Serial: 183549

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-DR-00491-SCT

WILLIE JEROME MANNING A/K/A FLY

FILED

APR 2 5 2013

SUPREME COURT CLERK

v.

STATE OF MISSISSIPPI

ORDER

This matter is before the Court en banc on the Motion for Leave to File Successive Petition for Post-Conviction Relief Including DNA Testing and Other Forensic Analysis filed by Willie Jerome Manning.[1] Also before the Court is the Response filed by the State of Mississippi and the Rebuttal filed by Manning.

Manning was convicted of two counts of murder and was sentenced to death. This Court affirmed the conviction and sentence in ***Manning v. State***, 726 So. 2d 1152 (Miss. 1998). Manning's petition for post-conviction relief was denied. ***Manning v. State***, 929 So. 2d 885 (Miss. 2006). Manning's federal habeas concluded when the United States

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[1]Manning filed a pre-trial "Motion to Inspect, Examine and Test Physical Evidence." Specifically included in Manning's request was "all fingerprints," "all hair and fiber" and "all blood samples," *inter alia* – essentially what is now requested 19 years later. On April 26, 1994, the trial court granted Manning's motion which "permitted [him] to Inspect, Examine and Test *all Physical Evidence in the possession of the State*."

Supreme Court denied certiorari on March 25, 2013. ***Manning v. Epps***, __ S. Ct.__ , 2013 WL 1187604.

In this successive petition, Manning asserts that he is entitled to DNA and other forensic testing. Manning also asserts that one of the State's witnesses, Earl Jordan, has recanted his trial testimony. He further asserts that this Court should re-examine the allegation that the prosecutor violated ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), cumulative-error and, finally, that he was denied effective assistance of counsel at the penalty phase of his trial.

Manning's conviction and sentence were based on substantially more evidence than he now challenges or is referenced in the objections to this order. Our examination anew of the record reveals that conclusive, overwhelming evidence of guilt was presented to the jury.

Inter alia, three items were stolen from burglary victim John Wise's car (parked in the same lot as Tiffany Miller's (murder victim) car that night) – a CD player, a leather jacket and a unique bathroom token. In addition, Steckler's watch and class ring were missing. A witness who had known Manning for years testified that, within a week of the murders, Manning showed up at her house and wanted to sell her a watch and ring which matched the exemplars introduced at trial. She also testified that Manning was wearing a leather jacket which matched the one introduced at trial, and, that she attempted to purchase the jacket from Manning, but he refused. Multiple other witnesses testified to seeing Manning with the CD player and to seeing Manning wearing the leather jacket, a ring and watch matching the exemplars. An electronic store owner identified Manning as the man who attempted to pawn

the CD player, and a separate witness testified that he actually purchased the CD player from Manning. The witness later pawned it in Jackson. It was recovered and matched by serial number as Wise's. The token taken from Wise's car was recovered at the murder scene.

Manning's live-in girlfriend testified that she last saw Manning before the murders leaving the house with a handgun and gloves. He returned to the house a few days after the murders, *sans* handgun and gloves, but with a CD player, a watch and a leather jacket, *inter alia*. She testified that Manning wore the leather jacket until a deputy sheriff came to the house, after which, he gave the leather jacket to her. She later turned over Wise's jacket to authorities. She further testified that, just days before the murders, she observed Manning firing a handgun into a tree behind the house in which they lived. 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. ***Manning,*** 726 So. 2d at 1168.

Moreover, Manning's cousin, Earl Jordan, testified that Manning told him that he and another had killed "the two students out [there] at Mississippi State." Jordan testified that Manning told him that they were on campus breaking into a car when the two victims walked up on them. Manning pulled a gun and forced them into the victim's car. Manning told Jordan that he was the one who shot the victims. Regarding this testimony, this Court stated, "Manning's confession to Jordan removed this case from the circumstantial realm . . . ." ***Id.*** at 1194. Coupled with Jordan's testimony, the jury heard from a cell mate of Manning's,

Frank Parker, that Manning had stated that he did not believe that he could be convicted and that he "sold the gun on the street."

Finally, in reference to Justice King's concern regarding hair fragments, the State argued in closing that it is only "corroborative . . . not dispositive evidence." The defense elicited testimony that other African Americans had been seen in Miller's car before her murder. In closing, defense counsel made it clear "there was no physical evidence that put Manning at the scene." The State offered no evidence claiming the hair fragments found at the crime scene were a match for Manning. The absence of Manning's DNA does not preclude his participation in the crimes charged. Similar findings were made by the United States District Court in Manning's habeas proceedings, including "[e]ven if DNA testing could conclusively prove that it was not [Manning's] hair that was found in the vehicle, those results would not impeach the testimony given at trial, much less exonerate [Manning]." **Manning v. Epps**, 2008 WL 4516386 (N.D. Miss.).[2]

After due consideration and a fastidious examination of the entire record, the Court finds that Manning fails to demonstrate a reasonable probability that he would not have been convicted or would have received a lesser sentence if favorable results had been obtained

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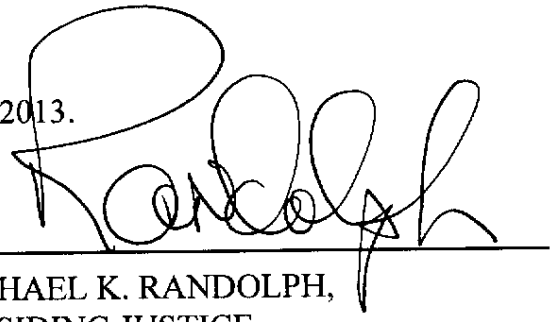
[2]Habeas petitions are controlled by the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). *See* ***Manning v. Epps***, 695 F. Supp. 2d 323, 343 (N.D. Miss. 2009). Under the AEDPA, "relief cannot be granted in connection with any claim adjudicated on the merits in State court proceedings unless that adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established United States Supreme Court precedent; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the presented evidence." ***Id.***

through such forensic DNA testing at the time of the original prosecution. *See* Miss. Code Ann. § 99-39-5(2)(a)(ii) (Supp. 2012).

Furthermore, Manning fails to present any competent evidence Earl Jordan has recanted his trial testimony. Finally, the ***Batson*** claim, cumulative-error claim and the ineffective-assistance-of-counsel claim previously have been litigated before this Court in post-conviction proceedings. Therefore, the Court finds that the ***Batson***, cumulative-error and ineffective-assistance-of-counsel claims have been substantially reviewed in prior proceedings and are now barred by the doctrine of *res judicata*. These claims also were subject to review in his federal habeas proceedings and were denied at every level – United States District Court, United States Court of Appeals for the Fifth Circuit and the Supreme Court of the United States.

IT IS THEREFORE ORDERED that the Motion for Leave to File Successive Petition for Post-Conviction Relief Including DNA Testing and Other Forensic Analysis filed by Willie Jerome Manning is hereby denied.

SO ORDERED, this the 25th day of April, 2013.



MICHAEL K. RANDOLPH,
PRESIDING JUSTICE
FOR THE COURT

TO DENY AS TO DNA AND OTHER FORENSIC TESTING: WALLER, C.J., RANDOLPH, P.J., LAMAR, PIERCE AND COLEMAN, JJ.

TO GRANT AS TO DNA AND OTHER FORENSIC TESTING: DICKINSON, P.J., KITCHENS, CHANDLER, AND KING, JJ.

TO DENY AS TO THE CLAIMS OF RECANTATION OF A WITNESS AND INEFFECTIVE ASSISTANCE OF COUNSEL: ALL JUSTICES.

TO DENY AS TO THE ***BATSON*** CLAIM: WALLER, C.J., RANDOLPH, P.J., LAMAR, PIERCE AND COLEMAN, JJ.

TO GRANT AS TO THE ***BATSON*** CLAIM: DICKINSON, P.J., KITCHENS, CHANDLER AND KING, JJ.

KITCHENS, JUSTICE, OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY DICKINSON, P.J., CHANDLER AND KING, JJ.

KING, JUSTICE, OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY DICKINSON, P.J., KITCHENS AND CHANDLER, JJ.

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-DR-00491-SCT

WILLIE JEROME MANNING A/K/A FLY

v.

STATE OF MISSISSIPPI

KITCHENS, J.,OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. I fully join Justice King's objection to this Court's denial of Manning's request to seek relief on the first two issues. There is nothing that I could add to Justice King's astute and thorough analysis of Manning's ***Batson***[3] claims. I write separately simply to expound on his objection to the denial of *Manning's* petition for leave to proceed in the trial court with those claims related to DNA and fingerprints.

¶2. Manning has requested an opportunity to seek DNA testing of hair, fingernail scrapings, and evidence from the rape kit. He has also asked that the fingerprints found in the victim's car be compared to those in databases maintained by law enforcement authorities. As Justice King notes, the order does not address his arguments related to fingerprints.

¶3. The Court's order denies Manning relief for his claims related to DNA, finding "conclusive, overwhelming evidence" of guilt. Yet, with the sole exception of Earl Jordan's

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[3]***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)

testimony, the case against Manning was based on circumstantial evidence. Moreover, Manning presented evidence at trial that undermined the State's case against him, including evidence that Jordan had previously implicated two other men, and that the token found at the scene of the murder may not have come from Jon Wise's vehicle. Jordan also testified that, while the two were incarcerated, Manning had confessed that he and *another* man had murdered the two victims. Therefore, it is reasonable to conclude that the development of further evidence could exonerate Manning, or possibly implicate an additional person or persons who, in the interest of justice, ought to be prosecuted.

¶4. The order also denies relief, reasoning that the State did not match the hair from the car to Manning and that "the absence of Manning's DNA does not preclude his participation in the crimes charged." The order points to similar findings by a federal district court judge, including that judge's finding that such evidence would not even serve as impeachment evidence. As Justice King so aptly explains in his separate objection, the testimony that the hairs belonged to an African American was used by the prosecution to implicate Manning. ***Manning v Epps***, 2008 WL 4516386 *2 (N.D. Miss. Oct. 3, 2008). If the hairs do not match Manning, this testimony (a highlight of the State's closing arguments) would have had no relevance during Manning's trial.

¶5. Moreover, federal habeas review is an entirely different process in another court system, and the federal courts have limited authority in review of decisions by state courts. In the opinion cited in the order, the federal district court judge found "[a] DNA result which excluded Petitioner as the source of the hair would not meet the threshold for proving a

freestanding claim of actual innocence, assuming that one exists," citing ***House v. Bell***, 547 U.S. 518, 555, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (emphasis added). ***Manning v Epps***, 2008 WL 4516386 *2 (N.D. Miss. Oct. 3, 2008). Claims of actual innocence based on newly discovered evidence do not constitute grounds for federal habeas relief. ***Herrera v. Collins***, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). As ***House***, 547 U.S. at 555, explained, before a petitioner in federal proceedings is even allowed to argue the merits of a procedurally defaulted claim, he or she must "present[] evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error . . . ." (citing ***Schlup v. Delo***, 513 U.S. 298, 316, 115 S. Ct. 851, 130 L. Ed 2d 808 (1995).

¶6. In the present petition we are concerned with Mississippi's laws governing post-conviction proceedings, not with a claim of actual innocence sufficient to overcome the federal "state procedural default" rule. For example, the federal district court also denied relief because DNA evidence was not used against Manning at trial; but our laws do not require such evidence to have been used to secure conviction. Mississippi Code section 99-39-5(1)(f) (Supp. 2012) addresses biological evidence "secured in relation to the investigation or prosecution attendant to the petitioner's conviction" and does not require that previous testing occurred. *See also* Miss. Code Ann. § 99-39-5 (2)(a)(ii) (Supp. 2012); Miss. Code Ann. § 99-39-11 (Supp. 2012).

¶7. Contrary to the order's suggestion in footnote 1, Manning's request is not "essentially" the same request he made in 1994. Manning is requesting an opportunity to

inspect evidence in the State's custody to determine whether it is suitable for DNA testing using the most recent testing methods. As his petition explains in detail, there have been nineteen years of technological advancements in DNA. In passing legislation to require preservation of biological evidence, the legislature explicitly stated, "[t]he value of properly preserved biological evidence has been enhanced by the discovery of modern DNA testing methods, which, coupled with a comprehensive system of DNA databases that store crime scene and offender profiles, allow law enforcement to improve its crime-solving potential." Miss. Code Ann. § 99-49-1(a) (Supp. 2012). Likewise, Manning requests an opportunity to review the fingerprints in the State Crime Laboratory's custody to assess whether they are suitable for advanced computerized comparisons with the fingerprints of innumerable persons. Moreover, Manning has sufficiently demonstrated that his efforts have not been dilatory throughout his post-conviction proceedings, and the statutory provisions excepting such relief from procedural bars became effective on March 16, 2009, three years after this Court's 2006 decision denying post-conviction relief.

¶8. If the testing of biological material collected during the investigation proves that DNA in that material came from a donor or donors *other than* Manning, this would strongly suggest that someone besides Manning (or, possibly, someone in addition to Manning), was a perpetrator. The same can be said of further examination of the latent fingerprints lifted from the automobile of one of the victims, which have not been identified and have never been compared to the millions of known fingerprints contained in any of the state, local, and/or national databases.

¶9. The victims' families and the public at large deserve to know whether another, or an additional, perpetrator was involved. If such a person can be identified, he or she should be prosecuted. Further examination of the fingerprints and biological evidence in this case could help achieve that end and/or significantly reinforce the basis for Manning's conviction. Interests far beyond Manning's are at stake, and whatever potential harm the denial seeks to avert is surely outweighed by the benefits of ensuring justice by the scientific analysis of all of the trace evidence that the authorities were able to collect from on or about the victims' bodies. Unless and until that is done, the investigation of these horrible crimes will remain incomplete.

DICKINSON, P.J., CHANDLER AND KING, JJ., JOIN THIS SEPARATE WRITTEN STATEMENT.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2013-DR-00491-SCT

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KING, JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶10. Manning has filed with this Court a motion asking leave to seek successive post-conviction relief. Manning gives the Court three reasons for requesting this relief: (1) to pursue an expanded analysis of the fingerprint evidence, and to obtain DNA testing of previously untested forensic evidence; (2) to pursue a claim that the prosecution impermissibly used race as a factor in jury selection in violation of ***Batson v. Kentucky***;[4] and (3) to pursue a claim that a prosecution witness had recanted his testimony. By order entered today, this Court denies all of Manning's requested relief.

¶11. I agree that Manning failed to offer an acceptable and persuasive basis to obtain relief upon his third issue and, therefore, would deny that relief. However, I would grant relief as to issues one and two – the fingerprint and DNA testing and the ***Batson*** jury-selection claims.

¶12. Today's majority finds that "Manning fails to demonstrate a reasonable probability that he would not have been convicted or would have received a lesser sentence if favorable

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[4]***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

results had been obtained through such forensic DNA testing at the time of the original prosecution." For this reason, the majority denies Manning's motion. The infirmity of that position can be seen in the examination of the various items of physical evidence. I, however, would point to two items in particular.

¶13. Hair samples were taken from Miller's car and submitted to the FBI for analysis. An FBI agent testified that the hair samples from Miller's car were insufficient for purposes of comparison, but that those samples were from an African American. In asking the jury to convict Manning, an African American, of the murder of two white students, the prosecution seems to have placed great emphasis on the fact that hair samples, originating from an African American, were found in Miller's car. The sole purpose of the prosecution's emphasis on the fact that the hairs found in Miller's car were of African-American origin appears to have been to lead the jury to construct a faulty syllogism. That syllogism would be as follows: First, that hairs from an African American were found in Miller's car. Second, Manning is an African American. Third, because Manning is an African American, he must have killed Miller and Steckler. Should a DNA test demonstrate that the African-American hairs found in Miller's car did not belong to Manning, then the infirmity in the prosecution's emphasis on the importance of this evidence would be exposed. And it would certainly raise reasonable questions regarding Manning's guilt.

¶14. I would note that the majority completely ignores Manning's request for an expanded fingerprint analysis. I would grant Manning's motion to pursue DNA testing and expanded fingerprint analysis.

¶15. Manning also alleges that the prosecution impermissibly exercised peremptory challenges against African-American veniremen, while accepting similarly situated whites. The majority dismisses Manning's ***Batson*** claims as barred under the doctrine of res judicata. A look at this Court's treatment of Manning's ***Batson*** claims on direct appeal and in the prior post-conviction-relief action lead me to disagree with the majority's holding of res judicata.

¶16. In Manning's direct appeal, he argued that the prosecution used pretextual reasons to dismiss African-American veniremen in violation of ***Batson***. In an opinion released on June 25, 1998, this Court summarily rejected Manning's ***Batson*** claims. ***Manning v. State***, 726 So. 2d 1152 (Miss. 1998). The Court stated that "Manning is procedurally barred from asserting this claim for error for failure to rebut the prosecutor's reason for the strike as pretextual." ***Id.*** at 1185 (¶122).

¶17. As I stated in my dissenting opinion in ***Davis v. State***, our trial judges should conduct an on-the-record review of peremptory jury strikes to determine if the reasons given for the exercise of those strikes are pretextual. *See* ***Davis v. State***, 76 So. 3d 659, 664-67 (¶¶20-34) (Miss. 2011) (King, J. dissenting). This on-the-record review should not be dependent upon whether the opposing party rebuts the reasons offered for the strikes.

¶18. The constitutional right to protection from racial discrimination in the jury selection process extends to the parties[5] and to the veniremen. ***Powers v. Ohio***, 499 U.S. 400, 413, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); ***Carter v. Jury Comm'n of Greene County***, 396 U.S. 320, 329, 90 S. Ct. 518, 523, 24 L. Ed. 2d 549 (1970) (holding that "[p]eople excluded from

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[5]***Batson***, 476 U.S. at 84.

juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion"). Counsel for the defendant would do well to present to the trial court any facts which rebut the prosecution's stated reasons for the exercise of its peremptory strikes. Doing so would have aided the trial court in initially addressing these issues, as well as aid this Court in its appellate review. The failure of trial counsel to offer facts in rebuttal is a factor to be considered. However, that failure does not relieve the trial court of its responsibility to insure fairness in the jury-selection process, fairness to the parties and fairness to the veniremen. As such, I reject the notion that the failure to offer a rebuttal to the reasons given for the exercise of peremptory jury strikes serves as a procedural bar on appeal. To so hold makes our trial judges the equivalent of the three little monkeys, who see, hear, and speak no evil – a notion which I reject.

¶19 Having satisfied itself that these matters were waived procedurally, this Court then appears to have given a cursory review to Manning's ***Batson*** claims. That cursory review of these claims leads me to conclude that the majority's invocation of the doctrine of res judicata is inappropriate.

¶20. Manning states that the prosecution struck Shirley Wooten based upon her response to questions regarding the death penalty. He states that at least two white females, Ola Lee Smith and Wilma Oliver, were accepted for jury service, notwithstanding having given responses very much like Wooten regarding the death penalty. This Court's opinion fails to consider that whites similarly situated to Wooten were selected for jury service while Wooten was rejected.

¶21. Manning argues that the prosecution struck James Graves because he regularly read Jet magazine, which has as its primary readership African Americans. To accept that reason as lacking pretext absolutely strains credulity. Indeed, it is about as preposterous as suggesting that a judge who reads the American Bar Association Journal should be disqualified from sitting on civil or criminal appeals.

¶22. Manning argues that Ronald Henry, like Wooten, was struck by the prosecution because of his responses to questions regarding the death penalty while similarly situated whites were selected for jury service. Additionally, Manning argues that Henry was rejected because a member of his family had been convicted of a crime while similarly situated whites were selected for jury service. The Court's opinion merely says that there were several reasons to exclude Henry, and the fact that whites who shared some of those reasons were allowed to serve is not evidence of pretext. Where there are multiple examples of dissimilar treatment, it clearly suggests that the reasons given are pretextual.

¶23. Manning argues that Joyce Merritt, like Wooten and Henry, was struck by the prosecution because of her responses regarding the death penalty, while similarly situated whites were not struck. Manning argues that the prosecution included as a reason to strike Merritt, who was disabled and did not work, the fact that she was unemployed, while not expressing concerns about whites who were unemployed. The prosecution also struck Merritt because she, like Graves, read magazines whose primary readership is African American. Again, to embrace this as race-neutral absolutely strains credulity. This Court's

opinion found several other reasons also were given for the exclusion of Merritt, so that the issue was "meritless."

¶24. Manning argues that the prosecution's reasons for striking Christi Robertson were pretextual. Those reasons were because (1) he lived in a high-crime (primarily African-American) neighborhood; (2) he regularly read Jet and Ebony magazines, whose primary readership is African American; and (3) he failed to fully complete the jury questionnaire. This Court's sole finding regarding Mr. Robertson was, "Manning is procedurally barred from asserting this claim of error for failure to rebut the prosecutor's reason for the strike as pretextual." Clearly, where the claim has not been addressed on the merits, the doctrine of res judicata should not be applied. *Cf.* ***Spicer v. State***, 973 So. 2d 184, 197 (¶38) (Miss. 2007) (although defendant failed to object to error at trial, the Court addressed the claim's merits on direct appeal and, thus, found the issue barred on motion for post-conviction relief).

¶25. It is not unusual to see multiple reasons given for a particular peremptory strike in hopes that one of them will be upheld as being race-neutral. That appears to be what was done by the prosecution in this case. However, when it is clear that a pretextual reason for the exercise of a peremptory strike is included with a race-neutral reason, the strike should be disallowed as a violation of ***Batson***. ***Flowers v. State***, 947 So. 2d 910 (Miss. 2007) (stating that "[t]hough a reason proffered by the State is facially neutral, trial judges should not blindly accept any and every reason put forth by the State, especially where, as here, the

State continues to exercise challenge after challenge only upon members of a particular race.").

¶26. This Court's prior opinion appears to consider each of Manning's ***Batson*** claims in isolation and, thus, finds no impermissible racial discrimination by the prosecution in the exercise of its peremptory jury strikes. However, even when viewed in isolation, the reasons offered by the prosecution are highly suggestive of pretextual motivations. And when viewed as a whole, a clear pattern suggesting pretextual reasons by the prosecution in the use of peremptory strikes appears. Because the facts suggest a pattern of impermissible racial discrimination by the prosecution in jury selection, the doctrine of res judicata should not be applied.

¶27. This Court has stated that it applies a heightened standard of review to death-penalty cases and gives the defendant the benefit of the doubt on questionable matters. ***Bennett v. State***, 990 So. 2d 155, 158 (¶6) (Miss. 2008). That same heightened standard of review should apply to jury-selection issues in death-penalty cases. Had that standard been applied to the jury-selection issues in this case, they should have been resolved in favor of Manning. Because that heightened standard of review clearly was not applied to the ***Batson*** issues, the doctrine of res judicata should not now be applied to the ***Batson*** issues.

¶28. A reading of this Court's opinion in Manning's post-conviction-relief action indicates that a very cursory review was given to Manning's ***Batson*** claims. *See* ***Manning v. State***, 929 So. 2d 885 (Miss. 2006). Indeed, the entirety of the Court's opinion on these claims is found in the following quote: "The defense attorney did raise a claim under ***Batson***, and the

trial court required the state to give race-neutral reasons for its peremptory challenges. Those reasons were then reviewed by this Court on appeal." ***Id.*** at 904 (¶60). This seemingly cursory review of these claims in Manning's post-conviction-relief action suggest that res judicata should not be applied to this case.

¶29. The majority's attempt at addressing my concerns regarding the hair evidence falls far short of the mark. The decision to introduce the hair evidence was made by the prosecution. In making that decision, the prosecution knew precisely what the testimony would yield. A careful reading of the record of (1) the prosecution's introduction of the hair evidence, (2) the prosecution's questioning of FBI Agent Blythe regarding the hair evidence, and (3) the prosecution's closing argument regarding the hair evidence, clearly indicates that the prosecution placed great emphasis on the hair evidence. The purpose of introducing the hair evidence is shown in the following testimony by Agent Blythe during his direct examination by the prosecution:

> BY MR. ALLGOOD: Thank you, your Honor.
>
> Q. Continue if you would, Mr. Blythe.
>
> A. Well using these certain characteristics that are associated with the various races, I was able to determine these hairs were hairs from an individual of the black race. The hairs were hair fragments and I couldn't identify the area of the body from which the [sic] came so they're unsuitable for comparison with the known hair sample. *So the limit of my abilities at this point in time was just to associate these hairs or determine that these hairs came from an individual of the black race.*
>
> Q. Now, when you start talking about hair fragments as opposed to an actual, uh, full hair, explain for the ladies and gentlemen of the jury, I realize obviously everybody knows a fragment is something smaller, but explain to

> them what difficulties you have when you try to make comparisons from those fragments as opposed to a full length hair and things of that nature.
>
> A. Well a–a–a person's head hair, for example, is–doesn't look exactly the same near the root end of the hair as it looks towards the tip of the hair. In most everyone, especially if they let their hair grow out, be they male or female or what have you, naturally the hair at the root end is darker than the hair at the tip. Usually the sunlight, for example, will cause some bleaching effect. So I need a full length or nearly a full length of hair to make a reliable association. If I take just a small fraction of an inch or a small piece of hair and try to compare it with a head hair, there's no reliable information that can be obtained as far as saying it came from a person. *The only reliable information in these small fragments would be the racial indicators.*

(Emphasis added.) Without making the specific statement, it clearly appears that the prosecution's purpose in placing emphasis on the hair evidence, was to lead the jury to conclude that Manning was an African American therefore he was the killer of Miller and Steckler. The majority seeks to prop up its holding on this issue by cloaking itself in the habeas opinion of the United States District Court. Again, the effort falls short. It is clear that the sole purpose in presenting the hair evidence was to have the jury conclude (1) hair from an African American was found in the car of Miller – a white student, (2) Manning is an African American, (3) therefore, Manning killed Miller and Steckler.

¶30. For the reasons stated herein and by Justice Kitchens in his separate statement, I object to the entry of the orders which deny Manning's motion for a successive PCR action and set an execution date of May 7, 2013.

DICKINSON, P.J., KITCHENS AND CHANDLER, JJ., JOIN THIS SEPARATE WRITTEN STATEMENT.