IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS

WESTERN DISTRICT

DAMIEN WAYNE ECHOLS, DEFENDANT/PETITIONER

vs. NO. CR-93-450 A

STATE OF ARKANSAS PLAINTIFF/RESPONDENT

DAMIEN ECHOLS' BRIEF ON THE ADMISSIBILITY OF EVIDENCE OF JUROR MISCONDUCT

INTRODUCTION

On November 4, 2010, the Arkansas Supreme Court issued its decision holding that this circuit court, per the Honorable David Burnett, had erroneously interpreted the Arkansas DNA testing statutes in refusing to hold an evidentiary hearing on a motion for a new trial filed by defendant/petitioner Damien Echols in April of 2008. As a result, the Supreme Court remanded the matter "for an evidentiary hearing, at which the circuit court shall hear Echols's motion for a new trial and consider the DNA-test results 'with all other evidence in the case regardless of whether the evidence was introduced at trial' to determine if Echols has 'establish[ed] by compelling evidence that a new trial would result in acquittal.' Ark. Code Ann. § 16-112-208(e)(3) (Repl. 2006)." *Echols v. Arkansas*, 2010 Ark. 417, __ S.W.3d __. Because "the circuit court [had] interpreted the statutes in question incorrectly," and because "Echols's petition and the files and records of the proceeding do not conclusively show he is entitled to no relief," the high court directed that this court, following an evidentiary hearing, grant "reconsideration of the motion in light of the proper interpretation of the statutes." *Id.*.

One issue posed in the Supreme Court by the parties concerned the scope of the statutory

provision stating that a court deciding a motion for a new trial based on DNA-testing results must consider "all other evidence in the case regardless of whether the evidence was introduced at trial" in deciding whether "a new trial would result in acquittal ." Mr. Echols had included in his new trial motion in this court voluminous documentary evidence supporting his contention that his 1994 trial had been marred by gross misconduct on the part of the jury foreman. In response, the state argued both before Judge Burnett and in the Supreme Court that such evidence was wholly inadmissible under the law of the case doctrine.

While leaving the question of admissibility open for decision by this Court, the *Echols* opinion flatly rejected the state's law of the case argument:

> In denying Echols's motion for a new trial, the circuit court refused to consider evidence of juror misconduct during the first trial. The circuit court found that it was prevented by the law-of-the-case doctrine from considering the evidence because the issue had already been decided in prior postconviction proceedings. While it is true that Echols is barred from relitigating any issue as a means of collaterally attacking his judgment, evidence raised in prior postconviction proceedings may or may not be relevant under section 208(e)(3) to a determination of whether a new trial would result in acquittal.

Id.

Following remand, Mr. Echols raised the issue again, contending in his initial pre-hearing brief that the court should consider evidence of misconduct at the first trial evidence as relevant to the present inquiry. See Damien Echols's Pre Hearing Brief filed on February 18, 2011, at 15-19.[1] The state suggested further briefing on the misconduct issue in its pre-hearing brief filed the same date (at 4-5).

[1] Petitioner incorporates that previous argument by reference for purposes of the present brief.

On March 15, 2011, this court issued its first scheduling order concerning the evidentiary hearing ordered by the Supreme Court. Paragraph 4 of that order stated: "The question of alleged juror misconduct will be resolved by the Court upon adversarial briefs as follows: defense brief by May 1, 2011; response by May 15, 2011; reply by May 25, 2011." Accordingly, Mr. Echols now submits this memorandum on the admissibility in these proceedings of evidence of juror misconduct at his first trial in 1994.

Mr. Echols's position can be simply and succinctly stated. To begin, in this proceeding he *does not* seek a ruling that under the Arkansas and United States constitutions his convictions must be set aside due to violations of his right to a fair trial resulting from misconduct on the part of one or more members of the jury at his 1994 trial. The sole basis upon which he seeks a new trial in this proceeding will be that provided in Ark. Code Ann. § 16-112-208(e)(3), i.e., "compelling evidence [establishes] that a new trial would result in acquittal."

In assessing the persuasive impact of the evidence proffered by Mr. Echols, however, this court will necessarily be asked to decide to what degree the guilty verdicts at the 1994 trial tend to prove that Mr. Echols would not be acquitted, but rather convicted again, were a new trial now ordered. As demonstrated below, the state previously has argued in this proceeding that Mr. Echols's convictions seventeen years ago are entitled to a presumption of correctness that alone renders it nearly impossible to establish he would be acquitted if tried again, notwithstanding the new evidence proffered in this proceeding tending to prove his innocence. Mr. Echols contends that, to the contrary, the prior convictions must be afforded no weight whatsoever in the court's calculus of the likelihood of acquittal because, tainted by misconduct of the most egregious and blatant sort, their probative value on that crucial issue is nil. Indeed, the evidence of misconduct

now on file before this court makes clear that Mr. Echols and Mr. Baldwin were convicted in 1994 only because the jury foreman relied on information that was not only inadmissible, but demonstrably false, to convince his fellow jurors to vote for guilt.

Evidence of juror misconduct is thus relevant under Rule 401 of the Uniform Rules of Evidence. ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.") Because Mr. Echols will not advance a constitutional claim of juror misconduct "as a means of collaterally attacking his judgment," but rather will proffer evidence of misconduct in support of his statutory claim under section 208(e)(3), its introduction for that purpose is within the boundaries set by the Supreme Court in its remand order.

For this reason, Mr. Echols hereby requests : (A) that oral argument before this court be granted on the present issue; (B) that evidence of juror misconduct at Mr. Echols's first trial be deemed admissible in this proceeding; (C) that the state be ordered to submit in documentary form any evidence that would contradict the evidentiary showing made by Mr. Echols in the documents that accompany this memorandum; and (D) that the court hear testimonial evidence on those matters, if any, placed in dispute by the documentary submissions of the parties, at the hearing scheduled in this matter for December 5, 2011, or at any other date set by the court.

STATEMENT OF FACTS

The allegations and documentary evidence concerning juror misconduct at the trial of Mr. Echols and his co-defendant, Jason Baldwin, have previously been set forth in pleadings filed in this court and the Arkansas Supreme Court. The misconduct largely revolved around the jury's

improper consideration of the highly publicized "confession" of Jesse Misskelley, taken at the time of his arrest in 1993. Misskelley was tried separately and prior to the trial of Messrs. Echols and Baldwin precisely because his hearsay statements were inadmissible against his two co-defendants under state and federal law.

For that reason, Mr. Echols now provides a necessarily extensive description of the content of the Misskelley statement; of events at and following Misskelley's trial; and of the role played by the Misskelley statement in the jury selection, taking of evidence, and jury deliberations at the Echols-Baldwin trial. Copies of relevant exhibits previously filed in support of Echol's new trial motion accompany this memorandum for the court's convenience. To avoid confusion, those exhibits bear the same letters they were assigned in the prior filing. Exhibits previously submitted under seal are again submitted under seal herewith.

A. The Arrest of the West Memphis Three

Chris Byers, Stevie Branch, and Michael Moore disappeared on May 5, 1993. Their bodies were discovered in a drainage ditch in West Memphis the next day.

> On June 3, or almost one month after the murders, Detective Mike Allen asked Jessie Lloyd Misskelley, Jr., about the murders. Misskelley was not a suspect at the time, but Echols was, and it was thought that Misskelley might give some valuable information about Echols. Detective Allen had been told that all three engaged in cult-like activities. Misskelley made two statements to the detective that implicated Echols and Baldwin, as well as himself...
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> Misskelley, age seventeen, Echols, age nineteen [[2]], and Baldwin, age

[2] According to a trial stipulation, Echols was born on December 10, 1974, making him eighteen at the time of the charged crimes and nineteen at the time of his trial. (EBRT 2675, *3463*) "EBRT" refers to the Echols-Baldwin Reporter's Transcript. The transcripts from the Echols-Baldwin trial in counsel's possession bear two sets of page numbers. The first set is the original pagination at the trial court level, while the second is a Bates stamp numbering used for the

> sixteen, were jointly charged with the capital murders of Moore, Byers, and Branch. Misskelley moved for a severance from Echols and Baldwin, and the trial court granted the severance

Echols v. State, 936 S.W.2d 509, 517 (Ark. 1996).

Upon the arrest of the three defendants, lead investigator Gary Gitchell held a press conference at which it was announced that Jesse Misskelley had confessed to seeing Damien Echols and Jason Baldwin use a knife to rape, sexually mutilate, and murder the three victims as part of a satanic ritual. Gitchell described the proof against the defendants as eleven on a scale of ten.[3]

B. The Misskelley Trial, Verdict, And Proceedings Concerning Misskelley's Possible Testimony in The Echols Case

Misskelley's trial began on January 18, 1994 in Clay County, after being severed from that of Echols and Baldwin. The proceedings were televised and widely reported in the print media. Echols below summarizes evidence from the Misskelley proceeding which was not formally admitted at his own trial but which, because it concerns the Misskelley statement improperly considered by the Echols-Baldwin jury, bears on the reliability of the previous verdict in this matter.

1. Vicky Hutcheson

Vicky Hutcheson was a prosecution witness at the trial of Jesse Misskelley and was the subject of testimony, although she was not called by either party, at Echols's trial.

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record on direct appeal. Petitioner will use both sets of numbers for each page citation, the Bates stamp number being supplied in italics.

[3] Gitchell's statement was included in the HBO documentary "Paradise Lost; The Robin Hood Hills Murders." (*See* Exh. A, affidavit of Dennis P. Riordan.)

Hutcheson testified at the Misskelley trial that in May of 1993, she lived in Highland Park in a trailer. Her son Aaron was good friends with the three murder victims, and Hutcheson became close friends with Jessie Misskelley. (MRT 970-71.)[4] At some point after the killings, she decided to play detective. (MRT 971-72.) She had heard about Damien Echols, so she had Misskelley introduce her to Echols. (MRT 972.)

Hutcheson did a number of things to gain Echols' confidence. She went to see Don Bray, a police officer at Marion, to get his library card to check out "some satanic books because they can't be checked out just by normal [people]"; she spread the books around her coffee table. (MRT 972.) At the Echols trial, it was established that the West Memphis police, working with Vicky Hutcheson, had conducted audio and visual surveillance of Echols at Hutcheson's home in an effort to catch Echols saying something incriminating, but to no avail. (EBRT 2153-54, *2940-49.*)

According to Hutcheson's testimony in the Misskelley trial, at one point, Echols invited her to an "esbat," which Hutcheson claimed was an occult satanic meeting mentioned in one of the witch books. (MRT 973.) Hutcheson, Misskelley and Echols went to the meeting in a red Ford Escort driven by Echols. Hutcheson claimed that from a distance she saw 10 to 15 people at the meeting. She asked Echols to take her home, but Misskelley stayed at the scene. (MRT 973-74.)

On cross-examination, Hutcheson admitted that she had been in Officer Bray's office on the day the bodies of the murder victims were discovered, the reason being she was being

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[4] "MRT" refers to the Misskelley Reporter's Transcript. Citations to the MRT are to the pagination found in the transcripts produced in the circuit court.

investigated in regard to a "a credit card mess-up." (MRT 975.) She had been previously convicted in Arkansas for writing "hot checks." (MRT 976.) After she began her cooperation with the police regarding Echols, authorities dropped all charges involving the credit card problem. (MRT 975.) Hutcheson frequently bought liquor for a fifteen-year-old friend of Misskelley's (MRT 1214), and spent the night with Misskelley the night before he gave his statement to the police and was arrested. (MRT 976-77.) The defense proffered a witness who stated that on two occasions Hutcheson said that her son Aaron would receive reward money related to the case. (MRT 1268-69.)

On January 29, 1994, the *Arkansas Democrat-Gazette* reported Hutcheson's testimony that she "attended a satanic cult meeting with Misskelley and co-defendant Damien Echols." (Exh. C; *see also* Exh. D, Jonesboro Sun article, Jan. 28, 1994.) The *Democrat-Gazette* also reported that Misskelley confessed that he and Echols and Baldwin were involved in satanic activities "and the sexual assaults, mutilations and beatings of the children." (Exh. C.)

In a series of interviews in 2004, Vicky Hutcheson stated that her testimony about driving to and attending a satanic "esbat" meeting with Echols and Misskelley was a "complete fabrication."[5] That assertion is supported by the fact that although the police were interrogating and conducting surveillance of Echols on multiple occasions between the discovery of the victims' bodies on May 6th and the defendants' arrests on June 3, 1993, the time period when Hutcheson was cooperating in the police investigation of Echols, no corroboration of Hutcheson's claim of a satanic meeting was offered at either the Misskelley or Echols trial, nor

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[5] *See* Tim Hackler, "Complete Fabrication: A crucial witness says her testimony in the West Memphis 3 case wasn't true, but a product of police pressure to get results in the deaths of three children," *Arkansas Times*, Oct. 7, 2004, at 12-17. (Exh. QQ.)

has there ever been a claim by any other witness that Damien Echols knew how to drive an automobile or ever had done so.

2. The Misskelley Statement

Expert psychological testimony at the Misskelley proceeding established that Misskelley had been diagnosed as mentally retarded, as had his brother. (MRT 342.) Misskelley's arithmetic and spelling skills were on the 2nd or 3rd grade level. (MRT 344.) He tended to think in childlike ways as "a six [or] seven year-old child would do." (MRT 346.) He performed psychological tests from the viewpoint of a five to seven year-old child. (MRT 349.) On moral reasoning test instruments, he again was very childlike. (MRT 351.) He was severely insecure and did not understand the world very well. When he was under stress, he rapidly reverted to fantasy and daydreaming "and at times can't tell the difference between fantasy and reality." (MRT 352.)

The diagnoses of Misskelley were adjustment disorder with depressed mood, with a history of psychoactive substance abuse, including marijuana, huffing gasoline, and alcohol. (MRT 352.) He possessed borderline intellectual functioning. (MRT 353.) He had a diagnosed developmental disorder, as well as other dysfunctions "primarily schizotypal, antisocial, and dependent." (MRT 353.) Misskelley had impaired memory, both long and short-term. (MRT 354.)

The following facts concerning the Jesse Misskelley statement are taken from the opinion of the Arkansas Supreme Court affirming Misskelley's convictions on direct appeal:

> Approximately one month into the investigation, the police considered Damien Echols a suspect in the murders, but no arrests had been made. [Misskelley]'s name had been given to officers as

one who participated in cult activities with Echols.[6]

Detective Sergeant Mike Allen questioned [Misskelley] on the morning of June 3, 1993. [Misskelley] was not considered a suspect at that time[.]

[Misskelley and Allen] arrived at the station at approximately 10:00 a.m. Detective Allen and Detective Bryn Ridge questioned [Misskelley] for about an hour when they became concerned that he wasn't telling the truth. In particular, he denied participation in the cult activity, a statement which was at odds with what other witnesses had said. At this point, the detectives decided to advise [Misskelley] of his rights. Detective Allen read him a form entitled "YOUR RIGHTS," and verbally advised him of the *Miranda* rights contained in the form. [Misskelley] responded verbally that he understood his rights and also initialed each component of the rights form. There was no evidence of any promises, threats or coercion...

After he was advised of his rights and had waived them, [Misskelley] was asked if he would take a polygraph examination. He agreed that he would. Detective Allen took [Misskelley] to look for his father so that his father could grant permission for [Misskelley] to take the polygraph. They observed Mr. Misskelley driving on the same road they were on, stopped him, and received the authorization. There was no evidence of promises, threats or coercion.

Upon returning to the station, Detective Bill Durham, who would administer the polygraph, once again explained [Misskelley]'s rights to him. [Misskelley] verbally indicated he understood, and initialed and signed a second rights and waiver form which was identical to the first.

Detective Durham explained to [Misskelley] how the polygraph would work and administered the test over the course of one hour. In Detective Durham's opinion, [Misskelley] was being deceptive in his answers and he was advised that he had failed the test. At that point, [Misskelley] became nonresponsive.

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6 This is a reference, *inter alia*, to Hutcheson's "esbat" story.

> Detective Bryn Ridge and Inspector Gary Gitchell began another interrogation of [Misskelley] at about 12:40 p.m. They employed a number of techniques designed to elicit a response from [Misskelley]. A circle diagram was drawn and [Misskelley] was told that the persons who committed the murders were inside the circle and that those trying to solve the crime were on the outside. He was asked whether he was going to be inside the circle or outside. He apparently had no response. He was then shown a picture of one of the victims and had a strong reaction to it. According to Gitchell, [Misskelley] sank back into his chair, grasped the picture and would not take his eyes off it. Yet, he still did not speak. Finally, Gitchell played a portion of a tape recorded statement which had been given by a young boy named Aaron. The boy was the son of a friend of [Misskelley]'s and had known the victims.[7] The portion of the statement which the officers played was the boy's voice saying, "nobody knows what happened but me." Upon hearing this, [Misskelley] stated that he wanted out and wanted to tell everything.
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> The officers decided to tape record a statement and received the confessions which are set out above. At the beginning of the first statement, on tape, [Misskelley] was advised of his rights for the third time. The rights were fully explained to him, and the waiver of rights read to him verbatim.
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> The evidence presented by [Misskelley] at the suppression hearing consisted primarily of the testimony of polygraph expert Warren Holmes. Mr. Holmes testified that, in his opinion, [Misskelley] had not been deceptive in his answers to the polygraph questions. He raised the possibility that [Misskelley] had been wrongly informed that he had failed.

Misskelley v. State, 915 S.W.2d 702, 710-11 (Ark. 1996).

The Arkansas Supreme Court described the contents of Misskelley's statements as follows:

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[7] This is a reference to Aaron Hutcheson, Vicky Hutcheson's son, who soon after the killings claimed to have witnessed the murders and thus to be entitled to reward money. However, Aaron proved so untrustworthy that he was never called by the prosecution at either the Misskelley or Echols-Baldwin trials.

At 2:44 p.m. and again at approximately 5:00 p.m., [Misskelley] gave statements to police in which he confessed his involvement in the murders. Both statements were tape recorded.

The statements were the strongest evidence offered against [Misskelley] at trial. In fact, they were virtually the only evidence, all other testimony and exhibits serving primarily as corroboration.

The statements were obtained in a question and answer format rather than in a narrative form. However, we will set out the substance of the statements in such a way as to reveal with clarity [Misskelley]'s description of the crime:

In the early morning hours of May 5, 1993, [Misskelley] received a phone call from Jason Baldwin. Baldwin asked [Misskelley] to accompany him and Damien Echols to the Robin Hood area. [Misskelley] agreed to go. They went to the area, which has a creek, and were in the creek when the victims rode up on their bicycles. Baldwin and Echols called to the boys, who came to the creek. The boys were severely beaten by Baldwin and Echols. At least two of the boys were raped and forced to perform oral sex on Baldwin and Echols. According to appellant, he was merely an observer.

While these events were taking place, Michael Moore tried to escape and began running. [Misskelley] chased him down and returned him to Baldwin and Echols. [Misskelley] also stated that Baldwin had used a knife to cut the boys in the facial area and that the Byers boy was cut on his penis. Echols used a large stick to hit one of the boys. All three boys had their clothes taken off and were tied up.

According to [Misskelley], he ran away from the scene at some point after the boys were tied up. He did observe that the Byers boy was dead when he left. Sometime after [Misskelley] arrived home, Baldwin called saying, "we done it" and "what are we going to do if somebody saw us." Echols could be heard in the background.

[Misskelley] was asked about his involvement in a cult. He said he had been involved for about three months. The participants would typically meet in the woods. They engaged in orgies and,

> as an initiation rite, killing and eating dogs. He noted that at one cult meeting, he saw a picture that Echols had taken of the three boys. He stated that Echols had been watching the boys.
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> [Misskelley] was also asked to describe what Baldwin and Echols were wearing the day of the murders. Baldwin was wearing blue jeans, black lace-up boots and a T-shirt with a rendering of a skull and the name of the group Metallica on it. Echols was wearing black pants, boots and a black T-shirt.
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> [Misskelley] initially stated that the events took place about 9:00 a.m. on May 5. Later in the statement, he changed that time to 12:00 noon. He admitted that his time periods might not be exactly right. He explained the presence of the young boys by saying they had skipped school that day.
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> The first tape recorded statement concluded at 3:18 p.m. At approximately 5:00 p.m., another statement was recorded. This time, [Misskelley] said he, Echols and Baldwin had come to the Robin Hood area between 5:00 and 6:00 p.m. Upon prompting by the officer, he changed that to 7:00 or 8:00 p.m. He finally settled on saying that his group arrived at 6:00 p.m. while the victims arrived near dark. He went into further detail about the sexual molestation of the victims. At least one of the boys had been held by the head and ears while being accosted. Both the Byers boy and the Branch boy had been raped. All the boys, he said, were tied up with brown rope[.]
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> [Misskelley]'s statements are a confusing amalgam of times and events. Numerous inconsistencies appear, the most obvious being the various times of day the murders took place. Additionally, the boys were not tied with rope, but with black and white shoe laces. It was also revealed that the victims had not skipped school on May 5.

Id. at 707-08.

3. Other Evidence Bearing On The Unreliability of The Misskelley Statement

Not only had the victims attended school during the day on May 5, 1993, but Baldwin had as well, (MRT 946; EBRT 974, *1754*), and it was established during the Echols trial that Echols had been at a doctor's appointment that morning. (EBRT 1852, 1891, 1915, 1948, *2638, 2677, 2701, 2734.*) Indeed, uncontradicted testimony was admitted at Misskelley's trial that Misskelley had been on a roofing job the entire morning of May 5th. (MRT 1104-05, 1113.) That being so, when Misskelley early in his statement described getting up on the morning of May 5th, receiving a phone call from Jason Baldwin, meeting with Baldwin and Echols, and walking to the Robin Hood woods at 9 a.m. in the morning, he was describing a series of events that never happened.

When Misskelley then described the victims being intercepted on the morning of the 5th as "they's going to catch their bus and stuff, and they's on their bikes," and stated that the victims then "skipped school" (MRT 946-47), he was engaging in fiction. When he stated that he witnessed Echols and Baldwin committing the killings and then he "went home by noon," he again was inventing a narrative, as both the victims and Baldwin were sitting in school while Misskelley was roofing at noon, and the victims were riding their bikes around their neighborhoods six and a half hours later. Detective Ridge, one of the interrogators, admitted being shocked when Misskelley said the little boys were killed at noon, because he knew the little boys were in school at noontime, and their killings occurred between 6:30 on May 5 and early in the morning on the 6th; he did not raise the inconsistency with Misskelley, however, because "when you start contradicting somebody, then they stop talking." (MRT 904-05.) The police terminated the first recorded statement of Misskelley at 3:18 p.m. and attempted to

obtain a warrant, but were told by the issuing magistrate that there were problems with the time sequence described by Misskelley. (MRT 154-56, 193, 212-20.) During the second interview beginning at 5 p.m., Misskelley moved the time the victims were seized back to five or six o'clock, again a false statement, only to have the police tell him he had stated earlier in the interview the time was actually seven to eight (which Misskelley had *not* done in the earlier recorded interview), a suggestion to which Misskelley then acceded. Having invented a story about meeting Baldwin and Echols and walking to Robin Hood woods in the morning, Misskelley never explained how he came to be in the presence of his codefendants later that day. Of great importance, a person who had in fact been present at the commission of the crime would have seen the victims hog-tied — *i.e.*, left hand to left foot, right hand to right foot — with shoe laces of different colors, including white and black, taken from the victims' own shoes. (EBRT 195-96, *971-72.*) A true memory of binding the victims in such a horrible way with their shoelaces removed from their own sneakers would surely have been indelible. Yet in his statement Misskelley said only that the victims' hands were tied, and that was done with brown rope. His interrogators attempted to have Misskelley correct this false description by suggesting the boys would have run away had only their hands been tied, but Misskelley failed to come up with the explanation that would have been obvious to any one who actually witnessed the murders: the hog-tying with shoelaces. Finally, Detective Ridge flatly asked, "were [their] hands tied in a fashion that they couldn't have run, you tell me?" Misskelley replied: "They could run[.]"

Ridge admitted to again being shocked when Misskelley falsely stated that the victims were bound with brown rope but agreed that he had been happy to get an incriminating statement

from Misskelley because the police were under a lot of pressure to solve the crimes. (MRT 905-06.)

Moreover, when Misskelley described Damien Echols taking a "big old stick" and using it to choke Chris Byers to death, he again was speaking falsely, for an autopsy revealed Chris Byers had suffered no injuries to his neck consistent with choking, much less the fractures that would result from being asphyxiated with a stick. (MRT 852.) Similarly, one of the few details that Misskelley readily volunteered at the beginning of his interview was he saw Echols "start[] screwing them," (Exh. A), but the state pathologist testified that the victims suffered absolutely none of the injuries to their anal cavities that would necessarily be present if an adult sodomized a child. (EBRT at 1102-03, *1883-84*.) And though Misskelly stated that he saw Echols and Baldwin "beat them up real bad" before the two took the victims' clothes off, (Exh A), there was no blood nor any other evidence of a beating (tears or rips in the material) located on the victims' clothing when it was recovered from the crime scene. (EBRT 957-63, *1737-43*.)

Testimony was offered at the Misskelley trial that on the day of Jessie's arrest, Jessie and Officer Allen joked about a reward of $40,000 and the fact that if a conviction was obtained, Jessie would be able to buy himself a new truck. (MRT 1183.) Finally, Misskelley's defense called a substantial number of witnesses who testified that Misskelley had been at the Highland Trailer Park in the early evening of May 5th when the police were called to the area in regard to a neighborhood dispute, and then had gone wrestling. (MRT 1124-29, 1149-52, 1161-63, 1173-75, 1180-82, 1188-90, 1198-1200, 1211-13.)

4. The Misskelley Verdict And Accompanying Publicity

On January 28, 1994, the *Jonesboro Sun* carried a front page story about the playing of

the Misskelley confession in court, including graphic descriptions of Echols and Baldwin beating and sexually abusing the three victims. (Exh. D.) An article in the *Jonesboro Sun* on February 4, 1994 reported the prosecutor's use in closing argument of the Misskelley statement, including its references to Echols and Baldwin. (Exh. E.) Misskelley was convicted in Clay County on February 4, 1994. Press coverage of the verdict on February 5th described Misskelley's statement of June 3, 1993, stating that Misskelley had confessed that he had helped subdue the victims but that it was Echols and Baldwin who "beat, cut, and sexually abused the boys." (*See* Exh. F, *Arkansas Democrat-Gazette* article, Feb. 5, 1994.)

C. The Echols-Baldwin Trial

1. Pretrial Proceedings

On February 22, the day jury selection was to begin in the Echols-Baldwin trial, Judge Burnett held an extended proceeding in chambers dealing with the issue of whether, in an effort to obtain the testimony of recently-convicted Jesse Misskelley, the prosecution had acted improperly in interviewing Misskelley on a number of occasions over his attorney's objections and, in some instances, without defense counsel being present, and in then having Misskelley brought to Jonesboro to testify at the Echols-Baldwin trial. (EBRT 512, *et. seq.*; *1290*, *et seq*.) The court indicated that it would find an independent attorney to interview Misskelley and determine whether he wished to testify over the objections of his trial attorneys in return for use immunity, (EBRT 560-618, *1338-96*), and appointed Philip Wells to perform that task. (EBRT 576, *1354*.) Mr. Wells interviewed Misskelley and reported that Misskelley wished to consult with his parents before deciding whether to enter into a bargain in exchange for his testimony. (EBRT 578-82, *1356-60.*)

The following morning, newspapers reported that the trial judge in the Echols and Baldwin case had cleared the way for Jessie Lloyd Misskelley Jr. to testify against Echols and Baldwin. One report continued:

> Misskelley's testimony or statement is important to prosecutors. In a June 3, confession to West Memphis police, he said he helped Echols and Baldwin subdue the victims on May 5 and watched as the teen-agers beat and sexually abused Christopher Byers, Michael Moore, and Steve Branch.

(Exh. G, *Arkansas Democrat-Gazette*, Feb. 23, 1994.) The press further reported that the prosecution had asked Jesse Misskelley's father to convince his son to testify in return for a reduced sentence of forty years. (*Id.*)

Also on the morning of February 23rd, the court announced that Misskelley had decided not to testify, and the parties agreed that there would be no further contact with him by the prosecution without prior notice to defense counsel. (EBRT 619, *1397.*)

On February 25, 1994, Baldwin's attorney, Paul Ford, asked to make a record regarding his objection to statements made by Phillip Wells that Ford saw on television the previous evening. (EBRT 672, *1451.*) Ford characterized the statements as "alarming . . . by virtue of [Wells] . . . standing as a liaison of the Court[.]" Ford stated:

> On a Channel Eight news report last night [Wells] said that Jessie had not made up his mind. [Jessie] was going back and forth whether he would testify, whether he would not testify. He was talking to his daddy. But he also said that [Jessie] has decided if he will testify, he will testify to the truth.
>
> And I feel like that statement coming from that impartial capacity means that it's almost the Court indicating that if he testifies, he will be testifying to the truth[.]

(EBRT 672-73, *1451-52.*)

2. The Echols-Baldwin Jury Selection

Jury selection in the trial of Echols and Baldwin began on February 22, 1994 and was conducted at the same time the media was reporting the controversy over Misskelley's potential status as a witness against Echols and Baldwin. The court began its voir dire of prospective jurors by acknowledging the threat to a fair trial posed by the enormous media attention the case had received: "This is one of those cases where there's been a great deal of media attention to it, and it's evident here today that there will a great deal more." (VDRT at 3.)[8] The court observed that: Often times the slant or the spin that's put on the news article will influence you, where had you been in court and heard it all, you might have had a totally different perspective of it. So the spin that's sometimes put on news stories will affect your mind. "So you should only allow your judgment to be affected by what you hear in the courtroom." (VDRT 3-4.)

Later during voir dire, the prosecutor made the following remarks to prospective jurors about the press environment surrounding the trial: "You've seen all the cameras out here, and you know this case is described as a high profile or media attention. You've seen all the camera people. I don't know if you've seen how they rush like little packs of wolves out there." "Because of the high interest in the area, the state, the nation, we felt like it would be appropriate to have cameras in the courtroom to record the proceedings rather than have 'em outside the courtroom and hundreds of 'em just hovering around everybody that goes in and out. We felt like it would be simpler just to let 'em have access and you'd have less of that shark feeding atmosphere outside the courthouse." (VDRT 219-220.)

On the morning of February 23rd, the court placed eighteen prospective jurors in the jury

[8] "VDRT" refers to the Reporter's Transcript of the Echols-Baldwin voir dire.

box and began substantive questioning on voir dire. (VDRT 8-9.) Immediately it became evident that the pervasive publicity the case had received in Jonesboro would pose a threat to the defendants' right to be judged only on the basis of the evidence received in court. All jurors indicated that they were aware of at least "some information" about the case. (VDRT 17.)[9] The jury selection process that followed demonstrated that media exposure had created a broad and deep prejudgement among prospective jurors that the defendants were guilty. While numerous jurors were excused for cause, their responses to questions often exposed those remaining to prejudicial information, and some of those selected to serve had expressed a belief in the defendants' guilt.

In response to the court's threshold question whether prospective jurors could award the defendants the presumption of innocence, one juror quickly volunteered that he had "a very strong opinion formed." (VDRT 16.) In the presence of a courtroom filled with venire persons, including those later selected to serve on the case, prospective juror Sharp announced that he remembered that "the detective in West Memphis made the news – made the announcement to the press" and "the confidence that he made his statement with pretty well has been rooted in my memory." (VDRT 18.) Sharp assured the court that he could not put that information aside and decide the case on the evidence introduced in court, and was therefore excused. (VDRT 17-18.) Prospective Juror Harthorn was excused at the same time for having "strong convictions" that could not be set aside. (VDRT 18.)

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[9] The following day, the court stated: "This case, of course, has been the subject of endless attention, and it is probably going to continue for many weeks after this trial is concluded. I know all of you indicated yesterday that you had at least heard about the case, and I would be amazed if you had not." (VDRT 269-70.)

The court then began individualized questioning in chambers of small groups of three or four prospective jurors. Juror One,[10] who was in the first group, stated that she had heard "an awful lot" about the case through the *Jonesboro Sun*, the *Arkansas Democrat*, and television 7 and 8, reading articles on a daily basis. (VDRT 35, 49-50.) Juror One listened as prospective juror Tate was excused because Tate had an opinion of the defendants' guilt because what she had read was "gonna stick in my mind." (VDRT 52.) Juror One then stated that "anyone under these circumstances would form an opinion," and that she had formed an opinion the defendants were guilty, but "I don't feel like my opinion is totally fixed. I feel like I can listen to the evidence" and set aside her previously formed opinion of guilt. (VDRT 52.)

During voir dire of the next two small groups of venire persons, none of whom served on the jury, those questioned made statements to the effect that: (1) all the evidence they had heard of was "stacked against" Baldwin; (2) that part of what they had heard on television and read was "in relationship to another trial of another defendant in this matter," (VDRT 133); (3) that "if you just watch the news or read the news and watch the television, they to me portray people as guilty," (VDRT 160); (4) that one prospective juror had "feelings [that] evidently they're guilty. All – everything you read in the newspapers and, you know," (VDRT 162); (5) that another prospective juror had an unchangeable opinion because "I believe I have seen too much of it on television and read it in the paper to do that because I have seen it all and read it all," (VDRT 175); and (6) yet another juror stated that the media tended to make the defendants look guilty and that she could not judge the defendants separately because of what she had read linking them

[10] In an effort to preserve privacy, jurors are identified in this memorandum by the numbers assigned them by the trial court. Affidavits containing their names are being filed under seal.

together. (VDRT 189, 195, 200-01.)

On the following day, February 24th, one prospective juror, questioned in private on the subject, stated that she had heard from her pastor that Echols had changed his name to Damien because that name means Satan. (VDRT 234-36.) The juror maintained that she believed she could afford Echols the presumption of innocence, but nothing had changed her opinion that he was evil. (VDRT 237.) She was excused.

Juror Two stated that she had received information on the case from "good old television and newspaper," later stating "they do publicize it a great deal. I read the headlines. I won't deny it. I do read the headlines, and I listen to the news." (VDRT 223, 245.) Juror Three got her information about the case from "people in the office mainly;" she also read newspaper headlines. (VDRT 292.)

Juror Four, who would serve as the jury foreman, stated he read three newspapers; that he knew the Misskelley trial had been going on; and that" "I think you probably should've had this trial – you moved it to here. You probably should have moved it to another state if you wanted to get – I mean this is still too close." (VDRT 292.) Juror Four's opinion was formulated based on "just what you hear in the paper. I think the paper assumes they're guilty." (VDRT 292.) Juror Four then asked of the prosecutor, who had described the atmosphere as one of a media circus, whether the publicity would get worse; the prosecutor replied: "I don't know exactly how it can get worse, but it possibly could." (VDRT 293.)

Juror Four was aware that photographers had taken pictures of jurors at Misskelley's trial in Corning "and they splashed 'em in this paper." (VDRT 299.) In a critical exchange with defense counsel, Juror Four acknowledged that he knew of the verdict in the Misskelley case, but

stated "I don't know anything – I couldn't tell you anything about Misskelley except that I understand that he was convicted of something, and I couldn't even tell you of what." (VDRT 307.) He then stated of his reaction to the Misskelley verdict: "My feeling was that if they were tried on the ten o'clock news and guilty, then that's a statement of it that was confirmed." He then stated that the earlier trial did not give him "any feelings about the trial that was next." (VDRT 308.) Juror Four then asked whether the name Damien was itself Satanic. (VDRT 316.) Juror Four did not disclose that he had any knowledge of the existence or contents of the Misskelley statement.

Juror Five acknowledged that she received the *Jonesboro Sun* every day and had read "all about" the case regularly until she received her jury summons at the end of the Misskelley trial. Her feeling was that she was leaning to believing that the defendants had probably committed the crime, and nothing had yet changed that feeling. (VDRT 337-39.) What had led her to believe the defendants were guilty was "a law enforcement officer who said that he felt like it was a pretty well open and shut case, you know, that they had enough evidence"; nonetheless, she believed that she could begin the trial believing the defendants were innocent. (VDRT 337-39.)

Jurors Six, Seven, and Eight were voir dired with Melissa Bruno, who was not chosen as a juror. Juror Eight got his information on the case from the *Jonesboro Sun* and from people around him. (VDRT 357, 366.) Juror Six received such information from newspapers, television and gossip. (VDRT 358.) In the presence of the three who would later serve as jurors, Bruno, who was not selected as a juror, stated that people never talked that defendants are innocent; "everyone just talked like they were guilty." (VDRT 368.) Juror Six's friends talked about the case and "of course, they felt like they were guilty," although Juror Six thought that the

defendants were innocent until proven guilty. (VDRT 369.) Juror Six did not state that she had been aware that Miskelley had confessed to committing the same offenses for which Echols and Baldwin were being tried.

Juror Seven stated that she wasn't sure whether she could keep the defendants separated. (VDRT 380.) When asked where she heard about the case, Juror Seven replied in part: "I don't actually read the papers and watch the news that often but I did hear, you know, from the beginning. I haven't kept up with it that closely." (VDRT 358.) She later added: "I haven't read the paper very much. I don;t really have time. Where I work we don't have time to talk about anything." (VDRT 367.) When asked about her "general feeling" about who committed this crime, Juror Seven replied "I don't have any feeling about who committed it." (VDRT 367.) Juror Seven did not state that she was aware that Jesse Misskelley had confessed to, and had been convicted of, the same charges Echols and Baldwin were facing.

Juror Nine was questioned in the presence of Ms. Childers and Ron Bennett both of whom, before being excused, stated that they had read in the newspaper that witchcraft was involved in the case. (VDRT 411-12.) Bennett stated he had formed an opinion from the media that "they did it." (VDRT 413.) Juror Nine himself acknowledged that his biological father was a police commissioner in Helena, Arkansas, but further stated that he had not talked to his father about this case. (VDRT 436.)

The final three jurors were selected on February 25th. Juror Eleven had heard the original television accounts about the case, but had heard not much more until very recently when the "last trial" occurred. (VDRT 510.) Juror Ten stated that it "seems the general opinion is that everybody thinks they're guilty," although he believed everyone was innocent until proven

guilty." (VDRT 510.) The final juror, Juror Twelve, stated that she had gotten her news concerning the case from newspaper and television accounts. (VDRT 528.)

Later, at the close of the evidence and just prior to instructions, the court would poll the jurors on the issue of whether they have "read the newspaper, watched the TV, or listened to the radio, or through any other source, have gained any outside information from those sources or any other about this case?" The jurors answered "no." The court then asked whether the jury had followed the admonishment of the court as "best as humanly possible," and was told "yes." (EBRT 2478, *3267.*)

3. Press Coverage of Opening Statements

Following opening statements on February 28, 1993, the *Arkansas Democrat-Gazette* reported that Echols, Baldwin, and Misskelley had been arrested "based on a statement Misskelley gave police describing their involvement in the killings." (Exh. H, *Arkansas Democrat-Gazette*, March 1, 1994; *see also* Exh. I, *Jonesboro Sun*, March 2, 1994 ("Misskelley confessed to being present while Echols and Baldwin killed the boys.").) The article continued that a transcript of the statement revealed that Misskelley said "Echols and Baldwin killed the boys while he watched, and that the three teenagers belong to a cult whose members eat dogs during rituals." (Exh. H.)

On the same day, Paul Ford and petitioner's trial counsel, Val Price, objected outside the presence of the jury that Phillip Wells was standing at the courtroom rail and holding what amounted to a press conference regarding whether or not Jessie Misskelley had decided to testify. (EBRT 887-89, *1667-69.*) The court stated that it had been inappropriate for Wells to describe himself as a court liaison and he would tell Wells to refrain from making comments in the future.

(EBRT 888-89, *1668-69.*)

4. The Prosecution's Reference to the Misskelley Statement

Prior to the Echols-Baldwin trial, prosecutor Davis had stated that the state needed Jesse Misskelley to testify against Echols and Baldwin "real bad."[11] Misskelley was not called to testify, and any out-of-court statements he had made were plainly inadmissible against Echols and Baldwin. Because there was no evidence linking Misskelley to the charged crimes other than his out-of-court statements, no evidence concerning Misskelley was in any way relevant or admissible at the Echols and Baldwin trial. The only impact that mentioning Misskelley during the Echols-Baldwin trial could have had on jurors would be to provoke those jurors to connect the defendants to the charged crimes based on what they had heard outside the courtroom regarding Misskelley: *i.e.*, that he had confessed to, and been convicted of, the charged murders.

On March 1, 1994, the second day testimony was taken, in response to a question that called for a yes or no answer,[12] West Memphis Police Department Detective Bryn Ridge stated on cross-examination, 'I didn't take this stick into evidence until the statement of Jessie Misskelley, in which he said . . ." (EBRT 923, *1703*.) Petitioner's trial counsel, Val Price, immediately objected and moved for a mistrial. In further discussion outside the presence of the jurors, Price argued, "The basis [for the mistrial] is the question that I asked the officer did not

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[11] In a videotaped conference with the victims' families prior to the Echols trial made part of the HBO documentary "Paradise Lost; The Robin Hood Hills Murders," prosecutors Fogelman and Davis described the evidence to be offered at trial, and Davis evaluated the chances of gaining a conviction on that evidence as only "fifty/fifty.

[12] The question posed to Ridge was: "[Y]ou didn't take that stick into evidence at the time y'all recovered the bodies." (EBRT 922; *1702*.)

call for him blurting out the fact that Jessie Misskelley gave a confession. The whole purpose for our trial being severed from Mr. Misskelley's trial in the first place, was the confession that Jessie Misskelley gave." (EBRT 924, *1704.*)

Judge Burnett reasoned: "He shouldn't have volunteered that, but I certainly don't see any basis for a mistrial." (EBRT 925, *1705*.) After more objections by counsel, Judge Burnett stated, "I suggest, gentlemen, that there isn't a soul up on that jury or in this courtroom that doesn't know Mr. Misskelley gave a statement. Now the contents of the statement certainly would be prejudicial. And the contents of the statement, this Court will not allow, and that was the reason for the severance in the first place." (EBRT 930-31, *1710-11.*) Ultimately, the court gave the following cautionary instruction to the jury:

> Ladies and gentlemen, you are instructed and told at this time that you are to disregard and not consider the last response made by Detective Ridge to a question from Mr. Price and you're to – if you can remember it – you're to strike it from your mind and not give it any consideration.

(EBRT 934, *1714*.)

The following day, the press reported Ridge's reference to the Misskelley statement, stating that the police had "used Misskelley's June 3 statement to pull together enough evidence to arrest the three teenagers in the deaths." (Exh. N, *Arkansas Democrat-Gazette*, March 2, 1994) It was also reported that the court had suggested "there isn't a soul up on that jury or in this courtroom that doesn't know Mr. Misskelley gave a statement." (*Id*.) The *Jonesboro Sun* reported that "[u]nder the hearsay law, the state is prevented from telling jurors about Misskelley's June 3 confession to West Memphis police." (Exh. I.)

The press also reported on March 2nd that negotiations by the prosecution to obtain

Misskelley's testimony were continuing, and that Phillip Wells had been appointed by the court "to meet with Misskelley to give him a 'fresh perspective' on what effect his testimony could have on his own case and that of Baldwin and Echols." (Exh. N.) Wells, who described himself to the press as a "court liaison," had announced to the media that there was "no question the prosecution's office will benefit" from Misskelley's possible testimony. (*Id*.)

D. The Foreman's Misconduct and The Extrajudicial Information Received by the Jury

1. The Jury Foreman (Juror Four)

During voir dire, Juror Four acknowledged that he knew of the verdict in the Misskelley case, but stated, "I don't know anything – I couldn't tell you anything about Misskelley except that I understand that he was convicted of something, and I couldn't even tell you of what. . . ." (VDRT 307) Juror Four was elected the foreman of the Echols jury.

On October 8, 2004, during an interview in Jonesboro with two attorneys representing Echols,[13] Juror Four admitted that around the time he was called as a juror, he was aware that Jessie Misskelley had been brought to the Craighead County Courthouse and had been offered a sentence reduction to 40 years if he testified against Baldwin and Echols. Prior to trial, Juror Four had heard that Misskelley made a confession to authorities implicating Baldwin and Echols, stating that the three victims had been hogtied, that they were castrated, and that Echols and Baldwin had made Misskelley chase the victims down and catch them. Misskelley continued to be a factor in Juror Four's mind throughout the trial.

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[13] The summary of Juror Four's admission is based on Exh. VV and WW, the affidavits of attorneys Theresa Gibbons and Deborah Sallings. All affidavits mentioning jurors names are being filed under seal.

As foreman, Juror Four was the juror who suggested using "T charts" on large sheets of paper to organize and analyze the evidence during deliberations, which is a common tool used in decision-making. He personally wrote down the issues in the appropriate column.

In Juror Four's opinion, the jury could not ignore the Misskelley confession despite the court's instructions to do so. The Misskelley confession was published in the newspapers. It played a "large part" in his decision of the case. It was a "known event."

Juror Four has stated that the other evidence against Echols and Baldwin was scanty. Unlike Manson or a thousand other cases, without the Misskelley evidence, it was extremely circumstantial.

On May 30, 2008, an affidavit by an Arkansas attorney concerning his dealings with Juror Four was filed ex parte in this court under seal. The affidavit has since been released to Mr. Echols's counsel. The contents of that affidavit, including the identity of that attorney and Juror Four, have been reported in local and national media. Nonetheless, for the purposes of this proceeding at this time, Echols's counsel will refrain from using their names. The affidavit was previously submitted to the court under seal by petitioner Baldwin and is submitted herewith under seal as Exh. BBB.

The affidavit discloses the following facts:

Just before or during the voir dire at petitioner's trial, which took place in the last week of February of 1994, Juror Four, who was a prospective juror at the time, retained the attorney to represent Juror Four's brother, who was being investigated for raping his four year old daughter. At the same time, Juror Four also retained the attorney to represent himself in matters related to his real estate business. The attorney is an ex-prosecutor and former state official.

Between the end of February and the first week of April, 1994, the attorney was involved in attempting to prevent the filing of charges against Juror Four. Once rape charges were filed in April of that year, the attorney represented the brother through the time of his guilty plea in September of 1994. The court file containing that plea has been lodged with this court. Between late February and September of 1994, the attorney was in regular telephone contact with Juror Four both in regard to his brother's case and the juror's own business matters.

During their initial phone call or during calls soon thereafter, Juror Four informed the attorney that he had been called as a prospective juror in a trial in Jonesboro involving the murder of three eight year old boys in West Memphis, Arkansas, in May of 1993. Juror Four informed the attorney that he wanted to be selected as a juror in petitioner's trial. The attorney told Juror Four that it was unlikely he would be selected because of his brother's pending case and his extensive knowledge of the case. The attorney also thought it was unlikely that Juror Four would be selected because of his prejudgement that the defendants were guilty and because of his disdain for the criminal justice system and the rights of criminal defendants, attitudes the prospective juror could hardly contain. Juror Four later informed the attorney that he had been selected as a juror in the case. When the attorney expressed amazement at that fact, Juror Four attributed his selection to "stupid lawyers and judges not asking specific questions." Juror Four had not wished to answer any questions by the court or counsel that might reveal information or attitudes on his part that might lead to his being struck from the jury pool. He informed the attorney that for that reason he did not answer any question that was not directed specifically to him, even if it was clear that the question was posed to all jurors, and even if Juror Four had information or a point of view that would have required him to respond to the question.

At some point during the prosecution's presentation of its evidence, Juror Four asked the attorney why the state had not yet presented proof of a confession by one of the defendants in the case, Jesse Misskelley. Juror Four, who was frustrated with the pace of the case, stated that nine of his fellow jurors were already prepared to convict, and he wondered why the prosecution did not simply play the Misskelley statement "and get this over with." Juror Four, who was an avid newspaper reader, was aware of the confession because it had been described in newspaper articles and other media reports in the period before the Jonesboro trial began. When Juror Four became aware that the Misskelley statement would not be played, he was furious.

While evidence was still being presented in the Echols-Baldwin trial, Juror Four expressed to the attorney his opinion that most jurors were prepared to convict before the trial was over, but that a few jurors still had to be convinced. Juror Four was surprised that some of the jurors had been unaware of the Misskelley confession, but there had been some reference to the confession during courtroom proceedings, and that reference had helped the majority who had known of the confession in its effort to convince the others of the inadmissible confession's existence. (This was a clear reference to the blatantly improper reference to the Misskelley statement during the testimony of Detective Ridge, which drew a motion for a mistrial from Echols counsel.)

During their conversations, Juror Four told the attorney that the prosecution had presented a weak case; that the prosecution had better present something powerful the next day or there would be an acquittal; and that it would be up to Juror Four to secure a conviction. Juror Four told the attorney that he was astonished how many of the jurors had been unaware of the Misskelley statement until he had informed them of it. Juror Four refused to believe that there

could be any such thing as a false confession, even though the attorney himself had had a case involving such a false confession by a mentally handicapped suspect. Juror Four made clear in his discussions with the attorney that his knowledge of the Misskelley statement was the key factor in his being convinced of the guilt of Echols and Baldwin.

Following the verdicts in the penalty phases of the trial, Juror Number Four engaged in two colloquies with the Court, one with the jury as a whole, one by himself,[14] in which he falsely assured the Court that he had not engaged in misconduct or relied on extrajudicial information in reaching his verdict.[15]

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[14]

The Court: Did it have – and you didn't even discuss it in your deliberations?

[Foreman:] I think if – I think if anybody would be interested, *the only thing that was discussed during deliberations was only facts in evidence that was delivered to us and nothing else.*

(RT 2656) (Emphasis added). It bears notice that in his recent interview with the Arkansas Democrat Gazette, Number Four agrees that the Misskelley confession was discussed in the jury room during deliberations.*

[15] The Court: Can you give me your assurances that at least to this point in this case that there has been no contacts from outside the family, media, or anyone else that would in any way influence your findings?

Jurors: Yes.

The Court: Are each of you satisfied and can you give me your personal assurance that you have only considered the evidence that was introduced in court by proper court procedure?

Jurors: *Yes*.

2. Juror Seven

On June 7, 2004, Juror Seven signed a notarized affidavit describing aspects of her participation in petitioner's trial. (Exh. XX.) She stated under oath that before serving on the jury, she knew about the earlier trial of Jessie Misskelley in Corning in which Misskelley had been found guilty; she believed she also knew that he had confessed to the crime.

Juror Seven kept a set of "good notes" both during the trial and deliberations. She provided a copy of those notes, which had not been altered to investigator Tom Quinn, and they are attached to her affidavit.

According to Juror Seven, Juror Four, as foreman, put information down on some large sheets of paper in the jury room. Juror Seven's affidavit states: "When we discussed the case, we discussed each of the two defendants. We placed items on the pro or con side of the large sheets that were used in the jury room." Juror Seven copied into her notes a chart that duplicated the items written on the large sheets of paper the jurors used to list evidence during deliberations. The penultimate item on the "con" side as to Echols reads as follows: "Jessie Misskelley Test. Led to Arrest." As to Baldwin, the third item from the bottom of the "con" list reads: "J. Misk. State." Juror Seven's affidavit states: "That was my shorthand for "Jessie Misskelley Statement." Juror Seven's affidavit further states: "As far as I recall we either heard testimony

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> The Court: Okay. Do any of you feel that there has been anything whatsoever that in any way affected your ability to deal strictly with the evidence that was produced in court?
>
> Jurors: No.

(RT 2643-44) (Emphasis added)

about, or discussed during jury deliberations, all of the subjects and matters that are reflected in my notes."

3. Juror Six

In her affidavit of June 8, 2004, Juror Six stated, "I made it clear prior to being seated as a juror that I knew about the Jessie Misskelley case through the newspaper and having seen stories about him and his case on television." (Exh. YY) She continued, "I was aware that Misskelley had confessed to the police."

Juror Six further stated: "I recall that many days that testimony was presented during the trial, we jurors would talk to one another in the jury room using our notes to help us understand what was going on. We all read from our notes to each other at the end of the day, or in the mornings. We did this in the jury room where we gathered during breaks in the trial, and whenever we were excluded from the courtroom due to issues discussed outside of our hearing." The affidavit of Juror Six continues:

"My recollection of this process of daily reviewing our notes with one another is that it permitted us to assess whether we had missed something, or did not write down a matter of significance during the course of the testimony. I recall reading to other jurors from my notes, and it was clear to me that certain other jurors had missed matters that I had noted. I found that this process helped me to better understand the evidence at trial."

> As a result of this daily process of observing witnesses and reviewing notes and daily discussions with my fellow jurors, and based on my view of the evidence as I was hearing it in court, it was clear to me even before the deliberations that the defendants were guilty.

(Exh. YY.)

Juror Six further stated that: "during the course of the jury deliberations, I believe that Juror Four, the foreman, wrote notes on large pieces of paper stating the pros and cons under the name of each defendant, and under the names of each witness that we considered to be a key witness. We did this by going over our notes, and discussing our views about the case."

4. Juror Nine

Juror Nine stated in his interview with investigator Tom Quinn, conducted January 8, 2004, that when after being selected as a juror he called his father, a police commissioner, Juror Nine learned that his father had heard about the case, which had wide media attention. (Exh. ZZ.) When Juror Nine told his father that he was going to be a juror, his father "started spitting out the details."

Juror Nine stated that his jury experience "spooked the hell" out of him, and that he "never felt so scared." He couldn't sleep at night and 'felt he could hear noises outside and would look out the window." His fear was the result of the talk of those kids being part of a cult, and looking into the audience and seeing the victim's families and the families of the accused. The accused had their families there as well as friends, some dressed in black with straight black hair and cult symbols. Juror 9 didn't know who was who, but he was concerned that if they voted for guilt, some of those people who were free on the street might seek revenge and kill him. Although he was never personally threatened, he felt that something could happen to him. "[S]ince the kids on trial were not afraid to kill, [Juror Nine] thought, maybe they had friends or were part of a cult that was capable of killing." Later in the interview, Juror Nine said that he remembered seeing a girl in the gallery with black lipstick, black hair, the gothic look. When he looked into the gallery, where Echols' people were sitting, he saw those kinds of people and

thought, 'They're going to kill me.'"

Juror Nine's father was afraid for his son's safety. The father and a friend came to Jonesboro at the end of the trial and sneaked Juror Nine out the back of the courthouse. Although Juror Nine did not remember a juror getting a threat during the trial, he commented, "Maybe there was and maybe that's why my father came up." The father's friend had a shotgun concealed under a newspaper, and they made Juror Nine lie on the floor in the backseat of a car and whisked him away. (Exh. ZZ.)

The written lists of "pros" and "cons" as to Echols and Baldwin drawn up by the jury during deliberations have been retained in evidence lockers along with the other exhibits in the case. Photographs of those written lists are submitted as Exh. AAA.[16] The items on those original lists appear to match the items listed in Juror Seven's notes, except that the written references to the Misskelley statement on both the Echols and Baldwin list have been blacked out by someone.

ARGUMENT

THE VERDICTS AGAINST ECHOLS MERIT NO DEFERENCE BECAUSE THEY REST ON INFORMATION DEEMED UNRELIABLE AS A MATTER OF LAW

In his motion for a new trial filed in this court in 2008, Echols stated: "The state will surely assert that the 1994 verdict of conviction presents an insurmountable obstacle to Echols's present request for relief, contending that the fact that a jury of his peers then fairly found petitioner guilty precludes a finding that petitioner surely would be acquitted now." (*Id.*, at page

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16 The authentication of these photos can be found in Exh.A.

6) As noted above, the state then made that precise response in urging this Court to deny Echols's motion for a new trial without holding an evidentiary hearing. (States's "Response to Petitioner Echols's Motion For a New Trial, filed on May 30, 2008, at 18: petitioner must present "necessarily extraordinary proof" for nothing else "could undo a presumptively valid criminal conviction;" *see also* Response, at 13: DNA-testing results alone must exclude petitioner as the perpetrator because "[n]othing less could compellingly lead to an acquittal when considered with all other evidence that previously supported a verdict of guilt beyond a reasonable doubt...") Similarly, in its brief in the Arkansas Supreme Court defending Judge Burnett's erroneous denial of an evidentiary hearing, the state argued that: "Like its counterpart in Louisiana, the DNA-testing statute's purpose and design is to give the appellant an opportunity to prove his innocence (if he meets many criteria), *despite the validity of his conviction*, not an opportunity to reweigh the evidence used to convict." Id., at page 14 (emphasis on "despite" in original; other emphasis added)

Anticipating the state's argument, Echols contended in his 2008 motion, and asserts again here, that the 1994 judgments were fundamentally flawed and unreliable, and thus are not entitled to a presumption of validity. Rather than being convicted on "evidence developed [on] the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel," *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965), Echols was found guilty principally based on what biased jurors had heard and read outside the courtroom. Echols's jury convicted him based on information both unadmitted and inadmissible at trial: media reports concerning a demonstrably false statement of codefendant Jesse Misskelley implicating Echols and Baldwin in the charged crimes.

Petitioner's argument then and now centers on Juror Number Four, the foreman, who has admitted that he relied on the unadmitted and flawed Misskelley confession to convict Echols. His conversations with the attorney for himself and his brother during the course of the 1994 trial, in themselves a blatant violation of a juror's duty not to discuss a case with any one during the pendency of a trial, establish the juror's bias and prejudgment of guilt before the formal jury deliberations began.

Furthermore, those conversations establish that Juror Four deliberately concealed information on voir dire to ensure he would be selected for service and thus have the opportunity to convict the defendant. "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "[T]he honesty and dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 556 (Blackmun, J., concurring); *see also Caldarera v. Giles*, 360 S.W.2d 767, 769 (Ark. 1962) ("There is a duty upon every prospective juror on voir dire examination to make a full and frank disclosure of any connection he may have with the litigants or anything that would or could in any way affect his verdict as a juror.").

There is no evidentiary bar to the admission of the evidence of misconduct because it is not being used as a basis for overturning the prior verdicts on the basis of trial error, but rather to rebut the state's claim the verdicts demonstrate that Mr. Echols would be convicted at a new trial. Furthermore, evidence of the foreman's conversations with the attorney do not in any way implicate Rule of Evidence 606, as those conversations preceded the jury's deliberations. *State v. Cherry*, 341 Ark. 924, 928, 20 S.W.3d 354, 357 (2000) (affirming grant of a new trial based on

premature deliberations in first-degree murder case, expressly finding Ark.R.Evid. 606(b) not implicated because the information on which the new trial grant rested did not involve matters relating to jury's "formal deliberations").[17]

Perhaps the most telling rejoinder to the state's claim of the validity of the 1994 verdicts is the assessment of the state's case by Juror Number Four, who told his attorney in 1994 that the state had presented a case so weak that it would be up to him to secure a conviction by resorting to reliance on information not in evidence. A trial in which most jurors decide guilt based on extrajudicial information that the federal constitution deems inadmissible**,** and do so before the presentation of evidence has been completed is, quite simply, a sham proceeding. The extremely credible evidence now before the Court establishes that is precisely what occurred in this case.

CONCLUSION

For the foregoing reasons, petitioner Echols hereby requests an order : (A) that oral argument before this court be granted on the present issue; (B) that evidence of juror misconduct at Mr. Echols's first trial be deemed admissible in this proceeding; (C) that the state be ordered

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[17] *See also Witherspoon v. State*, 322 Ark. 376, 909 S.W.2d 314 (1995), where the defendant was convicted of criminal contempt for her actions as a juror in a criminal case. She failed to disclose certain information during jury selection, namely, she had a prior felony conviction, she had been represented by one of the defense attorneys, and she had independent knowledge of the case.

On appeal, the defendant challenged the admissibility of the testimony of her fellow jurors. One testified that the defendant stated that all of the officers who had participated in the criminal investigation had been promoted. *Id.* at 380. Another testified that the defendant stated that she had worked with one of the prosecutor's witnesses and questioned why he was at home the day of the murder, and not at work. *Id.* The Supreme Court, however, rejected the defendant's challenge on the ground that Ark.R.Evid. 606(b) establishes an extraneous information exception which allows testimony "that one or more members of the jury *brought to a trial* specific personal knowledge about the parties or controversy...." *Id.* at 382 (emphasis added)

to submit in documentary form any evidence that would contradict the evidentiary showing made by Mr. Echols in the documents that accompany this memorandum; and (D) that the court hear testimonial evidence on those matters, if any, placed in dispute by the documentary submissions of the parties, at the hearing scheduled in this matter for December 5, 2011, or at any other date set by the court.

DATED: April 29, 2011 Respectfully submitted,

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