IN THE CIRCUIT COURT OF PULASKI, COUNTY, ARKANSAS

LEDELL LEE PETITIONER

V. NO. CR-93-1249

STATE OF ARKANSAS RESPONDENT

RESPONSE IN OPPOSITION TO MOTION FOR DNA TESTING PURSUANT TO ARKANSAS CODE ANNOTATED §16-112-201 AND REQUEST FOR HEARING

COMES NOW the State of Arkansas, by and through counsel, John F. Johnson, Chief Deputy Prosecuting Attorney, Sixth Judicial District, and in opposition to the petition filed herein, states:

Introduction

Lee, over 20 years after his initial conviction, and **just four days before his scheduled execution**, seeks a stay of the execution in order to obtain DNA testing of both a blood spot on *Lee's shoe* as well as an "intact Negroid head hair" taken from the crime scene – i.e., Debra Reese's house. (Pet. at 2). He says that he can prove his innocence that he did not kill Debra Reese because blood found on his shoe might not be the victim's, and the hair might not be his. That idea is transparently illogical: even if it were so, it would only show that in addition to killing Debra Reese, Lee managed to get someone else's blood or his own blood on his shoes, at some point during his lifetime: and that Debra Reese sometime during her lifetime had an African American person in her home. Lee's contentions are

probative of exactly nothing as regards his capital murder of Debra Reese. His petition, accordingly, does not advance any claim of actual innocence as required by Ark. Code Ann. § 16-112-202. Moreover, the testing methods that he wishes to use have existed, *according to his own petition*, since 2009. His petition, accordingly, does not rebut the presumption of untimeliness under the statute. This Court should not permit Lee to pervert justice by delaying his execution based upon his unpersuasive assertion to entitlement to testing under Ark. Code Ann. § 16-112-201.

Relevant Procedural History

On February 9, 1993, Debra Reese was found murdered in her bedroom, having been beaten and strangled. Ledell Lee was convicted on October 12, 1995, by a Pulaski County, Arkansas, jury of capital murder and sentenced to death by lethal injection. His conviction and sentence were affirmed on direct appeal by the Arkansas Court. *Lee v. State*, 327 Ark. 692, 942 S.W.2d 231 (1997), *cert. denied* 522 U.S. 1002 (1997). In particular, Lee argued that the capital murder charge should have been dismissed due to the destruction of possibly exculpatory evidence – namely a spot of blood found on his tennis shoe. The Arkansas Supreme Court rejected his contention finding both that Lee had not shown the State had acted in bad faith when testing the blood evidence and, thus, destroying the sample, and that Lee had made no showing that the blood evidence on the shoe

possessed any exculpatory value. *Id*. at 699-701, 942 S.W.2d at 234-235. Lee's petition for post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure was subsequently denied, and the Arkansas Supreme Court affirmed. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001).

The litigation that followed represents a sixteen-year campaign to undue the jury's verdict, which has failed in front of every court that has considered his claims. On November 2, 2001, Lee filed a petition for federal habeas corpus relief pursuant to 28 U.S.C. §2254, in which he raised 19 claims for relief. *Lee v. Norris*, 5:01CV00377-GH (Doc. No. 1). United States District Judge George Howard concluded that, *inter alia*, because Lee's post-conviction counsel "may have been impaired to the point of unavailability on one or more days of the [state post-conviction] hearing[,]" the federal proceedings would be held in abeyance and "returned to the trial court for reconsideration of the claims at Lee's Rule 37 hearing." *Lee v. Norris*, 354 F.3d 846, 848, 850 (8th Cir. 2004). The Honorable Richard Arnold, writing for a three-judge panel of the Eighth Circuit, affirmed Judge Howard's order to hold the petition in abeyance. *Id.*

On August 30, 2005, Lee filed a motion in the Arkansas Supreme Court requesting a recall of the mandate in his post-conviction appeal. Lee's motion was granted on June 29, 2006. *Lee v. State*, 367 Ark. 84, 238 S.W.3d 52 (2006). Lee subsequently raised seven claims in an amended petition for post-conviction relief

under Ark. R. Crim. P. 37. Each of the claims raised in Lee's initial Rule 37 petition in circuit court and addressed by the Arkansas Supreme Court, 343 Ark. at 713-726, 38 S.W.3d at 342-349, also were presented to the circuit court in his subsequent Rule 37 petition filed after the mandate was recalled. After the August 28, 2007, hearing on these claims, the Pulaski County Circuit Court denied Lee relief. The Arkansas Supreme Court affirmed the circuit court's judgment on May 7, 2009. *Lee v. State*, 2009 Ark. 255, 308 S.W.3d 596, *cert. denied*, 558 U.S. 1013 (2009).

Following the state courts' consideration of the claims in Lee's second post-conviction proceeding, a motion was filed asking the district court to dissolve its stay of federal habeas proceedings on January 21, 2010. *Lee v. Norris*, 5:01CV00377-JH (Doc. No. 78). The motion was granted, and the stay was lifted on March 15, 2010. *Lee v. Norris*, 5:01CV00377-JH (Doc. No. 80). A telephonic status conference was held on September 14, 2011. In that hearing, Lee confirmed that he would be standing on the claims raised in his habeas petition filed in 2001. Wendy Kelley, respondent, however, was granted leave to amend her response in order to address the additional post-conviction rulings following the recall of the mandate, *Id.* (Doc. No. 88) and did so on October 28, 2011. *Id.* (Doc. No. 89).

On June 18, 2013, United States District Court Judge Hendren denied Lee's petition in its entirety. *Lee v. Norris*, 5:01CV00377-JH (Doc. No. 115). Lee

subsequently filed a motion to vacate, alter, or amend judgment pursuant to Fed. Rule Civ. P. 59(e), which was denied by the district court on December 18, 2013. *Lee v. Norris*, 5:01CV00377-JH (Doc. No. 127). Lee filed an application for a certificate of appealability ("COA") in the district court, which was denied on February 18, 2014. *Lee v. Norris*, 5:01CV00377-JH (Doc. No. 134).

On June 17, 2014, Lee filed an application in the Eighth Circuit, seeking a certificate of appealability. *Lee v. Hobbs*, No. 14-1363 (8th Cir. 2014). On September 22, 2014, the Eighth Circuit summarily denied Lee's petition for a COA. Lee then, on October 30, 2014, petitioned both for rehearing as well as rehearing en banc. Both petitions were denied by order entered on November 21, 2014. The Mandate issued on December 3, 2014. Thereafter, Lee petitioned for, and was denied, a writ of certiorari on October 13, 2015. *Lee v. Kelley*, 136 S.Ct. 354 (2015).

Lee filed an application for executive clemency arguing before the Arkansas Parole Board that both his trial counsel and the trial judge had been conflicted – claims that had been raised and rejected by both state and federal courts. A clemency hearing was held on March 24, 2017, and the Parole Board unanimously recommended that Lee's application be denied.

On April 3, 2017, Lee petitioned the Arkansas Supreme Court to recall its mandates in both his direct appeal and his second Rule 37 appeal and asked that it

stay the executions. The Arkansas Supreme Court denied the petitions on April 6, 2017. Lee is scheduled to be put to death by lethal injection on April 20.

Now, more than twenty-four years after his crime, Lee seeks Act 1780 relief and asks this Court to order testing of his shoes and a hair found at the scene, citing an alleged advance in DNA technology. For the reasons that follow, his petition should be denied.

Discussion

A. Lee's request for additional testing is presumptively untimely. Arkansas Code Annotated §16-112-202(10) provides a rebuttable presumption of untimeliness if a petition pursuant to §16-112-201 is not made within 36 months of conviction. Lee asserts that alleged new advances in DNA testing, specifically mitochondrial and STR testing render his petition timely under §16-112-202(10)(b)(iv). This specific technology, however, has been available since at least 2009. *See e.g. State v. Reynolds*, 186 Ohio App.3d 1, 926 N.E.2d 315 (2009) (discussing touch DNA testing and Y-STR testing). *See also People v. Zapata*, 8 N.E.3d 1188, 1193, 380 Ill. Dec. 646, 651 (2014) (noting that in 2014, "Y-STR testing does not embrace new scientific techniques"), and *Ware v. State*, 348 Ark. 181, 188, 755 S.W.3d 167, 170 (2002) (discussing mitochondrial DNA testing conducted on bones). By his own admission, Lee acknowledges "STR testing fully replaced other DNA testing methods . . . by 2000." (Pet. at 12). He additionally

cites mitochondrial DNA testing data from 2009. (Pet. at 13). Lee's proposed testing simply does not involve a "new method of technology" so as to rebut the presumption contained in the statute that his petition is untimely. Lee's petition is untimely and must be dismissed.

B. Lee has also not established a chain of custody as required under the statute. It is true that under certain circumstances a person convicted of a crime may request DNA testing under Act 1780 of 2001 to demonstrate the person's actual innocence. However, to be entitled to testing, the applicant seeking testing must establish, *inter alia*, that "[t]he specific evidence to be tested is in the possession of the state and has been subject to a chain of custody and retained under conditions sufficient to ensure that the evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed testing." Ark. Code Ann. § 16-112-202(4) (Repl. 2006). Lee has not done this. He merely has asserted—with no specifics—that because the evidence was obtained during the police investigation that these items have continuously been in the State's custody under conditions that ensure no contamination or tampering. Indeed, a review of the Arkansas Supreme Court's opinion from his direct appeal, reveals that the very blood evidence that he now wishes to test was destroyed in testing before trial. Lee, 327 Ark. 692, 699-701, 942 S.W.2d 231, 234-235. Lee simply asserts that both the shoes and the hair fragments have

"presumably" been held by the State since 1993 and that there is no evidence that the "evidence has been in any way compromised." (Pet. at 10-11). This is simply insufficient and squarely counsels against permitting testing of evidence under the statute.

C. Additionally, Lee has not established that the results of his proposed testing would significantly advance his claim of actual innocence, as required under the statute. Even if the predicate requirements of subsection -202 are met, additional scientific testing under the statute is authorized only if it "can provide materially relevant evidence that will significantly advance the defendant's claim of innocence in light of all the evidence presented to the jury." *King v. State*, 2013 Ark. 133, at 4 (*per curiam*). Evidence does not have to, by itself, completely exonerate the defendant, but in order to be materially relevant such evidence must "tend to significantly advance [the defendant's] claim of innocence." *Id.* at 4-5. Evidence of low probative value, considered against strong evidence of guilt, is not materially relevant to a showing of actual innocence. *E.g.*, *Cooper v. State*, 2013 Ark. 180, 4-5 (*per curiam*). Under these legal standards, Lee's proposed testing would not yield materially relevant evidence.

The evidence presented to the jury overwhelmingly pointed to Lee's guilt. The Arkansas Supreme Court recounted the facts surrounding the crime as follows:

> William McCullough Jr. lived near the victim's house and had been home on the morning in question. Sometime between 10:00 a.m.

and 11:00 a.m., he heard a knock at his door. McCullough went to the door and was met by a man who asked to borrow some tools. McCullough gave the man a driver ratchet and a socket, which he promised to return. The man did not return the tools.

At approximately 10:50 a.m. on the morning of the murder, Katherine Williams, the victim's mother, received a phone call from her daughter, who lived some four or five houses away. A man had just knocked on the victim's door, asked if her husband was home, and inquired about borrowing some tools. When the victim replied that she had no tools, the man left. According to Katherine, her daughter told her that she was scared and "did not trust this guy." The victim promised her mother that she would be at her house as soon as she finished curling her hair. Her daughter never arrived.

Andy Gomez lived across the street from the victim, and was also home on the morning in question. While looking out his front window, he saw a man standing at the front door of the victim's residence. He watched the man grab the screen door and "make a B-line inside just real fast." Approximately twenty minutes later, the man exited Debra's residence. According to Gomez, the man made rapid–head movements, as if he was checking to see if he was being watched. Suspicious, Gomez got in his car to follow the man. He caught up with him on a nearby street, where he observed the man talking to a female with spirals or braids in her hair.

Glenda Pruitt lived at 128 Galloway Circle on the date in question. A man she had seen four or five times and knew as "Skip" walked up her street. Glenda, who wore her hair in long braids, had a short conversation with Skip as he passed by her house. McCullough, Gomez, and Pruitt identified Lee in a photographic lineup as the man they had seen in the victim's neighborhood on the morning of her murder.

Debra's body was discovered in her bedroom at approximately 1:38 p.m. that same date. Three one hundred dollar bills that Debra's father, Stephen Williams, had given to her were missing from her wallet. This money had been part of a larger stack of crisp new bills Williams received in sequential order from the Arkansas Federal Credit Union. At Lee's trial, the State offered evidence that, at 1:53 p.m. on the day of the murder, Lee paid a debt at the Rent–A–Center with a one-hundred dollar bill. Of the three one-hundred dollar bills that the Rent–A–Center received on February 9, one of the bills bore a

> serial number that was two bills away from one of the bills that the victim's father had turned over to police.

Lee v. State, 327 Ark. 692, 696–98, 942 S.W.2d 231, 233 (1997).

Lee did not challenge the sufficiency of the evidence on direct appeal. And, he never attempted to overcome his procedural default of his federal claims by alleging that he was actually innocent. Lee characterizes the evidence in this case as presenting a "weak" and "circumstantial" case, but that characterization of the record could not be more wrong. Although much of the mountain of proof supporting the jury's conviction can be fairly called circumstantial, the eyewitness account of Gomez, who saw Lee enter Debra Reece's house right before the murder, and leave right after the murder, is direct evidence of his involvement. Although it is true that "[o]verwhelming evidence of guilt is not required in cases based on circumstantial evidence[,]" *Thornton v. State*, 2014 Ark. 157, at 16, 433 S.W.3d 216, 224, the evidence in this case—which is both direct and circumstantial—is overwhelming. Taking this into account with his present requests, his last minute attempts asserting that DNA evidence can exonerate him do not, in fact, establish his innocence nor that his proposed testing significantly would advance his claim of actual innocence.

D. No further pleading and no hearing. Lee is not allowed to file further pleadings with this Court "except as the court may order." And, Ark. Code Ann. § 16-112-205(a) (Repl. 2006) provides that the petition may be denied without a

hearing if "the petition and the files and records of the proceeding conclusively demonstrate that the petitioner is entitled to no relief[.]" Ark. Code Ann. § 16-112-205(a) (Repl. 2006). This is the case here. Thus, the State requests that this petition be dismissed without further pleading and without an evidentiary hearing and that Lee's request to stay his execution be denied.

WHEREFORE, the State prays that this Court dismiss the petition, deny Lee's request to stay his execution, and for all other relief to which it may be entitled.

RESPECTFULLY SUBMITTED,

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JOHN F. JOHNSON
CHIEF DEPUTY
PROSECUTING ATTORNEY
SIXTH JUDICIAL DISTRICT

CERTIFICATE OF SERVICE

I certify that I have delivered a true and correct copy upon Lee Short, attorney for Petitioner, by fax and U.S. Mail addressed to 425 W. Broadway, Ste. A, Little Rock, AR, 72114 this 17th day of April, 2017.

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JOHN F. JOHNSON