IN THE SUPREME COURT OF MISSISSIPPI
No. 2020-CA-01096-SCT

WILLLIE MANNING	**APPELLANT**
V.	
STATE OF MISSISSIPPI	**APPELLEE**

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Honorable Lee J. Howard – presiding Circuit Court judge

Willie Jerome Manning

David Voisin, Attorney – counsel for Willie Jerome Manning;

Robert S. Mink, Attorney, Mink & Mink, PLLC – counsel for Willie Jerome Manning;

Humphreys McGee, Attorney, Mississippi Office of Capital Post-Conviction Counsel – counsel for Willie Manning;

LaDonna Holland, Special Assistant Attorney General – counsel for the State of Mississippi;

Brad Alan Smith, Special Assistant Attorney General – counsel for the State of Mississippi;

Ashley L. Sulser, Assistant Attorney General – counsel for the State of Mississippi;

This the 19th day of April, 2021.

/s/ Robert S. Mink
Attorney of record for Appellant, Willie Manning

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STATEMENT OF THE ISSUE

After it was determined by a forensic testing laboratory that data could not be obtained from old and very small samples of hair evidence using the methods currently employed by that lab, should Manning be allowed to send the hairs to a specialized lab with more advanced capabilities and a 90% likelihood of obtaining the data?

Should Manning be allowed to send the hairs if the additional testing will take three to four months to complete?

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STATEMENT OF ASSIGNMENT

This appeal is made in a case that involves the imposition of the death penalty. According to Rule 16(b)(1) of the Mississippi Rules of Appellate Procedure, the Mississippi Supreme Court must retain jurisdiction of such cases.

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No. 2020-CA-01096-SCT

WILLLIE MANNING **APPELLANT**

V.

STATE OF MISSISSIPPI **APPELLEE**

BRIEF OF APPELLANT

Willie Manning, Appellant, respectfully asks this Court to reverse the order of the Circuit Court of Oktibbeha County, Mississippi, denying his Motion to Allow Transfer of Evidence for Conclusion of DNA Testing. (R.E. 2, R. 24-27)[1] Manning states the following in support.

STATEMENT OF THE CASE

I. INTRODUCTION

In 2013, this Court granted Manning's request for DNA and fingerprint testing. In November 2019, as the testing was drawing to a close, representatives of Bode Technology recommended sending certain hair evidence to MitoTyping Technologies, LLC. Bode Technology had performed all of the DNA testing to date, but it was unable to obtain DNA data from important samples of hair used by the State at Manning's trial. Because MitoTyping Technologies has been especially successful in identifying DNA from very old hair evidence, Manning took Bode's advice and asked the Circuit Court to allow him to send seven hairs to MitoTyping Technologies to see if it could extract mitochondrial DNA from the hair samples Although it was estimated that the testing would be completed in three to four months, the State

[1] References to the record are designated as follows: "R." refers to the Circuit Court record on appeal; "R.E." refers to Record Excerpts; "Trial T." refers to the transcript of trial testimony taken in 1994; "T." refers to the transcript of hearings that took place in the Circuit Court from 2013 through 2020.

opposed the request and the Circuit Court denied it in an order dated April 27, 2020. (R.E. 2, R24-27) Manning respectfully submits that the testing should have been allowed.

RELEVANT PROCEDURAL HISTORY

Willie Manning was convicted and sentenced to death in 1994 for the murders of Jon Steckler and Tiffany Miller, two students at Mississippi State University.[2] The Mississippi Supreme Court affirmed the judgment on direct appeal. *Manning v. State,* 726 So. 2d 1152 (Miss. 1999). This Court initially granted post-conviction relief in a unanimous opinion but granted Respondents' 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 his former girlfriend. The lower court denied relief, and the Mississippi Supreme Court likewise denied all post-conviction relief. *Manning v. State,* 929 So. 2d 885 (Miss. 2006).

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. When this Court initially granted relief,[3] it held that the discovery motion was moot. Later, when the Court granted rehearing and denied post-conviction relief, Petitioner renewed the discovery motion. On March 9, 2006, however, the Court denied the discovery motion. Order, *Manning v. State,* No. 2001-DR-00230-SCT (Miss. Mar. 9, 2006).

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[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. This Court overturned those convictions in February 2015 on the grounds that 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.

[3] This Court initially vacated Petitioner's convictions in a unanimous opinion that applied the intervening decision of *Weatherspoon v. State,* 732 So. 2d 158 (Miss. 1999). However, the Court granted rehearing, found *Weatherspoon* did not apply retroactively, and ultimately denied relief.

When Petitioner sought federal habeas corpus relief, the District Court granted his 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. The District Court, however, denied the request. Order, *Manning v. Epps,* No. 1:05-cv-00256-WAP (Dkt #65) (N.D. Miss. Oct. 3, 2008). The District Court explained the request was denied because the request for testing did not relate to the grounds raised in the petition. *Id.* at 4 ("Petitioner has failed to establish that DNA testing of the fingernail scrapings and the hair found in the victims' hands is reasonably necessary to pursue the claims in his petition, nor is there a basis for the Court to authorize inspection of the sexual assault kit performed on Miller"). Under federal habeas procedure, there is no right to DNA testing comparable to the provisions of Miss. Code Ann. § 99-39-9(1)(d).

In March and May of 2013, Manning filed two motions in this Court requesting leave to file a successive petition for post-conviction relief, including requests for DNA testing and other forensic analysis. The Court denied the first motion on April 25, 2013. On May 7, 2013, the Court stayed Manning's execution. 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)

The State's theory at trial – hair evidence allegedly placing Manning in the victims' car

In December 1992, Jon Steckler and Tiffany Miller were found lying on Pat Station Road in Starkville, Mississippi, with gunshot wounds to the head. *Manning v. State*, 726 So. 2d 1152, 1164 (Miss. 1998). These victims, both students at Mississippi State University, had been on a date the previous evening and were last seen by their friends leaving the Sigma Chi house at about 1 a.m. *See id*. at 1164-66. The prosecution's theory at trial was that Steckler and Miller were on their way to Miller's car in the parking lot of the Sigma Chi house when they came upon

Manning stealing items from the car of John Wise, another student who lived in the Sigma Chi house. It was theorized that Manning produced a gun, ordered the victims to get into Miller's car and rode in the car with them to Pat Station Road, where he shot them. Manning then drove Miller's car back to Starkville, where he abandoned it in a parking lot near Miller's residence. *Id.*

No witness claimed to see Manning in the Sigma Chi parking lot and no one testified that Manning was ever seen in Miller's car. Manning's alleged connection to the incident was that he had been in possession of items stolen from John Wise's car. *See id.*

During the investigation, Miller's car was swept and vacuumed. Hairs from the driver's seat and passenger seat[4] were examined by an FBI expert who testified at trial that he examined the hairs under a microscope and determined that the hairs came from a member of the African American race. 726 So. 2d at 1181. (See Trial T. 1047-48) In closing argument, the prosecutor argued that since Manning is African American, the hairs could have come from him, showing that he was in the car with the victims. The hair evidence, therefore, narrowed the set of people who could have committed the murders, and that narrowed set included Manning. (Trial T. 1546-48)

Facts and Procedural History – 2013 to the Present

On July 23, 2013, the Mississippi Supreme Court granted Manning permission to proceed in the Circuit Court of Oktibbeha County with a request for DNA and fingerprint testing. (R. 31) Manning filed his Petition on October 11, 2013. The State filed a response opposing the petition but stated in its response that it would likely withdraw its opposition if provided with more

[4] Miller drove a Toyota MR2, which had no back seat.

specific identification of the evidence Manning sought to test. (R. 548) 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 seven entities instructing them to search their facilities for evidence related to this case. (R. 563-589) Over the next several months, it was determined that only three of the entities were in possession of evidence: the Oktibbeha County Sheriff's Department, the Mississippi Crime Lab and the Circuit Clerk of Oktibbeha County. 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. (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.[6] (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

[5] Orchid Cellmark later merged with Bode Technology, which performed the remainder of the testing in this case.
[6] The original funding source was an anonymous private donor who had donated to the Innocence Project.

victim Tiffany Miller, fingernail scrapings of Ms. Miller and Jon Steckler, pubic hair and combings of Miller, all items of Miller's clothing provided as evidence, debris from Miller's clothing, and hairs found in the hands of both victims. (R. 756)

While evidence was being gathered for DNA testing in 2014, Manning's attorneys contacted Ron Smith & Associates to request updated evaluations of fingerprints obtained during the pre-trial investigation in 1992. Smith informed counsel that he could not perform the evaluation because of a conflict of interest arising from the fact that he had served as the fingerprint expert in the pre-trial investigation. Manning searched for another suitable fingerprint expert and on September 3, 2014, sent a proposed agreed order to the State directing Kenneth Moses to perform the fingerprint analysis. (See R. 758) Two months later, on October 30, 2014, counsel for Manning sent another request to the State asking its attorney to sign the proposed agreed order to proceed with the fingerprint analysis. (*Id.*) On November 4, 2014, counsel for the State said he would respond in a few days regarding the use of Moses for fingerprint comparison. (*Id.*) Three months later, on February 10, 2015, counsel for Manning again asked the State to sign the proposed order on fingerprint comparisons, this time sending information about Moses' qualifications and experience. *(*R. 758-759) On February 16, 2015, counsel for the State sent an email saying, "We object to Mr. Moses." (R. 759) On March 20, 2015, counsel for Manning proposed using expert David Stoney for the fingerprint analysis and provided a copy of Dr. Stoney's CV. (*Id.*) On April 9, 2015, Manning asked the State to respond to the March 20 email proposing Dr. Stoney for the fingerprint work. (*Id.*) On April 14, 2015, counsel for the State sent an email objecting to the use of Dr. Stoney. (*Id.*) On April 24, 2015, Manning filed a Motion for Fingerprint Analysis asking the Court to appoint either Moses or Stoney to perform the fingerprint analysis. (R. 757-864) *On* May 8 and again on May 21, 2015, the State filed two unopposed motions for extension of time to respond to Manning's Motion for Fingerprint Analysis. (R 868-871)

In May or June, 2015, before the State filed its response to Manning's motion to proceed with fingerprint testing, Manning's attorney asked Ron Smith whether he would perform the needed fingerprint evaluation if Manning and the State both agreed to waive any conflict of interest arising from his having worked on the case before trial. Smith agreed. On June 5, 2015, the Circuit Court entered an agreed order directing Smith to compare the fingerprints in evidence to fingerprints contained in the AFIS and IAFIS databases, and to identify any potential matches. (R. 877-880, *Agreed Order for Delivery of Fingerprint Evidence and Protocol for Fingerprint Analysis*) Smith received fingerprint evidence from the Mississippi Crime Lab and the Oktibbeha County Sheriff's Department in July of 2015. Six months later, on January 19, 2016, Smith reported that no potential matches were found. (R. 932 ("No suitable candidate for further comparisons was found in the AFIS or IAFIS databases."))

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. 883-86) 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.*

To put these findings in context, the report stated, "Negative results from presumptive screening tests and 0.00ng/ul quantitation values do not signify the absence of sufficient DNA from which to develop a profile, especially in older cases in which there is a limited amount of sample or degradation has occurred. Further processing may yield sufficient DNA from which to develop a profile." (R. 886) Also, the report added, "Other items of evidence remain to be screened after completing the testing on the samples identified in this letter." *Id.*

In July of 2015, samples of blood from Miller and Steckler were sent to the lab for purposes of comparison to any DNA found in the evidence. In August 2015, Manning's DNA was collected from a cheek swab and was sent to the lab for comparison.[7]

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 Bode 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 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)

[7] The Agreed Order setting the Protocol for DNA Testing provided that comparisons to Manning's DNA would take place "after [Cellmark] has finished testing the crime scene evidence." (R. 655-56, paragraphs 8 and 10)

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)

Over the course of 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. One week later, the lab notified counsel that due to the volume of testing and the associated cost, pre-payment would be required. On January 15, 2018, counsel notified the lab that a decision had been made by the funding source to pre-pay the stated amount of $45,200. (R. 951)

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. However, "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 three to four 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 attorneys for Manning and the attorneys for the State conferred on the terms of an agreed order regarding future testing, and on February 11, 2019, an agreed order was entered providing three additional stages of testing beginning with hair fragments. (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 was unable to 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)

On 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. This testing, according to the lab, would be completed by June 5, 2019. (R. 969) However, the testing was delayed for at least six weeks because of concerns over consumption. *Id.* On March 27, lab personnel reported that two small hair fragments selected for testing would be completely consumed in the testing process, and they asked for permission to consume the hairs. *Id.* Manning's attorneys stated their agreement to consumption on March 29 and asked the State's attorneys for their permission as well. On April 5 and April 29, the lab again asked the attorneys for the State whether they agreed to consumption of the samples. On April 29, counsel for Manning sent an email to the State's attorneys saying, "Please let us know if you object to the consumption of E13 and E14." On May 2, counsel for the State replied, "We are still discussing this issue. We will get back to you with an answer no later than next Tuesday." On May 6, 2019, the State recommended that Manning obtain an order authorizing consumption of the samples. (R. 969) After further discussion, the lab informed the parties on June 27 that it could preserve the DNA data in extracts (i.e., maintain the hair tissue in a solution in which any DNA data could still be detected). The State reported on July 2 that it would agree to consumption of the hairs if the lab would provide written confirmation that it would preserve the DNA data in extracts. *Id.* The lab provided that confirmation on July 10, and on July 13 Manning's attorney instructed the lab to proceed with the testing as agreed. *Id.* The lab estimated a completion date of October 30, 2019. *Id.*

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 filed a motion asking 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)[8]

The State opposed the motion, alleging that Manning "d[id] not like" the "unfavorable" results reported by Bode, implying that Bode's results were incriminating and that Manning hoped to obtain contrary findings from a different lab. (R. 997-98) Manning explained that he was trying to remedy "an absence of results," since Bode was not able to report anything at all about the presence or characteristics of DNA in the seven hairs at issue. *Id.* It remained to be seen whether the DNA was incriminating or not.

At the hearing on Manning's motion, the Circuit Court asked how the testing of the hairs could be relevant. Manning explained that all of the hairs at issue had been taken from Miller's car and that some of them were admitted into evidence at trial. (T. 38) An FBI expert testified that he had examined the hairs under a microscope and concluded that the hairs had come from an African American (*id.*); the State then argued in closing that the hairs and the expert's testimony made it more likely that Manning was the killer, since he was an African American

[8] Manning filed a motion for a three-week extension before requesting the involvement of MitoTyping. (R. 970) When Manning's attorneys received the October 2019 report from Bode, they conferred with lab personnel and scheduled a conference call to take place on November 21, 2019. *Id.* This would allow counsel to decide the next stage of testing by November 24 (thirty days from October 25, the date on which the lab had delivered its report). During the conference call on November 21, Manning learned that the lab technicians who had actually performed the tests discussed in the October report were not available to participate. *Id.* On November 22, 2019, Manning filed a motion requesting an extension of twenty-one days so he could consult with the needed lab personnel about the next stage of testing. (R. 970) The State opposed the motion (R. 973) and a hearing was set for January 31, 2020. (R. 978) By the time of this hearing, Manning had already complied with his remaining obligations under the scheduling order: (a) he had instructed the lab to compare the DNA profiles that *had* been obtained to the DNA profiles of Manning and the victims; and (b) he filed "any additional motions . . . for additional testing of any evidence" (R. 959) by filing his motion to transfer seven hairs to MitoTyping Technologies.

and consequently could have left the hair in Miller's car. (T. 39) The Circuit Court then asked, "Why would that make it relevant as to the DNA and the source of it?" (*Id.*) Manning replied that if sufficient information were obtained about the mitochondrial DNA in the hairs, Manning could be excluded as the source of the hairs and that would eliminate important evidence used against him at trial. (*Id.*)

The Circuit Court denied the motion. (R.E. 2, 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." (*Id.* at 25) The court then concluded that *no evidence concerning hairs was admitted against Manning at trial*. (*Id.* at R. 26 (finding that discussion of hairs occurred only during the State's closing argument)) 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.

(Order, R.E. 2, R. 26-27)

Manning filed a motion to reconsider (R. 1018), which was denied on August 26, 2020. (R.E. 3; R. 28-29)

SUMMARY OF THE ARGUMENT

The Circuit Court clearly erred and abused its discretion in refusing to allow additional testing of seven hairs. In reaching its conclusion, the Circuit Court overlooked this Court's prior determination and its own earlier orders finding the hair evidence relevant. The Circuit Court also denied Appellant due process of law when, without notice, it addressed whether the hair evidence was relevant. The Circuit Court's determination that there were "many deviations" from its second scheduling order is contrary to the record; Appellant made one request for a 21-day extension, which the Circuit Court granted. The Circuit Court's finding that Manning made no showing of a reasonable likelihood that MitoTyping could obtain results is also contrary to the record.

A trial court's denial of a motion for post-conviction relief will be reversed if the court abused its discretion or was clearly erroneous; the trial court's legal conclusions are reviewed under a *de novo* standard. *Green v. State*, 242 So. 3d 176, 178 (Miss. App. 2017). "A finding of fact is 'clearly erroneous' when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made." *Johns v. State,* 926 So. 2d (¶ 29) (Miss. 2006) (citations and quotes omitted).

ARGUMENT

1. The Circuit Court clearly erred when, without notice to Manning, it determined the ultimate relevance of testing prematurely, contravening its own prior findings and the order of this Court to allow testing.

The Circuit Court found there was no reasonable probability of a different result if Manning were allowed to have MitoTyping Technologies use its specialized techniques to develop mitochondrial profiles of very small hair samples, even for those samples for which Bode was unable to develop a profile. (R.E. 2, R. 26) The Court addressed this issue without giving notice to Manning. The State had not raised the issue in its Response in Opposition to Petitioner's Motion to Allow Transfer of Evidence for Conclusion of DNA Testing. Addressing this issue without notice or a meaningful opportunity to respond violated Manning's right to due process of law. *See, e.g., Groppi v. Leslie,* 404 U.S. 496 (1972); *Lankford v. Idaho*, 500 U.S. 110 (1991); *Simmons v. South Carolina*, 512 U.S. 154 (1994). Manning did not have an opportunity to brief the question or describe the importance of the hair evidence in light of all available evidence, including evidence obtained in earlier post-conviction proceedings. Instead, the Circuit Court myopically focused solely on the trial record.

Further, the Circuit Court had already approved the examination of hair evidence in the Agreed Order for Delivery of Evidence and Protocol for DNA Testing entered September 8, 2014. (R. 653, contemplating the testing of "hair and fiber from Miller's car" (R. 664) and "hairs found in car" (R. 670)) The Circuit Court also expressly approved the testing of hair evidence on February 11, 2019, when it entered the Scheduling Order Regarding DNA Testing. This order makes several specific references to "hair evidence." (R. 958) Because the Circuit Court had signed orders contemplating the testing of hair evidence, by agreement of the parties, there was no indication the court would question the relevance of such testing before it was completed and the results were not known.

Finally, both of the Circuit Court orders contemplating the testing of hairs were entered as a result of *this* Court's order of July 25, 2013. The process followed by Manning was wholly consistent with the procedures set forth in Miss. Code Ann. § 99-39-11 and 99-39-27. Manning filed his successive application, identifying, among other items, various pieces of hair for testing. Finding he had carried his initial burden of pleading, this Court remanded the matter to the Circuit Court for proceedings consistent with § 99-39-11. Following the remand and the filing of

Petitioner's successive petition, the Circuit Court ordered the relevant testing with the agreement of both parties.

As found by the Mississippi Supreme Court and the Circuit Court in earlier orders, Manning satisfied his burden to obtain testing. Until testing is completed, any discussion of the ultimate merits of the successive petition is premature. Hair found in Miller's car, introduced at trial and purportedly coming from the perpetrator, may be identified as coming from a different individual. When the identity of that person is ascertained, Manning will be able to carry his burden of demonstrating his entitlement to relief. He will be unfairly denied this opportunity if the Court refuses his request to have a specialized lab determine the characteristics of the mitochondrial DNA in old, tiny samples that Bode was not able to detect.

2. The Circuit Court clearly erred in concluding there were "many deviations" from the applicable scheduling order.

The Circuit Court stated that there had been "many deviations from the timeframe established by the second scheduling order." (R.E. 2, R. 25) The "second scheduling order" was the Scheduling Order Regarding DNA Testing entered on February 11, 2019. (R. 964) Manning deviated from this order only once, when he filed his motion on November 22, 2019, seeking an extension of twenty-one days because the relevant analysts who examined the evidence were unavailable to make a scheduled call with his attorneys. (R. 970; *see also supra*, n.7) The twenty-one-day extension was deemed granted during the hearing on the motion which is the subject of this appeal. (T. 28)

With the twenty-one day extension, Manning had until December 18, 2019, to ask Bode to screen other items for testing. (*Id*.) He had until January 18, 2020, to instruct Bode to compare DNA obtained from any of the evidence to the DNA profiles of the victims and Manning. He gave those instructions to the lab on January 13, 2020. He had thirty days after that date to file "any additional motions . . . for additional testing of any evidence." (R. 959, Scheduling Order Regarding DNA Testing) His motion requesting delivery of evidence to MitoTyping was filed only ten days later, on January 23, 2020. (R. 979)

Since all actions taken by Manning were performed within 21 days of the deadlines imposed by the second scheduling order, there were no other deviations. Moreover, a delay of twenty-one days is inconsequential when compared to the many months and years that, justifiably, were consumed by the collection of evidence, the testing of the evidence and the deliberations required throughout by counsel for both parties. Moreover, the need for an extension arose because analysts at Bode were not available for a call and not as a result of a lack of diligence on Petitioner's part.

3. The Circuit Court clearly erred in finding that the testing of hair evidence could not produce relevant results.

Although the Circuit Court wrongly attempted to readdress the question of the relevance of the hair evidence, Petitioner pointed out that examination of hair taken from Ms. Miller's car played a prominent role at Manning's trial. During the investigation of the murders, officers vacuumed the driver's seat and the passenger side of Miller's car; the debris and fibers obtained from the vacuuming were admitted into evidence as State's Exhibits 49 and 50. (Trial T. 1041-42) Chester Blythe, an expert employed by the FBI, examined the contents of Exhibits 49 and 50, which were also known to the FBI as Exhibits Q43 and Q44. (Trial T. 1044-45) Using a microscope, Blythe concluded that the bags contained human hairs which originated from an individual of the African American race. (Trial T. 1047-48.)

To demonstrate its relevance, the prosecutor repeatedly stressed the importance of the hairs and Blythe's testimony 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 . . . .

(Trial 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 attempted to answer the defense's position that no physical evidence linked petitioner to the murder scene. After discussing the token that was found at the murder scene, the prosecutor added, "there's even some additional proof inside that vehicle and that's the hair fragments." (Trial T. 1607)

At the hearing on Manning's motion requesting transfer of evidence to MitoTyping, the Circuit Court asked whether the proposed testing of hairs was relevant:

> Court: What relevance does any of this testing no matter what they come up with, no matter what the result is, what's going to be the ultimate relevance?
>
> Counsel: At the trial of this case the State identified numerous hairs that were taken from Ms. Miller's car [and] had those examined by an FBI expert. The FBI expert testified at trial that some of those hairs – and these are State's exhibits I believe they're Q43 and Q44. They're E7 and E8, the last two items listed in our motion. The FBI expert testified that those hairs came from an African American. That was admitted into evidence, the hairs themselves and the testimony of the expert. Mr. Allgood testified [sic] and I would say effectively in closing argument that the fact that some hairs of an African American were found in the car increased the likelihood that Willie Manning was the perpetrator. He added that to the list of other items of evidence and said that this increases the likelihood that we've got the right fellow.

Court: That was in argument?

Counsel: Correct.

Court: Which is not evidence.

Counsel: But the hairs themselves were admitted as evidence. And the FBI expert's testimony that the hair came from an African American, that was admitted into evidence. Something I might add to that –

Court: Why would that make it relevant as to the DNA and the source of it?

Counsel: If we can demonstrate or if the lab can demonstrate or can exclude Mr. Manning as the source of the DNA in those hairs, then that strikes an important piece of evidence that was used at trial to convict him. Mitochondrial DNA testing does allow the lab to exclude a particular person as the contributor if the lab is able to get enough information about the DNA from the sample. That's why we are so interested in having the lab determine the characteristics of the DNA in those hairs that were found in Ms. Miller's car. Now, I talked about E7 and E8, the last two items in our list. Those were the ones actually used at trial. There were other hairs not used at trial but were part of the evidence, and those are included in the other items that we listed in the motion.

(T. 38-40)

As the foregoing demonstrates, the Circuit Court was reluctant to accept that hairs and expert testimony regarding hairs were actually used against Manning at trial. The Court suggested that discussion of hairs took place only in closing argument, which would have been improper if no evidence regarding hairs had been admitted at trial. Although counsel pointed out in the hearing that summation was *not* the only time when hair evidence was discussed, the Circuit Court nevertheless implied later in its order that evidence concerning hairs was mentioned only in the prosecutor's closing argument:

> The Petitioner argues that the DNA evidence is relevant because the State's closing argument at trial discussed DNA results and that may have influenced the jury. The Court finds this argument to be without merit. Closing arguments are not evidence.

(R.E. 2, R. 26) This conclusion is clearly erroneous for two reasons. First, the hairs were admitted into evidence as State's Exhibits 49 and 50 and were identified by the FBI expert as containing the hairs of an African American. (T. 1047, 1054) Consequently, the discussion of hairs did not occur only in the State's closing. Second, there was no talk at all regarding *hair DNA* at trial, because no DNA testing of hair had been done. However, there certainly was talk of hairs taken from Miller's car, and an FBI expert was allowed to testify – over Manning's objection (R. 1054) – that microscopic examination of the hairs was sufficient to establish that they had come from someone of Manning's race. While the State's closing argument was not evidence in itself, it was used to emphasize evidence admitted by the court which allegedly showed that Manning had been in Miller's car.

In explaining why it considered the requested testing to be irrelevant, the Circuit Court in effect opined that the hairs vacuumed from Miller's car were not relevant at trial:

> [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*.

R.E. 2, R. 26-27 (emphasis added)

The Circuit Court's rationale begs the question: If vacuum sweeping and debris from the car are "irrelevant to the issue of guilt," then why were they admitted into evidence at trial and why was the FBI expert allowed to testify about them? If the Circuit Court is correct in opining that the hairs are irrelevant, then it was error to admit them and the expert's testimony, in which case there is an additional reason to grant Manning a new trial. But since the hairs *were* admitted and *were* used against Manning at trial, their DNA is relevant at this time to determine whether Manning can be excluded as the source.

Testing of the hairs is relevant for another reason; there is the possibility that MitoTyping is able not only to exclude Manning as a contributor of the hairs, but to obtain a full profile that matches the profile of an individual whose DNA data is included in available databases. Follow-up on that information could provide the identity of the real killer, which would be relevant and would serve the best interests of Manning, "the victims' families and the public at large [who] deserve to know whether another, or an additional, perpetrator was involved." *Manning v. State*, No. 2013-DR-00491-SCT, 2013 Miss. LEXIS 186, at *14 (Apr. 25, 2013) (Kitchens, J., dissenting)

4. The Circuit Court clearly erred when it found there was no reasonable probability that MitoTyping Technologies can develop probative mitochondrial DNA profiles from the seven hairs at issue.

Although Manning should not have been required to prove the ultimate effect of testing on the merits of his case, he successfully demonstrated that testing by MitoTyping presents a "reasonable likelihood of more probative results." Miss. Code Ann. § 99-39-5(1)(f).

In support of his motion to allow testing of seven hairs by MitoTyping, Manning provided two reports of Bode showing the results of Bode's testing of twenty-three hairs. The first report, dated February 20, 2019, showed that eighteen hairs were tested and that Bode found mitochondrial DNA data in only five of them. (R. 987-88) The second report, dated October 23, 2019, showed that five hairs were tested and that Bode found mtDNA data in none of them. R. 983. Five hairs out of twenty-three translates to a success rate of 22%.

The affidavit of Gloria Dimmick submitted in support of Manning's motion states that MitoTyping Technologies has experienced a much higher rate of success when dealing with hairs that are very small and very old: "hairs less than 0.5 cm can successfully be typed for mtDNA over 90% of the time." (R. 991 (referring to peer-reviewed publications documenting the success rate)).

In his motion, and in his argument at the hearing on the motion, Manning demonstrated that Bode was unable to detect mitochondrial DNA in 78% of the hairs most recently tested. This did not mean that there was no mitochondrial DNA present in those hairs. It meant that Bode personnel were not able to detect and report the characteristics of the DNA using the methods currently available to them. (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") It was for this reason that Bode recommended sending some of the evidence to MitoTyping Technologies, where there is a 90% likelihood that mitochondrial DNA data will be found.

Manning showed a "*reasonable* likelihood of more probative results" when he showed the significant disparity between the *past* success rates of Bode and MitoTyping. He could not do more. He could not guarantee *future* success by MitoTyping in testing the evidence in his case. To require that of him would be to hold him to an unreasonable standard, but that is the standard applied by the Circuit Court when it concluded, "MitoTyping may be able to provide an 'ancient DNA approach' with a success rate of 95% [sic], but there still has been no showing as to why they would succeed in obtaining mtDNA where Bode has failed to do so." (R.E. 2, R. 26)

The Circuit Court cited *Green v. State*, 242 So.3d 176 (Miss. Ct. App. 2017) in support of its statement that the movant must show "how a different testing method would produce more probative results that the method originally used." (R.E. 2, R. 26) *Green* does not state what method of DNA testing was used in that case, however, or what type of biological evidence was tested, whether hair, blood, or some other material. Green provides no guidance beyond the applicable statute, which only requires a "reasonable likelihood of more probative results." Miss. Code Ann. § 99-39-5(1)(f).

No lab can guarantee results. Nor can Manning do the impossible and prove beforehand that MitoTyping will in fact find mtDNA data in the hairs selected for testing. However, by showing a success rate of 90% compared to Bode's 22%, Manning has at least shown a "reasonable likelihood" that MitoTyping will find mtDNA in some of the hairs that yielded no results for Bode. Failure to permit the transfer of hair evidence for last remaining testing violates Manning's right to due process. *DA's Office v. Osborne*, 557 U.S. 52 (2009).

5. No prejudice would be caused by the additional testing.

The testing requested by Manning could have been completed in three to four months, or nearly a year ago. (R. 998; T. 19; T. 40-41) The testing would not have consumed the hairs, so the evidence would still be available for testing in the future if that need should arise. (T. 980) No one would have been prejudiced by the proposed testing. In the absence of such prejudice, there is no good reason to refuse the testing.

CONCLUSION

For the reasons stated above, the Circuit Court clearly erred and abused its discretion in refusing to allow the additional testing of seven hairs by MitoTyping Technologies. The Order dated April 27, 2020, should be reversed and the case remanded with instructions to deliver the evidence for additional testing as requested in Appellant's Motion.

Respectfully submitted, this the 19th day of April, 2021.

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CERTIFICATE OF SERVICE

I certify I filed the foregoing using the Court's electronic filing system, which caused a copy to be delivered to the following:

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This the 19th day of April, 2021.

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