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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

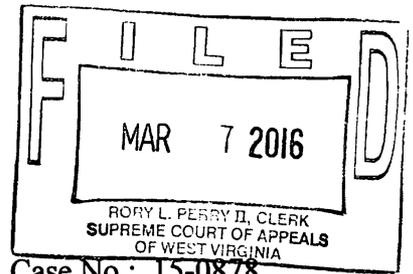
STATE OF WEST VIRGINIA,

Respondent,

V.

RASHAUN R. BOYD,

Petitioner.



Case No.: 15-0878

(Circuit Court No.: 14-F-45)

Berkeley County, WV

PETITIONER'S BRIEF

Jason D. Parmer
West Virginia State Bar #8005
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
jason.d.parmar@wv.gov

Counsel for Petitioner

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ASSIGNMENT OF ERROR

There is insufficient evidence for a reasonable jury to conclude beyond a reasonable doubt that Petitioner possessed or fired a gun, essential elements of the crimes for which Petitioner is convicted.

STATEMENT OF THE CASE

Petitioner Rashaun Boyd was unlawfully convicted for the attempted murder of Samson Edmond, wanton endangerment with a firearm, and possession of a firearm by a prohibited person because there was insufficient evidence that Petitioner possessed a firearm on the night in question. The jury acquitted Petitioner of first degree murder and conspiracy. *A.R. 81-82.*

Antoine Stokes and Edmond went to the Brickhouse Bar in Martinsburg, West Virginia on the night in question, September 16, 2012. *A.R. 980-82.* They were in the bar for an hour and a half. *A.R. 982.* While at the Brickhouse, Edmond and Stokes ran into an acquaintance, Shawntaney Parker. *A.R. 1120-21.* Although Stokes claims he wasn't drinking at the bar, Parker testified that both Stokes and Edmond drinking. *A.R. 982, 1121.* When Stokes and Edmond left the bar near closing time, they walked Parker to her car. *A.R. 987, 1112-13.* Parker testified that the Brickhouse was full on the night in question, the parking lot was almost full, and there were people parked in the grass and across the street at the Denny's restaurant. *A.R. 1131-32, 1136-37.* There could have been hundreds of people in the parking lot. *A.R. 1133.*

While Stokes and Edmond were walking with Parker, Stokes noticed Petitioner in the parking lot when he yelled to Sierra Frisbee to "hurry up, we need to go." They proceeded to his car. *A.R. 989.* Edmond then complimented Frisbee on her tattoo. *A.R. 989-91.* Petitioner took exception to Edmond speaking to Frisbee and "started yelling profane language and saying ... I'm going to beat your ass and things of that nature." *A.R. 991.* Stokes and Edmond apologized

and started retreating. *A.R. 991*. Petitioner then “rushed towards [Edmond and] began to hit him.” *A.R. 992*. Edmond fought back. *A.R. 992*. Stokes joined the altercation and hit Petitioner. *A.R. 993*. At this time, Petitioner, Edmond, and Stokes were “in a very close vicinity” during the fight; “phone booth tight ... not even arm-length distance away from each other.” *A.R. 994-95, 1039*. Despite their proximity, Stokes never saw Petitioner in possession of a firearm. *A.R. 1035, 1041-42, 1087*. Further, the surveillance video from the Brickhouse does not show the Petitioner with a gun. *A.R. 1448-49*. Stokes initially saw Petitioner’s co-defendant Wyche “out of [his] peripheral” when the fight started, but he lost track of him; Stokes had “no idea where [Wyche] was at” when the first shots were fired. *A.R. 1038-39*. In addition, Stokes did not recall whether Wyche actually joined the fight. *A.R. 1039*.

Stokes had landed one or two blows when two shots rang out; both Stokes and Edmond retreated. *A.R. 994-95*. Despite his military background, familiarity with firearms, and the late hour darkness, Stokes did not see any muzzle flashes. *A.R. 1081-82, 1745*. More importantly, Stokes did not see who fired the shots and he did not see a weapon. *A.R. 995*. Petitioner was engaged in said altercation when the shots went off, yet Stokes never saw Petitioner with a firearm. *A.R. 1041-42*. Further, it Edmond was not hit with a heavy object that may have been a gun. *A.R. 1042*. In fact, Stokes never saw anyone in possession of a gun. *A.R. 995*.

When the shots were fired, chaos erupted in the parking lot with dozens of people running and cars spinning their tires to get out of the parking lot. *A.R. 1132*. While retreating, Stokes heard more shots that sounded as though they were from a larger caliber handgun than the first two shots. *A.R. 995*. Stokes and Edmond ran approximately 10-15 feet from the site of the altercation when the second round of shots were fired. *A.R. 1041*. However, before this second round of shots were fired, Edmond said “I’m hit” and Stokes began dragging him. *A.R. 1064-65*.

It does not appear as though any of the second round of shots hit Edmond, because the medical examiner testified that Edmond was only shot once. *A.R. 1247, 1251-53*. The bullet was not recovered. *A.R. 1247*.

Edmond became too heavy for Stokes to move, so he left Edmond by a car, ran around the Brickhouse for cover and returned to where Edmond was lying. *A.R. 1048-49*. As Stokes returned to Edmond, he saw a Cadillac leaving the parking lot. *A.R. 1050*. Stokes did not see Petitioner or Wyche in the parking lot at this point. Stokes could not see who was driving the Cadillac because it had tinted windows. *A.R. 1051-52*.

Tamara Burnett testified that she heard the shots fired, which scared her, so she put the car in drive. *A.R. 1185-86*. As she was getting ready to leave, Petitioner and Wyche jumped in the car. *A.R. 1186*. This is consistent with Shawntaney Parker's testimony that scores of people were scrambling to get out the parking lot after the shots were fired. *A.R. 1132*. Burnett drove the Cadillac out of the Brickhouse parking lot with five people in the vehicle including herself, Petitioner, Christopher Wyche, Sierra Frisbee, and Jimmy Vick. *A.R. 1178-86*. As the Cadillac left the parking lot, Stokes called 911 at 2:58 a.m. and provided a description of the vehicle and the clothing worn by Petitioner and co-defendant Wyche. *A.R. 966, 999-1001*. After Burnett made it to relative safety on the Interstate 81, she was not driving fast or attempting to flee. *A.R. 1188*. While Burnett was driving, she never saw anyone with a gun, talk about a gun, or roll the window down to dispose of a gun. *A.R. 1202-07*. Around 3:35 a.m., Maryland police conducted a traffic stop of the Cadillac on I-81. *A.R. 1202-03*. Burnett was not concerned about the stop because she was doing nothing wrong. *A.R. 1188*. However, Petitioner told Burnett not to stop the vehicle. *A.R. 1188*. She did anyway. *A.R. 1188*. The defense argued that Petitioner was

concerned about a traffic stop because there was a small amount of a controlled substance in the vehicle. *A.R. 2058-59.*

When the vehicle stopped, Burnett got out of the car and Petitioner got into the driver's seat and drove off, fleeing from police. *A.R. 1189-90.* Petitioner drove the vehicle for a short distance before ditching it and running into the woods. *A.R. 2237.* Petitioner was apprehended minutes later by Maryland authorities. *A.R. 2237.*

Deputies Hall and Christian arrived in Maryland at the scene of the flight at 4:30 a.m., but they had no contact with Petitioner until 6:23 a.m. because Maryland authorities took all five people to the Maryland State Police barracks, and then transported them to the Washington County, Maryland Sheriff's Department for questioning. *A.R. 1424, 1439-45, 1613-15.* While Petitioner and his acquaintances were being detained, Maryland State Police obtained a search warrant for the vehicle. *A.R. 278-85, 1142-43, 1626.* No gun was found in the vehicle, but the search did reveal the presence of a controlled substance, which defense counsel submitted was the reason for Petitioner's flight. *A.R. 1148, 1642-43, 2058-59.*

Hall and Christian were in Maryland conducted warrantless gunshot residue tests on Petitioner, Wyche, and Vick prior to taking their statements. *A.R. 1428-29.* There was no visible GSR on their hands, and the tests were sent to the West Virginia State Police crime lab for testing. *A.R. 172-73; 237-38.* During the interviews, none of the five people in the car saw a gun or heard anyone talking about a gun. *A.R. 2236.* Further, neither Petitioner, Wyche, nor Stokes appeared to have been injured in the altercation. *A.R. 237, 1634.*

Despite the fact that there were five people in the car, the State could not elicit any evidence that any of the occupants saw a gun, no one rolled down a window in the car to potentially dispose of a gun, and no one discussed a shooting while they were in the car. *A.R.*

2236. At the conclusion of the interviews and GSR tests, Deputies Hall and Christian admitted that they did not have probable cause to arrest Petitioner, or anyone for the shooting. *A.R. 1624*. All five suspects were released from custody after the interviews were over, and the State of Maryland never charged them with a crime. *A.R. 1625, 432, 482-83*.

The Brickhouse surveillance video and screenshots taken therefrom were shown to the jury, but they were quite blurry and showed little if anything of evidentiary value. The video was so blurry that Stokes was unable to recognize himself. *A.R. 1071-83*. Further, the video did not comport with Stokes' memory of the minutes leading up to Edmond's shooting and he expressed doubts the accuracy of the video. *A.R. 1071-83*. More importantly, neither the video nor the screenshots taken from the Brickhouse surveillance video provide any evidence that Petitioner possessed a firearm. *A.R. 1071-83, 1449*. Although the surveillance video from the Brickhouse seemed to verify that Boyd and Wyche were present on the night in question, the video neither captured the alleged altercation nor the shooting. *A.R. 1448-49, 1645-54*.

Christian interviewed seven employees of the Brickhouse and none of them had relevant information. *A.R. 1658-59*. Part of a spent bullet and shell casings were recovered at the scene, however the State could not connect these to the shooting. *A.R. 1282-93, 1629-32, 1785-86*. Police did not find a gun at the scene. *A.R. 1642-43*. The medical examiner could not determine what caliber bullet killed Edmond, but he did determine that he had only been shot once. *A.R. 1260-61, 1722*. Further, police could not determine who actually shot Edmond, the position of the shooter, or if Edmond was shot during the fight or while running away. *A.R. 1780-82*.

The State's expert Koren Powers was qualified as expert in trace evidence, specifically GSR. *A.R. 1553-56*. She conducted the GSR test and testified that Petitioner had one particle of GSR on right back and one particle of GSR on left palm. *A.R. 1563*. This is very little GSR

considering that hundreds or thousands of particles of GSR can be found during an examination. *A.R. 1566, 1864.* Stokes also tested positive for GSR even though he was not accused of firing a weapon. *A.R. 175-76, 1747-48.*

Powers testified further that a person cannot see or feel GSR. *A.R. 1560.* It is like chalkdust and it is easily transferable, especially if it gets on your hands or face. *A.R. 1560.* Powers admitted that there are several different ways of getting GSR on your hands without firing a gun. Because of this, it is important for police to document pre-testing conditions, e.g., the time lapse between alleged firing of gun and collection of GSR. *A.R. 1574-75, 1579.* The crime lab recommends that officers collect GSR samples as soon as possible because of evanescence and contamination risk. *A.R. 1579-80.* A person can get GSR from being around GSR. *A.R. 1574.* GSR contaminates furniture. *A.R. 1565.* Handcuffs or flashlights may contain GSR because they are kept on gun belt. *A.R. 1574-75.* GSR can be picked up in the back of police cruisers. *A.R. 1576.* Police barracks and holding cells could also have GSR. *A.R. 1577.* Frisking gloves could have GSR on them. *A.R. 1578-79.* If a GSR test is performed hours after arrest, as occurred in this case, it is possible that an individual could come into contact with GSR during that time. *A.R. 1582-83.* Moreover, Deputy Christian admitted that Petitioner, Wyche, and Stokes may have gotten GSR on his hands when in proximity of a weapon being fired. *A.R. 1747-48.*

Defense expert Robert White agreed with the State's expert Koren Powers that police cruisers, police stations, holding cells, and handcuffs kept on a gunbelt are all potential sources for GSR. *A.R. 1866-67, 1875.* If an officer repeatedly discharges his service weapon in training or on the job and doesn't clean it, it could be a source of extreme amounts of GSR. *A.R. 1867.* Every time an officer gets his gun out he could be getting GSR on his hands and then it could be

transferred to other things. *A.R. 1868*. In this case, officers on scene had weapons drawn and flashlights out after the car chase, and they cuffed Boyd. *A.R. 2237*. This could be a source of potential GSR transfer. *A.R. 1868*. Flashlights can also be a potential source of GSR transfer because they are kept on gun belt. *A.R. 1869-70*. People can also get GSR residue from car seat in police car if they are cuffed with hands behind their back. *A.R. 1870*. Handcuffs can have GSR on them and be a source of contamination. *A.R. 1870-71*. Also, wind disperses GSR. *A.R. 1882-83*.

The defense argued that this case was a rush to judgment and the Berkeley County Sheriff's Department did not follow leads that they should have followed. *A.R. 2012*. For instance, Deputy Christian admitted that he received a Crimestoppers tip that Ronald Marese Oliver was heard telling people that he was involved in a shooting in Martinsburg. *A.R. 1756*. Oliver drove a green Lincoln similar in color and make with the green or black Cadillac identified by Stokes during his 911 call. *A.R. Vol. 1660-61*. Despite the fact that Oliver had a similar vehicle and a violent criminal history, Christian did not take this tip seriously. *A.R. 1660-61*. Because Christian did not adequately pursue Oliver as a potential suspect, he was unaware that on November 30, 2012, Oliver was convicted of assault with a deadly weapon. *A.R. 1760*. Christian claimed he did not have a good address to find Oliver, but he was unaware that Oliver had been incarcerated three separate times at Eastern Regional Jail in 2014 for charges including DUI and being a fugitive from justice. *A.R. 181-86, 1760-67*.

Moreover, DNA evidence collected at the Brickhouse showed that Roy Winston was in the parking lot on the night in question. *A.R. 289, 1661-63, 1769*. Winston also had a criminal history but it was not provided to the defense and Christian did not know the particulars because it was "possibly on [his] desk." *A.R. 1662-63*. Despite DNA evidence that put Winston at the

scene of the shooting, Berkeley County authorities never followed this lead, nor did he even show a picture of Winston to Stokes. *A.R. 1661-63, 1768-70, 1810*. In addition to the unresolved Winston and Oliver leads, police did not obtain license plate numbers of cars that were in the parking lot or any information about who else was at the Brickhouse that night. *A.R. 1633*.

SUMMARY OF ARGUMENT

Because Federal Due Process sets the bar for the States, this Court should abandon the *Guthrie* “no evidence” rule for analyzing claims of insufficient evidence. Petitioner’s convictions should be vacated because no reasonable juror would conclude beyond a reasonable doubt that he either possessed or fired a gun on the night in question.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests this Court to schedule a Rule 20 argument because this brief addresses a due process issue regarding the sufficiency of evidence supporting Petitioner’s convictions.

ARGUMENT

- I. The “no evidence” rule violates the Due Process that is guaranteed by the 14th Amendment to the United States Constitution. Therefore, Syllabus Point 3 of *State v. Guthrie* should be overruled to the extent it is in conflict with Federal Due Process.

Although this Court apparently adopted the *Jackson v. Virginia* sufficiency of evidence rule, there is still an unresolved conflict between this Court and the United States Supreme Court regarding the standard for an appellate court to follow when reviewing sufficiency of evidence claims. *State v. Guthrie*, 194 W.Va. 657, 667-68, 461 S.E.2d 163, 173-74 (1995); *Jackson v. Virginia*, 443 U.S. 307, 316-20, 99 S.Ct. 2781, 2788-90 (1973). At first glance, *Guthrie* and *Jackson* agree that the record must reasonably support of finding of guilt beyond a reasonable doubt. However, Syllabus Point 3 of *Guthrie* hedges on this rule by requiring that the record

contain no evidence of guilt before setting aside a jury verdict for insufficient evidence. Syllabus Point 3, *Guthrie Jackson*, on the other hand, makes clear that due process does not require an appellant to prove that there is no evidence of guilt in the record. *Jackson v. Virginia*, 443 U.S. 307, 316-20, 99 S.Ct. 2781, 2788-90 (1973); see U.S. Const. Amend. XIV.

This issue was examined in *Jackson*, and the Supreme Court opined that the mere existence of relevant evidence of guilt does not always “rationally support a conviction beyond a reasonable doubt.” *Jackson* at 320, 2789. The Supreme Court concluded “the *Thompson [v. Louisville]* ‘no evidence’ rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt” because it “fails to supply a workable or even a predictable standard for determining whether” the jury actually heard proof that would justify a verdict of guilt beyond a reasonable doubt. *Jackson* at 320, 2790, citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970) (proof beyond a reasonable doubt is required to establish guilt of a criminal charge).

Therefore, as a matter of Federal due process, the question is not whether the State presented any evidence that Petitioner possessed and fired the gun that killed Edmond, or even whether there is “a mere modicum of evidence” that Petitioner did so. *Jackson* at 319, 2789. Rather, it is simply whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 319, 2789. The “no evidence” part of the *Guthrie* sufficiency of evidence analysis does not comply with *Jackson v. Virginia* and therefore Syllabus Point 3 of *Guthrie* should be overruled.

II. There is insufficient evidence in the record for a reasonable jury to find Petitioner guilty of attempted murder, wanton endangerment, and unlawful possession of a firearm.

All of Petitioner’s convictions require evidence that he possessed a gun, and there is insufficient evidence of this element. W.Va. Code §§ 61-2-1, 61-7-7, 61-7-12 (2015).

Attempted murder requires proof beyond a reasonable doubt that Petitioner had the specific intent to murder Samson Edmond and committed a “direct overt and substantial act toward” the commission of murder. Syllabus Points 1 and 2, *State v. Burd*, 187 W.Va. 415, 419 S.E.2d 676 (1991); W.Va. Code §61-2-1 (2015). Therefore, under the facts of this case, there must be proof beyond a reasonable doubt that Petitioner had a gun, fired it in the Brickhouse parking lot, and killed Edmond. However, the most that Petitioner should have been convicted of is voluntary manslaughter because the evidence was that the shot happened during the altercation between Boyd and Edmond.

Similarly, Wanton Endangerment Involving A Firearm requires proof beyond a reasonable doubt that Petitioner had a gun and fired it in the Brickhouse parking lot. W.Va. Code § 61-7-12 (2015). Further, the Prohibited Person In Possession of Firearm conviction requires proof beyond a reasonable doubt that Petitioner had a certain status and possessed a gun. W.Va. Code § 61-7-7 (2015). Even when the evidence of Petitioner’s possession and firing of the gun that killed Edmond is viewed in the light most favorable to the State, there was insufficient evidence to convince a reasonable juror beyond a reasonable doubt that Petitioner is guilty of attempted murder, wanton endangerment, and prohibited person in possession of a firearm. *See* Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Under the circumstances of this case, the State’s evidence failed to prove beyond a reasonable doubt that Petitioner committed a direct overt and substantial act toward killing Samson Edmond. The State’s evidence was that Boyd became physically aggressive when Edmond complimented Sierra Frisbee. However, Stokes, Wyche and Petitioner bore no visible signs of injury from the alleged scum. Moreover, the shot that killed Edmond was fired during the time of this altercation. Despite the quarrel occurring in a figurative “phone booth,” Stokes

never had any inkling that Petitioner had a gun. There was nothing heavy in Petitioner's hands that would indicate the presence of a gun, Stokes did not see a gun, nor did he even see a muzzle flash. Most importantly, the State presented no evidence of who fired the shots that killed Edmond.

The shooting occurred around closing time, and the Brickhouse parking lot had scores of people in it, any of whom could have discharged a firearm to stop the fight. Police got no license plate numbers and could not identify who any of these people were. The surveillance video was of little evidentiary value because it was so blurry Antoine Stokes could not identify himself in it. Although shell casings and part of a bullet were found in the parking lot, they could not be connected to this shooting. There was no gun recovered either in the Cadillac or at the scene. The bullet that killed Edmond was never recovered and the State failed to produce evidence of the caliber of bullet that caused his death.

There was evidence of flight, but a controlled substance was found in the Cadillac, and the defense argued this was the reason for it. Police did not find a gun in the vehicle, at the scene, or anywhere else. Further, none of the five people in the Cadillac said that either Petitioner or Wyche had a gun, shot a gun, talked about a gun, or disposed of a gun.

Under the circumstances of this case, no reasonable juror would believe beyond a reasonable doubt that GSR is definitive evidence that Petitioner fired a gun. Given the ease of GSR transfer and the numerous potential sources of contamination that Petitioner encountered during arrest, booking, and detention at the Washington County, Maryland jail, any inference from the presence of GSR is unreasonable. Because of the transferability of GSR and potential sources of contamination, the FBI has admitted “[r]eputable scientists always have reported the finding of GSR cannot indicate the shooter....” Michael Trimpe, *The Current Status of GSR*

Examinations, FBI Law Enforcement Bulletin (May 2011), at 25, available at <https://leb.fbi.gov/2011/may/leb-may-2011>. The reliability of the GSR evidence in this case is slight because of the delay in its collection and the conditions under which Petitioner was held before the GSR test was conducted. Police cruisers, police stations, holding cells, and anything kept on a gunbelt, e.g., handcuffs, are common sources of GSR contamination. Both experts testified that GSR cannot be seen or felt. Wind disperses GSR because it is like chalk dust and easily transferable. Only two particles were found on Petitioner's hands, GSR examiners find hundreds or even thousands of particles in some samples. Petitioner could have gotten GSR on him because he was near the person that shot Edmond. Stokes had GSR on his hands, but he was not charged with discharging a firearm.

In this case almost three hours passed before Petitioner was tested for GSR; the longer one goes before being tested for GSR, the greater the contamination risk. The contamination risk is particularly relevant under the facts of this case because Petitioner was held in custody of Maryland authorities from 3:30 a.m. until 6:23 a.m. when the GSR test was conducted by Deputies Hall and Christian. Petitioner was held in a police car, a booking area, and a holding cell for almost three hours before being tested for GSR. These are all areas where the risk of GSR contamination is high. Gun belts, where handcuffs are stored, are havens for GSR. Petitioner could have gotten GSR on his hands from handcuffs, being in a police car, a holding cell or a processing area at the jail, or just being near the assailant that shot Edmond. In sum, it is unreasonable to draw any inference from the presence of GSR because it "cannot indicate the shooter." Michael Trimpe, *The Current Status of GSR Examinations*, FBI Law Enforcement Bulletin (May 2011), at 25, available at <https://leb.fbi.gov/2011/may/leb-may-2011>. In light of

the circumstances of this case, the GSR evidence is insufficient to prove to a reasonable juror beyond a reasonable doubt that Petitioner possessed or fired a gun.

DNA evidence from the parking lot proved that Roy Winston was in the Brickhouse parking lot, but Deputy Christian did not follow this lead despite the fact that Winston had a criminal record. Christian also received a Crimestoppers tip that a violent felon by the name of Ronald Morese Oliver was heard to be talking about his involvement in a shooting in Martinsburg. Oliver had a green Lincoln, similar to the green or black Cadillac driven by Petitioner, but Christian did not really pursue this lead either.

When viewed in a light most favorable to the State, the evidence supporting the attempted murder, wanton endangerment and prohibited possession of a firearm convictions are as follows: Petitioner was in the Brickhouse parking lot at the time of the shooting, he had two particles of gunshot residue on his hands, he was involved in a fight with the decedent and he fled with drugs in his car. This is not enough evidence for a reasonable jury to believe beyond a reasonable doubt that Petitioner had a gun, shot it in the Brickhouse parking lot and killed Edmond.

CONCLUSION

Petitioner asks this Court to vacate his conviction on the grounds of insufficient evidence, and all other relief deemed just and proper.

RASHAUN BOYD,
BY COUNSEL



Jason D. Parmer
Public Defender Services
One Players Club Drive, Suite 301
Charleston, West Virginia 25311
(304) 558-3905
WV Bar ID 8005

Jason.D.Parmer@wv.gov

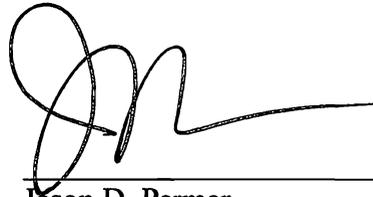
CERTIFICATE OF SERVICE

I, Jason D. Parmer, counsel for Petitioner, Rashaun R. Boyd, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying *Petitioner's Brief* to the following:

Laura Young, Esq.
West Virginia Attorney General's Office
812 Quarrier Street, 6th Floor
Charleston WV 25305

Counsel for Respondent

by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 7th day of March, 2016.



Jason D. Parmer
West Virginia State Bar #8005
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
jason.d.parmer@wv.gov

Counsel for Petitioner