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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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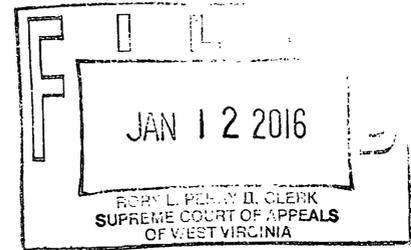
ROBERT HERNANDEZ, JR.,

Petitioner,

v.

DAVID BALLARD, Warden of the
Mount Olive Correctional Complex,

Respondent.



APPEAL FROM THE CIRCUIT COURT OF MONONGALIA COUNTY
THE HONORABLE SUSAN B. TUCKER
Case No.: 14-F-314

PETITION FOR APPEAL

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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Upon review of the case and relevant rules, the Petitioner believes this case is proper for a Rule 19 argument since it involves assignments of error in settled law and issues regarding the unsustainable exercise of discretion in cases where the law is settled.

**NATURE OF RULINGS BELOW /INTRODUCTION
AND STATEMENT OF FACTS**

This was a criminal proceeding before the Circuit Court of Monongalia County, with the Honorable Judge Susan B. Tucker, presiding.

Robert Hernandez, Jr., (hereinafter referred to as "Petitioner"), was indicted (Appendix Vol. I, pg. 8) in the September 2014 term of Court, by the Monongalia County Grand Jury in a single count Indictment for Murder in the First Degree.

On February 6, 2015, Petitioner was convicted of Murder in the First Degree by a petit jury in the Circuit Court of Monongalia County, with the supplemental verdict of No Mercy.

Based on the jury verdict and the jury's recommendation for no mercy, the Court Ordered the Petitioner to be sentenced to a term of life imprisonment in the West Virginia State Penitentiary without mercy, meaning that the Petitioner is not be eligible for parole at any time.

On May 4, 2015, a post-trial motion hearing was held on Petitioner's duly filed Motion for Judgment of Acquittal and Motion for New Trial. The States filed its response. The Court denied Petitioner's motions.

Petitioner sought relief from his convictions by filing a petition for appeal in the Supreme Court of Appeals of West Virginia.

IV. ASSIGNMENT OF ERROR

- A. The Jury's Verdict Was Against the Manifest Weight and Sufficiency of the Evidence Adduced At Trial.
- B. The Trial Court Erred When It Denied Petitioner's Motion for Judgment of Acquittal or, in the Alternative, for a New Trial on Grounds that the State Failed to Sufficiently Establish the Elements of Premeditation and Deliberation for a First Degree Murder Conviction.
- C. Petitioner Hernandez' Due Process Rights Were Violated When The Trial Court Denied His Motions for Judgment of Acquittal and New Trial.

V. STATUTORY POINTS AND AUTHORITIES

§61-2-1 First and Second Degree Murder

Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the first degree. All other murder is murder of the second degree.

In an indictment for murder and manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased.

§61-2-2. Penalty for First Degree Murder.

Murder in the first degree shall be punished by confinement in the penitentiary for life.

United States Constitution, 14th Amendment, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III, Section 1, of the West Virginia State Constitution, Bill of Rights.

All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: The enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.

VI. STANDARD OF REVIEW

This case is an appeal from a Sentencing Order, entered by the Circuit Court of Monongalia County, on April 1, 2015 and Re-Sentenced Order entered on May 15, 2015.

The standard of reviewing sentencing orders are as follows: “The Supreme Court of Appeals reviews sentencing orders under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syllabus pt. 1, in part, *State of West Virginia v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997).

VII. ARGUMENT AND DISCUSSION OF LAW

A. The Jury's Verdict Was Against the Manifest Weight and Sufficiency of the Evidence Adduced At Trial.

This case involves the arrest, interrogation, detention, trial and criminal conviction of Petitioner, Robert Hernandez, Jr. (hereinafter referred to as "the Petitioner") for the alleged murder of an African American named, Devante Waites (hereinafter referred to as "the decedent"). The decedent was a 2013 graduate of Fairmont Senior High School and incoming freshman at West Virginia University. The West Virginia Medical Examiner, Dr. James C. Craner, testified that they found alcohol present at a concentration of .03 percent in the decedent's blood and also in the urine at .06 percent. He also testified that there was a finding of marijuana in the decedent's blood as well as a marijuana metabolite. (Appendix Vol. III, pg. 232, lines 3-6)

There can be little doubt that one's interest in not being wrongfully convicted by a petit jury falls within the 'life or liberty' language of the Fourteenth Amendment¹ to the United States Constitution and within Article III, Section 1, of the West Virginia State Constitution.

From a verdict of guilt in a criminal trial, "the evidence is to be viewed in the light most favorable to the prosecution." *State of West Virginia v. Yates*, W.Va., 288 S.E.2d 522, 523 (1982), citing syl. pt. 1, *State of West Virginia v. Starkey*, W.Va., 244 S.E.2d 219 (1978).

In this case, the Petitioner pled not guilty at arraignment proceedings, rejected proposed plea agreements offered by the State and maintained his innocence throughout the criminal proceedings.

¹ Section. 1. ...nor shall any State deprive any person of life, liberty, or property, without due process of law.

At trial, the State presented evidence that (1) the killing was done with a bladed instrument; (2) the victim and Petitioner never spoke to one another; (3) the victim and Petitioner were not involved in an ongoing argument; and (4) the victim and Petitioner never met one another.

To the contrary, several witnesses, including family members, positively identified Tashaon Shamel Davis-Jones (hereinafter referred to as “Mr. Davis-Jones”) as the person who stabbed the decedent. Incongruously, the State did not call Mr. Davis-Jones as a witness in the case. (Appendix pg. 473, line 3)

After deliberation, the jury convicted the Petitioner of murder in the first degree, with a supplemental verdict of no mercy.

The Petitioner asserts that the verdict is of questionable validity. Based upon the verdict, it appears that the jury evidently believed the State's key witness, Mr. Jared Ford (hereinafter referred to as “Mr. Ford”) and was able to resolve the discrepancies in his testimony in light of substantial key factual conflicts. However, even when viewed in the light most favorable to the prosecution, the factual conflicts found in this case provides reasonable doubt concerning Petitioner’s guilt, and suggest that the jury committed prejudicial error.

The Bailey Court stated, “We are, of course, not empowered to look over a jury's shoulder and second-guess the jury on the issue of credibility.” *State of West Virginia v. Bailey*, 151 W.Va. 796, 155 S.E.2d 850 (1967).

However, the Atkins Court stated, “Nonetheless, this Court has said in an analogous context that where “the case contains a number of substantial key factual conflicts ... there is an increased probability that an error will be deemed prejudicial.” *State of West Virginia v. Atkins*,

W.Va., 261 S.E.2d 55, 63 (1979), cert. denied, 445 U.S. 904, 100 S. Ct. 1081, 63 L. Ed. 2d 320 (1980).

The Adkins Court further stated, “Although manipulation on appeal of a jury verdict is an enterprise to be undertaken rarely, and in extraordinary circumstances...an appeals court may properly pass on the validity in light of the evidence of the jury's conclusions, if for the purpose of assessing the weight of the verdict against the magnitude of the error.”

The magnitude of the error measured against the weight of the verdict suggests that a reasonable doubt was created by the inconsistent testimony of Mr. Ford, and the obvious inconsistencies and discrepancies were completely ignored by the jury.

It appears that the decedent was stabbed in the blink of an eye. That sad reality was consistent with Mr. Ford’s testimony, which corroborated his ephemeral view of an alleged incident that occurred within two seconds.

The evidence in this case consists of an indecipherable video (Appendix, Vol. 1) (Appendix –Tre Hines) which contains (a) silhouette images captured from surveillance camera’s inside Brent Willey’s Bar (hereinafter referred to as “the Bar”) and (b) the incredible testimony of Mr. Ford (Appendix, Vol. III, pgs. 67-118), an intoxicated patron, who provided two (2) inconsistent statements to law enforcement, with conflicting descriptions of the assailant, on two separate occasions.

On August 14, 2014, at approximately 12:43 o’clock, a.m., Morgantown police officers were dispatched to the Bar, located at 471 Chestnut Street in Morgantown. Upon arrival, they found the decedent stabbed in the abdomen. EMS personnel attempted to render first aid and transported the decedent to Ruby Memorial Hospital. He was pronounced dead as a result of the wound.

As a result of the incident, Morgantown police and the U.S. Marshal's Mountain State Fugitive Task Force began conducting an investigation. They reviewed video surveillance footage of camera's from other business establishments in the immediate area, including video surveillance camera's located inside the Bar. Moreover, the authorities interviewed a number of witnesses, including Mr. Ford, who was a patron at the Bar.

Mr. Ford had no personal knowledge of any of the events that he provided the jury in his testimony during trial. In fact, on August 14, 2014 Mr. Ford provided an initial statement to law enforcement that clearly showed that he had no personal knowledge of the stabbing incident other than what he was told by the decedent's family and friends. On September 24, 2014, Detective Trejo unequivocally coached Mr. Ford during the second interview. The surveillance video was indecipherable and Detective Trejo advised Mr. Ford to follow his imaginary path towards the Petitioner.

Several eyewitnesses testified that they believed that Mr. Davis-Jones stabbed the decedent, not the Petitioner.

Let's examine Mr. Jovaun Howard's testimony during trial.

(Appendix, Vol. III, pg. 58, lines 20-24)

BY MR. LAMBERT:

Q. And at some point in time you gave a statement, didn't you?

A. Yes, sir.

Q. In your statement did you tell the authorities who you believed had stabbed your friend?

(Appendix, Vol. III, pg. 59, lines 1-24)

A. Yes, sir.

Q. Who did you tell them that you thought did it?

A. Well, at that moment I thought it was Tashaon.

Q. Why?

A. Because when -- watching the video, you see him at the end of the fight jerk and, like, you know, jump towards him at the end of the fight and get a hit. And when I seen that, I think - - I thought, you know, that's when he -- I thought he stabbed him, but, like going on, later on, watching the video, they show you, you know, what actually happened.

Q. They showed you?

A. Yes, sir.

Q. Who is "they"?

A. The people that showed you the video, the attorneys, the -- whatever you want to call them. I'm sorry.

Q. How do they know? They weren't there.

A. They know what?

Q. How do they know what happened?

A. They seen the video.

Q. But you were there and you told them who you thought stabbed your friend, didn't you?

A. Yes, sir.

(Appendix, Vol. III, pg. 60, lines 1-24)

But they told you what happened?

A. You see it in the video. They didn't tell me what happened; I watched what happened.

Q. That's what you just said, sir.

A. I mean, they pointed me into another direction and told me to watch this, and that's what happened.

Q. Oh, really?

A. Yes, sir.

Q. Thank you. So the information that you took to the authorities was that it was your belief at that time -

A. Yes, sir.

Q. -- that Tashaon Davis was the perpetrator of this crime?

A. Yes, sir.

Q. And you believed that, didn't you, until you were told differently?

A. Not told different.

Q. Very well, sir. What did Mr. Hernandez have to do with this at that particular point during the fight?

A. I mean, he came over there and did what he did.

Q. No, no. Let me rephrase my question.

Was Mr. Hernandez involved in your fight with Tashaon Davis?

A. No, sir.

(Appendix, Vol. III, pg. 61, lines 1-6)

Q. Was -- did you see Mr. Hernandez in the area of that altercation at all?

A. No, sir.

Q. And you told the police initially that Tashaon Davis did it, didn't you?

A. Yes, sir.

(Appendix, Vol. III, pg. 63, lines 6-24)

BY MRS. DECHRISTOPHER:

Q. Jovaun, did you see Tashaon with a knife?

A. No, ma'am.

Q. Did you see him stab anyone?

A. I thought I seen him stab someone, yeah.

Q. Did you see anything in his hand?

A. Not initially, but I thought, you know, he covered it up pretty good when he did it.

Q. I'm talking about Tashaon, the person that you guys were fighting with originally.

A. Uh-huh.

Q. When you thought that he was the stabber -

A. Uh-huh.

Q. -- when you told the police that -

A. Uh-huh.

Q. -- you just assumed that because that's who you were fighting with; correct?

A. Yes, ma'am.

Q. You didn't see him stab --

(Appendix, Vol. III, pg. 64, lines 1-20)

MR. LAMBERT: Objection, Your Honor. She's leading him.

MRS. DECHRISTOPHER: Sorry.

THE COURT: Sustained. She'll rephrase.

MR. LAMBERT: Thank you.

MRS. DECHRISTOPHER: I will.

BY MRS. DECHRISTOPHER:

Q. You originally thought it was the person that police took into custody?

A. Yes, ma'am.

Q. Correct?

A. Yes, ma'am.

Q. And I think that defense counsel asked you why you thought that, and you said you had a million things going on in your head?

(Appendix, Vol. III, pg. 64, lines 12-23)

A. Yes, ma'am.

Q. Tell us what was going on in your head.

MR. LAMBERT: Objection, Your Honor. That was the other witness that said "I had a million things going on in my head."

MRS. DECHRISTOPHER: Strike that.

THE COURT: You are absolutely right. She's striking the question.

Clearly, Mr. Davis-Jones was positively identified by several witnesses as the person believed to have stabbed the decedent and was the target of the murder investigation. The footage from the surveillance video from the Bar did not exonerate Mr. Davis-Jones, nor

incriminate the Petitioner. What was needed was further investigation of Mr. Davis-Jones.

Detective Trejo and others used the surveillance video to coerce patrons to change their stories and identify the Petitioner as the perpetrator of the killing.

The record shows that Mr. Ford was sympathetic towards the plight of the decedent and that he had discussions with the decedent's family members while waiting to be interviewed by law enforcement, on August 14, 2014. While waiting, they were discussing the facts of the case with each other, and Mr. Ford was clearly told that Mr. Davis-Jones was the person who's moments they observed and that he was believed to be the person who stabbed the decedent.

Let's examine Mr. Ford's testimony during direct examination.

(Appendix, Vol. III, pg. 67, lines 18-19)

BY MRS. DECHRISTOPHER:

Q. Sir, why don't you state your name for the jury?

A. I'm Jared Ford.

(Appendix, Vol. III, pg. 67, lines 20-24)

Q. I'm going to ask you to keep your voice up so I can hear you all the way back here.

Okay?

A. Okay.

Q. How old are you, Jared?

A. I'm 23.

(Appendix, Vol. III, pg. 70, lines 2-9)

Q. Okay. What did you witness happening next?

A. I remember looking over and the first thing I saw was a larger gentleman come up to someone and make a motion towards his side that I immediately -- my first innocent

thought was, wow, looked like he shanked that person, and then I -- I immediately forgot the idea, and I decided to help intervene with the fights.

(Appendix, Vol. III, pg. 72, lines 1-7)

Q. What happened next?

A. They brought me out the back of the club and then to the parking lot with the other witnesses.

Q. Okay. Did you see anyone that police had in custody?

A. They eventually led me to the guy they had arrested, yes.

Q. And what were your thoughts when you saw that?

A. As soon as the second I saw him I knew it wasn't the guy that I had saw make the motion before. Within one second I said, "I don't know who that is."

Q. And who did you say that to?

A. The police officer that I was with.

Q. Okay. The person that they led you to and the person that you saw in police custody, did you see that person engaged in the fight?

A. Not that I was able to differentiate.

(Appendix, Vol. III, pg. 72, lines 18-24)

Q. Okay. So what happened next?

A. I waited for -- around a little bit. I ended up being with the friends and the brother of Devante. I went back to the police station and we waited to give our testimonies.

Q. Had you known any of those individuals before that night?

(Appendix, Vol. III, pg. 73, lines 1-23)

A. No.

Q. Had you even made note of them at the bar before the incident took place?

A. No.

Q. Did you come to give your statement to law enforcement that night?

A. I'm sorry.

Q. You gave a statement to law enforcement that night at the police station; correct?

A. Yes.

Q. What was your state of mind that evening when you had arrived at the police station?

A. Well, when I arrived at the police station, I was obviously shaken up a bit. I was sad, but I -- I had heard he -- I had known that he had been stabbed, but I didn't think it would be fatal. I thought, you know, just a stabbing. You know, you hear that a lot. It wasn't until the friends of Devante noticed -- or they found out that he had passed, that obviously the whole situation became much more emotional.

Q. You were with those friends when they found out that Devante had passed; correct?

A. (Nods head).

(Appendix, Vol. III, pg. 74, lines 1-24)

Q. Yes?

A. (Nods head).

Q. Did that affect you?

A. (Nods head).

Q. Okay.

A. It was the saddest thing I've ever witnessed.

Q. And, sir, you gave your statement to law enforcement that night -

A. (Nods head.

Q. -- remembering as best you could?

A. Yes.

Q. Did there come a time later that you went back to the police station to give another statement?

A. (Nods head). About a month later, yes.

Q. And the second statement was to Detective Trejo; is that correct?

A. Yes.

Q. Did you come to learn in that statement that there was a video of the incident that happened that night?

A. Yes.

Q. And did you watch that video?

A. I did.

Q. And were you able to view that video and get your bearings and determine where you were during that video?

A. After multiple viewings, yes.

(Appendix, Vol. III, pg. 75, lines 1-6)

Q. I'm sorry. Can you repeat that?

A. After looking at it a few time, yes, I was able to find myself.

Q. Okay. Did you come to learn that your perception, some of your perceptions of that night, when you gave your first statement at the police department, were just wrong?

(Appendix, Vol. III, pg. 75, lines 7-24)

A. Yes.

Q. And how did you learn they were wrong?

A. I learned that what I believed to have -- what I believed to have witnessed was Devante being stabbed was actually a very similar, what appeared to be an attempt, but somehow failed, on another of the friends.

MR. LAMBERT: I'm sorry, Your Honor. I didn't hear that, the last part of that.

THE COURT: Can you repeat it, please?

THE WITNESS: I came to realize that what I had thought was him stabbing Devante was a very similar motion towards someone else.

Q. Because that person wasn't Devante; correct?

A. Correct.

Q. I'm going to --

MRS. DECHRISTOPHER: Your Honor, may I approach the witness?

THE COURT: You may.

(Appendix, Vol. III, pg. 81, lines 3-11)

Q. Tell us what do you attribute that difference to?

A. I -- I think -- I had only seen the person for two seconds or less. I never really recall trying to look at their face and memorize their face. My attention was diverted to their torsos and the motion I saw, and then I immediately was on my way in between them and that person was behind me. I never got another look at the guy. I was just trying my best to pull what I could from that two seconds of memory.

Let's examine Mr. Ford's testimony on cross-examination.

(Appendix, Vol. III, pg. 86, lines 1-24)

BY MR. LAMBERT:

You were drinking, weren't you?

A. Yes.

Q. And how far away were you from the decedent when he was stabbed?

A. Ten to twelve feet.

Q. Ten to twelve feet? Do you wear contacts?

A. No. I have perfect vision.

Q. Now, you told us that you had about two seconds -

A. Yes.

Q. -- two seconds to identify the stabbing motion; is that correct?

A. Yes.

Q. All right. And were you fixed on the perpetrator's face?

A. No.

Q. What were you fixed on?

A. The stabbing motion.

Q. The stabbing motion. So you are telling us for two seconds your eyes were fixed on the motion?

A. I mean, yes.

Q. I'm sorry. I can't hear you.

A. Yes.

Q. Did you see a knife?

A. No.

(Appendix, Vol. III, pg. 91, lines 19-24)

Q. Now, after watching the video with law enforcement, you changed your story, didn't you?

A. I don't feel that I did.

Q. Well, let's talk about that. On August 14, 2014, you gave a story to the authorities, didn't you?

A. Yes.

(Appendix, Vol. III, pg. 92, lines 1-18)

Q. Would you tell the Judge and the ladies and gentlemen of the jury whether or not that story changed on September 24 of 2014?

A. I'm not aware if it -- of any difference.

Q. On cross-examination, Mr. Ford, you testified that after watching the video with law enforcement you realized that you got some things wrong [sic].

A. Yep.

Q. Would that be a change to you?

A. Oh. Well, then, yes.

Q. In your initial description of the perpetrator, tell us what description did you give the police on August 14 of 2014?

A. I said he was approximately 250 pounds. He was wearing a light polo, perhaps blue; shorts; and that I thought he had short hair.

Q. You thought he had short hair?

A. Yes.

(Appendix, Vol. III, pg. 92, lines 19-24)

Q. Why would you think he had short hair?

A. I'm not sure. I was just doing the best I could.

Q. But you also described a race, didn't you?

A. Yes.

Q. What race did you tell him?

A. I said that he looked light-skinned black.

(Appendix, Vol. III, pg. 93, lines 1-24)

Q. Did you say that you said you told the police on August 14 of 2014 that the perpetrator was light-skinned?

A. I don't recall if that's what I said or not, but I definitely said he was a black gentleman.

Q. Did you tell the authorities at that time how long was the perpetrator's hair?

A. I gave an approximation. I can't remember exactly what it was.

Q. Isn't it true that you made a gesture in your interview, you said it was about that long? And then later you said his hair was one and a half to two inches thick, isn't that true?

A. Well, if I had said that, then I didn't convey what I meant.

Q. If you had said that, then you didn't convey - what did you mean?

A. That he had short hair, like a typical cropped top.

Q. So your statement to the police that his hair, the perpetrator's was one and a half to two inches long was incorrect? You didn't mean that?

A. I'm sure -

Q. I'm sorry, sir. I didn't understand that response.

(Appendix, Vol. III, pg. 94, lines 1-24)

A. I think I may have over exaggerated what I meant to have said, but one inch is what I had said, yes.

Q. Well, would you -- would you tell us what else you may have over exaggerated in your story?

A. Nothing comes to mind.

Q. Do you recall in your initial statement, which was given on August 14 of 2014, when you indicated that you really didn't know what had happened?

A. Where I indicated that I didn't know what happened?

Q. Yes.

A. Can you repeat the question, please?

Q. I'll move on, sir.

Do you remember saying in your initial statement on August 14 of 2014 that you don't really remember everything because it all happened so fast?

A. Yes.

Q. Now, did you know a gentleman by the name of Tashaon Davis-Jones?

A. No.

Q. Did you ever see a gentlemen by -- well, if you didn't know him, you wouldn't see him.

Were you told or shown this gentleman at any point in time prior or after the fight?

(Appendix, Vol. III, pg. 95, lines 1-6)

A. Yep.

Q. Where was he?

A. He was handcuffed to a parking meter in front of the club.

Q. This was after the fight?

A. Yes.

(Appendix, Vol. III, pg. 95, lines 7-24)

Q. Were you asked to identify him?

A. Yes.

Q. Did you?

A. I told him that it wasn't the guy I had seen.

Q. Who did you tell that to?

A. A police officer.

Q. And -- but were you aware of a conflicting story that said that that was the perpetrator of the crime?

A. All I knew was they told me they had a suspect and they showed it to me and I told them that's not the guy that I saw.

Q. When you were asked by law enforcement on August 14 of 2014 to think back from the beginning, isn't it true that you said my account appears to contradict theirs?

A. Yes.

Q. So it's true you were aware of another story?

A. My story, yes.

(Appendix, Vol. III, pg. 96, lines 1-9)

Q. Was there a story that contradicted your story?

A. Yes. They had believed it was the guy they got in the fight with.

Q. Who was this Tashaon Davis-Jones; is that correct?

A. Yes.

Q. All right. Now, you were shown him, and it's your story that this is not the guy that you saw do this; is that correct?

A. Yes.

(Appendix, Vol. III, pg. 96, lines 10-24)

MR. LAMBERT: All right. Now, with the Court's indulgence, Your Honor.

BY MR. LAMBERT:

Q. Did you ever see a knife?

A. No.

Q. Did you see a tooth brush?

A. No.

Q. Did you see any sharp object?

A. No.

Q. When you were shown Mr. Davis, isn't it true that you indicated that you were probably confused if that was the guy?

A. Is it true that I indicated I was confused?

Q. I will withdraw the question, sir.

Tell us what type of lighting was it on the dance

(Appendix, Vol. III, pg. 97, lines 1-10)

A. Green, pink, white, blue, red.

Q. It was flashing, wasn't it?

A. Yeah. It was lots of lights.

Q. I'm sorry. Say it again?

A. There were lots of lights, yes.

Q. And you were seven feet away so you say; is that correct?

A. No. I believe I said ten to twelve.

Q. You said ten to twelve?

(Appendix, Vol. III, pg. 97, lines 11-24)

A. If we are referencing the past five minutes ago.

Q. Very well, sir. I stand corrected.

Now, at what point in time during your second interview on September 24 of 2014 did you change your story?

MRS. DECHRISTOPHER: I'm going to object, Your Honor, to the characterization of changing his story. This witness said, "I didn't change my story, I watched the videotape." He doesn't ever change his story. He says that's what he said in the first interview and that was it; so I'm going to object to that characterization.

THE COURT: Sustained. And you can ask it another way. You can ask him what he said this time,

(Appendix, Vol. III, pg. 98, lines 1-17)

what he said that time, and the jury can conclude whether or not he changed his story.

MR. LAMBERT: Very well, Your Honor.

BY MR. LAMBERT:

Q. At any point in time had you been mistaken, Mr. Ford, in terms of the scenario you gave on August 14 versus the scenario you gave on September 24?

A. Did I repeat the scenario of September 24? I thought we just watched the video.

Q. You watched the video? Who did you watch the video with?

A. Detective Trejo.

Q. Detective Trejo?

A. Uh-huh.

Q. All right. And after you watched the video, did you say anything different than what you said to law enforcement on August 14 of 2014?

(Appendix, Vol. III, pg. 98, lines 18-24)

A. I don't recall saying anything so much different that I can remember it.

Q. At any point in time did Officer Trejo show you a video, pictorial representation where Mr. Hernandez had on a hat?

A. So you are asking me if in the video he was wearing a hat?

(Appendix, Vol. III, pg. 99, lines 1-21)

Q. I'm asking you did Detective Trejo show you a pictorial representation where Mr. Hernandez had on a hat?

A. By pictorial representation do you mean video?

Q. Picture, yes.

A. I never saw pictures. Only watched the video.

Q. On the video, did you tell the officer that Mr. Hernandez had on a hat on August 14 of 2014?

A. No, I did not.

Q. Did you say that he had on a hat on September 24 of 2014?

A. No.

Q. You didn't? Were there any discussions on September 24, 2014, about the defendant having on a hat?

A. No. I don't think I realized that at the time.

Q. I'm sorry?

A. I don't believe I realized that at the time.

Q. You realized what at the time?

A. He was wearing a hat.

Q. Very well. So the defendant did have on a hat, didn't he?

A. Yes.

(Appendix, Vol. III, pg. 99, lines 22-24)

Q. When did you discover that the defendant had on a hat?

A. When re-watching the video.

(Appendix, Vol. III, pg. 100, lines 1-14)

Q. But you didn't say he had on a hat in the initial interview on August 14 of 2014, did you?

A. It would appear I didn't notice that.

Q. You didn't notice that? You said that his hair was an inch and a half to two inches thick; isn't that correct?

A. That was my guess, yes.

Q. With no hat?

A. Talking about two seconds.

Q. Yes, we are. Yes, we are, Mr. Ford. Two seconds.

MR. LAMBERT: Ask the Court's indulgence for one moment, Your Honor.

THE COURT: Whatever.

MR. LAMBERT: Thank you.

(Appendix, Vol. III, pg. 104, lines 13-24)

BY MR. LAMBERT:

Q. Could you show us -- we're going to start again at the frame 23:34:40. Could you show us, if you will, where Tashaon Davis-Jones is?

A. I will try, based on what other people have told me where he is.

Q. Based on what other people have told you where he is?

A. I don't know Tashaon. I didn't know who he was during the fight. I didn't know any of the people. So the only way I know who any of the people are within the video is what people have told me afterwards who have talked to the witnesses.

(Appendix, Vol. III, pg. 105, lines 1-24)

Q. Who told you that?

A. Detective Trejo, the police that watched the video with me. So you're -- I mean, I can tell you what they have told me and point it out as that person, but at the time of the video, at the time of this, I didn't know who anybody was. But I can point to you and tell you who they told me Trevon is [sic].

Q. Would you do that for us?

A. Yes.

Q. Just ask us to stop and we will.

A. Let's see. The guy in the white -

Q. Could you stop, please?

A. -- is Tashaon.

Q. You want to use this so you can point to it right there on the screen? It's a little red dot.

A. That is what I believe to be Tashaon.

Q. Where are you?

A. Standing right behind him. Right there.

Q. You are standing right behind him?

A. Yes.

Q. Where is Majid?

A. You would have to back up while I follow it.

Q. But he's not behind you, is he?

A. I can't tell. It's not a very good video.

(Appendix, Vol. III, pg. 106, lines 1-24)

Q. We can back up. Would you back up a little bit, please?

A. He's right here.

Q. Stop, please. Would you use the pointer? Right here, sir.

A. That is him.

Q. That's him right there?

A. Yes.

Q. And where are you?

A. Right there in the white.

Q. Okay. Would you hand me that, please? And Tashaon you said was right -

A. Looks like he's now over my -

Q. Is he here? Or here?

A. Looks like he's the one bent over in front of my waist.

Q. Here?

A. Yes.

Q. All right. Thank you. Thank you, ma'am. Now, after this fight, Mr. Ford, you had blood all over you, didn't you?

A. Yes.

Q. And you don't know where the blood came from, do you?

(Appendix, Vol. III, pg. 107, lines 1-5)

A. Well, after watching the video, it appears it came from Tashaon.

Q. Was Tashaon bleeding?

A. I was told he was. I didn't realize I even had blood on me until I was at the station.

Q. But tell us what else you were told at the station.

A. Well, at the station I wasn't told that at all. I mean, I don't think they knew that he was bleeding.

What was the question?

MR. LAMBERT: Your Honor, I have no other questions for this witness. Thank you.

Clearly, the Petitioner was prejudiced by Mr. Ford's testimony on grounds that the jury wrongfully convicted him of first degree murder. In *State of West Virginia v. Walker*, 207 W. Va. 415, 533 S.E.2d 48 (2000), the Court stated that "the evidentiary rulings of a circuit court, including those affecting constitutional rights, are reviewed under an abuse of discretion standard." *State of West Virginia v. Marple*, 197 W.Va. 47, 51, 475 S.E.2d 47, 51 (1996). The Walker Court stated further, "even if we find the circuit court abused its discretion, the error is not reversible unless the defendant was prejudiced." *Id.* (citing *State of West Virginia v. Guthrie*, 194 W.Va. 657, 684, 461 S.E.2d 163, 190 (1995)).

B. The Trial Court Erred When It Denied Petitioner's Motion for Judgment of Acquittal or, in the Alternative, for a New Trial on Grounds that the State Failed to Sufficiently Establish the Elements of Premeditation and Deliberation for a First Degree Murder Conviction.

The Petitioner argues that the trial court erred when it denied his motion for judgment of acquittal or, in the alternative, for a new trial because the State failed to sufficiently establish the elements of premeditation and deliberation for a first degree murder conviction.

The Petitioner maintains his innocence and argues that after reviewing the evidence in the light most favorable to the prosecution, no rational trier of fact would have found the essential elements of the crime of murder proved beyond a reasonable doubt in this case.

The old adage regarding the burden of sufficiency of evidence stated succinctly is, "A convicted defendant who presses a claim of evidentiary insufficiency faces an uphill climb."

No rational trier of fact could have found the essential elements of murder in the first degree beyond a reasonable doubt in this case.

Clearly, the aggregate evidence culminated in this case would not justify a conviction of the Petitioner.

In *State of West Virginia v. Guthrie*, 194 W.Va. 657, 667-70, 461 S.E.2d 163, 173-76 (1995), we recently revised our standard of review when a criminal defendant challenges the sufficiency of the evidence in support of a jury verdict. We adopted, both generally and in cases with circumstantial evidence, the standard set forth by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The United States Supreme Court held in *Jackson* that when reviewing a record in the light most favorable to the prosecution, an appellate court must determine whether "any rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319, 99 S.Ct. at 2789, 61 L.Ed.2d at 573. (Emphasis in original; citation omitted).

In adopting the *Jackson* standard, we retained a "highly deferential" and "strict" approach stating that "a jury verdict will not be overturned lightly" and concluded in Syllabus Point 1 of *Guthrie*:

"The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt."

By so holding, we overruled our prior cases¹⁰ which applied the requirement the State's evidence must exclude *all* other reasonable hypotheses of innocence in circumstantial evidence cases. 194 W.Va. at 668, 461 S.E.2d at 174. *See Holland v. United States*, 348 U.S. 121, 139-40, 75 S.Ct. 127, 137-38, 99 L.Ed. 150, 166 (1954); *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492, 502 (1991). We also recognized "there is no qualitative difference between direct and circumstantial evidence" and "[t]here should be only one standard of proof in criminal cases and that is proof beyond a reasonable doubt." 194 W.Va. at 669, 461 S.E.2d at 175.

Thus, when a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict.¹¹ This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are

plausible, the judge must choose the inference that best fits the prosecution's theory of guilt. The trial court's disposition of a motion for judgment of acquittal is subject to our *de novo* review; therefore, this Court, like the trial court, must scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict's favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt. *State v. LaRock*, 196 W.Va.294, 303, 470 S.E.2d. 613, 622 (1996).

Given these facts, the jury could not have concluded beyond a reasonable doubt the Petitioner acted with premeditation and deliberation when the decedent was killed. The State did not establish sufficient evidence of first degree murder for the issue to be submitted to the jury. Hence, the trial court should have granted the motion for acquittal or, in the alternative, a new trial. Here, the Petitioner is heavily relying on Syllabus Point 5 of *Guthrie* which states:

Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed.

According to the testimony, the jury could not have reasonably determined: (1) that the Petitioner formulated his intent to kill decedent at any point in time; or (2) that the Petitioner formulated his intent to kill the decedent because Mr. Davis-Jones was involved in a scuffle with the decedent and his family.

In addition, as a practical matter, premeditation generally can be proved only by circumstantial evidence. Because the Petitioner's mental processes are wholly subjective, it is seldom possible to prove them directly.

C. Petitioner Hernandez' Due Process Rights Were Violated When The Circuit Court Denied His Motions for Judgment of Acquittal and New Trial.

Petitioner Hernandez believes the Court erred in denying his motion for post-verdict judgment of acquittal and motion for new trial on the grounds that the State failed to establish that Petitioner Hernandez killed the decedent. No evidence of Petitioner Hernandez's guilt beyond a reasonable doubt is found in the record and therefore does not exist.

In reviewing challenges to findings and rulings made by a Circuit Court, the Supreme Court of Appeals of West Virginia will apply a two-pronged deferential standard of review.

In review of rulings of the Circuit Court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, the West Virginia Supreme Court of Appeals will review the Circuit Court's underlying factual findings under a clearly erroneous standard.

Questions of law are subject to a de novo review. Syllabus point 3, *State of West Virginia v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

Additionally, the Supreme Court of Appeals has held that "a trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syllabus Point 4, *State of West Virginia v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998).

In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilty on the ground of

insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

Upon motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt. *State of West Virginia v. West*, 153 W. Va. 325 [168 S.E.2d 716] (1969). Syllabus Point 1, *State of West Virginia v. Fischer*, 158 W. Va. 72, 211 S.E.2d 666 (1974).

With respect to whether the evidence is sufficient to support the criminal conviction, the Supreme Court of Appeals of West Virginia held in [*9] Syllabus Points 1 and 2, respectively, of *State of West Virginia v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996):

“The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” Syl.Pt. 1, *State of West Virginia v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence

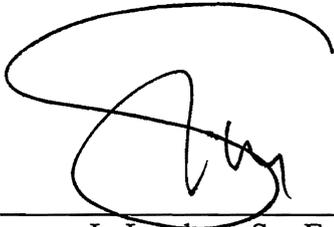
need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court.

Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent our prior cases are inconsistent, they are expressly overruled. Syl.Pt. 3, *State of West Virginia v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

RELIEF PRAYED FOR/CONCLUSION

WHEREFORE, for these and other errors which are apparent upon a fair reading of the record, and may be more fully briefed in the previously filed Petition for Appeal, your Petitioner, Robert Hernandez, Jr., respectfully prays that this Honorable Court reverse the judgment of the petit jury and remand for further proceedings to allow Petitioner a new Trial, which would cure the errors set forth therein.

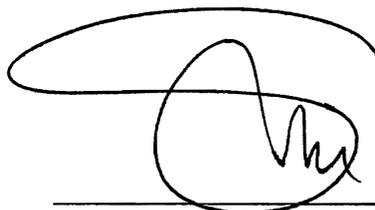
ROBERT HERNANDEZ, JR., Petitioner
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CERTIFICATE OF SERVICE

I, Sherman L. Lambert, Sr., of the Law Offices of Sherman L. Lambert, Sr., PLLC, hereby certify that a true copy of the attached **PETITION FOR APPEAL** and **APPENDIX TO PETITION FOR APPEAL**, was served upon Laura Young, Deputy Attorney General, West Virginia Attorney General's Office, located at 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301, United States mail, postage pre-paid, on this 11th day of January 2016.



Sherman L. Lambert, Sr., Esquire