# ABSTRACT OF RULE 37

## STATUS HEARING

August 20, 2008

*(The following hearing was a joint status hearing for Appellant Charles Jason Baldwin, Damien Echols (CR 09-60), and Jessie Misskelley, Jr. (CR 08-1481), conducted as part of the proceedings from which this appeal is taken. The parties were represented as follows: For the State of Arkansas: Brent Davis, Kent Holt and David Raupp; for Appellant Baldwin: John Philipsborn and Blake Hendrix; for Damien Echols: Dennis Riordan, Don Horgan and Deborah Sallings; and for Jessie Misskelley: Michael Burt and Jeff Rosenzweig. The pages of this record are designated as "SHR", Status Hearing Record.*

*At the time of the status hearing, habeas corpus petitions were pending for Misskelley, Echols and Baldwin, while Rule 37 petitions were pending for Misskelley and Baldwin. After the hearing, Judge Burnett denied the habeas petitions and all three appealed. In 2010 this Court reversed the denial and remanded the habeas petitions for a hearing. That matter is currently pending before Judge David Laser. The Rule 37 petitions were heard, several days at a time, over the course of the following year.*

THE COURT: This is billed as a scheduling or as a status hearing. Frankly, I'm of the opinion that I can't basically do anything without the defendants here. We can talk about the schedule, we can talk about matters of law, strictly, but as far as taking testimony, we can't do that. So I'm here to listen to your comments about the schedule (SHR 1305)

I'm more interested right now; I've read most of the pleadings. Good lord, y'all gave me a box full, so I'm not sure I've read everything, but I take it that all of the pleadings have been filed that are going to be filed?

MR. ROSENZWEIG: We filed by fax yesterday a motion adopting pleadings that can be filed by some of the co-defendants, and of course, we had to file in Clay County. The others are filed in Craighead County. In order to avoid just cluttering up that record, we did not specifically attach the pleadings that we were adopting. We can do that, but if everyone would agree that we don't necessarily have to attach them, that might be more efficient. But we are happy to specifically attach, in the Clay County file, those pleadings if anyone deems it necessary.

THE COURT: The Court needs to know exactly what you're talking about, Jeff, because your particular client is in a different posture than Echols. You're on a Rule 37 petition, non-capital (SHR 1306). I don't even think the Act 1780 would apply to your client. It's not applicable him at this time (SHR 1307).

MR. ROSENZWEIG: To make it clear, the pleadings that we were adopting [was] Baldwin's initial reply to the State's response to the Amended Rule 37 Petition and the motion to enlarge the Amended Rule 37 Petition. [...] and then Echols's reply is for a motion for a new trial in the DNA case (SHR 1307).

THE COURT: First of all, let me say this. I'm going to divide this into separate hearings: Misskelley and Baldwin will have a separate hearing and frankly, I believe I'd rather do that first (SHR 1307).

MR. RAUPP: Your Honor, the State's position on what we call the 1780

cases, the DNA testing cases, as to all three defendants, and as I understand the pleadings Jeff is talking about, Mr. Echols filed on August 13th what he called a reply, the State's position is that reply is essentially an amendment to his petition, which is a permissible pleading.

To my knowledge, the Court hasn't given him permission under the statute to file an additional pleading. The statute provides for a petition and response by the State, which were filed and concluded in May as to the Echols cases and then in July as to the Misskelley and Baldwin cases.

We resist the filing of any amendment to that under the statute. We think it's unnecessary and the case to be resolved on the pleadings. If, however, the Court indulges a permissive amendment, which certainly is discretionary, the State would request an opportunity to do a permissive amendment to its answer, to its response, which the statute provides for. So we'd have to resolve that. But initially, we would resist that filing and agree with the Court that the 1780 cases can be (SHR 1308) separated out and dealt with separately and together.

And I had forgotten if there are proposed amendments for post amendments in the Rule 37 cases that are replies, but the replies having been filed there. The State doesn't resist those, but we do resist in the 1780 and the DNA testing cases (SHR 1309).

MR. ROSENZWEIG: Your Honor, in that, uh, what I was referring to and I

think Mr. Raupp had referred to as well, uh, we filed, uh, Misskelly filed a, both a ten-page petition and an expanded petition for motion for permission to file the expanded petition. So the, uh, we need to obtain a ruling from the Court, uh, granting, uh, technically granting that, uh, expanded petition and allowing the expanded petition to be considered. We have a compliant ten-page petition we've also filed.

And so we ask that the Court, uh, grant our motion to file an expanded or enlarged Rule 37 petition.

THE COURT: What did you add to it?

MR. ROSENZWEIG: It was one that discussed all of the claims, instead of just listing them, because the strict draconian interpretation of Rule 37: a ten-page limit, exhibits count against the limit, uh, the only thing that may not count against the limit is the certificate of service.

So we had to, uh, we had to file, uh, something with intent, you know, within ten pages, which we did. And that is in compliance with the amended ten-page petition, but we also filed one that actually has the room to discuss all of the various claims. The Rule, if you strictly interpret it, says we can't file that without permission, so we filed contemporaneously a motion seeking the permission, uh, and we would ask that the Court grant that motion.

THE COURT: You have replied to it?

MR. RAUPP: We have replied and resisted that motion, uh, in the Misskelley case. That was filed initially with Misskelley's, uh, Misskelley filed a ten-page petition, and the additional room was an additional two hundred and sixty-six pages.

It was rather expansive and i think as the Court knows, the Arkansas Supreme Court has consistently upheld the ten-page limit, particularly in non-capital cases, as an appropriate limit on the availability of a pleading to explain to the Court.

So we do resist the expanded petition in Misskelley, and then in Baldwin as well. Baldwin asked for an expanded petition only in early August, uh, and what we, what our response is to the ten-page, the properly filed ten-page petitions, is in the pleadings explains that on their faces they can be denied because they are so conclusory, because they purport to raise upwards of scores of ineffective assistance claims.

But we would anticipate that the Court will permit particular discrete claims to be raised, and we would anticipate after a hearing that the post-hearing briefing by both parties will address a few discrete claims.

But we would resist the filing of the two hundred and sixty-six page petition and instead, ask that the Court simply require counsel in Misskelley and Baldwin to reduce their claims to something in the nature of those that can be adequately

stated.

And ten pages, as the rule requires it, as the Arkansas Supreme Court has consistently upheld is appropriate.

THE COURT: Jeff, what did you add that's new, is what I asked earlier?

MR. ROSENZWEIG: Judge, what we did is discussed, we discussed the ...

THE COURT: ... but you didn't any new points, any new claims?

MR. ROSENZWEIG: Well, we, I mean, we added some from the original pro se Misskelley thing that had been filed back years ago, uh, and that there are some things that had, in the course of our investigation, we developed.

Now the problem is that as, as you might tell, if we, if we are able to write two hundred and fifty pages to give the Court appropriate guidance to what some of the issues are, we're only going to reduce it to ten pages to reduce it down to a few syllables, uh, per claim.

And, and that's what we had to do. And so, you know, we can, we can write a few syllables to shoe-horn it into ten pages, but if the Court wishes a discussion, uh, the Arkansas Supreme court has been generally, generally, but not exclusively restrict, you restrictive to ten pages, bu ton any number of occasions, it hasn't been an issue because a trial has permitted the expanded petition.

And therefore, there's, uh, you know, the pendant is an appealing issue.

THE COURT: All right, I think in this case I'm going to allow you to file it

and then you can file a response to it and then we'll have, uh, make sure we've got everything that you wnat in the record in the record. All right.

MOTION FOR RECUSAL

MR. ROSENZWEIG: Okay. With some trepidation, I take up another motion that we had filed, and that was the motion for your, your recusal, Your Honor.

THE COURT: Well, that's denied.

MR. ROSENZWEIG: And, uh, uh, if I could, uh, if I could respectfully inquire of the Court whether or not, uh, uh, because part of the motion was based on Your Honor's future political plans after you leave the court.

THE COURT: Well, that's something that's two years away. I don't retire until December and, and anything I might choose to do later is probably up in the air. I don't know. Speculation. So that has nothing whatsoever to do with this matter. All right. Yes sir?

MR. RIORDAN: Your Honor, Dennis Riordan, for Echols. Could I address the State's motion on the question of what we've framed as a reply brief and what they've framed as an amendment to the 1780 petition? Your Honor, my suggestion would be this. The State, in its opposition to our motion for a new trial under the DNA and new science statutes, has taken a position (SHR 1313) that the Court can and should simply deny that petition at this point. That there is nothing, either

dealing directly with DNA or anything else such as new scientific evidence on animal predation, that the Court need take evidence on because, either if one assumes all of the evidence is true, it isn't sufficient to grant the petition, or alternatively, that it is not cognizable within the DNA statute. We all agree that we've got issues of first impression before the Court on the scope of the DNA statute, whatever we consider, what we've filed are a reply and amendment to the petition, I think that they've discussed that as State authority. We have provided the Court with State authority and responses to their interpretation of the petition. I think it's just going to be very helpful in a question of first impression and important case for the Court to consider that. So if we classify it as an amendment to our petition, we certainly don't object to the State replying to that, and we think that it will be very helpful to have all of that before the Court (SHR 1314).

The other thing that I would say, Your Honor, is that, because the State is taking the position that you needn't hear any evidence as to Echols, and that it's either unnecessary, because thinking it's true, it's inadequate or it's not cognizable, I would think that what we may need, want to do is have the State file our answer and have the Court rule on the scope of the statute before we commence an evidentiary hearing, simply because if the Court accepts the State's position, we're done. And any hearing that the Court would hold if it were at the end of that to conclude that that evidence didn't need to be taken would be a waste of the Court's

time. So, I would submit that the Court should permit the filling and permit an answer and then, hopefully, issue an opinion or a ruling, which either, if it takes the State's position, denies the DNA petition, or says, "I'll hear evidence directly related to DNA, but nothing else; I'll hear evidence related to DNA and animal predation, but not this issue, dealing with new information on juror misconduct by the foreman," it would, I think, be enormously helpful (SHR 1315) if we had a ruling before the hearing commenced, Your Honor.

THE COURT: Well, I plan to give you a written order on what I'll hear and what I won't hear. Do you want to respond any further? What my feeling is, whatever pleadings I've got, I'm going to accept. So if you need to file a response, then how much time do you need?

MR. RAUPP: I would ask for 30 days. We filed our answer to the petition on May 30th, and this amendment came in last Wednesday, August 13th, so it's about seven days.

THE COURT: I don't guess I've seen that. Last Wednesday?

MR. RAUPP: I think that's correct. It was filed August 12th, maybe? (SHR 1316)

MR. RIORDAN: That's correct, Your Honor (SHR 1316).

THE COURT: So I've got more? I've got two boxes full of pleadings back there.

MR. RIORDAN: It was file stamped by the court on the 13th (SHR 934).

MR. RAUPP: But given that, it was about 70 days out, and if we could have about half that much time, and of course, if we could accommodate the Court, it will be in sooner (SHR 1317). But we would certainly hope to have about 30 days.

THE COURT: The problem is with giving you 30 days - I've got two capital murder cases that I've had to sandwich in the docket to finish before December 31st. It would be almost impossible to schedule. I was thinking about giving you ten or 15 days, and even that would push the schedule, if it's September 8th.

MR. RAUPP: We'll accommodate the Court.

THE COURT: Well, all right, let's do that and then I don't want any more pleadings filed, period. Ten days, will that get us to where we can start whatever it is we're going to do on September 8th, because after I receive that, I need probably a week, I guess, or however many days that gives me before the 8th to give you a letter opinion on what I'll hear and what I won't hear, or if I adopt your theories in the last response that you read, then there won't be any need for a hearing, period (SHR 935)

MR. RAUPP: The State would be happy to provide a precedent to that effect.

THE COURT: I mean, if I do that, then there won't need to be any further

hearings on Echols. Now in Misskelley, it's a different matter, and Baldwin (SHR 1318).

(SHR 1320) THE COURT: All right, that will be all right. I invite all of you to draft a preliminary order, if you care to, if you want to, because it's always helpful. It'll make my time speed up. And I invite each of you to do that.

THE COURT: Is there anything else we need to discuss? (SHR 1320)

MR. HENDRIX: Judge, Blake Hendrix on behalf of petitioner Baldwin, the same stuff, we don't want to paper up the Court any more. I've got here a request to ask that Baldwin will be able to adopt Echols's reply, because it has the same legal issues. It's a total of two paragraphs of additional reading, but it's permissive, and we didn't want to be presumptuous.

THE COURT: All right, I'll let you do that (SHR 1320) You need to understand whatever ruling I make in Echols probably also applies to those adopted pleadings.

MR. HENDRIX: Absolutely (SHR 1321).

THE COURT: So the filings would be in either, in Baldwin's case and Echols', in Craighead County, and in Misskelley, in Clay County.

MR. HENDRIX: So we only need to file in one place?

THE COURT: One place (SHR 1321).

MR. HENDRIX: Great (SHR 1321). Judge, on Baldwin's motion to enlarge, that's just a simple matter of trying not to get caught in that catch-22 when you've got a complicated case and the ten days, so we'll be happy to go either way the Court wants us to go.

THE COURT: Well, I'm not going to restrict you to the ten pages. I've already told Jeff that, and I'll, I'll allow you to amplify your brief.

MR. HENDRIX: And then this is sort of the next to the last thing is on, I think the State is resisting this. We've got all of those exhibits that are filed in the 1780, under the 1780 petition, and to be sure and have a complete record in Rule 37, we can either adopt them by reference, or do we need to just absolutely re-file all of those exhibits as part of the Rule 37, and I think the State has taken a position on it, haven't you, David?

MR. RAUPP: Yes, Your Honor. We've resisted on the basis that it's an expanded petition over the ten pages. And I don't have - in light of the Court's ruling in Misskelley's case, I anticipate that you will grant Mr. Hendrix's motion to essentially have those exhibits be part of his ten-page petition.

THE COURT: Yes, I'll do that.

MR. RAUPP: And given that, we have the exhibits (SHR 1322) filed in Craighead County as to the 1780 case. I don't need them filed again. I don't know if the Court wants to enter an order in the 37 case.

THE COURT: The only reason I'm allowing the expanded petition is so we'll have all of the issues in the record and all of the matters will be wrapped up for a higher court to look at whatever we do. So all of it will there.

MR. HENDRIX: We're going broke on copying expenses, too (SHR 1323).

THE COURT: Well, yeah, there's no need to keep duplicating that. That will be fine. And you're going to respond to that?

MR. RAUPP: In both Baldwin and Misskelley's Rule 37, the State will reserve a response to a post-hearing pleading and the proposed order (SHR 1323).

THE COURT: Right.

MR. RAUPP: And as to the 1780 cases...

THE COURT: ...I'm inviting you to do the same thing in that.

MR. RAUPP: And we're going to reply in ten days with a proposed order, a reply and then a proposed order, as to all three cases. (SHR 1324) And I will file a separate pleading in each of those three cases, because I think their cases are proceeding under the names of each one.

THE COURT: All right, Mr. Riordan, if you want to submit a proposed precedent, I need that simultaneously.

MR. RIORDAN: Very good, Your Honor, and I again, to save paper, we might propose an order that just says that we are incorporating in our 1780 petition certain exhibits filed by co-defendants. We have copies here, but if we propose an

order and the Court would just say yes, they're incorporated by reference, we've saved the clerk's office another six inches of file.

THE COURT: Yes, let's do that. There's no point in having multiple filings of the same thing (SHR 1324).

MR. HENDRIX: And Judge, just for the record, Baldwin does need to join in the recusal motion, understanding the Court's ruling.

THE COURT: I'm going to deny that motion.

MR. HENDRIX: I'm assuming this argument is not going to persuade you to go otherwise. THE COURT: I'm going to deny that motion.

MR. HENDRIX: Sure. Understood.

MR. RAUPP: Your Honor, the State would have just one more question. Anticipating that the losing party in either case, or the person losing might prosecute an appeal, it does occur to the State that the record will have to be prepared separately by the Clay County Circuit Court?

THE COURT: Yes.

MR. RAUPP: And the Craighead County Circuit Court, so it would be useful to have the separate exhibits actually filed and pleadings actually filed. We don't have a problem with them adopting, in the sense they adopted arguments, but I think it's appropriate to style pleading and filing.

MR. ROSENZWEIG: That will be fine.

THE COURT: Jeff, that would relate to your client only, because Baldwin is here anyway (SHR 1325).

MR. ROSENZWEIG: That will be fine. We will do that, Your Honor, and that won't be a problem.

MR. PHILIPSBORN: Your Honor, John Philipsborn, Baldwin's co-counsel. (SHR 1326) Just to clarify something that I may have misunderstood, I thought when the Court was first discussing what it wanted us to discuss this morning, it indicated that the 1780 statutes would not reach the non-capital cases, but then we have been discussing the issues as though it does, and our view is that it does. But just so the record is clear... (SHR 1327)

THE COURT: ...no, I allowed you to file that and to raise those issues, but I think I've indicated that if I follow the State's theory on it, that's going to terminate those issues in Baldwin and Misskelley, as well.

MR. PHILIPSBORN: Okay.

THE COURT: I'm not saying that that's what I'm going to do, because I haven't digested it all yet, but y'all raise all kinds of stuff that is kind of interesting. No, it is a part of your pleading at this time.

MR. PHILIPSBORN: I appreciate it. Thank you (SHR 1327)

THE COURT: ... well, I think we can hear it here. Does the State have any

opinion on whether to do Baldwin and Misskelly simultaneously? That's kind of the way I would rather do it...

MR. ROSENZWEIG: ... I didn't mean to interrupt, Your Honor, and my counsel, Mr. Burt, has some scheduling issues and all of us have scheduling issues, including the Court. And so as long as we are here, we probably need to get that resolved.

Mr. Burt has some, I wasn't here for the April hearing, so I'm second-hand on a lot of what the Court said, and Mr. Burt was here. And so we need to figure out so we don't have to file a motion later on.

THE COURT: Well, my thought on it would be to schedule Misskelley and Baldwin for September the 8th and hopefully, we can finish in a week, because we've got a full week; that would be the 8th through the 13th (SHR 1328).

(SHR 1329) MR. BURT: I had planned to be here on October 1st, because that's when I was told the day was that the Court was going to take up Misskelley.

And now the Court has indicated September 8th, so there is a scheduling problem there.

MR. DAVIS: Judge, when the Court asked did we think it would be appropriate for the two to go together, it's the State's position based on the responses that have filed that in terms of the Act 1780 petition that are filed by all three defendants, that the Court can rule as a matter of law, and if, depending upon

what the Court's decision is in regard to that, if we are then left with Rule 37 hearings regarding the two other co-defendants, because with a ruling of that nature, that eliminates defendant Echols from any further proceedings.

Then if it's merely Rule 37 hearings regarding the two defendants, I can't see any benefit to conducting those simultaneously, because, I mean, (SHR 1329) in a two hundred and sixty-seven page petition, there have been hundreds of issues raised.

I think actually I'm optimistic that the Court will narrow those issues down when it comes time for the actual proceeding, but in any event, the more pertinent issues will be the performance or effectiveness of the two defense teams involved in representing the clients at trial.

And I don't see where combining the two together is going to achieve much in the way of benefit, because the questions that are pertinent...

THE COURT: ... I'm just raising for economy of time, I mean... (SHR 1330)

THE COURT: All right. That's Misskelley. And then Baldwin, any matters that need to be heard by the Court will be on September the 8th, that week of the 8th through the 12th.

Frankly, gentlemen, the Court can rule as a matter of law on all of the issues. I can decide that an evidentiary hearing is not even necessary. So you can view it

from that standpoint as well.

I'm not likely to do that, but I could. So when (SHR 1332) you draft your precedents, consider that as an option that the Court has.

MR. PHILIPSBORN: Your Honor?

THE COURT: Yes, sir?

MR. PHILIPSBORN: On the Baldwin matter, John Philipsborn, on the scheduling issue, Mr. Burt said he and I are actually both involved in the same multiple defendant homicide case; I had thought that you had actually talked about scheduling this sequentially, so I thought the week of September 8th had been reserved for Echols, if there was going to be an Echols matter.

My question to the Court, because I think our, the evidence in our case, if the Court grants us a hearing, is going to be pretty compact.

THE COURT: I'm sure of that.

MR. PHILIPSBORN: But I hear the Court in that regard. Would the Court consider allowing us to be scheduled right after Misskelley?

THE COURT: That would be fine. And I have a problem with, I think I've got a murder case tentatively set for September 15th, that I wasn't aware of, but we were going to move that anyway. The Paragould case, and I've got a pre-trial on the 15th, but I have, we could start, I guess, on - I can (SHR 1333) give you one day; the part of the 15th and the 16th and then skip to September the 24th and then

go through the 29th. That's the best I can do.

Wednesday, yeah, we can go the 24th and finish that week. That would be three days, but we might have to do it like that. We'll tentatively set it for then.

MR. PHILIPSBORN: Thank you. I appreciate it, Your Honor.

THE COURT: The next time court meets, the defendants are going to have to be here, because I'm uncomfortable in doing anything but scheduling without them being present.

MR. DAVIS: Judge, one thing that just crossed my mind; Dave kind of mentioned it. One thing I did think we agreed on was that any 1780 proceedings on the new scientific evidence would be consolidated, since basically the pleadings in regard to that are pretty much similar regarding all of the defendants (SHR 1334).

THE COURT: Well, they're identical (SHR 1335).

MR. DAVIS: And so if when we talk about whether the Court would take up the issues involving Echols early on, on the 8th of September, and fill in that first few weeks with that, assuming those issues were still on the table after the Court makes its ruling. If the Court decides that we're having hearings on that issue, then those hearings will not just apply to Echols, they'll apply to all three defendants. And so that doesn't cure the problem of having scheduling conflicts with the 8th through the 24th of September, because it's not just going to be

dealing with defendant Echols, it will be dealing with all three defendants, should the Court determine that it can't rule as a matter of law (SHR 1335).

THE COURT: Jeff, your conflict was for who? Who had the conflict with September 8th?

MR. ROSENZWEIG: Any conflicts I have are solvable. Mr. Burt is the one with the more difficult conflict.

MR. PHILIPSBORN: And I have that same conflict, Your Honor.

THE COURT: Well, I thought we dealt with those.

MR. PHILIPSBORN: We did just now as Mr. Davis is pointing out that if . . . (SHR 1335)

THE COURT: Well, he's probably right. The issues are identical. Basically, you all adopted what they have filed. So on the 1780 matters, they're the same.

MR. PHILIPSBORN: I agree, Your Honor.

THE COURT: I'm going to block out the dates and those days will be available and then depending upon everyone's schedule, let's just see what we can present at that time. And depending upon how I ultimately decide, too.

There may be issues that will remain that need to be, we need to have hearings on. So that time is available and we'll do whatever we have to do at that time. Okay? So you need to keep your schedules flexible (SHR 1336).

THE COURT: (SHR 1337) And again, I'm going to be looking for proposed precedents on the 1780 rulings and the Rule 37 rulings, too.

MR. ROSENZWEIG: Looking for them before the hearings, or after the hearings?

THE COURT: On the Rule 37, after the hearings. But on the 1780, I thought we were going to schedule that for the next ten days. Anything else?

MR. DAVIS: Well, there's a couple of things that, and Dave may correct me if I'm wrong, as I probably will be on the law, but I know the Court had indicated that there was some concern about any rulings that could be made on the pleadings if the defendants weren't present. And we have looked at the statutes, specifically the particular statutory provisions under Rule 37, and under the 16-112-200, new scientific evidence, and the Court can make rulings and as a matter of law, enter orders as a matter of law on pleadings without the necessity of the defendants being present.

THE COURT: I know I can do that, but I can't take testimony.

MR. DAVIS: Correct. I think it would be appropriate in that regard (SHR. 1337).

MR. RIORDAN: (SHR 1347:22) Just a final thing for clarification, Your Honor. As I understand it, the State will be filing an answer to what's deemed an

amended petition, we called it our reply brief, by the 30th (SHR 1347), and by that time you'd also like from us essentially a proposed... (SHR 1348)

THE COURT: ...a proposed precedent, for a finding.

MR. RIORDAN: And Your Honor, there is a pending question on sealing a declaration before the Court, and we'll address that in our proposed order, as well.

THE COURT: I'm sorry. I didn't follow you on that.

MR. RIORDAN: Well, we're in an unusual situation, Your Honor, in which a declaration has been filed with this Court that none of the parties has seen, and has been filed by a Little Rock lawyer on behalf of another lawyer that deals with arguably privileged conversations between that lawyer and the jury foreman in this case. And we have addressed the question of privilege. The lawyer filed it under seal; he did not give it to either of the parties; he wanted the ruling from the (SHR 1348) Court on the question of privilege before any of the parties saw it. So we will address the question of unsealing that in the proposed order.

THE COURT: Well, where did he file that? I haven't seen it.

MR. RIORDAN: It is filed in this Court, Your Honor. It's highly unusual; it's a situation in which a lawyer was retained by the jury foreman in this case. The jury foreman had conversations...

THE COURT: ...I saw some pleadings to that effect, but I haven't seen any sealed pleadings. I saw your pleadings.

MR. RIORDAN: Well, our information, the filing actually took place May 30th in the Baldwin case, a sealed envelope was filed by a Little Rock attorney containing an affidavit from another Little Rock attorney, and it was filed in the Baldwin case. And as you've seen, we have sent various things in our pleadings.

THE COURT: Yes.

MR. RIORDAN: Various things about that declaration. But I will work with the Court's office and confirm that that sealed declaration is in fact before (SHR 1349) the Court. And we'll address the unsealing of it in our proposed order by the 30th.

THE COURT: Okay.

MR. RAUPP: Your Honor, the State hasn't seen that either, and obviously would like to see it. Mr. Echols's counsel has taken the position that privilege doesn't apply, so I presume they're going to ask that it be unsealed despite not seeing it, they've gone on at length to explain what it, I guess, what they hope it represents.

THE COURT: Well, then that's what I read; your pleading.

MR. RAUPP: But it would be helpful to the State before the 30th that that be unsealed, if we're to respond to the allegations. And I take it that you're going move that it be unsealed?

MR. RIORDAN: Well, there's actually a motion pending in the Baldwin

case (SHR 1350) that the Court unseal it under a protective order, so that the parties could at least see it and address it, and according to them, the Court could unseal it under a protective order before it rules on the question of privilege, so the State would have a meaningful opportunity to address the privilege question.

THE COURT: (SHR 1350) Well, yeah, I don't have any problem with that. I mean, I'd have to look at it to rule whether it was a privilege question or not, anyway. So y'all might as well get the benefit of it. So it's supposedly in the Baldwin case?

MR. RIORDAN: It is filed on May 30th, and that is the ideal thing; both parties get it under a protective order and they can certainly address the privilege question as a straight question of law, I think.

MR. RAUPP: Thank you.

THE COURT: All right, we'll do that. Is there anything else?

MR. PHILIPSBORN: Your Honor, the last thing, and I appreciate the Court's indulgence and patience. There is pending before the Court and has been for some period of time, in the context of the 1780 cases, a motion for some additional testing, and I gather that it would be appropriate to the parties to address that in the precedent that they offer, because obviously, if the Court's going to deny the hearing and basically rule on the pleadings, I think we put the relevant facts before the Court and the Court could address that issue as well, but I didn't

want it left hanging (SHR 1351).

THE COURT: What additional testing are you referring to? (SHR 1352)

MR. PHILIPSBORN: Your Honor, there were two classes of evidence that we agree to disagree about. This is in the conversations that I had with Mr. Davis; the re-testing of some fiber evidence and some testing of some specific hair evidence. And so that issue was put before the Court and the State has opposed the re-testing and it has been dealt with in the pleadings.

THE COURT: It seems like I remember y'all raising that the last time we were here.

MR. PHILIPSBORN: Yes, sir.

MR. BURT: Judge, there's one last issue which is an evidentiary issue, and we'd be glad to brief this for the Court. But I wanted to go on record as stating an objection to an exhibit that the State has attached to its response to the petition in Misskelley's DNA motion. And that is an exhibit in which the State has designated as Exhibit "E," which is a transcript (SHR 1352) of, apparently, a post-trial interrogation of Mr. Misskelley. I don't know if the Court has that in front of it.

THE COURT: It doesn't look like I have it here.

MR. BURT: I have it. This is our file, Your Honor. At the outset of this interview, Mr. Davis informs Mr. Misskelley that the statement that he is about to

give will not be used against him in any proceeding whatsoever, in the future. And essentially gives him use immunity for the statement he is about to make. And it's our position that a statement given under those circumstances cannot be used in any proceeding, including this one, and that the Court ought not to consider that in making any rulings that it might make in regard to the motions that are before the Court.

THE COURT: Is that objection in your pleadings?

MR. BURT: No, it's not, and that's why I'm raising it at this point. We're adopting the pleadings of Mr. Echols, and this issue pertains to Mr. Misskelley (SHR 1353). We've not filed a separate pleading, but will be glad to brief the issue, because there is some law on this. But I just wanted, at this point, to go on record as stating that objection, and with the Court's permission, we file a brief as to the issue.

THE COURT: All right. Do you need to file a reply to that?

MR. RAUPP: I would, just briefly, the State's position is with immunity granted and authorized by the Court in case with consistent to the Arkansas statute which provides only for the use immunity, and while described in any transaction, the immunity granted would have to have been consistent with Arkansas law used in a criminal proceeding. This is no longer a criminal proceeding; it's a civil proceeding.

THE COURT: It's a civil proceeding.

MR. ROSENZWEIG: Except, Your Honor, that the courts have also held that representations made by a prosecutor are equitability enforceable.

THE COURT: Well, brief it for me.

MR. ROSENZWEIG: I will (SHR 1354).

MR. PHILIPSBORN: Your Honor, that same objection would also pertain to Baldwin, because the same item has been proffered in Baldwin's case.

THE COURT: Okay. All right. Is there anything else? (SHR 1355)