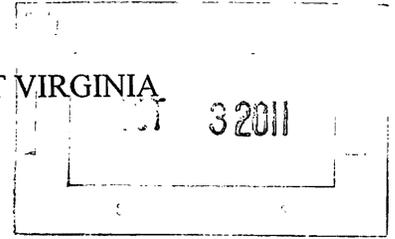


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

v.

Supreme Court No. 11-0691

Circuit Court No. 09-F-23
(Cabell)

ROBERT FRAZIER,

Petitioner.

AMDENDED PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- I. The State failed to rebut Mr. Frazier's claim of self-defense beyond a reasonable doubt.
- II. The trial court's refusal to instruct on the inconsistent defenses of accident and self-defense denied Mr. Frazier his right to fully present a defense to the state's case.
- III. Mr. Frazier's 6th amendment right to confrontation was violated when the trial court allowed the State to admit Dr. Belding's autopsy report into evidence without him being present to testify. The Court further erred when it allowed Dr. Kaplan to testify to the findings, conclusions, and ultimate opinion of Dr. Belding's autopsy report, an autopsy he admittedly did not participate in, over defense counsel's objection.
- IV. The State's failure to notify counsel of Belding's termination from the M.E.'s office and of its intent to call Kaplan as a substitute witness until mid-trial despite the fact the state had known of this situation for three months prior to trial, the failure to turn over Jackson's exculpatory statement, and state's failure to timely turn over Belding's notes all constitute Brady violations. Additionally, these instances of failing to turn over material information prior to trial constitute prosecutorial misconduct.
- V. The trial court's denial of counsel's challenge for cause as to Juror Tucker denied Mr. Frazier his right to strike an impartial jury from a panel of 20 jurors free from exception or bias.

STATEMENT OF THE CASE

Robert Frazier (hereinafter Mr. Frazier) was tried by a jury for the first degree murder, in Cabell County Circuit Court, in connection with an accident that ended with the death of his long-time girlfriend Kathy Smith (hereinafter Smith), on August 25, 2008. Mr. Frazier was picked up, questioned, and arrested that same night by Detective Sperry (hereinafter Sperry). Mr. Frazier has maintained his innocence since the time he told Sperry what *really* happened on August 25, 2008.¹ *A.R. 18-40* Mr. Frazier told Sperry he and Smith had been arguing. They

¹ Mr. Frazier initially tried to blame the shooting on Josh Jackson, but quickly retracted that statement and told Sperry what truly happened. And from that point on he has never waived from the initial version of facts he gave

were drug dealer's and money was tight. Smith came home to see Mr. Frazier and his ex-wife Susan smoking pot on the couch. *A.R.33, 842* This made Smith angry. *A. R. 33* Smith was even more angry at him for fronting his ex-wife some marijuana at the ex-wife price. *A.R. 22, 842* Mr. Frazier explained Smith saw that as taking money directly out of her pocket. *Id.*

While they were still fighting, Josh Jackson (hereinafter Jackson), showed up. *A.R.* When Jackson arrived, Smith grabbed the bag of marijuana they sold from and the digital scales, went into the bedroom stating "I will show you." *A.R. 37, 1008* In response to her taking the marijuana, Frazier got up and went into the bedroom too and Smith pulled a shotgun on him. Mr. Frazier told Sperry that as soon as he stepped through the door, Smith put the gun in his face. They kept the gun loaded at all times because they lived in a bad neighborhood. The gun was so old there was no safety. *A.R. 27* Therefore, once the hammer was pulled back, the gun was ready to fire "locked" as Mr. Frazier described it. *A.R. 27, 1029* Frazier told Sperry his immediate reaction was to shove the gun out of his face; and then he attempted to get the gun from Smith. Sperry asked Mr. Frazier: "[w]hy did you put it back in her face?" And he responded: "*I was just pushing it out of mine.*" *A.R. 38 (emphasis added)* Mr. Frazier told Sperry on two separate occasions he did not know she had it "locked." *A.R. 27* A struggle ensued and during that struggle the gun went off, accidentally killing Smith.² *A.R. 35*

Sperry, in an attempt to get Mr. Frazier to "tell the truth" kept telling Mr. Frazier:

Sperry: Well, Robert, if that is truthful, okay, the ballistics...
Sperry: well ballistics is going to show us that, okay? A lot of times, you know, your not stupid, when you shoot a gun, when you have spray with a gun powders, that'll show the direction of her injury.

to Sperry despite numerous attempts by Sperry to "scare him into telling the truth" to which Mr. Frazier maintained the version he had expressed and continually told Sperry during this pressing he was not lying. Importantly, Mr. Frazier even expressed remorse for trying to blame Jackson. He stated: "I'm sorry I tried to blame it on little Jackson." *A.R. 36.* Sperry responded: "You were panicking you did not know what to do." *Id.* Frazier then stated: "*But I am telling the truth now.*" *Id.*

² Mr. Frazier panicked and fled the scene.

Frazier: Yep

A.R. 28
Frazier: I'm telling you the truth me and Kathy were fighting over the shotgun and it went off.

A.R. 32
Sperry: Robert if you are telling me the truth
Frazier: **I swear on my hand to whoever's in charge Chris, it was an accident.** And we were standing just as close as we were **and I am not sure who pulled the trigger.**

Sperry: Well
Frazier: But I know she ended up dead
Sperry: Well Robert, with that, if she touched that gun today her prints are going to be on the gun. Did you leave the gun at the house?

Frazier: Yep.
Sperry: Okay. Her prints will be on that gun.
Frazier: Man I turned around and I
Sperry: Robert if she had that gun, her prints are going to be on that gun.
Frazier: I know
Sperry: Okay? The same thing, if she was shot that close, she's going to have gun shot residue on her hands, if she's fighting for the gun from you and you

Frazier: **I'm not, I'm not lying.**
Sperry: I'm not saying that you, I'm just saying if you are telling me the truth
Frazier: I'm tell, I'm telling you what we were right here with the gun, smell it I mean

A.R. 31
Sperry: Anything else you want to say? Look at me in the face³ and tell me you two were wrestling for the gun?

Frazier: Yes
Sperry: And Robert that's the truth?
Frazier: Yes

A.R. 35
Frazier: I didn't burn em and I didn't discard em because I didn't do anything wrong. And I knew when I face the music it'd prove it cause there's powder burns on her to.⁴

Sperry: That's what we are going to see. And I hope her prints are on that gun Robert.

Frazier: **They are**
Sperry: And if she had that gun today her prints are going to be on it.
Frazier: I guaran-f-cking-to-it

A.R. 37 (*emphasis added*)

³ This is significant because Frazier and Sperry have known each other for a very long time and when Robert initially told Sperry it was Jackson he could not look Sperry in the eye. A.R.25-26

⁴ When Frazier was initially telling Sperry where the clothes were, he gave him the address, and then went through an entire list of the items he retained to help prove his innocence. Then he stated "Yes, everything that I was wearing *when the accident happened.*" A.R. 30(*emphasis added*)

Sperry asked Mr. Frazier: well if it happened as you said it did then why didn't you call the police to which Mr. Frazier responded, "I'm a f-cking dope dealer." Sperry then ask Mr. Frazier why he didn't just go in the house, remove his dope and then call the cops to tell them he had accidentally shot her. Mr. Frazier responded it was due to his ignorance. The interview ended by Sperry telling Mr. Frazier "*I think you probably panicked. Didn't know what to do.*" *A.R.39 (emphasis added)*

According to George Shiro's (herein after Shiro) testimony, the defense's expert in bloodstain analysis, DNA, and crime scene analysis, the State did not have nor did it present a shred of *physical evidence* that was inconsistent with Mr. Frazier's description to Sperry of how the incident unfolded between him and Smith-- a struggle resulting in an accidental discharge. *A.R. 1345-46* Shiro arrived at this conclusion with scientific findings he testified to in court and he *supported his findings with the physical evidence* collected by the state. Shiro's opinion was consistent with the physical evidence *and* with the statement of Mr. Frazier, the only other person in the room with Smith at the time this tragic situation took place. Using the crime scene photos, Shiro testified that based on a void in the blood spatter on Smith's shirt her right arm was elevated and across her body.⁵ *A.R. 1336* He further testified Smith's left arm was also elevated due to placement of blood spatter found on her left shoulder. *Id.* Shiro, testified his findings

⁵ The state was allowed, over counsel's objection, to recreate the incident as their expert Castle believed it occurred. The in-court recreation included Castle posing as Frazier and the prosecutor posing as Smith. Counsel argued the recreation was not accurate in any respect, regarding size, height, etc., and because of that, the state should not be allowed to do the in-court demonstration. The court overruled the objection and allowed Castle to demonstrate the incident. He posed Smith with her hands down at her sides, a submissive position, with her head turned slightly away from Mr. Frazier. Castle abandoned his opinion regarding this positioning after Mr. Shiro, the defense's expert in bloodstain analysis, DNA, who held a degree in microbiology, and masters in forensic science and industrial chemistry and had 25 years of experience in crime scene analysis, testified as to his opinion regarding positioning. Shiro supported his opinion with science and physical evidence the state collected from the crime scene. Castle's abandonment of his findings made the in-court demonstration even more prejudicial to Mr. Frazier. *A.R. 1119*

were consistent with a struggle as Mr. Frazier had described. *A.R. 1337* The state failed to refute Mr. Frazier's assertion of self-defense and accidental discharge of the firearm.

Shockingly, the state's own crime scene witness, Huntington Police Officer David Castle,⁶ (herein after Castle) abandoned his initial representations, i.e. *Smith's arms were down to her sides*, and adopted Shiro's, who determined both of Smith's arms were raised. *A.R. 1336* Castle gave additional testimony during rebuttal that further supported Mr. Frazier's defense. Castle testified Shiro was correct on arm placement, but he felt it was *possible* Smith's arm positioning was defensive rather than aggressive. On re-cross counsel asked Castle: "The fact is you do not know if it was defensive or aggressive; do you? **Castle: Nobody does.** You can't say for sure; can you? **Nobody can.**" *A.R.1373(emphasis added)* Shiro did not take a position on the evidence, he testified to what the evidence showed, his in-court assertions were scientifically based, and he *supported his representations with the physical evidence*. Shiro concluded that positions of Smith's arms were consistent with the type of struggle Mr. Frazier described. *A.R. 1345-46* Dr. James Kaplan, the State's Medical Examiner,(herein after Kaplan) (hereinafter M.E.) also provided testimony that supported Frazier's defense. Kaplan, testified the gunshot wound Smith suffered was the type seen when two people come together that are involved in a struggle. *A.R. 869* There was evidence the muzzle came into contact with Smith's face. Shiro testified this too was consistent with Frazier's assertion of a struggle. He explained it was possible the gun hit Smith's face during the struggle, turning her head to the side before it discharged. *A.R. 730*

Mr. Frazier's ability to present his defense to the jury was dealt a devastating blow when the trial court erroneously denied defense counsel's request to submit both an accident and self-defense instruction to the jury. *A.R. 1200* The trial court mistakenly believed and held that

⁶ Castle was the officer in charge of the crime scene and collecting the evidence in Mr. Frazier's case.

counsel could not offer inconsistent defenses on behalf of Mr. Frazier. *A.R. 1200* This was highly prejudicial to Mr. Frazier's case because Shiro, the defense's expert, reviewed all of the evidence provided by the state and testified there was not a shred of physical evidence that could rule out a struggle and an accidental discharge. *A.R. 1345*

This was Mr. Frazier's theory of defense and, as shown above, there were facts in evidence to support each instruction. *Id.* Mr. Frazier asserted a shotgun was pulled on him, he shoved it out of his face in an attempt to keep from getting shot, and during the struggle the gun accidentally discharged. *A.R. 37* In his statement to police, Mr. Frazier said this was *an accident and he did not even know who pulled the trigger.* *A.R. 31* Despite counsel's argument that the facts of Mr. Frazier's case supported a act of self-defense that turned into an accidental shooting, the court refused to give both instructions. The court told counsel they would have to choose which theory to pursue because a defendant could not offer inconsistent defenses. *A.R. 1200* Counsel chose to have the jury instructed as to self defense. *Id.* This was highly prejudicial to Mr. Frazier as all through his statement he referred to "the accident," and the physical evidence was consistent with a struggle resulting in an accidental discharge. The court's ruling prevented Mr. Frazier from having his entire defense considered by the jury despite the fact he had presented evidence to support it.

See generally A.R. 18-40

Additional reversible error was created by to the state's withholding material evidence from defense counsel prior to trial and ambushing them with it once trial had begun. Kaplan was the first witness called by the state. *A.R. 848* This drew an immediate objection from counsel for the following reasons: Kaplan did not perform the autopsy, the state never informed counsel it intended to call Kaplan as a witness, hearsay, and this is a "Crawford problem because Dr.

Kaplan did not actually perform the autopsy. He didn't talk to the officers or anybody that was present giving Dr. Robert Belding, M.D. a Deputy Medical Examiner, at the State Medical Examiners Office, (hereinafter Belding) the information to do this autopsy. He did not observe Dr. Belding do this procedure or anything. I can't cross-examine Dr. Kaplan about what Dr. Belding did." *A.R. 849*. "And so it is a confrontation problem, which is a clear constitutional violation of our client's rights if Dr. Kaplan testifies." *A. R. 850* The trial court overruled counsel's objection and allowed Kaplan to testify to Belding's report as a business record. *A.R. 849-50*⁷ The autopsy was performed on Smith the morning after the incident by Belding, M.D. with Sperry in attendance. *A.R. 871*

This situation could have been avoided. *The state admitted* during the in-chamber hearing on counsel's motion to dismiss based on the inability to cross-examine Belding *it had known of Belding's termination since May and did not notify counsel of this development.* *A.R. 875*. The circuit clerk file reveals the state knew of Belding's termination since early April of 2010. The issuance of subpoenas by the state verifies this point. On April 9, 2010, the state issued a subpoena for Dr. Belding. *A.R. 42,43* Then on the 12th of April a subpoena was issued for Kaplan. *A.R. 44* The state did not file an amended witness list *and* Dr. Belding was the only M.E. that appeared on the state's original witness list. *A.R. 41* The state did nothing to notify counsel of this change despite the fact there were countless communications back and forth regarding the case during the same time frame.

During Kaplan's testimony he referred to Belding's notes, the notes counsel relentlessly attempted to obtain prior to trial, including issuing a subpoena on the M.E.'s office and numerous calls to the M.E.'s office the week prior to trial. *A.R. 9, 868* Counsel was given the

⁷ The court did this without requiring argument from the state. The court told counsel Kaplan could testify to the report in the normal, ordinary course of business. A statement the state responded to by arguing "absolutely.

“run-around” and never received the notes prior to trial. Counsel immediately requested a copy of Belding’s notes. The court agreed counsel was entitled to the notes and ordered they be given a copy of them. Counsel requested a break to review Belding’s notes. *A.R. 864* Counsel found the notes to be exculpatory and moved to dismiss the case against Mr. Frazier due to the state withholding exculpatory information. *A.R. 868-70* The trial court agreed with counsel that portions of Belding’s notes were exculpatory. The court stated: “...you can certainly argue that to the jury. That is definitely evidence in your favor.” *A.R. 874* The court denied counsel’s motion to dismiss the case. But, the court agreed to allow Belding’s notes to be made part of the record and submitted to the jury. *A.R. 876-77*

A page of the notes turned over to counsel mid-trial was entitled “Clinical Summary.”⁸ This page detailed the incident as it was described to Dr. Belding, by an officer. No one knows for sure what officer gave Belding this information because the summary did not reference the officer. The summary stated the following:

Kathryn Gail Smith was a 53 year old white woman who, after threatening to throw her boyfriend out of their trailer, walked into a bedroom and seized a single barrel shotgun. The boyfriend took the shotgun from her and shot her in the face. The boyfriend was subsequently arrested and (*reportedly* was marked out and replaced with *has*) has confessed. There was a witness.

See original A.R. 1.

In another page of the notes, Belding had marked a box that read “possible accidental.” *A.R. 2* Counsel expressed frustration to have received this information during the middle of the trial because there was no way to explore the mentioned witness nor was there anyway to ascertain for sure what Belding meant by possible accidental. Counsel also stated that had

⁸ The court even made a statement regarding Belding’s notes that goes to the heart of Mr. Frazier’s argument on this issue while the parties were involved in the heated in-chambers meeting: “We don’t know how he came up with this. Clearly somebody had to give him that information. He couldn’t have---- Counsel: That’s our exact point.” *A.R. 871*

counsel known of Belding's termination they may have decided to track him down. *A.R. 869* Kaplan testified the possible accidental had nothing to do with the infliction of the wound but instead was referencing possible accidental overdose. However, accidental overdose was never a factor in the case *and* Kaplan did testify Belding did things differently than other examiners. Kaplan specifically pointed out clinical summaries were not prepared by other examiners it was something Belding did in order to assist himself. *A.R. 879*

The state also presented the testimony of Josh Jackson who arrived at Mr. Frazier's house a few minutes before Smith went into the bedroom. That point and the fact that Mr. Frazier carried a gun into the bedroom are about the only things in his statement, testimony at the preliminary hearing, and his testimony at trial that are consistent. Jackson testified at the preliminary hearing and at trial that Mr. Frazier and Smith were arguing when he arrived. *A.R. 283, 1206-07* In his recorded statement, he said they were getting along just fine when he arrived. *A.R. 1268* He verified Smith went into the bedroom.

At the preliminary hearing, Jackson testified only Robert jumped up and stated, "I'll show you. And then he walked into the room." *A.R. 284* At trial, years after the incident, Jackson testified Robert stated "I will f-cking show you, Bitch." *A.R. 1209* Then the recorded statement police took from Jackson, the night of the incident, Jackson stated *Smith* was the first to say "I will show you" and went into the bedroom, which is **exactly** how Mr. Frazier described the incident to police. *A.R. 1268* Again, during his recorded statement he told police that Frazier and Smith were arguing over money. *A.R. 627*

Another key point regarding the money that Jackson's statement verified was that Smith told Mr. Frazier that "he was spending her money." *A.R. 1253* This corroborated Mr. Frazier's statement that Smith was mad at him for fronting the marijuana to his ex-wife because it was

taking money out of her pocket. At the preliminary hearing and at trial, Jackson stated he could not hear what they were saying *A.R. 284, 1207*. In his statement to the police he stated he did not hear anything before the shot. In his testimony he stated he could hear arguing and seconds later he heard the shot. *A.R. 286*. Importantly, Jackson testified he did not see anything. *Id.* As demonstrated above, Jackson's recorded statement contained both exculpatory and impeachment evidence but it was not turned over to counsel prior to trial.

Once again, defense counsel was back before the court arguing the state withheld additional exculpatory evidence from them. Counsel argued the recorded statement of Jackson, taken hours after the incident, was exculpatory, it was "wildly inconsistent with what he just testified to today" and counsel argued it should have been turned over to them. Counsel further argued the state's act of turning the statement over on the third day of trial was *extremely prejudicial* to Mr. Frazier. *A.R. 1217*. The Court refused to rule on the Brady issue stating "...I am going to have wait until all the smoke clears to rule on that." 1217-18. The court told counsel they could impeach Jackson with his statement which posed its own problem because it *was a recorded statement and counsel had just heard it for the first time*. Additionally, they would have to rely on someone else to play the portions of the statement they required.

Counsel suggested that due to the most recent surprise the court should adjourn the trial until Monday because they had to come back anyway and allow them time to review and transcribe the statement. The court denied this request. The state responded it already had a transcript if counsel would like it. *A.R. 1213-1216*. Another issue counsel addressed was Jackson testified at the preliminary hearing and during trial that he gave both a written and verbal statement. *Id.* However, the state could not locate the written statement and did not believe one existed. Defense was forced to move forward and cross-examine Jackson on the statement.

The final error asserted on Mr. Frazier’s behalf is the trial court’s refusal to strike Juror Tucker for cause, requiring Mr. Frazier to use one of his strikes on an unqualified juror. *A.R. 52, 128, 761* Ms. Tucker who was raised by a father who was a F.B.I. agent and was previously married to an F.B.I. agent stated she believed officers would be better witnesses due to their training and their experience. *A.R. 669, 749-50* This unequivocal assertion of bias could not be cured.

Despite the fact she responded “correctly” to the rehabilitation questions the court immediately resorted to based on her following response to Counsel’s question: “[w]ould any of you give more creditability to the testimony of a police officer merely because he is a police officer?”:

Juror Tucker:	Well, I mean, I am just thinking that they have been trained to take evidence and look at the facts. So I would think that someone who has been trained understands maybe more so than someone else.
Court:would you automatically believe everything a law enforcement officer testified to under oath?
Juror Tucker:	No
Court:	Okay. That’s the thing. You would judge their testimony just like someone else’s?
Juror Tucker:	Yes
Court:	Sure. Okay.

A.R. 749-50.

Counsel made the first challenge for cause regarding Juror Tucker and it was denied. *A.R. 128* The court even acknowledged the fact that some of the jurors were unfit when it stated: “...there are some people that I would normally let go but I am in a bind because we do not have enough here.” *A.R. 761* After the court made this comment, another discussion regarding Ms. Tucker began. Counsel argued her answer showed bias. The fact that she has in her mind that police officers, because of their training and investigation is going to make her place their testimony above other people, “which includes our client....since he is not a law enforcement

officer.” “Your Honor, I mean her father was an F.B. I. agent.” To which the court responded: “I am happy with her and I am not going to argue about that anymore.” *A.R. 763*

Mr. Frazier’s trial ended with him being convicted of second degree murder on July 12, 2010. Mr. Frazier was sentenced to 40 years in prison by the trial court. *A.R. 1583-84* Mr. Frazier requests this Honorable Court reverse his conviction based on all the above issues.

SUMMARY OF THE ARGUMENT

The State failed to rebut Mr. Frazier’s theory of self-defense and an accidental shooting that resulted in the death of Kathy Smith. Shiro, the defense’s expert reviewed all of the State’s evidence and concluded there was no physical evidence that refuted Mr. Frazier’s explanation of events. An additional error which devastated Mr. Frazier’s defense was the trial court’s misunderstanding of the law and incorrect ruling regarding jury instructions. Counsel submitted instructions on both self defense and accident. The court refused to instruct on both issues holding a defendant cannot offer inconsistent defenses. Despite counsel’s attempt to explain both instructions were consistent with Mr. Frazier’s defense, the court required counsel to choose which theory they wanted the jury instructed on. This error prevented the jury from fully considering Mr. Frazier’s defense.

The court also issued a ruling allowing the State to call Kaplan to testify to the findings of Belding’s report. This ruling violated Mr. Frazier’s right to confront the witnesses against him as was recently decided in *Melendez-Diaz and Bullcoming*. Belding’s conclusion the death was a homicide was the state’s only evidence to the ultimate issue of its case. The state knew of Belding’s dismissal for three months prior to trial but failed to notify counsel of this issue. Furthermore, the state did not argue Belding was unavailable just that he no longer worked for the M.E. The court allowed Kaplan to testify to Belding’s findings and conclusions, even though

he testified he was not involved in any aspect of the case besides reviewing the report as he is obligated to do as The Medical Examiner of the State. The court did not require him to review the material and testify to his own opinion at trial.

The court's ruling insulated all of the findings and the conclusion found in Belding's report from the testing of cross-examination required by the Confrontation Clause. This was a highly prejudicial ruling because Mr. Frazier's expert found there was no physical evidence to discredit Mr. Frazier's explanation of the events that occurred on August 25, 2008. Therefore, Belding was a crucial witness for counsel to "test" cross-examine, on his determination of homicide because, Belding's report was the state's *only* evidence of homicide.

The State also failed to provide counsel with Belding's notes he created while performing the autopsy, prior to trial, even though counsel requested the notes and the notes contained exculpatory evidence. Finally, the state withheld the statement of Jackson taken by police on the night of the incident; the differences in Jackson's testimony at the preliminary hearing and within his statement were significant and would have served as both impeachment and exculpatory evidence on behalf of Mr. Frazier. The states actions of withholding this information from counsel not only hampered the preparation and presentation of Mr. Frazier's case, it also changed how the entire case proceeded. For instance the United States Supreme Court decided *Melendez-Diaz v. Massachusetts*, - U.S. -, 129 S.Ct. 2527, 2009 U.S. LEXIS 4734 (2009) prior to trial. Therefore had counsel known of Belding's dismissal the state would have either had to call Belding as a witness or not use the report, or have another M.E. review the file and make a determination as to what the evidence demonstrated and defend his or her opinion on the witness stand.

Finally, the court denied counsel's challenge for cause on a biased juror. This required Mr. Frazier to use one of his peremptory challenges on a juror that was not fit to sit on the panel. Juror Tucker whose father was a retired F.B.I. agent, and who was formerly married to an F.B.I. agent stated she thought officers would make better witnesses because they are trained in fact finding and due to their experience. Counsel correctly argued the bias she expressed would cause her to give an officer's testimony more weight than Mr. Frazier's and that was not acceptable.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Frazier Counsel request's an oral argument on Mr. Frazier's case and due to the fact that his case concerns an issue of first impression for this Court his case should be heard on the Rule 20 docket, therefore, a memorandum decision is not suitable for Mr. Frazier's case.

ARGUMENTS

I. **The State Failed To Rebut Mr. Frazier's Claim Of Self-Defense Beyond A Reasonable Doubt.**

Standard of Review: The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syl. Pt., State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Mr. Frazier never waived from his initial statement as to how the incident unfolded between him and Smith despite numerous threats from Detective Sperry during his interview that the gun was going to be analyzed and they would find out if he was telling the truth. *See generally A.R. 18-40* Mr. Frazier told Detective Sperry Smith pulled the gun on him the moment

he entered their bedroom on August 25, 2008. He then attempted to defend himself from her use of deadly force, and a struggle ensued over the gun. During the struggle, the gun accidentally discharged killing Smith. The evidence presented at trial by the State supported this assertion too. *A.R. 1345-46*

Dr. Kaplan, testifying to an autopsy performed by Dr. Belding⁹, testified "...it is a very unusual place for someone to shoot themselves. On the other hand, in an altercation we do see contact firearm injuries in the setting of an altercation or a disagreement where two parties come together." *A.R. 859* Additionally, the State's crime scene expert, Detective Castle (hereinafter Castle) changed his "opinion" mid-trial regarding the positioning of Mr. Frazier and Smith during the incident, agreeing with the findings of counsel's forensic expert Shiro. This occurred *after* he presented a picture, over defense counsel's objection, re-creating the event according to his opinion. *A.R. 40A*, The Court also allowed the State to re-create the incident, over defense counsel's objection, in the courtroom with Detective Castle posing as Mr. Frazier and Ms. Howard, the prosecutor, posing as Smith. Castle positioned Howard with arms down to her side and her head turned away from him making it appear as though Mr. Frazier was the aggressor in the incident. *A.R. 40A, 491*

Defense counsel's forensic expert, Mr. Shiro¹⁰, who held a Bachelor of Science in Microbiology and a Masters degree in Forensic Science and Industrial Chemistry, and who also had 25 years experience in the field, did not agree with Castle's findings regarding the positioning of Smith's arms down at her sides. Shiro used science and physical evidence to support his investigative findings and in the process completely discredited Castle's opinion. *A.R. 1336* Mr. Shiro explained that based on blood stain patterns he observed in the

⁹ An issue comprising an entire assignment of error in this brief.

¹⁰ Mr. Shiro's testimony regarding his education, qualifications, and experience in the field of forensic science is found at *A.R. 1325-28*

photographs, it appeared that Cathy's right arm was across her body due to blood spatter patterns. He pointed out there was a large void pattern, meaning no blood was deposited, in the area where her right arm was covering. *Id.* Mr. Shiro further testified the blood spatter evidenced Cathy's left arm was also elevated, once again documenting his findings by pointing out specific physical evidence in the photos. *Id.* Mr. Shiro confirmed the positions of Smith's arms, as he had determined they were placed, could be indicative of a struggle, just as Mr. Frazier had described. *A.R. 1337*

Importantly, Mr. Shiro testified he had reviewed everything provided by the State in Mr. Frazier's case and he found there was no physical evidence presented that could rule out a struggle where the gun accidentally went off. *A.R. 1345-46* Counsel then asked: "So, really there is not a shred of physical evidence that can contradict Mr. Frazier's statement?" Mr. Shiro: "No. Again, in my opinion, the only thing would have been maybe whose DNA we find on the hammer of that shotgun."¹¹ Shockingly, the hammer of the gun was not swabbed for DNA. Shiro testified this test could have been outcome determinative in this case.¹² *A.R. 1346* The state failed to preserve this evidence even though it was a point it was well aware of from the time Mr. Frazier gave his statement. This Court created a test to be used regarding the burden of proof in self defense cases:

¹¹ Mr. Frazier told Sperry on the night of his statement that Smith had pulled the hammer back on the gun. Shiro testified that the state was obligated to preserve all evidence and then after the evidence was preserved determine what was relevant. He further testified that the test required to determine if there was touch DNA on the hammer of the gun cost approximately \$1.00. He also testified that if there was touch DNA recovered it would have been outcome determinative in this case. Frazier's statement to Sperry put the state on notice of this issue. Castle fingerprinted the gun because he claimed that the struggle or a prior use could have caused the touch DNA to be compromised. However, Shiro stated the same would go for fingerprints and even if there was DNA from both of them that would also have supported Frazier's description of a struggle. *A.R. 1340* Therefore, Castle's reasoning was flawed and the test should have been performed. Shiro testified the state had an obligation to collect all evidence analyze it and let the evidence demonstrate what happened. *A.R. 1353*

¹² Shiro discussed a case that he was involved with, in which the DNA recovered from the hammer was in fact outcome determinative. In that case police initially thought the death was a possible suicide. However, when the DNA off of the hammer was analyzed the husband's DNA was present. *A.R. 1338-39*

Once there is sufficient evidence to create reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self defense.

Syl. Pt. 6, State v. Harden 223 W.Va. 796, 679 S.E. 2d 628 (2009), quoting Syl. Pt. 4, State v. Kirtley, 162 W.Va. 249, 252 S.E. 2d 374 (1978). See also Syl. Pt. 8, State v. Whittaker, 221 W.Va. 117, 650 S.E. 2d 216 (2007). In *State v. Clark, 171 W.Va. 74, 76, 297 S.E.2d 849, 851(1982)*, this Court explained further the amount of proof required to shift the burden to the State to prove beyond a reasonable doubt the killing was not the result of self defense: "... we adopted the majority rule in America that the defendant need not prove self-defense by a preponderance of the evidence in order to place the burden of proof on the prosecution, *but merely must produce sufficient evidence to create a reasonable doubt on the issue.*" Shiro's testimony alone shifted the burden to the state.

In an attempt to rebut Mr. Shiro's testimony, the State recalled Castle to the stand. However, rather than discrediting Shiro's testimony, Castle strengthened Mr. Frazier's claim of self-defense. Castle testified to the following on direct:

State: Do you disagree with Mr. Shiro ...that the arms were in the position he has indicated?

Castle: No, ma'am. I cannot disagree with that.

State: What is your take on those arm positions though?

Castle: Those are positions he explained are consistent with the bloodstains that are on her arms and chest. It is quite possible was a defensive position.

A.R. 1367

This change of opinion went from arms *down* to arms *elevated*. On cross, when pushed regarding whether the position of Cathy's arms was a defensive or aggressive position, Castle gave the following testimony:

Counsel: You disagree with Mr. Shiro's rationale behind the arms, I guess? The positioning of the arms?

Castle: No, I don't disagree with that

Counsel: Then what is it about that that you disagree with?

Castle: Nothing. I believe his explanation for how the arms were positioned is a plausible explanation, but in my opinion it is more consistent with a defensive posture, the arms being in a position he described.

Counsel: The fact is you don't know if it was offensive or aggressive; do you?

Castle: Nobody does.

Counsel: You can't say for sure; can you?

Castle: Nobody can

A.R. 1373

Castle, *the state's forensic expert admitted there is no physical evidence in the State's case that refuted Mr. Frazier's claim of self defense.* Kaplan's testimony also failed to support the ultimate conclusion of Belding's report,¹³ homicide, with any physical evidence. In fact, his testimony also refuted the conclusion of homicide during his testimony:

Prosecutor: This type of gunshot wound with a shotgun with the contact that you said was kind of below the nose...is that consistent with something of a non-suicidal wound, if that makes sense?"

Kaplan: Well, it's—an unusual location for a shotgun wound under any circumstance. But it's—I guess for the purposes of the Court here, it's a very unusual spot for someone to shoot themselves. On the other hand, in an altercation we do see contact firearm injuries in the setting of an altercation or a disagreement where the two parties come together.

A.R. 859

His answer is clearly supportive of Frazier's theory of defense-- Smith pulled a gun on him, a struggle ensued over the gun, and it accidentally discharged. When you consider the entirety of the State's evidence it is apparent the State failed to rebut Mr. Frazier's assertion of self defense beyond a reasonable doubt and; therefore the trial court erred when it denied counsel's motions for judgment of acquittal made both at the end of the state's case and at the close of all the evidence. Therefore, Mr. Frazier respectfully requests that this Honorable Court reverse his conviction and enter an order of acquittal on his behalf.

¹³ Again, this demonstrates how devastating the substitution of Kaplan for Belding was because if there was no physical evidence that refuted Mr. Frazier's defense, counsel was entitled to question Belding to see why it was that he concluded this was a homicide rather than an accidental shooting.

II. The Trial Court's Refusal To Instruct On The Inconsistent Defenses Of Accident And Self-Defense Denied Mr. Frazier His Right To Fully Present A Defense To The State's Case.

Standard of Review: A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syl. Pt. 4, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

To this day Mr. Frazier asserts the same facts he gave in his first statement to Det. Sperry. *A.R. 18-40* He stated to Det. Sperry that Smith pulled the loaded shotgun on him the moment he went into their bedroom. He further explained his immediate response was to shove the barrel away from him, an act of self-defense. During their struggle over the gun, it *accidentally* discharged killing Smith.¹⁴ He further stated that he did not know who pulled the trigger. *A.R. 32* Accident was a viable defense based on the situation described above. This is especially true because it was part of Mr. Frazier's theory of defense. Therefore, the trial court's refusal to instruct the jury on inconsistent defenses¹⁵ denied Mr. Frazier the right to fully present his defense of accident to the jury.

“Even where the evidence is scant, *the trial court has a duty to allow a defendant to get her theory before the jury.*” “The fact that the evidence may not be of a character to inspire

¹⁴There was additional evidence that supported giving the accident instruction: 1.) *Consistent with Mr. Frazier's statement was Kaplan's testimony that the gunshot wound, in this case, is of the type you would expect to see in a struggle.* 2.) *Mr. Shiro, counsel's expert testified there is not a shred of physical evidence produced by the state that would prove anything other than what Mr. Frazier described.*

¹⁵ While in most situations the defenses of self-defense and accident are inconsistent, in Mr. Frazier's case the two defenses actually compliment each other. Mr. Frazier stated that when Smith pulled the gun on him, his initial reaction to defend the use of force was to push the gun out of his face. Then a struggle ensued over the gun and it accidentally discharged. Therefore, there was sufficient evidence in this situation to justify the giving of both instructions.

belief does not authorize refusal....[t]hat is a question in the exclusive province of the jury.”

State v. Headley, 210 W.Va. 524, 558 S.E.2d 324, 329 n.5 (2001). “The evidentiary threshold that must be satisfied to justify the giving of an instruction that embodies a litigant’s theory of the case is minimal. The threshold that must be met in order to warrant a jury instruction on a particular theory, such as self-defense, would necessarily be particularly modest in criminal cases where personal liberty is at stake.” *Headley*, 210 W.Va. 524, 558 S.E.2d 324, 328-29 (2001). “If there is any evidence before the jury tending to prove a case supposed in an instruction asked for, and the instruction propounds the law correctly, it should be given.... In such a case, **it is best and safest to give the instruction.**” *Danco, Inc. v. Donahue*, 176 W.Va. 57, 60, 341 S.E.2d 676, 679 (1985)(*internal citations omitted*)

The Court refused to instruct on accident, not because there was no evidence to support the instruction, but due to the court’s own misunderstanding of the law. When counsel submitted the instruction the court incorrectly held counsel could not offer inconsistent defense instructions. The court stated to counsel:

Court: “You can’t have both. You can’t have an accidental killing and a self-defense. You are going to have to make up your mind are you going on self-defense or are you going on accidental shooting? There is a difference.

Counsel: In his statement, Your Honor, he indicates that there was a struggle over the gun because she threatened him with a gun but he defended himself and it went of accidentally. So, it is tied in part and parcel.

Court: Well then you are going to have to argue it was an accidental shooting.

Counsel: But, your honor—

Counsel: Well, your honor it was self-defense that turned into an accidental shooting.

Court: I understand that.

A.R. 1200

Counsel was forced to choose mid-trial whether to pursue a self-defense theory or accident theory. While, counsel did not object¹⁶ to this ruling made by the court, the purpose behind an objection is fulfilled in this situation. The court fully discussed the issue on the record and required counsel to choose which theory they would like to submit to the jury. An objection would have been nothing more than a futile exercise on behalf of counsel as the court had already ruled on the subject.

Unfortunately, the trial court was wrong. Its incorrect ruling denied Mr. Frazier the right to fully defend against the state's case. This honorable court held the following: "...as a general rule, a criminal defendant is entitled to an instruction on any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his/her favor. Consequently, a criminal defendant *may present alternative defenses even when they are inconsistent*, and the *mere fact that the defense may be inconsistent with an alternative defense does not justify excluding evidence related to either defense.*" *State v. McCoy*, 219 W.Va. 130, 134, 632 S.E.2d 70, 74 (2006). "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Matthews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 887(1988)

Additionally, the trial court holds an equal obligation to ensure the jury is properly instructed. The ultimate responsibility of ensuring that a jury is clearly and properly instructed as to the law rests with the trial court. *State v. Lambert*, 173 W.Va. 60, 63, 312 S.E.2d 31, 34

¹⁶ There was an objection to the entire conversation the court and counsel had, however, the parties immediately began discussing the fact that the state despite being ordered to turn over Smith's criminal record did not supply counsel with a complete copy as it was missing the federal drug charge that Smith had been charged with in the past. The way that Smith was identified by the M.E. was through F.B.I. fingerprint match. They were arguing the offense she was charged with was important for them to use because it furthered his self-defense claim stating it was highly relevant. The court denied knowing anything about the convictions and stated it was not relevant. It was after this discussion counsel noted their objection. In the objection the only thing counsel referred to was the refusal to order the state to give them a complete record but, the entire conversation was regarding the instructions and how the conviction was relevant to self-defense. *A.R. 1200-1201*

(1984), *State v. Dozier*, 163 W.Va. 192, 196, 255 S.E.2d 552, 554 (1979); *State v. Riley*, 151 W.Va. 364, 394, 151 S.E.2d 308, 326 (1966), overruled on other grounds by *Proudfoot v. Dan's Marine Service*, 210 W.Va. 498, 558 S.E.2d 298 (2001). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045 (1973). Justice Black identified "[a] persons right to reasonable notice of the charges against him and an opportunity to be heard in his defense – a right to his day in court--..." as the minimum essentials to the right to a fair trial in, *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507 (1948) Although Mr. Frazier's counsel was able to present sufficient evidence of accidental discharge of the firearm there was no way for the jury to give any effect to that theory of defense, in the absence of the accident instruction, other than to find Mr. Frazier not guilty of the crime charged. This was a violation of Mr. Frazier's right to a fair trial.

The trial court failed to meet the responsibility to ensure the jury is fully and properly instructed. This Court explained "[w]hile ordinary rulings on the admissibility of evidence are largely within a trial court's sound discretion, *a trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights*, such as the right to examine witnesses against him or her, *to offer testimony in support of his or her defense*, and to be represented by counsel, which are essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the Constitution of the United States and article III § 14 of the West Virginia Constitution." (emphasis added). *Syl. Pt. 3, State v. Jenkins*, 195 W.Va. 620, 466 S.e.2d 471 (1995). Mr. Frazier was denied the opportunity to present his full theory of defense to the jury in a way that jurors could give it credit if they choose to, due to the trial court's incorrect ruling. Therefore, he was denied due process of law and is entitled to a new trial.

III. Mr. Frazier's 6th Amendment Right To Confrontation Was Violated When The Trial Court Allowed The State To Admit Dr. Belding's Autopsy Report Into Evidence Without Him Being Present To Testify. The Court Further Erred When It Allowed Dr. Kaplan To Testify To The Findings, Conclusions, And Ultimate Opinion Of Dr. Belding's Autopsy Report, An Autopsy He Admittedly Did Not Participate In, Over Defense Counsel's Objection.

A claim of a violation of *Brady* and *Hatfield* presents mixed questions of law and fact. The circuit court's factual findings should be reviewed under a clearly erroneous standard and . . . questions of law are subject to *de novo* review.

State v. Kearns, 210 W. Va. 167, 168-169, 556 S.E.2d 812, 813-814 (2001).

The trial court created reversible error when it ruled Dr. Kaplan could testify to the contents of Belding's autopsy report, over counsel's objection. *A.R. 849-50* Kaplan testified that he neither took part in nor observed the autopsy of Smith. Kaplan also testified he did not know what officers Belding spoke to regarding the case investigation, because he also did not participate in the investigation. *A.R. 860-61* It was apparent from reading Belding's completed report he considered information from officers in order to reach his ultimate conclusion in the report. *A.R. 11-17* Therefore, without Belding being called as a witness, counsel was unable to properly explore how much the officers input influenced his ultimate conclusion. This was a key-point for counsel to explore with Belding because Shiro opined there was not a shred of evidence in the State's case that refuted the struggle and accidental discharge of the gun Mr. Frazier described. *A.R. 1345-46*

The trial court's ruling allowing the substitution of Kaplan hindered counsel's ability to fully, properly, and adequately explore the findings, opinions, and ultimate conclusion found within Belding's autopsy report. This was devastating to Frazier's defense because if there was no physical evidence to dispute Mr. Frazier's statement counsel should have been able to question Belding as to how and why he arrived at the conclusion of homicide rather than

accidental shooting. The court's ruling insulated Belding's report from any form of "testing" envisioned by the Confrontation Clause and in doing so denied Mr. Frazier his fundamental right to confront the witnesses against him guaranteed by the Sixth Amendment. *See generally counsel's argument against Kaplan testifying A.R. 848-50*

The trial court's ruling was highly prejudicial because it allowed the State's only evidence regarding the ultimate issue in the case to go untested and; therefore Mr. Frazier is entitled to a new trial. Additionally, the trial court also ruled the report could be entered into evidence, in its entirety, over counsel's vehement objection which is also error.

This issue is a case of first impression for this Honorable Court. The United States Supreme Court highlighted an important distinction that is helpful in understanding the assertions made by Mr. Frazier in this section, the Confrontation Clause commands, "not that the evidence be reliable, but that the reliability be accessed in a particular manner: by testing [the evidence] in the crucible of cross-examination." *Crawford v. Washington, 541 U.S.36, 61, 124 S.Ct. 1354, 1370 (2004).*¹⁷

The *Crawford Court* defined the right to confrontation to include the right to confront those "who bear testimony" against him. *541 U.S., at 51, 124 S.Ct. at 1354* The Court also identified a "core class of testimonial statements: covered by the defendant's right of confrontation:

¹⁷ The right of Confrontation is a right that has been recognized for centuries. It is not a novel idea or concept; it is the recognized means of testing material in the justice system. In *United States v. Kirby, 174 U.S. 47, 55, 19 S.Ct. 574, 577 (1899)*, the Supreme Court of the United States stated: "[b]ut the fact which can be primarily established only by witnesses cannot be proved against an accused except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." Again in *Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, (1965)*, the United States Supreme Court held the Sixth Amendment to the United States Constitution made applicable to the States through the Fourteenth Amendment requires: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

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 the circumstances which would lead an objective witness to reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52, 124 S.Ct. 1354. Cf. *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006)

Recently, the United States Supreme Court issued two opinions dealing specifically with a defendant’s right to confront the particular lab analyst who completed the forensic testing, in question, rather than a substitute analyst or a supervisor. *Melendez-Diaz v. Massachusetts*, - U.S. -, 129 S.Ct. 2527, 2009 U.S. LEXIS 4734 (2009), *Bullcoming v. New Mexico*, - U.S. -, 131 S.Ct. 2705, 2011 U.S. LEXIS 4790 (2011). The Court held in both cases a finding or ruling requiring the testing analyst to appear and testify as to their own findings ***is nothing more than a straight forward application of Crawford*** which clearly states: “...a witness’s testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.” *Crawford*, 541 U.S. at 54, 124 S.Ct. at 1354 (2004)(*emphasis added*)

In *Melendez-Diaz*, the trial court allowed the state to introduce the affidavit of the lab analyst, as a business record, to prove the substance obtained from the defendant was in fact cocaine, an element of the state’s case. Defense counsel objected to the introduction of the affidavit without the analysts who performed the test being present to testify alleging it constituted a violation of the defendant’s right to confrontation. The United States Supreme Court agreed with counsel’s argument. It reversed, holding the affidavits fell in the “core class of testimonial statements” covered by the confrontation clause and while the statute referred to the documents as “certificates” the court found they were in fact affidavits, “declarations of facts

written down and sworn to by the declarant before an officer authorized to administer oaths.”

Melendez-Diaz v. Massachusetts, - U.S. -, 129 S.Ct. at 2532, 2009 U.S. LEXIS 4734¹⁸

Additionally, the court found the “certificates” were made under circumstances which would have led an objective witness reasonably to believe they were made for use in a criminal trial. *Id.* Therefore, under *Crawford* “the analysts’ affidavits were testimonial statements and the analysts were ‘witnesses’ for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that the petitioner had a prior opportunity to cross-examine them, petitioner was entitled to “be confronted with’ the analysts at trial.”

Melendez-Diaz, 129 S.Ct. at 2527,2532 quoting *Crawford*, 541 U.S. 36, 54, 124 S.C. 1354, (2004)¹⁹

The substitution of Kaplan for Belding, as the state’s witness, and the introduction of Belding’s report into evidence was a violation of Mr. Frazier’s right to confront the witnesses against him, just as his trial attorney argued. *A.R. 848-50* The affidavit affixed to the autopsy report, of Kathy Smith, swearing to its contents was signed by one doctor: Dr. Robert Belding. *A.R. 5* Belding performed the autopsy less than 24 hours after the incident in Mr. Frazier’s case. At the time the autopsy began, Mr. Frazier’s statement had been taken by officers, and he had been placed under arrest for murder. Furthermore, the lead Detective, Detective Chris Sperry, appeared and witnessed the entire autopsy as Belding was performing it. *A.R. 871* Therefore, any reasonable person in Belding’s shoes would understand his report would be used as evidence

¹⁸ Just as in *Melendez*, the contents of the autopsy report were sworn to by Dr. Belding before a notary. *A.R.5*

¹⁹ Important to Frazier’s case the *Melendez Court*, in a footnote demonstrated it was aware the ruling would be applicable in many other areas of forensic science including autopsies. *Melendez-Diaz*, 129 S.Ct. at 2527,2536 at n.5

and depending on the outcome of his report he may be required to testify. Belding was a “witness” against Mr. Frazier.

Under these circumstances, one could accurately describe Belding as a forensic investigator for the Huntington Police Department. Belding also swore to the contents of the autopsy report before a notary on March 14th 2009, a formal act done in anticipation of trial. *A.R. 41*²⁰ Also, M.E.’s are aware a copy of the completed report is required to be sent to the prosecution pursuant to the statute governing autopsy results, *W.Va. Code § 61-12-8 (2011)*. Finally, *W. Va. Code § 61-12-13 (2011)*, states the report “...shall be received as evidence in any court or other proceeding....” However, based on *Melendez-Diaz*, this portion of the statute is now unconstitutional as written. After *Melendez-Diaz*, an autopsy report can only be introduced into evidence if the doctor who performed the autopsy is present to testify as a witness against the defendant.

The *Melendez-Diaz Court*, further explained forensic testing, requires proper training and at times the methodology requires the exercise of judgment which presents the risk of error all of which can be explored on cross-examination. *Melendez-Diaz, - U.S. -, 129 S.Ct. at 2537, 2009 U.S. LEXIS at 4727*. The Court also recognized science is neither infallible nor immune from manipulation or falsification. The completion of an autopsy is very technical and includes a tremendous amount of exercise in judgment which clearly presents the possibility of error, and differences in opinions. The Court recognized cross-examination may not always be the best way to ferret out these deficiencies but it is the method of testing evidence that is guaranteed to every defendant by the Sixth Amendment.

²⁰ The dates present in this report are somewhat troublesome in many respects. The autopsy itself was performed on August 26, 2008, at 9:45 a.m. That is less than 24 hours after Smith’s death. The opinion was not issued until April 14, 2009, *eight months after the actual autopsy was performed*. The oath swearing to the report itself *was sworn to by Belding on March 12, 2009, an entire month before the opinion itself was rendered*.

The complexity of performing an autopsy and the highly subjective nature of the findings, opinions, and ultimate conclusions of the individual reports demonstrates the invaluable role cross-examination plays in testing the findings of the particular doctor. It also demonstrates why the substitution of a doctor, who was not present, and who did not participate in the investigation, is not adequate and is in-fact a violation of the defendant's constitutional right to confront the witnesses against him.

The substitution of Kaplan as the state's witness insulated Belding's entire report. Counsel did not get to question his techniques, his skills, question how long he had been a M.E., how many autopsies he had completed, how much the discussions with officers impacted his ultimate finding, etc..... Cross-examination was useless. Kaplan would simply state he did not know or, could not answer a particular question. An exchange which demonstrates the true impact of the substitution on counsel's opportunity for a thorough and complete cross examination was the following:

Counsel: So these notes were made to help him make his report and they were based on information given to him by officers in this case; is that correct?
Kaplan: I can't tell you where they came from ma'am you would have to talk to Dr. Belding.

A.R. 880

Despite his admitted lack of knowledge regarding the autopsy itself, and the investigation portion of the case, Kaplan was allowed to testify, as an expert during Mr. Frazier's case, to the ultimate conclusion of Belding's report. Kaplan stated: "after consideration of investigational findings, the nature of the wound itself, its range, its directionality we feel to a reasonable degree of certainty that this is a homicide; that is to say, someone else discharged the weapon." *A.R. 860* This conclusion was obviously not Kaplan's as he denied any participation or independent knowledge in the entire process itself during cross examination. *A.R. 860-61* The only act

Kaplan could accurately represent he completed was the review of the completed report; and he also co-signed the report itself, a task he is required to do based on his position as The State Medical Examiner.

Finding this approach to be wrong, the *Bullcoming Court*, quoting *Crawford*, stated, “[t]he text of the *Sixth Amendment* does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.” *Bullcoming -U.S.-, 131 S.Ct. 2705, 2716 (2011)* The *Melendez-Diaz Court* also refused to “relax the requirements of the Confrontation Clause to accommodate the necessities of trial and the adversary process.” *Id. at 2540*, stating: “[t]he Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to a trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.” *Id.* It is important to keep in mind, as the *Melendez-Diaz Court* rightfully pointed out: “the burden is on the prosecution.” *Melendez-Diaz, - U.S. -, 129 S.Ct. at 2540, 2009 U.S. LEXIS at 4727.*

Again in *Bullcoming v. New Mexico*, the United States Supreme Court was faced with an issue dealing with one analyst performing the blood-alcohol concentration test and another appearing in court to testify to the results of a test that they had neither participated in nor observed. Here the analyst who performed the test was on un-paid administrative leave. Justice Ginsberg explained: “[t]his Court settled in *Crawford* that the ‘obviou[s] reliab [ility]’ of a testimonial statement does not dispense with the Confrontation Clause.” *Bullcoming -U.S.-, 131 S.Ct. 2705, 2716 (2011)* Quoting from *United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), in part*, the Court stated:

True enough the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on

the whole fair. If a 'particular guarantee' of the Sixth Amendment is violated, no substitute procedure can cure the violations, and '[n]o additional showing of prejudice is required to make the violation 'complete.' In short, when the State elected to introduce Claytor's certification, Claytor became a witness Bullcoming had the right to confront.

Bullcoming v. New Mexico, - U.S. -, 131 S.Ct. at 2716, 2011 U.S. LEXIS 4790. Importantly, Ginsberg also explained that the reason why Claytor was on unpaid leave may in-fact call into question his abilities as an analyst and that would be an area counsel could pursue on cross-examination. This was very similar to the situation in Frazier's case. The only difference being Belding had been terminated from his position. When counsel asked why Belding had been terminated, Kaplan stated it was a private employment matter, and the court refused to make Kaplan answer the question more specifically. Counsel argued the reason for termination could impact Belding's findings in the report and noted her objection to the court's refusal to have Kaplan answer the question. *A.R.* 867

Frazier's case has two additional similarities with *Bullcoming* that are worth noting as these issues held significant weight with the court in deciding *Bullcoming*. First, when substituting Kaplan for Belding the state **did not** allege that Belding was "**unavailable.**" The state simply asserted that he no longer worked for the state and when counsel attempted to ascertain why Belding was no longer employed with the state the court shut them down. *A.R.* 864 Additionally, the State, just like in *Bullcoming*, did not assert Kaplan had developed his own independent opinion regarding the case based on a review of Belding's report. Instead, the state called him to testify as to Belding's findings, opinions, and conclusions. "Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Bullcoming -U.S.-, 131 S.Ct. 2705, 2716 (2011)*

The *Melendez* and *Bullcoming* opinions have been applied in numerous courts around the nation. There are numerous variations as to how these rulings are being applied to autopsy reports. In North Carolina the *Melendez-Diaz* and *Crawford* opinions were used to define autopsy reports as “testimonial” and therefore *inadmissible* absent a showing that the forensic analyst was unavailable to testify and the defendant had a prior opportunity to cross-examine the report. *See State v. Locklear, 681 S.E.2d 293, (N.C. 2009)*

Courts have also held if the examining M.E. is not available to testify, a substitute M.E. cannot testify to the factual findings of the unavailable M.E. *Wood v. State, 299 S.W.3d 200, 215-16(Tex. App. 2009)* Other jurisdictions have held the same but further expanded the holding to allow a substitute M.E. to review the file and testify as to his or her own opinion based on a review of the materials, i.e. as an expert witness. In defense of this position the court explained this method allows for cross-examination, because the defense can cross-examine the testifying M.E. regarding his or her own opinion. *Importantly, this court noted the report itself is not admissible into evidence, as it is hearsay.* However, this position has been criticized as simply providing a backdoor for inadmissible hearsay. *See Commonwealth v. Avila, 912 N.E.2d 1014, 1029-30 (2009)*

Mr. Frazier is entitled to a new trial, no matter what approach this Court decides to adopt regarding the application of this new principal announced by the United States Supreme Court in *Melendez* and *Bullcoming*. The trial court erroneously allowed a substitute M.E., Kaplan, to testify to Belding’s findings. The court did not require Kaplan to review the evidence the state had in its possession and render his own opinion. There was no way for counsel to explore anything within the report. Importantly, there was no way for counsel to determine how much of an impact the officers’ participation influenced Belding’s ultimate finding, rendering cross-

examination useless. This was highly prejudicial because Frazier's expert, Shiro, testified the State did not have a shred of physical evidence that refuted Frazier's statement of a struggle that ended with the gun accidentally discharging. Furthermore, the introduction of the report into evidence was also error, just as trial counsel argued, because it constituted inadmissible hearsay without Belding there to testify. The above listed errors constitute violations of Mr. Frazier's rights as guaranteed under the Sixth and Fourteenth Amendments of the United States Constitution and Article III Section 14 of the West Virginia Constitution. It is for that reason Mr. Frazier is asking this Honorable Court to reverse his conviction. 9

IV. The State's Failure To Notify Counsel Of Belding's Termination From The M.E.'S Office And Of It's Intent To Call Kaplan As A Substitute Witness Until Mid-Trial Despite The Fact The State Had Known Of This Situation For Three Months Prior To Trial, The Failure To Turn Over Jackson's Exculpatory Statement, And State's Failure To Timely Turn Over Belding's Notes All Constitute Brady Violations. Additionally, These Instances Of Failing To Turn Over Material Information Prior To Trial Constitute Prosecutorial Misconduct.

Standard of Review: A claim of a violation of *Brady* and *Hatfield* presents mixed questions of law and fact. The circuit court's factual findings should be reviewed under a clearly erroneous standard and . . . questions of law are subject to *de novo* review.

State v. Kearns, 210 W. Va. 167, 168-169, 556 S.E.2d 812, 813-814 (2001).

In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197 (1963), the United States

Supreme Court held:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

See also United States v. Bagley 473 U.S. 667, 676, 105 S.Ct. 3375 (1985) (The duty to disclose evidence extends to impeachment evidence as well as exculpatory evidence) *Kyles v. Whitley*,

514 U.S. 419, 434, 115 S.Ct. 1555, 1565 (1995), State v. Youngblood, 126 S.Ct. 2188, 165 L.Ed.2d 269, 74 U.S.W.L.3701 (2006)

The State failed to disclose three material pieces of evidence to counsel prior to trial. First, it failed to inform counsel that Belding, the M.E. who performed the autopsy on Smith Smith had been terminated from the M.E.'s office and its plan to Kaplan to testify to Belding's report. *A.R. 848-50* Second, the state failed to obtain Belding's autopsy notes and turn them over to counsel despite the fact that counsel had requested them and the state had met in person with Kaplan to discuss Frazier's case in April. *A.R. 867-880* Finally, the state failed to turn over the recorded statement of Jackson, taken the night of the incident despite the fact that the statement was inconsistent with his preliminary testimony, in such a way as to make it exculpatory. *A.R. 1217*

The State learned of Belding's dismissal in April and the trial did not occur until July. *A.R. 43,44,875* Belding's report and his ultimate conclusion was material evidence and crucial to the State's case. If Belding's dismissal had been disclosed to counsel, they would and could have used it in several different respects during preparation for trial. Including, at the very least filing a motion in limine to prevent Dr. Kaplan from testifying to the findings within Dr. Belding's report and, finding Dr. Belding and possibly issuing a subpoena for him after their discussion. The state **did not** assert that Belding was unavailable; it merely asserted that he was no longer employed with M.E.'s Office. This information would have changed the entire presentation of Mr. Frazier's trial.

In *State v. Ashcraft 172 W.Va. 640,646, 309 S.E2d 600,607 (1983)*, this Court held "[a] criminal defendant is entitled to be fully and plainly informed of the charges against him. W.Va.

Const. art. III, § 14. Accordingly, we have developed liberalized rules of discovery to permit defendants to learn facts and details of the State's case against them." (internal citations omitted)

Further, in *Syl. Pt. 2 of State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173(1980), this Court held:

When a trial court grants a pretrial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case.

See also *Syl. Pt. 1 State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340(1988), *Syl. Pt. 5 State v.*

Graham, 208 W.Va. 463, 541 S.E.2d 341 (2000). Furthermore, the state's actions also violated

Rule 16(c) of West Virginia Rules of Criminal Procedure which states:

If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is the subject to discovery or inspection under this rule, such party **shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.**

In, *State ex. Rel. Rusen v. Hill*, 193 W.Va. 133, 139, 454 S.E.2d 427, 433 (1994) this court

explained the purpose and importance of Rule 16 of the W.Va. R. Crim. Pro.: "...is to protect a criminal defendant's right to a fair trial. The degree to which that right suffered as a result of a discovery violation cannot be determined by simply asking would the non-disclosed information enhance or destroy the State's case. A significant inquiry is how would the timely access of that information have affected the success of the defendant's case." The *Rusen Court* also stated:

"[w]e believe that it is necessary in most criminal trials for the state to share its information with the defendant **if a fair trial is to result.** Furthermore, we find that complete and reasonable discovery is normally in the best interest of the public." *Id Cf. State v. Justice*, 209 W.Va. 614, 550 S.E.2d 404 (2001)

In addition to the inquiry this Court established, the United States Supreme Court in *Kyles*, explained that evidence withheld from counsel must be analyzed **collectively not item by**

item in determining the impact on a trial. *Kyles, 514 U.S. at 436, 115 S.Ct. at 1567* The *Kyles Court*, also clarified a defendant's burden in proving whether or not the withheld evidence is "material." The Court explained that a reviewing court need not be convinced to an absolute certainty that if the evidence had been turned over it would have resulted in a different verdict. The Court explained the question for the reviewing court "...is not whether the defendant would more likely than not have received a different verdict with the evidence, but **whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.**" *Kyles, 514 U.S. at 434, 115 S.Ct. at 1566.*

The State was obligated to inform counsel of Belding's termination because his report was material to the State's case and based on the representations of the state's witness list counsel was preparing for a trial in which she would cross-examine Belding. The State was also required to notify counsel of its intent to call Kaplan as an expert. In a case with very similar circumstances as Mr. Frazier's, this court explained "a defendant's constitutional rights are implicated when discovery fails and noted that discovery is one of the most important tools of the criminal justice system." *State v. Keenan, 213 W.Va. 557,561, 584 S.E.2d 191,195 (2003).* In *Keenan*, there was considerable question as to how the victim died, whether he accidentally shot himself or whether he was shot by the defendant. Therefore, the gunshot residue results on both the defendant and the victim were critical to the defendant's case. The initial testing showed gun shot residue on both the defendant and the victim. Counsel for Mr. Keenan then requested notes that were generated during the testing and some other items.

Based on the results of the testing counsel decided to defend defendant's case by asserting the victim had died of an accidental self inflicted gun shot wound. However, on the first day of trial counsel was presented with a "corrected" forensic report. The corrected report

stated a mistake had occurred in the lab and the victim's gun shot residue tests had not been analyzed during the first report. The corrected report reflected there was no gunshot residue on the decedent's hands. This destroyed counsels prepared defense. It also turned out there were pages of notes and graphs that were not turned over to counsel despite his request for any notes created during the testing of the gun shot residue.

The *Keenan Court* explained the main purpose of discovery is to protect a defendant's right to a fair trial and while not all discovery violations are fatal to a state's case, failure to provide discovery in certain circumstances can be fatal. The failure will be fatal when it is a non-disclosure involving a material fact and the non-disclosure hampered the preparation and presentation of the defendant's case. *Keenan, 213 W.Va. at 562, 584 S.E.2d at 196*. Importantly, the court explained that the state's failure to provide the supplemental documentation requested by the appellant magnified and exacerbated the situation. *Id. 562, 196*

The impact of counsel finding out, during trial, that Belding was not going to be present cannot be fully described or measured. The disturbing fact that makes this situation inexcusable is the state knew about this for three months prior to trial and did not inform either counsel or the court of Belding's dismissal. Counsel found out the moment the state called Kaplan to testify to the findings within Belding's report. Below is a list of activities and communications that occurred specifically regarding Mr. Frazier's case, **after** the state was aware of Belding's termination:

Date Filed	Title of Document	Prepared By
April 9, 2010	Subpoena for Dr. Belding	Jara Howard
April 12, 2010	Subpoena for Dr. Kaplan	Jara Howard
April 12, 2010	Order Pursuant To Motions Hearing	Jara Howard
April 27, 2010	Order Pursuant To Motion Hearing	Jara Howard

May 3, 2010	Motion To Withdraw As Counsel	Jason Goad
May 12, 2010	Motion For Clarification of The Record	Jason Goad
May 12, 2010	State's Additional Answer To Defendant's Discovery Request	Jara Howard
May 13, 2010	Order Pursuant To Motion Hearing	Jara Howard

The state admitted it knew of Belding's termination during a hearing held in the court's chambers to address an additional failure of the state to turn over material evidence prior to trial: Belding's notes. During that hearing, the state claimed it did not know of Belding's termination until May but the circuit clerks file demonstrates it was April. *See first two entries in above chart.* Belding's notes were never turned over, prior to trial, despite counsel's request to the prosecutor, subpoena to the M.E.'s office, and numerous follow up calls to the M.E.'s office the week before Mr. Frazier's trial was to being. Counsel made a motion to dismiss, after she had only a few brief minutes to review Belding's notes in the middle of questioning Kaplan, because the notes contained exculpatory evidence and, it had been withheld from the defense.

The state argued they were not aware of the notes and counsel actually had them before the state did, which is not a viable argument. *A.R. 867-73* The State's argument completely ignores its obligations under *Brady and its progeny*. Specifically, in *Kyles, 514 U.S. at 420, 115 S.Ct. at 1558-59*, the Supreme Court of the United States held that the knowledge of all state agents is imputed to the prosecutor and to hold otherwise would render the *Brady* requirements virtually meaningless. Mr. Frazier was not fully informed of the evidence against him and because of that he was denied the right to a fair trial. The state's behavior in withholding material evidence from counsel hampered their ability to prepare for trial and clearly impacted the presentation of the entire trial.

Counsel correctly responded the state was under a duty to seek out this information from their own officers. Counsel also stated “[t]his is not the first murder trial that the Cabell County Prosecutor’s Office has done and they know this when the autopsy report is made that there are things done and there are notes made by the examiner. They should have asked for this information before now, and for us to be surprised with it when we are in the middle of the trial is wrong.” Importantly, during the in-chamber meeting the state asserted it met with Dr. Kaplan, in May (was actually April), regarding the autopsy of Kathy Smith. Therefore, the state had an opportunity to get the notes and, should have so it could promptly turn them over to counsel. Because, just as trial counsel pointed out, the state knows these notes are created on every autopsy and it had an obligation to seek them out. The trial court denied counsel’s motion but allowed the notes to be submitted into evidence. *A.R. 872-73*

The state ambushed counsel regarding two crucial witnesses and with material evidence critical to its case. Even the trial court agreed some of the notes provided, by Kaplan from the witness stand were exculpatory in nature. These were notes counsel had requested numerous times and, went as far as issuing a subpoena to the M.E’s Office requesting the notes. *A.R. 9, 867-73* The state’s failure to notify counsel of Belding’s dismissal completely derailed any attempt to defend Mr. Frazier at trial, because it left the ultimate conclusion of Belding’s report insulated from cross-examination. This was highly prejudicial because Belding’s final conclusion in the report went to the ultimate issue of Mr. Frazier’s case.

Furthermore, the state would not have had any evidence of homicide without Kaplan’s testimony and the report, aside from the circumstantial evidence Jackson provided. Jackson gave multiple versions of the incident and, he did not witness the struggle over the gun nor could he say who pulled the trigger. Jackson’s testimony would have been weak and highly susceptible to

impeachment, even before, counsel was aware of the exculpatory statement, withheld from them by the state. Jackson gave a recorded statement to police the night of the incident. In that statement, he described the incident just as Mr. Frazier did, telling police that Smith was the one that stated “I will show you” before entering the bedroom. Again, this was material exculpatory evidence withheld from counsel and; sprung on them at trial.

Knowledge of Belding’s dismissal, the recorded statement of Jackson, and the state’s intent to call Kaplan to testify to Belding’s findings would clearly have changed not only counsel’s trial strategy, but how the entire trial proceeded. The autopsy report was not just any “statement,” it was a “statement” that went to the ultimate issue of the case. Belding’s testimony and the autopsy report was material evidence and having prior knowledge of his termination would have changed the trial strategy of counsel depending on what they uncovered during their investigation of Belding’s dismissal. Additionally, how they would defend Mr. Frazier’s case would clearly be dependant on how the trial court ruled as to the admissibility of the autopsy report without Belding as witness.

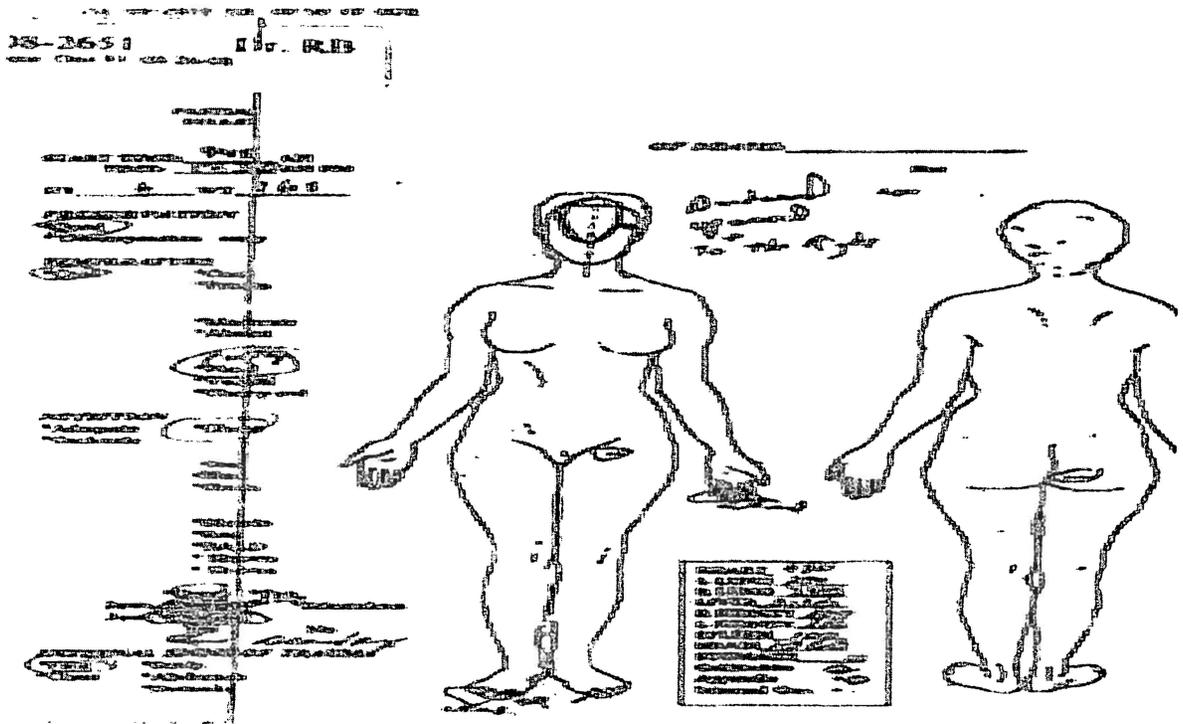
Furthermore, the court’s ruling regarding Kaplan’s ability to testify and the admissibility of the report, may have and probably would have been completely different than the ruling it issued during trial. The court was blindsided by these issues too. It was placed in a situation where it had to make a spur of the moment decision, during a high profile murder trial.²¹

Melendez-Diaz had just been issued by the United States Supreme Court in June of 2010, prior to Mr. Frazier’s trial. This fact alone demonstrates that if the state been forthcoming with Belding’s termination, Mr. Frazier’s case would have proceeded differently. Someone involved in the case, be it the law clerk or the defense attorney, would have found *Melendez* and the trial

²¹ The time constraints involved in the trial were a constant issue. The M.E. was only available to testify on a certain day and, counsel’s expert was from out of town and counsel had purchased a \$1,000 non-refundable ticket to secure his attendance at the trial.

court would have applied that ruling to the facts of Mr. Frazier's case, which would have prevented Kaplan's testimony. Then the only way the report and the findings would have come into evidence would have been if the state subpoenaed Belding. Again, the state did not represent he was unavailable just that he was no longer employed with the M.E.'s office.

There is also an example of how late discovery possibly impacted Mr. Frazier's trial. In response to Counsel's persistence in calling the M.E.'s office regarding Belding's notes, after the issuance of the subpoena but prior to trial, the M.E.'s secretary faxed a copy of the diagram of Smith's body completed by Belding during the autopsy but, not his notes. *A.R. 6* It appears below:



While, counsel did not find this form helpful, current counsel believes if counsel had this document in a timely fashion, Mr. Shiro would have found it to be highly relevant. The document may have proved to be quite helpful to further the theory of defense asserted by Mr.

Frazier. The markings that were made by Dr. Belding show a visible mark on Smith's left hand fingers and a mark on her left leg. The mark on her fingers could have been bruising that resulted from Smith having her finger in the trigger mechanism during the struggle over the gun and, the mark on her leg could be bruising due to the kick back of the shotgun going off when not properly supported. These marks also coincide with Shiro's opinion regarding arm placement, as if Smith was left handed she would have been supporting the shotgun with her right arm. Someone shoving on the gun upwards would cause both arms to be elevated and the right arm to go across the body, exactly as Shiro described Smith's arms due to the void in blood-spatter across the front of Smith's shirt and the blood-spatter present on her left shoulder. Additionally, the directionality of the wound is consistent with this proposed set of facts. Therefore, this could have been a key document, as it would have been exculpatory, had it been provided to the defense in a timely manner. *State v. Hatfield, 169 W.Va. 191, 205, 286 S.E.2d 402, 411(1982)* :

It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

A prosecutor holds a special position in our judicial system. It is a very powerful and important position that should not be misused. The failure to disclose Belding's termination, to obtain and turn over Belding's notes, and the failure to turn over Jackson's recorded statement which contained exculpatory evidence all constitute acts of misconduct on behalf of the state. The United States Supreme Court held these violations occur even when they are not knowingly or intentionally committed. *Kyles*

The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, [s]he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as other participants in the trial. It is a prosecutor's duty to set a tone of fairness and impartiality, and while [s]he may and should vigorously pursue the State's case, in so doing [s]he must not abandon the quasi-judicial role with which [s]he is cloaked under the law.

Syl. Pt. 3, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977).

The actions of a prosecutor should be guided by two considerations. First, "a prosecutor's duty is to obtain justice and not simply to convict [.]" *Nicholas v. Sammons, 178 W.Va. 631, 632, 363 S.E.2d 516, 518 (1987)* *Second*, it is a prosecutor's duty to maintain "public confidence in the criminal justice system . . . by assuring that it operates in a fair and impartial manner." *Nicholas v. Sammons, 178 W.Va. at 631, 363 S.E.2d at 51* This Court emphasized the fact the prosecutor's duty to approach a case with fairness can be "elevated when the offense charged is of a serious or revolting nature, as it is recognized that a jury in this type of case may be more easily inflamed against the defendant by the very nature of the crime charged." *Syl. Pt.3 and 4, in-part, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977).*

The prosecutors in this case knew Dr. Belding's findings, opinions and ultimate conclusion found within his report were crucial to their case. The prosecutor's also knew the M.E. would be a critical witness for them and, at the same time a critical witness for the defense to discredit on cross-examination. The state was aware the M.E.'s report was material evidence. The failure of the state to notify counsel of Belding's dismissal and its plans to call Kaplan in his place produced an inexcusable surprise on a material issue in Mr. Frazier's trial.

The defense was surprised by evidence that went to the ultimate issue of the case. The state's act of withholding this information shut-down the defense's ability to cross-examine, i.e. test, any information found within Belding's report. The state had numerous contacts with counsel, specifically about Mr. Frazier's case, during the time period that elapsed from the time

they were informed of Belding's termination until the time of trial and failed to disclose this information. Finally, the state failed to turn over Jackson's exculpatory statement until during trial and, it also failed to obtain and turn over Belding's notes in which even the trial court stated appeared to be exculpatory.

The state failed to live up to its obligation to use its powerful position in a fair and impartial manner. The state sought a conviction in this case rather than attempting to seek justice, otherwise it would have complied with its discovery obligations and tried a fair case. Instead the state ambushed counsel on three separate occasions, during Mr. Frazier's trial. In *Brady*, the United States Supreme Court stated "[s]ociety wins not only when the guilty are convicted **but when criminal trials are fair**; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 88, 83 S.Ct. 1194, 1197 (1963). The states behavior infected the outcome of the trial to such a degree, when you consider all the evidence that was withheld, that the verdict in Mr. Frazier's trial is not worthy of any confidence. In the process the State violated the Sixth and Fourteenth Amendments of the United States Constitution and Article III Section 14 of the West Virginia Constitution. It is for that reason Mr. Frazier is asking this Honorable Court to reverse his conviction.

V. The trial court's denial of counsel's challenge for cause as to Juror Tucker denied Mr. Frazier his right to strike an impartial jury from a panel of 20 jurors free from exception or bias

Standard of Review: The challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for cause. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law. *Syl. pt. 6, State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).

“The right to a fair trial is guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States and by article III, section 14 of the Constitution of the State of West Virginia. Subsumed under the right to a fair trial is the right to a fair and impartial jury.” *State v. Stonestreet*, 112 W.Va. 688, 166 S.E. 378 (1932) Accord: *State v. Lohm* 97 W.Va. 652, 125 S.E. 758 “Jurors who on voir dire of the panel indicate possible prejudice should be excused, or should be questioned individually either by the court or by counsel to precisely determine whether they entertain bias or prejudice for or against either party requiring their excuse.” *Syl. Pt. 3, State v. Pratt*, 161 W.Va. 530, 244 S.E. 2d 227 (1978) This should be done with caution and with the intent to err on the side of excusing the juror in a close situation because: ““..a juror who has formed an opinion cannot be impartial.” *Reynolds v. United States*, 98 U. S. 145, 155, 25 L.Ed. 244, 246 (1878) See also *State v. Myers*, 204 W.Va. 449, 463, 513 S.E.2d 676, 690 (1998), *W.Va. Code Section 62-3-3 (1949)(2005 Rep. Vol.)* provides that a criminal defendant is entitled to conduct voir dire until a panel of twenty jurors free from exception is seated. This Court held it is from that panel of twenty impartial jurors that a defendant’s strikes are to be made. *O’Dell v. Miller*, 211 W.Va. 285, 288, 565 S.E.2d 407, 410 (2002)

Mr. Frazier was denied this right by the trial court’s refusal to excuse Juror Tucker for cause requiring counsel to use one of their strikes to excuse a juror that was unfit to sit on his panel. Juror Tucker had been married to an FBI agent. She was divorced at the time of trial. Her father was a retired FBI agent. That knowledge together with her answer to counsel’s question regarding police officers demonstrated she held an improper bias and therefore was unfit to sit on Mr. Frazier’s jury panel. The bias that Juror Tucker expressed is a bias that could not be corrected, despite the fact she responded “correctly” to the rehabilitation questions the court immediately resorted to based on her following response to Counsel’s question: “[w]ould any of

you give more creditability to the testimony of a police officer merely because he is a police officer?":

Juror Thacker: Well, I mean, I am just thinking that they have been trained to take evidence and look at the facts. So I would think that someone who has been trained understands maybe more so than someone else.

Court:would you automatically believe everything a law enforcement officer testified to under oath?

Juror Thacker: No

Court: Okay. That's the thing. You would judge their testimony just like someone else's?

Juror Thacker: Yes

Court: Sure. Okay.

A.R. 750.

This Court held the decision as to the fitness of a juror is not solely dependant on their answers. A trial court is also required to look beyond a juror's responses: [w]hen considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror. *Syl. Pt. 3, O'Dell v. Miller, 211 W.Va. 285(2002)*

This court further stated in *O'Dell* that: "[o]nce a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair. *Syl. Pt. 5, Id.*

Counsel made the first challenge for cause regarding Juror Thacker and it was denied. *A.R. 128* The court even acknowledged the fact that some of the jurors were unfit when it stated:...there are some people that I would normally let go but I am in a bind because we do not have enough here." *A.R. 761* After the court made this statement, another discussion regarding Ms. Thacker began. Counsel felt so strongly about Juror Tucker's bias that they attempted to get

the court to reconsider its initial ruling as to her fitness. Counsel argued her answer showed bias. The fact that she has in her mind that police officers, because of their training and investigation is going to make her place their testimony above other people, “which includes our client....since he is not a law enforcement officer.” **“Your Honor, I mean her father was an F.B. I. agent.”** To which the court responded: “I am happy with her and I am not going to argue about that anymore.” *A.R. 763*

The bias Juror Tucker expressed was clear and, it was not something she could change. The bias was created by who she was how she was raised; therefore it could not be changed. She was raised by an F.B.I. agent, she was married to one for a period of time, and she stated she felt officers would be better witnesses due to their training and experience. Clearly, the court’s rehabilitative question of --but you can be fair to both sides—and her positive response is not going to take away a lifetime of exposure to law enforcement.

The trial court erred by keeping Juror Tucker on the panel. The court created an unfit panel. Mr. Frazier was entitled to 20 jurors free from bias on the panel to strike a jury from, and the court’s refusal to remove Juror Tucker required counsel to improperly use one of Mr. Frazier’s strikes and strike a juror who was unfit to even be on the panel. This denied him of his right to strike a jury panel free from exception as guaranteed by this court’s precedent and statute. Therefore, Mr. Frazier is entitled to a new trial.

CONCLUSION

Counsel appeared prepared and ready to go, on the first day of Frazier’s jury trial, only to be met with surprise after devastating surprise. Counsel had to feel as though they stepped into the wrong courtroom. The trial they prepared for was not the trial they had to defend against.

The trial Mr. Frazier was afforded can be described as nothing more than a trial by ambush. Despite all of the struggles counsel endured due to the state's actions counsel continued to defend Mr. Frazier. In the end, the state failed to rebut Mr. Frazier's theory of self-defense and accidental shooting, therefore Mr. Frazier respectfully requests this Honorable Court for a reversal and an order of acquittal. However, if this Court should deny relief on his first issue Mr. Frazier requests a reversal of his case with an order for a new trial as to all other issues asserted and any other remedy this Court may see fit.

Respectfully submitted,

ROBERT FRAZIER
By Counsel

A handwritten signature in cursive script, appearing to read "Crystal L. Walden". The signature is written in black ink and is positioned above the typed name and contact information.

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CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 3rd day of October, 2011, I mailed a copy of the foregoing Amended *Petitioner's Brief* to Thomas Rodd, Assistant Attorney General, Appellate Division, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301.

A handwritten signature in black ink, appearing to read 'Crystal L. Walden', written in a cursive style.

Crystal L. Walden
Deputy Public Defender