

IN THE CIRCUIT COURT OF CRITTENDEN COUNTY
FIRST DIVISION

STATE OF ARKANSAS

PLAINTIFF/RESPONDENT

v.

No. 18CR-93-516

DAMIEN ECHOLS

DEFENDANT/PETITIONER

PETITION TO CONDUCT ADDITIONAL DNA TESTING

Pursuant to Ark. Code Ann. Sections 16-112-201 through 16-112-208, Ark. Code Section 12-12-104 and the entire record herein, Damien Echols moves this Court to permit new scientific testing of certain evidence in this case. The scientific testing proposed is a new DNA collection technology called the M-Vac wet vacuum system, which was unavailable at the times of prior DNA testing done in this case. The evidence proposed to be collected and tested with the aid of this new technology are the ligatures used to bind the child victims in this case. As grounds for this petition, Echols asserts the following.

BACKGROUND

Echols was one of three teenagers tried and convicted of killing three young boys in the infamous West Memphis Three case. Echols was sentenced to death as a result of his murder convictions. Throughout the proceedings, Echols and his co-defendants Jason Baldwin and Jessie Misskelley, Jr. (collectively “the WM3”) maintained their innocence of the crimes.

Over the course of the eighteen years following the murders, and consistent with their claims of innocence, the WM3 pursued numerous factual and legal challenges to the convictions. In connection with one of those challenges, in November 2010, the Arkansas Supreme 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. 417 (Nov. 4, 2010). Ultimately, the development of further evidence in anticipation of that hearing - including the results of additional DNA testing of certain evidence - led the parties to negotiate an Alford plea resolution of the cases, enabling the WM3 to maintain their innocence while being immediately released from prison.

As part of the Alford plea resolution, the State also demanded and obtained waivers from the WM3 of any claims they might have had to sue the State for their wrongful convictions. In the discussions surrounding this waiver, the WM3 and their counsel made it abundantly clear to the State that they intended to continue with all available means of further investigating the case to prove their actual innocence of the crimes charged. Prosecutor Scott Ellington, in turn, committed that his office would investigate any credible leads brought to him by the WM3 defense teams concerning their innocence, including having the Arkansas state crime laboratory help to identify other suspects by running searches on any DNA evidence produced in private laboratory tests during the defense team's investigation.

In early 2020, investigative journalist Bob Ruff was producing a new true crime “documentary” re-examining the WM3 case. Ruff thought it would be a productive idea in that show to apply a new advanced DNA collection technology called the MVac wet vacuum system to search for and test any DNA that might remain on certain items of the State’s evidence. Accordingly, Ruff asked the WM3 if they would agree to such testing at his expense, and they all did. When he asked Ellington however, the prosecutor balked. As a result, Ruff’s show ultimately aired in late March 2020 without the new DNA testing but with plenty of questions being asked by viewers about why Ellington would not return Ruff’s calls asking for permission to conduct the new testing.

After his show aired, and with many viewers still furious at the State over the testing issue, Ruff asked Echols’ counsel Stephen L. Braga if he would try to intervene with Ellington to secure his consent to the M-Vac testing of the evidence. Braga agreed to do so. Braga subsequently reached out to Ellington, who said he had no problem with having the evidence so tested.

Over the course of the next eight months, Braga and Ellington engaged in a series of communications designed to facilitate the transmission of specified items of evidence from the WMPD to the accredited laboratory chosen to do the M-Vac 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 M-Vac technology.¹

Unfortunately, despite these many communications, which also involved at certain points - at the express direction of Ellington - Assistant Chief Langston and Major Stacey Allen of the WMPD, none of the evidence was ever transferred by the WMPD to the M-Vac laboratory. No explanation was ever given for this failure. It just never occurred. At no point during any of these communications did Ellington or either of the WMPD personnel ever indicate that anything had happened to the evidence in the WM3 case.

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 M-Vac DNA technology, despite Ellington’s repeated consent to that testing, Echols’ undersigned counsel reached out to Chrestman to try to

¹ See www.puregoldforensics.com.

complete that task. In mid-March, Echols' counsel and Chrestman spoke by phone. In an unexpected development in that conversation, Chrestman informed Echols counsel that after the 2011 Alford plea, some of the case evidence ended up "lost," some of the case evidence was "misplaced" and some of the case evidence was "destroyed by fire" in a building that burned down.

On April 1, 2021, Chrestman wrote to Echols' counsel as follows:

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. But in anticipation of your client's motion, I've asked the West Memphis Police Department to catalogue what remaining evidence there is.

(Emphasis added).

In response to Chrestman's email, on April 5, 2021, Echols' counsel sent a letter to Chrestman seeking the details of what Chrestman had described in their phone conversation as some of the WM3 evidence being "lost," some of the evidence being "misplaced" and some of the evidence being "destroyed by fire." The letter also requested indications of "when" these things had happened to the evidence in the case.

Receiving no response from Chrestman to his letter, on April 13, 2021, Echols counsel emailed Chrestman:

Just wanted to follow up with you regarding the cataloguing of evidence in this matter post-discovery of its current condition. I have attached a letter that I sent out a week or so ago. I really want to make sure we get ahead of this. Thanks again for your assistance.

Once again, Echols' counsel received no response to this email.

On April 28, 2021, however, Chrestman gave a media interview concerning his "first 100 days in office."² 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.

Id. at 2. 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.

There has never been, and hopefully never will be, another case like this.

Throughout the summer of 2021, Chrestman had still not responded to counsel's April 5 letter requesting to be informed of the details concerning Chrestman's representation that some of the WM3 case evidence was "lost," some was "misplaced" and some was "destroyed by fire," and "when" those things had occurred. Nor had Chrestman provided any information as a result of his April 1 tasking of "the West Memphis Police Department to catalogue what remaining evidence there is."

² See <https://talkbusiness.net/2021/04/prosecutor-keith-chrestman-talks-first-100-days-in-office>.

In the Fall of 2021, in response to a Freedom of Information Act lawsuit filed by Echols against the WMPD for the information in question, City Attorney Michael Stevenson reached out to Echols' counsel to discuss the disputes between the parties. Ultimately, Stephenson 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 for present purposes - the ligatures used to bind the murdered children - misfiled at the police department.

Following up on the success at the WMPD meeting, on December 27, 2021, Echols' counsel emailed Chrestman as follows:

You may have heard that we received good news last week and located the ligatures. I have attached an agreed order to get the testing that Steve went over with Scott and I discussed with you. If you have any corrections or changes, let me know. Either way, I'll forward to the Court for signature after we both agree.

(Emphasis added).

On January 7th, Chrestman responded to counsel's email, continuing to withhold his consent to the new DNA testing of the evidence.

I've received and reviewed your proposed agreed order. There is statutory law for addressing new scientific evidence and governing physical evidence. But the proposed order doesn't reference them. Nor is there an explanation of how the proposed order comports with the law. Indeed, it doesn't cite any legal authority. So, I can't imagine the circuit court entering this order. I renew my original suggestion (which I emailed to you more than nine months ago): You need to file a petition with the circuit court for the relief your

client seeks.

(Statutory citations omitted).

This petition followed.

ARGUMENT

Arkansas Code Section 12-12-104 (“the Arkansas DNA statute”) expressly provides that:

- (a) In a prosecution for a sex offense or a violent offense, the law enforcement agency shall preserve, subject to a continuous chain of custody, any physical evidence secured in relation to a trial and sufficient official documentation to locate that evidence.
- (b)(1) After a trial resulting in conviction, the evidence shall be impounded and securely retained by a law enforcement agency.
- (2) Retention shall be the greater of:
 - (A) Permanent following any conviction for a violent offense . . .

(Emphasis added). The WM3 case self-evidently involved convictions for “a violent offense” and, therefore, equally self-evidently required “permanent” preservation of the evidence in the case. The point of these evidentiary preservation provisions is not some empty record-keeping formality; it is, rather, the possibility that such evidence might provide a future opportunity for scientifically testing the validity of certain results obtained in the criminal justice system.

According to its legislative history, the DNA statute 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.”³ Addressing the public policy behind enactment of the Arkansas DNA statute, the “General Assembly [found] that the mission of the criminal justice system is to punish the guilty and to exonerate the innocent. The General Assembly further [found] that Arkansas laws and procedures should be changed in order to accommodate the advent of new technologies enhancing the ability to analyze scientific evidence.” See Section 1 (emphasis added).

The new M-Vac wet vacuum DNA collection testing technology is precisely the type of scientific step forward contemplated by the statute. 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;”
- “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.”

³ See <ftp://www.arkleg.state.ar.us/acts/2001/htm/ACT1780.pdf>.

“FBI Study: M-Vac System Collects More DNA Than Swabbing,” Forensic On The Scene And In The Lab, pp. 1-2 (August 3, 2020).

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 - it brings forces to bear on the bio-stain or touch DNA that the swab just wasn’t designed for.” Id. at 2 (emphasis added).⁴

Why might the new M-Vac technology achieve such results in this case? In prior rounds of analysis and DNA testing, the ligatures have yielded important biological material as evidence in the case. This is hardly surprising given that the ligatures are the pieces of evidence that we can most confidently say were necessarily handled by the killer(s) who wrapped them around the victims’ limbs and

⁴ As evidenced by Pure Gold Forensic’s website, this powerful new technology has already been used to recover new DNA evidence in a murder case from 1964! See n.1 supra.

then knotted them in place. The ligatures are also the kind of porous material - fabric shoelaces from the victims' sneakers - in which subsurface DNA could well be expected to reside, especially in the knots. Indeed, personnel at one of the prior forensic laboratories involved in the examination of evidence in this case told Echols' counsel that the ligatures were the "most likely" source of DNA evidence, if it existed.

No one knows, of course, whether additional testing of the ligatures with the new M-Vac DNA collection technology will lead to the recovery of new DNA samples for testing or not. But one thing for certain is that such evidence will definitely not be found if testing with this new technology is not done. The Arkansas Supreme Court's November 2010 decision in Echols v. State thoroughly laid out the reasons why the compelling facts of this case plainly satisfied the law's predicates for consideration of newly developed DNA evidence in this matter. That same reasoning should apply even more forcefully now.

CONCLUSION

As the facts recounted above readily reveal, Echols has repeatedly tried to achieve the relief sought on this petition with consent of the Prosecuting Attorney. At times that consent was granted and, more recently, it has been withheld. It is hard to understand the latter position. As the Supreme Court has put it, a prosecu-

tor “is the representative not of an ordinary party to a controversy, but of 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. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Berger v. United States, 295 U.S. 78, 88 (1935).

No matter how one looks at it, using the new advanced M-Vac DNA technology to scientifically test the ligatures used by the killer(s) for biological material left behind that might serve to identify the killer(s) is all about trying to ensure that “justice” is done in this case. There is no better way for the judiciary “to accommodate the advent of new technologies enhancing the ability to analyze scientific evidence.” Echols knows that his DNA is not on those ligatures because he had no role in committing these murders. Others might not be so certain though, and who those others are surely needs to be determined if it can be “in the interests of justice.”

For all of the foregoing reasons, this Court should grant Echols' petition to have the ligatures in this case processed with the new M-Vac wet vacuum DNA collection system, at the accredited forensic laboratory chosen by the defense and at the defense's expense. The State will suffer no prejudice by allowing this testing to move forward and the public interest will be well-served by doing so.

Respectfully submitted,

/s/ Stephen L. Braga

s/ Patrick J. Benca
Patrick J. Benca
Ark. Bar No. 99020
MCDANIEL WOLFF & BENCA
1307 W. 4th Street
Little Rock, Arkansas 72201
(501) 353-0024
patrick@mwbfirm.com

CERTIFICATE OF SERVICE

I, Patrick Benca, do hereby certify that this petition has been filed via Eflex to ensure proper delivery to the appropriate parties on January 24, 2022.

/s/ Patrick Benca
Patrick J. Benca
January 24, 2022