IN THE ARKANSAS SUPREME COURT

DAMIEN WAYNE ECHOLS APPELLANT

V. NO. CR 08-1493

STATE OF ARKANSAS APPELLEE

RESPONSE TO APPELLANT ECHOLS'S MOTION TO CORRECT SUPPLEMENTED RECORD ON APPEAL

Comes now the appellee, the State of Arkansas, by and through counsel, Dustin McDaniel, Attorney General, and David R. Raupp, Senior Assistant Attorney General, and, for its response, states:

Echols essentially seeks to supplement the record with an *uncertified* copy of an apparently missing exhibit (apparently first filed under seal by his codefendant Jason Baldwin in companion litigation in circuit court and known as so-called Baldwin Exhibit 76) which was neither included in the initial or supplemental record prepared and certified by the circuit clerk.[1] His motion should be denied for any one of a number of reasons.

First, the State is unaware of any authority that permits correcting or supplementing an appellate record with an uncertified copy of a document, and Echols points to none. While his motion's heading makes a reference to Rule 6(e) of

[1]To the State's knowledge, the exhibit is not contained in the supplemental record filed in Baldwin's companion appeal, docketed as CR 09-60. Baldwin has filed his initial brief apparently without pursuing the record point further.

the Arkansas Rules of Appellate Procedure—Civil, that Rule does not contemplate doing so, as it requires that a "supplemental record be certified and transmitted." Id. After all, it is axiomatic that this Court does not resolve in the first instance factual matters as to what transpired below. Yet that is what Echols seeks by his motion and supporting affidavits asking the Court to accept his "true and exact copy of omitted Exhibit 76." Echols's Mot. at 4. While the State has no reason to doubt Echols's counsel's representations or those of Affiants Stephen Engstrom and Cody Fry as to the accuracy of that document, apparently provided to this Court under seal, only the circuit court can settle whether Baldwin Exhibit 76 was filed below and whether the document sought to be substituted now is a "true and exact" copy of it. In short, the appellate record should not be corrected or supplemented with uncertified documents by virtue of affidavits filed in this Court. Cf. Jacobs v. State, 316 Ark. 96, 870 S.W.2d 740 (1994) (per curiam) (Court will not permit supplementation of record with material not part of decision below).[2]

[2]Rule 6(e) does contemplate that the parties may stipulate that a record be supplemented with certified documents, and the State regularly accommodates appellants by so stipulating. It cannot do so here, of course, not only because a certified copy of the so-called Baldwin Exhibit 76 has not been procured, but also because it has never been served with such a copy. As explained in the text, however, want of the exhibit was not an obstacle below to litigating or resolving the claim advanced as to it, and want of it now is not an obstacle to resolution of the appeal.

Second, the Court may dispose of a case even on an arguably incomplete record. As the Court has explained, "a full and complete record is not necessary; instead, [it can] evaluate the record on appeal to determine whether it is sufficient . . . to perform a review of the claimed errors." Lewis v. State, 354 Ark. 359, 362, 123 S.W.3d 891, 893 (2003) (citations omitted). The record here is sufficient because the circuit court denied Echols's claim founded on Baldwin Exhibit 76 without respect to its contents (and certainly without any discussion of its contents). The circuit court denied Echols's DNA habeas petition, summarily rejecting his juror-misconduct claim by agreeing with the State that the court could not entertain the claim under the DNA-testing statute because such a claim is not cognizable and that any consideration of it was foreclosed by law-of-the-case.[3] In short, whether the circuit court was correct for those reasons can be determined without reviewing the exhibit because the circuit court's ruling did not turn on its review of the exhibit.

Finally, in the case of an apparently missing exhibit, it appears that the appropriate remedy would be a remand to the circuit court to settle the record under

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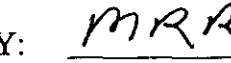
[3]The State explained below, *inter alia*, that this Court had already rejected Echols's efforts to raise such a claim either by recalling its mandate or reinvesting the circuit court with jurisdiction to consider it in a petition for a writ of error coram nobis, see Echols v. State, 360 Ark. 332, 201 S.W.3d 890 (2005), and that the statute additionally foreclosed the claim by its provision that a court "may summarily deny a petition if the issues raised in it have previously been decided by ... the Arkansas Supreme Court in the same case." Ark. Code Ann. §16-112-205(d) (Supp. 2003 & Repl. 2006).

at all and is unnecessary for this Court's review of Echols's appeal here, any remand to settle the record as to the exhibit is premature unless and until this Court rejects the circuit court's resolution of Echols's juror-misconduct claim as either not cognizable or barred by law of the case.

WHEREFORE, the State asks that Echols's motion be denied.

Respectfully submitted,

DUSTIN McDANIEL
Attorney General

BY: 

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CERTIFICATE OF SERVICE

I, David R. Raupp, Senior Assistant Attorney General, do hereby certify that I have served a copy of the foregoing pleading for Appellee, by mailing a copy of same, by U.S. Mail, postage prepaid, to counsel for appellant, this 8th day of June, 2009, at:

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