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.	)	

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

DENNIS P. RIORDAN
(CA SBN 69320)
DONALD M. HORGAN
(CA SBN 121547)
THERESA GIBBONS
(CA SBN 191633)
523 Octavia Street
San Francisco, CA 94102
Telephone: (415) 431-3472

DEBORAH R. SALLINGS
(AR SBN 80127)
Cauley Bowman Carney & Williams
11001 Executive Center Drive, Ste. 200
Little Rock, AR 72211
Telephone: (501) 312-8500
(Local Counsel)

Attorneys for Petitioner
DAMIEN WAYNE ECHOLS

INTRODUCTION

1. Damien Wayne Echols, petitioner, by and through his undersigned counsel, hereby submits for filing his instant first amended petition for habeas corpus relief pursuant to 28 U.S.C. section 2254. This amended petition is intended to supersede that filed in this Court on October 28, 2004.

2. Filing of an amended petition is permitted without leave of court where, as here, it occurs prior to the state's filing of a responsive pleading to an original petition. 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); Federal Rule of Civil Procedure 15(a) (establishing right to file one amended pleading without leave of court prior to filing of responsive pleading). 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 §2254 Rule 11, *supra*; Fed.R.Civ.Pro. 15(c) (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 and reported at *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 Rule 37

7. Meanwhile, on March 11, 1997, well prior to the conclusion of direct 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. *See 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, as reported at *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003).

//

The Initial State Motion 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) and reported at *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, and likewise 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 all of the claims asserted in the instant amended petition, including (1) juror misconduct; (2) juror bias; (3); DNA 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 in paragraphs 16 and 17, *infra*, the first and second claim, together with the noted element of the fifth claim, have been exhausted in the state courts as of the time of filing this petition.

//

//

The Second State Motion to Reinvest Jurisdiction in the Trial Court

15. 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 THE ARKANSAS COURTS

16. As noted, the first and second claims in the original, October 28, 2004 federal petition (see paragraph 14, *supra)*, like those contained in the instant 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 instant 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 in paragraph 15, supra. The fact that the jury misconduct and juror bias claims in the instant petition have been exhausted thus constitutes one of the major differences between the instant petition and that filed on October 28, 2004.

17. As also noted, the fifth claim in Echols's original petition (see paragraph 14, *supra)* 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, as described in paragraph 15, *supra*, 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 section V., paragraph 91, *infra*.

TIMELINESS OF PETITION

18. 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.

19. 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."

20. 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 limitations period established by section 2244(d)(1) cannot have commenced any earlier than October 30, 2003.

21. 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). Furthermore, 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.*

22. 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). Furthermore, 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, as described in par. 7-9 and 11-13, *supra*. Accordingly, 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.

23. Notwithstanding the foregoing analysis, the Supreme Court and Eighth Circuit Court of Appeals have yet to decide whether an Arkansas DNA motion filed pursuant to Ark. Code section 16-112-201 et seq. or a similar state DNA motion meets the criteria set forth in 28 U.S.C. section 2244(d)(2), thereby tolling the one-year limitations period set forth in 28 U.S.C. section 2254(d)(1). In the event that the Supreme Court or Eighth Circuit were to decide that such a motion does not toll that one-year limitations period, Echols's petition for federal habeas corpus relief arguably would have been due in this Court within a year of the date that the Rule 37 proceedings terminated, i.e., by October 30, 2004.

24. Accordingly, acting with an abundance of caution and in light of the sentence imposed in this matter, Echols submitted his original federal habeas petition prior to October 30, 2004. Again, the claims stated in the instant amended petition relate back to the date of filing the original petition for the reasons stated in par. 2, *supra*. All claims in this petition are timely presented.

REQUEST FOR ORDER HOLDING PETITION IN ABEYANCE PENDING EXHAUSTION OF CERTAIN CLAIMS IN STATE COURT

25. This petition contains exhausted claims as well as one claim as to which petitioner has not yet exhausted his state remedies. The exhausted claims are stated in sections I., II, IV. and V., *infra*. The unexhausted claim relates to the

DNA motion as described in par. 11-13, *supra*, and as stated in section III. (par. 63-65), *infra*.

26. Echols requests that the District Court hold his petition in abeyance pursuant to the procedure authorized by *Lee v. Norris*, 354 F.3d 846 (8th Cir. 2004) .

27. Every circuit other than the Eighth Circuit has authorized the regular use of the "stay-and-abeyance" procedure for mixed petitions. *See Pliler v. Ford*, 124 S. Ct. 2441, 2450 (2004) (Breyer, J., dissenting); *Akins v. Kenney*, 341 F.3d 681, 685-86 (8th Cir. 2003). The Supreme Court recently granted certiorari to settle the propriety of the procedure, *see Rhines v. Weber*, 346 F.3d 799 (8th Cir. 2003), *cert. granted* 124 S. Ct. 2905 (June 28, 2004), and it appears likely that the Court will approve the stay-and-abeyance procedure.

28. In *Ford*, the five-member majority decided not to "address[] the propriety of this stay-and-abeyance procedure;" instead, it issued a narrow ruling that District Courts are not required to give *pro se* litigants specific warnings about the procedure. *Ford*, 124 S.Ct. at 2446. Justices Breyer, Souter, and Stevens, however, explicitly endorsed the procedure. *See id.* at 2448 (Stevens, J., concurring); id. at 2449-50 (Breyer, J., concurring). Justices Ginsburg and O'Conner, moreover, both suggested that they would endorse the procedure. *See*

id. at 2448 ("I note, however, that the procedure is not an idiosyncratic one; . . . seven of the eight Circuits to consider it have approved stay-and-abeyance as an appropriate exercise of a district court's equitable powers.") (O'Connor, J., concurring); *id.* at 2448-49 (Ginsburg, J., dissenting).

29. It thus appears that when the Supreme Court issues its ruling in *Rhines*, at least five members will endorse the stay-and-abeyance procedure. But even putting aside any predictions about the outcome in *Rhines*, the Eighth Circuit has itself authorized the procedure in at least some cases. Thus, under *Lee v. Norris*, a District Court may hold a petition in abeyance when "exceptional circumstances" exist. Id., 354 F.3d at 849.

30. Mr. Echols filed his Motion for DNA Testing under Arkansas Code § 16-112-202 et seq. on July 25, 2002, and that motion is still pending in state court. The motion for DNA testing raises a variety of challenges to his conviction. The DNA motion should, in Mr. Echols's view, qualify as "a properly filed application for State post- conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2). See par. 19-22, *supra*. Mr. Echols therefore maintains that the AEDPA statute of limitations will be tolled during the pendency of his DNA motion. He maintains, in other words, that his one-year limitations period has not yet begun to run since his DNA motion was filed before the Arkansas Supreme

Court rendered its final judgment on his Rule 37 petition.

31. The Eighth Circuit, however, has not yet determined whether a motion under Arkansas Code § 16-112-202 entitles a prisoner to statutory tolling. If Mr. Echols waited to file his habeas petition until after exhausting his DNA claim, the state could argue at that time — and this Court or the Eighth Circuit could rule — that his DNA motion did not come within the tolling provision of § 2244(d)(2). If this Court were to rule at that time that the DNA motion did not qualify for statutory tolling, it would likely calculate the expiration of the § 2244(d)(1) limitations period on October 30, 2004, one year after the Arkansas Supreme Court's final disposition of his Rule 37 petition. In short, if Mr. Echols had waited to commence the instant habeas proceedings until all of his applications for state post-conviction relief, including his still-pending state DNA application, were exhausted, he would risk forfeiting all federal review of the state judgment and the sentence of death imposed upon him.

32. On the other hand, had Mr. Echols commenced these federal habeas proceedings with a petition containing only exhausted claims, he would have been forced to forfeit any claim founded on his still-pending state DNA motion. Such a claim possibly could not be raised in a second or successive petition because such petitions are generally barred by 28 U.S.C. § 2244(b).

33. Mr. Echols thus faced a Hobson's choice. Had he waited to file his original federal petition until his DNA claim was exhausted in the Arkansas courts, he would risk an adverse ruling on § 2244(d)(2) tolling that would deny him all federal relief. But if he filed an original or amended federal petition containing only exhausted claims, he would forfeit all opportunity for federal review of his DNA-related claim still pending in the state courts. No prisoner — and especially no prisoner on death row — should be forced to make such a choice.

34. Mr. Echols is not seeking to circumvent the state court review process or to undermine the principles of comity that underlie the exhaustion doctrine. *See Rose v. Lundy*, 455 U.S. 509, 515-21 (1982). He has been diligent in pursuing his claims. Mr. Echols has made every effort to comply with both Arkansas's procedural rules and those of AEDPA. The problem he faces is not one of his own making, but is instead the product of an unresolved question of federal law. This unique situation of uncertainty is precisely the sort of "exceptional" case where a District Court should employ the stay-and-abeyance procedure pursuant to *Lee v. Norris*, *supra*, thereby permitting Echols to exhaust his DNA application in the Arkansas courts while the instant petition remains pending.

//

35. In the alternative, this Court could solve this problem by resolving the currently unresolved question of law. The Court could issue a ruling that Mr. Echols's state court DNA motion will entitle him to statutory tolling under 28 U.S.C. § 2244(d)(2) during the pendency of that motion. It could then dismiss Mr. Echols's amended petition without prejudice to refiling following complete exhaustion. *See Slack v. McDaniel*, 529 U.S. 473, 488-89 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 650-51 (1998); *Singleton v. Norris*, 319 F.3d 1018, 1028-29 (8th Cir. 2003); *Camarano v. Irvin*, 98 F.3d 44, 45-47 (2d Cir. 1996). This Court could thereby allow Mr. Echols to complete his state court proceedings without a risk of forfeiting all federal review.

36. Mr. Echols is stuck in a bind created by the AEDPA limitations period, the rule against successive petitions, and the unsettled question of law regarding the status of Arkansas state DNA motions. He seeks to exhaust all claims in state court before pursuing federal remedies, but he obviously seeks to do so in a manner that will comply with AEDPA's various procedural restrictions. He respectfully asks this Court to issue a ruling that will permit him to do so.

//

//

//

GROUNDS FOR RELIEF

37. This case arises under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, for each of the reasons set forth herein. The Arkansas state courts' adjudications of the exhausted claims set forth in sections I, II, IV. and V., *infra*, constitute decisions that 1) were contrary to, or involved an unreasonable application of, clearly established federal law, within the meaning of 28 U.S.C. § 2254(d)(1) and/or 2) were 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). Ibid.; see also Williams v. Taylor, 529 U.S. 362 (2000).

38. Furthermore, should the unexhausted claim set forth in sections III., *infra*, be decided against petitioner in the Arkansas state courts, such decision will be 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). Ibid.; see also Williams v. Taylor, 529 U.S. 362 (2000).

//

//

CLAIMS FOR RELIEF

I. THE STATE COURTS UNREASONABLY REJECTED PETITIONER'S CLAIM THAT THE JURY'S EXTRAJUDICIAL RECEIPT AND CONSIDERATION OF THE INADMISSIBLE AND FALSE MISSKELLEY STATEMENT IMPLICATING ECHOLS IN THE CHARGED OFFENSES VIOLATED PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, CROSS-EXAMINATION, COUNSEL, AND DUE PROCESS OF LAW, REQUIRING THAT HIS CONVICTIONS BE VACATED

39. The claims and factual allegations set forth in all other sections of this Petition are realleged as if set forth entirely herein.

40. Prior to petitioner's trial, the state tried and convicted Jesse Misskelley for allegedly participating with petitioner and defendant Jason Baldwin in the murders at issue. Misskelley was tried and convicted of murder in a separate trial that concluded shortly before the joint trial of petitioner and Baldwin. *See Misskelley v. State,* 323 Ark. 449 (1996)(setting forth the evidence adduced at Misskelley trial and disposing of Misskelley's claims on appeal).

41. As the Arkansas Supreme Court noted, *see Misskelley v. State*, 323 Ark. 449, 459 (1996), the state's case against Misskelley rested almost entirely on a statement which he made to police on June 3, 1993, implicating himself as well as petitioner and Baldwin in the murders for which petitioner and Baldwin were also convicted at their later trial. The Misskelley statement, however, was

fundamentally unreliable and, in all respects material to Echols, utterly false.

42. Under firmly established Supreme Court precedent, it would have been error of federal constitutional dimension to admit the Misskelley statement at a joint trial of the declarant (Misskelley) and the codefendants (Echols and Baldwin) unless the declarant were to take the stand and be subject himself to cross-examination by his codefendants, an event which never occurred in this matter. *Bruton v. United States*, 391 U.S. 123 (1968). Injection of such evidence into the trial proceedings against Echols necessarily would have violated his federal constitutional rights, including those arising under the Sixth Amendment's Confrontation Clause, because the extraordinarily prejudicial nature of a cross-incriminating statement of a non-testifying defendant cannot be dispelled by a trial court admonition limiting the statement's admissibility to the declarant alone. *Ibid.*

43. It was for the foregoing reason that the state trial court severed the trial of Echols and Baldwin from that of Misskelley. Despite the importance of insulating the Echols-Baldwin proceeding from any taint of the Misskelley statement, however, a reference to the statement was injected into the Echols trial through a prosecution witness's unresponsive answer to a question on cross-examination. While striking the answer from the record and admonishing the jury

to ignore it, the trial court justified its ruling denying a defense motion for a mistrial on the ground that the jury had heard mention only of the statement's existence, not its prejudicial contents.

44. Nonetheless, the trial of Echols and Baldwin was plagued by the very unfairness the severance of their case from Misskelley's was designed to avoid. Having learned of its contents through media reports, jurors considered the Misskelley statement and relied on it to convict, as evidenced by the fact that a chart drawn up during jury deliberations and copied into one juror's notes listed the Misskelley statement as a ground upon which to rest a verdict of guilt as to both defendants.

45. The jurors' discussion of the Misskelley statement breached a direct judicial command. In addition, such discussion ran afoul of the Fifth, Sixth, and Fourteenth Amendments and firmly established Supreme Court precedent prohibiting jurors from considering in their deliberations information received from extrajudicial sources such as newspaper or television reports. For instance, in *Turner v. Louisiana*, 379 U. S. 466 (1965), the Court reversed the defendant's murder conviction and sentence of death where two deputy sheriffs who served as bailiffs during Turner's trial also testified as witnesses for the prosecution. The Court explained:

> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury.

Turner, 379 U.S. at 473; *see also Rideau v. Louisiana*, 373 U.S. 723 (1963) (relying on due process clause to reverse conviction of defendant where jurors discussed extra-judicial evidence in form of televised news report containing defendant's pre-trial self-incriminating statements); *Parker v. Gladden*, 385 U.S. 363 (1966) (holding that bailiff's negative comments concerning defendant's character to one deliberating juror and improper comment to another mandated reversal given patent violation of defendant's rights to confrontation, cross-examination, and counsel.)

46. The unfairness caused by the jury's discussion and weighing of the Misskelley statement was even greater than would have resulted had the trial court erroneously admitted the out-of-court statement over hearsay and Confrontation Clause objections. In that instance, the defense, on notice that the statement was before the jury, could have proceeded during its case to demonstrate that every line of the statement was false. Instead, having heard no evidence to the contrary,

the jury was left under the delusion that Misskelley had provided the police with credible information establishing his own culpability and that of his codefendants. The devastating impact of the extrajudicial information received by the jury dwarfed the persuasive force of the minimal evidence properly admitted into evidence against Echols. This grossly prejudicial Fifth, Sixth, and Fourteenth Amendment violation mandates the habeas relief sought in the instant petition.

47. In its order of January 20, 2005, the Arkansas Supreme Court did not dispute the validity of petitioner's federal constitutional claim based on juror misconduct, but refused to consider that claim, holding alternatively that: (a) the claim was untimely because it could have been raised before judgment was rendered in the trial court; and (b) Arkansas evidentiary law would have barred relief on the misconduct claim, whenever it was raised. This ruling (1) was contrary to, or involved an unreasonable application of, clearly established federal law, within the meaning of 28 U.S.C. § 2254(d)(1) and/or 2) was 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). Ibid.; see also Williams v. Taylor, 529 U.S. 362 (2000).

//

//

II. THE STATE COURT 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, MANDATING THAT HIS CONVICTIONS BE VACATED

48. The claims and factual allegations set forth in all other sections of this Petition are realleged as if set forth entirely herein.

49. The evidence described in the foregoing claim for relief concerning the extraneous information injected into the deliberations of the Echols jury proves the jury's receipt of, and reliance on, extrajudicial information in patent violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. That same evidence also establishes a related but distinct constitutional deprivation of Echols's right to twelve impartial jurors.

50. During individualized voir dire at Echols's trial, no juror admitted to being aware of the fact that Jesse Misskelley had given a statement or confession to police interrogators, and certainly none disclosed knowledge that any such statement implicated either Echols or Baldwin. Yet during deliberations the Misskelley statement was listed on a jury display board as a reason to convict both Echols and Baldwin. That conduct can now be explained by the fact that three jurors have now admitted at the time of jury selection they were aware of the

Misskelley statement.

51. Furthermore, the foreperson has admitted an extensive familiarity with the media reports disseminated on the eve of trial, particularly those details incriminatory of Echols and Baldwin, despite the fact that during jury selection he denied knowing anything about the Misskelley matter other than that Misskelley had been previously convicted of something, although the foreperson did not know what.

52. A second juror at petitioner's trial maintained during voir dire that he had not discussed the case with his father, but recently has stated that in a pre-trial conversation with that juror, his father "spit out" the details of the case. The receipt of that information surely explains the fact that during the trial this juror not only held the opinion that the defendants were guilty, but that they had supporters in the courtroom who were capable of killing the juror as well, leading the juror to be terribly frightened for his own life at a time he was supposed to be dispassionately deciding the guilt or innocence of Echols.

53. A third juror at petitioner's trial has sworn that she decided the guilt of the defendants before hearing closing arguments and the trial court's instructions.

54. Several other jurors admitted during voir dire that they tended to believe that the defendants were guilty, although they promised to set those

opinions aside.

55. The United States Supreme Court has held that "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds v. United States*, 98 US 145, 155 [1878]." *Id.* at 722. While a juror who truly can put aside his or her opinions may fairly serve, "those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to [that juror]." *Id.* at n 3 (quoting Chief Justice Marshall in 1 *Burr's Trial* 416 (1807).)

56. A pivotal factor in determining a prospective juror's impartiality is his or her candor in responding to questions on voir dire. "Voir dire plays a critical function in assuring the criminal defendant that his [or her] Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). "The necessity of truthful answers by prospective jurors . . . is obvious.'" *McDonough Power Equipment, Inc. v. Greenwood* 464 U.S. 548, 554 (1984)(plurality) (Rehnquist, J.); *see also McDonough,* 464 U.S. at 556 (1984) (Blackmun, J., concurring) ("[T]he honesty and dishonesty of a juror's

response is the best initial indicator of whether the juror in fact was impartial."); *Clark v. United States*, 289 U.S. 1, 11 (1933) (Cardozo, J.) ("The judge who examines on the voir dire is engaged in the process of organizing the court [and] if the answers to the questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only.")

57. In *Irvin*, *supra*, eight of the twelve jurors selected to sit on the defendant's jury had formed the opinion that he was guilty based on exposure to pretrial publicity, although each stated "that notwithstanding his opinion he could render an impartial verdict." *Irvin,* 366 U.S. at 724. The Supreme Court vacated the defendant's murder convictions and sentence of death, holding that:

> With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two thirds admit, before hearing any testimony, to possessing a belief in his guilt.

Id., 366 U.S. at 728.

58. In light of the foregoing precedent and related cases, the facts alleged in support of the present claim require vacation of Echols's convictions for at least three closely related reasons.

59. First, the responses of certain jurors demonstrate that, contrary to the express assurances they gave to the trial court during voir dire, such jurors had in

fact known the details of the devastatingly prejudicial Misskelley statement and of related negative publicity concerning petitioner. Such concealment demonstrates that one or more of the jurors who returned verdicts of guilt against Echols harbored an impermissible bias against him, a prejudicial violation of his rights under the Fifth, Sixth and Fourteenth Amendments.

60. Second, the responses of certain jurors likewise demonstrates that, again contrary to the assurances provided on voir dire, they prejudged defendant's guilt prior to the close of evidence, again constituting a prejudicial violation of Echols's rights under the relevant Constitutional guarantees.

61. Third, the Supreme Court's holding in *Irvin, supra,* 366 U.S. at 728, establishes that such disavowals of bias as were expressed by the jurors at Echols's trial cannot under any circumstance be deemed conclusive when the exposure of jurors to inadmissible and prejudicial information is so great that a majority of sitting jurors was predisposed to a finding of guilt when selected to serve. That critical mass of bias and prejudgment was reached in this case, yet another reason why Echols's convictions must be set aside.

62. As with petitioner's jury misconduct claim, in its order of January 20, 2005, the Arkansas Supreme Court did not dispute the validity of petitioner's federal constitutional claim based on juror bias, but refused to consider that claim,

holding alternatively that: (a) the claim was untimely because it could have been raised before judgment was rendered in the trial court; and (b) Arkansas evidentiary law would have barred relief on the misconduct claim, whenever it was raised. This ruling (1) was contrary to, or involved an unreasonable application of, clearly established federal law, within the meaning of 28 U.S.C. § 2254(d)(1) and/or 2) was 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). Ibid.; see also Williams v. Taylor, 529 U.S. 362 (2000).

III. PETITIONER'S INCARCERATION AND SENTENCE OF DEATH VIOLATE HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS AND PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT INSOFAR AS FORENSIC EVIDENCE NOT AVAILABLE AT THE TIME OF TRIAL DEMONSTRATES HIS ACTUAL INNOCENCE OF THE CRIMES

63. The claims and factual allegations set forth in all other sections of this Petition are realleged as if set forth entirely herein.

64. Subsequent to his convictions in this matter, petitioner filed a "Motion for DNA Forensic Testing" in the Arkansas Circuit Court for Craighead County pursuant to Arkansas Code section 16-112-202 et seq.

65. The biological material which is the subject of Echols's pending motion for DNA forensic testing will establish that petitioner is actually innocent of the

crimes of which he was convicted in the Arkansas trial court and for which he was sentenced to death. The judgment and sentence pursuant to which petitioner remains in custody and subject to execution by the state have thus been imposed in violation of the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of equal protection and due process of law, and must accordingly be vacated.

IV. THE STATE COURTS UNREASONABLY REJECTED PETITIONER'S CLAIM THAT HIS TRIAL COUNSEL LABORED UNDER VARIOUS CONFLICTS OF INTEREST WHICH DENIED PETITIONER HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

66. The claims and factual allegations set forth in all other sections of this Petition are realleged as if set forth entirely herein.

67. Petitioner alleges that all of his convictions were obtained in violation of his Fifth, Sixth and Fourteenth Amendment rights to the effective assistance of counsel in light of trial counsel's multiple conflicts of interest. The United States Supreme Court enunciated the standard for establishing such a violation in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and related precedent. The standard articulated in *Sullivan* holds that to establish a Sixth Amendment violation based on a conflict not exposed on the record in the trial court, a defendant must show: (1) the presence of an actual conflict of interest; and (2) that the conflict resulted in an

adverse effect upon the lawyer's performance. Once the defendant establishes such an adverse effect, he need not establish prejudice, which is presumed to result from the conflict. 446 U.S. at 349-50; *Mickens v. Taylor*, 535 U.S. 162, 172-73 (2002).

68. A defendant can establish an "adverse affect" on his counsel's representation by demonstrating that "a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests." *United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990) (citing *Brien v. United States*, 695 F.2d 10, 15 (1st Cir. 1982)). Alternatively, a defendant can show that "some plausible alternative defense strategy or tactic – 'a viable alternative' – might have been pursued. *Perillo v. Johnson*, 79 F.3d 41, 449 (5th Cir. 1996); *see also United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1988), *cert. denied*, 492 U.S. 906 (1989) (holding that to prevail on claim under *Cuyler*, the defendant simply needs to show that an alternative was available to counsel and that it 'possessed sufficient substance to be a viable alternative' [quoting *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985)])

69. The defendant need not show that any such "available strategy" is likely to have resulted in a different outcome at trial. *See, e.g., Rosenwald v. United*

States, 898 F.2d 585, 589 (7th Cir. 1990)(per curiam)(relief required even though strength of the state's case makes it improbable the conflict caused any harm to the accused); *Thomas v. Foltz*, 818 F.2d 476, 483 (6th Cir. 1987) (pressure to plead guilty, brought to bear by conflicted attorney, requires reversal even though strength of state's case makes it obvious non-conflicted attorney would have given same advice); *United States v. Cancilla*, 725 F.2d 867, 871 (2d Cir. 1984)(when conflict induced attorney to retreat from particular defense, reversal is mandated; "it is irrelevant that such a defense is unlikely to prevail and was unsuccessfully urged by [co-defendant]"; *Westbrook v. Zant*, 704 F.2d 1487, 1499, & n. 14 (11th Cir. 1983) (reversible error if conflict prompted counsel to refrain from raising a particular defense, even if that defense would not have proven successful); *Brien v. United States*, 695 F.2d 10, 15 (1st Cir. 1982) (to prevail on conflict claim, petitioner need only show conflicted attorney failed to pursue plausible strategy, not that strategy would have been successful).

70. In this matter, Echols alleges that his trial counsel labored under numerous conflicts of interest which adversely affected his performance in the course of his representation of Echols and within the meaning of *Sullivan* and related precedent, as set forth below:

//

The HBO Contract

71. Prior to trial, trial counsel induced Echols's agreement to conclude a contract with Creative Thinking International, a production company engaged by Home Box Office ("HBO") to make a film about petitioner's case and trial. In exchange for, inter alia, Echols's participation in the making of the film, including Echols's engagement in interviews and agreement to placement of cameras in the courtroom, HBO agreed to pay Echols $7,500. Trial counsel used some of the funds paid under the contract as compensation for expenses he incurred during the trial. In accordance with the terms of the contract, trial counsel did not disclose the existence and terms of the contract to the trial court during petitioner's trial.

72. The HBO contract spawned an actual conflict between trial counsel's interest in pursuing the best possible defense for Echols and counsel's interest in the benefits he sought to reap from the contract including, inter alia, his long term pecuniary, professional, and social interests in release of a successful film. This actual conflict, moreover, resulted in several adverse effects on counsel's representation of Echols, including the following:

a. Publicity concerning the underlying incidents in this matter was ubiquitous, intense and, to the extent it concerned petitioner's background and character, overwhelmingly negative. Though the trial in the Misskelley matter had

concluded a mere two weeks earlier, trial counsel failed to move for a continuance of the Echols trial date because he wished to conclude the trial before the film's release. As he expressly conceded and the state Supreme Court expressly found (*Echols v. State*, *supra*, 354 Ark. at 546), trial counsel reasoned that the impending and pre-scheduled release of the film, production of which had been facilitated by counsel himself, would undermine petitioner's defense at trial; as counsel stated, he "wanted the trial over before the film was shown" because the film, including its depiction of interviews with Echols, might have an impact on the jury. Counsel's failure to seek the continuance led to the impanelment of jurors who, as alleged elsewhere in this petition, harbored a significant bias against Echols and/or who, during deliberations, considered extraneous prejudicial material in the form of the confession elicited from Misskelley.

b. As a result of the HBO contract, trial counsel relied on the meager funds to be paid from the HBO contract for such things as pretrial investigation, discovery, and expert witnesses at both the guilt and penalty phases of Echols's trial, thereby causing counsel to forego funds that were available from the trial court upon request.

c. As a result of the HBO contract, trial counsel devoted time otherwise available for trial preparation to participation in the production of the

HBO film, including, inter alia, the staging of defense strategy meetings and other projects relating to such production.

d. Adherence to the HBO contract also led counsel to refrain from challenging the use of cameras in the courtroom during Echols's trial, which adversely affected the jurors' capacity to neutrally and fairly evaluate the evidence in the case.

Prior Representation of Michael Carson

73. Michael Carson was a critical prosecution witness at Echols's trial. Specifically, Carson testified that Jason Baldwin, Echols's co-defendant, confessed his participation in the crime alleged against both Echols and Baldwin. Other state testimony established that Echols and Baldwin were best friends who spent virtually all of their available time together, and that they had been together shortly before the time of the homicides. Carson's testimony as to Baldwin's purported confession thus constituted devastatingly prejudicial evidence not only against Baldwin but against Echols as well. The Carson testimony was used as the basis for opinion evidence offered against Echols.

74. Notwithstanding Carson's pivotal role at trial, Echols's trial counsel labored under a conflict of interest arising from his prior representation of Carson in a juvenile criminal matter, a conflict which trial counsel never disclosed to

Echols. That conflict adversely affected trial counsel's performance by causing trial counsel to refrain from conducting any cross-examination of Carson, despite such counsel's knowledge of matters, including Carson's prior criminal history, that would have gravely undermined Carson's credibility before the jury.

Representation of Mark Byers' Co-Defendant in Civil Action Pending at time of Petitioner's Trial

75. John Mark Byers was a critical witness at Echols's state trial. Among other things, defense counsel and, for a time, law enforcement viewed Byers as the possible perpetrator of the crimes alleged against Echols. Byers's interests were thus diametrically opposed to Echols's interests at Echols's state court trial. Trial counsel, however, labored under a conflict of interest arising from his representation of two co-defendants of Byers on whose behalf Byers had testified in a civil matter involving an alleged burglary of a jewelry store. The civil matter had not been concluded at the time that Echols's trial counsel questioned Byers at Echols's trial. Trial counsel never disclosed the conflict to Echols.

76. Trial counsel's loyalty to his civil clients and, by extension, to Byers adversely affected counsel's representation of Echols at trial. While counsel conducted some examination of Byers concerning his possible involvement in the case, his divided loyalties led him to refrain from actively and zealously

questioning and impeaching Byers on all relevant matters, including the full history of Byers's prior criminal and violent conduct; Byers's medical condition, including his affliction with brain tumors which, as trial counsel knew, could be associated with violent and criminal conduct; and Byers's involvement in the civil case in which counsel represented Byers' codefendant.

V. THE STATE COURTS UNREASONABLY REJECTED PETITIONER'S CLAIM THAT HE WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WITHIN THE MEANING OF *STRICKLAND V. WASHINGTON*

77. The claims and factual allegations set forth in all other sections of this Petition are realleged as if set forth entirely herein.

78. Petitioner alleges that all of his convictions were obtained in violation of his federal constitutional right under the Sixth Amendment to the effective assistance of counsel under an additional analysis established by Supreme Court precedent. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court held that in order to succeed in challenging a conviction on this basis, (1) The defendant must show that counsel's performance fell outside the wide range of professional competence; and (2) the defendant must prove that his trial counsel's conduct was prejudicial to his case, *i.e.*, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. *Strickland*, 466 U.S. at 688-93. Stated otherwise, ". . . to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonable competence, and that the deficient performance prejudiced the defendant." *United States v. Villalpando*, 259 F.3d 934, 938 (8th Cir. 2001) (citing *Strickland*, 466 U.S. at 687).

79. Under *Strickland*, decisions may not be viewed as "tactical," and hence do not merit deference, when they are the product of counsel's ignorance or lack of preparation. *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986); *see also United States v. Gray*, 878 F.2d 702 , 711 (3d Cir. 1989). Furthermore, a "reasonable probability" of a different outcome does not require a showing that counsel's conduct more likely than not altered the outcome in the case, but simply "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693-4; *see also Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995) (A "reasonable probability" is less than a preponderance of the evidence)

80. Petitioner alleges that his trial counsel rendered objectively deficient assistance in the following instances, the prejudicial impact of which, considered alone and cumulatively, mandates reversal under *Strickland*:

//

//

Jury Voir Dire

81. First, trial counsel unreasonably failed to conduct a constitutionally adequate voir dire of prospective jurors or submit to jurors a constitutionally adequate pre-trial questionnaire, despite the presence of extensive prejudicial publicity concerning Echols, as set forth above. Of great importance, such publicity included extensive reporting both of the Misskelley confession implicating defendant as a primary participant in the homicides and Misskelley's potential appearance as a witness for the prosecution in the case.

82. Notwithstanding these developments, trial counsel rendered deficient performance by, inter alia, a) unreasonably failing to conduct an adequate inquiry into the bias of potential jurors; b) unreasonably failing to determine the extent and effect of potential jurors' exposure to news accounts surrounding the case, including but not limited to the Misskelley confession, and to other extraneous matter; c) unreasonably failing to recognize the harm that would be effected by intentionally selecting jurors even after counsel learned of their exposure to prejudicial matters; and d) unreasonably failing to excuse potential jurors in view of that harm.

83. The foregoing errors and omissions were prejudicial to petitioner within the meaning of *Strickland* because, among other things, and as set forth above,

they resulted in 1) juror exposure to extraneous evidence, including the Misskelley confession, and 2) the empaneling of biased jurors who, contrary to their promises to the court and their obligations as jurors, considered the Misskelley confession and other extra-judicial evidence during their deliberations.

Failure to Move for Continuance

84. Second, trial counsel unreasonably failed to move for a continuance of petitioner's trial to permit the negative publicity surrounding the case to subside. This omission prejudiced petitioner under *Strickland* not only because the presence of such publicity swayed jurors against petitioner as a general matter, but also because it resulted in 1) juror exposure to extraneous evidence, including the Misskelley confession, and 2) the empaneling of biased jurors who, contrary to their promises to the court and their obligations as jurors, considered the Misskelley confession and other extra-judicial evidence during their deliberations.

Failure to Seek Second Change of Venue

85. Third, trial counsel unreasonably failed to move for a second change of venue out of Craighead County despite the intense negative publicity surrounding the case in that locale and the juror responses on voir dire establishing that most had formed an opinion as to petitioner's guilt. Here again, the omission prejudiced petitioner under *Strickland* because, inter alia, it likewise resulted in 1) juror

exposure to extraneous evidence, including the Misskelley confession, and 2) the empaneling of biased jurors who, contrary to their promises to the court and their obligations as jurors, considered the Misskelley confession and other extra-judicial evidence during their deliberations.

Failure to Retain and Use Experts

86. Fourth, trial counsel unreasonably failed to investigate, select, retain, and make appropriate use of experts, including a forensic odontologist, forensic entomologist, and/or forensic pathologist in connection with petitioner's trial. The omission was prejudicial under *Strickland* because, inter alia, it prevented Echols from rebutting the unreliable and highly prejudicial expert evidence adduced by the state at trial and from corroborating petitioner's claim that he was actually innocent of the alleged crimes.

Failure to Challenge Expert Testimony Relating to the Occult

87. Fifth, trial counsel unreasonably 1) failed to adequately challenge the proposed introduction of purported expert testimony from prosecution witness Dale Griffis, who rendered a variety of speculative and damaging opinions linking both defendant and the homicides to occult practices; and 2) failed to challenge the trial court's instructions concerning the permissible uses of such testimony.

The bases for such challenges was readily available to counsel in light of the Arkansas Supreme Court's holding in *Prater v. State*, 307 Ark. 180 (1991), which adopted a standard of expert testimony admissibility similar to that adopted by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

88. These failures prejudiced Echols within the meaning of *Strickland* because, inter alia, they led directly to the jury's consideration of Griffis' fundamentally unreliable and highly inflammatory testimony. The failure further prejudiced Echols because, in his testimony, Griffis relied on the Michael Carson statement implicating Jason Baldwin in concluding that the homicides were occult-related, thereby permitting the jury to rely on that statement as a basis for incriminating petitioner, notwithstanding the fact that the statement should have been deemed flatly inadmissible against petitioner for any purpose pursuant to the dictates of the Fifth, Sixth and Fourteenth Amendments.

Unreasonable Presentation of Evidence at Sentencing

89. Sixth, at sentencing, trial counsel unreasonably introduced testimony from defense expert James Moneypenny concerning petitioner's mental health history; unreasonably failed to object to cross-examination of Moneypenny concerning excerpts drawn from Echols's mental health records; and unreasonably

failed to seek a limiting instruction as to the use of the Moneypenny testimony. These failures prejudiced Echols under *Strickland* because, inter alia, Moneypenny's testimony and cross-examination disclosed grossly inflammatory and otherwise inadmissible material that patently undermined rather than advanced the effort to mitigate the evidence relating to penalty.

Failure to Investigate and Present Mitigating Evidence at Sentencing

90. Seventh, trial counsel unreasonably failed to investigate and present substantial mitigating evidence on Echols's behalf at sentencing. This failure prejudiced Echols within the meaning of *Strickland* because, inter alia, it undermined the defense effort to challenge evidence in aggravation which was introduced by the state and which resulted in the sentence of death ultimately imposed by the trial court.

Failure to Move for a New Trial Based on Evidence of Juror Misconduct and Bias

91. Eighth, trial counsel unreasonably failed to seek a new trial based on evidence of juror misconduct and/or juror bias. The Arkansas Supreme Court's January 20, 2005 ruling denying petitioner's motion to recall the mandate and to reinvest jurisdiction in the trial court for purposes of convening coram nobis proceedings, as described in paragraph 15, *supra*, effectively establishes the

unreasonableness of counsel's omission in this regard. This omission prejudiced Echols within the meaning of *Strickland* for the reasons set forth in paragraphs 39-62, supra.

92. In its order of February 24, 2005, the Arkansas Supreme Court refused to consider this aspect of petitioner's claim of ineffective assistance of counsel on the merits, holding that it could have and should have been raised at an earlier stage of the proceedings. This ruling (1) was contrary to, or involved an unreasonable application of, clearly established federal law, within the meaning of 28 U.S.C. § 2254(d)(1) and/or 2) was 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). Ibid.; see also Williams v. Taylor, 529 U.S. 362 (2000).

INCORPORATION OF STATE RECORD

93. Petitioner hereby incorporates by reference 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), *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. Issue an order holding the instant petition in abeyance to permit petitioner to exhaust all of his present claims in the Arkansas state courts; or, alternatively, issue an order finding that petitioner' pending state DNA proceeding tolls the statutory deadline for seeking habeas relief in this Court under the AEDPA, and dismissing the instant petition without prejudice to its timely refiling after the conclusion of that state court proceeding;

2. Grant leave to amend the petition, as may be appropriate;

3. 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;

4. Convene an evidentiary hearing to resolve all disputed issues of fact;

5. After full consideration of petitioner's claims, set aside petitioner's convictions and/or sentence of death; and

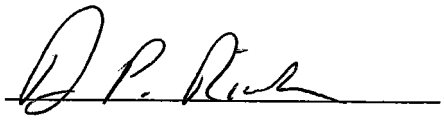
//

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

DATED: February 25, 2005

Respectfully submitted,

DENNIS P. RIORDAN
DONALD M. HORGAN

By 

DENNIS P. RIORDAN, Cal. SBN 69320
RIORDAN & HORGAN
523 Octavia Street
San Francisco, CA 94102
(415) 431-3472

Attorneys for Petitioner
DAMIEN WAYNE ECHOLS

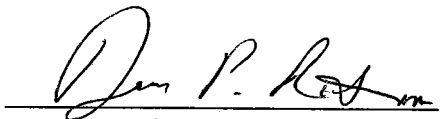
VERIFICATION

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 the petition are true to the best of my knowledge.

Executed this 25th day of February, 2005, at San Francisco, California.



Dennis P. Riordan

PROOF OF SERVICE BY MAIL

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

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:

First Amended Petition For A 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
(Courtesy Copy)

[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 February 25, 2005 at San Francisco, California.

DONALD M. HORGAN