

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

DAMIEN WAYNE ECHOLS

PETITIONER

v.

No. 5:04CV00391 WRW

**LARRY NORRIS, Director,
Arkansas Department of Correction**

RESPONDENT

**MOTION FOR DETERMINATION OF TIME TO RESPOND AND ALTERNATIVE
MOTION FOR AN EXTENSION OF TIME**

Comes now the respondent, Larry Norris, by and through counsel, Dustin McDaniel, Attorney General, and Brent P. Gasper, Assistant Attorney General, and Lauren Elizabeth Heil, Assistant Attorney General, and for his motion states:

1. On October 29, 2007, Echols filed a motion for leave to file a second amended petition under Fed. R. Civ. P. 15 (2007). (Doc. No. 19) Although Local Rule 5.5(e) only allowed Echols to attach the second amended petition to his motion for leave, he nevertheless filed it – without leave from this Court – contemporaneously with his motion. (Doc. No. 20) According to Local Rule 5.2 and Rule 5(b)(2)(D) of the Federal Rules of Civil Procedure, the respondent was served with the motion for leave and the second amended petition on the date they were transmitted electronically, October 29, 2007. Ordinarily, Rule 15 of the Federal Rules of Civil Procedure would require that where, as here, the time to respond to the original pleading has lapsed, a party shall plead in response to an amended pleading “within 10 days after service of the amended pleading.” For reasons noted below, however, the applicability of this rule here is in question.

2. On November 7, 2007, this Court entered an order granting Echols leave to file the second amended habeas petition. (Doc. No. 26)

3. Local Rule 5.5(e) provides that “[t]he party amending the pleading shall file the original of the amended pleading within five (5) days of the entry of the order granting leave to amend unless otherwise ordered by the Court.” Presumably, then, an amended pleading is not properly filed and served until leave has been granted and the petition thereafter has been filed in compliance with Rule 5.5(e).

4. While Echols filed and served an amended pleading on October 29, 2007, leave had not yet been granted to authorize the filing and service, and the petitioner has not yet complied with Rule 5.5(e). So, it is unclear whether the response time is running at all,¹ or whether it may be deemed to have begun running on October 29, 2007—more than a week before the Court granted leave to permit the filing.

5. Certainly, the respondent’s time to respond should not be deemed to have begun when Echols filed his second amended petition on October 29, 2007, because he had had not yet obtained this Court’s leave to do so. Indeed, the time could not run any earlier than November 7, 2007, when this Court granted leave.

6. Based on the foregoing, respondent is unsure whether he is currently under an obligation to respond to the second amended petition and, if so, the date on which he is to calculate his deadline to file such a response. Accordingly, respondent respectfully asks the Court as follows:

- a) Whether, in light of Habeas rule 5(a), respondent is obligated to respond absent an order requiring a response;
- b) If a response is required, the date on which it is due, and;

¹ To confuse matters further, Habeas Rule 5(a) implies that no response time runs unless a Court orders a response to the petition, and the Habeas Rules supersede any conflicting provision in the Federal Rules of Civil Procedure. Habeas Rule 11.

c) Regardless of that date, respondent respectfully requests an additional 120 days in which to respond. The nature of this case, combined with the size of the second amended petition, warrants this additional time.

7. Finally, this matter is currently stayed pursuant to an order of this Court pending the completion of a related state court proceeding. Since this Court has entered an order allowing Echols to file his second amended petition, respondent is uncertain whether the stay remains in place. If it is in place and will remain so, respondent sees no need for a deadline on which he must file a responsive pleading. However, respondent anticipates that the issue of the stay will need to be addressed in separate pleadings, which respondent anticipates filing in the coming days.

WHEREFORE, Respondent respectfully requests that that this Court determine his time to respond to Echols' second amended habeas petition, if a response is required at all given the uncertain status of the stay entered by this Court. Further, if this Court determines that a response is required of Respondent, Respondent respectfully requests an additional 120 days in which to file his response.

Respectfully submitted:

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By: /s/ Lauren Elizabeth Heil
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CERTIFICATE OF SERVICE

I, Lauren Elizabeth Heil, hereby certify that on this 9th day of November, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and mailed a copy of the document, along with a copy of the Notice of Electronic Filing, by U.S. Mail, postage prepaid, to the following non CM/ECF participant(s):

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