IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

DAMIEN WAYNE ECHOLS AND CHARLES JASON BALDWIN — PETITIONERS

NO. CR 93-450A & B

STATE OF ARKANSAS — RESPONDENT

RESPONDENT'S RESPONSE TO ECHOLS' BRIEF ON THE ADMISSIBILITY OF EVIDENCE OF JUROR MISCONDUCT AND TO BALDWIN'S JOINDER IN ECHOLS' BRIEF ON THE ADMISSIBILITY OF EVIDENCE OF JUROR MISCONDUCT AND BALDWIN'S SUPPLEMENTAL BRIEF

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

The State does not resist admission of juror-misconduct evidence, although the State does not believe it will aid the Court' resolution of the question on remand under Ark. Code Ann. §16-112-208(e)(3)—whether a new trial would result in acquittal. Despite that belief, however, and because the Arkansas Supreme Court has said that such evidence "may or may not be relevant" under that section, see Echols v. State, 2010 Ark. 417 at 13 n.4, ___ S.W.3d ___, ___ n.4; Baldwin v. State, 2010 Ark. 412 at 2, it would be at least prudent for the Court to admit such evidence. For the benefit of the Court, the State nevertheless briefly explains its skepticism about the utility of that evidence in the proceeding on remand and in the resolution of the question whether a new trial would result in acquittal.

Juror misconduct at the original trial is not evidence of guilt or innocence likely to inform that determination now because it is not logically or legally relevant

to the proceeding on remand. Indeed, Echols and Baldwin do not discuss, much less bridge, the relevancy gap between 1994 and now. They instead argue that juror misconduct demonstrates the original verdicts are not reliable. See Echols' Br. at pp. 36-39. That point it seems is inapposite, as the reliability (or unreliability) of those verdicts is irrelevant to this Court's determination under 208(e)(3), which they acknowledge is the sole basis upon which they seek relief in this proceeding. See Echols' Br. at 3.

Under that section, the Court will be determining whether all the evidence before it *now* would result in an acquittal. If the Court's assessment is that the evidence would result in an acquittal, the Court may then grant a new trial under the statute. See Ark. Code Ann. §16-112-208(e)(3). The Court must make that assessment on *all the evidence* that will be before the Court, from the defendants and from the State, without regard to whether the jury reliably reached verdicts on the trial evidence in 1994. Contrary to Baldwin's suggestion, see Baldwin's Br. at 3, it would seem that the Court can "calibrate" the value of the evidence it considers without any regard for the 1994 verdicts or alleged juror misconduct. As the fact-finder now, the Court will be free to evaluate for itself all the evidence without regard to the 1994 verdicts in order to make the determination called upon in 208(e)(3).[1]

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[1]Echols and Baldwin, consequently, are mistaken that juror-misconduct evidence is needed to rebut the State's defense of the jury's verdicts as presumptively valid. See Echols' Br. at 38. While the State maintains that view of the verdicts, they are now beside the point of the remand proceeding, which is for the Court's

In other words, the Court will be evaluating evidence of guilt or innocence, not juror misconduct. After all, juror misconduct can yield a mistrial or new trial due to the misconduct itself, without regard to an assessment of the evidence of guilt or innocence. Compare generally State v. Cherry, 341 Ark. 924, 20 S.W.3d 354 (2000), with Cherry v. State, 347 Ark. 606, 66 S.W.3d 605 (2002). Misconduct is a structural flaw, the denial of a fair trial for which relief is available—without regard to the strength of the evidence of guilt—on a timely claim raised in the appropriate proceeding, but this is not such a claim or proceeding. Cf., e.g., Howard v. State, 367 Ark. 18, 29, 238 S.W.3d 24, 33 (2006) ("a defendant's remedy for alleged juror misconduct is to directly attack a verdict by requesting a new trial pursuant to Ark. Code Ann. § 16-89-130(c)(7)"). Instead, the relief available in this statutory proceeding is available without regard to the reliability of the original trial process, if testing evidence and all other evidence compellingly demonstrates that a new trial would result in an acquittal under 208(e)(3).[2] Thus, even a conviction from an

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consideration and evaluation of all the evidence that will come before it under 208(e)(3), without regard for the 1994 verdicts.

[2]An easy illustration of the point is that part of the juror-misconduct claim is that the Echols/Baldwin jury wrongly considered Jessie Misskelley's confession in reaching its verdicts, yet this Court as factfinder may consider his confession and other admissions by him as part and parcel of all the evidence it must evaluate under 208(e)(3). See Misskelley v. State, 2010 Ark. 415, at 7 (Misskelley's immunized statement relevant in deciding whether to grant a new trial under interpretation of §16-112-208(e)(3) from Echols v. State, 2010 Ark. 417, ___ S.W.3d ___).

unassailably reliable trial process can be challenged under the statute because the statute is concerned with the strength of evidence in the face of DNA testing, not the process by which evidence was considered at trial.[3] Echols and Baldwin may obtain relief under the statute if they meet its evidentiary burden, without regard to juror misconduct or the reliability of their 1994 convictions. They recognize as much by declaring that they do not seek relief *due* to that alleged misconduct, but only under the statute. See, e.g., Echols' Br. at 3.

Thus, the State does not resist the admission of juror-misconduct evidence, but reserves the right, at the hearing and in any post-hearing briefing, to refute its relevance to a demonstration of proof of the petitioners' burden under 208(e)(3).[4]

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[3]The constitutional authorities on which Echols and Baldwin rely concerning jurors and fair-trial principles are inapposite to the statutory-relief determination the Court must make under 208(e)(3). Nevertheless, the State would be remiss not to observe that it has no interest in securing convictions by juror misconduct contrary to those principles as alleged here. It does have an interest in the resolution of such allegations in timely, appropriate proceedings, but as noted in the text, this is not such a proceeding.

[4] If the Court admits the evidence, Echols' four concluding requests—for oral argument, admission of juror misconduct evidence, submission by the State of documentary proof, and the hearing of testimonial proof, see Echols' Br. at pp. 39-40—are, in turn, moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David R. Raupp, Senior Assistant Attorney General, do hereby certify that I have served a copy of the foregoing pleading, by mailing a copy of same, by U.S. Mail, postage prepaid, to counsel for petitioner this 16th day of May, 2011, as follows:

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