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IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT
COURT CLERK

DAMIEN ECHOLS and CHARLES
JASON BALDWIN,

PLAINTIFFS,

vs.

CR-93-450A & 450 B

THE STATE OF ARKANSAS,

RESPONDENT.

FIRST AMENDED ORDER FOR DNA TESTING

THESE MATTERS are before this Court because Echols and Baldwin have separately filed Petitions and Motions for post-conviction evidence testing under Arkansas Code Section 16-112-201, *et seq.*

FINDINGS

This Court has previously been informed that counsel for Echols and Baldwin, and the State of Arkansas, represented by the Office of the Prosecuting Attorney for the Second Judicial District, have agreed that DNA analysis of the below-described items of evidence will be conducted, and that the described parties have reached an agreement on protocols to accomplish this testing.

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As a result of the information provided to the Court, on May 26, 2004, this Court entered an order for DNA testing, which was filed on June 2, 2004.

The Court is now informed that because of developments since the entry of its previous order, filed June 2, 2004, the parties have consulted with personnel at Bode Technologies, the laboratory they have agreed will conduct the DNA testing in this case, as well as with personnel from the Arkansas Crime Laboratory. Recommendations made by Bode have been adopted by the parties. As a result, the Court is informed that the Order that it entered on May 26, 2004, and that it filed on June 2, 2004, should be modified pursuant to the agreement and stipulation of the parties. The Court now accepts this agreement, and sets forth the below findings and orders.

The Court is further informed, and finds, that the parties have agreed that biological material found on the below-described evidence has the scientific potential to produce new noncumulative evidence which may be materially relevant to the defendants'/Petitioners' assertions of actual innocence for the purposes of this Court's finding of good cause for the agreed upon testing to proceed. The Court further is informed, and finds, that the State of Arkansas has reserved the right, based on reasonable notice to the Petitioners, to object to the relevance of test results obtained from testing of items enumerated and described in "List B" below as not being items which have the

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scientific potential to produce new noncumulative evidence materially relevant to the defendants'/Petitioners' assertions of actual innocence.

The Court is further informed, and finds, that Echols and Baldwin have agreed to pay for the testing to be conducted on the items of evidence enumerated and described below. Their agreement to make payment shall not be deemed a waiver of any rights that they may have to seek reimbursement from the State for any or all of these testing related expenses pursuant to the provisions of Arkansas Code Sections 16-112-201, *et seq.* The Court is further informed, and finds, that the parties have agreed that Echols and Baldwin may initiate action either in this Court as a part of these actions, or by bringing separate legal actions either in this Court or in any other court of the State of Arkansas, pursuant to Arkansas Code Sections 16-112-201, *et seq.*, seeking reimbursement or payment of any costs of testing, or other costs for which the State of Arkansas is deemed and/or found to be liable, or responsible.

The Court is further informed, and finds, that the parties have agreed to perform tests on a number of the below-described items of evidence even though they have been notified that these tests will be, or are likely to be, destructive of the evidence item being tested. The Court, and parties, are aware of the provisions of Arkansas Code §§16-112-201 *et seq.*, and specifically those provisions that prohibit the performance, and completion, of destructive testing if objections to such testing are raised. The Court is

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further informed, and finds, that the parties have agreed that in the interests of a full and fair inquiry into these matters, they will each waive and thus will effectively give up rights that they may have to prohibit, contest, or otherwise object to, the performance of tests that either will, or may, result in the destruction of items of evidence that could otherwise be retained for further testing.

The Court is informed, and finds, that the signatures of counsel below evidence a knowing, intelligent, and voluntary waiver of Arkansas Code §§16-112-201 et seq, specifically in so far as the Code requires preservation of sufficient evidence so as to assure that testing is non-destructive. The Court is further informed, and finds, that the signatures of counsel for Echols and Baldwin certify to this Court that counsel have specifically consulted with their respective clients on the rights provided in Arkansas Code §§16-112-201 et seq., and that Echols and Baldwin have joined their counsel in informing this Court, and providing a basis for a finding, that the individual Petitioners and the State of Arkansas have knowingly, intelligently, and voluntarily entered into these waivers . The Court is informed, and finds, that counsel for Echols and Baldwin have agreed to file written waivers executed by their respective clients reflecting Echols' and Baldwin's consent to destructive testing and that waivers satisfactory to the State have been filed by both Baldwin and Echols.

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Because the evidence at issue in this Order is also arguably relevant to litigation in a related case, *State v. Misskelley*, pending in the Circuit Court of Clay County, Western District, No. 93-47, the Court is informed, and finds, that counsel for Misskelley have been parties to this agreement and that they have also joined in this knowing, voluntary and intelligent waiver on behalf of Misskelley. The Court directs that the parties in Misskelley's case to prepare and submit a proposed order covering the same issues and items of evidence as this does this order. Counsel for Misskelley are also directed to prepare, and ask Misskelley to execute, a written waiver of his right to non-destructive testing. The Misskelley order and waiver shall be made part of the record in his case. Counsel for the State shall forward a copy of this order to counsel for Misskelley within 15 days of his receipt of it.

IT IS HEREBY ORDERED:

1. Based on the agreement of the parties, the Court orders that the following items of evidence are to be tested using technology and techniques applicable to DNA testing, and finds that any results pertinent to the items enumerated and described in "List A" below may produce relevant information within the meaning of Arkansas Code Sections 16-112-201, *et seq.* The Court is further informed, and finds, that the parties

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have agreed that (1) available reference samples from the victims currently in the possession of the Arkansas Crime Laboratory will be forwarded to Bode Technologies to be used to establish the relevant DNA profiles, and (2) that the item descriptions set forth were provided to the parties by Bode Technologies and that where necessary, the parties will be permitted to enter stipulations, or offer evidence, to correct the item descriptions :

LIST A ITEMS

<u>Bode Item No.</u>	<u>Lab Case No.</u>	<u>Description</u>
01	93-0516 FP2	M. Moore Lt. nail scrapings; STR
02	93-05716 FP3	M. Moore Rt. nail scrapings; STR
03	93-0516 FP6, 03Aa, 03Ab; 03B	Hair from M. Moore ligature; hair from tape lift; mtDNA
05	93-05716, Q1-4	Swabs from M. Moore, STR and mtDNA
06	93-5717 (FP3)	S. Branch, Lt. nail scrapings; STR
07	93-5717 (FP4)	S. Branch, Rt. nail scrapings; STR
08	93-5717 (FP5)	S. Branch, two slides of hair, total three hairs, mtDNA
09	93-0517 (FP6)	S. Branch, hair from ligature, STR
10	93-0517, K1, Q1-Q4	S. Branch, blood sample and swabs; STR and mtDNA testing

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11	93-0518 (FP3)	C. Byers, hairs from slide, 11A-11Z, select hair with root material, STR analysis, six hairs for mtDNA
12	93-05718 FP4	C. Byers, Lt. nail scrapings; STR
13	93-0518 FP5	C. Byers, Rt. nail scrapings; STR
14	93-0518 FP6, QH	Hair from lower body of C. Byers; mtDNA
15	93-0518 FP6, QH	C. Byers, hair from ligature; mtDNA
17	93-05718 FP9, QH	C. Byers, hair from perineum; mtDNA
18	93-0518 FP10	One hair from sheet, 18A, negroid hair, mtDNA; 18B, 18D, and 18F, mtDNA
19	93-05718, Q1-Q3	C. Byers, swabs; STR and mtDNA;
20	93-05716, E3, QH	Hair slides 20A and 20B, mtDNA
21	93-05716, E5, Q4 (A-B)	Hair from scout cap, one slide, two hairs, mtDNA
23	93-0516, E127	Hair from tree stump; mtDNA
25	93-05716, E3, Q10	Cutting from blue pants "suspected semen stain" STR
27	93-0517, FP7, QH	S. Branch, dyed hair from sheet, mtDNA
31	E-178	Kershaw knife; STR
33	93-05718, Q4 331-93	C. Byers, ligatures; STR
34	93-05717, FP6	S. Branch, ligatures; STR

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2. Based on the agreement of the parties, the Court reserves the parties the right to object to the relevance of results of testing on Item E-178, listed immediately above, a Kershaw folding knife. The objections reserved to all parties include the objection that there was a failure to maintain a chain of custody sufficient to establish that the knife was neither tampered with, nor altered in any material way.

3. Based on the agreement of the parties, the Court orders testing of the items enumerated and described in "List B" below using technologies and techniques pertinent to DNA testing. The Court is informed, and finds, that the State has reserved the right to dispute whether the items in "List B" below have the potential to produce new noncumulative evidence which may be materially relevant to the defendants'/Petitioners' assertions of actual innocence:

LIST B ITEMS

<u>Bode Item No.</u>	<u>Lab Case No.</u>	<u>Description</u>
32	93-0516 BR1, Q1-Q25	Bag of clothing found near scene; two razors only, items 32G and 32H, STR

4. The Court is further informed, and hereby finds, that the above-described items have already been delivered, pursuant to this Court's order of May 26, 2004, filed June 2, 2004, to the laboratories of Bode Technologies, Inc. in Virginia. On the basis of this information, and based on the information provided by the parties, the Court finds

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that the evidence transmitted to Bode Technologies from the Arkansas Crime Laboratory has been: inventoried; numbered by Bode Technologies; cross-referenced to the Arkansas Crime Laboratory identification numbers; and that testing protocols have been discussed by representatives of Bode Technologies with the parties.

5. The Court is also informed, and finds, that the parties have modified their initial agreement, and are requesting an amendment to this Court's May 26, 2004 order which was filed on June 2, 2004 as follows: The parties have agreed that Bode Technologies shall conduct both the nuclear DNA testing, as well as the mitochondrial DNA analysis on all items described above.

6. Upon completion of its testing and analysis, Bode Technologies, Inc. shall reduce its findings to a written report, which shall be provided to the Office of the Prosecuting Attorney, to counsel for Echols and Baldwin, and shall be transmitted by the parties in this case to counsel for Misskelley. Copies of these reports shall be filed with the Court.

Reservations of Rights

7. The parties have agreed, and the Court finds, that each of the parties in this case has reserved certain rights as set forth below. The Court recognizes these reservations without purporting to adjudicate or enforce those rights at this juncture in the proceedings.

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8. The State of Arkansas, through the Office of the Prosecuting Attorney for the Second Judicial Circuit, reserves the right to object to the relevance of any results of testing on any items listed herein insofar as those results may pertain to the defendants'/Petitioners' claims for relief resulting from said tests. In addition, the State has further reserved objections to the results of any test conducted on the items enumerated and described in List B, above for the reasons specified in paragraph 3 above, and to the results of any test conducted on List A, Item E-178 for the reasons specified in paragraph 2, above.

9. Petitioners Echols and Baldwin reserve the right to litigate the legal and scientific validity of any of the State's objections. Petitioner have also specifically reserved the right to demonstrate the relevance of any biological material, or test results, pertinent to items on List B and of any biological material, and test results, pertinent to List A, Item E-178. Echols and Baldwin also reserve the right to contest the validity of the State of Arkansas' objections to the testing of evidence items that are not the subject of this Order, but which the parties stipulate, and the Court finds, are the subject of Echols' and Baldwin's written requests, and the State's written objections. The parties have agreed, and the Court finds, that the parties have exchanged letters that evidence both the requests and objections just noted. Finally, Echols and Baldwin also reserve the right to seek reimbursement for the costs of testing pursuant to Arkansas Code Section

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16-112-201, *et seq.* insofar as this Court, or any other court of the State of Arkansas, finds that testing was conducted on items, evidence, or biological material as provided for, covered by, or defined in, Arkansas Code Sections 16-112-201, *et seq.*

10. Upon written application by any of the parties to this action, this Court will adjudicate any claim of right specifically reserved under the agreement which has led to the issuance of this Order.

11. For the reasons specified above, the parties have agreed, and the Court finds, that no party will have the right to raise the destruction of an item of evidence during testing as a bar to the use of test results in the proceedings of this case absent other proper and legal objections, except where a party can establish, by the appropriate burden of proof, that the results of the test are not accurate according to the standard relevant to the admission of the particular scientific test at issue.

IT IS SO ORDERED.



CIRCUIT JUDGE DAVID BURNETT

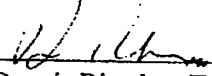
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APPROVED BY COUNSEL:

FOR PETITIONER DAMIEN ECHOLS:

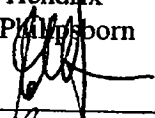


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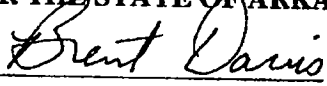
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