No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIE JEROME MANNING, *Petitioner,*

v.

MISSISSIPPI, *Respondent*

ON WRIT OF CERTIORARI TO THE
MISSISSIPPI SUPREME COURT
PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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THIS IS A CAPITAL CASE

QUESTION PRESENTED

After trying for many years, Willie Manning was finally given access to biological evidence, including hairs that were introduced at trial and used against him, for DNA testing. He and the State agreed to a facility for testing, but no one could know whether DNA profiles could be developed from the samples. When the first laboratory found most of the hair samples too small or degraded to develop a profile, Manning asked for the hairs to be sent to a facility with greater capability to develop profiles on those types of samples. The state courts denied the request, which raises the following question:

If a State creates a protected interest in DNA testing, may it curtail that right arbitrarily?

RELATED PROCEEDINGS

Manning v. State, 726 So. 2d 1152 (Miss. 1998) (direct appeal)

Manning v. State, 903 So. 2d 29 (Miss. 2004) (opinion initially granting post-conviction relief and vacating convictions)

Manning v. State, 929 So. 2d 885 (Miss. 2006) (on state's motion for rehearing and vacating grant of post-conviction relief)

Manning v. Epps, 695 F. Supp.2d 323 (N.D. Miss. 2009) (denial of habeas corpus relief)

Manning v. Epps, 688 F.3d 177 (5th Cir. 2012) (affirming denial of habeas corpus relief)

Manning v. State, 2013 Miss. LEXIS 186 (Miss. Apr. 25, 2013) (denial of successive post-conviction petition)

Manning v. State, 112 So. 3d 1082 (Miss. 2013) (granting stay of execution)

Manning v. State, 119 So. 3d 293 (Miss. 2013) (granting leave to pursue DNA testing)

Manning v. State, 2022 Miss. LEXIS 175 (Miss. Jun. 30, 2022) (denial of request to transfer more appropriate DNA lab)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

ADDITIONAL AUTHORITY

PETITION FOR WRIT OF CERTIORARI

Petitioner, Willie Jerome Manning, a state capital inmate respectfully requests that the Court grant a writ of certiorari to review the decision of the Supreme Court of the State of Mississippi.

INTRODUCTION

Willie Manning has maintained his innocence and developed evidence to undermine the State's case against him. Although he sought access to physical evidence, he was never given access to inspect and test biological evidence until 2013. Some of the evidence consisted of hairs found in the victim's car that were used against him. An expert with the FBI testified that those hairs came from an African-American. T. 1047-48. The FBI subsequently acknowledged that such testimony lacked scientific basis. Manning hoped to show that DNA analysis of the hairs would exclude him and possibly point to the identity of the real perpetrator.[1]

The laboratory, which was jointly chosen by Manning and the State, could not develop profiles on many of the hairs because they were too small or degraded. Manning sought to have the hairs transferred to a different lab with specialized capability to develop profiles from degraded samples. It was impossible for Manning, or even an expert, to determine the quality of the samples until the initial lab attempted to develop a profile.

[1] As discussed below, the challenge to the hair evidence, in conjunction with other new evidence demonstrating the unreliable nature of the state's case, would have shown a "reasonable probability that the petitioner would not have been convicted." Miss. Code Ann. § 99-39-5(2)(a)(ii).

The state courts, however, denied his request. The decision of the Mississippi Supreme Court places all petitioners in the untenable position of having to guess what the most suitable lab will be, with no ability to make necessary changes after an expert evaluation of the samples. This decision is all the more arbitrary because a petitioner will not be able to change labs even based on advances in DNA analysis. Under these circumstances, the likelihood of obtaining usable results turns on a random guess made by petitioners and lawyers who have no qualified basis for making this decision. This arbitrariness creates a violation of due process.

OPINIONS BELOW

The order of the Mississippi Supreme Court denying Petitioner's appeal of the trial court's order denying mitochondrial DNA testing was entered on June 30, 2022 and is attached as Appendix A. The order of the Mississippi Supreme Court denying a motion for rehearing was issued on November 10, 2022, and is attached as Appendix B.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Mississippi Supreme Court on the basis of 28 U.S.C. Section 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mississippi Code Ann. § 99-39-5 provides, in part:

(2) A motion for relief under this article shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:

(a)

(i) That there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence; or

(ii) That, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.

Mississippi Code Ann. § 99-39-11 provides, in part:

> **(4)** To facilitate DNA testing of biological evidence, if granted under subsection (3) and if the interests of justice require, the judge may order:
>
> **(a)** The state to locate and provide the petitioner with any document, note, log or report relating to items of physical evidence

collected in connection with the case, or to otherwise assist the petitioner in locating items of biological evidence that the state contends have been lost or destroyed;

(b) The state to take reasonable measures to locate biological evidence that may be in its custody and to prepare an itemized inventory of such evidence;

(c) The state to assist the petitioner in locating evidence that may be in the custody of a public or private hospital, public or private laboratory or other facility;

(d) Both parties to reveal whether any DNA or other biological evidence testing was previously conducted without knowledge of the other party; and

(e) Both parties to produce laboratory reports prepared in connection with DNA testing, as well as the underlying data and the laboratory notes, if evidence had previously been subjected to DNA testing.

(5) If the court orders DNA testing of biological evidence under subsection (3) and evidence for such testing is located in accordance with subsection (4), such testing shall be conducted by a facility mutually agreed upon by the petitioner and the state and approved by the court, or, if the parties cannot agree, the court shall designate the testing facility and provide parties with a reasonable opportunity to be heard on the choice of laboratory issue. The court shall impose reasonable conditions on the testing to protect the parties' interests in the integrity of the evidence and the testing process.

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(9) The court, in its discretion, may make such other orders as may be appropriate in connection with a granting of testing under subsection (3). These include, but are not limited to, designating:

(a) The type of DNA analysis to be used;

(b) The testing procedures to be followed;

(c) The preservation of some portion of the sample for testing replication;

(d) Additional DNA testing, if the results of the initial testing are inconclusive or otherwise merit additional scientific analysis;

(e) The collection and DNA testing of elimination samples from third parties; or

(f) Any combination of these.

STATEMENT OF THE CASE

I. Summary of the History of Petitioner's Case.

A. Trial and Direct Appeal

Manning was convicted of and sentenced to death for the murders of Jon Steckler and Tiffany Miller, two students at Mississippi State University. At trial, Manning raised an alibi defense and has always maintained his innocence. As discussed in greater detail below, the State's case was based on circumstantial evidence except for a "confession" allegedly given to a jailhouse informant who had also been a suspect in the case and who had already given a statement implicating another person. No physical evidence tied Manning to the murders, and no DNA testing was done to determine if Manning was present because the technology of DNA testing was not sufficiently advanced. An FBI expert testified that hairs found in Miller's car came from an African-American. Manning is an African-American, and the victims were white. The prosecutor relied on the hair evidence as circumstantial proof of Manning's involvement in the crime. The Mississippi Supreme Court affirmed his convictions and death sentences. *Manning v. State,* 726 So. 2d 1152 (Miss. 1999) ("*Manning I*"). [2]

[2] At one time, Manning had a total of four capital murder convictions. In 1996 he was convicted and sentenced to death for the murders of Alberta Jordan and Emmoline Jimmerson. Those convictions were overturned in February 2015 because the State had failed to disclose evidence that discredited the testimony of its only eyewitness. *Manning v. State*, 158 So. 3d 302 (Miss. 2015). The State voluntarily dismissed the case on remand.

B. The First Effort to Obtain State Post-Conviction Relief

During the course of post-conviction proceedings, Manning sought to inspect the State's files to determine whether there was any evidence suitable for DNA testing. The Mississippi Court initially granted post-conviction relief in a unanimous opinion that applied the intervening decision of *Weatherspoon v. State,* 732 So. 2d 158 (Miss. 1999) (holding that witnesses should not be allowed to testify about their offers to take polygraph examinations). The Mississippi Supreme Court found that the pending discovery motions, including a motion to inspect the physical evidence, were moot. Order on Motion #2003-3019, *Manning v. State,* No. 2001-DR-00230-SCT (entered May 27, 2004).

The Mississippi Supreme Court granted Respondent's motion for rehearing and remanded the case to the Circuit Court of Oktibbeha County for a hearing to determine whether the State suppressed surreptitiously recorded telephone conversations between Manning and Paula Hathorn, his former girlfriend. At the behest of law enforcement, Hathorn agreed for her conversations with Manning to be recorded. On the recordings, Hathorn made a number of statements at odds with her trial testimony as she attempted in vain to induce Manning to incriminate himself. The lower court denied relief. The Mississippi Supreme Court affirmed the decision of the lower court. As for the *Weatherspoon* issue, the state supreme court held for the first time that it would apply the nonretroactivity principles of *Teague v. Lane,*

489 U.S. 288 (1989), to its own new decisions.[3] *Manning v. State,* 929 So. 2d 885 (Miss. 2006) ("*Manning II*").

Petitioner sought rehearing and renewed his discovery motion with the Mississippi Supreme Court and also filed a Renewed Petition for Review of Lower Court's Refusal to Address Discovery Motions. Mot. #2005-2984, *Manning v. State,* No. 2001-DR-00230-SCT (filed Sept. 19, 2005). The Mississippi Supreme Court denied rehearing as well as the renewed motion for discovery. Order denying Mot. #2005-2984, *Manning v. State,* No. 2001-DR-00230-SCT (Miss. March 9, 2006). The Mississippi Supreme Court also denied a motion for rehearing to reconsider the denial of the discovery motion. Order on Mot. #2006-948, *Manning v. Epps,* No. 2001-DR-00230-SCT (Miss. June 15, 2006).

C. Federal Habeas Corpus Proceedings

Following the denial of state post-conviction relief, Petitioner filed a petition for a writ of habeas corpus. The District Court granted a motion to inspect the State's evidence. After determining that key biological evidence remained in the custody of the Oktibbeha Sheriff's Department, Petitioner sought DNA testing. Successor Ex. 1.[4] The District Court, however, denied the request, primarily because it was not related to any ground raised in the habeas petition. Order, *Manning v. Epps,* No. 1:05-cv-00256-WAP (Doc. #65) (N.D. Miss. Oct. 3, 2008).

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[3] Compare *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008) (States are not bound to apply *Teague* retroactivity analysis in their post-conviction jurisprudence).

[4] "Successor Ex." refers to exhibits attached to the Motion for Leave to File Successive Petition for Post-Conviction Relief, Including DNA Testing and Other Forensic Analysis, *Manning v. State,* No. 2013-DR-00491-SCT (filed March 22, 2013).

The District Court denied relief on the merits of the claims raised but granted permission to appeal on two issues: the discriminatory use of peremptory strikes and trial counsel's failure to develop and present mitigating evidence. 695 F. Supp.2d 323 (N.D. Miss. 2009).

On appeal, the Fifth Circuit dismissed the petition, finding that Manning's federal habeas petition was filed too late and that he was not entitled to equitable tolling. The Fifth Circuit blamed Manning for the failure of two different court-appointed lawyers to file a timely state court petition to toll the limitations period, finding that he could have retained his own lawyer or filed his own petition. *Manning v. Epps,* 688 F.3d 177, 187 (5th Cir. 2012). This Court denied certiorari. *Manning v. Epps,* 568 U.S. 1251 (2013).

D. State Successor Proceedings

In March and May of 2013, Manning filed two motions with the Mississippi Supreme Court requesting leave to file a successive petition for post-conviction relief, including requests for DNA testing and other forensic analysis. The state court denied the first motion on April 25, 2013, and set an execution date. On May 7, 2013, the Mississippi Supreme Court stayed Manning's execution, after receiving three letters from the United States Department of Justice stating that FBI experts used as witnesses in Manning's trial had testified contrary to accepted scientific principles. See infra at 23-25. On July 23, 2013, the court granted Manning's second motion for the limited purpose of allowing him to proceed in circuit court with his request for DNA testing and fingerprint comparison. R. 30.

Manning filed his Petition on October 11, 2013. At the hearing of Manning's petition on January 31, 2014, the Circuit Court instructed the parties to present an agreed order listing the items of evidence for which testing was requested, identifying the custodians of the evidence and setting forth the procedures to be followed by the various custodians in packaging and delivering the evidence to the testing laboratory. The parties agreed that DNA testing would be performed at the Orchid Cellmark Forensic DNA Testing Facility in Farmers Branch, Texas.[5]

On March 6, 2014, "Order(s) Directing Search for Evidence" were delivered to various entities instructing them to search their facilities for evidence related to this case. R. 563-589. With the assistance of counsel for both parties, the evidence was inventoried and catalogued, and on August 29, 2014, the Circuit Court entered an agreed order specifying the method of delivery of evidence to the lab and the general protocol and schedule for testing. App. 54a-57a, R. 653-57, Order for Delivery of Evidence and Protocol for DNA Testing. The Order observed that all costs of testing would be paid by Innocence Project Mississippi. App. 58a, R. 657.

The evidence was shipped from each of the three entities to Orchid Cellmark in October and November of 2014. The lab began its review of the evidence to determine the items most likely to yield probative results. On November 24, 2014, the lab sent a letter to the parties recommending that testing begin with three swabs from the rape kit used in the examination of victim Tiffany Miller, fingernail scrapings of Ms. Miller and Jon Steckler, pubic hair and combings of Miller, all items

[5] Orchid Cellmark later merged with Bode Technology, which performed the remainder of the testing in this case.

of Miller's clothing provided as evidence, debris from Miller's clothing, and hairs found in the hands of both victims. R. 756.

On June 5, 2015, Orchid Cellmark provided an update of its initial screening (begun in November 2014) of vaginal swabs from the rape kit, pubic hair combings, fingernail scrapings of both victims and hairs found in both victims' hands. *R. 883-886* All three rape kit swabs and the pubic hair and combings tested negative for semen; all would undergo further testing, however, including "DNA extraction and quantitation for the purpose of determining whether any male DNA is present." R. 884 and 885. The fingernail scrapings were found to have "0.00" concentration of male DNA, but the scrapings also would "now undergo a process to increase the concentration of DNA." Finally, the evidence "said to contain hairs found in the victims' hands" did not in fact contain any hairs. *Id.*

In October of 2015, Orchid Cellmark announced that it was merging with Bode Technology, and that all of the evidence in Manning's case would be transported to a facility in Virginia.

On January 6, 2016, the lab recommended that it "thoroughly screen" each item of evidence not yet tested. R. 898. In its email, the lab listed all of the items "as inventoried by Cellmark Forensics in Dallas." This list included seventy-seven items that were not the subject of testing reported on June 5, 2015. R. 898-99. Many of these items were in fact collections of several smaller pieces of evidence, including hairs. For example, items designated Q32 through Q52 were sweepings and debris removed from Miller's car. *Id.* Q43 and Q44 were of primary interest to Manning

because these items contained several hair fragments that were admitted at trial as evidence that Manning had been in Miller's car. (State's Ex. 49 and Ex. 50; Trial T. 1041-42, 1044-45)

The cost of testing only one hair was $2,950, so Manning had to be selective in deciding which items of evidence to test. He selected fourteen items of hair sample for the lab to screen for further testing. R. 940.

On May 31, 2016, the lab sent the parties a report listing the fourteen items Manning had selected for screening. Altogether these items contained 59 apparent human hairs, 45 of which presented the *possibility* of yielding an identifiable DNA profile. *See* R. 940. According to the report, Q43 and Q44 contained thirteen "apparent human hairs" that "may be suitable for mitochondrial DNA testing." *Id.*

Manning selected a number of hairs for testing. These included additional hairs found in the victims' hands and hairs contained in Q43 and Q44 (State's Exhibits 49 and 50). Later the lab reported that the testing was likely to consume some of the hairs, making them unavailable for future testing. R. 940

For the next several months, Manning's attorneys conferred with the funding source and also conferred with counsel for the State regarding consumption of the hairs at issue. Then in July 2017, the lab reported that the number of hairs it had identified as suitable for testing (34 hairs total, including hairs in Q43 and Q44) were far in excess of the number previously reported. (See R. 940 and R. 944) The estimated cost of testing thirty-four hairs was $85,680. R. 951

On October 5, 2017, counsel submitted an alternative proposal to test 18 hair fragments and obtained a formal cost estimate of $45,200. R. 951 On December 6, 2017, counsel notified the lab that a funding source had been confirmed and the cost estimate of $45,200 was accepted.

The lab proceeded with testing of the hairs, and on April 17, 2018, sent an email listing the preliminary results. Enough information was obtained to determine partial or complete DNA profiles from each of the hairs found in the victims' hands. That said, "no mtDNA data was obtained" from numerous other hair samples, including those in Q43 and Q44 (State Exhibits 49 and 50). *See* R. 955.

In discussions with counsel throughout testing efforts, lab representatives explained that its difficulty detecting DNA data in the samples was due to the advanced age and degradation of the evidence (collected in 1992 and 1993), and the limited size of evidence such as hairs. According to the lab, hairs should be at least 3 to 4 centimeters in length to maximize the possibility of detecting useful information about its DNA. *See* R. 997, 1004; T. 35.

On October 15, 2018, counsel reported to the Court they had lost their funding source and were looking for other means to pay for the testing. By the end of 2018, the Mississippi Office of Capital Post-Conviction Counsel agreed to pay for the remainder of the testing.

In January 2019, the Circuit Court ordered a status conference to discuss bringing the testing to a conclusion. The conference took place on January 10, 2019. R. 956. The parties agreed on the terms of a proposed order regarding future testing,

and on February 11, 2019, an agreed order was entered providing three additional stages of testing beginning with hair fragments. App. 85a-86a, R. 958-59. For subsequent rounds of testing, the parties were required to submit their requests to the lab within thirty days of the lab's reporting on the previous round of testing. *Id.* Pursuant to the agreement of counsel for both parties, the order did not state any calendar dates as deadlines, and it contemplated the filing of additional motions for other testing: "After determining whether additional items already submitted to Bode Cellmark should be screened, the parties will have thirty days to file any additional motions with this Court for additional testing of evidence." *Id.*

On February 20, 2019, the lab issued a report to document the results of screening undertaken to date. R. 985. It listed one hundred and two (102) hair samples that had been tested for the presence of mitochondrial DNA. R. 985-88. Data was found in only five hairs, and these were limited to the hair fragments found in the hands of the victims. R. 987. The report confirmed that the lab could not obtain any data regarding the presence or the characteristics of any mitochondrial DNA in most of the items, including twelve hair fragments contained in Q43 and Q44. (R. 985, 988)

In March 13, 2019, Manning's attorneys asked the lab to test five additional hair fragments. Manning selected hairs that were at least three centimeters long. On October 25, 2019, the lab reported its findings. No usable information was obtained about the DNA in any of the five hairs tested. For three of the hairs, "No mtDNA was obtained." R. 983. For one of the hairs, "the mtDNA obtained . . . [was]

not reportable." *Id.* For another hair (an "apparent root end"), "the results were below the limit of detection." *Id.*

In discussions with Manning's attorneys, representatives of the lab stated that these conclusions did not mean that there was no human DNA present in the samples; nor did they mean that DNA data categorically could not be obtained. Rather, it meant that the data could not be obtained or detected *using the methods employed by Bode Cellmark*. (R. 997 and 1012 (email from A. Barranco stating there is "not enough" mtDNA data "present for us to detect it with our current testing methods"). However, according to the Bode representatives, there were other labs that employed more specialized methods for detecting DNA data in very old and very small samples of evidence. The representatives referred to one lab in particular – MitoTyping Technologies, LLC – and suggested that some of the hairs be sent there. Counsel for Manning contacted MitoTyping Technologies and determined that it could perform the needed testing within three to four months. (*See* R. 998.) Manning moved the court to authorize delivery of seven hair fragments to MitoTyping. He attached the affidavit of Gloria Dimick, Quality Manager, which referenced peer-reviewed articles showing that MitoTyping had detected mtDNA data from hair samples only 0.5 cm in length 90% of the time. R. 991. MitoTyping had obtained mtDNA data from a hair taken into evidence in 1969, and from a hair that measured only 2 millimeters (not centimeters) in length. R. 991.

The Circuit Court denied the motion. App. 87a-90a, R. 24-27. In its Order, the court first found that there had been "many deviations from the timeframe

established by the second scheduling order." App. 88a, R. 25. The court then concluded that *no evidence concerning hairs was admitted against Manning at trial*. *See* App. 89a, R. 26 (finding that discussion of hairs occurred only during the State's closing argument).[6] The court also concluded (a) that Manning had not shown "a reasonable likelihood that MitoTyping would be able to provide results that Bode could not;" (b) that Manning had not shown a reasonable probability that testing would provide more probative results or new evidence, and (c) that the requested testing would not show a reasonable probability that Manning would not have been convicted or would have received a lesser sentence *Id.* In reaching the latter conclusions about the probative value of the requested testing, the Circuit Court in effect found that hair evidence is simply irrelevant to Manning's case:

> [If] mitochondrial DNA was found in all seven samples, there would be no outcome relevant to the case. The vacuum sweeping could have come from any source from the time the car was manufactured until the time the samples were obtained. Identifying the mitochondrial DNA of seven hair samples obtained from vacuum sweeping and debris from the car will not call into question the Petitioner's conviction as it is irrelevant to the issue of guilt.

App. 89a-90a, R. 26-27.

Manning filed a motion to reconsider (R. 1018), which was denied on August 26, 2020. App. 91a, R. 28-29.

[6] Astonishingly, although the trial court correctly recognized that the prosecution focused repeatedly on the hairs in closing argument, it failed to recognize that the hairs themselves were admitted as State exhibits Q43 and Q44 and were the subject of FBI expert testimony opining (incorrectly) that the hairs came from an African American.

E. The Appeal from the Motion to Send Hair Evidence to a Specialized Lab.

On appeal, the Mississippi Supreme Court acknowledged that the source of the hairs in question had not been determined. App. 26a, *Manning,* at *35. However, it faulted Manning for not showing that Mitotyping could overcome the problems with the degraded samples. App. 31a, *Id.* at *41. It found that the "circuit court did not abuse its discretion by denying Manning's motion because Manning failed to introduce any reliable evidence as to why the allegedly inconclusive results merited additional scientific analysis or proof that the additional testing would produce results." App. 31a, *Id.* at *42. It also faulted Manning for not providing "additional evidence or claims of a third party's involvement in the crime." App. 32a, *Id.* at *44. Finally, given other evidence presented at trial, Manning could not make a showing that "the outcome would have been different." App. 36a, *Id.* at *49-50.

F. The Importance of the Hair Evidence at Trial

1. How the State Used the Hair Evidence.

Examination of hair taken from Miller's car played a prominent role at Petitioner's trial. The FBI examined the evidence and found some "hair fragments of Negroid racial origin." Successor Ex. 5 and 6 (inventory of evidence sent to FBI and FBI report on hair comparison). Chester Blythe, an expert from the FBI, testified at trial that the hair found in Miller's car and collected as samples Q43 and Q44 originated from an African-American. T. 1048.[7]

[7] "T." refers to the trial transcript; "PCR T." refers to the transcript of the PCR evidentiary hearing; "C.P." refers to the Clerk's Papers from Petitioner's trial.

The prosecutor repeatedly stressed the importance of this hair evidence in his summation:

> [O]ut of all the people that could have been a burglar of John Wise's car, **how many of them could leave hair fragments in the car**, **hair fragments that came from a member of the African-American race** because that's what they find when they vacuum the sweepings of the car, that's what they find in both significantly the passenger's seat and the driver's seat, just like it would be if the man rode out there as a passenger and came back as a driver. . . . **How many people, ladies and gentlemen, who could leave those fragments**, how many of those also left his home on the morning of December 9th. . . . How many people could have committed this crime, ladies and gentlemen, that **could have left those fragments**, that left their home carrying a gun and some gloves . . . . **How many people could leave those hair fragments**, how many people left their house that morning with the gun and the gloves . . . . **How many people could leave those hair fragments**, left the house with the gun and the gloves, was trying to sell a ring and a watch like Jon Steckler's, and also had the jacket from John Wise's car . . . . **How many people could leave the fragments**, left his house with gun and gloves, were trying to sell rings and watches like Jon Steckler's, had a jacket from the burglary, and undeniably had the CD player from that burglary . . . .

T. 1546-47 (emphasis added). The prosecutor continued in this vein, each time reminding the jury of the hair fragments.

In his rebuttal argument, the prosecutor again relied on the hairs to answer the defense's position that no physical evidence linked petitioner to the murder scene: "there's even some additional proof inside that vehicle and that's the hair fragments." T. 1607.

2. Probative DNA evidence would have tipped the balance in Petitioner's favor because the State's case had glaring weaknesses.

The prosecution's case was built on a sketchy theory supported by much unreliable evidence. The state theorized the Jon Steckler and Tiffany Miller were abducted from a fraternity parking lot when they discovered Manning breaking into a car owned by John Wise. Manning then forced them to climb into Miller's car, which was a Toyota MR2 designed to hold only two people. The perpetrator also got into the car and supposedly made Miller sit on his lap while Steckler drove the car to a deserted location. T. 915-18. Law enforcement spent seven hours dusting for fingerprints and checking for blood, hair, and fibers. T. 1400. Numerous prints suitable for comparison were found. The latent lifts of those prints were compared to prints on file for several individuals, including Petitioner, thought to have been involved in car burglaries in the Starkville area. The prints found in the car did not match any of the prints on file. Thus, no fingerprint evidence tied Petitioner to the car. Likewise, the state found no basis to allege that hair, blood, or fibers linked Petitioner specifically to the MR2 or crime scene. T. 876.

There was no firm proof linking the murders to the burglary of Wise's car. Items taken from the car included a CD player, a brown leather bomber jacket, a silver monogrammed huggie, and several dollars in change from the console. T. 634. The State speculated that the car burglary was tied to the murders. The prosecution presented evidence trying to link Manning to the theft from Wise's car. Paula Hathorn, Manning's girlfriend, produced a jacket that she said belonged to Manning.

Wise identified the bomber jacket as having been taken from his car, T. 641, although he could not identify the jacket at first, and the FBI could not conclude that the jacket had belonged to Wise. T. 647, 1582.[8]

The prosecution then tried to link the theft from the car to the scene of the murder. Wise identified a token found at the scene of the murder, T. 638, as coming from a public rest room in Grenada. He said it had lost its shine sitting on his console. T. 638. However, the one found at the scene was, according to Sheriff Dolph Bryan, a bright shiny gold color. T. 784. There was no evidence how it got there, and there were no fingerprints on the token. T. 855. This was the only evidence linking the murder to the car theft in any way. T. 856-57. The State speculated that the victims walked up on a car burglary in progress. T. 852. However, Sheriff Bryan admitted that no evidence supported this. T. 854.

On the day of the murders, Miller's MR2 was discovered in a parking lot within view of her home, several miles from the location where the victims' bodies were found. T. 871. This might suggest that her killer may have known her or been a perverted admirer from the area around her trailer. On the other hand, there was no link between Manning and the victims, T. 874, and Manning lived ten miles from where her car was abandoned. T. 874. The prosecution did not even attempt to speculate how Manning managed to get home that night carrying an armload of stolen goods after he dumped Miller's car at such a distance from his own home.

[8]The investigators had looked at 100 jackets, and the jacket at issue is a popular brand. T. 830.

As noted previously, no physical evidence from the car linked Manning directly to the crime. There were no prints on bullet casings or the token. T. 776, 855.[9] There were footprints at the scene, T. 858, but no footwear found in Manning's house matched them. T. 859. The murder weapon was never found. T. 866.[10] None of the items supposedly missing from the victims – two watches, a class ring and perhaps a necklace, T. 866-67[11] – were ever linked to the accused.[12] They were linked to other people.[13] The sheriff acknowledged the lack of evidence. T. 877.[14]

What supposedly 'led' the sheriff to Manning was finding a "huggie" supposedly in the proximity of where Manning lived. T. 882. Actually, the huggie was found five miles from his house. T. 882.

In the end, the State made its case only through using highly incentivized witnesses. Paula Hathorn, Manning's former girlfriend, was "number one on [Sheriff Bryan's] list" for receiving a large part of the $25,000 reward for solving this crime. T. 886. Even the sheriff acknowledged that Hathorn was untrustworthy. T. 887. According to law enforcement, Hathorn showed the authorities a tree where there

[9] Some hairs were found on the victims and in the MR2. None were linked to Manning.
[10]Law enforcement checked on every .380 transferred in the area in over a year, sending them all to the FBI lab for comparison. T. 831.
[11]Nothing in the ashes of burned material at Manning's house linked him to the crime. T. 913.
[12] Steckler wore a gold high school ring from Cathedral High in Natchez, and a distinctive watch with a leather band and little clocks decorating the main face. T. 609. Hathorn had listed all the things that Manning had supposedly stolen, and nowhere on the list was the class ring that the prosecution alleged that he stole from Steckler. T. 714-15.
[13]For example, Carl Rambus gave a statement early on to the authorities about another person who had been seen in possession of the ring allegedly stolen from Steckler. T. 1332-33.
[14]The FBI did exhaustive work on gleanings from the case, including seventeen prints that were not from the victims, but could not match them to Manning. T. 832, 1498.

were four bullets that allegedly matched the bullets in the victims. T. 996 *et seq*. But Hathorn initially told law enforcement that she had not seen Manning fire into the tree, T. 695-96. Even if the overstated ballistics evidence were accepted at face value, the sheriff conceded that others could still have been responsible: "Once a gun gets in the street in the street hoodlum's hands, it can pass many, many times." T. 902.

Earl Jordan claimed to have overheard Manning confess to committing the crime with Jessie Lawrence. Manning supposedly told Jordan that he and Lawrence forced the victims at gunpoint to get in Miller's MR2, and that Manning and Lawrence rode with them to the murder scene, an implausible account given that Lawrence was incarcerated in Alabama at the time, and that it was impossible to fit four people into the MR2. Moreover, Jordan had initially given a statement to the police linking Anthony Reed, an early suspect, to the crimes. Jordan told the police that he had seen Reed in the victim's car with Tiffany. T. 1164-65, 1188. Jordan, who could have been indicted as a habitual offender, found his pending charge for burglary reduced to looting shortly after giving his statement to law enforcement.

The State also turned to Frank Parker, another jailhouse informant. According to Parker, Manning had a conversation with someone called "Miami" about the gun used in the crime. T. 1120.

Manning consistently maintained his innocence. At trial, he pursued an alibi defense, sought to discredit the State's informants, and pointed to evidence suggesting that someone else was responsible for the homicides. For instance, the defense called a witness who saw Miller's car parked at the Mayhew Apt. complex at

1:00 a.m., which is when the prosecution thought Manning was committing the kidnapping and murder. Later, two students saw a car traveling at a high rate of speed near Miller's apartment around the time that the bodies of Miller and Steckler were found. T. 1339-41.

The defense sought to establish that Manning was elsewhere – the 2500 Club – at the time of the crime. Gene Rice, one of the few visitors at the 2500 Club that night who had no criminal record, recalled seeing Manning at the club that night. As the prosecutor so aptly pointed out, if this was the case, Manning "could not possibly have committed this crime. . . ." T. 1302. Since Rice did not like Manning, there was little reason for him to lie. Others also saw Manning at the club.[15]

Manning also undermined Hathorn's testimony about his whereabouts the day after the murders. At trial, Hathorn, who lived with Manning at the time, testified that she did not see Manning the morning just after the murders. Lindell Grayer, however, testified that he picked Manning up the next morning at Manning's house. T. 1413.

3. Evidence Developed Post-Conviction Undermines Confidence in the Outcome of the Trial

When considering whether the trial court erred in not authorizing another lab to analyze the evidence, the Mississippi Supreme Court overlooked additional evidence developed in post-conviction proceedings and also presented in conjunction

[15] King Hall saw Willie Manning at the 2500 Club sometime after 11:30 or 12:00. T. 1273. Landon "Poncho" Clayborne saw him around 11:00 p.m. T. 1283. Mario Hall saw him sometime after 12:00 a.m. T. 1256. Keith Higgins saw him there possibly up to 12:30 a.m. T. 1216.

with the successive petition that further weakened the state's case, and which only increased the likelihood that probative results of mitochondrial hair testing would decidedly tip the balance in Manning's favor.

For instance, on May 2, 2013, the United States Department of Justice transmitted a letter to the prosecutor in Manning's case to report that "erroneous statements regarding microscopic hair comparison analysis was used in this case." (*Manning v. State*, No. 2013-DR-00491-SCT, Motion to Stay Execution, May 6, 2013, Ex. A at 1) The letter explained that the Department of Justice and the Federal Bureau of Investigation have been engaged in a review of cases involving microscopic hair comparison in order "to ensure that FBI Laboratory reports and examiner testimony regarding microscopic hair comparison analysis met accepted scientific standards." (*Id.*) In the section of the letter labeled, "Error Identified in this Matter," the Department explains its position regarding the FBI hair expert who testified in Manning's case:

> We have determined that the microscopic hair comparison analysis testimony or laboratory report presented in this case included statements that exceeded the limits of science and was, therefore, invalid. While this case did not involved a positive association of an evidentiary hair to an individual, the examiner stated or implied in a general explanation of microscopic hair comparison analysis that a questioned hair could be associated with a specific individual to the exclusion of all others – this type of testimony exceeded the limits of the science. The examiner also assigned a statistical weight or probability or provided a likelihood that, through microscopic hair comparison analysis, the examiner could determine that a questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of a positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association – this type of testimony exceeded the limits of the science.

(*Id.*, Ex. A at 2)

In its May 2 letter, the Department of Justice also offered to provide additional DNA testing of the kind specifically requested by Manning in his motion filed March 22, 2013:

> In the event that your office determines that further testing is appropriate or necessary, the FBI is available to provide mitochondrial DNA testing of the relevant hair evidence or STR testing of related biological evidence if testing of hair evidence is no longer possible, if (1) the evidence to be tested is in the government's possession or control, and (2) the chain of custody for the evidence can be established.

(*Id.*)

On May 4, 2013, the Department of Justice transmitted a second letter in response to inquiries about the first letter, in particular, "whether the errors identified in the [May 2] letter had any bearing on the examiner's opinion regarding the racial classification of the hair." The second letter states:

> In response to inquiries regarding whether the errors identified in the notification letter had any bearing on the examiner's opinion regarding the racial classification of the hair, the FBI states the following: The scientific analysis of hair evidence permits an examiner to offer an opinion that a questioned hair possesses certain traits that are associated with a particular racial group. However, since a statistical probability cannot be determined for classification of hair into a particular racial group, *it would be error for an examiner to testify that he can determine that the questioned hairs were from an individual of a particular racial group*. Thus, an examiner cannot testify with any statement of probability whether the hair is from a particular racial group, but can testify that a hair exhibits traits associated with a particular racial group.

(Ex. B at 1) (emphasis added). The DOJ renewed its offer to conduct DNA testing.

On May 6, 2013, Department of Justice sent a third letter, this time identifying error in FBI ballistics testimony that bullets taken from the victims were identical to bullets taken from a tree near Manning's home. (*Manning v. State*, No. 2013-DR-00491-SCT, Supplement to Motion to Stay Execution, May 7, 2013, Ex. E (Letter from John Crabb, Jr. to Deforest R. Allgood, dated May 6, 2013). At trial, FBI firearms examiner John Lewoczko testified that a projectile found at the crime scene and two projectiles taken from the body of Tiffany Miller were fired from the same gun "to the exclusion of every other firearm in the world." T. 1091. Lewoczko also testified that he compared the three crime-scene bullets to projectiles taken from a tree near Manning's house, and found that *all* came from the same gun "to the exclusion of every other firearm – every other barrel, in the world." T. 1092. He added, "It's like fingerprints are to you. These bullets were all fired from one barrel." T. 1092; *see also* T. 1096.

In its letter dated May 6, 2013, the Department of Justice stated that this testimony was erroneous:

> The science regarding firearms examinations does not permit examiner testimony that a specific gun fired a specific bullet to the exclusion of all other guns in the world. The examiner could testify to that information, to a reasonable degree of scientific certainty, but not absolutely. Any individual association or identification conclusion effected through this examination process is based not on absolute certainty but rather a reasonable degree of scientific certainty. As with any process involving human judgment, claims of infallibility or impossibility of error are not supported by scientific standards.

(*Id.*, Ex. E at 1-2)

Testimony that all the projectiles at issue were fired from the same weapon has been a central part of the State's case since trial. When denying Manning's request for DNA testing, the Mississippi Supreme Court highlighted the examiner's conclusion that he could rule out all other guns as having fired the projectiles: "In what this Court described as even "[m]ore damning testimony[,] FBI experts testified that the bullets retrieved from that tree were fired from the same gun as the bullets recovered at the scene of the murders and from the victims' bodies, to the exclusion of all other guns." Order at 3, *Manning v. State,* No. 2013-DR-00491-SCT (Miss. Apr. 25 2013) (citations omitted).

In the 1998 opinion affirming Manning's convictions, the state supreme court twice referenced the certainty of the ballistics examiner. First, in finding that Manning did not suffer prejudice from a conflict of interest due to his trial attorney's prior representation of Paula Hathorn, the Court observed that "more damaging testimony [than that of Hathorn] came from the FBI ballistics examiner who testified that the bullets in the tree matched those that killed Jon and Tiffany." *Manning v. State*, 726 So.2d 1152, 1168 (Miss. 1998).

Second, the state court relied on the certainty of the expert's conclusion in rejecting an earlier challenge by Manning. The court contrasted Manning's challenge with a related claim raised in *Foster v. State,* 508 So. 2d 1111, 1118 (Miss. 1987):

> In *Foster*, the Court was concerned with an expert testifying that a knife "could have" been used in a murder. The Court was concerned that this type of testimony could mislead the jury. The opposite occurred in this case. There was no speculation. *The expert was sure that the projectiles taken from the victims and the projectiles taken from the tree came from the same gun*. This claim for error is meritless.

Manning, 726 So. 2d at 1181 (emphasis added). Thus, the Court upheld Manning's convictions based on the certainty of the expert's opinions when that certainty should have been cause for questioning it.

Manning has also uncovered additional false statements made by the State's most prized informant, Earl Jordan. For instance, Jordan asserted that Manning pulled a gun on Doug Miller, T. 1199, but Miller denied that he was threatened by Manning. Successor Exhibit 8.[16]

Post-conviction investigation of Paula Hathorn revealed her incentives to cooperate with law enforcement. Hathorn testified that she received no assistance on the charges she was facing in exchange for her testimony against Manning. T. 690. The sheriff testified similarly. T. 838-39. That, however, was not true. In an affidavit filed in post-conviction proceedings, Hathorn acknowledged:

> . . . [A]fter I testified against Willie, my charges were passed to the file, and I have not served any time. I was worried about this before I was approached by Sheriff Bryan, but *he told me not to worry about going to jail*.

Successor Ex. 9 (emphasis added). She had much to worry about:

> When I was approached to help Sheriff Bryan, I had about thirteen bad check charges in Oktibbeha County. I also had about twenty bad check charges in Lowndes County.

[16] Another aspect of Jordan's testimony was false but went uncorrected. To support his allegation that he had not made a deal with the State, Jordan testified that the attorney representing him on his pending charge did not know that he would be testifying against Manning. T. 1170 -1181. This was not true. Jordan's attorney was Bruce Brown, a public defender for Oktibbeha County. Mr. Brown had also been appointed to represent Manning. He moved to withdraw from his representation of Manning, noting that he had been told by the State that Jordan was expected to be a witness against Manning. T. 11. The prosecutor confirmed this, T. 20, and Brown was allowed to withdraw.

> There were also bad check charges in Macon, Clay, and Jackson Counties. Altogether, I owed more than $10,000 in fraudulent checks and court fees.

Id. Hathorn understood that she could probably have gotten as much as eight to ten years for her pending charges. .

Mild treatment at the hands of law enforcement was only part of the consideration Hathorn received. The sheriff testified that he would recommend that Hathorn receive a reward. No one, however, disclosed the magnitude of the reward: $17,500. Successor Ex. 9. Furthermore, it was never disclosed that the sheriff held out the hope for a reward when he first approached Hathorn to make a case against Manning. Successor Ex. 9.

Whether through the suppression of evidence or trial counsel's failure to conduct an adequate inspection of the State's files, the jury never learned of secretly recorded telephone conversations between Hathorn and Manning. If those recordings had been known, the jury would have learned that Hathorn was acting as a state agent, was willing to – and actually did – say whatever the sheriff asked her to say, and was testifying at trial inconsistently with the statements on the tapes.

Unbeknownst to Petitioner, the sheriff arranged for Manning's calls from jail to Hathorn to be recorded. The sheriff provided Hathorn with a number of questions to ask Manning in the hope of getting him to incriminate himself. Two microcassettes in the custody of the Sheriff's Department contained a number of these conversations, and the sheriff had arranged for the transcription of at least one of these conversations. PCR T. 27-28; Successor Ex. 15; *see also* Successor Exhibit 14.

In the transcript prepared by the sheriff's department, Hathorn covered most, if not all, of the topics that the sheriff wanted her to cover. She failed to elicit an incriminating statement from Manning, and made several statements contradicting her trial testimony or the testimony of Sheriff Bryan.

Regarding the bullets in the tree, Hathorn was emphatic about not knowing anything when discussing the matter on the telephone with Manning. In the suppressed recordings, Hathorn also ventured her own opinion of the evidence: "I said [to the sheriff] I know Fly [Manning] didn't do that." *Id*.

The secret recordings captured other statements inconsistent with Hathorn's trial testimony. At trial, Hathorn testified that she saw Manning with a CD player on December 14. T. 678. On tape, however, Hathorn said that she told law enforcement that she did not know about a CD player. Successor Ex. 15, pp. 3, 11. At trial, there was some discussion as to whether Hathorn ever saw Manning with a class ring. T. 711. In the undisclosed telephone conversations, however, Hathorn denied any knowledge of a class ring. Successor Ex. 15, p. 4.

A discussion about the leather jacket proved no more incriminating; in fact, it demonstrated that law enforcement believed that Manning bought the jacket, not that he had stolen it. Successor Ex. 15, p. 1. When Manning denied having any of the items that he allegedly stole, Hathorn did not contradict him. *Id.*, p. 4.

Hathorn also did not dispute Manning's contention that he was at the 2500 Club the night of the students' death and that he came home after being at the club.

Id., pp. 11-12.[17] Of course, at trial Hathorn testified that Manning was gone from December 9 until December 14. Since she was living with him at the time, she would have known that he really was home on the morning of December 11.

On the secret recordings, Hathorn declared several times that she was being threatened with prosecution. Successor Ex. 15, pp. 2, 8, 10. The handwritten section of the transcript references additional coercion applied to Hathorn. *Id.* (handwritten section). Later, Hathorn returned to the threats of prosecution: "Well, Dolph [the sheriff] told me that I would be accessory after the fact of murder that I could get 10 yrs what's that." *Id*. In another conversation, which was not transcribed until after the evidentiary hearing, Hathorn confided to Manning that the Sheriff accused her of participating in a cover-up, specifically hiding the murder weapon.[18]

Finally, the jury never learned that Hathorn was actively working as a state agent in an attempt to gather evidence against Manning. The evidence developed since Petitioner's trial provides many reasons for questioning Hathorn's veracity.

Frank Parker was another informant willing to say anything to help advance his position. According to Parker, he came to the jail in Starkville because he was on the run from charges in Texas and decided to turn himself in. T. 1117. There, he supposedly overheard Manning mention that he sold the gun that he used to commit the crime on the street. T. 1120; *see also* Successor Ex. 16.

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[17] At trial, Lindell Grayer testified that he picked Manning up the next morning at Manning's house. T. 1413.

[18] Although sheriff testified that Hathorn was merely "role playing" by repeating what he wrote down for her to say, PCR T. 85, there are no notes asking her to mention that she was being accused of hiding the murder weapon.

Parker testified that at one point he had a burglary charge lodged against him. T. 1116. However, he added that he "had written the governor of Texas and the sheriff asking them to drop all charges against me and they did." Parker denied receiving any consideration for his testimony and reiterated that the charges against him in Texas had been dropped. T. 1121, 1126. Parker also tried to minimize the seriousness of the Texas charges, stating that if the charges had not been dropped, he would only have had to serve "approximately six weeks in a drug rehab." T. 1132.

Parker's testimony was false. Parker, a long-time thief, often stole from his own family, forcing his uncle to padlock the doors within the house to prevent Parker from stealing valuables. Successor Ex. 17 (affidavit of Chester Blanchard, Parker's uncle). Around March 11, 1993, while his aunt and uncle were out of town, Parker cleaned out their house and pawned their valuables. *Id.* *See also* Successor Ex. 18 (Offense Report listing property stolen); Successor Ex. 19 (Declaration of Complaint signed by Chester Blanchard); Successor Ex. 20 (statement of Carolyn L. Blanchard and Stacey L. Blanchard); Successor Ex. 21 (Investigation Bureau Supplementary/Follow Up Report).

The Bexar County Sheriff's Department learned that Parker was in custody in Mississippi on May 14, 1993. Parker's uncle, Chester Blanchard, recalled receiving a call from a sheriff's department in Mississippi at around 2:00 a.m. stating that Parker was in custody and was going to be a witness in a murder trial. Successor Ex. 17 (affidavit of Chester Blanchard). During that conversation, Blanchard informed

the authorities in Mississippi about the charges he had pressed against his nephew. *Id*.

In August, when Parker said that the charges were supposedly dropped, a Texas grand jury indicted him for theft. Successor Ex. 22 (True Bill of Indictment, *Parker v. State*, No. 93-CR-5281, filed August 11, 1993). He faced a sentence of two to ten years. Successor Ex. 23. Parker also testified that charges against him in Frio County had been dropped; however, he never faced charges in that county. Successor Ex. 24 (note from Frio County Clerk of Court on fax).

When Parker finally returned to Texas, he pled guilty to theft. The trial judge was initially going to reject the plea bargain. The prosecution then apparently explained to the judge that Parker's incarceration and testimony factored into the plea bargain. After hearing this, the judge accepted the plea bargain and sentenced Parker to three years' probation. Successor Ex. 27 (Transcript, Plea of Guilt and Sentencing, *State v. Parker*, No. 93-CR-5281, 144th Judicial District, dated April 10, 1995).

To support his alibi at trial, Petitioner located several witnesses who saw him at the 2500 Club the night that the students were murdered. The defense presentation had two weaknesses. Most of the witnesses saw Manning no later than around 11:00 p.m., which, according to the sheriff, would have given Manning sufficient time to somehow make his way to the other side of town to break into John Wise's car and abduct and kill Jon Steckler and Tiffany Miller. Two other witnesses saw Manning later, but their testimony was subject to impeachment. *See, e.g.,* T.

1258 (testimony of Mario Hall about seeing Manning around 11:00 p.m.); T. 1283 (testimony of Landon Clayborne about seeing Manning around 11:00 p.m.); T. 1293-98 (testimony of Gene Rice).[19]

Keith Higgins testified that he saw Manning at the club sometime between 11:00 p.m. and 12:30 a.m. T. 1216. He also testified that the sheriff had threatened to prosecute him for perjury if he testified on behalf of Manning. T. 1218. He also said that he was reluctant to become involved because he also had brothers in jail facing serious charges.

Witnesses located during the post-conviction investigation also support Manning's alibi. Sherron Armstead Mitchell recalled going to the 2500 Club on the night of December 10, 1992. She recalled seeing Manning, and even remembered what he was wearing that night. She knew that she saw him inside the club at 12:30 a.m. because she "was fixing to leave because I knew that my husband would be mad at me for being out so late." She knew that when she left it was almost 1:00 a.m., and Manning was still at the club.

Doug Miller and Troylin Jones also recalled seeing Manning at the club that night after 12:00. Successor Ex. 8 (affidavit of Doug Miller); Successor Ex. 30 (affidavit of Troylin Jones).

[19] Gene Rice testified that he got into an argument with Manning at the club. Based on his testimony, it appears that he and Manning had their confrontation sometime between 12:30 and 1:00 a.m. He claimed that they squabbled because he danced with Hathorn. The problem that emerged with Rice's testimony was that no one else who was at the club recalled seeing either him or Hathorn that night, and thus his testimony lacked corroboration.

DNA testing could exonerate Manning. The prosecution used the hair fragments as evidence that Manning had been in Miller's car. If testing excludes Manning as the source of the hair, then an important piece of the prosecution's case disappears. Further, if DNA from the hair found in the car matches the DNA found elsewhere and does not come from either Manning or the victims, then it is likely that this DNA originated from the actual perpetrator.

REASONS FOR GRANTING THE PETITION

This Court Should Grant Certiorari To Address Whether The Mississippi Supreme Court Denied Petitioner His Protected Liberty Interest In DNA And Forensic Testimony By Focusing Solely On A Skewed One-Sided Appraisal Of The Record.

"Although States are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they employ must comport with the demands of the Due Process Clause." *District Attorney's Office for the Third Judicial Circuit v. Osborne*, 557 U.S. 52, 68 (2009) (citing *Evitts v. Lucey,* 469 U.S. 387, 393 (1985)). The enactment of a system for obtaining DNA testing gives rise to a protected liberty interest to demonstrate innocence. *Osborne,* 557 U.S. at 68. Access to DNA testing is crucial because of its "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices." *Id*. at 55. If a State's procedures are facially adequate but are applied inadequately, a prisoner may demonstrate that he has suffered a violation of his right to due process.

Mississippi provides, in part, that post-conviction DNA testing should be

available if there "exists a reasonable probability that the petitioner would not have been convicted . . . if favorable results had been obtained through DNA testing at the time of the original prosecution." Miss. Code Ann. § 99-39-9(1)(d). The Mississippi Supreme Court found Manning met his burden and authorized him to present his case to the circuit court. Because of unforeseeable problems with the evidence, the lab jointly selected by the parties could not develop a mitochondrial profile of hairs introduced at trial. The lab explained that the samples were likely too small or degraded for it to develop the evidence. Apprised of the nature of the evidence, Manning located a different lab with enhanced capabilities to develop mtDNA profiles even from the hairs Manning located. Mississippi's post-conviction statute provides for additional testing if the evidence was "inconclusive or otherwise merited additional analysis or separately demonstrates a reasonable probability of possible guilt of a third party by virtue of DNA comparison." *Manning,* at * 33 (discussing Miss. Code Ann. § 99-39-11(10)). Manning has always asserted his evidence and presented an alibi defense. Any DNA profile that did not match either of the victims would provide proof of a third party's guilt even if Manning could not name the perpetrator.

Superficially, Mississippi's statutory provisions allowing for DNA testing are similar to Alaska's provisions discussed in *Osborne.* Here, however, the Mississippi courts denied Manning his right to testing by the arbitrary application of procedures making it unlikely that he could make a showing for additional testing. The state courts considered only the prosecutor's trial evidence and ignored the substantial

evidence Manning developed that showed pronounced weaknesses in the its case. And the state court's saddled Manning with the burden of identifying a third party without affording him a meaningful opportunity to develop a DNA profile and determine whether another person could be identified with that profile.

Initially, the state courts granted leave to conduct testing on the hair evidence introduced against Manning at trial. Prohibiting further testing when the initial lab was unable to develop a profile and after Manning located a lab with a high success rate in handling degraded samples was arbitrary. There was no way for Manning to know from the outset that the hair samples had problems and that the initial lab would be unable to develop profiles. Only after the first lab attempted and failed to develop a mtDNA profile would Manning have known to look for another lab. Essentially, if Manning had guessed right and selected the most appropriate lab when the Mississippi Supreme Court first authorized testing, he could very well have had suitable profiles developed. Instead, he guessed wrong.

In *Osborne*, this Court recognized that due process protections following conviction are lessened. However, procedures utilized by a state court must at least comply with "recognized principle[s] of fundamental fairness." *Osborne,* 557 U.S. at 70 (citing *Medina v. California*, 505 U.S. 437, 446 (1992)). Punishing Manning because he (and the State) did not select the most appropriate lab at the beginning of the process reduces the process almost to a game of chance in which those who are lucky enough to pick the right lab may get results but others lose despite following all procedures and despite the strength of their case. Due process requires more than

the arbitrary outcomes. *Cf. Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272, 289 (1998) (O'Conner, J., concurring) (due process violated if clemency were to be decided by a coin flip or if a prisoner arbitrarily denied access to clemency process).

Manning has "a legitimate interest in the character of the procedure" followed by the state court. *Gardner v. Florida,* 430 U.S. 349, 358 (1977). Finality is not served if answerable questions are purposefully left unanswered when the execution occurs. The skewed, one-sided review by the Mississippi Supreme Court that failed to account for all evidence in the record arbitrarily denied Manning a protected liberty interest. For these reasons, this Court should grant certiorari.

CONCLUSION

Wherefore, for the foregoing reasons, this Court should grant certiorari to review the decisions of the Mississippi Supreme Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, David P. Voisin, do hereby certify that I have this day, March 10, 2023, caused to be delivered via email and U.S. Mail first class a copy of the foregoing Petition for a Writ of Certiorari to Counsel for Respondent:

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