

COVER STORIES

The 'big ask'

by Mara Leveritt

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The 'big ask'

Last November's Arkansas Supreme Court decision marked the first time any court had acknowledged a need to revisit any part of the controversial 1994 trials, let alone "all" of the evidence. It was a pivotal change, and others quickly followed.

Immediately after the court's ruling, won by San Francisco attorney Dennis Riordan, death-row inmate Damien Echols and his wife Lorri Davis startled supporters by hiring Stephen L. Braga, of Washington, D.C., as their team's new lead attorney. When Deborah Sallings, the Arkansas member of Echols' team, resigned at about the same time, Davis and Braga were left looking for another Arkansas lawyer to take her place amid preparations for the critical hearing the high court had ordered.

ADVERTISING

The advertisement is set against a bright yellow background. At the top left, the word "goodr" is written in a bold, black, lowercase sans-serif font. Below this, on the left, is a photograph of a woman in a red tank top and sunglasses on a golf course. Overlaid on the photo is the text "GOLF SHOULD BE FUN" in white, with "goodr" in a smaller font below it. To the right of the photo is a 2x2 grid of four different styles of sunglasses: top-left is black with orange accents, top-right is blue with yellow accents, bottom-left is red with orange accents, and bottom-right is blue with yellow accents. At the bottom left of the ad, the text "GOLF SHOULD BE FUN" is repeated in a large, bold, pink font. At the bottom right, there is a pink rounded rectangular button with the text "SHOP NOW" in white, bold, uppercase letters.

Davis said she and Braga approached many local attorneys, but found none willing to defend Echols, who was sentenced to death 17 years before for the murders of three West Memphis children. They were growing despondent when someone recommended they contact Little Rock attorney Patrick Benca.

"I met with Lorri and Steve right here in this office," Benca recalled this week, in the book-lined conference room of his 19th Century office on Broadway. "I was nervous. I really wanted the job. What defense attorney wouldn't want to be part of what was going on?"

When reminded that others declined, Benca said, "Yeah. I don't understand that."

One of the things Braga asked Benca was whether he had a good working relationship with David Raupp, the chief deputy to Arkansas Attorney General Dustin McDaniel. Benca replied that he considered Raupp "a good attorney and a good guy," and that he'd "never had any problems with him." Benca added that he had known McDaniel for years — that the two had gone through the University of Arkansas at Little Rock and the UALR School of Law together.

Davis and Braga brought Benca onto the Echols defense team in late January. Like Braga, Benca agreed to work pro bono.

It took him about a month to get up to speed, reading all the records in the case—and watching the HBO documentary films. In early spring Benca emailed Braga: “I’m prepared. I’m ready to do whatever you need me to do.”

Braga wanted help getting some records relating to the victims’ autopsies. Benca contacted Raupp, who agreed to release some of them. Benca was working on obtaining the others, when, in early summer, the laboratory conducting new DNA tests on evidence from the 1993 murders began issuing its first results.

To the lawyers’ disappointment, the scientific findings did not definitively point to a different assailant. But neither did they trace to Echols or his co-defendants, Jason Baldwin and Jessie Misskelley, Jr. That absence of evidence underlined a fact that had been apparent in this case from the start: there never was any physical evidence — from the time of the murders to these new tests — that could be linked to the men in prison.

In July, while the lab was still conducting tests, Braga submitted a status report on the information received so far to Circuit Judge David L. Laser, who had been assigned to review the case. “At this point in time, we were trying to make some decisions,” Benca said. He and Braga pondered the seemingly far-fetched idea of asking the state’s attorneys to agree to skip the evidentiary hearing, which Laser had scheduled for December, by agreeing that new trials were warranted.

So far, everyone on the state side had fought tooth-and-nail to resist new trials for the men. But Braga and Benca thought there was a chance that neither they nor the defense teams would want to “waste all that time” going through an evidentiary hearing if, in the end, Laser was going to order new trials. That would require all sides to present the same evidence again — this time before juries — in one, two or even three trials — depending on what Laser ordered.

The question for Braga and Benca was: What would persuade McDaniel, Raupp, and Scott Ellington, the prosecuting attorney for Arkansas’s 2nd Judicial District, to change their dug-in position and agree to skip the evidentiary hearing by preemptively supporting new trials? Benca and Braga reviewed all the issues they were prepared to raise at the hearing and set all of them aside but one: the matter of juror misconduct in the trial of Echols and Baldwin.

Juror misconduct

The stunning information that the jury foreman at their trial had violated court instructions had come to light three years earlier. Little Rock restaurateurs Capi Peck and Brent Peterson, who had become supporters of the three defendants, hosted a gathering at Trio's restaurant in early 2008 for several local attorneys, hoping to enlist further support. At that event, one attorney mentioned knowing that another attorney had received phone calls from the foreman throughout the Echols-Baldwin trial.

The Echols team contacted that attorney and in May 2008, Lloyd Warford, of Little Rock, signed an affidavit stating that, at the time of the trial, he was working for the jury foreman, Jonesboro real estate broker Kent Arnold, on an unrelated matter. Warford said Arnold called him repeatedly during the trial, purportedly about the other work, but that during the conversations, Arnold spoke passionately about the trial.

Warford stated in his affidavit that he was surprised that Arnold was selected for the jury because, from the start, he "seemed to have made up his mind the defendants were guilty." As the trial progressed, Warford said, Arnold expressed frustration that prosecutors were not presenting evidence that Jessie Misskelley had confessed to police — evidence that was used to convict Misskelley at his separate trial a month earlier, but which was inadmissible at the Echols-Baldwin trial because Misskelley refused to appear and repeat his statement that he had seen Echols and Baldwin kill the boys.

"Eventually," Warford wrote: "Kent said this prosecutor has not done his job and that if the prosecution didn't come up with something powerful the next day, there was probably going to be an acquittal. At one point, I distinctly remember him saying, 'If anyone is going to convince this jury to convict it is going to have to be me.'" "

Evidence from other jurors supported Warford's affidavit — and his belief that "Kent Arnold saw himself as the real hero of this trial," because he had informed fellow jurors of Misskelley's confession. A flip-chart used in the jury room, listing reasons for and against convicting Echols and Baldwin, referenced Misskelley's confession in the "pro" column. Notes kept during the trial by another juror also mentioned Misskelley's statement.

Judge David Burnett, who officiated at the trials and throughout subsequent circuit court appeals, ordered Warford's affidavit to be sealed, and for the next couple of years, it remained unknown to all, except the judge, the defendants and a small circle of lawyers. By 2010, however, defense attorneys were able to argue before the state Supreme Court that the juror misconduct issue, along with the new DNA findings, warranted new trials.

The Supreme Court agreed, primarily on the DNA issues. The juror misconduct question was relatively sidelined, and as Braga and Benca prepared for the hearing set for December, they were not even sure Laser would consider it.

Yet they knew that if Laser did consider the issue of juror misconduct, that alone could impel him to order new trials, at least for Echols and Baldwin. “There was no case law I could find, in this state or anywhere else,” Benca said, “where juror misconduct that egregious had been found acceptable.” He and Braga suspected that Ellington and the attorneys general might be thinking the same thing. “So,” Benca said, “we decided that was the approach.”

‘A big ask’

It fell to Benca to make the local contact. Since McDaniel and Raupp had signed all the state’s motions in the case, along with Ellington, Benca thought that McDaniel, as attorney general, was calling the shots. “I assumed he was the decision-maker.”

Benca called to ask if McDaniel would consider lunch. McDaniel inquired as to what was “on the agenda.” Benca told his law school friend that he wanted to “catch up” — and that, “by the way, you know I’m on this West Memphis case.” McDaniel accepted the invitation.

The two attorneys met for a late lunch at the Little Rock Club on Wednesday, Aug. 3. They chatted a bit about their families, friends and school days. “Then,” Benca said, “the discussion turned to the possibility that Judge Laser would order new trials.”

As he and Braga had planned, Benca tried to keep the conversation’s focus “as simple as possible.” Benca bore down on the rationale that if Laser were to consider the juror misconduct issue, he would almost certainly order new trials.

Benca said McDaniel told him he “still believed those boys were responsible for the crime.” Benca said the attorney general also informed him, “that he didn’t have the decision-making power: that was Scott Ellington’s job.”

Still, Benca could see that McDaniel was listening closely to his idea that all parties could leap-frog over the hearing by agreeing to new trials beforehand. When Benca concluded, McDaniel responded, “That’s a big ask.”

“My heart was jumping about out of my chest,” Benca recalled. “It’s something when the attorney general says to you, ‘That’s a big ask.’ But then he went over it with me.”

In the end, “Dustin was quite candid,” Benca said. “He told me he would present the issue to Mr. Ellington and to David Raupp and he said, ‘I’ll get back to you.’ He didn’t shut me down. So I had hope when I walked

out of there.”

Benca called Braga. “He was excited. We both were.”

A couple of days later, Benca had a second “conversation” with McDaniel, in which Benca mentioned how nice it would be if everyone could simply “resolve it.” The suggestion was that, through negotiation, the attorneys might be able to avoid not only the hearing, but the potential trials as well.

“Dustin said, ‘If you’re interested in resolving it, I can make arrangements for you guys to present your argument to Mr. Ellington.’ I called Steve [Braga], and we had the meeting the following Tuesday.”

‘Pretty intimidating’

That meeting, on Aug. 9, took place in the second-floor conference room of the attorney general’s office. “It has the biggest conference table I’ve ever seen in my life,” Benca said. “There were at least 15 chairs on each side. It was pretty intimidating.” Joining Braga and Benca on the defense side were Little Rock attorneys Blake Hendrix, representing Baldwin, and Jeff Rosenzweig, for Misskelley.

“All of Ellington’s team were on the other side. Dustin was at the head of the table, to my left, with his deputies seated, not at the table, but along the walls nearby.”

Benca recalled: “Dustin set the tone for the meeting. He told everyone, ‘Patrick and I went to law school together, we’re friends, and we met for lunch to talk about this,’ explaining how it all came about. Then he turned it over to us. We proposed an Alford plea with time served.”

The “ask” that Benca mentioned at lunch had by now grown considerably bigger. Benca and Braga were proposing that the state and three defense teams not only agree to new trials, thereby avoiding the hearing, but that they also avoid the risks of new trials — risks that were felt all around — by negotiating a plea agreement to be entered as soon as the new trials were ordered.

That agreement, known as an Alford plea, would allow the defendants to plead guilty to reduced charges, while maintaining that they were innocent, because their lawyers had advised that it was in their best interest to do so. If the state accepted the plea — and if the judge approved it — Benca and Braga were asking that Echols, Baldwin and Misskelley all be released from their respective prisons, based on the time they had already served.

Braga presented the proposal. “He was quite compelling,” Benca said. “He’s a good attorney. I understand why he’s one of the best.”

Hendrix said he did not know what Baldwin would say about such a plea, so he was not in a position to agree or disagree. According to Benca, Rosenzweig “felt very confident” he would prevail on an issue in Misskelley’s case that is still before the state Supreme Court. That concerns Judge Burnett’s decision to preside at one of Misskelley’s appeals, even after the judge had retired from the bench and announced his intention to run for a seat in the state senate.

Other factors coloring considerations around the table were the lack of physical evidence, the new DNA findings, anticipated changes in testimony, and the risks inherent to all sides in facing new panels of jurors. Hendrix asked for time to consult with Baldwin, his client.

Ellington noted that he still believed the men guilty. Nevertheless, Benca said, the prosecutor acknowledged “that this was going to be a difficult case to win.

“We could see there was some concern that they may not get the outcome they wanted. But Ellington also said he thought they had enough for a jury to hang their hat on. And we agreed that you never know what’s going to happen with a jury.”

The meeting lasted approximately an hour and a half. According to Benca, “the deal would have been done right there, except for Jason.” And that was a big “except.” The state’s attorneys said the deal would have to be for all the men or none. As Benca put it: “They wanted it all wrapped up.”

“Jeff [Rosenzweig] made no bones about it. He would definitely encourage his client [Misskelley] to take the deal. He felt his client was on board prior to us leaving the meeting. Our only concern was Jason.”

Would Baldwin ‘turn around’?

From that Tuesday, Aug. 9, until the hearing Judge Laser scheduled on Friday, Aug. 19, Benca said, “I’m telling you, I didn’t sleep. Just a couple of hours here, a couple there. I’d wake up at 3 a.m. and never get back to sleep. I mean, it was high anxiety.”

The next day, Aug. 10, Braga and Benca drove to the state’s Supermax Unit, to relate the news to Echols. On the way there, the lawyers passed a car with a bumper sticker that read, “Free the West Memphis Three.” “We thought it was a sign,” Benca said.

Benca's concerns were that Baldwin might not "turn around." And secondly, if Baldwin stood firm, could they persuade the state's attorneys to consider a different deal — one just for Echols and Baldwin, based on the juror misconduct issue?

The defense teams gave Ellington permission to approach Judge Laser *ex parte*, or outside of a formal hearing, to determine if he would consider the proposed pleas and if he had any suggestions, procedurally, for how the sides should go forward. Laser requested some additional language in the agreements pertaining to the Supreme Court's order, but other than that, Benca said, he generally accepted the plan.

It was a week after the meeting at the AG's office, on Tuesday, Aug. 16, that the legal teams got word that Jason had come onboard. "It was a huge day," Benca said. He drove to Jonesboro the next day to continue work with Ellington's group, as, over the next 48 hours, other attorneys converged on the Northeast Arkansas city.

Four legal teams had to agree on a complex series of documents. There were four in all:

Paperwork by which Judge Laser would order a conditional grant of new trials. The condition was that a plea agreement, signed by all sides, would immediately follow.

Paperwork for the Alford plea, in which the three men all would plead guilty to reduced charges of murder, while also maintaining that they were innocent. Where all had initially been charged with capital murder, Echols and Baldwin now would plead guilty to three counts of first-degree murder; Misskelley to one count of first-degree and to two of second-degree murder.

Paperwork documenting their new sentencing recommendations — essentially to time served.

And paperwork outlining the conditions of the suspended imposition of sentence, that being the 10 years they had to stay out of trouble or risk being imprisoned again. They also agreed not to sue the state for damages, though they retained the option of returning to court with new evidence to prove their innocence.

On Wednesday, Laser announced that he would hold an unexpected hearing on Friday, Aug. 19. On Thursday, Echols, Baldwin and Misskelley were taken from their respective prisons — Echols off of Death Row — and transported in chains in a van to the Craighead County Jail. Benca, Braga, and Lonnie Soury of New York, a spokesman for Echols' team, visited their client in the jail on the night before the hearing.

"I remember thinking, 'He doesn't look good,' " Benca said. "He was very, very white. His lips were blue. He said he hadn't slept in four days, since learning that Jason was onboard."

To Benca, Echols seemed torn between hope and the fear of hope. “He looked like he was thinking, ‘Is this another high moment that is just going to collapse and fall apart?’ ” Echols told the attorneys that Jason had been upbeat on the ride to Jonesboro, but that the three prisoners had spoken little.

All the defense teams brought suits for their clients to wear in court, along with bags of toiletries. The inconceivable seemed on the verge of happening. When Benca went to bed that night, he had “a sense that the judge would approve everything.”

Friday, Aug. 19, 2011

Media, including many with satellite trucks, began converging on the Craighead County Courthouse at dawn. Police and sheriff’s deputies stood on street corners and at every courthouse door. Inside the building, subdued members of the victims’ families, relatives of the defendants, and hundreds of supporters of the men known as the West Memphis Three began to fill the corridors outside Laser’s courtroom.

In mid-morning, in a room out of public sight, the judge met with the various legal teams and the prisoners. When Benca and Braga first saw Echols, Baldwin and Misskelley, they were shackled to their chairs. The attorneys asked that the restraints be removed, and officers complied.

Judge Laser outlined the procedure that was to follow in open court. “It was like a dry run,” Benca said. The attorney added: “I think the judge was excited. He’s a nice guy. It was clear he had a concern for all involved — the victims’ families, the boys in prison and their families. I recommended to the Association of Criminal Defense Lawyers that he be given an award by the defense bar. He was so fair, and very gracious to everyone involved. The way he handled the whole thing was pretty spectacular.”

Benca also praised the attorneys general and the lawyers in Ellington’s office. “We had opposing positions,” Benca said, “but they were all very pleasant to work with.”

At about 11 a.m., the doors to the courtroom were opened. Police looked into women’s purses. Everyone entering the courtroom was electronically scanned. Members of the media were seated in the jury box. A single television camera from Little Rock’s KARK-TV was situated to the right of the judge’s bench, to record the hearing for a pool of reporters — and for posterity.

Echols’ wife, Lorri Davis, who had worked tirelessly for years raising money for the defense, sat in a front row, alongside musicians Eddie Vedder of Pearl Jam and Natalie Maines of the Dixie Chicks. Other friends and supporters, including her friends Capi Peck and the actor Jacob Pitts sat nearby.

Also in the small courtroom were John Mark Byers, stepfather of victim Christopher Byers; Pam Hobbs, mother of victim Stevie Branch; Terry Hobbs, Stevie Branch's stepfather; Joe Berlinger and Bruce Sinofsky, who made the "Paradise Lost" films for HBO, and filmmaker Amy Berg, who is completing an independent documentary about the case. Pam Echols, Damien's mother, sat in a wheel chair in the main aisle. More than a dozen police officers stood, scattered strategically around the room.

Events between the time the bailiff said, "All rise," and the judge said, "Court dismissed," unfolded quickly. The "paperwork" was outlined for the judge in the agreed-upon sequence. The defendants uttered short, rehearsed responses.

The judge said he was satisfied that the defendants would prevail if they faced new trials, and so he ordered those trials. State's attorneys said they believed that they could win at those trials, because of testimony that all had confessed. The judge accepted that contention, as is required in an Alford plea. Echols, Baldwin and Misskelley stood and individually pleaded guilty but said they were innocent.

Attorneys on all sides said what they'd agreed to about reducing the men's sentences to the time they'd already served. Laser warned Echols, Baldwin and Misskelley that they faced serious consequences if they got arrested again for anything within the next ten years. And with that, it was pretty much done. The judge sent the defendants and their lawyers back to the room from which they'd come to complete some out-processing paperwork for the prison system.

"It's hard to wrap your head around," Benca reflected. "But that's it. It just boils down to [the fact] that there were risks. There was uncertainty all around. We thought about it. We prayed about. We felt we could fight this better with them out of prison than in."

Asked to list the elements he thought contributed to the outcome, Benca cited the juror misconduct issue; the fact that, despite extensive testing of evidence, no DNA matched the men in prison; and "the change of public perception," which he attributed to Berlinger and Sinofsky's documentary films, other media and the years-long dedication of supporters. "In my view," Benca said, "that absolutely played a crucial role."

After the hearing, on their way to a party in Memphis, lawyers drove Echols and Baldwin to the small town of Marked Tree. There, they stopped at a state revenue office, where arrangements had been made for the men to be issued new identification cards. After their photos were taken — which resemble, but are not, drivers licenses — the two were told to sign their names on a data device and handed an electronic pen. Benca recalled that Echols took the instrument, looked at him and asked, "Are you telling me, I just sign — like it's a piece of paper?"

Benca expects that before Gov. Mike Beebe leaves office, his signature too will be requested — on pardons for the West Memphis Three.

The governor has indicated he will deny them.

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