

IN THE CIRCUIT COURT OF CRITTENDEN COUNTY
FIRST DIVISION

STATE OF ARKANSAS

PLAINTIFF/RESPONDENT

v.

No. 18CR-93-516

DAMIEN ECHOLS

DEFENDANT/PETITIONER

MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

Having recently learned of the West Memphis Police Department's ("WMPD") spoliation of evidence in his case, apparently both before and after his Alford plea, Damien Echols moves this Court to exercise its continuing supervisory jurisdiction over this case to declare the violation of his rights by this misconduct and to enjoin its continuation pending the development of a full factual record upon which the Court can consider awarding appropriate relief to Echols for the damages it has caused him. As grounds for this motion, Echols asserts the following:

Background

1. 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.

2. 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. Ultimately, the development of further evidence in anticipation of that hearing - including the results of additional new 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.

3. 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.

4. In early 2020, investigative journalist Bob Ruff was producing a new “documentary” show re-examining the WM3 case. Ruff thought it would be a productive idea in that regard to use new advanced DNA testing technology called MVac to search for and test DNA that might remain on certain items of the State’s evidence in the case. Accordingly, Ruff asked the WM3 if they would agree to such testing, 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 about the testing.

5. 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 endeavor to intervene with Ellington to secure his consent to MVac testing of certain evidence in the case. Braga agreed to do so. Braga subsequently reached out to Ellington, who said he had no problem with having the evidence so tested.

6. 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 laboratory chosen to do the MVac 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 MVac technology.

7. 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 MVac 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.

8. 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.

9. In light of the then still-uncompleted effort to have certain WM3 case evidence tested with the new MVac DNA technology, despite Ellington’s repeated consent to that testing, Echols’ undersigned counsel reached out to Chrestman to try to 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.

10. 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).

11. 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.

12. 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.

13. On April 28, 2021, however, Chrestman gave a media interview concerning his “first 100 days in office.”¹ 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.

14. As of mid-May 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.”

15. In light of Echols’ defense team’s inability to secure this information from the WMPD informally, on July 6, 2021, Echols’ counsel submitted a formal request under the Arkansas Freedom of Information Act (Ark. Code Ann. Sections

¹ See <https://talkbusiness.net/2021/04/prosecutor-keith-chrestman-talks-first-100-days-in-office>.

25-19-101, et seq.) to “inspect, copy or receive” records containing the following information:

- All records cataloging the evidence in the WM3 case before August 19, 2011, and identifying the location(s) of the evidence at the time of such cataloging.
- All records cataloging the evidence in the WM3 case after August 19, 2011, and identifying the location(s) of the evidence at the time of such cataloging.
- All records referencing the “loss” of any of the evidence in the WM3 case after August 19, 2011.
- All records referencing the “misplacement” of any of the evidence in the WM3 case after August 19, 2011.
- All records referencing the “destruction by fire” of any of the evidence in the WM3 case after August 19, 2011, and identifying the location of that fire.
- All records referencing the “destruction” of any of the evidence in the WM3 case for any other reason after August 19, 2011, and identifying the participants in the ordering and implementing of that destruction.
- All records identifying any policies or procedures to be followed by the WMPD in preserving evidence seized in criminal cases.
- All records identifying any policies or procedures to be followed by the WMPD in preserving sources of potential DNA evidence in criminal cases.
- All records evidencing any communications between one or more of Ellington, Chrestman, Langston, Allen, other members of the WMPD or any personnel associated with the Arkansas State Crime Laboratory concerning the evidence in the WM3 case from August 19, 2011 to date.
- All records evidencing any communications by one or more of Ellington, Chrestman, Langston, Allen or any other members of the WMPD and any third-parties concerning the evidence in the WM3 case from August 19, 2011 to date.

16. As of the date of this filing, and despite the statutory deadline for agency action, Echols' counsel has not received any response to the foregoing FOIA request.

17. After Echols' FOIA request was sent to the WMPD and made public, news media in West Memphis and its surrounding communities started to investigate its allegations that evidence in the WM3 case had been "lost," "misplaced" or "destroyed."

18. According to a report published by the Arkansas Democrat-Gazette, it was told by West Memphis Mayor Marco McClendon that he had confirmed with the West Memphis Police Department that some of the evidence "might have been destroyed" in a fire "around 15 years ago." "I don't know what was destroyed or what was not destroyed," McClendon said. "That is what I am being told, that there was a fire many, many years ago."

19. According to WMC5 Action News, it learned the following about the destruction of some of the evidence: "A source said the evidence was transferred to shipping containers where there was a fire, and some of the evidence was destroyed."

Grounds For Relief

20. This Court is more familiar with the extraordinary WM3 case than any other. At the time it accepted Echols' Alford plea, the Court accurately characterized it as a "tragedy on all sides." Unbelievably, the case has now gotten even more tragic with the State's recent admissions, never before disclosed to Echols' counsel or the Court, that evidence in the case has been negligently, recklessly and/or intentionally lost, misplaced and/or destroyed. As Chrestman matter-of-factly told the media about the evidence, now "much of it is gone." See Para. 13 supra (emphasis added). The full extent of this outrageous dereliction of duty by WMPD authorities needs to be promptly discovered, enjoined and remedied.

The Arkansas DNA Statute

21. 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.

22. Significantly, Section 12-12-104 also provides a framework for “the prosecuting attorney or law enforcement agency having custody of the evidence to petition the court with notice to the defendant for entry of an order allowing disposition of the evidence” under certain conditions. *Id.* at (c)&(d). Those conditions are primarily designed to further opportunities for future DNA testing and other forensic analysis of the case evidence before any of it is destroyed. No prosecuting attorney or law enforcement agency ever invoked that framework, and thus its conditions were never satisfied to allow any destruction of evidence, in the WM3 case.

23. The Arkansas DNA statute became effective on August 13, 2001. According to its legislative history, the 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.”² Since that date, for the last twenty years, it has been a criminal offense for any prosecuting attorney or law enforcement agency to “purposely” violate its provisions. *Id.* at (e)(1)&(2). To date, all of the evidence spoliation we have heard about - and recounted above - in the WM3 case has occurred within the past fifteen years.

² See <ftp://www.arkleg.state.ar.us/acts/2001/htm/ACT1780.pdf>.

24. It could hardly be clearer from the limited factual record known to date that WMPD authorities, and those who might have directed their actions, have been derelict - possibly criminally derelict - in fulfilling their evidentiary preservation duties under the Arkansas DNA statute. In the face of the clear and mandatory duties imposed by this statute, how can the Prosecuting Authority even attempt to explain such conduct with the non sequitur that “in cases like this the evidence is often destroyed.” See Para. 13 supra (emphasis added). Multiple wrongs do not make a right.

25. It could also hardly be clearer that the limited factual record known to date needs to be fully developed so that the Court has before it the full extent of what happened, to which evidence, when, where and how - including why neither the Court nor Echols’ counsel were ever advised of these multiple evidentiary transgressions over the years - in order to consider the appropriate remedies for this misconduct. A prompt and complete response to the information requests in Echols’ July 6 FOIA request is a vital first step in the development of such a full factual record.

Relief Requested

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 n.2 supra (Section 1). The new MVac DNA testing technology is precisely the type of scientific step forward contemplated by the statute. The WMPD’s failure to properly preserve the WM3 case evidence that might now be subjected to such testing is precisely the type of law enforcement step backward that entirely undermines the purpose of the statute. The tragedy continues.

On the basis of the foregoing, Echols asks this Court to:

- (a) declare that the WMPD has, by its own admissions, violated the Arkansas DNA statute’s evidence preservation obligations in the WM3 case;
- (b) enjoin the WMPD from any further failures to preserve any of the remaining evidence in the WM3 case;
- (c) direct the WMPD to immediately provide a full and complete response to Echols’ pending FOIA request seeking further information about the “lost,” “misplaced,” and/or “destroyed” case evidence;
- (d) provide a reasonable opportunity for Echols to take discovery to further develop the factual record of what has transpired with respect to the WM3 case evidence;

(e) establish a post-discovery briefing schedule to address the potential remedies the Court might impose as a result of the misconduct at issue herein; and

(f) award such further relief as the Court might deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patrick Benca, do hereby certify that this motion has been filed via Eflex to ensure proper delivery to the appropriate parties on July 16, 2021.

/s/ Patrick Benca
Patrick J. Benca