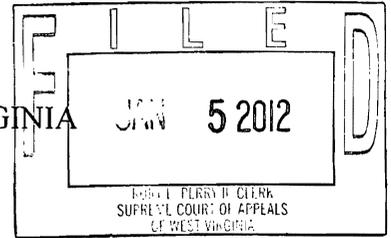


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No. 11-0691

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

ROBERT FRAZIER,

Petitioner.

PETITIONER'S REPLY BRIEF

Crystal L. Walden
Deputy Public Defender
W.Va. Bar No. 8954
Office of the Public Defender
Kanawha County
Charleston, WV 25330
(304) 348-2323
cwalden@wvdefender.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

PETITIONER’S FACTUAL REPLY 1

I. THE STATE INCORRECTLY ASSERTS THAT JACKSON’S TESTIMONY WAS ENOUGH TO REBUT FRAZIER’S CLAIM OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.7

II. THE STATE CORRECTLY ASSERTS THAT THE TRIAL COURT DID NOT REFUSE AN INSTRUCTION ON ACCIDENT. HOWEVER, THE TRIAL COURT INCORRECTLY RULED COUNSEL COULD NOT PRESENT INCONSISTENT DEFENSES ON BEHALF OF MR. FRAZIER AND MID-TRIAL INFORMED COUNSEL THEY WOULD HAVE TO CHOOSE WHICH THEORY TO PURSUE, BUT THEY COULD NOT PURSUE BOTH SELF DEFENSE AND ACCIDENT DESPITE COUNSELS’ ARGUMENT THAT THE FACTS OF THE CASE SUPPORTED SELF- DEFENSE THAT TURNED INTO AN ACCIDENTIAL SHOOTING.....9

III. THE STATE CONCEDES THE TRIAL COURT’S ADMISSION OF THE AUTOPSY REPORT OVER COUNSEL’S OBJECTION WAS A VIOLATION OF MR. FRAZIER’S RIGHT TO CONFRONTATION. HOWEVER, THE STATES ASSERTION THAT THE VIOLATION WAS HARMLESS IS INCORRECT. THE STATE ALSO FAILED TO ADDRESS COUNSEL’S ARUGMENT THAT ALLOWING KAPLAN TO TESTIFY TO THE FINDINGS OF BELDINGS REPORT WAS ALSO A VIOLATION OF MR. FRAZIER’S RIGHT TO CONFRONTATION13

IV. THE STATE CONCEDES COUNSEL’S ARGUMENT REGARDING EXCULPATORY EVIDENCE BEING WITHHELD, WAS “PARTIALLY” MERITORIOUS AS TO THE AUTOPSY NOTES. THE STATES ASSERTIONS REGARDING THE REMAINING EXCULPATORY EVIDENCE WITHHELD FROM COUNSEL PRIOR TO TRIAL IS INCORRECT.....16

CONCLUSION21

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
Bullcoming v. New Mexico, - U.S. -, 131 S.Ct. 2705, 2716, 2011 U.S. LEXIS 4790	14,15
Crawford v. Washington, 541 U.S.36, 61, 124 S.Ct. 1354, 1370 (2004).....	13,14
Kyles v. Whitley, 514 U.S.419, 420, 115, S.Ct. 1555, 1558-59.....	18
Melendez-Diaz v. Massachusetts, - U.S. -, 129 S.Ct. 2527, 2532, 2009 U.S. LEXIS 4734	14,15
State v. Graham, 208 W.Va. 463, 541 S.E.2d 341 (2000).....	17
State v. Grimm, 165 W.Va. 547, 270 S.E.2d 173(1980).....	17
State v. Jenkins, 195 W.Va. 620, 466 S.e.2d 471 (1995).....	12
State v. Johnson, 179 W.Va. 619, 371 S.E.2d 340(1988)	17
State v. McCoy, 219 W.Va. 130, 134, 632 S.E.2d 70, 74 (2006)	11

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amend. VI	15,19
U.S. Constitution, Amend. XIV	12,19
W.Va. Constitution, Article III, §14.....	12,19

PETITIONER'S FACTUAL REPLY

Mr. Frazier's actions immediately after the incident that occurred between him and Smith are not that of a guilty, fleeing suspect. In fact his actions are quite the opposite. Sperry, the lead investigator of Mr. Frazier's case, got it right when he described Mr. Frazier's actions by stating: "[y]ou're panicking, you did not know what to do." *A.R. 36, 39* No one knows how they would react to a horrific and traumatic event such as the one that occurred on August 25, 2008. Mr. Frazier admits he should have stayed and called 911. But he did not and, as he stated to Sperry, hindsight is 20/20. *A.R. 40.*

Sperry knew Mr. Frazier for a long time and actually worked with him at a retail store in the past. *A.R. 32^[1]* This prior acquaintance is significant because Mr. Frazier could not look Sperry in the eyes when he was blaming the incident on Jackson. *A.R. 26* The State represents in its brief that Mr. Frazier was fleeing the scene or attempting to flee. This is not true. *State's Brief at 1, 2* After the incident, Mr. Frazier went to his house located at 222 Buffington St. which according to Officer Denning (hereinafter Denning) is *six blocks* from 530 Richmond St., the house where the incident occurred. *A.R. 997, 1050* From there Mr. Frazier went to a gas station which was .2 of a mile from his home and sat out in the open. He made a call to his mother and was then approached by Denning and arrested.

Mr. Frazier did not hide the gun or take the gun with him as a guilty, fleeing suspect would do. Officers found the gun laying on the bed where it ended up after the incident. Mr. Frazier did leave the home for obvious reasons^[2], but he went to his house at 222 Buffington St, a house he had been pulled over in front of by Sperry. *A.R. 29.* He did change clothes but as he

^[1] Mr. Frazier also had contact with Sperry as a police officer, which is also detailed in his statement. *A.R. 29* This is significant as Sperry had a rapport with Mr. Frazier and could immediately tell when Mr. Frazier was not being truthful in the beginning of the statement. He was able to call Frazier out immediately for being dishonest: "look at me. You never lied to me before." Mr. Frazier responds "No sir." ... "Listen to me Robert, look at me." Mr. Frazier "I can't" Sperry: "I know" Mr. Frazier: "I'm disgusted." *A.R. 26*

^[2] The woman he lived with and loved was dead at that house.

explained to Sperry: “[e]verything that I was wearing when Kathy got shot is at 222 Buffington Street.” *A.R. 29* “Yea everything that I was wearing when the *accident happened.*” *A.R. 30* “I kept everything together.” *A.R. 35* “*I kept it for a reason.*” *A.R. 36* “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 because there is powder burns on her too.” *A.R. 37* This is not the thoughts or actions of a guilty, fleeing man as the State attempts to portray.

Jackson, the “young man” the state claims rebutted Mr. Frazier’s self defense claim, did not tell a consistent version of the events and, he had a history himself a history the state went to great lengths to keep out at trial.^[3] *A.R. 1190-1195* Furthermore, the quoted statement found in the State’s brief “I will fucking show you, bitch” [*State’s brief at 2*] is only one of several versions Jackson gave regarding that specific point during the incident. Jackson’s version of events was significantly different *every time* he gave it in his: statement to police, testimony at the preliminary hearing, and his testimony at trial. The inconsistencies involved significant facts making the State’s current claim of harmlessness in failing to turn over the recorded statement prior to trial incorrect, as is demonstrated below:

^[3] Jackson had a juvenile arrest consisting of drug related charges. Jackson also had a shoplifting dismissed two weeks before trial in Magistrate Court, by the elected prosecutor himself, in lieu of community service that had not been performed on the date of the dismissal. Without a pending charge the agreement was not enforceable. Additionally, this was a disposition trial counsel argued was never offered in the normal course of business on a shoplifting charge. *A.R. 1191-95.*

JOSHUA JACKSON

STATEMENT	PRELIM	TRIAL
He was sitting in the living room and they were getting along good when he arrived. (<i>A.R. 1235</i>).	They were arguing when he got there (<i>A.R. 283</i>).	They were arguing when he got there (<i>A.R. 1207</i>).
He did not see Smith at all. (<i>A.R. 1251</i>).	Smith was in the living room <i>A.R. 283</i> , but she walked out after he arrived. (<i>A.R. 284</i>).	They were arguing in the living room when he got there. (<i>A.R. 1207</i>).
He went over there to talk to Mr. Frazier about the motorcycle. Robert and Smith got into an argument right after he talked to Mr. Frazier about the motorcycle. (<i>A.R. 1239</i>).	They were arguing when he got there. (<i>A.R. 283</i>).	They were arguing when he got there (<i>A.R. 1207</i>).
Smith started yelling at Mr. Frazier—saying: “I will show you,”—he said: “Well I will fucking show you,” ^[4] (<i>A.R. 1236-37</i>).	All he heard was arguing. And then Mr. Frazier said, I’ll show you and walked in the room. (<i>A.R. 285</i>).	Robert said, “I will fucking show you, bitch.” (<i>A.R. 1207</i>).
Robert told him he was going in the bedroom to talk to Smith. (<i>A.R. 1252</i>).	All he heard was arguing. Then Mr. Frazier said “I’ll show you.” And he walked in the room. (<i>A.R. 285</i>).	Mr. Frazier said: “I will fucking show you bitch.” (<i>A.R. 1207</i>).
He could hear them arguing over money. (<i>A.R. 1253</i>). ^[5]	He did not know what they were arguing about. (<i>A.R. 283</i>). He was not paying attention. He does not get into other people’s business. (<i>A.R. 288</i>).	He did not know what they were arguing about—he was not paying attention. (<i>A.R. 1207</i>).
Mr. Frazier kicked screen out of window and climbed out. (<i>A.R. 1238</i>).	He saw Robert coming out of the window (<i>A.R. 283</i>).	He saw Robert kicking the screen out of the window. (<i>A.R. 1210</i>).

^[4] This portion of Jackson’s statement, made hours after the incident, was exculpatory and highly relevant to Mr. Frazier’s defense. It corroborates Mr. Frazier’s representations that 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.* It also corroborates Mr. Frazier’s statements regarding what Kathy meant by “I will show you.” She stated this to him as she was disappearing in the bedroom with the all the drugs, therefore she was taking control of their livelihood. This Court should note there are several other inconsistencies in the statement counsel did not detail.

^[5] This row in the chart, no matter which version one is to believe regarding the argument, calls into question Jackson’s testimony that the gun shot instantly followed Mr. Frazier’s entrance to the bedroom.

As is demonstrated above, the recorded statement held several exculpatory statements within it. Therefore, the State's act of withholding Jackson's recorded statement from counsel until trial was highly prejudicial because it corroborated portions of Mr. Frazier's statement and if counsel had the statement prior to trial, Mr. Jackson would have been subjected to a much harsher cross as counsel would have had time to go through the statement and be better prepared to impeach him on the various versions he gave regarding this single event. This is a crucial fact because seeing Jackson impeached to a greater degree on significant facts would have impacted his credibility in the jurors' eyes. The withholding of Jackson's statement was not harmless.

The State asserts: **"The father [Jackson's father] called 911 and reported the shooting. The Petitioner, meanwhile, fled the scene, and was arrested hours later."** *State's brief* 2 What the State failed to explain was the 911 call was also not made *until hours later* at 5:40 p.m. Furthermore, the caller gave a bogus name and made up two completely different versions of why he thought a woman had been shot. Clearly, not the actions of a good samaritan who was calling in an emergency, otherwise the incident would have been reported honestly even if in third person.^[6] Additionally, Jackson testified that both his dad and his dad's boss called 911 to report the incident.^[7] *A.R. 1262-1265* However, Stephanie Sowder, the 911 operator testified she took the only call regarding the shooting, and the caller stated he was a business owner. She also verified the call came in around 5:40 in the evening *A.R.1285* The **"fleeing"** suspect, Mr. Frazier, was located .65 miles from the scene and was placed in custody, without incident, within 20 minutes of the 911 call.^[8]

^[6] This also adds credit to the defense's assertion that Jackson was there to buy drugs and did not want to place himself at a known drug house, rather than him being afraid of Mr. Frazier.

^[7] While not significant to the facts of the case it is yet another misrepresentation by Jackson.

^[8] The arresting officer, Denning, testified he was called to the scene at approximately 5:45 and instructed to look for Mr. Frazier. While on scene, Mr. Frazier's neighbor told Denning, they could find Mr. Frazier at the Marathon station. Denning, left 530 Richmond St. and drove to the Marathon station where he located Frazier and took him into custody.^[8] *A.R.299* This is also supported by the testimony of Sperry who stated he was called out around 6:30

The State's representation of the following portion of Mr. Frazier's statement in its brief is out of context: "[t]he Petitioner told police that he 'put [the gun] back in [Kathy Smith's] face and it went off.'" *State's Brief 2* This isolated portion of Mr. Frazier's statement quoted by the State is immediately followed by the following exchange:

Sperry: Why did you put it back in her face?
Frazier: I just pushed it away from mine.
Sperry: Towards her? To get it away from ya?
Frazier: It was away from mine. I do not think I will ever get this smell off of me.

A.R. 38 The State then quotes a second statement out of order in its brief . The quotation in the state's brief which follows the above mentioned quote was *made at the beginning of Mr. Frazier's statement*. This statement was also further explained to Sperry, as counsel will demonstrate. This second statement was also cited out of context in the State's brief: "**The Petitioner stated to police (and the jury heard): '[Y]es, I shot her.'**"^[9] Immediately, following that statement Mr. Frazier explains what happened:

Frazier: **She pulled a gun on me**
Frazier: My shotgun
Frazier: I live in a bad neighborhood Chris
Sperry: Do you usually keep it loaded
Frazier: **Always.**
Sperry: So you knew the gun was loaded?
Frazier: **Yep. I didn't know she had it locked...**
Frazier: There is no safety"

to question Mr. Frazier at the police station. *A.R. 304*. Hall questioned Mr. Frazier while he was in the police cruiser. This occurred before Mr. Frazier was transported to the police station to give his official statement to Sperry. *A.R. 299*

^[9] The use of the quoted portions of Mr. Frazier's statement by the State are out of order. **The second statement quoted by the State was made at the beginning of Mr. Frazier's statement**. The State cites to Mr. Frazier's statement: "Yes, I shot her" in such a way as to make the reader think that after discussing the incident with Sperry Mr. Frazier decides to "come clean" and admits "Yes, I shot her" and that is in no way what happened.

Sperry: Did she pull the gun on you?
Frazier: Yes Sir.
Sperry: And you took it away from her?
Frazier: And in the process the hammer.
Sperry: Did you step back and shoot her?
Frazier: Nope
Sperry: Did you shoot her point blank?
Frazier: No.
Frazier: And I was taking it from her
Sperry: Gun went off? Okay
Sperry: Well Robert if that's truthful, okay the ballistics
Frazier: That is
Sperry: Well ballistics is gonna show us that, okay? That'll show
the direction of her injury.
Frazier: Yep.

A.R. 26 -28. Sperry's "threats" to Mr. Frazier of ballistics showing what really happened goes on for page after page of Mr. Frazier's statement. Yet Mr. Frazier's response *never changed*.

Additionally, Sperry told Mr. Frazier time after time if Smith touched the gun her prints will be on the gun. Again, this did not cause Mr. Frazier to change his version of the facts. Finally, one last attempt by Sperry on both ballistics and fingerprints went as follows:

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'm
not sure who pulled that trigger**.
Sperry: Robert if she touched 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 residue on her hands, if she's fighting for the gun from you and you.

Frazier: **I'm not, I'm not lying.**

A.R. 31 Importantly, part of that evidence was proven to be true.^[10] The gun shot suffered by Smith was a contact shot. There was gun powder on her face. In fact, defense expert Shiro testified the force of the gun hitting her face could have caused her head to turn just as the gun went off explaining the angle of the injuries sustained to Smith's face.^[11] Furthermore, Kaplan testified the gunshot was the type of injury that you would expect to see in the type of struggle Mr. Frazier described. The State failed to test the hammer for touch DNA, a test Shiro testified could have been outcome determinative in this case. The State argued defense counsel did not request the test^[12], but Shiro testified *correctly* that it is the State's job to collect all possible evidence and therefore even if Castle did not think it would be there he had an obligation to attempt collect the evidence. Shiro also testified the test would have cost at the most \$1.00.

I. THE STATE INCORRECTLY ASSERTS THAT JACKSON'S TESTIMONY WAS ENOUGH TO REBUT FRAZIER'S CLAIM OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.

Despite the State's representation that Jackson was an eyewitness, he was not. He was in the house but, as is demonstrated above, it is hard to determine what in fact Jackson did or did not hear, or did or did not witness. *Respondent's Brief 5* One thing is for certain he did not

^[10] The state was unsuccessful in lifting fingerprints. Additionally, the state failed to even attempt to preserve DNA on the hammer of the shotgun even though Mr. Frazier consistently maintained Smith pulled the hammer back; therefore, if the DNA was recovered it would have been outcome determinative. Furthermore, even if Castle did not believe the DNA would be relevant he has an obligation to collect all evidence and then determine what he believed would produce the best results.

^[11] This was an alternate explanation to that of Castle when he was initially asserting Smith had her hands down to her side with her head turned away from Mr. Frazier, a position he later abandoned when it was proven to be wrong by defense expert Shiro.

^[12] An officer also testified that if the defense wanted the test done they could have had it completed. There was an objection to this comment as counsel argued Mr. Frazier did not have a burden to prove anything and that comment amounted to the officer shifting the burden of proof. The objection was overruled by the court.

witness anything that transpired in the bedroom. Jackson's representations regarding the events of August 25, 2008, were not consistent during any of the three separate times he discussed them: in his statement to police, during his testimony at the preliminary hearing, or during his testimony at trial. The differences were significant and at times exculpatory.

In fact, significant portions of his statement to police, the version he gave only a few hours after the incident, was exculpatory and supported Mr. Frazier's statement, making the failure of the State to turn Jackson's recorded statement over prior to trial highly prejudicial to the presentation of Mr. Frazier's defense. Shiro, defense counsel's forensic and crime scene investigating expert,^[13] testified the State did not present a shred of physical evidence that refuted Mr. Frazier's version of events surrounding the incident in the bedroom. *A.R. 1345-46*

In fact, during the attempt to rebut Shiro's testimony the State recalled Castle. Castle, the state's expert, abandoned his own findings regarding a crime scene he was in charge of and agreed with Shiro's findings.^[14] He admitted the state did not have any physical evidence that refuted Mr.

Frazier's version of events:

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

^[13] Mr. Shiro's testimony regarding his education, qualifications, and experience in the field of forensic science is found at *A.R. 1325-28*

^[14] Castle's agreement with Shiro was a complete abandonment of the findings he had just previously represented to the jury by way of written report, testimony, pictures, and the live in court demonstration that occurred over counsels' objection during the state's case-in-chief. Trial counsel objected to this demonstration and argued correctly that in order to be relevant an in-court demonstration must be accurate and the individuals posing in the court room were not equal in size or height to Smith and Mr. Frazier. Current Counsel was aware this was a legitimate argument, however, not every issue that is appealable can be asserted at times due to many factors, one of which is the strength of the argument, versus the other errors that must be asserted. See *A.R. 40A* demonstrates the in Court demonstration.

In light of Mr. Shiro's testimony, Castle's testimony [listed above], Castle's abandonment of his initial findings and his adoption of Shiro's findings, there is no way Jackson's inconsistent and questionable testimony was enough to meet the state's obligation of rebutting Mr. Frazier's claim of self-defense *beyond a reasonable doubt*.

II. THE STATE CORRECTLY ASSERTS THAT THE TRIAL COURT DID NOT REFUSE AN INSTRUCTION ON ACCIDENT. HOWEVER, THE TRIAL COURT INCORRECTLY RULED COUNSEL COULD NOT PRESENT INCONSISTENT DEFENSES ON BEHALF OF MR. FRAZIER AND MID-TRIAL INFORMED COUNSEL THEY WOULD HAVE TO CHOOSE WHICH THEORY TO PURSUE, BUT THEY COULD NOT PURSUE BOTH SELF DEFENSE AND ACCIDENT DESPITE COUNSELS' ARGUMENT THAT THE FACTS OF THE CASE SUPPORTED SELF- DEFENSE THAT TURNED INTO AN ACCIDENTIAL SHOOTING.^[15]

Mr. Frazier's ability to present his defense to the jury was dealt a devastating blow when the trial court erroneously informed defense counsel mid-trial that they could not pursue both an accident and self-defense theory. *A.R. 1200* The trial court mistakenly believed and held that 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*

^[15] Regrettably counsel framed and argued incorrectly in petitioners brief, that the trial court refused instructions on this issue. However, the portion of the argument that appears in this reply was within counsel's original brief and is correct and a valid argument on Mr. Frazier's behalf. The court incorrectly informed counsel they could not offer inconsistent defenses on behalf of Mr. Frazier. The court specifically told counsel they were going to have to choose what theory to go on: self-defense or accident. *A.R. 1200* Further error occurred when the court improperly limited the presentation of Mr. Frazier's self-defense theory by refusing to allow counsel to bring out Smith's history of violence Mr. Frazier was aware of by calling the deputy who arrested her on the possession with intent to distribute, a crime the state has argued in the past is clearly a crime of violence. Finally, the state incorrectly represented to this court in its brief that the court was not presented with an instruction on accident. State's Brief 4. In fact after telling counsel they could not pursue both defenses on behalf of Mr. Frazier, the court gave the accident instruction counsel had prepared in advance of trial. However, this does not cure the damage the improper ruling created as we do not know nor could we possibly know how the ruling impacted the presentation of Mr. Frazier's defense. Counsel would point out there was an additional witness the defense had under subpoena but ultimately did not call on Mr. Frazier's behalf.

Counsel unsuccessfully argued to the court this was Mr. Frazier's theory of defense and, as shown above, there were facts in evidence to support each theory. *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 informed counsel they would have to choose which theory they were going to pursue because a defendant could not offer inconsistent defenses. *A.R. 1200* . This was highly prejudicial to Mr. Frazier as all through his statement, taken hours after the incident, 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 presenting his entire defense at trial. *See generally A.R. 18-40*

The Court refused to allow inconsistent defenses, not because there was no evidence to support the theories, but due to the court's own misunderstanding of the law. 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 object^[16] to this ruling made by the court, nor did they cite case law to the court to the contrary, 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).*

^[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*

Additionally, as was pointed out in petitioner's brief, the trial court also incorrectly ruled that the victim's prior criminal history was not relevant to the defendant's claim of self-defense. The court held this despite counsel's best efforts to explain that a prior criminal history was in fact relevant to the defendant's state of mind in relation to the presentation of self defense.^[17] The court refused to allow counsel to call Deputy Mike Clark to testify that he had arrested Smith on charges of possession with intent to distribute despite counsel's argument that this knowledge was relevant to Mr. Frazier's state of mind when Smith pulled the gun on him.

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. THE STATE CONCEDES THE TRIAL COURT'S ADMISSION OF THE AUTOPSY REPORT OVER COUNSEL'S OBJECTION WAS A VIOLATION OF MR. FRAZIER'S RIGHT TO CONFRONTATION. HOWEVER, THE STATES ASSERTION THAT THE VIOLATION WAS HARMLESS IS INCORRECT.

^[17] The trial court granted counsel's pretrial motion for the state to provide the victim's criminal history. The criminal history the state provided was not complete because counsel and Mr. Frazier was aware that Smith had resided with another drug dealer in the 90's and was charged and arrested on charges of possession with intent to distribute. However, her charges were eventually disposed of in what the arresting officer believed was a misdemeanor plea. The trial court refused to let counsel call the arresting officer to testify to Smith's arrest and conviction, holding it was not relevant to the current case. Counsel disagreed and argued it was relevant and went to Mr. Frazier's state of mind, i.e., knowing of her violent past and tendencies when faced with her pulling the gun on him.

**THE STATE ALSO FAILED TO ADDRESS COUNSEL'S
ARUGMENT THAT ALLOWING KAPLAN TO TESTIFY TO THE
FINDINGS OF BELDINGS REPORT WAS ALSO A VIOLATION
OF MR. FRAZIER'S RIGHT TO CONFRONTATION**

The trial court's rulings allowing both Belding's full report to be admitted into evidence and allowing Dr. Kaplan to testify to Belding's findings were incorrect and violated Mr. Frazier's constitutional rights to confrontation. These erroneous rulings by the court were highly prejudicial to Mr. Frazier because it allowed the State's only evidence regarding the ultimate issue in the case to go untested. The State's assertion that these errors were harmless is without merit because without the testimony of Kaplan and the admission of Belding's full report, the State did not have any concrete evidence of homicide: **the ultimate issue in the case**. Therefore, Mr. Frazier is entitled to a new trial

Belding was a critical witness for the state as he was the only "witness" that provided evidence of homicide for the State. Further, the State knew Belding was also a critical witness for Mr. Frazier. Counsel needed to question how and why Belding arrived at the conclusion of homicide during cross-examination. This was material because their crime scene expert Shiro found, after reviewing all of the State's evidence, that there was "not a shred of physical evidence" to refute Mr. Frazier's statement that there was a struggle for the gun and it accidentally discharged killing Smith.

The court's rulings denied Mr. Frazier the protections guaranteed by the Confrontation Clause "that the reliability[of evidence] be assessed 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). These two rulings by the court destroyed counsel's ability to fully, properly, and adequately explore the findings, opinions, and ultimate conclusion found within the autopsy report with Belding, the M.E. who performed the autopsy and wrote the report.

Allowing the introduction of the full report along with Kaplan's testimony as to the contents of the report, despite his admitted lack of personal knowledge regarding the case, rendered cross-examination *useless*. The court's incorrect rulings insulated Belding's report from any form of "testing" envisioned by the Confrontation Clause, thereby permitting the only evidence the State possessed representing the incident as a homicide to go "untested" 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* Importantly, both of these rulings by the court were made over vehement objections from counsel.

The state's argument that Dr. Kaplan was present and subjected to extensive cross-examination is without merit.^[18] *Respondent's Brief 5* The United States Supreme Court disposed of this very argument in *Melendez-Diaz v. Massachusetts, - U.S. -, 129 S.Ct. 2527, 2532, 2009 U.S. LEXIS 4734 [prior to Mr. Frazier's trial]* and in *Bullcoming v. New Mexico, - U.S. -, 131 S.Ct. 2705, 2716, 2011 U.S. LEXIS 4790*, holding that *requiring the examining expert to be present and testify to their 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.C. at 1354 (2004)* (*emphasis added*) Importantly, the State did not represent Belding was unavailable, only that he no longer worked for the Medical Examiner.

^[18] 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

Additionally, 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 substitution of Kaplan as the state's witness not only insulated Belding's entire report, it prevented counsel from questioning Belding's techniques, skills, question how long he had been a M.E., how many autopsies he had completed, ***and most importantly, due to Shiro's findings, how much his discussions with officers impacted his ultimate finding of homicide.***

Furthermore, Belding's employment status was in issue, just as in *Bullcoming*. Belding had been terminated while the examiner in *Bullcoming* was only on administrative leave. *A.R.* 863. The trial court refused to require Kaplan to answer questions regarding Belding's termination when counsel attempted to delve into why Belding had been terminated. *Id.* The trial court refused to instruct Kaplan to answer counsel's questions despite counsel's argument that the reason for his termination could have an impact on the results of his reports. *A.R.* 863-64, 868. This too was an erroneous ruling as the *Bullcoming Court* held the issue was an area ripe for cross-examination as it clearly could have an impact on the results of his work.

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. Kaplan did not have personal knowledge regarding the case, he merely testified to Belding's findings and opinions effectively insulating them from cross. Furthermore, the introduction of the full 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.

IV. THE STATE CONCEDES COUNSEL'S ARGUMENT REGARDING EXCULPATORY EVIDENCE BEING WITHHELD, WAS "PARTIALLY" MERITORIOUS AS TO THE AUTOPSY NOTES. THE STATES ASSERTIONS REGARDING THE REMAINING EXCULPATORY EVIDENCE WITHHELD FROM COUNSEL PRIOR TO TRIAL IS INCORRECT.

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, had been terminated from the M.E.'s office and of its plan to call 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 from the state and the state had met in person with Kaplan to discuss Frazier's case in April. *A.R. 867-880^[19]* 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 was obligated to inform counsel of Belding's termination because his report and his ultimate conclusion were material to the State's case. Moreover, due to the representations of the state's final witness list, counsel was preparing for a trial in which she would cross-examine Belding as the testifying M.E.. Clearly, being surprised by the substitution of the M.E. was a material issue that obviously hampered preparation. 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 three months prior to trial and did not inform either counsel or the court of Belding's dismissal.

^[19] This does not include counsel's additional efforts to obtain the notes directly from the M.E.'s office which included serving a subpoena on the M.E. requesting the notes and numerous phone calls.

Furthermore, the State was required to notify counsel of its intent to call Kaplan because he was an expert. Prior knowledge of this would have without a doubt changed both counsel's preparation and presentation of Mr. Frazier's case. 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).

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 were material evidence and having prior knowledge of his termination would have changed the trial counsel's strategy depending on what they uncovered during their investigation of Belding's dismissal. Belding's absence impaired counsel's ability to advance Mr. Frazier's defense as they were unable to question Belding regarding Shiro's finding that the State did not present a shred of physical evidence that refuted Frazier's version of events. 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 sadly failed to disclose this information.

The state argued they were not aware of the additional autopsy notes and counsel actually had them before the state did, which is not a viable argument. *A.R. 867-73, State's Brief*

5. The State's argument completely ignores its obligations under *Brady and its progeny*.^[20] Trial counsel correctly responded the state was under a duty to seek out this information from their own officers and further argued being surprised with it in the middle of the trial was wrong. The state had an opportunity to get the notes during the meeting with Kaplan and should have so it could promptly turn them over to counsel. Counsel additionally argued this was not the first murder trial the prosecutor had tried and the prosecution knows these types of notes are generated during an autopsy. *A.R. 872*.

Furthermore, the state would not have had any evidence of homicide without Dr. 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 portions of Jackson's recorded statement given the night of the incident. In his recorded statement, Jackson 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.

The state ambushed counsel regarding two crucial witnesses and with material evidence critical to its case. Knowledge of Belding's dismissal, the recorded statement of Jackson, and the state's intent to call Kaplan to testify to Belding's findings, and the additional autopsy notes would clearly have changed not only counsel's trial strategy, but how the entire trial proceeded. The state's behavior of withholding and or failing to provide this material evidence to counsel

^[20] Specifically, in *Kyles v. Whitley*, 514 U.S.419, 420, 115, S.Ct. 1555, 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.

prior to trial affected the outcome of Mr. Frazier's trial. The verdict in Mr. Frazier's trial is not worthy of any confidence once the amount and material nature of the evidence withheld from counsel is considered. The state's actions of withholding this evidence 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.

CONCLUSION

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.

Robert Frazier
Respectfully submitted,

By Counsel



Crystal L. Walden
Deputy Public Defender
W.Va. Bar No. 8954
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330
(304) 348-2323
cwalden@wvdefender.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on this 5th day of January, 2012, a copy of the foregoing Petitioner's Reply Brief was sent via U.S. Mail to counsel for respondent, Thomas Rodd, Assistant Attorney General, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301.


Crystal L. Walden
Counsel for Petitioner