

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0829

STATE OF WEST VIRGINIA,

*Plaintiff Below,  
Respondent,*

v.

BRANDON FLACK,

*Defendant Below,  
Petitioner.*

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RESPONSE BRIEF

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PATRICK MORRISEY  
ATTORNEY GENERAL

THOMAS W. RODD  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 3143  
E-mail: [twr@wvago.gov](mailto:twr@wvago.gov)

*Counsel for Respondent*

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RESPONSE BRIEF

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I.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The short factual statement in the following paragraph is taken from the evidence admitted at the Petitioner Brandon Flack's criminal trial, viewed in the light most favorable to the jury's verdict.<sup>1</sup> Supporting excerpts from and citations to specific trial testimony are set out in a footnote at the end of the paragraph.

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<sup>1</sup>An appellate court ordinarily views the facts of a case on review as being the facts and reasonable inferences from the admissible evidence that are consistent with the jury's verdict. *See, e.g., State v. Bull*, 204 W. Va. 255, 258 n.1, 512 S.E. 2d 177, 180 n.1 (1998) ("in light of the jury's guilty verdict, we view factual conflicts in the evidence as having been resolved by the jury in a fashion consistent with the jury's verdict."). *See also State v. Atkins*, 163 W. Va. 502, 515, 261 S.E.2d 55, 62 (1980) ("the jury's verdict of guilty is taken to have resolved factual conflicts in favor of the State . . ."); *State v. Kirk N.*, 214 W. Va. 730, 735, 591 S.E.2d 288, 293 (2003) ("We set forth in a footnote a summary statement of facts taken from the evidence at trial, assuming that the jury believed those pieces of evidence consistent with their verdict.").

After midnight on the night of January 29, 2011, the Petitioner/Appellant, Brandon Flack (“Brandon Flack”) and two other men, Jasman Montgomery and Jacob Thomas, knocked on the door of Brandon Flack’s uncle David Flack’s house in Bluefield, West Virginia. All three men had their faces masked; they were armed with two guns. In the house, Matthew Flack, age 17, the son of Brandon Flack’s uncle, was playing video games with two friends -- Mel Thomas, also age 17, and India Simmons, also age 17. Matthew Flack heard the knocking and went to the door where he could look out and see the masked men. Matthew did not let the men in; instead, he went upstairs to get a gun, followed by Mel Thomas. The masked men kicked in the door and followed Matthew and Mel upstairs, where there was an altercation. Jasman Montgomery shot and killed Matthew Flack; Brandon Flack was wounded.<sup>2</sup>

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<sup>2</sup>Q. And for all you know, he [Matthew] went back and opened [the front door] it. You don’t know that he didn’t.

A. He didn’t open it.

Q. How do you know that? You don’t know that he opened it. I mean, there was testimony that it was opened.

A. [Matthew] walked in the kitchen and he looked out, and he said, “There’s guys out there with masks on.” He came back in, and we was just sitting and then he went upstairs and --

(Testimony of Mel Thomas, App. vol. II at 62-63.)

A. [Matthew] comes back, and he told us that there was guys out there with masks on, and he didn’t know what they were doing. He then -- that’s when he went upstairs.

While he was upstairs, that’s when the door had got kicked in.

(*Id.* at 64.)

Q. You’re pretty sure?

A. I’m positive it was the door getting kicked in. [Matthew] didn’t open the door. I heard the door getting kicked in, and when the door got kicked in, that’s when they came in.

(continued...)

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

Q. So he went to the top of the stairs, and you followed him?

A. I didn't follow him up the steps. He went up the steps. They kicked the door in, and I ran up the steps.

Q. And where was Matthew at the time?

A. When I had ran up the steps, he was walking past me. When he walked past me, he was cocking the gun.

(*Id.* at 66.)

A. Three people came into the house, and two ran upstairs, and one stayed downstairs.

Q. Was there an indication that -- had there been a knock on the door?

A. Yes.

Q. Did -- what happened when there was a knock on the door?

A. Matt went to the back to see who it was, and then -- he went to go see who it was.

Q. Okay. What happened then?

A. Then he rushed back through. He mumbled something, but I couldn't hear what he said. Then he ran upstairs, and then there was a loud bang at the back, and three people rushed in and two went upstairs and one stayed downstairs.

Q. What were these people wearing?

A. I seen two black masks and a red mask. And the heavy set one, I remember he had a jacket, and it had a bunch of colorful, like, logos on it, and it had a bunch of colorful, like, logos on it, and the other two had on like hoodies or something.

(Testimony of India Simmons, *Id.* at 92-93.)

Q. Where was Mel, by the time they got into the living room?

A. Once the door burst open, he ran straight upstairs.

Q. So was he gone by the time they got there?

A. Yeah. By the time they entered the house, he was already up the steps.

(*Id.* at 93.)

Jasman Montgomery, one of the intruders, corroborated the testimony of Mel Thomas and India Simmons:

Q. What did you do when you got to the house?

A. I just remember somebody knocking on it.

(continued...)

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

Q. And what happened then?

A. Matthew came.

Q. Did he open the door?

A. He just looked out.

Q. Did he leave the door?

A. Yeah, then he left.

Q. And what happened then?

A. We just stood there.

Q. Did there come a time when you went inside the house?

A. Yes.

Q. How did you get inside the house?

A. When I turned around, I just know it was kicked in.

Q. Did you hear the door being kicked in?

A. Yeah.

Q. Do you know who kicked it in?

A. Jacob or Brandon.

Q. What happened then?

A. Went in, there was the shot -- there was a shot fired. Brandon yelled "I'm hit." Then I'm the one that run upstairs and shot [Matthew Flack] --

Q. Okay. Did you all have guns when you came in through the door?

A. I'm the only one that had one, me and Jacob.

Q. You and Jacob had guns?

(Testimony of Jasman Montgomery, *Id.* at 186-87.)

Although the masks, guns, and the kicking in the door were ample evidence that Brandon Flack and his associates were not paying a social call, Jasman Montgomery's testimony corroborated the intruders' criminal motive:

Q. What was the new plan?

A. To go to David's.

Q. Do you know David's last name?

A. Flack.

Q. And from there what was the plan?

A. To go to rob.

(*Id.* at 184.)

Q. Of the people that went over the David Flack's house on January 29th, right after midnight, which of them knew about the plan to steal money?

(continued...)

At his trial, Brandon Flack took the stand and disputed the evidence that established the foregoing-described facts.<sup>3</sup>

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

A. All of us.

Q. Were you invited into the house?

A. No.

(*Id.* at 190.)

Q. Not much of a plan at all, was it, Mr. Montgomery?

A. Not really.

Q. That's because there was no plan. Isn't that right?

A. What you mean, there wasn't no plan?

(*Id.* at 200.)

<sup>3</sup>Brandon Flack testified at his trial, *inter alia*, as follows:

A . . . I knocked on the door, and Matthew came to the door and said "Who is it?" And I said "It's Brandon."

And by that time Jacob and Jasman were coming up the steps. And he said -- he opened up the door and said something, I couldn't really hear him, and walked away toward the living room. I thought he might have said "Come in," so I just went on in.

Q. The door was open?

A. Yes, sir.

Q. All righty. So what happened from there?

A. From there he started to go up the steps, and I was just following him to see what he was up to. He wasn't running or anything. I was walking and he was walking.

And when he had got to the steps -- when I got to the steps I was walking up them and he was at the landing coming back down by this time.

(continued...)

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<sup>3</sup>(...continued)

Q. And what did you notice when you encountered him on the landing?

A. That he had a gun in his hand.

Q. Brandon, did you kick that door in?

A. No, sir.

Q. Okay. It was opened for you?

A. Yes, sir.

Q. So you encountered Matthew on the stairs with a gun in his hands.

A. Yes, sir.

Q. What was going on?

A. I don't know, sir. What do you mean, what was going on?

Q. Well, what happened? Why did he have that gun?

A. He had said something about Bruce. I don't --

Q. And who's Bruce?

A. Bruce, that's my uncle.

Q. Bruce --

A. Flack.

Q. All right. What did he say about Bruce?

A. I couldn't really hear him. He said something.

Q. Why were you even concerned about Bruce Flack?

A. Because, ah, Bruce had robbed David at his house.

Q. Bruce Flack had robbed that home before?

A. Yes, sir.

(Testimony of Brandon Flack, *Id.* at 297-99.)

Q. How about India Simmons? Did she know you?

A. Yes, sir.

Q. And you passed right through the living room on a relatively slow pace, walking up after him, didn't you?

A. Yes, sir.

Q. But she testified -- you heard her testify that she didn't know who that was. Is she lying about that?

A. I know that I walked up the steps, sir.

(*Id.* at 303-04.)

Q. Now, [Matthew] wouldn't have shot you [if he recognized you], would he, because he would have known you as friend and cousin.

A. Correct.

Q. Unless of course you had a mask on that would hide your identity. Is that  
(continued...)

On April 26, 2012, Brandon Flack was convicted by a jury of First Degree Felony Murder, Nighttime Burglary, First Degree Robbery, and Conspiracy to Commit First Degree Murder. (App. vol. II at 420-21.)

### **Jasman Montgomery's Testimony Regarding His Guilty Plea**

In his opening statement at Brandon Flack's trial, the prosecutor explained to the jury the nature of a plea agreement that Jasman Montgomery, who testified at Brandon Flack's trial, had made with the prosecution:

Jasman Montgomery, who you have heard before has pled guilty. He pled guilty to first-degree murder in the case, and part of his plea deal, if you will, for us dropping the robbery, conspiracy, and burglary was truthful testimony, that he come forth and tell the truth about his involvement and the involvement of others in the case, and you will hear his testimony.

He's been brought down from Mt. Olive where he is currently serving a life sentence with an eligibility for parole in 15 years.

(*Id.* at 14.)

The prosecutor presented the following introductory testimony from Jasman Montgomery regarding Montgomery's plea agreement (after which testimony Montgomery testified about breaking into the David Flack home and about killing Matthew Flack, *see* note 2 *supra.*):

BY MR. ASH:

Q. Sir, would you please state your name?

A. Jasman Montgomery.

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<sup>3</sup>(...continued)  
right?

A. I suppose so.

(*Id.* at 315.)

Q. You're in the orange outfit from the Division of corrections. Is that correct?

A. Yes, sir.

Q. Where are you being incarcerated now?

A. Yes, sir.

Q. Where at?

A. Mt. Olive.

Q. And for what charge?

A. Murder.

Q. And that would have been of Matthew Flack?

A. Yes, sir.

Q. As a part of the plea agreement in the matter whereby you pled guilty to first-degree murder, did you agree to come forward and give truthful testimony, if necessary?

A. Yes, sir.

*(Id. at 178-79.)*

There was no objection to this foregoing-quoted testimony, and specifically there was no request for any sort of cautionary or limiting instruction regarding Montgomery's testimony that he had pled guilty. Brandon Flack's attorney subsequently vigorously cross-examined Jasman Montgomery about Montgomery's plea agreement, suggesting that the plea agreement showed that Jasman Montgomery had a motive to falsify. *(Id. at 196, 201-02.)*

At the end of the trial, the circuit court conducted a lengthy colloquy with Flack's trial counsel and the prosecution regarding instructions, and ended by giving both sides a chance to raise any further concerns or suggestions. *(Id. at 338, 417.)* At no time did Brandon Flack's counsel

propose any cautionary or limiting instruction regarding Jasman Montgomery's testimony that he had pled guilty.

### **Testimony By Medical Examiner**

There was relatively brief testimony at Brandon Flack's trial by a medical examiner-- testimony that was entirely non-controversial and unchallenged by the defense--to the effect that a gunshot wound (as opposed to a coincidental heart attack, for example)--had been the cause of Matthew Flack's death:

The cause of death is simply the perturbation -- the injury, the natural disease, the abnormality which brings a person to their death. The physiologic abnormality that brings a person to their death, so it could be heart disease, it could be injury, it could be an intoxication.

*(Id. at 79-80.)*

Yes. There was a gunshot wound to Matthew's face which -- and I'm going to point to the left upper part of my mouth -- which entered approximately here, passed through the lower portion of Mr. Flack's head, and exited just underneath the chin.

There was a second gunshot wound entrance that lay on the inside, left part of the upper chest. That bullet then passed partially through the upper torso traversing a very large blood vessel in the chest, which resulted in Mr. Flack's death.

A bullet was recovered at the end of that path and was retained by my office.

*(Id. at 83-84.)* As noted, there was no objection to this testimony by the medical examiner.

### **Motion for A New Trial**

After Brandon Flack was convicted, he made a motion for a new trial in which he claimed that the circuit court had committed reversible error by not giving a cautionary/curative instruction regarding Jasman Montgomery's testimony that he had pled guilty. (App. vol. III at 188-89.) Flack also claimed for the first time that there had been "systematic exclusion" of African Americans

from the jury pool from which Flack's jury was chosen, (*id.*) in violation of the *United States Constitution's* Sixth Amendment's "fair cross-section" requirements. *See Taylor v. Louisiana*, 419 U.S. 522, 95 S.C. 692 (1975). This claim had not been mentioned by Flack either before or during his trial.

After a hearing, the circuit court ruled on Flack's new trial motion from the bench (*id.* at 9-16, 46-49) and in a subsequent written order (*id.* at 191-200). The circuit court's oral and written discussion of these issues, the Respondent submits, are thoughtful and well-set forth -- and, in their entirety, are worthy of this Court's direct attention in the instant case.

In sum, the circuit court concluded that the alleged instructional error complained of by Flack could and should have been raised during Flack's trial; and thus was at best subject to a "plain error" standard of review. (*Id.*) Applying that standard, the circuit court concluded that any assumed error did not undermine the basic fairness of Flack's trial and the jury's verdict. (*Id.*) As to Flack's "systematic exclusion" claim, the court concluded that Flack had not shown that such exclusion had occurred. (*Id.*)

## II.

### STATEMENT REGARDING ORAL ARGUMENT

The Respondent does not believe this case requires oral argument.

## III.

### SUMMARY OF ARGUMENT

A jury found that the Petitioner participated in a "home-invasion" robbery in which a 17 year old boy was shot and killed.

The Petitioner's four assignments of trial error are without merit. In each assignment, the Petitioner bases his argument on an alleged trial error that the Petitioner never brought to the attention of the trial court--until after he was convicted. The Petitioner had a fair trial, and his convictions for felony murder, burglary, robbery, and conspiracy should be upheld.

#### IV.

#### ARGUMENT

##### A. **Flack's Assignment of Error Number One--Regarding a Limiting Instruction for Testimony Regarding a Guilty Plea**

After Flack was convicted, his counsel advised the court (in the new trial motion hearing, *see* App. vol. III, hearing page 10) that while preparing the motion counsel had "stumbled onto" Syllabus Point 3 of *State v. Caudill*, 170 W. Va. 74, 289 S.E.2d 749 (1982), which states:

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 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-accomplice's credibility. The failure by a trial judge to give a jury instruction so limiting such testimony is, however, reversible error.

*Caudill* contains a lengthy and nuanced discussion of the evolution of the rule in West Virginia that testimony regarding an accomplice's guilty plea is admissible when "the testimony regarding the plea is but a small part of an accomplice's testimony, which testimony is general and extensive in nature." *Id.* at 81, 289 S.E.2d at 755. That, of course, is the situation with the testimony of Jasman Montgomery.

Syllabus Point 3 of *State v. Caudill* has been discussed in several cases since 1982.

Recently, in *State v. Scarbro*, 229 W. Va. 164, 727 S.E.2d 840 (2012), the defendant argued that his conviction should be reversed in part because the trial court did not give a “*Caudill*-type” limiting or cautionary “accomplice” instruction, regarding the testimony of a witness who had pled guilty to two charges arising from the same events that led to the charges against the defendant. 229 W. Va. at \_\_\_\_, 727 S.E.2d at 847. The Defendant in *Scarbro* had not proffered any such instruction; and the State argued that the court’s failure to give a cautionary limiting instruction *sua sponte* was not “plain error” that could be the basis of reversing the Defendant’s conviction. (*Id.*) This Court reversed the conviction in *Scarbro* on another basis, and declined to reach the question of whether the court’s not *sua sponte* giving a *Caudill* instruction was “plain error” that justified reversing the defendant’s conviction.

In another recent case, *State ex rel. Kitchen v. Painter*, 226 W. Va. 278, 700 S.E.2d 489 (2010), the evidence against the defendant included a witness’ guilty plea to the same crime with which the defendant was charged. This Court’s opinion in *Kitchen* did not suggest that the circuit court’s failure to *sua sponte* give a *Caudill*-type limiting/cautionary instruction was reversible error. 226 W. Va. at 293 n.16, 700 S.E.2d at 504 n.16 (2010).

In another recent case, *State v. Barnett*, 226 W. Va. 422, 701 S.E.2d 480 (2010), the defendant was convicted of second degree murder, in part based on the testimony of a witness who the evidence showed had pled guilty to murdering the victim with the defendant. *Id.* at 426, 702 S.E.2d at 464. The defendant did not offer any limiting or cautionary instruction regarding the witness’ testimony, and the trial judge did not *sua sponte* give such an instruction. (*Id.*) This Court in *Barnett* noted the issue and did not find reversible error in the trial court’s failure to give a limiting/cautionary instruction. *Id.*, 428 n.10, 701 S.E.2d at 465 n.10.

Additionally, in *State ex rel. Franklin v. McBride*, 226 W. Va. 375, 701 S.E.2d 97 (2009), this Court directly addressed whether a trial court has a duty to *sua sponte* give a limiting/cautionary instruction regarding the testimony of an accomplice. *Id.* at 381, 701 S.E.2d at 103. In *Franklin* this Court stated that West Virginia law “does not mandate that a trial judge *sua sponte* give a cautionary instruction on a accomplice testimony . . . a defendant must request such an instruction.” *Id.* at n.14, 701 S.E.2d at 103 n.14. *See also State v. Cabalceta*, 174 W. Va. 240, 244, 324 S.E.2d 383, 387 (1984) (*per curiam*) (trial court’s failure to *sua sponte* give a *Caudill*-type limiting/cautionary instruction regarding evidence of a guilty plea by a co-defendant was not error). *See also State v. Collins*, 186 W. Va. 1, 409 S.E.2d 181 (1990) (trial court’s failure to *sua sponte* instruct the jury about impeachment evidence was subject to plain error analysis.)

Thus, this Court has had several recent opportunities to find “plain error” that warrants the reversal of a defendant’s conviction because of a trial courts’ failure to *sua sponte* give a *Caudill*-type limiting/cautionary instruction -- and this Court has not done so.<sup>4</sup> This precedent supports the

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<sup>4</sup> 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.

Under the “plain error” doctrine, “waiver” of error must be distinguished from “forfeiture” of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right—the failure to make timely assertion of the right—does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is “plain.” To be “plain,” the error must be “clear” or “obvious.”

Assuming that an error is “plain,” the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the

(continued...)

proposition that a trial judge's failure to *sua sponte* give a *Caudill*-type limiting or cautionary instruction regarding evidence about an accomplice's guilty plea is not, in itself, plain error that requires reversal of a defendant's conviction.

In taking this approach, and in recognizing that where a defendant has not requested a limiting instruction regarding such guilty plea evidence only an exceptional and egregious instance of unfair prejudice will lead to a finding of plain error, West Virginia is in line with the large majority of jurisdictions and cases across the country, both state and federal.

For example, in *State v. Adams*, 943 A.2d 851 (N.J. 2008) the Court stated:

In the present case, the trial court should have instructed the jury to carefully scrutinize co-defendant Harrison's testimony, and not to consider his guilty plea as substantive evidence of defendants' guilt but only in assessing Harrison's credibility. Defendants, however, neither requested those instructions nor did they object to the instructions that were given. The question then is whether in the context of the trial, the error was clearly capable of bringing about an unjust result.

We find no plain error in the court's failure to give a cautionary instruction on the allowable uses of Harrison's guilty plea and his testimony. *See Stefanelli, supra*, 78 J.J. at 436, 396 A.2d 1105. At trial, defense counsel thoroughly cross-examined Harrison to challenge his credibility and Harrison's lack of credibility was a major theme in closing arguments for the defense, which asserted that Harrison was a liar. The detailed testimony of Harrison independently established his guilt of the crime and, therefore his guilty plea added little weight to that testimony. Further the trial court gave the standard charge on credibility. Under those circumstances, we are satisfied that "the error did not have the clear capacity to produce an unjust result and that it had a minimal effect on the outcome of trial." *Id.* at 437, 396 A.2d 1105.

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<sup>4</sup>(...continued)

outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. Pts. 7, 8 and 9, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

*Id.* at 864-65. *See also United States v. Smith*, 459 F.2d 12 (4th Cir. 1972) (where Defendant did not request cautionary accomplice instruction, trial judge “was not required to give an accomplice instruction *sua sponte*”). *See generally*, “Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice’s testimony against defendant in federal criminal trial,” 17 A.L.R. FED. 249, § 2[b] (1973.) (“In the absence of the defendant’s having expressly requested the trial judge to give the jury a cautionary instruction, the federal appellate courts have been especially reluctant to reverse a conviction on the ground of the omission of such an instruction.” *See id.* at § 10[a] (“It has been held in numerous cases that where the defendant had not specifically requested the federal trial judge to give the jury a cautionary instruction as to accomplice testimony, (1) the trial judge was not required to give such an instruction on his own motion, or (2) the omission of such a cautionary instruction was not prejudicial, or was ‘not reversible error,’ or was ‘not plain error.’”).<sup>5</sup>

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<sup>5</sup>This footnote quotes the short case descriptions in the above-cited 17 A.L.R. FED. 249's § 10[a] cumulative supplement, covering more recent cases addressing claims of error from a court’s failure to give an unrequested accomplice testimony instruction:

Where trial record did not disclose that defense lawyers brought to trial judge’s direct attention that they wanted him to include accomplice witness charge in his instructions to jury, and where defendants did not except to charge, court found, under circumstances, that failure to deliver accomplice witness charge *sua sponte* was not “plain error.” *U.S. v La Sorsa* (CA2 NY) 480 F2d 522, *cert den* 414 US 855, 38 L. Ed. 2d 105, 94 S Ct 157.

Where defendant failed to request instruction on accomplice testimony, court would examine contention that failure to so instruct was error under plain error standard; evidence in case did not warrant reversal. *United States v Nabrit* (CA5 Ga) 554 F2d 247.

Unless manifest prejudice is shown, failure to timely request cautionary accomplice instruction precludes finding of error on appeal. *United States v Moore*

(continued...)

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<sup>5</sup>(...continued)

(CA5 Fla) 505 F2d 620, *cert den* 421 US 918, 43 L. Ed. 2d 785, 95 S Ct 1581.

There was no plain error in trial court's omission of accomplice instruction where accomplices' testimony was amply corroborated, and counsel did not tender instruction nor object to instructions at time of trial. *United States v Hudson* (CA5 Fla) 496 F2d 698.

Trial court's failure to give accomplice instruction on its own motion does not rise to level of plain error. *United States v Cooper* (CA8 Mo) 596 F2d 327.

*See United States v Bosch* (1990, CA9 Cal) 914 F2d 1239, § 24.

Where an accomplice credibility instruction is not requested, it is not plain error not to give one sua sponte. *United States v Moore* (1983, CA9 Cal) 700 F2d 535.

It was not plain error for trial court not to give cautionary instruction sua sponte, where accomplice's testimony was corroborated by other evidence. *United States v Martin* (CA9 Ariz) 489 F2d 674, *cert den* 417 US 948, 41 L. Ed. 2d 668, 94 S Ct 3073.

Where no cautionary instruction was requested by defense counsel and no exceptions taken to instructions as given, court found from record and supplemental transcript that need for cautionary instruction did not exist and that it was not plain error for trial judge to fail to give, sua sponte, cautionary instruction then suggested. *U. S. v Ketola* (CA9 Cal) 478 F2d 64, *cert den* 414 US 847, 38 L. Ed. 2d 95, 94 S Ct 133.

In prosecution for conspiracy to submit false loan application to bank and for aiding and abetting submission of false loan application in violation of federal statute, trial court's failure to give cautionary instruction concerning substantive use of codefendants' guilty pleas and testimony did not constitute reversible error where defendant neither requested instruction nor objected to its absence; moreover, in light of overwhelming evidence of guilt present in record, trial court's failure to give cautionary instruction was not such plain error as to require reversal. *United States v Davis* (1985, CA10 Okla) 766 F2d 1452, 18 Fed Rules Evid Serv 1448, *cert den* (US) 88 L Ed 2d 240, 106 S Ct 239.

Failure to give cautionary instruction as to accomplice's testimony did not constitute plain error, where accomplice's testimony was corroborated by other

(continued...)

The brief evidence showing that Jasman Montgomery had entered into a plea agreement to a murder charge was not used by the prosecution as any sort of cornerstone of its proof that Brandon

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<sup>5</sup>(...continued)

evidence. *U. S. v. Leonard*, 494 F.2d 955 (D.C. Cir. 1974), *appeal after remand*, 523 F.2d 1177 (D.C. Cir. 1975) (holding conviction reversible on other grounds).

Defendant was precluded from raising on appeal claim that trial court erred in failing to give a cautionary instruction as to accomplice's testimony, where defendant made no request for a special cautionary instruction and defendant did not make contemporaneous objection to lack of instruction at trial. LSA-C.Cr.P. art. 841. *State v. Rabun*, 880 So. 2d 184 (La. Ct. App. 2d Cir. 2004).

Defendant's failure to request cautionary accomplice instruction or to object to trial court's failure to give one sua sponte barred defendant from seeking relief on that basis on appeal. M.C.L.A. § 768.29; MCR 2.516(C). *People v. Gonzalez*, 664 N.W.2d 159 (Mich. 2003).

Murder defendant's failure to request accomplice witness instruction at trial rendered challenge to lack of such instruction unpreserved for appellate review. *People v. Weeks*, 789 N.Y.S.2d 373 (App. Div. 4th Dep't 2005).

Failure to give cautionary instruction on accomplice testimony, at guilt phase of capital murder trial, was not plain error; defense was permitted wide latitude in cross-examining accomplice, his plea agreement was presented to jury, trial court's general instructions informed jury how to weigh credibility of witnesses and included much of the substance of statutory instruction on accomplices, and overwhelming evidence established defendant's guilt. R.C. § 2923.03(D). *State v. Yarbrough*, 104 Ohio St. 3d 1, 2004-Ohio-6087, 817 N.E.2d 845 (2004).

Where evidence clearly shows a witness is an accomplice as a matter of law, a trial court must so instruct jury, but if defendant fails to object to the omission of the instruction, he must prove egregious harm to prevail on appeal. *Hall v. State*, 161 S.W.3d 142 (Tex. App. Texarkana 2005), *reh'g overruled*, (Mar. 8, 2005) and *petition for discretionary review filed*, (May 18, 2005).

Defense counsel did not offer any jury instruction on accomplices or co-proposed instructions, and thus Supreme Court reviewed alleged instruct error standard. *Adams v. State*, 2003 WY 152, 79 P.3d 526 (Wyo. 2003).

Flack was part of a planned burglary/robbery of his uncle's house, in which Matthew Flack was killed. Rather, Brandon Flack, by his own actions, provided that proof, when he burst into the house with two other masked, armed men. India Simmons and Mel Thomas also provided that proof. Jasman Montgomery's admission that he had pled guilty to first degree murder, when he *personally* shot and killed Matthew Flack, did not even have applicability to the felony murder charge against Brandon Flack.

Applying the foregoing-stated standards, and in accord with the overwhelming legal authority cited herein, the circuit judge was quite correct when he concluded that any error--an error for which Flack himself must be entirely responsible--in not having *sua sponte* given a *Caudill*-type instruction when Montgomery testified that he pled guilty--did not rise to the level of plain error requiring the reversal of Brandon Flack's convictions.

**B. Flack's Assignments of Error Numbers Two and Three Regarding Jury Selection.**

Brandon Flack is African American (and so was Matthew Flack, the victim.)<sup>6</sup> There

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<sup>6</sup>At the hearing on Brandon Flack's new trial motion (also Brandon Flack's sentencing hearing), Matthew Flack's father David Flack testified about how he as an African American man felt about Brandon Flack's crime, and about Brandon Flack's claim of racial discrimination in the jury selection process:

First, I just want to say something about role models. Matthew was a role model to his sisters, his little brother, his cousin.

You chose to hang out with your uncles, who caused this -- you know it to be the truth. This family is not broke up because of what you done. We talk on all the time, and they still love you, but you know good and well that you are responsible for what happened here.

Trina was on her way here the next day to get you, to take you to Durham, to get a job, get you enrolled in college. You have to accept the truth.

(continued...)

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<sup>6</sup>(...continued)

Even the uncle you mentioned in this trial is not a robber. He's a thief, and he steals from everybody.

What you done was broke in that house and your actions caused someone to be killed. You have to accept responsibility for that. You're sitting up here now -- look at these people out here now. It's a whole rainbow of colors. You want your lawyers to come up with any kind of thing instead of telling the truth.

Look at your family. It's a rainbow. I've even known you to date other races.

Now all of a sudden you get convicted by a jury of your peers, peers, that's because you're an adult, you have to understand you are convicted of killing another black man. What do you think a black jury is going to think about that?

You need some help. Just tell the truth. You're going to have to sit in jail for that long time to think about this. You need to get some addresses and do some apologizing.

You had days, and you know it, to change your mind. Days. This didn't happen one night. You were over my house on Thursday night. You came over there and asked me to borrow \$5.00. I gave you 20. I told you we was going out Friday night around midnight, didn't I? I told you we were going out Friday around midnight. I wasn't out of the house 45 minutes before you all were running in there.

And what else? I told you if you ever need anything from me, to just ask me. I know you've been through some hurting in your life, and I was there. I asked you -- the first thing you ever asked me to get you was what? A weapon. What did I tell you? I said I'd have never seen your father with a gun, and I don't think you need one.

You said "I just want one for protection."

What did I say? "Whoever you're hanging around with that you need a weapon for protection, all you need to do is stop hanging around them right now."

That's the best advice you should have took, because you got yourself into this. Nobody else did. You would have been in Durham the next day doing something responsible; but, no, you wanted to be a gangster.

You've made your bed hard, you have to lie in it. And that's just the end of  
(continued...)

apparently were no African American jurors on the jury panel that convicted Brandon Flack, and few in the jury pool. After Brandon Flack was convicted, Flack claimed in his new trial motion that there had been alleged “systematic exclusion” of African Americans from the Mercer County jury pool. Flack has not offered any explanation regarding his failure to raise any sort of “racial” challenge to the jury selection process at the time his jury was selected. This appears to be another instance of Flack bringing an alleged error to the court’s attention--only after the jury’s verdict had been rendered.

In Syllabus Point 2 of *State v. Hobbs*, 168 W. Va. 13, 282 S.E.2d 258 (1981), this Court stated:

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” group in the community; (2) that the representation of this group in venues 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 under representation is due to systematic exclusion of the group in the jury-selection process.

Flack’s argument is based on his claim that a greater percentage of African Americans who receive jury summonses in Mercer County--greater than the percentage of whites who receive such summonses--do not report for jury duty; and that the failure of officials to “go get” non-responding

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<sup>6</sup>(...continued)  
it.

I don’t have nothing else to say.

(App. vol. III at 53-56.)

jurors results in fewer African American potential jurors, and thus their “systematic exclusion” in the jury-selection process--and is otherwise illegal.

However, Flack’s particular “systematic exclusion” argument has been carefully considered --and soundly rejected--by numerous courts.

In *Berhuis v. Smith*, 130 S. Ct. 1382, 559 U.S. 314 (2010), a unanimous Supreme Court held that practices like “excusing people [from the jury pool] who . . . **simply failed to show up for jury service**” have never been held by the Court to give rise to a fair-cross-section claim. 130 S. Ct. at 1395, 559 U.S. at \_\_\_\_ (emphasis added).<sup>7</sup>

In *Hall v. Wolfenbarger*, 2012 WL 3263764 (E.D. Mich. August 9, 2012), the court held that “a trial court’s failure to obtain responses from potential jurors [is] not generally considered a ‘systematic exclusion of a group from jury service.’” (*Id.* at \*7.) The court continued, “non-responses . . . are not a problem ‘inherent’ to the jury selection procedures, but the result of individual choice. . . . petitioner has failed to show any systematic exclusion of African-Americans from his jury pool.” (*Id.*) (citations omitted.)

In *Alba v. Quarterman*, 621 F. Supp. 2d 396 (E.D. Texas 2008), where the court held that “discrepancies resulting from the private choices of individual summonses do not exemplify the type of constitutional infirmity [that supports a fair-cross-section claim].” *Id.* at 414. *See also People v. Smith*, 615 N.W.2d 1 (Mich. 2000) (jury pool selection practices that are not racially based, but which may result in racial disparities, are not unconstitutional “systematic exclusion.”). *See also*

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<sup>7</sup>Flack’s brief does not recognize that *Berhuis* explicitly rejected the Sixth Circuit’s expansion of the gender discrimination case of *Duren v. Missouri*, 439 U.S. 357 (1979) to include “juror no-show” claims like Flack’s. Flack’s discussion of *Duren* is simply irrelevant, in light of the above-quoted language from *Berhuis*.

cases collected at *Bates v. U.S.*, 473 F. App'x 446, 451-52 (6th Cir. 2012). (“The jury selection system is not excluding African Americans as a group, but many African Americans are excluding themselves . . .” (citations omitted)).

This Court held in Syllabus Point 2 of *Parham v. Horace Mann Ins. Co.*, 200 W. Va. 609, 490 S.E.2d 696 (1997) that the burden of showing unconstitutional racial motivation in jury selection is upon the defendant. In Syllabus Point 4 of *Parham*, this Court held that a trial court’s findings on the issue of racial discrimination in jury selection are to be given “great weight.” This Court is respectfully directed to the thoughtful analysis of the trial court in the instant case in resolving the “systematic exclusion” claim. (App. vol. III. at 46-49, 191-200.) The Respondent submits that the court correctly concluded that Brandon Flack’s “systematic exclusion” claim, in his Assignment of Error Number Three, is without merit.

Flack also claims in his Assignment of Error Number Four that the circuit clerk’s failure to aggressively “go get” jurors who do not respond to summonses--without regard to the racial effect of such conduct--was also violative of Flack’s Sixth Amendment rights. But Flack does not show that “no-shows” are a distinctive group, and he does not show that he suffered any prejudice from their exclusion. He offers no legal authority for this claim, and it is without merit.

**C. Flack’s Assignment of Error Number Four -- Medical Examiner Testimony**

Brandon Flack also asserts as “plain error” the entirely-unobjected-to testimony of a medical examiner. As demonstrated *supra* at p. 9, the medical examiner’s testimony was simply that a gunshot wound was the cause of Matthew Flack’s death. “Any physician qualified as an expert may give an opinion about physical and medical cause of injury or death. This opinion may be based in part on an autopsy report.’ Syl. Pt. 5, *State v. Jackson*, 171 W. Va. 329, 298 S.E.2d 866 (1982).” Syl.

Pt. 7, *State v. Kennedy*, 229 W. Va. 756, 735 S.E.2d 905 (2012). Jasman Montgomery *admitted* to shooting and killing Matthew Flack. This point was entirely undisputed and uncontradicted at Brandon Flack's trial. The medical examiner's testimony about the (undisputed) cause of Matthew Flack's death, although it helped prove that a person had been killed during the break-in, did not point to Brandon Flack as being involved in connection with the shooting. Flack has not demonstrated how any cross-examination of the person who prepared the autopsy report that the medical examiner relied upon could have negated in any fashion Brandon Flack's guilt of felony murder, burglary, robbery, and conspiracy to commit felony murder. For these reasons, Flack's argument that his conviction should be reversed for "plain error" in the innocuous admission of the medical examiner's testimony is without merit.

V.

### CONCLUSION

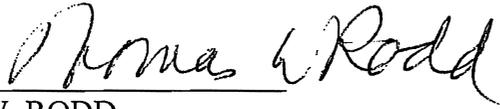
Brandon Flack had a fair trial. The jury believed the two witnesses who saw Brandon Flack and two other masked men break into the house, where one of them killed Matthew Flack. Brandon Flack was correctly convicted. His convictions should be upheld.

Respectfully submitted,

STATE OF WEST VIRGINIA  
*Respondent,*

By counsel,

PATRICK MORRISEY,  
ATTORNEY GENERAL



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THOMAS W. RODD  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 3143  
E-mail: [twr@wvago.gov](mailto:twr@wvago.gov)

*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, THOMAS W. RODD, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *RESPONSE BRIEF* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 26<sup>th</sup> day of March, 2012, addressed as follows:

To: Derrick W. Lefler, Esquire  
Gibson, Lefler & Associates  
1345 Mercer Street  
Princeton, WV 24740

E. Ward Morgan, Esquire  
3217 Cumberland Road  
Bluefield, WV 24701



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THOMAS W. RODD