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' REPLY BRIEF RE: THE ADMISSIBILITY OF EVIDENCE OF JUROR MISCONDUCT

In his opening brief, petitioner Echols argued that in deciding whether consideration of the DNA test results and "all other evidence in the case" would likely lead to his acquittal at a new trial — the central inquiry mandated by A.C.A. § 16-112-208(e)(3)) — this Court should admit evidence of the juror misconduct which marred his 1994 trial. That evidence of misconduct gravely undermines the probative value that might otherwise attach to the substantive evidence concerning the charged offenses admitted at that trial, and undermines any presumption of correctness that would otherwise attach to the 1994 verdicts of conviction. In this connection, Echols cited the Supreme Court's statement that rejected the state's "law of the case" argument and held that "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." (Opening Brief, at 2, citing *Echols v. Arkansas*, 2010 Ark. 417, at 13, n.4, __ S.W.3d __)

In its present Response ("Resp."), the state begins by conceding that, given the Supreme Court's ruling concerning the potential relevance of the misconduct evidence to the statutory inquiry, it "does not resist" its admission here. (Resp., at 1) But having conceded this point, the

state seeks to minimize its significance by abandoning its previous position and arguing that "the reliability (or unreliability) of [the 1994] verdict is irrelevant to this Court's determination under 208(e)(3)." (Resp., at 2) This is so, the state now says, because in assessing the evidence under section 208(e)(3), "the Court will be evaluating evidence of guilt or innocence, not juror misconduct." (Resp., at 3) In essence, then, the state urges that the Court must now engage in a surface, value-free consideration of "the strength of the evidence in the face of the DNA testing, not the process by which evidence was considered at [Echols's 1994] trial." (*Id*., at 3-4)

This approach, however, cannot be reconciled with the guidelines established by the state Supreme Court for purposes of applying section 208(e)(3), which requires the circuit court to "reweigh the trial evidence against all other evidence," since this is "precisely what the statute's plain language contemplates." *Echols,* 2010 Ark. 417, at 13, __ S.W.3d __. In order to properly reweigh the trial evidence, the Court must consider any significant factors bearing on its reliability and probative value; contrary to the state's view, the value of substantive evidence of guilt and innocence cannot be divorced from the context and circumstances in which that evidence was considered at the 1994 trial. Evidence of jury misconduct at the Echols-Baldwin trial is germane to the Court's present inquiry because it eliminates not only a presumption that the verdicts were valid but also any inference that the substantive evidence adduced at the trial was deemed reliable or credible by the Echols-Baldwin jury.

Stated otherwise, in the absence of jury misconduct at the 1994 trial, the Court might conclude that jurors were persuaded by the substantive evidence of guilt (however scant) and that such evidence would therefore weigh against the likelihood of an acquittal at a retrial. But to the extent the Court finds that the alleged misconduct caused jurors to rely on unreliable,

extrajudicial matters in rendering their verdicts, no weight should be accorded to the purported evidence of guilt because it may have had little, if any, importance to the outcome. Indeed, that conclusion is bolstered by the (blatantly improper) pre-deliberations discussion between Juror Four, later elected foreman of the 1994 jury, and the attorney that Juror Four hired to represent his brother in a pending child rape case. Before the evidence closed, Juror Four described the case presented by the state as weak and complained that it would be up to him to convince the jury to convict based on extrajudicial information.[1]

As to the procedural impact of Respondent's agreement to admission of the misconduct evidence (see Resp., at 4, n.4), if the state is willing to stipulate that all of the allegations proffered by petitioners on the misconduct issue are accepted as true and beyond dispute, then the misconduct marring the Echols-Baldwin verdicts will be conclusively established. In that case,

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[1] As Echols has noted in prior briefing, according to the attorney's affidavit, 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.

petitioner Echols agrees that no further evidence need be taken on the matter. But should the state decline to concede the occurrence of any material aspect of the misconduct described in the documentary showing now before the Court, petitioner again requests that the Court issue an order requiring oral argument and the submission of evidence, including, where probative on the critical misconduct allegations, testimonial evidence, in accordance with the request in his opening brief. If such testimonial evidence is required, then Echols would further suggest that this separate and limited juror misconduct testimony be taken at a mutually agreeable time in advance of the December 5 hearing so as not to further burden the calendar during that already-crowded hearing session.[2]

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[2] Finally, in a parenthetical footnote, the state urges that the "Court as factfinder may consider [the Misskelley] confession and other admissions by him as part and parcel of all the evidence it must evaluate under 208(e)(3)." (Resp., at 3, n.2, citing *Misskelley v. State*, 2010 Ark. 415, at 7 for the proposition that "Misskelley's immunized statement [is] relevant in deciding whether to grant a new trial under interpretation of section 16-112-208(e)(3) from *Echols v. State*, 2010 Ark. 417, ___S.W.___.")

Of course, under the statute, the Court will take evidence at the joint hearing of the Misskelley statements in considering *Misskelley's* DNA petition. To be sure, his counsel will present the powerful reasons that the Misskelley statements are inherently unreliable as to Misskelley himself. The statements are doubly and inherently unreliable as to petitioners Echols and Baldwin as a matter of law. *See Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) and related precedent. Most importantly, as a procedural matter, they could not be admitted against Echols and Baldwin at a retrial, and thus are irrelevant under section

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208(e)(3) as to the issue of whether a new trial would result in acquittal of Echols and Baldwin.