IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

DAMIEN WAYNE ECHOLS **PETITIONER**

NO. CR 93-450A

STATE OF ARKANSAS **RESPONDENT**

RESPONDENT'S PRE-HEARING BRIEF FOLLOWING REVERSAL AND REMAND OF THE DENIAL OF PETITIONER'S MOTION FOR NEW TRIAL UNDER ARK. CODE ANN. §16-112-208(e)(3)

Comes now the State of Arkansas, by and through counsel, Scott Ellington, Prosecuting Attorney, Second Judicial District, Dustin McDaniel, Attorney General, and David R. Raupp, Senior Assistant Attorney General, and for its Pre-Hearing Brief states:

On Petitioner Echols' appeal, Echols v. State, 2010 Ark. 417, ___ S.W.3d ___, the Arkansas Supreme Court reversed and remanded the September 2008 denial of his motion for a new trial of his three 1994 capital-murder convictions under Ark. Code Ann. §16-112-201 *et seq.* (Repl. 2006), which motion was based on DNA-test results that he claimed excluded him as a source and which testing was conducted by agreement of the parties under a previous version of the statute. The Supreme Court concluded that the denial of Echols' motion without a hearing under §16-112-208(e)(3) was founded on erroneous interpretations of the statutes under which he sought relief, principally because the pleadings did not conclusively show that he was entitled to no relief under the statute in light of all other evidence. Id. at 15, ___ S.W.3d at ___. The Court concluded that on remand, following an evidentiary hearing, this Court must hear Echols' new-trial motion to consider his DNA-test

results "with all other evidence in the case regardless of whether the evidence was introduced at trial to determine if Echols has established by compelling evidence that a new trial would result in acquittal." Id., ___ S.W.3d at ___ (internal quotation and editor's marks omitted). The Supreme Court reached like conclusions in the cases of Echols' jointly tried codefendant, Charles Jason Baldwin, and separately tried codefendant, Jessie Lloyd Misskelley, Jr., relying on its decision in Echols. Baldwin v. State, 2010 Ark. 412, at 1-2; Misskelley v. State, 2010 Ark. 415, at 4. The Court also reached in those cases the issue of additional testing, which was not raised by Echols, and reversed and remanded as to the denial of additional testing requests by Baldwin and Misskelley, concluding that the denials were wrongly founded on the present version of the statute while the requests were made under the former version. See Baldwin, 2010 Ark. 412, at 2; Misskelley, 2010 Ark. 415, at 5.

The Supreme Court's remand for an evidentiary hearing on Echols' motion for a new trial and the like remands as to the like motions of his codefendants' raise four initial questions for this Court. First, should the evidentiary hearings be held jointly; second, should additional testing be permitted as to any petitioner; and third, what is the scope of "all other evidence in the case" to be considered as to extant DNA-test results (and new results, if ordered and obtained); and, fourth, how should the Court receive such "all other evidence." The State offers the following by way of guideposts for this Court for conducting the hearing on remand.

First, judicial economy and convenience to the parties recommend a joint hearing for the presentation of evidence. Undoubtedly some testimony, such as that of the three petitioners' DNA experts, will be common to all three cases. Indeed,

based on the extant pleadings and exhibits of the petitioners and the State filed in 2008 as to the motions seeking new trials and on which this remanded hearing is founded, most of the evidence to be heard is common to all three cases. If some witnesses are unique to only one or two of the petitioners, it may be possible to schedule their testimony to permit the other petitioners to be absent. The State, of course, will always be present. Experience in these cases, teaches, however, that coordinating the schedules of the lawyers and witnesses for joint hearings requires calendaring hearing dates as much as nine months or more in advance. The State anticipates that, given the scope of the possible evidence to be considered, hearing dates may need to be scheduled starting this fall and will not conclude before well into the next calendar year. Such scheduling will be driven by the answers to the remaining questions, which the State discusses only briefly for pre-hearing purposes.

Second, additional testing should not be permitted to any petitioner. Echols did not ask for it, and the Supreme Court remanded the denials of Baldwin's and Misskelley's requests for additional testing for reconsideration by this Court under the former version of the statute in effect at the time of their additional requests. Baldwin, 2010 Ark. 412, at 2; Misskelley, 2010 Ark. 415, at 4-5 (citing Baldwin). In any event, Baldwin's and Misskelley's requests, even considered under the former version of the statute, Ark. Code Ann. §16-112-202(c)(1)(B) (Supp. 2003), should be denied as cumulative to the identity and animal-predation evidence they already advanced in the extant record and more of which no doubt will be offered on remand. However, the Court should not determine the matter on simultaneous briefing at this point; rather, any requests for additional testing (both as remanded or

newly made), should be resolved on adversarial briefing by motions and responses with cut-off dates set prior to the first hearing dates, which presumably will be set later this year.

Third, what "all other evidence" includes for purposes of the remands here is a less than certain proposition. On the one hand, the Supreme Court explained that Misskelley's immunized statement would be relevant in deciding whether to grant a new trial under its interpretation of §16-112-208(e)(3) from Echols. See Misskelley, 2010 Ark. 415 at 7. On the other hand, while the Supreme Court in this principal case, see Echols, 2010 Ark. 417, at 12-13, ___ S.W.3d at ___, advanced a literal reading of the statute bounded by a relevancy gateway for the admission of evidence, it offered little more guidance. For example, when discussing the 2008 denial order's ruling that juror-misconduct evidence could not be considered under the law-of-the-case doctrine, the Supreme Court merely observed that evidence raised in prior postconviction proceedings "may or may not be relevant under section 208(e)(3) to a determination of whether a new trial would result in acquittal." Id. at 13, n.4, ___ S.W.3d at ___ n.4; see also Baldwin, 2010 Ark. 412, at 2 (observing that, while Baldwin is barred from relitigating any issue to attack his convictions collaterally, "evidence of juror bias and misconduct may or may not be relevant" under §16-112-208(e)(3)). While the State cannot imagine how a previous factfinder's alleged bias or misconduct in evaluating evidence is relevant to this Court's determinations anew about that and additional evidence, the relevancy question should be resolved on adversarial briefing. Indeed, given that the parties likely will dispute not only whether juror-misconduct evidence, but also whether other particular or categorical

items of evidence, are relevant to the question on remand, here, too, the Court should set cut-off dates for motions and responses to aid it in determining the scope of relevant evidence under the "all other evidence" remand.

Fourth, having failed in resolution of their motions without a hearing, the State prefers live testimony for its challenges to, and this Court's resolution of, the petitioner's new-trial claims at a hearing, although the statute permits receipt of evidence by affidavit, deposition, or oral testimony, as the Supreme Court observed. Echols, 2010 Ark. 417, at 15, ___ S.W.3d at ___ (citing Ark. Code Ann. §16-112-205(b)(5). Given that Court's remand for a hearing, it is patent that some oral testimony must be heard, although undoubtedly this Court could receive evidence in the other forms. Additionally, the transcripts of previous proceedings in the cases might be relied upon, should the parties and the Court find them adequate to present evidence for the purpose of resolving the motions for new trials. Here, again, however, the Court should consider adversarial pleadings by the parties prior to the onset of hearing dates in order to resolve how it will receive evidence on the petitioners' motions for new trial. Thereafter, the parties can then identify what witnesses will be heard live.

In sum, prior to the onset of hearing dates, the State suggests that the Court should set motions and responses cut-off dates for its resolution of any requests for additional testing, the scope of relevant evidence under §16-112-208(e)(3), and the manner of its receipt by the Court during the anticipated hearings in the coming year or more. Finally, the State observes that, given that the controlling pleadings under the statute were filed in 2008 and addressed statutory arguments now resolved by the

Supreme Court, it may be useful to the Court for the petitioners and the State to file updated new-trial pleadings under §16-112-208(e)(1) & (2), along with motions and responses addressing the evidentiary arguments left by that Court to this Court's resolution.

Respectfully submitted,

SCOTT ELLINGTON
Prosecuting Attorney

DUSTIN McDANIEL
Attorney General

DAVID R. RAUPP
Senior Assistant Attorney General

BY: _____

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Scott Ellington, Prosecuting Attorney, do hereby certify that I have served a copy of the foregoing pleading, by mailing a copy of same, by U.S. Mail, postage prepaid, to counsel for petitioner this 18th day of February, 2011, as follows:

Dennis P. Riordan, Esq.
Donald M. Horgan, Esq.
RIORDAN & HORGAN
523 Octavia Street
San Francisco, CA 94102

Stephen L. Braga, Esq.
Ropes & Gray LLP
One Metro Center
700 12th Street, NW, Suite 900
Washington, DC 20005-3948

Deborah R. Sallings, Esq.
101 East Capitol, Suite 201
Little Rock, AR 72201

_____
SCOTT ELLINGTON