IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

CHARLES JASON BALDWIN, DEFENDANT/PETITIONER

vs. NO. CR-93-450

STATE OF ARKANSAS PLAINTIFF/RESPONDENT

BALDWIN'S AND MISSKELLEY'S BRIEF OF ISSUES ON REMAND INCLUDING THEIR MOTION FOR TESTING OF HAIR AND FIBER EVIDENCE; THEIR MOTION FOR AN ORDERING REQUIRING A HEARING BASED ON THE PROPER LEGAL STANDARD; THEIR MOTION TO INCORPORATE THEIR RULE 37 HEARING RECORD INTO THE RECORD OF THESE PROCEEDINGS; AND INCLUDING THEIR STATUS REPORT ON FINANCIAL ISSUES; BALDWIN'S MOTION TO EXCLUDE MISSKELLEY'S STATEMENTS FROM BALDWIN'S CASE

I. INTRODUCTION

Pursuant to this Court's request, Baldwin and Misskelley are tendering this combined brief to address the status of this case and to state several motions that they are asking this Court to rule on.

Financial issues report

Baldwin and Misskelley report that they have not independently raised any money to help defray the costs of any upcoming hearing. Their counsel are informed, however, that monies have been raised to help defray their costs. Undersigned counsel are not in a position to confirm this information. None of the below-named lawyers, all of whom have been involved in the litigation of this case

for more than seven years, expect to be compensated. At this juncture, all below-named counsel remain willing to continue litigating this matter, if monies to defray necessary costs and to allow necessary investigation and experts are available.

Thus, Baldwin and Misskelley[1] begin by asking this Court to consider them indigent, and represented by counsel who are currently serving as *pro bono* counsel without payment. No undersigned counsel is currently asking for appointment and compensation from the Court. However, the state of affairs just summarized means that Baldwin and Misskelley may need to ask this Court, at some point, for monies to defray case-related expenses, including fees for experts. This is a point that Baldwin has made over the several years of the litigation of this matter since attorneys Hendrix and Philipsborn have represented him.

At this juncture, undersigned counsel must defer to other counsel in this matter to address the financial issues in detail.

Scheduling Information

Undersigned counsel for Mr. Baldwin respectfully point out that the timing of their ability to move forward with any hearings in this case depends in part on the financial situation described above.

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[1] While this pleading is written on behalf of both Baldwin and Misskelley, Misskelley's counsel will file it under the appropriate case number with their own captioned face sheet.

Also, both of Baldwin's lawyers have significant scheduling conflicts in 2011. The undersigned Philipsborn, who has been Baldwin's main lawyer on scientific evidence issues, is about to start a lengthy federal racketeering and murder trial in March, 2011 in the Northern District of California, and is awaiting further scheduling decisions in a federal capital case now scheduled for trial in Hawaii in September, 2011–a trial that is anticipated to be continued. It is therefore possible that Baldwin will be ready to proceed with some hearings in the fall, 2011–around September or October, assuming that continuances are granted.

However, it is also clear to undersigned counsel that the length of the hearing in this case will largely depend on how the Court and various parties decide to interpret and apply the relevant statutory scheme, and much 'live evidence' is contemplated.

The pertinent statutory scheme provides that evidence in hearings like these can be received in several forms–including "affidavit, deposition, or oral testimony." A.C.A. §16-112-205(c)(5). That part of the statutory scheme has not changed (see attached Exhibit 1, a copy of the just described Code Section from 2001). At this point, Baldwin has presented some, but not all of his non-expert evidence in the recent Rule 37 proceedings summarized below. Misskelley also contemplates presenting the testimony of several lay witnesses. Some of the

Baldwin/Misskelley lay and expert witnesses could be presented through affidavits, but others likely should be heard 'live'. The Court's view of these matters will be a great value to Baldwin, Misskelley, and their counsel in deciding on an approach, and to determine the likely duration of the hearing.

Also, there are entire components of the case (DNA evidence, for example) that could take lengthy periods of time depending on the potential challenges to experts opinions, etc. On the other hand, it may be that the parties will be able to work out stipulations, or other ways of promoting hearings on such evidence that go to the key issues.

In addition, Baldwin's view is that the scope of his presentation is in part going to be influenced by the way their co-Petitioners present their cases. For example, Baldwin is of the view that all three Petitioners have lay witnesses, in addition to scientific evidence, available. At trial, Baldwin could have chosen to present lay witness testimony that would have pertained to Echols and Misskelley–their lack of a relationship at the time of the crime; their whereabouts at times critical to an analysis of the cases; their behavior and demeanor up to time of arrest, etc. Thus, it is possible that during the hearing contemplated, if one Petitioner chooses to limit his approach, another may choose to step in and address facts related to that person.

In sum, there are a number of variables that will influence both the scheduling of the hearing, and the scope of it. It may be that proposals can be made to limit the need for a wide range of live evidence given the nature of the hearing process described in A.C.A. §16-112-205. These are matters that can clearly be worked on as the parties get ready for further hearings in this matter. As a result, Baldwin and Misskelley respectfully inform the Court that the hearing in this matter could range from a few weeks duration to a much longer hearing depending on the configuration and procedure adopted–understanding that the State's input on scheduling will also affect any time estimate.

II. MOTION FOR RELEASE AND TESTING OF HAIR AND FIBER EVIDENCE

Baldwin and Misskelly move for the release of hair and fiber evidence. In particular, they seek an Order permitting them to use DNA technology (1) to test and obtain DNA profiles on selected human hairs; (2) to have hairs identified as animal hairs by criminalists at the Arkansas Crime Laboratory and/or DNA analysts and criminalists at the laboratory of Bode Technologies, Inc. specifically identified by animal species. Copies of original hair slides (some of which are attached here as Exhibit 2) that were prepared by the Arkansas Crime Laboratory at the time of the initial investigation clearly demonstrate that at the time evidence was first processed, initial microscopic review of hair evidence indicated the

presence of likely animal hairs on hair slides prepared by the Arkansas Crime Laboratory.

After June, 2004, criminalists at Bode Technologies (the lab agreed upon by the parties to conduct post-conviction DNA testing) were permitted to make a closer inspection of hair slides that had been sent to them. In doing so, these criminalists reported to Baldwin's below-named defense counsel (and to other counsel in the case) that they had identified, microscopically, a number of likely animal hairs on hair slides that had been given to them. Baldwin had moved for the release of all hair and fiber evidence for re-testing as of November, 2002. Misskelley also filed such motions.

Other than having 'identified' animal hairs microscopically (a technique that relies on the appearance of the hairs to the examiner), no further effort has been made to identify animal hairs and of some untested human hairs because the State opposed the defense motion, and the Circuit Court denied Baldwin's repeated motions for such testing. The Baldwin defense had submitted an affidavit from Dr. Joy Halverson to Judge Burnett as Exhibit 65 to the initial statutory petition, together with Dr. Halverson's CV (Exhibit 66 to Petition for Writ of Habeas Corpus Under Arkansas Code Annotated 16-112-201 et seq.) Dr. Halverson is the Director and Senior Scientist at QuestGen Forensics, a laboratory located in Davis,

California. Davis, California is the home of the University of California at Davis, one of the world's leading schools of veterinary medicine. Dr. Halverson obtained her doctorate in veterinary medicine in 1981, and a Master's Degree in veterinary epidemiology, from the University of California at Davis in 1985. Dr. Halverson was a post-doctoral researcher at the University of California at Davis.

Dr. Halverson has conducted research, and published, on the identification of genetic markers for animal hairs. She also has given presentations to learned groups, such as the American Academy of Forensic Science, about the identification of animal hairs in forensic investigations. Her talk in 2005 was entitled "Hanging by a Hair - Animal Trace Evidence in Forensic Investigations". She gave a presentation in 2004 to the International Society of Animal Genetics entitled "Animal DNA - a Forensic Tool". In 2005 she gave another presentation to the American Academy of Forensic Science entitled "Forensic DNA Identification of Feline Hairs, Case Work and a Mitochondrial Database". In 2003 she had given a presentation to the European Academy of Forensic Science, together with other colleagues, on the subject of canine DNA testing and its use in criminal investigations.

Dr. Halverson has done extensive work on DNA identification of animal hairs. She has directed and worked in a laboratory that conducts such testing. She

has worked on animal hair-related cases in various parts of the United States, as well as in Canada and in the United Kingdom. In her affidavit, Dr. Halverson clearly indicates that technologies, and DNA databases, specific to animal hair have been developed to allow animal hairs to be identified in forensic settings. One of the pertinent data bases is the National Cancer Institute's Cytochrome B gene database.

Baldwin and Misskelley have taken the position, based on evidence presented to the Court (in the person of Judge Burnett) during the Baldwin/Misskelley Rule 37 proceedings that significant injuries caused to the three victims in this case were the result of animal predation. Questions have been raised about what kinds of animals might have been involved, and a range of opinions on this subject has been heard by the Court to date. The defense intends on presenting some local naturalists and persons knowledgeable about the animal populations around West Memphis, Arkansas to describe those animals known to populate the area. The Baldwin petition evidence included excerpts from books on Arkansas mammals, turtles, and reptiles known to populate the West Memphis area. Moreover, since animal hairs were actually recovered in this case, the Baldwin defense submits that there is ample evidence, especially based on the record of the Baldwin/Misskelley Rule 37 proceedings, to permit this Court to

order the release of pre-screened likely animal hairs to a laboratory that is staffed by a qualified scientist like Dr. Halverson who is experienced in the area of DNA testing applied to animal hairs, and who, like Dr. Halverson, have qualified as experts in the field in courts of law.

Other human hairs that have not yet been tested, designated by the defense, should also be tested to obtain DNA profiles of the donors.

A reminder of the statutory basis for the motion can be borrowed from two separate decisions that resulted in the remanding of this case for further consideration in this Court. The first is *Echols v. State*, 2010 Ark. 417, which reviews the Arkansas DNA testing statutes as they existed at the time Baldwin first filed his motion for preservation of evidence, for release of the evidence for testing, and statutory petition for relief under §16-112-201 et seq. The second source of legal analysis here is contained in *Baldwin v. State*, 2010 Ark.412, which reversed and remanded the matter of Baldwin's statutory petition under Act 1780 to this Court. The decision in *Baldwin v. State* 2010 Ark.412 clearly indicates that Baldwin's request for further scientific testing of hair and fiber evidence was wrongly decided. The Supreme Court succinctly ruled:

> "We must reverse and remand to the circuit court because it applied the wrong legal standard. Baldwin's request for additional testing was

made in November, 2002; therefore, the circuit court should have considered the request under the DNA testing statutes in effect at that time, see Ark.Code ANN §§16-112-201 to 207 (Supp. 2001)."

(Slip opinion in *Baldwin v. State* at pp.2-3). As the Supreme Court pointed out in *Echols, supra*, 2010 Ark.417, there were significant changes brought about when the General Assembly amended and added to A.C.A. §16-112-201 et seq. At the time he had brought his initial motion for testing, Baldwin was entitled to test case evidence if "[t]he testing has the scientific potential to produce new non-cumulative evidence materially relevant to the defendant's assertion of actual innocence." §16-112-202, as it existed in 2001. Clearly, given the facts available here, testing is needed to ensure the identification of hairs as animal hairs of a specific kind, and the identification of specified human hairs that have not been subjected to testing to date. If Baldwin can identify animal hairs as belonging to the kinds of animals (dogs, cats, and other carnivores or scavengers) who might have engaged in predation, he would produce evidence material to his claim of actual innocence. A similar rationale applies to human hairs that may belong to the actual perpetrator. Baldwin has claimed actual innocence, and to date no DNA testing result links him to the crimes of which he was convicted.

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A. The pertinent test in 2001

For the convenience of the Court, appended, the Court will find Exhibit 1, a copy of the pertinent subsection of the 2001 statute, A.C.A. §16-112-202. The undersigned will refer to this section, in this argument, as "§202". At the point at which Baldwin (who originally moved for hair and fiber testing) made his motion, it was the 2001 version of §202 that governed. §202(a)(1) provided that where no direct appeal was available a person convicted of a crime could make a motion for the performance of specified testing "... or other tests which may become available through advances in technology to demonstrate the person's actual innocence...." Certain predicates had to be established. First, the testing had to be performed on evidence secured in relation to the trial. That is the case with both the hair and fiber evidence, thus the predicate for §202(a)(1)(A) is satisfied. Second, the evidence must not have been subject to testing, either because the technology for the testing was not available at time of trial "or the testing was not available as evidence at time of trial." §202(a)(1)(B). There was no DNA testing of hairs available in the State of Arkansas at the time, and no DNA testing of animal hair was available at the time of the trial. DNA testing of animal hair was not available until well after 1994. Thus, Baldwin satisfies §202(a)(1)(B).

Baldwin has already satisfied the various predicates set forth in §202(b):

identity was an issue in the trial; there has been a chain of custody sufficient to establish the integrity of the evidence. These are requirements of §202(b)(1) and (2).

Finally, the testing shall be ordered under §202(c)(1) if the requirements of §202(b) have been met and the testing has the "scientific potential" to produce new non-cumulative evidence material to the assertion of actual innocence and employs a scientific method generally accepted within the relevant scientific community. §202(c)(B) and (C). Baldwin clearly is able to establish that. Especially with the various hairs, it is clear that the State gained access to the hairs - maintained custody over the hairs, and then agreed that some of the hair evidence could be transmitted to Bode Technologies. No one has had access to the hair evidence other than a laboratory designated pursuant to a Court Order. Some of the hair, specifically the animal hair, is likely to be at the Arkansas Crime Laboratory - since Baldwin was unsuccessful in his motion.

In sum, as to remaining human and animal hair, Baldwin and Misskelley satisfy the criteria set forth in the 2001 version of the statute.

B. The fiber evidence

Baldwin is also seeking access to the fiber evidence introduced at his trial that was used to link him (and co-defendant Echols) to the crime scene. The background to this part of this motion is as follows. Now deceased Arkansas

Crime Laboratory criminalist Lisa Sakevicius testified in the record of pre-trial and then trial proceedings that on June 3, 1993, in part because fiber evidence had been found on the victims' clothing. The police decided to search the Baldwin and Echols homes to see if they could recover fiber evidence that matched the unknown fibers found at the crime scene. Sakevicius went to the Baldwin residence and took a variety of fibers (Reporter's Transcript of proceedings at pp. 206-207, Echols/Baldwin pre-trial hearings). She found one fiber on a toilet seat cover, and another on a red robe. Later, during the trial proceedings, Sakevicius testified that she found various fibers on the victims' clothing. She had located a green polyester fiber from a shirt in the Echols residence and testified that that fiber was similar in consistency and appearance to a fiber found on a Boy Scout cap at the scene (RT at 1465-69). The shirt was never identified as having been worn by Damien Echols - nor was it identified as a man's shirt. The theory advanced was that the cap had come in contact with Echols' clothing, and picked up the green fiber, which had been transferred to Echols' clothing prior to the killings.

Similarly, Sakevicius testified about Exhibit 88, which was a red robe (belonging to Baldwin's mother), which might have transferred a fiber to Baldwin's clothing. The fiber was then transferred to a pair of a victim's pants that had been recovered from a drainage ditch (RT 1470-71). Notwithstanding the fact

that Sakevicius admitted that recovering trace evidence from items that had been submerged in water would be difficult, this evidence was admitted without objections (other than on Fourth Amendment grounds). Sakevicius claimed to have made her fiber comparisons by looking at the diameters and shape of the fibers; the colors; and based on examination of delustrants. She also testified that she looked at the dye characteristics, whether the polymers match, etc. (RT 1473-74). She opined that the fiber evidence from the scene was consistent with the red and green fiber sources found during the house searches.

During post-conviction litigation, Baldwin had offered the affidavit of Max Houck, Director of the Forensic Science Initiative at the University of West Virginia, a training center for forensic scientists. In addition to serving as a professor in forensic and investigative sciences, Houck served as a senior instructor and researcher in the Department of Applied and Forensic Chemistry at Curtin University of Technology in Perth, Australia. Before that, Houck had worked as a criminalist with the Tarrant County Medical Examiner's Office in Forth Worth, Texas in 1992, and then spent seven years with the Trace Evidence Unit in the Laboratory Division of the FBI.

Mr. Houck worked on over 800 cases involving trace evidence and/or anthropology issues. While at the FBI, he served as the Chairman of the Scientific

Working Group for Materials Analysis which was organized with the assistance of the U.S. Department of Justice and established standards on a number of forensic issues specific to issues concerning fibers. Houck is a Fellow of the American Academy of Forensic Science; a Senior Member of the American Association of Textile Chemists and Colorists, and sits on the editorial boards of publications pertinent to the forensic sciences. Houck has been involved in fiber analysis and identification, and provided technical assistance over the years to numerous laboratories and forensic scientists dealing with fiber issues.

Houck pointed out that the Arkansas State Crime Laboratory documentation pertinent to the hair and fiber evidence analyzed by Ms. Sakevicius was so disorganized that the documentation of the hair and fiber examination provided insufficient foundation for the opinions expressed by Ms. Sakevicius. Houck noted that Sakevicius's testimony indicated that she had a weak knowledge of hair and fiber examination processes, the standards applicable to hair and fiber examination, and the meaning of the technical vocabulary involved in the fields of hair and fiber examination. Houck pointed out that Sakevicius's work cannot be said to conform to currently accepted scientific practices because of her failure to document her work in such a way as to permit it to be verified. In sum, the State has introduced unreliable information about fiber identification into the trial.

The Baldwin defense pointed out in its prior motions for testing and examination of fiber evidence that there are laboratories that have the expertise in microscopy and instrumental fiber analysis such as to be able to use a defensible scientific process to compare the evidence obtained during the search of the crime scene, specifically the fiber evidence described as "consistent" with fibers obtained from the Echols and Baldwin households.

At the time of the trial of this case, there were no Department of Justice-sponsored Scientific Working Groups in existence (including the working groups for DNA, firearms, fingerprints, and numerous other aspects of the forensic sciences). None of the scientific evidence in this case was reviewed in a defensible way by the defense lawyers–none of them obtained or reviewed the laboratory's bench notes, documentation, and binders. They simply obtained the end-product typewritten reports that were provided to them by the prosecution. It was not until undersigned post-conviction counsel insisted on obtaining the laboratory's notebooks that it became evident that Ms. Sakevicius did not have documentation sufficient to demonstrate a foundation for her opinions. While the State did submit some of the hair and fiber evidence to a more experienced examiner, John Kilbourn (who was affiliated with the State Crime Laboratory in Alabama at the time), Mr. Kilbourn essentially provided confirmatory testimony, and applied only basic

laboratory work to some of the pertinent evidence.

No methodical, defensible, microscopic and instrumental analysis of the fibers (including use of instruments that can produce spectra of the chemical constituents of dyes) exists in this case. While the State has defended the work done by criminalist Sakevicius and anointed by Mr. Kilbourn, it has never substantively addressed the question of whether the work was done properly in the first place.

As the defense pointed out to Judge Burnett, in submitting articles on fiber evidence analysis, there are recent techniques that add to the microscopic and chemical analyses that were available at the time of the processing of the evidence in this case. The problem that needs to be addressed is two-fold: first, the analysis was not proper or adequate in the first place, and the data underscoring the testimony provided in the Echols/Baldwin trial was suspect–which is the point made by Houck in his affidavit. Second, modern and more accurate techniques can be applied to fiber evidence that were never applied to the fibers in this case.[2]

As with the hair evidence, all of the predicates for the granting of this

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[2] Since a number of these matters are new to this Court, the Baldwin/Misskelley defenses will be guided by the Court's views of what it needs on these topics. The defense is prepared to obtain further expert affidavits and/or literature on fiber analysis to buttress the points made here.

motion exist.

III. BALDWIN/MISSKELLEY MOTION TO ADOPT EXISTING RULE 37 HEARING TESTIMONY AS A FACTUAL BASIS FOR RELIEF

On January 4, 2011, the Court indicated its interest in the possibility of using the record already made in this case as a basis for its consideration of the issues. That record, as the Court is aware, consists of the trial records that are generally described by the Arkansas Supreme Court in *Misskelley v. State*, 320 Ark.449, 915 S.W.2d 702 (1076), and *Echols and Baldwin v. State*, 326 Ark.917, 936 S.W.2d 509 (1996). It also consists of the record of the two Rule 37 proceedings held in these matters: the Echols hearing and the Baldwin/Misskelley hearing. These are summarized below to provide the Court information about the matters of interest to Baldwin and Misskelley–and to demonstrate that the Court should incorporate them into the record that it considers on the issues currently before it.

Baldwin and Misskelley move for the incorporation of these two Rule 37 proceedings (Echols and MissKelley/Baldwin) into the record of the hearing under A.C.A. §16-112-201(a)(1) and (2) [scientific evidence not available at trial establishes innocence; scientific predicate for the claim sufficient to undermine conviction]; A.C.A. §16-112-205 [court can receive evidence in several forms]; also, the court may grant relief where DNA evidence considered with "all other evidence in the case" establishes that a new trial would result in an acquittal.

A.C.A. §16-112-208(e)(3).

A. The post-conviction proceedings - evidentiary hearings

1. The 1998-1999 Echols Rule 37 hearings

Over the period of several days spread between October, 1998 and March, 1999, evidence was presented in the context of Petitioner Echols' Rule 37 hearings. On October 26, 1998, Echols presented the testimony of Brent Turvey who provided an analysis of crime scene evidence; Dr. Thomas David, board certified in forensic odontology and a consultant for the Medical Examiner in the State of Texas. He believed that there was a human bite mark found on the remains of Steven Branch. On October 28, 1998, Dr. Joseph Cohen, a forensic pathologist employed by the Chief Medical Examiner for the City of New York testified, addressing the testimony of Dr. Peretti, including whether injuries were consistent with a sexual assault; whether the injuries occurred after death, and whether injuries are likely to have been inflicted by a knife. During that testimony, Dr. Cohen noted his view that the left side of Steven Branch's face appeared to have been the subject of "post-mortem marine activity" (RT 1126). In response to an inquiry by the Court concerning his view of some of the wounds Dr. Cohen explained: "I see areas that are suspicious for animal activity." (RT 1133)

Echols also presented the testimony of John Hutson, a clinical psychologist.

West Memphis Police Department Detective Bryan Ridge reviewed his work on the case as a witness for the State. The State also called licensed private investigator Ron Lax, who investigated Echols' case at the trial level, and discussed aspects of his work on the matter.

On March 18, 1999, Echols called Dr. Neal Haskell, a forensic entomologist, who testified about his views of the implications of fly larvae and other matters. This testimony was followed by State witness Detective Mike Allen from the West Memphis Police Department.

Dr. Harry Mincer, a dentist with a doctoral degree in pathology, and an odontologist with the Medical Examiner in Shelby County, Tennessee, as well as a consultant with the State Medical Examiner in Tennessee, was called to testify about bite mark evidence. His view was that the pattern injury previously identified during the hearing as a human bite mark was not, in his view. (RT 1395-1396). Dr. Kevin Dugan, a dentist who has worked with the Arkansas State Medical Examiner for about 9 years as of the time of his testimony was called to consult with Dr. Peretti. He did not see what he considered to be a human bite mark and explained why the mark at issue could not be a human bite mark in his opinion. (RT 1421). Dr. Peretti, who conducted the post-mortem examinations of the three victims in this case testified on March 19, 1999. He indicated that while

he did not think there were bite marks on the bodies, he called in Dr. Dugan because he saw pattern injuries on the forehead of Steve Branch and was being cautious (RT 1437).

Dr. William Sturner, Chief Medical Examiner, noted that he had reviewed the autopsy findings which were consistent with his observations. He further indicated that Dr. Dugan is a dentist who has worked with his office.

2. The Baldwin/Misskelley Rule 37 hearings

Beginning in September, 2008, Baldwin and former co-defendant Misskelley had hearings in support of their Rule 37 petitions and motions. Numerous witnesses were called (24 by the Petitioners, 4 by the State). Of those witnesses, a number offered testimony that is relevant to the proceedings here. This includes testimony from Petitioner Baldwin; Arkansas State Crime Laboratory Executive Director Kermit Channell (who worked on serological matters in this case); Dr. Patricia Zajac, who also testified about serology issues. One of the matters addressed in the testimony of Mr. Channell and Dr. Zajac was whether there had been any evidence found on victim clothing, and particularly on the pants found at the scene, that was consistent with semen or seminal fluid. Both Mr. Channell and Dr. Zajac explained that the documentation indicated no such evidence. Mr. Channell also addressed the processing of some of the evidence by

Lisa Sakevicius, a criminalist who specialized in trace evidence, who passed away after giving testimony in the trials, and prior to the Rule 37 proceedings. Mr. Channell noted the presence in the laboratory notebooks of an indication of a red beard hair on ligature FP6, which was associated with the victim Michael Moore. Mr. Channell also described, briefly, the documentation that was produced by the Crime Laboratory.

Both Mr. Channell, and Dr. Zajac, addressed some of the DNA testing that had been done as part of the initial investigation.

The Court also heard extensive testimony from Baldwin's lawyer Paul Ford, and from Misskelley's lawyers Greg Crow and Dan Stidham. One of the topics covered, at some length, during Mr. Stidham's testimony was a series of statements attributed to Mr. Misskelley, some of which were contained in defense counsel's files and reflected Misskelley's interactions with his own counsel, and with others.

Baldwin also presented the testimony of persons knowledgeable about the Craighead County Juvenile Detention Facility, for the purpose of addressing the testimony of Michael Carson, a jailhouse informant and witness who testified against Baldwin. Among the witnesses presented, the Court heard from Joyce Cureton, who had directed the facility at the time that Baldwin was incarcerated there, and knew both Baldwin and the witness Carson. She described the housing

conditions; the brief time that Carson had been in the facility; the protocol for housing newly arrived detainees; and her knowledge of Baldwin and his persistent denials of involvement. This testimony was seconded by that of Paul Jason Duncan, who had been in the facility with Baldwin and Carson, and who testified that he had never heard Baldwin make admissions, or talk about his case, to persons that he did not know. He (Duncan) and Baldwin were incarcerated together for a considerable time.

Misskelley called Dr. Tim Derning, a psychologist and expert on neuro-cognitive disabilities who testified about Misskelley's cognitive functioning, finding that Misskelley had a full scale IQ of 72, widespread cognitive impairment, and was likely not competent.

Misskelley and Baldwin called a series of forensic science experts who addressed cause of death, and cause of injury matters. These included board-certified forensic pathologists Dr. Werner Spitz; Dr. Michael Baden; Dr. Janice Ophoven. They also called Dr. Richard Souviron, Chief Odontologist for the Miama-Dade Medical Examiner's Office. Dr. Baden was the then-current Medical Examiner for the New York State Police, having been Chief Medical Examiner in New York City for many years prior to that. Dr. Werner Spitz, the author of an authoritative and widely-used book on forensic pathology had also been a Chief

Pathologist and Medical Examiner in several jurisdictions, including the City of Detroit, and the City of Baltimore, Maryland. Dr. Ophoven, whose emphasis has been pediatric pathology, has also been an Assistant Medical Examiner for several jurisdictions, as well as a hospital-based pathologist. All of these experts on forensic pathology (all of whom were board-certified) testified that in their view many of the injuries to the three victims were post-mortem. The most egregious, including the area of genital mutilation of the victim Chris Byers, was in their unanimous view as a result of animal predation. In this opinion, they agreed with other forensic pathologists whose materials had been submitted as exhibits. Dr. Baden, accompanied by well-known forensic pathologist Dr. Vince Dimaio, Dr. Souviron, and Canadian forensic odontologist (Dr. Robert Wood) had attended a meeting in May of 2007 at the Arkansas Crime Laboratory. The meeting had been suggested by counsel for Petitioner Echols, and was attended by all counsel in the case as well. The meeting was called to allow a discussion with Dr. Peretti and members of the Crime Lab staff about the case in an effort to discuss, in a collegial manner, the issues in the case and the findings by multiple experts consulted by the defense.

The step-father of Chris Byers, John Mark Byers, who lived near the crime scene noted that his sons had brought turtles back from the Robin Hood Woods

(the crime scene) on a number of occasions. Attorney Paul Ford had previously explained that he recalled being told by Dr. Peretti that there might be turtle bites on one of the bodies - and the above-named pathology experts noted that turtles, and other wild life, might have contributed to the predation on the victims. In addition, Dr. Richard Souviron, the forensic odontologist described above, had specifically prepared a one-to-one acetate of a knife that had been identified as a possible murder weapon, and consistent with the weapon that inflicted injuries, including pattern injuries, on the victims. According to Dr. Souviron, who demonstrated this in court, the knife could not have made marks described in prior proceedings as having been made by it.

Baldwin presented alibi evidence from his mother Angela Grinell, as well as from long-time Marion High School teacher Sally Ware, who felt that she could account for Baldwin's presence at school during the entire week that the three victims disappeared, and were found dead–these events happened on a Wednesday and a Thursday. This view was seconded by Baldwin's neighbor, and friend, Joseph Samuel "Sammy" Dwyer, who indicated that he had been riding the school bus with Baldwin and his younger brother every day, and that they had left the area of their home in Lakeshore Trailer Park at 7:30 in the morning, returning to school in the afternoon. Baldwin had further provided evidence, some from defense

counsel's files, that indicated that Baldwin had cut his great uncle Hubert Bartoush's lawn the afternoon of May 5, when the three boys were reported to have disappeared. Baldwin also presented evidence of a statement from his mother's then-boyfriend, Richard "Dink" Dent, whose statement was taken by police, and also reflected in a handwritten statement prepared by Dent, to the effect that Baldwin was at home on the night of May 5.

This information was supplemented by the testimony of Jennifer Bearden, currently a paralegal in Little Rock, whose interest in criminal just was prompted by her involvement in this matter. She had befriended Echols and Baldwin, and had, during May of 1993, been speaking with both of them by phone each evening. She also had another friend, Holly George, who was doing the same thing. The two girls periodically got together with Baldwin and Echols on weekends. Bearden, who had been interviewed by police at the time, indicated that she recalled being on the phone with Echols the night of May 5.

Misskelley called Victoria Hutcheson, a witness called at his trial, who refused to testify in the absence of a grant of immunity, and whose prior inconsistent statements, and statements against penal interest, contending that she had committed perjury and lied during the Misskelley trial about having information concerning satanism, cult meetings and the like were sought to be

admitted into evidence by Misskelley.

The State called Detective Mike Allen (now an Assistant Chief of Police), and Captain Bryan Ridge (who was a detective at the time of the events), both testified for the State. They had participated in the processing of the crime scene, and had not seen wild life out at the scene–though they did indicate that there were a number of persons at the scene, and with a gas-driven pump working in the background, and given the searching of the drainage ditch in which the remains were found. Detective Ridge noted his view that the injuries he saw were consistent with knife wounds, and that the bank of the drainage ditch appeared to have been cleaned off in some way.

Dr. Peretti testified that he believed he was correct in his assessment of the case, and that there is no evidence of animal predation here. He indicated that while he felt there was evidence of sexual assault, he never had testified that there had been an act of sodomy here. Having met with defense experts and being familiar with their opinions, Dr. Peretti, who admitted he is not a board-certified forensic pathologist, stated he disagreed with their opinions. Dr. William Sturner, former Chief Medical Examiner for the State of Arkansas agreed that he supported Dr. Peretti's views generally. He did not believe there was evidence of sexual assault in the case, however. Moreover, his view was that something like a pipe or

some other object resulted in the injuries to the face of Steven Branch. Dr. Sturner indicated that he understood (as did Dr. Peretti) that competent pathologists may disagree on the interpretation of evidence.

Conclusion

In sum, the Echols, and Baldwin/Misskelley Rule 37 hearings contain evidence relevant to this Court's consideration of case issues and the record of those hearings should be incorporated into the record that this Court uses to assess the issues presented by the Baldwin and Misskelley statutory petitions for relief brought under A.C.A. § 16-112-201, et seq.

IV. BALDWIN'S AND MISSKELLEY'S MOTION FOR RULING THAT THIS HEARING IS GOVERNED BY 2001 STATUTES

As noted above, in ruling on Baldwin's statutory petition, the Arkansas Supreme Court ruled that the Circuit Court had applied the wrong legal standard in denying Baldwin's request for further scientific of hair and fiber evidence. *Baldwin v. State, supra*, 2010 Ark. 412. (Slip opinion at pp.2-3). Baldwin had initially brought a "Motion to Preserve Evidence and for Access to Evidence for Testing" on March 9, 2001. Subsequently, after the enactment of A.C.A. §16-112-201 *et seq.*, Misskelley and Baldwin both referenced this statutory scheme in seeking statutory relief, including additional testing. This explains the Arkansas Supreme Court's reference to: "Baldwin's request for additional testing [which]

was made in November, 2002...." In *Misskelley v. State*, 2010 Ark.415, the Arkansas Supreme Court specifically referenced the procedural history in Misskelley's case. He had filed a motion to preserve evidence as early as November 17, 2000, and in September of 2002 had filed his first "Petition for Writ of Habeas Corpus and Supplement to Motion to Preserve Evidence and for Access to Evidence for Testing." *Id.*, slip opinion at p.4, para.4.

The procedural history of this case is clear that by 2004, all of the defendants in this case were statutory habeas corpus petitioners as well–and all were seeking access to evidence for testing, which explains the issuance of the Circuit Court's DNA testing orders beginning in 2004.

In the just-referenced *Baldwin* and *Misskelley* decisions of 2010, the Arkansas Supreme Court clearly accepted the notion that both Baldwin and Misskelley had sought access to case evidence for testing prior to 2005, and the record is clear that they had embarked on their pursuit of statutory habeas corpus relief by the time A.C.A. §16-112-201 *et seq*. had been amended and supplemented.

This thus frames an issue of key importance to the determination of the framework for the upcoming hearings–which have been shorthanded as hearings on 'DNA petitions'. This shorthand may well be misleading in the Misskelley and

Baldwin cases for the reasons pointed out by the Arkansas Supreme Court in determining the standard under which these petitioners' motions for the right of access to case evidence should be reviewed. It appears, based on the Arkansas Supreme Court's 2010 decisions in both *Misskelley* and *Baldwin* that the dates of the filings of the original statutory petitions that initiated the litigation in these cases control the version of the statutory scheme under which the petitions are to be litigated. Both Misskelley and Baldwin were permitted to amend their statutory petitions in May, 2008 - but by then, each of them had sought relief under A.C.A. §16-112-201, *et seq.*, as these existed in 2001, and the State had deemed them sufficiently eligible for at least some testing-related relief as to agree to the DNA testing Orders issued beginning in 2004.

In sum, the statutory scheme that applies to Misskelley and Baldwin, according to the recent rulings of the Arkansas Supreme Court, is the 2001 iteration of A.C.A. §§16-112-201 to 207. §16-112-208 did not figure prior to 2005.

As indicated in the appended exhibits, §§201-207 as enacted in 2001, clearly envisioned a wide range of "scientific evidence" that could be accessed to demonstrate the basis for a new trial. The 2001 version of §16-112-207 specifically referenced some examples of scientific evidence 'services' that could be accessed, including: fingerprint identification; DNA testing; and "other tests

which may become available through advances in technology". §207(b)(1)(A).

However, in 2002, and 2004, there was no statute that concentrated on the implications of DNA evidence specifically. §16-112-208 (hereafter §208) provides a standard under which an individual can (1) file a motion for a new trial or re-sentencing based on DNA evidence (§208(e)(1)), as well as (2) a standard under which the Court can grant the motion for new trial or re-sentencing when the DNA test results "when considered with all other evidence in the case regardless of whether the evidence was introduced at trial, established by compelling evidence that a new trial would result in an acquittal." (§208(e)(3)).

Both Baldwin and Misskelley filed amended statutory "DNA petitions" invoking the statutory scheme as it existed when originally enacted (2001), and then when amended to include new provisions, including claims for relief brought under §208. Both Baldwin and Misskelley have specifically applied the analysis set forth in §208(e)(1) and (3) to their cases–prior to the 2010 Arkansas Supreme Court opinions remanding these cases to this Court. Thus, it appears that the State Supreme Court's view is that this Court must apply the statutory scheme in existence at the time the application for relief was first made–indeed, both Baldwin and Misskelley applied for further testing of evidence in their amended 2008 statutory petitions, and in the above-referenced decisions on appeal, the Arkansas

Supreme Court clearly ruled that consideration must be given to the application for relief under the law as it existed when relief was originally sought. Thus, it appears that for Misskelley and Baldwin, the principal vehicle for the granting of relief is found in the 2001 version of §16-112-201(a) which does not include the refinement contained in §208(e).

In the alternative, it may be that the Court's position is (as was Baldwin's position in his petition for statutory relief filed in 2008) that because of the timing of the various filings in this case, Baldwin and Misskelley are entitled to have this Court consider their petitions insofar as these reference any scientific evidence which has been developed, or tested, since the time of conviction under the 2001 version of §201(a), and that they may also, in the alternative, ask the Court to consider the implications of DNA testing results specifically under §208(e). This decision-making process, however, would depend less on the timing of the filing of the petition for relief than it would on the timing of the completion of the DNA testing, some of which was not completed until §208(e) was part of Arkansas's statutory scheme. However, arguably, for the reasons explained in the 2010 decisions in *Misskelley* and *Baldwin*, this nuanced approach is not endorsed by the Arkansas Supreme Court in these cases.

The decision in *Echols v. State*, 2010 Ark. 417 does, admittedly, suggest that

the Supreme Court viewed §208 as legitimately applicable in this case, thus explaining the Court's focus on that sub-section, and the ruling (in *Echols*) that §208(b) is inapplicable to the cases (*Echols* slip opinion at p.10), though §208(e) pertains, but must be correctly applied (*Echols* at p.14). Interestingly, however, the Court did not address the timing of filing issues in *Echols* in such a detailed way as to shed light on whether the timing issue makes the application of §208(e) a moot point in this case. The ultimate ruling in *Echols* suggests that the Court views §208(e) as applicable to the consideration of this case, though, as explained in this argument, consistent application of the rulings concerning the timing of filings at least as applied to Misskelley and Baldwin appears to call for consideration of these applications for relief under the pre-§ 208 (and thus pre-2005) standard(s).

Either way - whether the Court agrees that §208(e) cannot be retrospectively applied where the petition for relief was first filed prior to the enactment of §208 (and other changes in the statutory scheme), or the Court is of the view that the different statutory schemes including §208 can be applied to both Misskelley and Baldwin, these two petitioners respectfully submit that they are entitled to relief.

V. BALDWIN'S MOTION TO EXCLUDE THE USE OF MISSKELLEY'S STATEMENTS TO POLICE AND TO COUNSEL IN BALDWIN'S MATTER

Finally, the last motion presented here is Baldwin's alone. During recent

Rule 37 proceedings in front of Judge Burnett, it was agreed, and understood, that no statements attributed to Misskelley, including his alleged admissions (or his denials of guilt) would be admitted in Baldwin's proceedings. Unlike Baldwin who did testify in his Rule 37 proceedings, Misskelley did not. Baldwin has had no opportunity to examine Misskelley. While it now turns out that Misskelley's contradictory statements to law enforcement and counsel spanned a number of months through 1993 and 1994 and involved a number of different conversations, none should play a part in Baldwin's case. The basic rationale of *Bruton v. U.S.*, 391 U.S. 123, 137 (1968) and *Cruz v. New York*, 481 U.S. 186, 192-193 (1987) applies here. Baldwin has no access to Misskelley to confront and cross-examine him on his cross-inculpatory statements.

CONCLUSION

For the reasons stated here, Misskelley joins Baldwin in urging: (1) that the Court deem both of them indigent with the notion that in the short run funding from private donors may defray the costs of upcoming hearings, pending the provision of further information to the Court; (2) the Court should grant the Baldwin/Misskelley motion to release hairs, including animal hairs and fibers, for further examination and testing; (3) the Court should consider the records made in the Echols and Misskelley/Baldwin Rule 37 proceedings; (4) the Court should

decide which statutory scheme applies here, noting that in *Baldwin* and *Misskelley* (2010 decisions), the Arkansas Supreme Court focused on filing dates to address the applicability of a given statutory scheme; and finally, (5) Baldwin alone moves for this Court to excise from consideration in his case the various statements attributed to co-defendant Jessie Misskelley in large measure because Baldwin has not had the opportunity to examine Misskelley, whereas Misskelley (and the State) did have the opportunity to examine Baldwin during the Rule 37 proceedings.

Dated: February 16th, 2011

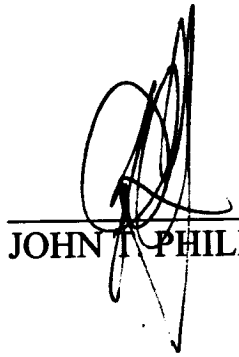
Respectfully submitted by

J. BLAKE HENDRIX; J.T. PHILIPSBORN
Attorneys for Charles Jason Baldwin

MICHAEL BURT; JEFF ROSENZWEIG
Attorneys for Jessie Misskelley

CERTIFICATE OF SERVICE

I hereby certify that I have mailed, and/or sent electronic, copies of Baldwin's and Misskelley's Brief of Issues on Remand to the Hon. David N. Laser, c/o Craighead County Courthouse, Jonesboro, AR; Dustin McDaniel, Attorney General; David Raupp, Senior Assistant Attorney General; Kent Holt, Deputy Attorney General, 323 Center St., Little Rock, AR 72201; Michael Walden, Circuit Prosecutor, Jonesboro; and counsel of record for the co-defendants: Deborah Sallings, 35715 Sample Road, Roland, AR 72135 for Echols; and Jeff Rosenzweig, 300 Spring Street, Little Rock, AR 72201 for Misskelley this 16th day of February, 2011.



JOHN T. PHILIPSBORN

EXHIBIT 1–2001 STATUTES
A.C.A. § 16-112-201 ET SEQ

(2) Where the proof shall also be sufficient to justify the arrest of the person having the prisoner in his custody, as for a criminal offense committed in the taking and detaining the prisoner, the warrant shall also contain an order for the arrest of the offender.

(b) The warrant shall be executed according to the command thereof, and, when the prisoner is brought before the court or judge, the person detaining the prisoner shall make a return in like manner, and the like proceedings shall be had as if a writ of habeas corpus had been issued in the first instance.

(c) If the person having the prisoner in custody is brought before a court or a judge as for a criminal offense, he shall be examined, committed, bailed, or discharged in the same manner as in other criminal cases of like nature.

Formerly Rev. Stat., c. 73, art. 4, §§ 1 to 4; C. & M. Dig., §§ 5121 to 5124; Pope's Dig., §§ 6384 to 6387; A.S.A. 1947, §§ 34–1743 to 34–1746.

Library References

Habeas Corpus ⇐685, 791, 792, 800.
Westlaw Key Number Searches: 197k685; 197k791; 197k792; 197k800.

SUBCHAPTER 2—MOTIONS BASED ON SCIENTIFIC EVIDENCE.

§ 16–112–201. Appeals—New scientific evidence

(a) Except when direct appeal is available, a person convicted of a crime may commence a proceeding to secure relief by filing a petition in the court in which the conviction was entered to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate, if the person claims that:

(1) Scientific evidence not available at trial establishes the petitioner's actual innocence; or

(2) The scientific predicate for the claim could not have been previously discovered through the exercise of due diligence and the facts underlying the claim, 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 of the underlying offense.

(b) Nothing contained in this subchapter shall prevent the Arkansas Supreme Court or the Arkansas Court of Appeals, upon application by a party, from granting a stay of an appeal to allow an application to the trial court for an evidentiary hearing under this subchapter.

Acts of 2001, Act 1780, § 4, eff. Aug. 13, 2001.

Historical and Statutory Notes

Acts of 2001, Act 1780, § 10, eff. Aug. 13, 2001, provides:

"(a) A person financially unable to obtain counsel who desires to pursue the remedy provided in this act may apply for representation by

the Public Defender Commission or appointed private attorneys.

"(b) The trial public defenders or appointed private attorneys may represent indigent persons who apply for representation under this section.

"(c)(1) With the approval of the court, petitioners may use the services of the State Crime Laboratory for latent fingerprinting identification, DNA testing and other tests which may become available through advances in technology.

"(2)(A) If approved by the court, the State Crime Laboratory shall provide the requested services.

"(B) Samples shall be of sufficient quantity to allow testing by both the prosecution and the defense.

"(C) Neither the prosecution nor defense shall consume the entire sample in testing in the absence of a court order allowing the sample to be entirely consumed in testing.

"(d) Subsection (c) of this section shall not apply to any tests before trial of a matter that will be governed by relevant constitutional provisions, statutory law, or court rules.

"(e) The executive director and the State Crime Laboratory shall give priority to claims based on factors including:

"(1) The opportunity for conclusive or near conclusive proof through scientific evidence that the person is actually innocent; and

"(2) A lengthy sentence of imprisonment or a death sentence."

Library References

Criminal Law ⇐1536.
Westlaw Key Number Search: 110k1536.

Notes of Decisions

Hearings 2
Purpose of act 1

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1. Purpose of act

The purpose in passing act allowing a convicted defendant to file petition for postconviction relief based on scientific evidence that was not available at trial was to change state laws and procedures in order to accommodate the advent of new technologies enhancing the ability to analyze scientific evidence. A.C.A. § 16-112-201 et seq. Echols v. State, 2002, 350 Ark. 42, 84 S.W.3d 424. Criminal Law ⇐ 1403

2. Hearings

Petitioner convicted of capital murder and sentenced to death would be granted stay of appeal of his postconviction proceedings pending outcome of his petition for DNA testing in the interest of justice, even though circuit court had jurisdiction to consider petition for scientific testing while appeal was pending, since petition was appropriately filed under procedures established under provisions of act allowing a convicted defendant to file petition for postconviction relief based on scientific evidence that was not available at trial. A.C.A. § 16-112-201 et seq. Echols v. State, 2002, 350 Ark. 42, 84 S.W.3d 424. Criminal Law ⇐ 1132

§ 16–112–202. Form of motion

(a)(1) Except when direct appeal is available, a person convicted of a crime may make a motion for the performance of fingerprinting, forensic deoxyribonucleic acid testing, or other tests which may become available through advances in technology to demonstrate the person's actual innocence if:

(A) The testing is to be performed on evidence secured in relation to the trial which resulted in the conviction; and

(B) The evidence was not subject to the testing because either the technology for the testing was not available at the time of the trial or the testing was not available as evidence at the time of the trial.

(2) The motion shall be filed before the court in which the conviction was entered.

(3) Reasonable notice of the motion shall be served on the prosecuting attorney who represented the state at trial.

(b) A person who makes a motion for the performance of fingerprinting, forensic deoxyribonucleic acid testing, or other tests which may become avail-

able through advances in technology to demonstrate the person's actual innocence must present a prima facie case that:

(1) Identity was an issue in the trial; and

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(c)(1) The court shall order that the testing be performed if:

(A) A prima facie case has been established under subsection (b) of this section;

(B) The testing has the scientific potential to produce new noncumulative evidence materially relevant to the defendant's assertion of actual innocence; and

(C) The testing requested employs a scientific method generally accepted within the relevant scientific community.

(2) The court shall impose reasonable conditions on the testing designed to protect the state's interests in the integrity of the evidence and the testing process.

Acts of 2001, Act 1780, § 5, eff. Aug. 13, 2001.

Historical and Statutory Notes

Acts of 2001, Act 1780, § 10, eff. Aug. 13, 2001, provides:

"(a) A person financially unable to obtain counsel who desires to pursue the remedy provided in this act may apply for representation by the *Public Defender Commission* or appointed private attorneys.

"(b) The trial public defenders or appointed private attorneys may represent indigent persons who apply for representation under this section.

"(c)(1) With the approval of the court, petitioners may use the services of the State Crime Laboratory for latent fingerprinting identification, DNA testing and other tests which may become available through advances in technology.

"(2)(A) If approved by the court, the State Crime Laboratory shall provide the requested services.

"(B) Samples shall be of sufficient quantity to allow testing by both the prosecution and the defense.

"(C) Neither the prosecution nor defense shall consume the entire sample –in testing in the absence of a court order allowing the sample to be entirely consumed in testing.

"(d) Subsection (c) of this section shall not apply to any tests before trial of a matter that will be governed by relevant constitutional provisions, statutory law, or court rules.

"(e) The executive director and the State Crime Laboratory shall give priority to claims based on factors including:

"(1) The opportunity for conclusive or near conclusive proof through scientific evidence that the person is actually innocent; and

"(2) A lengthy sentence of imprisonment or a death sentence."

Library References

Criminal Law ⇐1536.
Westlaw Key Number Search: 110k1536.

§ 16–112–203. Contents of motion

(a) The petition filed under this subchapter shall be entitled in the name of the petitioner versus the State of Arkansas and shall contain:

(1)(A) A statement of the facts and the grounds upon which the petition is based and relief desired.

(B) All grounds for relief shall be stated in the petition or any amendment to the petition, unless the grounds could not reasonably have been set forth in the petition.

(C) The petition may contain argument or citation of authorities;

(2) An identification of the proceedings in which the petitioner was convicted, including the date of the entry of conviction and sentence or other disposition complained of;

(3) An identification of any previous proceeding, together with the grounds asserted in the previous proceeding, which sought to secure relief for the petitioner from the conviction and sentence or other disposition; and

(4)(A) The name and address of any attorney representing the petitioner; or

(B) If the petitioner is without counsel, the circuit clerk shall immediately transmit a copy of the petition to the judge and shall advise the petitioner of that referral.

(b) The filing of the petition and any related documents and any proceedings pursuant to the petition shall be without any costs or fees charged to the petitioner.

(c) The petition shall be:

(1)(A) Verified by the petitioner; or

(B) Signed by the petitioner's attorney; and

(2) Addressed to the court in which the conviction was entered.

(d) The circuit clerk shall deliver a copy of the petition to the prosecuting attorney and to the Attorney General.

Acts of 2001, Act 1780, § 6, eff. Aug. 13, 2001.

Library References

Criminal Law ⇐1574.
Westlaw Key Number Search: 110k1574.

§ 16–112–204. Other pleadings

(a) Within twenty (20) days after the filing of the petition, the prosecuting attorney or the Attorney General shall respond to the petition by answer or motion which shall be filed with the court and served on the petitioner if unrepresented or served on the petitioner's attorney.

(b)(1) No further pleadings are necessary except as the court may order.

(2) However, the court may at any time prior to its decision on the merits permit:

(A) A withdrawal of the petition;

(B) Amendments to the petition; and

(C) Amendments to the answer.

(3) The court shall examine the substance of the pleading and shall waive any irregularities or defects in form.

Acts of 2001, Act 1780, § 7, eff. Aug. 13, 2001.

Library References

Criminal Law ⇐1582.
Westlaw Key Number Search: 110k1582.

§ 16–112–205. Hearing

(a) Unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief, the court shall promptly set an early hearing on the petition and response, promptly determine the issues, make findings of fact and conclusions of law, and either deny the petition or enter an order granting the appropriate relief.

(b) Hearings on a petition filed pursuant to this subchapter shall be open and shall be held in the court in which the conviction was entered.

(c)(1) The court may order the petitioner to be present at the hearing.

(2) If the petitioner is represented by an attorney, the attorney shall be present at any hearing.

(3) A verbatim record of any hearing shall be made and kept.

(4) Unless otherwise ordered by the court, the petitioner shall bear the burden of proving the facts alleged in the petition by a preponderance of the evidence.

(5) The court may receive evidence in the form of affidavit, deposition, or oral testimony.

(d) The court may summarily deny a second or successive petition for similar relief on behalf of the same petitioner and may summarily deny a petition if the issues raised in it have previously been decided by the Arkansas Court of Appeals or the Arkansas Supreme Court in the same case.

Acts of 2001, Act 1780, § 8, eff. Aug. 13, 2001.

Library References

Criminal Law ⇐1650 to 1669.
Westlaw Key Number Searches: 110k1650 to 110k1669.

§ 16–112–206. Appeals

(a) The appealing party, within thirty (30) calendar days after the entry of the order, shall file a notice of appeal if the party wishes to appeal.

(b)(1) If the appeal is by the petitioner, the service shall be on the prosecuting attorney and the Attorney General.

(2) If the appeal is by the state, the service shall be on the petitioner or the petitioner's attorney.

(c) No fees or bond for costs shall be required for the appeal.

Acts of 2001, Act 1780, § 9, eff. Aug. 13, 2001.

Library References

Criminal Law ⇐1081(1, 4.1).
Westlaw Key Number Searches: 110k1081(1); 110k1081(4.1).

C.J.S. Criminal Law § 1685.

§ 16–112–207. Appointment of counsel

(a)(1) A person financially unable to obtain counsel who desires to pursue the remedy provided in this subchapter may apply for representation by the Arkansas Public Defender Commission or appointed private attorneys.

(2) The trial public defenders or appointed private attorneys may represent indigent persons who apply for representation under this section.

(b)(1)(A) With the approval of the court, petitioners may use the services of the State Crime Laboratory for latent fingerprinting identification, deoxyribonucleic acid testing, and other tests which may become available through advances in technology.

(B)(i) If approved by the court, the State Crime Laboratory shall provide the requested services.

(ii) Samples shall be of sufficient quantity to allow testing by both the prosecution and the defense.

(iii) Neither the prosecution nor the defense shall consume the entire sample in testing in the absence of a court order allowing the sample to be entirely consumed in testing.

(2) Subdivision (b)(1) of this section shall not apply to any tests before trial of a matter that will be governed by relevant constitutional provisions, statutory law, or court rules.

(c) The executive director and the State Crime Laboratory shall give priority to claims based on factors including:

(1) The opportunity for conclusive or near conclusive proof through scientific evidence that the person is actually innocent; and

(2) A lengthy sentence of imprisonment or a death sentence.

Acts of 2001, Act 1780, § 10, eff. Aug. 13, 2001.

Library References

Criminal Law ⇐1650.
Westlaw Key Number Search: 110k1650.

Notes of Decisions

In general 1

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1. In general

On appeal of an order denying relief pursuant to provision of habeas corpus statute allowing a convicted defendant to file postconviction challenge to a judgment of conviction based on scientific evidence that was not available at trial, the exercise of discretion to appoint attorneys for an indigent petitioner depends on whether the pro se petitioner makes a substantial showing that the appeal has merit and that he cannot proceed without appointment of counsel. A.C.A. § 16–112–207(a)(1). Hardin v. State, 2002, 350 Ark. 299, 86 S.W.3d 384. Habeas Corpus ⇐ 820

Petitioner who sought relief pursuant to provision of habeas corpus statute governing postconviction challenge to judgment of conviction on grounds of scientific evidence that was not available at trial, based on allegation that there was no conclusive scientific evidence adduced

EXHIBIT 2-COPIES OF ORIGINAL SELECT HAIR SLIDES AND NOTES

PHOTOCOPIES OF HAIRSLIDES

PHOTO LOG

Case #	Item/Item	Descrip.	Exp. #	Film ASA	Camera ISO	Microscope Cond.	Operator	Date
93-13467	CC01 / std	burned paper	1	100	80	bright field	LS/CB	12/30/93
"	"	"	2	"	"	"	"	"
93-15806	E3QF / E5KF	fibers	1	100	80	"	LS	1/5/94
"	E2QF / E5KF	"	1	"	"	"	LS	1/6/94
"	E2QF / E5KF	"	1	"	"	"	"	"
"	E2QF / E6KF	"	1	"	"	"	LS	"
"	E2QF / E6KF	"	1	"	"	"	CB/LS	"
"	E2QF / E5KF	"	1	"	"	"	LS	1/10/94
"	"	"	1	"	"	"	"	"
93-15582	vict. QF / E6 KF	black cotton	3	100	80	bright field	LS	1/12/94
93-15582	vict. QF / E7 KF	black polyester	4	"	"	"	"	"
93-15582	vict. QF / E7 KF	black cotton/polyester	5	"	"	"	"	"
93-05716	5718 FP6 QH / 5716 E12a KHH	Hairs	6	"	"	"	LS	1/14/94
93-05716	5718 FP6 QH / 5716 FP7 KHH	Hairs	7	"	"	"	"	"
93-05716	5716 FP4 KHH / 5718 FP6 QH	Hairs	8	"	"	"	"	1/15/94

PHOTO LOG

Case #	Item/Item	Descrip.	Exp. #	Film ASA	Camera ISO	Microscope Cond.	Operator	Date
93-05716	FP5 QH 57M / E156 KHH	Hairs	9	100	80	bright field 250X	LS	1/15/94
93-05716	FP5 QH 57M / E35a KHH	Hairs	10	"	"	"	"	"
93-05716	FP5 QH 57M / E70 KHH	Hairs	11	"	"	"	"	"
93-05716	E1 QF / MM1a KF	fibers red cotton	12	"	"	160X bright field	"	1/16/94

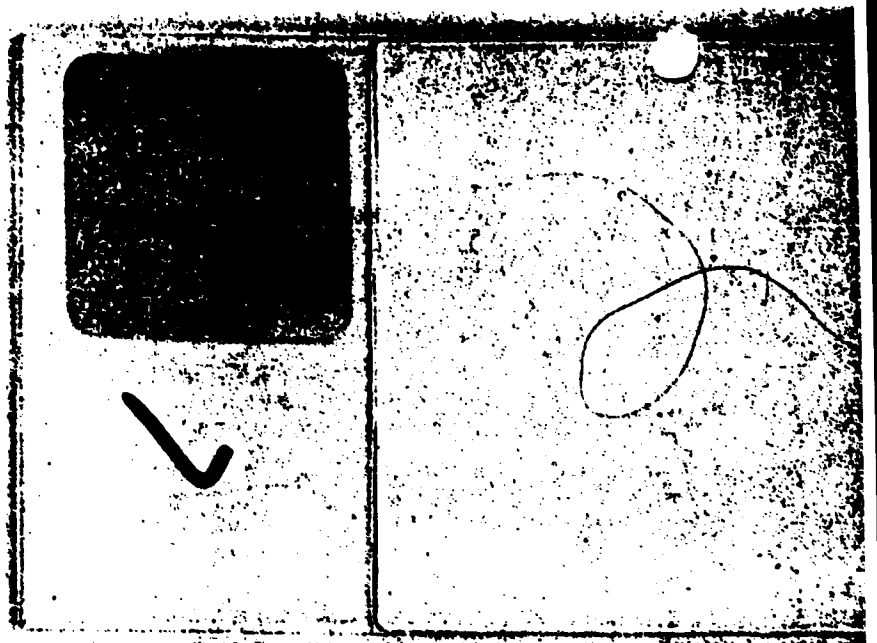
5/26/93

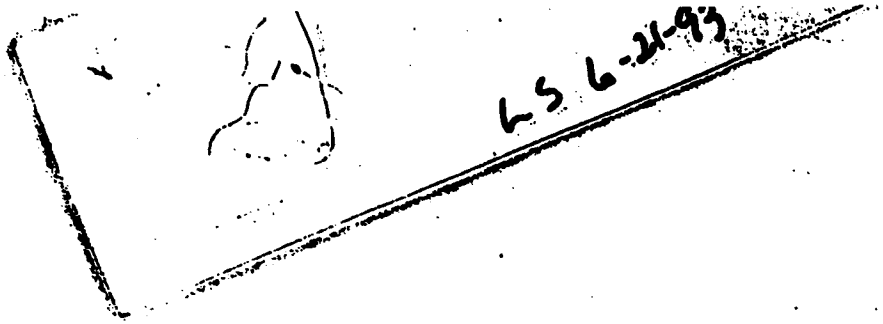
Animal hair

≈ 3 in.

dark and light bandings

root resembles dog?

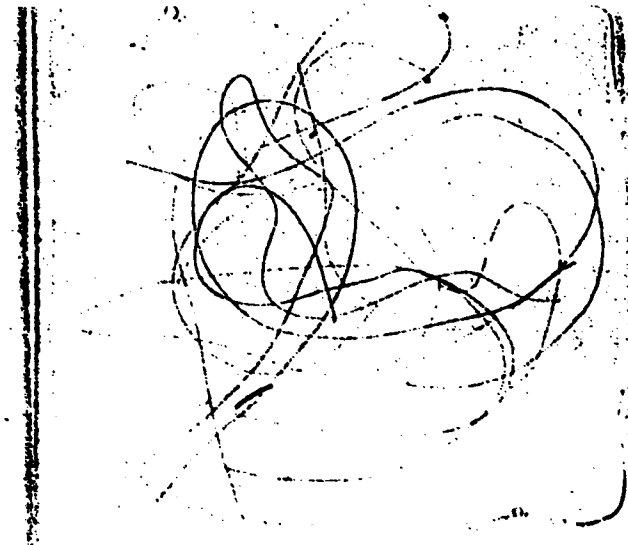




LS 6-21-93

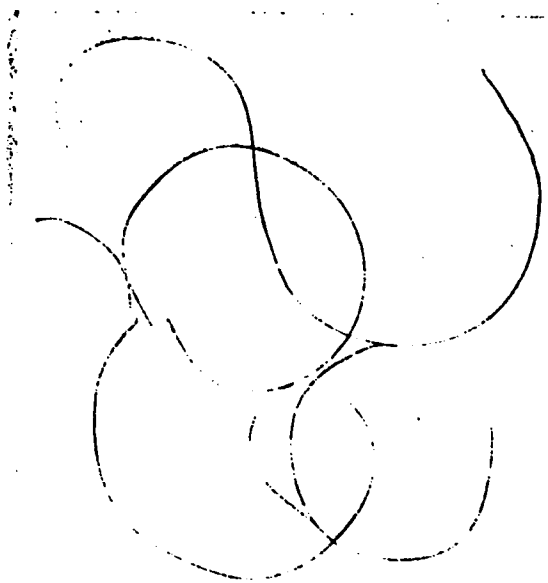
93-05716
E7
QH
LS 6-16-93

Cat. hair



93-05
E10 QH
LS 6-28
Ark. State Crime

V



93-05716
E70 KH1+
Echols
LS 6/8/93
Ark. State Crime Lab

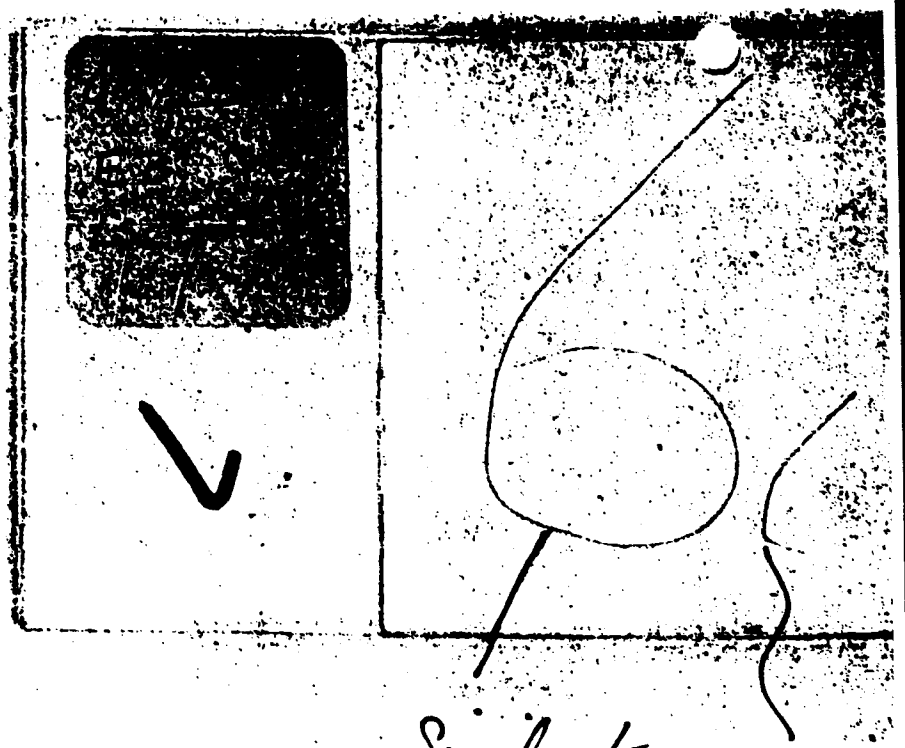
colorless fine hair

caucasian unassociated hair frag. poss. pubic or axilla

microscopically similar to Body hair (Bellham)
E143e

93-05716
E134 Q
LS 6-14-
Ark. State Crime

5/26/93



Similar to KHH of moore

assumed hair

burned tip

telogen root

similar to cat hair ro

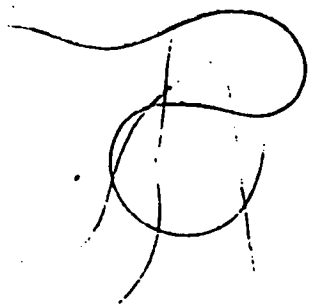
LS2
QH

6-21-93 LS

93-05716
E139
QH
LS 6/25/93
animal
Hair

93-05716
E7
QH
LS 6-16-93

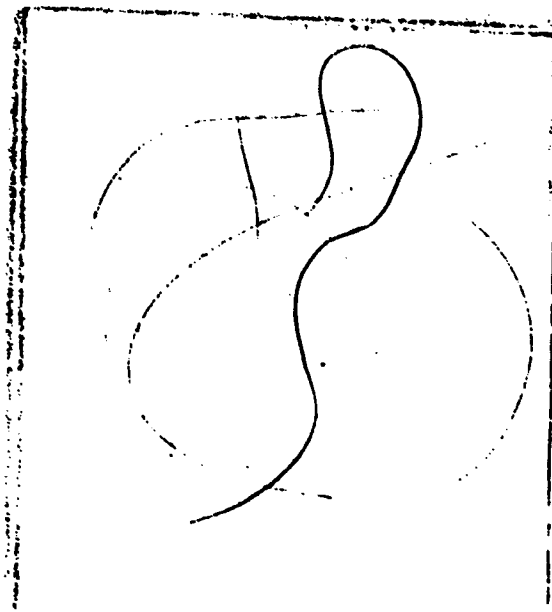
93-05716
E136
QH
LS 6-23-93



93-05716
E125 QH

LS 6-14-93
Ark. State Crime Lab

✓



93-05716
E125 QH

LS 6-14-93
Ark. State Crime Lab

✓