No. CR-22-670

IN THE ARKANSAS SUPREME COURT

DAMIEN ECHOLS,

Appellant,

v.

STATE OF ARKANSAS,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS

Honorable Tonya Alexander, Circuit Judge

REPLY BRIEF OF APPELLANT DAMIEN ECHOLS

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MISCELLANEOUS

The State's responsive brief[1] raises three new issues on appeal in an effort to distract the Court from the one issue that is the proper focus of this appeal: whether "a person convicted of a crime" is entitled to file an Act 1780 petition (as the Act itself plainly provides).

Of the new issues raised, Point 1 was previously decided against the State when this Court denied its motion to dismiss this appeal. *Echols v. State*, 18 CR-93-516, Formal Order, (Ark. Apr. 6, 2023). Another new issue, Point 4 on appeal, is easily cured at whatever new circuit court proceedings follow this appeal (as it would have been had the State objected). And the last of these new issues, Point 3 on appeal, is hardly the simple reaffirmance of a prior holding by this Court, as suggested by the State, but rather involves a complicated issue expressly left "open" by this Court. These new issues – which need not be considered by this Court[2] – are,

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1 *See* Appellee's Brief ("State Br.") at 3.

2 It is hornbook law that such belatedly raised issues need not be considered by the Court. "As we have said on numerous occasions, we will not consider an issue raised for the first time on appeal." *Sutter v. Payne*, 337 Ark. 330, 334, 989 S.W.2d 887 (1999).

thus, no panacea for the State. It cannot avoid addressing the inescapable contradictions between its interpretation of Act 1780 and that Act's six plain words providing that its provisions may be invoked by "a person convicted of a crime."

ARGUMENT

Act 1780 was expressly enacted "to provide a remedy for innocent persons who may be exonerated by [DNA] evidence."[3] To that end, the Act "expressly allowed 'a person convicted of a crime' to 'make a motion for the performance of . . . forensic DNA testing . . . which may become available through advances in technology to demonstrate the person's actual innocence.'" Echols Br. at 10-11. The State's position in this case appears designed to undermine the availability of that remedy in every way.

1. Act 1780 Says What It Means And Means What It Says

This Court has repeatedly emphasized that the primary source for statutory construction is the language of the statute itself. Thus, the Court's obligation is to "construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language." Echols Br. at 23. Critically, "if the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion to resort to rules of statutory interpretation." *Id.* at 23-24. This language comes from this Court's decision on Echols' 2010 appeal, which

[3] Brief Of Appellant Damien Echols ("Echols Br.") at 10 (citing authorities).

provided multiple object lessons in statutory interpretation for the State. *See Echols v. State*, 2010 Ark. 417, 373 S.W.3d 892. Unfortunately, the State failed to learn those lessons.

The State uses most of its Brief to recount secondary sources of statutory interpretation, such as the history of Arkansas's habeas corpus statute (State Br. at 14), the location of Act 1780 within the habeas corpus portion of the Arkansas Code (State Br. at 15), and the statutory construction principle *ejusdem generis* (State Br. at 21). The State nowhere applies the most fundamental and determinative rule of statutory construction: the plain meaning of the six-word statutory phrase "a person convicted of a crime." The interpretation of such clear statutory language begins **and ends** with that plain meaning. *Echols v. State*, 2010 Ark. 417, 373 S.W.3d 892, 897-98. The State erroneously skips over the starting place for questions of statutory interpretation, in favor of secondary sources of interpretation that simply never come into play here because the meaning of these six words is as plain as could be. *See* Echols Br. at 23-24 (citing authorities).

Surprisingly, the State wholly ignores the guidance on statutory interpretation from this Court for this same statute in its decision on Echols' 2010 appeal.[4] This is undoubtedly because the State's interpretive analysis is eerily similar to that which

it urged on that 2010 appeal. There, the State argued that the statutory language "all other evidence in the case" meant "all other evidence of guilt." *Echols*, 2010 Ark. 417, 373 S.W.3d at 900-01. This Court rejected the State's restrictive interpretation – which "read additional language into the statute" – because "the statute's plain language dictated that 'all other evidence' is to be considered." *Id*. The Court found that "all" meant "all," in other words. Similarly, the Court here should find that "a person convicted of a crime" means exactly what it says, "person" and not "prisoner."

Without offering any alternative meaning for what "a person convicted of a crime" means, because there is none, the State argues that this phrase was not "meant to define the universe of eligible Act 1780 petitioners." State Br. at 17. But that is exactly what the plain meaning of this language does. How else can one define the phraseology that "a person convicted of a crime" may "make a motion" under Act 1780?[5] If it does not define those eligible to seek the remedy under Act 1780, what

[5] The State's attempt to explain why this language does not define those qualified to file Act 1780 motions is nothing short of circular gibberish. "Read as a whole, Section 201 instead establishes the procedural requirements that Act 1780 petitioners must meet, including where to file their petitions, the relief they must seek, and the claims they must make under penalty of perjury to verify their petitions." State

purpose could this language conceivably play in the statute? The State has no answer, effectively reading the phrase out of the statute (in violation of another principle of interpretive guidance given by this Court in *Echols*).[6]

2. There Is No Territorial Jurisdictional Impediment

The State argues that "[t]his Court lacks jurisdiction because Echols filed his petition in the wrong court." State Br. at 10. This argument was already briefed for the Court on the State's motion to dismiss this appeal. As the State acknowledges "[t]his Court declined to dismiss for lack of jurisdiction." *Id*. The law of the case precludes the State from rearguing this point. *Kemp v. State*, 335 Ark. 139, 142, 983 S.W.2d 383, 385 (1998) (the doctrine of the law of the case prevents an issue already decided from being raised subsequently); *Fairchild v. Norris*, 317 Ark. 166, 170, 876 S.W.2d 588 (1994) (The court adheres to this doctrine to preserve consistency and to avoid reconsideration of matters previously decided). There is no material

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Br. at 17. This only begs the question though of "who" those "Act 1780 petitioners" are. The plain language "a person convicted of a crime" clearly and directly answers that question. "Reading the statute as a whole" requires including these six words (and their plain meaning), not pretending they do not exist.

[6] 2010 Ark. 417, 373 S.W.3d at 899 (declining to interpret statutory language to render it "meaningless").

variation in the State's brief from the facts and law presented in its Motion to Dismiss. The State is merely rearguing the same point this Court previously decided against it. That decision controls.

If, for some reason, this Court entertains anew the State's jurisdiction argument, Echols incorporates his Opposition to the State's motion to dismiss filed March 1, 2023. As that opposition established, on both the facts and the law, there is no warrant for the dismissal of Echols' Act 1780 petition on jurisdictional grounds.

3. An *Alford* Plea Is An Accommodation Not An Admission

In an argument raised for the first time in its opposition brief on appeal, the State contends that the decision below can be affirmed because "this Court's precedents foreclose relief under Act 1780 to challenge a guilty plea." State Br. at 10. This point is misleadingly phrased as dispositive by the State. In fact, there is no prior "precedent[] foreclos[ing]" such relief. To the contrary, as the State elsewhere reluctantly admits, this Court has expressly left open the question of "whether entering an *Alford* plea of guilty . . . wherein a defendant maintains his innocence, affords a defendant the opportunity to later challenge the judgment on the grounds of actual innocence." State Br. at 25 (citing *Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 n.2 (2006)).

The non-*Alford* plea precedents the State relies on turn on the interplay of two separate points: 1) that a "petitioner seeking testing under Act 1780 must present a

prima facie case that identity was an issue at trial," and 2) that "when a defendant enters a plea of guilty" and "admit[s] that he committed the offense" then "identity is [no longer] in question for purposes of the Act." State Br. at 24 (citations omitted). It is on the second of these points that the State's analysis necessarily falters in the unique circumstances of an *Alford* plea, where the required linkage between an admission and identity is missing.

As the Court recognized in *North Carolina v. Alford*, 400 U.S. 25 (1970) the *Alford* plea is an accommodation designed to allow the parties and the court to bring an end to a criminal case even while the defendant maintains his innocence of the charges:

> while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

400 U.S. at 37. It is not an "admission of guilt" that triggers the elimination of "identity" in the case, as required by the State's precedents.

Consistent with *Alford*'s reasoning, at his *Alford* plea hearing, Echols stated: "Your Honor, I am innocent of these charges, but I'm entering an *Alford* guilty plea today based on the advice of my counsel and my understanding that it's in my best

interest to do so, given the entire record." (RP 145). This is not an "admission of guilt." It is the exact opposite.

The State's contention that Echols' Act 1780 petition should be denied because "identity" is not an issue is laughable. Since the day the murdered children were discovered submerged in water in the Robin Hood Hills, the seminal issue in the case has been "identity." Who killed those children? Indeed, Echols' Act 1780 petition is part of his continuing quest to answer that question by using new scientific technology to test targeted case evidence from the crime scene for DNA that might further exclude him and more precisely identify another as the perpetrator of these crimes.[7] This is precisely what the new scientific technology testing provisions in Act 1780 are designed to foster.

At the time of this Court's last decision in this case, as a result of post-trial DNA testing undertaken before then, the Court was able to recite that "it is undisputed that the [DNA testing] results conclusively excluded Echols, Baldwin and Misskelley as the source of the DNA tested." *Echols*, *supra* at 899. The Court then,

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[7] The State snipes that Echols' petition is an effort to "recenter the limelight on [him as a] freed felon[]." State Br. at 7. Nothing could be further from the truth. The timing of Echols' petition was driven by development and availability of new MVac DNA testing technology, not the State's hypothesized interests.

over the State's ill-founded statutory interpretation objections, remanded the case to the circuit court for proper consideration of additional DNA testing and an evidentiary hearing. *Id*. at 900-02. Additional DNA testing on "new hair evidence" from the crime scene again "exclude[d] Echols, Baldwin or Misskelley as the source,"[8] while revealing inter alia mitochondrial DNA from an unidentified third-party male source.

Significantly, in this regard, the State's brief nowhere references these factual underpinnings of the Court's 2010 opinion and its aftermath. Yet, if the past is prologue, there is every reason to believe that new forensic DNA testing technology will yield additional information pertinent *to the identity issue in this case*. Echols is not some abusive litigant "unduly expend[ing] judicial resources with endless requests for further DNA testing," as the State suggests. State Br. at 26. But he is a persistent searcher for the truth surrounding these crimes: a truth that may establish his innocence, a truth that may identify the real guilty party and a truth that may aid

[8] Damien Echols' Supplemental DNA Testing Status Report at 1-2 (2011).

the families of the victims with certainty as to what really transpired to their loved ones. Those are all sound public interest goals furthered by Act 1780. Aren't they?[9]

4. The State Waived Its Technical Objection To Verification

In a final attempt to convince this Court to dispense with this appeal without addressing its merits, the State for the first time contends that "this Court can simply affirm the circuit court's denial of relief" because "Echols' petition does not contain

[9] On the 2010 appeal in this Court, the State articulated its view that wrongful convictions are not a real concern "due to [its] confidence that the Arkansas criminal-justice system does not convict the innocent." *Echols*, *supra* at 899. This Court appropriately rejected that position as "absurd." *Id.* Its absurdity becomes more evident with each passing day's news. *See generally* Siegelman and Bentley, We oversaw executions as governor. We regret it," Op-Ed, *The Washington Post* (May 24, 2023) ("According to the Death Penalty Information Center, since 1976, nationwide, 1 person on death row has been exonerated for every 8.3 executions. That means we have been getting it wrong about 12 percent of the time."); "Man Released After Overturned Conviction," p. A3, *The Wall Street Journal* (May 24, 2023) (man "released from prison after serving more than 20 years for a murder that a court found he didn't commit").

any sort of verification or supporting affidavit." State Br. at 26-27. The State recognizes, though, that the plain language of Ark. Code Ann. § 16-112-203 (c) provides that a petition be "[v]erified by the petitioner *or signed by the petitioner's attorney*." State Br. at 27 n.4 (emphasis added). Echols' petition was signed by his attorney. (RP 38 & 51). Thus, once again, the State seeks to avoid the plain language of the statute in order to prop up the alternative result it desires.

Moreover, the record reveals that it would have been obvious to the prosecutor in the circuit court that Echols' petition was not signed by him personally. If, contrary to the plain statutory language quoted above, that prosecutor believed that Echols' petition was defective in that regard, then he could have – and should have – raised that objection below when the issue could have been easily corrected. The State's failure to do so plainly waived any objection to this technical issue.[10]

[10] *See Barker v. State*, 2014 Ark. 467, 3, 448 S.W.3d 197, 199 (2014) ("We will not consider new arguments raised for the first time on appeal."). *Dade v. Arkansas Dep't of Hum. Servs. & Minor Child*, 2016 Ark. App. 443, 6, 503 S.W.3d 96, 99 (2016) (same).

CONCLUSION

The Arkansas Legislature passed Act 1780 for a laudatory public purpose: to provide a remedy to help address the injustices associated with the wrongful convictions of persons whose innocence might be established by new scientific technologies unavailable at the time of their trials. The Act permitted "a person convicted of a crime" to invoke that remedy. As "a person convicted of a crime," and relying on new forensic DNA technology, Echols endeavored to do just that, only to be rebuffed at every turn.

It is evident from the State's brief how bitterly the Attorney General's Office feels toward Echols. But how would it feel if new DNA testing identified an individual other than Echols as the perpetrator of these crimes? Would it celebrate the criminal justice system's correction of a horrible error? Or would it bemoan the loss of its trophy conviction of Echols and the West Memphis Three? The answer unfortunately seems readily apparent, albeit one contrary to the public prosecutor's role to ensure "that justice shall be done . . . guilt shall not escape *or innocence suffer*." *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kerri E. Kobbeman, hereby certify that, on May 30, 2023, I electronically filed this Brief using the Court's electronic filing system, which shall 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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CERTIFICATION 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 limitation in Rule 4-2(d) of the Rules of the Supreme Court and Court of Appeals, because it contains 2,722 words, excluding the cover, table of contents, 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.

A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

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