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STATE OF ARKANSAS
DUSTIN McDANIEL

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October 10, 2012

Ms. Terry Hawkins
Crittenden County Circuit Clerk
Crittenden County Courthouse
100 Court Street
Marion, Arkansas 72364

VIA OVERNIGHT DELIVERY

RE: *Hicks, et al. v. The West Memphis, Arkansas Police Department, et al.*
Crittenden County Circuit No. CIV-2012-290-6

Dear Ms. Hawkins:

Enclosed please find originals and two copies of: (1) Motion to Dismiss Third Amended Petition for Declaratory Judgment, Complaint for Violations of the Arkansas Freedom of Information Act of 1967, and Appeal from Administrative Decision of Appellees; and (2) Brief in Support of Motion to Dismiss Third Amended Petition for Declaratory Judgment, Complaint for Violations of the Arkansas Freedom of Information Act of 1967, and Appeal from Administrative Decision of Appellees. Please file the originals and return file-marked copies to me in the enclosed self-addressed, stamped envelope. Thank you for your kind attention to this matter, and please feel free to contact me with any questions or concerns you may have.

Best regards,

A handwritten signature in dark ink, appearing to read "C. Jorgensen", followed by a long, sweeping horizontal line that extends to the right.

Colin R. Jorgensen
Assistant Attorney General

CRJ/jkh
Enclosures

CC: (w.encl.): Hon. Victor Hill
Mr. Scott Ellington
Mr. Ken Swindle
Mr. David Peebles

IN THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS

PAM HICKS and
JOHN MARK BYERS

PLAINTIFFS/APPELLANTS

v.

CV-2012-290-6

THE WEST MEMPHIS, ARKANSAS, POLICE
DEPARTMENT; THE CITY OF WEST MEMPHIS,
ARKANSAS; DONALD OAKES, in his Individual
and Official Capacities as Chief of Police of the West
Memphis, Arkansas, Police Department;
WILLIAM H. JOHNSON, in his Individual and Official
Capacities as Mayor of West Memphis, Arkansas; and
SCOTT ELLINGTON, in his Individual and Official
Capacities as Prosecuting Attorney for the Second
Judicial District of Arkansas

DEFENDANTS/APPELLEES

**MOTION TO DISMISS THIRD AMENDED PETITION FOR
DECLARATORY JUDGMENT, COMPLAINT FOR VIOLATIONS
OF THE ARKANSAS FREEDOM OF INFORMATION ACT OF 1967, AND
APPEAL FROM ADMINISTRATIVE DECISION OF APPELLEES**

COMES NOW Separate Defendant/Appellee Scott Ellington, in his Individual and Official Capacities as Prosecuting Attorney for the Second Judicial District of Arkansas ("Prosecutor Ellington"), and offers the following Motion to Dismiss the Third Amended Petition for Declaratory Judgment, Complaint for Violations of the Arkansas Freedom of Information Act of 1967, and Appeal from Administrative Decision of the Appellees ("Third Amended Petition") filed by Plaintiffs/Appellants Pam Hicks and John Mark Byers ("Plaintiffs"). Prosecutor Ellington is represented herein by the Office of the Arkansas Attorney General pursuant to Ark. Code Ann. § 25-16-702(a), which requires the Attorney General to serve as counsel for state agencies and entities when requested. *See id.* ("The Attorney General shall be the attorney for all state officials, departments, institutions, and agencies. Whenever any

officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention.").

1. On September 4, 2012, Plaintiffs filed their Third Amended Petition pursuant to the Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-101 et seq. ("FOIA"), against Prosecutor Ellington and other Defendants/Appellees. In their Third Amended Petition, Plaintiffs allege that their attorney, Ken Swindle, submitted an eight-page letter to Prosecutor Ellington setting forth a series of requests pursuant to the FOIA. The letter is attached to the Third Amended Petition as Plaintiffs' Exhibit 11. Prosecutor Ellington admits that he received a letter from Mr. Swindle, and that a true and accurate copy of the letter is attached to the Third Amended Petition as Exhibit 11. Plaintiffs allege that Prosecutor Ellington "acknowledged to [Mr. Swindle], both over the telephone and by electronic communication, receipt of said letter." Third Amended Petition, ¶ 5. Prosecutor Ellington admits that he acknowledged receipt of Mr. Swindle's letter by telephone and electronic communication.

2. Prosecutor Ellington affirmatively pleads that he has offered to make all responsive and non-exempt records available for Mr. Swindle's inspection and copying, in full compliance with the FOIA. Specifically, Prosecutor Ellington has informed Mr. Swindle by phone numerous times that Prosecutor Ellington will make the files delivered to Prosecutor Ellington by his predecessors available for Mr. Swindle's inspection and copying, at Prosecutor Ellington's office, with the exception only of matters exempt from disclosure under the exemption codified at Ark. Code Ann. § 25-19-105(b)(6). Prosecutor Ellington stands ready to provide reasonable access to all responsive and non-exempt records requested by Mr. Swindle, in full compliance with the FOIA.

3. Prosecutor Ellington has received a separate but substantively identical FOIA request from Mr. Laird Williams. Consistent with his response to Mr. Swindle's FOIA request, Prosecutor Ellington responded to Mr. Williams by offering to make all responsive and non-exempt records available for Mr. Williams' inspection and copying, in full compliance with the FOIA. A copy of Prosecutor Ellington's September 12, 2012 letter to Mr. Williams is attached to Prosecutor Ellington's Motion to Dismiss as Exhibit A. Prosecutor Ellington has provided the same substantive response (by telephone) to Mr. Swindle. Notably, in his letter to Mr. Williams, Prosecutor Ellington referred to the fact that he has had email correspondence with Mr. Swindle, and included copies of his email correspondence with Mr. Swindle in his response to Mr. Williams. Prosecutor Ellington's email correspondence with Mr. Swindle indicates that Prosecutor Ellington has attempted to work with Mr. Swindle to make the responsive and non-exempt records available for Mr. Swindle's inspection. By filing this pleading, Prosecutor Ellington is stating on record that he will make all responsive and non-exempt records available to Mr. Swindle and the Plaintiffs, for their inspection and copying if they so desire, in complete compliance with the FOIA.

4. Prosecutor Ellington has not violated the FOIA in this case. Prosecutor Ellington has repeatedly offered, and remains willing, to make all responsive and non-exempt records available to Mr. Swindle and the Plaintiffs, for their inspection and copying if they so desire, in complete compliance with the FOIA. The Plaintiffs' FOIA action against Prosecutor Ellington should be dismissed.

5. The Third Amended Petition against Prosecutor Ellington should be dismissed for failure to state a claim for which relief can be granted. *See* Ark. R. Civ. P. 12(b)(6).

6. The Third Amended Petition against Prosecutor Ellington should be dismissed because Prosecutor Ellington has complied with the FOIA, and will continue to comply with the FOIA by making all responsive and non-exempt records available for inspection and copying.

7. The Third Amended Petition against Prosecutor Ellington should be dismissed because Prosecutor Ellington has properly denied access to records related to an open and ongoing law enforcement investigation. *See* Ark. Code Ann. § 25-19-105(b)(6).

8. The Third Amended Petition against Prosecutor Ellington in his individual capacity should be dismissed because an FOIA request made to an individual is outside the scope of the FOIA.

9. To the extent that Plaintiffs have requested the recovery of any fees or costs against Prosecutor Ellington, the request should be denied because the recovery of fees or costs against a state official or state entity is explicitly barred by the FOIA. *See* Ark. Code Ann. § 25-19-107(e)(1).

10. In support of his Motion to Dismiss, Prosecutor Ellington relies upon the Brief being filed contemporaneously herewith and Prosecutor Ellington's September 12, 2012 letter to Mr. Laird Williams, which is attached to Prosecutor Ellington's Motion to Dismiss as Exhibit A.

WHEREFORE, Separate Defendant/Appellee Scott Ellington, in his Individual and Official Capacities as Prosecuting Attorney for the Second Judicial District of Arkansas, prays that the Third Amended Petition against him be dismissed with prejudice, and for all other just and appropriate relief.

Respectfully Submitted,

DUSTIN MCDANIEL

By:



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CERTIFICATE OF SERVICE

I, Colin R. Jorgensen, certify that on this 10th day of October, 2012, I have served the foregoing by depositing a copy in the United States Mail, postage prepaid, addressed to the following:

Ken Swindle
619 West Walnut Street
Rogers, AR 72756

Attorney for the Plaintiffs/Appellants


Colin R. Jorgensen



STATE OF ARKANSAS
Office of the Prosecuting Attorney
Second Judicial District

Scott Ellington
Prosecuting Attorney
P.O. Box 1736
Jonesboro, AR 72403
(870) 932-1513
Fax: (870) 336-4011

September 12, 2012

Mr. Laird Williams
1821 North Cleveland St.
Little Rock, AR 72207

RE: Response to Request Made Under the Arkansas Freedom of Information Act

Dear Mr. Williams:

Below please find my responses to requests made by you under the Arkansas Freedom of Information Act:

1. All records of any statement reflecting Michael Hobbs, Jr. stated Terry Hobbs (sometimes referred to herein as Hobbs) was in any way involved in the murders of Steve Branch, Michael Moore, and/or Christopher Byers.

Response: This matter is exempt from disclosure under the current investigation exception in the Freedom of Information Act, A.C.A. § 25-19-105(b)(6)

2. All records of any statement reflecting a person heard a conversation between Terry Hobbs and his brother Michael Hobbs, Sr., including, but not limited to, a statement reflecting a conversation where Hobbs stated: "I am sorry, I regret it" and Michael Hobbs, Sr. responded "you are in the clear, no one thinks you are a suspect, those guys are already in prison."

Response: This matter is exempt from disclosure under the current investigation exception in the Freedom of Information Act, A.C.A. § 25-19-105(b)(6)

3. All records concerning a person providing a statement described in items 1 or 2 above, including, but not limited to, any interview of such a person and any background check of such a person.

Response: This matter is exempt from disclosure under the current investigation exception in the Freedom of Information Act, A.C.A. § 25-19-105(b)(6)

4. All records concerning Michael Hobbs, Jr., including, but not limited to, any interview of Michael Hobbs, Jr., concerning any statement described in items 1 and 2 above and any background check of Michael Hobbs, Jr.

Response: This matter is exempt from disclosure under the current investigation exception in the Freedom of Information Act, A.C.A. § 25-19-105(b)(6)



5. All records concerning Michael Hobbs, Sr., including, but not limited to, any interview of Michael Hobbs, Sr. concerning any statement described in items 1 and 2 above and any background check of Michael Hobbs, Sr.

Response: This matter is exempt from disclosure under the current investigation exception in the Freedom of Information Act, A.C.A. § 25-19-105(b)(6)

6. All records concerning Terry Hobbs, including, but not limited to, any interview of Terry Hobbs concerning any statement described in items 1 and 2 above and any background check of Terry Hobbs.

Response: This matter is exempt from disclosure under the current investigation exception in the Freedom of Information Act, A.C.A. § 25-19-105(b)(6)

7. All records of any interview of any person concerning any statement described in items 1 and 2 above.

Response: This matter is exempt from disclosure under the current investigation exception in the Freedom of Information Act, A.C.A. § 25-19-105(b)(6)

8. All records of any test conducted on any knife in Terry Hobbs' collection of knives, including, but not limited to, any test conducted on Steve Branch's pocket knife.

EXPLANATION:

According to Pam Hicks, her son Steve Branch always carried the pocket knife his grandfather gave him. Her suspicions that Terry Hobbs might have been involved in Steve's death were exacerbated when she learned Terry Hobbs had Steve's pocket knife. She had always thought the killer took it. The West Memphis Police Department (WMPD) did not check the contents of the boys' pant pockets, but left that to the Crime Lab. http://callahan.8k.com/wm3/gitchell_letter_5_26_93.html. The WMPD asked the Crime Lab to look for the badge Michael Moore was known to wear and a pocket knife. The Crime Lab found the badge. http://callahan.8k.com/images2/ascl/lab_note.jpg. The pocket knife was not found. <http://callahan.8k.com/images/ascl/lisasakkermittechan.jpg>. After Steve Branch's pocket knife was found in Terry Hobbs' collection of knives, the collection of knives was turned over to the WMPD. This inquiry is to determine what, if anything, was done with the collection of Terry Hobbs' knives turned over to the WMPD, including Steve's pocket knife.

Response: I have no specific knowledge that the requested information is contained in the files delivered to my possession by my predecessors. Any records I have in my possession, with the exception pertaining to answers 1-7 above, will be made available at my office for your review. Please contact my assistant, Zach Morrison, to schedule a time you want to come review the items.

9. All records concerning any opportunity for Pam Hicks or Mark Byers to view the clothing and personal items associated with any of the children (Steve Branch, Christopher Byers and Michael Moore) so they may properly identify the items and advise of any discrepancies in what was found, who it belonged to, and what should have been found.

EXPLANATION:

The parents of Steve Branch and Christopher Byers were never asked to identify the clothing and personal items found at the ditch and associate them with their children. Pam Hicks and John Mark Byers requested permission to view the items of clothing and personal items found at the ditch associated with any of the children to determine if the clothing is what they last saw the child wearing on May 5, 1993, if the clothing and personal items belonged to one of the children and have been properly attributed to the correct child, and to determine what should have been, but was not, found. Pam Hicks, for example, saw all three boys after school on May 5, 1993. Michael Moore had on a wrist watch or a wrist compass. Was this found? Christopher Byers was wearing a long sleeve white shirt when he left the Hobbs' home at 4 p.m. on May 5, 1993, and when Mark Byers left Christopher at his carport on May 5, 1993, at 5:30 p.m. The shirt associated with Christopher found at the ditch is different and has never been identified as a shirt belonging to Christopher. Christopher was also wearing a medical id bracelet. Was this found?

Response: It is my understanding that Pam Hicks and Mark Byers want to examine evidence being held by the West Memphis Police Department. I have no records pertaining to these items other than email correspondence occurring since July 2012 with attorney Ken Swindle.

I have no specific knowledge that the requested information is contained in the files delivered to my possession by my predecessors. Any records I have in my possession, with the exception pertaining to answers 1-7 above, will be made available at my office for your review. Please contact my assistant, Zach Morrison, to schedule a time you want to come review the items.

10. All records of any interview of any person who saw the boys after 4 p.m. on May 5, 1993 and before 8 p.m. on May 5, 1993 reflecting what any of the boys was wearing at that time.

EXPLANATION:

Pam Hicks recalls Steve Branch changed into blue jeans and a primarily white t-shirt when he came home from school on May 5, and this was what he was wearing when she last saw him as he left her home around 3:15 to ride bikes with Michael Moore. This is what she reported Steve Branch was wearing to the WMPD in the missing person report. <http://callahan.8k.com/wm3/mprpb.html>. But at 5:45 p.m. on May 5, Steve Branch reportedly was wearing something different. Allen Bailey reported Steve was wearing white/red shorts. See, http://callahan.8k.com/wm3/allen_bailey_door.html; http://callahan.8k.com/wm3/o_bailey_statement.html. I have located no report of how Steve Branch was dressed after 5 p.m. by anyone other than Allen Bailey. Did Steve return to the Hobbs' unlocked home about 4:50 p.m., shortly after his stepfather left to take his Mother to work, to eat and perhaps change from jeans to shorts? Did Terry Hobbs return home at about 5:00 p.m. to find Steve there and give Steve permission to stay out with his friends until 6:30? It seems clear the answer to both these questions is yes. Hobbs claims he was searching for Steve from the time he let Pam off at work, and that he did not see Steve or his friends the entire day. But Hobbs' conduct (going to David Jacoby's shortly after 5:00 p.m. to play guitars) and words (telling David Jacoby Steve is riding his bike and then telling Jacoby shortly before 6:30 that he needs to go home to check on Steve) say otherwise. http://callahan.8k.com/wm3/d_jacoby_declaration.html This may explain why the boys were stripped by their killer. Pam Hicks told Officer Moore in Hobbs' presence that Steve was last seen wearing jeans, and this is what is reflected in Steve's Missing Person Report. At the first opportunity after hearing this (about 10:30), Hobbs abandoned Pam Hicks and their daughter and was gone for about an hour without explanation. http://callahan.8k.com/wm3/p_hobbs_declaration1.html (paragraph 52). This provided ample

time for Hobbs to strip the boys and replace the shorts with Steve's jeans. If Steve was in fact wearing shorts after 5 p.m., Hobbs was the only person with both the motive and opportunity to replace the shorts with jeans. Moreover, it appears Hobbs may have washed Steve's clothes on May 5, including the clothes Steve wore to school that day. When officers came to collect clothing with Stevie's scent about 10 a.m. on May 6, the only item of clothing Ms. Hicks could locate that had not been washed was Stevie's Cub Scout kerchief. No one acknowledges washing the clothes Steve Branch wore to school on May 5, 1993, but they had been washed. This may also explain why the jeans associated with Steve Branch found at the ditch are clean compared to the pants associated with Michael Moore. Compare the jeans associated with Steve, http://callahan.8k.com/images2/clothing/clothing_241.JPG with Michael's pants, http://callahan.8k.com/images2/mm_clothing/mm_clothing_225.JPG.

Response: I have no specific knowledge that the requested information is contained in the files delivered to my possession by my predecessors. Any records I have in my possession, with the exception pertaining to answers 1-7 above, will be made available at my office for your review. Please contact my assistant, Zach Morrison, to schedule a time you want to come review the items.

11. All records of any reports estimating the length of time before Steve died that he ate the green vegetable material found in his stomach during his autopsy.

EXPLANATION:

The autopsy report for Steve Branch shows his stomach contained remnants of green vegetable-like material. <http://callahan.8k.com/wm3/autsb.html> (p. 4; Alimentary Tract). Steve ate lunch at school on May 5. The menu for that day was hamburger and the pickles on the hamburger were the only green vegetable shown on the menu. http://callahan.8k.com/images/eveningtimes/school_lunch_menus.jpg. Pam Hicks does not recall Steve ate anything after school before leaving to ride bikes with Michael Moore, and certainly not any green vegetables. Pam Hicks fixed green beans and Salisbury steak for supper, but Steve did not come home to eat before she left for work. His plate was left out for him. The only logical explanation for the green vegetable-like material in Steve's stomach is that Steve returned home and ate some green beans. Given the boys reported activities on May 5, this could have occurred only between 4:50 and 5:15 p.m., or between 6:15 and 6:20. The time it takes for an active, normal 8-year old boy to digest a serving of green beans should be ascertainable to a reasonable degree of scientific certainty.

Response: I have no specific knowledge that the requested information is contained in the files delivered to my possession by my predecessors. Any records I have in my possession, with the exception pertaining to answers 1-7, above will be made available at my office for your review. Please contact my assistant, Zach Morrison, to schedule a time you want to come review the items.

12. All records of any reports and/or interviews of any person attempting to resolve any of the inconsistencies between Terry Hobbs' statements and those of other witnesses, or to confirm Hobbs' alibi, including, but not limited to, any interview conducted of David Jacoby, Bobbie Jacoby, Pam Hicks, John Mark Byers, Deborah Moyer, Jamie Clark Ballard, or Erin Clark Williams.

EXPLANATION:

Generally, proof that a person has attempted to fabricate evidence of his innocence or engaged in other conduct to obstruct justice is admissible to show the person committed the crime. See *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565, 574 (1999); *Kellensworth v. State*, 276 Ark. 127, 131, 633 S.W.2d 21 (1982); *Flowers v. State*, 30 Ark.App. 204, 207, 785 S.W.2d 242, 243 (1990). Hobbs' statements about what he did after taking Pam Hicks to work on May 5, 1993, are inconsistent with other witnesses'

statements and appear to many as an attempt to fabricate an alibi and conceal his participation in the murders of Steve, Michael and Chris. Here are some examples:

- a. Hobbs maintains he did not see Steve, Michael or Chris on May 5, 1993.

As stated above, the evidence does far more than suggest Hobbs saw the boys around 5 p.m. when he returned home from taking Pam to work. Additionally, the statements of Hobbs' neighbors directly conflict with this assertion: Hobbs saw the boys at 6:30.
http://callahan.8k.com/pdf/affidavit_jamie_clark_ballard.pdf
http://callahan.8k.com/pdf/affidavit_deborah_moyer.pdf
http://callahan.8k.com/pdf/affidavit_brandv_clark_williams.pdf

- b. Hobbs maintains he searched for Steve from the time he left Pam off at work shortly before 5 p.m. on May 5, 1993 until the next morning.

Hobbs was not searching for Steve from shortly after 5 p.m. until shortly before 6:30 p.m. on May 5, 1993. He was at Jacoby's and then at home where he saw the boys. Hobbs never suggested Stevie was missing until he returned to Jacoby's at about 6:45.
http://callahan.8k.com/wm3/d_jacoby_declaration.html

- c. Hobbs has stated he met up with John Mark Byers and Dana Moore at 6 p.m. on May 5 and searched with them until he picked Pam up from work around 9:15 p.m. on May 5.

Hobbs tried mightily to get John Mark Byers to provide him an alibi for the time period from 6:00 p.m. until 9:15 p.m. on May 5, 1993. Mr. Byers insists he did not meet Hobbs and was not with Hobbs until after Mr. Byers completed a missing person report for Chris, sometime between 8:15 and 8:30 p.m. Mr. Byers also states that when the search began of Robin Hood Hills around 8:30, all the searchers but Hobbs headed to the Devils Den area. Hobbs went in the opposite direction towards the pipe-bridge and where the boys' bodies were ultimately found.
http://callahan.8k.com/wm3/jmb_declaration.html

- d. Hobbs claims he went to the West Memphis Police Department the evening of May 5 and raised hell because he had no help finding Steve and his friends. Hobbs even claimed the WMPD had him on videotape when he was at the WMPD.

The WMPD has no record or video of Hobbs coming to the police station on May 5, 1993.
http://callahan.8k.com/hobbs_pasdar/l_mitchell_depo.pdf (p. 10)

- e. Hobbs claims that after he dropped Pam off at work, he was with somebody all night. Either Amanda, Pam, Pam's Dad, David Jacoby, John Mark Byers, or a combination of them.

The fact is Hobbs has no alibi for these periods during May 5-6, 1993: 7:00-7:45 p.m.; 8:40-9:10 p.m.; 10:30-11:30 p.m.; and 3:00 a.m.-5:30 a.m. Hobbs has never explained why he abandoned Stevie's Mother and Sister at 10:30 for about an hour. http://callahan.8k.com/wm3/p_hobbs_declaration1.html (paragraph 52). Jacoby left the search around 3:00 a.m. http://callahan.8k.com/wm3/d_jacoby_declaration.html (paragraph 15).

- f. At about dawn on May 6, 1993, Hobbs claims he saw a "black bum" at the 7th Street Bridge over 10 Mile Bayou.

When the DNA evidence implicating Hobbs became known in 2007, Hobbs introduced a "black bum" as an alternative suspect. While maintaining the State got it right and the WM3 were the murderers, Hobbs casually introduced this alternative suspect into the mix. He claims his former wife, Pam Hicks, was with him when he saw this "black bum" on the 7th Street Bridge around dawn on May 6. Pam Hobbs says this is not true. John Mark Byers likewise says there was no "black bum" mentioned

before 2007. http://callahan.8k.com/wm3/jmb_declaration.html (paragraphs 22-23);
http://callahan.8k.com/wm3/p_hobbs_declaration1.html (paragraph 63)

This is not an exhaustive list of Hobbs' inconsistent statements. The inconsistencies need to be resolved, as does Hobbs' opportunity to commit the crimes.

Response: I have no specific knowledge that the requested information is contained in the files delivered to my possession by my predecessors. Any records I have in my possession, with the exception pertaining to answers 1-7, above will be made available at my office for your review. Please contact my assistant, Zach Morrison, to schedule a time you want to come review the items.

13. All records of tests conducted on any of the shoelaces found at or near the location where the boys' bodies were discovered, including each lace used as a ligature to bind any of the boys and the lace left in one of Christopher Byers' shoe.

EXPLANATION:

Michael Moore was apparently bound by an adult shoe string that was 60 inches in length and cut in half. This lace would not have come from any of the boys' shoes; it was too long. There was a lace left in one of Chris' shoes. This means the murderer used a lace to bind the boys that did not come from one of the boys' shoes, and the murderer also disposed of a lace that did come from one of the boys' shoes. Please provide all tests conducted of the ligatures used to tie the boys.

Response: I have no specific knowledge that the requested information is contained in the files delivered to my possession by my predecessors. Any records I have in my possession, with the exception pertaining to answers 1-7 above, will be made available at my office for your review. Please contact my assistant, Zach Morrison, to schedule a time you want to come review the items.

14. All records of the interviews conducted of any of the friends of Steve Branch, Michael Moore or Christopher Byers, including, but not limited to, George Taylor and Aaron Hutcheson, or any other person who knew or might have known what the three boys had planned for the afternoon of May 5, 1993, whether Terry Hobbs helped build a tree house for the boys in the Robin Hood Hills woods, or where any of the boys may have had a secret hideout in the Robin Hood Hills woods. This request includes any interview with Bobby Posey who reported in the door-to-door interviews conducted by the WMPD in May 1993 that he saw Christopher Byers the afternoon of May 5, 1993, and that Christopher was planning on running away.

Response: I have no specific knowledge that the requested information is contained in the files delivered to my possession by my predecessors. Any records I have in my possession, with the exception pertaining to answers 1-7, above will be made available at my office for your review. Please contact my assistant, Zach Morrison, to schedule a time you want to come review the items.

15. All records indicating Steve Branch, Michael Moore and Christopher Branch were not murdered in or adjacent to the ditch where their bodies were discovered.

Response: I have no specific knowledge that the requested information is contained in the files delivered to my possession by my predecessors. Any records I have in my possession, with the exception pertaining to answers 1-7 above, will be made available at my office for your review. Please contact my assistant, Zach Morrison, to schedule a time you want to come review the items.

16. All records concerning any search or investigation of the manholes and drainage system in or adjacent to Robin Hood Hills woods as the possible location for the murders of Steve Branch, Michael Moore and Christopher Byers or as the possible location of the boys' items of clothing and property not found in the ditch. This request includes, but is not limited to, any interview of Ryan Clark to determine whether he told Terry Hobbs the boys played in a manhole and, if so, where that manhole was located and whether he searched that manhole on May 5 or 6, 1993.

EXPLANATION:

The theory of the crime presented by the State in the cases of Jessie Misskelley, Damien Echols and Jason Baldwin (the "WM3") – that the WM3 "mutilated, molested and murdered three cub scouts, tied their wrists and ankles together and shoved their bodies under the water and watched them twitch and fight until they died" – appears inconsistent with the physical evidence.

- If the boys had died in 2 to 3 feet of ditch water, there would have been appreciable water and mud in their lungs and stomachs. None of the boys had any appreciable water or mud in his lungs or stomach.
- If the boys had been staked to the mud in the bottom of the ditch immediately after death in the position in which they were found, lividity would have settled primarily on their faces and torsos. This was not the case, as lividity settled primarily on the boys' backs and buttocks.
- If the boys had been tied before they died, there would be appreciable contusions from the ligatures and a lack of animal hair under the ligatures. The minimal contusions coupled with the animal hair under the ligatures led Dr. Michael Baden, a renowned board-certified forensic pathologist, to conclude the boys were tied after death.
- There is no credible evidence the boys were sexually molested.
- There is no credible evidence the boys were mutilated with a knife.

In his 2007 statement to the WMPD, Hobbs states the Byers' boy "who was still alive" told him about a covered hole where the boys played. <http://www.youtube.com/watch?v=qhEVugsKCKY&feature=relmfu> (3:29 mark). Hobbs clarified in a deposition that it was Ryan Clark, Chris' half-brother, who told him this, and Hobbs also confirmed the "covered hole" was a manhole. Hobbs did not know if anyone searched the manholes, but states he did not search them or suggest anyone else search them.

Response: I have no specific knowledge that the requested information is contained in the files delivered to my possession by my predecessors. Any records I have in my possession, with the exception pertaining to answers 1-7 above, will be made available at my office for your review. Please contact my assistant, Zach Morrison, to schedule a time you want to come review the items.

17. The records reflecting the toe and footprints of any of the murdered children - Steve Branch, Michael Moore and Christopher Byers.

Response: I have no specific knowledge that the requested information is contained in the files delivered to my possession by my predecessors. Any records I have in my possession, with the exception pertaining to answers 1-7 above, will be made available

at my office for your review. Please contact my assistant, Zach Morrison, to schedule a time you want to come review the items.

18. The records reflecting any comparison of any of the murdered children's toe and footprints to any skin friction print obtained from the area where the boys' bodies were found.

Response: I have no specific knowledge that the requested information is contained in the files delivered to my possession by my predecessors. Any records I have in my possession, with the exception pertaining to answers 1-7 above, will be made available at my office for your review. Please contact my assistant, Zach Morrison, to schedule a time you want to come review the items.

19. The records reflecting any previous request for information made to you under the Freedom of Information Act of 1967 related to the murders of Steve Branch, Christopher Byers and Michael Moore.

Response: See answer to number 9 above. No other FOIA requests have been made to this office while I have been prosecuting attorney.

20. The records provided by you in response to any request for information made to you under the Freedom of Information Act of 1967 related to the murders of Steve Branch, Christopher Byers and Michael Moore.

Response: I have provided no records per FOIA request. I had telephone conversations with Ken Swindle when I offered to make all WM3 material available for his review with the exception of matters pertaining to questions 1-7 above.

21. The records reflecting Terry Hobbs' DNA has been run through CODIS.

Response: To my knowledge, I have no such records.

22. All records reflecting communications between you and the Office of the Arkansas Attorney General concerning the advisability of affording Damien Echols, Jason Baldwin and/or Jessie Misskelley, Jr., the opportunity to enter an Alford Plea to the murders of Steve Branch, Christopher Byers and Michael Moore.

Response: I have no records pertaining to this request.

23. All records reflecting communications between you and former prosecutor Brent Davis concerning the advisability of affording Damien Echols, Jason Baldwin and/or Jessie Misskelley, Jr., the opportunity to enter an Alford Plea to the murders of Steve Branch, Christopher Byers and Michael Moore.

Response: I have no records pertaining to this request.

24. All records reflecting communications between you and any law enforcement agent or agency, including the West Memphis Police Department and the Crittenden County Sheriff's Office, concerning the advisability of affording Damien Echols, Jason Baldwin and/or Jessie Misskelley, Jr., the opportunity to enter an Alford Plea to the murders of Steve Branch, Christopher Byers and Michael Moore.

Response: I have no records pertaining to this request.

Wherefore I have answered the requests for information set forth above fully and truthfully; and, the emails referred to in Response to Request No. 9 above are attached hereto as Exhibits A-K.

Sincerely,

A handwritten signature in blue ink, appearing to read "Scott Ellington". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Scott Ellington
Prosecuting Attorney
Second Judicial District

SE/zwm



Zach Morrison <zachmorrison@yourprosecutor.org>

Fwd: Your letter

S.A. Ellington <s.a.ellington@gmail.com>

Tue, Sep 11, 2012 at 4:21 PM

Reply-To: s.a.ellington@gmail.com

To: Zach Morrison <zachmorrison@yourprosecutor.org>

----- Forwarded message -----

From: **Scott Ellington** <scottellington@att.blackberry.net>

Date: Fri, Jul 13, 2012 at 12:14 PM

Subject: Your letter

To: Ken Swindle <Ken@swindlelawfirm.com>

In response to your emailed letter this m. morning, I have not spoken with your clients since you and I spoke 2 weeks ago. Your client's sister (Pam's sister) reached out to me. I returned a promised phone call earlier this week. In no way did I attempt to call Pam or John Mark. I am in court right now. I can call you later today to discuss this matter further.

Scott Ellington

Sent via BlackBerry by AT&T

--
Scott A. Ellington

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Ex. A



Zach Morrison <zachmorrison@yourprosecutor.org>

Fwd: Further

S.A. Ellington <s.a.ellington@gmail.com>

Tue, Sep 11, 2012 at 4:21 PM

Reply-To: s.a.ellington@gmail.com

To: Zach Morrison <zachmorrison@yourprosecutor.org>

----- Forwarded message -----

From: **Scott Ellington** <scottellington@att.blackberry.net>

Date: Fri, Jul 13, 2012 at 12:28 PM

Subject: Further

To: Ken Swindle <Ken@swindlelawfirm.com>

I re-reading your letter, I have spoken to no one in your camp since I received the FOIA request you mailed yesterday.

I agree such a contact would have been improper and unethical. I did not do that.

I only spoke to Jo Lynn like Tuesday or Wednesday as I said returning a promised call from me. I had no idea of the FOIA request coming a day or two later.

Scott Ellington

Sent via BlackBerry by AT&T

—
Scott A. Ellington

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Ex.B



Zach Morrison <zachmorrison@yourprosecutor.org>

Fwd: Pam Hicks call.

S.A. Ellington <s.a.ellington@gmail.com>

Tue, Sep 11, 2012 at 4:22 PM

Reply-To: s.a.ellington@gmail.com

To: Zach Morrison <zachmorrison@yourprosecutor.org>

----- Forwarded message -----

From: **Ken Swindle** <Ken@swindlelawfirm.com>

Date: Tue, Jul 17, 2012 at 6:40 PM

Subject: RE: Pam Hicks call.

To: scottellington@att.blackberry.net

Sorry. Thank you for telling me. She did not get your telephone number from me and I have no explanation for that. Please let me know when you anticipate your trial to be finished and good luck with your trial.

Ken Swindle

-----Original Message-----

From: Scott Ellington [mailto:scottellington@att.blackberry.net]

Sent: Tuesday, July 17, 2012 6:31 PM

To: Ken Swindle

Subject: Pam Hicks call.

For your information, your client called my cell today and left message. I will not return that call. SE Scott Ellington Sent via BlackBerry by AT&T

--

Scott A. Ellington

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Ex.C



Scott Ellington <ellington@yourprosecutor.org>

Ellington FOIA Response

4 messages

Zach Morrison <zachmorrison@yourprosecutor.org>

Tue, Jul 17, 2012 at 4:56 PM

To: Ken@swindlelawfirm.com

Cc: Scott Ellington <ellington@yourprosecutor.org>

Dear Mr. Swindle:

Per your telephone conversation with Mr. Scott Ellington on Friday, he is engaged in a capital murder trial, State v. Lard, in Greene County Circuit Court in Paragould.

Per your agreement with Mr. Ellington, you will allow the State three weeks to respond to the FOIA request posed to our office by your clients, Pam Hicks and John Mark Byers. Thank you for your consideration.

Yours,

Zach Morrison

—

Zach Morrison

*Executive Assistant for Scott Ellington,
Second Judicial District Prosecuting Attorney*

P.O. Box 1736 | Jonesboro, AR 72403

870.932.1513 - Office | 870.336.4011 - Fax | 870.351.2729 - Mobile

zachmorrison@yourprosecutor.org

Ken Swindle <Ken@swindlelawfirm.com>

Tue, Jul 17, 2012 at 5:07 PM

To: Zach Morrison <zachmorrison@yourprosecutor.org>

Cc: Scott Ellington <ellington@yourprosecutor.org>

Zach, Thank you for your letter. I do have new information for Scott, but I did not want to interrupt his trial. Could you please let me know when he anticipates the conclusion of the trial?

[Quoted text hidden]

Zach Morrison <zachmorrison@yourprosecutor.org>

Wed, Jul 18, 2012 at 10:01 AM

To: Ken Swindle <Ken@swindlelawfirm.com>

Cc: Scott Ellington <ellington@yourprosecutor.org>

Trial is scheduled to conclude Friday, July 27. However, jury selection is moving much slower than anticipated.

Zach

[Quoted text hidden]

Ex. D

Ken Swindle <Ken@swindlelawfirm.com>
To: Zach Morrison <zachmorrison@yourprosecutor.org>
Cc: Scott Ellington <ellington@yourprosecutor.org>

Wed, Jul 18, 2012 at 10:19 AM

Thank you. I will wait to speak to Scott until his trial is finished.

-----Original Message-----

From: Zach Morrison [mailto:zachmorrison@yourprosecutor.org]

Sent: Wednesday, July 18, 2012 10:02 AM

To: Ken Swindle

Cc: Scott Ellington

[Quoted text hidden]

Ex. D(2)



Scott Ellington <ellington@yourprosecutor.org>

Meeting

Ken Swindle <Ken@swindlelawfirm.com>

Sat, Jul 28, 2012 at 12:08 PM

To: Scott Ellington <ellington@yourprosecutor.org>

Scott, I trust that your trial has concluded. I would like to meet with you in person and discuss how we can resolve the concerns of Ms. Hicks and Mr. Byers quietly and quickly. Please let me know if this is possible. Thank you, in advance, for your time in this matter.

Ken Swindle

Ex. E



Scott Ellington <ellington@yourprosecutor.org>

Hicks v. WMPD

Ken Swindle <Ken@swindlelawfirm.com>

Tue, Jul 31, 2012 at 4:08 PM

To: Scott Ellington <ellington@yourprosecutor.org>

Scott, I have decided not to attend your fund-raising event with Dustin in Little Rock because I do not want to create any uncomfortable situation. I will look for other ways to show my support.

You have not responded to my email from Saturday. As I have repeatedly told you, making you a party to this lawsuit is the last thing that I want to do, but the parents do have the right to see the evidence, and currently you have not responded to their request, although I have given you every courtesy that you have asked for. If you will not even try to work with the parents to find an appropriate resolution, then obviously I will have no other option but to make you part of the lawsuit. Frankly, I am puzzled by your position. These are not only parents, they are key witnesses. I do not understand why you would not want key witnesses not to be able to view and identify the evidence with you.

Would you please let me know when we can meet and try to get this matter settled quickly and quietly? Thank you and good luck on your campaign.

Ken Swindle

Ex. F



Zach Morrison <zachmorrison@yourprosecutor.org>

Fwd: Your email

S.A. Ellington <s.a.ellington@gmail.com>

Tue, Sep 11, 2012 at 4:22 PM

Reply-To: s.a.ellington@gmail.com

To: Zach Morrison <zachmorrison@yourprosecutor.org>

----- Forwarded message -----

From: **Ken Swindle** <Ken@swindlelawfirm.com>

Date: Tue, Jul 31, 2012 at 5:24 PM

Subject: Your email

To: scottellington@att.blackberry.net

Scott, Thank you very much. I understand completely about trials. The legendary Jonesboro trial attorney Tuffy Howard said that he left a piece of himself in the courtroom after every trial. I hope that you understand that my clients are pressuring me for results. I hope that you also understand that if I would have taken political considerations into account (as I should have), that I would have waited until after November to even begin this whole thing and now I am looking for way to get it resolved quickly and quietly without giving soundbites to Republicans. I look forward to discussing this tomorrow. Thank you.

Ken

-----Original Message-----

From: Scott Ellington [mailto:scottellington@att.blackberry.net]

Sent: Tuesday, July 31, 2012 4:58 PM

To: Ken Swindle

Subject: Your email

Ken:

I have not been ignoring you. If you have ever has a 2 week jury trial you know that one doesn't walk out of court on Saturday afternoon and feel like jumping into anything else for about 48 hours. They drug me to Little Rock today and I will be calling you tomorrow.

If you are in LR you should come on by. I hear the food will be very good and the drinks plentiful.

Scott Ellington

Sent via BlackBerry by AT&T

--

Scott A. Ellington

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Ex. G

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Ex. G (2)



Zach Morrison <zachmorrison@yourprosecutor.org>

Fwd: Conference

S.A. Ellington <s.a.ellington@gmail.com>
Reply-To: s.a.ellington@gmail.com
To: Zach Morrison <zachmorrison@yourprosecutor.org>

Tue, Sep 11, 2012 at 4:23 PM

----- Forwarded message -----
From: **Ken Swindle** <Ken@swindlelawfirm.com>
Date: Mon, Aug 6, 2012 at 9:22 AM
Subject: RE: Conference
To: scottellington@att.blackberry.net

I know that you are busy, but I suspect that will only get worse in a few weeks, so the sooner the better for you. Any time Wednesday will be fine with me. Just let me know when to put it on my calendar. Thanks.

Ken
-----Original Message-----
From: Scott Ellington [mailto:scottellington@att.blackberry.net]
Sent: Monday, August 06, 2012 8:40 AM
To: Ken Swindle
Subject: Conference

We still need to talk. I have stuff today and tomorrow but maybe we can visit via telephone Wed.

Scott Ellington
Sent via BlackBerry by AT&T

--
Scott A. Ellington

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Ex. H



Zach Morrison <zachmorrison@yourprosecutor.org>

Fwd: Hicks v. WMPD

S.A. Ellington <s.a.ellington@gmail.com>

Tue, Sep 11, 2012 at 4:24 PM

Reply-To: s.a.ellington@gmail.com

To: Zach Morrison <zachmorrison@yourprosecutor.org>

----- Forwarded message -----

From: **Ken Swindle** <Ken@swindlelawfirm.com>

Date: Fri, Aug 10, 2012 at 10:45 AM

Subject: Hicks v. WMPD

To: scottellington@att.blackberry.net

Scott, I have confirmed that all defendants were served on August 1. They have 30 days from that date to file an answer and the judge will set a hearing within 7 days of their answer.

I have been pretty up-front with you on my political leanings, and I think that you understand that I do not want to rock the boat of your political campaign with this lawsuit. I hope that you also understand that the parents, both in their role as parents and as witnesses, have a right to see the evidence, and they have no interest in politics one way or the other and they are pushing me to allow them to see the evidence and for you to respond to the Freedom of Information Act request that I sent to you. I really don't even see how that is disputable. They are right, and I think that you know that they are right. This is a long way of saying that I have a narrow window to work with you and get this matter resolved, which is what I want, what the parents want, and, I hope, what you want. Would you please let me know a time when I, along with my clients and my litigation team, can meet with you privately to see if we can resolve this matter?

Ken Swindle

--

Scott A. Ellington

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Ex. I



Zach Morrison <zachmorrison@yourprosecutor.org>

Fwd: Pam Hicks/ Mark Byers

S.A. Ellington <s.a.ellington@gmail.com>

Tue, Sep 11, 2012 at 4:24 PM

Reply-To: s.a.ellington@gmail.com

To: Zach Morrison <zachmorrison@yourprosecutor.org>

----- Forwarded message -----

From: <dannyowensgop@gmail.com>

Date: Sat, Aug 11, 2012 at 6:56 PM

Subject: Pam Hicks/ Mark Byers

To: scottellington@att.blackberry.net

Mr. Ellington,

Please allow me to reintroduce myself. I am Danny Owens and, as you know, I am assisting Ken Swindle in his representation of Pam Hicks and Mark Byers in their efforts to review the evidence in the now criminal case involving the deaths of their sons, Steve Hicks and Christopher Byers.

I applied for law student employment with your office earlier this year. As I stated then, it has always been my purpose in obtaining a legal education to pursue a career in criminal prosecution. I contacted you because your district would grant the opportunity to work in a less metropolitan area than Shelby County. When I applied for the position, I had no way of knowing that I would be involved in this case today. The study of law is proving to be quite unpredictable.

I became involved with Pam Hicks when she first asked for my help concerning her son's gravestone and then later to see his bicycle and to review the evidence in this case. I made the decision to assist her, realizing that, as a law student, I could be putting my career opportunities in Arkansas and West Tennessee in jeopardy. I made the decision because, as a father, I could not say no to a parent who has suffered the violent loss of her son. I do not believe any compassionate person would have turned her away.

I respect the stand you have taken in this case. I believe a private meeting between the two of us to review whatever file that you have possession of would and to discuss this case face to face can be fruitful. As a law student I do not garner the media attention that Mr. Swindle does.

Sincerely,

Danny Owens

Sent on the Sprint® Now Network from my BlackBerry®

Ex . J

--
Scott A. Ellington

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Ex. J (2)



Zach Morrison <zachmorrison@yourprosecutor.org>

Fwd: Jonesboro

S.A. Ellington <s.a.ellington@gmail.com>
Reply-To: s.a.ellington@gmail.com
To: Zach Morrison <zachmorrison@yourprosecutor.org>

Tue, Sep 11, 2012 at 4:25 PM

----- Forwarded message -----
From: <dannyowensgop@gmail.com>
Date: Mon, Aug 13, 2012 at 10:55 AM
Subject: Jonesboro
To: scottellington@att.blackberry.net
Cc: Ken Swindle <Ken@swindlelawfirm.com>

Mr. Ellington,

I am willing to drive to your office and meet you privately on your terms this week if you will allow me to do so. I am available any day except Wednesday where I already have a commitment at the WMPD. I do not ask for much of your time - just enough to meet and discuss our requests.

It is important that we get beyond possible misconceptions and work together toward an amiable resolution. Surely reasonable people can work through this issue as it is reasonably straightforward. I understand that you have offered Mr. Swindle to meet with me and review the evidence file. I feel like there must be some misunderstanding that is preventing you from responding to me now. Again, I am willing to meet you on terms that are most comfortable to you.

I still look forward to working with you in this matter.

Sincerely,
Danny Owens
Sent on the Sprint® Now Network from my BlackBerry®

--
Scott A. Ellington

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Ex. K

IN THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS

PAM HICKS and
JOHN MARK BYERS

PLAINTIFFS/APPELLANTS

v.

CV-2012-290-6

THE WEST MEMPHIS, ARKANSAS, POLICE
DEPARTMENT; THE CITY OF WEST MEMPHIS,
ARKANSAS; DONALD OAKES, in his Individual
and Official Capacities as Chief of Police of the West
Memphis, Arkansas, Police Department;
WILLIAM H. JOHNSON, in his Individual and Official
Capacities as Mayor of West Memphis, Arkansas; and
SCOTT ELLINGTON, in his Individual and Official
Capacities as Prosecuting Attorney for the Second
Judicial District of Arkansas

DEFENDANTS/APPELLEES

**BRIEF IN SUPPORT OF MOTION TO DISMISS THIRD AMENDED
PETITION FOR DECLARATORY JUDGMENT, COMPLAINT FOR VIOLATIONS
OF THE ARKANSAS FREEDOM OF INFORMATION ACT OF 1967, AND
APPEAL FROM ADMINISTRATIVE DECISION OF APPELLEES**

COMES NOW Separate Defendant/Appellee Scott Ellington, in his Individual and Official Capacities as Prosecuting Attorney for the Second Judicial District of Arkansas ("Prosecutor Ellington"), and offers the following Brief in Support of his Motion to Dismiss the Third Amended Petition for Declaratory Judgment, Complaint for Violations of the Arkansas Freedom of Information Act of 1967, and Appeal from Administrative Decision of the Appellees ("Third Amended Petition") filed by Plaintiffs/Appellants Pam Hicks and John Mark Byers ("Plaintiffs"). Prosecutor Ellington is represented herein by the Office of the Arkansas Attorney General pursuant to Ark. Code Ann. § 25-16-702(a), which requires the Attorney General to serve as counsel for state agencies and entities when requested. *See id.* ("The Attorney General shall be the attorney for all state officials, departments, institutions, and agencies. Whenever any

officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention.”).

I. INTRODUCTION

On September 4, 2012, Plaintiffs filed their Third Amended Petition pursuant to the Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-101 et seq. (“FOIA”), against Prosecutor Ellington and other Defendants/Appellees. In their Third Amended Petition, Plaintiffs allege that their attorney, Ken Swindle, submitted an eight-page letter to Prosecutor Ellington setting forth a series of requests pursuant to the FOIA. The letter is attached to the Third Amended Petition as Plaintiffs’ Exhibit 11. Prosecutor Ellington admits that he received a letter from Mr. Swindle, and that a true and accurate copy of the letter is attached to the Third Amended Petition as Exhibit 11. Plaintiffs allege that Prosecutor Ellington “acknowledged to [Mr. Swindle], both over the telephone and by electronic communication, receipt of said letter.” Third Amended Petition, ¶ 5. Prosecutor Ellington admits that he acknowledged receipt of Mr. Swindle’s letter by telephone and electronic communication.

Prosecutor Ellington affirmatively pleads that he has offered to make all responsive and non-exempt records available for Mr. Swindle’s inspection and copying, in full compliance with the FOIA. Specifically, Prosecutor Ellington has informed Mr. Swindle by phone numerous times that Prosecutor Ellington will make the files delivered to Prosecutor Ellington by his predecessors available for Mr. Swindle’s inspection and copying, at Prosecutor Ellington’s office, with the exception only of matters exempt from disclosure under the exemption codified at Ark. Code Ann. § 25-19-105(b)(6). Prosecutor Ellington stands ready to provide reasonable access to all responsive and non-exempt records requested by Mr. Swindle, in full compliance with the FOIA.

Prosecutor Ellington has received a separate but substantively identical FOIA request from Mr. Laird Williams. Consistent with his response to Mr. Swindle's FOIA request, Prosecutor Ellington responded to Mr. Williams by offering to make all responsive and non-exempt records available for Mr. Williams' inspection and copying, in full compliance with the FOIA. A copy of Prosecutor Ellington's September 12, 2012 letter to Mr. Williams is attached to Prosecutor Ellington's Motion to Dismiss as Exhibit A. Prosecutor Ellington has provided the same substantive response (by telephone) to Mr. Swindle. Notably, in his letter to Mr. Williams, Prosecutor Ellington referred to the fact that he has had email correspondence with Mr. Swindle, and included copies of his email correspondence with Mr. Swindle in his response to Mr. Williams. Prosecutor Ellington's email correspondence with Mr. Swindle indicates that Prosecutor Ellington has attempted to work with Mr. Swindle to make the responsive and non-exempt records available for Mr. Swindle's inspection. By filing this pleading, Prosecutor Ellington is stating on record that he will make all responsive and non-exempt records available to Mr. Swindle and the Plaintiffs, for their inspection and copying if they so desire, in complete compliance with the FOIA.

II. STANDARD OF REVIEW

The Court should dismiss the Complaint under Ark. R. Civ. P. 12(b)(6) if a Plaintiff either (1) fails to state general facts upon which relief can be granted, or (2) fails to include specific facts pertaining to one or more of the elements of his claims after accepting all facts contained in the Complaint as true and in the light most favorable to Plaintiff. *Thomas v. Pierce*, 87 Ark. App. 26, 28, 184 S.W.3d 489 (2004) (citing *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 924 S.W.2d 494 (1996)). "[O]ur rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief." *Fulton*

v. Beacon Nat'l Ins. Co., 2012 Ark. App. 320, *8, --- S.W.3d --- (May 2, 2012) (citing Ark. R. Civ. P. 8(a)(1); *Born v. Hosto & Buchanan, PLLC*, 2010 Ark. 292, --- S.W.3d ---). “We treat only the facts alleged in the complaint as true, but not a plaintiff’s theories, speculation, or statutory interpretation.” *Id.* (Citing *Dockery v. Morgan*, 2011 Ark. 94, --- S.W.3d ---).

III. ARGUMENT

Prosecutor Ellington has not violated the FOIA in this case. Prosecutor Ellington has repeatedly offered, and remains willing, to make all responsive and non-exempt records available to Mr. Swindle and the Plaintiffs, for their inspection and copying if they so desire, in complete compliance with the FOIA. The Plaintiffs’ FOIA action against Prosecutor Ellington should be dismissed.

A. Prosecutor Ellington has complied with the FOIA, and will continue to comply with the FOIA by making all responsive and non-exempt records available for inspection and copying.

“Except as otherwise provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of records.” Ark. Code Ann. § 25-19-105(a)(1)(A). Prosecutor Ellington has offered, and continues to offer, to make all responsive and non-exempt records available to Mr. Swindle and the Plaintiffs, for their inspection and copying if they so desire, in complete compliance with the FOIA. In fact, Prosecutor Ellington has offered to make the entirety of his files available, with the exception only of records related to an open and ongoing law enforcement investigation, *infra*. As demonstrated by Prosecutor Ellington’s response to Mr. Williams’ substantively identical FOIA request (Exhibit A), Prosecutor Ellington does not have personal knowledge that any of the requested information is contained in the files delivered to Prosecutor Ellington by his predecessors, but Prosecutor Ellington stands ready to make those files available for Mr.

Swindle's inspection so that Mr. Swindle can review the records and obtain copies of any records he wishes to copy. The FOIA does not require Prosecutor Ellington to respond to Mr. Swindle's FOIA request in writing, to compile information, or to respond to questions. The FOIA requires custodians of public records to provide reasonable access to public records upon request. See *Fox v. Perroni*, 358 Ark. 251, 188 S.W.3d 881 (2004); *Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995). That is exactly what Prosecutor Ellington has done, and will continue to do. Prosecutor Ellington has fully complied with the FOIA and will continue to do so. The Third Amended Petition against Prosecutor Ellington should be dismissed.

B. Prosecutor Ellington has properly denied access to records related to an open and ongoing law enforcement investigation.

The only records Prosecutor Ellington has declined to disclose are records related to an open and ongoing law enforcement investigation. The first seven (7) items of Mr. Swindle's FOIA request (Plaintiffs' Exhibit 11) seek records of statements and interviews related to Terry Hobbs, Michael Hobbs, Jr., and Michael Hobbs, Sr. Prosecutor Ellington has recently received sworn affidavits that might be responsive to these requests. However, Prosecutor Ellington's office is currently investigating the matters set forth in those affidavits, and the affidavits are therefore exempt from public disclosure pursuant to Ark. Code Ann. § 25-19-105(b)(6) ("the following shall not be deemed to be made open to the public under the provisions of this chapter . . . [u]ndisclosed investigations by law enforcement agencies of suspected criminal activity.").

In *Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990), the attorney for a criminal defendant who had not yet been tried made an FOIA request for the Chief of Police's police investigation file with respect to the charges filed against his client. The circuit court ruled that the information need not be released until the attorney's client was tried or a decision had been made not to try him, and the Arkansas Supreme Court affirmed. 303 Ark. at 656-657. In

arriving at this decision, the Court relied upon an exemption from disclosure contained in the FOIA itself, Ark. Code Ann. § 25-19-105(b)(6), which exempts “[u]ndisclosed investigations by law enforcement agencies of suspected criminal activity.” *Id.* The Court concluded by holding that “if a law enforcement investigation remains open and ongoing it is one meant to be protected as ‘undisclosed’ under the act.” *Id.* at 660. *See also Byrne v. Eagle*, 319 Ark. 587, 595, 892 S.W.2d 487 (1995) (“[W]e have held that the term ‘undisclosed’ investigations includes ‘ongoing’ investigations.”); *Johninson v. Stodola*, 316 Ark. 423, 426, 872 S.W.2d 374 (1994) (“We have also held that an undisclosed investigation includes those that are open and ongoing.”); *Ark. Gazette Co. v. Goodwin*, 304 Ark. 204, 210, 801 S.W.2d 284 (1990) (“We held that if a law enforcement investigation remained open and ongoing, it was meant to be protected as undisclosed under the FOIA.”); Ark. Op. Atty. Gen. No. 2006-094 (explaining that a criminal investigative file, including confidential informant interviews, will be exempt from public inspection as long as the investigation is ongoing.).

Prosecutor Ellington has offered (and continues to offer) to make his files entirely available for Mr. Swindle’s inspection, with the exception of sworn affidavits recently received by his office, regarding matters that are currently the subject of an open and ongoing criminal investigation by his office. The affidavits are exempt from public disclosure as a matter of law. Prosecutor Ellington has fully complied with the FOIA. The Third Amended Petition against Prosecutor Ellington should be dismissed.

C. Plaintiffs’ claims against Prosecutor Ellington in his individual capacity should be dismissed because an FOIA request made to an individual is outside the scope of the FOIA.

Plaintiffs’ claim against Prosecutor Ellington in his individual capacity is not cognizable under the FOIA:

The Arkansas Department of Human Services is a department of the State of Arkansas. Furthermore, a suit against a state official in his official capacity is not a suit against that person but is rather a suit against that official's office. *Fegans v. Norris*, 351 Ark. 200, 206, 89 S.W.3d 919, 924 (2002). Thus, no award of attorney's fees may be assessed against a state official in his official capacity under Ark. Code Ann. § 25-19-107(d).

Neither could appellant prevail in an action against Mr. Jeffus in his individual capacity. In his individual capacity, Mr. Jeffus had no administrative control of the data elements from which any record responsive to appellant's FOIA request would be created or provided. **Any request made to Mr. Jeffus as an individual would be outside the scope of the FOIA since the Act pertains to "public" documents and the "custodian" of the public records as "the person having administrative control of that record."** As an individual, Mr. Jeffus would have no administrative control of the public records. He would have control of the public records only in his official capacity.

George v. Ark. Dep't of Human Services, 88 Ark. App. 135, 139-140, 195 S.W.3d 399 (2004) (emphasis added). Any FOIA request made to Prosecutor Ellington in his individual capacity is outside the scope of the FOIA because as an individual, Prosecutor Ellington has no administrative control of public records. The Third Amended Petition against Prosecutor Ellington in his individual capacity should be dismissed.

D. Plaintiffs may not recover fees or costs against Prosecutor Ellington.

Plaintiffs do not request the recovery of any fees or costs against Prosecutor Ellington in their Third Amended Petition. The Third Amended Petition incorporates Plaintiffs' prior petitions by reference pursuant to Ark. R. Civ. P. 10(c). To the extent that Plaintiffs have requested the recovery of any fees or costs against Prosecutor Ellington, the request is explicitly barred by the FOIA: "the court shall not assess reasonable attorney's fees or other litigation expenses reasonably incurred by a plaintiff against the State of Arkansas or a department, agency, or institution of the state." Ark. Code Ann. § 25-19-107(e)(1). The Court may take

judicial notice of the fact that in his official capacity as the Prosecuting Attorney for the Second Judicial District of Arkansas, Prosecutor Ellington is a state official. Any request for the recovery of fees or costs against Prosecutor Ellington must be denied accordingly.

IV. CONCLUSION

The Plaintiffs' Third Amended Petition against Prosecutor Ellington should be dismissed for failure to state a claim for which relief can be granted. *See* Ark. R. Civ. P. 12(b)(6). Prosecutor Ellington has offered to make all responsive and non-exempt records available to Mr. Swindle and the Plaintiffs, for their inspection and copying if they so desire, in complete compliance with the FOIA. Prosecutor Ellington has not violated the FOIA in this case. Prosecutor Ellington will continue to comply with the FOIA. The Plaintiffs' Third Amended Petition against Prosecutor Ellington should be dismissed.

WHEREFORE, Separate Defendant/Appellee Scott Ellington, in his Individual and Official Capacities as Prosecuting Attorney for the Second Judicial District of Arkansas, prays that the Third Amended Petition against him be dismissed with prejudice, and for all other just and appropriate relief.

Respectfully Submitted,

DUSTIN MCDANIEL

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CERTIFICATE OF SERVICE

I, Colin R. Jorgensen, certify that on this 10th day of October, 2012, I have served the foregoing by depositing a copy in the United States Mail, postage prepaid, addressed to the following:

Ken Swindle
619 West Walnut Street
Rogers, AR 72756

Attorney for the Plaintiffs/Appellants


Colin R. Jorgensen