IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

CHARLES JASON BALDWIN PETITIONER

V. NO. CR 93-450B

STATE OF ARKANSAS RESPONDENT

RESPONSE TO PETITIONER BALDWIN'S ADOPTION OF ECHOLS'S REPLY IN SUPPORT OF MOTION FOR A NEW TRIAL

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

In early April 2008, Petitioner Echols filed a motion for a new trial under Ark. Code Ann. §16-112-201 *et seq.* (Repl. 2006) (Act 1780 of 2001) for his 1994 capital-murder convictions and death sentences for the 1993 killings of three eight-year-old boys. After a scheduling hearing on April 15, Petitioner Baldwin was granted until May 30 to file, among other things, a similar pleading as to his convictions and life sentences for the same killings. He timely did so. The State was granted until May 30 to file a response to Echols's motion and until July 15 to file responses to Baldwin's pleadings, which it timely did as to all pleadings. In its responses to the requests for relief under Act 1780, the State made several alternative arguments for denying relief without a hearing. On August 12, the week before a scheduled status hearing on August 20, Echols filed a reply. While the State orally resisted the filing of that reply at the August 20 hearing, the Court accepted it, permitted Baldwin to adopt it, and permitted further response by the State by August

30.[1] The Court also invited all parties to tender proposed orders as to this proceeding by that date. Per the Court's instructions, the State submits this further response and the accompanying proposed precedent denying relief without an evidentiary hearing.

ARGUMENT

Baldwin's initial pleading was divided into ten point headings, to which the State responded by combining the many points concerning DNA testing into one and responding separately to the juror-misconduct point and the further-testing point. Echols's August reply adopted by Baldwin is divided into five point headings, to which the State again will respond by combining the points that concern DNA testing and by taking the juror-misconduct point separately. Echols has not pursued further testing; thus, the State will not respond again to Baldwin's request for it.

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[1]Arkansas Code Annotated §16-112-208(e)(2) contemplates only a motion and a response. While §16-112-204(b) contemplates further pleading as permitted by the Court, it appears to be limited to withdrawal or amendment to a petition for testing and amendment to an answer. Id. at §16-112-204(b)(2). Echols's August reply and Baldwin's adoption of it certainly are not withdrawals and apparently are not an amendment of their testing petitions, although the reply does contain an expanded version of their juror-misconduct claim. In any event, the State is grateful for the opportunity to respond.

I., II., III., & V.

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.

As the State explained in detail in its initial response, Baldwin cannot obtain relief under either of the two controlling statutory provisions upon which the Court may rely in considering his DNA-testing results, and an evidentiary hearing is unnecessary to conclude as much. The first, Ark. Code Ann. §16-112-208(b), addresses inconclusive testing results; the second, Ark. Code Ann. §16-112-208(e), addresses results that exclude a petitioner. The State will not repeat those arguments at length here, but instead will explain why Baldwin's contrary arguments fail.

A. Denial of relief under §16-112-208(b)

Baldwin's desire to avoid disposition of his new-trial motion under §16-112-208(b) as suggested by the State depends upon his myopic reliance on §16-112-208(e), but that paragraph erects no obstacle to the Court's reliance on (b). Contrary to his reliance on plain-language principles, the plain language of paragraph (e) demonstrates the State's point. It does not, as he claims, compel the Court to assess DNA results only under that provision because some results exclude him as a source. See Baldwin/Echols's Reply at 5. Rather, such results merely permitted him to file a

motion for a new trial, which the Court may grant upon a particular evidentiary showing by him. See Ark. Code Ann. §16-112-208(e)(1) & (3). That the statute provides that the Court may grant his motion if he meets his burden necessarily means that it also permits the Court to deny his motion if he does not meet his burden (as the State alternatively has argued), but that does not mean, as Baldwin presumes, that the Court can *only* deny his motion for that failure. Rather, as the State's initial response explained, §16-112-208 also contemplates the denial of relief when testing results are inconclusive as to a claim of actual innocence, as Baldwin's results are here.

Baldwin's complaint that this application of paragraph (b) to his motion renders the DNA-testing statute a shell "under which relief can never be obtained[,]" is simply hyperbolic and specious. Admittedly, the State expects the universe of cases in which relief could be granted under the statute to be exceedingly small, but rightly so. Application of (b) to Baldwin's and like cases simply ensures that circuit courts do not needlessly conduct hearings under (e) on testing results that are inconclusive as to claims of actual innocence.[2] Contrary to Baldwin's complaint, the State does not seek to erect insurmountable legal hurdles to claims of actual

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[2]Baldwin's case is likely an historical anomaly under the statute. As the State's initial response explained, he obtained an order for testing under a prior version of the statute with a much lower threshold for testing than the much more stringent one found in the current version. Thus, future petitioners are not likely to find themselves in his posture—having filed a motion for a new trial founded on the results of testing that would not meet the threshold to be ordered in the first place.

innocence, it seeks only to hold him (and all petitioners) to those already erected by the statute.

Baldwin's incomplete hypothetical, see Baldwin/Echols's Reply at 4-5, although meant to do otherwise, illustrates the soundness of the State's position. His hypothetical details no proof of the rapist/murderer's identity apart from the later-contradicted semen/blood-type evidence. If indeed that were the only proof of identity, later DNA testing contradicting that singular proof likely would warrant a hearing on a motion for new trial under (e)(3). If, however, there was also an admission of guilt by the defendant, as in his actual case, a hearing rightly would *not* be warranted.[3] Not because the semen evidence was not relevant to the *crime* (obviously it would have been relevant at trial) as Baldwin posits, but because its later contradiction is not conclusive as to the hypothetical defendant's claim of actual innocence in the face of the admission of guilt.

Baldwin would have the Court bound to indulge a hearing to every petitioner like him with a testing result merely excluding the petitioner as the source of any piece of evidence. Another hypothetical illustrates why that is a flawed understanding of the statute. Suppose again the hypothetical rapist/murderer's conviction as before, but also suppose the admission of a videotape of the crime

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[3]That Baldwin supposes a third-party confession in his hypothetical also illustrates his misunderstanding of the DNA-testing statute. A third-party confession might support having an evidentiary hearing in coram-nobis proceedings, see, e.g., Williams v. State, 335 Ark. 453, 983 S.W.2d 407 (1998) (per curiam), but it is simply irrelevant to proving a petitioner's innocence by DNA-testing results.

identifying the defendant. The later contradictory DNA testing requires a hearing in Baldwin's calculus, despite the fact that the crime was videotaped, although he might agree that denial is the likely outcome of such a hearing. The point is that Baldwin misapprehends the scope of the statute. It is not simply to provide a venue to retry a case with new evidence contradicting some portion of the trial proof as he imagines, it is to provide a mechanism to exonerate those petitioners who conclusively demonstrate their actual innocence by demonstrating that they could not have committed the crime.[4]

The State relies on Louisiana authority to bolster the foregoing point because that authority is, indeed, persuasively on point, and it bears repeating. Both Louisiana and Arkansas have DNA-testing statutes directed toward freeing the innocent, not to reweighing the evidence of conviction. Baldwin's proposed reliance on Illinois precedent, on the other hand, is wholly misplaced for at least three reasons. First, while the Arkansas Supreme Court observed in Johnson v. State, 356 Ark. 534, 157 S.W.3d 151 (2004), that the original version of the statute was modeled after Illinois law and relied on it to interpret the phrase "materially relevant

[4]The State does not shrink from the charge that relief may never be granted under this view of the statute, but embraces it out of confidence that the Arkansas criminal-justice system does not convict the innocent. It may be fashionable to believe otherwise, and certainly the statute represents a legislative judgment that the possibility exists. Even still, the statutory correction of such a damnable wrong is available only on the most conclusive proof of innocence, not on mere disputes with the evidence of guilt.

to the defendant's assertion of actual innocence," found in Ark. Code Ann. §16-112-202(C)(1)(B) (Supp. 2003), that version and its interpretation were short lived. The statute was amended by the General Assembly in 2005. 2005 Ark. Acts, No. 2250. The section of the statute interpreted in Johnson was entirely rewritten and the precise phrase no longer appears at all and has been replaced by a statutory formulation.[5] See Ark. Code Ann. §16-112-202(8) (Repl. 2006).

Second, the principal section of the statute under which Baldwin is seeking relief, §16-112-208(e), was not even adopted until that 2005 amendment, when the Illinois-based version of section 202 was entirely rewritten. That new section (along with the revision of §16-112-202) apparently was based on nearly identical language from the federal Innocence Protection Act of 2004. See 18 U.S.C.A. §3600 (a), (f), & (g) (Supp. 2008). Finally, even a cursory examination of Illinois and Louisiana authorities on evaluating DNA-testing *results* demonstrates that our southern sister provides the better comparison of the two jurisdictions. The Illinois statute apparently has no analog to Ark. Code Ann. §16-112-208, see 725 ILCS 5/116-3, and the evaluation of results instead is governed by a three-stage review developed under the general state-habeas act, 725 ILCS 5/122-1, which is also used to evaluate post-conviction constitutional claims. See generally People v. Dodds, 801 N.E.2d 63, 68-70 (Ill. Ct. App. 1st) (2003). Louisiana, on the other hand, has a statutory analog that employs a particular standard of proof (clear and convincing) to evaluate

[5]As the State's initial response explained, Baldwin would not even be entitled to testing under the current version.

DNA-testing-result claims, see L.S.A.-C.Cr.P. Art. 930.3(7), which standard is also found in the Arkansas statute. See Ark. Code Ann. §16-112-201(a)(2) (Repl. 2006).

Of course, this Court's interpretation of the Arkansas statute need not turn on any other state's laws. Yet it is evident that the Illinois scheme and Johnson's reliance on it are no longer relevant in light of the 2005 legislative amendments to Arkansas law, while the similarity of the Louisiana scheme can helpfully inform the meaning and scope of the Arkansas law. In short, the Court should conclude, as suggested in the State's initial response, that Louisiana authority is persuasive for interpreting the Arkansas statute, particularly to conclude that relief should be denied on the pleadings pursuant to §16-112-208(b) because Baldwin's DNA testing results are inconclusive as to his claim of actual innocence.

B. Denial of relief under §16-112-208(e)

The State agrees that, if the Court evaluates Baldwin's motion under (e)(3), the language of that section controls, but disagrees with his suggestion that the measure of proof and relief available there are informed by §16-112-201(a) or the federal gateway standard. Without fully repeating the arguments from its initial response, it bears observing that, prior to the 2005 legislative amendment which added §16-112-208, the statute provided no standard for awarding relief, only one for ordering testing, which itself was changed by the 2005 amendment. Because the relief that the original statute provided for in 201(a) is constitutionally suspect in light of the doctrine of separation of powers and the Governor's clemency power, and because the Court should avoid unnecessary constitutional decisions, it should reject Baldwin's reliance on the relief suggested by 201(a). His unsupported conclusion

that such relief is readily available through the judicial branch without a demonstration of a constitutional defect in the criminal proceedings, see Baldwin/Echols's Reply at n. 7, is wholly inadequate to resolve the serious constitutional question concerning the Governor's clemency power. The Court, however, may (and should) avoid resolving that question as explained in the State's initial response.

As for Baldwin's claims concerning the use of the federal gateway standard, they contradict the purposes of the statute. The statute does not vindicate greater state constitutional rights, as he imagines by invoking Arkansas Supreme Court cases interpreting the state constitution more broadly than like federal guarantees, for example as to limits on police search-and-seizure powers. See Baldwin/Echols's reply at 13. Rather, the statute is simply a matter of legislative grace (as the Governor's clemency power enshrined in the Arkansas Constitution is a matter of executive grace) that creates a venue for exonerating the innocent where the criminal-justice system has failed to do so. Thus, the new trial available under (e)(3) necessarily requires a greater showing than the federal gateway standard by which a defendant may only collaterally raise otherwise defaulted constitutional claims in federal court.

Finally, Baldwin's desire to introduce a myriad of new evidence and expert opinions once again reflects his fundamental misunderstanding of the purposes of the statute. This proceeding is not a vehicle for reweighing the proof of a conviction; it is one for testing a convicted defendant's proof of his innocence. The proof of innocence the statute is designed to bring forward is scientific, such as by DNA-

testing results. The weighing to be done under (e)(3) is on a scale with testing results on one side and all the other evidence of guilt regardless of whether it was admitted at trial on the other side. Thus, the State's interpretation of "all other evidence" is wholly consistent with the statute's purpose and design, while Baldwin's interpretation would portend only endless reweighing of trial evidence. After all, (e)(3) requires that he demonstrate his innocence by compelling evidence that he would be acquitted, it does not require the State to again prove his guilt.

C. Relief should be denied in any event

Although his reply refers to an additional exhibit filed by Misskelley, Baldwin has added little to his motion and petition, and nothing to change the conclusion that he has failed any burden of demonstrating his actual innocence, even under the one which he argued. Thus, the State will not repeat its analysis from its initial response. Contrary to his continuing view, the absence of a biological link of him to the items tested to date does not contradict the prosecution's theory of the killings, founded principally on his admission and that of his codefendants'. For example, Baldwin misapprehends the State's point in saying that his animal-predation theory is incredible. It is not that his experts have reached the forensic conclusions they have that is incredible, although those conclusions are subject to dispute. Rather, it is the tendentious theory of innocence that Baldwin builds on those conclusions that is incredible.

Moreover, the Court need not conduct an evidentiary hearing to evaluate the quality or credibility of Baldwin's new forensic evidence to conclude that his actual-innocence claim, if not incredible, fails to meet the statute's rigors. As the State

previously has explained, even if his animal-predation theory accounts for some of the victims's wounds and discredits part of the prosecution's theory of the case, that theory simply does not explain the killings, much less exclude Baldwin as a possible perpetrator. In sum, all the inculpatory evidence in the case, particularly his admission and those of his codefendants' (despite his doubts about them), forecloses the possibility that by compelling evidence he could demonstrate that he would be acquitted.[6]

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[6]In addition to Misskelley's confession from his own trial discussed in the State's initial response, it also relies on a statement that he gave to prosecutors, attached to its initial response as State's Exhibit E. At the August 20 hearing, Misskelley objected to the Court's consideration of that statement as it was taken pursuant to a grant of use immunity to Misskelley with the assurance that it would not be used against him in any proceeding. Baldwin joined the objection, and the Court instructed the parties to brief its use in these proceedings. Any objection by Baldwin, however, is meritless.

The Court plainly may consider the statement to evaluate the new-trial, actual-innocence claims advanced by Baldwin. Whatever limits imposed on the use of the statement by the phrase "in any proceeding against" Misskelley, it is evident they would not reach his codefendants. In other words, Baldwin has no standing to complain of the use of the Misskelley statement against him here, particularly in light of §16-112-208(e)(3)'s *requirement* that his DNA-testing results be evaluated against all the other evidence of his guilt, regardless of whether it was introduced at his trial.

IV.

THE COURT CANNOT ENTERTAIN BALDWIN'S CLAIMS OF JUROR BIAS AND MISCONDUCT 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 THE SUMMARY REJECTION OF BALDWIN'S CLAIMS HERE.

The analysis from the State's initial response fully answers the new claim of juror bias and misconduct Baldwin makes in his reply, and the State will not fully restate it here. However, it bears repeating that Baldwin again is trying to impeach the verdict against him, and, despite acknowledging the State's position that such a claim is not cognizable under the DNA-testing statute and is otherwise foreclosed to him, he offers no explanation of how the Court nevertheless could entertain his claim.[7] Whatever its evidentiary underpinnings—the State has not been provided a

[7]Baldwin's reliance on State v. Cherry, 341 Ark. 924, 20 S.W.3d 354 (2000), is of no aid to him. The supreme court there merely affirmed the grant of a new trial on a motion for one timely made after trial. That hardly supports considering Baldwin's claim made 14 years after his trial in a wholly different proceeding, particularly when like claims have been foreclosed to Echols by the supreme court. Moreover, it bears observing that the premature-deliberation claim made in Cherry was brought to the trial court's attention by an alternate juror shortly after trial, while Baldwin's claim is founded on an affidavit by a lawyer (described as a prominent member of the bar) who apparently remained silent for 14 years, and even still

copy of the affidavit on which the claim is based—the Court plainly cannot entertain the claim.

CONCLUSION

For the many reasons explained above and in the State's initial response, the Court should deny Baldwin's petition for habeas corpus and motion for a new trial.

WHEREFORE, the State respectfully asks that this Court deny the petition and motion without a hearing as proposed in the accompanying precedent.

Respectfully submitted,

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Prosecuting Attorney

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Attorney General

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BY: _____, DPA

ATTORNEYS FOR RESPONDENT

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apparently is not communicating directly with the Court. Although the merits of the affidavit need not be tested to dispose of Baldwin's claim, whatever they are one might expect an officer of the courts to more promptly act forthrightly. Cf. generally Phillips v. State, 338 Ark. 209, 210-11, 992 S.W.2d 86, 87 (1999) (mistrial declared following attorney's representation to court concerning victim testimony).

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 29th day of August, 2008, as follows:

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MRRpp
DAVID R. RAUPP

IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

CHARLES JASON BALDWIN — PETITIONER

V. — NO. CR 93-450B

STATE OF ARKANSAS — RESPONDENT

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR NEW TRIAL UNDER ARK. CODE ANN. §16-112-201, *et seq.*

On this ____ day of September, 2008, came on to be heard the petition for habeas corpus and motion of the Petitioner for a new trial. Based on the pleadings, statements of counsel, and the files and records of this proceeding, the Court finds as follows:

1. The Petitioner and his codefendant Damien Echols are pursuing relief under to Act 1780 of 2001, first codified at §16-112-201 *et seq.* (Supp. 2003). Pursuant to an agreement of the parties, in June 2004, and February 2005, the Court ordered DNA testing of many items of evidence. After obtaining some results that he asserted were favorable to him, Echols raised them in federal district court in a pending habeas-corpus proceeding. The federal district court would not consider them due to the pendency of the proceeding in this Court. Thus, Echols returned to this Court and filed a motion for a new trial in mid-April 2008, seeking relief particularly under Ark. Code Ann. §16-112-208(e) (Repl. 2006). Pursuant to a scheduling order announced at a hearing in this case on April 15, 2008, the Court ordered the Petitioner to file any like pleading by May 30, which he did, and ordered the State to respond by July 15, which it did. The Court also set this and

companion cases for a status hearing on August 20, 2008, and set hearing dates for all cases from September 8 to October 3, 2008. Echols filed a Reply to the State's Response in his case on August 12, 2008. At the August 20 status hearing, the Court granted (over the State's objection) Echols leave to file his Reply and the Petitioner permission to adopt it and gave the State until August 30 to file a further Response, which it did. Both parties were invited to file proposed precedents by that date as well.

2. The Petitioner seeks a new trial pursuant to a 2005 amendment to the DNA-testing statute that was not in effect at the time the Court ordered the agreed-upon DNA testing under a prior version of the statute. That testing provision is no longer in effect and was replaced by a more stringent one also by the 2005 amendment. See 2005 Ark. Acts, No. 2250; compare Ark. Code Ann. §§16-112-201, *et seq.* (Supp. 2003) with Ark. Code Ann. §§16-112-202, 16-112-208 (Repl. 2006). Thus, his petition and new-trial motion is founded on testing results that have not been found to meet the strictures of the statute. Indeed, the State asserts that it would not now agree to the testing that it did under the earlier version of the statute because the testing pursued by the Petitioner cannot produce material evidence raising a reasonable probability that he did not commit the offense, as now required by the statute.

While the Petitioner has invoked the new version of the statute (§16-112-208(e)) in asking for a new trial in light of his DNA-testing results and other claims, he has not separately demonstrated that the testing could be ordered under the new version of the statute (§16-112-202) in the first place.

The State, on the other hand, has not suggested that he must do so or that he is limited to the relief available under the statute as it existed at the time testing was ordered. The Court agrees with the State's observation that before the 2005 amendments to the statute it was unclear how testing results were to be gauged. In these circumstances, the Court must resolve how the current relief provisions found in §16-112-208 operate, particularly here on testing results ordered under the now-repealed testing provision of §16-112-202.

3. That resolution is informed by the simple facts that this case began with the Court's order for DNA testing that might be materially relevant to the Petitioner's mere assertion of actual innocence under the previous statutory scheme for pursuing actual-innocence relief. How the Court must evaluate the results of such testing is necessarily a matter of turning to the statute. The Court is largely persuaded by the State's analysis of the statute as detailed in its responses, particularly as applied to this case given the procedural history and legislative changes recounted above. The Court's legal conclusions are as follows.

The first provision of the statute concerning results, Ark. Code Ann. §16-112-208(b), gives the Court two options when results are inconclusive, order additional testing or deny relief. The Court will address the Petitioner's request for additional testing below. As for the results already obtained, the Court must determine the meaning of inconclusive in this case in light of the testing ordered. Because the Petitioner's testing results were obtained without a finding that he had shown that testing would raise a reasonable probability

that he did not commit the offenses as now required by §16-112-202(8)(B), his DNA-testing results must at least demonstrate as much to avoid denial of relief due to inconclusiveness under section 208(b). Under the statute, results that might support relief will necessarily raise a reasonable probability that a petitioner did not commit an offense, because only testing that could yield such results can be ordered.

In other words, the Petitioner cannot jump past section 208(b) to §16-112-208(e) to pursue a new trial simply because he claims his results exclude him as a source of DNA because his testing was not ordered under the rigors of the current version of section 202. All the relief available under section 208 is premised on testing ordered consistently with the current version of section 202. Because there was no finding that Petitioner's testing would raise a reasonable probability that he did not commit the offenses at the time that testing was ordered in 2004 (as no such finding was then required), but that finding is now required under section 202, the Court must evaluate whether his testing results are inconclusive as to that probability under section 208. If the Court did not first evaluate the Petitioner's DNA-testing results by that measure, it would contradict the statute's requirement that only testing that satisfies section 202 should be conducted—i.e., there is no point to a hearing on the results of testing that could not be ordered now. Thus, in order to determine whether relief must be denied under section 208(b), the Court must determine whether the Petitioner's results are inconclusive as to his claim of actual innocence.

The results on which the Petitioner relies are most recently described in Echols's Reply at pp. 14-15, which he has adopted. Although the State apparently would dispute some of his results at a hearing, because the Court is denying relief without an evidentiary hearing, it will accept his results as follows for purposes of its legal analysis in this order. The DNA-testing results exclude the Petitioner as a source of most of the biological material tested to date, particularly from 1) a foreign allele from a penile swab of one victim, 2) a hair recovered from a shoelace used to bind another victim, and 3) a hair recovered from a tree stump at the crime scene. The step-father of one victim and a friend of his are, respectively, not excluded as sources of the latter two items. The Petitioner also is excluded as the source of biological material from a pants cutting of one victim.

The Court finds that the Petitioner's DNA-testing results are inconclusive because they do not raise a reasonable probability that he did not commit the offenses; that is, they are inconclusive as to his claim of actual innocence. The Court readily can find as much from the Petitioner's adoption of Echols's description of the results in his August 12 Reply to the State's Response. The section advancing the reliability and significance of the results concludes by saying they together raise "an inference of innocence[.]" Reply at p. 18. An inference in this context plainly is not a reasonable probability that could support the Petitioner's claim. The Court agrees with the State that the mere exclusion of the Petitioner as the source of some biological material from the crime scene (including the four particular items

on which he relies) neither establishes that he was not there nor that he was not a killer. On the other hand, that two other persons are not excluded from the two hairs does not place them there nor make them killers. That the crimes here may not admit of ready identification of its perpetrators through DNA evidence does not make the Petitioner's burden to demonstrate conclusive DNA-testing results of his innocence any easier. Proof of actual innocence requires more than his exclusion as the source of a handful of biological material that is not dispositive of the identity of a killer. As his DNA-testing results offer no more than that, they are inconclusive and cannot support a hearing to evaluate his assertion of actual innocence.

Even apart from his own luke-warm characterization of his results, however, it is evident from the balance of his pleadings that he is not actually relying on his results alone to overcome the threshold to obtain a hearing, much less relief. Instead his petition and motion depends upon consideration of voluminous exhibits purporting to undermine the evidence of guilt from his trial. His reliance on those materials reflects a fundamental misunderstanding of the claim he can make and his burden to obtain relief under the statute. The statute permits evaluation of claims of actual innocence supported by scientific testing, here the ordered DNA testing, it does not permit reweighing of the trial evidence. The adequacy of that evidence to demonstrate his guilt is fixed, particularly in a case like this in which he did not challenge its sufficiency on direct appeal. The point of the statute is to provide relief when, considering all the evidence of guilt, a petitioner nevertheless can demonstrate

by DNA-testing results that he is actually innocent. The statute places the burden on a petitioner to prove his innocence, not on the State to reprove guilt. As already noted, this proceeding began with a request and an order for DNA testing. The Court did not order forensic evaluation of the trial proof of guilt to be prepared, nor could it have. In short, the Court finds the Petitioner's DNA-testing results to be inconclusive and denies him further relief pursuant to section 208(b).

4. Even if the Court agreed with the Petitioner that his DNA-testing results should be evaluated under section 208(e) because they exclude him as the source of DNA, the Court would deny his motion without a hearing. The evaluation of his DNA-testing results under (e)(3) calls for a demonstration that those results "establish by compelling evidence that a new trial would result in an acquittal" when considered with all the other evidence in the case regardless whether it was admitted at trial. The Court agrees with the State that the Petitioner's new forensic evidence and numerous exhibits (e.g., pertaining to expert opinions on post-mortem animal predation) are not to be considered under that section. As already noted, the Petitioner's burden is to show his innocence by DNA-testing results, despite all other evidence of guilt, not by reweighing the trial evidence against new forensic evidence or opinions. Those matters simply are not cognizable under the statute.

The Petitioner's reliance on that new evidence is misplaced and again reflects a fundamental misunderstanding of the statute's scope in the Arkansas post-conviction scheme, as evidenced again by his latest adoptive pleading.

The introduction argues, "[o]nce it is established that [the Petitioner's] convictions are invalid and not entitled to conclusive effect, it will be apparent that new scientific evidence" supports relief. Reply at p. 2. He has the cart before the horse. The time to consider the validity of his convictions has long since passed. The statute, however, gives him an opportunity to demonstrate that—*despite* the validity of his convictions—he should obtain relief from them because he is actually innocent. That demonstration simply has nothing whatever to do with discrediting the proof of guilt by re-evaluating it or considering new forensic evidence disputing it.

The Court finds that the Petitioner has not made that demonstration with his DNA-testing results. Even accepting those results as unchallenged, they merely exclude him as the source of several pieces of biological material that have differing connections to the crime scene and do not exclude two other persons connected to one of the victims. The results do not, however, foreclose the possibility that he nevertheless committed the offenses. In other words, a jury readily could reject the absence of DNA identity evidence as inconsistent with other proof of guilt, particularly the several admissions of guilt from the Petitioner and his codefendants' recounted by the State in its Response and exhibits. In particular, the Court finds that it may consider against the Petitioner here the statement that Jessie Misskelley gave to prosecutors after he was convicted in 1994. Thus, the Petitioner's DNA-testing results are not compelling evidence that he would be acquitted.

Additionally, the Court rejects the Petitioner's view that the statute requires a lesser burden of him to obtain relief under (e)(3) because it provides only for a new trial, while section 201(a) contemplates his complete discharge from criminal liability. Given the 2005 amendment of the statute adding section 208, the Court is doubtful that any greater relief than permitted there is any longer independently available under section 201(a), as is evident by harmoniously reading the two sections together. Nevertheless, the Court agrees with the State that the Petitioner's claim to an easier burden under section 208(e) because outright discharge is possible under section 201(a) should be rejected to avoid an unnecessary separation-of-powers ruling on the constitutionality of section 201(a) vis-à-vis the Governor's clemency power.

Finally, even if the Court accepted the Petitioner's proposed lesser burden from federal authorities and credited his new forensic evidence on animal predation and indulged him further impeaching evidence of the trial evidence, it would still deny him a new trial. The Court agrees with the State's analysis that, upon comparison to House v. Bell, 547 U.S. 518 (2006), the Petitioner has fallen well short of the stringent showing of a compelling claim of actual innocence found there. While the Petitioner, like House, has some DNA results that exclude him as a source, they are not as significant as the evidence to which House pointed. House had new DNA evidence linking the victim's abusive husband to the crime as well as evidence of the husband's admissions of guilt. The Petitioner's claim would fail even under House.

5. The Court agrees with the State that it cannot entertain the Petitioner's juror bias and misconduct claims under the DNA-testing statute and that the Court's consideration of them in any proceeding is foreclosed by law of the case. The same considerations apply to the claim advanced in the Petitioner's August 12 Reply concerning a sealed affidavit. Consequently, they are hereby denied.

6. The Court also denies the Petitioner's request for further testing of animal hairs and certain fibers. As is true of the results he relies on now, any results of those further tests would not raise a reasonable probability that he did not commit the offenses, a required showing under §16-112-202(8)(B).

IT IS SO ORDERED.

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CIRCUIT JUDGE DAVID BURNETT

DATE OF ENTRY:_____