CR 08-1493

THIS IS A CAPITAL CASE

IN THE SUPREME COURT OF ARKANSAS

DAMIEN WAYNE ECHOLS **APPELLANT**

v.

STATE OF ARKANSAS **APPELLEE**

An Appeal from
CRAIGHEAD COUNTY CIRCUIT COURT
ON CHANGE OF VENUE FROM CRITTENDEN COUNTY CIRCUIT COURT
Circuit Court No. CR 93-450a
Hon. David Burnett, *Judge*

REPLY BRIEF OF APPELLANT DAMIEN WAYNE ECHOLS

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INTRODUCTION

Echols's central claim in the circuit court and in this appeal is a simple one: DNA testing authorized by the court under A.C.A. § 16-112-201, *et seq*.,[1] produced DNA results that exclude him as the source of any and all DNA recovered from the crime scene evidence identified in the circuit court's testing order. For that reason, and pursuant to the express provisions of § 16-112-208(e)(3), he is entitled to new trial because the relevant DNA test results exclude him as the source of the sample DNA, and those results, "when considered with all other evidence in the case regardless of whether the evidence was introduced at trial, establish by compelling evidence that a new trial would result in an acquittal." The circuit court therefore erred in denying Echols such relief.

The State's response to Echols's argument and showing is deficient in several key respects. First, although the substantive standard for the granting of a new trial is plainly stated in § 16-112-208(e)(3), the State largely ignores that provision in focusing on a different statutory provision irrelevant to the relief sought by Echols. Second, to the extent that the State does address the controlling subdivision, it disregards the plain meaning of its language in favor of a construction that renders its key provisions meaningless.

Finally, the positions taken by the Office of the Attorney General here are, most disturbingly, in stark conflict with those advanced in a brief it recently filed before the United States Supreme Court. In the *Osborne* case,[2] the Arkansas Attorney General agreed that there was a recognized need for DNA testing in the context of litigation of claims of wrongful conviction, but successfully argued that the Supreme Court should not provide DNA testing as a federal constitutional entitlement because Arkansas and nearly all other states had statutorily provided a "meaningful opportunity" for

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[1] Except as noted, all further statutory section and subsection references are to those contained in A.C.A. § 16-112-201, *et seq*. In addition, although § 16-112-201, *et seq*., set forth conditions for securing relief based on new scientific evidence in various forms, Echols, for convenience, at times refers to these provisions as the Arkansas DNA statute.

[2] *District Attorney's Office for the Third Judicial District v. Osborne,* 129 S.Ct. 2308 (2009).

the wrongly convicted to challenge and overturn their convictions. Indeed, Arkansas is eligible to receive money from the federal government conditioned on a certification that the state legislatively provides such a meaningful opportunity.

Yet here the Attorney General asserts, despite the Legislature's finding to the contrary, that there are and can be no instances of wrongful conviction in Arkansas, and on that basis explicitly urges this Court to interpret the state's DNA statutory scheme so as to make it functionally impossible for any petitioner to gain relief. Indeed, the Attorney General proposes that the DNA statute be struck as unconstitutional because the Legislature has no power to provide a remedy to the wrongly convicted, a position flatly in conflict with that the Office took before the United States Supreme Court in *Osborne*. This Court should reject the Attorney General's exercise in gamesmanship. Arkansas' assurance in *Osborne* that the state provides meaningful post-conviction remedies for the wrongly convicted must be honored.

I. THE CIRCUIT COURT ERRED IN CONSTRUING A.C.A. § 16-112-202(8)(b) AS SETTING FORTH THE SUBSTANTIVE STANDARD FOR RELIEF AND AS SUPERSEDING THE NEW TRIAL PROVISIONS SET FORTH IN § 16-112-208(e)

A. The State Defends a Novel Circuit Court Analysis of the DNA Statute That the State Itself Did Not Advance Below; Suggests That Relief under the Statute May Well Be Unattainable; and Disputes the Constitutionality of the DNA Statute Itself

As Echols recounted in his opening brief ("Arg.") at 28-33, one basis for the circuit court's denial of any and all relief to Echols rested on the conclusion that the DNA testing results were "inconclusive" within the meaning of subsection 208(b), which was added by amendment to the original statute in 2005, and which provides:

> If the . . . (DNA) test results obtained under this subchapter are inconclusive, the court may order additional testing or deny further relief to the person who requested the testing.

Observing that the amended statute did not define the term "inconclusive," the circuit court reasoned that the substantive standard for obtaining relief should be imported from the standard an applicant must meet to secure a testing order in the first instance. (Add. 904, citing subsection 202(8)(B)). That subsection permits a convicted defendant to move for DNA testing if, *inter alia*,

the proposed testing may produce new material evidence that would "[r]aise a reasonable probability that the person making a motion under this section did not commit the crime." Thus, the circuit court denied relief because, even accepting all of Echols's factual allegations as true, the DNA results purportedly did not raise a reasonable probability that he had not committed the offense. (Add. 904-08.)

In defense of the circuit court's approach, the State sympathizes with the "procedural dilemma" the court confronted where, as here, Echols secured his original testing order under a statutory testing standard that, the State asserts, has subsequently been made more demanding. (State's Brief [hereafter "SB"] at 8 n. 6.) It then defends the circuit court's decision to read the new "reasonable probability" testing standard contained in subsection 202(8)(B) as setting the *substantive* standard for relief -- notwithstanding the substantive standard for securing new trial relief that is expressly set forth in subsection 208(e)(3) -- contending that use of the testing standard best gives "effect to the intent of the legislature, the canon of interpretation to which all others must yield." (SB at 8-9.)

Indeed, the State seeks to raise the bar to any and all relief under the statute even higher than did the circuit court. Thus, the State cites Arkansas precedent interpreting the original version of the DNA statute (SB at 4) and notes that version's concern with proving actual innocence and exonerating the innocent. Having done so, the State again and again invokes Louisiana law interpreting that state's post-conviction DNA testing statute, observing that it predicates relief of any kind on test results that, standing alone, conclusively exonerate the applicant, and contending that it is persuasive authority for interpreting the Arkansas statute presently at issue. (SB at 6 [citing *State v. Johnson*, 971 So.2d 1124, 1131-32 [La.App.1st 2007] and n. 5; SB at 8 and n. 6; SB at 14-15)

Expanding on this point, the State contends:

> The circuit court was correct that a claim of innocence of murders like those 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.

(SB at 9.)

The State then turns to the conceptual difficulty presented by the obvious inconsistency arising from its conflated construction of subsections 202(8)(B) and 208(b), which purportedly require a conclusive legal showing of innocence, with subsection 208(3)(e) which, by its terms, affords the applicant the more limited remedy of a new trial relief upon a showing -- when "the DNA test results, when considered with all other evidence in the case regardless of whether the evidence was introduced at trial, establish by compelling evidence that a new trial would result in an acquittal" -- that does not require the conclusive results for which the State contends.

Driven into this logical corner, the State argues that subsection 208(e)(3) must nevertheless require the conclusive showing it claims, and that had the legislature intended an "easier remedy" under subsection 208(e)(3), it "would have said so . . ." (SB at 10.)

The implications of the State's position are profound. It is not difficult to postulate how the use of scientific methodologies such as DNA testing could establish beyond peradventure that at the time of an offense of which he was convicted as the perpetrator, a defendant was hundreds of miles away in another state. The Attorney General takes the position that the Arkansas statute could not free that wrongly convicted defendant from a sentence of imprisonment or death because the newly developed scientifically based alibi evidence, while reliable and conclusive evidence of innocence, would not constitute "evidence dispositive of the identity of the [real] killers." Lest there be any doubt that the State posits a view of the DNA statute under which relief is impossible, the State at a later point in its brief says as much:

> [Echols's] 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 the forum the statute provides *may well never yield relief* due to confidence that the Arkansas criminal-justice system does not convict the innocent. . .

(SB at 11, emphasis added.)

Finally, near its brief's conclusion, the State renews its attack on Echols's invocation of subsection 208(e)(3), now disputing the constitutional validity of the statutory scheme itself. The

State, while stating that this Court need not resolve the issue, argues that the entire statute, 208(3)(e) included, likely infringes on the executive's power to grant clemency, thereby rendering it unconstitutional and invalid *per se*. (SB at 18-20; *see also id*. at 19 ["The General Assembly cannot delegate this power [of granting clemency] to the courts without infringing on the Governor's powers. *Abbott [v. State],* 256 Ark. [558,] 562-63, 508 S.W. [2d. 733,] 736 [1974]."])

B. The States's Defense of the Circuit Court's Reliance on Section 202(8)(B) To Deny Relief Is Meritless

1. The State Wrongly Conflates the Testing Standard with the Substantive Standard for Relief

The State's initial arguments supporting the circuit court's decision to view the testing standard stated in subsection 202(8)(B) as the substantive standard for garnering relief in any form fail for several reasons.

First, appellant again notes that the circuit court's interpretation of what the state DNA statute requires for purposes of granting substantive relief is so far removed from the express language of that statute that the State never once advanced that interpretation below.

Second, while the State concedes that discerning the intent of the legislature is the "canon of interpretation to which all others yield" (SB at 9, citing *Williams v. State*, 364 Ark. 203, 208, 217 S.W.3d 817, 819 (2005)), it flatly ignores this Court's admonition that, wherever possible, legislative intent must be located in the plain meaning of the statutory language. (*See* Arg. at 28 and citations therein; *Artman v. Hoy*, 370 Ark. 131, 135, 257 S.W.3d 864, 868 (2007) ("When a statute is clear, it is given its plain meaning and this court will not search for legislative intent; rather, that intent must be gathered from the plain meaning of the language used.")) By its terms, subsection 202(8)(B) describes what an applicant's "proposed testing" must show to secure a *testing* order, not what he must show to secure the *substantive* new trial relief sought by Echols under subsection 208(e)(3). Those substantive requirements are plainly stated in the language of 208(e)(3) itself, and they accordingly govern the question whether Echols's substantive showing was adequate. (*See* Arg. at 29-30.)

Third, as the specific provision dealing with new trial relief, 208(e)(3) takes precedence over the unrelated and/or more general provisions appearing in subsections 202(8)(B) (testing) and 208(b) (inconclusive results). (*See* Arg. at 30 and citations.) This is a point to which the State fails to submit any meaningful response.

Fourth, in any event, even were Echols's proposed testing required to meet the amended, "reasonable probability" testing standard set forth in 202(8)(B) -- and it was not -- it would certainly have done so. (*See* Arg. at 30; see also discussion in subsection I.B.3, below.)[3]

2. The Law Does Not Otherwise Support the Circuit Court's and State's Conclusion Claim That New Trial Relief under the DNA Statute Requires a Conclusive Legal Showing of Innocence

Echols's opening brief discussed the reasons for rejecting the conclusion, advanced by the State and adopted by the circuit court, to the effect that Echols's claim for any and all relief is not legally conclusive under section 208(b), and thus can be appropriately rejected. (*See* Arg. at 30-33.) To this discussion, Echols adds the following:

First, the express wording of subsection 208(b) does not authorize denial of relief in response to inconclusive *legal claims,* as the State asserts, but rather inconclusive *DNA testing results.* (*Ibid*.) This, obviously, is the reason why the subsection provides, as an alternative remedy to the denial of relief, an order for further *testing*. The remedy of further testing can only have been meant to rectify the absence of results that theretofore have been inconclusive with respect to including or excluding the applicant as the source of biological samples identified in the circuit court's testing order. But here, as the State concedes, the cognizable and relevant testing results flatly exclude petitioner and his co-defendants (at the same time as they tend to inculpate another to whom serious suspicion has

[3] Significantly, as noted in the reply brief of Echols's co-petitioner Jason Baldwin (at 3), the State never sought to rescind or limit the scope of the circuit court's original 2004 and 2005 testing orders in the wake of the purportedly more demanding testing standard articulated in the statute's 2005 amendment (section 202(B)(8)).

otherwise rationally and persuasively attached). All such exclusions are "conclusive" within the meaning of subsection 208(b), such that reliance on that subsection to deny Echols new trial relief was unwarranted.

Second -- as Echols has previously contended (Arg. at 32) -- construing subsection 208(b) as the circuit court and the State have done renders meaningless the new trial provisions contained in subsection 208(e)(3). If, as a legal matter, a petitioner conclusively establishes his right to relief under 208(b) by proving beyond doubt the identity of another, actual perpetrator, why would such a petitioner not be entitled to an order that vacates and sets aside the judgment and discharges the applicant, as subsection 201(a) expressly provides?[4] Why would the statute put such an applicant to the burden of a new trial?

Third, contrary to the State's argument, Echols's construction of the DNA statute is wholly consistent with the goal of exonerating the innocent. Echols contends that the statute authorizes a vacatur where the petitioner conclusively proves innocence (subsection 201(a), (a)(1)), and a new trial where the petitioner shows that the DNA results, weighed with the other evidence, would preclude a reasonable jurist from convicting (subsection 208(e)(3)). But the latter remedy no less than the former serves the purpose of "exoneration" for the "actually innocent" if the state then fails to prove guilt at a retrial before a jury informed of all relevant and reasonably available facts, including, but not limited to, the new scientific evidence never presented prior to the initial judgment of conviction.

3. The State's Reliance on Louisiana Law Is Misplaced Because, as the State Has Acknowledged, the Relevant Portions of the DNA Statute Are Modeled on Federal Law

As noted, the State relies heavily on Louisiana statutory and case law in support of its

[4] A telling indication that the State's argument on this point is logically flawed is that despite subsection 201(a)'s and 208(e)(3)'s express identification of different remedies -- vacation of the judgment as opposed to an order for a new trial -- the State does not discuss what showing would be required to trigger one remedy as opposed to the other.

arguments that the Arkansas DNA statute requires results that conclusively prove innocence and, by implication, that new trial relief based on a compelling, albeit more modest showing, is unavailable.[5] But the State has made no showing whatever that the Arkansas DNA statute is modeled on Louisiana's; to the contrary, the State at one point concedes that the substantial amendments to the Arkansas statutes presently at issue in fact ". . . resemble a similar federal statute." (SB at 6 n. 5, citing Add. 845-47, R. 851-53.) The cited portion of the Addendum, in turn, consists of an excerpt from the State's brief below stating, "[§ 16-112-208 (e)] (along with the revision of § 16-112-202) apparently was based on nearly identical language from the federal Innocence Protection Act of 2004. *See* 18 U.S.C.A. §3600(a), (f), & (g) (Supp. 2008)."

In fact, *all* of the provisions bearing on the circuit court's and State's central argument -- *i.e.*, sections 202(B)(8) (testing), 208(e)(3) (new trial relief) as well as 208(b) (inconclusive results) -- are virtually identical to those appearing in the federal Innocence Protection Act ("IPA"). (Compare foregoing provisions with 18 U.S.C. § 3600 subsections (a)(8)(B), (f)(1), and (g)(1), (2), respectively.) Furthermore, the Attorney General of Arkansas formally joined an amicus curiae brief in support of the petitioner in *District Attorney's Office for the Third Judicial District v. Osborne,* 129 S.Ct. 2308 (2009) (cited in SB at 17). In that brief, this State's Attorney General observed that the IPA is the "substantive and procedural model for its state counterparts," clearly including the Arkansas DNA statute as one such state counterpart. See *Brief For the States of California, Arizona, Arkansas, et al. As Amicus Curiae Supporting Petitioners in District Attorney's Office for the Third Judicial District v. Osborne, supra* (hereinafter "Osborne Amicus Brief"), 2008 WL 5462088, at 10. Relying on the testing procedures cited in the brief of the Attorneys General of Arkansas and other states, the United States Supreme Court held that, in light of available state procedures, there is no

[5] In this connection, the State contends that Echols has "abandoned" the dispute he had with the State's reliance on Louisiana in the circuit court "as he does not even cite it on appeal" (SB at 6 n. 5) This point is spurious: Echols did not address Louisiana law in his opening brief because the circuit court's order does not cite it, much less rely on it.

federal due process right to post-conviction testing of DNA evidence. Arkansas and other states now establish their eligibility for federal funding in support of their post-conviction testing procedures only if they enact procedures comparable to the IPA. *See* 42 U.S.C. § 14136 and note.

Thus, like the Arkansas statute, the IPA permits an applicant to move for and secure new trial relief under the same circumstances as are identified in the Arkansas statute. The Louisiana law on which the State has relied, by contrast, consists of no such counterpart to the new trial provisions contained in A.C.A. § 16-112-208 (e). (*See State v. Johnson*, 971 So.2d 1124 (La.App.1st 2007), and Louisiana statute discussed therein). Accordingly, the new trial provisions contained in § 16-112-208 (e) can no more be read out of the Arkansas's statutory scheme than they can be read out of the IPA. Any Louisiana statute or precedent purportedly suggesting something to the contrary is irrelevant.

Finally, as established above, the "reasonable probability" testing standard identified in § 16-112-202(8)(B) is modeled on an identical provision in the IPA. Thus, even were "reasonable probability" deemed the testing standard as well as the standard for substantive relief in this case -- and, for the reasons previously stated, it cannot be -- a "reasonable probability" under the Arkansas DNA statute means precisely what it does under federal law. As to that issue, the United States Supreme Court has defined the term "reasonable probability" as "a probability sufficient to undermine confidence in the outcome" of the trial. *See United States v. Bagley*, 473 U.S. 667, 683 (1985); *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Furthermore, a reasonable probability is more than a possibility but less than "more likely than not." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *White v. Roper*, 416 F.3d 728, 732 (8th Cir.2005); Osborne Amicus Brief, 2008 WL 5462088, at 10 (recognizing that *Strickland* standard is IPA testing standard). Accordingly, § 202(8)(B)'s testing standard is far less daunting than the State suggests that it is, and rightly so: Were it otherwise, meritorious claims of innocence might be peremptorily, and unjustifiably, denied. *See*, *e.g.*, *United States v. Fasano,* 577 F.3d 572 (5th Cir. 2009) (petitioner entitled to DNA testing order under IPA as to clothes and demand note used by bank robber, notwithstanding trial evidence showing, *inter alia*, that four eyewitnesses identified petitioner as the robber and petitioner's

fingerprints were found on demand note).

In the present case, the DNA testing proposed by Echols plainly might have produced material new evidence that would undermine confidence in the outcome of the case. Furthermore, once produced, all cognizable results excluded Echols and his co-defendants as the source of the relevant samples -- a highly unlikely outcome had they engaged in the extensive homicidal and sexual assault the prosecution theorized in the Echols-Baldwin and Misskelley trials. At the same time, the test results tended to inculpate another, thereby actually undermining confidence in the jury's verdict. The "reasonable probability" standard set forth in the amended DNA statute presented no bar to the relief sought by Echols below.

4. The State's Claim That the Standard of Proof in the DNA Statute Is So High That It "May Well Never Yield Relief" Cannot Be Squared with its Recent Argument in the United States Supreme Court

As noted, the State has argued that "the forum the [DNA] statute provides may well never yield relief due to confidence that the Arkansas criminal-justice system does not convict the innocent. . ." (SB at 11 n. 9)

This argument fails on the merits, for the reasons stated in Echols's opening brief and above. Here, Echols simply observes that the argument also flies in the face of the position the State Attorney General expressed in his amicus brief in *Osborne, supra.* There, the Attorney General argued that confirming the presence of a federal due process right to post-conviction DNA testing was unwarranted in view of available state procedures. On this point, the Attorney General noted:

> Recognizing the importance of postconviction DNA testing, most state legislatures and the United States Congress have enacted comprehensive statutes that provide convicted offenders a *meaningful opportunity* to seek such testing in appropriate cases. Many of these state laws are modeled on the federal procedure set forth in 18 U.S.C. § 3600.

See Osborne Amicus Brief at 7. (Emphasis added.) While insisting on the need for reasonable limits, the State contended that "these state procedures allow convicted felons a fair opportunity for postconviction DNA testing." *Id.* The Attorney General also noted that:

In accord with legislatures across the country, this Court observed in *House v. Bell,*

> 547 U.S. 518, 540 (2006), that *DNA evidence can be of "central importance" to postconviction litigation concerning actual innocence. The necessity for a meaningful opportunity to obtain postconviction DNA testing in appropriate cases is not in dispute.*

Id. at 8. (Emphasis added.) Later, the Attorney General observed:

> Postconviction DNA testing laws nationwide recognize that the opportunity to generate accurate and objective identification evidence enhances the integrity of the criminal justice system.

Id. at 9.

Suffice it to say that viewing the Arkansas DNA statute as one placing on a petitioner a burden of proof so great that the statute "may well never yield relief" can hardly be squared with the Attorney General's assertions in *Osborne* that DNA evidence is of central importance to postconviction litigation concerning actual innocence, and that the DNA testing opportunities it provides are "meaningful" ones.

5. The State's Constitutional Challenge to the DNA Statutes Contravenes the States's Argument in the United States Supreme Court

In disputing Echols's view of section 208(e)(3) as imposing a lesser burden than would be required for an order of vacatur, the State advances its constitutional challenge that would in fact invalidate the DNA statute in its entirety. This argument -- that the statute likely offends the separation of powers doctrine and infringes on the executive power to grant clemency (SB at 18-20) -- is both mistaken and disingenuous. The DNA statute is a legitimate legislative enactment designed to ensure that a criminal conviction is valid and based on reliable evidence in the first instance. As such, it provides a means of relief from an invalid conviction; it does not constitute a means of granting clemency, which grants relief from a conviction already reliably found to be valid. *Cf*. *Osborne v. State*, 237 Ark. 5, 371 S.W.2d 518 (1963); *Abbott v. State*, 256 Ark. 558, 508 S.W.2d 733 (1974). The statute also vindicates a criminal defendant's state constitutional protection against cruel and unusual punishment.

Of paramount importance, the Attorney General's attack on the very existence of the DNA statute is flatly inconsistent with his amicus argument to the United States Supreme Court in

Osborne, 129 S.Ct. 2308, *supra*. In that brief, the Attorney General argued, *inter alia*, that:

> Legislatures, not the federal judiciary, should take the lead in evaluating the proper role for identification technology in facilitating collateral attack on otherwise final state judgments.

Osborne Amicus Brief, 2008 WL 5462088, at 7.

> "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area."

Id. at 15 (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 [1977]).

> The decision of state legislators to enact postconviction DNA testing laws cannot be said to implicate, let alone offend, some fundamental principle of justice rooted in society's traditions and conscience. To the contrary, the fundamental principle is that legislatures should be accorded the latitude to do so.

Id. at 15.

> When innocence claims are said to hinge upon scientific evidence, the canons of federalism and judicial restraint necessitate deference to state policymakers' evaluation of the best use of that science in the criminal justice system.

Id. at 15-16.

Simply put, having himself recognized the need for meaningful state DNA testing statutes in the post conviction context and insisted that state legislatures should be accorded the latitude to devise and enact them, the State Attorney General cannot credibly argue that the entire DNA statute -- duly enacted by the Arkansas legislature, signed into law by the Governor, and modeled on the IPA, a federal statute repeatedly praised in the amicus briefing -- is, at its core, an infringement on the power of an executive branch represented by the Attorney General himself. Such an argument strongly suggests that for the Attorney General, the present appeal regrettably has become nothing other than a "sporting event" rather a pursuit of justice. *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986).

II. THE CIRCUIT COURT ERRED IN CONSTRUING AND APPLYING THE NEW TRIAL PROVISIONS SET FORTH IN A.C.A. § 16-112-208(e)

A. The State's Arguments Supporting the Circuit's Construction and Application of § 16-112-208(e) Are Meritless

Echols's opening brief addresses at length the bases for concluding that the circuit court erred

in deciding that it would have denied his claim even had it applied the new trial provisions set forth in A.C.A. § 16-112-208(e).[6] (Arg. at 9-28, 33-36.) The State's various arguments challenging Echols's analysis are largely addressed in his opening brief; he briefly addresses the State's most salient points as follows.

First, as a preliminary matter, the State does not, and cannot, dispute that the DNA test results presented below conclusively "exclude" Echols (as well as petitioners Baldwin and Misskelley) as the source of the DNA evidence within the meaning of § 16-112-208(e)(1), thereby triggering the inquiry mandated by subsection 208(e)(3).

Second, the State argues that "compelling evidence" that a new trial would result in an acquittal within the meaning of subsection 208(e)(3) necessarily imposes on the petitioner a far more demanding burden than the preponderance of the evidence standard set forth in *House v. Bell,* 547 U.S. 518 (2006). (SB at 16-17.) That argument, however, is refuted by the contemporaneous understanding accorded the term "compelling" in the federal IPA, which, as the State has conceded, is the model for the disputed 2005 amendments to the Arkansas DNA statute.

Senator Leahy, chairman of the Senate Judiciary Committee and one of the main proponents of the Justice For All Act, explained the purpose of the relevant standards in § 3600(g), the model for Arkansas subsection 208(e), as follows:

> Section 3600 … establishes procedures to be followed when DNA testing exculpates the applicant. A court shall grant relief if the test results, when considered with all the other evidence in the case, establish by compelling evidence that a new trial would result in an acquittal. *The "compelling evidence" standard was another late addition; earlier versions of the IPA set the applicant's burden at "a preponderance of the evidence." The point of the change, which I proposed, was to require courts to focus on the quality of the evidence supporting an applicant's new trial motion rather than trying to calculate the odds of a different verdict.*

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[6] Again, that subsection affords new trial relief where the DNA test results exclude the petitioner and the results "when considered with all other evidence in the case regardless of whether the evidence was introduced at trial, establish by compelling evidence that a new trial would result in an acquittal."

> In setting the new trial standard in section 3600, Congress rejected the Justice Department's proposal, under which an applicant would have to prove, by clear and convincing evidence, that he did not commit the crime. That standard is substantially more demanding than the standard established for second or successive motions filed under 28 U.S.C. § 2255 based on newly discovered evidence -- a remedy that is already open to Federal inmates with new evidence of a DNA exclusion. It would have made no sense for Congress to establish a more demanding new trial standard for cases involving a new DNA test result than for other cases involving newly discovered evidence. *To the contrary, because DNA testing conducted years and even decades after a conviction can provide a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial, the standard should be and has appropriately been set a notch lower.* This is consistent with Congress' decision, in section 204 of the Justice For All Act, to toll the statute of limitations in cases involving DNA evidence; both provisions recognize the unique ability of DNA testing to produce scientifically precise and highly probative evidence long after a crime has been committed.

149 CONG. REC. S89, 142. (Emphasis added.)

Senator Leahy's comments about § 3600 are persuasive evidence of the correct interpretation of Arkansas' § 208(e), one that again strongly supports Echols's contention that the showing required to obtain a new trial is less than that required for exoneration. More specifically, they indicate that the "compelling" showing required under § 3600 (g) is the rough equivalent of the preponderance standard applied in *House* and invoked by Echols, inasmuch as a proposed preponderance standard was replaced in the IPA with the "compelling evidence " standard simply to "require courts to focus on the quality of the evidence supporting an applicant's new trial motion rather than trying to calculate the odds of a different verdict." Nor can the State credibly disavow Senator Leahy's explanation of the burden required under § 3600 (g) (and, therefore, under 208(e)), since the State Attorney General's amicus brief in the federal *Osborne* case repeatedly quotes and endorses Leahy's extensive commentary as to the meaning and purpose of a host of other IPA provisions. *See* Osborne Amicus Brief, 2008 WL 5462088, at 9-10.[7]

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[7] Furthermore, Echols's reading of the term "compelling" in subsection 208(e)(3) does not "ignore" the purportedly higher "reasonable probability" testing standard set forth in subsection 202(B)(8), as the State contends (SB at 16), given that: (1) both subsections are derived from the federal IPA; and (2) the "reasonable probability" standard requires a showing by *less* than a

Third, where, as here, relevant DNA results "exclude" the petitioner under subsection 208(e)(1), subsection 208(e)(3) directs the court to consider the results "with *all other evidence* in the case regardless of whether the evidence was introduced at trial. . ." (*Id*., emphasis added.) The State -- again relying in part on Louisiana law -- argues that the circuit court properly considered only admitted and unadmitted evidence of guilt and just as properly declined to consider all evidence of innocence (SB at 14-15), urging that "had the legislature intended [a different approach], it could readily have provided that both incriminating *and* exculpatory evidence could be considered under section 208(e)(3), as noted in [*House*]." (SB at 15.)

This point unpersuasively seeks to turn a patent weakness into advantage. The State elsewhere stresses the primary importance of effecting the legislature's intent (SB at 8-9), but, for purposes of the present issue, ignores the elementary principle that adhering to the plain meaning of the statutory language is, where possible, the required means of doing so. Again, the statutory reference to "all other evidence in the case regardless of whether the evidence was admitted at trial" is, by its express terms categorical and unlimited. No reasonable person can dispute that there is such a thing as evidence of innocence as well as evidence of guilt. That being so, the plain meaning of "all other evidence" embraces evidence in both forms. All of the State's remaining attempts to limit and alter the plain meaning of section 208(e)(3) are conjectural and beside the point.

Fourth, on a related issue, the State contends that subsection 208(e)(3) does not, in any event, permit the court to "reweigh" the evidence in assessing the DNA results along with "all other evidence in the case" (SB at 14-16; 14 n.13), but, here again, the claim cannot be reconciled with the plain meaning of the statutory language. How a court can meaningfully consider the likely response of a reasonable juror to DNA results together with all other evidence in the case *without* reweighing all such evidence has not been, and cannot be, explained. Indeed, weighing the impact of "newly discovered evidence" vis-a-vis all other evidence introduced at trial is an exercise that trial courts necessarily and routinely perform when considering a post-verdict motion for a new trial on

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preponderance of the evidence, as explained in subsection I.B.3, above.

this basis. Significantly, the only authority invoked by the State in direct support of its point that "reweighing" is prohibited is the Louisiana decision (*Johnson*, 971 So.2d at 1130), which, again, does not construe a statutory provision remotely resembling subsection 208(e)(3).[8]

B. The States's Remaining Challenges to the Construction and Application of the *House* Standard Are Unfounded

1. Reliance on the *House* Standard Advances a Valid Legislative Enactment that Plainly Comports With the State Constitution

The State's remaining challenges to Echols's invocation of the *House* standard (SB at 16-18) are groundless. Echols has demonstrated the rough equivalence of section 208(e)(3)'s "compelling evidence" and *House*'s "preponderance of the evidence" standards for purposes of securing new trial relief; as to statutory construction, *House* thus is highly persuasive.

The State, however, disputes the applicability of *House* to section 208(e)(3) on additional, more expansive grounds. It reasons that satisfying the *House* standard merely endows a federal petitioner with a procedural benefit, while a state petitioner who satisfies the standard set forth in subsection 208(e) secures a far greater substantive benefit in the form of an order for a new trial. (*Id*.) In this view, the required showings cannot be identical or similar because the state remedy is different and more generous than the federal one. (SB at 16-18.)

This view is wrong. The fact that a showing like that articulated in *House* should provide a state petitioner a greater substantive benefit than that provided a federal petitioner is perfectly consistent with a legislative determination that the state constitution should and does afford greater rights and protections, including the right to due process, a fair trial, and the protection against cruel and unusual punishment, than does the federal constitution. *See*, *e.g.*, *State v. Brown*, 356 Ark. 460,

[8] The State's argument that the DNA statute cannot serve as the basis for renewed Rule 37 or coram nobis relief (SB at 14 n. 13) states the obvious. The DNA statute, however, is a fundamentally distinct post-conviction remedy founded on assessing the impact of new and previously unavailable scientific evidence on the case, one that the State has elsewhere trumpeted as critical to ensuring the integrity of the judicial system.

156 S.W.3d 722 (2004) (though search-and-seizure language of state constitution is very similar to the words of federal constitution's Fourth Amendment, state affords greater privacy rights in interpreting state constitution.)

2. Application of the *House* Standard, As Embodied in Subsection 208(e)(3), Mandates New Trial Relief

Echols has extensively discussed significance of (1) the DNA results that exclude him and his co-petitioners as the source of relevant DNA (just as certain results link Terry Hobbs to DNA recovered from a ligature) (Arg. at 13-16); (2) the newly developed and powerful evidence, credited by the circuit court for purposes of its ruling, showing that post-mortem animal predation caused virtually all of the cutting injuries to the victims (Arg. at 16-20); as well as additional evidence never admitted at trial that further undermines the State's case against him (Arg. at 20-26). Echols submits that, considering the DNA results together with all other evidence pointing to guilt or innocence, he has made a compelling showing that no reasonable juror would convict him today.

The State, as below, contends that Echols's showing falls short of that required under *House* and section 208(e)(3). (SB, at 21-23.) The gist of its analysis is that, even accepting the DNA results and predation evidence, a reasonable juror might nevertheless convict petitioner given the evidence of his purported admission and those of his co-petitioners. (*Id*.) Even were it true that the "new forensic/additional" evidence contradicts certain aspects of the admissions, the State reasons, jurors would be free to credit the remaining ones, including, most importantly, those wherein Echols and his co-petitioners stated their responsibility for the crimes. (*Id.*)

This argument does not warrant lengthy discussion. The initial Misskelley confession was riddled with inconsistencies and with recollections that could not be reconciled with known features of the crime, while his post-conviction statement to police a revised version aimed at pleasing authorities. The DNA results and predation evidence refuted these accounts even more fundamentally, demonstrating the sexual assault described by Misskelley had never occurred, and that the purported use of a knife to cut the boys and castrate Christopher Byers was an additional and critical fabrication. (Arg. at 20-21 and n. 12.)

Meanwhile, other new evidence indicates that petitioner Echols's reported statement at the ballpark was no more than an attempt to gain attention and one not taken seriously by the adult to whom the witnesses first reported it. (Arg. at 24.)

Finally, the new evidence undermined the trial evidence relating to Baldwin's supported admission, as reported by witness Michael Carson, particularly as to single factual detail purportedly recounted by Baldwin, *i.e.*, that concerning the genital injury to Christopher Byers. Again, that single detail was flatly refuted by the predation evidence. Indeed, additional new evidence proves that Carson had no opportunity to speak to Baldwin at all. (Arg. at 22.)

Simply put, it is one thing to assert that jurors could accept a confession containing certain details that do not match known conditions and events, but it strains credulity to assert that they could accept one that is fundamentally at odds with them.[9] Why, otherwise, did police struggle so mightily to lead Misskelley into finally stating that the crimes had occurred during the evening, rather than in the morning, as he first reported?[10]

3. Evidence of Juror Bias and Misconduct Undermine the Reliability of the Jury's Verdicts and Implied Findings in Support Thereof

Echols has argued here and in the court below that evidence of extensive jury bias and

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[9] That the new DNA, predation, and other unadmitted evidence contravenes so many elements of the State's case against Echols distinguishes cases where new evidence may be found insufficient under *House*, such as *Hildwin v. State*, 951 So.2d 784 (Fl. 2006) (cited in SB at 21).

[10] In pressing a similar argument elsewhere in its brief, the State argues that, despite their fundamental errors, the admissions by the petitioners should be likened to a report by a certain movie viewer: "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." (SB at 12-13 n. 10.) The better comparison is to one who claims to have seen *Psycho* but describes the plot as involving hordes of birds that attack the residents of a coastal California town; in such a case, the listener would correctly conclude that the movie, in fact, was *The Birds*.

misconduct, including evidence reported in a newly produced attorney affidavit, is cognizable under § 16-112-208(e)(3), and that it gravely undermines the probative value of the evidence of guilt adduced at his trial. (Arg. at 26-27.) The State's response to this argument is largely confined to a footnote, in which it (1) makes the self-evident observation that Echols does not rely on evidence of bias and misconduct as a claim apart from that asserted under section 208(e), and (2) contends that his presentation of such evidence in some manner constitutes an impermissible attempt to "impugn his trial and impeach the verdicts of guilt as weighed against his DNA testing results." (SB at 13-14, n. 12.)

The State's latter point essentially mirrors the circuit court's ruling that consideration of juror bias and misconduct at Echols's trial is barred by law of the case. Such a conclusion, however, is flawed: That evidence of bias and/or misconduct was cited in an earlier challenge to Echols's conviction does not preclude its consideration in the specific context of assessing the probative force of the trial evidence as authorized by subsection 208(e)(3). That provision directs the trial court to consider the impact of that evidence on a reasonable juror in a different context and under a different measure than it would in a different proceeding. Furthermore, and in any event, this Court's previous disposition of Echols's 2004 coram nobis proceedings did not reject Echols's showing of misconduct and bias on the merits. Finally, under no circumstances may the new attorney affidavit filed under seal below be ruled out on a law of the case theory, given that such evidence was not included in the coram nobis application Echols made in 2004.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the circuit court denying Echols's motion for a new trial under §16-112-208(e) and (1) order a new trial or (2) remand the matter for further proceedings consistent with this Court's opinion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deborah R. Sallings, hereby certify that on November 30, 2009, the original and 17 copies of the APPELLANT ECHOLS'S REPLY BRIEF, were filed with the Clerk of the Supreme Court; and a true and accurate copy of the reply brief was served on the other parties by placing copy in the United States mail, first class postage pre-paid and addressed to the following:

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