

**I. CERTIFICATE OF INTERESTED PERSONS**

I hereby certify that the following persons have an interest in this proceeding:

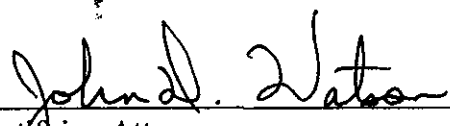
Johnny Wayne Wallace  
Appellant

Honorable John D. Watson  
Counsel for Appellant  
P.O. Box 1366  
Southaven, MS 38671

Honorable Rhonda M. Amis  
Assistant District Attorney  
365 Loshier Street, Suite 210  
Hernando, MS 38632

Honorable Robert Goza  
Circuit Court Judge

Appellant certifies that he knows of no other person, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case.

  
\_\_\_\_\_  
Certifying Attorney

2007-KA-~~01275~~

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COA-T

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#### **STATUTES:**

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#### **IV. STATEMENT OF THE ISSUES**

- I. THE TRIAL COURT ERRED IN ALLOWING THE VICTIM TO MAKE AN IN COURT IDENTIFICATION WHEN IT WAS RULED THAT THE OUT OF COURT IDENTIFICATION WAS OVERLY SUGGESTIVE.
- II. THE TRIAL COURT ERRED IN GRANTING THE STATE'S REQUEST TO REQUIRE THE APPELLANT TO STAND BEFORE THE JURY AND OPEN HIS MOUTH TO SHOW HIS GOLD TEETH WHICH VIOLATED HIS RIGHT AGAINST SELF INCRIMINATION.
- III. THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

## **V. STATEMENT OF THE CASE PROCEDURAL HISTORY**

Johnny Wayne Wallace("Appellant") was indicted by the grand jury of Tate County, Mississippi for Armed Robbery, Conspiracy to Commit Armed Robbery, and Aggravated Assault. The first trial resulted in a hung jury and a mistrial was declared on February 6<sup>th</sup>, 2007. After the second trial, the jury found Appellant guilty of Armed Robbery and Conspiracy. They found him not guilty of Aggravated Assault. T. at 163. The Circuit Court sentenced Appellant to serve twelve(12) years in the MDOC on the Armed Robbery and five(5) years in the MDOC on the Conspiracy to run consecutive to each other but concurrent with the sentence the Appellant is currently serving in Wisconsin. T. at 171. On June 21<sup>st</sup>, 2007, the Circuit Court denied Appellant's motion for new trial and jnov. T. at 162. A notice of appeal was filed on July 19<sup>th</sup>, 2007.

## **SUBSTANTIVE FACTS**

### **Ollie Buford**

Ollie Buford testified that on September 9<sup>th</sup>, 2004, Marrieo Love came to his house with two other men. T. at 3. Marrieo told him he need to use his phone so they went upstairs to use the phone. T. at 4. As they came back downstairs, one of the men got up and pulled a weapon and started shooting. T. at 6. He was shot five times. T. at 6. He identified the Appellant as the shooter. T. at 8.

On cross examination, he admitted that he told the detective that Steve shot him. T. at 11. He testified that it was less than a minute from the time the three individuals arrived that he and Marreio went upstairs. T. at 13. He could not give the detectives a good description of the

shooter. T. at 14. Detective Lance showed him four pictures of suspects. T. at 16.

**Jim Woolfolk**

Woolfolk was a Tate County Sheriff's Deputy at the time of the incident. T. at 21. He was one of the first officers on the scene and Ollie Buford told him that Steve shot him. T. at 22. Mr. Buford could not give an accurate description of the shooter that night. T. at 23.

**Brad Lance**

Brad Lance was the chief deputy for the Tate County Sheriff's Department at the time. T. at 24. Mr. Love told him where he would find the gun. T. at 40. He sent the pistol and the shell casings to the crime lab. T. at 42. Appellant told him that he was with Marrieo Love and Lacie Jones that night. T. at 43. On cross examination, Deputy Lance testified that he did not process the crime scene for fingerprints. T. at 46. He showed Mr. Buford a picture of Steve Mangrum and during that time Mr. Buford saw a picture of Appellant in the file and identified Appellant. T. at 48. He did not lay the pictures on the table. T. at 48. He showed Buford several photographs but only two individuals were contained in the photographs. T. at 49. He did not lay the pictures on the table or counter. T. at 49.

**Starks Hathcock**

Starks Hathcock is a firearms examiner employed with the Mississippi Crime Laboratory. T. at 57. The projectiles he examined were fired by the gun he examined. T. at 65. On cross examination, Mr. Hathcock stated that no fingerprints were lifted from the gun. T. at 66.

**Lacie Jones**

Co-Defendant, Lacie Jones testified that Marrieo Love, Antonio Boyce, and Appellant intended to rob Mr. Buford that night. T. at 70. She did not see a weapon prior to the men

getting out of the car to rob Buford. T. at 73. She saw Appellant with a weapon when they came back to the car. T. at 73. She admitted that she lied under oath about whether or not she knew that they were going there to rob Buford. T. at 80. On cross examination, Jones testified that she had been offered probation in return for her testimony. T. at 86.

### **Marrieco Love**

Co-Defendant, Marrieco Love, testified that he, Appellant, Antonio Boyce and Lacie Jones went to Buford's house to rob him. T. at 94. Appellant shot Buford. T. at 96. He wrote a letter that stated that Appellant was accused of something he did not do. T. at 106. On cross examination, Love admitted that in previous testimony he stated he could not remember who put the gun under the couch but now he remembered that Appellant put it there. T. at 112.

### **Antonio Boyce**

Co-Defendant, Antonio Boyce, testified that they went to Buford's house to rob him. T. at 128. Once Buford and Love came back downstairs, Appellant asked where the money was and shot Buford. T. at 129.

### **SUMMARY OF ARGUMENT**

The Court should not have allowed the in court identification by the victim of the Appellant as the shooter because the out of court identification was overly suggestive. The Court should not have instructed the Appellant to open his mouth in front of the jury to show his gold teeth in violation of his right against self incrimination. The jury was not presented sufficient evidence to warrant a conviction on armed robbery.

## ARGUMENT

### ISSUE NO. 1:

**WHETHER THE COURT ERRED IN ALLOWING AN IN COURT IDENTIFICATION OF THE APPELLANT BY THE VICTIM WHEN THE COURT HAD RULED THAT THE OUT OF COURT IDENTIFICATION WAS IMPROPER.**

Prior to trial, a suppression hearing was held to determine issues concerning the out of court identification of the Appellant by the victim, Buford. T. at 2 of Suppression Hearing(SH). Brad Lance testified that he met with Buford to show him a picture of Steve Mangrum. T. at 3(SH). The only two(2) individuals that he had photographs of that day were Steve Mangrum and Appellant. T. at 5(SH). Lance did not intend to show Buford a picture of Appellant that day. T. at 7(SH).

Buford testified at the suppression hearing that Lance told him that they thought they had identified who had done the shooting. T. at 16(SH). Lance wanted him to look at a picture and see if it resembled the shooter. Id. Buford testified that Lance had all of the pictures out to show him. T. at 17(SH). He saw the photograph of Appellant five(5) or six(6) months after the incident. T. at 20(SH).

The Trial Court ruled that it would be improper for the State to put on any evidence concerning the out of court identification but that they could ask Buford for an in court identification. T. at 24-5(SH).

The Mississippi Supreme Court in York v. State, 413 So.2d 1372(Miss. 1983) set forth the guidelines that must be followed in determining the competency of identification testimony. As in York, Appellant's argument is that he was deprived of his due process rights because of the



suggestiveness of the photograph. In addition, as the Trial Court ruled, the versions of Detective Lance and the victim Buford differed as to how Buford came about to see the photograph of Appellant. T. at 23(SH).

York set out the factors cited in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375(1972), as follows:

1) opportunity of the witness to view the accused at the time of the crime. Buford testified that it was less than a minute from the time the three(3) individuals entered his home until he a Marrieo Love went upstairs and that Appellant began shooting immediately upon their return downstairs. T. at 13.

2) the degree of attention exhibited by the witness. Appellant could not give the officers an accurate description of the shooter just after the incident. T. at 14. Officer Woolfolk further testified that Buford could not give him an accurate description right after the incident. T. at 23.

3) the accuracy of the witness's prior description of the criminal; see 2) above.

4) the level of certainty exhibited by the witness at the confrontation; As previously pointed out above, Buford's and Lance's versions of the photo viewing are strikingly different, therefore, there is no evidence of Buford's certainty. It is further interesting to note that the jury acquitted the Appellant on the Aggravated Assault count which was the shooting. The only way for him to be acquitted on that count was for the jury to find that Appellant was not the shooter beyond a reasonable doubt because there was no doubt that all other factors of an aggravated assault were met.

5) length of time between the crime and the confrontation. Buford testified that it was approximately five(5) or six(6) months after the incident when he saw the Appellant's photo. T.

at 20(SH).

An impermissibly suggestive pre-trial identification does not preclude in-court identification by an eyewitness unless from the totality of the circumstances surrounding it, the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable mis-identification. York at 1383. The totality of the circumstances surrounding the identification should be viewed to determine if it is impermissibly tainted. Nicholson v. State, 523 So.2d 68, 75(Miss. 1988). In the case at bar, Buford testified that Lance told him prior to viewing the photo, “We think we’ve identified the shooter.” T. at 16(SH). Further, the Trial Judge found that the versions of Lance and Buford differed. T. at 23(SH). Additionally, Buford identified Appellant’s teeth as pointed out by the Trial Court T. at 24(SH). Last, as previously pointed out, the jury acquitted Appellant of the shooting.

## **ISSUE NO. 2**

### **WHETHER THE TRIAL COURT ERRED IN ORDERING THE APPELLANT TO OPEN HIS MOUTH AND SHOW THE JURY HIS TEETH WAS AGAINST HIS RIGHT AGAINST SELF INCRIMINATION.**

The State requested that the Appellant be required to open his mouth and show his teeth to the jury. T. at 19. Appellant objected. T. at 55. Appellant concedes that the existing law according to Porter v. State, 519 So.2d 1230(Miss. 1988), states that compelling a Defendant to show a body characteristic does not violate his right against self incrimination and this ruling has been affirmed in numerous other cases.

### **ISSUE NO. 3**

#### **WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE OR THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT**

On review of a denial of a JNOV, the “critical inquiry is whether the evidence shows ‘beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.’” Bush v. State, 895 So.2d 836, 843(Miss. 2005). In this case, the Trial Judge had serious reservations about whether the State had met its burden regarding the armed robbery. T. at 139-49. In the first trial, the Trial Judge at the time, the Honorable Ann H. Lamar, originally granted a directed verdict on the armed robbery count only to later change her ruling and allow it to go to the jury.(Appellant concedes that there is no transcript of that ruling). In the second trial, the Trial Judge stated: “I don’t think an armed robbery occurred.” T. at 139.

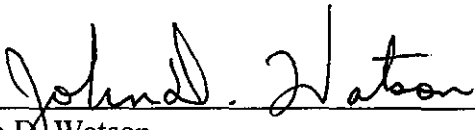

Appellant contends that the armed robbery count should be reversed and rendered due to the fact that there was no testimony that Buford was placed in fear.

### VIII. CONCLUSION

Based upon the foregoing arguments and authorities, the Appellant hereby urges the court to reverse the convictions of the Appellant.

Respectfully submitted,

This the 6<sup>th</sup> day of March, 2008.

  
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MSB 

## **XI. CERTIFICATE OF SERVICE**

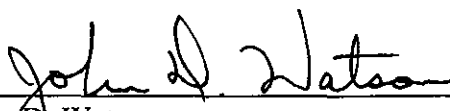
I, John D. Watson, counsel for Appellant, hereby certify that I have this day mailed with postage prepaid a true and accurate copy of the Appellant's Brief to the following persons:

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Honorable Robert Goza  
Circuit Court Judge  
Via Lata Lightsey  
Circuit Court Administrator

Honorable Jim Hood  
Attorney General  
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450 High Street  
Jackson, MS 39201

This 6<sup>th</sup> day of March, 2008.

  
\_\_\_\_\_  
John D. Watson  
Certifying Attorney