

**THIS IS A CAPITAL CASE**

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

**FILED**  
U.S. DISTRICT COURT  
EASTERN DISTRICT ARKANSAS

MAR 02 2005

By: **JAMES W. McCORMACK, CLERK**  
DEP CLERK

**DAMIEN WAYNE ECHOLS  
ADC #SK931**

**PETITIONER**

v. **Case No. 5:04-CV-391-WRW**

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

**RESPONDENT**

**MOTION TO DISMISS PETITION FOR WRIT OF  
HABEAS CORPUS FOR NON-EXHAUSTION**

COMES NOW Respondent, Larry Norris, by and through counsel, Mike Beebe, Attorney General, Brent P. Gasper, and Joe Svoboda, Assistant Attorneys General, and for his response, states:

**I. Statement of Facts and Procedural History**

Petitioner Damien Wayne Echols is a state prisoner currently sentenced to death for three counts of capital murder committed in West Memphis, which is in Crittenden County, Arkansas. Venue was transferred to Craighead County, and, after a trial, a jury found him guilty of these crimes on March 19, 1994. A copy of the judgment and commitment order is attached as Respondent's Exhibit "A."<sup>1</sup>

Echols appealed his convictions, initially raising thirty (30) points on appeal, and the Arkansas Supreme Court affirmed the convictions on December 23, 1996. *See Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996) (hereinafter referred to as *Echols I*). A copy of his

---

<sup>1</sup> Because of the voluminous number of exhibits, they will not be attached here and will be filed with this Court under different cover contemporaneously with the filing of this motion. Additionally, some of the appellate briefs and abstracts submitted as exhibits are printed on both sides of the paper – as they were tendered to the Arkansas Supreme Court – and we reprinted as double-sided due to size and volume considerations.

abstract of pleadings and testimony, volumes I and II, are attached as Respondent's Exhibit "B," collectively. A copy of his direct appeal brief is attached as Respondent's Exhibit "C." A copy of the State's supplemental abstract and response brief is attached as Respondent's Exhibit "D." A copy of Echols' reply brief is attached as Respondent's Exhibit "E." A copy of the opinion is attached as Respondent's Exhibit "F." Echols petitioned the United States Supreme Court for a writ of certiorari, which was denied on May 27, 1997. *See Echols v. Arkansas*, 520 U.S. 1244 (1997). A copy of the denial is attached as Respondent's Exhibit "G."

While the United States Supreme Court still considered the petition for writ of certiorari, on March 11, 1997, Echols filed a petition for post-conviction relief under Rule 37 of the Arkansas Rules of Criminal Procedure in the circuit court of Craighead County. A copy of his petition is attached as Respondent's Exhibit "H." Another Rule 37 petition was filed on November 7, 1997. A copy of this petition is attached as Respondent's Exhibit "I." An amended Rule 37 petition was filed on December 12, 1997, although the attached copy, Respondent's Exhibit "J," is not file-marked.<sup>2</sup> A motion to clarify or amend the Rule 37 petition was filed on June 9, 1998. A copy of this motion is attached as Respondent's Exhibit "K." On June 29, 1998, Echols filed both a motion for leave to further amend his Rule 37 petition as well as a second amended Rule 37 petition. Copies of the motion and the petition are attached as Respondent's Exhibits "L" and "M." The following grounds were raised in his original Rule 37 petition:

1. Deprivation of due process and his right to counsel and to effective assistance of counsel at both stages of his trial and on appeal in the following ways:
  - a. counsel failed to conduct voir dire examination appropriate to death penalty litigation or involving prejudicial pretrial publicity;

---

<sup>2</sup> Its filing, however, is reflected on the attached docket sheet. *See* Respondent's Exhibit "II."

- b. his counsel inappropriately entered into a contract with HBO to record pre-trial proceedings, as well as the trial itself, undermining Echols' ability to defend himself;
- c. counsel failed to make adequate efforts to obtain state funding for expert witnesses, such as crime scene analysts;
- d. counsel failed to object to leading questions, answers based on conjecture, hearsay, badgering of witnesses, and improper closing argument by the prosecutor;
- e. counsel failed to have blood splatters found on Echols' necklace tested and fully explore the possibility that DNA evidence would help the defense;
- f. counsel failed to request a mistrial or admonition when objecting to a leading question identifying a weapon as "...a sharp object such as a knife."
- g. counsel failed to attempt impeachment of state witness Michael Carson;
- h. counsel failed to argue that Officer Ridge's volunteered reference to a co-defendant's alleged confession was not inadvertent;
- i. counsel failed to move *in limine* barring evidence linking Echols to occult/satanic practice;
- j. counsel failed to move to preclude purported expert testimony introduced to explain that the triple homicide was motivated by satanic practices and/or beliefs;
- k. counsel opened the door to defendant's connection to the occult through his cross-examination of Officer Ridge, notwithstanding a court order barring such evidence;
- l. counsel failed to determine if Dr. Griffis' testimony had a scientific basis to,
  - i. object when the trial court changed the standard of admissibility from that applicable to scientific evidence to specialized knowledge;

- ii. argue that, to the extent that a field of satanic knowledge existed, it was a social science, and as such, was, under *Daubert*, subject to the same standard of admissibility that applied to physical science;
- iii. move to reopen the hearing and recall Dr. Griffis and cross-examine him on issues that became relevant only after the trial court's decision altering the standard of admissibility;
- m. counsel failed to move to reopen the hearing to call Dr. Robert Hicks to testify in rebuttal that the area of satanic studies, as applied to criminal cases, lacked reliability and was helpful only to the extent that it inflamed the jurors' existing prejudices;
- n. counsel failed, because of his conflict of interest, to raise any of these issues on direct appeal;
- o. presented Dr. James Money Penny and advised him to bring to court Echols' records he had reviewed, without adequately interviewing Money Penny and without adequately advising Echols of the consequence of waiving his patient-psychotherapist privilege;
- p. counsel failed, in voir dire, opening or closing statement, to properly educate the jury on the issues involved in a capital sentencing;
- q. counsel failed to focus the jury's attention on the role of mitigation or the humanity of their client and the need for each juror to be satisfied beyond a reasonable doubt of the appropriateness of the death penalty;
- r. counsel failed to study and know the law about what constitutes "mitigating" evidence;
- s. counsel failed to object to instructions and comments by the court that violated *Mills v. Maryland*, which told jurors if they made the three requisite findings (that, beyond a reasonable doubt, an aggravating circumstance existed, that it outweighed any mitigating circumstances found to exist, and that the aggravating circumstance justified a sentence of death) "you will impose the death penalty";

- t. counsel failed to preserve cumulative reversible error argument by not complaining about individual comments;
  - u. counsel failed to request transcription of the jury selection process so that this critical stage of the proceeding could not be reviewed for error by the Arkansas Supreme Court or reviewed for the purpose of post-conviction proceedings;
  - v. counsel failed to conduct post-trial interviews of jurors regarding the trial court's *ex parte* meeting with them about threats;
  - w. counsel failed to properly present errors to the trial court and failed to properly preserve them for appeal:
    - i. by not laying a foundation under Ark. R. Evid. 803(18) by identifying a particular treatise to which the witness Hicks could refer in seeking admission of writings of Ken Lanning;
    - ii. by not attempting to show the trial court that more than one quotation in the publications of Lanning and Hicks contradicted the State's theory of the case;
2. The aggravating circumstance found in this case is unconstitutional;
  3. The trial court improperly ordered the court reporter to refuse to transcribe voir dire of respective [sic] jurors;
  4. The trial court erred by denying separate trials for Echols and Baldwin;
  5. The trial court erred in not excluding evidence;
  6. The trial court erred in allowing the testimony of Dr. Jennings;
  7. The trial court improperly denied defense questioning of John Mark Byers;
  8. The trial court erred in improperly allowing the introduction of a knife found behind Baldwin's residence;
  9. The trial court erred in improperly allowing the introduction of sticks found near the victim's bodies;

10. The trial court erred in improperly giving an accomplice instruction;
11. The trial court improperly granted an *ex parte* continuance to the prosecution;
12. The trial court improperly found that the death penalty is not cruel and unusual punishment;
13. The capital murder statute does not give proper notice of the criminal offense, does not narrow the crime for which capital punishment may be imposed, and is void for vagueness due to overlap with the statute for first-degree murder;
14. The capital murder statute improperly requires the death penalty;
15. The cruel and depraved aggravating circumstance does not genuinely narrow the types of persons deserving of a life sentence from those eligible for the death penalty;
16. Prosecutorial misconduct.

The following new grounds were raised in Echols' second Rule 37 petition:

1. Newly discovered evidence can establish Echols' actual innocence;
2. Trial counsel failed to adequately investigate the facts.

The following new ground was raised in Echols' amended Rule 37 petition:

1. Ineffective assistance of counsel in the failure to request a change of venue to a county outside of the Second Judicial District.

The following new grounds were raised in Echols' second amended Rule 37 petition:

1. Ineffective assistance of counsel in the failure to adequately investigate or question John Mark Byers due in part to the fact that one of the defense attorneys had a conflict of interest in that he represented Byers' codefendant in a contemporaneous civil suit;
2. Defense counsel failed to raise on appeal the trial court's inadequate questioning of jurors about the content of threats and

communications during the trial and their effect on the jury deliberations;

3. Prosecutorial misconduct and violation of *Brady v. Maryland* in that the Sheriff's department discouraged a favorable witness from testifying.

The trial court conducted hearings over the course of almost a year and denied the petition in its entirety on June 17, 1999. A copy of that order is attached as Respondent's Exhibit "N." On May 25, 2000, Echols filed a timely appeal, raising the following grounds:

1. The trial court's order does not comply with the requirements of Rule 37.3 of the Arkansas Rules of Criminal Procedure in that it fails to make findings of fact sufficient to permit meaningful appellate review of Echols' claims for relief;
2. The trial court applied the wrong legal standard in assessing Echols' claim that his counsel was burdened by multiple conflicts of interest that adversely affected counsel's conduct of the defense. In the alternative, the record establishes conclusively that Echols' counsel labored under a "conflict in fact" and Echols' defense was adversely affected as a result;
3. The trial court failed to permit inquiry into relevant factual matters that are essential to the fair and reliable disposition of Echols' claim that his counsel was burdened by multiple conflicts of interest that adversely affected counsel's conduct of the defense;
4. The trial court failed to inquire into the existence of a conflict of interest when that conflict should have been apparent from the circumstances before the court;
5. The trial court erred in denying relief on Echols' claim of ineffective assistance of counsel at trial, under *Strickland v. Washington*;
6. The trial court erred in declining to recuse itself so that the court might testify as a witness;
7. The court should remand to permit a full and fair inquiry into juror receipt of extraneous information during the trial;

8. Echols' death sentence rests on a constitutionally invalid aggravating circumstance;
9. The court should reverse based on the other grounds presented in Echols' pleadings in the court below.

A copy of Echols' Rule 37 appeal brief, in two volumes, is attached as Respondent's Exhibit "O." A supplemental abstract to that brief was filed on October 3, 2000, and is attached as Respondent's Exhibit "P." On April 26, 2001, the Arkansas Supreme Court affirmed in part and remanded in part. *See Echols v. State*, 344 Ark. 513, 42 S.W.3d 467 (2001) (hereinafter referred to as *Echols II*). A copy of the opinion is attached as Respondent's Exhibit "Q." The Arkansas Supreme Court remanded the case to the circuit court and ordered it to make factual findings and legal conclusions only as to the issues raised by Echols on appeal, as all other claims raised in the circuit court but not argued on appeal were considered abandoned. *See id.*, 344 Ark. at 519, 42 S.W.3d at 471-482.

Pursuant to the order of the Arkansas Supreme Court, the circuit court issued an amended order, still denying Echols' Rule 37 petition, on July 30, 2001. A copy of that order is attached as Respondent's Exhibit "R." Echols then appealed that ruling to the Arkansas Supreme Court, raising the following points:

1. The circuit court's verbatim adoption of the prosecutor's proposed findings denied Echols due process on remand and in the present appeal and fails to comply with the court's prior ruling;
2. Echols' counsel labored under a "conflict in fact" which adversely affected his defense;
3. The circuit court erred in refusing to permit inquiry into relevant factual matters that are essential to the fair and reliable disposition of Echols' claims;
4. The circuit court must reverse because it failed to inquire into the existence of a conflict of interest when it reasonably should have known that the conflict existed;



5. Echols's counsel failed to provide him effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments;
6. Echols was denied effective assistance of counsel at the punishment stage;
7. There were no findings on important punishment issues.

A copy of Echols' second Rule 37 brief and his reply brief are attached as Respondent's Exhibits "S" and "T." The Arkansas Supreme Court affirmed on October 30, 2003. *See Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003) (hereinafter referred to as *Echols III*). A copy of the opinion is attached as Respondent's Exhibit "U."

In the interim, on February 27, 2001, Echols filed a petition in the Arkansas Supreme Court, asking that jurisdiction be reinvested in the circuit court to allow him to seek a writ of error coram nobis. A copy of Echols' petition/brief is attached as Respondent's Exhibit "V." The Arkansas Supreme Court denied that petition on October 16, 2003. *See Echols v. State*, 354 Ark. 414, 125 S.W.3d 153 (2003) (hereinafter referred to as *Echols IV*). A copy of that opinion is attached as Respondent's Exhibit "W." On October 24, 2004, Echols filed in the Arkansas Supreme Court 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. A copy of that motion is attached hereto as Respondent's Exhibit "X."<sup>3</sup> Specifically, Echols argued that the Arkansas Supreme Court wields the inherent power to recall the mandate and should do so where warranted by extraordinary circumstances. Further, Echols argued that the Arkansas Supreme

---

<sup>3</sup> Additionally, Echols filed many supporting exhibits under seal with permission from the Arkansas Supreme Court. The stated reason to put the exhibits under seal was that they contained the identities of the jurors. Because those were filed under seal, they will not be included here. However, if this Court wishes to see the supporting exhibits filed under seal, the Respondent will seek permission from the Arkansas Supreme Court to disclose them to this Court as exhibits in related litigation.

Court should allow him to return to state court through a writ of error coram nobis to address his claim of “fundamental error extrinsic to the record which might have resulted in a different verdict.” See Respondent’s Exhibit “X” at 6. The “fundamental errors” of which Echols complained were:

1. The jury received and considered extraneous information during deliberations at petitioner’s trial, specifically, the confession of Jesse Miskelley, and that such conduct flatly violated his rights under the Fifth, Sixth, and Fourteenth Amendments, fatally undermining fair consideration of the otherwise meager evidence adduced by the prosecution in support of its case;
2. As disclosed by evidence of their responses on voir dire and recent admissions, certain members of the jury harbored an impermissible bias against Echols, in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments.

The Court denied the motion on January 20, 2005. See *Echols v. State*, CR-94-928, CR-99-1060 (Ark. Sup. Ct. Jan. 20, 2005) (hereinafter referred to as *Echols V*). A copy of the opinion is attached as Respondent’s Exhibit “Y.” Echols next filed a petition for reconsideration, but that was denied on February 24, 2005. A copy of that opinion is attached as Respondent’s Exhibit “Z.” Complete copies of Echols’ appellate docket sheets, as retrieved from the Arkansas Supreme Court’s website, are attached as Respondent’s Exhibits “AA” and “BB.”<sup>4</sup>

Echols also filed a state habeas corpus petition pursuant to Ark. Code Ann. § 16-112-201 *et seq.* on July 25, 2002, in the Craighead County Circuit Court. A copy of that petition is attached as Respondent’s Exhibit “CC.” An appendix to that petition was filed later, on September 5, 2002. A copy of that appendix is attached as Respondent’s Exhibit “DD.”

---

<sup>4</sup> The appellate cases, CR-94-928 and CR-99-1060, have been merged for the purposes of *Echols V* and therefore reflect, most recently, the same filings. See *Echols v. State*, 350 Ark. 42, 84 S.W.3d 424 (2002) (holding that both cases are separate cases and would be considered individually, but both would be submitted and heard on the same date). However, both are attached as exhibits for this Court’s reference.

Specifically, Echols invoked the "New Scientific Evidence" provision of the state habeas statutes. That statute reads, in part:

(a) Except when direct appeal is available, a person convicted of a crime may commence a proceeding to secure relief by filing a petition in the court in which the conviction was entered 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, if the person claims that:

(1) Scientific evidence not available at trial establishes the petitioner's actual innocence; or

(2) The scientific predicate for the claim could not have been previously discovered through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.

(b) Nothing contained in this subchapter shall prevent the Arkansas Supreme Court or the Arkansas Court of Appeals, upon application by a party, from granting a stay of an appeal to allow an application to the trial court for an evidentiary hearing under this subchapter.

Ark. Code Ann. § 16-112-201 (Supp. 2003). Pursuant to his petition, Echols alleged that certain pieces of evidence were not subject to new methods of DNA testing at the time of his trial due to the non-existence of those methods at that time. He listed numerous pieces of evidence, from hair samples to a bloody knife to semen stains on one of the victims' jeans that he wanted tested with new methods of DNA testing.

The circuit court ordered the preservation of the evidence listed in the habeas corpus petition on January 28, 2003, and on May 21, 2003, Echols filed a supplement to his original motion for DNA testing, asserting additional factual and legal grounds in support of his petition. A copy of the court's order and of Echols' supplement are attached as Respondent's Exhibits "EE" and "FF." On June 2, 2004, the circuit court ordered the testing of certain pieces of

evidence pursuant to an agreement between the State and Echols' attorneys as to which pieces of evidence would be tested, who should pay for the testing, who should test the evidence, and certain time frames for these things to be accomplished. A copy of that order is attached as Respondent's Exhibit "GG." That same day, the State and Echols filed a joint status memorandum in the circuit court, outlining the current status of the case. A copy of that memorandum is attached as Respondent's Exhibit "HH." As of the date of this motion to dismiss, the state-habeas DNA petition is still being litigated in Craighead County Circuit Court. For this Court's reference, a complete copy of the circuit court docket sheet is attached as Respondent's Exhibit "II."

Echols next filed the instant petition, alleging the following:

1. The jury's extrajudicial receipt and consideration of the inadmissible and false Misskelley statement implicating Echols in the charged offenses violated [Echols'] federal constitutional rights to confrontation, cross-examination, counsel, and due process of law, requiring that his convictions be vacated;
2. Echols 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;
3. [Echols'] 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;
4. The state courts unreasonably rejected [Echols'] claim that his trial counsel labored under various conflicts of interest which denied [him] his Sixth Amendment right to the effective assistance of counsel;
5. The state courts unreasonably rejected [Echols'] claim that he was deprived of his constitutional right to the effective assistance of counsel within the meaning of *Strickland v. Washington*.

On February 28, 2005, before the Respondent filed his response to the original petition, Echols filed his first-amended petition, alleging no new grounds, but instead merely supplementing the procedural history of the case in light of the February 24, 2005, opinion from the Arkansas Supreme Court (*Echols V*), which denied his petition for rehearing, and expressly conceding that all but Echols' third ground in the original petition were now exhausted.

Respondent contends that as of the date of this motion, Echols is currently in state custody and is housed on Death Row.

## II. Reasons the Petition should be Dismissed

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State." *See* 28 U.S.C. § 2254(b)(1)(A). It is clear – admittedly so, even by Echols himself – that at this moment in time, he is still litigating his case in state court. He continues to litigate his state habeas corpus petition regarding the DNA testing of certain pieces of evidence in the Craighead County Circuit Court. *See* Respondent's Exhibits "CC," "EE," and "FF." The issue before this Court is whether to dismiss the instant petition for non-exhaustion or to do what Echols has suggested and hold the instant petition in abeyance while he continues – and ultimately concludes – his state-court litigation. However, binding precedent of the United States Supreme Court and the Eighth Circuit Court of Appeals requires that this Court shall dismiss the instant petition without prejudice, allowing Echols to return to federal court once his state-court remedies have indeed been exhausted, or allow him to dismiss the unexhausted claims and proceed here on only those claims that are clearly exhausted. This Court cannot hold this case in abeyance during the pendency of the state-court litigation.

In *Victor v. Hopkins*, 90 F.3d 276, 279-80 n.2, 282 (8th Cir. 1996), *cert. denied*, 519 U.S. 1153 (1997), the Eighth Circuit held that a federal court has no authority to hold a habeas proceeding in abeyance and maintain a stay of execution while the petitioner returns to state court in an effort to exhaust available remedies. Rather, if a federal court determines that a petitioner has not exhausted his state remedies, the court must afford the petitioner the limited options stated in *Rose v. Lundy*, 455 U.S. 509 (1982).

In *Rose*, the Supreme Court noted that the prior version of 28 U.S.C. § 2254 “expressly require[d] the prisoner to exhaust ‘the remedies available in the courts of the State,’” *id.* at 519, and that, consequently, a district court must dismiss a habeas petition containing unexhausted claims. *Id.* at 522. Further, the *Rose* Court held that if a petition contains both exhausted and unexhausted claims, the petitioner may elect to abandon his unexhausted claims and proceed with habeas review of his exhausted claims only, or alternatively, he may elect to dismiss the entire petition without prejudice in order to exhaust any available state remedies. *Id.* at 518-20. And subsequently, in *Pliler v. Ford*, the United States Supreme Court emphasized that dismissal of an unexhausted petition *remains* the only proper course of action under *Rose*, notwithstanding AEDPA’s newly imposed limitation period. *Pliler v. Ford*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2441, 2445 (2004).<sup>5</sup> For these reasons, Echols’ motion for a stay of this proceeding must be denied.

As a matter of comity, the state courts should have the first opportunity to review federal constitutional issues and to correct federal constitutional errors made by the state’s trial courts. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). A federal-habeas petitioner, therefore,

---

<sup>5</sup> The Respondent likewise recognizes that *Rhines v. Weber*, 346 F.3d 799 (8<sup>th</sup> Cir. 2003), is currently on review in the United States Supreme Court, No. 03-9046. However, as much as Echols asserts that “it appears likely” the Court will recognize the stay-and-abey procedure, the Respondent asserts just the opposite, and has joined in an *amicus* brief arguing against the procedure. Oral arguments were held on January 12, 2005, according to the United States Supreme Court website.

must exhaust all available avenues of relief in the state courts before the federal court will consider a claim. 28 U.S.C. § 2254(b) & (c). A claim is considered exhausted if “the petitioner has afforded the highest state court a fair opportunity to rule on the factual and theoretical substance of his claim,” or failing that, if no “non-futile state court remedies remain available” to him. *E.g., Ashker v. Leapley*, 5 F.3d 1178, 1179, 1180 (8th Cir. 1993).

Echols concedes that his petition is “mixed,” in that grounds, except his third, are exhausted. *See* Echols’ petition at 7. For the most part, the Respondent agrees with Echols in this assessment. However, because his third claim, involving the DNA testing of evidence, is still being litigated in Craighead County Circuit Court, even Echols agrees that this Court cannot address it at this time. In fact, the testing of the evidence has not even been finished yet. One can only speculate to what extent the results of the DNA testing will affect the case and, potentially, given the already-lengthy history of this case, those matters could be litigated in state court for years to come. Simply, it is premature for this Court to consider the petition as it is currently drafted, with one clearly unexhausted claim. Pursuant to *Victor v. Hopkins* and *Rose v. Lundy*, as the law stands today, this Court must either dismiss the instant petition in its entirety and require that Echols fully exhaust all his state court remedies or, if Echols so chooses, it can dismiss claim three and proceed here on the four remaining claims.

If, however, this Court finds that Echols has no available state court remedies and finds that this petition is properly and timely filed, or if this Court dismisses, at Echols’ request, those claims it finds to be unexhausted and proceeds here with those claims that it finds exhausted and properly filed, the Respondent respectfully requests that he be allowed to respond in kind to the merits of the petition and be allowed to raise any and all procedural defenses that would normally be available to him.

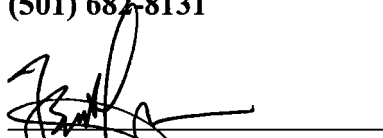
WHEREFORE, the Respondent prays that the Court dismiss Echols's petition for a writ of habeas corpus without prejudice and without a hearing pursuant to Rule 8(a) of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS as he is currently still pursuing his state-court remedies .

Respectfully submitted:

**MIKE BEEBE**  
**ATTORNEY GENERAL**

**OFFICE OF THE ATTORNEY GENERAL**  
**323 Center Street, SUITE 200**  
**Little Rock, AR 72201**  
**(501) 682-8131**

By:



**Brent P. Gasper**  
Ark. Bar No. 98240  
**Joe V. Svoboda**  
Ark. Bar No. 74144  
Attorneys for the Respondent



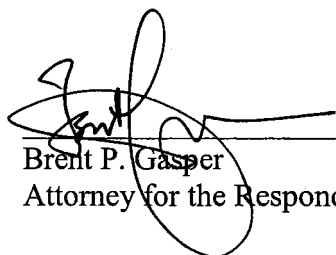
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed via U.S. Mail, postage prepaid, to

Dennis P. Riordan  
Donald M. Horgan  
Theresa Gibbons  
Attorneys for the Petitioner  
523 Octavia Street  
San Francisco, California 94102

Deborah R. Sallings  
Attorney for the Petitioner  
Cauley Bowman Carney & Williams  
11001 Executive Center Drive, Ste. 200  
Little Rock, Arkansas 72211

on this 2nd day of March, 2005.

  
\_\_\_\_\_  
Brent P. Gasper  
Attorney for the Respondent