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No. 86585-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Personal Restraint of
JONATHAN LEE GENTRY,
Petitioner.

PETITIONER'S RESPONSE TO THE STATE'S
MOTION TO STRIKE FILED JUNE 17, 2013

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ATTORNEYS FOR PETITIONER

 ORIGINAL

In the world the law aspires to, where prosecutors seek not to “win a case, but that justice shall be done,” *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) a prosecuting attorney who learned of evidence undermining the State’s race-based forensic theory in a capital case would be appalled and would do what they could to rectify the error, or at least fully ascertain all the facts. *See, e.g., Saldano v. Texas*, 530 U.S. 1212, 120 S.Ct. 2214, 147 L.Ed.2d 246 (2006) (reversing death sentences on confession of error regarding race-based future dangerousness testimony). Unfortunately, that is not what happens in the competitive world of capital litigation this case epitomizes. In this world, the prosecutor’s response is to file a motion to strike the new evidence and prevent the Court from considering it.

This motion should be denied, for several reasons.

First, the document the State seeks to strike is referenced in both of the *Amicus* Briefs to which the State has separately responded. *See Amicus* Brief of the ACLU at 17; *Amicus* Brief of the NAACP Legal Defense Fund at 16 n.22. It would make little sense to leave those references in the record, and strike the document referenced itself.

Second, the argument that the document is unauthenticated forgets that strict rules of evidence do not necessarily control an appellate court’s constitutional review process. *See, e.g., State v. Cauthron*, 120 Wn.2d

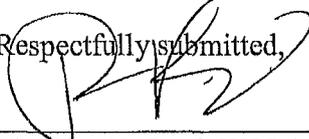
879, 887-88, 846 P.2d 502 (1993), *overruled in part on other grounds*, *State v. Buckner*, 133 Wn.2d 63, 941 P.2d 667 (1997) (appellate review of admissibility of scientific evidence is not confined to the record but may include review of literature on the validity of the procedure).

The State's position also forgets that, to support a request for reference hearing based on information held by others, a personal restraint petitioner may either "present their affidavits" or "present evidence to corroborate what the petitioner believes they will reveal if subpoenaed." *In re Yates*, 177 Wn.2d 1, 18, 296 P.3d 872 (2013) (quoting *In re Rice*, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992)). In the present posture of this case, Petitioner has no way to compel testimony from FBI experts on the points in this letter. But to answer the State's objection his counsel have obtained the most authentic copy of the letter he can—the copy submitted to and acted on by the Mississippi Supreme Court in *Manning v. State*, ___ So.3d ___, 2013 WL 1917632 (Miss. 2013). See Declaration of Tucker Carrington, submitted herewith, Exhibit A. The letter led that Court to stay an execution to permit full development of this significant, newly available evidence. See *id.* at Exhibit B; *Manning v. State, supra*. It is at least sufficient to "corroborate what the petitioner believes [the FBI experts] will reveal if subpoenaed" to the reference hearing he has requested on any material facts the State disputes. See Petition ¶21(c).

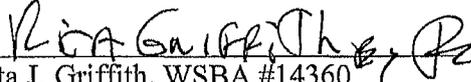
The State's final argument—that this evidence is irrelevant because it sheds no light on the intent of the prosecutors at the time of Petitioner's trial—has more merit. But that is not the only issue before this Court. Part of the issue before the Court is whether the race prejudice that Petitioner has shown to have infected his trial was harmless, beyond a reasonable doubt. This is another piece of evidence that shows it was not.

The racial classification of this hair was a cornerstone of the prosecutions' case. It was the foundation for its argument that there was "absolutely no doubt" that the killer was "a black individual." RP(6/25/91) 5393-5394. It provided the denominator against which the DQ Alpha type of the tissue on the hair root was compared, to support the argument that the source was likely Petitioner's brother. See RP(6/17/91) 5041. The fact that classification has now been shown to be unscientific is another reason to doubt that the pervasive emphasis on race in this trial was harmless. That fact should not be ignored or excluded from consideration.

DATED this 20th day of June, 2013.

Respectfully submitted,


Timothy K. Ford, WSBA #5986

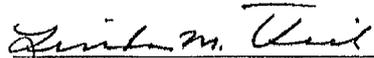


Rita J. Griffith, WSBA #14360
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies, under penalty of perjury under the laws of the State of Washington, that on June 20, 2013, a copy of the foregoing was sent by e-mail to RSutton@co.kitsap.wa.us and also was deposited in the United States Mail, first class postage prepaid, addressed to:

Randall Avery Sutton
Kitsap County Prosecutor's Office
614 Division Street
MS-35A
Port Orchard, WA 98366-7148



Linda M. Thiel, Legal Assistant

EXHIBIT A

No. 86585-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Personal Restraint of

JONATHAN LEE GENTRY,

Petitioner.

DECLARATION OF TUCKER CARRINGTON

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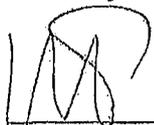
STATE OF MISSISSIPPI)
County of LAFAYETTE) ss.

TUCKER CARRINGTON on oath states:

I am an attorney employed by the Mississippi Innocence Project. I filed a Brief as *amicus curiae* in the Mississippi Supreme Court case of *Willie Jerome Manning v. State*, 2013-DR-00491-SCT. In that capacity, I was served with copies of the Defendant's Motions to Stay Execution, including a Motion that resulted in the Mississippi Supreme Court's Order Granting Stay issued May 7, 2013. Those Motions included a letter from John Crabb, Jr., Special Counsel to the United States Department of Justice, to Deforest R. Allgood, Esq., of the Oktibbeha County District Attorney's Office, dated May 4, 2013. A true copy of that letter is attached to this Declaration as Exhibit A. A true copy of the Mississippi Supreme Court's Order of May 7, 2013, staying Mr. Manning's execution, is attached to this Declaration as Exhibit B.

I swear under penalty of perjury under the laws of the State of Washington that the above statement is true to the best of my knowledge.

DATED at OXFORD, Mississippi, this 20th day of June, 2013.



Tucker Carrington



U.S. Department of Justice

950 Pennsylvania Ave., NW
Washington, DC 20530

VIA E-MAIL

May 4, 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 cases involving microscopic hair comparison analysis. Through this review, we previously determined that testimony containing erroneous statements regarding microscopic hair comparison analysis was used in this case. (See Letter dated May 2, 2013.) That error and the process through which it was identified were explained in more detail in our May 2, 2013 letter.

I. Additional Error Identified in this Matter

We have determined that the microscopic hair comparison analysis testimony or laboratory report presented in this case included additional statements that exceeded the limits of science and was, therefore, invalid. In response to inquiries regarding whether the errors identified in the notification letter had any bearing on the examiner's opinion regarding the racial classification of the hair, the FBI states the following: The scientific analysis of hair evidence permits an examiner to offer an opinion that a questioned hair possesses certain traits that are associated with a particular racial group. However, since a statistical probability cannot be determined for classification of hair into a particular racial group, it would be error for an examiner to testify that he can determine that the questioned hairs were from an individual of a particular racial group. Thus, an examiner cannot testify with any statement of probability

whether the hair is from a particular racial group, but can testify that a hair exhibits traits associated with a particular racial group. (A copy of the FBI Microscopic Hair Analysis Report, dated May 4, 2013, is attached.)

II. Potential DNA Testing

In the event that your office determines that further testing is appropriate or necessary, we reiterate that the FBI is available to provide mitochondrial DNA testing of the relevant hair evidence or STR testing of related biological evidence if testing of hair evidence is no longer possible, if (1) the evidence to be tested is in the government's possession or control, and (2) the chain of custody for the evidence can be established.

III. 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 by May 6, 2013, 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.

IV. Additional Notifications

You should be aware that we are also notifying the governor's office and the defense, as well as the Innocence Project and the National Association of Criminal Defense Lawyers of the error. 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.

EXHIBIT B

Serial: 184104

IN THE SUPREME COURT OF MISSISSIPPI

No. 95-DP-00066-SCT

WILLIE JEROME MANNING A/K/A "FLY"

v.

STATE OF MISSISSIPPI

FILED

MAY 07 2013

SUPREME COURT CLERK

CORRECTED ORDER

This matter is before the Court en banc on the 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 filed by Willie Jerome Manning. Also before the Court is the Response filed by the State of Mississippi, the Reply filed by Manning, the Supplement to the Motion filed by Manning, and the Supplement to the Response filed by the State of Mississippi.

After due consideration, the Court finds that the Motion to Stay Execution should be granted until further Order of this Court.

IT IS THEREFORE ORDERED that the Motion to Stay Execution filed by Willie Jerome Manning is hereby granted pending further Order of this Court.

SO ORDERED, this the 7th day of May, 2013.


ANN H. LAMAR, JUSTICE
FOR THE COURT

TO GRANT: WALLER, C.J., DICKINSON, P.J., LAMAR, KITCHENS, CHANDLER, PIERCE, KING AND COLEMAN, JJ.

RANDOLPH, PRESIDING JUSTICE, OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT.

IN THE SUPREME COURT OF MISSISSIPPI

No. 95-DP-00066-SCT

WILLIE JEROME MANNING A/K/A "FLY"

v.

STATE OF MISSISSIPPI

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

¶1. Before the Court en banc is the "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" filed by Willie Jerome Manning. Also before the Court is Manning's Supplement to his motion, the Response filed by the State of Mississippi, the State's Supplement to its Response, and Manning's Reply to the State's Response.

¶2. I would deny relief, for Manning has wholly and completely failed to comply with statutory requirements and the precedent of this Court. "Mississippi Code Section 99-39-9(e) (Rev. 2007) requires that an application for post-conviction collateral relief be supported by the affidavits of witnesses who will prove the petitioner's claims." *Brown v. State*, 88 So. 3d 726, 733 (Miss. 2012).

¶3. Letters submitted by petitioner from the Department of Justice have unsigned reports attached from a Microscopic Hair Comparison Analysis Review Team Laboratory Division (FBI), without identifying the authority, credentials, qualifications, name, or title of any

member of the team. The letters challenge not only former FBI experts in hair, but also ballistics. Our established law and justice require more.

¶4. The petitioner has had access to the hair and other forensic evidence since April 26, 1994, (R. 335). The petitioner even was granted his own ballistics expert, Richard D. Carter, at taxpayer expense on August 24, 1994, (R. 368). However, petitioner elected not to call Carter at trial.

¶5. Hair and ballistics issues from petitioner's violent crimes committed twenty years ago have been included in a long string of litigation in State and Federal Courts. This is not the first time petitioner has raised these issues. Our predecessors on this very Court rejected the hair issue on direct appeal, stating that Blythe "did not claim that the hair matched that of the defendant." Blythe only testified that the hair came from a member of the black race. He also admitted that his expertise could not produce absolute certainty. *Manning v. State*, 726 So. 2d 1152, 1180-81 (Miss. 1998).

¶6. After relief was denied on direct appeal, petitioner filed for post-conviction relief in this Court in 2001.¹ At that time, petitioner neither sought DNA testing nor raised hair or ballistics issues as a basis for relief.²

¶7. In his federal habeas action, the same issues were raised and rejected. Former United States District Court Judge Allen Pepper (now deceased) wrote that "[a]t trial expert testimony was given only that the hair found in Miller's car exhibited characteristics associated with the African-Americans." *Manning v. Epps*, 2008 WL 4516386 (N.D. Miss

¹Post-conviction relief was denied in 2006.

²This Court was granting DNA requests as early as 2002 – seven years before the post-conviction relief statute was amended.

2008). Judge Pepper continued, “[e]ven if DNA testing could conclusively prove that it was not Petitioner’s hair that was found in the vehicle, those results would not impeach the testimony given at trial, much less exonerated Petitioner.” This issue has been fully litigated.

¶8. Only after exhaustion of all appeals, federal and state, has this series of eleventh-hour applications been made. “[A.] defendant should not be allowed to take a gambler’s risk and complain only if the cards [fall] the wrong way.” *District Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 86, 129 S. Ct. 2308, 2330, 174 L. Ed. 2d 38 (2009) (Alito, J., concurring) (citation omitted).

¶9. One of the Department of Justice’s letters contains specific statements that are contrary to prior Department of Justice publications. The letter asserts that “[m]itochondrial DNA testing became routine after December 31, 1999.” A Department of Justice article published in July 1999 belies this assertion. The July article states unequivocally that testing began in 1992, and that evidentiary sampling began in 1996. As of April 1999, mtDNA analyses had been admitted in criminal proceedings in the following states: Alabama, Arkansas, Florida, Indiana, Illinois, Maryland, Michigan, New Mexico, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Washington.³

¶10. The letter also states that the Department of Justice is “assist[ing] [the Innocence Project and the National Association of Criminal Defense Lawyers] in their evaluations.”

³Alice R. Isenberg and Jodi M. Moore, *Mitochondrial DNA Analysis at the FBI Laboratory*, 1 Forensic Science Communications (July 1999), <http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/july1999/dnalist.htm> (last visited May 7, 2013).

"The Innocence Project supports a moratorium on capital punishment."⁴ The "NACDL has been an outspoken critic of the death penalty system."⁵ Of critical concern is the language contained in the first FBI report stating that, "[g]iven the abbreviated time frame for review, the FBI requests the Innocence Project (IP) to advise as to whether or not they agree with the FBI's conclusions as soon as possible." Although the connectivity and expediency by which this review was accomplished is mind boggling, I should not be surprised, given that the families of victims of the clandestine 'Fast and Furious' gun running operation can't get the Department of Justice to identify the decision makers (whose actions resulted in the death of a border agent and many others) after years of inquiry, and that this is the same Department of Justice that grants and enforces *Miranda* warnings to foreign enemy combatants.

¶11. There exists a host of other legal and factual issues. But time allocated to write is so compressed due to last minute filings, I shall more fully address these deficiencies when the opportunity presents itself.

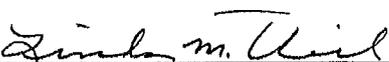
⁴http://www.innocenceproject.org/Content/The_Death_Penalty.php (Last visited May 7, 2013).

⁵<http://www.nacdl.org/criminal-defense/death-penalty/>. (Last visited May 7, 2013).

CERTIFICATE OF SERVICE

The undersigned hereby certifies, under penalty of perjury under the laws of the State of Washington, that on June 20, 2013, a copy of the foregoing was sent by e-mail to RSutton@co.kitsap.wa.us and also was deposited in the United States Mail, first class postage prepaid, addressed to:

Randall Avery Sutton
Kitsap County Prosecutor's Office
614 Division Street
MS-35A
Port Orchard, WA 98366-7148


Linda M. Thiel, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Linda Thiel
Cc: RSutton@co.kitsap.wa.us; Tim Ford; GRIFF1984
Subject: RE: In re Gentry, No. 86585-0

Rec'd 6-20-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Linda Thiel [<mailto:LindaMT@MHB.com>]
Sent: Thursday, June 20, 2013 4:16 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: RSutton@co.kitsap.wa.us; Tim Ford; GRIFF1984
Subject: In re Gentry, No. 86585-0

Attached for filing are Petitioner's Response to the State's Motion to Strike Filed June 17, 2013, and Declaration of Tucker Carrington. Thank you.

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