



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No. 13-1122

Circuit Court No. 09-F-023
(Cabell)

ROBERT FRAZIER,

Petitioner.

PETITIONER'S BRIEF

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

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 6

ARGUMENT:

 I. Double Jeopardy protections found in both Art. 3 §5 of the West Virginia Constitution and 5th Amendment of the United States Constitution guarantee that no man shall be *twice tried, convicted*, or punished for the same offense. Therefore, the trial court committed reversible error when it allowed Mr. Frazier to be retried on first degree murder charges, over counsel’s objection, despite the fact Mr. Frazier was acquitted of first degree murder during his first trial. 6

 II. The trial court erred when it allowed the State to enhance Mr. Frazier’s sentence, upon retrial, in violation of due process, by seeking and obtaining the finding of a firearm determination under W.Va. Code §62-12-13, even though the State failed to seek the enhancement during Mr. Frazier’s first trial. This improperly increased Mr. Frazier’s sentence, after appeal. This occurred over counsel’s objection. 13

CONCLUSION..... 15

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Burks v U.S.</i> , 437 U.S. 1, 15-16, 98 S.Ct. 2141, 2149-50 (1978).....	7
<i>Chrystal R.M. v. Charlie A.L.</i> , 194 W.Va. 138, 459 S.E.2d 415 (1995)	13
<i>Green v. U.S.</i> , 355 U.S. 184, 187, 78 S.Ct. 221, 223 (1957).....	5,9,10
<i>North Carolina v. Pearce</i> , 395 U.S. 711, 717, 89 S.Ct. 2072, 2076(1969).....	9
<i>Price v. Georgia</i> , 398 U.S. 323,328-29, 90 S.Ct. 1757, 1761 (1970)	10,11
<i>State v. Clayton</i> , 173 W.Va. 414, 317 S.E.2d 499 (1984)	7
<i>State v. Cobb</i> , 166 W.Va. 65, 272 S.E. 2d. 467, (1980).....	11,12,13
<i>State v. Frazier</i> , 229 W.Va. 724, 735 S.E.2d 727(2012).....	2
<i>State v. Gill</i> , 187 W.Va. 136, 416 S.E.2d 253(1992).....	9,12
<i>State v. Sears</i> , 196 W.Va. 71, 468 S.E.2d 324 (1996).....	7
<i>State v. Young</i> , 173 W.Va.1, 311 S.E.2d 118(1983).....	<i>passim</i>
<i>U.S. v. Ball</i> 163 U.S. 662, 16 S.Ct. 1192(1896)	7,8
<i>U.S. v. Wilson</i> , 420 U.S.332, 342, 95 S.Ct. 1013, 1021 (1975).....	8
 <u>CONSTITUTIONAL PROVISIONS</u>	
U.S. Constitution, Amend. V	4,6,7
West Virginia Constitution, Art. 3, §5.....	4,6,7
 <u>STATUTES</u>	
W.Va. Code, § 61-11-13	8
W.Va. Code § 62-12-13 (2013)	1,13,14

ASSIGNMENTS OF ERROR

- I. Double Jeopardy protections found in both Art. 3 §5 of the West Virginia Constitution and 5th Amendment of the United States Constitution guarantee that no man shall be *twice tried, convicted*, or punished for the same offense. Therefore, the trial court committed reversible error when it allowed Mr. Frazier to be retried on first degree murder charges, over counsel's objection, despite the fact Mr. Frazier was acquitted of first degree murder during his first trial.

- II. The trial court erred when it allowed the State to enhance Mr. Frazier's sentence, upon retrial, in violation of due process, by seeking and obtaining the finding of a firearm determination under W.Va. Code §62-12-13, even though the State failed to seek the enhancement during Mr. Frazier's first trial. This improperly increased Mr. Frazier's sentence, after appeal. This occurred over counsel's objection.

Statement of the Case

In August of 2008, the state charged Robert Frazier with the first degree murder of his live-in girlfriend Kathy Smith (hereinafter Smith). A jury convicted him of second degree murder on October 12, 2010. The trial court sentenced Mr. Frazer to serve 40 years in prison. Mr. Frazier appealed his conviction asserting several errors that occurred during his trial. This Court reversed Mr. Frazier's conviction in November of 2012, based on a confrontation clause error. *State v. Frazier*, 229 W.Va. 724, 735 S.E.2d 727(2012). In September of 2013, the state tried Mr. Frazier a second time on the underlying charges, in the Cabell County Circuit Court. At this second trial, the state, once again, tried to prove Mr. Frazier guilty of first degree murder, despite the fact that his first trial had ended in an acquittal of that charge. *A.R. Vol. I 5-6*.

Throughout all of these proceedings Mr. Frazier has maintained his innocence. He asserts the shooting was accidental; occurring during a struggle over the shotgun after Smith pulled the shotgun on him and put it in his face. *A.R. Vol. I 507, 509*. Mr. Frazier told officers that he reacted to Smith putting the gun in his face by shoving the shotgun out of his face. *A.R. Vol. I 509-510*. A struggle ensued over the gun. He further explained that he did not know Smith had the gun "locked and loaded" while the struggle was occurring. He stated everything happened so fast that he has no idea how the gun went off, or who pulled the trigger. *A.R. Vol. I 510*. The medical examiner (hereinafter M.E.) testified that the shooting could have been accidental, it could be a suicide, it was not necessarily a homicide. *A.R. Vol. I 124*. The M.E. further testified that he arrived at the finding of homicide not based on his medical training, but based on the outside information that he had been given regarding the incident. *A.R. Vol. I 124-125*. Additionally, Mr. Frazier's forensic expert, Mr. Shiro, testified that the explanation of the fatal shot to Smith, as explained by Mr. Frazier, was plausible. *A.R. Vol. I 470*.

At the outset of his second trial, Mr. Frazier's trial lawyer objected to Mr. Frazier being re-tried on first degree murder charges, based on the jury verdict of second degree murder in his initial trial. *A.R. Vol. I 5-6*. The jury at Mr. Frazier's first trial had already acquitted Mr. Frazier of first degree murder; that finding was still valid after the appeal. The trial court stated "the prosecutor has just supplied me with the case of *State versus Young*, which was decided in 1983, which is a West Virginia case, which seems to go along with my opinion that it should be tried as a first degree case with the understanding that he cannot be convicted accordingly or could not be sentenced under the first degree." *Id.* Based on this improper ruling by the trial court, Mr. Frazier was forced to defend against a first degree murder charge, which he had been acquitted of, for a second time. The state argued to the jury that Mr. Frazier was guilty of first degree murder in its opening and its closing of his second trial. The state's final statement to the jury in its opening was:

[a]nd at the close of this evidence the State will ask you to find the Defendant guilty of First Degree Murder for the premeditated, the deliberate, intentional, wilful, and malicious killing of Kathy Gail Smith."

A.R. Vol. I 99. Again, the final statement jurors heard, from the State, before retiring to begin deliberations was the state arguing that Mr. Frazier was guilty of first degree murder:

He made the decision that day to end her life. Premeditation can occur in an instant in West Virginia. You heard that from the Judge. It does not have to be a grand plan like you see on T.V.... Ladies and Gentlemen, he shot her. She died. He thought about it before he did it. It is that simple. We would ask you to come back with a verdict of guilty of first degree murder. Thank you.

A.R. Vol. I 625.

Additional due process violations occurred during Mr. Frazier's second trial when the trial court allowed the state to enhance Mr. Frazier's sentence by seeking the finding of a firearm

from the jury. The state did not seek the finding of a firearm during Mr. Frazier's first trial. Despite this fact, the state did seek to enhance his sentence on retrial by submitting interrogatories to the jury regarding the use of a firearm. Counsel objected to this arguing that the interrogatories were not submitted during the first trial and therefore the state should be barred from submitting the interrogatories on retrial. The trial court overruled counsel's objection and allowed the jury to consider the interrogatories. The jury found that a firearm was used during the offense, therefore this improperly increased Mr. Frazier's sentence on retrial.

Mr. Frazier's second trial ended with him being convicted of second degree murder. *A.R. Vol. II 37, 38*. He was sentenced to serve 40 years in prison on October 2, 2013, with the finding of a firearm. *A.R. Vol. II 15, A.R. Vol. I 654*. It is from this conviction and sentence that he now appeals.

Summary of the Argument

Robert Frazier was acquitted of first degree murder in October 2010, when a Cabell County jury found him guilty of the lesser-included offense of second degree murder. Therefore, a proper application of the double jeopardy protections guaranteed by Art. 3 §5 of the West Virginia Constitution, and by the 5th Amendment to the United States Constitution prohibited Mr. Frazier from ever having to defend against the charge of first degree murder again. Unfortunately, over counsel's objection, that is exactly what Mr. Frazier was forced to do. The trial court, relying on *State v. Young*, 173 W.Va.1, 311 S.E.2d 118(1983), overruled counsel's objection to Mr. Frazier being re-tried on first degree murder charges during his second trial. *A.R. Vol. I 5-6*.

In reliance on *Young*, the court held that Mr. Frazier could be tried for first degree murder again, but it could not sentence him to anything more than second degree murder. *Id.* This ruling was in direct conflict with the protections of double jeopardy which guarantees that no man will be “subjected to the *hazards of trial and possible conviction* more than once for an alleged offense.” *Green v. U.S.*, 355 U.S. 184, 187, 78 S.Ct. 221, 223 (1957)(*emphasis added*). The holding in *Green* demonstrates that double jeopardy protects Mr. Frazier from being improperly subjected to the *ordeal of trial and the possibility of a conviction* on a charge that he was acquitted of, in addition to the more commonly understood protection against multiple punishments for the same act. Further, it served no purpose to try Mr. Frazier on first degree murder charges when the maximum punishment the state could impose was the punishment for second degree murder.

During Mr. Frazier’s second trial, the state improperly asserted throughout Mr. Frazier’s trial that his case was a first degree murder case and that Mr. Frazier was guilty of first degree murder. The state ended its opening by telling jurors it would ask them to find Mr. Frazier guilty of first degree murder at the close of the case. *A.R. Vol. I 99*. Again in closing statements, the final statement jurors heard before retiring to begin deliberations was the state arguing that Mr. Frazier was guilty of first degree murder. *A.R. Vol. I 625*. These arguments demonstrate Mr. Frazier was forced to defend against the charge of first degree murder a second time, despite the fact that he was acquitted of that offense in October of 2010. The impact of allowing the retrial for an offense in which there has been a valid acquittal is far reaching on both jury trials and the judicial system. Instructing juries on an offense that it cannot convict on is misleading, a waste of time and resources, and could possibly cause the public to lose faith in the judicial system. Finally, it puts the defendant through the stress, embarrassment and publicity of a trial on an

offense he has previously been acquitted. It is for all the above stated reasons this violation of Mr. Frazier's state and federal constitutional rights against double jeopardy requires reversal.

The State did not seek the enhancement of the finding of a firearm at Mr. Frazier's first trial. However, upon retrial, the State did seek to submit interrogatories to the jury once the verdict was returned. Counsel objected to the interrogatories arguing the state failed to pursue the enhancement at the first trial and, therefore, the state should be barred from pursuing it on re-trial. Additionally there is nothing in the record, to prove the state notified counsel prior to trial, in writing, of its intention to submit interrogatories to the jury as is required, and the indictment does not allege the finding of a firearm. The court overruled counsel's objection and allowed the state to submit the interrogatories to the jury. The jury found the offense was committed with the use of a firearm. This improperly increased Mr. Frazier's sentence on re-trial as the addition of the finding of a firearm requires that Mr. Frazier serve one third of his sentence before he is eligible for parole rather than serving the usual one fourth of a determinate sentence.

Statement Regarding Oral Argument

Mr. Frazier Counsel requests an oral argument on Mr. Frazier's case and due to the fact that his case concerns a significant constitutional issue, double jeopardy, which needs revisited by this Court. Therefore, his case should be heard on the Rule 20 docket and a memorandum decision is not suitable for Mr. Frazier's case.

Argument

- I. Double jeopardy protections found in both Art. 3 §5 of the West Virginia Constitution and 5th Amendment of the United States Constitution guarantee that no man shall be *twice tried, convicted, or punished for the same offense.* Therefore, the trial court committed reversible error when it allowed Mr. Frazier to be retried on first degree murder charges, over counsel's**

objection, despite the fact Mr. Frazier was acquitted of first degree murder during his first trial.

Standard of Review: *Syl. Pt 1, in part, State v. Sears*, 196 W.Va. 71, 468 S.E.2d 324 (1996), “[A] **double jeopardy** claim [is] reviewed *de novo*.”

Mr. Frazier was acquitted of first degree murder in October of 2010, and in direct violation of his constitutional right to double jeopardy protections, he was retried on first degree murder charges again in September of 2013. This retrial occurred over counsel’s objection. *A.R. Vol. I 5*. The State presented the trial court with the instructions given in Mr. Frazier’s first trial to use in his second trial. Counsel objected to jurors being instructed on first degree murder because Mr. Frazier’s first trial had ended with a conviction to second degree murder. *A.R. Vol. I 5*. The trial court ruled that the jury would be instructed on first degree murder and if jurors convicted Mr. Frazier of first degree murder the court would change the conviction to second degree. While the trial court acknowledged Mr. Frazier’s right against multiple punishments with this ruling, it simultaneously denied his right, under double jeopardy principles, of not being twice put in jeopardy for an offense in which he had been previously acquitted of by a jury.

Double jeopardy protections found in both Art. 3 §5 of the West Virginia Constitution¹ and 5th Amendment of the United States Constitution² guarantee that no man shall be *twice tried, convicted, or punished* for the same offense. The United States Supreme Court held “[t]he verdict of acquittal is final” *U.S. v. Ball* 163 U.S. 662, 16 S.Ct. 1192(1896). *See also Burks v. U.S.*, 437 U.S. 1, 15-16, 98 S.Ct. 2141, 2149-50 (1978), *Syl. Pt. 2, State v. Clayton*, 173 W.Va.

¹ “No person shall be... twice put in jeopardy of life or liberty for the same offence.”

² “...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...”

414, 317 S.E.2d 499 (1984). In *Ball*, the Court stated simply that the double jeopardy “prohibition is not against being twice punished, but against being twice put in jeopardy.” *Id. at 163 U.S. at 669, 16 S.Ct. at 1759*. The United States Supreme Court then explained that when a man has been acquitted of an offense the [Double Jeopardy] Clause guarantees that the State shall not be permitted to make repeated attempts to convict. *U.S. V. Wilson*, 420 U.S.332, 342, 95 S.Ct. 1013, 1021 (1975). However, the trial court permitted the state to place Mr. Frazier in jeopardy again on first degree murder charges, despite counsel’s objection and despite the previous, valid acquittal. If the trial court had properly applied the Double Jeopardy principles on retrial, the most that Mr. Frazier could have been tried on, during his retrial, was second degree murder charges.

West Virginia has a statute that addresses former acquittals on the merits, W.Va. Code, § 61-11-13. It is in agreement with the holdings of the United States Supreme Court mentioned above. It states:

A person acquitted by the jury upon the facts and merits on a former trial may plead such acquittal in bar of a second prosecution for the same offense, notwithstanding any defect in the form or substance of the indictment or the accusation on which he was acquitted.

This statute specifically prohibited the retrial of Mr. Frazier on first degree murder charges once counsel asserted his prior conviction as a bar to retrial on first degree murder charges. Defense counsel did just that at the outset of Mr. Frazier’s trial. *A.R. Vol. I 5-6*. Unfortunately, the trial court ruled against counsel and held that Mr. Frazier would be subjected to trial on first degree murder.

Both this Court and the United States Supreme Court recognized the Double Jeopardy Clause provides three related protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076(1969), *Syl. Pt. 1,2, State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253(1992)(*emphasis added*). During Mr. Frazier's second trial, the state improperly asserted throughout Mr. Frazier's trial that his case was a first degree murder case and that Mr. Frazier was guilty of first degree murder. The state ended its opening by telling jurors it would ask them to find Mr. Frazier guilty of first degree murder at the close of the case. *A.R. Vol. I 99*. Again in closing statements, the final statement jurors heard before retiring to begin deliberations was the state arguing that Mr. Frazier was guilty of first degree murder. *A.R. Vol. I 625*. These arguments demonstrate Mr. Frazier was forced to defend against the charge of first degree murder a second time, despite the fact that he was acquitted of that offense in October of 2010. This occurred over counsel's objection, and in direct violation of, Mr. Frazier's constitutionally guaranteed protections against double jeopardy under both the state and federal constitutions. It is immaterial that the trial court informed the parties that Mr. Frazier could not be convicted or sentenced to more than second degree murder. This ruling by the trial court did not change the fact that the state argued and, therefore, counsel was forced to defend Mr. Frazier against the charge of first degree murder for a second time before a jury. Importantly, jurors were not aware of this ruling regarding the maximum punishment by the court. Therefore, Mr. Frazier was forced to defend against first degree murder charges for a second time, despite his previous acquittal on the charge, based on the trial court's erroneous ruling.

The United States Supreme Court addressed the double jeopardy bar created by a prior acquittal, which is present in Mr. Frazier's case, in *Green v. U.S.* 355 U.S. 184,190, 78 S.Ct. 221,

226 (1957). In *Green*, the Court held that “the constitutional prohibition against ‘double jeopardy’ was designed to protect an individual from being subjected to *the hazards of trial and possible conviction* more than once for an alleged offense.” *Id.* at 355 U.S. 184, 186, 78 S.Ct. 221, 223 (*emphasis added*). Mr. Green was tried on first degree murder charges during his first trial. The jury convicted Green of second degree murder. He appealed and his conviction was reversed. During his second trial Mr. Green was again tried for first degree murder charges, even though his original jury had acquitted him of the charges. Jurors convicted Mr. Green of first degree murder during his second trial. The United States Supreme Court reversed Mr. Green’s conviction of first degree murder. The Court held reversal was necessary because: “this second trial for first degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution.” *Id.* The *Green* court explained that at the end of his first trial when the jury was discharged, Green’s jeopardy for first degree murder came to an end. *Green*, 355 U.S. at 191, 78 S.Ct. at 226. Therefore, it was error to try Mr. Green for anything more than his original conviction, second degree murder, on retrial. Applying this holding to Mr. Frazier’s case, it was error to try Mr. Frazier for anything more than second degree murder, on retrial.

The United States Supreme Court revisited the issue of a prior acquittal being a bar to retrial again in *Price v. Georgia*, 398 U.S. 323,328-29, 90 S.Ct. 1757, 1761 (1970). *Price* presented a similar factual situation present in Mr. Frazier’s case. Mr. Price was initially tried on first degree murder charges. Like Mr. Frazier, Mr. Price was found guilty of the same lesser included offense in both trials. He was initially convicted of voluntary manslaughter. He appealed his conviction and was granted a reversal. Mr. Price was retried on first degree murder charges over counsel’s objection and was again convicted of voluntary manslaughter.

The Court held that reversal was necessary in Mr. Price's case, despite the fact that the second jury reached the same verdict as the first jury. The Court explained that although the second jury convicted Mr. Price of the lesser offense, "the risk of conviction on the greater charge was the same in both cases and the Double Jeopardy Clause of the Fifth Amendment is written in terms of *the potential or risk of trial and conviction*, not punishment." *Id.* (*emphasis added*). The Court also found it highly significant that there is no way to "determine whether or not the murder charge against the petitioner induced the jury to find Mr. Price guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." *Id.* 398 U.S. at 331, 90 S.Ct. at 1762. Importantly, the Court stated "to be charged and to be subjected to a second trial for first degree murder is an ordeal not to be viewed lightly." *Id.*

Mr. Frazier's case is almost exactly the same as *Price*. Therefore, the same analysis should apply to his case. The fact that Mr. Frazier was convicted of the same offense on retrial is immaterial. What is of importance is the fact that Mr. Frazier was forced to defend against first degree murder charges a second time, despite his acquittal on that charge during his first trial. Additionally, just as in the *Price* case, there is no way to determine how the instructions on first degree murder impacted the second jury's deliberation process in Mr. Frazier's second trial. The mere existence of first degree murder as a possible verdict could have kept jurors from honoring Mr. Frazier's theory of defense: accidental shooting, leading ultimately to a not guilty verdict.

This Court's line of cases that hold upon retrial a jury can be instructed on all the levels of homicide that are supported by the evidence with the understanding the defendant will not be sentenced to anything higher than his initial conviction cannot be reconciled with the principles of double jeopardy discussed above. *See Syl. Pt. 3, State v. Cobb*, 166 W.Va. 65, 272 S.E.2d.

467, (1980), *State v. Young*, 173 W.Va.1,7, 311 S.E.2d 118, 124(1983). In *Syl. Pt. 3, State v. Cobb*, 166 W.Va. 65, 272 S.E.2d. 467, (1980)(*emphasis added*) this Court held:

When a new trial is granted upon appeal, a defendant in the new trial who was originally convicted of voluntary manslaughter cannot be convicted of a more serious degree of homicide or sentenced to a harsher penalty than he received at the original trial; **however, proper procedure upon retrial is to submit the case to the jury under proper instructions for every degree of homicide which the evidence supports, and if the jury returns a verdict in the second trial for an offense greater than that returned in the first trial, the trial court should then enter judgment for the offense for which the first conviction was obtained.**

See also State v. Young, 173 W.Va.1,7, 311 S.E.2d 118, 124(1983). These cases specifically deny criminal defendants, in homicide cases, who were convicted of a lesser included offense, the right against a second prosecution for an offense for which they have previously been acquitted. Therefore, this line of cases is in direct violation of state and federal double jeopardy principles; the same double jeopardy principles which are recognized and guaranteed by this Court, in other opinions. *See Syl. Pt. 1,2, State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253(1992). Double jeopardy protections guard against the risk of being put on trial and the obligation to defend against a charge, as well as the right against multiple or enhanced punishments. *Id.* Therefore, while the analyses in *Cobb* and *Young* protect against multiple or enhanced punishment, it violates the guarantee of being twice put in jeopardy on an offense in which one has been previously acquitted of at trial.

The impact of allowing the retrial for an offense in which there has been a valid acquittal is far reaching on both jury trials and the judicial system. Instructing juries on an offense that it cannot convict on is misleading, a waste of time and resources, and could possibly cause the public to lose faith in the judicial system. How could a juror, who served on a trial, have faith in

the system when he or she finds through the media that the trial court lowered or changed the verdict jurors worked so hard to reach? It also puts the prosecutor in the precarious situation of a seeking a conviction he or she knows is illegal and cannot be enforced. Instructing jurors on an offense in which they cannot convict on, not only changes deliberations, it interferes with them. It also forces the defendant and the trial lawyer to defend against an offense they should not have to, and this clearly impacts trial strategy and preparations. Finally, it puts the defendant through the stress, embarrassment, and publicity of a trial on an offense that he has previously been acquitted. It is for all the above stated reasons, this violation of Mr. Frazier's state and federal constitutional rights against double jeopardy requires the reversal of his conviction.

It is for these reasons discussed above, that the *Cobb* and *Young* opinions, as well as Mr. Frazier's most recent conviction, must be reversed.

II. The trial court erred when it allowed the State to enhance Mr. Frazier's sentence, upon retrial, in violation of due process, by seeking and obtaining the finding of a firearm determination under W.Va. Code § 62-12-13, even though the State failed to seek the enhancement during Mr. Frazier's first trial. This improperly increased Mr. Frazier's sentence, after appeal. This occurred over counsel's objection.

Standard of Review: Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review. *Syl. Pt. 1, Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

In 2010, when Mr. Frazier was tried and convicted by a jury, of second degree murder, the state did not seek to obtain the finding of a firearm by the jury. However, the state did seek to enhance Mr. Frazier's sentence upon retrial by seeking the finding of a firearm by submitting interrogatories to the jury. Counsel objected to the state pursuing this additional enhancement of

Mr. Frazier's sentence on retrial, by arguing that the state did not pursue it during his first trial, therefore the state should be barred from seeking it on retrial. *A.R. Vol. I 657*. The trial court overruled counsel's objection and held that the state was entitled to seek the enhancement by submitting the interrogatories to the jury. *Id.* Prior to the jury returning with the finding, counsel renewed his objection to the enhancement arguing that Mr. Frazier was being penalized for successfully appealing if the court allowed the enhancement. *A.R. Vol. I 658-659*. The trial court responded by telling counsel to argue the issue to the "Higher Court." *A.R. Vol. I 659*.

In *State v. Young*, 173 W.Va. 1, 6, 311 S.E.2d 118, 123-24, (1983), this Court held that "upon a defendant's conviction at retrial following the prosecution of a successful appeal, imposition by the sentencing court of an increased sentence violates due process and the original sentence must act as a ceiling above which no additional penalty is permitted." (*internal citations omitted*). Therefore, just as counsel argued, allowing the state to pursue the finding of a firearm enhancement during Mr. Frazier's second trial violated his due process rights, and the finding by the jury must be stricken from his sentence. Mr. Frazier's initial conviction and sentence is the ceiling above which no penalty is permitted. The finding of a firearm enhancement in W.Va. Code § 62-12-13 (2013), increased Mr. Frazier's sentence from the required one fourth to be served before he is eligible for parole, to now require one third of his sentence to be served before he can be considered for parole. Therefore the enhancement improperly added 3 years and 4 months to his sentence on retrial.

Conclusion

Mr. Frazier respectfully requests that the Court reverse his conviction and remand for a new trial on the charge of second degree murder with an additional order that the state may not pursue the finding of a firearm enhancement upon retrial.

Respectfully Submitted,

Robert Frazier
By Counsel

A handwritten signature in cursive script that reads "C. L. Walden". The signature is written in black ink and is positioned above a horizontal line.

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

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 18th day of February 2014, I mailed a copy of the foregoing *Petitioner's Brief* to counsel for respondent, Scott Johnson, Assistant Attorney General, Office of the Attorney General, 812 Quarrier Street, 6th Floor, Charleston, WV 25301.



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

Counsel for Petitioner