ARKANSAS SUPREME COURT

No. CR 08-97

	Opinion Delivered **April 3, 2008**
SAMUEL EDWARD DAVID Appellant v. STATE OF ARKANSAS Appellee	PRO SE MOTIONS FOR TRIAL TRANSCRIPT AND EXTENSION OF TIME TO FILE APPELLANT'S BRIEF [CIRCUIT COURT OF HOT SPRING COUNTY, CR 87-23, HON. PHILLIP H. SHIRRON, JUDGE] APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

In 1987, a jury found appellant Samuel Edward David guilty of capital felony murder and sentenced him to life imprisonment without parole. This court affirmed the judgment. *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988). In 2006, appellant filed in the trial court two motions and a petition that sought a writ of habeas corpus under Act 1780 of 2001, codified as Ark. Code Ann. §§ 16-112-201 – 16-112-208 (Repl. 2006). The trial court treated the pleadings as a motion for writ of habeas corpus that did not invoke Act 1780 and dismissed the motion. Appellant has lodged an appeal of that order in this court and has filed a motion requesting access to the trial transcript and a motion that requests an extension of time in which to file his brief.

This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (per curiam). Here, although the trial court erroneously treated the petition as one that did not seek scientific testing under Act 1780, it clearly did not err in

dismissing the petition and motions. We accordingly dismiss the appeal and the motions are moot.

It is true that a petition for writ of habeas corpus to effect the release of a prisoner is properly addressed to the circuit court in the county in which the prisoner is held in custody, unless the petition is filed pursuant to Act 1780 of 2001. *Lukach v. State*, 369 Ark. 475, ___ S.W.3d ___ (2007) (per curiam). But, here, the petition did invoke the act and requested scientific testing. Jurisdiction under section 16-112-201(a) was proper in the court in which the conviction was entered.

Act 1780, as amended by Act 2250 of 2005, sets forth in section 16-112-202 a number of predicate requirements for the filing of a motion for testing under the act. Appellant's pleadings were not sufficient to meet all of those predicate requirements.

Section 16-112-202(10) provides for a rebuttable presumption against timeliness for any motion not made within thirty-six months of the date of conviction, and lists five grounds by which the presumption may be rebutted. Appellant's petition may have arguably been considered to have overcome that presumption as to one of the requested tests, DNA testing of cigarette butts found near the crime scene. DNA profiles have been admissible evidence in Arkansas since 1991. *Whitfield v. State*, 346 Ark. 43, 56 S.W.3d 357 (2001). Appellant was convicted prior to that date. Even if appellant's petition for relief under Act 1780 were timely, however, his petition failed to meet the requirements of subsection (8) of section 16-112-202.

Under section 16-112-202(8), the requested testing of specific evidence must be capable of producing new material evidence that would support a theory of defense identified in the petition, complying with section 16-112-202(6), and which would establish the petitioner's actual innocence. The new evidence must raise a reasonable probability that the petitioner did not commit the offense.

None of the evidence that might potentially result from the tests appellant requested satisfied this requirement.

Appellant requested testing of cigarette butts, footprints and a cut tree at the location of the crime in support of a theory that he was not present at the crime scene. That evidence was not material to his conviction, and new test results concerning that evidence would not establish appellant's innocence. In our opinion on direct appeal, we discussed the sufficiency of the evidence as outlined throughout the opinion, and did not consider those items as significant in tying appellant to the crime. *David*, 295 Ark. at 141, 748 S.W.2d at 122. We did consider testimony of two accomplices, testimony placing appellant's car parked near the crime scene the day before, and other testimony concerning appellant's use of the murder weapon to kill the victim. *Id.* The testing appellant requested would not raise a reasonable probability that appellant did not commit the offense.

Appeal dismissed; motions moot.