No. CR-22-670
IN THE ARKANSAS SUPREME COURT

DAMIEN ECHOLS **APPELLANT**

v.

STATE OF ARKANSAS **APPELLEE**

On Appeal from the Circuit Court of Crittenden County, Arkansas
The Honorable Tonya Alexander, Circuit Judge

BRIEF OF APPELLANT DAMIEN ECHOLS

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POINTS ON APPEAL

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II. Assuming *arguendo* that the operative language of Act 1780 is somehow viewed as "ambiguous enough" to go beyond its plain meaning for interpretation, the Circuit Court also erred in failing to apply established principles of statutory interpretation to accurately determine the meaning of that language. *Central & Southern Companies, Inc. v. Weiss*, 339 Ark. 76, 80, 3 S.W.3d 294, 297 (1999); *Chicago Mill & Lumber Co. v. Smith*, 228 Ark. 876, 310 S.W.2d 803 (1958).

III. In light of the above, separately and in combination, the Circuit Court erred in dismissing Echols' Act 1780 petition because he was not "in prison." *Simpson v. Calvary SPVI, LLC*, 2014 Ark. 363, 440 S.W.3d 335, 339; *Reynolds v. Holland*, 35 Ark. 56 (1879).

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JURISDICTIONAL STATEMENT

This is an appeal from a final order entered by Circuit Court of Crittenden County on June 28, 2022, dismissing Echols' Act 1780 petition in its entirety for lack of jurisdiction. (RP 178-180). Echols timely noticed an appeal from the Circuit Court's ruling on June 22, 2022. (RP 181). "Because Echols was sentenced to death at his original trial in 1994, [this Court's] jurisdiction is pursuant to Ark. R. Sup. Ct. 1-2(a)(2)(2010)." *Echols v. State*, 2010 Ark. 417, 373 S.W.3d at 895 (emphasis added). Jurisdiction also exists in this Court pursuant to Ark. R. Sup. Ct. 1-2(a)(7) because prior appeals in this case have been before this Court.

STATEMENT OF THE CASE AND FACTS

This appeal is about the interpretation of a statute intended to provide a remedy to help "exonerate" the "innocent" from "wrongful convictions." The protection of innocence has a long pedigree in the criminal justice system. As Lord Blackstone recounted it centuries ago: "it is better that ten guilty persons escape than that one innocent suffer."[1]

Over the years, states have developed various means of trying to remedy such suffering. One of the most effective has been the DNA-testing revolution: "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty . . . the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure." *Dist. Attorney's Office for Third Judicial List. v. Osborne*, 557 U.S. 52, 55 (2009).

Arkansas was one of those States. In 2001, the Arkansas General Assembly enacted Act 1780 to "provide a remedy for innocent persons who may be exonerated by [DNA] evidence." *See* 2001 Ark. Act 1780 (emphasis added). That remedy expressly allowed "a person convicted of a crime" to "make a motion for the performance of fingerprinting, forensic DNA testing, or other tests which may become available through advances in technology to demonstrate the person's actual

[1] *Blackstone*, "Commentaries on the Laws of England" (Lippencott 1893).

innocence.'" *Echols v. State*, 2010 Ark. 417, 373 S.W.3d 892, 897 (emphases added). As "a person convicted of a crime," Damien Echols ("Echols") made "a motion" seeking the remedy provided by Act 1780. Despite the plain statutory language, the Circuit Court of Crittenden County denied Echols' motion because he was not "in prison" – a jurisdictional qualification nowhere stated in the Act.

The "West Memphis Three" murder case has been before this Court on multiple prior occasions over the past 26 years.[2] Familiarity with its lengthy history is accordingly presumed. Before the Court now is the latest chapter in Echols' unceasing efforts to prove his innocence of these murders,[3] and to identify the real killer(s).

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[2] *See Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996); *Echols v. State*, 344 Ark. 513, 42 S.W.3d 467 (2001); *Echols v. State*, 354 Ark. 414, 125 S.W.3d 153 (2003); *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003); *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2006); *Echols v. State*, 2010 Ark. 417, 373 S.W.3d 892.

[3] Echols was tried together with co-defendant Jason Baldwin ("Baldwin"). Upon their convictions, Echols was sentenced as an adult and received the death penalty; Baldwin was sentenced as a juvenile and received a sentence of life in prison without parole. In an earlier proceeding, co-defendant Jessie Misskelley was separately tried. Upon his conviction, Misskelley was also sentenced as a juvenile

In January 2022, Echols' petitioned the Circuit Court to allow him to pursue new technology DNA testing of key evidence in the case under Act 1780, which expressly permits "a person convicted of a crime" to make "a motion" for such testing. After briefing by the parties, the Circuit Court held a hearing on Echols' petition. (RT 1-35). That Court subsequently ruled that Echols was not entitled to seek Act 1780 relief because he was not "in prison" – a criterion unmentioned in the Act. (RP 178-180). Echols timely appealed that ruling to this Court. (RP 181).

Over the course of time following the WM3's convictions, and consistent with the WM3's steadfast claims of innocence, Echols pursued numerous factual and legal challenges to his convictions. In connection with one of those challenges, in November 2010, this Court ordered the trial court to hold a hearing to consider whether newly analyzed DNA evidence might exonerate the WM3. *See Echols v. State*, 2010 Ark. at *14, 373 S.W.3d at 902. Ultimately, the development of further evidence in anticipation of that hearing – including the results of additional DNA testing available at that time – led the parties to negotiate an *Alford* plea resolution of the cases, enabling the WM3 to maintain their innocence while being immediately

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to life in prison without parole. Echols, Baldwin and Misskelley collectively comprise the West Memphis Three ("WM3").

released from prison (and, in Echols' case, from death row). The *Alford* plea was entered on August 19, 2011. (RP 89-161).

In early 2020, Echols' defense team approached then-Prosecutor Scott Ellington to secure his consent to the testing of certain evidence in the case with a new technology called the "MVac Wet Vacuum DNA Collection Technology" ("MVac"). As discussed further below, MVac was an exciting state-of-the art technology that was yielding unprecedented DNA results, the bona fides of which were verified by the Federal Bureau of Investigation ("FBI"). Ellington ultimately indicated that he had no problem with having the evidence so tested.

Over the course of the next eight months, Echols' defense team and Ellington engaged in a series of communications designed to facilitate the transmission of specified items of evidence from the West Memphis Police Department ("WMPD") to the accredited laboratory chosen to do the MVac DNA testing. The specified items of evidence were the victims' shoes, socks, Boy Scout cap, shirts, pants and underwear, as well as the sticks used to hold the clothing underwater and the shoelaces used as ligatures to bind the victims. The chosen laboratory was "Pure Gold Forensics, Inc.," a California-accredited private forensic DNA laboratory specializing in the new MVac technology.

Unfortunately, despite these many communications, none of the evidence was ever transferred by the WMPD to the MVac laboratory. No explanation was ever given for this failure. It just never occurred.

In March of 2020, Ellington was elected to a position as Circuit Judge for the Second Judicial Circuit in Jonesboro. On October 22, 2020, Governor Asa Hutchinson appointed Keith Chrestman to serve as Ellington's replacement as the Prosecuting Attorney for the Second Judicial District. Chrestman's term was set to run from January 1, 2021 through December 31, 2022.

In light of the then still-uncompleted effort to have WM3 case evidence tested with the new MVac DNA technology, after Chrestman took office, Echols' defense team reached out to Chrestman to try to complete that task. In mid-March, Echols' counsel and Chrestman spoke by phone. Additional communications followed. Ultimately, Chrestman took a different position than Ellington:

> I confirmed with my predecessor your discussion. Based on his description, it sounds like your client wants to use the M-Vac® Wet-Vacuum-Based Collection Method analysis. Regardless of whether this will yield valuable evidence, releasing the material isn't my decision. The property is seized; it doesn't belong to my office. So you'll need to petition the court, asking for permission and giving the State an opportunity to be heard.

(RP 43).

On April 28, 2021, however, Chrestman gave a media interview concerning his "first 100 days in office."[4] In that interview, Christmas volunteered that:

> Echols . . . ha[d] asked Chrestman's office to test items of evidence in the case, but much of it is gone, the prosecutor said. In capital murder cases, evidence is kept and securely stored, but in cases like this the evidence is often destroyed or lost.

(RP 44). The WM3 case was a "capital murder case" with regard to Echols of course, and it was hardly a run of the mill "case[] like this" under anyone's definition. So why would any evidence from the case be destroyed, and what evidence was destroyed?

In the Fall of 2021, in response to a Freedom of Information Act lawsuit filed by Echols against the WMPD seeking answers to the foregoing questions, the City Attorney invited Echols' counsel to the WMPD to survey the case evidence files to ascertain what was there and what was not. That visit proved productive with the finding of the most important evidence – the ligatures used to bind the murdered children[5] – misfiled at the police department.

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[4] *See* https://talkbusiness.net/2021/04/prosecutor-keith-chrestman-talks-first-100-days-in-office.

[5] At Echols' trial, evidence from the crime scene was front and center of course. The most disturbing items of that evidence were the horrifying photographs of the

In due course, Echols filed a "Petition To Conduct Additional DNA Testing" of the ligatures pursuant to "Ark. Code Ann. Sections 16-112-201 through 16-112-208," at his own expense. **(**RP 39-51). Echols' Act 1780 Petition cited the newly available MVac technology as his predicate for the performance of new "forensic DNA testing" on certain of the ligatures used by the killer(s) to bind the hands and ankles of the murdered children. (*Id.*). As Echols explained, "the new MVac wet vacuum DNA collection testing technology is precisely the type of scientific step forward contemplated by the statute." (*Id.*). As an FBI research study found upon comparing this new technology to the traditional wet-swab method of DNA extraction:

- "the M-Vac yielded consistently greater nDNA yields than the wet-swab method;"

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child victims' bodies nude and hogtied as they had been dumped in the creek by the killer(s). The ligatures used to hogtie the victims were laces from the children's own sneakers. Laces were tied together to make them longer and then tied again around the victims' wrists and ankles. The nature of this brutal exercise made one thing entirely clear: the killer(s) hands had to have been all over the ligatures – especially the knotting of them – as the victims' bodies were bound. *See, e.g.*, *Echols v. State*, 2010 Ark. at *3, 373 S.W.3d at 896.

- "the M-Vac . . . yielded an average of 12 times more nDNA and 17 times greater mtDNA;" and

- "wet-vacuuming after swabbing yielded an average of 10 times more nDNA and nine times more mtDNA as compared to the initial wet-swabbing."

'FBI Study: M-Vac System Collects More DNA Than Swabbing,' *Forensic On The Scene And In The Lab*, pp. 1-2 (August 3, 2020)."[6] (RP 47-48). Significantly, other law enforcement agencies (including some in Arkansas) have also recognized the power of this new technology and deployed it in their cases. *See generally State of Utah v. Wall*, 460 P.3d 1058, 1074-76 (Utah 2020).

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[6] How does the M-Vac system achieve such incredible results? It aggressively sprays sterile solution onto a surface and simultaneously applies vacuum pressure to collect the solution and whatever DNA material is present on the surface. The solution and DNA are then run through a filter or a micro centrifuge. Comparing the prior wet-swab to this new technology is, in the words of Jared Bradley the CEO of M-Vac Systems, Inc., "kind of like comparing a hand broom to a carpet cleaner. One is a simple device that is effective in some cases, and the other is a much more robust machine that is used when it's obvious the broom won't cut it or has been tried and failed. Same with the M-Vac – <u>it brings forces to bear on the bio-stain or touch DNA that the swab just wasn't designed for</u>." (RP 48) (emphasis added).

In opposition to Echols' petition, Chrestman raised a litany of arguments why Echols should not be permitted to invoke Act 1780's simple procedures to apply new scientific testing to evidence that might help to "punish the guilty and exonerate the innocent" in this case. (RP 52-61). Only one of Chrestman's arguments is relevant at this juncture, because the Circuit Judge apparently relied on it in denying Echols' petition. In five brief sentences, Chrestman argued that:

> When the State has no one in custody to bring to court, habeas corpus isn't an available remedy. To allow a non-prisoner to seek Act 1780 relief would make the habeas corpus statute absurd. Under statutory law, if new DNA testing - like Defendant seeks - excludes him, the circuit court has two options: grant a new trial or resentence. When a defendant has completed their sentence, it makes no sense to grant them a retrial. Nor does it make sense to resentence them.

(RP 53-54).[7]

Echols responded to this argument by the prosecutor as follows:

> The prosecutor's conclusion is based on the flawed assumption that the only consequence that matters from a conviction is its sentence.
>
> As the Supreme Court long ago recognized, however, there are many "disabilities or burdens [which] flow from' a defendant's conviction that give him a 'substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' Recognition of this fundamental reality is undoubtedly why the Arkansas Legislature worded the key statute at issue herein so that it is triggered

[7] As discussed further below, the prosecutor had it completely wrong that the circuit court faced with an Act 1780 petition had only habeas' "two options" – "grant a new trial or resentence" – for providing relief under the statute.

> by being convicted not by being in custody. 'Except when direct appeal is available, a person convicted of a crime may make a motion for the performance of . . . DNA testing, or other tests which may become available through advances in technology to demonstrate the person's actual innocence.' The only truly 'absurd' result here would be an interpretation of this plain statutory language that prevented Echols from pursuing the relief he seeks."

(RP 63-73) (citations omitted; emphasis in original).

A. The Hearing And Ruling On Echols' Act 1780 Petition

At a June 23, 2022 hearing on Echols' petition, the Circuit Court of Crittenden County began by noting that Echols' filing was a "petition pursuant to Ark. Code Ann. Section 16-112-204,"[8] and pointed out that the Legislature made this statute part of the Habeas Corpus Chapter, (Chapter 112), of the Arkansas Criminal Code. (RT 7). She then established the "hurdle" for Echols at the hearing as follows: "[t]his is a habeas corpus statute. Habeas Corpus literally means 'bring the prisoner forth.' Can an individual who is lawfully at liberty claim relief under a Habeas Corpus statute?"[9] (RT 4).

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[8] (RT 4).

[9] The short answer to this question is: "Yes, if the Legislature expressly authorized the individual to do so." As this Court has previously recognized, with respect to Act 1780, the Arkansas General Assembly specifically found that "Arkansas laws and procedures should be *changed* in order to accommodate the

In response to the Circuit Court's question, Echols' counsel explained that the statute under which Echols was pursuing his DNA testing request "carves out a particular exception with regard to your general Habeas Corpus petition . . . an actual innocence claim."[10] (RT 8). Counsel then also noted that Act 1780's provisions "allow[] for the defendant to be able to exonerate himself." (RT 9).

The Court was unmoved though. "This Court cannot carve out an exception that does not lawfully and legally exist . . . *if you talk to the legislature and they make an exception*, the Court will follow it." (RT 29) (emphasis added).

Five days later, in accord with her statements at the hearing, the Circuit Court entered an "Order Denying Act 1780 Habeas Corpus Petition." In that Order, the Court found that the "General Assembly did not make scientific testing based on new technology an independent form of post-conviction relief. (RP 179). Instead, the legislature amended statutory law to make scientific testing based on new

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advent of new technologies enhancing the ability to analyze new scientific evidence." *Echols v. State*, 2010 Ark. at *4-5, 373 S.W.3d at 896 (emphasis added). And changed they were.

[10] Arkansas's Habeas Corpus statute expressly recognizes that separate procedures – those set out in Act 1780 – apply to actual innocence claims. *See* Ark. Code Ann. § 16-112-103(a)(2) (referring to Ark. Code Ann. § 16-112-201).

technology a form of habeas corpus relief." (RP 179). However, *"[w]hen a petitioner is not in custody, the circuit court does not have jurisdiction to grant habeas corpus relief*." (RP 180) (emphasis added). Accordingly, the Circuit Court "denied" Echols' petition. (RP 180).

This timely appeal followed. (RP 181).

ARGUMENT

At one level, this is an elemental statutory construction case, because virtually every express or interpretive indicia of legislative intent indicates that Act 1780 should be applied as written (not as reimagined by the State). At another level, it is a monumental criminal justice case, because the broad remedial purpose of Act 1780 to help exonerate the innocent from wrongful convictions will remain underfulfilled unless the statute is applied as written (not as restricted by the State). There is much at stake on both levels.

1. Standard of Review

This Court reviews the interpretation of statutes *de novo*. *Echols v. State*, 2010 Ark. at *6, 373 S.W.3d at 897; *Kelley v. USAA Cas. Ins. Co*., 371 Ark. 344, 346, 266 S.W.3d 363, 365 (2007); *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). Jurisdictional determinations based on the interpretation of a statute are also reviewed *de novo*. *See Ark. Dep't of Fin. & Admin. v. Natural Health, LLC*, 2018 Ark. 224, 549 S.W.3d 901, 906.

2. The Statutory Language

Act 1780 uses six simple words to define who may move for relief under the statute: "[A] person convicted of a crime. . . ." The proper interpretation of this language is the question of first impression before the Court on this appeal.

3. The Plain Language of Act 1780 Authorizes Echols' Petition

Act 1780 was codified and titled: "An Act To Provide Methods For Preserving DNA And Other Scientific Evidence And To Provide A Remedy For Innocent Persons Who May Be Exonerated By This Evidence."[11] To seek that remedy, Arkansas Code Annotated section 16-112-202 expressly allows "***a person convicted of a crime***" to "***make a motion*** for the performance of fingerprinting, forensic DNA testing, or other tests which may become available through advances in technology to demonstrate the person's actual innocence if '[t]he testing has the scientific potential to produce new non-cumulative evidence materially relevant to the defendant's assertion of actual innocence.'" *Echols v. State*, 2010 Ark. at *5, 373

[11] Arkansas Bill Status, 2001 Reg. Sess. S.B. 4 (April 19, 2001). Significantly, Arkansas Code Annotated section 12-12-104 provides for the "permanent" preservation of such evidence in "any conviction for a violent offense."

S.W.3d at 897 (emphases added).[12] Echols – as "a person convicted of a crime," – filed such a motion.

Nonetheless, the prosecutor objected to Echols' motion on the ground that he was not entitled to seek Act 1780 relief because he was not then "in prison" – a prerequisite nowhere stated in the Act. The prosecutor thus effectively rewrote the meaning of these six simple words to substitute "prisoner" for "person." Under this revisionist interpretation of the statute, Echols was not entitled to seek the relief provided by it because only "a [prisoner] convicted of a crime" may do so.

With this dispute before the court, the Circuit Court's task should have been self-evident. It needed to determine the meaning of the pertinent statutory language while "adher[ing] to the basic rule of statutory construction, which is to give effect to the intent of the legislature . . . constru[ing] the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language, and if the language of the statute is plain and unambiguous, and conveys a clear and definite

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[12] In 2005, the Arkansas General Assembly amended Act 1780 to change Section 16-112-202 "to permit testing where '[t]he proposed testing of the specified evidence may produce new material evidence that would . . . [r]aise a reasonable probability that the person making a motion under this section did not commit the offense.'" *Echols v. State*, 2010 Ark. at *5-6, 373 S.W.3d at 897.

meaning, there is no occasion to resort to rules of statutory interpretation." *Echols v. State*, 2010 Ark. at *7, 373 S.W.3d at 897-98 (citing *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004)); *accord, Sluder v. Steak & Ale of Little Rock, Inc.*, 361 Ark. 267, 272, 206 S.W.3d 213, 215 (2005); *Britt v. State*, 261 Ark. 488, 495, 549 S.W.2d 84, 87 (1977).

There is nothing in Act 1780 suggesting any legislative intention that the language of the statute be interpreted any way other than according to the plain meaning of that language. Nor is there any other authority for a Circuit Court to rewrite what the General Assembly authored.

Courts are "not [to] read into legislation what is simply not there." *Simpson v. Calvary SPVI, LLC*, 2014 Ark. 363, 440 S.W.3d 335, 339. Yet, that is exactly what the lower court did here. It was clear error to do so. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (if the words of statute are clear and unambiguous court need not inquire any further into its meaning); *Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558 (2003) (same).

"[A] person convicted of a crime" means exactly what it says. Nothing more and nothing less. The meaning of this language is as plain as the nose on a man's face. This simple and clear language chosen by the General Assembly in enacting Act 1780 must be given dispositive effect by this Court. *Echols v. State*, 2010 Ark. at *7, 373 S.W.3d at 897-98 (citing *Greene*, 356 Ark. 59, 146 S.W.3d 871; *accord,*

Sluder, 361 Ark. at 267, 206 S.W.3d at 215; *Britt*, 261 Ark. at 495, 549 S.W.2d at 87; *McMillan v. Live Nation Ent., Inc.*, 2012 Ark. 166, *4-6, 401 S.W.3d 473, 476-77 (2012) ("When the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, there is no need to resort to rules of statutory interpretation. In other words, when the language of the statute is not ambiguous, the analysis need not go further and we will not search for legislative intent; rather, the intent is gathered from the plain meaning of the language used. Thus, an unambiguous statute presents no occasion to resort to other means of interpretation as "it is not allowable to interpret what has no need of interpretation . . . . The rules of statutory construction do not permit us to read into it words that are not there . . . . and we will not by judicial fiat amend the statute to address concerns that are properly the province of the General Assembly." (internal citations omitted)).

4. Alternative Interpretative Means Also Support Echols' Petition

As discussed above, it is Echols' position that there is no ambiguity in the plain statutory language used by the General Assembly to identify who may file an Act 1780 position: "a person convicted of a crime" may do so. Assuming arguendo that this Court this were to find some reason to take its analysis beyond this plain statutory language, however, then the next interpretive steps are to "look to the language of the statute, the subject matter, the object to be accomplished, the purpose

to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject." *Sluder*, 361 Ark. at 267, 206 S.W.3d at 215. Those alternative means of statutory construction also support Echols' petition.

5. The Language of The Whole Act

When a statutory interpretation review is necessary, it is "an examination of the whole act." *Weiss v. Maples*, 369 Ark. 282, 286, 253 S.W.3d 907, 911 (2007). The circuit court failed to do that here. Without ever directly addressing the critical six word phrase expressly identifying who the legislature authorized to make an Act 1780 motion for post-conviction DNA testing, the Circuit Court jumped to an alternative conclusion on a different jurisdictional footing. "Our General Assembly did not make scientific testing based on new technology an independent form of post-conviction relief. Instead, the legislature amended statutory law to make scientific testing based on new technology a form of habeas corpus relief. When a petitioner is not in custody, the Circuit Court does not have jurisdiction to grant habeas corpus relief." (RP 180).

The Circuit Court's distinction between enactment of "an independent form of post-conviction relief" and enactment of an "amended . . . form of habeas corpus relief" is illusory. The General Assembly undeniably had the power to effect the same relief in either form, independently or by amendment. The relevant question

is not what "form" the General Assembly chose for the enactment, but rather what "purpose" the Legislature sought to achieve - in either form.

The amended form of habeas corpus relief the Legislature enacted in Act 1780 could hardly be clearer that its purpose was to "carve[] out a particular exception with regard to your general Habeas Corpus petition . . . an actual innocence claim," just as Echols' counsel argued at the hearing.[13] (RT 8). The full text of Arkansas's Habeas Corpus statute makes quite plain its recognition that separate procedures – those set out in Act 1780 – apply to actual innocence claims based on new scientific evidence. *See* Ark. Code Ann. § 16-112-103(a)(2) (specifying that "[t]he procedures for persons who allege actual innocence shall be in accordance with § 16-112-201 et seq.," Subchapter 2).

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[13] There is no dispute, as the Circuit Court recognized, that the General Assembly had (and has) the power to create such an exception: "if you talk to the legislature and they make an exception, the Court will follow it." (Emphasis added). The Habeas Corpus provisions of the Arkansas Code are merely statutes, subject to revisions and exceptions as the Legislature sees fit. The Circuit Court mistakenly failed to appreciate exactly what the General Assembly actually did with respect to these statutory provisions.

6. Different Subchapters for Traditional Habeas And Actual Innocence Claims

The Circuit Court's laser focus on the traditional Subchapter 1 "General Provisions" for habeas practice completely overlooked the different Subchapter 2 "New Scientific Evidence" provisions for actual innocence claims. The language of the two separate Subchapters clearly contemplates separate prerequisites. For example, the texts of Subchapter 1's provisions repeatedly refer to "the prisoner" as being the party seeking the writ. *See generally* Ark. Code. Ann. §§ 16-112-105, 109, 115, 116 & 117. But the texts of Subchapter 2, as noted above, repeatedly define "a person convicted of a crime" as being the movant seeking actual innocence scientific testing. Significantly, Subchapter 1 never uses the "person convicted of a crime" phraseology, and Subchapter 2 never uses the "prisoner" terminology. Through the use of this different language, the legislature is presumed to have intended that these two Subchapters have different meanings and applications. *See generally* Antonin Scalia & Bryan A. Garner, *Reading Law*, at 179 (2012) (a word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in its meaning); 82 C.J.S. Statutes § 372 (where different words

or phrases are used in the same connection in different parts of a statute, it is presumed that the legislature intended a different meaning).[14]

7. Different Venues for Traditional Habeas and Actual Innocence Claims

Beyond the different subchapters, there are other differences in how the "whole act" treats traditional habeas and actual innocence claims. For example, as this Court has previously recognized: "Arkansas Code Annotated Section 16-112-201 (Repl. 2016) provides that petitions under Act 1780 are to be brought in the court in which the petitioner's convictions were entered, but any petition for a writ of habeas corpus to effect the release of a petitioner is properly addressed to the circuit court in which the prisoner is held in custody." *Williams v. Arkansas*, 2020 Ark. 199. This venue distinction makes perfect sense if the habeas statutes are trying to distinguish between actual innocence petitions seeking relief from a "conviction"

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[14] Both federal and state courts follow this interpretive canon. *See Coalition for ICANN Transparency Inc. v. VeriSign, Inc*., 452 F. Supp. 2d 924, 939 (N.D. Cal. 2006) ("material changes in the phraseology of statutes normally demonstrate an intent by the lawmakers to change the meaning"); *Sabine Parish Police Jury v. Comm'r of Alcohol & Tobacco Control*, 898 So. 2d 1244, 1256 (La. 2005) ("Where a new statute is worded differently from the preceding statute, the legislature is presumed to have intended to change the law").

and traditional habeas petitions seeking relief from being "in prison." The former belongs in the venue where the "conviction" was entered, and the latter belongs in the venue where the petitioner is "in prison." Once again here, therefore, Act 1780 draws a different path for actual innocence claims.[15]

8. Different Remedies for Traditional And Actual Innocence Habeas Claims

In the proceedings below, the prosecutor argued that allowing Echols' petition to proceed would lead to "absurd" results because in the habeas setting "the circuit court [only] has two options [for relief] grant a new trial or resentence," (RP 54), and neither of those options made "sense" when a "Defendant has completed his sentence." *Id*.

[15] This distinction is particularly noteworthy here because the circuit judge directly tied her reasoning to the fact that "Habeas Corpus literally means 'Bring The Prisoner Forth,'" (RT 4), so that traditional habeas relief required the jurisdiction of a court where the prisoner was held in order to "bring the prisoner forth" from that location. But in Act 1780, the Legislature expressly provided for something different with actual innocence claims under the habeas chapter, the jurisdiction of a court where the conviction was entered in order to address new technology challenges to the potential wrongfulness of that conviction.

But reading the "whole act" tells a different story. In Act 1780, the Legislature specifically provided for a number of additional remedies above and beyond the traditional remedies relied upon by the prosecutor. Thus, Arkansas Code Section 16-112-201 specifically provides for the courts to be able to effect the following relief under Act 1780: "to vacate and set aside the judgment, and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence ***or make other disposition as may be appropriate***." (Emphasis added). For such claims, the relief possibilities are much greater than those seen by the prosecutor through his traditional habeas glasses. Indeed, under the final statutory phrase highlighted above, the possibilities for achieving "justice" – like "exoneration" – are as wide open as might be needed to remedy the vexing problem of wrongful convictions.

At bottom, the question becomes why the Act 1780 Legislature would have created all of these textual and structural distinctions between traditional and actual innocence habeas claims if it otherwise intended for actual innocence claims to treated no differently than traditional habeas claims by the courts. Why did the General Assembly, which is presumed to know the content of Subchapter 1 of the Habeas Corpus Code, simply not use the "prisoner" terminology from that Subchapter in Act 1780 and instead use the "person convicted of a crime" terminology, if it intended to apply the "in prison" requirement of Subchapter 1 to

Subchapter 2? The answer is simple. The General Assembly must have had no such intention or it would certainly have undertaken the simple task of doing so. *See People v. Schutz*, 344 Ill. App. 3d 87, 799 N.E.2d 930 (2003).[16]

The crafting of Act 1780 to read as it does was an intentional legislative act. The critical six-word phrase "a person convicted of a crime" is used multiple times in Act 1780, and it also reappears in the 2005 amendments to that Act. There is no reason to believe that the Legislature did anything other than say what it meant with this phraseology. *Ark. Dep't of Correction v. Shults*, 2017 Ark. 300, 6–7, 529 S.W.3d 628, 632 (2017) ("We have repeatedly held that we will not read into a statute language that was not included by the legislature"). To the contrary, the remedial purpose of Act 1780 itself provides all the reason one might need to explain the use of this different phraseology in Subchapter 2. The "person convicted of a crime" language is broader than the "prisoner" language and, thus, applies to more potentially wrongfully convicted persons whose circumstances might be remedied

[16] As the *Schutz* court wrote in rejecting a similar argument against Illinois' post-conviction DNA testing statute: "[S]ection 116-3 contains no language limiting its availability to incarcerated defendants. If the legislature had intended section 116-3 to apply only to incarcerated defendants, it clearly could have done so. Section 116-3 simply does not contain the restriction the State wishes to impose on it."

through application of the Act. Indeed, using "a person convicted of a crime" as the standard covers everyone, including Echols). A complete solution! *See Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 698 (1995) ("The broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid.").

9. The Legislative History of Act 1780 Supports Echols' Petition

Act 1780 was enacted by the 83rd General Assembly, during its Regular Session in 2001. It was part of S.B. 4, which was approved on April 19, 2001 to address "Criminal Procedure - Post-Conviction Remedies - Exoneration Based Upon DNA And Other Scientific Evidence." It was titled, in relevant part, as "An Act To Provide For . . . "Post-Conviction Appeals Based On DNA And Other Scientific Evidence." It was subtitled as "An Act To Provide Methods For Preserving DNA And Other Scientific Evidence And To Provide A Remedy For Innocent Persons Who May Be Exonerated By This Evidence."

Section 1 of S.B. 4 stated: "The General Assembly finds that the mission of the criminal justice system is to punish the guilty and to exonerate the innocent. The General Assembly further finds that Arkansas laws and procedures should be changed in order to accommodate the advent of new technologies enhancing the ability to analyze scientific evidence." (Emphasis added). Section 3 of S.B. 4

"amended . . . Arkansas Code 16-112-103(a), concerning writ of habeas corpus" to provide for the granting of the writ to "any person . . . showing . . . probable cause to believe he is detained without lawful authority, or imprisoned when by law he is entitled to bail or who has alleged actual innocence of the offense or offenses for which the person was convicted." (Emphases added). Section 3 then further provided that "[t]he procedures for persons who allege actual innocence shall be in accordance with Sections 16-112-124 through 16-112-129." In those "procedures," the "persons" to pursue relief based upon "[n]ew scientific evidence" were individually identified as "a person convicted of a crime."[17]

The legislative history of Act 1780 amply confirms that the critical six-word phrase "a person convicted of a crime" was employed deliberately. And there is nothing in the legislative history to support the Circuit Court's overly restrictive interpretation of this language to mean something other than what it quite plainly says.

[17] In 2005, the General Assembly approved H.B. 2857 as Act 2250 to amend certain provisions of Act 1780 on matters not relevant to this appeal. Significantly, the amended statute retained the six word phrase "a person convicted of a crime" as the qualification for who could seek relief under the statute.

10. The Remedial Purposes of Act 780 Support Echols' Petition

It is hornbook law that remedial statutes are to be given a liberal construction. *See Chicago Mill & Lumber Co. v. Smith*, 228 Ark. 876, 310 S.W.2d 803 (1958). Act 1780 was expressly designed to be remedial.[18] Indeed, the Legislature specifically titled it as "An Act To Provide Methods For Preserving DNA And Other Scientific Evidence And To Provide A Remedy For Innocent Persons Who May Be Exonerated By This Evidence." (Emphasis added). A patent purpose to provide a remedy furthering the public interest in ferreting out and correcting wrongful convictions could hardly be clearer. Thus, Act 1780 is to be given a liberal construction in any interpretation of its provisions.

This appeal presents this Court with two alternative interpretations of Act 1780's pertinent text. Echols contends that the phrase "a person convicted of a crime" means just what it says. The State contends that the phrase should be interpreted as if it says "a prisoner convicted of a crime." Echols' contention is a

[18] One leading case has defined remedial statutes as those which "provide a remedy where the common law either provides no remedy or provides an imperfect or ineffective remedy." *Fumarelli v. Marsam Development, Inc.*, 703 N.E.2d 251, 255 (N.Y. 1998). That is exactly the situation here.

liberal (indeed literal) construction of this statutory language. The State's contention is a restrictive construction. The liberal construction must prevail in order to further "the [remedial] purpose to be attained" by the statute.[19].

11. The Avoidance of Absurd Results

Courts are to avoid statutory interpretations which lead to "absurd consequences." *Reynolds v. Holland*, 35 Ark. 56 (1879). The circuit court's restrictive interpretation of Act 1780, however, leads inexorably to just such consequences with respect to the purpose of the Act. Although the Act says that "a person convicted of a crime" may invoke its provisions, the Circuit Court effectively rewrote this statutory language to provide that only "some persons" convicted of a crime may do so – persons who are "in prison." The resulting distinctions between those who can and those who cannot move for Act 1780 relief are arbitrary and irrational in light of the statute's broad remedial purpose.

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[19] *See McDaniel v. Herrn*, 120 Ark. 288, 179 S.W. 337, 338 (1915) ("It is a well-established canon of interpretation that the object to be attained and the purpose of the Legislature are to be kept in mind in construing a statute. If the language used in a statute is susceptible of more than one construction, then the meaning must be given to it which is in harmony with the purpose to be attained rather than a construction which would tend to defeat it.").

For example, the Circuit Court's ruling carves an entire class of convicted persons – those who were never sentenced to prison – out from under the statute's reach. There is no reason to believe that the problem of wrongful convictions is any less evident in the case of leniently sentenced persons than it is in the case of those sentenced to prison. Yet, under the Circuit Court's interpretation, the actually innocent persons in this class cannot use the procedures of Act 1780 to prove it. There is no indication that Act 1780 was intended to draw such an irrational distinction, artificially limiting the statute's purpose of exonerating the innocent.

Similarly, if "imprisonment" is the qualification to be a movant under Act 1780, then the variabilities inherently associated with the sentencing process can become outcome determinative in an arbitrary manner. Imagine two similarly situated persons (co-defendants) both wrongfully convicted of the same crime. For reasons immaterial to guilt or innocence, these individuals receive different sentences: one shorter than the other. Time passes and new technology is developed for scientific testing of evidence in the case which can potentially prove the innocence of both men, exonerating them completely. But this technology becomes available only after the individual with the shorter sentence has completed serving his time. Under the circuit court's ruling, one of these individuals will be able to move for actual innocence relief under Act 1780 and the other will not be. There is

no indication that Act 1780 was intended to allow such fortuitous sentencing consequences to control its application, to the limitation of its statutory purpose.[20]

Finally, if staying in prison becomes the only way a person can benefit from the possibility of new technology scientific testing of case evidence to establish actual innocence, then a wrongfully convicted person with an opportunity to be released from prison will have to decide if bypassing that opportunity is more in line with his/her long-term interests (exoneration) than being released is. In this case, for example, if Echols knew in August of 2011 that his being released pursuant to an *Alford* plea was going to disqualify him from ever seeking Act 1780 relief to establish his actual innocence, then he might have passed on that plea to preserve the possibility of being exonerated by science in the future.[21] Assuming *arguendo*

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[20] Sentencing disparities are not the only fortuities that can create an uneven (and, thus, unjust) application of Act 1780 against different persons. Parole decisions, clemency petitions, compassionate relief applications and sentence commutations can easily effect similar distortions for those seeking Act 1780 relief if being "in prison" is a prerequisite for such relief**.**

[21] This is not a fanciful point. There are many indications of wrongfully convicted persons declining *Alford* pleas and other plea offers featuring prison-shortening provisions in favor of continuing their quests for exoneration. Indeed,

that Echols faced that choice and opted to remain in prison to be qualified to file the same petition he filed below, what would have happened? Echols would not have been able to pursue his petition — ***because he would have been executed during the intervening waiting period***.[22] There is no indication that Act 1780 was intended to put the burden of such a "life or death gamble" on the wrongfully convicted.

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the "West Of Memphis" film about this case documents Echols' co-defendant Jason Baldwin's deep struggles on this very point: whether to accept his *Alford* plea which was required by the State in order for Echols and Misskelley to accept their pleas (because the State's plea offers were "wired" together) or to stand on his quest for a declaration of actual innocence. Baldwin ultimately agreed to accept the *Alford* plea in order to save Echols' life and to be able to continue the fight to clear his name from the outside.

[22] Almost exactly in the middle of the time period between Echols' 2011 *Alford* plea and his 2022 Act 1780 petition, in April 2017, Arkansas executed Ledell Lee, Jack Jones, Marcel Williams and Kenneth Williams. *See* "Arkansas Marks Five Years Since End Of 2017 Execution Spree," *Death Penalty Information Center* (April 27, 2022). Echols was on death row with these men, and Echols' execution date was in the midst of their dates which triggered these executions.

All of these absurd results disappear if the plain meaning of the six-word phrase "a person convicted of a crime" chosen by the Legislature guides the application of Act 1780 rather than the restrictive misinterpreted alternative endorsed below.

12. The Public Interest Supports Echols' Petition

In enacting Act 1780, "[t]he General Assembly" found that the mission of the criminal justice system is ***to punish the guilty and*** to exonerate the innocence," not just to exonerate those wrongfully convicted. (Emphasis added). The Supreme Court has recognized this dual purpose as well. "DNA testing has an unparalleled ability both to exonerate the wrongly convicted ***and to identify the guilty***." *Dist. Attorney's Office for Third Judicial List. v. Osborne*, 557 U.S. at 55 (emphasis added). This public interest is analytically linked to the first, of course. To the extent that new technology DNA testing results do not point toward a wrongfully convicted person, then those same results by necessary implication must point toward someone else. That someone else may be the real perpetrator of the crimes at issue. After all, if innocent persons have been wrongfully convicted, then the guilty persons have obviously not been convicted. Take this case for example. If, as they have steadfastly maintained for almost three decades now, the WM3 did not commit these murders, then the person(s) who did so remain in the community – murderers at large, putting us all at risk.

The extent of Act 1780's ability to work as a vehicle for furthering this additional public interest of identifying (and then punishing) the guilty is a direct function of how many persons are able to file motions invoking the statute's provisions to initiate new technology scientific testing of evidence. The greater the number of movants for such testing, the greater the number of opportunities for that testing to identify real guilty parties who have escaped punishment to date. It is a numbers game. Accordingly, to further that statutory purpose, an interpretation of the statute which increases the number of potential movants should be favored over one which reduces the number of potential movants.[23]

CONCLUSION

Legislators make the law, not judges. Yet here the Circuit Court's drastic recreation of the terms that the General Assembly expressly used in Act 1780 turned this allocation of power on its head. Under that interpretation, innocent individuals wrongfully convicted of crimes in Arkansas with new DNA technology available that might exonerate them cannot use the Arkansas courts to access that DNA testing

[23] It is also worth noting that crime victims and their families are potential third-party beneficiaries of successful efforts to identify the real perpetrators behind wrongfully convicted cases. Anything that can be done to aid their suffering is a worthy statutory goal too, of course.

unless they are in prison. Innocent individuals wrongfully convicted who either completed service of their sentences or avoided sentences of imprisonment in the first place are left wholly without a remedy. They may be innocent, but in the eyes of the Arkansas criminal justice system they are "forever damned."

Innocence is a state of being. It is not a state of location, in prison or not. One is either "free from guilt" or not. There is no in between. It is a binary determination. Why would anyone not want to encourage that determination to be made? Arkansas is "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . . guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). But "guilt" may well "escape" and "innocence" may well "suffer" under the restrictive statutory interpretation endorsed below, despite the fact that the Arkansas Legislature was admittedly trying to reduce both risks with its passage of Act 1780.

REQUEST FOR RELIEF

The erroneous jurisdictional decision below should be reversed and this case should be remanded for plenary consideration of the substantive merits of Echols' petition to conduct the new DNA testing he requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kerri E. Kobbeman, hereby certify that, on January 9, 2023, I electronically filed this Brief using the Court's electronic filing system, which will automatically serve all Counsel of Record. On approval by the clerk's office, I will serve a paper copy of the Brief via U.S. Mail on the following:

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CERTIFICATE OF COMPLIANCE

I, Kerri E. Kobbeman, hereby certify that this Brief complies with Rule 4-1 of the Rules of the Supreme Court and Court of Appeals, the Electronic Pilot Project Rules, Administrative Order No. 19 regarding the style of briefs and the redaction of any confidential information, and Administrative Order No. 21. The PDF document(s) are identical to the corresponding parts of the paper document(s) from which they were created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses with an antivirus program, the PDF documents are free of computer viruses.

This Brief also complies with the word-count limitations in Rule 4-2(d) of the Rules of the Supreme Court and Court of Appeals, because it contains 7,748 words, excluding the cover, table of contents, points on appeal, table of authorities, certificate of service, and this certificate of compliance.

Finally, this Brief also complies with Rule 21-9 and does not contain any hyperlinks to external papers or websites.

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