Cite as 2018 Ark. 344

SUPREME COURT OF ARKANSAS

No. CR-00-1382

	Opinion Delivered: December 6, 2018
GARY B. MARTIN PETITIONER V. STATE OF ARKANSAS RESPONDENT	PETITION TO REINVEST THE CIRCUIT COURT WITH JURISDICTION TO CONSIDER PETITION FOR WRIT OF ERROR CORAM NOBIS OR FOR OTHER RELIEF PETITION GRANTED.

COURTNEY HUDSON GOODSON, Associate Justice

Petitioner Gary B. Martin was convicted of first-degree murder for the 1998 killing of Kimberly Burris, and he was sentenced to life imprisonment. Martin has now filed a petition to reinvest the circuit court with jurisdiction to consider his petition for writ of error coram nobis or for other relief. Martin argues that his petition should be granted because expert hair-comparison testimony at his trial was not meaningfully different from hair-comparison testimony in other cases wherein we reinvested jurisdiction in the circuit court. He contends that we should follow that precedent in this case. We agree and grant the petition to reinvest jurisdiction in the circuit court.

I. *Facts and Procedural History*

Burris disappeared from North Little Rock in July 1998. Her remains were discovered in a freezer in an abandoned house in Lonoke County in November 1998. Martin was charged with Burris's murder in March 1999. The bases of the charges included

statements given by Yolonda Day. In affirming on direct appeal, we recounted Day's interaction with authorities investigating Burris's death:

> Lonoke County authorities learned that Day was in the St. Louis, Missouri area, and contacted the police in St. Louis, who, in turn, picked up Day on April 26, 1999, and questioned her about Burris's murder. That same day, St. Louis Detective Robert Jordan videotaped his interview with Day. Day stated that she did not remember the exact day of the events, but said that she and Gary Martin and two other men—Elton Simms and Lester Perry—were driving in North Little Rock when they picked up Burris on Main Street. Martin said that they needed to take a ride, so they drove to an abandoned house in Lonoke. While in the living room of the house, the group was smoking crack cocaine, when Martin told Burris that he needed to talk to her; the two left the room and went back to a bedroom. About fifteen or twenty minutes later, Day said she heard a scream. She, along with Simms and Perry, went to see what had happened, and they discovered Burris lying in a pool of blood and Martin standing over her with a knife in his hand. Day related that Martin then took some duct tape and rope, put the tape on Burris's mouth, and "hog-tied her and . . . stuffed her in the freezer."
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> In her interview, Day described the route by which the group drove to the Lonoke house, and provided other details of the killing, such as the type and size of the freezer into which Burris's body had been placed. Day also stated that the men had been saying that they were "going to rough her up or something," although she did not know that they meant to kill her. When asked why Martin would want to "get" Burris, Day said that it was because Burris had given Martin AIDS.
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> On April 28, 1999, Arkansas State Police Investigator Scott Pillow drove to St. Louis to pick up Day and bring her back to Arkansas. After booking her into the Lonoke County jail, Pillow informed Day of her *Miranda* rights and began an interview with her, which he audiotaped. During the interview, Day repeated that she joined Martin, Simms, and Perry, and then the group picked up Burris on Main Street in North Little Rock. Day said that Burris was wearing a striped shirt and a pair of shorts at the time. (This fact was later confirmed by Dr. Charles Kokes, the medical examiner, who testified that Burris's remains were clothed in a striped shirt and shorts.) Day essentially repeated to Pillow the same information she had given to Detective Jordan in St. Louis, including the directions to the house where the murder took place, Martin's taking Burris aside to talk to her, and the fact that Martin hogtied Burris with duct tape after placing tape over her mouth and then placed her body in a freezer.

Martin v. State, 346 Ark. 198, 201–02, 57 S.W.3d 136, 138–39 (2001).

Although Day told investigators that she was with Martin at the crime scene, at the trial itself, Day recanted and testified that she did not know him. However, the State was allowed to introduce Day's earlier taped statements pursuant to Arkansas Rule of Evidence 803(24). In affirming Martin's conviction, we observed that although "the State was able to offer the testimony of numerous witnesses who described seeing Martin with Burris, and spoke of Martin's unusual behavior following her disappearance, Day was the only witness who set out the details and the actual circumstances of the murder." *Martin*, 346 Ark. at 207, 57 S.W.3d at 142. We concluded that Day's knowledge of the events was highly indicative of her truthfulness in her statements implicating Martin, and we also noted that Day's presence at the house was corroborated by Arkansas State Crime Lab criminalist Chantelle Bequette's testimony at trial that a hair matching Day's was found at the crime scene.

Martin has now filed a petition to reinvest the circuit court with jurisdiction to consider his petition for writ of error coram nobis or for other relief based on Bequette's hair-comparison testimony.[1] In *Strawhacker v. State*, 2016 Ark. 348, 500 S.W.3d 716, and *Pitts v. State*, 2016 Ark. 345, 501 S.W.3d 803, we concluded that similar testimony in those cases had been repudiated as overstating the scientific certainty of hair-comparison identification. Martin argues that one cannot meaningfully distinguish his case from *Strawhacker* and *Pitts* and that we should therefore grant his petition as well.

[1] We denied Martin's unrelated prior petition to reinvest jurisdiction in the circuit court to consider his petition for writ of error coram nobis. *Martin v. State*, 2010 Ark. 164 (per curiam). We also recently affirmed the circuit court's denial of Martin's motion for post-conviction DNA testing. *Martin v. State*, 2018 Ark. 176, 545 S.W.3d 763.

II. *Writ of Error Coram Nobis*

The petition for leave to proceed in the trial court is necessary because the trial court can entertain a petition for writ of error coram nobis after a judgment has been affirmed on appeal only after we grant permission. *Newman v. State*, 2009 Ark. 539, 354 S.W.3d 61. A writ of error coram nobis is an extraordinarily rare remedy. *State v. Larimore*, 341 Ark. 397, 17 S.W.3d 87 (2000). Coram nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Green v. State*, 2016 Ark. 386, 502 S.W.3d 524. The function of the writ is to secure relief from a judgment rendered while there existed some fact that would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of the judgment. *Newman*, 2009 Ark. 539, 354 S.W.3d 61. The petitioner has the burden of demonstrating a fundamental error of fact extrinsic to the record. *Roberts v. State*, 2013 Ark. 56, 425 S.W.3d 771. The writ is issued only under compelling circumstances to achieve justice and to address errors of the most fundamental nature, and it is available to address only certain errors that are found in one of four categories: (1) insanity at the time of trial, (2) a coerced guilty plea, (3) material evidence withheld by the prosecutor, or (4) a third-party confession to the crime during the time between conviction and appeal. *See id.*

III. *Martin's Petition*

Martin argues that coram nobis relief is appropriate because repudiated testimony led to an unjust conviction and that his petition reasonably alleges facts meeting the *Strawhacker* standard. Essentially, Martin argues that the hair-comparison testimony offered by Bequette

at his trial suffered from the same infirmities as that offered by Michael Malone, an FBI hair-comparison expert in *Strawhacker* and *Pitts*. The State responds that Martin's case is not like *Strawhacker* and *Pitts* because Bequette's testimony has not been specifically repudiated and because there was a "stark difference" between her testimony and Malone's. The State also argues that Bequette's testimony was not material and that Martin's petition is nothing more than a recantation claim and should be denied as an abuse of the writ.

Like Martin, both Strawhacker and Pitts petitioned this court to reinvest jurisdiction in the circuit court to consider their petitions for coram nobis or other relief. In *Strawhacker* and *Pitts*, the Department of Justice had sent individual letters to Strawhacker and Pitts advising them that the hair-comparison testimony offered by Malone in their cases exceeded the limits of science. The Department of Justice concluded that Malone's statements contained three types of errors: (1) the testimony erroneously stated or implied that the hair could be associated with a specific individual to the exclusion of all others, (2) the statements assigned a statistical weight or probability that the hair originated from a specific source or provided an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association, and (3) the expert cited the number of samples from different individuals that could not be distinguished from one another as a predictive value to bolster the conclusion that a hair belonged to a specific individual. Unlike Malone, Bequette was not an FBI employee when she gave her testimony, and the Department of Justice did not send Martin an individual letter. However, the Department of Justice did send letters to all governors advising them of the problems with hair-comparison testimony, stating that they have

offered hair-comparison training for state labs, and requesting the states' assistance in evaluating possible problems with hair-comparison testimony offered in other cases. Thus, while neither the State nor the Department of Justice specifically repudiated Bequette's testimony, her testimony in this case is of the same type that has previously been found to be unreliable.

Further, Bequette's testimony was similar to that offered by Malone. Malone testified in *Strawhacker* that he had seen only two cases out of ten thousand in which he had hairs from two different people that could not be distinguished. Malone also testified that the hairs he examined were "absolutely indistinguishable" from Strawhacker's and the victim's and that the probability of a false identification was one in five thousand. In *Pitts*, Malone testified that, in his nine years of experience, the only way that he had seen hairs match the way that they did in that case was when the hairs did in fact come from the same person. The colloquy between Bequette and the deputy prosecuting attorney highlights the similarities:

PROSECUTION: Okay. Have you ever had a hair from one person be microscopically similar to the hair of another person?

BEQUETTE: It is unusual. We have had one case where we really could not tell the two samples apart, and we did no further comparisons in that case.

PROSECUTION: So, that's one case in—how long have you been with the crime lab?

BEQUETTE: I've been doing hair analysis for six years.

PROSECUTION: So, in that six years, how many hair analyses have you done?

BEQUETTE: I've done probably hundreds, thousands of hair cases.

PROSECUTION: And out of all those, you've only had one where one person's was similar to the other one.

BEQUETTE: Yes.

Bequette's testimony clearly contained the third type of error the Department of Justice identified in that it cited the number of samples from different individuals that could not be distinguished from one another as a predictive value to bolster the conclusion that the hair belonged to Day. Bequette's testimony arguably contained the second type of error in that a statistical analysis could be inferred from her testimony that only two cases out of hundreds or thousands were similar. Both Bequette and Malone acknowledged that hairs are not unique like fingerprints.

As we explained in *Strawhacker*, we look to the reasonableness of the allegations of the petition and to the existence of the probability of the truth thereof. Martin's petition is grounded in a challenge to the reliability of expert testimony connecting Day to the scene of the crime and providing corroboration for Day's recanted statements regarding Martin's connection to the murder. Martin argues that the "invalid hair comparison analysis supplies the State's only evidence corroborating Yolanda Day's recanted statements, which, taken together, constitute the only substantial evidence implicating Mr. Martin." Having reviewed Martin's petition and our precedent in *Strawhacker* and *Pitts*, we hold that Martin has stated sufficient grounds for us to find that his writ may be meritorious, and we therefore grant his petition to reinvest jurisdiction in the circuit court so that it may consider his petition for writ of error coram nobis or other relief. We emphasize that reinvesting jurisdiction in the circuit court will not be required in all cases involving hair-comparison testimony. However, in this particular case, where the expert's testimony contained one or

more of the same errors as those identified in *Strawhacker* and *Pitts*, reinvesting jurisdiction in the circuit court is appropriate. Finally, as we noted in *Strawhacker*, the materiality of the expert testimony is a question for the circuit court to decide after the record has been developed at an evidentiary hearing.

Petition granted.

KEMP, C.J., and BAKER and WOMACK, JJ., dissent.

KAREN R. BAKER, Justice, dissenting. Because Martin has failed to state sufficient grounds for the court to find that his writ may be meritorious, I dissent from the majority opinion and would deny Martin's petition. In granting Martin's petition to reinvest jurisdiction in the circuit court, the majority erroneously holds that Bequette's testimony contains the same type of errors as in *Strawhacker* and *Pitts*. At Martin's trial, the following colloquy occurred on cross-examination:

DEFENSE ATTORNEY: Ms. Bequette, when you said that you examined the hair, the way that I understand it is that it was not microscopically similar. I mean, it's microscopically similar. I mean, you look [at] two microscopes, and they match because they've gotten the same kinds of - -

BEQUETTE: The characteristics and features were similar.

DEFENSE ATTORNEY: But they're not - - but you can't use it for identification?

BEQUETTE: That's correct.

. . .

DEFENSE ATTORNEY: Ms. Bequette, it's microscopically similar, and you look at two hairs and they're the same. I mean, it's microscopically similar, but you cannot say that that hair specifically came from Yolanda Day.

BEQUETTE: No, ma'am.

. . .

DEFENSE ATTORNEY: What is personal identification?

BEQUETTE: Personal identification is that you can identify someone based on a characteristic or feature, or like a – – a fingerprint can be used for personal identification. This just means that hair cannot be used to personally identify someone.

DEFENSE ATTORNEY: Okay. So, we cannot be – – you can't say with a reasonable degree of certainty, I guess, that it was Yolanda Day's hair.

BEQUETTE: I can say that it was microscopically similar to her hair.

. . .

DEFENSE ATTORNEY: Okay. But you cannot say that that hair belonged to Yolanda Day.

BEQUETTE: No, I cannot.

Bequette's testimony is distinguishable from Malone's testimony in *Strawhacker* and *Pitts* because Bequette's testimony has not been repudiated as overstating scientific certainty. First, Martin's case is distinguishable from *Strawhacker*. Bequette's testimony comprises 25 pages of the 905-page written transcript: 10 lines on one 25-line page contained Bequette's qualifications. Further, Bequette testified that she had conducted hundreds, thousands of hair analyses; she was qualified as an expert based on her testimony that she had earned a bachelor of science degree from Harding University, worked at the Arkansas State Crime Lab for six years, received a week-long training in hair microscopy, been trained by criminalists in the state crime lab, and received on-the-job training. Unlike Malone,

Bequette did not testify about the number of cases she had worked or how many times she had testified as an expert witness in court. In comparison, Malone testified that he had worked for the FBI for nineteen years, received training in hair and fiber analysis; worked on over 3500 cases; examined hair from over 10,000 people; lectured and trained others in the field of hair comparison; published articles; and testified as an expert over 350 times.

Second, Bequette did not testify with the certainty that Malone did in Strawhacker's trial. Bequette testified that the hair was microscopically similar to Yolanda Day's hair but could not be used for personal identification. Bequette further testified that she could not with reasonable certainty identify that the hair came from Day or that it belonged to Day. In Strawhacker's trial, Malone testified that the hair in Strawhacker's case was "absolutely indistinguishable"—"exhibited exactly the same characteristics" as Strawhacker's hair sample and was "absolutely indistinguishable" and "consistent with coming from Mr. Strawhacker."

Third, Bequette's testimony is distinguishable from the *Strawhacker* testimony because the government has not represented that Bequette's analysis was flawed and that her conclusions exceeded the limits of science as in *Strawhacker*. Nor has the government alleged that Bequette's testimony was material to the verdict. Finally, in *Strawhacker*, the hair analysis was directly connected to Strawhacker. Here, the hair is purported to be from a witness, not Martin.

Martin's case is also distinguishable from *Pitts*. First, in Martin's case, Bequette testified that she had conducted hundreds, thousands of hair analyses. Bequette was qualified as an expert based on her testimony that she had earned a bachelor of science degree from

Harding University, worked at the Arkansas State Crime Lab for six years, received a week-long training in hair microscopy, been trained by criminalists in the state crime lab, and received on-the-job training. In comparison, in *Pitt*s, Malone testified at trial "that as part of a test to qualify as an FBI examiner he was given 50 hairs from 50 different persons. He was also given another 50 hairs from the same persons, but they were all mixed up. He passed the test by matching all 50 pairs correctly, with no mistakes. He said that in his nine years' experience the only way he had seen hairs match the way they did in this instance was when in fact they came from the same person. He testified that his identification was not absolutely positive, like a fingerprint." *Pitts v. State*, 273 Ark. 220, 224-225, 617 S.W.2d 849, 851 (1981).

Second, Bequette did not testify with the certainty that Malone did in Pitts's trial. In Martin's case, Bequette testified that the hair was microscopically similar to Yolanda Day's hair, but the hair could not be used for personal identification. Bequette further testified that she could not with reasonable certainty identify that the hair came from Day or belonged to Day. In Pitts's trial, "Malone testified that . . . a brown Negroid hair on the clothing, . . . when examined with a microscope, had 20 different characteristics. Sample specimens of Pitts's hair had exactly the same 20 characteristics. Malone testified that in his nine years' experience the only way he had seen hairs match the way they did in this instance was when in fact they came from the same person. He testified that his identification was not absolutely positive, like a fingerprint." *Pitts*, 273 Ark. at 224-225, 617 S.W.2d at 851.

Third, Bequette's testimony is distinguishable from the testimony in *Pitts* because the government has not represented that Bequette's analysis was flawed or that her conclusions

exceeded the limits of science as in *Pitts*. Nor has the government alleged that Bequette's testimony was material to the verdict. Finally, in *Pitts*, the hair analysis was directly connected to Pitts. Here, the hair is purported to be from a witness, not Martin.

In sum, Martin has failed to demonstrate that the proposed attack on the judgment at issue is meritorious. The record does not support the assertion that Bequette overstated the evidence and exceeded scientific reliability and that Martin's case is distinguishable from *Strawhacker* and *Pitts*. Based on the discussion above, I dissent from the majority opinion and would deny Martin's petition to reinvest jurisdiction in the circuit court.

KEMP, C.J., and WOMACK, J., join.

Bryce Benjet, The Innocence Project; and *Tinsley & Youngdahl, PLLC*, by: *Jordan B. Tinsley*, for petitioner.

Leslie Rutledge, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for respondent.