

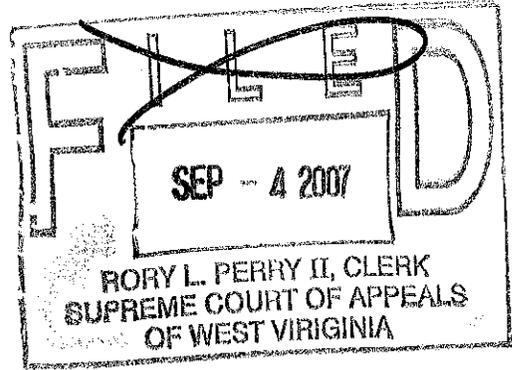
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**GARY ALLEN GIBSON,**  
**Petitioner Below, Appellee**

v.

*Hodges*  
SUPREME COURT NO.: 33321

**THOMAS McBRIDE, Warden,**  
**Mt. Olive Correctional Facility,**  
**Respondent Below, Appellant**



**APPELLEE'S BRIEF**

**I**  
**STATEMENT OF CASE**

Appellee's counsel would defer the court's attention setting forth the previous procedural history of this case to Judge Pancake's 1. Procedural History set forth on page 2 and 3 of the opinion order granting appellee's writ of habeas corpus before the Cabell County Circuit Court, which is the subject of the appellant's appeal to this court. Appellee would add, very importantly, that his petition for appeal subsequent to trial, and prior to this post conviction Habeas proceeding, was refused by this court without a consideration on the merits by order entered December 4<sup>th</sup>, 1991. (R. 517). Thus, with no decision on the merits after a full and final hearing such refusal by this court to entertain the appellee's original petition for appeal did not satisfy the "previously and finally adjudicated" standard as set forth in W. Va. Code 53-4A-1(b) to preclude

appellee from filing a post conviction habeas corpus appeal. State ex rel Hall v. Liller, 536 S.E.2d 120(W. Va. 2000).

Your appellee also presented an original habeas corpus to this court so challenging the validity his second life recidivist conviction subsequent to his trial, wherein he alleged that same issue as set forth in his pro se post conviction habeas corpus petition at issue in this matter. The Supreme Court did accept that habeas corpus petition and rendered a decision on the merits in the case style Gibson v. Legursky, 415 S.E.2d 457(W. Va. 1992). Appellee's counsel conceded, even though appellee pro se raised this issue once more, that the previous decision on the merits by the Supreme Court in that case precluded your appellee from presenting that issue once more for adjudication. However, no other issues concerning the appellee's allegations of constitutional errors from his original trial where raised in that habeas corpus petition, and thus do not preclude this post conviction habeas corpus proceeding.

Appellant on page 2 under the heading Summary of Arguments attempts to argue that appellee could not bring his other issues forth in a post conviction habeas proceeding, and thereafter cites the decision of this court titled Pethel v. McBride 638 S.E.2d 727 (2006). Nothing in the Pethel decision stands for the proposition that your appellee is precluded from presenting constitutional issues in a post conviction habeas corpus petition. In that decision this court reversed the Circuit Court of Ohio's previous order granting the habeas relief to Pethel so finding that the issues involving the interstate agreement on the detainers in that case were statutory in nature, and did not implicate constitutional jurisdictional matters. Whereas, appellee's case does involve constitutional issues, most importantly the right to a fair trial and due process of law, as so found by

Judge Pancake were violated at the appellee's original trial. Appellee's counsel will not belabor the court any further in regards to this jurisdictional issue, since obviously the issues involved in appellee's post conviction habeas petition involved constitutional rights, and were not previously adjudicated within the meaning of the habeas corpus statute.

In regards to appellant's citing of testimony from appellee's trial transcript, appellee takes great exception to numerous factual misrepresentations made to the court in the appellant's petition and brief, most notably that the appellee was a member of the Aryan Brotherhood. Appellee testified at trial that he was not a member of the Aryan Brotherhood. (Trial tr. page 477.) This fact was never disputed by the state, nor did any of the state's witnesses testify that the appellee was a member of the Aryan Brotherhood. The appellant has made this assumption and that assumption is incorrect. Thus, Appellant's statement on page 4 "That all of the conspirators belonged to the Aryan Brotherhood", is not supported by any evidence in the record.

Next appellant argues that appellee acted as a cut off man to the murder of Danny Lehman, and states on page 4 "That Gibson acted as a cut off man, standing 15 feet from Lehman with a knife in his hand while Perry stabbed Lehman, and later confronted members of Lehman's gang with the same knife in his hand." Appellant cites trial transcript page 162 of the testimony of state's witness and fellow inmate Ervil Bogard to support this statement allegedly made at trial. Appellee's counsel has reviewed Ervil Bogard's entire testimony, and specifically page 162 of the trial transcript, and nothing therein indicates or states that the appellee was a cut off man or confronted members of Lehman's rival gang with a knife in his hand. In fact Bogard testified at trial

that two of four conspirators that actually committed the murder asked him to be the cut off man. Trial transcript pages 147-150. Bogard's testimony as contained on page 162 of the trial transcript supported the Appellee's version that he left at the time when the four conspirators grabbed the victim and the murder began. This is found on line 7 of page 162, when Bogard indicates that "Rocky and Morgan left". Rocky was identified as the appellee's nickname during the trial which is undisputed. Further review of Bogard's testimony will reveal that he had no evidence that the appellee was involved in this conspiracy, and admitted to such on page 178 of the trial transcript, other than Bogard's interpretation of the appellee asking him if he was going to join the Aryan Brotherhood. Bogard's testimony at trial was that he implied from that question that the appellee was involved in the conspiracy, even though that he admits that the appellee never asked him to be involved in the conspiracy, or that the appellee never admitted that he was involved in the conspiracy. This improper testimony went without objection by appellee's trial counsel, which is one of the grounds for ineffective assistance of counsel alleged by your appellee in this post conviction petition.

The other evidence presented at trial was by another inmate by the name of Wallace Jackson. Jackson testified that appellee was present when one of the conspirators by the name of Perry was directing people where to stand prior to the killing. Jackson further testified that appellee listened to the conversation, but made no comment. (Tr. T 186). Jackson's testimony confirmed Bogard's testimony that the appellee and another inmate by the name of Morgan went down the tier at the time of the killing. (Tr. T 204). Jackson did testify that appellee had a knife in his hand at the time of the murder, but it was undisputed that the appellee took no part in the actual killing, and the

appellant's representations that he confronted members of Lehman's gang is totally unsupported by any evidence.

The court must consider the circumstances at Moundsville at that time, that being the appellee was an inmate in close quarters with other inmates serving life sentences, and to simply implicate him in the conspiracy by virtue of the fact that he was standing near the scene is not credible evidence of guilt, in that all inmates were closely confined. More importantly co-conspirator Gillespie, who admittedly committed the murder, testified that the appellee had no part in the conspiracy. (Tr.T 329). Appellee's defense at trial included 9 other inmates who all confirmed that either the appellee had no part in the conspiracy, or was talking to them at the time of the murder, and that Wallace Jackson had made statements that the appellee was not involved and he was testifying to get a break on his own sentence.

Your appellee contends that the most obvious error of the trial was that there was a total insufficiency of evidence to prove that he was involved in the conspiracy. Yes there was a conspiracy to murder Danny Lehman, but no affirmative evidence linked the appellee to that conspiracy. Inmate Bogard's testimony that he "implied" that the appellee was involved in the conspiracy from a mere question should have been objected to and disallowed, since Bogard can not testify to the appellee's state of mind. The testimony of Wallace Jackson did nothing other than to confirm that the appellee was in the location of the cellblock at the time of the murder, and once again there was nothing in his testimony affirmatively showing that the appellee was ever involved in the conspiracy to murder Danny Lehman.

## II

### APPELLEE'S REPLY TO APPELLANT'S ASSIGNMENTS OF ERROR

Appellant's counsel states on page 8 as assignment of error 1. that "Gary Gibson's grounds for relief are not cognizable in habeas corpus, and do not constitute ordinary trial error." Appellee's counsel has difficulty understanding this statement. Appellee's grounds for relief are based upon constitutional error, and as set forth above have not been previously and finally adjudicated, and being such are exactly what a post conviction habeas corpus proceeding is allowed to challenge. Habeas corpus relief is available where there is a denial or infringement of a person's constitutional rights. *Pethel v. McBride id.*; and W.Va. Code 53-4A-1(a). The West Virginia post conviction habeas corpus statute begins with stating that: "Any person convicted of a crime and incarcerated under sentence of imprisonment therefore who contends that there was such a denial or infringement of his rights as to render his conviction or sentence void under the Constitution of the United States or the Constitution of this State...may file a petition for habeas corpus ad subjiciendum, and prosecute the same, seeking relief from such illegal imprisonment."

The primary issue in appellee's post conviction petition was that he did not receive a fair trial, which is an obvious constitutional error involving due process of law. Your appellee not having finally adjudicated the issues raised in his post conviction habeas petition was entitled to do so in that proceeding before Judge Pancake, and Judge Pancake had the right and duty to review appellee's trial for constitutional errors. It appears that the appellant is attempting to argue that the cumulative error rule does not apply in habeas corpus proceedings. The citations that appellant sets forth concerning that

proposition do not support that conclusion. Judge Pancake's decision concerning the cumulative error rule is set forth on page 13 of his opinion order, and correctly cites the controlling Supreme Court decisions concerning the cumulative error rule in so citing State v. Johnson 557 S.E. 2d 811(W. Va. 2001), and State v. Smith 193 S.E. 2d 550(W. Va. 1972). Cumulative error concerns the constitutional right to receive a fair and impartial trial, and if the appellant is contending that the cumulative error rule does not apply to post conviction habeas corpus petitions, such proposition is clearly wrong and unsupported by any precedent that appellant has set forth in his petition and brief. Nor is there any precedence so holding that the cumulative error rule does not apply to post conviction proceedings.

Assignment of error 2. by appellant so states that "That the lower court applied the wrong 'cumulative error' standard to the case at bar." Appellant then states on page 21 that the habeas corpus order substantially expands the cumulative error review in post conviction proceedings. Appellant then attempts to explain this blank conclusion by stating further on page 21 "By aggregating three non constitutional claims into one constitutional claim the habeas court provided Gibson with an opportunity to relitigate issue involving ordinary trial court error settled along time ago." Appellant's discussion of the distinction between constitutional and nonconstitutional errors in regards to the harmless error rule are not support for the proposition that the cumulative error rule does not apply to post conviction proceedings. Cumulative error deals with the effect of errors standing alone as not supporting a reversal, but the cumulative effect of numerous errors committed during trial prevents a defendant from receiving a fair trial. This is the essence of the cumulative error rule, and implicates the most protected constitutional right, that

being to receive a fair and impartial trial. Appellant's attempt to dissect the lower court's ruling, and then concluding that the lower court used the wrong cumulative error standard is misplaced and unsupported by the record, by Judge Pancake's ruling, by the cases so cited by the appellant in his petition for appeal and brief, and as such should be summarily dismissed by the court as such.

Appellant's third assignment of error is that the appellee received a fair trial. This is not an assignment of error but a conclusionary statement. Judge Pancake's ruling set forth his reasons why the appellee did not receive a fair trial based upon cumulative error. Appellee's counsel agrees with Judge Pancake that the cumulative effect of those errors were such that the defendant did not receive a fair trial, but would further submit to the court that any one of those errors standing alone constituted reversible error as violations of your appellee's constitutional right to a fair trial. Your appellee so requests the court to consider this position as a cross petition for appeal, in that the appellee hereby submits that the three errors found by the lower court standing alone are such that the appellee did not receive a constitutional fair and impartial trial, but certainly appellee agrees with Judge Pancake's ruling that the cumulative effect of those three errors were such that appellee did not receive a fair trial.

Appellant's 4<sup>th</sup> issue so states "That the lower court failed to provide the state with a reasonable opportunity to retry Gibson." Appellant's subheading on page 24 so states "That the habeas court's final order authorizes the unconditional release of Mr. Gibson without providing the state with the opportunity to retry him." A review of Judge Pancake's order, specifically his Ruling as set forth on page 14 and page 15 does not support appellant's contention that the lower court unconditionally released the appellant

without providing the state with the opportunity to retry him. The lower court simply set aside the appellee's conviction as set forth in paragraph 2 page 15 of the lower court's ruling. Nothing in the lower court's ruling states that the petitioner is unconditionally released, and nothing in the lower court's ruling states that the state does not have the opportunity to retry him. The lower court's ruling was that the trial was constitutionally unfair. Appellee's counsel would admit pursuant to the lower court's ruling that the state, if its desires, could retry the appellee, and appellee's counsel welcomes the opportunity to represent the appellee's that trial.

Wherefore, appellee hereby requests that the court upon consideration of those four errors assigned by appellant to the court that such assignment of errors be denied, and that the lower court's ruling be affirmed.

#### **CROSS ASSIGNMENT OF ERROR**

Now comes your appellee pursuant to Rule 10(f) of the Rules of Appellate Procedure, and assigns as cross assignment of error his position that the three errors so found by Judge Pancake cumulatively denying appellee a fair trial, standing alone are such of a constitutional magnitude that any one of those issues would constitute reversible error in this matter. Appellee so states this position on Page 8 of this brief. Those three errors constituting Judge Pancake's finding of cumulative error are set forth on Page 10 through 14 of the lower court's order.

The first error concerned the pre-autopsy photograph of the victim which is contained in the record as Trial Transcript Exhibit 8. This was a conspiracy to murder trial, not a murder trial. The actually perpetrator of this murder, Gary Gillespie, admitted committing to the murder at appellee's trial. There was absolutely no purpose or

relevancy for introducing that photograph, since the defense never contended that a murder did not occur. The only purpose of introducing that photograph was to inflame the jury, and as such it obviously succeeded. Without belaboring the court upon its rulings upon gruesome photographs, and the elementary concept of relevant evidence under our Rules of Evidence, the admission of that photograph with no apparent necessity or relevance, and with gruesomeness of the victim shanked in the eye, was such to deny your appellee a fair trial and constitutes reversible error alone.

The lower court's second finding of error concerned the trial court's order entered January 4<sup>th</sup>, 1989, prior to appellee's trial, found in the record at Page 386, and states that the two state's institutional witnesses be furnished with non institutional shirt and pants for trial at the expense of the Department of Corrections. The record contains no written motion by the state so requesting this order, and was prepared by the prosecuting attorney with no indication that it had been approved by appellee's trial counsel. It is undisputed that appellee's institutional witnesses were required to wear institutional clothes. No reasoning for this distinction was set forth by the court, and this obvious disparate treatment of the state's witnesses opposed to the appellee's witnesses, who were all institutionalized by the Department of Corrections at the time of trial, constitutes a blatant infringement of the appellee's equal protection rights and due process rights to a fair trial. Judge Pancake's decision correctly sets forth this court's prior rulings and discussions upon the issue of a defendant wearing civilian attire, but to appellee's counsel's knowledge there is no case in this jurisdiction, or any federal or state's jurisdiction, which justifies or contemplates allowing state's witnesses opposed to

defendant's witnesses to testify in non institutional clothes, when all such witnesses are prisoners at the time of testimony.

Appellee's counsel so submits to the court that this disparate treatment and infringement of equal protection rights is an issue of first impression, and being such he has no case law to directly cite for this proposition. However, the infringement of constitutional rights is obvious, and without any explanation by the lower court of the disparate treatment of these similar class of witnesses tilted the trial in the state's favor, and unconstitutionally denied your appellee his fair trial, which appellee contends standing alone is reversible error.

In regards to the third cumulative error appellee's counsel agrees with Judge Pancake's analysis of the late disclosure of co-conspirator's trial transcripts prior to trial as denying your appellee a fair trial by undue surprise, and counsel has nothing further to state in regards to that issue, other than his position that such standing alone constitutes reversible error in that it denied appellee a fair and impartial trial.

Your appellee would cite as further grounds of reversible error the most glaring error in appellee's trial, that being that there was insufficient evidence to prove that the appellee was involved in the conspiracy. Judge Pancake's decision on Page 7 and 8 dismisses that ground, and appellee takes no exception with the case law decisions cited concerning the standard of review. However, appellee's assignment of error goes to the record and evidence itself, in that the state never demonstrated that the appellee agreed with any person to conspire to commit the murder. Guilt by implication does not arise to a legally sufficient evidence to convict, and that is what occurred in the appellee's trial. State's witnesses were allowed, without objection, to testify to their interpretation of the

appellee's mere question: "are you going to join the Aryan Brotherhood." That testimony was clearly objectionable, in that a witness cannot testify to another's state of mind. W. Va. R.E. 602. But other than that improper testimony the record so reveals that no one testified that the appellee had agreed to participate in the conspiracy. Yes he was present, but he was confined in the same cellblock, and his proximity to the murder was unpreventable. Thus, your appellee so requests the court to review the record as a whole, and so find that there was not legally sufficient evidence to convict him of conspiracy based upon the record as a whole.

Lastly, your appellee would assign as a separate assignment of error that his trial counsel was ineffective. Appellee has in his pro se petition and in his testimony at the Omnibus Hearing held in July 2001, testified to several matters which he alleges proves that his trial counsel was ineffective. Appellee's counsel is of the opinion that the most compelling error of trial counsel was the failure to object to Inmate Ervil Bogard's testimony on Trial Transcript Page 178, wherein Bogard interpreted the appellee's question, and he specifically states on line 23 and 24 of Page 178, "What I do remember was implied." Prosecutors can argue reasonable inferences from evidence to a jury in closing, but witnesses cannot interpret another person's state of mind, unless qualified as an expert. This should have been objected to by trial counsel at trial, and if known before trial should have been the subject of a motion in limine, but in either event trial counsels' failure to prevent Ervil Bogard's testimony concerning his interpretation of the appellee's state of mind is obvious error, and as such denied your appellee a fair trial.

Once again, appellee's counsel takes no exception to the case law cited by Judge Pancake upon the subject of ineffective assistance of counsel, but rather Judge

Pancake failed to discuss this aspect of ineffective assistance of counsel by trial counsel's failure to object to that obviously objectionable and highly inflammatory statement.

Wherefore, your appellee cites the following cross assignments of error for the court's consideration, and so contends that any one of these errors standing alone are such that it denied him a fair and impartial trial in violation of his federal and state constitutional rights, and as being such his conviction should be reversed upon any one of those grounds.

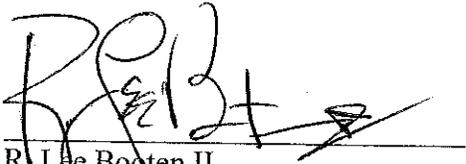
**RENEWED MOTION TO QUASH APPELLANT'S PETITION FOR APPEAL  
FOR VIOLATION OF THE RULES OF APPELLATE PROCEDURE**

Appellee's counsel prior to the court's acceptance of this matter for review filed a motion titled Motion to Quash Petitioner's Petition for Appeal. Appellee renews that motion, and defers the court's attention to that motion wherein he set forth appellee's argument that the petition was not timely filed under Rule 3, and that a review of the appeal so shows that the appellant actually filed the petition for appeal under Rule 4(a), and being such was filed outside the 60 day period for filing an appeal without a transcript of testimony.

Wherefore, your appellee hereby moves the court to quash the appellant's Petition for Appeal for violation of the Rules of Appellate Procedure's filing rules, and thereby deny appellant's petition upon those grounds.

**GARY ALLEN GIBSON,**

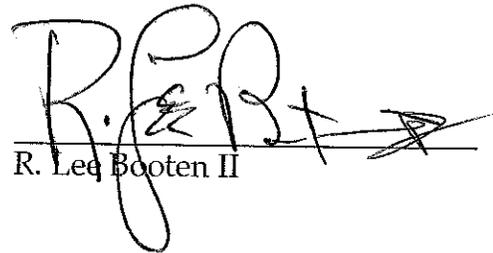
**BY COUNSEL**

A handwritten signature in black ink, appearing to read "R. Lee Boaten II", written over a horizontal line.

R. Lee Boaten II  
Of Counsel for Appellee  
637 7<sup>th</sup> Street  
Huntington, WV 25701  
(304) 522-4601

CERTIFICATE OF SERVICE

I, R. Lee Booten II, counsel for respondent, do hereby certify the that the service of Appellee's Brief, Cross Assignment of Errors, and Renewed Motion to Quash Appeal upon Darrell B. McGraw, Jr, and Robert Goldberg, Assistant Attorney General, by mailing a true copy of thereof to the State Capitol Complex Room 26-E, Office of the Attorney General, Charleston, West Virginia 25305, in the United States Mail, postage prepaid on this 31<sup>st</sup> day of August 2007.

  
R. Lee Booten II