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CRIMINAL LAW—Rush to Judgment: Arkansas's Troubling Interpretation of DNA Statutory Law

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CRIMINAL LAW—RUSH TO JUDGMENT: ARKANSAS’S TROUBLING
INTERPRETATION OF DNA STATUTORY LAW

I. INTRODUCTION

Some murders are punishable by death.¹ But imagine a person found guilty of capital murder and sent away to live out the remaining days of life on death row. Though the person may understand that the appellate process moves slowly, the person is eager to prove innocence,² but the State will not recognize any new scientific evidence brought forth.³

This scenario is appalling, but it is a true story told by a witness to the criminal justice system which, while built to punish the guilty, is a man-made construct capable of error.⁴ People sitting on Arkansas’s death row have committed brutal murders, but true stories of powerlessness to prove innocence serve as cautionary tales that show why there is an affirmative duty to review these cases.⁵

In 2001, the Arkansas General Assembly passed a law allowing capital defendants to prove innocence.⁶ The Supreme Court of Arkansas has offered a faithful interpretation of that law’s codified statute,⁷ so it is troubling that no individual in Arkansas has been exonerated where DNA evidence was central to proving innocence.⁸ This note argues for a plain meaning interpre-

1. In a political climate wrought with moral posturing, this note is meant to offer legal arguments regarding the implementation of statutory law in Arkansas concerning DNA evidence. This note is not meant to offer any arguments pertaining to the wisdom of having the death penalty in the State of Arkansas. *See Kansas v. Marsh*, 548 U.S. 163, 187 (Scalia, J. concurring) (“There exists in some parts of the world sanctimonious criticism of America’s death penalty, as somehow unworthy of a civilized society.”).

2. “Innocent” meaning free from guilt. *Innocent*, BLACK’S LAW DICTIONARY (10th ed. 2014).

3. *See infra* Part II–III.

4. *See North Carolina v. Alford*, 400 U.S. 25, 36–40 (1970) (affirming that there are constitutional limits preventing a judge from accepting a guilty plea from a defendant who wants to plead guilty while still maintaining innocence). *See generally* DAMIEN ECHOLS, *LIFE AFTER DEATH* (2013). Echols is still a convicted murderer.

5. *Robbins v. State*, 339 Ark. 379, 382, 5 S.W.3d 51, 53 (1999). *See also* ECHOLS, *supra* note 4.

6. ARK. CODE ANN. §§ 16-112-201 to -208 (West, Westlaw through 2018).

7. *See Echols v. State*, 2010 Ark. 417, at 9–10, 373 S.W.3d 892, 899.

8. E-mail from Vanessa Meterko, Research Analyst, Innocence Project Comm’n, to author (Sept. 9, 2017, 2:58 PM) (on file with author).

tation of the Arkansas DNA statutes⁹ and a more explicit standard favorable to innocence in light of recent technological advancement.¹⁰

This note first discusses flaws in the forensic science used to secure convictions and advances in that science used for exoneration today.¹¹ Next, it argues for a plain meaning interpretation of the Arkansas DNA statutes in contradistinction to the State's interpretation.¹² Last, it identifies a powerful incentive for the State to keep capital murder convictions final despite newly available evidence.¹³

II. BACKGROUND

In February 2017, eight men on Arkansas death row were set to die in the span of four nights before the expiration of a key drug in a lethal injection cocktail.¹⁴ Hundreds of people came to the State Capitol to protest.¹⁵ News of the executions raised questions about the state of capital punishment in Arkansas and engendered moral and political posturing from those opposed to it.¹⁶ Prominent members of the Arkansas legal community have been outspoken on this subject—addressing cases involving capital punishment and defendants' attempts to acquire relief.¹⁷

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

10. *See infra* Part II–III.

11. *See infra* Part II.

12. *See infra* Part III.

13. ARK. CODE ANN. §§ 16-112-201 to -208; *see infra* Part III. *See generally* SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 1 (2012), https://www.law.umich.edu/special/exoneration/documents/exonerations_us_1989_2012_full_report.pdf.

14. Liliana Segura, *Arkansas Justice: Racism, Torture, and Botched Execution*, INTERCEPT (Nov. 12, 2017, 9:22 AM), <https://theintercept.com/2017/11/12/arkansas-death-row-executions-kenneth-williams/>.

15. *See generally id.*

16. *See generally id.*

17. Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence"*, 22 U. ARK. LITTLE ROCK L. REV. 629, 629–30 (2000) (explaining that "[u]ndoubtedly, most Arkansans believe that a rational society would not acquiesce to a system of laws permitting incarceration or execution of innocent persons, and they are unlikely to accept the proposition that our jurisprudence provides no remedy for innocent persons wrongfully imprisoned. However, in Arkansas, a person with newly discovered, incontrovertible proof of actual innocence, discovered post-trial, has limited judicial recourse."). Justice Josephine Linker Hart now sits on the Supreme Court of Arkansas. *Associate Justice Josephine L. Hart, Position 4*, ARK. JUDICIARY, <https://www.arcourts.gov/courts/supreme-court/justices/associate-justice-josephine-l-hart-position-4> (last visited Oct. 7, 2018). *See also* Niraj Chokshi, *False Confessions, Mistaken Witnesses, Corrupt Investigators: Why 139 Innocent People Went to Jail*, N.Y. TIMES (Mar. 14, 2018), <https://www.nytimes.com/2018/03/14/us/convict-exonerations-2017.html> (noting that, in 2017, at least 139 individuals

A. The Probative Value of DNA Evidence

Death penalty cases are unique because these defendants, many of whom were convicted based upon—what has been discovered to be—faulty forensic science and eyewitness testimony, are fighting for their lives.¹⁸ In the wake of newly available scientific evidence, private measures and philanthropic efforts have been employed to provide direct representation or assistance in post-conviction cases to prove innocence through DNA testing.¹⁹ The Innocence Project is a helpful source for determining any given state’s treatment of newly discovered evidence.²⁰ Vanessa Meterko, who is part of the Science & Research Department at the Innocence Project, wrote, “Unfortunately the Innocence Project doesn’t have any Arkansas cases in our database of DNA exonerees.”²¹ The Innocence Project tracks cases of official exoneration in which DNA was central to proving innocence.²² Pres-

in the United States were exonerated thanks to private efforts dedicated to freeing the wrongfully convicted).

18. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (noting that the difference of the death penalty from all other forms of punishment is that it calls for increased scrutiny on federal grounds); *Johnson v. State*, 326 Ark. 430, 437–38, 934 S.W.2d 179, 182 (1996) (a conviction with great reliance on the admission of a six-year-old’s hearsay evidence via a police officer’s testimony); *Nooner v. State*, 322 Ark. 87, 101–02, 907 S.W.2d 677, 684–85 (1995) (a conviction relying heavily on identification testimony in lieu of direct evidence); *Bloodsworth v. State*, 76 Md. App. 23, 33, 543 A.2d 382, 387 (1988) (a conviction based primarily on the basis of eyewitness identification); *see also Furman v. Georgia*, 408 U.S. 238, 290 (Brennan, J., concurring) (“Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity . . . [T]he finality of death precludes relief.”); *see also* Craig M. Cooley, *Reforming the Forensic Science Community to Avoid the Ultimate Injustice*, 15 STAN. L. & POL’Y REV. 381, 382–83 (2004) (“[There is] increased attention directed toward the capital punishment system [which] can be directly attributed to its pitiable state. The capital punishment systems operating throughout the United States seldom operate in an efficient and fundamentally fair manner given that death sentences are frequently overturned for various constitutional reasons.”).

19. INNOCENCE PROJECT, <https://www.innocenceproject.org/exonerate/> (last visited Oct. 14, 2018); *see also* HENRY ROLLINS, *BROKEN SUMMERS* (2003) (ebook). Henry Rollins and other notable performers including Iggy Pop, the late Lemmy Kilmister of Motörhead, and Public Enemy’s Chuck D united for recording sessions and a subsequent tour to raise money for DNA testing previously untested in the West Memphis Three case. *Id.* at 235 (According to Rollins, the goal was facts, explaining that “[t]o pursue this end doesn’t make me in any way an advocate of harm to children or for those who harm them. . . . If you are convinced of the [West Memphis Three’s] guilt then you won’t have a problem with some evidence being tested, because if conclusive results are derived, it will only point to the ones presently incarcerated, thus anchoring your position in absolute truth.”).

20. E-mail from Vanessa Meterko, *supra* note 8.

21. *Id.*

22. *See id.*

ently, no one in Arkansas has been exonerated where post-conviction DNA evidence was central to establishing innocence.²³

Though Arkansas has fallen behind when it comes to exoneration, there are statistics revealing wrongful convictions nationwide.²⁴ Since the first DNA exoneration in 1989, 362 individuals in the United States have been exonerated by DNA testing, twenty of whom served time on death row.²⁵ Organizations dedicated to freeing the innocent are burdened with numerous claims of innocence, prosecutors vehemently fighting these claims “to the hilt,” and appellate courts’ deference to the verdict entered.²⁶

23. NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016, at 5 (2017), https://www.law.umich.edu/special/exoneration/documents/exonerations_in_2016.pdf (In 2016, “[t]here were 166 exoneration in 2016, including 153 in 25 states and the District of Columbia, plus 10 federal cases, and 3 in Puerto Rico. The states with the most exoneration are, in order: Texas, Illinois, New York, California, North Carolina, Oregon, Pennsylvania, Michigan, Oklahoma, and Virginia.”); see also Samuel R. Gross, *The Staggering Number of Wrongful Convictions in America*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a_story.html?utm_term=.fdd80f203513 (“[These] cases are fascinating and important, but [haunting]: So many of them are stories of destruction and defeat.”).

24. NAT’L REGISTRY OF EXONERATIONS, *supra* note 23, at 2–3, 17–18 (case by case statistical gathering of exoneration in which eighty-four exoneration involved pernicious conduct by the state, eighty-seven included perjury or a false accusation, and noting “DNA exoneration now account for 21% of the exoneration in the Registry through 2017 (459/2,161)”); see Robert Barnes, *Supreme Court Confronts Conflicting Laws on Post-Conviction DNA Testing*, WASH. POST (Feb. 14, 2011, 12:29 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/13/AR2011021303415.html> (discussing Dallas County District Attorney Craig Watkins organization of a special unit for DNA testing, which, in the span of four years, exonerated twenty-one men convicted in the Dallas area through DNA testing).

25. *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, <https://www.innocenceproject.org/access-post-conviction-dna-testing/> (last visited Nov. 5, 2017) (“Some laws present insurmountable hurdles to the individual seeking access, putting the burden on the wrongfully convicted person to effectively solve the crime and prove that the DNA evidence promises to implicate another individual.”); see, e.g., *Skinner v. Switzer*, 562 U.S. 521 (2011) (after exhausting all available avenues of relief, the defendant was less than an hour from entering the death chamber when the Texas Supreme Court stayed his execution to consider possible due process issues by state courts which opted not to provide ways to compel the State to conduct DNA testing on the critical evidence used to convict him).

26. NAT’L REGISTRY OF EXONERATIONS, *supra* note 23, at 17–18 (“We may well continue to see record numbers of exoneration in years to come. The room for growth is essentially unlimited. The mass of innocent defendants who could be helped dwarfs the help that is available.”). Those working toward a wider acceptance of exoneration have a long fight ahead of them.

Wrongful convictions have become an incentive for reform of the criminal justice system.²⁷ Kirk Bloodsworth was the first death row inmate to be exonerated through DNA evidence.²⁸ Convicted in 1984 for the horrific killing of a child, he spent eight years on Maryland death row.²⁹ After he gained his freedom, the Kirk Bloodsworth Postconviction DNA Testing Grant Program became law.³⁰ This competitive grant program provides funding to states “to help defray the costs associated with postconviction DNA testing.”³¹

B. Scientific Development and the Arkansas DNA Statutes

This section will first examine the past faults of forensic science and eyewitness testimony which the present-day criminal justice system should recognize.³² Next, it will look at Arkansas statutory law enacted in light of scientific advancement capable of showing innocence.³³

27. Gross, *supra* note 23 (“We can do better, of course—for misdemeanors, for death penalty cases and for everything in between—if we’re willing to foot the bill. It’ll cost money to achieve the quality of justice we claim to provide: to do more careful investigations, to take fewer quick guilty pleas and conduct more trials, and to make sure those trials are well done. But first we have to recognize that what we do now is not good enough.”).

28. *Bloodsworth v. State*, 76 Md. App. 23, 33, 543 A.2d 382, 387 (1988) (convicting Kirk Bloodsworth of the crime of murder primarily on the basis of eyewitness identification). Bloodsworth was later exonerated via DNA testing in 1993. *See Kirk Bloodsworth*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/kirk-bloodsworth/> (last visited Oct. 14, 2018); *see also* Gregory Bayne, *Bloodsworth: Kirk Bloodsworth Tells His Story*, YOUTUBE (Nov. 3, 2011), <https://www.youtube.com/watch?v=qjAOw-n3CxQ>. At approximately 2:30 PM on July 24, 1984, the body of nine-year-old Dawn Hamilton was found dead lying face down in a pile of leaves. *Id.* This is the crime an honorably discharged marine with no criminal record was charged with. *Id.* Bloodsworth later remarked, “When that 400-pound door slammed shut like the tailgate off of a dump truck, my life was over.” *Id.*

29. *Kirk Bloodsworth*, *supra* note 28.

30. 34 U.S.C. § 40727 (2018).

31. *Id.* (authorizing \$10,000,000 to be appropriated from 2017 through 2021 to carry out the goals of the statute); *see also* 34 U.S.C. § 40724 (2018) (creating grants for research and advancement for purposes of improving forensic DNA technology “including increasing the identification accuracy and efficiency of DNA analysis, decreasing time and expense, and increasing portability”).

32. *See* Cooley, *supra* note 18, at 388 (“The point is that the American public, if not the world, is being perpetually inundated with distorted perceptions of forensic science’s capabilities.”).

33. Act of Apr. 19, 2001, No. 4, sec. 1, 2001 Ark. Acts 1780 (codified at ARK. CODE ANN. § 16-112-201 (2018)) (providing remedies for innocent persons who may be exonerated through DNA evidence).

1. *Faulty Evidence's Role in Wrongful Conviction*

Over recent decades, advancements in science and technology have proven that numerous capital convictions have been based on faulty science and unreliable eyewitness testimony.³⁴ The Supreme Court has held that DNA testing's ability to link an individual to a crime should be considered highly reliable³⁵ and over the past twenty-five years, as the use of DNA testing has become commonplace, the courts have had to adapt.³⁶

Since the landmark case *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, there has been a change in the judicial gatekeeping of novel scientific evidence.³⁷ In Arkansas, many years before *Daubert*, expert testimony was

34. See Michael J. Saks, *Banishing Ipse Dixit: The Impact of Kumho Tire on Forensic Identification Science*, 57 WASH. & LEE L. REV. 879, 879 (2000) (protesting the shoddy science that has been offered to courts, "for much of the twentieth century, the courts readily admitted these fields, apparently because they were flying the banner of science and not because they presented sound data supporting their claims." Eyewitness testimony has also been found to be unreliable.); see Gross, *supra* note 23; see, e.g., *Bloodsworth v. State*, 76 Md. App. 23, 33, 543 A.2d 382, 387 (1988) (revealing a greater understanding of the mechanics of memory that may not be intuitive to a layperson, and holding that trial courts should recognize these scientific advances in exercising their discretion whether to admit such expert testimony in a particular case); see also Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 NAT'L ACAD. OF SCI. 7230, 7233 (2014) (showing that 4.1% of those sentenced to death in the United States are later shown to be innocent. That is 1 in 25 people). *But see* *United States v. Brownlee*, 454 F.3d 131, 141–42 (3d Cir. 2006) ("The recent availability of post-conviction DNA tests demonstrate that there have been an overwhelming number of false convictions stemming from uninformed reliance on eyewitness misidentifications '[E]yewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, is among the least reliable forms of evidence.'" (quoting A. Daniel Yarmey, *Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?*, 42 CANADIAN PSYCHOL. 92, 93 (2001))); *but see* *Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996) (convicted on great reliance of the testimony of a six-year-old).

35. Dist. Attorney's Office for the Third Judicial Dist. v. *Osborne*, 557 U.S. 52, 73–74 (2009) (holding that DNA testing has the ability to exonerate the innocent, identify guilty parties, and effectively improve the criminal justice system as a whole).

36. Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, 76 ALA. L. REV. 717, 717 (2016) ("During the last quarter century there have been 325 DNA exonerations in the United States (1989-2014). What seemingly started out as a few tragic examples of wrongful convictions has turned into a growing body of cases (and individuals), allowing for deep investigation and research to determine why these injustices occur and how they might be prevented."); see also *Osborne*, 557 U.S. at 55 (noting that the criminal justice system, at both the state and federal levels, has developed unique approaches ensuring that DNA evidence can be assimilated).

37. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (holding that scientific evidence must be based on scientific principles); see, e.g., *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1036 (S.D.N.Y. 1995) (holding that were forensic document examination, for example, applied to the scrutiny of *Daubert*, it would be excluded).

held admissible based solely on the judge's discretion.³⁸ Change came in 1991 with *Prater v. State*, which opted for a "relevancy approach" as a standard for admitting novel scientific evidence.³⁹ However, there is key language absent from the "reliability" prong of the approach.⁴⁰ Under *Prater*, the governing law at the time of the convictions relevant to this note, a proponent may present novel scientific evidence without having to demonstrate whether the science has a proven track record.⁴¹

This language has caused numerous problems when presenting scientific evidence in court. For example, expert testimony on forensic identification, while found to be faulty in recent years, has been a very powerful form of evidence to secure convictions.⁴² Expert witnesses have a tendency to exaggerate, and the medical examiner is sometimes just another arm of the prosecution.⁴³ Examples include testimony suggesting a group of character-

38. *Ratton v. Busby*, 230 Ark. 667, 674, 326 S.W.2d 889, 894 (1959); *see also* *Lee v. Crittenden County*, 216 Ark. 480, 226 S.W.2d 79, 81–82 (1950). In *Lee*, Crittenden County, Arkansas sued the defendant for damages when his elevator shaft struck a radio tower owned by the county. *Id.* at 481, 226 S.W.2d at 80. The trial court allowed a witness with less than two years of general experience in the area of constructing towers to testify. *Id.* at 483, 226 S.W.2d at 81.

39. *Prater v. State*, 307 Ark. 180, 186, 820 S.W.2d 429, 431 (1991). This approach under *Prater* "requires that the trial court conduct a preliminary inquiry which must focus on (1) the reliability of the novel process used to generate the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse or mislead the jury, and (3) the connection between the novel process evidence to be offered and the disputed factual issues in the particular case." *Id.*, 820 S.W.2d at 431.

40. *United States v. Downing*, 753 F.2d 1224, 1238–39 (3d Cir. 1985) (identifying two variables that merely "bear upon" reliability: (1) the frequency of a technique leading to incorrect results and (2) judicial notice of subsequent expert testimony disputing the merits of a particular scientific methodology).

41. *See Davasher v. State*, 308 Ark. 154, 158, 823 S.W.2d 863, 866 (1992) (rejecting defendant's argument that the scientific methodology, dog bite identification, used by an expert witness to secure the capital conviction had no general acceptance in science by simply reasoning that it was similar enough to human bite identification and that it was, therefore, reliable).

42. *See Ex parte Robbins*, 478 S.W.3d 678, 680 (Tex. Crim. App. 2014). In *Robbins*, a medical examiner reevaluated her testimony and opinion offered by the State of Texas at the original trial that a child's death was a homicide and stated that she could no longer stand by that testimony. *Id.* The testimony was relied on by the State of Texas as "scientific knowledge." *Id.* at 692. The court found, "on the preponderance of the evidence that, had this testimony by the medical examiner been presented at trial, the defendant would not have been convicted." *Id.* *See also Knowledge*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "scientific knowledge" as "knowledge that is grounded on scientific methods that have been supported by adequate validation.").

43. Joseph Sanders, *Science, Law, and the Expert Witness*, 72 L. & CONTEMP. PROBS. 64, 74–75 (2009) (citing a survey of experts showing that the vast majority agreed with the statement that attorneys often manipulate their experts to weaken unfavorable testimony and create favorable testimony and showing that experts abandon objectivity and become a resource for the state).

istics are unique, overstating how rare or unusual it would be to view these characteristics, implying that it is likely that the accused person is the source of the evidence, and testimony that fails to offer all possible conclusions.⁴⁴

Sometimes forensic testimony even omits the significance of an analysis establishing that a person should be excluded as a suspect in a given case.⁴⁵ One example is testimony establishing that a certain analysis is “inconclusive” when in actuality, the analysis excluded the accused.⁴⁶ Moreover, in some scenarios, this type of testimony fails to include limitations of the methodology used in the analysis, “such as the method’s error rates and situations in which the method has, and has not, been shown to be valid.”⁴⁷

The first major scientific institution to investigate the problems with forensic science across a broad spectrum was the National Academy of Sciences (NAS).⁴⁸ In a report released in 2009, the NAS found that “imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.”⁴⁹ Additionally, NAS noted that some forensic techniques, particularly those that deal with comparing patterns or features, have not been subjected to adequate scientific scrutiny.⁵⁰

More concerns regarding the validity of modern forensic science were expounded upon in another report by the President’s Council of Advisors on Science and Technology (PCAST).⁵¹ PCAST examined the research underlying specific forensic feature comparison disciplines, evaluated their accuracy and reliability, and made recommendations to various federal agencies to strengthen forensic disciplines.⁵² The most comprehensive review of forensics and its scientific validity in criminal law and procedure came in 2009 with a report by the National Research Council (NRC).⁵³

44. *Misapplication of Forensic Science*, INNOCENCE PROJECT, <https://www.innocenceproject.org/causes/misapplication-forensic-science/> (last visited Oct. 15, 2017).

45. *Id.*

46. *Id.*

47. *Id.*

48. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., STRENGTHENING FORENSIC SCI. IN THE U.S.: A PATH FORWARD 1 (2009) [hereinafter STRENGTHENING FORENSIC SCI.]; see also PRESIDENT’S COUNCIL OF ADVISORS ON SCI. AND TECH., EXEC. OFF. OF THE PRESIDENT, FORENSIC SCI. IN CRIM. CTS: ENSURING SCI. VALIDITY OF FEATURE-COMPARISON METHODS 1 (2016) [hereinafter PRESIDENT’S COUNCIL OF ADVISORS].

49. STRENGTHENING FORENSIC SCI., *supra* note 48, at 4.

50. See *id.*; see, e.g., *Davasher v. State*, 308 Ark. at 158, 823 S.W.2d at 866 (1992) (holding that comparison methodology for a dog bite mark was reliable).

51. PRESIDENT’S COUNCIL OF ADVISORS, *supra* note 48, at 1.

52. *Id.* at 2.

53. STRENGTHENING FORENSIC SCI., *supra* note 48, at 43; see also PRESIDENT’S COUNCIL OF ADVISORS, *supra* note 48.

The report revealed an unsettling pattern of defects common to many forensic methods routinely used in the justice system: most notably a dearth of rigorous studies establishing their scientific validity.⁵⁴ The report further concluded that a large amount of forensic evidence is introduced in the courtrooms of criminal cases absent any meaningful scientific validation.⁵⁵

The NRC concluded that a sizable number of scientists in the field of criminal forensics do not meet the fundamental requirements of science.⁵⁶ Additionally, PCAST agreed with that finding and noted, “[E]xpert witnesses have often overstated the probative value of their evidence, going far beyond what the relevant science can justify.”⁵⁷ Generally, PCAST concluded that there are two important gaps in the nation’s legal system: (1) a need for more clarity in the standards used for the validity of forensic methods and (2) a need to ensure that specific forensic methods have been scientifically established.⁵⁸

Both legal and lay comprehensions of forensic science are rife with falsehoods. For instance, the phrase: “[t]o a reasonable degree of scientific certainty,” commonly used in criminal trials and popular crime T.V. shows, “has no generally accepted meaning” within the scientific community.⁵⁹ Among the hundreds of convictions invalidated through DNA testing since 1989, the Innocence Project has found that forty-five percent of those cases involved misapplication of forensic science.⁶⁰ Furthermore, between the 1970s and 1990s, there were 268 cases where hair analysis done by the FBI led to a conviction and ninety-six percent of these cases utilized flawed fo-

54. STRENGTHENING FORENSIC SCI., *supra* note 48, at 4.

55. *Id.* at 107–08; *see, e.g.*, *United States v. Green*, 405 F. Supp. 2d 104, 109 (D. Mass. 2005) (acknowledging that toolmark identification testimony, without requiring documentation, proficiency testing, or evidence showing reliability, ought not to be considered lest the shoddy forensic practices will continue). *See generally* Cooley, *supra* note 18, at 381 (“It seems that the only standard the courts are requiring of forensic science is that it be incriminating to the defendant.”).

56. STRENGTHENING FORENSIC SCI., *supra* note 48, at 43. “Acceptance of the work comes as results and theories continue to hold, even under the scrutiny of peers, in an environment that encourages healthy skepticism. . . . As credibility accrues to data and theories, they become accepted as established fact and become the ‘scaffolding’ upon which other investigations are constructed.” *Id.* at 112.

57. PRESIDENT’S COUNCIL OF ADVISORS, *supra* note 48, at 3.

58. *Id.* at x (concluding that measures could be taken to reinforce the “scientific underpinnings” of the current forensic science used in the courtroom).

59. *Id.* at 30.

60. *Overturing Wrongful Convictions Involving Flawed Forensics*, INNOCENCE PROJECT, <https://www.innocenceproject.org/overturing-wrongful-convictions-involving-flawed-forensics/> (last visited Oct. 14, 2018).

rensis testimony.⁶¹ Hauntingly, by the time of this discovery, nine of the defendants in those cases had already been executed.⁶²

DNA analysis is a new development which led to serious inquiry into the validity of convictions and the forensic science used to secure them.⁶³ After DNA evidence was declared inadmissible in *People v. Castro* in 1989,⁶⁴ the scientific community and the FBI banded together to develop better standards which have led to DNA evidence becoming the most reliable scientific evidence used in the courtroom.⁶⁵

2. *The Arkansas DNA Statutes*

During its regular session in early 2001, the Arkansas General Assembly enacted a bill recognizing that “Arkansas laws and procedures should be changed in order to accommodate the advent of new technologies enhancing the ability to analyze scientific evidence.”⁶⁶ The Act, intended to exonerate the innocent, passed when DNA testing was gaining national recognition.⁶⁷

Theorists disagree with the prevailing interpretation in Arkansas regarding the issue of materially relevant DNA evidence.⁶⁸ The conflict con-

61. *Id.*

62. Michael P. Kortan, *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review*, FED. BUREAU OF INVESTIGATION (Apr. 20, 2015), <https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review>.

63. PRESIDENT’S COUNCIL OF ADVISORS, *supra* note 48, at 25.

64. 545 N.Y.S.2d 985, 999 (Sup. Ct. 1989) (holding that DNA evidence was not admissible in criminal court because the standards utilized by the crime lab were faulty).

65. *See* PRESIDENT’S COUNCIL OF ADVISORS, *supra* note 48, at 25–26 (“Once DNA analysis became a reliable methodology, the power of the technology—including its ability to analyze small samples and to distinguish between individuals—made it possible not only to identify and convict true perpetrators but also to clear mistakenly accused suspects before prosecution and to re-examine a number of past convictions.”).

66. Act of Apr. 19, 2001, No. 4, sec. 1, 2001 Ark. Acts 1780, 1780 (codified at ARK. CODE ANN. § 16-112-201 (2018)) (providing methods for preserving DNA and other scientific evidence and providing a remedy for innocent persons who may be exonerated by this evidence).

67. *Id.*; *see also* URBAN INST., POST-CONVICTION DNA TESTING & WRONGFUL CONVICTION 10–11 (2012), <https://www.urban.org/sites/default/files/publication/25506/412589-Post-Conviction-DNA-Testing-and-Wrongful-Conviction.PDF> (tracing the roots of DNA evidence as an investigative tool back to 1985. A 1983 survey showed that over 200 crime labs in the U.S. were analyzing hair, semen, and blood, but that by 2002, a similar survey revealed a dramatic transformation—over 350 labs were now delving into DNA analysis).

68. ARK. CODE ANN. § 16-112-202(c)(1)(B) (requiring that the DNA evidence presented be materially relevant to the defendant’s assertion of actual innocence). *Compare* PRESIDENT’S COUNCIL OF ADVISORS, *supra* note 48, at 26 (stating that once DNA was established as a reliable methodology, it became possible to not only identify true culprits, but also to clear the wrongfully convicted), *with* Echols v. State, 2010 Ark. 417, at 8, 373 S.W.3d 892,

cerns weighing the public's interest in keeping capital convictions final and the defendant's interest in having the ability to prove innocence. As mentioned, during the 1980s, testing capable of proving factual innocence was developed.⁶⁹ The case law discussed in this note concerns defendants who were tried and convicted before the advent of this new testing.⁷⁰ Thus, evidence not otherwise available at an original trial can, once available, become new evidence for purposes of acquiring relief.⁷¹ In Arkansas, a defendant may be granted a hearing if the petitioner can show, among other factors, that a new method of evidence testing exists, that a new method is substantially more probative than the testing available at the time of the conviction, or that there is some other good cause.⁷²

Since Arkansas's passage of its own DNA statutory law, the State has maintained an interpretation that ensures no one can succeed.⁷³ Though the Supreme Court of Arkansas disagrees with the interpretation from the Arkansas Attorney General's Office in *Echols v. State*, the State's interpretation—limiting evidence under the DNA Statutes to evidence of guilt—is prevailing; no individual has succeeded in finding relief through the Arkan-

897 (the State argued that DNA evidence does not have the ability to prove guilt conclusively).

69. Barnes, *supra* note 24.

70. See *infra* Section III.A; see, e.g., *King v. State*, 2013 Ark. 133, at 4, 2013 WL 1279079, at *3; *Johnson v. State*, 356 Ark. 534, 546, 157 S.W.3d 151, 161 (2004); see also Doug Plank, *Convicted Defendants' Access to DNA Evidence*, NAT'L LEGAL RES. GROUP, INC.: CRIM. L. BLOG (Mar. 16, 2011, 12:03 PM), <http://www.nlrg.com/criminal-law-legal-research/bid/55495/Convicted-Defendants-Access-to-DNA-Evidence>.

71. Barnes, *supra* note 24; see, e.g., *King*, 2013 Ark. 133, at 4–5, 2013 WL 1279079, at *3 (holding that DNA testing is authorized under Arkansas statutory law if the testing can provide materially relevant evidence that will significantly advance defendant's claim of actual innocence in light of all evidence presented at the original trial).

72. See, e.g., *King*, 2013 Ark. 133, at 5–6, 2013 WL 1279079, at *3 (holding that, “with respect to the fingerprint evidence” used to convict the defendant, defendant “did not demonstrate that the technology was substantially more probative than technology available when he was convicted” in 1998). But see Michael J. Saks, *Banishing Ipse Dixit: The Impact of Kumho Tire on Forensic Identification Science*, 57 WASH. & LEE L. REV. 879, 881 (2000) (arguing that forensic identification science, like fingerprinting, has no basic science to support them: “Once one appreciates the weaknesses of the bases of forensic identification science, one can better understand why the casualness of judges admitting these fields creates a serious problem . . .”).

73. *Echols v. State*, 2010 Ark. 417, at 15–16, 373 S.W.3d 892, 902. In *Echols*, it was unclear to the Arkansas Supreme Court how DNA test results alone could ever prove innocence under the State's interpretation of the DNA statutes. *Id.* at 9, 373 S.W.3d at 899. The court then declined the invitation to interpret the statutes in this way, noting, “it would render them meaningless.” *Id.* at 10, 373 S.W.3d at 899.

sas DNA Statutes.⁷⁴ The discord is palpable, especially in light of recent events in the state.⁷⁵

III. ARGUMENT

The State of Arkansas credits DNA evidence little probative value, and any chance for an evidentiary hearing is blocked by an inexplicable statutory interpretation,⁷⁶ which is clearly visible in the State's argument in the *Echols* case.⁷⁷ This section of the note will begin with an explanation of the Supreme Court of Arkansas's holding regarding the use of DNA to exonerate the innocent and, despite a faithful statutory interpretation, why no exonerations through DNA in Arkansas have come to pass.⁷⁸ Next, the note will examine the Arkansas Attorney General's argument in *Echols v. State* to keep capital convictions final despite the advances in forensic science used to secure them.⁷⁹

When Damien Echols, one of three individuals convicted and sent to death row for the 1993 murders of three West Memphis second graders, brought newly available DNA evidence showing actual innocence to the Supreme Court of Arkansas, the State argued that DNA evidence alone does not have the ability to prove innocence conclusively, that review of the appellant's case pursuant to Ark. Code Ann. § 16-112-201 *et seq.* should be limited to evidence of guilt, and that no relief should be granted to the defendant in the interests of finality in a criminal conviction.⁸⁰

74. *Id.* at 12–14, 373 S.W.3d at 900–01. The State argued that, without testing results dispositive of the identity of the true perpetrator, appellant cannot raise a reasonable probability that he was not the perpetrator and despite this argument, the State failed to offer any examples of a scenario when DNA could identify a true killer. *Id.* at 9–10, 373 S.W.3d at 899. See NAT'L REGISTRY OF EXONERATIONS, *supra* note 23 (showing no exonerations in Arkansas where DNA was central to proving innocence).

75. Segura, *supra* note 14 (noting that in April 2017, Arkansas became a highly publicized death penalty state).

76. See, e.g., *Carter v. State*, 2015 Ark. 57, at 3–6, 536 S.W.3d 123, 125–26 (holding the circuit court erred in denying defendant's motion for postconviction forensic DNA testing pursuant to ARK. CODE ANN. §§ 16-112-201 to 208 (2018) because the circuit court erred in failing to hold an evidentiary hearing under ARK. CODE ANN. § 16-112-205(a) to determine whether defendant satisfied the chain-of-custody requirements of ARK. CODE ANN. § 16-112-202(4)); *Aaron v. State*, 2010 Ark. 249, at 1–4, 2010 WL 2006568, at *1–2 (holding that the defendant, who filed a pro se motion for DNA testing sixteen years after his conviction at trial, did not include in the motion a showing that the new technology available is substantially more probative than prior testing available at the time of the original trial).

77. *Echols*, 2010 Ark. 417, at 15–16, 373 S.W.3d at 902 (holding that both the State's and original trial court's shared interpretation of the DNA statutes limiting evidence to only evidence of guilt was incorrect).

78. See *infra* Section III.A.

79. See *infra* Section III.B.

80. *Echols*, 2010 Ark. 417, at 9–10, 373 S.W.3d at 899.

A. Interpreting the Arkansas DNA Statutes in Light of Newly Available Scientific Evidence

Conflicting interpretations of the DNA Statutes in *Echols v. State* hinged on Ark. Code Ann. § 16-112-208(e)(3) which states that a motion for a new trial may be granted if the results of the DNA testing, “when considered with all other evidence in the case regardless of whether the evidence was introduced at trial, establish[es] by compelling evidence that a new trial would result in an acquittal.”⁸¹ But the Arkansas Attorney General argued that DNA evidence showing innocence is never sufficient to establish actual innocence and that additional evidence is needed to attain relief under 208(e)(3).⁸² The Attorney General also asserted that the “additional evidence,” while required, is not permitted by law; that is, only evidence of guilt should be permitted.⁸³ This view previously had been adopted by the original trial court in Echols’s case.⁸⁴ In the trial court’s order denying relief, Judge David Burnett, agreeing with the Attorney General’s contention that newly available DNA evidence, along with abundant evidence gathered in the years since the convictions were entered, held that no new evidence is to be considered under Ark. Code Ann. § 16-112-208(e)(3).⁸⁵

As the Supreme Court of Arkansas has held, the cardinal rule in all statutory-construction issues is to give full effect to the will of the legisla-

81. *Id.* at 11, 373 S.W.3d at 900 (quoting ARK. CODE ANN. § 16-112-208(e)(3) (2018)); see also Oral Argument at 6:00, *Echols*, 2010 Ark. 417, 373 S.W.3d 892 (No. CR08-1493), http://arkansas-sc.granicus.com/MediaPlayer.php?view_id=4&clip_id=71 [hereinafter Oral Argument] (explaining that the word “all” in this section is the focal point of the conflicting interpretations. The State construed “all” to mean all the evidence of guilt while Echols argued that “all other evidence” must mean the evidence presented at trial in addition to the evidence gathered in the seventeen years since the trial ended).

82. Oral Argument, *supra* note 81, at 7:15; see also Order Denying Petition for Writ of Habeas Corpus and Motion for New Trial Under ARK. CODE ANN § 16-112-201, *et seq.* at ¶ 4, *Baldwin v. State*, No. CR 93-450 (Cir. Ct. of Craighead Cty., Ark. W.D. filed Sept. 10, 2008) (on file with the Circuit Court Clerk of Craighead County, Arkansas, Western District) [hereinafter Order Denying Relief] (“Proof of actual innocence requires more than [defendant’s] exclusion as the source of a handful of biological material that is not dispositive of the identity of a killer. As his DNA-testing results offer no more than that, they are inconclusive and cannot support a hearing to evaluate his assertion of actual innocence.”).

83. Oral Argument, *supra* note 81, at 7:00.

84. *Id.*; see also ARK. CODE ANN. § 16-112-201(a) (“[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”). Review of the West Memphis Three’s request for relief, under the DNA statutes, rested on the trial court, assuming the original trial judge would be the best individual to review the case because he or she is the judge most familiar with the case to be reviewed. Oral Argument, *supra* note 81, at 7:00.

85. Order Denying Relief, *supra* note 82.

ture.⁸⁶ Though the Supreme Court of Arkansas ruled in favor of Echols in 2010, the Attorney General's interpretation of evidentiary review under the DNA Statutes has not lost support in Arkansas's highest court. Justice Rhonda K. Wood wrote in her dissent in the April 2017 appeals case *Johnson v. State*, "[W]e do not believe . . . that testing should be authorized regardless of the slight chance it may yield a favorable result."⁸⁷ However, the standard set forth in the DNA Statutes says that the evidence tested need not entirely exonerate the defendant to be materially relevant; it need only tend to significantly advance the defendant's claim of innocence.⁸⁸

It remains unclear how much probative value attained through modern DNA testing is needed for an appellant to attain a hearing under the DNA Statutes in Arkansas.⁸⁹ In *Echols*, DNA testing exculpated all three convicted men from the scene of the crime, but the evidence gathered from that testing never saw the inside of a courtroom despite the great efforts undergone to attain the evidence.⁹⁰ Both before and since *Echols* no one has ever succeeded under the DNA Statutes.⁹¹

In fighting so zealously against exoneration through DNA evidence, the State maintains a hyperbolic view of Arkansas's justice system:

The State does not shrink from [Echols's] charge that relief may never be granted under its view of the statute, but embraces it out of confidence that the Arkansas criminal-justice system does not convict the innocent. It may be fashionable to believe otherwise, and certainly the statute rep-

86. See *State v. Pinell*, 353 Ark. 129, 134, 114 S.W.3d 175, 178 (2003).

87. *Johnson v. State*, 2017 Ark. 138, at 2 (Wood, J., dissenting) (quoting *Johnson v. State*, 356 Ark. 534 536, 157, S.W.3d 151, 161 (2004)).

88. *King v. State*, 2013 Ark. 133, at 4–5, 2013 WL 1279079, at *3; see ARK. CODE ANN. § 16-112-208(e)(3); see also Petitioner Damien Echols's Motion for a New Trial at 53, *Echols v. State*, 2010 Ark. 417, 373 S.W.3d 892 (No. CR-93-450A) ("[T]he relevant question is this: is this a case where, had he or she heard all the evidence, including but not limited to the new DNA evidence described above, any reasonable juror would have a reasonable doubt as to petitioner's guilt?") (citing ARK. CODE ANN. § 16-112-208(e)(3)). See generally *House v. Bell*, 547 U.S. 518 (2006).

89. See, e.g., *Cooper v. State*, 2013 Ark. 180, at 3, 2013 WL 1776437, at *2 (per curiam) (holding that the evidence that defendant would have tested had already been previously held to have extremely low probative value by the court of appeals on direct appeal. Additionally, the defendant's identification of an alternative perpetrator was not sufficient to make the requested testing any more probative. The language of 208(e)(3) plainly states the court must place on the scale not only evidence of guilt, but also all evidence which bears on the offenses. Under the State's interpretation, if there is DNA evidence pointing to another individual and that person admits to the crime, a court cannot consider that the confession exists.)

90. Petitioner Damien Echols's Motion for a New Trial, *supra* note 88, at 46–47. Such testing was conducted at Bode Laboratories in Virginia. *Id.*

91. *Id.* at 39 ("The Arkansas Supreme Court has yet to render a decision in which it applies the statutory scheme for obtaining a new trial based on new scientific evidence to a specific set of facts.").

resents a legislative judgment that the possibility exists. Even still, the statutory correction of such a damnable wrong is available only on the most conclusive proof of innocence, not on mere disputes with evidence of guilt.⁹²

The DNA Statutes passed amidst nationwide concerns that individuals were being sent to prison, even executed, for crimes they did not commit. Hence, in passing this statute, the Arkansas legislature was recognizing that the criminal justice system is sometimes imperfect, as are all human institutions.

B. Finality of Judgments

Uncertainty abounds in the doctrines of criminal law which are used to determine when, if ever, a conviction assumes finality.⁹³ In death penalty cases, the principal argument against broadening defendants' access to DNA testing to prove innocence is the endangerment of reliance on finality of judgments.⁹⁴ But those in this camp, who argue for upholding the integrity of criminal trials, ignore the utility of newly available evidence to a point of irrationality.⁹⁵ It would be difficult to find anyone who acts with maliciousness in sending an innocent person to death and someone who acts in bad faith in lessening a person's ability to prove innocence.⁹⁶ But as statistics and case law show, "the very people who are responsible for ensuring truth and justice—law enforcement officials and prosecutors—lose sight of these obligations and instead focus solely on securing convictions."⁹⁷

92. Response to Petitioner Baldwin's Adoption of Echols's Reply in Support of Motion for a New Trial, *Baldwin v. State*, No. CR 93-450B (Cir. Ct. of Craighead Cty., Ark. W.D. filed Aug. 29, 2008) (on file with the Circuit Court Clerk of Craighead County, Arkansas, Western District); *see also* Oral Argument, *supra* note 81 at 5:00.

93. If the criminal justice system's success rate is to be tested by stacking overturned convictions based on DNA evidence against the number of felony convictions, the ratio would be permissibly negligible and qualms with our justice system should be stated particularly. NAT'L REGISTRY OF EXONERATIONS, *supra* note 23, at 2–3, 17–18 (2017). *Compare 25 Years of Wrongful Convictions: By the Numbers*, WEEK (May 23, 2012), <http://theweek.com/articles/475332/25-years-wrongful-convictions-by-numbers> (showing 2,000 wrongful convictions since 1989), with *Felony Sentences*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=233> (last visited Oct. 15, 2018) (showing an estimated 1.1 million persons convicted of a felony in state courts in 2006).

94. Plank, *supra* note 70.

95. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 348–53 (2006) (arguing that tunnel vision, intensified in the post-conviction process, leads prosecutors to focus on a specific conclusion and then filter all evidence in a case through the lens that conclusion creates).

96. INNOCENCE PROJECT, *supra* note 19.

97. *Id.* (explaining that the eye is most always on the prize: achieving a fair and just result); *see* Findley & Scott, *supra* note 95, at 328 (noting that prosecutors' offices place significant importance and pride in conviction rates. Conviction rates are also regarded to be

1. *The Meaning of Finality*

“Finality” can take on a number of different meanings and, as Associate Professor Aaron- Andrew P. Bruhl wrote, “[p]erhaps the safest answer, when it comes to litigation, is that it is never over, at least if we mean absolutely and irretrievably over.”⁹⁸ It follows that a case where the defendant has been sentenced to death reaches finality when the defendant is executed. Therefore, death penalty cases are not easily reconcilable with the doctrines of finality. According to Black’s Law Dictionary, a final judgment is “[o]ne which finally disposes of rights of parties, either upon entire controversy or upon some definite and separate branch thereof.”⁹⁹ Furthermore, “Judgment is considered ‘final’ only if it determines the rights of the parties and disposes of all the issues involved so that no future action by the court will be necessary in order to settle and determine the entire controversy.”¹⁰⁰ If it is at the imposition of a death sentence when all rights have been disposed of in a given case, then the finality Justice Brennan points to in his dissent in *Furman* should not be ignored.¹⁰¹

In *Echols*, the State asserted that the appellant’s goal under the statutes would undermine confidence in the outcome of the original trial.¹⁰² The State equated a remand to a retrial and argued that the DNA Statutes do not call for retrying cases every few years:¹⁰³ The State contended that it would be remarkable if the statute’s animating purpose is to force the State to prove guilt again or re-weight the credibility of the State’s proof of guilt.¹⁰⁴

a method for measuring the success of prosecutors); *see also* MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (AM. BAR ASS’N 1983) (giving a prosecutor not only the title of advocate, but also a “minister of justice”).

98. Aaron-Andrew P. Bruhl, *When Is Finality . . . Final? Rehearing and Resurrection in the Supreme Court*, 12 J. APP. PRAC. & PROCESS 1, 1–2 (2011). “Now, finality is a word of many meanings, so one has to be careful in using it. The particular type of finality that concerns us here is the finality that attaches when the direct appellate process has run its course. This type of finality is important because it marks the point at which a case outcome is no longer routinely subject to revision based on changes in the governing law. A case that is still on appeal is not yet final in this sense, and so an appellate court can reverse a trial court decision that was perfectly correct when rendered but that has become incorrect by the time of the appeal. After finality attaches, however, the judgment stands even if the law later changes.” *Id.*; *see, e.g.*, FED. R. CIV. P. 60(b) (providing for reopening judgments in certain circumstances).

99. *Final Judgment*, BLACK’S LAW DICTIONARY (5th ed. 1979).

100. *Id.*

101. *Furman v. Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J., concurring) (“Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity . . . [T]he finality of death precludes relief.”).

102. Oral Argument, *supra* note 81, at 23:00.

103. *Id.*

104. *Id.*

But there is no hinderance when the procedures are in place to at least inquire whether a wrong need be addressed, even if review defers to the judgment entered under the Arkansas Rules.¹⁰⁵ Moreover, the procedure for a hearing is less formal than that of a trial, generally held publicly, with definite issues of fact or of law to be tried.¹⁰⁶ While it is much the same as a trial and may terminate a final order, “[t]he introduction and admissibility of evidence is usually more lax in a hearing than in a civil or criminal trial.”¹⁰⁷

Furthermore, the Supreme Court has consistently held that federal constitutional protection requires greater procedural safeguards that may or may not be required in other cases in order to minimize the risk of arbitrariness and capriciousness in imposing death.¹⁰⁸

2. *Procedural Safeguards in Place*

Not only should special sufferance be given to death row inmates in their appeals for relief in light of newly available DNA evidence, rules currently exist within the Arkansas Code indicating that deference should be given to compensate for other errors.¹⁰⁹ Under Rule 10 of the Arkansas Rules of Appellate Procedure, even if a defendant sentenced to death waives her right of appeal, the Supreme Court will automatically conduct a review of the record for egregious and prejudicial errors.¹¹⁰ The Supreme Court of Arkansas noted in *State v. Robbins*:

In capital offenses, for many years all errors of the lower court prejudicial to the rights of appellant have been required to be heard and considered by this court and, if we found any prejudicial error by the trial court, this court was required to reverse and remand the cause for a new trial, or, in the discretion of this court, modify the judgment.¹¹¹

105. ARK. R. APP. P. CRIM. 1 (West 2018).

106. *Hearing*, BLACK’S LAW DICTIONARY (5th ed. 1979).

107. *Id.*

108. *See* *Woodward v. Alabama*, 134 S. Ct. 405, 406 (2013) (recognizing that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice (citing *Furman v. Georgia*, 408 U.S. 238, 286–91 (1972) (Brennan, J. concurring))); *see also* *Murray v. Giarratano*, 492 U.S. 1, 8–9 (1989) (Burger, C.J., concurring); *see also* *Lockett v. Ohio*, 439 U.S. 586, 605 (1978); *see also* *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (Stewart, Powell & Stevens, JJ., joint opinion).

109. ARK. R. APP. P. CRIM. 10(a) (allowing for special deference to an individual sentenced to death: “[T]he circuit court shall order the circuit clerk to file a notice of appeal on behalf of the defendant . . .”).

110. *Id.*; *see* *State v. Robbins*, 339 Ark. 379, 386, 5 S.W.3d 51, 55 (1999); *see also* *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977) (holding that the Arkansas judicial system has special broad powers to keep the impositions of the death penalty in check).

111. *Robbins*, 339 Ark. at 385, 5 S.W.3d at 54.

Rule 37.5 of the Arkansas Rules of Criminal Procedure provides increased procedural rights for individuals sentenced to death in challenging their convictions. This includes the right to appoint specialized counsel to represent the inmate in the state post-conviction process, as opposed to the situation faced by inmates not sentenced to death in Rule 37.1.¹¹²

3. *Finality and Reaching a Fair and Just Result*

A court cannot be divine. In other words, a court can be wrong.¹¹³ In the interests of pursuing justice, the criminal justice system must be able to continue to ask whether the court applied the correct rule or made the correct decision.¹¹⁴ In order to adhere to the purpose of habeas corpus, the criminal justice system “should come to terms with the possibility of error inherent in any process.”¹¹⁵ Additionally, “The task of assuring legality is to define and create a set of arrangements and procedures which provide a reasoned and acceptable probability that justice will be done, that the facts found will be ‘true’ and the law applied ‘correct.’”¹¹⁶

A convicted individual should not have limitless access to collateral proceedings permitted to disturb a resolution achieved through a painstaking criminal trial, but rather, sufferance should be given to that individual await-

112. ARK. R. CRIM. P. 37.5 (recognizing that criminal defense attorneys remain under-resourced and their clients find themselves with fewer and fewer avenues for relief, notably in post-conviction death penalty cases); *see also* United States v. Green, 405 F. Supp. 2d 104 (D. Mass. 2005) (recognizing that when liberty is hanging in the balance and, in the case of those sentenced to death, life itself, the standards should be higher across the country); *see also* Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 348 (2003) (“[O]ne weak link in the chain of ‘super due process’ that is claimed to ensure reliable death sentences has received comparatively little public attention. Incompetent habeas corpus representation occurs all too frequently in death-penalty appeals--especially in Southern states, which are less than eager to spend public funds to ensure adequate representation to indigent inmates. The issue of incompetent habeas representation is not one for the masses: Understanding the vital role post-conviction plays, and the arcane rules that control it, takes legal training. However, post-conviction proceedings are, after trial, perhaps the most common and effective means of forestalling substantive injustice in capital cases.”); *see also* ARK. R. CRIM. P. 37.1.

113. *See* Brown v. Allen, 344 U.S. 443, 540 (1952) (Jackson, J., concurring in result) (“We are not final because we are infallible, but we are infallible only because we are final.”). Finality is obviously important to the legal process because, absent finality there would be no way to know when the outcome of any legal process arrives.

114. *Id.*

115. *Id.*

116. *Id.*

ing execution.¹¹⁷ In 2017, after the Supreme Court of Arkansas granted death row inmate Stacey Johnson's motion for stay of execution and remanded for a hearing on petitioner's motion for postconviction DNA testing, Justice Rhonda K. Wood wrote in her dissenting opinion, "Today, our court gives uncertainty to any case ever truly being final in the Arkansas Supreme Court."¹¹⁸ The room for error, arbitrary enforcement, and even ill will in any man-made institution is such that allowing a decision to re-weigh evidence in light of newly available scientific evidence showing innocence serves a role paramount for convicted individuals and the public confidence.¹¹⁹

IV. CONCLUSION

The rush to carry out judgment¹²⁰ can never be reconciled with advances in technology. Though Arkansas precedent is sound, all interpretations, whether made by a court of general jurisdiction or an attorney for the State, should follow explicit available statutory schemes. Recent events in the State of Arkansas must serve as a reminder that the efforts made both inside and outside the criminal justice system furthering the interests of justice must not go unrecognized. The fruits of such efforts should garner the desired effect in adherence to the will of the legislature.

*Michael Pollock**

117. See Oral Argument, *supra* note 81, at 54:41 (acknowledging that "these are limited actions, but we must face that there is no question that the legislature intended other forms of finality to be breached by this new legislative regime.").

118. Johnson v. State, 2017 Ark. 138, at 3 (Wood, J., dissenting) (Johnson was among those eight individuals to be executed in April, 2017).

119. See also Cooley, *supra* note 18, at 388 ("As the Supreme Court has repeatedly explained, 'death is different.'").

120. Though a convicted person's appeals can take years to exhaust, a rush best describes what procedurally occurred in Arkansas in April 2017. See Lee v. State, 2017 Ark. 337, 532 S.W.3d 43.

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