
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SUPREME COURT NO: 12-0829

BRANDON FLACK

PETITIONER/APPELLANT

V.

STATE OF WEST VIRGINIA,

RESPONDENT/APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF
MERCER COUNTY, WEST VIRGINIA**

(11-F-288)

BRIEF OF APPELLANT

ORAL PRESENTATION REQUESTED

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ASSIGNMENTS OF ERROR

Appellant, Brandon Flack, assigns the following errors from proceedings before the Circuit Court of Mercer County, West Virginia:

I. The trial court failed to provide a limiting instruction to the jury relating to the guilty plea of Jasmen Montgomery.

II. The venire from which the jury which convicted Appellant was drawn did not constitute a "fair cross section" of the community in violation of his rights under the Sixth Amendment, as incorporated into the Fourteenth Amendment of the United States Constitution.

III. The method by which the venire for Appellant's jury was constructed did not comply with the statutory requirements of the West Virginia Code.

IV. Testimony from the Chief Medical Examiner violated Appellant's right to confrontation under the 6th Amendment as incorporated into the 14th Amendment of the United States Constitution and Section 14 of Article III of the West Virginia Constitution.

STATEMENT OF THE CASE

The Appellant, Brandon Flack, was convicted in the Circuit Court of Mercer County of the felony offenses of First Degree Murder (under a Felony Murder theory), Burglary, First Degree Robbery, and Conspiracy. He was sentenced to life imprisonment with the possibility of parole on the charge of 1st Degree Murder, 40 years on the charge of robbery, and an indeterminate sentence of 1 to 5 years on the charge of Conspiracy.¹ All sentences were ordered to run consecutively. (App. Vol. III, Page 144).

Appellant's conviction stems from an occurrence on January 29, 2011, when Appellant and two others, all African-American, entered the home of Appellant's cousin, Matthew Flack. A struggle ensued and Matthew Flack was shot and killed. It was undisputed that Appellant did not shoot Matthew Flack. A co-defendant, Jasmen Montgomery, admitted to firing the fatal shot. The evidence also established that Appellant did not possess a gun at any point in the event, or any time prior. (App. Vol. II, Page 187, 191-92). A fourth individual, Joe Flack, an uncle of both Appellant and the victim, who is blind, did not enter the house, and remained in the car.

Appellant was indicted by the October, 2012 Term of the Grand Jury for Mercer County, West Virginia, on the four felony counts referenced above. Trial began on April 24, 2012, before Mercer County Circuit Court Judge Omar J. Aboulhosn. The court called five panels of jurors for jury selection. Those five panels constituted every juror

¹ Appellant's burglary conviction was dismissed and merged into the conviction for felony murder, as the predicate felony.

serving the circuit court for that portion of the court term. The five panels totaled 127 potential jurors. (App. Vol. III, Page 94-132). Of those 127 potential jurors, three were African American. Only one of the three African-American jurors in the five panels appeared on the morning of jury selection. (App. Vol. III, Page 246-248). That single African-American juror was excused for cause, because she was related by marriage to the defendant and the victim. (App. Vol. I, Page 2).

Defense counsel objected to the composition of the venire asserting with the dismissal of the juror related to the participants, the potential pool actually present was devoid of African-Americans. (App. Vol. I, Page 8-9). The prosecutor asserted he thought there may be one African-American present. (App. Vol. I, Page 9). The trial court overruled the objection to the composition of the jury panel, finding there had been no intentional exclusion of African-American jurors. (App. Vol. I, Page 9). Subsequently there were no African-Americans called to the panel from which the jury was ultimately selected, as none were available.

Following opening statements, the State presented testimony from 13 witnesses. Among those were several Bluefield, West Virginia police officers: Detectives, Scott Meyers (App. Vol. II, Page 207); John Whitt (App. Vol. II, Page 204); and officers, R.S. Gibson (App. Vol. II, Page 106), and R.D. Davis (App. Vol. II, Page 116), who testified as to their investigation of the shooting. India Simmons (App. Vol. II, Page 90), the victim's cousin and Milton Thomas (App. Vol. II, Page 48), the victim's friend, were inside the residence at the time of the incident, and testified as to their observations. Amanda Shorter (App. Vol. II, Page 27), the neighbor to the rear of the Flack house

testified as to her observation of Appellant and his co-defendant's approach and entry into Flack home.

The State also presented scientific evidence from Lt. R.R. Reed, a ballistics expert, (App. Vol. II, Page 158), Mary Heaton, who provided testimony regarding DNA evidence, (App. Vol. II, Page 148), and Koren Powers, who testified as to gunshot residue testing. (App. Vol. II, Page 139).

The State's key witness, however, was Jasmen Montgomery (App. Vol. II, Page 178), an initial co-defendant. Prior to trial, Mr. Montgomery had entered a plea of guilty to the charge of First-Degree Murder with a recommendation of mercy. Montgomery appeared to testify clad in orange prisoner garb. Evidence was elicited from Montgomery by the State on direct examination as to his guilty plea. (App. Vol. II, Page 178-79). In his testimony, Jasmen Montgomery testified as to a plan among the codefendants to rob the home of David Flack, the victim's father, and the forced entry into the home. (App. Vol. II, Page 184-87). Montgomery also testified to firing the shot that killed Matthew Flack. (App. Vol. II, Page 187-91).

The State also called Dr. James Kaplan, the Chief Medical Examiner of the State of West Virginia, who had signed the autopsy report, together with another medical examiner in his office. (App. Vol. II, Page 79). Dr. Kaplan testified as to the cause of death of Matthew Flack, but also offered other opinions as to the specific nature of Matthew Flack's wounds and their cause. (App. Vol. II, Page 83-86). Dr. Kaplan's testimony as to the autopsy report indicated his role in the preparation of the report was limited to, "making sure the conceptual findings in the autopsy report were correct,

that is the say, the description of the findings, as well as the conclusions reached and commensuration of those findings, as well as clerical errors that might be present in the draft of the report, so my signature just confirms my review of both the findings and their documentation as noted in the autopsy report.” (App. Vol. II, Page 81-82).

The defense called Pearl Dunford, Appellant's mother, to testify. (App. Vol. II, Page 285). Appellant also testified on his own behalf. (App. Vol. II, Page 289).

Following the close of evidence and the court's denial of defense motions to acquit, the court undertook to instruct the jury. Prior to instructing the jury, the court conferred with counsel as to instructions. (App. Vol. II, Page 324-340). Neither counsel for defendant, nor the prosecuting attorney offered or requested a limiting instruction to the jury advising that Jasmen Montgomery's guilty plea could not be considered as evidence of Appellant's guilt, but could be considered only with reference to Montgomery's credibility. Nor did the trial court recognize the necessity of such instruction, as indicated in State v. Caudill and its progeny.

On April 26, 2012, following instructions to the jury, counsel had the opportunity to present closing arguments to the jury. Within the state's closing argument prosecuting attorney, Scott Ash, on several occasions made reference to Jasmen Montgomery's plea and his acceptance of responsibility. (App. Vol. II, Page 376-77, 381, 408-409). After a period of deliberation, the jury returned the guilty verdicts referenced above.

Subsequently, Appellant filed a Motion for New Trial on May 7, 2012. (App. Vol. III, Page 188). The court heard arguments on the New Trial motion prior to sentencing

on June 6, 2012. At that time the court denied the Motion for New Trial, (App. Vol. III, Page 142), subsequently setting forth its rationale in a written opinion. (App. Vol. III, Page 191). The court then moved to sentencing, imposing the consecutive sentences previously referenced. (App. Vol. III, Page 143-144).

Appellant sought relief from the action in the trial court, timely filing a Notice of Appeal.

SUMMARY OF ARGUMENT

Appellant, Brandon Flack, rests his argument on four points, as set forth in the Assignment of Error.

I. Appellant asserts that the jury was insufficiently instructed due to the lack of the instruction recognized and commanded in State v. Caudill. Appellant's codefendant, Jasmen Montgomery, testified against him. Montgomery had previously accepted a plea offer from the state, and the state introduced evidence of the plea offer in its direct examination of Montgomery. In such circumstance, case law requires that an instruction be given to the jury, instructing that evidence of the testifying codefendants plea may not be considered as evidence of guilt or innocence, but rather goes solely to the issue of the credibility of the codefendant, as witness. Neither the defense nor the prosecutor requested such instruction, and the court did not give the instruction *sua sponte*.

Appellant submits that the need for the instruction has been made clear in the numerous prior pronouncements by this Court, and that the absence of the required instruction is sufficient to find reversible error.

The state argued below, and the trial court agreed, that in the absence of objection by Appellant at the trial court level, the issue addressed under a "plain error" standard. Appellant submits that even under the plain error standard the lack of instruction in the instant matter is reversible error.

Applying the plain error standard, the lack of the instruction, which has been consistently recognized as required, is error, and such error is plain. Further, appellant contends the error affected Appellant's "substantial rights" in that the testimony of Jasmen Montgomery was central to the prosecution's case in that it was central in the State's proof of essential elements of the crimes charged, such as forced entry into the Flack home, as well as intent. Appellant is not required to show that without the error he would not have been convicted in order to show that his substantial rights have been affected. Rather he need only show the error had a significant impact in the outcome.

In addition to affecting the substantial rights of Appellant, the omission of the required instruction seriously denigrates the quality of justice and threatens the integrity of the judicial process by failing to afford Brandon Flack, a young man charged with the most serious criminal offenses available in the state of West Virginia, the benefit of an instruction which this Court has unwaveringly recognized as fundamentally required to insure fair and appropriate judgment by the jury before which he is tried.

II. Secondly, Applicant asserts the venire from which his jury was selected was not drawn from a fair cross-section of the population in the county. The trial court called five panels of jurors to serve as potential jurors in Appellant's trial. This constituted every available juror in the circuit for the portion of the term in which Appellant was tried. Of those jurors on those five panels, three were African-American. Of those jurors, one appeared for service on the day of appellant's trial, and that juror was excused for cause at the outset.

Given the African-American population in Mercer County, West Virginia, the venire from which Appellant's jury panel was drawn significantly underrepresented the African American population in the county. Appellant further asserts that review of historical jury pool information indicates there to be a consistent underrepresentation of African-Americans in Mercer County venires.

Appellant further asserts that such underrepresentation is the result of a systematic exclusion of African-Americans by virtue of the failure to follow statutory directives for the selection of jurors which allow jurors to deselect themselves by non-response to questionnaires and subpoenas. Such underrepresentation as a result of the systematic exclusion of African-Americans by voluntary deselection deprived Appellant of his rights to a fair trial under the 6th and 14th Amendment of the United States Constitution.

III. The venire from which Appellant's petit jury was drawn was constructed in violation of the West Virginia Code. West Virginia Code § 52-1-1 et seq., sets forth the procedures for selecting jurors from the community and constructing the venire from which the petit jurors will be drawn. The statutory provisions cite as their principal goal the "selection of jurors from a fair cross-section of the community." Those provisions call for prospective jurors to return questionnaires provided them, and commands the clerk to demand the appearance forthwith of any of those prospective jurors who do not. The statute also calls for the issuance of subpoenas by the clerk, which are to be enforced if not honored by appearance as commanded.

Testimony at the hearing on the Motion for New Trial established that in Mercer County, the official response to the failure of potential jurors to respond or to appear is to take no action, despite the clear statutory commands as to the actions required in response to those failures to respond or appear. Such evidence clearly establishes that the procedures commanded by the statutory provisions, aimed at fairly assembling a jury panel, are routinely not followed, and were not followed with reference to the panel from which Appellant's jury was drawn.

IV. The testimony of Dr. James Kaplan as to the findings of the autopsy of Matthew Flack violated Appellant's rights to confrontation as guaranteed under the United States and West Virginia constitutions.

The State called Dr. Kaplan, the Chief Medical Examiner, to testify as the matters relating to the post-mortem examination performed on Matthew Flack. Dr. Kaplan, however, did not perform the examination, which was performed by a deputy medical examiner. Among the testimony provided by Dr. Kaplan, was a recitation of the cause of death, and other observations from the autopsy report. This Court has recently recognized in State v. Kennedy, that such testimony violates a defendant's right to confrontation as guaranteed under the 6th and 14th Amendments to the United States Constitution, and Section 14 of Article III of the West Virginia Constitution.

STATEMENT REGARDING ORAL ARGUMENT IN DECISION

Appellant submits that oral argument is necessary in view of the criteria set forth in Rule 18 (a) of the West Virginia Rules of Appellate Procedure. Appellant submits pursuant to Rule 18, that the issues presented in the instant appeal, particularly those relating to the error asserted with reference to the lack of a cautionary instruction, have not been authoritatively decided. In addition, while facts and arguments are significantly and adequately presented in Appellant's brief, Appellant believes the decision process would be significantly aided by oral argument.

Appellant believes that the instant matter would be appropriate for oral argument pursuant to Rule 19 of the Rules of Appellate Procedure in that the matter involves assignments of error in the application of settled law which are also narrow issues of law.

Appellant further believes the case at bar would also be appropriate for oral argument under Rule 20 of the Rules of Appellate Procedure, in that the appeal presents constitutional questions regarding the rulings of the trial court.

ARGUMENT

The instant appeal follows from the denial of Appellant's Motion for New Trial by the trial court below. Findings and rulings of the trial court are reviewed utilizing a two-pronged deferential standard of review. Rulings of the circuit court concerning a new trial, and its conclusion as to the existence of a reversible error are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law, however, are subject to a de novo review. Syl. Pt. 3, State v. Vance, 207 W.Va. 640, 535 S.Ed.2d 484 (2000).

I. The Failure To Give a Limiting Instruction As To the Testimony of Co-Defendant, Jasmen Montgomery Constitutes Reversible Error

The instructions given the jury by the court at the conclusion of the trial were fatally deficient. The question of whether a jury was properly instructed is a question of law, subject to de novo review. Syl. Pt. 1, State v. Hinkle, 489 S.E.2d 257, 200 W.Va. 280 (1996).

The theory of the State's prosecution in this matter was that Appellant, along with three other individuals went to the home of his cousin Mathew Flack for the purpose of robbing the household. With the resulting death of Matthew Flack, Appellant, and the individuals accompanying him to the Flack house, were charged with 1st Degree Murder, Robbery, Burglary and Conspiracy.

Central to the State's case was testimony from Jasmen Montgomery, a co-defendant who had previously entered a guilty plea to First Degree Murder with Mercy. During the State's direct examination, Montgomery was questioned as to the plea he had entered, and the sentence he had received. (App. Vol. II, Pages 178-179) No instruction as to the limited purpose for which Mr. Montgomery's guilty plea could be considered by the jury was offered by either party, nor given by the court.²

This Court has consistently held that "in a criminal trial an accomplice may testify as a witness on behalf of the state to having entered a plea of guilty to the crime charged against the defendant where such testimony is not for the purpose of proving the guilt of the defendant, and is relevant to the issue of the witness-accomplice's credibility. It has also been consistently held that "the failure by trial judge to give a jury instruction so limiting such testimony is, however, reversible error." Syllabus Pt. 3 State v. Caudill, 170 W.Va. 74, 289 S.E.2d 748 (1982); Syllabus Pt. 1 State v. Cabalalcta, 174 W.Va. 240, 324 SE.2d 383 (1984); Syllabus Pt. 2, State V. Farmer, 191 W.Va. 372, 445 S.E.2d 759 (1994).

In State v. Caudill, 170 W.Va. 74, 289 S.E.2d 748 (1982), the defendant was convicted of armed robbery of a jewelry store. The State relied heavily on the testimony of two accomplices who had previously entered guilty pleas in connection with their roles in the crime. No limiting instruction was provided to the jury clarifying the purpose of the accomplices' testimony. In reversing the conviction, the court held that:

² Counsel for Appellant admitted their unfamiliarity with the Caudill instruction and its necessity. The instruction was discovered post trial in the course of researching other issues in the case. Prosecuting Counsel also conceded ignorance as to the instruction (App. Vol. III, Pages 9-11)

(a)n accomplice may testify as a witness on behalf of the State to having entered a plea of guilty to the crime charged against a defendant where such testimony is not for the purpose of proving the guilt of the defendant and is relevant to the issue of the witness' credibility. The failure by a trial judge to give a jury instruction so limiting such testimony is, however, reversible error.

Caudill, 289 S.E.2d, at 755-756, 170 W.Va. at 81-82.

In the trial of this matter, an accomplice, Jasmen Montgomery, testified against Appellant as a condition of his plea agreement with the State. On direct examination, Montgomery admitted he had entered a guilty plea, and was appearing as part of his plea agreement. (App. Vol. II, Pages 178-79) The trial court's charge to the jury did not clarify that his appearance and, indeed, the plea bargain itself, was not to be construed as evidence against Brandon Flack, and that it was relevant only for purposes of determining the witnesses credibility.

Clarification of this distinction for the jury's benefit is paramount. A guilty plea made by an accomplice cannot be used as an attempt to show guilt by association. Testimony having that intent and so limited as to achieve that intent is error. Caudill, 174 W.Va. at 81, 289 S.E.2d at 755; citing State v. Price, 114 W.Va. 736, 174 S.E. 518 (1934).

The Court in Caudill recognized that the concern inherent in this situation is that the jury may misinterpret the purpose for which testimony of a co-defendant's plea is offered, thus the requirement of the limiting instruction, a requirement which the court noted Professor Cleckley recognized as being the subject of a "well recognized rule" in

federal courts. 170 W.Va. at 81, 289 S.E.2d at 755, citing, Franklin Cleckley, Handbook on Evidence for West Virginia Trial Lawyers, 135 (1979 Supplement).

An examination of the evolution of jurisprudence as to this issue, beginning with the prohibitions against co-conspirator testimony in State v. Price, 114 W.Va. 736, 174 S.E. 518 (1934), and State v. Bennett, 157 W.VA. 702, 203 S.E.2d 699 (1974), proceeding through State v. Ellis, 161 W.VA. 40, 239 S.E.2d 670 (1977) and State V. Adkins, 162 W.VA. 815, 253 S.E. 2d 146 (1979), displays that the focus has shifted from prohibition to permitting the jury to hear the evidence available from the codefendant/co-conspirator, including the fact of his guilty plea. These cases also evidence, however, the clear recognition of the need to ensure that the jury has a clear understanding of the appropriate purpose for which such information may be considered by the jury. As recognized by Professor Cleckley, the propriety of informing the jury of the co-defendants guilty plea is contingent or conditioned upon providing a cautionary instruction, thus his reference to "the well-recognized rule in federal courts that the jury may be informed of a co-defendant's guilty plea, provided the proper cautionary instructions are given." Cleckley, *supra* at 135.

With this clear, and well-recognized, concern that a jury may misconstrue the appropriate purpose of testimony regarding a co-defendants plea, the limiting instruction is all the more important when the evidence comes from the prosecution. The cases, as discussed in Caudill, recognize that this occurs because the prosecution is permitted to presume the introduction of the evidence of the plea by the defense, and is not as a matter of trial strategy, required to await that introduction. However, this

point cannot be one presumed to be understood by a jury. The limiting instruction is absolutely necessary to ensure that the jury understands that although the evidence is coming from the State in its case in chief, it is not evidence for the purpose of proving the State's case in chief, and the defendant's guilt, but rather goes solely to the credibility of the witness. Without the limiting instruction, the jury is left with the logical understanding that evidence presented by the state is favorable to the proposition of the defendant's guilt, while those matters addressed through cross-examination are favorable to defendant. It is not sufficient to say simply because the defendant asserted a vigorous cross-examination as to the codefendant's plea that there has been no impact resulting from the lack of the cautionary instruction. It is just as likely that the jury would perceive that the cross-examiner was merely attempting to do the best he could with otherwise unfavorable evidence.

The trial court suggested that the applicability of the rule requiring a cautionary instruction was somehow affected by the number of defendants, or whether the plea in question was contemporaneous with the trial. (App. Vol. III, Page 192-93). However, neither of these points has been a recognized factor, or the basis of any of the numerous decisions recognizing the rule, and its necessity.

In its memorandum opinion denying the new trial motion, the trial court also pointed to State v. Cabalceta, 324 S.E.2d 383, 174 W.Va. 240 (1984), as indicating the lack of a Caudill instruction was not fatal to the jury's verdict. The trial court based its position on perceived similarities to the case at bar, primarily the evidence of a co-

defendant's plea agreement, and that there was no instruction given by the court as to the evidence of the plea agreements of co-defendants. (App. Vol. III, Page 193-194).

However, a fair reading of Cabalceta clearly indicates the support perceived by the trial court was unfounded. The testimony as to Jasmen Montgomery's plea agreement was not elicited on cross examination, as stated by the trial court. Rather, testimony about the plea was part of the State's direct examination of its own witness. (App. Vol. II, Page 178-79). More importantly, the thrust of the Court's decision in Cabalceta was the recognition that in practical terms there had, in fact, been instruction to the jury as to the issue, the lack of a formal Caudill instruction notwithstanding. As the court below noted, the trial court in Cabalceta had instructed the jury *sua sponte* during the cross examination of the witness in a fashion that substantially delivered the substance of the Caudill instruction. The appellate court also noted an additional instruction proffered by the defense and given the jury, which instructed caution in consideration of the testimony of a co-conspirator or accomplice. 324 S.E.2d at 387, 174 W.Va. at 244.

Additionally the trial court would have appeared to find that decision in Cabalceta stood for the proposition that failure to give a Caudill instruction was not error where there was sufficient evidence to sustain the conviction. (App. Vol. III, Page 193). Appellant submits the decision in Cabalceta cannot be read in any manner to support such conclusion. The clear basis of the Court's decision in Cabalceta was the circumstance of the admission of the testimony, and, more prominently, that the jury

had in fact been instructed, albeit piecemeal, with the substantive equivalent of a Caudill instruction.

This Court has very recently again recognized that such a limiting instruction is mandatory, and failure to do so requires a new trial. In State v. Barnett, 226 W.Va. 422, 701 S.E.2d 460 (2010), the trial court offered no limiting instruction in a case in which an accomplice testified pursuant to a plea bargain. The state in Barnett argued that any error relating to such a limiting instruction was waived because there had been no request from defense counsel for such an instruction, nor any objection to the failure to give the instruction. Alternatively the state contended that any error was harmless. While the conviction was reversed on other grounds, the decision noted that, "(w)e observe that our holding in Caudill would appear to require the trial court to give such an instruction". "Because of our resolution of this appeal . . . it is not necessary for us to now consider whether the trial court's failure to give such an instruction was plain error." Barnett at fn. 11. [Emphasis Added] This issue was again presented in State v. Scarbro, No. 11-0090 (Filed June 7, 2012). However, again the court reversed on other grounds finding it unnecessary to address the plain error issue.

In the case at bar, the state has also raised the plain error issue, arguing that given the lack of objection to the court's instruction, the issue of the lack of the Caudill instruction must be reviewed under the plain error standard. Appellant submits that in light of this Court's prior holdings as to the paramount importance of proper instruction, plain error is not necessarily the standard to be applied.

A. The Failure To Give A Caudill Instruction Is Reversible Error Without More.

This Court has consistently recognized that the jury must be clearly and properly advised of the law in order to render a true and lawful verdict. State v. Romine, 166 W.Va. 135, 137, 272 S.E.2d 680, 682 (1980); State v. McClure, 163 W.Va. 33, 37, 253 S.E.2d 555, 558 (1979). The duty as to such clear and proper instruction has been recognized to rest with the trial court. "Ultimately, the responsibility to ensure in criminal cases that the jury is properly instructed rests with the trial court." State v. Lambert, 173 W.Va. 60, 312 S.E.2d 31, 34 (1984); State v. Dozier, 163 W.Va. 192, 255 S.E.2d 552 (1979). All instructions are the court's instructions. State v. Riley, 151 W.Va. 364, 151 S.E.2d 308 (1966). In light of the consistent recognition as to the necessity of the instruction in question, and the clear declarations that its absence constitutes reversible error, any instructions to a jury without such limiting instruction, where merited, would be fatally incomplete.

B. The Failure To Give The Caudill Instruction Is Reversible Under Plain Error Analysis.

Appellant readily recognizes the principle of plain error analysis. "Where a party does not make a clear, specific objection at trial to the charge that he challenges is erroneous, he forfeits his appeal unless the issue is so fundamental and prejudicial as to constitute "plain error"." State v. Guthrie, 194 W.Va. 657, 671, n.13, 461 S.E.2d 163, 177, n. 13 (1995); State v. Miller, 194, W.Va. 3, 459 S.E.2d 114 (1995). In the event plain error is found to be the applicable, the standards for plain error analysis have

been identified as follows. "To trigger application of the "plain error" doctrine, there must be 1) an error; 2) that is plain; 3) that affects substantial rights; and 4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." State v. Poore, 226 W.Va. 727, 704 S.E.2d 727 (2010); Syl. Pt. 7. State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

In the instant case, the trial court's failure to provide a cautionary instruction to the jury, meets the plain error standard.

1. The Failure to Give the Limiting Instruction Constituted "Error" which was "Plain"

Once error is established, the examination is as to whether such error was "Plain."

Under plain error analysis, an error may be "plain" in two contexts. First, an error may be plain under existing law, which means that the plainness of the error is predicated upon legal principles that the litigants and the trial court knew or should have known at the time the prosecution. Second, an error may be plain because of a new legal principle that did not exist at the time of the prosecution, i.e., the error was unclear at the time of trial; however, it becomes plain on appeal because the applicable law has been clarified.

Syl. Pt. 6, State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998).

In this matter there should be little question that there was error and that such error was "plain". This Court has reiterated the principle set forth in Caudill, on a number of occasions, most recently in State v. Barnett, *supra* and State v. Scarbro, *supra*. While clearly not recognized by the litigants or the court, given these multiple

and clear pronouncements it is a principle that clearly should have been recognized and applied in the trial below.

2. Appellant's Substantial Rights Were Affected by the Lack of a Limiting Instruction.

In determining whether the assigned plain error affected the "substantial rights" of a defendant, the defendant need not establish that in a trial absent the error a reasonable jury would have acquitted. Rather, the defendant need only demonstrate the verdict in his or her case was actually affected by the assigned, but unobjected to, error. Syl. Pt. 3, State v. Marple, 197 W.Va. 47, 475 S.E.2d 47 (1996).

The testimony of Jasmen Montgomery was the linchpin of the State's case. The State provided testimony from Milton Thomas and India Simmons, two individuals inside the Flack home. However, neither Mr. Thomas, nor Ms. Simmons, witnessed the entry into the Flack residence. (App. Vol. II, Pages 60-62, 98) While they provided testimony as to a loud noise, which they presumed was the back door being kicked in, (App. Vol. II, Pages 60,90), such testimony was significantly refuted by the testimony of Amanda Shorter, an individual watching this scene from an adjacent house, who testified that she saw the individuals go into the house and did not observe the door being kicked in, or a forced entry. (App. Vol. II, Pages 32, 37, 42-43). This evidentiary point was of tremendous significance to the State because its entire case as to the murder charge was premised upon a forced entry in support of the burglary charge, the predicate felony in the state's felony murder theory.

Without the testimony of Jasmen Montgomery the State was left with the fair contest between the two witnesses who were unable to make personal observations of the points, and could testify only to what they perceived through hearing sounds remotely, versus an eyewitness with a clear view of the scene. However, with the testimony of Jasmen Montgomery the State has its own eyewitness and co-conspirator, to testify as to the events and intent, the uber witness if you will.

Likewise as to the issue of intent, the State's witnesses inside the Flack home could provide a limited amount of information. Milton Thomas saw none of the individuals who came in to the Flack home, except for the tussling at the top of the stairs at which time he had limited visibility. (App. Vol. II, Pages 51-53) India Simmons testified as to individuals entering the home wearing masks. However she did not testify as to observing any guns carried by the individual entering the house, or any threats made by them to her or anyone else. (App. Vol. II, Pages 90-100) Furthermore, her testimony as to the individuals in the home was subject to significant question in that she identified the masked individual who remained downstairs with her as the heaviest of the three individuals in the home. (App. Vol. II, Page 99) Other testimony, made clear that Jasmen Montgomery was the heaviest of the three young men who entered the home, (App. Vol. II, Pages 262-263), and the well-established facts clearly indicated his presence upstairs, where he fired the shot fatal to Matthew Flack. (App. Vol. II, Page 191).

In these respects the State's evidence without Jasmen Montgomery was disjointed, incomplete, and subject to significant challenge. Again however, Jasmen

Montgomery provided the State evidence as to the alleged intent, not only for the burglary in support of the State's felony murder theory, but also as to the companion charge of first-degree robbery. It is noteworthy that without the testimony of Jasmen Montgomery, the State had no specific evidence of intent as to the robbery charge as there was no property removed or taken away from the Flack home.

It is clear that Jasmen Montgomery's contribution to the state's case was significant and invaluable to the state's prosecution of the charges against Brandon Flack. As such, it should be clear that his testimony significantly affected the judge's verdict.

Harmless error inquiry in criminal cases is significantly more stringent than in civil cases.³ The hypothetical rational jury is irrelevant for appraising the prejudice of error in a criminal jury trial. Harmless error analysis in the appeal of a criminal case asks "not whether, in a trial that occurred without error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered... was surely unattributable to the error." State v. Marple, 197 W.Va. at 53, 475 S.E.2d at 53; citing Solomon v. Louisiana, 508 U. S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182, 189 (1993).

In State v. Marple, the court utilized a plain error standard to examine the prosecutor's eliciting testimony as to the defendant's post-miranda silence. In finding that the defendant had not satisfied the plain error standard, the court noted that the state called a total of 28 witnesses in the case, and that the witness offering the testimony in question was the first and only witness to comment on the defendant's

³ Inquiry as to the "substantial rights" analysis is the same as "harmless error" analysis, except the defendant bears the burden of proof. State v. Marple, 197 W.Va. at 53, 475 S.E.2d at 53.

post-miranda silence. The court also observed that the state "did not dwell on the issue beyond the one question" and did not address the issue during its closing argument. The court also noted multiple inculpatory statements made by the defendant, as well as multiple pieces of physical evidence consistent with defendant's guilt. 197 W.Va. at 53, 475 S.E.2d at 53.

For the reasons noted previously, the instant case is significantly distinguishable from Marple. While Jasmen Montgomery was the only state's witness to provide testimony raising the issue in question, he was the centerpiece of the state's case. In addition, unlike the prosecutor in Marple, who "did not dwell on the issue beyond the one question," the prosecutor in the instant matter made Jasmen Montgomery's plea and his admissions a significant and compelling component of his arguments to the jury.

I must say, Jasmen Montgomery, accepted his responsibility and his punishment, life, no guarantee of ever being paroled. He has stood up and taken the first step back in accepting his responsibility and doing what he can to rectify what he did.

Now, Mr. Montgomery, I hope he does get himself straight with his God, with the rest of us, and I hope that for Brandon, too.

But, ladies and gentleman, unless that first step is taken, it's never going to be a matter of reform. There's never going to be anything there.

In fact, Brandon's denial was on full display before you yesterday.

(App. Vol. II, Page 376-77)

Given that Mr. Montgomery's testimony has such an impact on the issues before the jury, the failure to provide instruction to appropriately limit such testimony necessarily contributes to the infirmity.

3. The Error Seriously Affects the Fairness and Integrity of the Judicial Proceedings

Final inquiry by the court is determination to the extent of the extent to which the error threatens the integrity of the judicial process and the fundamental fairness required of such processes and the public reputation of the judicial process.

This Court has noted:

“[o]nce a defendant has established the first three requirements of [the plain error doctrine], we have the authority to correct the error, but we are not required to do so unless a fundamental miscarriage of justice has occurred. Otherwise, we will not reverse unless, in our discretion, we find the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

State v. Marple, 197 W.Va. 47, 52; 475 S.E 2d 47, 52 (1996).

The jury heard on direct examination of Jasmen Montgomery’s testimony, his guilty plea to the same murder for which Appellant stood accused. Furthermore, Mr. Montgomery’s guilty plea was highlighted by the state in its arguments to the jury focusing on the defendant’s failure to accept his responsibility for his role in the alleged offense, as compared to its witness, Jasmen Montgomery, who has accepted his responsibility by entering a guilty plea. There should be no dispute that the failure of the court to give the limiting instruction constitutes error. As noted above, this Court has repeatedly recognized the necessity of such instruction and that the failure to give such instruction was error. The State’s juxtaposition of Brandon Flack and Jasmen Montgomery goes to the heart of the necessity of the limiting instruction in question.

Whether the jury considered this testimony as evidence of guilt or merely going to his credibility is ultimately unknowable since it was not instructed to make that distinction.

The Caudill instruction goes to the very heart of the fairness and credibility of the judicial process. By its nature, the instruction aims to guide the jury in its consideration of testimony and evidence of an inherently powerful witness, the co-defendant/accomplice.

The lack of adequate instruction as to such witness and the admission of guilt by that witness leaves the defendant in the proceeding defenseless against the assumptions and supposition of the inadequately instructed jury. What could possibly pose a greater threat to the integrity and reputation of the proceeding, and the fundamental fairness of these proceedings??

II. Appellant's Jury Was Not Drawn From a Fair Cross Section of the Community.

The right to a jury drawn from a fair cross-section of the community has been explicitly recognized as a Sixth Amendment guarantee. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed. 2d 690 (1975). Such a constitutional right has also been recognized by this Court in State v. Hobbs, 168 W.Va 3, 282 S.E.2d 258 (1981).

Appellant's trial was commenced on April 24, 2012. In anticipation of the need for a significant number of jurors, the court utilized five panels of jurors, constituting all jurors available for service during the portion of the court term in which Appellant was tried. This venire, consisting of 127 individuals, contained three African-American jurors. Of these three, only one appeared for jury selection in the case. That juror was

married to a Flack, the family of both the defendant and the victim. This juror was immediately excused, leaving the venire from which the jury was to be selected devoid of African-Americans.

At the hearing on the Motion For New Trial, the trial court took judicial notice that according to the 2010 census the percentage of African-Americans residing in the Mercer County population is 6.1%. (App. Vol. III, Pages 17, 198). The full five panel jury pool contained 1.57% percent African-American potential jurors. The one African-American juror who appeared for service on the first day of trial would comprise less than 1% of the 127 member total pool, and just under 1% of the 104 jurors who appeared for service on that date. (App. Vol. III, Pages 246-248). Of course, the percentage of African-American jurors available for selection at the actual trial was ultimately 0%.

At the hearing on the new trial motion, testimony was taken from Margaret Bryant, a deputy clerk in the Mercer County Circuit Clerk's Office. Ms. Bryant is the deputy clerk charged with managing the assembly of the potential jurors each term. (App. Vol. III, Page 22). Ms. Bryant testified as to the method by which the venire for petit juries in Mercer County is drawn. She testified she draws the pool of potential jurors utilizing an automated system implemented by the West Virginia Supreme Court of Appeals. (App. Vol. III, Page 23). According to her understanding, potential jurors are selected from the rolls of licensed drivers, information obtained through the west

Virginia Department of Motor Vehicles, and from the county voter registration rolls.⁴ (App. Vol. III, Page 24).

Ms. Bryant indicated that the standing procedure is to draw down a significant number of names, typically 800, to serve as potential jurors for one half of a given term of court. These individuals are issued a summons to appear for jury orientation and provided letters explaining their jury duty. (App. Vol. III, Page 25). Along with the summons, a questionnaire with return envelope is sent to the potential jurors. (App. Vol. III, Page 26) From the original number, a smaller percentage, will typically respond and submit their questionnaires. (App. Vol. III, Page 27). Ms. Bryant testified that if she has a pool of 140 qualified jurors from those who responded, she is pleased. (App. Vol. III, Page 28) From that point those jurors with excuses are reviewed and a number are excused for good cause. However, despite the command of the court to respond to the questionnaire and to appear, those individuals who choose to ignore the court's directive, and who do appear or respond by returning their questionnaires, are essentially ignored, as there is no follow-up or enforcement action taken upon the failure to honor the Clerk's summons. (App. Vol. III, Page 29).

It is generally recognized that to establish a prima facie case of unconstitutional jury selection methods under the Sixth Amendment's "fair cross section" requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive"

⁴ It does not appear possible to accurately determine the percentages of African-Americans contained in this pool of potential jurors, as there is no information as to race available to the clerk at the time the potential jurors names and other information provided is accessed by the clerk. Additionally, voter registration rolls do not distinguish as to the race of the individual voters, and likewise do not tabulate votes, or appear to have the ability to do so, by race. (Affidavit of Marie Hill) (App. Vol. III, Page 136).

group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. Hobbs, at Syl. Pt. 2; Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 604, 588 L.Ed. 2d 579 (1979).

A. African Americans Are a Distinctive Group in the Community.

In examining these requirements, it is clear that the group in question, "African-American jurors, is a "distinctive" group within the community.

A group to be "cognizable" for present purposes must have a definite composition. That is, there must be some factor which defines and limits the group. A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. Secondly, the group must have cohesion. There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experiences which is present in members of the group and which can be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that exclusion of the group will result in partiality or bias on the part of the juries hearing cases in which group members are involved. That is, the group must have a community of interest which cannot be adequately protected by the rest of the populace.

Hobbs, 282 S.E.2d at 267, quoting, United States v. Guzman, 337 F.Supp. 140, 143-144 (S.D.N.Y.), aff'd 468 F.2d. 1245 (2nd Cir. 1972), cert denied, 410 U.S. 937 (1973).

Applying these criteria, there can be no serious dispute that racial classifications provide a sufficient separateness to qualify as a "distinctive" group.

B. The Representation of African Americans in Mercer County Venires is Not Fair and Reasonable.

The second prong of the test for a "fair cross section" requires the defendant to show that the representation of the "distinctive group" in venires from which the jury is selected is not fair and reasonable in relation to the number of such persons in the community.

Underrepresentation has been examined in terms of "absolute disparity" where the percentage of the group in question within the jury pool is subtracted from the percentage in the local population. This figure indicates the breadth of the gap between the population itself and that portion that is actually in service as potential jurors.

Additionally, a "comparative disparity" test has been utilized to indicate the percentage by which the group in question is less likely to be on the jury service list when compared to the overall jury eligible population. This percentage is arrived at by dividing the absolute disparity figure by the percentage of the group in the population. See: Beghus v. Smith, 559 U.S. _____, 130 S.Ct. 1382, 176 L.Ed.2d 249 (2010)

For example, applying these processes to the panel from which the Appellant's jury was drawn would show that the three African Americans on the panel of 127 total jurors calculates to 2.36%, of the panel. Compared to the 6.1% African American population in the county, there would be an "absolute disparity" of 3.74%. The "comparative disparity" would be calculated to yield a result indicating that African Americans were 61.31% ($3.74\% / 6.1\%$), less likely to appear on the jury list for Appellant's trial. Of course, the ration of African-American jurors present and available

to serve as potential jurors was 0%. These figures clearly indicate a significant underrepresentation of African Americans, and clearly serve to satisfy the second prong of the "clear cross section" test.

Examination of recent historic jury information confirms these disparities are recurring and routine. (App. Vol. III, Pages 133-135).⁵ For the full February 2012 term there was an absolute disparity of 2.3%, and a comparative disparity of 37.73%. Conversely, information for the three terms of court in 2011 indicated no disparity, and in two or three terms of court there was a percentage of African Americans on the panel at, or in excess of, their representation in the community. Data for 2010 for all three terms of court indicated an absolute disparity of 1.13% and a comparative disparity of 18.52%. In only one term for 2010, did the percentage of African Americans in the venire meet the community representation figure.

In 2009, absolute disparity was 2.03%, and comparative disparity was 33.27%. In no term of court did African-American representation meet community levels. Data for 2008 shows an absolute disparity of 2.37% and a comparative disparity of 37.86%. African-American representation was at community levels in one term of court in 2008.

While these figures vary across the years examined, this information clearly displays that the underrepresentation of African-Americans in the Mercer County venire recurs consistently and is routinely significant. Based upon this information, it is submitted that Appellant has effectively demonstrated satisfaction of the second prong of the Hobbs/Duren test.

⁵ Actual "Summoned Juror Profiles" for years 2008-2012, were admitted to record in the trial court, together with the summary appearing at Pages 133-135 of Vol. III of the Appendix. In order to avoid an unduly voluminous Appendix, only the summary submitted to the trial court with the juror profiles is included herein.

C. The Underrepresentation of African Americans is the Result of a Systematic Exclusion in the Jury Selection Process in Mercer County.

The final prong the Appellant must meet to establish a prima facie case for a "fair cross section" violation is that the underrepresentation established in the previous prong was the result of a "systematic exclusion" in the jury selection process.

In Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 588 L.Ed.2d 579 (1979), the United States Supreme Court found that the defendant had established the underrepresentation of women in his venire was attributable to their systematic exclusion in the jury selection process. The court found the systematic exclusion was established by Missouri jury selection procedures which allowed women to claim exemption, by either claiming exemption in response to a jury selection questionnaire, in response to the notice to appear for jury service or, by simply not appearing for jury service. The court noted that the practice before the Missouri courts was that even those women who failed to return the summons were treated as having claimed exemption if they failed to appear for jury service on the appointed day. 439 U.S. at 362.

In the matter at hand, this "systematic" exclusion is established by the consistent practices of the clerk and court in failing to adhere to clear statutory directives which are designed and intended to insure a fair and adequate jury pool.

The stated policy of West Virginia Code §52-1-1- et seq., is to ensure a fair cross section of the population and to ensure broad participation from the citizenry. "It is the policy of this state that all persons selected for jury service be selected at random from

a fair cross-section of the population of the area served by the court, and that all citizens have the opportunity in accordance with this article to be considered for jury service and an obligation to serve as jurors when summoned for that purpose.” West Virginia Code § 52-1-1. As noted previously, these statutory provisions were enacted to ensure a “fair cross section” of the population and universal participation in jury service.

West Virginia Code § 52-1-5a(c) directs that “any prospective juror who fails to return a completed juror qualification form as instructed shall be directed by the clerk to appear forthwith before the clerk to fill out the juror qualification form.” W.Va. Code § 52-1-5a(c). [Emphasis Added] Likewise, under §52-1-7, the circuit clerk is commanded to notify each person drawn for jury service of their required service by issuing and serving a summons on the prospective juror. W.Va. Code § 52-1-7(b). Subsection (c) of the same statutory section indicates that, “a prospective juror who fails to appear as directed by the summons issued pursuant to subsection (b) of this section shall be ordered by the court to appear and show cause for failure to appear as directed. [Emphasis Added] W.Va. Code § 52-1-7(c).

The Duren court recognized that the petitioner's demonstration of the consistent underrepresentation in the venire supported a finding that the cause of the underrepresentation was systematic, that is, inherent in the particular jury-selection process utilized. The court also noted that significant in examining the method by which the systematic underrepresentation occurred was the ability of the female jurors to deselect themselves as jurors by failing to respond to the summons issued, thereby spurring a presumption they had claimed exemption. 439 U.S. at 366-67.

The evidence presented in this matter clearly displayed that the statutory commands are routinely ignored, and by merely declining to return the questionnaires sent to them, or failing to honor their summons, prospective jurors are able to unilaterally dismiss themselves from jury service. Such voluntary deselection is similar to that recognized in Duren. The failure to follow the mandates of the statute basically results in a volunteer jury. Such a fundamental failure is a "systemic" mechanism of the most basic, yet powerful variety.

III. The Venire From Which Appellant's Jury Was Selected Was Drawn Contrary to Statutory Procedures.

The forgoing arguments regarding a "fair cross section" notwithstanding, it is clear that the process by which Brandon Flack's jury pool was assembled did not adhere to the statutory requirements set forth in West Virginia Code § 52-1-1, et seq. Appellant submits that based upon the foregoing, he has sufficiently established that his jury was not drawn from a fair cross section of the community, and that by the failure to meet the statutory directives for the jury selection process which resulted in the systematic exclusion of African Americans from the jury pool in Mercer County.

To effectuate these policies, § 52-1-5a directs that the circuit clerk is to identify those potential jurors for the term and to provide notice to such jurors and gather information from them via a questionnaire. Any prospective juror who fails to return his questionnaire "shall" be directed by the clerk to appear forth with. West Virginia Code § 52-1-5a(c). [Emphasis Added]

Margaret Bryant, the deputy clerk charged with assembling the jury panels testified that per office procedure the potential jurors are identified utilizing the list compiled through the service. Those jurors are then mailed a notice of their selection and provided a questionnaire by which they would provide basic information about themselves, and their qualifications for service. Ms. Bryant testified that she constructs the jury panels for the term from those individuals who voluntarily respond to those mailings. (App. Vol. III, Pages 26-29) However, she testified that no additional action is taken with reference to those individuals who do not respond. (App. Vol. III, Page 29)

The procedure outlined by the deputy clerk clearly evidences the failure to follow the directives of the statute, which clearly commands that those who do not respond to the clerk's notice shall be brought forthwith before the court. West Virginia Code §52-1-7(c). The practical effect of the procedure utilized as a matter of course in gathering jury panels in Mercer County is that individuals are permitted to deselect themselves from jury service simply by nonresponse. This de facto deselection necessarily results in jury panels other than that contemplated by the statute.

It is certainly true that given the circumstances, the actual impact on any particular group characteristic resulting from the Mercer County selection procedure may be exceptionally difficult to specifically identify. However, it cannot be denied that there is an impact when a significant number of potential jurors may deselect themselves and not go into the pool of potential jurors. If the statutory procedures are intended to render a jury pool which represents a "fair cross-section" of the community, a failure to adhere to those procedures necessarily renders a pool which does not

necessarily represent a "fair cross section" of the community, or at the very least, one that is significantly less likely to do so.

Brandon Flack was entitled to a jury of his peers, drawn from a "fair cross-section" of the community. He was entitled to a jury pool gathered and constructed in compliance with the terms of the statutes implemented to effectuate these policies of jury selection. It is clear that he did not receive such a pool.

The trial court dismissed these arguments as to the failure to follow the statutory procedures by pointing out the cost and resources which would be required to meet those directives. (App. Vol. III, Page 48) While those points cannot be denied, they do not obviate the fact that the statute requires what it requires. A criminal defendant's rights, especially in a case where he faces imprisonment for life, cannot be forfeited for the sake of budgetary policy. "The right to a proper jury cannot be overcome on merely rational grounds advanced by those aspects of the jury-selection process, such as the exemption criteria, that result in the disproportionate exclusion of a distinctive group. Duren, 439 U.S. at 367-368; citing Taylor, 419 US at 534, 95 S.Ct., at 699, 700

IV. Testimony From Chief Medical Examiner, Dr. James Kaplan Violated Appellant's Right to Confrontation.

The state presented the testimony of Dr. James Kaplan, a forensic pathologist and the Chief Medical Examiner. The primary focus of Dr. Kaplan's testimony was to explain the autopsy findings, and to testify as to the cause of death.

While Dr. Kaplan signed off on the autopsy report, his testimony clearly indicated that his role in the autopsy was in a supervisory capacity, reviewing the report as to

form and for clerical errors. (App. Vol. II, Page 81-82). Although not put into evidence, the autopsy report produced in discovery clearly indicates the autopsy itself was performed by Dr. Elise Arbefeville, Deputy Chief Medical Examiner. (App. Vol. III, Page 236).

The testimony from Dr. Kaplan as to the substance of the autopsy report represents a clear violation of Appellant's right to confrontation provided under the Sixth Amendment of the United States Constitution, incorporated into the Fourteenth Amendment, and Section 14, of Article III of the West Virginia Constitution. See: Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); State v. Mechling, 219 W.Va. 366, 633 S.E.2d 311 (2006).

This Court has very recently recognized the direct application of Crawford and Mechling, to the specific situation presented by the case at hand. The decision in State v. Kennedy, No. 11-0223 (Decided November 21, 2012), recognized an autopsy report to be "testimonial" evidence for purposes of confrontation analysis.

[W]e find that the trial court's determination that the autopsy report was not testimonial to be error. However, we do not confine this conclusion to the facts of this case. W.Va. Code § 61-12-3(d) compels the conclusion that, for purposes of use in criminal prosecutions, autopsy reports are under all circumstances testimonial. Therefore, to the extent that that W.Va. Code § 61-12-13 compels the mandatory admission of an autopsy report or other testimonial document, in a criminal action, where the performing pathologist or analyst does not appear at trial and the State fails to establish that the pathologist or analyst is unavailable and that the accused has had a prior opportunity to cross-examine the witness, it is unconstitutional and unenforceable.

Kennedy, at Page 26.

The decision in Kennedy also addressed the situation presented in the instant case, wherein the medical examiner appearing as a witness testifies to matters appearing within the autopsy report generated by another examiner who actually performed the autopsy. The Court recognized that the "surrogate" testimony in such a situation, to the extent the surrogate served as a "transmitter" of information from the autopsy, such as cause of death, is violative of the Confrontation Clause. Kennedy, at Page 35. See also: Bullcoming v. New Mexico, 564 U.S. _____, 131 S.Ct. 2705 (2011). With reference to the testimony as to cause of death, the Court made clear that the testifying witness' concurrence with the cause of death opinions in the autopsy report, which the witness read and reiterated, does not transform those into the opinion of the testifying medical examiner. Kennedy, at Page 35. However, "original observations and opinions" developed by the witness medical examiner are appropriate, as the witness is present and subject to cross examination. Kennedy, at Page 35-36.

It is clear that to the extent that such qualified physician is a "mere conduit" for the opinions of the authoring pathologist, such testimony violates the Confrontation Clause as outlined in Bullcoming. Moreover, to the extent that such "opinion about physical and medical cause of injury or death" as described in Jackson utilizes an autopsy report as its basis, courts should conduct a careful analysis under Doe before permitting disclosure of the content of the autopsy report in the absence of its testifying author. [citations omitted]

Kennedy, at Page 38.

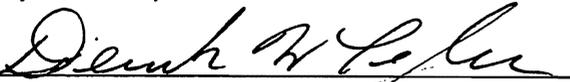
Applying these principles to the case at bar, it is clear that the testimony of Dr. Kaplan violated Appellant's confrontation rights at several points. Dr. Kaplan testified as to the cause of death of Matthew Flack. That testimony was clearly not the result of any independent examination or observation of Dr. Kaplan, but rather was drawn

directly from the report itself with Dr. Kaplan as its "surrogate" conduit. This is precisely the situation identified in Kennedy as violative of Appellant's constitutional right to confrontation.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests, for the reasons stated herein that his appeal be granted and requests the verdict previously entered be set aside and that he be granted a new trial.

BRANDON FLACK,
By Counsel,


Derrick W. Lefler


Ward Morgan

CERTIFICATE OF SERVICE

I, Derrick W. Lefler, counsel for Appellant, do hereby certify that I have served a true copy of the foregoing Brief of Appellant to the Supreme Court of Appeals of Southern West Virginia, via Federal Express Mail Services, addressed to said counsel as follows, on this the 8th day of February, 2013:

Thomas R. Rodd
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DERRICK W. LEFLER