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

BRIEF FOR PETITIONER-APPELLEE DEREK TICE

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March 5, 2010

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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STATEMENT OF THE ISSUES

1. Whether the District Court properly determined that Tice's trial counsel's failure to move to suppress Tice's constitutionally defective statement constituted ineffective assistance of counsel.

2. Whether the District Court properly determined that the Supreme Court of Virginia's finding of no prejudice was contrary to, or an unreasonable application of, clearly established precedent.

INTRODUCTION

This case confirms why "[t]he great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." Ex Parte Yerger, 75 U.S. (8 Wall.) 85, 95 (1868). Twice now, courts have granted that great writ to petitioner, Derek E. Tice, a 40-year-old veteran of the Navy and Army, a former boy scout, and volunteer EMT. And for good reason: The rape and murder for which Tice had been serving dual-life sentences were committed by someone else.

That someone else was Omar Ballard, a sex-offender with a history of violently assaulting young women. DNA tests proved that Ballard—and Ballard alone—was the source of the DNA recovered from three locations at the crime scene. Ballard, who knew the victim and was trusted by her, spontaneously confessed to the crime in a letter to a friend. He confessed again when police eventually confronted him. And in multiple statements to the police and the courts, Ballard insisted that he committed the crime alone.

The Commonwealth initially recognized that this was a crime committed by one man. There was no sign of forced entry, the furniture and stacks of paper were all still neatly arranged in the small apartment where the crime was committed, and—of course—the DNA recovered from the victim and around the apartment matched only one man. The problem for the Commonwealth is that it initially

arrested the wrong man. When that man's DNA later proved no match, the Commonwealth arrested another, hypothesizing that it must have been a two-person crime. When DNA tests came back negative for him, the Commonwealth pivoted to a new three-perpetrator theory and arrested a third suspect. And so on. This tragic cycle repeated until the Commonwealth had seven men in custody under a theory that this marauding gang stormed the victim's apartment, took turns raping her, and then stabbed her—all without disturbing the contents of the apartment, inflicting a bruise on her body, leaving any fingerprints, or depositing the slightest trace of DNA.

Tice was the fourth man ensnared by this investigation. Yet, even after Ballard stepped forward to claim sole responsibility for the crime—and even after DNA tests conclusively linked Ballard alone to the crime—the Commonwealth continued to prosecute Tice and three others under the theory that Ballard simply must have been the eighth conspirator to participate in the crime (and the only one unlucky enough to leave DNA at the scene). Despite the lack of physical evidence linking Tice or anyone other than Ballard to the crime, the prosecution prevailed against Tice. But it did so by relying exclusively on a confession that investigators had coaxed from Tice after hours of interrogation and after he had unequivocally invoked his right to remain silent. That confession came into evidence only because Tice's lawyers never moved to suppress it.

On state habeas, the Virginia Circuit Court granted Tice a writ. Applying Strickland v. Washington, 466 U.S. 668 (1984), the court ruled that Tice's Sixth Amendment right to effective assistance of counsel had been violated. The court first found that, in failing to make any motion to suppress Tice's statement—which was the centerpiece of the prosecution's case—counsel's performance fell below reasonable standards. The Circuit Court then easily found prejudice. After all, "[t]here was no fingerprint, DNA, or other scientific evidence against [Tice]; no independent eyewitnesses implicated him; no physical evidence directly implicated him." JA 1079. Because the only remaining evidence against Tice was hopelessly contradictory testimony from a co-defendant with limited mental abilities—whose withering cross-examination the Circuit Court described as "quite damaging"—the court concluded that there was "a reasonable probability the jury would have acquitted the petitioner if his confession had not been admitted into evidence." JA 1080.

The Virginia Supreme Court did not disturb the Circuit Court's finding of deficient performance under Strickland, but it reversed on the prejudice prong. According to the Virginia Supreme Court, Tice would have been convicted beyond a reasonable doubt—even without the statement—on just the testimony of his co-defendant. The court reached that result even though it acknowledged that that

testimony was riddled with "inaccuracies," JA 1093, and that no other evidence linked Tice to the crime.

On federal habeas, the District Court below granted Tice's petition, finding that "[t]he Virginia Supreme Court's conclusion that there was no reasonable probability of a different result if Tice's confession had been excluded is objectively unreasonable." JA 1164 (citing 28 U.S.C. § 2254(d)(1)). The District Court emphasized that, "[c]onfronted with the history of the meandering development of [the co-defendant's] account of the crime and [his] expressed willingness to tell the police anything they wanted [to] hear, a juror would have significant questions about the veracity of [his] testimony." JA 1160. The District Court therefore ordered the Commonwealth to either retry Tice or free him.

The glaring problems with Tice's conviction have been recognized by the Executive branch as well as the Judicial. Finding that the evidence "raised substantial doubts about [Tice's] conviction and the propriety of his continued detention," Governor Timothy Kaine of Virginia issued Tice a conditional pardon releasing him from incarceration. See Aug. 21, 2009 Req. to File Supp. Briefing in Light of Governor's Conditional Pardon at Attachment (hereinafter "Conditional Pardon"). Although the Governor's conditional pardon has brought Tice much of the vindication and justice he has sought for more than a decade, it is still a

conditional pardon. This Court should affirm the District Court's grant of habeas and bring to a close the long nightmare that Tice has endured.

STATEMENT OF FACTS

I. THE CRIME

On July 8, 1997, eighteen-year-old Michelle Moore-Bosko was raped and killed in her Norfolk, Virginia apartment. JA 27-30, 842-843. When her husband, William Bosko, returned home that evening, there were initially no signs to indicate that anything was wrong. JA 39. He entered the front door of their small apartment, which showed no signs of forced entry, and walked into the combination living and dining room area. Nothing was amiss. JA 40-41. The four dining-room chairs were all nicely upright around the table, and letters and papers remained neatly stacked on a display shelf. JA 43-46. In fact, even the stacks of papers that balanced precariously from shelves leading into the narrow hallway remained undisturbed. JA 46. It was only after William Bosko navigated down this hallway and into the bedroom that he saw his wife's body. JA 30.

A subsequent autopsy by the Medical Examiner, Doctor Elizabeth Kinnison, ruled that Moore-Bosko died from a combination of strangulation and three penetrating stab wounds. JA 185-186, 189-190. According to Dr. Kinnison, all three of the penetrating stab wounds, along with a fourth superficial stab wound, were at the exact same angle and "within a couple inches of each other." JA 187-

188. Dr. Kinnison agreed that the stab wounds were consistent with a finding that a single person inflicted them. JA 189. In fact, the parallel nature of the wounds, the lack of bruises on Moore-Bosko's body, and the unspoiled condition of the small apartment all indicated that this was the work of a lone individual. JA 42-43, 192-194, 197, 1046.

Eighteen months later, DNA test results confirmed this conclusion. All three samples that were collected from three different locations within the apartment matched the DNA of just one person: convicted felon Omar Ballard. JA 592-594.

II. THE INVESTIGATION

From the outset, this should have been a straightforward case for the police. All signs pointed to Ballard as the prime suspect. He knew the victim, frequented her apartment, and had been in the apartment days before the murder. JA 49-51, 99-101, 105. Ballard was also known to be a violent individual. As it turned out, he was in the midst of a sexually violent crime spree against women in Moore-Bosko's neighborhood when he killed her. Days before the Moore-Bosko crime, Ballard violently assaulted another young woman in the same apartment complex, and days after he raped and killed Moore-Bosko, Ballard raped a 15-year-old girl less than a mile from Moore-Bosko's home. JA 50-51; see Commonwealth v. Tice, CR98002980, Mot. Hr'g Tr. at 3-6, Jan. 28, 2000. But the police did not bother to investigate Ballard's connection to the Moore-Bosko crime. Instead they set their

sights on Danial Williams, a young sailor with no criminal record who lived with his wife across the hall from the Boskos. JA 18.

A. Danial Williams

On July 8, 1997, an hour after arriving on the scene, the police summoned an unsuspecting Williams to the station, where he was interrogated by two detectives for almost 10 hours. JA 728-730. Williams repeatedly denied any involvement in the crime and cooperated with the detectives' requests for various tests, including tests of a stain in his underwear that ultimately did not tie him to the crime. See Mar. 26, 1998 Division of Forensic Science Certificate of Analysis (Def. Trial Ex. 6).

Just before five in the morning, lead Detective Glen Ford decided it was time to up the ante. JA 732. After taking over for one of the detectives in the interrogation room, Ford launched into high-pressure interrogation tactics designed to frighten and intimidate Williams into confessing to the crime. It worked. JA 723, 730. Williams told the investigators that he had hit Moore-Bosko in the face with his fist, that he struck her as well with a shoe, and that he had used no other weapon. JA 724, 726.

There was just one problem: The autopsy results came back and demonstrated that Moore-Bosko had not been hit in the face, had not suffered any bruises, and, in fact, had been strangled and stabbed. JA 576, 730-731. That left

the investigators with a confession to a crime that did not exist. But rather than question whether they had the right man, the investigators took a more expedient approach: They informed the now-compliant and petrified Williams of the true facts of the murder scene, and then coaxed him into drafting a "supplemental statement" that essentially renounced his first version and adopted the spoon-fed narrative the investigators had offered. JA 730-731. But even this confession exposed a glaring problem: Williams was unable to describe the knife that he supposedly used to carry out the new version of the murder because that was a detail the investigators never told him. See July 9, 1997 Supplemental Statement of Danial Williams (State Habeas Pet. Ex. 10) at 1-2.

For the next six months, the investigators considered the case solved. JA 1046. After all, the crime scene and forensic evidence suggested this was a single-perpetrator crime, and the investigators now had behind bars a single perpetrator who had confessed to the crime.

Or so they thought. In December 1997, the long-awaited DNA tests finally came back and conclusively eliminated Williams as the source of the three DNA samples recovered from the crime scene: a vaginal swab from Moore-Bosko's body, a spermatozoa stain on a blanket covering her body, and material from beneath her fingernails. JA 581-583. This stunning turn forced the investigators to accept that one of their two theories was wrong: Either Williams was not the

perpetrator or else this was not a lone-perpetrator crime and Williams was just one of several perpetrators. Despite all evidence supporting the lone-perpetrator theory—and despite Williams never mentioning an accomplice at any time—the investigators forged ahead with a new two-perpetrator theory.

That faulty hypothesis thus began a tragic cycle: The investigators would set their sights on a new suspect, pressure a young Navy man with no criminal record into another bizarre and contradictory confession to corroborate their theory, and declare the case solved—only to learn months later that this suspect was not the source of the DNA samples taken from the crime scene. The investigators would then focus on yet another man and repeat the same mistakes anew. This gambit ultimately metastasized into an investigation implicating more than a half dozen innocent men.[1]

[1] Recent studies have confirmed the surprising number of innocent people who have falsely confessed to crimes over the past few decades. In one study of more than 200 people who had been exonerated by DNA evidence and released from prison, researchers found that "[i]n 15-20% of these cases, police-induced false confessions were involved." Saul M. Kassin, Police-Induced Confessions: Risk Factors and Recommendations, Law & Human Behavior at 2 (2009) (citing Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 89-93 (2008)), available at, http://www.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20online%20%2809%29.pdf. Nor is it unprecedented to have multiple people falsely confess to the same crime when told the same story by police. One of the more notorious examples was New York City's Central Park Jogger case, "where five false confessions were taken within a single investigation" into a brutal rape. Id. The police extracted confessions from five boys, all of whom later recanted but were nevertheless convicted and sentenced to

B. Joseph J. Dick, Jr.

The first to get swept up in the investigators' new two-perpetrator theory was Williams's roommate, Joseph J. Dick, Jr., another sailor with no criminal history and with significantly limited mental capabilities. See Sept. 11, 2006 Habeas Hearing Tr. at 105-108, 115-117. On January 12, 1998, six months after the crime, detectives interrogated Dick. JA 220-221. He repeatedly denied any involvement in the crime and told the detectives that he was on duty aboard a naval vessel on the night in question. JA 223. Without bothering to verify Dick's answer, the interrogation continued. The detectives insisted Dick was involved in the crime, and they shoved graphic crime-scene photos of Moore-Bosko's body in his face. JA 225-226.

After nearly eight hours of aggressive interrogation, Dick told the detectives what they wanted to hear: that he and Williams committed the crime. JA 224-227. But as with Williams's initial confession, Dick's statement was riddled with demonstrably false details. The most telling example had to do with the blanket that covered Moore-Bosko's body. Having been shown photos of Moore-Bosko's body covered with that blanket, Dick claimed that he had placed it there before leaving the scene. JA 225, 234. But the investigators knew that was not true. It

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prison. They were exonerated years later "when the real rapist gave a confession, accurately detailed, that was confirmed by DNA evidence." Id.

was Moore-Bosko's husband who had covered his wife after finding her on that tragic day. JA 31, 52. Nor was that the only sign that Dick was just making things up to appease the investigators. He also said that Moore-Bosko had fought and resisted him and Williams, but the autopsy report showed that Moore-Bosko had suffered no defensive injuries. JA 192-193, 232, 576-580.

Then the DNA tests came back. And as with Williams, the tests conclusively eliminated Dick as the source of DNA found at the crime scene. See Mar. 26, 1998 Division of Forensic Science Certificate of Analysis (Def. Trial Ex. 6). But the investigators did not let science stand in the way of their two-perpetrator theory. Instead, they now hypothesized that the crime must have been carried out by not one person, or two people, but by three.

C. Eric Wilson

The next to be arrested was Eric Wilson, another Navy sailor with no criminal history. Like Williams and Dick, Wilson repeatedly denied any involvement in the crime. See Apr. 8, 1998 Notes of Dets. Ford and Hoggard (State Habeas Pet. Ex. 13) at 2-4. But after hours of high-pressure interrogation, during which the investigators showed Wilson some but not all photos from the crime scene, Wilson submitted to the investigators' demands; he said that he, Williams, and Dick had raped Moore-Bosko. Id. at 8. But like Williams and Dick, Wilson's "confession" got virtually all of the details wrong. For example, Wilson

initially said that the rape occurred in the living room. But after detectives showed Wilson a picture of the victim's body in the bedroom, he changed his story in response to that not-so-subtle hint. Id. at 8-9.

That though was good enough for the investigators. They now had a third perpetrator in custody who had not only confessed to the crime but had also confirmed their newly minted three-perpetrator theory. Then came the DNA tests and it was déjà vu all over again; Wilson's DNA did not match the samples taken from the crime scene. JA 584.

For the detectives there was no turning back now. Although the physical evidence at the crime scene, the exonerating DNA results, and every expert's first impression indicated one perpetrator had committed this crime, the detectives continued to chase an elusive DNA match that they were convinced would turn up with one of Williams's friends. Now they decided the crime, which they originally had concluded was committed by just one person, must have been conducted by not one, two, or three people, but instead by no less than four men.

D. Derek Tice

The investigators returned to Dick, asking him to name another accomplice. Dick, who had been threatened with the death penalty if he did not cooperate, offered up someone named "George Clark" as yet another participant in the crime. JA 247. After the detectives were unable to find anyone by that name, they gave

Dick a Navy ship book and asked him to pluck someone from its pages. JA 1051. With a point of a finger, Derek Tice's life changed forever.

On June 18, 1998, nearly a year after the murder, a Norfolk detective left a message for Tice at his Orlando, Florida home, where he had moved in November 1997. JA 966. A former sailor, Army reservist, boy scout, and emergency-rescue volunteer, Tice had no criminal record and a healthy respect for law enforcement. Tice accordingly returned the detective's call and—having no reason to believe he was a suspect—willingly gave his full name, social security number, date of birth, and address. JA 323-324, 966-967. Hours after that phone call, the local authorities arrested Tice at home on charges of capital murder and rape. JA 323-324, 968-969. On June 22, 1998, Tice waived extradition; in all, he spent six days in the Orlando City jail. JA 324-325; JA 970.

On June 25, 1998, between 5:00 and 6:00 a.m., Ford and another detective picked up Tice at the Orlando City jail; the three then flew to Norfolk. JA 325, 970-971. They arrived at the Norfolk police headquarters around 2:00 p.m., and the detectives almost immediately launched into a highly coercive interrogation. JA 972-977. Like the other defendants, Tice repeatedly asserted his innocence and stated that he knew nothing about the crime. JA 974-978, 987-990.

From the start, Tice's assertions of innocence were ignored. Instead, the detectives repeatedly yelled at Tice, fed Tice information about the crime, lied

about the existence of a witness placing Tice at the crime scene, and threatened Tice with the death penalty. JA 982-998. After almost 11 hours in Norfolk police custody, at approximately 4:00 p.m., Tice was sent to Detective Randy Crank in a nearby room, where he was subjected to another three-hour session of questioning.[2] JA 614, 992, 1038-42; see also JA 598.

Finally, after six days in a Florida jail and almost 14 hours of Norfolk police custody, Tice thought enough was enough. He therefore told Crank in no uncertain terms that he wanted the interrogation to stop. JA 994. Crank's own notes underscore the clarity of Tice's request: "He told me he decided not to say any more; that he might decide to talk after he talks with a lawyer or spends some time alone thinking about it." JA 614.

But the investigators did not heed Tice's demand. Instead, Crank returned Tice to the interrogation room presided over by Ford. A mere 13 minutes after Tice invoked his right to remain silent, Ford resumed the interrogation with renewed vigor. JA 598, 994-995, 1052-53, 1068-69. That devastated Tice. Having his constitutional right to silence ignored, Tice cracked when it became clear that the police were not going to honor his demand "not to say any more."

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[2] The Commonwealth's claim that Tice failed a polygraph during this interrogation mischaracterizes the record. All we know is that Tice was informed that he had failed the test. But the detective who told Tice of this "result" was the same detective who admitted lying to Tice about other "evidence" that did not exist. JA 1053.

JA 994-997. Beleaguered and defeated from almost 18 hours in Norfolk police custody, Tice agreed to offer a statement that jibed with the detectives' latest theory that had been repeated over and over to Tice during the interrogation: that he was one of many men who joined forces to rape and murder Moore-Bosko. JA 1001-1004.

But when pressed for details on how the crime occurred, Tice fared no better than Williams, Dick, or Wilson in guessing at the details. JA 1004-1008, 1053-1055; see JA 599-609. For example, Tice claimed that the men pried their way into the victim's apartment with a claw hammer, and indicated that the crime occurred as soon as the group pushed their way inside the apartment. JA 601. But, of course, there were no signs of damage to the door or forced entry into the apartment. Nor were there any signs of struggle in the living/dining room into which the door opened.

Other key aspects of Tice's confession confirmed that his was the story of someone guessing at what happened, not that of someone who had lived through it first-hand. Thus, apart from implicating the suspects that the investigators told him about—Williams, Dick, and Wilson—Tice identified two other perpetrators: Geoffrey Farris and Richard Pauley. JA 600. But Pauley had an airtight alibi for

the early morning hours of July 8, 1997, when the crime occurred.[3] Pauley's parents testified that Pauley came home from work between 6:30 and 7:00 p.m. on July 7, 1997, and remained at home until Pauley's father took him to work the next day. JA 535-537, 548-549. And telephone records confirmed that Pauley talked with his girlfriend in Australia from 11:00 p.m. to 2:00 or 3:00 a.m. on July 8, 1997. JA 535-536.

And then the DNA tests came back and told a familiar story: Despite confessing to the crime, Tice's DNA conclusively did not match the DNA profiles collected from the crime scene. JA 586-587. That was particularly significant for Tice because it further confirmed the absurdity of his confession, in which he claimed to have ejaculated during his supposed rape. JA 608. Nor did the DNA tests link Farris or Pauley to the crime. JA 586.

The Commonwealth, however, would not be deterred. Its prosecutors continued to insist that, unless Tice pleaded and cooperated, they would seek the death penalty against him. To avoid that fate, Tice was forced to enter into plea negotiations with the Commonwealth, which required him to make other statements and to testify against his co-defendants. JA 1011. Because the police still had not found a DNA match for the crime scene, they needed another man to

[3] Testimony from Moore-Bosko's friend, Tamika Taylor, suggested that Moore-Bosko was killed between 11:00 p.m. on July 7, 1997, and 8:00 a.m. on July 8, 1997. JA 83-86. That timing comports with Ballard's statement that he killed Moore-Bosko between 2:30 a.m. and 3:00 a.m. on July 8, 1997. JA 471.

complete their theory. Interestingly enough, in Tice's plea negotiations, another name was provided: John Danser. JA 1011. But Danser, like the six other men who had been accused of committing this crime, could not be linked by DNA tests to the rape or murder. JA 588-591. And he, too, had an airtight alibi.[4]

E. The Commonwealth Drops Charges Against Three Suspects, But Not Tice.

As time passed and Tice recovered from the emotionally bruising and suggestive interrogation, Tice protested his innocence. Even though pleading not guilty meant facing the death penalty, he refused to plea to a crime he never committed. That put the Commonwealth in fine kettle. After all, in a little over a year, the Commonwealth's theory of the crime had mutated from a lone-perpetrator hypothesis to a seven-perpetrator gang rape and murder with ritualistic acts involving Williams, Dick, Wilson, Tice, Farris, Pauley, and Danser. And by early 1999, the Norfolk police were holding all seven suspects in custody. So when Tice walked away from a plea deal and refused to testify against anyone, the Commonwealth's cases against Pauley, Danser, and Farris—none of whom had

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[4] Danser's timesheets (initialed by his supervisor) for July 7, 1997, show that he reported to work at 7:45 a.m. and worked over 10 straight hours servicing air conditioners. JA 500-502. Danser withdrew money from an ATM at 8:42 p.m., and then went to a nightclub where he met up with friends to celebrate his birthday until 2:00 a.m. on July 8, 1997. JA 507-509, 512-513, 517. Danser then clocked into work a few hours later at 7:30 a.m. and worked for eight hours. JA 515. To drive from Danser's home in Warminster, Pennsylvania, to Norfolk, Virginia, would have taken six hours each way. JA 517.

confessed—crumbled. JA 692, 1012, 1055-1056. Left with only the testimony of Dick—whose statements were punctuated with scores of inconsistencies—to implicate these three men, the Commonwealth dismissed the cases against Pauley, Danser, and Farris. JA 691-694, see JA 499.

The Commonwealth took a different tack with Tice. Even though the physical evidence linking Tice to the crime was the same as it was for Pauley, Danser, and Farris—that is to say, there was none—the Commonwealth continued to pursue Tice on a theory that seven men committed this crime. And even when a different individual—Ballard—subsequently confessed to committing the crime alone, the Commonwealth pressed on. Rather than meaningfully reevaluate its theory of the crime, it instead reflexively tacked on yet one more man to the theory. By the time Tice went to trial, the Commonwealth's theory du jour was that Tice was one of eight men who raped and murdered Moore-Bosko.

III. BALLARD ADMITS THAT HE COMMITTED THE CRIME ALONE.

In early 1999, while serving a prison sentence for raping and maliciously wounding a teenage girl less than a mile from Moore-Bosko's home, Ballard handwrote a letter to his friend, Karen Armstrong Stover, in which he volunteered that he had killed Moore-Bosko:

> Remember that night I went to Mommie's house and the next morning Michelle got killed guess who did that, Me, Ha, Ha. It wasn't the first time * * * [I]f I was out I would have killed that Bitch down the street from you too * * *.

JA 695-696; see 847-848.

When the police received a copy of the letter, detectives finally trained their sights on the person who should have been the obvious suspect from day one. The detectives subsequently questioned Ballard, who dared them to find evidence linking him to the crime. JA 488-489, 845, 1057. On March 4, 1999, the detectives did just that. DNA tests finally gave the detectives what they had been searching for during the past 18 months: a positive DNA match to the blood and semen found at three different locations at the crime scene and on Moore-Bosko. JA 592-594.

Confronted with the damning DNA evidence, Ballard confessed virtually immediately—in stark contrast to the lengthy interrogations required of the sailors. JA 488-489, 846. In a March 4, 1999 statement to police, Ballard confirmed, as he had indicated in his handwritten letter to Stover, that he committed the crime by himself. He explained that he had not seen anyone inside or outside the apartment before or after the offense, and that he had never talked with anyone about the crime. JA 701-702, 846. When specifically asked whether anyone else participated, Ballard said, "No." JA 701, 843-844.

A week later, on March 11, 1999, Ballard gave another statement to police, and once again told them he had committed the crime by himself. JA 710-713; see JA 846-847, 1057. By this point, however, the Commonwealth was committed to

securing convictions of Williams, Dick, Wilson, and Tice. To say the least, Ballard's confession that he alone committed this crime—confirmed by the DNA results—made the Commonwealth's cases suspect.

Then a curious thing happened. On March 15, 2000, a week before Ballard pleaded guilty, Ballard made a brand new "statement" to secure a plea deal that would spare him the death penalty. JA 849-852, 839. In this eleventh-hour epiphany, Ballard now signed on to the investigators' theory of the crime: that the four other men who had already been indicted for the rape and murder—Williams, Dick, Wilson, and Tice—had committed the crime with him. JA 722, 850-851. This was the one and only time that Ballard ever varied from his insistence that he had acted alone.

At the Habeas Hearing, Ballard confirmed that he made the new statement solely for the purpose of securing the plea agreement to spare his life. Under oath, Ballard testified as follows:

> Q. Was anyone with you the night that you killed Ms. Moore-Bosko?
>
> A. No.
>
> * * *
>
> Q. Was Derek Tice involved in this crime?
>
> A. No.

JA 843-844.

IV. TICE'S TRIAL

After Tice's first conviction in 2000 was overturned—and after Ballard had repeatedly claimed sole responsibility for the crime—the Commonwealth nevertheless insisted on trying Tice again. During both trials, Tice was represented by James Broccoletti and Jeffrey Russell. JA 840, 903, 946. It is undisputed that trial counsel never moved to suppress Tice's statement to the police on any ground. JA 840, 906-907, 949.

Needless to say, Tice's statement was the centerpiece of the Commonwealth's case. In the opening and closing statements, the prosecutors focused almost exclusively on the statement. An audiotape of Tice's statement was played for the jury, and a typed version was provided for further consideration. See App. 292-308. Given that "[a] confession is like no other evidence," Arizona v. Fulminante, 499 U.S. 279, 296 (1991), Tice's fate was sealed as soon as the jury heard that recording.

The rest of the trial was mere formality. The Commonwealth did not—because it could not—present any physical or forensic evidence linking Tice (or any of the sailors) to the crime. JA 1079 ("There was no fingerprint, DNA, or other scientific evidence against [Tice]; no independent eyewitnesses implicated him; [and] no physical evidence directly implicated him."). Instead, to try to corroborate Tice's statement, the Commonwealth relied on the testimony of Dick,

who had pleaded guilty and was required to testify against Tice under the terms of his plea agreement. JA 221-259; see JA 904.

As the Commonwealth concedes, Dick's testimony was "vigorously and extensively challenged." Br. 23. The defense pointed out the vast number of statements Dick had made that were inconsistent with each other and with his trial testimony, and the defense contended that Dick "had lied in order to save himself from the death penalty." Id. In response, Dick "repeatedly acknowledged that various aspects of the events he had previously mentioned were not true." Id.

In Tice's defense, trial counsel introduced Ballard's two statements to the police in which he admitted committing the crime alone. JA 461-485. Trial counsel also presented the results of the DNA analysis that proved that Ballard was the sole DNA match and that the DNA of Tice, Dick, and the other men charged with the crime was conclusively eliminated as a source of the DNA found at the crime scene.

V. THE STATE HABEAS HEARING

At the state Habeas Hearing, Tice's counsel, Broccoletti, acknowledged that every statement a defendant makes to a police officer is "extremely significant." JA 935. He also acknowledged that before Tice's second trial, he had in his files Detective Crank's notes, which set forth in black and white Tice's unequivocal statement that he had "decided not to say any more." JA 908-910; JA 613-614.

Although defense counsel had this critically important piece of evidence, neither Broccoletti nor his co-counsel could recall ever seeing the notes until shortly before the Habeas Hearing. JA 908-910, 923-925, 951-952.[5] Broccoletti and his co-counsel both testified that they had never even considered filing a motion to suppress Tice's statement based on Miranda grounds. JA 907, 910, 950. Broccoletti further conceded that, "[a]s I go back and look at [Crank's notes] now, [the notes] may have generated * * * a motion [to suppress]." JA 911.

VI. HABEAS COURT DECISIONS

The Circuit Court granted Tice's petition. In reaching that ruling, the Circuit Court determined that Tice's "statement (when put in the first person) 'I've decided not to say any more' was [an] unambiguous and unequivocal" invocation of the right to silence. JA 1077. Having concluded that a motion to suppress would have been granted, the Circuit Court then assessed whether counsel's failure to file such a motion constituted ineffective assistance under the two-part test of Strickland, 466 U.S. at 687 (stating that petitioner must prove counsel's actions were deficient and prejudicial).

The court found that it did. As the Circuit Court explained, "Crank's notes were in the Court's file for more than three years before the second trial [and] they

[5] Although the Commonwealth claims that Broccoletti "was sure that he would have reviewed those notes with Tice," the Commonwealth concedes that Broccoletti repeatedly admitted under oath that he had no recollection of having ever done so. Br. 25.

were in Mr. Broccoletti's file." JA 1079. But neither of Tice's lawyers had any specific recollection of seeing the notes before the Habeas Hearing. Id. at 923-925, 951-952. And based on counsel's own admission at the hearing, the Circuit Court concluded that "[n]o reason ha[d] been offered for the failure to file the motion." JA 1079.

The Circuit Court went on to find that counsel's errors clearly prejudiced Tice. The court explained that "[t]here was no fingerprint, DNA, or other scientific evidence against him; no independent eyewitnesses implicated him; no physical evidence directly implicated him." JA 1079. Because the only remaining evidence against Tice was his co-defendant Dick's testimony—and because the cross-examination of Dick at Tice's trial was "quite damaging"—the court found that there was "a reasonable probability the jury would have acquitted the petitioner if his confession had not been admitted into evidence." JA 1080.

On appeal, the Virginia Supreme Court did not disturb the Circuit Court's finding of deficient performance under Strickland. But the Virginia Supreme Court reversed the habeas grant because, in its view, Tice was not prejudiced by having his unconstitutional confession admitted in evidence and played for the jury. To be sure, the Virginia Supreme Court acknowledged that, without the confession, Dick's testimony was the lone piece of evidence linking Tice to the crime, and it conceded that Dick's testimony contained numerous "inaccuracies." JA 1093.

Despite all that, the court held that Dick's imperfect testimony was enough—by itself—to convict Tice beyond a reasonable doubt. JA 1094.

On federal habeas, the United States District Court for the Eastern District of Virginia granted Tice's petition. The court held that "[t]he Supreme Court of Virginia's conclusion that there was no reasonable probability of a different result if Tice's confession had been excluded is objectively unreasonable." JA 1164 (citing 28 U.S.C. § 2254(d)(1)). That was because "the prosecution's case against Tice would be left awash in doubt" were his unconstitutional statement suppressed. JA 1163. Without that statement, the prosecution had virtually nothing on which to convict Tice, given that "[t]here was no physical evidence linking Tice to the crimes or suggesting that Tice acted in concert with the individuals who had committed the crimes." JA 1163.

That left the prosecution with only Dick's testimony. But the District Court, after reviewing all the evidence and granting the Virginia Supreme Court the deference it is due, found that Dick's word alone would not have sufficed: "Considering the variety of accounts Dick had provided and the lack of any significant corroboration of his testimony that Tice had participated in the crime, a reasonable juror would have grave doubts as to Dick's veracity regarding Tice's participation in the crime." JA 1164. To support that ruling, the District Court methodically catalogued Dick's four separate, contradictory, and ever-evolving

theories. JA 1156-1160. It ultimately concluded—as had the Circuit Court on state habeas—that "[c]onfronted with the history of the meandering development of Dick's account of the crime and Dick's expressed willingness to tell the police anything they wanted [to] hear, a juror would have significant questions about the veracity of Dick's testimony." JA 1160. The court accordingly granted Tice a writ of habeas corpus.

VII. TICE RECEIVES A CONDITIONAL PARDON FROM GOVERNOR KAINE.

On August 6, 2009, the Governor of Virginia, Timothy M. Kaine, agreed that Tice had "raised substantial doubts about his conviction and the propriety of his continued detention." The Governor therefore issued Tice a conditional pardon releasing him from incarceration. Conditional Pardon, JA 1166. Underscoring the fatal flaws in the Commonwealth's entire case against everyone other than Ballard, Governor Kaine also conditionally pardoned and released from prison Williams and Dick (Wilson, who had received a shorter sentence and was no longer in prison did not need the conditional pardon). Even though the Governor confirmed that there are "substantial doubts" about Tice's guilt, the Commonwealth appealed the District Court's grant of habeas.

SUMMARY OF ARGUMENT

I. The District Court correctly found that counsel provided Tice with ineffective assistance of counsel. The deferential standard of review under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), does not govern the first prong of the Strickland inquiry here because the Virginia Supreme Court never passed upon the reasonableness of counsel's failure to file a motion to suppress. The only state habeas court to reach that question was the Circuit Court, which found that counsel had no tactical reason for failing to move to suppress Tice's statement—the very centerpiece of the prosecution's case. That is a factual finding that is "presumed correct." 28 U.S.C. § 2254(e)(1). And none of the post-hoc tactical theories conjured up by the Commonwealth in its brief trump that presumption. To the contrary, they are nothing more than "exercises in retrospective sophistry" that this Court has rejected. Griffin v. Warden, 970 F.2d 1355, 1358 (4th Cir. 1992).

II. The District Court was also correct in finding that "[t]he Supreme Court of Virginia's conclusion that there was no reasonable probability of a different result if Tice's confession had been excluded is objectively unreasonable." JA 1164 (citing 28 U.S.C. § 2254(d)(1)). Without Tice's statement, the Commonwealth had no evidence on which to convict Tice beyond a reasonable doubt. The Virginia Supreme Court disagreed, but it relied solely on the testimony

of Dick, which the court conceded was plagued by "inaccuracies." JA 1093. But the inaccuracies were so stark that "a reasonable juror would have grave doubts as to Dick's veracity regarding Tice's participation in the crime." JA 1164. It was therefore objectively unreasonable for the Virginia Supreme Court to conclude that, but for counsel's errors, the result of Tice's trial would have been the same.

ARGUMENT

I. AEDPA STANDARD OF REVIEW

A petitioner is entitled to a writ of habeas corpus under AEDPA when the state court's resolution of his claim on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A decision is contrary to clearly established Federal law "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if the decision confronts facts that are "materially indistinguishable" from a relevant Supreme Court case yet reaches a different result. Williams v. Taylor, 529 U.S. 362, 405-406 (2000).

An unreasonable application of clearly established Federal law occurs when a state court "identifies the correct governing legal principle from the [Supreme] Court decisions but unreasonably applies that principle to the facts of [petitioner's] case." Id. at 413. "In other words, a federal court may grant relief when a state

court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.' " Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). But when the state Supreme Court has not reached the merits of a question, no deference under AEDPA is due. See Rompilla v. Beard, 545 U.S. 374, 390 (2005) (prejudice element of Strickland claim reviewed de novo because state courts never reached the issue); Wiggins, 539 U.S. at 534 (same).

Pursuant to 28 U.S.C. § 2254(e)(1), the Circuit Court's factual findings "shall be presumed to be correct."

II. THE DISTRICT COURT CORRECTLY HELD THAT TRIAL COUNSEL'S FAILURE TO MOVE TO SUPPRESS TICE'S STATEMENT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

The Commonwealth acknowledges that the "Supreme Court of Virginia did not address the performance prong of the Strickland test." Br. 41. Because the Virginia Supreme Court failed to address this issue, the Circuit Court's opinion is the "last reasoned" state court decision that is entitled to deference. Indeed, the only courts to address this habeas issue—the Circuit Court and the District Court—both correctly held that Tice's trial counsel provided deficient performance in failing to move to suppress Tice's statement. The record supports no other conclusion.

A. Tice Invoked His Fifth Amendment Right To Silence, Which The Police Failed To Scrupulously Honor.

Because custodial interrogations are inherently coercive, the Supreme Court has adopted a bright-line rule of decision: An individual may invoke his Fifth Amendment right to silence "in any manner" and "at any time prior to or during questioning." Miranda v. Arizona, 384 U.S. 436, 473-474 (1966). Once an individual has indicated that he does not want to continue talking, "the interrogation must cease." Id. at 474. And if police fail to "scrupulously honor" that request, the consequences are equally clear: Any subsequent statement must be excluded because it "cannot be other than the product of compulsion, subtle or otherwise." Id. See also Michigan v. Mosley, 423 U.S. 96, 104 (1975).

Those rules apply with full force here. After being interrogated and worn down for almost 14 hours in police custody, Tice told Detective Crank that "he decided not to say any more, that he might decide to after he talks with a lawyer, or spends some time alone thinking about it." JA 614. As the Circuit Court properly found, there is nothing ambiguous about that statement. Particularly given that "a suspect need not 'speak with the discrimination of an Oxford don' " to invoke the right to remain silent, Davis v. United States, 512 U.S. 452, 459 (1994) (citation omitted), the police should have understood Tice's plain-English demand "not to say any more" to mean just what those words convey in a custodial interrogation: that the right to remain silent has been invoked.

The Commonwealth effectively concedes as much. In its blue brief, the Commonwealth acknowledges that when an individual says he has "decided not to say any more" it places him "in a strong position to argue that he invoked his right to remain silent." Br. 45. Indeed it does.[6] As the Sixth Circuit has held in an analogous case, "[a]ny reasonable police officer, knowing that the exercise of the right to silence must be 'scrupulously honored,' " would have understood a suspect's request that "she did not want to talk about the rape" to be an unambiguous invocation of that right. McGraw v. Holland, 257 F.3d 513, 518 (6th Cir. 2001).

Numerous courts have reached the same conclusion when confronted with similar expressions. For example, in Florida v. Belcher, the court determined that the statement, "I don't want to talk to you any more," was a valid invocation of the right to silence that was violated when the interrogating detective immediately stopped the questioning and left the room, only to be replaced by another detective just over an hour later. 520 So. 2d 303, 304 (Fla. Dist. Ct. App. 1988). In Stinnett v. Texas, 720 S.W.2d 663, 668 (Tex. Ct. App. 1986), and in Colorado v.

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[6] The clarity of Tice's request becomes clearer still when, as the Circuit Court recognized, it is transcribed from Crank's notes and "put in the first person." JA 1077, 1143. Even outside the coercive bounds of police interrogation, when an acquaintance tells you, "I've decided not to say any more," nothing is left to the imagination. When a suspect says the same thing during a custodial interrogation, the Constitution compels the police to stop.

Arroya, 988 P.2d 1124, 1135 (Colo. 1999), the courts held that each defendant expressed a clear desire to cut off questioning with the respective statements, "I don't want to talk anymore," and "I don't wanna talk no more." And in Law v. Maryland, the court determined that an officer's "continuing to take a statement from appellant after appellant told him '* * * he didn't want to talk any more * * *' was a denial of appellant's Fifth Amendment rights." 318 A.2d 859, 873 (Md. Ct. Spec. App. 1974). See also North Carolina v. Murphy, 467 S.E.2d 428, 434 (N.C. 1996) (stating that the defendant invoked his right to remain silent with the "unambiguous statement, 'I got nothing to say' ").

The Commonwealth nevertheless tries to gin up an ambiguity in Tice's request. According to the Commonwealth, Tice's clear request—the one it concedes would put him in a "strong position to argue that he invoked his right to remain silent," Br. 45—became shrouded in ambiguity when he went on to suggest that he "might decide to say more after he talks with a lawyer or spends some time thinking about it." Id. (emphasis omitted) (citation and internal quotations omitted).

There is much wrong with the Commonwealth's theory. Problem number one is basic grammar; the Commonwealth's argument conflates two distinct parts of Tice's statement. As the Circuit Court recognized, the conditional codicils that Tice mentioned after already invoking the right to silence "did not render the entire

statement ambiguous or equivocal." JA 1077, 1143. Instead, those distinct statements "merely indicated he might be willing to speak at a later time." Id. But simply because Tice "might" be willing to talk at some indeterminate point in the future does not say anything about his present willingness to talk. The only thing Tice said about that key temporal moment was his first unequivocal statement that "I've decided not to say any more."

In Arizona v. Strayhand, the court rejected a state's similar attempt to conflate two distinct parts of the defendant's statement. 911 P.2d 577, 591 (Ariz. Ct. App. 1995). The court determined that the first part of the defendant's statement, "Well I don't want [to] answer anymore," "could not have been clearer" and was a valid invocation of the right to remain silent. Id. at 590. The court therefore concluded that the "additional words 'I mean I'm in, fuck it. I'm going to have a fucked up life,' [could] do nothing to confuse or detract from the idea that the Defendant did not want to answer any more questions" at that time. Id. at 591.

Problem number two with the Commonwealth's argument is that it squarely conflicts with decisions of other courts of appeals that have considered virtually identical statements. In Campaneria v. Reid, 891 F.2d 1014, 1021-22 (2d Cir. 1989), the defendant stated, "I don't want to talk to you now, maybe come back later." Like Tice, the defendant in Campaneria expressed his present desire to

remain silent while indicating, at most, that he might later decide to change his mind. But the Second Circuit held that the defendant had unequivocally invoked his right to remain silent. Rejecting the argument that the Commonwealth recycles here, the Second Circuit ruled that it was irrelevant that the defendant indicated that he might change his mind in the future; all that mattered is that he clearly conveyed a present desire to remain silent at the time. Id. at 1021. That makes sense. After all, a contrary rule like the one pressed by the Commonwealth would penalize an individual for openly considering future cooperation.[7]

The Commonwealth's two bids to distinguish Campaneria both fail. First, the Commonwealth argues that the situation here is distinguishable because the police in Campaneria never stopped questioning the suspect, whereas the police

[7] The handful of cases cited by the Commonwealth have nothing to do with the precise question before this Court. Br. 47-48. That is because all involve statements where the defendant did not clearly distinguish between a present desire to say nothing more and a conditional willingness to perhaps resume the interrogation later. To the contrary, the defendants' statements in each of these cases suggested an equivocal desire to suspend present questioning. See, e.g., Lemmons v. Texas, 75 S.W.3d 513, 520 (Tex. Ct. App. 2002) (conditional request for counsel where defendant indicated that, while he did not wish to speak to police any more that evening, he would talk to the police again either tomorrow or when he got a lawyer); Wisconsin v. Fischer, 656 N.W.2d 503, 509 (Wisc. Ct. App. 2002) (futuristic request for counsel where defendant said he would request an attorney in future if police read him his rights); Walker v. Florida, 707 So. 2d 300, 310 (Fla. 1997) (futuristic request for counsel where defendant said he would request an attorney in future if police brought stenographer in room); Jolley v. Indiana, 684 N.E.2d 491, 493 (Ind. 1997) (futuristic request for counsel where defendant said he would request an attorney in future if a polygraph exam was given).

gave Tice a 13-minute respite (to switch investigators) before renewing their interrogation. Br. 49. True, but irrelevant. The question here is whether Tice unambiguously communicated his right to remain silent. If he did, the police had to cease all interrogation. Whether they pressed on immediately or waited 13 minutes makes no difference; in either case, the police violated the Fifth Amendment.

Were there any doubt about that point, the Supreme Court's decision just last week in Maryland v. Shatzer, __ U.S. __, No. 08-680, 2010 WL 624042 (Feb. 24, 2010), puts those doubts to rest. There, the Court reaffirmed the rule that, once a suspect invokes his right to silence, " 'any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." Id. at *4 (quoting Arizona v. Roberson, 486 U.S. 675, 681 (1988)). The Court went on to announce that, even after a suspect has been released from custody, the police may not reinitiate an interrogation for 14 days if the suspect invoked his right to counsel. Id. at *8. Here, after Tice invoked his right to remain silent, the police not only kept him in custody but then resumed questioning him within 13 minutes, not days. Not to put too fine a point on matters, but 13 minutes—780 seconds—is not the "significant period of time" that the Supreme

Court demands before the police may resume interrogations. Mosley, 423 U.S. at 106.[8]

Second, the Commonwealth points out that the defendant in Campaneria invoked his right of silence at the outset of the interrogation, whereas Tice invoked his after numerous hours of interrogation. Br. 49. Again: True, but irrelevant. The Supreme Court has confirmed that a defendant may invoke his right to silence "at any time." Miranda, 384 U.S. at 474. Thus, courts have repeatedly held that the fact that a defendant "had answered the officers' questions for [a number of] hours does not somehow undermine or cast doubt on an unambiguous invocation." Anderson v. Terhune, 516 F.3d 781, 788 (9th Cir. 2008).

At the end of the day, the Commonwealth's attempt to use " 'context' to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law." Id. at 787. When Tice plainly stated that he had "decided not to say any more," he invoked his Fifth Amendment right to silence. Because the police failed to "scrupulously honor"

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[8] In an analogous situation in Murphy, the court held that where "the police cease the interrogation but then resume the interrogation within fifteen minutes of the time the defendant invoked his right to remain silent, the second interrogation involves the same subject matter as the earlier interrogation, and the defendant is not readvised of his Miranda rights, the defendant's Fifth Amendment right to remain silent is violated." 467 S.E.2d at 435. See Campaneria, 891 F.2d at 1021 (noting that questioning can only resume "after fresh Miranda warnings are given and the right to remain silent is otherwise scrupulously honored").

Tice's invocation of his constitutional privilege, the statement that was subsequently elicited from Tice should have been suppressed.

B. Trial Counsel's Failure To Move To Suppress Tice's Statement Was Deficient Under Strickland.

The failure by Tice's trial counsel to move to suppress his custodial confession on Miranda grounds constitutes deficient performance under Strickland. To prove deficient performance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-688; see Frazer v. South Carolina, 430 F.3d 696, 707 (4th Cir. 2005). It does not matter that counsel may have done other things well during the representation. Instead, a "single, serious error" by counsel—including the failure to file a motion to suppress—is enough to establish a claim of ineffective assistance. Kimmelman v. Morrison, 477 U.S. 365, 383-385 (1986).

Here, trial counsel's performance was deficient because, as the Circuit Court properly found, there was no actual trial strategy behind their failure to move to suppress Tice's custodial confession. Such a finding is presumed correct and warrants deference under 28 U.S.C. § 2254(e)(1). Given that counsel knew that Tice's confession was the centerpiece of the Commonwealth's case against him, given the blatant constitutional violation reflected in the investigatory notes made available to counsel, and given that counsel could not articulate any tactical reason to forgo filing a motion to suppress the confession, the District Court and the

Circuit Court both correctly determined that "counsel were deficient." JA 1079, 1151.

1. Tice's Discussions With Counsel Do Not Supply A Basis For Failing To File A Suppression Motion.

The Commonwealth first argues that trial counsel should be excused for their failure to file a suppression motion because Tice "never told" them that "he had invoked his right to remain silent or his right to an attorney." Br. 50-51. Notably, the Commonwealth does not—nor could it—suggest that Tice misled his counsel about the facts or what he said to police. Rather, the Commonwealth points out that Tice—a layman—"'didn't say that he invoked his rights.'" Br. 51 (quoting App. 950). But a client shoulders no burden to familiarize himself with principles of constitutional law, let alone issue-spot potential legal challenges. Nor is a client to blame for failing to mention facts that would support his case, where counsel should have discovered the exact same facts after conducting a reasonable investigation. Rompilla, 545 U.S. at 387-389 (client's failure to mention mitigating evidence does not excuse counsel from discovering mitigating evidence in a place he should have looked); Strickland, 466 U.S. at 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary").

That is precisely the situation here. The District Court correctly held that a "reasonable investigation" by counsel in these circumstances would have involved

a review of Detective Crank's notes of his conversations with Tice, particularly given the importance of those conversations to the prosecution's case.[9] Here, as in Rompilla, "it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to [the prosecution's] case." 545 U.S. at 385. There simply is no basis for excusing trial counsel's failure to file a suppression motion merely because Tice did not flag the issue for them.

2. There Was No Trial Strategy Behind Counsel's Failure To File A Suppression Motion.

The state habeas court found that Tice's counsel had no tactical reason for failing to file a suppression motion. Because "[t]he question whether a decision by counsel was a tactical one is a question of fact," Bolender v. Singletary, 16 F.3d 1547, 1558 n.12 (11th Cir. 1994), and because the Virginia Supreme Court did not disturb the Circuit Court's finding on tactics, that finding is "presumed to be

[9] When Broccoletti was asked whether he recalled seeing Detective Crank's notes during his representation of Tice, he speculated that he must have seen them at some point because his assistant's handwriting appeared on notes attached to the statement. However, both lawyers acknowledged that they could not actually recall seeing Detective Crank's notes until shortly before the Habeas Hearing. JA 1079; see JA 908-910, 923-925, 951-952.

correct." 28 U.S.C. § 2254(e)(1).[10] The Commonwealth offers nothing in its brief to trump that presumption.

Nor could it. As the Circuit Court found, Tice's counsel offered "no reason * * * for the failure to file the motion." JA 1079. The District Court likewise agreed that the reason Tice's counsel failed to file a motion to suppress had nothing to do with nuanced tactical considerations, but rather garden-variety negligence: "[C]ounsel simply overlooked Detective Crank's notes as a basis for suppressing Tice's confession." JA 1151.

These factual findings were based on the extensive testimony of trial counsel at the habeas hearing, during which Broccoletti was asked twice whether he ever considered filing a motion to suppress based on a Miranda violation, and twice responded that he never even considered doing so. JA 907, 910. Broccoletti could not articulate any reason for having failed to file the suppression motion based on Detective Crank's notes, but he admitted while reviewing them on the stand that he probably should have done so:

> The one part of [Detective Crank's] notes that do concern me is where he said, 'He told me he decided not to say

[10] See Moore v. Johnson, 194 F.3d 586 (5th Cir. 1999) ("a state habeas court's determination that counsel conducted a pretrial investigation or that counsel's conduct was the result of a fully formed strategic or tactical decision is a factual determination"); Berryman v. Morton, 100 F.3d 1089, 1095 (3d Cir. 1996) ("it is apparent that a state court's finding that counsel had a trial strategy is a finding of fact").

> any more.' As I go back and look at that now, that statement may have generated something, may have generated a motion.

JA 911.

At that point in the hearing, Broccoletti speculated that there must have been some reason why he did not file a motion to suppress on Miranda grounds—though what that reason was he could never say. Id. at 907-911. But in light of Broccoletti's earlier testimony that he never even considered filing a suppression motion based on Miranda grounds, id. at 907-910, both the Circuit Court and the District Court were correct in finding that trial counsel had no reasonable trial strategy that caused them to forgo a suppression motion. See Griffin, 970 F.2d at 1358; see also Williams v. Washington, 59 F.3d 673, 680 (7th Cir. 1995) ("[I]n order to eliminate hindsight's distorting effect, our assessment must proceed as an evaluation of counsel's conduct from his perspective at the time he decided to forgo these stages of pretrial preparation.").

The Commonwealth does not dispute that counsel failed to articulate any tactical consideration for failing to file a suppression motion. But in lieu of evidence, the Commonwealth presents a hodgepodge of "reasons why counsel could have declined to file a motion to suppress Tice's first confession." Br. 54 (emphasis added). The Commonwealth then proceeds to invent a Rube Goldberg-like strategy that counsel may—or may not—have ever contemplated; one that

involves an arcane parsing of Virginia local rules, the imponderables of rebuttal testimony that never took place, and a series of other post-hoc theories that—needless to say—appear nowhere in the record. Br. 52-54.

But that is not how Strickland works. The goal of the habeas court is to evaluate the reasonableness of the rationales and tactics that counsel actually formulated, not the fanciful theories that appellate counsel can engineer. As this Court has emphasized in rejecting nearly identical arguments, "courts should not conjure up tactical decisions an attorney could have made, but plainly did not." Griffin, 970 F.2d at 1358; see Moore v. Czerniak, 574 F.3d 1092 (9th Cir. 2009) ("Where the issue is whether counsel's performance was ineffective, we must decide that question based on what counsel's reasons for his decisions actually were, not on the basis of what reasons he could have had for those decisions.").

Here, as in Griffin, the tactical decisions that the Commonwealth now seeks to "bestow[ ]" upon Tice's counsel "are exercises in retrospective sophistry." Griffin, 970 F.2d at 1358. What matters is that "[f]rom the attorney's perspective at the time of trial, no reasonable excuse for failing to" move to suppress Tice's statement "appears or is even suggested in the evidentiary record." Id. (emphasis added). There is, in short, no evidence that Tice's trial counsel actually thought about any of the theories that the Commonwealth spins out in the blue brief.

On the second-to-last page of its brief, the Commonwealth cites two cases for the unremarkable proposition that counsel need not remember "all the details" of case strategy "'where a justification appears on the record.'" Br. 56 (citing Greiner v. Wells, 417 F.3d 305, 326 (2d Cir. 2005), and Fretwell v. Norris, 133 F.3d 621, 627-628 (8th Cir. 1998) (emphasis omitted)). But there are two obvious distinctions between those cases and this one. First, this is not a case where defense counsel simply forgot about the "details" of his strategy. It is instead a case where counsel, who otherwise could and did recount vivid details of preparing for and defending Tice in two trials, could not identify any strategy at even the broadest level of abstraction for his failure to file an otherwise obvious motion to suppress.

Second, unlike in Greiner and Fretwell, no obvious justification "appears on the record" for counsel's failure to move to suppress Tice's confession—the very linchpin of the prosecution's case. The Commonwealth certainly points to nothing in the record. Instead, it relies again on "exercises in retrospective sophistry," Griffin, 970 F.2d at 1358, arguing that there would have been a "difficult tactical dilemma for the defense * * * [h]ad counsel succeeded in suppressing the initial confession." Br. 53. But that is nonsense. Had counsel suppressed the confession, the prosecution would have had to rely—exclusively—on the wildly contradictory testimony of Dick during its case in chief. In other words, the Commonwealth's

case against Tice would have been based on the exact same evidence the Commonwealth had against Pauley, Danser, and Farris—all of whom had their cases dismissed by the Commonwealth, an implicit recognition that Dick's testimony would not suffice to carry the Commonwealth's burden of proof. Because no jury would have been able to convict Tice beyond a reasonable doubt on Dick's word alone, the defense would have had no need to even put on a defense and possibly—though not certainly—open the door to the introduction of Tice's plea statements.

But even if that did happen, Tice would have been no worse than he was before. That is significant, because a "tactical" decision is one where counsel concludes that there is some net benefit to be had by forgoing a particular motion or strategy. But no reasonable counsel would opt to forgo suppressing the one key piece of evidence from the prosecution's case-in-chief simply because other incriminating statements might—or might not—come in during a rebuttal presentation that might—or might not—ever take place. Precisely because the theory is so absurd, the District Court correctly found that "[t]here is * * * no evidence that such considerations motivated counsel." JA 1151. The District Court's finding of deficiency under Strickland should be upheld.

III. THE DISTRICT COURT CORRECTLY RULED THAT THE SUPREME COURT OF VIRGINIA'S FINDING OF NO PREJUDICE WAS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED PRECEDENT.

Needless to say, Tice was prejudiced by his counsel's failure to suppress the confession. The Virginia Supreme Court concluded otherwise, but the District Court found that that ruling was an "objectively unreasonable" application of settled law. JA 1152.

It was. Under Strickland, a "defendant must show 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 694. A reasonable probability means "a probability sufficient to undermine confidence in the outcome." Id. (no internal quotation marks); see also Wiggins, 539 U.S. at 534. The question therefore in this case is whether, but for counsel's unprofessional errors, the jury "would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695. The answer is yes.

A. There Is A Reasonable Probability That The Outcome Of The Proceeding Would Have Been Different Without Tice's Constitutionally Defective Statement.

Excluding Tice's confession would have been the difference between conviction and acquittal. After all, the Supreme Court has emphasized that "[a] confession is like no other evidence." Fulminante, 499 U.S. at 296. Indeed, it is "probably the most probative and damaging evidence that can be admitted against"

a defendant. Id. So there is no question that admitting Tice's unconstitutional statement "prejudiced" him. The question is whether there is a reasonable probability that Tice's jury would have returned a different verdict had that singularly damaging statement been excluded.

That, of course, depends on what other evidence the prosecution had. As the Supreme Court has held, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 696. Here, the prosecution had nothing beyond the confession that could link Tice to the crime and prove its case beyond a reasonable doubt. As the District Court recognized—and the Virginia Supreme Court did not dispute—"'[t]here was no fingerprint, DNA, or other scientific evidence against [Tice]; no independent eyewitnesses implicated him; [and] no physical evidence directly implicated him.'" JA 1153 n.16 (quoting JA 1079). Moreover, the Commonwealth would have been forced to confront the physical evidence that refuted the multiple-perpetrator theory, JA 46-47, 1046, Dr. Kinnison's impression that the crime was committed by a single individual, JA 197, Ballard's confessions to committing the crime alone, and the DNA tests that linked Ballard—and Ballard alone—to the rape and murder. JA 432-433, 462-485.

As the Virginia Supreme Court acknowledged, that leaves the testimony of Joseph Dick, a man with limited mental capabilities, as the "only significant

evidence of Tice's guilt." JA 1093. Yet even the Commonwealth acknowledges that Dick's testimony was "vigorously and extensively challenged" at Tice's trial based upon the "number of prior inconsistent statements that were inconsistent with his trial testimony" and based upon contentions that he "had lied in order to save himself from the death penalty." Br. 23. The upshot of all these self-contradictory and constantly morphing statements was a cross-examination of Dick at Tice's trial that the state habeas court described as "quite damaging." JA 1080. The District Court below found that that description was, if anything, "an understatement." JA 1160.

But the Virginia Supreme Court concluded that, "despite these and other inaccuracies in his earlier statements to the police," Dick's testimony would have been enough to support a conviction because "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." JA 1093. This ruling was objectively unreasonable for several reasons. For starters, it is irrelevant that Dick was "consistent in his sworn testimony" at trial about the role of Tice. The whole point of the cross-examination was to impeach Dick's new-found clarity and consistency with his prior inconsistent statements made to police.

And there was much that was inconsistent. As the District Court confirmed by methodically tracing the evolution of Dick's multiple statements, JA 1157-1160, Dick's first statement to the police never said anything about Tice. JA 1157-1158. Dick's second statement to the police—taken after it became clear that Dick's first statement squarely conflicted with the actual crime scene—also "did not mention Wilson, Tice, Farris, Pauley, Danser, or Ballard." JA 1158. Dick's third statement—taken months later after the police discovered that Dick's DNA did not match that collected from the crime scene—also did not mention Tice. JA 1158-1159. Dick's fourth statement—taken after Wilson's DNA turned up no match—was the first time that Dick mentioned that "a total of six people had been involved in the crime." JA 1159. And even then, Dick was unable to identify Tice until the police put a Navy ship book before him, flagged specific pages, and asked him to single out an accomplice from those few pages. JA 1051.

Thus, whatever may be said for Dick's "consistency" at Tice's trial, the District Court was exactly right in recognizing that "a juror would have significant questions about the veracity of Dick's testimony," given the "history of the meandering development of Dick's account of the crime and Dick's expressed willingness to tell the police anything they wanted [to] hear." JA 1160.[11] And as

[11] Despite the Commonwealth's attempts to portray Dick as lacking motive here, it is undisputed that Dick's plea agreement required him to testify against his co-defendants. Moreover, Dick's trial testimony makes clear that he did not

the District Court recognized, "the doubts about Dick's veracity and Tice's guilt could only become more profound as the jury heard the DNA evidence, Ballard's admissions, and the significant alibi for two of the individuals Dick asserted were involved in Michelle's rape and murder." JA 1160.

In short, there is a "reasonable probability" that the result of Tice's trial would have been different. After all, without the confession, the Commonwealth's case against Tice was essentially the same case it had against Pauley, Farris, and Danser, each of whom did not confess. But the Commonwealth nolle prossed the charges against those three suspects thereby conceding that no jury would convict anyone on Dick's word alone. See Thomas v. Varner, 428 F.3d 491, 504 (3d Cir. 2005) (finding Strickland prejudice where, but for trial counsel's failure to suppress eyewitness identification, the only remaining evidence against defendant would have been the testimony of one witness—yet a "co-defendant was acquitted by the jury notwithstanding [the same witness'] implication of him in the criminal activity").

The District Court's finding of "objective unreasonableness" draws still more support from a long line of federal appellate decisions. These cases recognize that the combination here—a failure to suppress pivotal, damaging

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understand what the consequences would be if he failed to do so. In his mind, it remained an open question whether he would again be facing the death penalty if he refused to testify against Tice. JA 1156-1157.

evidence such as a confession or eyewitness identification, coupled with no physical evidence linking the defendant to the crime—will almost invariably satisfy Strickland's prejudice requirement.[12] For example, in Cossel v. Miller, where the victim's identification testimony "was the pivotal evidence in the case," the Seventh Circuit determined that the defendant was prejudiced by his attorney's deficient performance in failing to move to suppress the testimony considering that "the DNA tests were inconclusive" and "there were no fingerprint matches" to the defendant. 229 F.3d 649, 652, 654 (7th Cir. 2000). Here, of course, a finding of prejudice is even more compelling where the DNA tests were conclusive: They matched up exactly with Ballard, a man who confessed to having committed the crime alone.

Likewise, in the Ninth Circuit's decision in Moore—relied on by the District Court (JA 1150-1151) and ignored entirely by the Commonwealth in its opening brief—the court held that the petitioner was entitled to relief where his

[12] Indeed, courts also find prejudice in cases involving improperly admitted confessions, even where other legally sufficient or strong circumstantial evidence remains. See, e.g., Edwards v. Lamarque, 439 F.3d 504, 516 (9th Cir. 2005), overruled on other grounds, 475 F.3d 1121 (9th Cir. 2007) (affirming trial court's finding of prejudice, notwithstanding "extremely strong" remaining evidence, because "it is impossible to be free from doubt in the verdict" given the improper admission of defendant's confession through testimony of hostile witness); Henry v. Scully, 918 F. Supp. 693, 717-718 (S.D.N.Y. 1995) (concluding that although there was sufficient evidence aside from co-defendant confession, its improper admission against defendant caused prejudice because court could not be sure that the jury would not have decided differently had confession been excluded).

constitutionally defective statement was "central" to the state's case. 574 F.3d at 1114. In reaching its decision, the Ninth Circuit held that the state court's finding of no prejudice was "contrary to clearly established Supreme Court law." Id. at 1110 (citing Fulminante, 499 U.S. 279).

In Bynum v. Lemmon, where the defendant's "confessions were the crux of the case against him," the court noted that a "suppression motion was * * * critical to the defense: without the confessions, the prosecution would have been left to depend on the testimony of a thirteen-year-old boy." 560 F.3d 678, 684 (7th Cir. 2009). Because the prosecution's case would have been "significantly weaken[ed]" with no evidence of the defendant's guilt aside from one individual's incriminating testimony, the court stated that it could "readily assume" that the defendant satisfied the Strickland prejudice element of demonstrating a reasonable probability that he "would have been acquitted had the two confessions been suppressed." Id. at 685.[13]

In Thomas, the Third Circuit similarly explained that it was "not a stringent standard" to demonstrate a "reasonable likelihood that the result of the trial would have been different" if an eyewitness identification had been suppressed. 428 F.3d at 504. The court noted that if a motion to suppress had been successful, "the only

[13] The court nevertheless affirmed the denial of the defendant's petition for a writ of habeas corpus because, unlike here, the defendant could not demonstrate a "reasonable probability that he would have prevailed on the motion to suppress." Id. at 685.

remaining evidence inculpating" the defendant would have been the "questionable" testimony of one individual who was impeached at trial. Id. Because the suppression would have weakened the state's case, the court determined that the defendant had adequately demonstrated Strickland prejudice. Id.

The common thread in all of these cases is that where there is no physical or otherwise compelling evidence linking the defendant to the crime, a lawyer's negligence in failing to exclude a confession is undeniably prejudicial. And a state court judgment to the contrary will necessarily be found "objectively unreasonable." The District Court correctly followed this line of authority in granting Tice habeas relief.

B. Tice's Plea Negotiation Statements Are Irrelevant.

The Commonwealth's final bid to resuscitate Tice's unconstitutional conviction is an argument that even the Virginia Supreme Court did not embrace: that Tice could not be prejudiced due to the potential admission of his plea negotiation statements. In making this argument, the Commonwealth argues that "[s]uccess on a suppression motion would have been a pyrrhic victory for the defense." Br. 29. Not so.

First, the Commonwealth errs in arguing that Tice's plea negotiation statements, which were not admitted in Tice's trial, should play any role in the Court's prejudice analysis. As a basis for this argument, the Commonwealth cites

to one inapplicable case: Wong v. Belmontes, 130 S. Ct. 383, 386 (2009), where the Court assessed an ineffective assistance of counsel claim in the sentencing context. Wong does not, as the Commonwealth indicates, stand for the proposition that a district court is required to assess evidence that the prosecution chose not to introduce during the defendant's trial.

Second, at this point it time, it is mere speculation as to whether the Commonwealth might have turned to the plea negotiation statements if the trial court had suppressed Tice's statement. Under Virginia Supreme Court Rule 3A:8(C)(5), it is undisputed that the Commonwealth could not use Tice's plea negotiation statements in its case in chief. Because the admissibility of plea negotiation statements as impeachment or rebuttal evidence in a situation similar to the one here remains an unsettled question in Virginia, the Commonwealth itself admits that prosecutors feared the possibility of "open[ing] up appellate review to construe a rule of court that had not been the subject of an appellate decision." Br. 28.

Third, assuming arguendo that the trial court would have allowed the statements to be introduced in rebuttal if the Commonwealth had made such a request, the Commonwealth is wrong that there would have been just two routes for the defense as a result: (1) forgo any defense whatsoever, or (2) present defense evidence and expose Tice to a rebuttal case with the plea negotiation statements.

As previously explained, if Tice presented no defense—thereby ensuring that his plea negotiation statements would not be admitted—the Commonwealth's case against Tice would again "be left awash in doubt" with no DNA evidence against Tice, no physical evidence against Tice, no independent eyewitness testimony against Tice, and Dick's confusing, contradictory, and uncorroborated statements. JA 1157-63. In short, there is a "reasonable probability" that the outcome of Tice's proceeding would have been different.

Or, if Tice elected to present a defense, the Commonwealth fails to recognize that he could have effectively done so without opening the door to the admission of the plea negotiation statements. The Commonwealth's bewildering assertion that had "Tice chose to put on evidence, nothing would have prevented the prosecution from using these devastating statements during its rebuttal case" is wrong. Br. 39. Indeed, the trial court decision relied on by the Commonwealth here, Commonwealth v. Evans, No. CR-01-26 to 01-37, 2001 WL 474422, at *3 (Va. Cir. Ct. May 7, 2001), specifically cautions that "non-case-in-chief uses remain subject to the ordinary principles policing the admission of evidence generally—such as those governing * * * rebuttal scope." Under Virginia law, the prosecution's rebuttal is "restricted in scope to refuting matters brought out by its proponent's adversary," Byrd v. Commonwealth, 517 S.E.2d 243, 244 n.1 (Va. Ct. App. 1999), and such rebuttal evidence may only be "offered to disprove or

contradict the evidence presented by an opposing party." Calhoun v. Commonwealth, 546 S.E.2d 239, 241 (Va. Ct. App. 2001) (citation and internal quotation omitted).

As just one example, Tice could have presented the "very favorable" forensic evidence indicating that the only DNA sample recovered from the crime scene matched Omar Ballard without opening the door to his plea negotiation statements. That is because the only door the DNA evidence arguably would have opened would have been one looking out on a narrow point: that either the DNA did not match Ballard or that it did match Tice—evidence that, of course, does not exist. Id. (indicating that "[o]nly evidence that bears on the facts asserted in [the defendant's case] would rebut that [evidence]").

And that is why no court—not even the Virginia Supreme Court—ever adopted the Commonwealth's prejudice-assessed-through-revisionist-history rule. This Court should not be the first. Instead, this Court should follow the settled rule that it "cannot now consider the question or make a determination on appeal, for purposes of assessing the state's case, [as to whether] any of the 'evidence' [would have been] admissible." Moore, 574 F.3d at 1121.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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March 5, 2010

PETITIONER-APPELLEE'S STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedures 34(a)(1) and Fourth Circuit Rule 34(a), Petitioner-Appellee respectfully suggests that this Court dispense with oral argument. The issues in this case are governed by clear-cut principles that the District Court faithfully applied.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was produced using the Times New Roman 14-point typeface and contains 13,402 words, exclusive of the table of contents, table of authorities, and the certificate of service.

/s/ Christopher T. Handman
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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2010, I electronically filed the foregoing Brief for Petitioner-Appellee Derek Tice using the CM/ECF system, which will send notification of such filing to counsel for Respondent-Appellant as follows:

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