UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2302

Sanders McDaniel Carter

Plaintiff - Appellant

v.

Dexter Payne, Director, Arkansas Division of Correction

Defendant - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:16-cv-00367-DPM)

JUDGMENT

Before LOKEN, COLLOTON, and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. The motion for appointment of counsel is denied as moot.

August 04, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2302

Sanders McDaniel Carter

Appellant

v.

Dexter Payne, Director, Arkansas Division of Correction

Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:16-cv-00367-DPM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 09, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix "B"

JUD[illegible] AND COMMITMENT ORD[illegible]

IN THE CI[illegible]URT OF PULASKI COUNTY, [illegible]KANSAS
[illegible]STICT 4 DIVISION

Jun 3, 1987, the defendant personally appeared before the Court with legal counsel having been informed by the Court of the nature of the charge(s), of his constitutional legal rights, of the effect of a guilty plea upon those rights, and of his right to make statement before sentencing, the Court made the following findings:

__ Defendant voluntarily, intelligently, and knowingly entered a plea of __ guilty or __ Nolo Contendere to the charge(s) herein enumerated and acknowledged factual bases for charge(s);
__ Defendant is found guilty of said charge(s) by the Court, sitting as trier of fact;
x Defendant was found guilty at jury trial.

CHANGE OF VENUE:	DEFENDANT'S FULL NAME	DATE OF BIRTH	RACE	SEX	S.S. NUMBER
	SANDERS MCDANIEL CARTER	08/06/55	BLA	M	440732

DEFENDANT'S ATTORNEY	TYPE ATTY	PROSECUTING ATTORNEY OR DEPUTY
Jeff Padilla	PUB. DEF.	Chris Piazza, Prosecuting Attorney

There being no legal cause shown by the defendant, as requested, why judgment should not be pronounced against him, a judgment of conviction is hereby entered against the defendant on each charge enumerated and court costs assessed. The County Sheriff is hereby ordered and directed to transport the defendant to

x The Arkansas Department of Corrections or _____ County Jail, where he is sentenced to hard labor for the term specified on each charge:

STATUTE #	OFFENSE	OFFENSE DATE	DOCKET #	CT.	F M	CL	SENTENCE	SUSPENDED
-2002.	BURGLARY	11-18-87	87-00063	01	F	B	20YRS	
-1803.	RAPE	11-18-87	87-00063	01	F	Y	LIFE	
-2102.	AGGRAVATED ROBBERY WITH DEADLY WEAPON	11-18-87	87-00063	01	F	Y	20YRS	

If consecutive, explain:

TIME TO SERVE AT ADC/PCJ LIFE + 40 YRS

OTHER SENTENCING PROVISIONS:
x HABITUAL (41-1001)
__ FIREARM (41-1004/43-2336)
__ DEADLY WEAPON (43-2336.1)
__ OTHER:

OTHER PAROLE ELIGIBILITY PROVISIONS:
Alternative Services (Act 378) (43-2340). The defendant knowingly and willingly consents to sentence provisions:
__ 43-2342(c) - Eligible for parole immediately
__ 43-2342(d) - Eligible for parole as normal

EXPLANATORY NOTES:
CONSECUTIVE:MORE THAN ONE BUT LESS THAN FOUR FELONIES
CONSECUTIVE TO EACH OTHER AND TIME NOW SERVING

OTHER: FINE $
RESTITUTION $
COURT COSTS $

__ DEATH PENALTY
EXECUTION DATE: / /

FILED
JUN -5 PM 1:00
CIRCUIT COURT CLERK

x DEFENDANT INFORMED OF RIGHT TO APPEAL
JAIL TIME CREDIT: _____ OR x NONE

BOND PROVISIONS: _____

DATE 6/5/87 | CIRCUIT JUDGE (Print or Type) Judge John Langston | CIRCUIT JUDGE (Signature) John Langston

6/4/87 I certify this is a true and correct record of [illegible] Court with short report of circumstances attached. [illegible] (SEE)

DATE | I acknowledge receipt of judgment | DEFENDANT (Signature)

SHERIFF'S RETURN

DATE REL. ON APPEAL BOND	DATE RET. TO CUSTODY	I certify the defendant named within was delivered to: __ The A.D.C. or __ _____ County Jail	DATE	SHERIFF/DEPUTY (Signature)

WHITE: Court File, Yellow: Sheriff, Pink: ADC or Jail, Yellow: Defendant, Pink: Prosecutor
PCC #1 07/28/86

~~Supp Add 2~~ Appendix "C"

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

SANDERS M. CARTER **PETITIONER**
ADC #88350

v. **No. 5:16-cv-367-DPM**

DEXTER PAYNE, Director,
Arkansas Division of Correction **RESPONDENT**

ORDER

Carter's motion, *Doc. 43*, is denied without prejudice for lack of jurisdiction. This is a second or successive *habeas* petition; and Carter must get permission from the United States Court of Appeals for the Eighth Circuit before this Court can proceed. 28 U.S.C. § 2244(b)(3)(A). No certificate of appealability will issue. 28 U.S.C. § 2253(c)(1)-(2).

So Ordered.

D.P. Marshall Jr.

D.P. Marshall Jr.
United States District Judge

27 May 2022

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

SANDERS M. CARTER
ADC #88350 **PETITIONER**

v. **No. 5:16-cv-367-DPM**

DEXTER PAYNE, Director,
Arkansas Division of Correction* **RESPONDENT**

ORDER

Motion for certificate of appealability, *Doc. 32 & 33*, denied. Carter's Rule 60(d) motion didn't show deliberate wrongdoing amounting to fraud on the court; and this isn't a matter about which reasonable jurists would disagree. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253(c)(2).

So Ordered.

D.P. Marshall Jr.
United States District Judge

13 April 2021

* Dexter Payne is the Director of what is now known as the Arkansas Division of Correction. The Court directs the Clerk to amend the docket. FED. R. CIV. P. 25(d).

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

SANDERS M. CARTER — PETITIONER

v. — NO. 5:16-cv-00367 DPM-PSH

WENDY KELLEY, Director of the
Arkansas Department of Correction — RESPONDENT

FINDINGS AND RECOMMENDATION

INSTRUCTIONS

The following proposed Findings and Recommendation have been sent to United States District Judge D.P. Marshall Jr. You may file written objections to all or part of this Recommendation. If you do so, those objections must: (1) specifically explain the factual and/or legal basis for your objection, and (2) be received by the Clerk of this Court within fourteen (14) days of this Recommendation. By not objecting, you may waive the right to appeal questions of fact.

FINDINGS AND RECOMMENDATION

PRIOR STATE AND FEDERAL COURT PROCEEDINGS. The record reflects that in June of 1987, petitioner Sanders M. Carter ("Carter") was convicted in an Arkansas state trial court of rape, aggravated robbery, and burglary and sentenced to the custody of the Arkansas Department of Correction ("ADC"). See Docket Entry 9, Exhibit 1. The Arkansas Supreme Court affirmed his convictions in April of 1988. See Id.

Carter then began collaterally attacking his 1987 convictions by filing a series of legal proceedings in state and federal court. It is not necessary to catalog every effort he undertook, save to note the following proceedings.

In December of 1990, Carter filed a petition for writ of habeas corpus pursuant to 28 U.S.C. 2254. See Carter v. Lockhart, 5:90-cv-00643. In the petition, he maintained that the state trial court erred when it allowed the introduction of prejudicial evidence and that his trial attorney provided ineffective assistance of counsel. United States Magistrate Judge John Forster, Jr., recommended that the petition be dismissed because there was no merit to Carter's challenge to the introduction of evidence and his claim of ineffective assistance of counsel was procedurally barred from federal court review. United States District Judge Susan Webber Wright adopted the recommendation and dismissed 5:90-cv-00643 in January of 1992. See Docket Entry 9, Exhibit 1. Carter sought, but was denied, a certificate of appealability from Judge Wright and later from the United States Court of Appeals for the Eighth Circuit ("Court of Appeal").

In January of 1993, Carter filed a second petition for writ of habeas corpus pursuant to 28 U.S.C. 2254. See Carter v. Endell, 5:93-cv-00063. In the petition, he again maintained that his trial attorney provided ineffective assistance. United States Magistrate Judge Jerry Cavaneau recommended that the petition be dismissed because Carter failed to offer a "sufficient justification for ... re-visit[ing] the first habeas court's determination of [the ineffective assistance of counsel] claims." See Docket Entry 9, Exhibit 2 at CM/ECF 6. Judge Wright adopted Judge Cavaneau's recommendation and dismissed 5:93-cv-00063 in January of 1994. See Docket Entry 9, Exhibit 2. Carter sought, but was denied, a certificate of appealability from Judge Wright and later from the Court of Appeals.

In April of 2004, Carter filed yet another petition for writ of habeas corpus pursuant to 28 U.S.C. 2254. See Carter v. Norris, 5:04-cv-00115. In the petition, he maintained that the state trial and appellate courts erred when they denied his petition for writ of habeas corpus seeking additional scientific testing under Ark. Code Ann. 16-112-201. United States Magistrate Judge Henry Jones, Jr., recommended that 5:04-cv-00115 be dismissed because Carter did not fairly present the claim to the state courts of Arkansas and because the claim had no merit. United States District Judge James M. Moody adopted Judge Jones' recommendation and dismissed 5:04-cv-00115 in December of 2004. See Docket Entry 9, Exhibit 4. Carter sought, but was denied, a certificate of appealability from Judge Moody and later from the Court of Appeals.

The records maintained by the Court of Appeals reflect that in June of 2007, Carter filed a petition for authorization to file a successive petition for writ of habeas corpus in the district court. In the petition for authorization, he appeared to maintain that crime scene evidence was not returned to the Little Rock, Arkansas, Police Department after testing at the Arkansas State Crime Laboratory ("State Crime Lab"), and this failure resulted in perjured testimony being introduced at his trial. The Court of Appeals was not persuaded and denied his petition for authorization in November of 2007. See Docket Entry 9, Exhibit 5.

The records maintained by the Court of Appeals reflect that in December of 2011, Carter filed another petition for authorization to file a successive petition for writ of habeas corpus in the district court. A brief summary of his petition for authorization is extremely difficult. It is sufficient to simply note that the Court of Appeals denied the petition for authorization in January of 2012. See Docket Entry 9, Exhibit 6.

At some point, Carter came to be represented by attorneys with the Innocence Project. It was believed that all of the evidence obtained from the crime scene had been destroyed, save a knife. In May of 2012, Carter filed a state trial court motion for post-conviction forensic DNA testing pursuant to Ark. Code Ann. 16-112-201. See Docket Entry 21, Exhibit 19 at CM/ECF 7-24. In the motion, he asked that the knife be subjected to DNA testing. The trial court denied the motion without a hearing, see Docket Entry 21, Exhibit 19 at CM/ECF 26-28, but the state Supreme Court reversed the trial court's ruling and remanded the case for a hearing, see Docket Entry 21, Exhibit 20.

It was subsequently learned that officials at the State Crime Lab were in possession of additional crime scene evidence, specifically, "... seven (7) hairs recovered from the victim's pubic hair combings; thirty-five (35) whole 'negroid' hairs and 'negroid' hair fragments recovered from the victim's pink bed sheet and a pot holder; and twenty-one hairs recovered from the victim's nightgown." See Docket Entry 21, Exhibit 22 at CM/ECF 1-2. The evidence had never been disclosed to Carter. In July of 2015, the state trial court entered an order for post-conviction DNA testing pursuant to Ark. Code Ann. 16-112-201. See Docket Entry 21, Exhibit 22. The order provided, in part, that the knife, hair, and hair fragments would be tested for "interpretable DNA profiles" and compared with a sample from Carter. See Docket Entry 21, Exhibit 22 at CM/ECF 3.

The knife, hair, and hair fragments were tested, and the results of the testing were inconclusive. Although Carter was excluded as a "possible contributor of the major component DNA profile obtained from the epithelial fraction" of one sample, he was not excluded as a "possible contributor of the partial Y-STR profile" obtained from other samples. See Docket Entry 21, Exhibit 25 at CM/ECF 3-5.

The state trial court convened a hearing on Carter's motion for post-conviction forensic DNA testing pursuant to Ark. Code Ann. 16-112-201. See Docket Entry 21, Exhibit 23. During the hearing, Carter's attorney informed the state trial court that DNA testing was complete, and counsel was not going to request any additional relief on Carter's behalf. Given counsel's representation, the state trial court deemed the matter closed because Carter had obtained all the relief he sought. See Docket Entry 21, Exhibit 24.

In August of 2016, Carter filed a pro se petition with the state Supreme Court to reinvest jurisdiction in the state trial court so that the trial court could consider a petition for writ of error coram nobis. See Docket Entry 21, Exhibit 26. The state Supreme Court construed his petition to contain the following claim:

> ... Carter asserts ... that he learned during the 2015 [Ark. Code Ann. 16-112-201] proceeding in the trial court that there were thirty-four "negroid" hairs recovered from the rape victim's pink bedsheet. He contends that at his trial in 1987 only one pubic hair and eight hair fragments had been forensically tested and that the existence of the thirty-four hairs had been concealed from the defense. He argues that he would not have been found guilty had the thirty-four hairs been tested at the time of trial because the hair examiner would have had a larger pool of evidence to test.

See Carter v. State, 2016 Ark. 390, 502 S.W.3d 516, 518 (2016). The state Supreme Court found that Carter had not shown a violation of Brady v. Maryland, 373 U.S. 83 (1963), and denied the petition to reinvest jurisdiction in the state trial court. The state Supreme Court so found for the following reason:

> We do not find that Carter has proven a Brady violation because Carter has not demonstrated with facts that there is a reasonable probability that the outcome of the trial would have been different had the hair examiner had a larger pool of hair samples to examine. At most, Carter has suggested that more hair would have given the examiner more to compare; he does not contend that more hair would necessarily have ruled him out as the perpetrator. Moreover, even if it could be said that not all of the hairs taken into evidence were forensically examined at the time of trial, Carter has not shown that there is a reasonable probability based on the evidence adduced at trial that the outcome of the trial would have been different if the hair examiner who testified at trial had a greater number of hairs to test.

> There was evidence adduced at Carter's trial that in November 1986 a man entered the victim's home through a kitchen window off a deck. He threatened to kill the victim with a knife, searched her purse for money, raped her, beat her repeatedly, and threatened that, if she called the police, he would come back at a later time and cut her throat. The assault lasted forty to forty-five minutes. In spite of his threat, the victim called the police and gave a description of the perpetrator. One night in January 1987, the victim heard someone on the deck and saw a man pass by the window. She called the police, and Carter was apprehended on the deck and taken into custody. Later that day, and again at trial, the victim identified Carter as her assailant. ...
>
> ... Here, the victim's testimony was sufficient to establish that Carter committed the offenses. His claim of a Brady violation falls short of establishing that there was evidence withheld that meets the threshold requirements of a Brady violation that was both material and prejudicial such as to have prevented rendition of the judgment had it been known at the time of trial. It is petitioner's burden to demonstrate that there is a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the information been disclosed at trial. ... [Carter] has failed to meet this burden.

See Carter v. State, 502 S.W.3d at 518-519.

THE PLEADINGS AT BAR. Carter commenced the case at bar by filing a petition for writ of habeas corpus pursuant to 28 U.S.C. 2254. In the petition, he challenged his 1987 convictions and advanced a single claim. The precise characterization of his claim has not always been easy. The undersigned previously characterized his claim as follows:

> ... [Carter] maintained that his right to due process was violated when exculpatory evidence was withheld. According to Carter, the evidence at trial was that only one African-American pubic hair was recovered from the crime scene. He has recently learned, though, that thirty-four to thirty-five African-American pubic hairs were actually recovered from the crime scene. It is his position that proper DNA testing of the additional pubic hairs would exonerate him.

See Docket Entry 12 at CM/ECF 5. In his objections to the undersigned's previous Findings and Recommendation, though, he represented that his claim was actually as follows:

> Petitioner objects to the Magistrate's findings which misstate petitioner's pleading at bar by stating that it is the petitioner's position that proper DNA testing of the additional pubic hairs would exonerate him. Petitioner makes no such claim in petitioner's instant petition or pleading at bar. Petitioner's pleading at bar is that the Prosecutor for the State violated the Brady ... rule during petitioner's trial and that by so doing deprived petitioner of his [constitutional rights].

See Docket Entry 13 at CM/ECF 3. In a subsequent pleading, he characterized the claim in his petition as follows:

> ... In said habeas petition, the petitioner asserts that his United States Constitutional Rights under the Fifth and Fourteenth Amendments to due process and equal protection of the law were violated by the State's prosecutor by failure to disclose to the petitioner during his State criminal trial evidence that was of exculpatory and impeachment value, i.e., thirty-four (34) whole negroid hairs recovered from a Caucasian rape victim's bedsheet. Petitioner further contends that the failure of the prosecutor to disclose said hair evidence violated the mandate established by the United States Supreme Court in Brady ...

See Docket Entry 23 at CM/ECF 1-2.

Respondent Wendy Kelley ("Kelley") filed an amended response to Carter's petition. In the amended response, Kelley asked that the petition be denied and this case be dismissed for two reasons. Kelley maintained that Carter's petition was a second or successive petition, and he did not obtain permission from the Court of Appeals to file his petition. Kelley alternatively maintained that the petition had no merit.

Carter filed what he styled an "amended petition and traverse to the response," see Docket Entry 23, although the submission is not a true amendment. In it, he maintained that his Brady claim is material for the following reasons:

> ... In the petitioner's case at bar, this is shown [i.e., a Brady violation] through the Bode Cellmark Laboratory DNA report of STR Processing, Results, and Conclusions, page 3, section 4, paragraph 2, which excluded petitioner as a possible contributor of the major component DNA profile obtain[ed] from the epithelial fraction. ... In petitioner's case, ... serologist, Mr. Edward Vollman, testified at petitioner's trial, by sworn deposition, that he recovered one negroid hair from the victim's bedsheet, which is a perjured statement. ... Said perjured statement would have been impeached by the petitioner had thirty-four (34) whole negroid hairs not been suppressed by the prosecutor. Further, it could possibly be considered an anomaly of no consequence to petitioner's juror that Mr. Vollman, who was stipulated at petitioner's trial as an expert on hair identification, ... to not be able to say that the one (1) negroid hair that he found on the Caucasian rape victim's bedsheet could not be said to have come from the negro petitioner accused of committing the crime. However, it would or should be considered overwhelming "material" evidence of petitioner's innocence to have thirty-five (35) whole hairs that an expert on hair identification was unable to say came from the person accused of committing the crime, as would obtaining a DNA profile obtained from the "apparent hairs/fibers CCB1537-0304-E03C" that excluded petitioner as a possible contributor. ...

See Docket Entry 23 at CM/ECF 5-7.

ANALYSIS. 28 U.S.C. 2244(b)(3)(A) provides, in part, that before a second or successive petition pursuant to 28 U.S.C. 2254 is filed in the district court, the petitioner shall move in the court of appeals for an order authorizing the district court to consider the petition. The phrase "second or successive" is a "term of art and not every habeas petition that is second in time requires preauthorization." See Williams v. Hobbs, 658

F.3d 842, 853 (8th Cir. 2011) (challenge to execution protocol adopted after sentencing). In some instances, a petitioner who could not have raised a claim in his first petition because the claim had not yet arisen will be allowed to file a second petition without first obtaining preauthorization. See Id. See also Singleton v. Norris, 319 F.3d 1018 (8th Cir. 2003) (challenge to involuntary medication begun after sentencing).

The petition at bar is not Carter's first collateral attack on his 1987 convictions by means of a petition pursuant to 28 U.S.C. 2254. At a minimum, it is his third such attack.[1] The question is whether he was required to obtain permission, or preauthorization, from the Court of Appeals before filing the petition at bar.

Carter's claim, regardless how it is characterized, is built upon Brady. United States District Judge D.P. Marshall Jr. found the following with respect to a Brady claim in a second or successive petition:

> ... In the Brady context, ... materiality is the touchstone. If Carter's Brady claim is nonmaterial, then he'll have to get preauthorization to file his petition. Crawford v. Minnesota, 698 F.3d 1086, 1089-90 (8th Cir. 2012). But if his Brady claim is material, then his petition may not be "second or successive" within the meaning of the AEDPA. Ibid.; see also United States v. Lopez, 577 F.3d 1053, 1066-67 (9th Cir. 2009).

See Docket Entry 14 at CM/ECF 1. Judge Marshall could not determine from the record whether Carter's Brady claim is material and, thus, whether the petition at bar requires

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[1] Carter collaterally attacked his 1987 convictions in 5:90-cv-00643, 5:93-cv-00063, and 5:04-cv-00115.

pre-authorization. Judge Marshall asked that the record be more fully developed.

A petitioner establishes a Brady violation by making the following three-part showing: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." See Strickler v. Greene, 527 U.S. 263, 281-282 (1999). The third element, i.e., prejudice, requires the petitioner to show that the suppressed evidence was material. See Banks v. Dretke, 540 U.S. 668 (2004). "[E]vidence is material within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." See Turner v. United States, — U.S. —, 137 S.Ct. 1885, 1893, 198 L.Ed.2d 443 (2017).

The allegedly material evidence is the additional African-American hairs and hair fragments discovered at the State Crime Lab after Carter's trial. The undersigned assumes without deciding that the evidence is favorable to Carter as it may have some impeachment value. The undersigned finds that the evidence was suppressed by the State, and it matters not that the suppression may have been inadvertent. Thus, two of the requisite elements can be shown. Carter cannot show, though, that the evidence is material. The undersigned so finds because after examining the trial record and evaluating the withheld evidence in the context of the entire record, see Turner v. United States, 137 S.Ct. at 1893, there is not a reasonable probability that, had the additional African American hair and hair fragments been disclosed to Carter prior to

trial, the result of the proceeding would have been different.

The state Supreme Court made factual findings in denying the petition to reinvest jurisdiction in the state trial court. See Carter v. State, 502 S.W.3d at 519. Carter has not rebutted the presumption accorded those findings, and they are accepted as correct. See 28 U.S.C. 2254(e). They reflect that in November of 1986, a man entered the victim's home through a kitchen window off a deck. He threatened to kill her with a knife, then searched her purse for money, raped her, and beat her repeatedly. He threatened that if she called the police, he would come back to her home and cut her throat. The assault lasted forty to forty-five minutes. The victim ignored the man's threat and called the police. She provided the police with a description of her assailant. In January 1987, the victim heard someone on the deck and saw a man pass by her window. She called the police, and Carter was apprehended on the deck and taken into custody. Later that day, and again at trial, the victim identified Carter as her assailant.

Carter attempted to show during his defense that he was not the assailant. See Docket Entry 21, Exhibit 7 at CM/ECF 137-178. For instance, Carter presented evidence challenging the victim's identification of Carter. Although the victim described her assailant as clean-shaven, he presented evidence that he was not clean-shaven when the assault occurred. Carter called a fingerprint examiner from the State Crime Lab who testified that the one latent, partial fingerprint found on the knife could not be identified. See Docket Entry 21, Exhibit 7 at CM/ECF 149-152. A deposition by a forensic serologist from the State Crime Lab was then read to the jury. The serologist testified

as follows with respect to the one pubic hair he examined:

> Q. And you also conducted an examination regarding pubic hairs, did you not?
>
> A. Yes.
>
> Q. And were you able to, after your examination, reach a conclusion regarding that?
>
> A. No-well, the conclusion was that from observing the pubic hair recovered from a pink sheet and comparing those against the known pubic hairs of Sanders Carter, there were similarities and dissimilarities in these hairs and the question hair. And therefore, no conclusion could be reached.
>
> Q. After you conducted your scientific examination, did you find anything that would be in any way incriminating to [Carter]?
>
> A. No.

See Docket Entry 21, Exhibit 7 at CM/ECF 157. The serologist was cross examined and testified as follows with regard to the hair:

> Q. On hairs, you mentioned that you could not form a conclusion based upon this hair. Is that a fair assessment of your testimony?
>
> A. Yes.
>
> Q. You had one pubic hair. And there are situations if you have more than one or two, or maybe as much as ten or fifteen hairs, you would have a better sample to use?
>
> A. When there are more question hairs, you do you have-is a better pool of hairs to compare against some known hairs, yes.
>
> Q. And you were not able to make any comparison, one way or the other in this case, on this particular hair?

A. That's correct.

Q. In other words, it would be fair to say that this hair, we cannot say either came from Mr. Carter or didn't come from Mr. Carter?

A. That's correct.

See Docket Entry 21, Exhibit 7 at CM/ECF 161.

The additional hair and hair fragments discovered at the State Crime Lab after Carter's trial were tested for "interpretable DNA profiles" and compared with a sample from Carter. See Docket Entry 21, Exhibit 22 at CM/ECF 3. The results of the testing were inconclusive. Although Carter was excluded as a "possible contributor of the major component DNA profile obtained from the epithelial fraction" of one sample, he was not excluded as a "possible contributor of the partial Y-STR profile" obtained from other samples. See Docket Entry 21, Exhibit 25 at CM/ECF 3-5.

The additional hair and hair fragments establish very little. They do not exonerate Carter. The test results simply show that the hairs and hair fragments may, or may not, have come from him. The test results do not undermine, or otherwise call into question, the serologist's deposition. Instead, a fair characterization of the test results are that they are largely consistent with the serologist's testimony. He testified that it was impossible to say whether the one hair he examined came from Carter. Although testing of the additional hair and hair fragments could exclude Carter as a possible contributor of one sample, the testing could not exclude him as a possible contributor of other samples. Because this case is not one that hinges on the strength of forensic evidence,

the additional hair and hair fragments are ultimately of minimal evidentiary value.

Carter maintains that the outcome of the trial would have been different had the serologist had a larger pool of hair samples to examine. There is nothing, though, to substantiate Carter's assertion. Although the serologist acknowledged that a larger sample of hairs would have aided his work, the results of the testing were inconclusive and would not have changed his testimony to any measurable degree.[2]

RECOMMENDATION. On the basis of the foregoing, the undersigned finds that Carter's Brady claim is nonmaterial. Because the petition at bar is a second or successive petition, he must have preauthorization to file his petition. He did not obtain the requisite preauthorization. It is therefore recommended that Carter's petition be dismissed without prejudice so that he may seek pre-authorization from the Court of Appeals.[3] All requested relief should be denied, and judgment should be entered for Kelley. A certificate of appealability should also be denied. See 28 U.S.C. 2253.

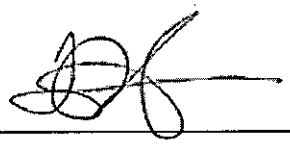
2

Liberally construing Carter's pro se submissions, he appears to maintain that the State's failure to disclose the hair and hair fragments was a per se Brady violation requiring no further inquiry into the actual effect of the violation. The undersigned need not address his assertion because the undersigned has only been asked to determine whether the additional evidence is material.

3

In Bates v. Norris, 2006 WL 3741925 (E.D.Ark. December 18, 2006), the petitioner failed to obtain preauthorization from the Court of Appeals before filing his petition. He recognized his problem and asked that his petition not be dismissed without prejudice but instead be transferred to the Court of Appeals. His request was granted, and his petition was simply transferred to the Court of Appeals. Carter has failed to make such a request, and he has not offered a good reason for transferring his petition.

DATED this 31st day of August, 2017.



UNITED STATES MAGISTRATE JUDGE