IN THE CIRCUIT COURT OF CLAY COUNTY, ARKANSAS

FILED FOR RECORD

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JESSIE LLOYD MISSKELLEY, JR. PETITIONER

vs. No. CR 93-47

STATE OF ARKANSAS RESPONDENT

ORDER DENYING POST-CONVICTION RELIEF

The Petitioner's first-degree and two second-degree murder convictions were affirmed on direct appeal in early 1996, Misskelley v. State, 323 Ark. 449, 915 S.W.2d 702 (1996), and he timely filed a petition for relief under A.R.Cr.P. 37 later that year. For reasons not entirely clear to the Court, although he filed an amended petition in 2001, he apparently did not pursue any action in this proceeding for many years.[1] The Court need not, however, determine whether such inaction warrants dismissal for want of prosecution because the Court permitted him to file an amended and supplemental petition in June 2008, and, over the State's objection, an enlarged petition.[2] In parallel litigation, the Court

[1]It may be that the petitioner (or his post-conviction counsel) during that decade was content to await the outcomes of the post-conviction relief efforts undertaken by his codefendant Damien Echols. The Court recognizes that the petitioner had begun pursuit of DNA-testing under a statute adopted during that time and that, once Echols' federal proceeding was stayed to return to state court in 2007, the petitioner joined his codefendants in pursuit of relief under that statute and by renewing his own Rule 37 efforts. However, given that his original Rule 37 petition filed in 1996 purported to identify grounds on which he believed he could obtain relief, it is unclear why he would countenance any delay in the interim.

[2]While Rule 37 does not explicitly authorize dismissal for failure to prosecute as A.R.C.P. 41 does, Rule 37 proceedings are civil, not criminal, in nature, and several provisions of the rule suggest that dismissal for failure to prosecute might be appropriate in a given case—from the jurisdictional deadlines for seeking relief in Rule 37.2 to the prompt-hearing requirement in Rule 37.3. Whether dismissal might have been appropriate in this

denied the petitioner's habeas-corpus petition and its companion motion for a new trial under the DNA-testing statute, and the petitioner separately has appealed the order doing so. The Court conducted Rule 37 hearings on several occasions over the course of more than a year, concluding in October 2009, taking testimony of witnesses for the petitioner, his codefendant Baldwin, and the State. In lieu of post-hearing briefing, the Court instructed the parties to file proposed precedents directly with the Court. Based on the pleadings filed, the original trial record, and from the hearing testimony, the Court makes the following findings of fact and conclusions of law and denies the petitioner's amended and supplemental Rule 37 petition.

Recusal

As at the hearings, the Court denies the petitioner's requests for its recusal. The supreme court has "consistently held that the judge who presides over a defendant's trial may also preside over that defendant's postconviction proceeding." Echols v. State, 344 Ark. 513, 519, 42 S.W.3d 467, 471 (2001). Moreover, "[a] trial judge's development of opinions, biases, or prejudices during a trial do not make the trial judge so biased as to require that he or she recuse from further proceedings in the case." Anderson v. State, 357 Ark. 180, 210, 163 S.W.3d 333, 351 (2004) (citation and internal quotation marks omitted). Indeed, the presumption is that a judge is impartial, and a judge has a duty to remain on a case where no prejudice exists. See, e.g., Owens v. State, 354 Ark. 644, 654, 128 S.W.3d 445, 451 (2003). The petitioner's suggestion that the undersigned judge's *future* political plans—particularly that he will be a candidate for state senate in 2010—will cause the Court

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case before, it is fair to observe now that the lengthy delay to disposition here ill serves all concerned, including the criminal justice system's interest in the finality of its judgments.

to decide this case as part of a political agenda are flatly rejected. Neither do those plans require resignation of the judicial office the Court holds prior to filing for the nonjudicial elective office.[3] Finally, as the supreme court has explained, a claim of bias is evaluated on the record of the proceeding, presuming impartiality, and even apparent ethical lapses—which the Court denies exist here despite the petitioner's allegations under the code of judicial conduct—do not alone demonstrate bias. See, e.g., Walls v. State, 341 Ark. 787, 791-92, 20 S.W.3d 322, 324-25 (2000).

The decision whether to recuse rests in the sound discretion and conscience of the judge, see, e.g., Davis v. State, 345 Ark. 161, 173, 44 S.W.3d 726, 733 (2001), and the Court's conscience is clear; it has presided over this case and the petitioner's codefendants' cases impartially for over 15 years and has done so as to this proceeding. Particularly given the lengthy history of the cases, it is the Court's obligation to continue to so preside.

Non-Cognizable Claims XIX, XX, & XXI

The State's assessment of claims XIX, XX, and XXI, as not cognizable as they appeared in the Ten-Page Version of the Amended and Supplemental Petition (where they were numbered respectively as claims III, IV, and I) is correct. His last claim, XXI—that he is actually innocent of his crimes—is, of course, the claim he made in his companion petition for habeas corpus relief and a new trial filed in this Court pursuant to Ark. Code

[3]The comments to Rule 4.5 that explain the resign-to-run principle of the Rule illustrate that the Court's continuing to preside in this case after its retirement hardly raises the twin specters of political promises by a judge as candidate or of retaliation by a losing candidate who remains a judge. See In re: Arkansas Bar Association Petition to Amend Code of Judicial Conduct, 2009 Ark. 238 (per curiam). The Court can conceive of no politically motivated promise or threat to be made in connection with this case, save its impartial disposition of it.

Ann. §16-112-201, *et seq.* (Act 1780 of 2001), the Court's denial of which is now pending on appeal. Indeed, he refers to that petition in the claim, but his assertion of actual innocence alleges no error in the proceedings by which he was convicted and, consequently, could afford him no relief under Rule 37. See generally A.R.Cr.P. 37.1(a) (2008); cf. Graham v. State, 358 Ark. 296, 298, 188 S.W.3d 893, 895 (2004) (per curiam) (Act 1780 not substitute for Rule 37 or coram-nobis proceedings, but provides narrow post-conviction review for claims of actual innocence).

To the extent that he relied on Johnson v. State, 356 Ark. 534, 157 S.W.3d 151 (2004), in his ten-page version to suggest otherwise, see Pet. at ¶4 (ten-page version), he is wrong. Johnson, like the petitioner, filed two distinct pleadings in circuit court, and the circuit court denied Johnson relief in separate orders. Id. at 541, 157 S.W.3d at 157. That the supreme court entertained appeals of those orders in one appellate case is no demonstration that the claims and their distinct rule and statutory frameworks are interchangeable. The petitioner's actual-innocence claim is not cognizable in Rule 37 proceedings and is denied as such.

The petitioner's claim XIX—that he was convicted on false evidence—is a direct challenge to his convictions that should have been raised on direct review at trial and on appeal. Consequently, it is not cognizable in Rule 37 proceedings. See, e.g., Howard v. State, 367 Ark. 18, 26, 238 S.W.3d 24, 32 (2006); see also Davis, 345 Ark. at 169, 44 S.W.3d at 730 (Rule 37 not opportunity to reargue points settled on direct appeal). He complains that one witness falsely testified and the certain serology evidence was false and misleading. These complaints are simple disputes about the credibility of evidence that

cannot be raised in Rule 37 proceedings. Cf. Johnson v. State, 298 Ark. 617, 621-22, 770 S.W.2d 128, 131 (1989) (even at trial at which evidence recantation admissible, that evidence only creates credibility question for jury).[4]

The petitioner's prosecutorial-misconduct claims, XX, founded on Brady v. Maryland, 373 U.S. 83 (1963), also are not cognizable. See generally, e.g. Howard, 367 Ark. at 27, 238 S.W.3d at 32. Such claims must be diligently pursued in error-coram-nobis proceedings, which are not interchangeable with Rule 37 proceedings. See generally Larimore v. State, 327 Ark. 271, 938 S.W.2d 818 (1997). The petitioner acknowledges that he raised several such claims in a petition seeking permission to pursue error-coram-nobis relief in this Court, which was denied without prejudice by the supreme court. See Misskelley v. State, No. CR 94-848 (Ark. Jun. 26, 2008) (Orders List).

Finally, the Court rejects the petitioner's argument (made by adoption of his codefendant Baldwin's reply to the State's Response to Baldwin's amended petition) that his erstwhile non-cognizable claims are cognizable under Rowbottom v. State, 341 Ark. 33, 13 S.W.3d 904 (2000), because they would render his judgment of conviction void. While Rowbottom discussed several claims that are cognizable for the first time in Rule 37 proceedings, such as a double-jeopardy claim like Rowbottom raised, the petitioner does not advance such claims. More importantly, he does not provide any authority for his bare assertion that his claims, like Rowbottom's jeopardy claim, would void his conviction. Nor

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[4]This is not to say that the Court would countenance the conviction of persons by false evidence. It is only to say that the time and place for the resolution of the truthfulness of witnesses and the accuracy of evidence is at trial. Collateral review generally and Rule 37 proceedings specifically are not appropriate venues in which to reargue such issues.

docs he distinguish the binding authorities recited above as to each of his non-cognizable claims. Those authorities dictate that the Court deny his non-cognizable claims.

Ineffective Assistance, Claims I – XVIII

Claims I through XVIII—allege that trial counsel was ineffective under the Sixth Amendment and the like provision of the Arkansas Constitution, art. 2, §10.[5] Given the volume of these claims, they were all necessarily only conclusorily pleaded in the ten-page version of his amended petition and, for that reason alone, could not support relief. See, e.g., Jackson v. State, 352 Ark. 359, 371, 105 S.W.3d 352, 360 (2003). The Court, however permitted the petitioner, over the State's objection, to file an overlength amended petition. Nevertheless, as to each claim of ineffective assistance, he must, of course, satisfy both the deficiency and prejudice showings of Strickland v. Washington, 466 U.S. 668 (1984), in order to obtain relief.

The Court is especially mindful of the Supreme Court's observations in Strickland, id. at 689, 697 (citations omitted), that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or

[5]The petitioner in a section of his amended petition entitled General Allegations also cites the due-process and cruel-and-unusual punishment clauses of the federal and state constitutions. Apart from the due-process clause of the Fourteenth Amendment, through which the Sixth Amendment is incorporated against the states, his reliance on the other clauses, particularly those of the State constitution are misplaced. He provides no argument or authority, moreover, for the proposition that he would be entitled to greater relief under any provision of the state constitution than that available under the Sixth and Fourteenth Amendments. As the supreme court long ago adopted the Sixth Amendment rubric for such ineffective-assistance-of-counsel claims, see Hicks v. State, 289 Ark. 83, 85, 709 S.W.2d 87, 89 (1986) (citing cases), the Court analyzes the petitioner's claims under only it. His effort to couch his claims as support for any relief other than that available under the Sixth Amendment for ineffective-assistance-of-counsel claims is rejected.

> adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

And that

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

The Court also is mindful that ineffective-assistance-of-counsel claims are evaluated on the totality of the evidence. See, e.g., Howard, 367 Ark. at 31, 238 S.W.3d at 35. Given the petitioner's confession of the crimes as noted on direct appeal, Misskelley, 323 Ark. at 459-61, 915 S.W.2d at 707-08, he can hardly demonstrate prejudice, even assuming a demonstration of counsel's deficiency in most respects, by showing that there is a reasonable probability that he would have been acquitted despite his confession (save, perhaps, as to a claim concerning the admission of the confession at trial). Apart from mostly conclusory allegations of prejudice, the petitioner also concludes his claims with two catch-alls, XVII and XVIII, which are denied below as non-cognizable, cumulative claims.

As the Court is not obligated to peruse the record and divine for the petitioner what proof from the hearing supports particular claims in his petition, see, e.g., Elmore v. State, 285 Ark. 42, 44, 684 S.W.2d 263, 264 (1985) (per curiam), the Court makes the following findings of fact and conclusions of law under Strickland v. Washington, and its Arkansas progeny, as to the petitioner's claims enumerated by roman numerals, with additional findings as to the hearing proof where helpful to explain its Strickland conclusions.[6] Many of the claims have numerous subsidiary points—claim III, for example has six lettered and 33 Arabic-numbered subsidiary points—which, to the extent they are not otherwise specifically addressed below—the Court denies as explained as to the corresponding Roman-numeral claim.[7]

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[6]In doing so, the Court rejects the petitioner's reliance on guidelines adopted by the American Bar Association to evaluate the reasonableness of the performance of trial counsel under the Sixth Amendment. While the Court recognizes that the guidelines have been used in evaluating the performance of trial counsel in capital cases, contrary to what the petitioner suggests, counsel can be said to have reasonably represented a capital defendant without following the guidelines or even knowing of them. Indeed, the United States Supreme Court recently has reiterated that they are only guides in evaluating the reasonableness of a lawyer's performance under the Sixth Amendment, they do not define it. Bobby v. Van Hook, 558 U.S. ___, No. 09-144, slip op. at 5 (Nov. 9, 2009) (per curiam). Moreover, the Court shares the opinion of Justice Alito on the point—to wit: it is a legal question for courts whether counsel fell below the standards the Sixth Amendment limns, and the views of an advisory committee of a private association of lawyers hold no privileged position to inform the courts in answering the question. Id. (Alito, J., concurring). In this case, for example, the petitioner's reliance on Attorney Jack Lassiter as an expert at the hearing only illustrates the wisdom of the cautions which Strickland itself admonishes must be observed—particularly that even the best criminal defense lawyers, of which Mr. Lassiter is surely one, would not defend a particular client in the same way.

[7]In permitting the petitioner, over the State's objection, to file an amended petition some 250 pages over the page limit of the Rule, the Court's expectation was that he would delineate by his hearing proof the fewer, discrete claims from the petition on which he was proceeding. Nevertheless, the Court endeavors to make a ruling on each roman-numeral claim from that amended petition, although not all of them were addressed at the hearing.

Claim I is denied because strict compliance with A.R.Cr.P. 2.3 is no longer required under Arkansas law; indeed, that requirement was abandoned shortly after the petitioner's direct appeal. See State v. Bell, 329 Ark. 422, 431, 948 S.W.2d 557, 562 (1997). Consequently, the petitioner has not (and cannot) now demonstrate Strickland prejudice from a failure by counsel to preserve a direct-appeal claim that no longer supports reversible error. See Lockhart v. Fretwell, 506 U.S. 364, 368-73 (1993). Whether police complied with Rule 2.3 is but one factor in evaluating the voluntariness of a custodial statement, and the determination that petitioner's statement was voluntary would not turn on that single factor. See Misskelley, 323 Ark. at 464-70, 915 S.W.2d at 710-13. The petitioner has not demonstrated that the determination that his statement was voluntary would have changed on appeal or that his trial was unfair or its result unreliable but for consideration of whether he was advised under Rule 2.3.

Claim II and its subsidiary points, that trial counsel should have made a greater showing of his mental deficits to demonstrate that his statement could not be voluntary, fails both Strickland prongs. The hearing proof demonstrated only that an additional witness might have been called to offer an opinion about the petitioner's mental deficits, but that is not a demonstration of deficiency for not doing so. This is particularly true here where that opinion was not founded on the many admissions the petitioner made to his counsel before and after trial as he endeavored to pursue a plea deal, but on the basis of a psychological test not dispositive of the legal question of voluntariness courts are called upon to make and which was not demonstrated to be in existence in 1993. The Court also finds that Dr. Deming's testimony is at variance with psychological testing done a decade earlier, defense

counsel notes of interviews, as well as audio and video tapes that demonstrate the petitioner's ability to understand the criminality of charged offenses and to assist in his defense. This material also confirmed his ability to make a knowing and intelligent waiver of his Miranda rights. Moreover, as explained on direct appeal, the petitioner's mental capacity is but one factor in assessing the voluntariness of a statement. Further opinion testimony on the appellant's mental capacity would not have led to suppression of his statement as involuntary. See Misskelley, 323 Ark. at 466-67, 915 S.W.3d at 711. Thus, this claim also fails for want of a demonstration of Strickland prejudice.

Claim III and its subsidiary points, that trial counsel failed in many particulars to demonstrate that the petitioner's confession to police was false, fails as a debate about strategy as to whether to call additional witnesses or make particular objections and wrongly presumes the jury would have been bound to agree with his claim of falsity. The claim of falsity was neither conclusively proven at the hearing nor shown to have been the product of the failure of professional judgment. After all, "[g]enerally, the decision whether to call a witness is a matter of trial strategy that is outside the purview of Rule 37..., including [as] to expert witnesses." Echols v. State, 354 Ark. 530, 554, 127 S.W.3d 486, 501 (2003) (citations omitted). Thus, "[w]hen assessing an attorney's decision not to call a particular witness, it must be taken into account that the decision is largely a matter of professional judgment that experienced advocates could endlessly debate, and the fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not in itself proof of counsel's ineffectiveness." Id. Similarly, whether to object to particular evidence or argument are often strategic decisions. See, e.g., Sasser v. State, 338 Ark. 375, 391, 993

S.W.2d 901, 910 (1999) (per curiam). As to the petitioner's reliance on expert testimony to demonstrate falsity, it could not have been admitted as it would have usurped the jury's role as fact finder. See Flowers v. State, 362 Ark. 193, 212, 208 S.W.3d 113, 127-28 (2005). In short, the petitioner demonstrated no particular deficiency, but only a debate by new counsel about how further to proceed.[8] Neither trial nor appellate counsel were deficient, nor has the petitioner shown the reasonable probability of a different trial or appellate outcome.

The petitioner's claim and his various particular allegations of deficiency as to evidence he believes should have been introduced from which to further argue that his confession was false ignore the forest for the trees. As his own experts largely agreed, the autopsies correctly concluded the victims' deaths were homicides by multiple injuries from blunt force trauma and drowning. The discovery of the bodies submerged under water, naked and hogtied could not be refuted. Thus, his admission to participation in the crimes was hardly wholly implausible, no matter how many details he might now dispute as accurate or what additional witnesses might have opined or evidence might support his claim that his confession was false. As the supreme court explained on direct appeal, inconsistencies in the proof, even such as those evident from the petitioner's confession were

[8] In this (or almost any) regard, the Court cannot credit the hearing testimony of the petitioner's trial counsel, Daniel Stidham, in which he concluded that he had been deficient as to nearly every claim about which he testified. But for his commitment to demonstrating the petitioner's innocence, his claim to total failure as counsel might be called dissemblance; as either, it neither supports the claims themselves nor aids the Court's resolution of them. In other words, the petitioner could not, and did not, demonstrate that any claim was not founded on a strategic or tactical decision by virtue of Mr. Stidham's repeated assertions that the claims about which he testified were the product of his incompetence. The determination of counsel's performance under the Sixth Amendment is for the Court without regard to counsel's subjective evaluation. See, e.g., Howard, 367 Ark. at 33, 238 S.W.3d at 36.

for the jury to resolve, and it was free to believe and reject those parts of the evidence it chose. Misskelley, 323 Ark. 461-62, 915 S.W.2d 708-09.

Counsel's professional judgment could certainly embrace the view that spending time further debating the proof of a sexual assault, *vel non*, or whether a knife or predatory animals caused all the victims' injuries post-mortem—to name but two examples of lines of inquiry to which he points to show the alleged falsity of his confession—would not be time well-spent in preparing for or trying a triple-homicide when the jury would learn that the petitioner admitted to participating in the crimes, even assuming proof along those lines of inquiry could be adduced.[9] Decisions regarding what theory of a case to pursue and how best to do so are the epitome of trial strategy and not readily grounds for claims ineffective assistance of counsel. See, e.g., Howard, 367 Ark. at 34, 238 S.W.3d at 37. Indeed, as a general matter a hearing is not even warranted as to such disputes with trial strategy. E.g. Fretwell v. State, 292 Ark. 96, 99, 728 S.W.2d 180, 181-82 (1987) (per curiam). Finally, even choices which prove to be improvident do not render counsel ineffective. See, e.g., Jenkins v. State, 348 Ark. 686, 700, 75 S.W.3d 180, 189 (2002), overruled on other grounds,

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[9]While the petitioner presented several expert witnesses who believed photographic evidence supported their conclusions that post-mortem animal predation caused most of the victims' injuries, they could not identify, much less agree upon, a particular animal that would have done so. The speculation of Dr. Spitz about large canines and the wide variety of creatures posited by Dr. Souviron were incredible, especially in the absence of any exemplars. To the extent they posited it was turtles, the Court credits the testimony of the State's medical examiner, who performed the autopsies on the victims and is a turtle expert, to the effect that turtles did not cause the victims' injuries. Moreover, the petitioner's experts' opinions that there were post-mortem injuries from animal predation, even in the face of massive blood loss as to a victim who died in part due to exsanguination, which necessarily occurred ante-mortem, are not only difficult to credit, but would be of little value to the petitioner in trying to defend the charge that he participated in the ante-mortem crimes.

Grillot v. State, 353 Ark. 294, 107 S.W.3d 136 (2003). In other words, on the totality of the evidence, counsel was not deficient with respect to discrediting further the petitioner's confession because the jury readily could choose to credit his admission to participation in the homicides even in the face of contradictory proof as to certain details and other purported evidence of the confession's falsity.

Likewise, even if counsel were deficient in any particular respects—that is even if additional evidence should have been admitted to cast doubt on some particulars of the petitioner's confession or to otherwise suggest its falsity, such as the self-serving exculpatory post-arrest statements to which he points—this claim still fails for want of Strickland prejudice because the petitioner did not demonstrate that a jury would have rejected his admission to participation in the crimes, even had it heard further evidence supporting his claim of falsity, which the jury was free to reject. See Misskelley, 323 Ark. at 462, 915 S.W.3d at 709.

Claim IV is denied because, even assuming counsel failed to exclude allegedly hearsay statements of the petitioner's codefendants, it does not demonstrate a reasonable probability that his jury would have rejected his own admission to participation in the crimes and acquitted him.

Claim V is denied because the petitioner did not demonstrate that he could have overcome the presumption that he was competent to stand trial or that the supreme court would have reversed the competency finding on appeal. Dr. Deming's contrary assessment of the petitioner's competency made a decade after trial hardly disproved as much,

particularly in light of the Court's own observations and the hearing evidence in the form of taped conversations between the petitioner and counsel admitted at the hearing.

Claims VI through IX and XIII and their subsidiary points all fail for want of Strickland prejudice, even assuming deficient performance in each particular, because none demonstrates a reasonable probability that the petitioner's jury would have rejected his admission to participation in the crimes and acquitted him. Moreover, Claims VI, VII, VIII, IX, and XIII are rejected as to deficiency. The hearing proof demonstrated only that experts can disagree, and counsel was not deficient for neither calling more experts nor further examining those that testified. For example, while the petitioner at the hearing presented expert testimony concerning post-mortem animal predation, no expert espousing the view that photographs of the victims showed post-mortem animal predation could identify by exemplar a particular animal that would have caused it, and all, save one, generally nevertheless agreed with the autopsy findings of the State's medical examiner as to manner of death—homicide.[10] Counsel was hardly deficient for not pursuing a sideshow about post-mortem animal predation, any more than the counsel of his codefendant Echols was as to human bite marks. See Echols, 354 Ark. at 554-55, 127 S.W.3d at 501-02. After all, whether to call certain experts—such as criminal profilers, forensic odontologists, entomologists or pathologists, like any witnesses, is largely a strategic decision. See, e.g.,

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[10]As to the post-mortem animal-predation claims of the petitioner in particular, as a note 9, *supra*, the Court finds that he failed to show that expert testimony that a particular kind of animal caused the disputed injuries exists, particularly as neither he nor his experts offered exemplars by a particular animal they believed to have caused the injuries here. The speculation of Dr. Spitz about large canines and the wide variety of creatures posited by Dr. Souviron were incredible, especially in the absence of any exemplars. The suggestion of turtles as the culprits was refuted by the State's medical examiner who has extensive experience with turtles and who performed the autopsies and observed the injuries firsthand.

id., at 553-54, 127 S.W.3d at 500-01. As already noted, what theory of a case to pursue—human bite mark, alibi, animal predation, third-party guilt—are the epitome of strategic decisions. In the face of an admission to police like the petitioner's, counsel was not deficient; and if so in some particular, the petitioner was not prejudiced under the prevailing standards of law.

As to Claim XIII in particular, the petitioner also has not demonstrated counsel's investigation was deficient as to further investigation. To the contrary, the hearing proof was that counsel conducted extensive investigation and preparation over many months, which, even if improvident in some respects, was hardly deficient. Indeed, counsel worked on nothing but this case between September 1993 and trial. The various claims of deficiency made here (and generally) are only hindsight criticism of that effort, which in the end yielded for the petitioner the lightest combination of convictions and sentences among the three codefendants. Given the petitioner's admission to participation in the crimes, he cannot demonstrate that further investigation (including even that conducted over the last 15 years that might be said to have been available in the finite, real-time frame of trial preparation) would have yielded a reasonable probability that a jury would have acquitted him of his crimes.

Claim X is denied as to deficiency and prejudice. Counsel was not deficient for further challenging serological evidence or argument as to whether the jury could conclude that a sexual assault occurred as part of the crimes. The petitioner has failed to demonstrate that the body of knowledge associated with DNA testing was such that counsel at the time of trial should have been aware of scientific advances, technology, or experts that he might

have sought out. Moreover, even with respect to the extant evidence available, counsel was not deficient on this point because the circumstance of the victims being hogtied and naked required no additional evidence to suggest a sexual assault. Reasonable counsel could fairly conclude that in the face of that irrefutable evidence, proof whether sperm or semen had been found—even while it might undermine a claim of sexual assault—would not itself defend against the homicide crimes actually charged. In other words, even disproving any sexual assault would hardly disprove the murders. Yet, even if counsel were deficient in these respects, the petitioner has not demonstrated that, but for any such deficiency as to serological evidence, there is a reasonable probability that his jury would have rejected his admission to participation in the crimes and acquitted him of the homicides.

Claims XI and XII are denied both on deficiency and prejudice grounds. As to Claim XI, the petitioner offers nothing but his own dispute with the police testimony about the crime scene and his confession as a basis to say counsel was ineffective for failing to exclude it. His dispute is hardly a demonstration that the Court would have agreed with him and excluded that testimony. Indeed, the Court would not have done so. After all, what the police saw and concluded about the crime scene was clearly admissible, and the petitioner offers neither law nor logic to dictate exclusion of such testimony. Moreover, the decision by counsel not to object to certain testimony is often a strategic one, not amenable to debate in Rule 37 claims. Finally, contrary to the petitioner's facile conclusions, he has not demonstrated Strickland prejudice—that, despite his admission to participation in the crimes, his jury would have rejected his confession and acquitted him but for his counsel's

failure to exclude this testimony. Indeed, there is not a reasonable probability that the jury would have done so.

As to Claim XII and its subsidiary points on prosecutorial argument or misconduct, the Court finds neither deficiency nor prejudice. Trial counsel generally is not deficient because he did not raise every objection to a prosecutor's argument that post-conviction counsel later identifies might have been made. So it was here. Moreover, none of the objections the petitioner posits are the game-changers he self-servingly concludes demonstrate Strickland prejudice when evaluated in light of his admission to participation in the crimes. In other words, bearing the trial testimony in mind, there is not a reasonable probability that, but for objections from counsel as to certain remarks of the prosecutor, the jury would have abdicated its role as the sole arbiter of the proof and ignored the petitioner's admission to participation in the crimes and acquitted him or that, as to any preserved objections, the supreme court would have reversed.

Claims XIV and XV are denied for want of Strickland deficiency or prejudice. Despite counsel's self-serving views now, the record demonstrates that the parties agreed to forego putting on additional evidence at the sentencing phase and elected to make only arguments to the jury. That was a strategic decision that hardly can be second-guessed now, and the petitioner's reliance on death-penalty authority is inapposite. See State v. Franklin, 351 Ark. 131, 141-42, 89 S.W.3d 865, 870 (2002). Likewise, the hindsight critique the petitioner makes of counsel's argument to the jury is only that, not a demonstration of deficiency. In any event, the petitioner has not demonstrated, as he must, that the outcome at sentencing would have been different had counsel pressed for sentences short of the

maximums. See, e.g., Pyle v. State, 340 Ark. 53, 64, 8 S.W.3d 491, 499 (2000). He must make that demonstration, even assuming a deficient argument by counsel, in the context of his crimes of conviction and his admission to participating in them. The Court finds that, given that context, that there is not a reasonable probability that any proof or argument to which the petitioner points would have yielded anything short of maximum prison terms for the crimes of conviction.

Claim XVI fails for want of proof or under law-of-the-case doctrine. The self-serving report and hearsay declaration of counsel relied on to support the conclusions drawn in the petition are rejected. The petitioner's conclusions that the Court "appeared surprised," "expressed [its] feelings," or "vocaliz[ed]" as to guilt, are unsupported as a matter of fact, even if crediting the declaration. As such, counsel was not deficient for not seeking a mistrial, and the petitioner was not prejudiced by counsel's not doing so given his admission to participation in the crimes.

In any event, claims of error that are subject to review under former Ark. S. Ct. R. 4-3(h), cannot support relief in Rule 37. See, e.g., Hill v. State, 347 Ark. 441, 450-51, 65 S.W.3d 408, 415 (2002). Claims of juror contact in violation of Ark. Code Ann. §16-89-125(e) are reviewable under that rule even without being raised by defense counsel. See, e.g., Anderson v. State, 353 Ark. 384, 394, 108 S.W.3d 592, 59_ (2003). Like such review in Atkinson v. State, 347 Ark. 336, 350-52, 64, S.W.3d 259, 268-70 (2002), the State and the supreme court's Rule 4-3(h) review of the petitioner's trial without discussing the circumstances claimed as error here demonstrate there was no prejudice. Moreover, the Court would not have granted a mistrial had one been sought here because, even crediting

the declaration's account, the inquiry about lunch hardly was an incident of contact during deliberations about the case under the statute or one at which the petitioner had a right to be present. The petitioner did not demonstrate the contrary at the hearing. In any event, even if prejudice could be presumed, any motion by the petitioner would have only ensured that the State could produce a record overcoming it, as in Atkinson, particularly given the incidental nature of the contact. Counsel was neither deficient nor has the petitioner shown Strickland prejudice.

The petitioner's claims XVII and XVIII, are not cognizable because they are claims of cumulative error, which is not cognizable here. See, e.g., Howard, 367 Ark at 50, 238 S.W.3d at 48. Thus, they are denied for that reason.

IT IS SO ORDERED.

David Burnett
CIRCUIT JUDGE DAVID BURNETT

DATE OF ENTRY: 1/20/10