IN THE CIRCUIT COURT OF CRITTENDEN COUNTY
FIRST DIVISION

STATE OF ARKANSAS PLAINTIFF/RESPONDENT

v. No. 18CR-93-516

DAMIEN ECHOLS DEFENDANT/PETITIONER

REPLY MEMORANDUM IN SUPPORT OF PETITION TO CONDUCT ADDITIONAL DNA TESTING

Relying on erroneous facts, hiding behind strained theories of law, and ironically citing evidentiary preservation obligations the Prosecuting Attorney himself had personally disclaimed, the State has now finally indicated - for the first time after years of discussion - that it "cannot agree to the Court granting [Echols'] request" to test certain evidence in this case with new DNA technology. Response To Act 1780 Petition ("State Response") at 1. Now that it is clear that the current Prosecuting Attorney has no intention of meeting the commitments made by the prior Prosecuting Attorney, at the time of the Alford plea and thereafter, to cooperate with the defendants' efforts to develop further evidence of their innocence, it is up to this Court to afford the fairness and due process that justice requires on the instant Petition.[1]

ARGUMENT

1. The Place Of Conviction: The Prosecuting Attorney argues that the Petition contains a "fatal" error because it was not filed "in the court in which the conviction was entered." State Response at 2. In support of this argument, the Prosecuting Attorney asserts that the conviction "was entered in Craighead County." Id. This is simply false. As any review of the case record

[1] See Petition To Conduct Additional DNA Testing ("Petition").

would reveal, the 2011 Alford plea proceedings resulted in the Craighead County convictions being vacated and replaced with the Alford plea convictions in Crittenden County. The State's opening argument, thus, falls completely flat.

2. The Completion Of Echols' Sentence: The Prosecuting Attorney next argues that "[t]o allow a non-prisoner to seek Act 1780 relief would make the habeas corpus statute absurd." State Response at 2-3. The Prosecuting Attorney sees absurdity because "[w]hen a defendant has completed their sentence, it makes no sense to grant them a new trial." Id. at 3. This 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] may 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." Fiswick v. United States, 329 U.S. 211, 222 (1946); accord, Carafas v. LaVallee, 391 U.S. 234, 237-238 (1968)(cataloging disabilities and burdens). Recognition of this fundamental reality is undoubtedly why the Arkansas Legislature worded the key statute at issue herein so that it is triggered 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." Ark Code Section 16-112-202 (emphasis added). The only truly "absurd" result here would be an interpretation of this plain statutory language that prevented Echols from pursuing the relief he seeks.

3. The Timeliness Of The Petition: The Prosecuting Attorney relies upon a statutory presumption that deems this petition "presumptively untimely [because it was] "filed more than

36 months after conviction." State Response at 3. But it should be obvious to any reader of Echols' Petition that is is premised on statutory grounds that allow that "presumption [to] be rebutted upon a showing [t]hat a new method of technology that is substantially more probative than prior testing is available." Ark. Code Ann. Section 16-112-202(10)(B)(iv). The "new method of technology" detailed in Echols' Petition makes this timeliness argument a complete red herring.

4. The Scientific Support For The New Technology: The Prosecuting Attorney seeks to convert the statutory test described above that the "new method of technology . . . is substantially more probative than prior testing" into two new sub-tests: whether the new technology "is a generally accepted scientific testing method" and whether the new technology "violates the requirement that physical evidence in violent-offense cases must be preserved." State Response at 4. He shifts the goal posts in this regard, of course, because the new M-Vac technology so clearly meets the statutory test. Indeed, the very purpose of this new technology is to have its collection system extract DNA that would not be collected by prior DNA technology. Obviously, new DNA evidence to test is "substantially more probative" than none.

A. Generally Accepted Scientific Testing Method: The Prosecuting Attorney contends that the instant petition should be denied because Echols has not established that "M-Vac uses scientifically sound methods consistent with accepted forensic practices." State Response at 5. To make this point, the State has to completely ignore the landmark research study that the Federal Bureau of Investigation ("FBI") conducted on the M-Vac technology, as reported on page 9 of Echols' Petition. Amazingly, despite the FBI's status as the top forensic agency and laboratory in the country, the State's Response nowhere even mentions the FBI's analysis of this new technology. This Court deserves better than that and, accordingly, we provide the online link to the FBI's research study for the Court's own review:

https://onlinelibrary.wiley.com/doi/full/10.1111/1556-4029.14508

In addition to ignoring the FBI, the State's Response also fails to utter a single word about the M-Vac laboratory accreditation information recited in Echols' Petition. See Petition at 4 n.1. Tellingly, that information reveals that the M-Vac laboratory is accredited to the same level of forensic standards - ISO/IEC 17025:2017 - as the Arkansas State Crime Laboratory.[2] This accreditation information also indicates that the A2LA Certification Association has assessed the "the laboratory's conformance to the FBI Quality Assurance Standards." See https://puregoldforensics.com/accreditation/. Surely, the quality of these laboratories and certifications says something meaningful about their endorsement of the M-Vac technology.

The Prosecuting Attorney advises that his "general caselaw research reveals only two cases in which courts mentioned M-Vac." State Response at 5. Even if accurate,[3] this "case count" is hardly surprising in the case of a new technology, precisely because of its newness. But one of the cases cited by the State is actually quite instructive to the contrary of its position herein. Thus, while the Prosecuting Attorney argues that State v. Wall, 460 P.3d 1058, 1074-1076 (Utah 2020) does not "discuss[] whether M-Vac uses scientifically sound methods consistent with forensic practices," State Response at 5, the entire point of the relevant portion of that appellate court's decision was stated as follows:

> Wall next argues that the district court should have excluded the DNA evidence that was extracted from Uta's pillowcase because "the State failed to make the threshold showing that [the forensic laboratory's] methodology was reliable or reliably applied" under rule 702(b) of the Utah Rules of Evidence. Rule 702(b) provides that "[s]cientific, technical or other specialized knowledge may serve as the basis for expert

[2] Significantly, this is also the same level of certification as Virginia's Bode Technology Laboratory, which all parties previously agreed upon as appropriate for earlier DNA testing in the case.
[3] Through our general research to date, we have been informed of unreported cases in Maryland, Florida, Georgia, California, Utah, Colorado, Washington and Texas that have all accepted M-Vac processed evidence.

> testimony only if there is a threshold showing that the princi-
> ples or methods that are underlying the testimony" are "reliable," "based
> upon sufficient facts or data," and "have been reliably applied to the facts." Utah
> R. Evid. 702(b).

State v. Wall, supra. Critically, "the DNA evidence that was extracted from Uta's pillowcase," was extracted using the M-Vac DNA collection system. Id. at 1075. The scientific reliability of the M-Vac system was, therefore, at the very heart of the appeal, which ultimately affirmed the technology's use - and the defendant's conviction.[4]

Another instructive aspect from the State v. Wall decision is the fact that it was the state law enforcement agency arguing in favor of the admissibility of the M-Vac DNA processed evidence. It means something when the state endorses such technology, as it has in a number of cases. Just as it means something when the FBI endorses such technology. Indeed, our "general research" has failed to uncover a single case where a state law enforcement agency has deemed the M-Vac technology unreliable. In this regard, it would be interesting to hear what Kermitt Channell, the Director of the Arkansas State Crime Laboratory, might have to say about M-Vac technology, if the Court determines that a hearing is necessary to evaluate its scientific propriety.

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[4] The Prosecuting Attorney also cites Davis v. State, 366 Ark. 401, 402-04 (2006) in support of his argument. See State Response at 5 n.18. But Davis involved a scientific claim that was on its face completely ridiculous, and thus is completely inapposite here:

> Here, appellant states in his brief to this court that . . . [t]he victims were virgins after the date of the alleged (rapes). Citing only 'forensic DNA testing or other tests which have become available through the advances in technology, 'appellant has failed to reveal in his pleadings a generally accepted scientific method that can prove that the victims were virgins after July 12, 1997, based on blood, tissue, or other samples taken today, nearly a decade later. . . . This court will not delve into the realm of pure science fiction to allow appellant's request to proceed pursuant to Act 1780.

Id. (emphasis added).

B. The Preservation Of Physical Evidence: Having been educated by Echols' counsel on the State's obligation to preserve evidence for future DNA testing, the Prosecuting Attorney now suggests that M-Vac "isn't a viable testing method" because "it cleans physical evidence through its wet vacuum collection process [which] -rather than preserving physical evidence- is a one-shot deal that forever alters it." State Response at 6. This argument reflects misunderstandings of both the preservation obligation generally and the possibilities of M-Vac testing in this case specifically.

It is a matter of scientific fact, of course, that any testing of evidence for DNA alters the physical evidence to some degree. For example, the very point of the old technology act of wet swabbing evidence for potential DNA contained in fluids or contact touch points is to remove (or recover) that DNA from the evidence for testing in the laboratory. Thus, after such swabbing, the evidence has necessarily been altered by the removal of that DNA from it. The Arkansas DNA statute's preservation obligation has to allow for this degree of evidentiary alteration through the testing process, or else there would never be ANY DNA testing ever turning the statute into a wholly meaningless enactment.

Fortunately, this case does not require the Court to calibrate too precisely what degree of evidentiary alteration might be effected by the M-Vac technology on the evidentiary items proposed for testing. That is because this case contains six separate ligatures, not just one, for potential testing. Two ligatures were used on each of the child victims: one to tie each victim's right ankle and right wrist together behind their backs and one to tie each victim's left ankle and left wrist together in the same way. Three victims with two ligatures each provides a total of six pieces of this type of evidence for analysis. Because the facts of this case present no reason to suggest that the killer(s) handled the ligatures associated with one victim any differently than the

others, each of the ligatures should present equal potential evidentiary value for M-Vac processing. Accordingly, this Court can order M-Vac testing of any subset it chooses of this ligatures evidence and still fully ensure the preservation of such ligature evidence for the future as well.[5]

5. The Impact Of The Proposed Testing's New Evidence: The Prosecuting Attorney's final argument is that "the jury was presented with "substantial evidence of . . . guilt" and that "given this trial evidence, another person's DNA at the crime scene wouldn't prove Defendant innocent." State Response at 7-9. This position is a repetition of the same mistake that the State made in the last hearing of Echols' case before the Arkansas Supreme Court. There the State argued that, under the Arkansas statutes, "the DNA test test results, standing alone, had to be considered against 'all other evidence of guilt' to determine whether Echols was innocent." Echols v. State, 2010 Ark. 417, at 12 (2010). The Supreme Court unanimously rejected this argument because it "read additional language into the statute," which otherwise plainly required the DNA test results to be considered "with all other evidence in the case, regardless of whether the evidence was introduced at trial." Id. (emphasis in original).

The Supreme Court also noted the following about earlier DNA testing of evidence "conducted between December 2005 and September 2007":

> The results of the testing established that neither Echols, Baldwin, nor Misskelley was the source of any of the biological material tested, which included a foreign allele from a penile swap of victim Steven Branch; a hair from the ligature used to bind victim Michael Moore; and a hair recovered from a tree stump, near where the bodies were recovered. In addition, the DNA material from the hair found in the ligature used to

[5] This multiplicity of the ligature evidence moots the "due process concerns" articulated by the Prosecuting Attorney with respect to how Echols' proposed testing might affect the rights of his co-defendants: Jason Baldwin and Jesse Misskelley. State's Response at 6-7. In this respect, it is also worth noting - although the State refuses to do so - that Baldwin and Misskelley expressly agreed to the M-Vac DNA testing of the evidence requested in Echols' Petition.

> bind Moore was found to be consistent with Terry Hobbs, Branch's stepfather. The hair found on the tree stump was consistent with the DNA of David Jacoby, a friend of Terry Hobbs.

Id. at 3.

Significantly, after this Supreme Court decision, the case was remanded to the Circuit Court for Crittenden County for further proceedings on the defendants' DNA motions. In those proceedings, the State and the defense agreed to additional DNA testing of certain case evidence, which Judge Laser promptly ordered. Two public pleadings conveying the results of that additional testing were filed in the Circuit Court. As with the earlier testing considered by the Supreme Court, both sets of results excluded Echols, Baldwin and Misskelley as the source of the DNA tested. Consistent with the Supreme Court's guidance, which is the law of the case in this proceeding, ALL of this exculpatory evidence[6] needs to be considered by the Court in evaluating the statutory test for relief under the Arkansas DNA statute, NOT just the evidence of "guilt" presented by the prosecution at trial.

As the Arkansas Supreme Court recognized in one of the cases cited in the State's Response:

> The prerequisite for establishing a prima facie claim under Act 1780 includes demonstrating the existence of evidence or scientific methods of testing that had not been available at the time of trial or could not have been previously discovered through the exercise of due diligence. Ark. Code Ann. § 16-112-201(a)(1)(2). Furthermore,the petitioner is required to demonstrate that the identity of the perpetrator was at issue during the investigation and prosecution of the offense being challenged. Ark. Code Ann. § 16-112-202(7). Finally, the petitioner must also show that the proposed testing of the specific evidence may produce material evidence that would raise a reasonable probability that the person making a motion

[6] The exculpatory evidence in the record is not limited to the DNA testing results discussed in the text above. As the Supreme Court recognized, "Echols submitted a total of fifty-seven exhibits in support of his motion," id. at 4, n.2, many of which addressed non-DNA evidence of his innocence as well.

> under this section did not commit the offense. Ark. Code Ann. § 16-112- 202(8)(B).

McClinton v. State, 2017 Ark. 360, at 5 (cited in State Response at 7, n.25)(footnotes omitted). Upon any fair appraisal, there can be little doubt that Echols' Petition satisfies these prerequisites for establishing a "prima facie claim" to relief.

The Prosecuting Attorney reveals the unfairness of his contrary claim, though, when he mischaracterizes Echols' proposed testing as merely seeking to establish "another person's DNA at the crime scene," State Response at 8 (emphasis added), as if we were asking for DNA testing of a random cigarette package that might have blown into the crime scene geography from any-where. Nothing could be further from the truth. The ligatures Echols proposes for testing herein were, in fact, an intimate part of the crime itself. The killer(s) used the ligatures to bind the child victims' wrists and ankles together, behind their backs, in hog-tied fashion. Looking at the crime scene photos in this case, or viewing the multiple documentaries about it, amply illustrates how the ligatures are front-and-center in the horror created by the killer(s). Searching for new and previously unavailable DNA on the ligatures, therefore, is very much a direct search for the killer(s) DNA; the DNA of the individual(s) who removed the laces from the victims' sneakers, who wrapped those laces around the victims' ankles and wrists and who then tied tight knots in those laces so that they would stay forever bound.

A simple hypothetical will illustrate the difference. On one hand, we have a gun that is found at a murder crime scene where the victim was not shot. On the other hand, we have a gun that is found at a murder crime scene where the victim was shot. In the first situation, DNA from the gun might be characterizable as being simply "another person's DNA at the crime scene." But in the second situation, DNA from the gun must be more logically characterizable as being the DNA of the killer(s). The ligatures fall squarely into the second situation because we know

that the killer(s) used them in the commission of these crimes. Why is it so hard for the Prosecuting Attorney to see - or, perhaps, to admit - that Echols' Petition presents a real new technology opportunity to obtain the "biological fingerprints" of the killer(s), whoever that might be?

CONCLUSION

The Prosecuting Attorney nominally recognizes that he "is a minister of justice and shouldn't oppose a post-trial motion without a reasonable basis." State Response at 9. But his concluding points in support of that premise demonstrate nothing but the unreasonableness of his position here. The fact that the "Defendant was imprisoned; now, he's free," State Response at 9, is wholly unrelated to the question of Echols' guilt or innocence. It is a pure non sequitur. Likewise, the claim that "the proposed testing would forever alter the physical evidence," id. at 9-10, is simply false. As discussed above, appropriately defining the parameters of the proposed testing moots this issue entirely. Finally, the statutory "change[]" making the DNA testing law "more stringent" is a sound bite without substance. More stringent or not, the "new standard" - requir[ing] petitioner to advance a theory of defense that'd establish actual innocence," State Response at 10, n.37 - would certainly be satisfied by DNA results identifying a third-party perpetrator as the individual who bound the child victims with their sneaker-lace ligatures on the night they were murdered. No credible "minister of justice" would even think of ignoring the power of such potential evidence.

"Arkansas laws and procedures [were] changed in order to accommodate the advent of new technologies enhancing the ability to analyze new scientific evidence" in order to further "the mission of the criminal justice system . . . to punish the guilty and to exonerate the innocent." Echols v. State, supra at 4. The Prosecuting Attorney wants to go back in time before these laudable changes were made. This Court, to the contrary, must remain forward-looking.

For the foregoing reasons, as well as those asserted in Echols' Petition, this Court should grant Echols' Petition and enter an Order detailing the circumstances under which the M-Vac processing of some of the ligature evidence in the case can go forward. Alternatively, if the Court has any concerns, it should schedule a hearing to determine the merits of Echols' request to be allowed to conduct additional DNA testing of ligature evidence in his case with this new and previously unavailable DNA technology.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patrick Benca, do hereby certify that this petition has been filed via Eflex toensure proper delivery to the appropriate parties on February 15, 2022.

/s/ Patrick Benca
Patrick J. Benca
February 15, 2022