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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Orangeburg County
Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2020-000093

GEORGE NAPOLEON MOSES,

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

Did the circuit court judge err in denying Moses's application for post-conviction DNA testing when the circuit court judge allegedly misinterpreted the factors for post-conviction DNA analysis set forth in the plain language of Section 17-28-90 of the South Carolina Code of Laws by improperly relying on Moses's statements and trial testimony indicating Moses had been in a physical altercation with the victim as the basis for denying the application?

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the circuit court judge abuse his broad discretion or otherwise err by denying Moses's application seeking post-conviction DNA testing of a swab collected from one of the pockets of a pair of shorts covered in the victim's blood and of clippings collected from the victim's fingernails when Moses failed to meet his burden of establishing and could not establish several factors that he was required to establish in order to be entitled to the requested testing, including that the result of his trial would probably be different if the test results proved to be exculpatory, due to the fact even exculpatory results from the testing sought could not have had any conceivable impact on the outcome of Moses's case when the low potential significance of those results is considered in conjunction with the other evidence of Moses's guilt presented during trial, which included multiple incriminating admissions that came directly from Moses himself?

STATEMENT OF THE CASE

Procedural History

In January of 2017, Petitioner George Napoleon Moses—while serving two sentences of life without parole following his February 2009 convictions for voluntary manslaughter and armed robbery—submitted an application for post-conviction forensic DNA testing pursuant to the Access to Justice Post-Conviction DNA Testing Act (“the Act”).¹ In response, a hearing was conducted on the matter on August 28, 2019, in the Orangeburg County Court of General Sessions with the Honorable Edgar W. Dickson, circuit court judge, presiding. Subsequent to the hearing, the circuit court judge issued an order on December 16, 2019, denying Moses’s application. Moses then timely initiated an appeal following receipt of the order.

Factual History

Summary of Moses’s Crimes and the Evidence Discovered During the Ensuing Investigation of Them

A little before 6:00 a.m. on the morning of September 29, 2006, law enforcement officers were dispatched to the residence of fifty-seven-year-old Harry Livingston (“Victim”) after receiving a report indicating he had been observed on the kitchen floor of his trailer. (App’x pp. 127-129; pp. 135-136; pp. 138-139; pp. 342-343). Upon arriving, the officers found Victim’s home in disarray, noticed the kitchen was “in shambles” with numerous broken objects scattered about, and detected signs of an obvious struggle. (App’x p. 141; p. 143; p. 161; p. 165). They also found Victim, who was bleeding profusely and covered in blood, on the kitchen floor as described with his large—but docile and uninjured—dog nearby. (App’x pp. 141-142; p. 160). By that point, Victim was already deceased. (App’x pp. 144-145; p. 165). In response to those

¹ Based on his prior conviction for the “most serious” offense of voluntary manslaughter, Moses’s life sentences were imposed pursuant to Section 17-25-45 of the South Carolina Code of Laws. (App’x pp. 585-586; pp. 588-589; p. 591; p. 598; p. 601).

discoveries, officers secured the scene, Victim's brother secured the dog, and an investigation into Victim's suspicious death was initiated.² (App'x p. 141; pp. 144-145; p. 164)

Through their investigative efforts, the officers quickly obtained information establishing Moses was with Victim at the trailer just a few hours before Victim's death was discovered. (App'x pp. 211-212; p. 345). Based on that information, Moses was rapidly tracked down and taken into custody that same day. (App'x p. 345; pp. 348-349). Following that, Lieutenant James Shumpert of the Orangeburg County Sheriff's Office attempted to interview Moses, and, after waiving his rights, Moses agreed to speak with the lieutenant. (App'x p. 345; pp. 348-349). During the ensuing conversation, Moses initially denied any knowledge regarding Victim's death. (App'x p. 349). However, as the conversation progressed, Moses altered his version of events, admitted he went to Victim's trailer earlier that morning, and claimed he did so along with "some important people" in order to buy drugs. (App'x p. 349). Significantly though, Moses maintained Victim was fine when he subsequently left Victim's home.³ (App'x p. 350).

As the investigation into Victim's death continued, Lieutenant Shumpert ascertained Moses's vehicle had been observed parked outside the home of an individual named Jeffrey Conner around 3:00 a.m. on the date of the incident. (App'x pp. 217-218; p. 282; pp. 289-290; pp. 351-352). In response, he spoke with Conner and obtained consent for a search of Conner's residence. (App'x p. 227; p. 353). During the search, he located a pair of jean shorts that had been hidden in an opening in the steps leading up to Conner's door. (App'x pp. 167-169; pp.

² Victim's brother had been alerted of the situation by an individual named Lloyd Bowman, who first spotted Victim's body through one of Victim's home's windows shortly after 5:00 a.m. on the date of the incident. (App'x pp. 125-129).

³ In addition to providing a statement, Moses also provided the clothing he claimed to have been wearing earlier that morning to the lieutenant. (App'x p. 350). However, as would later be revealed, that act was purely a ruse. (App'x pp. 425-426).

227-228; pp. 353-354). Significantly, that clothing item appeared to be covered in blood and, as a result, was collected as evidence. (App'x pp. 169; p. 355). Beyond that, a recent pay stub with Moses's name on it was found in Conner's living room. (App'x pp. 170-172).

Meanwhile, on the same date, Dr. Janice Ross, an expert forensic pathologist, conducted Victim's autopsy. (App'x pp. 253-256). Through the autopsy, Dr. Ross discovered numerous injuries establishing Victim had been both beaten with an object and stabbed multiple times. (App'x p. 258; pp. 260-262). Dr. Ross also found signs of defensive wounds to Victim's fingers, hands, and arms. (App'x p. 263). Ultimately, Dr. Ross determined the stab wounds were non-fatal and Victim died as a result of acute respiratory insufficiency caused by the blunt force trauma he sustained from blows to his head. (App'x p. 263; p. 270; pp. 271-272).

On the following day, Lieutenant Shumpert again interviewed Moses, and Deputy Roman Rodriguez of the Orangeburg County Sheriff's Office assisted by writing down Moses's statement.⁴ (App'x pp. 357-361; pp. 364-368; p. 370). During the course of that interview, Moses stated he went to Victim's residence around 2:30 a.m. and alerted Victim he needed some cocaine. (App'x pp. 372-373). However, Moses asserted Victim told him he only had three bags of the substance and rejected Moses's offers to exchange some crack cocaine for it or to come back later with money. (App'x p. 373). At that point, Moses claimed he tried to leave with Victim's cocaine anyway, Victim told him not to do so, and Victim "called" his dog on him. (App'x p. 373). In response, Moses alleged he grabbed a knife from the kitchen, Victim began threatening him with a stick, and he grabbed the stick before stabbing Victim.⁵ (App'x p. 374). After that, Moses alleged the two fought with one another, he stabbed Victim again, the two fell

⁴ At the time of the interview, Moses was not exhibiting any visible signs of injuries. (App'x pp. 377-378).

⁵ A bloody knife was found underneath Victim's body at the crime scene. (App'x pp. 161-162).

onto the floor, Victim's dog attacked him, and he repeatedly punched Victim in the face until Victim lost consciousness. (App'x p. 374). Once Victim was unconscious, Moses stated he took some money Victim had dropped, left Victim's home, went to Conner's residence, borrowed some new pants, hid the shorts he had been wearing in Conner's steps, got "high" with Conner, and then went home and burned the shirt he had been wearing. (App'x p. 375). Following those admissions, Moses was subsequently charged with murder and armed robbery. (App'x p. 8).

Relevant Details from Moses's Trial

During Moses's ensuing trial, the State presented evidence and testimony through numerous witnesses detailing the circumstances surrounding Victim's violent demise and the discoveries made during the investigation connected to it. (App'x p. 8; p. 125; p. 135; p. 152; p. 181; p. 203; p. 253; p. 282). Amongst the evidence and testimony presented, multiple witnesses confirmed Moses was alone at Victim's residence with Victim at approximately 2:30 a.m. on the date of the incident. (App'x pp. 186-188; pp. 190-191; pp. 206-208; p. 211). Additionally, Lieutenant Shumpert and Deputy Rodriguez provided the details regarding Moses's strikingly divergent accounts of what occurred during the incident, and Moses's written—and personally signed—statement was introduced into evidence. (App'x p. 345; pp. 348-350; pp. 357-361; pp. 364-379; pp. 623-625). Furthermore, a woman who had previously lived with Moses for a period of time placed Moses's vehicle at Conner's house at around 3:00 a.m. on the incident date. (App'x p. 282; pp. 289-290; p. 292).

In addition to that testimony and evidence, Conner testified for the State and confirmed he spotted Moses outside his residence around 3:00 a.m. on the date of the incident. (App'x pp. 218-219). At that time, Conner stated Moses was going through surplus gear stored on his porch. (App'x pp. 218-219). Conner further indicated Moses apologized for waking him, told

him he needed some of the gear because he was going on a “mission,” and left for roughly forty-five minutes. (App’x p. 219). When Moses returned, Conner stated Moses, who had no signs of any injuries, asked to use his restroom, went inside it for a few minutes, and came back out wearing only his underwear and a shirt. (App’x p. 220; pp. 222-223; p. 226). At that point, Conner testified Moses borrowed some jeans, the two shared some cocaine that Moses had brought with him, and Moses left within just fifteen to twenty minutes of arriving back at that location. (App’x pp. 223-226). Conner further affirmed he had nothing to do with the shorts subsequently found hidden outside his residence. (App’x pp. 227-228).

Beyond that, evidence was presented concerning the analyses done on various items collected during the investigation into Victim’s murder. (App’x p. 152; p. 303). Specifically, Agent Roderick Green, who was an investigator with SLED, explained he processed a knife and broken pieces of a chair found at the crime scene for fingerprints but was unable to find any, which he explained was not unusual. (App’x p. 152; pp. 175-178). Additionally, Betty Butler, who also worked at SLED, testified she analyzed the pair of shorts submitted as evidence, found blood in several spots on the shorts, and collected two cuttings for further analysis.⁶ (App’x pp. 303-309). Furthermore, Dr. Laura Mills, an expert DNA analyst with SLED, discussed the results of the testing she conducted on various pieces of evidence, and, as expected, she confirmed Victim’s blood was the blood found on both cuttings collected from the shorts while Victim was a contributor to genetic material found on the knife handle. (App’x pp. 321-322; pp. 325-326; p. 329). Moreover, she noted a swab had been collected from the pocket of the shorts but was never tested, which she explained was not unusual due to the limited nature of the available resources. (App’x pp. 337-338). Likewise, Dr. Mills explained she did not find any

⁶ During her testimony, Butler also explained each piece of evidence submitted to SLED was assigned its own individual item number. (App’x p. 305).

DNA evidence specifically establishing who had been wearing the shorts, and she directly noted Moses's DNA profile was not located on any of the items tested.⁷ (App'x pp. 338-339).

Following the presentation of the State's evidence, Moses elected to testify in his own defense and provide yet another account of the incident. (App'x pp. 399-400). Through his testimony, Moses alleged he went to Victim's residence to buy drugs from Victim's roommate, Victim offered to give him cocaine in exchange for crack cocaine, he traded some crack cocaine to Victim for three bags of cocaine, Victim demanded more crack cocaine, and he refused. (App'x p. 400; pp. 406-407). At that point, Moses alleged he tried to leave, and Victim responded by blocking the exit with his dog. (App'x p. 407). Moses claimed Victim then began assaulting him with a stick, he grabbed a knife and swung it at Victim and his dog, Victim knocked the knife away with the stick, and he grabbed Victim, which led to both of them falling onto the floor. (App'x p. 408; p. 441). Once they fell to the floor, Moses asserted he took the stick from Victim and tried to leave, Victim grabbed his leg and ordered his dog to kill him, and he struck Victim with the stick until Victim released him. (App'x pp. 408-409; p. 445). After that, Moses asserted he left with the cocaine and crack cocaine, took the stick as well, tossed the stick from his vehicle as he drove away, went to Conner's house, borrowed some pants, hid the bloody shorts, went home, and burned his bloody shirt. (App'x p. 409; pp. 411-412; pp. 416; pp. 418-424; p. 442; p. 448; pp. 453-454). Thereafter, Moses stated he was apprehended by law enforcement, initially made vague and untruthful statements to them, and provided them with

⁷ Amongst the items tested, Dr. Mills noted she analyzed a swab collected from a light switch in Victim's home and an "indication of blood" was determined to be present on it. (App'x pp. 165-166; p. 323). Dr. Mills further indicated her analysis showed the major contributor of the DNA present on that swab was an unknown male while Victim could not be excluded as a minor contributor, and she confirmed the mixture could have been made up of both blood and skin cells. (App'x pp. 322-324). Beyond that, Dr. Mills indicated she analyzed some samples collected from a vehicle but was not able to develop any testable profiles from those samples. (App'x p. 319; pp. 324-325).

random clothing when asked for the clothes he had been wearing around the time of the incident. (App'x pp. 424-426). Nevertheless, Moses insisted he acted in self-defense during the incident and alleged Victim was alive when he left Victim's residence "to the best of [his] knowledge." (App'x p. 410; pp. 416-417).

At the conclusion of the evidentiary phase of trial, the parties presented their closing arguments to the jury. (App'x pp. 482-536). During defense counsel's closing argument, defense counsel called the jury's attention to the evidence he contended was consistent the account of the incident presented through Moses's testimony as support for his claim Moses was acting in self-defense in response to an attack initiated by Victim. (App'x pp. 495-496; pp. 499-503; p. 506; p. 511). Likewise, defense counsel pointed out no DNA evidence or fingerprints were found linking Moses to the incident. (App'x pp. 496-497; p. 502). Furthermore, defense counsel acknowledged Moses admitted to hiding the shorts at Conner's house and argued the fact Victim's blood was found on those shorts was fully consistent with Moses's version of events. (App'x pp. 501-503). Thereafter, the case was submitted to the jury, and the jury ultimately convicted Moses of voluntary manslaughter and armed robbery. (App'x pp. 577-578).

Relevant Details from Moses's Attempt to Obtain Post-Conviction DNA Testing

Nearly eight years later and following a number of unsuccessful attempts to obtain relief from his convictions through a variety of different avenues, Moses filed an application seeking forensic DNA testing pursuant to the Act. (App'x p. 598; p. 601; pp. 603-609; p. 643). Specifically, Moses sought the testing of a swab from the pocket of the jean shorts collected as evidence along with testing of fingernail clippings that had been collected from Victim's body. (App'x p. 605; pp. 643-644). In seeking such testing, Moses alleged it would show he was innocent and demonstrate others actually committed the killing. (App'x p. 604; p. 606).

In response, counsel was appointed to represent Moses, and a hearing was held on the matter. (App’x p. 637; p. 640). Towards the outset of the hearing, appointed counsel indicated he had attempted to verify the items pertinent to Moses’s application were still in existence as required by the Act but candidly conceded he had *not* been able to successfully confirm they were, in fact, still available. (App’x pp. 642-643). Appointed counsel further acknowledged Moses consistently maintained he defended himself from Victim during the incident but nonetheless maintained the issue of identity was not as “cut and dry as the State believed.” (App’x pp. 644-646). Based on that, appointed counsel alleged testing of the fingernail clippings would reveal if Victim had been involved in any “other” altercation while testing of the swab from the shorts could somehow be relevant to identifying the person that had been wearing them despite Moses’s admission to placing them where they were found.⁸ (App’x pp. 649-650; pp. 657-658). In rebuttal, the solicitor argued identity was not at issue in Moses’s case since Moses admitted involvement in the altercation with Victim both before and during trial, and the solicitor similarly noted Moses admitted to leaving the shorts at the location where they were recovered. (App’x pp. 650-653). Furthermore, the solicitor contended testing of the fingernail clippings would not necessarily prove anything regarding the altercation, and he noted Moses was placed at Victim’s house on the night of the incident by multiple witnesses. (App’x pp. 652-653; p. 655). Following the solicitor’s remarks, appointed counsel expressly urged the circuit court judge to read Moses’s statement and trial testimony before issuing his ruling. (App’x p. 657). The circuit court judge then took the matter under advisement. (App’x p. 659).

⁸ During the hearing, Moses personally claimed at one point there must have been two separate pairs of shorts based on the references to the shorts contained in the SLED DNA analysis reports from 2006 and 2008. (App’x pp. 659-660). However, only one pair of shorts—which was designated as SLED item # 8—was actually identified in the SLED documentation related to Moses’s case. (App’x pp. 667-668; pp. 670-674; pp. 683-684; p. 687).

Subsequently, after considering the matter, the circuit court judge issued an order denying Moses's application for post-conviction DNA testing. (App'x pp. 690-694). In doing so, the circuit court judge initially found Moses failed to show identity was a significant issue in his case while referencing Moses's statement and testimony, which appointed counsel had directly asked him to review before deciding the matter. (App'x p. 657; p. 693). Additionally, the circuit court judge found Moses failed to establish the testing would have provided a substantially more probative result than the evidence presented at trial in light of the fact testing of the identified items could not have had a significant bearing on the case under the circumstances involved. (App'x p. 693). Finally, the circuit court judge concluded Moses failed to establish the requested additional testing would likely have changed the result of the trial if a new one was granted since identity was not at issue, the items sought to be tested would have had no bearing on the key issue of self-defense, and any results would have merely been cumulative to Moses's own testimony about his altercation with Victim.^{9 10} (App'x pp. 693-694).

⁹ Perhaps tellingly, Moses—when summarizing the circuit court judge's ruling in his petition for a writ of certiorari—stops short of acknowledging the circuit court judge's express and critical finding the requested testing would not likely change the result of trial if a new one was granted. (Pet. for Cert. p. 8).

¹⁰ After the circuit court judge issued his ruling, there is nothing indicating appointed counsel moved for reconsideration or sought any other relief from the circuit court judge based on the contents of the order. See Records for George Napoleon Moses, Orangeburg County First Judicial Circuit Public Index, <https://publicindex.sccourts.org/orangeburg/publicindex> (containing no information suggesting any type of motion for reconsideration was filed prior to the initiation of the appeal of the circuit court judge's ruling).

STANDARD OF REVIEW

The Act provides a procedure by which a defendant in South Carolina can potentially obtain post-conviction forensic DNA testing, and, to date, no published appellate decision in our state has explicitly articulated the applicable standard of appellate review for a ruling made pursuant to it. See Act No. 413, § 1, 2008 S.C. Acts & Joint Resolutions (enacting procedures for post-conviction DNA testing). However, a ruling made pursuant to the Act directly relates to a criminal matter and, in a number of ways, is analogous to a ruling on a post-trial motion for a new trial in a criminal case. See, e.g., S.C. Code Ann. § 17-28-90(A) (“All rules and statutes applicable in criminal proceedings are available to the applicant and the solicitor or Attorney General, as applicable.”). Therefore, like in appeals from other criminal matters, an appellate court reviewing a ruling made pursuant to the Act should review the ruling for errors on law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Moreover, since a ruling under the Act necessarily involves a discretionary decision as to whether the defendant has met his or her statutorily-mandated burden of proof, an appellate court should only reverse such a ruling when it constitutes a clear abuse of discretion. See S.C. Code Ann. § 17-28-90(B) (instructing a circuit court judge should order forensic DNA testing only upon determining the defendant has established a number of factors “by a preponderance of the evidence”); cf. State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983) (“The granting or refusal of a motion for a new trial is within the discretion of the trial judge and will not be disturbed absent a clear abuse of discretion.”). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

The circuit court judge did not abuse his broad discretion or otherwise err by denying Moses’s application seeking post-conviction DNA testing of a swab collected from one of the pockets of a pair of shorts covered in the victim’s blood and of clippings collected from the victim’s fingernails because Moses failed to meet his burden of establishing and could not establish several factors that he was required to establish in order to be entitled to the requested testing, including that the result of his trial would probably be different if the test results proved to be exculpatory, due to the fact even exculpatory results from the testing sought could not have had any conceivable impact on the outcome of Moses’s case when the low potential significance of those results is considered in conjunction with the other evidence of Moses’s guilt presented during trial, which included multiple incriminating admissions that came directly from Moses himself.

Moses contends the circuit court judge committed reversible error by denying his application for post-conviction DNA testing. In support of that contention, Moses maintains the circuit court judge improperly: (1) failed to conduct the correct inquiry by purportedly considering the wrong statutory factors as part of his analysis; and (2) took into consideration Moses’s statements and claim of self-defense when denying the application.¹¹ Moses further maintains he did, in fact, satisfy his burden of establishing the statutorily-mandated factors

¹¹ To the extent Moses contends the circuit court judge conducted the wrong analysis and improperly considered his statements and self-defense assertion, Moses did *not* present those claims to the circuit court judge and, instead, elected to wait to raise them for the first time on appeal. (App’x pp. 642-650; pp. 656-660). In fact, some of Moses’s current appellate claims even directly conflict with the actions of appointed counsel, who—during the hearing—explicitly urged the circuit court judge to review Moses’s accounts of the incident before issuing his ruling on the matter. (App’x p. 657). As a result, those particular appellate claims were not properly preserved for appellate review and cannot appropriately be considered or addressed for the first time on appeal. See Herron v. Century BMW, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (2011) (“[I]ssue preservation rules prevent a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” (citation, internal quotations, and brackets in original omitted)); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”); State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (“A party cannot complain of an error which his own conduct induced.”); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) (“[A] party cannot argue one theory at trial and a different theory on appeal.”).

necessary to warrant post-conviction DNA testing despite the circuit court judge reaching a differing conclusion and, thus, was entitled to the requested additional testing. To the contrary, the circuit court judge committed no error by denying Moses's application for post-conviction DNA testing because he correctly determined Moses failed to meet his burden of establishing all the required factors necessary to warrant a grant of post-conviction DNA testing after taking into consideration the significance of the items Moses was seeking to be tested in conjunction with the probability the testing of those items would change the result of Moses's trial in the event it resulted in the discovery of something exculpatory. Moses's petition for a writ of certiorari should be denied.

Pursuant to the Act, an individual who has been convicted of a number of different offenses, including voluntary manslaughter and armed robbery, "may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication." S.C. Code Ann. § 17-28-30(A). In order to do so, the individual is required to submit an application that—under the penalty of perjury—must:

- (1) identify the proceedings in which the applicant was convicted or adjudicated;
- (2) give the date of the entry of the judgment and sentence and identify the applicant's current place of incarceration;
- (3) identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication;
- (4) make a reasonable attempt to identify the physical evidence or biological material that should be tested and the specific type of DNA testing that is sought;
- (5) explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or

nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(6) explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result;

(7) explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching; and

(8) provide that the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

S.C. Code Ann. § 17-28-40(C).

Once an application has been submitted, a grant of the requested testing is *not* automatically required. S.C. Code Ann. § 17-28-50; S.C. Code Ann. § 17-28-90; see Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 82 (2009) (Alito, J., concurring) (explaining requests for post-conviction DNA testing are *not* cost-free and noting “the risks associated with evidence contamination increase every time someone attempts to extract new DNA from a sample”). Instead, pursuant to the Act, a circuit court judge may conduct a hearing on the matter, seek further documentation or amendments to the application, or summarily dismiss the application when satisfied the applicant is not entitled to testing and “no purpose would be served by any further proceedings.” S.C. Code Ann. § 17-28-50.

In the event a hearing on the matter is conducted, the convicted applicant has the burden of establishing *all* of the following factors by preponderance of the evidence:

(1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;

(2) the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;

(3) the physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;¹²

(4) the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(5) if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching;

(6) the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and

¹² As to what was intended by the use of the word "material," evidence in a related context has been recognized to be "material" only when there is a reasonable probability its presence would have led to the proceeding ending in a different result. Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993); see United States v. Agurs, 427 U.S. 97, 109-110 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."); BLACK'S LAW DICTIONARY 1066 (9th ed. 2009) (defining "material" as "[h]aving some logical connection with the consequential facts" or as "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential"); see also Evans v. United States, 504 U.S. 255, 260, n. 3 (1992) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (citation and internal quotations omitted)).

(7) the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

S.C. Code Ann. § 17-28-90(B). Significantly, if—and only if—the circuit court judge determines the applicant has met the requisite burden of proof in regard to all the necessary factors, testing should be ordered.¹³ Id.

In the case at bar, Moses—as an initial matter—wholly failed to establish some of the most basic factors he was required to establish in order to demonstrate it would even be possible for the requested testing to actually be conducted in his case. Significantly, in order to be entitled to post-conviction DNA testing, Moses had the affirmative burden of demonstrating by a preponderance of the evidence the items he was seeking to be tested were, in fact, actually still available, were in a condition that potentially would allow for testing to occur, and had been subjected to a sufficient chain of custody to ensure the integrity of the results of any testing conducted. Id. However, Moses did not present *anything* to the circuit court judge to satisfy his requisite burden of establishing those fundamental factors. Instead, Moses’s appointed counsel did the exact opposite and conceded to the circuit court judge he had *not* been able to verify whether any of the items Moses was seeking to be tested were still in existence and capable of being subjected to the desired testing.¹⁴ See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d

¹³ Regarding that burden, a preponderance of the evidence means evidence which convinces of its truth and is more convincing than the evidence to the contrary. State v. Scott, 420 S.C. 108, 113, 800 S.E.2d 793, 796 (Ct. App. 2017), aff’d as modified, 424 S.C. 463, 819 S.E.2d 116 (2018); see BLACK’S LAW DICTIONARY 1301 (9th ed. 2009) (defining “preponderance of the evidence” as “[t]he greater weight of the evidence, not necessarily established by the greatest number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other”).

¹⁴ Specifically, during the hearing, Moses’s appointed counsel candidly asserted: “One of the -- one of the requirements in the application for postconviction DNA testing is that the items still

582, 588 (2007) (recognizing a matter conceded in the circuit court cannot subsequently be argued on appeal). As a result, Moses failed to establish some of the requisite factors he necessarily had to establish in order to prevail on his request for post-conviction DNA testing and, thus, was unequivocally *not* entitled to testing being ordered since it remains entirely unknown whether there is even anything that can still be tested—meaningfully or otherwise—in his more-than-a-decade-old case.^{15 16} See S.C. Code Ann. § 17-28-90(B) (explaining “each” of the delineated factors—including the factor requiring proof “the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing”—must be established by a preponderance of the evidence before the requested testing shall be ordered).

In addition to those basic foundational failures, Moses likewise did not and could not establish—as required—the results of the testing sought would probably change the result of his

exist. I’ve sent a couple requests to the clerk’s office and I have not received confirmation whether these items still exist or not. That’s kind of a nonstarter if the evidence is still in existence. So I wanted to put that on the record. . . . I don’t have confirmation. I mean, Judge, that’s the very first element for your consideration is whether the items still exist. I just wanted to, you know, put on the record that I don’t have confirmation despite my request just to confirm whether it existed or not.” (App’x p. 642-643). Recognizing the significance of appointed counsel’s concession in that regard, the circuit court judge responded: “Okay. All right. Well, that’s number one on the list.” (App’x p. 643).

¹⁵ In his petition for a writ of certiorari, Moses—without acknowledging in any manner his appointed counsel’s concession regarding his inability to verify whether the evidence sought to be tested was currently available—contends the factor regarding the current availability of the evidence for which testing was sought is “not contested in [his] case.” (Pet. for Cert. p. 12). Obviously though, that particular contention is inaccurate. (App’x pp. 642-643).

¹⁶ Notably, Moses’s clear failure to make the requisite showing does not necessarily preclude him from attempting to do so again at some future point. See S.C. Code Ann. § 17-28-50 (“If the applicant has filed a previous application for DNA testing, the applicant may file a successive application, provided the applicant asserts grounds for DNA testing which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.”).

trial if those results proved to be exculpatory in nature. See id. (requiring the applicant to establish by a preponderance of the evidence “the testing will constitute new evidence that will probably change the result of the applicant’s conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching” in the event “the requested DNA testing produces exculpatory results”). That is true because—just as the circuit court judge recognized—any exculpatory results that could have been obtained from the swab of the shorts pocket or from Victim’s fingernail clippings would have been insignificant and could not have had a meaningful impact on the outcome of Moses’s trial when considered in conjunction with the other evidence of Moses’s guilt that was presented. See State v. Adams, 430 S.C. 420, 438, 845 S.E.2d 217, 226 (Ct. App. 2020) (recognizing there must necessarily be “outcome-changing facts” when relief hinges on establishing something would probably change the result of trial); see also United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982) (“[D]eterminations of materiality are often best made in light of all of the evidence adduced at trial[.]”).

As to the swab of the shorts pocket, nothing was presented suggesting either the absence of Moses’s DNA or the presence of someone else’s DNA on the pocket would have in any way demonstrated Moses, who admitted to hiding the bloody shorts in the spot where they were recovered, was not wearing the shorts at the time of Victim’s killing. See Commonwealth v. Heilman, 867 A.2d 542, 547 (Pa. Super. Ct. 2005) (“In DNA as in other areas, an absence of evidence is not evidence of absence.”); see also Osborne, 557 U.S. at 80-81 (Alito, J., concurring) (“DNA testing—even when performed with modern STR technology, and even when performed in perfect accordance with protocols—often fails to provide ‘absolute proof’ of anything.”). Significantly, based on the nature of DNA itself, Moses’s DNA might not have been present on the swab even if he had been wearing the shorts simply because he had not left

any behind, and the presence of someone else's DNA would not have meant Moses had not *also* worn the shorts since—as clearly illustrated by Moses's self-admitted act of borrowing someone else's pants on the very date of the incident—an article of clothing can be worn by more than just the specific individual who owns it. See Rivera v. State, 89 S.W.3d 55, 60, n. 20 (Tex. Crim. App. 2002) (recognizing the absence of a defendant's DNA following testing of a sample “would not indicate innocence because it could simply mean none was deposited”). Therefore, even without considering the other evidence of guilt presented during trial, any results of the testing of the swab of the shorts pocket would not have been exculpatory, significant, or outcome-altering under the circumstances involved. See People v. Allen, 880 N.E.2d 223, 228 (Ill. App. Ct. 2007) (recognizing the absence of a defendant's DNA on an object does not constitute conclusive evidence establishing the defendant did not handle the object and, therefore, concluding evidence establishing Allen's DNA was not on a gun—even assuming it existed—would not in any way have exonerated him).

Likewise, as to the clippings from Victim's fingernails, neither the absence of Moses's DNA nor the presence of some other individual's DNA underneath Victim's fingernails would—without accompanying evidence also specifically demonstrating Victim scratched his assailant during the fatal attack—constitute exculpatory evidence establishing someone other than Moses inflicted the brutal beating that resulted in Victim's death. See Commonwealth v. Smith, 889 A.2d 582, 585 (Pa. Super. Ct. 2005) (“[Smith]'s entire argument depends upon an assumption for which there is no evidence in the record, *i.e.* that the victim scratched her assailant, thereby acquiring fragments of skin or droplets of blood from the assailant on her fingernails. Based on this assumption, [Smith] contends that the DNA profile obtained by testing the victim's fingernails will identify her assailant. In the absence of supporting evidence, we cannot accept

[Smith]’s premise. We have no evidentiary basis on which to infer that any DNA detected on the victim’s fingernails was deposited there by her assailant during the fatal attack. Merely detecting DNA from another individual on the victim’s fingernails, in the absence of any evidence as to how and when that DNA was deposited, *would not exculpate [Smith] by pointing to a different assailant.*” (emphasis added); see also Osborne, 557 U.S. at 82 (Alito, J., concurring) (“[M]odern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence. STR tests, for example, are so sensitive that they can detect DNA transferred from person X to a towel (with which he wipes his face), from the towel to Y (who subsequently wipes his face), and from Y’s face to a murder weapon later wielded by Z (who can use STR technology to blame X for the murder).”). Thus, the testing sought for the fingernail clippings could not have resulted in the discovery of any outcome-altering evidence under the circumstances involved. Cf. Smith, 889 A.2d at 587 (“Given this evidence of record, [Smith]’s argument that his innocence would be established by failure to find his DNA on the victim’s fingernails is totally unsupported.”).

Moreover, notwithstanding the fact any additional test results would have been completely insignificant even without giving consideration to any of the other evidence presented during trial, such results—even if they possessed some conceivable exculpatory value—most certainly would not have and could not have had an impact on the outcome of Moses’s case when properly considered in relation to the other substantial and compelling evidence of Moses’s guilt that was introduced. Critically, through the testimony of multiple witnesses, Moses was placed both at the crime scene and at the location where a pair of shorts covered in Victim’s blood were located around the time of Victim’s death. Additionally, expert testimony was presented establishing *no* DNA evidence on any kind existed directly linking

Moses to the killing of Victim. Furthermore and perhaps most importantly, Moses—by his own admission—was at Victim’s home around the time of the killing, pummeled Victim into unconsciousness while there, removed the weapon he beat Victim with from the crime scene, disposed of it, hid the blood-covered shorts he was wearing at the time of the crime exactly where that article of clothing was later found, burned the shirt he was wearing at the time of the incident, and then attempted to steer the investigation into Victim’s death off course by making false statements and presenting false evidence to law enforcement. See Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (“A confession is like no other evidence. Indeed, the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.” (citations, internal quotations, brackets, and ellipsis omitted)); State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) (“As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt.”). In light of that highly-damaging evidence and testimony, any DNA test results concerning the swab from the shorts pocket and from the clippings taken from Victim’s fingernails could not have had any impact on the outcome of Moses’s case even if those results—like the other non-incriminating DNA test results that have already once been presented to a jury—did not actually end up connecting Moses to Victim’s death. Cf. State v. Ford, 301 S.C. 485, 492, 392 S.E.2d 781, 785 (1990) (“[T]he DNA results are merely cumulative to other evidence presented and as such if a new trial was had, the result would probably not change. Thus, we conclude that Ford failed to establish the requirements for a new trial and accordingly

deny his motion.”); Rivera, 89 S.W.3d at 60 (“Even if one concluded that negative test results supplied a very weak exculpatory inference, such an inference would not come close to outweighing [Rivera]’s confession.”); State v. Hudson, 681 N.W.2d 316, 321 (Wis. Ct. App. 2004) (rejecting Hudson’s attempt to obtain post-conviction DNA testing of various items, including fingernail clippings taken from the homicide victim, because Hudson failed to establish a reasonable probability of a different result even assuming the items would lead to the discovery of exculpatory evidence in light of the other evidence of guilt, which included multiple confessions from Hudson, that was presented during trial).

Accordingly, the circuit court judge did not abuse his broad discretion by finding Moses failed to meet his burden of establishing all the factors necessary to warrant the grant of post-conviction DNA testing, and there are no proper or compelling grounds upon which to disturb his ruling on appeal. See State v. Wells, 249 S.C. 249, 264, 153 S.E.2d 904, 912 (1967) (“It cannot be said, therefore, that the affidavits must necessarily lead any reasonable mind to the inference that the newly-discovered evidence would probably change the result. Nothing short of this would justify the conclusion that the Circuit Court abused its discretion in refusing the motion.” (citation and internal quotations omitted)); see also Osborne, 557 U.S. at 62 (“DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent. The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt.” (citation omitted)). Moses’s petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

November 13, 2020

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Nov 13 2020

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Orangeburg County
Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2020-000093

GEORGE NAPOLEON MOSES,

Petitioner,

vs.

THE STATE,

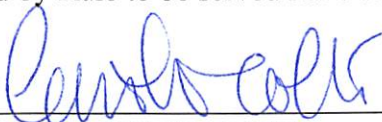
Respondent.

PROOF OF SERVICE

I, Caroline Collins, certify I have served the within Return to Petition for Writ of Certiorari on Petitioner by sending an electronic copy via email to the address listed in AIS for the following individual:

Jessica M. Saxon, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 13th day of November, 2020.



CAROLINE COLLINS
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Caroline Collins

From: Caroline Collins
Sent: Friday, November 13, 2020 1:27 PM
To: 'jsaxon@sccid.sc.gov'
Cc: 'Allgire, Mary'; William Blicht; Mark Farthing
Subject: The State v. George Napoleon Moses (2020-000093)
Attachments: Moses.Return to Cert (02426562xD2C78).PDF

Follow Up Flag: Worldox

Good Afternoon Ms. Saxon,

Attached please find the Return to Petition for Writ of Certiorari in The State v. George Napoleon Moses (2020-000093). This Return will be submitted to the Court of Appeals today via the AIS One Drive System.

If you will, please reply to this email to confirm receipt.

Thank you!

Caroline Collins

Administrative Coordinator
South Carolina Attorney General's Office
P: (803) 734-3723

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Nov 13 2020

SC Court of Appeals