

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

MAY 13 2005

JAMES W. McCORMACK, CLERK  
DEP CLERK

**THIS IS A CAPITAL CASE**

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

**DAMIEN WAYNE ECHOLS  
ADC #SK931**

**PETITIONER**

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

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

**RESPONDENT**

**REPLY TO ECHOL'S REPOSE TO MOTION TO  
DISMISS PETITION FOR HABEAS CORPUS**

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 reply to Echols' response to the motion to dismiss, states:

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. Echols filed a petition for a writ of habeas corpus on October 28, 2004, and an amended petition on or about February 28, 2005. Respondent filed a motion to dismiss the petitions on March 2, 2005, arguing that under 28 U.S.C. § 2254(b)(1)(A) and *Victor v. Hopkins*, 90 F.3d 276 (8<sup>th</sup> Cir. 1996), because Echols filed a "mixed" petition containing exhausted and unexhausted claims, this Court had no authority to hold the case open under the theory of stay-and-abeyance, as Echols requested, and that he must exhaust "the remedies available in the courts of the State," pursuant to *Rose v. Lundy*, 455 U.S. 509, 519 (1982).

Subsequently, the United States Supreme Court handed down its opinion in *Rhines v. Weber*, 125 S.Ct. 1528 (March 30, 2005). Echols now requests this Court employ the principles

of *Rhines* and stay-and-abey the instant case, allowing him to complete the state-habeas DNA proceedings currently pending in Craighead County Circuit Court. However, Respondent respectfully disagrees with this argument, and believes that *Rhines* is not applicable in the instant case, and, as such, again asks this Court to dismiss the instant action for Echols' failure to fully exhaust all available state remedies.

The language of *Rhines* is straightforward. Specifically:

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's **failure to present his claims first** to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court.

*Rhines*, 125 S.Ct. at 1535 (emphasis added). Essentially, the *Rhines* Court addresses those instances where a petitioner must **return** to state court in order to exhaust his state remedies, yet still has the federal limitations period to contend with. Indeed, the factual scenario of *Rhines* is drastically different than the one in the instant case. In *Rhines*, the petitioner filed a mixed habeas petition with eleven months still left in the one-year statute of limitations period, but with no pending state-court proceedings. *Id.* at 1532. After filing an amended petition some months later, the district court found that some of his claims were not exhausted, but by that time, his federal limitations period had run. *Id.* The petitioner requested that the district court stay-and-abey the proceedings, because if the court dismissed the mixed petition for failing to exhaust, he could not re-file due to the expiration of the federal limitations period. *Id.*

However, Echols' federal limitations period has *at no time* started running by virtue of his lengthy and overlapping state-court proceedings. If this Court dismissed the instant petition, Echols federal habeas' limitations period would still not begin to run until the conclusion of the

state-habeas DNA proceeding currently pending in Craighead County Circuit Court.<sup>1</sup> Given the lengthy procedural history of this case, that time period could be several years if the results of the DNA testing inure to Echols' benefit and one takes into account all circuit court hearings and appellate proceedings such a result would invariably lead toward.

Echols has not failed to present his claims in state court. In fact, up to this point, he seemingly has litigated every claim available, oftentimes overlapping in several different legal avenues. The one claim still viable in state court was commenced before the filing of his federal habeas petition and he readily admits that he filed his federal petition in order to "cover his bases" so-to-speak, just in case his state habeas DNA action didn't for some reason toll the limitations period, which it surely does. Simply, the *Rhines* stay-and-abey procedure is available to those petitioners who are required to return to state court in order to exhaust claims, not for petitioners who are already there. As such, *Rhines* is inapplicable to the case at bar and this Court should grant Respondent's motion to dismiss the mixed petition pursuant to *Rose*.

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:

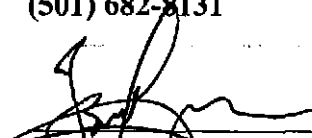
**MIKE BEEBE**  
**ATTORNEY GENERAL**

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<sup>1</sup> While Echols expresses concerns in his original federal habeas petition that his state-habeas DNA petition might not toll the statute of limitations because that issue has not squarely been addressed by a federal court, Respondent firmly believes that it would as a valid state-court post-conviction proceeding and would have no issue with this Court's finding it as such.

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**CERTIFICATE OF SERVICE**

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

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on this 13th day of May, 2005.

  
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**Brent P. Gasper**  
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