IN THE CIRCUIT COURT OF CLAY COUNTY, ARKANSAS,
ON CHANGE OF VENUE FROM
CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS

STATE OF ARKANSAS, Plaintiff/Respondent, vs. JESSIE LLOYD MISSKELLEY, JR., Defendant/Petitioner.	Case No. CR 93 47 (Clay County number) Case No. CR 93 516 through 518 (Crittenden County numbers) **AMENDED AND SUPPLEMENTAL PETITION FOR RELIEF UNDER RULE 37.1**

AMENDED AND SUPPLEMENTAL PETITION FOR RELIEF UNDER RULE 37.1

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AMENDED AND SUPPLEMENTAL PETITION FOR RELIEF UNDER RULE 37.1

INTRODUCTION

As this Court is aware, in June of 1993 Jessie Loyd Misskelley (Petitioner), 17, Jason Baldwin, 16, and Damien Echols, 18, were arrested and charged with committing the murders of three eight year old boys. Preceding the arrests, police formed a hunch that Damien Echols – a teenager who wore a black trench coat, listened to heavy metal music, and experienced some minor run-ins with the law – was involved in the murders. When police learned that Petitioner was acquainted with Echols, they brought Petitioner to the station for questioning. Petitioner, diagnosed as both mentally retarded and borderline functioning,[1, 2] did not withstand the rigors of

[1]Though at the time of trial, Petitioner was diagnosed as, among other things, "borderline functioning," he had been diagnosed earlier as mentally retarded. (RT 342; Bates 840).

[2]Throughout this pleading, "RT" refers to the Reporters Transcript of Petitioner's trial, and "EBRT" refers the Reporter's Transcript in the Echols/Baldwin trial. Finally, due to some pagination discrepancies in the RT, counsel has also provided for the Court's convenience, Bates numbers where possible.

a 12-hour police interrogation unassisted by counsel or with the support of his parents. Though Petitioner consistently denied any knowledge of the crimes, he eventually became despondent and silent when informed that he had allegedly failed a lie detector test. He was then told that he had two choices: being a suspect or being a person who helped police.[3] Soon thereafter, Petitioner began to respond to police questions in a manner that implicated Echols and Echols' good friend, Baldwin. Petitioner maintained that he was merely an observer of the bizarre and quite unbelievable crimes, but he eventually implicated himself as an aider and abettor in the murder of Michael Moore.

In March of 1994, Petitioner was convicted of one count of first degree murder and two counts of second degree murder on evidence consisting almost entirely of his confession. He was sentenced to life in prison plus forty years. Baldwin and Echols were both convicted in a subsequent trial on very questionable evidence after the news of Petitioner's confession was reported, in detail, statewide. Baldwin was sentenced to life in prison without the possibility of parole, and Echols was sentenced to death.

In Petitioner's case, both evidence that was available at trial and evidence that was unavailable at trial would have established that virtually all of Petitioner's statements to police were demonstrably false. As discussed in Petitioner's Petition for Writ of Habeas Corpus Pursuant to Arkansas Code Annotated 16-112-201 et seq., recent DNA testing shows that *no* DNA from any of the young men convicted in this case was at the crime scene or on the victims'

[3]A polygraph expert hired to testify at Petitioner's suppression motion would later explain that Petitioner did not fail the test, but rather had passed.

bodies. Further, a hair consistent with Terry Hobbs' (victim Steve Branch's stepfather) DNA was found in the ligature used to bind victim Michael Moore. A hair consistent with the DNA of his friend, David Jacoby, was found on a tree root near the location where the bodies were discovered.

Further, and of equal importance, six different forensic pathologists and odontologists came to the independent conclusions that the injuries to the victims' skin and orifices were the result of post-mortem animal predation, and were *not* the result of the supposed sexual assaults and mutilations that Petitioner described in his confession. This evidence proves that Petitioner's confession–the veracity of which was already in serious question at trial–was false. Some of the problems with Petitioner's confession, discussed more fully below, include the fact that when Petitioner implicated Echols and Baldwin, he believed that his cooperation would lead to a reward rather than his own prosecution.[4] Further, the confession was riddled with inconsistencies and were at complete odds with the physical evidence. As explained below, defense counsel could have significantly, if not completely, undermined the veracity of Petitioner's confession had counsel consulted the proper experts and conducted adequate investigation.

In this regard, Petitioner was entitled to competent counsel provided at state expense to

[4]At trial, Petitioner's father explained that, as Petitioner was talking to Detective Allen before Allen transported Petitioner to the police station for questioning, they were joking about the forty thousand dollar reward offered in the case. Allen said that if the police got a conviction from the information that Petitioner supplied, Petitioner could get a new truck for himself. Petitioner responded, "'No I'm not either. I'm going to buy my daddy a truck and I am going to take his old one." (RT 1183, Bates 1685.)

provide a competent defense. Trial counsel was obligated to retain and consult with the investigators and technical experts necessary to defend Petitioner effectively. Petitioner's lawyers failed to recognize the need for certain experts and failed to procure funding for those experts they deemed necessary. In addition, counsel retained an expert who actually *damaged* Petitioner's case considerably: counsel chose this expert solely because the expert was willing to work without compensation. As it turned out, counsel failed to investigate this expert, whose license was suspended for inappropriate behavior with minors, and who was no longer allowed to work with cases of child sexual abuse. The jury heard these details, and the result to Petitioner's case was devastating. These errors, and several others discussed below, deprived Petitioner of a due process, a fair trial, and effective assistance of counsel.

Through his Amended and Supplemental Rule 37 Petition and hearing on the petition, Petitioner will demonstrate that defense counsel was constitutionally ineffective in their representation of Petitioner at trial and on appeal. Specifically, appellant's rights to effective representation, due process and a fair trial were violated by several errors and omissions committed by trial and appellate counsel. (U.S.C.A. Amend. IV, V, VI; Ark. Const., Art. 2 §§ 8, 9, 10). These errors and omissions rendered counsel constitutionally ineffective under the standards articulated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Counsel's errors and omissions led to a delay in discovery of evidence that would have undercut the prosecution's entire case at trial or would have at least supported a motion for a new trial. Because the delay in discovery of this new evidence was a result of ineffective assistance, appellant may present this new evidence to this court in a Rule 37 proceeding. Indeed, under *Camargo v. State*, 346 Ark. 118 (2001), appellant *must* present such evidence in order to show

prejudice resulting from counsel's ineffective assistance. ["We do not grant postconviction relief for ineffective assistance of counsel where appellant fails to show what the omitted testimony or other evidence was and how it would have changed the outcome."] *(Id.* at 129) Thus, this court must consider new evidence where it is relevant to the question of whether counsel's failure to uncover it was reasonable. (*Dumond v. State* 294 Ark. 379, 385 (1988)).

Petitioner hereby alleges that each of the claims of ineffective assistance of counsel alleged below, both individually and collectively, entitle him to vacation of his conviction and sentence respectively. For each of these matters, there is a reasonable probability that the result would have been different had counsel been effective. Further, with regard to each of those matters where a constitutional issue should have been alleged, Petitioner asserts each of the constitutional claims as independent grounds, and the ineffectiveness of counsel as "cause" for any default of the claim. (*Murray v. Carrier,* 477 U.S. 478, 488-489 (1986))

In addition to Petitioner's several claims of ineffective assistance of counsel, Petitioner also alleges below that he was convicted on false evidence. Victoria Hutcheson, the only witness to link Petitioner to so-called "cult activity," contacted defense counsel in 2004 to report that, due to intense police pressure and coercion, she had fabricated all of her damaging testimony against Petitioner. Hutcheson also stated that before Petitioner's trial, the police required her and her son, Aaron, to remain silent about the fact that shortly after the murders, Aaron told police that Mark Byers (Christopher Byers' stepfather) killed his friends. Hutcheson's recent testimony shows that the prosecution convicted appellant on false evidence, thus violating Petitioner's Fourteenth Amendment right to due process under *Giglio v. United States*, 405 U.S. 150.

Finally, Petitioner calls to this Court's attention a recent study that examines a wave of

exonerations due to new DNA testing and analyzes the factors that led to these wrongful convictions. False confessions by defendants "who were juveniles, mentally retarded or both" were the decisive factor in many flawed verdicts. Juries also had been misled by flawed or fraudulent expert testimony, by mistaken or false eyewitness testimony, and by prosecutorial misconduct during closing argument. (See article entitled "Question of Wrongful Convictions Raises Questions Beyond DNA, attached hereto as Exhibit Volume 1, Exh. A)[5] Petitioner's conviction resulted from a combination of these factors, compounded by several errors and omissions of his inexperienced trial attorneys. As a result, Petitioner has unjustifiably spent his entire adult life in jail. While Petitioner cannot regain those years, this Court has the power to release him from further imprisonment by issuing a writ vacating Petitioner's convictions and prison sentence. Petitioner respectfully requests that the Court grant him this relief to which he is entitled.

PROCEDURAL HISTORY AND REQUEST FOR LEAVE TO AMEND

1. Jessie Loyd Misskelley, Jr., having previously filed a timely Petition for Relief under Rule 37, A.R.C.P., and an amended petition for relief comes now to further amend his Petition for Relief, and to allege further grounds for relief under Rule 37, A.R.C.P.

2. On August 4, 1994, Petitioner Misskelley and co-defendants Damien Echols and Jason Baldwin were arraigned on three capital murder charges arising from the deaths of Steven Branch, Christopher Byers, and Michael Moore.

3. On the date of arraignment, August 4, 1993, the court granted the state's discovery

[5] "Exhibit Volume" refers to the joint volume of Exhibits that is being offered in support of this Amended and Supplemental Petition and of the Petition for Writ of Habeas Corpus or Other Relief Pursuant to Arkansas Code Annotated 16-112-201 *et. seq.* and Motion for New Trial Pursuant to 16-112-208(e)(1)

motion to take evidence from Mr. Misskelley's person including blood, saliva, head hair, body hair, pubic hair, fingerprints and footprints.

4. Petitioner's jury was sworn on January 20, 1994.

5. On February 4, 1994, the jury returned verdicts of guilty on one count of first degree murder and two counts of second degree murder.

6. The Court of Appeal affirmed those convictions on February 19, 1996, and the Supreme Court of Arkansas denied his petition for rehearing on April 1, 1996.

7. The United Sates Supreme Court denied Petitioner's writ of certiorari on October 7, 1996.

8. Petitioner timely filed a Petition for Relief Under Rule 37 on November 11, 1996. On February 8, 2001, Petitioner filed an Amended Petition for Relief Under Rule 37. In both his original and amended petitions, Petitioner sought appointment of competent counsel. No counsel was appointed. In August 2002, attorneys Michael Burt and Jeff Rosenzweig were retained to represent Petitioner.

9. In September of 2002, Petitioner filed a "Motion for Forensic DNA Testing" ("DNA motion") in the 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. On January 27, 2003, this Court ordered the impoundment and preservation of all material that could afford a basis for Petitioner's actual innocence claim pursuant to this statutory scheme. Testing of the material subject to this Court's preservation order and related trial court proceedings then began and remains in progress as of the time of filing the instant petition.

10. Petitioner now seeks leave to amend and supplement his petition based on this new testing and on information that lately has come to his and his attorney's attention.

GENERAL ALLEGATIONS

11. Petitioner now presents his Second Amended and Supplemental Rule 37 Petition. He incorporates by reference, as if fully set forth herein, all claims previously asserted in the original Rule 37 Petition and Amended Rule 37 Petition unless specifically disclaimed herein. He likewise incorporates by reference the certified record on appeal and all other documents filed in connection with his original Rule 37 Petition and Amended Rule 37 Petition and direct appeal. His claims in this petition are based on the allegations contained in the Petition, the Amended Petition, the declarations and other documents attached hereto as Exhibits, his Petition for Habeas Corpus under Arkansas Code section 16-112-201, and the entire record of all the proceedings in the trial courts and on direct appeal. Petitioner requests this Court to take judicial notice of all the records, documents, exhibits, and pleadings in *State v. Jesse Lloyd Misskelley*, Case No. CR-93-47, *Jesse Lloyd Misskelley v. State*, 323 Ark. 449 (1996), as well as *State v. Crittenden County* (Nos. 94-930, 94-931), and the entire record of all proceedings in the trial court, on direct appeal, and in the habeas proceedings in *State v. Echols and Baldwin* (No. CR 94-928), *Echols v. State* 326 Ark. 917 (1996); 344 Ark. 513 (2001), *State v. Echols* (CR -93-450A) and *State v. Baldwin* (CR-93-450B).

12. Petitioner makes the following general allegations with respect to each claim and allegation in this third petition:

a. To the extent that the error or deficiency alleged was due to trial counsel's or appellate counsel's failure to investigate and/or litigate in a reasonably competent manner on Petitioner's

behalf, Petitioner was deprived of the effective assistance of counsel at trial and on appeal. To the extent that trial counsel's or appellate counsel's actions and omissions were the product of purported strategic and/or tactical decisions, such decisions were based upon state interference, prosecutorial misconduct, inadequate and unreasonable investigation and discovery, and/or inadequate consultation with independent experts and therefore were not reasonable, rational or informed. Such errors, omissions, decisions and deficiencies violated Petitioner's right to effective assistance of counsel, due process and freedom from cruel and unusual punishment. (U.S.C.A. Amends. V, VI, VII, VIX; Ark. Const. Art. 2, §§ 8, 9, 10.)

b. Whenever this Petition refers to the federal Constitution, it alleges the analogous Arkansas Constitutional provision as well. Further, as to each ineffective assistance claim asserted below, where a constitutional issue should have been alleged, Petitioner asserts each of the constitutional claims as independent grounds, and the ineffectiveness of counsel as "cause" for any default of the claim. *Murray v. Carrier,* 477 U.S. 478, 488-489 (1986). In every instance of ineffective assistance of counsel at trial alleged herein, Petitioner likewise alleges that appellate counsel was ineffective for failing to raise on appeal his own and co-counsel's ineffective assistance on appeal.

c. To the extent that the facts set forth below could not reasonably have been uncovered by trial counsel or appellate counsel, those facts constitute newly discovered evidence which casts fundamental doubt on the accuracy and reliability of the proceedings and undermine the prosecution's entire case against Petitioner, thus violating Petitioner's Fifth and Fourteenth Amendment rights to due process and a fair trial and his Eight Amendment right to be free from cruel and unusual punishment. Collateral relief is appropriate to avoid a fundamental

miscarriage of justice.

d. To the extent that any claim alleged herein was not previously raised at trial, on direct appeal, or in Petitioner's prior Rule 37 petitions, such claim is not untimely or otherwise procedurally barred because: (i) there is an absence of substantial delay in presenting the claim; (ii) good cause for any delay exists; and (iii) the claim falls within exceptions to the bar of untimeliness.

13. If the prosecution disputes any of the facts alleged below, Petitioner requests an evidentiary hearing so that the factual disputes may be resolved. After Petitioner has been afforded discovery and the disclosure of material evidence by the prosecution, the use of this Court's subpoena power, and the funds and opportunity to investigate fully, Petitioner requests an opportunity to supplement or amend this petition. He is presently aware of the facts set out below, establishing a prima facie case for relief.

14. Petitioner's convictions and sentences resulted from violation of his most

fundamental

constitutional

rights,

including the

rights to a fair

trial, an

impartial jury,

effective

representation

of counsel,

and due

process. The

entire

judgment must

be reversed.

(U.S. Const.,

Amends. V,

VI, XIV; Ark.

Const. Art. 2,

§ 13.)

STATEMEN

T OF FACTS

The summary of facts below is by no means exhaustive as to matters that may be relevant to the proceedings on the present Rule 37 proceedings, but is designed to highlight the most significant facts as they relate to the claims raised herein.

A. Evidence as Discussed by the Supreme Court.

The Statement of Facts includes the facts as recited by the Arkansas Supreme Court in *Jesse Lloyd Misskelley v. State*, 323 Ark. 449 (1996):

> The Moore, Byers and Branch boys were last seen at approximately 6:00 p.m. on May 5, 1993. At least two of the boys were riding their bicycles. Their parents reported them missing at about 8:00 p.m. Police and area residents conducted a search later that evening, but the boys were not found. The search continued on May 6. The boys' bodies were discovered about 1:15 that afternoon.

On June 3, 1993, the crime having remained unsolved, Detective Sergeant Mike Allen sought the appellant out for questioning. The appellant was not considered a suspect, but it was thought he might have knowledge about Damien Echols, who was a suspect. Detective Allen located the appellant and brought him back to the station, arriving at approximately 10:00 a.m. Later in this opinion, we will address in detail the circumstances surrounding the appellant's interrogation. For now, it is sufficient to say that the appellant was questioned off and on over a period from 10:00 a.m. until 2:30 p.m. At 2:44 p.m. and again at approximately 5:00 p.m., he gave statements to police in which he confessed his involvement in the murders. Both statements were tape recorded.

The statements were the strongest evidence offered against the appellant at trial. In fact, they were virtually the only evidence, all other testimony and exhibits serving primarily as corroboration.

The statements were obtained in a question and answer format rather than in a narrative form. However, we will set out the substance of the statements in such a way as to reveal with clarity the appellant's description of the crime:

> In the early morning hours of May 5, 1993, the appellant received a phone call from Jason Baldwin. Baldwin asked the appellant to accompany him and Damien Echols to the Robin Hood area. The appellant agreed to go. They went to the area, which has a creek, and were in the creek when the victims rode up on their bicycles. Baldwin and Echols called to the boys, who came to the creek. The boys were severely beaten by Baldwin and Echols. At least two of the boys were raped and forced to perform oral sex on Baldwin and Echols. According to appellant, he was merely an observer.
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> While these events were taking place, Michael Moore tried to escape and began running. The appellant chased him down and returned him to Baldwin and Echols. The appellant also stated that Baldwin had used a knife to cut the boys in the facial area and that the Byers boy was cut on his penis. Echols used a large stick to hit one of the boys. All three boys had their clothes taken off and were tied up.
>
> According to the appellant, he ran away from the scene at some point after the boys were tied up. He did observe that the Byers boy was dead when he left. Sometime after the appellant arrived home, Baldwin called saying, "we done it" and "what are we going to do if somebody saw us." Echols could be heard in the background. The appellant was asked about his involvement in a cult. He said

he had been involved for about three months. The participants would typically meet in the woods. They engaged in orgies and, as an initiation rite, killing and eating dogs. He noted that at one cult meeting, he saw a picture that Echols had taken of the three boys. He stated that Echols had been watching the boys.

The appellant was also asked to describe what Baldwin and Echols were wearing the day of the murders. Baldwin was wearing blue jeans, black lace-up boots and a T-shirt with a rendering of a skull and the name of the group Metallica on it. Echols was wearing black pants, boots and a black T-shirt.

The appellant initially stated that the events took place about 9:00 a.m. on May 5. Later in the statement, he changed that time to 12:00 noon. He admitted that his time periods might not be exactly right. He explained the presence of the young boys by saying they had skipped school that day.

The first tape recorded statement concluded at 3:18 p.m. At approximately 5:00 p.m., another statement was recorded. This time, the appellant said he, Echols and Baldwin had come to the Robin Hood area between 5:00 and 6:00 p.m. Upon prompting by the officer, he changed that to 7:00 or 8:00 p.m. He finally settled on saying that his group arrived at 6:00 p.m. while the victims arrived near dark. He went into further detail about the sexual molestation of the victims. At least one of the boys had been

> held by the head and ears while being accosted. Both the Byers boy and the Branch boy had been raped. All the boys, he said, were tied up with brown rope.
>
> One of the interrogating officers later testified that his notes revealed the appellant told him he received a phone call from Baldwin on the night before the murders. Baldwin stated that they planned to go out and get some boys and hurt them.
>
> The appellant's statements are a confusing amalgam of times and events....

Misskelley v. State, 323 Ark. 449, 459-462 (1996).

B. Testimony of State Medical Examiner

At the time of trial, forensic pathologist Frank Peretti was the associate medical examiner for the state of Arkansas. (RT 813, Bates 1313) With the aid of several autopsy photographs introduced as exhibits at trial, he testified extensively on the types of injuries sustained by the victims and to the condition of the bodies. Some of his conclusions are summarized briefly below.

All of the boys' bodies were bound with their own shoelaces: right ankle to right foot, left ankle to left foot. (RT 820, 828, 830, 840; Bates 1320, 1328, 1330, 1340) Peretti said that the causes of death of Michael Moore and Steve Branch were "multiple injuries with drowning." (RT 829, 839, Bates 1329, 1339) Some of Branch's wounds were perimortem, and some were post-mortem. (RT 838, Bates 1338) According to Peretti, Chris Byers died of multiple injuries but "there was no evidence of drowning in Chris Byers." (RT 847, Bates 1347)

Peretti claimed that two of the boys had injuries to their ears and mouths that suggested they had been held by the ears and forced to perform oral sex. (RT 827, Bates 1327) He found that Moore's and Branch's ears were bruised, "with overlying linear scratches;" (RT 826, 833, Bates 1326, 1333) Byers' ears were was contused, scratched, and abraded. (RT 841, Bates 1341) Regarding mouth injuries, Byers had a cut, several abrasions, and bruises on his lips and inside his mouth. (RT 841, Bates 1341) Moore's inner lips and nose had scrapes and his upper lip had cuts, contusions, and swelling. (RT 825, Bates 1325) Branch's outer lips were abraded with multiple lacerations, and his inner lips were bruised, lacerated, and hemorrhaged. (RT 832, Bates 1332) According to Peretti, the boys' ear and mouth injuries could have been caused "by holding the ears, pulling the ears" and "having an object, any object, inserted inside the mouth...." (RT 836, Bates 1336) He expanded on this theory when he added that these were "injuries you normally see on areas of children who are forced to perform oral sex... ." (RT 846, Bates 1346)

Peretti also found evidence of anal dilation and abrasions in all of the boys. Further, Byers had "multiple cutting wounds and abrasions on the anal orifice and perineum area." (RT 825, 836, 843; Bates 1325, 1336, 1343) Two of the boys also had penile injuries. Branch had a clearly demarcated injury to the head of his penis that Peretti opined could have resulted "from oral sex...[or from]...a very tight squeeze," or "an object could have been placed around the penis and tightened very fast." (RT 837, Bates 1337) With regard to Byers, the skin covering the shaft of the penis had been "carved off." (RT 843, Bates 1343) The scrotal sac and testes were also missing. (RT 844, Bates 1344) Around the genital area were "multiple gouging type wounds, stab wounds, and cutting wounds." (RT 844, Bates 1344) Peretti opined that these

injuries could have been caused by a knife or a piece of glass, and that "[u]sually the knife or the object is being twisted, and the victim is moving to get those irregular edges." (RT 844, Bates 1344) Byers also had bruising on his inner thighs that Peretti suggested could have resulted from attempts to spread his legs for penetration. (RT 844, Bates 1344)

Also, the face of Steve Branch incurred more injury than the faces of the other victims. "The entire left side of [Branch's] face," measuring five and a half by five inches, contained "multiple gouging type wounds, cutting wounds." (RT 833, Bates 1333)

All of the boys sustained head injuries that, according to Peretti, were caused by a "broom handle type weapon," and/or a two by four piece of wood. (RT 822, 834, 842; Bates 1322 , 1334, 1342)

C. Forensic Evidence That Could Have Been Obtained at Trial Through Reasonable Investigation

As discussed in detail in Claim VI below, no less than six forensic pathologists and odontologists have reviewed the autopsy reports, photographs, and other materials related to the condition of the bodies of the victims in this case. All of the experts agree that the skin injuries on the bodies – including the emasculation of Christopher Byers, the injuries to the ears and lips of all three boys, and the extensive injuries to the face of Steve Branch – resulted from post-mortem animal predation. Further, the experts unanimously agree these and other injuries did not result from forced oral sex, sodomy, or mutilation by knife, and that Peretti was wrong in his conclusions to the contrary.

D. Petitioner's "Confession"

As set forth in the above facts from the Supreme Court opinion, Petitioner gave the police

a statement implicating Echols, Baldwin, and himself after a long interrogation by a number of officers. The Supreme Court found, "The statements were the strongest evidence offered against the appellant at trial. In fact, they were virtually the only evidence, all other testimony and exhibits serving primarily as corroboration." *(Misskelley v. State* 915 S.W.2d at 707) The court, nonetheless characterized these statements as "a confusing amalgam of times and events. (Id. at 708)

1. Petitioner's Mental Impairments at the Time of Questioning

Expert psychological testimony at Petitioner's motion to suppress his confession established that he had been diagnosed as mentally retarded, as had his brother. (RT 342, Bates 840) Though this court ultimately ruled that Petitioner was not mentally retarded at the time of trial, one expert concluded that he was retarded within the meaning of Arkansas Code section 5-4-618. Petitioner's math and spelling skills were at the second or third grade level. His reading skills were at the third grade level, and his writing ability fell below the first grade level. (RT 344, Bates 842) His thought processes were similar to those of a six- or seven year-old . (RT 346, Bates 844) He performed psychological tests from the viewpoint of a five- to seven-year-old child. (RT 349, Bates 847) He was severely insecure and did not understand the world very well. When he was under stress, he rapidly reverted to fantasy and daydreaming, "and at times [he could not] tell the difference between fantasy and reality." (RT 352, Bates 850) He reasoned at the level of a six to eight-year-old and was very dependent on others to make major decisions for him. (RT 1423-24, Bates 1927-28)

2. The Circumstances of Petitioner's Statement

The following version of the facts concerning Petitioner's statement to police are taken

from the opinion of the Arkansas Supreme Court affirming Petitioner's convictions on direct appeal.

> Approximately one month into the investigation, the police considered Damien Echols a suspect in the murders, but no arrests had been made. Appellant's name had been given to officers as one who participated in cult activities with Echols...[6]
>
> [Appellant and Allen] arrived at the station at approximately 10:00 a.m. Detective Allen and Detective Bryn Ridge questioned appellant for about an hour when they became concerned that he wasn't telling the truth. In particular, he denied participation in the cult activity, a statement which was at odds with what other witnesses had said. At this point, the detectives decided to advise appellant of his rights. Detective Allen read him a form entitled "YOUR RIGHTS," and verbally advised him of the Miranda rights contained in the form. Appellant responded verbally that he understood his rights and also initialed each component of the rights form. There was no evidence of any promises, threats or coercion... After he was advised of his rights and had waived them, appellant was asked if he would take a polygraph examination. He agreed that he would. Detective Allen took appellant to look for his father so that his father could grant permission for appellant to take the polygraph. They observed Mr. Misskelley driving on the same road they were on, stopped him, and received the authorization. There was no evidence of promises, threats or coercion.
>
> Upon returning to the station, Detective Bill Durham, who would administer the polygraph, once again explained appellant's rights to him. Appellant verbally indicated he understood, and initialed and signed a second rights and waiver form which was identical to the first.
>
> Detective Durham explained to appellant how the polygraph would work and administered the test over the course of one hour. In Detective Durham's opinion, appellant was being deceptive in his answers and he was advised that he

[6]Here, the court is referring to Detective Allen's testimony that Inspector Gitchell relayed information to him that "Damien and Jessie had been... [to] some kind of strange meeting together." As discussed below, Victoria Hutcheson, the person who provided Gitchell with this information, fabricated the story that Petitioner and Echols went to an "esbat" together, because the police threatened to take her son away and prosecute her for murder if she did not manufacture this evidence. She fabricated the story during an interrogation with Detective Ridge, who did the threatening, and Inspector Gitchell, who played the good cop.

had failed the test. At that point, appellant became nonresponsive.

Detective Bryn Ridge and Inspector Gary Gitchell began another interrogation of appellant at about 12:40 p.m. They employed a number of techniques designed to elicit a response from appellant. A circle diagram was drawn and appellant was told that the persons who committed the murders were inside the circle and that those trying to solve the crime were on the outside. He was asked whether he was going to be inside the circle or outside. He apparently had no response. He was then shown a picture of one of the victims and had a strong reaction to it. According to Gitchell, appellant sank back into his chair, grasped the picture and would not take his eyes off it. Yet, he still did not speak. Finally, Gitchell played a portion of a tape recorded statement which had been given by a young boy named Aaron. The boy was the son of a friend of appellant's and had known the victims. The portion of the statement which the officers played was the boy's voice saying, "nobody knows what happened but me." Upon hearing this, appellant stated that he wanted out and wanted to tell everything.

The officers decided to tape record a statement and received the confessions which are set out above. At the beginning of the first statement, on tape, appellant was advised of his rights for the third time. The rights were fully explained to him, and the waiver of rights read to him verbatim.

The evidence presented by appellant at the suppression hearing consisted primarily of the testimony of polygraph expert Warren Holmes. Mr. Holmes testified that, in his opinion, appellant had not been deceptive in his answers to the polygraph questions. He raised the possibility that appellant had been wrongly informed that he had failed.

Misskelley v. State, 323 Ark. 449, 465-466, 915 S.W.2d 702, 710-11 (Ark. 1996).

In addition, though the evidence established that Petitioner was eventually informed of his *Miranda* rights, the evidence at the suppression hearing did not establish that Detective Allen complied with Arkansas Rules of Criminal Procedure, Rule 2.3, which requires that a suspect be informed that he need not go to the police station for questioning. At the suppression hearing, Detective Allen testified that he did not advise Petitioner of any rights when he asked him to come to the police station for questioning.

3. Inconsistencies in Petitioner's Statements

The Supreme Court characterized Petitioner's statements as "a confusing amalgam of times and events." *Id.* The court noted that "numerous inconsistencies appear, the most obvious being the various times of day the murders took place. Additionally, the boys were not tied with rope but rather with black and white shoe laces. It was also revealed that the victims had not skipped school on May 5." *Id.*

In addition, not only had the victims attended school during the day on May 5th, but so had Baldwin. (RT 946, Bates 1447) Further, it was established during the Echols trial that Echols had been at a doctor's appointment that morning. (EBRT 1852, 1891, 1915, 1948; Bates 2638, 2677, 2701, 2734) Indeed, uncontradicted testimony was admitted at Petitioner's trial that Petitioner had been on a roofing job the entire morning of May 5th. (RT 1104-05, 1113; Bates 1606-07, 1615.) Thus, according to the evidence, when Petitioner described getting up on the morning of the 5th, receiving a phone call from Jason Baldwin, meeting with Baldwin and Echols, and walking to the Robin Hood woods at 9 a.m., he was describing a series of events that never happened. (See Statement of Jessie Misskelly dated June 3, 1993, attached hereto as Exhibit Volume 1, Exh. B at 481)

When Petitioner then described the victims being intercepted on the morning of the 5th as "they's going to catch their bus and stuff, and they's on their bikes," and stated that the victims then "skipped school" (RT 946-47, Bates 1447-48), he was engaging in fiction. When he stated that he witnessed Echols and Baldwin committing the killings "about noon," (Exhibit Volume 1, Exh. B at 487), he again was inventing a narrative since both the victims and Baldwin were sitting in school while Petitioner was roofing at noon, and the victims were riding their bikes around their neighborhoods six and a half hours later. Even Detective Ridge, one of the

interrogators, admitted being shocked when Misskelley said the boys were killed at noon, because Ridge knew that they were in school at noontime, and that their killings occurred between 6:30 on May 5 and 1:30 in the morning on the 6th; he did not raise the inconsistency with Misskelley, however, because "when you start contradicting somebody, then they stop talking." (RT 904-05, Bates 1405-06) Further, Ridge was happy to get an incriminating statement from Petitioner because the police were under a lot of pressure to solve the crimes. (RT 906, Bates 1407)

The police terminated the first recorded statement of Petitioner at 3:18 p.m. and attempted to obtain a warrant but learned from the issuing magistrate that there were problems with the time sequence described by Petitioner. (RT 154-56, 191-193, 212-20; Bates 651-53, 689- 691, 712-720) During the second interview beginning at 5:00 p.m., Petitioner moved up the time the victims were seized to five or six o'clock, only to have Gitchell tell him that he had stated in earlier the interview that the time was actually seven to eight, which was not true.[7] (RT 1624-25, Bates 2129-30) Petitioner then acquiesced to the suggestion that they encountered the victims at seven to eight o'clock. Having invented a story about meeting Baldwin and Echols and walking to Robin Hood woods in the morning, Petitioner never explained how he came to be in the presence of his codefendants later that day.

Further, not only did Petitioner not know that the victims were tied with their own

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[7]Detective Gitchell testified that he had deduced this time period from the fact that Petitioner said he arrived home about an hour before he got a 9:00 phone call from Baldwin.(RT 1639, Bates 2143) Nonetheless, the fact remains that Gitchell told Petitioner that he had made a statement that Petitioner did not make. Moreover, the "hour" time period before the phone call was also suggested to Petitioner: Ridge did not simply ask him what time he got home before the call. Rather, Ridge gave Misskelley only two choices: he could select either thirty minutes or an hour. In response to this question, Petitioner said "Uh," followed by silence, and then, "an hour." (RT 1622, Bates 2127) Thus the deduction Gitchell used to suggest the answer of seven or eight, was itself derived from suggested information.

shoelaces, some black and some white, he did not know that they were hog-tied, i.e., left hand to left foot, right hand to right foot. (RT 192, 689-90) Rather, Petitioner told police that only that the victims' hands were tied, and that this was accomplished with brown rope. (RT 192, Bates 689; also at Exhibit Volume 1, Exh. B at 492 and B-1at 509) His interrogators attempted to help Petitioner correct this false description by suggesting the boys would have run away if only their hands were tied, but Petitioner failed to produce the explanation that would have been obvious to any one who had actually witnessed the murders: the victims were hog-tied with shoelaces. Finally, Detective Ridge flatly asked "were they [sic] hands tied in a fashion that they couldn't have run, you tell me? Petitioner replied: "They could run...They could move their arms and stuff." (Exhibit Volume 1, Exh. B at 492)

Again, Ridge admitted that he was shocked when Misskelley falsely stated that the victims were bound with brown rope. (RT 905, Bates 1406) Moreover, when Petitioner described Damien Echols taking a "big old stick" and using it to choke Chris Byers to death, he again was speaking falsely because an autopsy revealed that Chris Byers suffered no injuries to his neck consistent with choking, much less any fractures that would result from being asphyxiated with a stick. (RT 852, Bates 1352) Similarly, one of the few details that Petitioner readily volunteered at the beginning of his interview was he saw Echols "start[] screwing them" (Exhibit Volume 1, Exh. B at 484), but the state pathologist testified that, although the anuses of the boys' submerged bodies were dilated, Peretti did not see "any evidence of sodomy...on any of [the] victims." (RT 852, Bates 1352) In fact, the dilation could have occurred from submersion in water. (RT 850, Bates 1350) And though Petitioner stated that he saw Echols and Baldwin "beat them up real bad" before they took the victims' clothes off, (Exhibit Volume 1, Exh. B at

484), there was no evidence that the boys' clothing recovered at the scene had any blood on it or other evidence of a beating, such as tears or rips in the material.

Further, testimony at Petitioner's trial showed that, on the day of Petitioner's arrest, he and Officer Allen joked about a reward of $40,000 and the fact that, if a conviction was obtained, Petitioner would be able to buy himself a new truck. (RT 1183, Bates 1685) Petitioner father testified that Petitioner responded to Allen, "'No I'm not either. I'm going to buy my daddy a truck and I am going to take his old one." (RT 1183, Bates 1685.)

E. Evidence of Coercive and Suggestive Police Interrogation Tactics

At trial, the defense presented testimony of three experts to support its main theory at trial that Petitioner's so-called confession to police was false. The following is a summary of the testimony of the defense's false confession experts, though a more detailed recitation of some of this testimony will follow in Claim III below.

1. Testimony of Warren B. Holmes

Warren B. Holmes testified on the topic of false confessions generally, though the court did not permit him to opine that Petitioner's confession was false. Holmes described thirteen factors that he considered in determining whether a confession was true. Initially, he told the jury, the confession is "always in narrative form where he suddenly gets it off his chest and is a – an indication of relief that sets in, and he tells you about it, and you don't have to prompt him or lead him with questions." He stated that only after getting a narrative should the interrogator begin asking questions. (RT 1340, Bates 1843) He also testified that with a true confession, the confessor tells the police things they do not already know. (RT 1340, Bates 1843) To ensure reliability, detailed questioning should not begin until after that. He also explained that "[w]hen

you do start questioning him to clarify certain points in his confession, if you are wrong in a supposition, he will tell you that. He will tell you, 'No that's not the way it happened." He will correct you. You don't have to correct him." (RT 1340, Bates 1843)

Holmes was troubled by Petitioner's confession for these reasons and others. Particularly, he was questioned the reliability of Petitioner's confession because of the time discrepancies; for example, first Petitioner told the police that he, Baldwin and Echols encountered the victims at 9:00 a.m., then he said it occurred at noon. (RT 1345, Bates 1848) Also of great importance, Petitioner did not know about the ligature used to tie the victims. Defense counsel did not ask Dr. Holmes about each of the thirteen factors he identified.

Defense counsel elicited on direct examination that, in Petitioner's confession, there is false information but "the whole question is why? Is it because he's innocent or because he's duplicitous and cunning and decided to offer a false confession and retract that later on." (RT 1347, Bates 1850)

On cross-examination, the prosecution elicited from Dr. Holmes that he had no problem with the length of the interrogation (RT 1350, Bates 1853); the only problem he had with the police tactics was that they didn't resolve the discrepancies between

the confession and the crime scene evidence. (RT 1362, Bates 1865) The prosecution also elicited from Dr. Holmes, over defense counsel's objection, that 99% of people who confess are in fact guilty and that it is not unusual for a defendant to recant his confession. (RT 1364, Bates 1867)

2. William Wilkins

At trial, the defense called psychologist Dr. William Wilkins in order to establish that Petitioner's mental impairments rendered him vulnerable to suggestive or coercive police tactics. Serious problems with Wilkins' professional standing, resulting from improper conduct with patients, however, undermined his substantive testimony. The details of Wilkins' devastating impeachment are discussed in detail in Claim III.B. below. In sum, before the jurors heard any of Wilkins' testimony, they heard first that he had been suspended from treating patients without

supervision, that he could not longer work with child sex abuse cases, and that he had significant deficits in his ability to reliably administer psychological testing. Despite the fact that counsel for Petitioner was aware of these problems at least two weeks before Wilkins' testimony, counsel relied on Wilkins exclusively to establish the following.

Wilkins testified to Petitioner's mental deficits and to his suggestibility during questioning. He administered a number of tests to Petitioner. Among other things, he concluded that Petitioner's full scale IQ was 72, with a verbal I.Q. of 70 and a performance I.Q. of 75. Average I.Q. is between 84 and 116.[8] (RT 1416, Bates 1920) He reasoned on the level of a six- to eight-year-old. His reading skills were at the third-grade level, and his writing ability fell below the first-grade level. (RT 1422, Bates 1926) It likewise showed that Petitioner was dependent on others to make major decisions for him, and he had great difficulty separating fantasy from reality, particularly when under significant stress. (RT 1423-24, Bates 1927-28) Though he was not "mentally retarded" at the time of trial, he had been diagnosed as mentally retarded in the past. (RT 1501, Bates 2005)

During Wilkins' testimony, defense counsel Crow attempted to elicit testimony from Wilkins about "some kind of suggestibility test," but after a sustained foundational challenge to the scientific basis for that test, Wilkins was prohibited from discussing it any further. Thus, Wilkins was permitted to testify that, based on interviews with Petitioner, Wilkins thought that Petitioner was "quite suggestible," though he was not allowed to testify that he arrived at this conclusion by administering the specific test designed to measure such suggestibility. (RT 1461,

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[8]The prosecution established that in the past, Wilkins tests showed Petitioner's performance I.Q. in the low-average range. (RT 1477, Bates 1981)

Bates 1965)

3. Dr. Richard Ofshe

The defense called Doctor Richard Ofshe as an expert on police interrogation tactics and confessions. Ofshe explained that certain individuals are more susceptible to coercive police tactics, particularly those with low self-esteem, low self-confidence, and/or mental handicaps. (RT 1552, Bates 2056) In his opinion, based on the transcripts of Petitioner's statements to police and the testimony of the officers at the suppression hearing, the interrogation tactics used by police were suggestive and led Petitioner to make a statement. Further, the contents of his statements were shaped by those tactics. (RT 1590, Bates 2095) This was the thrust of the evidence adduced on direct examination of Ofshe.[9]

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[9]After the court sustained an objection to the question "Do you have an opinion as to whether or not some of the interrogation tactics employed by the police against Mr. Misskelley were coercive in nature or overborne his will?," the defense made the following proffer outside the presence of the jury: Ofshe explained that various techniques used by the police led to a coerced, compliant confession. Several techniques employed by police produced this result.

First, police told Petitioner that he failed a polygraph test, which significantly contributed to Petitioner's feelings of helplessness during the interrogation. (RT 1571, Bates 2076) Ofshe explained that police also put pressure on Petitioner by use of the circle diagram: Gitchell drew a circle in which he placed three dots, and then placed several dots around the circle. He then asked Petitioner whether he wanted to be one of the suspects on the inside of the circle, or whether he wanted to be someone helping law enforcement on the outside of the circle. (RT 1571-1572, Bates 2076-2077) Although he did not fully comprehend what it meant to be inside the circle, Petitioner knew "that it was bad," and "that it was a place where he did not want to be." (RT 1573, Bates 2078) He knew that if he conformed to what police wanted of him, they would take him outside of the circle. (RT 1573, Bates 2078)

Police followed this up with another hour and a half of intense pressure. (RT 1573, Bates 2078) His feelings of helplessness were compounded when he told the officers that he wanted to go home but was told that he could not. (RT 1573, Bates 2078.) Eventually relenting, Petitioner started telling the police about the existence of a satanic cult and made statements implicating Echols and Baldwin. (RT 1574, Bates 2079) He made guesses when responding to repeated questions about the crime, and when his guesses were incorrect, Ridge, sitting across from him, would simply shake his head back and forth to indicate that Petitioner gave the wrong answer. (RT 1574, Bates 2079) He learned to feed back to the interrogators the answers they suggested because, when he made wrong guesses, they made him go through the entire story. They also would not believe that he was working with Ricky Deese on the day of the murders and that he knew nothing about the crime. (RT 1574, Bates 2079)

Another important factor contributing to his helplessness and distress was the gruesome photograph of one of the victims that Gitchell showed him. According to all parties present, Petitioner was transfixed on the photo and was very upset by it. He was unable to respond to additional questions. (RT 1575, Bates 2080) This was followed by the police playing a tape recording of a little boy with whom he had a close relationship (Aaron Hutcheson). Immediately after this, Petitioner said, "I want out." (RT 1575, Bates 2080) Only at this point did police begin to

record the statement. (RT 1576, Bates 2081.) He also opined that no evidence suggested that the killings were cult-related. (RT 1579-80) The Court ruled that "the information elicited in the testimony proffered not only embraces the ultimate issue or facts for the jury to consider, that in effect tells the jury what their finding should be." (RT 1582)

On redirect, Ofshe pointed to a number of examples where police used coercive tactics. One of the main areas in which police used suggestion or coercion was regarding the timing of the defendants' first encounter with the victims on May 5th. The police revisited the issue eight times until they got a time frame that fit with the evidence. First, Petitioner told the detective Ridge that they encountered the victims at 9:00 in the morning. Then, when Ridge did not like that answer, he said it happened at noon. (RT 1617-18, Bates 2122-23) Later, Ridge asked him "Okay, was it after school let out?" to which Petitioner responded that the victims had skipped school. (RT1619, Bates 2124) When pressed, he went back to his statement that he first saw the victims in the woods at nine in the morning. (RT 1620, Bates 2125) Later, after the police suggest that it happened at night, Petitioner adopted that version and began to say that the incident occurred at night. (RT 1622, Bates 2127) Then he said that they met up with the victims at five or six in the evening. (RT 1623, Bates 2128) Then Detective Gitchell told Petitioner he had already said that it happened around seven or eight and asked him to choose between those times. (RT 1625, Bates 2130)

Ofshe explained that suggestive questioning of the nature described above is common and that it is an effective manipulation tool. He stated that this is one of many important examples of police manipulation contained throughout the record. Counsel did not follow up on this comment by eliciting the other examples of inconsistencies in the confession (e.g., Petitioner's unfamiliarity with the ligature used, the fact that he did not know the victims were bound hand to foot, the fact that he inaccurately described the killing of one of the boys) but rather passed the witness.

F. Testimony of Vicky Hutcheson

Hutcheson was the only witness who corroborated Petitioner's statements to police that he engaged in so called "cult" activities. As discussed more fully below, Hutcheson has come forth with the truth about her testimony at trial: she fabricated it all under duress caused by police threats and coercion. Hutcheson recently gave a sworn statement explaining, among other things, that the police had predetermined that Echols perpetrated the crimes as part if a cult ritual, and that they threatened her into manufacturing evidence against him. (See Transcript of Sworn Statement of Victoria Hutcheson, attached hereto as Exhibit Volume 1, Exh. C; see also Declaration of Nancy Pemberton, attached hereto as Exhibit Volume 1, Exh. C-1). Because Petitioner – who was her good friend – was the only person she knew who knew Echols, Petitioner became implicated in the false story she told to police as well. The full details of Hutcheson's sworn statement are discussed below in Claim VIII.B.2.

At trial, Hutcheson testified that, in May of 1993, she lived in Highland Park in a trailer. Her son, Aaron, was good friends with the three murder victims, and Hutcheson was really close friends with Petitioner. (RT 970-71, Bates 1471-72) At some point after the killings, she decided to play detective.[10] (RT 971-72, Bates 1472) She had heard a lot of things about Damien Echols, so she had Petitioner introduce her to Echols. (RT 972, Bates 1473) Before the meeting with Echols, she went to see Don Bray, Marion Chief of Police, to get his library card to check out "some satanic books because they can't be checked out just by normal." She spread the books around her coffee table in anticipation of her meeting with Echols. (RT 972, Bates

[10]Hutcheson made this statement in response to a leading question: The prosecutor asked her, "At some point after the murders, did you decide to play detective?" She parroted back, "I decided to play detective." (RT

1473.)

971, Bates 1472)

According to Hutcheson, after meeting Echols, he invited her to an "esbat," which Hutcheson claimed was an occult satanic meeting mentioned in one of the witch books she had checked out of the library. (RT 973, Bates 1474) Hutcheson, Misskelley, and Echols went to the meeting in a red Ford Escort driven by Echols. Hutcheson claimed that, from a distance, she saw 10 to 15 people at the meeting. She had Echols to take her home, but Misskelley stayed at the scene. (RT 973, Bates 1474) [11]

On cross-examination, Hutcheson admitted that she had been in Officer Bray's office on the day the bodies of the murder victims were discovered because she was under investigation for a "a credit card mess-up." (RT 975, Bates 1476) She had been previously convicted in Arkansas for writing "hot checks." (RT 976, Bates 1477) After she began her cooperation with the police regarding Echols, authorities dropped all charges involving the credit card problem. (RT 975, Bates 1477) She had spent the night with Misskelley the night before he gave his statement to the police and was arrested. (RT 976-77, Bates 1477-78) The defense proffered a witness who stated that, on two occasions, Hutcheson said that her son Aaron would receive reward money related to the case. (RT 1268-69, Bates 1771-72)

G. The Uninvestigated Bloody Man in the Bojangles Restaurant

At trial, the manager of the Bojangles Restaurant in West Memphis testified that on May 5, at about 9:30 p.m., a customer in the restaurant reported that a man was in the women's restroom. (RT 1325, Bates 1828) The manager went into the restroom and saw a black man

[11] At the Echols trial, it was established that the West Memphis police, working with Vicky Hutcheson, had conducted audio and visual surveillance of Echols at Hutcheson's home in an effort to catch Echols saying something incriminating, but to no avail. (EBRT 2153-54, Bates 2940-49)

with his head in his lap. (RT 1325, Bates 1828) There was a forearm print of blood on the wall above the toilet and blood around the toilet near where man was sitting. (RT 1325, Bates 1828) The man appeared disarrayed. (RT 1325, Bates 1828) He had muddy feet, and was wet up to his knees. (RT 1325, Bates 1828) He had a bowel movement all over himself, the seat, the floor, and "everywhere." (RT 1325, Bates 1828) There was blood on the toilet paper roll that the man placed in the trash can. (RT 1327, Bates 1830) Also, there was blood on the wall where he staggered out of the restroom. (RT 1329, Bates 1832) He either placed, dropped, or attempted to flush a pair of sunglasses in the toilet. (RT 1327, Bates 1830) The manager called the police, but by the time they came, the man had left. (RT 1326, Bates 1829) The police did not go into the restaurant but merely drove up to the drive-through window. (RT 1326, Bates 1829) Later that evening, after it was dark, the police came back to the Restaurant to investigate. (RT 1328, Bates 1831) They scraped samples off the wall and the door of the restroom. (RT 1328, Bates 1831) They also took the sunglasses. (RT 1328, Bates 1831) The manager informed them about the bloody toilet paper, but they declined to take it. (RT 1328, Bates 1831) A Negroid hair was later discovered on a sheet used to cover the body of Chris Byers. (RT 1022, Bates 1523)

Evidence presented at the Baldwin/Echols trial but not at Petitioner's trial also showed that the man at Bojangles had "wasted a whole roll of toilet tissue by soaking up blood or grabbing it for himself." The toilet paper "had blood all over it. It was saturated all the way down to the cardboard roll." (EBRT 2213-14, Bates 3001-02) Detectives Ridge and Allen were the officers who investigated and took a report. The detectives asked the manager whether the man in the restroom appeared to have muddy feet like those of the officers (who had been at the

crime scene all morning) and the manager responded that the man did. (EBRT 2215, Bates 3003) Ridge and Allen took blood scrapings off the wall in the women's restroom. (EBRT 2215, Bates 3003) Detective Ridge testified that he never sent the samples taken at Bojangles to the crime lab and that he later lost them. (EBRT 810-11, Bates 1589-90; EBRT 945, Bates 1725)

AMENDED AND SUPPLEMENTED CLAIMS

INTRODUCTION TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

A. Every Facet of Counsel's Performance in this Case Violated Then-existing National Norms as Expressed by the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

Defendants in a criminal trial have a right to effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2563 (2006). "To prevail on a claim of ineffective assistance of counsel, Petitioner must show that counsel's representation fell below an objective standard of reasonableness and that but for counsels errors, the result of the trial would have been different." *Haynes v. State*, 2008 Ark. LEXIS 86 (2008)(*citing Strickland v. Washington*, 466 U.S. 668(1984); *Andrews v. State*, 344 Ark. 606 (2001) (per curiam)). While there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, (*Id., citing Noel v. State*, 342 Ark. 35(2000), Petitioner can rebut this presumption by showing that a reasonable probability exists "that the decision reached would have been different absent counsel's errors." *Id.*, citing *Greene v. State*, 356 Ark. 59 (2004). "A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial." *Id.*

The American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (A.B.A. 1989 Ed.) (hereinafter ABA Guidelines) delineate what

needs to be done in preparing for, and defending, a capital case. These standards have long been considered "guides to determining what is reasonable". *Wiggins v. Smith*, 539 U.S. at 522, 123 S.Ct. 2527. See also, *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir.2003) (concluding that although the case was tried in 1983-1984 before the 1989 ABA guidelines were published, the 1989 and 2003 standards represented prevailing professional norms under Strickland because the standards were merely codification of "longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases.")("[T]the Wiggins case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the "prevailing professional norms" in ineffective assistance cases.")

The Guidelines are addressed not only to defense counsel but to the jurisdictions in which counsel are appointed and compensated. The Guidelines set standards for every aspect of the case, including the quantity and quality of counsel (ABA Guidelines 2.1, 3.1, 4.1, 5.1, 11.1, 11.2), the workload of counsel (ABA Guideline 6.1), the training and compensation of counsel (ABA Guidelines 9.1, 10.1), the support services that should be made available to counsel (ABA Guideline 8.1), the scope of the investigation of all phases of the case (ABA Guideline 11.4.1) including the securing of experts (ABA Guideline 11.4.1.D.7), decisions regarding the filing of pretrial motions (ABA Guideline 11.5.1), decisions regarding pleas (ABA Guideline 11.6), preparation of trial (ABA Guideline 11.7.1), presentation at trial, including jury selection and objections (ABA Guidelines 11.7.2, 11.7.3), obligations during the sentencing phase (ABA Guideline 11.8), and duties of trial, appellate and post-conviction counsel (ABA Guideline 11.9).

The performance in this case fell below every national norm as established by the ABA

Guidelines.

B. Counsel Lacked Experience Necessary to Effectively Represent Petitioner

As discussed below, counsel was ineffective during Petitioner's 1994 trial in several respects. Though the trial record and video coverage of the trial show that counsel cared a great deal about the outcome of the case and certainly *endeavored* to provide adequate representation, counsel simply did not have the experience necessary to effectively represent Petitioner.

At the time lead counsel Dan Stidham was appointed to represent Petitioner in his capital case, Stidham was thirty years old and had been practicing law for only five years. (See Declaration of Daniel T. Stidham, attached hereto as Exhibit Volume 1, Exh. D) The Misskelley capital murder case was his *first* jury trial as lead counsel. Up until that time, he had only tried one case, as second chair, on a felony drug charge. Other than that, Stidham's mere *exposure* to jury trials was severely limited: In 1988 he had assisted the local public defender in a murder case (though he was not co-counsel); he had been appointed as co-counsel on a conspiracy to commit capital murder case that was never tried; and he had watched a rape trial when he was in law school. His only real criminal trial experience consisted primarily of misdemeanor bench trials. Moreover, his only experience with capital cases occurred during law school when he did legal research and investigation on two capital cases as a law clerk. One involved a trial and the other was a post conviction appeal. That was the extent of Stidham's trial experience and death penalty training when he accepted appointment on Petitioner's case in 1993. (Exhibit Volume 1, Exh. D)

If a person with the above listed qualifications applied today for appointment on a capital case in Arkansas, the application would be rejected pursuant to the Minimum Standards for

attorney qualifications established in 1997 by the Arkansas Public Defender Commission ("ACPD"). The ACPD was established by the legislature in 1993 (Act 1193 of 1993) in an effort to "address a myriad of problems and concerns related to the representation of indigent criminal defendants in Arkansas." *See* Arkansas 2007-2009 Budget Manual at 278.[12] Among other things, the ACPD established minimum qualifications for appointed counsel in capital cases, and established a certification system whereby attorneys must be certified for handling felonies of varying levels of seriousness and complexity. (*Id.*) Currently, lead counsel appointed in a capital case in Arkansas must, at a minimum, "[h]ave prior experience as lead counsel in no fewer than five jury trials of serious and complex cases where tried to completion as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought." *(See* ACPD Attorney Elegilility Death Cases, section (A)(3)).[13] Moreover, "[t]he attorney should have been lead counsel in at least two cases in which the charge was murder or capital murder; or alternatively, at least one was a murder or capital murder trial and an additional two others were felony jury trials." (*Id.*)

To Petitioner's great detriment, these standards were not yet in place at the time of his trial. Lead counsel Stidham had tried only one simple drug felony to a jury. Worse still, he was only second chair in the single jury trial of his then young career. This falls far below the *minimum* requirement of at least five prior "serious and complex" felony jury trials required today. Further, while he had once been appointed on a capital conspiracy case, Stidham did not

[12]Available at http://www.arkansas.gov/dfa/budget/07_09_budget_manual_pdf_files/manual_3/summary/0324_public_defender_pg278.pdf

[13]Available at http://www.arkansas.gov/apdc/news/qualifications.html#Cases

actually try that case, and his only other capital experience occurred as a law clerk while he was a student. This experience falls far below the minimum qualifications set by the ACPD.

The ACPD also set minimum standards for co-counsel seeking appointment in capital cases. Among other things, the ACPD currently requires that co-counsel have "at least two years litigation experience in the field of criminal defense, and have prior experience as lead counsel or co- counsel in no fewer than three jury trials, at least two of which were trials in which the charge was murder; or alternatively, of the three jury trials, at least one was a murder trial and one was a felony jury trial." *Id.*

Crow had never tried a criminal case either as lead counsel *or* co-counsel, before Petitioner's trial. (See Declaration of Gregory Crow, attached hereto as Exhibit Volume 1, Exh. E) Further, neither Crow nor Stidham would have met the current minimum standards for appointment on non-capital murder cases in Arkansas. (See ACPD Certification Criteria (3)(b)(2).)

While the ASPD criteria were not yet in place at the time of Petitioner's trial, the ABA Guidelines were. Counsel was woefully unqualified under the ABA Guidelines. The 1989 Guidelines required that, among other qualifications, lead counsel:

> iii. have prior experience as lead counsel in *no fewer than nine jury trials* of serious and complex cases which were tried to completion, as well as prior *experience as lead counsel or co-counsel in at least one case in which the death penalty was sought.* In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and
>
> iv. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

v. are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

vi. have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

vii. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

ABA Guideline 5.1.

Defense counsel Stidham had never been lead counsel in any serious, complex criminal trial; he had never been counsel of record in a death penalty case; he had never presented any forensic experts or evidence. (Exhibit Volume 1, Exh. D)

Defense counsel's utter lack of experience with forensic experts or evidence flew in the face of the ABA Guidelines. The Commentary to Guideline 5.1 underscores the importance of this experience. "As discussed in Guidelines 1.1, 11.4.1, 11.7.2, and 11.8, verdicts and sentencing decisions in capital cases often turn upon the submission by both the prosecution and defense of evidence from expert witnesses. Eligible trial attorneys should therefore be adept at using expert evidence to the advantage of the client, and at cross-examining prosecution witnesses." Not only was counsel not adept, he had no experience with experts. He completely failed to "demonstrate the necessary proficiency" exemplifying the "quality of representation appropriate to capital cases."

Similarly, co-counsel was required under the 1989 Guidelines to have three years litigation experience in criminal defense with three jury trials of serious and complex cases. ABA Guideline 5.1. Stidham's co-counsel Gregory Crow had absolutely no criminal trial experience. (Exhibit Volume 1, Exh. D)

Moreover, the Guidelines cautioned that,

> A. Minimum standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such standards required for non-capital cases, should not be adopted as sufficient for death penalty cases.
>
> B. Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.

ABA Guideline 11.2

Mr. Misskelley was represented by two lawyers completely unqualified to handle this most serious death penalty case. Counsel accepted the appointment thinking that it was not really a capital case, that his job would be to prepare his client to testify in his co-defendants' case. (Exhibit Volume 1, Exh. D). He was not prepared "to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation." (Id.) Counsel's appointment violated every national legal standard at the time.

C. Lack of Funding Rendered Counsel Ineffective

The defense team not only lacked the experience to handle Petitioner's defense, but they also lacked the funding to conduct competent representation.

As a preliminary matter, Petitioner notes that, due to the chronic funding problems in indigent criminal cases that plagued Arkansas counties at or near the time of Petitioner's trial, the state, through the APDC, is now responsible for paying court-appointed counsel. (Act 1341 of 1997). That agency also pays the expenses for all expert assistance furnished to indigent defendants. As this Court is well aware, this was not the case in late 1993. At that time, the

question of whether the county or the state was responsible for paying the appointed attorneys in this case was unsettled. (RT 535-561); *State v. Crittenden County*, 320 Ark. 356 (1995)). Before the jury was empaneled in Petitioner's trial, this Court heard argument and ordered briefing on the issue. (RT 536-538) The matter was not settled until after trial, contrary to established United States Supreme Court precedence.

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake v. Oklahoma, 470 U.S. 68, 77, 105 S.Ct. 1087 (1985).

The ABA Guidelines also required that counsel should have "investigative, expert, and other services necessary to prepare and present an adequate defense." ABA Guideline 8.1. Not only must counsel be provided sufficient funding for support services, the Guidelines required that counsel be compensated for actual time at a reasonable rate, fully reimbursed for incidental expenses, and paid periodically throughout the course of representation. ABA Guideline 10.1.

As the Commentary to ABA Guideline 8.1 instructs,

> It is critical . . . for each jurisdiction to authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal and postconviction and to procure the necessary expert witnesses and documentary evidence. Assigned attorneys . . . are typically provided few, if any, resources to fund this aspect of case preparation. According to one source, the funds which states and counties provide . . .are far below the amounts that would be needed even if capital trials had only one phase. Furthermore, funds available to appointed defense counsel are substantially below those available to the prosecution. *This inequity is unconcionable.*

ABA Guideline 8.1 Commentary (last emphasis added).

The funding of this case failed in all respects to meet the ABA Guidelines and established

Supreme Court law. By contrast, the State had at its fingertips two experienced prosecutors, several police and probation officers, the State Crime Lab, and the FBI Crime Lab. The funding of the defense in this case was, as the Guidelines incisively comment, unconscionable.

When this Court first visited the funding matter at Petitioner's trial, the General Assembly had recently passed Section 8 of Act 1193, codified at Ark. Code Ann. § 16-87-219 (a) (Supp. 1993), which allocated to the state the financial burden of defending capital cases. (*State v. Crittenden County* at 362) The act was in response to the Supreme Court's opinion in (*Arnold v. Kemp*, 306 Ark. 294 (1991)), that statutory fee caps previously contained in Ark. Code Ann. § 16-92-108(b) (1987) (repealed by Act 1193 of 1993) were unconstitutional. (*State v. Crittenden County* at 362) After declaring the remainder of that statute unconstitutional in *State v. Post*, 311 Ark. 510 (1993), the Court held that in the absence of a statute delegating payment of indigents' attorneys' fees to the counties, the state must bear the responsibility. *Id.* Shortly thereafter, the General Assembly enacted Act 1193, which required counties to pay fees and expenses, *except* for the costs of the "Capital, Conflicts, and Appellate Office," which would eventually oversee appointment and funding of counsel and their experts.

In *State v. Crittenden County,* the Supreme Court quoted language from this Court's 1994 opinion that the Capital, Conflicts and Appellate Office "was not operational or functioning sufficiently" at the time counsel was appointed to represent Petitioner. *State v. Crittenden County* at 362 (agreeing with this Court's finding that under Act 1193, the State, not the County, was responsible for paying defense counsel fees and expenses.)

Thus in 1993, defense counsel did not know who, if anyone, would pay his fees and expenses. Moreover, counsel had previously labored under a system where indigent defense

expenses, including expenses in capital cases, were capped at an unimaginable (and unconstitutional) $1,000. Under this system, counsel had become so inured to the courts' rejection of funding requests that he considered such requests futile. (Exhibit Volume 1, Exh. D) Without a new system in place, counsel lacked any confidence that the court would grant his requests for fees and funds, despite the fact that this court told counsel to submit detailed time sheets and to get preapproval of experts. In fact, during trial, the court made remarks that may well have discouraged counsel from applying for sufficient funds.

For example, during a hearing on January 31, 1994, the court warned counsel for all three defendants that they should obtain prior approval of the court for expert funding, but this followed on the heels of the court's earlier statement to Petitioner's counsel, "I've never been asked to approve [Dr. Richard Ofshe] – and I'm sure not going to pay somebody from California three hundred dollars an hour.") (RT 1088, Bates 1590) Nonetheless, while counsel may have had legitimate concerns about whether he could obtain funding for experts and independent investigators, the failure to at least attempt to obtain such funding was ineffective.

To the extent that counsel asserts he did not seek funding for experts and investigators for fear that his case strategy would become apparent to the prosecution, these decisions were not rational or informed; counsel did not seek to file any such funding requests under seal, which would have been a simple solution to counsel's strategic concerns. (Exhibit Volume 1, Exh. D)

The ABA Guidelines require counsel to obtain experts to be "independent and their work product [to be] confidential to the extent allowed by law." ABA Guideline 11.4.1. The Commentary to Guideline 11.4.1 requires counsel to seek "resources that counsel needs to pursue a proper investigation . . . early in the case" noting that "counsel should demand on behalf of the

client all necessary experts for preparation of both phases of trial." The Commentary also offers protection from exactly the concern counsel asserts, "Individuals assisting in investigation should be within the confidences of the client and defense counsel, and should not be required to disclose information discovered during the investigation except at the direction of counsel."

In sum, as set forth below, counsel committed several errors and omissions amounting to ineffective assistance that resulted either from inexperience, lack of funding, or a combination thereof.

I. COUNSEL WAS INEFFECTIVE FOR FAILING TO TIMELY RAISE AND PRESERVE FOR REVIEW PETITIONER'S CLAIM THAT HIS STATEMENT REQUIRED SUPPRESSION DUE TO THE POLICE'S FAILURE TO COMPLY WITH ARKANSAS RULE OF CRIMINAL PROCEDURE RULE 2.3

At the hearing on Petitioner's motion to suppress his statements to police, counsel failed to timely raise a critical issue that would have resulted in suppression of Petitioner's statements under state law at that time. At the time of Petitioner's suppression motion in 1993, Rule 2.3 was a bright line rule requiring that "when a law enforcement officer requests someone to accompany him to the police station, he shall make it clear that there is no legal obligation to comply with such a request." (*Hart v. State*, 312 Ark. 600, 605 (1993)(*overruled by State v. Bell*, 329 Ark. 422, 430 (1997)[holding that Rule 2.3 is no longer a bright line rule requiring automatic suppression, but rather is subject to the federal "totality of the circumstances" analysis])). In *Hart*, "[t]he detectives did not tell appellant that he did not have to go with them to the police station. Since the detectives did not comply with the rule, there was a seizure of the appellant and a violation of his rights under the Fourth Amendment unless the detectives had probable cause to

arrest him." (*Id.*)

As explained below, counsel failed to timely raise Rule 2.3, which, according to the testimony of the police at the suppression hearing, would have resulted in automatic suppression of Petitioner's statements to police. Without this evidence, Petitioner would have been acquitted. *See. e.g., Misskelley v. State*, 915 S.W.2d at 707 ("The statements were the strongest evidence offered against the appellant at trial. In fact, they were virtually the only evidence...").[14]

Though the issue was untimely raised, counsel did nonetheless attempt to raise it. As the Supreme Court explained in its opinion on direct appeal:

> This issue arose in a unique procedural way at the trial level. The appellant never raised the point in his motions to suppress or at any time during the suppression hearing. During the suppression hearing, Detective Allen testified that he asked the appellant if he would come with him to the station and the defendant voluntarily did so. However, the state, at this point, was unaware of any Rule 2.3 problem, and no further testimony was elicited. After the suppression hearing, the appellant, in a post-hearing brief, raised the issue for the first time.

Misskelley v. State, 323 Ark. at 471.

In addition to these facts, the record at trial also shows that defense counsel asked Detective Allen whether he told Petitioner about any of his rights before transporting him to the police station. However, as the Supreme Court pointed out, counsel did not ask Allen specifically whether he had complied with rule 2.3, and he otherwise made no related objection.

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[14] *See* ABA Guideline 11.5.1, The Decision to File Pretrial Motions, "Counsel should consider filing a pretrial motion whenever there exists reason to believe that applicable law may entitle the client to relief or that legal and/or policy arguments can be made that the law should provide the requested relief" (Part A.) and Commentary: "Counsel in a death penalty case must be especially aware at all trial level stages not only of strategies for winning at that level but also of the need to fully preserve issues for later review."

According to the Supreme Court, this failure precluded appeal of the issue:

> ...we are hesitant to hold that a defendant may file a general motion to suppress, containing no notice of any technical deficiency, then require the state to put on evidence of compliance with all conceivable technical requirements of the Rules of Criminal Procedure. This is totally contrary to our rule that objections must be raised in a timely manner.

Misskelley v. State, at 471.

Worse still, counsel prepared the order denying the motion[15] and failed to include in that order any reference to Rule 2.3, which likewise precluded review of the issue:

> However, just as importantly, the appellant did not obtain a ruling from the trial court on this specific issue. The court's order denying the motion to suppress was drafted by appellant's counsel. It declared that appellant's statements were voluntarily given, that the appellant was afforded his rights under the Constitution, that his rights were knowingly and willfully waived. There is no mention in the order, or during the course of any hearing, of a violation of Rule 2.3. An issue is precluded from review on appeal where there is no clear ruling by the trial court.

Id. (citations omitted.)

Thus, with no tactical reason for doing so, counsel failed to preserve one of the strongest and simplest issues in the suppression hearing. Counsel's performance in this regard was

[15]Counsel wanted to be prepared in the event that he lost the motion, and drafted the order with the specific purpose of preserving the Rule 2.3 motion. (Exhibit Volume 1, Exh. D) While he did include in the order that the court's ruling was based on "the Motion and Amended Motion to Suppress...the testimony of the witnesses at the hearing...and the Hearing Brief of the Defendant," (See Order of January 20, 1994, attached hereto as Exhibit Volume 1, Exh. F) , he failed to specifically mention the Rule 2.3 issue, which, under state law, was inadequate to preserve review of that issue. *Misskelley v. State*, at 471.

deficient because "i]t is the appellant's obligation to obtain a ruling at trial in order to properly preserve an issue for review." *Rutledge v. State*, 361 Ark. 229, 236 (2005)(*citing, Beshears v. State*, 340 Ark. 70 (2000)). Counsel's failure to preserve the Rule 2.3 issue in this case was undoubtedly prejudicial under *Strickland*, 466 U.S. 668, because a reasonable probability exists that in the absence of counsel's omissions, the appeals court would have reversed the trial court's order denying Petitioner's suppression motion.

In fact, Petitioner's statements to police should have been suppressed because, at the time of Petitioner's trial, Rule 2.3 was a bright line rule that, if violated, rendered a person "seized" under the Fourth Amendment. As interpreted by the Supreme Court at the time of Petitioner's trial, the rule placed a "positive duty" on the police to inform a person that he need not go to the police station for questioning and that he is free to leave. *Addison v. State,* 298 Ark. 1 (1989)(*overruled by State v. Bell*, 329 Ark. 422, 430 (1997)); *Burks v. State*, 293 Ark. 374, 377 (1987)(holding that without "testimony or other evidence that the appellant was ever told by any of the officer that he was free to leave at any time," the officers violated Rule 2.3 and appellant's questioning at the police station constituted a seizure under the Fourth Amendment) (*overruled by State v. Bell*, 329 Ark. 422, 430 (1997)); *Hart v. State*, 312 Ark. 600, 605 (1993)(*overruled by State v. Bell*, 329 Ark. 422, 430 (1997)); *Kiefer v. State*, 297 Ark. 464 (1989)(*overruled by State v. Bell*, 329 Ark. 422, 430 (1997)).

In *Addison, supra*, "[o]ne of the officers testified that he asked [appellant] if he would mind going down to the station, to which [he] replied that he had 'no problem with that.'" *Id.* at 4. Another officer told the appellant that he was "at the station voluntarily." *Id.* However, because neither officer "specifically informed him that he had no obligation to be there or that he

could leave if he wanted," the officers violated Rule 2.3 and defendant was seized within the meaning of the Fourth Amendment. *Id.*

The facts of Petitioner's case are strikingly similar to the facts of *Addison.* Here, when Detective Allen asked Petitioner if he would go to the police station for some questioning, Petitioner said, "sure, he would go." (RT 460, Bates 960) He then voluntarily accompanied Allen to the station. *Id.* Allen did not advise him of any rights at this time or when they began talking at the police station because according to Allen, Petitioner was not a suspect at that time. (RT 462, Bates 962; RT 475, Bates 975). Accordingly, under *Addison* and the line of similar cases cited above, Petitioner was seized for Fourth Amendment purposes in the absence of a Rule 2.3 admonition. Moreover, unlike the police in *Addison* who had probable cause to justify their seizure of the defendant in that case, the police in Petitioner's case had no such probable cause. In fact, they insisted at the suppression hearing that Petitioner was *not* a suspect when brought to the police station and initially questioned; they simply wanted to know what he knew about Damien Echols. Thus police did not even have reasonable suspicion–let alone probable cause– to seize appellant.

Accordingly, had counsel properly raised and/or preserved the Rule 2.3 issue, a reasonable likelihood exists that the court would have compelled suppression of Petitioner's statement under *Addison* and similar precedents at that time. *Addison*, 298 Ark. 1; *Burks,* 293 Ark. at 377*; Hart,* 312 Ark. at 605 *; Kiefer,* 297 Ark. 464.

This omission constituted ineffective assistance of counsel. *See, e.g.*, *Davis v. Secretary For the Department of Corrections*, 341 F.3d 1310 (11th Cir. 2003)(counsel was ineffective in murder case for failing to adequately preserve *Batson* claim for appellate review); *Flores v.*

Demskie, 215 F.3d 293 (2nd Cir.), cert. denied, 531 U.S. 1029 (2000)(trial counsel ineffective in child sodomy case for waiving reversible error).

Moreover, counsel's deficient performance prejudiced Petitioner because, without Petitioner's statements to police, the prosecution simply had no case. *Misskelley v. State*, 915 S.W.2d at 707 ("The statements were the strongest evidence offered against the appellant at trial. In fact, they were virtually the only evidence..."). Under *Strickland*, 466 U.S. 668, counsel's ineffectiveness prejudiced Petitioner and he is entitled to relief on those grounds.

II. COUNSEL WAS INEFFECTIVE FOR FAILING TO TIMELY INVESTIGATE AND PRESENT TESTIMONY OF THE BASIS FOR SUPPRESSING PETITIONER'S STATEMENTS TO THE POLICE

A. Counsel Failed to Present Adequate Evidence of Petitioner's Mental Deficits at the Motion to Suppress His Confession

Counsel was ineffective for failing to present sufficient and available evidence of Petitioner's mental deficiencies at the motion to suppress his confession. At the hearing on that motion, Petitioner presented the testimony of Warren Holmes, who testified Petitioner had passed the polygraph exam administered before he confessed. Holmes testified briefly to a couple of inconsistencies in Petitioner's confession and that Petitioner had not failed the polygraph but was wrongly informed that he had. (RT 598-609, Bates 1098-1109)

Counsel did not, however, present any evidence of Petitioner's mental deficits on the issues of whether Petitioner knowingly and intelligently waived his *Miranda* rights or whether he voluntarily confessed. *See, Fare v. Michael C.*,442 U.S. 707 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Instead, counsel asked the court to consider the testimony Dr. William Wilkins given two months earlier at Petitioner's hearing on motion to transfer, and 23 days earlier at Petitioner's motion to prohibit imposition of the death penalty due to mental retardation. (RT 337-371, Bates 835-869; RT 391-424, Bates 889-923) In particular, counsel

wanted the court to take judicial notice of Petitioner's IQ and mental capabilities to which Wilkins had previously testified. (RT 481, Bates 981). The court responded that it recalled Wilkins' testimony that Petitioner "was not mentally retarded, that he was borderline." (RT 482, Bates 982). Attorney Crow countered, "He testified to his diminished capacity, your honor." (RT 482, Bates 982). The court then said, "I am aware of that and I can't throw it out of my mind when I make a decision, so in that regard I will certainly consider his mental capacity which I've already ruled on." (RT 482, Bates 982).

Thus, Wilkins' previous testimony was the only evidence before the Court of Petitioner's ability to knowingly, intelligently and voluntarily waive his rights and render a voluntary confession. This is true despite the fact that at the previous hearing, Wilkins did not testify about Petitioner's mental deficits as they related these issues. Wilkins never testified that he conducted an examination of Petitioner designed to assess him in these areas, and in fact, he did not conduct such testing. (See Forensic Evaluation dated November 8, 1993, attached hereto as Exhibit Volume 1, Exh. G) It did not occur to counsel to use Wilkins for this purpose. (Exhibit Volume 1, Exh. D) Wilkins, however, was apparently familiar with these issues because, at the hearing on the motion to prohibit imposition of the death penalty, Wilkins testified that "with *Miranda*, even the most conservative estimates say you have to read at least at the sixth grade level to understand those. Ah, Jessie reads at a third grade level." (RT 400, Bates 898) Counsel was therefore on notice that expert testimony was available on these issues and failed to pursue that evidence for the suppression hearing.[16]

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[16] *See* ABA Guideline 11.5.1, The Decision to File Pretrial Motions, and Commentary: "The possibility that the client will be sentenced to death increases the need to litigate potential issues at all levels. With the client's life hanging in the balance, trial counsel's perception that the effort needed to bring the motion probably outweighs the

Further, at the earlier hearing on the motion to transfer, Wilkins did testify to findings that nonetheless were relevant to the suppression hearing, but counsel failed to discuss those findings at the suppression hearing. Particularly important, Petitioner had a full-scale IQ of 72, a *verbal* IQ of 70, and a performance IQ of 75. Earlier tests showed results at 67, 70, 73, respectively. (RT 341, Bates 839, RT 344, Bates 842). Petitioner's reading skills were at the third grade level, while his writing ability fell below the first grade level. (RT 344, Bates 842) Petitioner tended to think in childlike ways about the same way... that a six or seven year old would do." (RT 349, 847, Bates 847, 1347) Under significant stress, Petitioner would rapidly revert to fantasy and daydreaming. (RT 352, Bates 850)

Counsel failed to bring these details to the court's attention and all but conceded the issues at the hearing by proceeding solely on Wilkins' earlier testimony; before the Court ruled on the admissibility of the confession, the court indicated to counsel that it gave Wilkins' testimony little to no weight on the suppression issues when it stressed that Wilkins testified "rather clearly" that Petitioner was *not* mentally retarded, and when it reminded counsel that it had "already ruled on" Petitioner's mental capacity. (RT 482, Bates 982). Further, the issues at the suppression hearing were distinctly different from those on which the court ruled at the earlier hearings, and Wilkins' testimony was therefore insufficient to establish the issues before the court at the suppression hearing.

Accordingly, counsel failed to present evidence showing Petitioner's inability to knowingly and intelligently waive his *Miranda* rights and to render a voluntary confession. As

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chances of the motion being granted should not alone preclude filing of the motion."

discussed below, had counsel obtained the proper expert to conduct the relevant testing, a reasonable likelihood exist that the results at the suppression hearing would have been different.

B. At the Time of Trial, Counsel Could have Discovered that Petitioner Was Incapable of Knowingly, Intelligently and Voluntarily Waiving His Rights and Rendering a Voluntary Confession

In 2004, Doctor Timothy Derning evaluated Petitioner to determine whether in 1993 and 1994, Petitioner was competent to stand trial and whether he could knowingly, intelligently, and voluntarily waive his *Miranda* rights and render a voluntary confession. (See Declaration of Timothy J. Derning, attached hereto as Exhibit Volume 1, Exh. H; his curriculum vitae is attached thereto as Exhibit Volume 1, Exh. H-1, and a chart of the materials he reviewed is attached as Exhibit Volume1, Exh. H-2).

As to both issues, Derning explained that, generally, the longer criminal defendants are involved in the criminal justice system, including incarceration, the better they understand the proceedings and their rights. Further, mature criminal defendants are more likely to have a better understanding of the proceedings and constitutional rights than defendants who are young, naive, and less sophisticated and experienced. Based on his experience, Derning would expect that during Petitioner's 11 years of incarceration between 1993 and 2004, he would have developed a better understanding and mastery about constitutional rights, the nature of criminal proceedings, the roles of the participants in the criminal justice system, and the nature of criminal charges than he was at the time of his arrest and trial, particularly since he had the experience of sitting through an entire trial by the time Derning conducted his assessments. (Exhibit Volume 1, Exh. H.

1. Petitioner Was Unable to Knowingly and Intelligently Waive His Rights in 1993-1994.

Derning administered the *Instruments for Assessing, Understanding and Appreciation of Miranda Rights*, authored by Thomas Grisso, Ph.D. Dr. Grisso is Professor of Psychiatry (Clinical Psychology) at the University of Massachusetts Medical School where his research, teaching, and clinical practice focus on forensic mental health evaluations and services. Grisso has authored and edited several books on evaluations for the courts and juvenile forensic issues, including *Competency to Stand Trial Evaluations* (1988), *Assessing Competence to Consent to Treatment* (with P. Appelbaum, 1998), and *Evaluating Competencies: Forensic Assessments and Instruments* (2003). (Exhibit Volume 1, Exh. H)

The *Instruments for Assessing, Understanding and Appreciation of Miranda Rights* consists of four instruments developed in an NIMH-funded research project completed in 1980: Comprehension of *Miranda* Rights (CMR), Comprehension of *Miranda* Rights - Recognition (CMR-R), Comprehension of *Miranda* Vocabulary (CMV), and Function of Rights of Interrogation (FRI). The first three assessment tools employ a multi-method approach to assessing understanding of the *Miranda* warnings, while the fourth examines a defendant's capacities to appreciate the significance of the rights in the context of police questioning, the attorney-client relationship, and court proceedings. (Exhibit Volume 1, Exh. H)

After conducting an evaluation of Petitioner that included administering the above described tests, Dr. Derning's assessment revealed that Petitioner often had a superficial understanding of his Miranda rights, or had no appreciation of his rights enunciated in the *Miranda* warning. Adequate answers for this assessment tool do not require sophistication or a depth of knowledge, only the demonstration of a basic, but adequate lay understanding of one's rights in this context. Petition demonstrated a lack of appreciation of the consequences of

waiving his rights. (Exhibit Volume 1, Exh. H)

Petitioner's understanding of the right to remain silent was overbroad, quite superficial, and incorrect. During the CMR, he reported that the right to remain silent meant, "You don't have to talk to anybody...you don't have to talk to nobody." He did not associate the right to remain silent to the police or a legal context. (Exhibit Volume 1, Exh. H)

During the CMR-R, he was asked whether these two statements were the same or different: "You do not have to make a statement and you have the right to remain silent," and "You should not say anything **until** the police ask you questions." Petitioner reported that these two statements meant the same thing. He did not understand that he did not have to answer questions if they were asked of him. (Exhibit Volume 1, Exh. H)

Petitioner defined the word, "right," as in the *right to remain silent* or *right to any attorney*, as meaning "choice." For example, you can if you want to. He did not articulate or comprehend the notion of "right" as a legal protection, even when asked follow-up questions intended to elicit that definition. (Exhibit Volume 1, Exh. H)

During Dr. Derning's evaluation, Petitioner demonstrated a critical misunderstanding of the application of the "burden of proof" in the criminal justice system. He believes a suspect or defendant must prove his innocence. (Exhibit Volume 1, Exh. H)

Petitioner articulated an understanding of the statement, *Anything you say can and will be used against you in a court of law*. He explained it meant that "whatever you say they can bring up in court" and he identified "they" as the police. This is not surprising given his experience at trial and subsequent exposure; it demonstrated a valid effort on his part to answer the questions to the best of his ability. (Exhibit Volume 1, Exh. H)

Petitioner had only a tenuous understanding of his right to consult with an attorney prior to interrogation and to have an attorney present during interrogation. Although he was able to state that it meant you had a right to talk to an attorney before they ask any questions, he was not able to explain why he did not have an attorney during questioning by the police in 1993. (Exhibit Volume 1, Exh. H)

In the Vocabulary section, Petitioner's definition of *attorney* was overly inclusive, encompassing any professional, including a medical doctor or psychologist, who knows "something about the system or the law and know right from wrong." He also did not recognize that the word *consult* means more than talking; that it conveys the idea of advice pursuant to a decision. (Exhibit Volume 1, Exh. H)

Further, Petitioner's understanding of his right to have an attorney appointed for him if he could not afford one demonstrated his continuing confusion about the roles of criminal justice participants. This was somewhat surprising in the context of his years of incarceration following his trial. When asked what the statement, *If you cannot afford an attorney, one will be appointed for you*, he responded "If you don't have the money for an attorney then the police or judge will appoint one to you." Later, when he was asked whether two statements are the same or different: *If you cannot afford an attorney, one will be appointed for you*, and *You can get legal help if you are poor,*" Mr. Misskelley responded they were **different** and commented, "How can you get legal help if you're poor? You can't do nothing about it." Only after extended probing and re-redirecting was he able to comprehend the similarity between the two statements. (Exhibit Volume 1, Exh. H)

Petitioner also answered close-ended questions even when he did not understand them.

Thus, his positive response to the close-ended question, "Do you understand your rights?" cannot be accepted as evidence of his actual understanding. (Exhibit Volume 1, Exh. H)

Based on the above findings, Dr. Derning concluded that in 1993 and 1994, Petitioner could not make a knowing and intelligent waiver of his *Miranda* rights. He did not demonstrate that he understood that the rights enunciated in the *Miranda* warning were legal protections for his benefit, or even that he actually understood the language contained in the warnings. Petitioner's cognitive limitations, his lack of education, his age, and his naiveté were severe impediments to his ability to understand the warnings and fully appreciate the consequences of relinquishing his rights. The stress of being interviewed and interrogated in a police station would further interfere with his already limited abilities to comprehend these rights, in addition to his dependent interpersonal style, which it seems likely sought to reduce stress by acquiescence and compliance. (Exhibit Volume 1, Exh. H)

2. Petitioner Was Highly Susceptible to Involuntarily Waiving His Rights and Involuntarily Confessing.

Regarding the voluntariness of Petitioner's waiver and statement, Derning confirmed that Petitioner had, at best, low intellectual functioning. His school records reflect poor grades, and poor test scores. He was in resource and special education classes beginning in second grade, and he repeated both kindergarten and second grade. In 1993, at the age of 17, his reading, spelling, and arithmetic skills were at the third grade level. His IQ scores are consistently at or below the 5th percentile. (Exhibit Volume 1, Exh. H)

During Derning's evaluation, Petitioner evidenced an inability to retain concepts that were explained to him. Even if he demonstrated an immediate understanding, he rapidly became confused. His understanding and mastery of information was short-lived. (Exhibit Volume 1,

Exh. H)

As described above, Petitioner did not understand the protections the adversary system afforded him. He did not have anyone supporting him, providing counsel, and/or advocating for him. Because of his immaturity, naiveté, limited social development and low intellectual functioning, he was unable to effectively assert himself, or assert those protections during a lengthy interrogation on his own. (Exhibit Volume 1, Exh. H)

Petitioner did not appreciate the long-term serious consequences of answering questions from the police. His focus was on immediate short-term consequences related to his desire to go home, to reduce his anxiety, to reduce stress and tension during the police interrogation and questioning, and to seeking a solution that would please and calm those demanding answers in an emotional context. (Exhibit Volume 1, Exh. H)

Derning's finding is consistent with Petitioner's statement reflected at the end of the transcript of the police interrogation. After implicating himself in the murder of three boys, the police asked him why he had not come forward earlier and he said "Cause I was afraid...of the police." When Ridge asked him "Are you afraid of the police now?," Petitioner said "no." (See Petitioner's Transcript of Statement dated June 3, 1993, in which the exchange was omitted from Transcript admitted at Trial, attached hereto as Exhibit Volume 1, Exh. B-2 at 27) Thus, it is evident that Petitioner had no understanding of the consequences of talking with the police.

Derning also found that Petitioner is susceptible to be led along a path of a logical argument, as he is predisposed to follow passively, especially if he is encouraged to do so, even ignoring or failing to recognize misunderstandings and errors. Not unlikely others who function similarly to Petitioner, he seeks to appear more competent and intelligent, as though he

understands more than he does. Derning identified this phenomenon in forensic settings as being referred to in the intellectually disabled literature as "cheating to lose." (Exhibit Volume 1, Exh. H)

Derning concluded that Petitioner is cognitively impaired and as a result is quite susceptible to having his will overborne through confusion, stress, intimidation, coercion, or deception (intended or not), and therefore that he was quite susceptible to agree to something he did not understand: to waive his rights (involuntarily), without adequate understanding of those rights or the consequences of his waiver, ultimately leading to an involuntary confession. (Exhibit Volume 1, Exh. H)

C. Counsel's Failure to Present Competent, Relevant Evidence of Petitioner's Inability to Knowingly and Intelligently Waive his Rights and of His Susceptibility to Involuntary Waiver and Statements Prejudiced Petitioner

Though the suppression motion was the most important pretrial motion of Petitioner's case, counsel failed to present thorough, well-investigated evidence on the issues before the court. Counsel's deficient performance was prejudicial because Petitioner's confession comprised almost the entire case against him. Complete and competent evidence of Petitioner's impairments as they related to specific issues at the suppression hearing would likely have resulted in suppression of his statement. Had counsel properly investigated, prepared, and presented Petitioner's mental deficits at the suppression hearing, a reasonable likelihood exists that he would have been acquitted, or the case would have been dismissed. Petitioner was prejudiced by counsel's failure to do so.

D. Counsel Failed to Investigate and Conduct Discovery to Uncover Evidence of WMPD Police Interrogation Tactics and Training and Present Evidence of

Literature Documenting Overreaching Police Interrogation Tactics

The defense did not investigate or conduct discovery aimed at uncovering tactics used by WMPD in its interrogations. Counsel did not investigate the extent to which WMPD officers, including Ridge and Gitchell, were trained in the "Reid Method" discussed in Inbau and Reid, *Criminal Interrogation and Confessions* (1962) - the contents of which spurred the United States Supreme Court to fashion the prophylactic rule announced in *Miranda v. Arizona* (1966) 384 U.S. 436. Nor did counsel consider questioning the officers about such tactics at the suppression hearing or at trial, despite the abundance of literature available to prepare for such questioning.

Had counsel undertaken an investigation of the training WMPD officers likely would have undergone, he would have discovered that:

The "Reid Technique" is the primary method of interrogation taught and practiced in the United States. It was created in the 1940s by John Reid and Fred Inbau, who co-wrote a textbook entitled Criminal Interrogation and Confessions, which has become the bible of all interrogation training in America. The 4th and current edition of this manual (with two additional co-authors) was published in 2001. It remains the leading interrogation training manual in the United States. (See Declaration of Richard Leo attached hereto as Exhibit Volume 1, Exh. I; see also Curriculum Vitae of Richard A. Leo, Ph.D., J.D., attached hereto as Exhibit Volume 1, Exh. I-1)

John Reid founded the interrogation training firm "Reid and Associates" in 1947. In addition to publishing and promoting the their training manual, Reid & Associates puts on numerous introductory and advanced interrogation training seminars across the United States every year. The purpose of these seminars (as well as their interrogation manual) is to teach police officers and detectives the "Reid Method" of interrogation. Virtually every detective in

America who has received training in interrogation has either been trained in the Reid Method directly through Reid and Associates or through similar interrogation training put on by someone else or by the police department to which they belong. (Exhibit Volume 1, Exh. I)

The Reid Technique distinguishes between interviewing and interrogation. The two are very different forms of questioning and information gathering. Interviewing involves the questioning of witnesses, victims, and potential suspects. It involves asking friendly, open-ended questions in a non-accusatorial and non-confrontational manner. The purpose of an interview is to get the truth and as much information as can be helpful in figuring out the truth. The idea is to ask questions in a manner that is not leading, suggestive, or manipulative. The interviewee should feel at ease and should do most of the talking in an interview. (Exhibit Volume 1, Exh. I)

By contrast, an interrogation is altogether different. Police interrogate criminal suspects only when they presume the guilt of the suspect (i.e., have decided in their own minds that the suspect is guilty). The primary purpose of interrogation is not to investigate whether the suspect is guilty but, rather, to get from the suspect an admission and/or a confession that will assist the prosecution in convicting him. The goal of interrogation is therefore not necessarily to get the truth since interrogation is premised on the idea that the police detective already knows the truth (i.e., that the suspect committed the underlying offense of which he is being accused). Rather, the primary goal of interrogation is to get incriminating statements that confirm the detective's pre-existing theory of the suspect's guilt with regard to the underlying criminal act. As a result, interrogation (unlike interviewing) is confrontational (even if this occurs in a friendly or professional manner). The detective is supposed to do most of the talking, and the detective uses accusatorial, manipulative and deceptive interrogation techniques to overcome the suspect's

anticipated resistance and move him from denial (what the interrogator expects) to admission (the objective of interrogation). The methods necessary to accomplish this may be highly leading and suggestive, sometimes even coercive. The ultimate goal of an interrogation is to stop the suspect from saying "I didn't do it" and get him to say "I did it" by persuading or tricking him into believing that this is the best thing to do under the circumstances. (Exhibit Volume 1, Exh. I)

According to John Reid & Associates, the Reid Method works to change the suspect's mind-set by using interrogation methods and strategies that simultaneously (1) raise the suspect's anxiety during interrogation (i.e., increase the psychological stress associated with continuing to deny that he committed the crime) and (2) decrease the suspect's perceptions about what will happen to him if he agrees with the interrogator's suggestions (i.e., persuade him that confessing to the act is not very serious). According to psychological research, the Reid method works to break down a suspect's resistance and elicit his compliance by convincing him that he is caught, that his situation is hopeless unless he agrees with the interrogator's suggestions that he committed the underlying act of which he is being accused, and that he will receive more favorable or lenient treatment (i.e. "an out") if he does so. (Exhibit Volume 1, Exh. I)

Police are poorly trained about the phenomenon, causes, and varieties of psychologically induced false statements and confessions. (Exhibit Volume 1, Exh. I)

He further would have learned that "[t]here is a well-established field of research in the academic disciplines of psychology, criminology, and sociology on the subject of police interrogation practices, coercive influence techniques and confessions.[17] This research dates

[17] In 1993, the recent literature included, e.g., Gisli H. Gudjonsson, The Psychology of Interrogations, Confessions and Testimony (1992); Lawrence S. Wrightsman & Saul M. Kassin, Confessions in the Courtroom (1993); Phillip M. Coons, Misuse of Forensic Hypnosis: A Hypnotically

back to 1908, has been the subject of extensive publication (hundreds of articles, books and book chapters) in peer reviewed journals, is based on generally accepted principles, is capable of validity testing, and has been generally accepted as valid in the relevant scientific community. (Exhibit Volume 1, Exh. I)

Had counsel been armed with this information, he could have questioned the use of these tactics at the suppression hearing and at trial. Armed with the literature, he could have bolstered the otherwise unsupported testimony of his experts. These omissions were prejudicial because,

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Elicited False Confession with the Apparent Creation of a Multiple Personality, 36 Int'l J. Clinical & Experimental Hypnosis 1 (1988); Gisli Gudjonsson & James MacKeith, A Proven Case of False Confession: Psychological Aspects of the Coerced-Compliant Type, 30 Med. Sci. & L. 329 (1990); Gisli H. Gudjonsson & James MacKeith, False Confessions, Psychological Effects of Interrogation, in Reconstructing the Past: The Role of Psychologists in Criminal Trials 253-69 (A. Trankel ed., 1982); Stephen Moston et al., The Effects of Case Characteristics on Suspect Behavior During Police Questioning, 32 Brit. J. Criminology 23 (1992); Richard J. Ofshe, Coerced Confessions: The Logic of Seemingly Irrational Action, 6 Cultic Stud. J. 1 (1989); Richard J. Ofshe, Inadvertent Hypnosis during Interrogation: False Confession Due to Dissociative State; Mis-Identified Multiple Personality and the Satanic Cult Hypothesis, 40 Int'l J. Clinical & Experimental Hypnosis 125 (1992); Philip Zimbardo, Coercion and Compliance: The Psychology of Police Confessions, in the Triple Revolution 492-508 (C. Perruci & M. Pilisuk eds., 1971); Corey Ayling, Corroborating confessions: An empirical analysis of legal safeguards against false confessions, Wisconsin Law Review, 1984, 1121-1204; Hugo Adam Bedau and Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, Stanford Law Review, 40: 21-179 (1987); Ronald Conley, Ruth Luckasson and George Bouthilet, Eds., The Criminal Justice System and Mental Retardation: Defendants and Victims (Baltimore: Paul H. Brookes 1992); James W. Ellis and Ruth A. Luckasson, Mentall Regarded Criminal Defendants, The George Washington Law Review, Vol. 53:414 (1985).

again, without Petitioner's confession, the prosecution had no case.

Counsel will seek discovery pursuant to these proceedings to obtain the interrogation training materials used by WMPD before and at the time of Petitioner's confession. As stated generally above, with respect to all claims herein, Petitioner reserves the right to amend this pleading upon discovery of new information relevant to this claim.

III. SEVERAL ERRORS AND OMISSIONS RENDERED COUNSEL INEFFECTIVE IN PRESENTING PETITIONER'S PRIMARY DEFENSE AT TRIAL THAT HIS STATEMENT TO POLICE WAS FALSE RESULTING IN PREJUDICE TO PETITIONER

At trial, defense counsel focused primarily on its attempts to prove that Petitioner made a false confession to the police. However, counsel conducted inadequate investigation, preparation and litigation of this defense.[18] To prove the false confession, counsel called three experts: Warren B. Holmes, William Wilkins, and Richard Ofshe. Holmes and Oshe testified to the factors that are often present in a false confession and likewise testified that Petitioner's confession evidenced several of these factors. Ofshe also testified that by using particular techniques, police can elicit a false confession in a person who is highly suggestible, has low self esteem, and/or has mental deficiencies. (RT 1546-1547, 1552, Bates 2050-51, 2056) He explained that Petitioner's statements were shaped by the police tactics employed during his twelve hours at the police station.

Counsel called Richard Wilkins to establish the critical link in Petitioner's false

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[18] *See* ABA Guidelines 5.1 (Attorney Eligibility); 8.1 (Support Services); 10.1 (Compensation); (11.2) (Minimum Standards Not Sufficient); 11.4.1 (Investigation); 11.5.1 (The Decision to File Pretrial Motions).

confession defense: that he was indeed highly suggestible and had mental deficiencies that made him vulnerable to coercive or suggestive police interrogation. As discussed below, Wilkins was not only an ineffective witness on the crucial issue for which he was called, but he actually *damaged* Petitioner's case considerably.

Moreover, the defense did not elicit from any of its false confession experts a discussion of the famous publication by Inbau and Reid on coercive police tactics. The United States Supreme Court discussed this and other publications as evidence of the need to advise suspects of their pre-interrogation rights in the watershed case of *Miranda v. Arizona* (1966) 384 U.S. 436. Abundant literature on such tactics existed at the time, yet counsel never adduced any such evidence at trial or at Petitioner's suppression motion. In addition, counsel did not take the steps necessary to demonstrate Ofshe's reliability to the jury.

Counsel also failed to elicit from any of the defense experts or argue in closing that Misskelley's own voice on the audio tape reflected the incredible pressure he felt during the interrogation. It was left to the prosecutor to comment on this, not in support of Misskelley's defense but to undermine the testimony of defense expert Holmes. (RT 1740, Bates 2245)

> "Then you get to further corroboration – the injuries. When in discussing – and listen – you have a right to listen to those tapes as many times as you all want you (sic). Listen to those tapes. Don't rely on what I say they say or what Mr. Stidham or Mr. Crow says or what Mr. Davis says, you go back there and listen to those tapes. *Listen for the inflection in the voice. Listen for the yawns that shows the tremendous pressure he was under in this interview.* But when you listen to it, what you're going to find is they ask him – it said something about a boy and where was the person cut? He said, "In the face."

Id. (emphasis added.)

Counsel's lack of preparation and deficient performance completely undermined what should have been a solid showing that Misskelley's confession was coerced, unreliable, and false,

creating a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 687.

A. Abundant Evidence Demonstrates The Falsity of Petitioner's Confession.

1. The Arkansas Supreme Court Opinion

The Arkansas Supreme Court, in its opinion, rightfully credited Jessie Misskelley's confessions with being the most powerful, indeed the only, evidence against Petitioner. "The statements were the strongest evidence offered against the appellant at trial. In fact, they were virtually the only evidence, all other testimony and exhibits serving primarily as corroboration." *Misskelley v. State*, 323 Ark. at 707.

The Court identified in its opinion the testimony and exhibits it determined were corroborating:

> However, there were portions of the statements which were consistent with the evidence and were corroborated by the state's testimony and exhibits. The victims had been seen riding their bicycles. The medical examiner testified that the boys had been severely beaten. Two of them had injuries consistent with being hit by a large object. One of the boys had facial lacerations. The Byers boy had indeed been severely mutilated in the genital area. All the boys had injuries which were consistent with rape and forced oral sex. There was evidence that drowning contributed to the deaths of the Moore and Branch boys, but not the Byers boy. This is consistent with the appellant's statement that the Byers boy was already dead when he left the scene. The boys were in fact tied up, albeit with shoe laces rather than rope. Damien Echols was observed near the crime scene at 9:30 p.m. on May 5. He was wearing black pants and a black shirt and his clothes were muddy. A witness testified that she had attended a satanic cult meeting with Echols and the appellant. Steven Byers' mother testified that, approximately two months before the murders, her son told her that a man dressed all in black had taken his picture. There was evidence that Baldwin owned a shirt and boots of the type described by the appellant. Finally, a witness from the State Crime Lab testified that she found fibers on the victims' clothing which were microscopically similar to items in the Baldwin and Echols residences.

Id. at 462.

The key elements of the corroborating physical evidence, as identified by the Arkansas Supreme Court were:

a. Christopher Byer's penis was severely mutilated;

b. One of the boys had facial lacerations;

c. All of the boys had injuries consistent with rape and forced oral sex;

d. The victims were severely beaten and two had injuries consistent with being beaten by a large object;

e. Two of the boys were drowned but not Christopher Byers;

f. Fibers found on two of the victims' clothing was consistent with fibers found at Damien Echols' and Jason Baldwin's homes; and

g. The boys had their clothes taken off and were tied up (with shoelaces rather than brown rope as Petitioner had reported when asked in his second taped confession)

Much of the corroborating evidence came from the State's Medical Examiner, Dr. Peretti. The last item came from the State's witness, Lisa Sakevicus. For the reasons described in Claims VI, VII, VIII, IX, and X, and immediately below their testimony was unreliable and cannot be used to corroborate the confession.

New scientific evidence and reliable scientists' reviews and analysis of then existing evidence demonstrates the following:

a. None of the boys was cut on his penis, and the one boy whose genital area was described as "mutilated" actually suffered a 'degloving' injury inconsistent with the use of a knife, and consistent with the kind of degloving injury caused by animal predation;

b. There are no knife wounds to Steven Branch's face;

c. A number of the observed injuries are postmortem injuries;

d. There is no evidence on any of the three boys of anal or oral sex;

e. The mechanism for the blunt force injuries cannot be determined;

f. The evidence regarding causes of death is not definitive;

g. The fiber evidence is completely unreliable; and

h. The victims were tied in a manner wholly inconsistent with Petitioner's description.

2. Christopher Byers, Whose Genital Area Was Described as "Mutilated" Suffered a 'Degloving' Injury Inconsistent with the Use of a Knife, and Consistent with the Kind of Degloving Injury Caused by Animal Predation.

The Arkansas Supreme Court pointed to the mutilation of Christopher Byers' genital area as corroborating Petitioner's confession. The transcript of the first taped confession reveals the following interaction about this matter:

Ridge: Alright, another boy was cut I understand, where was he cut at?
Jessie: At the bottom.
Ridge: On his bottom? Was he face down and he was cutting on him, or
Jessie: He was
Gitchell: Now you're talking about bottom, do you mean right here?
Jessie: Yes.
Gitchell: In his groin area?
Jessie: Yes
Gitchell: Okay
Ridge: Do you know what his penis is?
Jessie: Yeah, that's where he was cut at.

(Exhibit Volume, Exh. B, 485)

Petitioner reported in his confession that the same knife was used to cut both Steven Branch's face and Christopher Byers' genitalia.

The Medical Examiner testified at Petitioner's trial regarding the genital wounds to Christopher Byers that, "Not knowing the type of instrument, you can get these types of wounds from a knife, piece of glass. Usually the knife or the object is being twisted and the victim is moving to get those irregular edges." (RT 844, Bates 1344)

At the trial of Damien Echols and Jason Baldwin, regarding those same injuries to Christopher Byers, the prosecutor asked the Medical Examiner, "Doctor, is there also serration type wounds or serrated type wound patterns contained in that photograph?" to which the Medical Examiner responded, "There is a serrated type pattern here, yes." (EBRT 1067, 1847) The prosecutor then asked, "When you say 'serrated,' what do you mean?" The Medical Examiner offered, "Well, I am talking about, for example, a typical serrated knife is a steak knife, that pattern of serrations." (EBRT 1067-68, 1847-48) The prosecutor elicited yet more testimony on this topic: "And that (referring to three or four wounds) would be consistent with the serration of the blade that inflicted that?" The Medical Examiner replied, "Yes. To an extent, providing there is no twisting or turning." (EBRT 1068, 1848)

The Medical Examiner's opinion about how these injuries occurred was wrong.

Dr. Janice Ophoven, a Board-certified forensic pathologist who has specialized training and experience in the assessment of cause of death in children and in the accepted protocols for assessing sexual crimes according to evidence found during a post-mortem examination, is of the opinion that there is no evidence available in the descriptions given by Dr. Peretti, or in the autopsy photographs, consistent with the use of a knife to remove the genitalia of Christopher, or to inflict the injuries described as cuts on his buttocks. Her view is that "the appearance of the wounds in the genital area of this boy show irregularity consistent with tissue being pulled off

after having been gnawed upon" and "evidence of chewing, biting, land likely clawing on the area of [Byers'] inner thigh." (See Affidavit of Dr. Janice Ophoven, attached hereto as Exhibit Volume 2, Exh. J, at 8-9; her curriculum vitae is attached thereto as Exhibit Volume 2, Exh. J-1)

Dr. Werner Spitz, one of the country's leading forensic pathologists (*See* Dr. Spitz's curriculum vitae attached as Exhibit Volume 2, Exh. K), conducted a thorough examination of extensive materials in this case and reached the identical conclusion (See Dr. Spitz's Report dated November 27, 2006, attached hereto as Exhibit Volume 2, Exh. L) "The remaining injuries, including emasculation of Christopher Byers [references omitted] were due to anthropophagy, i.e., inflicted postmortem by large and small animals, including marine life." (Exhibit Volume 2, Exh. L at ¶ 2)

Dr. Spitz' conclusion was bolstered by the victim tissue slides sent by the Arkansas crime lab to him in September 2007. (*See* Affidavit of Donald Horgan, attached hereto as Exhibit Volume 2, Exh. M) Dr. Spitz found on the slides disruption of tissue, bacterial growth, early decomposition, and foreign bodies of vegetal and possibly some insect origin. He concluded that, "[t]he presence of these foreign bodies in the depth of the tissues, without evidence of hemorrhage, indicates that they were introduced into the tissue after death, most likely by repeated bites by large carnivorous animals, consistent with the appearance of the injuries on the body surface as documented in the postmortem photographs." (See Supplemental Report of Werner Spitz dated October 12, 2007, attached hereto as Exhibit Volume 2, Exh. N)

Similarly, Dr. Richard Souviron, Chief Forensic Odontologist at the Miami Dade Medical Examiners Department (See R. Richard Souviron's curriculum vitae, attached hereto as Exhibit Volume 2, Exh. O) also reviewed extensive material and is of the same opinion. He

concluded that the mutilation to the genital area and inner thighs appeared to be post-mortem, was consistent with animal activity, and was inconsistent with being caused by a serrated knife. (See Dr. Donald Horgan's Report dated January 11, 2007, attached hereto as Exhibit Volume 2, Exh. P)

Dr. Robert Wood, (See Dr. Robert Wood's curriculum vitae, attached hereto as Exhibit Volume 2, Exh. Q), also concluded that the injuries to Christopher Byers' genitalia was caused by postmortem animal activity. In a draft report extensively quoted *infra* at Claim VI, Dr. Wood described the nature of the injuries to the penis and reviewed the literature regarding this type of traumatic injury. (See Declaration of Don Horgan, attached as Exhibit Volume 2, Exh. Y) Dr. Wood found it "reasonable" that the penis was not cut off but that the penis and scrotum were degloved and found a minimum of three citations in the literature documenting genital degloving from animal bites including a case of postmortem castration by a dog. Dr. Wood concluded that is would seem highly unlikely that a knife was used to cut the penis and testicles, as the State's Medical Examiner testified.

Still another forensic pathologist came to the same conclusion. Dr. Terri Haddix, a member of the faculty at Stanford University Medical School in Palo Alto, California, who is also affiliated with Forensic Analytic Sciences, Inc., a forensic laboratory near San Francisco, California, (See Dr. Haddix's curriculum vitae, attached hereto as Exhibit Volume 2, Exh. R), was also asked to review materials from this case. She summarized her preliminary findings in a report dated October 22, 2007. (See Dr. Haddix's Report dated October 22, 2007, attached hereto as Exhibit Volume 2, Exh. S) She described the injuries to the genital region and thighs of Christopher Byers and noted "[t]hese injuries also do not have the cleanly incised edges that are

typical of injuries inflicted by a sharp edged implement. Additionally the skin surrounding this area has a yellow, bloodless appearance which is typical of postmortem abrasions. I believe the genital and thigh injuries are most compatible with postmortem animal depradation." (Exhibit Volume 2, Exh. S, at 3-4)

Finally, Dr. Janice Ophoven, previously the Deputy Medical Examiner for Hennepin County, Minnesota, reviewed the photographs of Christopher Byers and concluded, subject to obtaining further information, "that the appearance of the wounds in the genital area of this boy show irregularity consistent with tissue being pulled off after having been gnawed upon." (Exhibit Volume 2, Exh. J, at 8)

Contrary to the testimony of the State Medical Examiner, the genital mutilation of Christopher Byers was not caused perimortem by a knife; it was caused postmortem by animal predation. Petitioner's confession is not corroborated by evidence of these injuries.

3. There Are No Knife Wounds to Steven Branch's Face

Petitioner told the police in his confession that he had seen Jason Baldwin cut one of the boys in the face "real bad." (Exhibit Volume 1, Exh. B, at 492-93) He described the knife as a folding knife with a "regular blade." (Exhibit Volume 1, Exh. B, at 493-94)

At Petitioner's trial, the prosecutor elicited testimony from the Medical Examiner that the injuries to Steven Branch's face, which he described as "abrasions, gouging, cutting wounds, contusions, bruising and superficial lacerations and abrasions" (RT 833, Bates, 1333) were made with "an instrument other than big object or broom handle object." (RT 834, Bates 1834).[19]

[19] At Petitioner's trial, the Medical Examiner's did not identify any injuries on Michael Moore consistent with being cut. (RT 822-23, Bates 1822-23) but at the Echols-Baldwin trial testified about "abrasions and apparently (sic) serrations" on the front of his chest. (EBRT 1048, Bates 1828)

At the trial of Damian Echols and Jason Baldwin, the Medical Examiner was more specific about the instrument that made the cutting wounds on Branch's face. There, with the prosecution attempting to connect a serrated knife found in the lake near Baldwin's home to the crime, the Medical Examiner testified that the "multiple, irregular, and gouging type cutting wounds" on Steven Branch's face were "consistent with some sharp object such as a knife." (EBRT 1055, 1835) He further testified that "we generally see these type of injuries when an object such as a knife or any sharp object is put into the skin and either the person doing the stabbing is twisting and pulling the knife, or a combination of the person being stabbed – and they are not standing still, they are going to be moving around." *Id.* For an injury to Branch identified only by reference to the photograph exhibit number 66B, the Medical Examiner told the jury that it "could be caused either by a serration from a knife or another type of object." (EBRT 1056, 1836).

In his report, Dr. Spitz noted that the right side of Steven Branch's face was virtually untouched while the left side was a bloody mass. Dr. Spitz's opinion is that the right side was covered by the left side was exposed to animal activity. "The large area with scattered irregular lacerations on Steven Branch's left cheek [reference omitted] was the result of bites by large animals and claw marks on the background of abrasion from licking off of emanating blood and tissue fluids [references omitted]." (Exhibit Volume 2, Exh. N at ¶ 6)

Dr. Souviron concluded that the "V-shaped cuts in the cheek, the tearing of the flesh and mutilation observed in these photographs [of the left side of Steven Branch's face] is consistent with animal activity and more likely than not in my opinion with an aquatic creature. The mutilation appears to be postmortem. Photograph #3 B shows intra oral injury to the mucobuccal fold and to the upper and lower lip area. These injuries in my opinion are perimortem. Photograph #2 B shows the right side of Steven Branch's face. There are scratches and gauges in this area consistent with animal activity...Photograph #4 B is an extreme[] close up with the words "potential bite mark evidence" written on the photograph. This is consistent with my opinion that this is postmortem bite mark activity left by animals more likely than not, turtle activity or some other aquatic animal. None of the marks on the face of Steven Branch in my opinion are consistent with having been caused by a serrated knife." (Exhibit Volume 2, Exh. P at p.2)[20]

Dr. Ophoven stated more conservatively that, although she could not state with a reasonable degree of medical certainty "whether the remains of the three boys had wounds caused by dragging the bodies over sharp objects or had any wounds caused by a knife, . . . I do believe that a number of the wounds that Dr. Peretti generally described as consistent with knife wounds are neither described sufficiently in his autopsy report to be knife wounds, and, equally significantly, do not appear on photographs to be knife wounds. . . . Some of the injuries to the remains documented in the photographs do not appear to be knife wounds at all, but, as I have

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[20] The opinions of Dr. Spitz and Dr. Souviron were independently reached by Dr. Michael Baden, chief forensic pathologist for the New York State Police, Dr. Vincent Di Maio, former medical examiner of San Antonio, Texas, and forensic odontologist Dr. Robert Wood. Each one of the independently concluded that the injuries to the left side of Steven Branch's face that Dr. Peretti testified had been caused by a knife or sharp object were, in fact, caused by animal predation.

explained, are injuries caused by a mechanism that left a pattern consistent with animal predation." (Exhibit Volume 2, Exh. J)

Dr. Haddix agreed. "Sharp force injuries are described in Branch's left facial area. I think these are postmortem injuries (possibly attributable to animal depradation), superimposed on antemortem injuries." (Exhibit Volume 2, Exh. S at 3)

The facial lacerations to Steven Branch's face were not caused by a knife. They do not corroborate Petitioner's confession. They contradict it.

4. There Is No Evidence of Anal or Oral Sex on Any of the Three Boys

Petitioner's description of the events of May 5, 1993, begins in response to the question, "Okay, what occurred while you were there?" with "When I was there, I saw Damien hit these one boy real bad and then uh, and he started screwing them and stuff and then uh." (Exhibit Volume 1, Exh. B at 482). He later told the police, "Then they tied them up, tied their hands up, they started screwing them and stuff, cutting them and stuff, and I saw it and turned around and looked, and then I took off running, I went home . . ." (Exhibit Volume 1, Exh. B at 484). He again described sexual activity: "They, Jason stuck his in one them's mouth and Damien was screwing one of them up the ass and stuff." (Exhibit Volume 1, Exh. B at 492)

In his second taped confession, taken after the magistrate had refused to issue a search warrant based on the first confession, Gitchell asked Petitioner about the sexual activity:

Gitchell: Which, which boys were raped?
Jessie: Byers and the Branch

. . .

Gitchell: Ok. Did you, did you see the Moore boy, was he raped?
Jessie: No.
Gitchell: Alright. Who raped those two boys?
Jessie: Jason and Damien.
Gitchell: Do you know which one raped which boy, or how did that happen?

Jessie:	Damien raped the Myers by hisself and Jason and Damien raped the Branch.

. . .

Gitchell:	Did anyone have oral sex with the boys?
Jessie:	Yes, Damien and Jason.
Gitchell:	How many of them did they do that too (sic)?
Jessie:	Just two, Branch and Byers.

(Exhibit Volume 1, Exh. B-2 at 510-511)

Gitchell, after leaving the room and consulting with others, returned and said, "I got people that want me to ask you some other questions, uh talking about oral sex, did you see, you know we had talked earlier about how Jason and uh Damien do each other, have sex with each other did they, did they have oral sex on the boys?" (Exhibit Volume 1, Exh. B-2 at 511)

Gitchell then asked, "Did anyone go down on the boys or maybe sucked theirs or something?" and Petitioner responded, "Not that, I didn't seen nothing neither one of them do that." *Id.* After eliciting from Petitioner that he did not see any of the boys getting their penis pinched or touched roughly and again that he did not see anyone having oral sex, Gitchell left the room again. Upon his return, he asked again about oral sex. (Exhibit Volume 1, Exh. B-2 at 512) This time, he wanted Petitioner to describe how the boys were held during oral sex. When Petitioner responded, "One of them had holding them by the arms while the other one got behind them and stuff," (Exhibit Volume 1, Exh. B-2 at 512), Gitchell helped him along:

Gitchell:	Did he ever hold him up here or
Jessie:	Uh, the one that was holding him up there at the front grabbing him by his headlock.
Gitchell:	Had him in a headlock? Did he have him any other way?
Jessie:	He was holding him like this by his head like this and stuff (Note: was indicating the victims being held by their ears)[21]

[21] Defense counsel should not have permitted the transcript to be admitted and go to the jury with this prejudicial comment in it. The confession was not videotaped and the transcriber could not have known what Petitioner was indicating. Moreover, the transcript does not similarly note the gestures made by Detective Gitchell,

Gitchell: Could he have been holding him up here like that?
Jessie: I was too far away he ws holding him up here by his head like this (Note: showed the same as above)[22]

Id.

The Medical Examiner testified at Petitioner's trial that Michael Moore had abrasions and contusions behind the ear and scattered abrasions under the scalp on the left side. (RT 823, Bates 1324) He testified that Moore had anal dilatation, abrasions and scrapes on his buttocks, and abrasions and focal areas of contusions on the anal orifice. (RT 824, Bates 1325) He further testified that he had abrasions on the nose, cuts, contusions and swelling around the upper lip, and bruising of the lower lip. (RT 825-26, Bates 1326-27) He was allowed to opine that the ear and mouth injuries were the type of injuries seen in children who had been held by their ears and forced to perform oral sex. (RT 827, Bates 1328)

Steve Branch was described by the Medical Examiner as having injuries to ears that were of the same nature and type as the injuries to Michael Moore's injuries and to having injuries to his mouth and lips. (RT 835, Bates 1335) When defense counsel objected to the Medical Examiner's opinion about the cause of these injuries, the court asked, "Doctor, do you have an opinion as to the cause of those injuries and, if so, is that opinion based upon a reasonable degree of medical certainty in your experience and training in the field?" The Medical Examiner responded, "Yes," and was allowed to testify that "[i]njuries noted to the ears **can be** caused by holding the ears, pulling the ears. The injuries involving the lips **could be** from having an object, any object inserted inside the mouth or a hand placed over the mouth or a firm object placed over

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which happened on numerous occasions, including just before and just after this comment.

[22] See footnote 21, immediately above.

the mouth. It **could also be** from a punch also or hit with a rock. That is how you sustain those type of injuries." (RT 836, Bates 1336 (emphasis added))

Again, the Medical Examiner found injuries on Christopher Byers' ears and nose similar to "what [he] found with the other two" (RT 845, Bates 1345) and opined that "[t]hose injuries you normally see on areas of children who are forced to perform oral sex. You can get those types of injuries from an object placed over the mouth, a firm object, the hand or mouth. Some injuries – the contusion to the lips, the bruising, may be due to a punch." (RT 846, Bates 1346) He further found bruising to the top of the things and inner aspect of the thighs, which "we normally see in female rape victims when they are trying to spread the legs for penetration or they may be hit with an object also. It is a possibility." (RT 844, Bates 1344) The Medical Examiner testified that Byers had "anal rectal mucosa hyperemic and injected." (RT 843, Bates 1343)

On cross-examination, the Medical Examiner admitted that he found "no evidence of semen in the oral cavities" and detected no semen in the anal orifice and canals. (RT 850, Bates 1350) He also admitted on cross-examination that dilation of the anal orifices could be caused by the bodies being in the water (RT 850, Bates 1350) and that he would expect anal trauma if the victim had been sodomized. (RT 851, Bates 1351)

On re-direct, Mr. Davis elicited testimony from the Medical Examiner that Cristopher Byers' anal orifice was "markedly" dilated, indicating it was more dilated than the orifices of the other two boys (RT 853, Bates 1353) and that if there were no penetration of the anal canal but a forceful attempt, you would have some injuries around the external aspect of the orifice, and "we had some abrasions." (RT 854-55, Bates 1354-55)

In fact, as is discussed below, there was no anal trauma to any of the boys because there

was no rape and the bruising to the ears and mouths was caused by animal predation and perhaps blunt force but not by forced oral sex.[23]

In Dr. Ophoven's careful review of the autopsy reports, the photographs, and other materials, she found that "none of the specific findings essential to forced oral or anal sex were present in this case, and . . . the statement that a victim had a 'dilated anus' is itself insufficient to establish sexual assault." (Exhibit Volume 2, Exh. J at 11)

Dr. Haddix similarly found that the abrasions and contusions about the ears of each child, as well as the perioral/intraoral injuries, were "not in isolation, but often in proximity to other injuries. In consideration of the extensive blunt force injuries sustained elsewhere on the heads of these children, I do not think a specific mechanism (e.g., forced oral sex) can be assigned to any reasonable degree of medical certainty." (Exhibit Volume 2, Exh. S at 2) Regarding the anal dilatation found in all three children, Dr. Haddix concluded, "[T]here is no objective evidence of anal penetration in these cases." *Id.*

Dr. Wood, in his analysis, reviewed the literature associated with intra-oral injuries caused by forced or vigorous fellatio. He found no literature describing pathognomic signs of facial injuries from forced fellatio. (See *infra* at Claim VI; see also Exhibit Volume 2, Exh. M) Dr. Wood reviewed the injuries to each child and found that, as to each one, the evidence did not support the Medical Examiner's testimony.

The injury to Steven Branch's right ear is very slight compared to the injury to his left ear.

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[23] The Medical Examiner's testimony was supported by the testimony of Kermit Channell and Michael Deguglielmo. For the reasons stated in Claim X, *infra*, their testimony was completely inaccurate and misleading, and lacked any scientific bases.

He had no intra-oral lesions and he had puncture marks on his nose, lips and cheeks, none of which could be caused by a penis. The puncture marks had to be caused by something small and pointed such as animal teeth or claws. (See *infra* at Claim VI; see also Exhibit Volume 2, Exh. M)

Dr. Wood found no injury to the left ear of Michael Moore. The nose and area behind his left ear have very small linear abrasions, which are not consistent with finger marks or fingernail marks and cannot be attributed to the act of forced fellatio.

Christopher Byers has two small abrasions on his right ear and three very small puncture marks on his left ear. His lips appear to have cut marks that were likely caused by self-bites. He has markings on the nose and small facial cut marks. There is hemorrhage in the deep connective tissue of the buccal sulcus anteriorly in the upper and lower. None of these marks, Dr. Wood concluded, can be attributable to forced fellatio. The bruising of the lips of Christopher Byers and Michael Moore are far more likely to have occurred from an impact injury such as a slap or punch than to have been made by an erect penis. (See *infra* at Claim VI; see also Exhibit Volume 2, Exh. M)

The conclusion that Petitioner's confession is corroborated by proof of anal and oral sex cannot stand. There is no such objective proof.

5. The Mechanism for the Blunt Force Injuries Cannot be Determined

Detective Gitchell asked Petitioner, "Did you ever use, did anyone use a stick and hit the boys with?" Petitioner responded, "Damien had kinda of a big old stick when he hit that first one, after he hit him with his fist and knocked him down and got him a big old stick and hit him." Gitchell then elicits from petitioner that the stick was about the size of a baseball bat. (Exhibit Volume 1, Exh. B at 493)

At trial, the Medical Examiner testified that the head injuries to Michael Moore were caused by two different types of weapons: a broad surface, for example a log 2-4 inches in diameter, and a two by four or smaller stick or broom handle. (RT 822-23, Bates 1322-23) He testified that a large abrasion to the back of Steven Branch's head was consistent with a three to four inch club or log (RT 834, Bates 1334), and that the laceration on the back of Christopher Byers' scalp was consistent with a two by four. (RT 842, Bates 1342)

Dr. Haddix, by contrast, found that "[T]he items potentially responsible for producing the scalp contusions, abrasions and lacerations are legion and the appearance of the cutaneous injuries doesn't particularly help narrow the field. However, the curvilinear skull fractures identified during Moore's autopsy are suggestive of an object with a similar curvilinear profile. The skull fractures in Branch and Byers autopies are not as illustrative." (Exhibit Volume 2, Exh. S at 2)

Dr. Spitz found that the location of skull fractures at the base of the skulls of Christopher Byers and Steven Branch is inconsistent with blows. (Exhibit Volume 2, Exh. L at 2)

Thus, as with the other injuries, the corroboration does not exist. For most of the blunt force injuries, the mechanism could not be determined. For some of the injuries attributable to blows, the Medical Examiner was simply wrong.

6. The Evidence Regarding Causes of Death Is Not Definitive

The Arkansas Supreme Court found very persuasive the fact that Petitioner reported he had seen Christopher Byers apparently die but not the two other boys and the Medical Examiner testified that Byers did not drown but the other two did.

Petitioner reported that Christopher Byers had been choked by a stick but that he left before the other two died. (Exhibit Volume 1, Exh. B at 499) At trial, the Medical Examiner

testified that Michael Moore (RT 829, Bates 1329) and Steven Branch (RT 839, Bates 1339) died from multiple injuries with drowning but that there was no evidence of Christopher Byers having drowned. (RT 847, Bates 1347)

By contrast, Dr. Spitz found that all three boys "died of drowning while bound at the ankles and wrists. All 3 victims were alive when placed in the water as shown by large amounts and sometimes bloody foam emanating from the airway as shown on photographs 00106 001 and 00570 001]. Additionally, the autopsy reports for all 3 boys describes vomitus and frothy material in the lungs." (Exhibit Volume 2, Exh. L at 1)

Dr. Ophoven found that "[i]n the case of James Michael Moore, it appears from the photographs that the foamy purge associated with him is consistent with drowning. However, because of what can be described as an incomplete post-mortem investigation of death, it is also possible that the other victims drowned as well. The question of exactly how these young boys died cannot be ascertained based on the contents of the post-mortem examination reports generated by the Arkansas State Crime Laboratory, in part because they do not contain data necessary to establish an reliable and valid statement of cause of death." (Exhibit Volume 2, Exh. J at 10)

While Dr. Haddix states that she does agree with the cause of death in these cases, she notes that she has "not completed my review of the submitted materials and I reserve the right to modify my opinion/findings." (Exhibit Volume 2, Exh. S at 3)

Thus, the evidence of corroboration from cause of death is, at best, weak, and at worst, non-existent. Without more, the confession cannot be corroborated with the causes of deaths.

7. The Fiber Evidence Does Not Corroborate the Confession

At trial, the State called Lisa Sakevicius, a criminalist with the Arkansas State Crime Lab.

The defense allowed her to be qualified as an expert without objection (RT 1007, Bates 1508). She testified without objection[24] that a fiber found on a victim's Cub Scout cap was "similar to" fibers from a shirt from Damien Echols' residence; that a second fiber found on a victim's pants was "microscopically similar" to the same shirt; and that a third fiber found on a victim's shirt was "consistent with" a fiber from a red housecoat found at Jason Baldwin's residence. (RT 1016, Bates 1517)

In 2004, counsel for Jason Baldwin asked Max M. Houck, the Director of the Forensic Science Initiative at the University of West Virginia (see curriculum vitae attached as Exhibit Volume 5, Exh BBB-1) to review materials, including the testimony at the Echols-Baldwin trial and the laboratory bench notes from Lisa Sakevicius and opine on the "accuracy, validity, and quality, from a forensic science's viewpoint, of the hair and fiber examinations conducted by the Arkansas State Crime Laboratory" (See Declaration of Max M. Houck, Exhibit Volume 5, Exh. BBB) Mr. Houck concluded that "Ms. Sakevicius' testimony suggests a weak knowledge of both hair and fiber examination processes, of standards applicable to hair and fiber examination, and of the meaning of the technical vocabulary involved in the fields of hair and fiber examination." (*Id.* at ¶ 22) He further concluded that "[u]ltimately, the bench notes and analytical data do not support the reports insofar as the notes, etc. appear to be incomplete. The instrumentation and methods used originally are themselves appropriate for fiber analysis but it is not discernable that they were applied *appropriately* in these analyses. The scattered nature of the note-taking, the spectra, and the lack of comprehensive documentation leads me to question

[24] The only objection to her testimony was that it related only to the co-defendants, not Petitioner. (RT 1015, Bates 1516)

the quality of the work performed." (Exhibit Volume 5, Exh. BBB(emphasis in original)

Because the evidence of fiber comparisons is so questionable, it cannot corroborate Petitioner's confession.

8. The Evidence that the Boys Were Tied Is Not Corroborative

The Arkansas Supreme Court identified as corroborating evidence that "the boys were in fact tied up, albeit with shoe laces rather than rope," *Misskelley v. State*, 323 Ark. at 462.

During Petitioner's first taped confession, Detective Ridge raises the issue of the boys being tied.

Ridge: Okay, and when you came back a little bit later, now are all three boys tied?
Jessie: Yes
Ridge: Is that right?
Jessie: Yes, and I took off and run home.
Ridge: Alrigiht, have they got their clothes on when you saw them tied?
Jessie: No, they had them off.

. . .

Ridge: And then they tied them
Jessie: Then they tied them up, tied their hands up, they started screwing them and stuff, cutting them and stuff, and I saw it and turned around and looked, and then I took off running, I went home, then they called me and asked me, how come I didn't stay, I told them, I just couldn't.

(Exhibit Volume 1, Exh. B, 484)

Later during the first taped confession, the issue of the boys being tied arose again.

Jessie: I was there until they tied them up and then that's when I left, after they tied them up, I left.

. . .

Ridge: Okay, he had his legs up in the air, alright, what was to keep the little boys from running off, but just their hands are tied, what's to keep them from running off?
Jessie: They beat them up so bad so they can't hardly move, they had their hands tied down and he sit on them.
Ridge: You said that they had their hands tied up, tied down, were they hands tied in a fashion that they couldn't have run, you tell me.
Jessie: They could run, they just had them tied, when they knocked them down and stuff, they could move their arms and stuff, and hold them down like, wake up and raise up and the other one just put his legs up.

Ridge: Okay, so they had them under control, you were there the whole time that was taking place?
Jessie: I was there.

(Exhibit Volume 1, Exh. B, 491-92)

During the second taped confession, Detective Gitchell was the first to mention the boys being tied.

Gitchell: Who tied the boys up?
Jessie: Uh, Damien.
Gitchell: Did just Damien or did anyone help Damien?
Jessie: Jason helped him.
Gitchell: What did they use to tie them up?
Jessie: A rope.
Gitchell: Okay. What color was the rope?
Jessie: Brown.

(Exhibit Volume 1, Exh. B-1 at 509)

In fact, however, the boys hands were not tied to each other. Each one was hog-tied, *i.e.*, left hand to left foot, right hand to right foot. (RT 192, 689-90) Moreover, as the Arkansas Supreme Court acknowledged, they were not tied with rope, they were tied with their own shoelaces, *Id.* And, the restraints were not brown, some were black and some were white. *Id.*

Moreover, contrary to Petitioner's confession, it was impossible for the boys to have "move[d] their arms and stuff" and one "put his legs up" (Exhibit Volume 1, Exh. B, 492) while hog-tied.

The fact that Petitioner parroted back to the detectives their suggestion that the victims were tied, without being able to accurately describe what was tied (hands and feet), how they were tied (hand to foot) and what type of restraint was used (black and white shoelaces) can hardly be adequate corroboration for a confession so riddled with errors.

Had defense counsel effectively presented all of the facts surrounding the crime and the

circumstances of the confessions, the jury would have concluded the confessions were false and acquitted petitioner.

B. Counsel Was Ineffective For Failing to Hire a Competent Psychological Expert on the Issue Petitioner's Suggestibility, and in Hiring an Expert That Damaged Petitioner's Case.

Counsel's hiring of Wilkins as the only psychological expert to evaluate Petitioner was extremely deficient. As explained below, Wilkins did more harm than good to Petitioner's case. Without a doubt, counsels omissions and errors with regard to Wilkins prejudiced Petitioner.

1. Background on Wilkins' Professional Misconduct, Compromised Credentials, and Resulting Impeachment

Questions as to Wilkins' reliability as an expert arose well before the defense put him on the stand. During *in limine* motions conducted on January 19, 2004, the defense and the prosecution discussed with the court the fact that Wilkins was "under investigation for a number of things," related to his alleged professional misconduct. (RT 655, Bates 1155) The defense argued that the prosecution could not impeach Wilkins with allegations of "ethical violations," because Wilkins had not yet had a hearing with his licensing board on the matter. (RT 655-56, Bates 1155-56) The court agreed that any questioning of Wilkins about the investigation would be improper if he had not yet had a hearing but added that "if there had been a decision by [the licensing board], that might have been a fair question. (RT 656, Bates 1156) The court indicated that it would also permit the prosecutor to inquire into Wilkins' "personal situation" to the extent that it bore on his subjective interpretation of tests administered to Petitioner. (RT 656, Bates 1156) In response to counsel's request that the court prohibit the prosecutor from asking Wilkins whether he was a member in good standing with the licencing board, the Court explained to defense counsel that "[t]hose questions are asked when you are qualifying a doctor," but

reiterated that no questions about the investigation would be permitted so long as there had been no hearing. (RT 657, Bates 1157)

Two weeks later, on February 1, 2004, the morning Wilkins was scheduled to testify, the prosecution provided the defense and the court with a copy of a court order and stipulation of settlement arising from two separate hearings before the Licensing Board. Wilkins had signed a stipulation in connection with these hearing in which he agreed to certain restrictions on his practice, and agreed to undergo his own psychological evaluation. (RT 1274, 1300, Bates 1777, 1803) Defense counsel explained to the court that the doctor had denied that any hearing was pending and assured counsel that he was a member in good standing of his professional board. (RT 1283, Bates 1786) Despite defense counsel's complaints, the court ruled that while it would not permit the prosecution to inquire into the actual conduct giving rise to the disciplinary hearings, Wilkins nonetheless could be impeached on his standing in the field, his restricted ability to practice, and the outcome of his own psychological evaluation. (RT 1291, Bates 1794) Defense counsel complained that the information in the consent order came as a "complete and total surprise," and moved a number of times for a continuance. (RT 1281, 1287, Bates 1784, 1790) The court denied the motion but indicated that would provide counsel with "a day or two" to find a new expert to testify. (RT 1283-84, 1291 Bates 1786-87, 1794) The court then asked defense counsel "How did you come by this guy?" Counsel answered "we made some phone calls and found someone willing to work on the chance that they might get paid." (RT 1286, Bates 1789)

After the court made it's ruling, the court permitted the defense to present in camera testimony from Wilkins regarding the disciplinary issues. (RT 1296, Bates 1799) Wilkins explained that the disciplinary proceedings arose from an incident where Wilkins had a child

patient expose his genitals to Wilkins during a therapy session with the boy and his father.[25] (RT 1297, Bates 1800) The resulting order excluded him from practicing neuropsychology and from handling sex abuse cases, and required that he be supervised in his practice. (RT 1300, 1304, 1306, Bates 1803, 1807, 1809) He also had to undergo a psychological evaluation. (RT 1299, Bates 1802)

The court reiterated its ruling that with the exception of the underlying conduct, the disciplinary proceedings and their aftermath were permissible topics for impeachment. (RT 1309, Bates 1812) The next morning, the defense put Wilkins on the stand.

As Wilkins testified before the jury, the defense elicited from him that, as a result of "some hearings," he had entered into a stipulation, where he agreed not to practice neuropsychology and to be supervised for six months. Wilkins explained that after two and a half years, however, the board had not yet decided in what areas he required supervision or who would conduct that supervision. (RT 1389, Bates 1893) On voir dire, the prosecution immediately established that as a result of "disciplinary action" against him, Wilkins "can't deal at all with child sexual abuse cases." (RT 1390, Bates 1894) The prosecution also established that although he was ordered to be supervised, he nonetheless remained unsupervised while still practicing and that he was unsupervised when he did the evaluations of Petitioner. (RT 1397, Bates 1901)

[25]According to Wilkins, the boy's sister alleged that the boy had sexually abused her, and that she could prove this because the boy had certain identifying marks on his genitals. In looking at the boy's genitals, Wilkins and the father were checking the veracity of the girl's story. (RT 1297, Bates 1800)

Wilkins also admitted that pursuant to an order from his governing board, he submitted to an examination by a Dr. Hazelwood. (RT 1398, Bates 1902) He confirmed that Hazelwood expressed concern about his lack of knowledge of the widely used psychological test known as the MMPI.[26] (RT 1399, Bates 1903) Hazelwood also found some 'fundamental deficits in [Wilkins'] knowledge in certain areas." (RT 1401, Bates 1905) Hazelwood noted Wilkins' "[i]nability to provide the sub-test of the Wechsler Memory Scale, a test he reportedly utilizes." (RT 1401, Bates 1905) In addition, Wilkins demonstrated a "failure to follow standardized procedures in the administration of the Finger Oscillation Test." (RT 1402, Bates 1906) Moreover, Wilkins suffered from "a failure to appreciate the limitations of [his] professional competence," according to Hazelwood's report. (RT 1402, Bates 1906)

Wilkins agreed that in any subjective test administered to a subject, the test administrator's perception, viewpoints, and "mental make-up" contributes to the results derived from the test. (RT 1404, Bates 1908) Wilkins conceded that at least three of the tests he used to evaluate Petitioner were subjective or contained a subjective component. (RT 1403, Bates 1907)

Finally, Wilkins admitted that he had not filed a "letter of intent" to practice forensic psychology in Arkansas until the week before his testimony.[27]

After this introduction to Wilkins, the jury heard his substantive testimony that Petitioner had been previously diagnosed as mentally retarded, that he was presently functioned at a "low borderline" intelligence level, and that he often had difficulty distinguishing from fantasy and

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[26] Minnesota Multiphasic Personality Inventory

[27]Psychologists are supposed to file a letter of intent with the Board of Psychology indicating the areas of psychology they intend to practice. (RT 1405, Bates 1909)

reality in stressful situations

2. Counsel Was Ineffective For Putting Wilkins on the Stand Because Wilkins Significantly Damaged Petitioner's Case.

Despite the fact that counsel knew Wilkins would be impeached to the degree discussed above, counsel nonetheless put Wilkins on the stand. Perhaps the most damaging testimony the jury heard in this regard was the fact that, as a result of disciplinary proceedings against him, Wilkins could no longer "deal at all with child sexual abuse cases," and that he required supervision while treating any patients. (RT 1390, Bates 1894) Thus, while the jury did not hear directly about the conduct underlying the disciplinary action against Wilkins, it essentially heard that he had done something bad enough that he could no longer be trusted alone with children who had been victims of sexual abuse. Unfortunately, the jury was left to speculate as to what conduct may have led to this specific and unusual restriction on his practice. The conclusion that Wilkins' professional misdeeds were of a sexual and predatory nature, even if incorrect, was inescapable – why else would he be restricted from handling child sex abuse cases and require supervision while treating patients? Needless to say, Petitioner, who was accused of a triple homicide in which all of the child victims were allegedly sexually assaulted, was prejudiced by his association with an expert who himself had apparently engaged in some sort of sexual misconduct with a child. It is difficult to imagine a more prejudicial association. The jury likely viewed Wilkins as one sexual predator attempting to aid another.

3. Counsel Was Ineffective for Retaining Wilkins Because He Was Not a Competent Expert On the Issue of Petitioner's Mental Deficits and Suggestibility

As noted above, the jury heard from Wilkins that he was required to undergo an examination by Dr. Hazelwood. (RT 1398, Bates 1902) Wilkins confirmed that Hazelwood

expressed concern about his lack of knowledge of the MMPI. (RT 1399, Bates 1903) This was prejudicial because Wilkins testified shortly thereafter that Petitioner's MMPI-2 test showed that he was dependent on others to make major decisions for him and that he had great difficulty separating fantasy from reality, particularly when under significant stress. (RT 1423-24, Bates 1927-28) This was critical testimony because it went to the heart of Petitioner's assertion that as a result of his mental impairments, he was particularly vulnerable to police pressure. Coming from Wilkins, however, these results had no weight due Hazelwood's assessment that Wilkins lacked knowledge about the test.

Further, Wilkins confirmed Hazelwood's opinion that he could not provide the sub-test of the Wechsler Memory Scale, "a test he reportedly utilizes," and that he failed to follow standardized procedures of the Finger Oscillation Test. Wilkins also acknowledged Hazelwood's opinion of him that he suffered "a failure to appreciate the limitations of [his] professional competence." Under these circumstances, Wilkins' testimony at trial was worthless and completely ineffectual on the issue of Petitioner's mental deficits and suggestibility.

While Wilkins sufficiently identified that Petitioner suffered from a number of mental impairments and deficits, those preliminary findings indicated a need for additional standardized testing, and further psychological and psychiatric evaluation. Wilkins credentials were so suspect that counsel was obligated to hire another *qualified* psychologist and/or psychiatrist to examine Petitioner and testify at trial.

4. Background on Sustained Foundational Challenge to Gudjonsson Suggestibility Scale

During Wilkins' substantive testimony, defense counsel Crow attempted to elicit testimony from Wilkins about "some kind of suggestibility test...." Crow began his introduction

to the topic by saying to Wilkins, "I have a text book you pulled out by – I don't want to butcher his name – Gisli Gudjonsson?" The prosecution then objected on foundational grounds to any further testimony on the subject. (RT 1424, Bates 1928) The court held an admissibility hearing outside the presence of the jury. (RT 1425, Bates 1930) Counsel's attempt to establish the foundation for testimony about the suggestibility test consisted of the following:

CROW: ...What is the nature of the text book? What's it about?

WILKINS: The text book is title[d] *The Psychology of Interrogations, Confessions and Testimony*. Basically what Dr. Gudjonnson is doing is –is – as the title suggests is looking at a wide variety of issues in the psychology of interrogations and confessions testimony. This is one place where he – uh – also reiterates some of the things he had done in the past on the suggestibility scale. As I recall in the past looking through the index, I think he lists fifty-six references to himself – dealing with this issue.

Q: Do you have any information about Mr. Gudjonnson?

A: He currently is a – I think his title is – uh – uh– I don't know what his title is. He's at the Institute of Psychiatry in London, does fairly well – well world wide –world wide recog – worldly – world wide recognized as a leading authority on false confessions and testimony and police interrogation techniques.

Q: So it's your testimony here today that Mr. Gudjonsson is a – Dr. Gudjonsson – excuse me – is a world recognized authority on – in this area?

A: Yes.

Q: Okay. Do you know anything about the suggestibility scale? Do you know who developed it?

A: Dr. Gudjonsson did.

Q: Dr. Gudjonsson did? Do you know, has it been employed –

A: Yes.

Q: Does it have a scientific basis?

A: Yes.

CROW: I think we've met the argument showing, your Honor, that it's based on scientific criteria...

(RT 1425-27, Bates 1929-31)

Unsatisfied, the Court conducted its own inquiry. Wilkins resorted to confusing vagaries when the court asked him to explain the "scientific basis of the test." He started by saying that "the general issue of suggestibility has been around a long time, okay." (RT 1444, Bates 1948) He explained that the scale is "designed to try and assess and to understand how the process of false confession may happen...." He added that "the scale then is one of many options that if used, much like we don't depend on any one scale for personality assessment, we use several. The suggestibility scale which has been used in a wide variety of places –many of them in Great Britain, I agree – but they have been used in a wide variety of places." After this discussion, Wilkins added, "It has all kinds of read out reliability of data of a –of a –it has validity data. There is – there is a –it is demonstrated to be a valid and reliable instrument." (RT 1445, Bates 1950) He finished off these comments by adding, "The first time –I haven't used it before in my practice before, but I've never done –I –I have – I have not until recently –the last couple of years done any false confession statement. I did one a while ago – so in this case then as far as my using it, it has nothing to do with it being worthless – it has to do with the fact that I've never had need for it before." (RT 1446, Bates 1950) These nonsensical statements were Wilkins' attempts to explain to the court the scientific validity of the test he himself employed to determine Petitioner's suggestibility.

Worse still, Wilkins testified on cross that he had *never used* the scale before (RT 1449, Bates 1953), had no training in giving the test, and had no training in how to interpret the results.

(RT 1450, Bates 1954) Under these circumstances, the court was practically obligated to sustain the prosecution's objection to that evidence.[28]

5. Counsel Was Ineffective Because He Was Unprepared for a Foundational Challenge to The Suggestibility Scale Evidence, and Hired an Exert Unfamiliar With the Scale

One of the primary purposes for which counsel hired Wilkins was to show that, based on Wilkins' use of the Gudjonsson Suggestibility Scale, Petitioner was indeed suggestible. (Exhibit Volume 1, Exh. D) Wilkins, who was hired primarily because he would work for free, turned out to be no bargain. His lack of knowledge about the Scale–combined with his complete lack of experience with its use–resulted in a sustained objection to this important evidence that would otherwise have been admissible through a competent expert.

[28] Rejecting the test for admitting scientific evidence enunciated in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), The Arkansas Supreme Court in *Prater v. State*, 307 Ark. 180 (1991), adopted an approach to the admission of novel scientific expert testimony similar to that which the United States Supreme Court would later adopt in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This *Prater* approach, based on Arkansas Rules of Evidence 401, 402, and 702, required the trial court to conduct a three prong inquiry: (1) the reliability of the novel process used to generate the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the connection between the evidence to be offered and the disputed factual issues in the particular case. "Under this approach, reliability is the critical element." *Prater,* 307 Ark. at 186.

In fact, in 1994 at the time of trial, Gudjonnson's book, *The Psychology of Interrogations, Confessions and Testimony* (G. Gudjonsson. John Wiley & Sons, Chichester and New York, 1992), was the leading authority on false confessions and the circumstances that produce them. A qualified expert truly familiar with Gudjonsson's work could have established the scientific validity of the Gudjonsson Suggestibility Scale.[29] (See Merckelbach, Harald, The Gudjonsson suggestibility scale (GSS): Further data on its reliability, validity, and metacognition correlates, Social Behavior and Personality, 1998 [discussing and collecting publications from 1984-1998], Attached hereto as Exhibit Volume 2, Exh. T)

After the Court sustained the prosecution's objection to the Gudjonnson-related evidence, Wilkins was left to render a bare opinion that Petitioner was prone to suggestion, but could offer no scientific basis for that opinion. As a result, Wilkins looked like a rogue scientist with unsubstantiated methods and opinions. This seriously damaged the integrity of Petitioner's position that he falsely confessed.

6. Appellate Counsel Was Ineffective For Failing to Challenge the Court's Ruling Denying Petitioner's Request for a Continuance to Retain a New Expert

Appellate counsel was also ineffective for failing to challenge this court's ruling denying Petitioner's motion for continuance to find and prepare another mental health expert. Though this court agreed to give counsel "a day or two" to find a new expert after the extent of Wilkins disciplinary problems fully surfaced, that time period was wholly insufficient under the circumstances. Counsel had to (1) find and retain the expert, (2) allow the expert time to become

[29] In fact Ofshe, who took the stand after Wilkins, described Gudjonsson's book as the "authoritative work" on interrogations and confessions and opined that the content reported therein was universally accepted by professionals in the field. (RT 1558, Bates 2062)

familiar with the case and Petitioner's background, and (3) allow sufficient time to re-test Petitioner. Appellate counsel failed to challenge this court's abuse of discretion on Petitioner's motion for a continuance and this omission was deficient.

7. Counsel Was Ineffective For Failing to Prepare For and Object to Wilkins' Unreliable Opinions That Petitioner Was Possibly Malingering and That He Showed Features of Antisocial Personality Disorder

Counsel did not sufficiently prepare to present Wilkins' testimony to the jury and permitted invalid and scientifically unreliable opinions and testimony to be presented to the jury. Specifically, Wilkins testified that Petitioner might have been malingering on at least one of the tests given, and that he had an antisocial Personality Disorder, or at least, had features of the disorder. (RT 1423, Bates 1927) This latter "diagnosis" could not have been made on the basis of the scales of an MMPI-II as it existed at the time. Counsel failed to address this matter not only during the course of motion litigation when Dr. Wilkins was first presented as a witness (RT 363, 366-367, Bates 861, 864-865), but also during the course of his testimony in the context of the trial. (RT 1449-1483, Bates 1983-1985)

8. Counsel's Performance Litigating Petitioner's Mental Impairments and Suggestibility at the Time of Questioning Was Deficient

As set forth above, counsel's performance was deficient in several respects. Counsel was ineffective in retaining Wilkins without investigating his professional qualifications, his standing in the professional community, and his experience litigating the issue of suggestibility. Moreover, once counsel learned of Wilkins' serious disciplinary problems two weeks before his scheduled testimony, counsel should have retained a new psychologist immediately. To the extent that counsel relied on Wilkins' representation that he had no problems with his licensing board (Exhibit Volume 1, Exh. D), counsel was ineffective and should have independently investigated the information already in the possession of the prosecution.

"Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." .Skaggs v. Parker, 235 F.3d 261 (6th Cir. 2000)(*quoting*, *Strickland,* 466 U.S. at 690-91.) In *Skaggs*, after defendant received a death sentence, appellate counsel discovered that the defense's mental health expert had falsified his credentials, that he was neither a licensed clinical nor a licensed forensic psychologist, and that he held no degrees. *Id.* The expert took the stand during the guilt phase of the trial and gave "bizarre and eccentric testimony." *Id.* at 269. Nonetheless, after counsel witnessed his "awful" and "incoherent" performance, counsel called him during the penalty phase of the trial as the sole mitigation witness. *Id.* at 270.

On petition for habeas corpus, defendant in *Skaggs* alleged ineffective assistance for failure to investigate the expert and to present competent expert testimony at both the guilt and penalty phases of the trial. As to the first contention that counsel was ineffective at the guilt phase for failure investigate, the *Skaggs* Court held that counsel's performance did not fall below the objective standard of reasonableness because counsel had used the expert successfully in the past and had hired the expert after two other attorneys recommended him. Thus, counsel's choice was a tactical one that did not fall below an objective standard of reasonableness. *Id.* at 268. The court nonetheless admonished counsel that "[g]iven the magnitude of what was at stake, and the centrality of [defendant's] mental state to a legitimate defense, counsel should have taken more time and given more thought to their expert witness." *Id.* at 268.

Here, counsel's failure to investigate Wilkins before hiring him was not a reasonable exercise of professional judgment. Unlike counsel in *Skaggs*, counsel in this case cannot point to

specific instances of Wilkins' prior acceptable performance on the stand. While Stidham stated in his declaration that he may have used Wilkins in the past, he was unclear as to the circumstances under which he had previously used Wilkins. He might have used him in child custody situations or in juvenile cases, and he may have seen him testify in court on custody issues and possibly on a competency issue, but counsel could not be certain. (Exhibit Volume 1, Exh. D) Moreover, even if counsel had in fact used Wilkins in all of the suggested situations listed above, the fact remains that, unlike defense counsel in *Skaggs*, counsel in this case had never used Wilkins as a witness in a jury trial, and therefore had no indication of how he might perform in front of a jury.

Thus the "reasonable" process by which defense counsel in *Skaggs* chose their expert did not occur in this case. *Skaggs*, 235 F.3d at 268. The decision to hire Wilkins was therefore not "a tactical one that did not fall below an objective standard of reasonableness," (*Id.*), but rather, was an ill-considered choice based on economics and convenience. (Exhibit Volume 1, Exh. D) To the extent that counsel failed seek funding for fear of 'tipping his hand' as to what his defense was, this was not a rational decision, because counsel never asked the court to file his funding requests under seal. Accordingly, the failure to investigate Wilkins before hiring him as an expert witness was objectively unreasonable.[30]

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[30] *See* ABA Guideline 8.1 (Supporting Services), ABA Guideline 11.4.1 (Investigation) and Commentary: "Resources that counsel needs to pursue a proper investigation should be sought early in the case. . . . Individuals assisting in investigation should be within the confidences of the client and defense counsel, and should not be required to disclose information discovered during the investigation except at the direction of counsel."

See also ABA Guideline 5.1A.v.: Lead counsel must be "familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence . . . "; and Commentary to Guideline 5.1.A.v.: " . . .verdicts and sentencing decisions in capital cases often turn upon the submission by both the prosecution and defense of evidence from expert witnesses. Eligible trial attorneys should therefore be adept at using expert evidence to the advantage of the client, and at cross-examining prosecution witnesses."

Counsel likewise was ineffective when, after becoming aware of Wilkins' disciplinary problems, counsel failed to hire another expert to testify at Petitioner's trial. When counsel knowingly calls an expert witness whose testimony "could realistically be more harmful than helpful," counsel fails to exercise reasonable professional judgment. *Skaggs*, 235 F.3d at 270. In *Skaggs*, though the court declined to find that counsel was ineffective in failing to investigate the expert's credentials before he testified in the guilt phase, the court held that counsel *was* ineffective for calling that same expert at the penalty phase. The expert was then impeached during the penalty phase "on some of the more peculiar aspects of his earlier testimony." *Id.* at 270, 271. The effect of the damage was as if counsel had put on no mitigating evidence at all. *Id.* As with counsel in the present case, counsel in *Skaggs* decided to call the incompetent expert in part because they assumed that the trial court would not grant the funds or the summons necessary for a new mitigation expert. *Id.* at 269. The Court of Appeals held that counsel's decision to present the expert's testimony after witnessing his previous "awful" performance, fell below an objective standard of reasonableness. *Id., citing Strickland*, 466 U.S. at 687.

Here, counsel made objectively unreasonable decisions not to seek out a new expert once they became aware that Wilkins under investigation. Two weeks before Wilkins would testify, the prosecution informed counsel that Wilkins was "under investigation for a number of things." (RT 655, Bates 1155) Defense counsel argued to the court at that time that the prosecution could not impeach Wilkins with allegations of "ethical violations," because he had not yet had a hearing on the allegations. (RT 655-56, Bates 1155-56) Counsel, therefore, was on notice that Wilkins was under investigation, and rather than call the licensing board or other mental health professionals in the local community to investigate, counsel merely asked the impugned doctor whether the allegations were true, and accepted his false denials at face value.

Further, counsel's performance also fell below an objective standard of reasonableness when he put Wilkins on the stand knowing full well that he would be impeached on facts, among others, that (1) he could no longer work with sex abuse victims, (2) he required supervision while treating patients,(3) he had "fundamental deficits" in knowledge of the psychological tests he administered, and (4) he failed to appreciate the limitations of his own professional competence. At that point, Wilkins testimony could only do more harm than good. Moreover, because the fully impeached and incredible Wilkins was the only psychological expert on the issue of Petitioner's mental impairments and proneness to suggestibility, counsel in effect failed to put on any such evidence. *See, e.g., Skaggs*, 235 F.3d at 270.

9. Each Error Regarding Wilkins Prejudiced Petitioner

Counsel's deficient performance prejudiced Petitioner's case because the prosecution's case was not subjected to "meaningful adversarial testing," and there was, accordingly, a total breakdown in the adversary system which is prejudicial *per se.* (*United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). Moreover, counsel's performance was prejudicial under *Strickland v. Washington*, 466 U.S. 668.

Petitioner's entire defense rested on his assertion that he falsely confessed. Wilkins' complete ineffectiveness left a gaping whole in the defense: both Ofshe and Holmes testified that certain police techniques can lead to coerced confessions in certain types of people, and Oshe explained that such people include suggestible people with mental impairments and/or low self-esteem. However, the jury heard *no* competent or credible testimony that Petitioner was such a suggestible person with mental impairments and low self-esteem. By using Wilkins, the defense essentially presented no evidence of Petitioner's mental state at the time of police questioning. Had the jury heard believable testimony on this point, a reasonable probability exists that the

outcome of the trial would have been different. *Strickland*, 466 U.S. at 687; *See Skaggs* at 271 (counsel's failure to present a competent expert on defendant's "one chance at mitigation... his borderline mental retardation and other clinical psychological conditions...," prejudiced defendant at the penalty phase.)

C. Counsel Failed to Object or Cross Examine Regarding Rickert's Testimony

Counsel was ineffective for failing to challenge the scientific basis for statements made by rebuttal witness Dr. Vaughn Rickert.[31] The prosecution called Rickert as a rebuttal witness to Dr. Wilkins' testimony. (RT 1651, Bates 2156) He was qualified as an expert in the field of adolescent psychology after brief questioning by the prosecution and no voir dire from the defense. (RT 1647-50, Bates 2152-55) Among other things, he testified that a person who had witnessed a shocking event 35 days prior to relating its details, would not recite the details in chronological order. He also concluded that the graphic details of the event would remain the most vivid in the person's memory. (RT 1670-71, Bates 2175-76)

Counsel did not challenge this testimony, despite the fact that it was not within the realm of Rickert's expertise; Rickert was not qualified as an expert in memory and he cited no scientific basis for reaching this conclusion. He cited neither published studies nor his own empirical research. The statements were bare conclusions with no scientific support. Counsel also failed to cross-examine Rickert on his conclusions.

Counsel's omissions were highly prejudicial. Allowing Rickert's statements to stand unchallenged created the perfect opportunity for the prosecutor to explain away the major inconsistencies in Petitioner's confession. Indeed, Fogleman argued to the jury that Petitioner's confession was believable because Petitioner remembered "the significant things...[t]he most

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[31] See ABA Guideline 5.1A.v. and Commentary, *supra*, note 30.

traumatic and terrible event." (RT 1743, Bates 2248) Further, the details such as the time the crimes occurred or the fact that the victims were tied with their own shoelaces were not "things that a person with memory deficits" would remember over a month after the crimes occurred. (RT 1743, Bates 2248) Petitioner was prejudiced because absent his questionable confession, the police had no case against him. Had counsel effectively dealt with or excluded the evidence that explained away the problems with Petitioner's confession, the jury likely would have reached a different result.

D. Counsel Was Ineffective for Failing to Adequately Prepare, Question, and Defend Expert Richard Ofshe

Counsel's unfamiliarity with use of scientific trial experts resulted in ineffective presentation of evidence from confessions expert Richard Ofshe.[32] This ineffective presentation left open to attack and derision Ofshe's opinions in the prosecutor's closing argument. Petitioner was prejudiced as a result.

1. Counsel Did Not Elicit From Ofshe Evidence of Universally Accepted Literature in the Area of Coerced Confessions and Police Interrogation Techniques

At trial, Ofshe testified that all of his work for the last 30 years had focused on the subject of influence, including ten or twelve years studying the influence of violent cult groups on the individual. (RT 1524, Bates 2028) Since the late 1980's he had focused on police interrogations and how in certain circumstances, they can lead to coerced confessions. (RT 1530-1537, Bates 2028-2029) He explained that he has published works on all of the aforementioned topics, including four or five books, thirty or more articles in scientific journals, and numerous papers presented at dozens of conferences over the years.

Defense counsel did not, however, ask Ofshe to discuss any of the specific works he has published on police interrogation and/or coerced confessions. The curriculum vitae that Ofshe furnished to the defense contained numerous examples of literature on confessions, coercion and related materials that he had published or delivered orally and thus submitted for peer review:

> "Coerced Confession: The Logic of Seemingly Irrational Action," Cultic Studies Journal, Vol 6, No. 1, pp. 1-15, 1989.
> "Coerced Persuasion and Attitude Change," The Encyclopedia of Sociology, edited by Edgar Borgatta and Marie Borgatta. Macmillan, New York, 1982.
>
> "Coerced Confessions: Case Studies in the Tactics of Persuasion," America Sociological Association meeting, Atlanta, August 1988.
>
> "Coercive Persuasion of the Mind in Police Obtained Confessions," Second Annual Conference – Criminal Defense Litigation Along the Rim and the River. Flagstaff, Arizona, June 1991.
>
> "Coerced False Confessions: The Social Psychology of Extreme Influence," Alameda County Criminal Defense Bar, Oakland, California, October 4, 1993.
>
> "Police Interrogations and the Coercion of False Confessions" Top Gun II, Criminal Defense Seminar, St. Petersburg, Florida, October 22, 1993.

(See curriculum vitae of Dr. Ofshe, attached hereto as Exhibit Volume 1, Exh. D-3)

In addition to these examples, several other publications and academic lectures were listed on Ofshe's CV that explored general concepts of coercion, influence, and decision-making. (Exhibit Volume 1, Exh. D-3) Counsel failed to explore with Ofshe these works that directly bore on his expertise to evaluate Petitioner's confession for evidence of coercion. Nor did counsel ask Ofshe about other literature on which Ofshe would have based his opinions, such as Inbau and Reid, *Criminal Interrogation and Confessions* (1962). The 'Reid Method' was discussed at length in *Miranda v. Arizona*, 384 U.S. 436, 449-445 (1966). In that famous case,

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[32] See ABA Guideline 5.1A.v. and Commentary, *supra*, note 30.

the United States Supreme Court held that a subject must be warned of rights to remain silent and to have counsel present because of the tactics used by police trained in the Reid method. After explaining the tactics for several pages, the high court summarized the critical aspects of the method:

> To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained.

Id. at 455.

Despite the widespread availability of materials on the Reid method and other well-known interrogation tactics, counsel for Petitioner discussed none of these important works with Ofshe while he was on the stand. Testimony about the Reid method is standard testimony commonly elicited from experts because the lay person cannot begin to imagine how or why a person would confess to a crime that he or she did not commit. Defense counsel in a false confession case must therefore educate jurors through expert testimony, that police are specifically trained to extract confessions, and further, that they learn deliberate techniques designed to exert significant pressure on the person being interrogated.

Counsel also failed to meaningfully discuss the authoritative work on interrogations at the time, Gudjonnson's *The Psychology of Interrogations, Confessions and Testimony.* Counsel did elicit that Gudjonsson's "authoritative work" was a book compiling the author's studies and those of several others (including Ofshe's) on police interrogation and coerced confessions, and that it is universally accepted by professionals in the field. (RT 1557-58, Bates 2061-62) But the conversation ended there. Counsel did not discuss any of the content regarding documented

common interrogation tactics then under study by several concerned academics.[33]

Failure to discuss literature of police interrogation training and tactics left Ofshe's opinions unsubstantiated and unsupported. Further, failure to explore with Ofshe specific articles he had published and lectures he had delivered on coerced confessions, had the same effect. These omissions fell below an objective standard of reasonableness. *Cf, Hovey v. Ayers*, 458 F.3d 892, 926-929 (2006) (ineffective assistance results from failure to prepare mental health expert by supplying relevant information about defendant).

Moreover, counsel's ineffectiveness prejudiced Petitioner substantially. *First*, the prosecution called Dr. Rickert as a rebuttal witness who testified that nothing in Ofshe's testimony showed that his theories were accepted in the scientific community. (RT 1657-1658, Bates 2162-2163) Specifically, Rickert cited the fact that Ofshe did not testify that his theories had been published in any peer-review article. (RT 1658, Bates 2163) As noted above, this was far from true, yet was not challenged by defense counsel. *Second*, the prosecution capitalized on counsel's failures. During closing argument, the prosecutor stated:

> What scientific basis did he give you for concluding that any of that statement was coerced? What was the scientific basis that he told you? What as it? He didn't give you any... He just said "it's coerced because I reviewed this," just like you could review the transcript and listen to the tapes and say 'Um there's a problem with time.' You need to pay a guy three hundred dollars and hour to look and see there's a problem with time?"

(RT 1747, Bates 2252)

> "...If these officers were so diabolical and manipulative, to hear Mr. Ofshe say there's some sort of book where they have these interrogation tactics that they can get you or I to confess to multiple homicides..."

Thus, the prosecution was able to completely discredit Ofshe by taking advantage of

[33] See literature cited in n. 17, *supra*.

counsel's deficient performance. Because the veracity of Petitioner's confession was essentially the only real issue at trial, a reasonable probability exists that the outcome of the trial would have been different had counsel laid a proper foundation for Ofshe's testimony. *Strickland*, 466 U.S. at 687.

2. Counsel Was Ineffective For Failing to Provide Information to Ofshe About the Circumstances of Petitioner's Confession.

Counsel's failure to provide Ofshe with information about Petitioner's confession was prejudicially ineffective. Specifically, counsel did not provide Ofshe with information about the photo spread that Petitioner looked at during the interrogation. During cross-examination, the prosecutor was attempting to discredit Ofshe's conclusion that Petitioner's statement was the product of suggestion because Petitioner did not tell the police any corroborating details of the crime that only a witness or participant would know. The prosecutor focused on the fact that on the recording of the confession, police did not tell Petitioner which boy was castrated, but Petitioner himself identified the Byers boy. To establish that this detail was not the product of coercion or suggestion, the prosecutor asked Ofshe whether anything in the recording indicated that the officer asked a leading question to produce the detail about the Byers boy. (RT 1597, Bates 2102) Ofshe answered "no," except that as he recalled, the police appeared to be showing Petitioner a picture when they asked him to identify which boy was castrated. (RT 1599, Bates 2104) Ofshe did not know how many photographs Petitioner saw or "how they were being manipulated at the time." (RT 1599, Bates 2104) Then, the prosecutor showed Ofshe the photographs Petitioner looked at and Ofshe conceded that they were not in and of themselves suggestive but opined that the police may have pointed at a particular photograph to suggest which one Petitioner should have picked. (RT 1606, Bates 2111) The prosecution called

Detective Gitchell as a rebuttal witness to testify that no one suggested which photo Petitioner had picked.

Ofshe's unfamiliarity with the circumstances of Petitioner's confession likely lessened his credibility with the jury. He was called specifically to analyze and render an opinion on Petitioner's confession, yet he did not even know about something as important as which photograph of the victims used during the questioning of Petitioner. Counsel should have furnished the photograph to Ofshe so that he did not have to speculate on the stand as to what *may* have occurred during Petitioner's interrogation. Counsel was aware of which photograph the police used during Petitioner's confession because, Gitchell discussed the newspaper photograph extensively at trial and it was introduced as an exhibit. (RT 920-923, Bates 1421-24) Ofshe's lack of preparedness undermined the perceived reliability of his opinions.

3. Counsel Was Ineffective For Failing to Cross Examine Gitchell Who Was Called To Rebut Ofshe's Testimony.

Counsel failed to cross examine Detective Gitchell on an inaccurate statement that he made to rebut Ofshe's testimony. Prior to Gitchell's rebuttal testimony, Ofshe testified at length about several inconsistencies in Petitioner's statement regarding the time that the crimes took place. He also explained that, after stating several times that the events took place in the morning and at noon, Petitioner eventually said that the crimes took place at night, but only after police first suggested to him that this was the appropriate answer. (RT 1621, Bates 2126) According to Ofshe, the first time that "night" was mentioned at all was on RT 18, Bates 496 of the transcript of Petitioner's statement, where Ridge asked Petitioner, "The night you were in the woods, had you all been in the water?" (RT 1621, Bates 2126) After that, according to Ofshe, Petitioner began to say that the crimes occurred at night. (RT 1621, Bates 2126)

On rebuttal, however, Gitchell testified that Ridge was not the first to say that the events took place at night, but rather, it was Petitioner who first mentioned this. Gitchell testified, "Mr. Ofshe's remark was incorrect insomuch as on page twelve of the transcript Jessie states, 'Well, after all this stuff happened at night.' That's the first time that night is mentioned by Jessie himself." (RT 1639, Bates 2143) This, however, was not entirely true. Immediately prior to Petitioner's statement, Ridge mentioned the word "evening":

Ridge:	So, your time period may not be exactly right in what you're saying?
Jessie:	Right
Ridge:	It was like earlier in the day, but you don't know exactly what time, okay, cause, I've gotten some real confusion with the times that you're telling me. But now, this 9 o'clock in the *evening* call that you got, explain that to me?
Jessie:	Well after, all this stuff happened that night, that they done it, I went home about noon, then they called me at 9 o'clock that night, they called me... They asked me how come I left so early and stuff... .

(Exhibit Volume 1, Exh. B at 494).

Thus, it was not until Ridge asked about something that occurred in the evening that Petitioner used the word "night." He was not, therefore, the first to say "night" as the prosecution attempted to establish. From the actual tape as well as the transcript, Petitioner appears to be trying to answer a question about a night time phone call he received, after the murders in the woods, from which he returned at *noon*. Moreover, the audiotape of Petitioner's confession demonstrates that Petitioner often stumbled over his words and would begin one thought and then interrupt it with another. This, of course, is consistent with his third grade linguistic abilities and low cognitive functioning. A fair reading of Petitioner's statement about "that night" was he was talking about the phone call that Ridge had directed him to –after Ridge expressed his dissatisfaction with the times Petitioner had given. Because Petitioner maintained that he "left so early" from the crime scene to arrive home at noon, he essentially maintained his

original position (untenable to the police who knew better) that the events took place in the morning. Counsel however, did not cross examine Gitchell on this point. Ofshe's point that Petitioner was not the first to say the events took place at night was therefore completely rebutted. Once again, it looked as though Ofshe, at the very least, did not have a grasp of the facts. Had counsel cross-examined Gitchell or recalled Ofshe, counsel could have established that indeed, the police were the first to say that anything occurred at night, and that when Petitioner responded "Well, after all of this stuff that night..." he was responding to a direct question about a 9:00 p.m phone call that he allegedly received. This would have a least weakened the prosecution's rebuttal evidence and would have reinforced the notion that the police repeatedly suggested time frames to Petitioner.

Prejudice resulted from counsel's omissions when the prosecution capitalized on them. During closing argument, the prosecutor impugned Offshe's integrity and suggested that he was lying to the jury:

> "Now why Ofshe tried to pass off to you all that the police had introduced night, I don't know. Was he wrong? Just Wrong? Mistaken? Not – doesn't have a grasp of the facts? Or was he misrepresenting to you?"

(RT 1755, Bates 2260)

The defense's premier expert on confessions was therefore stripped of any credibility. Counsel did nothing to correct this during the defense's closing argument, but simply dismissed the attacks as insignificant, remarking, "For a minute there I actually thought Doctor Richard Ofshe was on trial...." (RT 1763, Bates 2268) He later characterized Offshe's testimony as "riveting," and "very helpful." He did nothing to address the lengthy and devastating arguments raised by the prosecution as to Ofshe's credibility. In that regard, counsel's failure to address the attacks on Offshe during closing was likewise deficient. Had counsel been experienced enough

to rehabilitate Ofshe through cross-examination of Gitchell and appropriate closing argument, a reasonable probability exists that the outcome of the trial would have been different.

4. Counsel failed to impeach Gitchell.

Counsel failed to impeach Gitchell on an inconsistent statement he made on whether Petitioner said that he had encountered the victims at 7:00 or 8:00 p.m. Ofshe noted that one of the significant problems with Petitioner's statements was the fact that he kept changing the times upon prompting by police. Ofshe noted that Gitchell told Petitioner, "You told me earlier around seven or eight," but nowhere in the transcripts of Petitioner's two statements did he ever say that. (RT 1525, Bates 2130) Ofshe opined that this detail was "extremely important" because it demonstrated the interrogation tactic of "making up evidence or inaccurately stating evidence" in order to manipulate the suspect. (RT 1625, Bates 2130)

When called on rebuttal, Gitchell claimed that he arrived at the seven or eight time frame by deduction, because Petitioner had said he arrived home about an hour before he got a 9 pm phone call from Baldwin. (RT 1639, Bates 2143) If this was true, it seems that Gitchell would have simply deduced that Petitioner arrived home at about 8:00 p.m. and would have no need to give Petitioner a choice between 7:00 or 8:00 p.m.. Moreover, the 'hour' time period before the phone call was also suggested to Petitioner by detective Ridge: Ridge did not simply ask him what time he got home before the 9:00 p.m. call but rather gave him only two choices – he could select either thirty minutes or an hour. In response to this question by Ridge, Petitioner said "Uh," followed by silence, and then, "an hour." (RT 1622, Bates 2127) Thus, Gitchell's deduction that he used to suggest to Petitioner the correct time frame, was itself based on suggested information.

Counsel failed to impeach Gitchell with a prior inconsistent statement in which he

testified that Petitioner told him "seven or eight." At the earlier hearing to suppress Petitioner's confession, defense counsel asked Gitchell when it was that Petitioner told him "seven or eight," and Gitchell stated, "It was earlier, but I don't know if it was [in the first taped interview]... and it's not there so it may have been the time that we were talking with him beforehand. (RT 583, Bates 1083) He added, "it must have been prior to the taped statement that Ridge and I did." (RT 583, Bates 1083) This story was completely inconsistent with Gitchell's new version that Petitioner did *not* tell him seven or eight, but that he deduced that time frame from other information. Counsel was ineffective for failing to impeach Gitchell and undermine his shifting statements.

Further, Gitchell told Petitioner, "*You told me* earlier around seven or eight." Since this was not on the first taped confession, this is a classic example of exactly the improper suggestiveness both Ofshe and Holmes were describing. Counsel ineffectively and prejudicially failed to highlight these important points.

5. Counsel Was Ineffective For Failing to Clarify a Misstatement by Ofshe.

During direct examination, Ofshe made an error regarding the content of Petitioner's statements to police that counsel failed to clarify. Then, in closing argument after the prosecutor capitalized on that error, counsel failed to address it in his own closing argument, though the error was easy to explain. These omissions amounted to ineffective assistance of counsel.

The misstatement arose as Ofshe focused on the first instance in the transcript of Petitioner's statement where Petitioner's serious inconsistencies with time became an issue: Ofshe noted that Detective Ridge asked Petitioner, "alright, when did you go with them?" and that Petitioner replied "that morning." Ofshe then said that according to the transcript , "Ridge says, Nine o'clock in the morning," but he thought this was a misprint because he recalled that

Petitioner first said nine o'clock in the morning. (RT 1618, Bates 2123) Nonetheless, Ofshe indicated that his opinions did not depend either way on whether Ridge or Petitioner first said 'nine o'clock in the morning' because"[i]n any case, [Petitioner] agrees *or* says that it is 9 o'clock in the morning." (RT 1618, Bates 2123)

Defense counsel did nothing to clear up the discrepancy or to stress to the jury that the matter was inconsequential and did not affect Ofshe's opinions. Accordingly, the prosecution called Detective Gitchell as a rebuttal witness, who played the tape of the confession in the courtroom and confirmed that Ridge, not Petitioner, was the first to say the events took place at nine o'clock in the morning. At the very least, the jury was left with the impression that, once again, Ofshe did not have all of the information necessary to render a professional opinion on Petitioner's confession.

During closing argument, however, the prosecution argued something much more damaging. Immediately after asking the jury whether Ofshe was "misrepresenting" the fact that Petitioner was the first to say "night," the prosecutor followed with, "again, I don't know why he did this, I don't know– Ofshe tells you that where the transcript shows that Detective Ridge said nine o'clock in the morning, [and that] the transcript's wrong..." (RT 1755, Bates 2260) Once again, the prosecution took full advantage of counsel's deficient performance to discredit its most important witness.

6. Each Error Related to Ofshe's Testimony Prejudiced Petitioner.

Ofshe's testimony, if properly prepared, presented, and defended would have gone a long way to explain why Petitioner's statements were "a confusing amalgam of times and events." *Misskelley v. State*, 915 S.W.2d at 707. Accordingly, absent counsel's errors, whether considered singly or cumulatively, a reasonable likelihood exists that the result at trial would have been

different.

E. Counsel's Ineffectiveness in the Presentation of His Crucial Witness Dr. Holmes' Testimony at Trial Completely Undermined His Defense.

Dr. Holmes was called and qualified as "an expert in the field of police interrogation." (RT 1339, Bates 1842) His testimony was critical to the overarching defense theme that Petitioner's confession was false and was coerced. Although he had initially been retained to opine on the polygraph results, counsel knew that testimony would be inadmissible at trial. (RT 445, Bates 945).

During the course of Dr. Holmes' testimony, counsel failed to elicit significant discrepancies between the confession and the facts. He elicited from his own witness very damaging testimony about the reasons one might confess, completely undermining his psychological expert, and the prosecutor elicited on cross-examination that Dr. Holmes had no objection to most of the tactics the police used in the interrogation, in direct conflict with the testimony of his other expert, Richard Ofshe.

Although counsel later elicited testimony from Holmes that there are particular personality traits which make it more likely someone will confess (RT 1360, Bates 1863), he never tied those traits to Misskelley, nor did he provide Holmes with materials that would allow Holmes to tie them to Misskelley.

Counsel's failure to adequately prepare his expert and to put on testimony in direct contradiction to his other two defense experts, completely undermined his entire defense and prejudiced the defendant.[34]

Holmes identified thirteen factors that he considered important in determining the truth or falsity of a confession (RT 1341-42, Bates 1843-44) Those factors included (a) telling a

narrative at the beginning of the confession and (b) describing facts that conflict with the crime scene. Additional factors that Holmes testified he considered in determining whether a confession is true or false were: (a) whether the suspect relates information the police did not know; (b) whether the suspect leads the police to fruits of the crime or crime weapons; and (c) whether the tone of the confession indicates the suspect was reliving the experience during the confession.

Dr. Holmes testified on direct examination that two obvious points disturbed him about the confession: (1) Misskelley got the time frame of the crime wrong and (2) he got the type of ligature wrong. (RT 1345, Bates 1848) Dr. Holmes also testified that the police should have probed further to determine whether Misskelley was making up facts (RT 1345, Bates 1848), that they did not first elicit a narrative from Misskelley (RT 1346, Bates 1849), and that he did not like that the police mentioned they were disturbed by what they were hearing and that they did not believe Misskelley. (RT 1347, Bates 1850)

1. Counsel Did Not Exploit the Inconsistencies in the Confession

Counsel focused Dr. Holmes on only two facts that were inconsistent with the crime scene: the general time frame and the type of ligature. He did not elicit other critical facts that Misskelley had gotten wrong.

Misskelley incorrectly described how the victims were tied. "They tied them up, tied their hands up." (Exhibit Volume 1, Exh. B at 484) His interrogators attempted to help Petitioner correct this false description by suggesting the boys would have run away had only their hands been tied, but Petitioner failed to produce the explanation that would have been obvious to any one who had actually witnessed the murders: the boys were hog-tied with

[34] See ABA Guideline 5.1A.v. and Commentary, *supra*, note 30.

shoelaces, i.e., left hand to left foot, right hand to right foot. (RT 192, 971-72) Finally, Detective Ridge flatly asked, "Were they [sic] hands tied in a fashion that they couldn't have run, you tell me?" Misskelley replied: "They could run..."They could move their arms and stuff." (Exhibit Volume 1, Exh. B at 492)

Petitioner reported that he saw one of the boys, Byers, get killed, that he saw him choked "real bad and all." In response to a question about what was used to choke him, Petitioner responded, "His hands, like a stick, he had a bit (sic) old stick, kinda holding it over his neck." (Exhibit Volume 1, Exh. B at 499) In fact, however, this was completely false. The state's pathologist found no evidence that Byers was choked. (RT 852, Bates 1352)

Similarly, one of the few details that Petitioner readily volunteered at the beginning of his interview was he saw Echols "start[] screwing them," (Exhibit Volume 1, Exh. B at 484), but the state pathologist testified that no semen was found in any of the boys' anal orifice and canals, and no tears or lacerations in the anal orifices. (RT 850-56, Bates 1350-1357)

And though Misskelly stated that he saw Echols and Baldwin "beat them up real bad" before the two took the victims' clothes off, (Exhibit Volume 1, Exh. B at 484), there was no blood nor any other evidence of a beating (tears or rips in the material) located on the victims' clothing when it was recovered from the crime scene. (EBRT 957-63, 1737-43.)

Petitioner told his interrogators that immediately after grabbing one of the boys who was trying to escape, he left the creek area and watched what happened from the Service Road (Exhibit Volume 1, Exh. B at 482). Yet, testimony and photographic exhibits at trial demonstrated that Petitioner could not have seen anything from that vantage point, 450 feet from where the bodies were recovered through relatively dense forest. (RT 777-78, Bates 1277-78)

These facts were at least as significant as the two "facts" the prosecutor kept asserting

Petitioner had reported that were true but counsel failed to elicit or exploit them from his crucial expert.

Moreover, prior to the taped portion of the confession, Petitioner named several participants in cult meetings he said he attended. (RT 886, Bates 1387) The police, however, failed to confirm that any of those people attended cult meetings (RT 897, Bates 1398) Counsel failed to draw attention to that inconsistency through his expert.

2. Counsel Failed to Elicit Testimony that the Police Did not Gain Any New Information from Petitioner's Confession

Mr. Holmes testified that he would expect the police to learn new information from a true confession (RT 1340, Bates 1843) Yet there is not a single fact in either of Petitioner's two taped confessions that gave the police information they did not already have. The police had already identified Damien Echols and Jason Baldwin as suspects; they had the results of the Medical Examiner's autopsies that identified the types and causes of the multiple injuries. The interrogators had been at the crime scene when the bodies were first recovered and knew what evidence had been uncovered there.

The interrogation did not uncover a single iota of new evidence, nor a single new suspect, nor even a new motive for the killings.

The only weapons Petitioner identified were a "big old stick" so broadly described as to be useless as an identifier from a wooded crime scene and a 6" regular, folding knife (Exhibit Volume 1, Exh. B at 482). Not only did Petitioner's confession not lead to a crime weapon, at the trial of Damien Echols and Jason Baldwin, Dr. Peretti testified "... that there were serrated wound patterns on the three victims" consistent with a large serrated knife found in a lake behind Baldwin's parents' residence *Echols and Baldwin v. State*, 326 Ark. 917, 939-40; 936 S.W.2d 509 (1996). Thus, the prosecution's proof in the Echols and Baldwin trial was completely

contradictory to Misskelley's description of the crime weapon.

3. Counsel Completely Undermined His Argument that Misskelley's Low Cognitive Functioning Caused Him to Succumb to Coercive Tactics.

During direct examination, Holmes testified that there were four possible reasons for a false confession: (1) the suspect is totally innocent and just made up the facts; (2) he was so doped up he does not remember what happened; (3) he's psychologically impaired causing faulty memory; or (4) he wants to get someone off his back and decided to "give them a bunch of baloney . . . and recant later." (RT 1347, Bates 1850)

That testimony undermined defense expert witness Dr. Wilkins who had testified that Misskelley's cognitive impairments caused him to be susceptible to coercive tactics. Holmes does not even mention coercive tactics overbearing a suspect's will as a possiblity.

4. Counsel Failed to Prepare Holmes for Cross-Examination and Allowed the Prosecutor to Elicit Testimony that Undermined the Defense.

The defense theory was that Mr. Misskelley had been subjected to coercive police tactics to which he was particularly susceptible because of his cognitive deficits, resulting in a false confession. In numerous ways, Holmes' testimony undercut both the theory of coercive tactics and the theory of susceptibility.

During the suppression hearing, Holmes testified that it was during the fourth hour that "you have got to be very careful that the person just doesn't enter into this resignation and just say anything at all to get out of there. You have got to be careful of that." (RT 451-452, Bates 951-952.) Yet, on cross-examination at trial, the prosecutor elicited from Holmes that he thought the length of interrogation time – four hours – before the confession was not a problem and, in fact he trained officers to go a minimum of four uninterrupted hours in an interrogation. (RT 1349-50, Bates 1852-53) Thus, the prosecutor was able to elicit testimony at trial contrary

to the earlier testimony, and counsel did nothing to rehabilitate the witness.

Further, on cross-examination, Holmes testified that the "only disagreement" he had with the officers was that they did not stop and say, "'Hey, there's something wrong here'" when Misskelley gave the wrong time and wrong type of ligature. (RT 1362, Bates 1865) Defense counsel did not ask his own expert whether it would have been better to tape the entire interrogation so the jury could hear for itself what happened. This completely undermined Ofshe's complaint that they did not tape the entire interrogation.

Moreover, it allowed the prosecutor to hammer on the two facts that Misskelley supposedly got correct. Holmes' only way to play down the significance of getting these facts right was to say we don't know whether the interrogators contaminated Misskelley. (RT 1354, Bates 1857) He could not support his assertion because the interrogation was not recorded, yet defense counsel failed to elicit from him testimony that rightfully placed the blame on the police for their failure to record the entire interrogation.

At the suppression hearing, Holmes testified that he thought Misskelley's confession was false although he admitted he had not yet listened to the tape. (RT 463-64, Bates 964-64) At trial, the prosecutor was able to exploit the contradiction between Holmes' testimony on direct that the tone of the confession was an important indicator the suspect was reliving the experience but that he had reached his conclusion before listening to Misskelley's voice during the confession. (RT 1350, Bates 1853; RT 1371, Bates 1874)

Finally, by not providing Holmes with sufficient background material–not even the transcripts of the officers at the suppression hearing or the medical examiner's report or testimony–he allowed the prosecutor to undermine the expert opinion by showing he was not familiar with the facts of the case. (RT 1375-76, Bates 1878-79)

5. Counsel Was Ineffective For Failing to Object to Mr. Holmes' Testimony That 99 Percent of Recanted Confessions Are True.

Counsel rendered prejudicial ineffective assistance by failing to object to Holmes' testimony that in 99 percent of the cases involving recanted confessions, the confessor is actually guilty. On cross examination, the prosecutor asked Holmes, "In fact, wouldn't you agree that in ninety-nine percent of the cases where a defendant has confessed to a crime and they then recant... the defendant is guilty?" Holmes answered, "Yes." The defense did not object at this time. Only after a few follow-up questions did defense counsel Crow object on the grounds that evidence of percentages "showing other people's... guilt or innocence" permitted an inference that Petitioner was guilty. (RT 1365, Bates 1868) Counsel argued that this was outside the scope of direct examination and that it was inadmissible Rule 404 prohibiting evidence of prior bad acts. The court disagreed. Counsel did not raise the issue on appeal. To the extent that the court's rulings was in error, appellate counsel Stidham was ineffective for failing to raise the issue on appeal.

Moreover, at trial, counsel failed to raise the proper objection under Arkansas Rules of Evidence, Rule 403 – that the probative value of the statistical evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The evidence was highly misleading because it allowed the jury to speculate that Petitioner was in all likelihood guilty because 99 percent of all *other* confessors are guilty. This invited the jury to convict Petitioner on the facts of *other* cases, not just his own.

More egregiously, as the prosecutor well knew and was established at the Echols trial, there had been at least one other confession by a Christopher Morgan in regard to the murder of the three eight-year-olds that was deemed unreliable. Morgan, who knew the three boys and had left the Memphis area three or four days after the homicides, had told police in Oceanside,

California in an interview on May 17, 1993 that maybe he had blacked out, screwed the three boys, killed them, and cut off their arms and legs. (EBRT 2054-61, Bates 2841-48)

Moreover, counsel should have objected on the grounds that no foundation had been established for this statistical evidence. *See, e.g., Prater v. State,* 307 Ark. at 199 (noting that future attacks on DNA statistical evidence depending on "[j]ust how small the sample population may be, how the sampling is done, and the assumptions that underlie the probability calculation from the sample"); *United States v. Massey,* 594 F.2d 676, 679-81 (8th Cir. 1979) (testimony stating probability of match to be one chance in 4,500 was unfairly confusing where expert relied on his own experience to arrive at the figure, and thus no foundation for statement was provided); *cf United States v. Kandiel,* 865 F.2d 967 (1989) statistical probabilities evidence not subject to exclusion under Rule 403 when based on frequency tables derived from scientifically controlled random population studies); *See also, e.g., United States v. Thomas,* 2006 U.S. Dist. LEXIS 3266, *82 (speculative to conclude that defendant convicted of sexual exploitation of a child and possession of child pornography would likely re-offend based on a study showing that 54 of 62 inmates who were convicted of possession of child pornography each admitted committing approximately 30 instances of undetected molestation).

Here, while the court properly qualified Holmes as a confessions expert generally, the court did not specifically qualify him to render statistical evidence. No foundation established the scientific validity of Holmes' "99 percent guilty" calculation. Defense counsel should have objected on foundational grounds to this evidence. Counsel's failure to raise an objection for lack of foundation and under Rule 403 waived the issue on appeal. *Barrett v. State* , 354 Ark. 187, 200 (2003).

Prejudice resulted because, again, Petitioner's entire defense depended on whether the

jury believed he falsely confessed. After hearing that they had a 99 percent chance of being wrong if they did so, jurors likely dismissed Petitioner's otherwise compelling evidence of false confession. The introduction of the 99 percent statistic deprived appellant of due process and a fair trial based on the evidence of *his* case. Without the statistic, the jury probably would have reached a different result.

6. Counsel's Ineffective Preparation and Presentation Prejudiced Petitioner.

The prosecutor devoted much of his closing argument attacking the testimony of Mr. Holmes. (RT 1733-44, Bates 2238-49) He began by highlighting that Holmes did not believe the police did anything wrong, and that he "would have done the same thing himself." (RT 1733, Bates 2238) Holmes' only complaint about the police conduct (the prosecutor argued) was time and ligature, but Holmes admitted that an interrogator would not necessarily clarify the incorrect facts at the moment and he further admitted that the police cleared up the time frame problem.

Next, the prosecutor was able to put the nail in Wilkins' coffin with Holmes' alternative explanations for why someone would confess. Holmes said that a suspect could be wrong in his confession because he was "doped up"; Wilkins testified he "huffed gas, smoked pot, and abused alcohol. Holmes said that a suspect could have a faulty memory; Wilkins testified that Misskelley's memory was impaired. (RT 1734-35, Bates 2239-40)

The prosecutor exploited Holmes' lack of preparation through the admission he had not heard the tape before formulating his opinion (Id.)

The prosecutor then significantly misstated Holmes' testimony, and exploited the misstatement without objection from defense counsel. Holmes had testified that one indication of a true confession was the suspect's relief that his guilt was exposed. The expression of that relief, Holmes testified, was in the narrative that he told. "Now, in the initial part of the

confession, it's always in narrative form where he suddenly just gets it off his chest and is a – an indication of relief that sets in, and he tells you about it, and you don't have to prompt him or lead him with questions." (RT 1340, Bates 1843)

The prosecutor, however, pointed to another supposed indication of relief – that Misskelley cried. Importantly, that argument mischaracterized Holmes' description of what relief was: a narrative. Defense counsel failed to object to the misstatement of the evidence, and he failed to correct them in his own argument.

The closing argument continued to go through other factors that Holmes had testified were relevant to whether the confession was true or false, including whether Misskelley followed incorrect suppositions, whether he reported conversations between the co-defendants, and the non-challenged fiber evidence tying Echols and Baldwin to the scene. (RT 1738-40, Bates 2243-45)

Twice more the prosecutor misled the jury. When he discussed Tabitha Hollingsworth testifying about seeing Damien Echols the night of the killings, he argued that Hollingsworth's description of Domini Teer, Damien's girlfriend, was consistent with Misskelly's description of Jason Baldwin. (RT 1738-39, Bates 2243-44) Yet, Hollingsworth testified Teer was wearing black flowered pants and Misskelley described Baldwin as wearing blue jeans. Hollingsworth said nothing about Teer wearing boots; Misskelley described Baldwin as wearing boots. Defense counsel neither objected nor corrected this mischaracterization.[35]

Again, the prosecutor misled the jury when he pointed to confirmation of an inconsequential fact as proof the confession was true. Misskelley told the police he wore his blue

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[35] Counsel also failed to investigate and present evidence that Echols and Baldwin were on the telephone with others during the time that Tabitha Hollingsworth claimed to have seen Echols and Teer. See infra at Claim XIII.

Adidas shoes at the crime scene and later lent those shoes to Buddy Lucas. (Exhibit Volume 1, Exh. B at 501-02). The police later found those shoes at Lucas's house. What the prosecutor omitted from his argument–and what defense counsel failed to correct–was that soil from those shoes was compared to the crime scene and it did not match. (RT 894-95, Bates 1395-96) The prosecutor's misleading argument turned an inconsistency into an apparent consistency.

Thus, the prosecution was able to completely discredit Holmes by taking advantage of counsel's deficient performance. Because the veracity of Petitioner's confession was essentially the only real issue at trial, a reasonable probability exists that the outcome of the trial would have been different had counsel properly prepared and presented Holmes' testimony, and objected to and corrected the prosecutor's prejudicially misleading argument about the testimony. *Strickland*, 466 U.S. at 687.

F. Counsel Was Prejudicially Ineffective for Failing to Introduce Evidence at Trial Petitioner's Exculpatory Statements Made Immediately Following His Arrest

On the day following Petitioner's confessions and arrest, he wrote a letter to his family, stating, "I hope that y'all don't hate me because I did not do it." The letter also stated: "I cannot stand (it) in here much longer. I will go crazy. Please try to get me out. I will die in here." The letter also stated: "My stomach has been hurting me. I watch the news last night and I cry and cry." (Exhibit Volume 2, Exh. U-1) The details of the letter were published on June 9, 1993 in *The Commercial Appeal* under the headline, " 'DID NOT' KILL 3 BOYS, TEEN WRITES FROM JAIL". (Exhibit Volume 2, Exh. U) Counsel had both the letter and the article before trial and, once his motion to suppress the confession failed, knew that he needed employ all means to attack the truthfulness and voluntariness of those statements in front of the jury. (Exhibit Volume 1, Exh. D)

The letter was admissible under Arkansas Rules of Evidence, Rule 806 which states, "If a hearsay statement, or a statement defined in Rule 801(2)(iii), (iv), or (v), has been admitted into evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain."

The Arkansas Supreme Court has had occasion to consider Rule 806 in connection with a petition for postconviction relief. *Peebles v. State*, 331 Ark. 188, 958 S.W.2d 533(1998). In that case, a child's hearsay statements that the petitioner had molested him were introduced at trial under the child-hearsay exception. The boy had testified in an earlier hearing that the petitioner had not molested him. Trial counsel for petitioner did not seek to introduce the prior inconsistent statements under Rule 806, Arkansas Rules of Evidence. The Court found that the inconsistent statements would have been admissible as impeachment even though not made under oath and even though the declarant did not testify at trial. *Id.* at 537. Moreover, the court found that trial counsel's "performance was deficient" under *Strickland v. Washington*, 466 U.S. 668 and *Thomas v. State*, 322 Ark. 670, 922 S.W.2d 259 (1995) and that the deficient performance prejudiced petitioner. *Id.*

In this case, trial counsel did not attempt to introduce petitioner's statement that he did not commit the crimes at the hearing on the motion to suppress. At trial, they erroneously argued that this letter was admissible only if Mr. Misskelley testified:

> "Obviously Mr. Misskelley would have to testify before we could lay a foundation for that, and we have not made up our minds for certain whether he will testify, but that is one of our exhibits." (Statement of Mr. Stidham) (RT 1095-96/Bates 1597-1598).

> "I believe under the rules once he's testified, that a contemporaneous statement saying that his statement to the police was not correct is admissible evidence . . . . Obviously he will have to testify."(Statement of Mr. Crow) (RT 1096/Bates 1096).
>
> "Obviously this would not come in unless he gets on the stand."(Statement of Mr. Stidham) (RT 1097/Bates 1599).

These erroneous statements were obviously prejudicial, as Judge Burnett ruled that "You will have to put him on the stand" and reserved ruling on the admissibility of the letter until a decision was made about whether Mr. Misskelley would testify. (RT 1096-1097/Bates 1598/1599). Trial counsel never renewed their offer to introduce the letter into evidence because they ultimately decided not to put Mr. Misskelley on the stand. (Exhibit Volume 1, Exh. D)

At the time trial counsel made the argument that "[o]bviously this would not come in unless he gets on the stand", they were unaware or had forgotten that Arkansas Rules of Evidence Rule 806 allowed impeachment of the truthfulness of a hearsay declaration with evidence of a prior or a subsequent inconsistent statement, regardless of whether the hearsay declarant testifies at trial. (*Id.*) They were also unaware or had forgotten aware that a statement could be introduced for the non-hearsay purpose of showing a relevant state of mind. (*Id.*)

The statements could have been easily authenticated as the handwriting of his son by Petitioner's father, Jessie Misskelley Sr., to whom the letter was addressed, as he testified at both the motion to suppress and at trial but trial counsel failed to do so. Counsel had no tactical reason for doing so but was instead misled by their erroneous interpretation of the law.

As a result of these missteps, counsel failed to introduce Jessie's recantation of his confessions for the purpose of impeaching the truthfulness of the confessions. Since the recantation occurred within days of the confession, those missteps caused the jury to be deprived of powerfully exculpatory evidence.

Counsel also failed to introduce the statements for the non-hearsay purpose of showing that even days after his confession Jessie was still in a state of mind where he thought he was going crazy and was going to die. This evidence would have gone a long way toward showing that Jessie's statements were coerced, both at the motion to suppress and at trial.

Counsel's failure to introduce Petitioner's exculpatory statement was prejudicial.

IV. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBJECT TO HEARSAY STATEMENTS OF BALDWIN AND ECHOLS ADMITTED IN VIOLATION OF PETITIONER'S CONFRONTATION RIGHTS

Counsel failed to object to several statements, including double hearsay statements testified to by Detective Ridge and hearsay statements contained in the transcript of Petitioner's statements to the police.

At trial, Ridge testified that Petitioner told him that Jason Baldwin called Misskelley the night before the murders and told him that he (Baldwin) and Echols "were going to go out and get some boys and hurt them." (RT 888, Bates 1389.) This statement does not appear in the transcripts of either of Petitioner's statements.

Ridge also testified that Petitioner told him that Baldwin and Echols called Petitioner on the morning of the murders and that "they wanted him [petitioner] to go with them." (RT 888-89, Bates 1389-90). The transcript of Misskelley's statement shows that he said, "[Baldwin] called me and asked if I could go to West Memphis with him...that he had to go to West Memphis so, him and Damien went and then and I went with them." (Exhibit Volume 1, Exh. A at 481.) Misskelley did not tell the police that Echols or Baldwin told him why they needed to go to West Memphis.

Defense counsel did not object either to Ridge's testimony or to the admission of the hearsay portion of the confession. During closing argument, the prosecution relied on this

evidence to show premeditation and deliberation, specifically noting that on the day before the murders, Echols and Baldwin called Misskelley and said they were going to "get these boys" and hurt them. (RT 1726 Bates 2231.)

A. The statements were not admissible as co-conspirator statements.

The above statements were not admissible as non-hearsay statements by a co-conspirator of a party made during the course and in furtherance of the conspiracy. Ark. R. Evid. 801(d)(2)(v); *see also* Fed.R.Evid. 801(d)(2)(E). To admit co-conspirator statements, "a court must be satisfied that the statement actually falls within the definition of the Rule. There must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made "during the course and in furtherance of the conspiracy." *Bourjaily v. United States,* 483 U.S. 171, 175; 107 S. Ct. 2775, ___; 97 L. Ed. 2d 144, ___ (1987). Although the court may use the statement itself to determine whether there is a conspiracy which the defendant had joined, it cannot rely on the statement alone. *Id.* at 181; 107 S. Ct. at 2781; *see also* Fed.R.Evid. 104(a). The requirements for admissibility under Rule 801(d)(2)(E) are identical with the requirements under the Confrontation Clause. *Id.* at 182, 107 S.Ct. at 2782.

Here, the statements should not have been admitted because Misskelley was not a member of a conspiracy and the statements were *not* made in furtherance of any established conspiracy.

A person conspires to commit an offense if, with the purpose of promoting or facilitating the commission of any criminal offense, he agrees with another person or other persons that one or more of the persons will engage in conduct that constitutes that offense, or he will aid in the

planning or commission of that criminal offense, and one of the parties does any overt act in pursuance of the conspiracy. Ark. Code. Ann. § 5-3-401.

Misskelley was not in a conspiracy with Baldwin and Echols at the time the first alleged statement was made nor was he being invited to join the conspiracy. Accordingly, that statement was not in furtherance of a conspiracy. Regarding the first call on the night before the murders where Baldwin allegedly informed Misskelley that he (Baldwin) and Echols "were going to go out and get some boys and hurt them," the record was devoid of evidence that this statement was meant to involve Misskelley in the conspiracy. (RT 888, Bates 1389.) Misskelley never said that he agreed to "get some boys" either before or during this call. Nothing in the record established that prior to receiving this call he was planning such activities or had agreed to partake in them. At best, the statement showed a conspiracy between Baldwin and Echols; Baldwin's statement to Misskelley did not invite him into this conspiracy, but "merely inform[ed] the listener...of the declarant's activities." *United States v. Snider*, 720 F.2d 985, 992 (8th Cir.1983). As such, it was inadmissible as a co-conspirator statement.

Further, the second call was not in furtherance of a conspiracy. Regarding that call, Misskelley reported that he agreed to go to West Memphis simply because Baldwin "had to go to West Memphis," not because he was invited to or planning to participate in any crimes. No connection between the first call and the second call was ever established.

Moreover, the remaining record failed to establish a conspiracy existed at any time among Misskelley and Echols and Baldwin. Regarding the murders themselves, Misskelley described an *unplanned* encounter with the victims, not a pre-planned event: according to the 'nighttime' version of events (favored by the prosecution for finally establishing the correct time frame), Misskelley, Baldwin and Echols were playing in the water at night and then Baldwin and Echols

"seen them boys and then Damien hollered 'hey,' [and] the little boys come up there." (Exhibit Volume 1, Exh. B at 496) Thus, Misskelley discussed a chance encounter with the victims, not a pre-planned event.

In addition, although the police talked with Misskelley about a "cult" meeting where he saw a picture of the three victims in a briefcase, Misskelley never stated that this meeting occurred *before* the murders. When asked whether he had seen the briefcase containing the pictures before, he said "I've seen them once that night, I seen them with it that night...I think when we had that cult." (Exhibit Volume 1, Exh. B at 494). He then explained that he has "been in [the cult] for about three months." (Exhibit Volume 1, Exh. B at 495). Thus, the cult meeting that Misskelley described could have occurred well after the murders. Likewise, though Misskelley said that Echols had "been watching" the boys before the murders, the prosecution did not establish *when* Misskelley learned this information and whether it was ever conveyed to Misskelley before the murders. Accordingly, neither of the facts discussed above showed that Misskelley entered into a conspiracy with Baldwin and Echols, at any time.

B. The Confrontation Clause of the Sixth Amendment Prohibits the Admission of these Statements Because They Are Unreliable Hearsay.

Neither of the above statements were admissible, because they all contained double hearsay that did not fit within a hearsay exception and violated the Confrontation Clause. Counsel, however, did not object on those grounds.

"[T]he Confrontation Clause reflects a preference for face-to-face confrontation at trial, and [] 'a primary interest secured by [the Clause] is the right of cross-examination.'" *Ohio v. Roberts*, 448 U.S. 56 at 62; 100 S. Ct. 2531, 2537; 65 L. Ed. 2d 597 *(1980) quoting Douglas v. Alabama*, 380 U.S. 415, 418 (1965). "In short, the Clause envisions 'a personal examination and

cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'" *Id.* at 63, 100 S. Ct. 2538, *quoting Mattox v. United States*, 156 U.S., 237, 242-243 (1895). The Clause is intended to exclude some hearsay. *Id.*

Here, all of Ridge's testimony regarding what Petitioner purportedly reported outside the taped confessions that Baldwin and Echols said was double hearsay, not admissible under any deeply rooted hearsay exception. *See* Arkansas Rules of Evidence 802, 803 and 804.

The hearsay exception found in Rule 804 (b)(3) permitting introduction of a "statement against interest" does not apply here because "a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception." Ark. R. Evid. 804 (b)(3). Thus, Baldwin's statement from the night before the killings could not be admitted against Misskelley under this exception.

Further, the statements do not fall within the catch-all hearsay exceptions found in Rules 803 (24) and 804 (b)(5) , permitting introduction of hearsay statements with "equivalent circumstantial guarantees of trustworthiness." As the explained in *Hill v. Brown* 283 Ark. 185, 672 S.W.2d 330 (1984), these catch-all provisions were added by Congress when it adopted the Federal Rules of Evidence. The court admonished lower courts that:

> The provision was not intended to throw open a wide door for the entry of judicially created exceptions to the hearsay rule. To the contrary, the new exception is to be narrowly construed. That is made plain by this paragraph in the report of the Senate's Advisory Committee:
>
> It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within

> one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

Id. at 188-189 (citing S.Rep. No. 93-1277, 93rd Cong., 2nd Sess. 1, 20, reprinted in 1974 U.S.Code Cong. & Ad.News 7051, 7066). *See also Ohio v Roberts*, 448 U.S. at 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.").

Here, the statements lacked any guarantees of trustworthiness. While Ridge testified that Misskelley said that Baldwin said "they were going to get some boys and hurt them," no such statement appears in the transcript of Misskelley's statements, despite the fact that the transcript contains a discussion of the phone calls. Further, Ridge characterized the second call as an invitation to commit murder, when in fact it was merely an invitation to go to West Memphis because, for some unknown reason, Baldwin needed to go there. These discrepancies between Ridge's testimony and Misskelley's actual statements (or lack thereof) call into to serious doubt the accuracy of Ridge's testimony. Ridge's testimony regarding the phone calls lacked the guarantees of trustworthiness that justify a departure from the hearsay rule, and violated Petitioner's right to confront the witnesses against him.

Further, to the extent that Misskelley relayed statements by Baldwin and Echols that *are* in the transcript of his taped confession, these statements are likewise untrustworthy. As this court is well aware, the reliability of Misskelley's confession was in serious question at trial. This Court acknowledged at trial that Misskelley was at best "borderline functioning." (RT 644,

Bates 1144). Indeed, this Court stated in the Rule 37 proceeding in *State v. Echols*, No. 93-450A, "...Jessie Misskelley's statement was full of a lot of points that were pointed out by the defense, adequately I thought, that might suggest that he didn't know what he was saying or whatever." (Exhibit Volume 3, Exh. W at 38). Under these circumstances, the hearsay contained in Misskelley's statement did not have the circumstantial guarantees of trustworthiness necessary to admit such statements. Their admission without objection violated Petitioner's right to confront the witnesses against him.

Counsel's deficiency in failing to object to these statements severely prejudiced Misskelley. During closing argument, the prosecution relied on this evidence to show premeditation and deliberation, specifically noting that on the day before the murders, Echols and Baldwin called Misskelley and said they were going to "get these boys" and hurt them. (RT 1726 Bates 2231.) Petitioner was convicted of first degree murder of Michael Moore. Absent counsel's failure to object to this inadmissible evidence, a reasonable likelihood exists that the verdict would have been different.

V. COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF PETITIONER'S COMPETENCE TO STAND TRIAL.

Counsel failed to adequately investigate and raise the issue of Petitioner's competence to stand trial. Instead, counsel argued that he had *no doubt* about Petitioner's competency. Counsel's failure to raise Petitioner's competency was deficient and prejudiced Petitioner.

A. Background

This Court first raised the issue of Petitioner's competence on September 27, 1993 during a hearing on pretrial motions. The Court informed counsel that, if counsel wanted a mental examination done, he should request one within 30 days or else waive the issue. (RT 209, Bates

707) The Court assured counsel however, that "if something arises after that 30 day period," counsel can raise the issue at that time. (RT 210, Bates 708)

On October 19, 1993, the court again asked counsel if he was going to raise the issue of Petitioner's "mental capacity." Counsel said, "not as a defense to the charges but as a factor to be considered by the court in ruling on the motion to transfer." (RT 247, Bates 745) The Court informed counsel that it was going to enter an order to have Petitioner sent immediately to State Hospital for an evaluation of his "fitness to proceed." (RT 247, Bates 745) Counsel objected, and said explicitly that he was not raising the issue of Petitioner's competency to assist in his defense. (RT 248, Bates 746) Upon further questioning by the Court, counsel told the court that he was "convinced that Mr. Misskelley is of "limited intellect," and that he did not know what Petitioner's mental capabilities were. (RT 249, Bates 747) The judge responded that under those circumstances, Petitioner should be evaluated. (RT 249, Bates 747) Counsel objected on the grounds that he did not want the State Hospital staff to conduct the examination, but rather wanted his own expert, funded by the court. Counsel did not think the people at State Hospital were qualified to render a forensic evaluation. The Court assured counsel that, if counsel was dissatisfied with the state evaluation, it would permit counsel "to have an outside examination done and "may even order the county to pay for it." Counsel then insisted he was not yet raising the issue, and explained his concern that the press would report that the Court ordered an evaluation. (RT 251, 254, Bates 749, 752)

At a November 16, 1993 hearing on Petitioner's motion to transfer the case to juvenile court, Dr. William Wilkins testified on the issue of Petitioner's mental maturity. Among other things Wilkins testified that Petitioner had a full-scale IQ of 72, a verbal IQ of 70, and a performance IQ of 75, and that earlier tests showed results at 67, 70, 73, respectively. (RT 341,

Bates 841) He was in the "low borderline range" of intellectual functioning, and had never passed the Arkansas minimum standards test. (RT 344, Bates 842) Petitioner tended to think in childlike ways about the same way... that a six or seven year old would do." (RT 349, 847) Under significant stress, Petitioner would rapidly revert to fantasy and daydreaming. (RT 352, Bates 850)

During cross-examination, Wilkins testified that after administering a 30 to 45 minute test, he had determined that Petitioner was competent. (RT 357, Bates 855) The test was a "standard form" that consisted "of a variety of questions which deal with, ah, being in contact with reality, basic intelligence levels." Shortly thereafter, Wilkins assured the Court, "unequivocally," Petitioner was competent to proceed and that he "understands the traditional legal notion of right and wrong." (RT 365, Bates 863) Based on that testimony, the court ruled that Petitioner was competent. (RT 385, Bates 883)

This issue arose again during trial when, during voir dire of Wilkins, the prosecution challenged his qualifications as an expert. (RT 1408, Bates 1912) Defense counsel asked to approach the bench and expressed concern that if Wilkins was not qualified at this point in the proceedings, his earlier competency finding would be invalid: (RT 1409, Bates 1913) The following exchange took place at the bench:

Stidham: Your honor, my concern is we've got a competency of the defendant issue now...at a previous hearing Doctor Wilkins was qualified as an expert. He testified about a forensic evaluation he did and he said the defendant was competent to stand trial and that he was aware of the difference between right or wrong... Is the state questioning that now? I mean, do I need to move for a continuance... I don't want to have to retry the case based on the defendant's competency. They hadn't challenged this until yesterday.

Court: I don't think that's even an issue.

Stidham: Judge, they're saying he's not competent to do this.

Court: They're saying this man – they're challenging his competency as an expert.

Fogleman: Not your client's competence.

...

Stidham: May I inquire of the Court, does the Court have any concerns about the defendant's fitness to proceed?

...

Court: ...no, not at all. None whatsoever.

Stidham: Is the state raising that issue?

Court: Not that I know of.

Stidham: (To prosecutors) Are you satisfied that he's competent?

(Davis answers whether Wilkins, not defendant is competent.)

Court: Are you trying to tell me you don't think...the defendant is competent to stand trial? Is that what you're saying?

Stidham: No, I'm asking you: Does the Court have any question about that – does the State have any –

Court: None at all as to competency of the defendant. None. Zero.

Stidham: Is the Court satisfied with that?

Court: Sure.

Stidham: Is the State satisfied that the defendant is competent to proceed?

Fogleman: Oh, yes. We've never questioned that.

Stidham: I just want to make sure...

(RT 1409-13, Bates 1913-17)

As it turned out, however, counsel was *not* sure about Petitioner's competency. During a post trial hearing conducted on February 22, 1994, Stidham told the court that Petitioner required a mental evaluation. At that hearing, counsel complained to the Court of prosecutorial misconduct for speaking to Petitioner without his attorneys present, in order to secure Petitioner's testimony at the Baldwin/Echols trial. Counsel informed the Court that he believed

Petitioner needed to have "a mental evaluation" before the issue of his proposed testimony could be resolved. (RT 1839, Bates 2345) Rather than order the evaluation, the Court appointed Phillip Wells as an independent attorney to assist Petitioner in making the decision to testify. (RT 1899, Bates 2405) The Court wanted to be sure that the decision "is his own voluntary act and not influenced by his father, his lawyers, or anyone else." (RT 1861-1862, Bates 2367-2368) Counsel responded, "I think Mr. Misskelley needs to have a mental evaluation...." (RT 1896, Bates 2402) He also asks the court to permit Petitioner to discuss his options with his family because "[h]e's eighteen years old, but he's also very incapable from a mental standpoint." (RT 1897, Bates 2403)

Recently, counsel explained that, early in the case, he knew about issues that may have affected Petitioner's competence to stand trial. When he had meetings with Petitioner when Petitioner's father was present, Petitioner always insisted that he had no involvement with the crimes. Yet, when his father was not present, he would try to recite for defense counsel the story he had told the police. Every time he told the story, it never matched what he told the police. One day, counsel demanded that Petitioner tell him whether he was he involved in crimes or not. When Petitioner said that he was not involved, counsel asked why he had repeatedly told him that he *was*. Petitioner answered that he did so because he did not want to get the electric chair. When counsel asked Petitioner if he knew what a lawyer was, he responded that lawyers are police officers. Petitioner believed that defense counsel was simply continuing the interrogation process. (Exhibit Volume 1, Exh. D)

At that point, counsel began to understand that Mr. Misskelley had some significant mental deficits. He observed that Petitioner had difficulty understanding reality, and that he would believe anything that anyone told him. (Exhibit Volume 1, Exh. D)

Though during his evaluation of Petitioner, Dr. Wilkins determined that he was competent, counsel still did not believe that Petitioner could assist in his own defense. Specifically, he felt he could not put Petitioner on the stand because he could be pushed into saying whatever any questioner wanted him to say, and would adopt as true anything he was told, regardless of its accuracy. (Exhibit Volume 1, Exh. D) Counsel was not alone in his assessment of Petitioner. After trial, one juror commented in an interview with the *Commercial Appeal* that he was not surprised that counsel did not put Petitioner on the stand because the prosecutor "could have tore him apart and made him say anything." (See *Memphis Commercial Appeal,* March 17, 1994, attached hereto as Exhibit Volume 2, Exh. V)

B. Evidence That Petitioner Was Incompetent to Stand Trial.

In 2004, Doctor Timothy Derning evaluated Petitioner to determine whether in 1993 and 1994, Petitioner was competent to stand trial and whether he could knowingly, intelligently, and voluntarily waive his *Miranda* rights. All of the following facts are taken from Derning's Declaration (Exhibit Volume 1, Exh. H)

Based on Derning's two days of evaluation in June 2004, including his administration of the MacCAT-CA, Derning opined that in 1993 and 1994, Petitioner was not competent to stand trial. Petitioner did not adequately understand the nature of the proceedings against him; he was not able to consult meaningfully with counsel; he demonstrated inadequate decisional competence; and he was not able to participate and assist in the preparation of his defense. (Exhibit Volume 1, Exh. H)

The evaluation revealed that Petitioner did not understand basic concepts of criminal trials. For example, he did not understand that the prosecution bore the burden of proof; he believed a criminal defendant had to prove his innocence. He believed he had an obligation to

tell the truth, that this obligation was primary and took precedence over any other rights or obligations he had as a defendant he did not understand that he could remain silent without prejudice. (Exhibit Volume 1, Exh. H)

Petitioner did not, during the evaluation, demonstrate understanding of the concept of intent or recognize the importance of intent in the eyes of the law. (Exhibit Volume 1, Exh. H)

Petitioner confused the roles of the participants in a trial. He spoke of the prosecutor proving self-defense. He did not demonstrate an understanding that the jurors decide guilt or innocence, only that they listen to both sides of the story. He had an inadequate understanding of the role and function of the judge in a jury trial. (Exhibit Volume 1, Exh. H)

Further, Petitioner did not understand the logical inconsistency that if a defendant accepts a plea bargain offer and enters a plea of guilty then he cannot continue to try to convince the judge he is innocent. (Exhibit Volume 1, Exh. H)

Petitioner could not identify salient facts he would need to make an informed decision about whether to plead guilty or not. (Exhibit Volume 1, Exh. H)

Petitioner had difficulty keeping straight facts of a hypothetical vignette while being questioned about the vignette. He had difficulty staying on point during the interviews with Derning about the competency to stand trial questions. When Derning explained a concept to him, he was able to understand and discuss it briefly, but then he often became confused and did not demonstrate the same level of mastery or retention later. (Exhibit Volume 1, Exh. H)

Derning found that Petitioner had difficulty shifting his recognition of questions about the hypothetical vignette to questions about his own case, as he sometimes confused the two. (Exhibit Volume 1, Exh. H)

Petitioner gave less specific answers to some of Derning's questions. Derning explained these answers are common among people with low intellectual ability, individuals who function similarly to Petitioner. Vague answers among persons with intellectual handicaps are often used to attempt to mask cognitive deficits by avoiding specifics, which can be shown to be "wrong." In such individuals it is not lying or deceitfulness, rather it is an attempt to keep from exposing one's embarrassing ignorance. During Derning's evaluation, he concluded that Petitioner was often attempting to mask his ignorance rather than just admitting he did not know. (Exhibit Volume 1, Exh. H)

As is typical of intellecutally-impaired individuals, close-ended questions appeared to be easier for him to answer. On occasion, when close-ended questions were followed by open-ended questions (i.e., "In your own words, please explain . . . "), it became evident that Petitioner did not truly understand the question or have a valid reason for his answer. As is typical of individuals with intellectual disabilities he may have answered the close-ended question to avoid appearing ignorant and child-like. (Exhibit Volume 1, Exh. H)

Petitioner also had difficulty explaining himself and his reasoning process. Often, his initial responses were unclear, and Derning had to ask numerous follow-up questions to clarify his answers. The follow-up questions often led to further confusion, perhaps because Petitioner did not really understand what he was initially asked, or trying to describe, or because Petitioner can be easily led to modify his answers in an effort to try to get the "right" answer. It is commonly found with low intelligence individuals that they prefer to be agreeable, acquiesce, and seek to "please" an interviewer, attempting to provide a "pleasing" answer rather than a valid answer to the question. (Exhibit Volume 1, Exh. H)

Finally, Petitioner demonstrated to Derning difficulty being able to generalize a concept even when understanding the concept in a specific situation or setting. This is a hallmark of individuals with low intellectual ability. While Petitioner might understand a concept as it applied to a specific situation or setting, he demonstrated an inability to consistently apply the principles of that concept to novel or different situations and settings. (Exhibit Volume 1, Exh. H)

Derning found that Petitioner's limited cognitive functioning made it extremely difficult, if not impossible, for him to provide his attorney with accurate and reliable information necessary to prepare and present his defense, and to comprehend and weigh his options and the consequences of his choices, i.e., he lacked adequate decisional competence. (Exhibit Volume 1, Exh. H). (See Stidham and Crow declarations, Volume 1, Exhs. D and E).

C. Counsel Was Ineffective For Failing to Raise and Investigate the Issue of Petitioner's Competence to Stand Trial

Counsel not only failed to raise Petitioner's competence to stand trial but he went out of his way to secure an adverse ruling on that issue.[36] As demonstrated in the dialogue quoted in Claim V.A., counsel explicitly made a record that neither he, the prosecution, nor the court had any questions about Petitioner's competency to stand trial. Yet counsel *did* have concerns about whether Petitioner was mentally fit; he expressed those concerns to the court immediately after trial when he requested a mental evaluation, and he recently revealed the extent to which he questioned Petitioner's competence well before trial.

[36] See ABA Guideline 11.5.1: "Counsel should consider all pretrial motions potentially available, and should evaluate them in light of the unique circumstances of a capital case, including the potential impact of any pretrial motion or ruling on the strategy for the sentencing phase, and the likelihood that all available avenues of appellate and postconviction relief will be sought in the event of conviction and imposition of a death sentence."

"[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). "The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent ...deprives him of his due process right to a fair trial." *Id.* at 172 (*citing Pate v. Robinson*, 383 U.S. 375 (1966)). The test for competence to stand trial is whether the defendant has the present ability to understand the charges against him and communicate effectively with defense counsel. *Godinez v. Moran,* 509 U.S. 389 (1993) (*citing, Dusky v. United States*, 362 U.S. 402 (1960); *Steward v. State*, 95 Ark. App. 6, 15 (2006). Further, Arkansas courts hold that criminal defendants are presumed to be competent to stand trial and they have the burden of proving otherwise. (*Steward*, 95 Ark. App. at 15.)

To the extent that counsel relied on Wilkins' findings of competence to forego litigating Petitioner's the issue, such reliance was deficient. As explained fully above, Wilkins was a psychologist with very questionable credentials. Counsel retained his services not because he was particularly qualified but because he was the only person who would work for free. Even this Court remarked, "Where did you get this guy?" and later voiced concern about his qualifications, stating, "Quite frankly, I've got some serious reservations [about Wilkins] based on what I've read and heard, but that doesn't mean I'm not going to let him testify... ." (RT 1411, Bates 1915) Wilkins' vaguely described the half-hour competency test was not adequate to assess Petitioner's competence to stand trial. By contrast, Dr. Derning spent two days with Petitioner to determine his competence and administered the appropriate tests to make that determination.

Thus, counsel's performance was deficient for failing to investigate and litigate Petitioner's competence. *See, e.g., Brown v. Sternes*, 304 F.3d 677 (7th Cir. 2002) (counsel ineffective where she abandoned investigation into defendant's mental health history despite knowledge that client had been treated for mental illness, failed to request a hearing to determine competency to stand trial, and failed to consider an insanity defense); *See also, Parkus v. Delo*, 33 F.3d 933 (8th Cir. 1994).

D. Appellate Counsel Was Ineffective For Failing to Challenge the Court's Competency Ruling on Appeal.

Appellate counsel's performance was deficient for failing to challenge the trial court's erroneous ruling that Petitioner was competent. The trial court reached this ruling on insufficient evidence. *First*, the court made this determination without conducting a full competency hearing. Thus Petitioner was denied the opportunity to fully litigate the issue. *Second*, when the Court asked Wilkins whether Petitioner was competent, it then asked whether Petitioner knew the difference between right and wrong. The relevant inquiry, however, was whether the defendant understands the proceedings against him and can communicate effectively with counsel to assist in his own defense. None of those questions were asked by the court or the attorneys.

The record, therefore was devoid of evidence that Petitioner in fact understood the proceedings against him and could rationally assist in his own defense. Accordingly, appellate counsel was ineffective for failing to challenge the ruling on appeal. For the same reason, counsel was also ineffective for failing to preserve the issue in the trial court.

VI. COUNSEL WAS INEFFECTIVE IN FAILING TO CONSULT WITH AND UTILIZE A FORENSIC PATHOLOGIST TO AID IN PETITIONER'S DEFENSE AND THE FAILURE PREJUDICED PETITIONER

A. Introduction

At Petitioner Echols's Rule 37 hearing, Mr. Stidham admitted that despite the trial court's ruling that he would consider requests for the funding of defense experts on a case by case basis, he "didn't make a specific request in advance for the payment of experts." (Testimony of Dan Stidham, May 5, 1998, p. 81-82). He also admitted that "[t]he only pathologist that I spoke with before the trial was Doctor Peretti at the State Medical Examiner's Office." (Id. at 128). [37]

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[37] Mr. Stidham attempted to qualify this statement by stating that "Ron Lax...was assisting the defense team...and Mr. Lax reported to me that he had consulted the Medical Examiner's Office in I believe Atlanta. I don't remember the county that Atlanta is in, but he had talked to the particular county's M.E. and had received some information. So, yes, we did attempt to obtain the services and consult with a forensic pathologist." (Id. at p. 129). However, at Echols's Rule 37 hearing, the state elicited testimony and documentary evidence from Lax that his initial referral letter to an independent pathologist, Dr. Kris Sperry, did not occur until February 14, 2004, and that his initial meeting with Sperry did not occur until sometime before February 23, 1994, the date on which Lax wrote a memo to counsel about his conversation with Sperry. (Testimony of Ron Lax, pp. 1238-1246). Mr. Misskelley was sentenced on February 4, 1994, so Lax's investigation into the availability of a forensic pathologist came too late. Further, Lax himself testified that the upshot of that investigation was that Sperry "said [information contained in Lax's memo] were his thoughts on the limited review he had of the documents" (p. 1246), and that "this is all he could do based on the time he spent on this case." (Id. at 1247). and that he accordingly advised the attorneys for Echols that "we have a more thorough pathologist examine everything." (Id. at 1250). Even after Misskelley's tial this never happened because "we didn't have the funds for it." (Id.). Mr. Stidham now admits that his testimony at the Rule 37 hearing was incorrect to the extent it suggested that he made any attempt to consult with an independent forensic pathologist prior to Petitioner's conviction. (See, Declaration of Dan Stidham, attached hereto as Exhibit Volume 1, Exh. D)

Counsel's failure to consult with any forensic pathologist before, during, or after trial (within the time for filing a motion for new trial), fell below an objective standard of reasonableness because the state relied primarily on its own pathologist's controversial theories to corroborate Petitioner's statements to police.[38] When a Petitioner alleges ineffective assistance for failure to provide expert testimony, Petitioner must "name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence." *Greene v. State*, 356 Ark. at 74. In *Greene*, the Rule 37 Petitioner in that case alleged that counsel was ineffective for failing to impeach the medical examiner in light other evidence that the expert had a history of controversial and inaccurate determinations. *Id.* at 74. Though the Petitioner in that case alleged that a reasonable probability existed that another examiner would have disagreed with the state's experts, he offered no evidence to that effect. *Id.* Because the *Greene* Petitioner failed to show what testimony or other evidence had been omitted and how it would have changed the outcome, the court denied his petition. *Id.*

By contrast in the present case, Petitioner submits to this Court several exhibits from six different forensic experts showing the evidence counsel could have presented at trial and used for cross examination had counsel considered doing so. The content of those exhibits, and the manner in which the evidence contained therein was developed in this case and shared with the prosecution, is summarized below.

B. Evidence Showing That State Medical Examiner Peretti's Theories As to Cause of Injuries Were Scientifically Unsound.

The following is a summary of the newly developed forensic evidence demonstrating, among other things, that Christopher Byers was not deliberately castrated as the prosecution

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[38] See ABA Guideline 5.1A.v. and Commentary, *supra*, note 30.

asserted, that none of the victims in this case were sexually assaulted, and that the injuries described by Peretti as deliberate "cutting" injuries were not cause by a knife or other sharp weapon. Rather, all of the injuries to the victims that corroborated the version of events that Petitioner produced for the police were the result of post-mortem animal predation.

1. Dr. Janice Ophoven

1. In September, 2005, counsel for Jason Baldwin, Mr. Echols's co-defendant at his 1994 state criminal trial, contacted a renowned pediatric pathologist, Doctor Janice Ophoven. (See Curriculum Vitae of Janice Jean Ophoven, M.D., attached hereto as Exhibit Volume 2, Exh. J-1) Mr. Baldwin's counsel subsequently supplied Dr. Ophoven with various background materials, including the autopsy reports and extensive photographs, relating to the condition of the victims' bodies both at the time they were recovered from the crime scene on May 6, 1993 and at the time of the subsequent autopsies.

2. In May, 2006, Dr. Ophoven stated that, while her findings were entirely preliminary, she had concluded:

a. The injuries to the faces of the boys, particularly the punctate injuries, suggested that the remains had been chewed on by a dog or a rodent. She stated that while the photographs were not of good quality, they were sufficient to indicate to her it was possible that the genitalia of Byers were removed by an animal chewing on the remains, noting that the irregularity in the "cut" was consistent with tissue being pulled after having been gnawed on. There was some chewing, biting, and likely clawing in the area of the inner thigh. As to the remains of Chris Byers, some of the injuries to the face appeared to be of the type that might be caused by a small dog, or a rodent, and the pulling of some of the flesh, and punctate wounds, were completely consistent, in her view, with animal bite marks.

b. The ear which was described during trial as likely having been injured during some form of sexual attack was more likely chewed on and pulled on by an animal than by a human being. There were no artifacts or findings consistent with there having been any kind of a sexual attack here. Each of the areas of "pathologic diagnoses" of anal dilation was meaningless. The findings are insufficient to specifically suggest that the victims were in any way sexually penetrated, or abused, prior to their deaths. (Exhibit Volume 2, Exh. J)

2. Dr. Werner Spitz

3. Prior to learning of Dr. Ophoven's preliminary conclusions, counsel for Mr. Echols had contacted one of the country's leading forensic pathologists, Dr. Werner Spitz in connection with the case. (Exhibit Volume 2, Exh. K) Counsel sought Dr. Spitz's independent opinion as to the nature and cause of the victims' injuries with a view to determining, among other things, whether Dr. Spitz viewed the animal predation theory as viable. To that end, Dr. Spitz was provided extensive background materials relating to the case, including the autopsy reports; various crime scene and autopsy photographs; photographs of the knife that purportedly belonged to defendant Echols and that was recovered from the lake near Jason Baldwin's trailer, (*i.e.*, State's Exh. 77); literature concerning wildlife in the area where the bodies were recovered; and excerpts from the prosecutors' closing arguments at that trial. Dr. Spitz was also supplied with trial testimony at the Echols-Baldwin trial given by Dr. Frank Peretti, who performed the autopsies on the victims.

4. On September 22, 2006, counsel for Echols participated in a video tele-conference with Dr. Spitz at which Spitz discussed his preliminary conclusions concerning the forensic issues presented.

a. Beginning with photos of Chris Byers, Doctor Spitz demonstrated why the victim's most apparent traumatic injuries were the result of post-mortem animal predation. He began with photo one (a frontal view of Byers' upper thighs and genitalia) in his Byers series. Doctor Spitz noted the discoloration on both the inner left and right thighs which likely was due to an animal licking the skin off the thighs with its rough tongue. He commented that the skin becomes more conducive to being removed in this manner when it has been submerged in water.

b. Doctor Spitz then turned to the punctate marks on Byers' thighs and abdomen. There are holes, usually in twos and sometimes equi-distant, as well as lines in these areas. The double marks are due to the predator digging the nails of a paw into the flesh as the animal licks or eats. According to Doctor Spitz, these wounds do not show evidence of bleeding externally or in the tissue, meaning that they were made post-mortem. As to the amputation of the scrotum and penile skin, the edges are irregular, indicating the cuts were not made with a knife. Doctor Spitz's conclusion was that the wounds could not have been made by a serrated knife, much less by the lake knife, but rather are the result of animals feeding on the bodies.

c. Doctor Spitz then turned to a rear view photo of Byers' buttocks and anus which corresponds to State's 71C. He noted that it shows the jagged pattern of the genitals being chewed off. He then turned to the pattern of parallel lines on both the right and left buttocks, which he explained as paws or nails being dragged across the skin, and noted that each set of lines has at its top a puncture wound or wounds, indicating where the animal dug in its nail or claw to hold the flesh, then dragged down across the skin as it would loss its grip. In order to have those parallel lines made by a serrated knife, one would have to turn the knife sideways and then drag it down the skin, but the lines are irregular and certainly do not match the pattern of the lake knife.

d. Doctor Spitz noted that different animals tend to favor certain areas of the human body to feed on. The third edition of his book has photos of people mutilated by fish, and they show injuries to the nose, earlobes, and lips quite similar to those on these victims' bodies. Byers has injuries on his nose and eyelids characteristic of marine life, as demonstrated in the treatise. Spitz also noted that the Byers' photo does not show dilation of the anus, as Dr. Peretti testified.

e. Doctor Spitz then turned to the photos of Steve Branch, which show the right side of his face virtually untouched but the left side was a bloody mass. The likely explanation is that the right side was covered but the left side exposed to animal activity, and the epidermis on that side of the face was licked off. Branch shows the punctate and scratch marks of animal claws. There are gaping wounds under the chin made by animal bites. The wounds behind the ears of Branch that Dr. Peretti said could have been due to the ears being held during oral sex are actually likely claw marks. There is no bruising of the ears.

f. As to Moore, Doctor Spitz showed on his nose, ear, and lip injuries typical of post-mortem injuries by marine life. The bottom of his ear lobe has been chewed away. The epidermis has been licked off the lips. The scratches and punctate wound on his right shoulder are from animal claws. There is no dilation of the anus.

g. Doctor Spitz suggested that the predators responsible for the wounds might be roaming dogs, cats, racoons, etc., although he would have to know more about the animal life in the area to be more definite.[39] (*See* Affidavit of Dennis Riordan, Exhibit A to Petitioner Damien Echols's Motion for a New Trial, CR 93-450A)

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[39] Ryan Clark, the brother of Steve Byers, has submitted a declaration attesting that on a number of previous occasions he had taken alligator snapping turtles out of the very area where his brother's body was found submerged. (See Declaration of Ryan Clark, attached hereto as Exhibit Volume 3, Exh. X)

5. Subsequently, on November 27, 2006, Dr. Spitz issued a written report essentially restating the conclusions he had verbally reported on September 22, 2006. (Exhibit Volume 2, Exh. L) The report reiterated Dr. Spitz's verbal findings as elicited during the September 22, 2006 telephone conference. Thus, among other things, the November 27th report stated:

a. Most of the injuries suffered by the victims, including emasculation of Christopher Byers (331-03), [photographs, 00003 001 and 00072 001] were due to anthropophagy, *i.e.*, inflicted postmortem by large and small animals, including marine life.

b. None of the injuries were caused by a knife, specially the serrated hunting knife depicted in photograph P5211548. Wound characteristics of those injuries that were suspected to have been caused by a knife are compatible with animal claws and teeth and inconsistent with the dimensions and configuration of the knife [00004 001, 00067 001, 00071 001, 00072 001, all crime scene & evidence 1396 and 1398].

c. The large area with scattered irregular lacerations on Steven Branch's (330-93) left cheek was likely the result of bites by large animals and claw marks on a background of abrasion from licking off of emanating blood and tissue fluids [00012 001, 01169 001, steviesideface, ear2] .

d. As to Christopher Byers (331-93), obvious claw marks are noted on both sides of the anus, predominately on the left side, with straight, parallel scratches [00004 001, 00071 001]. The anus does not appear distended, dilated, traumatized or in any way abnormal. The penis and scrotum were ripped and chewed off postmortem [00003 001, 00072 001]. The edges are irregular and

ragged without evidence of bruising, which indicates they were not cut or skinned by a knife.

e. Injuries on Michael Moore's (329-93) scalp resemble stab wounds [01163 001, 00084 001], yet widely abraded without underlying fracture [and] are inconsistent with knife wounds, and similar injuries on Christopher Byers' (331-93) scalp are unabraded resembling stab wounds [00083 001], but also without underlying bone damage. Further, what appear to be four circular paw marks, arranged in a semicircle are noted below the inferior edge of the laceration and two superficial scratches are noted in the same area against the upper edge of the wound.

f. Michael Moore (329-93) has obvious claw marks on the right side of the chest [all crime scene & evidence 1396, 1398].

g. Clawing injuries are irregularly spaced [00004 001, 00071 001, all crime scene & evidence 1396, 1398].

h. "After consideration of all the injuries, it is my conclusion based on my education, training and experience and also having previously seen these kinds of injuries, that these 3 boys were mutilated by animals postmortem, when in the water and that none of these cases resulted from satanic ritualistic activity. My textbook, *MEDICOLEGAL INVESTIGATION OF DEATH*, 4th edition, published by Charles C. Thomas, Springfield, Illinois, 2005 discusses many of the issues in this letter in greater detail."

6. Subsequently, in early December 2006, counsel for Echols participated in a telephone conference with Dr. Ophoven at which they further discussed her findings and conclusions

concerning the victims' injuries. During this conference, Dr. Ophoven adhered to and elaborated on the animal predation theory she had previously described in May 2006. (Exhibit Volume 2, Exh. J)

7. In December 2006 and early 2007, Mr. Echols' counsel retained other reputable forensic experts to secure their opinions and test the validity of the animal predation theory adopted by Drs. Ophoven and Spitz. These experts included forensic pathologists Dr. Michael Baden, the former Chief Medical Examiner of New York City and presently the chief forensic pathologist for the New York State Police as well as Dr. Vincent Di Maio, author of Forensic Pathology, who is widely considered one of the profession's guiding textbooks and who is the former medical examiner of San Antonio, Texas.

3. Dr. Richard Souviron

8. To further explore the predation theory, Mr. Echols's counsel also retained two reputable forensic odontologists, *i.e.*, experts in the identification of human and animal bite marks. These experts were Dr. Richard Souviron, Chief Forensic Odontologist at the Miami Dade Medical Examiners Department (Exhibit Volume 2, Exh. O), who was instrumental in the state of Florida's successful murder prosecution of Ted Bundy in 1979; and Dr. Robert Wood (Exhibit Volume 2, Exh. Q)

9. Like Drs. Ophoven and Spitz, all the newly retained experts were supplied with relevant photographs and documents relating to the case, including the autopsy reports, the testimony of state pathologist Peretti, and the arguments of counsel.

10. After reviewing the relevant case materials, Drs. Baden, Di Maio, Souviron, and Wood independently concluded that apart from the blunt force injuries to the head, most of the injuries to the skin of the victims — *i.e.*, the hundreds of gouges, punctures, lacerations,

abrasions, and scratches — were not caused antemortem by the use of a knife, but instead were the post-mortem product of animal predation. Animal predation rather than use of a knife also accounted for the severe genital injury to victim Christopher Byers. In addition, the experts all concluded that none of the victims exhibited injuries consistent with sexual abuse such as anal penetration or oral sex. (Exhibit Volume 2, Exh. M)

11. On January 11, 2007, Dr. Souviron issued a report (Exhibit Volume 2, Exh. P) in which he stated, *inter alia*, that:

> a. Photographs 1B, 3B and 4B all depict injuries to the left side of the face of Steve Branch. These V-shaped cuts in the cheek, the tearing of the flesh and mutilation observed in these photographs is consistent with animal activity and more likely than not in my opinion with an aquatic creature. The mutilation appears to be postmortem. Photograph #3 B shows intra oral injury to the mucobuccal fold and to the upper and lower lip area. These injuries in my opinion are perimortem. Photograph #2 B shows the right side of Steve Branch's face. There are scratches and gauges in this area consistent with animal activity...Photograph #4 B is an extreme[] close up with the words "potential bite mark evidence" written on the photograph. This is consistent with my opinion that this is postmortem bite mark activity left by animals more likely than not, turtle activity or some other aquatic animal. None of the marks on the face of Steve Branch in my opinion are consistent with having been caused by a serrated knife.

b. The mutilation suffered by Chris Beyers was documented photographically. My evaluation is directed to the inner aspect of the upper legs (right and left), the groin and buttocks area.

Photographs 1C, 2C, 4C and 10C depict overall and close up of the pubic mutilation, scrapes and scratches to the inner aspect of the both legs, all around the pubic area. The genitals are missing. From the photographs, the mutilation appears to be post mortem activity especially to the inner aspect of the left leg. This injury is consistent with animal activity. Especially when the overall photograph 1C is compared with the close up. None of these marks are consistent with a knife when all of the photographic evidence is taken into consideration.

Photographs 7C, 8C and 9C depict the groin area and inner aspect of the legs photographed from the feet towards the head. The victim is on his back. There is perimortem and postmortem animal activity. None of these linear abrasions in my opinion are made by the serrations from the knife-Exhibit 77. The scratches and openings in the tissue are consistent with postmortem animal activity. The mutilation of the groin area is also consistent with animal activity-postmortem.

Photographs 3C, 5C and 6C depict the buttocks, anus and inner aspect of the legs. The victim is lying on his stomach and the photographs were taken from above looking down. The scratches are consistent with animal claws and appear to be both peri and postmortem. None of these scratches are from the serrated knife in my opinion.

12. In February of 2007, counsel for defendants Echols, Baldwin, and Misskelley met with prosecutor Brent Davis in Jonesboro, Arkansas, to discuss various issues relating to the status of the state post-conviction proceedings, including DNA proceedings, in the cases. At that meeting, and in addition to addressing other matters, counsel for defendants informed Mr. Davis of the consensus view among several defense experts that, putting aside injuries to the victims' heads, post-mortem animal activity rather than pre-mortem criminal acts caused virtually all of the wounds to the victims' flesh. In this connection, defense counsel proposed that counsel for the parties convene a future meeting, to be attended by defense experts as well as state forensic pathologist Peretti, at which expert views on the forensic issues, and the reasons for them, might be exchanged in a consultative rather than adversarial atmosphere. Mr. Davis agreed to consider the proposal. (Exhibit Volume 2, Exh. M)

13. On March 9, 2007, counsel for defendant Echols wrote a letter to Mr. Davis restating the defense proposal for a collaborative meeting addressing the merits of the animal predation theory. In the course of the letter, counsel identified six different points on which the predation theory, if accurate, would, in the defense view, undermine the validity of the verdicts at the defendants' 1994 trials. (See a copy of the letter from Echols to Davis dated March 9, 2007, attached hereto as Exhibit Volume 3, Exh. Y)

4. Dr. Vincent Di Maio

14. In verbal reports to counsel for Mr. Echols during March and April, 2007, Dr. DiMaio observed that there was absolutely no evidence of use of knife on any of the three victims, and that the severe genital injuries to Christopher Byers were the result of post-mortem animal activity, as was the injury to the face of Steve Branch. Michael Moore also exhibited

wounds which appear to be caused by animal activity and inflicted post-mortem. Dr. Di Maio had observed similar trauma caused by rats or turtles.

15. Dr. Di Maio further stated that the dilation of an anus is normal post mortem condition and does not indicate trauma. The discoloration of the tip of the penis of one victim was likely caused by the way he was lying in water, laying against something, and has no significance. Returning to the mutilation of Chris Byers, Di Maio noted that fish can be "very selective." Based on his experience in Texas, Di Maio described how fish can eat a hole in the armpit of a victim and eat all of the internal organs. He also discussed waterborne rodents. He believed that the scratches in evidence are claw marks. As a result, he believed that some of the scratches may have been caused by rats. (Exhibit Volume 2, Exh. J)

5. Dr. Robert Wood

16. On May 6, 2007, Dr. Wood also completed a written draft report on his findings. (See Exhibit Volume 2, Exh. M) Some of Doctor Wood's findings are as follows:

a. The nature of the emasculation of Byers

> The genital injuries to Byers are most likely the result of post mortem animal activity. The idea that these could have been made with the survival knife is in the range of unlikely in the extreme to impossible...
>
> It is clear from the post mortem photographs that the penis has not been "cut" at all. What has occurred is not a sharp-force dissection but rather a de-gloving of the skin of the penis and scrotum. De-gloving of the skin of the penis is not uncommon and has been reported on many occasions in the medical and forensic literature. Looking at what remains of the genital area of Byers, it appears that the residual material left is comprised mostly of the corpus

cavernosum. The corpus remained because of the anatomy of the genital region of the male. The corpus has a dense fibrous capsule around it and along its superior surface is the suspensory ligament that attaches the penis to the pelvis. It is this suspensory ligament that is cut in penile lengthening surgery because this allows the corpus of the penis and the penis itself to be separated from the anchoring bone. The scrotum and connective tissue surrounding the shaft of the penis are separable from the corpus itself. This has been described frequently in the literature:

D'Alessio, et al, Figure 1 "Reconstruction in Traumatic Avulsion of the Penile and Scrotal Skin." Annals of Plastic Surgery 9(2) pp 120 -122, 1982.

Zanettini, et al, Figure 1 "Traumatic degloving lesion of penile and scrotal skin. Int Braz J Urol 31(3); 2620263, 2005.

Stephan, et al, Figure 3 in "Care of the Degloved penis and scrotum: A 25 year Experience. Plastic and Reconstructive Surgery 104 (7) pp 2074-2078, 1999.

Paraskevas, et al, "An extensive traumatic degloving of the penis. A case report and review of the literature. Int J Urology and Nephrology 35: 523-527, 2003. In Paraskevas et al, see Figure 1 and the case report that describes "complete de-gloving of the penile skin and partial avulsion of he scrotal skin with total concomitant revealing of the corpus cavernosa and the corpus spongiousum was observed."

McAninch, et al, "Major Traumatic and Septic Genital Injuries" The Journal of Trauma 24(4): pp 292-297. 1984.

Rashid, et al, "Avulsion injuries of the male external genitalia: classification and reconstruction with the customized radial free forearm flap. Brit J f Plastic Surgery 58 pp 585-592, 2005. See in Rashid, et al, the quote "Although it is not uncommon for the penis alone to be totally lost, the majority of cases have accompanying loss of the scrotum, the testis, the perineal urethra or occasionally all three."

Wilhlemson, et al, "Avulsion Injury of the Skin of the Male Genitalia: Presentation of two cases." Md State Med J. 27(4) pp 61-66, 1978. Wilhlemson

et al describe two patients with complete avulsion of the skin of the penis and either laceration to or almost complete avulsion of the skin of the scrotum.

From a review of the above-the cited literature it seems reasonable to assume that the penis was not cut off but that the penis and scrotum were degloved, leaving the corpus cavernosum and the suspensory ligament in place. Most ante mortem degloving injuries occur as a result of industrial or farming accidents, not from sharp-force trauma. The typical causative event is the "take-off injury" where a pant-leg is caught on a drive shaft and the victim is "wound-up" the rotating drive shaft with resultant tearing away of the penile and scrotal skin. However there are at minimum at least three citations in the literature that document genital injuries from animal bites including a case report of post mortem castration by a dog.

Romain et al, "Post Mortem Castration by a Dog: a Case report." Med Sci Law 42(3): 269-271.

Gomes et al, (Figures 3 and 4 a) "Genital Trauma due to animal bites" the Journal Of Urology 165 pp 80-83, 2000.

El-Bahnasawy et al "Paediatric penile trauma." Brit J Urol. 90: 92-96, 2002.

Examination of all of these articles shows that traumatic degloving of the penis is relatively common and does occur with similar loss of scrotal skin. The State's scenario that a knife was used to "cut the penis and testicles off" would seem highly unlikely since the resultant degloving injury is more in keeping with something pulling at the penis and scrotal skin and their contents; that the corpus has been retained [] as it is in de-gloving injuries and that the wounds around the penis are quite shallow. [Dr.] Peretti describes them as being ¼ to ½ inch deep. There is little information in the literature about purposeful cutting off of the penis

but we can gain some knowledge of how penises are typically cut off by examining two articles:

Marneros et al "Self amputation of penis and tongue after use of Angel's Trumpet." Eur J Psych Clin Neurosci 256: 458-459, 2006.

Stunell, H. et al Genital self-mutilation. Int J of Urol. 13: 1358-60, 2006.

In both these cases when the genitals were cut they were cut through the corpus – i.e., they were not degloving injuries as seen in Byers but rather transverse sectioning by a sharp instrument across the corpus and removing of the corpus itself.

An additional finding is the presence of what appear to be post mortem animal tooth marks on the inner thighs of Byers that can be seen directly (bi)lateral to the genital excavation and the presence of what appear to be claw markings on the buttocks of Byers. The former can be readily seen on ACSE photo 276 and the latter on ACSE photo 233. The notion that the parallel broad lines on the left buttock of Byers could have been made by the survival knife is nonsensical.

b. The Survival Knife and the Markings on the Para-genital and Buttock Region of Byers

Examination of the para-genital region of Byers reveals markings consistent with post mortem animal activity. There are obvious post mortem linear scratch marks on the inner right thigh and three parallel claw marks on the left buttock. None of these markings are attributable to the serrated portion of the survival knife.

c. The Facial Markings on the Left Side of Branch

Close examination of the cleaned face of Branch photo ACSE 123 reveals that there is a large number of apparent injuries. On one count I noted in excess of 125 separate injuries. The injuries include avulsion (noted over the left anterior and posterior horizontal ramus of the mandible), puncture marks that were very fine and small in size and linear scratch marks. Most of these marks are in an area with confluent sub-epithelial bleeding. Most are completely inconsistent with knife wounds due to their small size and apparent lack of depth. It would be extremely unlikely that any person could stab anything more than a hundred times with a knife and exert enough pressure to break the skin but not so much pressure that a knife or other stabbing instrument would not carry further into the deeper tissues. There is not a great deal of documentation on these injuries, likely because of their number, however[,] it is my opinion that they represent post mortem animal activity in the form of feeding or markings from being thrown through or coming to rest on "brush." There is not enough individualizing detail to ascribe these marks to one particular species of animal however many of the longer linear marks behind the left ear, on the nape of the neck and below the ear are consistent with claws of a small mammal. Additionally although the autopsy report notes that the right ear showed multiple confluent contusions and abrasions, this is not visible on the materials I viewed.

d. Fellatio as a Cause for the Auricular and Facial Markings

It has been documented that forced or vigorous fellatio has been associated with intra-oral injuries – mainly on the soft palate and this presumably from the

glans of the erect penis impacting on the palate or from oral suction. This has been mentioned in the scientific literature on at least 4 occasions.

Worsaae, et al, "Oral Injury by fellatio." Acta Derm Venerol, 58(2):187-188, (1978).

Schlesinger, et al, "Petichial hemorrhages of the soft palate secondary to fellatio."Oral Surg Oral Med Oral Pathol 40(3): 376-378, (1975).

Van Wyk "The oral lesion caused by fellatio. Am J Forensic Med Pathol 2(3):217-219, 1981.

Bellizzi, et al "Soft palate trauma associated with fellatio: case report." Mil Med 145(11):787-778, 1980.

There is no literature describing any pathognomic signs of facial injuries from forced fellatio.

[Dr.] Peretti specifically mentions that there were no intra-oral injuries but attributes the auricular and the injuries to the lips and anterior face to forced fellatio. Computer literature searches of the National Library of Medicine and the National Institutes of health NCBI of the "pubmed" database reveals no articles linking acts of fellatio to injuries of the lips, face or ears.

To be sure Branch has trauma to his lips – albeit likely post mortem trauma but the injury to his ears are grossly disproportional from right to left. If [Dr.] Peretti is assuming that a perpetrator grasped the ears of Branch to force their penis into his mouth, then the forensic evidence does not support this. The injury to Branch's right ear is very slight compared to the left. There were no recorded intra-oral lesions and the puncture marks on Branch's nose, lips and cheeks could not be caused by a penis. They had to be caused by something small and pointed – like animal teeth or claws.

There is no damage to the left ear of Moore. There is swelling of the lips and small cuts (see photo ACSE 070). The nose of Moore is covered with very small linear abrasions. There appear to be some very fine small linear abrasions behind the left ear. None of these abrasions are consistent with finger marks or fingernail marks and none can be attributed to the act of forced fellatio.

Byers has two small abrasions on the helix and lobe of his right ear and three very small puncture marks on the cartilaginous portions of the left ear. The lips of Byers appear to have cut marks – likely self-bites and there is hemorrhage in the deep connective tissue of the buccal sulcus anteriorly in the upper and lower. Byers too has markings on the nose and small facial cut marks. None of these markings can be attributable to forced fellatio.

The bruises of the lips of Byers and Moore are far more likely to have occurred from an impact injury such as a slap or punch than to have been made by an erect penis.

6. Meeting with the Arkansas State Crime Lab and Medical Examiner

17. Counsel for the defendants and Mr. Davis ultimately agreed to convene a meeting to discuss the forensic issues described above. The meeting was scheduled for the morning of May 17, 2007, at the Arkansas Crime Lab and Medical Examiner's office in Jonesboro, Arkansas, at 10:30 a.m. On May 15, 2007, in advance of the meeting, Michael Burt, counsel for defendant Misskelley, on behalf of all three defendants, wrote a letter to Dr. Peretti that both identified the experts who would attend on behalf of the defendants and stated the defense's expert consensus concerning the post-mortem animal predation theory. (See a copy the letter from Burt to Peretti dated May 15, 2007, attached hereto as Exhibit Volume 3, Exh. Z)

18. The May 17th meeting was attended by forensic pathologists DiMaio and Baden and forensic odontologists Souviron and Wood, Dr. Peretti, the state's pathologist, counsel for both the state and the three defendants, as well as other members of the prosecutorial and defense teams. Dr. Peretti began the May 17th meeting by describing how he proceeded in conducting the autopsies of the three victims of the homicides. Subsequently, the defense experts described their views concerning the nature and cause of the victims' injuries, including those such experts attributed to post-mortem animal predation. Dr. Peretti listened to the defense presentation and, at the conclusion of the meeting, stated that he would give further consideration to the defense experts' views. Dr. Peretti also stated that he would review the medical examiner's case files covering the previous ten years to determine whether the office had previously recovered bodies found submerged in water that might have suffered animal predation, and that such information would be made available to the defense. In addition, Dr. Peretti and Mr. Davis agreed to produce tissue slides containing extracts of tissue from the victims for the review of the defense experts. (Exhibit Volume 2, Exh. M)

19. On June 25, 2007, Mr. Davis wrote a letter to defense counsel addressing both the forensic issues discussed at the May 17th meeting and the ongoing DNA testing of items recovered from the crime scene and the victims' bodies. As to the former, Mr. Davis provided information concerning the transmission of the promised tissue slides. Mr. Davis also stated that the medical examiner's office was compiling information from files involving victims found submerged in water that suffered animal predation for production to the defense team. (Exhibit Volume 2, Exh. M)

20. On July 10, 2007, counsel for defendant Echols responded to Mr. Davis's June 25, 2007 letter. As to the forensic issues raised in the June 25th letter, Echols's counsel requested

that the crime lab send the tissue slides to Dr. Spitz. Counsel also expressed gratitude for the crime lab's willingness to review the agency's files to determine what, if anything, they disclosed concerning previous incidents of possible animal predation. Counsel noted the relevance of, and sought information concerning, any incidents suggesting predation while victims were out of, as well as submerged under, the water, and expressly sought information concerning all such incidents. (See a copy of the letter from Echols to Davis dated July 10, 2007, attached hereto as Exhibit Volume 4, Exh. AA)

21. Responding to further instructions from Mr. Davis, defense counsel transmitted payment for the victim tissue slides to the Arkansas crime lab on July 24, 2007. The crime lab transmitted the slides to defense expert Werner Spitz on September 7, 2007. (Exhibit Volume 2, Exh. M)

22. In the meantime, counsel for defendant Echols concluded that, for purposes of the present filing, it would be useful to seek a final opinion from an additional forensic pathologist concerning the nature and causes of the injuries to the three victims in this matter. In early September, 2007, counsel contacted and retained forensic pathologist Terri Haddix of the Stanford Medical School faculty and Forensic Analytic Sciences, Inc. (See Terri L. Haddix's curriculum vitae, attached hereto as Exhibit Volume 2, Exh. R) Counsel provided Dr. Haddix with essentially the same background and case material as had been provided to other defense experts. Counsel refrained from disclosing to Dr. Haddix any of the opinions reported by other defense experts, including the theory that post-mortem animal predation caused most of the victims' injuries.

23. On October 4, 2007, in a further effort to identify specific areas of agreement and/or disagreement between defendants on the one hand and the state of Arkansas on the other, counsel

for defendant Echols sent a letter to Dr. Peretti setting forth specific questions concerning his position on the forensic issues that had been discussed at the May 17th meeting. (A copy of the letter from Echols to Peretti dated October 4, 2007, attached hereto as Exhibit Volume 4, Exh. BB; see also Exhibit Volume 2, Exh. M)

24. On October 5, 2007, counsel for defendant Echols transmitted to Dr. Peretti a journal article on postmortem anal dilation which had been identified counsel's October 4, 2007 letter to him. (Exhibit Volume 2, Exh. M)

7. Supplemental Report of Dr. Werner Spitz

25. On October 12, 2007, Dr. Spitz issued a supplemental report in which he discussed his review of the tissue slides transmitted to him on September 7, 2007. In that report, Dr. Spitz determined that evidence disclosed by the slides was consistent with the post-mortem animal predation theory the defense experts had previously discussed with Dr. Peretti. The report states, inter alia, that:

> Subcutaneous hemorrhage was found in Byers 331/93 slides numbered 1 and 17 and in slide number 2 with no name, labeled: AR State Crime Lab RC1
>
> Ten (10) microphotographs are enclosed. These illustrate disruption of tissue, bacterial growth, early decomposition, and foreign bodies of vegetal and possibly some of insect origin.
>
> The presence of these foreign bodies in the depth of the tissues, without evidence of hemorrhage, indicates that they were introduced into the tissue after death, most likely by repeated bites by large carnivorous animals, consistent with the appearance of the injuries on the body surface as documented in the postmortem photographs.

(Exhibit Volume 2, Exh. N)

8. Dr. Terri Haddix

26. On October 22, 2007, Dr. Haddix issued an interim report on her findings concerning the victims' injuries. (Exhibit Volume 2, Exh. S) In that report, Dr. Haddix, like the other defense experts, found that post-mortem animal predation had been responsible for the vast majority of the injuries to the skin of the victims, including the genital mutilation of Christopher Byers. Specifically, and among other things, Dr. Haddix reported that:

a. Each child has evidence of abrasions and contusions about the ears as well as perioral/intraoral injuries. Dr. Peretti opines that these injuries are "generally seen in children forced to perform oral sex" (transcript Echols-Baldwin trial, Bates stamp 1826). He further acknowledges that these injuries can result from a number of other mechanisms including punches, slaps and obstructing objects (e.g. hands, gags). The injuries in these areas are not in isolation, but often in proximity to other injuries. In consideration of the extensive blunt force injuries sustained elsewhere on the heads of these children, I do not think a specific mechanism (e.g. forced oral sex) can be assigned to any reasonable degree of medical certainty.

b. Anal dilatation is found in all three children. In some portions of the transcript this finding is included in the discussion of various injuries. Dr. Peretti acknowledges that this finding can be entirely attributed to postmortem relaxation. Further, he does not describe evidence of anal injury in any of the autopsy reports. Anal dilatation is a common postmortem finding and, in fact, has been studied (*Am. J. Forensic Med. Pathol.* 17(4): 289-298, 1996). Venous congestion

was also a common finding in this study. Accordingly, there is no objective evidence of anal penetration in these cases.

c. Injuries due to a serrated blade in each child are described in the transcripts of Dr. Peretti's testimony. The specific injuries include the diagonal injury on the right upper chest of Moore [ ], an injury on an extremity of Branch[ ] and associated with the genital and thigh injuries of Byers [ ]. With regards to the injuries on Moore attributed to a serrated blade, my first and enduring impression is that these injuries more likely reflect abrasions produced by dragging along a roughened surface. The abrasions and contusions are typical of those I have encountered in people who have slid across a roughened surface (e.g. motor vehicle collisions). With regards to Branch's injury stated to have been a possible consequence of a serrated blade, I cannot find that this injury is documented in Dr. Peretti's report and therefore the location and dimensions of this injury are unknown. Similarly, I cannot find a description of this patterned injury in Dr. Peretti's report of Byers' autopsy. Although I am unable to determine which photograph represents exhibit 73C [of the Echols trial exhibit], I cannot find an injury in all of the submitted photographs from this autopsy that demonstrate a purported injury of this nature on Byers' inner thighs.

d. The injuries on Byers' buttocks, specifically the "cuts," photographically appear to represent abrasions rather than sharp force injuries. I think these injuries are also most compatible with dragging. In the discussion of the perianal injuries [ ], Dr. Peretti notes that "You have all this bleeding here in the soft tissues." Photographically there is not convincing evidence of

hemorrhage into the tissues. An incision in this area (and subsequent photographic documentation) would have helped clarify this issue.

e. Sharp force injuries are described in Branch's left facial area. I think these are postmortem injuries (possibly attributable to animal depredation), superimposed upon antemortem injuries. The close-up photographs of the "cutting" injuries, which were described as entering the mouth, show characteristics which are not typical of injuries produced by a sharp edged implement. Specifically, the edges of the wounds are irregular and not cleanly incised and tissue bridges are evident within the depths of some of the wounds. As these injuries extend into the left side of the neck, I would expect to see some indication of hemorrhage within the anterior neck, rather than the described absence of abnormalities in [quoting Dr. Peretti's autopsy report] "[the] soft tissues of the neck, including strap muscles, thyroid gland and large vessels . . ."

f. The sharp force injuries of the genital region and thighs in Byers' autopsy are remarkably similar in appearance: " . . . extensive irregular punctate gouging type injuries measuring from 1/8 to ¾ inch and had a depth of penetration of ¼ to ½ inch." Hemorrhage is noted to be associated with some but not all of these injuries. These injuries also do not have the cleanly incised edges that are typical of injuries inflicted by a sharp edged implement. Additionally the skin surrounding this area has a yellow, bloodless appearance which is typical of postmortem abrasions. I believe the genital and thigh injuries are most compatible with postmortem animal depredation. That these are postmortem injuries would also account for the absence of blood on the banks of the creek

where it was suggested in the transcript that this injury was inflicted prior to death.

g. A diagonal injury on Branch's left thigh was described as a patterned impression in the autopsy report. In his testimony (Echols-Baldwin trial, Bates stamp 1839-1840), Dr. Peretti described this area as a contusion attributed to an impact with some object. Again, photographs of this area do not clearly demonstrate the presence of hemorrhage and it is not clear why this was not described as a contusion initially. An incision (and subsequent photographic documentation) would have helped clarify this issue.

h. Curiously, Dr. Peretti states in his testimony (Echols-Baldwin trial, Bates stamp 1845) that there are postmortem injuries, however this is not further pursued either in direct or cross examination.

27. As of the date of filing the present petition, defense counsel has received no information from the Arkansas crime lab on past cases involving corpses submerged in water (or any other information). (Exhibit Volume 2, Exh. M)

28. As of the date of filing the present petition, Dr. Peretti has provided the defense with no response to the questions on forensic issues set forth by counsel for defendant Echols in the letter to Dr. Peretti sent on October 4, 2007. (Exhibit Volume 2, Exh. M)

C. Counsel Was Ineffective For Failing to Consult With Qualified Experts to Prepare for Cross Examination of Peretti, and to Call Such Experts to Rebut Peretti's Testimony

Dr. Peretti was the prosecution's main witness on the physical evidence and the manner in which it corroborated Petitioner's confession as to how the murders supposedly took place. Peretti's testimony corroborated Petitioner's eventual statement to police that the boys had been

repeatedly raped, had been held by their ears during forced oral sex, and that Byers had been the victim of a deliberate castration with a knife.[40] These were the main details on which the prosecution relied to demonstrate that Petitioner did not falsely confess under police pressure. Yet, as the above reports from several forensic experts show, none of these details were true. Without the corroborating physical evidence, Petitioner's outlandish story, full of inconsistencies, would not likely have resulted in his conviction. Counsel was therefore prejudicially ineffective for failing to expose Peretti's faulty science and uninformed conclusions, and for failing to put on its own witnesses to rebut Peretti's unsubstantiated claims.[41]

The Eight Circuit has noted that "[s]erious dereliction in counsels representation might well be established where material witnesses are not called to testify....For example, if an expert witness could readily verify that 'blood' was actually 'paint,' counsel might be deficient in failing to pursue such a witness." *Knott v. Mabry*, 671 F.2d 1208, 1212 (8th Cir. Ark. 1982)(discussing *Miller v. Pate*, 386 U.S. 1, 87[knowing use of false evidence – blood that was actually paint stain – violated due process clause].) "Where there is substantial contradiction in a given area of expertise, it may be vital in affording effective representation to a defendant in a criminal case for counsel to elicit expert testimony rebutting the state's expert testimony. *Id.* at 1212-1213 (*citing Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) [denial of funds to secure pathologist to evaluate cause of death].) "Counsel's failure to become versed in a technical subject matter in order to conduct effective cross-examination or failure to properly seek and

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[40]Though Peretti said that the cutting injuries could have occurred with a piece of glass or knife, Petitioner's statement to police mentioned only a knife.

[41] See ABA Guideline 5.1A.v. and Commentary, *supra*, note 30.

produce witnesses at trial may constitute a constitutional flaw in the representation of a defendant in a particular case." *Knott,* at 1213.

In *Knott*, the Court found no ineffective assistance of counsel for failure to consult with an expert to prepare for cross-examination the state's arson expert because counsel had a strategic reason for doing so: counsel chose to expose the weaknesses of the expert's testimony in laymen's terms rather than focus on technical, scientific details that might be less meaningful to a jury. The opposite is true in the present case. Counsel had no tactical reason for failing to hire a forensic pathologist as a rebuttal witness as well as a consultant to prepare for cross examination of Dr. Peretti.

As a result, Petitioner was deprived of his right to effective assistance of counsel and to qualified scientific experts. *See, e.g, Stouffer v. Reynolds* , 214 F.3d 1231, 1234 (Colo. 2000) (upholding finding of ineffective assistance where, among other things, Petitioner's trial counsel failed to apply for funds to hire experts to examine the opinions of the State's expert witnesses, resulting in an "inability to develop the defense theory through cross-examination of the State's witnesses...").

Petitioner has provided ths court with several exhibits and summarized testimony of six forensic experts who all agree that not only was there no anal penetration or evidence of forced oral sex, but the skin injuries, including those to the ears and lips, as well as the Byers castration, were the result of animal predation. These consensus findings completely undermine the prosecution's case because they directly contradict Petitioner's story of how the murders occurred and they negate any suggestion that the killings were "cult related." Because the scientific basis for these findings was available at trial, counsel was ineffective in failing to consult with a forensic pathologist who could rebut the state's expert's theories on the cause of

the injuries to the victims.

Further, because Peretti's testimony was the most significant and substantial evidence to corroborate the details of Petitioner's confession, counsel's deficient performance prejudiced Petitioner. Petitioners statement was the only proof the prosecution had to connect him to the murders. The details of that confession were outlandish and difficult to believe. When coupled with Petitioner's young age and his mental deficiencies, the statement, standing alone, would not likely have been enough to convict him. Peretti's testimony made Petitioner's bizarre statement believable because Peretti's opinion tracked the details of the statement. Among other things, Perretti corroborated that the boys had been held by their ears during forced oral sex; that the Byers boy was castrated with a knife; that the victims had anal dilation that could have resulted from insertion of an object; that Steve Branch's face had multiple "cutting wounds."

During closing arguments, both District Attorneys seized on Peretti's testimony as proof Petitioner's guilt. The prosecution relied on this testimony to argue that Petitioner's confession was not false, because the physical evidence confirmed details relayed by Petitioner that no one else supposedly knew: castration, facial cuts, and forced oral sex. Each deputy district attorney argued that Petitioner's confession had to be true because Petitioner confessed to seeing the "castration" of Christopher Byers – a detail that allegedly no one else knew about. (RT 1741, Bates 2246; RT 1777, Bates 2283) For example, Fogleman said to the jury that:

> [Petitioner] describes details that only a person that is there could possibly know, and I don't care what he says. He can say it was newspaper articles or what else. But you can read in that statement that he described the castration of that particular boy. That is a fact that only someone who was there would know.

(RT 1777, Bates 2283)

Davis capitalized on Peretti's theories that Steve Branch was deliberately and extensively cut in the face, and that the ear injuries to the boys resulted from holding their ears during forced

oral sex. He argued: "...the other two individuals forced them to perform oral sex on them and grabbed them by the ears...[and] ...[Petitioner] described the cutting on the side of one boy's face, those are facts that only a person that was there would know." (RT 1777, Bates 2283) Further, Davis used Peretti's testimony to discredit the defense argument that Petitioner's confession had to be false because his story of forced sodomy was completely inconsistent with the evidence:

> Then [Petitioner] goes on and says, '...there's no evidence that the victims were sodomized.' Well, if you'll recall the Doctor's testimony was that in all three instances there was anal dilation. That there were abrasions and bruises about the buttocks and the anal rectal area... .

(RT 1779, 2285)

Also, in arguing for the death penalty, Davis again asked the jury to focus on Petitioner's "confession that gives details that only this defendant could know," and argued that the defense used smoke and mirrors to "make it sound like a person that confesses to such heinous crimes and...gives you specific details of the involvement," was forced to confess. (RT 1796, Bates 2302)

Even the Supreme Court recognized the importance of Peretti's testimony when, after discussing the "confusing amalgam of times and events" that comprised Petitioner's confession the court noted:

> However, there were portions of the statements which were consistent with the evidence and were corroborated by the state's testimony and exhibits. The victims had been seen riding their bicycles. The medical examiner testified that the boys had been severely beaten. Two of them had injuries consistent with being hit by a large object. One of the boys had facial lacerations. The Byers boy had indeed been severely mutilated in the genital area. All the boys had injuries which were consistent with rape and forced oral sex. There was evidence that drowning contributed to the deaths of the Moore and Branch boys, but not the Byers boy. This is consistent with the appellant's statement that the Byers boy was already dead when he left the scene...

Misskelley v. State, 323 Ark. at 461.

In light of the extent to which Petitioner's conviction hinged on Peretti's testimony, prejudice necessarily resulted from counsel's failure to consult with forensic experts. Counsel's deficient performance prejudiced Petitioner's case because the prosecution's case was not subjected to "meaningful adversarial testing," and there was, accordingly, a total breakdown in the adversary system which is prejudicial per se. (*United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). Further, had counsel (1) consulted with forensic experts regarding the cause of the injuries to the victims, (2) utilized those experts to prepare for adequate cross-examination of Peretti, and (3) put such experts on the stand to rebut the state's forensic theories, a reasonable probability exists that the result at trial would have been different. *Strickland*, 466 U.S. at 694.

VII. COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE PERETTI'S QUALIFICATIONS AND THEORIES ON THE MANNER IN WHICH THE INJURIES OCCURRED.

Notwithstanding counsel's failure to hire an expert to aid in his preparation for the Peretti testimony, counsel was also deficient for failing to challenge Peretti's qualifications as an expert, as well as his substantive testimony.[42]

A. Counsel Conducted No Voir Dire.

First, as with *all* of the state's scientific experts, counsel conducted no voir dire of Peretti. This decision was not tactical. Rather, defense counsel was unaware of the value of conducting voir dire, and did not therefore utilize this process to present weaknesses in the expert's

[42] *See* ABA Guideline 5.1A.v.: Lead counsel must be "familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence . . . "; and Commentary to Guideline 5.1.A.v.: " . . .verdicts and sentencing decisions in capital cases often turn upon the submission by both the prosecution and defense of evidence from expert witnesses. Eligible trial attorneys should therefore be adept at using expert evidence to the advantage of the client, and at cross-examining prosecution witnesses."

education, background and training, and to cast doubt on the scientific basis for the proposed testimony. (Exhibit Volume 1, Exh. D)

Counsel missed an important opportunity. Peretti testified that he did not complete his training in forensic pathology until 1989, though he did not state whether this was at the beginning, middle, or end of that year. (RT 813, Bates 1313) He then worked in Maryland, conducting medical legal autopsies until he went to work in Arkansas in 1992. Thus, Peretti did not have extensive experience in forensic pathology and had been working in the field as a licensed professional for less than five years at the time of Petitioner's trial. Nonetheless, counsel failed to inquire into the number of autopsies he had performed, how many of those included apparent murder victims, how many were children, or how many included sexual assault victims, etc. Nor did counsel confront Peretti with any of the above cited literature that existed at the time, which would have cast doubt on his qualifications as an expert – particularly with his fitness to render a opinions about the degree to which certain injuries may or may not indicate signs of sexual assault and mutilation.

B. Counsel Did Not Challenge The Scientific Basis For Peretti's Opinions

In this same vein, counsel did not challenge Peretti's testimony under *Prater v. State*, 307 Ark. 180 (1991) or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) regarding the methodologies by which Peretti arrived at his conclusions regarding cause of death, mechanism of injury, and evidence of sexual assault. As we now know from the extensive new forensic analyses reviewed above, the methods Peretti employed to arrive at his theories of forced oral sex and deliberate castration – to the extent that he had any methods – were scientifically unsound.

C. Counsel Failed to Exercise Due Diligence in Seeking from Peretti the Opinions That the Murders Could Have Occurred in a Different Location and That the Byers

Castration Required Surgical Skill and Precision.

The Supreme Court found that counsel failed to conduct effective cross examination on two points that would have demonstrated the falsity of Petitioner's confession. Specifically, counsel failed to elicit from Peretti the facts that (1) the lack of blood at scene meant that the victims may have been murdered in a different location than Robin Hood Hills, and (2) the castration of Byers would have required skill and precision. *See State v. Misskelley*, 323 Ark. at 478. The Supreme Court denied Petitioner a new trial because trial counsel failed to elicit this testimony:

> The appellant used due diligence in seeking opinion from Peretti regarding time of death. The same cannot be said of the other evidence. The evidence regarding the use of the knife and the scene of the murders was brought out in Baldwin/Echols trial on vigorous cross-examination. The appellant has not shown that, prior to his conviction, he could not have discovered such evidence.

Id.

Counsel's failure fell below an objective standard of reasonableness. As demonstrated at the trial of Baldwin and Echols, effective cross-examination of Peretti on these points would have elicited testimony favorable to defendants.

D. Counsel Was Ineffective For Failing to Cross Examine Peretti on Several Other Issues

As discussed in Claim above, counsel failed to conduct any meaningful cross examination on the testimony that Peretti freely provided, without objection by the defense. Peretti's direct testimony filled 37 pages of transcript, (RT 814-849, Bates 1314-1349), while Counsel's cross examination filled three. (RT 850-851, Bates 1350-1352) While counsel established that there was no evidence of semen in the oral or anal cavities and that there was no trauma to the anuses of the boys, he did little to undercut Peretti's unsubstantiated findings that, among other things, the ear injuries resulted from holding or pulling of the ears during oral sex,

that the mouth injuries resulted from forced oral sex, and that "there was no evidence of drowning in Chris Byers." (RT 847, Bates 1347) These and other deficiencies described herein rendered counsel ineffective in cross-examining Peretti.

E. Counsel's Deficient Performance Prejudiced Petitioner

Counsel's deficient performance prejudiced Petitioner's case because the prosecution's case was not subjected to "meaningful adversarial testing," and there was, accordingly, a total breakdown in the adversary system which is prejudicial per se. *(United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). Further, counsel's deficiency meets the *Strickland* standard of prejudice. Because the veracity of Petitioner's confession was the most significant question of fact at trial, any opinions or facts that were inconsistent with Petitioner's statements to police would have supported his defense that he falsely confessed. Had the jury heard that the murders may have occurred in a different location, that the castration of Byers would have required unusual skill and precision, and that Peretti's methods and conclusions were scientifically unsound, a reasonable probability exists that the result at trial would have been different.

VIII. COUNSEL WAS INEFFECTIVE FOR FAILING TO CONSULT WITH AND UTILIZE A CRIMINAL PROFILER OR CRIME SCENE RECONSTRUCTIONIST

Though counsel recognized the need for consultation with a criminal profiler, counsel nonetheless failed to retain one. Counsel spoke with at least one retired FBI criminal profiling experts and learned that he could not afford the retainer fees. (Exhibit Volume 1, Exh. D) Counsel did not ask the Court for funding for this expert because he did not believe the court would award such funds. As shown below, the evidence would have been exculpatory, and

Petitioner was prejudiced by its absence.[43]

Recently, the nation's top criminal investigative analyst reviewed this case. John Douglas is the former FBI Unit Chief of the Investigative Support Unit of the National Center for the Analysis of Violent Crime ("NCAVC") in which he both served and headed for 25 years between 1970 and 1995. (See Curriculum vitae of John Douglas, attached hereto as Exhibit Volume 4, Exh. CC) He is probably the country's leading expert in criminal investigative analysis, and has performed an analysis of these charged murders. (See John Douglas' analysis dated May 5, 1993, attached hereto as Exhibit Volume 4, Exh. DD) While all of Douglas' analysis and conclusions are relevant and necessary to Petitioner's claim, Douglas' final conclusions are stated here for the Court's convenience:

> The offender acted alone and was familiar with the victims and the geographical area. He will in fact have a violent history in his past and future. The offender was not a teenager at the time of the homicides. The crime demonstrated criminal sophistication and knowledge not observed in previous and very rare cases in which teens were subjects in multiple homicides (i.e., school shootings). There was no evidence at the scene or in the way that the victims were murdered that this was some Satanic-related type of crime. This was a personal cause driven crime with the victims dying from a combination of blunt force trauma wounds and drowning. What was believed at the time to be some type of Satanic ritualistic mutilation upon victims we know from forensic experts was in fact caused as a result of animal predation.

(Exhibit Volume 4, Exh. DD at 18-19)

Had counsel followed through on his original intention to hire the retired FBI criminal analyst with whom he spoke, counsel would have obtained similar information to that which Douglas recently reported. Counsel's omission prejudiced Petitioner because this evidence would have shown that Petitioner in no way fit the profile developed by Douglas: Petitioner was

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[43] See, *supra,* note 30.

teenager with no criminal sophistication who did not know the victims. He was at complete odds with the profile of the likely perpetrator. Had the jury heard such evidence, they would have been more disposed to rejecting Petitioner's confession and voting for acquittal. *See, e.g., State v. Spann*, 513 S.E. 2d 98, 100, 334 S.C. 618, 622 (1999)(criminal profiler's testimony that appellant did not fit profile of serial murderer "raised a reasonable inference as to appellant's innocence").

Further, as Mr. Stidham testified at the Echols' Rule 37 hearing, regardless of whether a criminal profiler's testimony itself was admissible, consultation with a criminal profiler would have, and eventually did after the conviction, led Mr. Stidham in the direction of retaining other pertinent experts, such as forensic pathologists, crime scene reconstuctionists, forensic odontologists, and forensic entomologists. As Stidham also testified, and as his Affidavit and attached email of February 1998 demonstrates, consultation with these additional experts led Stidham in the post-trial phase of this case to the very animal predation theory which undermines the reliability of Petitioner's confessions and the state's entire case against Petitioner. (See, Declaration of Dan Stidham and attached email, attached hereto as Exhibit Volume 1, Exh. D).

IX. COUNSEL FAILED TO PROPERLY CHALLENGE, CROSS EXAMINE, AND REBUT THE STATE'S FIBER EVIDENCE.

Trial counsel for Petitioner was ineffective for failing to adequately challenge and rebut the state's fiber evidence.[44] At trial, the state had no physical evidence connecting Petitioner to the scene. The best it could do was attempt to connect Baldwin and Echols to the scene and did so with the flimsy "scientific" evidence presented by Criminologist Lisa Sacevicius. According to Sacevicius, she found fibers on the crime scene evidence that were "microscopically similar" to fibers found in the homes of Echols and Baldwin. Specifically, she testified that she found (1)

a single red rayon fiber on a polka dot shirt belonging to one of the victims, that was "microscopically similar" to a red housecoat found in Baldwin's home (RT 1013, 1016, Bates 1514, 1517); (2) a green polyester fiber from a cub scout cap that was microscopically similar to a shirt in Echols' house (RT 1014, 1016, Bates 1515, 1517); and (3) a green polycotton fiber on one of the victim's blue pants that was microscopically similar to the shirt in Echols' house. Counsel for Petitioner committed a four-tiered error that prejudiced Petitioner with regard to Sacevicius' testimony.

First, counsel failed to challenge Sacevicius' testimony under *Prater v. State*, 307 Ark. 180 (1991) or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Had counsel adequately prepared for this testimony and objected to it, the fiber evidence would likely have been excluded. First, Sakevicius did not adequately document her work. (Exhibit Volume 5, Exh. BBB) Further, the record shows that counsel had information necessary to conduct a challenge to the actual testing and methodology employed by Sakevicius in this case. In chambers, counsel made an *in limine* motion to exclude the evidence on relevance grounds; he explained that he had consulted with an Alabama criminologist who said the "hair" was not long enough for scientific analysis, and it did not have significant characteristics to permit a comparison (RT 799-800, Bates 1299-1300); however, due to inexperience with litigating scientific evidence, counsel did not object on *Daubert* grounds or request a hearing on that basis. (Exhibit Volume 1, Exh. D)

Second, counsel failed to conduct voir dire of Sacevicius before her direct examination. This decision was not tactical. Rather, defense counsel was unaware of the value of conducting voir dire, and did not therefore utilize this process to present weaknesses in the expert's

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[44] See, *supra*, note 30.

education, background and training, and to cast doubt on the scientific basis for the proposed testimony. (Exhibit Volume 1, Exh. D)

Third, counsel failed to effectively cross examine Sacevicius on her findings. Importantly, counsel did not elicit from Sacevicius that the fibers she compared were very common and could be found in the majority of households: In the Echols/Baldwin trial, Sacevicius agreed that there were insufficient unique individual microscopic characteristics to identify the green fiber as coming from the shirt, which in fact was blue in color. (EBRT 1474, 1477; Bates 2257, 2260) She also testified that if a rack of clothes at Walmart was made at the same time from the same fiber, a fiber identified as microscopically similar to a garment so manufactured "could have come from one of these other items that was hanging on the same rack." (EBRT 1474-75, Bates 2257-58) Counsel failed to elicit any such testimony.

Counsel undoubtedly would have been able to establish that the finding of "microscopically similar" fibers at the scene and at the Echols and Baldwin homes was meaningless given the Walmart hypothetical. Such testimony would have done far more to discredit the value of her findings than the testimony that counsel actually elicited: that "microscopically similar" does not mean the sample "definitely" came from the questioned source, and that Sacevicius could not "exclude all other sources." (RT 1018, Bates 1519) The testimony that counsel *should* have elicited was far more powerful and significant: not only could Sacevicius not exclude *all* other sources, but the possible "other sources" were so numerous that the match was essentially meaningless. Again, the decision not to thoroughly cross-examine on this point was not tactical, but rather, resulted from counsel's inexperience with litigating scientific evidence.

Finally, defense counsel failed to call an expert to rebut Sacevicius' testimony. While

defense counsel had consulted with an Alabama criminologist who opined that at least one of the fibers did not have enough ascertainable characteristics to conduct a scientifically valid analysis, counsel did not follow through on this lead and failed to call this expert to testify. As such, Sacevicius' testimony that fibers found at the scene of the crime essentially matched samples found in the co-defendants' homes was allowed to stand unrebutted. The prosecution was able to place Echols and Baldwin at the scene and thus, once again, presented evidence to corroborate Petitioner's confession.

The above omissions, taken singly or together, resulted in prejudicial error. Had Sacevicius' testimony been undermined by utilizing well-established, long-standing trial practices, the prosecution would have had no physical evidence connecting Baldwin or Echols to the scene. Thus none of the parites implicated in Petitioner's confession would have had any demonstrable connection to the scene. Because the fiber evidence served to corroborate Petitioner's otherwise unreliable confession, a reasonable probability exists that the result of the trial would have been different had the fiber evidence been effectively litigated.

X. COUNSEL WAS INEFFECTIVE FOR FAILING TO PREPARE FOR AND CHALLENGE THE SEROLOGY AND DNA EVIDENCE.

Counsel rendered prejudicial ineffective assistance when he did not move to exclude the serology and DNA evidence that was ultimately entered in this case and when he otherwise failed to challenge and effectively litigate the evidence when it did come in. Counsel failed to prepare to litigate this evidence by hiring competent serology and DNA expert to help challenge the admissibility of this evidence and to prepare for adequate cross-examination of the state's expert, and/or to present expert rebuttal testimony. Counsel's failure to meaningfully consult with serology and DNA experts or otherwise become competent on the subject was deficient; counsel was completely unfamiliar with litigating scientific evidence and had no experience with

the complicated nature of DNA testimony. (Exhibit Volume 1, Exh. D)

When counsel learned from prosecutor John Fogelman that there was DNA evidence linking the victim Michael Moore to Petitioner, he applied to the court for funding for a DNA expert. He withdrew that funding request before it was ruled upon immediately after he learned from Mr. Fogelman that the DNA evidence did not link Petitioner to Michael Moore. He did not consider whether a serology or DNA expert could assist with the alleged evidence of semen on two pair of wet, muddy pants (Exhibits 45 and 48) which belonged to two of the victims in this case. He had no tactical reason for not consulting a serology or DNA expert about the semen. (Exhibit Volume 1, Exh. D).

The serology and DNA evidence became a centerpiece of the state's argument that there had in fact been a sexual assault of the victims, thus supposedly verifying Petitioner's confession. (Misskelley RT 1759- 1760/Bates 2264-2265)(Fogelman argument); (Misskelley RT 1779/Bates 2285)(Davis rebuttal). But when trial counsel finally got around to consulting with a DNA expert in the post conviction phase of this case he quickly learned that there were major problems with the DNA evidence. (See, Affidavit of DNA Expert Marc Scott Taylor, filed as part of trial counsel's post-conviction Motion to Preserve Evidence and for Access to Evidence, attached hereto as Exhibit Volume 5, Exh. XX).[45] Moreover, because trial counsel failed at trial and even

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[45] Mr. Taylor stated in his affidavit:

I am aware that there was testimony to the effect that semen was detected on patches of clothing cut out by a State Criminalist. However, according to the information provided to me, the tests performed on the clothing could in no way lead to a conclusion as to the presence or absence of semen. The testing performed by the State Criminalist will identify any of a variety of stains by their non-specific fluorescence. The stains removed were further tested by the staff of Genetic Design laboratory. The testing performed at Genetic Design is simply a technique to give an estimate of the quantity of human DNA extracted from a sample, and this testing is known to have low levels of nonspecific activity such as what was seen in the sample at issue. This testing cannot give any information as to the source of the DNA or that it originated from a biological fluid such as semen. Specific tests are available to make this determination and superior procedures are available currently. Further testing would permit a defensible and scientifically valid determination of the presence of semen and, if present, its origin.

post-conviction to request the bench notes of either the state's serology or DNA experts, trial counsel failed to uncover that the problems with this evidence identified by Mr. Taylor in 2000 only scratched the surface of the many flaws in the serology and DNA evidence. In fact, as will now be demonstrated, such evidence was wholly unreliable and should never have been admitted in evidence at either the Misskelley trial or the Echols/Baldwin trials.

A. The False and Misleading DNA and Serology Evidence Presented at Both Trials

At both the Misskelley and Echols/Baldwin trials the state presented the testimony of serologist Kermitt Channell and DNA analyst Michael DeGuglielmo in an attempt to show that there was sperm on Evidence Exhibits 45 (described as blue pants) and Exhibit 48 (described as blue jeans). (Misskelley RT 1030-1050/Bates 1530-1551; Echols RT 1323-1397/Bates 2103-2180), These pants, wet and muddy, had belonged to two of the victims and had been retrieved from the drainage ditch when the bodies were discovered. (Echols RT 901-904, 920/ Bates 1681-1684, 170). In the Misskelley trial, this testimony became an important part of the state's final argument, with Mr. Fogelman arguing that

> Now if you'll recall Kermit Channell from the crime lab said that on–in his tests–on the little boy's pants that *he ran screening tests ran one screening test and it came back positive–positive for semen. He ran a second screening test–positive for semen.* He looked under a microscope and the pants are all muddy and everything and he couldn't see any sperm but he had these two positive tests for semen. So he sent those cuttings from the pants to Genetic Design in North Carolina and that was the man from North Carolina. *And what did he tell you? We boil it all down -- if I can boil it down -- he tells you that in his opinion the DNA that he foundfrom those cuttings was from sperm.* Did he see any sperm? No. Because he doesn't look at things under the microscope. His are DNA tests. He says they ask - Mr.Stidham said, "Are you saying positively that there is sperm there?" He said, "Well, no, you can never say positively unless you look under a microscope and are able to see it. But if I had done that it would have used up part of the sample and we were trying to preserve the sample." But with his opinion, with the test that he ran, if you'll remember there's the epithelial -- what he calls the fractions -- and the male or sperm fractions. Remember the way he was describing *how*

> *you split out the two and you've got more than one suspect and you split it out so you'll be able to divide them up?* The epithelial fraction is the non-male fraction. If it's something other than sperm it's going to show up in that -- like blood. Well, when you got the DNA test back and the epithelial back, nothing. No DNA. *On the male fractions-- the sperm fractions -- it was positive for DNA and he stated that in his opinion that this indicated the presence of sperm on those pants.*

(Misskelley RT 1759- 1760/Bates 2264-2265)

Mr. Davis reinforced this point in rebuttal, arguing that "the DNA guy said that there was DNA consistent as coming from a source of male sperm on the pants of one of the boys." (Misskelley RT 1779/Bates 2285). The same point was made in rebuttal in the Echols/Baldwin trial, with the state arguing that "there was testimony that there was a DNA source consistent with semen found on the pants of one of the children. And Mr. Ford indicated that there was no evidence of that."

As is demonstrated in the attached affidavits of forensic serologist Dr. Patricia Zajac and DNA expert Dr. Donald Riley, the testimony upon which the state relied to make these arguments was false and misleading, and the arguments themselves misconstrued and distorted the false evidence that had been presented by the serology and DNA experts. (See, Affidavit and C.V. of Dr. Patricia Zajac, with attached reports and bench notes of Channel and DeGuglielmo, attached hereto as Exhibit Volume 4, Exh. EE and EE-1 and EE-2; Affidavit and C.V. of Dr. Donald Riley, attached hereto as Exhibit Volume 4, Exh. FF and FF-1. As Dr. Zajac summarizes, "[t]estimony and arguments at trial expanded and enhanced the results beyond the scientific conclusions of 'no semen was found' to state that the stains were semen and the DNA was from sperm. This was misleading to the jury and scientifically unfounded and incorrect." (Exh. EE). See also, Affidavit of Dr. Donald Riley, Exh FF ("In his closing argument (Misskelly case) the prosecutor stated, 'Now if you'll recall Kermit Channell from the crime lab said that on-in his

tests-on the little boy's pants that he ran screening tests ran one screening test and it came back positive-positive for semen. He ran a second screening test-positive for semen.' These statements misrepresent and overstate Mr. Channell's testimony. As a summary of Mr. Channell's testimony 'positive for semen' couldn't be much more misleading. This was at least a serious scientific failure.")

At both trials, Mr. Channell did in fact testify that he ran two presumptive tests for semen and got positive results. The two tests he identified as positive were the laser "test" and the acid phosphatase test. (Misskelley RT 1031-1033/Bates 1532-1534; Echols RT 1032/1533) However, as Dr. Zajac explains,

> "22. First, Mr. Channell stated, and closing arguments reiterated, that he conducted two (2) screening tests of the items for presence of semen: laser and Acid Phosphatase (AP). He further stated the stains were sent to Genetic Design for "more sensitive DNA" testing. This is most misleading to a jury and scientifically wrong:
>
> 22.1 Laser is not a screening "test" or presumptive test, but merely an extension of visual examination for possible locations on garments to further examine. Nowhere in the protocols is there mention that the laser is a screening test.
>
> 22.2 The AP is a presumptive test, meaning that it is a screening "test" and not conclusive for presence of semen. There were no substrate controls analyzed on these items to indicate possible contaminants which might also cause a "positive" for AP on Item 45. This was very important, especially since this substrate control gave a positive for P30. The "very faint" AP results on Item 48

cannot be considered a positive test for semen.

22.3 There was a third test that was negative for semen: microscopic exam for spermatozoa.

22.4 There was no mention in the arguments of the specific P30 test which, although was positive on the stains, was also positive on the substrate control, meaning the stains gave a "false positive."

22.5 There was no mention in testimony that the report of Serologist Channell stated "no semen found on any items." Serologist Channell had a professional responsibility to clearly state to the court and to the jury that his tests showed "no semen."

23. Although the DNA testimony said human or higher primate DNA on these items, the fact remains that no semen was identified by the tests and the report from Genetic Design does not support this testimony or the arguments. This is not only grossly misleading to the jury, but scientifically incorrect and without scientific foundation. There were no test results to support this conclusion. In fact, to the contrary: results showed no semen. The DNA report states that these samples "could not be amplified due to inhibition," and that there were "no results."

(Exh EE).

As Dr. Zajac further explains, on review of Mr. Channel's lab notes, which were not disclosed to the defense prior to trial, "the items 45 (Q-10) and 48 (Q-6) were examined visually and with laser light. Subsequently, areas on the left and right thigh of item 45, and the back and front of item 48 were tested for the possible presence of seminal stains with the presumptive test

for Acid Phosphatase (AP). These stains were further examined microscopically for the presence of spermatozoa (sperm) and electrophoretically for P30 (an antigen specific to the male prostate)." (Exh. EE).

As Dr. Zajac further explains, "On Item 45, Serologist Channell obtained a positive AP result, negative for spermatozoa, and positive P30. However, the background control on this item also was positive for P30. *Therefore, there can be no conclusion as to possible presence of semen.*" (Exh. EE). The background control sample is identified in Mr. Channell's notes as a "false positive." (Exh EE-2). This note was never disclosed to the defense and the term "false positive" was nowhere used in Mr. Channell's testimony. See, Misskelley RT 1031/Bates 1532 ("I ran a [P30] test on these items ..., and I got a positive reaction. However, in the course of my work I also ran control samples which also gave me a similar reaction. Based on that, I concluded there could possibly be something in the material or in the mud that was interfering with my testing. Therefore, I submitted those items also to Genetic Design where they could employ DNA testing which is a more sensitive technique."); Echols RT 1323-1397/Bates 2103-2180 ("I did have some positive controls along with my cutting samples, which indicated to me that there could be some interaction with the material that was hindering me with getting a proper answer, uh - therefore, I had to conclude that I could not determine based on my testing that semen was present and because of that reason, I then took those cuttings and submitted them also to Genetic Design where they could employ DNA testing, which is far more sensitive then my testing.")

As Dr. Zajac further explains, "[t]ests for AP on Item 48, 'back' were negative and this stain was not examined further. The stain on the front gave a 'very light' reaction for AP, and negative for sperm. The P30 test on this stain was positive; however, the background "control" (unstained area, indicated as "mud") also was positive for P30. *The 'very light' AP reaction is*

not considered a 'positive' test for semen. AP is present in low amounts in other biological materials and high amounts in semen. Therefore, there can be no conclusion as to possible presence of semen." (Exh. EE). Mr. Channell's notes describing the "very light" reaction on the AP test were never disclosed to the defense. Further, Mr. Channell never disclosed in his testimony that the reaction on the AP test was "very light" or the implications of this finding. Instead, he said in both trials that he got a positive reaction on his AP test. See, Misskelley RT 1033/Bates 1534 ("The second part of the analysis is an acid phosphatase test, which is again a screening test to see if the item that I am testing possibly can contain semen, and that test was also positive."); Echols RT 1328/Bates 2109 ("Actually, I ran the laser screening test, and also the acid phosphatase as a screen....These reactions were positive.")

A further misleading aspect of Mr. Channell's serology testing and testimony is explained by Dr. Zajac as follows:

> 15. There are no notes that appropriate standards, negative reagent controls, or substrate controls (background) were analyzed along with these stains for Acid Phosphatase. This is an essential part of the testing procedure: Standards would be known semen, as well as other body fluids, to determine strength of reactions for proper interpretation. Negative reagent controls would be "blanks" of chemicals used in the tests to be sure there is no contamination. Substrate controls, as mentioned above, would be the background (mud in this case) to determine if there is contaminating or interfering substances.
>
> 16. Since the background controls on both items 45 and 48 gave positive results for P30, it is most likely that had these background controls been analyzed for AP, they also would have been positive for Acid Phosphatase, since P30 is more

specific and AP is a more general presumptive test.

17. Serologist Channell correctly stated in his report of 06/01/93 that "no semen was found on any items."

(Exh. EE)

Although Mr. Channell may have correctly stated in his report that "no semen was found on any items", this statement in his report was never brought to the attention of the jury through cross examination at either trial.

Regarding the DNA testing at Genetic Design, Mr. DeGugglelmo falsely testified at an admissibility hearing in the Misskelley case that "[t]he initial information that we were given on this was that they were, what I guess would best be phrased as potential seminal stains." (Misskelley RT 999/Bates 1499). However, the transmittal letter dated May 19, 1993 from Channell to Genetic Design (Exhibit EE-2) does not document the presence of any seminal stains, and as noted above, Channell's report of June 1, 1993 states: " "no semen was found on any items".

Mr. DeGugglelmo also misleadingly stated during the admissibility hearing and repeated in both trials that

> In any potential sexual assault specimen where the possibility exists for mixed specimens we use what is called a differential extraction. The purpose there is to separate sperm and nonsperm components from other material. So we can try to elucidate which type was attributed to which component...In this particular quantitation with this case those two items [Exhibits 45 and 48] show a very small, marginal amount of DNA on the *male fractions* of those two items of evidence.... The ...thing I can tell you is the two fractions that come from that are

what we refer to as epithelial, or nonsperm, and male, or sperm fractions, because they represent in the prototypical sexual assault case the sperm cells from a male contributor and epithelial cells from a female contributor. *What we would expect to see is anything other than sperm cells in the epithelial or nonsperm portion* .

In this particular case we detected no DNA in the epithelial or nonsperm portion of those two samples *and a very small amount of DNA in the male or sperm portion of those two samples, the interpretation from that being that there likely was a small amount of sperm present on those garments.*

Misskelley RT 999-1002/Bates 1500-1503).

What Mr. DeGugglelmo did <u>not</u> explain is what is common knowledge among all competent forensic DNA analysts. As explained in Rudin and Inman, <u>An Introduction To Forensic DNA Analysis</u> (2d. ed. 2002),

> The result of a differential extraction is two tubes, one containing DNA all or mostly from sperm and the other containing DNA all or mostly from the non-sperm cells. Due to the nature of the sample, seperation of the non-sperm cell DNA from sperm cell DNA may not always be complete. For example, if the sperm is in poor condition, some sperm cells may have already popped open, releasing their DNA prematurely. Because the method of seperation depends upon initially intact sperm cells, some of this free sperm DNA may show up in the final non-sperm cell fraction. *Alternatively, in a mix of many non-sperm cells and just a few sperm, some non-sperm cell DNA may persist among the sperm and may be detected in the final sperm fraction.*

(Id. Ch. 6)(emphasis added). See also Id. Ch 7 ("[S]eparation is not always entirely successful, and some non-sperm DNA may leak into the sperm fraction or some sperm DNA may end up in the non-sperm fraction.")

Because "some non-sperm DNA may leak into the sperm fraction" it was misleading in the extreme for DeGugglelmo to testify that because his DNA quantiation test found a "marginal" level of DNA in a "sperm" fraction it must mean that the DNA came from sperm.

The testimony was especially misleading since, according to Channell's report, "no sperm

But DeGugglelmo's testimony is scientifically inaccurate on a more fundamental level. As explained by Dr. Zajac,

> 18. Sections of the stains from Items 45 and 48 were subsequently sent to Genetic Design, Inc., for DNA testing. In the letter dated May 9, 1993, these stains were listed as "questioned stain." *Handwritten notations next to these two items state "? Poss. Bacterial in nature."* Per the report from Genetic Design dated July 13, 1993, the test results of these two stains were stated as: "DNA isolated from the blue jeans items Q6 and Q10 could not be amplified due to inhibition." The Appendix #1 listed results of these two stains as *"no result."*
>
> 19. There were no "bench notes" (analyses notes) from Genetic Design indicating what samples were actually analyzed. There is no mention or notes that substrate controls from the items were analyzed along with the stains. Given the previous P30 false positive results on the background "mud," it was imperative that the background be tested for the DNA (it is imperative in any protocol, but even more so in this instance).
>
> 20. It is my opinion that whatever contaminant in the background gave the false P30 also gave the AP results on Item 45, the "very faint" AP results on item 48, and the weak DNA results for both items. These clearly do not indicate the presence of semen.

(Ehh. EEE).

Dr. Riley's affidavit supports the affidavit of Dr. Zajac and indicates a number of additional flaws in the serology and DNA testimony in this case. First, he agrees with Dr. Zajac

about the misleading nature of Channell's testimony about the laser "test": "These lights can be used to locate stains on material but there are many biological and non-biological substances that will glow under these lights. Virtually all biological material including human tissues, plants and microbes contain molecules that fluoresce. To name a few, the amino acids tyrosine, tryptophan and phenylalanine, widely present in biological materials fluoresce. False positive results when using alternate light sources to search for semen have been documented. Urine, saliva and other materials will glow under alternate light sources. Mr. Channell may have been unaware of the wide range of materials that fluoresce. In any case, he seemed aware that the alternate light source was not specific for semen. In my opinion, he resisted the implication he found semen, but failed to adequately inform the court and the jury of this fact." (Exh. FF)

Dr. Riley also agrees with Dr. Zajac about the misleading nature of Channell's testimony about the acid phosphatase test:

> The second screening test performed was acid phosphatase. While it is true semen has acid phosphatase, many other tissues have this enzyme including at least 16 different acid phosphatases. Microbes expected to be present in drainage water have the enzyme as well. In handwriting on his letter/report of 5-19-93 is the note: "poss. bacterial in nature." This referred to the cuttings Q6 and Q10 questioned stains from the blue jeans. This indicates to me that bacteria may have been identified during microscopic examination. Presence of bacteria and other microcrobes in muddy drainage water is certainly expected.
>
> A weak positive acid phosphatase test is by no means definitive for semen. Acid phosphatase is widely recognized as only presumptive and not confirmatory of presence of semen.

(Exh. FF)

Dr. Riley also agrees with Dr. Zajac about the misleading nature of Channell's testimony about the P30 test: "Another test performed was p30, sometimes referred to as PSA (prostate specific antigen). Mr. Channell indicated that his substrate control reaction was also positive. This completely nullifies results from the putative stain. No conclusions can be drawn when the

substrate control is positive." (Exh. FF) He continues: "Since non-scientists are untrained in the importance of controls, false positive results, nonspecificity and other scientific issues, Mr. Channell really needed to go the extra mile to emphasize these points in order to prevent the misunderstanding or misuse that occurred." (Id.)

Dr. Riley also addresses DeGugglelmo's testimony that his " marginal" finding of DNA on his quantitation test supported an inference that any DNA was present in the samples. He explains:

> At the Misskelly trial, Mr. DeGuglielmo testified that he found a very small, marginal amount of DNA in the "male fractions" from the pants. At the Echols/Baldwin trial, referring to the same samples according to my reading, he is more specific stating it was 50 picograms. According to manufacturer's recommendations for the test kit he was using this was well below margin. Confirming sample insufficiency (perhaps combined with or exacerbated by inhibition) he did not get a usable result.

Dr. Riley further explains on this issue, incorporating the findings of the Bode STR analysis report attached hereto as Exhibit EEE,

> The most sensitive tests applied were the microscopic examination and PCR (polymerase chain reaction)-based tests. Mr. Channell testified that a PCR-based test called DQ alpha was applied and they were unable to get a result. In still another analysis, in their report of 12-30-05, the Bode Technology group reported they obtained no result from the "SF" fraction (abbreviation for "sperm fraction" again referring to the method used not factual presence of sperm) of the pants cutting 2S04-114-25. This referred to a PCR-based test using the commercially supplied PowerPlex 16 kit. Thus, the three most sensitive tests applied, to the best of my knowledge, failed to yield any evidence of sperm or sperm DNA. Therefore, a microbial source for the very small amount of DNA in Mr. Channell's original Quantiblot test seems a more viable explanation than the presence of sperm.

(Exh. FF)

Dr. Riley further explains why DeGugglelmo was scientifically inaccurate in testifying at the admissibility hearing and at both trials that his DNA quantitation test ("Quantiblot") was

human or primate specific:

> Mr. DeGuglielmo also testified that the quantitation procedure he used was specific for human or primate DNA. This is simply not established. The product insert for the Quantiblot kit that he used cites non-primate species that were tested. The only microbes listed were E. coli and an unspecified yeast species. E. coli and yeast certainly do not represent the microbial world and it unreasonable to suggest they represent the microbial life present in muddy water. Moreover, the insert suggests that the Quantiblot system will give results with non-primate species they tested at the level of 0.15 nanograms or less. The 0.05 nanograms found in the instant cases is obviously less. Again, a microbial explanation is plausible.

(Exh. FF)

Finally, Dr. Riley exposes in detail the fallacous and misleading nature of DeGugglelmo's testimony that he found a "marginal" amount of the DNA in the "sperm" fraction, thus indicating that the DNA came from sperm:

> At the Misskelly trial, Mr. DeGuglielmo testified that he found a very small, marginal amount of DNA in the "male fractions" from the pants. At the Echols/Baldwin trial, referring to the same samples according to my reading, he is more specific stating it was 50 picograms. According to manufacturer's recommendations for the test kit he was using this was well below margin. Confirming sample insufficiency (perhaps combined with or exacerbated by inhibition) he did not get a usable result.
>
> Mr. DeGuglielmo's testimony strongly implies that since this amount (very near the vanishing point) of DNA showed up in the sperm or male fraction, that was evidence of semen. This was incorrect for several reasons:
>
> 1. No sperm were found by microscope.
> 2. The term "male fraction" is a misnomer. The term refers to the method used. When no sperm are present, the term male fraction unfortunately remains the same. The term " male fraction" is highly misleading when no sperm are present. Some laboratories use less prejudicial terms such as E1 and E2 fractions to avoid misleading the jury.
> 3. While Mr. DeGuglielmo seemed convinced that appearance of a small amount of DNA in the "male fraction" instead of the female fraction was evidence of semen, this conclusion was unreasonable for reasons that follow.
>
> > The male fraction preparation begins when a chemical called DTT is added to the DNA extraction procedure. This is done because the membranous-protein outer layer of sperm cells is held together in part by disulphide bonds (two sulphur atoms bonded together forming a bridge

between proteins). DTT disrupts those bonds allowing the release of the sperm DNA.

Unfortunately, Mr. DeGuglielmo seemed unaware that disulphide bonds are also involved in the membranous-protein layer of diverse microbes. There are many thousands of microbial species in nature including virtually countless species of bacterial, fungi and other organisms. Microbes with disulfide laden membranes are expected to behave like sperm in the extraction procedure Mr. DeGuglielmo used. Since no sperm were observed, the microbial explanation is plausible.

The foregoing demonstrates beyond any doubt that the state's serology and DNA evidence and argument at both trials was false and misleading and that there is no support whatsoever for a cental tenet of the state's case against all three defendants, namely, that there was sperm or semen found on the pants of two of the victims. Further, it is clear from Mr. Stidham's affidavit that he made no effort before conviction to discover the laboratory bench notes, or to the challenge the admissibility or weight of this evidence. Had he done so the evidence would have been excluded and the entire case against Petitioner would have been undermined.

B. Counsel failed to move to exclude the serology and DNA evidence.

Counsel made no motion to exclude the DNA evidence on the grounds that it was inadmissible under *Prater* and *Daubert*. In fact, attorney Crow waived the issue and conceded the acceptance of the test in the scientific community. (RT 997, Bates 1498) Specifically, the defense counsel failed to recognize that in this specific case, the scientific evidence was the product of a test or methodology of which was not scientifically recognized to identify potential semen stains. Counsel complained instead that the sample analyzed called the results into question, and the court ruled that such concerns go to the weight and not the admissibility of the evidence. Thus, counsel's omission deprived Petitioner of effective representation because the

evidence was subject to exclusion. (RT 997-998; Bates 1498-99)

C. Counsel failed to challenge the serology and DNA evidence and undermine its impact.

Counsel made several omissions in litigating the serology and DNA evidence and his performance was deficient in that regard. *First*, counsel failed to request the bench notes of either Channell or Deguglielmo and thus failed to uncover important exculpatory evidence, as outlined above. *Second*, counsel failed to conduct any voir dire of Channell or Deguglielmo, and thus failed to uncover weaknesses in their training and expertise. This is because counsel was unfamiliar with the common practice of undermining an expert's opinions by highlighting weaknesses and deficiencies in the expert's education, training and experience. (Exhibit Volume 1, Exh. D) *Third*, counsel failed to properly challenge Deguglielmo's substantive testimony regarding the "very small amount of DNA," he found in the stains from the victims' pants, that resulted in "a marginal level of detection for the two sperm fractions." Because the sample was so small, Deguglielmo was unable to amplify it using HLA SQ Alpha technology. So, based on the "small amount of DNA, basically a threshold amount" he concluded that the DNA was from a higher primate and that "small amounts of DNA...were present in the male or sperm portions of the extraction." (RT 1049-50; Bates 1550-51)

Though Deguglielmo admitted that he could not say for certain that the cuttings from the jeans were "sperm stains" because he did not see any sperm under the microscope, he nonetheless testified that he detected "sperm fractions" through the process of differential extraction. These findings were subject to attack in light of the state of the science at the time of trial.

Further, counsel's failure to prepare and hire a DNA expert rendered him incapable of adequately challenging the testimony of crime lab employee Kermit Channel, who supposedly

provided the foundation for Deguglielmo's testimony. While counsel vaguely objected to the scientific basis for Channell's testimony in chambers, (RT 996, Bates 1497), counsel failed to timely renew the objection seek a hearing on the admissibility of the results of Channell's screening tests. As a result, testimony without sufficient scientific basis went to the jury.

Counsel also failed to challenge the evidence that did come in. Channell testified that the first test he ran on the cuttings from the victims pants was "just a basic screening test." The tests employs a laser that "picks up on any material that might glow, and semen is one of them." (RT 1032, Bates 1033) Channell testified that he then conducted the second test which is the acid phosphatase test. Channell explained that this is "a screening test to see if the item...*possibly* can contain semen," and that this second test came back positive. (RT 1032-1033, Bates 1533-1534, emphasis added.) On cross, counsel did nothing to underscore the fact that a positive acid phosphatase test means only that the item tested *may* contain semen, not that it is in fact *positive* for semen. Counsel did not elicit that a positive acid phosphatase test could indicate the presence of something other than semen. Counsel conducted completely ineffective cross examination by failing to highlight the inconclusiveness of Channels' findings. Had counsel prepared for this testimony with the assistance of a DNA expert, he would not have missed this fundamental and important point.

Had counsel retained a serology and DNA expert, he would have learned that Channell reached a conclusion about the presence of semen and had a professional responsibility to so testify, and that the work of Genetic Design was fatally flawed. (Exhibit Volume 4, Exh. EE and Exh. FF, Affidavits of Patricia Zajac and Donald Riley)

Accordingly, counsel failed to properly cross-examined the state's experts and/or call a defense rebuttal witness who could explain why Deguglielmo's conclusions were unreliable, and

Channel's opinions nondispositive. Had counsel not rendered this deficient performance, the jury would have given these experts' opinions little to no weight. However, the opposite result occurred when the prosecution appropriated for its own benefit counsel's serious missteps. In summation, prosecutor Fogelman told the jury that

> ...Kermit Channel from the crime lab said that...in his tests on the little boy's pants...one screening test... came back positive – positive for semen. He ran a second screening test – positive for semen. He couldn't see any sperm but he had these two positive tests for semen.

(RT 1759-60, Bates 2264-65)

Fogelman grossly misstated the evidence, and defense counsel lacked the knowledge to say so. Fogelman also focused on the fact that although Deguglielmo saw no sperm under the microscope, he did separate out "sperm fractions" containing DNA that indicated the presence of sperm. (RT 1760, Bates 2265) Later, Davis rebutted defense counsel's argument that no evidence supported Petitioner's statement to police that the victims were sodomized by arguing "the DNA guy said that there was DNA consistent as coming from a source of male sperm on the pants of one of the boys." (RT 1779, Bates 2285) (*Cf.* Exhibit Volume 4, Exh. EE and Exh. FF, Affidavits of Patricia Zajac and Donald Riley)

Because the DNA evidence corroborated Petitioner's statements that the boys were sexually attacked, counsel's failure to vigorously cross-examine and rebut this evidence prejudiced Petitioner. The circumstances surrounding his confession were highly questionable and its veracity was hotly contested. Any physical evidence corroborating the details of the confession was therefore devastating. Without the uncontested DNA evidence, therefore, a reasonable probability exists that the results of the trial would have been different.

XI. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO INADMISSIBLE EVIDENCE

Counsel failed to raise several objections to inadmissible evidence. These errors, whether considered cumulatively or singly, prejudiced Petitioner.

A. Counsel Failed to Object to Inadmissible Evidence That the Area Where the Murders Occurred Had Been "Slicked Off," and "Watered Down."

Counsel failed to object to testimony by Detectives Ridge and Allen that the area where the bodies were discovered had been slicked off, watered down, and cleaned of debris when no facts were in evidence to establish this and no foundation existed for drawing those conclusions.

Discussing a photograph of the crime scene, Detective Ridge testified that near the slope by the ditch where the bodies were located, there was a "shelf" and "you can see where it appears to be slicked off where something has scooted across the bank or cleaned of debris or whatever." (RT 771, Bates 1271); however, there was no testimony that anyone had "slicked off" the area or had "scooted" something across the bank to clean it. This was pure speculation that assumed facts not in evidence and was completely without foundation.

After defense counsel failed to object, Ridge stated his unsupported conclusions more forcefully. He added, "It looked like it had been cleaned of leaves and debris. This is the area where it looks like it had been slicked off or cleaned off. The grass is embedded in the mud. I don't know what the reason would be other than if you raked your hand across that portion the grass would be embedded in the mud at that location." (RT 771, Bates 1271) Yet, despite Ridge's own admission that he did not "know what the reason would be" for the embedded grass in the mud, counsel still failed to object to his speculation that someone had deliberately cleaned the area. Counsel should have objected to this testimony on the grounds that Ridge was engaging in speculation, was assuming facts not in evidence, and had no foundation for his testimony. Moreover, the answer was non-responsive; the question that proceeded Ridge's discussion was,

"In relation to the surrounding area how did it compare in the amount of leaves?" (RT 771, Bates 1271)

Once Ridge established the speculative "slicked off theory," prosecutor Fogleman adopted it as an established fact, asking him, "Is this the area we have talked about being slicked off?" Thus, the testimony developed from a tentative speculation, that the area had been "slicked off...or whatever," to an established fact in Fogleman's follow-up question. Still, the defense made no objection at this point.

Nor did the defense object when, remarkably, Detective Allen later expanded on the slicked-off theory by stating without equivocation that the flattened area "had been smoothed, like watered down with a hose." (RT 727, Bates 1227) Again, the defense did not object. Thus, with absolutely no evidence that any "slicking off" or "watering down" of the area occurred, the prosecution was able to establish this theory through the speculative, unsupported comments of the testifying officers.

Counsel failures to object to this evidence were highly prejudicial because the "slicked-off" theory was crucial to the prosecution's showing that the crimes occurred as Petitioner said they did – at the scene near the ditch where the bodies were found. Without the theory that someone had watered down the area where the victims were allegedly beaten, cut, stabbed, and even castrated, the prosecution could not explain why *no* blood was found at the scene. Thus, counsel's failure to object to this inadmissible speculation was an omission of significant magnitude. Had the testimony been properly excluded, the defense could have argued with conviction that Petitioner's story to police could not have been true because, if it was, the violence at the scene would have bloodied the area significantly. Without the slicked-off theory, the prosecution had no reasonable explanation for the lack of blood at the scene. Accordingly,

the defense missed another crucial opportunity to demonstrate that Petitioner falsely confessed.

The prosecution, in turn, took full advantage of defense counsel's deficient performance. During closing argument, Fogleman discounted the defense theory that the bloody man in the Bojangles restaurant was the more likely perpetrator of the crimes:

> ...the blood was washed off the bank and the scuff marks.... Do you really believe that a guy is going to go to the trouble of cleaning up the crime scene...and then he's going to walk down through a field to Bojangles Restaurant, a public place, and leave blood all over the place. Give me a break.

(RT 1732, Bates 2237)

Also, Davis argued, "...the person that was in Bojangles –I don't know if they investigated him –whatever happened to him –whatever caused him to be bleeding – that person was not the same person who meticulously cleaned this area..."(RT 1787, Bates 2293)

Thus the prosecution relied heavily on counsel's deficient performance to discredit an otherwise compelling defense – that a bloody, disoriented man seen near the time and place of the murders was a more likely suspect than the three teenagers who were prosecuted. Accordingly, had counsel properly objected to the "slicked off" evidence, a reasonable probability exists that the result at trial would have been different.

B. Counsel Was Ineffective For Failing to Object To Detective Gitchell's Testimony That The Inconsistencies in Petitioner's Confession Resulted From Confusion.

Counsel's performance was deficient for failing to object when Detective Gitchell provided damaging speculative testimony as to why Petitioner often provided the wrong details of the crime during his confession to police. When confronted by defense counsel with the significant inconsistencies in Petitioner's statement, Gitchell stated that Petitioner got the facts of the crime wrong because Petitioner was confused. (RT 948, Bates 1449) However, no question called for his opinion, so his answer was nonresponsive. Moreover, the answer was

speculative; Gitchell could only have guessed the reason why Petitioner provided so many wrong details. Though this testimony was inadmissible, counsel made no motion to strike and to admonish jury.

Counsel's omissions were prejudicial because Petitioner's entire case rested on the theory that he gave the wrong details of the crime because he was not at the scene. The fact that he gave the wrong details was proof that his confession was false. Gitchell, however, established as fact the notion that Petitioner got the details wrong because he was confused. Through Gitchell, the jury was supplied with a reason for what was otherwise unexplainable: a person who was involved in the crimes did not know significant and important details that a participant or a witness *would* have known. As such, without Gitchell's inadmissible comment, the jury would likely have given more credence to Petitioner's false confession defense and reached a different verdict.

XII. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER ARGUMENT AND/OR PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

As discussed below, counsel failed to raise several critical objections during the prosecution's closing argument, thereby waiving those issues on appeal.

A. Counsel failed to object to prosecutor's personal comment on the defense evidence and his personal disparagement of defense counsel.

Counsel should have objected and moved for mistrial when prosecutor Davis committed misconduct by disparaging defense counsel, and stating his personal opinions about the evidence. During his argument that Petitioner's false confession defense was not credible, Davis stated, "Personally, I find it repugnant, with this evidence, that Mr. Stidham would make such allegations. It is the first time I've had to stand up here and deal with a defense attorney claiming that his client lies." (RT 1776-77, Bates 2282-83)

The prosecutor's attacks on defense counsel's ethics and integrity deprived Petitioner of

his Fourteenth Amendment right to due process and his Sixth Amendment right to effective assistance of counsel. A prosecutor acts improperly when making "unfounded and inflammatory attacks on the opposing advocate. " *United States v. Young*, 470 U.S. 1, 9, 105 S.Ct. 1038, 1043 (1985). As the court in *Bruno v. Rushen*, 721 F.2d 1193 (1983), stated,

> ...Neither is it accurate to state that defense counsel, in general, act in underhanded and unethical ways, and absent specific evidence in the record, no particular defense counsel can be maligned. Even though such prosecutorial expressions of belief are only intended ultimately to impute guilt to the accused, not only are they invalid for that purpose, they also severely damage an accused's opportunity to present his case before the jury. It therefore is an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice. [citation] Furthermore, such tactics unquestionably tarnish the badge of evenhandedness and fairness that normally marks our system of justice and we readily presume because the principle is so fundamental that all attorneys are cognizant of it. Any abridgment of its sanctity therefore seems particularly unacceptable.

Id. at 1195 (prosecutor's suggestion that a witness changed her testimony as a direct result of communications with defense counsel constituted error); *see also*; *United States v. Murrah*, 888 F.2d 24 (5th Cir.1989) (reversing arson conviction where prosecutor accused defense counsel of hiding expert retained for trial preparation so that expert could not be called as a government witness); *United States v. McLain*, 823 F.2d 1457, 1462-63 (11th Cir.1987) (finding plain error where prosecutor accused defense counsel of "intentionally misleading the jurors and witnesses and of lying in court").

Here, the prosecution called defense counsel "repugnant" for putting on Petitioner's defense, thereby infringing on Petitioner's Sixth and Fourteenth Amendment rights. Counsel was ineffective for failing to object, move for mistrial, or seek curative instruction. This deficiency was highly prejudicial because the comments struck at the heart of Petitioner's defense and suggested that because Petitioner *and* his counsel were dishonest, the jury should reject

Petitioner's defense.

B. Counsel Failed to Object When Prosecutor Davis Gave Unsworn Testimony That "All Criminal Defendants Do Not Immediately Tell You the Truth."

During closing argument, the prosecutor gave damaging, prejudicial, and unfounded testimony that, "All defendants – all criminal defendants do not immediately tell you the truth." (RT 1779, Bates 2285) There was no such evidence adduced at trial and the comment amounted to testimony by Davis. Moreover, Davis' testimony carried significant weight because the jury was doubtlessly aware that, in his position as a prosecutor, he did in fact have extensive experience with criminal defendants. In that respect, his testimony was akin to expert testimony and would have had significant weight with the jury. "The American Bar Association Standards for Criminal Justice declare: 'It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or guilt of the defendant.'" *United States. v. Modica*, 663 F.2d 1173, 1178 (2nd Cir. 1981)(quoting ABA Standards for Criminal Justice, Standard 3-5.8(b) (1980) "The policies underlying this proscription go to the heart of a fair trial." *Id.* Counsel was ineffective for failing to object to this inadmissible testimony.

Davis' testimony that all criminal defendants do not immediately tell the truth negated Petitioner's entire defense and therefore prejudiced Petitioner. Petitioner's false confession defense focused on the fact that, among other things, Petitioner relayed to the police several incorrect time frames for the murders, and did not arrive at a feasible time frame until much later, after extensive police interrogation. Petitioner raised a compelling point that, if he had actually committed or witnessed the crimes, he would have known that they did not occur in the morning or at noon, but that they occurred at night. He also would have known that the victims were tied

with their own shoe laces, hand to foot, and not tied by their hands only, with brown rope. Further, no one had been choked to the point of unconsciousness with a large stick as Petitioner had claimed. Davis dismissed the importance of the these and other troubling discrepancies when he assured jurors that all in all of his years dealing with criminal defendants, they *never* tell the truth at first. Thus any reasonable doubts that the jurors had about the veracity of Petitioner's confession were likely extinguished with Davis' inadmissible testimony.

The prejudice was compounded when Davis immediately added, "in fact, Mr. Stidham forgets that his very own expert, Mr. Holmes, told you that...in ninety-nine percent of the [confession] cases the defendant is guilty," (RT 1779, Bates 2285) and then repeated the statistic again. (RT 1780, Bates 2286) As discussed more fully below, these comments amounted to misconduct and were based on inadmissible testimony. The combined improper statements by Davis would have squelched any reasonable doubts about Petitioner's confession. Counsel was ineffective for failing to object, move for mistrial, or seek curative instruction.

C. Counsel failed to timely object to Davis' improper argument that in 99 percent of confession cases, the defendant is guilty

Counsel was ineffective for failing to timely object when prosecutor Davis argued to the jury that "in ninety-nine percent of the [confession] cases the defendant is guilty." (RT 1779-80, Bates 2285-86). Rather than object at the time Davis made the comment, counsel waited until the jurors began deliberations, and then moved for a mistrial on the grounds that the prosecution was using the guilt or innocence of other people's to prove the guilt of Petitioner. (RT 1803, Bates 2309). The court denied the motion, stating,

> For several reasons I will deny the motion for mistrial. One, and perhaps the most important reason for denying it is no objection was made at the time. The Court was not given an opportunity, therefore, to rule on the objectionable comment, nor was the court given an opportunity to caution the jury on excessive language that any attorney might use other than the instruction that's given in 101. So your

failure to object at the time in my estimation is a waiver of that objection.

(RT 1804, Bates 2310.)

Counsel's error was prejudicial because the prosecutor invited jurors to convict Petitioner on evidence of other people's guilt by assuring them that Petitioner belonged to a class of persons who are guilty 99 percent of the time. Davis's comments eviscerated Petitioner's false confession defense and destroyed any credibility Petitioner may have had with the jury. Counsel was ineffective for failing to timely object, move for mistrial, or seek curative instruction.

D. Failure to object to misstatement of evidence regarding Ofshe testimony

Counsel failed to object when prosecutor Davis argued that Ofshe claimed, "there's some sort of book where they have these interrogation tactics that they can get *you or I* to confess...to multiple homicides." (RT 1791, Bates 2297) This misstated the record and was misleading because it encouraged the jury to use themselves and the prosecutor as reference points for whether *Petitioner* would have been susceptible to suggestive interrogation tactics. The issue before the jury was whether Petitioner, with his mental impairments, falsely confessed due to inability to withstand strenuous interrogation. It was *not* whether someone with the mental faculties of Davis or the jurors themselves would have falsely confessed. Thus, Davis misstated the evidence and mislead the jury, and counsel should have objected on those grounds. Counsel was ineffective for failing to object, move for mistrial, or seek curative instruction.

For the reason stated several times herein, this error was prejudicial because Petitioner's entire defense required jurors to entertain a reasonable doubt about his confession. Had the jury properly focused on whether Petitioner, with his myriad of mental limitations, could have falsely confessed, a reasonable probability exists that the verdict would have been different.

E. Failure to object to prosecutor's testifying and characterization of Dr. Ofshe as a "salesman" who whose opinion had been purchased.

Counsel was ineffective for failing to object to the prosecution's characterization of its leading expert and most important witness as a salesman who charged $350 for his opinions. Specifically, prosecutor Fogleman argued that Ofshe was paid "to go out on a limb and make the statements that he makes based on the flimsy information he possesses – well, that – he – he was on trial to some extent. It reminds me – in preparation of this case I listened to the tape recording of Warren Holmes, their other expert, and he said in that, he said, 'The difference between a Ten Thousand Dollar a year salesman and a hundred thousand dollar a year salesman is one is a better liar." He added, "We've got a $40,000 a year salesman who came and talked to you." (RT 1778, Bates 2284)

The prosecutor's comments amounted to misconduct. Although it is acceptable to inquire into the compensation an expert receives and to highlight such facts for the jury, a prosecutor crosses the line between permissible argument and misconduct when he implies that the expert lied or rendered an unfounded opinion in exchange for compensation. *See, e.g., State v. Hughes*, 193 Ariz. 72, 969 P.2d 1184 (Ariz.,1998)(prosecutor committed misconduct for suggesting that defendant's mental health expert fabricated a diagnosis in exchange for $950.) When the prosecutor makes these suggestions, he disparages defense counsel as well. The implication is that the defense attorney intentionally hired a person to lie and misrepresent, and that the attorney paid the expert handsomely to do so.

Here, the prosecution first testified to what another defense expert said out of cour, and then implied that defense counsel suborned perjury from Ofshe, who was hired to "sell" the false confession defense to the jury. Counsel should have objected and requested a curative instruction. By remaining silent, counsel permitted the jury to perceive Ofshe's opinions as purchased falsehoods, to further perceive that one of Petitioner's other experts agreed, and worse, to perceive

Petitioner and his counsel as the parties who bought the fabrications.

Prejudice resulted because Ofshe was the star witness of Petitioner's false confession defense. If the jury disbelieved Ofshe, it necessarily rejected Petitioner's defense.

F. Failure to object to misstatement of record that blood had been washed off the embankment.

In arguing that the jury should disregard the theory that the bloody man found in the Bojangles restaurant on the night of the murders was the likely perpetrator, both prosecutors argued repeatedly that a man meticulous enough to clean the crime scene would not then stumble into a restaurant, bleeding. (RT 1732, Bates 2237; RT 1758-59, Bates 2263-64; RT 1787, Bates 2293) Specifically, Fogleman stated that "[t]he blood was washed off the bank and the scuff marks." (RT 1732, Bates 2237) No such fact was in evidence, and the there was *no* evidence that any blood was on the embankment in the first place. The prosecutors did not present this as a theory by stating, for example, that one possible reason why the police found no blood at the scene was because someone may have washed it off. Rather, Fogleman stated it as a fact that "the blood" (the existence of which had not been proved), "was washed off the bank . . ." and later, "[t]here's not any blood out there because it had been wiped down. You got the pictures and you can see in the pictures the condition of that bank where it had been cleaned off." (RT 1759, Bates 2264) When Davis argued in rebuttal, he repeated the argument that the person who committed the crime "meticulously cleaned this area . . ." (RT 1787, Bates 2293)

Counsel failed to object to these multiple misstatements of the record. This prejudiced Petitioner because the man in the Bojangles restaurant would have likely caused a reasonable doubt for some jurors. The prosecution's statement that the same person who washed the blood off the bank would not have then left his own blood all over the bathroom of the Bojangles restaurant likely relieved the jurors of any concerns they had about this man. Had counsel objected

and sought admonishment and further instruction, the verdict likely would have been different.

G. Failure to object to misstatement that the state's crime lab technician ran two screening tests that both tested positive for semen.

Counsel was ineffective for failing to object to the prosecution's misrepresentation of the results of crime lab technician Kermit Channell's tests for the possible presence of semen. During closing, prosecutor Fogleman told the jury:

> ...Kermit Channel from the crime lab said that...in his tests on the little boy's pants...one screening test... came back positive – positive for semen. He ran a second screening test – positive for semen. He couldn't see any sperm but he had these two positive tests for semen.

(RT 1759-60, Bates 2264-65)

Fogleman grossly misstated the evidence. Channell testified that the first test he ran on the cuttings from the victims pants was "just a basic screening test." The tests employs a laser that "picks up on *any* material that might glow, and semen is one of them." (RT 1032, Bates 1033, emphasis added). Thus, the first test was not "positive for semen," as misrepresented by Fogleman, but rather, the test indicated that some material which may or *may not* have been semen glowed under the laser.

Channell also testified that he then conducted the second test which is the acid phosphatase test. Channell explained that this is "a screening test to see if the item...*possibly* can contain semen," (RT 1033, Bates 1534)which came back positive. Thus, the second test was not "positive for semen" but rather was positive for the *possible existence* of semen.

In fact, Channell sent the samples to DNA analyst Michael Deguglielmo labeled as "questioned stains." (RT 1044, Bates 1545) Deguglielmo then tested the "very small amount of DNA," (RT 1048, Bates 1549) he found in those stains, which resulted in "a marginal level of detection for the two sperm fractions." (RT 1048, Bates 1549) Because the sample was so small,

Deguglielmo was unable to amplify it using HLA DQ Alpha technology. So, based on the "small amount of DNA, basically a threshold amount" (RT 1048, 1549) he concluded that the DNA was from a higher primate and that "small amounts of DNA...were present in the male or sperm portions of the extraction." (RT 1048-49, Bates 1549-1550) Deguglielmo admitted that he could not say for certain that the cuttings from the jeans were "sperm stains" (RT 1049, Bates 1550) because he did not see any sperm under the microscope.

Thus, when prosecutor Fogleman misrepresented the results Channell obtained in his two screening tests, he bolstered Deguglielmo's equivocal and inconclusive testimony about the results of the DNA tests. Fogleman therefore mislead the jury into thinking that the state's sexual assault evidence was significantly stronger than it was. The jury likely accepted ' summary of this evidence because, as Fogleman told the jurors, DNA evidence "is somewhat confusing." (RT 1759, Bates 2264) He then purported to clarify it for them. In so doing, he bolstered the state's sexual assault evidence, thus corroborating the wild tale that Petitioner told police. Counsel's failure to object and request admonishment and curative instruction was therefore prejudicial.

H. Failure to Object to Misrepresentation That the Bojangles Blood Sample Was Examined and That the Defense Failed to Discuss the Results of That Examination

Defense counsel failed to object when prosecutor Davis committed bold misconduct when discussing the defendant's failure to produce evidence regarding blood samples taken from the Bojangles restaurant. While arguing against Petitioner's theory that the man in the Bojangles restaurant was a more apt suspect in the murders, Davis said:

> Do you think if the blood sample that was obtained at Bojangles had indicated in its examination that it belonged to somebody or something or would have any evidentiary value you would have heard some evidence about it from the defense? Don't you think they would have put something on?

(RT 1797, Bates 2293)

Davis' comments were objectionable because he mislead the jury into thinking that the blood sample taken from the Bojangles were in fact tested. He stated explicitly that the blood sample underwent an "examination." The record contained no indication that the blood sample had been tested. In fact, shortly after Petitioner's trial, Detective Ridge testified in the Baldwin/Echols trial that he never sent the samples to the crime lab, but rather, he lost them. (EBRT 810-11, 1589-90; 945, 1725) In all likelihood, prosecutor Davis was aware of the state of that evidence; Ridge was a member of the prosecutorial team. *See, e.g., Kyles v. Whitley* 514 U.S. 419, 437-438 (1995). Even if unintentional, Davis still misstated the record: there was no testimony that the blood sample had undergone any "examination" as Davis claimed.

Thus, Davis saddled Petitioner with an impossible burden when he commented about the lack of defense evidence regarding the samples – "Don't you think they would have put something on?" While the prosecution may comment on a defendant's failure to call witnesses to support its theories (*States v. Fleishman*, 684 F.2d 1329, 1343 (9th Cir. 1982); *United States v. Parker*, 903 F.2d 91, 98 (2d Cir. 1990)), here, the prosecutor faulted Petitioner for failing to produce evidence that was unavailable because the prosecution's own team lost it. The jury was therefore mislead into believing Petitioner did not present this evidence because it was unfavorable. Because Bojangles evidence was likely to create a reasonable doubt if unrebutted, the prosecutor's misconduct was prejudicial. Counsel's failure to object to this misconduct, therefore, was likewise prejudicial.

I. Failure to Object to Prosecutor's Appeals to the Juror's "Integrity"

Defense counsel was ineffective for failing to object to comments about juror integrity that appealed to the jurors' emotions. Specifically, Davis argued to the jury that it must convict Petitioner, "...unless he successfully convinces you that the police are lying, and that they

are the ones that are lying to you. And *I hope that you have the integrity and good sense not to buy that* because it doesn't mesh with the facts... ." (RT 1777, Bates 283) This argument was inflammatory and was designed to appeal to the jury's passions and/or prejudices. *See U.S. v. Modica,* 663 F.2d 1173 (2nd Cir. 1981)

This case is similar to the circumstances of *Modica*, where the prosecutor committed misconduct by telling the jury, "Don't let [defendant] walk out of this room laughing at you." The court found that the comment was "calculated to inflame the passions or prejudices of the jury," in violation of ABA Standard 3-5.8(c). (*Id.* at 1180.) As such, the comment constituted misconduct. *Id.* Here, the prosecutor suggested that the jurors would lack integrity if they refused to convict Petitioner. Thus, the prosecutor appealed to the jurors' emotions about themselves (i.e., whether they are ethical, upright people with integrity) to secure a conviction.

Counsel was ineffective for failing to object to this inflammatory comment and to move for a mistrial. The error was prejudicial because the prosecutor told the jury that no one with any integrity would believe that Petitioner falsely confessed. The veracity of Petitioner's confession defense was the primary contested issue. Had the jury been free to consider only the *facts* of that confession, without the prosecutor's inflammatory remarks aimed at their emotions, a reasonable probability exists that the verdict would have been different.

J. Failure to Object to Prosecution's Comment on Petitioner's Demeanor During Trial And/or Raise the Issue on Appeal.

As explained below, the prosecutor improperly commented on Petitioner's demeanor three separate times, yet counsel failed to object until well after all three comments had passed. When counsel did finally move for mistrial, he did not accurately refer to all three comments, thus it is unclear whether counsel raised the necessary objections. In the event that counsel did not raise the objection sufficiently to preserve the issue for appeal, counsel was ineffective at trial. Further,

counsel should have raised objections at the time the prosecutor made the comments, so that the court could issue a curative instruction. Counsel was also ineffective for failing to state all possible grounds on which the comments were objectionable. Finally, to the extent that counsel *did* preserve the issue for appeal, appellate counsel Stidham was ineffective for failing to challenge the court's ruling.

1. Background

In arguing that the jury should reject Petitioner's defense that the statement he gave to police was false, prosecutor Davis said to the jury:

"[I]t's a very detailed statement that flies in the face of this poor little innocent fellow that's had his head tucked down during the course of this trial and that wouldn't look you in the eye." (RT 1790, Bates 2296) Defense counsel did not object at this time. Davis then continued to argue that Petitioner, not the police, was the deceptive party because:

> when you look at these photographs of this guy right here [pictures of Petitioner with a different haircut] and then you look at what you've been staring at for the last two or three weeks sitting over there *with his head bowed down*, different attire, different haircut, please tell me who it is that's the deceptive party in this whole situation?

(RT 1790, Bates 2296)

Again, counsel voiced no objection. Undeterred, Davis later held up a picture of Michael Moore and said, "See this picture? This is the Moore boy, and this defendant won't look up and won't look at you." (RT 1794, Bates 2300)

Counsel raised no objection to these comments until after the jury began deliberations. (RT 1802, Bates 2308) At that point, counsel moved for a mistrial on the grounds that the prosecutor's remarks amounted to a "veiled comment on Mr. Misskelley's failure to testify." *Id.* Counsel objected specifically to to Davis's remarks about Peitioner "sitting there with his head

bent over, in different clothes, different hair cut, and won't look you in the eye." (RT 1802, Bates 2308) Counsel could not, however, recall "the exact quote" to which he objected. (RT 1802, Bates 2308) Counsel did not object specifically to the language, "See this picture? This is the Moore boy and this defendant won't look up and won't look at you."

The court denied Petitioner's motion for mistrial, stating:

> The Court was conscious and aware of the comment made and did not feel at the time that it was an inappropriate remark that would single out or call attention of the jury the defendant's failure to testify. It just simply was too remote to do that in my opinion and a mistrial after several days of trial would be a drastic remedy and if there was any error in that it was so minuscule that it was harmless. And...the tactic that it was employed was a proper inference that the jury could draw from the appearance of the defendant from the photographs that were introduced and the appearance during trial, and, if anything, reflected his demeanor during the trial, and not his failure to testify in his own behalf and recant or deny any statement he made.

(RT 1802-03, Bates 2308-09)

2. Counsel failed to state all grounds for the objection

Comments on a defendant's demeanor during trial can amount to the introduction of inadmissible character evidence against the defendant. *United States v. Schuler*, 813 F.2d 978 (9th Cir. 1987). In *Schuler*, the prosecutor told the jury, "I noticed a number of you were looking at [defendant] while that testimony was coming in and a number of you saw him laugh." The court held that the prosecutor's comments resulted in the "introduction of character evidence of the accused solely to prove guilt." *Id.* at 980. The court explained that the defendant's "courtroom behavior off the witness stand was legally irrelevant to the question of his guilt of the crime charged." *Id.* at 980. See also *United States v. Carroll*, 678 F.2d 1208, 1210 (4th Cir.1982). Counsel did not object on this ground and therefore failed to preserve review of the issue.

Further, a prosecutor's comments about a defendant's off-the-stand behavior constitutes a violation of the due process clause of the Fifth Amendment, noting that "one accused of a crime is

entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds ... not adduced as proof at trial." *Id.*, *quoting*, *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)(internal quotes omitted).

Likewise, in *United States v. Pearson*, 746 F.2d 787 (11th Cir.1984), the court found a due process violation occurred when the prosecutor commented on defendant's off-the-stand behavior. There, the prosecutor said about the defendant: "Does it sound to you like he was afraid? You saw him sitting there in the trial. Did you see his leg going up and down? He is nervous. You saw how nervous he was sitting there. Do you think he is afraid?" *Id.* at 796. In the absence of a curative instruction, the comments violated due process. *Id.*

Similarly, the prosecutor's comments that Petitioner was sitting at the defense table with "his head tucked down," and with "his head bowed down," and that he "wouldn't look [the jury] in the eye, and wouldn't "look up and...look at [the jury]," violated Petitioner's right to have his guilt or innocence determined solely on evidence adduced at trial. As such, the prosecutor's several comments violated Petitioner's Fifth Amendment right to due process. Trial counsel was ineffective for failing to object on that ground.

Prejudice resulted from counsel's omissions because a mistrial was warranted under these circumstances, but at the very least, the court had no opportunity to issue a curative instruction. Thus the jury was free to accept the inference tacitly urged by the prosecutor – that Petitioner's demeanor showed that he was of bad character, and that it helped to prove his guilt. Given the weak case against Petitioner, counsel's failure to preserve these issues for review prejudiced Petitioner.

3. Appellate counsel was ineffective for failing to challenge the court's ruling on appeal.

The one objection that counsel did raise had merit. Counsel correctly argued that the

prosecutor's comments violated appellant's Fifth Amendment right not to testify. The prosecution shall not comment on a defendants Fifth Amendment right not to testify. *Griffin v. California,* 380 U.S. 609, 612 (1965). The test is whether the language used was "manifestly intended" or was "of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. Brown*, 546 F.2d 166, 173 (5th Cir. 1977); *United States v. Williams*, 503 F.2d 480, 485 (8th Cir. 1974).

For example, in *United States v. Rodriguez*, 627 F.2d 110 (1980), the prosecutor's comment that "throughout the trial [defendant] has been very quiet at the end of counsel table," was a violation of the Fifth Amendment right to remain silent. Here, though Davis did not explicitly refer to Petitioner's silence, he nonetheless suggested that if Petitioner was innocent, he would have looked the jury in the eye. Thus, Petitioner's silent avoidance of the jury became evidence of his guilt. Accordingly, appellate counsel should have challenged this court's ruling to the contrary. His failure to do so was prejudicial for the reasons stated above in Claim XII.J.2.

XIII. COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984.)[46]

A. The Defense, Through its Investigator, Was Burdened by a Conflict of Interest

Defense counsel did not hire its own investigator, but rather relied on the efforts of Ron Lax, the investigator for Echols and Baldwin. However, Lax's main focus was on investigating the Baldwin/Echols case, and he therefore operated under a conflict of interest as a member of Petitioner's defense team. For example, a comparison of the bills submitted by Lax shows that he

[46] See ABA Guideline 11.4.1 and Commentary.

billed for 1,513.45 hours for investigation on behalf of Echols, while he billed a scant 107.85 hours for investigation on Petitioner's behalf. (See Excerpts From Abstract and Brief for Cross-appellants in State v. Crittenden County, attached hereto as Exhibit Volume 4, Exh. GG; see also Invoice by Ronald L. Lax for Echols investigative services dated March 28, 1994, attached hereto as Exhibit Volume 4, Exh. GG-1 as well as Invoice by Ronald L. Lax for Misskelley investigative services dated March 28, 1994, attached hereto as Exhibit Volume 4, Exh. GG-1). Lax's focus on the Echols trial conflicted with his duty to focus on Petitioner's case. Prejudice is presumed when counsel is burdened by an actual conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980), *reaffirmed* in *Strickland*, 466 U.S. at 683. Counsel, through Lax, labored under a conflict of interest that prejudiced Petitioner.

B. Counsel Failed to Effectively Investigate Petitioner's Case.

Regardless of whether a conflict arose from the hiring of Lax, counsel was nonetheless ineffective for hiring an investigator who failed to give the case appropriate attention and/or for failing to adequately direct the investigator as to the matters requiring investigation.

1. Counsel failed to investigate the fate of the Bojangles blood samples.

Counsel was ineffective for failing to fully investigate the Bojangles defense. Specifically, counsel was aware that the police had scraped blood samples off the wall of restroom of the Bojangles restaurant. Despite the fact that counsel presented to the jury that this man was a likely suspect, Counsel made no effort to determine what, if anything, the police did with the samples. Counsel could have obtained this information either through investigation or with a discovery request targeted specifically to the results of the samples. Proper investigation would have revealed that the Detective Ridge never sent the samples to the crime lab, and that he "lost them." (EBRT 810-11, Bates 1589-90; EBRT 945, Bates 1725) Failure to uncover this information was

ineffective. See *Kimmelman v. Morrison*, 477 U.S. 365 (1986)(ineffective assistance found for failure to conduct pretrial discovery that would have disclosed evidence that was suppressible, had counsel brought a motion to suppress).

Counsel's deficient performance on this important issue was devastating to Petitioner's defense. Had counsel obtained the information about the lost samples, he could have preempted Davis' improper argument that the "examination" of the samples produced no exculpatory information. As discussed above in Claim XIII, this representation was false and misleading and it severely damaged Petitioner's defense.

Counsel also could have answered the prosecution's remark although counsel promised he would show that the investigating officers had "Damien tunnel vision," he nonetheless failed to do so. Counsel could have shown that, indeed, the police were focusing so exclusively and misguidedly on Echols that they were completely unconcerned with their most promising lead. They therefore "lost" evidence related to a bloody, disoriented, muddy, black man who on the night of murders, stumbled into the Bojangles restaurant – in fact, they lost this evidence even though a Negroid hair found inside the sheet covering one of the victims remained unaccounted for. (RT 1022, Bates 1523) By showing that the police did have "Damien tunnel vision," defense counsel would have helped the jury better understand why the police were s willing to overlook the glaring inconsistencies and falsehoods in Petitioner's statements. Accordingly, had counsel properly investigated the Bojangles samples, they jury likely would have reached a different verdict.

2. Failure to Interview Victoria Hutcheson on Behalf of Petitioner Alone.

Counsel was ineffective for failing to interview or attempt to interview Victoria Hutcheson about her statements to police that she went to an esbat with Petitioner and Echols. Relying on

Echols' investigator Ron Lax's interview with her was inadequate, because Lax's focus was on Echols' case. Lax also conducted only a single interview of Hutcheson, despite the fact that proper investigation often requires a number of interviews and attempts at interviews before a witness will feel comfortable enough to speak about difficult or sensitive matters. Further, because Petitioner and Hutcheson were very close friends she was more likely to open up to *Petitioner's* defense team than Echols' team. Counsel for Petitioner could have impressed upon her how important her truthful testimony was to Petitioner. Instead, Hutcheson was visited by the investigator for Echols, though Echols was a person she barely knew and was someone for whom she had no affinity. His one interview with her was not adequate for Petitioner's purposes.

Once counsel learned from Petitioner that the trip to the esbat never occurred and that Petitioner had no idea why his very close friend was lying, counsel should have done everything possible to interview Hutcheson on *Petitioner's* behalf, and impress upon her the irrevocable damage that any untruthfulness would cause to her close friend. Hutcheson was the sole eyewitness to link Petitioner to "cult activity." She was also the one witness that counsel knew or should have known, was lying. Moreover, her sympathies were with Petitioner, not Echols or Baldwin, whom she did not know. Sending the Echols investigator as a proxy for Petitioner's investigatory team was grossly inadequate and deficient. Counsel should have spoken personally with Hutcheson because he was in the best position to appeal to her deep affection for Petitioner and to urge her to tell the truth. This is particularly true because counsel did not even discuss with Lax in advance the particular matters to be stressed on Petitioner's behalf. At the very least, counsel should have sent an investigator with only *Petitioner's* interests in mind to appeal to Hutcheson. Relying on Lax's efforts was akin to conducting no interview on Petitioner's behalf.

Counsel's failure to interview Hutcheson constituted ineffective assistance. See *Chambers*

v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(counsel ineffective for failing to interview and call witness who could provide self-defense explanation for defendant's actions; *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994)(Though defendant withheld the names of exculpatory witnesses until seventy-two hours before trial, counsel was nonetheless ineffective for failing to investigate the witnesses); *Reynoso v. Giurbino*, 462 F.3d 1099 (9th Cir. 2006) (counsel provided ineffective assistance by failing to interview the only two witnesses who placed the defendant at the murder scene); *Anderson v. Johnson*, 338 F.3d 382 (5th Cir. 2003) (failure to interview either eyewitnesses to the crime was deficient performance and prejudiced the defendant.)

Had counsel spoken with Hutcheson, she may have mustered the courage then to explain what she is now willing to reveal – that she fabricated the entire esbat story. Indeed, at the time of trial, she was poised to tell Stidham the truth: in an interview under penalty of perjury with current defense investigator Nancy Pemberton and trial counsel Stidham, Hutcheson explained that when she was on the stand, she was answering Stidham's questions but was also trying to send him signals that her testimony was not true . Had counsel made his own inquiries of Hutcheson, he probably would have learned the following information obtained from recent interviews:

a. Pre-trial Information that counsel could have discovered with due diligence.

The following facts are taken from the Transcript of Sworn Statement of Victoria Hutcheson (Exhibit Volume 1, Exh. C): Hutcheson lived in same trailer park as Petitioner, and they were very clos e friends. He was at her house every day and was like a brother. Hutcheson's son, Aaron, also had a close relationship with Petitioner.

On May 6, 1993, Hutcheson brought her eight-year-old son Aaron with her to the Marion police station for a lie detector test on a credit card theft case. (Exhibit Volume 1, Exh. C at 6). She met with Don Bray who was Chief of Police in Marion. During that meeting, Bray struck up

a conversation with Aaron about the disappearance of the victims, who were his friends. (Exhibit Volume 1, Exh. C at 7) When Aaron offered nothing more than the fact that the victims were his friends, Bray asked Hutcheson to step out of the room so he could talk to Aaron alone. (Exhibit Volume 1, Exh. C at 8). After that conversation, Bray called the West Memphis Police Department (" WMPD") to tell the investigating officers that they should look for a secret club house that Aaron described, but was then informed that the boys' bodies had been found.(Exhibit Volume 1, Exh. C at 9-11) Bray told WMPD that Aaron may know something about the murders and that they should talk with him. (Exhibit Volume 1, Exh. C at 10)

The next day, Gary Gitchell, Bryn Ridge and an Officer Sudbury spoke with Hutcheson. In fact, she met with them at least 6 times before Petitioner's arrest and four times after his arrest. The meetings took place in the Drug Task Force ("DTF") building in West Memphis, at Don Bray's storage building in Marion, and in Jerry Driver's (Echols' probation officer's) office. (Exhibit Volume 1, Exh. C at 19)

The first time Hutcheson met Driver was at a meeting in Bray's Marion Police Department office about two weeks after the murders. (Exhibit Volume 1, Exh. C at 33-35) Driver told Hutcheson that he thought Echols was responsible for the murders and he asked for her help because a lot of kids used to hang out at her trailer, and he thought she might know Echols. (Exhibit Volume 1, Exh. C at 36-37) She explained that she did not know Echols but that she knew Petitioner who did know Echols. (Exhibit Volume 1, Exh. C at 37)

At another meeting shortly thereafter, Bray brought Hutcheson to Driver's office at the courthouse. Driver and told Hutcheson that he believed Echols was the perpetrator of the crime – Echols had previously been on probation with Driver, who previously had a "hard time" with Echols. Driver claimed that Echols "was really crazy," "a problem boy," and "a monster"

((Exhibit Volume 1, Exh. C at 33) The officers talked about Echols as if he was Jeffrey Dahmer.

Under these circumstances, Hutcheson wanted to help. They asked her to get Petitioner to introduce her to Echols. Bray also told her to get some witchcraft books at the library with his library card. (Exhibit Volume 1, Exh. C at 37-39) The plan was that she would place them conspicuously in her house so that she could discuss them with Echols when the meeting took place. In anticipation of the meeting with Echols, WMPD officers wired Hutcheson's house and told her how to trigger the recording. (Exhibit Volume 1, Exh. C at 40-41) As directed, Hutcheson went to the library, got the witchcraft books, and put them on her coffee table. (Exhibit Volume 1, Exh. C at 46)

One day when Petitioner was at her house, she asked him if he would introduce her to Echols, and though Petitioner was incredulous that she desired this meeting, he agreed to help, though he reminded her that he was "weird." (Exhibit Volume 1, Exh. C at 47-48) The next day, Petitioner and Hutcheson went to pick up Echols because Echols did not drive. (Exhibit Volume 1, Exh. C at 48-49) After picking him up, they all went back to Hutcheson's house where she plugged in the lamp that triggered the recording. (Exhibit Volume 1, Exh. C at 51-52) Echols was nervous, and Hutcheson asked him why. (Exhibit Volume 1, Exh. C at 52) He said "you would be nervous too if they thought you had killed three kids." When she asked him if he did it, and he said, "no, why would I do something like that?" (Exhibit Volume 1, Exh. C at 53) According to Hutcheson, Echols "was totally normal – just like any other kid his age." Then, as they were all watching the movie "Grease," Hutcheson then told Echols that she was interested in "demonic stuff," and he looked at her like she was crazy. She asked him if he knew how she could get involved with demonic stuff, and he said "no, I really can't help you out." Hutcheson had the

impression that Echols thought she was being stupid, and he left abruptly. (Exhibit Volume 1, Exh. C at 53-54)

Hutcheson called Bray to let him know she had talked to Echols and that they "had the wrong guy." The police came and took the tapes. (Exhibit Volume 1, Exh. C at 55-56) The next day, Ridge brought her to the DTF office and listen to the tapes with Gitchell, Ridge, Sudbury, and an officer nick-named "Tiny." (Exhibit Volume 1, Exh. C at 58 - 63) After listening to the tapes, the officers "made [her] feel guilty like [she] had ruined something of theirs ...[and] didn't do the right job." (Exhibit Volume 1, Exh. C at 62) They told her that the person on the tape did not sound like Damien, but she heard the entire taped conversation, and it was definitely the same conversation from the night before. (Exhibit Volume 1, Exh. C at 174)

Ridge then brought Hutcheson into a little room and told her she was the link between the suspects and the victims, and that she may be implicated unless things started going the way that police wanted them to go: she had to help them establish that the killing was a satanic cult killing carried out by Echols. (Exhibit Volume 1, Exh. C at 66) He more or less told her that "[she] was going to say exactly what they want [her] to say..., [a]nd it would be a shame if [she] lost Aaron over this whole thing." (Exhibit Volume 1, Exh. C at 66) She said to Ridge, "Wait, what are you going to do...you're going to try to link me to the murders?" And he said, "Well you know things are going to start going a certain way and it's got to start going our way."(Exhibit Volume 1, Exh. C at 68) Ridge was "real scary when he said it." (Exhibit Volume 1, Exh. C at 68) She agreed to do whatever they wanted her to do.

The next day, she spent about twelve and a half hours in a recorded interview with Ridge and Gitchell. (Exhibit Volume 1, Exh. C at 69) She was allowed no breaks and had nothing to eat or drink, though she was permitted to use the bathroom. Every time she "messed up,"or got

something wrong, Ridge turned off the recorder and said, "now did it happen like that...are you *sure* it happened like that," and then he would turn the recorder back on. (Exhibit Volume 1, Exh. C at 69) She said that Ridge supplied her with the story of the esbat by asking her, "now wasn't it a satanic place that you went?...an esbat, wasn't it?" She assented to these questions, and then just started making things up as she went along because she "didn't know what else to do." (Exhibit Volume 1, Exh. C at 69) After several stops and starts, Ridge would have her do a summary on tape, or as she called it, "a redo," after Ridge would indicate, "Oh this is it. This is right. This is good. This is what we need." At that point, Hutcheson explained, "that's your story. That's what you stick to." (Exhibit Volume 1, Exh. C at 84) At home, after the interview, she looked up "esbat" in the dictionary. She spoke to no one about this because she was so afraid of the police. (Exhibit Volume 1, Exh. C at 73)

At some point after this interview, Gitchell suggested that Hutcheson call Echols and to again solicit incriminating remarks from him. (Exhibit Volume 1, Exh. C at 75) After it failed miserably, she went angry to Gitchell's office about the "stupidity" of the focus on Echols, and there she saw the officers throwing darts at pictures of Petitioner, Echols, and Baldwin.(Exhibit Volume 1, Exh. C at 76-77). After Petitioner was arrested, she called Gitchell to tell him that Petitioner was not involved, but he told her it was none of her business.

Hutcheson felt as though she had no choice but to testify. (Exhibit Volume 1, Exh. C at 116) She believed Ridge when he said he could take away her son, and all she could focus on was the thought of losing her child. She had also watched the police make Petitioner, Echols, and Baldwin look guilty of three murders they did not commit, and she believed that the police could do the same to her. She saw her as a potential defendant, and she "was scared to death." (Exhibit Volume 1, Exh. C at 116)

After Petitioner was arrested, she started drinking heavily and increasing her drug use (nonprescription pain medication and barbiturates). She was distressed that she participated in the events leading to Petitioner's arrest. (Exhibit Volume 1, Exh. C at 122) She talked to Lax once but did not say much. She told Bray that she had spoken with Lax, and Bray told her not to talk to him anymore. (Exhibit Volume 1, Exh. C at 136)[47]

b. Counsel's failure to interview Hutcheson was prejudicial because evidence that police coerced Hutcheson's statements and manufactured false evidence would likely have resulted in acquittal

Had the above information come out at trial, a reasonable probability exists that the jury would have acquitted Petitioner. Hutcheson's detailed account of the tactics employed by the WMPD completely corroborated Petitioner's defense that he was coerced into confessing. Had counsel elicited this information from Hutcheson at trial, it would have cast significant doubt on the veracity of Petitioner's confession. It would have bolstered Ofshe's testimony on the suggestive tactics employed during Petitioner's confession. Further, it would have caused the jurors to wonder what happened during the several *unrecorded* hours of Petitioner's conversations with police.

Likewise, Hutcheson's account would have undermined and/or destroyed the credibility of the interrogating officers who testified against Petitioner. Once the jury heard that the police had manufactured false evidence against Petitioner, the jury would likely have eyed with deep suspicion all of the state's evidence, scant as it was.

Further, the prosecution focused the jury on the fact that Hutcheson was a critical witness to its case. In closing argument, Davis explained that the evidence corroborating Petitioner's

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[47]She also spoke with Glory a few times, Echols' penalty phase investigator who worked in Lax's office.

statement about participation in cult activities "is that a witness testified that this defendant, along with Damien Echols...took her to a cult related activity....You seen the book that they confiscated from Damien's house and when this Hutcheson lady wanted to get hooked up with Damien who was it she was able to go through to make that connection? It was Jessie Misskelley." (RT 1788, Bates 2294)

Thus, because Hutcheson's *true* testimony would have exposed the falsity of the case against Petitioner, a reasonable probability exists that the result at trial would have been different.

3. Counsel failed to investigate Hutcheson's story that Echols drove her and Petitioner to an esbat

Counsel was ineffective for failing to investigate the details of the story that Victoria Hutcheson told police: she attended an esbat with Petitioner and Echols. One of the details of that story was that Echols was the person who drove them all to the esbat in a red escort; however, had counsel and/or his investigator spoken to any of the people who knew Echols, they would have discovered that Echols did not drive. According to family members, Damien suffered from intense motion sickness since childhood. When he turned 16, he showed no interest in learning to drive, and was content to walk. (Leveritt, *Devils Knot*, Simon and Schuster, 2003 at 355, n. 61.)

This information would have cast significant doubt on Hutcheson's testimony. It could well have been the information needed to induce the reluctant and heavily-drugged Hutcheson to crack under the pressure of cross examination. Given Hutcheson's recent revelation that she was coerced into lying on the stand and had to take over 10 valium to lie about her friend (See Claim

XX below), she may have lost her resolve when confronted with evidence that flatly contradicted her story. As it was, Hutcheson was already trying to steer counsel in the direction of the truth. She knew that Echols did not drive because Petitioner had told her this. (See Claim XX below) Had counsel properly investigated her story, he would have had a reasonable chance of inducing Hutcheson to tell the truth: that she never went to an esbat with Petitioner and that she was saying otherwise out of fear of losing her child. (See Claim XX below)

Further, evidence that Damien did not drive would have negated the relevance of Melissa Byers' testimony that a man dressed in black with black hair pulled up in a green car and took his picture. (RT 1484, Bates 1988) As the prosecutor explained to the court, the reasonable inference from this evidence was that Echols, the only defendant with black hair, was the person driving the green car. The evidence corroborated Petitioner's statement that, at a meeting before the murders, someone brought a briefcase with a picture of the victims in it. Information that Echols did not drive would have rebutted this evidence and shown either that Byers was inventing the story to secure a conviction, or that someone else, *not* Echols, took Christopher's picture.

4. Failure to timely investigate and prepare for the alibi defense

The defense was not adequately or effectively prepared to chronicle the activities, locations, and alibi evidence pertinent to Petitioner's case on both the day before the killing (May 4, 1993) and throughout the day of the killings (May 5, 1993). Counsel investigated and prepared this defense shortly before trial and did not spend the time necessary to prepare the witnesses and did not prepare for or anticipate the cross examination that completely undermined this defense. The prosecution cross-examined and impeached the defense's alibi witnesses with documents, police incident reports, prior statements, and other matters that the defense was not prepared to adequately address, though the information was available and pertinent.

For example, defense witnesses Stephanie Dollar remembered seeing Petitioner at the Highland Trailer Park in the early evening of May 5, 1993 because that was the same day that her neighbor, Connie Molden, slapped Stephanie's son off of his bicycle. She testified that, when Officer Dollarhite responded to the scene, she and Petitioner were standing no more than five feet away from Dollarhite's car. The next witness that the defense called on this point was Officer Dollarhite, who said that he had indeed responded to the scene, but he did not see Petitioner there. Apparently unprepared for this response, counsel asked, "is it possible that he was there and you just don't remember it?" to which Dollarhite responded, "No Sir." (RT 1138-1139, Bates 1640-1641) On cross, the prosecution elicited repetitive testimony on the fact that Dollarhite did not recognize Petitioner as someone who was with Stephanie Dollar or any of the other bystanders, despite having know Petitioner and his family for 22-23 years. Counsel conducted no re-direct examination. Counsel apparently did not anticipate or prepare for the possibility that Dollarhite would testify unfavorably.

Counsel also failed to anticipate use of alibi witnesses' prior statements to police. For example, Josh Darby testified that Petitioner slept at his house the night before the murders, and then went roofing the next morning. On cross examination, the prosecution established that he had given the police a previous statement in which he did not disclose that Petitioner had stayed with him on the 4th. (RT 1107, Bates 1609) Attorney Crow attempted to rehabilitate Darby by asking whether the police "were inquiring about where [Petitioner] was the night before or were they inquiring about where he was that afternoon?" After a hearsay objection , the court instructed Crow to rephrase. Rather than do so, Crow said simply, "I will let it pass" and therefore let the impeachment of Darby stand. (RT 1111, Bates 1613)

Further, while several other witnesses testified that they saw Petitioner in the early

afternoon and evening at Highland Trailer Park, or that he was wrestling later that night, the prosecution established a number of those witnesses had given previous statements to police in which they had not mentioned these facts to the police. The most striking example is the testimony of Dennis Carter who testified that he went wrestling with Petitioner and some other boys on May 5th, but was then confronted with the statement that he made to the police "I have never went with Jessie to Dyess [wrestling gym]." (RT 1219, Bates 1722) Similarly devastating impeachment occurred with the testimony of Christy Moss Jones, (RT 1165, Bates 1667); Jim McNease (RT 1193, Bates 1695); Fred Revelle (RT 1235, 1238, Bates1738, 1741) and Roger Jones (RT 1246, Bates 1749)

Further, several of the alibi witnesses wore yellow ribbons of support for Petitioner, which gave the prosecution ample opportunity to impeach their credibility on cross and in closing arguments. (RT 1152, Bates 1654 [Jennifer Roberts]; RT 1165, Bates 1667 [Christy Moss Jones]; RT 1202, Bates 1704 [Louis Haggard]; RT 1220, Bates 1723 [Dennis Carter]; (RT 1238, Bates 1741 [Fred Revelle].) Counsel apparently never discussed with these witnesses how the yellow ribbons of support could create in the jury a perception of bias that the prosecution would undoubtedly exploit to its advantage. Counsel's failure to prepare the defense witnesses for the realities of courtroom testimony was severely damaging to Petitioner's case.

These are just a few examples of several errors and omissions that turned Petitioner's strong alibi into something that damaged Petitioner's case. The alibi defense was also extremely disorganized and did not appear to follow any prepared time line or method of presentation. It was a confusing, often contradictory, presentation of no less than sixteen witnesses. During closing arguments, counsel used no time line–visual or otherwise–to explain to the jury how the testimony of those sixteen witnesses proved Petitioner was in the park and then wrestling on the

night of the murders.

The prosecution benefitted from counsels omissions and lack of preparation:

> "This was a parade of defendant's friends. You saw the yellow ribbons...the instruction tells you...whether there is any reason [for] him not to be telling the truth, any bias, anything to be gained from the outcome of the case. And when you look at the people with the yellow ribbons the bias is obvious. They're here to try to help the defendant."

(RT 1727, Bates 2232)

Further, the prosecution argued that Petitioner's own alibi put him in two places at once, remarking "he's sitting on the front porch with somebody, and at the same time, he's with his girlfriend, and they're two different people, and then all of a sudden at the time that the Sheriff's Deputy got there, he's with Dennis Carter." The prosecution also reminded the jury that "Dennis Carter got up here and testified when he talked to the police the first time he gave them a statement and said he hadn't seen Jessie all day." (RT 1780-1781, Bates 2286-2287)

These errors prejudiced Petitioner because, with adequate investigation and preparation, counsel could have effectively and convincingly presented his alibi defense. Counsel deprived Petitioner of the opportunity to effectively present this viable defense, which, if adequately presented, would likely have resulted in acquittal.

5. Counsel Failed to Investigate and Present Evidence of His Codefendant's Alibis

Not only did counsel conduct late and inadequate investigation and preparation of Petitioner's alibi, but counsel likewise failed to present alibi evidence of his codefendants. Such evidence was highly relevant because a showing that Baldwin could not have been at the scene would have shown that Petitioner' statements about the crimes were false. This evidence includes but is not limited to:

a. Baldwin was a student enrolled at Marion High School at the time the crimes were

committed. Marion High School is at least 6 miles away (by roads and across at least two interstate highways) from Robin Hood Woods. This evidence was never presented at trial. Baldwin attended school on May 5 and 6, 1993. No independent witnesses testified about his presence in school on May 5 and May 6, 1993, about his school schedule, or about the fact that he rode a bus to and from school (he had to be in school at 8 a.m.). No witnesses, including classmates and teachers, attested to Baldwin's demeanor and behavior while in school during two those days and up to the time of his arrest. A number of such witnesses are available. Baldwin's mother had obtained his school attendance records and shown them to police within days of his arrest. The jury never heard of this evidence, which was important to show that Petitioner's statement to police was false.

b. One witness who could have testified that Baldwin was in school on the day of the murders was Sally Ware (see Affidavit of Sally Ware, attached hereto as Exhibit Volume 4, Exh. HH) who used to be a high school art teacher at Marion High School. Baldwin had been one of her students. She recalled learning of the arrest of her student, Jason Baldwin, through the media and also recalled that the Principal at Marion High at the time stated that no school employee should talk to the media. Ms. Ware discussed this policy with the Principal, explaining, "I felt that the authorities should be told that Jason had been in school on the day in question." (Exhibit Volume 4, Exh. HH at p.2, para.5.) The Principal responded that it would not be "much good for Jason if I were fired. My understanding was that Mr. Wood [the Principal] was letting me know that I would not have a lot of credibility if I had been fired from my job. As a result, I did not go to authorities, or to anyone else." (Exhibit Volume 4, Exh. HH at p.2, para. 5)

c. Ms. Ware specifically recalled Baldwin's presence in school during the week of the killings. Nothing about Baldwin's behavior or appearance...caused [her] any suspicion about his

involvement" in the crimes. (Exhibit Volume 4, Exh. HH at pp.2-3)

d. Further, during the course of the investigation of this case, WMPD officers interviewed several witnesses who accounted for Baldwin's whereabouts at the time of the homicides. For example, police interviewed Baldwin's younger brother, Matthew Baldwin, prior to Petitioner's trial. (See Interview of Matthew Baldwin, attached hereto as Exhibit Volume 4, Exh. II). Matthew Baldwin told police that he and his brother rode the school bus together, and they arrived home at about 3:40 p.m. Matthew's account was that he recalled his brother going to their uncle Hubert Bartoush's residence (several miles from Robin Hood Woods) at some point in the afternoon, at about 4:30 p.m. to mow Bartoush's lawn. (See also Affidavit of Matthew Baldwin, attached hereto as Exhibit Volume 4, Exh. JJ at p.3). Matt Baldwin has also furnished an affidavit explaining his memory of events, including that, in order to get to West Memphis from his family's home where Petitioner lived, it was a 20 to 40 minute walk, depending on the location (Exhibit Volume 4, Exh. JJ at pp.5-6)

e. Shortly after the homicides occurred, Bartoush gave a statement (June 14, 1993) stating that his nephew was at his residence mowing the lawn between 4:30 p.m. and 6:30 p.m.

f. This recollection was shared by Angela "Gail" Grinnell, Baldwin's mother, with whom he resided in the Lakeshore Trailer Park. She told police in a statement given in June 1993 that Baldwin had returned from school and then went to his uncle's house (See Transcript of police interview with Angela Gail Grinnell, attached hereto as Exhibit Volume 4, Exh. KK; see also Affidavit of Angela Gail Grinnell, attached hereto as Exhibit Volume 4, Exh. LL)

g. This same account was corroborated separately by Dennis Dent, boyfriend of Gail Grinnell (see above), who was interviewed by police in Phoenix, Arizona where he was in jail in January of 1994. He recalled that Baldwin spent some of the afternoon, between approximately

3:30 and 8 to 8:30 p.m. (at a later point he puts it at between 9 and 9:30 p.m.) cutting his uncle's lawn (See transcript of police interview of Dennis Lee Dent, attached hereto as Exhibit Volume 4, Exh. MM)

h. Several other witnesses talked to Baldwin by phone after he had returned to his mother's house that evening. Jennifer Bearden, who now admits having under-reported to police the level of her contacts with Baldwin and his friend Damien Echols when she was initially interviewed by police, states that, around the time of the killings, she used to talk to Damien Echols every day on the phone. She only told police about some aspects of her contacts with Baldwin and Echols (See transcript of police interview with Jennifer Elizabeth Bearden, attached hereto as Exhibit Volume 4, Exh. NN). Her recollection is that, on May 5, 1993, Echols told her he would be at Baldwin's house, and she talked to both of them on May 5, 1993. (See Affidavit of Jennifer Bearden, attached hereto as Exhibit Volume 4, Exh. OO) Jennifer Bearden and her friend, Holly George, were critically important witnesses because they had been socializing with both Baldwin and Damien Echols during this period of time. (Exhibit Volume 4, Exh. OO)

i. A friend of Jennifer Bearden's at the time, Holly George (now Holly George Thorpe) recalls a practice of calling Echols and Baldwin. She was usually at home by 3:30 p.m. on school days. She remembers that, during May of 1993, she would often be on the phone with Baldwin and Echols. She specifically remembers talking to them on the night of the killings. (See Affidavit of Holly George Thorpe, attached hereto as Exhibit Volume 4, Exh. PP)

j. Baldwin's girlfriend at the time, Heather Cliett, who lived near the Byers' residence (family of one of the victims) and who was aware of Christopher Byers' disappearance and the search for him, recalled that she too called and spoke with Echols and Baldwin by phone on May 5, 1993 into the early morning of the next day (See Affidavit of Heather Cliett Hollis, attached

hereto as Exhibit Volume 4, Exh. QQ)

k. Heather Cliett acknowledges that, because of the notoriety of the case and the number of contacts she had with police at the time of the initial investigation, she may have under-represented the amount of time she had spent with Echols and Baldwin as well as the amount of time they talked by phone.

l. None of Baldwin's school schedule (which required him to be in school in the early morning prior at 8 a.m.), nor the record of his class attendance nor his other activities of May 5 and 6, 1993, were made known to the jury. Nor was the jury informed that WMPD officers investigating the homicides found persons who had seen or been with Baldwin at various times during the day of May 5, 1993 or May 6, 1993 or people who talked to him by phone in the afternoon and evening of those days. Moreover, at no time were jurors told that the WMPD investigators tracked Baldwin's whereabouts on May 5, 1993 and found corroborating evidence that Baldwin was cutting of his uncle's lawn and then returned to his mother's trailer in Lakeshore that evening. Baldwin's mother told police in 1993 that, when she returned from work, she would have looked in on her son. Gail Grinnell states that her son was home that night (Exhibit Volume 4, Exh. LL) Baldwin's brother rode the school bus with him on both the day the victims were reported missing and the next day, and he knew of nothing unusual that would have connected his brother with the killings. (Exhibit Volume 4, Exh. JJ at pp. 2-4)

m. In addition, there was evidence available about the whereabouts and activities of Damien Echols on May 5 and 6, 1993, bearing on whether Baldwin, Echols, and Petitioner could have been involved together in these killings. None of this evidence was introduced in Petitioner's defense to show the falsity of his confession.

o. Several members of Damien Echols' family reported to police, and at least one

testified, that Echols was at a doctor's appointment on May 5, 1993, and he later returned to his family's home after being picked up at a laundromat. Had they been called as witnesses, and if called today, Jennifer Bearden, Heather Cliett Hollis, and Holly George Thorpe would all provide evidence concerning their contacts with Baldwin and Damien Echols; their knowledge of these two men who were accused of being in a cult as teenagers in 1993, and the nature of their phone conversations with them including those of May 5, 1993.

p. In addition, between June and September of 1993, WMPD officers interviewed other witnesses who indicated that they had knowledge of Echol's whereabouts on May 5, 1993. For example, Echols' mother, when interviewed by police on September 10, 1993, was aware that Echols and his girlfriend-at-the-time, Domini Teer, had reported having walked on May 5, 1993 to Baldwin's uncle's house, and then from there to the laundromat. Echols' mother (Pam Hutchison) also told police that she recalled her son being on the phone with various persons on the evening of May 5, including Baldwin, Jennifer Bearden, and Holly George.

q. Domini Teer also reported to police that she recalled Baldwin going to his uncle's house to mow the lawn after school on May 5, 1993; both she and Echols accompanied him. She also explained that Echols' mother then picked her and Echols up from the laundromat located near the Bartoush residence. (See transcript of police interview of Domini Teer, attached hereto as Exhibit Volume 4, Exh. RR; see also Affidavit of Domini Teer, attached hereto as Exhibit Volume 4, Exh. SS)

r. Also available at the time of trial were statements from young men who knew Baldwin, one of whom (Garrett Schwarting) told police on June 11, 1993 that he recalled Baldwin mowing his uncle's lawn on May 5, 1993 and also recalled Baldwin's presence at Petitioner's trailer home in the afternoon and evening of May 5, 1993. Other then-contemporaries of Baldwin,

including Kevin Lawrence (interviewed June 11, 1993), and Don Nam (interviewed December 23, 1993) stated that they had either been at Baldwin's house (Kevin Lawrence) or had seen Baldwin near Walmart in West Memphis on the evening of May 5, 1993 (Don Nam).

s. Various witnesses saw Baldwin at various times of the afternoon and evening of May 5, 1993, but it is clear that some witnesses reported to police that they had seen Baldwin on the day of the disappearance of the three boys, and other observers (teachers, classmates) reported seeing Petitioner at school the day that the bodies of the three young boys were discovered (May 6, 1993). Some of these persons are now identified and include: Crystal Hale, Sally Ware, Amy Mathis, and Sammy Dwyer.

t. Jennifer Bearden witnessed an incident involving Petitioner, Echols, and Baldwin (the theft of a pool ball) and was also aware, based on her contacts with Baldwin and Echols, that, prior to the homicides, they both appeared to dislike Petitioner. (Exhibit Volume 4, Exh. OO)

u. Sammy Dwyer knew Petitioner and lived two doors away from him in May of 1993. He also knew Petitioner, who had moved away. Dwyer stated that he never saw Baldwin and Petitioner hanging around one another even while Petitioner still lived in the trailer park. Further, after Petitioner moved out of the trailer park (before the homicides), he never saw Baldwin with Petitioner. Nor did Dwyer, who knew Echols but did not like him, ever see Echols with Petitioner. (See Affidavit of Joseph Samuel Dwyer, attached hereto as Exhibit Volume 4, Exh. TT at pp. 3-4)

The above evidence was critical to Petitioner's defense that he falsely confessed and, in the process, falsely implicated Echols and Baldwin. First, though counsel elicited from Gitchell a conclusory statement that he had confirmed that Baldwin was in school on the day of the murders, this was insufficient to establish that Baldwin could not have participated the crimes. The above

evidence establishes a more complete alibi for Baldwin, given the 'window of disappearance' of the three victims, established by the facts that civilian (and later police) searchers were looking for the boys beginning at roughly 6:30 p.m., and continuing into the night of May 5, 1993. Second, the fact that several persons saw Baldwin at school, on the bus ride home from school, at home, walking to cut his uncle's lawn, back at his family's trailer, and other witnesses reported talking to Baldwin is evidence that undermines the theory that Baldwin was planning or participating in a crime with Petitioner in Robin Hood Woods or that he had the opportunity to participate in the homicides in question. Third, several witnesses, including Jennifer Bearden, Holly George, and Heather Cliett in addition to Matt Baldwin and Gail Grinnell (all of whom have submitted affidavits) stated that they had contact with either Echols, Baldwin, or both on the evening and night of May 5, 1993. Fourth and finally, evidence that neither Baldwin nor Echols liked Petitioner or socialized with him completely contradicted Petitioner's story that Echols and Baldwin went to cult meetings with Petitioner, planned sophisticated crimes with him, and invited him to engage in a triple homicide. Accordingly, counsel was ineffective for failing to present this evidence at trial. Prejudice resulted because, once again, Petitioner's weak and unreliable confession was practically the only evidence against him at trial. Had counsel not failed to present evidence of its falseness, a reasonable likelihood exists that Petitioner would not have been convicted.

XIV. COUNSEL FAILED TO IMPEACH VICTORIA HUTCHESON.

Counsel was ineffective for failing to impeach witnesses with information available at trial, including but not limited to, Victoria Hutcheson. First, counsel failed to recall Hutcheson's denial of a statement that would have permitted impeachment with testimony by Rhonda Dedman. Second, counsel failed to use information provided by Jennifer Roberts that would have

impeached Hutcheson on several matter to which Hutcheson testified.

A. Failure to Establish Foundation for Rhonda Dedman's Testimony

Counsel intended to call Rhonda Dedman to show that, contrary to Hutcheson's testimony at trial, Hutcheson made statements about her interest in the reward money offered for information in the investigation of this case. When counsel asked Hutcheson, "Did that thirty thousand dollar reward have anything to do with your decision" to "play detective?," she answered, "No. It had nothing to do with it. Counsel then asked, "Did you ever tell anybody that you were going to get that reward?" Hutcheson answered "Not to my knowledge, no." (RT 976, Bates 1477) Thus, Hutcheson undoubtedly denied making a statement about her expectation of a reward.

Yet, when counsel called Rhonda Dedman to say that Hutcheson had plans for how to "split the reward money" with her son and "another little boy," the court sustained an objection on the grounds that counsel had not confronted Hutcheson with such a statement. (RT 1269, Bates 1772) This is because both counsel Stidham and Crow erroneously told the court that Hutcheson said "she did not remember" telling anyone she would get the reward money. (RT 1261, 1262, 1263, 1267; Bates 1764, 1765, 1766, 1770) Hutcheson, however, never said that she "did not remember" making such a statement. Rather, she denied making such a statement. Nonetheless, proceeding on their faulty recollection of Hutcheson's testimony, both counsel erroneously argued that a witnesses' failure to remember making a statement was a proper foundation for admitting extrinsic evidence to impeach the forgetful witness. (RT 1261-62, Bates 1764-65). The court held that, because counsel did not offer Hutcheson a chance to explain or deny the statement, Dedman's testimony was inadmissible. (RT 1266, Bates 1769) Worse still, the court told counsel that they could recall Hutcheson to establish the necessary foundation (which had already been established), but counsel neglected to do so.

C. Failure to Impeach Hutcheson With Statements Made to Jennifer Roberts

On January 11, 1994, Investigator Ron Lax conducted an interview with Jennifer Roberts, who the defense later called as an alibi witness at trial. (See Exhibit Volume 1, Exh. D-2, Transcript of Statement of Jennifer M. Roberts, dated January 11, 1994) Counsel had the transcript of that interview at trial. (Exhibit Volume 1, Exh. D-2) In that interview, Roberts explained that, on May 6, 1993, the day after the murders, Hutcheson told her that the victims in this case were dead, and they had been mutilated, castrated, and tied up. (See transcript of interview with Jennifer M. Roberts, attached hereto as Exhibit Volume 1, Exhibit D-2).

On another date, Roberts was at Hutcheson's trailer when Hutcheson showed her a "box" under her bed. She explained to Roberts that the police had installed the box and two microphones in her trailer so that she could record "when somebody came in and...was talking about...the murders." The box remained in the house for at least a month and was removed on June 2nd. (Exhibit Volume 1, Exhibit C).

Further, when Roberts asked Hutcheson about some witchcraft books Roberts found lying on the floor, Hutcheson explained that she had checked them out of the library because she thought Mark Byers was a believer in witchcraft and was the leader of a cult. Hutcheson never told Roberts, however, that she had been to a cult meeting with Petitioner and Echols. All of this occurred before the arrests of Petitioner and his co-defendants. (Exhibit Volume 1, Exhibit D-2).

Sometime after Petitioner was arrested, Roberts mentioned to Hutcheson that she did not believe that Petitioner was guilty. Hutcheson then told her that she could take Roberts to Detective Gitchell's office and let her read Petitioner's statement if she didn't believe it. (Exhibit Volume 1, Exhibit D-2)). In addition, on a number of occasions in May and June, Roberts heard Hutcheson speak to the police (primarily Don Bray and Gary Gitchell), sometimes four or five

times a day. Sometimes she would meet with them at their office. Roberts did not know what the purpose of this contact was.

Further, Hutcheson told Roberts that Hutcheson's son, Aaron, was going to get the reward money for furnishing information in the case because he saw the murders. Roberts reminded Hutcheson, however, that she saw Hutcheson and Aaron on the evening the victims were killed; that night, Hutcheson stopped by to tell Roberts about the incident involving Connie hitting someone and the police being called.

Despite the fact that counsel had this information at least two weeks before Hutcheson testified, counsel failed to use any of this information to elicit testimony that would impeach Hutcheson. Among other things, counsel did not elicit from the defense's own witness, Roberts, that, despite Hutcheson's testimony that the WMPD "knew nothing" about her "playing detective," she in fact spoke to Gitchell and Bray several times during the months of May and June. Counsel neither elicited this fact from Roberts nor confronted Hutcheson with it.

Counsel also failed to confront Hutcheson on other points, including, but not limited to, the fact that, although she claimed that WMPD had no involvement in her investigative efforts, she knew details of the crime that (as police claimed) no one else knew. She had seen Petitioner's statement at Gitchell's office, and she had a police-installed surveillance system in her trailer. These facts showed that she was working closely with Bray from Marion Police Department and WMPD,

and was not merely "playing detective" as she claimed. Such information would have impeached her testimony that she decided "on [her] own" to play detective because she loved the victims and simply "wanted their killers caught." (RT 976, Bates 1477) Further, if Hutcheson had admitted to the recordings, counsel may have elicited further testimony regarding the fruitlessness of

Hutcheson's attempts to ensnare Echols, who found her interest in the occult off-putting.(Exhibit Volume 1, Exh. C at 53-54)

Counsel also failed to confront Hutcheson on whether she told Roberts that she obtained witchcraft books because she thought Mark Byers was a believer in witchcraft and was the head of a cult; the spectre of the castrated victim's stepfather as the head of a cult would have raised a reasonable doubt about who committed the so-called cult killings alleged at trial.

Further, counsel had two witnesses – Dedman and Roberts – who could have impeached Hutcheson on whether she was expecting to receive the reward money. Needless to say, such testimony would have suggested bias and improper motivation for testifying.

Moreover, had counsel confronted Hutcheson with the lies she was telling, she may have faltered, or even capitulated and told the truth: she was fabricating the story to avoid prosecution and the loss of her son. (Exhibit Volume 1, Exh. C) To the extent that Hutcheson would have denied making statement about these matters, Roberts could have been called to impeach her.

D. Counsel's Deficient Performance Prejudiced Petitioner.

Counsel's deficient performance prejudiced Petitioner because Hutcheson's false and damaging testimony placing Petitioner at an "esbat" was allowed to stand, untarnished. Because this testimony corroborated the only significant (albeit unreliable) evidence against Petitioner, a reasonable likelihood exists that, absence counsel's errors and omissions, the jury would have reached a different result.

XIV. COUNSEL WAS INEFFECTIVE AT THE SENTENCING HEARING.

Counsel's performance was woefully deficient for failure to present mitigation evidence. Counsel's deficient performance prejudiced Petitioner, who received the maximum possible sentence for the crimes of which he was convicted.

A. Background Regarding Applicability of Arkansas Code Section 16-97-101 and Counsel's Choice Not to Present Additional Mitigating Evidence

After the jury returned the verdicts on February 4, 1994, this Court informed both sides that "under our new law you all are entitled to put on aggravation or mitigation." (RT 1810, Bates 2316) After some discussion about whether the effective date of the "new law" would render it applicable to Petitioner's case, the prosecution stated that the effective date of the new law was January 1, 1994 and that it would therefore apply to Petitioner's case. Defense counsel Stidham said however, "I discussed this matter with several attorneys and it was my understanding that we had the option of opting in or opting out." (RT 1811, Bates 2317) Stidham then informed the court, "And Mr. Crow and I don't feel the need to go into mitigating or aggravating matters since the crimes were committed in May of ninety-three." (RT 1811-12, Bates 2317-18) Crow added, "We want to opt out." (RT 1811, Bates 2317) The court then asked counsel for both sides whether they wanted to "do a little research on it," and inform the Court later what they wanted to do. (RT 1812, Bates 2318) Prosecutor Davis responded that he wanted to "put on some argument real brief," but Stidham protested, "I don't want to," and Crow formally objected. (RT 1812, Bates 2318) The Court then stated that nonetheless, because the sentencing was bifurcated, both sides were at least entitled to argue for particular punishment. (RT 1813, Bates 2319) In response, Crow indicated that defense counsel would "look at the law." (RT 1813, Bates 2319)

After a recess, in the presence of the jury, the Court explained that the hour-long delay was "necessary in order to allow the attorneys an opportunity to discuss whether or not they needed to produce additional testimony or evidence which they would have been entitled to." (RT 1813-14, Bates 2319-20) Turning to the attorneys, the Court added, "...am I correct, gentlemen – that each of you just chose to do a brief additional argument and proceed." (RT 1814, Bates 2320) Both

sides agreed that this was correct. (RT 1814, Bates 2320) Further, responding to an inquiry by the Court, defense counsel assured this Court that they had consulted with Petitioner and his family members, as well as "anyone else that may be appropriate at this time." They also agreed that they were "satisfied that arguments are all that's necessary" at the sentencing hearing. (RT 1314, Bates 2320).

Counsel Stidham now acknowledges, however, that he and Crow were "woefully unprepared, and had no idea how to present mitigation and argument on sentencing." (Exhibit Volume 1, Exh. D) Although the attorneys agreed that Crow would handle it and Stidham would assist, Stidham was so devastated by the verdict that he "just handed the sentencing phase over to Mr. Crow." (Exhibit Volume 1, Exh. D) Unfortunately, Mr. Crow was no better prepared. (Exhibit Volume 1, Exh. E)

B. Petitioner Was Entitled to a Full Evidentiary Sentencing Hearing Under Arkansas Code Section 16-97-101.

As this court correctly stated to the jury, both sides were entitled to present evidence at the sentencing hearing. The "new law" to which the Court and counsel referred, Arkansas Code sections 16-97-101 and 16-97-103, were enacted in 1993 by Acts 535, section 2 and 551, section 2, and provided for bifurcated evidentiary hearings in felony cases. Section 7 of both of the aforementioned Acts provided that the effective date of the new procedures would be January 1, 1994. Accordingly, since Petitioner's trial began after January 1, 1994 (RT 657, Bates 1157), the Court was correct to conclude that the new bifurcated sentencing procedures applied to Petitioner's case. This is true regardless of when the crimes took place. *Williams v. State*, 318 Ark. 846, 848 (1996)(act providing for bifurcated proceedings of determinations of guilt and punishment does not violate state ex post facto clause, even where criminal acts occurred in 1993,

before its effective date.)

C. Counsel Was Ineffective for Failing to Present Mitigating Evidence.

Counsel rendered ineffective assistance of counsel for failing to put on mitigating evidence at sentencing. A criminal defendant has "a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams v. Taylor*, 529 U.S. 362, 393 (2000). *See also* ABA Guidelines 11.8.2 (Duties of Counsel Regarding Sentencing Options, Consequences and Procedures), 11.8.3 (Preparation for the Sentencing Phase), 11.8.4 (The Prosecution's Case at the Sentencing)11.8.6 (The Defense Case at the Sentencing Phase).

In *Williams*, the United States Supreme Court found ineffective assistance of counsel where counsel did not begin to prepare for the penalty phase of the trial until a week before it commenced. *Id.*, at 395. Counsel in that case failed to investigate the defendant's "nightmarish childhood" and failed to present available evidence of mental retardation, educational limitations, and positive character evidence showing his ability to succeed in a structured environment. *Id.* at 396. Despite the fact that some of the evidence would have been unfavorable to defendant, including three juvenile commitments, counsel's decision not to present the volumes of mitigating evidence was not justified by a decision to focus on the Petitioner's voluntary confession. *Id.* Moreover, the Virginia Supreme Court's determination that no prejudice resulted was "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." *Id.* at 399.

Here, at the very least, counsel failed to present mitigating evidence that was adduced at Petitioner's motion to transfer. Specifically, Dr. Wilkins testified that Petitioner's biological mother abandoned him at age four. (RT 340, Bates 838) He had no further interaction with her

until he was 16 or 17, and at that point, he no longer considered her his mother. (RT 340-41, Bates 838-39) Petitioner came from a "dysfunctional child rearing system" because he was left to the care of his alcoholic father and had a number of "substitute parents." (RT 341, Bates 839) One of several babysitters put his head in the toilet and flushed it on numerous occasions. (RT 341, Bates 839) School officials repeatedly recommended that he undergo counseling, but with the exception of a couple of sessions, he received no meaningful mental health treatment. (RT 342, Bates 840) Further, at the time of the offenses, Petitioner's father and stepmother were separated. He had endured a constantly shifting sense of family with a wide variety of step-siblings and half-siblings as he moved "from place to place." (RT 342, Bates 840)

This evidence, in conjunction with the evidence of prior diagnoses of mental retardation and borderline functioning, would have supplied ample reasons for the jury to consider a mitigated term. For example, with such evidence, counsel could have argued that, with proper counseling, structure, and education, Petitioner would one day be a suitable candidate for eventual release.

Counsel, however, apparently had the erroneous belief that this evidence was already before the jury during the guilt phase. During counsel's very brief mitigation argument (spanning a mere two and a third pages of transcript), counsel told the jury:

> I'll also ask you to consider [Petitioner's] family background. He has mental problems –you've heard bits and pieces of his background. You heard some testimony about his mother and father. He was raised by his father and stepmother and the other family history. I ask you to please consider those things.

(RT 1820-21, Bates 2327-28)

First, if such evidence was in fact before the jury, nothing about counsel's above statement presented reasons for mitigation: the fact that a person "was raised by his father and stepmother" without more facts is hardly cause for concern. But the real problem with counsel's statement was

that the family history to which he referred – matters concerning his father and stepmother–were *not* before the jury. Counsel, apparently, was confusing evidence adduced at Petitioner's motion to transfer with evidence adduced at trial. The only family/social history before the jury was Wilkins' single, unexplored comment that Petitioner was raised in an environment of "alcohol abuse" and "child abuse." (RT 1469, Bates 1973) Wilkins made this comment when Crow questioned Wilkins at trial regarding Petitioner's suggestibility and "dependency status." (RT 1469, Bates 1973) Wilkins stated, "Part of that comes from Jessie's social history, *as we pointed out in the past* (i.e., at the transfer hearing), that Jessie comes from a family system that has a fair amount of alcohol abuse and some child abuse as well." (RT 1469, Bates 1973) Counsel did not explore the point further.

Thus, at sentencing, Counsel directed the jury to evidence of Petitioner's upbringing that it did not hear. He also failed to offer in mitigation the evidence that it did hear–that Petitioner was raised in an environment of alcohol abuse and child abuse. (RT 1469, Bates 1973)

Further, counsel failed to meaningfully review for the jury any of the mental health mitigation evidence and the bare social history that *was* adduced at trial. Counsel's weak summary of Wilkins' extensive testimony emphasized only one fact: Petitioner reasoned at the level of a six to eight-year-old. Counsel then generalized that Petitioner had "some type of mental deficiency" without recounting the substantial evidence adduced at trial that justified this conclusion. Among other things, Crow did not discuss Wilkins' testimony at trial that (1) Petitioner was previously diagnosed as mentally retarded; (2) I.Q. tests and other psychological testing revealed that at best, Petitioner was borderline functioning; (3) Petitioner had difficulty distinguishing fantasy from reality in highly stressful situations; (4) Petitioner was very dependent on others to make major decisions for him; and (5) Petitioner had never passed the Arkansas

minimum standards test. Crow failed to refresh the jurors' minds about this evidence and squandered an opportunity to argue that, if Petitioner did chase down Michael Moore, his *significant* mental impairments informed that decision. Counsel's performance was extremely deficient.

Counsel did not make a strategic choice not to present evidence. Rather, as counsel admit, they made no effort to prepare for the sentencing phase of the trial, and they had no idea how to present mitigation evidence and arguments to the jury with regard to sentencing. (Exhibit Volume 1, Exhs. D and E)

The prejudice is apparent. Petitioner received the maximum sentence on each count, despite the fact that no evidence suggested that inflicted any injuries on any of the victims. A reasonable likelihood exists that if the jury heard well-presented evidence of mitigation, it would have sentenced Petitioner to less than the statutory maximum.

XV. COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE FOR THE MITIGATED TERM.

Counsel practically abandoned Petitioner's case during argument at the sentencing phase of the trial. After both sides agreed that they would merely argue rather than put on new evidence, the Court indicated that it hoped each sides' sentencing arguments would be no longer than 15 minutes. (RT 1815, Bates 2321) When the Court asked whether 15 minutes would be "cutting you too close," the prosecution responded, "no," and the defense team remained silent. (RT 1815, Bates 2321) Upon the Courts inquiry, prosecutor Davis then expressed his intent to "split" the prosecution's arguments. (RT 1815, Bates 2321)

After the prosecution's brief first argument (approximately 4 pages of transcript), the court asked defense counsel whether they too wanted to split their arguments, and Crow answered that he would "do it all" at once. (RT 1819, Bates 2325) Crow then delivered an argument that was

half the length of the prosecution's first argument (approximately two and one third pages [RT 1819-1822, Bates 2325-2328]) Further, counsel's actual substantive argument concerning Petitioner's particular mitigating circumstances spanned a mere one page of transcript (RT 1820, Bates 2326, ¶ 2,3,4; RT 2327, 1821 Bates 2327, ¶ 2)

In this remarkably brief mitigation argument, Crow asked the jury to consider Petitioner's statement to police: "what he said he did, and what he said he didn't do." He asked the jury to "consider all of the circumstances." (RT 1820, Bates 2326) He then asked the jury to consider that Petitioner was 17 at the time of the murders, but that he "reasons on the level of a six to eight year old, and certainly "does have some type of mental deficiency." Regarding Petitioner's social history, Crow remarked:

> I'll also ask you to consider his family background. He has mental problems – you've heard bits and pieces of his background. You heard some testimony about his mother and father. He was raised by his father and stepmother and the other family history. I ask you to please consider those things.

(RT 1820-21, Bates 2327-28)

Crow then reminded jurors that, although they believed Petitioner's statement, they should "consider what he himself contends."[48] (RT 1821, Bates 2327) Counsel then moved on to the subject of statutory ranges of punishment.

On that subject, Crow did nothing to argue Petitioner's cause:

> ...murder in the first degree – the range of punishment is ten to forty to life. I'll ask you to please consider all of them. I'm not going to stand here and say it should be one or the other. I would ask you to please consider all of them. Murder in the second degree, ladies and gentlemen, the range of punishment is five to twenty. I would ask you to consider the full range of punishment.

(RT 1821, Bates 2327)

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[48]The record reflects that an additional inaudible comment occurred at this time.

Crow then asked the jury to review the tape of Petitioner's statements to police and consider "what Jessie did and what he didn't do," as it makes its determination. (RT 1821, Bates 2327)

The above-recited facts from the record show that counsel's performance was extremely deficient and highly prejudicial. Counsel did not prepare for the sentencing phase of the trial, (Exhibit Volume 1, Exh. D & E) and their lack of preparation resulted in a near concession on the sentencing issues in this case.

First, counsel did not once identify or emphasize the specific things that Petitioner "did and didn't do," but rather, invited the jury to review the entire confession to find this mitigating evidence. Rather than play the mitigating parts of the confession for the jury or at least point out the specifics on which it should focus, Crow asked the jury to review the entire confession. This conduct was objectively unreasonable because the confession – complete with stories of rape, murder, mutilation, dog-eating, orgies and other inflammatory material – contained far more aggravating facts than mitigating ones. Thus, counsel argued *against* Petitioner when he asked the jury to "please review the tape and consider what did and didn't happen." (RT 1821, Bates 2327)

Second, counsel failed to meaningfully review any of the mental health mitigation evidence and the bare social history that was adduced at trial. Counsel's weak summary of Wilkins' extensive testimony emphasized only one fact –that Petitioner reasoned at the level of a six to eight-year-old. Counsel then generalized that Petitioner had "some type of mental deficiency" without recounting the substantial evidence adduced at trial that justified this conclusion. Among other things, Crow did not discuss that (1) Petitioner was previously diagnosed as mentally retarded, (2) I.Q. tests and other psychological testing revealed that at best,

Petitioner was borderline functioning; (3) Petitioner had difficulty distinguishing fantasy from reality in highly stressful situations; (4) Petitioner was very dependent on others to make major decisions for him. Crow failed to refresh the jurors' minds about this evidence and squandered an opportunity to argue that if Petitioner did chase down Michael Moore, his *significant* mental impairments informed that decision.

Third, as discussed above, counsel failed to discuss what little social history evidence there was. Apparently unprepared, counsel argued that the jury should consider "some testimony about [Petitioner's] mother and father. He was raised by his father and stepmother and the other family history." Yet counsel was mistaken because this particular family history was not before the jury. The only mention of Petitioner's social history at trial was when Wilkins stated that Petitioner "comes from a family system that has a fair amount of alcohol abuse and some child abuse as well." As noted above, counsel did not encourage any elaboration on this point at trial, and failed to bring this single statement to the jury's attention as he argued for mitigation.

Fourth, counsel not only failed to ask for a sentence less than the statutory maximum, he asked the jury *to consider* the maximum when he said, "the range of punishment is ten to forty to life. I'll ask you to please consider all of them. I'm not going to stand here and say it should be one or the other. I would ask you to please consider all of them." He repeated the invitation to sentence Petitioner to the maximum when he stated, "Murder in the second degree, ladies and gentlemen, the range of punishment is five to twenty. I would ask you to consider the full range of punishment." (RT 1821, Bates 2327) Counsel did not once tell the jury that Petitioner's mitigating circumstances entitled him to something less than the maximum sentence. The jury was left to conclude that even Petitioner's own attorney did not really believe that he was entitled to a mitigated sentence. Accordingly, counsel abandoned his role as advocate and left Petitioner

without meaningful representation at sentencing.

Fifth and finally, counsel relinquished the right to split his arguments and therefore squandered Petitioner's right to have the last word at the sentencing hearing. Thus, prosecutor Davis was the last person heard on the issue when he made his final argument (filling three additional pages of transcript). Among other things, counsel failed to respond to Davis' appeals to the jury to sentence Petitioner to "stop these kids from doing these stupid, crazy things." (RT 1826, Bates 2332)

In sum, counsel argued only a third as long as the prosecution did on the issue of sentencing and permitted the prosecution to speak last on that issue. This is true despite the fact that procedurally, Petitioner was entitled to have the last word. Further, during the brief argument made, counsel failed to recount salient mitigating facts and pointed the jury to evidence that it did not hear. Counsel sealed Petitioner's fate when he encouraged the jury to consider imposing the maximum statutory sentence. Counsel's performance was completely deficient.

Counsel's deficient performance prejudiced Petitioner's case because the prosecution's case was not subjected to "meaningful adversarial testing," and there was, accordingly, a total breakdown in the adversary system which is prejudicial *per se.* (*United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). Moreover, counsel's performance was prejudicial under *Strickland v. Washington*, 466 U.S. 668. Petitioner was sentenced to the maximum sentence on each count and will spend the remainder of his life in prison, despite the fact that no evidence even suggested that he personally inflicted injury on any of the victims. Had counsel made proper and zealous mitigation arguments, a reasonable likelihood exists that the sentencing verdict would have been different.

XVI. COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL WHEN JUDGE BURNETT OPENED THE DOOR TO THE JURY AND ROOM

AND MADE STATEMENTS REFLECTING HIS BELIEF THAT PETITIONER SHOULD BE FOUND GUILTY.

Counsel was ineffective for failing to move for a mistrial on state and federal grounds after the Judge opened the door to the jury room and spoke to the jury. The judge's off-the-record communications with the jury violated Petitioner's federal and state rights to due process and a fair trial including but not limited to his rights to be have a trial free from judicial opinions on the evidence and on his guilt or innocence, to have all proceedings conducted in open court, and to be present at all critical stages of the proceedings.

A. Background

On the second day of jury deliberations, (February 4, 1994), defense counsel Stidham, Prosecutor Davis, and Judge Burnett were in the hallway outside of the jury room. It was getting close to lunch time, and the judge opened the door to the jury room and asked the jury if they wanted lunch. One of the jurors informed the judge that they were almost finished and could therefore wait to have lunch. The judge then said that they would have to come back for the sentencing phase anyway, so they might as well finish their deliberations after lunch. The juror then asked the judge "but what if we vote not guilty?" The judge appeared surprised by this comment, but said nothing, and closed the door. (Exhibit Volume 1, Exhs. D and E) The jury returned a guilty verdict on all three counts at noon. (RT 1806, Bates 2312)

B. Counsel Was Ineffective Because Judge Burnett's Remarks Warranted the Granting of a Motion for Mistrial.

"No principle is better settled than that a judge presiding at a trial should manifest the most impartial fairness in the conduct of the case." *Oglesby v. State*, 299 Ark. 403, 407, 773 S.W.2d 443, 444. "In recognition of the great influence a trial judge has on a jury...the judge should refrain from...unnecessary comments which may tend to result prejudicially to a litigant or

which might intend to influence the minds of the jury." *Id.* A comment by the trial judge expressing his opinion as to facts or evidence presented to the jury is reversible error. *Id.*

This is because "[i]n a jury trial there is probably no factor that makes a more indelible impression on a juror than the attitudes, statements and opinions of the trial judge. To them, his word is the law." *McMillan v. State*, 229 Ark. 249, 314 S.W.2d 483 (1958). Further, "[b]ecause of his influence with the jury, remarks by the trial judge may tend to prejudice a litigant by destroying the weight and credibility of testimony in his behalf in the minds of the jury. Although the judge may not intend to give an undue advantage to one party, his influence may quite likely produce that result." *Green v. State*, 343 Ark. 244, 33 S.W.3d 485 (2000)(*citing*, *Fuller v. State*, 217 Ark. 679, 232 S.W. 2d 988 (1950); *Seale v. State*, 240 Ark. 466, 400 S.W. 2d 269 (1966); *McMillan v. State, supra.* Prejudicial comments that go to the credibility and the weight of testimony violate article 7, section 23 of the Arkansas Constitution. *Id.*

This case is analogous to *Ogelby, supra,* where the judge made comments that reflected his own opinions about the evidence. In that case, defendant was charged with violating obscenity laws. During the viewing of certain pornographic films at issue, the trial judge, within the hearing of the jury, said, "I'm feeling ill. How much longer[?]" Reversing the trial court's denial of defendant's immediate motion for a mistrial, the Supreme Court reasoned, "The trial judge's comment obviously reflected his own feelings on these legal aspects in the case, and as a consequence, may have influenced the jury's decision." *Ogelby*, 299 Ark. at 407, 773 S.W.2d at 444-45; *See also, Jones v. State,* 301 Ark. 530, 785 S.W.2d 218 (1990); *Quercia v. United States, 289 U.S. 466* (1933)("The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling." Thus, even in the federal system where comments on the evidence are permissible,

the trial judge must "use great care that an expression of opinion upon the evidence should be so given as not to mislead, and especially that it should not be one-sided... .")(internal quotes and citations omitted.)

Here, too, Judge Burnett expressed his own feelings on the legal aspects of the case when he informed the jury, in essence, that Petitioner was guilty – a determination that rests soundly within the province of the jury. Further, his comment to the jury that it would have to return to deliberate for the sentencing phase was a comment on the weight of the evidence; in his view, the totality of the evidence supported guilt and not innocence, hence the need for a sentencing hearing. For this reason, Burnett's comments also violated Petitioner's state and federal due process right to a presumption of innocence. Because the judge's comment in this case expressed an opinion on Petitioner's guilt and on the weight of the evidence, a mistrial was warranted and counsel was ineffective for making the motion immediately after the incident occurred. At the very least, counsel should have requested a curative instruction to abate the prejudice inevitably caused by this judicial opinion on the evidence. Counsel failed to do so and was therefore ineffective.

C. The Communications With the Jury Should Have Been Conducted in Open Court, in Petitioner's Presence.

Because Judge Burnett's comments and the juror's subsequent question – "But what if we vote not guilty?"– was tantamount to a request for further instruction, the proceedings should have been conducted in open court. *Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986); A.C.A. § 16-89-125 (e). Counsel should have moved for a mistrial on those grounds. *Id.* Counsel's motion would likely have met with success because "[n]oncompliance with this statutory provision gives rise to a presumption of prejudice, and the State bears the burden of overcoming that presumption." *Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001).

Further, because Petitioner had a right to be present at all critical stages of the proceedings and counsel did not waive his appearance during the instruction to the jury, counsel should have objected to the proceedings as a violation of Petitioner's right to due process. (U.S.C.A. Amend. XIV; Ark. Const. Art 2 § 8).

D. Counsel's Deficient Performance Prejudiced Petitioner.

Counsel's failure to raise this issue in a motion for new trial was highly prejudicial. As counsel stated in his declaration, "it was getting close to lunch time" when the court made the objectionable comments, and jury returned its verdict at noon. Thus, immediately after hearing the judge's opinion that the state of the evidence warranted a guilty verdict, the jury returned a verdict of guilty, despite the foreman's clear indication that a verdict of "not guilty" was a distinct possibility. Not only were the judge's comments highly prejudicial, but his lack of comment compounded the error. When asked, "But what if we vote not guilty," the judge remained silent, indicating that the question warranted no response and had no merit. The judge's vocalization of his belief that a guilty verdict was the predetermined outcome, coupled with his silence on the question of how to proceed in the event of a not guilty verdict, prejudiced Petitioner. Under these circumstances, "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2543 (2003). Accordingly, counsel's failure to object and move for a mistrial was prejudicially deficient.

XVII. PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF HIS RIGHTS TO A FAIR TRIAL, DUE PROCESS, AND EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL'S INCOMPETENCE RESULTED IN A BREAKDOWN OF THE ADVERSARIAL PROCESS.

Petitioner's trial counsel failed to provide reasonably competent representation during the guilt and penalty phases of the trial, resulting in a complete breakdown of the adversarial process and a conviction obtained in violation of Petitioner's rights to effective representation of counsel,

a fair trial and due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and sections 8, 9, and 10 of article 2 of the Arkansas Constitution.

Each of the multiple errors and omissions in the guilt and penalty phase discussed above are reasserted here to support Petitioner's claim that trial counsel's performance was so deficient that it caused a complete breakdown of the adversary system, leading to the conviction of an innocent teenager and his sentence of life plus forty years.

These deficiencies at the guilt phase included, but are not limited to failure to timely raise and obtain a ruling on state law grounds for suppression of Petitioner's confession under Rule 2.3; failure to present evidence of Petitioner's mental deficits as it related to his motion to suppress; failure to uncover and present evidence of police interrogation tactics generally, as well as specifically, with regard to West Memphis Police Officers; failure to hire a competent expert on Petitioner's suggestibility; presenting damaging and highly prejudicial "expert" testimony of Dr. Wilkins at trial; failure to prepare for Wilkins' expert testimony; failing to challenge on appeal the trial court's ruling denying a motion to continue for reasonable amount of time to find a new expert; failing to object to invalid opinions that Petitioner was possibly malingering or had aspects of Antisocial Personality Disorder; failure to object to unreliable rebuttal testimony of Dr. Rickert; failing to elicit critical foundational testimony from confessions expert Dr. Ofshe; failure to furnish Ofshe with all materials relevant to Petitioner's confession; failure to cross examine and impeach Detective Gitchell's rebuttal testimony; failure to object to inadmissible evidence that 99 percent of recanting confessors are guilty; failure to investigate and litigate Petitioner's competency, including failure to raise the issue despite genuine concerns about Petitioner's competency and failure to challenge on appeal the court's *sua sponte* finding of competence; failure to hire a criminal profiler despite recognizing the need for one; failing to hire a forensic

pathologist or challenge the state's medical examiner's testimony; failure to properly challenge the state's finer, serology and DNA evidence; failure to object to inadmissible, speculative testimony that permitted the prosecution to explain away serious weaknesses in its case; failure to object to at least 10 highly prejudicial instances of prosecutorial misconduct during closing arguments; failing to investigate the fate of blood samples taken from a likely suspect in the crimes; failure to interview Victoria Hutcheson, who has come forward to explain that she fabricated her testimony against Petitioner; failure to otherwise investigate Hutcheson's story that she went with Petitioner and Echol's to an "esbat"; failure to adequately investigate and prepare Petitioner's alibi defense; failure to move for a mistrial when the court expressed its opinion on that the evidence supported only a guilty verdict. The failures at the guilt phase include, but are not limited to, failure to present mitigating evidence and failure to even ask for a mitigating term.

A consideration of all of the claims discussed in full detail above compels the conclusion that counsel's grossly substandard performance caused a breakdown in the adversary process such that prejudice is presumed and Petitioner's conviction and sentence cannot stand. *United States v. Chronic*, 466 U.S. at 656-657.

XVIII. THE EFFECT OF COUNSEL'S ERRORS, WHETHER CONSIDERED SINGLY OR CUMULATIVELY, WAS PREJUDICIAL.

Notwithstanding Petitioner's above claim that prejudice is presumed, Petitioner has established prejudice. Though each claim above is prejudicial in and of itself, it follows that the cumulative effect of the above claims of ineffective assistance was prejudicial. Considering the number and nature of the errors committed by counsel, "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2543 (2003). Reversal is required.

XIX. PETITIONER WAS CONVICTED ON FALSE EVIDENCE AND IS ENTITLED

TO A NEW TRIAL.

The presentation of false, material evidence against a defendant in a criminal case violates the right to due process. *Giglio* at 405 U.S. at Further, counsel's failure was prejudicial because a new trial would have been warranted on the grounds that Hutcheson gave false testimony. The presentation of false, material evidence against a defendant in a criminal case violates the right to due process, irrespective of the good or bad faith of the prosecution. *Giglio v. United States*, 405 U.S. 150, 153 (1972)(citing, *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

Here, Hutcheson's false testimony deprived Petitioner of his rights to due process and to a fair trial. This violation compromised defendant's fundamental rights to due process so as to void his conviction. Further, in the event that this court finds that the recent Hutcheson sworn statement was unavailable or unknowable to counsel at trial or on appeal, counsel could not have raised the present false evidence claim prior to these postconviction proceedings, and under those circumstances, he should not be barred from raising it for the first time under Rule 37.

The full details of Hutcheson's sworn statement that she provided false testimony are discussed extensively above in Petitioner's IAC claim for failure to interview and investigate Hutcheson. Hutcheson finally found the courage to admit that she told the jury a completely fabricated story that she attended an esbat with Petitioner. At trial, Prosecutor Fogleman told the jury that this Hutcheson's evidence led the police to Petitioner, who then confessed. Thus, her testimony offered a reasonable and convincing reason why the police suddenly seized on Petitioner as a suspect, and it partly (but erroneously) explained to the jury why he confessed: with Hutcheson's information, the police already knew about his alleged "cult" activities. Further, as prosecutor Davis stressed, Hutcheson was the *sole* witness to corroborate Petitioner's statements

to police about cult activity. Hutcheson's corroboration was therefore crucial to the jury's finding that Petitioner's highly questionable statements about a calculated cult-driven killing, were true. Accordingly, Petitioner was prejudiced by this false evidence.

XX. THE PROSECUTION VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER BRADY V. MARYLAND.

A. Petitioner's Brady Claim is Properly Before This Court.

Petitioner has filed in the Supreme Court a petition to reinvest this Court with jurisdiction to hear his claim on writ of error coram nobis regarding a violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Petitioner also asks this court to hear his *Brady* claim in the present Rule 37 proceeding. Petitioner recognizes that current Arkansas case law could be interpreted to hold that *Brady* claims are not cognizable in Rule 37 proceedings. Arkansas case law is in conflict with federal constitutional law on this point because the holding in *Brady v. Maryland* is a constitutional directive designed to protect the most fundamental rights to due process and a fair trial. Further, the language of Rule 37.1(a) permits Constitutional claims to be heard itself does not prohibit *Brady* claims. Moreover, the *Brady* violation that took place in *this* case - suppression of evidence that police manufactured witness testimony against Petitioner – was so fundamental as to render the judgment void and open to collateral attack.

B. The Prosecution Suppressed Favorable, Material Evidence, the Absence of Which Prejudiced Petitioner at Trial.

Suppression by the prosecution of relevant, favorable and material evidence violates due process of law under the Fourteenth Amendment. *Brady,* 373 U.S. at 87. To prevail on a *Brady* claim, a defendant must show (1) that the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that the prosecution suppressed the evidence either willfully or inadvertently; and (3) suppression of the evidence prejudiced

defendant. *Strickler v. Greene* 527 U.S. at 281–282.

Here, the prosecution suppressed favorable evidence that Hutcheson's statement was coerced by the police. The suppression of this favorable evidence severely prejudiced Petitioner.

The prosecution further suppressed Kermit Channell's laboratory bench notes which contained exculpatory evidence indicating that his serology testing was flawed.

Finally, it is believed that the prosecution had information at the time of trial or at the time of the motion for new trial that the injuries suffered to the three boys was caused by animal predation. Counsel for Jason Baldwin has learned that one or more persons from the West Memphis Police Department consulted with a member of the San Diego Police Department during the investigation of the case. It is believed that the San Diego police officer raised the issue of animal predation during that consultation. This is highly exculpatory information that should have been disclosed to the defense if in fact the prosecution or law enforcement knew of it.

C. The Evidence Was Favorable.

In the present case, prong one of the *Brady* claim is satisfied. Favorable evidence includes that which would impeach a witness whose testimony "may well be determinative of guilt or innocence." *Giglio v. United States* 405 U.S. 150, 154 (1972) In *Giglio*, the prosecutor who presented the case to the grand jury admitted that he promised the witness that he would not prosecute that witness if the witness testified. The prosecutor who tried the case, however, was unaware of the promise, and the jury did not learn of it at trial. The United States Supreme Court held that neither the original prosecutor's lack of authority to make the promise nor his failure to inform his associates of the promise cured the due process violation that resulted from the failure to present all material evidence to the jury. (*Id.* at pp. 153-155.) The Court reversed and remanded for new trial. (*Id.* at p. 155.)

Here too, the prosecutor's failure to disclose material evidence bearing on the credibility of Hutcheson and Channell violated Petitioner's due process rights. The evidence regarding Hutcheson would have shown not only that Hutcheson's story was false, but that Petitioner's defense of coerced confession was likely true – WMPD had used similar tactics on Hutcheson. Equally if not more important, the evidence would have proved that the police manufactured evidence against Petitioner. The evidence regarding Channell would have led to a successful challenge to the admissibility of the serology and DNA evidence, and failing that, the bench notes could have been used effectively to impeach the serology and DNA evidence at trial. See Exhibit Volume 4, Exhs. EE and FF, Affidavits of Patricia Zajac and Donald Riley). Without a doubt, the evidence was favorable.

Similarly, had law enforcement known of the animal predation theory learned from the San Diego Police Department, that too was favorable evidence for all the reasons cited throughout this petition.

D. The Evidence Was Suppressed.

Suppression by the prosecution of favorable, material evidence violates due process regardless of the good faith or bad faith of the prosecution. (*Id.* [citing *Brady v. Maryland, supra*, 373 U.S. at p. 87].) A prosecutor's duty under *Brady* to disclose material, exculpatory evidence extends to members of the prosecution team, including its investigators. *Kyles v. Whitley,* 514 U.S. 419, 437-438 (1995) . Under *Kyles*, a prosecutor has a duty to learn of favorable evidence known to other prosecutorial and investigative agencies acting on the prosecution's behalf, including police agencies. *Id.* Thus, even if the prosecutors in this case did not know that Hutcheson's statements were coerced by threats of prosecution and of loss of her child, the evidence was still "suppressed" for *Brady* purposes. Like the unaware prosecutor in *Giglio*, the

prosecution team in this case suppressed favorable evidence, regardless of whether the state's trial attorneys were aware of its existence.

Similarly, the evidence in Kermit Channell's notes and the evidence of animal predation were not disclosed to the defense.

E. Suppression of the Fact That Hutcheson's Statements Were Coerced and Fabricated Prejudiced Petitioner.

As discussed more fully above, a reasonable probability exists that the jury would have acquitted Petitioner had it known the truth about Hutcheson. At the very least, if counsel had this information at trial, the jury would have rejected all of Hutcheson's testimony. More likely, the jury would have found Petitioner's coerced-confession defense far more credible – her account completely corroborated Petitioner's defense. Further, because Hutcheson would have testified that the WMPD officers required her to manufacture evidence to fit their bizarre theory of the case, her testimony would have called into question all of the state's evidence. Prejudice certainly resulted.

XXI. PETITIONER IS ACTUALLY INNOCENT.

The information contained herein as well as information contained in Petitioner's Petition for Writ of Habeas Corpus Pursuant to Arkansas Code Annotated 16-112-201 et seq., shows that Petitioner is actually innocent. Although the Arkansas Supreme Court has held that actual innocence claims are direct attacks on the judgment that are not cognizable under Rule 37, (See, *Sanford v. State*, 342 Ark. 22 (2000)), as discussed below, evolving federal law suggests that a freestanding claim of actual innocence is viable where a Petitioner's sentence, in light of his innocence, violates his constitutional rights. Indeed, Rule 37 affords a remedy when the sentence in a case was imposed in violation of the Constitution of the United States or the Constitution of Arkansas. (A. R. Cr. Proc. Rule 37.1(a)(I)). Also, it provides an exception to the rule that claims

of error must be raised at trial or on appeal, when the "errors ...are so fundamental as to render the judgment of conviction void and subject to collateral attack." *Collins v. State*, 324 Ark. 322 (1996). Here, Petitioner's life-plus-forty-year sentence for a crime of which he is actually innocent violates the Eight Amendment prohibition against cruel and unusual punishment.

Evolving case law recognizes the viability of such a claim. In *Herrera v. Collins*, 506 U.S. 390 (1993), the majority court stated, "We may assume, for the sake of argument in deciding this case, that, in a capital case, a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Id.* at 417. Further, dissenting Justices Blackmun, Stevens, and Souter agreed that "executing an innocent person epitomizes 'the purposeless and needless imposition of pain and suffering'" that violates the Eighth Amendment. Id. at 431-432 *(quoting Coker v. Georgia*, 433 U.S. 584, 592 (1977). Importantly, these justices also explained that, "[i]t also may violate the Eighth Amendment to imprison someone who is actually innocent." Id. (citing *Robinson v. California*, 370 U.S. 660, 667, noting, "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"). The dissenting Justices also opined that the execution of the innocent would violate both procedural and substantive due process. (*Id.* at 435-436.) Based on the dissent's quoting of Robinson, above, the imprisonment of an actually innocent person would likewise violate a defendant's right to substantive due process.

More recently, in *House v. Bell*, 547 U.S. 518 (2006), the Court held that, while Petitioner's actual innocence showing entitled him only to relief from procedural default rules, "whatever burden a hypothetical free-standing innocence claim would require, this Petitioner has not satisfied it." (*Id.* at 555). Similarly, the dissenting Chief Justice stated, "I do not believe that

[Petitioner] has met the higher threshold for a free-standing innocence claim, assuming such a claim exists." *Id.* at 556 (Roberts, J., concurring in judgment in part and dissenting in part)(citing *Herrera* at 417).

As noted by the United States District Court, "...at least five of the [United States Supreme Court] Justices apparently would in a proper case affirmatively hold that a free standing claim of innocence may be litigated in a habeas petition." *Sacco v. Greene*, 2007 U.S. Dist. LEXIS 7635 ((S.D.N.Y. January 30, 2007)(discussing *Herrera v. Collins*, 506 U.S. 390, 400 (1993)). The *Sacco* Court pointed out that "[i]t would seem as a matter of ordinary logic, that the law must be the same in a capital case as in a case involving significant imprisonment." (Id.)

Thus the United States Supreme Court acknowledges the likely existence of a constitutional freestanding innocence claim in habeas corpus proceedings, and at least one district court has held that such a claim is indeed cognizable. At the very least, these cases demonstrate that such claims are not barred. Moreover, under Arkansas Constitution, Article 2, section 13,

> Every person is entitled to a certain remedy in the laws for *all* injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase; completely, and without denial; promptly and without delay; conformably to the laws.

As such, this court should hear Petitioner's freestanding claim of actual innocence in the present Rule 37 proceedings, and in so doing, consider new evidence that was available at trial, as well as evidence that was unavailable at trial in support of this claim.

As discussed fully in Petitioner's 16-112-201 Petition, new DNA evidence in this case establishes that no genetic material of the defendants was present on the victims's bodies. This is strong evidence of actual innocence because a perpetrator who committed the types of crimes described by defendant in his confession would surely leave behind some DNA: On the other hand, there was genetic material on the penis of Steve Branch that could *not* have come from any

of the defendants or victims.

Of great significance, a hair containing mitochondrial DNA consistent with that of Terry Hobbs, the stepfather of victim Steve Branch, was found on the ligature used to bind Michael Moore. In addition, another hair found on a tree root at the scene where the bodies were discovered contains mitochondrial DNA consistent with that of David Jacoby; Hobbs was with Jacoby in the hours before and after the victims disappeared. Years before the DNA link between Hobbs and the crime scene was discovered, Pam Hobbs, the mother of Steve Branch, came forth with evidence that she believed linked her former husband, Terry Hobbs, to the murders. Further, John Douglas, former Chief of the Investigative Support Unit of the FBI for twenty five years, recently conducted an offender analysis of the murders which could readily apply to Hobbs but not to any of the three men convicted as teenagers in this case.

Of equal importance, an overwhelming amount of new forensic evidence establishes that most of the wounds suffered by the victims resulted from post-mortem animal predation. Several leading forensic pathologists and odontologists who reviewed the autopsy tests, photos, and reports in this case agree that, among other things, the Byers castration was not caused with a knife as Petitioner told the police, but was the result of animal activity. The presence of animal predation exposes the falsity of the state's case against Petitioner, which rested almost entirely on a confession that is irreconcilable with this new evidence.

Further, as discussed extensively above, the only eyewitness against Petitioner recanted her testimony and revealed that she fabricated evidence of Petitioner's alleged cult activity because WMPD officers threatened to take her young son away and prosecute her for murder. This witness provided the testimony necessary for the jury to believe that part of Petitioner's confession describing "cult meetings" where the 'hurting some boys' was allegedly discussed.

The foregoing establishes that Petitioner is actually innocent of the crimes for which he was convicted. His life plus forty year prison sentence therefore violates the Eighth Amendment to the United States Constitution.

Exhibits

Exhibits that Petitioner is submitting to support this Petition and Motion, as well as his Rule 37 Petition, all of which are incorporated by reference into this Petition, are, in alphabetical order:

A	Article entitled "Question of Wrongful Convictions Raises Questions Beyond DNA"
B	Transcript of Petitioner's Statement to Police on June 3, 1993
B-1	Transcript of Petitioner's Statement to Police on June 6, 1993 (B-2)
B-2	Corrected Transcript of Petitioner's Statement to Police on June 6, 1993
C	Transcript of Sworn Statement of Victoria Hutcheson on June 24, 2004
C-2	Declaration of Nancy Pemberton
D	Declaration of Daniel T. Stidham
D-1	Correspondence from Dan Stidham to Ed Mallett dated February 22, 1998
D-2	Transcript of Sworn Statement of Jennifer M. Roberts
D-3	Curriculum Vitae of Dr. Richard Ofshe
E	Declaration of Gregory Crow
F	Order re: Motion and Amended Motion to Suppress dated January 20, 1994
G	Forensic Evaluation of Dr. William E. Wilkins dated November 8, 1993
H	Declaration of Dr. Timothy J. Derning.
H-1	Curriculum Vitae of Dr. Timothy J. Derning
H-2	Chart of Materials Reviewed by Dr. Timothy J. Derning

I	Declaration of Richard A. Leo, Ph.D., J.D.
I-1	Curriculum Vitae of Richard A. Leo, Ph.D., J.D.
J	Affidavit of Janice Jean Ophoven, M.D.
J-1	Curriculum Vitae of Janice Jean Ophoven, M.D. (J-1)
K	Curriculum Vitae of Dr. Werner U. Spitz
L	Dr. Werner U. Spitz's Written Report dated November 27, 2006
M	Affidavit of Donald M. Horgan
M-1	Correspondence from Amy Jeanguenat to Donald Horgan dated August 16, 2007 (D-3)
N	Dr. Werner U. Spitz, M. D.'s Supplemental Report dated October 12, 2007
O	Curriculum Vitae of Dr. Richard Rafael Souviron
P	Dr. Richard Rafael Souviron's Report dated January 11, 2007
Q	Curriculum Vitae of Dr. Robert Wood
R	Curriculum Vitae of Terri L. Haddix, M.D.
S	Terri L. Haddix, M.D.'s Interim Report dated October 22, 2007
S-1	Terri L. Haddix, M.D.'s Supplemental Report dated May 6, 2008 (S-1)
T	Merckelbach, Harald, "The Gudjonsson suggestibility scale"
U	Memphis Commercial Appeal June 9, 1993
U-1	Letter from Jessie Misskelley, Jr. to Jessie Misskelley, Sr.
V	Memphis Commercial Appeal March 17, 1994
W	Partial Transcript of Hearing on Rule 37 Petition in State of Arkansas vs. Damien Echols: Testimony of Dan Stidham dated May 5, 1998
W-2	Partial Transcript of Hearing on Rule 37 Petition in State of Arkansas vs. Damien

	Echols: Testimony of Ron Lax dated October 28, 1998 (W-1)
W-3	Memorandum from Ronald Lax to Michael Echols File date February 23, 1994 (W-2)
X	Declaration of Shaun Ryan Clark
Y	Letter from Echols's Attorneys to Brent Davis dated March 12, 2007
Z	Letter from Michael Burt to Frank Peretti dated May 15, 2007
AA	Letter from Echols' Attorneys to Brent Davis dated July 10, 2007
BB	Letter from Echols' Attorneys to Frank Peretti dated October 4, 2007
CC	Curriculum Vitae of John Douglas
DD	John Douglas' Analysis of the Case dated May 5, 1993
EE	Affidavit of Dr. Patricia Zajac
EE-1	Curriculum Vitae of Dr. Patricia Zajac
EE-2	Bench Notes
FF	Affidavit Donald Riley, Ph.D.
FF-1	Curriculum Vitae of Donald Riley, Ph.D.
GG	Excerpts From Abstract and Brief for Cross-appellants in State v. Crittenden County
GG-1	Invoice by Ronald L. Lax for Misskelley Investigative Services dated March 25, 1994
GG-2	Invoice by Ronald L. Lax for Echols Investigative Services dated March 28, 1994
HH	Affidavit of Sally Ware
II	Transcript of Interview of Matthew Baldwin dated September 23, 1992
JJ	Affidavit of Matthew Baldwin

KK Transcript of Interview of Angela Gail Grinnell dated June 4, 1993

LL Affidavit of Angela Gail Grinnell

MM Transcript of Interview of Dennis Lee Dent dated January 7, 1994

NN Transcript of Interview of Jennifer Elizabeth Bearden dated September 10, 1993

OO Affidavit of Jennifer Elizabeth Bearden

PP Affidavit of Holly George Thorpe

QQ Affidavit of Heather Dawn Hollis

RR Transcript of Interview of Domini Teer dated September 10, 1993

SS Affidavit of Domini Teer

TT Affidavit of Joseph Samuel Dwyer

UU Affidavit Dan E. Krane

UU-1 Curriculum Vitae of Dan E. Krane

VV Affidavit of Jason R. Gilder

VV-1 Curriculum Vitae of Jason R. Gilder

WW Declaration of Jessie Misskelley

XX Motion to Preserve Evidence and for Access to Evidence for Testing file-stamped November 17, 2000

YY Declaration of Rachael Geiser

ZZ Affidavit of Charles Jason Baldwin

AAA Letter from Max Houck dated February 2, 2004

BBB Affidavit of Max Houck

BBB-1 Curriculum Vitae of Max Houck

CCC Order for DNA Testing dated June 2, 2004

DDD	First Amended Order for DNA Testing dated February 23, 2005
EEE	Bode STR Forensic Data Case Report dated December 30, 2005
FFF	Bode Mitochondrial Forensic DNA Case Report dated December 30, 2005
GGG	Bode STR Forensic DNA Case Report dated January 2, 2007
HHH	Bode Supplemental Forensic Case Report dated January 25, 2007
III	State's Reply to Echols' 2nd DNA Testing Status Report (undated)
JJJ	Bode STR Forensic DNA Case Report dated September 27, 2007
KKK	Bode Mitochondrial Supplemental Forensic Case Report dated September 27, 2007
LLL	Serological Research Institute 3rd Analytical Report dated May 11, 2007
MMM	Serological Research Institute 5th Analytical Report, dated October 26, 2007
NNN	Curriculum Vitae of Tom Fedor
OOO	Goudge Commission's Home Page and Witnesses
PPP	Letter from John Philipsborn to Brent Davis dated June 12, 2007
QQQ	Letter from John Philipsborn to Brent Davis dated December 27, 2007
RRR	Affidavit of Joyce Cureton
SSS	Affidavit of Sue Weaver
TTT	Affidavit of Patty Burcham
UUU	Affidavit of Daniel Biddle
VVV	Affidavit of Jason Duncan
WWW	Affidavit of Xavier Redus
XXX	Affidavit of Leonard Haskins
YYY	Affidavit of Montavious Gordon
ZZZ	Affidavit of Danny Williams

AAAA Affidavit of Amy Mathis

BBBB Affidavit of Crystal Hale Duncan

CCCC Mapquest Maps

DDDD Affidavit of Donna Medford

EEEE Arkansas Times Article

FFFF Press Articles prior to and during trial

GGGG Affidavit of Dr. Joy Halverson

GGGG-1 Curriculum Vitae of Dr. Joy Halverson

HHHH Article, "A Multi-Plex Assay to Identify 18 European Mammal Species form Mixtures Using the Mitochondrial Cytochrome B Gene, 29 Electrophoresis 340 (2008)

IIII Declaration of Tom Quinn

JJJJ Affidavit of Ann Tate

KKKK Bode Supplemental Mitochondrial Forensic DNA Case Report dated May 23, 2008

LLLL Affidavit of Sharon Nelson

MMMM Dr. Tabor Letter Report and Affidavit dated May 10, 2007

NNNN Curriculum Vitae of Dr. Tabor

CONCLUSION

For the reasons stated here, Petitioner is entitled to relief based on evidence that his trial, appellate and post-trial counsel rendered ineffective assistance of counsel.

Respectfully Submitted,

Michael N. Burt, Esq.
Jeff Rosenzweig, Esq.

Dated: June 5, 2008

____

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Dated: June 5, 2008

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AFFIDAVIT

The petitioner states under oath that he has read the foregoing petition for postconviction relief and that the facts true, correct, and complete to the best of petitioner's knowledge and belief.

____
JESSIE LOYD MISSKELLEY

STATE OF ARKANSAS

COUNTY of __________

Subscribed and sworn to before me the undersigned officer this _____ day of May, 2008.

____
NOTARY PUBLIC.

PROOF OF SERVICE

I, Jeff Rosenzweig, declare:

That I am over the age of 18, and not a party to the within action; my business address is :

On today's date, I served the within document entitled:

Amended and Supplemental Petition for Relief Under Rule 37.1

() By Federal Express , addressed as set forth below;

( ) By electronically transmitting a true copy thereof;

( ) By serving a true copy by facsimile

The Honorable David Burnett
Circuit Judge
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this _____ day of June, 2008, at Little Rock, Arkansas.

Signed: ________________________

Jeff Rosenzweig