IN THE CIRCUIT COURT CRITTENDEN COUNTY

PAM HICKS **PLAINTIFF**

v. **CV - 12 - _____**

THE WEST MEMPHIS, ARKANSAS, POLICE DEPARTMENT; THE CITY OF WEST MEMPHIS, ARKANSAS; DONALD OAKES, in his Individual and Official Capacities as Chief of Police of The West Memphis, Arkansas, Police Department; and, WILLIAM H. JOHNSON, in his Individual and Official Capacities as Mayor of WEST MEMPHIS, ARKANSAS **DEFENDANTS**

PETITION FOR DECLARATORY JUDGMENT AND COMPLAINT FOR VIOLATION OF THE ARKANSAS FREEDOM OF INFORMATION ACT OF 1967

Comes now the Petitioner, and for her Petition for Declaratory Judgment and Complaint for Violation of the Arkansas Freedom of Information Act of 1967, states:

I. PARTIES AND JURISDICTION

1. This Petition and Complaint is brought pursuant to Rule 57 of the Arkansas Rules of Civil Procedure, and Arkansas Code Annotated, Sections 16-90-1114(a), 16-111-101, *et seq*., and 25-19-101, *et seq*., to determine the rights and status of the parties with respect to the right of the Plaintiff, Pam Hicks to view evidence, if any, currently held by The West Memphis Police Department.

2. The Plaintiff is a resident of Blytheville, Mississippi County, Arkansas.

3. Defendant, The West Memphis, Arkansas, Police Department, is a state agency located in Crittenden County, Arkansas, responsible for the retention of evidence gathered in criminal investigations and prosecutions of criminal activity occurring within the borders of the City of West

Memphis.

4. Defendant, The City of West Memphis, is a Municipal Corporation, organized under the laws of the State of Arkansas and located in Crittenden County, Arkansas. It is responsible for the policies, procedures, and practices implemented through its various agencies, agents, departments, and employees, and for injury occasioned thereby. It was also the public employer of Defendants Chief Oakes, and Mayor Johnson at all times relevant to this Complaint.

5. Defendant, Donald Oakes, is the duly appointed Chief of Police of the Defendant, The West Memphis, Crittenden County, Arkansas, Police Department. Defendant, Oakes, is sued in his individual and official capacities as Chief of Police of the Defendant, The West Memphis, Arkansas, Police Department. He is and has been responsible for the promulgation and implementation of police policies, procedures, and practices in the City of West Memphis, Arkansas.

6. Defendant, William H. Johnson, is the duly elected Mayor of the City of West Memphis, Crittenden County, Arkansas.

7. All facts herein complained of occurred in Crittenden County, Arkansas.

8. The property at issue in this matter is located in Crittenden County, Arkansas.

9. This Court is a court of proper jurisdiction.

10. This Court is a court of proper venue.

II. FACTS

11. Pam Hicks of the mother of Steve E. Branch, deceased.

12. On May 5, 1993, Steve E. Branch, deceased, was murdered in West Memphis, Arkansas.

13. Steve E. Branch, deceased, was eight years old at the time of his murder.

14. Two other eight-year-old children were also murdered at the same place and time.

15. The Defendant, The West Memphis Police Department, investigated the murder of Steve E. Branch, deceased, as well as the two other minors.

16. The Defendant, The West Memphis Police Department, gathered evidence as part of said investigation.

17. On, or about, Saturday, June 9, 2012[1], the Plaintiff, through her below-signed attorney, requested the opportunity to view all said evidence. See, Plaintiff's Exhibit 1, Letter from below-signed attorney to the West Memphis Police Department, attached.

18. Said Letter was received on, or about, June 12, 2012. See, Plaintiff's Exhibit 2, Postal Service Form 3811, 7011 1570 0001 5355 0601, attached.

19. Also on June 12, 2012, the City of West Memphis responded in a letter to the below-signed attorney. See, Plaintiff's Exhibit 3, Letter from West Memphis Police Department to below-signed attorney, attached.

20. In said response, the City of West Memphis, on behalf of all Defendants, denied the Plaintiff's request to view the evidence gathered as part of the investigation of the murders of May 5, 1993, in West Memphis, Arkansas.

21. As is shown below, said denial was in violation of Arkansas Law.

[1] The Letter is dated June 8, 2012, but was actually mailed on June 9, 2012.

III. VIOLATION OF THE FREEDOM OF INFORMATION ACT OF 1967

22. In its Response Letter, the City of West Memphis states that the Rights of Victims of Crime Act "is not applicable to the physical evidence retained by a law enforcement agency following a conviction for a violent offense. In accordance with A.C.A. §12-12-104(b), following any conviction for a violent offense, the physical evidence is required to be permanently impounded and securely retained by the law enforcement agency." *Id*.

23. The Defendants err in the above-stated position.

a. THE RIGHTS OF VICTIMS OF CRIME ACT AND ARKANSAS CODE ANNOTATED SECTION 12-12-104

24. The Rights of Victims of Crime Act states that: "The responsible official shall promptly *return* the property to the victim *when it is no longer needed for evidentiary purposes*, unless it is contraband or subject to forfeiture." Ark. Code Ann. §16-90-1106(b)(emphasis supplied).

25. The Defendants are correct that the law enforcement agency shall permanently retain the property gathered in an investigation of a violent offense. Ark. Code Ann. §12-12-104(b)(2)(A).

26. The Plaintiffs certainly agree that the murder of Steve E. Branch is a violent offense.

27. Therefore, the Plaintiff would agree that there will never be a time when the evidence in said crime "is no longer needed for evidentiary purposes".

28. Therefore, the Plaintiff agrees that the Rights of Victims of Crime Act would not apply.

29. However, the Plaintiff has not asked that any property be *returned*, which is the remedy or right provided by the Rights of Victims of Crime Act. Ms. Hicks has only asked that she be allowed to view the property.

30. Therefore, the Defendants have created a straw-man argument by saying that the Rights of Victims of Crime Act "is not applicable". The Plaintiff asserts her standing pursuant to the Rights of Victims of Crime Act as well as the Freedom of Information Act.

31. As is shown below, the actions of the Defendants are in violation of the Arkansas Freedom of Information Act of 1967.

b. THE FREEDOM OF INFORMATION ACT OF 1967 AND ARKANSAS CODE ANNOTATED SECTION 12-12-104

32. As shown above, the Defendants create a false dichotomy between the Rights of Victims of Crime Act (the return of evidence) and the duty of law enforcement to retain evidence of a violent crime permanently.

33. The Plaintiff seeks to view the evidence, not return of the evidence.

34. The Plaintiff is entitled to view the evidence pursuant to the Freedom of Information Act of 1967.

35. The reliance of Defendants on Arkansas Code Annotated Section 12-12-104 is in error.

36. What the statute referred to by the Defendant, The City of West Memphis, actually says is: "After a trial resulting in conviction, the evidence shall be *impounded and securely retained* by a law enforcement agency" (emphasis supplied).

37. Nowhere in the statute does it state that the Freedom of Information Act "is not applicable to the physical evidence retained by a law enforcement agency following a conviction for a violent offense."

38. On the contrary, the very fact that law enforcement is required to retain evidence permanently instead of destroying the evidence would presumptively be indicative of the Legislative intent that the evidence should be made available to the public, and nothing in either the statute itself, or in the legislative history of the statute, or in any judicial interpretation of the statute says otherwise.

39. The right to such viewing is provided by the Freedom of Information Act of 1967. Ark. Code Ann. §25-19-101, *et seq*.

40. Specifically, "Except as otherwise *specifically* provided by *this section or* bylaws *specifically enacted to provide otherwise*, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records." Ark. Code Ann. §25-19-105(a)(1)(emphasis supplied).

41. There is nothing, specific or otherwise, in Arkansas Code Annotated Section 12-12-104 that exempts it from the Freedom of Information Act of 1967. On the contrary, the passage of 12-12-104 had nothing at all to do with whether evidence involving a violent crime could viewed by the public. The preamble to 12-12-104 states: "An act to provide for an alternate means of satisfaction of the statute of limitations for prosecutions based on DNA and other scientific evidence; for post-conviction appeals based on DNA and other scientific evidence; for chain of custody protection and other scientific evidence; and for other purposes." Act 1780 of 2001, General Session, preamble. There is not a single word indicating that the legislature intended 12-12-104 to prohibit the public from viewing evidence involving a violent crime. *Cf.*, Ark. Code Ann. §25-19-110(a).[2]

[2] "Beginning July 1, 2009, in order to be effective, a law that enacts a new exemption to the requirements of this chapter or that substantially amends an existing exemption to the requirements of this chapter shall state that the record or meeting is exempt from the Freedom of Information Act of 1967, § 25-19-101 *et seq*."

42. Because the Arkansas Freedom of Information Act of 1967 requires any exemption of the Act to be specific, whenever the legislature fails to specify that any records in the public domain are to be excluded from inspection, or is less than clear, the court must find in favor of the right to inspect. The burden of confidentiality rests on the statute itself, and if the intention is doubtful, the court must order disclosure. *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986).

43. Moreover, exemptions to the Freedom of Information Act of 1967 should be narrowly construed, and when the scope of the exemption is unclear or ambiguous, the court must rule in favor of disclosure. *Bryant v. Mars*, 309 Ark. 480, 830 S.W2d 869 (1992); *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

44. Words are given their usually accepted meaning in common language. *King v. Ochoa,* 373 Ark. 600, 601-02 (2008). Statutory language must be construed "so that no word is left void or superfluous and in such a way that meaning and effect is given to every word wherein, if possible." *Nationsbank, N.A. v. Murray Guard, Inc.,* 343 Ark. 437, 443-444, 36 S.W.3d 291, 295 (2001).

45. Moreover, "even seemingly conflicting statutes should be read in a harmonious manner where possible. In addition, this court will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent." *Wright v. Centerpoint Energy Resources Corp.*, 276 S.W.3d 253 (2008).

46. Plaintiff submits that The Freedom of Information Act of 1967 and Arkansas Code Annotated Section 12-12-104 are not contradictory, as there is nothing in Section 12-12-104 that prohibits the viewing of evidence, and therefore, the statutes should be read harmoniously.

47. To the extent that the Acts can be read to be in contradiction, such a result would lead

to an absurd result, as the very point of retaining evidence is that it may be viewed.

c. THE FREEDOM OF INFORMATION ACT OF 1967 AND JUDICIAL INTERPRETATION

48. The Defendants next rely upon *Nolan v. Little*, 196 S.W.3d 1(2004). This too is in error.

49. To understand why the Defendants are in error, first it must be understood how the Court interprets the Freedom of Information Act of 1967.

50. Upon passage of the Freedom of Information Act of 1967, the General Assembly found that "the proper functioning of a democratic society is dependent upon the public being informed at all times with respect to the operations of government, and public officials shall at all times be held accountable for their public actions and conduct". Emergency Clause of the Freedom of Information Act of 1967.

51. The General Assembly further found that: "the immediate passage of [the Freedom of Information Act of 1967] is necessary . . . to secure to the public their proper right of access to public records". *Id.*

52. Therefore, unless otherwise specifically provided, "all public records shall be open to inspection and copying by any citizen of the State of Arkansas". Ark. Code Ann. §25-19-105(a)(1).

53. That Court will recall, as shown above, that when determining whether a public record is exempt the exempting statute must be specific and unambiguous. So it is that when interpreting what is a "public record" the Freedom of Information Act of 1967 is to be liberally interpreted to accomplish the Act's laudable purposes. *See, e.g.*, *Commercial Printing Co. v. Rush*, 261 Ark. 468, 549

S.W.2d 790 (1977); *Sebastian County Chapter of Am. Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993); and, *Fox v. Perroni*, 358 Ark. 251, 188 S.W.3d 881 (2004). Therefore, the presumption, both in interpreting an exemption or determining whether the information requested is a public record, is the same: that there is no exemption and the information requested is a public record as defined by the Act. Stated another way, the presumption is that the public should have access to the information requested.

54. In contrast, the plaintiff in *Nolan* (the case relied upon by the Defendants) requested to take seeds held by the State Plant Board and destroy the seeds through testing.

55. The Court in *Nolan* held that a "seed sample does not meet the definition of a 'public record,' because it cannot be said to be an object 'on which records and information may be stored or represented.'"

56. The Court in *Nolan* held that the seeds themselves were therefore not public records, but instead, only "the documents relating to the testing of a seed sample" are public records.

57. The testing of seeds is to be distinguished from evidence in a criminal prosecution. In a criminal prosecution, it is the evidence itself, not documents about the evidence, that are presented to the jury.

58. Therefore, unlike the seeds in *Nolan*, the evidence in a criminal case here does directly present information to the public, and therefore is an object 'on which . . . . *information may be stored or represented*.'"

59. Contrary to the position of the Defendants, the Plaintiff's situation is much more similar to a request to view crime scene photographs and pathologist photographs. Such information are also

objects 'on which . . . . *information may be stored or represented*.'" Therefore, such evidence is subject to the Freedom of Information Act of 1967. *See*, *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). There simply is no exemption to the Freedom of Information Act of 1967 of evidence in a criminal prosecution.

60. Moreover, here, unlike the plaintiff in *Nolan*, Ms. Hicks does not wish to take anything, but merely view the evidence.

61. In *Nolan*, there was a relatively low level of public interest in the testing of the seeds. On the contrary, here, where the evidence sought to be viewed involved the triple-homicide of three young boys, it is difficult to imagine a higher level of public interest.

62. Certainly the Court would be wise to use a common sense approach when distinguishing these two fact-patterns - one involving the destruction of seeds held by an administrative agency with relatively low level of public interest in such testing and the other involving simple viewing of evidence in a criminal case with a very high level of public interest.

63. In fact, it is exactly the plea to "common sense" that the Court in *Nolan* required. ("This court has said that we will balance the interests between disclosure and non-disclosure using a common sense approach.")

IV. CONCLUSION

64. Therefore, the Defendants' reliance on Arkansas Code Annotated 12-12-104 and *Nolan* is in error.

65. Nothing in Arkansas Code Annotated 12-12-104 specifically exempts physical evidence in a criminal case. Therefore the information is subject to the Freedom of Information Act of

1967.

66. The information sought, as all evidence presented to a jury, is a medium that stores information. Ms. Hicks does not want to destroy the product, but seeks only to view and examine it, and it is of high public interest, unlike the seeds in *Nolan* that conveyed no information to the public in and of themselves, were sought to be destroyed, and were of low public interest.

WHEREFORE, Plaintiff prays for an order from this Court granting her Petition and Complaint against the Defendants, for an order to the Defendants requiring them to allow her to view and examine all evidence gathered in the investigation of the murders that occurred in West Memphis on May 5, 1993, and for all other proper relief.

Respectfully Submitted,

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Ken Swindle
Ark. Bar #97234
619 West Walnut Street
Rogers AR 72756
Telephone (479) 621-0120
Fax (479) 621-0838