House, the evidentiary showing offered herein completely undermines the state's evidence and convincingly points in the direction of alternative suspects. Every reasonable juror hearing Echol's new evidence would doubt his 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 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. 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.)[28] 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.)[29]

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

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

[29] 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.)

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 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.)[30] 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.

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[30] 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.)

In response to the court's threshold question as to whether prospective jurors could award the defendants the presumption of innocence, one juror quickly 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,[31] 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

[31] 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,[32] 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

[32] 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.

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 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, 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) 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 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.[33] 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

Under AEDPA, 28 U.S.C. § 2254(d), 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

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[33] The authentication of these photos can be found in Exhibit A.

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), 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.[34] The state court thus rejected Echols' claims on their merits.

"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

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[34] 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.

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 Arkansas high 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 *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. *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.[35]

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[35]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.

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:

(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. Trial 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.

(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 a constitutional violation for conflict of interest of defense counsel in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). 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. 446 U.S. at 349-50. Once the defendant establishes such an adverse effect, he need not establish prejudice, which is presumed to result from the conflict. *Id.*; *see also 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).

2. Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme 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 Arkansas supreme court denied 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. 354 Ark. at 559-561. 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 held:

> 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, 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 providing 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 his own understanding of 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, 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.

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

The Arkansas Supreme Court's ruling on January 20, 2005, which denied 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 section II, above.

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.)[36] 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.

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

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[36] 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.

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).

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CONCLUSION

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

Dated: October 29, 2007

Respectfully submitted,

Dennis P. Riordan
Donald M. Horgan

RIORDAN & HORGAN

By /s/ Dennis P. Riordan
Dennis P. Riordan

By /s/ Donald M. Horgan
Donald M. Horgan

Attorneys for Petitioner
DAMIEN WAYNE ECHOLS

PROOF OF SERVICE BY MAIL
Re: Damien Wayne Echols v. Larry Norris, Director No. 04CV00391 WRW

I am a citizen of the United States; my business address is 523 Octavia Street, San Francisco, California 94102. I am employed in the City and County of San Francisco, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served the within:

MEMORANDUM IN SUPPORT OF SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

Larry B. Norris, Director
Arkansas Department of Corrections
6814 Princeton Pike
Pine Bluff, AR 71603

Brent Gasper, Esq.
Deputy Arkansas Attorney General
Arkansas Attorney General's Office
323 Center Street, Ste. 200
Little Rock, Arkansas 77201

Brent Davis
Prosecuting Attorney
P.O. Box 491
Jonesboro, AR 72403

[x] BY MAIL: By depositing said envelope, with postage (certified mail, return receipt requested) thereon fully prepaid, in the United States mail in San Francisco, California, addressed to said party(ies);

I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on October 29, 2007 at San Francisco, California.

/s/ Jocilene Yue
Jocilene Yue