IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

DAMIEN WAYNE ECHOLS — DEFENDANT/PETITIONER

vs. — No. CR-93-450A

STATE OF ARKANSAS — PLAINTIFF/RESPONDENT

DAMIEN ECHOLS' MOTION FOR ADDITIONAL DNA AND OTHER FORENSIC EVIDENCE TESTING

Pursuant to Paragraph 2 of this Court's First Scheduling Order dated March 15, 2011, Damien Echols hereby moves the Court to allow the additional DNA and other forensic evidence testing identified in his February 18, 2011 Pre-Hearing Brief. As the Arkansas Supreme Court found on Echols' recent appeal, the State's DNA testing statute was enacted to further "the mission of the criminal justice system . . . to punish the guilty and to exonerate the innocent." Echols S. Ct. Decision at 4 (emphasis added). As set forth in the accompanying brief, the additional testing requested on this motion will further that mission in this controversial case.

Respectfully submitted,

Dennis P. Riordan (mjd)
DENNIS P. RIORDAN
(CA SBN 69320)
DONALD M. HORGAN
(CA SBN 121547)
RIORDAN & HORGAN
523 Octavia Street
San Francisco, CA 94102
(503) 431-3472

Stephen L. Braga (mjd)
STEPHEN L. BRAGA
(DC Bar No. 366727)
ROPES & GRAY LLP
700 12th Street, NW, Suite 900
Washington, D.C. 20005
(202) 508-4655

Deborah R. Sallings (mjd)
DEBORAH R. SALLINGS
(AR SBN 80127)
35715 Sample Road
Roland, AR 72135
(501) 330-2686

Counsel for Damien Wayne Echols

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BRIEF IN SUPPORT OF DAMIEN ECHOLS' MOTION FOR ADDITIONAL DNA AND OTHER FORENSIC EVIDENCE TESTING

FACTS

Echols' Pre-Hearing Brief identified the following "additional items which Echols would like to request be DNA tested, or otherwise scientifically tested" (Echols Pre-Hearing Br. at 6-7):

1. All of the victims' clothing, including shoes, should be DNA tested.

2. The wooden planks removed from the tree fort near the crime scene should be DNA tested.

3. The victims' shoelaces should be measured to determine which black shoelace was apparently cut in half to be used as a ligature. The remaining, non-ligature portion of that cut shoe lace should then be fiber tested for comparison to other fiber evidence in the case.

4. All remaining biological extracts held at the Arkansas State Crime Laboratory or elsewhere,[1] including 'skin cuticles' from the ligatures, should be DNA tested.

5. Various items of physical evidence from the crime scene should be checked for prints and DNA tested: sheriff's badge, bike reflector lights, bicycles, ice pick, cigarette packets (or other containers) and cigarette butts, child's wallet, hook and rope, and all wooden sticks.

6. All hair retrieved from the crime scene should be DNA tested. . . .

[1] In addition to the Arkansas State Crime Laboratory, at various times, certain forensic evidence in this case also appears to have been in the possession of – and could still be in the possession of - the West Memphis Police Department, LabCorp (formerly known as Genetic Design), the Alabama Department of Forensic Sciences, the Southwestern Institute of Forensic Sciences, the University of North Texas health Science Center and – possibly – the FBI.

7. The white sheets in which the victims' bodies were transported to the Medical Examiner's Office, and the white paper on which the victims' clothing was dried before being examined, should be DNA tested.

Echols also requested permission to test an eighth item: "the '2 ounces of partially digested fluid and remnants of green vegetable-like material' found in Stevie Branch's lumen during his autopsy to determine exactly what the green vegetable-like material is." Pre-Hearing Br. at 7 n.8.[2]

These factual requests break down into three basic categories, which we analyze separately below. The critical backdrop for each of these categories though is, as the Supreme Court recognized on Echols' recent appeal, that "Arkansas laws and procedures should . . . accommodate the advent of new technologies enhancing the ability to analyze new scientific evidence." Echols v. State, No. CR 08-1493 (Nov. 4, 2010) ("Echols S. Ct. Decision") at 4. The previously unanalyzed scientific evidence at issue herein should now be analyzed to the limit of the newest technologies' capabilities with Short Tandem Repeat ("STR"), Mini-Short Tandem Repeat ("MSTR") and/or Mitochondrial DNA testing ("mtDNA") testing as applicable.

ARGUMENT

The Arkansas Supreme Court set out the standards for DNA testing in its recent decision on Echols' appeal, and co-defendants Baldwin and Misskelley address those standards in their contemporaneously-filed DNA motion as well.[3] Whether the proposed testing is evaluated in terms of whether it "has the scientific potential to produce new non-cumulative evidence materially relevant to the defendant's assertion of actual innocence" or whether it "may produce

[2] In addition, Echols expressly "join[ed] in all testing requests made by Messrs. Baldwin and Misskelley." Echols Pre-Hearing Br. at 6 n.5.

[3] To the extent applicable herein, Echols hereby adopts the arguments set forth in the moving papers filed by co-defendants Baldwin and Misskelley.

new material evidence that would . . . raise a reasonable probability that the person making [the] motion . . . did not commit the offense," Echols S. Ct. Decision at 5, the standard is fully satisfied herein. In the context of a "razor-thin" factual case, Echols Pre-hearing Br. at 23, the potential for new evidence to create a reasonable doubt as to guilt in the mind of a new juror is at its peak. In this razor-thin case where the State Supreme Court has already found it to be "undisputed that the [existing DNA] results conclusively excluded Echols, Baldwin and Misskelley as the source of the DNA evidence tested" from the crime scene, Echols S. Ct. Decision at 10, the potential for additional scientific test results to make a difference in such a new juror's evaluation of Echols' guilt is palpable, and cannot be overstated.

DNA TESTING OF KNOWN BIOLOGICAL EVIDENCE

This first category of requested scientific examination involves testing previously identified and available biological evidence - hair, skin, etc. - with the latest DNA technology. As the Arkansas Supreme Court recognized, there are logically three possible results from such testing: 1) it matches one or more of the defendants; 2) it does not match one or more of the defendants; or 3) it is inconclusive. See Echols S. Ct. Decision at 9. Possibilities one and two would yield highly relevant evidence to any new juror's evaluation of the evidentiary balance in this case: possibility one for obvious reasons, and possibility two because of the "long shadow" that non-match DNA evidence casts over the trial finding that defendants committed these crimes. See Echols Pre-hearing Br. at 5.[4] Possibility three would simply be a non-event. Balancing the importance of possibilities one and two, against the risk of non-event possibility three, the balance plainly tips in favor of promptly ordering the requested testing to achieve the direct evidentiary results it will provide.

[4] Of course, should a non-match DNA result as possibility two happen to point the finger at a third-party already identified by other DNA testing in the case - such as Terry Hobbs, for example - that would undoubtedly be of extraordinarily high value in this Court's analysis of how a new juror would evaluate this case.

A. Additional Hair Testing: There are hairs from the crime scene which have never been tested, both human and animal hairs.[5] As explained in detail in the brief being filed by co-defendants Baldwin and Misskelley, there was no ability to conduct DNA testing of either of these types of hair evidence in the State of Arkansas at the time of Echols' trial. As set forth in Echols' pre-hearing brief, there are significant open and bitterly contested issues as to the identity of the perpetrator of these murders and the presence of animal predation wounds to the victims. See Echols Pre-hearing Br. at 4-8. This hair evidence is directly relevant to both of these issues, respectively.

The importance of the human hairs in particular is further heightened by the remote location in which they were found. The fact that the victims were found naked and bound in a relatively remote location in the middle of the woods gives special significance to any human hair found there that does not belong to the victims. Because one would not otherwise expect to find human hairs where these victims were found, the probabilities are logically high that some of the human hairs found at the scene or on the victims' bodies belong to the killer(s). The testing of these hairs, therefore, will yield material exculpatory evidence if the results reveal that these hairs belong to neither the victims nor the defendants.

Fortunately, DNA-testing technology has now advanced to the point where the hairs in question can be readily scientifically analyzed. Nor can there be any objection to this testing on the ground that such testing might consume the evidence because of small hair sample sizes etc. Such an objection would have the same net result as an "effective" destruction of these hair samples - the unavailability of this evidence to a determination of what happened here - so it does nothing to further the analysis. This hearing has been ordered to consider "all other

[5] It appears that these hairs are identifiable by at least the following Bode Tech sample numbers: E1-Q4 and E27-Q4.

evidence" in the case, and "all other evidence" certainly must include this type of critical crime scene evidence. The defendants are willing to have this evidence tested now and to live with the results. There is no legitimate reason why the State should not be willing to do so as well.

The record in this case already amply reveals how important a single piece of hair from the crime scene can be, when it is found in a ligature, does not match any of the defendants but does match another suspicious third-party. Additional hair analysis may yield results that are just as important, especially if - but not limited to the possibility that - those results were to interlock with any of what has already been learned from the testing previously conducted. That possibility certainly exists with the outstanding hairs to be tested, and the systemic mission "to punish the guilty and to exonerate the innocent" cannot be completely fulfilled until that possibility is scientifically evaluated.

B. Remaining Biological Extracts: At one point, the State Crime Laboratory admittedly had possession of "skin cuticles" from the ligatures used to bind the victims. There may be other biological extracts remaining in the possession or control of the State as well. All of this biological material should now be DNA-tested, with the newest technology. The potential importance of the evidence associated with the ligatures can hardly be overstated. They were critical implements used in the commission of these crimes and, thus, are as strong a source as possible for helping to identify their perpetrator(s). In addition, as noted above, any human biological evidence obtained from this remote crime scene is likely to be especially telling and, therefore, would constitute material noncumulative evidence in this case.

OTHER SCIENTIFIC TESTING OF KNOWN EVIDENCE

As noted above, in a case where there is little direct evidence of guilt, any new evidence might make a material difference in the overall evidentiary mix. This second category of

additional scientific testing requested by Echols involves non-DNA testing of two key items of physical evidence to determine whether those items might yield inferential proof as to certain events associated with these murders. The inferences are important, and thus the requested testing is as well.

A. The Green Vegetable-Like Material: As noted in our pre-hearing brief, the defense has developed "substantial new evidence from three eyewitnesses establishing that Terry Hobbs, Steven Branch's stepfather, was the last adult seen with the victims on the night they disappeared, at around 6:30 P.M. on May 5th." Echols Pre-hearing Br. at 12. The witnesses observed Hobbs calling Stevie, and the other young boys, down to Hobbs' house. Yet "Hobbs has always adamantly denied having seen his stepson Stevie, or the other victims, on the day they disappeared." Id.

The defense has also developed new evidence indicating that Pam Hobbs, Stevie's mother and Terry's wife at the time, prepared a dinner of salisbury steak, potatoes and green beans for Stevie on the night of May 5th before Terry drove her to work at 4:30 that day. Stevie was not home when Pam went to work. The new witnesses indicate that they later saw Stevie being called home by Terry at approximately 6:30 P.M. that day. If the "green vegetable-like material" found in Stevie's stomach turns out to be "green beans," then that fact would tend to confirm that Stevie did in fact return home on the afternoon of May 5th, as per the new witness testimony. Thus, this material should be tested.

B. The Victims' Shoelaces: According to the evidentiary record, Lisa Sakevious - a criminalist working for the Arkansas State Crime Laboratory - noted that one of the shoe laces that was used to bind the victims had been cut in two. We would like the opportunity to measure all of the shoe laces, and to match them to the shoes from which they were taken, in order to

verify and elaborate on this claim. A simple removal and measurement of the remaining shoelaces will establish this fact.

In addition, as a result of the foregoing, no one has yet conducted any fiber analysis on the cut shoe lace. Such fiber analysis could then be used for comparison with other fiber evidence in the case. Because it is indisputable that the ligatures were handled, and one indeed apparently cut, by the perpetrator(s) of these murders, no effort should be spared to analyze those key pieces of evidence. Accordingly, the black shoelace(s) should be tested as well.

OTHER TESTING FOR BIOLOGICAL EVIDENCE

In this final category, Echols' remaining testing requests are all, in one way or another, designed to use the newest technology to endeavor to determine whether certain other identified and critical case evidence contains any biological material worthy of testing. See Echols Pre-hearing Br. at 6-7. The relevance of each of these pieces of evidence is self-explanatory (the victims' clothing etc.), except perhaps one. The requested testing of "[t]he wooden planks from the tree fort near the crime scene," id., is relevant because victim Steven Branch's underwear was apparently found in a tree nearby and because the tree fort was apparently a known playground for the victims.

We concede, as we must, that this category of requested testing is - in the first instance - a search to determine the availability of biological material for testing. Thus, it is different in kind than the previously addressed requests for testing of already known and existing biological and physical evidence. Nonetheless, we deem it appropriate because of the seminal nature of the hearing being held by this Court in December. If "all other evidence" in the case is to be considered at that hearing, then we must first determine the universe of what "other evidence" exists. This category of requests will facilitate the making of that determination. If cigarette

butts from the crime scene contain DNA pointing to who left those butts there, then a new juror evaluating this case would assuredly want to know who that was.

CONCLUSION

The State contends that "additional testing should not be permitted to any petitioner" because "Echols did not ask for it" and "Baldwin's and Misskelley's requests . . . should be denied as cumulative to the identity and animal predation evidence they already advanced in the extant record."[6] But Echols did indeed ask for such "additional testing" at the very first opportunity to do so on this remand for consideration - in the Arkansas Supreme Court's own words - of "all other evidence in the case." Echols' S. Ct. Decision at 12 (emphasis added).[7] Moreover, Baldwin's and Misskelley's requests can hardly be denied as "cumulative" when the State continues to object to the persuasiveness of the animal predation evidence presented, and can certainly not be viewed as cumulative with respect to Echols who was not even present during the hearing at which such evidence was adduced. DNA testing of the animal hairs found in connection with the crime scene could obviously yield a new and important link in the chain of that predation proof.

It is easy to understand the State's adversarial reluctance to agree to additional testing in this case. As noted in our pre-hearing brief, at the original trial, the State made a major point to the jury out of the fact that "You'd see evidence out there that didn't match either one of these [people]. You'd see evidence that didn't connect. And you don't have that. There's just a

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[6] Respondent's Pre-Hearing Brief Following Reversal And Remand Of The Denial Of Petitioner's Motion For New Trial Under Ark. Code Ann. Section 16-112-208(e)(3) at 3.

[7] At that same time, Echols also formally joined in the outstanding requests for DNA testing made by co-defendants Baldwin and Misskelley. See Echols Pre-hearing Br. at 6 n. 5.

scarcity of evidence." Echols Pre-hearing Br. at 5-6. Additional testing might well yield additional evidence that does not "connect" to these defendants.[8]

For the foregoing reasons, and in the interests of justice, the testing requested by Echols above - as well as the testing requested by Baldwin and Misskelley - should be ordered by the Court in order to ensure the fullest possible presentation of new evidence at the December hearing on Echols' new trial motion. Given the "scarcity of evidence" from the crime scene, as noted by the State, the need for such additional testing is at a premium. In a case with scarce evidence, any one new test result could well make a difference in a new juror's evaluation of whether he or she possesses the "higher level of conviction" than "near certainty" about these defendants' guilt. Echols Pre-hearing Br. at 2-3. In a case with scarce evidence, no testing opportunity should be bypassed, especially when the ultimate result in the case is a matter of life or death for one of the defendants.

Respectfully submitted,

Dennis P. Riordan (sm/d)
DENNIS P. RIORDAN
(CA SBN 69320)
DONALD M. HORGAN
(CA SBN 121547)
RIORDAN & HORGAN
523 Octavia Street
San Francisco, CA 94102
(503) 431-3472

Stephen L. Braga (sm/d)
STEPHEN L. BRAGA
(DC Bar No. 366727)
ROPES & GRAY LLP
700 12th Street, NW
Suite 900
Washington, D.C. 20005
(202) 508-4655

[8] State officials have previously recognized the potential importance of DNA testing, in a directly analogous situation where the body of a young victim was found submerged in water at a roughly contemporaneous time. See "Officials Want DNA Test On Ark. Teenager's Body," The Commercial Appeal (July 3, 1992). The typical impediment to such testing has been its cost, in light of limited State resources. See id. But that impediment does not exist here given the defense's willingness to pay for the requested testing in this case.

DEBORAH R. SALLINGS
(AR SBN 80127)
35715 Sample Road
Roland, AR 72135
(501) 330-2686

Counsel for Damien Wayne Echols

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have mailed and/or sent true and accurate electronic copies of Damien Echols' Motion For Additional DNA And Other Forensic Evidence Testing, together with the Brief in support thereof, to State Attorneys David Raupp, Kent Holt, Michael Walden and Scott Ellington, as well as to counsel of record for all defendants, this 30th day of March 2011.

Stephen L. Braga (sig)
Stephen L. Braga