IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS

WESTERN DISTRICT

CRIMINAL DIVISION

DAMIEN WAYNE ECHOLS,	)	CR-93-450A
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
STATE OF ARKANSAS,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER DAMIEN ECHOLS'S REPLY
IN SUPPORT OF MOTION FOR A NEW TRIAL
(Ark. Code § 16-112-201, et seq.)

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INTRODUCTION

At the time petitioner Echols filed his motion for a new trial in this Court in April of this year, nearly fifteen years had passed since the horrifying murders of three eight year old boys that give rise to the present prosecution. It might be assumed that all information bearing on the accuracy of the verdicts and the fairness of the trial proceedings in this case necessarily had been unearthed in that period of time; anything not known after a decade and a half never would be. Yet the legal landscape of this case has taken a new and dramatic shift since April. Extremely reliable information has surfaced for the first time that, if proven to be true — and it will be — establishes beyond any doubt that Echols' murder convictions and sentence of death offend the fair trial protections provided by the United States Constitution.

Even before he was seated as a member of the jury he would eventually direct as foreman, Juror Four had violated his oath to this Court. He deliberately failed to give truthful answers to voir dire questions in order to avoid being removed from the venire; during the taking of evidence, he constantly discussed the case with an attorney he had hired to represent his close relative in a separate criminal matter; he informed other members of the jury of matters not in evidence in order to persuade them to convict on the basis of that unadmitted and inadmissible information; he expressed his intention to convict Echols even though he himself believed that the evidence presented in court did not suffice to prove guilt beyond a reasonable doubt; and, once he had succeeded in that objective, he lied to the Court regarding his conduct as a juror.

None of this information newly presented to the Court could have been obtained or presented by petitioner sooner than this June, as it was held in confidence by the attorney in question until he obtained independent legal advice that the information was not subject to a claim

of attorney-client privilege. Nor is consideration of the information barred by Arkansas Rule of Evidence 606, as it concerns events before formal jury deliberations commenced. Having been denied the fair trial constitutionally guaranteed him, petitioner's execution pursuant to a void judgment would be no more legitimate than had he never been tried at all.

The state will no doubt respond that this new information is irrelevant to the present proceeding under Arkansas's scientific evidence statutes. Yet the state attempts to attack the adequacy of the scientific proof offered by Echols in support of his present motion for a new trial on the ground that petitioner must present "necessarily extraordinary proof" for nothing else "could undo a presumptively valid criminal conviction." (Opposition, at 18) Once it is established that Echols's convictions are invalid and not entitled to conclusive effect, it will be apparent that the new scientific evidence, along with all other evidence bearing on guilt or innocence, would preclude a reasonable jury from convicting at a new trial.

In his opening brief, Echols demonstrated that neither he nor his co-petitioners, Jason Baldwin or Jesse Misskelley, can be linked to any of the DNA recovered from the crime scene or from the bodies of the three victims in this case. On the other hand, he has presented reliable DNA evidence that, if credited, conclusively excludes him and his co-petitioners as the source of the DNA recovered at four relevant locations, including a ligature used to bind one of the victims; a tree stump at the crime scene; a cutting from the jeans of one of the victims;[1] and the penis of one of the victims. Given that the new scientific evidence excludes him as the source of relevant

[1] The exhibit demonstrating the presence of foreign DNA on the cutting from the pants of Steven Branch was submitted as a supplemental exhibit ("OOOO") by counsel for petitioner Jesse Misskelley in his Rule 37 proceedings. As with other exhibits already placed before the Court by counsel for Misskelley or Jason Baldwin, Echols incorporates them by reference into his motion

DNA, petitioner is entitled to a new trial under Arkansas's new scientific evidence statute (Ark. Code § 16-112-201, et seq.) insofar as he can demonstrate that

> the DNA test results, when considered with all other evidence in the case regardless of whether the evidence was introduced at trial, establish by compelling evidence that a new trial would result in an acquittal.

See Ark. Code § 16-112-208(e)(3); see also § 16-112-201(a)(2).

As Echols has maintained — and as a common sense reading of the statute in its entirety demonstrates — the showing needed to obtain new trial relief under the foregoing new trial provision is distinct from that which conclusively establishes actual innocence and thus merits setting aside the judgment of conviction in its entirety. See § 16-112-201(a)(1); petitioner's Motion for a New Trial ("Motion"), at 37-44. The state's opposition ignores the express wording and meaning of the statute, including § 16-112-208(e) and other provisions, in a transparent effort to erect legal hurdles that no petitioner could ever surmount and that the legislature did not intend. See, e.g. Opp., at 14 ("Indeed, as to crimes like those committed by Echols, it may be that DNA-testing results can never conclusively support a claim of actual innocence.") The state goes so far as to argue that in a case in which a petitioner seeks a new trial partly on the basis of DNA results that exclude him as the contributor of relevant physical evidence, that petitioner is statutorily barred from also presenting newly obtained evidence of innocence such as a confession of a third party to the charged crime. To so read a statutory scheme intended to protect the innocent from wrongful conviction would be utterly nonsensical. Equally unpersuasive is the state's application of the statutory provisions to the facts presented by petitioner in this

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and will file copies of them with the Court at the next appearance on August 20, 2008.

proceeding.

Echols discusses the state's legal claims and factual arguments in turn below.

I. THE STATE MISSTATES THE LEGAL STANDARD GOVERNING GRANTS OF NEW TRIALS UNDER THE STATE'S NEW SCIENTIFIC EVIDENCE STATUTE

A. The Primary Guide to Interpreting the New Scientific Evidence Statute Is the Plain Meaning of the Language the Statute Employs

As discussed further in the subsections below, the first and primary rule of statutory interpretation is the plain meaning rule, which has particular application to determining the nature of the court's task in assessing petitioner's instant application for relief under Ark. § 16-112-201 et seq. As the state Supreme Court recently explained:

> . . . [T]he first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *State v. Britt*, 368 Ark. 273, 244 S.W.3d 665 (2006). When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. A statute is ambiguous only where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning. When a statute is clear, however, it is given its plain meaning, and we will not search for legislative intent; rather, that intent must be gathered from the plain meaning of the language used. We are very hesitant to interpret a legislative act in a manner contrary to its express language, unless it is clear that a drafting error or omission has circumvented legislative intent. *Id.*

Maddox v. City of Fortsmith, 369 Ark. 143, 146-47, 251 S.W.3d 281, 284-285 (2007); see also *Smith v. Fox* 358 Ark. 388, 392, 193 S.W.3d 238, 241 (Ark. 2004) ("When reviewing issues of statutory interpretation, the basic rule is to give effect to the intention of the legislature, making use of common sense, and assuming that when the legislature uses a word that has a fixed and

commonly accepted meaning, the word at issue has been used in its fixed and commonly accepted sense." [Citations omitted])

B. The State's Analysis of Ark. Code § 16-112-208(b) Is Both Flawed and Irrelevant

The state's initial argument in opposition to petitioner's motion rests on Ark. Code § 16-112-208(b), which states:

> If the deoxyribonucleic acid (DNA) test results obtained under this subchapter are inconclusive, the court may order additional testing or deny further relief to the person who requested the testing.

The state concedes that the term "conclusive" has not been defined elsewhere in the statute (Opp., at10; see also Opp., at 12 [". . . [T]he measure of inconclusiveness under § 16-112-208(b) . . . is a case of first impression for this Court . . ."]), but nevertheless interprets 208(b) as mandating the denial of relief in any form where further testing is not appropriate and the present DNA results — no matter how scientifically conclusive that a petitioner is not the source of relevant DNA — are not themselves legally conclusive in favor of innocence. See, e.g., Opp., at 10-12.

There are enormous problems with the state's analysis under § 16-112-208(b). To begin, suppose a situation in which a defendant was convicted of a rape-murder at a trial in which the prosecution argued strongly that semen on the victim's clothing was the same blood type as the defendant's, and on that basis the jury should find him guilty. Years later, DNA testing conclusively establishes that the semen came not from the defendant but from the victim's husband, who could not have committed the crime. Furthermore, a third party recently confessed to the murder in question. According to the state, while the DNA evidence conclusively excludes

the defendant as the contributor of the semen and therefore wholly undermines the state's theory at trial, it alone does not establish his innocence, as it does no more than prove the semen evidence is not relevant to the crime. (Opp., at 14: "It is common sense that a person's exclusion as the source of some biological material found at a murder scene neither means he was not there, nor that he was not the killer.") Since the scientific evidence is not (and cannot be) conclusive on legal innocence, relief must be denied, the exculpatory confession notwithstanding. In essence, the state argues that in enacting § 16-112-208(b) for the purpose of exonerating the innocent, the Legislature passed a statute under which relief can never be obtained.

In fact, neither subsection 208(b) nor any other provision of the Arkansas statute declares that the Court is authorized to deny relief where, as here, the petitioner has presented evidence of test results that, if credited, are *scientifically* conclusive, i.e., where they establish that the petitioner cannot have been the source of biological material from locations already deemed relevant pursuant to the Court's initial testing order. To the contrary, the logical, common sense reading of 208(b) is that it permits (and does not mandate) the denial of relief only where the DNA results are scientifically inconclusive in the sense that they neither include nor exclude the petitioner as the source of any relevant sample — not the case here.

But the simplest response to the state's argument as to § 16-112-208(b) is that Echols has not sought exoneration but a new trial under § 16-112-208(e)(3). The latter subsection expressly requires the Court to assess the DNA test results in light of all the evidence and grant a new trial under specified conditions where, as an initial matter, those results "*exclude* a person as the source of the deoxyribonucleic acid (DNA) evidence." *Ibid*. (emphasis added); cf. *Weiss v. Maples*, 369 Ark. 282, __ S.W.3d __ (2007) (statutes relating to the same subject are said to be

in pari materia and should be read in a harmonious manner, if possible.) Stated otherwise, where, as here, the DNA results, albeit not conclusive as to legal innocence, arguably establish a relevant exclusion and no relevant inclusions, they trigger the trial court's obligation to weigh the significance of those results for new trial purposes in a calculus that includes consideration of all other evidence in the case, previously admitted or not, as subsection (e)(3) provides.[2]

In addition, while the Arkansas statute does, indeed, afford relief to defendants on the grounds of actual innocence, the state's argument that this term encompasses only those who can achieve absolute "exoneration" through a conclusive legal showing of such innocence (Opp., at 11) imposes on the statute a meaning that simply does not appear therein. Again, the statute's express terms control, and, as petitioner explained in his opening motion, a petitioner able to prove innocence in the absolute measure cited by the state is entitled to exoneration in the form of a judicial order vacating the conviction in its entirety. See Motion, at 37 et seq.; § 16-112-201(a)(1). By contrast, the petitioner who can demonstrate that the DNA results, weighed with the other evidence, would preclude a reasonable jurist from convicting are entitled to the lesser remedy of an order for a new trial. Compare § 16-112-201(a), (a)(1) with § 16-112-208(e)(3). But the latter remedy no less than the former serves the purpose of "exoneration" for the "actually innocent" where the state fails to prove guilt at a retrial before a jury informed of all relevant and reasonably available facts, including the new scientific evidence never presented prior to the initial judgment of conviction. The statute's interest in protecting the actually innocent is thus wholly compatible with the new trial provisions contained in § 16-112-208(e)(3).

[2] The analysis mandated by the express language set forth in § 16-112-208(e)(3) is discussed further in subsection E, below.

C. To The Extent That Out Of State Law Is Helpful In Interpreting The Arkansas Statutes, The Court Should Look To Illinois Precedent

The state's reliance on Louisiana's DNA statute and related precedent in support of the claim that, under 208(b), relief under the Arkansas statute requires a conclusive showing of legal innocence (Opp., at 8, 12-13) is misplaced. The state has made no showing that the Arkansas statute is modeled on or should be guided by interpretation of the Louisiana statute or related Louisiana state precedent. On the other hand, as the Arkansas Supreme Court observed in *Johnson v. State*, 356 Ark. 534, 544-545, 157 S.W.3d 151, 160 (2004), "Illinois was the first state to pass postconviction DNA testing laws, and Arkansas's Act 1780 was largely modeled after the Illinois laws." Accordingly, Illinois law concerning its new scientific evidence statute *is* persuasive authority in interpreting the Arkansas statute, while Louisiana law plainly is not. Illinois law, moreover, contravenes the state's present claim that DNA results which, standing alone, are legally inconclusive foreclose relief to the petitioner.

Thus, in *People v. Dodds*, 344 Ill.App.3d 513, 801 N.E.2d 63, 279 Ill. Dec. 771 (2003), the Illinois Supreme Court discussed the significance of DNA test results on biological material which, if anything, were less exculpatory than Echols has proffered here, insofar as (like this case) they did not match the petitioner but (unlike this case) did not suggest the involvement of specific others in the crime. In that context, the Court in *Dodd*s observed:

> [I]f DNA evidence is truly exculpatory, a defendant's conviction should be vacated and the defendant should be released, or some other similar resolution should be had. See, *e.g.*, A. Cohen, *Innocent After Proven Guilty: More Inmates Being Set Free Thanks to DNA Tests and a Pioneering Legal Clinic*, Time, September 13, 1999, at 26, 28. If the results are neither truly exculpatory nor inculpatory, *i.e.*, they are somewhere in-between or

> are a non-match, which is the situation in the instant case, this may provide a basis for a defendant to file a postconviction petition asserting a claim of actual innocence based on newly discovered evidence.

Dodds, 344 Ill.App.3d at 519, 801 N.E.2d at 68, 279 Ill. Dec. at 776.[3] There can be no clearer statement that petitioner's instant new trial claim based on DNA results, even if not *conclusively* exculpatory, may nevertheless entitle him to a new trial (rather than a judgment of acquittal) because, considered with the other evidence, they are *compellingly* exculpatory.

D. Ark. Code § 16-112-208(b) Does Not Authorize the Court To Dispose of Petitioner's Motion Without Conducting a Meaningful Hearing

As to the state's claim that the Court should deny relief under subsection 208(b) without a meaningful hearing because the present testing results are not, as a legal matter, conclusively exculpatory (Opp., at 15),[4] the plain language of related statutory provisions once again refutes it. Thus, Ark. Code § 16-112-205 expressly mandates a hearing "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief . . . ." Because the test results now before the Court arguably "exclude the petitioner," and, indeed inculpate others, he is entitled to make the new trial showing expressly authorized by § 16-112-208(e)(3). The trial court's assessment of the DNA results in conjunction with all other evidence in the case, moreover, cannot be meaningfully accomplished without convening a meaningful

[3] To be sure, *Dodds* may read to impose on the petitioner a different standard for securing ultimate relief, but the Arkansas statute, including subsection 208(e)(3), expressly addresses and controls on the measure of proof needed to obtain a new trial order in the present matter.

[4] Opp. at 15: "[Petitioner's] burden is now to demonstrate his actual innocence by evidence that excludes him as the killer. As explained above, he has not met it, and a hearing is unnecessary to conclude as much."

evidentiary hearing, as *Dodds* makes clear:

> We hold that once DNA testing is ordered and the results are favorable, at least in part, to a defendant, such as where a non-match is revealed, an evidentiary hearing is necessary to determine the legal significance of the results because such results would make a substantial showing of a constitutional violation. In other words, the trial court is obligated to conduct an evidentiary hearing to determine whether the DNA results would or would not likely change the results upon a retrial. See K. Christian, _*And the DNA Shall Set You Free*_*: Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence*, 62 Ohio St. L.J. 1195, 1195 (2001) (advocating that if postconviction DNA results are favorable to a defendant, the defendant should receive a hearing to determine whether he or she is entitled to a new trial). See also National Institute of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* 1, 50 (1999) (stating that _if DNA testing results seem to exculpate the defendant because of an exclusion, an evidentiary hearing should be set to determine if there is a reasonable probability of a change in the verdict or judgment of conviction_). . . .

Dodds, 344 Ill.App.3d at 522, 801 N.E.2d at 71, 279 Ill. Dec. at 779.

In view of the above, the state's contention that this Court may now deny relief under § 16-112-208(b) because the DNA results do not conclusively establish his actual innocence and absolutely exonerate him as a matter of law is untenable.

E. Section 208(e)(3) Authorizes a New Trial Where, as Here, a Petitioner Invokes Reliable Evidence of Both Exclusions and Non-Matches Which, Considered in Conjunction with *All* Other Evidence in the Case, Compellingly Shows That No Reasonable Jurist Would Convict

The state makes a series of remarkable claims — what are, in effect, a series of fallback positions — as to how the subsection 208(e)(3) should be most narrowly interpreted, none of which can be reconciled with the terms of the provision itself.

Specifically, the state first contends that the language of subsection 208(e), standing alone,

demands conclusive proof of actual innocence before a new trial may be ordered (Opp., at 13); that a new trial is appropriate only where the DNA test results — without consideration of any other evidence — establish actual innocence (Opp., at 15); that, to the extent other available evidence is cognizable in assessing the new trial request, the Court should consider only the likely impact of the DNA testing results along with all other available evidence of *guilt* but not *innocence* (Opp. at 13, 16-17 [again citing Louisiana precedent]); and that in no event may the court engage in a "reweighing" of all other case evidence vis-a-vis what the DNA results disclose when performing the new trial assessment described in subsection (e)(3) (Opp., at 15-18). Petitioner considers each of these claims in turn.

The state's first proposition — that subsection 208(e)(3) itself establishes that a new trial is unavailable unless whatever evidence the court considers conclusively and legally "excludes" the petitioner as a possible perpetrator — makes no sense for the reasons stated in subsections B and C, *supra*, and also because it renders the language in subsection 201(a) both superfluous and meaningless. *Rose v. Arkansas State Plant Bd.*, 363 Ark. 281, 213 S.W.3d 607 (2005) (Court must construe statute so that no word is left void, superfluous or insignificant, and in a manner that gives meaning and effect to every word in the statute, if possible); *Smith v. Fox*, *supra*, 358 Ark. at 392, 193 S.W.3d at 241 (stressing importance of applying common sense in interpreting statutory language).

If new trial relief requires that the DNA results, as a legal matter, conclusively eliminate all possibility of the petitioner's involvement and point unambiguously to a single other culprit — a scenario which the state at points demands but elsewhere acknowledges is a virtual impossibility (Opp., at 14) — there is no place for the Court's option of "vacating and setting aside the

judgment" and discharging the petitioner, a remedy for which subsection 201(a) expressly provides. By the same token, why would subsection 208(e) ever limit a petitioner's remedy to an order for a new trial if he has made so conclusive a legal showing of actual innocence that he has foreclosed all possibility of his status as a perpetrator?

The state next suggests that a new trial order may issue under subsection 208(e)(3) only where the DNA test results alone, rather than such results considered in conjunction with other available evidence, supply compelling evidence that no reasonable juror would convict upon a retrial. See Opp., at 15. This notion, however, violates the most fundamental rule of statutory interpretation, as set forth in *Maddox, supra*, 369 Ark. 143, 146-47, 251 S.W.3d 281, 284-285 ("[T]he first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language.") Again, when the Court considers a new trial motion under 208(e)(3), the statute expressly directs that it determine whether "the DNA test results, *when considered with all other evidence in the case* regardless of whether the evidence was introduced at trial, establish by compelling evidence that a new trial would result in an acquittal." *Ibid*. The plain meaning of the statute is that the DNA results together with the other available evidence must inform the Court's assessment whether the petitioner has satisfied the actual innocence standard applicable to new trial relief.[5] The state's argument also defies common sense: were the DNA results alone required to supply the compelling evidence described in 208(e)(3), there would be no reason to examine the impact of

[5] The meaning of the state's claim that "the phrase [in subsection 208(e)(3)] referring to all other evidence] is set off by commas in a sentence that explains the context in which a court may grant a motion" (Opp., at 16) is unclear. To the extent the state is suggesting that the directive to consider other evidence is a meaningless aside, it simply attempts to read out of the

the other evidence at all.

The state's third argument assumes that the Court will consider the impact of the DNA results together with other evidence in the new trial calculus, but asserts that the Court may only consider all other evidence of *guilt*, but *not innocence*, in assessing what a reasonable juror would determine on retrial. Opp., at 13, 16-17. The state plainly advances this claim in an effort to foreclose consideration of petitioner's extensive evidence that post-mortem animal predation rather than a knife was responsible for the soft-tissue wounds sustained by the victims (Opp., at 16-17), as well as the evidence of credible witnesses such as Jennifer Bearden, who was on the phone with Echols at the time he is supposed to have been committing the charged murders. The argument's utility to the state, however, does nothing to conceal its patent flaw: once again, the express statutory language directs the court consider the DNA results with "*all* other evidence in the case . . ." See subsection 208(e)(3) (Emphasis added) If the statute was intended to limit the court's review to evidence of guilt alone, it could have, and surely would have, said so. Cf. *Phillips v. Arkansas Dept. of Human Services*, 85 Ark.App. 450, 456, 158 S.W.3d 691, 695 - 696 (2004) ("[The Court] will not interpret a statute in a manner that is contrary to the clear language of the statute; nor will [it] read into a statute language that is not there.") The statute passed by the Legislature was designed to protect the wrongfully convicted; the state's reading of it would continue their unjustified confinement or, in this case, wrongful execution.

Finally, the state repeatedly contends that in no event may the court "reweigh" the evidence because the time for such an exercise purportedly ended with the conclusion of

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statute language which it wishes the Legislature had not included.

petitioner's trial and appeal. Opp., at 15-18. Here, yet again, however, the state's claim cannot be squared with the express language of section 208(e)(3) which plainly requires the court to consider the impact of the DNA results together with all other evidence and, on the basis of such consideration, decide whether a reasonable trier of fact would convict upon retrial. Such an exercise, by its very nature, necessarily entails a *weighing* of the relative impact of various components of available evidence. The obvious purpose of the hearing for which subsection 205 provides is to give an opportunity for the Court's reasoned consideration of all relevant evidence implicated by the evidence and the weight thereof. *Ibid.*; see also *Dodds, supra*, 344 Ill.App.3d 513, 801 N.E.2d 63, 279 Ill. Dec. 771 (holding that an evidentiary hearing is required to determine legal significance of non-match evidence by assessing its weight in conjunction with that of other evidence in the case).

F. The Arkansas Statute Envisions Different Measures of Actual Innocence That Correlate to the Different Remedies Identified Therein

In his opening motion (at 39-44) petitioner demonstrated that the nature of the showing a petitioner must make in order to secure new trial relief under 208(e) is akin to the showing a federal habeas petitioner must make to overcome state procedural defaults, as that showing is explained in *House v. Bell*, 547 U.S. 518 (2006) and *Schlup v. Delo*, 513 U.S. 298 (1995), on which *House* relied.[6] On the other hand, the greater showing that a petitioner must make to

[6] As the Supreme Court stated in *House*, "A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt – or, to remove the double negative, that it is more likely than not any reasonable juror would have reasonable doubt." *Id.* "[B]ased on [the] total record, the court must make 'a probabilistic determination about what reasonable, properly instructed jurors [now] would do.'" *Id.*, 547 U.S. at 538.

secure a order vacating his conviction under 208(a) is akin to the conclusive showing of innocence that might afford a federal habeas petitioner relief as the Supreme Court discussed in *Herrera v. Collins,* 506 U.S. 390 (1993).

The state, however, argues that the showing required of a petitioner to obtain a new trial under subsection 208(e) cannot be the rough equivalent of the *Schlup* standard discussed in *House*. The core of its reasoning on this point is that satisfying the *Schlup* standard merely endows the federal petitioner with a procedural benefit, while a state petitioner who satisfies the standard set forth in subsection 208(e) secures a far greater substantive benefit in the form of an order for a new trial. Opp., at 21-22. Thus, in the state's view, the required showings cannot be identical or similar because the state remedy is different and more generous than the federal one.

This argument fails for three key reasons. *First*, the fact that a showing like that articulated in *Schlup* should provide a state petitioner a greater, substantive benefit than a federal petitioner is perfectly consistent with a legislative determination that the state constitution affords greater rights and protections, including the right to due process and the protection against cruel and unusual punishment, than does the federal constitution. See, e.g., *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004) (though search-and-seizure language of state constitution is very similar to the words of federal constitution's Fourth Amendment, state affords greater privacy rights in interpreting state constitution.)

Second, as petitioner has explained, the language of the *Schlup* standard, as articulated in *House*, bears a striking resemblance to the new trial standard set forth in subsection 208(e), supporting the plain inference that the latter provision was modeled on, and should be informed by, the former.

Finally, and in any event, the Arkansas statute *itself* contemplates that certain petitioners who present evidence under the new scientific evidence statute may be entitled to an order vacating their conviction (subsection 201(a)(1)), while others may be entitled to the lesser remedy of an order granting them the remedy of a new trial (subsection 208(e)). Because the provisions for different showings accompanied by different remedies inheres in the statute itself, they must be recognized and given meaningful effect.[7]

II. IF CREDITED, THE DNA TEST RESULTS "EXCLUDE" PETITIONER WITHIN THE MEANING OF § 16-112-208 (E)(3) AND, WHEN CONSIDERED WITH ALL

[7] On this last point, and seeking to attack the statute's provision for different showings of innocence, the state does not dispute that subsection 201(a) recognizes the remedy of ordering that a conviction be vacated, but instead contends that such an order might violate the doctrine of separation of powers because it would purportedly intrude on the executive branch's right to grant clemency. See Opp., at 23-24, note 11; see also Opp., at 4, note 2. This claim, in turn, is premised on the notion that such an order would issue "without a claim of error in the underlying proceedings." Opp., at 24, note 11. The judicial branch, however, is plainly authorized to issue such an order insofar as the detention and eventual execution of one shown to be actually innocent would constitute an egregious violation of that petitioner's state and federal rights to due process and his protections against cruel and unusual punishment. Significantly, the Illinois courts have apparently located no such separation of powers problem arising from the vacation remedy. See *Dodds*, supra, 344 Ill.App.3d at 519, 801 N.E.2d at 68, 279 Ill. Dec. at 776 ("[I]f DNA evidence is truly exculpatory, a defendant's conviction should be vacated and the defendant should be released, or some other similar resolution should be had.")

OTHER EVIDENCE IN THE CASE, WOULD LEAD TO AN ACQUITTAL AT RETRIAL

A. The Present Results

As petitioner has discussed, under § 16-112-208 (e)(1), when "the (DNA) test results obtained under this subchapter exclude a person as the source of the deoxyribonucleic acid (DNA) evidence," the Court may grant him a new trial if those DNA results, "when considered with all other evidence in the case regardless of whether the evidence was introduced at trial, establish by compelling evidence that a new trial would result in an acquittal." § 16-112-208 (e)(3).

In his initial motion, petitioner demonstrated one key exclusion in the form of evidence that from the scores of items subjected to DNA testing pursuant to this Court's amended testing order, *no* biological material could be linked to petitioner or to co-petitioners Baldwin or Misskelley. At the same time, petitioner cited three DNA results representing additional, affirmative exclusions of all petitioners that likewise triggered the assessment of such results vis-a-vis all other case evidence for purposes of considering the new trial application under subsection 208(e)(3). That exclusion evidence includes:

(1) a foreign allele located on a penile swab of victim Steven Branch;

(2) a hair recovered from the ligature used to bind Michael Moore that is consistent with Terry Hobbs, the stepfather of Steven Branch, but not with the hair of any of the petitioners; and

(3) a hair recovered from a tree stump at the crime scene very close to where one of the bodies was recovered, which hair was consistent with David Jacoby, a friend of Terry Hobbs whom Hobbs visited on the day the victims disappeared and, again, not with the hair of any

petitioner.

Subsequent to the filing of petitioner Echols's initial motion, moreover, Bode Laboratories has returned STR DNA results on a *fourth* item, i.e., a cutting from the pants of one of the victims. The significance of those results appears upon consideration of (1) the allegations of, and exhibits to, petitioner Misskelley's "Petition for Writ of Habeas Corpus or Other Relief; Motion for New Trial; Amended and Supplemental Petition for Relief under Rule 37.1; and Petition for Writ of Error Coram Nobis" [hereinafter "Misskelley petition"] in case nos. CR-93-47 (Clay County number) and CR 93-516 through 518 (Crittenden County numbers), which petitioner Echols hereby adopts and incorporates by reference; and (2) the evidence presented at the Echols-Baldwin trial. Specifically — as the Misskelley petition alleges — at the Misskelley trial, the prosecution presented evidence from witnesses Kermit Channel of the Arkansas Crime Lab and Michael Deguglielmo of Genetic Design which, it argued, indicated that DNA, including human sperm or semen, was present on cuttings from the pants worn by the victims of the homicides. (See discussion accompanying supplemental exhibit OOOO to Misskelley petition, at 1-5; see also Misskelley RT at 1047 et seq.) At the Echols-Baldwin trial, witnesses Channel and Deguglielmo likewise presented evidence purportedly showing that DNA was recovered from the two cuttings and that it "most likely" was derived from sperm cells. See Echols-Baldwin RT 1325-30, 1339-41 [Channel); 1386-90 [Deguglielmo]; see also *id*., at 1390 [Deguglielmo: "And that is most likely that the DNA we were detecting [from the cuttings] did come from sperm cells."])

Subsequent testing of the first cutting (Bode no. 2S04-114-25, item ID 93-05716 E3 Q10, trial exhibit 45) by Bode Laboratories, however, refutes the purported evidence and argument stating and/or suggesting that any sperm or reportable DNA was present on the cutting. See

Echols exhibit P, Misskelley exhibit EEE (12-30-05 Bode STR report); Misskelley exhibits EE (affidavit of serologist Dr. Zajac), FF (affidavit of Dr. Riley); discussion accompanying supplemental exhibit OOOO to Misskelley petition, at 1-5).[8]

Furthermore, results from a second Bode DNA test on the second pants cutting (Bode no. 2S04-114-26, item ID 93-05716 E7 Q6, trial exhibit 48), as set forth in a report issued by Bode on June 4, 2008, likewise refutes the prosecution's purported evidence and argument concerning the presence of sperm at the same time it disclosed the presence of a partial DNA profile consistent with a mixture. See supplemental exhibit OOOO to Misskelley petition, at 1. The June 4th report continues that Echols, Baldwin, Misskelley, Byers and Moore are excluded as possible contributors to this mixed profile, although Steven Branch cannot be. *Ibid*.

B. Reliability and Significance of the Results

In its opposition to the Echols's present motion, the state notes that it has "indulged" the accuracy of Echols' DNA test results as to the first three items of evidence identified in subsection A, above, but disputes the legal significance of those results. Opp., at 29, note 12. The state nevertheless appears to challenge the scientific significance of the third result, i.e., the one relating to the Branch penile swab. That result indicates that the profile obtained from sample 2S04-114-10E, an extract from a swab of victim Steven Branch's penis, "... suggest[s] *there is a foreign allele present that could not have come from the victims or defendants*; specifically, the '8' allele at the D16S539 locus in the -10E SF." See Opp., at 29, note 12; Petitioner's exhibit V-1. On this

[8] Echols will proffer copies of the relevant exhibits to the Misskelley petition and the Baldwin petition discussed in this section at the status hearing to be held on August 20th.

point, the state cites its exhibit E, a letter date May 27, 2008, from Kermit Channel, which disputes the validity of any such finding.

Petitioner Misskelley, however, has submitted exhibits from two DNA experts, Dan Krane and Jason Gilder, that not only support the conclusion as to the definite presence of a foreign allele on the Branch penile swab, but which also opine that the two alleles disclosed at the described locus do not represent a "mixed profile" — a possibility not foreclosed by the findings reported in exhibit V-1 — but rather were likely contributed by the same person. See Misskelley petition, exhibits UU and UU-1 (Krane affidavit and CV); VV and VV-1 (Gilder affidavit and CV). On this basis, moreover, Krane and Gilder have concluded that a single person, and not any of the petitioners or any of the victims, was the source of the two alleles at the D16S539 locus in the -10E SF. See Misskelley exhibit UU, par. 10-11; Misskelley exhibit VV, par. 10-11.

Furthermore, the state attached the May 27, 2008 Channel letter disputing the significance of the Branch penile swab results (Echols exhibit V-1) to its opposition to the Misskelley petition. DNA expert Gilder has since prepared a specific response to that letter, specifically challenging the methodology employed by Channel and demonstrating the factual and analytic flaws that discredit his conclusions. A copy of that second affidavit from Mr. Gilder, dated August 11, 2008, accompanies the instant petition as exhibit BBB, the final exhibit attached to Echols' new trial motion having been denominated AAA.[9]

In light of the above, and as assessed at this stage of the proceedings, petitioner's evidence of exclusions has only grown stronger. The state does not seriously dispute that the absence of a

[9] The original of the August 11, 2008 Gilder affidavit will be proffered to the Court at or before the August 20, 2008 status conference.

significant DNA match between any of the tested items and any of the petitioners; or the presence of Terry Hobbs hair in the Moore ligature; or the presence of his friend David Jacoby's hair on a tree stump at the crime scene. Petitioner, moreover, has now presented credible evidence not only excluding him and the other petitioners as the source of *one* of the alleles on the Branch penile swab but of *both*, which, rather than indicating a "mixed profile" are attributable, in fact, to a single other foreign contributor. In addition, in light of the Misskelley exhibits discussed above, petitioner has both discredited the state's claim that semen was discovered on the cuttings from the pants and established that neither he nor any other petitioner could be the source of any DNA located there.

All of the foregoing evidence and exclusions, considered in conjunction with other case evidence, supply compelling evidence that a new trial in this matter would result in an acquittal. The absence of a biological link between any tested item and any of the petitioners cannot be reconciled with a prosecution scenario depicting an active, murderous rampage by all petitioners at the crime scene. The presence of the Hobbs hair in a ligature used to bind someone other than his own stepson, moreover, is affirmatively incriminating of another, particularly when that evidence is viewed in conjunction with the Jacoby "tree stump" hair; the circumstantial evidence discussed in petitioner's opening motion relating to Hobbs (at 50-53); and the incriminating statements made by Hobbs concerning his activities on the day the victims disappeared, as disclosed by petitioner Baldwin in his "Statutory Habeas Corpus Petition, Motion for New Trial, Rule 37 Petition, Petition for Writ of Error" in Case No. 93-450B. See *Ibid*., exhibit 71 (Declaration of Sharon Nelson). The refutation of the state's allegations that semen was recovered from one of the victim's clothing further undermines the credibility of petitioner

Misskelley's account of a sexual assault. And, as discussed below, the inference of innocence driven by the foregoing results becomes exponentially more powerful when considered in conjunction with the remaining evidence in the case.

III. IF CREDITED, THE NEW PATHOLOGY EVIDENCE WHOLLY UNDERMINES THE STATE'S THEORY OF THE CASE AS PRESENTED AT PETITIONER'S TRIAL AND, WHEN COMBINED WITH THE DNA EVIDENCE, WOULD LEAD TO ACQUITTAL AT A RETRIAL, THUS MERITING RELIEF UNDER ARK. CODE § 16-112-208 (E)(3)

A. Introduction

The state's response to petitioner's newly presented scientific evidence from a panel of highly qualified forensic pathologists is summed up in the following passages from its brief:

> [T]he post-mortem animal predation theory is incredible. Despite the certainty with which Echols's experts assert it today, it was not propounded by the medical examiners who performed the autopsies on the victims the day after their bodies were discovered...[T]he findings of the examiners are clearly indicative of ante-mortem injuries (in addition to blunt trauma) that are inconsistent with post-mortem predation....
>
> The notion that the victims' injuries were post-mortem animal predation that escaped the observation of investigators and medical and dental experts at the time the bodies were found, recovered, and examined requires the rejection of common sense.

(Opp., at 25-26)

There are three telling replies to the state's contentions. The first is that the new evidence is in fact consistent with certain critical findings of Dr. Peretti, who performed the autopsies on the victims and testified as the state's medical expert at trial. Rather than contradicting Peretti in crucial respects, the new evidence provides the answer to key questions that his findings raised but which were either not answered or, in some cases, not even addressed at petitioner's trial.

Second, the new evidence puts the lie to powerfully misleading arguments used by the prosecutors to obtain petitioner's conviction, arguments that were utterly lacking in support in Peretti's testimony. Third, to the extent that there is a disparity between Peretti's findings and those of the petitioner's experts, the latter, all of whom are board certified in forensic pathology or forensic odontology and are leaders in their fields, are both individually and collectively far more qualified than Doctor Peretti, who has never managed to pass the boards in forensic pathology.

B. Doctor Peretti's Own Finding of Post-Mortem Injuries Supports The Theory Of Animal Predation

The state has appended to its brief as Exhibit B the autopsy reports for the three victims in this case. While those reports describe the injuries suffered by the victims, they do not classify any of those injuries as pre-mortem, peri-mortem, or post-mortem; indeed, those terms never appear in any of the three reports. At petitioner's trial, Doctor Peretti did testify that the bodies had suffered post-mortem injuries,[10] a finding consistent with those of Doctors Spitz, Souviron, DeMaio, Haddix, Woods, Baden, and Ophoven.[11]

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[10] In petitioner's trial, Peretti testified that Chris Byers suffered post-mortem injuries (RT 1065); in the Misskelley trial, he testified that some injuries of Branch were post-mortem (RT 838).

[11] A report by Doctor Janice Ophoven was submitted by counsel for Baldwin in support of his Rule 37 petition in late May, after Echols had filed his motion for a new trial in April.

Echols incorporates that report by reference and will proffer it to the Court at the time of the August 20, 2008 status conference in this matter.

That the victims suffered post-mortem injuries thus is not an "incredible" assertion by defense experts, but rather an undisputed fact. The question not addressed by Doctor Peretti in his autopsy reports or testimony is the etiology of those post-mortem injuries. (See Haddix report, at page 8: "Curiously, Dr. Peretti states in his testimony [Echols-Baldwin trial, Bates stamp 1845] that there are postmortem injuries, however this is not further pursued either in direct or cross examination.") As to at least two victims, Moore and Branch, Peretti concluded that they died of drowning, meaning that the post- mortem wounds they suffered occurred after they first entered the body of water in which their bodies were found the next day. In order for their post-mortem injuries to have been caused by a human agency, the perpetrator would have had to place their bodies in the water while the victims were alive, waited until they died, and then removed the bodies in order to mutilate them with a cutting instrument before again placing them in the water where they were later discovered. Doctor Peretti never advanced that "double entry" theory in his autopsy reports or testimony, not did he ever deny that animal predation would be a far more logical and far less "incredible" explanation for the post-mortem wounds he himself found on the bodies.

C. The Post-Mortem Injury To Byers's Genitals

For the most part, the autopsy findings and testimony of Doctor Peretti did not have any incriminatory value for the state at petitioner's trial. For example, the state did not argue that the blunt trauma wounds suffered by the victims in any way tended to connect Echols or Baldwin to the charged murders.

The notable exception was the genital injury exhibited by Chris Byers, whose scrotum and penis skin had been removed from his body before it was recovered.. As Echols' motion for a

new trial demonstrates, that injury was the key evidentiary underpinning for three important components of the state's theory of the case: (1) the scrotum and skin of Byers' penis were removed by use of a particular cutting instrument — a "survival" knife found in a pond behind Baldwin's house; (b) Baldwin was present when the scrotum were removed, at which time, according to the testimony of jailhouse informant Michael Carson, Baldwin put the severed testes in his mouth; and (3) the sexual mutilation killings proved the killings were part of a satanic ritual, and thus (according to "Doctor" Dale Griffis of the fraudulent Ph.D.) could be linked to Echols, who had displayed an interest in the occult.. All of these cornerstones crumble, and the state's case with them, if the Byers' injury resulted from post-mortem predation.

The expert pathological evidence now offered by petitioner regarding the Byers genital mutilation — that the nature of the injury is entirely inconsistent with the use of the knife in the lake and is attributable to post-mortem animal predation — is not contradicted by the autopsy findings or trial testimony of Doctor Peretti. In neither did he classify the genital injury as pre-mortem or peri-mortem, as opposed to post-mortem. Peretti did testify at trial that two marks on other parts of Byers' body were consistent with the use of some serrated knife (but no one knife in particular) but did not offer an opinion as to the cause of, or agency by, which Byers' scrotum and penis skin were removed. The assertion that the lake knife caused the genital injury was proffered in closing argument by the prosecutors.

The testimony that Peretti did give regarding the Byers' genital injury in fact is completely consistent with the conclusions proffered by the petitioner's experts. On cross-examination by counsel for Jason Baldwin, Peretti stated that, if done by a cutting instrument, removal of the skin of the penis while leaving the corpus of the penis intact would have required a very sharp

instrument such as a scalpel; would have taken a good deal of time and a fair amount of surgical skill; that if done on the ground at the crime scene would have resulted in a very significant spillage of blood that could not easily be cleaned up; and would have been virtually impossible to do in the water where Byers' body was eventually recovered. Peretti, a trained physician, would have a difficult time performing the operation himself. (RT 1109-1118) That testimony completely undermined the state's contention that the Byers' penile skin was removed at the crime scene by a teenager wielding the large, dull survival knife found in the lake, and left any claim of human agency problematic.

There is, however, an explanation of the injury which fully fits the facts, is consistent with Peretti's testimony on cross-examination, and is well-supported by the medical literature: that of "degloving," in this case by post-mortem animal predation. The "degloving" analysis now has been proffered by a number of this country's leading forensic pathologists and odontologists. The "incredible" theory in this case is not animal predation, but that tendered to the jury by the prosecutors — i.e., that Byers was castrated by Echols or Baldwin using the knife in the lake — a contention for which Peretti actually lent no support in his testimony.[12]

D. The New Forensic Evidence Is Simply Far More Reliable Than The Reports of Doctor Peretti, Who Is Not Board Certified

As demonstrated above, the key conclusions of petitioner's forensic experts are not contradicted by either Doctor Peretti's autopsy reports or his trial testimony. Indeed, his letter filed on May 30, 2008, in response to Echols' new trial motion neither denies that the victims

[12] *Echols v. State*, 936 S.W.2d 509, 969 (Ark. 1996): "On cross-examination, Dr. Peretti testified that he had never stated that the knife found behind Baldwin's house caused the injuries...."

suffered post-mortem injuries, nor that the Byers' genital injury was post-mortem, nor that "degloving" is a well-documented phenomenon that best explains the injury. Furthermore, Peretti, consistent with his prior testimony, does *not* assert in the May 30th letter that the genital injury could have been inflicted by the knife in the lake.[13]

What is certainly true is that the petitioner's forensic experts draw conclusions that Doctor Peretti did not advance in his autopsy reports or at trial, such as the role of animal predation and "degloving" in causing the victims' injuries. The state claims that the new evidence and findings defy "common sense" because they could not have "escaped the observation of investigators and medical examiners and dental experts at the time the bodies were found...." (Opp., at 26)

The simple truth is that Doctor Peretti, while a veteran of many autopsies, is in a very meaningful sense not a fully qualified forensic pathologist, as he has never been able to obtain board certification in that discipline. Doctor William Sturner, then Arkansas's Chief Medical Examiner, was out of the state at the time the autopsies were performed and did not participate in them, but simply signed off on Doctor Peretti's reports. On the other hand, Doctor Spitz authored one of the leading textbooks in the field of forensic pathology, as did Doctor DiMaio. They, along with Doctor Baden, are considered among the country's leading authorities in forensic pathology. Doctor Ophoven is perhaps the leading *pediatric* forensic pathologist in the nation, an expertise particularly relevant to the present case. There is simply no basis for comparing Doctor Peretti's limited expertise to theirs.

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[13] The May 30th letter does state that the autopsies revealed no human bite marks, a statement with which petitioner's forensic experts are in agreement.

Doctor Haddix is a assistant professor of forensic pathology at the Stanford Medical School. She reached her conclusions concerning "degloving," post-mortem animal predation, and the preclusion of the knife in the lake as the cause of the victim's injuries without any exposure to the opinions of her fellow experts. Doctor Souviron is a leading forensic odontologist, as is Doctor Wood, who offered a review of the relevant medical literature that Doctor Peretti has failed to respond to. All of petitioner's experts have been witnesses for the prosecution in many homicide cases. Their opinions are simply more authoritative than those of Doctor Peretti.

The new forensic evidence is powerful and convincing. At a minimum, this Court cannot discount the animal predation evidence unless and until it convenes an evidentiary hearing where it can be tested by the adversary process.

IV. THE EVIDENCE ESTABLISHING THAT THE JURY FOREMAN AT PETITIONER ECHOLS'S TRIAL WAS BIASED AND ENGAGED IN BLATANT MISCONDUCT IS RELEVANT AND ADMISSIBLE IN THE PRESENT ACTION

A. Introduction

In his motion for a new trial, Echols stated: "The state will surely assert that the 1994 verdict of conviction presents an insurmountable obstacle to Echols' present request for relief, contending that the fact that a jury of his peers then fairly found petitioner guilty precludes a finding that petitioner surely would be acquitted now." As noted above, the state indeed has made that precise response in urging this Court to deny Echols' motion for a new trial without holding an evidentiary hearing. (Opp., at 18: petitioner must present "necessarily extraordinary proof" for nothing else "could undo a presumptively valid criminal conviction;" Opp., at 13: DNA-testing results alone must exclude petitioner as the perpetrator because "[n]othing less could compellingly lead to an acquittal when considered with all other evidence that previously

supported a verdict of guilt beyond a reasonable doubt...")

Anticipating the state's argument, Echols contended in his motion that the 1994 judgments were fundamentally flawed. Rather than being convicted on "evidence developed [on] the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel," *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965), Echols was found guilty principally based on what biased jurors had heard and read outside the courtroom. Echols' jury convicted him based on information both unadmitted and inadmissible at trial: media reports concerning a (demonstrably false) statement of codefendant Jesse Misskelley implicating Echols and Baldwin in the charged crimes. Petitioner's argument centered on Juror Number Four, the foreman, who has admitted to persons that he relied on the unadmitted and flawed Misskelley confession to convict Echols. In its opposition, the state has argued that Echols' claims of juror bias and misconduct are not cognizable in an action under Arkansas's "new scientific evidence" statutes and that, in any case, the Arkansas Supreme Court has already ruled that the evidence supporting the juror claims is inadmissible under Arkansas Rule of Evidence 606.

Since the filing of Echols' new trial motion in April, yet more evidence of bias and misconduct on the part of the jury foreman at Echols trial has surfaced; that evidence could not have been presented to the Court at an earlier time and plainly falls outside the scope of Rule 606. On May 30, 2008, an affidavit was filed with this Court by a prominent Arkansas attorney detailing the contents of improper conversations that the foreman held with that attorney's client while petitioner's trial was still in progress. In those conversations, held prior to the commencement of deliberations, the foreman plainly indicated that he had prejudged defendant's

guilt and was lobbying other jurors to convict based on news reports of the inadmissible Misskelley statement.

In his prior pleadings in this Court and the Arkansas Supreme Court, Echols identified the jury foreman only as Juror Number Four in an effort to maintain his privacy for as long as possible, although that identity necessarily would be revealed at an evidentiary hearing in this matter. Recently, however, the foreman consented to an on-the-record interview with the Arkansas Democrat Gazette resulting in the publication of an article in that paper on June 11, 2008. That article contained the foreman's name and his comments that he may have called an attorney and "asked questions about procedures during the trial."[14]

Given the foreman's decision to speak openly about the events in question, there appears to be little reason to avoid identifying in court papers Juror Number Four as well as the affiant attorney with whom the foreman spoke during the trial, but in an excess of caution, petitioner will continue the practice of non-identification.

B. Statement of Facts

The affidavit filed with this Court on May 30, 2008 speaks for itself. Counsel for Echols has not seen it, but has received information from sources other than the affiant as to the affidavit's contents. On that basis, petitioner submits the evidence before this Court supports the following factual conclusions.

Just before or during the voir dire at petitioner's trial, which took place in the last week of

[14] "Lawyers for 3 Ask Judge To Look At Talk In '93 Trial," by Cathy Frye, June 11, 2008.

February of 1994, Juror Number Four, who was a prospective juror at the time, retained an attorney in an effort to prevent serious felony charges being filed against a close relative of Number Four. At the same time, Number Four also retained the attorney to represent himself in matters related to his real estate business. The attorney so retained is an ex-prosecutor and former state official.

Between the end of February and the first week of April, 1994, the attorney in question was involved in attempting to prevent the filing of charges against the close relative of Number Four. Once charges were filed in April of that year, the attorney represented the close relative through the time of his guilty plea in September of 1994. The court file containing that plea has been lodged with this Court. Between late February and September of 1994, the attorney was in regular telephone contact with Number Four both in regard to his relative's case and the juror's own business matters.

During their initial phone call or during calls soon thereafter, Juror Number Four informed the attorney that he had been called as a prospective juror in a trial in Jonesboro involving the murder of three eight year boys in West Memphis, Arkansas, in May of 1993. Number Four informed the attorney that he wanted to be selected as a juror in petitioner's trial, and he later informed the attorney that he had been selected as a juror in the case. Number Four did not wish to answer any questions by the court or counsel that might reveal information or attitudes on his part that might lead to his being struck from the jury pool. He informed the attorney that for that reason he did not answer any question that was not directed specifically to him, even if it was clear that the question was posed to all jurors, and even if Number Four had information or a point of view that would have required him to respond to the question.

At some point during the prosecution's presentation of its evidence, Number Four asked the attorney why the state had not yet presented proof of a confession by one of the defendants in the case, Jesse Misskelley. Number Four, who was an avid newspaper reader, was aware of the confession because it had been described in newspaper articles and other media reports in the period before the Jonesboro trial began. The attorney told Number Four that in his experience as a prosecutor, a confession is most often admitted at the beginning or end of the state's case, and that Number Four should wait to hear all of the evidence as it was presented.

While evidence was still being presented in the Echols-Baldwin trial, Number Four expressed to the attorney the opinion that most jurors were prepared to convict before the trial was over, but that a few jurors still had to be convinced. Number Four was surprised that some of the jurors had been unaware of the Misskelley confession, but there had been some reference to the confession during courtroom proceedings, and that reference had helped the majority who had known of the confession in its effort to convince the others of the inadmissible confession's existence. This is a clear reference to the blatantly improper reference to the Misskelley statement during the testimony of Detective Ridge, which drew a motion for a mistrial from Echols counsel. The motion was denied, with the jury being admonished to ignore the reference. See Echols' New trial Motion, at page 33.

During one conversation, Number Four told the attorney the evidence was to close the next day; that the prosecution had presented a weak case; and that the prosecution had better present something powerful the next day or it would be up to Number Four to secure a conviction.

Following the verdicts in the penalty phases of the trial, Juror Number Four engaged in

two colloquies with the Court, one with the jury as a whole,[15] one by himself,[16] in which he falsely assured the Court that he had not engaged in misconduct or relied on extrajudicial information in reaching his verdict.

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[15] The Court: Can you give me your assurances that at least to this point in this case that there has been no contacts from outside the family, media, or anyone else that would in any way influence your findings?

Jurors: Yes.

The Court: Are each of you satisfied and can you give me your personal assurance that you have only considered the evidence that was introduced in court by proper court procedure?

Jurors: *Yes.*

The Court: Okay. Do any of you feel that there has been anything whatsoever that in any way affected your ability to deal strictly with the evidence that was produced in court?

Jurors: No.

(RT 2643-44) (Emphasis added)

[16]

The Court: Did it have – and you didn't even discuss it in your deliberations?

[Foreman:] I think if – I think if anybody would be interested, *the only thing that was discussed during deliberations was only facts in evidence that was delivered to us and nothing else.*

(RT 2656) (Emphasis added). It bears notice that in his recent interview with the Arkansas Democrat Gazette, Number Four agrees that the Misskelley confession was discussed in the jury room during deliberations.

C. The Information Before the Court Is Neither Privileged or Barred from Consideration by Evidence Code Section 606, Nor Is its Presentation Untimely

1. Privilege

Had Juror Number Four ever possessed a claim of attorney-client privilege, he would have waived it by discussing publicly the contents of his conversations during trial with the attorney he retained, as he did in his recent interview with the Arkansas Democrat Gazette. That aside, the attorney-client privilege does not apply to communications that are unrelated to the matter for which the client has sought representation. Number Four's jury service had nothing to do with his relative's criminal prosecution or his own business affairs, and thus his improper conversations concerning petitioner's trial cannot have ben privileged.

The attorney-client privilege is defined by Arkansas Rule of Evidence 502. It defines the general rule of privilege:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

Ark. R. Evid. 502(b). The burden of showing that a privilege applies is upon the party asserting it. *Shankle v. State*, 309 Ark. 40 (1992).

Arkansas's definition of the attorney-client privilege is consistent with the general norms

that apply in other American jurisdictions. It conforms with the classic formulation given by Dean Wigmore:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 John Henry Wigmore, *Evidence* § 2292, at 554 (McNaughton rev. 1961); *accord United States v. Bisanti*, 414 F.3d 168, 171 (1st Cir. 2005); *In re Dow Corning Corp.*, 261 F.3d 280, 287 (2d Cir. 2001); *Hanes v. Dormire*, 240 F.3d 694, 717 (8th Cir. 2001).

Any privilege that might have attached to communications between Number Four and the attorney did not apply to statements regarding Echols's trial because Echols's trial had nothing to do with matter for which representation was sought. As the definitions above make clear, the privilege does not apply to *any* communication between attorney and client. Rather, it only applies to communications made "for the purpose of facilitating the rendition of professional legal services." Ark. R. Evid. 502(b). In other words, it only applies to communications "relating to that purpose" for which representation is sought. 8 Wigmore, *supra*, § 2292.

Put simply, the "mere fact that an attorney was involved in the communication does not automatically make it subject to the attorney-client privilege." Mueller & Kirkpatrick, *Evidence* _ 5.11 (3d ed. 2003); *see McCormick on Evidence* _ 88 (6th ed. 2006). Statements are privileged only if they are "relevant to the legal subject matter on which the client seeks legal assistance." Geoffrey C. Hazard, Jr. et al., *The Law and Ethics of Lawyering* 259 (4th ed. 2005). Thus, as state and federal courts around the country have recognized, an attorney-client communication

must "relate to the purpose of obtaining legal advice before it is protected." *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403 (8th Cir. 1987) (citing cases).

Arkansas courts have also consistently recognized this principle. As the state Supreme Court has stated, the relevance requirement is a "prerequisite" to the application of the privilege. *Parkman v. State*, 294 Ark. 339, 342 (1988). Where communications are "not made for the purpose of facilitating the rendition of professional legal services," they are not privileged. *Id.*; *see also Nance v. Arkansas Dep't of Human Servs.*, 316 Ark. 43, 51 (1994). To be covered, the statements must be "part of the . . . process of advising and protecting" the client. *Courteau v. St. Paul Fire & Marine Ins. Co.*, 307 Ark. 513, 517 (1989).

The relevance requirement derives from the goals of the privilege. The attorney-client privilege "is designed to secure subjective freedom of mind for the client in seeking legal advice." *Byrd v. State*, 326 Ark. 10, 14 (1996) (quoting *Arkansas Nat'l Bank v. Cleburne County Bank*, 258 Ark. 329, 331 (1975)). In order to further that goal, the privilege allows clients the freedom to discuss "the *relevant facts* bearing on their case." *Id.* (quoting 2 Mueller & Kirkpatrick, *Federal Evidence* § 181, at p. 302-03 (2d ed. 1994)) (emphasis added).

There is simply no need to cover communications regarding facts unrelated to the case, because covering such communications would do nothing to facilitate the goal of effective legal services. As the United States Supreme Court has recognized, "since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures – *necessary to obtain informed legal advice* – which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403 (1976) (emphasis added).

Juror Four's statements had nothing to do with the matters for which he had retained the attorney had been retained. Consequently, they were not privileged. Indeed, there is not even a colorable argument that any statements about the Echols-Baldwin trial were made for the purposes of facilitating the rendering of legal services. The relevance requirement conclusively defeats any claim of privilege.

2. Rule 606

Rule 606 bars the admission of evidence concerning what occurred during a jury's deliberations and what affected the jury's verdict, subject to the exception that evidence may be taken concerning the jury's consideration of extraneous information or outside influences.[17] The Rule plainly has no application to the information provided by the attorney, since that information

[17] Arkansas Rule of Evidence 606(b), adopted in 1975, reads:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

concerns misconduct engaged in, and bias and prejudgment of guilt displayed, by Number Four before the formal jury deliberations began. *State v. Cherry*, 341 Ark. 924, 928, 20 S.W.3d 354, 357 (2000) (affirming grant of a new trial based on premature deliberations in first-degree murder case, expressly finding Ark.R.Evid. 606(b) not implicated because the information on which the new trial grant rested did not involve matters relating to jury's "formal deliberations").

In *Witherspoon v. State*, 322 Ark. 376, 909 S.W.2d 314 (1995), the defendant was convicted of criminal contempt for her actions as a juror in a criminal case. She failed to disclose certain information during jury selection, namely, she had a prior felony conviction, she had been represented by one of the defense attorneys, and she had independent knowledge of the case.

On appeal, the defendant challenged the admissibility of the testimony of her fellow jurors. One testified that she stated that all of the officers who had participated in the criminal investigation had been promoted. *Id.* at 380. Another testified that she stated that she had worked with one of the prosecutor's witnesses and questioned why he was at home the day of the murder, and not at work. *Id.* The Court, however, rejected the defendant's challenge on the ground that Ark.R.Evid. 606(b) establishes an extraneous information exception which allows testimony "that one or more members of the jury *brought to a trial* specific personal knowledge about the parties or controversy...." *Id.* at 382 (emphasis added)

3. Timeliness

Petitioner could not previously have raised a claim based on this information because it was held in confidence by the attorney in question until now, apparently in the mistaken and now corrected belief that the information was privileged.

D. The Affidavit Now Before the Court, Which Petitioner Could

Not Possibly Have Presented at an Earlier Point in Time, Demonstrates That Petitioner's First Trial Was Marred by Outrageous Juror Misconduct and Bias, Precluding Any Reliance on the Resulting Verdicts as a Basis for Denying Echols's Present Claims

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). "[T]he honesty and dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 556 (Blackmun, J., concurring); *see also Caldarera v. Giles*, 360 S.W.2d 767, 769 (Ark. 1962) ("There is a duty upon every prospective juror on voir dire examination to make a full and frank disclosure of any connection he may have with the litigants or anything that would or could in any way affect his verdict as a juror.").

Furthermore, "[i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. *Turner v. Louisiana*, 379 U. S. 466. 472-73 (1965).

Under these controlling precedents, a trial in which most jurors decide guilt based on extrajudicial information that the federal constitution deems inadmissible**,** and do so before the presentation of evidence has been completed is, quite simply, a sham proceeding. The extremely credible evidence now before the Court establishes that is precisely what occurred in this case.

V. THE STATE'S EVIDENCE AT EARLIER TRIALS WOULD NOT IMPEDE AN ACQUITTAL AT A NEW TRIAL

Finally, the state argues that irrespective of the new evidence now before the Court, Echols would be still be convicted on the basis of the evidence offered at the 1994 trials of the

three defendants.

> Thus, even accepting Echols's theory of relief, his DNA-testing results – even if considered with his otherwise uncognizable new-forensic-evidence and his criticisms of the trial evidence against him – do not establish by compelling evidence that he would be acquitted when those results are considered with the extra-trial evidence of his guilt, particularly his admission and that of his codefendants'[sic]. One need only cast the question in light of his own proposed standard to see that his motion must be denied. Is it reasonable for a juror – even in light of Echols's exclusion as the source of some biological material from the crime scene and his post-mortem animal-predation theory – to nevertheless believe that his admissions of guilt and that of his codefendants'[sic], his physical and temporal proximity to the crimes, and the circumstantial and motive proof for the crimes consistent with the admissions, all come together to make him guilty? A reasonable juror could so conclude, and, consequently, his motion must be denied.

The following points are in order:

1. If the state did manage to put the Misskelley statement into evidence at a new trial, it now would prove exculpatory. As the previous section of this brief demonstrates, Echols was convicted at his first trial because the jury, while aware of the existence if the Misskelley statement, learned none of the facts that expose it as palpably false, nothing more than a confession wrested from a mentally defective subject who actually believed that he would be rewarded for the information he provided his interrogators. Now when the phenomenon of false confessions, particularly from mentally retarded juveniles, is well-documented, no reasonable juror would accept the statement of a supposed eyewitness who described a mid-morning massacre when the three victims were safely at school, who was so suggestible that he was easily be persuaded to turn nine in the morning to eight in the evening, and who could not describe anything that happened at the crime scene without being prompted to do so by his questioners.

Misskelley described strangling and sodomy of the victims that the DNA and medical evidence proves never occurred, but, despite intense prompting, could not describe the hog-tying that no witness to the crime could ever forget.

2. The state cites the Misskelley confession as proof that a knife was used to cut Byers on the penis. But (a) Misskelley, as demonstrated in Echols' motion for a new trial, only agreed to a knife scenario after his interrogators told him that a knife was involved; and (b) Peretti's own testimony established that the removal of the skin from Byers' penis by cutting instrument would have required a virtuoso surgical operation that Misskelley never described because, as the new forensic evidence will conclusively prove, that process never occurred.

3. The state also argues that a reasonable jury would convict Echols based on Baldwin's "confession" to Michael Carson that Baldwin put the victim's scrotum in his mouth. No reasonable jury would accept that testimony because the far more credible forensic evidence proves that Byers' genital injury was caused not by his killer, but by subsequent animal predation. Of equal importance, new evidence, proffered by Baldwin's present counsel,[18] establishes that Carson is, quite simply, a liar, a classic jailhouse informant who concocted his testimony from information obtained from third party sources. As both trustworthy officials as well as inmates at the detention facility attest, Carson, already a perpetrator of serious felony offenses, never had an opportunity to speak to Baldwin while the two were confined in the same unit.

4. The state claims credibility for evidence that Echols was in the vicinity of the crimes

[18] Echols incorporates by reference Exhibits Thirty Four to Forty Three in support of Baldwin's Motion For a New Trial and Rule 37 petition in case nos. CR 93-450 and 93-450B into this response, and will proffer copies of those declarations, which concern Michael Carson, at the status hearing to be held on August 20th.

near the time the boys disappeared, but unbeknownst to the jury that convicted Echols at the first trial, that identification testimony came from a convicted child molester, Anthony Hollingsworth, who was then on probation for sexually assaulting his eight year old sister, Mary. Anthony's mother, Narlene, who testified similarly to Anthony, had reasons to curry favor with the prosecution both because of Anthony's status and her own pending vehicular charges. At the 1994 trial, the state was forced to concede that the Hollingsworths' identification of Domini Terr as being in the same vicinity was mistaken (or fabricated).

The state cannot expect any reasonable juror to accept the testimony of the Hollingsworths once that juror learns of not only of their past bias and self-interest, but of Anthony's continued career as a sex offender in Crittenden County, where he has been charged with at least three recent sexual assaults, at least one against children. (Cases 2007-1235; 2007-962; 2007-1325).[19]

5. The state claims that a jury would convict on the basis of the testimony of the "ball park girls" that Echols proclaimed to bystanders at a softball that he had killed the victims and would kill other children as well. But Echols adamantly maintained his innocence in during many hours of interrogation at police headquarters the week after the crimes. Any reply he may have made in reply to taunts at the game or in a sick attempt at humor could not be taken seriously, which is why Donna Medford, the mother of Jodee, one of the adolescent witnesses, did not report them at the time. On the other hand, the declaration of Jennifer Bearden, who has

[19] Records of Anthony's recent charges are judicially noticeable, and will be filed with the Court at the status conference on May 20th. Ark. Rule Evid. 201(b).

absolutely no reason to perjure herself to assist Echols, puts him on the phone with her at the time the boys disappeared miles away. Bearden is vastly more credible than, for example, the Hollingsworths. No reasonable juror could find the alibi testimony of Bearden, Domini Terr, and Echols' mother refuted beyond a doubt by the state's deeply flawed evidence.

6. Perhaps the most telling rejoinder to the state's claim that it maintains a case strong enough to convict is the assessment of Juror Number Four, who told his attorney in 1994 that the state had presented a case so weak that it would be up to him to secure a conviction by resorting to reliance on information not in evidence. The new DNA evidence, when considered in conjunction with all other relevant evidence, would lead to acquittal at a new trial.

CONCLUSION

For the foregoing reasons, petitioner Echols' motion for a new trial based on new scientific evidence must be granted.

DATED: August 12, 2008

Respectfully submitted,

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