**Record No. 09-8245**

**In the United States Court of Appeals**
**for the Fourth Circuit**

**DEREK TICE**,

*Petitioner-Appellee*.

**v.**

**GENE M. JOHNSON,** Director
Virginia Department of Corrections

*Respondent-Appellant,*

**On Appeal from the United States District Court**
**for the Eastern District of Virginia**

# OPENING BRIEF

KENNETH T. CUCCINELLI II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
State Solicitor General

STEPHEN R. MCCULLOUGH
Virginia State Bar No. 41699
Senior Appellate Counsel
smccullough@oag.state.va.us
*Counsel of Record*

VIRGINIA B. THEISEN
Senior Assistant Attorney General
Virginia State Bar No. 23782

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

STEVEN T. BUCK
Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219

Telephone: (804) 786-2436
Facsimile: (804) 786-1991

*Counsel for Respondent /Appellant*

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## OPENING BRIEF

The Attorney General of Virginia submits this Opening Brief. For the reasons detailed below, the judgment should be reversed.

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction to decide the habeas corpus petition under 28 U.S.C. § 2254. This Court has appellate jurisdiction to review the final order of the district court under 28 U.S.C. § 1291.

The district court entered a final order on November 19, 2009. *App* 1166. The Director noted his appeal on December 18, 2009. *App*. 1169. The appeal is timely.

## STATEMENT OF THE ISSUES

1. Did the district court err in holding that the finding of no prejudice by the Supreme Court of Virginia was contrary to, or an unreasonable application of, clearly established precedent from the United States Supreme Court?

2. Did the district court err in concluding that the petitioner's attorneys were ineffective for failing to move to suppress the petitioner's confession on *Miranda* grounds?

## STATEMENT OF THE CASE

Following a second jury trial in Norfolk, Virginia,[1] Derek Tice was convicted of the rape and capital murder of Michelle Moore-Bosko. *App.* 1129. He was sentenced on January 31, 2003, to serve two life terms. *App*. 596. Tice unsuccessfully appealed the convictions. *App*. 1131.

Tice filed a petition for a writ of habeas corpus in the Circuit Court for the City of Norfolk on September 14, 2005. *App.* 832. The court ordered a hearing on, among other things, Tice's claim that his lawyers were ineffective for failing to move to suppress Tice's confession on *Miranda*[2] grounds. After an evidentiary hearing on September 11-12, 2006, the court granted Tice habeas relief on his claim that counsel were ineffective for failing to seek the suppression of Tice's confession on *Miranda* grounds. *App*. 1072-81.

The Supreme Court of Virginia granted the Director's appeal. In an opinion dated January 11, 2008, the Supreme Court of Virginia, Justice Keenan writing for a unanimous Court, reversed the judgment of the trial

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[1] Tice's first conviction was reversed by the Court of Appeals of Virginia based on faulty jury instructions. *Tice v. Commonwealth*, 563 S.E.2d 412 (Va. Ct. App. 2002). *App*. 1129.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

court. *App*. 1088. (reported as *Johnson v. Tice*, 654 S.E.2d 917 (Va. 2008)). The Court concluded that Tice had failed to demonstrate the requisite prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). *App*. 1092-94.

Tice filed a petition under 28 U.S.C. § 2254 for habeas relief in the United States District Court for the Eastern District of Virginia. *App.* 1095. He raised three claims, including the claim that his trial attorneys were ineffective for failing to move to suppress his confession on *Miranda* grounds. *App*. 1098.

The district court rejected Tice's other claims, but granted relief on the ineffective assistance of counsel claim concerning the failure to move to suppress on *Miranda* grounds. *App.* 1124-64. The court held that Tice made an unambiguous assertion of the right to remain silent. *App*. 1143. It held that a motion to suppress would have been granted. *App*. 1143. The court further concluded that the failure to file a suppression motion was an error rather than a tactical choice. *App*. 1144-51. Finally, the court held that the decision of the Supreme Court of Virginia, concluding that Tice had not shown prejudice, was objectively unreasonable. *App*.

1151-63.[3] The court ultimately concluded that the Commonwealth could retry the petitioner, rejecting Tice's argument to the contrary. *App*. 1166-67. The court observed that

> This Court has not concluded that Tice is actually innocent of the crimes of which he was found guilty. Tice has not persuaded any court that he was the victim of prosecutorial misconduct. Nor is the Court persuaded that any effort to retry Tice is suggestive of prosecutorial vindictiveness. Rather, it is simply reflective of the prosecution's attempt to bring to justice an individual who repeatedly confessed to participating in the murder and rape of Michelle Bosko.

*App*. 1167.

## STATEMENT OF FACTS

### I. THE MURDER

On July 8, 1997, William Bosko returned from duty with the United States Navy to his home in Norfolk. *App*. 27. When he walked into the bedroom of his apartment, he discovered the body of his wife, Michelle Moore Bosko, on the floor next to the bed. *App*. 30, 34. "There was blood all over the floor, all over the walls, all over her." *App*. 30. When police

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[3] On August 6, 2009, the Governor granted Tice a conditional pardon, freeing him from custody but preserving his conviction and requiring him, among other things, to submit to probation. App. 1166. Tice elected to continue his habeas litigation in federal court.

officers arrived, they promptly found an 8 to 10 inches long steak knife with a bent blade. *App.* 32. The knife was under a chest of drawers and contained visible blood stains. *App.* 118, 124.

The medical examiner determined that the cause of the victim's death was "stab wounds to the chest and strangulation." *App.* 185. Michelle had approximately four stab wounds to her chest, along with five "pinpoint pricks" from the knife. *App.* 186. Michelle's genital area was injured in a manner consistent with "[f]orcible injuries to the vaginal area." *App.* 180.

The police recovered some DNA evidence from Michelle's vagina as well as the surrounding area. *App.* 150. No incriminating fingerprints were located in the apartment. *App.* 134-42.

## II. THE INVESTIGATION

*A Suspect Quickly Emerges*

The investigation quickly focused on Danial J. Williams, a neighbor of the Boskos. Williams' apartment was "katty-cornered" from the Boskos. *App.* 37. In common parlance, Williams had been stalking Michelle. Tamika Taylor, a close friend of Michelle's, noticed that Williams would claim he needed to use the telephone as an excuse to visit

with Michelle. *App.* 68. Taylor observed Williams peeping at Michelle from behind the blinds in his apartment. *App.* 78-79. Williams also would try to speak with Michelle whenever he could. *App.* 78.

Taylor recalled that several days before the murder, she was in Michelle's apartment with a friend named Missy. Taylor's childhood friend, Omar Ballard, also was there. *App.* 70. Williams arrived, claiming he needed to use the telephone. He then stayed in the apartment and began to act inappropriately towards Michelle. *App.* 71. Taylor told Michelle that if she did not ask Williams to leave, Taylor would. *App.* 72. Taylor then asked him to leave. *App.* 72.

*Danial Williams Confesses*

The day after the murder, Williams provided a statement to the police in which he confessed to raping and killing Michelle. *App.* 723-26. He signed it and initialed each page. *App.* 723-26. He did not implicate any others in the crime. *App.* 723-26. He later filed a motion to suppress

the confession, which was denied. *App.* 727.[4] When Williams' DNA did not match the DNA recovered at the scene, police began to look for additional suspects. They turned to Joseph Dick, who had lived with Williams at the time of the murder.

*Joseph Dick Confesses*

Joseph Dick gave the police a statement on July 12, 1998. He was 21 years old at the time. At the time of Michelle's rape and murder, Dick resided with Williams and Williams' wife Nicole. *App.* 76. Initially, Dick denied any involvement and said he was on duty on the ship at the time of the crime. *App.* 223-24. Police showed him a photograph of Michelle, told him he faced the death penalty, advised him he was in serious trouble, and said they could prove he was there that night. *App.* 225-27.

After he had been at the police station approximately four hours, Dick confessed his involvement in the crime.[5] In this statement, he did

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[4] The full transcript of the suppression motion is in the record as Respondent's State Habeas Exhibit 4. It shows that a military man, who was 25 years old at the time, who was read his *Miranda* rights and who was offered food, drink and cigarette breaks, voluntarily confessed to the crime.

[5] The full typed statement is in the record as Petitioner's State Habeas Exhibit 11.

not implicate anyone besides himself and Williams. *App.* 222-24. Dick provided another statement to the police on April 27, 1998. Police asked Dick who else might have been involved. Dick mentioned Williams, himself, and Eric Wilson. *App.* 241. Dick also said the events unfolded in the bedroom. *App.* 242. Dick said Williams stabbed Michelle about three times, and Wilson did not stab her. *App.* 242-43. Dick said they took her body into the living room. *App.* 243. Finally, he told them that he thought he saw the knife they used at Williams' apartment, and that Eric started cleaning it. *App.* 244.

Dick provided another statement on June 16, 1998. In this statement, he implicated a man he believed was named George Clark. *App.* 246-47.

Dick also testified at a preliminary hearing on August 25, 1998. There, he explained that after Michelle initially refused them entry into Michelle's apartment, they went to the parking lot. *App.* 248-49. He said six men were involved. *App.* 249. He did not, however, mention Ballard. *App.* 249. He said that "when I had mentioned it to the police before, they didn't believe me, so I didn't bother mentioning it then." *App.* 249. Dick testified at the time that there could have been another person

involved and said that person was white. *App.* 250. He explained that he had not told the police about anyone being involved because he was afraid for his parents and his sister. *App.* 251.

*Eric Wilson Confesses*

On April 8, 1998, the police questioned Eric Wilson concerning his role in Michelle's rape and murder. Police informed him of his rights and was provided with cigarette breaks, soda, and food. *App.* 790, 797, 814, 820, 829. He was told he was free to leave. *App.* 816.

The police told Wilson he had been implicated, and they wanted to clear up one way or the other whether he was involved. Wilson initially denied any involvement. Detective Ford told Wilson he was lying. *App.* 818. Wilson took a polygraph test. *App.* 790. The polygraph indicated he had been deceptive in his answers regarding whether he had been present during the rape, whether he had sexual intercourse with Michelle against her will, and whether he in any way participated in the rape. *App.* 793.

The police informed Wilson he had failed the polygraph and resumed questioning him around 11:30 a.m. *App.* 790-91. Wilson acknowledged he knew Williams and his wife Nicole. *App.* 789-90.

Following the polygraph, around 4:00 p.m. that afternoon, he began to discuss a dream. *App.* 797. Wilson said he recalled two unknown men on a white couch. A girl was thrown on the floor, and he recalled her head going back and forth. He recognized the girl as Michelle. *App.* 799.

After police showed Wilson a photograph of Michelle, around 4:35 p.m., he became emotional and "came out of dream mode." *App.* 797, 800. He repeatedly said he was not involved in the murder and that he left before Michelle was killed. *App.* 802-03. He said he went to Michelle's apartment with Williams and Dick. She let them in and, for a while, everyone just talked. Then Williams began to poke her, "just having fun." They tickled her, and afterwards, they began to "wrestle." Michelle began to resist, and Wilson could see that Williams was about to rape her.

Wilson said they all took turns raping her and holding her down. *App.* 740-41. Dick placed his hand over her mouth so she could not scream. He recalled that Williams struck her once in the face. Wilson became angry with himself when he realized what was happening, and he left. *App.* 741. The following morning, he noticed that he had a scratch on his hand that occurred when she "broke loose one time." *App.* 741.

Wilson repeatedly said this statement was the truth. After the statement was transcribed, he read it, and made a few corrections. He initialed each page as he read it. *App.* 810-11. The court denied Wilson's motion to suppress the confession.

*Derek Tice Confesses*

Joseph Dick identified a man he believed was named "George" as one of the perpetrators. After the police determined that Derek Tice was "George," Tice was arrested in Florida on June 18, 1998. *App.* 269, 274. Detectives Ford and Wray flew to Florida and picked up Tice at 6:00 a.m. on June 25, 1998. *App.* 275. The flight arrived in Norfolk around 2:15 p.m. Ford informed Tice of the nature of the charge. However, Ford did not discuss the case during the flight, other than to state that Tice needed to tell the truth. *App.* 275-76.

The interview began at the police interview room shortly after 2:30 p.m. *App.* 276. Tice was provided with food, drink and cigarettes at the airport and in the interview room. *App.* 276. During the interview, Tice was not handcuffed or shackled in any way. *App.* 328-29. He was also advised of his *Miranda* rights. Tice signed the waiver form and agreed to speak with the police. *App.* 277-78. Ford informed Tice of the varying

degrees of murder and the attendant punishments for each offense. *App.* 332-33.

Tice first said that he was in Newport News the night of the crime and that a friend had told him that Williams had been arrested. *App.* 279. Ford informed Tice that he knew that was not true, that others had provided statements and they knew Tice was present at Michelle's apartment that night. *App.* 279-80, 334-35. The detectives left the room around 3:08 p.m. and returned around 3:35 p.m. During the interview, Ford showed Tice a photograph of the victim while she was alive. In the photograph, she is shown eating a pretzel. *App.* 289. Ford used the photograph several times. *App.* 290. Ford left the room around 3:50 p.m. *App.* 281. Tice continued to deny any knowledge of the crime. He admitted he knew Williams and said he had visited Williams in prison. *App.* 280.

Tice agreed to take a polygraph test. The examination was administered by Norfolk Detective Randy Crank, beginning around 4:00 p.m. *App.* 598. The test took approximately three hours. *App.* 598. Tice failed the polygraph test, and he was informed of that fact. *App.* 1053.

Following the test, around 7:15 p.m., Detective Crank took notes as he questioned Tice. *App.* 558, 1035-36. In those notes, Crank wrote:

> [Tice] told me he decided not to say anymore, that he might decide to after he talks with a lawyer, or spends some time alone thinking about it. I told him he would be given time to think about it. He did not request a lawyer.

*App.* 614. Tice was given some time to think. *App.* 1042. A copy of Crank's notes was filed in the circuit court on April 15, 1999, prior to the criminal trial. *App.* 613-14.[6]

Ford returned to the interrogation room at 7:28 p.m. *App.* 282, 598. Ford offered Tice food and drink. Tice accepted a Dr. Pepper. *App.* 282. Ford again told Tice that the police had statements from the accomplices and that he believed Tice was a liar. *App.* 282, 342. Ford again showed him the photograph of Michelle. *App.* 343. Ford acknowledged that he raised his voice several times, and he told Tice that there was DNA at the scene and there was a chance it could come back to him. *App.* 344.

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[6] Detective Ford did not see Crank's notes until 2006, in the weeks preceding the habeas hearing in September, 2006. *App.* 1059. Detective Brian Wray testified that he had not seen the notes prior to the habeas hearing, although he had heard about the notes in the weeks before the hearing. *App.* 1070-71.

At 7:57 p.m., Tice began to cry. He then started to talk about the murder. *App.* 282. He said that it was Williams' idea. He named Williams, Wilson, Dick, and Jeffrey Farris. He first said a man named Rick Pauley was not there, but later said Pauley was there. He said Williams' wife was present, but she was sick and went to bed. *App.* 282-83. The men began to talk about Michelle. Tice said they had a discussion about what color panties Michelle wore, that they would go over there and find out. They went to her apartment, but she told them to go away. *App.* 284. Tice said they pried open the door and got inside. He said they used a claw-hammer to get in. *App.* 352-53.

Tice said he could not recall where the rape took place, but said it was not the living room. *App.* 284. Williams raped Michelle first, and Tice was second. *App.* 285, 307. Tice stated that Williams claimed Michelle as his trophy, so he had "first dibs." *App.* 306. Tice said he held her down and raped her. He claimed that he ejaculated. *App.* 307. He also demonstrated for the detectives how they placed a hand over her mouth so she would not scream. *App.* 285. He heard a slap and thought Williams had hit Michelle in the face. *App.* 286.

Tice admitted he was present at the time of the murder. He related that Williams began to strangle her. *App.* 299. Tice told the others that she could pass out and still be alive, so he suggested they should get a knife and stab her. *App.* 299-300. He said he told Williams "just stab her, just stab the bitch." *App.* 286, 300. He described how they took turns stabbing her. *App.* 286. Tice said it was peer pressure that made him go to her apartment. *App.* 283. He explained that the men belonged to a group that called themselves the "Banque Crew," named after a country and western bar in Norfolk. *App.* 287-88.

The police left the interview room around 8:55 p.m. and returned to the room around 10:15 p.m. *App.* 287. They went over the events again from start to finish. *App.* 287. This statement was tape-recorded. *App.* 293. The statement ended at 11:57 p.m. *App.* 308. At the conclusion of his statement, Tice reaffirmed that the statement was true. *App.* 308.

At the time of this interview, Tice was 28 years old. He "went a little above the 12th grade" and could read and write. *App.* 296. At the time of his interrogation, Tice had served in two branches of the military, the Army and the Navy. In a later statement, he said he was not under the influence of anything when he spoke with the police. *App.* 661.

Pursuant to a negotiated plea agreement, which he later rejected, Tice and his attorneys agreed to provide additional statements to the police, the first of which occurred on October 27, 1998. *App*. 615, 1031-32. The police asked Tice to tell the truth. Tice implicated a man named "Scrappy" as the seventh person involved in the murder. *App*. 616. Tice admitted he lied when he said earlier that Wilson was not involved in stabbing the victim. *App*. 616. Tice said he was trying to help Wilson, but that Wilson did, in fact, also stab the victim. *App*. 616. He again admitted his involvement. *App*. 616-17. However, he later stated that he was not there at all. *App*. 618. Then he said that Scrappy was not there after all. *App*. 618. Tice proceeded to identify Danser as the seventh man. *App*. 619. Tice again said that all seven rushed in, carried Michelle to the bedroom, and took turns raping and stabbing her. *App*. 620-21. He said that they had agreed before going in Michelle's apartment that they would not tell on each other, that they wanted to be equally involved, and that is why they each stabbed her. *App*. 621.

On November 5, 1998, the police again questioned Tice after his attorneys authorized the meeting. *App*. 640. During the first part of the interview, Tice discussed meeting Danser. Five minutes later, Tice said

Danser was not involved at all, that he had named him because "he fit." He said he did not know the name of the other man involved and that this other man was at Williams' house when Tice arrived. Ford told Tice that he needed to tell the truth. Tice then said that "the seventh man was a muscular black man, about 5'9" to 5'10", a description that matched Omar Ballard's physique. Police asked Tice why he had not named this man before. Tice explained that they were all scared of him and that no one wanted to tell on him because they did not know what would happen. Soon thereafter, Tice said there was no black male. Tice added that he did not know who was there because he was not involved. Tice made this statement before police obtained the letter from Omar Ballard in early 1999. *App.* 641.

On December 28, 1998, Tice testified, under oath, at John Danser's preliminary hearing. *App.* 643. Tice testified that he was at Williams' apartment on the night of July 8, 1997. Danser, Farris, Dick Williams, Wilson, and Pauley were there. *App.* 648. He said they were there to celebrate Danser's birthday that had occurred the month before. *App.* 649. Tice said Williams wanted to go over to Michelle's apartment because he was infatuated with her. *App.* 650. At first, they talked about

how they wanted to find out the color of her panties. *App.* 670. Then, they discussed raping and killing Michelle. *App.* 650.

Tice said the victim opened the door, and they pushed their way in. *App.* 651. They held her down and took turns raping her in the bedroom. *App.* 651-52, 668. He said everyone then stabbed her with a kitchen knife. *App.* 652. Meanwhile, Williams was strangling her. *App.* 653. He said everyone had to stab her "[s]o that everyone that was involved would have equal part in it." *App.* 654. He estimated they left the victim's apartment around 8:30 p.m. *App.* 671-72.

Tice testified he did not mention Danser at first because "he was a friend and he was trying to protect him." *App.* 655. He repeatedly disavowed his statement that someone had forced open the door with a hammer. *App.* 655-56, 666. Tice said he was trying to "put[] enough lies into the statement to where [he] would not be implicated." *App.* 656. He wanted there to be "too many false statements." *App.* 656. Tice testified that the Commonwealth would reduce his charge to "murder one" in exchange for his testimony. *App.* 656.

Tice swore that his testimony was the truth. *App.* 656. He acknowledged he had failed a first polygraph, when he was first arrested,

but that he had passed a second one, on October 27, 1998. *App.* 657-58. Finally, Tice testified that he would not lie to save himself from the electric chair. *App.* 687.

*Omar Ballard Emerges As A Suspect*

Omar Ballard, while incarcerated for a different offense, wrote a lurid letter to his sister-in-law demanding, among other things, that she send him photographs of herself posing in her undergarments. He threatened to kill her if she did not. He added that he had killed Michelle. He also wrote that he had

> another family, people who will save my life, who will die for me if necessary, who give me what I want, who never front on me, who don't deny their feelings towards me, who talk to me constantly, whose always with me, the nation that is 5%er nation . . . .

*App.* 695. Prosecutors became aware of this letter in early 1999. Resp. State Hab. Exh. 1, ¶ 3.

Tamika Taylor had introduced the Boskos to Omar Ballard. *App.* -98-99. Taylor had known Ballard for 15 to 20 years, from the time she was a child. *App.* 88. She considered him a close friend. *App.* 92-93. He lived nearby, a 15-minute walk. *App.* 91. Ballard knew Michelle and had been inside her apartment many times. *App.* 75. Taylor believed that

Michelle would open the door to him without hesitation because she considered him a friend. *App.* 101, 105.

The police confronted Ballard, who first asserted he had consensual sexual intercourse with Michelle and then "just snapped," retrieved a knife and stabbed her. *App.* 700. Then, he took $35 and left. *App.* 701. He said nobody else was present. *App.* 701. He gave a second statement, in which he reiterated this version but acknowledged he had lied when he said they had engaged in consensual sex. *App.* 709, 710.

Before Ballard pled guilty to rape and murder charges, Ballard told the police yet another statement. *App.* 722. He said he met Williams, Dick, Wilson, and Tice in the parking lot. He said he knew Williams because he had seen him in Michelle's apartment. In the parking lot, the four men told Ballard they had tried to get into her apartment, but she would not let them in. Ballard told them that Michelle knew him and would open the door for him. When she opened the door, they all rushed in. They took turns raping her and then stabbing her. He said the others had not told on him because he told them that he would come back and get them. He "stated that he had not told this story because he was

already in prison and a member of the 5% and didn't want anyone to know that he had been involved in a crime with white boys." *App*. 722.

## III. TRIAL EVIDENCE

At trial, Tice was represented by two capital-qualified, highly experienced attorneys: James Broccoletti and Jeffrey Russell. *App*. 927-28, 944-45. Mr. Broccoletti, Tice's lead attorney, had handled over 100 murder cases and had filed many suppression motions over the course of his career. *App*. 928. Mr. Broccoletti and Mr. Russell represented Tice at both trials. Initially, Tice was represented by a different lawyer. *App*. 615.

At Tice's trial, the Commonwealth presented evidence of his confession as detailed above. Defense counsel questioned Detective Ford about the physical environment of Tice's questioning, as well as its duration and tone. Counsel also inquired about inconsistencies between Tice's confession and the physical evidence. For example, counsel emphasized Tice's statement that the men used a claw hammer to open the door when there were no pry marks on the door. *App*. 352.

Joseph Dick testified at Tice's second trial. At the time, Dick had pled guilty and had been sentenced to serve two life sentences. *App.* 217. Dick explained that he had overheard a conversation on the night of the murder relating to Michelle's panties. *App.* 208. He said Tice, Wilson, Williams, Danser, Pauley, and Farris were present. *App.* 206-08. The group knocked on Michelle's door, but she would not answer. *App.* 209. They went to the parking lot to smoke cigarettes. *App.* 209. Ballard arrived and joined the group. *App.* 209.

Dick testified that the men returned to Michelle's apartment. They rushed in when she opened the door. *App.* 210-11. The men grabbed her arms and legs and took her to the bedroom. *App.* 211. Everyone took turns raping her. *App.* 212. Dick recalled that someone retrieved a steak knife. *App.* 212. They then took turns stabbing the victim. *App.* 213-14. He said she could not cry out because someone always had their hand over her mouth. *App.* 214.

After they returned to Williams' apartment, they agreed not to say anything. Dick explained that he was scared of Ballard. He said that Ballard "just had that intimidating look about him . . . . [H]e's the type of guy that threatens you just by looking at you." *App.* 215.

Tice's attorneys vigorously and extensively challenged Dick's testimony, contending he made a number of prior statements that were inconsistent with his trial testimony and that he had lied in order to save himself from the death penalty. *App.* 216-59.

Dick repeatedly acknowledged that various aspects of the events he had previously mentioned were not true. *App.* 231-37. Dick also disclaimed his statement that he only watched and ran out when he became tired of watching. *App.* 227-29.

Dick admitted he had written a letter to an individual connected with a television program. In the letter, Dick said he was not involved and said he was pressured by the police to confess. He said in the letter that he confessed to "get [the police] off [his] back." *App.* 252-54. At trial, under oath, he disavowed the letter, explaining that he wrote it because he had hoped it might generate media interest and help him. *App.* 260.

Ballard was called as a defense witness but refused to testify at Tice's second trial. *App.* 454-57. The jury heard evidence of Ballard's various conflicting statements through the testimony of Detective Peterson. *App.* 459-94. In two statements, Ballard claimed that he acted alone. *App.* 467-87. Those statements contain various inconsistencies,

such as whether Ballard had engaged in consensual sex with Michelle. *App.* 470. The Commonwealth adduced evidence regarding Ballard's other "debriefing" statement, in which he implicated a group of "white boys." *App.* 491-94.

John Danser testified that he was not there, and specifically denied any involvement in the rape. *App.* 500-17. Judy and Richard Pauley testified that their son was at home talking with his Australian girlfriend on the telephone. *App.* 535, 536-37, 541-42. Richard Pauley, the father of Richard Dale Pauley, Jr., recalled that his son worked that day and never left the house upon his return from work. *App.* 547-48.

The defense introduced evidence that the only DNA material that was recovered from the scene did not match Tice, Williams, Dick, Wilson, Richard Pauley, or Jeffrey Farris. *App.* 424-26. The DNA sample was consistent with Omar Ballard's DNA profile. *App.* 432-34.[7]

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[7] In addition to Tice, four other defendants were convicted or pled guilty. Danial Williams pled guilty to the offenses and signed a "stipulation of facts" acknowledging his involvement. Resp. State Hab. Exh. 9. He was sentenced to serve life in prison on May 13, 1999, CR97003404. Following a jury trial, Eric Wilson was convicted of rape and acquitted of murder. He was sentenced on September 21, 1999, to serve eight and one half years, CR98004284-01. Omar Ballard pled guilty to capital murder and rape. He was sentenced on March 22, 2000, to serve two life terms. CR- CR99002426-00 and 01. Joseph Dick

## IV. THE STATE HABEAS HEARING

A focal point of the state habeas hearing was Tice's statement to Norfolk detective Randy Crank, following a polygraph examination. Although Tice's recollection of the statement differed from that of Detective Crank regarding what Tice said, the trial court credited Detective Crank's account. *App.* 1075. The court noted that Crank "was writing down the petitioner's words shortly after they were spoken. The petitioner is trying to recall his words of eight years ago." *App.* 1075.

According to the testimony of trial counsel, Tice never told his lawyers that he had invoked his right to remain silent or his right to an attorney. *App.* 910-11, 934. Mr. Broccoletti testified that Detective Crank's notes were in his file, and he was sure that he would have reviewed those notes with Tice although he had no present recollection at the time of the habeas hearing.[8] *App.* 925-26. He noted that "any statement that a defendant makes to a police officer is extremely

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pled guilty to charges of rape and first-degree murder. He was sentenced on September 22, 1999, to serve two life sentences, CR98000604-00 and 01.

[8] Under a police policy in place in Norfolk, counsel could not speak to the detectives. *App.* 914. Therefore, counsel could not confer with Detective Crank.

significant." *App.* 935. Mr. Broccoletti testified that he reviewed every statement Tice made to the police, and this would have included Crank's notes. *App.* 923-925, 935-36.

Mr. Broccoletti testified at the habeas hearing that he could not recall a specific reason why he and Mr. Russell did not file a suppression motion. *App.* 911, 929. When Tice's habeas attorney suggested that Broccoletti was "speculating" that he had reviewed the Crank notes, Broccoletti disagreed. Broccoletti stated that the yellow paper stapled to Crank's notes contained handwriting of Broccoletti's assistant, who provided a "synopsis" of Crank's notes. *App.* 924.

Jeffrey Russell testified that Tice was a "very engaged" client. *App.* 961. Mr. Russell recalled that counsel met "innumerable times" with Tice and "had both short and long conversations with him on every conceivable topic that related to this case over many years." *App.* 962. Mr. Russell was "confident saying that Tice didn't say that he invoked his rights." *App.* 950. Had Tice said his *Miranda* rights were violated, Russell testified, they would have pursued the issue. *App.* 951-52.

Omar Ballard testified at the habeas hearing, claiming he acted alone, and that he killed the victim after having consensual intercourse

with her. *App*. 843, 871. However, the trial court rejected Omar Ballard's testimony, "resolv[ing] all credibility issues" in connection with the claim based on Ballard's testimony "in favor of the respondent." *App.* 1072.[9]

## SUMMARY OF ARGUMENT

A claim of ineffective assistance of counsel can be disposed of on either performance or prejudice grounds. The Supreme Court of Virginia concluded that the petitioner had shown no prejudice from counsel's failure to move for the suppression of his confession on *Miranda* grounds. Under the highly deferential standard of review, that decision was not legally or factually unreasonable.

Two unusual circumstances stand out. First, a key piece of evidence against the petitioner was the testimony of co-participant Joe Dick. When he testified at Tice's trial, Dick was not the typical witness who was motivated to cooperate with the prosecution to gain favor at an upcoming sentencing hearing. Instead, he had received two life

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[9] At the conclusion of the hearing, the court had even stronger words, noting that Ballard was a "self-admitted perjurer" who had "committed more felonies than he can remember . . . . I don't think I'd believe a word that monster said." *App.* Tr. 09/12/08 at 466.

sentences after he agreed to testify against Tice in a previous trial. If anything, he should have been very hostile to the prosecution. Certainly, there was no evidence presented at Tice's trial that would show any leverage by the prosecution to induce Dick to cooperate. A similarly situated witness, Omar Ballard, simply refused to testify at all at Tice's second trial. The Supreme Court of Virginia properly took this unusual fact into account.

Second, unlike a typical criminal trial, the defense had a compelling case to present. Among other things, the only DNA sample that was recovered from the crime scene did not match the defendant. However, if the defense gained suppression of Tice's first confession, the prosecution would have had no choice but to present during its rebuttal case the many other highly damaging statements Tice made in contemplation of a guilty plea. Under the plain language of a rule of court, these devastating admissions would have been admissible during the prosecution's rebuttal case. Because prosecutors could use Tice's initial confession, they did not need these additional statements and did not need to open up appellate review to construe a rule of court that had not been the subject of an appellate decision. The fact that this was

Tice's second trial, after a first conviction was reversed for faulty jury instructions, would have made the prosecution more cautious in inviting appellate review on the use of statements Tice made in contemplation of his guilty plea.

Gaining the suppression of Tice's statement would have required the defense to either (1) forego a defense case, thus losing favorable forensic evidence, but thereby precluding the prosecution from employing Tice's many incriminating statements during the rebuttal phase of the trial or (2) present the defense evidence, but expose the defense to a withering rebuttal case by the prosecution.

The district court simply ignored this reality, assuming instead that the prosecution would have remained passive in the face of a successful suppression motion. However, a trial is a dynamic environment. Success on a suppression motion would have been a pyrrhic victory for the defense. The Supreme Court of Virginia correctly and reasonably concluded that Tice had shown no prejudice.

In addition, Tice's experienced trial attorneys were not ineffective. In context, Tice's statement was ambiguous and conditional. A reasonable police officer could conclude from context that Tice was not

asking for the interrogation to cease altogether, but rather was saying that he needed some time to think. He was given some time to reflect. Moreover, as noted above, gaining the suppression of Tice's first statement created a grave danger for the defense that the prosecution would be forced to aggressively introduce Tice's highly damaging subsequent confessions into evidence during the rebuttal phase.

## ARGUMENT

### I. THE DISTRICT COURT FAILED TO ACCORD THE PROPER DEFERENCE TO THE FINDING OF NO PREJUDICE BY THE SUPREME COURT OF VIRGINIA.

#### A. Standard of Review

A review in federal court of the merits of a state prisoner's habeas claims is governed by the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA). The AEDPA standard requires deference to the state court's merits decision unless the decision was (1) contrary to, or an *unreasonable* application of, a clearly established United States Supreme Court decision, or (2) based on an *unreasonable* determination of facts. *See* 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 403-13 (2000). *See also Muhammad v. Kelly*, 575 F.3d 359, 367 (4th Cir.), *cert. denied*, 130 S. Ct. 541 (2009). "The required deference encompasses both the state

court's legal conclusions and its factual findings." *Lenz v. Washington*, 444 F.3d 295, 299 (4th Cir. 2006).

Section 2254(d) provides a "'highly deferential standard for evaluating state court rulings,'. . . which demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (citation omitted). "Under § 2254(d)'s 'unreasonable application' clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly." *Id.* at 24-25. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable–a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

The federal court reviews the "ultimate decision" of the state court, not the specific contents of its reasoning or opinion. *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009). *See Sandoval v. Ulibarri*, 548 F.3d 902, 911 (10th Cir. 2008). The state court need not articulate, or even know, the clearly

established Supreme Court law, so long as its reasoning and decision do not contradict such law. *See Lenz v. Washington*, 444 F.3d at 307.

Furthermore, "a determination on a factual issue made by a State court shall be presumed correct." *Tucker v. Ozmint*, 350 F.3d 433, 439 (4th Cir. 2003) (quoting 28 U.S.C. § 2254(e)(1)). "In reviewing a habeas petition, federal courts must presume the correctness of a state court's factual determinations unless the habeas petitioner rebuts the presumption of correctness by clear and convincing evidence." *Green v. Johnson*, 515 F.3d 290, 299 (4th Cir.), *cert. denied*, 128 S. Ct. 2527 (2008). *See Landrigan*, 550 U.S. at 473-74. Significantly, "[a] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. ___, slip op. at 9-10, 2010 WL 173369 (U.S. Jan. 20, 2010).

### B. Under the deferential standard of review, the judgment of the Supreme Court of Virginia must be upheld.

The Supreme Court of Virginia concluded that Tice had failed to demonstrate prejudice for counsel's alleged ineffectiveness in failing to move to suppress Tice's confession on *Miranda* grounds. *App.* 1094. The

testimony of Joseph Dick was central to the Supreme Court of Virginia's conclusion. At Tice's first trial, Dick had a plea agreement with the Commonwealth that required him to testify truthfully against the other participants in the crime. However, by the time of Tice's second trial, Dick already had been sentenced to two life terms. *App*. 1094. Not only did the Commonwealth lack any leverage at that point over Dick, but also one would expect Dick to be embittered for receiving two life sentences in spite of his cooperation with the prosecution. Indeed, at Tice's second trial Omar Ballard, having received the benefit of his plea agreement, categorically refused to testify, even after the Court held him in contempt. *App*. 455-57. Joseph Dick, of course, could have done the same.

Nevertheless, Dick agreed to testify again against Tice. The Supreme Court of Virginia further found that Dick acknowledged inaccuracies in his earlier accounts to the police, but "Dick was consistent in his sworn testimony implicating himself and Tice in the rapes and murder of Michelle, and did not change or retract any aspect of that testimony on cross-examination by Tice's trial counsel." *App*. 1093. Moreover, Dick had seen Tice only on one occasion prior to Tice's murder.

Therefore, the Court reasonably found, Dick did not have a prior relationship with Tice that could support an argument that Dick disliked Tice or was otherwise biased against him. *App.* 1093. Thus, the Court reasonably concluded, "Tice's counsel failed to present any evidence showing that Dick had a motive to fabricate his testimony concerning Tice's role in the crimes." *App.* 1093.

Furthermore, the Supreme Court of Virginia correctly noted that Tamika Taylor's testimony undermined Tice's defense theory that Ballard acted alone. Taylor detailed Danial Williams' obsession with the victim, which "provid[ed] a link to the crimes perpetrated by the group that included Williams, Tice and Dick." *App.* 1093. Taylor's testimony also corroborated "Dick's testimony that Williams wanted to 'go over and see Michelle's panties.'" *App.* 1093. In addition, Taylor's testimony established a link between Ballard and the group that included Tice, Williams and Dick." Taylor explained that Ballard and Michelle were friends and that Ballard frequently visited Michelle in her apartment. This testimony, the Supreme Court of Virginia reasonably observed, "helped explain Ballard's statement to Detective Peterson that Michelle

opened her apartment door to the group that included Ballard, when she earlier had refused entry to the original group." *App.* 1094.

The Supreme Court of Virginia also found that expert testimony explained the absence of DNA evidence. Forensic scientists Robert Scanlon and Jerry Sellers both explained that sexual intercourse can occur during a rape without DNA material being deposited in a victim's vagina, provided the perpetrator did not ejaculate. Scanlon testified that a perpetrator would not usually leave epithelial cells containing DNA as a result of sexual intercourse. Therefore, he explained, "if there is no ejaculation, typically I don't expect to detect anything." "This expert testimony," the Supreme Court of Virginia found, "provided an explanation with regard to how several men could have raped Michelle with only one man, Ballard, having deposited bodily fluids from which DNA samples could be extracted." *App.* 1094.

Finally, the Court reasonably found that the alibis for other witnesses, including John Danser and Richard Pauley, did not bear on Tice's activities on the date of the offense. *App.* 1094.

The multiple "pinpricks" on Michelle's body are also consistent with the multiple perpetrator theory. It's hard to see why a strong, hardened

criminal like Ballard would bother with multiple superficial wounds, but it is not difficult to see reluctant perpetrators shamefully fulfilling their criminal pact out of peer pressure.

Contrary to the district court's conclusion, the testimony of the Medical Examiner, Dr. Kinnison, was not particularly favorable to the defense. *App*. 1155-56. She stated on cross-examination that "[i]t's possible that one person inflicted all of [the wounds]." *App*. 189. However, she also stated that "[i]t's possible" that the wounds and strangulation were caused by multiple individuals. *App*. 201. Nothing in her testimony undermined the prosecution's theory.

The Supreme Court of Virginia's decision certainly was not unreasonable. Joseph Dick had no plausible motive to implicate himself or to assist the prosecution when he testified against Tice at Tice's second trial. To the contrary, having cooperated with the Commonwealth and received two life sentences for his pains, if anything Dick would have been extremely hostile to the Commonwealth and eager to exculpate himself. Omar Ballard, in the same situation as Dick, refused to testify and ignored the Court's entreaties that he testify. With a life sentence,

the court's contempt power, Ballard recognized, was a hollow threat. *App*. 455-57.

The district court erroneously rejected the reasonable conclusion of the Supreme Court of Virginia that Dick lacked any plausible motive for implicating Tice. *App*. 1157. Dick stated on direct examination that no one had made him any promises or deals and that he had done nothing to save his life as a result of his testifying. *App*. 216. On cross-examination he stated "[i]t's not that I have to [testify]. It's because I want to." *App*. 219. Dick explained that he wrote letters claiming his innocence hoping it might help him find a "way out." *App*. 260. He repeated on re-direct that no one had made any promises to him of a lesser sentence. *App*. 260-61. Even if "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the [state] court's . . . determination.'"[10] *Wood v. Allen*, No. 08-9156, slip op. 21 (citation omitted).

[10] The district court also mistakenly stressed the alibi evidence for Danser and Pauley. *App*. 1162. However, the factfinder could readily conclude that Tice was involved without concluding that Danser and Pauley were involved. Notably, in his statement to the police of March 15, 2000, Ballard acknowledged that he participated with Williams, Tice, Dick, and Wilson, but did not mention Danser and Pauley. *App*. 722. Danser and Pauley, of course, never confessed.

Under the AEDPA, the role of the federal court is not, as the District Court did here, to reweigh the testimony and make its own independent determination of credibility. Rather, the reviewing court's role is to assess the decision of the state court for its reasonableness. There was no evidence at Tice's trial that Dick was delusional or that testified because he felt threatened. The Supreme Court of Virginia's conclusions regarding Dick's testimony are reasonably and fully justified by the record.

Finally, the district court erroneously assumed a static trial environment, taking it for granted in assessing prejudice that the trial would have unfolded exactly as it did, minus Tice's suppressed confession. However, as the prosecutors explained in affidavits filed in the district court, they refrained from using Tice's highly damaging subsequent statements, in which he repeatedly implicated himself in the crime, to avoid any risk of an appellate reversal. *App*. 1120-23. Had Tice gained the suppression of the first statement, the prosecutors would have had no choice but to seek to use these highly damaging subsequent statements. Virginia Supreme Court Rule 3A:8(C)(5) would have precluded the admission of these statements during the case in chief, but, assuming

Tice chose to put on evidence, nothing would have prevented the prosecution from using these devastating statements during its rebuttal case. *See Walker v. Kelly*, 589 F.3d 127, 143 (4th Cir. 2009) (rejecting materiality of *Brady* claim, in part, based on what "the Commonwealth would have offered in rebuttal").

Either Tice would have had to choose putting on no evidence, including helpful DNA evidence, thereby severely weakening the defense case, or he would have presented his defense case, but exposed himself to a devastating rebuttal case. In assessing prejudice, courts should consider how the trial would have unfolded had counsel taken the step the petitioner claims counsel should have taken. *Wong v. Belmontes*, 130 S. Ct. 383, 390 (2009) (*per curiam*).

Under the highly deferential standard of the AEDPA, the conclusion of the state court to deny Tice relief was neither contrary to, nor an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of the facts.

## II. COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO MOVE FOR THE SUPPRESSION OF TICE'S CONFESSION.

### A. Standard of review

The Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland*, 466 U.S. at 686. In order to establish that his counsel was not competent, a habeas petitioner must meet the "highly demanding" standard set forth in *Strickland*. *Kimmelman v. Morrison,* 477 U.S. 365, 382 (1986). The petitioner must show that his trial attorney's performance was deficient and that he was prejudiced as a result. See *Strickland*, 466 U.S. at 687. An ineffective assistance claim may be disposed of on either ground as deficient performance and prejudice are "separate and distinct elements." *Spencer v. Murray*, 18 F.3d 229, 233 (4th Cir. 1994). *See also Strickland*, 466 U.S. at 697.

The first prong of the *Strickland* test, the "performance" inquiry, "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Courts make this assessment of reasonableness "in light of all the circumstances." *Id.* at

690. The standard is one of "reasonableness under prevailing professional norms." *Id.* at 688.

In evaluating counsel's performance, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Furthermore, courts must not engage in hindsight; rather, they must evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors. *See id.* at 690. *See also Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). As the United States Supreme Court has emphasized, "judicial scrutiny of counsel's performance must be highly deferential." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 689. *See also Wong*, 558 U.S. ___, 130 S. Ct. 383, 384-85 (2009).

The Supreme Court of Virginia did not address the performance prong of the *Strickland* test as suggested in *Strickland* itself. 466 U.S. at 697. Therefore, if this Court were to determine that the Supreme Court of Virginia's decision on the prejudice prong was unreasonable

under § 2254(d), then it would be required to assess the performance prong *de novo*. *See Wolfe v. Johnson*, 565 F.3d 140, 161 (4th Cir. 2009). *See also Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

### B. *Miranda* requires a clear and unambiguous invocation of the right to counsel.

The ground rules regarding *Miranda* are well established. In *Miranda*, 384 U.S. at 469-73, the Court held that before interrogating a suspect who is in police custody, law enforcement officers must first inform the suspect of certain rights, including the right to the presence and assistance of counsel and the right to remain silent. *Id.* at 471. If the suspect waives his *Miranda* rights, the police are free to begin questioning him. However, a suspect may change his mind during the interrogation and invoke his *Miranda* rights. *Davis v. United States*, 512 U.S. 452, 458 (1994); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). A failure by the police to cut off questioning after a suspect invokes his right to remain silent renders the suspect's subsequent statement inadmissible. *See Michigan v. Mosley*, 423 U.S. 96, 104 (1975).

The question whether a suspect "actually invoked" a right under *Miranda*, "involves an objective inquiry." *Davis*, 512 U.S. at 459. A suspect must invoke his *Miranda* rights "sufficiently clearly that a

reasonable police officer under the circumstances would understand the statement" to be an exercise of a right under *Miranda*. *Id.*

In the context of requests for counsel, the United States Supreme Court in *Davis* addressed the issue of "ambiguous or equivocal" requests and concluded that a suspect has the burden to "unambiguously" make his request because "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S. at 459-60.

> [I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.

*Id.* at 459. Because the officer's responsibility to discontinue interrogation is triggered by the suspect's assertion of his *Miranda* right, that assertion must be "unambiguous." *Id.* at 459. In short,

> the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation, [b]ut when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.

*Id.* at 460 (citation and internal quotation marks omitted).[11]

"Generally, the decision whether to file a motion to suppress is a matter of trial strategy, which is entitled to great deference." *Illinois v. White*, 849 N.E.2d 406, 418 (Ill. 2006). *See also Wilson v. Schomig,* 234 F. Supp. 2d 851, 871 (C.D. Ill. 2002). ("As a general rule, trial counsel's failure to file a motion [to suppress statements] does not establish incompetent representation, especially when that motion would be futile. Whether or not to file a motion is a matter of trial strategy which will be accorded great deference.") (internal quotation marks and citation omitted).

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[11] The *Davis* framework applies whether a suspect invokes the right to remain silent or the right to counsel. Although the cases are persuasive only, it is worth noting that "[e]very federal circuit to consider the issue squarely has concluded that *Davis* applies to both components of *Miranda*: the right to counsel and the right to remain silent." *Bui v. DiPaolo,* 170 F.3d 232, 239 (1st Cir. 1999) (citing authority but declining to reach the issue). *See also* 2 Wayne R. LaFave et al., CRIMINAL PROCEDURE § 6.9(g) (2d ed. 1999) ("The *Davis* rule has been deemed equally applicable to post-waiver ambiguous references to the right to remain silent."). There is no logical reason why the analysis should proceed differently if the petitioner makes a conditional or ambiguous invocation of the right to remain silent versus a conditional or ambiguous invocation of the right to counsel.

### C. Tice's Statement was Conditional and Ambiguous.

The state habeas court credited the account of events reflected in Detective Crank's notes, as did the district court. *App*. 1075, 1141. These notes provide that: "[Tice] told me he decided not to say anymore, that he ***might*** decide to after he talks with a lawyer, ***or*** spends some time alone thinking about it. I told him he would be given time to think about it. He did not request a lawyer." (emphasis added). *App*. 614. This comment to Detective Crank was made after Tice had been given and waived his *Miranda* warnings, after he had spoken to Detectives Ford and Wray, after he had agreed to take a polygraph examination, and after he had in fact taken and failed the polygraph test. *App*. 276-79, 1053.

Had Tice simply said he had decided not to say anymore, he would be in a strong position to argue that he invoked his right to remain silent. But he did not stop there. Instead, he said he "might decide to [say more] after he talks with a lawyer ***or*** spends some time thinking about it." *App*. 614. It is not clear, viewing this statement in its totality, rather than isolating one particular clause, whether Tice sought to cease all questioning or whether he was in effect requesting a break from questioning to afford him time to think about whether he might invoke

his right to silence. His statements plainly were qualified and were ambiguous. Detective Crank testified that Tice was told he would be given time to think and he was given that time. *App*. 598, 1042. The police thereafter resumed questioning. No *Miranda* violation occurred. A reasonably competnent defense attorney, reviewing Crank's notes with his client, could reasonably conclude that they did not provide grounds for filing a suppression motion.

The case at bar is similar to *Lemmons v. Texas*, 75 S.W.3d 513 (Ct. App. Tex. 2002). In that case, the defendant said that "I'm done for the evening sir, please. I'm . . . for the evening at least. If you all would like to talk tomorrow or something, I would be more than willing to talk. But for the evening or until I can get a lawyer . . . ." *Id.* at 518. The court held that

> Lemmons's statement that he would be more than willing to talk to the officers tomorrow "or until I can get a lawyer" is not an unambiguous invocation of his right to counsel. "Or" makes Lemmons's request conditional and thus, equivocal. As Lemmons had not invoked his Fifth Amendment right to counsel at the time the officers questioned him…his Fifth Amendment rights were not violated.

*Id.* at 520. Similarly, Tice's statement that he did not wish to speak anymore at that particular point and that he might continue after he

spoke with an attorney "or" had some time alone to think rendered his request conditional and, therefore, equivocal.

Other cases similarly support the conclusion that Tice's statement was qualified and conditional and, therefore, ambiguous. *See United States v. Thompson,* 866 F.2d 268, 270, 2722 (8th Cir. 1989) (statement by suspect that he would talk "tomorrow" and that "I'll wait a little while before I'm interviewed" did not "as a whole indicate a decision to invoke the right to remain silent"); *Walker v. Florida*, 707 So. 2d 300, 310 (Fla. 1998) (assertion of the right to counsel ambiguous when the defendant stated that if police brought in a stenographer to record his statement, he wanted an attorney); *Jolley v. Indiana*, 684 N.E.2d 491, 493 (Ind. 1997) ("[t]he defendant's statement that he would want an attorney if he were to take a polygraph was not an unequivocal request for an attorney, but merely a conditional statement that he would want one if he were to take a polygraph, which he did not."); *Michigan v. Adams*, 627 N.W.2d 623, 628 (Mich. Ct. App. 2001) (defendant did not request an attorney when he asked whether he would be able to talk to a lawyer *if* he wanted to do so, detective answered that the interview would be stopped if the defendant wanted to talk to a lawyer and defendant then said he wanted "about five

minutes to think."); *Missouri v. Bailey*, 714 S.W.2d 590, 593 (Mo. Ct. App. 1986) (defendant's request for "some time to think alone" "did not constitute a request to cut off questioning and to remain silent"); *New York v. Lattanzio*, 549 N.Y.S.2d 179, 181 (N.Y. App. Div. 1989) (defendant's statement "that he thought, he believed that he wanted a lawyer, that he needed time to think about it" did not constitute an unequivocal invocation of the right to counsel); *Wisconsin v. Fischer*, 656 N.W.2d 503, 509 (Wis. Ct. App. 2003) ("A conditional and futuristic request for counsel is a statement that a reasonable officer in light of the circumstances would have understood only that [the defendant] *might* be invoking the right to counsel . . . and thus is not a clear and unequivocal request for counsel").

The district court erroneously relied on *Campaneria v. Reid*, 891 F.2d 1014 (2d Cir. 1989). *App*. 1143. In that case, the defendant, immediately after the police began to question him, stated that "I don't want to talk to you now, maybe come back later." *Id.* at 1017. The court held that the police should have ceased questioning. *Id.* at 1021-22.

The context of the statements in Campaneria is very different from the context in this case. First, when Campaneria told the police to "come back later," the police continued their questioning of the suspect. *Id.* at 1017. In contrast, when Tice asked for time to think, he was given time to think. Second, Tice made his statements after he waived his rights, willingly cooperated, and agreed to a polygraph. They were made while he was being questioned, several hours after he had been read the *Miranda* warnings and after he had taken a number of breaks for food, cigarettes, and bathroom breaks. *App.* 276, 282, 287, 598.

In context, a reasonable officer could conclude Tice was simply asking for another break, to think. In other words, he would probably continue talking after he had time to think. This draws added force from what Tice said immediately before, that "[h]e asked me if he could have some time to think about it, if he decide[d] to tell me could he talk to me and Wray, that he did not care for the other guy [Detective Ford.]" *App.* 613. In contrast, the defendant in *Campaneria* made the statement immediately after the officer asked if he could speak with him. *Campaneria*, 891 F.2d at 1017. Of course, *Campaneria* is in no way binding on this Court. Finally, *Campaneria* was decided before

*Davis*, where the United States Supreme Court made it clear that a request for counsel, or an invocation of the right to remain silent, must be unequivocal or questioning can continue.

A reasonable police officer would not have known, when Tice said he "***might*** decide to after he talks with a lawyer, ***or*** spends some time alone thinking about it" whether Tice sought to end all questioning or whether he was effectively asking for a break to "think about it." Because Tice's statement was conditional and, therefore, ambiguous, he can show neither ineffective assistance nor prejudice. The fact that Tice *might have been* invoking his right to remain silent does not suffice. Had counsel filed the motion to suppress on *Miranda* grounds, under the proper legal standard, it would have been denied.

### D. Additional Circumstances Indicate the Futility of Filing a Suppression Motion.

Tice's own discussions with counsel would not have led counsel to file a suppression motion. Tice never told Mr. Broccoletti he had invoked his right to remain silent or his right to an attorney. *App*. 910-11, 934. Mr. Broccoletti testified that he reviewed every statement Tice made to the police, and this would have included Crank's notes. *App*. 923-25, 935-36. At the habeas hearing, when Tice's habeas attorney accused Mr.

Broccoletti of "speculating" that he had reviewed Detective Crank's notes, Broccoletti firmly disagreed. Broccoletti noted that the yellow paper stapled to Crank's notes contained handwriting of Broccoletti's assistant, which reinforced his testimony that he must have reviewed the notes with his client. *App*. 924.

Mr. Russell recalled that counsel met "innumerable times" with Tice and was "confident saying that Tice didn't say that he invoked his rights." *App*. 950. Mr. Russell testified that had Tice said his *Miranda* rights were violated, counsel would have pursued the issue. *App*. 950-51. As the Court observed in *Strickland*, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. *See also Barnes v. Thompson*, 58 F.3d 971, 979 (4th Cir. 1995).

### E. Gaining Suppression of Tice's First Confession Would Have Placed Counsel in an Awkward Tactical Position Given Tice's Subsequent Statements to the Police and his Testimony at Danser's Preliminary hearing.

A plain language reading of the Rules of the Supreme Court of Virginia shows that success in suppressing Tice's first statement would have placed Tice's defense team on a very awkward footing. As he

contemplated whether to plead guilty, Tice made a number of highly damaging subsequent statements in which he admitted his involvement. These statements, made when Tice was represented by counsel, and one made under oath at John Danser's preliminary hearing, were far less susceptible to attack as being involuntary. *App*. 615-88.

Virginia Supreme Court Rule 3A:8(C)(5) provides in relevant part that "evidence of . . . statements made in connection with and relevant to any of the foregoing pleas or offers is not admissible in the *case-in-chief* in any civil or criminal proceeding against the person who made the plea offer." (emphasis added). Under the plain language of this Rule, Tice's statements to police of October 27, 1998 and November 5, 1998 and his sworn testimony at Danser's preliminary hearing on December 28, 1998, would not have been admissible during the prosecution's case-in-chief. However, they would have been admissible during rebuttal. *See Commonwealth v. Evans*, 55 Va. Cir. 237 (Southampton Circuit Court 2001) (concluding that under the plain language of Rule 3A:8(C)(5), the prosecution can use statements made by the defendant during plea negotiations in its rebuttal case).

The precise factual scenario at issue in Tice's case has not been the subject of an appellate decision. Nevertheless, a plain reading of Rule 3A:8(C)(5) and of the record reveals the following: Tice's trial counsel knew that Tice was being retried after an appellate reversal and the prosecution most likely would try to forestall any viable appellate issues. Therefore, the prosecution would most likely not seek to introduce Tice's subsequent statements during its rebuttal phase. However, if counsel succeeded in having the court suppress Tice's first confession, the prosecution obviously would have no choice but to try to introduce Tice's subsequent statements in which he admitted his involvement.[12]

Success on a suppression motion for the first confession of June 1998, therefore, would have created a difficult tactical dilemma for the defense. Had counsel succeeded in suppressing the initial confession, counsel would have had two options at the close of the Commonwealth's case. First, counsel could have presented no evidence at all, including evidence very favorable to the defense such as the DNA match to Omar

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[12] The "fruit of the poisonous tree" doctrine is inapplicable to *Miranda* violations. *Oregon v. Elstad*, 470 U.S. 298, 309 (1985). Therefore, even if one assumes the initial statement should have been suppressed on *Miranda* grounds, it does not follow that any statements Tice made after his initial confession would be inadmissible on the same basis.

Ballard. This evidence was critical to the goal that Omar Ballard acted alone. However, presenting no defense case would have had the virtue of depriving the Commonwealth of the opportunity to present any rebuttal case. The second option would have been for counsel to present the evidence favorable to the defense, but face the prospect of a damning rebuttal from the prosecution, *i.e.,* Tice's many subsequent statements in which he admitted his involvement.

The tactical impact of these known statements, actually introduced into evidence at the state habeas hearing, is obvious and does not require speculation. The record shows why, under the objective *Strickland* standard, counsel's actions were not unreasonable.

Indeed, the record reveals counsels' thorough investigation and contains perfectly sound reasons why counsel could have declined to file a motion to suppress Tice's first confession. Given the "highly deferential" scrutiny that courts must give to counsel's performance, and the "strong presumption" of effective assistance, this claim fails the "performance" part of the test articulated in *Strickland*, 466 U.S. at 689.

The district court mistakenly dismissed these plausible and obvious tactical judgments because counsel could not recall, years after the fact,

the basis for his decisions. However, the fact that defense counsel could not recall why he did not file a suppression motion cannot be dispositive. There is a difference between a silent record, and a record that reflects a thorough investigation and consideration of the issue, but where counsel simply cannot recall the reason. It is Tice's burden to show that counsel's actions were unreasonable, not the respondent's burden to prove otherwise.

At the state habeas evidentiary hearing, in reviewing Detective Crank's notes, counsel testified as follows:

> The one part of the notes that do concern me is where [Tice] said, "He told me he decided not to say any more." As I go back and look at that now, that statement ***may*** have generated something, ***may*** have generated a motion.
>
> There must have been some reason I didn't file it. I can't tell you today what that reason is, other than it's something that Jeff and I discussed with Derek and decided based upon whatever he told us, that it wasn't a – it wasn't a fertile ground or a valid ground. But I can't tell you today, six years later, what that reason was.

*App*. 911 (emphasis added).

A writ of habeas corpus turns on an objective inquiry. *See Strickland*, 466 U.S. at 669 (applicable standard is an "objective standard of reasonableness."). Therefore, the testimony of trial counsel – in this case, his unsurprising and candid lack of recollection – cannot be

dispositive. "Time inevitably fogs the memory of busy attorneys. That inevitability does not reverse the *Strickland* presumption of effective assistance." *Greiner v. Wells*, 417 F.3d 305, 326 (2nd Cir. 2005). The Second Circuit noted that "trial counsel's inability to recall why he abandoned a possible defense strategy – when queried seven years and seven hundred cases after petitioner's trial – does not establish a Sixth Amendment violation where a justification *appears on the record*." *Id.* at 307 (emphasis added). *See also Fretwell v. Norris*, 133 F.3d 621, 627-28 (8th Cir. 1998) (in spite of counsel's inability to recall precise rationale nine years after the trial, court could "readily reconstruct" the strategic reasons for counsel's actions from the record). Mr. Broccoletti can hardly be faulted for failing to recall in 2006 all the details of a case he initially handled in 1999.[13]

The Director does not suggest that the Court should imagine convoluted or implausible explanations for counsel's conduct. Rather, because counsel's memory will inevitably fade, particularly for busy

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[13] Mr. Broccoletti ceased representing Tice after his second trial, in early 2003. *App*. 929. He turned over the file to the public defender and then he turned over any remaining items in the file to habeas counsel in 2004 or 2005. *App*. 929.

attorneys who handle complex cases, it is appropriate for a court to draw out from the record the strategic reasons for counsel's actions from the record when the court can "readily reconstruct" these strategic reasons. This conclusion flows from *Strickland's* "strong presumption" that counsel's action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. In this instance, the record readily reflects the ambiguity of Tice's qualified statement and the fact that suppression would have placed counsel in a very awkward position tactically.

## CONCLUSION

For the reasons set forth above, the Judgment of the United States District Court for the Eastern District of Virginia granting habeas relief should be reversed.

## ORAL ARGUMENT

The Attorney General respectfully requests oral argument. Oral argument will assist the Court with the complex issues this case presents.

Respectfully submitted,

KENNETH T. CUCCINELLI II
Attorney General of Virginia

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

E. DUNCAN GETCHELL, JR.
State Solicitor General

STEVEN T. BUCK
Deputy Attorney General

STEPHEN R. MCCULLOUGH
Virginia State Bar No. 41699
Senior Appellate Counsel
smccullough@oag.state.va.us
*Counsel of Record*

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219

Telephone: (804) 786-2436
Facsimile: (804) 786-1991

VIRGINIA B. THEISEN
Virginia State Bar No. 23782
Senior Assistant Attorney General

*Counsel for Defendant/Appellant*

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief has been prepared using fourteen point, proportionally spaced, serif typeface: Microsoft Word 2007, Century Schoolbook, 14 point.

2. Exclusive of the table of contents, table of authorities and the certificate of service, this brief contains 11,747 words.

*/s/Stephen R. McCullough*
Counsel

## CERTIFICATE OF SERVICE

This is to certify that on February 1, 2010, I electronically filed the foregoing OPENING BRIEF with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

CHRISTOPHER T. HANDMAN
E. DESMOND HOGAN
THOMAS J. WIDOR
Hogan & Hartson, LLP
555 13th Street, N.W.
Washington, DC 20004
Telephone:(202) 637-5600
Facsimile:(202) 637-5910

MELISSA N. HENKE
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 661-6584

*/s/ Stephen R. McCullough*
Counsel