

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.)	

MOTION FOR LEAVE TO FILE SECOND AMENDED PETITION

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Pursuant to Fed. R. Civ. P. 15(a), petitioner Damien Echols by and through undersigned counsel respectively moves for leave to file a Second Amended Petition for habeas corpus relief. *See* Fed. R. Civ. P. 81(a)(2) (providing that the Federal Rules of Civil Procedure govern federal habeas corpus proceedings); Rules Governing Section 2254 Cases in the United States District Courts (same); *Mayle v. Felix*, 545 U.S. 644, 654 (2005) (same).

On October 28, 2005, Echols filed his original Petition for habeas relief. On February 28, 2005, Echols filed a First Amended Petition, which respondent opposed for non-exhaustion of federal claims. On August 18, 2005, this Court denied respondent's Motion to Dismiss and stayed and held in abeyance Echols's First Amended Petition, pending exhaustion of claims relating to newly available DNA testing. (Order dated Aug. 18, 2005.)

Echols now seeks leave to file a Second Amended Petition. Fed. R. Civ. P. 15(a) provides that a habeas petition may be amended once "as a matter of course" before a responsive pleading is filed and may be subsequently amended any time by leave of court. "As a general rule, leave to amend 'shall be freely given when justice so requires.'" *Moore-El v. Luebbers*, 446 F.3d 890, 902 (8th Cir. 2006). The Supreme Court and Eighth Circuit have enumerated several reasons to deny leave to amend a habeas petition: undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment. *Ibid.* (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962).) None apply here. In

particular, respondent suffers no prejudice from this amendment.

Leave to file Echol's Second Amended Petition is justified given the nature of the amended pleading, which arises from newly available DNA evidence establishing "actual innocence" and involves a fundamental miscarriage of justice in a capital case, as described in detail in the Memorandum of Points and Authorities filed herewith.

DATED: October 29, 2007

Respectfully submitted,

DENNIS P. RIORDAN
DONALD M. HORGAN

By /s/ Dennis P. Riordan

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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:

MOTION FOR LEAVE TO FILE SECOND AMENDED PETITION 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
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[x] 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