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MR. DAVIS: Judge, that's the court file for the Baldwin case there, and then I had Mr. Trail bring these court files from the Misskelley case in Clay County, and also the docket sheets.

THE COURT: Well, I wanted to hear that here, so let's make whatever arrangements we need to make to have it heard here.

(Pause.)

THE COURT: All right, I'm ready to start. I'm not sure where we are. There was a Baldwin file of Rule 37 petition years ago and then it's been amplified and amended at least twice since then, and I think I allowed the expanded Rule 37 petition to be filed and the exhibits that were attached to it.

It would seem, however, that most of the allegations contained in it were also issues in the Act 1780 motion and also a habeas motion had been filed in addition to the Rule 37, and as far as the Court is concerned, that's just an expansion of the Rule 37 petition.

And that's the way I'm going to treat the habeas, as a Rule 37 petition.

Now I understand that there is some question about a number of experts being called, and just exactly what the Court's going to allow to be heard in

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the Rule 37 petition, so who wants to start on that?

The State has objected; I think there were six major accounts in the amended petition and the State has objected to five of those, so let me hear the State's position on the Rule 37 petition with regard to the five points that have been objected to.

MR. DAVIS: Well, Your Honor, the original petition, or the amended petition for relief filed under Rule 37 alleged basically six areas, or six specific categories, basis for relief as a result of their petition.

The State's position is that basically none of those allegations contained in the claim for relief, then items number one through four are not cognizable under Rule 37, for reasons set forth in our response to the amended petition for relief.

And I hope the Court has read that but if it hasn't...

THE COURT: ...I've read it.

MR. DAVIS: It's set forth in there as to our reasoning and theory as to why those items are not cognizable basic relief under Rule 37.

The other item, which is item number five in their amended petition, which generally states ineffective assistance of counsel and then lists...

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THE COURT: ...sixteen points.

MR. DAVIS: A number of points. It's the State's position that those points are basically conclusory in nature and don't set forth specific facts sufficient to make those particular claims sufficient under a Rule 37 and request for relief under those particular provisions.

But in any event, it's the State's position that the items one through four and the items six that they claim relief under are not appropriate under Rule 37, and that if there is to be a hearing regarding the allegations or claims for relief under Rule 37, then it be limited to the specific claims under section five of the amended petition.

THE COURT: All right. Who's going to respond?

MR. PHILLIPSBORN: Your Honor, I am. Good morning. For the record, John Phillipsborn and Blake Hendrix on the behalf of Mr. Baldwin, and as ordered by the Court, Mr. Baldwin is present.

Your Honor, a couple of things just to begin with, and I apologize because I don't know the Court's procedure in this regard, but I would ask, unless there is a basis that the Court feels require, that Mr. Baldwin be unshackled.

THE COURT: That will be fine.

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MR. PHILLIPSBORN: Thank you, Your Honor. The other thing before I respond specifically to the State, Your Honor, uh, there is an issue pending that I realize may be mooted if the Court accepts the State's argument, but just because I know that it was a matter that we were going to take up today.

The Court had ordered an attorney's affidavit that had been lodged to the court under seal, to be released to the parties under seal. And I think for a while the affidavit had been misplaced or could not be located.

My understanding is that the affidavit was located and I was wondering if the Court would permit that affidavit, at some point during the course of these proceedings, to be released pursuant to a protective order, so that the parties could review it?

THE COURT: Yes, I think I can do that.

MR. PHILLIPSBORN: Thank you, Your Honor. So Your Honor, as to the issues presented, we, uh, I think both parties have briefed the issue.

Our position and response to the State's position was that in a series of cases, including most recently Rowbottom, R-O-W-B-O-T-T-O-M, the State Supreme Court of Arkansas has actually allowed the issues that we alleged in our amended Rule 37 petition to be

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addressed in the Rule 37 setting, including fair jury claims and other claims that we've made.

And so we would submit that particular, uh, we would submit our opposition and reply to the State as the basis for asking this court to allow all six grounds to be part of, uh, part of this hearing.

THE COURT: Were the jury issues not submitted in the direct appeal?

MR. PHILLIPSBORN: Your Honor, there wasn't a - - the Court is correct, that there were jury issues submitted on direct appeal, but at the time the parties did not have affidavits from the jurors; the jury room notes; the poster-size notes had not been released to the parties as of that time, so the record has been expanded in that sense.

And so the particular claim that's being made here addresses different facts than were addressed on the appeal.

And it's on that basis, Your Honor, that we are asking for, uh, the new facts to be part of the Rule 37 proceedings.

THE COURT: Well, of course, the Court could read your pleadings and make a decision based on the pleadings, and in fact, that's customarily done in many Rule 37 petitions.

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However, the nature of this case and the exposure of this case is what causes the Court to be inclined to give you a hearing on the issues that are raised.

However, I'm of the opinion that the only issue that's really covered by Rule 37 is the ineffective assistance of counsel, and that's what I'm going to hold it to.

So the issues that we are going to hear will be issues involving the ineffective assistance, and the others, I'm holding and it's my ruling that they are not cognizable by Rule 37, which your pleadings are filed and those will go to the Court.

MR. PHILLIPSBORN: Your Honor, I understand the Court's position and so there are just a couple of questions that I would respectfully ask of the Court, uh, just in terms of the Court's schedule.

I know the Court had written us a letter indicating that we would have three days this week, two days next week for this hearing, and the Miss-kelley attorneys are here.

I understand the schedule may have changed a little bit and I wanted to ask about that.

THE COURT: Well, the problem I have is I have a capital murder case scheduled for trial in Blytheville and I had to give them a pre-trial day, so that's why

1 I removed Friday. But you have today, tomorrow, and
2 certainly two days next week.

3 And I was under the impression that we were going
4 to try to have Mr. Misskelley here tomorrow, is that
5 correct? And I don't have any problem in having joint
6 submissions made, if that's what you all want to do.

7 MR. PHILLIPSBORN: I think that's what we were
8 hoping, Your Honor.

9 THE COURT: I'm sure the State wouldn't object to
10 that, necessarily, would you? I mean, it seems to me
11 an economy of time would suggest that.

12 MR. DAVIS: Your Honor, as far as saving time,
13 the State has no objection to that. But I think the
14 question is as far as since the Court has determined
15 that the scope of the Rule 37 hearing will be defined
16 as ineffective assistance of counsel and since we are
17 dealing with counsel and representing clients in two
18 separate trials, I'm not sure...

19 THE COURT: ...well, we can proceed with the
20 Baldwin issues today and then what's common for the
21 Misskelley defense could start tomorrow.

22 MR. DAVIS: Okay. So I'll need to get an order
23 to have him brought back.

24 THE COURT: Jeff, did you have something you
25 wanted to say?

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MR. ROSENZWEIG: Yes, sir. You made some statements and I think we need - - "we" the Misskelley people, need clarification.

THE COURT: Okay.

MR. ROSENZWEIG: First, I've been told that the current plans are to bring Mr. Misskelley to this part of the world on Sunday.

THE COURT: Where did you get that information?

MR. WALDEN: That's what the two sheriff's offices indicated yesterday, the Craighead County and Clay County.

We checked with Clay County and Clay County said they had already made arrangements to have Misskelley brought up Sunday.

MR. DAVIS: And if I could clarify, and I e-mailed Michael Burt yesterday and everybody else, uh, when at 11:45 yesterday I received the e-mail that referred to the Baldwin/Misskelley Rule 37 hearings, it kind of took me by surprise because I thought that we were having the Baldwin hearing today, tomorrow and Friday.

THE COURT: Well, that's what we originally talked about.

MR. DAVIS: And that some time next week we would start the Misskelley, so at that point we started

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scrambling to try to figure out if we had to have Mr. Misskelley here today or not.

And what I thought was, was that the more likelihood would be that Mr. Misskelley would have to be here Monday, and that's what the plans are, that he is to be brought back Sunday and be available for Monday's hearing.

If he needs to be brought back earlier, well, I know Sheriff Cole in Clay County is the one responsible for transporting him back. He's indicated that he would go Sunday and bring him back.

We'll just have to, if we need to, just get an order and see what can be done in the interim, but I'm the one responsible for kind of assuming that we didn't need him today.

THE COURT: Well, I think I indicated that we would sort that out today. But I didn't see any problem particularly in getting him here by tomorrow.

MR. DAVIS: We may be able to.

MR. ROSENZWEIG: And Your Honor, if I could address one other thing?

THE COURT: Sure.

MR. ROSENZWEIG: This has to do with scheduling witnesses and that type of thing, as well. You made reference to the fact that, of course, you denied the

1 DNA habeas petition, uh, and we have some issues in
2 our case that, uh, the DNA results are relevant, as
3 well as ineffective counsel and we're not seeking for
4 the basis, of course, we have prejudice.

5 Did I understand the Court as saying we will not
6 be able to participate; the Court was saying we will
7 not be allowed to present the DNA evidence in our case
8 either, or am I misunderstanding something?

9 THE COURT: Well, I'm not sure exactly - - you're
10 telling me that it will have some relevancy on the
11 issue of ineffective assistance?

12 MR. ROSENZWEIG: Yes, sir.

13 THE COURT: Well, in that context I probably will
14 allow a limited amount of it. But I'm primarily
15 concerned with the issue of ineffective assistance and
16 that's what I'm going to allow you to introduce proof
17 on.

18 So if you think it's relevant, I'll just have to
19 hear what you've got to say at that time. I'm not
20 sure I know exactly what you're talking about. I
21 assume you're saying that the lawyers should have
22 recognized the potentiality of the DNA?

23 MR. ROSENZWEIG: Yes, sir.

24 THE COURT: Okay.

25 MR. ROSENZWEIG: I had understood, or the implica-

1 tion of what I heard was in regard to the DNA stuff as
2 res judicata, essentially at this point.

3 THE COURT: Well, yeah, that point that I have
4 already entered an opinion on under the 1780 motion,
5 yes. I think that's been covered.

6 MR. ROSENZWEIG: Well, Your Honor, and for the
7 record, the argument that we would be making is that
8 there is a different and lesser standard of proof on
9 Rule 37 prejudice than there is on a DNA habeas.

10 THE COURT: Well, I'll listen to what you have
11 got to say and then we'll see where we go from there.

12 And by the way, for the record, I have read
13 volumes of pleadings, boxes full of it, so I mean, I
14 can't promise you that I will remember everything that
15 has been written in this case, but I will try real
16 hard to.

17 I mean, that's just one box and I've got four or
18 five in the back that I actually have gone through.

19 MR. DAVIS: And I guess one thing that would be,
20 uh, the State may request a clarification of Your
21 Honor, or at least request the Court look into it, if
22 the testimony regarding DNA, and I don't know exactly
23 what testimony they may proffer, I have some idea
24 based on the conversation with Mr. Holt this morning,
25 but at one point I think a lot of this was the same

1 evidence that they said required, they were entitled
2 to have it tested because there was new scientific
3 testing available that did not exist at the time of
4 trial, and if the reason for introducing it at the
5 Rule 37 is to say that the attorney was ineffective
6 for failing to having secured this type of testing, I
7 mean, I think a large part of what was done as far as
8 the Act 1780 DNA testing would have to be precluded,
9 because it was done by agreement because it was
10 ordered that if there was new scientific testing that
11 was available that wasn't available at the time of
12 trial; therefore, it would seem to preclude any
13 evidence of that coming in as a claim of ineffective
14 assistance of counsel, since the counsel wouldn't have
15 had it available to him in the first place.

16 THE COURT: Well, I don't want to hear proof, nor
17 do I want to have to rule again on the DNA issues that
18 were already decided in the 1780 hearing or motion,
19 but I will allow, if it dovetails into ineffective
20 assistance, as you pointed out, much of the allegation
21 was that it was newly discovered scientific evidence
22 that was not available.

23 If that's the case, then it can't very well mesh
24 with ineffective assistance of counsel. But if some
25 way the DNA is involved in decisions or actions of the

1 attorneys, I'll hear it.

2 But if it is strictly the matters that I've
3 already ruled on, I don't need to hear that again.
4 The Court's already got that information and any
5 appeal, it will be available there.

6 MR. PHILLIPSBORN: Your Honor, one thing I wanted
7 to address was the scheduling issue in view of the
8 Court's schedule on Friday.

9 There's one expert witness who is a serologist,
10 and again, whose testimony in our view would pertain
11 narrowly to the issue of ineffective assistance, and
12 obviously, by the time we get to the end of tomorrow,
13 the Court will know better from having heard the
14 testimony where we are, uh, we have, tentatively with
15 the Misskelley defense, scheduled that person to come
16 in on Friday.

17 It's my understanding she can come in on Monday
18 but I didn't want to take the Court by surprise at the
19 end of our hearing; I just wanted to make clear to the
20 Court that we will be available to present her, if the
21 Court permits it, on Monday.

22 THE COURT: That will be fine.

23 MR. PHILLIPSBORN: The other thing I wanted to
24 let the Court know is that Mr. Hendrix and I have a
25 few questions of one of the witnesses that is a

1 principal witness for the Misskelley team and that's
2 now Judge Stidham, and literally a very small amount
3 of questioning, and my understanding, and I've been in
4 touch with him, but I've also been in touch with Mr.
5 Burt, is that Judge Stidham is expected to be here on
6 Monday.

7 So again, not to take the Court by surprise on
8 that issue, but that is what I've been informed.

9 THE COURT: If it's all right with the State,
10 that's fine.

11 MR. PHILLIPSBORN: That's fine.

12 THE COURT: I don't want it by deposition. I
13 want him personally here, whatever his testimony is.

14 MR. PHILLIPSBORN: And we understood that, Your
15 Honor. And in view of that, there's only one thing I
16 wanted to do and again, we are doing it to preserve
17 our record, uh, and to try to be consistent on it, uh,
18 I think both the Misskelley and Baldwin defenses would
19 respectfully ask the Court to recuse itself from the
20 proceedings in this matter, and I would like to renew
21 that particular, uh, motion.

22 THE COURT: Well, that's been raised before and
23 I've denied it before, and I intend to hear it through
24 to the end, if I live long enough.

25 MR. PHILLIPSBORN: Well, we'll try to move it

1 along, Your Honor, and our first witness is Mr. Ford,
2 who is present.

3 THE COURT: All right, all who know yourselves to
4 be witnesses in this matter, please stand and raise
5 your right hand.

6 Gentlemen, I don't know who the witnesses are;
7 I'm sure the attorneys are, but is he the only witness
8 present in the courtroom?

9 MR. PHILLIPSBORN: Your Honor, most of our
10 witnesses are not. There is a potential witness who
11 is present, uh, Ms. Cureton, Joyce Cureton, and I was
12 actually going to make a motion for the witnesses to
13 be excluded.

14 I want to supply her as a potential witness.

15 MR. DAVIS: Judge, before we get started with
16 testimony, Mr. Walden advises me that Sheriff Cole in
17 Clay County can in fact pick up Mr. Misskelley and
18 have him here tomorrow.

19 THE COURT: Well, I'd like to have him here
20 tomorrow morning.

21 MR. DAVIS: We need to get an order to Clay
22 County to that effect.

23 THE COURT: Yes. Mike, are you going to fix
24 that?

25 MR. WALDEN: Yes, sir.

1 THE COURT: Okay.

2 (Witnesses sworn; Rule invoked.)

3 THEREUPON,

4 PAUL FORD

5 was called as a witness by and on behalf of the Petitioner/
6 Defendant and having been duly sworn, was examined and testified
7 as follows, to-wit:

8 DIRECT-EXAMINATION

9 BY MR. PHILLIPSBORN:

10 Q] Good morning, sir.

11 A] Good morning.

12 Q] Would you be kind enough to state your full name for our
13 record, please?

14 A] My name is Paul Ford.

15 Q] Mr. Ford, how are you presently employed, sir?

16 A] I'm an attorney.

17 Q] And were you involved in the defense of Jason Baldwin?

18 A] Yes, sir.

19 Q] And do you recognize Mr. Baldwin here today?

20 A] I do.

21 Q] Do you recall approximately when you became involved in his
22 defense?

23 A] The day of his Rule 8 hearing.

24 Q] And did you become involved in his defense by, by appoint-
25 ment, or were you retained; how is it you came to his, uh, to