

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

TERRY HOBBS,
Plaintiff,

v.

NATALIE PASDAR, Individually, et al.,
Defendants.

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CASE NO. 4:09CV00008 BSM

**OBJECTIONS AND RESPONSES OF DEFENDANT
NATALIE PASDAR TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**

Pursuant to the Federal Rules of Civil Procedure, Defendant Natalie Pasdar, Individually and d/b/a Dixie Chicks ("Ms. Pasdar"), serves her Objections and Responses to the First Set of Interrogatories of Plaintiff Terry Hobbs ("Hobbs").

**I.
GENERAL OBJECTIONS**

The following General Objections are incorporated by reference into each and every Interrogatory response that follows.

1. Ms. Pasdar objects to Plaintiff's use of the terms "you," "your," or "Defendant" (a) to the extent that the use of those words causes any Interrogatory to exceed the permissible scope of discovery under the FEDERAL RULES OF CIVIL PROCEDURE, (b) to the extent the use of those words includes any corporation, business, entity, or individuals other than Ms. Pasdar, and (c) to the extent the use of the words includes agents, representatives, [and] attorneys as calling for information subject to the attorney-client, work product, and/or joint defense privileges.

2. Ms. Pasdar objects to the Interrogatories, and to each and every individual Interrogatory contained therein, to the extent that they call for information not reasonably available to, or documents not within the possession, custody, or control of Ms. Pasdar. The

answers given herein are based on information reasonably available to Ms. Pasdar and documents within her possession, custody, or control, including Ms. Pasdar's knowledge of same.

3. Ms. Pasdar objects to Plaintiff's Interrogatories as uncertain, overbroad, unduly burdensome, and oppressive to the extent that many Interrogatories fail to specify any responsive time period, and are not limited to events relevant to this lawsuit.

4. Ms. Pasdar expressly incorporates the above General Objections into each specific answer to the Interrogatories set forth below as if set forth in full therein. An answer to an Interrogatory shall not work as a waiver of any applicable Specific or General Objection to an Interrogatory.

II.

These answers are made solely for the purpose of this action. Each answer is subject to all objections, as to competence, relevance, materiality, propriety, and admissibility, and to any and all other objections on the grounds that would require the exclusion of any statements contained herein if such Interrogatory were asked of, or statements contained herein were made by a witness present and testifying in Court, all of which objections and grounds are expressly reserved and may be interposed at the time of trial.

The following answers are based upon information presently available to and located by Ms. Pasdar. Ms. Pasdar has not completed her investigation of the facts relating to this case, discovery in this action, or her preparation for trial. The answers given herein are without prejudice to Ms. Pasdar's right to produce evidence of any additional facts. As such, these answers are subject to supplementation and amendment as discovery in this case progresses, should future investigation indicate that supplementation or amendment is necessary.

Any statement that particular information or documents, or categories of information or documents, will be produced shall not be considered a representation that such information or documents exist, but rather if such information or documents exist, and are within Ms. Ms. Pasdar's possession, custody, or control, and can be located in the course of a reasonably diligent search, they will be produced at a mutually convenient time and place.

No incidental or implied admissions are intended by the answers provided herein. The mere fact that Ms. Pasdar has answered or objected to any Interrogatory should not be taken as an admission that she admits the existence of any facts set forth or assumed by such Interrogatory. That Ms. Pasdar has answered part or all of any Interrogatory is not intended to be, and shall not be construed to be, a waiver by Ms. Pasdar of any part of any objection to any Interrogatory.

To the extent that any or all of the Interrogatories call for information protected by the work-product doctrine, the attorney-client privilege, the joint defense privilege, or any other privilege, Ms. Pasdar objects to each and every such Interrogatory and will not supply or render information protected from discovery by virtue of such doctrine or privileges.

III.
OBJECTIONS AND ANSWERS TO INTERROGATORIES

Subject to and without waiving any of the foregoing General Objections, which objections are incorporated in each response the same as if set forth at length, Ms. Pasdar answers the interrogatories as follows:

INTERROGATORY NO. 1: With respect to Exhibits "A", "D" and 'T' which were attached to Requests for Admissions which were served on you with these interrogatories, state whether you used the summary (Exhibit "I") to assist you when you wrote the letter dated November 26, 2007 (Exhibit "A") and the My Space posting dated November 21 (Exhibit "D"). If so, state in detail each step you took in order to receive your copy of the summary (Exhibit "I") and each person

you spoke to, wrote to, emailed or text messaged or otherwise communicated with in order to obtain a copy of such summary.

ANSWER: As part of my education about the West Memphis 3 and their efforts to obtain a new trial, Lorri Davis Echols provided me via email with a summary of evidence presented in the federal court proceeding. I understood then, as I do now, that the summary was prepared by lawyers for Damien Echols and was, in all respects, a truthful and accurate summary of what had previously been filed of public record. I used the summary, in part, when writing the November 26, 2007 letter (the "Letter") and the November 21, 2007 My Space posting (the "My Space Posting").

INTERROGATORY NO. 2:To the best of your recollection, state what you thought was the time of the death of Michael Moore, Christopher Byers and Steve Branch at the time that you wrote the letter dated November 26, 2007 (Exhibit "A") and the My Space posting dated November 21 (Exhibit "D").

ANSWER: I do not recall that I had any such specific belief at the time I wrote the Letter or the My Space Posting.

INTERROGATORY NO. 3:To the best of your recollection, state the date that you first became aware that there were references to fingerprint evidence in the Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus filed by Damien Echols on October 29, 2007.

ANSWER: I have not read the Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus filed by Damien Echols on October 29, 2007 (the "Memo") and I do not recall if there were references to fingerprint evidence being presented in any of the court filings, in the Echols Legal Team press conference held on November 2, 2007 and/or posted on the website. I do recall that I had watched the press conference and reviewed the website prior to November 26, 2007.

INTERROGATORY NO. 4:To the best of your recollection, state the date that you first became aware of who Terry Hobbs is.

ANSWER: OBJECTION. Ms. Pasdar objects to this request on the grounds it is vague and ambiguous with regard to "who Terry Hobbs is."

Subject to the preceding objection, Ms. Pasdar provides the following information: I first recall hearing the name Terry Hobbs when I first became aware of the West Memphis 3 and while watching the HBO movies about the West Memphis 3 and reading materials on the internet about the West Memphis 3.

INTERROGATORY NO. 5: List every fact known to you that you believe supports the proposition that Terry Hobbs thrust himself into the vortex of the controversy surrounding the convictions of Damien Echols, Jesse Miskelly and Jason Baldwin for the murders of Michael Moore, Christopher Byers and Steve Branch.

ANSWER: OBJECTION. Ms. Pasdar objects to this interrogatory on the grounds that it is vague and ambiguous. The request is also objectionable as it seeks to compel the disclosure of information protected by the attorney-client, attorney work product, work product, and joint defense privileges. Ms. Pasdar's investigation is continuing and Ms. Pasdar will supplement her answer hereto in accordance with the Federal Rules of Civil Procedure.

Subject to the preceding objections, Ms. Pasdar provides the following information: Terry Hobbs has made numerous statements in the press about the murders, has participated in various interviews with newspapers and television reporters about the murders and the fact that he has been interviewed by the police several times, has sold his story to a film company and is writing and/or "shopping" a book (and potentially a screenplay) regarding the Robin Hood Hills Murders. Hobbs has also commented on DNA evidence presented by counsel for the West Memphis 3 to police and others. All of these actions indicate that he has placed himself in the center of this controversy. Moreover, the presence of the subject DNA at the crime site and his actions regarding that DNA place Hobbs in the center of the controversy. Further, in the event Hobbs did commit the murders, his actions necessarily thrust himself into the vortex of the controversy. In sum, by publicly discussing the murders and evidence surrounding the case before and after the discover of his DNA at the crime site, a scenario exists in which Hobbs has been prominently and countlessly mentioned and discussed as part of the West Memphis 3 case and has become closely and inextricably related to the controversy that surrounds the West Memphis 3.

By way of further answer, Ms. Pasdar will produce documents in accordance with Federal Rule of Civil Procedure 33(d) from which further information responsive to this interrogatory may be gathered.

INTERROGATORY NO. 5 [SIC]: State the extent of your knowledge regarding who you would contact or what you would do if you wanted to determine how many people had viewed on the internet the letter dated November 26,2007 (Exhibit "A") and the My Space posting dated November 21 (Exhibit "D").

ANSWER: OBJECTION. Ms. Pasdar objects to Interrogatory No. 5 [sic] as it seeks to compel the disclosure of information protected by the attorney work product, work product, attorney-client and joint defense privileges. The interrogatory is also objectionable in that it is vague and calls for speculation rather than information based on personal knowledge.

Subject to the preceding objections, Ms. Pasdar would work with her management company and the entities managing the website in the event she wanted to determine number of “hits” or “views” to the Letter and the My Space Posting.

INTERROGATORY NO. 6: State the name and contact information of each person known to you that you believe has information relevant to the issues in this case.

ANSWER: OBJECTION. Ms. Pasdar objects to the interrogatory as it seeks to compel the disclosure of information protected by the attorney work product, attorney-client, work product and joint defense privileges. The interrogatory is also objectionable as it vague and ambiguous as Ms. Pasdar is uncertain as to what is meant by the phrase “relevant to the issues in this case.” Ms. Pasdar’s investigation continues. Ms. Pasdar will supplement her responses in accordance with the Federal Rules of Civil Procedure.

Subject to her objections, Ms. Pasdar answers as follows:

- (a) Terry Hobbs, c/o J. Cody Hiland, Hiland Law Firm, 557 Locust Avenue, Conway, Arkansas 72034, phone 501.932.1007
- (b) Pam Hobbs, current address unknown.
- (c) Natalie Pasdar, c/o Dan Davison, Fulbright & Jaworski L.L.P., 2200 Ross Avenue, Suite 2800, Dallas, Texas 75201, phone 214.855.8000
- (d) Martha Siedel, c/o Bob Wellenberger, Thompson, Coe, Cousins & Irons, L.L.P., 700 North Pearl Street, Plaza of the Americas, Twenty-Fifth Floor, Dallas, Texas 75201, phone 214.871.8257
- (e) Emily Robison, c/o Bob Wellenberger, Thompson, Coe, Cousins & Irons, L.L.P., 700 North Pearl Street, Plaza of the Americas, Twenty-Fifth Floor, Dallas, Texas 75201, phone 214.871.8257
- (f) Lorri Davis Echols, c/o Damien Echols Defense Fund, P. O. Box 1216, Little Rock, AR 72203
- (g) Damien Echols, #SK931, Varner Unit, P. O. Box 400, Grady, AR 71644
- (h) Jessie Misskelley, Jr., #103072, P. O. Box 600, Grady, AR 71644-0600
- (i) Jason Baldwin, #103335, 2501 State Farm Rd, Tucker, AR 72168
- (j) Simon Renshaw, Strategic Artist Management, 1100 Glendon Ave., Suite 1100, Los Angeles, CA 90024, phone 310.208.7882
- (k) Kat Darnell-Duffy, Strategic Artist Management, 1100 Glendon Avenue, Suite 1100, Los Angeles, CA 90024, phone 310.208.7882

- (l) Seema Sultanali, Strategic Artist Management, 1100 Glendon Avenue, Suite 1100, Los Angeles, CA 90024, phone 310.208.7882
- (m) Morgan Zuehlke, Strategic Artist Management, 1100 Glendon Avenue, Suite 1100, Los Angeles, CA 90024, phone 310.208.7882
- (n) Joanne Burnside, Strategic Artist Management, 1100 Glendon Avenue, Suite 1100, Los Angeles, CA 90024, phone 310.208.7882
- (o) Cindi Berger, PMK/HBH, 161 Ave. of the Americas, Suite 10-R, New York, NY 10013, phone 212.582.1111
- (p) Capi Peck, c/o Arkansas Take Action, P.O. Box 17788, Little Rock, AR 72222-7788
- (q) Dennis Riordan, 523 Octavia St, San Francisco, CA 94102, phone 415.431.3472
- (r) Donald Horgan 523 Octavia St, San Francisco, CA 94102, phone 415.431.3472
- (s) Deborah Sallings, 35715 Sample Road, Roland, AR 75165, phone 501.330.2686
- (t) Gerald Skahan, Luchessi & Skahan, 202 Adams Avenue, Memphis, TN 3810, phone 901.526.6476
- (u) Ron Lax, Inquisitor, Inc., 364 S. Front St., Memphis, TN 38103, phone 901.526.9281
- (v) Rachel Geiser, Inquisitor, Inc., 364 S. Front St., Memphis, TN 38103, phone 901.526.9281
- (w) John Crews, Bode Technology Group, 10430 Furnace Road, Suite 107, Lorton, VA 22079, phone 703.646.9740
- (x) Thomas Fedor, Serological Research Institute, 3053 Research Drive, Richmond, CA 94806, phone 510.223.-7374
- (y) Dr. Werner Spitz, Forensic Pathology and Toxicology, 23001 Greater Mack, St. Clair Shores, MI 48080, phone 586.776.2060
- (z) Dr. Richard Souviron, Number One Bob Hope Road, Miami, FL 33136-1133, phone 305.545.2425
- (aa) John Douglas, current address and telephone unknown.
- (bb) Mike Allen, Assistant Chief of Police, West Memphis Police Department, 626 East Broadway, West Memphis, AR 72301, phone 870.732.7352

- (cc) Lt. Ken Mitchell, West Memphis Police Department, 626 East Broadway, West Memphis, AR 72301, phone 870.732.7352
- (dd) John Mark Byers, current address and telephone unknown.
- (ee) Ryan Clark, current address and telephone unknown.
- (ff) Diana Moore, current address and telephone unknown.
- (gg) Roy Todd Moore, address and telephone unknown
- (hh) David Jacoby, current address and telephone unknown.
- (ii) Ross Sampson, 605 Poplar Avenue, Memphis, TN 38105, phone 901.575.9922
- (jj) Jackie Hicks, Jr. , current address and telephone unknown.
- (kk) Jackie Hicks, Sr. , current address and telephone unknown.
- (ll) Jo Lynn McCaughey, current address and telephone unknown.
- (mm) Judy Sadler, current address and telephone unknown.
- (nn) Donna Medford, current address and telephone unknown.
- (oo) Any and all attorneys for the West Memphis 3; contact information to be supplemented.
- (pp) Any and all police and other law enforcement agents who have investigated the Robin Hood Hills Murders; contact information to be supplemented.
- (qq) Any and all attorneys for Terry Hobbs, contact information to be supplemented.
- (rr) Any and all witnesses at the trial of the West Memphis 3, contact information to be supplemented.
- (ss) Any and all witnesses at the Federal Habeas Corpus hearing, contact information to be supplemented.
- (tt) Any and all DNA or forensic experts with knowledge of the DNA and other forensic evidence found at the murder site and on the victims, contact information to be supplemented.
- (uu) Any and all media outlets and personnel with whom Hobbs has dealt, contact information to be supplemented.
- (vv) Any and all book publishers with whom Hobbs has dealt, contact information to be supplemented.

INTERROGATORY NO. 7: With respect to the summary attached as Exhibit "T" to the Requests for Admission served herewith, state the extent of your knowledge as to who prepared the summary, how the summary was prepared, when the summary was prepared and the purpose for which the summary was prepared.

ANSWER: I do not know the precise identity of the persons who prepared the summary that is Exhibit I, although at the time of the Letter, the My Space Posting and the Rally, I believed that a similar summary, which Lorri Davis had sent me, had been prepared by lawyers, among others, for Damien Echols and that the summary accurately reflected information and materials that had been disclosed in court pleadings, at the November 02, 2007 press conference and elsewhere.

INTERROGATORY NO. 8: List every fact known to you that you believe supports the proposition that Terry Hobbs took actions which voluntarily assumed the risk that persons would make false statements of fact about him regarding the controversy surrounding the convictions of Damien Echols, Jesse Miskelly and Jason Baldwin for the murders of Michael Moore, Christopher Byers and Steve Branch.

ANSWER: OBJECTION. Ms. Pasdar objects to this interrogatory as it seeks to compel the disclosure of information protected by the attorney-client, attorney work product, work product and joint defense privileges. The interrogatory is also objectionable in that it is vague and ambiguous. Ms. Pasdar's investigation continues. She will supplement her response hereto in accordance with the Federal Rules of Civil Procedure.

Subject to her objections, Ms. Pasdar incorporates her earlier response to Interrogatory No. 5 above and provides the following information: In sum, by publicly discussing the murders, attempting to sell book and movie rights, being publicly interviewed by the media and taking the action set forth in response to Interrogatory No. 5, Hobbs assumed the risk that statements made about him might turn out to be incorrect.

INTERROGATORY NO. 9: To the best of your recollection, state the date and substance of any conversation that you have had in which Terry Hobbs was mentioned with any of the following persons: Capi Peck, Lorri Davis Echols, Eric Ferrero, Brent Peterson, Dennis Riordan, Don Horgan, Kathy Bakken, Grove Pashely, Lisa Fancher, and Burk Sauls.

ANSWER: OBJECTION. Ms. Pasdar objects to this interrogatory on the grounds that it seeks to compel the disclosure of information protected by the attorney-client, attorney work product, work product and joint defense privileges. The interrogatory is also objectionable as it is vague and ambiguous and, as phrased, not reasonably calculated to lead to the discovery of admissible evidence. Ms. Pasdar's investigation continues. She will supplement her response hereto in accordance with the Federal Rules of Civil Procedure with non-privileged and non-objectionable information.

Subject to her objections, Ms. Pasdar provides the following information: From the above list, I have only discussed the West Memphis 3 case (not Terry Hobbs specifically) with Lorri Davis. Davis discussed with me the Terry Hobbs forensic evidence when discussing all of the forensic evidence which suggests that Damien Echols and the other West Memphis 3 members are not guilty of the Robin Hood Hills Murders.

INTERROGATORY NO. 10: State everything you know about the group “Arkansas Take Action!”

ANSWER: OBJECTION. Ms. Pasdar objects to this request on the grounds that it is, as phrased, overly broad, unduly burdensome and neither relevant to issues in the pending litigation nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to the preceding objections, Ms. Pasdar provides the following information: At the time of my statements, I was aware that Arkansas Take Action is a volunteer organization which works to free the West Memphis 3.

INTERROGATORY NO. 11: To the best of your recollection, state whether or not you have ever read the Frequently Asked Questions article on the WM3.org website, a printed copy of which is attached hereto as Exhibit “1”. State the extent to which you were aware of and believed that the factual assertions contained in the Frequently Asked Questions were true statements of fact on or before November 26, 2007.

ANSWER: I believe I had visited the WM3.org website and had reviewed Exhibit 1 prior to November 26, 2007. I generally believed the factual assertions therein at that time (as I do today) and had (and have) no reason to believe that the statements are false or misleading.

INTERROGATORY NO. 12: To the best of your recollection, state whether or not you have ever read Dan Stidham’s case synopsis on the WM3.org website, a printed copy of which is attached hereto as Exhibit “2”. State the extent to which you were aware of and believed that the factual assertions contained in Dan Stidham’s case synopsis were true statements of fact on or before November 26, 2007.

ANSWER: I believe I had visited the WM3.org website and had reviewed Exhibit 2 prior to November 26, 2007. I generally believed the factual assertions therein at that time (as I do today) and have (and had) no reason to believe that the statements are false or misleading.

INTERROGATORY NO. 13: To the best of your recollection, state whether or not you have ever viewed the video of or read any transcript of the Damien Echols legal team’s press conference of November 1, 2007. A printed copy of the WM3.org page link to the video of the

press conference is attached hereto as Exhibit "3". State the extent to which you were aware of and believed that the factual assertions contained in Damien Echols legal team's press conference of November 1, 2007 were true statements of fact on or before November 26, 2007.

ANSWER: I believe I had visited the WM3.org website and had reviewed a video of the press conference prior to November 26, 2007. I generally believed the factual assertions therein at that time (as I do today) and had (and have) no reason to believe that the statements are false or misleading.

INTERROGATORY NO. 14: To the best of your recollection, state the date that you first became aware that Judge Burnett made a ruling regarding DNA evidence submitted by Damien Echols.

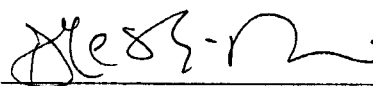
ANSWER: I am unaware of any ruling made by Judge Burnett regarding DNA evidence submitted by Damien Echols.

INTERROGATORY NO. 15: In Paragraph 41 of a pleading styled DEFENDANTS' ORIGINAL ANSWER filed on your behalf in the Circuit Court of Pulaski County, Arkansas, it states "41. Plaintiffs claims are barred because the statements complained of are true and/or substantially true." In the letter that you wrote dated November 26, 2007 (attached to the Requests for Admission served herewith as Exhibit "A") you stated "The filing also includes a chronology of Hobbs' activities on the night of the crimes, when he washed his clothes and sheets at odd hours for no reason other than to hide evidence from the crimes." State the complete factual basis for your statement that it is true or substantially true that the filing includes a chronology of Hobbs' activities on the night of the crimes, when he washed his clothes and sheets at odd hours for no reason other than to hide evidence from the crimes.

ANSWER: OBJECTION. Ms. Pashar objects to this interrogatory on the grounds it seeks to compel the disclosure of information protected by the attorney-client, attorney work product, work product and joint defense privileges. The interrogatory is also objectionable as it is vague and ambiguous and, as phrased, not reasonably calculated to lead to the discovery of admissible evidence. Ms. Pashar further objects to this interrogatory on the grounds that it mischaracterizes her pleadings and her position in this case. Ms. Pashar's investigation continues. She will supplement her response hereto in accordance with the Federal Rules of Civil Procedure.

Subject to the preceding objections, Ms. Pashar provides the following information: I believed at the time of the Letter that the filing contained a chronology, based on information I received about that filing from Lorri Davis which I understood came from Damien Echols' lawyers. It is my belief, as pled in my Answer, that the gist of the Letter, when taken as a whole - that the West Memphis 3 did not commit the Robin Hood Hills Murders and deserve a new trial - was true and/or substantially true.

Respectfully submitted,



Dan D. Davison
Texas State Bar No. 05590900
Admitted - Pro Hac Vice
D'Lesli Davis
Texas State Bar No. 05479459
Admitted - Pro Hac Vice
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John E. Moore
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Regions Center
400 W. Capital, Suite 1900
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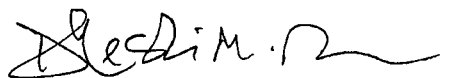
**COUNSEL FOR DEFENDANT,
NATALIE PASDAR**

CERTIFICATE OF SERVICE

This discovery pleading has been served in compliance with the Federal Rules of Civil Procedure on March 24, 2009.

J. Cody Hiland
557 Locust Ave.
Conway, Arkansas 72034

Bob Wellenberger
Thompson, Coe, Cousins & Irons, L.L.P.
700 North Pearl Street
Plaza of the Americas, Twenty-Fifth Floor
Dallas, Texas 75201-2832

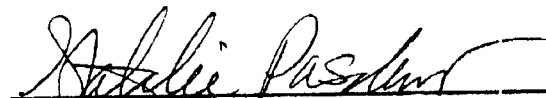


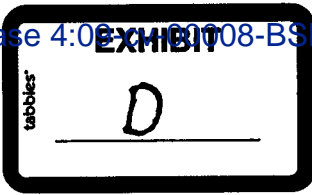
D'Lesli M. Davis

VERIFICATION

I, Natalie Pasdar, do hereby declare, pursuant to 28 U.S.C. §1746(2) and under penalty of perjury, that each and every response and objection to the foregoing Objections and Responses of Defendant Natalie Pasdar to Plaintiff's First Set of Interrogatories are true and correct to the best of my personal information and belief.

SIGNED this 27th day of March, 2009.


NATALIE PASDAR



Criminal Bk 143 Pg 239

IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

DAMIEN WAYNE ECHOLS

V.

NO. CR 93-450A

STATE OF ARKANSAS

PETITIONER
CIRCUIT COURT CLERK
08 SEP 10 PM 1:34
FILED
RESPONDENT

ORDER DENYING MOTION FOR A NEW TRIAL UNDER ARK. CODE
ANN. §16-112-201, et seq.

On this 10 day of September, 2008, came on to be heard the motion of the petitioner for a new trial. Based on the pleadings, statements of counsel, and the files and records of this proceeding, the Court finds as follows:

1. In July and September 2002, the Petitioner filed motions for DNA testing pursuant to Act 1780 of 2001, first codified at §16-112-201 et seq. (Supp. 2003). Pursuant to an agreement of the parties, in June 2004, and February 2005, the Court ordered DNA testing of many items of evidence. After obtaining some results that he asserted were favorable to him, the Petitioner raised them in federal district court in a pending habeas-corpus proceeding. The federal district court would not consider them due to the pendency of the proceeding in this Court. Thus, the petitioner returned to this Court and filed a motion for a new trial in mid-April 2008, seeking relief particularly under Ark. Code Ann. §16-112-208(e) (Repl. 2006).

Pursuant to a scheduling order announced at a hearing on April 15, 2008, the State filed a Response on May 30, 2008. The Court set this and companion cases for a status hearing on August 20, 2008, and set hearing

State of Arkansas
County of Craighead
TRUE COPY CERTIFY
ANN HUDSON, Circuit Court Clerk
BY [Signature]

dates for all cases from September 8 to October 3, 2008. The Petitioner filed a Reply to the State's Response on August 12, 2008. At the August 20 status hearing, the Court granted (over the State's objection) the Petitioner leave to file his Reply and the State until August 30 to file a further Response. Both parties were invited to file proposed precedents by that date as well.

2. The Petitioner seeks a new trial pursuant to a 2005 amendment to the DNA-testing statute that was not in effect at the time the Court ordered the agreed-upon DNA testing under a prior version of the statute. That testing provision is no longer in effect and was replaced by a more stringent one also by the 2005 amendment. See 2005 Ark. Acts, No. 2250; compare Ark. Code Ann. §§16-112-201, *et seq.* (Supp. 2003) with Ark. Code Ann. §§16-112-202, 16-112-208 (Repl. 2006). Thus, his new-trial motion is founded on testing results that have not been found to meet the strictures of the statute. Indeed, the State asserts that it would not now agree to the testing that it did under the earlier version of the statute because the testing pursued by the Petitioner cannot produce material evidence raising a reasonable probability that he did not commit the offense, as now required by the statute.

While the Petitioner has invoked the new version of the statute (§16-112-208(e)) in asking for a new trial in light of his DNA-testing results and other claims, he has not separately demonstrated that the testing could be ordered under the new version of the statute (§16-112-202) in the first place. The State, on the other hand, has not suggested that he must do so or that he is limited to the relief available under the statute as it existed at the time

Criminal Bk 143 Pg 241

testing was ordered. The Court agrees with the State's observation that before the 2005 amendments to the statute it was unclear how testing results were to be gauged. In these circumstances, the Court must resolve how the current relief provisions found in §16-112-208 operate, particularly here on testing results ordered under the now-repealed testing provision of §16-112-202.

3. That resolution is informed by the simple facts that this case began with the Petitioner's request, and the Court's order, for DNA testing that might be materially relevant to the Petitioner's mere assertion of actual innocence under the previous statutory scheme for pursuing actual-innocence relief. How the Court must evaluate the results of such testing is necessarily a matter of turning to the statute. The Court is largely persuaded by the State's analysis of the statute as detailed in its responses, particularly as applied to this case given the procedural history and legislative changes recounted above. The Court's legal conclusions are as follows.

The first provision of the statute concerning results, Ark. Code Ann. §16-112-208(b), gives the Court two options when results are inconclusive, order additional testing or deny relief. The Petitioner has not requested additional testing. As for the results already obtained, the Court must determine the meaning of inconclusive in this case in light of the testing ordered. Because the Petitioner's testing results were obtained without a finding that he had shown that testing would raise a reasonable probability that he did not commit the offenses as now required by §16-112-202(8)(B), his DNA-testing results must at least demonstrate as much to avoid denial of

relief due to inconclusiveness under section 208(b). Under the statute, results that might support relief will necessarily raise a reasonable probability that a petitioner did not commit an offense, because only testing that could yield such results can be ordered.

In other words, the Petitioner cannot jump past section 208(b) to §16-112-208(e) to pursue a new trial simply because he claims his results exclude him as a source of DNA because his testing was not ordered under the rigors of the current version of section 202. All the relief available under section 208 is premised on testing ordered consistently with the current version of section 202. Because there was no finding that Petitioner's testing would raise a reasonable probability that he did not commit the offenses at the time that testing was ordered in 2004 (as no such finding was then required), but that finding is now required under section 202, the Court must evaluate whether his testing results are inconclusive as to that probability under section 208. If the Court did not first evaluate the Petitioner's DNA-testing results by that measure, it would contradict the statute's requirement that only testing that satisfies section 202 should be conducted—i.e., there is no point to a hearing on the results of testing that could not be ordered now. Thus, in order to determine whether relief must be denied under section 208(b), the Court must determine whether the Petitioner's results are inconclusive as to his claim of actual innocence.

The results on which the Petitioner relies are most recently described by him in his Reply at pp. 14-15. Although the State apparently would

dispute some of his results at a hearing, because the Court is denying relief without an evidentiary hearing, it will accept his results as follows for purposes of its legal analysis in this order. The DNA-testing results exclude the Petitioner as a source of most of the biological material tested to date, particularly from 1) a foreign allele from a penile swab of one victim, 2) a hair recovered from a shoelace used to bind another victim, and 3) a hair recovered from a tree stump at the crime scene. The step-father of one victim and a friend of his are, respectively, not excluded as sources of the latter two items. The Petitioner also is excluded as the source of biological material from a pants cutting of one victim.

The Court finds that the Petitioner's DNA-testing results are inconclusive because they do not raise a reasonable probability that he did not commit the offenses; that is, they are inconclusive as to his claim of actual innocence. The Court readily can find as much from the Petitioner's own description of his results in his latest pleading, his August 12 Reply to the State's Response. His section advancing the reliability and significance of the results concludes by saying they together raise "an inference of innocence[.]" Reply at p. 18. An inference in this context plainly is not a reasonable probability that could support his claim. The Court agrees with the State that the mere exclusion of the Petitioner as the source of some biological material from the crime scene (including the four particular items on which he relies) neither establishes that he was not there nor that he was not a killer. On the other hand, that two other persons are not excluded from the two hairs does

not place them there nor make them killers. That the crimes here may not admit of ready identification of its perpetrators through DNA evidence does not make the Petitioner's burden to demonstrate conclusive DNA-testing results of his innocence any easier. Proof of actual innocence requires more than his exclusion as the source of a handful of biological material that is not dispositive of the identity of a killer. As his DNA-testing results offer no more than that, they are inconclusive and cannot support a hearing to evaluate his assertion of actual innocence.

Even apart from his own luke-warm characterization of his results, however, it is evident from the balance of his pleadings that he is not actually relying on his results alone to overcome the threshold to obtain a hearing, much less relief. Instead his motion depends upon consideration of voluminous exhibits purporting to undermine the evidence of guilt from his trial. His reliance on those materials reflects a fundamental misunderstanding of the claim he can make and his burden to obtain relief under the statute. The statute permits evaluation of claims of actual innocence supported by scientific testing, here the ordered DNA testing, it does not permit reweighing of the trial evidence. The adequacy of that evidence to demonstrate his guilt is fixed, particularly in a case like this in which its sufficiency was challenged and resolved on direct appeal. The point of the statute is to provide relief when, considering all the evidence of guilt, a petitioner nevertheless can demonstrate by DNA-testing results that he is actually innocent. The statute places the burden on a petitioner to prove his innocence, not on the State to

Criminal Bk 143 Pg 245

reprove guilt. As already noted, this proceeding began with a request and an order for DNA testing. The Court did not order forensic evaluation of the trial proof of guilt to be prepared, nor could it have. In short, the Court finds the Petitioner's DNA-testing results to be inconclusive and denies him further relief pursuant to section 208(b).

4. Even if the Court agreed with the Petitioner that his DNA-testing results should be evaluated under section 208(e) because they exclude him as the source of DNA, the Court would deny his motion without a hearing. The evaluation of his DNA-testing results under (e)(3) calls for a demonstration that those results "establish by compelling evidence that a new trial would result in an acquittal" when considered with all the other evidence in the case regardless whether it was admitted at trial. The Court agrees with the State that the Petitioner's new forensic evidence and numerous exhibits (e.g., pertaining to expert opinions on post-mortem animal predation) are not to be considered under that section. As already noted, the Petitioner's burden is to show his innocence by DNA-testing results, despite all other evidence of guilt, not by reweighing the trial evidence against new forensic evidence or opinions. Those matters simply are not cognizable under the statute.

The Petitioner's reliance on that new evidence is misplaced and again reflects a fundamental misunderstanding of the statute's scope in the Arkansas post-conviction scheme, as evidenced again by his latest pleading. In his introduction to his Reply, he argues "[o]nce it is established that [the Petitioner's] convictions are invalid and not entitled to conclusive effect, it

Criminal Bk 143 Pg 246

will be apparent that new scientific evidence" supports relief. Reply at p. 2. He has the cart before the horse. The time to consider the validity of his convictions has long since passed. The statute, however, gives him an opportunity to demonstrate that—*despite* the validity of his convictions—he should obtain relief from them because he is actually innocent. That demonstration simply has nothing whatever to do with discrediting the proof of guilt by re-evaluating it or considering new forensic evidence disputing it.

The Court finds that the Petitioner has not made that demonstration with his DNA-testing results. Even accepting those results as unchallenged, they merely exclude him as the source of several pieces of biological material that have differing connections to the crime scene and do not exclude two other persons connected to one of the victims. The results do not, however, foreclose the possibility that he nevertheless committed the offenses. In other words, a jury readily could reject the absence of DNA identity evidence as inconsistent with other proof of guilt, particularly the several admissions of guilt from the Petitioner and his codefendants' recounted by the State in its Response and exhibits. In particular, the Court finds that it may consider against the Petitioner here the statement that Jessie Misskelley gave to prosecutors after he was convicted in 1994. Thus, the Petitioner's DNA-testing results are not compelling evidence that he would be acquitted.

Additionally, the Court rejects the Petitioner's view that the statute requires a lesser burden of him to obtain relief under (e)(3) because it provides only for a new trial, while section 201(a) contemplates his complete discharge

from criminal liability. Given the 2005 amendment of the statute adding section 208, the Court is doubtful that any greater relief than permitted there is any longer independently available under section 201(a), as is evident by harmoniously reading the two sections together. Nevertheless, the Court agrees with the State that the Petitioner's claim to an easier burden under section 208(e) because outright discharge is possible under section 201(a) should be rejected to avoid an unnecessary separation-of-powers ruling on the constitutionality of section 201(a) vis-à-vis the Governor's clemency power.

Finally, even if the Court accepted the Petitioner's proposed lesser burden from federal authorities and credited his new forensic evidence on animal predation and indulged him further impeaching evidence of the trial evidence, it would still deny him a new trial. The Court agrees with the State's analysis that, upon comparison to House v. Bell, 547 U.S. 518 (2006), the Petitioner has fallen well short of the stringent showing of a compelling claim of actual innocence found there. While the Petitioner, like House, has some DNA results that exclude him as a source, they are not as significant as the evidence to which House pointed. House had new DNA evidence linking the victim's abusive husband to the crime as well as evidence of the husband's admissions of guilt. The Petitioner's claim would fail even under House.

5. The Court agrees with the State that it cannot entertain the Petitioner's juror bias and misconduct claims under the DNA-testing statute and that the Court's consideration of them in any proceeding is foreclosed by law of the case. The same considerations apply to the claim advanced in the

Criminal Bk 143 Pg 248

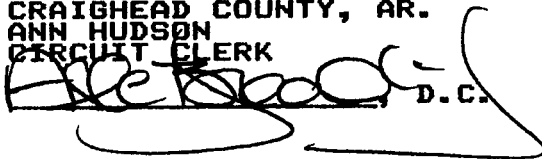
Petitioner's August 12 Reply concerning a sealed affidavit. Consequently,
they are hereby denied.

IT IS SO ORDERED.


CIRCUIT JUDGE DAVID BURNETT

DATE OF ENTRY: 9/10/08

Criminal Bk 143 Pg 239-248
DATE :09-15-2008
TIME :10:55:56 AM
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