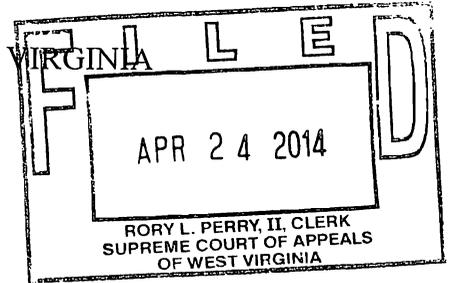


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Respondent

Supreme Court No. 13-1122

v.

ROBERT FRAZIER

Petitioner.

PETITIONER'S REPLY BRIEF

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

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

REPLY ARGUMENT

I. The State’s assertion that Mr. Frazier was not at risk of being convicted of first degree murder on retrial is wrong. The State conflates the meaning of conviction and punishment in order to assert Mr. Frazier was not in jeopardy of being convicted of first degree murder. *Response to State’s brief 4-6* 1

II. The State’s Argument that there was no sentence enhancement is wrong. *Reply to State’s brief 6-10* 4

CONCLUSION..... 5

TABLE OF AUTHORITIES

Cases	<u>PAGE</u>
<i>Burks v. U.S.</i> , 437 U.S. 1, 15-16, 98 S.Ct. 2141, 2149-50 (1978).....	1
<i>Commonwealth v. Flax</i> , 200 A 632 (Pa. 1938).....	4
<i>Corbett v. State</i> , 91 So.2d 509 (Ala. 1956).....	4
<i>Green v. United States</i> , 355 U.S. 184, 78 S.Ct. 221 (1957)	1,2,3,4
<i>Hearn v. State</i> , 205 S.W.2d 477 (Ark. 1947)	4
<i>People v. Graham</i> , 331 N.E.2d 673 (N.Y. 1975)	4
<i>People v. Mitchell</i> , 583 N.E.2d 78, 82 (App. Ct. Ill. 1991).....	4
<i>Price v. Georgia</i> , 398 U.S. 323, 328-29, 90 S.Ct. 1757 (1970).	1,2,3
<i>Sandstrom v. Montana</i> , 442 U.S. 510, 521, 99 S.Ct. 2450, 2458 (1979)	4
<i>State v. Clayton</i> , 173 W.Va. 414, 317 S.E.2d 499 (1984).....	1
<i>State v. Cobb</i> , 166 W.Va. 65, 272 S.E.2d. 467 (1980).....	3,4
<i>State v. Coleman</i> , 285 NW 269 (Iowa 1939).....	4
<i>State v. Felton</i> , 434 A.2d 1131 (NJ 1981).....	4
<i>State v. Gill</i> , 187 W.Va. 136, 416 S.E.2d 253 (1992).....	1
<i>State v. Guthrie</i> , 194 W.Va. 657, 461 S.E.2d. 163 (1995)	3
<i>State v. Langley</i> , 958 So.2d 1160 (La. 2007).....	4
<i>State v. Low</i> , 192 P.3d 867, 880 (Ut. 2008).....	4
<i>State v. Maloney</i> , 464 P. 2nd 793, 801-2 (Ariz.1970)	4
<i>State v. McGilton</i> , 229 W.Va. 554, 729 S.E.2d 876 (2012)	2
<i>State v. Sears</i> , 196 W.Va. 71, 468 S.E.2d 324 (1996).....	4
<i>State v. White</i> , 295 P.2d 1019 (1956)	4
<i>State v. Young</i> , 173 W.Va. 1, 6, 311 S.E.2d 118 (1983).....	3,4

Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080 (1993).....4

Taylor v. Commonwealth, 43 S.E.2d 906 (Va. 1947).....4

U.S. v. Ball,163 U.S. 662, 16 S.Ct. 1192 (1896)1

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amend. V 1

Article III, Section 5, W.Va. Constitution 1

STATUES

WV Code 62-12-13 (2013).....4

I. The State’s assertion that Mr. Frazier was not at risk of being convicted of first degree murder on retrial is wrong. The State conflates the meaning of conviction and punishment in order to assert Mr. Frazier was not in jeopardy of being convicted of first degree murder. *Response to State’s brief 4-6.*

Despite the state’s assertion to the contrary, Robert Frazier *was* in jeopardy of being convicted of first-degree murder during his second trial, even though he was previously acquitted on that same charge by a jury three years earlier, in violation of Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and in Article III, Section 5 of the West Virginia Constitution. ¹ The State’s argument that Mr. Frazier was not in jeopardy of being convicted of first-degree murder improperly conflates the meaning of conviction and punishment. Black’s Law Dictionary defines *conviction* as: the judgment (as by a jury verdict) that a person is guilty of a crime. Therefore, when Mr. Frazier’s second jury was instructed on first-degree murder, over counsel’s objection, Mr. Frazier was denied the protection “against a second prosecution for the same offense after acquittal,” by the State of West Virginia. *Syl. Pt 1 & 2, State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992). The exact violation, the United States Supreme Court condemned in *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221 (1957), and again in *Price v. Georgia*, 398 U.S. 323, 328-29, 90 S.Ct. 1757, 1761 (1970).

The State attempts to distinguish Mr. Frazier’s case from the holdings in *Green* and *Price* by arguing that Mr. Frazier was not in jeopardy of being convicted of first-degree murder, during his second trial, *because he was informed he could not be convicted of first-degree murder. State’s brief at 5-6.* This argument is without merit. As the *Price* Court explained the

¹ Both this Court and the United States Supreme Court recognize that “[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. 414, 317 S.E.2d 499 (1984).

key focus in determining if a defendant was twice in jeopardy is whether, “the risk of conviction on the greater charge was the same in both cases and [recognizing] the Double Jeopardy Clause of the Fifth Amendment is written in terms of *the potential or risk of trial and conviction*, not punishment.” *Price v. Georgia*, 398 U.S. 323, 327, 90 S.Ct. 1757, 1760 (1970) (emphasis added). *See also Green v. United States*, 355 U.S. 184, 78 S.Ct. 221 (1957). The state’s argument misconstrues the holdings of *Green* and *Price* by improperly shifting the focus from the “ordeal of trial” and “risk of conviction” to the knowledge of Mr. Frazier and his punishment.

It is immaterial that Mr. Frazier and counsel were informed, by the trial court, that he could not be convicted of first-degree murder. The jury was not informed of this fact and, *it is the jury that returns the verdict in a jury trial*, a fact this Court regularly emphasizes, “[t]he jury is the sole trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses.” *State v. McGilton*, 229 W.Va. 554, 729 S.E.2d 876 (2012) (citations omitted).

If it is true that Mr. Frazier was truly not in jeopardy of being convicted of first degree murder during his second trial, why did the State bother to argue to jurors that he was guilty of first-degree murder and ask jurors return a verdict of guilty as to that charge? Also, why was it necessary for the jury to be instructed on first-degree murder, over counsel’s objection, if Mr. Frazier was not in jeopardy of being convicted of that charge? It is the jury that convicts, not the judge. In this same vein, counsel and Mr. Frazier were forced to prepare for and defend against a first-degree murder case rather than a second degree murder case. This reality clearly impacted trial strategy and possible theories of defense.

Because this is structural error, it is irrelevant to the legal analysis how specifically the unlawful instructions and argument impacted the jury’s deliberations. Nonetheless, it is clear the

State in principle could not prove harmlessness. The *Price* court found it highly significant that there was no way to “determine whether or not the murder charge against 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.” *Price*, 398 U.S. at 331, 90 S.Ct. at 1762. At a minimum, the improper instructions in this case clearly had to impact jurors simply because under *Price* and *Green* the jurors should have begun their deliberations by discussing second degree murder.

Instead, jurors in Mr. Frazier’s second trial began deliberations on an offense which they could not even legally convict on, a point no one disputes.² This occurred because the trial court instructed jurors on first-degree murder knowing it was not a possible verdict. Then prosecutor stood before jurors, in closing argument, moments before they were to begin deliberations and requested that jurors return a verdict the prosecutor knew was not even a possibility. Therefore, based on the trial court’s application of this Court’s holding in *State v. Young*, 173 W.Va.1, 7, 311 S.E.2d 118,124 (1983), Mr. Frazier faced the same *risk of conviction* on first-degree murder charges in his second trial as he did during his first trial, despite the fact that he had been acquitted of those charges.

As Mr. Frazier argued in his petition, 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,

² Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they **understood the issues involved and were not misled by the law.** *Syl. Pt. 4, in part, State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d. 163 (1995) (emphasis added). Clearly, being instructed on an offense that is not a possible verdict is misleading.

124 (1983).³ Courts around the country apply the holdings in *Green* and *Young* to bar retrial on the greater offense when the initial conviction on a lesser included offense is reversed. *State v. Maloney*, 464 P. 2d 793, 801-2 (Ariz.1970) (Retrial on first-degree murder is barred when initial trial, which was reversed, ended in a conviction for second degree murder. The initial verdict served as an acquittal of the greater charge.); *People v. Mitchell*, 583 N.E.2d 78, 82 (App. Ct. Ill. 1991) (A conviction of second degree murder is an acquittal on first-degree murder and upon reversal of that conviction, double jeopardy bars retrial on first degree murder.); *State v. Low*, 192 P.3d 867, 880 (Ut. 2008) (Conviction on the lesser included offense precludes retrial on the greater offense after successful appeal of the conviction.)⁴

**II. The State’s Argument that there was no sentence enhancement is wrong.
Reply to State’s brief 6-10.**

In *State v. Sears*, 196 W.Va. 71, 77, 468 S.E.2d 324, 330 (1996) (emphasis added), Justice Cleckley found “[u]ndoubtedly, the parole *enhancement*, which is designed to *punish and deter* criminal conduct is *punitive* in nature and, therefore, we are convinced the Legislature did not consider W.Va. Code, 62-12-13 (2013), to serve solely a remedial purpose.” Therefore, the addition of the finding of a firearm at Mr. Frazier’s second trial was, in fact, an *enhancement of his punishment* thus a violation of his due process rights. Just as this Court held in *State v. Young*, 173 W.Va. 1, 6, 311 S.E.2d 118, 123-24 (1983) (*internal citations omitted*), “upon a

³ The application of the holdings in *Young* and *Cobb* will deny additional fundamental constitutional rights, in the situation where a defendant is convicted upon retrial of the greater offense requiring the trial judge to lower the verdict. In this situation, it would be the trial judge rather than the jury making the finding of guilt, in violation of the defendant’s “[right]to have the jury, rather than the judge, reach the requisite finding of guilty.” *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080 (1993) (emphasis added). A right the United States Supreme Court held qualifies as ‘structural error’ *Sandstrom v. Montana*, 442 U.S. 510, 521, 99 S.Ct. 2450, 2458 (1979).

⁴ See also *State v. Felton*, 434 A.2d 1131, (NJ 1981); *People v. Graham*, 331 N.E.2d 673 (N.Y. 1975); *State v. Langley*, 958 So.2d 1160 (LA 2007); *Taylor v. Commonwealth*, 43 S.E.2d 906 (Va. 1947); *Corbett v. State*, 91 So.2d 509 (Ala. 1956); *Hearn v. State*, 205 S.W.2d 477 (Ark. 1947); *State v. Coleman*, 285 NW 269 (Iowa 1939); *State v. White*, 295 P.2d 1019 (1956); *Commonwealth v. Flax*, 200 A 632 (Pa. 1938). **Opinions issued before 1957 were issued prior to *Green*, but have the same holding as *Green* and are still good law in that state.

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." Mr. Frazier respectfully requests the sentencing enhancement added due to the jury's finding of a firearm be stricken from his sentence.

CONCLUSION

Mr. Frazier respectfully requests this Court reverse his conviction and remand to the Circuit Court Cabell County.

Respectfully submitted,

Robert Frazier
By Counsel



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

CERTIFICATE OF SERVICE

I, Crystal L. Walden, do hereby certify on the 24th day of April, 2014, I delivered by mail, the attached *Reply Brief to Julie A. Warren, 812 Quarrier Street, Charleston, WV 25301, Attorney General Appellate Division Kanawha County of West Virginia.*

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

Crystal L. Walden
Deputy Public Defender
WV Bar ID# 8954
Office of the Public Defender
Kanawha County
P.O. Box 2827
Charleston, WV 25330