

IN THE SUPREME COURT OF MISSISSIPPI

ORIGINAL

No. 2013-DR-00491-SCT

WILLIE MANNING

FILED

PETITIONER

V.

MAY - 6 2013

STATE OF MISSISSIPPI

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

RESPONDENT

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REPLY TO STATE'S OPPOSITION

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The State urges this Court to press ahead with the execution of Willie Manning even in spite of the stunning revelation by the FBI that its agent provided false testimony at trial; testimony that was used by the prosecutor in closing to link Willie Manning to the crime scene. It does so by diminishing the importance of the hair analysis testimony that was repeatedly relied on by the prosecutor in closing argument to suggest Willie Manning's presence at the crime scene and by providing disingenuous statements about DNA testing that was conducted in this case. It also disregards the importance of the second, May 4<sup>th</sup> letter, sent by the FBI to counsel which specifically refer to testimony about hairs analyzed in this case.

It is through no fault of Willie Manning or his counsel that these revelations from the FBI have only just come to light. The false testimony was uncovered as part of a full internal review at the Department of Justice of all cases in which FBI agents have performed forensic hair analysis and subsequently testified in trials. Second Successor Exhibits 1 and 2. This case was prioritized because of Mr. Manning's pending execution date.

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1. The State also argues that Manning's claims regarding the invalidity of the hair testimony is barred. First, the State contends, although his lawyers objected to the evidence, they objected on a different basis than the basis asserted now. This is preposterous. Manning did not raise the issue of the FBI's repudiation of its own testimony because he did not receive the letters from the Department of Justice until Thursday and Saturday of last week. Nor can he be barred by *res judicata* from asserting an argument that he could not have discovered until his receipt of the letters. State's Response at 2-6. Those prior decisions relate to whether the hair had a more prejudicial than probative effect on the jury and should have been admitted in the first place, not to whether the use of false evidence at a capital trial is a constitutional violation that demands a new trial.
2. The State now tries to downplay the importance of both the hair evidence at trial and the subsequent letters from the FBI admitting its falsity. Response at 6-11. It is not a "matter of semantics." The FBI admitted that the testimony saying the hair came from a member of the "black race" is scientifically invalid. The May 4 letter superseded the May 2 letter by stating directly that a hair analyst cannot say that a hair comes from a particular race. That is exactly what FBI agent Blythe said at this trial and what the district attorney repeatedly relied on in his closing argument.

Having offered these [statistical composite bullet lead analysis] proofs and argued their significance, the State should not be permitted to now "walk away" from its evidence and demean its importance.

*State v. Behn*, 868 A.2d 329, 345-46 (N.J.Super. A.D. 2005).

3. This Court has frequently acknowledged the disproportionate impact that forensic testimony has on a jury. In *Edmonds v. State*, this Court explained:

We have no alternative but to find that Tyler's substantial rights were affected by Dr. Hayne's conclusory and improper testimony. Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain area than the average person. *See* M.R.E. 702. Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness. *See generally Simmons v. State*, 722 So.2d 666, 673 (Miss.1998); *see also United States v. Benson*, 941 F.2d 598, 604 (7th Cir.1999) (an expert's "stamp of approval" on a particular witness's testimony [or theory of the case] may unduly influence the jury).

*Edmonds v. State*, 955 So.2d 787, 792 (Miss. 2007). Speculating after the fact that a forensic examiner's testimony had no impact on the jury is impossible and, in a capital case, unconstitutional.<sup>1</sup>

4. The State's argument that DNA testing has already been performed is misleading. No DNA testing has ever been performed on the rape kit, the hair fibers (indeed it could not be performed on hair at the time), or on the fingernail scrapings. The DNA testing to which the State refers on page 8 of its response was performed on blood stains on a shirt belonging to an early suspect named Johnny Lowery. Lowery said that the blood on his shirt resulted from a fight with an individual named Hill. Testing was done to see if the blood did in fact come from Hill, as opposed to the victims of this crime, and the result was that Hill could not be excluded as the source. Thus, the DNA testing was limited to the suspicion of Lowery and had nothing to do with Manning or evidence from the scene

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<sup>1</sup> It should also be noted that Mr. Manning previously raised *Brady* claims in his prior post-conviction application that were denied by the state courts but that this revelation of false evidence by the FBI could, with full briefing and consideration, change the outcome of those previously rejected claims.

of the crime. This is not the testing that Manning has been seeking since his first requests for access to the evidence in 2001.

For the reasons above, this Court must issue a stay in this extraordinary matter in order that it can more carefully consider the matter or remand for proceedings that would expand the record on the issue of the hair analysis. To pass on this issue and sanction the execution of Willie Manning, even in light of these revelations, would be counter to fundamental due process, the eighth and fourteenth amendments to the Constitution and to the Mississippi Constitution. The State clearly relied on the forensic hair analyst's testimony to link Willie Manning to the crime scene and forensic testimony is known to have an impact on juries. Even in a non-capital case, this would be enough to remand the case for an evidentiary hearing on the issue of the hair analysis. This is a capital case with an execution date scheduled for tomorrow. Prudence, let alone the "heightened scrutiny" required when a death sentence is about to be carried out, requires that this Court stay the proceedings so that the issue may be considered thoroughly in the court below.

The standard of review for capital convictions and sentences is "one of 'heightened scrutiny' under which all bona fide doubts are resolved in favor of the accused." *Flowers v. State*, 773 So. 2d 309, 317 (Miss. 2000) (citations omitted). "This Court recognizes that 'what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.'" *Id.*

*Chamberlin v. State*, 55 So. 3d 1046, 1049-50 (Miss. 2010). See also, *Lockett v. Ohio*, 438 US 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.").

The FBI agent provided false testimony that was then used by the prosecutor at trial to suggest to the jury that Mr. Manning was in the victim's car. Regardless of its opinion of the guilt of Mr. Manning, it would offend due process to send Mr. Manning to his execution with

this latest admission. This Court should vacate Mr. Manning's convictions and order a new trial. At the very least the Court should stay the execution, order DNA testing on the hair or remand the case for further factual development.

Respectfully submitted, this the 6<sup>th</sup> day of May, 2013.

WILLIE JEROME MANNING

By:

  
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**CERTIFICATE OF SERVICE**

I, Robert S. Mink, 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:

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This the 6<sup>th</sup> day of May, 2013.

  
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ROBERT S. MINK (MSB #9002)