

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.

**JASON BALDWIN'S MEMORANDUM IN SUPPORT OF PREVIOUSLY MADE
STATUTORY MOTION FOR RELEASE OF FIBER EVIDENCE
AND ANIMAL HAIRS**

DEPT: THE HON. DAVID
BURNETT, CIRCUIT JUDGE

1. **INTRODUCTION**

This pleading addresses items of evidence that the Baldwin defense seeks permission to test prior to filing amended post-conviction petitions, including fibers and animal hairs.

2. **PROCEDURAL HISTORY AND BACKGROUND**

On March 9, 2001 Petitioner Baldwin filed a “Motion to Preserve Evidence and for Access to Evidence for Testing.” Thereafter, on November 20, 2002, Petitioner filed a “Petition for Writ of Habeas Corpus and Supplement to Motion to Preserve Evidence and for Access to Evidence for Testing Filed by Petitioner”.

The just-described November, 2002 petition followed Petitioner’s conviction in 1994 on three counts of capital murder in violation of Arkansas Code Annotated (hereafter A.C.A.) Section 5-10-101. Petitioner’s convictions were affirmed on direct appeal in *Echols and Baldwin v. State*, 326 Ark. 917; 936 S.W.2d 509 (1996) *cert denied* 520 U.S. 1244 (1997). Petitioner filed his November 20, 2004 Petition for Writ seeking to avail himself of A.C.A. Section 16-112-201-203, the codification of Act 1780 of 2001. As noted by the State Supreme Court of Arkansas in *Johnson v. State*, 356 Ark.534; 157 S.W.3d 151 (2004) *cert denied* 543 U.S. 932 (2004), orders for retesting of evidence can be sought under A.C.A. 16-112-201 through 207 and Rule 37 when there is a basis for issuing such orders. *Id.* at 543-547.

In response to Petitioner's March, 2001 motion for preservation of evidence and the November 20, 2002 petition, and in anticipation of the filing of a statutory petition for habeas corpus under A.C.A. 16-112-201 *et seq.*, on December 18, 2002, the Court issued an Order for Preservation of Evidence specific to Petitioner Baldwin's case. Subsequently, on June 2, 2004, this Court entered an order for DNA testing. That order was amended on February 23, 2005 with the issuance of the 'First Amended Order for DNA Testing'. That First Amended Order provided that a list of 35 numbered items should be transmitted to a laboratory, Bode Technology, Inc., in Virginia for testing pursuant to the times and conditions of the just-described Amended Order.

Since the issuance of the 2004 DNA testing orders, there have been subsequent agreements between the parties for additional testing of items already released to Bode Technology and in the care and custody of that laboratory.

Prior to reading an agreement on the 2004 DNA testing order, the parties agreed to disagree on several aspects of Petitioner Baldwin's Petition for Writ of Habeas Corpus. Petitioner had alleged in that initial petition that "SEM and other current technologies should be applied to all hairs, fibers, and other trace evidence transmitted to the Alabama Department of Forensic Services... [and described in forensic scientist John Kilbourn's letter and inventory dated January 5, 1994]." [November 20, 2002 petition at pp.16-19.] In addition, Petitioner had sought access to test "[a]ll known and unknown

hair, clothing, and fiber evidence processed by the Arkansas State Crime Laboratory, and transmitted to the Alabama Department of Forensic Sciences...[as described in Mr. Kilbourn's letter dated January 5, 1994].” Included in the items sought to be tested, and specifically described at page 19 of the November 20, 2002 petition were: black polyester fibers; blue polyester fibers; green polyester fibers; red rayon fibers and cotton fibers, and the shirt and bathrobe from which they were said to have possibly originated.

Criminalist Lisa Sakevicius, the Arkansas State Crime Laboratory (now deceased) testified at Petitioner's trial about finding a green polyester fiber on a Cub Scout cap; the comparison between green fiber found on the cap and a cotton polyester blend shirt that may have come in contact with some of Damien Echol's clothing (Reporter's Transcript of trial, RT at 1468-1470). Ms. Sakevicius also testified about the possible transfer of fiber from a red robe found in the Baldwin home to a pair of pants pertinent to the case (RT at 1470-1471).

Among the narrow group of evidence items that the State objected to releasing during discussions of post-conviction evidence testing were the fiber evidence and the clothing (for fiber comparison).

The defense submits that both fiber and animal hair evidence should be released, and tested.

Animal hair

The Baldwin defense believes that it is possible that the State may not object to further examination of animal hair taken from the crime scene and incorporated into hair slides prepared by the Arkansas Crime Lab. However, since this specific topic was not discussed during recent exchanges between counsel, in an abundance of caution, it is brought up at this juncture since the Court is setting a briefing and hearing schedule. As has been made clear during the course of discussions of this case in the past two years, the Petitioners have been reviewing the possibility that the scientific evidence pertinent to cause of death and mechanism of injury given by State Medical Examiner Frank Peretti, M.D., was scientifically inaccurate and undermined, as well, by post-conviction DNA testing done to date.

Petitioner expects to file an Amended Petition for Writ of Habeas Corpus in which he alleges that at least five qualified forensic pathologists, who have been employed by various government entities in the United States, as well as several qualified forensic odontologists, one of whom is the Chief Odontologist for the State of Tennessee, and another a renowned odontologist with the Miami Dade Medical Examiner's Office, have reviewed the post-mortem examination reports in this case; studied autopsy photographs; reviewed autopsy findings; studied the area of the crime scene, and have concluded that the principal scientific evidence theory under which the

State prosecuted this case is not supported by the medical and forensic pathology evidence. They provide a basis to dispute the account given by Jessie Misskelley to Detective Gitchell (according to evidence at the Misskelley trial) and other law enforcement officers. Generally the Misskelley statement was that the three victims in this case were killed by Petitioner and his co-defendant Damien Echols after having been assaulted sexually, stabbed and beaten, and after one of them had been cut on his penis. These experts in forensic sciences also undermine the State's theory that these killings were part of some satanic ritual (the theory specifically presented by the State in the Echols and Baldwin trial). Petitioner also expects to tender persuasive evidence concerning other aspects of the evidence against him.

DNA testing now establishes that there is no evidence that Petitioners were involved in any sexual activity with any of the victims. Significantly, the defense's experts on forensic pathology, and medical issues, are unanimously of the view that injuries described at trial as having been made by one or more knives are not knife wounds, but rather artifacts of animal predation, mostly post-mortem.

In reviewing the evidence in this case, Bode Technology informed the parties that on the various hair slides prepared by the Arkansas State Crime Laboratory in this case, and elsewhere in the evidence submitted to it, there were a number of animal hairs. This scientific opinion was arrived at after the defense (with the agreement of the State)

approved a microscopic examination of hair evidence to differentiate between human and animal hairs, in part because the Bode Technology, Inc. laboratories did not, when it first started testing the samples in this case, conduct DNA testing of animal tissue or animal hair as part of its normal forensic work.

Certain of the injuries observed on the victims were consistent with non-human bite marks; the extrusion of tissue from the area of lips, eyelids, and wounds on faces consistent with animal feeding behavior. Also, pathologists working with the defense have identified a series of wounds that Dr. Peretti had opined were knife wounds as wounds actually caused by animal claws.

The defense submits that under the facts as they have been developed in this case, and given the State's theory at trial, as well as given Petitioner Baldwin's claim of innocence, and satisfaction of the requirements under A.C.A. 16-112-201 *et seq.*, the various animal hairs impounded, and kept in laboratory settings, should be released for further microscopic and DNA examination.

Fiber evidence

The main disagreement between the parties on fiber evidence is the State's contention that there are no new technologies to apply to the fibers; that the fiber evidence was correctly tested by the Arkansas Crime Laboratory, as well as by a forensic scientist in Alabama, and that the reports pertinent to this testing were made known to the

defense at the time of the trial of this case. The Baldwin defense, at trial, had itself called an alleged expert on fibers.

During post-conviction case review, Petitioner Baldwin has had the fiber evidence at issue reviewed by Max Houck, former Physical Scientist in the Trace Evidence Unit of the Federal Bureau of Investigation, who now runs the Forensic Science Initiative (see attached resume). Mr. Houck's 2004 letter about the case and CV are appended here as Exhibits A and B. The State was served with the Houck letter in 2004.

Mr. Houck reports that one of the difficulties here (which will likely be a basis of one of the ineffectiveness claims in the upcoming amended Baldwin Rule 37 petition) is that the documentation produced by the State to evidence what work was actually done on the fibers does not substantiate the opinions on fiber evidence stated at trial, in part because the documentation was incomplete and insufficient as a matter of accepted laboratory practice to serve as the foundation for an expert's opinion. Mr. Houck notes as well that Ms. Sakevicius (see Houck letter at p.2) used other than an accepted practice in conducting her analysis of the colors of the textiles involved. Since it was a combination of color and weave patterns that provided the foundation for Ms. Sakevicius' testimony that the crime scene fibers were consistent with fibers found in the Echols and Baldwin households, this error in the analysis is significant.

The State has been in possession of the Houck letter since 2004, and while prosecutor Brent Davis was kind enough to verbally relay some verbal disagreements of Arkansas State Crime Laboratory criminalists who were involved in the investigation of this case (Kermit and Lisa Chanell), it is not clear that the Chanells would qualify as proficient technical reviewers of expert evidence on fiber analysis conducted by their own laboratory. Further, and more significantly, it is not clear that there is any scientifically valid basis on which to rebut Mr. Houck's statements.

Since the trial of this case systematized protocols for fiber analysis have been developed as have new analysis techniques pertinent to fibers - further, existing techniques cannot be said to have been reliably applied in this case, such as to have produced scientifically accepted, valid and reliable results.

As noted above, the concern expressed by Mr. Houck in his review of the pertinent evidence, based in part on his tenure with the FBI's Trace Analysis Section, is that the Arkansas State Crime Laboratory's fiber-related documentation in this case does not provide a sufficient basis upon which to conclude that at the time of the analysis of the fibers in this case, or at the time of trial, a qualified analyst used accepted methods and protocols to obtain valid and reliable scientific evidence, and thus testified on the basis of a reliable and valid scientific foundation on the issue of fibers. This set of observations, however, does not seem to be the basis for the State's objections to the defense's petition/motion/requests for the release of fiber evidence for analysis. Rather,

the objection offered by the State has been that the techniques for analysis of fibers have not changed since the time of trial.

A number of publications explain the state of the science of fiber analysis at or near the time of the trial of this case. See, for example, Laing D.K. *et al.*, *A Fibre Data Collection for Forensic Scientists - Collection and Examination Methods*, 32 *Journal of Forensic Science* 364 (1967).¹ Since the time of this trial, the Scientific Working Group for Material Analysis (SWGMAF), Fiber Subgroup, one of the several scientific working groups assembled by the United States Department of Justice for the purpose of setting forth accepted forensic science methodologies, laboratory practices, and the like, has published several pertinent works. Included in the published materials is the May, 1994 ‘Forensic Fiber Examiner Training Program’ publication that sets out the various training proficiencies that the SWGMAF Fiber Subgroup outlined for fiber analysts. In doing so, the Fiber Subgroup has usefully divided up the various bodies of knowledge involved in fiber analysis, including the methodologies used to classify fibers, and fiber dyes (see Exhibit C, appended).

Notwithstanding the Arkansas State Crime Laboratory’s reported assumption that forensic fiber analysis has not changed since 1994, it is clear that certain areas of fiber analysis have indeed evolved. One of the world renowned experts on fiber evidence,

¹Several publications use the “English” spelling of the word fiber.

Scotland Yard's Ken Wiggins (whose work is relied upon by the Fiber Subgroup, described above, in the United States) was the Chairman of the European Fibres Group for several years. Wiggins has written a number of influential publications including *Forensic Textile Fiber Examination Across the USA and Europe*, 46 *Journal of Forensic Sciences* 1303 (November, 2001). The just described article was described by another expert as follows:

... the outcome of a comparative survey relating to textile fibre examination and analysis in North America and across Europe. The paper gave an insight into the experience of fibre examiners, equipment availability and usage and the range of analysis carried out in over 130 laboratories. It has helped to educate the smaller laboratories about these and many other aspects of fibres work. Finally, it will enable managers to judge whether their particular laboratory is performing adequately in the field of textile fibre examination or could be improved. This project was jointly organized by Terri Santamaria of the Georgia Bureau of Investigation, Georgia, USA, and Ken Wiggins of the FSS, Metropolitan Laboratory, London, UK, on behalf of SWGMAT, and the EFG respectively. This information could not have been obtained without the co-operation of many American and European laboratories.²

Since many areas of the forensic sciences in the United States measure their standards either against, or in cooperation with, the Forensic Science Services of the Metropolitan Police in the United Kingdom, Wiggins' work has been deemed

²Dr. Stefan Becker "*Current Issues and Trends in the Crime Laboratory - Developments in the Last Ten Years - New Challenges for the Trace Examiner*". <http://projects.nfstc.org/trace/docs>.

authoritative in the United States. It is referenced repeatedly in materials published by the U.S. Department of Justice. Wiggins has made the point that prior to 2001, forensic laboratory practices in fiber analysis were highly variable.

A number of leading fiber examiners, including Wiggins, are represented in Robertson and Grieve, eds., *Forensic Examination of Fibres* (2d ed., 1999). As explained in that generally accepted source, while it is true that the microscopic and other techniques used by the Arkansas State Crime Laboratory in this case are accepted by fiber examiners (if correctly applied), so are several other techniques specific to the analysis of fibers, including color measurement techniques, and techniques of interpretation of fiber evidence that were either not available at the time of this case, or were not applied in Arkansas or Alabama by the crime laboratories that were involved in the fiber analysis in this case.

The defense is aware that the protocol in use in Arkansas at the time of this case included: visual inspection; visual inspection using optical microscopic techniques; analysis using spectroscopic methods. Also in use at the time at the FBI and in other well equipped laboratories were methods of extracting dye from the fiber, followed by analysis using high resolution separation techniques. These are the techniques that have advanced since 1994. Recently, a group of scientists has developed a capillary electrophoresis/mass spectrometry technique for the use of separation and identification

of extracted dye that allows for enhanced discrimination of trace fiber evidence. See, generally, Stefan *et al.*, *Capillary Electrophoresis/Mass Spectrometry for the Forensic Analysis of Dyes Extracted from Fibers*, February, 2006, Proceedings of the American Academy of Forensic Sciences. Other refined techniques allowing the identification of dyes in case threads from the six major textile dye classes have also been developed since 1994.

The application of new technologies, and technologies not applied at the time of this case, is of considerable importance to the analysis of this case, given that the State presented fiber evidence that occupied a significant amount of trial time (since it involved presentations during the State's case in chief, defense case in chief, and in the State's rebuttal case). While the net effect of the fiber evidence may have been to corroborate other evidence, since the case against Petitioner was largely circumstantial, the State's testimony was significant in that it purported to demonstrate a scientific basis for identifying Petitioner as having been at the scene. Though Ms. Sakevicius did not purport to definitively identify the unknown fibers to the known garments, she did state that they were similar in appearance and color in such a way as to offer circumstantial evidence of identity.

Based on the information made available here, the Court should allow the release of these fibers for advanced testing, particularly so that the dye components can be

analyzed in highly discriminating ways to enable reliable and valid testimony to be provided.

Exhibits appended

- A Houck 2004 letter
- B Houck CV
- C SWGMAT publication excerpt

CONCLUSION

For the reasons stated here, the Baldwin defense urges the Court to order the release of both animal hair and fiber evidence for examination and analysis.

Dated: April 8, 2008

Respectfully Submitted by

PETITIONER CHARLES JASON BALDWIN

J. Blake Hendrix, Esq
John T. Philipsborn, Esq.

By: _____
JOHN T. PHILIPSBORN
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PROOF OF SERVICE

I, Steven Gray, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 507 Polk Street, Suite 350, San Francisco, California 94102.

On today's date, I served the within document entitled:

**JASON BALDWIN'S MEMORANDUM IN SUPPORT OF PREVIOUSLY
MADE STATUTORY MOTION FOR RELEASE OF FIBER EVIDENCE
AND ANIMAL HAIRS**

- (x) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as set forth below;
- (x) By electronically transmitting a true copy thereof;
- () By serving a true copy by facsimile to the person and/or office of the person at the address set forth below

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 8th day of April, 2008, at San Francisco, California.

Signed: _____
Steven Gray