CR 08-1493

IN THE SUPREME COURT OF ARKANSAS

DAMIEN WAYNE ECHOLS — APPELLANT

v. — NO. CR 08-1493

STATE OF ARKANSAS — APPELLEE

AN APPEAL FROM THE

CRAIGHEAD COUNTY CIRCUIT COURT

THE HONORABLE DAVID BURNETT

CIRCUIT JUDGE

BRIEF OF APPELLEE

Respectfully submitted,

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The appellant's brief, like his pleadings below, is largely devoted more to his effort to undermine his 1994 trial than to a demonstration of his actual innocence now under the controlling DNA-testing statute or to a demonstration that the circuit court erred by denying him relief under the statute by essentially three alternative holdings. His modest arguments to that effect are found largely only in his last point for reversal, point IV at pages 28-36 of his argument, and divided into several subheadings, to which the State's brief responds, albeit in fewer subheadings. The State need not (and does not) respond at length in defense of his trial (which has withstood several direct and collateral attacks, including on appeal to this Court) to explain that his effort to undermine that trial is wholly misplaced because this case was resolved below on the pleadings, not on hearing *proof*, as the State's pleadings below and the circuit court's order well explain. (Add. 656-89, 840-53, 902-11; R. 656-89, 846-59, 908-17) In short, his effort was neither cognizable under the statute nor, even crediting it, capable of supporting relief on the testing results that he obtained. Thus, despite the length of his pleadings below and on appeal, this case did not there require and does not here call for the extensive re-examination of his trial or his expansive (and endless) effort by voluminous exhibits (to which he has endeavored to add *even on appeal*) to undermine the proof from trial and his jury's verdicts that he has undertaken.[1] Rather, the case calls only for reasoned and

[1]To be sure, the State disputes many of the characterizations and conclusions about the law and the facts of his case that the appellant makes throughout the first three points in his brief—such as the self-serving suggestions that his case was the

straightforward application of the now-controlling statute on review of the pleadings.

The circuit court's order doing just that was correct, not only for the detailed reasons that follow, but also in general because it recognized that the statute does not provide for routine post-conviction evaluation of a trial, but instead provides for a narrowly directed habeas-corpus action to prove a claim of actual innocence, here by DNA-testing results, without regard to claims of trial error that could be (and/or have been) assessed in other proceedings. This Court should not be distracted by the appellant's misplaced challenges to his trial proof, but need only evaluate whether the DNA-testing results he obtained satisfied the necessarily high burdens of the statute for proof of a claim of actual innocence. As the circuit court's order illustrates, it does not take long to appreciate that the appellant's results fell well

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impetus for passage of the DNA-testing statute, given that it was substantially amended after he obtained a testing order, or that any particular claim below was "uncontradicted," given that the case was resolved *without* hearing proof because it was unnecessary to contradict every claim he made to deny him relief under the statute—but it would not serve the Court's review of the circuit court's order to detail such disputes. As the State's briefing here will demonstrate, that order should be affirmed for one of several straightforward, alternative reasons. The State has made like arguments in the pending appeals of the orders denying relief to the appellant's codefendants, pending in this Court as Misskelley v. State, No. CR 08-1481, and Baldwin v. State, No. CR 09-60.

short of his burdens under the statute, even indulging him his own favorable measure of it.

I., II., III., & IV. [2]

THE CIRCUIT COURT'S ORDER DENYING THE APPELLANT'S HABEAS PETITION AND MOTION FOR NEW TRIAL UNDER ARK. CODE ANN. §16-112-201 et seq. SHOULD BE AFFIRMED.

The law is settled that the Court will not "reverse a denial of postconviction relief unless the [circuit] court's findings are clearly erroneous or clearly against the preponderance of the evidence." Davis v. State, 366 Ark. 401, 402, 235 S.W.3d 902, 904 (2006) (per curiam) (citation omitted). The DNA-testing statute under which the appellant sought postconviction relief, Ark. Code Ann. §16-112-201 *et seq.*, expressly provides that relief may be denied without a hearing. Id. at §16-112-

[2]The argument section of appellant's brief contains four points, see App. Br. at Arg. 1, 3, 9, 28, only the last three of which are identified as points on appeal. See App. Br. at xxiii. Points II and III in the argument section are an extended explanation (II) and application (III) of the appellant's claims for reversal found in point IV. In other words, it is actually point IV which contains the appellant's subheaded arguments for reversal of the circuit court's order. Because the State is not bound to follow his subheadings, it responds to all of his points under one combined point heading, defending the circuit court's order in three subheadings of its own to correspond to the court's three alternative reasons to deny the appellant relief under the statute without a hearing.

205(a). The circuit court's careful order doing so was not clearly erroneous, and this Court should affirm for the reasons detailed below.[3]

The Court has explained from the advent of the DNA-testing statute that it permits habeas-corpus relief based upon new scientific evidence proving persons "actually innocent" of the crimes of which they were convicted. See, e.g., Orndorff v. State, 355 Ark. 261, 263, 132 S.W.3d 722, 723 (2003) (per curiam). That assessment is wholly correct in light of the original act's pronouncement that it was adopted to "exonerate the innocent." 2001 Ark. Acts, No. 1780 §1; see also Johnson v. State, 356 Ark. 534, 549, 157 S.W.3d 151, 163 (2004) (emphasis in original) ("Act 1780 was … meant to be used to test evidence that will prove *actual innocence* of a wrongly-convicted person.").

As initially adopted, however, the statute provided no standard for evaluating testing results or awarding relief on claims to proof of actual innocence. It was, consequently, substantially amended in 2005, see generally 2005 Ark. Acts. No. 2250, and now includes the subsection under which the appellant sought a new trial in particular. Compare Ark. Code Ann. §§16-112-201 (Supp. 2003) with Ark. Code Ann. §§16-112-201, 16-112-208 (Repl. 2006). Because the appellant had

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[3]As explained elsewhere and in detail, *infra*, the circuit court denied relief by alternative conclusions, including in part by resolving the parties' disputes as to how the statute should be interpreted. While it is not necessary for this Court to reach each interpretation that court made to affirm the denial of relief, to the extent the Court does reach them, its standard of review is, of course, de novo. See generally, e.g., State v. Stites, 2009 Ark. 154, at 6.

obtained testing under the earlier version of the statute, but filed his request for relief under the new version, the circuit court denied the appellant relief on alternative grounds. Compare id. §16-112-202 (Supp. 2003) with id. §16-112-202(10)(B) (Repl. 2006). While this Court need not answer whether the circuit court was correct as to each alternative in order to affirm, the State nevertheless advances each as a basis to affirm in response to the appellant's arguments for reversal.[4]

A. Denial of relief under §16-112-208(b).

The circuit court correctly denied the appellant relief because his testing results are inconclusive as to his claim of actual innocence under Ark. Code Ann. §16-112-208(b) because they do not show a reasonable probability that he did not commit the offenses, the possibility for which is the threshold showing now

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[4]The Court has said that a circuit court cannot consider a petition for relief like the appellant's (who was convicted in 1994) that is filed outside the 36-month period of Ark. Code Ann. §16-112-202(10)(B) and does not state an enumerated ground to rebut the presumption of the petition's untimeliness, see Brown v. State, 367 Ark. 315, 317, 239 S.W.3d 481, 482-83 (2006) (per curiam), and that a petitioner's burden to rebut the presumption is jurisdictional. See Douthitt v. State, 366 Ark. 579, 581, 237 S.W.3d 76, 78 (2006) (per curiam). The State, however, does not here, as it did not below (Add. 661-62, R. 661-62), press the untimeliness of the appellant's petition, as he arguably could demonstrate good cause under (10)(B)(v) due to either the pendency of his case in circuit court prior to the adoption of the rebuttable presumption or the consent of the parties.

required by §16-112-202(8)(B) even simply to obtain testing in the first instance. (Add. 903-07, R. 909-13) As the State explained below, the circuit court's evaluation of the results under section 208(b) to determine if they were inconclusive as to the appellant's claim of actual innocence was wholly consistent with the purpose of the statute—to permit proof of actual innocence—as stated in the original act and this Court's cases. (Add. 663-70, 841-47; R. 663-70, 847-53)

The appellant's testing results—described in the circuit court's order from his own pleading—certainly fell well short of the mark, as the circuit court observed because even the appellant described them as raising only "an inference of innocence[.]" (Add. 906, R. 912) Indeed, even by that description the appellant overstates them, as none of the results are dispositive of the identity of the killers. Cf. State v. Johnson, 971 So.2d 1124, 1131-32 (La. App. 1st 2007), writ of certiorari recalled as moot, No. 07-2034 (La. Oct. 9, 2009), (under Louisiana statute, absent proof DNA could only be from assailant, exclusion of Johnson as source not clear and convincing evidence of factual innocence).[5]

[5]It appears that the appellant has abandoned the dispute he had below with the State's reliance on Louisiana law, as he does not even cite it on appeal. Nevertheless, as the State explained below, Louisiana law provides a better comparison than Illinois law, to which the appellant pointed below and to which the Court once pointed in passing on the original version of the DNA testing statute, see generally Johnson v. State, 356 Ark. 534, 157 S.W.3d 151 (2004), particularly since the substantial 2005 amendments to the Arkansas statute after Johnson make it more closely resemble a similar federal statute. (Add. 845-47, R. 851-53)

That the appellant was excluded as the source of the biological material tested from the crime scene is inconclusive as to his claim of innocence because his exclusion as a source does not prove that he was not at the crime scene or not a killer, particularly as it was apparent there was an effort to conceal the crimes. Likewise, that two other persons are not excluded as sources of two items of biological evidence from the crime scene does place them there at the time of the crime nor make them killers, much less prove that the appellant was not there and not a killer. In other words, it is conceivable that the appellant left no biological material or that any he left was not recovered or tested and there are wholly and obvious innocent explanations for the recovery of biological material of a victim's step-father and that of his friend. The circuit court's order denying relief and finding that the appellant's DNA-testing results were inconclusive as to his claim of actual innocence should be affirmed.

The appellant's disputes with the circuit court's reliance on section 208(b), see App. Br. at Arg. 29-33, are both wrong and misread the order. As the circuit court explained, the meaning of "inconclusive" in that section had to be considered in this case in light of the fact that testing was ordered under the previous version of the statute, but relief was being requested under the current version. In particular, the court observed that the appellant could not "jump past section 208(b) to §16-112-208(e)" because all relief under section 208 is premised on testing ordered under the strictures of the current version of section 202, but he had obtained a

testing order under the previous version with a demonstrably easier threshold.[6] (Add. 905, R. 911)

The statutory-interpretation principles to which the appellant points can hardly serve to resolve the procedural anomaly presented by this case and

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[6]As the circuit court also observed (Add. 903, R. 909), the State explained below that it would dispute that the appellant could meet the current requirements of section 202 to obtain the testing he earlier secured under the previous version of the statute. (Add. 664-65, R. 664-65) As explained in the text, his position and reliance on various statutory-interpretation principles, App. Br. at Arg. 29-33, simply ignores the procedural dilemma the circuit court had to resolve given the legislative changes between the testing orders and his request for relief. The General Assembly substantially revised section 202 and added section 208, including 208(b)'s use of the word "inconclusive" as a measure for determining whether to *deny further relief* as an alternative to additional testing under 202. Thus, the point is that the previous version of 202 that permitted testing that might produce evidence materially relevant to the appellant's *mere claim* of innocence, see Ark. Code Ann. §16-112-202(c)(1)(B) (Supp. 2003), is a far cry from testing that might produce new material evidence that raises a reasonable probability that he did not commit his crimes. See Ark. Code Ann. §16-112-202(8)(B) (Repl. 2006). It is difficult to conceive that any DNA-testing results could yield such material evidence as to a crime like the appellant's. Cf. Johnson, 971 So.2d at 1131-32 (under Louisiana statute, absent proof DNA could only be from assailant, exclusion of Johnson as source not clear and convincing evidence of factual innocence).

identified by the circuit court as simply as he would like. The best principle to guide any court caught in such a dilemma is to give effect to the intent of the legislature, the canon of interpretation to which all others yield. See, e.g., Williams v. State, 364 Ark. 203, 208, 217 S.W.3d 817, 819 (2005). The circuit court's resolution of how to evaluate a claim for relief under the substantially revised statute did just that and well serves the legislative intent of the DNA-testing statute, if not the outcome that the appellant wanted.

The circuit court certainly was correct that a claim of innocence of murders like those the appellant committed would have to be founded on evidence dispositive of the identity of the killers to meet the amended statutory gateway of a reasonable probability that he did not commit the murders. After all, the State secured his conviction on, *inter alia*, proof of his admission, and now in these proceedings also can use against him proof of the admissions of his codefendants. The point is not that a petitioner must name another killer to obtain testing now (indeed, he has already named himself, a fact that would not change even if DNA-testing results could name an additional killer); rather, a petitioner must show that DNA-testing results *could* do so to raise a reasonable probability that he did not commit the crimes. That burden is not met merely by demonstrating that he can be excluded as the source of a limited amount of tested biological material or that other persons cannot be excluded. As the State explained below, it is common sense that a person's exclusion as the source of some biological material found at a murder scene neither means that he was not there, nor that he was not a killer, and, likewise, common sense dictates that the recovery of biological material from a crime scene,

or even from a victim, does not make a killer of a person who is not excluded as its potential source. (Add. 669, R. 669)[7] In short, DNA evidence is not necessary to solve homicides, and, without DNA-testing results that *could be* dispositive of the identity of the killers here, the appellant cannot raise a reasonable probability that he was not one of them.

Finally, despite the appellant's various claims to the contrary, see App. Br. at Arg. 3-4, 9, 31-33, it is *no* answer here that he seeks only a new trial. The appellant's reliance on §16-112-201(a) in his effort to suggest that a new trial under 208(e) is an easier remedy to obtain under the statute is mistaken.[8] Had the legislature intended as much, it would have said so when it added that latter section in 2005,

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[7]The appellant repeats on appeal, see App. Br. at Arg. 30-31, an argument he made below employing a hypothetical to suggest denying relief under 208(b) reads the statute too narrowly. (Add. 758-59, R. 763-64) The State will not recite at length why that hypothetical actually proves the State's point, as its response below fully did so. (Add. 843-44, R. 849-50) Suffice it to say here that a useful hypothetical comparison to this case must also assume the admissions of guilt by the appellant and/or his codefendants and omit a third-party confession, the consideration of which might be undertaken in an error-coram-nobis proceeding, but is irrelevant as to a claim of innocence purportedly founded on DNA-testing results.

[8]His reliance on House v. Bell, 547 U.S. 518 (2006), is simply inapposite as to the circuit court's alternative ruling under 208(b), but is taken up and refuted (as it was by the circuit court) as to the denial of relief under 208(e), discussed *infra*.

outlining for the first time how testing results should be evaluated at all. See generally 2005 Ark. Acts, No. 2250. After all, the availability of a new trial years after direct and collateral review without a demonstration of trial or constitutional error is itself quite extraordinary relief, apparently unique outside of clemency prior to the adoption of the DNA-testing statute. In short, while the appellant's case (and those of his codefendants') may be anomalous given the intervening legislative amendments between the testing orders and their requests for relief, the cases nevertheless must be resolved by the correct application of the statute now.[9] The circuit court's order did just that by denying relief under 208(b), and it should be affirmed.

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[9]The appellant suggested below and does again on appeal, see, e.g., App. Br. at Arg. 2-4, that the statute must permit more commonly available relief than the State's and circuit court's analyses of it admit of, else it would be superfluous or meaningless. But his desire for a forum to proclaim his innocence by any means he chooses does not dictate the conclusion that the statute actually provides him one. Rather, as the State observed below (Add. 845, R. 851), it believes that the forum the statute provides may well never yield relief due to confidence that the Arkansas criminal-justice system does not convict the innocent. It may be fashionable to believe otherwise, and the statute represents a legislative judgment that the possibility exists, but surely a forum for the statutory correction of such a wrong is premised on demonstrations of only the most conclusive proof of innocence, not on mere disputes with the evidence of guilt, such as that on which the appellant relies.

B. Denial of relief under §16-112-208(e).

The circuit court's alternative denial of relief under Ark. Code Ann. §16-112-208(e) should be affirmed because, when considered with all the other evidence of the appellant's guilt, his DNA-testing results do not establish by compelling evidence that a new trial would result in an acquittal. (Add. 908-10, R. 914-16) Undoubtedly the circuit court was correct that a jury would not consider his unremarkable DNA-testing results as compelling evidence for an acquittal in the face of his own admission and those of his codefendants'.[10] Indeed, the appellant does not appear to dispute that this alternative finding was correct, made as it was without considering his new forensic evidence and other additional evidence claims, (Add. 908-09, R. 914-15), although he disputes the circuit court's interpretation of 208(e)(3), foreclosing that consideration. See App. Br. at Arg. 33-35.[11] Rather, he

[10]The appellant appears to have abandoned on appeal the legal challenge he joined below to the circuit court's reliance on, as evidence of his guilt, his codefendant Misskelley's immunized statement admitting the crimes. (Add. 854-81, R. 860-87) Instead on appeal he offers reasons to discount that statement. See App. Br. at Arg. 21, n. 12. The circuit court rightly did not do so (Add. 909, R. 915), nor should this Court.

[11]In recounting his new scientific evidence, see App. Br. at Arg. 13-16, it appears that the appellant disputes that the circuit court could give any credit (or at least so much as to reject his new-trial claim) to the appellant's and his

chiefly complains that the circuit court wrongly denied him relief without a hearing because it rejected his other-evidence and juror-misconduct claims as not cognizable and held him to the wrong burden for relief under section 208(e)(3) by not considering those claims as undermining the proof from trial.[12]

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codefendant's admissions of guilt in the face of the DNA-testing results, but his position would prove too much. It cannot be that simply because those results *could be said* to contradict *some* details of the killers' admissions of guilt (such as whether semen might have been present, a point the State does not concede has been disproved), that the admissions must be discounted altogether. Rather a court (or juror) could readily credit the admissions of guilt as proving the presence and participation of the killers in the crimes even while recognizing that some details of the admissions could be contradicted by other proof, or even shown to be demonstrably wrong. For example, that one mistakenly remembers an actress other than Janet Leigh as the victim in *Psycho* does not mean that he has not seen the movie on a given occasion.

[12]The appellant appears to have abandoned on appeal any challenge to the circuit court's ruling as to his jury-misconduct claim as an *independent* ground for relief under the statute. (Add. 910-11, R. 916-17) His references to the claim now, App. Br. at Arg. 13, 26-27, 35-36, are only additional attempts to impugn his trial and impeach the verdicts of guilt as weighed against his DNA-testing results. As the circuit court recognized in agreeing with the State, this Court previously has admonished him not to do so. (Add. 687-88, 910-11; R. 687-88, 916-17); see Echols v. State, 360 Ark. 332, 339-40 n.4, 201 S.W.3d 890, 895 n.4 (2005) ("We have

He is mistaken. First, as the circuit court correctly observed, his effort to introduce new forensic and other additional evidence to undermine the State's proof of his guilt at trial reflects his misunderstanding—with which he remains afflicted and maintains at length on appeal—of the scope of the statute under which he is seeking relief.[13] (Add. 908-09, R. 914-15) 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 him. See

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unequivocally stated that any effort by a lawyer to gather information in violation of Rule 606(b) to impeach a jury's verdict is improper.").

[13]His misunderstanding is well illustrated by the emphasis he gives to point III, App. Br. at Arg. 9-27, purporting to discredit the trial proof. That emphasis misapprehends that the DNA-testing statute is not a vehicle for reweighing the trial proof, but is only one for affirmatively demonstrating the proof of one's alleged innocence. The statute does not provide a forum for collateral review for trial errors. Indeed, he already has pursued such review in Rule 37 proceedings in circuit court, affirmed by this Court, Echols v. State, 354 Ark. 530, 127 S.W.3d 486 (2003), as well as other collateral efforts rejected by this Court. See, e.g., Echols v. State, 354 Ark. 414, 125 S.W.3d 153 (2003) (error coram nobis). Having failed to obtain DNA testing or results that can meet his high burden to *prove* his innocence now, he persists instead, as he did below, in trying to relitigate his 1994 trial. He has demonstrated he can do that endlessly and voluminously, attempting to do so in the midst of briefing this appeal, but even that still does not satisfy the statute.

Johnson, 971 So.2d at 1130 (Louisiana DNA-testing statute "directed toward freeing the innocent, and not toward a reweighing of the evidence used to convict."); cf. Johnson, 356 Ark. at 549, 157 S.W.3d at 163 (explaining under prior version that statute meant for "evidence that will prove *actual innocence* of a wrongly-convicted person"); cf. also Wainwright v. Sykes, 433 U.S. 72, 90 (1977) (noting state trial is the main event, not merely a tryout for later collateral review). Rather, it is his burden to demonstrate his innocence by compelling DNA-testing results that demonstrate a new trial would end in acquittal, as against all other evidence of guilt, whether or not admitted at trial. See Ark. Code Ann. §16-112-208(e)(3).

Had the legislature intended otherwise, it readily could have provided that both incriminating *and* exculpatory evidence could be considered under section 208(e)(3), as the federal standard expressly provides, as noted in House v. Bell, 547 U.S. 518, 538 (2006). Given the much greater relief available under the statute—the possibility of relief from an otherwise valid conviction without a demonstration of trial or constitutional error—it is unsurprising that the evidence to be considered under the statute is more narrowly circumscribed than that considered under the House standard. Had the legislature intended that phrase to mean anything more than evidence of guilt weighted against DNA-testing results as in §16-112-208(e)(3), it would have said so when it added that latter section in 2005. See generally 2005 Ark. Acts, No. 2250. In short, the circuit court correctly concluded that the appellant's new forensic and other additional evidence was not cognizable in evaluating his DNA-testing results under the DNA-testing statute.

Second, the circuit court also employed the correct burden to evaluate the appellant's DNA-testing results under Ark. Code Ann. §16-112-208(e)(3), rejecting the appellant's reliance on House v. Bell, and his claim that a lesser burden applied under section 208(e)(3) because it authorizes a new trial rather than complete discharge as suggested by section 201(a). As for the appellant's reliance on House v. Bell and the federal gateway standard, it is contrary to the statute's purpose (to provide a mechanism for testing to exonerate the innocent), ignores the higher threshold which now must be reached before testing even can be ordered (possibility of evidence raising a reasonable probability that the petitioner did not commit the offense), and contradicts the text of §16-112-208(e)(3) that any DNA-testing evidence so ordered compellingly prove acquittal. If the statute admits of scalable burdens by comparison to federal analogs, the burden of a petitioner to obtain new-trial relief is certainly greater than the federal gateway standard merely to obtain collateral review of defaulted constitutional claims from trial.

The standard from House v. Bell is patently inconsistent with the posture of the appellant's case and the available state statutory relief. As the United States Supreme Court explained, House raised his claim of actual innocence in federal court to excuse his failure to raise in Tennessee state court several federal constitutional challenges to his trial proceedings. Id., 547 U.S. at 521. That is, his demonstration of his actual innocence under the federal standard—new evidence demonstrating it is more likely than not that no reasonable juror would find him guilty—would simply permit him to raise those otherwise-barred constitutional challenges in federal court. Id. at 536-37. Even carrying his burden he could not

win a new trial, but only the *opportunity* to press on with his *collateral* attack on his trial and verdict, particularly his death sentence. Thus, House did not rely on or announce a constitutional standard applicable to statutory schemes like the DNA-testing statute. Rather, the federal gateway standard employed in House is simply a jurisprudential construction, not a constitutional right. See Herrera v. Collins, 506 U.S. 390, 404 (1993). Indeed, the United States Supreme Court recently rejected a claim to post-conviction DNA testing as a matter of constitutional right, pointing to state laws and cases as the appropriate sources of authority to establish and determine the scope of access to such testing. See generally District Attorney's Office for the Third Judicial District v. Osborne, 129 S. Ct. 2308 (2009).

The appellant seeks, and the DNA-testing statute provides the possibility of, a great deal more than he could obtain under federal jurisprudence as delineated in House. The statute may be employed to wipe clean the long presumptively valid determination of his guilt, yet requires no demonstration that his trial was constitutionally infirm. The relief House sought was far more modest, merely the opportunity to pursue in a federal habeas-corpus proceeding constitutional challenges to his trial proceedings that were barred from review in state court. In other words, the lesser gateway relief House pursued could be obtained by an actual-innocence burden less than that the appellant must meet to obtain a new trial. The appellant's burden to prevail here must correspond to the extraordinary relief he seeks; a greater remedy requires a greater evidentiary showing. That greater showing is not the so-called gateway actual-innocence demonstration from federal courts, but a freestanding demonstration of actual innocence that would

warrant extraordinary relief from his judgments of guilt.[14] Only such a remarkable showing calls for a new trial under the statute. Consequently, House does not set the standard of proof that the appellant had to meet. Rather the burden of compelling evidence necessary to demonstrate an acquittal required by §16-112-208(e)(3) is necessarily greater than the burden from House. The circuit court's conclusion to that effect should be affirmed.

The appellant's reliance on section 201(a)'s reference to the relief of vacation of judgment and discharge in propping up his new-trial claim, see App. Br. at Arg. 32-33, is wholly misplaced. Shortly after the adoption of Act 1780 of 2001, the Court observed that, "[b]ecause it was recently enacted, this court has not had the opportunity to consider the constitutionality of the act, whether it conflicts with other postconviction remedies available to the convicted defendant, or otherwise to address the provisions of the statute." Hardin v. State, 350 Ark. 299, 301, 86 S.W.3d 384, 385 (2002) (per curiam). Since then, the Court has neither entertained nor

[14]Indeed, as the Supreme Court explained in House, the burden to be met on a freestanding claim of actual innocence remains only a hypothetical construct for relief from a *death sentence*. Id., 547 U.S. at 554-55. Whatever that hypothetical burden, the Supreme Court concluded House's effort fell short. Id. at 555. Moreover, individual justices have explained that the burden certainly would be higher than the gateway standard, see House, 547 U.S. at 556 (Roberts, C.J., Scalia and Thomas, JJ., concurring in the judgment in part and dissenting in part) and certainly would be "extraordinarily high." Herrera v. Collins, 506 U.S. 390, 417 (1993).

answered a challenge to the statute's constitutionality under the Arkansas Constitution's provision guaranteeing the separation of powers, see Ark. Const. Art. 4, § 2, as to a claim that the statute impermissibly authorizes courts to grant petitioners relief from criminal judgments without a claim of error in the underlying proceedings. Such a request for relief from a criminal judgment without a claim of error in the underlying proceedings, however, is a request for clemency, see Abbott v. State, 256 Ark. 558, 563, 508 S.W.2d 733, 736 (1974), vested in the Governor pursuant to Art. 6, § 18 of the Arkansas Constitution. E.g., Osborne v. State, 237 Ark. 5, 7, 371 S.W.2d 518, 520 (1963). The General Assembly cannot delegate this power to the courts without infringing on the Governor's powers. Abbott, 256 Ark. at 562-63, 508 S.W.2d at 736.

Although the foregoing authorities undermine the appellant's entire theory of varying degrees of remedies found in the statute and upon which he posits a readily available new-trial remedy for himself, he does not confront—much less refute—them; indeed, he does not even cite them on appeal. Rather, he simply offers the *ipse dixit* that the judicial power must accommodate the relief he seeks. See App. Br. at Arg. 33.[15] Certainly the resort to judicial fiat would make all things

[15]While he claims that the judicial power he invokes would simply vindicate state and federal constitutional rights to due process and guarantees against cruel and unusual punishment, his claim does not make it so. Without fully repeating the point in the text, the potential separation-of-powers flaw in the statute is the provision for what amounts to *executive* clemency in the absence of a demonstration of constitutional or trial error in the underlying *judicial* proceeding.

possible for him, and thus it is unsurprising that he would invoke it, but it is not so. Laying aside that the concept of republican government itself—to say nothing of the Guaranty Clause of the federal constitution—does not accommodate such an expansive view of judicial power, it is patent that the Arkansas Constitution and the doctrine of separation of powers also does not do so, having reserved the clemency power to the Governor.

Nevertheless, this Court need not resolve whether section 201(a)'s purported remedy of vacation of a judgment and discharge of a defendant or the appellant's reliance on it would infringe the Governor's clemency power because he clearly is not entitled to relief under the statute and the courts have a duty to avoid reaching constitutional decisions unnecessary to the disposition of a case. E.g., Solis v. State, 371 Ark. 590, 598-99, 269 S.W.3d 352, 358 (2007). Thus, as the circuit court did below (Add. 910, R. 916), the Court should observe the doctrine of constitutional avoidance, rejecting the appellant's reliance on section 201(a) to obtain relief under section 208(e) and thereby avoiding a constitutionally suspect interpretation of the statute. For all these reasons, the Court should affirm the circuit court's alternative denial of relief under section 208(e)(3).

C. Denial of relief under House v. Bell.

Third, the circuit court's alternative denial of relief, even considering the appellant's reliance on new forensic evidence and other additional evidence, and even assuming that House v. Bell, stated the correct burden to obtain relief under section 208(e)(3), should be affirmed because the appellant's claim of actual innocence falls well short of the compelling claim considered in House. In

particular, the circuit court noted that House had new DNA evidence linking the victim's abusive husband to the crime along with evidence of the husband's admissions of guilt. (Add. 910, R. 916) Rather than pointing to any such damning new evidence in his case, the appellant instead argues that discrediting the State's case against him would satisfy House. App. Br. at Arg. 35. The circuit court's denial of relief even under House, however, accepted that he could discredit the State's case, but turned on how poorly the appellant's DNA-testing results and new-evidence claims compared to those that House had brought to federal court. (Add. 910, R. 916) The circuit court was surely correct that the appellant's new-evidence case so pales by comparison to House's that he could not obtain relief even under House itself.

As the State explained below, whether employing the House standard or not, (Add. 679-83, 685; R. 679-83, 685), even considered with his otherwise uncognizable, new-forensic/additional evidence critique of the trial evidence against him, his DNA-testing results do not establish by compelling evidence that he would be acquitted when those results are considered with the extra-trial evidence of his guilt, particularly the admissions of his codefendants'. Cf. generally Hildwin v. State, 951 So.2d 784, 789-90 (Fl. 2006) (distinguishing House and affirming denial of relief under Florida law on DNA-testing evidence that Hildwin did not contribute bodily fluids on panties and washcloth found in victim's car, although trial evidence suggested he had). After all, even considering the appellant's purportedly new forensic evidence of animal predation, for example, would not require that it be credited as a matter of evaluating proof of his guilt. Moreover, even if credited,

animal predation cannot explain the victims' deaths, in part by drowning, their being stripped, beaten, and hog-tied, or why their clothes were stuck in the mud nearby. Thus, even if his animal-predation theory accounts for some of the victims's wounds and discredits part of the prosecution's theory of the case, his theory simply does not explain the killings, much less exclude the appellant as a possible perpetrator. In short, all the inculpatory evidence in the case, particularly the appellant's admission and those of his codefendants' (despite his doubts about them[16]), forecloses the possibility that by compelling evidence he could demonstrate that he would be acquitted.

One need only cast the question in light of the appellant's proposed House standard: Is it reasonable for a juror—even in light of his exclusion as the source of some biological material from the crime scene, his post-mortem animal-predation theory, and other additional evidence—to nevertheless believe that his admission of

[16]And despite the doubts of his amici, whom the Court has permitted to appear here on the subject of so-called false confessions. However generously one might interpret the DNA-testing statute to permit the reweighing of trial proof—and, of course, the State denies that one should do so at all—it surely is not a forum for a debate about false-confession claims. Certainly the appellant's amici do not appear seriously to think so, as they do not bother even to cite the statute. Suffice it to say that, contrary to what the law might actually require, the appellant and his amici would have jurors and courts hold confessor killers to a power of recall uncommon in the rest of us, indulging little, if any, room for factual error and none for deceit.

guilt and those of his codefendants', his possible physical and temporal proximity to the crimes, and the circumstantial and motive proof for the crimes consistent with the admissions, all come together to make him guilty? A reasonable juror could so conclude. Thus, the circuit court's alternative denial of relief under House should be affirmed as well.

CONCLUSION

One would not expect killings like those the appellant and his codefendants committed—particularly given their efforts to conceal the crimes evident in the disposal of the victims and their clothing under water—to yield the DNA-testing results that could exonerate them as contemplated by the DNA-testing statute. Such results are, if they ever exist, certainly exceedingly rare. This is not that rarest case, and it is therefore unsurprising that the appellant has neither found nor offered any such results or other evidence that call for awarding him any habeas relief or a new trial for those killings. His extended critique of his 1994 trial and his jury's verdicts are neither cognizable under the statute nor sufficient aid to the inadequate DNA-testing results he obtained. The circuit court correctly concluded as much on the pleadings. For the reasons stated and the authorities cited, the State respectfully requests that the order denying relief be affirmed as to any alternative or in all respects.