

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

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Damien Echols

Appellant

v.

State of Arkansas

Appellee

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On Appeal from the Circuit Court of Crittenden County, Arkansas

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The Honorable Tonya Alexander, Circuit Judge

**BRIEF OF AMICUS CURIAE**  
**THE INNOCENCE PROJECT**  
**IN SUPPORT OF APPELLANT DAMIEN ECHOLS**

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J. William Manuel (AR Bar No. 2015257)  
Bartholomew J. Kempf  
(AR Bar No. 2007283)  
BRADLEY ARANT BOULT CUMMINGS LLP  
One Jackson Place  
188 E Capitol Street  
Suite 1000  
Jackson, MS 39201  
601-948-8000  
wmanuel@bradley.com  
bkempf@bradley.com

Lindsey C Boney IV\*  
Anne Miles Golson\*  
BRADLEY ARANT BOULT CUMMINGS LLP  
ONE FEDERAL PLACE  
1819 Fifth Avenue North  
Birmingham, AL 35203  
205-521-8000  
lboney@bradley.com  
agolson@bradley.com

Vanessa Potkin  
Mary-Kathryn Smith  
The Innocence Project

*\*Pro hac vice motion pending*

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## POINTS ON APPEAL

- I. Damien Echols sought, under Act 1780, new M-Vac DNA testing of the ligatures used to bind the children he was convicted of murdering (RP 39–51). The circuit court denied the petition, holding that Echols had to be incarcerated (RP 180). But the Act contains no such requirement—imposing one would deny wrongfully convicted individuals access to DNA testing that could conclusively establish their innocence. *Echols v. State*, 2010 Ark. 417 (2010); *Watkins v. Kelley*, 2018 Ark. 215 (2018).
- II. The circuit court overemphasized the *location* of the Act’s codification over its plain language. Post-conviction testing is fundamentally different from “habeas” and governed by a self-contained subsection that provides unique remedies and procedures unavailable in traditional habeas. *Compare* Ark. Code Ann. § 16-112-201 et seq., *with id.* § 16-112-101 et seq.
- III. Act 1780 tracks Illinois’s similar statute, which Illinois courts have declined to read to require incarceration. *People v. Schutz*, 344 Ill. App. 3d 87 (2003). This Court has interpreted the Act with reference to Illinois law before, *Johnson v. State*, 356 Ark. 534, 545–46 (2004), and should again.

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## JURISDICTIONAL STATEMENT

This appeal arises from an order entered by the Circuit Court of Crittenden County, which dismissed Echols’s petition for lack of jurisdiction (RP 178-180). Echols timely appealed (RP 181). Echols was sentenced to death at his 1994 trial, and this Court has heard prior appeals in this case, so this Court has jurisdiction. *See* Ark. R. Sup. Ct. 1-2(a)(2), (7); *Echols v. State*, 2010 Ark. 417 (2010).

## INTRODUCTION AND SUMMARY OF ARGUMENT

Some two decades ago, this Court recognized—in a case involving Appellant Damien Echols—that Act 1780 addressed “nation-wide concerns that innocent persons were being imprisoned and even executed for crimes that they did not commit” and passed “*in order to accommodate the advent of new technologies enhancing the ability to analyze scientific evidence.*” *Echols v. State*, 350 Ark. 42, 44 (2002) (quoting Act of Apr. 19, 2001, No. 1780 § 1, 2001 Ark. Acts 7736, 1) (emphasis in the original). The General Assembly created procedures to facilitate the exoneration of *any* innocent person who could establish innocence through previously unavailable scientific evidence. *See id.* (recognizing “the legislature’s belief that the ‘mission of the criminal justice system is to punish the guilty and to exonerate the innocent’” (quoting same)).

Nothing suggests that the General Assembly intended these protections would be available only to innocent persons who are *still incarcerated* when the



exonerating evidence becomes available. Quite the opposite, actually. The Act’s preamble describes dual procedural protections that would provide: (1) “methods for preserving DNA and other scientific evidence” and (2) “a remedy for innocent persons who may be exonerated by this evidence.” Act of Apr. 19, 2001, No. 1780, Subtitle, 2001 Ark. Acts 7736, 1. That first purpose *necessarily* contemplates needing to preserve “DNA and other scientific evidence” *until science advances* enough for it to be tested. There is no time limit. That makes sense—to fulfill the second purpose, evidence *must* remain available so that *any innocent person* may use it to establish factual innocence. *See also, e.g.*, Ark. Code Ann. § 16-112-202(10)(B)(iv) (allowing proof of timeliness by establishing “[t]hat a new method of technology that is substantially more probative than prior testing is available”).

The Act’s preamble proved prescient: DNA testing and extraction technology has evolved significantly since then. With each development, law enforcement identifies more perpetrators—and more wrongfully convicted individuals are exonerated. Echols petitioned to use the most recent advance in DNA extraction technology—the M-Vac wet-vacuum-based collection method—to test ligatures that the assailant used to bind the victims, which have never been successfully tested. The M-Vac technology can extract DNA from porous materials, like those ligatures, which enables law enforcement to identify perpetrator DNA that went undetected by prior testing methods. For just one illustration of M-Vac’s superior abilities, it was

recently used to solve the 1979 murder of a 12-year-old girl in Texas by retrieving DNA from clothing (years after swabbing proved unsuccessful), with the recovered profile matched to a known offender’s DNA.<sup>1</sup> M-Vac collection likewise could retrieve key DNA evidence that could exonerate Echols and identify the murderer of three children.

Even beyond the Act’s preamble, the codified text confirms that the procedures apply to *anyone* who can prove their innocence through new scientific evidence, regardless of incarceration status. Sections 16-112-201(a) and 202(a) provide several forms of relief that are *unrelated to incarceration*. *First*, as Echols did here, “a person convicted of a crime may [move] for the performance” of scientific testing to establish innocence, if certain enumerated criteria are met. Ark. Code Ann. § 16-112-202(a). Incarceration is not one of the criteria. If previously unavailable scientific evidence establishes innocence, the person “may commence a proceeding to secure relief by” petitioning the circuit court “to vacate and set aside the judgment *and* [1] to discharge the petitioner *or* [2] to resentence the petitioner *or* [3] grant a new trial *or* [4] correct the sentence *or* [5] make other disposition as

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<sup>1</sup> Michelle Taylor, *M-Vac Helps Solve 1979 Murder of 12-Year-Old-Girl*, Forensic, <https://www.forensicmag.com/588086-M-Vac-Helps-Solve-1979-Murder-of-12-Year-Old-Girl/> (last visited May 27, 2023).

may be appropriate.” *Id.* (emphasis and numbering added). So a person who is incarcerated might ask to be discharge[d],” while another—who is not incarcerated—might ask that the court “vacate and set aside the judgment and . . . make other disposition as may be appropriate.” The point of allowing later DNA testing is to provide innocent people a legal framework (1) for accessing ever-changing scientific developments, and (2) to be able to walk truly free, untethered to any vestige of their wrongful convictions. The circuit court denied relief because the Act was codified in the habeas portion of the Code but assumed that Act 1780 offers only habeas-type relief. Not so—it provides several protections that are not traditional habeas relief.

Affording the procedural protections of the Act to wrongfully-convicted-but-no-longer-incarcerated-innocent-people like Echols is consistent with other states’ laws. Act 1780 is modeled after an Illinois law that courts have interpreted to *not* require incarceration. This Court should continue to follow Illinois caselaw as an interpretive framework.

## ARGUMENT\*

### **I. Denying Relief To Wrongfully Convicted Persons Who Already Have Been Released from Custody Would Frustrate the Act's Express Purposes.**

The Act's dual purpose necessarily assumes that DNA and scientific evidence might only become available years after a conviction—or even *after* a person's release. The evidence-preservation requirement and access to testing together aim to allow *any* innocent person to access testing that could lead to exoneration. Imposing an incarceration requirement would preclude countless wrongfully convicted persons from accessing relief, including those it would most likely benefit.

#### **A. DNA technology continues to evolve, enabling testing to identify perpetrator DNA from items that previously could not be successfully tested.**

DNA technology has advanced significantly since its inception. Watershed developments in testing, extraction, and profile interpretation have made it possible to obtain conclusive results, exclude wrongfully convicted persons, and identify actual assailants where previous technology could not. Law enforcement now

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\* This brief was not authored in whole or in part by counsel for a party, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief or otherwise collaborated in the preparation or submission of the brief.

routinely reviews unsolved cases to evaluate whether new technology could help identify the perpetrator. DNA-access statutes like Act 1780 were passed to harness scientific developments and explicitly provide for testing—even when testing was previously conducted—if newer technology could provide more probative results.

### **1. The rapid evolution of DNA technology.**

To illustrate, when DNA was first used in criminal cases in the late 1980s and early 1990s, forensic scientists primarily used the “restriction fragment length polymorphism” (RFLP) test. It was “highly discriminating”—*i.e.*, it could narrow down the likelihood of a match in the population. *See* John M. Butler, *Fundamentals of Forensic DNA Typing* 66 (2010). But it was not very sensitive—*i.e.*, a large amount of undegraded and unmixed DNA was needed to produce a DNA profile.<sup>2</sup> So, although revolutionary, that limitation made the RFLP method often useless in practice.

Next was “polymerase chain reaction” (PCR), but it had the opposite flaw. PCR testing enabled the amplification of small amounts of DNA, *see* Robyn Thompson et al., *An Overview of DNA Typing Methods for Human Identification:*

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<sup>2</sup> *See* Nat’l Ins. of Justice, U.S. Dep’t of Justice, Postconviction DNA Testing: Recommendations for Handling Requests 26 (1999), <https://www.ncjrs.gov/pdffiles1/nij/177626.pdf>.

*Past, Present, and Future, in DNA Electrophoresis Protocols for Forensic Genetics* 3, 4–5 (Antonio Alonso ed., 2012), but it was not highly discriminating, *see* Butler, *supra*, at 67 (typically could go only to 1-in-1000 people).<sup>3</sup>

In the mid-1990s, scientists developed “short term repeat” (STR) testing, which finally enabled identification of profiles from smaller samples while also providing highly discriminating results. This quickly became the gold standard. And partly because STR was such a significant development, in 2004, Echols was granted STR testing (under Act 1780) on the victims’ pants and other items of clothing. *See generally Echols v. State*, 2010 Ark. 417, 3–4 (2010). That testing *excluded* Echols and the other two men convicted of the murders, which led to the parties negotiating an *Alford* plea and the three men’s release from prison. (RP 4). But the results did not conclusively identify the perpetrator(s). Since then, Echols has continued to maintain his innocence—and the ability of new DNA testing methods to yield discernable, identifiable genetic profiles from crime-scene evidence has continued to improve, grow, and evolve.

## **2. Advancement in technology leads to increasing utility of DNA databases.**

Like with Echols, exoneration sometimes depends on identifying the source of crime-scene evidence, not just excluding a convicted person—but matching

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<sup>3</sup> *See also* n.3, at 1.

crime-scene evidence may not be possible until the assailant's DNA is obtained.

The development of highly discriminating and sensitive DNA testing has fostered the creation of a powerful tool: searchable DNA databases, maintained by local, state, and federal authorities. This has radically increased the probative value of DNA testing in criminal cases. *See* Butler, *supra*, at 259.

Previously, crime-scene samples could only be compared to a DNA sample collected by law enforcement from a suspect. Now, unknown DNA profiles can be uploaded to the FBI's national database (the National DNA Index, or NDIS), which can then be matched to a known individual or evidence from another unsolved crime using the FBI's Combined DNA Index System (CODIS).<sup>4</sup> This process has unlocked the ability to solve cold cases—and to identify the true perpetrators in wrongful-conviction cases. Thanks in part to statutes like Act 1780, many jurisdictions now retain DNA samples for future comparison if later-developed technology is able to provide new evidence that can provide new answers. Emily J. Hanson, Cong. Rsch Serv., R41800, *The Use of DNA by the Criminal Justice System and the Federal Role: Background, Current Law, and Grants* 5 (2022).

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<sup>4</sup> *See* Fed. Bureau of Investigation, Frequently Asked Questions on CODIS and NDIS, <https://www.fbi.gov/how-we-can-help-you/dna-fingerprint-act-of-2005-expungement-policy/codis-and-ndis-fact-sheet> (last visited Feb. 20, 2023).

These databases have grown exponentially as testing capabilities have advanced. Each piece of evidence that is tested (or re-tested) with new capabilities like the M-Vac collection method could add DNA profiles to those databases—and aid in countless investigations. As of November 2022, NDIS contained more than 20 million profiles, and CODIS had assisted in more than 622,955 investigations.<sup>5</sup> Arkansas’s own database contains more than 179,197 profiles and has aided in 6,868 investigations. *See n.6 supra*. Of the 375 DNA exonerations nationally, CODIS was used to discover the actual assailant in nearly half.<sup>6</sup>

### **3. Additional advances have expanded the evidence that can be tested.**

These significant (and continuing) advancements have also expanded what can be DNA-tested—which is now *nearly everything*. As this case shows, recent advancements within STR testing have made it possible to obtain results where previous testing could not. In 2017, the FBI expanded CODIS to new STR genes,

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5 Fed. Bureau of Investigation, CODIS-NDIS Statistics, Law Enforcement Resources, <https://le.fbi.gov/science-and-lab-resources/biometrics-and-fingerprints/codis/codis-ndis-statistics> (last visited April 13, 2023).

6 *See* Innocence Project, DNA Exonerations in the United States, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Feb. 20, 2023).



which led to new STR testing kits. Those kits allow for amplification of even smaller portions of DNA, so previously undetected assailant DNA can be identified if evidence is re-examined. The emergence of probabilistic genotyping software has enabled scientists to interpret evidence that contains mixtures of DNA from multiple individuals and that was previously uninterpretable.<sup>7</sup>

New collection methods, such as the M-Vac, also have enabled the recovery of DNA that could not previously be extracted. Forensic scientists historically have used conventional collection techniques (*e.g.*, swabbing, cutting, taping) for DNA. This was mostly effective but not for porous samples (*e.g.*, cloth, wood) where DNA may be absorbed into the material and not readily obtainable on the surface. *See* Jessica M. McLamb et al., *Comparison of the M-Vac Wet-Vacuum-Based Collection Method to a Wet-Swabbing Method for DNA Recovery on Diluted Bloodstained Substrates*, 65 J. Forensic Sci. 1828, 1828 (2020). M-Vac is an emerging technology that uses a wet-vacuum; it is particularly successful in extracting DNA from porous samples, like the ligatures here. *Id.* M-Vac is even able to extract DNA from samples that have been previously swabbed, so evidence from old cases can be re-

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<sup>7</sup> Nat'l Inst. of Standards and Tech., DNA Mixtures: A Forensic Science Explainer, <https://www.nist.gov/feature-stories/dna-mixtures-forensic-science-explainer> (last visited Feb. 20, 2023).

tested where prior collection techniques failed to collect testable DNA. *Id.*

Genetic genealogy also emerged in 2018 as a novel investigative tool for solving cold cases. *See* David Gurney et al., *The need for standards and certification for investigative genetic genealogy, and a notice of action*, 341 *Forensic Sci. Int'l* 1, 1–2 (2022). In cases where DNA has been identified, but a CODIS search failed to help identify the DNA depositor, law enforcement has been able to search consumer-based genealogy databases for individuals who share partially matching or very similar DNA with an unknown DNA sample. Gurney et al., *supra*, at 1–3. Using those leads and traditional genealogy, law enforcement has been able to identify assailant DNA and solve more than 400 cases, including two that led to exoneration. *See* Gurney et al., *supra*, at 1. Genetic genealogy recently enabled Arkansas law enforcement to solve the 1996 cold-case murder of a 16-year-old girl.<sup>8</sup>

The ability to link DNA to a known individual is key. In some exonerations (like the example below), innocence is established by excluding the convicted person *and* matching the DNA to someone else. Here, Echols already has been excluded,

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<sup>8</sup> Max Brantley, *Genetic genealogy solves 24-year-old murder case and leads to a suspect in Arkansas who committed suicide*, *Arkansas Times* (Aug. 12, 2020, 10:45 AM), <https://arktimes.com/arkansas-blog/2020/08/12/genetic-genealogy-solves-24-year-old-murder-case-and-leads-to-a-suspect-in-arkansas-who-committed-suicide>.

but the new M-Vac technology and genetic-genealogy advances could finally and conclusively match key evidence to the true perpetrator(s) of these crimes, and thereby exonerate him. So, the evidence-preservation function of Act 1780 is critical—by creating a mechanism to preserve forensic evidence, it allows for these DNA advancements to be applied as they are available, irrespective of time.

\* \* \*

That is critically important in solving cold cases or correcting error in older cases as the science develops. Chris Tapp’s case, for example, bears key similarities to Echols’s. Pre-trial DNA testing in Tapp’s rape and murder case excluded him, but CODIS failed to yield a hit. Years later, thanks to the M-Vac technology, new evidence emerged and its testing led to a modification of Tapp’s sentence and his release. Later comparison of that DNA evidence to genetic genealogy helped to identify the true perpetrator. Tapp was exonerated, and the true perpetrator was convicted.

**B. Limiting access to testing would produce absurd and intolerable practical consequences.**

If Act 1780 applies only to those who remain incarcerated, the utility of DNA advancements would be significantly curtailed. Innocent individuals—and their families—would be robbed of the opportunity for exoneration simply because they had completed their sentences before the new advancements became available. That would frustrate the Act’s purpose, lead to absurd results, and allow true perpetrators

to remain free.

Widespread downstream consequences are not hard to imagine. For starters, the wrongfully convicted would face the untenable choice between parole and potential exoneration. *Cf. Rangel v. State*, 2017 Ark. 197, 3 (2017) (holding that a defendant on probation was not in custody). That creates a perverse incentive: Someone convicted of rape, for example, is usually eligible for parole after serving 70% of the sentence. *See* Ark. Code Ann. § 16-93-618. So a wrongfully convicted person sentenced to ten years, and granted parole after seven, would not be entitled to relief based on new DNA evidence that becomes available *anytime thereafter*. Worse, if the evidence comes to light as the person becomes parole-eligible, he would face a choice between parole and potential exoneration. That cannot be what was intended by “a remedy for innocent persons who may be exonerated by [DNA] evidence.”

The ruling below also would prevent exonerations. To illustrate, the paradigmatic DNA case involves sexual assault or rape, where assailants more often leave behind biological and physical evidence (*e.g.*, hair, semen, blood, and ligatures) capable of being DNA tested. Rape carries a minimum ten-year imprisonment in Arkansas. Ark. Code Ann. §§ 5-14-103, 5-4-401. The timeline of DNA technology’s evolution reveals the absurdity of the circuit court’s ruling. If an innocent person was wrongfully convicted in 1990 and sentenced to twenty years,

he would only have the benefit of DNA-testing advancements before 2010 (*i.e.*, the incarceration period). Even if current DNA technology (new STR kits, M-Vac, probabilistic genotyping, forensic genetic genealogy) made it possible to determine innocence *with absolute certainty*, there could be no relief.

That would be arbitrary and absurd—but it is not hypothetical. In a number of DNA exonerations for rape, the wrongfully convicted had already been released when testing became available to establish their innocence:

- Last month, Tyrone Day, who pleaded guilty in 1990, was exonerated based on new DNA evidence after serving 26 years for a sexual assault he did not commit. Eight years after his release on parole, Texas' highest criminal court vacated his conviction, exonerating him. *See Ex parte Day*, No. WR-41, 993-03, 2023 WL 3083613 (Tex. Crim. App. Apr. 26, 2023).
- Marvin Anderson served 15 years for rape. Evidence that could only be located and tested after his release not only excluded him but matched another man in the CODIS database who had confessed to the crime more than a decade before. Anderson was subsequently pardoned by the Virginia Governor.<sup>9</sup>
- Eddie Lowery was dishonorably discharged from the U.S. Army after being wrongfully convicted of a 1981 home-invasion rape in Kansas. Upon release after eleven years in prison, Lowery was required to register as a sex offender. In 2002, DNA testing definitively excluded Lowery, and his conviction was vacated. Almost a decade later, the

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<sup>9</sup> *See* The National Registry of Exonerations, *Marvin Anderson*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=299> 5 (last visited Apr. 18, 2023).

CODIS database finally linked the DNA to the true assailant, who has since pleaded guilty.<sup>10</sup>

The ruling below would have prevented all of those exonerations and would frustrate the intent of Act 1780.

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As if to compound those unjust and unreasonable effects, the State now argues that Echols forfeited new testing by entering an *Alford* plea<sup>11</sup>. See Appellee’s Br. at 25–26. This just proves the point—*Alford* pleas exist to allow a defendant who “refuses to admit commission of the criminal act” and maintains his innocence, but nonetheless “intelligently concludes that his interests require entry of a guilty plea,” to limit the penalty. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). For Echols, that meant avoiding the death penalty. Worse, Echols was offered the *Alford* plea in part *because of* DNA-test results that he obtained under the Act. This Court has never held that an *Alford* plea waives the right to post-conviction DNA testing, see *Davis v. State*, 366 Ark. 401, 402 n.2 (2006) (declining to reach the question), and it

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<sup>10</sup> See The National Registry of Exonerations, *Eddie Lowery*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3394> (last visited Apr. 18, 2023).

<sup>11</sup> According to the National Registry of Exonerations, 25% of the nation’s 3,319 exonerations, the wrongful convicted person plead guilty.

should not now. Otherwise, the wrongfully convicted would face another Hobson's choice: submit to an unjust sentence, hoping that DNA testing will advance enough in their lifetime to exonerate them; or secure release by waiving the ability to clear their name and shed the collateral consequences of conviction.<sup>12</sup> That choice is purely a creation of the State's argument.

Echols seeks to establish innocence through new M-Vac DNA-testing technology that was not available until more than 25 years after his sentencing. He should not be denied that testing simply because he has been released. This case has already shown the importance of Act 1780, and relief should not suddenly be limited when science has finally advanced enough to conclusively establish Echols's innocence, identify the true perpetrator(s) of this crime, and put this case to rest.

## **II. Any Incarceration Requirement Ignores Both the Plain Text and the Availability of Non-Habeas Relief that the Act Provides.**

The circuit court reasoned that the statute sits within the Code's "habeas section," and habeas addresses only wrongful incarceration. That ruling conflicts with the plain text and meaning of the Act, and the numerous non-habeas forms of relief that it provides.

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<sup>12</sup> Even beyond imprisonment, a conviction carries significant additional post-release consequences, not to mention the lasting stigma that a conviction can leave on the family of the convicted.

**A. The circuit court ignored the plain meaning.**

Nothing in the text conditions relief on incarceration. Just the opposite, actually. Act 1780 is available to any “person convicted of a crime,” without limitation. Ark. Code Ann. § 16-112-202. Echols fits that definition. And the statute expressly provides for several forms of relief that *are not* related to incarceration. *See id.* § 16-112-201(a) (petitioner may move to “vacate and set aside the judgment *and* [1] to discharge the petitioner *or* [2] to resentence the petitioner *or* [3] grant a new trial *or* [4] correct the sentence *or* [5] *make other disposition as may be appropriate.*” (emphasis and numbering added)).

**B. The circuit court ignored the statutory differences between traditional habeas and a motion for postconviction testing.**

Act 1780 provides relief that is plainly *unavailable* via any other “habeas petition.” Arkansas law provides forms of relief for a petitioner who is (1) detained without lawful authority, (2) imprisoned despite being entitled to bail, or (3) actually innocent. *See* Ark. Code Ann. § 16-112-103. The first two are governed by section 16-112-101 et seq., traditional habeas. Innocence claims are governed by section 16-112-201 et seq., the state’s postconviction DNA testing statute.

The distinctions between those forms of relief expose the impossibility of interpreting Act 1780 as a “habeas” statute.

*First*, the statutory language shows the difference on its face. Relief from unlawful detention *necessarily* requires incarceration—it is the very relief that the



petitioner seeks. Actual innocence claims are not so limited.

*Second*, the relief sought by a motion for postconviction testing is unavailable under traditional habeas. Section 16-112-202 allows a petitioner to seek scientific testing to establish innocence. That is not traditional habeas relief—*i.e.*, habeas examines the legality of a conviction, *see id.* § 16-112-108, and actual innocence is not a ground for habeas relief, *see Watkins v. Kelley*, 2018 Ark. 215, 2 (2018).

*Third*, the form required of petitions evidences the distinction. Postconviction-testing motions are captioned, “Petitioner versus State of Arkansas,” Ark. Code Ann. § 16-112-203, because the requested relief—DNA testing—can only be provided by the State. A traditional habeas petition instead must be “directed to the person in whose custody the prisoner is detained,” *id.* § 16-112-105, because only the person who detains the prisoner can return him to court. That is usually the Director of the Arkansas Department of Corrections. *See, e.g., Hobbs v. Gordon*, 2014 Ark. 225 (2014).

*Finally*, the procedures differ for each. Section 16-112-103 is available to “any person who shall apply for the writ by petition showing . . . probable cause to believe he or she is detained without lawful authority, is imprisoned when by law he or she is entitled to bail, or who has alleged actual innocence of the offense or offenses for which the person was convicted.” For individuals “detained” or “imprisoned,” their petitions are governed by the procedures in section 16-112-101

et seq. But “[t]he procedures for persons who allege actual innocence shall be in accordance with § 16-112-201 et seq.,” *id.* § 16-112-103(a)(2), an entirely different Code section.

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The General Assembly recognized the inherent differences between habeas and motions for postconviction testing—it created different requirements, forms of relief, and procedures for each. The circuit court did not attempt to fit this case into the distinct habeas framework but instead borrowed only one requirement and inappropriately imposed it wholesale. This Court should rectify that mistake.

### **III. Arkansas Joined All 50 States in Recognizing the Importance of Access to New Scientific Testing to Exonerate the Wrongfully Convicted, but the Decision Below Threatens that Progress.**

The General Assembly passed Act 1780 in 2001 as part of a nationwide acknowledgment of, and response to, “concerns that innocent persons were being imprisoned and even executed for crimes that they did not commit.” *Echols v. State*, 350 Ark. 42, 44 (2002). It was not writing on a blank slate. New York and Illinois first passed post-conviction-testing laws, and every other state followed. *See Johnson v. State*, 356 Ark. 534, 544–45 (2004). But, to be clear, the decision below would isolate Arkansas as *the only state* where an innocent person must remain incarcerated to prove his innocence through new DNA testing where the post-conviction-testing statute does not explicitly require incarceration.

Some states followed the New York model, which requires a higher standard of a “reasonable probability” that the verdict would be “more favorable” with the new evidence. N.Y. Code Crim. Proc. § 440.30. Arkansas (and others) followed Illinois, with its more permissive standard, requiring only that the result would have “the scientific potential to produce new, non-cumulative evidence materially relevant to the defendant’s assertion of actual innocence.” 725 Ill. Comp. Stat. 5/116-3(c)(1). This Court has followed Illinois caselaw when interpreting Arkansas’s statute. *See Johnson*, 356 Ark. at 544–46 (finding persuasive Illinois court’s interpretation of “materially relevant”).

The Court should do so again here. Like Act 1780, Illinois’s law does not contain “language limiting its availability to incarcerated defendants.” *People v. Schutz*, 344 Ill. App. 3d 87, 93 (2003). Instead, any “defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance” of DNA testing. 725 Ill. Comp. Stat. 5/116-3(a); *compare* Ark. Code Ann. § 16-112-202 (“[A] person convicted of a crime may make a motion.”).

The State of Illinois attempted to argue, like the State here, that the statute applied only during incarceration. *See Schutz*, 344 Ill. App. 3d at 93. But the Illinois Court of Appeals disagreed. Like here, the State argued that the statute’s caption indicated legislative intent to limit relief to the term of incarceration. *Id.* at 90–91. The State urged the court to interpret the phrase “actual innocence” in the statute’s

caption according to its usage in *People v. Washington*, 171 Ill.2d 475 (Ill. 1996), which tied “actual innocence” to a deprivation of liberty. *See Schutz*, 344 Ill. App. 3d at 91. But the court declined because (1) there was no express incarceration requirement, and (2) the statute’s purpose was to provide “convicted defendants” a way to establish innocence. *Id.* at 92. Thus, the court held “that relief under [the Illinois statute] is not limited to incarcerated defendants but is also available to defendants who have completed their sentences and who are no longer incarcerated.” *Id.* at 93.

The argument against an extra-textual incarceration requirement is even stronger here. A defendant must satisfy numerous requirements before seeking post-conviction testing under the Act. *See Ark. Code Ann. § 16-112-202.* Incarceration is not one of them—relief is available to any “person convicted of a crime,” without limitation. And the Act’s express purpose is “to provide a remedy for innocent persons who may be exonerated by [DNA] evidence”—again, without limitation. This Court should reverse to preserve the progress that Arkansas has made toward punishing the guilty and exonerating the innocent.

## CONCLUSION

The Act’s plain language provides the best means of fulfilling its purpose—to provide a remedy for innocent persons who may be exonerated by later-discovered DNA evidence. DNA technology has advanced significantly since its passage, with

more advances to come. And this case perfectly captures how the Act should work— years after Echols’s conviction, scientific advancements have begun to provide answers in a case begging for them. It is beyond dispute that the testing Echols seeks is capable of identifying perpetrator DNA, excluding him from being that person, and of identifying the actual assailant. The circuit court’s extra-textual interpretation would preclude using the most recent advancement to bring justice to Echols and the victims. It would prevent countless individuals from establishing their innocence— and countless perpetrators from being brought to justice. This Court should interpret Act 1780 according to its plain language and ensure that its purpose is fulfilled.

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Respectfully submitted,

*/s/ J. William Manuel*

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J. William Manuel  
Bartholomew J. Kempf  
BRADLEY ARANT BOULT CUMMINGS  
LLP  
One Jackson Place  
188 E Capitol Street  
Suite 1000  
Jackson, MS 39201  
Phone: 601-948-8000  
Email: wmanuel@bradley.com  
Email: bkempf@bradley.com

Lindsey C. Boney  
Anne Miles Golson  
BRADLEY ARANT BOULT CUMMINGS  
LLP  
1819 Fifth Avenue North  
Birmingham, AL 35203  
Phone: 205-521-8000  
Email: lboney@bradley.com  
Email: agolson@bradley.com

## CERTIFICATE OF COMPLIANCE

Under Rule 4-6(f) of the Rules of the Arkansas Supreme Court and Court of Appeals, the undersigned counsel certifies that this amicus brief complies with Administrative Order No. 19, Administrative Order No. 21(9), Rule 4-2, and the word-count limitations of Rule 4-6(g). This brief contains 4,943 words, excluding the parts exempted by Rule 4-6(g).

This amicus brief complies with the typeface requirements of Rule 4-1 because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman type style, font size 14, and includes serifs.

*/s/ J. William Manuel*  
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*Attorney for Amicus the Innocence Project*

**CERTIFICATE OF SERVICE**

I hereby certify that, in accordance with Administrative Order Number 21, on the 30th day of May 2023, I filed the foregoing document with the Clerk of the Court for the Arkansas Supreme Court via the eFlex electronic filing system, which will effect service on all counsel of record.

*/s/ J. William Manuel*  
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*Attorney for Amicus the Innocence Project*