IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

CHARLES JASON BALDWIN PETITIONER

NO. CR 93-450B

STATE OF ARKANSAS RESPONDENT

RESPONSE TO PETITIONER BALDWIN'S PETITION FOR WRIT OF HABEAS CORPUS UNDER ARK. CODE ANN. § 16-112-201, ET SEQ. AND MOTION FOR A NEW TRIAL UNDER §16-112-208(e)(1)

Comes now the State of Arkansas, by and through counsel, Brent Davis, Prosecuting Attorney, Second Judicial District, Dustin McDaniel, Attorney General, and David R. Raupp, Senior Assistant Attorney General, and for its response states:

INTRODUCTION

Petitioner Baldwin seeks a writ of habeas corpus under Ark. Code Ann. §16-112-201 *et seq.* (Repl. 2006) (Act 1780 of 2001), particularly a new trial under §16-112-208(e)(1), for his 1994 capital-murder convictions and life sentences for the 1993 killings of three eight-year-old boys. His petition and accompanying exhibits purport to advance ten points, but they fall under only three principal claims—1) DNA testing results and allegedly new forensic and other evidence (such as a claim that post-mortem animal predation caused some of the injuries to the victims) together undermine the State's trial proof, demonstrating, he argues, his actual innocence; 2) his jury convicted him based on extra-judicial evidence, codefendant's Misskelley's confession, which he additionally argues is unreliable; and 3) additional testing

should be ordered. His claims are meritless, and the Court should deny Baldwin's motion without a hearing.[1]

SUMMARY

Nothing Baldwin has demonstrated or alleged exonerates him of the 1993 killings of the three eight-year-old boys in this case. As it has for 15 years, the State remains confident that he and his codefendants, Damien Echols and Jessie Misskelley, in fact, are guilty of murder for those killings. The State also remains confident, as it has against Echols's many challenges since the jury's 1994 judgments of guilt, that the judgments against all three defendants should be upheld.

Baldwin's lengthy, habeas-corpus and new-trial request under the DNA-testing statute misses the mark for relief by a wide margin. First, his claim to new forensic and other evidence—such as expert opinions that some of the victims' wounds were caused by post-mortem animal predation—is not cognizable under the statute. Those opinions and his other new evidence are not new scientific evidence at all, but simply an effort to cast doubt on the State's trial proof. The statute is not a vehicle for second-guessing trial proof, but for exonerating defendants who demonstrate their actual innocence. Baldwin, however, has not demonstrated his innocence by his DNA-testing results. Whether or not the Court considers his

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[1]Although at a scheduling hearing on April 15, the Court set aside hearing dates in September and October 2008 for this matter (and post-conviction challenges by Baldwin's codefendants), Baldwin's petition for habeas corpus and motion for a new trial can be denied as a matter of law or on the pleadings without an evidentiary hearing as permitted by Ark. Code Ann. §16-112-205(a) (Repl. 2006).

allegedly new evidence (such as the animal-predation theory) alongside his DNA-testing results, those unremarkable results do not (and cannot) demonstrate his actual innocence. Even accepting them as true, his chief results merely exclude him as the source of three insignificant pieces of biological material from the crime scene (two hairs) and perhaps from one victim (a possible allele) and unsurprisingly do not exclude two other persons (a step-father and his friend) as the sources of the hairs. Second, Baldwin's complaints with his jury's verdicts are irrelevant to his claim for a new trial under the DNA-testing statute. In any event, his complaints have been rejected by the Arkansas Supreme Court, and that rejection controls here. Finally, he has not demonstrated that further testing is warranted under the applicable standard, that testing will demonstrate a reasonable probability that he did not commit the murders.

An evaluation of Baldwin's request for new-trial relief under the statute, which the State makes at length in this response's Argument section following a brief procedural history, *infra*, demonstrates that he is entitled to no relief. As detailed there, the Court should deny his petition and new-trial motion under the statute for one of several, alternative reasons. First, under Ark. Code Ann. §16-112-208(b), Baldwin's DNA-testing results are inconclusive as to his claim of actual innocence. Second, in the alternative, holding him to the correct burden under Ark. Code Ann. §16-112-208(e), he has not demonstrated that his DNA-testing results establish by compelling evidence that he would be acquitted. His motion wrongly relies on other-evidence claims, such as his animal-predation theory, to discredit the State's trial proof and understates his legal burden, relying on an inapplicable federal standard.

Finally, even considering his other-evidence analysis and applying his easier, federal standard, he still has failed to demonstrate that he would be acquitted.

PROCEDURAL HISTORY

Baldwin's capital-murder convictions and life sentences were affirmed on direct appeal in 1996. Echols v. State, 326 Ark. 917, 936 S.W.2d 509 (1996). In 1997, he filed a petition for relief under Arkansas Rule of Criminal Procedure 37 and recently filed an amended Rule 37 petition, which also is pending before the Court. After the adoption of Act 1780 in 2001, first codified at Ark. Code Ann. §16-112-201 *et seq.* (Supp. 2003), he and his codefendant, Damien Echols, pursued relief under that new habeas-corpus subchapter by motions for forensic DNA testing.[2]

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[2]Shortly after the adoption of Act 1780 of 2001, the Arkansas Supreme Court observed that, "[b]ecause it was recently enacted, this court has not had the opportunity to consider the constitutionality of the act, whether it conflicts with other postconviction remedies available to the convicted defendant, or otherwise to address the provisions of the statute." Hardin v. State, 350 Ark. 299, 301, 86 S.W.3d 384, 385 (2002) (per curiam). Since then, that court has neither entertained nor answered a challenge to the statute's constitutionality under the Arkansas Constitution's provision guaranteeing the separation of powers, see Ark. Const. Art. 4, § 2, founded on the claim that the statute impermissibly authorizes courts to grant petitioners relief from criminal judgments without a claim of error in the underlying proceedings. A request for relief from a criminal judgment without a claim of error in the underlying proceedings, however, is a request for clemency, see Abbott v. State, 256 Ark. 558, 563, 508 S.W.2d 733, 736 (1974), vested in the Governor

During that time, Echols had two post-conviction cases pending in the Arkansas Supreme Court and sought and received a stay of those cases due to the pendency of his motions for DNA testing. Echols v. State, 350 Ark. 42, 84 S.W.3d 424 (2002) (per curiam). When it became evident that the DNA testing would not conclude before the supreme court's last stay expired, it decided Echols's pending cases in October 2003, affirming this Court's denial of Rule 37 relief and denying Echols's petition to reinvest the Court with jurisdiction to consider a petition for a writ of error coram nobis. Echols v. State, 354 Ark. 530, 127 S.W.3d 486 (2003); Echols v. State, 354 Ark. 414, 125 S.W.3d 153 (2003).

In June 2004 and February 2005, the Court entered an order and an amended order, respectively, for DNA testing as to both Echols and Baldwin, finding that the parties agreed to the testing of certain items. The Court also noted that the parties reserved certain rights, including a right by the State to object to the relevance of any testing results as they might pertain to a claim for relief under the DNA-testing

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pursuant to Art. 6, § 18 of the Arkansas Constitution. E.g., Osborne v. State, 237 Ark. 5, 7, 371 S.W.2d 518, 520 (1963). The General Assembly cannot delegate this power to the courts without infringing on the Governor's powers. Abbott, 256 Ark. at 562-63, 508 S.W.2d at 736. Nevertheless, this Court need not resolve whether the statute or Baldwin's requests for relief under it would infringe the Governor's clemency power because Baldwin clearly is not entitled to relief under the statute and the courts have a duty to avoid reaching constitutional decisions unnecessary to the disposition of a case. E.g., Solis v. State, 371 Ark. 590, 598-99, ___ S.W.3d ___, ___ (2007).

statute. In October 2004, however, Echols again had pursued relief from the Arkansas Supreme Court, filing with it a motion to recall the mandate of his direct-appeal and Rule-37 cases, to reinvest this Court with jurisdiction to consider a petition for a writ of error coram nobis, or for other extraordinary relief, in which he alleged that his trial jury had been biased against him and wrongly considered evidence that codefendant, Jessie Misskelley, had confessed to the crimes. The supreme court denied his motion in January 2005, and encouraged the parties to conclude the DNA-testing matter. Echols v. State, 360 Ark. 332, 201 S.W.3d 890 (2005). In denying Echols's petition for rehearing, the supreme court explained that the parties had failed to advise it of the status of the DNA-testing matter in this Court, but again stressed the importance of concluding it. Echols v. State, 361 Ark. 15, 201 S.W.3d 896 (2005).

Echols, nevertheless, chose next to seek relief in federal district court, filing in late October 2007, a second amended federal habeas-corpus petition. The federal district court, however, concluded that his claim relying on DNA testing was unexhausted in state courts due to the pendency of his petition in this Court and, therefore, continued its so called stay-and-abey of the proceedings in federal court pending the exhaustion of state-court remedies. Consequently, Echols had to return to this Court to seek relief under the DNA-testing statute, and the Court in April 2008 set a pleading and hearing schedule for all parties, including Baldwin, who has not yet pursued relief in federal court. Pursuant to that schedule, Baldwin filed his

pending petition and motion.[3] After that filing, he sought to expand the scope of inquiry in this Court by seeking permission to reinvest it with jurisdiction to consider

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[3]During the regular legislative session of 2005—after the Court ordered DNA testing and before Baldwin filed his pending petition for habeas corpus and motion for a new trial—the General Assembly amended the DNA-testing statute. See 2005 Ark. Acts, No. 2250. Among other changes, the amendments added a rebuttably presumptive period of untimeliness for motions filed 36 months after the date of a person's conviction, a requirement that motions be filed under penalty of perjury, and added a new section concerning testing procedures that includes the particular subsection under which Baldwin now seeks a new trial. Compare Ark. Code Ann. §§16-112-201, 16-112-202 (Supp. 2003) with Ark. Code Ann. §§16-112-201, 16-112-202(10)(B), 16-112-208 (Repl. 2006).

Because, as explained in the text, his petition for habeas relief and motion for a new trial under the new provisions of §16-112-208 should be denied, the Court need not resolve whether Baldwin also must comply with other strictures of the amended statute as to his pending petition and motion. Cf. generally Douthitt v. State, 366 Ark. 579, 237 S.W.3d 76 (2006) (per curiam) (applying 2005 amendments, discussing 36-month limit). For present purposes, the State is satisfied that Baldwin will submit to penalties for perjury as to his claims under §16-112-201(a) and that he could show good cause for his presumptively late motion—filed well beyond 36 months after his 1994 conviction, see id. at 581, 237 S.W.3d at 78—under §16-112-202(10)(B)(v), arguably due to consent of the parties. Cf. generally Scott v. State, No. CR 08-48, slip op. at 2 (Ark. Mar. 6, 2008) (per curiam) (citing statute and

claims in a petition for a writ of error coram nobis, but the supreme court recently denied his request without prejudice. See Baldwin v. State, No. CR 94-928 (Ark. Jun. 26, 2008) (Orders List). He also should be denied any relief in this Court for one of the several, alternative reasons that follow.

ARGUMENT

I. – VI., VIII., & X.

THE COURT SHOULD DENY BALDWIN'S PETITION FOR HABEAS CORPUS AND MOTION FOR A NEW TRIAL BECAUSE THE DNA-TESTING RESULTS HE OBTAINED ARE INCONCLUSIVE AS TO HIS CLAIM OF ACTUAL INNOCENCE, OR, ALTERNATIVELY, BECAUSE, WHEN CONSIDERED WITH ALL THE OTHER EVIDENCE IN THE CASE, THE DNA-TESTING RESULTS DO NOT ESTABLISH BY COMPELLING EVIDENCE THAT A NEW TRIAL WOULD RESULT IN AN ACQUITTAL.

Although Baldwin has styled his pleading as both a petition for habeas corpus and a motion for new trial and pleaded for alternative relief under Ark. Code Ann. §§ 16-112-201 and 16-112-208, the State's response focuses on the latter provision. As it is plain that he cannot obtain a new trial under that provision, he necessarily cannot obtain any habeas-corpus relief under the former provision, even assuming that it governs available relief. Baldwin cannot obtain relief under either of the two controlling statutory provisions upon which the Court may rely in considering his DNA-testing results. The first, Ark. Code Ann. §16-112-208(b), addresses

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Douthitt to explain petition must establish ground that overcomes untimeliness presumption).

inconclusive testing results; the second, Ark. Code Ann. §16-112-208(e), addresses results that exclude a petitioner. The State takes them in order.

A. Denial of relief under §16-112-208(b). Even accepting Baldwin's DNA-testing results as correct, they are inconclusive as to his claim that he is actually innocent of his crimes, requiring denial of his petition and motion.

1. Statutory Analysis

The DNA-testing statute was adopted to permit courts to order DNA testing that could "exonerate the innocent." 2001 Ark. Acts, No. 1780 §1. As the Louisiana Court of Appeals has explained with respect to Louisiana's DNA-testing statute also adopted in 2001, it is "directed toward freeing the innocent, and not toward a reweighing of the evidence used to convict." State v. Johnson, 971 So.2d 1124, 1130 (La. App. 1st 2007), rev. granted, No. 2007-KP-2034 (La. Jun. 6, 2008) (internal quotation marks and citation omitted) (Attached as State's Exhibit "A"). The Arkansas statute is similarly, narrowly directed; as the Arkansas Supreme Court has said, "Act 1780 was ... meant to be used to test evidence that will prove *actual innocence* of a wrongly-convicted person." Johnson v. State, 356 Ark. 534, 549, 157 S.W.3d 151, 163 (2004) (emphasis in original). It permits the commencement of proceedings (now under penalty of perjury) for scientific testing previously unavailable (like the DNA testing conducted for Echols and Baldwin) when the facts underlying the claim of actual innocence, "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[.]" Ark. Code Ann. §16-112-201(a)(2) (Supp. 2003 & Repl. 2006). Thus, motions for testing,

both at the time Baldwin first filed such a motion and now, must be in service of a claim demonstrating "the person's actual innocence[.]" Ark. Code Ann. §16-112-202(a)(1) (Supp. 2003); §16-112-202 (Repl. 2006). Indeed, as the statute required at the time and as the Court's Orders For DNA Testing filed in June 2004 and February 2005, found, the parties agreed that certain biological material to be tested had the scientific potential to produce new non-cumulative evidence which might be materially relevant to Baldwin's claim of actual innocence. See Ark. Code Ann. §16-112-202(c)(1)(B) (Supp. 2003).[4]

That the parties agreed to DNA testing under the former version of the statute, however, does not answer how the Court should evaluate the results of that testing, as Baldwin apparently presumes, under the current statutory scheme.

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[4]This rather low threshold for testing has been replaced by the more stringent requirement that the proposed testing may produce new material evidence that raises "a reasonable probability that the person making a motion [for testing] did not commit the offense[.]" Ark. Code Ann. §16-112-202(8)(B) (Repl. 2006). Suffice it to say that the State would not have agreed to the testing done in this case under the new standard because the mere exclusion of Baldwin as the source of DNA from some items taken from the crime scene and perhaps from a victim and the inability to exclude two other persons acquainted with a victim as the source—the essential foundation for his current petition and motion—while arguably relevant to his simple *assertion* of actual innocence (the former standard to pursue testing) hardly raise a *reasonable probability* that he did not commit the murders in this case. Indeed, as explained at point IX, *infra*, additional testing should be denied under this standard.

Rather, that scheme contemplates three possible scenarios following DNA testing: 1) inconclusive results that support *either* more testing *or* the denial of relief, 2) results establishing the petitioner as the DNA source, leading only to a denial of relief, or 3) results excluding the petitioner as the DNA source, supporting a permissive motion for a new trial. See Ark. Code Ann. §16-112-208 (b), (c), & (e) (Repl. 2006). While Baldwin's petition and motion invokes the third scenario, claiming that he is entitled to file a motion for a new trial under §16-112-208(e)(1) because some tests results excluded him as the source of some DNA evidence, he is mistaken that the Court must employ only that provision to evaluate his request.

The Court should deny Baldwin relief under the first scenario because the testing results are wholly inconclusive as to his claim of actual innocence. While the statute does not define the term "inconclusive" as used in §16-112-208(b), its meaning must be interpreted in light of the purposes of the statute as expressed by the intent of the legislature. See, e.g., State v. Owens, 370 Ark. 421, 424, ___ S.W.3d ___, ___ (2007). The legislative intent is not in doubt—to provide a statutory scheme for scientific testing that can exonerate the innocent, see 2001 Ark. Acts, No. 1780 §1; that is, to entertain claims of actual innocence that, "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[.]" Ark. Code Ann. §16-112-201(a)(2) (Supp. 2003 & Repl. 2006). As to actual innocence, §16-112-208 contemplates that DNA-testing results will either 1) be inconclusive as to a claim of actual innocence as in (b), 2) refute such a claim as in (c), or 3) compellingly support such a claim, despite all evidence of guilt, to the effect that a

new trial would result in an acquittal as in (e). Thus, even if testing results exclude the petitioner and, therefore, could support a motion for new trial under §16-112-208(e)(1), even that provision provides only that the petitioner "*may* file a motion for a new trial ...." Id. (emphasis added). That permission to file, however, does not preclude the Court from denying relief under paragraph (b) when, as here, the results are inconclusive as to the claim of actual innocence.

In other words, conclusive scientific results do not necessarily compel conclusive legal results because a scientific conclusion may be insignificant as to a legal one. The alternative relief available for inconclusive results under paragraph (b) illustrates that the denial of relief is available even as to conclusive petitioner-excluding DNA-testing results. Even while such testing results may be conclusive—indeed they are likely to be, as testing can only be sought in circumstances that will almost certainly produce conclusive results excluding, *vel non*, a petitioner, see generally Ark. Code Ann. §16-112-202(1) through (9)—the results nevertheless also can be inconclusive as to an underlying claim of actual innocence. The alternatives in (b) demonstrate as much. When the *results* of testing that has met the high threshold of §16-112-202 are nevertheless inconclusive (that is, they do not exclude or establish the petitioner as the source), additional testing is available and appropriate under §16-112-208(b). On the other hand, the outright denial of relief is appropriate when results, while conclusive to the extent they exclude the petitioner as to particular items of evidence, nevertheless are inconclusive as to the claim of actual innocence.

In short, DNA testing that yields inconclusive results cannot, even at the outset, serve the purpose of the statute—exonerating the innocent. Thus, when results alone are inconclusive, additional testing if possible is the better remedy. But when the results (even when conclusive as to the exclusion of a petitioner, as Baldwin claims the results to be here as to some biological material from the crime scene) are inconclusive as to the claim of actual innocence (that Baldwin could not have committed the murders), the Court should deny relief. Consequently, the denial of relief available under §16-112-208(b) is the appropriate remedy here because the DNA-testing results, even accepting the exclusion of Baldwin as the source of some DNA (and the inability to exclude two other persons as the source) of some of the tested items, are inconclusive as to his claim of actual innocence. The scientific conclusion that he was not the source of some DNA evidence is a far cry from the legal conclusion that he could not commit the crimes.

2. The Measure of Inconclusive As To Actual Innocence

Although the measure of inconclusiveness as to a claim of actual innocence under §16-112-208(b) apparently is a case of first impression for this Court, the statute itself provides a benchmark found, again, in the purpose of the statute—to exonerate the innocent—and a comparison to Louisiana case law illustrates the point. In order for evidence to exonerate a convicted person as actually innocent, it must, at a minimum, exclude him as a possible perpetrator, not simply exclude him as a source for some biological material. Thus, just as DNA-testing results can be said to be inconclusive when failing to exclude a petitioner as the donor of biological material, so too can the results be said to be inconclusive as to a claim of actual

innocence when failing to exclude a petitioner as a possible perpetrator of a crime. See Johnson, 971 So.2d at 1131-32 (absent proof DNA could only be from assailant, exclusion of Johnson as source not clear and convincing evidence of factual innocence). That is, even if DNA-testing results exclude a petitioner as the source of biological material, he cannot obtain a new trial without satisfying the standard of proof required by §16-112-208(e)(3)—a showing that, when considered with all the other evidence of guilt, his DNA-testing results establish by compelling evidence that a new trial would result in an acquittal.

In order to compel that conclusion, DNA-testing results certainly must exclude a petitioner as the perpetrator under (e)(3). Nothing less could compellingly lead to an acquittal when considered with all other evidence that previously supported a verdict of guilt beyond a reasonable doubt, to say nothing of additional evidence of guilt which also may be considered. Cf. Johnson, 971 So.2d at 1131-32 (applying Louisiana statute). Thus, if, at a minimum, results must exclude a petitioner as the perpetrator to warrant even pursuit of relief under (e)(3), results as to a claim of actual innocence must, at a minimum, exclude a petitioner as a possible perpetrator under (b). Because the DNA-testing results upon which Baldwin relies do not exclude him as even a possible killer, they are inconclusive as to his claim of actual innocence, and his motion should be denied under §16-112-208(b).

The DNA-testing results upon which Baldwin relies—his exclusion as the source of some biological material recovered from the crime scene and perhaps from one victim and the non-exclusion of two persons acquainted with one of the victims as the source, even if taken as true—do not exclude him as a possible killer because

they simply cannot exclude that possibility. It is common sense that a person's exclusion as the source of some biological material found at a murder scene neither means that he was not there, nor that he was not a killer. Likewise, common sense dictates that the recovery of biological material from a crime scene, or even from a victim, does not make a killer of a person who is not excluded as its potential source. DNA-testing results that neither exclude nor identify a killer under §16-112-208(b) are simply inconclusive as to a claim of actual innocence as to the homicide. Cf. Engram v. State, 341 Ark. 196, 201-03, 15 S.W.3d 678, 680-81 (2000) (discussing conclusive DNA proof of guilt as sufficiency matter). Indeed, as to crimes like those committed by Baldwin, it may well be that DNA-testing results can never conclusively support a claim of actual innocence. In cases like this, they simply tell too little to be proof of actual innocence. Cf., e.g., Johnson, 971 So.2d at 1130 (collecting cases noting absence of defendant's DNA from victim's fingernail scrapings or clippings not proof of actual innocence).

Here, for example, to accept Baldwin's claim of actual innocence, the Court would have to reject, not only the circumstantial proof of his guilt, but also his admission that he killed the victims and the admissions of both of his codefendants, particularly the detailed one of Jessie Misskelley, even considering only the abbreviated versions in the published opinions on direct appeal. See Echols v. State, 326 Ark. 917, 938, 936 S.W.2d 509, 518 (1996); Misskelley v. State, 323 Ark. 449, 459-61, 915 S.W.2d 702, 707-08 (1996). He counters that proof only with the unremarkable DNA-testing results that simply exclude him as a source of some biological material and do not exclude other persons acquainted with one victim.

Those thin results cannot bear the weight of his burden under §16-112-208(b)—the production of *compelling* DNA-testing results that *would* result in an *acquittal* due to their exclusion of him as a possible killer.

Indeed, it is apparent that Baldwin implicitly agrees that his results do not demonstrate his actual innocence, as evidenced by his own petition and motion. After all, he does not claim that the DNA-testing results standing alone exclude him as a killer, but instead he depends upon an extensive re-examination of his prosecution, particularly by reliance on what he identifies as additional evidence, including a theory of post-mortem animal predation, all in the service of discrediting the case against him. See Pet. at V., VI. VII, & X. Discrediting his prosecution however is not his burden; the time for doing so passed with his trial and direct appeal. His burden now is to demonstrate his actual innocence by evidence that excludes him as a killer. As explained above, he has not met it, and a hearing is unnecessary to conclude as much. Consequently, his motion should be denied because his DNA-testing results are inconclusive as to his claim of actual innocence.

B. Denial of relief under §16-112-208(e). With or without consideration of his purported new forensic evidence and other additional evidence, Baldwin has not demonstrated by compelling DNA-testing results that he would be acquitted.

Even assuming that Baldwin is entitled to consideration of his new-trial motion under §16-112-208(e)(3), rather than subject to denial of relief due to inconclusive results as to his claim of actual innocence under (b) as argued above, he cannot prevail for several reasons. First, he is not entitled to the consideration of his

so-called additional evidence, such as that alleging post-mortem animal predation, to make a claim of actual innocence under (e)(3) because such evidence is not cognizable; second, he has understated his burden of proof under (e)(3) by wrongly equating it with a federal standard applicable to a wholly different type of relief; and, third, even indulging him consideration of his allegedly new forensic evidence and applying his proposed lower burden of proof, he cannot prevail.

1. Baldwin's so-called new forensic evidence and other additional evidence is not cognizable.

Baldwin is mistaken that the Court must consider additional evidence, such as that of his theory of post-mortem animal predation, under the guise of so-called new forensic evidence pursuant to the requirement of §16-112-208(e)(3) that DNA testing results be considered "with all other evidence in the case regardless of whether the evidence was introduced at trial[.]" His reading of that statutory phrase wrongly takes it out of context. The phrase is set off by commas in a sentence that explains the context in which a court may grant a new-trial motion. A court may do so when DNA "test results ... establish by compelling evidence that a new trial would result in an acquittal." It is DNA-testing results—not any other evidence—that must establish acquittal by compelling evidence. The statute, after all, is designed to permit such testing so that a petitioner can prove his innocence with its results, not to reweigh or otherwise re-examine the trial evidence. The "other evidence" to be considered is *as against* those results, not in service of them. That is to say, it is other evidence of guilt, regardless of whether it was introduced at trial. Were it otherwise, as in his limitless interpretation of the phrase, the statute would be nothing more

than a vehicle to retry the entire case again, which it certainly is not, as explained above. Cf. Johnson, 971 So.2d at 1130 (Louisiana DNA-testing statute "directed toward freeing the innocent, and not toward a reweighing of the evidence used to convict."); cf. also Johnson, 356 Ark. at 549, 157 S.W.3d at 163 (explaining under prior version that statute meant for "evidence that will prove *actual innocence* of a wrongly-convicted person").[5]

The lengthy forensic/additional-evidence critique contained in his petition and motion illustrates the point. His critique and his supporting exhibits are impressive only by volume, not content. One need only observe that some of the victims' injuries that Baldwin now attributes to animal predation, his codefendant Echols previously attributed to human bite marks that the defendants could not have made (a point on which Echols challenged his trial counsel's effectiveness, see

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[5]Had the legislature intended for it to be otherwise, it readily could have provided that both incriminating *and* exculpatory evidence could be considered under (e)(3), as the federal standard expressly provides, as noted in House v. Bell, 547 U.S. 518, 538 (1996), upon which Baldwin otherwise relies. Given the much greater relief available under the statute, it is unsurprising that the evidence that may be considered here is more narrowly circumscribed than that under House. Baldwin's reliance on the phrase "evidence as a whole" from §16-112-201(a)(2) lends no support to his effort. Had the legislature intended that phrase to mean anything more than the State's explanation of the meaning of other evidence found in §16-112-208(e)(3), it would have said so when it added the latter section in 2005. See generally 2005 Ark. Acts, No. 2250.

Echols, 354 Ark. at 553-55, 127 S.W.3d at 500-02) in order to see that there is no end to new forensic evidence that he might manufacture. The point here is not to disparage Baldwin's counsel or his experts for doing so, but only to explain that their inventiveness is out of place under the statute he now invokes. His collection of new expert opinions and new potential witnesses to challenge the State's trial evidence against him might have formed the basis for collateral post-conviction claims that his trial counsel failed him, for example, as noted above and evidenced by some of the claims made in his pending Rule 37 petition, but the menagerie he offers the Court has no place in evaluating now whether his DNA-testing results establish by compelling evidence that he would be acquitted. Stated differently, his new forensic evidence and additional evidence, particularly his post-mortem animal-predation claim, is simply not cognizable under the DNA-testing statute. It is not new scientific evidence, only newly advanced evidence.

In sum, it is because all trial evidence is open to the type of endless critique, second-guessing, and reassessment that he offers, that such allegedly new forensic or additional evidence has no place for consideration under (e)(3) in determining whether DNA-testing results establish by compelling evidence that a petitioner would be acquitted. Rather, the statute permits the Court to consider, not the simple reweighing of evidence used to convict, but only the necessarily extraordinary proof that could undo a presumptively valid criminal conviction without any demonstration of trial error in the exceedingly rare case of a defendant who has demonstrated his actual innocence.

Baldwin is not that defendant. His many opportunities to challenge the evidence that convicted him have long since passed. The Court need not consider his so-called new forensic and additional evidence to evaluate whether he has met his burden under (e)(3) to show that his DNA-testing results establish by compelling evidence that he would be acquitted at a new trial. As explained, *infra*, those results, even taken as true, establish very little—they merely exclude him as the source of some DNA found at the crime scene and perhaps on a victim and do not exclude two other persons acquainted with one victim as sources. Considered with the other evidence of his guilt, particularly his admission and that of his codefendants, those results are hardly compelling evidence that he would be acquitted at a new trial. Thus, the Court should deny his motion for new trial without considering his purportedly new forensic and other additional evidence.

2. Section 16-112-208(e)(3) requires Baldwin to demonstrate by compelling DNA-testing results that he would be acquitted despite all other evidence of his guilt.

Even assuming the Court does not deny relief to Baldwin because the results of his DNA testing are inconclusive as to his claim of actual innocence under §16-112-208(b), and regardless whether the Court considers his other additional evidence such as his theory of post-mortem animal predation under the guise of allegedly new forensic evidence, his motion can be straightforwardly rejected under §16-112-208(e)(3). That section provides that:

> 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.

While this provision has yet to be interpreted by an Arkansas appellate court, the section admits of no relief short of a demonstration of actual innocence. The very terms of the provision suggest no less, to say nothing of the statutory purpose it is meant to effectuate—exonerating the innocent. The measure of "compelling evidence that a new trial would result in an acquittal" from (e)(3) cannot be the lesser federal gateway standard Baldwin proposes for several reasons.

First, the measure for new-trial relief under (e)(3) logically cannot be *less* than the burden required for simply bringing a claim or merely obtaining testing under the statute generally, as Baldwin's proposed measure is. His suggestion that any standard for the various types of relief from a conviction under the statute can under no circumstance be higher than the federal gateway standard misapprehends the statute's purpose and misinterprets its provisions. Contrary to his reliance on it as a threshold standard for habeas relief, §16-112-201 (which refers to vacation of judgment and discharge of a petitioner) describes what a petitioner must aver *just to pursue* relief, not what he *must prove* to the Court to permit it to actually grant post-conviction relief; §16-112-202, in turn, states what a petitioner must aver just to obtain testing.[6] The point is simply that Baldwin's choice of a measure for ultimate

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[6]As originally enacted, the DNA-testing statute provided no clear standard for awarding relief. See Ark. Code Ann. §16-112-201 *et seq.* (Supp. 2003). Then, as now, §16-112-201 only described what a petitioner could claim, and the only standard then was the threshold in §16-112-202 governing orders for testing, not post-

relief that suits his claims does not make it so under the statute.[7] Rather, the Court must determine the measure of the statute under which he could obtain relief in light of all its provisions and the legislative purpose of the statute as a whole.

That analysis begins with the statute's purpose (to provide a mechanism for testing to exonerate the innocent), must consider the higher threshold that evidence must now reach before testing can be ordered (evidence raising a reasonable probability that the petitioner did not commit the offense), and ends with the text of §16-112-208(e)(3) that any DNA-testing evidence compellingly prove acquittal. If the statue admits of scaled burdens, it requires the greatest evidentiary burden of a petitioner before he can obtain new-trial relief. That burden is certainly greater than the federal gateway standard on which Baldwin relies; essentially it is evidence that would compel a verdict of innocence.

Baldwin's would-be employment of the standard from House v. Bell, 547 U.S. 518 (2006), is patently inconsistent with the posture of his case and the available state statutory relief. Indeed, the facts of House are so distinct from those here that, even

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conviction relief. That is the only standard the Arkansas Supreme Court has had occasion to interpret. See Johnson v. State, 356 Ark. 534, 543-51, 157 S.W.3d 151, 159-64 (2004). As explained in the text, and at note 4, *supra*, that low threshold no longer controls.

[7]Whether his premise that §16-112-201(a) states a threshold standard upon which a court could vacate a judgment and discharge a petitioner is consistent with the separation-of-powers doctrine and the Governor's clemency power need not be resolved by this Court in order to reject his argument, as explained at note 2, *supra*.

if House controlled, they only illustrate that relief should be denied, as explained more fully below at B.3. As it is, House does not control. As the United States Supreme Court explained, House raised his claim of actual innocence in federal court to excuse his failure to raise in Tennessee state court several federal constitutional challenges to his trial proceedings. Id., 547 U.S. at 521. That is, his demonstration of his actual innocence under the federal standard—new evidence demonstrating it is more likely than not that no reasonable juror would find him guilty—would simply permit him to raise those challenges in federal court. Id. at 536-37. Even carrying his burden he could not win a new trial, but only the *opportunity* to press on with his *collateral* attack on his trial.[8] Contrary to Baldwin's suggestion, House did not rely on or announce a constitutional standard. The federal gateway standard employed there is simply a jurisprudential construction, not a constitutional right. See Herrera v. Collins, 506 U.S. 390, 404 (1993). Also contrary to Baldwin's reliance on House in his effort to retry his case in this proceeding is the long-standing recognition that a state trial is the main event, not merely a tryout for later collateral review. See, e.g., Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

Baldwin seeks a great deal more from this Court than House received from the United States Supreme Court. He asks that it wipe clean the long presumptively valid determination of his guilt under a statute that requires no demonstration that

[8]House prevailed on several of his claims in federal district court in December 2007, House v. Bell, 2007 WL 4568444 (E.D. Tenn. 2007), and the Sixth Circuit recently affirmed. House v. Bell, 2007 WL 1943935 (6th Cir. 2008) (per curiam).

his trial was constitutionally infirm.[9] If a scale exists on which to measure the burden Baldwin must meet, it must correspond to the extraordinary relief he seeks. The relief House sought was far more modest, merely the opportunity to pursue in a federal habeas-corpus proceeding constitutional challenges to his trial proceedings that were barred from review in state court. In other words, the lesser gateway relief House pursued could be obtained by an actual innocence burden less than that Baldwin must meet to obtain a new trial. If Baldwin's burden is to be compared to House's, they certainly are not equivalent, and Baldwin's burden is the greater one. A greater remedy requires a greater evidentiary showing. That greater showing is not the so-called gateway actual-innocence demonstration from federal courts, but a freestanding demonstration of actual innocence that would warrant extraordinary relief from his judgments of guilt.[10] Only such a remarkable showing calls for a new trial under the statute.

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[9]Despite his effort to do so, Baldwin's complaint with his jury's deliberation—addressed at point VII, *infra*—cannot inform whether he can obtain relief under the DNA-testing statute. That statute is concerned with proof of actual innocence without respect to direct or collateral challenges to the validity of trial proceedings. Whether such challenges can support collateral relief is a matter for resolution in other proceedings.

[10]As the Supreme Court explained in House, the burden to be met on a freestanding claim of actual innocence remains only a hypothetical construct for relief from a *death sentence*, id., 547 U.S. at 554-55, which Baldwin did not receive. Whatever that hypothetical burden, the Supreme Court concluded House's effort fell

Consequently, House does not set the standard of proof that Baldwin must meet. Rather the burden of compelling evidence necessary to demonstrate an acquittal required by §16-112-208(e)(3) is necessarily greater than the burden from House. Nevertheless, it is unnecessary for this Court to determine with precision what that measure is. Because Baldwin cannot meet even the lower burden required in House, as demonstrated at B.3., *infra*, he certainly cannot meet the burden required to support his claim for a new trial under §16-112-208(e)(3).[11] Thus, the Court should deny his petition and motion.

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short. Id. at 555. Moreover, individual justices have explained that the burden certainly would be higher than the gateway standard, see House, 547 U.S. at 556 (Roberts, C.J., Scalia and Thomas, JJ., concurring in the judgment in part and dissenting in part) and certainly would be "extraordinarily high." Herrera v. Collins, 506 U.S. 390, 417 (1993).

[11]Baldwin's reliance on §16-112-201(a), which refers to the possible discharge of petitioners from criminal liability, to argue that his evidentiary burden can be met by some House-like, lower evidentiary burden—either to obtain a new trial or habeas relief under that section—ignores two things: 1) the serious constitutional question a statutory judicial discharge or exoneration would raise in light of the Governor's clemency power, as discussed at note 2, *supra*, and 2) the adoption in 2005 of §16-112-208. His theory simply does not square with the two provisions concerning relief to which he points when they are read harmoniously and to avoid constitutional doubt, as the Court must read them. See, e.g., Solis, 371 Ark. at 598-99, ___ S.W.3d at ___; State v. L.P., 369 Ark. 21, 27, 250 S.W.3d 248, 253 (2007). Rather, as

3. Relief Should Be Denied In Any Event

Even considering Baldwin's allegedly new forensic evidence and additional evidence and accepting his proposed lower standard for actual innocence, the Court should still deny his petition and motion for a new trial for three reasons, and it is unnecessary to hold a hearing to do so. First, considering his new forensic and additional evidence is not the equivalent of crediting it. As explained below, much of it is not creditable, either on its own or in light of the State's rebuttals of it. Second, the Court must consider all evidence of Baldwin's guilt, regardless of whether it was introduced at trial. Despite Baldwin's disputes with it, that evidence, particularly his codefendants' admissions of guilt, is especially damning and fatally undermines his reliance on other additional evidence. Third, the very slender results yielded after the years of DNA-testing in this case pale by even a cursory comparison to House. The "stringent showing" of "a compelling claim of actual innocence," Id., 547 U.S. at 522, found by the Supreme Court in that case is simply missing here.

a. Baldwin's alleged new forensic evidence of post-mortem animal predation should be rejected.

The chief forensic evidence upon which Baldwin relies can be summarized in a single assertion—he now theorizes that post-mortem animal predation caused most of the injuries to his victims rather than any explanation consistent with the

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explained in the text, the remedy of a new trial (to say nothing of outright discharge in state habeas) requires Baldwin to meet a higher evidentiary burden, not a lesser one (like that of House), to support the extraordinary relief from a criminal judgment with no demonstration of a trial defect such as he seeks.

homicides that the State proved at trial as committed by Baldwin and his codefendants as motivated in part by an interest in the occult. He details this purportedly new evidence, see Pet. at V. A. & B., reciting an array of well-known experts who have reported that their review of documentary and other evidence in the case leads them to the opinion that the knife injuries the boys suffered ante-mortem are, instead, the result of post-mortem animal predation. Laying aside that a new forensic theory, no matter how many experts will ascribe to it, is simply not new scientific evidence cognizable under the DNA-testing statute, the State nevertheless disputes the theory. Moreover, the State is fully prepared to present at length its own expert evidence clearly refuting Baldwin's incredible theory of post-mortem animal predation. However, for purposes of this response, and in order to deny relief, the Court need only consider the following brief points.

First, the post-mortem animal-predation theory is incredible. Despite the certainty with which Baldwin's experts assert it today, it was not propounded by the medical examiners who performed the autopsies on the victims the day after their bodies were discovered. State's Exhibit "B" (Autopsy Reports). That omission from those reports, like the omission of a reference to bullet wounds, is telling by itself. Additionally, the findings of the examiners are clearly indicative of ante-mortem injuries (in addition to blunt trauma) that are inconsistent with post-mortem predation. Finally, the autopsy findings on hemorrhaging similarly contradict Baldwin's claims. State's Exhibit "C" (Medical Examiners Letter).

Moreover, the victims were discovered after less than one day submerged in water. The chief medical examiner and a forensic dentist testified at codefendant

Echols's Rule 37 hearing that they observed nothing consistent with bite marks on the victims' bodies, and a police investigator testified that the ditch where the victims were found was pumped dry, yielding no evidence of aquatic animals. State's Exhibit "D" (Echols Rule 37 Testimony). The notion that the victims' injuries were post-mortem animal predation that escaped the observation of investigators and medical and dental experts at the time the bodies were found, recovered, and examined requires the rejection of common sense.

Second, the animal-predation theory is contradicted by proof (which cannot simply be dismissed here) that a knife was used against the victims. In confessing to the crimes, codefendant Misskelley said that Baldwin used a knife to cut the victims on the face and that one victim was cut on his penis, as recounted on direct appeal. Misskelley, 323 Ark. at 460, 915 S.W.2d at 708. In providing a statement to prosecutors after his conviction and against the advice of his attorneys, Misskelley again said that Baldwin cut two victims in his attacks. State's Exhibit "E" (Misskelley Statement to prosecutors). Michael Carson testified that Baldwin admitted that he had "dismembered" the victims and, as to the castrated one, "put the balls in his mouth." Echols, 326 Ark. at 941, 936 S.W.2d at 519-20. To be sure, Baldwin disputes the reliability of Misskelley's confession (and presumably his post-conviction statement) and Carson's testimony, but they indisputably *are* evidence that a knife was used. Finally, Lisa Sakevicius's Misskelley trial testimony concerning the shoelaces used to tie the victims is consistent with a conclusion that a knife was present at the crime scene because one of the black laces was in two pieces. State's Exhibit "F" (Misskelley Trial Record at pp. 1507-10).

The point remains that a confessing codefendant said a knife was used and Baldwin himself described castration of one of the victims, facts that cannot simply be discarded. In short, what happened is not a mystery that requires forensic examination or the search for additional evidence to unravel 15 years after the crimes. Even the confident opinions of forensic experts—formed on the basis of the review of a cold record more than a decade after the crime—do not overcome the contemporaneous observations of a petitioner and his codefendant.[12]

Finally, even if Baldwin's animal-predation theory offers an alternative explanation for some or many of the wounds the victims suffered, it does preclude the possibility that they were *also* injured with a knife ante-mortem. More importantly, this theory does not explain the victims' deaths, in part by drowning, their being stripped, beaten, and hog-tied, or why their clothes were stuck in the mud nearby. Nor does it explain the additional facts that Baldwin was possibly observed quite near the crime scene and later admitted the killings. Echols, 326 Ark. at 938, 441, 936 S.W.2d at 518, 519-20. Baldwin's post-mortem animal-predation theory cannot explain the homicides—the crimes for which he must demonstrate his actual innocence.

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[12]Baldwin's suggestion that his animal-predation claim is somehow more persuasive because the State, heretofore, had not answered it or refuted his experts, Pet. at 55, 62, is flawed for several reasons. First, the State's indulgence of a meeting to listen to his claims incurred no obligation to refute them. Second, silence is itself something of a rejoinder. Finally, and suffice it to say, the burdens are all his at this stage of the proceedings.

b. Extra-trial evidence of Baldwin's guilt wholly undermines his claim for habeas relief or a new trial, particularly as to his reliance on additional evidence.

Baldwin's petition and motion must be considered not only in light of the proof of his guilt upon which his jury convicted him—most of which he purports to discount, Pet. at V., VI., VIII.—but also in light of other evidence of his guilt. The State need point to but two pieces of evidence not introduced against him at his trial—the admissions of his codefendants. At this point, that evidence is especially damning. Baldwin is not like House, a killer who acted alone whose assertion of actual innocence in the face of exculpatory DNA evidence and the admissions of a third party merits some credence. To the contrary, the third-party admissions in this case *inculpate* Baldwin. Whatever disputes he has about their reliability, they cannot be rejected simply because he has a new post-homicide, post-appeal theory of the case. Rather, those admissions fatally undermine his assertion of actual innocence founded on the weak DNA-testing results and forensic/additional-evidence critique on which he bases his petition and motion.

c. <u>House v. Bell</u>

As detailed by the United States Supreme Court, the new evidence that House brought forward in support of his claim of actual innocence was so far greater as substantial support for his claim as to be wholly and qualitatively different than the evidence on which Baldwin relies to make his. House's new evidence included: 1) DNA testing establishing that the semen on the victim's nightgown and panties came from her husband, not House; 2) evidence that bloodstains on House's pants may

well have come from autopsy samples from the victim and not from her during or shortly after the crime; and 3), most troubling to that Court in light of the other new evidence, putative confessions of guilt from the victim's abusive husband. House, 547 U.S. at 540-53.

Nothing advanced by Baldwin even remotely resembles House's showing. Baldwin's DNA-testing results, even taken as correct in excluding him as the source of some insignificant biological material, hardly carry the significance of the results that House obtained showing that semen stains on the victim's clothing were wrongly attributed to him at his trial.[13] That evidence went both to House's identity (as opposed to another known possible source, the victim's husband) and a rape

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[13]Throughout this response, the State has indulged Baldwin's DNA-testing results as excluding him as the source of biological material from particular items from the crime scene and perhaps from a victim. The legal significance of the results, of course, is disputed by the State throughout this response. Additionally, the result as to biological material perhaps from a victim (the *possible* foreign allele on a penile swab) is open to dispute altogether, as illustrated by State's Exhibit "G" (Channell letter and supporting document). While it is unnecessary for the Court to resolve any dispute to deny Baldwin's petition and motion without a hearing, the State would be remiss not to note that the penile-swab result upon which Baldwin relies to claim his exclusion as a source, see, e.g., Pet. at pp. 27-29, apparently is no more significant than the result of a penile swab from another victim, as both initially were classified as incapable of supporting any conclusions. See Baldwin's Exhibit 9 at p. 6; compare generally Baldwin's Exhibits 9 & 12.

allegation, which supported an aggravating factor found to exist by the jury when imposing House's death sentence. Id., 547 U.S. at 528-29, 532. Likewise, nothing alleged by Baldwin compares to the serious question raised by evidence that bloodstains on House's pants used to link him to the crime are, at best, now doubtfully even connected, as they may be the result of spills from autopsy samples when the pants and samples were stored and transported together. Finally, even if Baldwin had comparatively strong new evidence, he posits nothing like that the Supreme Court found in House to tip the balance when considered with the other evidence—direct third-party admissions of guilt by the victim's husband, who had opportunity and motive for her killing.

Thus, even accepting Baldwin's theory of relief, his DNA-testing results—even if considered with his otherwise uncognizable new-forensic/additional evidence critique of the trial evidence against him—do not establish by compelling evidence that he would be acquitted when those results are considered with the extra-trial evidence of his guilt, particularly his admission and that of his codefendants'. Cf. generally Hildwin v. State, 951 So.2d 784, 789-90 (Fl. 2006) (distinguishing House and affirming denial of relief under Florida law on DNA-testing evidence that Hildwin did not contribute bodily fluids on panties and washcloth found in victim's car, although trial evidence suggested he had). One need only cast the question in light of his own proposed standard to see that his motion must be denied. Is it reasonable for a juror—even in light of Baldwin's exclusion as the source of some biological material from the crime scene, his post-mortem animal-predation theory, and other additional evidence—to nevertheless believe that his admission of guilt and

that of his codefendants', his possible physical and temporal proximity to the crimes, and the circumstantial and motive proof for the crimes consistent with the admissions, all come together to make him guilty? A reasonable juror could so conclude, and, consequently, his motion must be denied.

VII.

THE COURT CANNOT ENTERTAIN BALDWIN'S JURY CLAIMS BECAUSE THE DNA-TESTING STATUTE PROVIDES NO BASIS FOR DOING SO, AND, IN ANY EVENT, THE ARKANSAS SUPREME COURT'S REJECTION OF ECHOLS'S SIMILAR CLAIMS CALLS FOR THEIR SUMMARY REJECTION BY THIS COURT.

Offering no authority from the DNA-testing statute to support doing so, Baldwin nevertheless complains of his jury's conduct and simply concludes, *ipse dixit*, that he was denied his right to a jury trial under the federal and state constitutions. See Pet. at VII. His complaint is beside the point or foreclosed.

First, the Court's resolution of Baldwin's petition and motion for a new trial does not depend upon an evaluation of the jury's verdicts or its conduct in rendering them. It depends, rather, upon an evaluation of whether his DNA-testing results are compelling evidence that he is actually innocent. In that calculus, the jury's verdicts are only necessary predicate facts—if it had not returned them, we would not be here. Disputes about how they were derived and their reliability, which the State stands behind and elsewhere has noted is presumptive for finality purposes, is beside the point in the present proceeding as an evaluative matter. That is to say, Baldwin's

claims here—even while the State would dispute them—are only descriptive, not normative.

Even by his own theory, his burden is to demonstrate that his DNA-testing results when considered with all the other evidence compel the conclusion that he would be acquitted. Whether he meets that burden is for the Court to determine, despite the trial jury's verdicts and conduct, based upon the Court's review of the evidence. As even House explains, assuming that it controls here, the analysis it employs does not call for a factual determination about what likely occurred (and certainly not only as the trial jury saw it), "but rather [an assessment of] the likely impact of the evidence on reasonable jurors." Id., 547 U.S. at 538. Whatever complaints Baldwin has with his jurors and their deliberations, they are irrelevant to a determination of how hypothetical reasonable jurors would evaluate the evidence now before the Court. His very complaint that his jury considered his codefendant Misskelley's statement demonstrates the fallacy of his assault on his trial jury. While he complains of his trial jury's alleged reliance on that statement, the Court now can (and must) evaluate Baldwin's actual innocence claim in light of that very statement, among other evidence of his guilt, without regard to whether it was admitted at trial. See Ark. Code Ann. §16-112-208(e)(3).

Second, while the State is at a loss to understand how Baldwin imagines that his jury claims even inform this proceeding, much less can support relief in them, the Court simply cannot entertain them for any purpose. The Arkansas Supreme Court has already rejected Echols's similar efforts, either to recall its mandate or reinvest this Court with jurisdiction to consider them in a petition for a writ of error coram

nobis. Echols v. State, 360 Ark. 332, 201 S.W.3d 890 (2005). That rejection surely forecloses this Court's consideration of Baldwin claims for either of two reasons. The statute forecloses it, providing 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). Thus, to the extent that Baldwin makes jury claims already rejected by the supreme court, the Court may summarily deny them. Additionally, the supreme court's rejection of these claims as foreclosed under A.R.E. 606(b), see Echols, 360 Ark. at 339-40 n.4., 201 S.W.3d at 895 n.4, surely binds this Court.[14] Cf. generally Robinson v. State, 348 Ark. 280, 297, 72 S.W.3d 827, 838 (2002) (law of the case). For any of these reasons, Baldwin's jury claims are irrelevant and foreclosed from review here.

[14]The supreme court's conclusion hardly could have been more plain:

> Finally, Echols's attempt to prove that his jury considered the Misskelley statement is improper. Ark. R. Evid. 606(b) precludes inquiry into a juror's state of mind during deliberations; the rule only permits inquiry into whether any external influence or information could have played a part in the jury's verdict. The purpose of this rule is to balance the freedom of jury deliberations with the ability to correct an irregularity in those deliberations. We have unequivocally stated that any effort by a lawyer to gather information in violation of Rule 606(b) to impeach a jury's verdict is improper.

Echols, 360 Ark. at 339-40 n.4, 201 S.W.3d at 895 n.4 (citations omitted).

IX.

FURTHER TESTING IS UNWARRANTED.

As explained, *supra*, at note 4 and accompanying text, the statutory threshold for testing found at Ark. Code Ann. §16-112-202(c)(1)(B) (Supp. 2003) under which the Court ordered agreed-upon testing in 2004 and 2005 has been replaced by the more stringent requirement that the proposed testing may produce new material evidence that raises "a reasonable probability that the person making a motion [for testing] did not commit the offense[.]" Ark. Code Ann. §16-112-202(8)(B) (Repl. 2006). The State would not have agreed to the testing done in this case under that new standard and objects to the further testing proposed by Baldwin. As previously explained, the mere exclusion of Baldwin as the source of DNA from some items taken from the crime scene and perhaps from a victim and the inability to exclude two other persons acquainted with a victim as the source, while arguably relevant to his simple *assertion* of actual innocence (the former standard to pursue testing), hardly raise a *reasonable probability* that Baldwin did not commit the murders in this case, the standard required now.

The proposed animal-hair testing and additional fiber testing he seeks can, at best, only fall even shorter of the new testing-threshold requirement than the results of the DNA testing done to date.[15] Even if testing demonstrates that some animal hairs were recovered from the crime scene, that hardly raises a reasonable probability

[15]The State objects to any further testing in this case for the reasons explained in the text but confines its argument to refuting the animal-hair and fiber testing proposed by Baldwin because that is all his petition details at point IX.

that Baldwin did not commit the murders that he and his codefendants have admitted. Even if one accepts as true that the recovery of animal hairs supports Baldwin's animal-predation theory, as previously explained that theory cannot explain the victims' deaths, in part by drowning, their being stripped, beaten, and hog-tied, or why their clothes were stuck in the mud nearby.

Neither can further fiber testing raise a reasonable probability that Baldwin did not commit the murders that he has admitted. Even if he can demonstrate that no fibers link him to the crime scene, that fact would not—again, in the face of all three defendants' admissions of the crimes—raise a reasonable probability that Baldwin did not commit them. A hearing is unnecessary to reach this conclusion, and the Court should deny Baldwin's request for further testing without one.

CONCLUSION

One would not expect killings like those Baldwin and his codefendants committed to yield the kind of silver-bullet DNA-testing results that could exonerate them as contemplated by the DNA-testing statute. In turn, it is unsurprising that Baldwin has neither found nor offered any such results or other evidence that call for awarding him any habeas relief or a new trial for those killings. Thus, for the many reasons explained above, the Court should deny his petition for habeas corpus and motion for a new trial.

WHEREFORE, the State respectfully asks that this Court deny the petition for habeas corpus and motion for a new trial without a hearing as suggested by this response.

Respectfully submitted,

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BY: Brent Davis

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, David R. Raupp, Senior Assistant Attorney General, do hereby certify that I have served a copy of the foregoing pleading, by mailing a copy of same, by U.S. Mail, postage prepaid, to counsel for petitioner this 14th day of July, 2008, as follows:

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M R. Rapp
DAVID R. RAUPP

STATE'S EXHIBIT

A

State of Louisiana v. Anthony Johnson
971 So. 2d 1124
(La. App. 1st Cir. 2007)

(Echols Response Exhibit A)

001069

much cash as possible failed to recognize legal tender of the United States because the picture of Benjamin Franklin was "small", and given these doubts did not have the commonly used special pen to simply test the bill, which is exactly what the sheriff's office did in order to release plaintiff from custody. Instead, they shot from the hip and immediately called the police.

While we certainly want to excuse good faith, honest mistakes in reporting crimes, a more flexible justice would allow the issue of gross negligence to be considered by the fact finder when an actual loss of liberty occurs. False statements that send the innocent to jail should be scrutinized more closely than mere name calling, even while recognizing and protecting the privilege for reports to the police. A constitutionally based conditional or qualified privilege becomes meaningless when it results in the loss of the ultimate constitutional right, liberty. There should be no hesitation to call the police, but there should be some thought.

In the instant case I would affirm the findings of the trial court after a full trial on the merits for the reasons set forth by Judge Guidry in his dissent, and therefore I respectfully dissent.

2007-0475 (La.App. 1 Cir. 10/10/07)

STATE of Louisiana

v.

Anthony JOHNSON.

No. 2007 KW 0475.

Court of Appeal of Louisiana, First Circuit.

Oct. 10, 2007.

Background: Defendant convicted of second degree murder filed application for postconviction relief. The Twenty-Second Judicial District Court, No. 89 CRC 39701, Parish of Washington, Raymond S. Childress, J., granted the application, set aside the defendant's verdict, and ordered a new trial. State filed application for supervisory writ.

Holding: The Court of Appeal, Kuhn, J., held that results of DNA testing, which excluded defendant as the male donor of the DNA found under victim's fingernails, did not prove by clear and convincing evidence that the defendant was factually innocent of second-degree murder, and thus such evidence did not entitle defendant to postconviction relief.

Writ granted.

Welch, J., dissented and assigned reasons.

Criminal Law ⇐945(2)

Results of DNA testing, which excluded defendant as the male donor of the DNA found under victim's fingernails, did not prove by clear and convincing evidence that defendant was factually innocent of second-degree murder, the crime for which defendant was convicted, and thus such evidence did not entitle defendant to new trial; there was no evidence presented to show that the DNA detected on the victim's fingernail scrapings was deposited by the assailant during the attack, numerous other methods existed in which another male's DNA could have been transferred to victim's fingernails, and defendant had placed himself at the scene of the crime and told police the unusual circumstances of the murder, circumstances which police testified that they had not told defendant about. LSA-C.Cr.P. art. 930.3(7).

Lewis V. Murray, Assistant District Attorney, Walter Reed, District Attorney,

Franklinton, Louisiana, for Relator, State of Louisiana.

Kathryn Landry, Special Appeals Counsel, Baton Rouge, Louisiana, David Park, New Orleans, Louisiana, Richard Schroeder, New Orleans, Louisiana, for Defendant–Respondent.

Before KUHN, GAIDRY, and WELCH, JJ.

KUHN, J.

[1]This matter is before the court pursuant to an application for supervisory writs filed by the State of Louisiana. In its writ application filed with this Court, the state seeks review of the district court's granting of the defendant's application for postconviction relief and the ordering of a new trial based on DNA test results. In response to the state's writ application, this court issued a writ of certiorari that ordered the parties to file briefs and appear for oral arguments. We further ordered the district court's clerk of court to provide this court with transcripts of the hearing on the application for postconviction relief and of the trial. Following a thorough review of these proceedings, we find merit in the state's writ application.

PROCEDURAL HISTORY:

In 1986, the defendant was found guilty of second-degree murder and sentenced to life in prison. This Court affirmed the conviction and sentence. *State v. Johnson*, 501 So.2d 1091 (La.App. 1st Cir.1986) (unpublished), *writ denied*, 504 So.2d 875 (La. 1987).

In 1989, the defendant filed a motion for new trial, asserting that newly discovered evidence showed the victim had a relationship with a convicted murderer, Matthew Brown, and the prosecution was aware of that relationship prior to the defendant's trial. The district court denied the motion in 1990. The defendant filed applications for postconviction relief ("PCR") in 1991 and 1992, alleging ineffective assistance of counsel, insufficient evidence, denial of right to confrontation, and impermissible reference to other-crimes evidence.[1] The district court also denied these PCR applications.

[2]In 2004, the defendant filed the PCR application that is at issue in this writ application, raising two main claims: (1) a request for DNA testing; and (2) a claim that he should be granted a new trial based on the state's failure to disclose exculpatory evidence.[1] With regard to his second claim, the defendant maintained the evidence was newly discovered.[2]

In 2004, the district court granted the defendant's request for DNA testing. The test results revealed that the DNA sample from under the victim's fingernails was from a single male donor and the results excluded the defendant as the donor.

On November 29, 2006, the district court held an evidentiary hearing on the PCR application. The district court took the matter under advisement, and on February 21, 2007, the court granted the PCR, set aside the defendant's "verdict" and ordered a new trial. The district court's ruling was premised on the DNA test results, testimony concerning the transfer of

1. The PCR also contained six additional claims that are not presently at issue before this Court.

2. The state concedes that insofar as the defendant requested DNA testing, the PCR was filed timely under La.Code Crim. P. art. 926.1(A)(1). At the time the defendant filed his PCR in 2004, the deadline for filing a PCR under Article 926.1 was August 31, 2007. *See* La.Code Crim. P. art. 926.1(A)(1) (as amended by 2003 La. Acts No. 823, § 1, but prior to its amendment by 2006 La. Acts No. 120, § 1.

DNA, and the state's failure to disclose exculpatory evidence.

The state filed a motion for reconsideration of the court's ruling, arguing the court was wrong to grant relief based on the failure to disclose exculpatory evidence because the state had not been given the opportunity to respond to the merits of that claim. The state maintained the exculpatory evidence referred to in the court's ruling was furnished to the defense. The state asked the court to stay its decision pending the outcome of the motion.

The district court denied the request for a stay insofar as the DNA claim was concerned. The court granted the motion for reconsideration insofar as the *Brady* (exculpatory evidence) claim was concerned and scheduled a hearing regarding the matter.[3] Thus, this Court's review is limited to the district court's determination that the defendant is entitled to a new trial based on the results of the DNA testing. For the reasons that follow, we grant the state's application for supervisory writs.

FACTS:[4]

Sometime between the evening of October 18, and the morning of October 19, 1984, Angela Bond was murdered in the bedroom of her home in Bogalusa, Louisiana. The victim's one-year-old child and her sister's six-month-old child, whom she was babysitting, were with her when she was killed.

About 9:30 a.m. on October 19, 1984, Decrease Bond, the victim's sister, and her boyfriend went to the victim's home to pick up her child. After repeated knocks on the doors, Decrease entered the house through an open kitchen window. Decrease then discovered her sister's body on the floor in her bedroom. The victim was naked and stretched out on her back at the foot of the bed. Two weapons protruded from her body and a large chair lay on top of her, covering her face.

Decrease called the police from a neighbor's home and the officers who arrived at the scene secured several items of evidence, including a shower cap found near the body and a stick used to prop open the kitchen window. The police were unable to lift any fingerprints from the residence, but they subsequently secured other items of evidence, including hair samples, an ice pick, and a two-tined fork.

At approximately 11:00 a.m. on October 19th, the defendant was arrested at his residence. The defendant and the victim were romantically involved at the time of her death, and they had lived together, off and on, for several years. At the time of his arrest, the defendant was wearing pajamas and had a plastic shower cap on his head. Later that day, the defendant voluntarily gave the police the shower cap he was wearing.

While at police headquarters, the defendant recounted his version of the facts to Bogalusa City Police Officer Wayne Kemp. Kemp testified at trial that the defendant told him that at approximately 9:00 p.m. on October 18th, he and the victim had an argument, so he left and went to a nearby bar. The defendant told Kemp that he returned to the victim's home around midnight, but that she had locked the doors and would not let him in. The defendant claimed he then went home. However, according to Kemp, the defendant had special knowledge of the circumstances surrounding the victim's death as he told the officers that he would not have killed her "like that." When Kemp asked the defen-

3. The status of that claim is not evident based on the record presently before this Court.

4. The facts in this opinion were derived from this Court's appellate opinion and the defendant's trial transcript.

dant what he meant by "like that," the defendant told him "with the pick and the fork." Kemp asked the defendant how he knew what weapons were used to kill the victim and he hesitated and then said, "Well, I just figured that's what it was because she slept [6]with them under her pillow all the time." Kemp then asked the defendant how he knew the victim was in the bedroom, and the defendant stated he did not want to talk anymore and that he wanted an attorney.

The autopsy revealed the victim had multiple wounds, including five wounds to the neck (one punctured the jugular vein), an ice pick wound through the breastbone (which punctured the heart), and a fork wound through the abdomen into the liver. According to the pathologist, the latter two wounds required a great deal of force.

Testing revealed the hair samples taken from the plastic shower cap recovered from the scene were similar to the samples taken from the shower cap the defendant was wearing when he was arrested. No fingerprints were found on the ice pick, fork, or other items taken from the house.

Robert Magee, who lived across the street from the victim, testified at trial that he saw the defendant's car at the victim's home at about 1:00 a.m. on October 19th. Carl Magee, a neighbor of the victim, testified that at 6:00 a.m. on October 19th, he saw the defendant drive down the victim's street, blow his horn, and wave.

The defendant testified at trial that on the night of the murder, he went to a bar near the victim's home. At approximately 9:30 p.m., he went to the victim's home to ask her if she wanted some crabs. She told him that she did and at approximately 10:30 p.m., he returned to the victim's home with the crabs. However, at that time, the victim had locked the door, and would not let him in. He claimed she told him he stayed out too late. The defendant returned to the bar, and then returned to the victim's house a few more times throughout the evening, but she refused to let him in her home. The defendant stated that the last time he [7]went to the victim's home was at midnight. When she refused to let him in her house, he returned to the bar, got his car, drove past the victim's home, went to his home, and went to sleep. He maintained that during the entire evening his car was parked at the bar and never parked at the victim's home.

The following morning, he was still in bed when the officers knocked on his door. The officers told him the victim had been killed. He claimed that on the way to the police station, Bogalusa City Police Officer Phillip Collins told him that the victim had been stabbed and that it looked awful. The defendant further testified that Bogalusa City Police Officer Laverne Spikes told him that a fork and an ice pick had been used in the murder. He also stated he knew that the victim slept with a fork and an ice pick for protection. At trial, the defendant subsequently denied telling the officers that he knew the victim slept with an ice pick and fork under her pillow and he claimed the officers were not telling the truth.

On rebuttal, Officer Collins testified that he only told the defendant that the victim had been killed and he did not tell the defendant that she had been stabbed. Additionally, Officer Spikes testified at trial that he did not have a conversation with the defendant. Spikes stated he saw the defendant in lockup, but did not converse with him.

At the close of the state's case-in-chief, a joint stipulation was made that Matthew Brown pled guilty in 1985 to killing two women about five months after the victim

was killed. One of the murders occurred in the same home and same room in which the instant victim was murdered. Joseph Rogers testified as a witness for the defense, and he claimed that while in jail, Brown told him that he had murdered three women. Brown indicated to him that another man was serving time for the last girl that Brown killed. Rogers indicated that Brown told him he dumped that victim's body by the airport. Bogalusa City Police Officer Mike Edwards testified he interviewed Brown several months after the victim was murdered. Brown denied killing the victim in the instant case and stated that he was out of town during that time.

THE STATE'S CONTENTION:

In its application filed with this Court, the state urges the district court improperly granted the defendant's application for PCR and new trial based on the DNA test results. The state contends that La.Code Crim. P. art. 930.3(7) mandates that in order for relief to be granted, the results of the DNA testing performed pursuant to La.Code Crim. P. art. 926.1 must prove by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted. The state argues the defendant failed to meet this burden of proof. The state acknowledges that the DNA test results of the victim's fingernail scrapings excluded the defendant as a donor of that sample. The state points out, however, that during the hearing on this matter, there was expert testimony that DNA from another person could be transferred to the fingernails through contact other than a struggle. The state points out that there was trial testimony that at least one of the children at the victim's home on the night of the instant crime was male. Thus, the state contends the DNA tests results from the victim's fingernail scrapings did not prove by clear and convincing evidence that the defendant was factually innocent of the crime as required by article 930.3(7).

THE DEFENDANT'S REPLY:

In his reply to the state's writ application, the defendant contends that his exclusion as the male donor of the DNA found under the victim's fingernails was sufficient to meet the burden of proof set forth under La.Code Crim. P. art. 930.3(7). The defendant sets forth that evidence presented at trial showed the victim died after a violent struggle with her assailant. The defendant argues that the case against him was purely circumstantial. He sets forth that the only evidence against him was his incriminating statement made regarding the unusual circumstances of the crime and witness testimony regarding his presence at the victim's home around the time of the crime.

The defendant attempts to downplay the significance of his statement to the police by noting that the statement was not recorded and not put into a report until two months after the crime occurred. He also sets forth that conflicting explanations were given as to why the statement was not taped. The defendant further contends the neighbor, who testified he saw the defendant leaving the victim's house, might have seen him the day before the victim died because the neighbor testified he was taking his trash out, and garbage was collected on the day before the victim was found dead.[5]

The defendant further contends there is strong evidence that other individuals committed the crime. The defendant sets

5. As part of the *Brady* claim asserted in his PCR application, the defendant claimed that it was not until after trial that he learned that this witness, who claimed to have seen him leaving the victim's home, saw him while the witness was taking out the trash.

forth that another man, Matthew Brown, committed similar crimes in the same area, including one in the same house where the instant victim lived. The defendant also asserts that Kelvin Hayes made statements indicating he may have committed the murder.

Furthermore, the defendant argues there is a high probability that the victim was killed after a violent struggle. He references Dr. Sudhir Sinha's testimony at the PCR hearing regarding studies finding that biological material under the fingernails most likely results from intimate contact such as a struggle rather than from casual contact. The defendant claims that the state "tries to muddy the waters" by making an issue of the possibility of a male child being present in the victim's home at the time the crime occurred who possibly could have been the source of the DNA. The defendant asserts, however, that the testimony at the PCR hearing indicated that the children were female and notes the district court made this same finding after reviewing the entire record.

DISTRICT COURT'S RULING ON THE PCR:

In setting forth its reasons for granting the defendant's PCR application, the district court noted that at the time of his arrest, the defendant's body showed no evidence of bruising, swelling, cuts, or other indicia of a struggle, and no evidence relating to the murder was found in his apartment. The court also stated that a knife or other flat-bladed object was used to make five stab incisions on the left front side of the victim's neck, one of which slashed the jugular vein. The court noted that that injury alone could have been the cause of death after a few minutes. Additionally, the court stated that an ice pick was thrust through the victim's chest and pierced her heart, and a two-pronged fork pierced her abdomen extending into her liver and inferior vena cava. The court concluded that although either of these wounds could also have killed the victim, the greatest blood loss and the first injury came from the knife wound to the neck. The court further noted that a detective testified at trial that nothing was returned from the crime lab regarding the fingernail clippings and no foreign matter was found on the clippings.

The court stated that Dr. Sinha testified at the PCR hearing that DNA does not make its way to another's fingernails from casual contact, the most likely source is someone with whom the victim has had intimate contact, and DNA analysis of fingernail scrapings is particularly useful in cases where a struggle is involved.

Relying on the following, the district court determined the defendant proved by clear and convincing evidence that he was factually innocent of the victim's murder: (1) the circumstantial evidence introduced at trial was of a "very tenuous nature"; (2) the testimony at trial was that there was no foreign matter under the victim's fingernails; (3) the subsequent determination that DNA found under the victim's fingernail was of a single male "lineage" that excluded defendant; and (4) the credible expert testimony at the PCR hearing regarding the likelihood of DNA transfer in a struggle and the implausibility of DNA transfer through casual contact. The court concluded the defendant was entitled to a new trial, and the state filed its writ application.[6]

LAW:

In 2001, the Louisiana Legislature established a procedure for a felon to re-

6. The district court also determined the defendant was entitled to a new trial based on the state's failure to disclose exculpatory evidence and set forth extensive reasons regarding that determination, the subject of which is not now before this Court.

quest DNA testing. 2001 La. Acts No. 1020, § 1. One of the listed grounds for a PCR is that the "results of DNA testing performed pursuant to an application granted under Article 926.1 proves by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted." La.Code Crim. P. art. 930.3(7).

In *State v. Robertson*, 42,247 (La.App.2d Cir.6/25/07), 958 So.2d 787, the defendant had been convicted of rape, and pursuant to La.Code Crim. P. art. 926.1, he petitioned for DNA testing of certain evidentiary items used to convict. The district court denied his motion for DNA testing. In reviewing this ruling, the Second Circuit found that the defendant's claim that DNA testing would establish he was the attacker was an "alternative and inconsistent" theory of defense to the one he had offered at trial. It further reasoned, "The DNA testing statute appears to be directed toward freeing the innocent, and not toward a reweighing of the evidence used to convict." *State v. Robertson*, 42,247, at p. 1, 958 So.2d at 788. The Second Circuit determined that the district court did not err in denying the motion because the "[DNA] testing, even if it had been resolved in favor of the [defendant], ... would not have established his innocence of the crimes of which he was convicted." The court also stated that the DNA testing statute is an "extraordinary post-conviction remedy designed to free the innocent, and it is not an alternative form of motion for new trial based on newly discovered evidence." *State v. Robertson*, 42, 247, at p. 1, 958 So.2d at 788.

Additionally, we note courts in other jurisdictions have determined that the absence of a defendant's DNA from the victim's fingernail scrapings or clippings did not provide proof of actual innocence. *See Leonard v. Dretke*, 2005 WL 3543348, p. 8 (N.D.Tex.2005); *Com. v. Smith*, 889 A.2d 582, 585 (Pa.Super.Ct.2005), *appeal denied*, 588 Pa. 769, 905 A.2d 500 (2006); *Rivera v. State*, 89 S.W.3d 55, 60 (Tex.Crim.App. 2002); and *People v. Savory* 309 Ill.App.3d 408, 242 Ill.Dec. 731, 722 N.E.2d 220, 226 (1999), *affirmed*, 197 Ill.2d 203, 258 Ill. Dec. 530, 756 N.E.2d 804 (2001).

DISCUSSION:

Because the district court agreed to reconsider its ruling insofar as the *Brady* claim is concerned and a hearing is scheduled for that claim, the instant writ application is limited to review of the district court's ruling that the defendant proved with the DNA evidence that he is factually innocent of the instant offense. In its ruling, the district court specifically relied on the testimony of Dr. Sinha, noting the "likelihood of DNA transfer in a struggle, and the implausibility of DNA transfer through casual contact."

Dr. Sinha, an expert in DNA testing, testified, over the objection of the state, regarding articles from scientific journals concerning the transfer of DNA to the fingernails and fingernail scrapings. According to Dr. Sinha, his experience was not inconsistent with the views expressed in the journal articles, which indicated that the most likely source of DNA under the fingernails is an individual with whom the donor has had intimate contact. However, Dr. Sinha also indicated that a small amount of DNA could be transferred from casual contact. Dr. Sinha also admitted that DNA from fingernail scrapings could be tracked from a mother to a child.

Dr. Huma Nasir, an expert in DNA analysis, testified at the PCR hearing that the scrapings from the victim's fingernails were tested and that the defendant could be excluded as a donor for the DNA found from the victim's fingernail scrapings. However, Dr. Nasir testified that he did not know the source of the DNA. Dr.

Nasir stated that in order to determine if the samples were consistent with the DNA of the victim's son, the samples would have to be tested again.

During the PCR hearing, the issue was raised as to the sex of the children present in the victim's home on the night of the crime. Both the state and the defendant argued as to whether the children were girls or boys, but nothing definitive regarding this issue was established at the PCR hearing. The district court stated that the sex of the children was irrelevant in 1986, when DNA was not an issue, but that it has tremendous relevance in light of the new DNA evidence. Although the trial transcript clearly indicates that there was at least one male child in the house, the district court concluded that based on items submitted at the PCR hearing, the children present at the crime scene were girls and not boys. At the PCR hearing, the defendant's sister testified that the children at the victim's home on the night in question were girls.

During the trial in 1986, however, the victim's sister, Decrease, specifically testified that the victim was babysitting her little boy. Decrease also generally referenced the victim's son as being one year old at the time of the victim's death. In his response to the state's application, the defendant failed to explain the trial testimony, which referenced the children as males, other than to say that the victim's sister, Decrease, was simply mistaken.

Dr. Michael Haas, an expert in emergency medicine, testified at the PCR hearing that upon reviewing the coroner's report and other evidence, he felt that there had been a violent struggle between the victim and her attacker. Although [15] Dr. Haas opined violent activity had occurred at the time of the victim's death, he stated he could not testify as to whether the victim had resisted the attack.

While Dr. Sinha testified at the PCR hearing that fingernail scrapings can be useful in cases involving a struggle, he also indicated that DNA could be transferred by contact not involving a struggle. In the instant case, there was no proof of a struggle by the victim with her assailant. Although the victim apparently sustained bruises to the head and knife wounds to the neck, there is no testimony regarding defensive-type wounds to the victim. Also, trial testimony established that when defendant was arrested he did not appear to have any defensive-type wounds or indications that he was involved in a struggle.

At the defendant's trial, there was testimony that the testing of the victim's fingernail clippings produced negative results, indicating no foreign matter was found on them. However, the DNA in question, found later through more advanced testing, could have been transferred to the victim's fingernails at any time prior to her murder. The defendant's argument and the court's ruling appear to rely on an assumption for which there is no evidence in the record, i.e., that the victim struggled or fought with her assailant, thereby acquiring his DNA under her fingernails. There is no evidence presented to show that the DNA detected on the victim's fingernail scrapings was deposited by the assailant during the attack.

In the instant case, the mere detection of DNA from another male on the victim's fingernails, absent any evidence as to how and when the DNA was deposited, does not show by clear and convincing evidence that the defendant was factually innocent of the instant crime. The mere showing of DNA belonging to an unknown male on the victim's fingernail scrapings does not exonerate the [15] defendant in the instant case but would "merely muddy the waters." *See Rivera v. State*, 89 S.W.3d at

59. There is no showing in the instant case that only the assailant's DNA would have been found under the victim's fingernails, as there are numerous methods in which another male's DNA could have been transferred to the victim's fingernails.

The defendant placed himself at the scene of the crime, he told the police the unusual circumstances of the murder, and the police testified they had not told him about these circumstances of the crime. One neighbor testified that he saw the defendant's car at the victim's home on the night in question after the defendant claimed he went home and another neighbor saw him driving down the victim's street early on the morning the victim's body was found.

Considering the above, we conclude that the results of this DNA testing did not prove by clear and convincing evidence that the defendant is factually innocent of the crime for which he was convicted. Therefore, we find that the district court abused its discretion in granting the defendant's PCR application and ordering a new trial based on the finding that the DNA evidence found under the victim's fingernails did not match the defendant's DNA.

For these reasons, the state's application for supervisory writs is granted. That portion of the district court's February 21, 2007 ruling granting the defendant's PCR application based on La.Code Crim. P. art. 930.3(7) is reversed; that portion of the ruling setting aside the defendant's "verdict" and ordering a new trial on that ground is vacated.

WRIT OF CERTIORARI RECALLED. WRIT GRANTED AND MADE PEREMPTORY.

WELCH, J., dissents with reasons.

WELCH, J., Dissenting.

1 The only issue in this case is whether the DNA test results, which excluded the petitioner as a contributor of DNA found under the victim's fingernails, under all of the circumstances of this case, constitutes clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted. I believe the majority errs by placing too stringent a burden on the petitioner to virtually demonstrate that the test results would exonerate or completely vindicate him of the murder charge in order to obtain a new trial. Therefore, I respectfully dissent.

Louisiana Code of Criminal Procedure article 930.3(7) permits a petitioner to obtain a new trial upon showing that results of DNA testing performed pursuant to La.C.Cr.P. art. 926.1 "proves by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted." In discussing the burden of proof required by La.C.Cr.P. art. 930.3(7), the majority cites a second circuit case wherein the appellate court found that a trial court did not err in denying a motion for DNA testing because the testing would not have established the defendant's innocence. *State v. Robertson*, 42,247 (La.App. 2nd Cir.6/25/07), 958 So.2d 787. That case, however, has no bearing on the issue of the burden of proof required under La.C.Cr.P. art. 930.3(7). The only issue in *Robertson* was whether the petitioner had met the threshold showing necessary to obtain DNA testing. Under La.C.Cr.P. art. 926.1, testing is permitted only in those cases in which (1) there is a factual explanation of why there is an 2 "articulable doubt" as to guilt and (2) the testing "will resolve the doubt and establish the innocence of the petitioner." In *Robertson*, the applicant for DNA testing was convicted of rape. His victim identified him in two lineups and in open court,

and his prints were found at the point of entry on a window opening to the victim's home. On appeal, the applicant did not contest the sufficiency of evidence on the issue of identity, but rather, the degree of force used and proof that the offender was armed. Thereafter, the applicant sought DNA testing on evidentiary items used to convict him, asserting that the DNA testing would establish he was not the attacker. In upholding the lower court's denial of DNA testing, the court of appeal noted that the applicant was asserting an alternative and inconsistent theory of the defense to the one he offered at trial, which was prohibited by Supreme Court jurisprudence. Also, the court found that the DNA testing, even if resolved in the applicant's favor, would not "establish his innocence" of the crime for which he was convicted. Any statements the court made in that case as to the burden of proof under La. C.Cr.P. art. 930.3(7) are purely dicta, as that provision was never at issue.

The majority then cites cases requiring proof of "actual innocence" in discounting the value of a DNA exclusion result from fingernail scrapings. However, none of these cases involved a "clear and convincing" standard of proof, as does La.C.Cr.P. art. 930.3(7), and none of these cases are even remotely similar to the case at hand.

The "actual innocence" standard cited by the majority is employed by federal courts to determine whether a petitioner may pursue *habeas corpus* relief in federal court based on constitutional claims that are procedurally barred under state law. *House v. Bell*, 547 U.S. 518, 126 S.Ct. 2064, 2068, 165 L.Ed.2d 1 (2006). Federal courts have held that prisoners asserting innocence as a "gateway" to defaulted claims must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. *Id.*

The first case relied on in support of the proposition that the absence of a defendant's DNA from the victim's fingernail scrapings or clippings does not provide proof of "actual innocence," *Leonard v. Dretke*, 2005 WL 3543348, p. 8 (N.D.Tex. 2005), involved a *habeas corpus* challenge to a petitioner's murder conviction, in which the petitioner sought to raise an ineffective assistance of counsel claim in federal court that was not raised in state court. As a procedural matter, the claim could only be raised upon showing that the failure to consider the claim would result in a fundamental miscarriage of justice, which is confined to cases of "actual innocence." *Id.* The petitioner asserted that DNA testing would reveal that his skin was not found under the victim's fingernails, and thus would ultimately prove his claim of innocence. The court concluded the evidence was insufficient to overcome the procedural bar, observing that the DNA results even if favorable, would not "exonerate" the petitioner.

In *People v. Savory*, 309 Ill.App.3d 408, 242 Ill.Dec. 731, 722 N.E.2d 220, 226 (1999), *affirmed*, 197 Ill.2d 203, 258 Ill.Dec. 530, 756 N.E.2d 804 (2001), an appellate court was divided over how to interpret a DNA testing statute which required an applicant to demonstrate, in order to obtain DNA testing, that the result of the test would be "materially relevant to the defendant's assertion of actual innocence." The majority equated the term "actual innocence" with "total vindication," and read the provision to limit the scope of the statute to only that DNA evidence that had the potential to exonerate a defendant. Two judges dissented, believing that by using the term "actual innocence" the legislature did not intend to limit the use of scientific testing to only those situations

where it would result in the total vindication or would exonerate the defendant.

[14] Unlike the instant case, in the cited cases where the courts have found DNA fingernail scraping exclusion evidence would not exonerate the defendant, there was overwhelming evidence of the defendant's guilt. For instance, in *Rivera v. State of Texas*, 89 S.W.3d 55, 60 (Tex.Crim.App.2002), the defendant was convicted of capital murder in the course of an aggravated sexual assault of a child. The defendant gave a videotaped oral confession to the crime in which he admitted strangling the child and sexually assaulting her. In the course of the confession, the defendant gave numerous details of the murder, including where the body had been left, that were later corroborated in the investigation. Following his conviction, the defendant sought to have DNA testing done on his own fingernail clippings, supposedly taken from him during the murder investigation, claiming that the absence of the child's DNA from his fingernail clippings would prove his innocence. The court disagreed, finding that the defendant failed to show that favorable DNA results would prove his innocence. The court questioned whether the evidence even existed, and concluded that even if a negative test resulted in a weak exculpatory inference, such an inference could not come close to outweighing the defendant's confession.

Similarly, in the case of *Commonwealth v. Smith*, 889 A.2d 582, 585 (Pa.Super.Ct.2005), *appeal denied*, 588 Pa. 769, 905 A.2d 500 (2006), there was overwhelming evidence of a defendant's guilt for first-degree murder. In that case, the victim had 35 stab wounds, and the defendant was apprehended a few hours after the victim's body was found carrying a knife stained with blood matching the victim's blood type, and wearing clothes with blood stains linked to the victim. The court concluded that there was no "reasonable probability" the DNA testing of a victim's fingernail clippings would establish the defendant's actual innocence in light of the overwhelming evidence the defendant committed the crime. Moreover, the court noted, the defendant failed to provide an evidentiary basis from which to infer that [15] DNA on the victim's fingernails were deposited there by her assailant.

To the contrary, in this case, the petitioner did provide an evidentiary basis upon which the trial court could infer that DNA on the victim's fingernails was deposited there by her assailant. First, the petitioner presented testimony that Angela Bonds struggled with her assailant. Captain Wayne Kemp, who investigated the murder, attested it was not the type of situation where an assailant walked in the victim's home, stabbed her, and she "fell over dead." Instead, Captain Kemp stated, this murder involved a "fight." Additionally, the autopsy report showed that the victim had bruises and contusions on the right and left sides of her forehead where she had been struck with a blunt object.

Secondly, the petitioner offered evidence showing the significance of DNA evidence found in fingernail scrapings. At the evidentiary hearing, Dr. Sudhir Sinha, an expert in DNA testing, attested that in cases involving a struggle between a victim and an offender, fingernail clippings are a very useful identification tool. Dr. Sinha was questioned regarding numerous studies conducted in connection with DNA fingernail scraping evidence. He concurred in one report suggesting that when foreign DNA is present under fingernails, the most likely source of the DNA is an individual with whom the donor has had intimate contact. Dr. Sinha also stated that there were several studies supporting the

conclusion that in a casual contact, only a "very, very, very small" amount of DNA had been transferred, in the range of eight to ten percent. Dr. Sinha admitted that it is widely known that contact DNA does produce DNA in the fingernail, but stated it is "very low." Dr. Sinha acknowledged that in one or two instances, DNA had been transferred by intimate contact with a family member, such as mother to child's DNA in the mother's fingernail.

The State submits that because the trial evidence shows that there were two male children in the Bonds' home on the night of her murder, the DNA under the victim's fingernails may have belonged to one of them. However, the petitioner offered evidence at his hearing to establish that both of the children at the victim's home that evening were in fact female. In ruling on the motion for post-conviction relief, the court made a factual finding that there were two female children in the home, and that finding is supported by the record.

Thus, the petitioner presented evidence establishing that: (1) the victim died after a struggle with her assailant; (2) when DNA is found under fingernail scrapings, it most likely came from an intimate contact with the donor; (3) the DNA under the victim's fingernails was of a single male lineage; and (4) the DNA excluded the petitioner as the source of the DNA under the victim's fingernails. As the trial court correctly observed, this evidence created the inference that it is probable that the biological material from the fingernail scrapings was deposited there by Angela Bonds' killer, and the DNA evidence excluded petitioner as the source of the DNA.

Louisiana Code of Criminal Procedure article 930.3(7) employs a "clear and convincing" standard by which to measure the DNA test results. To prove a matter by clear and convincing evidence means to demonstrate that the existence of a disputed fact is highly probable, that is, more probable than its nonexistence. *Fernandez v. Hebert*, 2006-1558, p. 9 (La.App. 1st Cir.5/4/07), 961 So.2d 404, 408. To sustain his burden of proof under La.C.Cr.P. art. 930.3(7), a petitioner must demonstrate that the test results make it highly probable that he did not commit the crime for which he has been convicted. The petitioner is not required to demonstrate that the DNA tests, standing alone, constitute conclusive exculpatory evidence. Louisiana Code of Criminal Procedure article 930.3(7) does not require a demonstration that the test results exonerate a petitioner or establish his "actual innocence" as that term is utilized in the jurisprudence. Nor is there a requirement that the DNA evidence be considered in light of only the incriminating evidence adduced at the petitioner's trial, as the majority did in this case.

Instead, I believe that the resolution of whether the DNA results provide clear and convincing evidence of a petitioner's factual innocence can only be made by conducting a fact-intensive inquiry, during which a court should consider all evidence, both incriminating and exculpatory, in determining whether the petitioner met his burden of proof under the statute. The trial court conducted the type of fact-intensive inquiry envisioned by La.C.Cr.P. art. 930.3(7).

As the trial court correctly observed, the State's case against petitioner was entirely circumstantial. Moreover, there was evidence presented at trial and in the application for post-conviction relief implicating two other individuals in the murder. Considering all of the circumstances of this case, particularly the absence of any physical evidence against linking petitioner to the murder, the presence of evidence im-

plicating two other individuals in the murder, the probability that the biological material from the fingernail scrapings came from the killer, and the exclusion of petitioner as a source of the DNA found under the victim's fingernails, the DNA tests results create a strong exculpatory inference, making it "highly probable" that the defendant is innocent of the crime of murder. Therefore, the trial court correctly found that the petitioner met the burden of proof under La.C.Cr.P. art. 930.3(7), and I would deny the State's writ application.

2007-2020 (La.App. 1 Cir. 10/11/07)

Peter L. DALE and Vincent Bruno

v.

LOUISIANA SECRETARY OF STATE, Jay Dardene, & Jefferson Parish Clerk of Court, John Gegenheimer.

No. 2007 CE 2020.

Court of Appeal of Louisiana, First Circuit.

Oct. 11, 2007.

Background: Candidate for sheriff, along with taxpayer, filed lawsuit seeking declaration that statute providing for three-day reopened qualifying period when a candidate with opposition dies was unconstitutional on the date of the death of the incumbent sheriff who had been seeking reelection. Plaintiffs also sought preliminary injunction to prohibit the reopening of qualifying period for primary election for sheriff or declaring the reopening null and void. The District Court, East Baton Rouge Parish, Docket Number 559,775, Wilson Fields, J., denied request for preliminary injunction and took no action on request for declaratory judgment. Plaintiffs appealed.

Holdings: The Court of Appeal held that:

(1) plaintiffs were not entitled to preliminary injunction, and

(2) trial court was not required to consider merits of request for declaratory judgment.

Affirmed and remanded.

Gaidry, J., concurred in part, and assigned reasons.

Guidry, J., dissented, and assigned reasons.

Hughes, J., dissented for reasons assigned by Guidry, J.

1. **Declaratory Judgment** ⇐258
   Elections ⇐126(4), 154(3)

   Preliminary injunction prohibiting reopening of qualifying period for primary election for sheriff after candidate died would disserve public's compelling interest in being allowed to choose from all qualified candidates who sought to run for office; governing statute, which was challenged as violating equal protection and due process, served legitimate government purpose of promoting candidacy. (Per curiam opinion, with two judges joining and one judge concurring in part.) LSA–Const. Art. 1, §§ 2, 3; LSA–R.S. 18:469(A).

2. **Injunction** ⇐1, 14, 16

   The writ of injunction, a harsh, drastic, and extraordinary remedy, should only issue in those instances where the moving party is threatened with irreparable loss or injury and is without an adequate remedy at law. (Per curiam opinion, with two judges joining and one judge concurring in part.)

3. **Injunction** ⇐14

   "Irreparable injury," which is prerequisite for issuance of writ of injunction, has

STATE'S EXHIBIT

B

Autopsy No. ME-329-93
Autopsy No. ME-330-93
Autopsy No. MEA-331-93

(Echols Response Exhibit B)

001083

ARKANSAS STATE CRIME LABORATORY

MEDICAL EXAMINER DIVISION

Case No.: ME-329-93 Date of Examination: May 7, 1993

Name: MOORE, James Michael

Age: 8 years Race: White Sex: Male

Place of Death: West Memphis, Arkansas County: Crittenden

CONCLUSIONS

CAUSE OF DEATH: Multiple Injuries with Drowning.

MANNER OF DEATH: Homicide.

LABORATORY RESULTS

TOXICOLOGY:

Ethyl Alcohol: Blood - <0.01g%
Drug Screen: Blood - No drugs detected.

SEROLOGY:

Blood Type: A+

Frank J. Peretti, M.D.*
Assoc. Medical Examiner

William Q. Sturner, M.D.
Chief Medical Examiner

* Pathologist of Record

05-25-93/tjg

[illegible] Rock, Arkansas 72215

001084

NAME: MOORE, James Michael DATE: 5-7-93 NO: ME-329-93

EXTERNAL DESCRIPTION: The body was that of a well developed, well nourished, nude white male, whose hands were bound to the ankles in a "hog-tied" fashion. The body showed multiple injuries which are described further below in detail. The body weighed 55 pounds, was 49 1/2 inches in height and appeared compatible with the reported age of 8 years. The body was cold. Rigor was present and fixed to an equal degree in all extremities. Lividity was present, minimal and fixed on the posterior surface of the body except in areas exposed to pressure. The scalp hair was brown, wavy and blood-soiled. The irides were green. The corneae were clear. The sclerae and conjunctivae were slightly congested with no petechial hemorrhages. Fly larvae were present in the left periorbital region. The teeth were natural and in good condition. The neck, chest, abdomen and extremities were unremarkable except for the injuries to be described further below. The hands and feet show washer woman wrinkling. The posterior torso showed injuries as described below. A 1 inch birth mark is present over the left buttocks region.

DESCRIPTION OF INJURIES:

The body was covered with scattered and focal areas of dried mud and debris. The hands and feet showed washer woman wrinkling. The wrists were bound to the ankles bilaterally with black shoe laces. Removing of the binding showed the abraded and contused furrows present on both right and left ankles and wrists. A strand of "fabric-like" material was clenched in the left hand.

Head Injuries:

Multiple punctate scratches were present over the bridge of the nose. The left ala was abraded. The left side of the cheek was contused and edematous, with an overlying 1 1/2 inch contusion. The lips were abraded. The mucosal surfaces of the lips were contused, slightly edematous, with multiple superficial lacerations. The frenula were intact. Linear scratches were present on the left mandible region, along with a 3 by 3/4 inch area of abrasion.

Situated on the right frontal scalp was a 2 1/2 by 1/2 inch area of edema and ovoid contusion with overlying multiple small superficial lacerations and a 1/8 inch depressed abraded laceration. On the left forehead was a 1 5/8 inch by 1 1/8 inch abraded laceration. At the superior margin of this wound was a 1/2 inch abrasion. The anterior and posterior surfaces of the right ear were contused, with overlying linear scratches. The helix of the right ear was abraded.

Situated on the right parietal scalp was an ovoid area of contusion with associated edema, measuring 2 3/4 inch by 1 1/2 inch.

Situated behind the right ear was an ovoid contusion with edema measuring 1 3/4 inch by 3/4 inch.

Situated behind the right ear were multiple semi-lunar scratches.

Situated on the left parietal scalp was a dove-tail type laceration measuring 3/4 by 1/8 inch. At the inferior margin of the wound was an extension patterned contusion in the form of an upside down "L"; the vertical portion measured 1/2 inch and the horizontal portion measured 1/4 inch.

Situated on the left temporal scalp was an abraded contusion measuring 1 1/8 by 1/4 inch.

Situated on the right zygomatic region was a 4 by 3/4 inch contusion with overlying punctate abrasions and a 3/16 by 1/2 inch abrasion. Superior to this wound, extending on the right forehead region were two contusions measuring respectively 1/4 by 1/2 inch and 1/2 inch by 1/2 inch.

Subsequent autopsy of the head showed multifocal extensive subgaleal contusions and edema. There were also multiple skull fractures which are described as follows:

Situated on the right posterior frontal skull bone was a 1 1/4 semi-lunar fracture. Situated immediately below this fracture was a similar semi-lunar circular fracture measuring 2 inches. Below this on the lateral aspect was a 1 inch fracture. Extending over the temporal scalp were two contiguous fractures; the most superior one measured 1 3/4 inch and the intersecting semi-lunar inferior one measured 1 inch in length. Situated over the midline of the parietal scalp were three semi-lunar fractures, one of which became contiguous with the second with an overall dimension of 2 inches. Inferior to this fracture was a similar semi-lunar fracture measuring 1 3/4 inches.

A 3/4 inch fracture involved the right anterior cranial fossae. A 3 inch fracture extended across the right posterior cranial fossae.

The brain was edematous and showed subarachnoid hemorrhage involving the right cerebellar hemisphere. There were fracture contusions involving the right posterior cerebellar hemispheres.

Neck, Chest, and Abdominal Injuries:

In an area measuring 3 inches by 3/4 inch, situated over the right side of the neck and scapula region, was an area of contusion with an overlying 1 1/4 by 1/2 inch abrasion. Situated medial to this contusion, extending onto the left side of the neck, was a 1 by 3/4 inch contusion.

Situated on the right shoulder were three scattered contusions measuring about 1/4 to 1/2 inch. Adjacent to this was an area of focal red-purple contusion. Below this contusion an area measuring 2 1/4 by 1/4 inch were multiple linear, diagonally oriented abrasions surrounded by contusions. These abrasions were interspaced by a distance of 1/8 to 1/4 inch. Situated on the lower right side of the chest were two 3/4 inch contusions. Below this contusion were two parallel oriented abrasions which measured about 3/4 inch each and were interspaced by a distance of 1/8 inch.

Situated over the lower left side of the abdomen were a group of linear abrasions which were interspaced by a distance of 1/16 by 1/8 inch.

Anal/Genital Region:

The penis was circumcised and showed no injuries. The anus was dilated and showed no external evidence of injury. Mud and debris was present in the anal orifice. Subsequent autopsy demonstrated no internal injuries noted to the scrotum or testes. The mucosal surfaces of the rectum were slightly hyperemic and showed no evidence of injury.

Lower Extremities:

A 1/4 inch ovoid contusion is present over the left knee. Binding abrasions were present on the ankles bilaterally. Situated above and below these binding abrasions were faint red-purple contusions.

Back Injuries:

A 1 inch contusion was present on the back of the left forearm. Situated over the right upper back were two diagonally oriented interrupted abrasions, each measuring about 4 1/2 inches. They were interspaced by a distance of 1/2 inch. Situated below this abrasion and on the left side was a 4 by 2 inch area of contusion. Below this contusion, extending to the right mid back were two linear diagonally oriented abrasions which were interspaced by a distance of 2/16 inch.

Situated over the right buttocks were multiple linear scratches measuring from 1/2 inch to 3/8 inch. Punctate linear scratches were present on the inferior aspect of the left buttocks region.

Upper Extremity Injuries:

The wrists showed binding abrasions. Situated around these abrasions were contusions.

Situated on the left antecubital fossa was 1/8 inch abrasion. Below this were linear abrasions measuring from 1/16 to 1/2 inch.

Situated on the right thenar eminence was a 1 inch cut. Situated on the left thenar eminence was a 1/8 inch superficial laceration. Situated on the back of the left hand was a 3/4 inch scratch and a 1/16 inch abrasion which was present on the anterior surface of the left thumb. The hands showed bilaterally washer woman wrinkling.

Internal Evidence of Injury of the Neck, Chest, and Abdomen:

There were multiple bite marks present on the lateral margins and tip of the tongue. There was no hemorrhage noted in the muscles of the neck. The hyoid bone and larynx were intact. No petechial hemorrhages were present on the larynx or epiglottis. There were no penetrating or perforating injuries noted to the chest, abdomen, or pelvis.

Evidence of Drowning:

The hands and feet showed washer woman wrinkling. The sphenoid sinus contained 2 ml. of bloody fluid. Petechial hemorrhages were present on the epicardium, pleura, and thymus. The lungs were edematous and extruded abundant amounts of frothy material.

INTERNAL EXAMINATION

BODY CAVITIES: The body was opened by the usual thoraco-abdominal incision and the chest plate was removed. No adhesions or abnormal collections of fluid were present in any of the body cavities. All body organs were present in normal anatomical position and showed moderate pallor. The subcutaneous fat layer of the abdominal wall was 1/2 inch thick. There was no internal evidence of blunt force or penetrating injury to the thoraco-abdominal region.

WEIGHTS OF ORGANS: (in grams)

Brain - 1360
Right lung - 180
Left lung - 150
Heart - 110
Liver - 740
Spleen - 80
Right kidney - 50
Left kidney - 50
Pancreas - 40
Thymus - 30

NAME: MOORE, James Michael DATE: 5-7-93 NO: ME-329-93

HEAD: (CENTRAL NERVOUS SYSTEM) Injuries of the head were previously described. Sections through the cerebral hemispheres, brain stem and cerebellum, revealed no nontraumatic lesions.

NECK: Examination of the soft tissues of the neck, including strap muscles, thyroid gland and large vessels, revealed no abnormalities. The hyoid bone and larynx were intact with no evidence of injury.

CARDIOVASCULAR SYSTEM: The pericardial surfaces were smooth, glistening and unremarkable; the pericardial sac was free of significant fluid or adhesions. The coronary arteries arose normally, followed the usual distribution and were widely patent, without evidence of significant atherosclerosis or thrombosis. The chambers and valves exhibited the usual size-position relationship and were unremarkable. The myocardium was dark red-brown, firm and unremarkable; the atrial and ventricular septa were intact. The aorta and its major branches arose normally, followed the usual course and were widely patent, free of significant atherosclerosis and other abnormality. The vena cava and its major tributaries returned to the heart in the usual distribution and were free of thrombi.

RESPIRATORY SYSTEM: The upper and lower airways contained bloody, frothy material mixed with brown vomitus. The mucosal surfaces were smooth, yellow-tan and unremarkable. The pleural surfaces were smooth, glistening with petechial hemorrhages. The pulmonary parenchyma was salmon pink, exuding moderate amounts of blood and frothy fluid. No focal lesions or injuries were noted. The pulmonary arteries were normally developed, patent and without thrombus or embolus.

LIVER AND BILIARY SYSTEM: The hepatic capsule was smooth, glistening and intact, covering dark red-brown, moderately congested parenchyma with no focal lesions noted. The gallbladder contained 9 ml. of green, mucoid bile. The mucosa was velvety and unremarkable. The extrahepatic biliary tree was patent; without evidence of calculi.

ALIMENTARY TRACT: The tongue showed evidence of injury as described above. The esophagus was lined by gray-white, smooth mucosa. The gastric mucosa was arranged in the usual rugal folds and the lumen contained 2 ounces of brown fluid. The small and large bowel were unremarkable. The pancreas had a normal pink-tan lobulated appearance and the ducts were patent. The appendix was present.

GENITOURINARY SYSTEM: The renal capsules were smooth and thin, semi-transparent and stripped with ease from the underlying smooth, red-brown cortical surface. The cortex was slightly congested and sharply delineated from the medullary pyramids, which were red-purple to tan and unremarkable. The calyces, pelves and ureters were unremarkable. The urinary bladder contained 1 ml. of clear yellow urine. The mucosa was gray-tan and smooth. Testes, prostate and seminal vesicles were unremarkable.

RETICULOENDOTHELIAL SYSTEM: The spleen had a smooth, intact capsule covering red-purple, moderately firm parenchyma; the lymphoid follicles were unremarkable. The regional lymph nodes appeared normal.

ENDOCRINE SYSTEM: The pituitary, thyroid and adrenal glands were unremarkable.

MUSCULOSKELETAL SYSTEM: Muscle development was normal. No atraumatic bone or joint abnormalities were noted.

MICROSCOPIC:

Skin - right wrist - intact epithelium. No hemorrhage.
Skin - right ankle - intact epithelium. Subcutaneous hemorrhage.
Skin - left ankle - intact epithelium. Subcutaneous hemorrhage.
Skin - left wrist - disruption of epithelium with dermal hemorrhage.
Anus and Rectum - no hemorrhage.
Testis - no hemorrhage.

PATHOLOGIC DIAGNOSES:

I. Multiple injuries with drowning.
   a. Head injuries - multiple facial abrasions and contusions.
   b. Multiple abrasions and contusions of lips.
   c. Multiple scalp lacerations and contusions.
   d. Multifocal subgaleal contusions and edema.
   e. Multiple fractures of calvarium and base of skull.
   e. Subarachnoid hemorrhage and contusions involving the cerebrum and cerebellar hemispheres.

II. Binding of wrists and ankles in "hog-tied" fashion.

III. Multiple contusions, abrasions and lacerations of torso and extremities.

IV. Defense type injuries of hands.

V. Anal dilatation with hyperemia of anal/rectal mucosa.

VI. Evidence of drowning - washerwoman wrinkling on hands and feet.
   a. Washer woman wrinkling on hands and feet.
   b. Petechial hemorrhages of heart, lungs and thymus.
   c. Pulmonary edema and congestion.
   d. Aspiration of water into sphenoid sinus.

VII. No evidence of disease.

VIII. Terminal aspiration.

NAME: MOORE, James Michael DATE: 5-7-93 NO: ME-329-93

LABORATORY RESULTS

TOXICOLOGY:

Ethyl Alcohol: Blood - <0.01g%
Drug Screen: Blood - No drugs detected.

SEROLOGY:

Blood Type: A+

OPINION:

This 8 year old white male, James Michael Moore, died of multiple injuries with drowning.

Investigation of the circumstances of death revealed that the decedent was one of three children (see related cases MEA-330-93 and MEA-331-93) that were found in a ditch which contained approximately 2 to 2 1/2 feet of water, approximately 150 yards southwest of Blue Beacon Truck Wash on the south service road at Interstate 40 and 55, West Memphis, Arkansas. The decedent was reported missing at approximately 6:00 PM on May 5, 1993, and his body was found the afternoon of May 6, 1993. When found the body was nude and the wrists were bound to the ankles bilaterally.

Autopsy showed that the decedent's hands were bound to his feet in a "hog-tied" fashion. There were multiple traumatic injuries consisting of contusions, abrasions, and lacerations involving the head, torso and extremities. The skull showed multiple fractures with associated brain injury. Defense type injuries consisting of cuts were present on the hands. The anus was dilated and contained mud. Spermatozoa were not detected in the oral and anal smears. In addition, there was evidence of drowning, which included "washerwoman" wrinkling of the hands, pulmonary edema and congestion, aspiration of water into the sphenoid sinus and petechial hemorrhages involving the heart, lungs and thymus. The alcohol detected is probably the result of decomposition. No drugs were identified in the body fluids.

MANNER OF DEATH: Homicide.

Frank J. Peretti, M.D.
Assoc. Medical Examiner

* Pathologist of Record

William Q. Sturner, M.D.
Chief Medical Examiner

ARKANSAS STATE CRIME LABORATORY

MEDICAL EXAMINER DIVISION

Case No.: ME-330-93 Date of Examination: May 7, 1993

Name: BRANCH, Steve Edward

Age: 8 years Race: White Sex: Male

Place of Death: West Memphis, Arkansas County: Crittenden

CONCLUSIONS

CAUSE OF DEATH: Multiple Injuries with Drowning.

MANNER OF DEATH: Homicide.

LABORATORY RESULTS

TOXICOLOGY:

Ethyl Alcohol: None detected in Blood.
Acid and Neutral Drugs: None detected in Blood.
Basic Drugs: None detected in Blood.

SEROLOGY:

Blood Type: A+

Frank J. Peretti, M.D.*
Assoc. Medical Examiner

William Q. Sturner, M.D.
Chief Medical Examiner

* Pathologist of Record

05-24-93/tjg

NAME: BRANCH, Steve E. DATE: May 7, 1993 NO: ME-330-93

EXTERNAL DESCRIPTION: The body was that of a well developed, well nourished nude white male. The body was covered with mud, leaves and debris. The right hand was bound to the right ankle with a black shoe lace, the left hand was bound to the left ankle with a white shoe lace. Both hands and feet showed washerwoman wrinkling. The body weighed 65 pounds, was 50 inches in height and appeared compatible with the reported age of 8 years. The body was cold. Rigor was present and fixed to an equal degree in all extremities. Lividity was present, minimal and fixed on the anterior posterior surfaces of the body. There were multiple injuries situated on the body which are described further below in detail. The scalp hair was blond and bloody. The irides were blue-gray. The corneae were clear. Bilateral transverse drying was present. The conjunctivae and sclerae were congested. There was one petechial hemorrhage involving the left sclera. The teeth were natural and in good condition. Examination of the neck revealed no evidence of injury. The chest and abdomen were unremarkable, except for the injuries to be described further below. The penis showed injuries as described below. The upper and lower extremities showed no abnormalities except for the injuries. The fingernails were short and intact. There was no evidence of breakage and the nail beds were dirty. Injuries are described below. Posterior torso showed injuries as described below. A cloth friendship bracelet was present around the right wrist.

DESCRIPTION OF INJURIES:

Head Injuries:

The right ear showed multiple confluent contusions and abrasions. Scattered abrasions were present over the right eye. A 1/2 inch contusion was present in the right medial periorbital region. A 2 inch scratch was present below the right eye. Multiple scratches were present over the right mandible. Situated on the right mandible was a bell-shaped type abrasion which showed a central area of pallor and abrasion. The lips were abraded, with multiple superficial lacerations. The mucosal surfaces showed multiple contusions, lacerations and hemorrhage. The gums were hemorrhagic. Extending above and below the left eyebrow was a bell-shaped patterned abrasion. The base measured 3/4 inch. The distance between the base and the dome was 1 1/4 inch. A 1/4 inch laceration was present immediately adjacent to the superior medial margin.

The left parietal scalp showed multiple superficial cuts and abrasions. The entire left ear was contused with overlying finely linear abrasions.

The entire left side of the face to include the left ear and an area measuring 5 1/2 by 5 inches, showed multiple confluent red abrasions with multiple gouging type irregular cutting wounds and overlying abrasions. The cutting wounds measure from 1/8 to 1 3/4 inches. Many of these wounds terminated into the oral cavity.

The left occipital scalp was edematous and showed a contusion with overlying abrasions measuring about 4 inches in greatest dimension.

Subsequent examination of posterior neck muscles showed extravasated hemorrhage in the posterior neck muscles. Reflection of the scalp showed multifocal subgaleal contusions. There were no fractures noted to the calvarium. The base of the skull showed a 3 1/2 inch fracture with multiple extension fractures which terminate in the foramen magnum which measured 3 1/2 inches. The left posterior cerebral hemisphere showed multifocal subarachnoid hemorrhage. There were fracture contusions involving the posterior surface of the left cerebellar hemisphere. The right frontal lobe showed focal subarachnoid hemorrhage.

Chest Injuries:

Multiple scattered abrasions were present on the front of the chest.

Genital/Anal Area Injuries:

The anus was dilated. No injuries were noted. The anal and rectal mucosa showed mild hyperemia, but no evidence of injury.

The mid shaft of the penis to include the glans was diffusely red-purple with overlying very fine superficial scratches. There was a clear band of demarcation at the mid shaft which showed that the proximal portion was uninvolved. There were no injuries noted to the testes or internal aspect of the scrotal sac.

Lower Extremity Injuries:

Multiple scratches and contusions were present on the lower extremities. On the left thigh there was a 1 inch yellow scratch. Also, there was a patterned grid-like impression. The margins were diagonally oriented and measured respectively 3 inches laterally and 3 1/2 inches medially. There was evidence of binding abrasions and contusions involving the ankles. The binding abrasions were yellow tan with abraded margins.

Upper Extremity Injuries:

On the back of the hands were multiple scattered contusions. Scattered contusions were also present on the thenar eminence bilaterally.

Binding abrasions with surrounding red contusion were present on the wrists.

Back Injuries:

Present over the left upper back were two contusions measuring approximately 2 inches and 1 by 1 1/2 inches.

Terminal Submersion:

Both hands and feet showed washerwoman wrinkling. There was pulmonary edema and congestion with bloody, frothy fluid in the airways. Bloody watery fluid was present in the sphenoid sinus.

INTERNAL EXAMINATION

BODY CAVITIES: The body was opened by the usual thoraco-abdominal incision and the chest plate was removed. No adhesions or abnormal collections of fluid were present in any of the body cavities. Petechial hemorrhages were present on the epicardium and pleura. All body organs were present in normal anatomical position. The lungs slightly overdistended the midline. The subcutaneous fat layer of the abdominal wall was 1/2 inches thick. There was no internal evidence of blunt force or penetrating injury to the thoraco-abdominal region.

WEIGHTS OF ORGANS:

Brain - 1450 grams
Right lung - 180
Left lung - 170
Heart - 140
Liver - 920
Spleen - 60
Pancreas - 55
Thymus - 15

HEAD: (CENTRAL NERVOUS SYSTEM) Injuries to the head were previously described. Sections through the cerebral hemispheres, brain stem and cerebellum, revealed no nontraumatic lesions.

NECK: Examination of the soft tissues of the neck, including strap muscles, thyroid gland and large vessels, revealed no abnormalities. The hyoid bone and larynx were intact, with no evidence of fracture or hemorrhage.

CARDIOVASCULAR SYSTEM: The pericardial surfaces were smooth, glistening and unremarkable; the pericardial sac was free of significant fluid or adhesions. The coronary arteries arose normally, followed the usual distribution and were widely patent, without evidence of significant atherosclerosis or thrombosis. The chambers and valves exhibited the usual size-position relationship and were unremarkable. The myocardium was dark red-brown, firm and unremarkable; the atrial and ventricular septa were intact. The aorta and its major branches arose normally, followed the usual course and were widely patent, free of significant atherosclerosis and other abnormality. The vena cava and its major tributaries returned to the heart in the usual distribution and were free of thrombi.

RESPIRATORY SYSTEM: The upper and lower airways contained bloody, frothy material with a slight amount of vomitus. The mucosal surfaces were smooth, yellow-tan and unremarkable. The pleural surfaces were smooth, glistening and unremarkable bilaterally. The pulmonary parenchyma was salmon pink, exuding slight to moderate amounts of blood and frothy fluid; no focal lesions were noted. The pulmonary arteries were normally developed, patent and without thrombus or embolus.

LIVER AND BILIARY SYSTEM: The hepatic capsule was smooth, glistening and intact, covering dark red-brown, moderately congested parenchyma with no focal lesions noted. The gallbladder contained 15 ml. of green, mucoid bile. The mucosa was velvety and unremarkable. The extrahepatic biliary tree was patent, without evidence of calculi.

ALIMENTARY TRACT: The tongue was without evident recent injury. The esophagus was lined by gray-white, smooth mucosa. The gastric mucosa was arranged in the usual rugal folds and the lumen contained 2 ounces of partially digested fluid and remnants of green vegetable-like material. The small and large bowel were unremarkable. The anus and rectum showed mild hyperemia. No abrasions, contusions or lacerations were present. The pancreas had a normal pink-tan lobulated appearance and the ducts were patent. The appendix was present.

GENITOURINARY SYSTEM: The renal capsules were smooth and thin, semi-transparent and stripped with ease from the underlying smooth, red-brown cortical surface. The cortex was slightly congested and sharply delineated from the medullary pyramids, which were red-purple to tan and unremarkable. The calyces, pelves and ureters were unremarkable. The urinary bladder was contracted and empty. The mucosa was gray-tan and smooth. Testes, prostate and seminal vesicles were free of injury.

NAME: BRANCH, Steve E. DATE: May 7, 1993 NO: ME-330-93

RETICULOENDOTHELIAL SYSTEM: The spleen had a smooth, intact capsule covering red-purple, moderately firm parenchyma; the lymphoid follicles were unremarkable. The regional lymph nodes appeared normal.

ENDOCRINE SYSTEM: The pituitary, thyroid and adrenal glands were unremarkable.

MUSCULOSKELETAL SYSTEM: Muscle development was normal. No atraumatic bone or joint abnormalities were noted.

MICROSCOPIC:

Skin - right ankle - intact epithelium. No hemorrhage.
Skin - right wrist - intact epithelium. No hemorrhage.
Skin - left ankle - disruption of epithelium. No hemorrhage.
Skin - left wrist - intact epithelium. No hemorrhage.
Head of penis - intact epithelium. Blood vessel engorgement.
Shaft of penis - intact epithelium. Blood vessel engorgement.
Head and shaft of penis - disruption of epithelium. Blood vessel engorgement.
Anus and Rectum - no hemorrhage identified.
Testes - no hemorrhage identified.

NAME: BRANCH, Steve E. DATE: May 7, 1993 NO: ME-330-93

PATHOLOGIC DIAGNOSES:

I. Multiple Injuries:
   a. Multiple facial abrasions, contusions and lacerations.
   b. Subgaleal contusions.
   c. Fractures of base of skull.
   d. Subarachnoid hemorrhage of cerebral and cerebellar hemispheres.

II. Bindings of hands and feet.

III. Contusion of penis with superficial scratches.

IV. Dilation of anus.

V. Multiple contusions, abrasions, and lacerations of torso and extremities.

VI. Terminal submerging.
   a. Wrinkling of hands and feet.
   b. Water in sphenoid sinus.
   c. Pulmonary edema and congestion with bloody, frothy fluid in airways.

VII. Terminal aspiration.

VIII. No evidence of disease.

LABORATORY RESULTS

TOXICOLOGY:

Ethyl Alcohol: None detected in Blood.
Acid and Neutral Drugs: None detected in Blood.
Basic Drugs: None detected in Blood.

SEROLOGY:

Blood Type: A+

NAME: BRANCH, Steve E. DATE: May 7, 1993 NO: ME-330-93

OPINION:

This 8 year old, white male, Steve Branch, died of multiple injuries with drowning.

Investigation of the circumstances of death revealed that the decedent was one of three children (see related cases MEA-329-93 and MEA-331-93) that were found in a ditch which contained approximately 2 to 2 1/2 feet of water, approximately 150 yards southwest of Blue Beacon Truck Wash on the south service road at Interstate 40 and 55, West Memphis, Arkansas. The decedent was reported missing at approximately 6:00 PM on May 5, 1993, and his body was found the afternoon of May 6, 1993. When found the body was nude and the wrists were bound to the ankles bilaterally.

Autopsy demonstrated multiple cutting and gouging wounds and abrasions involving the facies. There were fractures of the base of the skull and hemorrhage involving the brain. There were multiple contusions, abrasions, and lacerations involving the torso and extremities. The penis showed injuries consisting of segmental intense hyperemia involving the mid shaft, glans and head of the penis with overlying very fine scratches. There was evidence also of terminal submersion consistent with "washerwoman" wrinkling of the hands and feet. There was pulmonary edema and congestion, along with bloody, frothy fluid, in the air passages and water in the sphenoid sinus. Petechial hemorrhages were present on the epicardium and pleura. The anus was dilated, with no external evidence of injury. The anal and rectal mucosae were slightly hyperemic and showed no injuries. Spermatozoa were not identified on the oral and anal smears. No drugs or alcohol were detected in the body fluids.

MANNER OF DEATH: Homicide.

Frank J. Peretti, M.D.*
Assoc. Medical Examiner

William Q. Sturner, M.D.
Chief Medical Examiner

* Pathologist of Record

ARKANSAS STATE CRIME LABORATORY

MEDICAL EXAMINER DIVISION

Case No.: ME-331-93 Date of Examination: May 7, 1993

Name: BYERS, Christopher Mark

Age: 8 years Race: White Sex: Male

Place of Death: West Memphis, Arkansas County: Crittenden

CONCLUSIONS

CAUSE OF DEATH: Multiple Injuries.

MANNER OF DEATH: Homicide.

LABORATORY RESULTS

TOXICOLOGY:

Ethyl Alcohol: Blood- Negative

Drug Screens: Blood- Acid & Neutral Drugs- 5.737 ug/ml Carbamazepine
Basic Drugs- None detected

SEROLOGY:

Blood Type: O+

Oral smears/swabs: No semen found.
Rectal smears/swabs: No semen or blood found.

Frank J. Peretti, M.D.*
Assoc. Medical Examiner

William Q. Sturner, M.D.
Chief Medical Examiner

* Pathologist of Record

05-28-93/tjg

#3 Natural Resources Drive, P.O. Box 5274, Little Rock, Arkansas 72215

NAME: BYERS, Christopher M. DATE: 5-7-93 NO.: MEA-331-93

EXTERNAL DESCRIPTION: The body was that of a well developed, well nourished nude white male. The hands were bound to the feet in "hog-tied" fashion. The fingernails were short and intact, with dirty beds. The body was covered with dried mud, leaves and debris. There were multiple injuries situated on the body which are described further below in detail. The body weighed 52 pounds, was 48 inches in height and appeared compatible with the reported age of 8 years. The body was cold. Rigor was present and fixed to an equal degree in all extremities. The body was pale with minimal posterior fixed lividity. The scalp hair was brown, wavy, and blood-soiled. A 3/4 inch old scar was present on the right forehead and a 1/4 inch old scar was present adjacent to the bridge of the nose. An old hypopigmented scar was present on the front of the chest. The irides were brown. The corneae were cloudy. The sclerae and conjunctivae were slightly congested, with no petechial hemorrhages. The teeth were natural and in good condition. The neck, chest and abdomen were unremarkable, except for the injuries to be described. There were injuries noted to the anal/genital area which are described below in detail. The upper and lower extremities show no abnormalities, except for the injuries and bindings to be described further below. The lower extremities show the presence of a few old healed scars. Abundant amount of feces was present about the anus.

DESCRIPTION OF INJURIES:

The body was received nude and was covered with dried mud, leaves and debris. There was washer woman wrinkling of the hands and feet. The hands were bound to the ankles behind the back in a "hog-tied" fashion. Strands of hair-like material were found on the left posterior thigh and under the bindings of the left ankle. The right wrist was bound to the right ankle with a black shoe lace and the left wrist was bound to the left ankle with a white shoe lace.

Head Injuries:

The right ear was abraded and contused. The inferior aspect of the right ear showed multiple linear abrasions measuring 1/2 inch to 1 1/4 inch.

On the bridge of the nose were multiple abrasions. Situated between the nose and the upper lip was a semi-lunar abrasion measuring about 1/8 inch. A 1/4 inch abrasion was present at the lateral aspect of the lower lips. A 1/8 inch abrasion was present on the midline of the lips. The mucosal surfaces of the lower lip showed a 5/16 inch laceration. The frenulum was contused and was surrounded by a 1/2 inch contusion. Multiple superficial bite marks were present on the mucosal surfaces of both right and left cheeks.

A 3/16 inch laceration was present above the left upper lip.

Situated on the superior aspect of the bridge of the nose was a 3/16 inch abrasion.

Situated above the left eyebrow were two abrasions measuring respectively 1 inch and 3/4 inch. Situated on the right eyelid was a 1/2 by 1/2 inch contusion. Adjacent to the medial aspect of the left eye was a 1/8 inch abrasion.

A 1/8 inch abrasion was present adjacent to the lateral aspect of the left eyebrow.

Situated on the left zygomatic region were two circular abrasions, each measuring 3/16 inch. Below these was a 1/4 by 1/8 inch abrasion.

The left ear was contused and situated behind it were five linear abrasions measuring respectively 1/2 inch, 7/16 inch, 1/2 inch, 7/16 inch, and 3/4 inch. A 1/8 inch abrasion was present on the helix of the left ear. In front of the left ear were five haphazardly oriented abrasions, measuring 5/16 to 1 3/4 inch.

Situated on the left parietal scalp was a 1 1/4 inch laceration.

Reflection of the scalp showed hemorrhage in the soft tissues underlying the laceration. There were multifocal, subgaleal contusions with associated edema.

There were no fractures noted to the calvarium, however, the base of the skull shows multiple fractures. In the left posterior cranial fossa was a fracture measuring 3 1/2 inches in length. Extending from this fracture were multiple radiating fractures which involved the entire posterior left cranial fossae. Situated on the left posterior medial cranial fossa was a 1/4 inch ovoid punched out fracture. A 1 inch fracture also involved the left middle cranial fossa.

The brain showed multifocal subarachnoid hemorrhage involving the left posterior cerebral and cerebellar hemispheres. Associated fracture contusions were present.

Neck Injuries:

Situated on the left side of the neck were a few scattered abrasions.

Subsequent autopsy of the neck showed no hemorrhage in the strap muscles of the neck. The hyoid bone and larynx were intact. No petechial hemorrhages were noted. No fractures were noted.

Genital and Anal Injuries:

The anal orifice was markedly dilated. Examination of the rectal and anal mucosa showed them to be diffusely hyperemic and injected. There were no injuries present.

The skin of the penis, scrotal sac and testes were missing. There was a large gaping defect measuring 2 3/4 by 1 1/2 inch. The shaft of the penis was present and measured 2 inches in length. The gaping defect was surrounded by multiple and extensive irregular punctate gouging type injuries measuring from 1/8 to 3/4 inch and had a depth of penetration of 1/4 inch to 1/2 inch. Some of these wounds showed hemorrhage in the underlying soft tissues, others did not. In between the thighs there were multiple areas of yellow abrasions with skin slippage. The medial aspect of the left thigh showed a yellow abrasion.

Situated on the posterior surface of the left buttocks was a 1/2 by 1/4 inch contusion and a 1 3/4 inch linear abrasion.

Situated on the posterior surface of the right buttocks were two faint contusions, each measuring about 1/2 by 1/2 inch.

The left buttock showed five superficial cutting wounds measuring from 1/2 to 2 1/8 inches.

Situated on the right buttock region were multiple linear superficial interrupted cuts measuring from 3/16 to 1/2 inch and were interspaced by a distance of 1/8 inch. Scattered linear abrasions were present about the anal orifice.

Injuries of Right Leg:

Situated on the right anterior thigh was a 1 by 1 3/8 inch reddish contusion. Below this contusion was a patterned contusion consisting of two ovoid red-purple contusions, the superior one measuring 3/4 by 7/16 inch, and the inferior one measuring 3/4 by 1 1/8 inch. Extending from both of these contusions were linear contusions, the superior one measuring 5 3/16 inches and the inferior contusion measuring 4 1/2 inches. The interspace between these two linear contusions was about 3/4 inch.

A 1/4 inch abrasion was present on the anterior surface of the right leg.

The ankles showed evidence of yellow-red binding abrasions. On the left ankle below the binding abrasion was a 3/4 by 1/2 inch abrasion.

Situated over the posterior right thigh and leg were multiple scattered abrasions and contusions. A 2 1/2 by 2 3/4 inch contusion was present above the ligature binding site of the right ankle.

Injuries of the Left Leg:

A 1/4 inch abrasion was present on the right knee. Situated below the right knee were three red contusions measuring 3/4 inch, 1/4 inch, and 1/2 inch each. A 3/4 by 1 inch abrasion was present on the left ankle. The posterior surface of the left lower leg and ankle show confluent contusions.

Back Injuries:

Multiple scattered abrasions were situated over the upper back region.

Injuries of Right Arm:

Scattered abrasions were present over the right arm and forearm. A yellow binding abrasion which was not surrounded by contusion was present on the right wrist.

Injuries of Left Arm:

Multiple scattered abrasions are present on the anteroposterior surfaces of the left arm. A binding abrasion was present on the left wrist and at the superior margin of this abrasion was a faint red-purple contusion.

INTERNAL EXAMINATION

BODY CAVITIES: The body was opened by the usual thoraco-abdominal incision and the chest plate was removed. No adhesions or abnormal collections of fluid were present in any of the body cavities. No petechial hemorrhages were present. All body organs showed diffuse pallor. The subcutaneous fat layer of the abdominal wall was 1/2 inches thick. There was no internal evidence of blunt force or penetrating injury to the thoraco-abdominal region.

NAME: BYERS, Christopher M. DATE: 5-7-93 NO.: MEA-331-93

WEIGHTS OF ORGANS: (in grams)

Brain - 1420
Right lung - 230
Left lung - 220
Heart - 120
Liver - 840
Right kidney - 62
Left kidney - 60
Spleen - 100
Thymus - 30

HEAD: (CENTRAL NERVOUS SYSTEM) Injuries of the head were previously described. Sections through the cerebral hemispheres, brain stem and cerebellum revealed no nontraumatic lesions.

NECK: Examination of the soft tissues of the neck, including strap muscles, thyroid gland and large vessels, revealed no abnormalities. The hyoid bone and larynx were intact and showed no evidence of fracture or hemorrhage.

CARDIOVASCULAR SYSTEM: The pericardial surfaces were smooth, glistening and unremarkable; the pericardial sac was free of significant fluid or adhesions. The coronary arteries arose normally, followed the usual distribution and were widely patent, without evidence of significant atherosclerosis or thrombosis. The chambers and valves exhibited the usual size-position relationship and were unremarkable. The myocardium was dark red-brown, firm and unremarkable; the atrial and ventricular septa were intact. The aorta and its major branches arose normally, followed the usual course and were widely patent, free of significant atherosclerosis and other abnormality. The vena cava and its major tributaries returned to the heart in the usual distribution and were free of thrombi.

RESPIRATORY SYSTEM: The upper and lower airways contained a slight amount of vomitus. The mucosal surfaces were hyperemic. The pleural surfaces were smooth, glistening and unremarkable bilaterally. The pulmonary parenchyma was salmon-pink, exuding slight amounts of blood and frothy fluid. No focal lesions were noted. The pulmonary arteries were normally developed, patent and without thrombus or embolus.

LIVER AND BILIARY SYSTEM: The hepatic capsule was smooth, glistening and intact, covering a pale brown parenchyma with no focal lesions noted. The gallbladder contained 3 ml. of green, mucoid bile. The mucosa was velvety and unremarkable. The extrahepatic biliary tree was patent, without evidence of calculi.

ALIMENTARY TRACT: The tongue was without evident recent injury. The esophagus was lined by gray-white, smooth mucosa. The gastric mucosa was arranged in the usual rugal folds and the lumen contained 1 ounce of red-tan fluid with a piece of chewing gum. The small and large bowel were unremarkable. The anal and rectal mucosae were hyperemic and injected. The pancreas had a normal pink-tan lobulated appearance and the ducts were patent. The appendix was present.

GENITOURINARY SYSTEM: The renal capsules were smooth and thin, semi-transparent and stripped with ease from the underlying smooth, red-brown cortical surface. The cortex was pale. The calyces, pelves and ureters were unremarkable. The urinary bladder was contracted and contained no urine. The mucosa was gray-tan and smooth. The prostate and seminal vesicles were unremarkable. The testes were missing.

RETICULOENDOTHELIAL SYSTEM: The spleen had a smooth, intact capsule covering red-purple, moderately firm parenchyma; the lymphoid follicles were unremarkable. The regional lymph nodes appeared normal.

ENDOCRINE SYSTEM: The pituitary, thyroid and adrenal glands were unremarkable.

MUSCULOSKELETAL SYSTEM: Muscle development was normal. No atraumatic bone or joint abnormalities were noted.

TOXICOLOGY:

Ethyl Alcohol: Blood- Negative

Drug Screens: Blood- Acid & Neutral Drugs- 5.737 ug/ml Carbamazepine
Basic Drugs- None detected

SEROLOGY:

Blood Type: O+

Oral smears/swabs: No semen found.
Rectal smears/swabs: No semen or blood found.

MICROSCOPIC:

Skin - left ankle - intact epithelium. No hemorrhage.
Skin - left wrist - intact epithelium. No hemorrhage.
Skin - right ankle - intact epithelium. No hemorrhage.
Skin - left wrist - intact epithelium. No hemorrhage.
Larynx - no hemorrhage.
Anal orifice - no hemorrhage.
Penis - Bacterial colonies. A few ghost remnants of red blood cells are identified in vessel and soft tissues.

NAME: BYERS, Christopher M. DATE: 5-7-93 NO.: MEA-331-93

PATHOLOGIC DIAGNOSES:

I. Multiple Injuries:
   a. Multiple facial contusions, abrasions, and lacerations.
   b. Contusions and abrasions of ears.
   c. Left parietal scalp laceration.
   d. Fractures of base of skull.
   e. Subarachnoid hemorrhage of cerebral and cerebellar hemispheres with fracture contusions.
   g. Abrasions of front of neck with no evidence of neck muscle injuries.

II. Genital mutilation with absence of scrotal sac, testes, skin and head of penis, with multiple surrounding gouging and cutting wounds.

III. Dilated anus.

IV. Bindings of wrists to ankles behind back in "hog-tied" fashion.

V. Multiple contusions, abrasions, and lacerations of torso and extremities.

VI. Terminal aspiration.

VII. No evidence of disease.

NAME: BYERS, Christopher M. DATE: 5-7-93 NO.: MEA-331-93

OPINION:

This 8 year old, white male, Christopher Byers, died of multiple injuries.

Investigation of the circumstances of death revealed that the decedent was one of three children (see related cases MEA-329-93 and MEA-330-93) that were found in a ditch which contained approximately 2 to 2 1/2 feet of water, approximately 150 yards southwest of Blue Beacon Truck Wash on the south service road at Interstate 40 and 55, West Memphis, Arkansas. The decedent was reported missing at approximately 6:00 PM on May 5, 1993, and his body was found the afternoon of May 6, 1993. When found the body was nude and the wrists were bound to the ankles bilaterally.

Autopsy demonstrated bindings of the hands and feet behind the back in a "hog-tied" fashion with shoe laces. There were multiple abrasions, contusions and lacerations of the facies which resulted in hemorrhage and fracturing of the skull. The skin of the penis, scrotal sac and testes, were missing. Surrounding the perineum were multiple gouging superficial wounds and multiple cutting wounds. The anus was dilated with a hyperemic mucosa. There were no injuries present. Spermatozoa were not detected in the oral and anal smears. In addition, there were multiple and extensive contusions, abrasions, and lacerations involving the torso and extremities. No alcohol was detected. Carbamazepine was detected in sub-therapeutic levels.

MANNER OF DEATH: Homicide.

Frank J. Peretti, M.D.*
Assoc. Medical Examiner

William Q. Sturner, M.D.
Chief Medical Examiner

* Pathologist of Record

STATE'S EXHIBIT

C

Letter from Medical Examiner's Office
Arkansas State Crime Lab

(Echols Response Exhibit C)

001109

ARKANSAS STATE CRIME LABORATORY

Mike Beebe
Governor

May 30, 2008

Kermit B. Channell II
Executive Director

Mr. Brent Davis
Prosecuting Attorney
Second Judicial District
P.O. Box 491
Jonesboro, AR 72403

Re: ME-329-93 James Michael Moore
ME-330-93 Steve Edward Branch
ME-331-93 Christopher Mark Byers

Dear Mr. Davis:

In discussions with various privately retained forensic pathologists regarding the autopsy reports referenced above, the following information should be noted:

First, Dr. William Q. Sturner, (the Chief Medical Examiner at the time of the autopsies) and I personally examined the bodies of the three boys along with Dr. Kevin Dugan, a forensic dentist. Dr. Dugan's finding that none of the wounds appeared to be human bite marks was subsequently corroborated by Dr. Harry Mincer.

Second, as part of the autopsy process, tissue samples were taken from some of the superficial and penetrating wounds. When examined grossly and microscopically these samples demonstrated presence of hemorrhage, clearly indicative of antemortem injury and not postmortem animal activity.

Third, physical examination of the penetrating wounds showed a lack of soft tissue bridging typical of wounds caused by tearing or biting. These wounds did show clearly incised edges, indicating they were caused by a sharp instrument.

Finally, I have consulted with Dr. Charles Kokes (the current Chief Medical Examiner) regarding the autopsies and he concurs in the findings made and the conclusions drawn from them.

#3 Natural Resources Drive • P.O. Box 8500 • Little Rock, Arkansas 72215

Fax 501-227-0713
Phone 501-227-5747
Laboratory Services

Fax 501-221-1653
Phone 501-227-5936
Medical Examiner

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Charles P. Kokes, M.D.
Chief Medical Examiner

Frank J. Peretti, M.D.
Associate Medical Examiner

CPK/FJP/mlp

STATE'S EXHIBIT

D

Damien Wayne Echols v. State of Arkansas
Arkansas Supreme Court Case No. CR 99-1060

Partial Testimony of Mike Allen
(Vol. 8; R. 1441)

Partial Testimony of Kevin Dugan
(Vol. 8; R. 1486 - 1488)

Partial Testimony of William Sturner
(Vol. 9; R. 1532-1533)

(Echols Response Exhibit D)

001112

A. Not -- not a lot of water. It was -- it was muddy but other than it -- we got the majority of the water out.
Q. Okay. Were you able to visualize the bottom of the ditch once you had pumped it down to that point?
A. Yes, sir.
Q. Okay. Do you recall seeing any crawfish, any fish flopping on the ground, any aquatic animals -- did you notice any of those in the ditch after you pumped it down to this level?
A. No, sir.
Q. Okay. No crawdads scurrying across the bottom or fish flopping on the bottom of the ditch?
A. No, sir.
Q. Okay. If they had been there, were you in a position to have observed that if they had in fact been there at the bottom of the ditch?
A. Yes, sir.
Q. Okay. And was the reason you pumped this out and went through this process with the screen, what type of evidence were you looking for?
A. Any type of weapons or we -- we did have a child that was dismembered -- you know -- looking -- that and weapons.
Q. Okay. And did you actually -- after the water had been pumped out, were there efforts to rake the bottom to gather any evidence that might be there?

A. Well, I was -- I was at my office and whenever there's a case that the M. E.'s office needs me on, they will call me at my office and instruct me as to what time they need me over there at their -- at the laboratory to work with them.
Q. And you know -- is that what happened in this particular instance?
A. Yes, sir, it is.
Q. Okay. When you went over there, can you describe for the Court the circumstances that existed, where you viewed the bodies, what the situation was?
A. In the -- in the downstairs area in the morgue when I entered the building, there were three young children who had been murdered and they were -- the three bodies were on the tables there for viewing.
Q. Okay. Now, who -- do you recall if Doctor Peretti was there when you arrived?
A. Yes, sir, Doctor Peretti was there.
Q. Okay. And tell us what was said to you in terms of your direction or what you were supposed to do or what they -- what he wanted from you in that particular instance.
A. He wanted me to view the three bodies individually and see if I saw anything that resembled a bite mark on any of the three bodies.
Q. Okay. Was there any particular injuries that were pointed out to you or indicated we really want you to look at this one

or we really want you to look at that one, or was it just generally look over these bodies and see if you see anything that's suspicious for a bite mark?
A. Well, the face of the one individual had many marks on it that were circular that they particularly wanted me to view.
Q. Okay. And did you do that and can you explain to us how you viewed the bodies and what steps you took to determine or ascertain if you thought there was anything there in the nature of a bite mark?
A. Well, when I was looking at -- at that body in particular, as I stated, there were many circular marks that were present all over the neck, chin, cheek, above the eye, et cetera. And they all seemed to me to have been made by a -- a circular object that -- a hollow pipe or something that would have been making such a -- such a mark on the face.
Q. Okay. And did you examine -- were you asked to look at the other two boys?
A. Yes, I was, and I looked at them also and I didn't see anything that -- that appeared to have any characteristics that would be bite marks.
Q. Okay. And at that -- after you conducted your examinations and viewed the bodies personally, were you asked, you know, do you see anything here that looks like a bite mark to you?
A. Yes, they -- they asked me that and I -- and I told them

that, no, I didn't see anything that looked like a bite mark.
Q. Okay. Now, as a forensic odontologist -- that is what you are, correct?
A. Yes, sir.
Q. Okay. Is it -- is it better in terms of being able to make calls as to whether something is a bite mark or not, is it better to have the body to examine than just a photograph?
A. I feel that it is, yes, sir.
Q. Okay. Why is that?
A. Well, you're able to see the three dimensional aspect a whole lot better because photographs, of course, are two dimensional. And you're able to move the body around and -- and -- you know, see from all angles how this mark could have been made and what could have made it.
Q. Okay. And you had that opportunity in examining the bodies of these three children, correct?
A. Yes, sir, I did.
Q. Okay. And your opinion to the doctors there upon that initial examination was that you didn't think there was anything there that would constitute a bite mark?
A. That's correct.
Q. And was that opinion within a reasonable degree of medical certainty as -- as applied in your field?
A. Yes, sir, it was.
Q. Okay. Now, subsequent to that, after you found out that

Q When you get a call from the Medical Examiner's Office that these bodies have been sent down for purposes of autopsy, what do you do then?
A Well, in this case I finished my work posthaste and drove back to Little Rock to the Medical Examiner's Office and reviewed the bodies with Doctor Peretti.
Q Was Doctor Peretti the Medical Examiner that was assigned to actually perform the autopsies and write the report?
A Yes, sir.
Q Is it unusual in the nontypical case for someone such as Doctor Peretti to consult with you and ask you to view the bodies and check his findings and report?
A I'd say it's the usual course of events.
Q Did you view all three of the bodies while they were there at the Crime Lab?
A I viewed all three while Doctor Peretti went over the findings with each individual body.
Q So he would go over the findings he had made, and you viewed the bodies to make sure that his findings in his report are consistent with what you see?
A Yes, sir.
Q There was nothing in any of his reports referring to anything that appeared to be a bite mark or that might be a bite mark. Was that consistent with what you saw when you looked at those bodies?

A None whatsoever, and it was perfectly consistent with what I saw.
Q With your years of experience, training and background, when you examined the bodies and heard Doctor Peretti's report, you saw nothing there that would alert you to think that something -- some injury on the bodies of these three young men were bite marks.
A I did not.
Q Are you familiar with Doctor Kevin Dugan?
A Yes, I am.
Q What work does he do with the Crime Lab?
A He's a forensic odontologist, or dentist, and performs identification procedures and other dental work on a consultant basis for the State Crime Lab.
Q Is he the one that y'all refer to when you have a situation where you need some added expertise in the area of possible bite mark or bite mark identification?
A We would. Yes, sir.
Q And did you know if he was consulted in this case?
A I found out about it, and I may have known at that time. It just doesn't come clear to me, but I would presume that he would be.
Q In terms of the Crime Lab at that time, the proper protocol in order to get additional expertise in the area of possible bite marks would be to consult Doctor Dugan and have him view

STATE'S EXHIBIT

E

Jessie Misskelley Statement to Prosecutors

DEPOSITION
OF
JESSIE LLOYD MISSKELLEY

Taken in the office of C. Joseph Calvin
Deputy Prosecuting Attorney
Clay County
201 East Ninth Street
Rector, Arkansas 72461

APPEARANCES:

C. JOSEPH CALVIN
DEPUTY PROSECUTOR

GREG ~~BRENT~~ CROW
DEFENSE COUNSEL

BRENT DAVIS
PROSECUTING ATTORNEY

DAN STIDHAM ~~GREG CROW~~
DEFENSE COUNSEL

JESSIE LLOYD MISSKELLEY
DEFENDANT

DEFENDANT'S EXHIBIT
Proffer 10 2-22-96

001120

J-Joe Calvin
B-Brent Davis
M-Jessie Misskelley
D-Daniel Stidham
G-Greg Crow

J- Okay I have the recorder on.

B- I have turned the other recorder on for purposes of this tape we are at the office of Joe Calvin, attorney, it is 8:02 p.m. on February 17, 1994, present in the room is Greg Crow.

G-Present

B-Jessie Misskelley, Jr.

M-Present

B-Dan Stidham

D-I am here

B-Joe Calvin

J-Present

B-and myself, Brent Davis, now Jessie before we start would you raise your right hand, do you swear to tell the truth the whole truth and nothing but the truth so help you god.

M-Yes sir I do

B-Now for purposes of the records I want it to reflect that number one that Mr. Stidham and myself have talked with Judge Burnett and have advised him of the proceedings and after discussing this with him, he approved or said that we could take a statement with Mr. Misskelley's attorneys present.

D-Over my objections

B-Over Mr. Stidhams objections. Also, for Mr. Misskelley's benefits that this statement will be taken with a grant of use immunity approved by the court which means that anything in this statement can not be used in any proceedings against Jessie Misskelley Jr., in the future, down the road or whatever. Also, for the record, and Mr. Stidham can add to this, it is my understanding that any statement that Mr. Misskelley gives will be against the advice of his attorneys, Mr. Stidham and Mr. Crow.

D-That is correct

B-and for the record that they are requesting, they have requested of the judge that it be delayed until the psychiatric evaluation could be performed and that the court indicated that this statement could be taken before that evaluation over the objection of Mr. Stidham.

D-That is correct

B-and that this statement will be tape recorded and a copy of that tape or that tape will be provided to the defense counsel and that at this point no promises have been made as to any deals or any benefits that will be granted to Mr. Misskelley as a result of his statement.

D-There have been no negotiations whatsoever primarily do to Mr. Misskelley's refusal to talk to us.

B-Now if you would, would you please state your name, Jessie.

D-Before you get started with that, I would like to make a record to what I have or have not advised Mr. Misskelley of tonight.

B-You may need to speak up.

D-Okak, Jessie can you hear me?

M-Yes I can hear you.

D-Now I want you to listen very carefully to what I have to tell you, okay. I told you earlier that I had some new evidence is that correct.

M-That is what you said.

D-And I told you that this new evidence may, I plain on filing a motion for a new trial and that court will grant you a new trial based on this new evidence, is that correct.

M-That is what you said.

D-I also told you that you given a statement would be against my advice and wishes.

M-That is what you said.

D-I am advising you that I don't think it is a good idea for you to give this statement, do you understand that.

M-Yes I do.

D-Okay, do you understand that Mr. Crow has given you the same advice.

M-Yes I do.

D-You need to speak up a little louder, Jessie.

M-Yes I do.

G-One second let me fix this.

D-So you understand that it is my advice to you, is that you not say anything, do you understand that.

M-Yes

D-And you are eighteen (18) years old and you understand that I have asked for a mental evaluation.

M-I do not know if you did or not.

D-I asked the court if I could get the opportunity to get you the psychiatric help that you asked for when I was down at Pine Bluff, Tuesday. Do you remember asking for that?

M-Yes I do

D-You asked my to get you a psychiatrist.

M-Yes, I said that I need help.

D-Okay and that is why I asked the judge for the opportunity to get you the evaluation before you made any statement. Do you understand that?

M-Yes

D-And do you also understand that again that it is my advice that you not talk or give any statement here tonight until we have a chance to file a motion for a new trial and get you some psychiatric evaluation completed. Do you understand that?

M-Yes I do.

D-And it is your decision to go ahead and make a statement any ways.

M-Yes

D-So you still want to give a statement against my advice and counsel.

M-Yes because I want something done about it.

D-Okay, is there any part of what I just told you that you do not understand.

M-No

D-Do you understand everything?

M-Yea

D-And you want to make this statement regardless of my advice against doing so.

M-Yea

D-Do you want to have the opportunity to talk to anyone else, your father or anyone else before you make this statement.

M-I may need to talk to my father but I am not sure.

D-It is your decision, you are eighteen (18) years old.

M-Yes I am

D-Do you want to talk to your father or not?

M-No, I can go ahead and do it.

D-Do you realize that once you make this statement there is no turning back.

M-I know there is no turning back.

D-Is there anything that your would like to add to that, Greg?

G-Jessie, do you realize that I do not always agree with everything that Dan says but this time agree, I do not think you should say anything. You now that you are aware of the fact that I am telling you that you should not say anything?

M-Yes I understand what you are saying.

G-I want you to understand that and you are going to anyway, is that right.

M-Right, because I want something done.

J-Let me ask a couple of questions before you get into it. Jessie when you where brought here, since you have been here with the Deputy Sheriff, I think that you got here about 5:00, is that correct.

M-Somewhere

J-Okay nobody has questioned you about anything that has happened is that correct.

M-No

J-How have we treated you?

M-Nice

J-Has anybody been rude to you or anything?

M-No

J-We got you a cheeseburger sandwich and I asked Mr. Crow on the telephone if that would be alright, he said that would be perfectly alright, and we purchased you a cheeseburger, is that correct.

M-Yes sir

J-And I gave you a couple of diet cokes, I do not now if you drank them all but you drank those, is that correct.

M-Yes

J-But you have not been promised anything before you testimony and you want to give it free and voluntary and nobody has mistreated you.

M-No

B-Would you please state your name Jessie?

M-Jessie Lloyd Misskelly, Jr.

B-And Jessie how old are you?

M-Eighteen (18)

B-And what is your birthdate?

M-July 10, 1975

B-Okay and where were you residing prior to the time that you were arrested?

M-Holland Trailer Park

B-Okay, I want to draw your attention back to the date that the three little boys were murdered, if you would on that day did you go to Robin Hood Woods?

M-Yes sir I did.

B-Okay and who did you go there with?

M-Damien and Jason.

B-Okay, and when you went there what happened when you got to the woods?

M-We sit there for awhile and then three little boys came up.

B-What, did you have anything to drink or had you done any drugs or anything like that prior to that time or during that time?

M-I was drinking

B-What were you drinking?

M-Whiskey, Evan Williams

B-Okay and do you recall whether it was day light or dark when you got to the woods?

M-It was still day light

B-Okay and do you know or have any idea what time it was about when you got to the woods?

M-No, I don't.

B-Okay, now, where did you enter the woods from?

M-By a bridge.

B-Okay and what kind of bridge was it

M-On a service road.

B-Okay, you entered the woods by a bridge near the service road.

M-Yes.

B-Okay, who was with you at that point.

M-Jason and Damien

B-Where did you get with them?

M-Lake Shore,

B-Okay and was there anybody else with you.

M-No.

B-And when you entered the woods near that bridge what happened next.

M-We just sit out there started drinking and all of a sudden we heard some noise. me and Jason hid and Damien sat there and he hid and three little boys came up and he jumped them.

B-Now when you say that prior to the boys coming up what was Damien doing?

M-He was just sitting there, waiting for them.

B-Was he drinking too?

M-Yes

B-What was he drinking?

M-He was drinking beer.

B-Okay and what about Jason?

M-Same thing.

B-Okay, did they appear to be intoxicated?

M-To me they were

B-Okay what about you had you drank to the point that you were intoxicated?

M-I drunk to the point that I was sick.

B-Okay. and what were you drinking with the Whiskey?

M-No

B-Okay and what brand was it?

M-Evan Williams

B-Okay, where did you get it from?

M-Vicky Hutchinson

B-Was there anybody with you when you got that?

M-No

B-Okay, did, were you the only one there when you got the Evan Williams from her?

M-Yea

B-Okay and how much, when did you make the arrangements for her to get that?

M-During that day, I do not know what time.

B-Now, where had you been right before hooking up or getting with Damien and Jason?

M-Well, that morning I went to West Memphis roofing.

B-Okay, and about what time did you get through roofing?

M-Well, I got off about dinner time.

B-Okay and after you got off at dinner time where, what were you doing right before you meet up with Jason and Damien, where had you been?

M-Holland Trailer Park

B-Okay, and had you seen anybody at Holland Trailer Park right before you left to meet up with those two?

M-Yes

B-and who had you seen.

M-Louis, Susie, Stephenie, Pat, Bubba, Cody, Stephenie, Bobby, no, some cop and there was some more people out there, too.

B-Okay so and so it was after was it, do you have any idea it was when you left the trailer park approximately?

M-I do not know what time it was I did not have my watch.

B-and where were you when as far as between the trailer park and Robin Hood Woods when you ran into or came across Jason and Damien.

M-Lake Shore.

B-Is that where you meet them?

M-Yes,

B-Where were they when you meet them?

M-By the interstate.

B-Okay did you know ahead of time that you were going to meet them there.

M-Yes

B-Okay and how did you know that?

M-Well, Damien, I talked to him a couple of times and he wanted me to go to West Memphis with him and Jason to find some girls and I went.

B-Did you know what you where going for what was going to happen?

M-No I didn't,

B-Okay, now how did get to Lake Shore to the Woods, what route did you take?

M-We walked by Wal-Mart and on the service road.

B-Okay do you remember Damien was wearing?

M-I can not remember to this day.

J-Jessie you need to speak up just a little bit!

M-I can not remember to this day.

B-Okay, do you remember what Jason was wearing?

M-No I don't, I can remember what I was wearing.

B-What was you wearing?

M-I was wearing a white shirt, that had a basketball, something on the front of it and I had blue jeans, that were greasy and white

and blue addidas (sp).

B-Okay now when you, after you got in the woods do you have any idea how long you were in the woods before the kids came up.

M-Not very long.

B-Okay, now, where were you in relation to the creek that runs through the woods. Are you, do you know what I am talking about when I say that there is a creek running through it?

M-Yea because it goes up under the bridge.

B-Okay the creek that runs under the

M-Bridge

B-Service Road okay, were ya'll in the creek, out of the creek,

M-Out of the creek

B-Okay, were all three of you out of the creek?

M-Yea

B-Okay and were you on the Blue Beacon side or the Memphis side of the creek.

B-Let me ask that again. The creek that runs under the service road and into Robin Hood Woods.

M-Right

B-Okay one side of it is the Blue Beacon side and one side of it is closer to Memphis one sides where ya'll on the Blue Beacon side or on the Memphis of that creek?

M-Blue Beacon

B-Okay and which way, where did the boys come from or do you know?

M-I don't know

B-When did you first know that they were in the woods?

M-All I know is that I heard some kids holler.

B-Okay and what happened at that point?

M-Nothing, Damien started making some noises to get there

attention and they came over to where we was at.

B-When you say that you made noises to get their attention what did he do?

M-Holler a little bit

B-Okay and when they came over what happened?

M-and Ja..., Damien jumped on them and the other two started beating on Damien and me and Jason jumped on them.

B-Do you know which one Damien jumped on?

M-One of them had blonde hair, I do not know which one.

B-Okay, which one were, which two was it that jumped on Damien when he jumped on the other one?

M-I can't I can't remember that.

B-What happened at that point when Ja..., Damien jumped on one and the other two jump on him?

M-Me and Jason grabbed them.

B-Okay, who did you grab?

M-The one that had a blue boy scout

B-Who did Jason grab or what did that boy look like that Jason grabbed?

M-I can not remember, I remember the one I grabbed.

B-Okay and what was that boy wearing?

M-I can't remember!

B-Okay you said

M-I was too messed up to remember that

B-Okay, you said something about a blue or about a boy scout something. Was one of them wearing a uniform?

M-Something with Boy Scout on it.

B-Okay, now when you grabbed one and Jason grabbed one what happened next?

M-We started hitting them.

B-With what?

M-Fist first

B-Where describe to me Ja..., what you saw Jason do.

M-He got, first he cut one of them on the face on his left side just a little bit like a scratch and then they went to the other one and got on top of him starting hitting him and pulled his, one of thems pants down and got on top of him and cut him.

B-Okay, now you said that he first hit somebody, one of them and cut him on the left side of his face, Okay, was that a different person then the one he jumped on and cut with the knife.

M-To my knowledge, yea, it was a different person.

B-What where you doing during this time?

M-I was still hitting that one.

B-What were you hitting him with?

M-My fist

B-Do you know how many times you might have hit him?

M-a bunch

B-What part of his body were you hitting him in?

M-Face

B-Okay

M-Head

B-What was Damien doing during this time?

M-Well, the one that got cut on his face, he stuck his finger on his cheek and licked the blood off of it.

B-That is what you saw Damien do. What else was he doing?

M-He grabbed one of them by the ears, I do not know which one, he grabbed one by the ears trying to pull his ears off or something and grabbed them pretty tight tell they turned red.

B-Did the, Were the kids, the three little boys, were they saying anything or doing anything during this?

M-They were saying stop, stop!

B-and what about the boy that you were hitting, was he saying that?

M-He was telling me to stop and I stopped and then Damien told me no, no don't stop and I got on it again.

B-Now, did anybody at what point or at this point when you are doing that did they have their clothes on?

M-While we were hitting them.

B-At some point did they get hit with anything besides your fist?

M-Stick

B-Who hit them with the stick?

M-Damien, he hit one of them in the head with a stick.

B-When you say that, do you remember what kind of stick did Damien had, you saw those sticks that we in court?

M-I didn't look at them.

B-Okay

M-I know that it was a stick like somebody had carved something into it or something, you know part of a bark off of it.

B-Did you know how long it was, was it as long as a baseball bat or longer?

M-It was longer than a baseball bat.

B-Describe for me what it looked like as far as you say that it looked like someone carved on it?

M-Like pieces of the bark were missing off it.

B-Was that at the end, middle or botton or do you remember?

M-I can't remember.

B-Okay, now

J-In order to make sure that it picks it up you need to talk up a little!!

M-Oh, I can't remember.

B-Now, when you were hitting, when you say that you were hitting them and Jason and Damien were hitting them were they, were the boys still conscious at that point?

M-Yea

B-At what point did you notice or did you ever see them when they did not appear to be conscious or appeared to be knocked out?

M-No

B-At any point did you, were you there the whole time while this was going on?

M-Yes

B-How far were you from Damien, Damien and Jason?

M-I was pretty good ways from them.

B-Okay, when you say you know, lets see, how

M-About from here to that door over there.

B-The door outside this building.

M-No, the door to the next room over there.

B-Okay so it would have been about say 10 yards or something?

M-Something like that maybe not even that far.

B-Okay could you see what they were doing?

M-I did not pay any attention to them, I just keep on hitting that one.

B-Okay and was that the boy that had the boy scout uniform on?

M-Yea

B-Now, what did Jas, what did you see Jason and Damien do to the other two?

M-Well, Damien was going to screw one of them.

B-When you say he was going to screw him what did you see him do?

M-He was going to stick his penis in that little boys behind but as far as I could see he didn't.

B-When you say he was going to what did you see Damien do and what happened between him and that little boy as far as that goes?

M-I do not understand

B-You said that he was going to screw the little boy or stick his penis in his behind, what did you see Damien do?

M-He did not do it, he was going to it then he didn't.

B-What was it that Damien did that made you think that he was going to do that?

M-Well, I seen the boys pants down.

B-How did his pants get down?

M-He pulled them.

B-Who pulled them?

M-Damien

B-And did the, was the boy running when that happened or was he trying to get away or what was happening?

M-He was kicking his feet.

B-And what else did Damien do besides pull his pants down, the little boys pants down, that made you think that he was going to screw him?

M-What do you mean?

B-What did you see, you said that Damien pulled his pants, the little boys pants down did you see Damien do anything else that indicated that he was going to screw him?

M-No

B-Did Damien have his clothes on or did he at that point?

M-He had his pants unbuttoned.

B-Okay and at that point what was Jason doing at that time.

M-He pulled one of these boys pants down and got on top of him and starting swinging.

B-When you say started swinging what do you mean?

M-He was swinging his arms.

B-Around, can you show me what you mean by that.

M-He was coming like this.

B-Hitting him

M-Yea, like you were swinging a swing blade.

B-Okay was the boy lying face down or face up?

M-Face up

B-And did Jason have anything in his hands at that point?

M-He had a knife.

B-And was he actually hitting him with his knife or his fist?

M-Well, the blade was opened.

B-Could you, see was he cutting the boy?

M-No, it looked like he was swinging the knife at his legs.

B-Could you, did you ever see one of the boys get cut with the knife?

M-After he got through I noticed what he had done.

B-What did you see?

M-I saw the boy that was missing everything.

B-If you would, when you saw that describe to me what you saw Jason do and what you saw happened?

M-Well, when he was doing that I seen blood fly.

B-Where did the blood go?

M-Grass, I mean not grass, weeds, like sticks laying around.

B-What did the boy do when that happened?

M-He started hollering and Jason put a shirt over his mouth.

J-You need to speak up a little!!

M-He put a shirt over his mouth.

B-What did Jason do after that?

M-Then he came over where I was at.

B-What did he do then?

M-He wanted to do that one that I was hitting he wanted to do him the same way and I would not let him?

B-What did you say to him?

M-I told him, I said after I seen what he did to the other boy I said no you are not doing this one like that.

B-What did Jason do then?

M-He looked at me real weird, showed me that knife and he just walked off.

B-Had you seen that knife before?

M-Yes

B-Who's knife was it?

M-Jason

B-And what did it look like?

M-I can't remember he keeps all kinds of knives.

B-Okay

M-I can't remember, all I know is that it was a lock blade.

B-When you say a lock blade do you mean the one that folds out and locks?

M-Yea

B-Okay and were what happened to the boys that did you stay after you seen Jason do that and he comes to you what happened next?

M-Well, Damien was squeezing, Jason went back to that one boy and

starting hitting him some more.

B-When you say the one boy

M-The one that he cut

B-Is that the one that had his penis cut?

M-Yea

B-Castrated

M-Right

B-So Jason goes back to him what is he doing to him when he goes back to him?

M-He just started hitting him in the face

B-What are you doing at that point, when you see him go back, he has castrated him and he is hitting the boy in the face what are you doing?

M-I had done stopped what I was doing.

B-What about the boy that you had been hitting on what is he doing at that point?

M-Nothing, he was unconscious.

B-Were you still holding on to him.

M-Yea

B-How did you have him held?

M-By the hand

B-And you see Jason go back to the other boy, what, describe to me what Damien is doing at this point? Jessie you told me that Jason came over to you and then went back to the boy that had been castrated and starting hitting him in the face. What was Damien doing at this point?

M-He was stilling holding, still messing with that boys ears.

B-You said that you had that the boy had was unconscious and then what happened next what do you rememeber happened next?

M-I let him go after that I let him go and Damien told me don't,

so I keep on holding on to him and then I hit him some more.

B-Was the other two boys still conscious you said the one you had was unconscious were the other two boys conscious at that point?

M-Well, the one that was castrated he was not moving that much no more, I figured that he might have been dead or whatever I really did not know.

B-Now what happened next you said that Damien still had the other one and Jason has one and you have one what happened next?

M-Damien was messing with one of those boys penis.

J-Jessie you need to speak up!!

B-When you say he was messing with one of boys penis what do you mean what was he doing?

M-Pulling on it!!

B-Do you remember which boy that was?

M-No, I do not.

B-Let me ask you this the boy was it the boy with the boy scout uniform on?

M-I can't remember because

B-Okay now, what happens next you said that Damien was pulling on one of the boys penis, what happens next?

M-We tied them up.

B-Now, you said before when the police asked you in their statement and asked what they were tied up with and you said that they were tied up with rope?

M-I made that up

B-Why?

M-Trying to get them off tract!

B-Who tied them up?

M-Damien and Jason

B-Did you help tie them up?

M-No

B-Did you see how they tied them?

M-No, just

B-Where were you when they were tying them up?

M-I was standing there.

B-When you say standing there where were you?

M-Right there beside them.

B-Okay where were they, you told us in the woods where in the woods were they?

M-Close by the _____

B-Okay, and how did, did you see how they were tied up or how did Jason and Damien tie them up?

M-Right hand, right leg, left hand, left leg

B-What did they tie them with?

M-Shoe strings.

B-Where did they get the shoe strings?

M-Out of the boys shoes.

B-Who got the shoe strings out of the shoes?

M-Damien and Jason and I handed it to them, I handed them the shoes.

B-Did you pull the strings out of the shoes?

M-What?

B-Did you

M-In one of them.

B-Okay

M-But the rest I just grabbed and pulled them out.

B-Where Damien and Jason taking the strings out of the shoes too or were you doing that?

M-I was doing that

B-And when you would get the strings out you would hand them to the other two?

M-Yes

B-And did you actually tie any of the knots that was tying any of the boys up?

M-No

B-Were they, did they have there clothes on or did they have there clothes off when they got tied up?

M-They had them off

B-Where they conscious when they were getting tied up?

M-They were not moving no more.

B-Can you tell us were they saying anything or were they?

M-They was not saying nothing and when they throwed them in the water and I don't remember but one of them was moving.

B-When you say moving do you remember which one was moving when they were thrown in the water?

M-No

B-When you say moving what do you mean?

M-Moving around

B-Who throw them in the water?

M-Damien and Jason

B-Were you there when that happened?

M-I was getting ready to leave.

B-Why was you getting ready to leave?

M-Because I was going to wrestling.

B-Was there in other reason you were getting ready to leave?

M-What else Jason did to that one boy I could not do anything else.

B-Did you all leave together?

M-No, I left before them.

B-Which way did you leave how did you get out of the woods?

M-I went up there by the _____ Truck Stop and got on the over pass and went around.

B-When you left woods did you head the interstate or the other direction?

M-Interstate

B-Did you have anything with you when you left the woods.

M-A whiskey bottle

B-Was it empty or did it have any in it?

M-Still had some in it.

B-And you said earlier that you had drank to the point that you were sick. Did you get sick that night?

M-Going home

B-Where?

G-How much to we have on this tape?

B-Okay we have turned one of the tapes over at least one of the tapes over Jessie, you said that you got sick going home that night, you mean sick at your stomach?

M-Yes,

B-Throwing up

M-Drunk until I got sick.

B-Do you remember where you were when you throw up?

M-It was in the grass.

B-Do you remember where it was in relation to the road or the over pass?

M-Over by the over pass.

B-What did you do with your bottle?

M-I busted it.

B-Where at?

M-On the side of a like a over pass.

B-Where a bridge goes over one of the interstates?

M-Yea, like coming from I think it is Little Rock that goes under and there is a bridge goes to Memphis.

B-and that would have been Evan Williams

M-Yea

B-When you left the woods and went back was Damien and Jason still in the woods, when you left?

M-They were still there when I left.

B-What was it as far as day light or dark what was it when you left the woods

M-I would say about dark close to dark it was still light out side a little, not much

B-It was getting dark and what did you do then

M-I went to my house, got my mask and then went to Johnny's and then went to

B-You went wrestling was it dark when you left to go wrestling

M-Yes, we usually leave about 8:00

B-But on that night was it already dark when you got ready to leave

M-Yes, but usually he say he is ready to go and we do not got and we just sit there and sit there and finally we get ready to go

B-Is everything that you told me true

M-Yes sir

B-Is there parts of what happened that night that are hard for you to remember

M-Parts

B-I mean are there things that happened that night that is hard or difficult for you to remember. Are there events that took place that night of things that happened that you that are some what difficult to remember

M-I can't remember

B-Where you there when the three boys were killed

M-Yes I was there

J-I would like to aske a question if I might, When they trough them in the water were any of them screaming or kicking or where they all unconscious or do you know

M-They were not hollering they was, one of them was just moving

J-When you say moving what do you mean

M-He was moving like a worm

J-Was it the one that was castrated or do you remember

M-I can't remember just one of them that all I remember

J-Who through them in the water

M-Damien and Jason

J-Did they push them down

M-Don't know

J-You stood and watched them

M-I seen them put them in the water but I don't know what they did after I left

J-In other words you left before, before they did

M-Right

J-and after it was over did ya'll have a conversation about it

M-No, when I seen Damien and Jason on the 14th they just looked at me and they never said nothing to me

J-So ya'll never had any discussion about it

M-No, I did not want to say nothing to them after what I had seen

J-and the knife that he used was a switch blade knife

M-It was a lock

J-Lock blade the kind that you fold up,

M-Yes, it has a button at the end of it

J-How long was it do you know

M-pretty long I guess

J-Have you seen it since

M-No

J-Do you know who it belongs to

M-Jason

J-Have you seen it before

M-Yes at his house, he has all kinds of knifes

D-Jessie this is for the tape this is Dan Stidham, prior to making this statement you refused to talk to Mr. Crow and I is that correct

M-Yes, I do

D-You did not want to talk to us

M-No

D-and again we advised you not to make this statement, is that correct

J-Yes

D-For the publish of this tape I would like to ____ as I did to Judge Burnett earlier that I think that Mr. Misskelly is perjuring himself. Do you have any opinion Mr. Crow

G-I have a very strong opinion that he is perjuring himself

D-We feel obligated to inform the court as officer to the court that we need to state that for the record of this statement

B-Let me ask one other, Jessie I asked you earlier about what you told me about the events that took place the night of May 5, is that what you told me the truth

M-Yes sir

B-and if asked to testify to that in court would you and could you testify truthfully to those same things

M-Yes sir

B-This will end the statement at 8:45 on February 17, 1994

I, Cindy Buck, secretary for C. Joseph Calvin, state on oath that I transcribed three (3) tapes of a statement given by Jessie Misskelly, given on or about 8:00 p.m. February 17, 1994, at the Law Office of C. Joseph Calvin, to the best of my ability.

Cindy Buck
Cindy Buck

STATE OF ARKANSAS
COUNTY OF CLAY

Subscribed and sworn to before me on this 21st day of February, 1994.

Sandra Russell
Notary Public

My commission expires: 3/7/2002

Sandra Russell, Notary Public
Clay County, Arkansas
My Commission Expires 3/7/2002

001146

STATE'S EXHIBIT

F

Jessie Misskelley v. State of Arkansas
Arkansas Supreme Court Case No. CR 94-848

Lisa Sakevicius Testimony
(Vol. 6, R. 1507)

001147

no, I can't positively tell you there are sperm, but that's because I didn't see them. And the only way that I or anyone else I know feels comfortable with saying they are there is to see them, but that doesn't mean that the results don't indicate to me that there could have been sperm cells there because we see DNA where we would see DNA from sperm cells.

(RETURN TO OPEN COURT)

LISA SAKEVICIUS

having been first duly sworn to speak the truth, the whole truth and nothing but the truth, then testified as follows:

DIRECT EXAMINATION

BY MR. FOGLEMAN:

Q Will you please state your name and occupation?

A Lisa Sakevicius and I'm a criminalist at the Arkansas State Crime Lab.

Q What education, experience and training have you had to qualify you as a criminalist at the Crime Lab?

A I have a degree in chemistry from the University of Central Arkansas. I worked as a chemist for a year at the Arkansas Plant Board where I learned to use several instruments. Then I started working at the lab about five and a half years ago.

I have been to the accelerant detection course from the FBI. I've had polarized light microscopy courses from the McKrohn Institute and manmade fiber identifications from McKrohn

Institute. I've had a hair comparison course from the Association of Forensic Sciences in Selma, Alabama. I have been to various workshops involving trace evidence.

MR. FOGLEMAN: Your Honor, we would submit Miss Sakevicius as an expert in the field as a criminalist.

THE COURT: Do you want to question her further?

MR. STIDHAM: No, your Honor.

THE COURT: All right. You may proceed.

BY MR. FOGLEMAN:

Q In the course of your duties did you come into contact with items from the West Memphis Police Department in their investigation of the murders of Michael Moore, Steve Branch and Chris Byers?

A Yes, I did.

Q I want to show you what I have marked and introduced as State's Exhibits 82, 81 and 80 and ask if you can identify those items? (HANDING)

A (EXAMINING) Yes. These are my initials and the date that I sealed this package and this is the ligature from Michael Moore.

(EXAMINING) Again my initials are on here. This is the ligature from Chris Byers.

(EXAMINING) Here are my initials again. This is the ligature from Steve Branch.

Q In regard to those ligatures -- and I assume the ligatures are the knots in the shoestrings that we're referring to?

A Yes.
Q What examinations did you make of those items?
A I looked at the types of knots present and examined them for hairs and fibers.
Q Referring first to Exhibit 80 -- on Exhibit 80 those were the knots on which --
A Michael Moore.
Q What were your findings as to the knots on Michael Moore?
A Two pieces of black shoestring, one each tied between the wrist and leg on the right and left side. The knots on the wrist and leg on the left side were both square knots. The knot on the wrist on the right side was a series of three half hitches. The knot on the left side of the right side was a series of four half hitches.
Q On the left side what kind of knots did you have?
A Square knots.
Q And on the right side what kind of knots?
A You had a series of three half hitches and then a series of four half hitches.
Q On Exhibit 81 -- if you would refer to that exhibit.
A That is from Steve Branch.
Q What were your findings as to the knots on Exhibit 81?
A Examination of the ligatures revealed a black shoestring on the right side tied in three half hitches with an extra loop around the leg to a single half hitch with a figure eight around

the right wrist. The left side consisted of a white shoestring tied in three half hitches around the wrist to three half hitches around the leg.

Q So on the left side on the wrist you had three half hitches?

A Correct.

Q And on the ankle you had three half hitches?

A Correct.

Q On the right side on the leg you had three half hitches with what?

A An extra loop around the right leg.

Q On the wrist you had?

A A figure eight.

Q With one half hitch. Is that right?

A Yes, sir.

Q Refer to Exhibit 82.

A That would be from Chris Byers. Examination of ligatures revealed one black shoestring tied in a double half hitch around the right wrist to a double half hitch around the right leg.

The ligature on the left side consisted of a double half hitch around the wrist and leg but was tied with a white shoestring.

Q When you say, "a double half hitch," is that the same as two half hitches?

A Yes.

STATE'S EXHIBIT

G

Letter from Kermit Channell
Arkansas State Crime Lab

(Echols Response Exhibit E)

001152

ARKANSAS STATE CRIME LABORATORY

Mike Beebe
Governor

Kermit B. Channell, II
Executive Director

May 27, 2008

Brent Davis
Prosecuting Attorney
Second Judicial District
P.O. Box 491
Jonesboro, AR. 72403

RE: Arkansas State Crime Laboratory Case No:
1993-wvs-05716, 05717, and 05718

Dear Mr. Davis:

The data provided by the Bode Technology Group, Inc. referencing samples 2S04-114-34AB (Branch ligatures combined); 2S04-114-05D (Penile Swab – Moore) and 2S04-114-10E (Penile Swab – Branch) was reviewed at the Arkansas State Crime Laboratory by three independent DNA analysts.

The Bode analyst, Amy Jeanguenat, has indicated the following:

"The profile obtained from sample 2S04-114-34AB (Branch ligatures combined) suggests there is a possible mixture present; this is specifically suggested at the D5S818 locus. The swabs used to swab the ligature were consumed during processing. However there may be liquid extract available for further testing. Bode can go back to the original extract tube and measure the volume left."

"The profile obtained from sample 2S04-114-05D (Penile Swab – Moore) suggests there is a possible mixture present; this is specifically suggested at the D5S818 locus in the -05D NSF. Bode can go back to the original extract tube and measure the volume remaining. However, according to the analyst's notes, Bode received two swabs and only one was processed. Extracting the remaining swab could give us more information."

"The profile obtained from sample 2S04-114-10E (Penile swab – Branch) suggests there is a foreign allele present that could not have come from the victims or defendants: specifically '8' allele at the D16S539 locus in the -10E SF. According to analyst's notes, Bode received two swabs and only one was processed. Extracting the remaining swab could give us more information."

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Medical Examiner

001153

In reviewing the data from *2S04-114-34AB (Branch ligatures combined)*, both the Bode analyst as well as our DNA analysts indicate that there is an elevated baseline. Bode also points out that there is an imbalance at amelogenin (gender determining region) and D3S1358 and that a possible mixture is present specifically at D5S818. *(When few copies of DNA template are present, stochastic amplification may occur, resulting in either a substantial imbalance of two alleles at a given heterozygous locus or allelic dropout).*

In reviewing the data from *2S04-114-05D (Penile Swab – Moore)*, both the Bode analyst as well as our DNA analysts indicate that there is an elevated baseline. It is noted by Bode that a possible mixture is present specifically at D5S818. Bode recognizes that this is a possible mixture, not in fact a mixture. In reviewing the data from sample No: 2S04-114-34AB and comparing it to sample No: 2S04-114-05D the potential mixture is not consistent (coming from the same individuals). This would indicate potential contamination or stochastic activity.

In reviewing the data from *2S04-114-10E (Penile swab – Branch)*, both the Bode analyst as well as our DNA analysts indicate that there is an elevated baseline. It is noted by the Arkansas State Crime Laboratory DNA analysts that the '8' allele at D16S539 in question is too low in comparison to surrounding baseline noise. Other potential peaks exist that are very similar in size (RFU's) that are not identified.

In reviewing all of this data, it is noted that the quality and quantity of the results obtained are very limited and require extreme caution in its interpretation. In rendering an opinion of this data, one cannot overlook the facts in this case: The three victims in this case were nude and submerged in water for between 18 to 24 hours prior to discovery. It is very unlikely that any interpretable DNA profile other than that due to contamination or that of the victims would be recoverable. Based on the Bode analyst's letter, it is clear that the data provided is questionable at best. The analyst uses "possible" and "suggests" to describe the data. Amy Jeanguenat documents that there is clearly a "possible mixture" present, not a "mixture present". She also indicates "elevated baseline", "primer peaks", "and imbalance".

It is clear that the data represented thus far by Bode, referenced above, is suspect at best. It is well documented that limited quantities of DNA, as noted in these samples and demonstrated by the quality of partial (at best) alleles obtained in this case, is too limited to render any opinion for comparison purposes.

It is my opinion that the alleles and possible mixtures are due to contamination and/or stochastic effects and no conclusive interpretation is possible.

Kermit B. Channell II
Executive Director
DNA Technical Leader

Mary Robnett
CODIS Administrator
DNA Analyst

Chris Glaze
DNA Analyst

Bode Technology™

10430 Furnace Road
Suite 107
Lorton, VA 22079

August 30, 2007

Kermit B. Channell II
Executive Director
Arkansas State Crime Laboratory
#3 Natural Resources Drive
Little Rock, AR. 72215

Dear Kermit:

Enclosed is a CD with scanned copies of electropherograms and trays containing raw data for samples 2S04-114-05D, -05E, -34AB.

Based on the limited data from the above samples, in an email I sent to Don Horgan on 08-16-07, I indicated the following:

Now that the defendant's and victim's reference samples have been processed we are able to determine if there are any foreign alleles present in any of the samples.

-The profile obtained from sample 2S04-114-34AB (Branch ligatures combined) suggest there is a possible mixture present; this is specifically suggested at the D5S818 locus. The swabs used to swab the ligature were consumed during processing however there may be liquid extract available for further testing. Bode can go back to the original extract tube and measure the volume left.

-The profile obtained from sample 2S04-114-05D (Penile swab Moore) suggest there is a possible mixture present; this is specifically suggested at the D5S818 locus in the -05D NSF.
Bode can go back to the original extract tube and measure the volume remaining. However according to analyst's notes Bode received two swabs and only one was processed. Extracting the remaining swab could give us more information.

-The profile obtained from sample 2S04-114-10E (Penile swab Branch) suggest there is a foreign allele present that could not have come from the victim's or defendant's; specifically the '8' allele at the D16S539 locus in the -10E SF. According to analyst's notes Bode received two swabs and only one was processed. Extracting the remaining swab could give us more information.

-The above samples may also benefit from a new technology introduced in the field called mini STRs. Mini STR technology is very beneficial for degraded and/or inhibited samples. Bode has validated MiniFiler and training for analysts is expected to begin next week. Within 6-8 weeks or sooner we should be able to begin using MiniFiler for casework.

Please let me know if you need any further clarification.

amy Jeanguenat
Bode

Sincerely,

Amy Jeanguenat
DNA Analyst II

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