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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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CLERK US DISTRICT COURT
RICHMOND, VIRGINIA

DEREK ELLIOTT TICE,)
)
Petitioner,)
)
v.)
)
GENE M. JOHNSON,)
DIRECTOR OF VIRGINIA)
DEPARTMENT OF CORRECTIONS,)
)
Respondent.)

Civil Case No. 3:08CV69

**PETITION FOR WRIT OF HABEAS CORPUS
UNDER 28 U.S.C. § 2254**

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Dated: January 28, 2008

Attorneys for Petitioner Derek E. Tice

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

DEREK ELLIOTT TICE,)
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Petitioner,)
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)

COMES NOW Derek Elliott Tice (“Mr. Tice”), by and through counsel, to petition this Court for a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254 *et seq.*

JURISDICTION AND VENUE

1. The District Court has jurisdiction over this federal habeas petition filed by Mr. Tice, pursuant to 28 U.S.C. § 2254 *et seq.*, because he is being held in custody in violation of the Constitution or laws of the United States, pursuant to the judgment of a State court.

2. Venue lies in the United States District Court for the Eastern District of Virginia (Richmond Division), the judicial district (and division) where Mr. Tice is being unlawfully detained. See 28 U.S.C. § 1441(d).

HISTORY OF PRIOR PROCEEDINGS

3. The name and location of the court that entered the judgment of conviction and sentence that Mr. Tice is challenging is the Circuit Court for the City of Norfolk, Norfolk, Virginia. The criminal case number is CR-98002980.

4. On August 5, 1998, Mr. Tice was indicted on charges of capital murder and rape.

5. Mr. Tice entered pleas of not guilty on both counts and was tried before a jury.

6. The date of judgment of conviction and sentencing is January 31, 2003. ^{1/} The length of sentence is two terms of life imprisonment.

7. The offenses for which Mr. Tice was convicted and sentenced are capital murder and rape.

8. Mr. Tice did not testify at any pre-trial hearing, at trial, or at any post-trial hearing in his criminal case.

9. Mr. Tice appealed from the judgment of conviction.

a. His timely appeal to the Virginia Court of Appeals (Record No. 0408-03-1) was denied on August 8, 2003. ^{2/}

b. His timely appeal to the Virginia Supreme Court (Record No. 040160) was denied on July 6, 2004.

c. His timely motion for reconsideration was denied by the Virginia Supreme Court on October 1, 2004.

d. Mr. Tice did not file a petition for certiorari in the United States Supreme Court.

10. Mr. Tice sought post-conviction relief in the Virginia courts.

a. He timely filed a petition for writ of habeas corpus in the Virginia Circuit Court for the City of Norfolk (the “Habeas Court”) on September 14, 2005, raising the following grounds:

^{1/} Mr. Tice’s first judgment of conviction, dated February 11, 2000, was overturned on direct appeal by the Virginia Court of Appeals on May 21, 2002. See Tice v. Commonwealth, 563 S.E.2d 412 (Va Ct. App. 2002).

^{2/} On appeal, Mr. Tice was represented by S. Jane Chittom, Appellate Defender, Public Defender Commission, 701 East Franklin Street, Suite 1416, Richmond, Virginia 23219.

i. The prosecution violated Mr. Tice's due process rights by (a) substantially interfering with two key witness's free will to testify at Mr. Tice's criminal trial, and (b) withholding Brady material that deprived Mr. Tice of the ability to impeach key prosecution witnesses on the prosecution's strained theory of the case and motives for steadfastly adhering to that theory.

ii. Trial counsel provided ineffective assistance in violation of Mr. Tice's Sixth Amendment right to effective assistance of counsel by (a) failing to properly authenticate a handwritten letter from Omar Ballard to a friend in which Ballard admitted committing the crime for which Mr. Tice was charged, (b) suggesting to Ballard that he not testify at Mr. Tice's trial, (c) failing to seek to suppress Mr. Tice's constitutionally defective and coerced confession, which was defective both because it occurred in violation of his Fifth Amendment right to silence and right to counsel, and was involuntarily given in violation of Mr. Tice's substantive due process rights, and (d) failing to offer several types of experts to rebut the prosecution's flawed multi-perpetrator theory upon which the case against Mr. Tice hinged.

iii. As set forth in Mr. Tice's direct appeal from his trial, the trial court committed prejudicial error by (a) excluding expert testimony related to police interrogation techniques and the reliability of confessions, including Mr. Tice's confession, (b) excluding testimony relating to prior false confessions extracted by the lead detective in the case, (c) excluding testimony relating to proper interrogation techniques in the Norfolk Police Department, and (d) excluding impeachment evidence relating to the testimony of a prosecution witness.

iv. To the extent that appellate counsel knew or should have known of any of the constitutional deprivations set forth in Mr. Tice's petition but failed to raise them

on Mr. Tice's direct appeal, appellate counsel also provided ineffective assistance in violation of Mr. Tice's Sixth Amendment right to effective assistance of counsel. ^{3/}

b. In an order dated April 11, 2006, the Habeas Court summarily dismissed some of Mr. Tice's claims, and ordered an evidentiary hearing on his remaining claims.

c. The Habeas Court conducted an evidentiary hearing on September 11 and 12, 2006.

d. In a letter opinion dated November 27, 2006 ("Habeas Opinion"), the Habeas Court granted Mr. Tice's petition, holding that Mr. Tice established a violation of his Sixth Amendment right to effective assistance of counsel under Strickland v. Washington, 466 U.S. 688 (1984), because trial counsel were ineffective in failing to file a motion to suppress a statement Mr. Tice made during a police interrogation that was conducted in violation of Mr. Tice's Fifth Amendment right to silence. The Habeas Court dismissed Mr. Tice's remaining claims.

e. The Habeas Court entered a final order, incorporating the Habeas Opinion, on December 20, 2006. The order also incorporated by reference the record of the underlying criminal matter into the record in Mr. Tice's habeas proceeding.

f. On March 16, 2007, the Commonwealth of Virginia (the "Commonwealth") filed a Petition for Appeal to the Virginia Supreme Court. The Commonwealth's Petition asserted three assignments of error, specifically that the Habeas Court erred in (1) concluding that trial counsel were ineffective for failing to file a motion to suppress

^{3/} The grounds listed above in subsection 10(a)(i)(ii) and (iv) had not been asserted in any other proceeding because the information had not come to light at the time of Mr. Tice's direct appeal.

Mr. Tice's statement based on a violation of Mr. Tice's right to silence under Miranda v. Arizona, (2) concluding that Mr. Tice demonstrated prejudice under Strickland v. Washington, in connection with trial counsel's failure to move to suppress Mr. Tice's unconstitutionally-elicited statement, and (3) employing an incorrect legal standard in determining Mr. Tice suffered prejudice.

g. Mr. Tice opposed the Petition for Appeal, and asserted three assignments of cross-error, specifically that the Habeas Court erred in denying Mr. Tice's ineffective assistance of counsel claims based on trial counsel's failure to (1) suppress Mr. Tice's statement on grounds that it was elicited in violation of his Fifth Amendment right to counsel, (2) introduce Omar Ballard's damning letter into evidence, and (3) present expert testimony to rebut the Commonwealth's multiple perpetrator theory of the crime.

h. On June 8, 2007, the Virginia Supreme Court granted the Commonwealth's Petition for Appeal with respect to all three of the Commonwealth's assignments of error and Mr. Tice's second assignment of cross-error.

i. On January 11, 2008, the Virginia Supreme Court reversed in part and affirmed in part the Habeas Court's decision, and dismissed Mr. Tice's petition. The Virginia Supreme Court reversed the Habeas Court on grounds not argued by the parties on appeal, concluding that the Habeas Court erred in finding that Mr. Tice established prejudice under Strickland as a result of trial counsel's failure to move to suppress Mr. Tice's unconstitutionally-elicited statement on Miranda grounds.

j. Mr. Tice has no pending state petitions or appeals, and this is his first petition under 28 U.S.C. § 2254.

STATEMENT OF FACTS

I. THE CRIME

11. In the early morning hours of July 8, 1997, Omar Ballard murdered eighteen-year-old Michelle Moore-Bosko in her apartment at 254 West Bay Avenue, F-111, Norfolk, Virginia. Habeas Tr. at 43. [‡]/ Ballard has repeatedly stated that he committed the crime by himself, including under oath at the habeas hearing. Id. at 43-44.

12. On the evening of July 8, 1997, William Bosko found his wife's body on the bedroom floor of their small one-bedroom apartment. Trial Tr. (Day 1) at 100. The front door to the apartment opened into a combination living and dining room area. Id. at 89. A narrow hallway led back to the bathroom and bedroom, which were located at the rear of the apartment. Id.

13. Bosko testified that upon entering the apartment, he found it to be tidy and he saw nothing that caused him concern – no signs of forced entry on the exterior door; nothing in the living/dining room area or hallway was amiss; the four chairs around the dining room table had not been overturned. Trial Tr. (Day 1) at 109-14. Notably, letters and papers were neatly stacked on the hallway display shelf and protruded into the hallway, id. at 116, which belied the Commonwealth's claim that eight men struggled down that hallway with Moore-Bosko.

14. The autopsy results also indicated that one person committed this crime. The Medical Examiner, Elizabeth Kinnison, M.D., determined that Moore-Bosko died from a

[‡]/ References to Mr. Tice's January 27-31, 2003 criminal trial are referred to herein as "Trial Tr." followed by an appropriate day and page number. References to Mr. Tice's state habeas petition are referred to herein as "Petition." References to Mr. Tice's habeas hearing on September 11-12, 2006 are referred to herein as Habeas Tr. followed by an appropriate page number. Trial exhibits are identified herein as either "Def. Trial Ex." or "Comm. Trial Ex.," and habeas hearing exhibits (that were not also trial exhibits), are identified herein as "Pet. Habeas Ex" and "Comm. Habeas Ex."

combination of strangulation and three penetrating stab wounds. Trial Tr. (Day 2) at 34-35, 38-39. There was a fourth stab wound, which Dr. Kinnison described as “superficial.” Id. at 26. All four stab wounds entered the skin at the same angle and “within a couple of inches of each other,” and the three penetrating stab wounds had an identical 5” depth. Id. at 36-37.

15. Dr. Kinnison agreed that the stab wounds were consistent with a finding that one person inflicted them. Trial Tr. (Day 2) at 38. She also testified that nothing in the autopsy report indicated that multiple attackers committed this crime, and agreed that the autopsy “was consistent with one person.” Id. at 46.

II. THE INVESTIGATION

A. Investigators First Focus on Moore-Bosko’s Neighbor.

16. At the outset of the investigation, the police focused on the victim’s neighbor, Danial Williams, a young sailor with no criminal record who lived across the hall from the Boskos.

17. On July 8, 1997, an hour after arriving on the scene, police summoned Williams to the Norfolk police station where he was interrogated for several hours. Petition Ex. 6 at 5-6. Williams denied any involvement in the crime, but after many hours of interrogation, he told the police that he raped and murdered the victim. Id. at 52.

18. Williams’s confession was bizarre and wholly inconsistent with the crime scene. For example, Williams said that he hit Moore-Bosko in the face with his fist and struck her with a shoe, and that no other weapon had been used, see Petition Ex. 8 at 3, but autopsy results indicated that Moore-Bosko had not been beaten in the face or with a shoe, but instead had been stabbed and strangled. See Comm. Trial. Ex. 28.

19. In the six months following Williams's confession, investigators did not search for any other suspect because they considered this a single perpetrator crime and Williams was their man. See Habeas Tr. at 350. But in late December 1997, DNA testing conclusively eliminated Williams as the source of the DNA found in three different locations at the crime scene. Police did not respond to the exonerating DNA results by questioning whether they had the right person in custody, but instead began investigating young men who knew Williams, under a new theory that placed someone at the crime scene with Williams.

B. With Williams's DNA Eliminated, the Investigators Focus on Williams's Roommate.

20. Investigators turned next to Williams's roommate, Joseph J. Dick, Jr., another sailor with no criminal history – and who turns out to have limited capabilities. Dick was interrogated on January 12, 1998. Trial Tr. (Day 2) at 69-70. For the first several hours of interrogation, Dick denied any involvement in the crime and told police that he was on duty aboard a naval vessel on the night of the crime. Id. at 72-77. After many hours of interrogation, however, Dick told the police that he and Williams committed the crime.

21. Dick's statement also was inconsistent with the crime scene. For example, Dick claimed that he covered Moore-Bosko with a blanket. Trial Tr. (Day 2) at 83. However, the blanket he observed in the crime scene photos that the police showed him was actually placed on Moore-Bosko by her husband. Trial Tr. (Day 1) at 101, 122.

22. A few months later, DNA testing also conclusively eliminated Dick as the source of the DNA found at the crime scene. Notwithstanding more exonerating DNA analysis, the investigators, led by Detective R. Glen Ford, searched for another of Williams's friends.

23. The next to be arrested was Eric Wilson, another Navy sailor with no criminal history. Wilson also repeatedly denied any involvement in the crime. Petition Ex. 13 at 2-4. But after hours of interrogation, Wilson said that he, Williams, and Dick had raped Moore-Bosko.

24. Wilson's statement also contained numerous inconsistencies with the crime scene evidence. For example, Wilson first said that the crime occurred in the living room. Petition Ex. 13 at 8. After detectives showed Wilson a picture of the victim's body in the bedroom, however, he changed his story to say the men may have ended up in the bedroom with Moore-Bosko. See id. at 9.

25. Shortly thereafter, Wilson's DNA was also eliminated as a source of the DNA found at the crime scene. Def. Trial Ex. 7; Trial Tr. (Day 2) at 285.

26. The investigators continued their unbridled search for a DNA match by preying upon another of Williams's friends. The next unwitting suspect was Mr. Tice.

C. The Investigators Arrest and Interrogate Mr. Tice.

27. On June 18, 1998, nearly a year after the crime, Mr. Tice, a former sailor, boy scout, and emergency-rescue volunteer who had no criminal record, was arrested at his Orlando, Florida home on charges of capital murder and rape. Trial Tr. (Day 2) at 183-84.

28. On June 25, 1998, Mr. Tice was transported to Norfolk by police who began interrogating him at approximately 2:00 p.m. Habeas Tr. at 229-33.

29. Mr. Tice initially and repeatedly asserted his innocence, and stated that he knew nothing about the crime. Habeas Tr. at 233-35.

30. In about the eleventh hour of Mr. Tice's interrogation, Mr. Tice was placed in another interrogation room with Detective Randy Crank. Habeas Tr. at 251.

31. At the end of the three-hour session with Crank, Mr. Tice told Crank that he “didn’t want to talk anymore and that [he] might after [he] talk[s] to a lawyer. Habeas Tr. at 253. Crank wrote down what Mr. Tice said in his notes, which state, in relevant part: “He told me he decide [sic] not to say anymore; that he might decide to talk after he talks with a lawyer or spends some time alone thinking about it.” Pet. Habeas Ex. 6; see also Habeas Opinion at 6-7. Mr. Tice was not provided a lawyer. Habeas Tr. at 253-54; see also Habeas Opinion at 6-7.

32. Crank testified that he did not specifically recall whether he gave his notes to Ford, and that he does not know what the detectives did with the notes. Habeas Tr. at 316.

33. Just 13 minutes after Mr. Tice’s statement to Crank, the interrogation continued. See Habeas Tr. at 253-54, 376-77, 453-54; Comm. Habeas Ex. A; see also Habeas Opinion at 6-7. The police, not Mr. Tice, reinitiated the interrogation, which was not preceded by Miranda warnings. Id.

34. After the police ignored Mr. Tice’s invocation of his constitutional right to silence, Mr. Tice subsequently told Ford that he, Williams, Dick, Wilson, and two other men, Geoffrey Farris and Richard Pauley, raped and murdered Moore-Bosko. Trial Tr. (Day 2) at 143-44; Habeas Tr. at 376-77, 453-54.

35. Mr. Tice’s statement to police was internally inconsistent, changed repeatedly, and failed to match important known details of the crime. See Comm. Trial Ex. 38. For example, Mr. Tice claimed that the men pried their way into the apartment with a claw hammer, and indicated that the crime occurred as soon as the group pushed their way inside. Id. at 3, 8. Yet 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, and the crime occurred in the back bedroom. Trial Tr. (Day 1) at 110-11.

36. Subsequent DNA testing conclusively eliminated Mr. Tice as a contributor to the DNA found at the crime scene. Def. Trial Ex. 8; Trial Tr. (Day) 2 at 288-92. Mr. Tice was not the source of any of the evidence recovered from the crime scene.

37. Farris and Pauley were also eliminated as sources of the DNA found at the crime scene. Def. Trial Ex. 8; Trial Tr. (Day) 2 at 288-92.

D. The Commonwealth Drops Charges Against Farris, Pauley, and Danser, but Continues Prosecuting Mr. Tice Based on a Theory That These Three Men Were Involved.

38. By early 1999, there were seven suspects in custody: Williams, Dick, Wilson, Mr. Tice, Farris, Pauley, and John (“CJ”) Danser. In his statement, Mr. Tice implicated Farris and Pauley as essential participants in the crime; and he subsequently implicated Danser.

39. Pauley and Danser had airtight alibis for the early morning hours of July 8, 1997 when Moore-Bosko was killed. Pauley’s parents testified at Mr. Tice’s trial, and evidence confirmed, that he was at home and on the phone at the time of the crime. Trial Tr. (Day 3) at 90-92, 103-04. The evidence also established that Danser was in Pennsylvania at the time of the murder, and could not have been in Norfolk. *Id.* at 47, 49, 50-55, 57-59, 62-63, 65, 67.

40. After they had been arrested and spent the better part of a year in jail, the Commonwealth ultimately abandoned cases against Farris, Pauley and Danser, none of whom had confessed, in May 1999. Petition Ex. 19; see also Trial Tr. (Day 3) at 49; Habeas Tr. at 394-95.

41. The Commonwealth nevertheless prosecuted the case against Mr. Tice on the theory that all seven sailors committed the crime. Yet all seven men had been subjected to sophisticated DNA analysis, and no scientific or physical evidence linked any of them to the crime. See Def. Trial Ex. 9.

III. Ballard Admits That He Committed the Crime Alone.

42. In early 1999, a year and a half after the crime, while serving a prison sentence for the rape and malicious wounding of a teenage girl, Ballard handwrote a letter to his friend, Karen Armstrong Stover in which he volunteered, writing in the singular, first-person, 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.” Pet. Habeas Ex. 1 (emphasis added).

43. It was Ballard’s letter that finally led the police to the only person whose DNA matched the DNA found at three different locations at the crime scene. Trial Tr. (Day 2) at 293-97. ^{5/}

44. When the police received a copy of the letter, they questioned Ballard about the crime. Habeas Tr. at 45, 396.

45. Ballard at first denied involvement and invited police to find evidence linking him to the crime. Trial Tr. (Day 3) at 38-39; Habeas Tr. at 45.

46. Once faced with such DNA evidence, days later, Ballard confessed virtually immediately. Trial Tr. (Day 3) at 38-39; Habeas Tr. at 46.

47. In a March 4, 1999 statement, Ballard told the police that he committed the crime by himself, that he had not seen anyone inside or outside the apartment before or after the offense, and that he never talked with anyone about the offense. Pet. Habeas Ex. 2 at 5-6; see also Habeas Tr. at 46.

^{5/} At the outset of the investigation, Ballard should have been a prime suspect. He knew the victim, frequented her apartment, violently assaulted another young woman in the victim’s apartment complex days before the murder, and raped a 15-year-old girl less than a mile from where Moore-Bosko was murdered several days after the crime. Trial Tr. (Day 1) at 119-21, 169-71, 175; Habeas Tr. at 42-43.

48. A week later, on March 11, 1999, Ballard gave another statement to the detectives. Pet. Habeas Ex. 3; see also Habeas Tr. at 46-47, 396. He once again told police that he committed the crime by himself. Id.

49. DNA testing established that Ballard's DNA matched the DNA from the blood and semen found at three different locations at the crime scene and in the victim. Def. Trial Ex. 10.

50. On March 15, 2000 (before Ballard pled guilty), he told police that the four other men whom the Commonwealth had already convicted committed the crime with him. Habeas Tr. at 341-42. He made the false statement to secure the plea deal offered to him by the Commonwealth that would spare him the death penalty. Id. at 49-51. Ballard testified in 2006 that what he told Ford on March 15, 2000 was false, and was made only to secure his plea agreement. Id. at 51.

51. On March 22, 2000, Ballard was allowed to plead guilty to the rape and murder of Moore-Bosko and received two life sentences. Habeas Tr. at 51-52.

IV. MR. TICE'S TRIAL

52. After Mr. Tice's conviction for rape and murder was overturned in May 2002, he was tried again in January 2003.

53. During both trials, Tice was represented by James O. Broccoletti, of Zoby and Broccoletti, 6663 Stony Point South, Norfolk, Virginia 23502, and Jeffrey R. Russell, who is currently employed by the Public Defender's Office for the City of Newport News, Virginia, 115 28th Street, Newport News, Virginia 23607. See Habeas Tr. at 125, 196-98.

54. Mr. Tice's trial counsel did not move to suppress his June 25, 1998 statement to police on any ground. Habeas Tr. at 130, 201.

55. The Commonwealth proceeded under a multi-perpetrator theory involving a chance meeting between seven young sailors who had no criminal records (Williams, Dick, Wilson, Mr. Tice, Farris, Pauley, and Danser) and a serial felon, Omar Ballard. At trial, the Commonwealth did not present any physical or forensic evidence linking Mr. Tice (or any of the sailors) to the crime. There was no fingerprint, DNA, or other scientific evidence against Mr. Tice; no independent eyewitnesses implicated him; no physical evidence directly implicated him. Habeas Opinion at 8.

56. The Commonwealth's evidence against Mr. Tice consisted only of his June 25, 1998 statement to police as the centerpiece, and the testimony of Dick, who had pled guilty and was required to testify against Mr. Tice under the terms of his plea agreement. Trial Tr. (Day 2) at 70-78; Habeas Tr. at 125-26.

57. Dick's story at trial was not only inconsistent with his earlier statements to police in many respects, and inconsistent with Ballard's plea debriefing, but it also defies common sense and contradicts the physical evidence of the crime scene, which showed that Moore-Bosko could not have been raped and murdered by eight men.

58. In Mr. Tice's defense, trial counsel introduced Ballard's two statements to police in which he admitted committing the crime alone. Trial Tr. (Day 3) at 11-35. They also presented the results of the DNA analysis that proved that Ballard was the sole DNA match and that the DNA of Mr. Tice (and the other sailors charged with the crime) was conclusively eliminated as a source of the DNA found at the crime scene. See Def. Trial Exs. 3, 7, 8, 9, 10; Trial Tr. (Day 3) at 293-97; Habeas Tr. at 126-28.

59. Incredibly, Tice was convicted on a theory that eight people participated equally in a crime but only one very unlucky soul – who just happens to be the only one who had

absolutely nothing in common with the others – left behind any trace of being there. That person – who insists that he acted alone – is Ballard.

V. THE HABEAS HEARING

60. A significant amount of evidence was presented in the state habeas proceeding that supports the claims raised in Mr. Tice’s state habeas petition and which are pleaded herein. That evidence demonstrates that trial counsel failed to provide effective assistance of counsel as required by the Sixth and Fourteenth Amendments.

61. Much of this evidence was presented at the habeas hearing conducted on September 11 through 12, 2006. Among the witnesses who testified at the habeas hearing are Ballard, Mr. Tice’s trial counsel, Ford, and Crank.

62. Ballard testified under oath that he raped and murdered Moore-Bosko, and that he committed the crime by himself.

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.

Habeas Tr. at 43-44 (emphasis added).

63. Crank testified that he wrote down in his notes what Mr. Tice said to him during the three-hour interrogation session with Mr. Tice on June 25, 1998. Habeas Tr. at 309-312; Pet. Habeas Ex. 6. Crank confirmed his notes state, in relevant part: “He told me he decide [sic] not to say anymore; that he might decide to talk after he talks with a lawyer or spends some time alone thinking about it.” Id.

64. Crank’s notes were filed with the Court on April 15, 1999, before Mr. Tice’s first trial. Pet. Habeas Ex. 6. The Commonwealth did not dispute, and the Habeas Court found, that

Crank's notes accurately reflect what Mr. Tice said during the interrogation. Habeas Opinion at 4.

65. Broccoletti testified that he and Russell never considered filing a motion to suppress Mr. Tice's June 25, 1998 statement based on the invocation of the right to silence or the right to counsel. Habeas Tr. at 130, 133, 201.

66. Broccoletti also testified that, as a criminal defense lawyer, he believes that every statement a defendant makes to a police officer is "extremely significant." Habeas Tr. at 185.

67. Broccoletti also admitted that Crank's notes were in his files before Mr. Tice's second trial. Habeas Tr. at 131-33.

68. Broccoletti further explained that, "[a]s I go back and look at [Crank's notes] now, [the notes] may have generated . . . a [motion to suppress]." Habeas Tr. at 135.

69. Both trial counsel testified, however, that despite their critical importance, counsel did not remember ever seeing the notes before the summer of 2006. Habeas Tr. at 169, 203.

GROUND FOR RELIEF

70. Mr. Tice has been convicted and sentenced in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Trial counsel's errors and omissions at Mr. Tice's trial denied Mr. Tice his right to effective assistance of counsel under the Sixth and Fourteenth Amendments. These errors and omissions, individually and collectively, resulted in representation that fell well below that required by constitutional standards and resulted in actual prejudice to Mr. Tice. Specifically, counsel's errors and omissions include, but are not limited to, the following.

I. Ineffective Assistance of Counsel Based on Trial Counsel's Failure to Move to Suppress Mr. Tice's Statement on Miranda Grounds.

71. Paragraphs 1 through 70 are re-alleged and incorporated herein by reference.

72. Mr. Tice's June 25, 1998 statement was elicited in violation of his Fifth Amendment right to silence and should not have been admitted at trial.

73. Mr. Tice clearly and unequivocally invoked his right to silence under the Fifth Amendment during the interrogation on June 25, 1998. See Habeas Opinion at 4, 6-7; see also Pet. Habeas Ex. 6; Habeas Tr. at 253, 311-12. Under Miranda v. Arizona, 384 U.S. 486, 473-74 (1966), when a defendant indicates his wish to remain silent at any time prior to or during questioning, the interrogation must cease.

74. The police did not "scrupulously honor" Mr. Tice's invocation of his right to silence as required by Michigan v. Moseley, 423 U.S. 96 (1975). The police never acknowledged Mr. Tice's invocation and continued the interrogation a mere 13 minutes later. See Habeas Tr. at 253-54, 376-77, 453-54; Comm. Habeas Ex. A; see also Habeas Opinion at 6-7. The police (not Mr. Tice) reinitiated the interrogation, which was not preceded by Miranda warnings. Id.

75. Trial counsel's failure to move to suppress Mr. Tice's statement on Miranda grounds was deficient under the standard outlined in Strickland. Any reasonable defense counsel would have moved to suppress the statement, and the failure to do so is objectively unreasonable. Trial counsel offered no reason for the decision not to file a motion to suppress based on a violation of Miranda. Habeas Tr. at 130, 133, 135, 201-02; see also Habeas Opinion at 7-8. Trial counsel's conduct in failing to file a motion to suppress was not part of any actual trial strategy. Id.

76. Trial counsel's failure to move to suppress Mr. Tice's unconstitutionally-elicited statement caused prejudice pursuant to the standard outlined in Strickland. If a motion to suppress based on a Miranda violation had been filed, it would have been granted, and without the statement in evidence, there is a reasonable probability that Mr. Tice would have been acquitted. Mr. Tice's statement was the crux of the Commonwealth's case against him, and there was no physical evidence whatsoever linking Mr. Tice to the crime. Def. Trial Exs. 3, 7, 8, 9, 10; Trial Tr. (Day 3) at 293-97; Habeas Tr. at 126-28; see also Habeas Opinion at 8.

II. Ineffective Assistance of Counsel Based on Trial Counsel's Failure to Introduce Ballard's Letter into Evidence.

77. Paragraphs 1 through 76 are re-alleged and incorporated herein by reference.

78. Trial counsel's failure to enter into evidence Ballard's handwritten letter to a friend was deficient under the standard outlined in Strickland. Any reasonable defense counsel would have properly authenticated the letter, and thus admitted it into evidence. Trial counsel identified no strategy behind their failure to authenticate Ballard's letter through other means once Ballard was not available to do so, and other means were available (including through testimony from Stover, Ford and another detective). Habeas Tr. at 94-99, 159-63, 396-97. 6/ Trial counsel's conduct was not part of any actual trial strategy. See Habeas Tr. at 159-60.

79. Trial counsel's failure to enter into evidence Ballard's handwritten letter to a friend, in which he spontaneously admitted that he murdered Moore-Bosko, caused prejudice pursuant to the standard outlined in Strickland. Had the jury read the contents of the letter and heard the circumstances under which he wrote it, in connection with the other evidence linking

6/ The Virginia Court of Appeals had previously ruled that Ballard's letter could be admitted into evidence if Ballard was "unavailable." Tice, 563 S.E.2d at 417. Thus, once Ballard's "unavailability" had been established at Mr. Tice's trial when Ballard refused to testify, Trial Tr. (Day 3) at 4-7, trial counsel was free to enter Ballard's letter into evidence.

only Ballard to the crime – Ballard’s two subsequent statements to police that he committed the crime alone, Pet. Habeas Exs. 2-3, the DNA evidence linking only Ballard to the crime, Def. Trial Ex. 10 – and the absence of any physical evidence connecting Mr. Tice to the crime, there is a reasonable probability that the jury would have voted to acquit Mr. Tice.

III. Ineffective Assistance of Counsel Based on Trial Counsel’s Failure to Present Expert Testimony to Rebut the Commonwealth’s Flawed Multi-Perpetrator Theory.

80. Paragraphs 1 through 79 are re-alleged and incorporated herein by reference.

81. Trial counsel’s failure to investigate or offer any one of a number of experts who could have rebutted the Commonwealth’s flawed multi-perpetrator theory was deficient under the standard outlined in Strickland.

82. Experts in the fields of forensic pathology, crime scene reconstruction, DNA, among others, could have exposed the fatal flaws in the Commonwealth’s claim that eight men committed this crime, and established that the crime was committed by one person – Ballard. See e.g., Habeas Ex. 32 (Affidavit from Larry E. McCann, an expert in the field of crime scene reconstruction and analysis, presenting his expert opinion regarding why the evidence supports that Moore-Bosko was killed by a single assailant, Omar Ballard, and that Mr. Tice did not commit the crime).

83. Any reasonable defense counsel would have investigated and presented such potentially exculpatory evidence. Trial counsel’s failure to do so was not part of any actual trial strategy.

84. Trial counsel’s failure to investigate or offer the type of exculpatory expert testimony described herein caused prejudice pursuant to the standard outlined in Strickland. There is a reasonable probability that the outcome of Mr. Tice’s trial would have been different if such testimony had been offered because it would have served to explain why the

Commonwealth's multi-perpetrator theory was inconsistent with the evidence at the crime scene, and why the evidence that did exist pointed to only one perpetrator – Omar Ballard. 7/

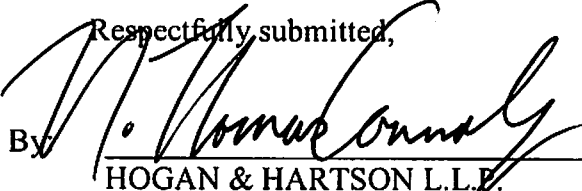
PRAYER FOR RELIEF

WHEREFORE, Mr. Tice prays that this Court:

1. Conduct a hearing at which proof may be offered concerning the allegations of his petition, including the testimony of experts;
2. Grant this Petition for Writ of Habeas Corpus ordering Mr. Tice's immediate release from state custody; and
3. Grant such other relief as may be necessary and appropriate.

Respectfully submitted,

BY


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January 28, 2008

Attorneys for Petitioner Derek E. Tice

7/ Mr. Tice was never afforded a hearing on this ground for relief in connection with his state habeas petition.

Therefore, petitioner asks that the Court grant the following relief: See previous pages.

or any other relief to which petitioner is entitled.

See previous page

Signature of Attorney

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Signed on Jan. 22, 2008 (date).

Derek [Signature]

Signature of Petitioner