INTRODUCTION

This case arises out of the slaying in 1993 of three eight-year-old boys in West Memphis, Arkansas. Chris Byers, Steve Branch, and James Michael Moore disappeared around 6: 30 p.m. on May 5th. Their bodies were found the next day submerged in a drainage ditch in Robin Hood Hills, a wooded area near their homes, with that of Byers apparently sexually mutilated.

The investigation and prosecution that followed these terrifying murders generated intense media attention and public discussion at a local, state, and national level. In June of 1993, three teenagers were arrested and charged with committing the murders as part of a satanic ritual. In March of 1994, following trial, petitioner Damien Echols, eighteen years old at the time of the charged offenses, was convicted and sentenced to death; his codefendant Jason Baldwin, sixteen years old when arrested, was sentenced to life in prison without the possibility of parole. A third defendant, Jesse Misskelley, earlier had been convicted and sentenced to life with parole.

It is in cases such as this one that the protections guaranteed a criminal defendant by the United States Constitution are both most needed and most threatened. Most needed because awful crimes — and there are no crimes more horrific than those inflicting suffering on children — provoke a cry for swift

justice. Only the rights to the assistance of counsel and of qualified experts, to due process, to confrontation and cross-examination of adverse witnesses and evidence, to present a defense, and to be judged by twelve impartial jurors can ensure that the public's understandable demand for retribution does not produce a flawed judgment that adds an innocent man's life to a crime's already tragic toll.

Yet it is never more difficult to achieve a fair trial than in cases attended from their inception by white-hot publicity. "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). But the "public print" and "private talk" generated by a notorious crime easily can invade the judicial process, leading to a verdict tainted by false rumor and unreliable gossip.

Indisputably, the danger of a verdict corrupted by unreliable and extraneous information was great in this matter. At a time when authorities possessed virtually none of the sparse evidence that eventually would be offered at trial against petitioner Echols, chief investigator Gary Gitchell announced to applause at a televised press conference beamed into countless households across the region that the strength of the case against Echols was "eleven" on a scale of ten. Not surprisingly, given Gitchell's irresponsible statement, every potential juror at

petitioner's trial had been exposed to pretrial media reports about the case, and many, including some selected to serve on Echols' jury, admitted to holding pre-existing opinions that he was guilty. The trial was televised, according to the lead prosecutor, "because of the high interest in the area, the state, the nation," and trial proceedings, again in the prosecutor's words, were surrounded by a "media circus" and a "shark feeding atmosphere" in which camera people rushed around the courthouse "like little packs of wolves." *Cf. Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966) (stating that in a capital case, "it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion").

Ten years after Damien Echols was condemned to die, the truth emerged. Rather than being convicted on "evidence developed [on] the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel," *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965), Echols was found guilty principally based on what jurors had heard and read outside the courtroom. Echols' jury convicted him based on information both unadmitted and inadmissible at trial: a hearsay statement of codefendant Jesse Misskelley implicating Echols and Baldwin in the charged crimes. Echols was tried separately from Misskelley precisely in order to ensure

that Echols' jury would not be exposed to the Misskelley statement. Yet notes taken by a juror, as well as statements of jurors themselves, establish the central role played by the Misskelley statement during the deliberations of the Echols jury.

Under controlling Supreme Court precedents, receipt by a jury of such an unexamined and inflammatory statement causes incurable prejudice. This case illustrates the wisdom of that rule. Virtually the entirety of the Misskelley statement was demonstrably false. When first interrogated, Misskelley, mentally handicapped, said he had no personal knowledge of the murders. After hours of suggestive questioning, Misskelley, believing that his cooperation would lead to a reward rather than his own prosecution, claimed that he saw Echols and Baldwin sexually assault and beat the victims on the morning of May 5th. In fact, the victims and Baldwin all were in school at that time, and Misskelley's description of the crimes was flatly contradicted in virtually every other respect by the physical evidence. Yet petitioner's jury, which relied on news reports of Misskelley's out-of-court statements to convict, never learned of the defects in Misskelley's statements, precisely because the law deemed the "confession" too unreliable to justify its admission into evidence against Echols and Baldwin.

Echols' trial was marred by a second fundamental defect related to but doctrinally distinct from the jury's receipt of extraneous and highly prejudicial

information. Echols was not judged by twelve impartial jurors. At one point during petitioner's trial, the judge expressed his opinion that every sitting juror no doubt had learned of the Misskelley statement from media reports. That observation is of jarring importance given that no juror had admitted knowledge of the statement during the voir dire process. Echols will now present this Court with evidence establishing that as to the Misskelley statement and other critical matters, several jurors did not give full and honest responses to questions on voir dire. Had these jurors answered candidly, challenges for cause or a change of venue would have been justified. Furthermore, some jurors decided guilt in advance of deliberations.

As the United States Supreme Court has made clear, errors of the sort that marred Echols' trial so offend the conception of fairness embodied in the Fifth, Sixth, and Fourteenth Amendments that they require a new trial even in cases where the properly admitted evidence convincingly demonstrates a defendant's guilt of heinous offenses. *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).[1] Here, the evidence introduced at trial of

[1] "[A] juror must be as 'indifferent as he stands unsworne.' . . . . His verdict must be based upon the evidence developed at the trial. . . . . This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Dowd*, 366 U.S. at 722.

Echols' guilt was disturbingly thin: no witness testified to having seen Echols commit the charged crimes; no physical evidence at the crime scene tied him to the murders; he maintained under grueling interrogation and in his trial testimony that he was at home when the victims disappeared; and his testimony was corroborated by other witnesses. Echols' prosecutors admitted prior to trial that the evidence they would introduce might be inadequate to convince a jury of the guilt of Echols and Baldwin,[2] and the foreman of their jury has since characterized the evidence admitted against them as scanty and circumstantial.

[2] In a videotaped conference with the victims' families prior to the Echols trial made part of the HBO documentary "Paradise Lost; The Robin Hood Hills Murders," prosecutors Fogelman and Davis described the evidence to be offered at trial, and Davis evaluated the chances of gaining a conviction on that evidence as possibly "fifty/fifty." (*See* Exh. A, declaration of Dennis P. Riordan.)

Of paramount importance, petitioner now will place before this Court evidence not introduced at his 1994 trial because (1) in the case of the DNA evidence proffered herein, the scientific methodology by which it was gathered did not then exist; (2) petitioner had no means of offering at trial the crucial opinions of forensic pathologists and odontologists now presented; and (3) in other instances, petitioner's appointed trial counsel failed to develop the evidence in question. This newly presented evidence will establish Echols' "actual innocence" under the legal standard announced by the United States Supreme Court in *Schlup v. Delo*, 513 U.S. 298 (1995), and *House v. Bell*, 126 S. Ct. 2064 (2006).

The DNA evidence has been developed during a state collateral proceeding statutorily established in 2001 in Arkansas partly because of continuing questions as to the accuracy of the verdicts in this case. It establishes that no genetic material of the defendants was present on the victims's bodies, as it would have been if the crimes occurred in the manner hypothesized at Echols' trial. 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, a stepfather of one of the victims (Branch), was found on the ligature used to bind another of the victims (Moore). 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 Branch, came forth with evidence that she believed linked Terry, her former husband, to the murders. And John Douglas, former chief of the Investigative Support Unit of the FBI for twenty five years, has done an offender analysis of the murders which could readily apply to Hobbs but not to any of the three convicted as teenagers in this case.

Of equal importance, new forensic evidence has established that most of the wounds suffered by the victims, and particularly those to the genitalia of Byers, were not inflicted with a perpetrator's knife, but resulted from post-mortem animal predation. That analysis and conclusion, reached by more than half a dozen leading forensic pathologists and odontologists who reviewed the autopsy tests, photos, and reports, were shared months ago with the state's prosecutorial team and have gone unrebutted. The presence of animal predation exposes the falsity of practically the entirety of the state's case against Echols, putting the lie to: (a) Dale Griffis, a "witchcraft expert" with a fraudulent Ph.D., who claimed the wound pattern of the victims reflected satanic motivation; (b) Michael Carson, the

jailhouse informant who testified that Baldwin admitted drinking Byers' blood and putting the victim's testes in his mouth, a horrifying but wholly perjured assertion relied upon by Griffis to support his theory of satanists at work; and (c) the state's claim that during a pre-arrest interview Echols had displayed knowledge of Byers' injuries available only to one who witnessed his castration.

The new forensic evidence also exposes the misconduct of prosecutor John Fogelman in closing argument when he conducted an experiment which he claimed proved that a knife recovered from a lake behind Baldwin's residence was the instrument which maimed Byers. No evidence in the record permitted the conclusion that the lake knife was used in the crime, yet Fogelman informed the jury in closing that he was able to reduplicate the marks on Byers' body by cutting into a grapefruit with the knife in question. The prosecutor's unsworn testimony in this regard violated petitioner's Sixth Amendment right to confrontation. *Berger v. United States*, 295 U.S. 78, 88 (1935) (holding that prosecutors have a "special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge'"). Furthermore, the forensic evidence presented herein exposes Fogelman's assertions to be utter falsehoods. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (reversing a conviction must based on testimony which gave the jury a "false impression" and which the prosecutor knew was misleading).

The federal constitutional errors that marred Echols' state court trial do not end here. Petitioner, penniless, was entitled to competent counsel provided at state expense to provide a competent defense. Appointed counsel was in turn obligated to obtain from the state the investigators and technical experts needed to defend Echols effectively. But faced with official resistance to providing adequate resources to the attorney of an accused already judged guilty in the court of public opinion, Echols' appointed lawyers signed a contract with the producers of a documentary on the case, intending thereby to raise funds to hire needed experts.

In doing so, petitioner's attorneys created a flagrant conflict of interest between their professional obligations to their client and their contractual duties to the film makers. The contractual obligations to which counsel subjected themselves led them to forgo measures such as a continuance and second change of venue that could have prevented the prejudicial media coverage of the Misskelley trial from contaminating the jury's decision in petitioner's case in the way that it did. Furthermore, despite entering into the contract, appointed counsel failed to present the forensic experts and other evidence needed to rebut the state's case.

This Court is empowered to decide any and all claims raised by Echols regardless of whether he has exhausted state remedies because (a) the Arkansas Supreme Court will not entertain any additional challenges by Echols to his

convictions; and (b) petitioner's successful meeting of the *Schlup-House* actual innocence standard overcomes any otherwise applicable state procedural bar to this Court's rendering of a decision on the merits on any and all of petitioner's claims.

Following the recent wave of exonerations due principally to DNA testing, a study examined the factors that had 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 again and again by flawed or fraudulent expert testimony; by jailhouse informants who gained benefits by committing perjury; and by mistaken eyewitness testimony.[3] And the likelihood of a wrongful conviction surely soars when prosecutors misled jurors in closing argument. The investigation and trial of Damien Echols joined all of these factors together to create a "perfect storm" of adjudicatory error; as a result, an innocent man has been condemned to death. This Court must remedy this grave miscarriage of justice by issuing its writ vacating petitioner's convictions and sentence of death.

[3] Adam Liptak, "Study of Wrongful Convictions Raises Questions Beyond DNA," New York Times, July 23, 2007, at page 1, discussing "Judging Innocence," by Professor Brandon Garrett of the University of Virginia, to be published in January, 2008, in the Columbia Law Review. The Liptak article is attached as Exhibit B.

STATEMENT OF THE CASE

On March 19, 1994, following trial by jury, an Arkansas trial court sitting in the Craighead County Circuit Court in Jonesboro, Arkansas, entered judgment against petitioner Echols for three counts of first-degree murder. On that same date, the trial court sentenced petitioner to death.

Echols timely appealed from the judgment and sentence, which were affirmed by the Arkansas Supreme Court in an opinion issued on December 23, 1996 and reported at *Echols v. State*, 936 S.W.2d 509 (Ark. 1996) ("*Echols I*"). Petitioner thereafter challenged the Court's appellate ruling by filing a timely petition for a writ of certiorari in the United States Supreme Court, which was denied in an order issued on May 27, 1997.

Meanwhile, on March 11, 1997, well before the conclusion of his direct appeal, Echols filed a motion for post-conviction relief from the trial court's judgment and sentence pursuant to Arkansas Rule of Criminal Procedure 37.1 et seq. Following amendments, petitioner's final Rule 37 petition was denied by the Craighead County Circuit Court in an order issued on June 17, 1999.

Petitioner timely appealed from the Circuit Court's June 17, 1999 order. On April 26, 2001, the Arkansas Supreme Court affirmed one portion of the district court's ruling but otherwise reversed and remanded in light of the Circuit Court's

failure to make required factual findings on petitioner's claims. *Echols v. State*, 42 S.W.3d 467 (Ark. 2001).

Following remand, in an order issued on July 30, 2001, the Circuit Court issued a new decision rejecting all of petitioner's claims under Rule 37. Petitioner timely appealed this ruling which was affirmed in an opinion issued on October 30, 2003, as reported at *Echols v. State*, 127 S.W.3d 486 (Ark. 2003) ("*Echols II*").

On February 27, 2001, while the Rule 37 proceedings described above were pending, Echols also petitioned the Arkansas Supreme Court for an order reinvesting jurisdiction in the Circuit Court to allow him to seek a writ of error *coram nobis.* The Court denied that petition in an opinion issued on October 16, 2003 (i.e., before the conclusion of the Rule 37 proceedings) and reported at *Echols v. State*, 125 S.W.3d 153 (Ark. 2003).

On July 25, 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. In an order dated September 12, 2002, the Arkansas Supreme Court observed that petitioner's DNA motion was "appropriately filed." *Echols v. State*, 84 S.W.3d 424, 426 (Ark. 2002) (per

curiam). On January 27, 2003, the Craighead County Circuit Court judge who presided at petitioner's trial 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 the Circuit Court's preservation order and related trial court proceedings then began and remains in progress as of the time of filing the instant petition.

On October 28, 2004, Echols filed his initial petition for federal habeas corpus relief in this Court. The October 28, 2004 petition contained a number of claims including (1) juror misconduct; (2) juror bias; (3) DNA testing then underway would establish his innocence, rendering his conviction and sentence of death unconstitutional; (4) his trial lawyer's conflict of interest; and (4) his trial lawyer's ineffective assistance of counsel. The first, second, and third claims, along with an element of the IAC claim, however, had not been exhausted in the Arkansas courts at the time that the original petition was filed. Echols requested that this Court hold his petition in abeyance until he could complete the process of exhausting state remedies.

On October 29, 2004, Echols filed a Motion to Recall The Mandate And to Reinvest Jurisdiction in The Trial Court to Consider Petition For Writ of Error Coram Nobis or For Other Extraordinary Relief. The motions were primarily

founded on newly discovered evidence of jury misconduct and juror bias at the time of Echols's state court trial. The state Supreme Court denied the motions in an order issued on January 20, 2005. (*See* Exh. BBB.) Echols thereafter filed a petition for rehearing as to the January 20, 2005 order, alleging, *inter alia*, that the state Supreme Court's disposition of the misconduct and bias claims effectively established that Echols' petitioner's trial lawyer had rendered constitutionally ineffective assistance of counsel by failing to present these claims in support of a motion for a new trial. That petition was denied in a state Supreme Court order issued on February 24, 2005. (*See* Exh. CCC.)

On February 28, 2005, Echols filed his first amended habeas petition in this Court. That petition resembled the original petition, but included the allegation that the juror misconduct and juror bias claims now had been exhausted, and again requested that the petition be held in abeyance until his substantive "actual innocence" claim based on DNA testing could be exhausted.

On March 2, 2005, the state of Arkansas moved to dismiss the first amended petition, claiming because the one-year period permitted under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") had not yet begun to run, there was no need to hold the petition in abeyance. On August 18, 2005, this Court denied the state's motion to dismiss, ruling that petitioner could maintain his habeas

petition in abeyance in this Court while his collateral attack on his convictions under Arkansas Code section 16-112-201 et seq. remained pending in state court.

STATEMENT OF FACTS

A. Prefatory Note On The *Schlup-House* "Actual Innocence" Doctrine

House v. Bell is the first case from the high court to consider the impact of recently developed DNA evidence on a death conviction returned before new technologies permitted such evidence to be generated. In *House*, the defendant had raised a number of federal constitutional claims that the Tennessee courts had held could not be addressed on the merits because they were procedurally defaulted, i.e., they were brought too late in the course of state proceedings. The Supreme Court had previously held in *Schlup v. Delo* that claims defaulted in state court due to state procedural rules generally cannot be heard in federal court, but that there is a "miscarriage of justice" exception for extraordinary cases where it appears likely that the defendant is innocent.

Writing for the *House* majority, Justice Kennedy stated: "[A] petition supported by a convincing *Schlup* gateway showing 'raise[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error'"; hence, "'a review of the merits of the constitutional claims' is justified." 126 S. Ct at 2077. Justice

Kennedy continued: "A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt – or, to remove the double negative, that it is more likely than not any reasonable juror would have reasonable doubt." *Id*.

House emphasized that "the habeas court must consider 'all the evidence,'" old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial." "Based on this total record, the court must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.'" *Id*.

Because petitioner is raising a *Schlup-House* claim of actual innocence that would trump any procedural default objection, he first summarizes below the evidence developed prior to and during petitioner's trial. This summary includes facts concerning Misskelley's statements which, while excluded from admission at petitioner's trial, played an improper but critical role in Echols' conviction. A summary of the DNA, forensic, and other evidence uncovered since the jury returned verdicts against Echols in 1994 will be presented in the factual statement of the *Schlup-House* discussion presented as the initial claim in the "Argument" Section that follows this "Statement of Facts." These factual summaries in tandem will permit the Court to assess whether a reasonable juror considering all of this

evidence would have a reasonable doubt as to Echols' guilt, thereby justifying the resolution of all of his constitutional challenges on the merits.

B. The Charged Murders

The Arkansas Supreme Court opinion affirming petitioner's convictions on direct appeal described the charged murders as follows:

> Michael [Moore], Christopher [Byers], and Steve [Branch] were eight years old, in the second grade, in the same Cub Scout troop, and often played together in their West Memphis neighborhood. On the afternoon of May 5, 1993, after school, Michael and Steve were riding their bicycles while Chris was skateboarding. Deborah O'Tinger saw the three boys walking through her yard between 5:45 and 6:00 that afternoon. Her recollection was that they were pushing a bicycle. At about 6:00 p.m., Dana Moore, Michael's mother, saw the three boys together. At that time Michael was riding his bicycle. Between 6:30 and 6:45 Brian Woody saw four boys going into some woods known as the Robin Hood woods. He noticed that two of the boys were pushing bicycles, one had a skateboard, and a fourth one was just walking behind them. Neither Michael, Christopher, nor Steve returned to their homes. Their parents called the police, and a search was begun.
>
> The next morning, members of the Crittenden County Search and Rescue Unit discovered a tennis shoe floating in a ditch just north of Ten Mile Bayou. The Robin Hood woods drain into Ten Mile Bayou, and the members of the search unit knew the boys were last seen in that area. Detective Mike Allen walked along the ditch bank to the place where the tennis shoe had been found. He noticed that one area of the ditch bank was cleared of leaves, while the rest of the bank was covered with leaves and sticks. He described the cleared area on the bank as being "slick," but having "scuffs" in the cleared-off area. He got into the water, reached down to get the shoe, and felt Michael Moore's body. The corpses of Christopher Byers and Steve Branch were subsequently found about twenty-five feet downstream.

Policeman John Moore, who was also there, said there was blood in the water, but none on the bank. Detective Bryn Ridge was also present and helped recover the boys' bodies. He collected the victims' clothes, three tennis shoes, and a Cub Scout cap that was floating in the water. He found a stick stuck in the mud that had one of the boy's shirts wrapped around the end that was stuck down in the mud. He dislodged another stick as he was removing the corpse of Michael Moore.

All three corpses had their right hands tied to their right feet, and their left hands tied to their left feet. Black shoe laces and white shoe laces were used as ligatures. Michael Moore's body had wounds to the neck, chest, and abdominal regions that appeared to have been caused by a serrated knife. There were abrasions over his scalp that could have been caused by a stick. Dr. Frank Peretti, a State medical examiner, testified that there was bruising and discoloring comparable to that frequently seen in children who are forced to perform oral sex He testified that there were defensive wounds to the hands and arms. Moore's anal orifice was dilated, and the rectal mucosa was reddened. Dr. Peretti testified this injury could have come from an object being placed in the anus. Finally, Dr. Peretti testified that there was evidence that Moore was still alive when he was in the water, as there was evidence of drowning.

Steve Branch's corpse had head injuries, chest injuries, genital-anal injuries, lower extremity injuries, upper extremity injuries, and back injuries. The body had multiple, irregular, gouging wounds, which indicated that he was moving when he was stabbed. The anus was dilated. Penile injuries indicated that oral sex had been performed on him. There was also evidence that he, too, had drowned.

Christopher Byers's corpse also had injuries indicating that he had been forced to perform oral sex. His head had scratches, abrasions, and a punched- out area on the skin, and one eyelid had a contusion. The back of the neck had a scrape. The inner thighs had diagonal cuts on them. The back of the skull had been struck with a stick-like, broomstick-size, object. The skin of the penis had been removed, and the scrotal sac and testes were missing. There were cuts around the

> anus, and the hemorrhaging from those cuts indicated he was still alive when they were made. Many of the cuts were made with a serrated blade knife. Byers did not drown; he bled to death.
>
> The boys' bicycles were found nearby.

Echols I, 936 S.W.2d at 516-17.

The record of petitioner's trial also discloses that on the night of May 5, 1993, a black man was found in the women's room at Bojangle's restaurant, blood dripping from his arm, with mud on his feet, disarrayed, and slurring his speech. (EBRT 2211-12, *2999-3000*.)[4] The women's room had blood and mud in it. According to the restaurant manager, there was quite a bit of mud that had to be cleaned up. The man 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, *3001-02*.)

[4] "EBRT" refers to the Echols-Baldwin Reporter's Transcript. The transcripts from the Echols-Baldwin trial in counsel's possession bear two sets of page numbers. The first set is the original pagination at the trial court level, while the second is a Bates stamp numbering used for the record on direct appeal. Petitioner will use both sets of numbers for each page citation, the Bates stamp number being supplied in italics.

The police were summoned that night to the Bojangles restaurant, which is approximately one mile from the Robin Hood woods, but collected no evidence. (EBRT 772-77, *1551-56*.) On the afternoon of May 6th, Detectives Ridge and Allen came out, took a report, and "then they took blood scrapings off the wall in the women's restroom." (EBRT 2215, *3003*.) The detectives asked whether the man appeared to have muddy feet like those of the officers (who had been at the crime scene all morning) and the manager of Bojangles responded that the man did. (EBRT 2215, *3003*.) The officers indicated they did not need to take possession of the bloody roll of toilet paper. (EBRT 2216, *3004*.)

Detective Ridge never sent the samples taken at Bojangles to the crime lab and then later lost them. (EBRT 810-11, *1589-90*; 945, *1725*.) A negroid hair was later discovered on a sheet used to cover the body of Chris Byers. (EBRT 1182, *1963*.)

C. The Arrest of the Three Defendants

The *Echols* opinion describes the events leading to the arrest of Echols, Baldwin, and Misskelley.

> On June 3, or almost one month after the murders, Detective Mike Allen asked Jessie Lloyd Misskelley, Jr., about the murders. Misskelley was not a suspect at the time, but Echols was, and it was thought that Misskelley might give some valuable information about Echols. Detective Allen had been told that all three engaged in cult-like activities. Misskelley made two statements to the detective that implicated Echols and Baldwin, as well as

himself...

> Misskelley, age seventeen, Echols, age nineteen[5], and Baldwin, age sixteen, were jointly charged with the capital murders of Moore, Byers, and Branch. Misskelley moved for a severance from Echols and Baldwin, and the trial court granted the severance

Echols I, 936 S.W.2d at 517.

As noted above, upon the arrest of the three defendants, lead investigator Gary Gitchell held a press conference at which it was announced that Jesse Misskelley had confessed to seeing Damien Echols and Jason Baldwin use a knife to rape, sexually mutilate, and murder the three victims as part of a satanic ritual. Gitchell described the proof against the defendants as eleven on a scale of ten.[6]

D. The Misskelley Trial, Verdict, And Proceedings Concerning Misskelley's Possible Testimony in The Echols Case

Misskelley's case having been severed from that of Echols and Baldwin, the former's trial began on January 18, 1994 in Clay County. The proceedings were televised and widely reported in the print media. Echols below summarizes evidence from the Misskelley proceeding which was not admitted at his own trial but bears on the constitutional claims he will present below.

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[5] According to a trial stipulation, Echols' date of birth is December 10, 1974, making him eighteen at the time of the charged crimes and nineteen at the time of his trial. (EBRT 2675, *3463*)

[6] Gitchell's statement was included in the "Paradise Lost" HBO documentary. (*See* Exh. A.)

1. The Role of Vicky Hutcheson

Vicky Hutcheson was a prosecution witness at the trial of Jesse Misskelley and was the subject of testimony, although she was not called by either party, at Echols' trial.

Hutcheson testified at the Misskelley trial 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 became really close friends with Jessie Misskelley (MRT 970-71.)[7] At some point after the killings, she decided to play detective. (MRT 971-72.) She had heard a lot of things about Damien Echols, so she had Misskelley introduce her to Echols. (MRT 972.)

Hutcheson did a number of things to gain Echols' confidence. She went to see Don Bray, a police officer at Marion, to get his library card to check out "some satanic books because they can't be checked out just by normal" people; she spread the books around her coffee table. (MRT 972.) 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, *2940-49.*)

[7] "MRT" refers to the Misskelley Reporter's Transcript. Citations to the MRT are to the pagination found in the transcripts produced in the Circuit Court.

According to Hutcheson's testimony in the Misskelley trial, at one point, Echols invited her to an "esbat," which Hutcheson claimed was an occult satanic meeting mentioned in one of the witch books. (MRT 973.) 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. (MRT 973-74.)

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, the reason being she was being investigated in regard to a "a credit card mess-up." (MRT 975.) She had been previously convicted in Arkansas for writing "hot checks." (MRT 976.) After she began her cooperation with the police regarding Echols, authorities dropped all charges involving the credit card problem. (MRT 975.) Hutcheson frequently bought liquor for a fifteen-year-old friend of Misskelley's (MRT 1214), and had spent the night with Misskelley the night before he gave his statement to the police and was arrested. (MRT 976-77.) 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. (MRT 1268-69.)

On January 29, 1994, the Arkansas Democrat-Gazette reported Hutcheson's testimony that she "attended a satanic cult meeting with Misskelley and co-

defendant Damien Echols." (Exh. C; *see also* Exh. D, Jonesboro Sun article of Jan. 28, 1993.) The Democrat-Gazette article also reported that Misskelley had confessed his involvement and that of Echols and Baldwin in satanic activities "and the sexual assaults, mutilations and beatings of the children." (Exh. C.)

2. The Misskelley Statement

Expert psychological testimony at the Misskelley proceeding established that Misskelley had been diagnosed as mentally retarded, as had his brother. (MRT 342.) Misskelley's arithmetic and spelling skills were on the 2nd or 3rd grade level. (MRT 344.) He tended to think in childlike ways as "a 6, 7-year-old child would do." (MRT 346.) He performed psychological tests from the viewpoint of a 5 to 7-year-old child. (MRT 349.) On moral reasoning test instruments, he again was very childlike. (MRT 351.) 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 can't tell the difference between fantasy and reality." (MRT 352.)

The diagnoses of Misskelley were adjustment disorder with depressed mood, with a history of psychoactive substance abuse, including marijuana, huffing gasoline, and alcohol. (MRT 352.) He possessed borderline intellectual functioning. (MRT 353.) He had a diagnosed developmental disorder, as well as

other dysfunctions “primarily schizotypal, antisocial, and dependent.” (MRT 353.) Misskelley had impaired memory, both long and short-term. (MRT 354.)

The following facts concerning the Jesse Misskelley statement are taken from the opinion of the Arkansas Supreme Court affirming Misskelley’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. [Misskelley]'s name had been given to officers as one who participated in cult activities with Echols.[8]
>
> Detective Sergeant Mike Allen questioned [Misskelley] on the morning of June 3, 1993. [Misskelley] was not considered a suspect at that time...
>
> [Misskelley and Allen] arrived at the station at approximately 10:00 a.m. Detective Allen and Detective Bryn Ridge questioned [Misskelley] 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 [Misskelley] of his rights. Detective Allen read him a form entitled "YOUR RIGHTS," and verbally advised him of the *Miranda* rights contained in the form. [Misskelley] 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...

[8] This is a reference, inter alia, to Hutcheson’s “esbat” story.

After he was advised of his rights and had waived them, [Misskelley] was asked if he would take a polygraph examination. He agreed that he would. Detective Allen took [Misskelley] to look for his father so that his father could grant permission for [Misskelley] 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 [Misskelley]'s rights to him. [Misskelley] verbally indicated he understood, and initialed and signed a second rights and waiver form which was identical to the first.

Detective Durham explained to [Misskelley] how the polygraph would work and administered the test over the course of one hour. In Detective Durham's opinion, [Misskelley] was being deceptive in his answers and he was advised that he had failed the test. At that point, [Misskelley] became nonresponsive.

Detective Bryn Ridge and Inspector Gary Gitchell began another interrogation of [Misskelley] at about 12:40 p.m. They employed a number of techniques designed to elicit a response from [Misskelley]. A circle diagram was drawn and [Misskelley] 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, [Misskelley] 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 [Misskelley]'s and had known the victims.[9] The portion of the

[9] This is a reference to Aaron Hutcheson, Vicky Hutcheson's son, who soon after the killings claimed to have witnessed the murders and thus to be entitled to reward money, but proved so untrustworthy that he was never called by the

statement which the officers played was the boy's voice saying, "nobody knows what happened but me." Upon hearing this, [Misskelley] stated that he wanted out and wanted to tell everything.

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prosecution at either the Misskelley or Echols-Baldwin trials.

> 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, [Misskelley] 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 [Misskelley] at the suppression hearing consisted primarily of the testimony of polygraph expert Warren Holmes. Mr. Holmes testified that, in his opinion, [Misskelley] had not been deceptive in his answers to the polygraph questions. He raised the possibility that [Misskelley] had been wrongly informed that he had failed.

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

The Arkansas Supreme Court described the contents of Misskelley's statements themselves as follows:

> 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 [Misskelley] 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 [Misskelley]'s description of the crime:
>
> In the early morning hours of May 5, 1993, [Misskelley] received a phone call from Jason Baldwin. Baldwin asked [Misskelley] to accompany him and Damien Echols to the Robin Hood area. [Misskelley] 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.

While these events were taking place, Michael Moore tried to escape and began running. [Misskelley] chased him down and returned him to Baldwin and Echols. [Misskelley] 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 [Misskelley], 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 [Misskelley] 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.

[Misskelley] 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.

[Misskelley] 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.

[Misskelley] 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, [Misskelley] 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...

> [Misskelley]'s statements are a confusing amalgam of times and events. 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 with black and white shoe laces. It was also revealed that the victims had not skipped school on May 5.

Id. at 707-08.

3. Other Evidence Bearing On The Unreliability of The Misskelley Statement

Not only had the victims attended school during the day on May 5th, but Baldwin had as well, (MRT 946; EBRT 974, *1754*), and it was established during the Echols trial that Echols had been at a doctor's appointment that morning.

(EBRT 1852, 1891, 1915, 1948, *2638, 2677, 2701, 2734.*) Indeed, uncontradicted testimony was admitted at Misskelley's trial that Misskelley had been on a roofing job the entire morning of May 5th. (MRT 1104-05, 1113.) That being so, when Misskelley early in his statement 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. in the morning, he was describing a series of events that never happened.

When Misskelley 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" (MRT 946-47), he was engaging in fiction. When he stated that he witnessed Echols and Baldwin committing the killings and then he "went home by noon," he again was inventing a narrative, as both the victims and Baldwin were sitting in school while Misskelley was roofing at noon, and the victims were riding their bikes around their neighborhoods six and a half hours later. Detective Ridge, one of the interrogators, admitted being shocked when Misskelley said the little boys were killed at noon, because he knew the little boys were in school at noontime, and 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." (MRT 904-05.)

The police terminated the first recorded statement of Miskelley at 3:18 p.m. and attempted to obtain a warrant, but were told by the issuing magistrate that there were problems with the time sequence described by Misskelley. (MRT 154-56, 193, 212-20.) During the second interview beginning at 5 p.m., Misskelley moved the time the victims were seized back to five or six o'clock, again a false statement, only to have the police tell him he had stated earlier in the interview the time was actually seven to eight (which Misskelley had *not* done in the earlier recorded interview), a suggestion to which Misskelley then acceded. Having invented a story about meeting Baldwin and Echols and walking to Robin Hood woods in the morning, Misskelley never explained how he came to be in the presence of his codefendants later that day.

Of great importance, a person who had in fact been present at the commission of the crime would have seen the victims hog-tied — i.e., left hand to left foot, right hand to right foot — with shoe laces of different colors, including white and black, (EBRT 195-96, *971-72*), apparently taken from the victims' own shoes. A true memory of binding the victims in such a horrible way with their shoelaces removed from their own sneakers would surely have been indelible. Yet in his statement Misskelley said only that the victims' hands were tied, and that

was done with brown rope. His interrogators attempted to have Misskelley correct this false description by suggesting the boys would have run away had only their hands been tied, but Misskelley failed to come up with the explanation that would have been obvious to any one who actually witnessed the murders: the hog-tying with shoelaces. 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..."

Ridge admitted to again being shocked when Misskelley falsely stated that the victims were bound with brown rope (MRT 905), but agreed that he had been happy to get an incriminating statement from Misskelley because the police were under a lot of pressure to solve the crimes. (MRT 906.)

Moreover, when Misskelley described Damien Echols taking a "big old stick" and using it to choke Chris Byers to death, he again was speaking falsely, for an autopsy revealed Chris Byers had suffered no injuries to his neck consistent with choking, much less the fractures that would result from being asphyxiated with a stick. (MRT 852.) Similarly, one of the few details that Misskelley readily volunteered at the beginning of his interview was he saw Echols "start[] screwing them" (MRT *; *see also* MRT *: "they started screwing them and stuff"), but the state pathologist testified that the victims suffered absolutely none of the injuries to

their anal cavities that would necessarily be present if an adult sodomized a child. (EBRT at 1102-03, *1883-84*.) And though Misskelly stated that he saw Echols and Baldwin "beat them up real bad" before the two took the victims' clothes off (MRT *), 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*.)

Testimony was offered at the Misskelley trial that on the day of Jessie's arrest, he and Officer Allen joked about a reward of $40,000 and the fact that if a conviction was obtained, Jessie would be able to buy himself a new truck. (MRT 1183.) Finally, Misskelley's defense called a substantial number of witnesses who testified that Misskelley had been at the Highland Trailer Park in the early evening of May 5th when the police were called to the area in regard to a neighborhood dispute, and then had gone wrestling. (MRT 1124-29, 1149-52, 1161-63, 1173-75, 1180-82, 1188-90, 1198-1200, 1211-13.)

As 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.[10]

[10] 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,

4. The Misskelley Verdict And Accompanying Publicity

killed them, and cut off their arms and legs. (EBRT 2054-61, *2841-48*.)

On January 28, 1993, the Jonesboro Sun carried a front page story about the playing of the Misskelley confession in court, including graphic descriptions of Echols and Baldwin beating and sexually abusing the three victims. (Exh. D.) An article in the Jonesboro Sun on February 4, 1994 reported the prosecutor's use in closing argument of the Misskelley statement, including its references to Echols and Baldwin. (Exh. E.) Misskelley was convicted in Clay County on February 4, 1994. Press coverage of the verdict on February 5th described Misskelley's statement of June 3, 1993, stating that Misskelley had confessed that he had helped subdue the victims but that it was Echols and Baldwin who "beat, cut, and sexually abused the boys." (*See* Exh. F, Arkansas Democrat-Gazette article of Feb. 5, 1994.)

E. The Echols Trial

1. Pretrial Proceedings

On February 22, the day jury selection was to begin in the Echols-Baldwin trial, the trial court held an extended proceeding in chambers dealing with the issue of whether, in an effort to obtain the testimony of recently-convicted Jesse Misskelley, the prosecution had acted improperly in interviewing Misskelley on a number of occasions over his attorney's objections and, in some instances, without defense counsel being present, and in then having Misskelley brought to Jonesboro

to testify. (EBRT 512 et. seq., *1290*, et seq.) The court indicated that it was "going to find an independent attorney" to interview Misskelley and determine whether he wished to testify over the objections of his trial attorneys in return for use immunity (EBRT 560-618, *1338-96*), and appointed Philip Wells to perform that task. (EBRT 576, *1354*.) Mr. Wells interviewed Misskelley and reported that Misskelley wished to consult with his parents before deciding whether to enter into a bargain in exchange for his testimony. (EBRT 578-82, *1356-60*.)

The following morning, newspapers reported that the trial judge in the Echols and Baldwin case had cleared the way for Jessie Lloyd Misskelley Jr. to testify against Echols and Baldwin. One report continued:

> Misskelley's testimony or statement is important to prosecutors. In a June 3, confession to West Memphis police, he said he helped Echols and Baldwin subdue the victims on May 5 and watched as the teen-agers beat and sexually abused Christopher Byers, Michael Moore, and Steve Branch.

(*See* Exh. G, Arkansas Democrat-Gazette of Feb. 23, 1994.) The press further reported that the prosecution had asked Jesse Misskelley's father to convince his son to testify in return for a reduced sentence of forty years. (*Id*.)

Also on the morning of February 23rd, the court announced that Misskelley had decided not to testify, and the parties agreed that there would be no further contact with him by the prosecution without prior notice to defense counsel.

(EBRT 619, *1397*.)

On February 25, 1994, Baldwin's attorney, Paul Ford, asked to make a record regarding his objection to statements made by Phillip Wells that Ford saw on television the previous evening. (EBRT 672, *1451*.) Ford characterized the statements as "alarming . . . by virtue of [Wells] . . . standing as a liaison of the Court[.]" Ford stated:

> On a Channel Eight news report last night [Wells] said that Jessie had not made up his mind. [Jessie] was going back and forth whether he would testify, whether he would not testify. He was talking to his daddy. But he also said that [Jessie] has decided if he will testify, he will testify to the truth.
>
> And I feel like that statement coming from that impartial capacity means that it's almost the Court indicating that if he testifies, he will be testifying to the truth[.]

(EBRT 672-73, *1451-52*.)

2. Press Coverage of Opening Statements

Following opening statements on February 28, 1993, the Arkansas Democrat-Gazette on March 1st reported that Echols, Baldwin, and Misskelley had been arrested "based on a statement Misskelley gave police describing their involvement in the killings." The article continued that a transcript of the statement revealed that Misskelley said "Echols and Baldwin killed the boys while he watched, and that the three teenagers belong to a cult whose members eat dogs

during rituals." (Exh. H, Arkansas Democrat-Gazette of March 1, 1994; *see also* Exh. I, The Jonesboro Sun of March 2, 1994 ("Misskelley confessed to being present while Echols and Baldwin killed the boys.").)

On the same day, Paul Ford and petitioner's trial counsel, Val Price, objected outside the presence of the jury that Phillip Wells was standing at the courtroom rail and holding what amounted to a press conference regarding whether or not Jessie Misskelley had decided to testify. (EBRT 887-89, *1667-69*.) The trial judge stated that it had been inappropriate for Wells to describe himself as a court liaison and he would tell Wells to refrain from making comments in the future. (EBRT 888-89, *1668-69*.)

3. The State's Evidence Against Echols

In denying Echols' direct appeal, the Arkansas Supreme Court summarized the evidence introduced against him at trial as follows:

> Anthony and Narlene Hollingsworth were well acquainted with Echols and testified that they saw Echols and his girlfriend, Domini Teer, walking after 9:30 on the night of the murders near the Blue Beacon Truck Stop, which is near Robin Hood woods where the bodies were found. The witnesses testified that Echols had on a dark-colored shirt and that his clothes were dirty. ..
>
> Twelve-year-old Christy VanVickle testified that she heard Echols say he "killed the three boys." Fifteen-year-old Jackie Medford testified that she heard Echols say, "I killed the three little boys and before I turn myself in, I'm going to kill two more, and I already have one of them picked out."...

Lisa Sakevicius, a criminalist from the State Crime Laboratory, testified that she compared fibers found on the victim's clothes with clothing found in Echols's home, and the fibers were microscopically similar.

Dr. Frank Peretti, a State Medical Examiner, testified that there were serrated wound patterns on the three victims. On November 17, 1993, a diver found a knife in a lake behind Baldwin's parents' residence. The large knife had a serrated edge and had the words "Special Forces Survival Roman Numeral Two" on the blade. Dr. Peretti testified that many of the wounds on the victims were consistent with, and could have been caused by, that knife.

Deanna Holcomb testified that she had seen Echols carrying a similar knife, except that the one she saw had a compass on the end. James Parker, owner of Parker's Knife Collector Service in Chattanooga, Tennessee, testified that a company distributed this type of knife from 1985-87. A 1987 catalog from the company was shown to the jury, and it had a picture of a knife like the knife found behind Baldwin's residence. The knife in the catalogue had a compass on the end, and it had the words "Special Forces Survival Roman Numeral Two" on the blade. The jury could have made a determination whether the compass had been unscrewed, and, in assessing the probativeness of the location of the knife introduced at trial, heard ample evidence that Echols and Baldwin spent much time together. ..

The State's theory of motive was that the killings were done in a satanic ritual. On cross-examination, Echols admitted that he has delved deeply into the occult and was familiar with its practices. Various items were found in his room, including a funeral register upon which he had drawn a pentagram and upside-down crosses and had copied spells. A journal was introduced, and it contained morbid images and references to dead children. Echols testified that he wore a long black trench coat even when it was warm. One witness had seen Echols, Baldwin, and Misskelley together six months before the murders, wearing long black coats and carrying long staffs. Dr. Peretti testified that some of the head wounds to the boys were

consistent with the size of the two sticks that were recovered by the police.

Dr. Dale Griffis, an expert in occult killings, testified in the State's case-in-chief that the killings had the "trappings of occultism." He testified that the date of the killings, near a pagan holiday, was significant, as well as the fact that there was a full moon. He stated that young children are often sought for sacrifice because "the younger, the more innocent, the better the life force." He testified that there were three victims, and the number three had significance in occultism. Also, the victims were all eight years old, and eight is a witches' number. He testified that sacrifices are often done near water for a baptism-type rite or just to wash the blood away. The fact that the victims were tied ankle to wrist was significant because this was done to display the genitalia, and the removal of Byers's testicles was significant because testicles are removed for the semen. He stated that the absence of blood at the scene could be significant because cult members store blood for future services in which they would drink the blood or bathe in it. He testified that the "overkill" or multiple cuts could reflect occult overtones. Dr. Griffis testified that there was significance in injuries to the left side of the victims as distinguished from the right side: People who practice occultism will use the midline theory, drawing straight down through the body. The right side is related to those things synonymous with Christianity while the left side is that of the practitioners of the satanic occult. He testified that the clear place on the bank could be consistent with a ceremony...

Lisa Sakevicius, the criminalist who testified about the fibers, stated that Byers's white polka-dot shirt had blue wax on it and that the wax was consistent with candle wax.

Detective Bryn Ridge testified that Echols said he understood the victims had been mutilated, with one being cut up more than the others, and that they had drowned. Ridge testified that when Echols made the statement, the fact that Christopher Byers had been mutilated more than the other two victims was not known by the public...

> Echols took the witness stand....When asked about his statement that one victim was mutilated more than the others, he said he learned the fact from newspaper accounts. His attorney showed him the newspaper articles about the murders. On cross- examination, Echols admitted that the articles did not mention one victim being mutilated more than the others, and he admitted that he did not read such a fact in a newspaper.

Echols I, 936 S.W.2d at 518-19.

As noted above, a reviewing court faced with an insufficiency of the evidence claim must assume that all of the state's evidence is credible and draw every rational inference supported by that evidence in favor of the prosecution. *The Arkansas Supreme Court did just that in rejecting Echols' insufficiency claim on direct appeal. That ruling by the Court, however, did not address the relative strength of the proof offered by the state, an issue relevant to this present petition. In fact, the accuracy and persuasiveness of each component of the state's evidence against Echols was subject to serious question.

a. The Ballpark Girls

In rejecting Echols's appeal of the denial of his Rule 37 motion, the state supreme court observed that the "most significant" evidence offered against petitioner at trial "were his statements that were overheard by two girls that he had 'killed the three boys,' and that 'I'm going to kill two more, and I already have one of them picked out.'" *Echols II*, 127 S.W.3d at 504 (citing *Echols I*, 936 S.W.2d at

518).

Echols did attend a softball game with Baldwin sometime between May 5th and his arrest on June 3rd. (EBRT 1962, 1976 *2748, 2762*.) According to the two girls, Echols' statements were made near a concession stand to a "whole crowd of people" (EBRT 1815, *2600*), at least six or seven of whom were with Damien (EBRT 1825, *2611*), and were heard by one of the girls at a distance of 15 to 20 feet. (EBRT 1818-1819, *2604, 2605*.) Neither of the girls came forward with their story until after Echols had been arrested. (EBRT 1817, 1831, *2603, 2617*.)

b. The Knife in the Lake

There was no meaningful evidence that the knife in the lake (State's exh. 77) was used in the slaying of the three boys. Doctor Peretti said some of the boys' wounds were made with a serrated knife, and therefore were consistent with the serrated knife found in the lake, but Peretti testified that the same could have been said of almost any serrated knife (EBRT 1108, *1889*), of which there were no doubt thousands in the West Memphis area. Indeed, Doctor Peretti said that the victims' wounds could have been caused by a serrated knife owned by Mark Byers, the step-father of Chris Byers (EBRT 1085, *1866*), which did have on it traces of blood consistent with that of Byers.[11] Just as Peretti could not say the

[11] *See Echols II*, 127 S.W.3d at 497. Byers was called as a defense witness

Byers knife was used in the slayings, he could not say that the knife in the lake was so used. (EBRT 1109, *1890.*)[12]

c. The Hollingsworth Testimony

Anthony and Narlene Hollingsworth testified that "they saw Echols and his girlfriend, Domini Teer, walking after 9:30 on the night of the murders near the Blue Beacon Truck Stop, which is near Robin Hood woods where the bodies were found." (**Echols* I)

There is evidence in the record that the Hollingsworths were related to Domini Teer and it was Domini that they described in more detail in their testimony. (EBRT 1969-70, *2755-56.*) Narlene, who had had a "wreck" earlier in the day and was feeling sick, identified Domini based in part on her pants with flowers on them that Narlene had seen Domini in previously. (EBRT 1295-96, 1300, 1303, *2076-77*, *2081*, *2084.*) Anthony was specific in his physical description of Domini as being extremely thin, 5'4" in height, and having red hair. (EBRT 1283, *2064.*) But in closing, the state's theory was that the Hollinsworths

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for the purpose of exposing prior inconsistent statements that he had made to police regarding the appearance of blood, which matched his and his son's blood-type, on a knife that he owned.

[12] *See Echols I*, 936 S.W.2d at 969: "On cross-examination, Dr. Peretti testified that he had never stated that the knife found behind Baldwin's house caused the injuries..."

were wrong in their positive identification of Domini; in the prosecution's view, the person they identified as Domini was not even a female at all, but most likely was Jason Baldwin. (EBRT 2499-2500, *3288-89*.)[13]

[13]Additionally, the time of the supposed identification of Echols by the Hollingsworths, if believed, created more problems for the state's case than it resolved. Doctor Peretti's best estimate of the victims' time of death was between 1:00 a.m. and 5-7:00 a.m on May 6th. (EBRT 1121, *1902*.) If Echols had been walking with Domini near the Blue Beacon at 9:30 p.m. on the 5th, the state still would be left without an explanation of how he could be exercising control of the victims, who apparently were not killed until hours later. (*Hobbs theory?)

Narlene Hollingsworth admitted during her cross-examination that she was aware that her nephew L.G. Hollingsworth, whom she had been with earlier in the day, "probably" had been a suspect in the charged murders (EBRT 1303, 1310-11, *2084, 2091-92*.)[14] At one point in her testimony, she stated that her son Anthony ate with the family, but lived out in a camper on her land, because "he has to." (EBRT 1305, *2086*.) The prosecution objected; Narlene added "He didn't kill anyone;" and the court sustained the objection. (*Id*.)

The testimony of the Hollingsworths apparently was met with a good deal of levity in the courtroom. Prosecutor Fogelman noted in closing: "I don't think any one of you could forget Anthony and Narlene's testimony...You laughed. We laughed. The defense attorneys laughed. Everybody laughed." Fogelman argued that the testimony of the Hollingsworths should not be rejected because they were "simple." (EBRT 2499, *3289*.)

d. The Fiber Evidence

A prosecution witness testified that a green cotton and two green polyester fibers found on one of the victim's clothing was similar in consistency and appearance to the fibers of a child's shirt made of a cotton polyester blend found in the Echols residence. (EBRT 1468-69, *2251-52*.) Echols could not have worn the

[14] L.G. was also her ex-step-son, Narlene having divorced the Hollingsworth who fathered L.G. and then married her ex-husband's brother Ricky.

t-shirt found in his home, a size 6. (EBRT 1470-71, *2253-54.*)

The prosecution witness agreed that there were insufficient unique individual microscopic characteristics to identify the green fiber as coming from the size 6 shirt, which in fact was blue in color. (EBRT 1474, 1477, *2257, 2260*.) When the witness testified that a fiber was microscopically similar to that found in a garment, that simply meant 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 those of one garment also "could have come from one of these other items that was hanging on the same rack." (EBRT 1474-75, *2257-58.*)

e. The Ridge Statement

Detective Bryn Ridge testified that in an unrecorded interview he conducted over many hours on May 10, 1994 with Echols, petitioner said he understood the victims had been mutilated, with one being cut up more than the others, and that they had drowned. (EBRT 1566, *2349.*) This statement would be incriminating if the fact that one of the victims (Chris Byers) had been injured more than the other two victims was not yet in the public domain.

Echols testified that on May 10th he discussed with Ridge things he had "seen on TV, newspapers, people talking" (EBRT 2029, *2816*), and that when Ridge had asked him whether one victim had been hurt worse than the others, he

had replied, "I guess so." (EBRT 1958, 2029-30, *2744*, *2816-17*.) The local and state press had reported on May 7, 1993, the day following the discovery of the bodies, that the victims had been bound and sexually mutilated, and that Mark Byers, the father of Chris Byers, had stated that one boy had been hit over the eye, another's jaw was injured, and the third "*was worse than that*" or "*looked worse than that*." (*See* Exh. K, Commercial Appeal article of May 7, 1993; Exh. L, West Memphis Evening Times article of May, 7, 1993; and Exh. M, Democrat-Gazette article of May 8, 1993.) Thus, the fact that one victim had been more severely mutilated than the others was in the public domain three days before the May 10th interview. Furthermore, as Ridge himself testified, at the time of the interview there were "all kinds of rumors of how people thought they died" circulating at the time in the community. (EBRT 1577, *2360*.)

Additionally, prior to May 10th, Echols had already been through at least two other interviews in which police officers, including Officer Sudbury, had discussed the murders with him at length and asked the same leading questions as did Ridge from a questionnaire developed by Sudbury. (EBRT 1571, 1586, 1588, 1956, *2354*, *2369*, *2371*, *2742*.) Echols had discussed with Sudbury rumors that he had heard about the condition of the bodies, which everyone in West Memphis was talking about. (EBRT 1954-55, *2740-41*.)

f. The "Occult Expert"

Although claiming to have earned a masters and doctorate in three years from "Columbia Pacific University," "a school without walls" in California, Griffis had lived in Ohio and worked as a full time police officer and took no classes while earning these degrees. (EBRT 1745, 1752-1753, *2529*, *2536-37*.) Griffis had once described his role as helping "brother police officers" who are under "a hell of a lot of pressure when I get there." (EBRT 1800, *2584*.)

On cross-examination, Griffis could offer no empirical basis for his speculation that the date of May 5th suggested a satanic impulse for the killings (EBRT 1777, *2561*), or that satanic killings are more likely when the moon is full (EBRT 1779, *2563*.) He agreed that the manner in which the victims were displayed could indicate a sex crime, not a satanic one; the same was true of the genital mutilation. (EBRT 1780, *2564*.) He knew of no satanic crime in which the victims were bound as they were in this case. (*Id*.) Griffis did refer to a killing in Rhode Island as involving satanic motivation, but that crime involved a female burned in a circle containing a pentagram; none of these factors was present in the present case. (EBRT 1781, *2565*.) Griffis agreed that the bodies could have been placed in water to drown or conceal the victims, rather than for satanic reasons. (EBRT 1781-82, *2565-66*.) He also agreed that the absence of blood at the scene

could simply mean that the victims were killed somewhere else. (EBRT 1783, *2567*.)

Defense expert Robert Hicks was employed by the Department of Justice of Virginia and had published two books on the issues of police investigation and alleged satanic crimes. (EB 2227-28, *3015-16*.) Hicks had acquired his advanced degree from a major university which requires candidates to be on campus and attend classes (EBRT 2225-26, *3013-14)*, not true of Griffis with his mail order "masters" and "Ph.D.," which he had obtained in three years without attending classes while working full time as a police officer (EBRT 1752-53, *2536-37*.) Hicks testified that there was no empirical basis for Griffis' opinions about the charged murders having the "trappings of occult killings," be it in relation to pagan holidays, the full moon, disfigurement or display of sexual organs, or the cleaning of a crime scene. (EBRT 2254-58, *3042-46*.) Indeed, in response to a defense objection that Griffis' failure to cite specific cases revealed there was no "established scientific opinion or body of work which is the basis of his opinion" (EBRT 1722, *2506*), the court observed it did not "know of any particular scientific field other than perhaps what he's indicated that would allow such testimony." (EBRT 1723, *2507*.)

g. Michael Carson

Michael Carson testified that he talked to Baldwin about the murders. The Arkansas Supreme Court described the Carson testimony as follows:

> I said, just between me and you, did you do it. I won't say a word. He said yes and he went into detail about it. It was just me and Jason [Baldwin]. He told me he dismembered the kids, or I don't know exactly how many kids. He just said he dismembered them. He sucked the blood from the penis and scrotum and put the balls in his mouth.

Echols I, 926 S.W.2d at 520.

Carson, who was sixteen at the time of his testimony, was then attending an alternative school for "kids who have trouble keeping up or troublemaker" and was "really nervous" testifying. (*EBRT 1173, 1180 [*no italicized cites here or following].). Carson had spent five days in the same juvenile detention facility where Baldwin was being held in August of 1993. (EBRT 1165.) Carson was being held in relation to a burglary he committed to steal guns in Craighead County, but also had burglarized and destroyed property inside a home in Lawrence County . (EBRT 1174, 1182-83.) Carson claimed that after being in solitary for two days, he met Baldwin on the third day and played cards with him. (EBRT 1176.) At that time, Baldwin denied his involvement in the murders, but a day later admitted his culpability and gave Carson details. (EBRT 1167, 1177.)

Carson purportedly told his father about Baldwin's alleged admission in September or October of 1993, but did not contact authorities with his story until

February 2, 1994 (EBRT 1184), at the height of media focus on the Misskelley trial.

The trial judge informed the jury that Carson's testimony was limited to Baldwin. (EBRT 1164.) But when Dale Griffis' testified that the killers of the three victims "were using the trappings of occultism during this event," testimony which was primarily offered against Echols, he did so in response to a hypothetical question which assumed "that the testimony showed that the defendant Jason Baldwin sucked the blood from the penis of one of the victims." (EBRT 1758.) Thus, despite the court's admonition, the state relied on the Carson testimony to convict Echols.

4. The Prosecution's Reference To The Misskelley Statement

Prior to the Echols-Baldwin trial, prosecutor Davis had stated that the state needed Jesse Misskeley to testify against Echols and Baldwin "real bad."[15] Misskelley was not called to testify, and any out-of-court statements he had made were plainly inadmissible against Echols and Baldwin. Because there was no evidence linking Misskelley to the charged crimes other than his out-of-court statements, no evidence concerning Misskelley was in any way relevant or

[15] In the aforecited taped HBO interview (see footnote 1), prosecutor Davis told the victims' families that the state needed testimony from Misskelley "real bad." (*See* Exh. A.)

admissible at the Echols and Baldwin trial. The only impact that mentioning Misskelley during the Echols-Baldwin trial could have had on jurors would be to provoke those jurors to connect the defendants to the charged crimes based on what they had heard outside the courtroom regarding Misskelley: i.e., that he had confessed to, and been convicted of, the charged murders.

On March 1, 1994, the second day testimony was taken, in response to a question that called for a yes or no answer,[16] West Memphis Police Department Detective Bryn Ridge stated on cross-examination, "I didn't take this stick into evidence until the statement of Jessie Misskelley, in which he said –." (EBRT 923, *1703*.) Attorney Val Price, petitioner's trial counsel, entered an immediate objection and moved for a mistrial, which was immediately denied by the trial judge. In further discussion outside the presence of the jurors, Price argued, "The basis [for the mistrial] is the question that I asked the officer did not call for him blurting out the fact that Jessie Misskelley gave a confession. The whole purpose for our trial being severed from Mr. Misskelley's trial in the first place, was the confession that Jessie Misskelley gave." (EBRT 924, *1704*.)

[16] The question posed to Ridge was: "[Y]ou didn't take that stick into evidence at the time y'all recovered the bodies." (EBRT 922; *1702*.)

The court reasoned, "He shouldn't have volunteered that, but I certainly don't see any basis for a mistrial." (EBRT 925, *1705*.) After more objections by counsel, the court stated, "I suggest, gentlemen, that there isn't a soul up on that jury or in this courtroom that doesn't know Mr. Misskelley gave a statement. Now the contents of the statement certainly would be prejudicial. And the contents of the statement, this Court will not allow, and that was the reason for the severance in the first place." (EBRT 930-31, *1710-11*.) Ultimately, the judge's remedy was to give a cautionary instruction to the jury:

> Ladies and gentlemen, you are instructed and told at this time that you are to disregard and not consider the last response made by Detective Ridge to a question from Mr. Price and you're to – if you can remember it – you're to strike it from your mind and not give it any consideration.

(EBRT 934, *1714*.)

The following day, the press reported Ridge's reference to the Misskelley statement, stating that the police had "used Misskelley's June 3 statement to pull together enough evidence to arrest the three teenagers in the deaths." (Exh. N, Arkansas Democrat-Gazette article of March 2, 1994) It was also reported that the trial judge had suggested "there isn't a soul up on that jury or in this courtroom that doesn't know Mr. Misskelley gave a statement." (*Id*.) The Jonesboro Sun reported that "[u]nder the hearsay law, the state is prevented from telling jurors about

Misskelley's June 3 confession to West Memphis police." (Exh. I.)

The press also reported on March 2nd that negotiations by the prosecution to obtain Misskelley's testimony were continuing, and that Phillip Wells had been appointed by the court "to meet with Misskelley to give him a 'fresh perspective' on what effect his testimony could have on his own case and that of Baldwin and Echols." (Exh. N.) Wells, who described himself to the press as a "court liaison," had announced to the media that there was "no question the prosecution's office will benefit" from Misskelley's possible testimony." (*Id*.)

5. The Print Evidence

Detective Bryn testifed that casts were made of prints at the crime scene, one a shoe print, another that could have been a barefoot print or fingerprint. (EBRT 965-66, *1745-46.*) The police were unable to match the print with anyone's known print. (*Id*.) They had obtained fingerprints and barefoot prints of Echols. (*Id*.) They never found anything from the Echols household that matched any prints in the area of the crime scene (EBRT 972, *1752*.) They never found any shoe imprints that matched those of the victims. (EBRT 973, *1753*.)

6. The Alibi Evidence

Echols offered extensive evidence, including his own testimony, that he was never in Robin Hood Woods on May 5, 1993, and thus could not have killed and

did not murder Chris Byers, Michael Moore, and Stevie Branch.

Pam Hutchinson, petitioner's mother, testified that on May 5, 1993, she was living at the Broadway Trailer Park in West Memphis with Joe Hutchinson, her husband and Damien's father, her mother, her daughter Michelle, and Damien. (EBRT 1847, *2633*.) Pam awoke Damien around 10 A.M. because he had a doctor's appointment around 10:30 or 11:00. After leaving the doctor's and dropping off a prescription,[17] Mrs. Hutchinson left Damien off at Lakeshore at about 1:00 p.m. at the home of his girl friend, Domini Teer. (EBRT 1852, *2638*.) She returned home and stayed there until about 4:00. She received a phone call from Damien and went with Joe and Michelle to pick him and Domini up at the laundromat on Missouri Street. (EBRT 1853, *2639*.)

They then dropped off Domini before going to the Marion Discount Pharmacy to pick up Damien's prescription at about 4:00 or 4:30. (EBRT 1854-55, *2640-41*.) They then went home together and had dinner. (EBRT 1855, *2641*.) Around 7:00 p.m, the family — Pam, Joe, Michelle, and Damien — went to see the Sanders family on Balfour street in West Memphis. (EBRT 1856, *2642*.) Only Jennifer, the Sanders' daughter, was home, so they left a note. (EBRT 1857, *2643*.) Damien returned home for the entire evening and stayed on the phone. (EBRT

[17] Pharmacy records confirmed the prescription was dropped off on May 5th. (EBRT 1906, *2692*.)

1858, *2644*.) Pam remembered that Damien and Domini had an argument before Damien went to bed at about 11:00 p.m. (EBRT 1859, *2645*.)

Michelle Echols likewise testified that on May 5th, her mother took her brother to the doctor. (EBRT 1915, *2701*.) Michelle stayed home until about 4:00 p.m., then went with her mother and father to get Damien and Domini from the laundromat. (EBRT 1916, *2701*.) They picked Domini and Damien up from the laundromat, took Domini home, and then went back home. (EBRT 1917, *2703*.)

They stayed home for a while and then went to Randy and Susan Sanders' house. It took them 10-15 minutes to get there. No one was at the Sanders house except for Jennifer. (EBRT 1918, *2704*.) They watched a bit of television there, including part of [Beverly Hills] 90210. They then returned home. When they got home, she used the phone and then her brother Damien was on the phone for quite a while. (EBRT 1919-20, *2705-06*.) When she woke up the next morning at 9 a.m., her brother was still there. (EBRT 1921, *2707*.)

Jennifer Sanders confirmed that Pam and Joe Hutchinson, Damien, and Michelle visited her home on the evening of May 5th (EBRT 2115-2116, *2902-03*); her sister Stacy Sanders, who was visiting her cousin across the street, saw the Hutchinson family at the Sanders' home on that night as well. (EBRT 2106-07, *2893-94*.) The Sanders girls recalled that their parents had been out at a casino the

night of May 5th, which their father and an independent witness confirmed. (EBRT 2126-28, 2133, *2913-15, 2920.*)

Petitioner testified he remembered going to the doctor's office on May 5th because his ex-stepsister Carol Ashmore was there. (EBRT 1948, *2734.*) He did not really recall what else he did that day, but was probably around the laundromat at 4:00 to 4:30 when his mother picked him and Domini up. (EBRT 1949, *2735*.) He recalled going to the Sanders house when Jennifer was there alone. (EBRT 1950, *2736.*) He then went home and talked on the phone to Holly George, Jennifer Bearden,[18] Domini Teer, and Heather Cliette. He and Domini had some kind of an argument. (EBRT 1952, *2738*.)[19] He did not leave the house on the evening of May 5th. He did not kill any of the youngsters. He had nothing to do with their death, and had not even heard of them before he saw it on the news. He had never been to the Robin Hood Wood area. (EBRT 1953, *2739.*)

In rebuttal, the state did not call Jennifer Bearden, Domini Teer, Holly George, or Heather Cliette, or offer any other evidence refuting Echols' testimony

[18] Bearden gave a statement to the police on September 10, 1993, later provided to the defense in discovery, confirming that she had spoken to Echols on the phone on the evening of May 5, 1993. (Exh. O.)

[19] Teers's interview with the police on September 19, 1993, provided the defense in discovery, confirmed petitioner's testimony concerning their telephone conversation on May 5th. (Exh. J.)

that he spoke to them on the phone on the day and evening of May 5th.

ARGUMENT

I. PETITIONER ECHOLS MEETS THE "ACTUAL INNOCENCE" STANDARD OF *HOUSE v. BELL* AND THEREBY DEFEATS ANY CLAIM OF PROCEDURAL DEFAULT

A. The Legal Standard

House v. Bell involved a murder of one Carolyn Muncey in Tennessee in the mid-1980s. No one witnessed the crime, although a witness testified that he had seen the defendant and his car in the area where the body was later discovered. The defendant had made false statements concerning his whereabouts when arrested, but testified and maintained his innocence at trial. "Central to the State's case... was what the FBI testing showed — that semen consistent (or so it seemed) with House's was present on Mrs. Muncey's nightgown and panties, and that small bloodstains consistent with Mrs. Muncey's blood but not House's appeared on the jeans belonging to House." 126 S. Ct. at 2072. House was convicted and sentenced to death.

The defendant had raised a number of federal constitutional claims during court proceedings that the Tennessee courts had held could not be addressed on the merits because they were procedurally defaulted. As reiterated in *House,* claims

defaulted in state court due to state procedural rules generally cannot be heard in federal court, but that there is a "miscarriage of justice" exception for extraordinary cases where it appears likely that the defendant is innocent.

Furthermore, unlike insufficiency of the evidence claims, as to which the habeas court must resolve every credibility issue and draw all reasonable inferences in favor of the prosecution, "[b]ecause a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. *See* [*Jackson v. Virginia*, 443 U.S. 307, 330 (1979).] If new evidence so requires, this may include consideration of 'the credibility of the witnesses presented at trial.' *Ibid.;* see also *ibid.* (noting that '[i]n such a case, the habeas court may have to make some credibility assessments')." *House*, 126 S. Ct. at 2078.

The Supreme Court addressed House's new DNA evidence, obtained through technology unavailable at the time of his trial, as to which it was undisputed that "in direct contradiction of evidence presented at trial, DNA testing has established that the semen on Mrs. Muncey's nightgown and panties came from her husband, Mr. Muncey, not from House." *Id*. at 2078-79. The state argued that this new evidence was irrelevant because it went only to the issue of whether the crime had been committed for a sexual motivation, and motive was not a necessary

element of the charged crime that the government had to prove, at least at the guilt phase of House's trial. The majority soundly rejected that contention.

> From beginning to end the case is about who committed the crime. When identity is in question, motive is key. The point, indeed, was not lost on the prosecution, for it introduced the evidence and relied on it in the final guilt-phase closing argument. Referring to "evidence at the scene," the prosecutor suggested that House committed, or attempted to commit, some "indignity" on Mrs. Muncey that neither she "nor any mother on that road would want to do with Mr. House." 9 Tr. 1302-1303. Particularly in a case like this where the proof was, as the State Supreme Court observed, circumstantial, *State v. House*, 743 S.W.2d, at 143, 144, we think a jury would have given this evidence great weight. Quite apart from providing proof of motive, it was the only forensic evidence at the scene that would link House to the murder....
>
> A jury informed that fluids on Mrs. Muncey's garments could have come from House might have found that House trekked the nearly two miles to the victim's home and lured her away in order to commit a sexual offense. By contrast a jury acting without the assumption that the semen could have come from House would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative. When the only direct evidence of sexual assault drops out of the case, so, too, does a central theme in the State's narrative linking House to the crime. In that light, furthermore, House's odd evening walk and his false statements to authorities, while still potentially incriminating, might appear less suspicious.

Id. at 2079.

The Court then turned to the evidence that House's pants had blood on them inconsistent with his own but consistent with that of the victim. On federal habeas, the defense had presented strong evidence that the victim's blood had been spilled on House's pants while both pieces of evidence were being transported in the trunk of the same car on their way to the FBI lab in Washington. The Court's analysis of the evidence concerning spoilation of the "blood on the pants" evidence follows:

> In sum, considering " 'all the evidence,' " *Schlup*, 513 U.S., at 328 (quoting Friendly, 38 U. Chi. L.Rev., at 160), on this issue, we think the evidentiary disarray surrounding the blood, taken together with Dr. Blake's testimony and the limited rebuttal of it in the present record, would prevent reasonable jurors from placing significant reliance on the blood evidence. We now know, though the trial jury did not, that an Assistant Chief Medical Examiner believes the blood on House's jeans must have come from autopsy samples; that a vial and a quarter of autopsy blood is unaccounted for; that the blood was transported to the FBI together with the pants in conditions that could have caused vials to spill; that the blood did indeed spill at least once during its journey from Tennessee authorities through FBI hands to a defense expert; that the pants were stored in a plastic bag bearing both a large blood stain and a label with TBI Agent Scott's name; and that the styrofoam box containing the blood samples may well have been opened before it arrived at the FBI lab. Thus, whereas the bloodstains, emphasized by the prosecution, seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin.

Id. at 2083.

The majority observed that if the attack on the physical evidence had been all that the defense presented, the state's countervailing evidence might have been sufficient to prevent relief, but the defense had also presented at the federal habeas hearing disturbing evidence that Mrs. Muncey had been killed by her husband, including extensive testimony of the husband's abuse of his wife and, most importantly, of the husband's admission to neighbors that he had killed his wife. Those neighbors were impeached with the fact that they had not come forward earlier, a fact they attempted to explain. The Court concluded:

> It bears emphasis, finally, that [the neighbors'] testimony is not comparable to the sort of eleventh-hour affidavit vouching for a defendant and incriminating a conveniently absent suspect that Justice O'Connor described in her concurring opinion in *Herrera* as "unfortunate" and "not uncommon" in capital cases, 506 U.S., at 423; nor was the confession Parker and Letner described induced under pressure of interrogation. The confession evidence here involves an alleged spontaneous statement recounted by two eyewitnesses with no evident motive to lie. For this reason it has more probative value than, for example, incriminating testimony from inmates, suspects, or friends or relations of the accused.
>
> The evidence pointing to Mr. Muncey is by no means conclusive. If considered in isolation, a reasonable jury might well disregard it. In combination, however, with the challenges to the blood evidence and the lack of motive with respect to House, the evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt.

Id. at 2085.

The Court concluded:

> This is not a case of conclusive exoneration. Some aspects of the State's evidence--Lora Muncey's memory of a deep voice, House's bizarre evening walk, his lie to law enforcement, his appearance near the body, and the blood on his pants--still support an inference of guilt. Yet the central forensic proof connecting House to the crime--the blood and the semen--has been called into question, and House has put forward substantial evidence pointing to a different suspect. Accordingly, and although the issue is close, we conclude that this is the rare case where--had the jury heard all the conflicting testimony--it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.

Id. at 2086.[20]

B. Petitioner Has Satisfied the *House* Standard

[20] In *Herrera v. Collins,* 506 U.S. 390 (1993), the Court had suggested, without deciding, that a defendant in a capital case who could prove "a freestanding innocence" claim could be entitled to federal habeas relief. The *House* Court again suggested without deciding that such a claim for a directed verdict of acquittal could in theory prevail, but held that House's showing had not satisfied what would be a more stringent standard of innocence than the *Schlup* test:

> To be sure, House has cast considerable doubt on his guilt--doubt sufficient to satisfy *Schlup* 's gateway standard for obtaining federal review despite a state procedural default. In *Herrera,* however, the Court described the threshold for any hypothetical freestanding innocence claim as "extraordinarily high."

126 S. Ct. at 2087.

Petitioner Echols will first discuss the DNA evidence that was not, and could not have been, presented at his state court trial because the scientific techniques by which it was developed did not then exist. Petitioner submits that in a case in which the circumstantial evidence properly admitted at trial was so weak, the DNA evidence alone would be sufficient to meet the *House* standard, but there is far more new evidence that the Court must consider in applying the *House* calculus. As Echols will next demonstrate, new forensic evidence exposes most of the testimony introduced against Echols as perjured, fraudulent, or of no probative value. Indeed, every iota of the state's evidence is destroyed or gravely weakened by the new evidence presented in support of this petition.

1. The DNA Evidence[21]

1. On July 25, 2002, petitioner filed a "Motion for Forensic DNA Testing" in the Arkansas Circuit Court for Craighead County 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, the motion asserted that petitioner's judgment and sentence should be vacated because petitioner was actually innocent of the

[21] The foundation for many of the documents identified in the statements of fact relating to relevant DNA and forensic evidence is set forth in the declaration of Donald Horgan, attached as Exhibit Y.

crimes. The motion specifically sought a Circuit Order authorizing DNA testing of evidentiary items, including materials recovered from the victims' bodies and the crime scene, for purposes of comparing recovered DNA with DNA supplied by the Mr. Echols. Defendants Baldwin and Misskelley also filed such motions in the Circuit Court.

2. On January 27, 2003, the Craighead County Circuit Court judge who presided at petitioner's trial ordered the impoundment and preservation of all material that could afford a basis for petitioner's claim pursuant to the state's statutory scheme.

3. On June 2, 2004, the Circuit Court issued an "Order for DNA Testing" based on a stipulation of the parties approving the DNA testing of specific items of evidence to be performed at the Bode Technology Group in Springfield, Virginia. Bode received over eighty items of evidence for DNA analysis on July 7, 2004. These items, which included anal, oral, and penile swabs from the victims' bodies, were to be analyzed for both STR (short tandem repeat) loci and mitochondrial DNA.

4. On February 23, 2005, the Circuit Court issued a "First Amended Order for DNA Testing" based on another stipulation of the parties and likewise approving the DNA testing of specific evidence at the Bode laboratory. The

amended order modified in certain respects the earlier list of items on which testing would be performed.

5. The Bode Laboratory's initial and extensive analysis of evidentiary items was completed on December 30, 2005, when the lab issued reports on the results of both the STR and mitochondrial analyses. The STR results were set forth in a report entitled, "STR Forensic DNA Case Report" and the mitochondrial results in a report entitled "Mitochondrial Forensic DNA Case Report." DNA testing of samples taken from the "known" sources, i.e., the defendants and the victims, however, had not been completed as of the date these reports issued. The December 30, 2005 STR Forensic DNA Case Report and Mitochondrial Forensic DNA Case Report are attached as Exhibits P and Q, respectively.

6. On March 14, 2006, in response to an order issued by the Arkansas Supreme Court, petitioner's counsel filed "Defendant Echols's Status Report Re: DNA Testing." That report discussed the status of the testing to date and observed that, for reasons outside of petitioner's control, the testing of DNA samples supplied by petitioner and defendants Baldwin and Misskelley as well as the victims had not been completed.

7. State authorities subsequently procured DNA samples contained in buccal (oral) swabs from each of the defendants and provided them to Bode for

purposes of STR and mitochondrial analyses.

8. On January 2, 2007, Bode, having now analyzed the DNA samples from the defendants, issued an additional "STR Forensic DNA Case Report" disclosing, at pp. 5-6, that for purposes of STR comparison, none of the defendants could be identified as a contributor of the genetic material recovered at the crime scene or on the victims' bodies which produced a useable STR result. A copy of the January 2, 2007 STR Forensic DNA Case Report is attached as Exhibit R.

9. On January 27, 2007, Bode issued a "Supplemental Forensic Case Report" disclosing, at p.1, that for purposes of mitochondrial comparison, none of the defendants could be identified as a contributor of the genetic material which was recovered at the crime scene or on the victims' bodies and which produced a useable mitochondrial result. A copy of the January 25, 2007, Supplemental Forensic Case Report is attached as Exhibit S.

10. The Arkansas crime laboratory subsequently supplied Bode with hair and blood samples extracted from the victims of the homicides.

12. On July 17, 2007, and again in response to an order issued by the Arkansas Supreme Court, petitioner filed in that court "Defendant Echols's Second Status Report re: DNA Testing." Based in part on verbal reports of the testing in progress, the report stated in relevant part:

> (1) The extensive DNA testing which was the subject of an initial agreement by the parties and which was embodied in the Circuit Court's First Amended DNA Order for DNA Testing filed on February 23, 2005 has essentially been completed. Such testing has been conducted at Bode Laboratories in Virginia.
>
> (2) The DNA testing results returned to date disclose that none of the genetic material recovered at the scene of the crimes was attributable to Mr. Echols, Mr. Echols's co-defendant, Jason Baldwin, or defendant Jesse Misskelley (*Arkansas v. Misskelley* [CR 94-848]).
>
> (3) Although most of the genetic material recovered from the scene was attributable to the victims of the offenses, some of it cannot be attributed to either the victims or the defendants.

A copy of petitioner's July 17, 2007 DNA status report is attached as Exhibit T.

12. In a "State Reply to Echols's Second Status Report re: DNA Testing" filed on July 19, 2007, the State of Arkansas stated in part at page one:

> The state agrees that DNA testing results have not disclosed genetic material recovered from the crime scene that is attributable to Echols and his co-defendants. To date, nearly all the genetic material recovered from the crime scene was attributable to the victims. It is the State's understanding that the only material not so attributable is that from a partial hair recovered from one of the ligatures (victim's shoelaces) that bound a victim and that preliminary testing results may attribute that material to one victim's step-parent.

(The basis for the state's understanding that a victim stepparent might have contributed the ligature hair is discussed further below.) A copy of the state's July

19, 2007 reply to the Echols DNA status report is attached as Exhibit U.

13. On September 27, 2007, Bode issued another "STR Forensic DNA Case Report" that formally analyzed the victim samples. In that report, Bode identified various items of evidence which had previously been subjected to STR testing and which disclosed DNA profiles that matched the victims' profiles, as disclosed by STR testing of the victim samples. *Id*. at 4. A copy of the September 27, 2007 STR Forensic DNA Case Report is attached as Exhibit V.

14. The September 27, 2007 STR Forensic DNA Case Report established that although most of the genetic material tested by Bode was attributable to the victims of the offenses, certain material could not be attributed to either the victims or the defendants. Thus, as discussed in correspondence sent by a Bode analyst to Echols counsel on August 16, 2007, the profile obtained from sample 2S04-114-10E, an extract from a swab of victim Steven Branch's penis, ". . . suggest[s] *there is a foreign allele present that could not have come from the victims or defendants*; specifically, the '8' allele at the D16S539 locus in the -10E SF." *Id.* (Emphasis added). *A copy of the August 16, 2007, correspondence is attached as Exhibit V-1. The analyst's statement on this point was later confirmed by an entry on page 7 of the September 27, 2007 STR Forensic DNA Case Report. *See* Exhibit V.

15. Likewise on September 27, 2007, Bode issued a "Supplemental

Forensic Case Report". In that report, Bode identified various items of evidence subjected to mitochondrial testing with which the victims' DNA profiles, as disclosed by such testing, was consistent, inconsistent, or as to which the victims could not be excluded as a possible source. A copy of the September 28, 2007 STR Forensic DNA Case Report is attached as Exhibit W.

16. In the meantime, investigators for petitioner Echols were conducting interviews with persons with might have knowledge of conditions and events related to the homicides. In this connection, one investigator, Rachael Geiser, made repeated contacts in 2007 with Terry Hobbs, the stepfather of victim Steven Branch.

17. In early February, 2007, Ms. Geiser transmitted to counsel for petitioner Echols as possible evidentiary items four cigarette butts, two of which Ms. Geiser had recovered from the front yard of Mr. Hobbs' residence in Memphis, Tennessee and which were preserved in a clear plastic baggie. (*See* Exh. X, declaration of Rachel Geiser.) In late February, 2007, Ms. Geiser transmitted an orange plastic bag containing two cigarette butts taken from an ashtray in Mr. Hobbs' living room during an interview with him on February 24, 2007. (*See* Exh. X.)

18. Counsel for petitioner maintained the cigarette butts described in paragraph 17 in their original packaging and condition following their receipt in

counsel's office. On February 15, 2007 and March 7, 2007, petitioner's counsel transmitted the items via Federal Express to Forensic Serologist Thomas Fedor at the Serological Research Institute in Richmond, California with instructions that Mr. Fedor subject the items to mitochondrial testing for purposes of comparing the resulting DNA profile to those appearing in the December 30, 2005, Mitochondrial Forensic DNA Case Report, which had previously been provided to Mr. Fedor. (*See* Exh. Y.) A copy of Mr. Fedor's curriculum vitae is attached hereto as Exhibit Z.

19. On May 11, 2007, Mr. Fedor issued a report concerning the mitochondrial testing of a cigarette butt from Mr. Hobbs' front yard ("item 8") and a cigarette butt taken from Mr. Hobbs' ashtray ("item 10"). In his conclusions stated at page 3 of the report, Mr. Fedor stated:

> The mitochrondrial sequence recovered from cigarette butt items 8 and 10 differs at one nucleotide position from the sequence Bode obtained from hair 2S04-114-03Aa, described [on the December 30, 2005 Bode report] as 'hair from ligature (Moore).' The sequence obtained from the cigarette butts shows an additional polymorphism (16093C) that the ligature hair does not possess. As this difference may be due to heteroplasmy, the person(s) who left DNA on the cigarette butts 8 and 10 (and anyone in his/their maternal lineage) are <u>not excluded</u> as the source of the ligature hair 2S04-114-03Aa. A search of the FBI's Forensic Mitochondrial DNA database of 4839 samples (consisting of 1674 Caucasians, 686 Hispanics, 848 Asians, 326 Native

> Americans and 1305 Africans and African Americans) showed three (0.06%) to have the same mitochondrial sequence as the cigarette butts 8 and 10 and three (0.06%) database samples to have a sequence differing at only one nucleotide position.

A copy of the May 11, 2007 Fedor report is attached as Exhibit AA.

20. Prosecutor Brent Davis was informed of this test result. In a letter to counsel for all three defendants sent on June 25, 2007, Mr. Davis stated that he had instructed personnel at the state crime lab to send the known hair samples from Terry Hobbs to Bode for testing and that he expected that transmission to occur shortly. (*See* Exh. Y.)

21. On October 26, 2007, an analyst at the Bode laboratory informed counsel for petitioner that Bode had not received from the crime lab any hair samples for Terry Hobbs. (*See* Exh. Y.)

22. Independent evidence indicates that Mr. Hobbs was alone or possibly with his four- year old daughter Amanda in the area of Robin Hood Hills for approximately an hour between 5 and 8 p.m. on the night of May 5, 1993. (*See* Exhs. X and Y.)

23. Furthermore, in an interview with an Arkansas detective in May, 2007, Jo Lynn McCaughey, the sister of Pam Hobbs, Terry Hobbs' ex-wife, Ms. McCaughey stated that in 2004, she and Pam Hobbs had entered the bedroom of

Terry Hobbs residence and recovered fourteen knives from a nightstand in the bedroom. Ms. McCaughey further stated that her father had identified one of the knives as a pocketknife he had given to Steven Branch before Steven's death. The knives recovered from the Hobbs residence have since been transmitted to the Bode laboratory by mutual agreement of counsel for defendants and the state. (*See* Exhs. X and Y.)

24. Ms. Geiser also interviewed David Jacoby, a friend of Mr. Hobbs, concerning relevant events. In late May, 2007, Ms. Geiser transmitted to counsel for petitioner Echols as possible evidentiary items (a) an envelope labeled, "David Jacoby Cheek Swabs 5-26-07" which Mr. Jacoby had voluntarily provided to Ms. Geiser during an interview she conducted with him on May 26, 2007; and (b) and envelope labeled, "David Jacoby Cigarette Butts 5-26-07 RMG" containing two cigarette butts taken by Ms. Geiser from Mr. Jacoby's front yard on the same date. (*See* Exh. X.)

25. Counsel for petitioner maintained the cheek swabs described in paragraph 14 in their offices in the envelope in which they had been transmitted by Ms. Geiser. On June 12, 2007, counsel transmitted the envelope via Federal Express to Mr. Fedor with instructions that he subject the enclosed cheek swab to mitochondrial testing for purposes of comparing the resulting DNA profile to those

appearing in the December 30, 2005, Mitochondrial Forensic DNA Case Report. (*See* Exh. Y.)

26. On October 26, 2007, Mr. Fedor issued a report concerning the mitochondrial testing of the cheek swabs and cigarette butts contained in the envelopes transmitted to him on June 12, 2007, as described above. In his conclusions stated at page 4 of the report, Mr. Fedor stated:

> The mitochrondrial sequence recovered from cigarette butt item 11 and cheek swabs item 13 differs at one nucleotide position from the sequence Bode obtained from hair 2S04-114-23, described (at Bode's page 2) as 'hair from tree stump' and (at Bode's page 11) as 'hair from scout cap.' (I have been informed by Counsel that Bode's reference to a scout cap is erroneous.) The sequence obtained from the cigarette butt and cheek swab shows an additional polymorphism (152C) that the tree stump hair does not possess. As this difference may be due to heteroplasmy, the person(s) who left DNA on the cigarette butt and cheek swab (and anyone in his/their maternal lineage) are <u>not excluded</u> as the source of the [*tree stump] hair 2S04-114-23. A search of the FBI's Forensic Mitochondrial DNA database of 4839 samples (consisting of 1674 Caucasians, 686 Hispanics, 848 Asians, 326 Native Americans and 1305 Africans and African Americans) showed <u>twelve</u> (0.25%) to have the same mitochondrial sequence as the cigarette butt and cheek swab (items 11 and 13) and one hundred eighteen (2.44%) database samples to have a sequence differing at only one nucleotide position.

A copy of the October 26, 2007 Fedor report is attached as Exhibit BB.

27. Independent evidence indicates that Mr. Jacoby was with Mr. Hobbs at Mr. Jacoby's home in the early evening of May 5, 1993. (*See* Exhs. X and Y.)

What the DNA testing results obtained to this date mean is this: genetic

material at the crime scene or on the victims' bodies has been identified which did not come from the three victims, and none of that material was contributed by any of the three defendants. That is an exculpatory fact of great importance. Certainly had the victims been forcibly sodomized by Echols and Baldwin, as claimed by Jesse Miskelley, it is inconceivable that those assaults could have been accomplished without leaving any genetic material detectable on the anal swabs of the three victims. Likewise, had the victims been forcibly orally copulated by Echols or Baldwin, as the state hypothesized at the defendants' trial, it is again difficult to explain why none of their genetic material has been detected on the oral swabs taken from the victims.

Nor can the great significance of the absence of the defendants' DNA be diminished by the contention that no foreign DNA could be recovered from the crime scene or the bodies. A foreign allele — a bit of genetic material that could not have come from the victim — was found on the penis of Steve Branch. While a single allele is an insufficient basis on which to determine by STR analysis who did leave their genetic material on Branch's penis, it is sufficient to conclusively say *who did not* — i.e., Echols, Baldwin, or Misskelley.

Of enormous significance, a mitochondrial profile has been developed for a hair found by the West Memphis police on a ligature used to bind James Michael

Moore. While a mitochondrial profile cannot identify with absolute certainty the donor of that hair, it does permit a determination of who is not. As the Fedor reports establish, more than 99.9 percent of the population, among them Echols, Baldwin, and Misskelley, can be excluded as the donor of the hair located on the Moore ligature, but one person who cannot be so excluded is Terry Hobbs, the stepfather of Steve Branch. Hobbs was in the area not far from Robin Hood Hills around the time when the boys disappeared, and the blood relatives of Steve Branch, including his mother Pam Hobbs, reported their suspicions that Terry was involved in the murders a number of years before the mitochondrial results were reported.

Also of great significance, a hair recovered by the West Memphis police on a tree root near where the victims' bodies were located has a mitochondrial profile possessed by less than three percent of the population, but one person who cannot be excluded as a donor is David Jacoby. Terry Hobbs had been at Jacoby's home playing the guitar with Jacoby just before the victims disappeared, and was with him in the hours their disappearance had been reported to the police.

Do the mitochondrial results in themselves establish the guilt of Hobbs or Jacoby? No. Mitochondrial DNA is held commonly by those in a maternal line, as opposed to being unique to an individual, as is true of nuclear DNA. When

informed of the results, however, Hobbs did not deny that the hair on the Moore ligature was his (nor does it seem likely that someone else in Hobbs' maternal line is a likely candidate as a donor), but rather claimed that the ligature hair must have been innocently transferred from himself to Moore.[22] (*See* Exh. X.) If the hair had been found on Branch, or even in a location on Moore other than a ligature that bound the victim, that explanation would appear more feasible.

As to Jacoby, who had no apparent connection to the victims and has been fully cooperative with both defense and prosecution investigators, it is certainly possible that Hobbs picked up a hair from Jacoby when Hobbs was at Jacoby's home just before the victims disappeared.[23] If that is the case, however, then Hobbs is the logical donor of *two* hairs recovered at the crime scene, and he would be hard pressed to come up with an innocent explanation of how he left Jacoby's hair on a tree root near the bodies.

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[22] On July 20, 2007, Janice Broach of WMCTV reported that Hobbs had stated to her: "If Michael Moore or Christopher Byers had a piece of my hair on shoes strings, these little boys came to my home and played with our little boy pretty regularly." www.wmctv.com/Global/story.asp?S=6814836 - 88k

[23] Again, it does not appear that there is another member of Jacoby's maternal line that is a likely donor of the tree root hair.

Under *House*, the relevant question is this: is this a case where "had the jury heard all the conflicting testimony — it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." 126 S. Ct. at 2086. As was true in *House*, and as the prosecution conceded in closing argument here, the state's evidence was entirely circumstantial (EBRT 2510-2512, *3299-3301*); indeed, the proof here was considerably weaker than that considered in *House.* The DNA test results are new circumstantial evidence that tends to exculpate petitioner more forcefully than all of the state's evidence tends to implicate him in the charged crimes. As Echols will now demonstrate, however, the test results are far from the only new evidence that supports the conclusion that Echols did not commit the charged crimes.

2. The New Forensic Evidence

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. (Dr. Ophoven's curriculum vitae is attached as Exhibit CC.) 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. (*See* Exh. A.)

3. Echols' present counsel learned of Dr. Ophoeven's preliminary conclusions concerning the nature and cause of the victims' injuries in May of 2006. Counsel recognized that Dr. Ophoven's theory that animal predation had caused the vast majority of the injuries to the victims' skin, including the severe injury to the genitalia of Christopher Byers, marked a dramatic departure from the state's contentions at trial that such injuries were consistent with the use of a knife and were the product of a satanic or cult activity.

4. 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. (Dr. Spitz's curriculum vitae is attached to the Horgan declaration as Exhibit EE.) 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 (State's Exh. 77) that purportedly belonged to defendant Echols and that was recovered from the lake

near Jason Baldwin's trailer; 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.

5. 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 predatation. He began with photo one in his Byers series, a frontal view of Byers' upper thighs and genitalia. 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 and lines in these areas, with the holes usually in twos, sometimes but not always equi-distant. 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 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 which Dr. Peretti said could be due to the ears being held during oral sex are 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.[24] *See Exhibit A (Riordan declaration).

[24] 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* Exh. EE.)

6. Subsequently, on November 27, 2006, Dr. Spitz issued a written report (Exh. FF) essentially restating the conclusions he had verbally reported on September 22, 2006. 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 suspected as 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, ragged, without evidence of bruising, 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."

7. 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 verbally reported to counsel for Mr. Baldwin in May, 2006. (*See* Exh. Y.)

8. 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, and Dr. Vincent Di Maio, author of Forensic Pathology, widely considered one of the profession's guiding textbooks, and the former medical examiner of San Antonio, Texas.

9. 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 (curriculum vitae attached as Exh. GG), who was instrumental in the state of Florida's successful murder prosecution of Ted Bundy in 1979; and Dr. Robert Wood (curriculum vitae attached as Exh. HH).

10. 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.

11. 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 were instead 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. (*See* Exh. Y.)

12. On January 11, 2007, Dr. Souviron issued a report (attached as Exh. II) 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 mucco buccal 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.

13. 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. (*See* Exh. Y.)

14. 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. A copy of the March 12th letter is attached as Exhibit JJ.

15. 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. (*See* Exh. Y.)

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. (*See* Exh. Y.)

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. (*See* Exh. Y.)

16. On May 6, 2007, Dr. Wood also completed a written draft report on his findings. Some of Doctor Woods' 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 penis's 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 "Grapefruit" Experiment

Grapefruit is not a recognized analog for human skin. To my knowledge it has never been used as a model for skin injury in any court, anywhere. There are models for injuries to human skin – the most suitable one would be a live juvenile pig. Anesthetized pigs as a substrate for injuries and have been published in peer-reviewed journals and presented at conferences. It has been used in rigorously-controlled experiments.

Grapefruit is clearly not a suitable analog to study dermal injuries of this type. Clearly it is not ethical to use a non-anesthetized live pig for these demonstrations. I have performed blunt force, sharp force, and pinch-type injuries in live anesthetized juvenile pigs. I have also cut a grapefruit. The difference in damage inflicted by a knife to these two substrates are as different as chalk and cheese.

c. 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.

d. 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.

e. 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...

(*See* Exh. Y.)

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. A copy of the May 15th letter is attached as Exhibit KK.

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. (*See* Exh. Y.)

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. (*See* Exh. Y.)

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. A copy of the July 10th letter as Exhibit LL.

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. (*See* Exh. Y.)

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., whose curriculam vitae is attached as Exhibit MM. 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. (*See* Exh. A.)

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 October 4th letter is attached as Exhibit NN. (*See* Exh. Y.)

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. (*See* Exh. Y.)

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.

A copy of Dr. Spitz's October 12th supplemental report is attached as Exhibit OO.

26. On October 22, 2007, Dr. Haddix issued an interim report on her findings concerning the victims' injuries. 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 (exhibit 60A Echols-Baldwin trial, Bates stamp 1828), an injury on an extremity of Branch (exhibit 66B Echols-Baldwin trial, Bates stamp 1836) and associated with the genital and thigh injuries of Byers (exhibit 73C Echols-Baldwin trial, Bates stamp 1847). 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, 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 (exhibit 71C Echols-Baldwin trial, Bates stamp 1847), 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.

A copy of the Dr. Haddix's October 22, 2007 report is attached as Exhibit PP.

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). (*See* Exh. Y.)

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. (*See* Exh. Y.)

3. Petitioner's Culpability Revisited

Petitioner will now review the case against him prior to and at trial in light of the DNA test results, the new forensic evidence, and other recently obtained evidence supporting his *House* claim of actual innocence.

a. Vicki Hutcheson

While Hutcheson's testimony was not admitted at the trial of Echols and Baldwin, given her important role in focusing suspicion on petitioner soon after the murders, it is important to note that this initial stage of the investigation was, like

so much that followed, based on lies.

In a series of interviews in 2004, Vicky Hutcheson stated that her testimony about driving to and attending a satanic "esbat" meeting with Echols and Misskelley was a "complete fabrication."[25] That assertion is supported by the fact that although the police were interrogating and conducting surveillance of Echols on multiple occasions between the discovery of the victims' bodies on May 6th and the defendants' arrests on June 3rd, 1993, the time period when Hutcheson was cooperating in the police investigation of Echols, no corroboration of Hutcheson's claim of a satanic meeting was offered at either the Misskelley or Echols trial, nor has there ever been a claim by any other witness that Damien Echols knew how to drive an automobile or ever had done so.

b. The Misskelley Statement

[25] *See* Tim Hackler, "Complete Fabrication: A crucial witness says her testimony in the West Memphis 3 case wasn't true, but a product of police pressure to get results in the deaths of three children," *Arkansas Times*, Oct. 7, 2004, at 12-17. (Exh. QQ.)

The Misskelley "confession" should not have affected the Echols proceedings because his statements were not, and could have been, admitted into evidence at petitioner's trial. As will be demonstrated below, however, his statements wrongfully served as a crucial underpinning for the convictions of both Echols and Baldwin. Therefore their truth or falsity is a proper subject for petitioner's actual innocence discussion.

There were at least ten good reasons why a reasonable finder of fact in 1994 should have concluded that Misskelley had not witnessed the victims' murders and thus that his statements to the police were entirely fabricated:

1. Misskelley, who was borderline mentally retarded and highly suggestible, initially denied knowledge of the crimes and was subjected to hours of interrogation before making his inculpatory statements. Aware that a reward had been offered for information leading to the arrest of the killers, Misskelley was told by his interrogators that he could place himself in the circle of those attempting to solve the crime.

2. Misskelley made his statement only after he had been told that he had failed a polygraph, which was not true.

3. Misskelley stated that the murders occurred at nine in the morning when the boys were riding their bikes to the school bus, when in fact the boys arrived at

school and spent the day there, as did Baldwin, while Echols was at a doctor's appointment and Misskelly himself was working on a roofing job that morning.

4. Misskelley stated that the boys were tied with brown rope in such a way that they could have run away, when in fact they were hog-tied with their own shoelaces.

5. Misskelley said that Echols had choked one of the boys to death with a "big old stick," but no body showed such an injury.

6. Misskelley said more than one boy had been sodomized by Echols and Baldwin, but none of the bodies showed any of the injuries that would have resulted from such a sexual assault.

7. Misskelley stated that the boys had been badly beaten with their clothes on, but none of those clothes had blood on them.

8. Misskelley stated that Baldwin called him at noon to report the murders, which was indisputably untrue.

9. Misskelley only moved the time of the murders to the evening after Detective Ridge told him that Misskelley had earlier stated they occurred at 8 p.m., but in fact Misskelley had made no such prior statement.

10. Misskelley offered no explanation of how it was that he came to be in the presence of Baldwin and Echols in the evening, when plainly he had not been

with them at all earlier that day.

In addition, Misskelley's statements must be re-examined in light of the new forensic findings. The Arkansas Supreme Court's statement that Misskelley's "statements were obtained in a question and answer format rather than a narrative form" is a reference to the fact that Misskelley did not supply his interrogators with much detailed information on his own; rather, he simply agreed to the factual propositions they proposed.

Early in his statement, Misskelley said that the victims were hit before Misskelley left. Later he mentioned that Echols and Baldwin were "screwing them and stuff, cutting them and stuff," so he ran off. Misskelley had made no reference to a knife in his statement prior to being asked by Detective Ridge: "Who had a knife? (MRT *) Misskelley then responded that Baldwin did. (*Id*.) Later, after Misskelley had said one boy was cut on the face, Ridge, in an apparent attempt to get information on the Byers' genital injuries, told Misskelley that another boy was cut and asked where. After Misskelley stated "at the bottom," Ridge suggested the "groin area," to which Misskelley made no reply. Finally, Ridge asked Misskelley if he "knows where his penis is," and Misskelley agreed "that's he was cut at." It was Detective Gitchell, not Misskelley, who then supplied the name of Byers for the boy being cut. (*Id*.)

Misskelley himself never volunteered that he had seen Byers being cut with a knife in his genital area. He did not do so for two reasons: he did not witness the murders; and if he had, he would not have seen Byers being cut in that manner by his killer because it never happened. He did not see Echols and Baldwin "screwing" the victims, because as Peretti testified and the DNA results confirm, the physical evidence that absolutely would have been present had the victims been sodomized simply does not exist. Rather in these regards, as is true of the rest of his statement, Misskelley told his interrogators not the truth, but what they wanted to hear.

Additionally, Gitchell and Ridge persisted interrogating Misskelley after he denied knowledge of the crimes and satanic activities because they had been told by Vicky Hutcheson that Misskelley had taken her to an "esbat." Hutcheson has since admitted that claim was a "total fabrication."

Echols would never had been arrested or prosecuted in this case but for Misskelley's statements. In the wake of the new DNA and forensic evidence, no reasonable person would give any credit to those statements today.

c. The Knife In The Lake

In his testimony, Doctor Peretti never suggested that the serrated lake knife (State's 77) was the instrument that caused any of the injuries suffered by the three

victims; indeed, he made clear that no such inference could rationally be drawn from the physical condition of the bodies. The real "evidence" concerning the knife in the lake came not from the witness stand but from the mouths of prosecutors in closing argument. The Arkansas Supreme Court refers to this portion of prosecutor Fogelman's argument thusly:

> The prosecuting attorney made one cut in a grapefruit with the serrated knife that the State recovered from behind Baldwin's residence, and then made another cut with the knife that defense counsel implied was used to cut the victims. The second knife had a regular blade. The prosecuting attorney compared the cuts in arguing that the cuts on Byers were like those made by the knife the State had introduced.

Echols I, 936 S.W.2d at 974.

The opinion greatly understates what in fact occurred. When it became apparent that Fogelman was going to use a grapefruit as part of an experiment in closing, the defense objected that the demonstration was not in evidence, that it was neither scientific nor reliable, and that it would have to be admitted "under [the] Rule 700 series." (EBRT 2536-37, *3325-26.*) Fogelman replied: "It's not an experiment. It's not even evidence." (EBRT 2537, *3326.*) Fogelman then stated: "I'm just going to show the types of marks that this knife makes and that knife makes. That's all." The trial court overruled the defense objection. (EBRT 2538, *3327.*)

Fogelman then referred to photographs of marks on Chris Byers, but not by number. He said that they show "like a dash where it's cut, cut, open space, cut and an open space." He then took State's 77, the lake knife, and tapped the grapefruit with it, then stated "if you look closely you can see it leaves a cut and an open space, cut and an open space." (EBRT 2539, *3328*.)

Fogelman then took up a photo (Exh. 73C) showing a frontal view of Byers' groin (although the penis area is cropped out). Fogelman pointed to the area circled by Peretti on the upper right thigh just to the right of the missing scrotum and noted that it showed "dash, dash, dash, dash." (EBRT 2539, *3328*.) He laid State's 77, the lake knife, diagonally on the right thigh in the photo and said it matches "practically perfectly," but then admitted that the picture was not to scale and "not a one to one." (*Id*.) Nonetheless, Fogelman argued that the jury could get a ruler and measure the spaces on State's 77 and "get a ruler back there" and "you're going to find that in between each of these blades is a quarter inch, and the blade itself is 3/16th" (EBRT 2540, *3329*), facts plainly not in evidence. The prosecutor then told the jury to get a piece of paper and, on the scale in the picture, "go three-sixteenths and a quarter, and where your three-sixteenths are make a straight line, just like this would be," referring to the blade on State's 77. (*Id*.)

Fogelman conceded that the wounds did not exactly match the blade pattern,

but attributed that to the curvature of the leg: "If you think about it it's rounded, this stripe around the surface — the ones on the end are going only to have part of a blade." With that, Fogelman stated that "if you lay it (it is not clear whether the "it" referred to the knife or to the piece of paper he urged them to fashion from the scale in the picture) on these two large cuts and you're going to find that they match. They fit. This is one example of how this knife matches — not just a little bit, but so much more than that knife or any other serrated knife. I submit the proof shows that knife caused it. . . I submit the proof — the circumstantial evidence shows that this knife — State's Exhibit Seventy Seven — caused those injuries right there," indicating the right thigh wounds on the picture. (*Id*.)

In the final portion of closing argument by prosecutor Davis, he made an argument that he conceded had not been made by Fogelman concerning the source of the wounds on the thighs of Chris Byers. Davis argued that State's 77 has two cutting surfaces: "It's got one here and it's got this serrated portion back there." (EBRT 2615, *3403*.) He then argued that the theory that "when this surface [assumably the non-serrated side] is being used to remove the genitals and the knife is worked in and they're trying to remove the genitals, this back surface [assumably the serrated side] is what's going to be coming in contact with the inside of the thighs and the back of the buttocks" (*id*.), thereby asserting that Byers' injuries in those locations were due to State's 77 and no other instrument.

By conducting his experiment with an object that never had been admitted in evidence or discussed in testimony, Fogelman necessarily vouched of his personal knowledge for the proposition that knife marks made on a human body can be replicated on a grapefruit. Had that proposition been advanced during the taking of evidence, it would have been proven absolutely false. As Professor Wood has noted: "The difference in damage inflicted by a knife to these two substrates are as different as chalk and cheese."

Both prosecutors Fogelman and Davis advanced in closing a series of propositions — measurements of spaces on knives and of injury marks on the bodies, what would happen if the jurors took rulers into the jury room and measured things, what marks State's 77 made on the buttocks of Byers while being used to remove his testicles — that were not supported by the testimony of Doctor Peretti or any other witness. Furthermore, by claiming to know what facts the jurors would discover if they performed certain experiments with the photographs and a ruler in the jury room, the prosecutors were informing the jury that they had performed these experiments and knew the correct outcomes, thereby obviating the need for the jury to even bother to conduct the experiments themselves.

No case better illustrates than this one the wisdom of the constitutional rule (discussed more fully below in Argument IV) that a factual proposition based on a

prosecutor's claim of personal knowledge and hence not subjected to the test of confrontation and cross-examination may not be argued in closing. The grapefruit experiment was not wholly improper, and itconvinced the jury to convict and sentence petitioner to death based on assertions proven utterly untrue by the forensic evidence of animal predation. Any reasonable juror who heard the new forensic evidence would reject the prosecution's"grapefruit" argument in its entirety.

d. Michael Carson

When the testimony of a jailhouse informant concerning a conversation he had with a defendant is supported by a surreptitious tape recording of the conversation or leads to the unearthing of other evidence that objectively corroborates the informant, such testimony plainly is reliable.

But when such a informant comes forward after a deluge of publicity concerning a notorious crime; when he claims to have heard had a confession in jail by an accused whom the informant just met; when that defendant has confessed to no one else; when the informant failed to report the confession until months later; and when everything the informant claims to have learned from the accused has been reported in the media, that testimony is inherently unworthy of belief. Such "snitch" testimony from persons who themselves are dishonest criminals is so

often false that no prosecutor can ever have any confidence that he will not suborn perjury by putting the informant on the stand.

Michael Carson's testimony perfectly illustrates the ethical pitfalls which invariably accompany calling an uncorroborated jailhouse informant. In a case where two men's lives were at stake, Carson manufactured the most horrible lies imaginable about Jason Baldwin, a teenager who, unlike Baldwin, had never committed a serious crime. Baldwin never confessed to Carson the unspeakable deeds described by Carson on the witness stand because those events never happened; the terrible genital injuries suffered by Chris Byers were not inflicted by a human agency. No reasonable juror who heard the new evidence would credit a word of Carson's testimony.

e. Dale Griffis

For Griffis' testimony regarding the "trappings of occultism" to have any meaningful weight, there would have to be some reliable data that proven satanic killings have been committed near pagan holidays and when there was a full moon, or that such killings typically involve the sacrifice of young children, or three victims, or victims who are eight years old, or that murders are often done near water for a baptism-type rite, or that such killings involve the display of the victims' genitals, the removal of testicles, or the storing of blood for future services

in which the killers would drink the blood or bathe in it. As Griffis' cross-examination demonstrated, however, there are no documented satanic murders involving three eight year old victims, or the removal of testicles, or the removal of blood for bathing and drinking; thus these factors could not possibly support a valid expert opinion that they indicate a satanically motivated crime as opposed to randomness, simple sadism, or sexual perversion.

Of paramount importance, Griffis' opinion as to the satanic nature of the charged crimes rested on Carson's testimony that Baldwin drank Byers' blood and put the victim's testes in his mouth, testimony now conclusively exposed as an outrageous lie by the new forensic evidence. Griffis' contention that a left-side facial wound on Branch was indicative of satanic motivation was nonsense when he offered it, but it is all the more ridiculous in the light of the fact that Branch's facial injuries resulted from animal predation.

Additionally, the "university" from which Griffis received his "Masters" and "Ph.D.," has been shut down by the state of California as a fraudulent diploma mill. (Columbia Pacific University v. Miller, Cal. Court of Appeal, First Appellate District, Case no. A087833 (July 7, 2000)[26] [*see Mike's e-mail; cites SF

[26]In the state's suit to compel CPU to close, California Deputy Attorney General Asher Rubin called the correspondence school "a diploma mill which has been preying on California consumers for too many years" and "a consumer fraud, a complete scam." The suit also referred to Columbia Pacific University as a

Chronicle article re shut-down; he couldn't find opinion] That the testimony of an utter charlatan like Griffis was offered to the jury as a basis for executing a human being is one of the most appalling aspects of this deeply disturbing case. No reasonable juror would now believe Griffis today.

f. Bryan Ridge

The argument that in his pre-arrest interview with Ridge, Echols had knowledge of Byers' genital injuries that a member of public would not have possessed was specious at the time it was advanced in 1993. It is all the more so in light of the fact that those injuries were not inflicted by the perpetrator or perpetrators of the crime. The Ridge contention would not now be credited by any reasonable juror.

g. The Hollingsworths

"phony operation" offering "totally worthless [degrees]...to enrich its unprincipled promoters."

Recent investigation has established that Anthony and Narlene Hollingsworth had substantial motivation to provide the prosecution with helpful testimony beyond Narlene's interest in shielding her nephew L.G. Hollingsworth from prosecution. Anthony had been pled guilty in Crittendon County Circuit Court- Second Division in 1991 to the crime of sexually abusing his younger sister Mary, who was eight years old at the time. (CR-91-457.) Anthony had been placed on a ten year probation at the time, and thus was on probation when he came forward to testify against petitioner. John Fogelman was the prosecutor in Anthony's case. (*See* Exh. X.)

Narlene was also facing charges when she first came forward to the authorities on May 10, 1993, with her story of seeing Domini Teer and petitioner on the night of May 5th. She mentioned in her testimony that she had had a "wreck," earlier that day, but not the fact that she had been cited following the accident for "Following Too Closely- Accident Involved." (Municipal Court of West Memphis No. C-93-3429). She pled no contest to that charge on June 7th, following petitioner's arrest, and the fine was suspended.

As noted above, the testimony of the Hollingsworths was greeted by the entire courtroom with laughter, but the prosecutor implored the jurors to take the Hollingsworths seriously. No reasonable juror would do so today.

h. The Ballpark Girls

Donna Medford, mother of Jodie Medford, has sworn out a declaration filed in support of this petition (Exh. RR), which states:

> I am informed and believe that during the 1994 trial, my daughter testified that she had attended a softball game in West Memphis in, Arkansas, in May of 1993, and that at that time she heard Damien Echols state that he had killed three little boys and that before he turned himself in he would kill two others. ..
>
> I presently recall that I learned of the statement when I was driving home with Jodee, Jackie (another of my daughters), Katie Hendrix (my niece), and another girl, Christy Van Vickle. Jodee and others described the statement to me at that time.
>
> When I heard the description of Mr. Echols's statement during the drive, I told the girls to forget about it. I recall that at the time, I did not believe it possible that Damien was actually confessing to the crime in front of so many people, but was instead simply trying to draw attention to himself. It was for that reason that I did not report the girls' statement to anyone else until I learned from television reports that Mr. Echols had been arrested.

Mrs. Medford's conclusion is the correct one. Whatever Damien Echols may or may not have said at a softball game in late May of 1993 in response to whatever taunts others may directed at him, at most he was acting in defiant bravado or, as Mrs. Medford states, "simply trying to draw attention to himself." After withstanding many hours of grilling by Detective Ridge on May 10th, Echols did not then in seriousness shout out a confession to a crowd at a ball game three weeks later.

i. The Fibers Evidence

The fact that the clothes of two victims had fibers on them that could have come from any number of garments sold at Wal-mart had little or no probative value in this case. The prosecution hypothesized that a child-size shirt found at Echols' home, which he never could have worn or did wear, might have produced a fiber that was transferred from the shirt to Echols and then to the clothing of a victim. If the fiber was transferred from someone's small shirt to the victim, as opposed to being picked up from the water of the drainage ditch where the victims were found, it was far more likely to have been transferred to the victim's clothing from one of his playmates on that or previous days. Compared to the powerful exculpatory impact of the new DNA evidence, the fiber evidence is meaningless.

j. The Fingerprint Evidence

In a recent interview with the West Memphis Police Department, Tony Anderson, the fingerprint expert on the crime scene when the victims' bodies were discovered, confirmed facts not apparent from the trial record: namely, that the aforementioned print found at the scene was within five to ten feet of where the first body was located, and that it was at an angle that made clear it had been left by someone who had been in the water. Anderson compared the print to Echols, Misskelley, and Baldwin, as well as every police officer at the scene, and found no

match. (*See* Exh. Y.) Like the newly discovered DNA evidence, that fact is powerful circumstantial evidence that someone other than the three accused defendants committed the charged murders.

k. Alibi

In 1993, soon after petitioner Echols was arrested, Jennifer Bearden gave authorities a statement to the effect that, as petitioner Echols and his mother testified at trial, Bearden spoke to Echols on the night of May 5, 1993 by telephone. (*See* Exh. O.) Domini Teer did the same. (*See* Exh. J.)

In 2004, Bearden swore out an affidavit concerning the events of May 5, 1993. (*See* Exh. SS.) She stated that: "This case has made a big impression on me. It influenced me to become a criminology major in college. I have thought a lot about the period in question because it was just an extraordinary time period." Bearden goes on to state that she spoke to Echols that evening for at least a half an hour, beginning about 9:30 p.m. and ending around 10 p.m. (*Id*.)

As an adult who majored in criminology, Bearden at this point in her life certainly has no motive to provide false assistance in any way to a person who could have murdered three children. Her assertion that petitioner was at home at between 9:30 and 10:00 p.m. on May 5, 1993, is simply far more credible than the eyewitness testimony of the Hollingsworths, who by the prosecution's own

account erred in their claim to have seen Domini Teer, with whom they claimed a family relationship, walking near the crime scene on that evening.

l. John Douglas

John Douglas is the former FBI Unit Chief of the Investigative Support Unit of the National Center for the Analysis of Violent Crime ("NCAVC"), which he served in and headed for 25 years between 1970 and 1995. (*See* Exh. TT.) He is probably the country's leading expert in criminal investigative analysis, and has performed an analysis of these charged murders. (*See* Exh. UU.) Every word of that study merits careful consideration, but the 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.

(Exh. UU at 18-19.)

m. Conclusion

Were he tried today, petitioner would meet the quackery of a Dale Griffis,

the perjury of a Michael Carson, the falsity of the grapefruit experiment, and the biased and mistaken eyewitness testimony of the Hollingsworths with the hard science of DNA and forensic pathology, with other highly persuasive expert testimony, and with credible witnesses as to petitioner's alibi. Even more than in *House*, the evidentiary showing offered herein completely undermines the state's evidence and convincingly points in the direction of alternative suspects. Every reasonable jury would doubt Echols' guilt; indeed, any such juror could be confident of his innocence. The *House* standard has been met.

II. THE JURY'S EXTRAJUDICIAL RECEIPT AND CONSIDERATION OF THE INADMISSIBLE AND FALSE MISSKELLEY STATEMENT IMPLICATING ECHOLS IN THE CHARGED OFFENSES VIOLATED PETITIONER'S RIGHTS TO COUNSEL, CONFRONTATION, AND A FAIR TRIAL UNDER THE UNITED STATES CONSTITUTION

A. Introduction

Jesse Misskelley's statement to investigating officers on June 3, 1993, although properly admissible only against Misskelley himself, also implicated Echols and Baldwin in the commission of the charged murders. Under controlling case law of both the United States Supreme Court, it would have been error of constitutional dimension to admit such evidence at a joint trial of the declarant (Misskelley) and the codefendants whom the statement implicated (Echols and Baldwin) unless the declarant were to take the stand and be subjected to cross-

examination by his codefendants, which was not to be the case here. Given the extraordinarily prejudicial nature of a cross-incriminating statement of a non-testifying defendant, a constitutional violation cannot be avoided by a trial court's admonition to jurors to limit the statement's admissibility to the declarant alone.

It was for these reasons that the trial court severed the trial of Echols and Baldwin from that of Misskelley, whom the state tried first and convicted almost entirely on the basis of his own statement. Both trials were moved from Despite the importance of insulating the Echols-Baldwin proceeding from any taint of the Misskelley statement, a reference to the statement was shoehorned into Echols' trial through a prosecution witness' unresponsive answer to a question on cross-examination. While striking the answer from the record and admonishing the jury to ignore it, the trial court justified denying a defense motion for a mistrial on the ground that the jury had heard mention only of the statement's existence, not its prejudicial contents.

It is now clear that the trial of Echols and Baldwin was plagued by the very unfairness the severance of their case from Misskelley's was designed to avoid. Having learned of its contents through media reports, jurors considered the Misskelley statement and relied on it to convict, as evidenced by the fact that a chart drawn up during the jury's deliberations and copied into one juror's notes listed the Misskelley statement as a ground upon which to rest the verdict of guilt

as to both defendants. The jurors' discussion of the Misskelley statement breached a direct judicial command.

The unfairness caused by the jury's discussion and weighing of the Misskelley statement was much greater than would have resulted had the trial court erroneously admitted the out-of-court statement over hearsay and confrontation clause objections. In that instance, the defense, on notice that the statement was before the jury, could have proceeded during its case to demonstrate that every line of the statement was false. Instead, having heard no evidence to the contrary, the jury was left under the delusion that Misskelley had provided the police with credible information establishing his own culpability and that of his codefendants. The devastating impact of the extrajudicially-received information dwarfed the persuasive force of the minimal evidence properly admitted into evidence. A new trial is plainly in order.

B. Relevant Facts

1. The Echols Jury Selection

Jury selection in the trial of Echols and Baldwin began on February 22, 1994 and was conducted at the same time the media was reporting the controversy over Misskelley's potential status as a witness against Echols and Baldwin. The court began its voir dire of prospective jurors by acknowledging the threat to a fair trial

posed by the enormous media attention the case had received: "This is one of those cases where there's been a great deal of media attention to it, and it's evident here today that there will a great deal more." (VDRT at 3.)[27] The court observed that: "Oftentimes the slant or the spin that's put on the news article will influence you, where had you been in court and heard it all, you might have had a totally different perspective of it. So the spin that's sometimes put on news stories will affect your mind. So you should only allow your judgment to be affected by what you hear in the courtroom." (VDRT 3-4.)[28]

Later during voir dire, the prosecutor made the following remarks to prospective jurors about the press environment surrounding the trial: "You've seen all the cameras out here, and you know this case is described as a high profile or media attention. You've seen all the camera people. I don't know if you've seen how they rush like little packs of wolves out there." "Because of the high interest in the area, the state, the nation, we felt like it would be appropriate to have cameras in the courtroom to record the proceedings rather than have 'em outside the courtroom and hundreds of 'em just hovering around everybody that goes in

[27] "VDRT" refers to the Reporter's Transcript of the Echols-Baldwin voir dire.

[28] The court later stated: "I'm sure everybody has read or heard or seen something about it. You would be an unusual person if you hadn't." (VDRT 455.)

and out. We felt like it would be simpler just to let 'em have access and you'd have less of that shark feeding atmosphere outside the courthouse."(VDRT 219-220.)

On the morning of February 23rd, the court placed eighteen prospective jurors in the jury box and began substantive questioning on voir dire. (VDRT 8-9.) Immediately it became evident that the pervasive publicity the case had received in Jonesboro would pose a threat to the defendants' right to be judged only on the basis of the evidence received in court. All jurors indicated that they were aware of at least "some information" about the case. (VDRT 17.)[29] The jury selection process that followed demonstrated that media exposure had created a broad and deep prejudgement among prospective jurors that the defendants were guilty. While numerous jurors were excused for cause, their responses to questions often exposed those remaining to prejudicial information, and some of those selected to serve had expressed a belief in the defendants' guilt.

In response to the court's threshold question as to whether prospective jurors could award the defendants the presumption of innocence, one juror quickly

[29] The following day, the court stated: "This case, of course, has been the subject of endless attention, and it is probably going to continue for many weeks after this trial is concluded. I know all of you indicated yesterday that you had at least heard about the case, and I would be amazed if you had not." (VDRT 269-70.)

volunteered that he had "a very strong opinion formed." (VDRT 16.) In the presence of a courtroom filled with venire persons, including those later selected to serve on the case, prospective juror Sharp announced that he remembered that "the detective in West Memphis made the news – made the announcement to the press" and "the confidence that he made his statement with pretty well has been rooted in my memory" (VDRT 18.) Sharp assured the court that he could not put that information aside and decide the case on the evidence introduced in court, and was therefore excused. (VDRT 17-18.) Prospective Juror Harthorn was excused at the same time for having "strong convictions" that could not be set aside. (VDRT 18.)

The court then began individualized questioning in chambers of small groups of three or four prospective jurors. Juror One,[30] who was in the first group, stated that she had heard "an awful lot" about the case through the Jonesboro Sun , the Arkansas Democrat, and television 7 and 8, reading articles on a daily basis. (VDRT 35, 49-50.) Juror One listened as prospective juror Tate was excused because Tate had an opinion of the defendants' guilt because what she had read that "is gonna stick in my mind." (VDRT 52.) Juror One then stated that "anyone under these circumstances would form an opinion," and that she had formed an

[30] In an effort to preserve privacy, jurors are identified in this memorandum by the numbers assigned them by the trial court. Affidavits containing their names are being filed under seal.

opinion the defendants were guilty, but "I don't feel like my opinion is totally fixed. I feel like I can listen to the evidence" and set aside her previously formed opinion of guilt. (VDRT 52.)

During voir dire of the next two small groups of venire persons, none of whom served on the jury, those questioned made statements to the effect that: (1) all the evidence they had heard of was "stacked against" Baldwin; (2) that part of what they had heard on television and read was "in relationship to another trial of another defendant in this matter" (VDRT 133); (3) that "if you just watch the news or read the news and watch the television, they to me portray people as guilty" (VDRT 160); (4) that one prospective juror had "feelings [that] evidently they're guilty. All–everything you read in the newspapers and, you know" (VDRT 162); (5) that another prospective juror had an unchangeable opinion because "I believe I have seen too much of it on television and read it in the paper to do that because I have seen it all and read it all" (VDRT 175); and (6) yet another juror stated that the media tended to make the defendants look guilty and that she could not judge the defendants separately because of what she had read linking them together. (VDRT 189, 195, 200-01.)

On the following day, February 24th, one prospective juror, questioned in private on the subject, stated that she had heard from her pastor that Echols had changed his name to Damien because that name means Satan. (VDRT 234-36.)

The juror maintained that she believed she could afford Echols the presumption of innocence, but nothing had changed her opinion that he was evil. (VDRT 237.) She was excused.

Juror Two stated that she had received information on the case from "good old television and newspaper," later stating "they do publicize it a great deal. I read the headlines. I won't deny it. I do read the headlines, and I listen to the news." (VDRT 223, 245.) Juror Three got her information about the case from "people in the office mainly;" she also read newspaper headlines. (VDRT 292.)

Juror Four, who would serve as the jury foreman, stated he read three newspapers; that he knew the Misskelley trial had been going on; and that " "I think you probably should've had this trial–you moved it to here. You probably should have moved it to another state if you wanted to get–I mean this is still too close." (VDRT 292.) Juror Four's opinion was formulated based on "just what you hear in the paper. I think the paper assumes they're guilty." (VDRT 292.) Juror Four then asked of the prosecutor, who had described the atmosphere as one of a media circus, whether the publicity would get worse; the prosecutor replied: "I don't know exactly how it can get worse, but it possibly could." (VDRT 293.)

Juror Four was aware that photographers had taken pictures of jurors at Misskelley's trial in Corning "and they splashed 'em in this paper." (VDRT 299.) In a critical exchange with defense counsel, Juror Four acknowledged that he knew

of the verdict in the Misskelley case, but stated "I don't know anything–I couldn't tell you anything about Misskelley except that I understand that he was convicted of something, and I couldn't even tell you of what." (VDRT 307.) He then stated of his reaction to the Misskelley verdict: "My feeling was that if they were tried on the ten o'clock news and guilty, then that's a statement of it that was confirmed." He then stated that the earlier trial did not give him "any feelings about the trial that was next." (VDRT 308.) Juror Four then asked whether the name Damien was itself Satanic. (VDRT 316.) Juror Four did not disclose that he had any knowledge of the existence or contents of the Misskelley statement.

Juror Five acknowledged that she received the Jonesboro Sun every day and had read "all about" the case regularly until she received her jury summons at the end of the Misskelley trial. Her feeling was that she was leaning to believing that the defendants had probably committed the crime, and nothing had yet changed that feeling. (VDRT 337-39.) What had led her to believe the defendants were guilty was "a law enforcement officer who said that he felt like it was a pretty well open and shut case, you know, that they had enough evidence"; nonetheless, she believed that she could begin the trial believing the defendants were innocent. (VDRT 337-39.)

Jurors Six, Seven, and Eight were voir dired with Melissa Bruno, who was not chosen as a juror. Juror Eight got his information on the case from the

Jonesboro Sun and from people around him. (VDRT 357, 366.) Juror Six received such information from newspapers, television and gossip. (VDRT 358.) In the presence of the three who would later serve as jurors, Bruno, who was not selected as a juror, stated that people never talked that defendants are innocent; "everyone just talked like they were guilty" (VDRT 368.) Juror Six's friends talked about the case and "of course, they felt like they were guilty," although Juror Six thought that the defendants were innocent until proven guilty. (VDRT 369.) Juror Six did not state that she had been aware that Miskelley had confessed to committing the same offenses for which Echols and Baldwin were being tried.

Juror Seven stated that she wasn't sure whether she could keep the defendants separated. (VDRT 380.) When asked where she heard about the case, Juror Seven replied in part: "I don't actually read the papers and watch the news that often but I did hear, you know, from the beginning. I haven't kept up with it that closely." (VDRT 358.) She later added: "I haven't read the paper very much. I don't really have time. Where I work we don't have time to talk about anything." (VDRT 367.) When asked about her "general feeling" about who committed this crime, Juror Seven replied "I don't have any feeling about who committed it." (VDRT 367.) Juror Seven did not state that she was aware that Jesse Misskelley had confessed to, and had been convicted of, the same charges Echols and Baldwin were facing.

Juror Nine was questioned in the presence of Ms. Childers and Ron Bennett both of whom, before being excused, stated that they had read in the newspaper that witchcraft was involved in the case. (VDRT 411-12.) Bennett stated he had formed an opinion from the media that "they did it." (VDRT 413.) Juror Nine himself acknowledged that his biological father was a police commissioner in Helena, Arkansas, but further stated that he had not talked to his father about this case. (VDRT 436.)

The final three jurors were selected on February 25th. Juror Eleven had heard the original television accounts about the case, but had heard not much more until very recently when the "last trial" occurred. (VDRT 510.) Juror Ten stated that it "seems the general opinion is that everybody thinks they're guilty," although he believed everyone was innocent until proven guilty." (VDRT 510.) The final juror, Juror Twelve, stated that she had gotten her news concerning the case from newspaper and television accounts. (VDRT 528.)

Later, at the close of the evidence and just prior to instructions, the trial court would poll the jurors on the issue of whether they have "read the newspaper, watched the TV, or listened to the radio, or through any other source, have gained any outside information from those sources or any other about this case?" The jurors answered "no." The court then asked whether the jury had followed the

admonishment of the court as "best as humanly possible," and was told "yes." (EBRT 2478, *3267*.)

2. Information on The Extrajudicial Information Received by The Jury

Juror Four was elected the foreman of the Echols jury. On October 8, 2004, during an interview in Jonesboro with two attorneys representing Echols,[31] he stated that around the time he was called as a juror, he was aware that Jessie Misskelley had been brought to the Craighead County Courthouse and had been offered a sentence reduction to 40 years if he testified against Baldwin and Echols. Prior to trial, Juror Four had heard that Misskelley made a confession to authorities implicating Baldwin and Echols, stating that the three victims had been hogtied, that they were castrated, and that Echols and Baldwin had made Misskelley chase the victims down and catch them. Misskelley continued to be a factor in Juror Four's mind throughout the trial.

Juror Four was the juror who suggested using T charts on large sheets of paper to organize and analyze the evidence during deliberations, which is a common tool used in decision-making. He personally wrote down the issues in the

[31] The summary of Juror Four's admission is based on Exhibits VV and WW, the affidavits of attorneys Theresa Gibbons and Deborah Sallings. All affidavits mentioning jurors names are, like the voir dire transcript, being filed under seal.

appropriate column.

In Juror Four's opinion, the jury could not ignore the Misskelley confession despite the court's instructions to do so. The Misskelley confession was published in the newspapers. It played a "large part" in his decision of the case. It was a known event.

Juror Four has stated that the other evidence against Echols and Baldwin was scanty. Unlike Manson or a thousand other cases, without the Misskelley evidence, it was extremely circumstantial.

Juror Four had been contacted numerous times since the trial by reporters, news people, lawyers and various groups who have asked him to comment on the trial. Juror Four had never granted an interview prior to being contacted on Friday, October 8, 2004, by attorneys for Echols.

On June 7, 2004, Juror Seven signed a notarized affidavit describing aspects of her participation in petitioner's trial. (Exh. XX.) She stated under oath that before serving on the jury, she knew about the earlier trial of Jessie Misskelley in Corning in which Misskelley had been found guilty; she believed she also knew that he had confessed to the crime.

Juror Seven kept a set of "good notes" both during the trial and deliberations. She provided a copy of those notes, which had not been altered to

investigator Tom Quinn, and they are attached to her affidavit.

According to Juror Seven, Juror Four put information down on some large sheets of paper in the jury room. Juror Seven's affidavit states: "When we discussed the case, we discussed each of the two defendants. We placed items on the pro or con side of the large sheets that were used in the jury room." Juror Seven copied into her notes a chart that duplicated the items written on the large sheets of paper the jurors used to list evidence during deliberations. The penultimate item on the "con' side as to Echols reads as follows: "Jessie Misskelley Test. Led to Arrest." As to Baldwin, the third item from the bottom of the "con" list reads: "J. Misk. State." Juror Seven's affidavit states: "That was my shorthand for "Jessie Misskelley Statement." Juror Seven's affidavit further states: "As far as I recall we either heard testimony about, or discussed during jury deliberations, all of the subjects and matters that are reflected in my notes."

In her affidavit of June 8, 2004 (Exh. YY), Juror Six stated, "I made it clear prior to being seated as a juror that I knew about the Jessie Misskelley case through the newspaper and having seen stories about him and his case on television." She continued, "I was aware that Misskelley had confessed to the police."

Juror Six further stated: "I recall that many days that testimony was presented during the trial, we jurors would talk to one another in the jury room

using our notes to help us understand what was going on. We all read from our notes to each other at the end of the day, or in the mornings. We did this in the jury room where we gathered during breaks in the trial, and whenever we were excluded from the courtroom due to issues discussed outside of our hearing." The affidavit of juror Six continues:

> My recollection of this process of daily reviewing our notes with one another is that it permitted us to assess whether we had missed something, or did not write down a matter of significance during the course of the testimony. I recall reading to other jurors from my notes, and it was clear to me that certain other jurors had missed matters that I had noted. I found that this process helped me to better understand the evidence at trial..
>
> As a result of this daily process of observing witnesses and reviewing notes and daily discussions with my fellow jurors, and based on my view of the evidence as I was hearing it in court, it was clear to me even before the deliberations that the defendants were guilty.

(Exh. YY.)

Juror Six further stated that: "during the course of the jury deliberations, I believe that Juror Four, the foreman, wrote notes on large pieces of paper stating the pros and cons under the name of each defendant, and under the names of each witness that we considered to be a key witness. We did this by going over our notes, and discussing our views about the case."

Juror Nine stated in his interview with investigator Tom Quinn, conducted January 8, 2004, that when after being selected as a juror he called his father, a

police commissioner, Juror Nine learned that his father had heard about the case, which had received state-wide, maybe tri-state wide, media attention. (Exh. ZZ.) When Juror Nine told his father that he was going to be a juror, his father "started spitting out the details."

Juror Nine stated that his jury experience "spooked the hell" out of him, and that he "never felt so scared." He couldn't sleep at night and "felt he could hear noises outside and would look out the window." His fear was the result of the talk of those kids being part of a cult, and looking into the audience and seeing the victim's families and the families of the accused. The accused had their families there as well as friends, some dressed in black with straight black hair and cult symbols. Juror 9 didn't know who was who, but he was concerned that if they voted for guilt, some of those people who were free on the street might seek revenge and kill him. Although he was never personally threatened, he felt that something could happen to him. "[S]ince the kids on trial were not afraid to kill, [Juror Nine] thought, maybe they had friends or were part of a cult that was capable of killing." Later in the interview, Juror Nine said that he remembered seeing a girl in the gallery with black lipstick, black hair, the gothic look. When he looked into the gallery, where Echols' people were sitting, he saw those kinds of people and thought, 'They're going to kill me.'"

Juror Nine's father was afraid for his son's safety. The father and a friend

came to Jonesboro at the end of the trial and sneaked Juror Nine out the back of the courthouse. Although Juror Nine did not remember a juror getting a threat during the trial, he commented, "Maybe there was and maybe that's why my father came up." The father's friend had a shotgun concealed under a newspaper, and they made Juror Nine lie on the floor in the backseat of a car and whisked him away. (Exh. ZZ.)

The written lists of "pros" and "cons" as to Echols and Baldwin drawn up by the jury during deliberations have been retained in evidence lockers along with the other exhibits in the case. Photographs of those written lists are submitted as Exhibit AAA.[32] The items on those original lists appear to match the items listed in Juror Seven's notes, except that the written references to the Misskelley statement on both the Echols and Baldwin list have been blacked out by someone.

C. Standard of Review On Federal Habeas

[32] The authentication of these photos can be found in Exhibit A*, the declaration of Dennis P. Riordan.

Under AEDPA, 28 U.S.C. § 2254(d)(1)-(2), an application for a writ of habeas corpus on behalf of a state court detainee can be adjudicated on the merits and granted if the claim "(1) resulted in a decision that was contrary to, or involved and unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable of the facts in light of the evidence presented in the State court proceeding."

A state court decision is "contrary to" established federal law within the meaning of § 2254(d)(1) if the state court "failed to apply the correct controlling authority from the Supreme Court." *Williams v. Taylor*, 529 U.S. 362, 405-07 (2000). In determining whether a state court decision is contrary to federal law, the federal court on habeas looks to the state's last reasoned decision as the basis for its judgment. *Ylst v. Nuuemaker*, 501 U.S. 803-04 (1991).

An unreasonable state court disposition of a federal constitutional claims under both § 2254(d)(1) and (2) warrants relief where it appears that the underlying error had a "'substantial or injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Hill v. Lockhart*, 28 F.3d 832, 838 (8th Cir. 1993). Furthermore, "[w]here a judge, in a habeas proceeding,

applying the [*Brecht*] standard of harmless error, 'is in grave doubt as to the harmlessness of an error,' the habeas 'petitioner must win.'" *California v. Roy*, 519 U.S. 2, 5 (1997).

Finally, it is well-settled that structural errors in the trial mechanism, as opposed to trial errors occurring during the presentation of the case to the jury, are not subject to harmless error review. *See, e.g.*i *Brecht*, 507 U.S. at 629; *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Thus, where a structural error occurs at trial, an appeals court does not conduct a harmless error review or look for a specific showing of prejudice. As the Supreme Court observed in *Brecht*, "[t]he existence of such defects ... requires automatic reversal of the conviction because they infect the entire trial process." 507 U.S. at 629-30 (citing *Fulminante*, 499 U.S. at 309-10); *see also Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1993) ("The presence of a biased jury is no less a fundamental structural defect than the presence of a biased judge.").

D. The United States Constitution Prohibits Jurors From Considering In Their Deliberations Information Received From Extrajudicial Sources Such as Newspaper or Television Reports

In a trio of opinions from the mid-sixties, the United States Supreme Court defined the boundaries of the federal due process right of a criminal defendant to be tried before a jury that will judge his or her guilt or innocence solely on the

basis of the evidence properly admitted in court rather than information obtained from extrajudicial sources.

In *Rideau v. Louisiana*, 373 U.S. 723 (1963), following his arrest for murder and robbery of a bank employee, the defendant confessed to the crimes during a filmed interview that was broadcast on local television three times. After a motion for a change of venue based on prejudicial publicity was denied, the defendant was tried and convicted before a jury containing three members who had seen the interview. The Supreme Court vacated the conviction, finding that the televised "spectacle" was "in a very real sense Rideau's trial. . . . Any subsequent court proceeding in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id*. at 726. The Court ruled that "due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised interview." *Id*. at 727. The Court reached that conclusion despite the fact that the three jurors who had seen the confession testified during voir dire that they "could lay aside any opinion, give the defendant the presumption of innocence as provided by law, base their decision solely upon the evidence, and apply the law as given by the court." *Id*. at 732 (Clark, J., dissenting).

In *Turner v. Louisiana*, 379 U. S. 466 (1965), two deputy sheriffs who had been the principal witnesses for the prosecution served as the bailiffs in charge of

the jury during the taking of evidence and the jury's deliberations. The Louisiana Supreme Court, while disapproving the practice, refused to reverse the defendant's murder conviction and sentence of death, finding that no prejudice had been demonstrated. *Id*. at 470. While the bailiff-witnesses had talked with the jurors, the state court found that there had been "no showing that either deputy had talked with any member of the jury about the case itself." *Id*. at 469.

The United States Supreme Court noted that:

> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury.

Id. at 472-73.

Reversing the judgment, the eight-judge majority held that "it would be blinking reality not to recognize the extreme prejudice inherent in this continued association throughout the trial between the jurors and these two key witnesses for the prosecution." *Id*. at 473.

> [T]he relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial. And Turner's fate depended upon how much confidence the jury placed in these two witnesses.

Id.

One year later, the Supreme Court decided *Parker v. Gladden*, 385 U.S. 363 (1966), in which the bailiff in charge of a deliberating jury told one juror that the defendant was a "wicked fellow" who was guilty; and told another juror that any improper guilty verdict would be corrected by the Supreme Court. The *Parker* Court analyzed the constitutional implications of this conduct in the following terms:

> We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that "the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and] be confronted with the witnesses against him . . . ." As we said in *Turner v. State of Louisiana*, 379 U.S. 466, 472-473 (1965), "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

Id. at 364.

In finding the bailiff's misconduct sufficient to reverse the conviction, the Supreme Court found that "his expressions were 'private talk,' tending to reach the jury by 'outside influence.'" *Id.* (citing *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)). The Court noted it previously had followed "the 'undeviating rule' that

the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial." *Id*. at 364-65 (citation omitted).

Finally, the Supreme Court rejected the argument that because ten jurors had testified that they had not heard the bailiff's comments, and because Oregon law only required ten affirmative votes to convict, no prejudice had been shown. The Court found that the unauthorized conduct of the bailiff "involved such a probability that prejudice will result that it is to be deemed inherently lacking in due process." *Id*. at 365 (quoting *Estes v. Texas*, 381 U.S. 532, 542-543 (1965)). Furthermore, the defendant "was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Id*. at 366.

E. Statements of Jurors Considering Whether They Relied on Information Not Received in Evidence Are Admissible

"A juror may testify concerning . . . whether extraneous prejudicial information was improperly brought to the juror's attention. *See* Fed. R. Evid. 606(b)." *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983). In *United States v. Brown*, 108 F.3d 863 (8th Cir. 1997), the Eighth Circuit affirmed the district court's grant of a new trial based on juror exposure to prejudicial extrinsic information. In *Brown,* after the district court granted motions for judgment of acquittal on all counts for several codefendants, the trial judge individually

examined the jurors to determine whether any of them saw the codefendants celebrating in the hallway and whether the jurors were exposed to subsequent news stories discussing the acquittals and the entry of a guilty plea by the corporate codefendant and the fine imposed on it. *Id.* at 865.

Several of the jurors were aware of the acquittals and several saw the celebrations, but none were aware of the corporation's guilty plea or the imposed fine. *Id.* Defendant, instead of moving for a mistrial, opted for a limiting instruction. After the verdicts were returned, the district court again individually voir dired the jury. *Id.* at 866. Two of them stated that during deliberations the jury considered the corporation's guilty plea. Id. The court then granted defendant's motion for a new trial.

In considering the admissibility of the jurors' post-verdict statements that they had considered the corporation's guilty plea while determining the defendant's guilt, the Eighth Circuit noted:

> [W]e do not believe that Rule 606(b) prohibits the consideration of the evidence that the jury continued to consider Caremark's plea and payment of a fine. Although Rule 606(b) generally prevents a juror from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind," the rule does allow jurors to "testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside

> influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). We believe that under Rule 606(b) the district court properly considered the testimony of the jurors to the extent that their testimony revealed that the extrinsic information continued to be considered by the jury.

Id. at 867.

F. The Jury's Consideration of the Misskelley Statement as a Factor Favoring Conviction Deprived Petitioner of His Constitutional Right to a Fair Trial

The evidence now before this Court establishes that the jury considered the unadmitted and inadmissible Misskelley confession during their deliberations that led to the conviction of Echols and Baldwin. The declarations of Jurors Six and Seven and the statements of Juror Four, the foreman, establish that the jury compiled a "pro" and "con" list of items favoring conviction or acquittal; Juror Seven's notes establish that the Misskelley statement was listed as a "con," or reason to convict, as to both Echols and Baldwin. Those items were placed on the list by Juror Four, the jury foreman.

The contents of the Misskelley statement were never placed in evidence; the one reference to the statement by a witness had been stricken from evidence, with the jury being admonished to disregard it. There was no basis in the record upon which the jury could have properly considered the Misskelley statement to be a

reason either for acquitting or convicting Echols. In considering the Misskelley statement and listing it as a reason to convict, jurors obviously relied on the widely disseminated press reports to the effect that Misskelley's statement implicated Echols and Baldwin in the charged offenses.

Despite being asked on voir dire what they had read or heard about the killings of the three victims, no juror revealed that they were aware of the fact that Misskelley had given a statement or of the contents of that statement. It is now clear, however, that at least three jurors — Four, Six, and Seven — knew of Misskelley's confession, and that Juror Four, the foreman, was thoroughly familiar with many of its details, including the fact that Misskelley had accused Echols and Baldwin of killing the youngsters. There can be no doubt that the Echols jury, in direct violation of the trial court's order, considered the unadmitted and inadmissible Misskelley statement during their deliberations, thereby violating Echols' rights to cross-examination, confrontation, due process of law, and the assistance of counsel under the United States Constitution.

G. The Jury's Impermissible Consideration of the Misskelley Statement Was Plainly Prejudicial

The United States Supreme Court has stated that:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for

> obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 U.S. 227, 229 (1954) (citations omitted).

In *Osborne v. United States*, 351 F.2d 111 (8th Cir. 1965), the Eighth Circuit reversed because a transcript of grand jury testimony was erroneously sent to the jury with the exhibits. The court noted that, although "[t]here is no evidence one way or the other with respect to the use of Exhibit D-47 by the jury . . . , it was the one [exhibit] most likely to arouse the curiosity of the jury and to attract their attention." *Id*. at 118. The court considered the strength of the government's case and held that, although it was substantial, it was not substantial enough to outweigh the possible prejudice. *Id*. "In addition to implicating the defendant in the robbery here involved, Exhibit D-47 contains considerable testimony of alleged statements of defendant which blacken his character and show him to be guilty of other crimes." *Id*. at 117; *see also United States v. Rodriguez*, 367 F.3d 1019, 1029 (8th Cir. 2004) (holding that the *Remmer* "presumption of prejudice does not apply unless the extrinsic contact relates to factual evidence not developed at trial"); *Sunderland v. United States*, 19 F.2d 202, 211-12 (8th Cir. 1927) (reversing

conviction by relying on "rebuttable presumption . . . communications by the juror with outside persons were prejudicial to the moving party," and adding that "[t]he least that can be said about this misconduct of one of the jurors is that it raises a grave doubt whether the constitutional right of plaintiffs in error to a trial by an impartial jury was not infringed").

In this case, it hardly matters whether this Court begins by applying a presumption of prejudice because the information received extrajudicially by jurors and discussed by them during deliberations — a statement by one defendant implicating his codefendants in the charged crime — is so uniquely prejudicial that it can never be deemed harmless. It is precisely because the introduction of Misskelley's statement at a joint trial would have been incurably prejudicial to Echols that the trial of the two defendants were severed in the first place.

In *Bruton v. United States*, 391 U.S. 123 (1968), the high court held that use of a codefendant's confession inculpating the defendant violates the non-confessing defendant's Sixth Amendment right of confrontation. In *Bruton*, the trial court had instructed the jury that the codefendant's confession "was inadmissible hearsay against [Bruton] and therefore had to be disregarded in determining [Bruton's] guilt or innocence." *Id*. at 125. Nonetheless, the denial of the right to confront the witness was so serious that the Court held that a limiting

instruction was not "an adequate substitute for petitioner's constitutional right of cross-examination." *Id*. at 137. The Court held

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. [Citations.] Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Id. at 135-36.

Given the nature and content of the Misskelley statement, its consideration by the jury, like the bailiff's comments in *Parker v. Gladden*, "involved such a probability that prejudice will result that it is to be deemed inherently lacking in due process" and cannot possibly be considered harmless. 385 U.S. at 365.

Furthermore, the Misskelley statement was placed on the jury's "con" list despite the trial court's express admonition that jurors were to ignore Detective Ridge's unwarranted reference to it during his cross-examination by defense counsel.

No rational argument can be made that the evidence against Echols was so overwhelming that the jury's grossly prejudicial consideration of the Misskelley statement could not have influenced their guilty verdict. Considered individually

or collectively, the evidence components of the case against Echols were shockingly weak. That the ballpark girls alone heard Echols publicly and seriously confess to the charged crimes at a softball game strains credulity; neither the knife, fiber, the Hollingsworth identification testimony, nor petitioner's statement to Ridge logically or directly connected Echols to the crime; and the Griffis "expert" testimony was fraudulent.

On the other hand, the defendant offered substantial and essentially unrebutted testimony that on the day of the crimes he was doing what an unemployed but innocent teenager would be doing: being driven by his mother to the doctor, visiting with his girlfriend, having dinner with his family, and talking on the telephone. Rather than being strong, the case against Echols may be among the flimsiest ever to result in a sentence of death in this state or nation.

Of great importance, the trial judge himself having stated that the jury's exposure to the contents of the Misskelley statement would certainly have been prejudicial (EBRT 930-31, *1710-11*), the state cannot reasonably argue to the contrary. That is all the more true when what the jury had heard about the Misskelley confession was terribly inaccurate. One of the reasons why the Misskelley confession was almost surely false was Misskelley's ignorance of the most obvious fact about the victims' condition: they had been hog-tied. Yet Juror Four heard and believed that Misskelley had included a description of the hog-

tying in his statement, rendering the statement credible. This case constitutes a perfect example of how a wrongful conviction can result from a failure to subject unreliable evidence to the constitutionally required process of confrontation and cross-examination.

Finally, as was true in *Parker v. Gladden*, one juror here, the jury foreman, "testified that [he] was prejudiced by the statements." 385 U.S. at 365. The foreman has admitted that the judge told the jurors that they could not consider the Misskelley matter at all, but stated with emphasis: "How could you not?" In statements admissible under the Rule 606(b) exception for evidence bearing on "whether extraneous information was improperly brought to the jury's attention," *Juror Four [*the foreman?] said : "It was a primary and deciding factor. It was a known event. People knew about it. The bottom line: the decision was potentially made upon the knowledge of that fact. It was in the newspapers. I read the newspapers. I was aware there was a trial." He described all the other evidence against Echols and Baldwin as "scanty, circumstantial." He called it a " very circumstantial case [emphasis his]. Look at Manson. If you were to take a thousand cases [he paused here] . . . without Misskelley, it was extremely circumstantial. Misskelley was the primary factor" in the finding that Echols and Baldwin were guilty.

Echols' conviction must be reversed and a new trial ordered.

H. The Denial by the Arkansas Supreme Court of Petitioner's Claim Of Juror Misconduct Was On The Merits And The Decision Was Objectively Unreasonable

The evidence of juror misconduct and bias relied on herein was not developed until 2003 and 2004. For example, Juror Four had been contacted numerous times since the trial by reporters, news people, lawyers and various groups who have asked him to comment on the trial but Juror Four had never granted an interview prior to being contacted on Friday, October 8, 2004, by attorneys for Echols.

Soon thereafter, on October 29, 2004, Echols raised in the Arkansas Supreme Court the claims of jury misconduct and juror bias he is raising here.. The state Supreme Court rejected the claims in an opinion issued on January 20, 2005. The Supreme Court initially cited procedural reasons for denying Echols's motion: "*coram nobis* is not applicable to address and correct the errors that allegedly occurred here, and Echols failed to exercise due diligence in raising these claims. . ." (*See* *Exh. BBB.)

The concluding portion of the court's opinion, however, determined that Echols's claims do not warrant relief because Arkansas evidentiary law bars the proof necessary to establish juror bias and misconduct. The court first explained

that jurors are presumed to be unbiased and to follow their instructions. The jury at Echols's trial having been directed to disregard the witnesses's reference to the Miskelley statement, the court observed that it "will not presume that a jury is incapable of following the trial court's instruction." (Opinion, [*Exh. BBB], at 9 n.4.) The court stated as a matter of law that "Echols's attempt to prove that his jury considered the Misskelley statement is improper." (*Id*. at 9-10 n.4.)

The Court based this ruling on its reading of the matters which may be considered under Arkansas Rule of Evidence 606(b). *Id.* The Court concluded that "[a]lthough Echols argues that he interviewed the jurors in order to determine whether any external influence or information played a role in the jury's deliberations, what he is essentially asking this court to do is to delve into the jury's deliberations in order to determine whether any of them disregarded the trial court's instructions — specifically, the court's instruction to not consider that a witness had mentioned Misskelley's statement." *Id.* In other words, if a court instructs jurors to decide the case only on the properly admitted evidence, a defendant is barred from proving that their verdict was tainted by improper consideration of extraneous information, no matter how unreliable or prejudicial that unadmitted evidence may have been.

I. Because the Arkansas Supreme Court Decided Echols's Claim on the Merits, the State Cannot Defend Against this

Action on Any Claim of a State Procedural Bar

The Arkansas Supreme Court opinion denying Echols's juror bias and misconduct claims initially did so on the procedural ground of untimeliness. Were the state to defend against this action on the ground that the procedural grounds constituted an independent and adequate state procedural bar to federal relief, that contention would be trumped by the fact that petitioner has satisfied the *House* "actual innocence" standard, which overcomes all state procedural hurdles. That aside, however, the state supreme court proceeded to rule that, even had it been timely, Echols' claims lacked merit because they necessarily rested on evidence concerning jury deliberations that was inadmissible under Rule 606 of the Arkansas Rules of Evidence, which is identical in all relevant respects to Federal Rule 606.[33] The state court thus rejected Echols' claims on their merits.

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[33] Arkansas Rule of Evidence 606(b), adopted in 1975, reads:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

"If the state court under state law chooses not to rely on a procedural bar..., then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim." *Harris v. Reed*, 489 U.S. 255, 265 n. 12 (1989). Under *Michigan v. Long*, 463 U.S. 1032 (1983), if "it fairly appears that the state court rested its decision primarily on federal law," the Supreme Court may reach the federal question on review unless the state court's opinion contains a "'plain statement' that [its] decision rests upon adequate and independent state grounds." *Harris*, 489 U.S. at 261 (quoting *Long*, 463 U.S. at 1042).

The *Long* "plain statement" rule applies regardless of whether the disputed state-law ground is substantive (as it was in *Long*) or procedural, as in *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). "Thus, the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: '[T]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.'" *Harris*, 489 U.S. at 261-62 (quoting *Cadwell*, 472 U.S. at 327).

The court in *Harris* extends the *Long* "plain statement" doctrine to habeas corpus review: "A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case " 'clearly and expressly'" states that its judgment rests on a state

procedural bar." *Id.* at 263 (quoting *Cadwell*, 472 U.S. at 327).

In *Harris*, a state appellate referred to the "well-settled" principle of Illinois law that "those [issues] which could have been presented [on direct appeal], but were not, are considered waived." *Id*. at 258. The state court found that petitioner's ineffective-assistance allegations "could have been raised in [his] direct appeal." *Id*. However, the state court went on to consider and reject petitioner's ineffective-assistance claim on its merits. *Id*.

The United States Supreme Court applied the "plain statement" requirement to the above statement made by the state court. *Id.* at 266. The high court concluded that the state court did not "clearly and expressly" rely on waiver as a ground for rejecting any aspect of petitioner's ineffective-assistance-of-counsel claim; the state court "did not appear to make two rulings in the alternative, but rather to note a procedural default and then ignore it, reaching the merits instead." *Id.*. The Supreme Court held there was no procedural bar even though the state court "perhaps laid the foundation" for a procedural bar because the statement "falls short of an explicit reliance on a state-law ground." *Id.* Accordingly, the state court reference to state law would not have precluded the Supreme Court addressing petitioner's claim had it arisen on direct review. *Id.* "As is now established, it also does not preclude habeas review by the District Court." *Id*.

The Supreme Court in *Harris* notes in footnote 13 that "[w]hile it perhaps could be argued that this statement would have sufficed had the state court never reached the federal claim, the state court clearly went on to reject the federal claim on the merits. As a result, the reference to state law in the state court's opinion is insufficient to demonstrate clearly whether the court intended to invoke waiver as an alternative ground. It is precisely with regard to such an ambiguous reference to state law in the context of clear reliance on federal law that *Long* permits federal review of the federal issue." *Id.* at 266 n.13.

Here, the state supreme court, as in *Harris*, cited state procedural bars but nonetheless proceeded to deny Echols's federal constitutional claims of juror bias and on the merits. As in *Harris*, this Court would be empowered to now pass on those claims even had Echols not hurdled the *House* standard, thereby overcoming all assertions of state procedural default.

J. The State Court's Disposal of Echols's Federal Constitutional Claims Was Wholly Unreasonable

As noted above, a state court decision is "contrary to" established federal law within the meaning of § 2254(d)(1) if the state court "failed to apply the correct controlling authority from the Supreme Court." *Williams v. Taylor*, 529 U.S. 362, 405-07 (2000). The state court denied Echols' claims on the ground that they required evidence concerning the jury's deliberations that was inadmissible

under Arkansas Rule of Evidence 606. If that were the case, it would mean that federal claims under cases such as *Turner* and *Parker* could not be heard in state court, a rule which would in itself be unconstitutional, because "[u]nder our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution.'" *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886); *see also Michel v. Lousiana*, 350 U.S. 91, 93 (1955) (holding that a procedural state rule barring review of a federal constitutional issue will not be allowed if it does not provide a reasonable opportunity to have the issue heard by the State court).

In truth, the state court ruling now at issue is not only flatly at odds with the precedents of the United States Supreme Court, but is contradicted by a long line of the state supreme court's own authority. The heart of petitioner's constitutional claims is his assertion, fully supported by the evidence he has presented, that jurors relied on information that they had received outside the courtroom – media reports that Jesse Misskelley had confessed to being involved in the murders of Chris Byers, Michael Moore, and Steve Branch and told the police that Echols and Baldwin were the principal authors of the crimes – in convicting Echols of the three charged murders. The core questions underlying petitioner's claims are "whether extraneous information was improperly brought to the jury's attention or

whether any outside influence was improperly brought to bear upon any juror." The Arkansas Supreme Court's opinion rejecting Echols's claims that state Rule 606(b) bars evidence on these questions, yet the words of the statute, the court's own prior rulings, and those of the federal courts interpreting the parallel federal provision, are to the contrary.

Arkansas Rule of Evidence 606(b) "establishes an extraneous information exception which allows jurors to testify that one or more members of the jury brought to a trial specific personal knowledge about the parties or controversy or acquired such knowledge from sources outside the courtroom during the trial or deliberations." *Witherspoon v. State*, 909 S.W.2d 314, 317-18 (Ark. 1995). While the rule bars presenting evidence of the mental state of jurors in order to argue that the jury improperly considered the evidence introduced into the record or misapplied the instructions given by the trial judge, *Miles v. State*, 85 S.W.3d 907, 912-913 (Ark. 2002)), it is clear that "[t]o show that extraneous materials were brought to the jurors' attention, the trial judge may properly consider the content of conversations that took place in the jury room," *Sunrise Enterprises, Inc. v. Mid-South Road Builders, Inc*., 987 S.W.2d 674, 676-77 (Ark. 1999); *accord Rushen*, 464 U.S. at 121 n.5; *Brown*, 108 F.3d at 867.

In *Capps v. State*, 159 S.W. 193 (Ark. 1913), for example, the court reversed

a first-degree murder case (and its accompanying death penalty) where jurors read newspaper accounts that contained information not adduced at trial.

> It is always improper for a juror to discuss a cause, which he is trying as a juror, or to receive any information about it except in open court and in the manner provided by the law. Otherwise some juror might be subjected to some influence which would control his judgment, something might be communicated to him which would be susceptible of some simple explanation, which could not be made because of the ignorance of the influence to which the juror had been subjected.

Id. at 195. With that focus, the court ruled:

> We believe these [newspaper articles read by jurors] were prejudicial, because they were not a mere narration of the evidence connected with the trial which had occurred within the view of the jury, and that their necessary effect was to convey to the jury the information that public sentiment had crystalized into the conviction that appellant was guilty of the horrible crime of which he was charged; that his children had stood the ordeal of a searching cross-examination, and yet remained firm because, as intimated by the papers, their story was true. These were improper influences, and we cannot know what effect they may have had upon the minds of the jury, and no attempt was made to show that the jury was not influenced thereby, and we, therefore, reverse this judgment, and remand the cause for a new trial.

Id. at 196; *see also Bodnar v. State*, 5 S.W.2d 293 (Ark. 1928) (reversing conviction where jurors were overheard discussing information not received at trial – that people had been seen drunk and fighting at defendant's house in case

charging her with selling whiskey – and the "trend" of the overheard conversation indicated it influenced jurors' decisionmaking); *Forehand v. State*, 11 S.W. 766 (Ark. 1889) (reversing murder conviction where the "jury's misconduct in taking the deceased's pistol and cartridges to the jury-room, and there experimenting with them, apparently for the purpose of testing the truth of the defendant's statement [that it was self-defense], was prejudicial to him. It was evidence taken by the jury out of the court, in the defendant's absence, which is prohibited by the statute, and contrary to the idea of fair and orderly proceedings.").

Much more recently, in *Larimore v. State*, 833 S.W.2d 358 (Ark. 1992), the Arkansas Court reversed the defendant's conviction for the murder of his wife as tainted by possibly prejudicial information which came before the jury improperly. Although a number of proffered exhibits had been ordered suppressed at a pretrial suppression hearing, through inadvertence these exhibits were intermingled with the admitted exhibits and sent to the jury. The trial court denied a motion for a new trial on the ground that "the time of death was the sole issue of fact presented by the evidence and since the extraneous materials were not relevant to that issue, they could not have affected the jury's deliberation." *Id*. at 360.

This Arkansas high court reversed with these words:

> Having reflected on the matter, and for reasons to be explained, we conclude that where no motive was

> deduced, no direct proof of guilt established and such circumstantial proof of guilt as did exist was in sharp dispute, a verdict tainted by the introduction of a mass of materials into the jury room which should not have been there must be set aside. Given the circumstances in their entirety, we are persuaded that a new trial is preferable to a trial encumbered by doubt and should have been ordered.

Id. at 360-61.

As was true of the United States Supreme Court in *Parker v. Gladden*, the *Larimore* court applied the principle that "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Id*. at 361 (quoting *Patterson v. Colorado,* 205 U.S. 454, 462 (1907) (Holmes, J.). *Larimore* also noted its reliance on the trial court's factual finding that the jurors had, in fact, reviewed the materials at issue during deliberations. *Id.*

Rather than Arkansas Rule 606 presenting a general bar to sustaining claims of juror misconduct in considering extraneous information, it appears that the Arkansas Supreme Court distorted its clear meaning in this very controversial case. In any case, the state court's resolution of the federal constitutional claims presented here was clearly contrary to controlling law of the United States Supreme Court and thus unreasonable.

III. ECHOLS WAS DEPRIVED OF HIS FEDERAL

CONSTITUTIONAL RIGHT TO BE JUDGED BY TWELVE IMPARTIAL JURORS CAPABLE OF DECIDING THE CASE SOLELY ON THE EVIDENCE ADMITTED AND THE INSTRUCTIONS GIVEN IN COURT

A. Introduction

As demonstrated in Argument II, newly discovered evidence concerning the extraneous information injected into the deliberations of the Echols jury proves the jury's receipt of, and reliance on, extrajudicial information, a federal constitutional violation; that same evidence also establishes a related but distinct constitutional deprivation: that of a defendant's right to twelve impartial jurors.

The United States Supreme Court have held that a foremost obligation of any prospective juror is that of honesty during the voir dire process; for that reason, a lack of such candor by a venire person is a telling indication that the prospective juror lacks the impartiality required to fairly judge the case. During individualized voir dire at Echols' trial, no juror admitted to being aware of the fact that Jesse Misskelley had given a statement or confession to police interrogators, and certainly none disclosed knowledge that any such statement implicated either Echols or Baldwin. Yet during deliberations the Misskelley statement was listed by jurors as a reason to convict both Echols and Baldwin. That conduct can be explained by the fact that three jurors – Four, Six, and Seven – have now admitted at the time of jury selection they were aware of the Misskelley statement.

Furthermore, Juror Four has admitted an extensive familiarity with the media reports disseminated on the eve of trial, particularly those details incriminatory of Echols and Baldwin, despite the fact that during jury selection he denied knowing anything about the Misskelley matter other than that Misskelley had been previously convicted of something, although Juror Four did not know what.

On voir dire, Juror Nine maintained that he had not discussed the case with his father, a police commissioner in Arkansas, but has recently stated that in a pretrial conversation with Juror Nine, his father "spit out" the details of the case. The receipt of that information surely explains the fact that during the trial Juror Nine not only held the opinion that the defendants were guilty, but that they had supporters in the courtroom who were capable of killing Juror Nine as well, leading the juror to be terribly frightened for his own life at a time he was supposed to be dispassionately deciding the guilt or innocence of Echols. Additionally, Juror Six now has sworn that she decided the guilt of the defendants before hearing closing arguments and the trial court's instructions, also a deprivation of the defendant's right to a fair and impartial jury.

Finally, several other jurors admitted during voir dire that they tended to believe that the defendants were guilty, although they promised to set those opinions aside. The United States Supreme Court has held that such disavowals of bias cannot be deemed conclusive when the exposure of jurors to inadmissible and

prejudicial information is so great that a majority of sitting jurors was predisposed to a finding of guilt when selected to serve. That critical mass was reached in this case, yet another reason why Echols' convictions must be set aside.

B. The Relevant Federal Law

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Id.* (internal quotation marks omitted). While a juror who truly can put aside his or her opinions may fairly serve, "those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to [that juror]." *Id*. at 722 n.3 (quoting 1 Burr's Trial 416 (1807) (Marshall, C.J.)).

In *Irvin v. Dowd*, eight of the twelve jurors selected to sit on the defendant's jury had formed the opinion that he was guilty based on exposure to pretrial publicity, although each stated "that notwithstanding his opinion he could render an impartial verdict." *Id*. at 724. The Supreme Court vacated the defendant's murder convictions and sentence of death, holding that:

> With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so

> huge a wave of public passion and by a jury other than one in which two thirds admit, before hearing any testimony, to possessing a belief in his guilt.

Id. at 728.

A pivotal factor in determining a prospective juror's impartiality is his or her candor in responding to questions on voir dire. "Voir dire plays a critical function in assuring the criminal defendant that his [or her] Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). "The necessity of truthful answers by prospective jurors ... is obvious." *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1984) (plurality); *see also Caldarera v. Giles*, 360 S.W.2d 767, 769 (Ark. 1962) ("There is a duty upon every prospective juror on voir dire examination to make a full and frank disclosure of any connection he may have with the litigants or anything that would or could in any way affect his verdict as a juror.").

That being so, "the honesty and dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." *McDonough*, 464 U.S. at 556 (Blackmun, J., concurring). Writing for a unanimous Court in *Clark v. United States*, 289 U.S. 1, 11 (1933), Justice Cardozo observed: "The judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are wilfully evasive or knowingly untrue, the talesman,

when accepted, is a juror in name only."

C. Echols Was Deprived of His Federal Constitutional Right to Twelve Impartial Jurors

Echols will now demonstrate both that a number of individual jurors lacked the impartiality required to serve as jurors and that the jury, considered collectively, must be found under controlling principles of the United States Supreme Court to have been biased against the defendants.

1. Juror Four

During voir dire, Juror Four acknowledged that he knew of the verdict in the Misskelley case, but stated, "I don't know anything — I couldn't tell you anything about Misskelley except that I understand that he was convicted of something, and I couldn't even tell you of what. . . ." (VDRT 307.)

Juror Four has now stated, however, that around the time he was called as a juror, he was aware that Jessie Misskelley had been brought to the Craighead County Courthouse and had been offered a sentence reduction to 40 years if he testified against Baldwin and Echols. (*See* Exh. VV.) That assertion is surely true, because on voir dire Juror Four stated that he read three newspapers daily, including the Arkansas Democrat Gazette and the Jonesboro Sun, both of which were flooded with stories about the Misskelley confession, conviction, and plea negotiations in the weeks before the Echols trial. Juror Four has stated that prior to

petitioner's trial, he had heard that Misskelley made a confession to authorities implicating Baldwin and Echols, stating that the three victims had been hogtied, that they were castrated, and that Echols and Baldwin had made Misskelley chase the victims down and catch them. Juror Four has also stated that he believed it was unreasonable to expect the jury to ignore the Misskelley confession, which was published in the newspapers.

Thus, during voir dire, Juror Four made misleading statements about the state of his knowledge regarding the case, stating that he knew virtually nothing about Misskelley when in fact he knew a great deal, including specific details published in the newspapers concerning Misskelley's statement.

Furthermore, during voir dire, Juror Four had heard and watched as Prospective Jurors Sharp and Hartshorn were excused because they admitted that they could not follow the court's command to "set aside" what they had heard in the media "and let your decision in this case be dictated by the evidence that you hear in the courtroom." (VDRT 17-18.) The court then again informed the remaining jurors, including Juror Four, that: "We're asking you to disregard what you've read, seen, or heard.. . . [I]t's important that a person have a fair and impartial trial and that your mind should not be made up from outside influences . . . ." (VDRT 19.) The court then asked each juror whether "you are prepared to listen to the evidence and let your mind be – your decision on this case be

determined by what you hear in the courtroom and the law given you by the Court?" (VDRT 19.) By failing to step forward as Jurors Sharp and Hartshorn had done, Juror Four indicated to the trial judge and counsel his ability and willingness to comply with that fundamental rule, yet he has since admitted that he thought the court's command to ignore media reports was "unreasonable" and that he violated it by relying on the decision of the Misskelley conviction in deciding to convict.

In order to gain a new trial on the ground that a juror was biased, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough,* 464 U.S. at 556 (1984). Juror Four did not honestly answer questions on voir dire concerning his knowledge of the case and his willingness and ability to judge the case on the evidence alone, and honest answers in regard to these matters certainly would have provided a valid basis for a challenge for cause. The presence of even a single biased juror cannot be deemed harmless, of course, because a defendant "is entitled to a trial by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker*, 385 U.S. at 366. A new trial would be in order on the ground of Juror Four's bias alone.

2. Juror Six

In her affidavit of June 8, 2004, Juror Six stated, "I made it clear prior to being seated as a juror that I knew about the Jessie Misskelley case through the

newspaper and having seen stories about him and his case on television." (Exh. YY.) Juror Six did not state on voir dire, however, that she "was aware that Misskelley had confessed to the police," a fact she has now revealed in her affidavit which would have provided a basis for a challenge for cause. Juror Six thus qualifies as a biased juror under the *McDonough* test.

Juror Six further stated in her affidavit that "I recall that many days that testimony was presented during the trial, we jurors would talk to one another in the jury room using our notes to help us understand what was going on. We all read from our notes to each other at the end of the day, or in the mornings. We did this in the jury room where we gathered during breaks in the trial, and whenever we were excluded from the courtroom due to issues discussed outside of our hearing." Juror Six continued:

> My recollection of this process of daily reviewing our notes with one another is that it permitted us to assess whether we had missed something, or did not write down a matter of significance during the course of the testimony. I recall reading to other jurors from my notes, and it was clear to me that certain other jurors had missed matters that I had noted. I found that this process helped me to better understand the evidence at trial...
>
> As a result of this daily process of observing witnesses and reviewing notes and daily discussions with my fellow jurors, and based on my view of the evidence as I was hearing it in court, it was clear to me even before the deliberations that the defendants were guilty.

Juror Six was a biased juror for this reason as well.

3. Juror Nine

During voir dire, Juror Nine stated that he had not talked about this case with his father, who was a police commissioner in Arkansas. (VDRT 436.) In a recent interview, however, Juror Nine stated that when he called his father after being selected as a juror, he learned that his father had heard about the case, which had received state-wide, maybe tri-state wide, media attention. When Juror Nine told his father that he was going to be a juror, his father "started spitting out the details." (Exh. ZZ.) Yet, when questioned by the trial court prior to deliberations as to whether any juror had received information from an outside source, Juror Nine did not disclose this conversation with his father.

Juror Nine thus gave a false answer to a court inquiry. Had Juror Nine been more forthcoming, the defense could have unearthed the likelihood that the information he had received about the case prior to trial had created a bias against the defendants that had led him to prejudge their guilt. Juror Nine stated that his "jury experience 'spooked the hell'" out of him and that he "never felt so scared." He couldn't sleep at night and "felt he could hear noises outside and would look out the window." His fear was the result of the "talk of those kids being part of a cult, and looking into the audience and seeing the victim's families and the

families of the accused." Although he was never personally threatened, he felt that something could happen to him. Juror Nine thought that since the kids on trial were not afraid to kill, maybe they had friends or were part of a cult that was capable of killing. When Juror Nine looked into the gallery, he saw people that he associated with the defendants and thought, "They're going to kill me." (Exh. ZZ.)

Juror Nine's fear during the taking of testimony that friends of the defendant were going to kill him was based both on matters not in evidence and his own prejudgment of the defendants' guilt of the charged murders. Obviously, a juror who before hearing all the evidence fears that a defendant is a murderer whose confederates mean the juror harm is not the sort of impartial arbiter contemplated by the Fifth and Sixth Amendments. Juror Nine was a biased juror whose presence on the jury deprived Echols of a fair trial.

4. Juror Seven

Juror Seven's affidavit states that, before serving on the jury, she knew about the earlier trial of Jessie Misskelley in Corning in which Misskelley had been found guilty and she believed she also knew that he had confessed to the crime. (Exh. XX.) Juror Seven did not reveal her knowledge of either of these facts during voir dire. These facts, combined with the fact that despite the court's admonition to ignore the Misskelley statement, Juror Seven listed it in her notes as a reason to convict both Echols and Baldwin, establish that she meets the legal

standard for a biased juror.

5. Juror One

During voir dire on February 23, 1993, Juror One stated that she had heard "an awful lot" about the case through the Jonesboro Sun and the Arkansas Democrat, Television Channels 7 and 8, and reading articles on a daily basis. (VDRT 35, 49-50.) Juror One then stated that "anyone under these circumstances would form an opinion," no doubt referring to the pervasive media coverage of the case, and that she had formed an opinion the defendants were guilty.

In fact, the Arkansas Democrat had run an article that very morning of February 23rd stating: "In a June 3, confession to West Memphis police, [Misskelley] said he helped Echols and Baldwin subdue the victims on May 5 and watched as the teen-agers beat and sexually abused Christopher Byers, Michael Moore, and Steve Branch." (Exh. G.) Thus, when the trial judge suggested that every juror knew of the Misskelley statement, he no doubt was right as to Juror One. Just as surely, Juror One knew the contents of that statement, reported again in the press that morning, leading Juror One to believe Echols and Baldwin guilty.

To be sure, Juror One stated during voir dire that she believed that she could put her opinion of the defendants' guilt aside and judge the case on the evidence admitted at trial. When a jury's exposure to inadmissible and prejudicial news reports is as extensive as it was in this matter, however, the United States Supreme

Court has found such self-appraisals inadequate to sustain a resulting conviction. *See Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966).

6. Juror Five

Juror Five acknowledged that she received the Jonesboro Sun every day and had read about the case regularly. Her feeling was that she was leaning to believing that the defendants had probably committed the crime, and nothing had yet changed that feeling, although she believed that she could begin the trial believing the defendants were innocent. (VDRT 337-38.) What had led her to believe the defendants were guilty was "a law enforcement officer who said that he felt like it was a pretty well open and shut case, you know, that they had enough evidence." (VDRT 338-39.) In light of the outside influences operating on so many of Juror Five's fellow jurors and Juror Five's own pre-existing opinion of the defendants' guilt, Juror Five's statement that she could judge the case based on the evidence alone was inadequate to ensure her impartiality.

7. Jurors Ten, Two, Three, Eight, Eleven, and Twelve

Juror Ten stated in voir dire that it "seems the general opinion is that everybody thinks they're guilty." (VDRT 510.) Jurors Two, Three, Eight, Eleven, and Twelve had all been exposed to press coverage or public discussion of the case, had heard other prospective jurors describe the case as open and shut and express unshakeable opinions that the defendants were guilty, and in the trial

judge's opinion almost surely knew of the Misskelley statement. When considered collectively, the exposure of the jury to prejudicial and inadmissible information was as great in this case as was the case in *Rideau*, *Irvin*, or *Sheppard*. Echols was deprived of his right to twelve impartial jurors, and his convictions consequently must be vacated.

IV. THE PROSECUTION'S USE OF THE GRAPEFRUIT EXPERIMENT IN CLOSING ARGUMENT CONSTITUTED MISCONDUCT IN VIOLATION OF ECHOL'S RIGHT TO DUE PROCESS OF LAW

Petitioner has explicated at length the manner (1) in which prosecutor Fogelman conducted a profoundly misleading experiment with a grapefruit and the lake knife in closing argument, and (2) how both Fogelman and prosecutor Davis made assertions of fact concerning the knife and the injuries it purportedly caused that were unsupported by the evidence in the trial record. In engaging in that experiment and making those assertions of personal knowledge, the prosecutors were guilty of prosecutorial misconduct that deprived Echols of a fair trial. Given that all of the assertions the prosecutors made have proven entirely false, their misconduct was devastatingly prejudicial.

Prosecutorial arguments that manipulate or misstate the evidence violate the Due Process Clause. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *United States v. Mullins*, 446 F.3d 750, 757 (8th Cir. 2006). "[T]he prosecutor must limit the closing argument to 'the evidence and the reasonable inferences that may be

drawn from it.'" *United States v. White*, 241 F.3d 1015, 1023 (8th Cir. 2001) (quoting *United States v. Robinson*, 110 F.3d 1320, 1327 (8th Cir. 1997)). Argument that goes beyond the evidence and reasonable inferences drawn therefrom constitutes misconduct. *See id.*; *see also United States v. Santana*, 150 F.3d 860, 863 (8th Cir. 1998) (referring to facts outside the record constitutes misconduct); *United States v. Necoechea*, 986 F.2d 1273, 1277-78 (8th Cir. 1992); *United States v. Smith*, 962 F.2d 923, 933-34 (8th Cir. 1992) (same).

Here, prosecutor Fogelman either knew, or certainly should have known, that the experiment he conducted with a grapefruit could not possibly accurately replicate knife wounds on a human body. In *Miller v. Pate*, 386 U.S. 1 (1966), the prosecutor argued that a pair of shorts allegedly worn by the defendant were soaked in blood. Yet, at the time of trial, the prosecutor knew the stains on the shorts were paint. The Supreme Court vacated the conviction, stating:

> More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Mooney v. Holohan*, 294 U.S. 103 []. There has been no deviation from that established principle. *Napue v. Illinois*, 360 U.S. 264 []; *Pyle v. Kansas*, 317 U.S. 213 []; cf. *Alcorta v. Texas*, 355 U.S. 28 []. There can be no retreat from that principle here.

Id. at 6-7.

In *Alcorta v. Texas*, 355 U.S. 28, 31 (1957), the Supreme Court held a

conviction must be reversed when it is based on testimony which gave the jury a "false impression" and which the prosecutor knew was misleading. In a case in which the defendant claimed to have killed his wife in the "heat of passion," a critical prosecution witness had suggested to the jury that he had not had an affair with the victim, when the prosecutor knew the contrary to be true. A new trial was ordered.

Here, a challenge to the grapefruit experiment, which was objected to only on the basis of state evidentiary principles, was made in the state supreme court; finding no abuse of discretion, that court denied the claim. *Echols I*, 936 S. W.2d at 538-39. The failure to raise a federal constitutional claim in state court, however, is remedied by petitioner's *House* showing.

As noted above, under _ 2254(d)(1), habeas relief is warranted when the defective state court ruling satisfies *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In this case, given the meager evidence against Echols and the central role the prosecutorial misconduct concerning played in the state's closing argument, the *Brecht* standard for prejudice is plainly met. "Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." *United States v. Kojayan*, 8 F.3d 1315, 1323-24 (9th Cir. 1993). Any claim that the grapefruit experiment and related arguments were either constitutionally acceptable or

harmless would be objectively unreasonable. A new trial is in order on this ground as well.

V. THE STATE COURT'S RESTRICTION ON THE CROSS-EXAMINATION OF NARLENE HOLLINGSWORTH WAS FEDERAL CONSTITUTIONAL ERROR

Narlene Hollingsworth testified that her son Anthony, who had been the prior witness for the prosecution, ate with the family, but lived out in a camper on her land, because "he has to." (EBRT 1305, 2086.) The prosecution objected to further questioning on the matter; Narlene added "He didn't kill anyone;" and the court sustained the objection. (*Id*.) It is now known that had further questioning been permitted, the jury would have learned that at the time he testified Anthony was on ten years of felony probation after pleading guilty in 1991 to sexually abusing his then eight-year-old sister, Mary. John Fogelman had been the prosecutor in Anthony's case.

A criminal defendant has a federal constitutional right to proof on cross-examination that a prosecution witness is on probation, parole, or facing charges because those facts provide a strong motivation to cooperate with prosecutors. *See, e.g.*, *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974); *Alford v. United States*, 282 U.S. 687 (1931).

Consistent with the constitutional principles set forth in *Davis* and related

precedent, matters which may reasonably be expected to color the testimony of a witness or cause him to testify falsely are proper subjects of impeachment inquiry directed at any witness. *United States v. Abel*, 469 U.S. 45, 51 (1984) This rule moreover, has specific application to witness bias which, in common acceptance, covers all varieties of hostility or prejudice by the witness against the opponent or in favor of the proponent. *Id.* Thus, as the Supreme Court stated in *Abel*,

> Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. *Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.*

Id. at 51 (emphasis added)**.**

That the exposure of Anthony's sexual molestation of a child would have been profoundly embarrassing to him provided no basis for excluding inquiry into his criminal record. In *Olden v. Kentucky* 488 U.S. 227 (1988), the Kentucky Court of Appeals had ruled that a line of cross-examination tending to show that the state's chief witness had a motive to lie to her husband about whether she had been raped — she, a white woman, was having an extramarital affair with a black man — although relevant, was properly excluded at trial because "its probative

value [was] outweighed by its possibility for prejudice." *Id*. at 230-31.

Relying on *Davis v. Alaska*, the Supreme Court found that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* The Sixth Amendment is violated when a defendant is "prohibited from engaging in otherwise proper cross-examination designed to show a prototypical form of bias on the part of the witness." *Id.* A new trial was required in *Olden* because "a reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." *Id*. at 232 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)).

Both Anthony and his mother had reasons to curry favor with the prosecutor who had placed Anthony on probation. Their eyewitness testimony was the only evidence that had any tendency in reason to place Echols near the crime scene. The jury "might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." The erroneous exclusion of proper and powerful evidence of both witness's bias was federal constitutional error that had a substantial and

injurious effect on petitioner's defense, meriting habeas relief.[34]

VI. ECHOLS WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF EFFECTIVE AND CONFLICT-FREE COUNSEL

1. Introduction

Petitioner Echols presented numerous claims of ineffective assistance of counsel to the Arkansas Supreme Court, among them:

[34]As with the prior argument, the failure of petitioner's appointed counsel to raise this federal claim in state court is remedied by his *House* showing.

(1) his counsel was ineffective in failing to assure that petitioner was tried before twelve impartial jurors, especially after voir dire revealed that the prospective venire persons had been exposed to massive prejudicial publicity. That publicity included intense media coverage from the trial of Jesse Misskelley, who had been convicted in a nearby county only a few weeks before the Echols-Baldwin trial was to begin in Jonesboro. Defense counsel's failure to seek a continuance and/or a second change of venue, as well their failure to adequately voir dire on the issues of bias and prejudicial publicity, resulted from, and constituted an adverse effect of, trial counsels' conflict of interest arising from contractual obligations they had entered into with producers of a documentary about the trial;

(2) trial counsel failed to move the court for funds to hire expert witnesses, including forensic pathologists, and likewise failed to obtain and present any such experts by other means; and

(3) defense counsel failed to investigate and obtain the evidence of juror bias and misconduct that later was presented in October of 2004 to the Arkansas Supreme Court in petitioner's "Motion to Reinvest Jurisdiction" and to this Court in the present petition.

The Arkansas Supreme Court rejected each of these contentions on the

ground that each failure by petitioner's counsel to act was a reasonable tactical decision. That holding was largely based on the court's conclusion that petitioner had failed to prove that any one of these omissions was prejudicial. Petitioner will now demonstrate that each of these shortcomings on the part of defense counsel was indeed highly prejudicial to his efforts to defend himself and thereby deprived him of his federal constitutional rights to the assistance of conflict free and effective counsel and to a fair trial.

B. The Relevant Law

1. Conflict of Interest

The United States Supreme Court enunciated the standard for establishing such a violation in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and related precedent. The standard articulated in *Sullivan* holds that to establish a Sixth Amendment violation based on a conflict not exposed on the record in the trial court, a defendant must show: (1) the presence of an actual conflict of interest; and (2) that the conflict resulted in an adverse effect upon the lawyer's performance. Once the defendant establishes such an adverse effect, he need not establish prejudice, which is presumed to result from the conflict. 446 U.S. at 349-50; *Mickens v. Taylor*, 535 U.S. 162, 172-73 (2002).

A defendant can establish an "adverse affect" on his counsel's representation

by demonstrating that "a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests." *United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990) (citing *Brien v. United States*, 695 F.2d 10, 15 (1st Cir. 1982)). Alternatively, a defendant can show that "some plausible alternative defense strategy or tactic — 'a viable alternative' — might have been pursued. *Perillo v. Johnson*, 79 F.3d 41, 449 (5th Cir. 1996); *see also United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1988), *cert. denied*, 492 U.S. 906 (1989) (holding that to prevail on claim under *Cuyler*, the defendant simply needs to show that an alternative was available to counsel and that it 'possessed sufficient substance to be a viable alternative' [quoting *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985)])

The defendant need not show that any such "available strategy" is likely to have resulted in a different outcome at trial. *See, e.g.*, *Rosenwald v. United States*, 898 F.2d 585, 589 (7th Cir. 1990)(per curiam)(relief required even though strength of the state's case makes it improbable the conflict caused any harm to the accused); *Thomas v. Foltz*, 818 F.2d 476, 483 (6th Cir. 1987) (pressure to plead guilty, brought to bear by conflicted attorney, requires reversal even though strength of state's case makes it obvious non-conflicted attorney would have given

same advice); *United States v. Cancilla*, 725 F.2d 867, 871 (2d Cir. 1984)(when conflict induced attorney to retreat from particular defense, reversal is mandated; "it is irrelevant that such a defense is unlikely to prevail and was unsuccessfully urged by [co-defendant]"; *Westbrook v. Zant*, 704 F.2d 1487, 1499, & n. 14 (11th Cir. 1983) (reversible error if conflict prompted counsel to refrain from raising a particular defense, even if that defense would not have proven successful); *Brien v. United States*, 695 F.2d 10, 15 (1st Cir. 1982) (to prevail on conflict claim, petitioner need only show conflicted attorney failed to pursue plausible strategy, not that strategy would have been successful).

Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court held that in order to succeed in challenging a conviction on this basis: (1) the defendant must show that counsel's performance fell outside the wide range of professional competence; and (2) the defendant must prove that his trial counsel's conduct was prejudicial to his case, *i.e.*, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688-93. Stated otherwise, ". . . to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonable competence, and that

the deficient performance prejudiced the defendant." *United States v. Villalpando*, 259 F.3d 934, 938 (8th Cir. 2001) (citing *Strickland*, 466 U.S. at 687).

Under *Strickland*, decisions may not be viewed as "tactical," and hence do not merit deference, when they are the product of counsel's ignorance or lack of preparation. *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986); *see also United States v. Gray*, 878 F.2d 702 , 711 (3d Cir. 1989). Furthermore, a "reasonable probability" of a different outcome does not require a showing that counsel's conduct more likely than not altered the outcome in the case, but simply "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693-4; *see also Kyles v.Whitley*, 514 U.S. 419, 434-35 (1995) (A "reasonable probability" is less than a preponderance of the evidence)

3. Defense Counsels' Failure To Seek A Continuance And/Or a Second Change Of Venue, As Well As To Adequately Voir Dire, Deprived Echols Of His Right to Effective and Conflict Free Counsel

The state supreme court denied relief on petitioner's claims raised in his Rule 37 motion that his trial counsel failed to protect his right to be judged by twelve impartial jurors. The court did so principally on the ground that any shortcomings in that regard were harmless. Specifically, the Court held that as to the failure to move for a second change of venue to a site other than Jonesboro:

> The record reflects that the crimes were committed in Crittenden County. A change of venue was granted in

> Misskelley's case to Clay County. Likewise, Echols and Baldwin received a change of venue to Craighead County. Misskelley was tried first. Part of the State's evidence against Misskelley was his custodial confession. Approximately two weeks after Misskelley's trial in Clay County, Echols and Baldwin were tried in Jonesboro, the county seat of Craighead County. Echols contends that trial counsel was deficient in failing to ask for a second change of venue to hold the trial outside of the entire Second Judicial Circuit, of which Crittenden, Clay, and Craighead Counties are part. There is no merit to this contention....
>
> The bottom line is that Echols cannot show that the decision not to seek a second change of venue was anything other than trial strategy or that it prejudiced his defense. As this court has previously explained:
>
> The decision of whether to seek a change of venue is largely a matter of trial strategy and therefore not an issue to be debated under our post-conviction rule. *To establish that the failure to seek a change in venue amounted to ineffective assistance of counsel, a petitioner must offer some basis on which to conclude that an impartial jury was not empaneled.* Petitioner here does not specify any conduct of a juror from which it can be ascertained that the juror was unprepared to afford him an impartial hearing of the evidence. Jurors are presumed unbiased, and the burden of demonstrating actual bias is on the petitioner. The essentially conclusory allegations made by petitioner are not sufficient to overcome the presumption that the jurors were truthful when they stated that they could give the petitioner a fair trial. A defendant is not entitled to a jury totally ignorant of the facts of a case, and he is not entitled to a perfect trial, only a fair one. [Cites omitted]

354 Ark. at 559-561 (emphasis in original)

As to the claim of a failure to seek a continuance, the state supreme court

stated:

> Price testified that he wanted the trial over before the film was released because he was concerned that the film's release would create even more media publicity and could lead to potential jurors having more pretrial knowledge about the case. Contrary to Echols's assertion, Price's decision does not demonstrate that he was placing the interests of the film and its makers over that of his client. Rather, under the circumstances, the decision whether to seek a continuance was a matter of trial strategy and tactics, upon which experienced advocates could endlessly debate. *See Monts v. State*, 312 Ark. 547, 851 S.W.2d 432 (1993). Moreover, as set out in the point pertaining to *voir dire*, Echols has failed to show that he was prejudiced by counsel's decision not to seek a continuance. Accordingly, we affirm on this point.

354 Ark. at 559.

On the issue of inadequate voir dire, the court stated:

> This court will not label counsel ineffective merely because of *possible* bad tactics or strategy in selecting a jury. *See Johnson v. State,* 321 Ark. 117, 900 S.W.2d 940 (1995). Jurors are presumed unbiased and qualified to serve. *Isom v. State,* 284 Ark. 426, 682 S.W.2d 755 (1985) (*per curiam*). To prevail on an allegation of ineffective assistance of counsel with regard to jury selection, a petitioner first has the heavy burden of overcoming the presumption that jurors are unbiased. *Tackett v. State*, 284 Ark. 211, 680 S.W.2d 696 (1984) (*per curiam*). To accomplish this, a petitioner must demonstrate actual bias, and the actual bias must have been sufficient to prejudice the petitioner to the degree that he was denied a fair trial. *Id.* Bare allegations of prejudice by counsel's conduct during *voir dire* that are unsupported by any showing of actual prejudice do not

> establish ineffective assistance of counsel. *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983) (*per curiam*), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1331, 79 L.Ed.2d 726 (1984).
>
> Echols has failed to show the existence of an actual bias on the part of some or all of the jurors.

354 Ark. at 556.

It is now apparent, however, as demonstrated above in Argument III, that the jury that found petitioner guilty of the charged murders and condemned him to die was in fact deeply biased, in the sense that most jurors carried into the trial a strong pre-judgement based on media reports that the defendant was guilty. Rather then setting that pre-judgment aside, these same jurors relied on it and the extraneous, inflammatory, and false information on which it rested to convict petitioner.

The biased nature of the jury having been established, the failure of defense counsel to act to counter such bias cannot be deemed to constitute a reasonable trial tactic. For example, the court said of this of lead defense counsel Price's failure to see a continuance;

> Price testified that although there was a great deal of publicity stemming from Misskelley's trial, he felt that a continuance would not be in his client's best interest because he believed that the media interest would not have waned at all by continuing the case for a month or two. He stated further that there was a good chance that the opposite would occur, that the publicity would have increased. He also stated that although he could not

> recall whether he had consulted with Echols on this particular decision, he believed that he had consulted with his client about every major decision in the case. Price also voiced concern about delaying the trial beyond the scheduled release date for the film, not for benefit of the filmmakers or HBO, as Echols asserts, but because the release of the film may have influenced potential jurors against Echols.

354 Ark. at 546.

It is hard to imagine that the contaminating effect of the Misskelley trial could have been worse months down the road than it was two weeks after Misskelley was convicted. Even if that proved to be the case, Price's obligation and only reasonable tactical choice was not to try his case before a biased jury, but to seek a continuance in March of 1994 on the quite valid ground that a fair jury could not be obtained in Jonesboro at that time, and then to seek yet another continuance later if the same conditions remained true on the date to which the trial had been continued.

Furthermore, Price's claim to be concerned about needing to the trial over before the film was released was disingenuous at best. The agreement with the HBO filmmakers, which was entered into evidence as Petititoner's Exhibit 33 at the Rule 37 hearing (RT 421 of May, 1998 hearing), anticipated that one interview with Echols would be conducted "during Echols' trial" and another "following the completion of the trial..." Furthermore, as the Arkansas Supreme Court noted, it

was a condition of the HBO contract that the parties would agree to the trial being filmed. Thus it Price was simply not true that Price feared that the documentary would be released before the trial; the trial was the entire point of the film. What is logical to conclude is that by declining to seek a continuance, Price was assisting the film makers in meeting the completion date for the film stated in the contract: October 30, 1994.

In any case, if Price did truly fear that the film could cause prejudice to his client, then he most definitely suffered from a conflict of interest, because the documentary could not possibly have been made had not Price agreed to participate in it himself, and had he not urged his client to do likewise. 354 Ark. at 546. It was the access that Price gave the film makers's cameras to petitioner and to the courtroom that made the project commercially feasible. Indeed, Price not only agreed to sign a waiver giving film makers a right to use his image — Petitioner's Exhibit 34 at the May, 1998 hearing; RT 447-448 — remarkably, he agreed to recreate a confidential strategy between, himself, co-counsel, and a defense investigator for inclusion in the documentary. 354 Ark. at 547. Plainly, an attorney who feels obliged to go to trial before a biased jury in order to avoid a greater problem of prejudicial publicity that the attorney himself created is suffering from a debilitating conflict of interest.

In one bizarre explanation of his failure to move for a second continuance,

Price acknowledged that Judge Burnett had indicated that despite a state rule stating that there could only be one change of venue and it had to be to another location in the same judicial circuit, the judge deemed himself to have the power to grant both a second change and one outside the judicial district if needed to find the unbiased and unprejudiced jury guaranteed to the defendant by the due process clause. Yet, according to Price, one reason that he did not move for a change of venue was because he believed that Burnett did not have the authority to grant it. (RT of Rule 37 hearing of May of 1998, at 644-648) In other words, Price was not willing to obtain a benefit offered by a judge in order to protect his client's federal constitutional rights because he felt to do so would offend state law. No competent defense lawyer in a capital case would maintain such a position.

But nothing is as shocking as Price's proffering of false testimony concerning why he failed to seek a continuance or change of venue from Jonesboro once it became apparent that potential jurors had been tainted by pretrial publicity.

In pretrial proceedings, Price did what even the most minimally competent lawyer would do in a case where a co-defendant, in this case Misskelley, had given a statement implicating both the co-defendant himself and the attorney's client, Echols. Thus, Price made sure that Misskelley was tried separately to ensure that Echols's jury did not hear the non-testifying co-defendant's statement, the admission of which would have violated Echols' Sixth Amendment right to

confrontation. And when detective Bryn Ridge slipped into his testimony a reference to the Misskelley statement, Price entered an immediate objection and moved for a mistrial. In further discussion outside the presence of the jurors, Price argued, "The basis [for the mistrial] is the question that I asked the officer did not call for him blurting out the fact that Jessie Misskelley gave a confession. The whole purpose for our trial being severed from Mr. Misskelley's trial in the first place, was the confession that Jessie Misskelley gave." (RT 924, *1704*)

Yet when pressed at the Rule 37 hearing as to why he tried the case in a place and at a time when jurors were likely to just have been exposed to the Misskelley confession immediate reports, Price

> indicated that he thought it would be beneficial to the defense that many of the jurors would have been exposed to the reports of Misskelley's trial. Price reasoned that because Misskelley's conviction had rested largely on his confession, and because the confession would not be admitted during Echols's trial, he thought that potential jurors would be less inclined to convict.

354 Ark. at 560.

This testimony was utter nonsense. Any lawyer not suffering from dementia would know that jurors exposed to an unadmitted and inadmissible statement of a co-defendant implicating their client will likely convict on that basis, which is precisely what we now know occurred at the trial of Echols and Baldwin. Price

was not *non compes mentis*; that is precisely why he moved for a mistrial at the time of Ridge's misconduct in referring to the Misskelley statement. That Price would be so bent on self-justification that he would testify to the contrary at the Rule 37 hearing only confirms that he lacked the commitment to his client required to provide constitutionally adequate representation to petitioner in this immensely important case. The denial by the Arkansas Supreme Court of petitioner's Sixth Amendment claims on these grounds was both contrary to, and involved an unreasonable application of, clearly established federal law, within the meaning of 28 U.S.C. § 2254(d)(1) and was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings within the meaning of 28 U.S.C. § 2254(d)(2).

D. Defense Counsel Were Inadequate in Failing to Retain Forensic Experts

Price never sought funding for experts from the trial court. He justified that failure by stating that he had decided to instead use funds from the HBO contract to fund experts, although the entirety of the money to be paid under the contract — $7,500 — was hardly sufficient to fund experts in a case of this complexity. Be that as it may, Price never talked to, met with, or retained a forensic pathologist. (RT of Rule 37 Hearing, at 655-657) The evidence of the forensic experts offered in support of this petition demonstrates that Price's omission resulted in the

defense's failure to obtain and present evidence of animal predation that would have prevented petitioner's conviction.

Defense Counsel's Failure to Move for a New Trial Based on Evidence of Juror Misconduct and Bias

The Arkansas Supreme Court's January 20, 2005 ruling denying petitioner's motion to recall the mandate and to reinvest jurisdiction in the trial court for purposes of convening coram nobis proceedings stated that the claims of juror misconduct and bias raised therein were untimely, as they should have been raised in the wake of petitioner's trial. One of two things is true: (a) that ruling was unreasonable because the evidence of juror misconduct and bias could not have been unearthed at an earlier date; or (b) the ruling effectively establishes the unreasonableness of trial counsel's omission in this regard. If the latter, trial counsel's failure prejudiced Echols within the meaning of *Strickland* for the reasons set forth in Argument II, *supra*.

The state supreme court concluded that Echols was alerted to the basis for his claims by facts reflected in the trial record, i.e., a witnesses's reference to the Misskelley confession while testifying at trial, and the trial court's observation that everyone in the courtroom knew that Misskelley had given a statement. (Opinion,

at 8)[35] The state court effectively held that petitioner's trial lawyers rendered constitutionally ineffective assistance of counsel as a matter of law by failing to bring such a motion.

[35] A valid factual finding that the newly discovered evidence on which petitioner's constitutional claims rest could have been discovered at an earlier date would appear possible only after the convening of an evidentiary hearing.

As explained in *Strickland*, ". . . 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." *Strickland*, 466 U.S. at 690-91. Thus, under *Strickland,* decisions may not be viewed as "tactical," and hence do not merit deference, when they are the product of counsel's ignorance or lack of preparation. *United States v. Gray*, 878 F.2d 702 , 711 (3rd Cir. 1989); *Wade v. Armontrout,* 798 F.2d 304, 307 (8th Cir. 1986).

There can be no conceivable and acceptable reason for a lawyer's failure to raise a colorable complaint of jury misconduct and bias by way of a new trial motion following the guilt and penalty phase verdicts. In this case, if the state court is correct that a timely new trial motion could have established the facts that petitioner can now prove — that jurors aware of the unadmitted and inadmissible Misskelley statement concealed that knowledge on voir dire and then discussed and relied on the statement in deliberations to convict — petitioner's convictions surely would have been vacated before judgment. Given the injury to petitioner's Sixth Amendment rights, the judgment against him should be vacated on this basis alone.

For all of the reasons stated above, petitioner was deprived of his right to

effective assistance of conflict free counsel. The state court's rulings rejecting these claims (1) were contrary to, or involved an unreasonable application of, clearly established federal law, within the meaning of 28 U.S.C. § 2254(d)(1) and/or 2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings within the meaning of 28 U.S.C. § 2254(d)(2).

CONCLUSION

For all of the foregoing reasons, this Court should grant the petition and vacate petitioner's state murder convictions.

Dated: October 27, 2007

Respectfully submitted,

Dennis P. Riordan
Donald M. Horgan

RIORDAN & HORGAN

By _____
Dennis P. Riordan

By _____
Donald M. Horgan

Attorneys for Petitioner
DAMIEN ECHOLS