

## Lock ‘Em Up and Throw Away the Key: “The West Memphis Three” and Arkansas’s Statute for Post-Conviction Relief Based on New Scientific Evidence\*

### I. INTRODUCTION

In March 1994, Damien Echols and Jason Baldwin were convicted of the capital murders of Michael Moore, Christopher Byers, and Steve Branch in Craighead County Circuit Court.<sup>1</sup> Jesse Misskelley was also convicted of the same murders in a separate trial, which occurred earlier that year.<sup>2</sup> When they were charged, Echols was nineteen years old, Baldwin was sixteen years old, and Misskelley was seventeen years old.<sup>3</sup> The trials and convictions of these three men, now commonly referred to as the “West Memphis Three,” have received substantial attention from around the nation due to the violent and horrifying nature of the crimes and because of the lack of any substantial physical evidence linking the men to the murders.<sup>4</sup>

In 2002, Echols, Baldwin, and Misskelley all filed motions for forensic DNA testing pursuant to section 16-112-201 to section 16-112-208 of the Arkansas Code in the Circuit Court of Craighead County.<sup>5</sup> These statutes provide a means for convicted persons to obtain relief based on new scientific evidence.<sup>6</sup> Two years after Echols filed his motion for forensic

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1. Echols v. State, 326 Ark. 917, 934, 936 S.W.2d 509, 516 (1996).

2. Misskelley v. State, 323 Ark. 449, 458, 915 S.W.2d 702, 707 (1996).

3. Echols, 326 Ark. at 937, 936 S.W.2d at 517.

4. See, e.g., MARA LEVERITT, DEVIL’S KNOT: THE TRUE STORY OF THE WEST MEMPHIS THREE 314-24 (Atria Books 2002); Free West Memphis 3, <http://www.freewestmemphis3.org> (last visited Sept. 8, 2009).

5. Petitioner Damien Echols’s Motion for a New Trial at 8, Echols v. State, No. CR 93-450A (Ark. Cir. Ct. Apr. 11, 2008) [hereinafter Echols’s Motion for New Trial].

6. See ARK. CODE ANN. § 16-112-201 (Repl. 2006).

DNA testing, the court issued an order for testing.<sup>7</sup> Based on the test results, Echols filed a motion for a new trial on April 14, 2008.<sup>8</sup> Both Baldwin and Misskelley filed similar motions for new trials, but the focus of this comment will be limited to Echols's motion to avoid confusion, and because the legal arguments underlying each respective motion were the same.<sup>9</sup> Without a hearing, Craighead County Circuit Judge David Burnett summarily denied Echols's motion on September 10, 2008.<sup>10</sup> Judge Burnett also summarily denied Baldwin's and Misskelley's respective motions without a hearing.<sup>11</sup>

This comment provides the factual background of the West Memphis Three case and the historical development of Arkansas's statute for post-conviction relief based on new scientific evidence. Then, it discusses the legal issues addressed in Echols's motion for a new trial, the State's reply, and the denial of Echols's motion by the circuit court. In light of these issues, this comment evaluates the propriety of the circuit court's denial of Echols's motion for a new trial. This comment first assesses the circuit court's decision to deny Echols's relief pursuant to section 16-112-208(b) of the Arkansas Code for inconclusive testing results. Then, it explores whether Echols's proposed new scientific evidence meets the evidentiary standard provided by section 16-112-208(e) for a new trial. The resolution of the second issue involves the examination of two sub-issues: (1) whether Echols's proposed forensic evidence may be considered under the statute; and (2) what evidentiary showing is required by the language of section 208(e) of the statute. After evaluating the legal arguments presented by the

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7. Echols's Motion for New Trial, *supra* note 5, at 8.

8. *Id.* at 9.

9. Petition for Writ of Habeas Corpus and Motion for New Trial Under Arkansas Code Annotated 16-112-201 Et. Seq. and Motion for New Trial Under 16-112-208(e)(1), Baldwin v. State, No. CR 93-450B (Ark. Cir. Ct. May 30, 2008); *see also* Petition for Writ of Habeas Corpus or Other Relief Pursuant to Arkansas Code Annotated 16-112-201 Et. Seq. and Motion for New Trial Pursuant to 16-112-208(e)(1), Misskelley v. State, No. CR 93-47 (Ark. Cir. Ct. June 5, 2008).

10. Order Denying Motion for a New Trial Under Ark. Code Ann. § 16-112-201, et. seq., Echols v. State, No. CR 93-450A (Ark. Cir. Ct. Sept. 10, 2008) [hereinafter Order Denying Motion for New Trial].

11. Order Denying Petition for Writ of Habeas Corpus and Motion for New Trial Under Ark. Code Ann. 16-112-201, et. seq., Baldwin v. State, No. CR 93-450B (Ark. Cir. Ct. Sept. 10, 2008); *see also* Order Denying Petition for Writ of Habeas Corpus and Motion for New Trial, Misskelley v. State, No. CR. 93-47 (Ark. Cir. Ct. Sept. 10, 2008).

2009]

POST-CONVICTION RELIEF

503

State and Echols on each of these issues, this comment reaches the conclusion that the trial court erred in denying Echols's motion for a new trial.

## II. FACTUAL BACKGROUND

Throughout the history of this case, the evidence has been heavily debated not only in the courtroom, but also in the surrounding media storm.<sup>12</sup> Nonetheless, this section attempts to provide an objective and unbiased overview of the relevant facts. Echols appealed his 1994 conviction on a number of different grounds, including insufficiency of the evidence supporting the verdict.<sup>13</sup> The Arkansas Supreme Court's opinion affirming the conviction included a general overview of the facts and listed specific pieces of evidence presented during Echols's trial that supported the guilty verdict.<sup>14</sup> First, this section presents the facts pertaining to the murders as the Arkansas Supreme Court did in 1996, as well as the court's evaluation of the evidence presented at trial. Then, it provides Echols's description of the new evidence as presented in his motion for a new trial.

### A. The Murders

Between 5:45 p.m. and 6:00 p.m. on May 5, 1993, two witnesses saw the three victims, Michael, Christopher, and Steve, walking in their West Memphis neighborhood.<sup>15</sup> Then, sometime between 6:30 p.m. and 6:45 p.m., Brian Woody saw four boys going into the Robin Hood woods, which adjoined the neighborhood.<sup>16</sup> The victims never made it to their homes that evening, and the police were contacted.<sup>17</sup> The next day, the

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12. See LEVERITT, *supra* note 4, at 314-24. In describing this media storm, Leveritt pointed out that some of the longtime West Memphis Three supporters were concerned that growing celebrity support would undercut the website's more "mainstream efforts," particularly those celebrities with "bad" reputations. *Id.* at 323. "But the storm of concern blew over—partly, no doubt, because it's hard to harm the image of someone who's already on death row—and the movement for the West Memphis Three widened." *Id.*

13. See generally Echols v. State, 326 Ark. 917, 936 S.W.2d 509 (1996).

14. See generally *id.*

15. *Id.* at 935, 936 S.W.2d at 516.

16. *Id.*

17. *Id.*

police found the boys' corpses submerged in a drainage ditch in Robin Hood woods.<sup>18</sup> The police noted that the bank on one side of the ditch was cleared of leaves and sticks, but the other side of the bank was not cleared.<sup>19</sup> No blood was found on the bank, but one policeman said he noticed some blood in the water.<sup>20</sup>

The three corpses had their right hands tied to their right feet and their left hands tied to their left feet.<sup>21</sup> They were bound with black and white shoelaces.<sup>22</sup> The Arkansas Supreme Court summarized the medical and autopsy testimony regarding each victim:

Michael Moore's body had wounds to the neck, chest, and abdominal regions that appeared to have been caused by a serrated knife. There were abrasions over his scalp that could have been caused by a stick. Dr. Frank Peretti, a State medical examiner, testified that there was bruising and discoloring comparable to that frequently seen in children who are forced to perform oral sex. He testified that there were defensive wounds to the hands and arms. Moore's anal orifice was dilated, and the rectal mucosa was reddened. Dr. Peretti testified that this injury could have come from an object being placed in the anus. Finally, Dr. Peretti testified that there was evidence that Moore was still alive when he was in the water, as there was evidence of drowning.

Steve Branch's corpse had head injuries, chest injuries, genital-anal injuries, lower extremity injuries, upper extremity injuries, and back injuries. The body had multiple, irregular, gouging wounds, which indicated that he was moving when he was stabbed. The anus was dilated. Penile injuries indicated that oral sex had been performed on him. There was also evidence that he, too, had drowned.

Christopher Byers's corpse also had injuries indicating that he had been forced to perform oral sex.

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18. *Echols*, 326 Ark. at 935, 936 S.W.2d at 516.

19. *Id.*

20. *Id.*

21. *Id.* at 935-36, 936 S.W.2d at 516.

22. *Id.*

His head had scratches, abrasions, and a punched-out area on the skin, and one eyelid had a contusion. The back of the neck had a scrape. The inner thighs had diagonal cuts on them. The back of the skull had been struck with a stick-like, broomstick-size, object. The skin of the penis had been removed, and the scrotal sac and testes were missing. There were cuts around the anus, and the hemorrhaging from those cuts indicated he was still alive when they were made. Many of the cuts were made with a serrated blade knife. Byers did not drown; he bled to death.<sup>23</sup>

### B. Arkansas Supreme Court's Evaluation of the Evidence

Following this summary, the court identified several individual pieces of evidence presented at trial which, in its opinion, "constitute[d] substantial evidence of the guilt of Damien Echols."<sup>24</sup> First, the court pointed to the testimony of Anthony and Narlene Hollingsworth, who stated that they saw Echols and his girlfriend, Domini Teer, "walking after 9:30 on the night of the murders near the Blue Beacon Truck Stop, which is near Robin Hood woods . . . ."<sup>25</sup> They also stated that Echols's clothes were dirty, and he had on a dark-colored shirt.<sup>26</sup> Second, the court cited the testimony of twelve-year-old Christy VanVickle and fifteen-year-old Jackie Medford.<sup>27</sup> Both girls stated that they heard Echols say he "killed the three boys."<sup>28</sup> Third, Lisa Sakevicius, a criminalist from the State Crime Laboratory, testified that fibers found on the victims' clothes were similar to clothing found in Echols's home.<sup>29</sup> Fourth, Dr. Frank Peretti, a State Medical Examiner, testified that there were "serrated wound patterns on the three victims" consistent with a knife found in a lake behind the residence of Baldwin's

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23. *Echols*, 326 Ark. at 936, 936 S.W.2d at 516-17.

24. *Id.* at 941, 936 S.W.2d at 519.

25. *Id.* at 938, 936 S.W.2d at 518.

26. *Id.*

27. *Id.* This comment refers to the girls as the "ballpark girls" because they allegedly overhead Echols admit to the murders at a ballpark. See LEVERITT, *supra* note 4, at 239-40.

28. *Echols*, 326 Ark. at 938, 936 S.W.2d at 518.

29. *Id.* at 939, 936 S.W.2d at 518.

parents.<sup>30</sup> This connected to Deanna Holcomb's testimony that she had seen Echols carry a knife that looked similar to the one found in the lake.<sup>31</sup> Fifth, the court cited the evidence supporting the State's theory on motive.<sup>32</sup> The State's theory was the murders were part of a satanic or occult ritual.<sup>33</sup> The court noted drawings of a pentagram and upside-down crosses were found in Echols's room along with a journal that contained "morbid images and references to dead children."<sup>34</sup> This motive evidence was bolstered by the testimony of Dr. Dale Griffis, "an expert in occult killings," who testified that numerous aspects of the murders provided "significant evidence of satanic ritual killings."<sup>35</sup> Sixth, Detective Bryn Ridge testified that during questioning Echols revealed he knew one of the victims had been "cut up" more than the other two.<sup>36</sup> Detective Ridge further stated that this was significant because the information had not been made public at the time.<sup>37</sup> The court held, "The foregoing, together, constitute[d] substantial evidence of the guilt of Damien Echols."<sup>38</sup>

### C. New Evidence Presented by Echols in Motion for New Trial

In his motion for a new trial, Echols primarily relied on DNA-testing results that excluded Misskelley, Baldwin, and himself as the donors of the genetic material recovered from the crime, as well as new forensic evidence that contradicted and undermined the State's evidence against Echols.<sup>39</sup> Echols also

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30. *Id.*

31. *See id.* Ms. Holcomb testified that the knife she had seen Echols carry looked like the knife found in the lake but had a compass on the end. *Id.*

32. *Id.* at 939, 936 S.W.2d at 519.

33. *Echols*, 326 Ark. at 939, 936 S.W.2d at 519.

34. *Id.*

35. *Id.* at 940, 936 S.W.2d at 519.

36. *Id.* at 941, 936 S.W.2d at 519.

37. *Id.*

38. *Echols*, 326 Ark. at 941, 936 S.W.2d at 519.

39. Echols's Motion for New Trial, *supra* note 5, at 51, 53-54. The State disputed whether the forensic evidence presented and argued by Echols could be considered for the purpose of Echols's motion. Response to Petitioner Echols's Motion for a New Trial, *Echols v. State*, No. CR 93-450A (Ark. Cir. Ct. Sept. 10, 2009) [hereinafter Response to Motion for New Trial]. The merits of this argument will be evaluated later in this comment.

2009]

## POST-CONVICTION RELIEF

507

presented evidence that questioned the reliability of other aspects of the State's evidence—most notably the Misskelley confession, the testimony of Vicki Hutcheson, the knife found in the lake, and the testimony of the “ballpark girls.”<sup>40</sup>

DNA testing was performed on the victims' bodies and on several other pieces of evidence from the crime scene.<sup>41</sup> These results showed:

- (1) [N]one of the genetic material recovered at the scene was attributable to [Damien Echols], Jason Baldwin, or Jesse Misskelley;
- (2) genetic material recovered from the penis of victim Steven Branch was contributed by a person other than any of the victims or defendants;
- (3) a hair found in the ligature used to bind Michael Moore was consistent with Terry Hobbs, the stepfather of Steven Branch;
- and (4) a hair recovered from a tree root or stump at the crime scene was consistent with the hair of one of Mr. Hobb's friends who had been with Hobbs on the day the crimes occurred.<sup>42</sup>

In addition to this DNA evidence, Echols relied on the opinions of several forensic experts who asserted that most of the injuries to the victims were the result of post-mortem animal predation.<sup>43</sup> These experts—specifically four forensic pathologists, two forensic odontologists, and a pediatric pathologist—all conducted an independent analysis of the victims' injuries and each concluded that many of the injuries were inflicted by animal predation, not by a serrated knife.<sup>44</sup> Echols argued that these expert opinions contradicted the State's theory regarding the use of the knife found in the lake behind Baldwin's house and completely undermined Misskelley's confession in which he described the use of the knife by Echols to inflict the injuries.<sup>45</sup>

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40. Echols's Motion for New Trial, *supra* note 5, at 75-78, 84. In light of its purpose and practical constraints, this comment does not specifically address the arguments regarding this evidence.

41. *Id.* at 45.

42. *Id.*

43. *Id.* at 57-60.

44. *Id.* at 54-60.

45. Echols's Motion for New Trial, *supra* note 5, at 76-81.

Echols contended that this DNA and forensic evidence, when viewed as a whole, “satisfied the standard for relief set forth in Arkansas’ [sic] new scientific evidence statutes.”<sup>46</sup> “[T]he evidentiary showing offered herein completely undermines the state’s evidence and convincingly points in the direction of alternative suspects. Every reasonable juror hearing Echol’s [sic] new evidence would doubt his guilt; indeed, any such juror could be confident of his innocence.”<sup>47</sup>

### III. DEVELOPMENT OF ARKANSAS’S STATUTE FOR POST-CONVICTION RELIEF BASED ON NEW SCIENTIFIC EVIDENCE

Judge Learned Hand once observed that “[o]ur procedure has always been haunted by the ghost of the innocent man convicted,” and DNA technology has since revealed the shocking reality of wrongful convictions in the United States.<sup>48</sup> As of August 2009, 242 people in the United States have been exonerated by DNA testing.<sup>49</sup> The capability of forensic DNA technology to remedy wrongful convictions was formally recognized by Congress in 2004, when the Innocence Protection Act providing for post-conviction DNA testing was passed as part of the Justice for All Act of 2004.<sup>50</sup> Congress encouraged every state to pass post-conviction DNA-testing laws in the wake of a national outcry against the execution of innocent individuals.<sup>51</sup> “There is no doubt that these statutes are revolutionary: they create a realistic hope for some of the ‘wrongfully convicted,’ erect brand new legal avenues for relief, and demand a new level of accuracy from the criminal justice system.”<sup>52</sup> New York had already passed the first state post-conviction DNA-testing statute in 1994, and Illinois was close

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46. *Id.* at 87.

47. *Id.*

48. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

49. The Innocence Project, Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Sept. 17, 2009).

50. See Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

51. See Patrick Leahy, *The Innocence Protection Act of 2001*, 29 HOFSTRA L. REV. 1113, 1116-17 (2001).

52. Kathy Swedlow, *Don’t Believe Everything You Read: A Review of Modern “Post-Conviction” DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 355-56 (2002).

behind in 1998.<sup>53</sup> Forty-seven states have now enacted some type of post-conviction DNA-testing legislation, including Arkansas.<sup>54</sup>

The Arkansas Legislature passed Arkansas's first legislation allowing for post-conviction relief based on new scientific evidence in 2001.<sup>55</sup> Act 1780 from the 2001 Arkansas Legislative Session provided a means for a person convicted of a crime to obtain relief based on new scientific evidence not available at the time of trial.<sup>56</sup> According to the Arkansas Supreme Court, the Act was "largely modeled after the Illinois laws" that allow for post-conviction DNA testing.<sup>57</sup> Arkansas is one of only a few states that follow the Illinois model.<sup>58</sup> Most states follow the New York model, which has an entirely different standard of review more akin to an ineffective-assistance standard.<sup>59</sup>

Despite the novelty of Arkansas's statute for post-conviction relief based on new scientific evidence, the Arkansas Supreme Court identified its legislative purpose in its order ruling on Echols's motion requesting forensic DNA testing.<sup>60</sup> In *Echols v. State*, the court stated that the purpose in passing Act 1780 was to allow a convicted defendant to file a petition for post-conviction relief based on scientific evidence that was not available at trial, and it was spurred by nationwide awareness of many imprisoned—and even executed—innocent individuals.<sup>61</sup>

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53. See N.Y. CRIM. PROC. LAW § 440.30(1-a) (West 2009); 725 ILL. COMP. STAT. 5/116-3 (West 2009).

54. The Innocence Project, News and Information: Fact Sheets, <http://www.innocenceproject.org/Content/304.php> (last visited Sept. 17, 2009); ARK. CODE ANN. §§ 16-112-201 to -208 (Repl. 2006).

55. Act 1780, 2001 Ark. Acts 7736 (codified at ARK. CODE ANN. § 16-112-103 (Repl. 2002)) (current version at ARK. CODE ANN. §§ 16-112-201 to -208).

56. See generally Act 1780, 2001 Ark. Acts 7736 (codified at ARK. CODE ANN. § 16-112-103 (Repl. 2002)) (current version at ARK. CODE ANN. §§ 16-112-201 to -208).

57. *Johnson v. State*, 356 Ark. 534, 544, 157 S.W.3d 151, 160 (2004). In *Johnson*, the Arkansas Supreme Court was referring to section 16-112-202 of the Arkansas Code, which was modeled after title 725, section 5/116-3 of the Illinois Code. *Id.* at 545, 157 S.W.3d at 160; 725 ILL. COMP. STAT. 5/116-3 (West 2009). Many states have similar statutes. See, e.g., LA. CODE CRIM. PROC. ANN. art. 926.1 (West 2009); MO. ANN. STAT. § 547.035 (West 2009); S.D. CODIFIED LAWS §§ 23-5B-1 to -16 (West 2009).

58. *Johnson*, 356 Ark. at 544, 157 S.W.3d at 160.

59. *Id.* at 544-45, 157 S.W.3d at 160.

60. See *Echols v. State*, 350 Ark. 42, 44, 84 S.W.3d 424, 426 (2002) (quoting Act 1780, 2001 Ark. Acts 7736, 7737).

61. *Id.*; see also *supra* notes 48-52 and accompanying text.

Further, the court explained that the legislature's purpose was to change Arkansas laws and procedures to comport with the mission of the criminal law, which is to "punish the guilty and exonerate the innocent," and to account for the capabilities of new technology to analyze scientific evidence.<sup>62</sup>

The Arkansas statutes passed in 2001 providing for post-conviction relief based on new scientific evidence were amended by Act 2250 in 2005.<sup>63</sup> Act 2250 made two significant changes to the pre-existing statutes. First, the requirements to obtain DNA testing were made more stringent.<sup>64</sup> Second, an additional section was added to provide the procedure for evaluating testing results, which was not included in the original statutes.<sup>65</sup>

These statutes are codified at section 16-112-201 to section 16-112-208 of the Arkansas Code.<sup>66</sup> Section 201 authorizes persons convicted of crimes to commence a proceeding based on the discovery of new scientific evidence, contemplating a range of potential remedies including complete discharge, resentencing, a new trial, or other appropriate dispositions.<sup>67</sup> Furthermore, section 201 contains two separate standards establishing the evidentiary showing required to obtain relief. The first standard requires "[s]cientific evidence not available at trial [that] establishes the petitioner's actual innocence."<sup>68</sup> The second standard requires a petitioner to "establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense."<sup>69</sup> Section 202 provides the procedure and requirements for motions requesting that DNA or other scientific testing be conducted.<sup>70</sup> The required contents for motions based on new scientific evidence are outlined in section 203.<sup>71</sup> Section 204 requires the State to respond to motions filed under chapter 112; section 205

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62. *Id.* (quoting Act 1780, 2001 Ark. Acts 7736, 7737).

63. Act 2250, 2005 Ark. Acts 9609, 9610-17 (codified as amended at ARK. CODE ANN. §§ 16-112-201 to -208 (Repl. 2006)).

64. *See* ARK. CODE ANN. § 16-112-202.

65. *See* ARK. CODE ANN. § 16-112-208.

66. ARK. CODE ANN. §§ 16-112-201 to -208.

67. ARK. CODE ANN. § 16-112-201.

68. ARK. CODE ANN. § 16-112-201(a)(1).

69. ARK. CODE ANN. § 16-112-201(a)(2).

70. ARK. CODE ANN. § 16-112-202.

71. ARK. CODE ANN. § 16-112-203 (Repl. 2006).

2009]

## POST-CONVICTION RELIEF

511

describes the procedure for conducting a hearing on the motions filed; and section 206 covers appeals from trial-court orders on the motions.<sup>72</sup> Section 207 addresses the availability of a public defender to represent individuals who wish to file motions under chapter 112.<sup>73</sup> Finally, section 208 details how the court should evaluate the results from DNA testing.<sup>74</sup>

This comment focuses primarily on section 208, around which the circuit court's decision on Echols's motion for a new trial revolved.<sup>75</sup> Section 208 identifies three possible categories under which the testing results could fall.<sup>76</sup> First, if the results are "inconclusive, the court may order additional testing or deny further relief . . . ."<sup>77</sup> Second, if the results "establish that the person who requested the testing was the source of the . . . evidence, the court shall deny any relief to the person."<sup>78</sup> And third, if the results "exclude a person as the source of the . . . evidence, the person may file a motion for a new trial or resentencing."<sup>79</sup> Under this third scenario, the court may then grant the motion for a new trial or resentencing if the test results, "when considered with all evidence in the case regardless of whether the evidence was introduced at trial, establish by compelling evidence that a new trial would result in an acquittal."<sup>80</sup>

## IV. ANALYSIS

Echols's motion for a new trial presented an issue of first impression for the Arkansas courts as to how the results from post-conviction scientific testing should be applied under the Arkansas statute.<sup>81</sup> Additionally, this case presented complex

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72. ARK. CODE ANN. §§ 16-112-204 to -206 (Repl. 2006).

73. ARK. CODE ANN. § 16-112-207 (Repl. 2006).

74. ARK. CODE ANN. § 16-112-208 (Repl. 2006).

75. *See generally* Order Denying Motion for New Trial, *supra* note 10.

76. ARK. CODE ANN. § 16-112-208.

77. ARK. CODE ANN. § 16-112-208(b).

78. ARK. CODE ANN. § 16-112-208(c)(1).

79. ARK. CODE ANN. § 16-112-208(e).

80. ARK. CODE ANN. § 16-112-208(e)(3).

81. Echols's Motion for New Trial, *supra* note 5, at 38. The Arkansas Supreme Court has interpreted the standard required in order to obtain scientific testing, but this interpretation is not relevant to this issue. *See generally* Johnson v. State, 356 Ark. 534, 546, 157 S.W.3d 151, 161 (2004).

issues regarding the proper legal standard and procedure for resolving Echols's motion under Arkansas law. This section discusses the two main issues under the statutory framework that were implicated by Echols's motion, specifically: (1) whether subsection (b) or subsection (e) of section 16-112-208 of the Arkansas Code was applicable to Echols's testing results; and (2) whether Echols's testing results met the evidentiary standard for a new trial under section 16-112-208(e)(3).<sup>82</sup> Within each of these main issues, this section discusses the circuit court's analysis and Echols's arguments in favor of his position and then evaluates the propriety of the court's interpretation of the relevant statutory language.

#### A. Inconclusive Under Subsection (b) or Exclusionary Under Subsection (e)?

The first issue implicated by Echols's motion was one of statutory construction regarding whether subsection (b) or subsection (e) of section 208 applied to the DNA-testing results ordered by the circuit court in 2004. As discussed previously, subsection (b) is triggered when the court is presented with testing results that are "inconclusive," while subsection (e) is triggered when the court is presented with testing results that "exclude a person as the source of the [DNA] evidence."<sup>83</sup> In response to Echols's motion for a new trial, the State argued,<sup>84</sup> and the circuit court agreed,<sup>85</sup> that subsection (b) was the applicable provision that governed the testing results. Echols, however, contended that subsection (e) was the proper provision because the testing results excluded Echols as a possible source of the DNA evidence.<sup>86</sup>

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82. See generally ARK. CODE ANN. §§ 16-112-201 to -208 (Repl. 2006).

83. See ARK. CODE ANN. § 16-112-208(b), -208(e); see also *supra* notes 76-79 and accompanying text.

84. Response to Motion for New Trial, *supra* note 39, at 8-12.

85. Order Denying Motion for New Trial, *supra* note 10, at 3-5.

86. Echols's Motion for New Trial, *supra* note 39, at 38-39, 51, 53. Compare ARK. CODE ANN. § 16-112-208(e) (allowing the court to grant a new trial if DNA-testing results exclude a person as the source of DNA evidence) with ARK. CODE ANN. § 16-112-208(b) (allowing the court to either order additional testing or deny relief if the DNA-testing results are inconclusive), and ARK. CODE ANN. § 16-112-208(c) (requiring the court to deny relief if the DNA-testing results establish that the individual in question was the source of the DNA evidence).

2009]

## POST-CONVICTION RELIEF

513

## 1. Circuit Court's Analysis

The circuit court reasoned that the legislative history of the statute indicated Echols's testing results were "inconclusive" and required that the motion be denied under section 208(b).<sup>87</sup> The court gave great significance to the fact that Echols's DNA testing was ordered under a prior version of the statute.<sup>88</sup> The previous testing provision called for tests to be conducted when the evidence had the "scientific potential to [be] . . . materially relevant" to the petitioner's claim for relief.<sup>89</sup> As discussed previously, this provision was replaced in 2005 with a stricter standard that only allows for testing when the results could "[r]aise a reasonable probability that the person . . . did not commit the offense."<sup>90</sup> In light of this change, the court reasoned:

Because the Petitioner's testing results were obtained without a finding that he had shown that testing would raise a reasonable probability that he did not commit the offenses as now required by § 16-112-202(8)(B), his DNA-testing results must at least demonstrate as much to avoid denial of relief due to inconclusiveness under section 208(b).<sup>91</sup>

Thus, the court asserted that because there was not a predetermination that the testing would raise a reasonable probability that Echols did not commit the offense, this procedural hurdle needed to be crossed before the results of the testing could be evaluated under section 208(e).<sup>92</sup> "[T]here is no point to a hearing on the results of testing that could not be ordered now."<sup>93</sup> Based on this reasoning, the court concluded that Echols's claim must be denied under section 208(b) because the results were "inconclusive as to [Echols's] claim of actual innocence."<sup>94</sup> The court posited that the results were

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87. Order Denying Motion for New Trial, *supra* note 10, at 3-5.

88. *Id.*

89. See Act 2250, 2005 Ark. Acts 9609, 9611-12 (codified as amended at ARK. CODE ANN. § 16-112-202 (Repl. 2006)).

90. ARK. CODE ANN. § 16-112-202(8)(b); see also *supra* notes 63-65 and accompanying text.

91. Order Denying Motion for New Trial, *supra* note 10, at 3-4.

92. *Id.* at 4.

93. *Id.*

94. *Id.* at 5.

inconclusive because they did not satisfy the new standard that needed to be met before testing could be ordered.<sup>95</sup> In other words, the evidence tested did not “raise a reasonable probability that [Echols] did not commit the offenses.”<sup>96</sup> Essentially, the circuit court interpreted subsection (b) as a hurdle that Echols was required to clear before his testing results were eligible to be analyzed under subsection (e).

## 2. Echols’s Analysis

In response to the State’s argument that the circuit court should dispose of Echols’s motion for a new trial under section 208(b), Echols urged the court instead to evaluate the DNA-testing results under section 208(e) in accordance with the plain-meaning rule of statutory construction.<sup>97</sup> Echols cautioned that his DNA-testing results did not trigger section 208(b) because they showed Echols could not have been the source of the tested DNA evidence.<sup>98</sup> Thus, the results were conclusive, not inconclusive. Specifically, Echols argued that the DNA-testing results were not “scientifically inconclusive” even though they were admittedly “legally inconclusive.”<sup>99</sup> “Inconclusive” is not defined by the statute; therefore, Echols argued that the plain-meaning rule controlled its interpretation.<sup>100</sup> The plain-meaning rule was the first rule of statutory construction, and it requires construing the statute “just as it reads, giving the words their ordinary and usually accepted meaning in common language.”<sup>101</sup> In light of this rule, Echols argued that “the logical, common sense reading of 208(b) is that it permits . . . the denial of relief

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95. *Id.*

96. Order Denying Motion for New Trial, *supra* note 10, at 5.

97. Petitioner Damien Echols’s Reply in Support of Motion for a New Trial at 4-5, Echols v. State, No. CR 93-450A (Ark. Cir. Ct. Aug. 12, 2008) [hereinafter Echols’s Reply in Support of Motion for New Trial].

98. *Id.* at 4-6.

99. *Id.* at 5-8. In Echols’s motion, “legally inconclusive” meant that the testing did not definitively establish Echols’s innocence. *See id.* at 5. Both Echols and the State agreed the testing results were “legally inconclusive” because even if the DNA evidence made it unlikely that Echols committed the crimes, it could never *definitively* establish his innocence. *See id.* at 5-6. Echols argued that “scientifically inconclusive” meant that the testing results could neither include nor exclude the person as the source of the scientific sample. *See id.* at 6.

100. *Id.* at 4.

101. Maddox v. City of Fort Smith, 369 Ark. 143, 147, 251 S.W.3d 281, 284 (2007).

2009]

## POST-CONVICTION RELIEF

515

only where the DNA results are scientifically inconclusive in the sense that they neither include nor exclude the petitioner as the source of any relevant sample . . . .”<sup>102</sup> Thus, because the testing results were scientifically conclusive, the court was not limited to the two possible actions under section 208(b): ordering additional testing or denying relief.<sup>103</sup>

Rather, Echols argued that the testing results fit the plain meaning of section 208(e), and as such, the evidence should have been evaluated under that section.<sup>104</sup> Section 208(e) provides the standard for evaluating test results that “exclude a person as the source of the DNA evidence.”<sup>105</sup> Echols contended that section 208(e) applied because the test results excluded him as the source of the tested DNA evidence.<sup>106</sup>

### 3. Evaluation of the Circuit Court’s Decision

Although the express language of the statute clearly indicated Echols’s testing results should have been evaluated under section 208(e), the circuit court denied Echols’s motion under section 208(b).<sup>107</sup> The crux of the dispute at the trial-court level on this issue centered on whether the term “inconclusive” in the statute meant “scientifically inconclusive” or “legally inconclusive.”<sup>108</sup> The plain-meaning rule quickly resolves this dispute, however, because it dictates that “inconclusive,” as used in the statute, means scientifically inconclusive, not legally inconclusive.

This conclusion is the only logical result when the statutory language of section 208 is viewed collectively. As discussed previously, section 208 envisions three possible scenarios that could result from DNA testing.<sup>109</sup> First, the testing could be deemed “inconclusive,” in which case the court may either order additional testing or deny relief.<sup>110</sup> Second, the test results could establish that the petitioner was the source of the DNA evidence,

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102. Echols’s Reply in Support of Motion for New Trial, *supra* note 97, at 6.

103. *See id.*

104. *Id.* at 6-7.

105. ARK. CODE ANN. § 16-112-208(e)(1) (Repl. 2006).

106. Echols’s Reply in Support of Motion for New Trial, *supra* note 97, at 7.

107. Order Denying Motion for New Trial, *supra* note 10, at 7.

108. *See supra* note 99 and accompanying text.

109. ARK. CODE ANN. § 16-112-208.

110. ARK. CODE ANN. § 16-112-208(b).

which requires the court to deny relief.<sup>111</sup> Finally, the results could exclude the person as the source of the DNA evidence.<sup>112</sup> In this situation, the statute calls for the court to evaluate the new scientific evidence in light of “all other evidence in the case regardless of whether the evidence was introduced at trial.”<sup>113</sup> If this weighing of the evidence “establish[es] by compelling evidence that a new trial would result in an acquittal,” the court “may grant the motion of the person for a new trial or resentencing.”<sup>114</sup>

Simply put, the statute would not make any sense if the word “inconclusive” in subsection (b) were intended to mean legally inconclusive instead of scientifically inconclusive. Per the circuit court’s interpretation of the statute, a petitioner’s DNA-testing results would have to clear the hurdle of legal conclusiveness under subsection (b) before being entitled to have DNA-testing results evaluated by the court under subsection (e).<sup>115</sup> This point is clear because if the evidence were legally conclusive, thus satisfying subsection (b) as interpreted by the circuit court, there would be no need for the court to subsequently perform a weighing of all the other evidence in the case under subsection (e). Legally conclusive evidence would definitively establish that the petitioner did not commit the offense—a result not even contemplated under Arkansas’s post-conviction relief statutory scheme. Instead, the legislature structured the statute in relation to the potential scientific results that may occur when DNA-testing is conducted: inconclusive, a match, or exclusive.<sup>116</sup> The only

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111. ARK. CODE ANN. § 16-112-208(c)(1).

112. ARK. CODE ANN. § 16-112-208(e)(1).

113. ARK. CODE ANN. § 16-112-208(e)(3).

114. ARK. CODE ANN. § 16-112-208(e)(3).

115. See Order Denying Motion for New Trial, *supra* note 10, at 3-4. “In other words, the Petitioner cannot jump past section 208(b) to § 16-112-208(e) to pursue a new trial simply because he claims his results exclude him as a source of DNA because his testing was not ordered under the rigors of the current version of section 202.” *Id.* at 4.

116. See ARK. CODE ANN. § 16-112-208(b), -208(e); see also Benjamin Vetter, Comment, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 589 (2004). “DNA testing, regardless of the form, yields one of three results: exclusion, meaning that the individual is not the source of the material tested; non-exclusion, meaning that the individual cannot be excluded as the source; or no result, meaning that the analysis cannot be completed.” *Id.* A common-sense reading of section 16-112-208 shows that the language refers to the conclusiveness of the DNA-testing results

2009]

*POST-CONVICTION RELIEF*

517

logical reading of the statute is to interpret “inconclusive” as referring to the scientific results of the test—not to their legal significance. The plain meaning of the statute dictates that Echols’s test results were exclusive, and thus should have been considered under subsection (e).

Furthermore, the fact that the testing was ordered pursuant to a lesser standard has no legal bearing on how the results should be interpreted now that the testing has been completed. Instead, section 202 provides the standard that must be met before a court may order post-conviction scientific testing,<sup>117</sup> while section 208 provides the way DNA-testing results should be evaluated after they are performed.<sup>118</sup> Nothing in this statutory scheme indicates that the standards under which the tests were first ordered should have any bearing whatsoever on how the results are evaluated. The circuit court’s misplaced reliance on subsection (b) is not redeemed by the fact that the initial hurdle for scientific testing is now higher than it was when the testing was ordered. A plain reading of the statute produces only one result—Echols’s DNA-testing results, which excluded him as the source of the tested DNA evidence, must be evaluated pursuant to subsection (e).

**B. Sufficiency of Echols’s New Scientific Evidence Under  
Section 16-112-208(e)**

The DNA-testing results, coupled with the new forensic evidence presented by Echols, likely “establish by compelling evidence that a new trial would result in an acquittal” as required for relief under the statutory scheme.<sup>119</sup> Before the sufficiency of Echols’s proposed evidence may be evaluated, two legal issues of first impression under Arkansas law must be resolved: (1) whether Echols’s newly advanced forensic evidence may be considered when evaluating the testing results in light of the other evidence in the case; and (2) what evidentiary standard must be met before Echols is entitled to

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with respect to whether the tested DNA matched, did not match, or was inconclusive with respect to the DNA sample of the individual being tested.

117. ARK. CODE ANN. § 16-112-202 (Repl. 2006).

118. *See* ARK. CODE ANN. § 16-112-208.

119. *See* ARK. CODE ANN. § 16-112-208(e).

relief. These issues were sharply contested by the parties, and this comment will first examine each of these questions individually. Following the resolution of these questions of law, this comment will evaluate the merits of Echols's motion for a new trial based on the sufficiency of his proposed evidence.

### 1. *New Forensic Evidence*

#### a. Circuit Court's Analysis

The State contended, and the circuit court agreed, that Echols's new forensic evidence was not cognizable under the statute and thus could not be considered when determining whether Echols had satisfied the section 208(e) requirement for a new trial.<sup>120</sup> The circuit court stated, "[T]he Petitioner's burden is to show his innocence by DNA-testing results, despite all other evidence of guilt, not by reweighing the trial evidence against new forensic evidence."<sup>121</sup> Furthermore, the State pointed out that the policy of finality must foreclose the questioning of evidence presented at trial in order to prevent the "endless critique, second-guessing, and reassessment" of all of the trial evidence.<sup>122</sup> The circuit court agreed the showing required for Echols to obtain relief "ha[d] nothing whatever to do with discrediting the proof of guilt by re-evaluating it or considering new forensic evidence disputing it."<sup>123</sup> Thus, the court concluded that the new forensic evidence presented by Echols could not be considered when determining whether the section 208(e) standard had been met.<sup>124</sup>

#### b. Echols's Analysis

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120. Response to Motion for New Trial, *supra* note 39, at 16; *see also* Order Denying Motion for New Trial, *supra* note 10, at 7.

121. Order Denying Motion for New Trial, *supra* note 10, at 7.

122. Response to Motion for New Trial, *supra* note 39, at 18. For a discussion of the way DNA evidence has transformed the criminal justice system, see Edward K. Cheng, *Reenvisioning Law Through the DNA Lens*, 60 N.Y.U. ANN. SURV. AM. L. 649, 650 (2005) (observing that "[p]ost-conviction DNA testing imposes pressure on our longstanding notions of finality . . . [w]hen the new evidence is DNA . . . the calculus changes").

123. Order Denying Motion for New Trial, *supra* note 10, at 8.

124. *Id.* at 7.

2009]

*POST-CONVICTION RELIEF*

519

Conversely, Echols contended that section 208(e) clearly provided for the inclusion of this new forensic evidence in the court's evaluation of whether a petitioner is entitled to a new trial.<sup>125</sup> Section 208(e)(3) states in relevant part, "The court may grant the motion . . . if the [DNA] test results, when considered with all other evidence in the case regardless of whether the evidence was introduced at trial, establish by compelling evidence that a new trial would result in an acquittal."<sup>126</sup> Echols argued that the plain meaning of the statute commanded that the new forensic evidence be included in the court's weighing of the testing results when compared to all other evidence in the case.<sup>127</sup> Furthermore, Echols contended that the statute's express language rejected the State's contention that only evidence of guilt may be considered.<sup>128</sup> "If the statute was intended to limit the court's review to evidence of guilt alone, it could have, and surely would have, said so."<sup>129</sup> Finally, Echols challenged the State's assertion that the court cannot re-weigh the evidence because the time for that exercise had passed with the trial and appeal.<sup>130</sup> Echols pointed out that the evaluation of the evidence demanded by section 208(e) "necessarily entails a weighing of the relative impact of various components of available evidence."<sup>131</sup> In short, Echols contended that the plain meaning of the statute compelled the conclusion the forensic evidence needed to be considered when evaluating the motion under section 208(e).

### c. Evaluation of the Circuit Court's Decision

When applied to section 208(e), basic rules of statutory construction required the circuit court to consider Echols's new forensic evidence. The statute unambiguously provides that "all other evidence in the case regardless of whether the evidence

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125. Echols's Motion for New Trial, *supra* note 5, at 53.

126. ARK. CODE ANN. § 16-112-208(e)(3) (Repl. 2006).

127. Echols's Reply in Support of Motion for New Trial, *supra* note 97, at 12.

128. *Id.* at 13.

129. *Id.*

130. *Id.* at 14.

131. *Id.*

was introduced at trial” is to be considered.<sup>132</sup> Arkansas courts “will not interpret a statute in a manner that is contrary to the clear language of the statute; nor will [courts] read into a statute language that is not there.”<sup>133</sup> The statute contains nothing which indicates that only evidence of the petitioner’s guilt can be considered, and to interpret the statute in this manner is clearly “read[ing] into a statute language that is not there.”<sup>134</sup> Therefore, despite the valid points advanced by the State regarding the policy of finality of judgments, the statute did not lend itself to incorporate those considerations, and the circuit court’s interpretation of the statute was clearly erroneous.

## 2. Evidentiary Standard Required

The last major legal issue presented by Echols’s motion was the evidentiary showing required under Arkansas law in order to entitle Echols to a new trial.<sup>135</sup> Section 208(e)(3) states that a petitioner must “establish by compelling evidence that a new trial would result in an acquittal.”<sup>136</sup> This provision has not previously been interpreted by an Arkansas court, and the parties sharply disagreed about what the standard actually meant.<sup>137</sup>

### a. Echols’s Analysis

Echols contended section 208(e) should be interpreted to require an evidentiary showing sufficient to establish that “no reasonable juror would find him guilty beyond a reasonable doubt.”<sup>138</sup> Echols asserted this standard fell short of requiring a showing of actual innocence because it did not require him to overcome the near impossible hurdle of proving that it was factually impossible for him to have committed the crimes.<sup>139</sup> Echols argued that the court should interpret the statute to

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132. See ARK. CODE ANN. § 16-112-208(e)(3) (Repl. 2006).

133. Phillips v. Ark. Dep’t of Human Servs., 85 Ark. App. 450, 456, 158 S.W.3d 691, 695-96 (2004).

134. *Id.* at 456, 158 S.W.3d at 696.

135. Echols’s Motion for New Trial, *supra* note 5, at 39.

136. ARK. CODE ANN. § 16-112-208(e)(3).

137. Echols’s Motion for New Trial, *supra* note 5, at 39; see also Response to Motion for New Trial, *supra* note 39, at 19.

138. Echols’s Motion for New Trial, *supra* note 5, at 37.

139. Echols’s Reply in Support of Motion for New Trial, *supra* note 97, at 11.

2009]

## POST-CONVICTION RELIEF

521

require his proposed standard for three reasons: (1) Arkansas's statutory scheme for post-conviction relief based on new scientific evidence contemplates a range of different remedies compelling the conclusion that a sliding scale of evidentiary standards must also similarly exist;<sup>140</sup> (2) the United States Supreme Court in *House v. Bell*<sup>141</sup> drew a distinction between an evidentiary showing of actual innocence necessary for complete exoneration and a showing necessary to defeat state claims of procedural default;<sup>142</sup> and (3) in *People v. Dodds*,<sup>143</sup> an Illinois appellate court rejected the notion that a truly exculpatory showing is necessary before a petitioner is entitled to relief.<sup>144</sup>

First, Echols pointed out that Arkansas's flagship statute for post-conviction relief, section 16-112-201, contemplates a range of potential remedies including complete discharge, resentencing, the grant of a new trial, or other appropriate disposition.<sup>145</sup> Furthermore, Echols pointed out that this statute contains two separate standards establishing the evidentiary showing required to obtain relief, as previously discussed in detail.<sup>146</sup> To reiterate this statutory construct, the first standard is set forth in section 201(a)(1) and requires "[s]cientific evidence not available at trial [that] establishes the petitioner's actual innocence."<sup>147</sup> The second standard requires a petitioner to "establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense."<sup>148</sup> As Echols argued, "The two subsections are separated by an 'or,' compelling the conclusion that they delineate conceptually distinct standards."<sup>149</sup> Although the statute does not indicate which of these standards applies to each of the aforementioned remedies, Echols observed that "[t]he most reasonable reading" of the statute indicated "a greater

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140. Echols's Motion for New Trial, *supra* note 5, at 37-39.

141. 547 U.S. 518, 555 (2006).

142. Echols's Motion for New Trial, *supra* note 5, at 39.

143. 801 N.E.2d 63 (Ill. App. Ct. 2003).

144. *Id.* at 71.

145. Echols's Motion for New Trial, *supra* note 5, at 37; *see also* ARK. CODE ANN. § 16-112-201 (Repl. 2006).

146. ARK. CODE ANN. § 16-112-201.

147. ARK. CODE ANN. § 16-112-201(a)(1).

148. ARK. CODE ANN. § 16-112-201(a)(2).

149. Echols's Motion for New Trial, *supra* note 5, at 38.

evidentiary showing is required to obtain a greater remedy.”<sup>150</sup> Echols asserted that the distinction contained in section 201 must be considered by the court when determining how the standard set forth in section 208(e) is interpreted.<sup>151</sup> Thus, because section 208(e) provides for a “new trial or resentencing” rather than complete exoneration, Echols argued that a showing of actual innocence was not required.<sup>152</sup> Instead, Echols concluded that section 208(e) requires a petitioner to demonstrate no reasonable jury would find him guilty beyond a reasonable doubt.<sup>153</sup>

Second, Echols argued that the Supreme Court’s decision in *House v. Bell*<sup>154</sup> demonstrated he was entitled to a new trial if the evidence established a reasonable jury would not find guilt beyond a reasonable doubt.<sup>155</sup> Similar to Echols, House was convicted of murder, and the Tennessee Supreme Court affirmed his conviction.<sup>156</sup> House was procedurally barred from asserting constitutional claims of his innocence, so he sought habeas corpus relief from the federal courts.<sup>157</sup> The United States Supreme Court was faced with defining the standard required to overcome this procedural bar under the “miscarriage of justice” exception, which prevented House from obtaining post-conviction relief.<sup>158</sup> The Court held that the petitioner must “demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt,” or in other words, “that any reasonable juror would have reasonable doubt.”<sup>159</sup> The *House* Court concluded that if the jury had heard the conflicting evidence, then it would be more likely than not that reasonable doubt would exist.<sup>160</sup>

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150. *Id.*

151. *Id.* at 38-39.

152. *Id.*

153. *Id.* at 37-39. Echols also argued that this standard was very similar to the express language of section 16-112-208(e) of the Arkansas Code, which requires the petitioner to “establish by compelling evidence that a new trial would result in an acquittal.” ARK. CODE ANN. § 16-112-208(e)(3) (Repl. 2006).

154. 547 U.S. 518 (2006).

155. Echols’s Motion for New Trial, *supra* note 5, at 39-44.

156. *House*, 547 U.S. at 532-33.

157. *Id.* at 521-22.

158. *Id.* at 536.

159. *Id.* at 538.

160. *Id.* at 554.

Thus, the Court granted the petitioner the opportunity to pursue post-conviction relief in federal court.<sup>161</sup> However, and most significant for Echols's argument, the Court distinguished this standard from a "freestanding innocence claim," which the Court previously suggested would support a directed verdict of acquittal<sup>162</sup> in *Herrera v. Collins*.<sup>163</sup> The *House* Court pointed out that "[t]his is not a case of conclusive exoneration. Some aspects of the State's evidence . . . still support an inference of guilt."<sup>164</sup> As such, the Court held that "whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it" even though he "has cast considerable doubt on his guilt . . . ."<sup>165</sup>

Echols contended that this distinction in federal habeas corpus proceedings should be considered and should inform the interpretation of the Arkansas post-conviction relief statutes.<sup>166</sup> Echols asserted that because he "[sought] the statutory remedy of a new trial rather than judicial exoneration . . . [he] need not conclusively prove his own innocence" in order to be entitled to relief.<sup>167</sup> "Rather the dispositive inquiry, like that of *House*, is whether Echols has clearly and convincingly proven that 'any reasonable juror would have reasonable doubt' as to his guilt."<sup>168</sup>

Third, Echols cited an Illinois appellate court case discussing the form of relief to which a petitioner is entitled based upon the varying legal significance of DNA-testing results.<sup>169</sup> Echols argued that this case was persuasive authority that supported his position that section 208(e) does not require truly exculpatory evidence for relief.<sup>170</sup> Illinois precedent is of particular significance because Arkansas modeled its post-

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161. *House*, 547 U.S. at 554.

162. *Id.* at 555.

163. 506 U.S. 390 (1993).

164. *House*, 547 U.S. at 553-54.

165. *Id.* at 555.

166. Echols's Motion for New Trial, *supra* note 5, at 39-43.

167. *Id.* at 44.

168. *Id.*

169. Echols's Reply in Support of Motion for New Trial, *supra* note 97, at 8 (citing *People v. Dodds*, 801 N.E.2d 63 (Ill. App. Ct. 2003)).

170. Echols's Reply in Support of Motion for New Trial, *supra* note 97, at 8.

conviction relief statutes after Illinois's statutes.<sup>171</sup> Thus, Echols contended that the court should look to Illinois case law for guidance as to how the Arkansas statute should be interpreted.<sup>172</sup>

In *People v. Dodds*,<sup>173</sup> the Illinois appellate court indicated that DNA-testing results do not have to be conclusively exculpatory in order to entitle a petitioner to a new trial.<sup>174</sup> The *Dodds* court started with the basic premise that "if DNA evidence is truly exculpatory, a defendant's conviction should be vacated and the defendant should be released, or some other similar resolution should be had."<sup>175</sup> Furthermore, "[i]f the results are neither truly exculpatory nor inculpatory, i.e., they are somewhere in-between or are a non-match . . . this may provide a basis for a defendant to file a postconviction petition asserting a claim of actual innocence based on newly discovered evidence."<sup>176</sup> Echols contended that "[t]here can be no clearer statement that petitioner's instant new trial claim based on DNA results, even if not conclusively exculpatory, may nevertheless entitle him to a new trial (rather than a judgment of acquittal) . . ."<sup>177</sup> Thus, Echols concluded that this interpretation by the Illinois court indicated a petitioner is not required to make an evidentiary demonstration akin to actual innocence.<sup>178</sup> Rather, Echols argued that the *Dodds* case was consistent with an interpretation of section 208(e), which only requires a showing that no reasonable jury would find guilt beyond a reasonable doubt.<sup>179</sup>

### b. The Circuit Court's and State's Analysis

The State argued, and the circuit court agreed, that the evidentiary showing necessary to obtain relief under section

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171. *Id.* "Illinois was the first state to pass postconviction DNA testing laws, and Arkansas's Act 1780 was largely modeled after the Illinois laws." *Id.*; see also Johnson v. State, 356 Ark. 534, 544, 157 S.W.3d 151, 160 (2004).

172. Echols's Reply in Support of Motion for New Trial, *supra* note 97, at 8.

173. 801 N.E.2d 63.

174. *Id.* at 68.

175. *Id.*

176. *Id.*

177. Echols's Reply in Support of Motion for New Trial, *supra* note 97, at 9.

178. *Id.* at 8-9.

179. *Id.*

2009]

## POST-CONVICTION RELIEF

525

208(e)(3) is akin to a demonstration of actual innocence.<sup>180</sup> Although the circuit court held that Echols should be denied relief under section 208(b) for inconclusive testing results, the court explained that “[e]ven if the Court agreed with the Petitioner that his DNA-testing results should be evaluated under section 208(e) . . . the Court would deny his motion without a hearing” because Echols failed to demonstrate that “he [was] actually innocent.”<sup>181</sup> Thus, the State contended that section 208(e) denied any relief “short of a demonstration of actual innocence.”<sup>182</sup> The circuit court seemingly agreed.<sup>183</sup> The State reasoned that the adoption of this standard was proper because of the legislature’s intent in passing the statute; “the higher threshold that evidence must now reach before testing can be ordered”; and the text of section 16-112-208(e).<sup>184</sup> Furthermore, the State argued that the federal habeas corpus standard set forth in *House v. Bell* was not applicable to Echols’s motion for a new trial in state court.<sup>185</sup>

The State argued that the intent of the legislature in passing the post-conviction relief statutes indicated that a demonstration of the petitioner’s actual innocence was required in order to obtain relief.<sup>186</sup> The purpose of these statutes was “to provide a mechanism for testing to exonerate the innocent.”<sup>187</sup> Thus, the State asserted that an interpretation of section 208(e) requiring anything less than a demonstration of actual innocence would be inconsistent with the legislature’s intent in passing the post-conviction relief statutes.<sup>188</sup> Therefore, the State concluded that

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180. Response to Motion for New Trial, *supra* note 39, at 19; *see also* Order Denying Motion for New Trial, *supra* note 10, at 7-8.

181. Order Denying Motion for New Trial, *supra* note 10, at 7-8. The issue of whether section 208(b) or section 208(e) should be applied to Echols’s testing results is discussed previously in this comment. *See infra* Part IV.

182. Response to Motion for New Trial, *supra* note 39, at 19; *see also* Order Denying Motion for New Trial, *supra* note 10, at 8.

183. Order Denying Motion for New Trial, *supra* note 10, at 8. The circuit court’s order did not specifically define the evidentiary standard set forth in section 208(e). *Id.* However, the circuit court indicated that the statute requires a showing akin to actual innocence in its evaluation and subsequent rejection of Echols’s claim under section 208(e). *Id.*

184. Response to Motion for New Trial, *supra* note 39, at 21.

185. *Id.* at 21-23.

186. *Id.* at 19.

187. *Id.* at 21.

188. *Id.* at 19-21.

a showing akin to actual innocence must be required before a petitioner is entitled to post-conviction relief under Arkansas law.<sup>189</sup>

The State also contended that the higher threshold a petitioner must meet in order to obtain DNA testing indicated that an evidentiary showing demonstrating the petitioner's actual innocence was required to obtain relief.<sup>190</sup> In order to obtain DNA testing under the revised statute, the proposed testing must have the possibility of "produc[ing] new material evidence" that would "[r]aise a reasonable probability that the person making a motion under this section did not commit the offense."<sup>191</sup> The State argued that the standard required to obtain testing was more stringent than Echols's proposed standard for a new trial.<sup>192</sup> "[T]he measure for new-trial relief under [subsection] (e)(3) logically cannot be less than the burden required for simply bringing a claim or merely obtaining testing under the statute generally, as [was] Echols's proposed measure."<sup>193</sup> Therefore, the State concluded that Echols's proposed standard for relief should be rejected because it was not reasonable in light of the revised standard required to obtain testing.<sup>194</sup>

The State asserted that the text of section 208(e) rendered Echols's argument regarding the potential range of remedies available under section 201 irrelevant and did not indicate that relief should be available absent an evidentiary showing akin to actual innocence.<sup>195</sup> "Contrary to [Echols's] reliance on it, [section] 201 describes what a petitioner must aver just to pursue relief, not what he must prove to the Court to permit it to actually grant post-conviction relief."<sup>196</sup> Thus, the State asserted that Echols's reliance on section 201 in support of his proposed evidentiary standard was misplaced and should have no impact

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189. Response to Motion for New Trial, *supra* note 39, at 21.

190. *Id.* at 20.

191. ARK. CODE ANN. § 16-112-202(8)(B) (Repl. 2006).

192. Response to Motion for New Trial, *supra* note 39, at 20. Echols's proposed standard required to obtain DNA testing was that no reasonable jury would find guilt beyond a reasonable doubt. Echols's Motion for New Trial, *supra* note 5, at 37.

193. Response to Motion for New Trial, *supra* note 39, at 20.

194. *Id.*

195. *Id.*

196. *Id.*

2009]

*POST-CONVICTION RELIEF*

527

on the determination of the evidentiary standard necessary to entitle a petitioner to relief under the statute.<sup>197</sup>

Furthermore, the State rejected Echols's argument that the *House* standard for federal habeas corpus relief was relevant in interpreting Arkansas's statutory scheme for post-conviction relief.<sup>198</sup> The State argued that the procedural and factual differences between the *House* case and Echols's motion were substantial, and, as a result, the *House* decision should have no influence on the interpretation of Arkansas's post-conviction statute.<sup>199</sup> "Echols's would-be employment of the standard from *House v. Bell* is patently inconsistent with the posture of his case and the available state statutory relief."<sup>200</sup> The State pointed to the fact that House "raised his claim of actual innocence in federal court to excuse his failure to raise in Tennessee state court several federal constitutional challenges to his trial proceedings."<sup>201</sup> House was only seeking procedural relief to enable him to raise his claim of actual innocence, while Echols asked the court to "wipe clean the long presumptively valid determination of his guilt . . ."<sup>202</sup> Thus, the "the lesser gateway relief House pursued could be obtained by an actual innocence burden less than that Echols must meet to obtain a new trial."<sup>203</sup> In light of these differences, the State contended that the *House* decision was not relevant to the interpretation of the evidentiary showing necessary to obtain relief under Arkansas's statutory scheme for post-conviction relief.<sup>204</sup>

### c. Evaluation of the Circuit Court's Decision

The circuit court likely erred in interpreting Arkansas's statutory scheme for post-conviction relief to require a demonstration of actual innocence in order to entitle a petitioner to relief.<sup>205</sup> The statute provides for relief when the totality of the evidence in a particular case, including the DNA-testing

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197. *Id.* at 19-21.

198. Response to Motion for New Trial, *supra* note 39, at 21.

199. *Id.* at 21-22.

200. *Id.* at 21 (citations omitted).

201. *Id.*

202. *Id.* at 21-22.

203. Response to Motion for New Trial, *supra* note 39, at 22.

204. *Id.* at 23.

205. Order Denying Motion for New Trial, *supra* note 10, at 7-8.

results, “establish by compelling evidence that a new trial would result in acquittal.”<sup>206</sup> This statute should be interpreted to require a petitioner to demonstrate that no reasonable jury would find guilt beyond a reasonable doubt in order to entitle a petitioner to a new trial. This interpretation is correct because of the three aforementioned reasons: (1) the range of potential remedies available under section 201 of the Arkansas Code; (2) the United States Supreme Court’s decision in *House*,<sup>207</sup> particularly when discussing the *Herrera*<sup>208</sup> decision; and (3) the Illinois appellate court’s decision in *Dodds*.<sup>209</sup>

Furthermore, the policy underlying the post-conviction relief statutes indicates that the circuit court’s interpretation of the statutes as requiring an evidentiary showing akin to actual innocence is erroneous. The statutes are designed to provide a scheme for scientific testing that can “exonerate the innocent.”<sup>210</sup> The State contended that this policy is furthered only when a new trial is granted based on evidence that makes it physically impossible for the petitioner to have committed the crime in question.<sup>211</sup> The practical effect of accepting such a narrow interpretation, however, will hinder the statute’s policy because it would be essentially impossible for any petitioner to ever meet such a high standard. This effect is the likely result of the circuit court’s interpretation of the statute as requiring a showing akin to actual innocence. And this result was even recognized by the State in its motion: “Indeed, as to crimes like those committed by Echols, it may well be that DNA-testing results can never conclusively support a claim of actual innocence.”<sup>212</sup> Thus, in light of its practical effect, it seems very

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206. ARK. CODE ANN. § 16-112-208(e)(3) (Repl. 2006).

207. 547 U.S. 518 (2006).

208. 506 U.S. 390 (1993).

209. 801 N.E.2d 63 (Ill. App. Ct. 2003).

210. Act 1780, 2001 Ark. Acts 7736, 7737.

The General Assembly finds that the mission of the criminal justice system is to punish the guilty and to exonerate the innocent. The General Assembly further finds that Arkansas laws and procedures should be changed in order to accommodate the advent of new technologies enhancing the ability to analyze scientific evidence.

Act 1780, 2001 Ark. Acts 7736, 7737.

211. Response to Motion for New Trial, *supra* note 39, at 8-11.

212. *See id.* at 14.

2009]

*POST-CONVICTION RELIEF*

529

unlikely the legislature intended this outcome when passing the statute.

Conversely, interpreting the statute to provide a petitioner relief when he can demonstrate that no reasonable jury would find guilt beyond a reasonable doubt promotes the policy of exonerating the innocent. This interpretation would better accomplish the purpose of the statute—freeing the innocent—because it recognizes the practical limitations of means of proof while still requires a very high evidentiary showing to entitle a petitioner to relief. Interpreting the statute in this manner provides a moderate amount of flexibility. It will not preclude a court from granting a new trial or other relief in situations where newly discovered evidence makes it highly unlikely that the petitioner committed the crime in question, but a showing of actual innocence is not possible. The ideal way to promote the policy of freeing the innocent is to incorporate this flexibility so these types of cases are not summarily denied. In short, a statute meant to free the innocent that would require such a rigorous showing simply cannot accomplish its purpose. Therefore, the circuit court erred in interpreting Arkansas’s post-conviction relief statutes to require a showing akin to actual innocence before a petitioner is entitled to relief.

### *3. Application of New Scientific Evidence to the Evidentiary Standard*

The DNA-testing results, coupled with the new forensic evidence presented by Echols, “establish by compelling evidence that a new trial would result in an acquittal.”<sup>213</sup> This evidence is sufficient to establish that any reasonable juror would have reasonable doubt as to Echols’s guilt because it completely undermines the evidence that supported Echols’s conviction.<sup>214</sup> Thus, the circuit court erred in denying Echols’s motion for a new trial.

Arkansas courts have never had the opportunity to apply this statute to the facts of a case. Thus, under Arkansas law, there are no available guidelines or comparisons that can be

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213. ARK. CODE ANN. § 16-112-208(e)(3) (Repl. 2006).

214. *See supra* notes 24-38 and accompanying text for an overview of the evidence produced at trial that led to Echols’s conviction.

made to aid in applying Echols's facts to the evidentiary standard provided by this statute. Illinois law, however, is much more developed on this topic, and *People v. Starks*<sup>215</sup> provides an example for Arkansas courts that is particularly pertinent to the facts presented in Echols's motion.<sup>216</sup> The petitioner in *Starks* was convicted of aggravated criminal sexual assault and various other lesser charges stemming from the alleged rape of a woman.<sup>217</sup> During the petitioner's trial, the State's forensic expert testified that "she could not exclude [the petitioner] as a possible source of the semen" that was recovered from the victim's underwear.<sup>218</sup> Almost two decades later, DNA testing excluded the petitioner as a possible source of the semen, and the petitioner filed a motion for a new trial.<sup>219</sup> The trial court denied the petitioner's motion, but on appeal, the trial court was overturned, and the petitioner was granted a new trial.<sup>220</sup> The State opposed the motion for a new trial by arguing that numerous pieces of evidence—not just the semen evidence—were relied upon for the petitioner's conviction.<sup>221</sup> The court, however, rejected the State's arguments and concluded, "The award of a new trial in this case is necessary, based upon the noncumulative evidence of the DNA test results and the probability of a different result upon retrial because of this evidence."<sup>222</sup>

The *Starks* case can serve as a guide for Echols's appeal because in *Starks*, the DNA evidence was not completely exculpatory. After considering all the attendant facts of the case, however, it was clear to the court that a jury could not find the petitioner's guilt beyond a reasonable doubt. As in *Starks*, the exclusion of Echols's as the source of any of the genetic material that was recovered from the crime scene is not conclusively exculpatory in itself. However, when Echols's exclusion as the source of the DNA is considered in light of the facts and circumstances of the crime, this exclusion becomes

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215. 850 N.E.2d 206 (Ill. App. Ct. 2006).

216. *See generally id.*

217. *Id.* at 209.

218. *Id.* at 210.

219. *Id.* at 211.

220. *Starks*, 850 N.E.2d at 211, 214.

221. *Id.* at 213.

222. *Id.* at 214-15.

2009]

*POST-CONVICTION RELIEF*

531

compelling evidence that a jury would not find Echols's guilt beyond a reasonable doubt.

The DNA-testing results and the newly discovered forensic evidence create reasonable doubt of Echols's guilt because this evidence, even when viewed in isolation, indicates that it is unlikely Echols committed the murders. However, the effect of this evidence, when viewed together, is sufficiently compelling to preclude any reasonable juror from finding Echols's guilt beyond a reasonable doubt. Therefore, Echols satisfied his burden of "establish[ing] by compelling evidence that a new trial would result in an acquittal."<sup>223</sup>

The DNA-testing results created reasonable doubt of Echols's guilt because due to the gruesome nature of the murders and the alleged sexual activity involved, it is extremely unlikely that the murders could have been conducted without leaving any detectable genetic material. Furthermore, the newly offered forensic evidence indicated that the injuries on the victims were the result of post-mortem animal predation, which renders much of the State's evidence against Echols entirely unreliable. Specifically, this evidence undermines the State's assertion that the knife recovered in the lake was used to inflict the victims' injuries, and perhaps more importantly, the forensic evidence indicates that the confession given by Misskelley was completely fabricated. Therefore, the evidence Echols produced was sufficient to entitle him to a new trial pursuant to Arkansas's statutory scheme providing post-conviction relief based on newly discovered scientific evidence.

## V. CONCLUSION

The circuit court failed in its interpretation of Arkansas's post-conviction relief statute. In doing so, it also failed to meet the Arkansas Legislature's goal of accounting for the ability of new technology to accomplish the mission of criminal law—to punish the guilty and exonerate the innocent. As U.S. Congressman Bill Delahunt stated, "[T]he criminal justice system is about the search for the truth, and like all human enterprises, it is fallible . . . [b]ut now we have the means at our disposal to minimize the possibility of error, and especially

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223. See ARK. CODE ANN. § 16-112-208(e)(3) (Repl. 2006).

where lives are at stake, we have no choice . . . we must take advantage of them.”<sup>224</sup> A close examination of the legal and factual issues presented by Echols’s motion for a new trial reveals the circuit court’s failures on each level, particularly the way the circuit court’s interpretation of the statute eviscerated its purpose. In the context of Echols’s motion, Arkansas courts have the opportunity to interpret this statute in accordance with its express language and the legislature’s purpose, as well as to provide much needed guidance to other jurisdictions in interpreting similar statutory schemes. If Arkansas seeks to accomplish the mission of the criminal law by way of new technology, then Arkansas courts must grant Echols’s motion for a new trial under Arkansas’s statute for post-conviction relief based on new scientific evidence.

DAVID S. MITCHELL, JR.

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224. 150 CONG. REC. H8179, 8189 (daily ed. Oct. 6, 2004) (statement of Rep. Delahunt).