and the Petitioner's testimony at pages 346-404.

The Petitioner did not dispute that Lashonda Viars died of multiple blunt force injury to the head, causing acute subdural, subarachnoid hemorrhage. Further, he did not dispute that Lashonda had injuries on her body that "were caused by a narrow metal like, even sharp like, instrument which could have been a screwdriver." (Trial Transcript, p. 381.)<sup>7</sup> Rather, his sole defense was that his wife committed the murder, while his only crime was disposing of the body, i.e., accessory after the fact.

The only factual dispute between Dr. Sabet and the Petitioner, who testified in his own defense, was whether the blunt force injuries to the victim's head could have been caused by a rock – *a subject not addressed in the autopsy report*. Dr. Sabet testified that the injuries were inconsistent with having been inflicted by a rock or a stone; rather, he opined that the injuries were consistent with the victim's head being smashed against a wall, or a car, or maybe the ground. (Trial Transcript, pp. 262, 266, 273-74.) This testimony was significant because the Petitioner had given a statement to his attorney – who turned it over to the prosecuting attorney, deeming it to be helpful – in which he said that his wife, in the course of killing Lashonda, had "used a rock." (Trial Transcript, p. 383.) At trial, the Petitioner modified this statement, explaining that the weapon was a broken brick, not

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<sup>7</sup>This was Dr. Sabet's testimony as an expert witness, and was based upon his review of the autopsy photographs; the autopsy report was silent as to the cause of the injuries. The Petitioner's testimony with respect to these injuries was that he did not see them being inflicted, thus implying that they occurred before he drove his truck around to the back of the store where his wife was allegedly fighting with Lashonda.

a stone, and that his wife “was stouthing her hand up with it. She, it wasn’t an open rock to her head. It was, to stouten her punch up with it.” (*Id.*)

The factual dispute about the rock was brought into sharp focus in the following exchange:

Q: And Mr. Lusk asked you about your wife hitting Lashonda with a rock. And, of course, today you got to hear the medical examiner’s testimony that her injuries were not consistent with being hit with a rock. But back when you gave your statement in April of 1995, you claim that you saw your wife – Here’s your statement. They started fighting with each other. Tonya got Lashonda down and started bearing her in the head with a rock she held in her hand. Do you remember making that statement?

A: Yeah.

Q: And now after hearing the medical examiner’s explanation and testimony, you’re saying that she actually covered that brick up with her hand and used it just to make her punches harder.

A: She had it in her hand.

(Trial Transcript, pp. 400-01.)

Inasmuch as the autopsy report contains no opinions with respect to the use of rocks, stones or bricks as weapons, and further that nothing at all in the autopsy report was controverted in the Petitioner’s case, admission of the report, even if error, was harmless beyond a reasonable doubt. The Petitioner’s defense was that he was not the perpetrator, not that the victim had died of something other than acute subdural, subarachnoid hemorrhage resulting from multiple blunt force injury to the head. With respect to this dispositive issue, identity of the perpetrator, the jury found

the State's non-medical evidence to be persuasive, and the Petitioner's testimony to be a tissue of lies.

VI.

**CONCLUSION**

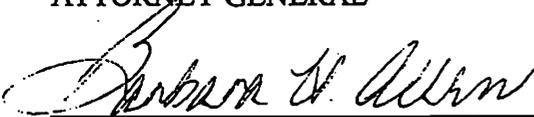
The judgment of the Circuit Court of McDowell County should be affirmed. Even assuming that the autopsy report at issue was "testimonial," which the State concedes, and further assuming that *Crawford v. Washington*, 541 U.S. 36 (2004), and *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), should be applied retroactively to a case which was previously and finally adjudicated eleven years before the Petitioner filed his Motion for New Trial, which the State controverts, any error in the admission of the autopsy report was harmless beyond a reasonable doubt.

Respectfully submitted,

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*Respondent,*

By counsel

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**CERTIFICATE OF SERVICE**

I, Barbara H. Allen, do hereby certify that a copy of the within "Brief of the Respondent, State of West Virginia" was served on all counsel of record by United States mail, first-class postage prepaid, on the 16th day of May, 2011, addressed as follows:

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BARBARA H ALLEN