IN THE CIRCUIT COURT OF CLAY COUNTY, ARKANSAS
WESTERN DISTRICT

STATE OF ARKANSAS PLAINTIFF

VS. CR 93-47

JESSIE LLOYD MISSKELLEY, JR. DEFENDANT

**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;**

## I. INTRODUCTION

Pursuant to this Court's request, Misskelley files this brief, substantially the same as Baldwin's in most respects, to address the status of this case and to state several motions that they are asking this Court to rule on.

**Status of Rule 37 appeal and effect on scheduling**

As of the filing of this document, the Misskelley and Baldwin appeals of the Rule 37 denial by Judge Burnett are due in the Arkansas Supreme Court on February 21, 2011. Both appeals will be filed on or before that date. Should the Supreme Court reverse Judge Burnett's denial, the Court will have to retry the Rule 37

proceedings. This will impact the Court's scheduling decisions, if only for judicial economy purposes. In addition to the various substantive objections to Judge Burnett's ruling, Misskelley has argued for a full reversal on the ground that Judge Burnett should have recused rather than sitting on this case while being a declared candidate for the state Senate. Baldwin argues similarly. If, for instance, the Supreme Court agrees with Misskelley and Baldwin that Judge Burnett should not have decided the case at all, there could be no deference to any adverse factfindings made by Judge Burnett.

**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

[1] Baldwin has filed a similar pleading in Craighead County.

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. Misskelley 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.

Also, one of Misskelley's lawyers has some significant scheduling conflicts in 2011. Rosenzweig is scheduled in various courts for trials through August. (State's counsel Kent Holt is also in the August trial, *State vs. Dunn* in Johnson County.) September would be the earliest time in which Rosenzweig could be present for a lengthy proceeding.

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, Misskelley'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 Misskelley 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. Misskelley has claimed actual innocence, and to date no DNA testing result links him to the crimes of which he was convicted.

**A. The pertinent test in 2001**

Appended to Baldwin's motion is 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 and Misskelley (who originally moved for hair and fiber testing) made their motions, 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, Misskelley satisfies §202(a)(1)(B).

Misskelley 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). Misskelley 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 Misskelley 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**

Misskelley is also seeking access to the fiber evidence introduced at his trial that was used to link Baldwin and Echols to the crime scene, and thus to corroborate Misskelley's statement. 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 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

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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.

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.

Because of the State's theory that the three defendants operated together, any evidence inuring to the innocence of one of the other defendants inures to Misskelley's benefit as well.

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 Misskelley's statutory petition, the Arkansas Supreme Court ruled that the Circuit Court had applied the wrong legal standard Misskelley had initially brought a "Motion to Preserve Evidence and for Access to Evidence for Testing" in 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 *Baldwi*n 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 Misskelley'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.

## 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;

JESSIE L. MISSKELLEY Jr.

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## 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 John Philipsborn and Blake Hendrix, 300 Spring Street, Little Rock, AR 72201 for Baldwin this _____ day of February, 2011.

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JEFF ROSENZWEIG