

THIS IS A CAPITAL CASE

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

DAMIEN WAYNE ECHOLS,) Case No. 5:04CV00391-WRW
)
Petitioner,)
)
vs.)
)
LARRY NORRIS, Director,)
Arkansas Department of Corrections,)
)
Respondent.)

**SECOND AMENDED PETITION FOR WRIT OF HABEAS
CORPUS BY A PERSON IN STATE CUSTODY**

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INTRODUCTION

1. Damien Wayne Echols, petitioner, by and through his undersigned counsel, hereby submits for filing his instant second amended petition for habeas corpus relief pursuant to 28 U.S.C. section 2254. This amended petition is intended to supersede petitioner's first amended petition filed in this Court on February 28, 2005.

2. By his accompanying motion, petitioner has sought leave of the court to file this petition. Since respondent has yet to file an answer to petitioner's previously filed petitions, he will suffer no prejudice from the Court's granting leave to file the present petition. Furthermore, under the applicable civil rules, the date of filing the instant amended petition is deemed to relate back to the date of filing the original petition which, in this matter, occurred on October 28, 2004. *See* Rule 11 of the Rules Governing §2254 Cases in the United States District Courts (hereinafter "§ 2254 Rules" (authorizing application of Federal Rules of Civil Procedure where not inconsistent with §2254 Rules)); Fed. R. Civ. P. 15 (amended pleading relates back to original where, *inter alia*, claims, as here, arise out of conduct, transaction, or occurrence set forth in original pleading)).

3. Petitioner is unlawfully incarcerated and restrained in violation of the United States Constitution in the Varner Unit of the Arkansas state prison located in Grady, Arkansas, by Larry Norris, Director of the Arkansas Department of

Corrections.

PROCEDURAL HISTORY

4. Following is a summary of the prior state and federal court proceedings relating to the instant amended petition:

Petitioner's Conviction and Direct State Court Appeal

5. On March 19, 1994, following trial by jury, an Arkansas trial court sitting in the Craighead County Circuit Court in Jonesboro, Arkansas, entered judgment against petitioner for three counts of first degree murder in connection with the homicides of three eight-year old boys in West Memphis, Arkansas, in May, 1993. On that same date, the trial court sentenced petitioner to death for the crimes.

6. Echols timely appealed from the judgment and sentence, which were affirmed by the Arkansas Supreme Court in an opinion issued on December 23, 1996. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996). Petitioner thereafter challenged the state Supreme Court's appellate ruling by filing a timely petition for a writ of certiorari in the United States Supreme Court, which petition was denied in an order issued on May 27, 1997.

The State Proceedings Relating to Petitioner's Motion for Post-Conviction Relief Under State Rule 37

7. Meanwhile, on March 11, 1997, well prior to the conclusion of direct

state court appellate proceedings on May 27, 1997, Echols filed a motion for post-conviction relief from the trial court's judgment and sentence, pursuant to Arkansas Rule of Criminal Procedure 37.1, *et seq.* ("Rule 37") Petitioner's final Rule 37 petition, which raised many of the claims presented in the instant petition, was denied by the Craighead County Circuit Court in an order issued on June 17, 1999.

8. Petitioner timely appealed from the Circuit Court's June 17, 1999 order. On April 26, 2001, the Arkansas Supreme Court affirmed one portion of the Circuit Court's ruling but otherwise reversed and remanded in light of the Circuit Court's failure to make required factual findings as to petitioner's claims. *Echols v. State*, 344 Ark. 513 (2001).

9. Following remand, in an order issued on July 30, 2001, the Circuit Court issued a new order again rejecting all of petitioner's claims under Rule 37. Petitioner timely appealed this order but it was affirmed in an order issued on October 30, 2003. *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003).

*The Initial Motion in State Court to Reinvest Jurisdiction
in the Trial Court*

10. Meanwhile, on February 27, 2001, while the Rule 37 proceedings described above were pending, Echols petitioned the Arkansas Supreme Court for an order reinvesting jurisdiction in the Circuit Court to allow him to seek a writ of

error *coram nobis*. The state Supreme Court denied that petition in an opinion issued on October 16, 2003 (*i.e.*, before the conclusion of the Rule 37 proceedings). *Echols v. State*, 354 Ark. 414, 125 S.W.3d 153 (2003).

The Pending State Motion to Permit Forensic Testing

11. On July 25, 2002 (also while the Rule 37 proceedings remained pending), petitioner filed a “Motion for Forensic DNA Testing” (hereinafter “DNA motion”) in the Arkansas Circuit Court pursuant to Arkansas Code section 16-112-201, *et seq.* Invoking the Eighth Amendment’s prohibition against cruel and unusual punishment and the Fourteenth Amendment’s guarantee of equal protection and due process of law, the motion asserted that the judgment and sentence should be vacated because petitioner was actually innocent of the crimes.

12. On January 27, 2003, the Craighead County Circuit Court judge who presided at petitioner’s trial ordered the impoundment and preservation of all material that could afford a basis for petitioner’s actual innocence claim pursuant to this statutory scheme.

13. Testing of the material subject to the Circuit Court’s preservation order, together with related trial court proceedings, remain in progress as of the time of filing the instant amended petition.

*The Original Petition for Federal Habeas Corpus Relief
in this Court*

14. On October 28, 2004, Echols filed his initial petition for federal habeas corpus relief in this Court. The October 28, 2004 petition contained the following claims, most of which are asserted in the instant amended petition: (1) juror misconduct; (2) juror bias; (3) DNA and other forensic evidence indicating actual innocence; (4) his trial lawyer's conflict of interest; and (5) his trial lawyer's ineffective assistance of counsel. The first, second, and third claims, along with an element of the fifth claim, however, had not been exhausted in the Arkansas courts at the time that the original petition was filed. As discussed further below, the juror misconduct and bias claims, together with the ineffective assistance of counsel claim, now have been presented and denied in the state courts prior to the time of filing this second amended petition.

15. On February 28, 2005, Echols filed his First Amended Habeas Petition in this Court. That petition resembled the original petition, but included the allegation that the juror misconduct and juror bias claims now had been exhausted, and again requested that the petition be held in abeyance until his substantive "actual innocence" claim based on DNA testing could be exhausted.

16. On March 2, 2005, the state of Arkansas moved to dismiss the first amended petition, claiming there was no need to hold the petition in abeyance because the one-year period permitted under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") had not yet begun to run.

17. On August 18, 2005, this Court denied the state's motion to dismiss, ruling that petitioner could maintain his habeas petition in abeyance in this Court while his collateral attack on his convictions under Arkansas Code section 16-112-201 et seq. remained pending in state court.

*The Second Motion in State Court to Reinvest
Jurisdiction in the Trial Court*

18. On October 29, 2004, Echols filed a Motion to Recall The Mandate And to Reinvest Jurisdiction in The Trial Court to Consider Petition For Writ of Error Coram Nobis or For Other Extraordinary Relief. The motions were primarily founded on newly discovered evidence of jury misconduct and juror bias at the time of Echols's state court trial. The state Supreme Court denied the motions in an order issued on January 20, 2005. Echols thereafter filed a petition for rehearing as to the January 20, 2005 order, alleging, *inter alia*, that the state Supreme Court's disposition of the misconduct and bias claims effectively established that Echols's petitioner's trial lawyer had rendered constitutionally ineffective assistance of counsel by failing to present these claims in support of a motion for a new trial. That petition was denied in a state Supreme Court order issued on February 24, 2005.

EXHAUSTION OF CLAIMS IN STATE COURT

19. As noted, the juror bias and misconduct claims in the original, October 28, 2004 federal petition, like those contained in this second amended petition, were founded respectively on newly discovered evidence indicating that (1) the jury committed prejudicial misconduct during deliberations at both phases of Echols's state trial, and (2) that jurors were actually biased against Echols at both phases of that trial. The original petition's first and second claims, however, differed from the identical claims set forth in the first amended petition and this second amended petition insofar as the former claims were as yet unexhausted in the Arkansas courts. Such exhaustion has now been accomplished by means of the subsequent motion and state court rulings described above.

20. As also noted, the fifth claim in Echols's original petition was founded on an allegation of constitutionally ineffective assistance of counsel rendered by Echols's lawyer at Echols's state court trial. The Arkansas Supreme Court's January 20, 2005, order denying the motions to recall the mandate and reinvest jurisdiction in the trial court has effectively established the presence of such ineffective assistance in connection with the failure of Echols's trial lawyer to raise claims of jury misconduct and juror bias in a motion for a new trial. That Sixth Amendment claim, now exhausted by the Arkansas Supreme Court's denial on February 24, 2005, of Echols's petition for rehearing as to that Court's January

20, 2005, order, forms a component of petitioner's amended ineffective assistance claim, as set forth in below.

21. In addition to the just-described juror misconduct and bias claims and those concerning a deprivation of the right to counsel, petitioner will raise herein claims of a denial of due process due to prosecutorial misconduct in closing argument and a denial of the right to confrontation due to an unconstitutional limitation on cross-examination. Those claims concededly have not been presented to the state courts, but petitioner asserts that the absence of exhaustion is remedied by the fact that he has presented herein a meritorious claim of actual innocence under *House v. Bell*, 126 S.Ct. 2064 (2006). Such a showing overcomes any claim of state procedural default.

22. Petitioner's collateral attack on his convictions under Arkansas Code section 16-112-201, *et seq.*, remains pending in state court, but it is his intention to proceed with this federal habeas corpus action at this time rather than hold it in abeyance until the section 16-112-201 proceeding is completed. While petitioner's aforementioned House showing is based in part on DNA evidence developed in the section 16-112-201 proceeding, the substantive claims raised in the pending state action are not included in this petition, and the fact that they remain pending in state court thus does not present an obstacle to disposition of this petition.

TIMELINESS OF PETITION

23. 28 U.S.C. section 2244(d)(1) requires a petitioner to file a federal petition for habeas corpus relief within a year of the latest of four alternative triggering dates, including the date that the disputed state judgment became final upon conclusion of direct review.

24. 28 U.S.C. section 2244(d)(2) states that “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.”

25. In this matter, petitioner filed his Rule 37 petition in the state courts prior to the conclusion of direct review. (*See* par. 7, *supra*.) The petition was a properly filed application for state post-conviction review within the meaning of section 2244(d), and proceedings founded on the petition did not conclude until the Arkansas Supreme Court issued its opinion on October 30, 2003. (*See* par. 9, *supra*.) Accordingly, pursuant to section 2244(d)(2), the one-year limitation period established by section 2244(d)(1) cannot have commenced any earlier than October 30, 2003. The original petition in this matter was filed on October 28, 2004, within a year of the denial of the Rule 37 petition.

26. Furthermore, the Arkansas Supreme Court has expressly declared that petitioner’s pending state DNA motion was properly filed. *See Echols v. State*,

350 Ark. 42, 44 (2002) (per curiam) (granting stay of Rule 37 proceedings pending outcome of petition for DNA testing). As stated in Arkansas Code section 16-112-201, the statutory scheme invoked by petitioner's pending DNA motion expressly authorizes a person convicted of a crime to rely on such evidence in order to "vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate[.]" *Ibid.*

27. Given the finding of the Arkansas Supreme Court and the statutory language set forth in Arkansas Code section 16-112-201 *et seq.*, petitioner's still-pending DNA motion, like his Rule 37 petition, facially qualifies as a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment within the meaning of 28 U.S.C. section 2244(d)(2). Additionally, the DNA motion has been pending since July 25, 2002 – *i.e.*, from a date well before the end of the tolling period (October 30, 2003) effected by the proceedings under Rule 37, (*see* par. 7-9 and 11-13, *supra.*) Accordingly, for several reasons, the one year limitations period applicable to the instant petition, as established by 28 section 2244(d)(1), has not yet commenced in this matter.

GENERAL GROUNDS FOR RELIEF

28. This case arises under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The Arkansas state courts'

adjudications of the exhausted claims set forth in sections II (juror misconduct), III (juror bias), and VI (deprivation of the right to counsel), in the Memorandum of Points and Authorities filed herewith, constitute decisions that (1) are contrary to, or involve an unreasonable application of, clearly established federal law, within the meaning of 28 U.S.C. § 2254(d)(1), and/or (2) are based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings within the meaning of 28 U.S.C. § 2254(d)(2). *See Williams v. Taylor*, 529 U.S. 362 (2000).

29. Furthermore, had the unexhausted claims set forth in sections IV and V, of the Memorandum filed herewith been decided against petitioner in the Arkansas state courts, such decisions would have been (1) contrary to, or involve an unreasonable application of, clearly established federal law, within the meaning of 28 U.S.C. § 2254(d)(1), and/or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings within the meaning of 28 U.S.C. § 2254(d)(2). *Williams v. Taylor*, 529 U.S. 362 (2000).

CLAIMS FOR RELIEF

30. As more fully set forth in the accompanying Memorandum, petitioner asserts six legal claims, one procedural and five substantive, in the present action. Those claims are as follows:

First, petitioner meets the “actual innocence” standard set forth in *House v.*

Bell, 126 S.Ct. 2064 (2006), and related precedent, and can therefore defeat any claim of procedural default.

Second, the state courts unreasonably rejected petitioner's claim that the jury's extrajudicial receipt and consideration of an inadmissible and false statement implicating petitioner in the charged offenses violated petitioner's federal constitutional rights to confrontation, cross-examination, counsel, and due process of law.

Third, the state courts unreasonably rejected petitioner's claim that he was deprived of his federal and state constitutional rights to be judged by twelve impartial jurors capable of deciding the case solely on the evidence admitted and the instructions given in court.

Fourth, the prosecutors' use of an experiment and their assertions of personal knowledge in closing argument constituted misconduct and denied petitioner his federal constitutional rights to due process and a fair trial;

Fifth, the state trial court's restriction on the cross-examination of a prosecution witness was likewise federal constitutional error.

Sixth, the state courts unreasonably rejected petitioner's claim that his trial counsel labored under various conflicts of interest which, along with other deficiencies in representation, denied petitioner his sixth amendment right to the effective assistance of counsel.

INCORPORATION OF MEMORANDUM AND STATE RECORD

31. Petitioner hereby incorporates by reference into this petition all of the factual allegations made in the accompanying legal Memorandum filed in support of this petition. He also incorporates herein the entire state court record relating to the allegations contained in the instant petition, including but not limited to all related proceedings in the Crittenden County Circuit Court, Arkansas, the Craighead County Circuit Court, Arkansas, and the Arkansas Supreme Court, as well as all proceedings reported and described in *Echols v. State*, 326 Ark. 917 (1996), *Echols v. State* 344 Ark. 513 (2001), *Echols v. State*, 350 Ark. 42 (2002), *Echols v. State*, 354 Ark. 414 (2003), and *Echols v. State*, 354 Ark. 530 (2003).

CONCLUSION

Petitioner has no plain, speedy and adequate remedy to obtain his immediate release from the conditions of custody presently imposed on him.

WHEREFORE, petitioner respectfully requests that this Court:

1. Grant leave to amend the petition, as may be appropriate;
2. Issue its writ of habeas corpus or an order to show cause to the Attorney General of Arkansas to inquire into the lawfulness of petitioner's convictions;
3. Convene an evidentiary hearing to resolve all disputed issues of fact;
4. After full consideration of petitioner's claims, set aside petitioner's convictions and/or sentence of death; and

5. Grant petitioner whatever further relief is appropriate in the interest of justice.

DATED: October 29, 2007

Respectfully submitted,

DENNIS P. RIORDAN
DONALD M. HORGAN

By /s/ Dennis P. Riordan
DENNIS P. RIORDAN
Cal. SBN 69320

By /s/ Donald M. Horgan
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VERIFICATION

DENNIS P. RIORDAN declares under penalty of perjury:

I am counsel for petitioner Damien Wayne Echols. My offices are in San Francisco County, California. In my capacity as attorney for petitioner I am making this verification on his behalf because these matters are more within my knowledge than his.

I have read the foregoing petition for a writ of habeas corpus, and declare that the contents of 29th day of October, 2007, at San Francisco, California.

/s/ Dennis P. Riordan
Dennis P. Riordan

PROOF OF SERVICE BY MAIL

Re: Damien Wayne Echols v. Larry Norris, Director No. 04CV00391 WRW

I am a citizen of the United States; my business address is 523 Octavia Street, San Francisco, California 94102. I am employed in the City and County of San Francisco, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served the within:

**SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY**

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

Larry B. Norris, Director
Arkansas Department of
Corrections
6814 Princeton Pike
Pine Bluff, AR 71603

Brent Gasper, Esq.
Deputy Arkansas Attorney General
Arkansas Attorney General's Office
323 Center Street, Ste. 200
Little Rock, Arkansas 77201

Brent Davis
Prosecuting Attorney
P.O. Box 491
Jonesboro, AR 72403

BY MAIL: By depositing said envelope, with postage (certified mail, return receipt requested) thereon fully prepaid, in the United States mail in San Francisco, California, addressed to said party(ies);

I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on October 29, 2007 at San Francisco, California.

/s/ Jocilene Yue

Jocilene Yue