

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**ZACHARY STRINGER****APPLICANT/PETITIONER****VS.****NO. 2017-M-00299****STATE OF MISSISSIPPI****RESPONDENT****STATE'S RESPONSE TO STRINGER'S "MOTION FOR LEAVE TO PROCEED IN
THE TRIAL COURT"****Statement of the Case and Facts**

Zachary Stringer was charged with the murder of his younger brother, Justin Stringer, which occurred on June 11, 2011. *Stringer v. State*, 131 So. 3d 1182, 1184 (Miss. 2014). The venue of his trial was transferred from Marion County to Jackson County. (Motion for Leave to Proceed in the Trial Court, p. 1). And, after a trial-by-jury, Zachary was convicted of the lesser-included offense of manslaughter. *Stringer*, 131 So. 3d at 1184. The trial court sentenced Zachary to a twenty-year sentence, with ten years to serve and ten years of post-release supervision, with five years reporting. *Id.* Zachary is currently serving his sentence under Earned Release Supervision, and, according to the Department of Corrections's website, he will be released on November 11, 2017.

In 2013, Stringer filed a direct appeal with this Court, challenging the legal sufficiency of the evidence. *Stringer*, 131 So. 3d at 1184. And, on February 13, 2014, this Court affirmed his conviction. *Id.* On appeal, Stringer argued that the State failed to present sufficient evidence to warrant a conviction for culpable negligence manslaughter. *Id.* at 1190. He argued that the

evidence presented at his trial showed that he killed his brother by accident, and that he committed no affirmative act of culpable negligence. *Id.*

This Court found that the physical evidence, as well as Zachary's statements to investigators, was sufficient to prove that he committed manslaughter. *Id.* In its summary of the evidence, this Court explained:

Although Zachary later admitted fault in Justin's killing, he initially claimed that Justin had shot himself. In his second statement, Zachary stated that he had gotten a "conversation piece"—his rifle—to have a talk with Justin, and the rifle had discharged accidentally. He admitted staging the scene and putting his rifle away to make Justin's death look like an accident. In his third statement, Zachary said that he had threatened to shoot Justin if Justin continued to pester him. He also admitted loading the rifle. Zachary still claimed that the rifle discharged accidentally. Evidence also was presented that Zachary's rifle had a "hard" trigger, and, when tested by the Mississippi Crime Laboratory, the rifle did not discharge accidentally or appear to be faulty.

Zachary argues that he did not know the rifle was loaded, and he did not deliberately point the rifle at Justin. The evidence, however, tells a different story. In at least one statement, Zachary admits that he loaded the rifle and threatened to shoot Justin. Also, the physical evidence—Justin's gunshot wound—suggests that the rifle could have been pointed directly at Justin's head. Zachary complains that the State failed to prove the bullet's angle of trajectory and, thus, failed to disprove Zachary's theory that the shooting was an accident. While evidence of the bullet's angle of trajectory would have supplemented the State's evidence, Zachary's provides no caselaw which mandates that such evidence is necessary for a conviction.

Id. at 1191. In affirming Stringer's conviction, this Court noted that, "[e]ven where a defendant claims the firing of a gun is accidental, pointing a loaded gun at an individual supports a conviction of manslaughter because the defendant's actions 'show a conscious, wanton and reckless disregard of the likely fatal consequences of his willful act which created an unreasonable risk.'" *Id.* at n.6 (quoting *Tait v. State*, 669 So. 2d 85, 89 (Miss. 1996)(quoting *Jernigan v. State*, 305 So. 2d 353, 354 (Miss. 1974)).

On March 3, 2017, Stringer filed a Motion for Leave to Proceed in the Trial Court to file a petition for post-conviction relief. And, on September 1, 2017, this Court ordered the State to

respond to Stringer's Motion. The Court also asked the State to report on the status and custody of the Remington rifle at issue. On September 25, 2017, Jason Davis, of the Attorney General's Office confirmed that the rifle was in the possession of the Marion County Circuit Court, and was in the same condition it was in at the time of Stringer's trial and had not been subjected to additional testing since trial.

Stringer claims that a recall issued by Remington, the manufacturer of the gun that was used to kill his brother, is evidence that was undiscoverable at the time of trial that requires his conviction to be vacated. In support of his motion, Stringer submitted the affidavit of attorney Robert Chafin, which contained attachments including portions of a deposition of Jim Ronkainen, customer complaints submitted to Remington, and the affidavit of John Butters. Stringer also submitted an affidavit from his father, his own affidavit, and an affidavit from Richard Barber.

Robert Chafin's Affidavit:

Robert Chafin is a personal injury attorney who has handled "approximately 25 product liability cases involving Remington Model 700 rifles that fired without a trigger pull resulting in injury and/or deaths." (Motion for Leave to Proceed in the Trial Court, Exhibit 6, p. 1 ("Ex. 6")).

In his affidavit, Chafin described incidents related to Remington Model 700 firearms, as well as what he classified as a manufacturing defect in Remington Model 700 XMP rifles. (Ex. 6, p. 1). According to Chafin, an assembly technique used in the manufacture of Remington Model 700 XMP rifles—whereby the "blocker screw" and "engagement screw" were rolled "in a glue-like substance called 'Loctite'"—caused excess glue to be deposited on the blocker screw and subsequently transferred to the trigger. (Ex. 6, p. 1). Chafin claims that the excess glue "causes the blocker screw to 'stick' to the trigger which creates a dangerously defective condition in XMP Model 700 rifles." (Ex. 6, p. 2).

In support of his claim that the excess glue creates a defective condition, Chafin cited to the deposition of James Ronkainen, Remington's chief engineer on the XMP. (Ex. 6, p. 2). Chafin claimed that, when deposed, Ronkainen stated, "with the intimate connection between [the trigger and the blocker screw], as the safety is moved from safe to fire, the interface between those two, the blocker could pull the trigger along and forward with that." (Ex. 6, p. 2). However, this response does not completely portray Ronkainen's statement. Through a series of questions, Chafin sought to determine whether excess Loctite would cause a weapon to fire without the trigger being pulled. (Ronkainen Deposition Transcript, Ex. 6-A, p. 23-30). Although the complete transcript has not been provided to this Court, the portions of the deposition transcript that were attached reveal that Ronkainen stated that the excessive Loctite would only have the potential to cause the trigger to be pulled if it had not yet cured and was in liquid form.¹ (Ex. 6-A, p. 25; 30-32).

To demonstrate that other Remington rifles had a history of firing with the safety released, but without the trigger being pulled, Chafin attached a complaint that was submitted to Remington's Product Services department. (Ex. 6-B). The complainant averred that, when exposed to cold temperatures ("winter temps of approximately [t]hirty degrees") "the rifle fired as soon as the safety was released" and "continued to display this flaw approximately a dozen times on a[n] empty chamber." (Ex. 6-B, p. 3). However, according to the complainant, "the rifle stopped malfunctioning as soon as it was exposed to warmer temps." (Ex. 6-B, p. 3). In the "Factory Repair" form that was submitted along with the complaint, the complainant explained that his firearm only displayed a problem "in cold temp 35 [degrees] or lower." (Ex. 6-B, p. 5).

¹ Only the transcript's cover page, and pages 22 to 25, 30 to 33, and 38 to 41 of the deposition transcript were attached, as Exhibit A, to Chafin's affidavit.

Chafin also attached the affidavit of John T. Butters, that was used in a civil case: *William Dan Edge and Jessie Edge v. Remington Arms Company, Inc.*² (Ex. 6-C). In that affidavit, Butters stated that he had reviewed a number of customer complaints regarding Remington rifles being fired without the trigger being pulled. (Ex. 6-C, p. 4). According to Butters, “[h]undreds of customer complaints” revealed that excess sealant on the blocker screw and trigger causes the rifle to fire without the trigger being pulled. (Ex. 6-C, p. 6). And, “Remington has been able to reproduce such malfunctions in the lab at temperatures ranging up to 45F.” (Ex. 6-C, p. 6). According to Butters, incidents of firing without the trigger being pulled “may manifest itself via the rifle firing upon release of the safety, closing of the bolt, opening of the bolt, and from what is referred to as a jar off which encompasses any other small impact or vibration that may result in the delayed discharge of the rifle.” (Ex. 6-C, p. 6).

Roger Dale Stringer’s Affidavit:

Through his affidavit, Stringer’s father, Roger Dale Stringer, explained that, after his son was convicted, he became aware that “a lot of Remington Model 700 gun owners had experienced their rifle firing without their finger on the trigger,” and that Remington had announced a recall. (Ex. 7, p. 2-3). Although Roger did not believe Stringer’s version of events, even after he was convicted, he stated in his affidavit that, based on Remington’s recall, he believes that Stringer’s gun fired without him pulling the trigger. (Ex. 7, p. 3).

Zachary Stringer’s Affidavit:

Stringer re-stated his version of events, as he had at trial. (Ex. 8, p. 1-2). He also explained that because the recall did not occur until after he was convicted, the evidence was not presented at his trial. (Ex. 8, p. 3).

² That civil case was the result of an incident that occurred on December 23, 2011. (Ex. 6-C, p. 7).

Richard Barber's Affidavit:

In addition to Chafin's affidavit, his own affidavit, and the affidavit from his father, Stringer also provided the affidavit from a newly-retained expert: Richard Barber. (Ex. 9). In Barber's personal opinion, there was no evidence indicating or suggesting that Stringer had motive, intent or willful premeditated design to kill his brother. (Ex. 9, p. 5). Without reference to the fact that Stringer's trial was moved to a different venue, Barber opined that "public bias and prejudice" possibly "influence[d] [the] jury to render a conviction of manslaughter." (Ex. 9, p. 14). Barber offered his opinion that, if the prosecutors had the information regarding the recall prior to trial, it may have "reconsidered advancing murder charges against [Stringer] for the death of his brother." (Ex. 9, p. 6-7).

In his affidavit, Barber explained that he reviewed the trial record and conducted an independent investigation in order to "offer insight and opinions to afford [Stringer] the ability to challenge the circumstantial evidence resulting in his 2013 conviction." (Ex. 9, p. 4). Based on Barber's questioning of Lori Beall, the state crime lab technician who conducted functionality tests on the rifle, Barber opined that Beall should not have been permitted to perform a drop test on the rifle without Stringer's knowledge and consent, and without his own expert being present.³ (Ex. 9, p. 5). According to Barber, the drop test was conducted at "heights closely approaching what is considered to be 'abusive testing.'" (Ex. 9, p. 5). It appears, from his affidavit, that the testing is considered "abusive" or "destructive" because the tests have a potential to effect the "integrity of the evidence." (Ex. 9, p. 5, n. 3).

Based on the fact that circumstantial evidence was used to support Stringer's conviction, and based on his perception that the State argued that a "Remington Model 700 just cannot,

³ Barber points out that Stringer did not have his own expert present when the tests were conducted. (Ex. 9, p. 5, n. 3). He also complains that Stringer did not have access to his own firearms expert at any time during trial. (Ex. 9, p. 6; p. 18). However, as the record reveals, Stringer did not retain, or seek to retain, his own firearms expert.

would not and did not possibly fire without the trigger being pulled” without looking into whether Stringer’s claim of what happened was “remotely plausible,” Barber opined that “it might have just been an easier proposition for the public and the district attorney to believe, absent any evidence suggesting otherwise and insist [Stringer] murdered his brother in cold blood (Ex. 9. p. 5-6).

Response

I. Stringer should not be granted leave to present his post-conviction claim.

Stringer seeks to be relieved of his manslaughter conviction, and to be granted a new trial. The Post-Conviction Relief Act provides that

[a]ny prisoner in custody under sentence of a court of record of the state of Mississippi who claims . . . [t]hat there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice . . . may file a motion to vacate, set aside or correct the judgment or sentence”

Miss. Code Ann. § 99–39–5(1)(e). A prisoner is not entitled to post-conviction relief unless he “proves by a preponderance of the evidence that he is entitled to such.” Miss. Code Ann. § 99-39-23(7). In deciding whether new evidence warrants vacation of a conviction, courts should determine “whether or not the newly discovered evidence is sufficient so that if a reasonable fact finder knew said information then that reasonable fact finder may have reached a result different from previous result reached.” *Brewer v. State*, 819 So. 2d 1169, 1174 (Miss. 2002)(remanding for an evidentiary hearing due to the heightened standard of review that applies in death penalty cases).

Stringer claims that, pursuant to Mississippi Code Annotated section 99-39-5(1)(e), the fact that Remington issued a recall of the model of his gun is material evidence not previously presented that warrants vacation of his conviction.

In *Watson v. State*, 483 So. 2d 1326 (Miss. 1986) and *Batiste v. State*, 184 So. 3d 290 (Miss. 2016), this Court demonstrated that evidence that a witness presented perjured testimony at trial, or evidence that bailiffs unduly influenced the jury is “the sort of evidence of material facts, not previously presented and heard,” which is contemplated by the PCR Act. *Batiste*, 184 So. 3d at 292. But evidence that is merely cumulative or impeaching of evidence that was presented at trial is not enough to warrant post-conviction relief. See *Brewer v. State*, 819 So. 2d 1169, 1172 (Miss. 2002)(citing *Ormond v. State*, 599 So. 2d 951, 962 (Miss. 1992)).

The fact that Remington issued a recall of some of its guns, due to the possibility that they could, “under certain circumstances, unintentionally misfire⁴,” is not evidence that would have created a different result at Stringer’s trial. This new evidence leads to speculation that Stringer’s gun might have misfired; however, the evidence that was produced at his trial shows that it did not.

At trial, Stringer’s father, Roger Dale Stringer, testified that he did not recall any misfires or mechanical problems with the gun; he did not remember it ever discharging upon being dropped; and he experienced no issues as far as it misfiring. (TR 340-341). Furthermore, Lori Beall, who performed a functional reliability test of the firearm, testified that, after testing the gun, there was no accidental discharge. (TR 249). Beall testified that, in addition to a drop test, she performed a test whereby she used a rawhide mallet and hit the firearm’s bolt action to see if it would accidentally fire—it would not. (TR 249).

At the absolute most, any evidence regarding a Remington recall is impeaching, and, therefore, does not warrant a new trial. But the opinions and exhibits that were attached to

⁴ For clarification, the word “misfire” was used at trial, and is used repeatedly throughout Stringer’s motion, and the exhibits attached thereto. However, as Richard Barber pointed out in his affidavit, it is likely that this is an improper description. (Ex. 9, p. 8). According to Barber, the word “misfire” is “generally classified as an ammunition malfunction,” while, what is purported to have happened to Stringer’s gun is that it “accidentally discharged.” (Ex. 9, p. 8). Nevertheless, the word “misfire” will also be used by the State throughout this response.

Stringer's proposed PCR petition, show that his claim is without merit; therefore, he should not be granted leave to proceed in the trial court.

The customer complaint that was attached to Robert Chafin's affidavit shows that the "misfires" that were reported to Remington occurred in temperatures below 35 degrees, and that Remington was able to recreate the misfire in temperatures up to 45 degrees Fahrenheit. Justin Stringer was killed in June. It is highly unlikely that the weather conditions at the time of the shooting were similar to those from the reported instances of misfire.

Furthermore, the new evidence would not change the outcome at a new trial. "Manslaughter is every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law." *Stringer*, 131 So. 3d at 1190-91 (citing Miss. Code Ann. §97-3-47). Chafin's affidavit demonstrates that Stringer's model of gun might have a risk of misfiring when the safety is moved from safe to fire. As this Court pointed out in the opinion issued in Stringer's direct appeal, Stringer pointed a loaded gun at his brother. And although he claimed that the firing of the gun was accidental, this act alone supported his conviction for manslaughter. *Stringer*, 131 So. 3d at n.6. Pointing a loaded gun, with the safety moved to fire only enhances the evidence against Stringer that supports his manslaughter conviction, it does not reduce it.

And, contrary to Barber's opinion, the fact that Stringer did not obtain his own expert at the time of trial, and that, due to new evidence, the prosecutor might have chosen not to charge Stringer with murder, does not warrant a new trial in this case. Stringer was not prevented from obtaining his own firearms expert to assist in his defense at the time of trial. The decision not to do so was one of trial strategy, and is not grounds for a new trial. Furthermore, Stringer was convicted of manslaughter, not murder. Barber's opinion that the State might have abandoned its murder charge, based on new evidence, is speculative and irrelevant.

Conclusion

Stringer has not shown, by a preponderance of the evidence, that there is any evidence that would lead to a different result at a new trial. Therefore, this Court should find that Stringer's claim for post-conviction relief is without merit, and should deny his request to be granted leave to present his motion for post-conviction relief in the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: s/ Barbara Byrd
BARBARA BYRD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 104233

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed (and mailed by United States Postal Service) the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Thomas M. Fortner, Esq.
LOWREY & FORTNER P.A.
525 Corinne Street
Hattiesburg, MS 39401

This the 2nd day of October, 2017.

s/Barbara Byrd
BARBARA BYRD
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205-0220
Telephone: (601) 359-3680