No. 22-7615

IN THE
Supreme Court of the United States

WILLIE JEROME MANNING,
Petitioner,

v.

THE STATE OF MISSISSIPPI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Did the Mississippi Supreme Court err in ruling that the state post-conviction trial court did not abuse its discretion by denying additional DNA testing to petitioner when petitioner had been granted extensive DNA testing over a course of years, that testing had failed to produce any results undermining his convictions for capital murder, and petitioner failed to satisfy his burden under state law to obtain more testing?

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The Mississippi Supreme Court's opinion affirming the state circuit court's order denying petitioner's motion to transfer DNA evidence for additional testing (Petition Appendix (App.) 1a-52a) is not yet published but is available at 2022 WL 2351516. The state circuit court's order (App.87a-90a) is not published.

JURISDICTION

The Mississippi Supreme Court's judgment was entered on June 30, 2022. The court denied rehearing on November 10, 2022. On February 8, 2023, Justice Alito extended the time to file a petition for a writ certiorari until March 10, 2023. The petition for a writ of certiorari was filed on March 10, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

STATEMENT

In 1994, petitioner Willie Jerome Manning was convicted of two counts of capital murder and sentenced to death. He challenged his convictions and sentences on direct review, state collateral review, and federal habeas review. Those challenges failed. The petition here arises from his second round of state collateral review.

1. Early on December 11, 1992, Jon Steckler and Tiffany Miller were murdered. *Manning v. State*, 726 So. 2d 1152, 1164 (Miss. 1998). Jon and Tiffany were dating and were students at Mississippi State University. *Ibid.* They left Jon's fraternity house around 12:50-1:00 am on December 11 in Tiffany's Toyota MR2 sports car. *Ibid.* At about 2:15 am, a motorist discovered Jon (still with a pulse) lying on a roadside in Oktibbeha County, Mississippi. *Ibid.* A deputy found Tiffany's body close by. *Ibid.*

Jon had been shot in the back of the head (from which he later died) and had received extensive abrasions before he died that "were consistent with being run over by a car." 726 So. 2d at 1164. Two items were missing from his body: "a class ring from Cathedral High School in Natchez, Mississippi," and "a watch which had little clocks on [its] face." *Id.* at 1165. Tiffany had been fatally shot in the face at close range. *Id.* at 1164. She "was found with one leg out of her pants and underwear, and with her shirt pulled up." *Ibid.* At the murder scene, officers found "a gold token," "three hulls or shell casings," and a "projectile" near Jon's body. *Ibid.* Tiffany's car was found the next morning. *Id.* at 1165. Blood was found on and under the car; hair and flesh were found on the car's underside. *Ibid.*

While investigating, the sheriff learned of a burglary that in turn led to petitioner. 726 So. 2d at 1165. Around 11:00 pm on December 10, shortly before the murders, Jon's fraternity brother John Wise loaned his car keys to his roommate to retrieve a Coke bottle from Wise's car. *Ibid.* The car was parked outside the fraternity house. *Ibid.* At about 1:30 am, Wise went to his car and found it unlocked; later that morning he discovered that it had been burglarized. *Ibid.* The items stolen were "a portable CD player and adapter, a brown leather bomber jacket, a silver monogrammed huggie [a beer-can insulator]," and some change that included "a rest room token that Wise received at a Grenada, Mississippi gas station." *Ibid.* "Only two places" in Mississippi "use[d] this type of token": a Kentucky Fried Chicken in Laurel and a Dutch Oil Company gas station in Grenada. *Ibid.* After learning about the burglary, the sheriff contacted Wise. *Ibid.* "Wise identified the coin found at the murder scene as being exactly like the rest room token taken out of his car." *Ibid.*

"The sheriff then began to search for whoever burglarized Wise's car as the possible murderer." *Ibid.* The huggie was later found a few miles from where petitioner lived with his mother. *Ibid.* Petitioner "became the primary suspect in the case." *Ibid.*

As the investigation progressed, the case against petitioner grew. Petitioner's live-in girlfriend, Paula Hathorn, saw him on December 9, 1992—about a day before the murders—with "a gun and some gloves." 726 So. 2d at 1165. When she next saw him, on December 14, he "no longer had the gun," but did have "the leather jacket belonging to John Wise." *Ibid.* "Several days after the murders," petitioner tried to sell to Barbara Duck a watch that "matched the description of the one worn by Jon Steckler." *Id.* at 1166. He also tried to sell to Duck "a gold ring similar to Steckler's class ring." *Ibid.* Also after the murders, petitioner used an assumed name to try to sell a CD player to a store. *Id.* at 1165. After that did not work, he sold it to Emmitt Johnson. *Ibid.* Johnson later pawned it. *Ibid.* The pawn shop recorded the CD player's serial number, which matched that of the CD player stolen from John Wise's car. *Ibid.*

As he was trying to sell items—watch, ring, CD player—that linked him to the burglary and murders, petitioner continued wearing the leather jacket. Hathorn reported that he wore it "until a county deputy appeared at his mother's house," where petitioner and Hathorn were living. 726 So. 2d at 1165. Petitioner then gave Hathorn the jacket. *Ibid.* Hathorn later gave the jacket to the sheriff. *Id.* at 1166. John Wise "identified the jacket as the one which was stolen out of his car." *Ibid.* Hathorn also reported that petitioner used a gun for target practice at trees around his mother's house, including days before the murders. *Ibid.*

In May 1993, when petitioner was incarcerated at the Oktibbeha County jail, inmate Frank Parker heard petitioner telling another inmate "that he didn't think they could convict him of the crime" and that he had "sold [the gun] on the street." 726 So. 2d at 1166. Petitioner also told inmate Earl Jordan (petitioner's cousin) "that he had killed the students" and assured Jordan that "he was not joking." *Ibid.*

2. Petitioner was indicted on two counts of capital murder. 726 So. 2d at 1162. Before trial, the Oktibbeha County Circuit Court granted petitioner's motion allowing him "to inspect all of the State's physical evidence, including fingerprints, hair, fiber and blood samples." App.3a.

"The State's theory at trial" was that Steckler and Miller confronted petitioner while he was burglarizing Wise's car, that petitioner forced them into Miller's car at gunpoint, that he ordered Miller to drive around, and that he later forced Steckler out, killed him, then killed Miller farther up the road. App.2a-3a. The State presented evidence and testimony from Hathorn, Parker, Jordan, expert witnesses, and others about the facts recounted above. *Supra* pp. 2-4; *see* App.3a-5a, 36a-37a. The State also introduced "State Evidence numbers 49 and 50, which were bags that contained hairs gathered from vacuuming and sweeping the carpet, console and floor of Miller's driver and passenger seat." App.3a. FBI Agent Chester Blythe testified that "he had performed a microscopic hair analysis" of that evidence and that the hairs "'exhibited characteristics associated with the black race.'" *Ibid.* The State "frequently referenced the determination of racial characteristics of State Evidence numbers 49 and 50 in its closing arguments but stated that the hair fragments were corroborative, not dispositive, evidence." *Ibid.* The State's ballistics expert testified that a "projectile

found at the scene" of the murders and the two projectiles found in Tiffany Miller's body "were fired from the exact same firearm" "[t]o the exclusion of every other firearm in the world." 726 So. 2d at 1181. That expert also "linked the projectiles taken from the victim to the tree" in petitioner's yard. *Ibid.*

Some witnesses placed petitioner at the 2500 Club in Starkville, Mississippi, on the night of the murders. 726 So. 2d at 1166. But only one, Gene Rice, placed him there at the time of the murders. *Ibid.* No other witness knew Rice or remembered him being at the club. *Ibid.* And Rice "gave conflicting statements about the time he last saw" petitioner at the club. *Ibid.* At trial he said that he saw petitioner "around thirty to forty-five minutes before he left the club around 2:00 a.m. or 2:30 a.m.," but he told the sheriff that he last saw petitioner at 12:30 am or 1:00 am. *Ibid.* No other witness could place petitioner at the club after 12:30 am, "and only one other could place him there that late." *Ibid.*

The jury convicted petitioner of both counts of capital murder and sentenced him to death. 726 So. 2d at 1162.

3. Petitioner pursued several challenges to his convictions and sentences.

a. He first sought direct review. The Mississippi Supreme Court affirmed his convictions and sentences. *Manning v. State*, 726 So. 2d 1152 (Miss. 1998). The court rejected 21 claims of error. *Id.* at 1162. Three matters are noted here. First, petitioner challenged the admission of FBI Agent Blythe's testimony about his forensic analysis of hair samples from Miller's car. *Id.* at 1180-81. Petitioner argued "that forensic hair analysis evidence should not be admitted in criminal trials because it is both nonsense and unreliable." *Id.* at 1180. The court ruled that this argument was

procedurally barred because petitioner had not objected to the evidence on this ground at trial. *Ibid.* The court alternatively ruled that the trial judge "did not abuse his discretion in admitting the hair analysis evidence." *Id.* at 1181. "The expert did not claim that the hair matched that of the defendant." *Ibid.* And he "admitted that his expertise could not produce absolute certainty." *Ibid.* The expert testified only that hairs from Miller's car "exhibited characteristics associated with the black race." *Id.* at 1180. Second, petitioner claimed that the State's ballistics expert testified "beyond the scope of his expertise." *Id.* at 1181. He especially faulted testimony that the projectiles from Miller's body and the scene were fired from the same firearm "[t]o the exclusion of every other firearm in the world." *Ibid.* The court rejected the view that the testimony "could mislead the jury" and ruled that the claim was procedurally barred for lack of a contemporaneous objection. *Ibid.* Third, the court rejected several claims related to Hathorn, Parker, and Jordan. *See id.* at 1167-69, 1171-72, 1176-78, 1179-80, 1192-94. This Court denied certiorari. *Manning v. Mississippi*, 526 U.S. 1056 (1999).

b. Petitioner then sought state post-conviction relief. The Mississippi Supreme Court denied all relief, including on claims related to Hathorn, Parker, Jordan, and petitioner's alibi defense. *Manning v. State*, 929 So. 2d 885, 890-905 (Miss. 2006).

c. Petitioner then sought federal habeas relief. He moved for "the production of evidence and funds for DNA testing," "the appointment of experts," and "the subpoena of records" from the State. *Manning v. Epps*, No. 1:05CV256-P, 2008 WL 4516386, at *1 (N.D. Miss. Oct. 3, 2008). The district court granted him "leave to inspect the physical evidence" in the sheriff's department's custody, *ibid.*, and petitioner

"discovered untested biological evidence from the rape kit, victims' hands, fingernail scrapings, and vacuum sweepings of the car," App.6a. But the court denied DNA testing. The court explained that there was "no nexus between the services sought and a claim of constitutional dimension." 2008 WL 4516386, at *2. And "[e]ven if DNA testing could conclusively prove that it was not" petitioner's hair found in the vehicle, "those results would not impeach" the trial testimony—which was only that hair found in Miller's car showed "characteristics associated with ... African-Americans"—"much less exonerate" petitioner. *Ibid.* The court later denied petitioner's habeas petition on the merits. 695 F. Supp. 2d 323, 340 (N.D. Miss. 2009). On appeal, the Fifth Circuit ruled that the petition should have been dismissed as untimely. 688 F.3d 177, 179-80 (5th Cir. 2012). This Court denied certiorari. 568 U.S. 1251 (2013).

4. The petition for certiorari here arises from petitioner's second round of state post-conviction review.

a. In 2013, petitioner moved the Mississippi Supreme Court for leave to file a successive petition for post-conviction relief. He asked that court to set aside his convictions, sought DNA testing and fingerprint analysis, and moved for hearings on the reliability of expert testimony at his trial on ballistics analysis and hair analysis. *Manning v. State*, 119 So. 3d 293, 293-94 (Miss. 2013). He relied on May 2013 letters from the U.S. Department of Justice. One letter faulted trial testimony stating that the bullets found at the crime scene and tree were fired from the same firearm "to the exclusion of all other firearm[s] in the world." App.4a n.2. Another letter said that "the microscopic hair comparison analysis testimony or laboratory report presented in this case included statements that exceeded the limits of science and was,

therefore, invalid." App.7a n.4. "While this case did not involve a positive association of an evidentiary hair to an individual," the letter continued, "the examiner stated or implied in a general explanation of microscopic hair comparison analysis that a questioned hair could be associated with a specific individual to the exclusion of all others—this type of testimony exceeded the limits of the science." *Ibid.*

The Mississippi Supreme Court denied petitioner's request to set aside his convictions and his requests for hearings, but granted him leave to proceed with DNA testing and fingerprint comparison. 119 So. 3d at 294; App.4a n.2, App.7a & n.4. In this round of proceedings the court also rejected petitioner's claim that Jordan recanted his testimony, stating that petitioner failed to "present any competent evidence" to support that claim. App.5a n.3.

b. In line with the state supreme court's ruling, in October 2013 petitioner petitioned the circuit court for DNA testing and fingerprint analysis. App.7a-8a. In August 2014, the circuit court entered an agreed order to send several items to the lab Orchid Cellmark for testing. App.9a. The parties also agreed on an expert to perform fingerprint analysis. *Ibid.* The circuit court later entered an agreed order for delivering and analyzing fingerprint evidence. App.10a.

By November 2014, Orchid received "three swabs from the rape kit, fingernail scrapings from both victims, pubic combings, items of Miller's clothing, hair found in both victims' hands and debris from clothing." App.9a. In the first round of testing, Orchid focused on finding DNA on several items with a plan to test them further if DNA was discovered (and to test other items if DNA was not discovered). App.9a-10a. In June 2015, Orchid reported that some items tested negative for sperm or semen,

but other items yielded "concentrations of human DNA" or were positive or inconclusive for semen. App.10a. For those other items—a pubic combing, rape-kit swabs, and fingernail scrapings from both victims—Orchid recommended further testing to determine if a male DNA profile was present. *Ibid.* In July 2015 the circuit court entered an agreed order to proceed with that testing and ordered that the victims' blood samples be delivered to the lab for DNA comparison. *Ibid.*

At about that time, Orchid merged with the lab Bode Technology, which took over the testing. App.10a. Petitioner's evidence was transferred to Bode. App.11a. In August 2015, the circuit court entered an agreed order to send petitioner's tissue samples to Bode for comparison of DNA profiles. *Ibid.*

In January 2016, the fingerprint-analysis results were reported. App.11a. The results revealed that "no suitable candidate for further comparisons" was found in either of two databases. App.11a. "This concluded fingerprint analysis" because "neither party requested any further action." *Ibid.*

Three years later, after a January 2019 status conference, the circuit court entered a scheduling order "setting final dates for the conclusion of DNA testing." App.11a. The order "authorized two rounds of DNA testing." App.11a-12a. "The lab would first screen the evidence for DNA and then do a final testing or comparison of the hair. After receiving the results from the second round of DNA testing, the parties would decide if other items of evidence submitted to Bode needed additional screening." App.12a. In February and October 2019, Bode reported the results from testing on hair samples from Miller's car and the victims' hands, including hair samples introduced at trial. App.12a-14a. For most of the 23 hairs tested, Bode did

not obtain a reportable DNA profile. *See ibid.* Bode got results from 5 hairs: 1 from Steckler's hand produced a full mitochondrial DNA (mtDNA) profile, 3 from Steckler's hand produced a partial mtDNA profile, and 1 from Miller's hand produced a partial mtDNA profile. App.13a. Petitioner has never used these results to seek relief and has never presented to any court a comparative DNA analysis using those results.

In June 2020, petitioner moved the circuit court to allow hair evidence to be transferred to another lab for further DNA testing. App.14a. He claimed that Bode recommended using a lab like MitoTyping Technologies, which specializes in isolating and identifying DNA in older and smaller hair samples using methods that Bode does not use. *Ibid.* Bode "characterize[d] the[ ] hair samples" at issue "to be small and note[d] the possib[ility] that the DNA has degraded." App.30a. Petitioner submitted an affidavit from a MitoTyping lab technician stating that MitoTyping "has provided forensic mtDNA analysis since 1999," describing its testing method that "can amplify small fragments of DNA and piece the information together," and stating that the lab "has published peer-reviewed articles ... showing that hairs less than 0.5 cm can successfully be typed for mtDNA over 90% of the time." App.29a. The affidavit added that "[d]espite our best efforts, there still exists the chance that the sample may be too highly degraded to yield a result." *Ibid.* In email correspondence with the parties, a MitoTyping forensic examiner said that MitoTyping cannot "guarant[ee] results or provide a probability of achieving results for [this] specific case." *Ibid.* The examiner also said that a hair sample's "integrity" will affect "the ability to successfully type" the sample. App.30a. Petitioner claimed that this testing could be completed in 3-4

months and would be the final attempt to obtain DNA for comparison to the crime-scene evidence. App.14a.

c. The circuit court denied additional testing. App.87a-90a. The court ruled that petitioner had not carried his burden under state law to obtain that testing. The court explained that "nothing" that petitioner presented "shows a reasonable likelihood" that MitoTyping "would be able to provide results that Bode could not." App.89a. And even if petitioner were "able to show that additional testing would provide a reasonable likelihood of more probative results, he would still have to show a reasonable probability that" the outcome at trial would have been different. *Ibid.* He failed to do that. He argued "that the DNA evidence is relevant because the State's closing argument at trial discussed DNA results and that may have influenced the jury." *Ibid.* That argument, the court ruled, was "without merit." *Ibid.* Identifying the mtDNA from the samples that he wanted to send to MitoTyping "will not call into question" his conviction. App.90a.

d. The Mississippi Supreme Court affirmed. App.1a-52a. The court's decision focused (like petitioner's appellate briefing) on whether petitioner had satisfied his burden under state law to obtain additional DNA testing and whether the circuit court abused its discretion in denying that testing. *See* App.25a-40a. Under state law, the state supreme court explained, a circuit court "may" order additional DNA testing when a petitioner shows that the testing is needed because "the results of the initial testing [we]re inconclusive or otherwise merit additional scientific analysis" (Miss. Code Ann. § 99-39-11(9)(d)) or that a DNA comparison could raise "a reasonable probability" of "a different outcome" by showing "the possible guilt of a third party"

(*id.* § 99-39-11(10)). App.25a. The Mississippi Supreme Court ruled that the circuit court did not abuse its discretion in ruling that petitioner failed to make either showing. App.25a-40a.

On the first showing: The Mississippi Supreme Court ruled that the circuit court "did not abuse its discretion by denying" more testing because petitioner "failed to introduce any reliable evidence as to why the allegedly inconclusive results merited additional scientific analysis or proof that the additional testing would produce results." App.31a; *see* App.25a-31a. The state supreme court "agree[d]" with petitioner "that the results" of the DNA testing were "arguably inconclusive." App.26a. But "merely because the results were inconclusive does not mean that the evidence should be subjected to additional testing." *Ibid.*; *see also* App.26a-29a. State law gives a circuit court "discretion to grant additional testing in light of inconclusive results." App.26a; *see* Miss. Code Ann. § 99-39-11(9)(d) (a circuit court, "in its discretion," "may" order additional testing when initial testing yields inconclusive results). The Mississippi Supreme Court ruled that the circuit court reasonably rejected additional testing because it found "no reasonable likelihood that further testing would produce probative results." App.26a. Petitioner claimed that "there is [a] 90 percent chance" that MitoTyping "will discover a full DNA profile from the evidence." App.29a. That claim rested on MitoTyping's 90% "general success rate for hairs less than 0.5 cm." App.30a. But, the state supreme court explained, petitioner "has not shown that MitoTyping's general rate of success will apply in this case as to these samples." *Ibid.* MitoTyping acknowledged that its success is affected by a sample's "integrity"; Bode "characterize[d] these hair samples to be small and note[d]

the possib[ility] that the DNA has degraded"; and, although petitioner "characterizes the samples as 'too small or too degraded' for Bode to study," "he does not show that MitoTyping will be able to overcome these issues to achieve results in this specific case." *Ibid.* So petitioner failed to show "a reasonable probability that a DNA profile would be obtained from the samples." App.31a.

On the second showing: The Mississippi Supreme Court ruled that the circuit court reasonably denied additional testing because petitioner failed to "'provide evidence that raises a reasonable probability that the trier of fact would have come to a different outcome' by demonstrating the possible guilt of a third party through DNA profile comparison." App.32a (quoting Miss. Code Ann. § 99-39-11(10)); *see* App.31a-38a. Petitioner "has not presented evidence that could link another possible suspect to the crime nor has he shown that DNA testing will prove a third party's involvement." App.34a. And a test showing DNA from a third party would "not call into question" petitioner's conviction. App.35a. Any such DNA could "have come from any source from the time the car was manufactured until the time the samples were obtained." *Ibid.* It "would not exonerate" petitioner, given the "additional," "conclusive," "overwhelming" "evidence presented at trial." App.36a. That evidence included the stolen items that, based on the testimony of multiple witnesses, linked petitioner to the murders, as well as testimony from petitioner's live-in girlfriend, cousin, and cellmate about petitioner's confession and other incriminating statements and actions. App.36a-37a. Petitioner "has failed to show that a full DNA profile, if gained from additional testing, would have raised a reasonable probability that the trier of fact would have come to a different outcome." App.38a.

Summing up these state-law rulings, the court observed that petitioner had been able "to test the evidence of his choice at the lab of his choice." App.38a. And he "has had multiple rounds of additional testing." App.39a. None of the tests—including the fingerprint-analysis he obtained—yielded results that helped his case or required the circuit court to order more testing. App.39a-40a. "[T]he circuit court did not abuse its discretion by denying additional testing." App.40a.

After rejecting petitioner's state-law arguments, the Mississippi Supreme Court rejected his argument, based on *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009), "that his right to due process will be violated" if he is not allowed "to transfer the evidence for additional testing." App.41a; *see* App.41a-43a. Noting that *Osborne* "refused to extend due process rights to include DNA testing of state evidence," the Mississippi Supreme Court found "no merit" in petitioner's argument "that denying him additional testing will violate his right to due process." App.42a. The court emphasized that petitioner "has pursued DNA testing and fingerprint analysis" many times. *Ibid.* Before trial he was allowed to inspect, examine, and test all physical evidence the State possessed. *Ibid.* He moved to discover and inspect evidence on state post-conviction review, but he failed to meet his burden to obtain that discovery. *Ibid.* In federal habeas proceedings the district court allowed him to inspect and obtain state evidence, but that court ultimately ruled that he had not met his burden to test that evidence. App.42a-43a. A decade ago the Mississippi Supreme Court granted him leave to obtain DNA and fingerprint analyses, which allowed him to pursue testing for years and led to the decision below.

App.43a. He "has been allowed extensive testing." App.42a. The court thus rejected his claim that denying him more testing violates the Due Process Clause.

Justice King, joined by Justice Kitchens, dissented. App.43a-52a. Justice King believed that additional testing could "exonerate" petitioner and should have been allowed. App.51a.

e. The Mississippi Supreme Court denied rehearing by a divided vote. App.53a.

REASONS FOR DENYING THE PETITION

Petitioner seeks this Court's review, claiming that the Mississippi state courts violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution by "arbitrarily" denying him additional DNA testing. Pet. ii; *see* Pet. 34-37. The decision below is correct and does not warrant further review.

1. The decision below does not satisfy any of the traditional certiorari criteria. Petitioner does not claim any conflict in the lower courts. He does not claim that this case presents a recurring question of federal law. Rather, he seeks error correction of a factbound, discretionary denial of a motion for more DNA testing. *See* Pet. 34-37. This case is not a vehicle for resolving any important question of federal law. Indeed, the petition may not even raise a bona fide federal question. The decision below focuses on whether petitioner met his state-law burden to obtain more DNA testing. *See* App.25a-40a. Petitioner's due-process argument boils down to a claim that the Mississippi Supreme Court misapplied state law. *See* Pet. 34-37. Petitioner may disagree with that court's application of state law, but the court thoroughly considered his claim and fairly applied state law. App.25a-40a. Its reasonable rejection of his state-law claim does not present a true federal issue.

2. To the extent that the Mississippi Supreme Court decided a federal issue, its decision was correct. Petitioner contends that the state supreme court "arbitrarily" denied him additional DNA testing. Pet. ii; *see* Pet. 34-37. He is wrong.

a. The decision below harmonizes with the Due Process Clause. The Mississippi Supreme Court carefully considered and correctly upheld the circuit court's rulings that petitioner had not made a showing that required additional DNA testing. *See* App.25a-40a.

First, the Mississippi Supreme Court soundly ruled that petitioner had "failed to introduce any reliable evidence as to why the allegedly inconclusive results merited additional scientific analysis or proof that the additional testing would produce results." App.31a; *see* App.25a-31a. Petitioner claimed that "there is [a] 90 percent chance" that MitoTyping "will discover a full DNA profile from the evidence." App.29a. But as the Mississippi Supreme Court recognized, petitioner failed to show "that MitoTyping's general rate of success will apply in this case as to these samples"—which were "small" and possibly "degraded." App.30a.

Second, the Mississippi Supreme Court soundly ruled that petitioner had failed to "provide evidence that raises a reasonable probability that the trier of fact would have come to a different outcome" by showing the possible guilt of a third party with DNA profile comparison. App.32a; *see* App.31a-38a. Petitioner did not "present[ ] evidence that could link another possible suspect to the crime" or "show[ ] that DNA testing will prove a third party's involvement." App.34a. And a test showing DNA from a third party "would not exonerate" petitioner, given the "additional evidence presented at trial." App.36a. That evidence included the stolen items that, based on

the testimony of multiple witnesses, linked petitioner to the murders, as well as testimony from petitioner's live-in girlfriend, cousin, and cellmate about petitioner's confession and other incriminating statements and actions. App.36a-37a.

In sum: Petitioner was able "to test the evidence of his choice at the lab of his choice," App.38a, and "had multiple rounds of additional testing," App.39a. None of the tests yielded results that helped his case or required the circuit court to order more testing. App.39a-40a.

The Due Process Clause entitles petitioner to nothing more. The lower courts reasonably applied governing state-law procedures that (petitioner appears to agree) are "facially adequate." Pet. 34. This Court has refused to endorse a freestanding due-process right to DNA testing. *District Attorney's Office for the Third Jud. Dist. v. Osborne*, 557 U.S. 52, 72-74 (2009). Far from being denied due process, petitioner "has been allowed extensive testing" and fair hearings of his claims. App.42a; *see* App.42a-43a. The Mississippi Supreme Court ruled correctly. At the least, it reasonably applied state law. Its ruling satisfies due process.

b. Petitioner contends that the state courts "arbitrar[ily]" denied DNA testing by "consider[ing] only the prosecutor's trial evidence and ignor[ing] the substantial evidence" that petitioner developed "that showed pronounced weaknesses in" the State's case. Pet. 35-36; *see* Pet. 18-33. These arguments fail. In faulting the State's case, petitioner repeatedly relies on a view of the trial evidence to which he is not entitled. *See* Pet. 18-22. The jury rejected petitioner's view of the facts and convicted him, the Mississippi Supreme Court has repeatedly declined to disturb those convictions, and in the decision below it reaffirmed that the evidence against

petitioner was "conclusive" and "overwhelming." App.36a. In arguing about claimed evidence developed since he was convicted, petitioner raises issues about the DOJ letters on hair analysis (Pet. 23-24), ballistics (Pet. 25-27), Jordan (Pet. 27 & n.16), Hathorn (Pet. 27-30), Parker (Pet. 30-32), and his alibi (Pet. 32-33). But the Mississippi Supreme Court has considered and rejected arguments that petitioner has made on all these fronts—some on direct review, some on the first round of state collateral review, others in this latest round of collateral review. *See supra* pp. 5-8. And petitioner is in no position to complain about that court's not giving more attention to these matters in its most recent decision. In the appellate briefing that led to the decision below, he did not mention the DOJ letters, ballistics, Jordan, Hathorn, Parker, or his alibi. He raised those points only when he sought rehearing. As a result, this case is not a vehicle to address those complaints.

Petitioner also contends that denying additional DNA testing is arbitrary because when he started DNA testing he had no way of knowing "that the hair samples had problems," "that the initial lab would be unable to develop profiles," and that another lab would be needed to test the samples effectively. Pet. 36; *see* Pet. 36-37. According to petitioner, the state courts treated Mississippi's DNA-testing framework as "a game of chance" and denied him the opportunity to get DNA results simply because he "guessed wrong" with the first lab he chose. Pet. 36. This is unavailing. The state courts denied petitioner additional testing not because he "guessed wrong" but because he failed to show "that the additional testing would produce results." App.31a. Petitioner clings to the idea that his newly favored lab was likely to obtain a result from the samples, but the state courts correctly rejected that

view of the facts, finding that petitioner had not shown that MitoTyping's general success rate would hold for the small, possibly degraded samples that petitioner wanted tested. App.30a. That reasonable finding comports with due process.

3. Last, it is hard to view the petition as something other than a delay tactic. For reasons given above, it is not a serious request for this Court's review. And, nearly thirty years after he was convicted, petitioner has continually sought to drag out his proceedings. He has had years of DNA testing. And for years—since 2019—he has possessed full or partial DNA profiles for five hairs from the victims' hands. App.12a-13a. He has never used these results to seek relief and has never presented to any court a comparative DNA analysis using those results. Instead, he has sought more testing. Besides failing to meet the standards to obtain more testing, petitioner has never established why testing hairs from Miller's car (which is what he now seeks, *see*, *e.g.*, App.89a-90a) would be more helpful than the profiles that he has already gotten for hairs from the victims' hands. Add to all this the latest in these proceedings: The Mississippi Supreme Court entered judgment against petitioner on June 30, 2022. Petitioner then filed a meritless request for rehearing—which was predictably denied, on November 10, 2022, but added over four months of delay. Petitioner then obtained an extension of time to file his petition for certiorari—so he did not need to file it until 120 days after rehearing was denied. On March 10, the day his petition was due, petitioner (who is represented by experienced capital-case counsel) filed a noncompliant motion for IFP status. The Clerk's Office gave him 60 days to file a compliant motion. Rather than promptly correct this error, he did not re-file until late May 2023—which is why, although the petition was deemed filed March 10, 2023, it

was not docketed until May 23, 2023. The timing of that latter filing pushed the petition into the summer recess, yet it should have been resolved this Term. This Court should not reward this approach—which bespeaks gamesmanship and abuse of the courtesy the Clerk's Office extended to petitioner—with a grant of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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June 12, 2023