ORIGINAL

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-DR-00491-SCT

WILLLIE MANNING — PETITIONER

V.

STATE OF MISSISSIPPI — RESPONDENT

SUPPLEMENT TO MOTION TO STAY EXECUTION AND SET ASIDE CONVICTIONS, SECOND MOTION FOR LEAVE TO FILE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF, AND MOTION IN THE ALTERNATIVE FOR OTHER FORMS OF RELIEF

I. INTRODUCTION

At 7:30 p.m. on May 6, 2013, the Department of Justice released another letter, acknowledging that even more of the expert testimony presented against Manning was false. Here, the Department of Justice admitted error with the ballistics testimony used to match bullets taken from a tree near Manning's house to bullets found in the victims. Ex. E (Letter from John Crabb, Jr. to Deforest R. Allgood, dated May 6, 2013); Ex. F (Analysis to Special Counsel, Microscopic Hair Comparison Analysis Review Team from FBI, dated May 6, 2013). This admission by the FBI supports Manning's arguments in support of DNA and other forensic testing as well as his claim that his convictions should be reversed because they were secured through the use of false testimony.

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. (His testimony is attached as Ex. G). Lewoczko also testified that he took the those three bullets and compared them to projectiles taken from a tree near Manning's house. He concluded that they 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.

The Department of Justice now admits that testimony claiming the ability to conclusively determine that one gun fired various projectiles "to the exclusion of every other firearm in the world" is erroneous. As the FBI explains:

> 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.

Ex. E at 1-2; Ex. F.

Testimony that the projectiles found at Manning's house and those from the victims came from the same gun "to the exclusion of all other guns in the world" has been a central part of the State's case since trial. In fact, when denying Manning's request for DNA testing, the majority 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) (cite omitted).

In the 1998 opinion affirming his convictions, this 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 from Paula Hathorne] 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 Court relied on the certainty of the expert's conclusion in upholding a challenge to his testimony. The Court noted Manning's challenge to the testimony linking the projectiles from the scene to those taken from the tree as being beyond the expertise of the expert. *Manning,* 726 So. 2d at 1181. In particular, Manning faulted the examiner for using the standard, "to the exclusion of every other firearm in the world." 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. *Id.* at 1118. 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.

This Court has leaned on the absolutist standard, "to the exclusion of all other guns," to uphold Manning's convictions on direct appeal and recently to deny DNA and other forensic testing. We now know that this reliance was misplaced because of the expert's misleading

testimony about the degree of certainty that he could have that the bullets were fired from the same gun. As the DOJ's letter admits, science does not permit that level of certainty

The FBI, in an unprecedented string of three letters, has admitted that two of its experts gave false testimony at Manning's trial, thereby undermining confidence in the outcome. These admissions, whether taken individually or collectively, require that Manning be given a new trial. *See Kyles v. Whitley* 514 U.S. 419 (1995). At a minimum, they require this Court to remand to the Circuit Court for DNA and other forensic testing.

Respectfully submitted, this the 7th day of May, 2013.

WILLIE JEROME MANNING

By: _____
COUNSEL FOR MANNING

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CERTIFICATE OF SERVICE

I, David P. Voisin, hereby certify that I have served this day a copy of the foregoing to the following counsel for Respondents via email and via hand delivery:

Marvin L. White, Jr.
Jason L. Davis
Office of the Attorney General
P. O. Box 220
Jackson, MS 39205-0220

This the 7th day of May, 2013.

DAVID P. VOISIN (MSB #100210)

U.S. Department of Justice

950 Pennsylvania Ave., NW
Washington, DC 20530

VIA E-MAIL

May 6, 2013

Deforest R. Allgood, Esq.
District Attorney's Office
Oktibbeha County, P.O. Box 1044
Columbus, MS 39703

Re: Manning v. Mississippi, 2013-DR-00491-SCT

Dear Mr. Allgood:

We write to advise you of additional results of a review by the United States Department of Justice (the "Department") and the Federal Bureau of Investigation ("FBI" and collectively with the Department "DOJ") of laboratory reports and testimony by FBI Laboratory examiners in this case. Through this review, we previously determined that testimony containing erroneous statements regarding microscopic hair comparison analysis was used in this case. (*See* Letters dated May 2 and 4, 2013.) Those errors and the process through which they were identified were explained in more detail in our May 2 and 4, 2013 letters.

I. Additional Error Identified in this Matter

In the course of its review of this case, the FBI provides the following with regard to testimony provided by an FBI firearms examiner:

> 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

Ex. "E"

> scientific certainty. As with any process involving human judgment, claims of infallibility or impossibility of error are not supported by scientific standards.

(A copy of the FBI Ballistics Analysis Report, dated May 6, 2013, is attached.)

II. Report of Action Taken

To assist us in monitoring the status of cases involving microscopic hair analysis comparisons, we ask that you please advise us, if you intend to take any action based on the information that we are providing to you. Please send this information to USAEO.HairReview@usdoj.gov, and let us know if we can be of any assistance.

III. Additional Notifications

You should be aware that we are also notifying the governor's office, attorney general's office, and the defense, as well as the Innocence Project and the National Association of Criminal Defense Lawyers of the errors. The Innocence Project and the National Association of Criminal Defense Lawyers have expressed an interest in determining whether improper reports or testimony affected any convictions and, if so, to ensure appropriate remedial actions are taken. To assist them in their evaluation, we will provide them with information from our files, including copies of FBI Laboratory examiners' reports and testimony, as well as our assessment of those reports and testimony.

If you have any questions regarding this matter please contact us at the email address provided above.

Sincerely,

/s/
John Crabb Jr.
Special Counsel

Encl.

cc: David Voisin, Esq. (via e-mail)
Jack Wilson, Deputy Counsel, Office of the Governor (via e-mail)
Jim Hood, Attorney General (via e-mail)
Peter J. Neufeld, Esq., Co-Director, Innocence Project (via e-mail)
Norman Reimer, Esq., Director, NADCL (via e-mail)

U.S. Department of Justice
Federal Bureau of Investigation
Washington, D.C., 20535-0001

MICROSCOPIC HAIR COMPARISON ANALYSIS

Date: 05/06/2013

To: Special Counsel
Microscopic Hair Comparison Analysis Review Team
Department of Justice

From: Federal Bureau of Investigation
Microscopic Hair Comparison Analysis Review Team
Laboratory Division

Re: Manning v. Mississippi, 2013-DR-00491-SCT

In the course of the FBI's review of the above captioned case, the FBI provides the following with regard to testimony provided by an FBI firearms examiner:

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.

Ex. "F"

name, please?

A. I certainly will. It's L-E-W-O-C-Z-K-O.

BY THE COURT REPORTER: Thank you.

A. You're welcome.

BY THE COURT: You may proceed.

DIRECT EXAMINATION BY MR. ALLGOOD:

Q. Would you tell the ladies and gentlemen of the jury what your name is, please, sir?

A. My name is John Lewoczko.

Q. And what is your occupation; who are you employed by?

A. I'm a special agent with the FBI.

Q. And back in nineteen ninety-three, what part of the FBI were you attached with?

A. I was assigned to the FBI laboratory in Washington, D. C.

Q. And what was your field of endeavor at that time, your specialty, if you will?

A. I was a firearms examiner.

Q. Now, if you would, give the Court and the jury the benefit of your training and experience in firearms examination.

A. Prior to becoming a special agent, I, uh, was assigned to the, uh, FBI laboratory in the firearms unit in Washington for a period of four years. During this time I was a physical science technician which worked with a qualified firearms examiner. I helped him in his day-to-day routine as he went through examination of cases. After being, uh, made a special agent of the FBI, I was

Ex. "G"

assigned to the Mobile office, then the Newark, New Jersey, office, and then I was recalled to the FBI laboratory, uh, back to the firearms unit where I underwent another one year training period under once again an experienced firearms examiner. During this time I was given approximately one hundred test cases; the results of my work was reviewed by my training agent and the other nine qualified firearms examiners in that unit. I was also made available with the literature in the FBI laboratory on firearms identification. I was familiar--familiarized with the equipment that we use in the laboratory to conduct firearms identification. Additionally, I toured numerous firearms manufacturing facilities throughout the United States to observe first-hand how firearms are manufactured, and also I, uh, traveled and went through several, uh, manufacturers of ammunition to observe once again how ammunition was manufactured. Upon the completion of my training, my results were once again reviewed by my training agent and the other nine, uh, firearms examiners in the unit in addition to the FBI laboratory's board of qualification and certification. Upon completion of their review, I was, uh, certified to conduct firearms examiner--examinations for the FBI laboratory, and had, uh, done--done so for approximately six years, being qualified in virtually every state in the United States and all of the, uh, U. S. territories of the United States.

Q. I--I think you've already answered in some respects my next question. Uh, how many times have you been qualified as an

expert in firearms examination analysis, uh, ballpark figure?

A. In excess of a hundred.

Q. And how many times have you had the occasion to perform firearms examination analysis on various questioned items of evidence?

A. Probably in excess of a thousand times.

BY MR. ALLGOOD: If your Honor please, we would tender this witness as an expert in the field of firearms examinations analysis.

BY THE COURT: Voir dire on qualifications?

BY MR. WILLIAMSON: No, your Honor.

BY THE COURT: Then he will be accepted as an expert in that field. You may proceed.

BY MR. ALLGOOD: May I approach the witness, your Honor?

BY THE COURT: You may.

Q. Mr. Lewoczko, I'm going to hand you a number of articles here, first is that which has been marked, uh, State's in Evidence Number 37, a plastic container, that which has been marked State's in Evidence Number 48 which is a paper sack containing smaller plastic sacks, and that which has been marked State's in Evidence Number--if I can have the Court's indulgence just for a minute--State's in Evidence Number 63 which includes two plastic sacks containing two white boxes with various writing and letter on them, and ask you if you can identify that for us, please.

A. (Witness opens package and examines exhibits) I'll lose it yet. I can.

Q. Where did you first see those items of evidence?

A. They were submitted, uh, to me in the laboratory for examination.

Q. And what services were requested of you; what were you asked to do with these items?

A. It was requested of me if I could determine if, uh, the four bullets contained in State's Exhibit 48 were fired from the same firearms--firearm as the, uh, bullets contained in State's Exhibit 37 and 63.

Q. Now, if you would, tell the ladies and gentlemen of the jury how y'all do that. If you would, give them the basis, I guess you'd say, of the--the science that's involved in firearms evidence identification.

A. When a firearm's manufactured, uh, in particular we're looking at the barrel portion, uh, because it involves the coming in ton--contact with the bullet itself. When a barrel in a firearm is manufactured the first thing it is done is drilled out from a stock or a piece of metal. After the metal has been drilled out or the barrel has been drilled out, they then, uh, cut the rifling into the barrel in a twisting motion. They drag what they call a broach through it and all that does is cuts the rifling in the barrel; when they drag the broach through, uh, they give it a twisting motion, and what that does, if you were to look down the

barrel of a firearm it'd look like a candy cane in essence. You would see those grooves cut into the inside of the barrel in a spiraling motion. What that does is when the bullet is fired, the bullet traveling down the barrel engages this rifling and it stocks the bullet the twist as it goes down the barrel. A bullet maintains that twisting motion after it leaves the barrel, just like you're throwing a football, you put a spiral to it, gives the bullet stability or gyroscopic motion. Now each manufacturer takes and they cut, uh, a particular type of rifling in there. One may cut five grooves in a particular barrel, one may cut six grooves, and they may vary the twist. It's just an option, whatever the manufacturer wants to do. So after they cut that rifling in, unique marks are added in that barrel; they're individual microscopic marks of value, as we refer to them. That is produced by, if you can envision, this cutting tool being dragged through the barrel is under a tremendous amount of pressure and also heat, and as it's pulled down the barrel friction takes its toll on it; it starts to wear. That's why after every so many firearms, maybe a hundred, some cases maybe a fifty, the cutting tool has to be replaced because of the wear involved. As this tool is pulled down the barrel the individual marks are constantly changing on that barrel there, the microscopic marks. You can take two barrels consecutively manufactured, fire two bullets or one bullet from each barrel, and compare them microscopically and they'll be different. It's because of the change of the microscopic cutting

surface on those tools. Also, that's why tools have to be sharpened because they're cutting and they're wearing all the time. Every fraction of an inch that tool is dragged down the barrel, it's undergoing change. That's what gives the firearms its unique individual characteristics. The rifling is the same throughout one barrel to the next, but it's the individual marks that are left on the wall of that rifling or of the barrel as it's being rifled that makes it unique. We first take, in this particular case, I took the two groups of bullets. In State's Exhibit 48 I was given four bullets. The first thing I did on those was to determine was the rifling the same. In other words, was it fired from the same fire--or--or general type of firearm, that is, I looked at the bullets microscopically and you can physically count the number of rifling, uh, on the exterior of the bullet or the bearing surface that is imparted or pressed into the bullet as it travels down the barrel. On State's Exhibit 48 there were six grooves right-hand twist; so this particular manufacturer of that firearm cut six grooves with a right-hand twist into it. I then also looked at it, took it one step further, did it contain individual microscopic marks of value that I can take it that one step further for identification purposes, and they did. I was able to identify all four of these bullets as having been fired from the same firearm. Then I took the same analysis over to State's Exhibit 63 and State's Exhibit 37 which were three bullets. I once again looked at the bearing surface of those bullets and determined that those

bullets also had been fired from a firearm rifled with six grooves right-hand twist. I then took it that one additional step to make a positive identification and determined that they also contained individual microscopic marks of value for comparison purposes.

Q. Let me stop you just for a second. So, Mr. Lewoczko--

BY MR. ALLGOOD: May I approach the witness, your Honor?

BY THE COURT: You may.

Q. That which has been marked State's for--in Evidence Number 37 which is a projectile found at the scene of these killings, and that which has been marked State's in Evidence 63 which are the two projectiles which have already been identified as being taken from the body of Tiffany Miller, they all three were fired from the exact same firearm, is that correct?

A. That's correct.

Q. To the exclusion of every other firearm in the world, is that correct?

A. That's correct.

Q. Likewise, the four projectiles which you had previously examined in State's Number 48 which had--

BY MR. WILLIAMSON: Your Honor, I'm going to object to the leading and testifying to evidence--

BY THE COURT: Rephrase your question, counsel. That is leading.

BY MR. ALLGOOD: Yes, sir, your Honor.

Q. Likewise, these four projectiles, what about these four?

A. As I previously stated, on State's Exhibit 48 all four of those projectiles were fired from the same firearm. At this point I then took the two groups of, uh, projectiles and I compared them, and I determined by, uh, comparing their individual microscopic marks of value that all of these projectiles, that is, all seven of these projectiles were fired from the exact same barrel. Now that is done by using a comparative microscope. Comparative microscope allows me to look at two bullets at the same time and when you put them on a comparative microscope you then align the individual marks of value, and you can tell if they're the exact same by side by side comparison.

Q. Once again, is this to the exclusion of every other firearm--every other barrel, in the world?

A. That's correct. It's like your fingerprints are to you. These bullets were all fired from one barrel.

BY MR. ALLGOOD: I've no further questions of this witness, your Honor.

BY THE COURT: Cross examination.

CROSS EXAMINATION BY MR. WILLIAMSON:

Q. Mr. Lewoczko, what manufacturer did you determine this, uh, gun was produced by?

A. Uh, the bullets; you mean the gun--the gun that fired these bullets?

Q. Yes, sir.

A. I gave--I wasn't able to break down a particular manufacturer, but several manufacturers.

Q. Didn't you say that the pistol that fired those bullets was manufactured by La--Le--Lema.

A. Llama.

Q. Llama, Garcia, Beretta, Brico Arms, Astra, Star, SWD, and Gendral, among others?

A. That's correct.

Q. Okay. Were you able to determine how long tho bul--those bullets had been fired from that gun?

A. No, sir, I was not.

Q. Okay. The--the three bullets that you compared to the four bullets, the three bru--bullets you--you weren't able to determine how long they had been fired out of the gun?

A. To my knowledge there is no examination available to give you that type of information.

Q. Okay. And the same thing with those four bullets that you compared the three to?

A. That's correct.

Q. There's no way to determine how long they had, uh,--

A. Abso--

Q. --had been fired from the gun, have you?

A. Absolutely not.

Q. Okay. How long has the gun that fired--the type of gun that fired those bullets, how long has that gun been in production?

A. I have no idea.

Q. Do you have a--a estimate?

A. Well given the fact that I don't know exactly what firearm fired these bullets, I would not be able to say that.

Q. You--you don't even know what type of gun fired these bullets?

A. I know it was a .380 auto caliber pistol, but I don't know the exact manufacturer.

Q. How long is--has a 3--how long has a .380 in any of these manufacturers that you've testified that it could have been, how long have they been in production?

A. Many years.

Q. Many years?

A. Yes, sir.

Q. How many years has the--this type of ammunition that you have there been in production?

A. At least since World War Two.

Q. Okay. Thank you.

A. You're welcome.

BY MR. WILLIAMSON: That's all I have.

BY THE COURT: Redirect.

BY MR. ALLGOOD: Just a couple of questions.

REDIRECT EXAMINATION BY MR. ALLGOOD:

Q. Mr. Lewoczko, the--you were asked about determining the actual make, the actual manufacturer of the firearm, and I think a

number of--of brand names were offered to you, that being Beretta and Llama and--and Brico and, uh, several others, is--

A. That's--

Q. --that correct?

A. That's correct.

Q. If--it--it might be useful at this point to explain to the jury what class characteristics are and how that gives you information insofar as who the manufacturer was.

A. Certainly. Class characteristics, uh, as I previously explained, is the rifling that's cut into the barrel. In other words, in this case it was six grooves, right-hand twist. Now this particular rifling is used by numerous manufacturers, but the point of, uh, demarcation is the individual marks of value are unique to one particular firearm. So you may have, uh, class characteristics which encompass a broad spectrum of firearms in the .380 auto caliber family. It's the individual, uh, marks of value which make it unique to one firearm in a particular manufacturer.

Q. And there might--and--and a matter of fact there are a number of other manufacturers of three hundred--.380 automatic pistols who use a different lands and grooves twist scheme, if you will,--

A. That's correct.

Q. --uh, in rifling their barrels, is that not correct?

A. That's also correct.

Q. Now insofar as this particular or these particular items

of evidence, whether it was a--a Brico, whether it was a Walter, whatever it was, does that in fact alter the fact that it was all, all seven of them fired from the same barrel?

A. That's correct. All the bullets were fired from one barrel.

BY MR. ALLGOOD: I've no further questions, your Honor.

BY THE COURT: You may stand down. Is this witness finally discharged?

BY MR. ALLGOOD: Yes, sir. I would ask that he be finally discharged.

BY MR. WILLIAMSON: Yes, sir.

BY THE COURT: Agent Lewoczko, you are finally discharged. You may go.

A. Thank you, your Honor.

BY THE COURT: Call your next witness, please.

BY MR. ALLGOOD: If your Honor please, the State would call Ginger Ryals Wallace.

BY THE COURT: Just a moment. Before we begin, you're going to have to replace the individuals into the right boxes, court reporter. Just a moment, please.

(COURT REPORTER REPLACES EXHIBITS INTO PROPER CONTAINERS)

BY THE COURT: Are you ready?

BY THE COURT REPORTER: Yes, sir.