CAPITAL CASE
No. 20-____

In the Supreme Court of the United States

STACEY EUGENE JOHNSON,
Petitioner,

v.

ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Petitioner, Stacey Eugene Johnson, was convicted and sentenced to death for the 1993 Sevier County, Arkansas murder of Carol Heath. Petitioner has always maintained his innocence of this crime. Untested physical evidence collected from the crime scene points to another man's guilt. Arkansas law provides a right to DNA testing pursuant to Act 1780 (codified at Ark. Code Ann. §§ 16-112-201, *et seq*.). Petitioner sought DNA testing on certain probative items of crime scene evidence under the provisions of 2001 Ark. Act 1780. Petitioner showed, as required by that statute, that the results of DNA testing may produce new material evidence that supports a theory of actual innocence and raises a reasonable probability that he did not commit the crime. Despite satisfying this required showing, the Arkansas Supreme Court, in a 5-2 opinion, affirmed the circuit court's denial of DNA testing.

The question presented is:

Does the Arkansas DNA testing statute, as construed by the Arkansas Supreme Court, prevent Petitioner from meaningfully accessing the State's post-conviction remedies by denying him potentially exculpatory DNA testing in a manner that is fundamentally unfair, and in violation of his due process rights under the Fifth and Fourteenth Amendments and his right to access courts under the First Amendment?

PARTIES TO THE PROCEEDINGS BELOW

The petition arises from a state proceeding in which Petitioner, Stacey Eugene Johnson, sought relief from the Arkansas Supreme Court.

LIST OF RELATED PROCEEDINGS

State of Arkansas vs. Stacey Eugene Johnson, No. CR-93-54 (Sevier Cty. Cir. Ct., Sep. 23, 1994)

Johnson v. State, No. CR 95-427, 326 Ark. 430, 934 S.W.2d 179 (Oct. 28, 1996), *cert. denied* 520 U.S. 1242 (May 27, 1997)

State of Arkansas v. Stacey Eugene Johnson, No. CR-93-54 (Sevier Cty. Cir. Ct., Nov. 21, 1997)

Johnson v. State, No. CR 98-00743, 342 Ark. 186, 27 S.W.3d 405 (Oct. 5, 2000), *cert. denied* 532 U.S. 944 (Mar. 26, 2001)

State of Arkansas v. Stacey Eugene Johnson, No. CR-93-54 (Sevier Cty. Cir. Ct., Jan. 7, 2002),

Johnson v. State, No. CR 02-1362, 356 Ark. 534, 157 S.W.3d 151 (Apr. 1, 2004), *cert denied* 543 U.S. 932 (Oct. 12, 2004)

State of Arkansas v. Stacey Eugene Johnson, No. CR-1993-54 (Sevier Cty. Cir. Ct., Jul. 22, 2005)

Johnson v. State, No. CR 05-1180, 366 Ark. 390, 235 S.W.3d 872 (May 18, 2006)

Johnson v. Norris, No. 5:06CV00185 JLH, 2007 WL 2343883 (E.D. Arkansas, Aug. 14, 2007)

Johnson v. Norris, No. 07-3058 537 F.3d 840 (8th Cir., Aug. 8, 2008), *cert. denied* 555 U.S. 1182 (Feb. 23, 2009)

Jones v. Hobbs et al., No. 5:10CV00065 JLH, 2010 WL 1417976 (E.D. Arkansas, Apr. 5, 2010)

Jones v. Hobbs et al., No. 10-1754, 604 F.3d 580 (8th Cir., Apr. 9, 2010), *cert. denied* No. 09-10327, 561 U.S. 1014 (Jun. 21, 2010)

Stacey Eugene Johnson v. State of Arkansas, No. CR-93-54, (Sevier Cty. Cir. Ct., Apr. 17, 2017)

Johnson v. State, No. CR-17-312, 2017 Ark. 137, 2017 WL 1455048 (Apr. 19, 2017)

Johnson v. State, No. CR-17-312, 2017 Ark. 138, 2017 WL 1455044 (Apr. 19, 2017)

Stacey Eugene Johnson v. State of Arkansas, No. 67CR-93-54, (Sevier Cty. Cir. Ct., May 9, 2018)

Johnson v. State, No. CR-18-700, 2019 Ark. 391, 591 S.W.3d 265 (Ark., Dec. 12, 2019), *rehearing denied* 2020 Ark. 86, 2020 WL 830044 (Feb. 20, 2020), *motion to stay mandate denied,* No. CR-18-700, (Ark., Feb. 20, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the final judgment of the Arkansas Supreme Court affirming the denial of his motion for DNA testing pursuant to Arkansas Code Annotated sections 16-112-201, *et seq*. ("Act 1780" or the "Statute") and denying rehearing of that decision.

OPINIONS BELOW

The Circuit Court of Sevier County issued its opinion on April 17, 2017. This decision was not reported. App.-91a-92a. On April 19, 2017, the Arkansas Supreme Court granted Petitioner's motion for a stay of execution and remanded for a hearing on Petitioner's motion for postconviction DNA testing. This decision was not reported. App.-83a-90a. On May 9, 2018, the Circuit Court of Sevier County issued its decision denying Petitioner's motion for postconviction DNA testing. This decision was not reported. App.-78a-82a. On December 12, 2019, the Arkansas Supreme Court issued its opinion affirming the Circuit Court of Sevier County's denial of Petitioner's motion for postconviction DNA testing. This decision was reported at *Johnson v. State,* No. CR-18-700, 2019 Ark. 391, 591 S.W.3d 265 (Ark., Dec. 12, 2019). App.-11a-77a. On February 20, 2020, the Arkansas Supreme Court denied Petitioner's motion for rehearing. This decision was not reported. App.-4a-10a.

STATEMENT OF JURISDICTION

The Arkansas Supreme Court denied Petitioner's petition for rehearing on February 20,

2020.[1] This Court's jurisdiction is invoked under 28 U.S.C. §1257(a). Petitioner now timely files this petition wherein he asserts a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in relevant part that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I.

The Fifth Amendment provides in relevant part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V.

The Fourteenth Amendment provides in relevant part that "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

Arkansas Code Annotated sections 16-112-201, *et seq*. is reprinted in the Appendix.

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[1] By order of the Supreme Court dated March 19, 2020, the deadline to file any petition for a writ of certiorari due on or after the date of that order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Petitioner's timely petition for rehearing was denied by order of the Arkansas Supreme Court on February 20, 2020. As such, Petitioner's petition for a writ of certiorari is due July 19, 2020.

INTRODUCTION

It is settled law that when states choose to provide mechanisms for post-conviction relief, those procedures must provide litigants with a fair opportunity to assert their state-created rights and that a failure to do so is a violation of the litigants' rights to due process. *See generally Skinner v. Switzer*, 562 U.S. 521 (2011); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009); *Bounds v. Smith*, 430 U.S. 817 (1977).

This Court recognized that litigants have a liberty interest in obtaining post-conviction relief by demonstrating their innocence with new evidence under state law. This includes DNA evidence. A state's procedures concerning access to and testing of that evidence must not offend fundamental principles of justice or transgress recognized principles of fundamental fairness in operation. *See Osborne*, 557 U.S. at 68-69.

The Arkansas Supreme Court has a history of unreasonably narrow interpretations of Act 1780 that render it virtually meaningless and thereby deprive litigants of their due process rights. Here, in affirming the state circuit court's denial of testing and denying rehearing of that decision, the Arkansas Supreme Court found that Petitioner had failed to establish that DNA testing would exonerate him, although Act 1780 does not require a petitioner to make that showing. In reaching this final judgment, the court also wrongly rejected the argument that DNA testing could exculpate Petitioner, notwithstanding that his conviction was predicated on the problematic eyewitness identification of a six-

year-old child and questionable forensic evidence, as discussed *infra* pp. 6-7, 9-11; note 3.

This Court has not yet determined what minimal protections are necessary to ensure fundamental fairness in the operation of state DNA testing laws. It should do so in this capital case, where the available DNA testing statute is rendered meaningless.

In *Osborne*, this Court held that when states, like Arkansas, provide for post-conviction relief—including through the presentation of new evidence such as DNA—the Constitution requires meaningful access to that new evidence in order to afford petitioners effective access to other post-conviction remedies; failure to afford such access is a violation of petitioners' constitutional rights. *See Osborne*, 557 U.S. at 68-69. As demonstrated below, the Arkansas Supreme Court's affirmance of the state circuit court's denial of Petitioner's Act 1780 motion violated his rights guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

From the time of his arrest until today, Petitioner has consistently maintained his innocence of the 1993 murder of Carol Heath. He has been incarcerated on death row for over a quarter of a century for capital murder. DNA testing is perfectly suited to conclusively "demonstrate [Petitioner's] actual innocence" and undermine the questionable evidence used to convict him at trial. *See* § 16-112-202. Petitioner is a black man and untested evidence in his case points to a white perpetrator.

The State's theory of prosecution was that Petitioner alone murdered and raped the victim. R3 T. 1581-1584.[2] On April 2, 1993, the victim was found dead in her home in Sevier County, Arkansas. R3 T. 951-953. She had cutting wounds on her neck and the certificate of death would note evidence of strangulation and blunt force head injuries. R3 T. 125. Her body was discovered between 6:00 and 6:30 a.m. and law enforcement officials from the local De Queen Police Department and the Arkansas State Police arrived shortly thereafter. R3 T. 951-954. Within hours of the crime, Petitioner was the first—and only—subject of police investigation. *See* R3 T. 1571.

At the victim's apartment, investigators collected several pieces of evidence, including underwear found next to the victim's thigh, a wad of tissue paper found near the victim's genitals (believed to have been used by the perpetrator to clean up after the sexual assault), a box of condoms, a douche bottle, a towel, a wash cloth, and pieces of the victim's clothing. R3 T. 116, 1003-1005. Swabs were collected of a clear pool of liquid surrounding the victim's body, believed to have come from the douche bottle used to clean up after the crime. R3 T. 1004; R4 T. 2308. Apparent hairs of both Caucasian and African American origin were collected from the floor near the victim's body. R3 T. 121; R4 T. 2518-19, 2523. From the victim's hand, Caucasian hairs microscopically

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[2] References to the record in this case use the following naming conventions: "R1 T. ___": May 23, 2018 Record on Appeal from May 2018 Denial of DNA Testing; "R2 T. ___": January 7, 2002 Hearing; "R3 T. ___": November 17-21, 1997 Trial; "R4 T. ___": April 19-23, 1995 Trial.

dissimilar to the victim were recovered. R3 T. 121, 721. Investigators also photographed a single, partially smoked cigarette on the floor of the apartment, although there is no record it was collected and sent to the Arkansas State Crime Lab with the other pieces of evidence. R3 T. 1109-10. Reference to *this* cigarette does not appear again in the record.

None of the evidence recovered from the victim's apartment was ever connected to Petitioner, except four hairs found on the floor by the victim. *See* R3 T. 1393. There is a plausible explanation for the presence of the hair, however; Petitioner knew the victim socially and had previously been to her apartment. R4 T. 20. Notably, no Caucasian hairs, including those recovered from the victim's hand, were submitted for DNA testing. R3 T. 1346-1347. Fingerprints on the condom package and douche bottle did not match Petitioner. R4 T. 91. Bite marks on the victim's breasts were swabbed for saliva, and a rape kit was performed to collect vaginal, rectal and oral swabs and smears. R3 T. 1285, 1288. No DNA testing was performed on the rape kit samples.

Several days after the crime, a passerby directed the authorities to a wooded area near a roadside park about four miles south of De Queen. R3 T. 989-90. There, various articles of clothing and a purse containing the victim's identification were found along with a "green pullover shirt," a white t-shirt, a towel, and a "sweater jacket," all of which were wet and had significant blood on them. R3 T. 989, 1025, 1067. The State theorized that the perpetrator personally brought several of the victim's items to this second crime scene and removed his bloodied clothing there. R3 T. 1583-1584.

Investigators transported the items to the local police station and laid them out in an attempt to dry them. R3 T. 1026-27. The following day, officials discovered "cigarettes and matches," all of which were reportedly dry and in pristine condition, in a "slit" pocket of the waterlogged green shirt. R3 T. 112, 1030-32, 1086; R2 T. 10, 191-194. There is no photo of these items in relation to the green shirt in the record. Investigators sent the shirts and some other items from the roadside park to the state crime lab. R3 T. 1033. De Queen Police Officer Jim Behling testified that the local police decided the sweater jacket was not "going to be usable" and it was never sent to state crime lab. R3 T. 1035. Inexplicably, investigators did not send the cigarettes and matches to the lab with the other items, but instead sent them six months later.[3] R1 T. 427; App.-57a-58a (Hart, J., dissenting).

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[3] As discussed *infra* pp. 8, 11, Petitioner's DNA was eventually recovered from this cigarette butt. Arkansas Supreme Court Associate Justice Hart's dissenting opinion, however, provides an analysis of the significant questions regarding the reliability of the cigarette evidence, including the mysterious transformation of the "cigarettes" into a single "cigarette butt." She provides a detailed timeline regarding the questionably changed description of these items, and concludes "[t]he collective weight of [the] information indicates that the cigarette butt with Johnson's saliva actually came from somewhere other than [the pocket of the green shirt] and its corresponding chain of custody." App.-55a (Hart, J., dissenting). Based on the inconsistencies regarding the cigarette evidence, she concludes:

> The chain of custody for the cigarette butt with Johnson's saliva is materially deficient. This deficiency undercuts the reliability of this evidence, and (despite the "plant" label volunteered by the State) supports the possibility

No DNA evidence ever connected Mr. Johnson to either shirt from the roadside park. The prosecution relied on the testimony of Sharon Johnston, Petitioner's stepmother, to connect him to these items. Her testimony, however, was varied and she could not definitively say either way if the white and green shirts belonged to Petitioner. R3 T. 1183-1193. Additionally, several untested Caucasian hairs were retrieved from the white t-shirt, green shirt and towel. R1 T. 460; R3 T. 1083-84. The only biological evidence that linked Petitioner to the second crime scene was from the "cigarettes and matches," which by the second trial was referred to by the prosecution as a single "cigarette butt." R1 T. 427-429; R4 T. 85, 91; R3 T. 1410-11.

Several items of probative value from both crime scenes were never submitted for DNA testing, including the rape kit samples, victim's underwear, tissue paper and fluid swabs collected from around the victim's genitals, and Caucasian hairs—dissimilar to the victim—including an apparent inch-and-a-half red beard hair found in the victim's hand. R3 T. 284; R2 T. 204. Her ex-boyfriend, Branson Ramsey, had a history of perpetrating domestic abuse and was described as having a "reddish brown beard" at the time of the murder. R3 T. 1502-03; R2 T. 214. Police

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> that it was "swapped in" at some point after the evidence from the crime scenes was collected. But regardless of how the cigarette butt became evidence in Johnson's case, the presently observable shortcomings in its chain of custody render it an unreliable piece of evidence for purposes of our subdivision 202(8) analysis.

App.-50a-51a (Hart, J., dissenting).

knew about the victim's relationship with Ramsey—that he had previously been in her home and had recent contact with her—yet there was no effort to compare these hairs to Ramsey's, or to submit them for DNA testing. R1 T. 44-45.

From the beginning of the investigation, officials pursued only Petitioner as a suspect. R3 T. 1571. In a sworn affidavit, De Queen Police Officer Hayes McWhirter noted that "in interviewing witnesses and suspects . . . it was learned that [the victim] knew [Petitioner] in at least a social manner" and that "[Petitioner] had been in [her] home . . . socially." R4 T. 20. Based on statements by "different people," Officer McWhirter requested a photo array, which included Petitioner and six other black males. R3 T. 1450-52.

The potential that additional DNA testing in this case would lead to exonerating evidence must be considered in tandem with the evidence used to convict and sentence Mr. Johnson to death, including: (1) the problematic identification provided by the victim's six-year-old daughter; (2) Petitioner's alleged and undocumented "confession"; and, (3) several pieces of questionable DNA evidence adduced at trial.

1. Eyewitness Testimony of the Victim's Six-Year-Old Daughter

After requesting the photo array following the victim's death, Officer McWhirter interviewed the victim's six-year-old daughter. R3 T. 1445-46, 1450. The interview was not recorded. R3 T. 1446. According to Officer McWhirter, the six-year-old child told him that a black male with a knife and a gun "knocked on the door" when she and her mother "were

on the couch," and that the victim "got up and opened the door" for the man. R3 T. 1447-48. Officer McWhirter showed the child seven photos of black males and asked her to identify "the person that was in her apartment last night." She picked the photo of Petitioner. R3 T. 1453. Later, however, when psychologist Dr. Camille Barnes showed her the same photo array Officer McWhirter had shown, the victim's daughter twice stated that "[t]he creep that killed my mother is not there." R3 T. 1470. Psychological examiner Jill Smith, who also treated the child, later stated there was "some question as to whether or not she really witnessed" the crime. R1 T. 370. At one point the victim's young daughter told a counselor that she believed Ramsey had been involved in her mother's murder.[4] R3 T. 1477. Indeed, her account of what and who she saw the night of her mother's murder changed with each telling. R3 T. 954, 1445-46; R4 T. 1310, 1320, 1331, 1333, 2860.

2. The Alleged and Undocumented Confession

On April 14, 1993, officers arrested Petitioner in Albuquerque, New Mexico. R4 T. 108. The State claims that in the course of this arrest, Petitioner confessed to Albuquerque Police Officer Paul Pacheco that he murdered the victim, though there is no evidence corroborating this claim. R3 T. 1233-34. Officer Pacheco did not record or write down the alleged confession, and his partner, Ed Bylotas, testified that he was present and did not hear the

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[4] Ramsey testified that he dated the victim from "Christmas [1992] through . . . late February [1993]," but was no longer dating her on April 1, 1993, and "hadn't been in sometime (sic)" to her house. R4 T. 2979.

alleged confession. R3 T. 1234-37, 1264-65. Petitioner denied ever making such a statement and the record plainly reflects he told investigating law enforcement in Albuquerque that he did not commit this crime. R4 T. 127-128, 168, 171-72.

3. DNA Evidence Adduced at Trial

At trial, the State relied upon DQ-Alpha DNA testing results, which indicated that four "Negroid" hairs collected from the victim's apartment, and saliva from the "cigarette butt" allegedly found in the green shirt at the second crime scene, were consistent with Petitioner (the cigarette evidence was submitted for testing nearly a half year after all the other items of evidence were submitted). R3 T. 1393; R1 T. 427-429. As discussed *supra* p. 6, the hairs on the floor could easily have been deposited by a prior, consensual interaction, and the lack of proper documentation surrounding the cigarette butt raises serious questions as to its provenance.

The State also focused on several pieces of evidence it argued connected Petitioner to the crime, notwithstanding contradicting exculpatory evidence. For example, the State claimed that Petitioner murdered and sexually assaulted the victim and used the douche bottle found at her home after the attack to remove evidence of the rape. R3 T. 1518. This argument was made even though the State knew that Petitioner's fingerprints did not match those lifted from douche bottle. R4 T. 91. The State noted that the victim's blood was "all over the[] clothes" found at the second crime scene, but did not mention that Petitioner's DNA was not. R3 T. 1521. Additionally, the State emphasized that saliva from the victim's breast swab was "consistent with [Petitioner's] blood

type and . . . secretor [status]," but failed to note Petitioner was excluded as the source of DNA on that same swab, or that Cordelia Vineyard, Ramsey's ex-wife, had proffered testimony during trial that Ramsey would bite her breasts during intercourse. R3 1502-03, 1519; R4 341-42. Ms. Vineyard also proffered testimony that the couple's divorce became final the day the victim was murdered, and that Ramsey had a history of violence towards women. R3 T. 1501-02.

After a trial, Petitioner was convicted of capital murder and sentenced to death. In 1996, the Arkansas Supreme Court reversed the conviction and ordered a new trial upon finding that certain utterances of the victim's daughter (who was deemed incompetent to testify, due to psychological trauma) were erroneously admitted at trial in violation of Petitioner's confrontation rights and the rules of evidence. *See Johnson v. State*, 934 S.W.2d 179, 182 (Ark. 1996) ("*Johnson I*"). At the second trial, the child was found competent to testify. Petitioner was again convicted of capital murder and sentenced to death.

The Arkansas Supreme Court affirmed the conviction and death sentence on direct appeal. *See generally Johnson v. State*, 27 S.W.3d 405 (2000) ("*Johnson II*").[5] State and federal collateral relief was

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[5] The three dissenting opinions of this 4-3 split found error in the trial court's refusal to give Petitioner's counsel access to the child's statements to her psychologist. "Had defense counsel been privy to [the therapist's] records, he would have been able to delve into [the therapist]'s conclusions that [the child's] stories were profoundly inconsistent and that she had been under considerable pressure from her family and the

also denied. *See Johnson v. State*, 157 S.W.3d 151, 158 (Ark. 2004) ("*Johnson III*"); *Johnson v. State*, 235 S.W.3d 872, 873 (Ark. 2006) ("*Johnson IV*"); *Johnson v. Norris*, 537 F.3d 840, 843 (8th Cir. 2008) ("*Johnson V*").

4. Post-Conviction Proceedings

On April 13, 2017, while scheduled to be executed, Petitioner filed a Motion for DNA Testing and a Request for Hearing under the Statute. Petitioner sought DNA testing of three categories of evidence that could contain the DNA of the real perpetrator of the crime: (i) items recovered from the victim's body and clothing, including the red Caucasian hair from her hand; (ii) items that appear to have been used to clean up the crime scene; and (iii) items found at the roadside park. Evidence from each of these three categories is highly probative of the identity of the perpetrator due to either the nature of the evidence or where it was found. Petitioner demonstrated that the evidence exists in a condition that makes DNA testing possible and was either not tested previously or could now be tested with new technology. He also showed that testing would provide additional probative results.

Petitioner first raised the constitutional question presented in this petition in this motion, requesting from the state circuit court "[a]ny . . . Order that the Court deems necessary to adequately protect the Petitioner's state and federal constitutional rights." App.-152a. The State opposed, and Petitioner pressed the constitutional issue in his reply, noting

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prosecutor to convict Stacey Johnson." *Johnson II*, 27 S.W.3d at 417 (Brown, J., dissenting).

that failure to grant the requested DNA testing would be a "flagrant and irreversible violation of [his] right to due process." Reply to State's Response in Opposition to Petition for Post-Conviction DNA Testing and Request for Hearing (filed Apr. 17, 2017 in *Johnson v. State*, No. CR-93-54, Sevier County Circuit Court, Arkansas) at 9. More specifically, Petitioner stated that "[p]reventing [him] from having the opportunity to conduct DNA testing on the requested items and prove his innocence claims [would] violate[] the very notion of 'fundamental fairness' and [would] den[y] him of due process." *Id*. at 9-10. Petitioner went on to note that as "the State of Arkansas has created a clear statutory procedure through which convicted persons can obtain DNA testing and then utilize exculpatory results from that testing to prove their innocence, the processes employed by the State for obtaining access to DNA must remain fundamental[ly] fair." *Id*. at 10.

The state circuit court denied and dismissed the motion without acknowledging Petitioner's constitutional claim. App.-91a-92a. The Arkansas Supreme Court reversed and remanded, granting a stay of execution and ordering the state circuit court to hold a hearing on the question of whether Petitioner's request for testing should be granted. App.-83a-84a. On May 9, 2018, the state circuit court denied the DNA Petition. This order similarly made no reference to the due process violation Petitioner claimed. App.-78a-82a.

On November 8, 2018, Petitioner appealed the state circuit court's denial of his DNA petition to the Arkansas Supreme Court. In his opening brief, Petitioner stated, "should DNA testing reveal

Appellant's actual innocence[,] Appellant's [Fifth] and [Fourteenth] Amendment rights . . . would have been compromised," if the Arkansas Supreme Court affirmed the state circuit court's denial of his motion for DNA testing. Appeal From the Order Denying Appellant's Motion for Post-Conviction DNA Testing (filed Nov. 8, 2018 in *Johnson v. State,* No. CR-18-700, Arkansas Supreme Court) at xvii.

On December 12, 2019, the Arkansas Supreme Court, in a 5-2 decision, affirmed the state circuit court's decision denying DNA testing. The Arkansas Supreme Court's affirmance hinged on its finding that "none of the evidence that might result from the proposed testing could advance Johnson's claim of actual innocence or raise a reasonable probability that he did not murder [the victim]" when viewed "in light of the remaining evidence." App.-23a-25a. The Arkansas Supreme Court passed on the constitutional questions in Petitioner's brief, making no reference to Petitioner's argument.

The dissenting justices opined that, in satisfaction of Act 1780, Petitioner identified a theory of defense that would support his actual innocence, and demonstrated how DNA testing may produce new evidence to support that theory and show a reasonable probability that he did not commit this crime. Having satisfied these materiality requirements of Act 1780, §§ 16-112-202(6) and (8), in the view of the dissenting justices, the motion for DNA testing should have been granted. As Associate Justice Hart concluded in dissent: "[Petitioner's] is a case [where] additional testing is not only appropriate, but necessary." App.-30a (Hart, J., dissenting).

Petitioner also raised this issue to the Arkansas Supreme Court on December 27, 2019, in his Petition for Rehearing from the Arkansas Supreme Court's affirmance of the state circuit court's denial of his motion for DNA testing. Petitioner argued to the Arkansas Supreme Court that the "interpretation and application of" the State's DNA testing statute by the state circuit court "violates [Petitioner's] rights to Due Process and Access to Courts as guaranteed by the First, Fifth, and Fourteenth Amendments to the United States Constitution." Petition for Rehearing (filed Dec. 27, 2019 in *Johnson v. State,* No. CR-18-700, Arkansas Supreme Court).

REASONS FOR GRANTING THE WRIT

I. The Arkansas Supreme Court's Construction of Act 1780 Does Not Comport with Petitioners' Due Process Rights.

When a state law creates a liberty interest, the state's procedures must comport with due process. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (States "must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."). Likewise, when a state creates a judicial remedy, access to that remedy must be fairly afforded. *See Bounds*, 430 U.S. at 822 (prisoners are entitled to "adequate, effective, and meaningful" access to courts; therefore, indigent prisoners must be allowed to file appeals and habeas corpus petitions without paying fees). A statutory scheme providing access to post-conviction relief is both a liberty interest and a judicial remedy, and state procedures

to access such relief must not offend principles of justice or fundamental fairness in operation.

Post-conviction DNA testing statutes are in place in all fifty states. Congress has enacted legislation, as well. The purpose of these statutes is to provide convicted persons a definitive right to obtain forensic DNA testing of evidence to prove their innocence.

The statutory provisions at issue here (§§ 16-112-202(6) and (8)) are identical to the theory of defense and materiality provisions in the federal Justice for All Act (18 U.S.C. § 3600) and Alaska's post-conviction DNA testing statute, Alaska Stat. § 12.73.010, *et seq*. The provisions are similar to those in several other jurisdictions, including Illinois, Delaware, Idaho, and Missouri. These DNA-testing statutes allow access to information that ultimately can make available post-conviction relief.

This Court has recognized a constitutionally protected liberty interest in access to post-conviction relief. Because of this, the procedures for obtaining DNA testing—as testing can be essential to realizing the right to post-conviction relief—must not offend fundamental principles of justice or transgress recognized principles of fundamental fairness in operation. *See generally Skinner*, 562 U.S. 521; *Osborne*, 557 U.S. 52; *Bounds*, 430 U.S. 817. The unanswered question this Court has yet to determine, however, is what fundamental principles of justice and fairness are required with respect to procedures available to litigants seeking access to a state's post-conviction DNA testing process. This Court should do so here.

In 2001, the Arkansas legislature enacted Act 1780 based on a finding that "the mission of the criminal justice system is to punish the guilty and to exonerate the innocent" as concerns mounted regarding persons who were incarcerated, and sometimes executed, for crimes they did not commit. Act 1780 was created to "provide a remedy for innocent persons who may be exonerated by [DNA] evidence." *See* 2001 Ark. Act 1780. Yet, despite the passing of Act 1780, post-conviction DNA testing in Arkansas remains virtually unavailable due to unduly restrictive judicial interpretations of the Act.

The Arkansas Supreme Court has in practice rendered Act 1780, and the DNA testing it affords to litigants, essentially unavailable by its unreasonably restrictive and unconstitutional interpretations of the Act, creating insurmountable roadblocks to obtaining testing. Of the 88 reported appellate decisions in which individuals sought scientific testing under the Statute, the Arkansas Supreme Court has denied *any* relief in all but five instances.[6]

Arkansas provides a means for obtaining post-conviction relief – a process that creates a liberty interest on the part of litigants. *See generally Osborne*, 557 U.S. 52; *Skinner*, 562 U.S. 521. The statutory scheme further provides that DNA evidence can be used as part of that process, thereby creating a

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[6] Five of the 88 cases were remanded to the circuit court. *See Rucker v. State*, No. CR 02-145, 2004 WL 1283985 (Ark. June 10, 2004); *Johnson III*, 157 S.W.3d 151, 158 (Ark. 2004); *Misskelley v. State*, 2010 Ark. 415 (2010); *Carter v. State*, 536 S.W.3d 123 (2015); *Johnson v. State*, 2017 Ark. 138 (2017).

liberty interest in such testing as part of a litigant's due process right to meaningfully access post-conviction review. This Court has held that a state's procedures for obtaining post-conviction relief—once such relief has been provided for—must not offend fundamental principles of justice or transgress principles of fundamental fairness in operation.

Here, the Arkansas Supreme Court has continued its pattern and construed Act 1780 to impose an unconstitutional barrier to Petitioner's access to post-conviction remedies by way of DNA testing by effectively reading into the Statute a near impossible requirement—that Petitioner must prove his innocence as a condition of obtaining DNA testing, when DNA testing is the only means in some cases, like Petitioner's, to exonerate the wrongly convicted.[7] In so doing, the state court also deprived Petitioner of his protected liberty interest in obtaining post-conviction remedies afforded under Arkansas law to those who can present exculpatory evidence.

Certiorari should be granted to ensure that procedural due process is satisfied in the interpretation and application of Act 1780 and similar post-conviction DNA testing statutes, as the determination of what fundamental principles of justice and fairness require—with respect to procedures available to litigants seeking access to a

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[7] As Justice Hart noted in her dissent from the Arkansas Supreme Court's opinion, "this process cannot function if the petitioner is required to exonerate himself on the front end before he is permitted to receive the testing." App.-70a (Hart, J., dissenting).

state's post-conviction DNA testing process—is of national importance.

A. The Court's Construction of Act 1780 Imposes a Near-Impossible Requirement of Proving Actual Innocence as a Prerequisite to Testing.

The Arkansas Supreme Court's unreasonable construction of §§ 16-112-202(6) and 202(8) renders Act 1780 fundamentally unfair in its operation, denying Petitioner meaningful access to DNA testing under the Statute and violating his due process rights. To require a showing of complete exoneration creates a near insurmountable hurdle for any petitioner to overcome; it is also not required by Act 1780.

Sections 16-112-202(6) and 202(8) of the Statute require only that Petitioner identify a theory of actual innocence and establish that testing "may" produce new evidence that would "support" that theory and show a "reasonable probability" that he did not commit the crime of conviction. Contrary to the Arkansas Supreme Court's construction, the Statute does not require that Petitioner establish that the DNA test results would "show actual innocence." App.-25a. Affirming the circuit court's denial of testing, the majority held "[b]ecause the presence or absence of Johnson's or another male's DNA would not show actual innocence, there is no reason to test for it." *Id.*

Petitioner unquestionably identified a theory of innocence: that he did not kill the victim and that someone else committed this rape and murder. Here, DNA testing has the potential to develop the profile of another suspect who has no innocent explanation for

the presence of their DNA comingled with evidence recovered from the crime scenes. For example, given the State's argument that Petitioner alone raped the victim, any presence of semen or male DNA in the rape kit swabs and smears, the douche fluid swabs, her underwear, or the tissue paper found beneath her body that excludes Petitioner would provide proof of an alternate perpetrator. The presence of such a suspect's DNA would strongly support Petitioner's theory of innocence and show a "reasonable probability" that he did not commit this murder. Petitioner squarely meets the requirements of §§ 16-112-202(6) and 202(8); the Arkansas Supreme Court's construction of those sections to reach a contrary conclusion is fundamentally unfair and deprived Petitioner of his liberty interest in proving his innocence.

The very purpose of Act 1780 (to provide a remedy for those persons whose innocence may be proven *by* DNA evidence) is thwarted by precluding access to DNA testing and blocking constitutionally required access to other related post-conviction relief. Without access to DNA testing, it is nearly impossible for any petitioner who has articulated a theory of innocence and a reasonable probability that DNA testing could prove his innocence to cast any doubt on the evidence used to convict.

This impossible burden on convicted persons is fundamentally unfair and violates Petitioner's right to due process of law.

B. DNA Testing on Key Evidence is Necessary to Fairly Access State Post-Conviction Remedies.

Under § 16-112-201, petitioners who obtain DNA testing results through § 16-112-202 that are "sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense" are entitled to secure relief. This can occur by vacating the sentence, resentencing, granting a new trial, or by other appropriate disposition. *See* App.-97a.

Arkansas has created certain liberty interests by providing other statutory post-conviction remedies for petitioners claiming innocence based on newly discovered DNA evidence. Petitioners can only unlock these post-conviction remedies if they are first granted access to DNA testing. These remedies include the executive clemency process, in which petitioners may request a pardon, commutation, or reprieve of a criminal sentence (on bases including DNA evidence), and the common law writ of error coram nobis, which provides relief not otherwise available on appeal based on a fact (such as exculpatory DNA evidence) not known at trial.

Act 1780 was enacted for the express purpose of allowing convicted persons to access evidence that they may use in other post-conviction proceedings to prove their innocence. To require that a petitioner prove his innocence *before* testing may be granted nullifies a statute that otherwise could facilitate the petitioner's development of exculpatory evidence. This deprives petitioners access to other post-conviction remedies in violation of their rights to due process.

II. The Arkansas Supreme Court's Construction of Act 1780 Impedes Petitioners' Rights to Access to Courts.

The Arkansas Supreme Court's holding also violates Petitioner's First Amendment right to reasonable access to courts. This Court in *Hudson v. Palmer* held that "prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts," 468 U.S. 517, 523 (1984), derived from the Petition Clause of the First Amendment. U.S. Const. amend. I; *see also Lewis v. Casey*, 518 U.S. 343, 404–05 (1996) (Stevens, J., dissenting) ("Within the residuum of liberty retained by prisoners are freedoms identified in the First Amendment to the Constitution [including] . . . the freedom to petition their government for a redress of grievances." (citing *Johnson v. Avery*, 393 U.S. 483, 485 (1969))). The right to petition restrains states from creating unreasonable barriers to court access. *See, e.g.*, *Silva v. Di Vittorio*, 658 F.3d 1090, 1102 (9th Cir. 2011) (citing *John L. v. Adams*, 969 F.2d 228, 235 (6th Cir. 1992) (finding that the First Amendment "forbids states from 'erect[ing] barriers that impede the right of access of incarcerated persons.'" (alteration in original) (citation omitted)), *overruled on other grounds by Coleman v. Tollefson*, 575 U.S. 532 (2015)); *Snyder v. Nolen*, 380 F.3d 279, 291 (7th Cir. 2004) ("The right of access to the courts is the right of an individual, whether free or incarcerated, to obtain access to the courts without undue interference.").

Here, the Arkansas Supreme Court created an unreasonable barrier to court access not contemplated by the legislature by reading into the Statute an

impossible hurdle and thereby preventing Petitioner from obtaining the DNA testing results with which he could avail himself of state post-conviction remedies.

III. Act 1780 Contemplates DNA Testing Where, As Here, Testing Could Produce New Evidence in Support of a Petitioner's Theory of Defense and Raise a Reasonable Probability of Innocence.

Arkansas purports to provide DNA testing in cases such as Petitioner's where several items of highly probative evidence have never been subjected to modern DNA testing, and there exist significant questions about the evidence used to convict the death-sentenced petitioner. Properly construed, Petitioner has met the requirements for obtaining DNA testing.

The portions of Act 1780 at issue here require only that Petitioner identify a theory of actual innocence and show how testing "may" produce new evidence that would "support" that theory and show a "reasonable probability" that he did not commit the crime of conviction. *See* App.-99a. Petitioner squarely meets the requirements of both. His theory of innocence is simple: he did not rape and murder the victim—someone else did. Moreover, in light of the nature of this crime, the items of untested evidence Petitioner requested to test are of particular significance. *See* App.-10a (Wynne, J., dissenting) ("[T]he proposed testing could significantly advance [Petitioner's] claim of innocence.").

For example, the discovery of third-party DNA on a single item of highly probative evidence, like the

red beard hair recovered from the victim's hand or the tissue paper found near the victim's genitals, could wholly exculpate Petitioner as the perpetrator. Given the State's argument that Petitioner alone raped the victim, the presence of semen or male DNA foreign to Petitioner in the rape kit samples or samples from other intimate areas would constitute proof of an alternative perpetrator. A qualifying male DNA profile developed from such testing could be run through the FBI's Combined DNA Index System ("CODIS"). As of May 2020, the CODIS national databank, National DNA Index ("NDIS"), contained 14,240,876 offender profiles and in Arkansas, over six thousand investigations have been aided through use of this database. Federal Bureau of Investigation, CODIS – NDIS Statistics, Investigations Aided at https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics (July 2020). In nearly half of the first 325 DNA exonerations, the DNA results not only proved the defendant's innocence, but ultimately identified the actual perpetrator. *See* Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, 79 ALBANY L. REV. 717, 765 (2016) (real perpetrator identified in 49% of DNA exonerations through 2014). Indeed, the DNA testing requested could provide "an untold number of possible result combinations that would substantiate [Petitioner's] claim of innocence," App.-69a (Hart, J., dissenting).

The Arkansas Supreme Court determined that "in light of the remaining evidence," DNA testing "could not significantly advance [Petitioner's] claim of innocence." App.-23a. This construction, along with the Court's mistaken characterization of the evidence

against Petitioner, resulted in the state court denying DNA testing. Contrary to that Court's holding, however, the evidence of Petitioner's guilt is far from overwhelming and DNA testing could certainly lead to exculpatory results that would "[r]aise a reasonable probability that [Petitioner] did not commit the offense," as the Statute requires. App.-99a. The Arkansas Supreme Court's construction otherwise deprives Petitioner of due process.

At Petitioner's trials, the State principally relied on (1) the identification by the victim's six-year-old daughter; (2) Petitioner's "confession" to a police officer in New Mexico; and, (3) the presence of Petitioner's DNA on certain transient or suspect items. Unlike the proposed DNA testing, which can definitively identify the perpetrator of this crime, each of these categories of evidence is either unreliable or not overwhelmingly probative of guilt.

First, the child eyewitness identification is not reliable, and in any event does not definitively establish that Petitioner is guilty of the victim's murder. The witness' various accounts of her mother's murder did not unequivocally identify Petitioner as the culprit. Her descriptions of the murder were inconsistent and contradictory. R3 T. 954, 1445-46, 1448; R4 T. 1310, 1320, 1331, 1333, 2860. Furthermore, many of the details of the child's identification that appear "consistent" with a description of Petitioner were known to officers before they spoke to her, including Petitioner's name, hair, and recent release from jail, thus suggesting that these details may have been communicated by officers to the child through suggestive questioning. R4 T. 20, 1211.

Second, Petitioner's alleged "confession" to police officers in New Mexico is inherently suspect. Albuquerque Police Officer Pacheco's claim that Petitioner confessed to him is uncorroborated and not documented. Officer Pacheco's trial testimony was disputed by his own partner, Officer Bylotas, who did not hear Petitioner make a confession. R3 T. 1234-39, 1264-65. This alleged "confession" is not supported in fact and should not have been a basis to conclude that the evidence of Petitioner's guilt was overwhelming, such that he was not entitled to DNA testing.

Third, the physical evidence against Petitioner, when carefully considered, does not amount to overwhelming evidence of his guilt.[8] Although the State claims that a green sweater and white t-shirt found at the second crime scene belonged to Petitioner, this is not borne out in the record. This connection is based on testimony by Petitioner's stepmother, Ms. Johnston, whose testimony raised doubt that the clothing at the second crime scene belonged to him, as she was unable to positively identify either the green sweater or the white t-shirt as Petitioner's. R3 T. 1183-1193.

Moreover, Petitioner admits that he was in the home on several occasions, including on the night of

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[8] In fact, as Justice Hart noted in her dissent from the Arkansas Supreme Court's opinion, "much of the evidence in this case points to a white perpetrator," such as the red beard hair found in the victim's hand and the numerous Caucasian hairs (dissimilar to those of the victim) found in probative areas at both crime scenes (including the blood-soaked towel found on the floor by the victim's head, the tissue found at the first crime scene, and the towel found at the second crime scene). App.-34a-35a (Hart, J., dissenting).

the murder. He further admits that he had prior intimate contact with the victim, meaning that there are reasonable, non-criminal explanations for the presence of his hair in the home. R1 T. 48. Finally, while Petitioner's DNA was found on a cigarette butt purportedly found at the second crime scene, the transient nature of cigarette butts, in addition to serious questions about the provenance of the evidence discussed *supra* note 3, substantially undermine the weight of that evidence. The cigarette butt appeared in pristine condition despite having allegedly been found in waterlogged clothing, and it was inconsistently described by law enforcement at various times as "cigarettes and matches" or a "cigarette butt," leading to significant questions about its origin.[9] R2 at 10, 191-194; R4 T. 85, 91; R3 T. 1410-11.

Despite the Arkansas Supreme Court's holding to the contrary, the existing evidence against Petitioner is not so strong as to foreclose the possibility that the proposed testing may produce new material evidence that would support Petitioner's theory of defense and raise a reasonable probability that he is actually innocent. That is all that Act 1780 requires, and the Arkansas Supreme Court's construction renders post-conviction remedies accessible through exculpatory DNA results unavailable in violation of Petitioner's right to due process of law.

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[9] *See supra* note 3; App.-55a-56a (Hart, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 15, 2020

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APPENDIX

FORMAL ORDER

STATE OF ARKANSAS,	)	
	)	**SCT.**
SUPREME COURT	)	

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON FEBRUARY 20, 2020, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CR-18-700	
STACEY EUGENE JOHNSON	APPELLANT
V. APPEAL FROM SEVIER COUNTY CIRCUIT COURT - 67CR-93-54	
STATE OF ARKANSAS	APPELLEE

APPELLANT'S PETITION FOR REHEARING IS DENIED. HART AND WYNNE, JJ., DISSENT. SEE **OPINION AND DISSENTING OPINIONS** THIS DATE. APPELLANT'S MOTION TO STAY THE MANDATE IS DENIED. HUDSON, HART, AND WYNNE, JJ., WOULD GRANT.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 20TH DAY OF FEBRUARY, 2020.

CLERK

BY:_____
DEPUTY CLERK

ORIGINAL TO CLERK (W/COPY OF OPINIONS)

CC: BRYCE BENJET
ERIN CASSINELLI
PAMELA RUMPZ, SENIOR ASSISTANT ATTORNEY GENERAL
HON. CHARLES A. YEARGAN, CIRCUIT JUDGE (W/COPY OF OPINIONS)

MANDATE

AFFIRMED

PROCEEDINGS OF
DECEMBER 12, 2019
SUPREME COURT CASE
NO. CR-18-700
STACEY EUGENE JOHNSON APPELLANT
V. APPEAL FROM SEVIER
COUNTY CIRCUIT COURT
(67CR-93-54)
STATE OF ARKANSAS APPELLEE

THIS POST CONVICTION CRIMINAL APPEAL WAS SUBMITTED TO THE ARKANSAS SUPREME COURT ON THE RECORD OF THE SEVIER COUNTY CIRCUIT COURT AND BRIEFS OF THE RESPECTIVE PARTIES. AFTER DUE CONSIDERATION, IT IS THE DECISION OF THE COURT THAT THE JUDGMENT OF THE CIRCUIT COURT IS AFFIRMED.

BAKER, J., CONCURS. HART AND WYNNE, JJ., DISSENT.

IN TESTIMONY, THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE JUDGMENT OF THE ARKANSAS SUPREME COURT, I, STACEY PECTOL, CLERK, SET MY HAND AND AFFIX MY OFFICIAL SEAL, ON THIS 20TH DAY OF FEBRUARY, 2020.

STACEY PECTOL, CLERK

SUPREME COURT OF ARKANSAS

No. CR-18-700

	§	**Opinion Delivered**:
	§	February 20, 2020
	§	
STACEY EUGENE	§	
JOHNSON,	§	APPEAL FROM THE
APPELLANT,	§	SEVIER COUNTY
	§	CIRCUIT COURT
V.	§	[NO. 67CR-93-54]
	§	
STATE OF ARKANSAS,	§	HONORABLE
APPELLEE	§	CHARLES A.
	§	YEARGAN, JUDGE
	§	
	§	PETITION FOR
	§	REHEARING DENIED.

SHAWN A. WOMACK, ASSOCIATE JUSTICE

Stacey Johnson seeks rehearing of our decision affirming the circuit court's denial of his petition for postconviction DNA testing under Act 1780. *See Johnson v. State*, 2019 Ark. 391. Because Johnson's petition for rehearing fails to comport with the requirements set forth in Arkansas Supreme Court Rule 2-3(g), we must deny his petition.

A petition for rehearing is limited to calling attention to specific errors of law or fact within the original opinion. *See* Ark. Sup. Ct. R. 2-3(g) (2018). A petition should not merely repeat arguments already considered by this court. *Id.* Nor should it include new arguments not presented in the original briefing. *Id.* Indeed, any repetitive or newly raised arguments

within the petition will simply not be considered. *See MacKool v. State*, 2012 Ark. 341, at 2 (per curiam). This is true even when the newly raised arguments are of constitutional dimension. *See*, *e.g.*, *McArty v. Hobbs*, 2012 Ark. 306, at 2 (per curiam).

The issues on appeal were limited to Johnson's satisfaction of the statutory predicates for scientific testing under Act 1780 and the admissibility of proffered testimony regarding the reliability of eyewitness identifications. *See Johnson*, 2019 Ark. 391, at 8. We affirmed the circuit court's conclusion that the proposed testing could not raise a reasonable probability that Johnson did not murder Carol Heath. *Id.* at 14. Johnson's failure to meet this statutory requirement under Act 1780 precluded testing as a matter of law. *Id.* at 9. We also held that the proffered eyewitness identification testimony exceeded the scope of our mandate and was procedurally barred from consideration. *Id.* at 15.

To support his petition for rehearing, Johnson reiterates the exact arguments that were considered and rejected on appeal. And, for the first time in this case, Johnson contends that his claims implicate a right to due process and access to the courts under the United States Constitution. The entirety of his petition thus falls outside of the scope of rehearing under Rule 2-3(g). *See MacKool*, 2012 Ark. 341, at 2. We will not consider the merits of his repetitive claims or his novel constitutional arguments that were raised for the first time in this petition. Our original opinion stands.

Petition for rehearing denied.

HART and WYNNE, JJ., dissent.

SUPREME COURT OF ARKANSAS

No. CR-18-700

	§	**Opinion Delivered**:
	§	February 20, 2020
	§	
STACEY EUGENE	§	
JOHNSON	§	APPEAL FROM THE
APPELLANT	§	SEVIER COUNTY
	§	CIRCUIT COURT
V.	§	[NO. 67CR-93-54]
	§	
STATE OF ARKANSAS	§	HONORABLE
APPELLEE	§	CHARLES A.
	§	YEARGAN, JUDGE
	§	
	§	DISSENTING
	§	OPINION.

JOSEPHINE LINKER HART, ASSOCIATE JUSTICE

Johnson's petition for rehearing is valid and meritorious. Petitions for rehearing are proper to call attention to errors of fact and errors of law, and as Johnson's petition points out, the majority's original opinion contains many of both. Furthermore, I object to the majority's insinuation that Johnson's petition for rehearing contains a new argument raised "for the first time in this case," namely that "his claims implicate a right to due process and access to the courts under the United States Constitution." Maj. Op. at 2. The majority, aiming to justify a procedural bar, makes it sound as if Johnson is impermissibly presenting an entirely new and separate argument for the first time in his petition for rehearing. This

representation is incorrect, misapprehends the nature of Johnson's petition for rehearing, and perpetuates the very constitutional violations of which Johnson complains.

Johnson initiated this litigation by filing in the circuit court his motion for postconviction scientific testing. The requirements for such motions are set out in Ark. Code Ann. §§ 16-112-201 et seq., and nowhere in that statutory framework is there a requirement that the movant allege or otherwise demonstrate that a refusal to allow testing would violate the movant's constitutional rights. In other words, a constitutional violation was never part of Johnson's burden of proof under the statute, and there was nothing to implicate such considerations when Johnson's motion was filed. However, after the State filed a response opposing Johnson's motion for testing, Johnson filed a reply making clear that to bar him from accessing the testing procedures would violate his constitutional rights. Under a heading labeled "A FAILURE TO GRANT DNA TESTING ... WOULD BE A FLAGRANT AND IRREVERSIBLE VIOLATION OF MR. JOHNSON'S RIGHT TO DUE PROCESS," Johnson's reply apprised the circuit court as follows:

> Preventing Mr. Johnson from having the opportunity to conduct DNA testing on the requested items and prove his innocence claims violates the very notion of "fundamental fairness" and denies him due process. As the State of Arkansas has created a clear statutory procedure through which convicted persons can obtain DNA testing and then utilize exculpatory results from that

> testing to prove their innocence, the processes employed by the State for obtaining access to DNA must remain fundamentally fair. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557* U.S. 52, 69 (2009).
>
> ...
>
> Mr. Johnson can only access these forms of relief—which in this case would not only exonerate him, but save his life—if this court grants his request to test the requested items of evidence.

Obviously, this aspect of Johnson's argument is "responsive" to a potential outcome—*if* Johnson's efforts to demonstrate his innocence here were denied by simply refusing to allow him access to the testing procedures, that *would* be fundamentally unfair and violate Johnson's constitutional rights. The circuit court was inescapably apprised of this issue when it later held that Johnson had failed to satisfy the statutory prerequisites for testing.

The same was true of this court when it issued its majority opinion affirming the circuit court's denial of Johnson's motion. In the jurisdictional statement of his opening brief on appeal, Johnson provided as follows:

> The appeal involves questions of substantial public interest: the statutory right to DNA testing where the results could prove Appellant's actual innocence and critically undermine the legitimacy of the conviction and resulting death

> sentence imposed by the State of Arkansas. Further, should DNA testing reveal Appellant's actual innocence, Appellant's [Fifth] and [Fourteenth] Amendment rights, and rights under article 2, sections 3 and 8 of the Arkansas Constitution, would have been compromised.

In other words, while the focus of the litigation thus far has been upon whether Johnson satisfied the prerequisites to obtain testing set out in Ark. Code Ann. §§ 16-112-201 et. seq.—obviously because that is the statutory vehicle through which Johnson must pursue this relief—the constitutional implications of denying Johnson's request have always been known.

Regardless of whether the majority realizes it, Johnson's petition for rehearing complains of a constitutional violation that occurred at the appellate level, i.e., *this court*. By refusing to engage in a reasonable application of law and by refusing to acknowledge the obvious significance of material evidence, this court violated Johnson's constitutional rights to due process and access to the courts.

I dissent.

SUPREME COURT OF ARKANSAS

No. CR-18-700

	§	**Opinion Delivered**:
	§	February 20, 2020
	§	
STACEY EUGENE	§	
JOHNSON,	§	APPEAL FROM THE
APPELLANT,	§	SEVIER COUNTY
	§	CIRCUIT COURT
V.	§	[67CR-93-54]
	§	
STATE OF ARKANSAS,	§	HONORABLE
APPELLEE	§	CHARLES A.
	§	YEARGAN, JUDGE
	§	
	§	DISSENTING
	§	OPINION.

ROBIN F. WYNNE, ASSOCIATE JUSTICE

I would grant Johnson's petition for rehearing. As set out in my dissenting opinion, the proposed testing could significantly advance his claim of innocence. *See Johnson v. State*, 2019 Ark. 391, ___ S.W.3d ___ (Wynne, J., dissenting).

SUPREME COURT OF ARKANSAS

No. CR-18-700

	§	**Opinion Delivered**:
	§	December 12, 2019
	§	
STACEY EUGENE	§	
JOHNSON,	§	APPEAL FROM THE
APPELLANT,	§	SEVIER COUNTY
	§	CIRCUIT COURT
V.	§	[NO. 67CR-93-54]
	§	
STATE OF ARKANSAS,	§	HONORABLE
APPELLEE	§	CHARLES A.
	§	YEARGAN, JUDGE
	§	
	§	AFFIRMED.

SHAWN A. WOMACK, ASSOCIATE JUSTICE

Stacey Johnson was twice convicted and sentenced to death for the 1993 murder of Carol Heath. Johnson has challenged his conviction on direct appeal, in state postconviction proceedings, and on federal habeas review. All of his challenges have ultimately proven unsuccessful. Now, Johnson seeks DNA testing of twenty-six pieces of evidence. He contends the results of the proposed testing could possibly exonerate him. The court is authorized to order testing only under certain specified conditions. *See* Ark. Code Ann. §§ 16-112-201—208 (Repl. 2016) ("Act 1780"). The circuit court concluded that Johnson failed to meet the predicate requirements for testing and denied his request. We affirm.

I.

A.

On the morning of April 2, 1993, Carol Heath was found dead on the living room floor of her DeQueen duplex. She was lying in a pool of blood, dressed only in a white shirt that had been wadded up around her neck. Her throat had been sliced through one-quarter inch into her spine, completely severing her windpipe, strap muscles, and the major arteries and veins in her neck. But that was not the sole cause of her death. Heath had also been strangled and sustained blunt force head injuries. The defensive wounds scattered across her arms and legs suggested that she tried to resist her attacker. Bite marks were found on each breast. A small contusion was discovered near the vaginal area that was consistent with, but not conclusive of, sexual assault.

Heath's two children were also in the home that night: Ashley, six years old, and Jonathan, age two. They were in the bedroom when Heath's body was discovered by her sister-in-law, Rose Cassady. After police removed the children through the bedroom window, Ashley told Cassady that "a black man broke in last night."

A few hours later, Ashley was interviewed by Arkansas State Police Investigator Hayes McWhirter. She told McWhirter that a black male with a "girl sounding name" had come over that night. He wore a "black hat with something hanging down in the back," a green shirt, and a sweater. According to Ashley, the man told Heath he had just been released from jail and was mad at Heath for dating Branson Ramsey.

She saw the man and her mother fighting. Ashley then saw Heath lying on the floor bleeding, while the man stood next to Heath with a knife in hand. After the interview, Ashley twice identified Johnson—an African American male—from a line-up of seven photographs.

Prior to Heath's murder, Johnson lived in Albuquerque, New Mexico. He came to DeQueen in January 1993 to attend his father's funeral. While in town, Johnson met Ramsey, who was dating Heath at the time. He followed Ramsey to a party at Heath's apartment. According to Shawnda Flowers Helms, Heath's friend, Johnson asked both women if they would date him and transport drugs for him. They refused and told him they did not date black men. Soon thereafter, Johnson approached the women at Ramsey's social establishment. He again asked them to date him and transport drugs. They again refused. Helms testified that Johnson appeared angry each time they rejected him.

Johnson was soon arrested for being a felon in possession of a firearm. He was incarcerated in the Sevier County jail from February 1993 until April 1, 1993. Steve Hill, a fellow inmate, testified that Johnson talked about meeting Heath through Ramsey and his plans to see her when he was released. According to Hill, Johnson also stated that "when he got out, he was going to have sex with the first woman he ran into." The day before his release, Johnson spoke about Heath with another inmate, Bobby Ray Wilkinson. Johnson told Wilkinson that he had "fucked her a time or two." Wilkinson knew Heath and did not believe him. So, Wilkinson asked him to describe the inside of her apartment, which he did.

Before Johnson was released the following afternoon, he told Wilkinson that "he was going to go see [Heath] and he was going to fuck her again when he got out."

On April 1, Johnson was released from jail at 2:00 p.m. He was the only African American male released from the Sevier County jail between March 14 and April 2 that year. After his release, Johnson went to his stepmother's home. She gave him a white t-shirt that had belonged to his father. When Johnson left that evening, he was wearing a black "do rag," a green shirt, and a jacket. He told her that he planned to stay the night with a white girl who had two young children.[1] Heath's body was found the next morning.

Three days after Heath's murder, her purse was discovered by a local resident at a roadside park between DeQueen and Horatio. Police examined the area and found a green pullover shirt, a white t-shirt, and a towel. A partially smoked cigarette was found in the pocket of the green shirt. Johnson's stepmother later testified that the white shirt looked like the one she had given him on April 1. She also recognized the green shirt as the one Johnson wore when she last saw him that evening. Testing revealed that the blood on the shirts and towel was consistent with Heath's DNA. Saliva on the cigarette was consistent with Johnson's DNA, as were several African American hairs found on and around Heath's body. This scientific evidence connected Johnson to both crime scenes.

Johnson was arrested several days later in Albuquerque after providing false identification

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[1] Carol Heath is Caucasian.

during a traffic stop. He offered the arresting officers $5,000 each to release him. At the station, Johnson gave his true identity and confessed to one officer that he killed someone in Arkansas and had a warrant out for his arrest. He was soon extradited to Arkansas and stood trial for capital murder.

B.

Johnson was first convicted of capital murder and sentenced to death in 1994. Because Ashley was found not competent to testify, the trial court allowed Officer McWhirter to read her prior statement and testify to her identification of Johnson. On appeal, we held that Ashley's identification was not admissible under the excited utterance exception to the hearsay rule. *See Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996) (*Johnson I*). We reversed and ordered a new trial.

Johnson was re-tried in 1997. This time, Ashley was competent to testify. New STR-DNA testing had also been conducted on the partially smoked cigarette, the green shirt, and the African American hairs. Under the new testing, the probability of the saliva on the cigarette belonging to anyone other than Johnson decreased to one in 28 million African Americans. *See Johnson v. State*, 356 Ark. 534, 543, 157 S.W.3d 151, 159 (2004) (*Johnson III*). The testing also showed that the African American hairs found on and around Heath's body were consistent with Johnson's DNA and would occur in one of 720 million African Americans. *See Johnson v. State*, 366 Ark. 390, 392, 235 S.W.3d 872, 873 (2006) (*Johnson IV*). The probability that the blood on the

green shirt belonged to Heath was similarly bolstered. *Id.*

Nevertheless, Johnson maintained his innocence. He alleged that another person, namely Ramsey, murdered Heath. But the jury was not convinced. Johnson was once again convicted of Heath's murder and sentenced to death. The conviction was affirmed on direct appeal. *See Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000) (*Johnson II*).

Johnson unsuccessfully sought postconviction relief under Rule 37. *See Johnson III*, 356 Ark. 534, 157 S.W.3d 151. He also moved for DNA testing under Act 1780. Johnson sought testing of a number of Caucasian hairs, retesting of the partially smoked cigarette, and retesting of some African American hairs. We ordered retesting only on the latter. *Id.* That decision was made under the mistaken belief that the hairs had not been tested since the 1994 trial. *See Johnson IV*, 366 Ark. at 394, 235 S.W.3d at 874-75. On remand, the circuit court held that new testing had been performed prior to the 1997 trial. *Id.* As mentioned above, the hairs were consistent with Johnson's DNA in a pattern that would occur in one of 720 million African Americans. *Id.* We affirmed the court's refusal to conduct further testing. *Id.* Johnson's pursuit of federal habeas relief was equally unavailing. *See Johnson v. Norris*, 537 F.3d 840 (8th Cir. 2008), *cert. denied*, 555 U.S. 1182 (2009).

The State of Arkansas subsequently scheduled Johnson's execution for April 20, 2017. Three weeks before his execution date, Johnson sought a recall of our mandate or, alternatively, permission to seek error coram nobis relief. He also requested a stay of

execution. In his petition, Johnson again sought testing of the Caucasian hairs. He alleged the testing would show that Ramsey, who died in 1998, was responsible for Heath's death. We denied his petition.

Days later, Johnson filed the underlying petition for postconviction DNA testing in the circuit court. He claimed the proposed testing might reveal DNA belonging to Ramsey or some other identified man, which could undermine the prosecution's case or exonerate him. He sought testing of twenty-six pieces of evidence. The evidence can be broadly categorized into three groups: (1) evidence of an alleged sexual assault[2]; (2) evidence from the roadside park[3]; and (3) evidence on and around Heath's body.[4] The court denied his request, concluding that he failed to meet the predicate requirements under Act 1780. We stayed the execution and remanded the case for an evidentiary hearing on the motion for postconviction DNA testing. *See Johnson v. State*, 2017 Ark. 138 (*Johnson V*).

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[2] The alleged sexual assault evidence includes: the rape kit; pubic hair; a douche bottle and condom box found in the bathroom; and swabs taken from liquid found under Heath's body.

[3] The roadside park evidence includes: the white and green shirts; a towel; Caucasian hairs found on both shirts and the towel; and Heath's purse and its contents.

[4] This includes: breast swabs; Heath's nail clippings; bags used to cover Heath's hands while transporting her body; a pair of underwear found near Heath's body; a towel found in the house and a Caucasian hair on the towel; Heath's white shirt and a Caucasian hair found on it; a washcloth; and tissue paper found near Heath's body.

At the hearing, Johnson offered evidence on three testing methodologies: touch DNA, mitochondrial DNA, and Y-STR DNA. He also proffered the testimony of Dr. Margaret Kovera, an alleged eyewitness identification expert, regarding the reliability of eyewitness identifications. The circuit court again found that Johnson had not satisfied the requirements for testing under Act 1780. The court also declined to consider Dr. Kovera's testimony. It is from this ruling that Johnson now appeals.

II.

Johnson submits three issues for our review. He first contends that the circuit court erroneously held that he failed to meet the predicate requirements for scientific testing under Act 1780. Johnson also challenges the circuit court's conclusion that the proposed testing would not produce new material evidence sufficient to raise a reasonable probability of his actual innocence. Given that we must necessarily consider the second issue in our analysis of the first, we will examine the issues together. Johnson's final point on appeal asks whether the circuit court abused its discretion by refusing to admit Dr. Kovera's testimony. For reasons explained below, we decline to consider this argument.

Our review today is limited to whether Johnson satisfied the predicate conditions for scientific testing under Act 1780. We will not reverse a denial of postconviction DNA testing under Act 1780 unless the circuit court's findings are clearly erroneous. *See McClinton v. State*, 2017 Ark. 360, at 3-4, 533 S.W.3d 578, 580. A finding is clearly erroneous when,

although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.* With this in mind, we proceed to the merits of this appeal.

A.

There is no question that the "advent of DNA technology is one of the most significant scientific advancements of our era." *Maryland v. King*, 569 U.S. 435, 442 (2013). Recognizing the potential of this technology, the Arkansas General Assembly adopted Act 1780 of 2001, as amended by Act 2250 of 2005, to provide a remedy for innocent persons who may be exonerated by new scientific evidence. *See* Act of Apr. 19, 2001, No. 1780, 2001 Ark. Acts 7737. Act 1780 provides that a writ of habeas corpus can issue based on new scientific evidence proving the actual innocence of a wrongfully convicted person. *See* Ark. Code Ann. § 16-112-201(a)(1).

At the same time, the statutory scheme was "not meant to do away with finality in judgments." *Johnson III*, 356 Ark. at 549, 157 S.W.3d at 163. As the United States Supreme Court has explained, "[w]here there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent. The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt." *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62 (2009) (internal citation omitted). To that end, postconviction testing is authorized only under specified conditions. *See* Ark.

Code Ann. §§ 16-112-201 to -203. The petitioner bears the burden of establishing that each condition is satisfied. *See McClinton*, 2017 Ark. 360, at 5, 533 S.W.3d at 581. Failure to meet any one condition precludes scientific testing as a matter of law. *See Hall v. State*, 2017 Ark. 77, at 3, 511 S.W.3d 842, 843 (per curiam).

Act 1780 preconditions the availability of DNA testing on, among other things, the petitioner's identification of a theory of defense that would establish his actual innocence. *See* Ark. Code Ann. § 16-112-202(6)(B). The petitioner must also show that the proposed testing may produce new material evidence that would support his theory and raise a reasonable probability that he did not commit the offense. *See* Ark. Code Ann. § 16-112-202(8). In other words, Act 1780 does not permit testing of evidence based on a mere assertion of innocence or a theoretical possibility that additional testing might alter the outcome of a trial. *See Martin v. State*, 2018 Ark. 176, at 3, 545 S.W.3d 763, 765. We have consequently held that testing is authorized only if it can provide materially relevant evidence that will significantly advance the petitioner's claim of innocence in light of all evidence presented to the jury. *See McClinton*, 2017 Ark. 360, at 5, 533 S.W.3d at 581.

Johnson claims that another man, possibly Branson Ramsey, murdered Carol Heath. Should the proposed testing reveal DNA belonging to Ramsey or another male, Johnson claims it would cast substantial doubt on the prosecution's theory and raise a reasonable probability of his actual innocence. The circuit court disagreed. It noted that the proposed testing "may produce evidence that would support a

theoretical defense, as it would in almost every case." Yet, the court determined the testing would not produce evidence that would raise a reasonable probability of Johnson's innocence or a third-party's guilt. It found that Johnson's defense was "based solely upon his own assertion of innocence and his attack upon the credibility of Ashley Heath[.]" Finding the scientific and testimonial evidence presented at trial "overwhelmingly pointed" to Johnson's guilt, the court concluded that Johnson failed to satisfy section 16-112-202(8).

We cannot say that these findings were clearly erroneous. We agree with the circuit court that the proposed testing could not raise a reasonable probability that Johnson did not commit the offense. As other courts have done in finding that a petitioner failed to satisfy an identical "reasonable probability" requirement, we note the significant evidence tying Johnson to the murder.[5] *See United States v. Jordan*, 594 F.3d 1265, 1268 (10th Cir. 2010); *United States v. Pitera*, 675 F.3d 122, 129 (2d Cir. 2012); *United States v. Cowley*, 814 F.3d 691, 700 (4th Cir. 2016). This is not the same as considering the sufficiency of the evidence on direct appeal. Indeed, the "reasonable probability" requirement may be met when favorable testing results would cause a "strong case" against the petitioner to "evaporate." *United States v. Fasano*, 577 F.3d 572, 578 (5th Cir. 2009). But where, like

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[5] In 2005, the legislature amended Act 1780 so that the provisions are substantially identical to the federal Justice for All Act of 2004, codified at 18 U.S.C. § 3600. The conditions within Ark. Code Ann. §§ 16-112-202(6) and -202(8) are identical to those at 18 U.S.C. §§ 3600(a)(6) and 3600(a)(8).

here, the "presence or absence of the [petitioner's] DNA would not show actual innocence, there is no reason to test for it." *United States v. Watson*, 792 F.3d 1174, 1180 (9th Cir. 2015).

The dissent suggests that we reevaluate and reweigh the credibility of evidence presented at trial. This approach is flatly inconsistent with the statutory requirements in Act 1780 and dismisses the role of this court on appellate review. The proposed analysis would require substituting our judgment for the jury, which is simply not our role. *See*, *e.g.*, *Smoak v. State*, 2011 Ark. 529, at 6, 385 S.W.3d 257, 261. The dissent would effectively relieve Johnson of the burden to satisfy the conditions for testing under Act 1780. Conversely, the State would be placed in the untenable position of overcoming a presumption in favor of testing. The State would also be required to defend the evidence at trial against the court's speculative credibility assessments made in place of the jury. We reject this approach.

Turning now to our analysis, we fail to see how the presence of another male's DNA on the evidence would raise a reasonable probability of Johnson's innocence. We have previously determined that the Caucasian hairs were not materially relevant to Johnson's claim of actual innocence. *See Johnson III*, 356 Ark. at 548, 157 S.W.3d at 162. As we explained in *Johnson III*, the prosecution stipulated that Johnson was not the donor of the Caucasian hairs. *Id.* The jury was, therefore, aware that hairs belonging to someone other than Johnson had been found. Yet the jury still convicted him. *Id.* This analysis remains true and is applicable to other evidence. Just as the jury heard about the Caucasian hairs, it heard

Johnson's theory that Ramsey murdered Heath. And it heard that Johnson was excluded from the DNA found on the breast swabs and on the white shirt from the roadside park.[6] Even so, the jury still convicted Johnson.

Even assuming the proposed testing revealed DNA belonging to Ramsey, there is a logical explanation for its presence on much of the evidence. Many of the twenty-six pieces of evidence that Johnson wants tested would have been in Heath's home at some point prior to the crime. Record evidence established that Ramsey had seen Heath the day before she was murdered and visited her home multiple times in the months before her death. It is undisputed that Ramsey had engaged in a romantic relationship with Heath. Indeed, Shawnda Flowers Helms testified that Ramsey and Heath were dating at the time of the murder. There would accordingly be an innocent explanation for Ramsey's DNA on much of the evidence found on and around Heath's body and in her home.

At any rate, the presence of another male's DNA could not significantly advance Johnson's claim of innocence in light of the remaining evidence. It simply cannot explain away the DNA evidence directly linking Johnson to both crime scenes: Johnson's saliva on the partially smoked cigarette in the pocket of the bloody green shirt at the roadside

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[6] In 1997, Johnson's consulting DNA expert noted that DNA from the breast swab and the white shirt had "additional alleles too weak to interpret with confidence, but consistent with alleles present in S. Johnson." The jury was unaware of this finding.

park and his hairs discovered on and around Heath's body. Nor can it change that Ashley twice identified him as the black man with a "girl sounding name" who stood over her bleeding mother, knife in hand. It would likewise not alter his confession to New Mexico police, his stepmother's testimony, or his jailhouse bragging about Heath and his plans to see her when he was released.

What is more, any results from the proposed testing cannot erase the consistencies connecting multiple pieces of evidence that point to Johnson's guilt. For example, Ashley stated that the black man wore a "black hat with something hanging down in the back," a green shirt, and a sweater. Johnson's stepmother testified that on the evening of April 1, 1993, he wore a black "do rag," a green shirt, and a jacket. She recognized that green shirt as the one found at the roadside park stained with Heath's blood. The partially smoked cigarette with Johnson's DNA was found in the pocket of that shirt. The green shirt was found next to a white shirt, also covered in Heath's blood, that Johnson's stepmother recognized as one she had given him when he was released from jail. Additionally, Ashley stated that the man told Heath he had just been released from jail. Johnson was the only African American male released from the Sevier County jail from March 14, 1993, until after Heath's body was found. Moreover, his stepmother testified that Johnson planned to stay that night with a white girl with two young children. This description fits Heath. It is also consistent with fellow inmates' testimony that Johnson planned to see Heath when he was released from jail. Heath was found brutally murdered the next morning.

Finally, we must respond to the dissent's unwarranted suggestion that the denial of testing reflects racial bias by the State of Arkansas and a majority of this court. Race has nothing to do with the legal question in this case, which is whether Johnson satisfied the predicate requirements for testing under Act 1780. We likewise object to the dissent's assertion that law enforcement officers "manufactured" the chain of custody and "swapp[ed] in" critical evidence. Such undeserved and unsubstantiated attacks undermine the public's trust in the integrity of our criminal justice system.

In sum, none of the evidence that might result from the proposed testing could advance Johnson's claim of actual innocence or raise a reasonable probability that he did not murder Carol Heath. Because the presence or absence of Johnson's or another male's DNA would not show actual innocence, there is no reason to test for it. We need not consider the remaining claims given Johnson's failure to make this predicate showing. The circuit court's decision denying Johnson's request for postconviction DNA testing is affirmed.

B.

Petitions under Act 1780 are limited to claims related to scientific testing of evidence. *See McClinton*, 2017 Ark. 360, at 4, 533 S.W.3d at 581. A petitioner cannot bootstrap claims falling outside the purview of Act 1780, even for the purpose of justifying entitlement to scientific testing. *Id.* This was precisely what Johnson sought to do by offering Dr. Kovera's testimony about the reliability of eyewitness identification. Further, our mandate explicitly

remanded the petition to the circuit court "for a hearing on petitioner's motion for postconviction DNA testing." *Johnson V*, 2017 Ark. 138. Anything more would have exceeded the scope of our mandate. *See Lacy v. State*, 2018 Ark. 174, at 6, 545 S.W.3d 746, 750. We accordingly decline to consider any argument on this matter.

Affirmed.

BAKER, J., concurs.

HART and WYNNE, JJ., dissent.

SUPREME COURT OF ARKANSAS

No. CR-18-700

	§	**Opinion Delivered**:
	§	December 12, 2019
	§	
STACEY EUGENE	§	
JOHNSON,	§	
APPELLANT,	§	
	§	
V.	§	
	§	
STATE OF ARKANSAS,	§	
APPELLEE	§	
	§	CONCURRING
	§	OPINION.

KAREN R. BAKER, ASSOCIATE JUSTICE

Because Johnson has failed to demonstrate that the circuit court erred, I concur with the majority opinion.

"This court does not reverse a denial of postconviction relief unless the circuit court's findings are clearly erroneous. *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918. A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *State v. Barrett*, 371 Ark. 91, 95, 263 S.W.3d 542, 545 (2007)." *Sandrelli v. State*, 2016 Ark. 103, at 2, 485 S.W.3d 692, 694. This same standard of review applies when a circuit court denies DNA testing under Arkansas Code Annotated sections 16-

112-201 to -208. *Carter v. State*, 2015 Ark. 57, 536 S.W.3d 123.

Here, the record before us and the applicable standard of review support our holding that Johnson has failed to demonstrate that the circuit court's decision was clearly erroneous. Accordingly, I would affirm the circuit court.

SUPREME COURT OF ARKANSAS

No.: CR-18-700

	§	**Opinion Delivered**:
	§	December 12, 2019
	§	
STACEY EUGENE	§	
JOHNSON,	§	APPEAL FROM THE
APPELLANT,	§	SEVIER COUNTY
	§	CIRCUIT COURT
V.	§	[NO. 67CR-93-54]
	§	
STATE OF ARKANSAS,	§	HONORABLE
APPELLEE	§	CHARLES A.
	§	YEARGAN, JUDGE
	§	
	§	DISSENTING
	§	OPINION.

JOSEPHINE LINKER HART, ASSOCIATE JUSTICE

The majority aims to blunt the unsettling circumstances identified herein, generalizing that this dissent levies "unwarranted suggestion(s)," "undeserved and unsubstantiated attacks," etc. While I am disappointed by the majority's response, I note that the majority does not attempt to demonstrate the alleged falsity or illegitimacy of even a single factual representation contained in this opinion. Instead of relying on hyperbole and a hand wave, this opinion supports its conclusions by simply citing to the record. The record can speak for itself.

I. Introduction

This is a postconviction request for scientific testing in a death-penalty case. At this point in time, Stacey Johnson is not asking to be released from prison. Presently, he is not even asking for a new trial. All he is asking for is modern scientific *testing* on the evidence used to convict him for the 1993 murder of Carol Heath. Act 1780, now codified at Ark. Code Ann. §§ 16-112-201 to -208, provides for such testing, and Johnson's is a case in which additional testing is not only appropriate, but necessary. However, the majority denies Johnson's request, concluding that he fails to satisfy the prerequisites for testing prescribed in Ark. Code Ann. § 16-112-202.

But the majority is only able to support its conclusion by contending that the case against Johnson was simply insurmountable, and any proposed testing, therefore, would not make any difference. The majority has essentially treated this matter as if it were a sufficiency-of-the-evidence appeal directly from a conviction, in which the appellate court considers *only* the evidence that supports the guilty verdict and reviews that evidence in the light *most favorable* to the prosecution. *See, e.g.*, *Hale v. State*, 343 Ark. 62, 74, 31 S.W.3d 850, 857 (2000). Such is not the matter currently before this court.

The two specific prerequisites for testing at issue here are found in Ark. Code Ann. § 16-112-202(6) and 202(8). Subdivision 202(6) requires the petition for scientific testing to "*identif[y] a theory of defense that* . . . [w]ould establish the actual innocence of the person in relation to the offense being challenged[.]"

(Emphasis added.) Subdivision 202(8) requires the petition to show that

> [t]he proposed testing of the specific evidence may produce new material evidence that would . . . [s]upport the theory of defense described in subdivision (6) (and) . . . [r]aise a *reasonable probability* that the person . . . did not commit the offense[.]

(Emphasis added.) Read together, subdivision 202(6) requires Johnson to "identify" a theory of actual innocence, and subdivision 202(8) requires Johnson to show how the testing "may" produce new evidence that would "support" that theory and show a "reasonable probability" that he did not kill Carol Heath.

There can be no legitimate answer to these questions without an objective assessment of the relevant evidentiary circumstances of Johnson's case, including the reliability of the evidence used to convict him. There is no other way this court could determine whether the proposed testing may show a "reasonable probability" of Johnson's innocence. Instead, the majority selectively quotes from disputed testimony by State witnesses and altogether ignores glaring issues related to the investigation and prosecution of this crime, ultimately concluding that Johnson fails to satisfy subdivisions 202(6) and 202(8). But as set forth below, in this particular case, there is reason to question the reliability of much of the evidence and testimony used against Johnson. Additionally, there are numerous highly probative evidentiary items that inexplicably have never been subjected to scientific

testing, but obviously need to be. Our inquiry necessarily must account for such circumstances.

Accordingly, the majority opinion's explanation of the evidence and the investigation of this crime will need to be supplemented at various points in this opinion. Even if a citizen is under a death sentence, the least he deserves is a complete and objective characterization of his case. Both sides of the issues must be acknowledged. The finality of the penalty Johnson is set to receive cannot be understated, and as Justice Wynne observed at oral argument in this case, "we have to get this right." A fair analysis shows that the requirements for postconviction scientific testing have been satisfied.

II. Ark. Code Ann. § 16-112-202(6)—Theory of Innocence

There should be no dispute that Johnson has adequately "identified" a "theory" of innocence, satisfying subdivision 202(6). Johnson's theory is as follows: while he and Carol Heath had engaged in consensual sexual acts both before and on the night of the murder, he did not kill her; instead, Johnson left Heath's apartment to return to New Mexico that evening (without having killed Heath or anyone else), and someone else committed the murder.

It should be noted that this is not some novel claim Johnson conjured up at the last minute to delay his death sentence. After Johnson was arrested for Heath's murder, he was interviewed by a clinical psychologist on March 8, 1994, to confirm he was competent to stand trial. The psychologist's report from that interview is included in the record. The

"version of alleged offense" that was elicited from Johnson and included in the psychologist's report (over twenty-five years ago) is as follows:

> Mr. Johnson was asked about the alleged offense and he denied killing anyone. He said some little girl picked his picture but "I haven't killed no one." He said he met the victim Carol Heath in January. He claims he and his friends took cocaine to her and they all snorted the drug. He said she "gave us head." He said shortly after he met Ms. Heath he was arrested for possession of a firearm. He was in the DeQueen County jail until he said he was released on April 1, 1993. He said when he was released from jail he intended to leave for New Mexico that day. He said before he left he wanted to "party and we were kicking it." He said he saw Ms. Heath at a party doing drugs. He said he left with her and another couple to go to her house. Once at Mrs. Heath's house the other couple was in another room. He said he was having sexual foreplay with Ms. Heath. He said a man knocked on the door asking the victim for "his stuff." He said he had an altercation with the man and they exchanged words. He left Ms. Heath's house and this individual stayed there. He claims he left at that time and drove to New Mexico. He said after a week in New Mexico "a chick I know told me I had a warrant out for murder." He said he was loaded on drugs at the time but was

> arrested in New Mexico. He would not sign for extradition and in late 1993 he was finally transferred to DeQueen, Arkansas.

Subdivision 202(6) requires only that Johnson "identify" a theory of innocence. While the theory stated above is sufficient to satisfy this basic requirement, some of the factual circumstances that would support this theory can be more seamlessly relayed here. There are additional circumstances (also not addressed in the majority opinion) that will need to be supplemented in the subdivision 202(8) analysis.

First, much of the evidence in this case points to a white perpetrator. It is important to note that an "inch-and-a-half red beard hair" was found in the victim's hand at the first crime scene. The majority heavily relies on the proposition that hairs recovered at the first crime scene (one from just under the victim's left breast, two from the floor near her body, and one from a bedsheet inside her apartment) have since been matched to Johnson's genetic profile through older forms of scientific testing. However, Johnson, a black man with dark hair, obviously did not shed the red beard hair. In fact, there were *numerous* Caucasian hairs, dissimilar to the those of the victim, found at *both* the first crime scene (Heath's apartment) and the second crime scene (a wooded area where Heath's purse and several other items were found), which was discovered a few days later.

For example, a Caucasian hair, dissimilar to those of the victim, was recovered from the blood-soaked towel found on the floor by the victim's head.

Another was recovered from the toilet paper found on the floor beneath the victim's genital area. Another was found on the floor beneath the victim's body. Three such hair fragments were recovered from a washcloth found in a paper sack inside the bathroom at Heath's apartment, which was "possibly used by suspect" to wipe down the crime scene, according to the investigator who collected that evidence. Two such hairs were recovered from the green shirt found at the second crime scene. Another was recovered from the white T-shirt found at the second crime scene. Another was recovered from the towel found at the second crime scene.

Unlike Johnson's hairs, which are of (what the forensic specialists referred to as) "Negroid origin" and have since been matched to his genetic profile through scientific testing, *none of the Caucasian hairs identified in the paragraphs above* have ever been subjected to scientific testing, despite Johnson's continued requests. The fact that the Caucasian hairs have never been tested is glaring and significant. Particularly so, since Brandon Ramsey, a white male who either was dating the victim at the time of her murder or was recently her ex-boyfriend, is described as having had a "reddish brown beard" at the time of the murder.

There was testimony at Johnson's postconviction Rule 37 hearing that Ramsey had been going through a divorce and had just lost custody of his children at a temporary hearing on the day of Heath's murder. The day Carol Heath's body was discovered, Ramsey was interviewed by the DeQueen police. During the interview, Ramsey acknowledged that he had seen Heath as recently as the day before

she was murdered. However, the record does not reveal any effort to match Ramsey to the aforementioned red beard hair found in the victim's hand (or any of the other hairs), or that any investigative steps were taken to develop Ramsey as a suspect. During the interview, Ramsey also stated, "I had Stacey Johnson arrested recently carrying a weapon. That's what he has been in jail for. He got out of jail recently. I am afraid of him."

Also relevant here is that the victim was found with bite marks on her breasts. At trial, Johnson sought to call Cordelia Vinyard, Ramsey's ex-wife, to testify as a witness in his defense, but the trial court refused to allow her testimony. However, outside the presence of the jury, Johnson proffered Vinyard's testimony for the record. In her proffered testimony, Vinyard stated that she divorced Ramsey because he had physically abused her, and she testified specifically that he would bite her on her breasts.

Overall, the evidence pointing to a white perpetrator supports Johnson's claim that someone else killed Carol Heath. Johnson has "identif[ied]" a theory of innocence, and subdivision 202(6) is satisfied.

III. Ark. Code Ann. § 16-112-202(8)—Reasonable Probability

Subdivision 202(8) requires Johnson to show how the proposed testing "may" produce new evidence that would "support" his theory of innocence and show a "reasonable probability" that he did not kill Carol Heath. The majority concludes that Johnson could never satisfy this prerequisite, since "any results from

the proposed testing cannot erase the consistencies connecting multiple pieces of evidence that point to Johnson's guilt." (Maj. Op. at 12). In particular, the majority points to (1) what it characterizes as Johnson's "confession"; (2) the testimony of Johnson's stepmother, Sharon Johnson, regarding the green shirt and the white T-shirt reportedly found at the second crime scene; (3) the testimony of the victim's daughter, Ashley Heath; and (4) a "cigarette butt" with traces of Johnson's saliva reportedly found in the pocket of the green shirt from the second crime scene. Before it can be determined whether Johnson has satisfied the criteria in subdivision 202(8), the majority's characterization of this evidence must be supplemented.

A. Johnson's "Confession"

The majority contends that Johnson "confess(ed)" to this crime, but a review of the actual statements at issue does not support this contention. First, the majority alludes to statements Johnson made to fellow inmates and to his stepmother about planning to be with Carol Heath on the day she was murdered. But the actual testimony from those individuals provides only that Johnson had an existing sexual relationship with Ms. Heath and that he intended to see her on the night of the murder. Johnson readily admits those facts.

The only evidence in the record concerning any alleged "confession" was Albuquerque police officer Pacheco's testimony claiming Johnson told him "he had killed someone in Arkansas." However, there is substantial reason to doubt this characterization.

First, there is no written memorialization of any alleged confession by Johnson. While I have not reviewed the Albuquerque Police Department's training manual, I imagine it instructs officers that if a suspect confesses to murder, someone should probably write that down and report it to superiors. The absence of any written memorialization of Johnson's alleged confession undercuts the reliability of Pacheco's testimony on this point. Additionally, Pacheco's testimony was contradicted by his own partner, Officer Bylotas, who said he did not hear Johnson make any confession.

After Johnson was arrested by the Albuquerque police officers, he was interviewed by Detective Foley. The transcript from that interview is in the record, and it contains nothing even remotely resembling a "confession" to Heath's murder (whether made to Officer Pacheco or to anyone else), nor any reference to Johnson offering his arresting officers money to let him go, nor any allusion thereto. The transcript does show that Johnson maintained he had never killed anyone.

Finally, the offense report that the Albuquerque Police Department sent to the DeQueen Police Department is particularly illuminating. This report details and summarizes the circumstances of Johnson's arrest, his interview, and the subsequent investigative steps taken by the Albuquerque officers. It specifically notes Officer Pacheco's involvement in Johnson's arrest, yet it makes no reference whatsoever to a confession by Johnson, nor to Officer Pacheco reporting any such confession, nor to Johnson offering his arresting officers money to let him go.

In short, what the majority characterizes as Johnson's "confession" (without any further explanation) is not borne out in the record. It certainly is not a sufficient reason to bar Johnson's request for scientific testing.

B. Sharon Johnson's Deposition Testimony

The majority intimates that Johnson's stepmother, Sharon Johnson, concluded that the green shirt and the white T-shirt found at the second crime scene were the same shirts that Johnson had left her house with on the day of the murder. This intimation significantly overstates and mischaracterizes Sharon's testimony; she could not confirm that either shirt was a match. In fact, the transcript from her testimony reveals several details that bolster Johnson's request for new scientific testing on both shirts. These details will also be relevant to circumstances of the investigation addressed later in this opinion.

Sharon passed away before Johnson's first trial, but the prosecuting attorney and Johnson's trial counsel took her deposition before she died, and the transcript of that deposition was read into the record. On direct examination, the prosecutor showed Sharon the green shirt and the white T-shirt in evidence bags. In response to the prosecutor's questions, Sharon initially thought that the white T-shirt shown to her was the same one that belonged to Johnson's deceased father that she had given to Johnson on the day of the murder. She also initially thought that the green shirt shown to her was the same one Johnson put on at her house (the green shirt she saw Johnson wearing was

one of his own, not his father's) on the day of the murder.

However, on cross-examination, Johnson's trial counsel actually took the shirts out of the evidence bags and showed them to Sharon. After examining both of the shirts, Sharon realized that she had to change her testimony. While Sharon was unable to confirm that these shirts were definitively *not* the same shirts that Johnson had left her house with on the day of the murder, she could not confirm that they *were*, either.

The white T-shirt from the evidence bag was a size large. Regarding the size of the shirt, Sharon testified as follows:

> Q: Now, this shirt is a Hane's shirt. I can tell from the label in the shirt. You can see that or do you agree with me?
>
> A: Yeah.
>
> Q: And this is a size large. Now, are you telling us, Sharon, that there could not be any other Hanes T-shirts in DeQueen?
>
> A: No. . . . No, I'm not saying that. . . . Because I know there's a whole bunch of them at Wal-Mart.
>
> . . . .
>
> Q: Okay. Now, Stacey is a large person. Would you agree with me there?
>
> A: Yes.

Q: And probably to really fit him, he would need probably an extra large or a two X, would he not?

A: I don't know because he fits into all of his dad's clothes and I buy all of his dad's clothes extra – sometimes extra extra large and sometimes just extra large, depending on how they make them.

Q: Okay. So most of your husband's shirts were extra large or two extra large?

A: Right.

Q: So if this shirt is a large, would that lead you to tend to believe also that this was not your husband's shirt?

A: Yeah.

Sharon did go on to acknowledge the possibility that Johnson's dad had some size large T-shirts, since he had been diabetic and his weight fluctuated from time to time. However, she nonetheless maintained that she could not confirm that the white T-shirt then being shown to her was the same one she gave to Johnson, which she also specified had been a "v-neck." Later, DNA testing performed on the white T-shirt taken from the second crime scene would *exclude* Johnson as a contributor to the genetic profile obtained therefrom.

Sharon could not identify the green shirt, either. After the green shirt was removed from the

evidence bag and Sharon looked it over, she testified as follows:

Q: Now, this shirt is the turquoise shirt that you've looked at, Sharon. Now, when Officer Godwin held it up for you a while ago, you mentioned that the shirt Stacey had on had pockets in the front?

A: Yeah, it had pockets in it.

Q: Okay. And you're pretty sure about that?

A: Yeah, I'm pretty sure about that.

Q: Now, you can agree and you see here this shirt doesn't have any pockets?

A: Yeah, it doesn't have no pockets.

Q: So basically all you can say is that when he left the last time about quarter till 9:00 that he had a turquoise shirt on because you can't say this is the same shirt, can you?

A: No, because the one he had on had pockets in it.

Q: Okay. What about the sleeves, Sharon? Do you remember what that shirt looked like that Stacey had on?

A: That looked like it.

Q: Now, there's a band here and a band here. I don't know whether you remember that or not.

A: That really looked like the shirt, though, that he had on that he left in.

Q: Okay. Except that you would say that it is not the shirt because of the pocket?

A: Right.

There are additional issues concerning the green shirt (Sharon described the color of the shirt Johnson put on at her house as "turquoise") and its pockets, or lack thereof, that should be addressed here. While the prosecutor at Johnson's trial stated that the green shirt had a "slit" pocket (which is where the cigarette butt was allegedly found—more on that later), the two pictures of the green shirt in the record on appeal do not clearly show that it has any pockets at all ("slit" or otherwise). If there was a "slit" pocket on the green shirt, Sharon plainly did not consider it to be the same type of "pockets" (plural) that were "on the front" of the turquoise shirt she saw Johnson wearing on the date of the murder.

Additionally, in a police interview with Deborah Ann Johnson, Johnson's aunt who also saw him on the date of the murder, Deborah stated, "He had on a light blue shirt, like a college sweatshirt but it had a hood and blue jeans." Neither of the shirts reportedly collected from the second crime scene have a hood.

It should also be noted here that Sharon's deposition was not the first time the authorities spoke

with her in regard to Carol Heath's murder. Carol Heath's body was found the morning after Johnson had left Sharon's house. The police came to question Sharon about Johnson later that very same morning. (R. 1202, 1998 Direct Appeal). The significance of this circumstance will be underscored in later sections of this opinion.

Ultimately, Sharon concluded her testimony by telling both Johnson's attorney and the prosecutor that while it was possible the shirts could be the same ones she saw Johnson with the day before the murder, she could not be sure either way. In the final exchange with Johnson's attorney, Sharon testified:

> Q: Okay. And, of course, [the prosecutor] asked you a lot of questions about these shirts, too, because they are important. You told (the prosecutor) that you can't say that they are not the shirts. They look like them, but at the same time you can't positively identify them either, can you, Sharon?
>
> A: No. I know that. All I know is he came in here with the turquoise shirt on.
>
> Q: Okay. These shirts you've looked at are similar, but there are also some differences you told us about?
>
> A: True.

And in the final exchange with the prosecutor, Sharon testified:

Q: Just one more, [Sharon]. These shirts can be the same ones that he had on; is that correct?

A: They could be.

Q: Okay.

Overall, Sharon's conclusions about the shirts were entirely equivocal. They certainly are not so overwhelming as to bar Johnson's petition for scientific testing.

C. Ashley Heath's Testimony

The majority emphasizes that the victim's daughter, Ashley Heath, identified Johnson as the murderer. At trial, Rose Cassady, Carol Heath's sister-in-law, testified that when she first made contact with Ashley through the window of Heath's apartment, Ashley told her, "A black man broke in last night." During Ashley's testimony, she never stated that she saw Johnson kill Heath. However, in response to questions from the prosecutor, Ashley did state that Johnson had come by the apartment earlier that day; that she woke up in the middle of the night; that she left her room to get a drink of water; that she saw "mom and him were pushing each other"; that she went back to her mother's room and put her younger brother in the closet; that she then came back out and saw Johnson "on top of (Heath);" that she then went back into the closet; and that later when she came back out, Heath was "in the living room with blood all over her." She also testified that Johnson is the person whose picture she had picked out of a photo lineup during an interview with Officer McWhirter.

At the hearing on Johnson's petition for postconviction scientific testing in the circuit court below, Johnson sought to introduce testimony from Dr. Margaret Kovera, an eyewitness-identification expert. The circuit court refused to allow Dr. Kovera's testimony into evidence, but Johnson's postconviction counsel proffered it for the record. The circuit court's exclusion of Dr. Kovera's testimony was error,[1] and her testimony should be considered.

To generally summarize Dr. Kovera's testimony, she explained that the human-memory process works in three general phases: (1) acquisition or encoding, (2) storage, and (3) retrieval. "At each of those stages," she testified, "errors can be introduced, given certain circumstances." This would include "estimator variables" (factors that affect the witness's ability to correctly make and store a memory of the event, including cross-racial identification, witness age, stress, etc.) and "system variables" (factors that affect how memory is retrieved, including police-identification procedures and postidentification information). Dr. Kovera explained that these circumstances can influence what someone ultimately

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[1] This testimony would have been highly relevant in this postconviction context, especially considering the circumstances surrounding Ashley Heath's testimony addressed in this section. Moreover, the provision of this subchapter prescribing hearing procedures contains no such limitation on expert opinion testimony as described in the majority opinion. *See* Ark. Code Ann. § 16-112-205(c)(4)–(5) ("Unless otherwise ordered by the court, the petitioner shall bear the burden of proving the facts alleged in the petition by a preponderance of the evidence. (. . .) The court may receive evidence in the form of affidavit, deposition, or oral testimony.").

testifies to, regardless of what that person did or did not actually witness. Obviously, this does not mean that any and all eyewitness testimony is therefore unreliable; it simply means that such circumstances, when introduced, can have an influence.

In this case, there are several reasons to suspect that Ashley Heath's testimony at trial may have been influenced by such circumstances.

First, it should be noted that by the time Ashley was interviewed by Officer McWhirter, the police had already questioned Sharon Johnson, Johnson's stepmother, earlier that morning. Between the information obtained from Sharon and from the questioning of others, the police would have already known Johnson's name, size (Johnson is six feet six inches tall, and was described as "chunky"), a description of the clothing he was wearing when he left his stepmother's house, a description of his hair, and the fact that he had been recently released from jail. Additionally, it is undisputed that Ashley had seen Johnson at Heath's apartment on prior occasions. It should also be noted that of the seven photos shown to Ashley, Johnson's was the only one featuring a person with baldness or a receding hairline. Furthermore, Ashley's interview with Officer McWhirter (which was unrecorded) was conducted the same day her mother's body was found. Ashley, who had just turned six years old, was with several family members at her grandmother's house during the hours leading up to the interview.

Whether Ashley's family members and the authorities pressured Ashley to identify Johnson is highly relevant to the reliability of her testimony. Before Johnson's first trial, Ashley was deemed

incompetent to testify, but after the outcome of the first trial was reversed on appeal, Ashley, then ten years old, was permitted to testify at the second trial. A major issue raised in Johnson's appeal from that conviction was the assertion of physician/psychotherapist privilege by Ashley's attorney ad litem over numerous reports prepared by one of Ashley's therapists.[2] These reports were never turned over to the defense, but they were placed under seal for the record on appeal in Johnson's second appeal. A review of those reports shows their significance. *Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000) (*Johnson II*) was a 4–3 split decision, and the three dissenting justices addressed and quoted from those reports as follows:

> Had defense counsel been privy to [the therapist's] records, he would have been able to delve into [the therapist]'s conclusions that Ashley's stories were profoundly inconsistent and that she had been under considerable pressure from her family and the prosecutor to convict Stacey Johnson. A sampling of [the therapist]'s notations after therapy sessions with Ashley before the second trial reveals the following:
>
> - The DA says she's the only one who can "keep him behind bars."

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[2] Arkansas Rule of Evidence 510 provides: "A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter."

- So much of what Ashley says is parroting other family members. For example, she says, "I'm the only one who can put him behind bars."
- Her grandmother told Ashley that she "has to keep him behind bars," because if he gets out he'll try to kill Ashley next.
- Her grandmother emphasized how much responsibility was on her, and if Johnson's sentence is overturned, Ashley will feel total responsibility.
- Ashley kept wanting to elaborate on what she saw. Atty emphasized to her that all she has to say is that she saw Jason [sic] murder her mom, period.

Johnson II, 342 Ark. at 205, 27 S.W.3d at 417 (Brown, J., dissenting). None of this was available for Johnson's defense at trial. There is at least one other relevant excerpt from the therapist's reports that was not identified in the *Johnson II* dissent. During a therapy session, after Ashley provided what the therapist describes as another "new" version of events from the night of the murder, Ashley "at 1 pt. . . . seemed to lose her memory of what she'd heard, and stated '*Let me go ask my aunt*[.]'" (Emphasis added.)

Without disparaging an innocent young girl whose life was surely turned upside down by this tragedy, the significance of the circumstances described above is apparent. The pressures exerted by Ashley's family members and the authorities are exactly the sort of circumstances Dr. Kovera identified as likely to influence human memory. The events in question occurred when Ashley was six years old, and

as the dissent in *Johnson II* noted from the therapist's observations, "Ashley's stories were profoundly inconsistent." 342 Ark. at 204, 27 S.W.3d at 417. Whatever the collective impact of these influences was, it should be noted that at one point, Ashley implicated Branson Ramsey in her mother's death. During an interview with a different therapist, in response to the question, "Who do you think did it," Ashley stated, "I think they both did it, Branson Ramsey and Stacey Johnson." (R. 1477, 1998 Direct Appeal). In short, Ashley's testimony at trial tending to identify Johnson as Carol Heath's murderer is not so reliable as to bar Johnson's petition for scientific testing.

D. The "Cigarette Butt"

The origin of the "cigarette butt" with Johnson's saliva on it, reportedly discovered in the pocket of the green shirt found at the second crime scene, is perhaps the most concerning aspect of this case. At one point in his brief, Johnson's attorneys "question the provenance" of this evidence. The State responds by stating that Johnson has accused investigators of "plant[ing]" this evidence at the crime scene, and that the accusation is baseless. However, a close review of the record from these cases reveals that Johnson has legitimate reason to be concerned. The chain of custody for the cigarette butt with Johnson's saliva is materially deficient. This deficiency undercuts the reliability of this evidence, and (despite the "plant" label volunteered by the State) supports the possibility that it was "swapped in" at some point after the evidence from the crime scenes was collected. But regardless of how the cigarette butt became evidence

in Johnson's case, the presently observable shortcomings in its chain of custody render it an unreliable piece of evidence for purposes of our subdivision 202(8) analysis.

To appreciate this concern, it is necessary to line out the details from several documents spread across the records of Johnson's past cases. This is a search-intensive inquiry, but as they say, the devil is in the details.

- Dated **April 7, 1993**, there is an Arkansas State Police report titled "Crime Scene Search." (R. 112, 1998 Direct Appeal). This report is authored by investigators identifying several items recovered from the second crime scene and then sent to the state crime lab. It identifies the items placed into evidence bag "**GGG-21**" as "**Cigarettes and matches** taken from pocket of green shirt." "**GGG**" corresponds to the initials of the State investigator who gathered the evidence, whose last name is **Godwin**. The report provides that "[t]hese items were **photographed** . . . and copies of those photographs supplemented in this case file."
- Also dated **April 7, 1993**, is a document titled "Evidence Submission Form." (R. 94, 1998 Direct Appeal). This form is utilized by investigators to identify specific items of evidence and to specify which forms of testing the investigators would like the state crime lab to perform on those items of evidence. The form contains a list of potential methods of testing to be selected,

including "latent prints," "serology," "toxicology," etc. In the handwritten list of items submitted, there is a notation for ". . . **GGG-21 Cigarettes & matches** taken from pocket of green shirt." At the bottom of the form, next to "Type of Analysis Requested," is a handwritten notation for each item of evidence on the submission list, including "**GGG 21** Process for **Latents** and compare to GGG-18 . . . ." The filled-in submission form requested testing only for **latent fingerprints** on **GGG-21** and did request other forms of testing on the other items on the submission list.

- Dated **May 4, 1993**, is a state crime lab document titled "Report of Laboratory Analysis." (R. 123-124, 1998 Direct Appeal). This report corresponds to "**Agency Case Number: 89-413-93**," which **State Investigator Godwin**, whose name is listed on the state crime lab reports as the "**Investigating Officer**" and the addressee, identified as "my (Godwin's) case number." (R. 1086, 1998 Direct Appeal). This report identifies several items of evidence that were **received by the lab on April 5, 1993**, for various testing. Among those items were "**Q4 – Breast Swabs**," which were subjected to "**Saliva Examination**." Also among those items was an item designated "**Q18 – T-shirt (GGG-22)**."
- Dated **May 10, 1993**, is another state crime lab document titled "Report of Laboratory Analysis." (R. 118, 1998 Direct Appeal). This report identifies several items of

evidence that were received by the state crime lab on April 5, 1993 to be tested for fingerprints. Among those items was "**GGG-21: Cigarettes and matches from pocket of green shirt**." The report provides that the lab recovered prints from a Lifestyles condom package, one douche bottle, and latent lifts. All the prints were negative for Johnson.

- Dated **April 15, 1994**, is a Cellmark Diagnostics (Cellmark) document titled "Report of Laboratory Examination." (R. 32–33, 1998 Direct Appeal). Cellmark was contracted to handle DNA testing for the state crime lab (at least what DNA testing was available at the time), and it issued several reports with the results of testing performed on various items of evidence in this case. Cellmark had issued at least three reports in this matter (dated January 19, February 18, and April 15, 1994 (R. 28-–-35, 1998 Direct Appeal)) before or at the same time of this report. I note that while these Cellmark reports, like the reports from the state crime lab, correspond to "**AR State Police Case No. 89-413-93**," State Investigator Godwin is not the addressee to whom the reports are directed; instead, the Cellmark reports are directed to "Investigator **Jim Behling** [new line] **DeQueen Police Department** [new line] . . ." Each of the prior Cellmark reports, as well as this April 15, 1994 report, have certain things in common. All the Cellmark reports note the date upon which each item

submitted for testing was received by Cellmark. All four of the Cellmark reports discussed thus far note that the evidence submitted for testing was received **either** in one batch on **December 2, 1993**, or in a second batch on **December 17, 1993**, in reference to "**Cellmark Case No. F931380**." Each of these four reports addressed items received in both batches. Additionally, all of the Cellmark reports discussed thus far identify each item of evidence with an "ID#" and "Description," which generally tracks with the designations previously utilized by the state crime lab. For example, this April 15, 1994 report notes that Cellmark performed testing on "Q18 – Material labelled '. . . white t-shirt . . .'" ("Q18 – T-shirt (GGG-22)" was listed on the previously described May 4, 1993 serology report from the state crime lab). This report also provided the results of testing performed on "Q4 – Two swabs labelled '. . . breast swabs . . .'" Importantly, the results from this report *excluded* Johnson as a contributor to whatever material was recovered on the swabs from the bite marks on the victim's breasts. Outside of Johnson's hairs, all the testing in the case thus far had excluded Johnson as a contributor to any of the genetic samples submitted for testing. Another forensic specialist has since opined that some of the results of this report were too faint to determine and could not actually exclude Johnson as a potential contributor to the

breast swabs, but *at the time*, this report's exclusion of Johnson would have been a significant development in Johnson's case—a key exculpatory piece of evidence.

- Dated **June 1, 1994**, is another report from Cellmark. (R. 427–29, 2018 Act 1780 Appeal). This report is different from the prior Cellmark reports in certain respects. First, the items submitted for testing are identified and described in less detail than those addressed in the prior reports. The two items submitted are identified and described as "**22 – one white t-shirt**" and "**21 – one cigarette butt labelled '. . . pocket of green shirt . . .'**" (ellipses in original). The numbers "22" and "21" seem *intended* to correspond to the previously utilized "GGG" numbers. Additionally, the report reflects that these items were received by Cellmark on different dates than all the other previously submitted evidence. The report says the white T-shirt was received **December 8, 1993**, and that the cigarette butt was received **May 16, 1994**. The results in the report **matched the DNA on the cigarette butt to Johnson**.

There is a great deal of information contained in each of these reports, but when you line up the relevant particulars, the timeline is beyond suggestive. The collective weight of this information indicates that the cigarette butt with Johnson's saliva actually came from somewhere other than **GGG-21** (supposedly the pocket contents from the green shirt at the second crime scene) and its corresponding chain of custody. From the very beginning of this

investigation until the June 1, 1994 report from Cellmark, every ounce of documentation indicated that it was "cigarettes (plural) and matches" that had been removed from the "pocket" of the green shirt found at the second crime scene and placed into evidence bag "**GGG-21**." At Johnson's first trial, when State Investigator Godwin was presented with his rough notes indicating that it was "cigarettes and matches taken from the pocket of the green shirt," he stated as follows:

> Q: Okay. So you would think that there were **cigarettes** that were found in that pocket?
>
> A: **More than one**, yes, ma'am.

(R. 2313, 1995 Direct Appeal.)

However, when other State witnesses (e.g., **Jim Behling** of the **DeQueen Police Department**) testified about **GGG-21**, they maintained that it was always a single cigarette butt (or as described in some places in the transcript, "a single partially smoked cigarette") taken from the green shirt at the second crime scene, and the saliva on that cigarette butt was matched to Johnson through testimony from other witnesses. To be clear, the Cellmark reports themselves were never entered into evidence for the jury's consideration—only testimony by State witnesses about the results contained in those reports.

That GGG-21 should have contained "cigarettes," as opposed to a single smoked "cigarette butt" or a single "partially smoked cigarette," is further supported by the fact that the investigators submitted GGG-21 to the state crime lab *only for*

fingerprint testing. If GGG-21's contents, whatever they actually were, had already been smoked, and there was a possibility of obtaining a genetic profile from saliva thereon, then it is conspicuous that investigators did not also request that GGG-21 receive testing for saliva.[3] This is especially true considering that other evidence collected at approximately the same time, such as the breast swabs, was submitted for saliva testing.

It is particularly concerning that Cellmark received what the June 1, 1994 report describes as "21 – **one cigarette butt** labelled '. . . pocket of green shirt . . .'" (ellipses in original) *nearly a half year* after Cellmark received all the other evidence submitted for testing. This was the first time the description changed from "**cigarettes**" to a single "**cigarette butt**." Additionally, each of those earlier reports had identified the items tested by maintaining the same "**GGG**," "**ME**," "**Q**," etc., formats utilized by the investigators, the medical examiner's office, and the state crime lab, so to maintain the corresponding chain-of-custody; those identifiers are missing from Cellmark's June 1, 1994 report.

While the date that the cigarette butt arrived at Cellmark came nearly a half year after all the other items of evidence were received, I note that the cigarette butt arrived at Cellmark *just one month after* Cellmark generated the April 15, 1994 report, which

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[3] How the State was able to perform any meaningful testing on the partially smoked cigarette is a fair question, considering that it was allegedly found in watersoaked clothing that had been sitting in the rain for the previous two days.

excluded Johnson as a contributor to the saliva on the breast swabs, as set forth above. This April 15, 1994 report marks what would have been a significant point in the case. Prior testing on the "green" shirt found at the second crime scene showed only that the blood on the green shirt belonged to Heath. The state crime lab had found fingerprints on the condom package and the douche bottle in Heath's apartment but determined that those fingerprints did not belong to Johnson. Cellmark had identified a DNA profile contained on the white T-shirt found at the second crime scene but determined that it did not match Johnson.

At that point, the only remaining physical evidence tending to connect Johnson to either crime scene would be his hairs found in Heath's apartment, which the forensic experts would explain are "transient" in nature and easily transferred from item to item, which can make it difficult to draw reliable inferences about where any given hair is found. Moreover, Johnson had a plausible explanation for the presence of his hairs around Heath and her property (their physical/social encounters), and at any rate, there were Caucasian hairs that did not belong to the victim found at *both* crime scenes. The burden of proof in a criminal case is guilt beyond a reasonable doubt, and the prosecution would have had a difficult time meeting that burden without the late advent of this "cigarette butt" containing Johnson's saliva to connect him to the second crime scene.

When one considers additional information from Johnson's second prosecution, the illegitimacy of the cigarette butt becomes even more apparent. After the outcome of Johnson's first trial was reversed on

appeal, a different attorney was appointed to represent Johnson in the second trial. Johnson's new attorney filed a motion for discovery. The State's response to Johnson's discovery request consisted of approximately two hundred pages and was filed in the record. (R. 21–219, 1998 Direct Appeal). Interestingly, each of the Cellmark reports from the first prosecution was included in the State's response, except for one. The June 1, 1994 report, which contained the testing results on the cigarette butt, was omitted.

Johnson's attorney later filed another request titled "Motion for Discovery of DNA Testing and Materials." The prosecutor then sent Johnson's attorney a new report from Cellmark dated **May 21, 1997**, which would again match the cigarette butt to Stacey Johnson. (R. 340–44, 1998 Direct Appeal). This report provided that on **April 4, 1997**, Cellmark had **received** ten tubes of liquid submitted for Polymerase Chain Reaction (PCR) testing. Each tube of liquid contained extracted organic material. The material in one of the tubes was developed from a blood sample provided by Johnson, identified as follows:

> Liquid in tube labelled "**F931380 09**" (containing extracted DNA from the tube of blood labelled Stacy Johnson previously submitted on **December 2, 1993**)

(Parenthetical and indentation in original; emphasis mine.) The remaining nine tubes consisted of material extracted from items allegedly collected at the crime scenes. This report included the aforementioned

identifiers corresponding to each item of evidence; for example:

> Liquid in tube labelled "**F931380 – 01** . . ." (containing extracted DNA from the **root of the hair** labelled **GGG13** previously submitted on **December 17, 1993**)
> Liquid in tube labelled "**F931380 – 01s** . . ." (containing an extract from the **shaft of the hair** labelled **GGG13** previously submitted on **December 17, 1993**)
> Liquid in tube labelled "**F931380 – 03** . . ." (containing extracted DNA from the **shaft of the hair** labelled **ME6** previously submitted on **December 17, 1993**)

(Ellipses, parentheticals, and indentations in original; emphases mine.) However, the report's description of the cigarette butt is as follows:

> Liquid in tube labelled "**F931380 12**" (containing extracted DNA from a **cigarette butt** previously submitted on M**ay 16, 1994**)

(Parenthetical and indentations in original; emphasis mine.) A close review of this **May 21, 1997** Cellmark report further substantiates that the cigarette butt with Johnson's saliva came from somewhere other than evidence bag "**GGG-21**."

First, while the **June 1, 1994 Cellmark report** was notable because its notation for the "**cigarette butt**" (recall that the June 1, 1994 report was the first time the description changed from

"cigarettes" to a single "cigarette butt") lacked the "**GGG**" identifier, this **May 21, 1997 report** does not even have the "**21**" identifier; it just states that PCR testing was performed on a cigarette butt received by Cellmark on **May 16, 1994**. Additionally, note the presence (or lack thereof) of ellipses (...) inside the end quotation marks preceding the descriptive parentheticals for each item. Of the ten items addressed in this report, eight contain the ellipses inside the end quotation mark, and each of those eight follows up with a parenthetical that describes the item with the same identifiers previously utilized by the investigators and the crime lab, e.g., "GGG," "ME," etc.

Of the two items that lack the ellipses, one of them, "**F931380 09**," is the blood sample provided by Johnson. With regard to this item, perhaps the lack of ellipses makes sense—the chain of custody *should be* different here. The sample of Johnson's blood could not have been obtained until after his arrest, well after the other items had been collected from the two crime scenes and submitted for testing—hence also the absence of a "GGG" or other such identifier in the parenthetical following this item. But that explanation obviously cannot be applied to "**F931380 12**," the tube containing DNA from the cigarette butt (which, like the other eight original items addressed in this report, was allegedly collected by investigators at the crime scenes), yet there are no ellipses contained in the description for this item, nor are there identifiers in the following parenthetical.

These discrepancies become even more significant when one considers the difference in State Investigator Godwin's testimony between the first and

second trials. On direct examination by the prosecutor at the second trial, when presented with the April 7, 1993 "Evidence Submission Form," Investigator Godwin testified as follows:

> Q: Okay. Are you saying that there were **multiple cigarettes** found in that pocket **or was that an error on your part**?
>
> A: It was an **error on my part**.
>
> Q: Is there **any doubt in your mind**, Investigator Godwin, that one partially smoke[d] cigarette along with this book of matches was found in this green shirt pocket?
>
> A: **That's all that was found**.

(R. 1088, 1998 Direct Appeal.) The disparity in Investigator Godwin's testimony between the two trials is ominous. In light of the circumstances described above, his credibility on this point is irretrievably compromised.

Overall, the originally-utilized-then-later-abandoned identifiers, the altered descriptions, the investigation timeline and the gaps therein, the changed testimony—when considered together, show that the cigarette butt is an unreliable piece of evidence. The reasonable conclusion is that this evidence came from somewhere other than where the rest of GGG-21's contents allegedly came from. *See Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997). The cigarette butt's chain of custody is materially

deficient, and the right inquiry may show it to have been determinably manufactured. Put simply, this evidence is so lacking in requisite authentication that it *should not have been allowed at either trial*, and the fact that it was poisoned the outcome of both.

Again, of all the documents discussed in this section, the only one that was ever entered as an exhibit for the jury's consideration at either trial was the April 7, 1993 "Evidence Submission Form." Without having all of these documents lined out together and a breakdown such as that set forth in this opinion (Johnson's trial attorneys certainly made no attempt to make such a presentation, if they even realized the chain-of-custody breakdown), it would be entirely unrealistic to expect a jury of laypersons to grasp each of these details and appreciate what they ultimately together reveal, especially considering the horrific facts being laid out in each trial. For purposes of our subdivision 202(8) analysis, it is plain enough that this evidence did not come from "GGG-21" and its corresponding chain of custody. This court can discount the probative value of the cigarette butt without determining exactly where it came from or how it got there.

However, note one last set of observations regarding these "cigarettes," which later turned into a single "cigarette butt," and then a single "partially smoked cigarette" by the time Investigator Godwin testified at Johnson's second trial. The April 7, 1993 "Crime Scene Search Report" discussed above provided that each item of evidence discussed in the report, including "**GGG-21** . . . **Cigarettes and matches** taken from pocket of green shirt" was "**photographed** . . . and copies of those photographs

supplemented in this case file." However, the record contains no photographs associated with any cigarette(s) (whether single or multiple, smoked or unsmoked) relating to the green shirt from the second crime scene. No such photograph was introduced at either trial. Furthermore, there is a discussion in the transcript from Johnson's Rule 37 hearing in which the attorneys are purportedly searching for the photographs, maintaining that they are supposed to be in the case file, but they are unable to locate them.

But, elsewhere in the record, there *is* a photograph featuring at its center a single, partially smoked cigarette, *not from the second crime scene* out in the woods, but *lying on the floor of Heath's apartment*. Inexplicably, there is no indication that the partially smoked cigarette from the floor of Heath's apartment was ever collected by investigators or submitted for any testing—some unidentified investigator photographed it, and then it simply disappeared. There is no indication of its existence anywhere else in the record. I also note from Sharon Johnson's deposition that the authorities were asking about the type of cigarettes Johnson smoked, and that when they first questioned Sharon (the same morning the body was found, which is also when the authorities obtained from Sharon the description of Johnson's clothing), the investigation of the first crime scene would not have been complete. Any more might involve some degree of speculation, but there is an obvious question this photograph brings to mind: Is *this* (the floor of Heath's apartment) where the cigarette containing Johnson's saliva *actually* came from? If further inquiry could confirm that possibility to be the truth, the impact would be substantial—

both[4] eliminating evidence that investigators used to linked Johnson to the second crime scene and bolstering the contention that Johnson's visit with Heath was social.[5]

Overall, the "cigarette butt" evidence is not so overwhelming as to bar Johnson's request for scientific testing.

E. Analysis

Finally, application of law. To satisfy subdivision 202(8), Johnson has to show how his proposed testing "may" produce new evidence that would "support" his theory of innocence and show a "reasonable probability" that he did not kill Carol Heath. Ark. Code Ann. § 16-112-202(8). Johnson has satisfied these requirements.

The modern landscape of forensic science and technology is entirely different from what it was in the 1990s. Within the last two decades, DNA testing has

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[4] Disclosing the *existence* of an item of evidence is not the same as disclosing the *location* that item of evidence was (actually) found. From *Johnson I* to the present case, the State has always maintained that the cigarette butt with Johnson's saliva came from the green shirt at the second crime scene. A reasonable assessment of the circumstances outlined herein dispels that proposition. Maybe it came from the floor of Heath's apartment, maybe it came from the jail where Johnson awaited trial, maybe it came from somewhere else, but it did not come from where the State has always represented it did. *See Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

[5] There was no indication of forced entry at Carol Heath's apartment.

significantly advanced in (1) sensitivity and discriminatory ability, (2) forms of testing, and (3) methods of collection and analysis; Johnson presented substantial evidence and academic literature about these advancements at the hearing below on his postconviction petition for scientific testing and to this court on appeal. DNA expert Meghan Clement testified: "[I]t is possible to distinguish mixtures more easily today . . . we could subtract [Ms. Heath's profile] from the overall mixture . . . (of DNA profiles on specific item(s) of evidence) . . . in order to develop a profile which may or may not be CODIS-eligible." Forensic analyst Huma Nasir similarly noted:

> Modern DNA technology . . . is considerably more sensitive and sophisticated than the testing available in 1994 and 1997 . . . and in 2002 . . . Current DNA technology is sensitive enough to identify an individual's unique DNA profile from a microscopic amount of biological material previously undetected . . . [and] is also designed to develop DNA profiles from poorly preserved or decades-old degraded samples that were [previously] unsuitable for testing.

These advancements have also significantly changed *where* DNA can be found, creating the possibility of finding DNA on evidence that was not able to be tested decades ago. Nasir stated further:

> In 2002 and before, it was common . . . to test only those samples with viable stains or those otherwise known to

> contain biological material . . . [b]y contrast, forensic scientists now collect and test samples from items where no biological material is visible . . . [W]e now sample items that were only touched or handled by the perpetrator of a crime to test 'touch DNA.'

For example, Y-STR testing, which only became available at the Arkansas State Crime Lab ("ASCL") in 2007, tests for DNA on the Y chromosome. This testing makes it possible to separate multiple male profiles in a single biological sample and find male DNA in a sample that would otherwise have been overwhelmed by a female donor. There is also now miniSTR testing, which became available at ASCL in 2009 and which applies STR technology to commonly observed DNA samples involving distinctly degraded biological evidence. This testing aims to enhance genetic samples, so to reveal a profile that may have previously been deemed inconclusive. Additionally, mitochondrial DNA testing became available at ASCL in 2001. Mitochondrial DNA testing analyzes DNA found in the cytoplasm of the cell; that is, the area that surrounds the nucleus. The mitochondrial genome, which is unchanged as it is passes from mother to child, is passed on to all the offspring of a mother and to those children's offspring. Mitochondrial DNA testing thus provides one particular advantage over STR testing; it can be compared to forensic samples that do not have the nucleated chromosomal information required for STR and thus may be used on biology without nucleated cells, including hair with no "root."

These modern forms of scientific testing could have extensive application to the evidence of Johnson's case, and in light of the apparent shenanigans in the handling of these items in the past, I would order new testing on literally every single piece of evidence. For purposes of the analysis here, simply note some of the more obvious testing opportunities.

Regarding the "inch-and-a-half red beard hair," as well as the other Caucasian hairs dissimilar to the victim's, any and all testing that could potentially develop a genetic profile from these items for comparison to the other evidence is *obviously* necessary. Consider, for example, the potential result of a DNA profile obtained from the red beard hair (collected at the first crime scene from the hand of the victim's body, which was covered in defensive wounds) being matched to the existing but presently unknown DNA profile on the white T-shirt collected at second crime scene. Johnson obviously did not shed the red beard hair—instead, this match would strongly suggest that it was a white man with a red beard who killed Heath and then dumped her purse and the other items out in the woods. At the least, the known biological evidence at that point would provide a far better case against the person with the red beard than the case against Johnson; the only biological evidence linking Johnson to the second crime scene is the cigarette butt addressed in Part III(D) of this opinion. In this way, a match between a profile obtained from any of the dissimilar Caucasian hairs and a profile from any of the evidence closely associated with the crime would significantly advance Johnson's claim of innocence.

But the potential result described in the paragraph above is just one possibility, tailored to the biological evidence already known to exist. If more sensitive modern testing revealed another male's DNA on the rape kit and smears, the douche-fluid swabs, Heath's underwear, the tissue paper found beneath her body, her pubic hairs, or the breast swabs (which have already shown the presence of saliva), that would be significant as well. There is an untold number of possible result combinations that would substantiate Johnson's claim of innocence. Certainly, Johnson's proposed testing "may" produce evidence that would "support" his theory of innocence and show a "reasonable probability" that he did not kill Carol Heath.

The majority's conclusion also disregards our maxims of statutory interpretation. Act 1780 was remedial legislation that must be liberally construed to accomplish its purpose. *See*, *e.g.*, *City of Fort Smith v. Wade*, 2019 Ark. 222, 578 S.W.3d 276 (remedial legislation such as the Freedom of Information Act must be liberally construed to accomplish its purpose). When construing any statute, we place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole. *Standridge v. State*, 2014 Ark. 515, at 9, 452 S.W.3d 103, 109. Here, the introductory provision that precedes Ark. Code Ann. § 16-112-202, subdivision 201, is instructive:

> (a) Except when direct appeal is available, a person convicted of a crime may commence a proceeding to secure relief by filing a petition in the court in which the conviction was entered to

> vacate and set aside the judgment and to discharge the petitioner **or** to resentence the petitioner **or** grant a new trial **or** correct the sentence **or** make other disposition **as may be appropriate**, if the person . . . [satisfies the requirements of the statute].

Ark. Code Ann. § 16-112-201(a) (emphasis added). Subdivision 208, which prescribes the procedures for conducting the new testing after it is ordered, further illustrates that this process was intended to be an organic, truth-seeking inquiry that can adapt to the particular evidentiary circumstances of a given case:

> (b) **If** the deoxyribonucleic acid (DNA) test results obtained under this subchapter are **inconclusive**, the court **may** order **additional testing** or **deny further relief** to the person who requested the testing.

Ark. Code Ann. § 16-112-208(b) (emphasis added).

In short, this process cannot function if the petitioner is required to exonerate himself on the front end before he is permitted to receive the testing. *See*, *e.g.*, *Garner v. State*, 2012 Ark. 271, at 2 (per curiam) ("Evidence does not have to completely exonerate the defendant in order to be 'materially relevant,' but it must tend to significantly advance his claim of innocence."). The process must be able to meaningfully address the varying and often complicated fact patterns that are the subject of criminal prosecutions, and the members of our legislature knew that when they drafted the statutes

prescribing this process. Had the legislature intended testing to be available only to people who could affirmatively and conclusively establish that they were wrongfully convicted beyond all doubt, the statute would not have afforded the judge in whose court one of these postconviction-testing cases is filed with the *discretion* "to vacate and set aside the judgment and to discharge the petitioner *or* to resentence the petitioner *or* grant a new trial *or* correct the sentence *or* make other disposition *as may be appropriate*[.]" Ark. Code Ann. § 16-112-201(a) (emphasis mine).

The overall theme of the majority opinion seems to be that because there is already evidence connecting Johnson to both crime scenes ("Johnson's saliva on the partially smoked cigarette in the pocket of the bloody green shirt at the roadside park (*See* Part III(D) of this opinion) and his hairs discovered on and around Heath's body" (Maj. Op. at 12)), he is therefore incapable of "disproving" his guilt. That a majority of this court would endorse this proposition, especially when there are Caucasian hairs (several more, actually) that have never been tested found in the same places (several more, actually) that Johnson's were found, is nothing short of incredulous. In almost the same breath, the majority suggests that there would be an innocent explanation if Brandon Ramsey's DNA was matched to the untested Caucasian hairs or any of the other items of evidence from either crime scene, since he (like Johnson) purportedly had a prior sexual relationship with the victim. There is no equal application of rationale.

If Johnson's case does not deserve the benefits of modern science, it is difficult to conceive of a case

that would. That Johnson could be absolutely innocent of Carol Heath's murder is a very real possibility, and his proposed testing would put that possibility to the test. Johnson acknowledges that, hypothetically, the results of this testing could incriminate him further, yet he still pleads that we order the testing. Johnson's attorneys are even willing to pay for it.[6] What interest—the public's faith in the judiciary or otherwise—is served by denying this request? Even if it is *true* that Johnson killed Carol Heath, and the results of Johnson's proposed testing only *confirmed* as much, *surely* that outcome

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[6] The very notion that *the State has the authority* to forever shield this evidence from Johnson's inspection is not supported by any persuasive rationale. To the extent the Supreme Court suggested otherwise in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), I respectfully disagree. Johnson's attorneys provided at oral argument that they would be willing to pay for all the proposed testing from their own funds. Why shouldn't an incarcerated person (through his legal representative) be allowed to access and inspect evidence from *his own case*, especially when it would involve no cost to the State? "All political power is inherent in the people and government is instituted for their protection, security and benefit[.]" Ark. Const. art. 2, § 1. "All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed." Ark. Const. art. 2, § 2. Furthermore, even if there is no constitutional right to post-conviction scientific testing as a general matter, surely there should be an exception to that proposition where, as here, the circumstances of the case indicate that evidence was actually mishandled (or affirmatively ignored) in a material way.

would be preferable to executing Johnson under the present circumstances. Perhaps those opposing Johnson's proposed testing are simply anxious about what it could *possibly* reveal—that another conviction[7] of a black man in the 1990s was attributable to investigative failures[8] and bias, and not to actual guilt.

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[7] *See*, *e.g.*, Samuel R. Gross et al., *National Registry of Exonerations, Race and Wrongful Convictions in the United States* ii (2017) ("African Americans are only 13% of the American population but a majority of innocent defendants wrongfully convicted of crimes and later exonerated. They constitute 47% of the 1,900 exonerations listed in the National Registry of Exonerations (as of October 2016), and the great majority of more than 1,800 additional innocent defendants who were framed and convicted of crimes in 15 large-scale police scandals and later cleared in 'group exonerations.'").

[8] The analysis contained in this dissent is limited to the circumstances presently before the court. Not every investigation has the problems this one did. But without a complete characterization of the evidence, the reader's perspective is not sufficiently informed to appreciate the difference Johnson's proposed testing could make. Literally, this investigation revealed far more biological evidence suggesting a white perpetrator than a black one, yet investigators only sought to develop a black man as a suspect and did not pursue the evidence suggesting a white perpetrator in any respect. If merely pointing out such obviously problematic circumstances makes one insecure about his or her perceived racial neutrality, then instead of crying foul, perhaps one should simply reassess the situation. "[T]he public's trust in the integrity of our criminal justice system" (Maj. Op. at 13) is earned by *transparency*—not by burying the circumstances that would cast doubt upon our conclusions and then stubbornly refusing to acknowledge their existence. The particular vulnerabilities of the

Modern science can be a valuable check on the functionality and reliability of our entire criminal justice system, including the past work of this court. Johnson's proposed testing could provide the answers this case is missing, but the majority will not allow it. I do not see the sense in this decision. We should welcome such an opportunity for the truth, whether to flush it out for the first time or to eliminate the doubts presently surrounding this conviction. The fact that we are instead rejecting that opportunity leaves me troubled. What are we so afraid of?

I dissent.

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evidence in this case are highly relevant to Johnson's petition for scientific testing; there can be no informed legal assessment of Johnson's petition without these circumstances being addressed and their impact considered.

SUPREME COURT OF ARKANSAS

No.: CR-18-700

	§	**Opinion Delivered**:
	§	December 12, 2019
	§	
STACEY EUGENE	§	
JOHNSON,	§	APPEAL FROM THE
APPELLANT,	§	SEVIER COUNTY
	§	CIRCUIT COURT
V.	§	[NO. 67CR-93-54]
	§	
STATE OF ARKANSAS,	§	HONORABLE
APPELLEE	§	CHARLES A.
	§	YEARGAN, JUDGE
	§	
	§	
	§	DISSENTING
	§	OPINION.

ROBIN F. WYNNE, ASSOCIATE JUSTICE

I believe appellant has satisfied his burden to obtain DNA testing under Act 1780 of 2001. For that reason, I dissent.

The majority concludes that the testing requested by Johnson would not significantly advance his claim of innocence even if it revealed the presence of DNA belonging to another individual. The majority is mistaken. As the majority recites, hairs belonging to Johnson were found at the crime scene. Hairs belonging to another individual who could not be

Johnson[1] were also found at the scene. At trial, the jury was aware that hairs belonging to another individual who was not Johnson were present at the scene.

This does not mean that the testing sought by Johnson cannot significantly advance his claim of innocence. The State sought to have the jury draw the conclusion at trial that the Caucasian hairs were from an individual who did not commit the rape and murder. However, there was evidence that Johnson had been in the victim's home previously, leaving the presence of his hairs at the crime scene subject to the same explanation as the presence of the other hairs. Not as subject to an innocent explanation is DNA obtained from a bite mark on the victim's breast. Testing at the time of trial revealed the presence of the victim's DNA, along with the DNA of a second contributor. The identity of the second contributor could not be determined from testing available at the time of trial. There was testimony at the hearing on Johnson's petition that advances in testing make identifying the second contributor through retesting more likely. Were DNA to be discovered from the breast swab that belonged to neither Johnson nor the victim, I am hard pressed to see how that would not significantly advance his claim of innocence.

In addition, vaginal swabs taken from the victim were not tested because no semen was detected. There was testimony during the hearing on Johnson's petition that advances in testing would allow for the detection of DNA in the absence of semen. Again, I

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[1] Johnson is African American. The other hairs found at the crime scene were Caucasian in origin.

fail to see how, if DNA were to be detected from this evidence that did not belong to Johnson or the victim, this would not significantly advance his claim of innocence. Due to the testimony at the hearing on Johnson's petition, I believe that he has satisfied the requirements under Act 1780 for DNA testing. Accordingly, I would reverse the circuit court's decision and remand for testing to be conducted.

For these reasons, I dissent.

IN THE CIRCUIT COURT OF SEVIER COUNTY, ARKANSAS

CRIMINAL DIVISION

STACEY EUGENE JOHNSON, PETITIONER,	§	
	§	CASE NO. 67CR-93-54
V.	§	
STATE OF ARKANSAS, RESPONDENT	§	

ORDER

On November 15, 2017, this Court held a hearing on Petitioner Stacey Eugene Johnson's ("Petitioner") Motion for Post-Conviction DNA Testing (the "Motion") pursuant to Arkansas's Habeas Corpus – New Scientific Evidence Statute (the "Statute") (codified at Ark. Code Ann. §§ 16-112-201, *et seq*.), filed on April 13, 2017. In his Motion, Petitioner asked this Court to permit forensic DNA testing on several items of evidence collected from the scene of the murder for which he is currently incarcerated and sentenced to death, in order to prove his innocence claim. After the Court's review of the initial briefing submitted by the Petitioner and the State of Arkansas (the "State", collectively, the "Parties"), the Court held a hearing pursuant to § 16-112-205 of the Statute. At that hearing, Petitioner appeared with and through his attorneys, Karen Thompson, Senior Staff Attorney of the Innocence Project, and Jeff Rosenzweig. The

State was present through its representatives from the Sevier County Office of Prosecuting Attorney, Bryan Chesshir and Alwin Smith, as well as Assistant Attorney General Kent Holt. Petitioner requested additional post-hearing briefing, which this Court granted.

The Court, having reviewed the record, pleadings and exhibits filed herein, and considered the testimony of the witnesses called by the Petitioner at the evidentiary hearing, the Court makes the following findings of fact and conclusions of law with regard to the statutory requirements set out in Arkansas Code Annotated §§ 16-112-202 (1) – (10), and 16-16-112-205(d):

1. The Court finds that the specific evidence to be tested was secured as a result of the conviction of an offense being challenged under § 16-112-201. Ark. Code Ann. § 16-112-202 (1).

2. The specific evidence to be tested was either subjected to DNA-STR testing prior to Petitioner's 1997 trial, or, as brought out at the Rule 37 evidentiary hearing, was declined, based upon discussions trial counsel had both with Petitioner and their DNA expert. (*Johnson v. State*, CR 02-1362, Rule 37 hearing record at pp. 200-06, 265-69, 372-75, Report of Dr. Ronald Rubocki, Defendant's Exhibit #3, to the hearing); *see also Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004).

3. The testing requested by Petitioner does not embrace any new technique or method of technology that is substantially more probative than the prior testing and has been available and was used in his 1997 trial. The testing done at the time of

Petitioner's trial and done today, as demonstrated by the pleadings and testimony presented at the hearing, is DNA-STR-type testing. The varieties of DNA-STR testing that have been developed and described as "touch" DNA and Y-STR DNA testing are not "new." The Petitioner has not rebutted the presumption against timeliness found in Ark. Code Ann. § 16-112-202 (10)(B)(i)-(v). This case is distinguishable from *Carter v. State*, 2015 Ark. 57, 536 S.W.3d 123, where DNA testing was unavailable in 1987, when Carter was convicted of rape and aggravated robbery, and he subsequently requested DNA-STR and Y-STR testing. *Id.* at 9, 536 S.W.3d at 128.

4. Petitioner has not identified any new evidence that has become available since the time of his retrial. The evidence sought to be tested has been retained by the state, subject to a chain of custody, and apparently retained under conditions sufficient to ensure that the evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed testing. Ark. Code Ann. § 16-112-202 (4).

5. While the proposed testing and retesting of evidence in this case may produce evidence that would support a theoretical defense, as it would in almost every case, it would not raise a reasonable probability under Ark. Code Ann. § 16-112-202 (8)(B), that the Petitioner did not commit the offense or point to a third party. Petitioner's defense remains one based solely upon his own assertion of innocence and his attack upon the credibility of Ashley Heath, the daughter of Carol Heath, who witnessed her mother being brutally murdered. Ashley Heath's description of Petitioner as her mother's killer led to the discovery

of physical evidence that corroborated Ashley's account of her mother's murder and resulted in the discovery of scientific evidence that positively linked Petitioner to Carol Heath's murder. In addition to the scientific evidence were Petitioner's statements and admissions to third parties, including police officers, fellow inmates at the jail, and his stepmother. The evidence presented at trial overwhelmingly pointed to Petitioner's guilt.

6. After review of Petitioner's arguments and requests, this Court is unable to determine what he would do with the evidence after testing. The proposed order of the Petitioner did not consider any other evidence or testimony that would help shed any theory that Petitioner did not commit the offense.

7. While the testimony of an eyewitness-identification expert is not admissible in Arkansas courts, the Court considered the proffered testimony of Dr. Margaret Kovera for the reasons it was proffered. Dr. Kovera's testimony was neither credible or reliable.

8. Petitioner's present petition, seeking testing on items available at the time of trial, with the same methodology that was available at the time of trial, constitutes a successive petition. Furthermore, the petition is untimely. Petitioner has not rebutted the presumption as set forth in §16-112-202(B)(i)-(v). The "new" testing Petitioner proposes has been available since 2009. The evidence requested is not newly discovered evidence and it has not been shown that the method of testing requested would be "substantially more probative than prior testing." Petitioner has failed to meet his required burden of proof.

WHEREFORE, based upon the foregoing findings of fact and conclusions of law, Petitioner's habeas petition seeking additional testing and retesting of evidence is hereby DENIED.

CIRCUIT JUDGE

5-9-18

DATE

FORMAL ORDER

STATE OF ARKANSAS,	)	
	)	**SCT.**
SUPREME COURT	)	

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON APRIL 19, 2017, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CR-17-312	
STACEY EUGENE JOHNSON	APPELLANT
V. APPEAL FROM SEVIER COUNTY CIRCUIT COURT - 67CR-93-54	
STATE OF ARKANSAS	APPELLEE

PETITIONER'S MOTION FOR STAY OF EXECUTION AND FOR AN ORDER REMANDING FOR A HEARING ON PETITIONER'S MOTION FOR POSTCONVICTION DNA TESTING. STAY OF EXECUTION GRANTED. REMANDED TO CIRCUIT COURT FOR A HEARING ON PETITIONER'S MOTION FOR POSTCONVICTION DNA TESTING. BAKER, WOOD, AND WOMACK, JJ., WOULD DENY. SEE **DISSENTING OPINIONS** THIS DATE.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID

SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 19TH DAY OF APRIL, 2017.

CLERK

BY: _____ DEPUTY CLERK

2017 APR 24 A 10

ORIGINAL TO CLERK (W/COPY OF DISSENTING OPINIONS)

CC/ENCLS: JEFF ROSENZWEIG
PAMELA RUMPZ, ASSISTANT ATTORNEY GENERAL
GOVERNOR ASA HUTCHINSON
WENDY KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION
MARK CASHION, WARDEN, VARNER SUPERMAX UNIT
WILLIAM STRAUGH, WARDEN, CUMMINS UNIT
HON. CHARLES A. YEARGAN, CIRCUIT JUDGE

SUPREME COURT OF ARKANSAS

No. CR-17-312

	§	Opinion Delivered:
	§	April 19, 2017
	§	
STACEY EUGENE	§	
JOHNSON,	§	
APPELLANT,	§	
	§	DISSENTING
V.	§	OPINION.
	§	
STATE OF ARKANSAS,	§	
APPELLEE	§	
	§	

KAREN R. BAKER, ASSOCIATE JUSTICE

I dissent from the majority's decision today to remand the matter to the circuit court for a hearing on Johnson's motion for postconviction DNA testing and to stay Johnson's execution. Simply put, Johnson has presented these same arguments regarding testing of DNA on numerous occasions in the two decades since his conviction for Carol Heath's murder. At trial, the testimony established that the DNA pattern found on the hair near Ms. Heath's body at the crime scene showed that the DNA in the hair was consistent with Johnson's. Testing Further showed that the DNA pattern found on the hair would occur among 1 in every 720 million African-Americans. Also at trial, the saliva on the partially smoked cigarette found in the pocket of the shirt at the park was also consistent with Johnson's DNA, and the shirt contained blood consistent with Ms. Heath's DNA.

In this case, the majority erroneously interprets Arkansas Code Annotated section 16-112-201 to include any and all claims presented under this statute. Here, it is clear from the record that Johnson cannot prevail under this statute. Johnson must demonstrate that "the scientific predicate for the claim could not have been previously discovered through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find Johnson guilty of the underlying offense." Arkansas Code Annotated § 16-112-201(a)(2)(Repl. 2016). In sum, Johnson cannot prevail. Accordingly, I dissent.

WOOD and WOMACK, JJ., join.

SUPREME COURT OF ARKANSAS

No. CR-17-312

	§	Opinion Delivered:
	§	April 19, 2017
	§	
STACEY EUGENE	§	
JOHNSON,	§	
APPELLANT/	§	
PETITIONER.	§	
	§	
V.	§	
	§	
STATE OF ARKANSAS,	§	
APPELLEE/	§	
RESPONDENT	§	DISSENTING
	§	OPINION.

RHONDA K. WOOD, ASSOCIATE JUSTICE

The General Assembly, elected by the voters in the State of Arkansas, passed a statutory scheme that provides for the death penalty as an appropriate sentence for certain crimes. Justices of this court have taken an oath to uphold the Constitution and the laws of the State of Arkansas without regard to their personal views. This means the court sometimes makes exceedingly difficult decisions without personal consideration to ourselves. Simply put, we follow the law.

The majority of this court has again summarily issued an order in a death penalty case without providing any explanation for its decision. It has granted a stay and remanded for a second hearing on Stacey Johnson's motion for postconviction DNA

testing pursuant to Arkansas Code Annotated section 16-112-201 et seq. (Repl. 2016). It does this despite the fact that the circuit court already held a telephonic hearing, made findings, and correctly found the defendant failed to meet the requirements of § 16-112-201 et seq.

The majority errs for three reasons: (1) Stacey Johnson failed to show that this testing might prove his actual innocence, (2) his motion is untimely, and (3) he failed to sufficiently plead chain of custody.

Arkansas Code Annotated section 16-112-201 permits a defendant to request relief when "scientific evidence not available at trial establishes the petitioner's actual innocence." *Id.* The statute also requires that the motion be timely, and the defendant has the burden of showing the evidence has not been tainted. *Id.*

First, Stacey Johnson has failed to make any showing that subsequent testing would result in proving his actual innocence. Indeed, Johnson has already made a virtually identical argument to this court, which we unanimously rejected. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004). In rejecting his argument then we stated, "we do not believe . . . that testing should be authorized regardless of the slight chance it may yield a favorable result." *Id.* at 536, 157 S.W.3d at 161. Now, on the eve of his execution, the majority provides Johnson with relief. In addition, we must be mindful of the evidence which supported Johnson's conviction, particularly the DNA evidence which linked Stacey Johnson to this murder, the testimony of the victim's daughter identifying him as her killer, and Stacey Johnson's statements to law-enforcement officers that

he had murdered a woman in Arkansas. The contention that the DNA of Carol Jean Heath's boyfriend might appear in her home is expected and does not equate to Stacey Johnson being innocent. Stacey Johnson was found guilty by two different juries for the April 1, 1993 murder of twenty-five-year-old Carol Jean Heath.

Second, this motion is untimely. The statute provides a rebuttable presumption that a motion made 36 months after a conviction is untimely. Johnson has not rebutted this presumption. *See* Ark. Code Ann. § 16-112-202(B)(i)-(v). The "new" touch DNA and Y-STR testing that Johnson proposes have been available since at least 2009. *See State v. Reynolds*, 926 N.E.2d 315 (Ohio App. 2009). Following the hearing, the trial court found defendant's motion untimely. Its finding was correct.

Third, it is incumbent statutorily that the defendant show "the specific evidence to be tested is in the possession of the state and has been subject to a chain of custody and retained under conditions sufficient to ensure that the evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect." Ark. Code Ann. § 16-112-202(4). The trial court correctly found defendant did not meet his burden.

Today, this court takes the extraordinary step of breaking from precedent and ignoring the General Assembly's statutory requirements for new scientific testing and stays this execution. With no explanation or instruction, this matter has been remanded to the trial court for another hearing. Today, our court gives uncertainty to any case ever truly being final in the Arkansas Supreme Court. Accordingly, I dissent.

BAKER and WOMACK, JJ., join.

IN THE CIRCUIT COURT OF SEVIER COUNTY, ARKANSAS

STACEY EUGENE JOHNSON, PETITIONER,	§	
V.	§	NO. CR-93-54
STATE OF ARKANSAS, RESPONDENT	§	

ORDER

Now before the Court is Petitioner's Motion For Post-Conviction DNA testing pursuant to Arkansas Code Annotated §§ 16-112-201, *ET SEQ* and Request For Hearing. Johnson has already been provided testing under this statute. *See Johnson v. State*, 366 Ark. 390, 235 S.W.3d 872 (2006). Johnson's request for additional testing is presumptively untimely under Arkansas Code Annotated §16-112-202(10). In addition, on April 6, 2017, the Arkansas Supreme Court declined to recall its mandate and remand this case, No. CR-93-54, to this court for additional testing of the items sought to be tested in Johnson's motion filed before this court on April 13, 2017. Thus, the court believes it is both without jurisdiction and barred by the law of the case doctrine, to entertain this successive petition for testing. Johnson, moreover, has not established a chain of custody as required under the statute. Finally, Johnson has not established that the results of his proposed testing would significantly advance his claim of actual

innocence, as required under the statute. For these reasons, Petitioner's motion is denied in its entirety. Because "the petition and the files and records of the proceeding conclusively demonstrate that the petitioner is entitled to no relief," Ark. Code Ann. § 16-112-205(a) (Repl. 2006), his request for an evidentiary hearing is denied.

IT IS SO ORDERED THIS 17 DAY OF APRIL, 2017.

Charles A Yeargan

CHARLES YEARGAN
CIRCUIT JUDGE

2017 APR 17 P 2:55
SEVIER COUNTY, AR
CATHY SMITH, CIRCUIT CLERK

U.S.C.A. CONST. AMEND. I

AMENDMENT I. ESTABLISHMENT OF RELIGION; FREE EXERCISE OF RELIGION; FREEDOM OF SPEECH AND THE PRESS; PEACEFUL ASSEMBLY; PETITION FOR REDRESS OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.C.A. CONST. AMEND. V

AMENDMENT V. GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; TAKINGS WITHOUT JUST COMPENSATION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A. CONST. AMEND. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

A.C.A. § 16-112-201

§ 16-112-201. WRIT OF HABEAS CORPUS--NEW SCIENTIFIC EVIDENCE

(a) Except when direct appeal is available, a person convicted of a crime may commence a proceeding to secure relief by filing a petition in the court in which the conviction was entered to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate, if the person claims under penalty of perjury that:

(1) Scientific evidence not available at trial establishes the petitioner's actual innocence; or

(2) The scientific predicate for the claim could not have been previously discovered through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.

(b) Nothing contained in this subchapter shall prevent the Supreme Court or the Court of Appeals, upon application by a party, from granting a stay of an appeal to allow an application to the trial court for an evidentiary hearing under this subchapter.

A.C.A. § 16-112-202

§ 16-112-202. FORM OF MOTION

Except when direct appeal is available, a person convicted of a crime may make a motion for the performance of fingerprinting, forensic deoxyribonucleic acid (DNA) testing, or other tests which may become available through advances in technology to demonstrate the person's actual innocence if:

(1) The specific evidence to be tested was secured as a result of the conviction of an offense's being challenged under § 16-112-201;

(2) The specific evidence to be tested was not previously subjected to testing and the person making the motion under this section did not:

(A) Knowingly and voluntarily waive the right to request testing of the evidence in a court proceeding commenced on or after August 12, 2005; or

(B) Knowingly fail to request testing of the evidence in a prior motion for post-conviction testing;

(3) The specific evidence was previously subjected to testing and the person making a motion under this section requests testing that uses a new method or technology that is substantially more probative than the prior testing;

(4) The specific evidence to be tested is in the possession of the state and has been subject to a chain of custody and retained under conditions sufficient to ensure that the evidence has not been substituted, contaminated, tampered with, replaced,

or altered in any respect material to the proposed testing;

(5) The proposed testing is reasonable in scope, utilizes scientifically sound methods, and is consistent with accepted forensic practices;

(6) The person making a motion under this section identifies a theory of defense that:

(A) Is not inconsistent with an affirmative defense presented at the trial of the offense being challenged under § 16-112-201; and

(B) Would establish the actual innocence of the person in relation to the offense being challenged under § 16-112-201;

(7) The identity of the perpetrator was at issue during the investigation or prosecution of the offense being challenged under § 16-112-201;

(8) The proposed testing of the specific evidence may produce new material evidence that would:

(A) Support the theory of defense described in subdivision (6) of this section; and

(B) Raise a reasonable probability that the person making a motion under this section did not commit the offense;

(9) The person making a motion under this section certifies that he or she will provide a deoxyribonucleic acid (DNA) or other sample or a fingerprint for comparison; and

(10) The motion is made in a timely fashion subject to the following conditions:

(A) There shall be a rebuttable presumption of timeliness if the motion is made within thirty-six (36) months of the date of conviction. The presumption may be rebutted upon a showing:

(i) That the motion for a test under this section is based solely upon information used in a previously denied motion; or

(ii) Of clear and convincing evidence that the motion filed under this section was filed solely to cause delay or harassment; and

(B) There shall be a rebuttable presumption against timeliness for any motion not made within thirty-six (36) months of the date of conviction. The presumption may be rebutted upon a showing:

(i) That the person making a motion under this section was or is incompetent and the incompetence substantially contributed to the delay in the motion for a test;

(ii) That the evidence to be tested is newly discovered evidence;

(iii) That the motion is not based solely upon the person's own assertion of innocence and a denial of the motion would result in a manifest injustice;

(iv) That a new method of technology that is substantially more probative than prior testing is available; or

(v) Of good cause.

A.C.A. § 16-112-203

§ 16-112-203. CONTENTS OF MOTION

(a) The petition filed under this subchapter shall be entitled in the name of the petitioner versus the State of Arkansas and shall contain:

(1)(A) A statement of the facts and the grounds upon which the petition is based and relief desired.

(B) All grounds for relief shall be stated in the petition or any amendment to the petition, unless the grounds could not reasonably have been set forth in the petition.

(C) The petition may contain argument or citation of authorities;

(2) An identification of the proceedings in which the petitioner was convicted, including the date of the entry of conviction and sentence or other disposition complained of;

(3) An identification of any previous proceeding, together with the grounds asserted in the previous proceeding, which sought to secure relief for the petitioner from the conviction and sentence or other disposition; and

(4)(A) The name and address of any attorney representing the petitioner.

(B) If the petitioner is without counsel, the circuit clerk shall immediately transmit a copy of the

petition to the judge and shall advise the petitioner of that referral.

(b) The filing of the petition and any related documents and any proceedings pursuant to the petition shall be without any costs or fees charged to the petitioner.

(c) The petition shall be:

(1) Verified by the petitioner or signed by the petitioner's attorney; and

(2) Addressed to the court in which the conviction was entered.

(d) The circuit clerk shall deliver a copy of the petition to the prosecuting attorney and to the Attorney General.

A.C.A. § 16-112-204

§ 16-112-204. OTHER PLEADINGS

(a) Within twenty (20) days after the filing of the petition, the prosecuting attorney or the Attorney General shall respond to the petition by answer or motion which shall be filed with the court and served on the petitioner if unrepresented or served on the petitioner's attorney.

(b)(1) No further pleadings are necessary except as the court may order.

(2) However, the court may at any time prior to its decision on the merits permit:

(A) A withdrawal of the petition;

(B) Amendments to the petition; and

(C) Amendments to the answer.

(3) The court shall examine the substance of the pleading and shall waive any irregularities or defects in form.

A.C.A. § 16-112-205

§ 16-112-205. HEARING

(a) Unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief, the court shall promptly set an early hearing on the petition and response, promptly determine the issues, make findings of fact and conclusions of law, and either deny the petition or enter an order granting the appropriate relief.

(b) Hearings on a petition filed pursuant to this subchapter shall be open and shall be held in the court in which the conviction was entered.

(c)(1) The court may order the petitioner to be present at the hearing.

(2) If the petitioner is represented by an attorney, the attorney shall be present at any hearing.

(3) A verbatim record of any hearing shall be made and kept.

(4) Unless otherwise ordered by the court, the petitioner shall bear the burden of proving the facts alleged in the petition by a preponderance of the evidence.

(5) The court may receive evidence in the form of affidavit, deposition, or oral testimony.

(d) The court may summarily deny a second or successive petition for similar relief on behalf of the same petitioner and may summarily deny a petition if the issues raised in it have previously been decided by the Court of Appeals or the Supreme Court in the same case.

A.C.A. § 16-112-206

§ 16-112-206. APPEALS

(a) The appealing party, within thirty (30) calendar days after the entry of the order, shall file a notice of appeal if the party wishes to appeal.

(b)(1) If the appeal is by the petitioner, the service shall be on the prosecuting attorney and the Attorney General.

(2) If the appeal is by the state, the service shall be on the petitioner or the petitioner's attorney.

(c) No fees or bond for costs shall be required for the appeal.

A.C.A. § 16-112-207

§ 16-112-207. APPOINTMENT OF COUNSEL

(a)(1) A person financially unable to obtain counsel who desires to pursue the remedy provided in this subchapter may apply for representation by the Arkansas Public Defender Commission or appointed private attorneys.

(2) The trial public defenders or appointed private attorneys may represent indigent persons who apply for representation under this section.

(b)(1)(A) With the approval of the court, petitioners may use the services of the State Crime Laboratory for latent fingerprinting identification, deoxyribonucleic acid (DNA) testing, and other tests which may become available through advances in technology.

(B)(i) If approved by the court, the laboratory shall provide the requested services.

(ii) Samples shall be of sufficient quantity to allow testing by both the prosecution and the defense.

(iii) Neither the prosecution nor the defense shall consume the entire sample in testing in the absence of a court order allowing the sample to be entirely consumed in testing.

(2) Subdivision (b)(1) of this section shall not apply to any tests before trial of a matter that

will be governed by relevant constitutional provisions, statutory law, or court rules.

(c) The Executive Director of the Arkansas Public Defender Commission and the laboratory shall give priority to claims based on factors including:

(1) The opportunity for conclusive or near conclusive proof through scientific evidence that the person is actually innocent; and

(2) A lengthy sentence of imprisonment or a death sentence.

A.C.A. § 16-112-208

§ 16-112-208. TESTING PROCEDURES

(a)(1) A court that orders any deoxyribonucleic acid (DNA) testing under this subchapter shall direct the testing to be carried out by the State Crime Laboratory.

(2)(A) However, the court may order deoxyribonucleic acid (DNA) testing by another qualified laboratory if the court makes all necessary orders to ensure the integrity of the specific evidence and the reliability of the testing process and test results.

(B) As used in this section, "qualified laboratory" means a laboratory that is accredited by the American Society of Crime Laboratory Directors or certified through the National Forensic Science Technology Center.

(3) The court may order the person who requested any deoxyribonucleic acid (DNA) testing under this subchapter to pay for the cost of the testing if the court determines that the person has the ability to pay for the testing.

(b) If the deoxyribonucleic acid (DNA) test results obtained under this subchapter are inconclusive, the court may order additional testing or deny further relief to the person who requested the testing.

(c)(1) If deoxyribonucleic acid (DNA) test results obtained under this subchapter establish that the person who requested the testing was the source of the deoxyribonucleic acid (DNA) evidence, the court shall deny any relief to the person.

(2) On motion of the state, the court shall determine if the person's assertion of actual innocence was false. If the court finds that the person's assertion of actual innocence was false, the court may:

(A) Hold the person in contempt;

(B) Assess against the person the cost of any deoxyribonucleic acid (DNA) testing carried out under this subchapter;

(C) Forward the finding to the Board of Corrections for consideration in the awarding of meritorious good time to the person; or

(D) Forward the finding to the Parole Board for consideration in the granting of parole to the person.

(d) In any prosecution of a person for perjury or other conduct resulting from a proceeding under this subchapter, upon conviction or a plea of guilty or nolo contendere the court shall sentence the person to a term of imprisonment that shall run consecutively to any other term of imprisonment the person is serving.

(e)(1) If deoxyribonucleic acid (DNA) test results obtained under this subchapter exclude a person as the source of the deoxyribonucleic acid (DNA) evidence, the person may file a motion for a new trial or resentencing.

(2) The court shall establish a reasonable schedule for the person to file a motion under

subdivision (e)(1) of this section and for the state to respond to the motion.

(3) The court may grant the motion of the person for a new trial or resentencing if the deoxyribonucleic acid (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.

(f) In a case in which a person is sentenced to death, any deoxyribonucleic acid (DNA) testing ordered under this subchapter shall be completed:

(1) No later than sixty (60) days after the date on which the state responds to the motion described in §§ 16-112-202 and 16-112-203; or

(2) No later than one hundred twenty (120) days after the date on which the deoxyribonucleic acid (DNA) testing was ordered under any post-conviction testing procedures under this subchapter.

(g)(1) The results of any deoxyribonucleic acid (DNA) testing ordered under this subchapter shall be simultaneously disclosed to the court, the person that requested the testing, and the State of Arkansas.

(2)(A) The state shall submit any test results relating to a person's deoxyribonucleic acid (DNA) to the National DNA Index System.

(B) If the deoxyribonucleic acid test (DNA) results obtained under this subchapter are inconclusive or show that the person tested was the source of

the deoxyribonucleic acid (DNA) evidence, the deoxyribonucleic acid (DNA) sample of the person tested may be retained in the system and State DNA Data Base.

(C) If the deoxyribonucleic acid (DNA) test results obtained under this subchapter exclude the person tested as the source of the deoxyribonucleic acid (DNA) evidence but a comparison of the deoxyribonucleic acid (DNA) sample of the person tested results in a match between the person's sample and another offense, the State Crime Laboratory shall notify the appropriate agency and preserve the deoxyribonucleic acid (DNA) sample of the person tested.

(D) The State Crime Laboratory shall destroy the deoxyribonucleic acid (DNA) sample of the person tested and ensure that the information is not retained in the system or the data base if:

(i) The deoxyribonucleic acid (DNA) test results obtained under this subchapter exclude the person tested as the source of the deoxyribonucleic acid (DNA) evidence;

(ii) A comparison of the deoxyribonucleic acid (DNA) sample through a search of the data base or system does not

match the person's sample and another offense; and

(iii) There is no other legal authority to retain the sample of the person tested in the data base or system.

IN THE CIRCUIT COURT OF SEVIER COUNTY, ARKANSAS
NINTH WEST JUDICIAL DISTRICT

STACEY EUGENE JOHNSON,
Petitioner,

CASE NO.: CR-93-54

v.
STATE OF ARKANSAS
Respondent.

MOTION FOR POST-CONVICTION DNA TESTING PURSUANT TO ARKANSAS CODE ANNOTATED §§ 16-112-201, *ET SEQ* AND REQUEST FOR HEARING

Petitioner Stacey Eugene Johnson ("Mr. Johnson" or "Petitioner"), through undersigned counsel, respectfully petitions this Court for an order directing forensic DNA testing of biological evidence collected during the investigation of the murder and possible sexual assault of Carol Jean Heath pursuant to Arkansas's Habeas Corpus — New Scientific Evidence Statute (the "Statute") (codified at Ark. Code Ann. §§ 16-112-201, *et seq.).*

PRELIMINARY STATEMENT

For nearly a quarter of a century, Mr. Johnson has steadfastly asserted his innocence and denied any involvement in the 1993 rape and murder of Carol Jean Heath, even in the face of execution. Today, probative biological evidence currently in the custody and control of the Arkansas State Crime Laboratory

("ASCL,")[1] and the DeQueen Police Department ("DPD") may now be able to provide—through the use of modern, cutting edge DNA testing technologies—irrefutable confirmation of the veracity of Mr. Johnson's innocence claims.

The exonerating potential of DNA testing in this case must be considered in tandem with the problematic evidence used to convict Mr. Johnson in the first place; indeed, his conviction is undermined by questionable investigatory tactics and evidence, including: (1) the problematic identification provided by the traumatized six-year old daughter of the victim; (2) the lack. of authoritative physical evidence connecting Mr. Johnson to the rape and murder of Carol Jean Heath; and (3) an alleged "confession" completely undocumented by police officers. Mr. Johnson's conviction was once reversed by the Arkansas Supreme Court, and the results of his second trial were affirmed by the narrowest of margins. See Johnson v. State. 326 Ark. 430, 934 S.W.2d 179 (1996) [*Johnson I*]; *Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000) [*Johnson II*] (three justices dissenting).

DNA testing is perfectly suited for cases like this one, where technology unavailable at the time of trial can conclusively establish the legitimacy of a Petitioner's innocence claims and undermine questionable evidence used to convict. As the

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[1] On April 7, 2017, ASCL.'s assistant director informed counsel for Mr. Johnson that "several" items and files retained by the laboratory in this case are currently under ASCL's custody and control since the initial testing was performed in 1993. (*See* Exhibit ("Exh.") A).

Supreme Court has recognized, "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty . . . [t]he Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can he effectively incorporated into established criminal procedure." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55, 129 S. Ct. 2308, 2312, 174 I. Ed. 2d 38 (2009). Given the State of Arkansas' recognition of the potential of DNA testing in pursuing Mr. Johnson's conviction, the reasons to utilize revolutionary scientific advances in forensic DNA technology to prove Mr. Johnson's innocence today should be just as clear. In light of the recognized weaknesses in the State's arguments to convict, Mr. Johnson's consistent and repeated requests for post-conviction DNA testing, and the irreversible finality of the scheduled execution date, the reasons for additional DNA testing given the facts of this *case* are even more compelling.

Accordingly, Mr. Johnson respectfully requests that this Court grant his application for post-conviction DNA testing.

PROCEDURAL HISTORY

The procedural history in this case clearly highlights (1) that Mr. Johnson's conviction does not stand on firm footing; and (2) that this motion is the culmination of Mr. Johnson's decades-long effort to prove his innocence though DNA testing and other methods.

Mr. Johnson was charged in Sevier County with the offense of capital murder in the April 1993 death of Carol Heath. The homicide was allegedly witnessed

by Carol Heath's small daughter, Ashley. The child was found incompetent to testify at the first trial, but statements she was alleged to have made to the authorities were admitted into evidence. The State also relied on DNA results from testing various items of evidence which were associated with Mr. Johnson. Mr. Johnson was convicted and sentenced to death. The Arkansas Supreme Court reversed Mr. Johnson's conviction on direct appeal on the ground that certain utterances of the unavailable Ashley Heath were erroneously admitted in violation of Johnson's confrontation rights and the rules of evidence. *Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996) [*Johnson I*].

On retrial, the State asserted that Ashley Heath had become competent. The defense sought her counseling records, but the circuit court sustained assertions of privilege made by her attorney ad litem and denied the defense access to many of the records, giving Mr. Johnson only those records created before the first trial and for which any alleged privilege had been already waived. The court denied access to all later records, including records of examination and counseling by the psychologist whose other records were provided. Those denied records were later shown to be grossly impeaching of the child. Additional DNA evidence was also presented as well as a contradicted and unrecorded statement allegedly made by Johnson in which he supposedly confessed to this and other homicides. That statement had been excluded from the first trial. Mr. Johnson appealed his second conviction. On appeal, the conviction and death sentence were affirmed by a narrow 4-3 vote. However, the dissenters agreed that Mr. Johnson's rights were violated by the denial of access to the

psychological records of Ashley Heath. *Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000) [*Johnson II*]. Certiorari was denied. *Johnson v. Arkansas*, 532 U.S. 944, 121 S.Ct. 1408 (2001).

Mr. Johnson then filed a timely Rule 37 petition and a habeas corpus petition under Arkansas law permitting access to further DNA testing under Ark. Code Ann. 16-112-201 *et seq.* In the habeas corpus petition, Mr. Johnson noted that newly available STR technology superseded the capacities of those DNA technologies used at the time of his first two trials. The two petitions were joined for hearing, and the trial court denied both petitions.

On appeal, where the two petitions were joined as well, the Arkansas Supreme Court denied Rule 37 relief and most of the testing/retesting petition, but granted a small portion of the habeas for further testing. Johnson v, State, 356 Ark. 534, 157 S.W.3d 151. (2004) [*Johnson III*]. Certiorari was denied. *Johnson v. Arkansas*. 543 U.S. 932 125 S.Ct. 326 (2004). Despite the specific remand to conduct testing, the circuit court again denied testing. On appeal, the Arkansas Supreme Court affirmed the judgment below, incorrectly finding that the additional DNA testing previously ordered had been superseded by the results of testing done prior to the second trial. *Johnson v. State*, 366 Ark. 390 235 S.W.3d 872 [*Johnson IV*].

Mr. Johnson then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Arkansas in which he renewed his request for DNA testing. The petition was denied in 2007, and the United States Court of Appeals for the Eighth Circuit affirmed the denial of habeas relief.

Johnson v. Norris, 537 F.3d 840 (8th Cir. 2008) [*Johnson V*]. Certiorari was denied. 555 U.S. 1182, 129 S.Ct. 1334 (2009).

Prior to filing this new motion for DNA testing, Mr. Johnson petitioned the Arkansas Supreme Court to recall its mandate or otherwise reinvest jurisdiction over his prior appeal from the denial of DNA testing resulting in the Supreme Court's opinion *in Johnson III and IV*. Mr. Johnson also asked for a stay of execution to facilitate the Supreme Court's consideration of the Petition. The Arkansas Supreme Court denied Mr. Johnson's Petition by summary order on April 6, 2017.

STATEMENT OF FACTS

The Crime

On April 1, 1993, Rose Cassady went to visit her friend Carole Jean Heath in DeQueen "right before dark"[2] to borrow her dryer. 11/18/1997 Tr.[3] at 6. Ms. Heath was home with her two children, Ashley (aged 6) and Jonathan (aged 2). *Id.* The next morning, April 2, Ms. Cassady returned between 6:00 and 6:30 a.m. to borrow a sweater. *Id.* at 7. Ms. Heath did not answer Ms. Cassady's knock on the door. *Id.* at 8. Hearing Ms. Heath's alarm clock sound, Ms. Cassady opened the door and discovered Ms. Heath's nude body

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[2] Twilight on April 1, 1993 in DeQueen, Arkansas was at 7:03 pm.

[3] Citations to the trial transcript refer to Petitioner's November 1997 trial, which was tried by jury before the Honorable Ted C. Capeheart, Circuit Court Judge. All references to this trial transcript are hereinafter designated "____ Tr. at _."

on the floor, in a pool of blood. *Id.* Ms. Cassady began screaming and went across the street to call the police. *Id.* at 9. When she returned to the house, she saw both children looking out the bedroom window and asked Ashley—who was in shock—to tell her what happened. The child allegedly replied: "a black man broke in last night." *Id.* at 10.

Police Sergeant Keith Tucker of the DPD arrived at the scene at 6:45 a.m., followed by Chief of Police James Smith, Arkansas State Police ("ASP") officers Butch Godwin and Hayes McWhirter, and Jim Behling, a DPD investigator. *Id.* at 26, 31-32, 35. Ms. Heath's body was on the living room floor, which "was in disarray." *Id.* at 2.1, 32. Closer examination by Chief Smith revealed that Ms. Heath's throat had been cut. *Id.* at 34. A t-shirt was "wadded up . . . and placed across her throat" and rigor had begun to set in her fingers and toes. *Id.* at 32, 34. Underneath Ms. Heath's body, just above her hips, was a tissue paper. *Id.* at 60. Her underwear was found next to her right leg and a towel was found just above her head. *Id.* at 61.

Crime scene investigators bagged Ms. Heath's hands and feet and wrapped her body in a green sheet for transportation to the ASCL. *Id.* at 61-62, 71. A single hair was found on Ms. Heath's body and clumps of hair were found on the floor of her unkempt house on both sides of her body. *Id.* at 69, 132. In the bathroom sink was a douche bottle, a "Lifestyles" condom box, and a pair of cutoff jeans was on the floor in front of the toilet. *Id.* at 59, Exh. B. Police also discovered and photographed a cigarette butt on the master bedroom floor, but there is no record it was collected and sent to ASCL. *Id.* at 165-166; Exh. C.

There was no indication that there had been a forced entry. *Id.* at 158. Indeed, "whomever . . . entered that house did it voluntarily through the front door." *Id.* at 170.

Officer Godwin took all of the evidence to ASCL for serology testing that same day. *Id.* at 139. Police also lifted eleven partial fingerprints from the scene along with a bloody print from the door knob to a linen closet in the bathroom. *Id.* at 92. The print on the linen closet was later determined to belong to Carol Heath. *Id.* at 93. None of the partial lifts were determined to be "of sufficient quality to make matches." *Id.*

On April 5, 1993, Kenneth Bryan stopped at a roadside park about four miles south of DeQueen on his way back from hunting. *Id.* at 44-45. While walking through the woods, he saw a purse and various articles of clothing lying on the ground and in the bushes. *Id.* at 45. Mr. Bryan picked up the purse and found identifying information showing that the purse belonged to Carol Heath. *Id.* at 45. He put the purse in his truck and forgot about it until a few days later, when local newspapers reported that Ms. Heath had been murdered. *Id.* at 46. Mr. Bryan immediately called the sheriff's department and directed them to the areas where he had found the purse and clothing. *Id.* The police collected a "green pullover shirt," a white t-shirt, a towel, and a "sweater jacket," all of which had "a bunch" of blood on them.[4] *Id.* at 81, 123.

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[4] The sweater jacket was later thrown away because it had begun to molder and blood found on the sweater "putrefied beyond what . . . would be used" for testing in the laboratory. 11/18/1997 Tr. at 91.

The items were laid out to dry, as the items were damp and wet. *Id.* at 83. During this process, on April 6, the state officers discovered "matches and [a] cigarette" in the pocket of the green shirt. *Id.* at 88, 141-142. Later inspection revealed hairs on the t-shirt, the green shirt, and the towel. *Id.* at 140. On April 7, Officer McWhirter took all of these items to the ASCL. 11/20/1997 Tr. at 79.

The Autopsy and Serological Testing

Dr. Frank Peretti, a forensic pathologist and medical examiner, conducted the autopsy on April 5, 1993. 11/19/1997 Tr. at 58. Ms. Heath had "cutting wounds of the neck, evidence of strangulation, [and] blunt force head injuries." *Id.* at 60; *see also* Exh. D at 8. Ms. Heath had several defensive wounds and injuries; specifically, cuts and bruising on her fingers, arms and legs. 11/19/1997 Tr. at 65; *see also* Exh. D at 2, 8. She also had bite marks on her left and right breasts. 11/19/1997 Tr. at 66; *see also* Exh. D at 7. Dr. Peretti concluded that the "blunt force injuries may have been sustained first," although the "cutting wound and the strangulation were . . . more lethal type injuries." 11/19/1997 Tr. at 70. Peretti also noted that such blunt force could have been caused by fists. *Id.* at 61.

Ms. Heath also had "injuries consistent with sexual assault"; specifically, a "quarter inch linear abraded contusion" on her right labia. *Id.* at 68, 85. Dr. Peretti took a full rape kit from the victim's body, including "vaginal, rectal and oral" swabs and smears. *Id.* at 69. He also took swabs of the bite marks, which later tested positive for amylase, a component of saliva, containing "B" and "H" blood group substances, which indicated that the donor was a "secretor." *Id.*;

Exh. D at 7. Ms. Heath had no alcohol or illegal drugs in her system. 11/19/2017 Tr. at 68; Exh. D at 1.

Dr. Peretti was unable to determine Ms. Heath's exact time of death: "we know the person was last seen alive at a certain hour and is found dead . . . so we have a range, but I can't tell you in that range . . . for example, did the person die at 10:50 a.m. in the morning. No one can tell you that unless you witness it." *Id.* at 80. Based on the facts provided to him by the police, however, Dr. Peritti noted that within a reasonable degree of medical certainty, Ms. Heath died "eight to ten hours" prior to her body being discovered.

The ASCL performed serological testing on the vaginal, rectal and oral smears and swabs, the bite mark swabs, and on the green shirt to determine whether there was any genetic material on several items of probative evidence. 11/19/1997 Tr. at 93-96. No semen was detected on any of the genital or oral smears or swabs, but the victim's blood was detected on the green shirt found at the second crime scene. *Id.* at 94-96. ASCL was unable to find enough genetic material to do any serology on the victim's underwear, the tissue found under her body, or on the towel found at the scene. *Id.* at 112.

ASCL collected several hairs from the first and second crime scenes. Of those hairs, three "indicative of Negroid origin"[5] were recovered: from the floor

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[5] While hair microscopy has been widely discredited as a forensic tool with regards to individualization (i.e. associating a particular hair with a particular person to the exclusion of all others), certain features of individual hairs do, in fact, have clear differentiating attributes. Hairs may

beside the victim's body, from underneath the victim's breast, and from the t-shirt found at the second crime scene. *Id.* at 123. Several Caucasian hairs—microscopically dissimilar from the victim's—were found underneath the victim's body, on a towel by the victim's head, in the bags that were placed on the hands of the victim at the scene, and on the green shirt. *Id.* at 123-124. The only hairs sent on for DNA testing were either "Negroid" or "unidentifiable." *Id.* at 127-128.

The Investigation of the Murder

Officer McWhirter immediately began "going from apartment to apartment and interviewing neighbors to see if they had seen anything." 11/20/1997 Tr. at 76. No one had seen a black man entering or leaving Ms. Heath's home. *Id.* at 195. During the afternoon of April 2, Officer McWhirter interviewed Ashley Heath, eight and a half hours after her mother's body was discovered. *Id.* at 80-81. Among other things, Ashley allegedly told Officer McWhirter: "Mother and I were on the couch when someone knocked on the door. She got up and opened the door. Mother likes Branson. He [sic] work[s] at In Your Ear Video Center. The black male asked where Branson was." *Id.* at 82. Ashley told the Officer the black male had "been over two other times" and noted "he had on a green shirt and sweater"[6] and "said he

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be classified as human or non-human, and also "by. racial and somatic characteristics," 5s...41..141.13. This is relevant in the instant case as the victim's hair was long, curly, and black and easily distinguished from shorter, lighter, or "coarser" hair.

[6] It should be noted that the sweater later found in the woods "appeared to be" a woman's sweater. 11/18/1997 Tr. at 129.

just got out of jail." *Id.* at 84. She further told the Officer that she hid when "I saw [her mother and the black male] fighting", but that "[w]hile Mother was laying on the floor, the black male walked to the bathroom. We were hiding in the closet. I came out to go to the bathroom and the black male had a knife in his band standing beside Mama. She was on the floor bleeding. After he left, I went in and saw mommy bleeding." *Id.* Ashley also told the Officer that when the black male left, "he got into a brown truck . . . [that was] parked beside the house." *Id.* Officer McWhirter then showed Ashley a photo array of seven black males. She picked Mr. Johnson's photo from the array. *Id.* at 86. DPD issued a warrant for Mr. Johnson's arrest for capital murder.

On April 14, 1993, Paul Paceco, a police officer with the Albuquerque Police Department, stopped a vehicle driven by Mr. Johnson. During the stop, Mr. Johnson provided Officer Paceco with a false name and was arrested for providing a false identity. As Officer Paceco transported Mr. Johnson to the jail, Mr. Johnson allegedly stated that he "killed somebody in Arkansas . . ." 11/19/1997 Tr. at 15. After running Mr. Johnson's correct name, it was revealed that Johnson had outstanding warrants for capital murder, firearms and drugs. Mr. Paceco did not make any notes of the alleged confession in his write up of the traffic stop and his partner did not hear the "confession" at all. *Id.* at 22, 24, 45, 48. Officer Paceco also failed to inform Rick Foley, the homicide detective in the Albuquerque Police Department, that Stacy Johnson had allegedly made a confession to him, even though Detective Foley interviewed Mr. Johnson at length that same day. (*Id.* at 52-53; Exh. F at 1). When asked during the interview if he was "willing to

talk to [the APD] at this time," Mr. Johnson responded "I have nothing to hide." (Exh. F at 2). At no time during his statement to Detective Foley did Mr. Johnson confess to killing Ms. Heath.

The Trial

Mr. Johnson was first tried in the Sevier Circuit Court. He was sentenced to death for the murder of Ms. Heath. Mr. Johnson immediately appealed his conviction. Mr. Johnson's sentence was reversed in *Johnson I* on the grounds that the trial court had improperly admitted an out-of-court statement allegedly made by Ashley (who had been found incompetent to testify) in which she claimed she had witnessed the murder of her mother and identified Mr. Johnson as the murderer. A retrial was held from November 18-21 in Pike County.

The Prosecution's Case

On retrial, the State once again asserted that Mr. Johnson was responsible for the murder and rape of Ms. Heath.

Ashley Heath was found competent to testify at the second trial and her testimony consisted almost entirely of one word answers. Ashley testified that having been "let in" by her mother, Mr. Johnson had come to the house on her sixth birthday and sat in the living room and talked with Ms. Heath. 11/18/1997 Tr. at 196, 199, 202. Ashley no longer knew whether or not "the black man" broke into her house, contrary to her definitive statement to Rose Cassady. *Id.* at 10, *compare with* 203. Further, Ashley no longer had any recollection as to the car the perpetrator was driving, even though she previously identified the perpetrator

entering a brown truck parked alongside the house after the murder. *Id.* at 203.

Ashley's testimony conflicted with testimony provided by Carnelle Barnes, the psychologist who counseled her weekly for almost a year after the murder. When Dr. Barnes showed Ashley a photo line-up using the same photographs provided by Officer McWhirter and including Mr. Johnson, Ashley twice stated that "[t]he creep's not here because there's no green shirt." 11/20/1997 Tr. at 106. Dr. Barnes also testified that Ashley "had many versions of this night [of the murder]," and allowed that overheard statements by family and friends "would certainly contaminate her memory." *Id.* at 106, 108. Inconsistencies in Ashley's testimony were further underscored by the State's other witnesses who testified that Ms. Heath had never had any black men over to her house. 11/18/1997 Tr. at 215, 223, 228. Shawnda Helms testified Mr. Johnson came to Ms. Heath's home on at least one occasion with her boyfriend, Branson Ramsey. *Id.* at 210. Ashley Heath also identified Mr. Johnson as a guest. *Id.* at 217.

The State also read into the record the testimony of Mr. Johnson's step-mother, Sharon. *Id.* at 233. While Ms. Johnson was unable to identify the white t-shirt as the one worn by Mr. Johnson on the day of the murder, she did testify that Stacey had told her he had found a place to stay "with a white girl with two little kids and she works at the bank." *Id.* at 239, 245. The latter testimony was "confirmed" by Steve Hill, a jailhouse informant, who claimed that Mr. Johnson told him he had met Ms. Heath through "a guy name[d] Branson" and they were "carrying on back and forth." *Id.* at 269. According to Hill, Mr.

Johnson told him "he was going to see" Ms. Heath after he got out of prison. *Id.*

The State introduced the results of early-generation DNA testing performed at Cellmark, a private laboratory. Using RFLP testing, Cellmark revealed that "Stacey Johnson could not be the source of the DNA on that green shirt and Carol Heath could be a source of that DNA from the green shirt." 11/20/1997 Tr. at 16. Using DQ-Alpha testing—a slightly more advanced form of DNA technology—Cellmark determined that the DNA found in the breast swabs and on the white t-shirt also excluded Mr. Johnson. *Id.* at 24. Applying DQ-Alpha once again, Cellmark found that the three "Negroid" hairs collected from the scene as well as a cigarette butt allegedly found in the green shirt, were "consistent with Stacey Johnson."[7] *Id.* at 28.

In closing, the State argued that Mr. Johnson left prison, murdered, and likely sexually assaulted Ms. Heath in alignment with his statements to Mr. Hill and Ashley's identification. 11/20/1997 Tr. at 153, 156. Noting that Carol Heath's blood was "all over those clothes" found at the second crime scene, the State argued the forensic evidence inculpated Mr. Johnson by showing that the saliva detected on the breast swab was "consistent with the blood type and being a secretor of which Mr. Johnson is." *Id.* at 154. Most importantly, the State argued, the DNA on the cigarette butt found in the green shirt "matches

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[7] The State repeatedly requested additional DNA testing and resubmitted the cigarette for retesting "because of a new [DNA] testing procedure" that they believed would provide more definitive results. 11/18/1997 Tr. at 89-91.

Stacey Johnson." *Id.* at 155. "[T]hey're going to argue to you about odds, 720 million and 1, 280 million and 1," the State asserted. "You know, the odd thing about that is we rely on that scientific procedure to save our lives and then we argue against it in criminal trials." *Id.*

The Defense Case

For its part, the defense presented an alibi defense through witnesses and phone records. 11/20/2017 Tr. at 117-126. Through testimony and phone records, Mr. Johnson's could fully account for his whereabouts eight to ten hours prior to Ms. Heath's body being discovered. Additionally, unlike the "brown truck" identified by Ashley Heath as being the one the perpetrator was driving, Debra Johnson and disinterested witness Rebecca Tapia identified the car Mr. Johnson was driving the night of the murder as a "big car" and not a truck. 11/20/1997 Tr. at 119.

The defense also presented evidence implicating the victim's boyfriend in the murder. Cordelia Vinyard testified that her divorce from ex-husband, Branson Ramsey[8] (the boyfriend of Ms. Heath at the time of her death), became final on April 1, 1993, the same day Ms. Heath was likely murdered. 11/20/1997 Tr. at 136. Vinyard had been separated from Ramsey for at least a month because "my ex-husband come to the house that I was living at, carried me over the banister and slapped me . . ." *Id.* at 137. Indeed, Ramsey had abused Ms. Vinyard for four years and had demonstrated a clear pattern of violent

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[8] On information and belief, Mr. Ramsey died in 1998.

mistreatment in the relationship that required Ms. Vinyard to obtain emergency custody of her children:

> A: [Ms. Vinyard]: I had—I had bruises on my back side where he kicked me. I had knots on my head where he hit my head up against the wall. I mean I fought back, but it did no good considering I don't weigh very much and I had a big man against me . . . He would punch me or slap me or kick me or bite me, just however he would.
>
> Q: And where would he bite you?
>
> A: He'd bite me on the upper torso, on my chest.
>
> Q: On your chest?. . . Are you reluctant to say the exact word?
>
> A: No. On my breast.

Id. at 137-38. (Emphasis added.) Despite the relationship between Ramsey and the victim (again, the. only constant in the investigation of Ms. Heath's murder),despite his history of abusive relationships, and despite his propensity to bite women's breasts, police never questioned Ms. Vinyard and Ramsey[9] was never investigated as a suspect. *Id.* at 138.

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[9] It should be noted that Ashley told Dr. Barnes that she believed Branson Ramsey had been involved in the minder, and "she mentioned Branson Ramsey's name on several occasions . . ." 11/20/1997 Tr. at 112.

Mr. Johnson was found guilty of capital murder on November 21, 1997. He was sentenced to death and is currently scheduled to be executed on April 20, 2017.

ARGUMENT

The Arkansas General Assembly passed Act 1780 to address mounting concerns regarding persons who wore jailed, and sometimes executed, for crimes they did not commit. See 2001 Ark. Acts 1780 ("[a]n 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."); *see also Echols v. State*, 350 Ark. 42, 44, 84 S.W.3d 424, 426-7 (2002); *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004). The amendment was passed "to accommodate the advent of new technologies enhancing the ability to analyze scientific evidence" and further the "mission of the criminal justice system [which] is to punish the guilty and exonerate the innocent." Act 1780, § 1.

Almost twenty-five years after the start of the Petitioner's first trial, the refined capacities of modern DNA testing can now be applied to the several items of probative, biological material recovered at the crime scenes in this case—including, but not limited to, hairs, vaginal, anal, and oral swabs taken from the victim's body, clothing worn and used by the perpetrator during the murder, and swabs taken from bite marks on the victim's breasts—and potentially prove Petitioner's innocence. A genetic profile obtained through this testing may "hit" to an as yet unknown assailant(s) through the CODIS DNA databank, conclusively identifying Carol Jean Heath's rapist and murderer. Given Petitioner's not guilty

plea at two earlier trials, his decades long battle to prove his innocence, and the State's underwhelming case against Mr. Johnson, the remedy of DNA testing is particularly compelling in this instance.

Under the Act, an Arkansas petitioner may make a motion for forensic DNA testing if:

> (1) The specific evidence to be tested was secured as a result of the conviction of an offense's being challenged under § 16-112-201;
>
> (3) The specific evidence was previously subjected to testing and the person making a motion under this section requests testing that uses a new method or technology that is substantially more probative than the prior testing;
>
> (4) The specific evidence to be tested is in the possession of the state and has been subject to a chain of custody and retained under conditions sufficient to ensure that the evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed testing;
>
> (5) The proposed testing is reasonable in scope, utilizes scientifically sound methods, and is consistent with accepted forensic practices;

(6) The person making a motion under this section identifies a theory of defense that:

(A) Is not inconsistent with an affirmative defense presented at the trial of the offense being challenged under § 16-112-201; and

(B) Would establish the actual innocence of the person in relation to the offense being challenged under § 16-112-201;

(7) The identity of the perpetrator was at issue during the investigation or prosecution of the offense being challenged under § 16-112-201;

(8) The proposed testing of the specific evidence may produce new material evidence that would:

(A) Support the theory of defense described in subdivision (6) of this section; and

(B) Raise a reasonable probability that the person making a motion under this section did not commit the offense;

(9) The person making a motion under this section certifies that he or she will provide a deoxyribonucleic acid (DNA)

> or other sample or a fingerprint for comparison; and
>
> (10) The motion is made in a timely fashion subject to the following conditions . . .
>
> (B) There shall be a rebuttable presumption against timeliness for any motion not made within thirty-six (36) months of the date of conviction. The presumption may be rebutted upon a showing . . . .
>
> (iv) That a new method of technology that is substantially more probative than prior testing is available; or

As all of these criteria are satisfied here, Petitioner requests that his motion for post-conviction forensic DNA testing be granted.

I. PETITIONER IS ENTITLED TO DNA TESTING PURSUANT TO ARK. CODE ANN. §§ 16-112-201 *ET SEQ*

A. The Physical Evidence in This Case Was Secured as a Result of Petitioner's Conviction and the Proposed DNA Testing May Produce New Material Evidence That Would Raise a Reasonable Probability That Mr. Johnson is Innocent of Capital Murder

All of the evidence Petitioner seeks to submit to DNA testing was obtained during the police investigation of the murder and rape of Carol Jean Heath and during the course of her autopsy. All evidence collected from the crime scenes and her body was delivered to the ASCL by police officers and other agents of the State and sent on for additional DNA testing to Cellmark by representatives of ASCL. *See* 11/18/1997 Tr. at 139; 11/20/1997 Tr. at 79. Specifically, Mr. Johnson seeks to test the following items:

(1) Pair of Panties (GGG 7; Q 5)

(2) Towel (From First Crime Scene: GGG 8; Q 6)

(3) Douche Bottle (GGG 9)

(4) Prophylactic Package (GGG 10)

(5) Hair From the Floor by Victim (GGG 13)

(6) Hair From Under the Victim (GGG 14)

(7) Tissue Paper (GGG 15; Q 8)

(8) Hair From Under the Victim (GGG 16)

(9) Green Shirt (GGG 19; Q 17)

(10) Hair From Green Shirt (GGG 20)

(11) Cigarettes and Matches From Pocket of Green Shirt (GGG 21)

(12) White T-Shirt (from Second Crime Scene: GGG 22; Q 18)

(13) Hair From White T-Shirt (from Second Crime Scene: GGG 23)

(14) Towel (From Second Crime Scene: GGG 24; Q 19)

(15) Hair From Towel (From Second Crime Scene: GGG 25)

(16) Victim's Purse and Contents (GGG 26)

(17) Swabs (GGG 28-35; Q 21-28)

(18) Rigid Hand Nail Clippings From Victim (ME 1)

(19) Left Hand Nail Clippings From Victim (ME 2)

(20) Combed Pubic Hair From Victim (ME 3)

(21) Bugs From Hands of Victim (ME 4)

(22) White T-Shirt (From First Crime Scene: ME 5)

(23) Vaginal Smears and Swabs (Q 1)

(24) Rectal Smears and Swabs (Q 2)

(25) Oral Smears and Swabs (Q 3)

(26) Breast Swabs (Q 4)

See Exh G. Each one of these items of evidence—if subjected to the requested DNA testing procedures detailed below—have the capacity to produce new material evidence that would substantiate Mr. Johnson's prior not guilty pleas by proving his actual innocence and raising a reasonable probability that Mr. Johnson is innocent of this crime.

In accordance with § 16-112-202(6)(B) & (8)(B), the Arkansas Supreme Court has held that DNA testing of evidence is authorized if testing or retesting can provide materially relevant evidence that will significantly advance the defendant's claim of innocence in light of all the evidence presented to the jury. *Johnson v. State*, 356 Ark. 534, 546, 157 S.W.3d 151, 161 (2004). Such evidence need not completely exonerate the defendant in order to be "materially relevant," but it must tend to significantly advance his claim of innocence. *King v. State*, 2013 Ark. 133, 4-5 (2013). The United States Supreme Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1996), is also instructive here. In *Schlup*, the Court held that a petitioner can demonstrate actual innocence by producing newly discovered evidence that makes it "more likely than not that no reasonable juror would

have found [him] guilty beyond a reasonable doubt." *Id.* at 327; *accord*, *House v. Bell*, 547 U.S 518 (2006). Moreover, because a *Schlup* "claim involves evidence the trial jury did not have before it, the inquiry requires the . . . court to assess how reasonable jurors would react to the overall, newly supplemented record." *Id.*

As described in more detail *infra,* DNA testing on the several items of probative evidence collected in this case could irrefutably establish Mr. Johnson's innocence by excluding him as a possible perpetrator and naming the actual assailant in this vicious crime. Should any of these items of evidence that were central to the crime provide a CODIS eligible profile that "hits" to a readily identified individual, such information would certainly significantly advance Mr. Johnson's innocence claim.

B. All of the Physical Evidence in This Case is Currently in the Possession of the State, Has Been Subject to a Chain of Custody and Retained Under Conditions Sufficient to Ensure that the Evidence has not Been Substituted, Contaminated, Tampered With, Replaced, or Altered in Any Respect Material to the Proposed DNA Testing

Vaginal, rectal and oral swabs, samples from the tissue, underpants, and towel found at the first crime scene as well as the green shirt and towel found at the second crime scene have been held by the ASCL since 1993, and at Ccllmark since 1997, when the second trial began. (Exh. Ci). All of this evidence has been retained by ASCL without interruption under the laboratory's mandatory conditions for safe-

guarding biological evidence,[10] There is no evidence demonstrating or reason to believe that the biological evidence has been in any way compromised.

Cellmark analyst, Melisa Weber, confirmed at the trial that a package brought to court contained "a whole bunch of tubes" filled with DNA generated from the previous testing that "contain the material cuttings from which I extracted the DNA." 11/20/1997 Tr. at 38-39. She noted that the tubes also contained samples that constituted "a future testing sampler meaning if another laboratory wanted some of the original evidence to test themselves, then some evidence is put inside before I tested it for anyone else to test, so there are some of those in here as well," *Id.* at 39. These tubes, along with several hairs, the bite mark swabs, and other pieces of physical evidence, were likely all returned to the DPD by Cellmark and should have been safetly kept within the DPD's

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[10] The purpose of DNA testing, is not merely to obtain a profile, but to compare any male DNA profile found on the knife to the over 10 million profiles in the national and state DNA databases and see if the DNA matches a convicted and/or incarcerated offender. To this end, any possible handling by a prosecutor, law enforcement officer, or other governmental agent would be irrelevant. STR testing of probative evidence and a subsequent CODIS upload of any DNA profile procured from that evidence has repeatedly been used by law enforcement in Arkansas, and throughout the country, to identify perpetrators of serious crimes (both new and "cold"), including sexual assaults, robberies and murders. *Clemons v. State*, 2010 Ark. 337, 369 S.W.3d 710 (five years after crime, evidence from stabbing murder was tested and pulled profile led to CODIS hit linking Appellant to crime); *see also State v. Armstrong*, 2013 Ohio 2618, 993 N.E.2d 836 (June 24, 2013) (DNA from knife discovered at crime scene led to hit in CODIS database).

custody and control since Petitioner's 1997 trial.[11] *See* Exhibit H at 3.

C. The Petitioner's Proposed Testing of the Physical Evidence is Scientifically Sound, Consistent With Accepted Forensic Practices, Reasonable in Scope, and Includes New Forms of DNA Testing That Are Substantially More Probative Than Prior Testing Technologies, Thus Rebutting the Presumption Against Timeliness

As will be discussed *infra,* new forms of forensic DNA testing that did not exist and were entirely unavailable at the time of Petitioner's first and second trials, and others that are substantially more probative than the DNA methods used at Mr. Johnson's 1994 and 1997 trials can now be deployed to analyze the collected biological evidence.

1. The proposed DNA testing is scientifically sound and consistent with accepted forensic practices and the technology to be used is substantially more probative than the technologies used at Mr. Johnson's 1994 and 1997 trials.

Forensic DNA testing methodologies have not been considered "novel science" in Arkansas since 1996 and have been admissible evidence since 1991.

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[11] Counsel was unable to obtain an inventory from DPD of the evidence in their possession at the time of filing.

Moore v. State, 323 Ark. 529, 915 S.W.2d 284 (1996); *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000); *Whitfield v. State*, 346 Ark. 43, 45, 56 S.W.3d 357, 358 (2001) (citing *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991)). Indeed, today's forensic DNA testing methodologies are inarguably more sensitive, discriminating, and accurate than almost any other form of evidentiary proof. *See Maryland v. King*, 133 U.S. 1958, 1964 (2013) ("The only difference between DNA analysis and fingerprint databases is the unparalleled accuracy DNA provides.").[12]

At the time of Mr. Johnson's 1994 trial, Cellmark Diagnostics performed RFLP, DQ-Alpha, and Polymarker testing. (*See* Exh. I at ¶ 9). Three years later, Cellmark performed additional testing using Geneprint STR DNA testing. *Id.* Short Tandem Repeat ("STR") "increase[ed] exponentially the reliability of forensic identification over earlier techniques" and is "qualitatively different from all that preceded it." *Harvey v. Horan*, 285 F.3d 298, 305, n.1 (4th Cir. 2002). STR testing fully replaced other DNA testing methods in the FBI crime laboratory and most other crime laboratories by 2000.[13] Today,

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[12] The RFLP form of DNA testing used at the time of the Petitioner's trial had extremely limited capabilities and is now obsolete within the forensic DNA context. "[T]he ability of laboratories to perform DNA typing methods has improved dramatically . . . due to rapid progress in the areas of biology, technology, and understanding of genetic theories. In addition, the power of discrimination for DNA texts has steadily increased in the late 1990s." John M. Butler, Forensic DNA Typing 11-12 (2d Ed. 2005); *see also* Exh. I at ¶ 11.

[13] Butler, *supra*, 11-12.

autosomal (non-sex determining) STR technology is the principal mechanism for obtaining DNA profiles in forensic laboratories around the nation, and is essentially the gold standard of modern DNA testing.[14] For a decade, the forensic science community used a minimum of thirteen genetic markers, referred to as the thirteen core CODIS (Combined DNA Index System) loci, when conducting forensic DNA testing.[15]

However, in the 20 years since that particular form of STR testing was performed, DNA technology has become "considerably more sensitive and sophisticated." *Id.* at ¶ 10. The tests used at the time of Mr. Johnson's prior trials only reported data from 3 genetic markers (called loci) in addition to the marker that identifies the sex of the contributors. *Id.* at ¶ 11. Current kits now test 23 loci. *Id.* On January 1, 2017, the National DNA Index System expanded to include

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[14] *Id.*

[15] The Combined DNA Index System, or CODIS, is the FBI's nationwide DNA database. The database contains DNA profiles collected by federal and state forensic laboratories. As of February 2017, CODIS contained approximately 12,772,888 offender profiles and 757,650 forensic profiles from crime scenes and produced over 365,634 profile "hits" assisting in more than 350,653 Investigations. *See* Federal Bureau of Investigation, *National DNA Index System Statistics*, http://www.fbi.gov/about-us/lab/codis/ndis-statistics. Arkansas has its own CODIS compatible DNA database which has over 159,373 convicted offenders in the system which have aided in over 4,500 investigations. This constitutes an average of 15 hits a month in Arkansas due to CODIS. *See* Arkansas State Crime Lab, CODIS, http://www.crimelab.arkansas.gov/sectionInfo/Pages/codis.aspx.

these new 20 core loci at crime laboratories nationwide. The switch "adds seven new markers carefully selected over a years-long process—making more certain matches—and potentially solving more crimes of both the future and even the past." (*See* Exhibit J; Exh. I at ¶ 11 ("By increasing the number of genetic loci tested from 3 in 1997 to 23 today, we greatly increase the likelihood of finding genetic material that will yield useful DNA results."). This quantum leap in DNA testing technology allows forensic scientists to differentiate between individuals with a radically high, never before seen level of discrimination.

2. The requested STR DNA testing is reasonable in scope

STR testing can generate a profile that is effectively unique; for example, the probability of a random, full profile STR-DNA match between two unrelated persons in the Caucasian population is conservatively estimated to be more than 1 in a trillion—far exceeding the size of the world's entire population.[16] Indeed, in 1997, the State in the instant case was confident enough in DNA's forensic abilities to use it to "bolster" its case against the Petitioner. *See* Exhibit K. Since that time, the capacities of DNA forensic science have radically improved; new forms of testing, like mitochondrial DNA have been discovered, and STR technologies now has several sub-categories of highly refined testing methods, including Y-STR and MiniFiler testing, that are the appropriate forms

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[16] Butler, *supra*, at 505.

of testing to be used on the types of evidence available for testing here.

(a) Y-STR DNA testing

Y-STR testing uses the same STR methodology as autosomal STR testing, but exclusively targets genetic markers found on the Y chromosome—which is present only in males. Accordingly, Y-STR DNA testing can be particularly probative in cases like this one, where there may be multiple male donors in a given sample. Through Y-STR testing, male DNA will not be lost (or masked) by the female victim's own genetic contribution. Y-STR testing thus allows for a more precise and accurate detection of multiple male DNA profiles in any given sample.[17]

(b) MiniFiler DNA testing

A new "kit" for the analysis of autosomal STR loci, called AmpFISTER® MiniFiler™, was developed and made available for forensic use in early 2007. Mini-STR analysis can obtain results where traditional SIR analysis has failed.[18] Mini-STRs correspond to shorter sequences of DNA than those found in conventional autosomal STRs and are able to amplify smaller portions of DNA. MiniFiler can thus

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[17] *See, e.g.*, Sudhir K. Shiba *et al.*, *Utility of the Y-STR Typing Systems Y-PLEX™ 6 and Y-PLEX™ 5 in Forensic Casework and 11 Y-STR Haplotype Database for Three Major Population Groups in the United States*, 49 J. Forensic Sci. 4 (July 2004); Mark A. Jobling & Peter Oil, *Encoded Evidence: DNA in Forensic Analysis* 5 Nat. Rev. Genetics 739, 746 (Oct. 2004).

[18] *See* P. Grubweiser et al., *A New "Mini-STR Multiplex: Displaying Reduced Amplicon Lengths for the Analysis of Degraded DNA*, 120 Int'l. J. Legal Med. 115 (2006).

be used when STR testing is not possible due to degradation of the evidence; an indispensable attribute in cases such as this, where the evidence is more than 20 years old and where the perpetrator may have tried to flush his DNA from the body of the victim. Mini-STR testing has already served to exonerate at least one wrongfully convicted individual where traditional STR failed. In 1983, Rickey Johnson was convicted of rape. Initial STR DNA testing on the victim's vaginal swab yielded DNA markers from the assailant's spermatozoa at only 3 out of 15 loci due to the apparent degradation of the sample. When the sample was re-tested using Mini-STRs, however, an additional 8 loci were detected, resulting in a combined 11-loci profile suitable for comparison. Mr. Johnson's sample was tested, and he was conclusively excluded as the source of that DNA. The profile was entered into CODIS and "hit" to John Carnell McNeal, who was already in prison for an identical rape in the same apartment complex.[19]

(c) Mitochondrial DNA Testing

Mitochondrial DNA testing ("mtDNA") analyzes DNA found in the cytoplasm of the cell; that is, the area that surrounds the nucleus. The mitochondria genome, which is unchanged as it is passes from mother to child, is passed on to all the offspring of a mother and to those children's offspring. Mitochondria' DNA testing thus provides one

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[19] Vickie Welborn, *Leesville Man Freed After Wrongful Conviction*, Shreveport Times (Jan. 12, 2008). Based on these extraordinary results, Mr. Johnson was immediately freed from prison after 25 years of wrongful imprisonment.

particular advantage over STR testing; it can be compared to forensic samples that do not have the nucleated chromosomal information required for STR, and thus may be used on biology without nucleated cells, including hair with no "root," and bones.

Given the range of evidence collected in this case and the different forms of testing that would be required to obtain the most definitive results, the proposed testing is reasonable in scope and necessary to fully prove Mr. Johnson's actual innocence claim. Accordingly, the presumption against timeliness is rebutted. *See* A.C.A. § 16-112-202(10)(Bkk)(iv); *Carter v. State*, No. CR-13-359, 2015 Ark. 57, *7 (Ark. February 26, 2015) (slip opinion attached hereto as Exh. L).

D. The Petitioner's Identity Was at Issue During the Investigation and Prosecution of Carol Jean Heath's Rape and Murder

The identity of the perpetrator of Ms. Heath's murder has always been at issue as the Petitioner has maintained his actual innocence of the crime since the time of his arrest, has consistently pled not guilty, and has strenuously litigated his innocence claim.

E. Petitioner Can Identify a Theory of Defense That is Not Inconsistent With His Defense at Trial and May be Able to Produce New Material Evidence Establishing His Actual Innocence

In light of his two decades old innocence claim, Petitioner can readily identify a theory of defense consistent with the "not guilty" plea presented at trial that could establish his actual innocence.

Prior DNA testing indicates that Ms. Heath's blood was found on the items of clothing strewn in the woods. There is no rational explanation for how those clothes ended up miles from Mr. Heath's home except that they were worn by the perpetrator of her murder and sexual assault and then discarded in flight from the crime. Here, one of the only constants in the murder investigation was the green shirt found at the second crime scene. That shirt was clearly worn by the perpetrator, and the victim's blood was also found on it. 11/20/1997 Tr. at 40. Accordingly, testing of "wearer DNA" on the green shirt and the white t-shirt and on the hairs on both, could identify the murderer either by matching a known suspect such as Branson or providing an STR profile that, when searched through the CODIS DNA database, identifies a heretofore unknown offender. See Exh. I at ¶ 25. Should no SIR profile be possible, mitochondria testing could similarly be associated with a known suspect like Branson even if such results could not be searched in the CODIS DNA database.

At trial, the State argued that Ms. Heath was, in fact, sexually assaulted. This assertion was supported by the testimony of the medical examiner who determined that the abrasion on Ms. Heath's labia was consistent with an assault. Testing of a variety of sexual assault evidence collected can both exclude Mr. Johnson and identify another man as the murderer. As part of hiding the signs of any assault, the State argued Mr. Johnson used the douche bottle to eliminate all traces of male DNA from the victim's vaginal vault. DNA testing on the bottle itself may reveal a male profile that excludes Mr. Johnson and matches either a known suspect like Branson or hits to an offender in the CODIS DNA database. *See* Exh.

I at ¶ 21. The same is true for swabs taken from the bite marks on Ms. Heath's body that have already tested positive for amylase, indicating that saliva was left by the perpetrator.

Hairs found in the victim's hand, as well as on and near her body, especially where they are from the same male source as DNA from the sexual assault evidence, could now provide irrefutable evidence of innocence. Either through standard STR or mitochondrial testing, both methods could provide identifying information. This is particularly relevant here where several hairs wore found at the crime scene and on the clearly probative clothing, identified as Caucasian hairs that did not match the victim, and were never sent for DNA testing. These items themselves could clearly provide a true perpetrator if subjected to testing. *See* Exh. I at ¶ 26.

Even absent a match to Branson or another known offender in the CODIS DNA database, if one or more of these profiles in any combination provide the same profile of an unknown or heretofore uninvestigated male—in tandem with the absence of Mr. Johnson's DNA—such a redundancy would definitively point to an actual perpetrator and fully exonerate Mr. Johnson.[20]

REQUEST FOR HEARING

Mr. Johnson respectfully requests that the Court schedule a hearing so that the Court can

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[20] Mr. Johnson asserts that he was involved in a consensual relationship with Ms. Heath. Accordingly, the presence of his profile on certain items gathered from the crime scene could have an altogether benign reason for their appearance.

carefully consider expert and other evidence supporting this Motion for DNA testing. In *Carter v. State*, the Arkansas Supreme Court held that an evidentiary hearing is necessary where a person seeking post-conviction DNA testing alleges facts that entitle them to relief. *See Carter*, 2015 Ark. 57. In *Carter*, the movant alleged a proper chain of custody as to the items at issue in the case, but the State contested this element. The trial court summarily denied DNA testing based in part on a finding that Carter had failed to establish a proper chain of custody. The Supreme Court reversed this judgment, holding that the trial court should have afforded Carter a hearing to resolve this contested fact issue. *See id.* at *6. Just as in *Carter*, Mr. Johnson has alleged facts which establish his right to relief. Accordingly, this Court should schedule a hearing at which Mr. Johnson may present evidence to prove all of the facts alleged in this Motion.

CONCLUSION

For all the aforementioned reasons, Petitioner's request that forensic DNA testing be performed on the several items of evidence collected in this case - with all costs to be paid for by the Innocence Project—should be granted.

WHEREFORE, The Petitioner states the following requests for relief:

1. An Order granting a hearing at which Mr. Johnson, through undersigned counsel, may fully present the evidence supporting this motion;

2. An Order releasing the already collected evidence to an accredited, CODIS-eligible, private DNA laboratory;

3. An Order compelling the State of Arkansas, the DeQueen Police Department, and the Arkansas State Police (1) to conduct an extensive and thorough search for any and all evidence relating to the Petitioner's case[21], (2) to inventory all case related evidence still in existence (conducted in such a way to prevent contamination), and (3) to document all the steps and places searched, the results of that search and/or destruction documents detailing the explanation for the absence of any relevant evidence;

4. An Order compelling the State of Arkansas to properly preserve any additionally discovered physical evidence until further order from this Court and, if such evidence were to be discovered, to allow for an amended testing order to include additional DNA testing of any probative evidence;

5. An Order compelling the State of Arkansas, the DeQueen Police Department, and the Arkansas State Police to disclose and turn over all evidence accrued from any prior DNA testing or investigation in the Petitioner's case and all relevant documents, including and not limited to police reports, lab reports, photographs, trial exhibits, bench notes, *etc.* regarding the Petitioner's case;

6. An Order staying Mr. Johnson's scheduled execution to accommodate the Court's

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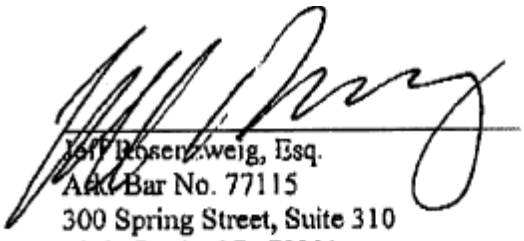
[21] Petitioner is well aware of the limited time and resources available to law enforcement agencies. Accordingly, Petitioner would also pay for an agreed upon, qualified, third party to assist in such a search under the supervision of the aforementioned agencies.

consideration of this motion and the requested DNA testing.

7. Any other Order that the Court deems necessary to adequately protect the Petitioner's state and federal constitutional rights.

Respectfully submitted this 13th day of April, 2017.



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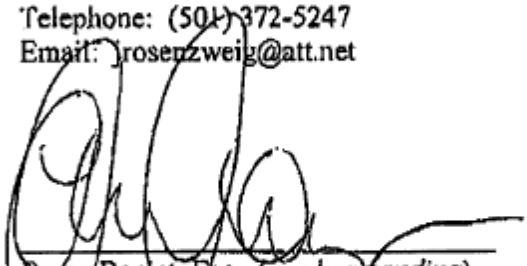

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CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have served a copy of the foregoing Motion on the below attorney for the State and on Petitioner, Stacey Eugene Johnson, by United States Postal Service on this 13th day of April, 2017.

Bryant L. Chesshir, Esq.
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Nashville, AR 71852

IN THE
SUPREME COURT OF ARKANSAS

STACEY EUGENE JOHNSON APPELLANT

VS. CR 18-700 CAPITAL CASE

STATE OF ARKANSAS APPELLEE

AN APPEAL FROM THE SEVIER COUNTY
CIRCUIT COURT
NINTH WEST JUDICIAL DISTRICT
HON. CHARLES YEARGAN, Circuit Judge

APPEAL FROM THE ORDER DENYING APPELLANT'S MOTION FOR POST-CONVICTION DNA TESTING PURSUANT TO ARKANSAS'S HABEAS CORPUS – NEW SCIENTIFIC EVIDENCE STATUTE §§ 16-112-201 ET SEQ.

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Attorneys for Appellant

VI.

STATEMENT OF THE CASE

Stacey Johnson was convicted for the murder of Carol Heath ("Ms. Heath") in 1994. This Court reversed and ordered a new trial. *Johnson v. State*, 326 Ark. 430, 437, 934 S.W.2d 179, 182 (1996) ("*Johnson I*"). Mr. Johnson was again found guilty of capital murder and sentenced to death. This Court affirmed. *Johnson v. State*, 342 Ark. 186, 190, 27 S.W.3d 405, 408 (2000) ("*Johnson II*").

Mr. Johnson filed a Rule 37 and an Act 1780 petition, which were both denied by the circuit court. The denials were appealed; this Court partially reversed and remanded the Act 1780 petition. *Johnson v. State*, 356 Ark. 534, 543, 157 S.W.3d 151, 159 (2004) ("*Johnson III*"). On remand, the circuit court refused to order testing. On appeal, this Court affirmed the decision. *Johnson v. State*, 366 Ark. 390, 395, 235 S.W.3d 872, 876 (2006) ("*Johnson IV*"). Mr. Johnson's habeas petition was denied in 2007, and the denial was affirmed by the Eight Circuit. *Johnson v. Norris*, 537 F.3d 840 (8th Cir. 2008) ("*Johnson V*").

On April 13, 2017, Mr. Johnson filed a Motion for DNA Testing and a Request for Hearing (the "Motion" or "Petition"). The Circuit Court denied and dismissed. This Court reversed and remanded, granting a stay of execution and a hearing on the testing. *Johnson v. State*, 2017 Ark. 137, 2017 WL 1455038 (2017) ("*Johnson VI*"). On May 9, 2018, the Circuit Court denied the DNA Petition.

Factual History

As the facts have been repeatedly provided in prior appeals in this case, Mr. Johnson limits his recitation to those facts that are central to this appeal.

On April 2, 1993, Ms. Heath's sister-in-law went to the DeQueen house where Ms. Heath lived with her two children—Ashley and Jonathan—sometime between 6:00 and 6:30 a.m. and discovered her body in a pool of blood. (Ab. 58.)[1]

Ms. Heath's throat was cut. (R3. 978.) She had several defensive wounds and injuries, including cuts and bruising on her fingers, arms, and legs. (R3. 1284; *see also* R4. 100-106.) There were bite marks on her left and right breasts. (R3. 1285; *see also* R4. 105.) A t-shirt had been placed across her throat, her underwear was next to her right leg and a towel above her head. (Ab. 59-60.) A pool of semi-clear fluid was around her genitals. (Ab. 59-60.) A bloody shoe print was on her thigh. (Ab. 59.) Caucasian hairs—not Ms. Heath's—were recovered from (1) tissue paper found under her body (R3 121, R4. 69), (2) a wash cloth (R1. 463; R4. 68), and (3) a towel discovered at the second crime scene, none of which were sent on for DNA testing. (R3. 121.) Police remarked that "whomever . . . entered [the] house did [so] voluntarily through the front door." (Ab. 64.) Ms. Heath's hands and feet were bagged to preserve trace evidence. (Ab. 58-59.)

DeQueen Police Department ("DPD") Officer Hayes McWhirter "interview[ed] neighbors to see if they had seen anything." (Ab. 79.) He "received

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[1] Record citation conventions are as explained on Abstract 1.

information from one of the [DPD] police officers" that Ashley "had told some of [Ms. Heath's] relatives that a black male had been at their apartment." (Ab. 82.) DPD officers "check[ed] to see if . . . anyone knew of any black males that had been to [the] apartment." (Ab. 81-82.) In a sworn affidavit, Officer McWhirter noted that "in interviewing witnesses and suspects . . . it was learned that the victim knew Johnson in at least a social manner" and that "Johnson had been in the home of the victim, socially." (AD0413.) Based on statements by "different people," Officer McWhirter requested a photo array from the DPD, which included Mr. Johnson. (Ab. 82.) DPD officers went to Mr. Johnson's stepmother's home the morning of April 2 to look for him. (Ab. 70.)

Officer McWhirter interviewed Ashley later that afternoon. (Ab. 80-81.) He did not tape record this interview. (AD0393.) Ashley provided several accounts of the murder. First, she said that "a black man broke in last night." (Ab. 58.) Then, she said "her mother [had been] asleep and [was] awaken[ed] by . . . someone in the house . . . [H]er mother got up to see who was there . . . [and] the next thing [Ashley] knew was that her mother had fallen." (R4. 2280.) She then allegedly told an aunt "a black man had broken into the house and killed her mama." (R4. 1310.) Ashley allegedly told her grandmother she had seen a "tall, chunky black man" (R4. 1333) who "had on a black shirt, green jacket, blue jeans and . . . boot". (R4. 1320.) The man sat "on her mother's . . . couch, . . . had a gun . . . [and] was just twisting it around or . . . playing with it." (R4. 1331.) When psychologist Dr. Camille Barnes showed Ashley the same photo array Officer McWhirter had shown, Ashley twice stated that "[t]he creep that killed my mother is not there."

(Ab. 83-84.) Psychological examiner Jill Smith, who also treated Ashley, stated there was "some question as to whether or not [she] really witnessed" the crime. (AD0360-AD0362.)

Several Caucasian hairs microscopically dissimilar from the victim's own hairs—including an "inch and a half red beard hair" (R2. 204)—were recovered from, among other places, "bags from [Ms. Heath's] hands" (R3. 120), the "white t-shirt" (R1. 460), and the "green sheet" (R1. 460) in which the Ms. Heath's body was transported to the medical examiner. Mr. Ramsey, Ms. Heath's ex-boyfriend, was described as having a "kind of reddish brown beard." (R2. 71.) He testified that he dated Ms. Heath from "Christmas [1992] through . . . late February [1993]," but was no longer dating her on April 1, 1993 and "hadn't been in sometime (sic)" to her house. (R4. 2979.) Ashley at one point stated that Mr. Ramsey had been involved in her mother's murder. (R3. 1477.)

In preparation for trial, defense counsel consulted with DNA expert Dr. Ronald Rubocki. (R. 86-90.) Dr. Rubocki noted: "[t]here are numerous other hairs . . . associated with this case that may have also been informative and led to a different or additional suspect." (AD0323-AD0327.) Dr. Rubocki also noted the "negative aspects about specimens such as cigarette butts and unbound (loose) hairs," namely "that they can be transferred from or between evidence articles if caution is not taken during collection." (AD0323-AD0327.)

In its closing, the State argued Mr. Johnson murdered and sexually assaulted Ms. Heath, and used a douche bottle "to get rid of . . . any evidence that could . . . connect him with that crime." (R3. 1518.)

The State focused on several pieces of evidence that it argued connected Mr. Johnson to the crime, notwithstanding exculpatory evidence. For example, the State noted that Ms. Heath's blood was "all over th[]e clothes" found at the second crime scene—not mentioning that Mr. Johnson's DNA was not. Additionally, the State emphasized that saliva from Ms. Heath's breast swab was "consistent with [Mr. Johnson's] blood type and . . . secretor [status]" but failed to note Mr. Johnson was excluded as the source of DNA on that same swab. (R3. 1519-1521.) Even though clothing found at a second crime scene was never definitively established as belonging to Mr. Johnson (Ab. 68-70) and despite the fact that several items of deeply probative physical evidence found at the crime scene—including Caucasian hairs in the victim's hands—were never subjected to DNA testing, Mr. Johnson was again convicted of murder and sentenced to death.

VII.

ARGUMENT

A trial court's decision for post-conviction relief will not be reversed unless clearly erroneous. *Johnson v. State*, 356 Ark. 534, 542, 157 S.W.3d 151, 158 (2004) ("*Johnson III*"); *Pankau v. State*, 2013 Ark. 162, at 5, 2013 WL 1694909, at *3 (2013). This court will not "reverse a denial of postconviction relief unless the trial court's findings are . . . clearly against the preponderance of the evidence." *Davis v. State*, 366 Ark. 401, 402, 235 S.W.3d 902, 904 (2006). "[I]ssues concerning statutory interpretation are reviewed de novo." *Clemons v. State*, 2014 Ark. 454, 8, 446 S.W.3d 619, 623–24 (2014). Both a clear error and *de novo* standard of review are applicable here.

I. THE LOWER COURT ERRED IN RULING THAT MR. JOHNSON FAILED TO MEET THE REQUIREMENTS FOR DNA TESTING BOTH PREVIOUSLY TESTED AND UNTESTED EVIDENCE.

The vast majority of the items Mr. Johnson currently seeks to test have *never* been tested or examined.[2] (AD0281; *see also* R. 26-26(a)-(b).)

A. Mr. Johnson Has Neither Knowingly Failed to Request Nor Waived the Right to Test the Previously Untested Evidence.

Where evidence has not previously been tested, a defendant must show he did not "[k]nowingly and voluntarily waive the right to request testing of the evidence in a court proceeding commenced on or after August 12, 2005," and "[k]nowingly fail to request testing of the evidence in a prior motion for post-conviction testing." Ark. Code Ann. § 16-112-202(2). The trial court's holding that the "specific evidence to be tested was . . . declined, based upon discussions trial counsel had both with Petitioner and their DNA expert," is erroneous and must be reversed. (AD0292-AD0330; AD0342-AD0346.)

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[2] The trial court's suggestion that the *availability of new evidence* is relevant to the question of a grant of DNA testing here is incorrect. (AD0342-AD0346.) Newly discovered evidence is an enumerated basis for rebutting the presumption against timeliness, but not one upon which Mr. Johnson relies. *See* Ark. Code Ann. § 16-112-202(B)(ii); § I(C), *infra*.

1. Mr. Johnson Did Not Knowingly and Voluntarily Waive the Right to Request Testing of Untested Evidence at Either His 1997 Trial or in His 2001 Act 1780 Petition.

The court proceedings in *Johnson IV* and *Johnson V* are extensions of the litigation begun with the filing of Mr. Johnson's 2001 Act 1780 petition. Accordingly, no new "court proceedings" commenced on or after August 12, 2005.

2. No Knowing Failure to Request Testing Occurred at the Time of Mr. Johnson's 2001 Petition.

An argument that Mr. Johnson "knowingly failed to request testing" in a prior motion for post-conviction testing likewise fails. The question of what constitutes a "knowing failure" within the context of 16-112-202(2)(B) has not yet been addressed by this Court. However, this Court's prior jurisprudence indicates no such "knowing waiver" is present here.

A knowing waiver requires, minimally, that the trial court satisfy its "weighty responsibility in determining whether an accused has 'knowingly and intelligently' waived . . ." the right bestowed on him by law. *Gibson v. State*, 298 Ark. 43, 45, 764 S.W.2d 617, 618 (1989) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)); *see also Flowers v. State*, 362 Ark. 193, 206, 208 S.W.3d 113, 123-24 (2005) ("did Appellant waive his rights with 'full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" (quoting *Sanford v. State*, 331 Ark. 334, 346, 962 S.W.2d 335, 341-42 (1998)). Such a determination requires a full examination of

whether a defendant received "specific warning of the dangers and disadvantages" or has been made "sufficiently aware of his right" and the "possible consequences of a decision to forego" if the waiver is accepted. *See Hatfield v. State*, 346 Ark. 319, 325-26, 57 S.W.3d 696, 700-01 (2001). Even if such an inquiry had been conducted by the trial court, which it was not, no such waiver occurred here.

(a) Mr. Johnson Affirmatively Pursued DNA Testing Prior To Trial.

The trial court's vague finding here was that testing was waived "based upon discussions trial counsel had both with Petitioner and their DNA expert" at the Rule 37 hearing. (R. 139.)

As a preliminary matter, the "discussions" the trial court mentions were held in 1997, not in 2001, when Mr. Johnson's *first* motion for post-conviction DNA testing was filed. *See* Ark. Code Ann. § 16-112-202(2)(B) ("Knowing[] fail[ure] to request testing of the evidence *in a prior motion for post-conviction testing*." (emphasis added)). The testimony of the defense counsel at the Rule 37 hearing likewise reflects that there was no conscious decision to forgo testing on the untested items at issue here, but only with respect to the Negroid hairs as a matter of trial strategy (items that are not included in Mr. Johnson's current request for testing). (Ab. 55, 57.)

Mr. Johnson never waived his right to DNA testing; rather, he "specifically discuss[ed]" the issue with and *directed* his counsel to pursue it. (Ab. 55.) Indeed, his counsel's attempt to obtain such testing at the time of his 1997 trial, through a motion for a continuance, was denied by the trial court. (Ab. 51,

54-55.) Since that time, Mr. Johnson has filed a Rule 37 Petition arguing ineffectiveness of prior counsel for failing to request DNA testing and an Act 1780 Petition asking for additional testing, underscoring his desire to *continue to seek* DNA testing under the statute. (R2. 124.) Both requests were denied by the trial court and those denials were then affirmed by this Court.

(b) Mr. Johnson Could Not Knowingly Fail to Request Entirely New Forms of DNA Testing, Collection, and Analysis That Did Not Exist in 2001.

Even had Mr. Johnson waived his right to DNA testing, a preponderance of the evidence would show that such waiver would be improper as no warning about the dangers and disadvantages of foregoing testing *could* have been provided to him. While STR testing has been available since 1996, the forms of testing available at the time of Mr. Johnson's 2001 request were of an entirely different caliber than those available today. Mr. Johnson could not have knowingly waived his right to the currently requested DNA testing because the testing he now seeks either *did not exist* or was in limited usage at the time of his last request. None of the aforementioned technologies or methods could possibly have been in Mr. Johnson's (or his counsel's) ken, and could not have been requested, much less waived. If John Butler, a forensic DNA expert, marvels at "how rapidly forensic DNA analysis methods have progressed in the last two decades," it is unrealistic to expect a death row inmate to be well versed in the scientific developments in the field. John M. Butler, *Forensic DNA Typing: Biology,*

Technology, and Genetics of STR Markers 11-13 (2d ed. 2005).

B. New DNA Testing Methods and Technologies Substantially More Probative Than Those Used in 1997 on the Previously Tested Items of Evidence Now Exist.

For previously tested evidence, a defendant must show that the requested testing uses "a new method or technology that is substantially more probative than the prior testing." Ark. Code Ann. § 16-112-202(3). Here, the trial court denied testing on the previously tested items because "the testing requested . . . does not embrace any new technique or method of technology that is substantially more probative than the prior testing and has been available and was used in [Mr. Johnson's] 1997 trial." (AD0342-AD0346.)

This holding, that the requested testing is not a new technology because forms of "DNA-STR-type testing" were available in 1997 (R. 140), categorically misapprehends modern DNA testing, avoids the expert testimony presented at the November 15, 2017 hearing, and ignores the evolution of DNA testing methods and technologies in the years since testing was last performed. To state that the testing capacities available in 1997 (or even 2001) are the same as those available in 2018 is akin to arguing that because the 1908 Ford Model-T and 2018 Tesla Model S are both types of cars, the features of a 2018 Tesla must be essentially the same as those of a 1908 Model-T.

Within the last two decades, DNA testing has radically advanced in (1) sensitivity and discriminatory ability, (2) forms of testing, and (3) methods of collection and analysis. As DNA expert Meghan Clement testified: "it is possible to distinguish mixtures more easily today . . . we could subtract [Ms. Heath's profile] from the overall mixture . . . in order to develop a profile which may or may not be CODIS-eligible." (Ab. 8.) Cellmark forensic analyst Huma Nasir similarly noted:

> Modern DNA technology . . . is considerably more sensitive and sophisticated than the testing available in 1994 and 1997 . . . and in 2002 . . . Current DNA technology is sensitive enough to identify an individual's unique DNA profile from a microscopic amount of biological material previously undetected . . . [and] is also designed to develop DNA profiles from poorly preserved or decades-old degraded samples that were [previously] unsuitable for testing.

(AD0132-AD0163.) Here, using the new technologies, the clothing and breast swabs may now provide profiles where previously no male DNA was found at all.

Developments in the sensitivity of DNA testing have also dramatically changed *where* DNA can be found, creating the possibility of finding DNA on evidence that was not even testable fifteen ago. Again, Ms. Nasir:

> In 2002 and before, it was common . . . to test only those samples with viable stains or those otherwise known to contain biological material . . . [b]y contrast, forensic scientists now collect and test samples from items where no biological material is visible . . . [W]e now sample items that were only touched or handled by the perpetrator of a crime to test 'touch DNA.'

(R. 180-181.) Ms. Clement testified that today, "as little as 250 picograms" of DNA are needed to obtain a full and interpretable DNA profile. As "each cell has 6.6 picograms of DNA . . . [, only] about 35 [or] 40 cells would be sufficient to develop a profile." (Ab. 8.)

In addition, today's new STR kits "provide[] . . . exponentially greater discriminatory power, allowing forensic scientists virtual certainty as to the identity of the source of DNA." (Ab. 8, AD0132-AD0168.) In January 2017, a new DNA testing kit standardizing the expansion of genetic "markers" became available, dramatically improving the discriminatory power of the testing and "greatly increas[ing] the likelihood of finding genetic material that will yield useful DNA results." (AD0132-AD0163.) This increase in testable loci added "weight and breadth to forensic science" – a development that could mean "the difference between a case breakthrough and an inconclusive result." Seth Augenstein, *DNA Core Loci Expanding in Two Weeks*, Forensic Mag. (Dec. 15, 2016, 4:44 PM), https://www.forensicmag.com/news/2016/12/dna-core-loci-expanding-two-weeks.

There are now entirely new forms of STR DNA testing available that were either in very limited use or not yet in existence at the time of testing in 1997 that could now provide previously unavailable probative DNA information. *See Carter v. State*, 2015 Ark. 57, at 7, 536 S.W.3d 123, 127 (2015); *see also* (R. 42, 103-104.)

Y-STR testing, which only became available at the Arkansas State Crime Lab ("ASCL") in 2007, tests for DNA on the Y chromosome. (AD0282.) This testing makes it possible to separate out multiple male profiles in a single biological sample and find male DNA in a sample where that biology would otherwise have been overwhelmed by a female donor. (Butler, at 202; Ab. 9, 14.) Such testing can be used to retest the breast swabs, prior testing of which indicated the presence of an enzyme in saliva and *excluded* Mr. Johnson as a donor. Even if Mr. Johnson's DNA is present on the swabs with a mixture of male DNA obtained, a second unknown male donor can now be identified. Mini-STR testing, which became available at ASCL in 2009, applies STR technology to commonly observed DNA samples involving distinctly degraded biological evidence. (AD0282.) The testing enhances genetic samples, thus revealing a profile that may have previously been deemed inconclusive. (Butler, at 148.)

In addition, new methods of DNA collection and analysis are now available. Robotic extraction can "increase . . . the yield of DNA extracted from a forensic sample." (AD0132-AD0163.) Laboratories can concentrate samples where only minute amounts of DNA exist, making it possible to "obtain useful DNA profiles even from samples that may contain only a

few skin cells." (R. 105.) Sampling techniques now include "scraping," a technique enabling the collection of "more [genetic] material than the sampling techniques . . . DNA scientists may have used in 2002 on similar items." (AD0132-AD0163.)

In 2004, this Court held that comparing profiles of Caucasian hairs gathered at the crime scene with those in the CODIS databank was so speculative an exercise that Mr. Johnson's defense attorney could not be faulted for "not having pursued it." *Johnson III*, 356 Ark. at 548-49, 157 S.W.3d at 162. Today, over 5,200 of precisely those kinds of matches have been made by law enforcement *in Arkansas alone*.[3] *See CODIS-NDIS Statistics*, FBI, https://www.fbi.gov/services /laboratory /biometric-analysis/codis/ndis-statistics (last visited Oct. 6, 2018).

Any concern that the ever-evolving nature of DNA technology will "do away with finality in judgments," allowing a defendant to "test and retest evidence repeatedly" is unfounded and an inappropriate basis for denying Mr. Johnson's petition. *Johnson III*, 356 Ark. at 549-50, 157 S.W.3d at 163. First, Mr. Johnson does not seek new testing on the African-American hairs and cigarette butt, recognizing that the results of the 1997 testing on the hair were discriminatory enough to include him as the source of the hairs. Second, much of the evidence Mr. Johnson seeks to test either was never tested or, when tested, did not obtain dispositive results, such that

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[3] Mitochondrial DNA (or "MtDNA") testing is also a viable testing method for Mr. Johnson to pursue. Even though this testing was available in 2001 at the ASCL, it only became available for a six to eight month period that year. (AD0282.)

additional testing is necessary. Without such testing, however, a defendant is deprived of the certainty that rigorous DNA testing technology now makes possible—a deprivation that is of greatest significance here, where Appellant has been sentenced to death and could be exonerated based on such testing results.

C. Mr. Johnson Rebuts the Presumption Against Timeliness Because Substantially More Probative DNA Testing Methods and Technologies Exist, a Manifest Injustice Would Result Should He be Denied DNA Testing, and He Has Shown Good Cause.

Despite the court's assertion that "the 'new' testing Petitioner proposes has been available since 2009," there is no statutory support for the contention that a defendant must request testing when it first becomes widely available. As this Court has already held, "the [S]tatute imposes no time limitation for rebutting a presumption against timeliness." Further, although Mr. Johnson has satisfied several of these bases for rebuttal, "a petitioner need only satisfy one of the enumerated bases for rebuttal." *Carter v. State*, 2015 Ark. 57, at 7-8, 536 S.W.3d 123, 127 (2015).

First, as noted *supra*, entirely new forms of substantially more probative DNA technology now exist. Ark. Code Ann. § 16-112-202(10)(B)(iv). Second, because Mr. Johnson's assertion of innocence is rooted both in physical and documentary support, the denial of testing here would result in a manifest injustice: the execution of a possibly innocent man. Ark. Code Ann. § 16-112-202(10)(B)(iii); *see also Wallace v. State*, 2011 Ark. 295, at 4-5, 2011 WL 3137811, at *2. Lastly, the mere fact that Mr. Johnson

has been sentenced to death constitutes sufficient good cause to find his motion timely. *See* Ark. Code Ann. § 16-112-202(10)(B)(v). *See also, e.g.*, *Wertz v. State*, 373 Ark. 260, 261, 283 S.W.3d 549, 550 (2008); *Echols v. State*, 344 Ark. 513, 518, 42 S.W.3d 467, 470 (2001). It also stands to reason that the achievement and maintenance of public confidence in the accuracy of a verdict is a form of "good cause," particularly where, as here, the vast majority of potentially exculpatory physical evidence remains untested.

For all these reasons, the trial court clearly erred in finding that Mr. Johnson knowingly failed to request DNA testing on the untested evidence.

II. THE LOWER COURT ERRED IN RULING THAT UNKNOWN MALE DNA OBTAINED FROM HIGHLY PROBATIVE CRIME SCENE EVIDENCE WOULD FAIL TO PRODUCE NEW MATERIAL EVIDENCE SUFFICIENT TO RAISE A REASONABLE PROBABILITY OF MR. JOHNSON'S ACTUAL INNOCENCE.

The trial court also denied Mr. Johnson's petition on the basis that "[w]hile the proposed testing and retesting of evidence . . . may produce evidence that would support a theoretical defense, as it would in almost every case, it would not raise a reasonable probability under Ark. Code Ann. § 16-112-202 (8)(B), that the Petitioner did not commit the offense or point to a third party." (R. 140-141.) This holding was clearly erroneous.

"DNA testing of evidence [under the Statute] is authorized if testing or retesting can provide *materially relevant evidence that will significantly*

advance the [petitioner's] claim of innocence, in light of all the evidence presented to the jury and the evidence presented to the trial court at the . . . hearing [on the petition filed pursuant to the Statute]." *Johnson III*, 356 Ark. at 546, 157 S.W.3d at 161 (emphasis added). A defendant need not establish that DNA evidence would exonerate him to obtain testing. *See, e.g., Foster v. State*, 2013 Ark. 61, at 2, 2011 WL 593296, at *1 (2011); *Garner v. State*, 2012 Ark. 271, at 2, 2012 WL 2149760, at *1 (2012) (per curiam).

A. The Proposed Testing Could Provide Overwhelming Evidence of Innocence That Would Critically Undermine the Legitimacy of Mr. Johnson's Conviction and Prove His Actual Innocence.

As the trial court noted in its Order, Mr. Johnson has already demonstrated that "the proposed testing and retesting of evidence in this case may produce evidence that would support a theoretical defense." (AD0342-AD0346.) The trial court erred, however, in finding that the evidence would not significantly advance his innocence claim, or, as is more likely, be dispositive as to the question of his innocence. The State's theory of guilt, as argued at two separate trials and in five separate appeals, is that Mr. Johnson, *by himself*, beat, raped, and strangled Ms. Heath, and then slit her throat. (R3. 1581-1584.) The State argued Mr. Johnson placed a "green" sweater[4] and other items at the second crime

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[4] Police photographs showed that the "green pullover shirt" collected at the crime scene was actually a *blue* sweater. (AD0454-0455; *see also* Ab. 44, 68-69.)

scene. (R3. 1566.) By the State's own theory of guilt, several items at both the first and second crime scenes should bear genetic evidence implicating Mr. Johnson.

Should DNA testing reveal the biology of a man not Mr. Johnson on evidence, it would, as an initial matter, cast substantial doubt on the State's theory of the case, but it would also raise a reasonable probability of Mr. Johnson's actual innocence in three ways: (1) by excluding him as the source of DNA on highly probative evidence or finding an unknown male on that same item of evidence (an "exclusion" scenario); (2) by finding the same unknown DNA profile on multiple items of evidence (a "redundancy" scenario); or (3) by matching an unknown DNA profile to one in a DNA database (a "CODIS match" scenario).

In an exclusion scenario, the discovery of third-party DNA on a single item of highly probative evidence could wholly exculpate Mr. Johnson as the perpetrator. For example, given the State's argument that Mr. Johnson alone raped Ms. Heath, the presence of semen or male DNA in the rape kit swabs and smears[5], the douche fluid swabs, her underwear, the tissue paper found beneath her body, her pubic hairs or on the breast swabs (which have already shown the presence of saliva), would constitute irrefutable proof of an alternative perpetrator.

If, as the State argues, the perpetrator, *inter alia*, used the douche bottle to cover up evidence of his

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[5] While semen was not found on or within Ms. Heath's body, advancements in DNA testing have made it possible "even if there is no ejaculation or digital penetration," to develop genetic profiles for comparison, even where a douche has been used. (Ab. 9.)

rape, wadded up the t-shirt on Ms. Heath's neck, beat Ms. Heath hard enough to leave defensive wounds on her hands and body, and then *personally took* several items to a second crime scene, his DNA should be on these items and/or underneath Ms. Heath's nails. In such a "redundancy scenario," if the same unknown DNA profile is identified on two or more items, the "redundant" DNA would be strong evidence of an alternative perpetrator; particularly if the DNA profile is found at both scenes.

Lastly, in a "CODIS match" scenario, an eligible DNA profile obtained from testing could be run through Arkansas and Federal DNA databanks for a match. In at least 158 of 362 DNA exonerations, the DNA results not only proved the defendant's innocence, but ultimately identified the actual perpetrator.

Should Branson Ramsey's DNA be found in any of these scenarios, there would be few plausible, non-criminal explanations for its presence. Mr. Ramsey had not been in Ms. Heath's home or intimate with her for months before her murder. Should his biology be found at the scenes, such evidence could exonerate Mr. Johnson.[6]

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[6] The trial court stated in its Opinion that Mr. Johnson's "did not consider any other evidence . . . that would help shed any theory (sic) that [he] did not commit the offense." (AD0342-AD0346.) This holding fails. Unknown DNA on probative evidence would corroborate Mr. Johnson's innocence claim considering the State's theory that Mr. Johnson alone murdered Ms. Heath.

B. The Proof of Mr. Johnson's Guilt is Far From "Overwhelming" and DNA Testing Could Fundamentally Overpower It.

As this Court has previously noted:

> When deciding whether evidence is materially relevant, the trial court must consider not only the exculpatory potential of a favorable DNA test result, but also the other evidence presented at trial. Thus, if . . . a favorable DNA test would discredit only an ancillary fact, the testing should be refused. At the opposite end of the spectrum, *where the DNA test could exonerate the defendant, it does not matter how strong the other evidence might have been* . . . .

Johnson III, 356 Ark. at 546, 157 S.W.3d at 161 (emphasis added) (footnote omitted) (citing *Anderson v. State*, 831 A.2d 858, 867 (Del. 2003)). Here, DNA testing can discredit not only evidence that is ancillary to the State's case, but that is critical, even central to it, including evidence that the trial court cited in its Order: (1) Ashley's eyewitness testimony identifying Mr. Johnson as the perpetrator, (2) scientific evidence that "positively linked" Mr. Johnson to Ms. Heath's murder, and (3) Mr. Johnson's "statements and admissions to third parties, including police officers, fellow inmates . . . and his stepmother." (AD0342-AD0346); Ark. Code Ann. § 16-112-202(8)(B).

1. Ashley Heath's Testimony is Not Overwhelming Evidence of Mr. Johnson's Guilt.

Ashley's eyewitness identification is not reliable and is certainly not so overwhelming as to definitively implicate Mr. Johnson in Ms. Heath's murder. While this Court has held that "unequivocal testimony identifying the appellant as the culprit is sufficient to sustain a conviction," *Williams v. State*, 2014 Ark. App. 561, at 5, 444 S.W.3d 877, 880 (2014) (citation omitted), Ashley's various accounts of her mother's murder did not unequivocally identify Mr. Johnson. In the chronological aggregate, her statements are "inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon." *See, e.g., Davenport v. State*, 373 Ark. 71, 73, 281 S.W.3d 268, 270 (2008). Regardless, even if the trial court found her testimony sufficient to sustain a conviction, her testimony is not so overwhelming as to bar testing.

Many of Ashley's details that appear to have been "consistent" with a description of Mr. Johnson were known to officers long before they spoke to Ashley, including Mr. Johnson's name, hair, and recent release from jail. Indeed, they already knew Mr. Johnson knew Ms. Heath "in at least a social manner" (AD0413) and they sought out Mr. Johnson at his stepmother's home before Ashley had even been interviewed. Because there is no audio recording of the alleged identification, it is impossible to know if the "facts" Ashley provided (facts that would dramatically change both before and after her interview with Officer McWhirter) were fed or suggested to the traumatized six-year-old. Further, despite Officer McWhirter's testimony that he did not have to elicit Ashley's statements, (R4. 1225-1226), Officer McWhirter wrote in a sworn arrest warrant that it was he who "asked Ashley if the man had said

anything about ever being in jail," not the child who provided the fact. (AD0413.) This leading questioning strongly suggests that Officer McWhirter was confirming preconceived suspicions with the child, as opposed to objectively eliciting facts.

2. Prior DNA Results Do Not Present Overwhelming Evidence of Mr. Johnson's Guilt.

The trial court erred in rejecting Mr. Johnson's request for testing due to prior DNA testing on three hairs taken from Ms. Heath's house and a cigarette butt found at the second crime scene.

Mr. Johnson admits he was in Ms. Heath's home on the evening in question. (AD0285-AD0289.) Three of the State's own witnesses, including Ashley, testified that Mr. Johnson was in Ms. Heath's house on at least one prior occasion, including the night of the murder. (AD0413, R3. 1145-1146.) The hairs could have been shed on any of these occasions. That Mr. Johnson could not be excluded as the source of these hairs hardly qualifies as overwhelming evidence that he is guilty of murder, particularly when *untested* Caucasian hairs not matching Ms. Heath were found on tissue under her genitalia, the towel from the second crime scene, and bags over her hands for transport to the medical examiner.

As for the cigarette butt, such a transient item is not overwhelming evidence of his guilt. (AD0326.) In addition to only being tested months after it was allegedly found in the clothing, the butt's provenance is questionable, as it appeared in pristine condition despite having allegedly been found in waterlogged clothing. (R2. 10.)

3. Statements Mr. Johnson Made to Others Do Not Constitute Overwhelming Evidence of Guilt.

Mr. Johnson's alleged "statements" or "admissions" of guilt to third parties, are not "overwhelming" evidence of his guilt. Albuquerque Police Officer Pacheco's testimony, claiming Johnson confessed to him, was uncorroborated and not memorialized, a noteworthy omission for any reasonably competent officer. (R3. 1234-1237.) His testimony was contradicted by his own partner, Officer Bylotas, who did not hear Mr. Johnson make a confession. (R3. 1264-1265.)

The trial court also cited Johnson's so-called "admissions" to fellow inmates and to his stepmother as overwhelming proof of guilt.[7] But those individuals testified only that Johnson had a sexual relationship with Ms. Heath and intended to see her on the night of the murder. Johnson readily admits those facts. Further, one of those witnesses, Steve Hill, told Rule 37 counsel that he had been pressured to make a signed a statement despite that he was illiterate. (R2. 248.)

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[7] Ms. Johnston's testimony raises doubt that the clothing at the second crime scene even belonged to him. She was unable to positively identify either the "green" sweater or the white t-shirt as Mr. Johnson's.

III. THE LOWER COURT ABUSED ITS DISCRETION BY REFUSING TO ADMIT THE PROFFERED TESTIMONY OF AN EYEWITNESS IDENTIFICATION EXPERT WHO OPINED THAT SEVERAL FACTORS LIKELY AFFECTED THE ACCURACY OF ASHLEY HEATH'S IDENTIFICATION OF MR. JOHNSON.

At the hearing, the State asked the trial court to rule that *Noel v. State* "declares that eyewitness identification expert testimony is inadmissible in State courts." (Ab. 5-6.) The Court did just that, finding that "eyewitness-identification expert [testimony] is not admissible in Arkansas courts" and excluding Dr. Kovera's testimony as inadmissible on the basis that it was "neither credible [n]or reliable." (AD0342-AD0346.) This decision reflects a clear abuse of discretion. *See Mosby v. State*, 2018 Ark. App. 139, at 14, 544 S.W.3d 78, 87 (2018) ("Abuse of discretion is a high threshold that . . . requires that the circuit court acted improvidently, thoughtlessly, or without due consideration." (citing *Hajek– McClure v. State*, 2014 Ark. App. 690, 450 S.W.3d 259)). Dr. Kovera's proffered testimony is based on decades of peer-reviewed scientific research. (Ab. 18.) Her conclusions are accepted within the field. (Ab 18-20.) Dr. Kovera's testimony was both credible and reliable, and the court abused its discretion by holding that it was not.[8] The trial court's exclusion should be reversed.

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[8] Arkansas courts have routinely approved the use of experts—*with fewer credentials and based on much thinner scientific frameworks*—in cases where psychological processes like

A. The Court Should Clarify Its Approach to Eyewitness Identification Expert Testimony.

This case presents an opportunity for the Court to clarify its jurisprudence concerning eyewitness expert testimony. Appellant respectfully submits that this Court revisit *Utley* and its progeny and join the majority of jurisdictions around the country by making plain that there is no presumption against, much less a flat ban of, the admissibility of eyewitness expert testimony.

B. Eyewitness Identification Experts Are Not Categorically Barred in Arkansas.

Contrary to the State's claim, adopted by the trial court, the longstanding rule in this state has been that admitting eyewitness identification expert testimony is within the trial court's discretion. *See Utley v. State*, 308 Ark. 622, 625, 826 S.W.2d 268, 270 (1992).

1. Expert Eyewitness Identification Testimony Satisfies the Daubert Factors For Admissibility of Expert Testimony.

This Court has not previously evaluated an eyewitness identification expert using the necessary *Daubert* framework, as adopted by Arkansas in *Farm Bureau Mutual Insurance Co. of Arkansas v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000). In *Foote*, this

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those at issue here were pivotal. *See, e.g., Davis v. State*, 330 Ark. 501, 508-09, 956 S.W.2d 163, 166 (1997) (allowing expert testimony of a family service worker for the Arkansas Department of Human Services as it was not unusual for child sexual abuse victims to recant allegations).

Court concluded that a trial judge, when presented with a proffer of expert scientific evidence, must, based on Arkansas Rules of Evidence 401, 402 and 702, conduct a preliminary *Daubert* inquiry focusing on the (1) reliability of the novel process used to generate the evidence, (2) possibility that admitting the evidence would overwhelm, confuse or mislead the jury, and (3) connection between the evidence to be offered and the disputed factual issues in the particular case; reliability is the critical element. *Foote*, 341 Ark. at 116–17, 14 S.W.3d at 519–20.

The question of memory formation by child eyewitnesses has become a rigorous scientific discipline. In light of the particular circumstances in this case—*namely that Mr. Johnson's conviction rests almost entirely on the uncorroborated identification of a traumatized six-year old child*—understanding memory contamination, best practices for interviewing child witnesses, and the factors contributing to the frailties of Ashley's identification are necessary to evaluate the weaknesses in her testimony and thus the materiality of any exculpatory DNA results that could be obtained through testing. Accordingly, this Court should treat eyewitness identification expert testimony as it would any "novel scientific evidence" and conduct the requisite analysis for admissibility, which Dr. Kovera easily satisfies. *Moore v. State*, 323 Ark. 529, 546, 915 S.W.2d 284, 294 (1996).

The general test used to determine the admissibility of expert testimony is whether the testimony will aid the trier of fact in understanding the evidence or in determining a fact in issue. Ark. R. Evid. 702; *Russell v. State*, 289 Ark. 533, 534, 712

S.W.2d 916, 917 (1986). A fundamental question in determining whether the testimony will aid the trier of fact is whether the situation is beyond the ability of the trier to understand and draw their own conclusions. *Utley*, 308 Ark. at 625, 826 S.W.2d at 270. "[I]f some reasonable basis exists demonstrating that a witness has knowledge of the subject beyond that of ordinary knowledge," that knowledge may be admissible as expert testimony under Rule 702. *Flowers v. State*, 373 Ark. 127, 133, 282 S.W.3d 767, 772 (2008) (quoting *Flowers v. State*, 362 Ark. 193, 210, 208 S.W.3d 113, 127 (2005)). Such determination requires an assessment of whether the reasoning or methodology the testimony is based on is scientifically valid and whether it is applicable to the facts at issue. *Flowers*, 373 Ark. at 132– 33, 282 S.W.3d at 772. The factors bearing on reliability include "the novelty of the new technique, its relationship to more established modes of scientific analysis, the existence of specialized literature dealing with the technique, the qualifications and professional stature of expert witnesses, and the non-judicial uses to which the scientific techniques are put." *Prater v. State*, 307 Ark. 180, 186, 820 S.W.2d 429, 431 (1991). Dr. Kovera's testimony satisfies all the factors of the test, and, therefore, should be admissible and considered here.

(a) The Reliability of Eyewitness Testimony Has Been the Subject of Well-Developed Scientific Scrutiny.

Scientific research establishes that there are serious questions about the reliability of the memory, perception and identification made by eyewitnesses, particularly under certain circumstances. The broad

and nearly unanimous scientific research on eyewitness identification that has emerged in the past four decades "represents the 'gold standard in terms of the applicability of social science research to the law.' Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated in real-world settings." *State v. Henderson*, 27 A.3d 872, 916 (N.J. 2011) (citation omitted). The Connecticut Supreme Court has called the scientific consensus on eyewitness identification "near perfect." *State v. Guilbert*, 49 A.3d 705, 720-21 (Conn. 2012).

(b) A Vast Body of Scientific Research, Embraced by the Majority of State and Federal Courts, Establishes the Field of Eyewitness Identification as Legitimate.

Courts, recognizing the vast body of scientific research now available, are trending toward greater acceptance of expert testimony on eyewitness identifications. *Commonwealth v. Walker*, 92 A.3d 766, 782–83 (Pa. 2014) (noting that there is a "a clear trend among state and federal courts permitting the admission of eyewitness expert testimony, at the discretion of the trial court, for the purpose of aiding the trier of fact in understanding the characteristics of eyewitness identification" and collecting demonstrative cases from 44 states, the District of Columbia, and 10 federal circuit courts). First, courts have recognized that the robust body of peer reviewed and uncontroverted scientific eyewitness identification research is generally accepted and probative in many cases. Second, courts have recognized the significant risk of wrongful conviction

based on mistaken eyewitness identification, as evidenced by the number of DNA exonerations involving eyewitness misidentification. *See Henderson*, 27 A.3d at 877-78 (noting that scientific research and studies demonstrate "that the possibility of mistaken identification is real," that many studies reveal "a troubling lack of reliability in eyewitness identifications," and that "[t]hat evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised"). Third, courts have recognized that jurors are often unfamiliar with, or hold views counter to, the research findings addressing the factors that can negatively affect the reliability of eyewitness identifications.[9] Finally, courts have recognized that expert testimony on eyewitness identification can be an important safeguard against wrongful convictions.[10]

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[9] *See Perry v. New Hampshire*, 565 U.S. 228, 264 (2012) (Sotomayor, J., dissenting) ("[J]urors routinely overestimate the accuracy of eyewitness identifications . . . ." (citing research)); *United States v. Brownlee*, 454 F.131, 142 (3d Cir. 2006) ("Thus, while science has firmly established the 'inherent unreliability of human perception and memory,' this reality is outside the 'jury's common knowledge,' and often contradicts jurors' 'commonsense' understandings." (citations omitted)); *State v. Carr*, 331 P.3d 544, 690 (Kan. 2014), *rev'd on other grounds sub nom. Kansas v. Carr*, 136 S. Ct. 633 (2016); *People v. Santiago*, 958 N.E.2d 874, 883 (N.Y. 2011).

[10] *State v. Lawson*, 352 Or. 724, 759, 291 P.3d 673, 695 (2012) ("[C]ourts around the country have recognized that traditional methods of informing factfinders of the pitfalls of eyewitness identification—cross-examination, closing argument, and generalized jury instructions—frequently are

States that categorically prohibited expert eyewitness testimony in the past have reversed course and now permit – and even encourage – such testimony. *See Guilbert*, 49 A.3d at 705 (reversing prior ban on eyewitness identification experts); *Walker*, 92 A.3d at 766 (same); *Carr*, 331 P.3d 544 (same). Other states that simply disfavored or otherwise limited expert testimony on eyewitness identification have likewise since endorsed greater reliance on expert testimony: "[I]n the 25 years since *Enis*, we not only have seen that eyewitness identifications are not always as reliable as they appear, but we also have learned, from a scientific standpoint, why this is often the case . . . today we are able to recognize that such research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony. *People v. Lerma*, 47 N.E.3d 985, 993 (Ill. 2016).

Federal courts of appeal similarly recognize the importance of eyewitness experts. The Seventh Circuit, disagreeing with a trial court ruling that eyewitness identification experts were unnecessary because jurors could evaluate the eyewitness's reliability on their own, reasoned:

> [T]he problem with eyewitness testimony is that witnesses who *think* they are identifying the wrongdoer—who are credible because they believe every word they utter on the stand—may be mistaken . . . . It will not do to reply that jurors know from their daily lives that

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not adequate to inform factfinders of the factors affecting the reliability of such identifications.").

> memory is fallible. *The question that social science can address is how fallible, and thus how deeply any given identification should be discounted.*

United States v. Bartlett, 567 F.3d 901, 906 (7th Cir. 2009) (second emphasis added); *see also, e.g., United States v. Smithers*, 212 F.3d 306, 314–18 (6th Cir. 2000) (eyewitness experts are admissible). Put simply, the reliability of the process used to generate the evidence relied upon by eyewitness identification expert witnesses is demonstrable and is rooted in clearly established scientific methods that are accepted by the majority of courts.

(c) A Strong Consensus Has Emerged That Certain Factors Negatively Affect the Reliability of Eyewitness Testimony.

Eyewitness misidentification is one of the most "pervasive factor[s] in the conviction of the innocent." Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 Vill. L. Rev. 337, 358 (2006).

It is now no longer seriously disputed that various variables significantly decrease the accuracy and reliability of eyewitness identifications. Dr. Kovera's testimony provided necessary context to the question of Ashley's memory formation and the inaccuracies presented in her testimony. (Ab. 20-36.) The accuracy of Ashley's identification and the memories that spawned it bear directly on Mr. Johnson's innocence claim and on the ability of DNA testing to raise a reasonable probability that he did not murder Ms. Heath. *See* Ark. Code Ann. § 16-112-

202(8)(B). This is particularly relevant here where Ashley's story changed profoundly at each telling.

C. Dr. Kovera's Testimony Is Directly Relevant to the Weaknesses in Ashley Heath's Memory Formation and Identification of Mr. Johnson as the Prime Suspect.

Concerns about the reliability of Ashley's testimony have been repeatedly expressed at several points throughout this litigation; however, the risk of misidentification can only sufficiently be addressed by an expert.

Dr. Kovera's testimony explored variables that may have impacted Ashley's ability to make an accurate identification. These variables include estimator variables (factors that affect the witness's ability to correctly make and store a memory of the event, including cross-racial identification, witness age, stress), as well as system variables (factors that affect how memory is retrieved, including police identification procedures and post-identification information).

Ashley may have witnessed the murder of her mother, in the dark, at the hands of a man who may have been of a different race and who brandished a weapon. Ashley's memory was likely contaminated by many conversations with individuals ranging from DPD officers to family members. These individuals targeted Mr. Johnson as a suspect before speaking to Ashley and in their questioning provided her with at least one piece of information that seriously risked contaminating her memory. As an essential part in presenting the frailty of the claims of guilt against Mr.

Johnson, the fundamental issues affecting Ashley's memory must be addressed by scientific opinion and expertise.

VIII.

CONCLUSION

WHEREFORE, this Court should reverse the Order of the Circuit Court, grant Mr. Johnson's Petition for Post-Conviction DNA testing, and hold that expert eyewitness testimony is on par with all expert testimony admitted in Arkansas, thus making Dr. Kovera's testimony admissible as evidence here.

Respectfully submitted this 8th day of November, 2018.

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IX.

CERTIFICATE OF SERVICE

I, Erin Cassinelli, certify that I have served the foregoing document to the Sevier County Prosecuting Attorney's Office, Bryan Chesshir, via electronic mail and facsimile, and David Robert Raupp, Arkansas Attorney General's Office, 323 Center Street, Suite 200, Little Rock, AR 72201, via first class mail, and the Honorable Charles A. Yeargan, Circuit Judge, via electronic mail and facsimile, this 8th day of November, 2018.

_____

Erin Cassinelli

X.

CERTIFICATE OF COMPLIANCE

Case Name: STACEY EUGENE JOHNSON V. STATE OF ARKANSAS

Docket Number: CV-18-700

Title of Brief: Appellant's brief

I hereby certify that:

I have submitted and served on opposing counsel an unredacted, and, if

required, a redacted PDF document(s) that comply with the Rules of The Supreme Court and Court of Appeals. The PDF document is identical to the corresponding parts of the paper document from which it was created as tiled with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

Identification of paper documents not in PDF format:

The following original paper documents are not in PDF format and are not included in the PDF documents(s): None

(Signature of filing party)

/s/ERIN CASSINELLI

Lassiter & Cassinelli

November 8, 2018