

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2019-KA-01033-COA**

**MICHAEL MOSLEY**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT: 06/14/2019  
TRIAL JUDGE: HON. ALBERT B. SMITH III  
COURT FROM WHICH APPEALED: BOLIVAR COUNTY CIRCUIT COURT,  
SECOND JUDICIAL DISTRICT  
ATTORNEY FOR APPELLANT: OFFICE OF STATE PUBLIC DEFENDER  
BY: HUNTER NOLAN AIKENS  
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL  
BY: BARBARA WAKELAND BYRD  
DISTRICT ATTORNEY: BRENDA F. MITCHELL  
NATURE OF THE CASE: CRIMINAL - FELONY  
DISPOSITION: AFFIRMED - 12/08/2020  
MOTION FOR REHEARING FILED:  
MANDATE ISSUED:

**BEFORE BARNES, C.J., McDONALD AND LAWRENCE, JJ.**

**McDONALD, J., FOR THE COURT:**

¶1. A Bolivar County Circuit Court jury convicted Michael Mosley (Mosley) of first-degree murder for killing his mother, Meae Mosley (Meae). The jury also found him guilty of possession of a firearm by a felon. The circuit court adjudged Mosley to be a habitual offender, and for the first-degree murder conviction, the court sentenced him to life imprisonment in the custody of the Mississippi Department of Corrections (MDOC). For the conviction of possession of firearm by a felon, the circuit court sentenced Mosley to serve ten years in the MDOC's custody, to run consecutively to his murder sentence. Mosley

appeals, claiming that his trial counsel's assistance was constitutionally ineffective. We affirm Mosley's convictions and sentences but without prejudice to any motion for post-conviction relief (PCR) he may file.

### **Facts**

¶2. In the early morning hours of September 11, 2016, Meae was shot and killed while lying on a couch in her trailer. No one witnessed the shooting except the killer. Ultimately, a jury decided that the evidence proved beyond a reasonable doubt, and to the exclusion of any other reasonable hypothesis, that Meae's son, Mosley, was the killer. Multiple witnesses, including police investigators, Mosley's acquaintances, the medical examiner, and other experts testified to the knowledge each had about the events of Meae's final day, Mosley's interactions with her, and the evidence against him.

¶3. Michael Mosley lived with his mother and father, Donald Mosley (Donald), in a trailer on Pecan Drive in Cleveland, Mississippi. Donald suffered from cancer and was hospitalized on the day of Meae's death. Their next door neighbor, Roel Soto, often drove Donald to doctor's appointments and would take Meae to visit Donald when he was hospitalized. Earlier in the evening of her death, around dinnertime, Meae went to Soto's trailer to ask him to take her to the hospital to visit Donald the next day. Soto readily agreed.

¶4. At the time, Mosley was a felon and admittedly a drug user. Most of his friends were drug users as well, including Brandi Gant and Karen Fox, both of whom had been intimate with Mosley. Although he was a felon and prohibited from possessing a gun, Fox said she saw Mosley with a gun number of times, even two days before Meae's death. On that day,

Friday, September 9, 2016, Fox and Mosley had gone to a casino in Vicksburg, and Fox said she had seen Mosley with a gun that day.

¶5. Fox and Mosley returned from the casino in the early morning hours of Saturday, September 10, 2016, and Mosley dropped Fox off at a girlfriend's house. While there, Fox read some texts Mosley had sent to Fox's friend, and Fox decided to break things off with him. Around 10:00 or 11:00 a.m, she went to Mosley's trailer to pick up some clothes she had left. Meae came to the door; they spoke, and Meae brought Fox the shorts she had asked for.

¶6. In the afternoon of September 10, 2016, Gant went to Mosley's trailer. As she came in, Gant saw Meae on the couch and spoke to her. Gant and Mosley left. Mosley had a black gun on him that Gant said she had seen him with several times before. A few hours later, Gant and Mosley went back to Mosley's trailer to use drugs and have sex. As they came in, Gant noticed Meae asleep on the couch. After Mosley was unable "to get the drugs to work," Gant developed a headache and left, walking home to her trailer. Mosley came after her in his truck, picked her up, and took her home where they found friends were partying.

¶7. Mosley decided to drive his truck back to his family's trailer in case Meae needed it. Gant trailed him in her car and waited for him. He came back out but then said he had left his phones in the trailer, so he went back to get them. When Mosley did not return after a half an hour, Gant drove her car back to her trailer. She stopped to pick up Fox, who was walking on the road with some packages. They both waited for Perry Thomas, a friend whom Fox had called for a ride, to arrive. After Fox and Thomas left, Gant stopped at a store

and then went back home. During the two hours she was at home, Gant saw Mosley drive past her house away from the direction of Old Ruleville Road. She later heard ambulance sirens.

¶8. Later that night, the Mosleys' next door neighbor, Soto, woke up when he heard Mosley call him from outside. Soto did not get up and went back to sleep. A while later, Mosley came to Soto's door and knocked. Soto checked the time; it was 2:38 a.m. He ignored Mosley when Mosley would not tell him why he was calling to him, and Soto went back to sleep.<sup>1</sup>

¶9. At 2:23 a.m., Mosley called 911 and reported that he had just walked inside his trailer and found his mother. He said that she had been "shot or something" and that he needed an ambulance. The Bolivar County Sheriff's Department responded, and Deputy Sheriff Jonathan Trotter was the first responder at the scene. As he arrived, Trotter saw Mosley come from behind the trailer. Trotter ordered Mosley to put up his hands to be sure that he had no weapons; Mosley complied. Trotter asked what had happened, and Mosley replied that "they shot my mama—they shot my number one." Trotter asked who had shot his mother, but Mosley did not respond. Trotter handcuffed Mosley and placed him in the back of his police car. Trotter told Mosley that he was not under arrest but that he was being detained until law enforcement could determine what was going on. There was no blood on Mosley's clothes, but later, at the police station, officers took Mosley's clothes as part of their investigation.

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<sup>1</sup> Soto said when he later heard the ambulance, he thought it might be for Meae, who had diabetes. Thinking so, Soto went to the hospital the next day to check on her.

¶10. Other officers arrived, including Investigator Michael Williams, and when they went inside the trailer, they found Meae’s lifeless body on the couch with a small hole in her head between her eyebrows. EMTs and the coroner arrived while Trotter and others searched the scene. They found a black duffle bag containing clothes and costume jewelry. They also found a spent bullet casing behind the couch, another casing under the kitchen table, and another in a chair underneath the table. They found two live .22-caliber bullets—one on the floor behind the couch where Meae’s body was found and another in the white pickup truck outside. An additional shell casing was found at a bridge on Old Ruleville Road. But they found no gun—just an empty box for a Ruger-made gun under the bed. Officers found no signs of a break-in. Meae’s wallet containing \$100 was found in a wheelchair that Donald had left on Soto’s porch. Investigators videotaped the crime scene, and the tape was later shown to the jury without objection by the defense.<sup>2</sup>

¶11. While law enforcement was at the scene, Gant, who had heard the ambulance sirens, came by. She said she thought something might be wrong with Mosley. She gave law enforcement her name and contact information. But she was unaware of Meae’s death.

¶12. Two hours after Trotter had placed Mosley in the police car, Mosley was taken to the police station. But he was not interviewed because Officer Michael Williams said Mosley appeared to be under the influence of drugs. However, they did collect samples from Mosley’s hands for a gunshot-residue (GSR) test. David Whitehead of the Mississippi

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<sup>2</sup> Mosley’s attorney only asked the judge to stop the tape if improper comments on it were made. But Mosley’s attorney made no objection to any comments, and the tape was played to the jury uninterrupted.

Forensics Laboratory, an expert in the field of trace evidence, concluded that all four samples—from Mosley’s right hand, right palm, left palm, and back of the left hand—showed recent gunshot residue, that was no more than four-hours old.<sup>3</sup>

¶13. Officer Williams interviewed Mosley on September 13, 2016, after informing him of his *Miranda* rights.<sup>4</sup> Although Mosley told Williams that he was on drugs—meth, marijuana and Xanax—on the day of Meae’s death, Mosley said that earlier in the day, he and Gant went to a bridge and fired a .22-caliber gun that Meae had purchased at the Outdoorsman’s store one year earlier.<sup>5</sup> He said that Gant drove him home from the party so he could get his truck. He went inside to check on his mother, and Gant drove off. He first noticed that his mother’s room had been ransacked, and then he saw that she had been shot. He said he called 911 as soon as he found her. Williams asked Mosley if he knew anything about the murder weapon, and Mosley suggested that the killer may have used Meae’s own gun and then stolen it. Mosley said that “drug heads” lived in the area, and they may have killed Meae.

¶14. One year after Meae’s death, Joseph Sampson, who lived with Fox, found a plastic bag with a pistol, costume jewelry, and Donald Mosley’s military identification card in it. Sampson was walking down Old Ruleville Road past Pecan Drive when he found the bag.

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<sup>3</sup> At trial, the defense posed no objection to the admission of the gun residue trace samples taken from Mosley or the test results.

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>5</sup> Gant was not asked about this during her testimony at trial, so she did not confirm Mosley’s statement.

The gun, a .22-caliber pistol, would not cock because it was dirty and rusty. Sampson gave the gun to Keith Brown, who gave it to Investigator Ray Morris of the Bolivar County Sheriff's Department who passed it on to Investigator Williams. Mark Boackle of the Mississippi Crime Laboratory, an expert in firearms examination, later obtained the gun.<sup>6</sup> He identified it as a "Ruger Model 45 Mark 3 22 Caliber Pistol." Despite its poor condition, Boackle was able to retrieve a serial number that established it was in fact Meae's gun.<sup>7</sup> Boackle had to disassemble the gun and use the frame from another gun to test-fire it. He did so, but due to the damage of the gun and the bullets he examined, Boackle was unable to determine whether the projectiles obtained from Meae's body were shot from her gun. Nor could he include or exclude the shell casings as having been ejected from her gun.

¶15. On September 28, 2017, a Bolivar County grand jury indicted Mosley for the first-degree murder of his mother, Meae, and for possession of a firearm by a felon. Because of his indigency, Mosley was appointed counsel, who filed a motion for discovery but no other pre-trial motions.

¶16. Mosley's trial began on June 10, 2019. Among the witnesses were law enforcement personnel, Trotter and Williams; lay witnesses Gant, Fox, Soto, Sampson, Brown; and experts Boackle, Whitehead and Chief Medical Examiner Dr. Mark LeVaughn, who testified

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<sup>6</sup> Whether the gun Boackle tested was in fact the gun Sampson found was in dispute. At trial, when showed photos of the gun, Sampson said it was not the gun he had found. He said the gun in the photo was similar to it, but it had more chrome on it than the gun he found.

<sup>7</sup> The State entered purchase documents from The Outdoorsman, which confirmed that the gun was the one Meae had bought.

to the results of an autopsy performed on Meae's body by Dr. Lisa Fuente. Dr. LeVaughn testified that Meae suffered four gunshot wounds—one in the midline of the nose that went into her brain; another that entered the right side of her head and went through the brain; a third that entered from the top of her head but lodged between the scalp and the skull; and a fourth that entered the left side of her abdomen and lodged in the vertebrae of her back. Dr. LeVaughn determined the cause of her death to be multiple gunshot wounds and the manner of death to be homicide.

¶17. Numerous photographs were entered into evidence, including several taken by law enforcement officers of Meae's bloody body as they found her that night and others taken during the autopsy. Two showed the skin pulled back from Meae's scalp. Mosley's counsel raised no objection to these photos. The autopsy report itself was not entered into evidence.

¶18. The jurors also heard the tape of Mosley's 911 call from that night and watched the videotape of the crime scene. Mosley decided not to testify, but the parties stipulated that prior to September 11, 2016, Mosley had been convicted of a felony. Mosley called no witnesses in his defense.

¶19. After three days of testimony, the jury was instructed on the elements of first-degree murder and possession of a firearm by a felon. They heard closing arguments of counsel<sup>8</sup> and deliberated.<sup>9</sup> The jury found Mosley guilty of both crimes, and the circuit court sentenced

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<sup>8</sup> In its closing argument, the State emphasized the proof of gun residue on Mosley's hand, the photos entered into evidence, and the inconsistency of Mosley's statements to law enforcement.

<sup>9</sup> During their deliberations, the jury sent out two notes. In one, the jury asked to hear the 911 tape again. The circuit court called the jury out, cleared the courtroom, and allowed



him thereafter.

¶20. In a post-trial motion for judgment notwithstanding the verdict or, in the alternative, a new trial, Mosley challenged the testimony of Dr. LeVaughn because the autopsy itself had been performed by Dr. Lisa Fuente. Mosley also raised the illegality of his arrest on the night of September 11, 2016, and the taking of the samples for the gunshot-residue test at that time. The circuit court denied Mosley's motion.

¶21. On appeal, Mosley is represented by the State Public Defender's Office of Indigent Appeals. The sole issue raised is the alleged ineffective assistance of Mosley's trial counsel because (1) his attorney failed to raise a timely motion to suppress evidence of Mosley's gunshot-residue test as the fruit of his unlawful arrest without probable cause, and (2) Mosley's counsel failed to object to the admission of gruesome, inflammatory photos from Meae's autopsy.

### **Discussion**

¶22. Mississippi Rule of Appellate Procedure 22(b) addresses the manner and method of raising post-conviction issues to the appellate court:

b) Issues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

Because Mosley is not represented on appeal by the attorney who represented him at trial,

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the jury to hear the tape. After further deliberation, the jury sent another note, asking if they could open the GSR envelope. The court's response does not appear in the record.

Mosley is required to raise any issues in his direct appeal that are based on facts fully apparent on the record or waive those issues in any subsequent PCR proceeding. *Branch v. State*, 882 So. 2d 36, 49 (¶18) (Miss. 2004).

¶23. Despite the requirement of Rule 22(b) that appellate counsel raise issues that are apparent on the record, it is still unusual for the appellate court to consider the issue of ineffective assistance of counsel in a direct appeal because there is usually insufficient evidence in the record to do so. *Ware v. State*, 301 So. 3d 605, 615 (¶45) (Miss. 2020). In this case, Mosley’s appellate counsel has not attached any exhibits nor sought to re-open the record to attach any extraneous material to support his claim of ineffective assistance of counsel, as the appellate counsel did in *Hodges v. State*, 912 So. 2d 730, 758 (¶48) (Miss. 2005). Mosley’s appellate counsel raises deficiencies by Mosley’s trial counsel even without supplementation, including the failure to object to gruesome photographs and the failure to challenge Mosley’s allegedly illegal arrest and the gunshot-residue test taken from him. If Mosley’s claims of ineffective assistance of counsel are based on facts fully apparent from the record, we will proceed to review them as our supreme court did in *Latham v. State*, 299 So. 3d 768 (Miss. 2020). If not, we will deny relief yet preserve the issue for the defendant to raise in a PCR motion.

¶24. “To prevail on an ineffective-assistance-of-counsel claim, the defendant must prove that (1) his counsel’s performance was deficient, and (2) the deficient performance prejudiced the defense of his case.” *Havard v. State*, 988 So. 2d 322, 328 (¶13) (Miss. 2006) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To show deficient

performance, a defendant must show that counsel’s performance “fell below an objective standard of reasonableness.” *Ware*, 301 So. 3d at 615 (¶44). “Counsel must have made errors so serious he or she was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Crawford v. State*, 218 So. 3d 1142, 1150 (¶18) (Miss. 2016). But there is a strong presumption that counsel’s action were consistent with a chosen trial strategy and was “within the wide range of reasonable professional assistance.” *Ware*, 301 So. 3d at 615 (¶44). To prove the second prong of the *Strickland* test, a defendant must show that “there was a reasonable probability that ‘but for’ counsel’s errors, the result in the trial court would have been different.” *Moss v. State*, 977 So. 2d 1201, 1213-14 (¶30) (Miss. Ct. App. 2007)

#### I. Gruesome Photos

¶25. Mosley argues that his trial counsel should have objected to the admission of autopsy photographs, including two that showed Meae’s scalp pulled back, revealing her brain. Because the record is clear on the lack of objection, Mosley’s claim of ineffective representation on that basis can be addressed. The issue becomes whether the trial court would have sustained an objection by Mosley’s counsel and excluded the photos from the evidence. Mosley has to show that “but for” the admission of these photos, the outcome of his trial would have been different.

¶26. The admission of photographs is reviewed for abuse of discretion. *Beasley v. State*, 136 So. 3d 393, 400 (¶21) (Miss. 2014). “Even if the photograph is gruesome, grisly, unpleasant, or even inflammatory, it still may be admitted so long as it has probative value

and its introduction serves a meaningful evidentiary purpose.” *Id.* A “meaningful evidentiary purposes” is one that describes the circumstances of the killing, its location, or the cause of death or supplements a witness’s testimony. *Id.*

¶27. Examples of photographs that should not be admitted include life-sized, full-color photographs that depicted the victim’s nude and partially decomposed body, including a full-color, close-up view of the victim’s decomposed and maggot-infested skull. *McNeal v. State*, 551 So. 2d 151, 159 (Miss. 1989). Yet the bar is low for admission, and “some probative value is the only requirement needed in order to support a trial judge’s decision to admit photographs into evidence.” *Martin v. State*, 289 So. 3d 703, 705 (¶7) (Miss. 2019); *Beasley*, 136 So. 3d at 401 (¶25). Thus, the *Beasley* court found no error in the admission of photographs that showed the back of victim’s head, shaved and unshaved, with significant gashes on her scalp because the photographs identified the manner of death, i.e., blows to the head with a machete or hatchet. *Beasley*, 136 So. 3d at 401 (¶26).

¶28. The Mississippi Supreme Court recently discussed the admissibility of autopsy photographs in *Martin v. State*, 289 So. 3d 703 (Miss. 2019). In that case, the defendant was charged with beating his victim to death. *Id.* at 704 (¶6). The State sought to enter two photographs from the victim’s autopsy. *Id.* at 706 (¶8). *Martin* offered to stipulate that the cause of death was blunt force trauma, but the trial judge felt the photos were probative of the cause and manner of death. *Id.* The supreme court agreed, citing several cases where photographs of bloody injuries had been admitted in the past. *Id.* at (¶11). It noted that photos admitted in *Alexander v. State*, 610 So. 2d 320, 338 (Miss. 1992), including a

photograph of a victim's open skull created by the autopsy, not the assault, were similar to the photos in Martin's case. *Martin*, 289 So. 3d at 707 (¶13). The supreme court found that the photos in *Martin* were relevant (i.e., probative and material) because they assisted the medical examiner in his testimony to the jury concerning the extent of the injuries. *Id.* at 706-07 (¶12).

¶29. In the case at hand, even though Mosley's attorney did not object, it is likely that any objection to the photographs would have been denied, and correctly so. Dr. LeVaughn used the autopsy photos to explain the three gunshot wounds to Meae's head and the damage each projectile caused. In this case, the State needed to prove not only that Mosley killed his mother, but that he did so with deliberate design. Shooting a person in the head three times supports the intent element the State needed to prove. This was not an accidental shooting. The photos in this case, like the photos in *Martin*, "did not rise to the level of gruesomeness of the pictures in *McNeal*," *id.* at 707 (¶15), did not prejudice Mosley, and were used to aid a witness in his testimony. Accordingly, they were admissible, and Mosley's counsel failure to object does not result in constitutionally ineffective assistance of counsel.<sup>10</sup>

## II. Gunshot-Residue Test

¶30. Mosley also claims ineffective assistance of counsel because his trial attorney failed to file a motion to suppress the gunshot-residue test results on the basis of violations of

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<sup>10</sup> Nonetheless, we caution the State in placing too many unnecessary autopsy photographs before the jury. While certainly probative, the probative value of some photographs may be outweighed by the prejudicial and inflammatory effect. It is a dangerous proposition to risk an abuse-of-discretion assessment on appeal when other less-prejudicial and inflammatory photographs were available.

either the Fourth or Fifth Amendments. From our review of the law, we can determine from the record whether there was a probable Fifth Amendment violation, but the record is insufficient for us to determine whether Mosley had a viable Fourth Amendment suppression claim and thus, ineffective assistance of counsel. We refrain from making a ruling on that claim, which we find is better left for resolution through a PCR motion.

¶31. Deputy Trotter arrived at the scene shortly after the 911 call at 2:23 a.m. Trotter encountered Mosley and placed him, handcuffed, in Trotter's police car until other officers arrived and the scene was fully investigated. The record reflects that Mosley sat in the police car for approximately two hours, after which he was taken to the Sheriff's Department. This would probably have been between 4:30 and 5:00 a.m. although there is no testimony or documents to verify this time. According to Deputy Trotter, Mosley was not under arrest and he was not formally interrogated at that time because, according to Officer Williams, Mosley was under the influence of drugs. However, officers did take samples from Mosley's hands at that time for a gunshot-residue test, and the results were positive. But no officer testified or explained why the test was administered.

¶32. Mosley now claims that despite Trotter's claims, Mosley had in fact been "arrested" without probable cause, without knowing his *Miranda* rights, and that any search of him, including samples taken from his hands for the gunshot-residue test, was unlawful. Therefore, Mosley argues, he received ineffective assistance of counsel when his trial attorney failed to move to suppress the gunshot-residue test results.

¶33. The record is scant as to the specific events that occurred after Mosley was placed in

Trotter's police car. What is known is that Mosley was sufficiently under the influence of drugs that law enforcement knew he was unable to give a statement or presumably to give consent to the gunshot-residue test. But gunshot-residue samples collected by law enforcement are evidence that is not testimonial in nature and admissible with no breach of the Fifth Amendment even if the defendant refuses to submit to a gunpowder test.

Evidence gathered by conducting a neutron activation test [gunshot-residue test] is analytically similar to cases in which evidence is collected through such tests and procedures as blood tests, breathalyzer tests, handwriting samples, voice exemplars and hair and saliva samples. In such cases, the evidence pursued is not testimonial in nature, and therefore does not fall within the scope Fifth Amendment.

*Hubbert v. State*, 759 So. 2d 504, 507 (¶11) (Miss. Ct. App. 2000).

¶34. Mosley argues that the gunshot residue test was nonetheless inadmissible under the Fourth Amendment as the result of a “search” incident to an illegal arrest, i.e. that law enforcement had no probable cause to take him into custody and that the GSR samples were thus illegally obtained. The two bases for exclusion of evidence of this nature, violation of the Fifth Amendment and violation of the Fourth Amendment, often overlap, but are nonetheless distinct. *Penick v. State*, 440 So. 2d 547, 553 (Miss. 1983) (citing *Brown v. Illinois*, 422 U.S. 590 (1975)). In deciding Fourth Amendment suppression claims, the court must assess whether the search was reasonable and valid by examining the totality of the circumstances of each case in particular. *Id.* at 549. In this case, because no motion to suppress the GSR test was made on Fourth Amendment grounds, we lack sufficient information to address Mosley's argument. Clearly, he was handcuffed, placed in Trotter's police car, and taken to the police station. Under such circumstances, it would appear that

Mosley was not free to leave and was in fact, in police custody although Trotter testified that Mosley was not under arrest. Such facts support Mosley’s argument that he had been “seized” under the Fourth Amendment. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Officer Williams testified that Mosley was not questioned because he was under the influence. But there was no testimony as to whether Mosley was able to or did consent to the gunshot-residue test. The record before us contains no other testimony as to what law enforcement did, at what time, and why. Whether police had probable cause to take and hold Mosley in their custody and/or whether they had any constitutionally sound reason for taking the samples for the gunshot-residue test cannot be determined from the record before us.<sup>11</sup> A hearing would be needed where Trotter and others could testify as to their actions and rationale for them. Even the State agrees that this issue may best be preserved for a PCR motion where an evidentiary hearing could be held concerning the circumstances surrounding Mosley’s detention and law enforcement’s rationale for securing the gunshot-residue samples. Accordingly, we make no ruling on Mosley’s ineffective counsel argument on this basis.

### **Conclusion**

¶35. On the face of the record before us, it is apparent that Mosley’s trial counsel did not object to autopsy photographs that were admitted into evidence. But we find that an

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<sup>11</sup> In cases such as *Longstreet v. State*, 592 So. 2d 16 (Miss. 1991), and *Ashley v. State*, 423 So. 2d 1311 (Miss. 1983), the Mississippi Supreme Court found it acceptable for blood samples to be taken from defendants who were not formally under arrest, saying that it could still determine from law enforcement testimony in the record that they had probable cause to detain the defendants nonetheless. *Longstreet*, 592 So. 2d at 20; *Ashley*, 423 So. 2d at 1313. Our record here contains no such testimony for us to make such a ruling.



objection to those would have been futile and the photographs were properly admitted. However, we cannot determine from the record that Mosley's counsel was ineffective because he did not file a motion to suppress the gunshot-residue test results on Fourth Amendment grounds. Such a determination can only be made with further testimony concerning the circumstances surrounding his custody and the rationale for obtaining the gunshot-residue samples.

¶36. Accordingly, because the only challenge Mosley raises to his conviction is the claim of ineffective assistance of counsel, which we partially decline to address, we affirm his convictions and sentences, and we dismiss his claim of ineffective assistance of counsel without prejudice to his right to raise it in a motion for post-conviction collateral relief.<sup>12</sup>

¶37. **AFFIRMED.**

**BARNES, C.J., CARLTON, P.J., GREENLEE, WESTBROOKS, LAWRENCE AND McCARTY, JJ., CONCUR. WILSON, P.J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION.**

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<sup>12</sup> Because Mosley has appealed his conviction, he must petition the Mississippi Supreme Court for leave to file a post-conviction-relief motion. *See* Miss. Code Ann. § 99-39-7 (Rev. 2015). This action must be taken within three years of the final decision on Mosley's appeal. *See* Miss. Code Ann. § 99-39-5(2); *see Walker v. State*, 262 So. 3d 560, 566 (¶20) (Miss. Ct. App. 2018).