IN THE SUPREME COURT OF ARKANSAS

JESSIE L. MISSKELLEY JR. APPELLANT/PETITIONER

VS. Original appeal No. CR 94-848

STATE OF ARKANSAS APPELLEE/RESPONDENT

PETITION TO REINVEST THE CIRCUIT COURT WITH JURISDICTION IN ORDER TO CONSIDER PETITION FOR *WRIT OF ERROR CORAM NOBIS*

Comes the Appellant, Jessie L. Misskelley Jr, through his attorney, Jeff Rosenzweig,[1] and for his Petition states as follows:

Jessie L. Misskelley Jr., a prisoner serving a sentence of life imprisonment for Murder in the First Degree plus two sentences of 20 years for Murder in the Second Degree, files this motion to reinvest the circuit court with jurisdiction to consider his petition for writ of *error coram nobis* based upon new evidence of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963), violations and prosecution witness perjury at his trial.

This case is part of the "West Memphis 3" prosecutions. Misskelley was

[1] Michael N. Burt of California has been permitted by the Circuit Court to practice before it by comity in the Misskelley litigation. Because Burt has not been specifically admitted to practice by comity before this Court, out of an abundance of caution only Rosenzweig signs this pleading.

convicted of murder in Clay Circuit Court, on change of venue from Crittenden Circuit Court. He was sentenced to life imprisonment for first degree murder and twenty years on each count of second degree murder. This Court affirmed his convictions. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996). Misskelley filed a timely petition for relief under Rule 37. Its resolution has been delayed for reasons of judicial economy because of the litigation surrounding his co-defendants, Damien Echols and Charles Jason Baldwin, and the testing regime involving the so-called "DNA habeas" statute, Ark. Code Ann. § 16-93-201 et seq. The circuit judge assigned to this case, the Hon. David Burnett, has scheduled hearings on the Rule 37 and habeas petitions for fall, 2008. Should this Court reinvest jurisdiction to consider the petition for writ of *error coram nobis*, that petition could be heard contemporaneously, with positive ramifications for judicial economy and clarity.

A brief recitation of the background of this case is appropriate. It is discussed at greater length in *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996) and *Echols and Baldwin v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996). Three young boys were found dead. West Memphis police officers conducted an intensive investigation, assisted at times by other police agencies, the Arkansas Crime Laboratory, and other agencies. At various points during the investigation, and prosecution, of this matter, investigating law enforcement officers were also in contact

with the Federal Bureau of Investigation and other police agencies around the country. More than 200 persons were interviewed during the initial stages of the investigation, and evidence was gathered from a number of persons in the area around West Memphis, Arkansas. Suspicions became focused on Echols and Baldwin, through the efforts of Craighead County probation authorities working with some West Memphis Police investigators. The suspicions were founded on the theory that the crime was committed during a satanic ritual, and that Echols and Baldwin appeared to associate with one another and to have such interests. During what was described as routine questioning of a local man, Jessie Misskelley, who was thought to have associated with Echols and Baldwin at various times, West Memphis Police officers obtained a series of admissions, and then a confession that Misskelley was involved in the crime. He identified Echols and Baldwin as co-participants, though he named them as the actual killers. In the Misskelley scenario, Echols and Baldwin sexually assaulted and then stabbed the victims and beat them. The victims were then tied up with rope.

Misskelley repudiated his statements and asserted unsuccessfully at trial and on appeal that the statements were false. [There are other issues involving the statements which are being litigated in the Rule 37 petition.]

While Misskelley's statement was inadmissible at Echols and Baldwin's trial, the State tried its case against Echols and Baldwin on a theory consistent with the

Misskelley statement. The scientific testimony was essentially the same in both trials.

That theory was that Echols and Baldwin were involved in the crime out of an interest in satanism, and that each of them made damaging admissions in the aftermath of the killings - Echols in statements to police, in his writings, and at a ball game in West Memphis, and Baldwin while incarcerated awaiting trial. Through the testimony of the State's Assistant Medical Examiner, Dr. Frank Peretti, and through the testimony of a DNA expert who had used then-available DNA technology to identify some blood evidence, the State introduced evidence to demonstrate there were indications of a sexual assault, and intimating that some other biological material was found on cuttings of victims' clothing. Though there was no eyewitness testimony linking either Baldwin or Echols to the crime in their trial, the State linked Echols to the crime in part on the basis of a knife recovered from a lake in the Lakeshore Trailer Park in which Baldwin and some of Echols' relatives lived. The knife, a large 'survival' knife, was found by a police diver, and was said to be of a type possessed by Echols. This was the factual background as the case was affirmed on appeal.

One of the accepted grounds for a writ of *error coram nobis* is "material evidence withheld by the prosecution." *Brown v. State*, 330 Ark. 627, 955 S.W.2d 901 (1997); *Larimore v. State*, 341 Ark.397, 17 S.W.3d 87 (2000); *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984); *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407

(1999). That is, in short, a *Brady* violation. Brady violations are violations of due process guarantees under the Fourteenth Amendment and Article 2 § 8 of the Arkansas Constitution. Significant *Brady* violations occurred in this case, and there is a reasonable probability that the result would have been different had the Brady violations not occurred.

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.

This Court should reinvest the trial court with jurisdiction to consider these claims. It is important to note that this Court is not being asked to grant ultimate relief at this time, rather merely to permit the full litigation of the claims.

## I. BRADY CLAIMS INVOLVING SCIENTIFIC EVIDENCE

As noted above, the "DNA habeas" petition under Ark. Code Ann. § 16-112-201 et seq. is pending before the Circuit Court. However, investigation has uncovered *Brady* claims regarding the scientific evidence which should be considered

along with the other issues in the case.

There have been a number of developments since this Court upheld the convictions of Misskelley and the other two defendants. During post-conviction investigation of this matter as part of the preparation for the Rule 37 and habeas corpus, it has been established that applying current DNA testing techniques to numerous items of evidence retrieved from the crime scene — including the victims' clothing, ligatures, rape kit swabs, and numerous hairs — there is no DNA evidence corroborating the State's theory that Baldwin, Echols, or Misskelley had bodily or sexual contact with the victims, or even that they were at the crime scene. While there is some foreign DNA on two of the victims, and in one of the ligatures that bound one of the victims, the DNA belongs to persons other the three defendants.

However, Misskelley also has learned that several critical pieces of information appear to have been known to the State at the time of the prosecution of this case, but not transmitted to the defense in a timely way, or made known to the trier of fact. Misskelley has sought disclosure of information about these omitted disclosures during post-conviction discussions and attempts at obtaining discovery through informal and negotiated means. While the State has cooperated in the scientific testing process, and has tendered some post-conviction interview material, elsewhere Misskelley has been unable to obtain necessary information. Reinvestiture to

consider the petition for writ of *error coram nobis* is necessary and appropriate.

**A. Animal predation evidence**

The State prosecuted the three defendants on the theory that one of the victims was emasculated through use of a knife; various knife wounds were inflicted on the victims; the victims were probably beaten with sticks; they were also marked with certain pattern injuries consistent with tool marks on the blade of the survival knife introduced at trial. During the post-conviction investigation, several forensic pathologists and odontologists have reviewed the case. In May 2007, several of these scientists met with the prosecuting attorney, the medical examiner and others to review this case. Their reports have been tendered to the State. The consulting forensic pathologists and odontologists have all opined that many of the injuries to the victims which the State's medical examiner, Dr. Frank Peretti, testified at trial were knife injuries (including the area of emasculation of one of the boys) were, in fact, the injuries caused by postmortem animals feeding on the remains. Animal hair has been identified on at least one of the evidence slides taken from the scene, and the DNA laboratory used in this case by agreement has also detected animal hair on some crime slides.

Misskelley also has learned there was a consultation between West Memphis Police officers and San Diego Police personnel on the subject of animal predation

during the investigation of the crimes, but Misskelley has not been provided with any reports or other evidence that animal predation was considered an area of concern to the State. It would be highly significant exculpatory evidence if the police and/or prosecution had considered animal predation as a cause of injury, or had investigated the issue prior to trial or during the post-conviction litigation, and had not revealed such information. Misskelley has been informed that a police officer from the San Diego Police Department claims he was contacted by West Memphis Police officers before trial, which led to a discussion of animal predation as being of concern to investigators in this case. If such information, or information like it, is in the hands of the State, that information should be made known now.

During the May 2007, meeting at the Arkansas State Crime Laboratory that included several members of the laboratory staff, two defense pathologists and two defense odontologists, as well as Dr. Frank Peretti, the State's pathologist (and counsel for the parties), Dr. Peretti's trial testimony about the mechanisms of injury to the victims, and the causes of death, was the subject of a frank discussion among the experts. Dr. Peretti indicated that he was reviewing Crime Lab data to identify autopsies the lab performed on bodies found in water (and that may have been subject to animal predation) over the past 10 years.

Since that meeting, several written requests have been made for information

pertaining to the subject of animal predation and to Dr. Peretti's search for information about human remains that had been the subject of autopsies at the Arkansas Crime Laboratory after having been found in water. The defense has not been provided with further follow-up information about the subject matter.

Misskelley submits that if the circuit court is reinvested with the jurisdiction to deal with the subject, the circuit court should be authorized and instructed to enter appropriate disclosure and discovery orders so that information about animal predation either considered by the State at the time of trial, or considered by the State since then, can be addressed as part of the post-conviction hearings in this matter, including information inquired into by the State about the animals that populated the area of the crime scene at relevant times.

If the State has evidence that bears on the reliability and validity (and thus the credibility and accuracy) of the scientific evidence and expertise that it presented at trial, that evidence should be ordered disclosed because it is Brady evidence.

**B. Survival knife**

One of the pieces of evidence was a survival knife found in a man-made lake at the Lakeshore Trailer Park in Marion where Baldwin lived with his mother and brothers. A law enforcement dive team found the knife several months after the murders. One of the critical issues in connection with the State's presentation of the

knife to the jury was when the knife presented to the jury as the likely murder weapon was tossed into the lake. Although no witness was presented to the jury to provide that information, the State argued this knife matched some of the wound patterns on the victims' remains, making the issue of timing logically explicit: the knife must have been tossed into the lake after the killings.

However, post-conviction investigation has revealed that at least two witnesses told the police that they were aware that a large knife was thrown into the lake before the murders. Also, one of the members of the law enforcement dive team has indicated the officers were given precise directions on where to find the knife.

If law enforcement officers and/or members of the prosecution team were aware of the knife was tossed into the lake many weeks prior to the killings, any failure to turn over that information would clearly be a Brady violation. Any failure to turn over any post-conviction evidence to that effect would also amount to a Brady violation.

**C. The pants cuttings**

During the course of the processing of evidence in this case, a criminalist from the Arkansas State Crime Laboratory, Kermit Channell, now the Director of the laboratory, examined the victims' clothing, and cut the clothing in certain areas to permit further testing and processing of it for possible biological material. The cuttings at issue were processed initially by Mr. Channell, and then were sent to a now

defunct DNA Laboratory directed by Michael DeGuglielmo (Trial R 1543-1551), a DNA scientist who no longer is involved in providing forensic DNA expertise, in part because of the questions that arose (in cases other than this one) about the reliability of his work.

In Misskelley's case, DeGuglielmo testified that his lab had looked at some cuttings from victims' jeans, items Q6 and Q10 (Trial R 1545) DeGuglielmo further testified that his laboratory recovered a small amount of human DNA from the two items, and separated the material into sperm and non-sperm components. They tried to amplify the DNA, but could not find any. He testified, before the jury, that it is "…the small amounts of DNA we detected were present in the male or sperm portions of the extraction, which would be indicattive of the DNA having come from a sperm origin. (Trial R 1050). DeGuglielmo admitted on cross examination that his laboratory had not done any microscopic examination of the material which is the basis for confirming the presence of sperm or sperm fractions. (Trial R 1550-1551)

In Misskelley's trial, the State used DeGuglielmo's testimony to argue that Petitioner's lawyer was wrong in suggesting there was no evidence that the victims were sexually abuse, by noting that there was a DNA source consistent with semen found on the pants of one of the children. (Trial R 2265) The same argument was made in the other trial.

At neither trial did the defense have in hand the actual laboratory notebooks, and criminalist's notes. Had they had the file materials, they would have seen a letter in Channell's file dated May 19, 1993 indicating that items Q6 and Q10 (see above) had been sent to Genetic Design for DNA analysis. On the version of the letter which is in the laboratory's materials (but was not transmitted to defense counsel), is handwriting next to samples Q6 and Q10 that reads: "? pos. bacterial in nature". The notes also included that he had a false positive in the semen testing. In the formal report of Mr. Channell's results, notwithstanding certain reported or observed results on screening testing, Mr. Channell wrote that: "no semen was found on any items." He also wrote that the acid phosphatase test was "very light," which, Misskelley is prepared to demonstrate, means that it cannot be semen. Mr. Channell's file (along with other Arkansas State Crime Laboratory files) was obtained during post conviction evidence review. A copy of the "Semen Examination" with reference to the false positive and the "very light" acid phosphatase is attached as Exhibit 1 to this petition, and a copy of the Channell letter to Genetic Design with the handwritten reference to "poss bacterial" is attached as Exhibit 2.

These developments present this issue: Was the jury in these cases presented with testimony from a scientist that was both misleading, and which the State had reason to know was open to question in part because the source of a positive reaction

for the constituent parts of seminal fluid may have been bacterial contamination on the cuttings due to their presence and dirty, bacterial-laden water? It appears likely, given the handwritten notes in Channell's file that this hypothesis was considered at the time.

Misskelley's post-conviction consultations with DNA experts and qualified forensic scientists indicate that the issue is one that should have been of serious concern, as there is no clear and acceptable scientific basis available in the materials pertinent to the cuttings from the clothing to hypothesize that there was sperm, or some sperm fractions, on the cuttings. The question of bacterial contamination turns out to be a critical question, as such contamination could explain the 'false positive' on a screening test for the presence of seminal fluid. The testimony offered at Petitioner's trial on this subject was misleading in that there was no scientific basis for DeGuglielmo's opinions about the evidence 'most likely' being linked to sperm cells, and was subject to informed cross examination on the issue, had the pertinent material been acquired by, or provided to, defense counsel.

The DNA testing techniques available at the time of trial, and applied in this case, would not yield any information about what the nature of the cellular material being tested was – in other words, the technology at DeGuglielmo's laboratory employed a specific process to report DNA results using very limited systems

available to that laboratory in 1993. The technology could not distinguish male from female DNA, and would not have been able to distinguish the type of cellular matter.

It can be assumed, though no specific testimony on this point was presented, that representatives of the Arkansas State Crime Laboratory conversed with their subcontractor DeGuglielmo, about the nature of their presumptive testing, and their reason for having transmitted Q6 and Q10 to his laboratory. Since he did not purport to have actually looked at the biological material transmitted to him under a microscope, he would not have known, with any scientific basis, that the hypothesis was that there was seminal fluid on the cuttings. Moreover, the fact that the State presented his testimony in the trial without also noting that the hypothesis of bacterial contamination had been raised at the laboratory itself is highly problematic – because, as noted, it would have explained why the laboratory's criminalist got a possible positive reaction on a screening test, but eventually stated that he had found no sperm on the evidence that he had reviewed.

All of this raises the question of whether impeaching evidence, and specifically evidence that would have undermined the aura of scientific infallibility provided by DeGuglielmo's testimony, could and should have been provided—and raises the question, as well, of whether the State was aware of the concerns about bacterial contamination when it presented its evidence, and made its rebuttal argument, in

Petitioner's trial. Post-conviction investigation and disclosure (in response to defense requests) has produced the crime laboratory's notes and files. The question of whether defense counsel were advised of the subject matter covered here, or whether there are other materials in the State's possession to shed light on these issues, should be dealt with by the trial court.

This withheld and/or misrepresented information certainly meets the *Brady* criteria that it (i) was favorable; (ii) was suppressed by the State; and (iii) Misskelley was prejudiced by its suppression.

**CLAIM 2: THE TESTIMONY OF VICKY HUTCHESON**

Vicky 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 - that she fabricated it all under duress caused by police threats and coercion.

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. (Trial R 1471-72.) At some point after the killings, she decided to play detective.[2] (Trial R 1472.) She had heard a lot

[2]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

of things about Damien Echols, so she had petitioner introduce her to Echols. (*Id*.) 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. (Trial R 1473.)

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 asked Echols to take her home, but Misskelley stayed at the scene. (RT 973, Bates 1474.)

**Hutcheson's Sworn Statement of June 2004.**

In June, 2004, Hutcheson gave a recorded statement to Nancy Pemberton, an investigator working with Misskelley's counsel. The following is a summary of the interview, a copy of which is attached as Exhibit 3.

Hutcheson lived in same trailer park as Petitioner and they were very close friends. He was at her house every day and was like a brother. Hutcheson's son

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to play detective." (Trial R 1472.)

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. 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. 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. Bray told WMPD that Aaron may know something about the murders and that they should talk with him.

The next day, Bray called Hutcheson and Aaron to the Marion station to meet with juvenile probation officer Jerry Driver and WMPD officers at the Marion Police Department. Driver told Hutcheson that he believed Echols was the perpetrator of the crime –Echols had previously been on probation with Driver, who had previously had a "hard time" with Echols. Driver claimed that Echols "was really crazy," that he was "a problem boy," and that he had once threatened to "eat his father... ."

The officers then asked Hutcheson if she would help them get in contact with Damien. They had convinced her that Echols was guilty and that he was "a monster." The officers talked about Echols as if he was Jeffrey Dahmer. Under these

circumstances, Hutcheson wanted to help.

She explained that she thought she had heard Petitioner talk about Echols, though he had described him as weird. At a subsequent meeting at the courthouse, Bray and Driver talked to Hutcheson about setting up Echols. 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. 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. As directed, Hutcheson went to the library, got the witchcraft books, and put them on her coffee table.

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." The next day, Petitioner and Hutcheson went to pick up Echols because Echols did not drive. After picking him up, they all went back to Hutcheson's house, where she plugged in the lamp that triggered the recording. Echols was nervous and Hutcheson asked him why. 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?" According to Hutcheson, Echols "was totally normal – just like any other kid his

age." She then told him that she was interested in "demonic stuff" and Echols 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." Hutcheson had the impression that Echols thought she was being stupid.

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. The next day, Detectives Gitchell, Ridge and "Tiny" asked her to come to the Drug Task Force office ("GTFO") and listen to the tapes. 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.

The officers expressed that they were dissatisfied with the job she had done. Ridge told Hutcheson that 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 – that is, that she help them establish that the killing was a satanic cult killing carried out by Echols. She said, "what are you going to do, link me to the murders?" Ridge responded that "things have to start moving our way." Ridge was really scary – he was the "bad cop" while Gitchell was calm and showed mercy. Ridge made it clear that if her participation in the investigation did not start leading in the right direction, she could lose her son. She agreed to do whatever they wanted her to do.

The next day, she spent about 12 hours in a recorded interview with Ridge and Gitchell. 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. They asked her leading questions such as "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. After several stops and starts and they had the story 'ironed out.' At that point the detectives finally kept the tape running and had her repeat the whole story from start to finish. At home, after the interview, she looked up "esbat" in the dictionary.

At some point after this interview, Gitchell suggested that Hutcheson call Echols and try again to solicit incriminating remarks from him. After it failed miserably, she went to Gitchell's office angry about the "stupidity" of the focus on Echols, and there she saw the officers throwing darts at pictures of Petitioner, Echols, and Baldwin. After Petitioner was arrested, she called Gitchell to tell him that Petitioner was not involved and he told her it was none of her business.

Hutcheson felt as though she had no choice but to testify. 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."

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. She talked to Echols' investigator Ron 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.

**Discussion of Brady claim as it applies to Hutcheson issue**.

Here, the prosecution suppressed favorable evidence that Hutcheson's statement was coerced by the police in order to manufacture evidence against petitioner, and that it was false. The suppression of this favorable evidence severely prejudiced Petitioner.

**A. 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 violated Petitioner's due process rights. The evidence 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. Without a doubt, the evidence was favorable.

**B. 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*, 405 U.S. at 154, the prosecution team in this case suppressed favorable evidence, regardless of whether the state's trial attorneys were aware of its existence.

### C. Suppression of the Fact That Hutcheson's Statements Were Coerced and Fabricated Prejudiced Petitioner.

The suppression of this favorable evidence undoubtedly prejudiced Petitioner. 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.

Hutcheson's detailed account of the tactics employed by the WMPD completely corroborated Petitioner's defense that he was coerced into confessing. Had this

information been available 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 if not destroyed the credibility of the interrogating officers who testified against petitioner. Once the jury heard that the police had manufactured false evidence against Petitioner, it 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 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." (Trial R 2294.)

Accordingly, the prosecution's suppression of material, favorable evidence prejudiced Petitioner.

*Error coram nobis* has a due diligence requirement. This information could not have been discovered until Hutcheson decided to tell the truth. From the time of the statement until this filing, counsel have been investigating all the various strands of the West Memphis 3 matter, resulting in Rule 37 and habeas corpus matters in addition to the *error coram nobis* issue. The Hutcheson matter is not a surprise to the State. It was discussed in detail in the October 7, 2004 issue of the Arkansas *Times*. It was understood and agreed by all parties that filing would be deferred until the investigation was complete.

WHEREFORE, Misskelley prays that the Circuit Court be reinvested with jurisdiction to hear a petition for writ of *error coram nobis* on the claims asserted here, and for all other relief to which he may be entitled.

JESSIE L. MISSKELLEY JR.

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*Attorney for Petitioner*

AFFIDAVIT

The petitioner states under oath that he has read the foregoing petition for writ of *error coram nobis* and that the facts stated in the petition are true, correct, and complete to the best of petitioner's knowledge and belief.

_____
JESSIE LLOYD MISSKELLEY JR.

STATE OF ARKANSAS
COUNTY OF _____

Subscribed and sworn to before me the undersigned officer this __ day of June, 2008.

_____
Notary Public

My commission expires:

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have served all counsel of record with the foregoing by United States mail, and also by electronic means, this ____ day of June, 2008.

_____
JEFF ROSENZWEIG