



This report prepared by Lane Investigations LLC

State of WV v

Flack Expert Report

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## MERCER COUNTY, WEST VIRGINIA

(11-F-288)

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### REPORT OF EXPERT WITNESS

DANIEL EDWARD LANE

#### **I. Expert Qualifications**

My current resume is attached (Attachment #1), reflecting my qualifications to speak to this matter. I have forty-five years in the fields of law enforcement and private investigations.

In May 1968, I joined the United States Marine Corps and went through basic training at Paris Island, South Carolina. I graduated in August 1968 and was sent to ITR (Infantry Training Regiment) at Camp Geiger and Camp Lejuene, North Carolina. In August of 1968, I was assigned the MOS (Military Occupation Specialty) 0300, which is an Infantry Small Arms Expert. I was trained, certified, and graduated from ITR in October 1968 and was sent to Camp Pendleton, California for Advanced Infantry Training and Prisoner of War indoctrination. From there, I was assigned to 3rd Battalion 5th Marine Regiment in Vietnam and served as an Infantry Combat soldier from October 1968 through November 31, 1969. I was awarded two Purple Hearts, Combat Action Medal, and several unit citations. As a **small arms expert**, I was trained in and used, the M-16 rifle, M-79 grenade launcher, M60 machine gun, 45 caliber pistol, 12 gauge shotgun, and 81mm mortars. I served in the Marine Reserve until 1974.

In January 1970, I was hired by the Huntington, West Virginia Police Department and sent to the West Virginia State Police Academy for training. As a police officer, I served in uniformed patrol, tactical unit, drug task force, major crimes and homicide detective, Special Weapons and Tactics (SWAT), and police defensive tactics academy instructor for the Huntington Police Department. During my career as a police officer, I investigated and made hundreds of constitutional arrests in misdemeanor and felony offenses.

As a Police Officer, Major Crimes Detective, and Private Investigator, I investigated more than a 100 murder cases from 1970 until present. I have testified in numerous homicide cases on crime scene investigation, blood splatter, ballistics and digital discovery. During this time, I qualified annually on the FBI firearms course in the use of service and off duty weapons, earning

a distinguished expert certification from the National Rifle Association. Currently I hold a retired law enforcement concealed weapons permit, good in 48 states. The guns I have qualified with are 45. Cal Smith, SIG-P226, S&W 38 caliber, 357 caliber, S&W 12 gauge shotgun, 9mm Beretta Compact and Beretta 9mm, full size.

## **II. Materials and Evidence Reviewed:**

1. State v Brandon Flack Trial Transcripts (400 pages).
2. Crime Scene Pictures from Bluefield Police Department (159 pictures)
3. Lt. Myers Investigative Report and notes (402 Pages)
4. West Virginia State Police Forensic Reports
5. Brandon Flack Medical Records from Bluefield Medical
6. Crime Scene Diagram and Graphs (13 Pages)
7. Statements from:
  - a. Amanda Shorter, including trial transcripts
  - b. Milton Thomas, including trial transcripts
  - c. Jasman Montgomery, including trial transcripts
  - d. Heather Davis
  - e. Ashley Burleson
  - f. India Simmons, including trial transcripts
8. Jacob Thomas Cell phone records
9. 911 Calls and CAD Report
10. Autopsy of Matthew Flack
11. Medical Diagrams of Brandon Flack gunshot wounds from Dr. Bryon Smith
12. Crime Scene Site Inspection, interior and exterior with Sid Bell

## **III. Factual Information**

Brandon Flack was indicted by the October 2011 Term of the Grand Jury for Mercer County, West Virginia. Mr. Flack was indicted on First Degree Murder (under a Felony Murder theory), Burglary, First Degree Robbery, and Conspiracy. He was sentenced to life imprisonment with the possibility of parole on the charge of 1st Degree Murder, 40 years on the charge of robbery, and an indeterminate sentence of 1 to 5 years on the charge of Conspiracy. All sentences were ordered to run consecutively.

Mr. Flack's conviction stems from an occurrence on January 29, 2011, when four African-American males drove to 119 Magnolia Street in Bluefield, WV . On that date, Mr. Flack and two others entered the home of, Matthew Flack, Brandon 's cousin. Joe Flack, Brandon's uncle, remained in the car and did not enter the house. Joe Flack is legally blind. Inside the home, a struggle ensued with Matthew Flack being shot and killed. It was undisputed that Brandon Flack did NOT shoot his cousin, Matthew Flack. A co-defendant, Jasman Montgomery, after police interrogation, confessed to firing a fatal shot. The evidence established that Mr. Flack did not possess a gun at any point prior, during, or after the event.

The State presented testimony from thirteen witnesses. The first four were Bluefield, West Virginia police officers: Detectives, Scott Meyers, John Whitt and Officers, R.S. Gibson, and R.D. Davis, who testified to their investigation of the shooting.

Witnesses five through seven included India Simmons, the victim's cousin and Milton Thomas, the victim's friend. Simmons and Thomas were inside the residence at the time of the incident and testified to their observations. Amanda Shorter, the neighbor to the rear of the Flack house testified to what she saw when Brandon Flack and his co-defendant's approach, enter the Flack residence, and flee after hearing gun shots.

The State's witnesses eight through ten presented scientific evidence from Lt. R.R. Reed, a ballistics expert, Mary Heaton, who provided testimony regarding DNA evidence, and Koren Powers, who testified as to gunshot residue testing.

Witness number eleven was the State's key witness, Jasman Montgomery, an initial co-defendant. Prior to trial, Mr. Montgomery had entered a plea of guilty to the charge of First-Degree Murder with a recommendation of mercy. Clad in orange prisoner attire, Montgomery appeared in court to testify. On direct examination by the state, evidence was elicited from Montgomery that lead to his guilty plea. In his testimony, Jasman Montgomery testified to a plan among the codefendants to rob the home of David Flack, the victim's father. Montgomery also testified to firing the shot that he thought killed Matthew Flack.

Dr. James Kaplan, the Chief Medical Examiner of the State of West Virginia, who had signed the autopsy report, together with another medical examiner in his office were the State's witnesses number twelve and thirteen. Dr. Kaplan testified to the cause of death of Matthew Flack, but also offered other opinions to the specific nature of Matthew Flack's wounds and their cause.

The defenses' only witnesses were Pearl Dunford, Mr. Flack 's mother, and Brandon Flack who testified on his own behalf.

#### **IV. Investigative Findings:**

##### **1. Amanda Shorter**

After reviewing her statements to police on February 16, 2011, her trial transcripts from the preliminary hearing August 19, 2011, and the trial transcripts from April 24, 2012, there seemed to be several discrepancies.

**Eighteen days** after the incident, Amanda went to the police with her statement. In her statement, she says she observed **four** men get out of a car, put on clothes from the trunk, and heard them talking just before entering the Flack home. She states she watched as all **four** men

approached the Flack home, with one male going around the house. She states **three** men went inside the Flack home after the door was opened . A short period later, Amanda stated she heard two gun shots as she was talking on the phone to her boss. Looking out her bedroom window, she saw three men run from the Flack house and one JUMP off the roof. At that time, the roof was covered with snow and ice, making dissention very difficult. She also stated **she saw two white women** run and get in the vehicle with the **four** men.

Amanda Shorter's statement to police was suspect because she **didn't call 911** to report the shots she heard or the men she saw running from a possible crime. She also waited **eighteen** days after the incident with her story.

It is undisputed that Joe Flack is **blind** and couldn't have been one of the four men that approached the house, nor could he have run from the house back to the vehicle. According to his and Jasman's statements, Joe stayed in the vehicle and went to asleep.

Amanda also stated **she saw two white women** run and get in the vehicle with the **four** men. This was never confirmed by police in their investigation nor explored by the defense. In Lt. Myers's report, Officer Davis only found **Jacob Thomas and Jasman Montgomery inside the vehicle** at the Bluefield Hospital. It was reported by Myers that Heather and Ashley **were brought there by someone else**. Heather Davis and Ashley Burleson were interviewed that night by Myers and told him they were not with Brandon and the others. Also Jacob Thomas's **cell phone texts** show that Heather was texting Jacob's phone about coming to the hospital. It would seem that the police knew that Amanda's statement was not consistent with the facts and other statements.

The defense didn't explore the **relationship with David Flack** and Amanda Shorter, nor was her **phone records** subpoenaed to verify her calls to her boss. Amanda described the two women she saw get in the car as one blond and one with dark hair. Heather has **dark hair** and was wearing **glasses** and Ashley also has dark hair. Another discrepancy in Amanda's statement was her February description of the jacket . In February, she described a **maroon** jacket and during the preliminary, she changed the description to a **red** hoodie.

## 2. David Flack

David Flack was never officially interviewed by police nor the defense. He, his vehicle, and his home were the subject of the entire investigation. It is disclosed in Lt. Myers report that David got a call to come home after Matthew was shot. It is not clear who called David, when he was called (was it before 911 call), and how he got home before police got there. It is known that 7 minutes after the 911 call came and 3 minutes after dispatch that Officer Gibson was on scene. David Flack was already home, upstairs, and holding Matthew. He had time to alter the crime scene or hide evidence. He also had time to talk to Milton Thomas about what happened. Phone records were never requested to prove the communications between David and Milton after the shooting.

3. **Heather Davis** was Jasman Montgomery's girlfriend and they have a child together. Jasman used Heather's phone all the time as if it was his own. She was interviewed by Lt. Myers the morning of the incident. She confirms she had no knowledge of any robbery prior to or during the incident at the Flack residence. She had no knowledge on her phone or by hearing conversation from Jasman that there was going to be an attempted larceny of any vehicle or burglary home invasion. She gave police the cell phone on 2/10/11 and nothing was on it. Police made no attempt to dump the phone

before trial. She states she was not with them or at the scene as Amanda Shorter described. She was NOT called for an interview by defense counsel or subpoenaed to trial.

4. **Ashley Burleson** was Jacob Thomas's girlfriend. She was interviewed by Lt. Myers the morning of the incident. She confirms she had no knowledge of any robbery prior to or during the incident at the Flack residence. There was no knowledge on Jacob's phone that there was going to be an attempted larceny of any vehicle or burglary home invasion. Myers took Thomas's phone with a search warrant and found no incriminating messages on the phone from Brandon or Jasman. There were however messages from Heather to Jacob the night of the incident to come to the hospital after the shooting. She was not with them or at the scene as Amanda Shorter described. She was NOT called for an interview by defense counsel or subpoenaed to trial.

5. **Jasman Montgomery**, the co-defendant, didn't give a statement until after he was in jail for eleven months. He failed a polygraph right after his statement. He gave the jury WHAT they needed to hear to hang Brandon with the Felony murder charge and the robbery. There was no evidence of the robbery **other than his statement**. The kick in the door statements was provided by the state to the kids in the house. There was no evidence of the door being kicked or forced. Jasman was their whole case. It appears that Jasman may not have shot Matthew at all. I believe it's possible his bullet struck Brandon and went through his right wrist while he was on his back near the bathroom door. The bullet was ascending upward and went through the door at 12 inches and hit the wall on the other side of the door in the wall at 13 inches. This bullet would have had to be fired from down the stairs. Jasman also gave a statement to Lt. Myers that they never got in the trunk to change clothes or put on hoodies at the scene. This discredits Amanda Shorter's statement as well.

6. **Officer Gibson** got the call from 911 at 12:53 am and arrived OS at 12:57. The call came in at 12:50am. He states that Matthew was at the top of the stairs with his dad, David Flack, holding him. He retrieved a gun (High Point) next to Matthew's body and states it had a shell stove piped in it. He ejected the shell and laid it down on the step he states. The shell casing was marked in the crime scene pictures as on the 2nd step going up from the first landing and marked as EV1. The shell casing was tested by SP and confirmed it was shot from the HighPoint gun that Gibson said he found by Matthew's body. He said he put the gun in his pocket and gave it to Lt. Myers when he got to the scene and pointed out where the shell casing was. He also states that EMS kicked the shell casing from its position that he laid it down. The 911 CAD report shows he left the scene to go to the hospital at 1:08 am.

7. **Dr. Bryon Smith**, the ER doctor, report shows that Brandon was shot twice. The entrance and exit wounds and angle and direction make it almost impossible for one shot to have made both wounds. This was never questioned by Defense counsel before trial or when the doctor testified. If Brandon was shot twice with two shots then there should have been 3 shell casing at the scene and 3 bullets. Mel Thomas stated that he heard THREE gunshots.

8. **Doctor Kaplan** was not asked by defense counsel the angle and direction and where the gun had to be when the shot was fired. Matthew was shot through the lip and downward through his chin into his chest cavity. The shooter had to be standing over Matthew with the gun angled downward. Jasman stated that he shot one shot UP the stairs near the first landing. He was not in the position to have fired the shot into Matthew from down the stairs.

9. **Lt Myers** admits taking a handgun from Gibson and that the shell casing he ejected was on the step and listed as EV1. He knew from Officer Davis that the girls was NOT with the guys at the

hospital and came later to hospital to address the car issue and give statements. Myers knew that Amanda Shorter could not have seen 2 white girls jump in the car at the scene but used her anyway. Jasman told him they were not, Heather and Ashley told him they were not, Officer Davis and Whitt at the scene didn't see them until later. Myer's testified that the door at the house could have been damaged anytime before the incident.

10. **Doctor Elise Arbeferville** who did the autopsy was not called as a witness at all. He should have been called and interviewed about the angle and direction.

11. **Milton Thomas** was at the top of the stairs at the flat where everything happened. He was at the right distance and angle to pick up the gun that Matthew had shot Brandon with one time.

**Is it possible** Milton could have shot towards Brandon that was on the floor with Matthew on top and hit Matthew through the lip? He could have put the gun down beside Matthew, picked up the shell casing, and ran because the gun jammed. Based on the evidence, Jasman's shot could have hit Brandon in the wrist. Milton lied to police about the 911 call and it seems he may have been more involved. In all scenarios, Matthew was shot from above and straight downward and Brandon was shot in the groin from above and downward to the left. Brandon's second shot was through the right hand by his thumb and out the back of his wrist, two totally different angles. I would believe that the scientific evidence would help Jasman on the murder charge. He admits shooting a gun towards Matthew and Brandon but doesn't know if his bullet killed him. We do know that a third gunshot EV21 was possible that hit the wall above the blood at the top of the stairs. I know he has admitted that the High Point was his but that was eleven months after his arrest and when he was cutting a deal.

#### **Ineffective assistance of counsel issues:**

##### **The Defense Counsel:**

1. Did not employ the services of a private investigator with homicide and criminal investigative experience to review crime scene photos or investigative reports by police and State's experts.
2. Did not employ the expert services to reconstruct the crime scene to prove the angle and direction **where** the gun shots were fired that wounded Brandon Flack and killed Matthew Flack. This evidence was not presented nor performed by the State, which is crucial.
3. Didn't hire any experts to examine the medical records and prove angle and direction of the shots that hit Brandon. They did not cross Dr. Smith about the two shots with the chart.
4. Didn't call any witnesses, other than Brandon and his mother.
5. Didn't address the autopsy finding on the angle of the shot on Matthew.
6. Didn't address the gun shots to Brandon.
7. Didn't cross Gibson on the stand when he testified that he found the Highpoint at the scene and ejected the shell and laid it on the step. Gibson said "I am familiar with that gun".

8. Never addressed the gun shot that went through the bathroom door proving the bullet was shot from down the stairs. The shot went through the door at 12 inches and came out into the wall at 13 inches high. This shows it was fired from a down to up angle. The SIG shell casing was found on the first landing and that is where Jasman said he fired the one shot. If Matthew fired the SIG at the top of the second landing, how did the SIG shell casing get all the way down the stairs to the first landing?

9. Never interviewed Amanda Shorter before the trial to dispute her different stories and to explore why it took eighteen days to come forward, why she didn't call 911 the night she saw the incident, and her relationship with David Flack.

10. Never interviewed David Flack to question him about his car, drugs, or money that Brandon could have known about. It was not disclosed **WHO** called David and how he got home **BEFORE** the police arrived at his residence. It was not disclosed if the gun found at the scene belonged to him.

11. The State, nor Defense questioned David Flack about the prior damage to the rear door and if any damage was fresh, showing signs of forced entry.

12. According to Pearl Dunford, David Flack or Melton Thomas did NOT go to the hospital after Matthew was taken from the home. The police never questioned David why he didn't go to the hospital with his son, who had just been shot.

13. Never requested that the State provide the ownership of all the guns from ATF. This was crucial to trace the guns to see who owned them and how they got at the Flack residence that night.

14. Never requested the 911 and CAD calls to see if Milton Thomas did make calls to 911 and what he said. CAD reports show that Milton did not call police.

15. Never requested or subpoenaed Amanda Shorter's, David Flack's, and Milton Thomas's phone records to prove that the statements they gave were credible.

16. Prosecutor was present and interviewing Jasman with Myers in November 2011 about the shooting. He could have been a witness.

17. The State went forward with Jasman's story, even though he failed the polygraph the same day he gave the statement.

18. Defense didn't produce evidence to dispute any of the State's witnesses testimony.

19. Defense counsel did not interview the following important witnesses that had factual and relative information about the case.

- a. Heather Davis
- b. Ashley Burleson
- c. David Flack
- d. Amanda Shorter
- e. Dr. Bryon Smith

- f. Dr. James Kaplan
- g. Officer Davis
- h. Officer Whitt
- i. Officer Gibson

**Things that weren't disclosed, investigated by Police or requested by counsel prior to trial:**

1. No close-up picture of the door being forced or kicked open. There were no shoe prints or fresh damage on the door.
2. No pictures of the High Point at the scene.
3. No pictures of the masks and guns found in the trunk.
4. No 911 calls or CAD report.
5. No interview or investigation of David Flack.
6. No follow up on the expert findings of how Matthew was shot.
7. No follow up of Brandon being shot twice, explaining the angle of the shot or where the other shell casing and bullet were.
8. No pictures of the bathroom window and screen that Milton said he jumped out of.
8. No follow-up to prove or disprove Milton's stories or 911 call.
9. Didn't test the SIG bullet recovered for DNA blood to determine if Brandon's was on it.

**Discrepancies:**

a. If you were going to commit a robbery, would you take a blind guy, change clothes, and make noise talking and laughing? Amanda Shorter stated she saw all four men get out of the car, with one going around the house. How could a blind guy do walking around the house or run back to the car after shots were fired.

b. Milton Thomas's story is questionable in many ways. (See Above)

c. David Flack never had to prove or say he had any money (15K) or drugs in his car to steal, thus discrediting the robbery and larceny. No one explored how David found out so quickly that Matthew was shot. It is possible that David or Milton altered the crime scene before the police arrived. The guns were never traced to the prior owners. Jasman said the (SIG & Derringer) belonged to him.

d. Officer Gibson testified that he found the Highpoint near Matthew's body. He ejected the jammed shell casing and laid it down on the steps. He admits it was kicked by EMS, but was on the step that was photographed as EV1.

e. Jasman's statement about where he shot from was around the second landing, where the SIG



shell casing was found. The bullet that went through the bathroom door was shot from a downward to upward angle. Jasman stated he fired upward towards the figures at the top of the third landing.

- f. State Police Reports confirm **EV1** was the **High Point shell** casing and **EV2** was the **SIG**.
- g. It seems impossible that Matthew could be shot through his lip, down through the chin, and into his chest from Jasman's position below him, while Matthew was on top of Brandon.
- h. Milton **heard 3 shots**. He was the only one that witnessed the struggle. He was in the right angle and direction to fire the shot into Matthew, place the gun down, and jump out the window.
- i. Brandon was shot **two times, at totally different angles**. Milton was the only one that had the angle and distance to have fired both shots. It is possible that Matthew shot Brandon once and then Milton's gun shot a second time, through Brandon's hand.
- j. Milton **didn't** call 911, according to the CAD report.
- k. It seems Jasman made a deal and told the police what they wanted, even saying the guns **belonged to him**.

### Conclusions:

The steps leading upstairs in the Flack home were composed of two steps located in the downstairs living room to the first landing. The steps continue at a right hand turn and proceed to a second landing. A window is located on the second landing. The steps again make a right hand turn up to a third landing, located outside three bedrooms and a bathroom. The SIG shell EV2 casing was found on the second landing. It had to be fired in that general area or maybe up a few steps. Since the shell ejected right and to the rear, it could have hit the wall and landed on the second flat.

If Matthew had the SIG at the top of the third flat and shot Brandon, the shell casing from the SIG would be upstairs on the third landing. The shell casing EMS kicked was EV1, not EV2. Due to forensic testing, we know that the bullet found in the bathroom was from a SIG. It entered at 12 inches from the base of the door, hit the wall at 13 inches, meaning the bullet was traveling upward. This would indicate it was fired from a downward position as indicated in Jasman's statement.

Since the SIG is a right side ejection weapon, if Matthew shot Brandon with the SIG the shell casing would be at the top of the stairs, not 5 steps down on the second landing. You can not position Brandon's body near the bathroom door to make that shot work with his entrance and exit wounds.

Officer Gibson's admission of **finding the High Point near Matthew's body** at the top of the second flat and **ejecting the jammed shell casing** is crucial. **His testimony was that he is familiar with the High Point.** Gibson testified he ejected the stove piped shell and laid the casing down on a step. He states it was accidentally kicked by EMS and was not in the place where he laid it. He then notated it to Lt. Myers as **EV1** on the 2nd step up to the top landing.

**Obvious Questions:**

1. During a search, twelve hours later at the Bluefield Police Department, the High Point ended up in the trunk of the red car driven by Jacob Thomas. How did the gun get there when Gibson found the gun on the stairs near Matthew Flack's body?
2. Why were no time stamped pictures taken of the guns or hoodies in the trunk, even though there were pictures taken of the blood stains on the interior and exterior of the car?
3. Why wasn't Brandon's two gunshot wounds questioned?
4. Why wasn't Milton's story and the 911 call investigated more thoroughly, since he said he saw the struggle, heard three gun shots, and was the only person that had the position to fire shots into both Matthew and Brandon?
5. Why weren't the owners of the guns traced?

Respectfully,

A handwritten signature in black ink, appearing to read "Danny Lane". The signature is written in a cursive, flowing style.

Danny & Gina Lane Investigations LLC