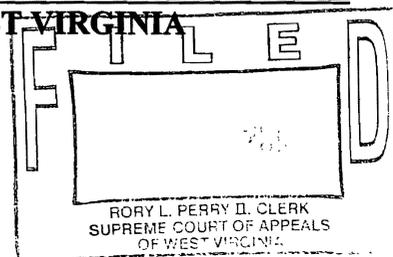


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-1122



**ROBERT FRAZIER,**

*Petitioner*

v.

**STATE OF WEST VIRGINIA,**

*Respondent.*

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**STATE'S BRIEF IN RESPONSE**

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---

**STATE'S RESPONSE BRIEF**

---

Comes now the respondent, by counsel, Julie Warren, Assistant Attorney General, and files the within brief in response to the Petitioner's Brief.

**I. STATEMENT OF THE CASE**

The grand jury of the Circuit Court of Cabell County returned a two (2) count indictment charging the Petitioner with Murder and Possession with Intent to Deliver a Controlled Substance, after he shot and killed his girlfriend, Kathryn Smith at their residence on August 25, 2008. App. Vol. II at 26. The Petitioner was convicted of the lesser offense of Second Degree Murder on July 12, 2010, and sentenced to 40 years imprisonment. See *State v. Frazier*, 229 W.Va. 724, 726-27 (2012). This Court reversed the Petitioner's second degree murder conviction, and remanded this matter back to the Circuit Court of Cabell County for a new trial, after it found that it violated the defendant's rights under the Confrontation Clause for the lower court to allow the chief medical examiner to testify concerning an autopsy report he did not draft. *Id.*, 229 W. Va. 732.

At the second trial, an acquaintance of the Petitioner, Joshua Jackson, who was at the Petitioner's house at the time of the murder, testified that he witnessed the Petitioner and the victim arguing, and that when the victim went into the bedroom, the Petitioner followed her, exclaiming "I'll f\*\*\*\*\* show you, B\*\*\*\*." App. Vol. I. at 249, 253. Mr. Jackson testified that the Petitioner then "grabbed the gun and then walked around the corner and I heard a gunshot." Id. at 253, 255. He further testified that after the gunshot he attempted to leave, but the Petitioner told him "I'm leaving," and kicked the window out telling Mr. Jackson "Well, don't tell nobody you were here." Id. at 256. The Petitioner claimed that the killing was accidental. He testified that the victim pulled the shotgun on him first, and when he attempted to take the gun away from her, it accidentally fired and killed her. Id. at 508-11. In fact, he expressly testified that his finger was not on the trigger, and that the discharge of the shot gun "had to have been an accident," and that "I did not intentionally go to harm anybody." Id. at 510-11, 518. However, the Petitioner admitted in his testimony that after the shooting he "panicked and crawled out the window," but that he did return to the house retrieved his "dope." Id. at 511, 529-30. He also admitted that he never called 911, and that he changed clothes and went to his sister's house after the shooting. Id. at 530-531. He also admitted that he had lied to Detective Sperry, of the Huntington Police Department, when he told him that Mr. Jackson had killed the victim, stating "I thought I could lie and put the blame on somebody else, and I couldn't." Id. at 516.

The circuit court overruled the motion of Petitioner's trial counsel to strike any instruction related to First Degree Murder and Second Degree Murder on the basis that no evidence was presented of premeditation or malice. Id. at 589. The Court instructed the jury as to elements of Murder in the First Degree, as well as the lesser included offenses of Murder in the Second Degree, Voluntary Manslaughter, and Involuntary Manslaughter. Id. at 601-10. The jury also presented

an instruction as to accidental causation. *Id.* at 610. The jury found the Petitioner guilty of the lesser included offense of Murder in the Second Degree, the same offense for which he was convicted in his first trial. *Id.* at 654; App vol. II at 35-36. Following the return of the verdict, the jury was presented with an Interrogatory asking “[d]id you find from the evidence beyond a reasonable doubt that the defendant committed the crime charged in the Indictment with the use of a firearm?” and after deliberation, the jury answered the Interrogatory in the affirmative. *Id.* at 656-58, App. vol. II at 37. The circuit court again sentenced the Petitioner to 40 years with credit for time served, as it did in the first trial. App. vol. II. at 15, 29-30.

## **II. SUMMARY OF THE ARGUMENT**

This Court’s application of the double jeopardy doctrine set forth in *State v. Cobb*, 166 W. Va. 65 (1980), *see also State v. Young*, 173 W. Va. 1 (1983) does not violate the U. S. Supreme Court’s precedent in *Green v. U. S.*, 355 U.S. 184, 186-87 (1957) and *Price v. Georgia*, 398 U.S. 323, 324 (1970). Furthermore, the Petitioner did not receive an enhanced sentence in his second trial, nor can he establish that the sentencing court was motivated by “actual vindictiveness” when it submitted the Interrogatory to the jury for a finding that he used a firearm in the commission of the crime, pursuant to the parole statute, W. Va. Code § 62-12-13 (b)(1)(C).

## **III. STATEMENT UPON ORAL ARGUMENT**

The State asserts that oral argument is not required in this case. The decisional process would not be assisted by oral argument. The facts and legal arguments are argued by and presented in the briefs and appendix. This matter is appropriate for memorandum decision.

#### IV. ARGUMENT

##### A. Standard of Review.

As this Court held in *State v. Sears*, 196 W. Va. 71, 75 (1996), “[b]oth the construction and scope of our parole statute and a double jeopardy claim are reviewed de novo.”

##### B. This Court has not Erred in its Application of the Double Jeopardy Doctrine.

The Petitioner appears to concede that the lower court did not err in its application of this Court’s authority concerning double jeopardy, which states:

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.

Syl. Pt. 3, *State v. Cobb*, 166 W.Va. 65 (1980), *see also State v. Young*, 173 W. Va. 1 (1983).

Instead, the Petitioner contends that the error lies with this Court and what he alleges is this Court’s failure to comply with U. S. Supreme Court authority governing the double jeopardy doctrine.

The Petitioner relies upon the U. S. Supreme Court’s decisions in *Green v. U. S.* and *Price v. Georgia*; however, he misapplied the Court’s analysis in both cases. In *Green*, which is factually distinguishable from the case at bar, the defendant was convicted of second degree murder in his first in his trial before the D. C. Circuit Court, and in the second trial following a remand, he was again tried for first degree murder and found guilty of this charge and given the mandatory death sentence. The first degree murder conviction and the sentence was upheld by the D. C. Court of Appeals. *Id.*, 355 U.S. at 186. Unlike the defendant in *Green*, who was twice subject to the jeopardy of being convicted and sentenced for the same first degree murder charge, this Petitioner was never in jeopardy at his second trial of having imposed upon him a judgment for

“a more serious degree of homicide than that imposed at the original trial.” *See Young*, 173 W. Va. at 8.

The Petitioner’s reliance upon the U. S. Supreme Court decision in *Price v. Georgia* is also unavailing, as it presents the same distinguishing factors of *Green*. There, the defendant was first found guilty of voluntary manslaughter, and after a remand, was retried on the first degree murder charge, and again, he was found guilty of voluntary manslaughter. 398 U. S. at 324. The defendant appealed claiming the retrial on the murder charge in the original indictment violated his right against double jeopardy. *Id.*, 398 U. S. at 325. The Court applied the rationale it set forth in *Green*, and explained that “[a]lthough the petitioner was not convicted of the greater charge on retrial whereas Green was, 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 potential or risk of trial and conviction, not punishment.” *Id.*, 398 U. S. at 329.

The Court’s analysis in both *Green* and *Price* turned on the fact that, at their respective retrials, both defendants were actually at risk of being convicted on the same charges for which they had been previously acquitted. This focus on the risk is further clarified by the *Price* Court’s rejection of the State’s argument that since “the petitioner was convicted of the same crime at both the first and second trials, and because he suffered no greater punishment on the subsequent conviction... second jeopardy was harmless error.” *Id.*, 398 U. S. at 331. The Court held that “[t]he Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict.” *Id.* In other words, double jeopardy analysis in *Green* and *Price* assumes that the defendants were at risk, i.e., in jeopardy of being convicted of the greater offense for which they had been previously acquitted. Such is not

the case here, where it was understood by the trial court and the parties that just because the jury would receive a First Degree Murder instruction, since the Petitioner had previously been acquitted of that charge, he could not be convicted of a charge greater than Second Degree Murder. The Petitioner, unlike the defendants in *Green* and *Price*, was never at any risk/jeopardy, and knew he was not at risk, of being convicted of First Degree Murder.

This Court's authority expressly provides that a defendant who was originally convicted of a lesser included offense cannot be convicted of a more serious offense at retrial, and moreover, "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." Under this double jeopardy regime, a defendant is not put at risk/jeopardy of being convicted at retrial for a greater offense for which he was originally acquitted. This Court's opinions in *Cobb* and *Young* conform to the double jeopardy principle set forth by the U. S. Supreme Court in *Green* and *Price*, and therefore, the application of this Court's principle by the circuit court should be affirmed.

**C. The Circuit Court Never Applied a Sentence Enhancement at the Second Trial.**

The Petitioner's claim that the circuit court "enhanced Mr. Frazier's sentence" following the second conviction, but did not pursue said enhancement after the first conviction, and thus, it "improperly increased Mr. Frazier's sentence, after appeal," is factually incorrect. The record is clear that the Petitioner received the exact same sentence in his second trial that he did in his first, which was the statutory maximum sentence of 40 years with credit for time served. There were no sentence enhancements applied by the circuit court in its issuance of the sentence following his second conviction for Second Degree Murder.

After the jury returned its verdict of Second Degree Murder in the second trial, the circuit court presented the jury with a special Interrogatory requesting that it answer whether evidence presented showed beyond a reasonable doubt that the crime was committed through the use of a firearm, which it affirmed. Despite objections to the submission of said Interrogatory by the Petitioner's counsel, the circuit court was correct in finding that the effect of an affirmance had no bearing on the Petitioner's sentence, only parole. App. vol. I at 657-59. Even though this firearm determination was not sought in the first trial, it was not erroneous for the circuit court to pursue such a determination from the jury in the second trial, as it only effected the Petitioner's parole eligibility and not his actual sentence, nor was such pursuit motivated by vindictiveness on the part of the court or the State.

The crime of Second Degree Murder is set forth in W. Va. Code, § 61-2-3, which provides that "[a] person imprisoned pursuant to the provisions of this section is not eligible for parole prior to having served a minimum of ten years of his or her sentence or the minimum period required by the provisions of section thirteen, article twelve, chapter sixty-two [62-12-13], whichever is greater."

W. Va. Code, § 62-12-13, the statutory provision which governs parole eligibility states as follows:

a) The Parole Board, whenever it is of the opinion that the best interests of the state and of the inmate will be served, and subject to the limitations provided in this section, shall release any inmate on parole for terms and upon conditions provided by this article.

(b) Any inmate of a state correctional institution is eligible for parole if he or she:

(1)(A) Has served the minimum term of his or her indeterminate sentence or has served one fourth of his or her definite term sentence, as the case may be; or

....

(C) Notwithstanding any provision of this code to the contrary, any inmate who committed, or attempted to commit, a felony with the use, presentment or brandishing of a firearm, is not eligible for parole prior to serving a minimum of three years of his or her sentence or the maximum sentence imposed by the court, whichever is less... An inmate is not ineligible for parole under the provisions of this paragraph because of the commission or attempted commission of a felony with the use, presentment or brandishing of a firearm unless that fact is clearly stated and included in the indictment or presentment by which the person was charged and was ... found guilty by the jury, upon submitting to the jury a special interrogatory for such purpose if the matter was tried before a jury...

The Petitioner is correct that the Second Degree Murder statute provides that he would normally not be eligible until he had served at least 10 years of his sentence, since he would be required to serve the greater of 10 years of his sentence, or, pursuant to § 62-12-13(b)(1), one fourth (1/4) of his 40 year sentence, which is 10 years. However, a finding that he utilized a firearm to commit the Second Degree Murder offense means he is ineligible for parole until he has served one third (1/3) of his sentence, which is 13.4 years. The Petitioner is incorrect in his assertion that the application of the firearm provision in the parole statute “increased Mr. Frazier’s sentence,” when it only increased the time for which he may be eligible for parole. Pet’r’s Br. at 14. Becoming parole eligible does not bestow any right to parole, and by no means should be construed as a guarantee that one will be released on parole upon becoming eligible. Parole is granted at the discretion of the Parole Board finding that “the best interests of the state and of the inmate will be served.” W. Va. Code, § 62-12-13 (a); *see also Tasker v. Mohn*, 165 W. Va. 55, 67 (1980) (“The decision to grant or deny parole is a discretionary evaluation by the board based on a prisoner’s record and its expertise.”)

The Petitioner was convicted for Second Degree Murder in the second trial, as he was in the first, and he received the same sentence, 40 years with time served. The court’s submission of

the special Interrogatory was a correct application of the requirement set forth in the parole statute. Moreover, the finding by the jury that he used a firearm in the commission of the crime was supported by the facts in the case, and only effects the application of the parole eligibility requirement.

Even if this Court were to determine that the firearm provision included in the parole statute has the effect of a sentence enhancement, the Petitioner has not established any impropriety on the part of the lower court.

In *Alabama v. Smith*, the U. S. Supreme Court maintained the principle that “[d]ue process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.” 490 U. S. 794, 798 (1989) (citation and internal quotations omitted.) However, the Court determined there could be no “presumption of vindictiveness” unless there is a “‘reasonable likelihood’ that an unexplained increase in sentence is the product of actual vindictiveness on the part of the sentencing authority.” Syl. *Id.*, Absent a “‘reasonable likelihood,’ the defendant has the burden of proving actual vindictiveness without aid of a presumption.” *Id.*

In this case, there is no “presumption of vindictiveness.” The record is devoid of any indication to suggest the sentencing court was acting with vindictiveness when it submitted the Interrogatory to the jury. In fact, when the Petitioner’s counsel objected claiming the Interrogatory had not been submitted to the jury in the first trial, the sentencing judge stated that “I don’t remember whether it was or not,” and correctly recognized that “it should have been.” App. vol. I at 657. Petitioner’s counsel and the trial court discussed the effect of the Interrogatory, and although they disagreed that a finding in the affirmative regarding the use of a firearm might affect

his parole date, they disagreed on whether it actually increased his sentence. *Id.* This exchange is in no way indicative of a “reasonable likelihood” that the submission of the Interrogatory was the result of “actual vindictiveness” on the part of the sentencing court.

That being said, the Petitioner has the burden to prove “actual vindictiveness” on the part of the sentencing court, and he offers no evidence whatsoever toward establishing “actual vindictiveness,” and in fact, he never even raises this claim. Instead, he relies upon this Court’s opinion in *Young*, the same opinion he claims is constitutionally flawed, to assert that the sentence from a retrial cannot be greater than the original sentence from the first trial.<sup>1</sup> However, *Young* acknowledged the U. S. Supreme Court’s decision in *Chaffin v. Stynchcombe*, 412 U. S. 17 (1973), wherein the Court affirmed a higher sentences at retrial, but this Court distinguished said precedent on the basis that it is “not controlling in the case at bar because the appellant herein was not reconvicted of the ‘same offense’ as was the defendant in *Chaffin*.” Such a distinguishing factor is not at issue here, since the Petitioner was convicted of Second Degree Murder, and effectively received the same sentence of 40 years with time served, at both his initial trial and his retrial.

## V. CONCLUSION

For all the reasons set forth in this brief and apparent on the face of the record, this Court should affirm the judgment and the sentence of the Circuit Court of Cabell County.

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<sup>1</sup> In *Young*, the Court relied upon the U. S. Supreme Court’s decision in *North Carolina v. Pearce*, 395 U.S. 711 (1969), and the Fourth Circuit application of the *Pearce* opinion in *Patton v. North Carolina*, 381 F.2d 636 (4th Cir.1967). However, in *Alabama v. Smith*, the Court overruled *Pearce* to the extent that it acknowledged that “[w]hile the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness ‘do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.’” 490 U. S. at 799, quoting *Texas v. McCullough*, 475 U. S. 134, 138 (1986).

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Respondent,*

By counsel,

PATRICK MORRISEY  
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'Julie A. Warren', is written over a horizontal line. The signature is fluid and cursive.

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**CERTIFICATE OF SERVICE**

I, Julie A. Warren, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *State's Response Brief* upon counsel for Petitioner by depositing said copy in the United State mail, with first-class postage prepaid, on the 4th day of April, 2014, addressed as follows:

Crystal Walden, Esquire  
Office of the Public Defender  
Kanawha County  
Charleston, WV 25330



JULIE A. WARREN