IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2008

NO. 2733

BRANDON MICHAEL GRIMES,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY (THE HONORABLE JUDGE MARTIN P. WELCH AND JUDGE WANDA KEYES HEARD PRESIDING WITH A JURY)

APPELLANT'S BRIEF AND APPENDIX

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APPELLANT'S BRIEF

STATEMENT OF THE CASE

Appellant, Brandon Grimes, was indicted in the Circuit Court for Baltimore City on February 12, 2007. Grimes was charged with first-degree murder, attempted robbery, assault, and multiple counts of use of a handgun in the commission of a crime of violence and wearing, carrying and transporting a handgun. A jury trial was begun on August 19,

2008. Judge Doory granted Grimes's motion for judgment of acquittal on charges of attempted robbery and attempted robbery with a dangerous weapon, first- and second-degree assault, one count of use of a handgun in the commission of a crime of violence, and one count of wearing, carrying, and transporting a handgun. The court also declined to instruct the jury on felony murder. The jury returned verdicts of guilty on the remaining counts on August 29, 2008. On December 31, 2008, Grimes was sentenced to life without parole for first-degree murder and 18 years, the first five without parole, consecutive, for use of a handgun in the commission of a crime of violence. This appeal was timely noted on January 7, 2009.

QUESTIONS PRESENTED

1. Did the trial court abuse its discretion in denying Grimes's request for a mistrial when the State retested key DNA evidence in the middle of trial?

2. Was the evidence insufficient to sustain the conviction for first degree premeditated murder?

3. Was the verdict not shown to be unanimous by polling because the foreperson was not separately polled?

STATEMENT OF FACTS

This case arose out of the shooting death of Troy Chesley on the night of January 9, 2007. The evidence adduced at trial was as follows:

Kelly Carter testified that she was Grimes's ex-girlfriend. She said that on the night of the shooting Grimes picked her and her children up to go shopping. They then dropped off the children at their grandmother's house. T 8/20/08 38-39. Grimes and Carter argued. He would not take her to her car as she expected. They then picked up

Joshua Morris and rode around, smoking marijuana. *Id*. 40-43. Grimes answered his phone and said "he would be there." He then stopped the van, turned off the lights, and got out. Carter heard a clicking sound and saw Grimes with a gun with a long clip. Carter identified the gun. *Id*. 44-46.

After Grimes walked around the corner, Carter heard shots, got in the driver's seat, and drove off. When she stopped and got out, she heard Grimes calling from the woods. He said he was bleeding. She did not see the gun or the black knit cap Grimes had been wearing. Morris helped her get Grimes into the van. *Id*. 50-52. Grimes's cell phone rang and Grimes told the caller he had been shot. Grimes told Carter and Morris not to take him to the hospital but they did. *Id*. 53-55. After police arrived at the hospital, Carter and Morris went out to the van and cleaned up, including taking down the "for sale" sign that had been in the window. Morris said he was going to walk. Carter went back in to the hospital. The police came out, arrested them, and took them in for questioning. *Id*. 56-59.

On cross examination Carter said the police did not do a gun shot residue test on her. *Id.* 80. She also said the van was hers, although on re-direct she said she had bought it in her name for Grimes to use. *Id*. 81, 98. She admitted she was high at the time of the shooting. Concerning the gun she had identified, she said "it looks like it." She did not recall having seen the "silver piece" on the gun. *Id*. 85-89.

Joshua Morris testified that he was a friend of Grimes's. Earlier in the day of the shooting, he had seen Grimes with a pistol with a black handle and an extended clip. He identified the gun. *Id*. 108-11.Grimes was talking with another person about the gun and was showing it to him. *Id*. 114. Later, Grimes came to pick him up in the van. Carter was

in the car and she and Grimes were bickering. They were riding around smoking marijuana. He was high and fell asleep. *Id.* 115-19. When they stopped he woke up and asked Carter where Grimes was. She said he went around the corner. Two or three minutes later, he heard shots. They drove around the corner. He saw two people on the right side of the street farther up at the end of the block. He did not think those two had fired the shots because the shots seemed to have been closer. *Id*. 120-22. They drove around and found Grimes, who was calling for help. He was bloody and had been shot in the leg. He was not wearing a hat. He had had gloves but was not wearing them when they found him. They took him to the hospital though he did not want to go. He would not say what happened. *Id* 122-25. Morris stayed at the hospital even though he knew the police would come. He and Carter cleaned up the van, putting the "for sale" sign under the seat and throwing Grimes's pants in the trash. The police came and took them in for questioning. *Id*. 129-32. Morris acknowledged he had two prior convictions for possession of narcotics with intent to distribute and one prior conviction for unauthorized use. *Id*. 139.

On cross examination Morris said the two persons he saw running up the street were young. They could have had a gun. He did not know whether they did or not. He also did not know whether Grimes had a gun when he got out of the van and had not seen a gun in the van. *Id*. 141-48. The police did not do a gun shot residue test on him. *Id*. 164.

Baltimore City Police Officer Jonathan Ricker responded to the scene at 1:19 am. In front of 4519 Fairfax he found the victim. A woman opened the door at 4517. (4517 and 4519 were a duplex.) Keys lay on the ground by the porch of 4517. There were shell

casings and a gun on the porch of 4519 and shell casings on the steps and walk of 4519. There were 9mm bullet holes in the building. *Id*. 179-83. There was also a bullet hole in a car on the street. Near the car in the street he found .40 caliber casings. *Id*. 189. Nearby was the start of a blood trail that led between 4523 and 4525. Along the trail he located a wool cap. Farther along in a wooded area he located a gun and a cell phone. *Id*. 184-87. Officer Ricker identified the gun, which had a rubber grip, extended magazine, and laser sight. *Id*. 191, 197.

Police Officer Shakia Finney testified that she accompanied the ambulance with the victim's body to the hospital where she recovered bullets and clothes from the body. She took them to the Evidence Control Unit. *Id*. 206-07. Finney identified a projectile as having been recovered from the victim at the hospital. *Id*. 211.

Police Officer Brandon Stickley testified that he recovered a bullet fragment taken from Grimes at St. Agnes Hospital, which he then submitted to Evidence Control. T 8/22/08 6-13.

Officer William Peterson testified that he responded to St. Agnes Hospital at 2:15 am for a report of a patient with a gunshot wound. He had no information about the shooting on Fairfax Street. *Id*. 15-17. Grimes would not give his name and would only say he was shot on Carey Street. Grimes said he was blacking out and was in pain. *Id*. 17-19.

April Taylor, Baltimore City Police Crime Lab Technician, testified that when she arrived at the scene at 1:55 am the victim had already been removed. Officers pointed out the shells to her. She photographed the scene and recovered various items of evidence,

including ballistic evidence and the knit cap. *Id*. 30-80. Taylor identified the victim's gun and a photograph of the Sig Sauer. *Id*. 50, 56. She took a blood sample from the porch of 4519 and from the blood trail. *Id*. 59, 72. A soda bottle was dusted for prints. No prints were recovered from the Sig Sauer. *Id.* 62, 89. She was not told about two men running up the street and did not check for evidence in that direction. *Id* 96. Her fellow technician Meinhardt handled the Sig Sauer to render it safe. He wore gloves. *Id*. 100-01. The knit cap was not checked for gun shot residue because that was not within the protocol. *Id*. 105. She identified a photograph of Grimes in the hospital with Tyvek bags on his hands. She said the time limit in the gun shot residue protocol was three hours plus time for treatment at the hospital. *Id*. 108-11.

Police Mobile Lab Technician Franklin Sanders testified that he went to St. Agnes to photograph the victim, swab Grimes for gun shot residue, and to photograph the van. *Id*. 117-18. The Tyvek bags were on Grimes's hands when he arrived at 3:52 am. He did not know who put the bags on or whether Grimes's hands had been washed. *Id*. 130. Grimes did not refuse to have his hands swabbed for gun shot residue. *Id*. 135-36. Sanders did not test Grimes's clothing for residue because he was not asked to. *Id*. 141.

Police Officer Denita Hurston went to St. Agnes Hospital at 2:01 am. She stood by the van until the crime lab arrived. She accompanied the van while it was towed in to the police garage. Neither the crime lab nor the tow operator entered the van. She released the van to the crime lab. *Id*. 146-52.

Lab Technician Tiffany Brooks testified that she processed the van. She took photographs of the contents of the van and took samples from apparent blood stains on

the seats and floor, which she submitted to the Evidence Control Unit. She also recovered and submitted latex gloves and a bandana. *Id.* 153-60.

Firearms Examiner Christopher Faber was accepted as an expert in firearms identification and ballistics evidence. *Id*. 178. The victim's gun was a Glock. It had blood on it. It was test fired and found to be operable. All the .40 caliber casings recovered from the scene were found to have come from the victim's Glock. *Id*. 184-94. The bullet recovered from the Durango had rifling that fit a Glock. It weighed the same and had the same jacket as ammunition from the victim's Glock. *Id*. 196-98. A lead fragment recovered from a Subaru could not be identified. *Id.* 199. The bullet recovered from Grimes was a .40 caliber, consistent with law enforcement ammunition. It could have been fired from the victim's Glock, but Faber could not say that it was. *Id*. 200-03. The Sig Sauer was test fired and found to be operable. The five 9mm casings recovered and the bullet recovered from the victim were fired from the Sig Sauer. *Id*. 211-13. The 9mm bullets fount in the door and on the walk shared class characteristics with the Sig Sauer but could not be matched to it. They were not fired from the Glock. *Id*. 216-18.

Anna Rubio, Assistant Medical Examiner, testified that the victim's body bore evidence of four gun shot wounds, probably three of which were caused by the same projectile. T 8/27/08 27. There was no evidence of close range firing. *Id*. 28. The wounds would have been quickly fatal, but the victim would have been able to move after being shot. There was no damage to the bones in the victim's arm. *Id*. 35-36. The cause of death was gun shot wounds and the manner of death was homicide. *Id*. 40. Dr. Rubio did

not recover any bullets from the victim's body, but according to medical records a bullet fell from the victim's clothing in the operating room. *Id*. 46-47.

Raina Santos, a police department DNA lab technical leader, testified as an expert in serology and DNA analysis. *Id.* 49. She testified that until three weeks previously, the lab did not have a database of staff DNA profiles to be used to eliminate staff from possible unknowns. *Id*. 60. After compiling such a database, she found twelve cases, including the present case, in which samples previously identified as "unknown" matched staff DNA. She also testified that the presence of staff contamination of samples did not affect the DNA already present, or the ability of the lab to separate out DNA from different sources. *Id*. 66-69. In this case, staff DNA was found only in a sample from the Sig Sauer, and not in samples from the blood trail or hats. *Id*. 69-70. Carter and Morris were excluded from the Sig Sauer sample. Grimes could not be excluded as the other contributor along with the staff member, Victor Meinhardt. *Id*. 101.

Police mobile crime lab technician Victor Meinhardt testified that he collected the Sig Sauer at the scene, which he found in the woods by following the blood trail. *Id*. 118-19. He wore gloves when he handled the gun. He took all required precautions, but wearing a mask was not a required precaution. He could have coughed, sneezed, or scratched his head thereby getting his DNA on the gun. *Id*. 120-21. No prints were recovered from the gun. *Id*. 124.

Terri Labbe, police department serologist, testi8fied as an expert in serology. She took a swab of a red stain on the Sig Sauer, but did not submit the swab for DNA analysis because it was negative for blood. *Id*. 140-42. A second swab was taken from the grip of

the gun for epithelials. This was sent for DNA analysis. *Id*. 142. Labbe prepared multiple swabs from stains on the steps, sidewalk, and other locations. These tested positive for blood and were sent for DNA analysis. *Id*. 142-52. She also prepared swabs or blood cards for Grimes, the victim, Carter, and Morris, and sent these for DNA analysis. *Id*. 153-55.

Police DNA analyst Jocelyn Carlson testified that the DNA identified as "unknown Male #1" in the original DNA report was retested and matched lab technician Meinhardt. *Id*. 177-78. DNA from the soda bottle matched the victim, as did DNA from blood on the steps and sidewalk of 4519 and DNA from hat "A". *Id*. 183-85. DNA from blood found on two leaves, a rock, and the sidewalk in front of 4506 Westchester matched Grimes, as did DNA from material vacuumed from inside hat "O", material cut from the seats of the van, and from a shoe found in the van. *Id*. 187-89. Carter and Morris were excluded from the sample taken from the grip of the gun, but Grimes could not be excluded from this "really low level partial profile." *Id*. 190-91. Carlson conceded that the absence of Morris's DNA from the gun did not mean that he did not handle it. *Id*. 199.

Detective Richard Purtell testified that at the end of the blood trail on Westchester he found the Sig Sauer and a cell phone. That phone turned out to be in the name of Eddie Parker, but he was never able to find Eddie Parker. Morris and Carter had their cell phones. He never found the phone on which Carter said Grimes received a call on the way to the hospital. There were no incoming calls on the "Eddie Parker" phone consistent with having received an incoming call. *Id*. 205-06.

Purtell testified he looked on South Parrish Street after he received information the suspect may have been shot there but found no evidence of a shooting, no blood, and no shells. *Id*. 215. He then went to police headquarters and took statements from Carter and Morris and showed them photo arrays. Both identified Grimes. Morris showed him and Det. Sydnor what happened at the scene. *Id*. 219-25. Morris was not checked for gun shot residue and that he had blood on his clothes, which turned out to be Grimes's blood. *Id*. 234-35, 241. He also said the victim was right-handed. T 8/28/08 6.

Grimes testified in his own defense. He testified that the black bandana found in the van was Morris's, and that Morris always wore a black bandana because he was a member of the Crips. *Id*. 18-19. Grimes did not see Morris at all on the afternoon of January 8th and was not showing anyone a gun that afternoon. *Id*. 25. Late in the evening of the 8th, Carter and Morris picked him, his girlfriend Shalita Venible, and another friend up in the van on Carey Street because his car would not start. *Id*. 26. They dropped off the friend, and then went to Venible's house where he and Venible got out of the van. Carter and Morris Grimes were supposed to take him to his child's mother Tanielle Allen's job to borrow her car but instead they dropped him off with Venible saying they had something to do and would come back later to get him. They called later and said to meet them on Fairfax, a few blocks away, and to call them when he got there. When he got to Fairfax he tried to call Carter and Morris, but the call did not go through. He heard shots ring out and ran, which was when he got shot in the leg. He did not have a gun. He made his way to Westchester, tried unsuccessfully to call for help, then saw the van and

got in. Carter was there but Morris was not. They drove back to Fairfax where they picked up Morris, who had the black bandana tied around his neck. *Id*. 26-45.

Joseph Harant, Baltimore City Police Department Criminalist, testified for the defense. Harant said he had analyzed a sample from the black bandana found in the van and found gun shot residue: one particle containing lead, barium, and antimony, three particles containing lead and antimony, and seven particles containing lead. *Id*. 156.

Re-called in rebuttal, Ms. Carter testified that Grimes kept a black bandana on the shift lever of his car and that she had also seen Morris with a black bandana, although she did not see him or Morris wearing it the night of the shooting. *Id*. 172-73.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING GRIMES'S REQUEST FOR A MISTRIAL WHEN THE STATE RETESTED KEY DNA EVIDENCE IN THE MIDDLE OF TRIAL.

Grimes's defense was that he was wounded at the scene accidentally and that he did not fire the Sig Sauer from which the fatal projectile was shown to have come. A key element of this defense strategy, along with the absence of any gun shot residue on Grimes and the absence of his fingerprints on the gun, was the fact that the DNA of an "unknown male" was found on the gun. This fact would have enabled Grimes to argue with some forensic support that a missing third party was the shooter.

During trial, it was disclosed in the press that the Baltimore City DNA lab had a problem with staff contamination. As a result, the director had been fired and a compilation of a database of staff DNA had been begun for the purpose of making

comparisons against the large number of unknowns identified by the lab. On August 25, 2008, the Monday of the second week of the trial, defense counsel brought the situation to the attention of the court, arguing that problems in the DNA lab could be *Brady* material. T 8/25/08 53. At the court's suggestion, the State made Raina Santos, technical leader for the DNA lab, available to defense counsel for an interview. *Id*. 55. After speaking with Ms. Santos, defense counsel moved to suppress DNA and in the alternative for mistrial was made. *Id.* 100.

The trial court said it was not going to suppress the DNA evidence. It also said, "we are going to finish this trial and turn this matter over to the jury on Friday or sooner." *Id*. 104. The trial court offered defense counsel "a day or so" to get the advice of a DNA expert, but reiterated its determination to conclude the trial quickly:

> Do you want me to do that arguing to the parties that no matter what happens, we are still going to get this case into the jury's hands by Friday? The reason I say that is that's what we asked them about in voir dire. Friday is the day before Labor Day and for many people the whole world changes come the first day after Labor Day so this jury is going to get this case by Friday. Do you want a day, a day and a half, to consult with an expert, to have the State give you a copy of the report.

Id. Defense counsel said he would do his best. *Id*. 105-06. The trial was then recessed at 2:42 pm. *Id*. 109.

After court had recessed on Monday, the DNA of Crime Lab technician Meinhardt, who had recovered and handled the gun, was compared with the unknown sample found on the gun and a match was made. The State's DNA report was amended, and this information was disclosed to defense counsel on Tuesday, August 26th. *See* St.

Ex. 1 on Motion to Suppress; T 8/27/08 10. When trial resumed the following Wednesday morning defense counsel renewed his motion to suppress and alternatively for a mistrial. Defense counsel explained the steps he had taken to consult with a DNA expert. *Id*. 4-5. After an unsuccessful attempt to retain one expert, counsel spoke with another by phone, giving the following account:

> The bottom line is, that I gathered from the conversation, is that he was somewhat familiar with the general situation. He regarded that as a substantial glitch in their procedure. But in order to assist me in any way, he would have to do a comprehensive evaluation of their procedures – just looking at the information he has. And talking to me did not put him in a position where he could make any valuable contributions to this case in any way, shape, or form.

Id 5.

The trial court denied the motion to suppress, noting that the pertinent witnesses would be testifying and subject to cross-examination. The court noted that Grimes could renew his motion for mistrial after the witnesses testified, but that at the present time there were no grounds for a mistrial. *Id*. 7. Before sentencing, Grimes moved for a new trial on this ground, supplemented by a complaint filed by The Innocence Project on December 17, 2008. T12/31/08 12 *et seq.* ; D. Ex. 2 for Motion for New Trial. After hearing testimony from Ms. Santos on behalf of the State, the trial court denied the motion. T 12/31/08 49-50.

This Court recently summarized the standard of review of a decision to deny a motion for mistrial in *Parker v. State*, ___ Md. App. ___, ___ A.2d ___, 2009 WL 5103219, *10 (Dec. 29, 2009):

> Generally, the decision to grant or deny a mistrial is committed to the discretion of the circuit court. Our review "is limited to determining whether there has been an abuse of discretion." *Coffey v. State,* 100 Md. App. 587, 597, 642 A.2d 276 (1994). The Court of Appeals has held that a trial court's denial of a motion for mistrial will not be reversed "unless the defendant was so clearly prejudiced that the denial constituted an abuse of discretion." *Hunt v. State,* 321 Md. 387, 422, 583 A.2d 218 (1990), citing *Johnson v. State,* 303 Md. 487, 516, 495 A.2d 1 (1985). But the Court of Appeals has found reversible error in a trial court's failure to grant a mistrial in cases in which there was a high probability that the improper reference influenced the jury's verdict. *E.g., Rainville v. State,* 328 Md. 398, 411, 614 A.2d 949 (1992) ("It is highly probable that the inadmissible evidence in this case had such a devastating and pervasive effect that no curative instruction, no matter how quickly and ably given, could salvage a fair trial for the defendant").

The information that the previously unknown DNA on the murder weapon in fact came from a crime lab technician who handled the gun substantially weakened Grimes's defense. Such a disclosure should have been subjected to the most careful possible scientific scrutiny in the interest of providing Grimes with an adequate defense. However, because the necessary testing was not done by the State until Monday evening on the second week of a trial the court was determined to conclude by that Friday, Grimes was denied a reasonable opportunity to develop the necessary expertise to consider how to respond to this new evidence.

Defense counsel's explanation of his attempts to consult with DNA experts during the one-day break in the trial after the issue came to light show clearly that the matter was not one that could be addressed in that short time. Likewise, the opportunity to cross-examine the State's DNA expert and lab personnel on the matter was an insufficient basis for denying the motion for mistrial. Without adequate time to consult an expert defense

counsel was in no position to challenge the claims of these witnesses to the effect that the police lab's systemic problems did not affect the relevant results in the case. Nor counsel conceivably have prepared adequately to challenge the lab's eleventh hour finding that the unknown male #1 sample from the Sig Sauer was in fact the DNA of technician Meinhardt.

The trial court's denial of Grimes's motion for mistrial was an abuse of discretion because of the paramount importance to the defense of the issue of the unknown male #1 sample and because of the evident impossibility of preparing an adequate defense centered around highly technical matters in one day. Moreover, it is apparent that the trial court was, to some extent at least, motivated by an unshakeable commitment to concluding the trial by the end of the week. While efficiency in the administration of the court is a laudable goal, it is an abuse of discretion to allow it to prevail over a defendant's reasonable request that in light of sudden changes in a key piece of technical evidence his trial be delayed.

II. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION FOR FIRST DEGREE PREMEDITATED MURDER.

The Standard of Review

A conviction cannot stand unless there is sufficient evidence such that any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *E.g. Goldsberry v. State*, 182 Md. App. 394, 412, 957 A.2d 1110, 1121 (2008). Among other sources, this standard for appellate review of the sufficiency of the evidence is rooted in the due process clause of the federal constitution, which has been held to

require that to warrant conviction in a criminal case, the state must prove "every fact necessary to constitute the crime" beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Not long ago, an appellate court reviewing a conviction for sufficiency of the evidence only needed to find *some* evidence of guilt, at least to pass federal constitutional muster. *See Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960)(due process violated by conviction on no evidence).[1] In *Jackson v. Virginia*, 443 U.S. 307, 316-17 (1979), the Court held that its decision in *Winship* compelled a higher standard: "The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence." Thus:

> After *Winship*, the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be … to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask" itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt …. Instead, the relevant question 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 beyond a reasonable doubt.

Id., 443 U.S. at 318-19 (emphasis in original; internal citation omitted). The Court also noted that although a "mere modicum" of evidence would satisfy the *Thompson* "no evidence" rule, this was not enough:

> Any evidence that is relevant – that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, *cf*., Fed. Rule Evid. 401 – could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt.

Id., 443 U.S. at 320. The key role of the requirement that a conviction be based only on proof beyond a reasonable doubt, and the necessity that this standard be more than just words, was expressed by Justice Blackmun, concurring in part and dissenting in part, in *Victor v. Nebraska*, 511 U.S. 1, 28 (1994):

> Our democracy rests in no small part on our faith in the ability of the criminal justice system to separate those who are guilty from those who are not. This is a faith which springs fundamentally from the requirement that unless guilt is established beyond a reasonable doubt, the accused shall go free. …
>
> * * *
>
> Despite the inherent appeal of the reasonable doubt standard, it provides protection to the innocent only to the extent that the standard, in reality, is an enforceable rule of law.

Justice Blackmun was dissenting from the Court's refusal to reverse a conviction based on what he considered to be a misleading definition of reasonable doubt. His argument, though, is also germane to the question of the scope of review for evidentiary sufficiency.[2] The reasonable doubt standard is an enforceable rule of law only if it is correctly stated to the jury. But it is also only an enforceable rule of law to the extent that appellate courts are willing to ensure that the standard is actually met.

Unfortunately, the oft-quoted *Jackson* rule seems to have been subject to two divergent interpretations, one that encourages real scrutiny of the sufficiency of the evidence, and a second that appears to endorse a less demanding level of review that threatens to creep back toward the *Thompson* standard. In brief, the problem turns on the perceived relation between the second and third sentences quoted from *Jackson* above, and on the inherent ambiguity of the word "any."[3]

Under the first interpretation, which Appellant asserts is the correct one, the inquiry described in the third sentence (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 beyond a reasonable doubt) is a more demanding *objective* inquiry than the *subjective* inquiry posited in the second sentence (in which the court asks itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. [4]) Under this interpretation, "any," as used in the third sentence, means "any one selected at random," or, effectively, "all" or "every."

Under the second interpretation, which Appellant argues is incorrect and inimical to the true level of review required by *Jackson*, the second sentence is seen as articulating a more demanding level of review than the third: the reviewing court is not to determine for itself whether, objectively speaking, the evidence is sufficient to establish guilt beyond a reasonable doubt. Instead, the reviewing court is to determine whether it is conceivable that among all the ostensibly rational fact-finders in the world there might be at least one that could reach a subjective level of certainty beyond a reasonable doubt based on the evidence, viewed in the light most favorable to the prosecution. Under this interpretation, "any" means "at least one."[5] This interpretation of *Jackson* might justifiably be called the *minimizing* interpretation.[6]

The Court of Appeals has paraphrased the familiar *Jackson* rule in a way that reaffirms the importance of the reasonable doubt standard in appellate review for evidentiary sufficiency, and suggests that the Court is applying the first interpretation of

Jackson. For instance, in *Albrecht v. State*, 336 Md. 475, 478-79, 649 A.2d 336, 337 (1994)(emphasis added), the Court said:

> Fundamentally, our concern is not with whether the trial court's verdict is in accord with what appears to us to be the weight of the evidence … , but rather is only with whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could *fairly* convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.[7]

The importance of robust appellate review for sufficiency of the evidence, consistent with the correct interpretation of *Jackson*, is also shown by the development and continued application of particular restatements of the rule where the evidence is entirely circumstantial. In *Taylor v. State*, 346 Md. 452, 458-459, 697 A.2d 462, 465 (1997), the Court of Appeals said:

> A conviction can rest on circumstantial evidence alone. A conviction resting on circumstantial evidence alone, however, cannot be sustained on proof amounting only to strong suspicion or mere probability. *See Wilson v. State,* 319 Md. 530, 535-36, 573 A.2d 831, 834 (1990). Circumstantial evidence may support a conviction if the circumstances, taken together, do not require the trier of fact to resort to speculation or conjecture, but
>
> > [c]ircumstantial evidence which merely arouses suspicion or leaves room for conjecture is obviously insufficient. It must do more than raise the possibility or even the probability of guilt. [I]t must ... afford the basis for an inference of guilt beyond a reasonable doubt.
>
> 1 UNDERHILL, CRIMINAL EVIDENCE § 17, at 29 (6th ed. 1973). If upon all of the evidence, the defendant's guilt is left to conjecture or surmise, and has no solid factual foundation, there can be no conviction. *Commonwealth v. White,* 422 Mass. 487, 663 N.E.2d 834, 840 (1996); *see also* WHARTON, WHARTON'S CRIMINAL EVIDENCE § 12, at 21-22 (14th ed. 1985). In this regard, this Court has held that when the evidence equally supports two versions of

> events, and a finding of guilt requires speculation as to which of the two versions is correct, a conviction cannot be sustained. *Hebron v. State,* 331 Md. 219, 234, 627 A.2d 1029, 1036 (1993); *West,* 312 Md. at 211, 539 A.2d at 237-38. This, of course, does not preclude a conviction based on a credibility determination emanating from disputed evidence.

This principle was recently reaffirmed in *Jones v. State*, 395 Md. 97, 119, 909 A.2d 650, 663 (2006), where the Court reversed a breaking and entering conviction:

> There was insufficient evidence to establish a constructive breaking. The State argues that because there was testimony presented that appellant's claim that an employee let him in the building without giving him the required security badge or without his checking in at the security desk, the evidence strongly suggests that he gained entry by fraud or by virtue of a conspiracy with someone in the Academy. While it is accurate that a conviction may rest on circumstantial evidence alone, we explained in *Oken v. State*, 327 Md. at 663, 612 A.2d at 275 (quoting *Wilson v. State*, 319 Md. 530, 536-37, 573 A.2d 831, 834 (1990)), that "a conviction upon circumstantial evidence *alone* is not to be sustained unless the circumstances, taken together, are inconsistent with any reasonable hypothesis of innocence." As we have noted, if the point of entry into the building was through the kitchen window, there was no evidence that the window had been secured or that anyone had to open the window in order to enter. That appellant entered the building through fraud or artifice is pure speculation.

Another particular instance of the application of this type of rule, which also predates *Jackson*, is the rule applied in cases where the only evidence is the defendant's fingerprint at the scene of a crime:

> It is generally recognized that finger print evidence found at the scene of the crime must be coupled with evidence of other circumstances tending to reasonably exclude the hypothesis that the print was impressed at a time other than that of the crime.

McNeil v. State, 227 Md. 298, 299, 176 A.2d 338, 339 (1961).

Despite the importance of the due process requirement of sufficiency of the evidence, however, *Jackson* is often interpreted incorrectly and the standard of appellate review is at least nominally reduced to something like review for abuse of discretion.[8] For instance, in *Mora v. State*, 123 Md. App. 699, 727, 720 A.2d 934, 947 (1998), *aff'd on other grounds*, 355 Md. 639, 735 A.2d 1122 (1999), this Court said the relevant question is "not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." This phrasing of the test for appellate review of the sufficiency of the evidence incorrectly opens up the possibility that a conviction may be affirmed if the court on appeal can imagine the existence of even one ostensibly otherwise rational fact-finder somewhere who could somehow manage to reach a subjective state of certainty beyond a reasonable doubt based on the evidence in the case. Quite obviously, when spelled out in this explicit way, such a test would be inconsistent with *Jackson*, and would be rejected. The problem is that the prevalence of the judicial language that is susceptible to this interpretation creates an unjustifiable risk that the proper and more stringent standard is not actually being applied in the decision-making process.

The troublesome language under consideration comes from Judge Charles E. Moylan, Jr.'s opinion in *Fraidin v. State*, 85 Md. App. 231, 241, 583 A.2d 1065, 1070, *cert. denied*, 322 Md. 614, 589 A.2d 57 (1991).[9] In that case, Judge Moylan was confronted with an appellant who took umbrage at the fact that the State was presenting the facts on appeal in the light most favorable to it. In context, the rhetorical flourish that has made *Fraidin* such an often-cited case was perhaps intended only to emphasize the

fact that on appellate review, the evidence is viewed in the light most favorable to the state.

This, too, was a focus of emphasis in *Jackson*, where the Court, after the familiar language quoted above, added:

> This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

443 U.S. at 318-19 (footnote omitted). What is required is assurance that what Judge Moylan in *Fraidin* called the pro-prosecution "spin," which properly fixes the evidence in the light most favorable to the State, does not leak over into the conceptually separate and completely objective question whether the evidence, so spun, is sufficient to establish the elements of the offense beyond a reasonable doubt.

There are two very different questions involved, and they must be kept separate: first, what historical facts could have been found by the jury from the evidence, assuming the jury resolved all credibility issues and other conflicts in the evidence in the state's favor, and what other relevant historical facts could rationally have been found by the jury by inference from the facts established by the evidence; and second, given the body of facts established in step one, could a rational jury have found beyond a reasonable doubt that all elements of the offense were established? Judge Moylan's language is

relevant to (at least the first part of) the first question: it is not a matter of whether the raw evidence presented at trial would have convinced all or even most juries (or appellate judges) of the particular historical fact sought to be established, but of whether some hypothetical rational jury could rationally have concluded that the particular historical fact was true, assuming it fully credited the evidence proffered in support of the proposition. The leap to the singular meaning of "any" ("at least some one") is powered here by the hypothetical notion that all the State's evidence is credited. We are imagining that there may be some one hypothetical rational fact-finder that does believe the State's witnesses but does not believe the defense witnesses. This is perfectly legitimate. As *Jackson* says, this is what gives the required "full play" to the fact-finder's role.

Similarly, with respect to drawing inferences from historical facts, the question is not whether the evidence would or would not have moved all or most juries to actually draw a particular pro-prosecution inference, but whether some hypothetical rational jury could rationally have drawn the inference from the predicate facts established by the evidence seen in the light most favorable to the State. This, however, does not give the same free range to a jury to draw inferences as it has to credit or discredit testimony. No fact finder is permitted to draw or rely on anything other than rational inferences.

What is a rational inference is in itself an extremely difficult question. In *Brown*, 182 Md. App. at 173, 957 A.2d at 674, this Court said: "To be sure, when we review a criminal conviction for sufficiency of the evidence, we draw all rational inferences that arise from the evidence in favor of the State. But this precept does not license an appellate court to indulge in rank speculation." The line between what is and what is not

a rational inference, according to this Court in *Brown*, is 50% probability. Anything less is speculation: "[W]here from the facts most favorable to [the party with the burden of proof] the nonexistence of the fact to be inferred is just as probable as its existence (or more probable than its existence), the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a jury will not be permitted to draw it." *Id*., *quoting Dukes v. State*, 178 Md. App. 38, 47-48, 940 A.2d 211, 217, *cert. denied*, 405 Md. 64, 949 A.2d 652 (2008)(internal quotes omitted).

Whether this definition of rational inference is the best one may be debatable. However, this question is not dispositive. Simply because an inference is considered a rational one, it does not therefore become capable in and of itself of sustaining a conviction beyond a reasonable doubt. *See, e.g. Williams v.* State, 342 Md. 724, 735, 679 A.2d 1106, 1112 (1996)(inference door would not have been left open based on evidence that victims were highly security conscious, without more, insufficient to prove breaking beyond a reasonable doubt). That is the essence of *Jackson*: even after viewing all the evidence in the light most favorable to the State, an appellate court must still determine, as an objective matter, whether that evidence rationally supports a finding of guilt *beyond a reasonable doubt*. No spin at all is involved at this stage. It is not a matter of whether some jury somewhere could be convinced to this degree. It is the inescapable burden of the appellate court to determine whether, as an objective matter, the evidence is sufficient to prove guilt *beyond a reasonable doubt*. [10]

The Evidence in This Case

Taken strictly in the light most favorable to the State, the evidence in this case, and reasonable inferences from the evidence, showed the following: Grimes drove to the vicinity of Fairfax Ave. late at night. After receiving a phone call and saying he would be there, Grimes got out of the van, armed with the Sig Sauer, and walked around the corner. The victim, an off-duty undercover police officer returning home, was on his front porch with keys in one hand and soda bottle in the other. Multiple shots were fired by the victim from in front of his home and the adjoining home and by Grimes from across the street. The victim was killed by a shot fired by Grimes's gun, while Grimes was seriously wounded by a shot fired from the victim's gun. After the shooting, two other men were seen running up the street. Grimes later received a phone call and told the caller he had been shot. Consciousness of guilt (of something) could be inferred from evidence that Grimes did not want to go to the hospital despite his serious wound and did not tell police the truth about where he had been shot, and from the jury's failure to credit Grimes's trial testimony..

As suggestive as this is, it not enough evidence to sustain a conviction of first-degree premeditated murder beyond a reasonable doubt. The elements of first-degree premeditated murder are an intentional, willful, and deliberate killing of one person by another. *See, e.g.,* Md. Crim. Pattern Jury Inst. 4:17; *Ferrell v. State*, 304 Md. 679, 687-88, 500 A.2d 1050, 1054 (1985).

Completely absent from this case is any evidence that could reasonably support a finding beyond a reasonable doubt that a premeditated first-degree murder took place on Fairfax Ave. There was no evidence from which a rational jury could find beyond a

reasonable doubt that Grime intended to kill the victim, or that his shooting of the victim was willful and deliberate. There was no evidence as to the chronology of the shooting by the victim and Grimes respectively. There was no evidence as to Grimes's reason for being on Fairfax or his intention at the time of the shooting. The evidence is completely consistent with the possibility that Grimes went to Fairfax to meet the other two men, perhaps to give them the gun, that the victim saw Grimes with a gun, that the victim shot first, and that Grimes shot back in self-defense.

The State's theory that Grimes was attempting to rob the victim was found by the trial judge to be without any evidentiary support when the court rejected the State's request for a felony murder instruction and granted Grime's motion for judgment of acquittal on all the attempted robbery related charges. The only other theory advanced by the State was that Grimes was targeting the victim. Of course, the evidence was consistent with this possibility, just as it is consistent with the possibility that the victim shot first. But one would have to speculate to conclude that this is what happened, and speculation is not enough to sustain a conviction. Where a conviction is based on circumstantial evidence, as this one was, the circumstances must exclude any reasonable hypothesis of innocence. *Jones v. State*, 395 Md. 97, 120, 909 A.2d 650, 663 (2006). The evidence in this case was equally consistent with the exonerating hypothesis that the victim shot first.

III. THE VERDICT WAS NOT SHOWN TO BE UNANIMOUS BY POLLING BECAUSE THE FOREPERSON WAS NOT SEPARATELY POLLED.

After the verdict of the jury was announced by the jury foreperson, Grimes requested a poll of the jurors. T 8/29/08 8-9. The clerk then asked eleven jurors in turn, "you've heard the verdict of your foreperson, is your verdict the same?" *Id*. 9-10. The clerk did not poll the jury foreperson by asking her if the jury's verdict, which she had delivered, was also her verdict individually, and simply asked each succeeding jury member whether he or she agreed with the verdict of the jury as announced by the foreperson. Thus, the jury's unanimity was not confirmed by the poll. A non-unanimous verdict is defective and must be set aside.

A criminal defendant has a constitutional right to a unanimous jury verdict. *Jones v. State*, 384 Md. 669, 682-683, 866 A.2d 151, 159 (2005); Md. Rule 4-327. The defendant's right to have the jurors individually polled to determine their assent to the verdict is established by rule, and is essential to protecting the constitutional right to unanimity. As the Court of Appeals said in *Jones*:

> A poll of the jury is conducted to ensure the unanimity of the verdict prior to its entry on the record. *Id.* at 166, 472 A.2d at 991. "The underlying requirement of a final verdict is that it be unanimous." *Id.* at 163, 472 A.2d at 990. The requirement of unanimity is, of course, a constitutional right set forth in Article 21 of the Maryland Declaration of Rights, which states that "every man hath a right ... to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty," and implemented through Rule 4-327(a). This Court explained this constitutional right in *Ford v. State,* 12 Md. 514 (1859):
>
> > 'The verdict is the *unanimous* decision made by the jury and reported to the court, on the matters lawfully submitted to them in the course of the trial.' *Unanimity* is indispensable to the sufficiency of the verdict.

> *Id.* at 549, quoting 10 *Bacon's Abridged Title Verdict,* 306 (emphasis in original).

Jones, 384 Md. at 682-683, 866 A.2d at 159.

There is language in *Smith v. State,* 299 Md. 158, 472 A.2d 988 (1984), to the effect that a valid poll can be accomplished by asking the remaining eleven jurors if they agree with the verdict of the jury as delivered by the foreperson. However, examination of this dictum in light of the factual context of its sources shows that it should not be taken as dispositive, or even persuasive. In a footnote *Smith*, the Court wrote:

> When the foreman has announced the verdict, it is sufficient if each of the other jurors when polled declares the verdict thus rendered by the foreman to be his verdict. This is the equivalent of a declaration on the part of each juror that the defendant was guilty (or not guilty) as stated by the foreman. "And this is all the law requires." *Biscoe v. State,* 68 Md. 294, 298-299, 12 A. 25 (1888). *Coby v. State,* 225 Md. 293, 299, 170 A.2d 199 (1961), approved the *Biscoe* rule. *Accord, Strong v. State,* 261 Md. 371, 373-374, 275 A.2d 491 (1971), *vacated in part, Strong v. Maryland,* 408 U.S. 939, 92 S. Ct. 2872, 33 L.Ed.2d 760 (1972).

299 Md. 158, 168 n.10, 472 A.2d 988, 992 n.10 (1984). This question was not relevant to the decision in *Smith.* This footnote occurs in the course of an extended general review of the law relating to the rendition of verdicts. Also, in *Smith*, the forelady herself was in fact individually questioned. More importantly, the proposition it states is not well founded on the primary source of the authorities cited. In *Biscoe*, the issue was whether the individual jurors' simple assent to the verdict as stated by the foreperson when polled, which did include the degree of murder, without individually repeating the degree of murder of which the defendant was found guilty, was a valid verdict when the law

required a murder verdict to state the degree. Moreover, the foreperson was in fact also individually polled. *See Biscoe v. State*, 68 Md. 294, 12 A. 25, 27 (1888).[11]

Thus, *Biscoe* is not authority for the proposition that the foreperson's announcement of the verdict of the jury as a whole is the equivalent of his or her individual assent to the verdict. Such a proposition is contrary to the entire purpose of polling, which is to give each and every juror the opportunity to freely and openly express his or her assent to (or dissent from) the verdict. Indeed, this was exactly what happened in *Smith*. There it was the jury forelady who changed her verdict upon being individually polled after announcing the verdict of the jury as a whole.

The *Jones* court did note that the defendant's constitutional right to a unanimous verdict can be waived. *Id*., n.15. However, any such waiver, because of the nature and importance of the right at stake, must meet constitutional standards. In *State v. McKay,* 280 Md. 558, 572, 375 A.2d 228, 236 (1977), the Court stated:

> We hold that a defendant may waive unanimity of a jury trial in criminal cases, provided not only that the court and the prosecution consent, but also that the waiver by the defendant conforms strictly with applicable constitutional standards.

In the present case, there was no constitutionally valid, knowing and intelligent waiver. Counsel's failure to object to the incomplete poll cannot trump Grimes's right to a unanimous jury verdict. Accordingly, the verdict was non-unanimous, and therefore defective, and must be set aside.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that this Court reverse the judgment of the court below.

Respectfully submitted,

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Counsel for Appellant

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PERTINENT AUTHORITY

MD Rules, Rule 4-327

(a) Return. The verdict of a jury shall be unanimous and shall be returned in open court.

***

(e) Poll of Jury. On request of a party or on the court's own initiative, the jury shall be polled after it has returned a verdict and before it is discharged. If the sworn jurors do not unanimously concur in the verdict, the court may direct the jury to retire for further deliberation, or may discharge the jury if satisfied that a unanimous verdict cannot be reached.

APPENDIX

[1] Of course, even before *Jackson*, Maryland law imposed a higher standard, akin to that set forth in *Jackson*. *See, e.g., Shelton v. State*, 198 Md. 405, 412, 84 A.2d 76, 80 (1951)("In a criminal case the fact must be shown or the inference supported beyond a reasonable doubt or to a moral certainty, or a reasonable doubt of an opposite fact must be created.") *Shelton* was the first case after the amendment of the Maryland Constitution (now Art. 23 of the Declaration of Rights) allowing review of the sufficiency of the evidence on appeal in criminal cases. For a discussion of the history of the review of facts on appeal in Maryland generally, *see Edwards v. State*, 198 Md. 132, 154, 83 A.2d 578, 579 (1951).

[2] *Cf. Thomas v. State*, 277 Md. 314, 325, 353 A.2d 256, 262 (1976)("When the day arrives, however, when a person may be convicted on the basis of suspicion only, liberty will have vanished from the land.")

[3] "Any" is defined as: 1) one or some, regardless of sort, quantity or number; 2a) one or another selected at random; 2b) one or another without restriction or exception; 3) the whole amount of; or 4) an indeterminate amount of: all. Webster's II New Riverside University Dictionary (1984).

[4] Interestingly, the concurring opinion in *Jackson* takes the position that enforcing the *Winship* "beyond a reasonable doubt" standard on appellate would require an appellate court to reach its own subjective certainty to that degree based on the evidence. 443 U.S. at 334-35.

[5] In translating ordinary language into logical symbols, "any" is ordinarily indistinguishable from "every" in positive statements, but may mean "some" or "none" when used with negation. *See* W. V. Quine, *Methods of Logic* (4th ed. 1982), at 97. Thus, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," means that all or every such trier of fact could have done so, not that one or some could have.

[6] As will be discussed later, a key element in this incorrect interpretation seems to be imprecision in the treatment of the role played by the presumption that the evidence be viewed in the light most favorable to the prosecution.

[7] The use of the word "fairly" in this context dates to *Williams v. State*, 5 Md. App. 450, 458, 247 A.2d 731, 737 (1968), *cert. denied*, 252 Md. 731 (1969). In *Wilson v. State*, 261 Md. 551, 564, 276 A.2d 214, 220 (1971), the Court said this was not a change from prior statements requiring that the evidence rightfully, properly, or justifiably support the conviction.

[8] This is certainly not to say that this Court has not undertaken a searching review of the sufficiency of the evidence in appropriate cases, s*ee, e.g., Brown v. State*, 182 Md. App. 138, 173, 957 A.2d 654, 674 (2008); *Handy v. State*, 175 Md. App. 538, 562, 930 A.2d 1111, 1125 (2007), or that the ultimate decision was necessarily wrong even in

cases where the articulation of the standard of review was susceptible to the argument being made here.

[9] This language from *Fraidin* is cited in many reported decisions of this Court, *see, e.g., Washington v. State*, 179 Md. App. 32, 70, 943 A.2d 704, 716, *rev'd on other grounds*, 406 Md. 642, 961 A.2d 1110 (2008); *Owens v. State*, 170 Md. App. 35, 101, 906 A.2d 989, 1026 (2006), *aff'd*, 399 Md. 388, 924 A.2d 1072 (2007), *cert. denied*, 128 S. Ct. 1064 (2008). And, as Shepardizing *Fraidin* in Westlaw shows, *Fraidin* is relied on in many hundreds of Appellees' Briefs filed by the State.

[10] Although the language in *Fraidin* did not, in context, go so far, in subsequent decisions Judge Moylan has articulated a theory that is arguably analytically incompatible with the interpretation of *Jackson* advocated here. In *Starke v. Starke*, 134 Md. App 663, 676, 761 A.2d 355, 362 (2000), Judge Moylan wrote that the measure of sufficiency has nothing to do with the burden (fn cont'd) of persuasion. In *Emory v. State*, 101 Md. App. 585, 622, 647 A.2d 1243, 1262 (1994), *cert. denied*, 337 Md. 90, 651 A.2d 855 (1995), he wrote:

> Evidence which is logically sufficient to persuade one fact finder to the bare preponderance level is, *ipso facto*, legally sufficient to persuade a second fact finder to the clear and convincing level and yet a third fact finder to the beyond a reasonable doubt level. The question of whether and of the degree to which legally sufficient evidence actually persuades is idiosyncratic to the fact finder.

See also Moosavi v. State, 118 Md. App. 683, 686, 703 A.2d 1302, 1304 (1998), *rev'd on other grounds*, 355 Md. 651, 736 A.2d 285 (1999).

[11] The present question was also not an issue in *Cody* or *Strong*, the two other cases cited in the *Smith* footnote. The repetition of the so-called *Biscoe* rule in those cases is thus also dictum.