IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS

WESTERN DISTRICT

DAMIEN ECHOLS and CHARLES JASON BALDWIN, PLAINTIFFS,

vs. CR-93-450A & 450 B

THE STATE OF ARKANSAS, RESPONDENT.

_____/

IN THE CIRCUIT COURT OF CLAY COUNTY, ARKANSAS

WESTERN DISTRICT

JESSIE LLOYD MISSKELLEY, JR. PLAINTIFF,

CR-93-47

vs.

THE STATE OF ARKANSAS, RESPONDENT.

_____/

JOINT STATUS AND CASE MANAGEMENT MEMORANDUM SUBMITTED BY ALL PARTIES

DEPT: THE HON. DAVID BURNETT, CIRCUIT JUDGE

1. **INTRODUCTION**

Prior to their receipt of this Court's January 29, 2008 letter counsel for the parties in this case had been in discussions about case management issues. In an effort to respond to the Court's scheduling concerns, and to inform the Court of the status of these matters to assist the Court in making further case management decisions, the parties are submitting this Joint Status and Case Management Memorandum. In doing so, the parties inform the Court that for a variety of reasons, stated below, they cannot begin a multi week evidentiary hearing on April 14, 2008. Moreover, the case cannot be fully briefed by then. However, the parties respectfully suggest that the Court maintain the April 14 date for a case management conference and motion hearing to resolve a number of issues summarized below.

In addressing this Memorandum to the Court, the parties respectfully note that in its January 29, 2008 letter, the Court appears to be approaching this case on the basis that all conditions precedent to an evidentiary hearing have been met, all necessary pleadings filed, all discovery or case management Orders entered, and all other work completed. That is not the case. As the parties further explain below, first, there is additional agreed upon DNA testing to be completed, as described below. Second, there are several matters that need to be brought to the Court's attention, and certain rulings obtained prior to the filing of amended (or original) Petitions and responses from the State. In addition,

as further noted, it is doubtful that the hearing contemplated by the Court can be completed in a week or two. Further, most of the counsel involved in this case have pre-existing scheduling conflicts that will need to be discussed with the Court. Finally, neither the State of Arkansas (which will have to respond to several lengthy pleadings) nor all of the Petitioners anticipate that these matters will be fully briefed by April 14, 2008.

As a result, the parties propose that hearings in this matter be held on April 14, 2008, with a view towards obtaining necessary Orders, and setting forth a realistic hearing schedule given the issues presented and known by the parties in this case to exist.

II. **CASE STATUS MEMORANDUM**

a) **DNA experts are still reviewing issues in this case and further testing is being undertaken**

As previously reported to the Court, as of last year, considerable progress had been made in completing DNA testing. The data available to the parties indicates that there are some foreign biological materials (meaning biological materials such as hair shafts, or other cellular material) that are not identified as having come from any of the three victims or any of the three defendants/Petitioners. Further testing indicated that some hairs found at the crime scene may have similar profiles to persons whose DNA profiles are known, including the step-father of one of the victims, and a male friend of the step-father's. Some biological material was also found in material swabbed from the

penis of one of the victims. In an effort to see whether this foreign material can be profiled and identified, further DNA testing, using another type of DNA testing that has been employed to date, is in progress as this report is prepared.

In addition, the parties may seek a ruling from the Court on whether any additional DNA testing conducted from this point forward can be the subject of the basis for any amendment of current or soon to be filed post-conviction actions by the Petitioners here, or successor Petitions - a ruling that may influence whether the defendant Petitioners seek leave of the Court to complete further DNA testing. It may be, since not all items subject to DNA testing have been tested, that some additional DNA testing may be undertaken.

b) **In addition, there are rulings that the Court will be required to make on matters on which the parties have agreed to disagree**

According to the procedure agreed upon by the parties in this case, evidence has been reviewed, and agreements have been reached to allow the laboratory testing of material, the results of which are contemplated to be incorporated into Petitions for Writ of Habeas Corpus brought under A.C.A. §§ 16-112-201 *et seq*. However, from the beginning of the discussions between the parties on these matters, it became evident that there were certain areas in which the parties disagreed - for example, defendants/ Petitioners and the State have disagreed on whether the fiber evidence that was the subject of testimony during the Echols/Baldwin trial should be released for further testing

by the defense, or whether the fiber evidence does not meet the criteria specified in A.C.A. §16-112-201.

The State has taken the position that the fiber testing done at the trial level demonstrates that the scientific evidence was available at trial. A.C.A. §16-112-201(a)(1). The defense has taken the position that the State's fiber testing documentation does not establish that the fiber evidence was processed according to then-existent scientific standards and further that other techniques available for use to process the fiber evidence establish that 'the scientific predicate for the claim could not have been previously discovered through the exercise of due diligence...' at the time of trial, thereby setting the stage for an Order releasing the fiber evidence to be tested by experts on the testing of fibers, using current technologies and processes. A.C.A. §16-112-201(a)(1) and (2).

In addition to the above specified controversy which requires resolution by the Court, the parties have also discussed the implications of certain fingerprint evidence, and a record will need to be made so as to establish whether there was scientific evidence not available at trial that fits the A.C.A. §16-112-201(a)(1) definition.

c) **Defendants/Petitioners have some outstanding discovery requests to bring to the Court's attention**

The parties have, over the past few years, discussed this case on an ongoing basis.

In May, 2007, the parties' experts on forensic pathology met to discuss the case, and one result of that meeting was that the Arkansas Crime Laboratory indicated that it would complete a review of its records to ascertain whether it had any evidence from other cases (in which human remains were found in bodies of water) that might be relevant to this case.

Also, because both parties have been conducting post-conviction investigation of this matter, with the acquisition of further information about witness information and credibility issues, it will be necessary for a record to be made of the status of post-conviction discovery to avoid the possibility that these cases may leave the Arkansas State courts without having received a full and fair adjudication.

d) **None of the defendants/Petitioners has yet to file a statutory habeas corpus Petition, or Amended Rule 37 Petition, or any other Petition pending completion of scientific testing and rulings on case management issues specified above**

While the Court's January 29, 2008 letter contemplates a hearing beginning on April 14, 2008 on State habeas Petitions, and Petitions for relief pursuant to Rule 37, for a number of reasons (including those described above) none of the defendants/Petitioners yet has final State habeas or Rule 37 Petitions pending in this Court. Moreover, any Petition filed on an interim basis (a situation that the parties had attempted to avoid by ensuring that all testing was completed before the just-described Petitions were filed) may need to be amended depending on the Court's rulings on the above issues. Since

defendants/Petitioners want to ensure that they have made every effort to fulfill the Federal requirement of a 'fair and full' State post-conviction hearing process, the parties respectfully suggest that the Court should consider the above matters before scheduling any evidentiary hearing in this case.

e) **The State will need time to respond to the various defense filings**

The State anticipates that the defense pleadings will be voluminous. It will take time for the State to respond to all of the anticipated defense pleadings. The current schedule does not allow adequate time for the State's replies.

f) **Most defense counsel have pre-existing obligations and scheduling conflicts**

Undersigned Dennis Riordan, Lead Counsel for Petitioner Echols has a pre-existing hearing set in the matter of the extradition of Sergio Dorantes Zurita, XR0790051 (JCS) MJJ, in the Federal District Court, Northern District of California.

Undersigned co-counsel for Jason Baldwin, J. Blake Hendrix, has pre-existing hearings in *U.S. v. Fennell*, 4-0700086 JMM, Federal District Court, Eastern District of Arkansas, and is set as well during the time proposed by the Court in *State of Arkansas v. Kristopher Murphy*, Pulaski County, Case No. CR05-1459 and 07-4187. Mr. Baldwin's other co-counsel, John Philipsborn, is counsel of record in a dispositive evidentiary hearing in a pending homicide case that begins on April 21, 2008 before the Honorable

Philip J. Moscone, San Francisco Superior Court, *People v. Bell,* No. 2301301. It is a multiple defendant case.

Undersigned Michael Burt is also counsel of record in *People v. Bell*, the case just described. Mr. Burt is also counsel of record in a murder trial that was scheduled on January 18, 2008 to begin on March 25, 2008. That trial is estimated to take 4 to 6 weeks. The title of the case is *People v. Pizarro*, Case No. M8517. Mr. Burt may be given a recess in the matter simply to attend the commencement of the hearings in *People v. Bell, et al.*, beginning on April 21, 2008, but he will be engaged in one of those two cases or both during the course of the month of April. Similarly, Mr. Misskelley's co-counsel, Jeff Rosenzweig is beginning post-conviction hearings in a capital case (State v. Raymond Sanders, Grant and Hot Springs Cos CR 1991-4) in the State of Arkansas on April 14, 2008 . The case in question also involves Mr. Holt of the Arkansas Attorney General's Office, who is one of the State's post-conviction lawyers in the Echols case. Thus, it is anticipated that both Mr. Rosenzweig and Mr. Holt would not be available at the time scheduled by this Court.

III. **BECAUSE OF THE NEED FOR THE ABOVE-DESCRIBED LITIGATION, PREPARATION, AND PRODUCTION OF DOCUMENTS, THE PARTIES RESPECTFULLY SUBMIT THAT THEY WILL NOT BE READY TO BEGIN AN EVIDENTIARY HEARING ON APRIL 14, 2008 BUT WILL BE AVAILABLE TO ADDRESS CERTAIN PRE-HEARING MATTERS AT THAT TIME**

Counsel for parties agree that it is doubtful, even were additional documents filed

in the near future, that all parties would have necessary Petitions, Oppositions, Replies, and Responses on file, and that all discovery and case management related issues would have been briefed (and resolved) by April 14, 2008. Counsel have also been informed that the Court anticipates the hearings in this case will take two weeks, which counsel respectfully believe is less than the time necessary for the Court to accomplish what it has described in its January 29, 2008 letter.

For example, the Petitioners have an interest in fully litigating the question of how the injuries to the victims occurred, and whether the causes of death were properly established at the time of the original trials. The Petitioners anticipate having a series of witnesses on this subject alone, and while it is likely that this is one of the aspects of the hearing that would be of interest to all parties, undersigned counsel for the Petitioners anticipate that the hearing on cause of death/forensic pathology issues alone will be protracted, unless the Court denies all parties the opportunity to call witnesses on this issue. If that is the case, then the parties will need the time to prepare detailed affidavits with the relevant experts so that an adequate record can be made for all concerned.

Similarly, while the parties agreed to the use of one DNA laboratory, it may be necessary for either the State, the defense, or both to call more than one DNA expert to explain the implications of certain DNA testing results. Again, it is likely that such testimony will (if the Court allows it) take several days to complete.

Based on the discussions, and meetings, in between the parties to date, the parties anticipate the need for the presentation of experts in several different areas of forensic science. First, while the parties agreed that a specific DNA laboratory would conduct the testing, and prepare the reports, in this case, they anticipate that the significance of the DNA results may be the subject of some testimony- though it is possible that much of the foundational evidence will be introduced through a combination of affidavits and laboratory reports that may be the subject of stipulations.

An area Petitioners believe likely to be more contested involves the testimony concerning mechanisms of injury and the causes of death of the victims - evidence that Petitioners believe will involve specific descriptions of what scientific evidence not available at trial establishes Petitioners' actual innocence (A.C.A. 116-12-201(a)(1)), and also evidence of whether the scientific predicates for the claim could not have been previously discovered through the exercise of due diligence, given the technologies, and protocols for the determination of causes of death and mechanisms of injury available at the time that these cases arose.

As will be demonstrated during the course of the testimony, some of the evidence now being relied upon is the newly applied (and relatively newly available) DNA technology. In the Arkansas Supreme Court's opinion on direct appeal in *Echols and Baldwin*, the Arkansas Supreme Court described the facts as established by the evidence

as demonstrating that the Medical Examiner testified that there was bruising and discoloring comparable to that frequently seen in children who were forced to perform oral sex. One of the children (Steve Branch) victimized in the case was described as having stab wounds, and injuries to his penis that indicated that oral sex had been performed on him. A second one of the victims (Chris Byers) was described as having had cuts around the anus and hemorrhaging indicative that he was still alive when the cuts were made. He too is described as having had injuries indicating that he had been forced to perform oral sex. *Id.* at 935-938. Petitioners contend the new DNA evidence and anticipated testimony on cause of death and mechanism of injury will address these issues.

The parties are guided in part by the review of the evidence by the Arkansas Supreme Court in approaching the impact of scientific evidence developed, and reviewed, during the post-conviction investigation - which will impact the nature of the evidence that is relevant to the habeas corpus litigation conducted under A.C.A. 116-12-201 *et seq.*, as well as to the context of the Rule 37 petitions that remain to be litigated in the Misskelley and Baldwin cases.

It is partially for that reason that the parties respectfully submit that proceeding to an evidentiary hearing before all necessary testing has been completed, results reviewed and digested, and necessary experts prepared (whether to tender affidavits or to testify)

would be counterproductive and not in the best interests of justice from the viewpoint of all the parties, including the State and Petitioners.

CONCLUSION

For the reasons stated above, the parties respectfully submit that the Court's currently proposed schedule cannot realistically be met first because testing is ongoing; second, because certain matters remain to be resolved by the Court that may influence what further testing can be undertaken prior to any hearing in this case; third, because all parties require further time to complete briefing the issues; and fourth, because of scheduling conflicts involving not only some of the counsel but also some of the proposed experts. Finally, the parties submit that two to three weeks is less time than is likely necessary to complete the hearings contemplated. The parties request the opportunity to appear on April 14, 2008 to discuss case status and management issues, and to litigate matters that should be reviewed prior to the commencement of any evidentiary hearing, including but not limited to addressing the scientific evidence that the parties have agreed to disagree upon, and that the Petitioners at least seek permission to test.

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Respectfully Submitted by the
Following Parties:

THE STATE OF ARKANSAS

Dated: 2/21/08, 2008

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BRENT DAVIS
Prosecuting Attorney
Second Judicial District

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Dated: 2/19, 2008.

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