

IN THE ARKANSAS SUPREME COURT

THIS IS A CAPITAL CASE

DAMIEN WAYNE ECHOLS

APPELLANT

vs. CASE NO. CR 08-1493

STATE OF ARKANSAS

APPELLEE

**APPELLANT ECHOLS'S MOTION FOR ORDER STAYING APPEAL  
AND REMANDING FOR FURTHER PROCEEDINGS  
REGARDING SHOWING OF ACTUAL INNOCENCE  
(ARKANSAS CODE ANNOTATED § 16-112-201, ET SEQ.)**

In his pending appeal, appellant Damien Wayne Echols challenges the order of the Craighead County Circuit Court denying his motion for relief under Arkansas Code Ann. § 16-112-201, et seq. from his convictions for the 1993 murders of Steven Branch, Christopher Byers, and Michael Moore. By this motion, appellant Echols seeks an order from this Court that stays the appeal to permit further factual development in the Circuit Court of his claim that, based on new and previously unavailable scientific evidence together with all other evidence in the case, no reasonable juror would likely convict appellants were their trial to be held today, and that they are accordingly entitled to relief from their convictions under § 16-112-201, et seq.

The new evidence submitted herewith is cognizable under § 16-112-201, et seq. It consists, *inter alia*, of the sworn statements of three women who truthfully and reliably attest that they saw Steven Branch, Christopher Byers, and Michael Moore at the home and in the presence of Terry Hobbs, the stepfather of Steven Branch, at 6:30 p.m. on Wednesday, May 5, 1993,

immediately before the boys disappeared. Hobbs was calling loudly to the children at the time. That evidence will thus establish that the last person who had custody of the three boys before they vanished and died was Terry Hobbs.

It has previously been established that Hobbs was never questioned by police during the original investigation of the crimes, despite the fact that the lead detective in the investigation of the murders has conceded both that when a child homicide occurs, police should always consider the parents of the child as potential suspects, and that it is “statistically proven that homicide victims are usually the result of family, close friends, [and] known acquaintances” (see below). Yet DNA evidence submitted to the Circuit Court in the § 16-112-201 proceedings below links Hobbs to the ligature used to bind Michael Moore. A hair linked by DNA testing to David Jacoby, whom Hobbs had visited in the hour before the boys disappeared, was found at the crime scene. Hobbs, moreover, has been accused assaultive conduct in the past. He has made bizarre and self-incriminating statements concerning his activities on the date the boys went missing. His whereabouts during a key early evening time period on May 5th have never been accounted for. Certain family members recalled that he had acted suspiciously on the date of the disappearance and the days that followed. His wife and other family members have voiced their belief that Hobbs was responsible for the killings.

Now, during a recent civil deposition — also new and previously unavailable evidence for present purposes — Hobbs, reiterating prior, unsworn claims, has stated, for the first time under oath, that he never saw his stepson, Steven Branch, or Christopher Byers, or Michael Moore, at any time on May 5, 1993 (see below). That claim is controverted not only by the new sworn statements of the three women who saw Hobbs in the presence of the boys that day (see below),

but also by the newly available, sworn declaration provided by Hobbs's friend, David Jacoby (see below).

Considered in the context of all available evidence in these matters, the new revelations that Terry Hobbs, the stepfather of Steven Branch, had Steven, Christopher, and Michael in his custody just before their disappearance and death, and that Hobbs has deliberately denied and concealed that critical fact, cannot reasonably be reconciled with the conclusion that appellants were responsible for the crimes of which they stand convicted.

The specific bases for the present motion are as follows:

1. In his motion for relief below, appellant contended that, under Arkansas Code Ann. § 16-112-201, et seq., where new scientific evidence is not conclusive but nonetheless excludes a petitioner as the source of previously untested and relevant DNA, the Circuit Court should grant relief from the petitioner's criminal conviction if, considering the new DNA evidence and all other evidence in the case, a reasonable juror would likely find the petitioner not guilty were he tried today. Appellant contended that, based on the evidence he had presented to the Circuit Court, application of this standard required that his murder convictions be vacated. The Circuit Court denied appellant's motion in an order issued on September 10, 2008, which order is the subject of appellant's pending appeal, commenced in 2008.

2. In 2008, Terry Hobbs sued Natalie Pasdar [Maines], lead singer of the Dixie Chicks, in federal court claiming that he had been libeled by public statements Pasdar made in December, 2007. *Hobbs v. Pasdar*, E.D. Arkansas No. 4-09-CV-0008BSM. In those statements, Pasdar commented on assertions and evidence contained in a November, 2007 filing in a federal habeas corpus action brought by defendant Echols in the Eastern District of Arkansas. Those assertions

and evidence linked Hobbs to the murders of Steven Branch, Christopher Byers, and Michael Moore.

3. As a result of the filing of Hobbs' libel suit against Ms. Pasdar, Hobbs was deposed by counsel for Pasdar on July 21, 2009 and thereafter in Little Rock, Arkansas.

4. In that deposition, Hobbs testified under oath and in relevant part that on May 5, 1993, he never saw his stepson Steven Branch, or Christopher Byers, or Michael Moore. He also testified that when he arrived at the house of his friend David Jacoby sometime after 5 p.m. on May 5, 1993, Steven Branch was not riding his bike with two other boys in the street in front of Jacoby's House. A true and exact copy of Hobbs's relevant deposition testimony in the *Pasdar* matter is attached hereto as Exhibit B.

5. On July 24, 2009, David Jacoby executed a sworn declaration in *Hobbs v. Pasdar*. In that declaration, Jacoby avers that (1) in May of 1993, Jacoby worked with Hobbs at the Memphis Ice Cream Company in Memphis, Tennessee; (2) on May 5, 1993, Jacoby lived in the same neighborhood with Terry Hobbs and his wife Pam Hobbs, as well as their children Amanda Hobbs and Steven Branch; (3) on May 5<sup>th</sup>, Terry Hobbs and Amanda came over to Jacoby's house between 5 and 6 p.m.; (3) Jacoby saw Steven Branch riding his bike in the street in front of his house, along with two other boys, one on a bike, one on a skateboard; (4) during his stay at Jacoby's house, Hobbs told Jacoby that Steven was riding his bike; and (5) between 6 and 6:30 p.m., Terry left Jacoby's house after saying he was going to his house to look for Steven. A true and exact copy of the Jacoby declaration is attached hereto as Exhibit C.

6. After the Circuit Court issued its order denying appellants' motions under §16-112-201 in the present matter, investigators for appellant Echols were contacted by Jamie Clark Ballard.

In May, 1993, Jamie was a thirteen year old living at 1609 McAuley Street in West Memphis, Arkansas. Her house was located three houses away from the home then occupied by Terry Hobbs. Jamie saw Steven Branch, Christopher Byers, and Michael Moore — all of whom she knew — playing in her backyard between 5:30 and 6:30 p.m. on May 5<sup>th</sup>. At 6:30 p.m., Jamie and her sister, Brandy, were going out the door of their house to meet the ride that would take them to the youth group meeting they regularly attended at church on Wednesday evenings. As they did so, the three boys came from the backyard through the side yard on their way to the street area. Jamie told Christopher that his brother, Ryan Clark, wanted Christopher to go home, as Ryan, a friend of Jamie's, had earlier said to Jamie.

7. Jamie then saw Terry Hobbs, whom Jamie also knew and recognized, in front of his house, three to the left of Jamie's. Hobbs was hollering at the three boys and telling them to come over to his house, where Steven's younger sister was playing in the yard.

8. Jamie then left with Brandy for the church meeting. When Jamie saw Ryan the next day, he was very upset because the boys had never come home and the police had found their bodies. Jamie had never disclosed the above information because she had never been interviewed by police and did not realize the significance of her recollection until learning very recently that Hobbs had denied seeing his step-son Steven at all on May 5th, 1993. Jamie's sworn and notarized affidavit containing the foregoing account and additional detail, executed on September 16, 2009, accompanies this motion as Exhibit D.

9. Following their initial contact with Jamie Ballard, Echols's investigators contacted Jamie's mother, Deborah Moyer, who stated that she lived with her daughters Jamie and Brandy at the home at 1609 McAuley Street in West Memphis Arkansas, in May, 1993. At the time,

Deborah had neighbors who lived several doors to the left of her house on McAuley Street, including a man, a woman, and at least one young son with blond hair. Deborah recalled that her daughters Jamie and Brandy attended church meetings on Wednesday nights during this period. May 5, 1993 was a Wednesday. Between 5:30 and 6:30 p.m. that evening, Deborah saw three little boys, including the blond boy who lived down the street, playing in her backyard. At about 6:30 p.m., when her daughters' ride arrived in front of the house, Deborah was about to tell the boys to stop playing in her backyard when all three came around the left side of the house, the blond one on a bicycle.

10. At that point, the man who lived down the street, whom Deborah believed to be the blond boy's father, was outside yelling for the boys to come to his house. She specifically recalled the father walking up the sidewalk talking loudly to the little blond boy and telling all three to get down to his house.

11. Deborah later learned that all three boys had been murdered. Over the ensuing years she talked to her daughter Jamie about having seen the boys on the day they disappeared. However, no police officers ever interviewed her or her daughters and she did not disclose the foregoing information because she had no reason to know it was significant. Deborah's sworn and notarized affidavit containing the foregoing account and additional detail, executed on September 16, accompanies this motion as Exhibit E.

12. Also following their initial contact with Jamie Ballard, Echols's investigators located and spoke with Brandy Clark Williams, who is Deborah's daughter, Jamie's sister, and now the wife of an Arizona police officer. Brandy was 11 in 1993 and attended youth group meetings on Wednesday nights. She recalled that at around 6:30 p.m. on Wednesday, May 5, 1993, she and

Jamie were leaving their house to meet the youth group coordinators who were picking them up for the church meeting. As Brandy and Jamie walked down their driveway, Steven Branch came around the side of the house on his bicycle, followed by Christopher Byers and Michael Moore. Brandy's mother yelled something to the boys about not playing in the back yard, but they did not respond. Jamie, meanwhile, told Christopher that he was wanted at his home. Brandy and Jamie were about to get into the car taking them to the church.

13. At this point, Brandy saw Steven's father standing in the driveway of his house a few doors away. Steven's father yelled at the boys to "come back down" to his house, and the boys went towards him.

14. Brandy clearly remembers these events because of the trauma of her learning the next day that the boys were missing and later learning that they had been murdered. Brandy's sworn and notarized affidavit containing the foregoing account and additional detail, executed on September 22, 2009, accompanies this motion as Exhibit F.

15. Gary Gitchell, the West Memphis Police Department's lead investigator into the murders, was also recently deposed in the *Pasdar* matter, *supra*. In that deposition, Mr. Gitchell stated, *inter alia*, that police in a homicide investigation should "look at people close, especially family;" that the reason for this focus is that it is "statistically proven that victims are usually the result of family, close friends, known acquaintances;" that where the homicide of a child is involved, the investigation should include consideration of the parents of the child as potential suspects; and that when looking at family or parents of child victims, the investigation should entail "looking into their background," including, among other things, "any past histories of violence," "neighbors' statements," and "law enforcement files and records." See Exhibit A

(Declaration of Donald Horgan).

16. As observed above, appellants contended in their briefing below that under § 16-112-201, et seq. the nature of the newly generated DNA results in this matter required the Circuit Court to consider such results in conjunction with all other available evidence in the case — whether weighing in favor of guilt or innocence — to determine whether or not a reasonable juror would likely convict today, and thus whether relief from their convictions was in order. The new evidence described in the present motion lends critical support to this contention. Furthermore, the evidence was not reasonably available to appellant at the time he commenced his appeal in this matter.

WHEREFORE, the appellant, Damien Wayne Echols, prays that this Court issue an order staying the pending appeal and remanding the matter to the Circuit Court to permit further factual development of appellants' claims of actual innocence under Ark. Code Ann. § 16-112-201, et seq., and specifically with respect to the matters described in the present motion and accompanying exhibits.

Dated: October 9, 2009

Respectfully submitted,

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