

FORMAL ORDER

Appendix-A

STATE OF ARKANSAS,)
SUPREME COURT)

**BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT
BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON MAY 30, 2024, AMONGST
OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:**

SUPREME COURT CASE NO. CR-12-74

TERRY DEAN BIRTS PETITIONER

V. APPEAL FROM PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION –
60CR-10-3471

STATE OF ARKANSAS RESPONDENT

PETITIONER'S PRO SE PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS OR HABEAS CORPUS AND MOTION TO REMAND TO THE TRIAL COURT FOR AN EVIDENTIARY HEARING IS DENIED. WOOD, J., WOULD DENY PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS OR HABEAS CORPUS AND DISMISS MOTION TO REMAND TO THE TRIAL COURT FOR AN EVIDENTIARY HEARING.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, KYLE E. BURTON, CLERK OF SAID SUPREME COURT, HEREBY SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 30TH DAY OF MAY, 2024.



CLERK

ORIGINAL TO CLERK

CC: TERRY DEAN BIRTS
DARNISA EVANS JOHNSON, DEPUTY ATTORNEY GENERAL

(1) majority evid was tested (couldn't determine a contribution)
(2) Advance DNA today?

07/12/23

Tiffany Grimes

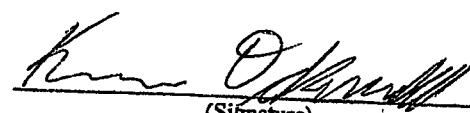
I hereby confess that I made a false confession in September of 2011 against my husband Terry Burts. I was threaten by Detective David Moss from the Arkansas State Police Department. He said if I didn't cooperate with him in getting my husband charged and convicted with murder. He was going to have the Department of Human Services to take my kids. I lied on my husband for the safety of my children. I'm here today doing what's right telling the truth. Because I was influenced on the stand and received a 10,000 dollar reward for the conviction of my husband. Tiffany Grimes



Subscribed & sworn before me, Craig C. Gerhard,
Notary Public by Tiffany Grimes, July 12th, 2023
County of Arkansas, County of Pulaski, Arkansas
Notary Public My commission expires 10/11/23

DATE: 4/30/18

I Kevin O'Donald Took A plea bargain for 10 years
~~6~~ with 6 suspended in the case with Terry dean birts
 I was charged with hindering apprehension.



(Signature)

(DO NOT WRITE BELOW LINE NOTARY PUBLIC USE ONLY)

State of Arkansas

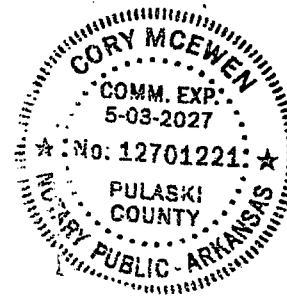
County of _____

On this the 30 day of April, 2018, before me, Cory McEwen, the undersigned notary, personally appeared Kevin O'donald, known to me (or satisfactorily proven) to be the person whose name(s) is/are subscribed to within the instrument and acknowledged that he/she/they executed the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.



Notary Public



(SEAL)

PETITIONER'S EXHIBIT 3

IN THE CIRCUIT COURT OF PULASKI COUNTY,
ARKANSAS FIFTH DIVISION

TERRY DEAN BIRTS

v.

CR 12-00074

STATE OF ARKANSAS

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

Petitioner Terry Dean Birts (“Mr. Birts” or “Petitioner”), through pro’se, respectfully petitions this Court for an order directing forensic DNA testing of biological evidence collected during the investigation of the murders of Tammy Lawrence, Ahki Hughes, and Barry Murphy pursuant to Arkansas’s Habeas Corpus – New Scientific Evidence Statute (the “Statute”) (codified at Ark. Code Ann. §§ 16-112-201, *et seq.*), and the Due Process and Cruel and Unusual Punishment Clauses of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. DNA testing of evidence is required 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).

PRELIMINARY STATEMENT

Mr. Birts has consistently asserted his innocence and denied any involvement in the 2009 murders of Tammy Lawrence, Ahki Hughes, and Barry Murphy. Today, probative biological evidence currently in the custody and control of the State may now be able to provide—through the use of modern, cutting edge DNA testing technologies—confirmation of the veracity of Mr. Birts's innocence claim.

Mr. Birts seeks to retest fingerprint evidence and residual biological evidence on prints, a condom, a cigarette butt, and a tall drinking glass, a vodka bottle, and a ceramic plate in the custody of the State seized from the residence of Lawrence and defendant on the day of the crime. Mr. Birts also seeks to have 50 caliber bullets tested that are in the custody of the State as well. The State's expert testified as to Lawrence's vehicle, Mr. Birts's right-palm print appeared between the front and rear doors on the driver's side of the exterior of the vehicle, and at the various crime scenes in this case, including the SUV in which Tammy Lawrence and Ahki Hughes were shot, the home of Tammy Lawrence and the body of Tammy Lawrence, the Arkansas State Crime Laboratory detected DNA and fingerprints that it was unable to determine a contributor. Moreover, this includes both semen and touch DNA that the State testified were unknown and deemed not relevant. The majority of this evidence was previously

tested and at the time, the State could not determine a contributor.

However, today's advanced DNA testing methods can now provide definitive answers to the questions that could not be resolved by the State's experts at trial. Indeed, this previously- unavailable testing could now demonstrate that the DNA and prints of unknown persons found throughout the crime scenes does not belong to Mr. Birts, and/or that they actually belong to Barry Murphy (the owner of the .50 gun) and Broderick Patrick. Further, if a DNA profile is obtained that excludes Mr. Birts as the source and/or points to Murphy and/or Patrick or some other person, the profile can be searched in the national CODIS DNA databank and potentially identify Ms. Lawrence, Mr. Hughes and Mr. Murphy's actual killer. As discussed *infra*, modern DNA technology has been used in numerous cases to exonerate innocent defendants who were sent to prison or death row on the same kinds of limited serology, DNA and fingerprint evidence offered by the State against Mr. Birts, after DNA testing provided more definitive and accurate results.

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 claim and undermine evidence used to convict. As the 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 be 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 L. Ed. 2d 38 (2009).

Accordingly, Mr. Birts respectfully requests that this Court grant his application for post- conviction DNA testing. In support of this motion petitioner submits the Declaration of Terry Birts (Exhibit 1).

PROCEDURAL HISTORY

B. Procedural history and pertinent facts of the case.

In Pulaski County Circuit Court Case No. CR 10-3471, on October 8, 2010, the State filed a seven-count felony information against Appellant Birts and two other persons. (Add. 15-19; R. 1-5) In the information the State alleged that on or about May 9, 2009, Appellant Birts committed three counts of premeditated and deliberated capital murder, as defined in Ark. Code Ann. 5-10-101(a)(4)(Supp. 2009). (Add. 15; R. 1) The victims were friends of Appellant Birts. Their names were Tammy Lawrence, Akhi Hughes and Barry Murphy. (Add. 15; R. 1) In the information, the State also alleged that Appellant Birts was a habitual offender with four or more prior felony convictions. (Add. 17; R. 3) In addition, in the information the State asserted that because Appellant Birts had used a firearm to

commit each of the three murders, whatever sentence of imprisonment that was imposed on him should be enhanced pursuant to Ark. Code Ann. § 16-20-120(a-b)(Supp. 2011). (Add. 17; R. 3)

Appellant Birts stood trial in Pulaski County Circuit Court on September 27-29, 2011. A jury sat as the trier-of-fact. The State waived its statutory right to seek the death penalty as punishment for capital murder. (Ab. 2; R. 154C) Because the State waived its statutory right to seek the death penalty, the only punishment possible for Appellant Birts, if the jury found him guilty of having committed capital murder, was life imprisonment without possibility of parole. Ark. Code Ann. § 5-4-

The jury found Appellant Birts guilty of having used a firearm to commit one count of capital murder, one count of first degree murder and one count of second degree murder. (Ab. 911-13; R. 1253-54) Appellant Birts waived his statutory right to be sentenced by the jury. (Ab. 913-16; R. 1255-58) The circuit court judge imposed on Appellant Birts an aggregate sentence of life imprisonment without possibility of parole. (Ab. 916-26; R. 1258-68).

The Supreme Court of Arkansas affirmed the conviction and sentence on September 27, 2012, *Birts v. State*, 2012 Ark. 348.. Mr. Birts argued on appeal that the circuit court abused its discretion in excluding fingerprint and trace-DNA evidence of unknown persons found at the crime scene and at the

residence of one of the victims

Birts subsequently filed a petition for post-conviction relief pursuant to Arkansas Rule of Criminal Procedure 37, which the Court denied. Birts then filed a Petition for Writ of Habeas Corpus in federal court. On December 8, 2015, United States District Judge Kristine G. Baker, denied Mr. Birts's actual innocence claim, his request for abeyance, his request for a hearing, and the Supreme Court's decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). *Birts v. Ark. Attorney Gen.*, Case No. 2:13-cv-00129 KGB (E.D. Ark. Dec. 8, 2014)(Dkt. No. 20).¹ The Court also denied Mr. Birts' motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e) (Dkt. No. 22).

STATEMENT OF FACTS

The exonerating potential of DNA testing in this case must be considered in tandem with the limited circumstantial evidence used to convict Mr. Birts and sentence him to multiple life term sentences. Ms. Lawrence and Mr. Hughes were found murdered on May 9, 2009, inside Lawrence's black Ford Expedition alongside I-40, and Mr. Murphy, who was found seven hours later,

¹. Petitioner hereby incorporates by reference all of the court opinions cited below and asks the court to take judicial of all filings and issues raised within these pleadings.

mortally wounded, alongside I-440.

During the September 21, 2011, the State sought a continuance of trial, after it discovered that shortly before his death, victim, Akhi Hughes, sent his girlfriend a text stating, "if anyone kills me, its David Tate or Darren Holmes."

The jury heard testimony from Tiffany Grimes, Appellant's wife, that Appellant admitted to her that he had killed all three persons. According to Grimes, she was not with Appellant when he committed the murders but saw him shortly after they had occurred, and he gave her the following explanation of events. He told her that he, Lawrence, and Hughes had been at Lawrence's residence "snorting powder and drinking," when they left in Lawrence's black sport-utility vehicle. He told Grimes that he was in the backseat and that he shot Hughes and then Lawrence. He also told Grimes that he called his cousin, Kevin O'Donald, to come pick him up, and that O'Donald brought the third victim, Murphy, with him to the scene. Appellant told Grimes that Murphy kept saying he would not tell anyone anything and that he did not see anything. Appellant then drove Murphy away, shot him in the shoulder, and threw him out of the vehicle.

The jury also heard testimony from O'Donald, who told them that Appellant called him to meet him in a parking lot and that while he waited, he heard two shots fired and saw two flashes of light inside a black vehicle that had just pulled up. O'Donald stated that he saw Appellant exit the vehicle holding a handgun. According

to O'Donald, he then followed Appellant while Appellant drove the black vehicle to a location where Appellant staged a collision. At trial, O'Donald denied that he was expecting to receive favorable treatment in exchange for his testimony against Mr. Birts.

The jury heard the following testimony from employees at the Arkansas State Crime Laboratory. Appellant's DNA was found on several items obtained at Lawrence's residence, including a condom, a cigarette butt, and a tall drinking glass. Appellant's fingerprints were also found on a vodka bottle, a ceramic plate, and a short drinking glass, all of which were also found at Lawrence's residence. As to Lawrence's vehicle, Appellant's right-palm print appeared between the front and rear doors on the driver's side of the exterior of the vehicle, but no usable prints were found inside the vehicle. The jury was also told that none of Appellant's DNA was found inside the vehicle.

The defense made a proffer of evidence that Appellant was excluded as the source of semen found in a condom that was in the bathroom trash can at Lawrence's residence. The defense also proffered evidence that Appellant was excluded as the source of DNA found on a coffee mug at Lawrence's residence. In addition, the defense made a proffer that unknown fingerprints were found on a bottle of hemp oil that was on Lawrence's night stand, and that Appellant was excluded as the source of those prints.

The jury also saw surveillance video taken from a restaurant, which was obtained by the Arkansas State Police as part of their investigation of these murders. The investigating officer explained to the jury that the surveillance video depicted Appellant, Lawrence, Hughes, and Broderick Patrick leaving the restaurant at approximately 8:54 p.m. on May 8, 2009.

The State waived the death penalty, and Appellant waived his right to be sentenced by the jury. The jury returned guilty verdicts for the capital murder of Murphy, first-degree murder of Lawrence, and second-degree murder of Hughes. Cite as 2012 Ark. 348.

Appellant's sole point on appeal was that the circuit court abused its discretion in granting the State's motion in limine to prohibit Appellant's introduction of fingerprints and trace- DNA evidence of unknown persons found inside the crime-scene vehicle and inside Lawrence's residence.

The State's motion stated in relevant part:

- 1) At the various crime scenes in this case, including the SUV in which Tammy Lawrence and Ahki Hughes were shot, the home of Tammy Lawrence and the body of Tammy Lawrence, the Arkansas State Crime Laboratory detected DNA and Fingerprints that it was unable to determine a contributor.
- 2) This DNA includes both semen and touch DNA.
....
- 3) The fact that there is unknown DNA and fingerprints located in this investigation is not relevant, and therefore inadmissible. Ark. Rules of Evidence 402 and 403.

4) Evidence that some third party committed an offense is inadmissible unless it points directly to the guilt of the third party. "Evidence that does no more than create an inference or conjecture as to another's guilt is inadmissible." Walker v. State, 353 Ark. 12, 110 S.W.3d 752 (2003); Zinger v. State, 313 Ark. 70, 852 S.W.2d 320 (1993).

In response to the motion, defense counsel argued that the defense did not intend to point the finger at any specific individual, but just wanted to make the jury a Birts v. State, 2012 Ark. 348.

ARGUMENT

The Arkansas General Assembly passed Act 1780 to address mounting concerns regarding persons who were 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.

The refined capacities of modern DNA testing can now be applied to the DNA and fingerprint evidence found at the crime scenes and potentially prove Petitioner's innocence. Given Petitioner's not guilty plea and his battle to prove his innocence,

and the State's underwhelming case against him, the remedy of DNA testing is particularly compelling.

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;

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. Birts is Innocent of Capital Murder And That The Actual Perpetrators are Murphy and Holms

All of the evidence Petitioner seeks to submit to DNA testing was obtained during the police investigation of the murder of Lawrence, Hughes and Murphy.

The biological evidence found at the crime scenes, DNA, semen and fingerprint—if subjected to the requested DNA testing procedures detailed below—has the capacity to produce new material evidence that would substantiate Mr. Birts's claim of not guilty by proving his actual innocence and demonstrating that Mr. Birts is innocent of these crimes.

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).

Petitioner is also entitled to relief under the United States Supreme Court's decision in Schlup v. Delo, 513 U.S. 298 (1996). 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 and retesting on the items collected in this case and the fingerprint evidence could establish Mr. Birts's innocence.

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.

The condom, cigarette butt, tall drinking glass, vodka bottle, ceramic plate, and short drinking glass, and fingerprints were found at the crime scene and on the driver's side of the exterior of Lawrence's vehicle but no usable prints were found inside the vehicle. The evidence seized from the crime scene have been presumably held by the State since May 2009 and have been subject to a chain of custody, and have been retained under circumstances to prevent contamination. There is no evidence demonstrating or reason to believe that the remaining biological evidence has been in any way compromised.

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 trial and others that are substantially more probative than the DNA methods available at Mr. Birts's 2011 trial 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. Birts's trial..*

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

The sensitivity of forensic DNA testing has steadily increased and improved over the last 15 years through advances in DNA extraction, detection, and analysis. Yet the routine use of conventional collection methods, for example, swabbing, cutting, taping, means that improvements in sensitivity have been limited to post-collection processing. While these conventional collection techniques are

effective for some substrates, they have limited efficacy for large, porous, absorbent, rough, and/or creviced substrates where the DNA may be too diffuse or unavailable for surface sampling. An alternative collection method which utilizes wet-vacuum technology has been developed to optimize DNA recovery from challenging items of interest where DNA may be absorbed within the substrate matrix.

The wet-vacuum-based collection system is designed for recovering DNA from porous substrates. The system consists of a vacuum, a hand-held collection device, a sample collection bottle, and sterile solution. It functions by dispensing the sterile solution onto a substrate while simultaneously vacuuming cellular material into the sample collection bottle. The liquid contents of the bottle are then filtered through a 0.45 polyethersulfone (PES) membrane in a two-stage filter unit, which traps and concentrates cellular material on the filter. Lastly, the filter is cut from the unit and processed for DNA extraction using common procedures.

Three methods are currently used to analyze DNA evidence. While these methods are very reliable, sometimes results cannot be obtained or are inconclusive if the quantity of the evidence is insufficient to analyze or if the evidence has been contaminated or improperly preserved. The technology used in analyzing DNA evidence is increasing in sophistication and in its ability to distinguish individuals,

so it may be possible to test evidence in the future in ways that are not possible today.

The most common form of DNA analysis is called polymerase chain reaction (PCR). The development of PCR testing has greatly advanced the field of forensic DNA testing by increasing the success rate of the analysis of old, degraded, or very small biological evidentiary samples. PCR testing has allowed investigators to analyze evidence samples that previously could not be tested because the quality or the amount of starting material was insufficient for previous DNA analysis techniques.

The PCR process works by taking very small amounts of DNA from biological evidence and making millions of copies of it. This process, often referred to as PCR amplification, creates enough DNA to allow a laboratory analyst to generate a DNA profile. The process also allows laboratory technicians to analyze degraded biological material. A group of 13 different locations is used for the analysis of evidentiary samples and to generate DNA profiles from convicted offenders for the CODIS database.

Because of the capability of PCR testing to amplify very small quantities of DNA, Mr. Birts submits that this method can be utilized to determine the identity of the unknown DNA gathered at the crime scenes, which will exonerate him by

establishing that the crime was committed by Patrick, Murphy, Darren Holmes, David Tate or some other culprit.

The other two methods used to analyze DNA evidence are restriction fragment length polymorphism (RFLP) testing and PCR testing on DNA from the mitochondria of the cell. RFLP testing usually requires a sample that has 100,000 or more cells (such as a dime-sized bloodstain) and contains DNA that is not degraded or broken into smaller fragments. RFLP has been widely used since the late 1980s and is able to exclude wrongly accused individuals. PCR testing on DNA from the mitochondria of the cell is conducted on samples that are unsuitable for RFLP or PCR nuclear DNA testing (such as dried bones or teeth, hair shafts, or samples that contain very little or highly degraded nuclear DNA). Mitochondrial DNA testing is available only in a limited number of laboratories primarily because of the time it takes to perform the tests.

Mr. Birts submits that these methods can be utilized to determine the identity of the unknown DNA gathered at the crime scenes, which will exonerate him by establishing that the crime was committed by Patrick, Murphy, Darren Holmes, David Tate or some other culprit.

At the time of Mr. Birts's trial in 2011, today's advanced methods of DNA analysis were unavailable. While Appellant's DNA was allegedly found on several

items obtained at Lawrence's residence, including a condom, a cigarette butt, and a tall drinking glass, Appellant seeks to have the items retested, and the 50 cal. bullets, which will show that the bullets can be traced back to Broderick Patrick, who recently purchased the bullets that killed the victims. The bullets are listed as States's Exhibits **SFEVA 2 and 3.**

For example, the discovery of Murphy, Patrick, Darren Holmes, David Tate or some other suspect DNA on a single item of highly probative evidence could wholly exculpate Petitioner as the perpetrator. Given the State's argument that Petitioner killed all three victims, the presence of any of the aforementioned or some unknown persons DNA foreign to Petitioner 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, InvestigationsAidedat<https://www.fbi.gov/services/laboratory/biometricanalysis/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. Second, Petitioner’s alleged “confession” to his wife Tiffany Grimes (who was paid by the State) should no longer be deemed valid, as Grimes has since recanted her testimony and for the first time, revealed that she was coerced by the State and told what to say. See (Exhibit 2, Sworn Affidavit of Tiffany Grimes, dated July 12, 2023, attached hereto). This alleged “confession” is no longer valid 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, Kevin O’Donald’s testimony is should no longer be deemed credible in light of the fact that he testified falsely during trial that he was not expecting to receive favorable treatment in exchange for his testimony against Mr. Birts, when in all actuality, Mr. O’Donald lied, because he received a partial suspended sentence for his cooperation against Mr. Birts. See (Exhibit 3, Sworn Affidavit of Kevin O’Donald, dated 4/30/2023, attached). Fourth, in respect to the physical evidence against Petitioner, when carefully considered, does not amount to overwhelming evidence of his guilt. Although the State claims that Mr. Birts fingerprints and DNA were found on several pieces of items inside Lawrence’s home and in/or her vehicle, this does not prove his guilt as Mr. Birts has been inside the home and or car drinking and doing drugs on a previous

• occasion. Finally, 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.

2. *The DNA and Fingerprint testing performed by the criminalist in 2011 was the requested DNA testing of the evidence is reasonable in scope.*

New DNA testing can generate a profile that is effectively unique; Since 2009-2011, the capacities of DNA forensic science have radically improved; new forms of testing, as shown above have been discovered, and STR technologies now have several sub-categories of highly refined testing methods that are the appropriate forms of testing to be used on the types of evidence available for testing here. Further facts regarding recent developments in DNA analysis that were unavailable at Mr. Birts's trial and in earlier post-conviction proceedings can be established at a hearing on this petition, if necessary.

The proposed testing is reasonable in scope and necessary to fully prove Mr. Birts's actual innocence claim. Accordingly, the presumption against timeliness is rebutted. See A.C.A. § 16-112-202(10)(B)(iv); Carter v. State, 2015 Ark. 57, *7.

D. The Petitioner's Identity Was at Issue During the Investigation and Prosecution of Lawrence, Hughes and Murphy's Murders.

The identity of the perpetrator of the murders in this case has always been at issue as the Petitioner has maintained his actual innocence of the crimes since the time of his arrest, has consistently pleaded not guilty, and has strenuously litigated his innocence claim. Because Petitioner has never conceded these critical points – and, indeed, has challenged the State's evidence and maintained his innocence since trial – this provision of the statute is satisfied.

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 15-year 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. He consistently maintained at trial and since that time that he was not the perpetrator of this crime, and the DNA testing requested would disprove critical State evidence tending to show that he was the perpetrator. With respect to the current testing, the potential materiality of exculpatory DNA results is apparent, because the testing can: (1) show that the DNA and fingerprint evidence found at the crimes scenes did not belong to Petitioner but to Mr. Murphy, Mr. Patrick, Darren Holmes, David Tate or some other suspect; (2) if new a DNA profile links any of the aforementioned or some other suspect is obtained from DNA

or fingerprint evidence and Mr. Birts is not the source, that profile can be searched in the CODIS DNA database, and potentially identify the actual killer of the victims.

There are also important public safety interests to be served by the testing Petitioner now seeks. If Mr. Birts is actually innocent of the triple murders, then the real perpetrator of these brutal crimes has not yet been brought to justice. That individual may still be at large, or incarcerated but pending release, and thus putting other members of the public at risk of future violence. The potential for post-conviction DNA testing to identify the real perpetrator of a serious crime is not speculative: in fully 29% of the post-conviction DNA exonerations documented over a twenty-five year period (1986-2014), the same DNA testing that exonerated a wrongly convicted defendant was used to directly identify a known alternate suspect in the crime(s). *See West & Meterko, DNA Exonerations 1989-2014: Review of Data and Findings from the First Twenty-Five Years*, 79 Alb. Law Rev. 717, 730-31 (2015-16). Tragically, many of these individuals had committed still more violent crimes while the innocent defendants were wrongly incarcerated: sixty-eight of these perpetrators went on to commit at least 142 additional violent crimes – including 34 homicides and 77 rapes. *See id.* at 731.

REQUEST FOR HEARING

Mr. Birts respectfully requests that the Court schedule a hearing and appoint

counsel so that the Court can carefully consider expert and other evidence supporting this Motion for DNA testing. Pursuant to A.C.A. § 16-112-205(a), a hearing is required “unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” This is Mr. Birts’s first petition requesting relief because of the availability of new scientific testing and evidence. 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 v. State*, 2015 Ark. 57 (2015). Just as in *Carter*, Mr. Birts has alleged facts which establish his right to relief. Accordingly, this Court should schedule a hearing at which Mr. Birts may present evidence to prove all of the facts alleged in this Motion.

CONCLUSION

For all the aforementioned reasons, Petitioner’s request that DNA and fingerprint testing be performed on the evidence in this case and that the 50 cal bullets be tested for ownership—should be granted.

WHEREFORE, The Petitioner states the following requests for relief:

1. An Order granting a hearing at which Mr. Birts, through appointed counsel, may fully present the evidence supporting this motion;
2. An Order releasing the already collected evidence to an accredited, private DNA laboratory;

3. 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;
4. An Order compelling the State of Arkansas, the Pulaski 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;
5. Any other Order that the Court deems necessary to adequately protect the Petitioner's state and federal constitutional rights.

Date: 12/01/2023

Respectfully submitted,

T. Birts
Terry D. Birts

CERTIFICATE OF SERVICE

I, Terry D. Birts, hereby certify under the penalty of perjury that a copy of the foregoing motion was this 12th day of December 2023, placed in the prison legal mail system with first class postage affixed, addressed to the following party:

Dustin McDaniel, Att'y Gen. and Brad Newman,

Office of Arkansas Attorney General,
323 Center Street, Suite 200
Little Rock, AR 72201

T. Birts
Terry D. Birts

PETITIONER'S EXHIBIT 1

Declaration of Terry Dean Birts

1. My name is Terry Dean Birts.
2. I was convicted in 2011 of the capital murder of Tammy Lawrence, Ahki Hughes, and Barry Murphy. I have always maintained my innocence in this case.
3. I had an alibi and the facts of the murder as alleged by the State against me were untrue.
4. The State used forensic evidence against me in my trial. They tested evidence taken from the crime scenes, and argued to the jury that they found my DNA at the crime scenes and that they found unknown fingerprints.
5. Today, new modern DNA and fingerprint testing methods are available to test and retest the evidence. These tests will show that either Murphy or some other suspect killed the first two victims and the 50 cal bullets can be traced back to Brodrick Patrick, Barry Murphy, Darren Holmes, David Tate or some other culprit and will exonerate me.
6. New scientific evidence available now was not available at the time of trial and establishes my actual innocence.

I swear that the foregoing is true and correct to the best of my knowledge under penalty of perjury under the laws of the United States.

Dated: 12/01/2023

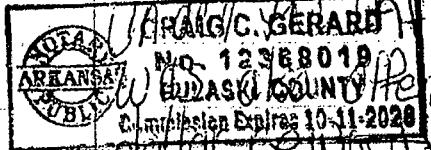
T. Birts
TERRY DEAN BIRTS

PETITIONER'S EXHIBIT 2

07/17/23

Tiffany Grimes

I hereby confess that I made a false confession in September of 2011 against my husband Terry Birts. I was beaten by Detective David Moss from the Arkansas State Police Department. He said if I didn't cooperate with him in getting my husband charged and convicted with murder He was going to have the Department of Human Services to take my kids. I lied on my husband for the safety of my children. I'm here today doing what's right telling the truth. Because I was influenced on the stand I offered and received a 10,000 dollar reward for the conviction of my husband. *Tiffany Grimes*



Subscribed & sworn before me, Craig Gerard,
Notary Publicly Tiffany Grimes, July 17th, 2023
State of Arkansas, County of Pulaski, Ex-CDL
Notary Publicly comm. exp. 10/11/28

