ARGUMENT

I. Introduction

In April, 2008, appellant, Damien Echols, filed a motion for a new trial as to his 1994 convictions for the 1993 murders of Christopher Byers, Steven Branch and Michael Moore. The motion was denied by the circuit court without a hearing on September 10, 2008.

This appeal arises under Arkansas statutes passed in 2001, which provide that a petitioner is entitled to relief on a post-appellate claim of wrongful conviction if previously unavailable 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." A.C.A. § 16-112-208 (e)(3). *See also* § 16-112-201, which provides that a new trial may be ordered for a person convicted of a crime where

> the scientific predicate for the claim could not have been previously discovered through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.

These Arkansas "new scientific evidence" statutes were passed in the wake of a nationwide wave of exonerations of persons whose convictions were exposed as wrongful by the increasing use of newly developed DNA technology.[1] At least part of the impetus for the

[1] Since 1989, when post conviction DNA testing was first performed, 232 people have been exonerated by post conviction DNA testing in the United States. *See* The Innocence Project Home Page, at http://www.innocenceproject.org (last visited Feb. 24, 2009) (providing count of U.S. post conviction DNA exonerations; the number as of February 2009 is 232); *see also* Brandon L. Garrett, Judging Innocence, 108 COLUM. L. REV. 55, 119 (2008) & Brandon L. Garrett, Judging Innocence: An Update, available at http://www.law.virginia.edu/html/librarysite/garrett_exonereedata.htm (last visited Feb. 24, 2009) (updating preliminary data regarding how 225 exonerees obtained DNA testing.)

enactment of the Arkansas statutes was the continuing controversy concerning the reliability of the judgments of conviction rendered in this very matter.

In the circuit court, Echols demonstrated that neither he nor his co-petitioners, Jason Baldwin or Jesse Misskelley, can be linked to any of the DNA recovered from the crime scene or from the bodies of the three victims in this case. On the other hand, he presented reliable DNA evidence that, if credited, conclusively excludes him and his co-petitioners as the source of the DNA recovered at four relevant locations, including a ligature used to bind one of the victims; a tree stump at the crime scene; a cutting from the jeans of one of the victims; and the penis of one of the victims. Given that the new scientific evidence excludes him as the source of relevant DNA, Echols is entitled to a new trial because

> 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.

A.C.A. § 16-112-208(e)(3).

A common sense reading of the statute in its entirety demonstrates that the showing needed to obtain new trial relief under the foregoing new trial provision is distinct from that which conclusively establishes actual innocence and thus merits setting aside the judgment of conviction in its entirety. *See* § 16-112-201(a)(1). The State's position, adopted by the circuit court, ignores the express wording and meaning of the statute, including § 16-112-208(e) and other provisions, in a transparent effort to erect legal hurdles that no petitioner could ever surmount and that the legislature did not intend. The State goes so far as to argue that in a case in which a petitioner seeks a new trial partly on the basis of DNA results that exclude him as the contributor of relevant physical evidence, that petitioner is statutorily barred from also presenting newly obtained evidence of innocence such as a confession of a third party to the charged crime. Indeed, the State essentially argues that DNA alone can never establish "actual innocence," and that since the only other evidence a court may consider under the relevant statutes is that tending to prove guilt, relief under the DNA statutes is barred as a matter of law. To so read a statutory

scheme intended to protect the innocent from wrongful conviction makes no sense. Equally unpersuasive is the state's application of the statutory provisions to the facts presented by Echols in this proceeding.

The circuit court's order and the present appeal place in issue (1) the proper construction of the new scientific evidence statutes; (2) the adequacy *vel non* of Echols's circuit court showing for purposes of securing relief under those statutes; (3) the validity of the circuit court's construction and application of the new scientific evidence statutes in denying Echols's motion; and (4) the validity of the circuit court's decision to deny Echols's new trial motion without a hearing. Echols addresses each of these matters in turn, below.

II. A Petitioner Is Entitled to Relief from His Convictions Under the State's "New Scientific Evidence" Statutes if He Is Excluded as the Source of Relevant Biological Material and If No Reasonable Juror, Considering Both the New Scientific Evidence and All Other Evidence in the Case Whether or Not Previously Admitted or Admissible at Trial, Would Find Him Guilty Beyond a Reasonable Doubt.

A. The Arkansas Statutory Standard

The Arkansas statutes that provide relief for convicted parties based on exculpatory scientific evidence, which was not available at the time of Echols's trial, contain a range of remedies: namely, "to discharge the petitioner *or* to resentence the petitioner *or* grant a new trial *or* correct the sentence *or* make other disposition as may be appropriate...." A.C.A. § 16-112-201(a).[2] (Emphasis added; *see also* § 16-112-208 (e)(1) ("If deoxyribonucleic acid (DNA) test

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[2] A.C.A. § 16-112-201. Appeals--New scientific evidence

> (a) Except when direct appeal is available, a person convicted of a crime may commence a proceeding to secure relief by filing a petition in the court in which the conviction was entered to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate, if the person claims that:
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> (1) Scientific evidence not available at trial establishes the petitioner's actual innocence; or
> (2) The scientific predicate for the claim could not have been previously discovered through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense. . . .

results obtained under this subchapter exclude a person as the source of the deoxyribonucleic acid (DNA) evidence, *the person may file a motion for a new trial or resentencing*.") (Emphasis added)

Likewise, these new scientific evidence statutes contain multiple standards defining the showing required to obtain relief. Specifically, § 16-112-201 (a) (1) mandates a remedy where "[s]cientific evidence not available at trial establishes the petitioner's actual innocence," while § 16-112-201 (a) (2) orders relief where:

> [t]he scientific predicate for the claim could not have been previously discovered through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.

See n. 1, *supra*. The two subsections are separated by an "or," compelling the conclusion that they delineate conceptually distinct standards.

Echols's motion for a new trial in the circuit court raised an issue of first impression in Arkansas, *i.e.*, which of these statutory standards for relief applies to the present motion, which seeks a new trial grant rather than the discharge of the petitioner? To state it differently, what legal standard must be met when the petitioner seeks not a directed verdict of acquittal as a matter of law from the circuit court which presided over his or her trial, but rather a new trial at which a jury will again decide guilt or innocence, albeit on the basis of a record amplified by new scientific evidence?

The most reasonable reading of § 16-112-201, the flagship of the "new scientific evidence" statutes, is that a greater evidentiary showing is required to obtain a greater remedy. A petitioner who wishes to be fully "discharged" from the criminal charges of which he or she has been convicted -- in essence, a "get out of jail" card -- must affirmatively prove to the court that

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[Acts of 2001, Act 1780, § 4, eff. Aug. 13, 2001.]

he or she is "actually innocent." *See* § 16-112-201(a)(1). On the other hand, to gain a new trial, a petitioner must convincingly prove that he would be acquitted at a new trial. *See* § 16-112-201(a)(2) (relief warranted if "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.") The evidentiary hurdle that must be cleared to obtain a new trial thus is considerable, yet clearly demands a lesser showing than that required to obtain a judicial order of acquittal. That conclusion is bolstered by § 16-112-208 (e)(3), the 2005 statute, which expressly deals with claims for a new trial based on DNA evidence, and which directs that a new trial be granted "if the deoxyribonucleic acid (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*." (Emphasis added)

B. The *House* Decision

This Court has yet to render a decision in which it applies the statutory scheme for obtaining a new trial based on new scientific evidence to a specific set of facts. The bifurcation in statutory standards for relief discussed above, however, does find a close parallel in the federal habeas corpus jurisprudence of the United States Supreme Court, which draws a distinction between the showing of "actual innocence" needed to wholly exonerate a defendant under the due process clause, and that showing of "actual innocence" which meets the statutory standard needed to defeat all state claims of procedural default. For that reason, the Supreme Court's decision in *House v. Bell*, 547 U.S. 518 (2006), bears directly on the issue of the quantity and quality of new evidence needed to establish "that no reasonable fact-finder would find the petitioner guilty of the underlying offense." § 16-112-201(a)(2).

In *House*, the defendant had raised a number of federal constitutional claims that the Tennessee courts had held could not be addressed on the merits because they were procedurally defaulted, *i.e.*, they were brought too late in the course of state proceedings. The Supreme Court

had previously held in *Schlup v. Delo*, 513 U.S. 298 (1995), that claims defaulted in state court due to state procedural rules generally cannot be heard in federal court, but that there is a "miscarriage of justice" exception for extraordinary cases where it appears likely that the defendant is innocent.

> *House* defined this "miscarriage of justice" standard as follows:
> A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt – or, to remove the double negative, that it is more likely than not any reasonable juror would have reasonable doubt." *Id*. "[B]ased on [the] total record, the court must make "a probabilistic determination about what reasonable, properly instructed jurors [now] would do."

House, 547 U.S. at 538.

Furthermore, just as Arkansas law requires that the new scientific evidence must be considered in the light of "all other evidence in the case regardless of whether the evidence was introduced at trial," so the *House-Shlup* rule holds that "the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." Unlike insufficiency of the evidence claims, as to which the habeas court must resolve every credibility issue and draw all reasonable inferences in favor of the prosecution,

> "[b]ecause [such a] claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. If new evidence so requires, this may include consideration of 'the credibility of the witnesses presented at trial."

House, 547 U.S. at 538-39 (citing *Schlup*, 513 U.S. 298, and *Jackson v. Virginia*, 443 U.S. 307, 330 (1979).)

House involved the murder of one Carolyn Muncey in Tennessee in the mid-1980s. No one witnessed the crime, although a witness testified that he had seen the defendant and his car in the area where the body was later discovered. The defendant had made false statements concerning his whereabouts when arrested, but testified and maintained his innocence at trial. "Central to the State's case... was what the FBI testing showed -- that semen consistent (or so it

seemed) with House's was present on Mrs. Muncey's nightgown and panties, and that small bloodstains consistent with Mrs. Muncey's blood but not House's appeared on the jeans belonging to House." 547 U.S. at 528-29. House was convicted and sentenced to death.

In *House*, the Supreme Court considered new DNA evidence, obtained through technology unavailable at the time of his trial, as to which it was undisputed that "in direct contradiction of evidence presented at trial, DNA testing has established that the semen on [the victim's] nightgown and panties came from her husband . . . not from House." *Id*. at 540. The state argued that this new evidence was irrelevant because it went only to the issue of whether the crime had been committed for a sexual motivation, and motive was not a necessary element of the charged crime that the government had to prove, at least at the guilt phase of House's trial. The majority soundly rejected that contention:

> From beginning to end the case is about who committed the crime. When identity is in question, motive is key. The point, indeed, was not lost on the prosecution, for it introduced the evidence and relied on it in the final guilt-phase closing argument. Referring to "evidence at the scene," the prosecutor suggested that House committed, or attempted to commit, some "indignity" on Mrs. Muncey that neither she "nor any mother on that road would want to do with Mr. House." 9 Tr. 1302-1303. Particularly in a case like this where the proof was, as the State Supreme Court observed, circumstantial, *State v. House*, 743 S.W.2d, at 143, 144, we think a jury would have given this evidence great weight. Quite apart from providing proof of motive, it was the only forensic evidence at the scene that would link House to the murder[.] . . .
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> A jury informed that fluids on Mrs. Muncey's garments could have come from House might have found that House trekked the nearly two miles to the victim's home and lured her away in order to commit a sexual offense. By contrast a jury acting without the assumption that the semen could have come from House would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative. When the only direct evidence of sexual assault drops out of the case, so, too, does a central theme in the State's narrative linking House to the crime. In that light, furthermore, House's odd evening walk and his false statements to authorities, while still potentially incriminating, might appear less suspicious.

Id. at 540-41.

The Court then turned to the evidence that House's pants had blood on them inconsistent with his own but consistent with that of the victim. On federal habeas, the defense had presented

strong evidence that the victim's blood had been spilled on House's pants while both pieces of evidence were being transported in the trunk of the same car on their way to the FBI lab in Washington. The Court's analysis of the evidence concerning spoilation of the "blood on the pants" evidence follows:

> In sum, considering "all the evidence," *Schlup*, 513 U.S., at 328 (quoting Friendly, 38 U. Chi. L.Rev., at 160), on this issue, we think the evidentiary disarray surrounding the blood, taken together with Dr. Blake's testimony and the limited rebuttal of it in the present record, would prevent reasonable jurors from placing significant reliance on the blood evidence. We now know, though the trial jury did not, that an Assistant Chief Medical Examiner believes the blood on House's jeans must have come from autopsy samples; that a vial and a quarter of autopsy blood is unaccounted for; that the blood was transported to the FBI together with the pants in conditions that could have caused vials to spill; that the blood did indeed spill at least once during its journey from Tennessee authorities through FBI hands to a defense expert; that the pants were stored in a plastic bag bearing both a large blood stain and a label with TBI Agent Scott's name; and that the styrofoam box containing the blood samples may well have been opened before it arrived at the FBI lab. Thus, whereas the bloodstains, emphasized by the prosecution, seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin.

Id. at 547-48.

The majority observed that if the attack on the physical evidence had been all that the defense presented, the state's countervailing evidence might have been sufficient to prevent relief, but the defense had also presented at the federal habeas hearing disturbing evidence that Mrs. Muncey had been killed by her husband, including extensive testimony of the husband's abuse of his wife and, most importantly, of the husband's admission to neighbors that he had killed his wife. Those neighbors were impeached with the fact that they had not come forward earlier, a fact they attempted to explain. The Court concluded:

> It bears emphasis, finally, that [the neighbors'] testimony is not comparable to the sort of eleventh-hour affidavit vouching for a defendant and incriminating a conveniently absent suspect that Justice O'Connor described in her concurring opinion in *Herrera* as "unfortunate" and "not uncommon" in capital cases, 506 U.S., at 423; nor was the confession [the neighbors] described induced under pressure of interrogation. The confession evidence here involves an alleged spontaneous statement recounted by two eyewitnesses with no evident motive to lie. For this reason it has more probative value than, for example, incriminating testimony from inmates, suspects, or friends or relations of the accused.
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> The evidence pointing to Mr. Muncey is by no means conclusive. If considered in

> isolation, a reasonable jury might well disregard it. In combination, however, with the challenges to the blood evidence and the lack of motive with respect to House, the evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt.

Id. at 552-53.

The *House* Court held that the petitioner had met this "actual innocence" standard:

> Out of respect for the finality of state-court judgments federal habeas courts, as a general rule, are closed to claims that state courts would consider defaulted. In certain exceptional cases involving a compelling claim of actual innocence, however, the state procedural default rule is not a bar to a federal habeas corpus petition. See *Schlup v. Delo*, 513 U.S. 298, 319-322, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). After careful review of the full record, we conclude that House has made the stringent showing required by this exception; and we hold that his federal habeas action may proceed.

547 U.S. at 522.

House emphasized that its holding did not mean that the petitioner had been effectively acquitted. In *Herrera v. Collins*, 506 U.S. 390 (1993), the Court had suggested, without deciding, that a defendant in a capital case who could prove "a freestanding innocence" claim could be entitled to federal habeas relief. The *House* Court again suggested without deciding that such a claim for a directed verdict of acquittal could in theory prevail, but held that House's showing had not satisfied what would be a more stringent standard of innocence than the *Schlup* test:

> To be sure, House has cast considerable doubt on his guilt--doubt sufficient to satisfy *Schlup* 's gateway standard for obtaining federal review despite a state procedural default. In *Herrera*, however, the Court described the threshold for any hypothetical freestanding innocence claim as "extraordinarily high."

547 U.S. at 555. The Court concluded:

> This is not a case of conclusive exoneration. Some aspects of the State's evidence . . . still support an inference of guilt. Yet the central forensic proof connecting House to the crime--the blood and the semen--has been called into question, and House has put forward substantial evidence pointing to a different suspect. Accordingly, and although the issue is close, we conclude that this is the rare case where--had the jury heard all the conflicting testimony--it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.

Id. at 553-554.

Given that Echols here sought the statutory remedy of a new trial rather than judicial exoneration, the question is not whether he is entitled to exoneration; thus, Echols need not conclusively prove his own innocence or the guilt of another. Rather the dispositive inquiry, like that of *House,* is whether Echols has clearly and convincingly shown that "any reasonable juror would have reasonable doubt" as to his guilt. *Id*. at 538.

III. Echols Demonstrated in the Circuit Court that New Scientific Evidence Produced in Compliance with A.C.A. § 16-112-201, *et seq.,* Together with All Other Evidence in the Case, Would Preclude a Reasonable Juror from Finding that Echols Was Guilty of Any of the Crimes Charged Against Him.

A. Introduction

Echols contended in the circuit court that, under §16-112-208(e)(1) and (3), the DNA testing previously authorized by that court "excluded" him as the source of all relevant biological material which produced a valid test result, and that no reasonable juror, considering those results in conjunction with all other evidence in the case, would convict at a re-trial. (Add. 3-459; 460-576; 750-798) Accordingly, Echols contended that, while not entitled to an outright order of release pursuant to §16-112-201, et seq., he had made the showing entitling him to a new trial pursuant to §16-112-208(e)(3). (*Ibid*.)[7]

Given the nature of the inquiry authorized under §16-112-208(e)(3), Echols in this Argument generally discusses -- as he did in greater detail at the portions of hiscCircuit court

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[7] The statute, effective in August, 2005, provides, in relevant part:

§ 16-112-208. Testing Procedures

. . .

(e)(1) If deoxyribonucleic acid (DNA) test results obtained under this subchapter exclude a person as the source of the deoxyribonucleic acid (DNA) evidence, the person may file a motion for a new trial or resentencing. . . .

(3) The court may grant the motion of the person for a new trial or resentencing if the deoxyribonucleic acid (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.

briefing cited in this paragraph -- the events surrounding, and general nature of the evidence introduced at, Echols's trial and the related trial of defendant Jesse Misskelley (Add. 473-504); the nature of the new scientific (DNA) evidence presented below (Add. 509-516); other reliable and admissible evidence that was never, in fact admitted at trial, including evidence that most victim injuries were not caused by human agency but rather by animal predation (Add. 519-540; 772-777); and (D) the reasons why no reasonable juror assessing the new scientific evidence and all other evidence in the case would convict Echols were his trial held today (Add. 509-565; 768-790).

A. Events and Evidence Relating to the Echols-Baldwin and Misskelley Trials

1. The Crimes

This Court described the crimes and convictions herein in issue in *Echols v. State*, 326 Ark. 917, 934-37, 936 S.W.2d 509, 516-17 (1996). Thus, the opinion in *Echols* describes how Michael Moore, Christopher Byers, and Steven Branch went missing in the late afternoon or early evening of May 5, 1993; the ensuing search; the discovery of the boys' bodies in a ditch north of Ten Mile Bayou; the condition of the boys's bodies, including the binding of the victims with white and black shoelaces; purported forensic evidence indicating the boys had been forced to perform oral sex; evidence purportedly consistent with the insertion of an object in the anus of Michael Moore; serious head injuries; numerous scratches, cuts, abrasions, and gougings on the bodies; the removal of skin from Christopher Byers' penis and of his scrotal sac and testes; and the fact that two of the victims had drowned. *Ibid*. As the opinion recounts in describing the flesh injuries, "Many of the cuts were made with a serrated blade knife." *Id*., 326 Ark. at 937, 936 S.W.2d at 517; *see also* Add. 475-477)

The trial record also showed that the night the boys disappeared, police were summoned to a women's room at a nearby Bojangle's restaurant where a black man had gone to a women's room with blood dripping from his arm, with mud on his feet, disarrayed, and slurring his speech.

(Add. 477) Police took samples of blood left on the walls but later lost the evidence. (*Id*.) A "negroid" hair was later discovered on a sheet used to cover the body of Chris Byers. (*Id*.)

2. The Arrests

In *Echols*, this Court described how police arrested Echols and Baldwin on June 3, 1993, after Jesse Misskelley made statements implicating Echols, Baldwin, and himself in the homicides. *Echols*, 326 Ark. at 937, 936 S.W.2d at 517. Immediately thereafter, lead West Memphis police investigator Gary Gitchell held a widely publicized press conference at which he described the Misskelley statements and characterized the proof against defendants as an "eleven" on a scale of ten. (Add. 478)

3. The Misskelley Trial

Misskelley was tried separately from Echols and Baldwin, who were tried together. The Misskelley trial began first, in January 1994. (Add. 478) A key figure in the Misskelley trial was Vicky Hutcheson, who had first led police to Misskelley and who testified that Echols had taken her to an occult satanic meeting.

As this Court relates in *Misskelley v. State*, 323 Ark. 449, 459, 915 S.W.2d 702, 707 (1996), virtually the entirety of the state's case against Misskelley consisted of the confession he had given to police. (" The statements were the strongest evidence offered against the appellant at trial. In fact, they were virtually the only evidence, all other testimony and exhibits serving primarily as corroboration.") In his new trial motion below, Echols detailed a host of reasons why the confession of Misskelley, whether or not legally sufficient to support a conviction on appeal, was highly questionable, observing, among other things (Add. 484-487) that Misskelley was very nearly mentally retarded; he had been confined for an extensive period before abandoning earlier denials and confessing; his timing of relevant events, including the times of meeting Echols and Baldwin and the time of the crime, was, in his initial accounts, an impossibility; his description of how the victims had been bound plainly contradicted evidence at the scene; his claim of one victim's asphyxiation at odds with the physical evidence; and his claim of presence at the scene

was contradicted by other witness testimony who placed him elsewhere at the time. (Add. 481-487); *see also Misskelley*, 323 Ark. at 461, 915 S.W. at 708 (["Misskelley's] statements are a confusing amalgam of times and events. Numerous inconsistencies appear, the most obvious being the various times of day the murders took place. Additionally, the boys were not tied with rope, but with black and white shoe laces. It was also revealed that the victims had not skipped school on May 5. . ."))

4. The Echols-Baldwin Trial

Shortly after the Misskelley trial concluded with his conviction, the Echols-Baldwin trial began. That event, like the Misskelley trial, was the subject of extensive press coverage. At the trial the prosecution essentially relied on the following items to incriminate Echols and Baldwin in the crimes: the discovery of a knife in a lake near Baldwin's trailer similar to one once owned by Echols and that prosecutors contended caused the victims' flesh wounds and the sexual mutilation of Christopher Byers; the purported sighting of Echols and his girlfriend by Narlene Hollingsworth near the scene of crime on the night the boys disappeared; Echols's purported statement to a number of people at a softball game admitting his commission of the crime; Echols's statement shortly after the crimes, reported by West Memphis detective Bryn Ridge, that one boy had been "cut up" more than the others" and that they had drowned; fiber evidence on a victim's clothing that was purportedly similar in consistency and appearance to a child's shirt in the Echols residence; the statement of Michael Carson, a jail inmate housed with Jason Baldwin who claimed that Baldwin admitted to dismembering "the kids" and that he had sucked the blood from the penis and scrotum and put the balls in his mouth;" and the testimony of a purported cult "expert," Dale Griffis, who opined that Echols, Baldwin, and Misskelley had been members of a Satanic cult who murdered the victims for ritualistic purposes. See *Echols*, 326 Ark. at 934-941, 936 S.W. at 516-520; *see also* Add. 489-502)

Significantly, during the prosecution's case in chief, a prosecution witness made express reference to the confession of Jesse Misskelley -- a matter that in no event should the jury ever

have been permitted to consider. (Add. 497-499)

Echols testified in his defense and denied responsibility for the crimes. He also presented alibi evidence which, if credited, precluded a finding he had been at the crime scene at the time suggested by the prosecution. *Echols*, 326 Ark. at 946; 936 S.W. at 522; Add. 499-502) Evidence of a shoe print and of a partial foot or fingerprint at the scene could not be matched to Echols, Baldwin, or Misskelley. (Add. 499)

5. Jury Bias and Misconduct

Finally, as noted previously, evidence which has surfaced since the time of the Echols trial establishes that the fact-finding process during jury deliberations was gravely compromised by undisclosed juror bias against Echols and serious instances of jury misconduct. That misconduct included the jury's explicit reliance on the Misskelley confession in determining that the Echols was guilty. Such juror bias and misconduct, discussed further below, should have informed the circuit court's ruling on the new trial inquiry authorized by §16-112-208(e)(3) because it erodes any the presumption of reliability that would otherwise attach to the verdicts returned by the Echols jury in 1993 and to the weight of the State's evidence on which the prosecution then relied.

B. The New Scientific Evidence

In his circuit court filings, Echols demonstrated a critical "exclusion" within the meaning of subsection 208(e)(1) in the form of evidence that from the scores of items subjected to DNA testing at Bode Laboratories pursuant to the Circuit Court's amended testing order, *no* biological material could be linked to Echols or to co-petitioners Baldwin or Misskelley. (Add.511) At the same time, Echols cited three DNA results representing additional, affirmative exclusions of all petitioners that likewise triggered the assessment of such results vis-a-vis all other case evidence for purposes of considering the new trial application under subsection 208(e)(3). Those additional exclusions include:

(1) a foreign allele located on a penile swab of victim Steven Branch (Add. 512-513);[8]

(2) a hair recovered from the ligature used to bind Michael Moore that is consistent with Terry Hobbs, the stepfather of Steven Branch, but not with the hair of any of the petitioners (Add.514) ; and

(3) a hair recovered from a tree stump at the crime scene very close to where one of the bodies was recovered, which hair was consistent with David Jacoby, a friend of Terry Hobbs whom Hobbs visited on the day the victims disappeared and, again, not with the hair of any petitioner. (Add. 515-516)

Furthermore, in his reply below, Echols produced findings based on the Bode testing demonstrating that, contrary to state testimony at the Misskelley trial, neither sperm nor reportable DNA was present on a pants cutting taken from one of the victims. (Add. 769-770) Results from a Bode test on a second pants cutting likewise refuted the prosecution's purported evidence and argument concerning the presence of sperm. (Add. 770) At the same time, the test on the second cutting disclosed the presence of a partial DNA profile consistent with a mixed profile from which Echols, Baldwin, Misskelley, Byers and Moore (but not Branch) were excluded as possible contributors. (Add. 770)

Significantly, the circuit court accepted the accuracy of virtually all of the foregoing results for purposes of its legal analysis and order. (Add.902-914)[9] Contrary to the conclusion of

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[8] The state disputed the validity of this "foreign allele" finding by attaching a letter from Kermit Channell, the Director of the Arkansas Crime Laboratory. (Add. 684; State Ex. E, Add. 740-743) In his reply brief, however, Echols cited evidence from two DNA experts that not only confirmed the presence of a foreign allele on the Branch penile swab, but which also demonstrated that the foreign allele and another at the relevant locus had been contributed by a single person, and not any of the petitioners or victims. (Add. 770-771)

[9] Although it purported to accept petitioner's characterization of the test results for purposes of its

the circuit court (Add. 906-907), moreover, the exclusion evidence, standing on its own, was highly significant. (Add. 516-518; 770-772) Had the victims been forcibly sodomized by Echols and Baldwin, as claimed by Jesse Miskelley, it is inconceivable that those assaults could have been accomplished without leaving any genetic material detectable on the anal swabs of the three victims. Likewise, had the victims been forcibly orally copulated by Echols or Baldwin, as the state hypothesized at the defendants' trial, it is again difficult to explain why none of their genetic material has been detected on the oral swabs taken from the victims.

Furthermore, while the presence of the foreign allele on the penis of Steven Branch is an insufficient basis on which to determine who did leave his genetic material on Branch's penis, it is sufficient to conclusively say *who did not* -- *i.e.*, Echols, Baldwin, or Misskelley.

To this is added the uncontradicted evidence of the hair consistent with the DNA profile for Terry Hobbs, the stepfather of Steven Branch, found on the ligature used to bind James Michael Moore. As Echols demonstrated, Hobbs was in the area not far from Robin Hood Hills around the time the boys disappeared, and the blood relatives of Steven, including his mother Pam Hobbs, had reported their suspicions that Terry was involved in the murders a number of years before the mitochondrial results were reported. Indeed, since the time of the murders, Hobbs made the startling admission to a girlfriend that during his search for the boys in Robin Hood Hills in the early evening of May 5th, he had come upon their bodies but chose not to inform the police. Meanwhile, the discovery of the hair linked to David Jacoby is significant because Hobbs had been at Jacoby's home playing guitar with Jacoby just before the victims disappeared, and was

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ruling, the Circuit Court unaccountably failed to expressly recognize the results showing that neither Echols, Baldwin or Misskelley was linked to any biological material recovered from the scene or the victims; that, contrary to Misskelley trial testimony, no sperm or reportable DNA was found on the first pants cutting; and that Echols, Baldwin, and Misskelley were excluded as contributors of the mixed profile on the second cutting. (Add. 905-906)

with him in the hours their disappearance had been reported to the police. This suggests Hobbs as the logical donor of *two* hairs recovered at the crime scene, and he would be hard pressed to come up with an innocent explanation of how he left Jacoby's hair on a tree root near the bodies. (Add. 513-516; 770-772)

In addition, the refutation of the state's allegations that semen was recovered from one of the victims clothing further undermines the credibility of petitioner Misskelley's account of a sexual assault.

The DNA test results are new circumstantial evidence that "excludes" Echols within the meaning of section 208(e) and tends to exculpate Echols more forcefully than all of the state's evidence tends to implicate him in the charged crimes. Viewed in conjunction with all other evidence in the case, discussed further below, the new scientific evidence would clearly preclude any reasonable juror from returning a guilty verdict against Echols on the murder charges.

C. The Newly Developed Forensic Evidence of Animal Predation

In addition to presenting the circuit court with the new scientific evidence described above, Echols submitted extensive new forensic evidence relating to the cause of the extensive victim injuries which the prosecution, at Echols's trial, attributed to the use of a survival knife that had been found in a lake and linked to Echols. The new forensic evidence consisted of affidavits and reports addressing this issue and prepared by a host of forensic pathologists and odontolologists whom Echols's counsel consulted from September, 2005 through early 2007. (Add. 519-540, and citations contained therein) These experts included pediatric pathologist, Dr. Janice Ophoven; forensic pathologist Dr. Werner Spitz, editor of Spitz and Fisher's "*Medicolegal Investigation of Death*"; forensic pathologist Dr. Michael Baden, the former Chief Medical Examiner of New York City and presently the chief forensic pathologist for the New York State Police; forensic pathologist Dr. Vincent Di Maio, the former medical examiner of San Antonio, Texas and author of Forensic Pathology, another of the profession's guiding textbooks; forensic pathologist Terri Haddix of the Stanford Medical School faculty and Forensic Analytic Sciences,

Inc., forensic odontologist Dr. Richard Souviron, Chief Forensic Odontologist at the Miami Dade Medical Examiners Department; and forensic odontologist Dr. Robert Wood. (*Ibid*.)

Echols's motion in the circuit court summarized the findings of the foregoing experts in detail. (*Ibid*.) The findings are chiefly significant because they reflect a consensus among all the experts as to the actual cause of (1) the hundreds of lacerations, gouge marks, cuts, and abrasions that covered the bodies of the victims and (2) the distinctive and horrifying genital mutilation of Christopher Byers. As noted, the prosecution at Echols's trial argued repeatedly that such injuries could be attributed to the "lake knife" which it sought to link to Echols. Without exception, however, the expert opinions attributed virtually all such injuries to animal predation that occurred after the time of death. (*Ibid*.) In addition, the expert consensus was that none of the victims exhibited injuries consistent with sexual abuse such as anal penetration or oral sex. (*Ibid.*) Given that the relevant DNA test results excluded Echols as the source of the DNA evidence, such forensic evidence was cognizable as "all other evidence in the case regardless of whether the evidence was introduced at trial" within the meaning of §16-112-208(e)(3).

Despite this express statutory directive, the circuit court gave short shrift to this new predation evidence, ruling that it was not to be considered under § 16-112-208(e)(3) at all. *See* Order at 7-8 (Add. 908-909). For that reason, Echols limits the majority of his present discussion to a representative summary in the form of the written opinion rendered by Dr. Spitz.

Dr. Spitz was provided extensive background materials relating to the case, including the autopsy reports; various crime scene and autopsy photographs; photographs of the knife that purportedly belonged to Echols and that was recovered from the lake near Jason Baldwin's trailer (*i.e.*, State's Exh. 77); literature concerning wildlife in the area where the bodies were recovered; and excerpts from the prosecutors' closing arguments at that trial. Dr. Spitz was also supplied with trial testimony at the Echols-Baldwin trial given by Dr. Frank Peretti, who performed the autopsies on the victims. (Add. 520)

On November 27, 2006, Dr. Spitz issued a written report essentially restating the

conclusions he had verbally reported to counsel on earlier dates. Thus, among other things, the November 27th report stated:

> a. Most of the injuries suffered by the victims, including emasculation of Christopher Byers were due to anthropophagy, *i.e.*, inflicted postmortem by large and small animals, including marine life.
>
> b. None of the injuries were caused by a knife, specially the serrated hunting knife depicted [introduced at petitioner's trial]. Wound characteristics of those injuries suspected as having been caused by a knife are compatible with animal claws and teeth and inconsistent with the dimensions and configuration of the knife.
>
> c. The large area with scattered irregular lacerations on Steven Branch's left cheek was likely the result of bites by large animals and claw marks on a background of abrasion from licking off of emanating blood and tissue fluids.
>
> d. As to Christopher Byers (331-93), obvious claw marks are noted on both sides of the anus, predominately on the left side, with straight, parallel scratches. The anus does not appear distended, dilated, traumatized or in any way abnormal. The penis and scrotum were ripped and chewed off postmortem. The edges are irregular, ragged, without evidence of bruising, not cut or skinned by a knife.
>
> e. Injuries on Michael Moore's scalp resemble stab wounds, yet widely abraded without underlying fracture [and] are inconsistent with knife wounds, and similar injuries on Christopher Byers' scalp are unabraded resembling stab wounds, but also without underlying bone damage. Further, what appear to be four circular paw marks, arranged in a semicircle are noted below the inferior edge of the laceration and two superficial scratches are noted in the same area against the upper edge of the wound.
>
> f. Michael Moore has obvious claw marks on the right side of the chest.
>
> g. Clawing injuries are irregularly spaced.
>
> h. "After consideration of all the injuries, it is my conclusion based on my education, training and experience and also having previously seen these kinds of injuries, that these 3 boys were mutilated by animals postmortem, when in the water and that none of these cases resulted from satanic ritualistic activity. My textbook, *Medicolegal Investigation of Death*, 4th edition, published by Charles C. Thomas, Springfield, Illinois, 2005 discusses many of the issues in this letter in greater detail."

(Add. 522-524)[10]

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[10] After examining tissue slides relating to all of the victims, Dr. Spitz issued a supplemental report which adhered to and expanded on the conclusions stated in the initial report. (Add. 535-536)

Forensic odontologist Wood, who, like the other experts, essentially concurred in Dr. Spitz's findings, concluded after an extensive review of the evidence that the removal of Christopher Byers's genitalia had occurred as a result of predatory animal "degloving" of the penis. (Add. 528-530) ("It is clear from the post mortem photographs that the penis has not been "cut" at all. What has occurred is not a sharp-force dissection but rather a de-gloving of the skin of the penis and scrotum.")

The state's briefing in the circuit court sought to characterize the theory of animal predation as "incredible," but there are at least three reasons, discussed in detail in Echols's new trial reply (Add. 772-777) why that claim was wholly unpersuasive.

First, the relevant autopsy reports proffered by the state describe the injuries suffered by the victims, but do not classify any of those injuries as pre-mortem, peri-mortem, or post-mortem; indeed, those terms never appear in any of the three reports. Furthermore, at Echols's trial, Doctor Peretti himself testified that the bodies had suffered post-mortem injuries,[11] a finding consistent with those of Doctors Spitz, Souviron, Di Maio, Haddix, Woods, Baden, and Ophoven. As to at least two victims, Moore and Branch, moreover, Peretti concluded that they died of drowning, meaning that the post- mortem wounds they suffered occurred after they first entered the body of water in which their bodies were found the next day. In order for their post-mortem injuries to have been caused by a human agency, the perpetrator would have had to place their bodies in the water while the victims were alive, waited until they died, and then removed the bodies in order to mutilate them with a cutting instrument before again placing them in the water where they were later discovered. (Add. 773-774)

Second, the expert pathological evidence that Echols offered regarding the genital mutilation of Christopher Byers -- that the nature of the injury is entirely inconsistent with the use

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[11] In Echols's trial, Peretti testified that Chris Byers suffered post-mortem injuries (Ab. 27); in the Misskelley trial, he testified that some injuries of Branch were post-mortem (Ab. 392)

of the knife in the lake and is attributable to post-mortem animal predation -- is not contradicted by the autopsy findings or trial testimony of Doctor Peretti; in neither did he classify the genital injury as pre-mortem or peri-mortem, as opposed to post-mortem. Indeed, the testimony Peretti gave regarding the Byers' genital injury is completely consistent with the conclusions proffered by the Echols's experts, given that Peretti conceded it would have been virtually impossible to have removed the genitalia with a cutting instrument under the conditions at the crime scene. (Add. 774-775) And, in a written response to Echols's motion below, Peretti neither denied that the victims suffered post-mortem injuries, nor that the Byers' genital injury was post-mortem, nor that "degloving" (defined by Dr. Wood) is a well-documented phenomenon that best explains the injury. And, consistent with his prior testimony, Peretti again declined to assert that the genital injury could have been inflicted by the knife in the lake. (*Ibid*.)

Finally, as Echols detailed below, to the extent that there is a disparity between Peretti's findings and those of the Echols's experts, the latter, all of whom are board certified in forensic pathology or forensic odontology and are leaders in their fields, are both individually and collectively far more qualified than Doctor Peretti, who has never managed to pass the boards in forensic pathology. (Add. 776-777)

D. The Significance of the Newly Developed Evidence for Purposes of Assessing the Likely Conclusion of A Reasonable Juror Upon Retrial

In his motion below, Echols presented an extensive review of the case against him in light of the DNA test results, the new forensic evidence, and other recently obtained evidence supporting his present claim for relief under § 16-112-201, *et seq*. (Add. 540-552) Consideration of all such evidence and all other evidence in the case, he maintained, would preclude a reasonable juror from finding him guilty of the alleged crimes and would therefore warrant new trial relief under § 16-112-208(e)(3). (*Ibid*.) The state of the evidence as it appears today includes the following:

(1) Vicky Hutcheson: While not a witness at Echols's trial, Vicky Hutcheson was critical

in focusing the authorities' attention on Echols when she told them that Echols had taken her to an occult satanic meeting. In a series of interviews in 2004, Hutcheson conceded that her claims concerning Echols had been a "complete fabrication," and the concession is borne out by the absence of any corroboration of the claims. (Add. 540-541)

(2) The Misskelley Confession: Assessed in their own terms, the statements constituting the confession introduced at the Misskelley trial were riddled with inconsistencies which Echols described below at length. (Add. 541-542) In addition, Misskelley's statements must be re-examined in light of the new DNA evidence and forensic findings. Early in his statement, Misskelley -- responding in a question and answer format rather than a more reliable narrative account -- stated that the victims were hit before he left. He later stated that Echols and Baldwin were "screwing them and stuff, cutting them and stuff" before he ran off. When he failed to mention use of a knife, police detective Ridge asked, "Who had a knife?" Misskelley then responded that Baldwin did. (*Id*.) Later, after Misskelley had said one boy was cut on the face, Ridge told Misskelley that another boy was cut and asked where. After Misskelley stated "at the bottom," Ridge suggested the "groin area," to which Misskelley made no reply. Finally, Ridge asked Misskelley if he "knows where his penis is," and Misskelley agreed "that's where he was cut at." It was Detective Gitchell, not Misskelley, who then supplied the name of Byers for the boy being cut. (*Id*.)

Misskelley never volunteered that he had seen Byers being cut with a knife in his genital area because he did not witness the murders. If he had, he would not have seen Byers being cut in that manner by his killer. As the forensic evidence shows, that cutting never happened, nor, indeed, was any knife used to cause any of the wounds to the victims' flesh. Nor did Misskelley see Echols and Baldwin "screwing" the victims, because, as Peretti testified and the forensic findings confirm, the gouging of the anus that absolutely would have been present had the victims been sodomized simply does not exist. Rather in these regards, as is true of the rest of his statement, Misskelley told his interrogators not the truth, but what they wanted to hear. (Add.

541-542).[12]

(3) The Lake Knife: In his testimony, Doctor Peretti never suggested that the serrated lake knife (State's 77) was the instrument that caused any of the injuries suffered by the three victims; indeed, he made clear that no such inference could rationally be drawn from the physical condition of the bodies. The real "evidence" concerning the knife in the lake came not from the witness stand but from the mouths of prosecutors in closing argument. As Echols recounted below (Add. 543-546), during the initial closing argument, prosecutor Fogelman, over defense objection, conducted a dramatic experiment with a grapefruit designed to persuade jurors that the serrations on the knife recovered from the lake matched those evident in photographs of the victims' bodies. (*Ibid*.) In the final closing argument, prosecutor Davis argued that serrations on the back of the knife explained other markings on the body of Christopher Byers. The experiment and argument were wholly improper and could not be permitted at a retrial. Furthermore, the forensic evidence exposes the critical inferences the prosecutors advanced -- that the lake knife had been used to assault the victims -- as patently false. No reasonable juror today would accept them.

(4) Michael Carson: The testimony of jailhouse informant Michael Carson concerning

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[12] The circuit court ruled in connection with the new trial inquiry that it was permitted to consider a statement given by Misskelley after his trial, which contradicted his original statements and more closely tracked the actual events and circumstances. (Add. 909; 854-881) No reasonable juror would credit the statement today, however, because, *inter alia*, (1) it extensively contradicted Misskelley's earlier account; (2) Misskelley was plainly seeking to curry favor with the prosecutors; (3) Misskelley by that point had been able to learn about the actual discoveries at the crime scene and the prosecution's theory of the case; and (4) he continued to assert that Baldwin had pulled down the pants of one of the boys and cut him with a knife, a claim the forensic evidence now flatly refutes.

Jason Baldwin's purported confession was inherently unworthy of belief: Carson came forward after a deluge of publicity concerning a notorious crime; he claimed to have heard the confession from an accused he had just met; the accused had confessed to no one else; Carson failed to report the confession until months later; and everything Carson claimed to have learned from the accused had been reported in the media. No reasonable jury would accept his testimony because the far more credible forensic evidence proves that Byers' genital injury was caused not by his killer, but by subsequent animal predation. Of equal importance, Echols below proffered evidence from both trustworthy officials as well as inmates at the detention facility establishing that Carson, already a perpetrator of serious felony offenses, never had an opportunity to speak to Baldwin while the two were confined in the same unit. All available evidence exposes Carson as a classic jailhouse informant who concocted his testimony from third party sources. (Add. 546-547)

(5) Dale Griffis: At trial, the defense strongly attacked the testimony of cult "expert" Dale Griffis at Echols's trial but he nevertheless rendered opinions constituting the most damaging form of character evidence imaginable. To the extent his opinion as to the satanic nature of the crimes rested on Carson's testimony that Baldwin drank Byers' blood and put the victim's testes in his mouth, the testimony has been exposed as an utter falsehood by the forensic evidence, as was Griffis' contention that a left-side facial wound on Branch was indicative of satanic motivation. Additionally, evidence developed post-trial demonstrates that the "university" from which Griffis received his "Masters" and "Ph.D.," has been shut down by the state of California as a fraudulent diploma mill. No reasonable juror would now believe Griffis today. (Add. 548-549)

(6) Statement to Ridge: The argument that in his pre-arrest interview with Ridge, Echols had knowledge of Byers' genital injuries that a member of the public would not have possessed was specious at the time it was advanced in 1993. It is all the more so in light of the fact that those injuries were not inflicted by the perpetrator or perpetrators of the crime. (Add.494-495; 548)

(7) The Hollingsworths : The testimony of Narlene and Anthony Hollingsworth was subject to serious doubt at the time of the trial, not least because they claimed to have seen Echols in the company of his girlfriend Domini Teer, rather than Jason Baldwin, near the scene of the crime on the evening the victims disappeared. In his showing below, Echols presented uncontradicted, previously undisclosed evidence that both Narlene and Anthony had substantial motivation to provide the prosecution with testimony that would aid its case against Echols, including the facts that:

(a) when, on March 10, 1993, Narlene first told authorities that she had seen Echols and Domini on the night of May 5th, she had yet to resolve a traffic citation issued her on the day of May 5th for "Following Too Closely- Accident Involved" (Municipal Court of West Memphis No. C-93-3429). After she pled no contest to that charge on June 7th, *i.e.*, subsequent to Echols's arrest, the fine was suspended.

(b) when he testified at Echols's trial, Anthony was in the third year of a ten year probationary term imposed in connection with his 1991 plea in Crittendon County to the crime of sexually abusing his younger sister Mary, who had been eight years old at the time.[13] (Add. 548-549) For various reasons Echols detailed below (Add. 493-494), at trial, the courtroom audience greeted parts of the Hollingsworths' testimony with laughter, but the prosecutor implored the jurors to take it seriously. No reasonable juror would do so now.

(8) The Ballpark Girls : Donna Medford, the mother of one of the two girls who testified at trial about overhearing Echols's purported confession to a group of bystanders at a softball game, provided a declaration presented in support of the motion below. In the declaration, Mrs. Medford stated that she heard talk of Echols's statement from a group of girls she was driving home from the game, including Christy Van Vickle, the other witness who

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[13] John Fogelman, one of the prosecutors at Echols's trial, was the prosecutor in Anthony's 1991 case. (Add. 548-549)

testified about the statement at trial. Mrs. Medford's declaration then states that when she heard Damien's statement described, she told the girls to forget about it because she "did not believe it possible that Damien was actually confessing to the crime in front of so many people, but was instead simply trying to draw attention to himself." It was for that reason, Mrs. Medford concluded, that she did not report the girls' statement to anyone she learned of Damien's arrest on television. (Add. 549-550)

Mrs. Medford's conclusion is the correct one. Whatever Damien Echols may or may not have said at a softball game in late May of 1993 in response to whatever taunts others may have directed at him, at most he was acting in defiant bravado or, as Mrs. Medford states, "simply trying to draw attention to himself." No reasonable juror would conclude that after withstanding many hours of grilling by Detective Ridge on May 10th, Echols shouted out a confession to a crowd at a ball game three weeks later.

(9) The Fibers Evidence: The fact that the clothes of two victims had fibers on them that could have come from any number of garments sold at Wal-mart had little or no probative value in this case. The prosecution hypothesized that a child-size shirt found at Echols' home, which he never could have worn or did wear, might have produced a fiber that was transferred from the shirt to Echols and then to the clothing of a victim. If the fiber was transferred from someone's small shirt to the victim, as opposed to being picked up from the water of the drainage ditch where the victims were found, it was far more likely to have been transferred to the victim's clothing from one of his playmates on that or previous days. Compared to the powerful exculpatory impact of the new DNA evidence, the fiber evidence is meaningless. (Add. 550)

(10) The Fingerprint Evidence: In a recent interview with the West Memphis Police Department, Tony Anderson, the fingerprint expert on the crime scene when the victims' bodies were discovered, confirmed facts not appearing in the trial record, *i.e.*, that one print taken at the scene was within five to ten feet of where the first body was located, and that it was at an angle making clear it had been left by someone who had been in the water. Anderson compared the

print to Echols, Misskelley, and Baldwin, as well as the victims and every police officer at the scene, and found no match. Like the new DNA evidence, that is powerful circumstantial evidence someone other than the three defendants committed the murders. (Add. 550-551)

(11) Alibi: Soon after Echols was arrested in 1993, Jennifer Bearden gave authorities a statement to the effect that, as Echols and his mother testified at trial, Bearden spoke to Echols on the night of May 5, 1993 by telephone. Domini Teer did the same. In 2004, Bearden provided an affidavit concerning the events of May 5, 1993 in which she stated,

> This case has made a big impression on me. It influenced me to become a criminology major in college. I have thought a lot about the period in question because it was just an extraordinary time period." Bearden goes on to state that she spoke to Echols that evening for at least a half an hour, beginning about 9:30 p.m. and ending around 10:00 p.m. (*Id*.)

(Add.550-551) As an adult who majored in criminology, Bearden has no motive to provide false assistance in any way to a person who could have murdered three children. Compare *House*, 547 U.S. at 552 (New evidence came from witnesses with "no evident motive to lie"). Her assertion that Echols was at home between 9:30 and 10:00 p.m. on May 5, 1993, is simply far more credible than the eyewitness testimony of the Hollingsworths, who by the prosecution's own account erred in their claim to have seen Domini Teer, with whom they claimed a family relationship, walking near the crime scene on May 5th.

(12) John Douglas: John Douglas is the former FBI Unit Chief of the Investigative Support Unit of the National Center for the Analysis of Violent Crime ("NCAVC"), which he served in and headed for 25 years between 1970 and 1995. (Add. 409-417) He is probably the country's leading expert in criminal investigative analysis. Douglas recently prepared an analysis of the murders, which was submitted in support of Echols's motion below. Flatly contradicting the theory of the case advanced by the trial prosecutors, Douglas concluded that, among other things, the offender acted alone; he was familiar with the victims and the geographical area; he had a violent past and would have a violent future; he was not a teenager; the crime demonstrated criminal sophistication not observed in previous and very rare cases in which teens committed

multiple homicides; there was no evidence to support the theory that this was a Satanic or cult related crime; and the murders were instead driven by a "personal cause." (Add. 551-552)

(13) Conclusion : Even more than in *House*, the evidentiary showing made by Echols completely undermines the state's evidence and convincingly points in the direction of alternative suspects. Every reasonable juror hearing Echols's new evidence would doubt his guilt; indeed, any such juror could be confident of his innocence. Echols has more than satisfied the standard for relief set forth in Arkansas' new scientific evidence statutes.

E. Extensive Evidence of Juror Bias and Misconduct, Including Improper Consideration of the Misskelley Confession, Fatally Undermines the Reliability of the Jury's Verdicts and Implied Findings in Support Thereof

By its terms, the state's "new scientific evidence" statutes, including §16-112-208(e), require a criminal defendant to overcome the presumption of reliability and legitimacy that, as a matter of law, attaches to the verdict and related judgment he or she seeks to attack. Because that is so, the "record evidence" that this Court is entitled to review under those statutes (and under the analogous standard articulated in *House*) necessarily includes evidence that undermines the integrity of the jury findings on which the verdict and judgment were based. Thus, even were it so inclined, a court considering a motion under §16-112-208(e)(3) should give no deference to the original jury's implied "rejection" of Echols's testimony and claims of innocence if Echols can show that the jury did not fairly assess his testimony and other defense evidence in the first instance.

As to this issue, Echols's showing in the circuit court included extensive, uncontradicted evidence of juror misconduct and bias that fatally undermined the integrity of his 1994 trial. Specifically, Echols showed that, contrary to statements and assurances during voir dire, jurors, and in particular the jury foreman, considered and discussed the unreliable and untested confession of Jesse Misskelley in finally deciding on their verdict against Echols. (Add. 552-575; 778-790)

Furthermore, part of Echols's showing below consisted of a sealed affidavit, never before

filed in this case, from an attorney containing previously unavailable and admissible evidence of the foreperson's misconduct that occurred prior to and during the trial, *i.e.*, not during deliberations themselves. That affidavit has never been in the possession of Echols' counsel.[14] On Echols's information and belief, however, he has asserted that the affidavit showed that before and during Echols's trial, the attorney-affiiant had spoken with the foreperson of the Echols-Baldwin jury about a criminal matter involving the foreperson's brother. In the course of the conversations, the foreperson disclosed his intense interest in the Misskelley confession and the manner in which he would place his knowledge of that forbidden matter before other jurors in an effort to ensure Echols's conviction. (Add. 777-778)

The fundamental defect in the original trial's fact-finding process thoroughly diminishes the weight and credibility that would otherwise attach to the state's evidence introduced at Echols's 1994 trial. This further compels the conclusion that a reasonable juror considering *all* the evidence in the case, whether pointing to guilt or to innocence, would not convict Echols were his trial held today. Echols was accordingly entitled to a new trial under §16-112-208(e)(3).

IV. The Circuit Court Repeatedly Erred in Construing and applying A.C.A. § 16-112-201(a), *et seq*., and Specifically Erred in Denying Echols's Motion for a New Trial Under § 16-112-208(e)(3).

A. Standard of Review and Principles of Statutory Construction

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[14] The sealed attorney affidavit was filed in the Circuit Court, and the Circuit Court judge stated at hearing below that he would order it unsealed under a protective order so that the parties could address issues relating to its admissibility in this proceeding. (Ab. 11-13) The Circuit Court later made reference to the affidavit in its Order below. (Add. 910-911) The affidavit, however, was never provided to the parties, and, despite Echols's repeated efforts, has yet to be included in the record on appeal. Echols has accordingly filed a petition for certiorari in this Court seeking an order that the appellate record be supplemented with the sealed affidavit.

Relatively recent as they are, the statutory provisions placed in issue by Echols's motion for a new trial below have not been the subject of significant judicial interpretation by the Arkansas courts. The issue of how the statute should be construed is reviewed de novo by this Court, which is not bound by the Circuit Court's interpretation. The primary means of construing a statute is to give effect to the plain meaning of the statutory language. As this Court stated in *Langton v. Langton*, 371 Ark. 404, 408, 266 S.W.3d 716, 720 (2007):

> . . . We review issues of statutory construction de novo. *Ryan & Co. AR, Inc. v. Weiss, 371 Ark. 43, 263 S.W.3d 489 (2007)*. It is for this court to decide what a statute means, and we are not bound by the circuit court's interpretation. *Id*. The basic rule of statutory construction is to give effect to the intent of the General Assembly. *Id*. In determining the meaning of a statute, the first rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id*. We construe the statute so that no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible. *Id*. When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to resort to rules of statutory construction. *Id*. However, we will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. *Id*. We will accept a circuit court's interpretation of the law unless it is shown that the court's interpretation was in error. *Id*. We seek to reconcile statutory provisions to make them consistent, harmonious, and sensible. *Id*.

See also *Smith v. Fox* 358 Ark. 388, 392, 193 S.W.3d 238, 241 (Ark. 2004) ("When reviewing issues of statutory interpretation, the basic rule is to give effect to the intention of the legislature, making use of common sense, and assuming that when the legislature uses a word that has a fixed and commonly accepted meaning, the word at issue has been used in its fixed and commonly accepted sense." [Citations omitted])

B. The Circuit Court Erred in Concluding that a Petitioner Must Be Denied New Trial Relief Unless He Demonstrates that the Test Results Demonstrate Legal Innocence under a Standard that Does Not Appear in § 16-112-208(e)(3).

The substantive portion of the circuit court's order began by invoking § 16-112-208(b), which states, "If the deoxyribonucleic acid (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." (Add. 904) In this connection, the lower court observed that at the time

testing was ordered in this matter, Echols was not required to meet the standard entitling a petitioner to testing that was adopted by a statutory amendment in 2005, and which requires the petitioner to show that "the proposed testing of the specific evidence may produce new material evidence that would . . . [raise a reasonable probability that the person making a motion under this section did not commit the offense." § 16-112-202(8) and subsection (B). (Add. 903)[15]

On these bases, the circuit court -- employing an analysis that the state's briefing did not -- reasoned that Echols was not entitled to new trial relief under the new trial statute (§ 16-112-208(b)) unless he could demonstrate that the testing results were *legally* conclusive under the statutory measure presently governing the entitlement to *testing*, *i.e.*, that the testing results establish "a reasonable probability that the person making the motion did not commit the offense." (Add. 903-904) Because, in the court's view, the test results did not meet this standard, no relief was available to Echols. (Add. 904-907)

This construction of what § 16-112-201, et seq. require of a petitioner seeking new trial relief under § 16-112-208(b)(3) is deeply flawed for a number of reasons.

First, the strictures of § 16-112-202(8) and subsection (B), the present testing statute, on their face, set forth the conditions for securing a testing order in the first instance and do *not* purport to set forth the specific conditions for granting new trial relief, which are expressly and specifically delineated in § 16-112-208(b)(3). Construing a statute expressly addressing testing conditions as setting forth, and superseding, the express standard for securing new trial relief contravenes the plain meaning of both the testing statute and the new trial statute, and further would render the latter (§ 16-112-208(b)(3)) utterly superfluous. *Langton*, *supra,* 371 Ark. at

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[15] The relevant portion of the former testing statute required the Echols to show that "the testing has the scientific potential to produce new noncumulative evidence materially relevant to the defendant's assertion of actual innocence." *See* former § 16-112-202(c)(1)(b) (Acts of 2001, Act 1780, § 5, eff. Aug. 13, 2001.)

408, 266 S.W.3d at 720. *Second*, on a closely related point, the present standard that governs the entitlement to testing cannot take precedence over that governing new trial relief because the latter sets forth a *specific* measure for obtaining such relief -- *i.e.*, a showing that 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." This specific statement of the new trial standard takes precedence over the unrelated and more general standard set forth in the present testing statute, as this Court has repeatedly stated. *See, e.g.*, *Ozark Gas Pipeline Corp. v. Arkansas Public Serv. Comm'n*, 342 Ark. 591, 602-03, 29 S.W.3d 730, 736 (2000) ("The rule is well settled that a general statute must yield when there is a specific statute involving the particular matter. [citations omitted]")

Third, at the time that Echols sought testing, he satisfied the testing conditions set forth in both the former and present versions of the testing statute because, when sought, the testing (1) "[had] the scientific potential to produce new noncumulative evidence materially relevant to the defendant's assertion of actual innocence" (see former § 16-112-202(c)(1)(b)) and (2) might have "produce[d] new material evidence that would . . . [raise a reasonable probability that the person making a motion under this section did not commit the offense" (see present § 16-112-202(8) and subsection (B)).

C. The Circuit Court Erred in Concluding that a Petitioner Must Be Denied New Trial Relief Unless the Test Results Alone Are Legally Conclusive in Favor of Innocence

Apart from its erroneous reliance on the present testing statute, the circuit court's analysis was flawed to the extent it adopted the state's argument in more general terms and assumed that Echols had to be denied any relief under § 16-112-208(b) unless the results, standing alone, were legally conclusive in favor of Echols's actual innocence.

As an initial matter, adopting such an approach would create enormous problems and contravene the intent of the statutory scheme. Suppose a situation in which a defendant was convicted of a rape-murder at a trial in which the prosecution argued strongly that semen on the

victim's clothing was the same blood type as the defendant's, and on that basis the jury should find him guilty. Years later, DNA testing conclusively establishes that the semen came not from the defendant but from the victim's husband, who could not have committed the crime. Furthermore, a third party recently confessed to the murder in question. In the state's view of this hypothetical, while the DNA evidence conclusively excludes the defendant as the contributor of the semen and therefore wholly undermines the state's theory at trial, it alone does not establish his innocence, as it does no more than prove the semen evidence was not relevant to the crime. *See* State's Response to Echols's Motion for New Trial, at 14: "It is common sense that a person's exclusion as the source of some biological material found at a murder scene neither means he was not there, nor that he was not the killer." (Add. 669) Since the scientific evidence is not (and cannot be) conclusive on legal innocence, relief must be denied, the exculpatory confession notwithstanding. In essence, the state argues that in enacting § 16-112-208(b) for the purpose of exonerating the innocent, the Legislature passed a statute under which relief can never be obtained.

In fact, neither subsection 208(b) nor any other provision of the Arkansas statute declares that the Circuit Court is authorized to deny relief where, as here, the Echols has presented evidence of test results that, if credited, are *scientifically* conclusive, *i.e.*, where they "exclude" Echols as the source of biological material from locations already deemed relevant pursuant to the court's initial testing order. To the contrary, the logical, common sense reading of 208(b) is that it permits (and does not mandate) the denial of relief only where the DNA results are scientifically inconclusive in the sense that they neither include nor exclude Echols as the source of any relevant sample -- not the case here.

But the simplest response to the state's argument as to § 16-112-208(b) is that Echols has not sought exoneration but instead a new trial under §16-112-208(e)(3). The latter subsection expressly requires the court to assess the DNA test results in light of all the evidence and grant a new trial under specified conditions where, as an initial matter, those results "*exclude* a person as

the source of the deoxyribonucleic acid (DNA) evidence." *Ibid*. (emphasis added); *cf*. *Weiss v. Maples*, 369 Ark. 282, 286, 253 S.W.3d 907, 911-12 (2007) (statutes relating to the same subject are said to be *in pari materia* and should be read in a harmonious manner, if possible.) Stated otherwise, where, as here, the DNA results, albeit not conclusive as to legal innocence, arguably establish a relevant exclusion and no relevant inclusions, they trigger the trial court's obligation to weigh the significance of those results for new trial purposes in a calculus that includes consideration of all other evidence in the case, previously admitted or not, as subsection (e)(3) expressly provides.

Thus, construing § 16-112-208(b) as barring any relief except upon a showing that the test results conclusively establish the petitioner's innocence, again, renders meaningless the specific provisions set forth in the new trial statute (§16-112-208(e)(3)). Furthermore, such a construction is doubly erroneous because it renders equally meaningless and superfluous the language set forth in subsection 201(a). If new trial relief requires that the DNA results, as a legal matter, conclusively eliminate all possibility of the petitioner's involvement and point unambiguously to a single other culprit -- a scenario which the State's circuit court briefing at points demanded but elsewhere acknowledged as a virtual impossibility (Add. 669) -- there is no place for the court's option of "vacating and setting aside the judgment" and discharging the petitioner, a remedy for which subsection 201(a) expressly provides. By the same token, why would subsection 208(e) ever limit a petitioner's remedy to an order for a new trial if he has made so conclusive a legal showing of actual innocence that he has foreclosed all possibility of his status as a perpetrator?

Near the conclusion of its order, the circuit court addressed and "reject[ed] the Petitioner's view that the statute requires a lesser burden of him to obtain relief under [§16-112-208(e)(3)] because it provides only for a new trial, while [§16-112-201(a)] contemplates his complete discharge from criminal liability." (Add. 909-910) The court reasoned that because section 208(e)(3) was added by amendment in 2005, it was "doubtful that any greater relief than

permitted there is any longer independently available under section 201(a), as is evident by harmoniously reading the two sections together." (Add. 909)

This reasoning is puzzling at best. First, the legislature was presumably aware of section 201(a) when it added section 208(e), yet it did not alter or remove section 201(a) when it did so. Given that section 201(a) remains in effect, its plain language cannot be disregarded. Second, as this Court stated in *McKenzie v. Burris*, 255 Ark. 330, 341-42, 500 S.W.2d 357, 364-65 (1973), a fundamental rule in construing statutes is that "repeal by implication is not looked upon with favor and is never allowed by the courts except where there is such an invincible repugnancy between the former and later provisions that both cannot stand together." Contrary to the circuit court's reasoning, sections 201(a) and 208(e) are readily harmonized as petitioner has explained, *i.e.*, by reading the former to authorize discharge where the petitioner demonstrates actual innocence, and the latter to authorize a new trial where no reasonable juror, considering the test results and all other evidence, would convict at a retrial.

The circuit court further concluded that in any event, Echols's claim of an easier burden in obtaining new trial relief under section 208(e) than is required for outright discharge under section 201(a) must be rejected because the latter remedy would infringe on the Governor's clemency power, thereby offending the doctrine of separation of powers. (Add 910) Ordering an outright discharge in the conclusive case of actual innocence, however, would do no such thing: the release of an innocent defendant in such a case would properly rest on the judicial power and *obligation* to vindicate that defendant's federal and state constitutional right to due process and guarantee against cruel and unusual punishment. In any event, even were section 201(a)'s "discharge" provision to be disregarded, that would in no way increase the petitioner's burden as to the showing required for new trial relief, as that burden is identified in the express language of the concededly valid section 208(e)(3).

D. The Circuit Court Erred in Concluding that Where a Motion for a New Trial Is Properly Made under §16-112-208(e)(3), the Court May Consider Only "All Other Evidence in the Case" that Points to Guilt.

The next significant point in the circuit court's analysis implicitly accepted for purposes of argument petitioner's claim that, pursuant to §16-112-208(e)(1) and (3), a showing of relevant DNA results excluding a petitioner as their source does indeed trigger the court's obligation to consider the impact on a reasonable juror of that evidence considered in conjunction with all other evidence in the case. (Add.907-908). In performing this exercise, however, the court adopted the State's argument below and concluded that it may only consider all other evidence of *guilt*, but not *innocence*. (Add. 908) For this reason, moreover, the circuit court concluded that it could not consider Echols's newly developed evidence of animal predation or any other evidence pointing to innocence in conducting its new trial analysis. (Add. 908)

This approach, however, must be rejected because it contravenes not only the legislative intent of providing relief notwithstanding the presence of a conviction that is otherwise legally "final," but also the express statutory language set forth in §16-112-208(e)(3). Again, that subsection directs the court to consider the impact on the reasonable juror of the new scientific evidence "with *all other evidence in the case* regardless of whether the evidence was introduced at trial" to determine whether, together, all such evidence establishes by compelling evidence that a new trial would result in an acquittal. *Ibid*. (Emphasis added) The plain meaning of the words "all other evidence" includes evidence of any kind, exculpatory as well as inculpatory, and that, accordingly, is how the language must be construed. If the statute was intended to limit the court's review under §16-112-208(e)(3) to evidence of guilt alone, it could have, and surely would have, said so. *Cf. Turnbough v. Mammoth Spring School Dist. No. 2*, 349 Ark. 341, 349, 78 S.W.3d 89, 94 (2002) ("[The Court] will not interpret a statute in a manner that is contrary to the clear language of the statute; nor will [it] read into a statute language that is not there.")

E. The Circuit Court Erred in Concluding Where a Motion for a New Trial Is Properly Made Under §16-112-208(e)(3), the Court May Not "Reweigh"All Evidence in the Case

On a closely related point, the Circuit Court accepted the state's contention that to the

extent that §16-112-208(e)(3) is applicable here, the Court may in no event "reweigh" the original evidence because the time for such an exercise purportedly ended with the conclusion of petitioner's trial and appeal. (Add.907-908) Here again, however, the court's conclusion cannot be squared with the express language of section 208(e)(3) which plainly requires the court to consider the impact of the DNA results together with all other evidence and, on the basis of that consideration, decide whether a reasonable trier of fact would convict upon retrial. Such an exercise, by its very nature, necessarily entails a *weighing* of the relative impact of various components of available evidence, whether admitted at trial or not.

Indeed, given that the statute expressly authorizes consideration of evidence in the case that was not admitted at trial, there cannot have been any prior weighing of such evidence vis-a-vis that which was admitted at trial. *Cf. House v. Bell, supra,* 547 U.S. at 538-39 (in conducting "actual innocence" inquiry under *Schlup*, the Court must assess how reasonable jurors would respond to all evidence in the case, and if new evidence so requires, this may include consideration of the credibility of the witnesses presented at trial.) Under these circumstances, a reading of section 208(e)(3) that would preclude a trial court's reasoned consideration of all relevant evidence and the weight thereof would lead to an absurd result that this Court should soundly reject.

F. The Circuit Court's Conclusion that Petitioner Is Not Entitled to New Trial Relief or to a Hearing under the Standard Petitioner Has Identified in Construing§16-112-208(e)(3) Is Not Supported by the Record.

Near the conclusion of its order, the circuit court devoted a single paragraph to its conclusion that even were the showing required for new trial relief as petitioner has described it, and even had it considered his "new forensic evidence on animal predation and indulged him further impeaching evidence of the trial evidence," it would nevertheless deny his motion. (Add. 910) The court's discussion on this point, however, is summary and essentially relies on the view that Echols's showing of innocence falls "well short of the stringent showing of a compelling claim of actual innocence found" in *House.* (Add. 910) That view, however, simply cannot be

reconciled with the specific factual showing made by appellant, as summarized in Argument II, *supra*. Furthermore, the circuit court's assessment of "all the evidence" made cognizable by the new trial statute was seriously impeded by the myriad analytical errors described in the present argument. Finally, because petitioner demonstrated that the files and records of the proceeding did not conclusively establish that petitioner was entitled to no relief, the circuit court was required, at a minimum, to convene an evidentiary hearing and receive evidence bearing on his new trial clam. *See* A.C.A. § 16-112-205.

G. The Circuit Court Erred in Concluding that Evidence of Rampant Juror Bias and Misconduct at Petitioner's Trial Is Not Cognizable in Assessing the Validity of the Original Trial Verdict and the Weight of the Trial Evidence Adduced against Him.

As set forth above, Echols presented the circuit court with extensive evidence of juror misconduct and bias, including evidence that during deliberations, jurors considered and relied on media reports of the Misskelley confession implicating petitioner in the crimes. Such evidence was provided in the form not only of juror and attorney declarations previously submitted to this Court in connection with his 2004 motion to reinvest jurisdiction for coram nobis purposes (Add. 1046-1048), but also of the new and previously unavailable attorney affidavit filed under seal that set forth additional evidence of bias and misconduct. Echols demonstrated below that the new affidavit was not subject to a valid claim of privilege, and that the statements and events it described could not be deemed inadmissible evidence of juror thought processes because it described events occurring and communications made before deliberations ever commenced.

The circuit court concluded that the bias and conduct evidence, including the new attorney affidavit filed under seal, was not cognizable and that its consideration was barred by law of the case. (Add. 910-911) This conclusion, however is flawed for at least two reasons.

First, as Echols contended above, the new trial statute set forth in §16-112-208(e)(3) directly places in issue the weight and credibility of the original trial evidence, and evidence of bias and misconduct undermines the presumption that jurors assessed *that* evidence -- as opposed

to the Misskelley confession -- in the State's favor. *See* Add. 673 (contending that to secure new trial relief, petitioner must present "necessarily extraordinary proof" for nothing else "could undo a presumptively valid criminal conviction.")

Second, the circuit court's reliance on the law of the case is unfounded. That is because 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. Furthermore, whether such a showing is cognizable under one standard or statute says nothing about whether it is cognizable under the wholly different one addressed here. In any event, 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 petitioner 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.

DATED: March __, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deborah R. Sallings, hereby certify that on March ____, 2009, the original and 17 copies of the ABSTRACT, BRIEF and ADDENDUM FOR APPELLANT were filed with the Clerk of the Supreme Court; and a true and accurate copy same 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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