

IN THE ARKANSAS SUPREME COURT

CHARLES JASON BALDWIN

PETITIONER

vs.

No. _____
Craighead County Circuit Court No.CR-93-450B

STATE OF ARKANSAS

RESPONDENT

PETITION TO PROCEED IN THE TRIAL COURT

WITH A WRIT OF ERROR CORAM NOBIS

The Petitioner, Charles Jason Baldwin (hereafter “Baldwin”), through his attorneys, John T. Philipsborn and J. Blake Hendrix, petitions this Court for permission to proceed in the trial court with a Petition for Writ of Error *Coram Nobis* to allow the trial court to consider whether material evidence was withheld.

I. Procedural History

Baldwin was convicted of the capital murders of three eight-year old boys. The convictions were upheld in *Echols and Baldwin v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996) *cert. denied* 520 U.S. 1244 (1997). Baldwin filed a timely *pro se* petition under A.R.Cr.P. 37, and, after the undersigned were retained, moved the trial court for an Order for Preservation of Evidence and a Petition for Writ of Habeas Corpus and Supplement to Motion to Preserve Evidence and for Access to Evidence for Testing. This motion was granted in part in an Order for DNA Testing on June 2, 2004, and in a First Amended Order for DNA Testing on February

23, 2005.¹ As ordered by the trial court, Baldwin is filing by May 30, 2008, an amended Rule 37 petition and a petition under A.C.A. section 16-112-201, *et seq.* The trial court has scheduled hearings on Baldwin's Rule 37 petition and petition under A.C.A. section 16-112-201 to begin September 8, 2008.

Baldwin moves this Court to reinvest the trial court with jurisdiction so that it may consider his claim for error *coram nobis* relief. He alleges material evidence was withheld, a proper ground for *coram nobis* relief.

II. *Coram Nobis* Relief and Post-conviction Exculpatory Disclosure

A circuit court can only entertain a petition for a writ of error *coram nobis* if granted permission by this Court. *State v. Wilmoth*, 369 Ark. 346, ___ S.W.3d ___ (2007); *Larrimore v. State (Larrimore III)*, 327 Ark. 271, 279, 938 S.W.2d 818 (1997). *Coram nobis* proceedings are attended by a strong presumption that the judgment of conviction is valid. *Thomas v. State*, 367 Ark. 478, 241 S.W.3d 247 (2006). A writ of error *coram nobis* is an extraordinarily rare remedy, more known for its denial than its approval. *Id.* For the writ to issue following the affirmance of a conviction, the petitioner must show a fundamental error of fact extrinsic to the record. *Id.* The function of the writ is to secure relief from a judgment rendered while there existed some fact which would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment. *Id.*

¹ Baldwin's co-defendant, Damien Echols, has periodically reported the progress of the DNA testing to this Court.

A writ of error coram nobis is available to address certain errors of the most fundamental nature found in one of four categories: 1) insanity at the time of trial, 2) a coerced guilty plea, 3) *material evidence withheld by the prosecutor*, or 4) a third-party confession to the crime during the time between conviction and appeal. *Larrimore v. State (Larrimore IV)*, 341 Ark. 397, 17 S.W.3d 87 (2000). An error *coram nobis* proceeding “is appropriate when an issue was not addressed or could not have been addressed at trial because it was somehow hidden or unknown.” *Larrimore III*, *supra* at 278. As stated in *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984):

In simple terms, this writ is a legal procedure to fill a gap in the legal system – to provide relief that was not available at trial because a fact exists which was not known at that time and relief is not available on appeal because it is not in the record.

Ibid at 574.

The prosecution has a constitutional duty, on request, to disclose all evidence which is favorable to a defendant which is material to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963) In conjunction with *Imbler v. Pachtman*, 424 U.S. 409, 427, fn.25 (1976), *Brady* makes clear that even “[a]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.” This Court has established that Rule 37 does not provide for discovery of evidence. *Cook v. State*, 361 Ark. 91, 105-106, 204 S.W. 3d 532 (2005), relying on *Weaver v. State*, 339 Ark. 97, 103, 3 S.W. 3d 323, 328 (1999). *Weaver* specifically limits post-conviction discovery to matters that could not have been addressed at trial or raised on appeal. The question of whether the State has an independent duty under *Brady* to provide discovery relevant to post-conviction litigation was not addressed in *Weaver*. However, information in the

hands of the State bearing on the reliability of the evidence on the one hand, and/or available for review by the State during the course of post-conviction litigation, on the other, is subject to disclosure where the evidence is favorable to the accused, because it is exculpatory or impeaching. *Cook v. State, supra*, 361 Ark. at 105-106 relying in part on *Strickler v. Greene*, 527 U.S. 260, 280 (1999).

III. Factual Background

A. The case through direct appeal

The evidence introduced at trial, viewed in the light most favorable to the verdict, is discussed in this court's opinions in *Echols and Baldwin v. State, supra*, and *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996). A review of the investigative files reveals that in the aftermath of the recovery of the remains of the victims, West Memphis police officers conducted an intensive investigation, assisted at times by other police agencies, the Arkansas Crime Laboratory, and other agencies. At various points during the investigation, and prosecution, of this matter, investigating law enforcement officers were also in contact with the Federal Bureau of Investigation and other police agencies around the country. More than 200 persons were interviewed during the initial stages of the investigation, and evidence was gathered from a number of persons in the area around West Memphis, Arkansas. Suspicions became focused on Echols and Baldwin, through the efforts of Craighead County probation authorities working with some West Memphis Police investigators. The suspicions were founded on the theory that the crime was committed during a satanic ritual, and that Echols and Baldwin appeared to associate with one another and to have such interests. During what was described as routine questioning

of a local man, Jessie Misskelley, who was thought to have associated with Echols and Baldwin at various times, West Memphis Police officers obtained a series of admissions, and then a confession that Misskelley was involved in the crime. He identified Echols and Baldwin as co-participants, though he named them as the actual killers. In the Misskelley scenario, Echols and Baldwin sexually assaulted and then stabbed the victims and beat them. The victims were then tied up with rope.

While Misskelley's statement was inadmissible at Echols and Baldwin's trial, the State tried its case against Echols and Baldwin on a theory consistent with the Misskelley statement. That theory was that Echols and Baldwin were involved in the crime out of an interest in satanism, and that each of them made damaging admissions in the aftermath of the killings - Echols in statements to police, in his writings, and at a ball game in West Memphis, and Baldwin while incarcerated awaiting trial. Through the testimony of the State's Assistant Medical Examiner, Dr. Frank Peretti, and through the testimony of a DNA expert who had used then-available DNA technology to identify some blood evidence, the State introduced evidence to demonstrate there were indications of a sexual assault, and intimating that some other biological material was found on cuttings of victims' clothing.

Though there was no eyewitness testimony linking either Baldwin or Echols to the crime in their trial, the State linked Echols to the crime in part on the basis of a knife recovered from a lake in the Lakeshore Trailer Park in which Baldwin and some of Echols' relatives lived. The knife, a large 'survival' knife, was found by a police diver, and was said to be of a type possessed by Echols.

This was the factual background as the case was affirmed on appeal.

B. Developments since the convictions

There have been a number of developments since this Court upheld Baldwin's convictions. Briefly stated, during post-conviction investigation of this matter, it has been established that applying current DNA testing techniques to numerous items of evidence retrieved from the crime scene - including the victims' clothing, ligatures, rape kit swabs, and numerous hairs - there is no DNA evidence corroborating the State's theory that Baldwin, Echols, or Misskelley had bodily or sexual contact with the victims, or even that they were at the crime scene. While there is some foreign DNA on two of the victims, and in one of the ligatures that bound one of the victims, the DNA belongs to persons other than Baldwin and his former co-defendants.

Baldwin has also learned that several critical pieces of information appear to have been known to the State at the time of the prosecution of this case, but not transmitted to the defense in a timely way, or made known to the trier of fact. Baldwin has sought disclosure of information about these omitted disclosures during post-conviction discussions and attempts at obtaining discovery through informal and negotiated means. While the State has cooperated in the scientific testing process, and has tendered some post-conviction interview material, elsewhere Baldwin has been unable to obtain necessary information.

1. Animal predation evidence

The State, consistent with Misskelley's statement, prosecuted Baldwin on the basis that: one of the victims was emasculated through use of a knife; various knife wounds were inflicted

on the victims; the victims were probably beaten with sticks; they were also marked with certain pattern injuries consistent with tool marks on the blade of the survival knife introduced at trial. During Baldwin's post-conviction investigation, several forensic pathologists and odontologists reviewed the case. In May 2007, several of these scientists met with the prosecutor and the Medical Examiner to review this case, and their reports have been tendered to the State. The consulting forensic pathologists and odontologists have all opined that many of the injuries to the victims that the State's pathologist, Dr. Frank Peretti, testified were knife injuries (including the area of emasculation of one of the boys) were, in fact, the injuries caused by animals feeding on the remains. Animal hair has been identified on at least one of the evidence slides taken from the scene, and the DNA laboratory used in this case by agreement has also detected animal hair on some crime slides.

Baldwin has learned there was a consultation between West Memphis Police officers and San Diego Police personnel on the subject of animal predation during the investigation of the crimes, but Baldwin has not been provided with any reports or other evidence that animal predation was considered an area of concern to the State. It would be highly significant exculpatory evidence if the police and/or prosecution had considered animal predation as a cause of injury, or had investigated the issue prior to trial or during the post-conviction litigation, and had not revealed such information. Baldwin has been informed that a police officer from the San Diego Police Department claims he was contacted by West Memphis Police officers before trial, which led to a discussion of animal predation as being of concern to investigators in this case. If such information, or information like it, is in the hands of the State, that information should be made known now.

During the previously described May 2007, meeting at the Arkansas State Crime Laboratory that included several members of the laboratory staff, two defense pathologists and two defense odontologists, as well as Dr. Frank Peretti, the State's pathologist (and counsel for the parties), Dr. Peretti's trial testimony about the mechanisms of injury to the victims, and the causes of death, was the subject of a frank discussion among the experts. Dr. Peretti indicated that he was reviewing Crime Lab data to identify autopsies the lab performed on bodies found in water (and that may have been subject to animal predation) over the past 10 years.

Since that meeting, the Baldwin has made several written requests for information pertaining to the subject of animal predation and to Dr. Peretti's search for information about human remains that had been the subject of autopsies at the Arkansas Crime Laboratory after having been found in water. Baldwin has not been provided with further follow-up information about the subject matter, and Baldwin respectfully submits that if reinvested with the jurisdiction to deal with the subject the trial court could, and should, enter appropriate disclosure and discovery orders so that information about animal predation either considered by the State at the time of trial, or considered by the State since then, can be addressed as part of the post-conviction hearings in this matter, including information inquired into by the State about the animals that populated the area of the crime scene at relevant times.

If the State has evidence that bears on the reliability and validity (and thus the credibility and accuracy) of the scientific evidence and expertise that it presented at trial, that evidence should be ordered divulged if it is *Brady* evidence.

2. Survival knife

One of the pieces of evidence identifying Echols and Baldwin as participants in the crime was a survival knife found in a man-made lake at the Lakeshore Trailer Park in Marion where Baldwin lived with his mother and brothers. A law enforcement dive team found the knife several months after the murders. One of the critical issues in connection with the State's presentation of the knife to the jury was *when* the knife presented to the jury as the likely murder weapon was tossed into the lake. Although no witness was presented to the jury to provide that information, the State argued this knife matched some of the wound patterns on the victims' remains, making the issue of timing logically explicit: the knife must have been tossed into the lake after the killings.

However, post-conviction investigation has revealed that at least two witnesses told the police that they were aware that a large knife was thrown into the lake *before* the murders. Also, one of the members of the law enforcement dive team has indicated the officers were given precise directions on where to find the knife.

If law enforcement officers and/or members of the prosecution team were aware of the knife was tossed into the lake many weeks prior to the killings, any failure to turn over that information would clearly be a *Brady* violation. Any failure to turn over any post-conviction evidence to that effect would also amount to a *Brady* violation.

3. Michael Carson

Michael Carson, who was housed with Baldwin in the Juvenile Detention Center in Jonesboro prior to trial for a total of seven days, testified Baldwin admitted to him his

participation in the crime. Carson claimed Baldwin told him: "He dismembered them. He sucked the blood from the penis and scrotum and put the balls in his mouth." (RT at 1116.) This evidence was critical to the State's theory, but Carson's credibility could not be adequately tested at the time of trial since cross examination was limited due in part to Carson's status as a prior client of co-defendant Echols's lawyer, and to his status as a juvenile.

The defense was aware Carson had a troubled past: he had a prior juvenile history, he had been in counseling, and was generally viewed by his counselor as unreliable. That counselor had also told the prosecutors and defense counsel that he believed that he might have influenced Carson's account by inadvertently revealing information about the killings, though the counselor was not called as a witness at trial.

Petitioner has learned during his post-conviction investigation that Carson, who left Arkansas after the trial and continued operating as an informant in California between his controlled substances arrests often sought assistance and counsel from Arkansas authorities even while located out of state. Further, none of the detainees who were housed with Carson and Baldwin during their seven days together in the Juvenile Detention Unit and none of the Unit staff who were supervising the boys' Unit at the time corroborate Carson's version of events. None of these witnesses (detainees or Unit staff) was called at trial. While records (and Unit staff) clearly indicate Baldwin and Carson were housed in the Unit for approximately seven days, on only one occasion do Unit logs document their being together for any length of time. That one documented meeting happened under the supervision of a staff member who has been interviewed and has tendered the defense an affidavit in the last month. The defense has also

now located and interviewed all available staff or detainees who were in the facility with Baldwin and Carson (a total of approximately 10 persons), none of whom ever heard Baldwin make any statements of the type attributed to him by Carson.

One staff member, the former Unit supervisor (who was there in 1993-4, the relevant period of time) has reported that she was actually told by law enforcement personnel to leave town at or near the time that she might have been called as a witness for the defense. None of the Juvenile Unit personnel or any detainees (other than the informant Carson) were called in Baldwin's trial, and the issue of Carson's credibility, constrained by the evidence then known, was the subject of limited cross-examination.

The question of what the prosecution knew about Carson's credibility, and witnesses available to impeach him, is not resolved by the record at trial, because there are no reports of State interviews of persons who were around both Baldwin and Carson in the Juvenile Detention Unit, co-detainees or staff. Carson is the only one whose interview was made available at trial.

Evidence bearing on Carson's credibility, and on the State's conduct in relation to his credibility, is *Brady* material, since without Carson's testimony, the State was without any means of claiming there was a personal admission linking Baldwin to the crimes.

4. The Pants Cuttings

During the course of the processing of evidence in this case, a criminalist from the Arkansas State Crime Laboratory, Kermit Channell, examined the victims' clothing, and cut the clothing in certain areas to permit further testing and processing of it for possible biological

material. The cuttings at issue were processed initially by Mr. Channell, and then were sent to a now defunct DNA Laboratory directed by Michael Deguglielmo, a DNA scientist who no longer is involved in providing forensic DNA expertise, in part because of the questions that arose (in cases other than this one) about the reliability of his work.

In Petitioner's case, Deguglielmo testified that his lab had looked at some cuttings from victims' jeans, items Q6 (Exhibit 48) and Q10 (Exhibit 45). (RT at pp.1386-1387) Deguglielmo further testified that his laboratory recovered a small amount of human DNA from the two items, and separated the material into sperm and non-sperm components. They tried to amplify the DNA, but could not find any. He testified, before the jury, that it is "...most likely that the DNA we were detecting did come from sperm cells." (RT at 1390)

This testimony was consistent with, though less extensive than that offered in the previous trial of the issues, *State v. Misskelley*, involving Petitioner's c-defendant Jessie Misskelley. There, on direct examination, Mr. Deguglielmo indicated that his laboratory had not done any microscopic examination of the material which is the basis for confirming the presence of sperm or sperm fractions.

In Petitioner's case, the State used Deguglielmo's testimony to argue that Petitioner's lawyer was wrong in suggesting there was no evidence that the victims were sexually abuse, by noting that there was a DNA source consistent with semen found on the pants of one of the children.

At trial, defense counsel did not have in hand the actual laboratory notebooks, and criminalist's notes. Had they had the file materials, they would have seen a letter in Arkansas

State Crime Laboratory Criminalist Channell's file dated May 19, 1993 indicating that items Q6 and Q10 (see above) had been sent to Genetic Design for DNA analysis. On the version of the letter which is in the laboratory's materials (but was not transmitted to defense counsel), is handwriting next to samples Q6 and Q10 that reads: "? pos. bacterial in nature". In the formal report of Mr. Channell's results, notwithstanding certain reported or observed results on screening testing, Mr. Channell wrote that: "no semen was found on any items." Mr. Channell's file (along with other Arkansas State Crime Laboratory files) was obtained during post conviction litigation, and evidence review.

This history frames the following issue – was the jury in petitioner's case (and in co-defendant Misskelley's case) presented with testimony from a scientist that was both misleading, and which the state had reason to know was open to question in part because the source of a positive reaction for the constituent parts of seminal fluid may have been bacterial contamination on the cuttings due to their presence and dirty, bacterial-laden water? It appears likely, given the handwritten notes in criminalist Channell's file that this hypothesis was considered at the time. Petitioner's post-conviction consultations with DNA experts and qualified forensic scientists indicate that the issue is one that should have been of serious concern, as there is no clear and acceptable scientific basis available in the materials pertinent to the cuttings from the clothing to hypothesize that there was sperm, or some sperm fractions, on the cuttings. The question of bacterial contamination turns out to be a critical question, as such contamination could explain a 'false positive' on a screening test for the presence of seminal fluid. The testimony offered at Petitioner's trial on this subject was misleading in that there was no scientific basis for Deguglielmo's opinions about the evidence 'most likely' being linked to sperm cells, and was

subject to informed cross examination on the issue, had the pertinent material been acquired by, or provided to, defense counsel.

The DNA testing techniques available at the time of trial, and applied in this case, would not yield any information about what the nature of the cellular material being tested was – in other words, the technology at Deguglielmo’s laboratory employed a specific process to report DNA results using very limited systems available to that laboratory in 1993. The technology could not distinguish male from female DNA, and would not have been able to distinguish the type of cellular matter.

It can be assumed (though no specific testimony on this point was presented to petitioner’s jury) that representatives of the Arkansas State Crime Laboratory conversed with their subcontractor Michael Deguglielmo, about the nature of their presumptive testing, and their reason for having transmitted Q6 and Q10 to his laboratory. Since he did not purport to have actually looked at the biological material transmitted to him under a microscope, he would not have known, with any scientific basis, that the hypothesis was that there was seminal fluid on the cuttings. Moreover, the fact that the State presented his testimony in petitioner’s without also noting that the hypothesis of bacterial contamination had been raised at the laboratory itself is highly problematic – because, as noted, it would have explained why the laboratory’s criminalist got a possible positive reaction on a screening test, but eventually stated that he had found no sperm on the evidence that he had reviewed.

All of this raises the question of whether impeaching evidence, and specifically evidence that would have undermined the aura of scientific infallibility provided by Deguglielmo’s

testimony, could and should have been provided—and raises the question, as well, of whether the State was aware of the concerns about bacterial contamination when it presented its evidence, and made its rebuttal argument, in Petitioner’s trial. Post-conviction investigation and disclosure (in response to defense requests) has produced the crime laboratory’s notes and files. The question of whether defense counsel were advised of the subject matter covered here, or whether there are other materials in the State’s possession to shed light on these issues, should be dealt with by the trial court.

IV. Conclusion

Baldwin asks this Court to reinvest jurisdiction in the trial court to address *Brady* issues dealing with: 1) information bearing on the reliability of Dr. Peretti’s testimony about mechanism of injury and cause of death and the subject of animal predation at the time of trial and information bearing on the validity, reliability, and factual accuracy of the testimony offered on mechanism of injury and cause of death of the victims given the facts made known to the State during post-conviction testing and meetings between and among experts for the State and defense; 2) evidence bearing on the credibility, and reliability, of the evidence presented to the jury about the large knife described as the likely murder weapon, and used as such in prosecution closing arguments, and; 3) evidence bearing on the credibility, and reliability, of the evidence presented to the jury from jailhouse informant Michael Carson; 4) evidence bearing on the credibility, scientific validity, and reliability of Mr. Deguglielmo’s testimony.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I, J. Blake Hendrix, certify that a true and correct copy of the foregoing was placed in the U. S. Mail with sufficient postage affixed hereto, as to guarantee proper delivery to the following on this _____ day of May, 2008:

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